



UNIVERSITY OF TRENTO - Italy

School of International Studies

**Providing Arms and Weapons to Parties Involved in Civil Wars: The Legal
Framework for EU Member States**

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Abstract

At a time when the majority of conflicts are non-international, providing arms to the legitimate government or to the opposition forces may influence and even determine the outcome of a civil war. It is, therefore, not surprising that such a provision is subject to a web of rules. This dissertation focuses on those applicable to the EU Member States, which arise from international, European, and domestic law. Sanctions regimes are an integral part of this legal framework. Of primary importance are, naturally, sanctions adopted by the Security Council under Chapter VII, but also the more controversial EU restrictive measures are accounted for.

The dissertation aims to clarify to whom EU Member States can legally provide arms and weapons during a civil war. This investigation is justified also in light of the positions adopted by individual EU Member States vis-a-vis the conflicts in Libya, Syria, and Yemen, three conflicts particularly relevant in political and economic terms for the EU and its Member States. By analysing these three case studies and putting the whole legal framework to the test the dissertation sheds light on how EU Member States justify their intervention. The adoption of these specific case studies allows for the assessment of their positions both when they provide arms to parties that intervene on request of the legitimate government and when they provide support to opposition forces. Despite being EU Member States subject to common European rules on arms exports and being all party to the Arms Trade Treaty, their practice is far from uniform. The result of these differences is far-reaching and has an impact not only on the civil war where the arms are provided but also on the EU.

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The author alone is responsible for any mistakes or errors made in this study.

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September 1900).

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CHAPTER I – Introduction

I.1 The Object of This Dissertation

Since the end of the Cold War, conflicts have been increasingly fought within States, between regular armies and non-state actors (NSAs), or even between different NSAs.¹ These types of conflicts, legally defined as non-international conflicts and commonly known as civil wars, have in common one trait: the means. Let alone the sporadic use of non-conventional weapons, parties to civil wars use conventional weapons. How do States and NSAs get arms and weapons? States can either produce or import them. NSAs, on the contrary, usually do not have the capacity to produce arms and weapons and therefore their supply choice is more limited. As a result, NSAs can either receive the arms, by purchasing them or through donations or by depredating stockpiles and/or stealing them from regular armies.

Except for four weapons that have been rendered illegal by disarmament treaties - anti-personnel mines, biological weapons, chemical weapons, and cluster munitions² - there exists a variety of rules that may have an impact on the provision of arms and weapons in civil conflicts.³ Some of the rules directly regulate the phenomenon, while others become applicable as a result of an interpretative exercise. The former group of rules includes treaties and other arrangements that form what is known as arms control law.⁴ The latter group encompasses rules of general international law, the majority of which aspire to maintain international peace and security. Arms control law and general international law cannot be seen as fully separate. By potentially reducing the chances of war, arms control law can contribute to international peace and security and, indirectly, promote general international law by

¹ See Jean Pictet, *Commentary to Geneva of August 12 1949, ICRC, Geneva, Vol. I, 1952*; Jelena Pejic, “The protective scope of Common Article 3: more than meets the eye”, *International Review of the Red Cross*, Volume 93 Number 881 March 2011; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, 2014, at 28; Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, at 254; Erik Melander, Therése Pettersson, and Lotta Themnér, “Organized violence, 1989-2015”, *Journal of Peace Research* 53(5), 2016, at 727-742.

² See at III.4.

³ Stuart Casey-Maslen, *Weapons Under International Human Rights Law*, Cambridge University press 2014, at XV.

⁴ See Oxford International Law Encyclopedia, at Arms Control Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e246>; see also Guido Den Dekker, The Effectiveness Of International Supervision In Arms Control Law, *Journal of Conflict & Security Law* (2004), Vol. 9 No. 3, at 316.

reinforcing certain rules such as, inter alia, the principle of non-intervention, sovereign equality, and the fulfilment of international obligations in good faith.⁵

The point of departure of this study is the co-existence of several norms that apply to the provision of arms and weapons in civil conflicts. On the one hand, arms control law that, as any treaty law, is the result of negotiation, compromise, and mutual agreement between States on a universal or on a regional level. On the other, there also exist general norms that should guide the States' position vis-à-vis civil conflicts.

This study focuses on a specific set of States that are party to a regional organization, which is in itself a legislating body. The reason for focusing on EU Member States is twofold. Firstly, their combined share of export amounts to ¼ of the global exports, a share that is inferior only to that of the US.⁶ Secondly, amongst the top ten arms exporters, they are the only ones subject to, aside from international law, a comprehensive regional legal framework for arms exports. In contrast, the US, the first global exporter, does not have a regional legal framework applicable. In fact, although the OAS has adopted the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, as well as the Inter-American Convention on Transparency in Conventional Weapons Acquisitions, these hardly can be deemed as a comprehensive framework, as they focus on important, yet not overarching, aspects related to arms exports, such as record-keeping, transparency, marking of firearms, criminalization of illicit conducts.⁷ In simple terms, the framework under the OAS does not contain arms export criteria. And, in addition, the US ratified neither of the two treaties.

The existence of norms stemming from international law, EU law and domestic legislation of each EU Member State - which should align, but not necessarily be restricted to international and EU

⁵ See Zeray Yihdego, *The Arms Trade and International Law*, Hart Publishing, 2007, at 4.

⁶ Global Share of Major Arms Exports by the 10 Largest Exporters, 2014-2018, SIPRI Arms Transfers Database, 11 March 2019, available at <https://www.sipri.org/research/armament-and-disarmament/arms-transfers-and-military-spending/international-arms-transfers>.

⁷ A-63: Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Adopted 14 November 1997, Entered into Force 1 July 1998, 31 States Party, available at <http://www.oas.org/juridico/english/sigs/a-63.html>; A-64: Inter-American Convention On Transparency In Conventional Weapons Acquisitions, Adopted 7 June 1999, Entered into Force 21 November 2002, 17 States Party, available at <http://www.oas.org/juridico/english/sigs/a-64.html>.

law – creates a complex web of norms. However, recent events have shown that the EU Member States interpret this complex web in different ways. At the heart of this study lies the need to clarify and assess the validity of these different interpretations. Consequently, the research questions underlying this study are: what is the legal regime governing the provision of arms and weapons to parties involved in a civil war? Can EU Member States legally provide arms and weapons to any of the parties involved in a civil war? The sub-questions that the study considers are: to whom EU Member States consider legal to provide arms and weapons? Is the provision of arms only legal to the benefit of the legitimate government? What is the legal reasoning for providing arms to parties opposing the legitimate government?

Against this background, the aim of this research is twofold. Firstly, it aims to clarify the rules *ratione materiae*. As anticipated, treaty laws designed to regulate arms transfers are only one part of the applicable legal framework. Due consideration to other rules stemming from general international law, is equally necessary in order to evaluate the legality of States' conduct. Moreover, in addition to general and specific rules of conventional and customary nature, one should also consider the specific restrictive measures adopted by international organizations and States.⁸ Especially relevant for this study are those adopted by the UN Security Council according to Chapter VII of the UN Charter and the restrictive measures adopted by the European Union. Secondly, this dissertation analyses the rules and the prohibitions *ratione personae*: generally speaking, States tend to provide weapons and arms to other States, yet States provide such support also to NSAs, especially during civil conflicts. The *ratione personae* aspect, therefore, is intended *sensu lato* and relates to the question to “whom” the arms and weapons are destined and whether differences amongst recipients have an impact on the legality of the supply.

This dissertation employs three case studies in order to see whether States' positions align with the theoretical considerations. The civil conflicts ongoing in Libya, Syria, and Yemen are adopted because of their economic and political importance for the EU and its Member States. The Syrian and

⁸ Under article 25 of the UN Charter, all Member States are obliged to implement binding resolutions adopted pursuant to Chapter VII. Article 215(1) of the TFUE provides that the Council can adopt restrictive measures against “one or more third states”. The possibility of adopting restrictive measures against natural and legal persons, as well as non-state groups is given by the second paragraph.

Libyan crises have had a major impact in terms of policies adopted by the EU.⁹ The Yemeni case is apt for a closer examination in light of the arms export from EU Member States to Saudi Arabia, as EU Member States are major suppliers to Saudi Arabia and combined are second only to the US.¹⁰

I.2 The Economic and Political Background

Arms exports cannot be seen as separate from the broader concept of defense industry and its strategic role in the economy of a nation: not only they ensure several thousands of jobs and they contribute to GDPs, but they also provide the military with their fighting means. The strategic importance of the defence industry is confirmed by the strong links between defense industries and governments. EU Member States hold shares in these industries and restrict foreign acquisitions.¹¹ In addition, the arms export is subject to authorization from the State itself, a question that will be covered further on in the dissertation.¹²

Two concepts are worth being outlined at the outset of this section. States are deemed to have a defence industrial base when they “have a sector or groups of industries that are dependent to some degree on defense spending and upon which the state is dependent for some degree of self-sufficiency in the production of the means of defense and war”.¹³ This notion is very broad as it encompasses industries that produce arms and weapons, but also industries that provide other goods not directly related to the production of arms, as, for instance, a clothing company that supplies the military. Furthermore, the complexity of the industrial chain also means that some suppliers may even ignore that they are involved in the defence industry.¹⁴ Nonetheless, both the arms industry and the clothing one are part of the “military-industrial complex”. This concept, introduced by President Eisenhower in

⁹ See Robert Mason, “The Syria Conflict and the Euro-Med Refugee Crisis: An Opportunity to Enhance the Common Foreign and Security Policy?”, *European Foreign Affairs Review*, Vol. 23 Issue 1, 2018, at 81–95.

¹⁰ Pieter D. Wezeman, Saudi Arabia, armaments and conflict in the Middle East, SIPRI Topical Backgrounders, available at <https://www.sipri.org/commentary/topical-backgrounder/2018/saudi-arabia-armaments-and-conflict-middle-east>.

¹¹ See *infra*.at p. 7.

¹² See below at III.3.2 and IV.2.1

¹³ Paul Dunne, “The defense industrial base”, in Keith Hartley and Todd Sandler, *Handbook of Defense Economics*, vol. 1. North-Holland, Amsterdam, at 401.

¹⁴ Keith Hartley, The Arms Industry, Procurement and Industrial Policies, in Keith Hartley and Todd Sandler, *Handbook of Defence Economics*, vol 2. 2007, at 1143.

his farewell speech at the White House, represents the influence exerted by the combination of the military establishment and the arms industry on governments.¹⁵

Another point can be raised vis-à-vis the tendency to outsourcing. Brauer puts it well when he posits that “a sale originating in any one state may still be credited to that state but production is as likely to take place in a variety of locations around the globe, including the recipient state.”¹⁶ Connecting the dots, it seems that one of the current trends in the arms industry is to retain in-house the most sensitive parts, including research and development, while outsourcing the assembly and, more in general, the licensed production, which can, therefore, occur in countries that are not top arms producers. Outsourcing is meaningful not just as an indicator of the transnationalization of arms production but is relevant also in terms of the arms trade. Scholars have indeed observed a rise in arms trade offset deals through licenses, co-production, and unrelated trade.¹⁷ In particular, it appears that the production of SALWs is being increasingly outsourced. The reason for that is twofold; on the one hand and with a certain degree of approximation, SALWs technology does neither require nor involve cutting edge technology; on the other, outsourcing SALW production allows for costs to remain low.¹⁸ As a result, non-high income states have in turn become exporters of SALW produced under license.¹⁹ This circle illustrates why the final product's overall cost makes it attractive to NSAs.

It is clear at this point that one of the many ways to interpret data on defense industry, and specifically on the arms industry, is to engage with them from both an external and an internal perspective. A preliminary caveat in terms of data: there exist three major data providers on the defence industry and arms trade. The annual publication entitled “Conventional Arms Transfers to Developing Nations”, produced for the United States Congress by its Congressional Research Service; the World Military Expenditures and Arms Transfers (WMEAT), published by the Bureau of Verification and Compliance, an agency of the United States Department of State; and, third, the annual SIPRI Yearbook,

¹⁵ Dwight D. Eisenhower, Military-Industrial Complex Speech, 1961, available at http://avalon.law.yale.edu/20th_century/eisenhower001.asp

¹⁶ Jurgen Brauer, “Arms Industries, Arms Trade, and Developing Countries”, in Todd Sandler and Keith Hartley, *Handbook of Defence Economics*, 2007, at 975.

¹⁷ Jurgen Brauer, J.P Dunne, *Arming the South: The Economics of Military Expenditure, Arms Production, and Arms Trade in Developing Countries*, Palgrave, 2002.

¹⁸ Brauer, “Arms Industries, Arms Trade, and Developing Countries”, above n. 16, at 998.

¹⁹ Small Arms Survey, *Small Arms Survey*, Oxford University Press, 2014, at 40–54.

issued by the Stockholm International Peace Research Institute. This study will mostly rely on the data collected by SIPRI.

One-quarter of the top 100 arms producers in the world are European industries. The following table shows that roughly 25% of the top arms producer are European or trans-European, meaning that the ownership and control structures are located in several European countries.²⁰

Rank	Company	Country	Arms Sales	Total Sales	Arms sales as a % of total sales	Total profit	Total Employment
4	BAE Systems	United Kingdom	22790	24008	95	2351	83000
7	Airbus Group	Trans-European	12520	73652	17	1101	133780
9	Leonardo	Italy	8500	13277	64	561	45630
10	Thales	France	8170	16471	50	1073	64100
16	Rolls-Royce	United Kingdom	4450	18601	24	--	49900
23	DCNS	France	3480	3530	99	97	12800
25	MBDA	Trans-European	3260	3319	98	7	10340
26	Rheinmetall	Germany	3260	6327	52	238	20990
28	Babcock International Group	United Kingdom	2950	6136	48	776	35000
30	Saab	Sweden	2770	3342	83	137	15470
33	Safran	France	2600	18232	14	2111	66490
42	CEA	France	2020	4577	44	-83	15620
47	ThyssenKrupp	Germany	1770	43433	4	289	156490
54	Fincantieri	Italy	1600	4899	33	15	--
57	Cobham	United Kingdom	1550	2623	59	81	10690
58	Serco	United Kingdom	1500	4713	32	45	47000
60	Dassault Aviation Groupe	France	1390	3967	35	425	11940
68	GKN	United Kingdom	1210	11906	10	329	58000
75	PZG	Poland	1140	1268	90	--	--
78	Krauss-Maffei Wegmann	Germany	950	996	95	--	4000
80	Meggitt	United Kingdom	940	2688	35	231	11210
82	Nexter	France	910	958	95	--	1750

²⁰ Data for 2016, extracted from SIPRI Arms Industry Database, available at <https://www.sipri.org/databases/armsindustry>

97	Ultra Electronics	United Kingdom	720	1061	68	92	4000
98	Navantia	Spain	710	801	88	-336	5510

From a domestic perspective and according to official data, in 2014 the European defence industry directly employed over 500 000 people, contributed to over 1.2 million indirect jobs with a turnover of roughly 97.3 billion.²¹ The defense industry has the characteristic of being both military and economically strategic. It is, therefore, not surprising that governments hold shares in the companies, or that they impose restrictions on foreign shareholding. The latter is the case of BAE Systems, the top European arms producer. Its article of association imposes that a foreign person, meaning a non-British citizen or a foreign corporation, can hold up to a maximum of 15% of the shares.²² The same provision can be also found in the article of association of Rolls Royce.²³ In the case of the Italian company Leonardo, the Italian Ministry of Economy and Finance holds 30,204% of the total share and it is the only subject that detains a relevant shareholding.²⁴ A little lower is the amount of shares held by the French State in the company Thales.²⁵ Also amongst the shareholders of the trans-European company Airbus, governments ensure that they hold a conspicuous amount of shares. According to the last published investor report, Germany, France, and Spain hold a combined 26,32% of the total shares.²⁶ The Spanish shares are held through a public company attached to the Ministry for the Treasury, SEPI, who also owns the biggest Spanish defence company, Navantia.²⁷

²¹ European Parliament, Fact Sheets on the European Union, Defence Industry, available at <http://www.europarl.europa.eu/factsheets/en/sheet/65/defence-industry>

²² See BAE Systems, Nationality Declaration, available at https://investors.baesystems.com/~media/Files/B/Bae-Systems-Investor-Relations-V3/PDFs/shareholder-forms/natdec_n.pdf

²³ See Rolls Royce, Full Annual Report 2017, at 199. Report available at: <https://www.rolls-royce.com/~media/Files/R/Rolls-Royce/documents/annual-report/2017/2017-full-annual-report.pdf>

²⁴ According to article 120 of the legislative decree n. 58 of 1998 (Testo Unico Finanza), any subject holding more than 3% of the share capital must declare it to the surveiling authority (CONSOB). For data on Leonardo's shareholding structure see: <https://www.leonardocompany.com/investitori-investors/titolo-borsa-stock-quote/capitale-azionariato-share-capital-1-1>.

²⁵ As of 30 June 2018, the French State held 25,71% of the shares with a voting rights percentage of 35,71%. See Thales Shareholding structure at <https://www.thalesgroup.com/en/investor/retail-investors/share-and-shareholding>.

²⁶ See Airbus Annual Report 2017, p 108. The Report is available at: https://www.airbus.com/content/dam/corporate-topics/financial-and-company-information/AIRBUS_Annual_Report_2017.pdf

²⁷ See Navantia Group, at <https://www.navantia.es/en/about-us/who-we-are/>

By scrolling the list of the biggest arms producers one easily observes that most of the producers are high-income economies.²⁸ In contrast, the list of the top largest importers brings to a very different conclusion, as most of the importers are developing economies and economies in transition. This is fully consistent with Levine and Garcia-Alonso's remark that "few developed countries are the main weapon exporters and producers and their production is ... increasingly dependent on imports from developing countries, many of which are involved in regional or internal conflicts."²⁹

	Importer	Main exporters		
1	India	Russia	USA	Israel
2	Saudi Arabia	USA	UK	France
3	Egypt	France	USA	Russia
4	UAE	USA	France	Italy
5	China	Russia	France	Ukraine
6	Australia	USA	Spain	France
7	Algeria	Russia	China	Germany
8	Iraq	USA	Russia	South Korea
9	Pakistan	China	USA	Russia
10	Indonesia	UK	USA	South Korea
11	Viet Nam	Russia	Israel	Belarus
12	Turkey	USA	Spain	Italy
13	South Korea	USA	Germany	Israel
14	United States	Germany	Netherlands	France
15	Taiwan	USA	Germany	Italy
16	Oman	UK	USA	Norway
17	Israel	USA	Germany	Italy
18	United Kingdom	USA	South Korea	Israel
19	Bangladesh	China	Russia	USA
20	Qatar	USA	Germany	Switzerland
21	Singapore	USA	France	Italy
22	Italy	USA	Germany	Israel
23	Azerbaijan	Russia	Israel	Turkey
24	Japan	USA	UK	Sweden
25	Venezuela	Russia	China	Ukraine
26	Canada	USA	Netherlands	Sweden
27	Kuwait	USA	Russia	France
28	Greece	Germany	USA	France
29	Thailand	Ukraine	China	Sweden
30	Morocco	USA	France	Italy
31	Kazakhstan	Russia	Spain	Ukraine
32	Finland	USA	Norway	France
33	Jordan	Netherlands	USA	UAE
34	Afghanistan	USA	Russia	Brazil
35	Mexico	USA	France	Netherlands
36	Myanmar	China	Russia	Belarus

²⁸ Classification taken from United Nations Department of Economic and Social Affairs, *World Economic Situation and Prospects 2018*, at 144.

²⁹ María D.C. García-Alonso And Paul Levine, *Arms Trade and Arms Races: A Strategic Analysis*, in Todd Sandler and Keith Hartley, *Handbook of Defence Economics*, vol 2. 2007, at 947.

37	Brazil	France	USA	Germany
38	Poland	Germany	Finland	Italy
39	Turkmenistan	Turkey	China	Russia
40	Norway	USA	Sweden	Italy

Data: Pieter D. Wezeman, Aude Fleurant, Alexandra Kuimova, Nan Tian And Siemon T. Wezeman, SIPRI Factsheet, March 2018, Trends In International Arms Transfers, 2017.

Several explanations have been provided in the literature on the military expenditure of developing countries.³⁰ The first one draws from strategic considerations: States choose arms to fulfil strategic military needs based on perceived internal and external threats. In other words, the central premise of this theory is that weapons procurement is driven by security needs. Accordingly, the level of arms procurement will be closely related to the level of military threat. The involvement in armed conflict, both internal and/or external or the perceived likelihood of such involvement is seen as a major determinant for military expenditures. Capabilities of neighbouring countries may also trigger an arms race and scholars have also observed that expenditure rises in the aftermath of inter-state conflicts.³¹ By the same token, because foreign relations are prone to change, arms procurement should also be associated with indices of strategic instability.³²

Partially akin to this theory is the geopolitical perspective, which describes the processes of arms acquisition as the result of global tensions within the international political economy.³³ In this context, regional confrontations represent proxy conflicts between superpowers, which maintain a destabilizing influence on their regional allies. In view of the fact that no developing country is fully self-sufficient in the production of weapons, and in particular major weapons, these countries are forced to resort to imports. In turn, this opens the door to the influence of donors and suppliers in the decision-making process relating to military expenditure.³⁴ A dependency relationship follows, especially as weapons become obsolete and countries engage in “cyclical procurement”.³⁵

³⁰ Robert West, “Determinants of Military Expenditure in Developing Countries: Review of Academic Research”, in G. Lamb and V. Kallas (eds.), *Military Expenditure and Economic Development. World Bank Discussion Papers*, No. 185, The World Bank, 1992. It should be noted that, although military expenditure includes arms imports, the concept is clearly broader.

³¹ Robert D. McKinlay, *Third World Military Economy: Determinants and Implications*, 1989. London: Printer Publishers.

³² Mark C. Suchman, Dana P. Eyre, “Military Procurement as Rational Myth: Notes on the Social Construction of Weapons Proliferation”, *Sociological Forum*, Vol. 7, No. 1, 1992, at 142.

³³ On this strand see Andrew J. Pierre, *The Global Politics of Arms Sales*, Princeton University Press, 1982.

³⁴ Paul W. Hoag, “Hi-Tech Armaments, Space Militarisation and the Third World”, in Colin Creighton and Martin Shaw, *The Sociology of War and Peace*, Macmillan Press, 1987, at 89.

³⁵ Brzoska, Michael, “Current Trends in Arms Transfers”, in Saadet Deger and Robert West, *Defense, Security and Development*, New York: St Martin's Press, at 176.

A third theory focuses on internal processes as a driving force for arms procurement, including bureaucratic and political processes linked to budgetary decisions. At the heart of this hypothesis, known as “factional theory”, lies the idea that arms procurement follows the same patterns of standard political action and, thus, is the result of, amongst others, bargaining and coalition formation.³⁶ The army in general and, with respect to particular types of weapons, the military branches in which such arms would be used are the groups with the most immediate interest in the acquisition of weapons. Furthermore, arms possession constitutes already by itself part of the military’s power, especially in situations where internal unrest or *coup d’état* are likely to occur. This may be particularly true for developing countries that are more prone to power changes and where the military often plays an important role in internal dynamics. Yet the military is not necessarily the only group of interest: arms procurement may represent a means to satisfy the armed forces in an effort to gain or consolidate power. In brief, military expenditure, and, at least partially, arms import, can depend on the relative strength of the military pressure group.³⁷ The limit of this theory, however, is the difficulty of empirically testing the extent of the military’s influence.³⁸

The fourth approach applies the institutional theory to arms transfers.³⁹ According to this theory, worldwide models define and legitimate agendas for action and shape the structures and policies of nation-states in virtually all domains. Thus, the emphasis is no longer on the “autonomous decision-making activity of independent nation-states, but rather [on] the metonymical iconography of the global cultural order”.⁴⁰ From this perspective, the availability of technological weapons to developed and developing States is not in itself problematic, but is an indicator of the existing tendency of

³⁶ Graham T. Allison, Frederic A. Morris, “Armaments and Arms Control: Exploring the Determinants of Military Weapons”, *Daedalus*, Vol. 104, No. 3, Arms, Defense Policy, and Arms Control, 1975, at 101.

³⁷ Geoff Harris, Military Expenditure and Economic Development in Asia During the 1990s, in Jurgen Brauer and J. Paul Dunne eds., *Arming the South: The Economics of Military Expenditure, Arms Production and Arms Trade in Developing Countries*, Palgrave, 2002, at 82.

³⁸ West, R. “Determinants of Military”, above n. 30, at 127.

³⁹ John W. Meyer, John Boli, George M. Thomas, and Francisco O. Ramirez, “World Society and the Nation-State”, *American Journal of Sociology*, Vol. 103, No. 1, 1997, at 145. On institutional theory see also John W. Meyer and Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony”, *American Journal of Sociology*, Vol. 83, No. 2, 1977, at. 340-363; Paul J. DiMaggio and Walter W. Powell, “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields”, *American Sociological Review*, Vol. 48, No. 2, 1983, at 147-160; Walter W. Powell and Paul J. DiMaggio, *The New Institutionalism in Organizational Analysis*, University of Chicago Press, 1991.

⁴⁰ Mark C. Suchman, Dana P. Eyre, “Military Procurement”, above n 32, at 149-150.

“isomorphism among nation-states”.⁴¹ Such ‘isomorphism’ suggests that States procure weapons because these are part of the tools and qualities that an independent and sovereign State must display. This is true for weapons but also to general organizational structure: once a new arm or a new corps entrenches in the image of statehood, the motives for the acquisition of the arm or the establishment of the corps shifts from a functionalist perspective to the value that is given to the weapon or to the corps by the world system. Ball observes that many governments in the Third World saw the armed forces, equipped with the most modern weapons possible, as a symbol of unity and independence and as evidence that the government intended to defend its sovereignty, while the actual usefulness of the weapons was of secondary importance.⁴² Overall, a robust rationale for explaining military expenditure would probably consider all four ideas. Strategic and geopolitical considerations may guide the choice towards a certain typology of arms, while internal processes may direct the expenditures towards a certain supplier. Finally, the need to display the belonging to a “club” of nations may also influence domestic choices on weapons or organizational methods.

Rebels typically procure weapons from four separate sources. Many insurgencies begin with readily available firearms such as guns for hunting and sporting. A second source of weapons comes from past weapons caches.⁴³ The third source of weapons, believed by scholars to be the primary source of weapons for most insurgencies, is the ability of insurgents to steal weapons from the government.⁴⁴ When insurgencies begin, victories against government forces empower rebels to increase their own capacity by acquiring arms from fallen government soldiers or by capturing government stocks. The fourth and final source of weapons is from international suppliers. Weapons obtained from international sources offer a number of benefits to weapons looted from government stockpiles. Marsh identifies three problems linked to looted weapons.⁴⁵ First, stolen weapons represent only a short-term source of

⁴¹ *Ibid*, at 150.

⁴² Nichole Bell, “Third World arms control: a Third World responsibility”, in Thomas Ohlson (ed.), *Arms Transfer Limitations and Third World Security*, Oxford, 1988 Oxford University Press, at 49.

⁴³ Nicholas Marsh, “Conflict Specific Capital: The Role of Weapons Acquisition in Civil War”, *International Studies Perspectives*, 2007, 8, at 61.

⁴⁴ Nils Duquet, “Arms Acquisition Patterns and the Dynamics of Armed Conflict: Lessons from the Niger Delta”, *International Studies Perspectives*, 10(2), at 176. See also Thomas Jackson, “From Under Their Noses: Rebel Groups’ Arms Acquisition and the Importance of Leakages from State Stockpiles”, *International Studies Perspectives*, 11(2):131-147.

⁴⁵ Nicholas Marsh, “Conflict Specific Capital”, above n 43, at 62.

arms since governments will likely try to better secure their weapons once the conflict begins. Second, control of the supply is fundamental to establishing a command structure within rebel organizations. In contrast, if the arms supply depends upon individual soldiers, the rebel movement risk fracturing around multiple leaders as opposed to a well-organized unitary group. This fragmentation is even less likely if arms supplies come from international sources, as it is difficult for individuals to have access to this source. Third, to escalate the conflict, rebel organizations will look to international arms suppliers to expand access to weapons and acquire specific systems that would otherwise be unavailable domestically. Obtaining arms from international suppliers offer rebel organizations some advantages.⁴⁶ Unlike looted weapons, rebels are often able to obtain also training, alongside weapons, which allows not only more effective use of weapons, but it also unlocks the possibility of operating more sophisticated weapons. Second, state support for rebel groups can provide a critical enabler step that allows looting to happen in the first place. Third, procuring weapons from foreign suppliers also means that the insurgents may request the weapons they are familiar with and need for the specific features of the conflict.

One of the ways to reduce the supply dependency is to develop an own defence industry and the initial motivation for indigenous arms production in developing nations is almost always strategic. According to this reasoning, the main strategic reasons include arms embargoes or other threats to the existing arms-import supply line.⁴⁷ However, some scholars stress that, unlike during the 1960s, nowadays the abundance of alternative supply lines available makes an embargo, or the threat of an embargo, no longer a driving strategic reason.⁴⁸ Other authors apply the security dilemma to arms production. According to a realist approach, domestic arms production comes in response to similar competitor efforts; in this case, the advantage of domestic production is the “increased autonomy of decision making in regard to war and peace”.⁴⁹ Other authors emphasize the political motives for arms

⁴⁶ Stephen John Stedman, “Conflict and Conciliation in Sub-Saharan Africa”, in Michael. E. Brown in *The International Dimensions of Internal Conflict*, Cambridge, MA, Harvard University, 1996, at 249.

⁴⁷ See Jurgen Brauer, *The Arms Industry in Developing Nations: and Post-Cold War Assessment*, in in Jurgen Brauer and J. Paul Dunne eds., *Arming the South. The Economics of Military Expenditure, Arms Production and Arms Trade in Developing Countries*, Palgrave, 2002, at 106

⁴⁸ *Ibid*, at 106.

⁴⁹ Mohammed Ayoob, *The Third World Security Predicament: State Making, Regional Conflict, and the International System*, Boulder, CO: Lynne Rienner, at 147.

production and see them as separate from strategic ones. These political considerations involve both foreign policy calculations and the potential influence and leverage on the recipients. On the one hand, arming a friendly state can be a way to secure the relationship between countries, to obtain trade advantages and other strategic benefits, such as securing allied military positions. On the other hand, the influence on recipients will be directly proportional to the desirability of a specific weapon, especially in situations of monopoly.⁵⁰ Given that the desirability of a weapon may ultimately depend on the overall military advantage that the weapon confers and, thus, on its technological superiority, this reasoning may be apt only vis-à-vis major weapons producers.

The counter-side of the wealth created by the defence industry is the costs bore by countries affected by armed conflicts, and specifically by civil wars. Collier distinguishes several effects. The most obvious consequence is the destruction of resources, both in terms of labour force and of infrastructures. Destruction brings about the diversion of available public resources. Productive activities cease to be the focus of public expenditure and resources are increasingly devoted to the army. The social order breaks down and, as a result, the rule of law peters out with direct negative effects on the legal certainty of contracts and on private property rights. This has an impact also on foreign investments that reduce due to the high instability. Not only do capitals and human beings leave the country but the remaining investments are diverted to secure activities.⁵¹ In numerical terms, scholars have estimated that one year of conflict reduces a country's growth rate by around 2.2%. Since, on average, civil conflict lasts for seven years, by the end of the conflict the economy will be 15% smaller than if the war had not taken place. Post-conflict the economy recovers, at about one percent above its normal growth rate. Overall, it takes around 21 years to get back to the level of GDP that the country would have had without the conflict.⁵²

Civil wars can also have a spillover effect and affect neighbouring countries. It has been observed that collateral damages from battles close to the borders may destroy infrastructures and

⁵⁰ See Ron Smith, Anthony Humm and Jacques Fontanel, "The Economics of Exporting Arms", *Journal of Peace Research*, Vol. 2, N.3, 1985, at 243.

⁵¹ See Paul Collier, "On the Economic Consequences of Civil War", *Oxford Economic Papers*, 51, 1999, at 169.

⁵² Paul Collier and Anke Hoeffler, Civil Wars, in Todd Sandler and Keith Hartley, *Handbook of Defence Economics*, vol 2. 2007, at 726.

capital in the bordering country. The perceived risk with regard to investment may also affect nearby countries, which must devote resources to secure their borders from rebel incursion and manage an increase of refugee flows. Neighbouring civil wars can also disrupt trade flows and sever crucial input supply lines.⁵³

A further layer of complexity is given by the tendency of civil wars to be recurrent. Estimates pose the risk of returning to conflict within five years at 44 percent.⁵⁴ The literature describes the vicious circle that derives from the recurrence of civil war as “conflict trap”.⁵⁵ There is no single explanation for this phenomenon. One of the reasons considers that the same factors that caused the initial war are usually present at the end of the civil war. In addition, characteristics that were present in the country before the war, such as low average income, a hostile neighbour, and a large diaspora, are likely to be present or even exacerbated at the end of the conflict. Scholars also indicate that some countries are more prone than others to civil war by virtue of their geography and economic structure.⁵⁶

I.3 The Definition of Civil War

As the title suggests, the focus of this study is the provision of arms and weapons in civil conflicts. The terminology used to define the type of war departs from the legal definition: if one were to adopt the definition given by international humanitarian, the term used would be non-international armed conflict (NIAC).⁵⁷ Under common Article 3 to the Geneva Conventions of 1949, NIACs are “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”.⁵⁸ A more restrictive definition is offered by Article 1 of the Additional Protocol

⁵³ See James C. Murdoch and Todd Sandler, “Economic Growth, Civil Wars, and Spatial Spillovers”, *Journal of Conflict Resolution* 2002 46: 91, at 96.

⁵⁴ See Paul Collier; Elliot Lance, Hegre Håvard, Anke Hoeffler, Marta Reynal-Querol & Nicholas Sambanis, 2003. *Breaking the Conflict Trap: Civil War and Development Policy*, World Bank Policy Research Report. cull

⁵⁵ *Ibid*, at 4.

⁵⁶ *Ibid*, at 83.

⁵⁷ On non-international armed conflict see, amongst others, Yoram Dinstein, *Non-International Armed Conflicts*, above n 1; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, 2010; Jean d’Aspremont and Jérôme de Hemptinne, *Droit International Humanitaire: Thèmes Choisis*, Pedone, 2012; Rosemary Abi-Saab. *Droit Humanitaire et Conflits Internes - Origines et Évolution de la Réglementation Internationale*, Editions Pedone, 1986; Julia Grignon, *L’applicabilité Temporelle du Droit International Humanitaire*, Genève: Schulthess éd. romandes, 2014, 145-206 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, 2004.

⁵⁸ Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949; Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949; Geneva Convention (III) on Prisoners of War, 1949; Geneva Convention (IV) on Civilians.

II, which states that a NIAC is a conflict “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.⁵⁹ However, two problems surround this definition. The first problem is a factual one. Although the Protocol has been ratified by a large number of States, the ratification has not been as widespread as the Geneva Conventions.⁶⁰ And while there is a general consensus that the Geneva Conventions are declaratory of customary international law, the same cannot be said vis-à-vis Additional Protocol II.⁶¹ The second problem lies within the requirements of the definition. On the one hand, the definition requires the NSA to exercise territorial control so as to “enable them to carry out sustained and concerted military operations”. By requiring territorial control, the definition excludes instances where the level of violence has surpassed the threshold of internal disturbances but the NSA yet does not control any territory, or simply where the NSA may not control a territory vast enough to permit “sustained and concerted military operations”. On the other hand, this definition does not apply to conflicts fought solely between NSAs.⁶² Nonetheless, it has to be warranted that Article 3 continues to apply whether or not the conflict is also covered by Additional Protocol II.⁶³

That the wider definition given by Article 3 is the one usually considered, and not that of the Additional Protocol II, is confirmed by the ICTY. In deciding on a defence motion the Court stated that a NIAC exists “whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.⁶⁴ The applicability of Article 3 is, therefore, subject to two criteria: there should be a minimum level of organization of the armed groups

⁵⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁶⁰ 168 States are party to the Protocol Additional II, while 3 States are just signatories (Islamic Republic of Iran, Pakistan, and the United States of America).

⁶¹ See Theodor Meron, The Geneva Conventions as Customary Law, *The American Journal of International Law*, Vol. 81, No. 2, 1987, at 348-370.

⁶² This interpretation stems from a literal reading of the norm. See also, International Committee of the Red Cross (ICRC), Opinion Paper, March 2008, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 4; Yoram Dinstein, *Non-International Armed*, above n 1, at 28.

⁶³ Dietrich Schindler “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, *The Hague Academy Collected Courses*, Vol. 63, 1979-II, at 149.

⁶⁴ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, (2 October 1995), para.70.

and a minimum intensity of the conflict, so to distinguish the armed conflict from banditry, low-level insurrection, and other criminal activities to which international humanitarian law does not apply.⁶⁵ The literature has further shed light on the territorial scope of the provision.⁶⁶ Article 3 simply states that the NIAC must occur in the “territory of one of the High Contracting Parties”. At first glance, it appears that armed groups operating from neighbouring countries would not be covered by the definition. However, commentators have clarified that it is a mere language imprecision and the provision must be read as covering also violence by armed across the borders. All in all, “internal conflicts are distinguished from international conflicts by the parties involved rather than by the territorial scope of the conflict”.⁶⁷

Resorting only to the definition given by the treaties bears the risk of missing the full picture, as the notions given therein are lacking a descriptive side of the phenomenon. This has direct consequences from a legal perspective. As La Haye states, “[t]he absence of a precise definition of internal armed conflict...enabled states on whose territory such a conflict was taking place to argue that the hostilities encountered did not amount to an armed conflict”.⁶⁸ On a first level, therefore, the impact of the definition lies in the conflicting parties. However, the impact goes beyond the conflicting parties and is relevant also vis-à-vis a broader range of norms – and actors – applicable to the topic of this dissertation. The legality test underpinned the provision of arms and weapons certainly encompasses norms of IHL but is not limited to them. In other words, at least part of the applicable rules that preclude the supply of arms does not move from the definition of IHL, but from a broader perspective that is rooted in a practice that is at least partly released from the *jus in bello*. If one were to settle for the definition given in Article 3, one must recognize, by the same token, the risk of weakening the precautionary approach underpinned by treaty law and applicable EU law. A precautionary approach

⁶⁵ ICTY, *The Prosecutor v. Dusko Tadic*, Trial Judgement, para 562. See also ICTY *The Prosecutor v Limaj, Bala and Musliu* (Trial Judgement) IT-03-66-T (30 November 2005), para 89.

⁶⁶ See Yoram Dinstein, *Non-International Armed Conflict*, above n. 1, at 24-28.

⁶⁷ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, at 136.

⁶⁸ Eve La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, 2008, at 8. See also Lindsay Moir, *The Law of Internal*, above at 57, at 67-88.

that, in principle, should not wait for the *jus in bello* to become applicable, but should guide the legality assessment at earlier stages.

In this regard, the definitions developed in political science and conflict analysis can provide a useful perspective in order to understand the complexity of civil wars. Useful not only with a view to understanding the phenomenon itself, but, more importantly, to facilitate the link between facts, such as how civil conflicts develop, and how the rules on the provision of arms account for such situations. There is a vast political-science literature and it is vital to appreciate that also these definitions are not an end in themselves. The choice of the definition has an impact on the data collected and, in fact, existing databases are built according to parameters developed around specific definitions of civil conflicts. In their book *Resort to Arms*, Small and Singer define a civil war as "any armed conflict that involves (a) military action internal to the metropole, (b) the active participation of the national government, and (c) effective resistance by both sides."⁶⁹ Other scholars emphasize a quantitative approach to civil wars. The Uppsala Conflict Data Program, while defining an armed conflict as an incompatibility between two parties that resort to the use of armed force of which one is the government of a State, adopts a minimum threshold of 1000 battle-related deaths in one calendar year.⁷⁰ Half of the battle-related deaths are required by the definition adopted by the Center for Systemic Peace.⁷¹ Fearon and Laitin propose a triple threshold: at least 1000 killed over the course of the fighting, with a yearly average of at least 100, and at least 100 killed on both sides.⁷² As observed by Newman, aside from the threshold, other problems surround quantitative definitions. In particular, according to the scholar, the notion of battle-death creates uncertainty as it is difficult to distinguish between combatants and victims of violence.⁷³ Not only does the author question the distinction, but he further challenges the entire definition as it is, in his view, linked to a "conventional model of civil war, where battles were fought

⁶⁹ Melvin Small and David J. Singer, *Resort to Arms: International and Civil War, 1816–1992*, Sage, 1982, at 210.

⁷⁰ See Department of Peace and Conflict Research of the University of Uppsala, Definitions at <https://www.pcr.uu.se/research/ucdp/definitions>

⁷¹ Center for Systemic Peace, *Conflict, Governance and State Fragility, Global Report 2017*, footnote 25, at 25.

⁷² James Fearon and David Laitin, "Ethnicity, Insurgency, and Civil War", *American Political Science Review*, 97(1), 2003, at 76.

⁷³ Edward Newman, "Conflict Research and the 'Decline' of Civil War", *Civil Wars*, 11:3, 2009, at 262.

and combatants were identifiable”.⁷⁴ The conventional model would, therefore, encompass the classic civil wars, where a government faces an NSA, major insurgencies, and wars of secession and of national liberation.⁷⁵ However, the risk of fully embracing this model is to neglect conflicts between NSAs without the involvement of governmental forces, typical of weak/fragile states. By the same token, also low-intensity conflicts and insurgencies risk being cut out by quantitative definitions. Quantitative definitions are also subject to the problem of data reliability. Fragmented news and non-verifiable numbers are variables that must be considered when collecting data about casualties in civil wars. Full reliance on data provided by third parties and opaque reports means that there cannot be absolute certainty about battle-related deaths. This may turn problematic when one wants to define the start or the end of a civil war, especially in the absence of a decisive victory or a peace agreement.

This overview makes it clear that the distinction between internal armed conflict and situations where there is a high level of tension is not straightforward. There are also two other points worth mentioning: firstly, that an authoritative decision on the existence of a non-international armed conflict will necessarily come *ex post facto*. This contrasts sharply with the goals of treaty law on the arms trade, which, on the contrary, also aims to anticipate human suffering.⁷⁶ Secondly, recourse to the notion of non-international armed conflict pursuant to Article 3 alone would obfuscate the wide point of view embraced by international and EU law, which, as will be seen, considers IHL to be just one of the conditions against which to determine the legality of the arms provisions.

I.4 The Definition of Arms and Weapons

As has been said, this study focuses on conventional weapons, as these are the typical means through which a civil war is fought.⁷⁷ Conventional arms and weapons are classified into eight categories, which are reported under Article 2 of the Arms Trade Treaty (ATT): (a) battle tanks; (b) armoured combat vehicles; (c) large-calibre artillery systems; (d) combat aircraft; (e) attack helicopters;

⁷⁴ *Ibid* at 262.

⁷⁵ *Ibid* at 263.

⁷⁶ See Article 1 of the Arms Trade Treaty, at III.3.2.

⁷⁷ Matthew Moore, “Selling to Both Sides: The Effects of Major Conventional Weapons Transfers on Civil War Severity and Duration”, *International Interactions: Empirical and Theoretical Research in International Relations*, 38:3, 2012, at 325-347; Daniel Byman, Peter Chalk, Bruce Hoffman, William Rosenau, And David Brannan. *Trends in Outside Support for Insurgent Movements*, RAND, 2001.

(f) warships; (g) missiles and missile launchers; and (h) with small arms and light weapons (SALWs).⁷⁸ Article 3 of the ATT also includes in its scope ammunitions, which are meant to be used in conjunction with one of the delivery means listed in article 2. The categories from a) to g) do not represent a novelty in the realm of international arrangements. The UN Register of Conventional Weapons already considered the same categories of weapons, with the exclusion of SALWs. Established in 1991, the UN Register of Conventional Weapons is a voluntary mechanism aimed at promoting a higher degree of transparency and thus to contribute to confidence-building and, in 2016, expanded its scope in order to include also SALWs. However, differently from the ATT, the Register does not consider SALWs as a separate category and adopts the formula of “7+1”.⁷⁹

Shortly after the establishment of the UN Register of Conventional Weapons, SALWs have been the focus of a Report requested by the General Assembly to the Secretary General.⁸⁰ The Panel of Governmental Experts that provided the Report developed a taxonomical division of SALWS.⁸¹ In order to do so, the Panel broke down the umbrella-term SALW, which counts for an array of different weapons, and identified a number of sub-categories. The arms and weapons comprised under the term SALWs are therefore the following : (a) small arms: (i) revolvers and self-loading pistols; (ii) rifles and carbines; (iii) sub-machine-guns; (iv) assault rifles;(v) light machine-guns; (b) light weapons: (i) heavy machine-guns; (ii) hand-held under-barrel and mounted grenade launchers; (iii) portable anti-aircraft guns; (iv) portable anti-tank guns, recoilless rifles; (v) portable launchers of anti-tank missile and rocket systems; (vi) portable launchers of anti-aircraft missile systems; (vii) mortars of calibres of less than 100 mm; (c) ammunition and explosives: (i) cartridges (rounds) for small arms; (ii) shells and missiles for light weapons; (iii) mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems; (iv) anti-personnel and anti-tank hand grenades; (v) landmines; (vi) explosives.⁸²

⁷⁸ UNGA Res 67/234 B (2 April 2013) UN Doc A/RES/67/234 B.

⁷⁹ See UNGA A/71/259 (29 July 2016), UN Doc A/71/259, para. 75.

⁸⁰ UNGA A/RES/50/70 (12 December 1995)

⁸¹ Report of the Panel of Governmental Experts on Small Arms, appointed by the UN Secretary-General, pursuant to UNGA 50/70 B of 12 December 1995, A/52/298 27 August 1997, point 1.

⁸² *Ibid*, point 26.

The eight categories under Article 2 of the ATT can be divided into two macro-categories: major and minor weapons.⁸³ Traits common to all the major weapons are, amongst others, the difficulty in disguising them and the high purchasing and maintenance costs. These characteristics explain why NSAs may find it difficult to possess or maintain major weapons, which tend to be possessed mostly by States. This is not to say that in the context of civil wars, NSAs may not obtain these weapons by means of, for instance, victories on the battlefield. It is, however, apparent that for the categories d) to f), the sole possession of the goods may not serve an operational purpose. Without specific training and without the possibility to operate them, these arms may risk being a burden rather than an advantage. On the contrary, the use of different arms and weapons combined can create a decisive advantage: “combined arms integrates different capabilities so that counteracting one makes the enemy vulnerable to another”.⁸⁴ This principle is valid also in urban operations, where the infantry, armed with SALW (category h), is reinforced by the artillery (category c) and by the aviation (categories d and e), but at the same time is protecting the tanks (category a) from enemy infantry and antitank systems.⁸⁵ The synchronized application of different sources of combat power requires a high degree of training, coupled with integrated information systems and capable leadership.⁸⁶

More in general, the strength of the interaction between air, land and maritime forces derives from the different environments where each of them operates. Air forces are characterized by being capable of posing threats – or countering them - simultaneously across a wide area. Their speed allows for tactical agility, which translates into the ability to achieve different effects in a short period. According to the UK Land Operations manual, the air force has four different roles: it controls the air, it gathers intelligence and situational awareness, it attacks and it has air mobility.⁸⁷ The control of the air means the freedom to use – and not to use – certain airspace while denying its use to an opponent. In order to challenge the airspace opponents do not necessarily need to have advanced air forces; especially at lower altitudes, man-portable-air-defense-systems (MANPADS) may suffice to pose such a threat to

⁸³Zeray Yihdego, *The Arms Trade*, above n 5, at 20.

⁸⁴ Department of the Army, *Field Manual 3-0, Operations*, Washington, DC, 22 February 2011, at 4-12.

⁸⁵ *Ibid*, at 4-12.

⁸⁶ *Ibid*, at 4-13.

⁸⁷ UK Army, Land Warfare Development Centre Army, *Land Operations Doctrine* Publication AC 71940, at 7-8.

discourage the control of the relevant airspace. As to 2013, it has been estimated that around 50 NSAs in 40 countries have held MANPADS, which demonstrates that the airspace is contestable not only by enemy aircraft possessed by States but also by individuals armed with the right equipment.⁸⁸

By enjoying a privileged point of observation, aviation is equipped with a key advantage in intelligence gathering. Its contribution can span from real-time intelligence to reconnaissance, target acquisition, electronic support and early warning, amongst others.⁸⁹ The intelligence gathered is precious both in the preparation stage and on the battlefield, as it can directly shape the operations on the field. However, it is worth noting that intelligence gathering missions are performed also by specialized aircraft and helicopters, which not necessarily fall within the scope of category (d) combat aircraft or (e) attack helicopters.

Allegedly, the most important function of the air force is to attack: “aviation’s primary mission is to fight the land battle and to support ground operations.”⁹⁰ As this quote highlights, the contribution of aviation in the attacking phase can be divided into two functions. On the one hand, there is the direct combat involvement, in which the aviation performs a battlefield role by conducting attacks on the enemy or on its infrastructures. It is clear that the target will inform whether the aviation is involved in a strategical or tactical operation. On the other hand, there is the close air support (CAS). On this point, military doctrines show different views on the relationship between the air and the land and in the level of interaction between forces. In the context of CAS, the differences can be significant. For instance, the American doctrine assigns to CAS a supportive role that includes communications, search and rescue, air movement and electronic warfare.⁹¹ The British doctrine sees CAS as an integral part of the firepower, which is meant to neutralise, disrupt or destroy the enemy. As an integral part of the violence of the battlefield, CAS requires perfect coordination with the land forces both for targeting guidance and for avoiding friendly losses.⁹² Also in the context of air mobility, there are differences amongst

⁸⁸ Small Arms Survey Guided light weapons reportedly held by non-state armed groups 1998-2013, available at <http://www.smallarmssurvey.org/armed-actors/armed-groups/groups-guided-weapons.html>

⁸⁹ Department of the Army, *Field Manual 1-0, Army Aviation Operations*, Washington, DC, 21 February 1997, at 1-8.

⁹⁰ *Ibid*, at 1-3.

⁹¹ *Ibid*, at 2-8.

⁹² UK Army, Land Warfare Development Centre Army, *Land Operations Doctrine* Publication AC 71940, at 7-9.

doctrines. Most importantly, not all the doctrines elevate air mobility to a separate role. In fact, some doctrines argue that mobility comes as part of the CAS, as it is meant to move troops, provide supplies and equipment in support of an operation.⁹³

The flexibility of the aviation, however, does come with a cost. From a budgetary perspective, combat aircraft or attack helicopters are goods that can be afforded by a limited number of actors. Associated costs, such as maintenance and fuel, secure basing, logistics and equipment support, are additional budget burdens but are unavoidable.⁹⁴

As seen above, when land, air, and maritime forces interact, the advantage provided can be decisive. According to the British doctrine, maritime forces (category f above), perform three roles when they interact with air or land forces: warfighting, maritime security, and international engagement.⁹⁵ Direct participation in fighting is coupled with a variety of supporting measures, such as defence over littoral areas and protection. In addition, maritime forces can provide intelligence, surveillance and communications capabilities and, given their very long autonomy, long-term sustainment to land forces. The same remarks on costs done above are equally applicable to maritime forces.

In civil conflicts, minor weapons, such as SALWs, play a fundamental role. Moore posits that the “nature of many insurgencies causes a reliance on small and light arms as opposed to major conventional weapons”.⁹⁶ The United Nations stresses that these arms “have been or are the primary or sole tools of violence in several of the armed conflicts [...], particularly where fighting involves irregular troops among the conflicting parties”, namely the civil wars that the present study is considering.⁹⁷ The reason for this reliance is manifold: on the one hand, these weapons are easy to

⁹³ Department of the Army, *Field Manual 1-0, Army Aviation Operations*, Washington, DC, 21 February 1997, at 2-8.

⁹⁴ From a press release of Boeing, it can be inferred that one Apache Helicopter “E” Variant would cost around 13 million \$. See Boeing, U.S. Army Sign \$3.4B Contract for 268 AH-64E Apache Helicopters, available at <https://boeing.mediaroom.com/2017-03-16-Boeing-U-S-Army-Sign-3-4B-Contract-for-268-AH-64E-Apache-Helicopters>; According to official sources, the unitary costs of one F-16A/B ,is \$14.6 million while for one F-16C/D is \$18.8 million. See U.S. Air Force, Factsheet F-16 Fighting Falcon, available at <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104505/f-16-fighting-falcon/>

⁹⁵ UK Army, Land Warfare Development Centre Army, *Land Operations Doctrine*, above n 92, at 7-9.

⁹⁶ Matthew Moore, “Selling to Both Sides”, above n 77, at 327. See also Michael T Klare, “The Arms Trade in the 1990s: Changing Patterns, Rising Dangers”, *Third World Quarterly*, 1996, 17(5):857–874.

⁹⁷ See Report of the Panel of Governmental A/52/298 above n 81, at para 15.

conceal and allow for swift movement. On the other hand, and compared to other conventional weapons SALWs are more accessible. In other words, entering into possession of a SALW is undeniably easier than obtaining other categories of weapons. Furthermore, existing stockpiles of SALWs exacerbates the problem. According to a UN Secretary General Report back in 2002, at least 639 million small arms were in circulation at that time.⁹⁸ The most recent estimates elevate that number to 1,013 million, the majority of them (84,6%) held by civilians, followed by the military (13,1%) and the rest by law enforcement agencies.⁹⁹

SALWs are also low-cost maintenance and do not require a high degree of technical knowledge to operate. In turn, this means that training people in SALW can be achieved on the field and without the need for specific skills or for physical strength, as the phenomenon of the child soldier confirms.¹⁰⁰ The maintenance cost and the durability of this category of weapons contribute to their widespread availability. The UN Secretary General stressed this point when he reported that “small arms survive from conflict to conflict...many of these weapons are even recycled, passed on from area to area, from one conflict to another”.¹⁰¹

An indirect confirmation that these arms have a very long life span comes from ammunitions. Not only is their importance recognised by some of the legal instruments, but also researchers are increasingly devoting attention to ammunitions as they can be a source of factual information.¹⁰² Amongst the data that can be obtained from the analysis of this material, there are countries of manufacture, dates and, naturally, it can give a hint at the arms that are supposedly present on the field. A recent study focused on seven countries affected by civil wars highlighted that more than half of the samples were produced before 1990, a third was produced after 2000 and the rest in the decade between these two dates.¹⁰³ This data does not directly mean that the SALWs on the field dates back to the same

⁹⁸ Report of the Secretary-General to the Security Council on Small Arms, S/2002/1053, 20 September 2002, at 2, para 3.

⁹⁹ Aaron Karp, “Estimating Global Military Owned Firearms Numbers”, *The Small Arms Survey Briefing Paper*, 2018, at 4.

¹⁰⁰ See Note by the UN Secretary General, Impact of armed conflict on children, A/51/150, at para 47.

¹⁰¹ UNSC, 4048th Meeting, 24 September 1999, S/PV.4048, at 2.

¹⁰² See, for instance, Article 3 of the ATT, at III.3.2.

¹⁰³ Nicolas Florquin and Jonah Leff. ‘Documenting Weapons in Situations of Armed Conflict: Methods and Trends.’ Research Note, No. 42. *Geneva: Small Arms Survey*. June.2014, at 189.

period, but it can help to identify the compatible weapons. Within the category of SALWs, ammunitions are known by the term cartridges. There exists a plethora of different types of cartridges and one of the main differences between cartridges is between those designed for being used by rifles and those by handguns. While the former is “largely standardized”, the latter come in very different shapes and forms.¹⁰⁴ Cartridges differ also for their intended purposes and users: tracers, incendiary, high-explosive, and armour-piercing cartridges are typically employed by military forces; hollow-point and blank are mainly employed by law enforcement and civilians. Other types of cartridges, such as full metal jacket, crosscut the division and are employed by the military as well as law enforcement and civilians.

At first sight, the distinction between major and minor weapons may appear legally irrelevant, but this must be confuted on a twofold level. First, research has shown that major weapons supply raises civil war violence by generating a higher level of collateral damage.¹⁰⁵ It is estimated that a “1% increase in the volume of major conventional weapons transferred results in a .4% increase in the number of casualties”, with obvious concerns in terms of IHL violations.¹⁰⁶ Second, on the level of national policies, one EU Member State has differentiated policies in relation to major and minor weapons. Taken as a whole, the division is, therefore, relevant on three levels. It has to be considered on the general international law perspective, as a consequence of the duty to ensure respect for IHL; it has to be part of the overall assessment based on treaty law and EU law, and, finally, it can translate into different national guidelines.

Finally, a brief explanation is warranted on the issue of non-lethal assistance as opposed to the provision of weapons. This clarification is needed in order to better understand the State practice in Chapter II. Currently, there is no definition of what constitutes non-lethal assistance, but the practice has shown that it usually includes, amongst others, technologies (such as jammers), body armours, communication equipment, trucks, generators, uniforms.¹⁰⁷ The thorny question surrounding non-lethal

¹⁰⁴ N.R. Jenzen-Jones and Matt Schroeder, An Introductory Guide to the Identification of Small Arms, Light Weapons, and Associated Ammunition, *Geneva: Small Arms Survey*, November 2018, at 135.

¹⁰⁵ See John Sislis and Frederic S. Pearson, *Arms and Ethnic Conflict*, Lanham, MD, 2001 Rowman & Littlefield.

¹⁰⁶ Matthew Moore, “Selling to Both Sides”, above n 77, at 339.

¹⁰⁷ See Gifting of non-lethal equipment to Syrian Opposition, 15 April 2013, available at <https://www.gov.uk/government/speeches/gifting-of-non-lethal-equipment-to-syrian-opposition>; See also

assistance is whether this may encompass also non-lethal weapons.¹⁰⁸ The reply to this question is, however, highly uncertain given that States, with few exceptions, do not clarify what items they provide when they deliver non-lethal assistance. Nonetheless, for the sake of completeness, according to a NATO definition, non-lethal weapons are “weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment”.¹⁰⁹ A document of the American Department of Defence also highlights that non-lethal weapons “shall not be required to have a zero probability of producing fatalities or permanent injuries”.¹¹⁰ The Small Arms Survey states that non-lethal weapons are “either stand-alone weapons or are integrated with firearms to provide the user with alternatives for graduated response” and include “kinetic energy launchers and ammunition, barriers and entanglements, electrical or ‘conducted-energy weapons’, acoustic weapons, directed energy weapons, riot control agents and malodorants, and biochemical and incapacitating agents”.¹¹¹

I.5. The Structure of the Dissertation

The dissertation is composed of five chapters. Chapters II and III examine the first of the three pillars that form the applicable legal framework, which is the rules of international law. More specifically, Chapter II is devoted to the relevant rules of general international law. At the outset, it discusses non-interference and non-intervention; it then analyses the thorny issue of recognition and connects it to the question of intervention upon invitation; it then considers the limits to the provision of arms and weapons stemming from international humanitarian law. The three case studies that follow put to test the norms that the chapter has considered.

Christian Henderson, “The Provision of Arms and ‘Non-lethal’ Assistance to Governmental and Opposition Forces”, *University of New South Wales Law Journal*, Volume 36(2), 642-681; Paul Holtom, “Prohibiting Arms Transfers to Non-State Actors and the Arms Trade Treaty”, United Nations Institute for Disarmament Research Resources, at 14.

¹⁰⁸ On this topic see David P. Fidler, “The International Legal Implications of ‘Non-Lethal’ Weapons”, *Michigan Journal of International Law*, Vol. 21, 1999, 51-100; David P. Fidler, “The meaning of Moscow: ‘Non-lethal’ weapons and international law in the early 21st century”, *International Review of the Red Cross*, Volume 87, N. 859, 2005, 525-552.

¹⁰⁹ NATO policy on non-lethal weapons, 13 October 1999, available at <https://www.nato.int/docu/pr/1999/p991013e.htm>.

¹¹⁰ US Department of Defence, Non-Lethal Weapons (NLW) Reference Book, 2012, at 1, available at https://www.supremecourt.gov/opinions/URLs_Cited/OT2015/14-10078/14-10078-3.pdf.

¹¹¹ Small Arms Survey, Less-lethal Weapons, available at <http://www.smallarmssurvey.org/weapons-and-markets/products/less-lethal-weapons.html>.

Starting from a historical perspective, Chapter III examines the applicable treaties. It devotes particular attention to the Arms Trade Treaty, the first universal treaty on conventional arms export, but also considers other applicable treaties, such as the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (hereinafter the “Firearm Protocol”) and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III).¹¹²

Finally, Chapter IV focuses on two aspects. At the outset, it considers the rules that stem from being EU Member States party to regional organisations and arrangements. The EU legal regime is mostly governed by secondary legislation. Council Position 2008/944/CFSP, the bedrock of the EU regulation in the field of arms export to non-EU countries and the ICT Directive, devoted to intra-Union transfers. The former act lays down eight conditions against which EU Member States must assess the extra-EU export of weapons and arms included in the EU Common Military List.¹¹³ The latter act provides for rules that relax the ex-ante controls and may appear problematic in the light of the commitments taken by EU Member States with the ATT. The Chapter then examines other regional arrangements to which EU Member States are party. Although these arrangements provide for non-binding rules, they are closely linked to the export criteria considered by EU legislation. The Chapter also provides for an overview of the applicable legislation of each EU Member State and shows that domestic legislations vary considerably. Finally, the Chapter resorts to the Yemeni case study with a view to analysing the rationale behind the decision taken by some EU Member States to stop the provision of arms.

¹¹² Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Adopted 31 May 2001, Entered into Force 3 July 2005, Signatories :52. Parties: 118, United Nations, Treaty Series, vol. 2326, p. 208; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), Adopted 10 October 1980, Entered into Force 2 December 1983, Signatories: 50. Parties: 125, United Nations, Treaty Series , vol. 1342, p. 137.

¹¹³ Common Military List of the European Union, adopted by the Council on 9 February 2015, (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment), 2015/C 129/01.

Chapter V examines sanction regimes. Sanctions under Chapter VII of the UN Charter are examined in the first place, as, if adopted within the boundaries of legality applicable to the UN Security Council, they require full compliance by Member States. Sanctions are also relevant from a different point of view, as they are one of the criteria States must consider when authorizing the export of arms and weapons. This is, for instance, the approach taken by the ATT in its Article 6 and of EU Common Position 944 at its criterion one. The Chapter then examines EU restrictive measures. The legal qualification of the EU restrictive measures greatly influences their legality, as these measures can be interpreted as third-party countermeasures, whose legality, alongside countermeasures with extraterritorial effects, is controversial.

The conclusion summarizes the main findings of each chapter and provides an overall assessment of the legality of the provision of arms and weapons by EU Member States to parties involved in civil wars.

CHAPTER II – General International Law

II.1 Introduction

This chapter marks the beginning of the analysis of the legal framework and is dedicated to the analysis of the international legal framework relevant for arms transfers. It is worth mentioning that general international law does not lay down specific rules for the regulation of arms transfers, but rather general norms regulating the conduct of States in all their international relations and affairs. In other words, these general norms encompass rules and principles that deal with matters of general interest to States as a whole.¹ As such, the legality of arms transfer must be assessed in relation to these norms, even if, differently from treaty law, they are not arms-specific.

Within the framework of general international law, a number of themes come into play when discussing arms and weapons. By moving from sovereign equality, the chapter begins with the premise that every State has the right to arm itself. These arms can be used by the State when it finds itself embroiled in a civil conflict and that can be provided, with the caveats that the chapter highlights, during the civil conflict. Those who, on the contrary, fight the government are in a weaker position, as non-intervention prevents third State to assist them. However, this is not as rigid as it sounds and different interpretations are possible, also with regard to whether the conflict has reached a certain level of intensity. That the legitimate authorities are, nonetheless, in a more favourable position is confirmed by the possibility to request military assistance from third States. This request may find response, but it may fail in the event of competition for authority. In other words, the *de jure* authorities may find themselves coexisting with *de facto* ones.

The last part of the chapter examines three case studies in order to gauge whether the theoretical analysis that precedes, finds confirmation in the selected State practice.

II.2. Sovereign equality

Article 2(1) of the UN Charter states that the Organization and its Member States, in pursuing the objectives listed under Article 1, shall act according to the principle of sovereign equality of its

¹ See United Nations, Yearbook of the International Law Commission, 1962, Vol. I, Summary records of the fourteenth session, at 239.

Members.² This principle is amongst the most fundamental ideas of international law and can be traced back to well before the UN Charter.³ In contemporary international law, sovereign equality should be analysed as the combination of sovereignty and equality, since to speak of ‘sovereign equality’ is justified only insofar as both qualities are considered to be related to one another.⁴ Dividing the concept into two different notions, not only provides for greater clarity, but also establishes the basis for a better understanding of its constraints. Sovereignty, in its most concise form, is defined as the absence within the territorial jurisdiction of a State of governmental, executive, legislative or judicial authority of a foreign State or of foreign law other than international law.⁵ In Kelsen’s words, “State is then sovereign when it is subjected only to international law, not to the national law of any other State”.⁶ Thus sovereign States experience the tension between the absolute authority over their territories and population and the relative authority in the international sphere, the limit to all States’ authority being international law. Simply put, all sovereign States are on an equal footing before international law.

The origin and the notion of equality is more contentious. According to some scholars, equality represents the external façade of sovereignty, when sovereignty is used as a synonym of “independence”.⁷ The independence of States is the condition that allows their interaction in the international order, where no State is legally superior to others and all States are “equally independent”.⁸ In the historical, yet influential, view of Oppenheim, “equality before International Law of all member-

² Charter of the United Nations, Article 2.

³ For an historical perspective see Harold J Laski, *The Foundations of Sovereignty and Other Essays*, New York: Harcourt, Brace and Company, 1921; C. E. Merriam, Jr. *History of the Theory of Sovereignty since Rousseau*, Batoche Books Kitchener 2001; Wiktor Sukiennicki, Albert Geouffre de Lapradelle, *La Souveraineté Des États En Droit International Moderne*, Paris: A. Pedone, 1927; Hermann Heller, *Sovereignty, a Contribution to the Theory of Public and International Law*, edited by David Dyzenhaus, Oxford University Press, 2019; Heinz Duchhardt, “From The Peace Of Westphalia To The Congress Of Vienna”, in Bardo Fassbender and Anne Peters *The Oxford Handbook of the History of International Law*, Oxford University Press, 2014; Edwin DeWitt Dickinson, *The Equality of States in International Law*, Cambridge, 1920.

⁴ Hans Kelsen, “The Principle of Sovereign Equality of States as A Basis for International Organization”, *The Yale Law Journal*, Vol. 53 (2), 1944, at 207.

⁵ Helmut Steinberg, “Sovereignty”, in R Bernhardt (ed) *Encyclopedia of Public International Law* 10, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 1987, at 408. One of the classical definitions is the one proposed by Max Huber in the *Las Palmas* case in 1928: “Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”

⁶ Hans Kelsen, “The Principle”, above n. 4, at 207.

⁷ See James Fry, “Sovereign Equality under the Chemical Weapons Convention: Doughnuts over Holes”, *Journal of Conflict & Security Law* (2010), Vol. 15 No. 1, at 49. See also Henry G. Schermers and Niels M. Blokkerat, *International Institutional Law, Unity Within Diversity*, Martinus Nijhoff Publishers, Leiden 2004, at 5.

⁸ Ulrich K Preuss, “Equality of States - Its Meaning in a Constitutionalized Global Order,” *Chicago Journal of International Law*, 2008, Vol. 9 No. 1, at 26.

States of the Family of Nations is an invariable quality derived from their International Personality”.⁹

Other authors, conversely, contend that equality does not derive from sovereignty and, hence, argue that the concept is something more than the external façade of sovereignty.¹⁰

Several corollaries derive from equality. Firstly, equality denotes that under the same condition States shall be capable of enjoying the same rights and duties.¹¹ But it also implies, *a contrario*, that under different conditions States have different rights and duties, as Carnazza-Amari makes it clear:

Cette égalité fondamentale ne doit pas être prise dans le sens qu'il leur faille développer leur existence et réaliser leurs droits au même degré; ces droits peuvent différer selon la plus ou moins grande activité des États, selon la différente situation dans laquelle peuvent se trouver les peuples, et l'influence diverse des circonstances; il faut entendre cette égalité dans le sens que tous les États ont virtuellement les mêmes droits et jouissent...de la même inviolabilité dans l'exercice et dans la réalisation de leurs droits.¹²

A second corollary is the principle *par in parem non habet imperium*, which underlines that no State can exercise its jurisdiction over another State without the consent of the latter. A third corollary, which descends from States being subject only to international law, is that States are the sole entities entitled to create rules for their internal sphere.¹³ Viewed from the opposite angle, one can say that sovereignty protects States' freedom to decide over their political, constitutional and socioeconomic system without interferences from the outside.¹⁴ Sovereignty thus safeguards States' cultural identity, territorial integrity and exclusive jurisdiction over their territory and their citizens and legal persons established

⁹ Lassa Francis Oppenheim, *International Law. A Treatise*, Volume I (of 2), Longmans, Green and Co, Second Edition, London 1912, at 169.

¹⁰ Kelsen: “According to traditional doctrine, the equality of the States in the sense of autonomy is derivable from their sovereignty. Actually, however, it is not possible to derive from the sovereignty of the State—that is, from the principle that a State is subjected only to international law, not to the national law of another State—the rules that no State can be legally bound without or against its will, that international treaties are binding only upon the contracting States, that a State cannot be legally bound by the decision of an international agency if it is not represented in this law making body or if the State's representative has voted against the decision, that no State has jurisdiction over the acts of another State, and so on.”, in “The Principle”, at 209-210.

¹¹ Kelsen, “The principle”, above n 4, at 299; R. P. Anand, “Sovereign Equality of States in International Law – II”, *International Studies*, 8(4), at 394.

¹² Carnazza-Amari, *Traité De Droit International Public En Temps De Paix*, Paris L. Larose; Libraire-Éditeur, 1880, at 380.

¹³ Pieter Hendrik Kooijmans, *The Doctrine of the Legal Equality of States. An Inquiry into the Foundations of International Law*, A.W. Sythoff, Leiden 1964, at 218.

¹⁴ Helmut Steinberg, “Sovereignty”, in R Bernhardt (ed) *Encyclopedia of Public International Law* 10 (Max Planck Institute for Comparative Public Law and International Law, Heidelberg 1987) at 410.

under their jurisdiction.¹⁵ It follows that States' territorial integrity and political independence are inviolable and the threat or use of force is outlawed.¹⁶

As observed by Corten and Klein, even if there is no explicit definition of coercion in international law, the term shall not be limited only to instances of resort to the use of force.¹⁷ This statement has been confirmed by several UN General Assembly resolutions. That severe political and economic coercion can amount to the use of force and, hence, are prohibited means of interference with sovereign prerogatives of a State is the bedrock of the UN General Assembly Resolution on Friendly Relations.¹⁸ While a more detailed discussion on this resolution and on coercion is reserved for the next section, suffice here to say that the principles expressed therein are deemed to reflect customary international law.¹⁹ Other subsequent acts have restated the same principles. Article 32 of the Charter of Economic Rights and Duties of States, adopts the very same wording of the Declaration on Friendly Relations: "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights".²⁰ The prohibition is not just a statement of principles, as UN General Assembly Resolution 44/215 illustrates. In the context of debating the economic efforts of developing countries, the UN General Assembly condemned the usage by the developed countries of political coercion by means of

¹⁵ *Ibid*, at 410.

¹⁶ Brad R. Roth, *Sovereign Equality and Moral Disagreement*, Oxford University Press, Oxford 2011, at 67.

¹⁷ Olivier Corten and Pierre Klein, "Droit D'ingérence Ou Obligation De Réaction Non Armée? Les possibilités d'actions non armées visant à assurer le respect des droits de la personne face au principe de non-ingérence" *Revue Belge De Droit International* 1990/2, at 378. Against this interpretation, see Farer, T. J., "Political and Economic Coercion in Contemporary International Law", *The American Journal of International Law*, 79(2), 1985, at 410. In general terms, coercion qualifies the outcome of an action that results in a "deliberate and drastic restriction or suppression by one actor of the choices of another", see Romana Sadurska, "Threats of Force", *The American Journal of International Law*, Vol. 82, No. 2, at 241.

¹⁸ "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights..." UNGA Resolution 2625/1970 A/RES/2625 (XXV), adopted without a vote, at 123. However, it must be also highlighted that in the negotiations of the Vienna Convention on the Law of the Treaties of 1969, nineteen States pushed unsuccessfully for an explicit mention of the words "including economic and political coercion as well", possibly showing a less than uniform understanding of what use of force may encompass. See Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary*, Second Edition, Springer 2018, at 950.

¹⁹ Borrowed the term community from Article 15 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

²⁰ UNGA Resolution 2A/RES/3281(XXIX), approved with 120 yes, 6 no, 10 abstentions and 2 non-voting.

economic measures adopted with the intention of inducing changes in domestic and foreign policies of developing countries.²¹

Sovereignty is not unfettered and is nowadays subject to several constraints. The first one can be traced back to *jus cogens*. According to Article 53 of the Vienna Convention on the law of treaties, a “peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²² The defining feature of peremptory rules is that they represent the higher and universal interests of the international community as a whole and, thus, prevail over the particular interests of individual States or groups of States.²³ Because of their absolute nature justified by the superior interests that they serve, these rules are non-derogable and operate in every circumstance. According to Orakhelashvili, “this conceptual independence of *jus cogens* from individual State conduct and attitudes explains its non-derogability”.²⁴ Not only does their absolute character put them at the top of the legal hierarchy, but also prevents States from recognizing as legal any violation or derogation.

A second limit to sovereignty is the increasing number and scope of international organizations. According to the statistics compiled by the Yearbook of International Organisations, as of 2016 there exist 275 IOs, with an increase of roughly 745% if compare to a century ago when there were 37 IOs. Shortly after the end of World War II this number rose to 123, at the end of the Cold War became 217 and a decade ago 246.²⁵ Amongst all IOs, it is a truism to say that the United Nations and its organs have and play a unique role, also in light of Article 103 of the UN Charter. And when analysing limitations of sovereignty by acts of an IO, the activities of the UN Security Council (UNSC) are of special interest, because as Alvarez posits, the “Council continues to be seen as the principal, if not the

²¹ Article 4 of UNGA Resolution 44/215, adopted with 118 yes, 23 no, 2 abstentions and 16 non-voting.

²² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

²³ Stefan Kadelbach, “Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms”, in Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules Of The International Legal Order*, Martinus Nijhoff, 2006, at 34.

²⁴ Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford 2008, at 69.

²⁵ Union of International Associations, Who's Who in International Organizations - Historical overview of number of international organizations by type, in 2016 *Yearbook of International Organizations*, Brill.

only, legitimator of uses of force precisely because it is the only organ, other than self-judging states, specifically authorized to use force itself and to license others to do so”.²⁶

A third constraint comes from human rights. As Henkin notes, since the end of World War II, the international system has shifted from being State-value centred towards human-valued centred.²⁷ States have accepted international human rights standards, as enshrined in human rights treaties.²⁸ Human rights and their protection restricts State sovereignty, which does not take precedence in case of conflict between the two. Furthermore, the purpose and intent of human rights treaties can often lead, on the one hand, to a wider view of individual rights and, on the other, to limits on State activities.²⁹ Some scholars go even further and affirm that not only is State sovereignty constrained by human rights, but is defined and justified by humanity and has a legal value only to the extent that it respects human rights.³⁰

A fourth limit stems from IHL. Common Article 1 to the Geneva Conventions and Article 1(1) of Additional Protocol I³¹ read as follows: “[t]he High Contracting Parties undertake to respect and to ensure respect for the Convention in all circumstances”. It is nowadays uncontroversial that the content of the article reflects customary international law.³² What appears to be still controversial is the extent of the obligation “to respect and to ensure respect” and its concrete application. Moreover, no consensus still exists on whether the obligation also applies to conflicts of non-international nature as per common

²⁶ José E. Alvarez, *International Organizations as Law-makers*, Oxford University Press, 2006, at 189.

²⁷ Louis Henkin, “Human Rights and State ‘Sovereignty’”, *Georgia Journal of International & Comparative Law*, Vol. 25, N. 1, 1996, at 34.

²⁸ Louis Henkin, “That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, Et Cetera”, *Fordham Law Review*, Vol. 68, Issue 1. Patrick Macklem, *The Sovereignty of Human Rights*, Oxford University Press 2015, at 22; Ivan Šimonović “Sovereignty and Globalization”, *Georgia Journal of International & Comparative Law*, Vol. 28, N.3, 2000, at 385; Karima Bennoune, “‘Sovereignty vs Suffering’: Re-examining Sovereignty and Human Rights Through the Lens of Iraq”, *The European Journal of International Law*, Vol. 13, N. 1, at 246.

²⁹ Rudolf Bernhardt, “Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights”, *German Yearbook of International Law*, Vol. 42, 1999, at. 14. Bardo Fassbender, “Sovereignty and Constitutionalism in International Law”, in Neil Walker, *Sovereignty in Transition*, Hart 2003, at 132. For a practical application of the concept, see also at ECHR, Grand Chamber, *Case of Khlaifia and Others v. Italy*, at 91.

³⁰ Anne Peters, “Humanity as the A and Ω of Sovereignty”, *The European Journal of International Law* Vol. 20 no. 3.

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4 (AP I) 7.

³² Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2005, Vol. I (Rules), Rule 144, at 509-513.

Article 3 of the Geneva Conventions. The dominant view draws from the *Nicaragua* case where the ICJ qualified the conflict in Nicaragua as a non-international one and concluded that the USA was bound by the obligation to ensure respect for the Conventions and, thus, it was obliged “not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions”.³³ Based on this authoritative view and on the ICRC commentaries, authors have reasonably argued that Article 1 applies to both international and non-international conflict.³⁴ With regard to the notion “ensure respect”, two interpretations have been advanced. On the one hand, a restrictive approach, according to which the obligation is jurisdictionally limited to every individual contracting State.³⁵ The obligation is then fulfilled by a contracting State adopting all the measures needed to ensure that individuals, organizations and State’s authorities comply with the Geneva Conventions. Measures that must be taken also during peacetime, as the term “in all circumstances” imposes. On the other hand, an extensive approach, which suggests that “in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention”.³⁶ Regardless of the doctrinal position adopted, and as observed by Corten and Koutroulis,³⁷ in the case of arms provisions it is superfluous to investigate all the range of positive measures that a third State can take

³³ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, *International Court of Justice (ICJ)*, 27 June 1986, at 220.

³⁴ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International*, above n 330, at 509; Maya Brehm, “The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law”, *Journal of Conflict & Security Law*, Vol. 12 No. 3, 2008, at 372; Birgit Kessler, “The Duty to ‘Ensure Respect’ Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts”, *German Yearbook of International Law*, Vol. 44, 2001, at 498; Alexandre Devillard, “L’obligation de faire respecter le droit international humanitaire : l’article 1 commun aux Conventions de Genève et à leur premier Protocole additionnel, fondement d’un droit international humanitaire de coopération?”, *Revue Québécoise de Droit International*, Vol. 20-2, 2007, at 82-83; Laurence Boisson de Chazournes and Luigi Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 82, N. 837, at 69. This opinion is, however, not unanimously shared. Focarelli contends that Article 1 cannot enlarge the scope of what is specifically designed for internal armed conflict. Accordingly, he does not deny the applicability of Article 1 to non-international armed conflict but limits its material application solely to the provisions contained in Article 3. Therefore, if there exists an obligation on third States to ensure the respect of the Geneva Conventions in internal conflict this must be read as an obligation to ensure that the provisions contained in Article 3 are applied by the conflicting parties. See Carlo Focarelli, “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, *The European Journal of International Law*, Vol. 21, No. 1, at 159-160.

³⁵ Alexandre Devillard, “L’obligation de faire respecter le droit international”, above n. 34, at 127.

³⁶ Jean S. Pictet, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, Geneva 1952 ICRC, at 26.

³⁷ Olivier Corten and Vaïos Koutroulis, “The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum and jus in bello”, *Journal of Conflict & Security Law*, 2013, Vol. 18 No. 1, at 84-85.

in order to ensure respect for the Geneva Conventions, since this case is about a duty of abstention.³⁸ Therefore, one can reasonably uphold that Article 1 imposes an obligation to refrain from providing arms and weapons to parties that commit breaches to Article 3, as suggested also by the practical guide on arms transfers of the ICRC. This indeed states that “the negative obligation would require a State to assess whether the recipient is likely to use the weapons to commit IHL violations and, if there is a substantial or clear risk of this happening, to refrain from transferring the weapons”³⁹.

In fact, political reality departs from legal considerations already at the notion of equality. The legal notion has no say on material inequalities, on differences amongst States, as general international law “does not demand of states that they act to redress these inequalities”.⁴⁰ In a system that largely relies on self-help, power and power-inequality determine the capacity of States to exert, or to resist, to outside pressures, including legal pressures. The schism between the rule and the *de facto* differences does not imply that sovereign equality and political inequality cannot co-exist. One can even bring the argument further: it is because of sovereign equality that States are able to pursue the foreign, economic and military policies that contribute to the differences between them.⁴¹ Be as it may, sovereignty means that States have the right to produce, export and import all type of weapons that are not explicitly prohibited by a treaty they are bound by. This principle is also enshrined in the fifth preamble of UNGA Resolution 61/81, which proclaims “... the right of all States to manufacture, import, export, transfer and retain conventional arms for self-defence and security needs, and in order to participate in peace support operations”.⁴²

³⁸ On positive measures see Umesh Palwankar, “Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law”, *International Review of the Red Cross*, No. 298, 1994, 227-240; Birgit Kessler, “The Duty to ‘Ensure Respect’”, above n 34.

³⁹ ICRC, *Arms Transfer Decisions Applying International Humanitarian Law and International Human Rights Law Criteria, A Practical Guide*, Box 3 at 13. However, it is to be noted that according to Brehm, “it cannot be presumed that otherwise legal arms are likely to be employed in contravention of humanitarian law in a future armed conflict, transfer limitations based on states’ duty to ensure respect for humanitarian law only apply in relation to states that are already involved in an armed conflict”, in Brehm, “The Arms Trade and States’ Duty”, above n 34, at 377.

⁴⁰ Colin Warbrick, “The principle of sovereign equality”, in Vaughan Lowe, Colin Warbrick (eds.), *The United Nations and the Principles of International Law, Essays in Memory of Michael Akehurst*, London, Routledge 1994, at 208. See also ICJ *Continental Shelf (Libya v. Malta)* [1985] I.C.J. Rep. 13, 41.

⁴¹ See Gerry Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order*, Cambridge: Cambridge University Press, 2004, at 57.

⁴² UNGA Resolution 61/89, A/RES/61/89.

Since States have the right to arm themselves, one should enquire whether this prerogative is unfettered. The accumulation of arms has been recognised as potentially “destabilizing”, yet there are no thresholds or positive indications to determine when the accumulation becomes excessive.⁴³ The upper limit could be identified *in abstracto*: accumulating arms is permitted until it becomes destabilizing so as to negatively affect international peace and security and trigger a UN Security Council resolution in this respect. As this determination is, with the limits that will be discussed in Chapter V, discretionary and, therefore, uncertain, the threshold may be set by arms exporters. In other words, it is up to the exporters to assess, on the basis of the existing parameters set in treaties and regional instruments, whether the accumulation of arms by the recipient is consistent with the export criteria.⁴⁴ This tension between the sovereign right to acquire arms and the legal (and political) determinations of the exporters is a feature of the arms trade that can be traced also in the historical debate.⁴⁵

II.3 Non-Intervention

II.3.1 The difference between non-interference and non-intervention

The terms *non-interference* and *non-intervention* have been used as synonyms, as both terms refer to a violation by a third party of one or more States’ prerogatives.⁴⁶ Distinguishing between the two terms can be thorny as these concepts are intertwined. This interaction, however, also means that they mutually complement each other and reinforce the legal safeguards against outside actors. At first approximation, the two principles seem to stem from sovereign equality, yet non-intervention is tied to the principle of territorial integrity and inviolability.⁴⁷ From a purely physical perspective, territory not

⁴³General and Complete Disarmament: Small Arms, Note by the Secretary-General, A/52/298, point 34.

⁴⁴ See III.3.2 and IV.2.1.

⁴⁵ See III.2.

⁴⁶ James Leslie Brierly, *The Law of Nations*, 5th Edition, 1955, at 308; Katja S. Ziegler, “Domaine Réservé”, in Max Planck Encyclopedia Of Public International Law, 2008, para. 1. The same remark is done by Sean Watts, “Low-Intensity Cyber Operations and the Principle of Non-Intervention”, in Jens David Ohlin, Kevin Govern, and Claire Finkelstein, *Cyber War: Law and Ethics for Virtual Conflicts*, Oxford University Press, 2015, at 256.

⁴⁷Niki Aloupi, The Right to Non-intervention and Non-interference, *Cambridge Journal of international Law*, 2015 Vol 4 Issue 3, at 572: “Such a distinction between non-intervention (territorial integrity) and non-interference (independence and autonomy) seems theoretically clear”. And also: “Even though both of these elements appear to be directly implied by the principle of equal sovereignty, they derive from different principles of international law. Each corresponds to a different constitutive (factual) element of the state. The first facet of non-intervention/non-interference derives from the principle of territorial integrity and inviolability and prohibits certain actions on foreign soil, whereas its second facet derives from the principle of a state’s independence and

only is a fundamental element without which a State could neither exist nor survive, but it is the area on which a State exercises its *iure imperii*.⁴⁸

Territorial integrity is the term used by the UN Charter in Article 2(4) against which the threat or use of force is outlawed.⁴⁹ The wording of the Article does not help to fully clarify the blurred lines between non-interference and non-intervention, especially as it couples territorial integrity with political independence. If non-intervention were solely linked to territorial integrity and non-interference only to political independence, there would be no need to use two different terms and it would actually be easier to adopt only one of the two. Since this is not the case, one has to turn to another argument in order to distinguish them. It seems that the two concepts can be differentiated according to the type of acts that are meant to interfere/intervene and the key concept involved is the one of coercion. In this regard, the ICJ has clarified that “[t]he element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another state.”⁵⁰ All in all, whenever an act conducted against a State's territorial integrity or political independence is short of coercion, one is in the domain of interference; on the other hand, whenever a coercive act is involved, one is in the sphere of non-intervention. This reasoning is fully consistent with the approach taken vis-à-vis non-interference and human rights discourses.⁵¹

As per Article 2(4) the clearest example of interventions are acts that amounts to the use of force. Since the term used by the Article is force the intervention should result in a *de minimis* violent

prohibits any interference in a state's domestic affairs”. Despite its analysis, Aloupi nonetheless uses the two terms as synonyms.

⁴⁸ Santiago Torres Bernardez, “Territorial Sovereignty”, in R Bernhardt (ed) *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg 1987, Vol. 10, at 408.

⁴⁹ In addition to the “in any other manner inconsistent with the Purposes of the United Nations”, which, according to Article 2(1) is the maintenance of international peace and security. *Contra* see A. D’Amato, *International Law: Process and Prospect*, Transnational Publishers, 1987, at 58-59.

⁵⁰ ICJ, *Nicaragua*, above n 33, at 205.

⁵¹ This reasoning explains why the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of State (UNGA 36/103) speaks about “the distortion of human rights issue as means of interference” rather than of intervention. See point (I) of Annex to UNGA 36/103; see also UN Repertory of Practice, Supplement No 10 (2000–2009), volume 1, at 63, 64 and 65.

disruption.⁵² In other words, pressures that do not concretise in minimum violence are not within the scope of Article 2(4). For instance, this can be the case of economic or political pressures whose end-result is non-violent, but nonetheless, impair the sovereignty of the targeted State. Since the Article speaks about a generic force and does not qualify it as armed force, the means of intervention can differ. Second, the threat of using force is itself coercion as “it aims at the deliberate and drastic restriction or suppression by one actor of the choices of another”.⁵³ To put it differently, the analysis of the threat or use of force must follow an objective and a subjective assessment. From an objective perspective, there are coercive actions that, notwithstanding their coercive nature, fall short of the use of force. As observed by Corten, transboundary police measures usually do not qualify as use of force, unless these cross a threshold of gravity, which, in any event, must be considered *in concreto*.⁵⁴ The situation must be judged also with regard to parameters such as geography and overall context.⁵⁵ From a subjective point of view, the intervention must be carried out with the intention to coerce the party against which the intervention takes place to act or not to act according to the will or the wish of the forcing party. Accordingly, a transboundary police operation usually does not come within the remit of Article 2(4), but a military measure, even if limited in scope and on the assumption that it crosses the objective threshold, may go against the mentioned article.⁵⁶ Furthermore, the mere procurement of arms and weapons, even if it has the potential to destabilize the relationship between States or of a region, does not materialize a threat as per Article 2(4).⁵⁷ In different terms, not all interventions are forcible and, thus, not all interventions are within the scope of Article 2(4). As long as these acts qualify as coercive, they qualify as interventions.

⁵² Olivier Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law*, Hart, 2010, at 66-92. But *contra* the existence of a threshold see Tom Ruys, “The Meaning of “Force” and the Boundaries of the Jus ad Bellum : Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?”, *The American Journal of International Law*, Vol. 108, No. 2, 2014, at 159-210.

⁵³ Romana Sadurska, “Threats of Force”, *The American Journal of International Law*, Vol. 82, No. 2, 1988, at 241.

⁵⁴ Olivier Corten, *The Law Against War*, above n 52, at 68-73.

⁵⁵ *Ibid*, at 75.

⁵⁶ *Ibid*, at 78.

⁵⁷ *Ibid*, at 96.

II.3.2 UN General Assembly Resolutions on non-intervention

According to Gray, the relevant norms of the UN Charter were drafted with inter-state conflicts in mind and the application of such rules to civil conflicts was developed through General Assembly resolutions.⁵⁸ A confirmation that the Charter primarily accounted for inter-state wars comes from statements of delegates to the Special Committee on Principles of International Relations Concerning Friendly Relations and Co-operation amongst States, such as the one delivered by the Swedish delegate: “the force employed in a civil war fell outside the scope of the provision [Article 2(4)]”.⁵⁹ Yet, the fact that the Charter’s norms are addressed to inter-state conflicts does not imply that, when a State is involved in a civil conflict, the prohibition of the threat or use of force becomes irrelevant. As a result, non-intervention applies both in relation to intervention against a State’s forces and as a prohibition to support non-state actors (NSAs) involved in the civil war.⁶⁰

This point does not stem from the analysis of the provisions of the Charter, as the Charter itself is silent on the problem of NSAs. It is the General Assembly (GA) that throughout the years has broadened the scope of non-intervention. As early as 1949, the GA transmitted to its Member States a draft declaration on the Rights and Duties of States. In its article 4, the declaration states that: “every State has the duty to refrain from fomenting civil strife in the territory of another State and to prevent the organization within its territory of activities calculated to foment such civil strife.”⁶¹ Its Article 3 stems from Article 2(7) of the Charter and provides that “every State has the duty to refrain from intervention in the internal and external affairs of any other State”. Resolution 2131 on the *Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, provided a more detailed text: “...no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State”.⁶² This article complements the preceding article, in which the Resolution declares that “[n]o State has the right to intervene, directly

⁵⁸ Christine Gray, *International Law and the Use of Force*, Oxford University Press, Oxford, 2008, 67.

⁵⁹ UNGA, Summary Record of the Tenth Meeting, A/AC.119/SR.10, 16 October 1964, at 9.

⁶⁰ Olivier Corten, *The Law Against War*, above n 52, at 129.

⁶¹ UNGA, Resolution 375/1949 A/RES/375(IV).

⁶² Article 2 of UNGA Resolution 2131/1965 A/RES/213, passed with only one abstention.

or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned”.⁶³ Resolution 2625, the *Declaration on Friendly Relations*, mirrors Resolution 2131: “[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force”.⁶⁴ This provision is restated in the part of the declaration devoted to the principles concerning the duty not to intervene in domestic affairs: “...no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state”. In addition, the declaration also states that “every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state”.⁶⁵ This consistent practice confirms that the difference between non-intervention and non-interference is linked to the use of coercive acts.

The *Declaration on Friendly Relations* paved the way for other resolutions on the same argument. The number of acts that followed the renowned Declaration on Friendly Relations, emphasizes the importance of the principle. While the content of these resolutions does not differ greatly amongst themselves, it is worth to note the different voting preferences. As observed by Shaw, State practice can be inferred by a State’s support for a decision and the elements to consider can lay either in the statement that accompanies the resolution/declaration or in the voting preference, while *opinio iuris* can be inferred in the assertion of the legality of the principles outlined in the decision itself.⁶⁶ Resolution 31/91⁶⁷, Resolution 32/153⁶⁸, Resolution 33/74⁶⁹, Resolution 34/101⁷⁰ and Resolution

⁶³ *Ibid*, article 1.

⁶⁴ UNGA Resolution 2625/1970 A/RES/2625 (XXV), adopted without a vote, at 123.

⁶⁵ *Ibid*, at 123.

⁶⁶ Malcom Shaw, *Title to Territory in Africa: International Legal Issues*, Clarendon Press, 1986, at 88.

⁶⁷ UNGA Resolution 31/91, approved with 99 yes, 1 no, 11 abstentions and 35 non-voting.

⁶⁸ UNGA Resolution 32/153, approved with 124 yes, 0 no, 14 abstentions and 11 non-voting.

⁶⁹ UNGA Resolution 33/74, approved with 128 yes, 0 no, 14 abstentions and 8 non-voting.

⁷⁰ UNGA Resolution 34/101, approved with 106 yes, 11 no, 14 abstentions and 21 non-voting.

35/159⁷¹ represent annual steps towards the adoption of Resolution 36/103, which approved the *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*. Differently from Resolution 2131, the consensus around Resolution 36/103 of December 1981 was less overwhelming.⁷² The Declaration contains a series of rights and duties of states that are relevant for both non-intervention and non-interference. Particular attention should be given to letters f) and n). Under letter f), states must refrain from promoting, encouraging or supporting, in a direct as well as in an indirect way, “rebellious or secessionist activities within other states, or any action that seeks to disrupt the unity or to undermine or subvert the political order of other States”. Letter n) specifically condemn organizing, training, financing and arming political and ethnic groups, both on their territories and in territories of other States for the “purpose of creating subversion, disorder or unrest in other countries”. In addition, letter i) considers unlawful to assist the “strengthening of existing military blocs or the creation or strengthening of new military alliances...the deployment of interventionist forces or military bases and other military installations conceived in the context of great-Power confrontation”. Even if the provision clearly stems from a cold-war context, its content is relevant nowadays in the context of the strategic proxy confrontation that characterizes the conflicts in Syria and Yemen, as the case study chapter will highlight.⁷³

The General Assembly considered the relationship between arms provision and the principle of non-interference and non-intervention in several other resolutions. For example, according to point 4 of the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force*, “States have the duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter”. One could take the view that under this provision States should refrain from providing arms and weapons to other States when these do not comply with the *ius ad bellum*.

⁷¹ UNGA Resolution 35/159, approved with 120 yes, 0 no, 25 abstentions and 9 non-voting.

⁷² UNGA Resolution 36/103, approved with 120 yes, 22 no, 6 abstentions and 9 non-voting.

⁷³ A direct confirmation that the provision was drafted on the basis of a bipolar confrontation between super-powers comes from point 3 of UNGA Resolution 43/75 F, which states that: “urges the countries with the largest military arsenals...and the member States of the two major military alliances...”.

The UNGA resolutions are not the only source that considers the principle of non-intervention vis-à-vis the provision of arms and weapons. The work of the Disarmament Commission, a specialised body established by means of UNGA resolution 502(VI)/1952 and composed by the UN Member States, has provided guidelines and principles in the field of conventional weapon and specifically on the issue of arms transfers. Two documents issued by this body are significant. The first one, adopted unanimously, examines the relationship between international peace and security, self-defence and arms acquisition and includes in an annex the guidelines for international arms transfer in the context of General Assembly resolution 46/36 H of 6 December 1991.⁷⁴ In the introductory part, the guidelines highlight the sources of the legality of international arms transfer: “[I]imitations on arms transfers can be found in international treaties, binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations and the principles and purposes of the Charter”.⁷⁵ These principles are listed in paragraph 14 of the document, where non-interference, sovereign equality and refrainment from the threat or use of force are explicitly mentioned. In addition, the last principle unambiguously states that “[i]nternational arms transfers should not be used as a means to interfere in the internal affairs of other States”.⁷⁶ The protection of the internal affairs appears, however, to be impaired by point 17, which states that “States, whether producers or importers have the responsibility to seek to ensure that their level of armaments is commensurate with their legitimate self-defence and security requirements, including their ability to participate in United Nations peace-keeping operations”. The article can be read from two different sides. If one departs from the last sentence, the article seems to imply that States shall secure a certain capacity following an overall assessment that includes the possibility of joining UN missions. From an opposite perspective, one could take the view that the article calls for restraint in acquiring arms and weapons and to level them to the actual security needs, without acquiring or producing more than what is strictly necessary to their self-defence and to the possibility of joining UN missions. In addition, point 18 provides that “States have responsibilities in exercising restraint over the production and procurement of arms as well as transfers”. Point 22 emphasizes the sovereignty

⁷⁴ United Nations, Report of the Disarmament Commission, General Assembly Official Records, Fifty-first Session Supplement No. 42 (A/51/42).

⁷⁵ *Ibid*, point 8, at 10.

⁷⁶ *Ibid*, point 22, at 12.

aspect, as it states that “[i]nternational arms transfers should not be used as a means to interfere in the internal affairs of other States”.

The second document focuses on disarmament measures in post-conflict situations.⁷⁷ Even if the attention is devoted to the control and destruction of arms, demobilisation, demining, reintegration of combatants, the principles of paragraph 14 of the guidelines for international arms transfer are explicitly recalled.⁷⁸ Differently from the previous guidelines, point 37 explicitly provides that “States considering measures to ensure that arms are exported only to Governments of sovereign States, either directly or through duly licensed or authorized agencies acting on their behalf are encouraged to draw upon already existing provisions in this field”.

II.3.3 The Judicial Practice of the International Court of Justice

Aside from the resolutions adopted by the General Assembly and the activities conducted by specialised bodies, also the judgements of the International Court of Justice clarify the scope of non-intervention and its corollaries. The *Nicaragua* case brought by Nicaragua against the USA for the unlawful use of force against its government and for the support of the activities of the opposition *contra* forces represents a cornerstone in the field of arms transfers in civil conflicts. One of the most frequently quoted excerpts, confirms, once again, that the element of coercion is the defining feature of non-intervention:

Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.⁷⁹

It is also worth recalling the point that, despite the existence of measures that seem to contradict the norm at first glance, no exceptions to the non-intervention rule have arisen:

The Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the

⁷⁷ United Nations Report of the Disarmament Commission, General Assembly Official Records Fifty-fourth Session Supplement No. 42 (A/54/42).

⁷⁸ *Ibid*, point 8, at 14.

⁷⁹ *Case Concerning Military and Paramilitary Activities*, above n. 33, at 205.

direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.⁸⁰

The Court mentioned the *Declaration on Friendly Relations* when it analysed the relationship between the use of force and the provision of arms and weapons. Based on the element of coercion, the Court concluded that arming opposition forces amounts to use of force and, thus, prohibited by Article 2(4). However, even if not every type of assistance falls within the use of force, it still constitutes an act of domestic interference:

According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.⁸¹

In reflecting on whether the provision of arms and weapons may amount to an armed attack, the Court gave a negative response to this question. In doing so, the Court implicitly acknowledged that there exists a gravity scale in relation to outside meddling in a State's affairs: at the bottom of this scale lies non-interference, which does not entail coercion; at the middle, non-intervention, which is marked by the element of coercion. And, at the top end aggression:

The Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.⁸²

The *Nicaragua* case also made clear the role of invitation at the request of the government and clarified that invitations from opposition forces cannot justify intervention. If such requests were to legitimize foreign intervention, the entire principle would be superfluous.

It is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition.

⁸⁰ *Ibid*, at 207.

⁸¹ *Ibid*, at 228.

⁸² *Ibid*, at 230.

Such a situation does not in the Court's view correspond to the present state of international law.⁸³

As a result, the Court stated that "... no such general right of intervention, in support of an opposition within another State, exists in contemporary international law".⁸⁴

The Court confirmed its dicta in the case brought by the DRC against Uganda in 2005. Uganda did not assert a right to arm and assist the rebels and justified its support on the basis of self-defence.⁸⁵ Not only were the proofs of self-defence unsatisfactory, but the admission of training and assisting the rebels amounted to an unlawful intervention in the DRC. Once again, as in the *Nicaragua* case, the Court relied on the declaratory evidence of customary international law provided by the Declaration on Friendly Relations.⁸⁶ As a result, the Court found that:

Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.⁸⁷

The Congo case gave the Court the opportunity to assess another aspect of non-intervention that had not been considered in *Nicaragua*. According to the counter-claim brought by Uganda, the DRC violated the non-intervention rule by both supporting groups that had carried out subversive activities in Uganda and by disregarding the duty of vigilance.⁸⁸ The scope of the duty of vigilance would be to ensure that the territory of the State is not used for activities detrimental to the rights of other States, a principle that the Court had already elaborated in the case concerning the Corfu Channel.⁸⁹ The Court did not uphold Uganda's counter-claim: on the one hand, the Court recognised that the DRC, at that time Zaire, did not take any action against the rebel groups. The lack of action was dictated by the remoteness of the border region where the rebels were operating and by the absence of governmental structures. On the other hand, the Court did not equate the lack of action to toleration or acquiescence

⁸³ *Ibid*, at 246.

⁸⁴ *Ibid*, at 209.

⁸⁵ ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (Congo v. Uganda), [2005] ICJ Rep. 168, at 41.

⁸⁶ *Ibid*, at 162.

⁸⁷ *Ibid*, at 165.

⁸⁸ *Ibid*, at 276.

⁸⁹ See *The Corfu Channel Case*, Judgment of 9 April 1949, ICJ Reports 1949, at 22.

and therefore did not find the DRC to be in breach of the non-intervention rule.⁹⁰ Not all the members of the Court agreed with this strict approach. In particular, two were the contentious points: firstly, that geographical and other *de facto* constraints do not suspend nor alleviate the duty of vigilance and, secondly, the allocation of the burden of proof. In Judge Kooijmans words, “it is for the state that is under a duty of vigilance to show what efforts it has made to fulfil that duty and what difficulties it has met”.⁹¹ Judge Tomka adopted the same reasoning, as he stated that

The occurrence of harm does not necessarily prove that the duty of vigilance was breached. But its occurrence creates the presumption that the obligation of vigilance has not been complied with. In such a case it would be for the State which has the duty of vigilance (i.e., the DRC in the present case) to demonstrate that it exerted all good efforts to prevent its territory from being misused for launching attacks against its neighbour in order to rebut such a presumption.⁹²

Since the duty of vigilance is an obligation of means and not of result, the efforts of the party must be adequate and the *de facto* circumstances cannot justify a lack of action, yet they can explain the lack of result.⁹³

II.3.4. Non-intervention in civil wars

Before turning to the issue of invitation, it is necessary to further define the scope of non-intervention and to recall the observation that the UN Charter was drafted based on an inter-state approach. As seen above, in the context of inter-state acrimonies, a certain act can be qualified as use of force only if it surpasses a threshold determined according to factual circumstances and to the intention of the perpetrating State. In domestic contexts the same principle applies *mutatis mutandis*: the level of violence shall cross a certain threshold for a situation to be legally described as a non-international armed conflict. According to the ICTY, such situation arises when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.⁹⁴ Internal acts of disturbances and tensions, such as riots, and isolated and sporadic acts

⁹⁰ *Case Concerning Armed Activities*, above n 85, at 301.

⁹¹ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Separate opinion of Judge Kooijmans, at 82.

⁹² *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Declaration of Judge Tomka, at 4.

⁹³ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Separate opinion of Judge Kooijmans, at 84.

⁹⁴ ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-A, Judgment of Appeals Chamber, July 1999, 38 ILM 1518 (1999). For an analysis of the case see Anthony Cullen, *The Concept of Non-International Armed*, above n. 57, at 117.

of violence fall short of the threshold and therefore do not amount to an armed conflict of non-international nature.⁹⁵ On this type of conflict, Article 2(4) remains silent and it is not controversial to say that civil conflicts are outside the scope of the norm. A confirmation thereof comes from a literal interpretation of the article that cannot but stress the qualification “international relations” in the body of the article; a second confirmation comes from the sovereignty principle, according to which, a State has the right and the duty to restore order also by resorting to coercive measures.

The relationship between non-international and international armed conflicts is marked by complexity. A non-international armed conflict can turn into an international armed conflict when a third State intervenes alongside the rebels and against the government.⁹⁶ Such illegitimate intervention can also take the form of arms provisions, in line with the finding of the ICJ in the *Nicaragua* case.⁹⁷ This dominant view, which favours the legitimate authority and safeguards the *status quo*, is nonetheless challenged by voices who reject this line of thought. As observed by Neuhold, “the very occurrence of a civil war proves that the government can no longer speak on behalf of the entire people”, especially if the forces that fight against the government have formed concurrent representative bodies.⁹⁸ This approach may find support in a declaration of the United Kingdom according to which “...any form of interference or assistance is prohibited (except possibly of a humanitarian kind) when a civil war is taking place and control of the state's territory is divided between warring parties.”⁹⁹ Nevertheless, the position of the United Kingdom seems to suggest that the NSAs should retain and control certain territory, a condition that Neuhold does not make in his view. That the internal conflict should reach a certain degree of gravity is advanced also by Schachter, who overall agrees with the position, but speaks

⁹⁵ ICRC, 2016 *Commentary of Article 3: Conflicts not of an International Character*, at 386, 431, 433.

⁹⁶ Hans Peter Gasser, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon”, *The American University Law Review*, Vol. 133, 1983, at 145. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, at 15.

⁹⁷ ICJ, *Case Concerning Armed Activities*, above n 85, at 219.

⁹⁸ Hanspeter Neuhold, “The Prohibition of the Threat or Use of Force”, in Neuhold (ed.) *The Law of International Conflict Force, Intervention and Peaceful Dispute Settlement*, Brill Nijhoff, 2016, at 37.

⁹⁹ Geoffrey Marston, “United Kingdom Materials on International Law 1986”, *British Yearbook of International Law*, Volume 57, Issue 1, 1986, at 616.

about large-scale organized insurgency with a substantial number of people involved or control over significant portions of the country.¹⁰⁰

Within the theory that a State can provide support to neither the legitimate government nor the other parties involved in a civil conflict, one is confronted with two nuances. On the one hand, there is the idea that outside assistance cannot be given to the legitimate government because it lacks legitimacy.¹⁰¹ Since it does not represent anymore the people, outside assistance would interfere with the principle of self-determination. On the other hand, the idea that the legitimate government lacks effectivity.¹⁰² According to this strand, the request for outside assistance is in itself the proof that the legitimate government cannot represent anymore the nation.

Finally, further backing the idea that the principle of non-intervention could apply to all parties involved in civil war comes from a resolution adopted by the *Institut de Droit International* (IDI). In its 1975 session the IDI issued a series of principles on assistance to parties in civil war and, amongst the prohibited practices, it established that third States shall refrain from “supplying weapons or other war material to any party to a civil war, or allowing them to be supplied”.¹⁰³

Other scholars propose a minoritarian view that assistance can be given to both parties, especially in a situation of “dual government”.¹⁰⁴ In line with this theory, as soon as the NSA effectively controls part of a territory and population, it acquires a *de facto* authority that legitimise the request for

¹⁰⁰ Oscar Schachter, “The Right of States to Use Armed Force”, *Michigan Law Review*, Vol. 82, No. 5/6, Festschrift in Honor of Eric Stein, 1984., at 1642.

¹⁰¹ See Carlos Wiesse, *Le Droit International Appliqué Aux Guerres Civiles*, Lausanne, 1898, at 86; H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, at 233.

¹⁰² See Joahn Kaspar Bluntschli, *Le Droit International Codifié*, Paris, 1886, Librairie De Guillaumin Et Cie, at 476; William Edward Hall, *A Treatise on International Law*, Oxford: Clarendon Press, 1890, at 291.

¹⁰³ Article 2(c) of Resolution on the Principle of Non-Intervention in Civil Wars (14 August 1975) of the *Institut de Droit International*. According to this article, other prohibited assistance imply the “a) sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out ; b) drawing up or training regular or irregular forces with a view to supporting any party to a civil war, or allowing them to be drawn up or trained ; c) supplying weapons or other war material to any party to a civil war, or allowing them to be supplied ; d) giving any party to a civil war any financial or economic aid likely to influence the outcome of that war, without prejudice to the exception provided for in Article 3 (b); e) making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies, as places of refuge, for the passage of regular or irregular forces, or for the transit of war material. The last mentioned prohibition includes transmitting military information to any of the parties; f) prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question”. For the debate that preceded and the different positions expressed by the participant see: *Institut de Droit International*, *Annuaire*, Tome 55, 1973, at 426-608. See also *Institut de Droit International*, *Annuaire*, 134-151.

¹⁰⁴ Richard A. Falk, *The Vietnam War and International Law*, Vol. II, 1969, Princeton University Press Princeton, New Jersey, at 238.

intervention. In Pinto's words, "[s]a qualité d'autorité de fait l'autorise à demander et obtenir une assistance étrangère sans que soit par là violés les droits du gouvernement légal dont l'effectivité est limitée par son existence et son action".¹⁰⁵

Notwithstanding the aforesaid, the dominant view favours the legitimate authorities and confirms the case law established by the International Court of Justice. As observed by Pustorino, State practice shows that the principle of neutrality in civil wars is ruled out to the benefit of the sovereign State.¹⁰⁶ While this is tenable vis-à-vis civil conflicts, this view must be further refined in relation to self-determination struggles. To frame it better, the question is whether assistance to national liberation movements is treated the same way as civil conflicts.

II.3.4 Self determination

Self-determination in contemporary international law is positively affirmed in the UN Charter. One of the purposes of the organization is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".¹⁰⁷ The principle is then re-stated in Article 55: "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...".¹⁰⁸ Several UNGA resolutions elaborated the principle and contributed to operationalize the principle into a legal right. Moreover, it is also successfully argued that the principle amounts to a rule of *jus cogens*.¹⁰⁹

The UNGA resolutions can be practically divided between those that elaborate the principle on a general level and those that refer to concrete situations. On a general level, three major resolutions are worth considering, especially in the part where these decisions mention the use of armed force.

¹⁰⁵ Roger Pinto, *Les Règles Du Droit International Concernant La Guerre Civile*, Collected Courses of the Hague Academy of International Law, 114, 1965, at 482.

¹⁰⁶ Pietro Pustorino, "The Principle of Non-Intervention in Recent non-International Armed Conflicts", *QIL*, Zoom-in, 53, 2018, 17-31.

¹⁰⁷ UN Charter, Article 1(2).

¹⁰⁸ UN Charter, Article 55.

¹⁰⁹ See ICJ, *Case Concerning East Timor (Portugal vs Australia)*, 30 June 1995: "The principle of self-determination...it is one of the essential principles of contemporary international law", at 29. See also ICJ, *Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion Of 21 June 1971; ICJ, *Western Sahara*, Advisory Opinion Of 16 October 1975.

Resolution 1514 states that: “[a]ll armed action or repressive measures of all kinds directed against dependent people shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected”.¹¹⁰ Resolution 2625, already analysed in the context of sovereignty, affirms that “[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence”.¹¹¹ Resolution 3314, which recalls Resolution 2625, and that defines aggression also provides in its article 7 that “[n]othing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence...particularly peoples under colonial and racist regimes or other forms of alien domination...”.¹¹² Even if they do not refer to armed force, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights contained in Resolution 2200 share a common Article 1 on the right of self-determination and the duty of States to promote it.¹¹³

The resolutions dealing with concrete situations focus on self-determination of people under colonial domination.¹¹⁴ And, as soon as the decolonization process was finished, there was a conundrum about the applicability of self-determination to other situations.¹¹⁵ In other words, the crux of the problem lies in whether self-determination allows people to determine freely their political status, including by establishing an independent State, and whether the use of force and outside assistance is permitted. Before analysing this question, it is worth to further assess self-determination as a general principle.

¹¹⁰ UNGA Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and People, 14 December 1960, approved with 89 yes, 0 no and 9 abstentions, emphasis mine.

¹¹¹ UNGA Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation, 24 October 1970, emphasis mine.

¹¹² UNGA Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974, adopted without a vote, emphasis mine.

¹¹³ UNGA Resolution 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966.

¹¹⁴ On specific cases see, amongst others, UNGA Resolutions. 1755 (XVII), 1962; 2138 (XXI), 1966; 2151 (XXI), 1966; 2379 (XXHI), 1968; 2383 (XXDJ), 1968.

¹¹⁵ Malcolm N. Shaw, “Peoples, Territorialism and Boundaries”, *European Journal of International Law* (1997) Vol. 3 at 481. On the tension between secessionist and non-secessionist see Jing Lu, *On State Secession from International Law Perspectives*, 2018 Springer, at 117.

As can be seen from the emphasis in the quotes of the resolutions above, the term “people” plays a central role in the overall meaning of these decisions. Corten notes that there are three possible interpretations.¹¹⁶ According to the dominant view, the term people must be constructed as the population that lives within a defined territory and who is accorded the right to self-determine.¹¹⁷ The underlying rationale of this strand is to avoid “... les risques de démembrement en distinguant le plus clairement possible un droit restreint à l’autodétermination d’un droit général à la secession”.¹¹⁸ The ICJ seemingly brought this reasoning forward as it contended that the territorial *status quo* and the *uti possidetis* represent a safeguard to the struggle of the self-determining people.¹¹⁹ This line of thought was confirmed by the Arbitration Commission of the European Conference on Yugoslavia: “it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise”.¹²⁰ In terms of regional positive instruments, the Helsinki Final Act of 1975 reaffirms the right of self-determination within the context of the Charter and of the territorial integrity of States.¹²¹ In fact, territorial integrity is restated in the same GA resolutions that declare the right to self-determination;¹²² moreover, still according to the prevailing interpretation, the content of self-determination is already positively contained in Resolution 2625. In essence, self-determination would amount to the right of the whole people to participate in government in a non-discriminatory fashion, within the territory in question.¹²³ Two consequences arise from framing self-determination according to this interpretation: first, that the principle becomes a matter of internal self-determination, to be

¹¹⁶ Olivier Corten, “Les Visions des Internationalistes du Droit des Peuples à Disposer D’eux-Mêmes: Une Approche Critique”, *Civitas Europa*, 2014/1 N. 32.

¹¹⁷ Helen Quane, “The United Nations and the Evolving Right to Self-Determination”, *International and Comparative Law Quarterly*, Vol. 47, No. 3, 1998, at 555-556.

¹¹⁸ Corten, “Les Visions”, above n 116, at 100.

¹¹⁹ International Court of Justice, *Case Concerning The Frontier Dispute (Burkina Faso/Republic Of Mali)*, Judgment Of 22 December 1986, at 567.

¹²⁰ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From The Dissolution Of Yugoslavia, Opinion n. 2, in Maurizio Ragazzi, *International Legal Materials*, Vol. 31, No. 6, 1992, at. 1488-1526.

¹²¹ Conference on Security and Co-Operation in Europe Final Act, Helsinki 1975, Principle VIII.

¹²² See Point 7 of UNGA Resolution 1514; See also UNGA Resolution 2625: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour”.

¹²³ Malcolm N. Shaw, “Peoples, Territorialism and Boundaries”, above n 115, at 483.

understood as the possibility of taking part to the political life of the territorial sovereign. Failure to achieve this result would still not justify external self-determination, as the threshold that needs to be crossed in order to allow secession seems to imply continuous and severe violence against the seceding group that makes the prospect of internal self-determination beyond reach.¹²⁴ Second, that outside the hypothesis of colonial domination, foreign occupation and racist regimes,¹²⁵ the principle boils down to a human right discourse. The internal aspect of self-determination is, hence, the recognition and the protection of specific group rights, also in relation to territorial – regional or federative - instances, rather than a legal mechanism justifying the dismantling of the territorial integrity.¹²⁶

The second interpretation adopts a nation-oriented concept of people, what Koskenniemi calls a romantic or a Rousseauesque approach.¹²⁷ According to this strand, those who are accorded the right to self-determination should be identified by criteria based on ethnicity, religion, linguistic or cultural elements.¹²⁸ The critical point in this interpretation is the indeterminacy and relativity of such criteria. While it is possible to apply one or more of these criteria on a case-by-case basis, by the same token, it is hard to extract a general rule apt to determine the exact meaning of a national self-determination principle.¹²⁹ The absence of purely objective criteria, such as territory, risks generating a paradox, as it favours unilateral interpretations and qualifications from actors that have the strength to impose their view.¹³⁰

A third interpretation, differently from the two just examined, moves from a different premise. Instead of relying on objective or subjective criteria, it embraces a constitutive approach inasmuch as it

¹²⁴ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 1995, Cambridge University Press, at 120. See also Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 SCR 217, at 134: “A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.”

¹²⁵ See Article 1(4) of Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Of 8 June 1977, which treats conflicts arising from colonization, foreign occupation and racist regime to international armed conflicts.

¹²⁶ Ian Brownlie, “The Rights of Peoples in Modern International Law”, 33 *Bulletin of the Australian Society of Legal Philosophy* 104, 1985, at 108-109.

¹²⁷ Martti Koskenniemi, National Self-Determination Today: Problems of Legal Theory and Practice, *The International and Comparative Law Quarterly*, Vol. 43, No. 2, 1994, at 250.

¹²⁸ Olivier Corten, “Les Visions des Internationalistes”, above n 116, at 103.

¹²⁹ Martti Koskenniemi, National Self-Determination, above n 127, at 263. See also Christian Tomuschat, “Secession and Self-Determination”, in Marcelo Kohen (ed.) *Secession. International Law Perspectives*, Cambridge, CUP, 2006,

¹³⁰ Barbara Delcourt, *Droit et souverainetés. Analyse critique du discours européen sur la Yougoslavie*, Bruxelles, Peter Lang, 2003, at 181 et s.

resorts to the United Nations list of non-self-governing Territories.¹³¹ *Ipsa facto* that a territory is included in this list, it acquires the right to self-determination.¹³² The decision to include a territory in the list and, thus, to give the people of that territory the right to self-determination, is assigned to the assessment of a third party, the UN. The inherent weakness of this solution rests within the risk that decisions on who, ultimately, enjoys self-determination, may be based on political interests in the absence of other criteria. And, if other criteria were to be established, the solution would fall within either the territorial or the national concept of self-determination.

Having framed the contours of the principle, the attention now can shift to the question whether struggles against colonial domination, foreign occupation and racist regime pertain to the same type of conflicts as traditional civil wars. If the answer to this question turns to be positive, it goes without saying that the regime for outside assistance follows the same scheme already provided vis-à-vis traditional civil conflicts; on the contrary, if these struggles are of a different nature, another, different, set of question will have to be answered.

As already seen above, several UNGA Resolutions appear to confer a right to people under colonial regimes or alien domination and racist regimes to self-determination and independence. Moreover, other Resolutions emphasize not solely the end-result, meaning freedom and independence, but also the means utilized. On the lawfulness of self-determination conflicts, the UNGA has affirmed “the legitimacy of the struggle” and subsequently confirmed “the legality of the people’s struggle to self-determination”.¹³³ On the means to achieve self-determination, Resolution 3070 has affirmed the “legitimacy of the people’s struggle...by all available means, including armed struggle”.¹³⁴ Even more crucially, the third Article of Resolution 3103 declared that “[t]he armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international

¹³¹ List available at <https://www.un.org/en/decolonization/nonselvgovterritories.shtml>

¹³² Olivier Corten, “Les Visions des Internationalistes”, above n 116, at 107.

¹³³ Respectively UNGA Resolution 2649 (XXV), Importance of the universal realization of the right of people to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, 30 November 1970 and UNGA Resolution 2787 (XXVI), Importance of the universal realization of the right of people to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, 6 December 1971.

¹³⁴ UNGA Resolution 3070 (XXVIII), Importance of the universal realization of the right of people to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, 30 November 1973.

armed conflicts in the sense of the 1949 Geneva Conventions...”.¹³⁵ According to this Resolution, since self-determination struggles are viewed as international armed conflict, outside assistance would not be subject to the constraints discussed above in relation to civil wars.

While important, resolutions alone cannot be seen as conclusive and other factors need to be considered, especially in light of the deep divide that existed at the time between Western States on the one hand, and Socialist and Non-Aligned States on the other. The I Protocol Additional to the Geneva Conventions has already been mentioned and in particular its Article 1(4), which enlarges the scope of Article 2 of the 1949 Geneva Conventions so to include self-determination struggles. Article 96 of the Protocol is also to be noted, as it provides that “the authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in article 1(4) may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary”. Should this declaration be issued, the Conventions and the Protocol would apply to the authority representing the self-determining people, with all the rights and obligations as a High Contracting Party. Another recognition of the limited, yet existent, international capacity of this authority comes from Article 7(4) of the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.¹³⁶ Even if the wide participation to the Protocol I and to the mentioned Convention may hint to the fact that self-determination struggles are seen by States as different from

¹³⁵ UNGA Resolution 3101 (XXVIII), Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, 12 December 1973. adopted without a vote.

¹³⁶ United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137; Article 7(4) provides that: “This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects: (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect; (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict. The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.”

“traditional” civil wars, a word of caution must be spent on the reservations that have been attached to both the instruments. In relation to Protocol I, most of the reservations focus on the authority that declares the acceptance of Protocol I as per Article 96. The reservations can be grouped into three positions: the first group stresses that the authority must genuinely satisfy the criteria contained in Article 1(4);¹³⁷ the second group posits that only the reserving State has the faculty to determine whether the authority genuinely represents the people;¹³⁸ the third group requires the authority to be recognized as such by an IO.¹³⁹ In relation to the Convention, some States denied the applicability of article 7(4) in its entirety¹⁴⁰ while others, similarly to the second group with regard to Protocol I, reserved the faculty to recognize the authority.¹⁴¹

Notwithstanding these reservations and the caveat on the resolutions, it can be affirmed that international law views struggles for self-determination differently from civil wars. Hence, the regime of outside assistance must be assessed in light of this different regime. Since it has been established that people under colonial domination, foreign occupation and racist regimes have a right to self-determination, the first issue is to determine whether Article 2(4) applies. In other words, whether these people have the right to resort to the use of force and, whether they can be supplied with arms and weapons. And, from a State perspective, if the State has the right to employ force against the self-

¹³⁷ See the reservation of Germany: “The Federal Republic of Germany understands paragraph 3 of Article 96 of Additional Protocol I to mean that only those declarations described in subparagraphs (a) and (c) of paragraph 3 of Article 96 that are issued by an authority which genuinely satisfies all the criteria contained in paragraph 4 of Article 1 can have legally binding effect.”

¹³⁸ See the reservation of the United Kingdom: “The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.”; and France: “Le Gouvernement de la République Française ne s'estime pas lié par une déclaration faite en application du paragraphe 3 de l'article 96, sauf s'il a reconnu expressément que cette déclaration a été faite par un organisme qui est véritablement une autorité représentative d'un peuple engagé dans un conflit tel que défini au paragraphe 4 de l'article 1”.

¹³⁹ See the reservation of Ireland: “It is the understanding of Ireland that the making of a unilateral declaration does not in itself, validate the credentials of the persons making such a declaration and that States are entitled to satisfy themselves as to whether in fact the makers of such a declaration, constitute an authority referred to in Article 96. In this respect, the fact that such authority has or has not been recognised as such by the UN or an appropriate regional intergovernmental organisation is relevant”; and Republic of Korea: “In relation to paragraph 3 of Article 96 of Protocol I, only a declaration made by an authority which genuinely fulfils the criteria of paragraph 4 of Article 1 can have the effects stated in paragraph 3 of Article 96, and it is also necessary that the authority concerned be recognized as such by the appropriate regional intergovernmental organization”. It is interesting to note how this position is conceptually linked to the constitutive interpretation of self-determination explained above at page 35-36.

¹⁴⁰ Israel, Turkey, United States of America.

¹⁴¹ United Kingdom of Great Britain and Northern Ireland.

determining people and if it can be supported by third parties. Beginning with this very last point, since it has been recognized that people have a right to self-determination, there is a correlative duty on States not to suppress by force the exercise of this right.¹⁴² Foreign supply of arms and weapons to a State that is engaged in this unlawful use of force would, therefore, be unlawful in itself. In Cassese's words, "la conséquence logique du principe de l'autodétermination est que les Etats tiers doivent s'abstenir de prêter assistance aux Etats qui refusent par la force le droit à l'autodétermination à un peuple opprimé".¹⁴³

The position vis-à-vis the right of the people to resort to the use of force is more controversial. The proposal for a specific derogation to Article 2(4) in order to allow national liberation struggles to lawfully use force has been deeply divisive and, although put forward by a substantial number of States, it has not been accepted by the international community as a whole since it was devoid of the consent of the Western States.¹⁴⁴ Despite the failure in being codified under Article 2(4) the proposed exception gives rise to two points of interest. Firstly, amongst the States that advanced the exception, there were proposals that emphasised "the right of peoples to seek and receive support of any kind, including armed support, in their resistance to forcible action aimed at denying them those rights".¹⁴⁵ The Kenyan delegation raised the same argument, as it stated that "peoples which were denied the right to self-determination were entitled to request and receive all assistance, including military aid".¹⁴⁶ Similarly, albeit with an emphasis on aggression, Libya, which declared that "such peoples had the right to seek and receive support in their struggle. Any assistance they were given could not be qualified as aggression".¹⁴⁷ And Congo: "it would be desirable for article 7 to provide unequivocally that a State which furnished armed or other support to movements fighting for the freedom of their country was not committing an act of aggression since the international community recognized the right of those peoples

¹⁴² Malcolm N. Shaw, "Self-Determination and The Use of Force", in Nazila Ghanea and Alexandra Xanthaki, *Minorities, Peoples and Self-Determination Essays in Honour of Patrick Thornberry*, 2005, Martinus Nijhoff At 45.

¹⁴³ Antonio Cassese, "Le Droit International Et La Question De L'assistance", *Revue Belge de Droit International*, Vol. 2, 1986, at 313.

¹⁴⁴ Corten, *The Law Against War*, above n 52, at 137; *contra* see Cassese.

¹⁴⁵ Zambia, A/C.6/SR.1178, 23 September 1970, para. 13.

¹⁴⁶ Kenya, A/C.6/SR.1350, 3 November 1972, para. 33.

¹⁴⁷ Libya A/C.6/SR.1477, 15 October 1974.

to seek and receive support”.¹⁴⁸ Secondly, and from the opposite perspective, some States have insisted on the unlawfulness of the use of force. The Canadian position was clear in that “foreign domination should not be considered as a legal licence for riot, terrorism and other forms of violence, which, if organized or assisted from outside the territory in question, might well - as it often had done - constitute a far greater threat to international peace and security”.¹⁴⁹ On the same line, although in a debate concerning the theme of aggression, Australia: “[a] dissident group need only invoke the right to self-determination to gain entitlement to use force and to call on and receive assistance from outside sources”.¹⁵⁰ Sweden’s position raised a valuable point when it affirmed that if outside assistance was to depend on the qualification of the war made by a third party, the consequences in terms of stability could be meaningful: “[t]he right to rebel must be accepted, but the claim of outside powers to determine which were ‘sacred wars’ and to give armed assistance to the party rebelling caused uneasiness.”¹⁵¹ On a similar note but in the context of self-defence, Guatemala: “...to sanction the concept of the self-defence of nations against colonial domination...would establish a legal norm which would mean a return to the traditional concept of just war”.¹⁵²

As can be seen from some of the excerpts, aggression is an argument that States have utilized in order to justify self-defence by the self-determining people. This argument was based on the idea that self-determining people were victims of perpetual aggression to which they could respond through individual and collective self-defence as per Article 51 of the Charter.¹⁵³ Naturally, the thesis of self-defence would have permitted third States to collectively assist the struggle and, thus, to provide arms and weapons. However, the argument was dismissed, and the definition of aggression does not contain any reference to a right of self-defence connected to self-determination.

¹⁴⁸ Congo A/C.6/SR.1477, 16 October 1974.

¹⁴⁹ Canada, A/AC.125/SR.66, 1 August 1967.

¹⁵⁰ Australia A/AC.125/SR.95, 1 March 1972.

¹⁵¹ Sweden A/C.6/886, 1 December 1965.

¹⁵² Guatemala A/AC.119/SR.14, 8 September 1964.

¹⁵³ Antonio Cassese, “Le Droit International Et La Question De L’assistance”, above n 143, at 313-314. See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Judge Ammoun, Separate Opinion, ICJ Rep (1971) at 70.

Self-determination struggles are not prohibited by international law, nor are other civil wars.¹⁵⁴ Having the right of self-determination, however, does not bestow self-determining people with an unrestricted right to use force, which must be proportionate to the force inflicted upon them.¹⁵⁵ And, although internal struggles of self-determination differ from ordinary civil conflicts, it is uncertain whether the provision of arms and weapons to the self-determining people was deemed lawful, as States' positions were highly divided on the point.

II.4 Intervention by Invitation

As seen earlier, there are competing views on whether governments that face prolonged and severe opposition are entitled to receive outside support. On the one hand, the majoritarian opinion, benevolent towards States' authority, upholds the lawfulness of such support. On the other hand, an alternative approach considers support to whatever side as undue interference. This section follows from this analysis and delves into the problem of invitation, a problem that highlights the tension between sovereignty and non-intervention. Before dwelling on the theory, a preliminary word of caution is needed. In the *Nicaragua* case, the Court established that providing arms and training involves the threat or use of force.¹⁵⁶ It can be argued, therefore, that the sole supply of arms, without the corresponding training, could fall in a grey area. On the one hand, it is difficult to decouple the provision of arms from the training that taken together demarcate the threat or use of force. In other words, the sole supply of arms cannot be tantamount to the combination of the two elements. On the other hand, providing funds alone cannot be equated with providing weapons. Clearly, the provision of funds may facilitate the purchase of arms, yet the two conducts are beyond doubt totally distinct.¹⁵⁷ As is apparent, a clear-cut answer to the question whether the provision of arms and weapons amounts to the threat or use of force is still lacking. As explained in Chapter 1, there are several differences between

¹⁵⁴ Christian Tomuschat, "Secession and Self-Determination", above n 129, at 43.

¹⁵⁵ Malcom Shaw, "The International Status of National Liberation Movements", *The Liverpool Law Review* Vol. V (1), 1983, at 34.

¹⁵⁶ *Case Concerning Military and Paramilitary Activities*, at 228.

¹⁵⁷ This argument has not been taken on board by the existing literature that seems to blindly accept that providing arms and weapons violate Article 2(4). See, for instance, Tom Ruys, "Of Arms, Funding and 'Nonlethal Assistance'—Issues Surrounding Third-State Intervention in the Syrian Civil War", *Chinese Journal of International Law*, 2014 at 32.

major arms and small weapons, one of them being the capacity to employ them. Light weapons and small arms do not require specific training and are a ready-to-use product. On the contrary, major arms require training in order to be used and their destructive capability can be hampered by the lack of specific expertise. This may lead to a conceptual paradox, where the provision of small arms – also considering the widespread damage that their ease of usage causes – may heightened insurgents' violent capabilities, although not amounting to the use of force according to the ICJ decision, given that little or no training is needed to operate them. By contrast, in practical terms the supply of heavy weapons may lead to minor violent capabilities and thus be qualified as a mere interference, if not coupled with training, as the training component is arguably to be an indispensable part in order to effectively employ them.

Traditionally, scholars have tended to agree that international law does not forbid “the government of one state from rendering assistance to the established legitimate government of another state with a view of enabling it to suppress an insurrection against its authority”.¹⁵⁸ Therefore, in principle, assistance to the legitimate government does not represent an unlawful intervention, while providing military aid to rebels “in another State has been unequivocally declared illegal”.¹⁵⁹ The assistance rendered by third States must be requested by the legitimate Government, as only its consent preclude the wrongfulness of the intervention by third States.¹⁶⁰ This consent can be given *ad hoc* in order to tackle a specific situation, but can also be granted in advance, by means of a treaty.

In the former situation, and save for the case of belligerency as it will be discussed below, a genuine request for assistance by the legitimate Government precludes the unlawfulness of the intervention by a third State and, hence, Article 2(4) of the Charter does not come into play. The genuineness of the consent has to be assessed by clear evidence, in order to dispel doubts that such consent may come from a puppet government.¹⁶¹ The consent can be qualified, meaning that the

¹⁵⁸ J.W. Garner, “Questions of International Law in the Spanish Civil War”, *American Journal of International Law*, Vol. 31, No. 1, 1937, at 68.

¹⁵⁹ Louise Doswald-Beck, “The Legal Validity of Military Intervention by Invitation of the Government”, *British Yearbook of International Law*, Volume 56, Issue 1, 1985, at 190. See also Brownlie, *International Law and the Use of Force by States* (1963), at 193, 279 and 370-I.

¹⁶⁰ See Article 20 of Draft Articles on State Responsibility.

¹⁶¹ Alexander Orakhelashvili, “Legal Stability and Claims of Change: The International Court’s Treatment of Jus ad Bellum and Jus in Bello”, *Nordic Journal of International Law*, Vol. 75, 2006, at 381.

legitimate Government can request assistance just for a certain territory, against specific foes, or for the attainment of a particular objective.¹⁶² In case of *ad hoc* consent, this can be revoked at anytime and is not subject to any formality. Following the revocation, the assisting parties must pull out without any delay and failing to do so would constitute aggression against the originally requesting State.¹⁶³ The latter situation means that consent can be given in advance through a bilateral or multilateral treaty. Also in this case consent can be revoked, yet, it should follow the procedure for the denunciation of the treaty and, therefore, it is conditional upon the existence of a legitimate Government, which may be non-existent in the case of failed States.¹⁶⁴

Article 2(2) of the rights and duties in case of insurrection adopted in a regulation by the IDI confirms that assistance directed to parties other than the requesting Government could be illegal: “[e]lle [Toute tierce puissance] est astreinte à ne fournir aux insurgés ni armes, ni munitions, ni effets militaires, ni subsides.”¹⁶⁵ The date of this regulation, alongside the mention of insurgents, suggests that the theoretical background of the regulation was the concept of recognition of belligerency. Indeed, international law provided a three-stage approach to characterize internal violent conflicts.¹⁶⁶ At the bottom end is rebellion, portrayed as violence of a limited extent that can be managed effectively with normal security measures.¹⁶⁷ During rebellion, which is a term that encompasses sporadic violence and riots but without any real threat to a State’s authority, “external help to the rebels is said to constitute illegal intervention, while foreign assistance to the incumbent government is said to be legal”.¹⁶⁸ Insurgency, which represents the middle stage between rebellion and belligerency, is characterized by increased violence if compared to mere rebellion but the challenge to the state authority is less than the one that occurs during belligerency. In terms of rights that the recognition of insurgency may bestow to the rebels, Lauterpacht observed that, following recognition, “legal rights and duties as between

¹⁶² *Case Concerning Armed Activities*, at 198-199.

¹⁶³ Yoram Dinstein, *War Aggression and Self-Defence*, Cambridge University Press, 2011, at 122.

¹⁶⁴ *Ibid.*, at 123.

¹⁶⁵ Institut De Droit International, *Annuaire*, Tome 18, 1900, at 227.

¹⁶⁶ Richard Falk, "Janus Tormented: The International Law of Internal War", in J. N. Rosenau (ed.), *International Aspects of Civil Strife* (1964), at 197.

¹⁶⁷ Lindsay Moir, "The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949", *International & Comparative Law Quarterly*, Volume 47 Issue 2, at 338.

¹⁶⁸ Burns Weston, Richard Falk, Hilary Charlesworth, Andrew Strauss, *International Law and World Order: A Problem Oriented Coursebook*, 1990, West Academic Press, at 857.

insurgents and outside States exist[ed] only in so far as they [were] expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest”.¹⁶⁹ Although insurgents acquire a limited international personality, the legal consequences that derive from recognition are contingent upon what is agreed between the recognizing party and the insurgent. In other words, States have the discretion to choose whether to deny or grant recognition and, in this latter case, to discretionally decide what rights to grant to insurgents.¹⁷⁰ According to Wippman, States that recognize an insurgency maintain, on the one hand, the duty not to aid the insurgents and, on the other hand, the right to do so for the benefit of the government.¹⁷¹ Also in the case of belligerency, the gravest stage amongst the three, States retain the faculty to grant recognition. However, even if discretionary, the recognition of belligerency is subject to the existence of some *de facto* criteria.¹⁷² Differently from the recognition of insurgency, where the rights accorded to the insurgents are defined in agreement with the recognizing State, the legal consequence that follows the recognition of belligerency is that the customary law of neutrality applies.¹⁷³ Since the recognizing State must respect neutrality, it

loses the right which it had during the period of insurgency to assist the legitimate government and henceforth must treat both belligerents alike....It can no more render aid to the former insurgents without violating the law of neutrality than it could have aided them before recognition without violating the law of non-intervention.¹⁷⁴

The practical utility of the above tripartite division is nowadays questionable, as the status of belligerency has not been declared since the American Civil War and it may be even contended that it has therefore fallen into desuetude. The debate has then turned to the relation between non-intervention and self-determination. By stretching self-determination beyond the hypotheses of colonial domination, foreign occupation and racist regimes, the internal side of self-determination acquires a

¹⁶⁹ Hersch Lauterpacht, *Recognition*, above n 101, at 276-277.

¹⁷⁰ See Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, 2018, Oxford University Press, at 31.

¹⁷¹ David Wippman, “Change and Continuity In Legal Justifications For Military Intervention In Internal Conflict”, 27 *Columbia Human Rights Law Review*, 1996, at 442.

¹⁷² According to the literature: i) The conflict shall be widespread and involve a large segment of the population; ii) insurgents shall occupy and administer a substantial portion of the national territory; iii) insurgents shall conduct hostilities in accordance with the laws of war, through armed forces under a responsible authority; iv) foreign States find it necessary to define their attitude towards the contesting factions. See Louise Doswald-Beck, “The Legal Validity” above n 159, at 196-197.

¹⁷³ Lindsay Moir, *The Law of Internal Armed Conflict*, 2004, Cambridge University Press, at 7.

¹⁷⁴ J.W. Garner, “Questions of International Law”, above n 158, at 70.

renewed function. In other words, while the traditional rules are favourable to the established authorities and safeguard their external legitimacy, the focus has shifted to the internal aspect of self-determination, particularly in cases where an imbalance between a robust external legitimacy and a shaky internal consensus appears to exist and is often built on coercion. Especially in the case of the arms trade, there is a growing concern

to make an acceptable distinction between arms which are mainly intended for external security and arms whose primary purpose is to help maintain internal authority. This is even more relevant in the case of internal resistance to an oppressive authority which, by virtue of the efficacy rule, may also claim, for instance, arms deliveries, whereas even the slightest external aid to the insurgent faction seemed to justify what was often disproportionately large aid to the legitimate authority.¹⁷⁵

It is not difficult to see how this position has evolved into what is currently known as responsibility to protect, an exception to the non-use of force that has hitherto failed to prove its customary nature.¹⁷⁶

The above quote also touches upon another contentious issue that surrounds the problem of invitation during civil conflicts. The complexity of contemporary conflicts, where a State often faces several NSAs fighting not only against the legitimate government but also amongst themselves, gives rise to uncertainties around who represents the legitimate government and is entitled to request outside assistance. In cases where competing forces struggle for power the concrete application of the criteria for recognition has proved to be a daunting task. While we shall go back to recognition in the following paragraph, the analysis of State practice highlights that invitation, recognition and self-determination are all concepts that have been employed by States to justify or to condemn the provision of arms in civil wars.

The Stanleyville case represents a good example of how the three elements just mentioned comes into play. The delegation of Ghana recognised the legitimacy of the Congolese government led

¹⁷⁵ J.H. Leuridijk, “Civil War and Intervention in International Law”, *Netherlands International Law Review*, 1977, Vol. 24, at 151.

¹⁷⁶ On the responsibility to protect, the literature is very vast. For a general introduction on the topic see: Ramesh Thakur, *The United Nations, Peace and Security: From the Collective Security to the Responsibility to Protect*, Cambridge University Press, 2017; Gareth Evans, *The Responsibility To Protect, Ending Mass Atrocities Once and For All*, Brookings Institution Press, 2008; Laurence Boisson, de Chazournes and Luigi Condorelli, “De la ‘responsabilité de protéger’ ou d’une nouvelle parure pour une notion déjà bien établie”, 110 *Revue Générale De Droit International Public*, Vol. 11, 2006; James Pattison, *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene?*, Oxford University Press, 2010; Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, 2011.

by Mr Tshombé, but warned that in a situation where the government faces an internal struggle, outside assistance may be put on hold.¹⁷⁷ Other governments, in contrast, questioned the legitimacy of the government and, therefore, the legality of the invitation.¹⁷⁸ Surrounding the overall debate in the Security Council were the proofs that some States were aiding the rebels. Without directly responding to these allegations, some States characterized the situation in Congo as a self-determination struggle, which may, therefore, justify outside support for the national liberation movement. This is the line adopted by the Soviet Union that claimed that “[t]he country is enveloped in the flames of a struggle for national liberation”.¹⁷⁹ By the same token, in self-determination struggles, support shall not be given to the government: “this interference in the internal affairs of countries and peoples fighting for their liberation is all the more intolerable in that, while waging a war of the most genuine kind, with weapons, against the sacred national liberation struggle...”.¹⁸⁰ Overall, in the Stanleyville operation, the qualification of the struggle is a central point in the entire debate, as the following statement of the Democratic Republic of Congo reveals: “[w]e term rebels those who have set up an armed opposition to the legal Government; the same countries which have recognized our Government-Ghana, for example, call them nationalists, while others speak of patriots”.¹⁸¹

That military assistance, including arms provision, may be provided to the benefit of the government also during struggles that may amount to rebellion comes from the Belgium representative: “What I tried to do in the Congo was to help the Leopoldville Government by, among other things, terminating the secession of Katanga; to give the Government of the Congo technical assistance and, after much hesitation, military technical aid”.¹⁸² He later on explicitly clarified the point:

There is no interference in the domestic affairs of a country when the lawful Government of that country is given the assistance for which it asks. There is

¹⁷⁷ UNSC, S/PV.1170, 9 December 1964, at 137: “Mr. Tshombé’s Government, the Government of the Democratic Republic of the Congo, must be helped...But when a Government with one of the largest armies in Africa cannot control its people, then one cannot just give it military assistance without being cautious”.

¹⁷⁸ See United Republic of Tanzania in UNSC, S/PV.1178, 17 December 1964, at 9,23.

¹⁷⁹ UNSC, S/PV.1170, 9 December 1964, at 68, Russia then added that “The country is enveloped in the flames of a struggle for national liberation. This noble struggle of the Congolese people is completely in line with the basic purposes and principles of the United Nations Charter and with the rules of contemporary international law”.

¹⁸⁰ UNSC, S/PV.1185, 24 December 1964 at 68.

¹⁸¹ UNSC, S/PV.1173, 11 December 1964, at 119. See also the Algerian statement in United Nations Security Council, S/PV.1183, 22 December 1964, at 13, that qualifies the rebels as a national liberation movement; the Congo Brazzaville statement in UNSC, S/PV.1184, 23 December 1964, at 105; the USA statement in UNSC, S/PV.1185, 24 December 1964 at 32; USSR statement in UNSC, S/PV.1185, 24 December 1964 at 62.

¹⁸² UNSC, S/PV.1173, 11 December 1964, at 68.

interference in the domestic affairs of a country when support is given to rebellion or revolution against the lawful Government.¹⁸³

The outside help appears to be possible at the stage of insurgency, as the USA representative explains:

Ever since that time both the Adoula Government and the present Government have been afflicted by insurgents aided and supported from the outside...At the request of the Prime Minister Adoula earlier this year, the United States provided some military material and training assistance to the Congo. This is exactly what all other African States have done or are doing. There is not one of them, I dare say, that does not obtain military equipment or training or both from outside Africa in the exercise of its own sovereign right.¹⁸⁴

He then restated the concept when he stated that “[w]here the government, recognized diplomatically by other States as the responsible government, exercises its sovereign right to ask for outside help, then it would seem that the response and the involvement of outsiders is all right”.¹⁸⁵ He then alludes to the fact that outside assistance to rebels may amount to intervention: “[c]ontrast the aid that has been supplied to successive Governments of the Congo, upon request, with the current intervention in the internal affairs of the Congo-in support of rebellion against the Government”.¹⁸⁶ This is confirmed by the following statement: “[w]hat is happening is that outside Governments are claiming that they - not the Government of the Congo - shall decide whether that Government can be assisted, or whether its enemies shall be assisted to overthrow it”.¹⁸⁷ The United Kingdom seems to follow the same argument when his representative stated that: “I hope that all that has happened in the Congo will bring home to Africans in particular the danger of giving outside support to rebel movements against legally established African Governments”.¹⁸⁸ A statement of the delegation of Nigeria seems to go even further by permitting intervention by invitation in whatever type of conflict:

As long as the Democratic Republic of Congo has stated here categorically that these people came in at its invitation in exercise of its right as a sovereign State, as a sovereign Government, nobody has a right to question its action, because that country is not a protectorate of anyone. It does not matter what difficulties it may have.¹⁸⁹

¹⁸³ *Ibid* at 73.

¹⁸⁴ UNSC, S/PV.1174, 14 December 1964, at 95-97.

¹⁸⁵ *Ibid*, at 106.

¹⁸⁶ *Ibid*, at 110.

¹⁸⁷ *Ibid*, at 119.

¹⁸⁸ UNSC, S/PV.1175, 15 December 1964, at 19.

¹⁸⁹ UNSC, S/PV.1176, 15 December 1964, at 13.

In contrast, Ivory Coast's statement explicitly clarified that aid to the rebels is unlawful, as opposed to the aid to the legitimate government.¹⁹⁰ The very same concept was expressed by Brasil¹⁹¹, and by Congo.¹⁹² Despite having an attitude favourable to the factions opposed to the government in Congo, the Algerian delegation makes clear that:

It is our opinion that every State must be free to seek military assistance from wherever it can be obtained; but there are some details on which we cannot remain silent. A State, of necessity, needs to be equipped militarily in order to defend itself and protect its sovereignty. That is more than a necessity for a State; it is a duty.¹⁹³

Finally, a point of interest is raised by the Algerian delegation. According to its statement, invitation is subject to internal Constitutional requirements:

Apparently the aggressors first wished to have a legal basis consistent with international law for their intervention. But, in order to do so, they had to have a request, i.e. an authentic and constitutional act whereby a legal authority appealed to a friendly country for military assistance, in circumstances provided for in the Constitution.¹⁹⁴

Adhering to the position that military assistance should not be given neither to the legitimate Government nor to the parties opposing, a restrictive position still upheld in the literature, brings about some practical problems.¹⁹⁵ One of them is whether normal relationships between countries can continue in case of civil war. In particular, it is unclear if country A, which supplies country B with arms and weapons under a trade agreement, can continue or must halt its supplies in case country B faces civil war. The proponents of the restrictive approach argue that the duty of neutrality does not

¹⁹⁰ UNSC, S/PV.1177, 16 December 1964, at 57-58: "It is, however, legitimate and even desirable that a constitutional government which requests it should be granted foreign aid, simply and solely for the purpose of maintaining order, but the amount and nature of such aid should not reach such proportions as to threaten the life of the nation and of neighbouring countries...On the other hand, military aid for the benefit of a section of the population which rejects the normal ways of gaining power and rebels against its government is not only completely illegal...".

¹⁹¹ *Ibid*, at 95: "...we cannot accept any justifications for the various forms of assistance allegedly being given by certain Governments to the rebel movement. They are contrary to the provisions of the United Nations Charter and represent an intervention in the internal affairs of a sovereign State".

¹⁹² UNSC, S/PV.1184, 23 December 1964, at 57: "We call upon you to condemn ...the material and moral support which they are still giving the rebels. We ask you to forbid any interference in our domestic affairs, and to condemn any assistance given to the Congolese people other than that which passes through the Central Government".

¹⁹³ UNSC, S/PV.1183, 22 December 1964, at 24.

¹⁹⁴ UNSC, S/PV.1171, 10 December 1964, at 22.

¹⁹⁵ See Gray, *International Law*, above n 58, at 84-88; Corten "The Law Against War", above n 52, at 294-296, Doswald-Beck "The Legal Validity", above n 159, at 251. For a review of the different positions see Dapo Akande and Zachary Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', EJIL:Talk! (2 February 2015), <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/> with references to State practice vis-à-vis the Iraqi request for assistance against ISIS.

prohibit general and logistical support and that there is no impediment to the continuation of normal interstate relations, including military cooperation.¹⁹⁶ This position is arguable: on the one hand, logistical and general support may be provided after the beginning of the civil strife, irrespective if it represents a continuation of practice started before the war or in response to a request by the legitimate, though contested, authority.¹⁹⁷ Military collaboration, on the other hand, if started before the war can continue, but it is, at best, uncertain whether it can be initiated after the beginning of the civil war, save for the case of counter-intervention as it will be shown below. Even if one assumes that the only hypothesis considered by the author is a continuation of normal relationships, military collaboration, especially if it includes the supply of arms as the author argues,¹⁹⁸ may provide a decisive advantage to the government and, thus, frustrate the very same principles that the restrictive approach aims to safeguard.¹⁹⁹ In addition, the fact that State A may freeze its military assistance does not dissipate the conundrum, since freezing the assistance could be interpreted as an intervention on behalf of the other faction.²⁰⁰ A way ahead proposed by another author would be to impose on State A “the burden of insisting on appropriate measures to assure that the aid will not be used to support the government in the internal civil strife” both to assistance provided before the civil strife and after its outbreak.²⁰¹ In cases where these measures would not be feasible, then the assistance should terminate. While this idea may seem attractive for its pragmatic intentions, it presents nonetheless two defects. The first problem is that it is not clear what the source for such imposition is. Not only is hard to conceive who may legally impose such a burden, aside from the UN Security Council, but it seems that the solution risks interfering with the sovereign determination of a State’s economic relations. The second problem is that cutting military assistance may deprive the State of the means to self-defence itself. Especially during civil conflicts, States experience limited capabilities to face external threats with the result that a

¹⁹⁶ See Corten, *The Law Against War*, above n 52, at 294 and 296.

¹⁹⁷ It is also unclear what it is meant by the term general support.

¹⁹⁸ Corten explicitly posits that “direct military intervention to which one cannot, however, assimilate the simple provision of arms and equipment, even in times of civil war”, at 296.

¹⁹⁹ In its dissenting opinion Judge Jennings points out that even the “logistical support may be itself be crucial”; see *Nicaragua v. United States*, above n 122, dissenting opinion of Judge Sir Robert Jennings, at 544.

²⁰⁰ John Norton Moore, “Legal Standards for Intervention in Internal Conflicts”, *Georgia Journal of International and Comparative Law*, 1983, Vol. 13, at 196.

²⁰¹ John A. Perkins, “The Right of Counterintervention”, *Georgia Journal of International and Comparative Law*, 1986, Vol. 17, at 196.

regional balance of power may be imbalanced if, in addition to the internal conflict, a State is left coping with an additional actor and with restricted tools.

The idea of restoration of power balance lies behind a lawful form of assistance. Whereas there is a prior outside intervention in favour of one of the parties, it is accepted that counter-intervention can occur in favour of the other side. If one adopts the restrictive approach where neither of the sides should receive outside assistance, the right to counter-intervene is self-explanatory. In relying on the necessity that the internal actors should determine the outcome of the strife, an external intervention may alter the equilibrium between combating forces and, thus, determine the winner. Counter-intervention is therefore aimed at restoring the balance between the actors. In case prior assistance is given to the rebels, counter-intervention in favour of the government offsets the unlawful use of indirect force. In case prior assistance is given to the government, counter-intervention in favour of the rebels restores the principle of self-determination. This is the conclusion reached by the IDI in its 1975 resolution. Article 5 indeed provides that “[w]henver it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law...”.²⁰²

Few considerations are, however, needed. First, the right to counter-intervene is subject to a prior illegal intervention of a third State. Sohn puts it well when he states that “[i]f a state does not comply with its obligations under international law and intervenes illegally in an internal conflict in another state, other states are entitled to remedy this situation by counter-intervention”.²⁰³ It follows that the prior conduct must be attributable to a State, and it must be in violation of an international law norm. Therefore, the right to counter-intervene does not arise if the prior intervention is done by NSAs and their conduct is not attributable to a State. Accordingly, there should be no room for counter-intervention by supplying arms to a government in response to rebels being supplied by sympathizer NSAs located in a third State. However, it must also be clarified that sometimes States fabricate allegations that a rebel force is aided from outside in order to trigger counter-intervention from allied

²⁰² Resolution on the Principle of Non-Intervention in Civil Wars, above n 103.

²⁰³ Louis B. Sohn, “Gradations of Intervention in Internal Conflicts”, *Georgia Journal of International and Comparative Law*, 1983, Vol. 13, at 229-230.

States, also in order to circumvent the problem of invitation.²⁰⁴ Second, counter-intervention does not constitute an alternative to collective self-defence. If an act amounting to an armed attack in the sense of Article 51 of the UN Charter is perpetrated against the State, its reaction will be based on its inherent right of self-defence, which obviously include the right to obtain assistance from third States. But, as Perkin noted, article 2(4) and article 51 do not run in parallel. Not every violation of article 2(4) must be countered through self-defence, as this would risk escalating the conflict and become a threat to international peace.²⁰⁵ In other terms, resorting solely to Article 51, “would be to deny any remedy by use of force, however necessary and proportionate, except where the violation involves an ‘armed attack’”.²⁰⁶ Third, counter-intervention is not boundless and it must respect some criteria. When counter-intervention is a measure to react to breaches to Article 2(4), this counter-intervention is governed by this very same article. Hence, the “political independence” and the “territorial integrity” of the offending State must not be impaired.²⁰⁷ Finally, counter-intervention must be proportionate, in analogy to other self-help measures.²⁰⁸

Another, more recent, form of support that appears to have some traction, is the intervention supporting the fight against terrorism. This type of intervention, which has mostly taken the form arms provision,²⁰⁹ assumes that self-determination is not impaired by the request of a State, which is in the course of a civil war, for assistance to counter terrorist groups.²¹⁰ Since the support is not directed to alter the *status quo*, this intervention runs contrary neither to self-determination nor to Article 2(4). However, it appears to have a different type of side effect. Without entering in the debate on whether the label “terrorist” could be instrumentally used by a government in order to receive material support, it seems rather unlikely that, as soon as the terrorist group is disrupted or defeated, the State will not employ the arms provided for countering terrorism in the ongoing civil war. One should, therefore,

²⁰⁴ See Wippmann, “Change and Continuity”, above n 171, at 450.

²⁰⁵ Oscar Schachter, “The Right of States to Use Armed Force”, above n 100, at 1642.

²⁰⁶ John A. Perkins, “The Right of Counterintervention”, above n 201, at 204.

²⁰⁷ *Ibid.*, at 201.

²⁰⁸ See Tom Ruys and Luca Ferro, “Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen”, *International and Comparative Law Quarterly*, 2016, 65(01), at 93.

²⁰⁹ See Christakis Théodore and Karine Mollard-Bannelier. “Volenti non fit injuria ? Les effets du consentement à l'intervention militaire”, *Annuaire Français de Droit International*, Vol. 50, 2004. at. 125: “S'il est vrai que ces coopérations prennent le plus souvent la forme d'une assistance militaire importante en matériel...”

²¹⁰ Tom Ruys and Luca Ferro, “Weathering the Storm”, above n 208, at 90.

accept that the only option available to fully preserve the *status quo* is an invitation to third parties to carry out direct military operations.

In a direct relation with the issue of the fight against terrorism, lies the question whether general international law prohibits *sic et simpliciter* the provision of arms and weapons to terrorists and/or terrorist groups. At the outset one should take note of the fact that ‘terrorism’ has been part of the UNSC vocabulary only since 1985, and since then the term has been used to qualify a wide array of conducts.²¹¹ UNSC Resolution 1373, adopted under Chapter VII and which represents the “cornerstone of the UN counter-terrorism effort”, left definitional issues aside allowing each Member State to resort to its own definition.²¹² By the same token, UNSC Resolution 1373²¹³, for the first time under Chapter VII, required all States to take or refrain from specific actions without reference to a particular country and, in particular, called States to eliminate the supply of weapons to terrorists.²¹⁴ As an immediate result, the Resolution fostered the adoption of widespread national legislations on the topic, yet the absence of definitions meant that no harmonization occurred around what constitutes terrorism.²¹⁵ A second result was the proliferation of national, as well as regional, lists of designated organizations and individuals. Needless to remark that these lists differ amongst themselves also because of political considerations linked to listing criteria. One can, therefore, state that the adoption of such widespread national laws may constitute a form of evidence of *opinio iuris* around a norm that prohibits *in abstracto* the provision of arms to terrorist groups. However, not only must this evidence be corroborated, but, even if one were to establish the existence of such norm, its application would be hampered by a lack of consensus around as to who the target is. It follows that, in practical terms, the prohibition to provide arms to terrorist is dealt with at the level of sanction regimes.

²¹¹ See Ben Saul, “Definition of ‘Terrorism’ in the UN Security Council: 1985–2004”, *Chinese Journal of International Law*, Vol. 4, No. 1, 2005, at 165.

²¹² Jane E. Stromseth, “The Security Council’s Counter-Terrorism Role: Continuity and Innovation”, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol.97, 2003, at 44.

²¹³ UNSC Resolution 1373, 28 September 2001, S/RES//1373.

²¹⁴ Paul C. Szasz, “The Security Council Starts Legislating”, *The American Journal of International Law*, Vol. 96, No. 4, 2002, at 901.

²¹⁵ Ben Saul, “Definition of ‘Terrorism’”, above n 211, at 160.

II.5 Recognition of Governments

As seen above, and despite the differences between those who deem assistance lawful and those who deny it, assistance by invitation rests on the assumption that invitation shall be issued by the legitimate government. Differently stated, when the level of the fight does not reach a certain threshold over which foreign aid can be seen as unlawful, all commentators agree that the only party that is legitimated to seek outside assistance is the government. The importance of recognition stems from this very fact: only the government may request, on behalf of the state, foreign assistance. On the contrary, calls for assistance issued from a faction denied recognition makes the call invalid and “any foreign response purporting to rely on it is properly impugned as illegal intervention or aggression”.²¹⁶

In the context of civil wars, and with the exclusion of secessionist civil wars, recognition is often referred to governments rather than to States. This latter traditionally follows the criteria codified in the Montevideo Convention on the Rights and Duties of States in 1933.²¹⁷ And, accordingly, the four elements that an entity shall feature in order to qualify as a State and, thus, as a subject of international law, are a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.²¹⁸

It can be argued that the recognition of a State is *pro futuro*. An internal civil war does not stripe the quality of a state to a recognised state, at least until another entity with a certain territory, permanent population and effective government manages to independently arise. Roth posits it well when he states that “Once a unit of the international system has been defined and accorded legal personality, that unitary personality endures notwithstanding internal divisions and crises”.²¹⁹ Not only do not internal wars deprive a State from its statehood, but also international wars do not affect its qualification despite foreign invasions and occupations.²²⁰ By the same token, in case of multiple insurgencies, a State does not split in as many parts as the number of insurgent groups that control a territory. Effective

²¹⁶ Brad Roth, *Governmental Illegitimacy in International Law*, Oxford University Press, 2000, at 122.

²¹⁷ Convention on Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

²¹⁸ *Ibid*, article 1.

²¹⁹ Brad Roth, *Governmental Illegitimacy*, above n 216, at 132.

²²⁰ Moreover, according to the Friendly Declaration, “no territorial acquisition resulting from the threat or use of force shall be recognized as legal”, above n 135.

government is thus a requirement for a State's recognition, but not a *conditio sine qua non* for a State's subsequent existence. The idea of State is a concept that is "independent of and precedent to that of the particular government that purports to rule it."²²¹ This independency explains why, during a civil conflict, a premature recognition of one side as the legitimate government is regarded as an unlawful interference in a State's internal affairs.²²²

In principle, a change of government within a State should be regarded as a matter pertaining to the domestic sphere. This approach was endorsed in 1930 by the Mexican Foreign Minister, Genaro Estrada, who declared that:

the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments...²²³

Although the doctrine acquired support from other States²²⁴, it has nonetheless one shortcoming. Under international law the government is deputed to represent the State in its international affairs and, also in order to accomplish this, its representatives are granted certain privileges. It is therefore important to determine who is the government, especially in situations where such authority is contested. One author goes even further and argues that recognition of a new government should be permissible only when there is a need to clarify the situation after a revolutionary change.²²⁵ This position is, however, debatable in light of the problem of invitation, as it risks to delay such recognition to a moment when the situation does not need any further clarification. A more robust reasoning is given by Lauterpacht, who contended that "the problem of recognition arises not because of any unlawfulness of the change, but because the accompanying violence and the resulting period of unsettlement demand an answer to the question whether the new government claiming to represent the State is in fact the government of the country."²²⁶

²²¹ Brad Roth, Governmental Illegitimacy, above n 216, at 132.

²²² *Ibid*, at 132.

²²³ Estrada Doctrine of Recognition, *The American Journal of International Law*, Vol. 25, No. 4, Supplement: Official Documents, 1931, at 203.

²²⁴ Thomas Galloway, *Recognizing of Foreign Governments: The Practice of the United States*, Washington: American Enterprise Institute, 1973, at 30.

²²⁵ Jochen Abr. Frowein, "Recognition", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 10, 1981, at 344.

²²⁶ Hersch Lauterpacht, *Recognition*, above n 101, at 98.

There is a general consensus that the main criterion for recognising a government is its effective control over a large majority of the State's territory coupled with a reasonable certainty that it will continue to do so.²²⁷ The effective control test, known in the literature also by the name *de facto* test, rests on the presumption of popular consent or, at least, as popular long term acquiescence.²²⁸ This is consistent with the observation that a high degree of popular consent may truly indicate a genuine high degree of government's control and, hence, foster the case for recognition.²²⁹ The presumption is a mere *factio iuris* because of the difficulties to empirically investigate the degree of popular consent.²³⁰ Neither can this popular consent be linked to a democratic expression of the will of the people. This is not to say that instances and doctrines that aimed to link democracy with government recognition have not been advanced. Under the Tobar doctrine, named after the Ecuadorian foreign minister that proposed it in 1907, recognition of governments that came to power by non-constitutional means and through revolutions was to be denied.²³¹ This legitimist doctrine was subsequently abandoned, also because of two inconsistencies immanent in the idea. First, the outsourcing to third States of the decision on the legality of the government runs against the freedom of people's choice in relation to who their ruler ought to be and, thus, amounts to an interference in domestic affairs.²³² Second, the doctrine ignores the fact that "every government now existing must at one time or another have derived its authority through extraconstitutional means".²³³ Although the Tobar doctrine was not followed, it is interesting to note that the idea that the consent of the population should be expressed rather than implicit has periodically regained momentum. On 20 October 1950 Cuba submitted a draft resolution to the *ad hoc* political

²²⁷ Stefan Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People", 12 *Chinese Journal of International Law* (2013), at 232. Stefan Talmon, "The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: an Obligation without Real Substance?", in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Brill Nijhoff, 2005, 99-125;

²²⁸ Brad Roth, *Governmental Illegitimacy*, above n 216, at 142.

²²⁹ Sean D. Murphy, "Democratic legitimacy and the recognition of States and governments" in Gregory H. Fox and Brad R. Roth (eds.) *Democratic Governance and International Law*, Cambridge University Press 2000, at 125.

²³⁰ Brad Roth, *Governmental Illegitimacy*, above n 216, at 142.

²³¹ See Remigiusz Bierzaneck, "La Non-Reconnaissance Et Le Droit International Contemporain", *Annuaire Français De Droit International*, Vol. 8, 1962. pp. 117-137; on the Tobar doctrine and its application to Central America see Charles L. Stansifer, "Application of the Tobar Doctrine to Central America", *The Americas*, Vol. 23, No. 3, 1967, at. 251-272.

²³² Ti-Chiang Chen, *The International Law of Recognition*, London Steven & Sons, 1951, at 112.

²³³ *Ibid*, at 113.

committee of the UNGA to which it was referred the problem of representation in the organs of the UN when two or more authorities claimed to be the only regular government. According to the draft, the criteria for recognition were the following:

- (a) effective authority over the national territory; (b) the general consent of the population; (c) ability and willingness to achieve the Purposes of the Charter, to observe its Principles and to fulfil the international obligations of the State; and (d) respect for human rights and fundamental freedoms²³⁴

Uruguay subsequently presented an amendment to the draft and specifically to criterion a) that should have therefore read as follows: effective authority over the national territory established without the intervention of any other State.²³⁵ The proposal of Cuba was commented also by China, who proposed several amendments. According to its proposal, criterion a) should have read as effective authority over the national territory established without the intervention of any other State, independent of foreign control and domination, and not as a result of foreign aggression, direct or indirect; criterion b): the general consent of the population expressed through freely conducted or internationally supervised or observed elections; criterion c) ability and willingness to achieve the Purposes of the Charter, to observe its Principles and to fulfil the international obligations of the State not having been an accomplice of aggression or given aid and sympathy to an aggressor so proclaimed by the United Nations, and not having committed acts of aggression; and criterion d) respect for human rights and fundamental freedoms as defined by the United Nations Universal Declaration of Human Rights.²³⁶ In addition, China proposed that a dedicated Commission of Investigation should ascertain the criteria with the view to reporting to the General Assembly. Neither of the proposals was finally endorsed by the UNGA, which adopted a looser wording. According to point 1 of UNGA Resolution 396, the question of recognition “should be considered in light of the Purposes and Principles of the Charter and of the circumstances of the case”.²³⁷ More recently, the link between recognition and democracy has re-emerged in some doctrinal argument, but as other scholars have highlighted, a norm that demands a

²³⁴ Cuba’s draft resolution A/AC.38/L.6

²³⁵ A/AC.38/L.11

²³⁶ A/AC.38/L.22

²³⁷ United UNGA Resolution 396 A/RES/396(V), 14 December 1950.

democratic base for recognition has neither crystallised nor States appears to be moving toward that direction.²³⁸

Foreign governments often resort to a *de facto* recognition in several hypotheses. Talmon argues that *de facto* recognitions are used to describe effective governments, unconstitutional governments, governments fulfilling some but not all the conditions of a government in international law, partially successful governments such as belligerent communities, governments without sovereign authority, and illegal governments under international law.²³⁹ In these cases, foreign authorities may be induced to *de facto* recognise the government in order to maintain what Lauterpacht defines as “freedom of action in relation to a change brought about by means contrary to international law”.²⁴⁰ Alternatively, and especially in situations of civil war where the recognised government ceases to exercise effective control over large portions of its territory to the benefit of the opposing faction, foreign authorities may resort to a *de facto* recognition as it represents the only means not to prematurely recognise a *de jure* government and, thus, to commit an act of interference. As long as the legitimate government offers some kind of resistance, which must not be purely nominal, international law favours the *status quo* and, therefore, the established government.²⁴¹ However, the difference between a *de facto* and *de jure* recognition is blurred and opposed by prominent scholars, who argue that, legally speaking, the difference has no relevance.²⁴²

Although arguably fallen in desuetude, the tripartite distinction of rebellion, insurgency and belligerency, offers, as observed by Roth, a framework for an analysis of the *de facto* vs *de jure* recognition.²⁴³ The stage of rebellion, characterized by acts of violence that can be dealt with coercive police measures, does not entail any form of specific recognition. The *de jure* government is not

²³⁸ See Thomas M. Franck, “The Emerging Right to Democratic Governance”, *The American Journal of International Law*, Vol. 86, No. 1, (Jan. 1992), 46-91; Gregory H. Fox, “The Right to Political Participation in International Law”, *Yale Journal of International Law* Volume 17 Issue 2, 540-607. *Contra* see Sean D. Murphy, “Democratic legitimacy”, above n 229, at 147.

²³⁹ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 2001, at 60.

²⁴⁰ Hersch Lauterpacht, *Recognition*, above n 101, at 348.

²⁴¹ *Ibid.*, at 94-95.

²⁴² See Charles L. Cochran, “De Facto and De Jure Recognition: Is there a Difference?”, *The American Journal of International Law*, Vol. 62, No. 2 (Apr., 1968), pp. 457-460; Hans Kelsen, *General Theory of Law and State*, Cambridge (Massachusetts): Harvard University Press, at 225-226.

²⁴³ Brad Roth, *Governmental Illegitimacy*, above n 216, at 173.

seriously challenged and the rebels lack effective control of any territory. Insurgency, which is a more serious challenge to the recognised authorities, amounts, if recognised by foreign governments, to a *de facto* recognition.²⁴⁴ As already seen above, this recognition is aimed at preserving the national interests of the recognising parties and resembles a political recognition, a concept that we shall see shortly. It is worth to restate that providing *matériel militaire* to the insurgent contravenes the duty of non-intervention owed to the *de jure* government. In case of recognised belligerency, the idea of effective control of the legitimate government is deeply challenged, as the belligerents retain control and administer a substantial part of the territory, also in order to be recognised as such. Following the recognition of belligerency, the law of neutrality binds the recognising governments. In other words, while during insurgency the duty of non-intervention was owed only to the *de jure* government, in the belligerency stage it is owed to both a *de jure* and a *de facto* authority. Yet the existence of a recognised belligerency seriously questions the degree to which the *de jure* government effectively control its territories and relies on an even implicit popular consent; and, thus, triggers the question if it is admissible to continuously shift the *de jure* recognition from one side to the other. The preference given by international law to the *status quo* entails a negative answer. Unless a revolution is successful and fully ousts the *de jure* government, it is the latter one who is “entitled to continued recognition”.²⁴⁵

We have seen that following the *de facto* recognition of belligerency, a legal consequence, namely neutrality, arises from the *de facto* recognition. However, we have also guarded against the fact that belligerency is a category that has fallen in desuetude. Nonetheless, *de facto* recognitions are still nowadays employed.²⁴⁶ The meaning of these recognitions are therefore limited to a political sphere

²⁴⁴Katharine Fortin Claims that the main difference between insurgency and belligerency is the requirement that the armed group occupies and administers a substantial portion of the national territory; see Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, 2017 at 102.

²⁴⁵ Hersch Lauterpacht, *Recognition*, above n 101, at 94.

²⁴⁶ The very recent case of Venezuela is illustrative. USA Secretary of State, Recognition of Juan Guaido as Venezuela's Interim President, 23 January 2019: “The United States recognizes Juan Guaido as the new interim President of Venezuela, and strongly supports his courageous decision to assume that role pursuant to Article 233 of Venezuela’s constitution and supported by the National Assembly, in restoring democracy to Venezuela.”; available at <https://www.state.gov/secretary/remarks/2019/01/288542.htm>; The Spanish foreign ministry, together with Portugal, Germany, UK, Denmark, The Netherlands, France, Hungary, Austria, Finland, Belgium, Luxemburg, Czech Republic, Latvia, Lithuania, Estonia, Poland, Sweden and Croatia, has also recognised Juan Guaido as the new interim President of Venezuela, by means of a Declaration conjunta sobre Venezuela “España, junto con Portugal, Alemania, Reino Unido, Dinamarca, Países Bajos, Francia, Hungría, Austria, Finlandia, Bélgica, Luxemburgo, la República Checa, Letonia, Lituania, Estonia, Polonia, Suecia y Croacia, toman nota de que Nicolás Maduro ha optado por no poner en marcha el proceso electoral. Por ello, y de acuerdo con los

and have, hence, political consequences as opposed to legal ones. Political recognitions denote that the recognizing States are willing to enter into political and other relations with the recognized groups.²⁴⁷ Although political recognitions may boost the political and financial standing of an opposition group, they do not create any legal obligation and can be withdrawn at any time. Neither are there any formalities for granting or retracting this type of recognition.²⁴⁸ If one recalls that subjects of international law are States and not governments, then it is clear that, as Roth posits, “[i]nternational legal relations, as opposed to political relations, are with the state, not the government”.²⁴⁹

The requirement of effective control fails to give a straightforward answer to situations of anarchy where there appears to be a power vacuum. In these instances, the question is whether the loss of internal control allows the *de jure* government to request a third State to provide arms and weapons. Corten analyses the question from the point of view of external military intervention and, by referring to the Somali and Albanian case, reaches the conclusion that the State’s request for assistance is not sufficient and a further element, identified in a Security Council measure, is needed. Yet, a boots-on-the-ground intervention is different from supplying arms and weapons.

The situation in Albania was characterized by anarchy, present also in the police forces, as the EU recognised when it stressed the importance of a “re-establishment of a viable police force”.²⁵⁰ However, despite the anarchy, the situation was furthermore characterized by the absence of a competing authority to the legitimate government and, therefore, one could contend that the effective control lacked because of endogenous dysfunctions in the Albanian State.²⁵¹ In this case, given the absence of competition for governmental authority, a request for arms by the still *de jure* government

preceptos de la Constitución venezolana, reconocen y apoyan a Juan Guaidó, Presidente de la Asamblea Nacional democráticamente elegida, como Presidente encargado de Venezuela, a fin de que convoque elecciones presidenciales libres, justas y democráticas.”, available at http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Comunicados/Paginas/2019_COMUNICADOS/20190204_COMU024.aspx; The situation of Venezuela falls short of any definition of civil war and therefore the recognising State have committed an unlawful act of interference in the domestic affairs of Venezuela.

²⁴⁷ Hans Kelsen, “Recognition in International Law: Theoretical Observations”, *The American Journal of International Law*, Vol. 35, No. 4, 1941, at 605.

²⁴⁸ *Ibid*, at 605.

²⁴⁹ Brad Roth, *Governmental Illegitimacy*, above n 216, at 132.

²⁵⁰ Conclusions of the Council of the European Union at its meeting on 24 March 1997, in Annex III S/1997/259.

²⁵¹ The Albanian authorities described the situation as a problem of “law and order” and not of a civil conflict.; see Letter Dated 28 March 1997 from the Permanent Representative of Albania to the United Nations Addressed to the President of the Security Council, S/1997/259.

could have been legitimately met. This reasoning may derive from the fact that, even if affected by systemic dysfunctions, the *de jure* government was not struggling against identifiable opposition forces, and its authority was not contested. Nonetheless, the provision of arms and weapons would certainly not have eased the situation, since the stockpiles were not adequately guarded, and which led “hundreds of thousands to break into armouries and loot weapons”.²⁵²

The Somali case in 1992 was described by the Somali representative to the UN as a civil war characterized by the presence of a multitude of clans and parties.²⁵³ This situation brought about “the absence of any national or even inter-clan political organization which can legitimately claim to have the right to form a national government”.²⁵⁴ The case is therefore characterized not only by the total absence of a *de facto* authority but arguably also by a *de jure* one and it is, hence, difficult to envisage even a valid request for assistance. In other words, and differently from the Albanian case, in the absence of any authority, be it *de jure* or *de facto*, the call for assistance could have been interpreted as lacking any valid legal basis.

II.6 State practice

This section collects selected elements of State practice on three cases, namely Libya, Syria and Yemen. For each of the cases, the section examines the positions of the States and analyses them in relation to the theoretical background discussed along this chapter.

II.6.1 Libya

II.6.1.1 France

With hindsight, the position of France is particularly relevant given the active role that it has adopted in relation to the north-African State. Speaking in front of the Assembly, the Minister of Foreign Affairs said that: “le régime libyen, en réprimant avec une extrême violence les mouvements de protestation populaire, a perdu toute légitimité” and also added that “[d]ores et déjà, la plus grande

²⁵² Annex I S/1997/259

²⁵³ Letter dated 20 January 1992 from the Charge d’Affaires A.I. of the Permanent Mission of Somalia to the United Nations Security Council, dated 30 January 1992, S/23445.

²⁵⁴ Letter dated 30 January 1992 from the Charge d’Affaires A.I. of the Permanent Mission of Somalia to the United Nations Security Council, dated 30 January 1992, S/23507, at 3.

partie du territoire libyen échappe à son contrôle. Il est " bunkerisé " à Tripoli...".²⁵⁵ In a subsequent audition the same Minister highlighted that: "[l]e colonel Kadhafi, en réprimant avec une extrême brutalité les mouvements populaires qui le mettent en cause, s'est disqualifié, si bien qu'il a perdu toute légitimité", seemingly suggesting that legitimacy is linked to popular support and is lost when brutal acts are committed against those who do not support the government.²⁵⁶ On the same line, a further response, in which the Minister of Foreign Affairs stated that "[e]n réprimant avec une brutalité inacceptable les mouvements qui lui sont hostiles, le colonel Kadhafi a perdu toute légitimité".²⁵⁷ Similarly, a successive declaration, in which it is stated that "Kadhafi a perdu toute légitimité en déclarant la guerre à son peuple...la France a clairement pris le parti des peuples et refuse toute complaisance avec les régimes qui oppriment leur peuple".²⁵⁸ Another declaration remarks the same point "la France estime que Kadhafi a perdu toute légitimité en s'attaquant à son peuple...".²⁵⁹

On the thorny question of the possibility to assist the Libyan government the Minister of Foreign Affairs, speaking about mercenaries from Chad, stated that: "[i]l paraît aujourd'hui beaucoup plus probable, s'il y a des mercenaires tchadiens au sein des troupes de Kadhafi, que cet engagement relève d'initiatives personnelles de Tchadiens déjà installés en Libye et non pas d'une aide fournie par le Tchad à la Libye."²⁶⁰ However, this statement must also be read in light of UNSC 1970 that imposed an arms embargo on Libya. It is therefore not fully clear whether the position refers to the possibility of assisting the State's authorities or compliance with the embargo.

On the possibility of arming the rebels, speaking at the beginning of September 2011, the Prime Minister thanked the MPs who "ont apporté leur soutien à l'initiative du Président de la République et du Gouvernement d'intervenir, en particulier pour sauver du massacre la ville de Benghazi, permettant ainsi à la rébellion de s'installer dans la durée, de s'armer et d'entreprendre la reconquête du pays".²⁶¹ In

²⁵⁵ Assemblée Nationale Français, 14ème legislature, Question N. 301, government response of 2 March 2011.

²⁵⁶ Assemblée Nationale Français, 14ème legislature, Question N.3023, government response of 3 March 2011.

²⁵⁷ Assemblée Nationale Français, 14ème legislature, Question N. 3048, government response of 9 March 2011.

²⁵⁸ Assemblée Nationale Français, 14ème legislature, Question N. 59538, government response of 16 August 2011.

²⁵⁹ Assemblée Nationale Français, 14ème legislature, Question N. 96021, government response of 16 August 2011.

²⁶⁰ Assemblée Nationale Français, 14ème legislature, Question N. 101301, government response of 14 February 2012.

²⁶¹ Assemblée Nationale Français, 14ème legislature, Question N. 3476, government response of 8 September 2011.

fact, the Parliament backed the French intervention in order to operationalize UNSC Resolution 1973, but did not explicitly authorize the provision of arms to the rebels. Such possibility stemmed from the French Government's interpretation of the Resolution.²⁶² In addition, he also generically stated that “les Occidentaux aient été aux côtés des révolutionnaires libyens”, which, taken together with the previous quote, alludes to the fact that Western States may feel legally empowered to assist rebellions.²⁶³ This is even more telling when the Libyan rebels were depicted, in another statement, as a liberation movement, in a narrative that can be ascribed to the legal category of self-determination.²⁶⁴

France suspended its arms export to the Libyan Government before the entry into force of the UN arms embargo, following an assessment that the arms were probably used by the government forces to repress the population: “l'implication inacceptable d'éléments de l'armée libyenne dans la répression contre la population en suspendant les procédures d'exportation en cours dès lors que des éléments armés ont été impliqués dans la répression.”²⁶⁵ Following the arms embargo, France provided arms and weapons to the opposition forces, in order to defend themselves against the repeated attacks from Khadafi troops: “[l]es aéronefs français ont alors procédé au largage d'armes légères et de munitions, afin de permettre aux personnes agressées d'organiser leur défense”.²⁶⁶ That provision, according to the French Minister, was in compliance with the arms embargo, as the UN resolution “autorise les États membres des Nations unies à prendre toutes les mesures nécessaires, malgré l'embargo sur les armes, pour protéger les populations civiles menacées”.²⁶⁷ Apparently, France notified the Sanction Committee of its intention to provide the rebels with arms and “ni le comité ni le groupe d'experts n'ont relevé de violation de l'embargo par la France”.²⁶⁸

²⁶² Assemblée Nationale Français, 13ème législature, Débat et vote sur l'autorisation de la prolongation de l'intervention des forces armées en Libye, 12 July 2011.

²⁶³ *Ibid.*

²⁶⁴ Assemblée Nationale Français, 14ème législature, Question N. 3584, government response of 26 October 2011. See also Assemblée Nationale Français, 14ème législature, Question N. 121628, government response of 10 January 2012, where the Minister said that “Le peuple libyen vient de s'affranchir d'une dictature particulièrement répressive et de recouvrir son droit à la parole et à l'autodétermination”

²⁶⁵ Assemblée Nationale Français, 14ème législature, Question N. 101568, government response of 26 July 2011.

²⁶⁶ Assemblée Nationale Français, 14ème législature, Question N. 114524, government response of 1 November 2011.

²⁶⁷ Assemblée Nationale Français, 14ème législature, Question N. 115479, government response of 1 November 2011.

²⁶⁸ Assemblée Nationale Français, 14ème législature, Question N. 114038, government response of 20 December 2011, and 114039, government response of 20 December 2011.

In terms of recognition, the French authorities stated that “nous qui avons été le premier pays à reconnaître la légitimité du Conseil national de transition.”²⁶⁹ This recognition follows what seems to be a change in the situation on the ground, where “[l]es foyers de résistance se multiplient sur le terrain...les défections se multiplient dans le premier cercle de Kadhafi”.²⁷⁰ The democratic plan of the National Transitional Council (NTC) appears to have played a role in French’s recognition, hinting to the possibility that, *de lege ferenda*, democracy may be an additional factor to consider: “[la France] soutient le projet d’État de droit démocratique porté par le Conseil national de transition”.²⁷¹ Nonetheless, the recognition of the (NTC) seems to be limited to a *de facto* recognition, rather than a *de jure* one, as the following statement shows: “[d]ès le 10 mars, les autorités françaises ont reconnu à Bruxelles le CNT comme instance légitime pour conduire le changement politique en Libye”.²⁷² A successive statement reflects the same idea, with the sole difference that, instead of using the term “instance légitime”, it adopted the term “interlocuteur légitime”. In addition, the Foreign Minister wrote that the following principles would inform French’s action: “[u]ne reconnaissance large du CNT, un soutien logistique et financier, ainsi qu’une coopération renforcée dans tous les domaines”, possibly including also the provision of arms and weapons to the CNT.²⁷³ That the French recognition of 10 March was only *de facto* is confirmed by the statement that, in 15 July 2011, the Libya Contact Group recognised “le CNT comme l’Autorité gouvernementale de la Libye et l’a appelé à former un gouvernement intérimaire largement représentatif”.²⁷⁴ It is also worth mentioning that a day after the *de facto* recognition, Libya cut the diplomatic relationship with France, in what can be therefore interpreted as a countermeasure against an illicit interference in the domestic affairs of the country.²⁷⁵ Be as it may, there is an important point to note in relation to the above discourse about the *de facto* recognition. It

²⁶⁹ Assemblée Nationale Français, 14ème legislature, Question N. 3282, government response of 25 May 2011.

²⁷⁰ *Ibid.*

²⁷¹ Assemblée Nationale Français, 14ème legislature, Question N. 96021, government response of 16 August 2011.

²⁷² Assemblée Nationale Français, 14ème legislature, Question N. 103732, government response of 16 August 2011.

²⁷³ Assemblée Nationale Français, 14ème legislature, Question N. 103734, government response of 16 August 2011.

²⁷⁴ Assemblée Nationale Français, 14ème legislature, Question N. 109982, government response of 16 August 2011. See also Assemblée Nationale Français, Commission des affaires étrangères, 4 May 2011, N. 56.

²⁷⁵ Assemblée Nationale Français, 14ème legislature, Question N. 114729, government response of 14 February 2012.

seems that the provision of arms to the rebels chronologically followed the recognition of the *de facto* authorities. However, this does not mean that the French position argues that it is legal under general international law to provide arms to *de facto* authorities, as France consistently argued that it provided arms on the basis of Resolution 1973, which spoke about “all measures to protect civilians”.

In more general terms, yet in contradiction with its conduct in Libya, France has stated that it opposes arms exports to countries involved in an open conflict: “[d]ans le respect de ses engagements diplomatiques, elle s’oppose en outre aux exportations vers un pays participant à un conflit ouvert, même en l’absence d’embargo international”.²⁷⁶ And, on the relevance of the capital city as a terms of reference for the legitimacy of the government, France underlined that, in order to solve the political impasse of Libya during 2014 and 2015, a “nouveau gouvernement qui devra siéger à Tripoli, car cette ville est la capitale de la Libye.”²⁷⁷ Furthermore, the Foreign Minister also stated that “[c]e gouvernement doit pouvoir s’installer à Tripoli, récupérer la souveraineté sur l’intégralité du territoire libyen et avoir l’appui de la communauté internationale”, because Libya was a failed State.²⁷⁸

As known the situation in Libya has kept unstable throughout the years and the situation was described by the Minister of Foreign Affairs as “chaotic” as Libya “s’agit d’un État failli”.²⁷⁹ In this context France, although recognising the Government of National Accord as legitimate, also entertains contacts with the opposing faction, led by Marshall Haftar.²⁸⁰ And, equally, France is lending the GNA assistance in order to enable it to “exercer pleinement sa souveraineté”. In practical terms, France has provided fast boats to the Libyan Navy. The Minister of Foreign Affairs underlined that this supply was made in full conformity with the terms of the embargo, possibly implying that the provision was done by requesting an exception to the relevant sanction committee.²⁸¹ More specifically, he stated:

La décision de céder six embarcations rapides à la marine libyenne s’inscrit dans cette perspective de consolidation des institutions de l’État libyen et du renforcement de ses capacités militaires. Elle a été prise dans le respect des engagements

²⁷⁶ Assemblée Nationale Français, 14^{ème} législature, Question N. 123411, government response of 21 February 2012.

²⁷⁷ Assemblée Nationale Français, 14^{ème} législature, Question N. 3470, government response of 17 December 2015.

²⁷⁸ Assemblée Nationale Français, 14^{ème} législature, Question N. 3719, government response of 10 March 2016, and Assemblée Nationale Français, 15^{ème} législature, Question N. 75, government response of 3 August 2017.

²⁷⁹ Assemblée Nationale Français, 15^{ème} législature, Question N. 75, government response of 3 August 2017.

²⁸⁰ Assemblée Nationale Français, 15^{ème} législature, Question N. 1868, government response of 10 April 2019.

²⁸¹ On sanction committees, see V.2.3.

européens et internationaux de la France, notamment en conformité avec les exigences des embargos institués par les résolutions du Conseil de sécurité des Nations-Unies, adoptées entre 2011 et 2018.²⁸²

On 9 July 2019 the New York Times published a reportage according to which French arms were discovered in a camp of the Libyan National Army led by Marshal Haftar.²⁸³ In response the Ministry of Defence affirmed:

ces armes étaient destinées à l'autoprotection d'un détachement français déployé à des fins de renseignement en matière de contre-terrorisme... Endommagées et hors d'usage, ces munitions étaient temporairement stockées dans un local en vue de leur destruction, ajoute le ministère. Elles n'ont pas été transférées à des forces locales... Détenues par nos forces pour leur propre sécurité, ces armes n'étaient pas concernées par les restrictions d'importation en Libye. Il n'a jamais été question de vendre, ni de céder ni de prêter ces munitions à quiconque en Libye.²⁸⁴

Therefore, according to the French authorities there was no breach of the arms embargo as, not only were the weapons defected, but also the property of the arms was not transferred to third parties. On the point there is an unanswered parliamentary question.²⁸⁵

II.6.1.2 United Kingdom

Similarly to the French position, also the UK expressed that the Libyan government “is an illegitimate regime that has lost the consent of its people”.²⁸⁶ Although it linked the consent to the legitimacy, the UK stated that the situation in Libya was short of being a civil war. In discussing the possible future of the country, the Prime Minister stated that the UK should “plan for what might happen should the regime fall, or —something we do not want to happen—should it embed itself for a long time, resulting effectively in civil war in Libya.”²⁸⁷ In other words, the authority of the Government of Libya was contested because of lack of representation and not because a civil war was ongoing and the withdrawal of the support from a number of tribes located in big parts of the territory appears to be a key indicator for the UK:

²⁸² Assemblée Nationale Français, 15ème legislature, Question N. 17976, government response of 24 September 2019.

²⁸³ The New York Times, U.S. Missiles Found in Libyan Rebel Camp Were First Sold to France, 10 July 2019, available at <https://www.nytimes.com/2019/07/09/world/middleeast/us-missiles-libya-france.html>.

²⁸⁴ Reported in Le Monde, L'embarras de Paris après la découverte de missiles sur une base d'Haftar en Libye, available at https://www.lemonde.fr/afrique/article/2019/07/10/libye-des-missiles-appartenant-a-la-france-aux-mains-des-forces-antigouvernementales_5487736_3212.html.

²⁸⁵ Assemblée Nationale Français, 15ème legislature, Question N. 21594.

²⁸⁶ House of Commons Hansard, Libya and the Middle East, Volume 524, at Column 25.

²⁸⁷ *Ibid*, at Column 33.

his authority is contested in large swathes of the country where local tribes have withdrawn their support. There is a clear risk of protracted conflict and an extremely dangerous and volatile situation in large parts of the country. Our position is that Colonel Gaddafi must put an immediate stop to the use of armed force against civilians and hand over power without delay to a Government who recognise the aspirations of the Libyan people and are more representative and accountable.²⁸⁸

The UK not only linked legitimacy to support by tribes or the population in general, but it also tied it to respect for human rights and welfare of the people. The Secretary of State expressed this concept in front of the House of Commons and stated that: “we can be confident that this is a regime with absolutely no regard for human rights, for human life, or for the welfare of the people of its own country. That is why, in the eyes of virtually of the whole world, it has utterly lost its legitimacy.”²⁸⁹

Despite the alleged illegitimacy of the regime, the UK did not strip its *de jure* recognition and, moreover, seemed to imply that only its fall would prompt this step from the UK. In this regard, the Prime Minister affirmed that:

I have never supported Colonel Gaddafi or his regime, and I think that his regime is illegitimate. Clearly that prompts the question of how long we are going to go on recognising it in any way, which is why I have requested another urgently needed piece of work. We must ensure that we do everything that we can to isolate it. We must cut off money, cut off supply and cut off oxygen from the regime, so that it falls as fast as it possibly can.²⁹⁰

Speaking about the means that the UK would consider in order to achieve the fall of Gaddafi, the UK gave mixed messages. On the one hand, the Prime Minister did not exclude the assistance to opposition: “[w]hat we want...is the swift removal of Colonel Gaddafi from his position. If helping the opposition in Libya would help to bring that about, it is certainly something we should consider”.²⁹¹ In this respect, at the early stages of the escalation in Libya, the Secretary of State, responding to a question on whether the UK was going to intervene militarily stated that: “...the contingency planning that we have asked for in NATO does not constitute such direct intervention in a civil war, or near civil war, but involves

²⁸⁸ House of Commons Hansard, Libya and the Middle East, Volume 524, at Column 644.

²⁸⁹ House of Commons Hansard, Libya (London Conference), Volume 526 at Column 354.

²⁹⁰ House of Commons Hansard, Libya and the Middle East, Volume 524, at Column 36.

²⁹¹ *Ibid*, at Column 34.

the consideration of measures to protect the civilian population and the provision of humanitarian assistance if necessary. That is different from directly intervening in a conflict”.²⁹² In addition, it added that these contingency measures “require demonstrable need, a clear legal basis and clear support from the region for them to be implemented”.²⁹³ Therefore, it appears that the contingency planning, a vague terminology that more likely than not encompasses the provision of arms to the opposition forces, was subject to an authorization of the UNSC. Absent such step from the UNSC, it is arguable *a contrario* that the UK does not judge to be legally feasible to provide such assistance, which, in any event, does not constitute at its eyes a direct intervention in a civil war.

In another response to a direct question on whether the UK was intending to arm the rebels, the Secretary of State answered that Libya was subject to an arms embargo, implying that providing arms to rebels would be in contravention of the embargo.²⁹⁴ This was confirmed by a subsequent statement, in which the Secretary stated that: “[t]he arms embargo agreed in United Nations resolution 1970 covers the whole country—that is, as it is understood by the members of the Security Council and by the vast majority of legal experts. The rebels and the Gaddafi regime are therefore in the same position as regards the arms embargo”.²⁹⁵ In a different response to a question from the Leader of the Labour party about arming the rebels the Prime Minister confirmed the previous position as he stated that: “[w]e should not exclude various possibilities, and there is an argument to be made, but there are important legal, practical and other issues that would have to be resolved, including the UN arms embargo.”²⁹⁶ The Prime Minister restated the same point: “our legal understanding is that that arms embargo applies to the whole of Libya”.²⁹⁷ He further made the point that any different interpretation of the embargo would be incorrect: “[t]he legal advice that others have mentioned, and that we believe some other countries were interested in, suggesting that perhaps this applied only to the regime, is not in fact correct”.²⁹⁸

²⁹² *Ibid.*, at Column 651.

²⁹³ *Ibid.*, at Column 660.

²⁹⁴ *Ibid.*, at Column 659.

²⁹⁵ House of Commons Hansard, Libya, Volume 525, at Column 153.

²⁹⁶ House of Commons Hansard, Japan and the Middle East, Volume 525, at 8.

²⁹⁷ House of Commons Hansard, UN Security Council Resolution (Libya), at Column 623.

²⁹⁸ House of Commons Hansard, UN Security Council Resolution (Libya), at Column 627.

However, this position seemed to have changed, perhaps in order to align with the USA's interpretation, as the Secretary of State, on 30 March 2011, affirmed that:

At the same time, our legal advice is that resolution 1973 allows all necessary measures to protect civilians and civilian-populated areas and that this would not necessarily rule out the provision of assistance to those protecting civilians in certain circumstances. Clearly, there are differing views internationally about the legal position, but I have explained what is the view of the British Government. As the Prime Minister told the House, we do not rule it out, but we have not taken any decision to provide that assistance.²⁹⁹

This change in position could have potentially opened the door to arming the rebels, although the Secretary of State informed the House of Commons that the UK “[is] not currently engaged in any arming of the opposition or rebel forces”.³⁰⁰ The change in policy did not occur also in light of considerations of long term security, as on the medium to long term the arms, if provided, could have “unforeseeable and unintended consequences”.³⁰¹ A further point of interest in relation to the shift in the interpretation of the embargo is the fact that the UK sustains that arms could be classified according to their defensive or offensive capabilities. Only the former category would fall within the exemption of the embargo:

Security Council resolution 1973—that it does not necessarily rule out the provision of assistance for those protecting civilians in certain circumstances. This is very much about protecting civilians. It is not about weapons that would be used primarily for attack, and it is certainly not about a general arming of one side in the conflict.³⁰²

In reply to a question on the establishment of a no-fly zone in Libya, the Secretary of State elaborated on which are the legal justifications for intervention. He pointed at the primacy, but not exclusivity, of Chapter VII resolutions, as he affirmed that “various circumstances in which nations are allowed to take action, which can of course include self-defence but can also include overwhelming humanitarian need. This is not a completely open-and-shut argument, but the clearest basis is a chapter VII resolution.”³⁰³ The use of the elusive term “take action” seems to support the argument that the UK admits that arming opposition forces could be justified as a means of self-defence, but also in light of a

²⁹⁹ House of Commons Hansard, Libya (London Conference), Volume 526 at Column 350. See also House of Commons Hansard, Middle East and North Africa, Volume 527, at Column 43.

³⁰⁰ House of Commons Hansard, Libya (London Conference), Volume 526 at Column 350.

³⁰¹ House of Commons Hansard, Libya (London Conference), Volume 526 at Column 350.

³⁰² House of Commons Hansard, Libya (London Conference), Volume 526 at Column 352.

³⁰³ House of Commons Hansard, Libya, Volume 525, at Column 154.

responsibility-to-protect narrative. The Parliamentary debate on the possibility of arming the rebels appears to be a theoretical discussion as there is neither proof nor statements that confirm that the UK eventually provided such assistance. In addition, the debate also points out that there is no reference to the existence of the possibility, under general international law, of arming the rebels, and, as per the French position, this arises solely as an interpretative result of the relevant UNSC Resolution.

In terms of recognition, the Prime Minister stated that: “. . . in this country, we recognise countries rather than Governments. What matters is making contact and having communications with the transitional authorities”.³⁰⁴ However, in a later statement, the Secretary of State granted the National Transitional Council a sort of *de facto* recognition as he said that the UK viewed “the National Transitional Council as a legitimate interlocutor representing the aspirations of the Libyan people”.³⁰⁵ With these *de facto* authorities the UK was engaged through the diplomatic outpost in Benghazi, while the embassy in Tripoli was not operating.³⁰⁶ However, a following statement of the Secretary puts into question, at least for what concerns the UK, the division between *de facto* and *de jure* recognition:

we recognise States rather than Governments within States and there are very good reasons to continue that policy, but it means that our diplomatic mission in Libya is in Benghazi, not in Tripoli. Our active daily work is with the transitional national council, so for all intents and purposes our approach, and that of France and Italy, for instance, which have formally recognised it, is identical in practical terms.³⁰⁷

Still, in terms of recognition, in 2016 the UK clarified in several instances its recognition of the Government of National Accord as the “only legitimate government in Libya, endorsed unanimously by the UN Security Council”.³⁰⁸ In a subsequent joint statement issued with Italy, France, the US, Germany and Spain the wording used was “full support for the GNA as Libya’s sole executive authority”.³⁰⁹ It is furthermore worth noting that the wording changed again, and the adjective ‘sole’

³⁰⁴ House of Commons Hansard, UN Security Council Resolution (Libya), at Column 632.

³⁰⁵ House of Commons Hansard, Middle East and North Africa, Volume 527, at Column 34

³⁰⁶ House of Commons Hansard, Middle East and North Africa, Volume 527, at Column 34. In the same terms see also House of Commons Hansard, Middle East and North Africa, Volume 727, at Column 56.

³⁰⁷ House of Commons Hansard, Middle East and North Africa, Volume 527, at Column 52.

³⁰⁸ Philip Hammond: UK supports Libyan Government of National Accord, 19 March 2016, available at <https://www.gov.uk/government/news/philip-hammond-uk-supports-libyan-government-of-national-accord>.

³⁰⁹ Joint statement on Libya, 13 September 2016, <https://www.gov.uk/government/news/joint-statement-on-libya-15>.

was not used by the UK Ambassador to the UN when describing Prime Minister al-Sarraj “as the legitimate executive authorities”.³¹⁰

The recognition of the Government of National Accord seemingly opened the door for the UK to provide support, if so requested. The Foreign Secretary stated that “[w]e stand ready to respond positively to requests for support and assistance from the GNA to help them restore stability to Libya”.³¹¹ The chaotic situation in Libya depended also upon third parties providing military supplies to the country, in breach of the existing sanctions. This point was raised several times by the UK representatives, who called “all Member States to implement that arms embargo in full and we hope Libya Sanctions Committee will continue to do its good work at looking at transgressions”.³¹² The use of the term ‘in full’ may support the view that the support that the UK offered, was conditional to the exemptions to the embargo being approved by the relevant sanction committee. The same concept was restated in another statement where the UK called “all Member States to respect international law and calls on the Security Council to take reports of violations very seriously”.³¹³

II.6.1.3 Italy

Italy, slightly in contrast to the UK and French position, did not explicitly sustain that the Libyan regime lost its legitimacy because of lack of internal consent. It also did not refer to effectiveness, as at the time of the following declaration, government forces were regaining terrain. Reporting in front of the Parliament, the Minister for Foreign Affairs linked legitimacy to international support:

The latest decisions taken by Russia, which decided to freeze the assets of Colonel Gaddafi and his family, the blockade of Libya's financial operations in Russia as well as the ban on the entry of the whole family of Colonel Gaddafi into the country, represent another significant fact which, added to the Arab League's decision to suspend Libya as a member of the Arab League and also to adopt a decision calling for the adoption of important measures, including the no-fly zone, certainly reveals

³¹⁰ Renewed Libya Sanctions Regime, 5 November 2018, available at <https://www.gov.uk/government/speeches/renewed-libya-sanctions-regime>.

³¹¹ Foreign Secretary statement on Libya, 30 March 2016, available at <https://www.gov.uk/government/news/foreign-secretary-statement-on-libya--2>.

³¹² Ending bloodshed in Libya, 21 May 2019, available at <https://www.gov.uk/government/speeches/ending-bloodshed-in-libya>.

³¹³ Recent violence and prospects for a truce in Libya, 29 July 2019, <https://www.gov.uk/government/speeches/recent-violence-and-prospects-for-a-truce-in-libya>; see also Fighting in Tripoli: P3+3 statement, 16 July 2019, available at <https://www.gov.uk/government/news/fighting-in-tripoli-p3-3-statement>.

an irreversible compromise in terms of legitimacy with respect to the whole world. The Arab League and the United Nations have in fact suspended Libya as a member of the Human Rights Council, Europe has decided not to consider it a legitimate interlocutor anymore...³¹⁴

Even before losing legitimacy and being sanctioned, Italy suspended the provision of arms and weapons to the country, indirectly hinting to the fact that Italy may consider itself as bound by neutrality:

...on the specific issue of arms supplies, I can clarify that there have been no authorizations granted by the Farnesina (Ministry for Foreign Affairs) for exports to Libya since mid-January and, in particular, that all arms activities have been suspended as a precautionary measure even before sanctions introduced by the United Nations and the European Union respectively on 26 and 28 February last.³¹⁵

However, it must be also said that the statement is not fully conclusive as the “precautionary measure” may also be interpreted as a step to ensure the effectiveness of a future sanction, of which Italy may have been informed in advance by its allies.

Italy did not exclude the possibility of providing arms and weapons to the opposition in Bengasi, after having it recognised as a “political interlocutor”.³¹⁶ But, at the same time, the Foreign Minister also made it clear that Italy “did not give the weapons, but we have met with the Council of Bengasi... We cannot think of sending weapons, as you clearly imagine, but we have sent aid and we will keep on sending it”.³¹⁷ However, this position changed and the Foreign Minister stated that Italy

³¹⁴ Senato della Repubblica, XVI Legislatura, Resoconto Stenografico n. 19, Commissioni Congiunte 3^a (Affari esteri, emigrazione) del Senato della Repubblica e III (Affari esteri e comunitari) della Camera dei deputati, Mercoledì 16 marzo 2011, at 4. In the original version: “Le ultime decisioni prese dalla Russia, che ha deciso il congelamento dei beni dello stesso colonnello Gheddafi e della sua famiglia, il blocco delle operazioni finanziarie della Libia in Russia nonché il bando all’ingresso nel Paese di tutta la famiglia del colonnello Gheddafi, rappresentano un altro fatto significativo che, aggiunto alla decisione della Lega araba di sospendere la Libia da membro della Lega araba e anche di adottare una decisione in cui chiede l’adozione di misure, inclusa la no-fly zone, fa emergere certamente un’irreversibile compromissione sotto il profilo della legittimità rispetto al mondo intero. La Lega araba e le Nazioni Unite hanno infatti sospeso la Libia da membro del Consiglio dei diritti umani, l’Europa ha deciso di non ritenerlo più un interlocutore legittimato”.

³¹⁵ Camera dei Deputati, XVI Legislatura, Bollettino delle Giunte e delle Commissioni Parlamentari, Martedì 8 Marzo 2011, at 63. In the original version: “sulla specifica questione delle forniture di armi, posso precisare che non vi sono state autorizzazioni concesse dalla Farnesina per esportazioni verso la Libia dalla metà di gennaio scorso ed, in particolare, che tutte le attività in materia di armamenti sono state sospese in via cautelare prima ancora delle sanzioni introdotte dalle Nazioni Unite e dall’Unione Europea rispettivamente il 26 e 28 febbraio scorso”.

³¹⁶ Senato della Repubblica, XVI Legislatura, Resoconto Stenografico n. 19, Commissioni Congiunte 3^a (Affari esteri, emigrazione) del Senato della Repubblica e III (Affari esteri e comunitari) della Camera dei deputati, Mercoledì 16 marzo 2011, at 7. In the original version: “[deciso di] considerare l’opposizione di Bengasi come un interlocutore politico”.

³¹⁷ Senato della Repubblica, XVI Legislatura, Resoconto Stenografico n. 19, Commissioni Congiunte 3^a (Affari esteri, emigrazione) del Senato della Repubblica e III (Affari esteri e comunitari) della Camera dei deputati, Mercoledì 16 marzo 2011, at 17. In the original version: “noi non abbiamo dato le armi, ma abbiamo incontrato il Consiglio di Bengasi... Non possiamo pensare di mandare le armi, come voi chiaramente immaginate, ma abbiamo mandato gli aiuti e continueremo a farlo”.

could send arms for allowing self-defence of the Libyans, if there was a general international agreed framework in this sense. In exploring the possibility for action in Libya, the Foreign Minister said that:

The first is the issue of how to deal with the issue of self-defense with respect to forms of heavy armed action in cities, which evidently preclude NATO intervention, but not, unfortunately, disastrous massacres of civilians. If our goal was and is to protect civilians, what are the alternatives? The first is an on-the-ground action, which is not shared by the international community, or by the large majority of it, including Italy. The second is an air attack, to take place also in urban areas, but Italy cannot share this perspective. We also do not share the risk of serious collateral damage. Only self-defense of the Libyans remains. It is a topic on which we must open a broad discussion, involving the countries that object and those who are already in favour now, then leaving it up to individual decisions, on the basis of a shared general framework, whether to proceed or not and what type of arms supply for self defense.³¹⁸

And further restated its stance on the possibility to provide arms as he stated that there is an “immediate and urgent international need for reflection on the tools of self-defense to combat these forms of military action conducted by the regime and not easily contrasted”.³¹⁹ While, as just seen, for the provision of arms and weapons Italy seems to require an understanding on an international level, it did not require so for providing non-lethal equipment:

As you already know, we have expressed our readiness for support with self-defense tools that touch, for example, communications, radar systems, frequency disturbance and that obviously include equipment, including night vision tools ... the rest, the real weapons, Italy has expressed its perplexity, although I have spoken of an *extrema ratio* that could be used, but I repeat that a more in-depth reflection is needed.³²⁰

³¹⁸ Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri E Comunitari (III) — Difesa (IV) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica, Resoconto Stenografico Audizione 6, Seduta di Martedì 19 Aprile 2011, at 6. In the original version: “Il primo è il tema di come affrontare la questione dell’autodifesa rispetto alle forme di azione armata pesante nelle città, che evidentemente precludono l’intervento della NATO, ma non, purtroppo, stragi disastrose di civili. Se il nostro obiettivo era ed è quello di proteggere i civili, quali sono le alternative? La prima è un’azione di terra, che non è condivisa dalla comunità internazionale, o dalla larga maggioranza di essa, Italia inclusa. La seconda è un’azione di attacco armato aereo anche nelle zone urbane, ma l’Italia non può condividere tale prospettiva. Non condividiamo neanche l’idea che si possa correre il rischio di un danno collaterale tanto grave. Resta soltanto l’autodifesa degli stessi libici. È un tema su cui dobbiamo aprire una discussione ampia, coinvolgendo i Paesi che sporgono obiezioni e quelli che sono già ora favorevoli, lasciando poi alle decisioni individuali, sulla base di un quadro generale condiviso, se procedere o meno e a quale tipo di fornitura di armamenti per autodifesa”.

³¹⁹ *Ibid*, at 4. In the original version: “...immediata e urgente una riflessione internazionale sugli strumenti di autodifesa per contrastare queste forme di azione militare condotta dal regime e non facilmente contrastabili...”.

³²⁰ *Ibid*, at 6. In the original version: “Come sapete già, noi abbiamo espresso la disponibilità a un sostegno con strumenti di autodifesa che tocchino, per esempio, le comunicazioni, i sistemi radar, il disturbo alle frequenze e che includano ovviamente equipaggiamenti, ivi compresi strumenti di visione notturna...Per quanto riguarda il resto, le armi vere e proprie, l’Italia ha espresso una sua perplessità, anche se io ho parlato di un’*extrema ratio* a cui si potrebbe ricorrere, ma ripeto che occorre una più approfondita riflessione”.

The understanding on the framework for legality for providing arms and weapons seems to lie within the interpretation of the relevant UNSC Resolution that set the arms embargo. In other words, while the Foreign Minister affirmed that the self-defence narrative could be applied as an interpretative means of last resort, he also stated that the solution would rest in a shared interpretation of the limits given by the UNSC Resolution:

We also want to work on the topic of self-defense. I do not shy away from the question by Mr Verneti and Mr Pistelli on why we do not supply weapons to civilians in Benghazi. The answer is because there has not been and there is no international framework that reassures about the legitimacy of this action ... It would be wrong, in my opinion, on a unilateral level, to decide what can and cannot be done. You know that there are countries according to which supplying weapons - I am not talking about interception or communication disturbances, or night vision devices - is illegal with respect to resolution no. 1973. Do you ever think that without an in-depth reflection in the UN interpretative framework, one can decide unilaterally? It is one of the reasons why we have explained that caution is not simple prudence but is based on the lack of a deeper understating of the international framework first. We do not even want to imagine that another country claims that Italy is carrying out an illegal action according to resolution no. 1973.³²¹

And, in terms of interpretation of UNSC 1973, Italy appears to adhere to the French position, inasmuch as the “UN mandate expressly excludes only one hypothesis, that of the use of a ground force on Libyan territory. This is and will be ruled out by any coalition partner...”.³²² This interpretation is confirmed by another statement on the topic, in which the Minister of Foreign Affairs maintained that “we are and will remain within resolution no. 1973, therefore no to ground actions, no to civilian objectives and certainly yes to everything necessary for the protection of the Libyan civilian population”.³²³ And, apparently, Italy followed its words with deeds. Following a request from the NTC, not only Italy sent

³²¹ *Ibid*, at 18. In the original version: “Vogliamo lavorare anche sul tema dell’autodifesa. Non mi sottraggo alla domanda dell’onorevole Verneti e dell’onorevole Pistelli su perché non forniamo le armi ai civili di Bengasi. La risposta è perché non c’è stato e non c’è un quadro internazionale che rassicuri sulla legittimità di tale azione... Sarebbe sbagliato, a mio avviso, a livello unilaterale, decidere ciò che si può e non si può fare. Voi sapete che vi sono Paesi secondo i quali fornire armi – non parlo degli apparati per intercettazione o per il disturbo delle comunicazioni, né dei visori notturni – è illegale rispetto alla risoluzione n. 1973. Pensate mai che senza un’approfondita riflessione in sede interpretativa dell’ONU si possa decidere unilateralmente? È una delle ragioni per le quali noi abbiamo spiegato che la cautela non è semplice prudenza, ma è fondata sulla mancanza di un approfondimento innanzitutto del quadro internazionale. Non vogliamo neanche immaginare che un altro Paese sostenga che l’Italia compie un’azione illegale secondo la risoluzione n. 1973”.

³²² Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri E Comunitari (III) — Difesa (IV) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica, Resoconto Stenografico Audizione 6, Seduta di Mercoledì 27 Aprile 2011. In the original version: “il mandato dell’ONU esclude espressamente solo un’ipotesi, quella dell’uso di una forza di terra sul territorio libico. Questo è e sarà escluso da parte di qualunque partner della coalizione”.

³²³ *Ibid*, at 22. In the original version: “si è e si resterà all’interno della risoluzione n. 1973, quindi no ad azioni di terra, no a obiettivi civili e certamente sì a tutto quanto occorre alla protezione della popolazione civile libica”.

a military advisory team to Bengasi but also sent protective equipment. It is not, however, clear if arms and weapons were provided, despite the persistent requests from the *de facto* authorities:

Members of the NTC have vigorously and insistently called for an even more flexible military support from Italy. This had already led to agree to supply some protective equipment and the sending to Benghazi of a team of military advisors arranged by Minister La Russa. These are measures that we have obviously notified to the UN Secretary-General in compliance with paragraph four of resolution no. 1973.³²⁴

The request for military supplies is reiterated during the same speech, shortly after:

...[the NTC] has made multiple requests for help and support precisely in relation to its operational impossibility of contrasting the action of government forces against the civilian population. I must incidentally say that, regardless of the incompatibility with resolution no. 1973, we were not asked for military employment on Libyan soil.³²⁵

It has also to be warranted that the provision of arms and weapons to the opposition forces was not a line of action endorsed by all EUMS. In responding to a parliamentary question, the Dutch Ministers of Defence and Foreign Affairs, for instance, stated that “[t]he Netherlands is not in favor of such arms deliveries”.³²⁶

In terms of recognition of the NTC, the seriousness of the political intentions of the NTC were at the base of the *de jure* recognition given by Italy, which used the term “legitimate representative of the Libyan people”.³²⁷ At a later stage, Italy further clarified that the NTC was the “only legitimate representative of its own people”, potentially suggesting that, until that moment, other entities could have been recognised *de jure*.³²⁸ This is further confirmed by a subsequent statement of the Minister of

³²⁴ *Ibid.*, at 5. In the original version: “I membri del CNT hanno invocato con forza e insistenza un sostegno anche militarmente più flessibile da parte dell’Italia. Questo aveva già indotto ad accordare la fornitura di alcuni equipaggiamenti protettivi e l’invio a Bengasi di un team di consiglieri militari disposto dal Ministro La Russa. Si tratta di misure che abbiamo ovviamente notificato al Segretario generale dell’ONU in ottemperanza al paragrafo quattro della risoluzione n. 1973”.

³²⁵ *Ibid.*, at 10. In the original version: “...ci ha fatto molteplici richieste di aiuto e sostegno proprio in relazione alla sua impossibilità operativa di contrastare l’azione delle forze governative contro la popolazione civile. Debbo dire incidentalmente che, a prescindere dall’incompatibilità con la risoluzione n. 1973, non ci è stato richiesto un impiego militare sul terreno della Libia”.

³²⁶ Tweede Kamer der Staten-Generaal, Vergaderjaar 2010–2011 Aanhangel van de Handelingen, 2625.

³²⁷ *Ibid.*, at 10. In the original version: “da noi riconosciuto come rappresentante legittimo del popolo libico”. See also Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri E Comunitari (III) — Difesa (IV) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica, Resoconto Stenografico Audizione 6, Seduta di Martedì 19 Aprile 2011, at 3.

³²⁸ Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri E Comunitari (III) — Difesa (IV) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica, Resoconto Stenografico Audizione 8, Seduta di Mercoledì 13 Luglio 2011, at 5. In the original version: “Consiglio nazionale di transizione (CNT), oggi unico legittimo rappresentante del proprio popolo”.

Foreign Affairs, in which, talking about the relationship between Italy and the NTC, underlined the privileged relationship between Italy and the NTC, with whom Italy signed a memorandum on human trafficking.³²⁹ The Italian position also seems to support the importance of the capital city for legitimacy. In this regard, the Minister of Foreign Affairs stated that “[t]here has already been the transfer of the CNT from Benghazi to Tripoli, which therefore confirms the determination to consider Tripoli as the capital city, as had always been said”.³³⁰

The legitimacy of the Government of National Accord, recognised also by Italy, seems to depart from the concepts of legitimacy and/or efficacy as it seems to be bestowed only from being recognised as such within the United Nations. Speaking in front of the Parliament, the Minister of Foreign Affairs stated that “naturally on the institutional level we consider our interlocutor the internationally recognized government of Serraj and that, consequently, this is the institutional reference point. Nevertheless, we dialogue with everyone”.³³¹ This statement must be read in light of the fact that the Minister also met with Marshal Haftar and reported to the Parliament about the perception of security in the area under his control: “when you arrive in the Benghazi area, you land and proceed towards the place where the meeting took place, you have objectively the clear perception of a situation of full territorial control and order”.³³² Nonetheless, Italy appears to be consistent in recognising the Government of National Accord as the “institutional interlocutor”.³³³ And, since the Government of National Accord is the *de jure* authority, according to the Minister of Foreign Affairs, there seems to be a duty to engage in dialogue with that authority:

³²⁹ *Ibid*, at 5. In original: “Con loro siamo in costante contatto; vi è un rapporto di collaborazione privilegiata e abbiamo firmato congiuntamente un importante memorandum per il contrasto ai traffici di esseri umani”.

³³⁰ Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri E Comunitari (III) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) del Senato della Repubblica, Resoconto Stenografico Audizione 20, Seduta di Mercoledì 7 Settembre 2011, at 4. In the original version: “Vi è stato già il trasferimento del CNT da Bengasi a Tripoli, il che conferma, quindi, la determinazione di considerare Tripoli come città capitale, come sempre era stato affermato”.

³³¹ Senato della Repubblica, XVIII Legislatura, Commissioni Riunite Affari Esteri, Emigrazione (3a) del Senato della Repubblica e Affari Esteri E Comunitari (III) della Camera dei Deputati, Resoconto Stenografico Audizione 2, Seduta di Giovedì 13 Settembre 2018, at 4. In the original version: “Naturalmente sul piano istituzionale consideriamo il nostro interlocutore il Governo internazionalmente riconosciuto di Serraj e che, di conseguenza, questo è il punto di riferimento di carattere istituzionale. Cionondimeno dialoghiamo con tutti”.

³³² *Ibid*, at 5. In the original version: “inutile dirvi che, quando si arriva nella zona di Bengasi, si atterra e si procede verso il luogo in cui vi è stato l’incontro, si ha oggettivamente la chiara percezione di una situazione di pieno controllo territoriale e di ordine.”

³³³ *Ibid*, at 12. In the original version: “interlocutore istituzionale”.

Talking to institutions recognized by the international community is a duty for a country that is part of the international community and that intends to respect, in a now consolidated tradition of our Republic, all the rules of international law, and to speak with everyone.³³⁴

That the authority of the Government of National Accord may be contested by a *de facto* government of Marshal Haftar, is subtly hinted by a statement of the Prime Minister who, without recognising such *de facto* authority, stated that:

While we continue to fully support and recognize the Government of National Agreement as the only legitimate authority - I assure you of this without any ambiguity - we consider the facts, that is, that General Haftar and Cyrenaica are interlocutors with whom to confront in order to reach a peaceful and sustainable solution..³³⁵

Italy has been concerned by the weakness of the internationally recognised Libyan Government. Furthermore, Italy also received from Libya requests for assistance, including requests for arms and weapons supplies. From the statement that follows, one could take the view that Italy has been ready to provide the Libyans with arms, but the embargo which is in place does not permit such actions. In replying to a parliamentary question, the Undersecretary of State remarks that there should be a reflection on the embargo:

Italy, at the forefront of supporting the action of the Special Representative Salamè, fully complies with the letter and substance of the Security Council decision to impose the arms embargo. This does not exclude the possibility of questioning the persisting validity of the sanctioning framework, knowing well, however, that any decision on the possible revision or removal of the same falls exclusively within the competence of the United Nations Security Council from which, until now, no sign of openness has arrived in this regard. The question that arises, therefore, is how to strengthen the Libyan institutions, operating in line with the forecasts of the Security Council and with the terms of the United Nations mandate in Libya. This in a context in which - as repeatedly complained by Libyan institutional leaders, most recently the Vice Premier Maitig - those legitimate institutions are struggling to equip themselves, precisely because of the existing restrictions, with the tools necessary for the maintenance of security and order public in the country.³³⁶

³³⁴ Camera dei Deputati, XVIII Legislatura, Commissioni Riunite Affari Esteri e Comunitari (III) — Difesa (IV) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica, Resoconto Stenografico Audizione 2, Giovedì 6 September 2018, at 22. In the original version: “Parlare con le istituzioni riconosciute dalla comunità internazionale è un dovere per un Paese che si inserisce nella comunità internazionale e che intende rispettare, in una tradizione oramai consolidata della nostra Repubblica, tutte le norme del diritto internazionale, e parlare con tutti.

³³⁵ Camera dei Deputati, XVIII Legislatura, Resoconto Stenografico 214, 24 July 2019, at 12. In the original version: “Mentre continuiamo a sostenere e riconoscere pienamente il Governo di Accordo Nazionale come unica autorità legittima - glielo assicuro senza nessuna ambiguità - consideriamo però i fatti, cioè che il generale Haftar e la Cirenaica sono interlocutori con cui confrontarsi per pervenire a una soluzione pacifica e sostenibile”.

³³⁶ Camera dei Deputati, Interrogazione a Risposta Immediata in Commissione 5/00304. In original: “L'Italia, in prima linea nel sostegno all'azione del Rappresentante Speciale Salamè, si conforma pienamente alla lettera e alla sostanza della decisione del Consiglio di Sicurezza di imporre l'embargo sulle armi. Questo non esclude che ci si

On the same line the Minister of Defence, who stated that

I listened to Prime Minister Al-Sarraj to illustrating how the country's stabilization process is still long and how, to reach a stable Libya, professional security forces unified under a single and civil command are needed, but also equipped with adequate equipment and armaments today not available due to the United Nations embargo. For our part, with the consent of Parliament, we will do our part, responding to Libyan security needs in coordination with our allies, in the traditional respect of the resolutions of the UN Security Council³³⁷

In the light of these statements, it could be argued that, without an embargo, the Italian Government would have provided the internationally recognized authorities with arms and weapons, despite the existence of a war in Libya.³³⁸

II.6.1.4 Russian Federation

The Prime Minister of the Russian Federation qualified the fight in Libya as a civil war when he clearly stated, on 23 March 2011, that “[a]t present, Libya is torn by civil unrest. Civil war has flared up there, and suggestions have been made for a flight ban to protect civilians by preventing Gaddafi’s Air Force from striking the enemy”.³³⁹ However, he also clarified that in its view outside intervention in civil war should not occur, neither to the benefit of the legitimate government nor to the opposition: “[t]he country's internal political situation has escalated into an armed struggle. But this does not mean that anyone outside the country has the right to interfere in the internal political conflict, even an armed one, by backing one side”.³⁴⁰ He restated the same concept when he rhetorically asked “[d]oes this

possa interrogare sulla perdurante validità del quadro sanzionatorio, ben sapendo, peraltro, che qualunque decisione sull'eventuale revisione o rimozione dello stesso ricade esclusivamente nella competenza del Consiglio di Sicurezza delle Nazioni Unite da cui, fino a questo momento, non è giunto alcun segnale di apertura in proposito. La questione che si pone, quindi, è come rafforzare le Istituzioni libiche, operando in linea con le previsioni del Consiglio di Sicurezza e con i termini del mandato delle Nazioni Unite in Libia. Questo in un contesto in cui – come lamentato a più riprese dai vertici istituzionali libici, da ultimo il Vice Premier Maitig – quelle stesse Istituzioni legittime faticano a dotarsi, proprio per le restrizioni esistenti, degli strumenti necessari per il mantenimento della sicurezza e dell'ordine pubblico nel Paese”.

³³⁷ Camera dei Deputati, XVIII Legislatura, 6 September 2018, above n 425. In original: “ Ho ascoltato il premier Al-Sarraj illustrarmi come il processo di stabilizzazione del Paese sia ancora lungo e come, per giungere a una Libia stabile, servano forze di sicurezza professionali unificate sotto comando unico e civile, ma dotate anche di adeguati equipaggiamenti e armamenti oggi non disponibili per via dell’embargo delle Nazioni Unite. Da parte nostra, con il consenso del Parlamento, faremo la nostra parte, dando risposta alle esigenze di sicurezza libiche in coordinamento con i nostri alleati, nel tradizionale rispetto delle risoluzioni del Consiglio di sicurezza dell’ONU.”

³³⁸ The Minister of Foreign Affairs openly stated that the situation in Libya amounts to a war. See Camera dei Deputati, XVIII Legislatura, Commissione Affari Esteri e Comunitari (III), Resoconto Stenografico Audizione 5, 3 May 2019, at 16.

³³⁹ Statement of Vladimir Putin, in Vladimir Putin and Boris Tadic attend a news conference on Russian-Serbian talks, 23 March 2011, available at <http://archive.government.ru/eng/docs/14609/>

³⁴⁰ Statement of Vladimir Putin, in Prime Minister Vladimir Putin comments on the situation in Libya during a meeting with workers at the Votkinsk plant in Udmurtia, available at <http://archive.government.ru/eng/docs/14542/>

domestic conflict require intervention from outside? After all, there are many other ugly regimes in the world. Should we meddle in all domestic clashes?”³⁴¹

As for the requirement that a country should be democratic in order for it to be recognised, Russia implicitly negates the point. Speaking about Libya, the representative of Russia said that: “[t]he first issue is defining the Libyan regime. Russian leaders have already voiced their opinions on this. As Dmitry Medvedev said, the Libyan regime is not democratic by any criteria”³⁴² In a different occasion he also implicitly reaffirmed that democracy is not a defining point for legitimacy: “Just look at the map of that part of the world, and you will see monarchies all around. Do they have democracy, Danish-style? No, they have monarchies all over the region. The system on the whole satisfies the local public mentality and political practice”³⁴³

Despite having voted UNSC Resolution 2259, which supported the Government of National Accord as the “sole legitimate government of Libya”, Russia’s position is less straightforward in relation to the recognition of the government led by Serraj.³⁴⁴ The Prime Minister of Russia stated indeed that Libya “no longer exists as a full-fledged state. It has been divided into parts. There are several leaders who have gathered here”³⁴⁵ And, as a result, Serraj is just “one of Libya’s executive leaders”. Nonetheless, an arms embargo is in place and the provision of arms to the Government of National Accord represents a violation of the terms. Russia has not reacted to reports that Russian operatives belonging to the private security company Wagner – with alleged ties to the Russian Government - are supporting and fighting on the side of Marshal Haftar.³⁴⁶

In relation to the signature of a memorandum between Turkey and the Government of National Accord, the spokesperson of the Foreign Ministry said that:

the signing gave rise to allegations of Turkey's attempts to legalise its military support for the government in Tripoli in its confrontation with the Libyan national

³⁴¹ Statement of Vladimir Putin, in Prime Minister Vladimir Putin and his Danish counterpart Lars Lokke Rasmussen address the media to summarise their talks, available at <http://archive.government.ru/eng/docs/14996/>

³⁴² Statement of Vladimir Putin, in Prime Minister Vladimir Putin comments on the situation in Libya, above n. 341.

³⁴³ Statement of Vladimir Putin, in Prime Minister Vladimir Putin and his Danish counterpart, above n 342.

³⁴⁴ UNSC Resolution 2259, 23 December 2015, S/RES/2259, at point 3

³⁴⁵ The Government of The Russian Federation, International conference on Libya, 18 November 2018, available at government.ru/en/news/34688/.

³⁴⁶ Institute for Security Studies, Russia throws more weight behind Haftar in Libya, 11 November 2019, available at <https://issafrika.org/iss-today/russia-throws-more-weight-behind-haftar-in-libya>.

army led by Khalifa Haftar, including by way of a blatant violation of the arms embargo.³⁴⁷

II.6.1.5 United States

The president of the US characterized the situation in Libya as one governed by a “period of unrest and upheaval”.³⁴⁸ In response to this crisis, marked by the absence of basic human rights that “are not negotiable [and] must be respected in every country”, the President implicitly admits that unilateral action can be taken.³⁴⁹ He indeed stated that:

I’ve also asked my administration to prepare the full range of options that we have to respond to this crisis. This includes those actions we may take and those we will coordinate with our allies and partners, or those that we’ll carry out through multilateral institutions.³⁵⁰

The use of the disjunctive “or” underlines that, according to the US, unilateral actions, with or without allies and partners, are not necessarily subject to or must follow actions taken within multilateral institutions. In a later statement, the President uses the term “aggression” to qualify the repression carried out by Qaddafi, seemingly creating a narrative alongside the wording of Article 51 of the Charter, despite the existence, at that time of the speech, of the relevant UNSC Resolution: “we took a series of swift steps in a matter of days to answer Qaddafi’s aggression”.³⁵¹ This point was restated few months afterwards when the President said that “Qaddafi threatened to hunt peaceful protestors down like rats. As his forces advanced across the country, there existed the potential for wholesale massacres of innocent civilians... In the face of this aggression...”.³⁵² Moreover, he also stated the American intervention was justified not solely on the basis of the UNSC Resolution, but also because there was a request from the opposition: “[t]he task that I assigned our forces — to protect the Libyan people from

³⁴⁷ Foreign Ministry Spokesperson Maria Zakharova’s answer to a media question about Turkey and the Government of National Accord of Libya signing memorandums, 3 December 2019, available at https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3930276/pop_up?_101_INSTANCE_cKNonkJE02Bw_vie%E2%80%A6.

³⁴⁸ Remarks by the President on Libya, 23 February 2011, available at <https://obamawhitehouse.archives.gov/photos-and-video/video/2011/02/23/president-obama-situation-libya#transcript>.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ Remarks by the President in Address to the Nation on Libya, National Defense University, Washington, D.C., 28 March 2011, available at <https://obamawhitehouse.archives.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript>.

³⁵² Statement by the President on Libya, 22 August 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/08/22/statement-president-libya>.

immediate danger, and to establish a no-fly zone — carries with it a UN mandate and international support. It's also what the Libyan opposition asked us to do".³⁵³ The same concept was repeated during the same speech: "[w]e had a unique ability to stop that violence: an international mandate for action, a broad coalition prepared to join us, the support of Arab countries, and a plea for help from the Libyan people themselves".³⁵⁴ And, according to the Secretary of State, providing arms to rebel forces would be permissible under Resolution 1973: "it is our interpretation that 1973 amended or overrode the absolute prohibition of arms to anyone in Libya so that there could be legitimate transfer of arms if a country were to choose to do that".³⁵⁵

In terms of support to the opposition forces, it is unclear whether it encompassed also arms and weapons. Certainly, the US provided non-lethal equipment, as a presidential memorandum demonstrates:

I therefore direct the drawdown of up to \$25 million in nonlethal commodities and services from the inventory and resources of any agency of the United States Government to support key U.S. Government partners such as the Transitional National Council...³⁵⁶

At the time of this memorandum, the US did not recognise *de facto* the NTC. It did, however, determine that legitimacy is linked to popular support: "Moammar Qaddafi clearly lost the confidence of his own people and the legitimacy to lead".³⁵⁷ That support of the people is a key component of legitimacy is reaffirmed in a subsequent statement where the President described "[t]he transition to a legitimate government that is responsive to the Libyan people" as difficult.³⁵⁸ And, on the same line, the President affirmed that the US is supportive to "governments that are ultimately responsive to the

³⁵³ Remarks by the President in Address to the Nation on Libya, National Defense University, Washington, D.C, 28 March 2011, above n 419.

³⁵⁴ *Ibid.*

³⁵⁵ U.S. Department of State, Diplomacy in Action, Remarks After the International Conference on the Libyan Crisis, 29 March 2011, available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/03/159327.htm>.

³⁵⁶ Presidential Memorandum—Libya, Presidential Determination No. 2011-9, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/04/26/presidential-memorandum-libya>.

³⁵⁷ Summary: President Obama updates the American people on the situation in Libya, 18 March 2011, available at <https://obamawhitehouse.archives.gov/blog/2011/03/18/president-libya-our-goal-focused-our-cause-just-and-our-coalition-strong>. See also the same wording in: Remarks of President Barack Obama Washington D.C., 26 March 2011, available at <https://obamawhitehouse.archives.gov/photos-and-video/video/2011/03/25/weekly-address-military-mission-libya#transcript>.

³⁵⁸ Remarks by the President in Address to the Nation on Libya, above at 348.

aspirations of the people”.³⁵⁹ The NTC qualified as such when it was granted a *de facto* recognition on 9 June 2011. In particular the Secretary of State affirmed that “[t]he United States views the Transitional National Council as the legitimate interlocutor for the Libyan people during this interim period”.³⁶⁰ Shortly afterwards, it was also recognised *de jure*. The President of the USC, on 15 July 2011, stated that:

the Transitional National Council established itself as a credible representative of the Libyan people. And the United States, together with our European allies and friends across the region, recognized the TNC as the legitimate governing authority in Libya.³⁶¹

It is worth noting that the US did not adopt “intermediate” recognising steps, meaning that the recognition of the NTC did not undergo the stage of *de facto* authorities before being recognised as *de jure*. A restatement of the *de jure* recognition comes from the fact that on 9 September 2011, the US “became one of the first countries around the world to fully credential a Libyan ambassador representing the new Libya”.³⁶²

Such recognition was, following the Libyan Political Agreement, accorded to the Government of National Accord, and Sarraj enjoyed full support from the US.³⁶³ That means that at the request and in coordination with the Government of National Accord, the US were ready to “to us[e] all available tools to sustain pressure against terrorist groups”.³⁶⁴ After meeting the Foreign Minister of the Government of National Accord, the US encouraged the Libyan National Army led by Marshal Haftar to halt the offensive on Tripoli, as this could “facilitate further U.S.-Libya cooperation to prevent undue foreign interference, reinforce legitimate state authority, and address the issues underlying the

³⁵⁹ *Ibid.*

³⁶⁰ U.S. Department of State Diplomacy in Action Press Availability in Abu Dhabi, United Arab Emirates, available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/06/165351.htm>.

³⁶¹ Statement by the President on Libya, 22 August 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/08/22/statement-president-libya>.

³⁶² First Ambassador of Free Libya Presents Credentials to President Obama, 9 September 2011, available at <https://obamawhitehouse.archives.gov/blog/2011/09/09/first-ambassador-free-libya-presents-credentials-president-obama>

³⁶³ Department Press Briefing - November 30, 2017 - United States Department of State, available at <https://www.state.gov/briefings/department-press-briefing-november-30-2017/>. See also, Joint Statement Welcoming the Ceasefire in Tripoli, Libya - United States Department of State, 4 September 2018, available at <https://www.state.gov/joint-statement-welcoming-the-ceasefire-in-tripoli-libya/>.

³⁶⁴ Situation in Southern Libya - United States Department of State, 14 February 2019, available at <https://www.state.gov/situation-in-southern-libya/>.

conflict”.³⁶⁵ Foreign interference that is allegedly run by Russia, whose “Russian regulars and the Wagner forces that are being deployed in significant numbers on the ground and support of the LNA” are described as “destabilizing”, but not “illegal” in a statement of the Assistant Secretary of State.³⁶⁶ This view was partially clarified shortly afterwards by the Secretary of State, who affirmed that an embargo is in place. However, the Secretary of State did not qualify as illegal the support given by Russia. In particular, he stated that:

I reminded him that there is a weapons embargo that is still in place in Libya, and that no nation ought to be providing incremental materiel inside of Libya, and that we have reached out not only to the Russians but to others who are providing weapon systems there and saying it’s not in the best interest.³⁶⁷

According to the a US statement, the legitimacy of the Government of National Accord cannot be linked to effectiveness, given that Haftar “controls some 80 percent of the territory of the country right now, although certainly a much smaller percentage of the population, but has armor and has significant forces under his control”.³⁶⁸

II.6.1.6 Other States

II.6.1.6.1 Turkey

Since the signature of the Libyan Political Agreement, Turkey has consistently recognised the Government led by Sarraj as the “sole legitimate institutions” in Libya,³⁶⁹ In its official press statements the Turkish authorities never mentions the name of Marshal Haftar. At the end of 2019 Turkey signed a memorandum with Libya on military cooperation³⁷⁰, and in this regard the Ministry of Foreign Affairs published that: “Turkey intend to support and strengthen the Government of National Accord as the

³⁶⁵ Joint Statement on U.S.-Libya Security Dialogue - United States Department of State, 14 November 2019, available at <https://www.state.gov/joint-statement-on-u-s-libya-security-dialogue/>.

³⁶⁶ Assistant Secretary for Near Eastern Affairs David Schenker - United States Department of State, 26 November 2019, available at <https://www.state.gov/assistant-secretary-for-near-eastern-affairs-david-schenker/>.

³⁶⁷ Secretary Michael R. Pompeo Remarks to the Press - United States Department of State, 11 December 2019, available at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-3/>.

³⁶⁸ Assistant Secretary for Near Eastern Affairs David Schenker, above n 451.

³⁶⁹ Press Release Regarding The First Anniversary of Signing of the Libyan Political Agreement, 17 December 2016, available at http://www.mfa.gov.tr/no_-323_-17-december-2016_-press-release-regarding-the-first-anniversary-of-signing-of-the-libyan-political-agreement.en.mfa. See also Press Release Regarding the Visit of Foreign Minister Çavuşoğlu to Libya, 30 May 2016, available at http://www.mfa.gov.tr/no_-121_-30-may-2015_-press-release-regarding-the-visit-of-foreign-minister-%C3%A7avu%C5%9Fo%C4%9Flu-to-libya.en.mfa.

³⁷⁰ The Guardian, Libyan government activates cooperation accord with Turkey, available at <https://www.theguardian.com/world/2019/dec/20/libyan-government-activates-cooperation-accord-with-turkey>.

sole legitimate representative of Libya and call upon all UN members to act in this manner”.³⁷¹ It also added that “the Arab League has remained silent and failed to decisively support international legitimacy against the months-long, foreign supported military offensive against Tripoli, capital city, by the so-called Libyan National Army”. Two points are worth mentioning: first, the statement does not qualify the foreign support as illegal and, second, it also fails to link the foreign support to the embargo.

II.6.1.6.2 Egypt

Compared to Turkey, Egypt has adopted an ambiguous stance vis-à-vis the Libyan authorities. In its official statements it does not add any qualification to the Presidency of the Council led by Sarraj.³⁷² The only reference to legitimate institutions appears in a statement on security in the country, where it is stated that there is a need to ensure the “exclusive competence of the security file only to the legitimate State institutions in Libya”.³⁷³ In contrast, it consistently denounced the violations of arms embargo, primarily pointing at Turkey.³⁷⁴ In a press release dated 12 January 2018, the Ministry of Foreign Affairs wrote that “Greek authorities' seizure of a ship loaded with explosives heading from Turkey to Misrata port in Libya, as this, if proved to be correct, constitutes a flagrant violation of the arms embargo imposed by the UN Security Council pursuant to Resolution No 2292”.³⁷⁵

³⁷¹ Statement of the Spokesperson of the Ministry of Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Extraordinary Session of the League of Arab States on Libya at the Level of Permanent Representatives, 31 December 2019, available at <http://www.mfa.gov.tr/sc-83-arap-ligi-konseyi-nin-libya-konulu-toplantisi-hk-sc.en.mfa>.

³⁷² Deputy Foreign Minister heads the Egyptian delegation to the 4th AU High-level Committee on Libya meeting, 10 September 2017, available at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/hamdilozal09.aspx>.

³⁷³ Egypt condemns targeting the headquarters of the Libyan Foreign Ministry in Tripoli, 25 December 2018, available at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/Tripoli.aspx>.

³⁷⁴ See also Press release, 24 September 2019, available at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/Eventskjhn.aspx>.

³⁷⁵ Egypt expresses deep concern over the seizure of a vessel with explosives from Turkey into Libya, 12 January 2018, available at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/lebia.aspx>. On the arms embargo see also: In the strongest terms, Egypt condemns bombing of electoral commission in Tripoli, 1 May 2018, available at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/Egypt-condemns-in-the-strongest-terms-a-bombing-incident.aspx>; Egypt calls on the United Nations to intensify engagement with the elected representatives of the Libyan people to resolve the crisis, 13 August 2019, available at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/mnbvcfdcxid.aspx>.

II.6.2 Syria

II.6.2.1 France

France confirmed its practice vis-à-vis the Libyan case also in relation to the situation in Syria. At the outset, it is worth noting that France did not explicitly recognise the unrest in Syria as a civil war even after nearly two years of fights and more than 70.000 deaths. In responding to a parliamentary question, the Minister of Foreign Affairs affirmed that “[i]l y a urgence à agir pour mettre un terme aux violences, dont le bilan plus de 70.000 morts à ce jour, et plusieurs centaines de milliers de réfugiés - ne cesse de s'alourdir. Il s'agit également d'éviter le glissement de la Syrie dans une situation de guerre civile et de chaos”.³⁷⁶ Nonetheless, and what appears to be at that stage an interference in Syrians affairs, the French sided with the rebels, in contrast to Russia and China that supported, according to the French, the regime: “on ne peut pas accepter, comme nous le demandaient la Russie et la Chine, de mettre sur le même pied un régime répressif et une rébellion qui, pour l'essentiel, se bat aujourd'hui à mains nues”.³⁷⁷ It is noteworthy that the French did not legally qualify the Russian and Chinese support, which opens the door to the argument that, for France, support to both sides may be legally tenable. This is supported by a statement issued by the Minister for Foreign Affairs, issued in 2016, when the death and the destruction were at such scale that it was untenable not to qualify it as a civil war, in which he stated that:

les Russes – ainsi que les Iraniens – ne se sont pas contentés d'offrir un soutien politique à Bachar Al-Assad: ils sont intervenus militairement. La Russie est aujourd'hui partie belligérante et soutient ce régime à bout de souffle, dans une logique de guerre totale.³⁷⁸

The use of the above-mentioned term “naked hands” (mains nues) together with a subsequent statement in which the Minister of Foreign Affairs stated that the “large majorité des personnes qui ont été conduites à prendre les armes l'ont fait pour se défendre contre le régime” seems to guide the French argument alongside a narrative of self-defence of the local population.³⁷⁹ France also depicted the fight of the opposition forces as a “just war” and supported these forces from the first stages of the conflict,

³⁷⁶ Assemblée Nationale Français, 14ème législature, Question N. 18168, government response of 26 February 2013.

³⁷⁷ Assemblée Nationale Français, 13ème législature, Question N. 3524, government response of 6 October 2011.

³⁷⁸ Assemblée Nationale Français, 14ème législature, Question N. 4472, government response of 15 December 2016.

³⁷⁹ Assemblée Nationale Français, 14ème législature, Question N. 18917, government response of 12 March 2013.

even before recognizing the legitimacy of the National Syrian Coalition.³⁸⁰ On the “just war”, the Minister of Foreign Affairs stated that:

Cette réunion dont l'objet était de remobiliser nos partenaires internationaux autour de la coalition, a permis de confirmer les soutiens politiques et matériels des Amis du peuple syrien pour conforter l'opposition dans son juste combat pour une Syrie démocratique.³⁸¹

Not only did France support the opposition from the outset, but it was also one of the first States to recognise the National Syrian Coalition as the “representative of the Syrian people”. In responding to a parliamentary question, the Minister of Foreign Affairs also affirmed that this recognition follows a practice already adopted by France in other instances. In particular, he stated that:

En conséquence, il était excellent que, par la voie la plus autorisée, celle du Président de la République, la France, dans une attitude qui a déjà été la sienne à d'autres périodes de son histoire, soit la première puissance d'Europe à reconnaître la légitimité de la Coalition nationale syrienne pour représenter le peuple syrien.³⁸²

Following this *de facto* recognition, France followed a twofold line of action: it tried to foster a wider international support to the opposition forces and, at the same time, and tried to create the conditions in order to provide them with non-lethal equipment.³⁸³ On the former point, it seems that the growing consensus around the opposition forces played a role in the slight, yet significant, change in the wording adopted by France vis-à-vis the opposition, as the recognition shifted from the one quoted above to “la Coalition nationale syrienne comme seul représentant légitime du peuple syrien”.³⁸⁴ Nonetheless, despite the wording, it is clear that the recognition is a *de facto* one, as the *de jure* government is represented by Assad, as the statement that follows shows. Speaking about the possibility to normalize the relationship with Syria in late October 2019, the Minister of Foreign Affairs stated that “[e]n l'absence d'un processus crédible et véritable, la normalisation des relations diplomatiques de la France

³⁸⁰ Assemblée Nationale Français, 13ème legislature, Question N. 3928: “nous soutenons l'opposition syrienne. J'ai encore rencontré hier le président du Conseil national syrien, M. Ghalioun, pour l'assurer de notre soutien et voir avec lui comment nous pouvons l'aider à organiser et à ouvrir le Conseil national syrien”, government response of 9 February 2012.

³⁸¹ Assemblée Nationale Français, 14ème legislature, Question N. 18168, government response of 26 February 2013.

³⁸² Assemblée Nationale Français, 14ème legislature, Question N. 284, government response of 15 November 2012.

³⁸³ Assemblée Nationale Français, 14ème legislature, Question N. 17498, government response of 12 March 2013.

³⁸⁴ Assemblée Nationale Français, 14ème legislature, Question N. 31140, government response of 23 July 2013, Question N. 21348, government response of 14 April 2013, and Question N. 33642, government response of 20 August 2013, emphasis mine.

avec la Syrie n'est pas à l'ordre du jour".³⁸⁵ On the latter point, the Minister of Foreign Affairs affirmed that: "[i]l est en effet impératif de donner à la Coalition les moyens de mener une action efficace sur le terrain, au service du peuple syrien".³⁸⁶

If, at an early stage, the assistance to the opposition forces was conducted with the aim of permitting self-defence of the population, this was not the only driving force behind France assistance. Another objective of France was to equalize the balance of power between the regime and the opposition, in order to force the government to engage in a dialogue. In this regard, the Minister of Foreign Affairs stated that "[l]a France souhaite qu'il y ait un processus politique de dialogue entre l'opposition et des éléments du régime acceptables par elle. Pour que ce processus s'engage, il faut débloquer le rapport de force sur le terrain et contraindre le régime à négocier".³⁸⁷ A further statement confirms the point: "[n]ous travaillons donc dans cette direction pour trouver une solution politique, qui, je le répète, demande un rééquilibrage sur le terrain"³⁸⁸. And, in order for the assistance to be provided, the EURM that were in place had to be partially lifted, which occurred by means of a Council decision.³⁸⁹ According to this rationale, one could, therefore, hold the view that France admits the possibility of arming opposition forces. In other words, were it not for the embargo, the provision would be lawful. This is confirmed by the following remark:

Nous serons évidemment très vigilants quant aux conditions de mise en œuvre de la levée de l'embargo, en relation avec nos amis britanniques. Nous surveillerons la destination des matériels livrés, et nous nous assurerons qu'ils sont exclusivement destinés à la coalition nationale syrienne, instance responsable et modérée.³⁹⁰

France, did not provide arms before the EU Restrictive Measures were modified, also because of the awareness of the perils surrounding the provision of arms and weapons to the opposition forces and especially the risk of diversion.³⁹¹ It is, therefore, not surprising that, on the one hand, the Minister of Foreign Affairs stated that "s'il y a livraison d'armes, elles doivent être traçables et ne pas se retourner

³⁸⁵ Assemblée Nationale Français, 15ème legislature, Question N. 18923, government response of 22 October 2019.

³⁸⁶ Assemblée Nationale Français, 14ème legislature, Question N. 18168, government response of 20 August 2013.

³⁸⁷ Assemblée Nationale Français, 14ème legislature, Question N. 644, government response of 20 March 2013.

³⁸⁸ Assemblée Nationale Français, 14ème legislature, Question N. 1034, government response of 27 June 2013.

³⁸⁹ Council Decision 2013/255/CFSP of 31 May 2013. The EU Restrictive Measures were originally imposed by means of Council Decision 2011/273/CFSP of 9 May 2011. On EU Restrictive measures see V.3.

³⁹⁰ Assemblée Nationale Français, 14ème legislature, Question N. 1034, government response of 27 June 2013.

³⁹¹ *Ibid.*

contre nous”³⁹²; and, on the other hand, that “des garanties sur les destinataires des livraisons d'armes et leur utilisation seront nécessaires de la part de la coalition nationale syrienne, des instances exécutives et de l'état-major conjoint de l'armée syrienne libre”.³⁹³ The assurance on the end-user are necessary in light of Common Position 944 regulating the arms export and to which the Minister of Foreign Affairs explicitly refers when he stated that “[t]oute décision de fournir des équipements militaires à la Coalition nationale syrienne devra être conforme, au-delà de la décision 2012/739/PESC du Conseil, à la position commune 2008/944/PESC du Conseil du 8 décembre 2008”.³⁹⁴

Moreover, France, allegedly acting in self-defence, intervened directly in the Syrian conflict against the Islamic State. According to the Minister of Foreign Affairs, “[n]otre objectif est, premièrement, de frapper le groupe terroriste Daech. Nous l'avons fait en Irak, depuis maintenant un an, nous le faisons depuis quelques semaines en Syrie, dans le cadre de la légitime défense”.³⁹⁵ However, and despite this statement, it is questionable whether such intervention was not also indirectly against the regime, as the following remark emphasizes that the regime was allied to that terrorist group:³⁹⁶ “[l]e régime est d'ailleurs l'allié objectif et le complice opérationnel des groupes terroristes. Il a libéré de nombreux jihadistes, il épargne leurs positions sur le terrain et a acheté des hydrocarbures à « l'Etat islamique en Irak et au Levant »”.³⁹⁷

³⁹² *Ibid.*

³⁹³ Assemblée Nationale Français, 14^{ème} législature, Question N. 22259, government response of 23 April 2013.

³⁹⁴ Assemblée Nationale Français, 14^{ème} législature, Question N. 31142, government response of 23 July 2013. In similar terms Question N. 38335, government response of 22 October 2013, where the Minister of Foreign Affairs said that “[l]es demandes de livraison devront être évaluées au cas par cas et de façon très rigoureuse par les Etats membres en tenant pleinement compte des législations nationales, ainsi que des critères fixés par la position commune 2008/944/PESC du conseil en date du 8 décembre 2008 définissant des règles communes encadrant le contrôle des exportations de technologies et d'équipements militaires”. See also, in similar terms Question N. 38336, government response of 10 December 2013, and Question N. 31141, government response of 23 July 2013.

³⁹⁵ Assemblée Nationale Français, 14^{ème} législature, Question N. 3171, government response of 7 October 2015.

³⁹⁶ On this see Karine Bannelier-Christakis, “Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent”, *Leiden Journal of International Law*, 2016, 29, at 754-756; Dapo Akande and Zachary Vermeer, “The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars”, *EJIL: Talk!*, 2 February 2015, available at www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars; Raphael Van Steenberghe, “The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer”, *EJIL: Talk!*, 12 February 2015, available at www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer.

³⁹⁷ Assemblée Nationale Français, 14^{ème} législature, Question N. 58122, government response of 15 July 2014.

II.6.2.2 United Kingdom

The violence that unravelled in Syria in 2011 by the Syrian Government brought the UK to question its legitimacy at an early stage of the unrest. In its statements, the UK Government consistently linked the loss of legitimacy to the violent repression, as in the following remark of the Foreign Secretary: “the violent repression in Hama will only further undermine the regime’s legitimacy”.³⁹⁸ The protracted violence triggered a joint statement by the UK, France and Germany, where the three leaders stated that “[o]ur three countries believe that President Assad, who is resorting to brutal military force against his own people and who is responsible for the situation, has lost all legitimacy and can no longer claim to lead the country”.³⁹⁹ This, despite the fact that President Assad was still in control of the country, as it is perhaps possible to infer *a contrario* from a statement of three years later where the UK stated that “Assad no longer controls his own country, having lost territory in the North, where the moderate opposition groups are fighting bravely. In the East, he is offering no resistance to ISIL. In the West, Al-Qaeda affiliates have set up. Assad’s own borders are infiltrated on all sides”.⁴⁰⁰ Therefore, at least in the case of Syria, it could be argued that, in the opinion of the UK, legitimacy can be partly detached from effective control and be linked to legitimacy, intended also as refrainment from violence against the population or, otherwise stated, as protection from violence.

In a statement given by the Prime Minister, the legality of arms provisions to the Syrian Government was not challenged in terms of legality, but solely on a policy level: “I also raised the issue of arms sales to the Syrian regime which we believe should be stopped immediately”.⁴⁰¹ Also the provision of arms by the Iranians was not questioned in terms of legality by the Foreign Secretary and

³⁹⁸ Syria: Foreign Secretary comments on situation in Hama, 5 July 2011, available at <https://www.gov.uk/government/news/syria-foreign-secretary-comments-on-situation-in-hama>. See also Foreign Secretary: Assad is fast losing the last shreds of his legitimacy, 16 August 2011, available at <https://www.gov.uk/government/news/foreign-secretary-assad-is-fast-losing-the-last-shreds-of-his-legitimacy>.

³⁹⁹ UK, Germany and France call for President Assad to stand down, 18 August 2011, available at <https://www.gov.uk/government/news/uk-germany-and-france-call-for-president-assad-to-stand-down>. See also Foreign Secretary on Syria: "Urgent for the Security Council to pass a meaningful and strong resolution", 1 February 2012, available at <https://www.gov.uk/government/news/foreign-secretary-on-syria-urgent-for-the-security-council-to-pass-a-meaningful-and-strong-resolution>.

⁴⁰⁰ UK Foreign Secretary and French Foreign Minister: Assad cannot be Syria’s future, 27 February 2015, available at <https://www.gov.uk/government/speeches/uk-foreign-secretary-and-french-foreign-minister-assad-cannot-be-syrias-future>.

⁴⁰¹ Foreign Secretary statement to Parliament on the crisis in Syria, 11 June 2012, available at <https://www.gov.uk/government/news/foreign-secretary-statement-to-parliament-on-the-crisis-in-syria>.

was presented as a fact: “[t]here is also credible information that Iran is providing considerable military support to the regime through its Revolutionary Guard Corps, including personnel, equipment, weapons, and direct financial assistance”.⁴⁰² In fact, the legality of providing weapons also to the opposition was not questioned, as it is clear from this comment: “[f]irst of all, to give more support, practical support, to the Syrian opposition; we do not give lethal support but I have no doubt that there will be other countries that will give greater lethal support to the Syrian opposition in these circumstances”.⁴⁰³ In the same circumstance, the Foreign Secretary elaborated on the UK position on the topic:

it’s never been our policy in any of the conflicts in the Middle East to send lethal assistance to any of the parties involved. I do think, however, that the Syrian opposition are receiving arms - that’s very evident from their ability to make military progress against a powerfully-equipped regime. So that is happening in any case; but that’s not our policy. We would prefer an arms embargo on everybody in Syria, and that is what we have in the European Union, we enforce that from the European Union. We would be happy to see the United Nations Security Council pass an arms embargo that would forbid not only supplies to the opposition but the continued arming of the regime, which, of course, continues from Russia. So no, we don’t approve of sending arms into Syria.⁴⁰⁴

Two points are of interest: first, that the Foreign Secretary specifies “in any conflict of the Middle-East”, possibly implying that the policy may differ in relation to where a conflict takes place. Second, that this policy was disproved by a subsequent statement of the same Foreign Secretary where he set out the legal conditions for such provision:

We have not sent arms to any side during the conflicts of the Arab Spring. No decision has been made to go down this route, and if we were to pursue this, it would be under the following conditions: in coordination with other nations, in carefully controlled circumstances, and in accordance with our obligations under national and international law.⁴⁰⁵

At the time of that speech, the conditions for sending arms were not fully met as the EU restrictive measure, which prohibited arms to Syria as whole, was still applicable.⁴⁰⁶ Thus, there was a need to

⁴⁰² Foreign Secretary Statement to Parliament on Syria, 6 March 2013, available at <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-syria>

⁴⁰³ Foreign Secretary sets out UK’s approach to Syrian crisis, 20 July 2012, available at <https://www.gov.uk/government/news/foreign-secretary-sets-out-uks-approach-to-syrian-crisis>.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Foreign Secretary statement to Parliament on Syria, 20 May 2013, available at <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-syria--2>. See also Transcript of Brussels press conference, 15 March 2013, available at <https://www.gov.uk/government/speeches/transcript-of-brussels-press-conference>

⁴⁰⁶ See note above n 390.

amend the European sanction in order for the three conditions to be met: as seen, France was open to arming the rebels, meeting, therefore, the condition for coordination. And, the recipient was already established to be certain parts of the opposition forces. Before this change in policy, the UK had only provided non-lethal equipment to the Syrian opposition and to civil society.⁴⁰⁷

The amendment to the EU restrictive measure would have allowed to actively pursue its change in policy and “to move towards more active efforts to prevent the loss of life in Syria and this means stepping up our support to the opposition”.⁴⁰⁸ Modifying the EU restrictive measures followed the rationale that the Prime Minister explained through a series of rhetorical questions:

is it right to have an arms embargo that basically still sees a sort of parity in terms of who you help between the regime and the opposition? Is that the right approach? Shouldn't we be sending a pretty clear signal, just as we've sent a signal that we recognise the opposition, shouldn't we be sending a more clear signal that there is a fundamental difference when it comes to the regime and the opposition?⁴⁰⁹

Once again, it is worth stressing the point of legality: if the UK saw the EU restrictive measures as the only legal impediment to providing arms to the rebels and did not qualify the Russian and Iranian support as unlawful, therefore, it follows that, according to the UK, in a context of civil war a State can legally side to either of the parties.

The UK intervened directly in the conflict with their air-force in two situations. First, together with France and the United States, it performed air-strikes against the Islamic State. The Prime Minister justified this intervention on the basis of collective self-defence as per Article 51 of the UN Charter and stated that:

⁴⁰⁷ Foreign Secretary to announce support for Syrian political opposition, 29 March 2012, available at <https://www.gov.uk/government/news/foreign-secretary-to-announce-support-for-syrian-political-opposition>.

⁴⁰⁸ Foreign Secretary Statement to Parliament on Syria, 6 March 2013, available at <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-syria>. See also Foreign Secretary statement on Syria, 10 August 2012, available at <https://www.gov.uk/government/news/foreign-secretary-statement-on-syria>.

⁴⁰⁹ Transcript of Brussels, above at 456. The same concept was restated: “we, I believe rightly, changed the terms of the EU arms embargo, because it was almost as if it was saying there was some sort of equivalence between Assad on the one hand and the official Syrian opposition on the other, and I don't believe there is”. In Press conference: the Prime Minister and President Vladimir Putin, 16 June 2013, available at <https://www.gov.uk/government/speeches/press-conference-the-prime-minister-and-president-vladimir-putin>.

the main basis of the global coalition's actions against ISIL in Syria is the collective self-defence of Iraq...It is also clear that ISIL's campaign against the UK and our allies has reached the level of an 'armed attack' such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL.⁴¹⁰

The second intervention, which in the words of the then Prime Minister "...was not about intervening in a civil war. And it was not about regime change", occurred in response to the alleged use of chemical weapons by the Syrian regime.⁴¹¹ The air-strike was carried out in accordance with the idea of humanitarian intervention, and the UK Government provided the legal reasoning for this specific attack:

It required three conditions to be met. First, there must be convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief. Second, it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved. And third, the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim.⁴¹²

The compelling point of this argument is that it is potentially applicable to the provision of arms to rebel forces. As seen in the Italian practice on Libya, there could be an emerging narrative according to which third States should facilitate, in extreme cases, local self-defence. It is, hence, not to exclude that States will further develop this argument in order to justify the provision of arms, in what can be termed as humanitarian self-defence.

In terms of recognition, the UK followed the same course of action of France. It initially recognised the Syrian National Council (SNC) as "a legitimate representative of the Syrian people".⁴¹³ The fact that the SNC was not in control of any territory, the existence of other representatives of the opposition, and the "need to see that they have genuine support within Syria" were blocking points for

⁴¹⁰ PM statement responding to FAC report on military operations in Syria, 26 November 2015, available at <https://www.gov.uk/government/speeches/pm-statement-responding-to-fac-report-on-military-operations-in-syria>.

⁴¹¹ PM statement on Syria: 16 April 2018, 16 April 2018, available at <https://www.gov.uk/government/speeches/pm-statement-on-syria-16-april-2018>.

⁴¹² *Ibid.*

⁴¹³ Foreign Secretary: "we have to intensify the pressure" on Syria, 24 February 2012, available at <https://www.gov.uk/government/news/foreign-secretary-we-have-to-intensify-the-pressure-on-syria--2>.

a genuine *de facto* recognition.⁴¹⁴ Such recognition came in the same form as France did, by replacing the article “a” with the word “sole”.⁴¹⁵ The *de facto* recognition led to the upgrade of the status of the representative office in London to a “Mission”.⁴¹⁶

II.6.2.3 Italy

The position of Italy in relation to the legitimacy of Assad follows the same lines of its European partners. At the beginning of the Syrian unrest, the Italian Government said that “[i]n pointing weapons towards its people, the Syrian leadership has questioned its legitimacy”, seemingly linking legitimacy to absence of governmental violence and/or to a failure to protect the population.⁴¹⁷ The protracted violence brought the Italian Government to state that “Assad has lost all legitimacy and credibility; in fact, his relationship with the population appears irremediably compromised”.⁴¹⁸ As it is apparent, no reference is made to territory or the loss thereof, and stress is given to the violence perpetrated by the government towards its own population.

It is worth noting that, even though Italy followed its European partners in the *de facto* recognition of the opposition – “[a]s you know, the Italian government has recognized the Syrian National Coalition as the only legitimate representative of the Syrian people” – it also predicated to endorse a neutral position vis-à-vis the conflict.⁴¹⁹ In reporting to the Parliament, the Minister of Foreign Affairs affirmed that:

We have supported the position of neutrality and dissociation from the regional crises that the Lebanese president has supported, but we are aware of how the latest

⁴¹⁴ International meeting on support to the Syrian Opposition, 16 November 2012, available at <https://www.gov.uk/government/news/international-meeting-on-support-to-the-syrian-opposition>.

⁴¹⁵ Foreign Secretary updates Parliament on Syria, 10 January 2013, available at <https://www.gov.uk/government/speeches/foreign-secretary-updates-parliament-on-syria>.

⁴¹⁶ Foreign Secretary comments on Syria and Ukraine, 15 May 2014, available at <https://www.gov.uk/government/news/foreign-secretary-comments-on-syria-and-ukraine>.

⁴¹⁷ Camera dei Deputati, XVI Legislatura, Resoconto stenografico dell'Assemblea Seduta n. 511 di martedì 2 agosto 2011, at 4. In original: “Nel puntare le armi verso il suo popolo la leadership siriana ha posto in dubbio la propria legittimità”.

⁴¹⁸ Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri E Comunitari (III) - Affari Esteri, Emigrazione (3a) del Senato della Repubblica, Resoconto Stenografico Audizione 22, Seduta di Mercoledì 30 Novembre 2011, at 6. In original: “Assad ha perso ogni legittimità e credibilità; difatti, il suo rapporto con la popolazione appare irrimediabilmente compromesso”.

⁴¹⁹ Senato della Repubblica, XVI Legislatura, Commissioni Riunite Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica e Affari Esteri E Comunitari (III) — Difesa (IV) della Camera dei Deputati, Resoconto Stenografico, Audizione 13, 16 January 2013, at 15. In original: “il Governo italiano, come sapete, ha riconosciuto la Coalizione nazionale siriana quale unico rappresentante legittimo del popolo siriano”.

developments in the Syrian conflict have profoundly changed the situation and make it increasingly difficult to maintain this policy.⁴²⁰

This position may be hard to reconcile with the *de facto* recognition, especially if one deems recognition as an interfering act.⁴²¹ Furthermore, it is even harder to reconcile with the fact that Italy provided non-lethal assistance to the opposition.⁴²² By the same token, it must be also stated that Italy opposed the provision of arms to the opposition and disagreed with France and the United Kingdom on the point: “we have opposed arming the rebels, even breaking the European front. When you have to do it, you do it. The British and French, not only at the moment, are not providing arms”.⁴²³ This position persisted also after the modification of the EU restrictive measures, which, in principle, removed the legal obstacle and it seems to be linked to a policy approach rather than a position taken on the basis of international law.⁴²⁴

The sort of neutrality mentioned above resumed when Italy limited the use of the American bases on Italian soil to activities not directly linked with the airstrikes that were going to be performed in response to the use of chemical weapons. More specially, the Italian Government stated that: “we have explicitly conditioned our availability for logistical support...to the fact that no direct actions to hit the Syrian territory started from our territory”.⁴²⁵

⁴²⁰ Camera dei Deputati, XVI Legislatura, Commissioni Riunite Affari Esteri e Comunitari (III) — Difesa (IV) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) — Difesa (4a) del Senato della Repubblica, Resoconto Stenografico, Audizione 1, 12 June 2013. In original: “Noi abbiamo appoggiato la posizione di neutralità e di dissociazione dalle crisi regionali che ha sostenuto il presidente libanese, ma siamo coscienti di come gli ultimi sviluppi del conflitto siriano abbiano modificato in profondità la situazione e rendano sempre più arduo mantenere questa politica”.

⁴²¹ See above at II.5.

⁴²² See Senato della Repubblica, XVII Legislatura, Commissioni Riunite Affari Esteri, Emigrazione (3a) del Senato della Repubblica e Affari Esteri E Comunitari (III) della Camera dei Deputati, Resoconto Stenografico, Audizione 3, 27 August 2013, at 9.

⁴²³ Camera dei Deputati, XVII Legislatura, Commissioni Riunite Affari Esteri e Comunitari (III) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) del Senato della Repubblica, Resoconto Stenografico, Audizione 2, 31 July 2013, at 21. In original: “noi ci siamo opposti ad armare i ribelli, anche rompendo un fronte europeo in qualche modo. Quando si deve fare, lo si fa. Gli inglesi e i francesi, non solo in questo momento, non stanno dando armi”.

⁴²⁴ Camera dei Deputati, XVII Legislatura, Risposta scritta pubblicata Mercoledì 5 giugno 2013 nell'allegato al bollettino in Commissione III (Affari esteri) 5-00252.

⁴²⁵ Camera dei Deputati, Resoconto Stenografico 6, 17 Tuesday 2018, at 2. In original: “Abbiamo, anzi, esplicitamente condizionato la nostra disponibilità ad attività di supporto logistico...al fatto che dal nostro territorio non partissero azioni dirette a colpire il territorio siriano.

II.6.2.4 Russian Federation

In a number of statements, the Russian Federation refers to its neutrality in the conflict, which it describes as a civil war.⁴²⁶ However, the fact that “[o]ur stance on Syria is well known: Russia does not support anyone in this conflict, neither President Assad (contrary to popular belief) nor the rebel”, should be construed, as other remarks show, as a lack of Russian support to the President as a person, rather than the institution.⁴²⁷ Responding to questions from a French newspaper, the Prime Minister made a complex point in which he described in legal terms the position of Russia:

Nevertheless, let me remind you that in keeping with the principles of international law, which the United Nations approved in 1970, not a single country, not a single state, not a single government should undertake any action directed at the forcible replacement of an acting government in any other country. This is a principle of international law. Therefore, when any state sides with a force that is not formally in power, this decision, at a minimum, is directed at tipping the balance of power in another country...In spite of existing perceptions, Russia supports neither the Assad regime, nor the opposition. We are neutral. As is only natural, we had and still have ties with the existing leadership. But, in fact, that’s not the point. The point is how correct it is at some moment in time to decide in favour of supporting another political force, if this political force is in direct opposition to the existing and officially recognised government of another country. From the point of view of international law, this seems to me absolutely unacceptable. What will be the fate of the Assad regime and Mr Assad’s personal fate? It’s up to the Syrian people to decide. Let this be decided, among others, by the opposition forces as well. It’s advisable that they should come to power via a legal procedure, not as a result of being supplied with arms by some other country. Therefore, the desire to influence another country’s government by recognising some political force as the sole bearer of its sovereignty doesn’t seem to me entirely civilised.⁴²⁸

According to this statement and, in spite of the claimed neutrality, Russia sees the support to the legitimate government as legal, while material support for opposition forces as intervention. The statement seems also to tie legitimacy with the process through which power is acquired and could be read as implying the need for a democratic process. The legitimacy of a government, according to another statement, is not necessarily linked to effective control of the entire territory, as Russia states that “the territory in Syria is controlled by several groups and not fully controlled by the ruling regime”.⁴²⁹

⁴²⁶ Dmitry Medvedev’s interview with the Brazilian newspaper O Globo, 22 February 2013, available at www.government.ru/en/news/487.

⁴²⁷ Prime Minister Dmitry Medvedev's interview with the Finnish newspaper Helsingin Sanomat and the Finnish public-broadcasting company Yleisradio, 13 November 2012, available at www.government.ru/en/news/6114.

⁴²⁸ Prime Minister Dmitry Medvedev gives an interview to France Presse and Le Figaro, 26 November 2012, available at www.government.ru/en/news/5919/.

⁴²⁹ Dmitry Medvedev's interview with CNN, 24 January 2014, available at www.government.ru/en/news/9868/.

Since the support to the legitimate government during civil war is legal for Russia, there is nothing illegal in providing it with weapons. This point was made several times by the President, the Prime Minister, and the Minister of Foreign Affairs. It has been reported that the Foreign Secretary of the UK “raised reports that Russia was selling arms to the Syrian regime. Mr Lavrov said that such sales were not illegal”.⁴³⁰ In another occasion the President said:

Russia supplies arms to the legitimate government of Syria in full compliance with the norms of international law. We are not breaching anything. Let me emphasise that we are not breaching any rules and norms, and we call on all our partners to act in same fashion.⁴³¹

These two statements reinforce the idea that the provision of arms to the legitimate government is lawful even if it occurs after the beginning of the conflict. A different conclusion may be reached if the following remark is read alone and not in connection with the others, as the reference to contracts could suggest that Russia is only performing its obligations under the terms of agreements signed before the start of the war:

We have never supplied anything to the current government that doesn't conform to international conventions. What we have supplied are weapons intended for defence against an outside aggression. Second, we have contracts that must be honoured...We would cease any supplies only in the event of international sanctions.⁴³²

In contrast, arms to the opposition do not stand the legality test: “we categorically object to any party providing arms either for the opposition or for anybody else. This has to stop”.⁴³³ Although at first sight the remark may appear ambiguous, as it refers to “opposition or for anybody else”, it must be, again, read in conjunction with the previous statements where the legality of supplying arms to the government is unmistakably affirmed.

⁴³⁰ Foreign Secretary discusses Syria with Russian Foreign Minister Lavrov, 8 February 2012, available at <https://www.gov.uk/government/news/foreign-secretary-discusses-syria-with-russian-foreign-minister-lavrov>.

⁴³¹ Press conference: the Prime Minister and President Vladimir Putin, 16 June 2013, available at <https://www.gov.uk/government/speeches/press-conference-the-prime-minister-and-president-vladimir-putin>.

⁴³² Prime Minister Dmitry Medvedev gives an interview to France Presse, above n. 469.

⁴³³ Dmitry Medvedev's interview with the German newspaper Handelsblatt, 28 January 2013, available at www.government.ru/en/news/163/.

Not only has Russia provided arms to the legitimate government but it has also intervened directly in the civil war, acting upon request of the government. In a reply to a journalist, the Prime Minister, explaining the operations that Russia has been undertaking against terrorist groups, explained that “[o]ur country obtained such a mandate in the form of a corresponding request by Syria’s President al-Assad... We received a request for help from legitimate Syrian authorities.”⁴³⁴ In a further statement, the Prime Minister justifies also Iran’s presence on the basis of the consent of the legitimate government:

The Russian Aerospace Defense Forces are in Syria at the request of the legal authorities of the country. Our goal is to help the Syrian people rid their country of ISIS [Islamic State] militants, not create a new war there. Iran, with which we are coordinating, is also helping Syria at the request of its government.⁴³⁵

Such consent has not been given to the coalition led by the US and that made Russia question the legality of that intervention:

The US-led coalition against the Islamic State provides support for the Iraqi armed forces in their fight against the Islamists. We understand that this is done with the approval and at the request of the Iraqi government. However, this coalition ... extended its activities to Syria without the consent of its government. This arouses serious doubts about the legitimacy of such action.⁴³⁶

II.6.2.5 United States

The position of the United States aligns with those of its main allies, namely the United Kingdom and France. The *de facto* recognition of the opposition came in the exact same terms, as the Secretary of State said: “our close partnership with the Syrian Opposition Coalition, the legitimate representative, we believe, of the Syrian people”.⁴³⁷ And, initially, the assistance to the opposition forces was limited to non-lethal equipment.⁴³⁸

⁴³⁴ Dmitry Medvedev’s interview with Vesti v Subbotu (News on Saturday) programme by the Rossiya television network, 17 October 2015, available at www.government.ru/en/news/20131. See also Dmitry Medvedev’s interview for Handelsblatt, Germany, 11 February 2016, available at www.government.ru/en/news/21765/; Dmitry Medvedev’s interview with Euronews TV channel, 14 February 2016, available at government.ru/en/news/21789/.

⁴³⁵ Interview of Russian Prime Minister Dmitry Medvedev to Sputnik News Agency, 12 February 2016, available at www.government.ru/en/news/21767/.

⁴³⁶ Prime Minister Dmitry Medvedev’s interview with Egyptian daily Al-Ahram, 6 August 2015, available at www.government.ru/en/news/19157/.

⁴³⁷ U.S. Department of State, Remarks With Turkish Foreign Minister Ahmet Davutoglu and Syrian Opposition Coalition President Moaz al-Khatib, 21 April 2013, available at <https://2009-2017.state.gov/secretary/remarks/2013/04/207811.htm>.

⁴³⁸ *Ibid.*

Consistently with a narrative that saw the opposition forces as the means that, on the ground, should defeat the Islamic State, the US decided to train and equip them.⁴³⁹ Furthermore, the Secretary of State explained that

In Syria, we have increased the shipment of supplies and ammunition to moderate opposition forces fighting Daesh. And the President has authorized the deployment of a small number of U.S. Special Forces in an advisory role to help them in this fight.⁴⁴⁰

Despite the lack of any legal references, the statement suggests that providing arms to actors who are engaged in “fight against terrorism” may be an admissible course of action. However, this statement appear to contrast with a subsequent statement, where the US Department of State remarked that “we have a global imperative here to deal with a terrorist entity, but also to end the civil war and to bring legitimacy back to the governance of Syria”.⁴⁴¹

II.6.3 Yemen⁴⁴²

II.6.3.1 France

France recognizes the existence of a full-fledged civil war in Yemen, caused by the Houthi rebels. In reply to a Parliamentary question, the Secretary of State to the Ministry of Defence stated that “la guerre civile éclate et voit la rébellion houthie, qui représentait 15 % de la population, démarrer une lutte contre le pouvoir central”.⁴⁴³ The Houthi rebels were not recognised in any way by France, who always backed the legitimate authorities. Following a meeting with the Minister of Foreign Affairs of Yemen, the French Minister of Foreign Affairs updated the Parliament in the following terms: “[l]e ministre des affaires étrangères...a réitéré l'appui de la France aux efforts des autorités yéménites légitimes et son soutien constant à la stabilité et à l'unité du pays”.⁴⁴⁴ France also backs the coalition led by Saudi Arabia that intervened in support and on demand of the legitimate authorities:

la France soutient l'action de la coalition dont l'objectif est de faire appliquer la résolution 2216 des Nations unies et de restaurer l'autorité légitime du pays. Cette

⁴³⁹ U.S. Department of State, Remarks at Syria Ministerial, 24 September 2014, available at <https://2009-2017.state.gov/secretary/remarks/2014/09/232086.htm>.

⁴⁴⁰ U.S. Department of State, Remarks on the U.S. Strategy in Syria, 12 November 2015, available at <https://2009-2017.state.gov/secretary/remarks/2015/11/249454.htm>.

⁴⁴¹ U.S. Department of State, Remarks at the United Nations Security Council Meeting on Syria, 18 December 2015, available at <https://2009-2017.state.gov/secretary/remarks/2015/12/250800.htm>.

⁴⁴² See also at IV.5, where the provision of arms to Saudi Arabia is analysed.

⁴⁴³ Assemblée Nationale Français, 15ème legislature, Question N. 1908, government response of 8 May 2019.

⁴⁴⁴ Assemblée Nationale Français, 14ème legislature, Question N. 86502, government response of 8 September 2015.

action s'inscrit dans le cadre du droit international puisqu'elle répond à une demande du président légitime du Yémen, M. Hadi.⁴⁴⁵

It is manifest from this statement that France admits the possibility of military intervention upon request in instances of civil war.⁴⁴⁶ In addition, France supports Saudi Arabia to act in legitimate defence against the strikes of the Houthis.⁴⁴⁷

Speaking about the need to respect IHL, the Minister of Foreign Affairs stated that all the parties to the conflict are bound by it and declared that: “[c]es principes ne sont pas optionnels, mais s'imposent à tous : à la coalition arabe, à l'Arabie saoudite, mais aussi aux Houthis, et donc à l'Iran, qui les aide par des livraisons d'armements”.⁴⁴⁸ The fact that the Minister did not qualify the support of Iran to the Houthis as unlawful, may open the door to the argument that support to both sides of the conflict may be lawful.

II.6.3.2 United Kingdom

The position of the UK vis-à-vis the government of President Hadi reflects that of France. The fact that the government was ousted by the capital city did not change the *de jure* recognition granted to the government of Yemen.⁴⁴⁹ Nor it hampered the request from the legitimate Government for assistance, which was met by the Saudi-led coalition. The following remark synthesizes the concept just expressed: “[t]he ongoing Coalition intervention in Yemen came at the request of the legitimate Government of Yemen after Houthi rebels took the Yemeni capital by force in 2014”.⁴⁵⁰ This statement also confirms that intervention upon request from legitimate governments during civil may seem legal for the UK.

⁴⁴⁵ Assemblée Nationale Français, 14ème legislature, Question N. 81151, government response of 1 December 2015.

⁴⁴⁶ See also Assemblée Nationale Français, 14ème legislature, Question N. 91698, government response of 9 February 2016 and Question N. 93867, government response of 13 September 2016.

⁴⁴⁷ Assemblée Nationale Français, 15ème legislature, Question N. 13792, government response of 25 June 2019.

⁴⁴⁸ Assemblée Nationale Français, 15ème legislature, Question N. 838, government response of 19 April 2018.

⁴⁴⁹ See Political solution “the best way” for peace in Yemen says UK Special Envoy, 22 September 2015, available at <https://www.gov.uk/government/news/political-solution-the-best-way-for-peace-in-yemen-says-uk-special-envoy>; Foreign Secretary statement on Yemen peace talks, 22 April 2016, available at <https://www.gov.uk/government/news/foreign-secretary-statement-on-yemen-peace-talks>; Yemen Foreign Minister visits London, 21 July 2015, available at <https://www.gov.uk/government/news/yemen-foreign-minister-visits-london>.

⁴⁵⁰ Foreign Secretary statement on military action in Hodeidah, 13 June 2018, available at <https://www.gov.uk/government/news/foreign-secretary-statement-on-military-action-in-hodeidah>.

The UK response to the allegations that Iran had provided arms and weapons to the Houthis provides an insight to the possibility that outside assistance to rebels may also be seen as legally viable by the UK. Speaking in front of the UNSC, the UK Ambassador stated that:

The United Kingdom is deeply concerned that Iran has failed to take the necessary measures to prevent the direct or indirect supply, sale or transfer of short-range ballistic missiles, missile propellant and unmanned aerial vehicles to the then Houthi-Saleh alliance, as reported by the Panel of Experts. We agree with the Panel's assessment that in light of this, Iran is in non-compliance with paragraph 14 of Resolution 2216. Iran - and other states who violate the Security Council Resolutions - must be held accountable for this. This Council needs to stand firm in the face of state non-compliance and send a clear message that it will not be tolerated. This is what the UN Charter demands from us: to respect the obligations arising from treaties and other sources of international law.⁴⁵¹

The declaration is particularly relevant, as the Ambassador refers only to the arms embargo as a reference point for assessing the conduct of Iran.⁴⁵²

II.6.3.3 Italy

Italy is aligned to its European partners in assessing the situation in Yemen. The Italian government deems the war in Yemen as a civil war, which follows a *coup d'état* carried out by paramilitary militias of the Houthis.⁴⁵³ Not only does it recognize the government led by Hadi, but also does not seem to oppose or reject the legality of the intervention upon request of the Saudi-Led coalition.⁴⁵⁴ However, the violations of IHL sparked a debate on the legality of arms supplies to the Saudi led Coalition, as it will be shown in Chapter IV.⁴⁵⁵

⁴⁵¹ Call for Security Council members to vote in favour of resolution on Yemen, 26 February 2018, <https://www.gov.uk/government/speeches/call-for-security-council-members-to-vote-in-favour-of-resolution-on-yemen>.

⁴⁵² See also Call for a Political Settlement to Address the Humanitarian Crisis and Security Threats in Yemen, 27 February 2018, available at <https://www.gov.uk/government/speeches/call-for-a-political-settlement-to-address-the-humanitarian-crisis-and-security-threats-in-yemen>; Yemen needs inclusive peace talks, UK says as conflict enters its fourth year, 26 March 2018, available at <https://www.gov.uk/government/news/yemen-needs-inclusive-peace-talks-uk-says-as-conflict-enters-its-fourth-year>.

⁴⁵³ Camera dei Deputati, Resoconto Stenografico Seduta N. 835, 17 July 2017.

⁴⁵⁴ Camera dei Deputati, XVII Legislatura, Commissioni Riunite Affari Esteri e Comunitari (III) della Camera dei Deputati e Affari Esteri, Emigrazione (3a) del Senato della Repubblica, Resoconto Stenografico, Audizione 14, 1 April 2015, at 5.

⁴⁵⁵ See IV.5.8.

II.6.3.4 United States

The US, similarly, to the previous three positions analysed, also backs the “elected government of Yemen” represented by President Hadi.⁴⁵⁶ The US also provides logistical and intelligence support to the Saudi-led coalition that received a request for intervention by the legitimate government of Yemen.⁴⁵⁷ As for the support given by Iran to the Houthis, the White House issued a statement according to which:

The United States calls on all nations to hold the Iranian regime accountable for its repeated violations of UN Security Council Resolutions 2216 and 2231, which ban arms transfers to the Houthis and prohibit Iran from exporting all arms and related materiel and specifically ballistic missile-related items.

As in the case of the United Kingdom, the position adopted by the United States links the illegality of Iranian supplies only to the UN arms embargo and not to the illegality of support for the opposition forces.

II.7 Conclusion

General international law does not provide any rules specifically designed to the arms trade. The absence of such rules does not imply that certain obligations can be, nonetheless, derived from the general principles. Sovereignty, self-determination, non-intervention, and those relating to recognition are all inter-related. Sovereignty guarantees in principle to all States on equal terms the right to supply weapons and to receive them as a result of discretionary and sovereign choices. Nonetheless, sovereignty has gone through a process of limitation, driven by the emergence of common values of the international community. These have found expression through the formation of both binding regulations and through the affirmation of human rights and humanitarian law.⁴⁵⁸ Besides that, the accumulation of arms may be regarded as a threat to international peace and security by the UNSC. General international law tends to preclude the transfer of weapons to insurgents and qualifies that as an intervention in the internal affairs of others. In contrast, the transfer of weapons to governments is

⁴⁵⁶ Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen, 25 March 2015, available at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ On binding regulations in the field of arms transfers see III.3.2.

generally seen as lawful, even if problems regarding the doctrine of intervention in high-intensity conflicts can arise as the French position on Syria seems to support. In these instances, it is held that the incumbent government cannot be believed to speak for the state. This lack of perceived authority leads to the requirement that third countries refrain from supporting not only the opposition, but also the incumbent government itself. As a result, should a third State provide assistance to the incumbent government, other States may counter-intervene so as to restore the balance between the actors. In addition, one should also reflect about the possibility of resorting to the theory of countermeasures, in order to justify the provision of arms to opposition forces. Since non-intervention does not qualify as a *jus cogens*, applying countermeasures would enable a third State, not directly injured, to supply arms to opposition forces in the context of a war where *erga omnes* obligations have been breached by the legitimate authorities.

The idea that governments can legally receive arms is subject to a careful assumption. Governments must be *de jure* governments. In this respect the traditional criterion of effectiveness appears to be increasingly coupled by a criterion linked to legitimacy. The case studies, and in particular Libya and Syria, show that the EU Member States have linked the violence applied by the legitimate government to its own population as a sign of the lack of legitimacy. Furthermore, the Anglo-Saxon position seems to link the loss of legitimacy, apart from violence, also with disrespect for human rights. In parallel, while the legitimacy of the government was fading, the legitimacy of some opposition forces was raising. This has brought the EU Member States, in both Libya – in the first stages of the conflicts - and Syria, to grant the insurgents a type of intermediate and temporary recognition as legitimate representatives of the people. Such *de facto* recognition does not extend to a full *de jure* recognition and, hence, does not imply that EU Member States considered these legitimate representatives as new government authorities, yet it seems to have at least facilitated the decision to supply arms. Moreover, the violence applied by the legitimate government seems to justify a narrative of popular self-defence, to which it is legitimate to assist by providing arms, at least for France and, partially, to Italy.

The case studies also showed other elements. First, whereas an embargo is in place, States seem to care, at least in their statements, about full compliance. Thus, the provision of military boats to Libya by Italy and France was consistent with the exceptions under the relevant resolution. And, furthermore,

States have openly denounced States that breached the terms. Second, that providing non-lethal assistance follows different legal parameters in comparison to arms and weapons, despite the uncertainty on whether non-lethal assistance may encompass non-lethal weapons. Third, that actors do not act in consistent manners. The Russian case is, in this respect, exemplificatory: whereas in Syria it supports the legitimate government and claims the legality of this support, in Libya, although not openly, it supports the field forces of Marshal Haftar. Four, and this is an aspect that the next chapter will analyse, States do not refer to their treaty obligations or to their regional legal framework applicable to arms transfers when they decide to provide arms.

CHAPTER III – Treaty Law

III.1 Introduction

The previous chapter has focused on the principles that are embedded in general international law. As the chapter has shown, the norms that derive from general international law are not specifically arms-oriented and their application to the arms trade is the result of an interpretative exercise. In contrast, treaty law, which is analysed in this chapter, is by its nature specific. In the field of conventional arms, treaties can be classified according to their objective. On the one hand, there are conventions that are intended to control the number of existing arms and to promote disarmament.¹ On the other hand, there are treaties whose purpose is to regulate the transfer of weapons.² Within the former category, the existing treaties prohibit, amongst others, the production and/or the use of certain arms and weapons, or set thresholds for conventional weapons to be deployed in a certain area.³ The aim of the latter category is different, as the scope of the instruments is to regulate rather than to prohibit. In other words, the treaties set certain conditions for a weapon-transfer to be legal. As soon as the conditions are met and the prohibitions respected, the transfers have met the requirements for legality set forth by the treaties. However, complying with the treaties does not exhaust the overall legality test. This test must also consider the principles examined in the previous chapter and the regional and domestic laws that the next chapter analyses.

The chapter begins with the examination of three historical instruments that were concluded between 1890 and 1925. Not only is their importance linked to the introduction of a licensing regime

¹ The distinction between arms control and disarmament is not totally clear. However, a criterium based on a temporal scope can clarify whether an instrument is meant for arm control or disarmament. Typically, disarmament treaties are for indefinite duration, while arms control ones can be concluded for a specific time frame. See Gabriella Venturini “Control and Verification of Multilateral Treaties on Disarmament and Non-Proliferation of Weapons of Mass Destruction”, *UC Davis Journal of International Law & Politics*, Vol. 17, 2010, at 345-383.

² Anthony E Cassimatis, Catherine Drummond, Kate Greenwood, “Traffic in Arms”, in Max Planck Encyclopedia of Public International Law, Oxford University Press, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e98>

³ See for instance: Treaty on the Non-Proliferation of Nuclear Weapons; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions; Treaty on Conventional Armed Forces in Europe.

for arms export, but also two out of the three treaties were concluded with the specific intention to regulate arms transfers. The chapter then examines the contemporary conventional legal regime. On the one hand, the firearm protocol, a protocol annexed to a convention devoted to transnational organized crime. On the other hand, the arms trade treaty, the universal treaty currently in force specifically concluded with the aim of regulating the trade in conventional weapons. The chapter also accounts for the disarmament treaties that nonetheless contain a reference to the transfer issue.

III.2 Historical Precedents

This first section provides an overview of the historical treaties that were concluded and, in one case also ratified, with the aim of limiting the transfer of arms, weapons, and ammunition. Despite their varying degree of success, these examples show that already at the end of the XIX and at the beginning of the XX century States felt the urgency to regulate the arms trade. For each of these historical experiences, the chapter selects and analyses the most relevant provisions.

III.2.1. The Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors (General Act of Brussels of 1890)⁴

Signed on 2 July 1890 and entered into force on 31 August 1891, the General Act of Brussels was the result of the Conference of Brussels hosted by King Leopold as part of his claim to the Congo.⁵ As maintained by Fischer, the General Act of Brussels was the most extensive treaty against the slave-trade and bound most of the signatories until 1919.⁶ The hundred articles of the treaty include a variety of measures, amongst which the limitation on the export of arms and ammunition to Africa, that combined should have contributed to suppressing the slave-trade, as Article I hints.

⁴ Text of the convention taken from Charles I. Bevans, *Treaties and Other International Agreements of the United States of America, 1776-1949*, Volume I, available at <https://www.loc.gov/law/help/us-treaties/bevans/must000001-0134.pdf> The General Act was signed by Austria-Hungary, Belgium, the Congo, Denmark, France, Germany, Italy, The Netherlands, Persia, Portugal, Russia, Spain, Sweden and Norway, Turkey, Great Britain, the United States and Zanzibar and ratified by all signatories.

⁵ Rhoda E. Howard-Hassmann, *Reparations to Africa*, University of Pennsylvania Press, 2008, at 65.

⁶ H. Fischer, "The Suppression of Slavery in International Law. I", *The International Law Quarterly*, Vol. 3, No. 1, 1950, at 49.

III.2.1.1 Article I⁷

The first article follows a very short preamble in which the parties announced the aim of bringing to the African continent “the benefits of peace and civilization”. As observed by Stone, the convention was drafted with the intention of ensuring stability in the European possession and ending the slave trade in Africa.⁸ The issue of arms trafficking was not a direct concern of the parties, but one of the means to achieve greater security in Africa. A confirmation thereof comes from the position of the provision related to arms in this first article. Numbers 1 to 6 deals with a variety of different issues that span from the construction of infrastructures to telegraphic lines, from the establishment of administrative services to the organization of expeditions.

Only the last point, number 7, deals with arms and specifically with firearms. It seems, therefore, that the drafters adopted a single category of weapons, excluding those firearms which were not of modern design. In addition to firearms, the provision indicates ammunitions, thus bringing the overall categories of restricted goods to two. These are further detailed in Article VIII, where the geographical scope of the restriction is also elaborated. In this respect, Article I solely hints to the fact that the entire territory where the slave trade takes place shall be covered by the restriction. In terms of prohibited conducts, the Article, as well as Article VIII, considers just the import while other conducts, such as sale and transportation are dealt with by Articles IX and X.

⁷ Article I read as following: “The powers declare that the most effective means of counteracting the slave-trade in the interior of Africa are the following: 1. Progressive organization of the administrative, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilized nations. 2. The gradual establishment in the interior, by the powers to which the territories are subject, of strongly occupied stations, in such a way as to make their protective or repressive action effectively felt in the territories devastated by slave hunting. 3. The construction of roads, and in particular of railways, connecting the advanced stations with the coast, and permitting easy access to the inland waters, and to such of the upper courses of the rivers and streams as are broken by rapids and cataracts, with a view to substituting economical and rapid means of transportation for the present system of carriage by men. 4. Establishment of steam-boats on the inland navigable waters and on the lakes, supported by fortified posts established on the banks. 5. Establishment of telegraphic lines, insuring the communication of the posts and stations with the coast and with the administrative centres. 6. Organization of expeditions and flying columns, to keep up the communication of the stations with each other and with the coast, to support repressive action, and to insure the security of high roads. 7. Restriction of the importation of firearms, at least of those of modern pattern, and of ammunition throughout the entire extent of the territory in which the slave-trade is carried on.”

⁸ David R. Stone, “Imperialism and Sovereignty: The League of Nations’ Drive to Control the Global Arms Trade”, *Journal of Contemporary History*, Vol 35(2), at 215.

III.2.1.2 Article VIII⁹

Article VIII is the first of seven articles that are devoted to regulating the import of firearms to Africa. The beginning of the article resembles a preamble in that the parties advance their concerns on the destructive capabilities of firearms in relation to both the slave-trade and internal wars between native tribes. The article further specifies the types of goods that are included in the two categories, firearms and ammunition, that Article I introduced. On the one hand, according to the article under comment, firearms include rifles and improved weapons, which, however, are not further specified or defined. The term improved weapons is also used in subsequent Articles IX, X, and XIII, where the articles prescribe specific safeguards that may hint to a greater destructive capability if compared to ordinary rifles. In addition, the use of the term “especially” signals that the classification is open-ended, and the drafters did not want to enumerate or list specific weapons. Aside from firearms, the article mentions ammunitions, a category that includes ball, cartridges, but also powder which, at that time, seemingly included black powder but also the more modern smokeless powder.¹⁰ Finally, the Article establishes a total import ban on a specific geographical area. The ban is subject to exceptions that are considered by the following Article.

III.2.1.3 Article IX¹¹

As already examined, Article VIII establishes a complete ban on import of firearms and ammunition in the area which is comprised between the 20th parallel North, the 22d parallel South, the

⁹ Article VIII read as following: “The experience of all nations that have intercourse with Africa having shown the pernicious and preponderating part played by firearms in operations connected with the slave-trade as well as internal wars between the native tribes; and this same experience having clearly proved that the preservation of the African population whose existence it is the express wish of the powers to protect, is a radical impossibility, if measures restricting the trade in fire-arms and ammunition are not adopted, the powers decide, so far as the present state of their frontiers permits, that the importation of firearms, and especially of rifles and improved weapons, as well as of powder, ball and cartridges, is, except in the cases and under the conditions provided for in the following Article, prohibited in the territories comprised between the 20th parallel of North latitude and the 22d parallel of South latitude, and extending westward to the Atlantic Ocean and eastward to the Indian Ocean and its dependencies, including the islands adjacent to the coast within 100 nautical miles from the shore”.

¹⁰ Norm Flayderman, *Flayderman’s Guide to Antique American Firearms*, Gun Digest Books, 9th Edition, at 101.

¹¹ Article IX read as following: “The introduction of fire-arms and ammunition, when there shall be occasion to authorize it in the possessions of the signatory powers that exercise rights of sovereignty or of protectorate in Africa, shall be regulated, unless identical or stricter regulations have already been enforced, in the following manner in the zone defined in Article VIII: All imported fire-arms shall be deposited, at the cost, risk and peril of the importers, in a public warehouse under the supervision of the State government. No withdrawal of firearms or imported ammunition shall take place from such warehouses without the previous authorization of the said government. This authorization shall, except in the cases hereinafter specified, be refused for the withdrawal of all arms for accurate firing, such as rifles, magazine guns, or breech-loaders, whether whole or in detached pieces,

Atlantic Ocean, and the Indian Ocean. However, this ban is not absolute as exceptions can be granted by the signatories powers that, according to the present Article, “exercise rights of sovereignty or of protectorate” in the banned area. The Article also underlines that the rules provided in relation to firearms and ammunitions represent a *de minimis* framework and if other, more stringent, rules exist, then these should apply.

The conditions that the Article sets in relation to the import are linked to the way the firearms and ammunition are stored. In other words, the import is permitted if the regulated goods are stored in public warehouses that are supervised by government authorities. Private warehouses, meaning, with an argument *a contrario*, warehouses hold and supervised by non-governmental authorities, are only allowed in seaports and only for ordinary powder and for flint-lock muskets. According to the Article, private warehouses cannot store improved arms and ammunition and are subject to the existence of safety guarantees.

The imported goods cannot be removed from the warehouse unless the authorities grant specific and individual authorization. This authorization should be refused in the case the person requiring it does not offer sufficient guarantees that the goods are not going to be given, assigned or sold to third parties. The authorization can also be granted in favour of travellers who should present a governmental declaration coming from her national authorities that assures that the goods will be used only for personal defence. However, the authorization cannot encompass the goods that the Article explicitly

their cartridges, caps, or other ammunition intended for them. In seaports, and under conditions affording the needful guarantees, the respective governments may permit private warehouses, but only for ordinary powder and for flint-lock muskets, and to the exclusion of improved arms and ammunition therefor. Independently of the measures directly taken by governments for the arming of the public force and the organization of their defence, individual exceptions may be allowed in the case of persons furnishing sufficient guarantees that the weapon and ammunition delivered to them shall not be given, assigned or sold to third parties, and for travelers provided with a declaration of their government stating that the weapon and ammunition are intended for their personal defence exclusively. All arms, in the cases provided for in the preceding paragraph, shall be registered and marked by the supervising authorities, who shall deliver to the persons in question permits to bear arms, stating the name of the bearer and showing the stamp with which the weapon is marked. These permits shall be revocable in case proof is furnished that they have been improperly used, and shall be issued for five years only, but may be renewed. The above rule as to warehousing shall also apply to gunpowder. Only flint-lock guns, with unrifled barrels, and common gunpowder known as trade powder, may be withdrawn from the warehouses for sale. At each withdrawal of arms and ammunition of this kind for sale, the local authorities shall determine the regions in which such arms and ammunition may be sold. The regions in which the slave-trade is carried on shall always be excluded. Persons authorized to take arms or powder out of the public warehouses, shall present to the State government, every six months, detailed lists indicating the destinations of the arms and powder sold, as well as the quantities still remaining in the warehouses”.

excludes from this regime, such as arms for accurate firing, including rifles, magazine guns, breech-loaders and the respective cartridges, caps, or other ammunition intended for these weapons. It is worth to note that the Article mentions that the prohibition applies both to arms which are in a whole state and in detached pieces.

Another point of interest is the provision that requires the marking of the firearms. Whenever an authorization is issued and a firearm is removed from the warehouse, the weapon should be registered and marked in order to allow for its traceability, a practice that reappeared in the contemporary Programme of Action on Small Arms and its connected International Tracing Instrument.¹² In addition, the authorization seems to be strictly linked to the specific weapon which is handed to the authorized person, as the stamp of the weapon mark should appear on the authorization itself. In principle, the authorization should last for five years, which can be renewed in case no improper use is reported. Should this be the case, the permit can be revoked before its natural expiration. Finally, this authorization regime does not apply to the arming of the public force and the organization of their defence, in line with the corollary of sovereignty discussed in the previous chapter.

The final part of the Article regulates the sale of specific goods such as flint-lock guns and common gunpowder, which are the only goods that can be withdrawn from the warehouses in order to be sold. According to the Article, the local authorities are under the obligation of determining the end destination of the goods, in order to uphold the ban on the region where the slave-trade occurs. The list of the end-destinations should also be included in a half-yearly report presented by those who are authorized to take arms and powder out of the warehouses, who should additionally include in the report the quantities that remain in the warehouses.

III.2.1.4 Article X¹³

Different from Article IX, which regulates the import and the sale of firearms and ammunition, Article X is broader as it encompasses also the transportation. In this regard, it sets a regime for the

¹² UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 2001 International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, 2005.

¹³ Article X read as following: “The Governments shall take all such measures as they may deem necessary to insure as complete a fulfilment as possible of the provisions respecting the importation, sale and transportation of fire-arms and ammunition, as well as to prevent either the entry or exit thereof via their inland frontiers, or the

entrance, the exit and the passage of the goods through the territory of the signatories. At the outset the Article generically imposes the signatories the adoption of the necessary measures in order to comply with the provisions of the General Act; it does not provide any standard but leaves the signatories free to decide what measures to adopt. It then specifies that the signatories must prevent the entrance and the exit of the regulated goods from their inland frontiers and, by the same token, the passage through their territories towards the regions where the slave trade takes place, meaning the territory comprised between the 20th parallel of North latitude and the 22d parallel of South latitude, as per Article VIII. The passage of firearms and ammunition can, however, occur where authorization is issued and, should the goods pass from the coastal territory of a signatory to an inland territory of another signatory, such authorization should not be withheld. An exception to this automatism is provided in case the receiving signatory power has its own access to the coast, but where this access is interrupted the signatory power from which the goods transit has no discretion and must issue the authorization.

The Article sets the content of the request for authorization, which must include a declaration from the inland signatory power that the goods are destined to the authorities or to the military - in connection with the protection of the missionary, commercial station, or other individuals whose name must be stated in the request - and are not for sale.

The last part of the Article deals with exceptional circumstances, where the signatory power that had issued the authorization can nonetheless retain the right to stop the transit. The provision mentions inland disturbances and other serious dangers, where it is understood that the transiting goods would risk exacerbating these events and, as a result, compromise the safety of the authorizing power.

passage thereof to regions where the slave-trade is rife. The authorization of transit within the limits of the zone specified in Article VIII shall not be withheld when the arms and ammunition are to pass across the territory of the signatory or adherent power occupying the coast, towards inland territories under the sovereignty or protectorate of another signatory or adherent power, unless this latter power have direct access to the sea through its own territory. If this access be wholly interrupted, the authorization of transit can not be withheld. Any application for transit must be accompanied by a declaration emanating from the government of the power having the inland possessions, and certifying that the said arms and ammunition are not intended for sale, but are for the use of the authorities of such power, or of the military forces necessary for the protection of the missionary or commercial stations, or of persons mentioned by name in the declaration. Nevertheless, the territorial power of the coast retains the right to stop, exceptionally and provisionally, the transit of improved arms and ammunition across its territory, if, in consequence of inland disturbances or other serious danger, there is ground for fearing lest the despatch of arms and ammunition may compromise its own safety”.

However, the right to stop the transit applies only temporarily and exceptionally and solely for improved arms and ammunition.

III.2.1.5 Article XI¹⁴

This Article establishes a system of information sharing, a confidence measure that will become increasingly important in the treaties and other non-binding instruments during the XX century. It is worth noting that this information sharing relates to three different elements: the traffic – as opposed to just the import – in firearms and ammunition; the permits granted, and the measure of repression in force.

III.2.1.6 Article XIII¹⁵

Article XIII, the last article on arms regulation, imposes to those signatories that have territorial possessions that border with the exclusion zone to adopt measures in order to prevent the introduction of firearms and ammunition to the exclusion zone. The obligation imposed is stricter in relation to improved arms and cartridges, but, differently from Article VIII, fails to mention rifles. By providing a double standard, one for improved arms and cartridges and another one for other firearms and powders, the Article seems to imply a higher degree of tolerance towards potential smuggling of goods that pertain to the latter categories. Finally, the Article leaves the signatories free to determine the measures that are apt to ensure that no cross-border activities take place.

III.2.2 The Convention of Saint-Germain¹⁶

As observed by Stone, the end of the first World War triggered a renewed interest in the regulation of the arms trade.¹⁷ Although never entered into force, largely because of United States' opposition, the Convention signed at Saint-Germain-en-Laye on 10 September 1919 is the first example of a stand-alone treaty devoted to arms regulation. In contrast, the rules governing arms in the Brussels

¹⁴ Article XI read as following: “The powers shall communicate to one another information relating to the traffic in firearms and ammunition, the permits granted, and the measures of repression in force in their respective territories”.

¹⁵ Article XIII read as following: “The signatory powers that have possessions in Africa in contact with the zone specified in Article VIII, bind themselves to take the necessary measures for preventing the introduction of firearms and ammunition across their inland frontiers into the regions of said zone, at least that of improved arms and cartridges”.

¹⁶ Convention for the Control of the Trade in Arms and Ammunition, and Protocol, *The American Journal of International Law*, Vol. 15, No. 4, Supplement: Official Documents, 1921, 297-313.

¹⁷ David R. Stone, *Imperialism and Sovereignty*, see above n 8, at 217.

General Act analysed above, were agreed by the signatories in the context of an instrument not specifically intended for regulating the arms trade.

The treaty was agreed by the representatives of the following countries: The United States of America, Belgium, Bolivia, the British Empire, China, Cuba, Ecuador, France, Greece, Guatemala, Haiti, the Hedjaz, Italy, Japan, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam and Czecho-Slovak.

*III.2.2.1 The Preamble*¹⁸

Not dissimilarly from contemporary treaties, the main objective of the preamble is to provide two types of general information: the list of contracting parties, which comes right before the quote, and a statement of the objective and purpose of the instrument.¹⁹ The first paragraph recognizes the problem posed by the presence of stockpiles scattered around the globe, as a result of the prolonged war that ended less than one year before the signature of the Convention. The accumulation of arms and ammunitions designed for war – as it will be seen the Convention divides between arms and ammunition for war and other arms – risks endangering peace and public order. As will be seen, the Convention establishes a licensing mechanism with the aim, amongst others, to prevent the arming of insurgent movements.²⁰

The second paragraph, which already anticipates the distinction between arms and ammunitions for war and other arms and ammunitions, highlights two distinct conducts that ought to be regulated: the trade and the possession. In addition, it generically refers to some areas of the world where the

¹⁸ The Preamble read as following: “Whereas the long war now ended, in which most nations have successively become involved, has led to the accumulation in various parts of the world of considerable quantities of arms and munitions of war, the dispersal of which would constitute a danger to peace and public order; Whereas in certain parts of the world it is necessary to exercise special supervision over the trade in, and the possession of, arms and ammunition; Whereas the existing treaties and conventions, and particularly the Brussels Act of July 2, 1890, regulating the traffic in arms and ammunition in certain regions, no longer meet present conditions, which require more elaborate provisions applicable to a wider area in Africa and the establishment of a corresponding regime in certain territories in Asia; Whereas a special supervision of the maritime zone adjacent to certain countries is necessary to ensure the efficacy of the measures adopted by the various Governments both as regards the importation of arms and ammunition into those countries and the export of such arms and ammunition from their own territory”.

¹⁹ On the legal value of a preamble see Charles Rousseau, *Droit international public*, vol. I, Paris: Sirey, 1970, at 85–8; Nguyen Quoc Dinh, P. Daillier, and A. Pellet, *Droit international public*, 7th edn, Paris: LGDJ, 2002, at 131–2; Jean-Louis Basdevant, *Dictionnaire de la terminologie du droit international public*, Paris: Sirey, 1960, at 465–6; Jean Salmon, *Dictionnaire de droit international public*, Brussels: Bruylant/AUF, 2001, at 864–5.

²⁰ David R. Stone, *Imperialism and Sovereignty*, see above n. 8, at 218.

supervision of the trade and possession must take place, yet it does not name any specific territory in contrast to the following paragraph.

The third paragraph acknowledges the preceding Brussels General Act while stating the need for a new, more developed instrument, that should cover a wider area of application than the one set by Article VIII of the Brussels General Act. Furthermore, it affirms that the restricted area should be expanded in order to cover also specific territories in Asia.

The last paragraph calls for the establishment of special maritime measures with the intent of supervising the area adjacent to certain territories, which, once again, are not explicitly mentioned. These supervisory measures should ensure that the import and export of arms and ammunition follow the measures adopted by the signatories.

III.2.2.2 Article 1²¹

The first article of the Convention can be ideally divided into three parts. At the outset, the Article lists the arms of war whose export is prohibited by the Convention. As can be seen clearly from the enumeration below, the list encompasses different types of arms and includes the ammunition to be used with these arms. It is worth to be noted that category b) appears to be ample and, apparently, could include category f). The definition “arms of war” hints to the existence of arms that are not intended for war, and which are indeed considered by Article 2. The followings are the arms of war which are prohibited:

- a. artillery of all kinds;
- b. apparatus for the discharge of all kinds of projectiles, explosive or gas-diffusing;
- c. flame-throwers;
- d. bombs;
- e. grenades;
- f. machine-guns and rifled small-bore breech-loading weapons of all kinds;

²¹ Article 1 read as following: “The High Contracting Parties undertake to prohibit the export of the following arms of war: artillery of all kinds, apparatus for the discharge of all kinds of projectiles, explosive or gas-diffusing, flame-throwers, bombs, grenades, machine-guns and rifled small-bore breech-loading weapons of all kinds, as well as the exportation of the ammunition for use with such arms. The prohibition of exportation shall apply to all such arms and ammunition, whether complete or in parts. Nevertheless, notwithstanding this prohibition, the High Contracting Parties reserve the right to grant, in respect of arms whose use is not prohibited by International Law, export licences to meet the requirements of their Governments or those of the Government of any of the High Contracting Parties, but for no other purpose. In the case of firearms and ammunition adapted both to warlike and also to other purposes, the High Contracting Parties reserve to themselves the right to determine from the size, destination, and other circumstances of each shipment for what uses it is intended and to decide in each case whether the provisions of this Article are applicable to it”.

g. ammunition for use with such arms.

The export limitation is not absolute, as the contracting parties can nonetheless permit the export in order to cater to the needs of their governmental authorities, consistently with the principle of sovereignty. In addition to their own governmental authorities, the export can take place if done to the benefit of the other contracting parties. In other words, the export of the prohibited arms can take place only between the signatories of the Convention and upon the issuance of an export licence.²² The establishment of a licencing regime - a mechanism according to which the export is prohibited unless a license is issued and which is, nowadays, common practice – is perhaps the biggest innovation of the Convention.²³ At the same time, the restriction to export solely to other signatories represented the most contentious issue and the reason for the failure of the Convention to enter into force.²⁴ In a letter transmitted to the Secretariat of the League of Nations during the negotiations of a convention that would supersede the Saint Germain one, the Secretary of the United States affirmed, in relation to the difficulties related to the licensing regime put in place by the Convention, that:

There is particular objection to the provisions by which the contracting parties would be prohibited from selling arms and ammunitions to States not parties to the Convention. By such provisions this Government would be required to prevent shipment of military supplies to such Latin-American countries as have not signed or adhered to the Convention, however desirable it might be to permit such shipments, merely because they are not signatory Powers and might not desire to adhere to the Convention.²⁵

Notwithstanding the licensing regime, the export of one category of arms is always prohibited: those arms that were prohibited by International Law and, at the time of the Convention, the instruments that outlawed the use of certain weapons were three. In response to a Russian invention of a bullet that explodes on contact with soft tissues, the Declaration of Saint Petersburg of 1868 prohibited the employment of explosive, fulminating or inflammable bullets of less than 400 grams.²⁶ This weight-criterion was chosen because, at the time of adoption of the Declaration, it marked the distinction between artillery and infantry bullets and, thus, between a bullet that was intended to be used against a

²² This also implies the prohibition to export arms destined directly to non-governmental authorities.

²³ See Chapter IV.

²⁴ David R. Stone, *Imperialism and Sovereignty*, see above n. 8, at 217.

²⁵ League of Nations Archives, C.758.M.258.1924, at 13.

²⁶ Declaration of Saint Petersburg, signed on 11 December 1868 by Austria-Hungary, Bavaria, Belgium, Denmark, France, Great Britain, Greece, Italy, Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden and Norway, Switzerland, Turkey, Wurtemberg. Baden and Brazil acceded to the Declaration on 11 January and 23 October 1869 respectively.

generality of combatants, but with a lesser degree of precision, and a specific individual.²⁷ Besides being the first instrument to prohibit the use of certain weapons, the importance of the Declaration lies in its preamble, where the Declaration states the “legitimate war aims and the principle of limitation of means allowed in warfare”.²⁸ Finally, as observed by Gasser, the Declaration marked the beginning of the never-ending enquiry on whether new weaponry is compatible with international law.²⁹

The second type of weapons that, at the time of the signature of the Convention, international law prohibited were bullets that expand or flatten in the human body. Adopted on 29 July 1899, the IV(3) Hague Declaration concerning expanding bullets provided that the “Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.³⁰ Coupland and Loye note that the wording of the Declaration was the result of the knowledge of weapon ballistic existing at that time and, although modern weapons have challenged the technicalities of this treaty, this Declaration has been able to stand the test of time and has proven to be effective.³¹ While the Declaration outlawed the use of expanding bullets, it did not touch upon the issues of possession, transfer, sale and did not pose any technical limitation in terms of weight or calibre, the rule became part of customary law and is applicable to both international and non-international armed conflicts.³²

²⁷ Henri Meyrowitz, “Reflections on the Centenary of the Declaration of St. Petersburg”, *International Review of the Red Cross*, 1968, 8, at 615. On the Declaration of Saint Petersburg see also Robert Kolb and Momchil Milanov, “The 1868 St Petersburg declaration on explosive projectiles: A reappraisal”, *Journal of the History of International Law*, 2018, 20(4), 515-543; Emily Crawford, “The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL”, *Journal of the History of International Law*, 20(4), 544-566.

²⁸ Robert Kolb, *Advanced Introduction to International Humanitarian Law*, Elgar Advanced Introductions Series, Edward Elgar, Cheltenham, 2014, at 54

²⁹ Hans-Peter Gasser, “A look at the Declaration of St. Petersburg of 1868”, *International Review of the Red Cross*, 1993, 33(297), at 513.

³⁰ Hague Declaration Of 1899 on Expanding Bullets, ratified by Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Norway, Persia, Roumania, Russia, Serbia, Siam, Spain, Sweden and Norway, Switzerland, Turkey and adhered by Great Britain, Nicaragua and Portugal, in James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Oxford University Press, 1915, at 228.

³¹ Robin Coupland and Dominique Loye, “The 1899 Hague Declaration concerning Expanding Bullets A treaty effective for more than 100 years faces complex contemporary issues”, *International Review of the Red Cross*, 2003, Vol 85, N. 849, at 135.

³² William H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd Edition, Oxford University Press, 2016, Oxford, at 139.

Lastly, the third type of weapons prohibited when the Convention was adopted was the poison and poisoned weapons. According to article 23(a) of both Convention II of the Hague 1899 and Convention IV 1907, “it is especially forbidden...To employ poison or poisoned weapons”.³³

The last part of the Article regulates what can be interpreted *sensu latu* as dual-use goods. In case a firearm and/or ammunition can be adapted both to war and for other usages, the signatories can determine from the size, the destination, and other circumstances whether the weapon and/or the ammunition is intended to be used for war, or not, and decide upon the applicability of the Article.

*III.2.2.3 Article 2*³⁴

As already observed, the Convention draws a distinction between weapons and ammunition of war and those that fall short of this qualification. Article 2 deals with the latter category and regulates the export of arms and ammunition that are not caught by Article 1. Not dissimilarly from the previous Article, also this one encompasses arms which are complete or in parts. However, given its catch-all nature, this Article does not enumerate the categories of weapons and, hence, can be interpreted as including any weapon and ammunition that is not explicitly contemplated by Article 1. Different from Article 1, the ban on the export is not limitless but applies only to the geographical area defined in Article 6. Once again, the Article provides for an exception to the rule: the signatories retain the right to grant an export licence if the arms and/or the ammunition are not to be re-exported or utilised in a way that would run against the Convention itself.

³³ Annex Regulations Respecting The. Laws and Customs of War on Land to the Hague Conventions Of 1899 (II) And 1907 (IV) Respecting the Laws and Customs of War on Land. The II Hague Convention of 1899 was ratified by the following powers: Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Norway, Persia, Portugal, Roumania, Russia, Servia, Siam, Spain, Sweden, Turkey, United States; and adhered by the followings: Argentine Republic, Bolivia, Brazil, Chile, China, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Korea, Nicaragua, Panama, Paraguay, Peru, Salvador, Switzerland, Uruguay, Venezuela. At the time of adoption of the Convention of Saint-Germain, the 1907 Convention was ratified by the following powers: Austria-Hungary, Belgium, Bolivia, Brazil, Cuba, Denmark, France, Germany, Great Britain, Guatemala, Haiti, Japan, Luxemburg, Mexico, Netherlands, Norway, Panama, Portugal, Roumania, Russia, Salvador, Siam, Sweden, Switzerland, United States; and adhered by the followings: Liberia, Nicaragua. See James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Oxford University Press, 1915, at 129-130.

³⁴ Article 2 read as following: “The High Contracting Parties undertake to prohibit the export of firearms and ammunition, whether complete or in parts, other than arms and munitions of war, to the areas and zone specified in Article 6. Nevertheless, notwithstanding this prohibition, the High Contracting Parties reserve the right to grant export licences on the understanding that such licences shall be issued only by their own authorities. Such authorities must satisfy themselves in advance that the arms or ammunition for which an export licence is requested are not intended for export to any destination, or for disposal in any way, contrary to the provisions of this Convention”.

III.2.2.4 Article 3³⁵

Article 3 specifies the application of the Convention *ratione temporis*. In this respect, it highlights that shipments, which have still to occur on the basis of contracts concluded before the entry into force of the Convention, shall respect the provisions of the Convention itself. In practical terms, this may imply that shipments towards the exclusion zones cannot take place even if the contracts were governed by the laws that pre-existed the Convention.

III.2.2.5 Article 4³⁶

As Stone observes, the aim of Article 4 is to prevent the arming of the non-Western world and to reinforce the status of the colonial powers.³⁷ In particular, the Article specifies that no license shall be issued for countries that either do not accept the tutelage or that, after having placed under one, try to obtain any category of arms and ammunitions.³⁸

III.2.2.6 Article 6³⁹

Not dissimilarly from Article VIII of the Brussels General Act, Article 6 establishes a geographical area of exclusion where the import of arms and ammunition for war and other arms and ammunition is prohibited. The article further specifies that the exclusion zone comprises both a land

³⁵ Article 3 read as following; “Shipments to be effected under contracts entered into before the coming into force of the present Convention shall be governed by its provisions.”

³⁶ Article 4 read as following: “The High Contracting Parties undertake to grant no export licences to any country which refuses to accept the tutelage under which it has been placed, or which, after having been placed under the tutelage of any Power may endeavour to obtain from any other Power any of the arms or ammunition specified in Articles 1 and 2”.

³⁷ David R. Stone, *Imperialism and Sovereignty*, see above n. 8, at 218.

³⁸ Although referring to the issue of license towards non-contracting parties, a telegram sent by the USA Secretary of State to the Minister in Bern in 1924 states that: “It is the view of this Government that the Convention of Saint-Germain is a political arrangement for the protection of the existing governments...”. Telegram dated 2 February 1924, in *Papers Relating to the Foreign Relations of the United States, 1924, Volume I*, at 18.

³⁹ Article 6 read as following: “The High Contracting Parties undertake, each as far as the territory under its jurisdiction is concerned, to prohibit the importation of the arms and ammunition specified in Articles 1 and 2 into the following territorial areas, and also to prevent their importation and transportation in the maritime zone defined below: 1. The whole of the Continent of Africa with the exception of Algeria, Libya and the Union of South Africa. Within this area are included all islands situated within a hundred nautical miles of the coast, together with Prince's Island, St. Thomas Island and the Islands of Annobon and Socotra. 2. Transcaucasia, Persia, Gwadar, the Arabian Peninsula and such continental parts of Asia as were included in the Turkish Empire on August 4, 1914. 3. A maritime zone, including the Red Sea, the Gulf of Aden, the Persian Gulf and the Sea of Oman, and bounded by a line drawn from Cape Guardafui, following the latitude of that cape to its intersection with longitude 570 east of Greenwich, and proceeding thence direct to the eastern frontier of Persia in the Gulf of Oman. Special licences for the import of arms or ammunition into the areas defined above may be issued. In the African area they shall be subject to the regulations specified in Articles 7 and 8 or to any local regulations of a stricter nature which may be in force. In the other areas specified in the present Article, these licences shall be subject to similar regulations put into effect by the Governments exercising authority there”.

and a maritime area, yet the prohibition regime appears to be different: while for the land area only the import is prohibited, in the maritime zone the prohibition also includes the transportation. Point 1 and 2 of the first paragraph detail the land exclusion zone, which encompasses not just the African continent, with the exception of Algeria, Libya and the Union of South Africa, but also parts of Asia such as Transcaucasia, Persia, Gwadar, the Arabian Peninsula and the continental parts of Asia that were part of the Turkish Empire as of 4 August 1914. In contrast, point 3 designates the maritime exclusion zone, which includes the Red Sea, the Gulf of Aden, the Persian Gulf and the Sea of Oman.

The prohibition to import established by the first paragraph is not absolute and is subject to an exception regime provided by the second paragraph. More in detail, the article specifies that the import into the excluded zones is allowed if a special license is granted; these special license does not have to be confused with the general export licenses mentioned under Article 1 but only relate to permission to import of arms and ammunition into the excluded zone. In addition, Article 6 does not differentiate between arms and ammunitions and one can, therefore, interpret that both arms and ammunitions for war and other arms are equally subject to the same special license mechanism. In contrast, the article establishes a different legal regime applicable to the licences depending on the end destination of the goods. If the arms and ammunitions are to be imported into the African continent, the article subjects the license to the rules of the Convention or to any local regulation that provides a stricter regime. If the goods are destined to other areas, the law applicable to the licenses should be regulations implemented by the Governments that exercise the authority on the specific geographical area. Two elements are, however, unclear. Firstly, the wording of the Convention does not specify whether these regulations already exist or, instead, calls for the Governments to set local rules. Secondly, the adjective ‘similar’ can refer to both the Convention and to the local regulations in force in Africa.

Notwithstanding the fact that the Convention became a dead letter, the intentions of the signatories were genuine. A confirmation thereof comes from the adoption, at the time of signature of the Convention by some of the contracting parties, of a Protocol anticipating the effects of the Convention. According to the signatories of the Protocol, “...they would regard it as contrary to the intention of the High Contracting Parties and to the spirit of this Convention that, pending the coming into force of the Convention, a Contracting Party should adopt any measure which is contrary to its

provisions.”⁴⁰ Despite the intentions and the outcome, the realization that the American endorsement was necessary for any convention on arms to be effective drove the Third Committee of the Assembly of the League of Nation to state, on 1 May 1923 that

it is most desirable that some treaty should be universally accepted for the control of the international trade in arms, and that all civilised countries should co-operate in a common policy of regulation. Whether that can be done, however, depends on the attitude of the United States of America. It is important, therefore, that the Members of the League should endeavour in every way to meet the views of the United States Government, and to secure their co-operation in a common policy⁴¹

III.2.3 The Convention for the Control of the International Trade in Arms, Munitions and Implements of War

III.2.3.1 The Draft Convention as drawn up by the Temporary Mixed Commission

The failure of the Saint-Germain Convention did not halt the quest for a global instrument on the arms trade. Already in 1923, the Assembly of the League of Nations adopted a resolution inviting the Temporary Mixed Commission to prepare a new convention in order to replace the Saint-Germain one.⁴² Mindful of the need to have an early endorsement of the US, the Council of the League of Nations, invited that Government to cooperate with the Temporary Mixed Commission.⁴³ The ninth session of the Temporary Mixed Commission, aimed at a new Arms Traffic Convention, took then place from 4 February 1924 with the presence of the US Under-Secretary of State.⁴⁴ By October of the same year, a new convention was already drafted and circulated for comments to members and non-members of the League of Nations with the aim of convening a conference during the first half of the next year.⁴⁵

The point of departure for a new convention was the Convention of Saint-Germain, although not the entire working group shared the same opinion.⁴⁶ In light of the opposition of the USA to that

⁴⁰ Protocol to the Convention for the Control of the Trade in Arms and Ammunition.

⁴¹ Papers Relating to the Foreign Relations of the United States, 1923, Volume I, at 36.

⁴² Papers Relating to the Foreign Relations of the United States, 1923, Volume I, at 44.

⁴³ Letter of the Council of the League of Nation, December 14th, 1923, in League of Nations Archives, C.758.M.258.1924, at 14.

⁴⁴ Letter of the Under-Secretary of State to the President of the Council, dated 2 February 1924, in League of Nations Archives, C.758.M.258.1924, at 14. See also, telegram of the Secretary of State to the Minister in Switzerland dated 1 February 1924, in Papers Relating to the Foreign Relations of the United States, 1924, Volume I, at 18.

⁴⁵ Historical Survey, in League of Nations Archives, C.758.M.258.1924, at 16.

⁴⁶ See Document 5 .Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Seventh Session, held at Geneva, February 7th, 1924, in League of Nations Archives, C.758.M.258.1924, at 70, 72, 73. See also Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 72, 73 and Document 15, Report

convention, the experts were divided between those that supported a re-elaboration of the old convention with the aim of meeting the US' demands and those that backed a totally new instrument. The former view prevailed, and the new convention followed the main principles enshrined in the old instruments, as the following analysis shows.⁴⁷ Before delving into specific articles of the Arms Traffic Convention, it is worth mentioning two problems that the drafters were confronted with. The first one, perhaps the thorniest one, was whether to treat together with the question of arms trade the issue of private manufacturers.⁴⁸ Eventually, the latter problem was left outside, not least because the US representative was not empowered to discuss anything but the traffic in arms.⁴⁹ Second, whether to split a convention into two separate instruments: one for the general traffic in arms and a second one specifically devoted to the prohibited territories, listed under Article 6 of the Saint-Germain Convention.⁵⁰ However, also this proposal, which was put forward by the British delegation, was eventually rejected as can be seen from the wording of Article 9.

Finally, a word of caution is required in order to justify commenting the draft text rather than the final text. Two reasons back this approach: first, and as the next paragraph will show, the debates held in the conference, which followed the draft, touched upon issues of general international law that would not be fully understood if the analysis covered the final text and omitted the preparatory works. Second, many of the drafters participated as delegates to the conference and their arguments are linked to the preparatory works.

Presented To The Council At Its June 1924 Session By The Permanent Advisory Commission On The Work Of Its Fourteenth Session, Held At Paris, May 1924, in League of Nations Archives, C.758.M.258.1924, at 148.

⁴⁷ President Count Carton De Wiart, President of the Conference for the Control of the International Trade in Arms, Munitions and Implements of War, at its opening speech remarked that: "In its general plan this draft Convention follows the main outlines of the Convention of St. Germain, as they are both based on the same considerations.", in League of Nations, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, A.13.1925.IX, at 122.

⁴⁸ See Document 5 .Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Seventh Session, held at Geneva, February 7th, 1924, in League of Nations Archives, C.758.M.258.1924, at 69.

⁴⁹ *Ibid*, at 69.

⁵⁰ See point IV of Document 16, Report by M. Branting on the Trade in Arms And Control Of The Private Manufacture Of Arms And Munitions, in League of Nations Archives, C.758.M.258.1924, at 155.

III.2.3.1.1 Article 1⁵¹

The classification of arms was one of the most debated issues, as it had been a tedious task to reach a definition that would be “precise and at the same time general in its character”.⁵² Although the Permanent Advisory Committee adopted a definition of munitions and implements of war, that encompassed “all weapons and products used exclusively for war purposes” and extended to certain dual-goods arms such as these “weapons and munitions adapted for both warlike and other purposes”⁵³, not all the parties deemed it sufficiently concrete for the purposes of the Convention.⁵⁴ The options in

⁵¹ Article 1 read as following: “This Convention applies to the following arms, munitions and implements of war: CATEGORY I.

1. ARMS AND MUNITIONS ASSEMBLED OR COMPONENT PARTS, EXCLUSIVELY DESIGNED FOR LAND, SEA OR AERIAL WARFARE, WHATEVER THEIR MODE OF EMPLOYMENT

a). — All arms and ammunition which are or shall be comprised in the equipment of the armed forces of the different States, including: Pistols and revolvers, automatic or self-loading, and developments of the same, designed for single-handed use or fired from the shoulder, of a calibre greater than 6.5 mm. and length of barrel more than 10 cm.; Rifles, muskets, carbines; Machine-guns, interrupter gears, mountings for machine-guns; Aerial gun sights; Infantry apparatus for the discharge of projectiles; Flame -throwers; Cannon, long or short, bomb throwers and mortars of all kinds and their carriages, mountings, recuperators, accessories for mounting and sighting apparatus; Apparatus for the discharge of all kinds of projectiles, bombs, torpedoes, depth charges, etc.; Grenades, bombs, land mines, submarine mines fixed or floating, torpedoes, depth charges; Projectiles of all kinds; Ammunition and appliances for the above arms and apparatus; Bayonets, swords and lances;

(b). — All arms and ammunition which, after having been employed in the services of the different States, are no longer part of their equipment but remain capable of being utilised for military purposes to the exclusion of any other utilisation.

2. IMPLEMENTS OF WAR HEREAFTER ENUMERATED AND COMPONENTS PARTS WHICH ARE CAPABLE OF BEING UTILISED ONLY IN THE MANUFACTURE OF THE SAID MATERIAL.

Ships of all kinds designed exclusively for war, including submarines and submersibles; Airships, aeroplanes and seaplanes designed exclusively for war; Tanks; Armoured cars.

CATEGORY II.

ARMS AND MUNITION ASSEMBLED OR COMPONENTS PARTS, CAPABLE OF USE BOTH FOR MILITARY AND OTHER PURPOSES

1. Fire-arms, designed or adapted for non-military purposes, that will fire cartridges that can be fired from fire-arms in Category I.

2. All other rifled, fire-arms, firing from the shoulder, of a calibre of 6 mm. or above, not included in Category I.

3. Ammunition for the arms enumerated above.

4. Gunpowder and explosives.

CATEGORY III.

ARMS AND MUNITIONS HAVING NO MILITARY VALUE

All the arms and munitions other than those defined in Categories I and II, such as:

Rifled weapons of a calibre of less than 6 mm. designed for firing from the shoulder; Revolvers and automatic pistols of a calibre of 6.5 mm. or less and length of barrel of to cm. or less; Smooth-bore shot guns; Double-barrelled shot-guns of which one barrel is rifled, the other smooth-bore; Single-shot pistols; Fire-arms firing rim fire ammunition; Muzzle-loading fire-arms; Life-saving rockets. Guns for whaling or other fisheries; Signal and saluting guns. Humane cattle-killers of all sorts. Ammunition for the above”.

⁵² Document 3, Draft Convention for the Control of the International Traffic In Arms, Munitions and Implements of War Submitted by Admiral the Marquis de Magaz to the Temporary Mixed Commission (January 21 st, 1924), in League of Nations Archives, C.758.M.258.1924, at 61.

⁵³ Document 2, Temporary Mixed Commission for the Reduction of Armaments, Extracts from the Minutes of the Ninth Session, Geneva (February 4th-7th, 1924), in League of Nations Archives, C.758.M.258.1924, at 48.

⁵⁴ *Ibid*, at 49.

front of the drafters were two. Either to employ a general definition that could nonetheless ensure an acceptable level of detail or to resort to a definition by enumeration. The advantage of the former technique was the overall stability of the instrument, as the latter required a procedure to review the list.⁵⁵

The choice between the two methods fell on the enumeration similarly to the method adopted by Article 1 of the Convention of Saint-Germain, which was frequently recalled during the initial discussions.⁵⁶ Already in the early drafts, the list contained three categories, which were described in the corpus of the Convention, while the individual arms were listed in an annex. Annexing, instead of listing within the corpus of the Convention could seem advantageous, as the list of weapons could have been amended without a formal renegotiation of the entire instruments. In particular, for Category I, modifications in the form of additions, omissions or interpretations of the annexed list, could be proposed at any time at the request of a contracting party and would become binding on all the contracting parties as soon as two-thirds of them ratified the amendment.⁵⁷ Category II was devoted to sporting weapons and it included arms that were not listed for Category I and were recognised as such by legitimate sporting associations. A third residual category included arms for self-defence.⁵⁸ In contrast, a second draft removed the third category as, in the idea of the drafter, arms for self-defence were part of the first Category and merged it with the sporting arms.⁵⁹ Deleting the category that encompassed self-defence arms brought the draft with only two categories, yet the problem of some sporting goods being used as arms for war purposes was unresolved. In particular, arms such as military rifles, revolvers, and pistols required a more precise definition, given the facility of these arms being employed in a dual-use capacity.⁶⁰

⁵⁵ *Ibid*, at 48.

⁵⁶ *Ibid*, at 49.

⁵⁷ *Ibid*, at 47.

⁵⁸ Document 3, Draft Convention for the Control of the International Traffic In Arms, Munitions and Implements of War Submitted by Admiral the Marquis de Magaz to the Temporary Mixed Commission (January 21 st, 1924), in League of Nations Archives, C.758.M.258.1924, at 62.

⁵⁹ Document 4, Draft Convention Relative to the Control of the International Trade In Arms, Munitions and Implements of War Together With Covering Letter, Explanatory Memorandum And Memorandum Containing a Draft Resolution Submitted by M. Jouhaux to the Temporary Mixed Commission (January 28th, 1924), in League of Nations Archives, C.758.M.258.1924, at 66.

⁶⁰ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 75.

The draft text presented by the Rapporteurs to the First Sub-Commission, thus, had only two categories. Within the first category, aside from the arms that already the Saint-Germain Convention included, the draft comprised some novelties and specifically “ships of war of all kinds, including submarines and submersibles; airships, aeroplanes, and seaplanes for use in war; tanks and armoured cars”.⁶¹ As per the second category, the draft did not solve the problem mentioned earlier but simply called the contracting parties to agree on a definition of the goods, such as rifles and pistols, that could be capable of use for both military and other purposes and those of no military value.⁶² This subdivision between dual goods and goods with no military value sparked the proposal by Jancovici of Roumania to regress to a threefold division, where the first category would remain arms of war, the second dual-goods and the third arms with no military value.⁶³ According to the same drafter, his proposal reflected the three categories that inter-Allied military organs, which composed the highest military jurisprudence, had made.⁶⁴

Jancovici’s amendment was endorsed, while the basis for the technical discussion on which arms to include was an analytical report compiled by the British delegation.⁶⁵ The lacunae in the list of arms contained in the British report prompted an observation from the Swedish delegation that eventually led to Category I, 1b). In fact, the British report contained a list of arms that were in use at the time but did not account for weapons that were not anymore employed, but which remained capable of being used for military purposes.⁶⁶ The French delegation explained the double-usage rationale behind the inclusion of a weapon in Category II. In particular, the double-usage could stem from arms being capable of firing ammunition of arms included in Category I, or arms which were capable of being converted into military weapons.⁶⁷ A Swedish proposal proved valuable also vis-à-vis the adjustments to residual Category III. Convinced that enumerating all the arms, including those with no

⁶¹ *Ibid*, at 75.

⁶² *Ibid*, at 75.

⁶³ *Ibid*, at 75.

⁶⁴ *Ibid*, at 77.

⁶⁵ Document 14, Schedule of Arms and Munitions Drawn up by the British Delegation, May 12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 138.

⁶⁶ Document 10, Permanent Advisory Commission For Military, Naval And Air Questions, Extracts From The Minutes Of The Fourteenth Session, Paris, May 12th-20th 1924, in League of Nations Archives, C.758.M.258.1924, at 115.

⁶⁷ *Ibid*, at 118.

military purpose, was an impossible task, Colonel Nygren suggested having Category I and II as complete as possible, so to define Category III by exclusion.⁶⁸

III.2.3.1.2 Article 2⁶⁹

This text is the result of various draft proposals submitted by the experts in the Temporary Mixed Commission. An early draft, dated 25 March 1924 differed from the final one as it extended the prohibition also to components and parts.⁷⁰ However, the insertion was deleted at the request of the British delegation and, in the final draft, it was moved under Article 4.⁷¹ With the aim of securing a watertight approach, the draft of 25 March 1924 complemented the export by including the import. In this way, the drafters believed that there could be increased certainty that the country of destination was the one shown in the licence.⁷² The proposal was met with resistance by other experts who underlined that “exportation is international in character, whereas importation is a national prerogative”. In addition, this further requirement risked lessening the likelihood of ratification, especially by countries that already failed to accept the previous convention.⁷³ These arguments were put to a vote and, as a result, the import was deleted from the draft.⁷⁴

At a later stage, another proposal provided that the three categories mentioned in Article 1 would receive a different export regime.⁷⁵ Category 1 would be subject to an export and import prohibition except for the conditions laid down by Article 3. Category 2 would be subject to an export and import prohibition except for the conditions laid down by Article 5, while the export and import of arms included in Category 3 would not be subject to any restriction. The rationale behind this threefold

⁶⁸ *Ibid*, at 119.

⁶⁹ Article 2 read as following: “The High Contracting Parties undertake not to export themselves and to prohibit the export of, arms, munitions and other implements of war enumerated in Category I, except on the conditions hereinafter mentioned”.

⁷⁰ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 77.

⁷¹ Document 15, Report Presented To The Council At Its June 1924 Session By The Permanent Advisory Commission On The Work Of Its Fourteenth Session, Held At Paris, May 1924, in League of Nations Archives, C.758.M.258.1924, at 144.

⁷² Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 79.

⁷³ *Ibid*, at 79.

⁷⁴ *Ibid*, at 80.

⁷⁵ Document 20, Temporary Mixed Commission for the Reduction of Armaments. Extracts from the Minutes of the Tenth Session, Geneva, July 7th-12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 177.

system was linked to the possibility of some Category 2 arms to be used in warfare. However, the proposal was rejected as the other participants regarded the amendment as the result of a misunderstanding of the system established by the draft convention, together with the reintroduction of the already debated import issue.⁷⁶

The result of these discussions is the final draft in the footnote, which prohibits the export, by the parties to the convention and by their agents, of arms included in category 1 if no license is issued.

III.2.3.1.3 Article 3⁷⁷

Already at the beginning of the discussions, it was clear to the drafters that this Article should have avoided the deadlock created by the limit to export only to contracting parties, a point that, as seen, was crucial in the failure of the Saint-Germain Convention. According to the new scheme, a contracting party could sell arms to a state that had no obligations under the Convention and which was not prevented from reselling them to another state, possibly hostile to the contracting party which had in the first instance furnished the arms.⁷⁸ However, even before touching upon the issue of export to non-contracting parties, the question of the sale to non-governments arose, a discussion whose outcome was future Article 25. Viscount Cecil (Great Britain) framed the problem in an acute way when he observed that if no arms were to be sold to anyone except to a Government in any circumstances, then no group of persons that was unable to manufacture arms would be able to obtain them.⁷⁹ Not only, as Major

⁷⁶ *Ibid*, at 188.

⁷⁷ Article 3 read as following: “Notwithstanding this prohibition, the High Contracting Parties may grant in respect of arms, munitions and implements of war whose use is not prohibited by international law, licences for the export of arms, munitions and implements of war enumerated in Category I, in the following conditions: 1. Licences are not to be granted except for a direct supply to a Government recognised as such by the Government of the exporting country. 2. The Government acquiring the consignment must act through a duly accredited representative. 3. Such representative must produce a written authority from the Government he represents for the acquisition of each consignment, which authority must state that the consignment is required for delivery to that Government for its own use. 4. The form in which this licence shall be given shall, so far as practicable, be that given as an appendix to the present Convention. Each licence must contain a description sufficient for the identification of the arms, munitions and implements of war to which it relates and the names of the exporter and the acquiring Government, ports of embarkation and disembarkation, means of transport, intended route and destination. 5. A separate licence shall be required for each separate consignment which crosses the frontier of the exporting country, whether by land, water or air, and shall accompany each separate consignment. 6. A return of the licences granted shall be sent quarterly to the Central International Office referred to in Article 8 of the present Convention by the issuing Governments, importing Governments, when High Contracting Parties, shall also forward quarterly to the Central International Office a return of the same licences enclosing particulars of the heading under which the imported goods will appear in their imports statistics”.

⁷⁸ Document 2, Temporary Mixed Commission for the Reduction of Armaments, Extracts from the Minutes of the Ninth Session, Geneva (February 4th-7th, 1924), in League of Nations Archives, C.758.M.258.1924, at 51.

⁷⁹ *Ibid*, at 55.

Hills (Great Britain) observed, did all countries have at some time passed through revolutions, but the prohibition to provide arms to recognised belligerent might have enraged the popular feeling and risked leading to the collapse of the Convention.⁸⁰ The only solution was, therefore, to allow a State to treat recognised belligerents as a Government. Furthermore, that solution would put non-contracting parties in a privileged position, as they would be able to sell arms to groups, as opposed to the countries bound by the Convention. This debate evolved as to the number of Governments that should recognise the receiving Government. In his draft Article 3, Admiral the Marquis de Magaz of Spain proposed to set the number to at least half of the High Contracting Parties.⁸¹ Some of the participants initially praised this proposal, although the number could be seen as somehow empirical and arbitrary because it avoided the danger of allowing one contracting party to authorise the export for the benefit of a Government recognised by no other contracting party.⁸² That number was further modified in a different draft that called for the largest possible number as defined by the Council.⁸³ In contrast, the draft presented by Jouhaux reduced the number of recognising powers as the export could only be authorised if it was to the benefit of “a constitutional or revolutionary Government recognised by at least three of the High Contracting Parties”.⁸⁴ This proposal found support in Viscount Cecil who suggested using the terms “de jure” or “de facto” instead of “constitutional” and “revolutionary” used by M. Jouhaux (France).⁸⁵ Further simplifying Fabry (France) advanced two options: a first one, which referred to “a Government or to belligerents recognised as such by the exporting State”; and a second one, based on a Machiavellian argument that if a Government decided to sell arms it would always do so and mindful

⁸⁰ *Ibid*, at 55.

⁸¹ Document 3, Draft Convention for the Control of the International Traffic in Arms, Munitions and Implements of War Submitted by Admiral the Marquis de Magaz to the Temporary Mixed Commission (January 21 st, 1924), in League of Nations Archives, C.758.M.258.1924, at 62.

⁸² Document 8, Report Submitted by Major J. W. Hills and L. Dupriez to the First Sub-Commission of the Temporary Mixed Commission at its March 1924 Session, in League of Nations Archives, C.758.M.258.1924, at 106.

⁸³ Document 24, Extracts from the Minutes of the Thirtieth Session of the Council Held at Geneva from August 29th to October 3rd, 1924, in League of Nations Archives, C.758.M.258.1924, at 243.

⁸⁴ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 78.

⁸⁵ *Ibid*, at 81.

that in some instances it was impossible to discern the real Government, which is the final wording of the article.⁸⁶

A different problem related to the licensing regime – and therefore on Article 2 and Article 3 - was raised by the Brazilian delegate. The control over the export heightened the inequalities existing between producing and non-producing states, as the former ones would have no issues in providing their military with the arms needed for their security and defence. In contrast, the latter would be subject to foreign control on arms and munition procurement exercised by a foreign Government.⁸⁷ The inferior position of non-producing countries would be underlined by the need to justify the purchase, by the absence of assurance that the request would be accepted and by the absence of a time-limit for a reply by the producing state.⁸⁸ The argument of the Brazilian delegate was echoed by the representative of Persia who also underlined that producing states should have no right to prohibit exports unless there were adequate reasons to do so.⁸⁹

The rationale behind the third paragraph was to avoid resales and to ensure that the Government purchasing the arms for war was also the end-user. A previous draft made it explicit that “the consignment is acquired for the use of that Government and not for transfer and will be delivered to them and to no one else”.⁹⁰ The aim of the fourth paragraph was to ensure to the extent possible uniformity between contracting parties. The need to maintain the wording “as far as practicable” came from the existence, already at that time, of license regimes throughout the world. This was exactly the case of Japan, who insisted that it would have been unfeasible to adopt the exact form annexed to the Convention.⁹¹ The experts, therefore, agreed that the provision should be read as a recommendation to the contracting parties to converge to a format similar to the one annexed, but it was not a hard obligation.⁹² The same concerns were raised in relation to the second part of the fourth paragraph, and

⁸⁶ *Ibid*, at 81.

⁸⁷ Document 15, Report Presented To The Council At Its June 1924 Session By The Permanent Advisory Commission On The Work Of Its Fourteenth Session, Held At Paris, May 1924, in League of Nations Archives, C.758.M.258.1924, at 149.

⁸⁸ Document 20, Temporary Mixed Commission for the Reduction of Armaments. Extracts from the Minutes of the Tenth Session, Geneva, July 7th-12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 178.

⁸⁹ The Polish representative also sidelined with the argument of the non-producing countries, see *ibid*, at 179.

⁹⁰ *Ibid*, at 180.

⁹¹ *Ibid*, at 181.

⁹² *Ibid*, at 181.

it was agreed that the description should not be a full meticulous one, yet sufficient to identify the arms.⁹³ Also with regard to the route, the experts observed that the exact route would have been difficult to identify at the time of issuance of the license, which could be issued long before the despatch of the goods.⁹⁴

The information principle enshrined in the last paragraph was also subject to the debate about producing and non-producing states. General De Marinis (Italy) was the first to signal that importing states would be affected by the provision while producing ones would escape that supervision altogether.⁹⁵ Admiral De Souza E Silva (Brazil) echoed the same argument and stressed the paradox underlying the possible absence of any supervision on producing countries.⁹⁶ Equally, the question of the frequency of information to be provided was not immediately settled. Originally the information was set to be sent on a monthly basis, with a view to reducing the possibility of secret accumulation and stockpiling, however, such a high threshold was regarded as too burdensome and the period was then prolonged.⁹⁷

III.2.3.1.4 Article 4⁹⁸

Article 4, originally sub-Article 3(a), was drafted in order to enable manufacturers of arms to import parts that they did not themselves manufacture. Major Hills explained that the objective to be achieved with this article was threefold. First, given that the component parts were of Category I arms, a system of permits was necessary. Second, as the end-user of the components was not a Government but a private manufacturer, both the exporting and the importing Government should exercise a special

⁹³ *Ibid*, at 182.

⁹⁴ *Ibid*, at 182.

⁹⁵ *Ibid*, at 182.

⁹⁶ *Ibid*, at 182.

⁹⁷ *Ibid*, at 183.

⁹⁸ Article 4 read as following: "Further, licences for the export to private individuals of component parts covered by Category I may be granted on the following conditions: The said component parts must be exported direct to a recognised manufacturer of war material, duly authorised by his own Government, on a declaration from him to the effect that the said component parts are required by him. The Government which grants the licence and the Government of the importer's country shall take all adequate precautions to ensure that the said component parts are direct to their destination. The licences granted in the terms of the present Article shall, so far as practicable, be drafted according to the form annexed to the present Convention, and shall conform to the revisions of the present Convention, and particularly to those of Article 8".

control in order for the goods to be delivered to the exact consignee. Third, the format of the license should be similar to that for exports of arms.⁹⁹

III.2.3.1.5 Article 6¹⁰⁰

The final draft of Article 6 appears to be very different from the early proposals, which were linked to a different classification of the arms under Article 1. In the draft proposed by Admiral the Marquis de Magaz of Spain on 21 January 1924, Article 6 centred around the possibility to export arms pertaining to Category II only to persons belonging to recognised sporting associations.¹⁰¹ This proposal was met with a certain resistance, also considering the different cultural background of the experts. Dupriez, the Belgium representative, for instance, clarified that the implementation of the draft was not possible in Belgium given the absence of specific sporting associations. The same concern was raised by Branting, the Swedish representative, and, as a result, the experts decided to reject this very first proposal.¹⁰²

Although shifted to Article 5, a second draft discussed on 25 March 1924, already resembled what will become the final draft. In his amendments, Jouhaux of France proposed that arms included in Category II could be freely exported, provided that the Government of the exporting country was convinced that the arms were not intended for war use. The conviction was to be based on quantity, destination, and other circumstances and, in case of doubt, the arms should have been treated as pertaining to Category I and subject to those requirements. In any event, the publicity regime was the same for both the categories.¹⁰³ The debate that followed highlights that the experts were more inclined

⁹⁹ Document 19, Temporary Mixed Commission For The Reduction of Armaments, Extracts From The Minutes Of The Ninth Session of The First Sub-Commission, Geneva, July 7th and 8th, 1924, in League of Nations Archives, C.758.M.258.1924, at 167.

¹⁰⁰ Article 6 read as following: “Without prejudice to the provisions of Article 7, arms and munitions in Categories II and III may, if the exporter’s country so desires, be exported without licence. Provided, nevertheless, that in the case of arms and munitions of Category II the High Contracting Parties hereby undertake to determine from the size, destination and other circumstances of each consignment whether these arms and munitions are intended for war purposes. If such is the case, the High Contracting Parties undertake that the shipments shall become subject to Articles 2 to 5”.

¹⁰¹ Document 3, Draft Convention for the Control of the International Traffic In Arms, Munitions and Implements of War Submitted by Admiral the Marquis de Magaz to the Temporary Mixed Commission (January 21st, 1924), in League of Nations Archives, C.758.M.258.1924, at 61.

¹⁰² Document 2, Temporary Mixed Commission for the Reduction of Armaments, Extracts from the Minutes of the Ninth Session, Geneva (February 4th-7th, 1924), in League of Nations Archives, C.758.M.258.1924, at 51,52.

¹⁰³ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 77.

to adopt the amendment proposed by Jouhaux, even if, for some states, the risk of having to issue thousands of licenses for Category II weapons was certainly a concern.¹⁰⁴ On a similar line, Marques De Viti, the Italian expert, opposed the French proposal because of the greater restrictions on the free flow of goods.

The draft proposed by Dupriez and Hills followed the same rationale of the amendment just discussed. According to their draft, “Fire-arms and ammunition in Category II may, if the exporting country so desires, be exported without a licence, except to the prohibited areas and zone mentioned in Article 6”.¹⁰⁵ The difference between this draft and the final one is twofold. First, that the exporting country can establish a licensing regime also for arms and ammunition of Category II. Second, that the export to the prohibited areas also apply to this Category of arms and not only for Category I. The second part of their draft article provided that in case of suspicious shipment the contracting parties reserved the right and undertook “to decide in each case whether such shipment falls properly under Category II or whether it ought to be considered to belong to Category I, and in the latter case they undertake that it shall become subject to Articles 2 and 3 hereof”. In this part, the only difference relates to the wording relating to the retention of the right to decide whether a shipment is genuinely a Category II, a redundancy that was later removed.

As it can be observed, although with different wording, the final draft draws from the Dupriez and Hills proposal. It provides no licensing regime for Category II weapons but requires coordination with Article 7, which establishes the no-export zones. In other words, contracting parties are prohibited to export Category II goods to the exclusion zone, save for the exception provided by Article 7; by the same token, outside the exclusion zone, the export does not require any license. Furthermore, a shipment of Category II goods must be treated as a Category I, and therefore require a license, if a shipment raises suspicion in terms of destination, size or other elements suggesting that the goods will be utilised for war purposes.

¹⁰⁴ *Ibid*, at 87.

¹⁰⁵ Document 9, Draft Convention Presented By M. Dupriez And Major Hills to the First Sub-Commission of the Temporary Mixed Commission at its March 1924 Session, in League of Nations Archives, C.758.M.258.1924, at 110.

III.2.3.1.6 Article 9¹⁰⁶

The only article of Chapter III (import of arms, munitions, and implements of war: prohibited zones) was subject to an intense debate that proved to be inconclusive, as it can be seen from the absence of territories where the export and import would be prohibited. In contrast, the initial draft provided three sub-paragraphs containing a threefold list:

1. The whole of the Continent of Africa, with the exception of Algeria, Libya, Spanish ports of North Africa, the Union of South Africa and Rhodesia. Within this area are included all islands situated within a hundred nautical miles of the coast, together with Prince's Islands, St. Thomas Island and the Islands of Annobom and Socotra.
2. Transcaucasia, Persia, Gwadar, the Arabian Peninsula and such continental parts of Asia as were included in the Turkish Empire on August 4th, 1924.
3. A maritime zone, including the Red Sea, the Gulf of Aden, the Persian Gulf and the Sea of Oman, and bounded by a line drawn from Cape Guardafui, following the latitude of that cape to its intersection with longitude 57° east of Greenwich, and proceeding thence direct to the eastern frontier of Persia in the Gulf of Oman.¹⁰⁷

The inclusion of Persia, which reflected the provision of the Convention of Saint-Germain, sparked controversy amongst the Persian representative. First, he questioned the reasons behind maintaining Persia in the list, a grave inequality towards its country given that Spanish Ports and Rhodesia – a new self-governing territory - were excluded. In addition, he pointed to another inequality, the one between producing and non-producing countries. In his view, if Persia was to be included in the list, its sovereign prerogative of an independent country would be affected as its ports and territories would be placed under the control of the producing countries.¹⁰⁸ The inclusion would also infringe Article 10 of the Covenant of the League of Nations, according to which the Members of the League undertook to mutually respect their political independence.¹⁰⁹¹¹⁰ In response, Dupriez

¹⁰⁶ Article 9 read as following: “The High Contracting Parties undertake, each as far as the territory under its jurisdiction is concerned, to prohibit the importation of arms, munitions and implements of war into the following territorial zones, and also to prevent their exportation to, importation and transportation in the territorial zones as well as in the maritime zone defined below. [omissis] Special licences for the import of arms, munitions and implements of war into the zones defined above may be issued. In the African zone they shall be subject to the regulations specified in Articles 10 and 11 or to any local regulations of a stricter nature which may be in force. In the other zones specified in the present Article, these licences shall be subject to similar regulations put into effect by the Governments exercising authority there”.

¹⁰⁷ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 93.

¹⁰⁸ *Ibid.*, at 94.

¹⁰⁹ Document 11, Report Submitted By The First Sub-Commission To The Temporary Mixed Commission On The Draft Convention Drawn Up By The Said Sub - Commission, March 27th, 1924, in League of Nations Archives, C.758.M.258.1924, at 131.

¹¹⁰ The representative of Persia made the same remark vis-à-vis the draft Preamble “Whereas the existing treaties and conventions, and particularly the Brussels Act of July 2nd, 1890, regulating the traffic in arms and ammunition in certain regions, no longer meet present conditions, which require more elaborate provisions applicable to a

explained that the choice of the territories to include in the list was also driven by the practical concerns in relation to the control of vast regions, but eventually agreed to transmit the question to the Council. The Persian representative was not persuaded by the reply and emphasized that due to the increasing prices of arms import, Persia was considering embarking in the production of arms. The adhesion of Persia was therefore in the general interest as it would be in the position to export to neighbouring countries.¹¹¹ An amendment that deleted the entire article was then passed and the entire matter referred to the Council.

The second paragraph of the Article recalls the provision of Article 6 of the Saint-Germain Convention commented above, to which the reader can refer.¹¹²

III.2.3.1.7 Article 25¹¹³

This article represents a novelty even within the drafting process of the Arms Traffic Convention as it was not present neither in the text presented by the Rapporteurs to the First Sub-Commission nor in the subsequent text drawn up by the First Sub-Commission. In fact, it originates from an amendment proposed to original Article 3 by Viscount Cecil who proposed to insert, after the article, the following wording: “[i]t is hereby declared that nothing in this article shall affect the rule of international law permitting the sale of munitions of war by the subject of a non-belligerent State to the Government or a belligerent State without breach of the neutrality of the non-belligerent State, and the grant of a licence under this article for such a sale shall not be deemed to be a breach of neutrality”.¹¹⁴ Notwithstanding his own doubts as to the legal feasibility of his proposal, Viscount Cecil justified the insertion based on the wish to allow arms sales to belligerents without that being a violation of neutrality

wider area in Africa and the establishment of a corresponding regime in certain territories in Asia”, requesting the deletion of the wording “certain territories in Asia”. He eventually succeeded and the reference at the end of the paragraph was deleted, see Document 20, Temporary Mixed Commission for the Reduction of Armaments, Extracts from the Minutes of the Tenth Session, Geneva, July 7th-12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 172, 173. See also his protest on the British proposal at 196.

¹¹¹ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 95.

¹¹² See above, at III.2.2.

¹¹³ Article 25 read as following: “In time of war, Articles 2, 3, 4, 5 and 6 shall be considered as suspended from operation until the restoration of peace so far as concerns any export and transit of arms, munitions or implements of war to or on behalf of any of the belligerents recognised as such by the exporting country and the countries of transit, provided such recognition has been previously communicated to the other High Contracting Parties”.

¹¹⁴ Document 7, above n. 111, at 83.

by the licensing Government. Marquis de Viti shared similar legal concerns as he considered the granting of license a breach of neutrality. In his view, the solution could be found in declaring the Convention suspended in time of war.¹¹⁵ Dupriez stressed the unintended consequences of the proposal on non-producing countries engaged in war with a producer, while Jancovici deemed that the amendment was out of the scope of the Commission as it was granting a new right to neutral countries. The question on the relationship between granting a license and the breach of neutrality was therefore referred to the counsel.¹¹⁶

At the outset of its legal memorandum, the legal section of the Secretariat recalled two applicable principles on neutrality.¹¹⁷ First, that a neutral State shall refrain from supplying arms and munitions directly or indirectly to any of the belligerents¹¹⁸ and, second, that, according to article 7 of the Hague Convention V, “a neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war...”.¹¹⁹ By restating these two principles, the memorandum confirms that the different regime applicable to State and to individuals with regard to neutrality obligations was already well established.¹²⁰ The conundrum posed by the draft article touched upon the very essence of the individual freedom to continue its exporting activities. Since the delivery of arms was subject to a license issued by a governmental authority the export ceased to be fully within the private domain and could impair the neutral status of a contracting party. More in detail, while under the Hague Convention the State was passive vis-à-vis the actions of private individuals and enterprises, under the terms of the Article the issuance of a license implied an action by the State and, as a result, it could not be excluded that “the attitude of the neutral State could be

¹¹⁵ *Ibid*, at 83.

¹¹⁶ *Ibid*, at 84.

¹¹⁷ Document 17, Note By The Legal Section Of The Secretariat On The Draft Convention Concerning The Trade In Arms And Munitions Drawn Up By The First Sub-Commission Of The Temporary Mixed Commission (June 16th, 1924), in League of Nations Archives, C.758.M.258.1924, at 163.

¹¹⁸ Article 6 of Convention (XIII) respecting the Rights and Duties of Neutral Powers and Persons in Naval War, The Hague, 18 October 1907.

¹¹⁹ Article 7 of Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in War on Land, The Hague, 18 October 1907; Article 7 of Convention (XIII) respecting the Rights and Duties of Neutral Powers and Persons in Naval War, The Hague, 18 October 1907.

¹²⁰ The applicability of a different regime follows the idea that while a neutral State must not intervene in a war and therefore not to assist the belligerents by means of procuring war material, commercial activities of neutral nationals must not suffer from the war; see Karl Zemanek, *Neutrality In Land Warfare*, in Bernhardt (ed.), *Encyclopaedia of Public International Law*, North Holland, 1982, at 18.

challenged by one of the belligerents”.¹²¹ The legal section then considered the issue of the suspension of the Convention. In this regard, it clarified that the effect of the clause would be to revert to a status where the Convention itself would be *tamquam non esset*. Consequently, the likelihood that the neutrality of a State might be questioned would be reduced.

The legal opinion was taken into account by the drafters who, as a result, proposed a new wording to replace the one of Viscount Cecil.¹²² Notwithstanding the redraft, which is akin to the final proposal, not all the problems were dissipated. In the debate that followed, Count Bonin-Longare proposed to suspend altogether the Convention in times of war, as any war may have repercussions on the entire continent.¹²³ This proposal found support in Admiral De Souza E Silva who observed that suspending the entire Convention would safeguard the neighbouring states, which would, therefore, be on equal footing in relation to the supply of arms.¹²⁴ Another strand of the discussion centred around the relationship between the Convention and the Covenant of the League of Nations. Observing that there existed two types of wars, namely legitimate and illegitimate wars, Jancovici mentioned that in case of illegitimate war all the relations with the aggressor should be severed and, thus, the debate should consider this factor.¹²⁵ However, in reply to this remark, Schanzer highlighted that the freedom of each country to decide whether article 16 of the Covenant was violated did not help the discussion to progress further and that Article 27 already coordinated the two instruments.¹²⁶ Right before the Convention was sent to the Governments, Guaini expressed his wish that recognition of belligerency would not be limited to the exporting and transit countries but should be recognised by a larger group

¹²¹ Document 17, Note By The Legal Section Of The Secretariat On The Draft Convention Concerning The Trade In Arms And Munitions Drawn Up By The First Sub-Commission Of The Temporary Mixed Commission (June 16th, 1924), in League of Nations Archives, C.758.M.258.1924, at 164.

¹²² Document 20, Temporary Mixed Commission for the Reduction of Armaments. Extracts from the Minutes of the Tenth Session, Geneva, July 7th-12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 204.

¹²³ *Ibid*, at 205.

¹²⁴ *Ibid*, at 205.

¹²⁵ According to paragraph 1 of Article 16 of the Covenant of the League of Nations “Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not”.

¹²⁶ Document 20, Temporary Mixed Commission for the Reduction of Armaments. Extracts from the Minutes of the Tenth Session, Geneva, July 7th-12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 205.

of contracting parties.¹²⁷ His proposal was not considered, and the draft article was adopted only with the additional insertion that the Convention would be suspended also for the transit countries.

III.2.3.1.8 Article 32¹²⁸

As discussed above in the sub-section devoted to the Convention of Saint-Germain, the USA played a major role in the overall failure of that convention. It should, therefore, be of no surprise that the drafters decided to include the ratification of certain states as a *conditio sine qua non* for the entry into force of the new instrument. However, the drafting history shows that the initial draft of Article 32 only provided that the permanent members of the Council of the League of Nations and sixteen other states should ratify the Convention for it to enter into force.¹²⁹ Given that the USA was not part of the League of Nations, this drafting would have risked tainting the success of the Convention. This was exactly the rationale of Viscount Cecil when he observed that it was preferable to mention the most important countries, in order to avoid the mistake done at Saint-Germain.¹³⁰

A successive draft took note of that remark and specified that “The present Convention shall come into force when ratified by twelve Powers, among which shall be all of the following: (Here will follow the names of the six Powers who are principal manufacturers of munitions, including the United States of America)”.¹³¹ The debate that followed revolved around which powers should be named within the article. Major Hills proposed to include France, Italy, the United States, Germany, Russia, and Great Britain but found the opposition of Fabry, who underlined that, according to the Treaty of Versailles, Germany could not be a manufacturer.¹³² He, therefore, proposed to include Japan, Czechoslovakia,

¹²⁷ Document 24, Extracts from the Minutes of the Thirtieth Session of the Council Held at Geneva from August 29th to October 3rd, 1924, in League of Nations Archives, C.758.M.258.1924, at 243.

¹²⁸ Article 32 read as following: “The present Convention will not come into force until it has been ratified by twelve Powers, among whom shall be the following: Belgium, the United States of America, France, Great Britain, Italy, Japan and Russia. The date of its coming into force shall be the.....day after the receipt by the French Government of the twelfth ratification. Thereafter, the present Convention will take effect in the case of each Party..... days after the receipt of its ratification or accession”.

¹²⁹ Document 2, Temporary Mixed Commission for the Reduction of Armaments, Extracts from the Minutes of the Ninth Session, Geneva (February 4th-7th, 1924), in League of Nations Archives, C.758.M.258.1924, at 53.

¹³⁰ *Ibid.*, at 53.

¹³¹ Document 7, Temporary Mixed Commission for the Reduction of Armaments, First Sub-Commission, Extracts from the Minutes of the Eighth Session, Held in Paris, March 24th to 28th, 1924, in League of Nations Archives, C.758.M.258.1924, at 100.

¹³² According to Article 126 of the Treaty of Versailles, “Germany undertakes to accept and observe the agreements made or to be made by the Allied and Associated Powers or some of them with any other Power with regard to the trade in arms and spirits, and to the matters dealt with in the General Act of Berlin of February 26, 1885, the General Act of Brussels of July 2, 1890/4 and the conventions completing or modifying the same”.

Italy, Belgium, Great Britain, and France; although he did not include in its list Russia, he nonetheless invited the other experts to reflect upon the need to include it and his suggestion was welcomed by Jancovici. Alongside Russia, the experts also dwelled upon the opportunity to include Turkey since part of its territory was in the exclusion zone and it was, therefore, necessary to secure its ratification in order to enforce the exclusion regime.¹³³ Nevertheless, it was decided not to include Turkey, as it was not a manufacturer and because of contingent political concerns, which would have endangered the entry into force of the Convention. The list, therefore, encompassed the United States, Belgium, France, Great Britain, Italy, Japan, and Russia.¹³⁴ With a view to secure wider ratification, Admiral De Souza E Silva proposed to include in the list also a South American state, but his suggestion was not endorsed.¹³⁵

III.2.3.2 The Conference and the legal problems examined

The Conference that opened on May 4, 1925, was tasked with drawing up four instruments: i) the convention for the supervision of the international trade in arms and ammunition and in implements of war; ii) a declaration regarding the territory of Ifni; iii) a protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare; and iv) a protocol of signature. The draft Convention examined in the previous paragraph formed the basis for the discussions that ended the following 17 June 1925 with the signature by 18 States of the Convention.¹³⁶ Notwithstanding the self-congratulatory end speeches, the Convention did not prove to be more successful than its predecessor signed in Saint-Germain, as the number of ratifications never achieved the fourteen ratifications set by final Article 41.¹³⁷

Article 170 of the same treaty also provided that “Importation into Germany of arms, munitions and war material of every kind shall be strictly prohibited. The same applies to the manufacture, for, and export to, foreign countries of arms, munition~ and war material of every kind.”

¹³³ See Article 9.

¹³⁴ Document 12, Draft Convention Presented By The First Sub-Commission To The Temporary Mixed Commission, March 27th, 1924, in League of Nations Archives, C.758.M.258.1924, at 136; and also Document 17, Note By The Legal Section Of The Secretariat On The Draft Convention Concerning The Trade In Arms And Munitions Drawn Up By The First Sub-Commission Of The Temporary Mixed Commission (June 16th, 1924), in League of Nations Archives, C.758.M.258.1924, at 162.

¹³⁵ Document 20, Temporary Mixed Commission for the Reduction of Armaments. Extracts from the Minutes of the Tenth Session, Geneva, July 7th-12th, 1924, in League of Nations Archives, C.758.M.258.1924, at 203.

¹³⁶ The Convention was signed by the following countries: Abyssinia Germany United States of America Hungary Austria Italy Brazil Japan British Empire Latvia India Luxemburg Chile Poland Czechoslovakia Roumania Esthonia Salvador Finland Kingdom Of The Serbs, Croats And Slovenes France Spain.

¹³⁷ The final text of the Convention is available at Foreign Relations of the United States, 1925, vol. 1, at 61–93.

It was clear already at the outset of the conference that the delegates were to be confronted with daunting questions on general international law. Furthermore, the differences between producing and non-producing States were still felt and an overall scepticism regarding the outcome was perceived since the very start of the conference. In this regard, the following words in the opening speech of vice-president Guerrero of Salvador are paradigmatic: “it will...be difficult to bring our task to a satisfactory conclusion if we seek to render countries which do not produce arms dependent in some sense on the exporting countries and to create, as between equal Governments, two groups, one of which would control the other.”¹³⁸

The very first issue that the delegate faced was the design of the convention and, hence, to choose whether “the Convention should provide for freedom of export under certain conditions or whether it should lay down the principle of prohibition subject to certain exceptions.”¹³⁹ In other words, two competing principles could inform the convention; on the one hand, the principle of allowing freedom with certain exceptions, and, on the other hand, the opposite one, namely the principle of conditional prohibition.¹⁴⁰ In this regard, the delegate from Salvador stressed that the public opinion of non-producing states was wary that the former principle would put these states in a disadvantageous position; this argument was not felt as compelling and the Italian delegate explained that the end result was the same irrespective of the principle chosen.¹⁴¹ De Palacios, the Spanish representative, put it bluntly by saying that “Freedom under certain conditions, or prohibition except in certain cases: both systems lead to the same result”.¹⁴² In the end, the agreed principle was a prohibition to export arms and implements of war to private persons, and freedom to export to Governments under certain conditions.¹⁴³

¹³⁸ League of Nations, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, A.13.1925.IX, at 130.

¹³⁹ *Ibid*, at 167.

¹⁴⁰ *Ibid*, at 578.

¹⁴¹ In his words, “Public opinion in the producing and non-producing countries was not so ingenuous that it would fail to understand that ‘to prohibit with certain exceptions’ or ‘to throw the trade open with certain restrictions’ were two methods of procedure which came to exactly the same thing”, in League of Nations, Proceedings of The Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, A.13.1925.IX, at 579.

¹⁴² *Ibid*, at 173.

¹⁴³ *Ibid*, at 174.

As soon as this formula was settled, a different, yet connected, problem arose and specifically whether producing States were obliged to sell to non-producers or, in contrast, they retained a degree of discretion. Mehmed Tevfik Bey of Turkey supported the former view and proposed to replace in Article 3 the word may with shall, so the article as amended in the conference would sound as following: “Export licences shall be granted by the Government of the producing country in all cases in which the purchasing Government complies with the conditions...”.¹⁴⁴ The aim of the amendment was to render obligatory the authorisation to export when the purchase was made by a Government recognised as such. The rationale behind it was that “non-producing countries, being sovereign and independent States, should always be in a position to provide freely for their defence”.¹⁴⁵ This proposal found the opposition of several other non-producing states and was rejected. Amongst the arguments adduced for its rejection, was the interference in internal legislation¹⁴⁶, and the infringement of the principle of sovereignty.¹⁴⁷ The Belgium representative also explained that if the amendment was accepted, it would have created a paradoxical situation inasmuch Governments would be free to control their export, except for arms and ammunitions.¹⁴⁸ The Japanese delegation, although supportive of the rejection, called to inquire whether an exporting country had the right to discriminate between different importing states.¹⁴⁹ Brazil reframed the Turkish proposal by suggesting to limit the ground for refusal by an exporting state only to legitimate and legal grounds.¹⁵⁰ Although not endorsed, the motion found some backing from Japan, which recognised that there existed disadvantages in leaving full discretion to the exporting country and further restated that prohibitions should be applied in an equal way to all importing countries.¹⁵¹ However, the legal committee, to which the issues were referred, definitively stated that:

International Law admits a general right of Governments to prohibit exports from their territories at their discretion, that a limitation on a Government's discretion in this respect as regards arms, munitions and implements of war might, in numerous cases, conflict with important national interests; and that accordingly on legal grounds it is not possible to recommend the insertion in the present Convention of a clause which would prevent a

¹⁴⁴ *Ibid*, at 177; see also at 286.

¹⁴⁵ *Ibid*, at 177.

¹⁴⁶ Uruguay, *ibid*, at 580.

¹⁴⁷ Czechoslovakia, *ibid*, at 580.

¹⁴⁸ *Ibid*, at 580; on the same line, Sweden, at 178.

¹⁴⁹ Japan, *ibid*, at 580.

¹⁵⁰ Brazil, *ibid*, at 581.

¹⁵¹ *Ibid*, at 582.

Government from stopping export of arms, etc., from its territory to a foreign Government which has complied with certain prescribed conditions¹⁵²

And on the Brazilian proposal, it added that: “the Committee was unanimously of the opinion that it was not necessary or desirable to insert in the Convention provisions relating to the reasons for which an export licence can be refused”.¹⁵³

A second ground for potential inequality between producers and importers appeared to be the regime of publicity. The problem was well summarized by Douthitch of the Kingdom of the Serbs, Croats and Slovenes, who stated that “the draft Convention provides for publicity regarding all export and import licences. This provision will create a distinction between non-producing and producing countries, for, since the latter procure their arms in the home country, they will not be obliged to publish data concerning their armaments”.¹⁵⁴ The Greek delegate was even more fearsome of the publicity regime as he pointed that “the secrets of the national defence forces of the small States will be compulsorily revealed, whilst the producing States will maintain complete secrecy...”.¹⁵⁵ De Souza E Silva of Brazil, speaking of non-producing countries as being under the supervision of producers, also highlighted that this regime would not contribute to peace as it would reveal the means of defence, or the lack thereof, of some countries, enabling others to take advantage.¹⁵⁶ On the same line Portugal according to which “[p]ublicity constitutes a gap in security. It is a breach in our defensive armour, through which our watchful, anxious and impatient enemy will plunge his sharp and ready sword”.¹⁵⁷ Not only was publicity felt as creating inequality between producing and non-producing states, but a further inequality raised amongst non-producers. The absence of Russia from the conference sparked fear in its neighbouring states that publicity would be increasingly detrimental to their security.¹⁵⁸ Speaking about the publicity regime, the Polish delegation emphasised that “the disadvantages of this situation will be enhanced in the case of States which desire loyally to conform to the principles on

¹⁵² *Ibid*, at 746-747.

¹⁵³ *Ibid*, at 747.

¹⁵⁴ *Ibid*, at 140.

¹⁵⁵ *Ibid*, at 137.

¹⁵⁶ *Ibid*, at 190.

¹⁵⁷ *Ibid*, at 195. See also Roumania at 244-245-246, Persia at 256, Turkey at 298 and 451, Salvador at 298. Italy, a producer, pointed to the problem of inequality when discussing whether to insert aircrafts in the Category I list, at 333.

¹⁵⁸ The absence of Russia from the conference also bore an effect on the article dealing with the entry into force of the Convention.

which sincere co-operation between States is based, and which do not belong to the group of producing States, but which are neighbouring upon other countries which are producers of arms and whose efforts are directed to escaping from the provisions of the Convention”.¹⁵⁹ As a result, Poland requested either to insert an opt-out clause so to exempt these countries from the standard publicity, or to insert Russia in the exclusion zone.¹⁶⁰ Naturally, the Polish argument was not welcomed by other non-producing states. Uruguay underlined that the argument was flawed, as the exemption would be triggered even in case of Poland having a non-producing, non-contracting neighbour that receives arms from a non-contracting but producing state.¹⁶¹ China as well refused the justification, for the sole reason that the “guiding principle should be peace and not mistrust”.¹⁶² Fearing a cascade effect, the Greek delegate signalled that the countries which border with Russia have themselves other border States and these will determine their political and military attitude by that of their neighbours.¹⁶³ The Greek’s fear materialised in the statement brought by Lithuania, which, at that time, did not have a border with Russia. Nonetheless, the territory dividing the two countries was not sufficient to afford the needed security in case of danger and, furthermore, was still subject to contention.¹⁶⁴ Eventually, Article 29 provided Estonia, Finland, Latvia, Poland, and Roumania the possibility of not being subject to the publicity regime until the accession of Russia.¹⁶⁵

A further ground for inequality was found in the reservations regime. The new draft that combined Article 26 and 32 of the version drafted by the Temporary Mixed Commission specified a different system depending on whether the signatory was a contracting party whose ratification was

¹⁵⁹ League of Nations, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, A.13.1925.IX, at 138 and 257. Roumania spoke about Russia not being handicapped by the Convention, at 147.

¹⁶⁰ *Ibid.*, at 257.

¹⁶¹ *Ibid.*, at 191.

¹⁶² *Ibid.*, at 193.

¹⁶³ *Ibid.*, at 196.

¹⁶⁴ *Ibid.*, at 266.

¹⁶⁵ Article 29 provides that “The High Contracting Parties agree to accept reservations which may be made by Estonia, Finland, Latvia, Poland and Roumania at the moment of their signature of the present Convention and which shall suspend in respect of these States, until the accession of Russia to the present Convention, the application of Article 6 and 9, as regards both export to and import into these countries by the High Contracting Parties. These reservations shall not be interpreted as preventing the publication of statistics in accordance with the laws and regulations in effect within the territory of any High Contracting Party”. All the five countries signed the Convention with such reservation, see League of Nations, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, A.13.1925.IX, at 54, 55, 56.

originally required for the entry into force of the Convention. In other words, only the seven States, whose ratification was indispensable, were free to make reservations without restriction and if no one of the seven States objected, the reservation was fully effective. In contrast, the other States had no say on the reservations of the seven States, but these could object any reservation of the other States. It is apparent that the remaining thirty-seven countries represented in the conference were in a “scandalously unfair position” as compared with the seven Powers.¹⁶⁶ The Brazilian delegate put it even fiercely as he stated that “it is proposed to set a sort of aristocracy of Powers enjoying special rights”.¹⁶⁷ On the meaning of equality the delegate of Salvador remarked that “I accept certain natural inequalities in practice, but I refuse to accept any inequality in law”. Colombia further stated that “[t]here will always be large and small Powers and there will always be a difference, politically, between them; we are bound to admit this. But what we cannot admit is that small Powers should sign documents by which they renounce the principle of the legal equality of States”.¹⁶⁸ The clause was certainly an anomaly in the law, which was recognised as such also by the delegate of the USA, and was redrafted in order to cater for the blunt misbalance.¹⁶⁹

The establishment of the exclusion zone, which was renamed special zone, raised once again the issue of equality together with sovereignty. The contention specifically centred around two territories to be included in the list, Liberia and Abyssinia. The former country was not represented at the conference, although the delegate of Nicaragua was also a Liberian Consul and supported the exclusion of Liberia from the special zone.¹⁷⁰ His argument was grounded on the fact that Liberia was a Member State of the League of Nations and enjoyed full sovereignty “both at home and abroad”.¹⁷¹ Its sovereignty would be infringed if it was to be treated as a special zone and would put it on a different footing vis-à-vis other independent States and members of the League of Nations.¹⁷² The Colombian representative made a similar remark and expressed his surprise in seeing a State, which fulfilled the

¹⁶⁶ *Ibid*, at 347.

¹⁶⁷ *Ibid*, at 347.

¹⁶⁸ *Ibid*, at 348.

¹⁶⁹ *Ibid*, at 348

¹⁷⁰ *Ibid*, at 371.

¹⁷¹ The delegate of Nicaragua later stated that Liberia was in complete possession of its internal and external sovereignty, see *ibid* at 385.

¹⁷² *Ibid*, at 370.

requisite conditions for admission to the League of Nations in terms of independence and frontiers, treated as a protectorate or a mandate territory.¹⁷³ The argument of Nicaragua was criticised by the US, which stated that being a member of the League did not guarantee the absence of particular conditions that may suggest the inclusion of a country in the special zone.¹⁷⁴ Spain commented that the inclusion of Liberia was linked to the *status quo* created by the Brussels Act, which placed Liberia within the exclusion zone.¹⁷⁵ China saw the inclusion of an independent State among the prohibited zone as a sanction, which should, therefore, be justified. Otherwise, the inclusion of an independent State in the special zone was subject to the consent of the same State.¹⁷⁶ Moreover, if the inclusion of independent States in these zones was to be accepted, no distinction should be made between great and small States.¹⁷⁷

In order to overcome the impasse the US proposed to adopt a clause that recites as follows: “[i]f a State at present included in the special zone should, at the moment of its adherence to the present Convention, assume the same undertakings as those outlined in the first paragraph of this article, the High Contracting Parties declare that they will consider that State as excluded from the said zone from the date that its adherence becomes effective...”.¹⁷⁸ This proposal was eventually accepted and a slightly amended version forms paragraph 3 of final Article 28.

Since it was agreed that export would be permitted only to Governments and not to private individuals, one of the most vexing questions for the delegate was to come to an understanding of what constitutes a Government. In its opening speech, the President, from Belgium, was explicit when he said that “[a]nother difficult political and legal question is that of defining the bodies upon whom the Convention will confer the right to purchase the implements of war. What constitutes a Government? When does a group of combatants acquire international importance, the status of ‘belligerent’, which will permit it to receive war material?”.¹⁷⁹ Criticising the draft Convention for its vagueness, in its

¹⁷³ *Ibid*, at 372.

¹⁷⁴ *Ibid*, at 385.

¹⁷⁵ *Ibid*, at 371.

¹⁷⁶ *Ibid*, at 677.

¹⁷⁷ *Ibid*, at 674.

¹⁷⁸ *Ibid*, at 370.

¹⁷⁹ *Ibid*, at 122.

opening speech the vice-president exemplified the danger of allowing arms transfers to Governments recognised as such by the exporting one when he stated that: “I can only contemplate with dismay the terrible case...of a country in the throes of internal dissension and having both a legal Government and a Government recognised as such by a State exporting arms”.¹⁸⁰ He immediately proposed the adoption of the policy followed at that time by the US not to recognise Governments arising from coup d’état or revolutions, as stated in the second paragraph of Article 2 of the General Treaty of Peace and Friendship on 7 February 1923.¹⁸¹ As a result, he recommended that Article 3 of the Convention would be complemented as follows: “[I]licences are not to be granted except for a direct supply to a Government recognised as such by the Government of the exporting country, and provided that the acquiring Government has been established in accordance with the constitutional forms and requirements in force in the country”.¹⁸² He subsequently amended the proposal limiting it to the “the provisions of the constitution in force”.¹⁸³ According to his explanation, doubts would arise only in case of internal disorders and the exporting Government, in that case, should inform itself to the satisfaction that the application comes from a Government that had the right to acquire the material.¹⁸⁴

Although the Chinese delegation agreed with Guerrero’s principle, it pointed out that the inquiry on the constitutionality of the Government did not account for the fact that there existed several Governments which exercised a *de facto* authority that was universally recognised, but which had not been established by a constitution.¹⁸⁵ Moreover, China felt that the wording proposed by the vice-president represented an impairment to the sovereignty of the acquiring State as no State had the right to pronounce itself on an internal question.¹⁸⁶ The same concern was raised by Persia, which stated that “[t]here is, therefore, only one recognised Government, and obviously, no Government can allow another country to ask it whether it is in conformity with the national constitution or not”.¹⁸⁷

¹⁸⁰ *Ibid*, at 131.

¹⁸¹ On this treaty see L. H. Woolsey, The Recognition of the Government of El Salvador, *The American Journal of International Law*, Vol. 28, No. 2, 1934, at. 325-329.

¹⁸² League of Nations, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, A.13.1925.IX, at 131.

¹⁸³ *Ibid*, at 163.

¹⁸⁴ *Ibid*, at 164.

¹⁸⁵ *Ibid*, at 583.

¹⁸⁶ *Ibid*, at 166.

¹⁸⁷ *Ibid*, at 180.

The vice-president, of Salvador, reiterated his conviction that export shall be allowed only to the benefit of *de jure* Governments in a subsequent meeting when he rhetorically asked the delegates if they were ready to permit “the supply of war material both to legitimate Governments and to *de facto* Governments simultaneously existing in the same State”.¹⁸⁸ Brazil responded to Salvador that the recognition of a Government depends on national policy, a sovereign prerogative in which no one has the right to interfere and to discuss the reasons for which one Government recognises or refuses to recognise another.¹⁸⁹ On a similar note the Persian delegation, who underlined that it is not allowed to anyone to ask whether a Government is in conformity with the national constitution or not.¹⁹⁰ It also added that “it is extremely rare for one country to have two Governments, equally recognised, and this situation is not admitted neither by international law nor by international usage”.¹⁹¹ In a later meeting, Persia gave a concrete example of the conundrum created by the clause. in case of secession following a civil war fought in a territory where two producing neighbours have diametrically opposed policies, it would be probable that one of these two countries would recognise as legal one party, while the other country would recognise as legal the other one. Not only would this give the opportunity of interfering in the domestic affairs of the importing country, but the result would be bloodshed.¹⁹² As a consequence, in Persia’s view, the preferable wording would be “[l]icences should not be granted except for a direct supply to a Government recognised as such by international law”.¹⁹³

Buero of Uruguay raised two issues: first, that according to Article 3 the Government of the exporting country is the one bestowed with the right to recognise. It, therefore, cannot be excluded that two exporters may recognise different factions, with the risk that an unscrupulous State may recognise a faction for the sole purpose of selling it arms.¹⁹⁴ Second, and on a more general level, that the discussion seemed to confuse the *de facto* and the *de jure* recognition and that the Conference could not deal with the latter one as it was “one of the most difficult in International Law and which will have to

¹⁸⁸ *Ibid*, at 179.

¹⁸⁹ *Ibid*, at 179-180.

¹⁹⁰ *Ibid*, at 180.

¹⁹¹ *Ibid*, at 180.

¹⁹² *Ibid*, at 583.

¹⁹³ *Ibid*, at 583.

¹⁹⁴ *Ibid*, at 584. Japan agreed on this risk, at 584.

be simplified sooner or later by means of codification”.¹⁹⁵ Germany observed that the number of coexisting Governments was not limited to two, but could be even three and, furthermore, that there existed also the concept of semi-recognised Governments.¹⁹⁶

The Kingdom of the Serbs, Croats and Slovenes raised a compelling question vis-à-vis recognition. Realising that revolutions in non-producing countries may be fomented by producers, the dilemma was whether the “right of recognising a Government which arises as the result of any upheaval belong solely to the countries which produce arms and munitions of war”.¹⁹⁷ In the Kingdom’s opinion, it would have been preferable that the Governments of several or of all countries should pronounce on the legality of a new Government, on its recognition and, thus, on the authorisation to import arms and implements of war. Belgium opposed this opinion when it stated that a Government was established either constitutionally or by revolution. In this latter case, recognition could follow more or less rapidly depending upon the interests and the geographical situation of the different States. In this regard, the Belgium representative rhetorically asked if a neighbouring State should “wait for a State situated in another part of the world to recognise this revolutionary Government before supplying it with arms which it required for its internal tranquillity and to defend itself against invasion”.¹⁹⁸

Finally, France highlighted that two questions were implied in the discussion. One, dealing with recognition in relation to successive governments and, the other one, with the simultaneous existence of two governments, yet this latter was no longer a question of recognition of governments but of belligerents.¹⁹⁹ In order to reach a conclusion on the point, the question was referred to the legal committee. Mindful of the difficulties and recognising that the solution to the question of recognition was not in the competence of the Conference the legal committee avoided the question altogether and suggested to scratch off the term recognition. As a result, the final form of Article 3 does not mention recognition as a condition for an importing Government to receive arms, ammunition, and implements of war. The division put forward by France between recognition of successive governments and of

¹⁹⁵ *Ibid.*, at 180.

¹⁹⁶ *Ibid.*, at 181.

¹⁹⁷ *Ibid.*, at 182.

¹⁹⁸ *Ibid.*, at 585.

¹⁹⁹ *Ibid.*, at 584.

belligerents informed the discussion on neutrality. The British delegation took care of proposing a draft, which was accepted and accorded the status of authentic interpretation of the text by the legal committee.²⁰⁰

III.3 Contemporary Treaties

The examination conducted above can be regarded as a historical enquiry on its own, but if one puts it in relation to the treaties that are nowadays in force, one can see that it was not an end in itself. As this section shows, the two international treaties that regulate the transfer of conventional arms owe to their historical precedents at least part of their structure. The Firearm Protocol, for instance, adopts the mechanism of licensing regime that the three historical treaties established; the list of categories under Article 2 of the Arms Trade Treaty (“ATT”) resembles the categories that both the Convention of Saint-Germain and the Arms Traffic Convention adopted. Moreover, some of the contentious points emerged during the negotiations of the historical conventions are mirrored in the contemporary discussions.

Not dissimilarly from the preceding section, also this one centres on the analysis of the most relevant articles and follows a chronological order. The Firearm Protocol will, therefore, be the first to be analysed and the ATT will subsequently follow.

III.3.1 The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (“The Protocol”)

Adopted by the GA with resolution 55/255 of 8 June 2001²⁰¹, the Firearms Protocol counts so far 118 parties, amongst which the European Union as a regional economic organization pursuant to Article 17 and 23 EU Member States.²⁰² Two years elapsed between the setting up of an ad hoc

²⁰⁰ *Ibid*, at 749-750. According to the British explanation: “There were two kinds of war: international war and civil war. The text applied to both. It was unnecessary to state that, in speaking of civil war, one did not have in view any revolt in which the insurgents might be possessed of arms or might call themselves a government; one had in view a struggle of a lasting and more serious character such as, for example, the War of Secession, which broke out in 1861 in the United States of America. The term applied to the situation which existed where two governments were in conflict, both organised and both possessing regularly constituted armies and sufficient organisation and stability to observe the rules of International Law. In cases of this class, it was regularly recognised that other States had the right to observe an attitude of neutrality which amounted to according the insurgent government recognition as a belligerent”.

²⁰¹ United Nations General Assembly, Resolution 55/255, A/RES/55/255.

²⁰² Germany, Ireland, Luxembourg, Malta and the UK are not party.

committee in order to elaborate, *inter alia*, an international instrument combating the illicit manufacturing and trafficking of firearms and the adoption of the Protocol.²⁰³ A relatively swift course of action that moved its first steps by means of a working paper²⁰⁴ and a draft Protocol presented by Canada already at the first session of the ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime.²⁰⁵ The Inter-American Convention on firearms, ammunition, and explosives in force since 1 July 1998 provided a solid reference to the Canadian drafters, who could rely on the first, albeit regional, instrument of this kind.²⁰⁶ The draft Protocol was overall welcomed by the other participants, even if South Africa mooted the possibility that a protocol may “diminish future efforts to elaborate an international instrument on arms trafficking...the idea of elaborating such an international instrument should not be lost.”²⁰⁷ The Protocol contains a preamble and a body of 21 Articles.

*III.3.1.1 The Preamble*²⁰⁸

Although, as the comment to Article 2 will show, the Protocol pertains to the sphere of multi-lateral cooperation in criminal matters, the final version of the Protocol includes remarks that,

²⁰³ United Nations General Assembly, Resolution 53/111, A/RES/53/111. See also United Nations General Assembly, Resolution 53/114, A/RES/53/114.

²⁰⁴ The working paper is contained in United Nations General Assembly A/AC.254/5, which contains also the paper presented by the UK.

²⁰⁵ Draft Protocol in United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/4/Add.2.

²⁰⁶ Organization of American States, Inter-American Convention Against the Illicit Manufacturing Of And Trafficking In Firearms, Ammunition, Explosives, And Other Related Materials (A-63). On the need to follow the example of the Inter-American Convention see also United Nations General Assembly, Resolution 54/127, A/RES/54/127, at point 2.

²⁰⁷ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.5, at 2.

²⁰⁸ The Preamble read as following: “The States Parties to this Protocol, Aware of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of each State, region and the world as a whole, endangering the well-being of peoples, their social and economic development and their right to live in peace, Convinced, therefore, of the necessity for all States to take all appropriate measures to this end, including international cooperation and other measures at the regional and global levels, Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, *inter alia*, an international instrument combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, Bearing in mind the principle of equal rights and self-determination of peoples, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition will be useful in preventing and combating those crimes.”

nonetheless, link to regional and global security and the right to live in peace. Furthermore, the third preamble contains an explicit reference to the Declaration on Friendly Relations, self-determination and cooperation principles as per the Charter.²⁰⁹ Mexico proposed to include other preambles with an even more explicit reference, such as “the need, in peace processes and post-conflict situations, to achieve effective control of firearms, ammunition, explosives” and to have an autonomous reference to the principles of sovereignty, non-intervention and the juridical equality of States.²¹⁰ The Colombian proposal linked the destabilizing effects of illicit arms transfers on the incidence of interstate conflict, yet it did not mention intra-state conflicts.²¹¹

The draft dated 2 March 2001 was more explicit in its reference to self-determination of all people, as it included the wording “in particular peoples under colonial or other forms of alien domination or foreign occupation”. In addition, this draft referred to GA resolution 54/54 V²¹² in which the right to individual and collective self-defence as per Article 51 of the Charter was reaffirmed together with the right upon States to acquire arms with which to defend themselves.²¹³ The inclusion of self-determination within the preamble was not unanimously welcomed. The representative of Argentina contested the appropriateness of such inclusion in an international instrument devoted to the fight against the illicit manufacturing and trafficking of firearms, as it would partially redefine the scope and the extent of the principle.²¹⁴

It is also worth to note that according to an early Mexican proposal the Protocol should have covered, in addition to firearms and ammunition, also explosives. However, such option was eventually discarded in light of a legal opinion of the Secretariat on the interpretation of resolution 54/127.²¹⁵ Point eight of this resolution called the ad hoc Committee “following the completion of the study, to consider

²⁰⁹ See II.3.

²¹⁰ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.1 at 7.

²¹¹ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2006, at 583.

²¹² United Nations General Assembly, Resolution 54/54 V, A/RES/54/54.

²¹³ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/L.281, at 2.

²¹⁴ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2006, at 594.

²¹⁵ See United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/25 at 6.

the possible elaboration of an international instrument on the illicit manufacturing of and trafficking in explosives”, and therefore, pursuant to the legal opinion, the mandate of the ad hoc Committee did not include the drafting of provisions on explosives.²¹⁶

*III.3.1.2 Article 2 - Statement of purpose*²¹⁷

As observed by McClean, the draft presented by the Canadian delegation did not differ much from the final form and heavily draws from Article 2 of the Inter-American Convention.²¹⁸ Two points are noteworthy: first, Pakistan strongly resented the refusal of its proposal to insert at the end of the sentence “with a view to fighting transnational organized crime”.²¹⁹ Second, France remarked that the purpose of the cooperation under this article was limited to combating transnational organized crime and should not extend to the area of disarmament and arms control.

*III.3.1.3 Article 3 – Use of terms*²²⁰

As already stressed, the Inter-American Convention influenced the drafting of this Protocol, and Article 3 is no exception. In defining the meaning of firearm, Article I(3)a of the Inter-American

²¹⁶ See United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/4/Add.2/Rev.4 at 1.

²¹⁷ Article 2 read as following: “The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition”.

²¹⁸ David McClean, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols*, Oxford University Press, 2007, at 451.

²¹⁹ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2006, at 603.

²²⁰ Article 3 read as following: For the purposes of this Protocol:

(a) “Firearm” shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899;

(b) “Parts and components” shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm;

(c) “Ammunition” shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party;

(d) “Illicit manufacturing” shall mean the manufacturing or assembly of firearms, their parts and components or ammunition:

i) From parts and components illicitly trafficked;

(ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or

(iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol; Licensing or authorization of the manufacture of parts and components shall be in accordance with domestic law;

(e) “Illicit trafficking” shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State

Convention was replicated with very few amendments.²²¹ The elements that differ are two. On the one hand, the insertion of the adjective “portable”, an element that, as noted in Chapter 1, characterises small arms and light weapons (SALW) and can contribute to explaining their wide usage in a civil war.²²² On the other hand, the problem of defining antique firearms is outflanked by referring to the definition given by the domestic legislation of the State parties. However, it is set that firearms after 1899 cannot be considered as antique.

Different from letter a, letter b of Article I(3) of the Inter-American Convention was not included in the definition of firearms. As per letter b, firearms encompass also “any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.” The comment to the preamble has already explained the reason behind the exclusion of explosives from the Protocol. A similar logic, linked to the extent of the mandate conferred to the ad hoc Committee, lays behind the exclusion of the other devices even if the legal opinion abovementioned did consider only explosives and not the other weapons. The United States, supported by Belgium, Egypt, Italy, New Zealand, South Africa, Turkey, and Zambia,²²³ was in favour of expanding the definition of firearms, as was Mexico whose early proposal already included the entire list.²²⁴ The rationale behind the expanded list was that organized criminals utilise and traffic such weapons and, therefore, excluding them from the list would lower the usefulness and effectiveness of the Protocol. Nonetheless, Australia, Germany, Japan, Norway, Paraguay, the Russian Federation, and Spain, contested the expansion.

The inclusion, or not, of these weapons touched upon a fundamental issue, an issue that is tied with the overall scope of the Protocol. By expanding or limiting the definition of firearms and, thus, the

Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol;

(f) “Tracing” shall mean the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking.

²²¹ According to Article I(3)a: Firearm: any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas.

²²² See I.4.

²²³ See United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/4/Add.2/Rev.1, footnote 33 at 6.

²²⁴ See United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.1 at 8.

overall list of goods covered by the instrument, the objective of the instrument shifts between being one aimed at countering transnational crime and one aimed at arms control. In other words, besides the stated scope pursuant to Article 4, the balance point of the Protocol rests in fact also on the extent of the regulated items. Not only do “terms ‘landmines’ and ‘missiles’ have their own definitions, to incorporate them into the definition of ‘firearms’ would give rise to confusion regarding the concepts involved and would cause the Firearms Protocol to lose its focus”, but also “[r]estricting the legitimate manufacturing and transfer of firearms is, in essence, an arms control issue”.²²⁵ As a result, China stated that it opposed any attempt to go beyond the given mandate of the Committee and to “indiscriminately expand the scope of the definition of such basic concepts as firearms, as well as the scope of application of the Firearms Protocol, under the pretext of preventing and combating crime”;²²⁶ this also in light of the fact that, already at the time of the Protocol, there were international legal instruments that placed restrictions on landmines and other weapons.²²⁷

The original Canadian proposal did not contain a specific definition of parts and component, but these were included under the definition of “other related material”.²²⁸ The Canadian draft was, however, criticised for two reasons. First, the question of what constitutes a spare part was far from settled and, furthermore, which component or part has to be regarded as essential for the functioning of the firearm was an even more strenuous question. The UK pointed at the former part of the question when it observed that certain component may commonly be used other than in firearms and therefore do not need to be controlled.²²⁹ In relation to the latter part of the question, the USA signalled that “virtually all parts—including stocks, triggers and barrels—are non-essential to the firearm’s ability to expel a projectile”.²³⁰ Second, the ambiguity around the lethality enhancement of certain accessories

²²⁵ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/L.137, at 2.

²²⁶ *Ibid*, at 3.

²²⁷ *Ibid*, at 2.

²²⁸ Article II (f): ‘Other related materials’: any components, parts or replacement parts of a firearm that are essential to its operation or accessories that can be attached to a firearm and that enhance its lethality. In contrast, Article I(6) of the Inter-American Convention is more succinct: ‘Other related materials’: any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm.

²²⁹ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.1, at 20.

²³⁰ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.1, at 23.

brought the USA to state that in fact the lethality of a firearm is defined by the calibre rather than from the accessory and that if the intention was to include items such as scopes and silencers then the definition was unclear.²³¹ The UK had the same difficulties vis-à-vis the lethality requirement and proposed to adopt a set of reference to the existing arms attachments.²³²

The definitions of illicit manufacturing and illicit trafficking, respectively point d) and e), adhere very strictly to those provided by the Inter-American Convention, while the definition of tracing follows a suggestion by Japan.²³³

*III.3.1.4 Article 4 – Scope of application*²³⁴

As already anticipated, while the list of arms included under Article 3 contributes to situating the instrument within the realm of measures against transnational organized crime, Article 4 explicitly states its scope of application. The initial problem centred around coordination between the scope of the Protocol and that of the Convention against Transnational Organized Crime, to which the Protocol is a supplement. While Article 1 of the Protocol states that “[t]his Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention”, the views on the scope differed. Mexico, the Republic of Korea and Turkey were concerned about the technical difficulties that might be caused by the scope of the Protocol being limited solely to organized crime.²³⁵ Algeria, France, Germany, and the Netherlands, suggested that the scope of the Protocol should not go beyond the mandate set forth by the General Assembly.²³⁶ Also China called to refrain from going beyond the mandate and adventuring into areas related to disarmament and arms control measures.²³⁷ On the differences and similarities between arms control and illicit

²³¹ *Ibid.*, at 23.

²³² *Ibid.*, at 20.

²³³ *Ibid.*, at 3.

²³⁴ Article 4 read as following: “1. This Protocol shall apply, except as otherwise stated herein, to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to the investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group. 2. This Protocol shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”.

²³⁵ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/4/Add.2/Rev.1, at 9.

²³⁶ *Ibid.*, at 9.

²³⁷ See United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/L.78, at 2.

manufacturing and trafficking in firearms in the field of crime prevention, China presented a position paper.²³⁸ In its view, both the efforts aimed at promoting security; however, combating illicit manufacturing and trafficking in firearms focuses on safeguarding public security in order to ensure the well-being of nations, while arms control and disarmament aims at “safeguarding the military security of each country, allowing the legal manufacture and transfer of arms to fulfil its legitimate defence needs”.²³⁹

Sweden suggested a middle view according to which, even if the Protocol should be subordinate to the Convention and whose scope was limited to transnational organized crime, the application of the Protocol should not necessarily be limited to transnational organized crime.²⁴⁰ The delegation of the United States, supported by the delegation of the United Kingdom, suggested that some provisions of the Protocol should go beyond the scope of the transnational organized crime.²⁴¹ Belgium also recommended the insertion of a “safeguard clause in respect of international humanitarian law for situations involving armed conflict, in particular domestic armed conflict, within the meaning ascribed to those terms by international humanitarian law.”²⁴²

Three main proposals were discussed at the negotiating table:

Option 1²⁴³

This Protocol applies to all classes of [commercially] traded [and manufactured] firearms, ammunition and other related materials but not to state-to-state transactions or transfers for purposes of national security.

Option 2²⁴⁴

This Protocol applies to all classes of firearm, including those which are commercially traded, and all classes of ammunition and related materials, but not to state-to-state transactions or transfers for the purpose of national security.

Option 3²⁴⁵

²³⁸ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/L.137.

²³⁹ *Ibid.*, at 2.

²⁴⁰ *Ibid.*, at 9.

²⁴¹ *Ibid.*, at 9.

²⁴² United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.5, at 2. See also United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/5/Add.10, at 1, where Belgium suggested the following wording: ““The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law shall not be governed by this Protocol.”

²⁴³ Original proposal of Canada, in United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, A/AC.254/4/Add.2, at 3, with amendments in brackets from Japan, see United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, A/AC.254/5/Add.1, at 3.

²⁴⁴ Proposed by the United Kingdom, see *ibid.*, at 20.

²⁴⁵ Proposed by the United States, see *ibid.* at 23.

This Protocol applies to all classes of firearms, ammunition and other related materials, except that it does not apply to state-to-state transactions or to transactions for purposes of national security.

As can be seen from these options, the exclusion of state-to-state transactions, as that these type of transactions pertained to the realm of arms control rather than crime control, was readily agreed.²⁴⁶ The main concerns were about the precise meaning of the words “state-to-state transactions” and “purposes of national security”. On the former, most delegations deemed that this should exclude transfers from one Government to another but not transfers between entities owned or operated by Governments, such as state-owned arms manufacturers.²⁴⁷ One delegation went even further and proposed to exempt transactions if only one of the parties was a State, but others opposed that view as doing so would exclude all acquisitions or transfers by a State.²⁴⁸ In this regard, an interpretative note was added to the *travaux préparatoires* in order to clarify that state-to-state transaction refers “only to transactions by States in a sovereign capacity”.²⁴⁹ On the latter, some delegations argued that it was either redundant, given the words “state-to-state transactions”, or unacceptable, as it would imply authorising transfers by individuals or non-State organizations if undertaken for national security purposes.²⁵⁰ As McClean commentary states, it seems clear that transfers by individuals or non-State organizations are therefore not protected by this paragraph.²⁵¹

Finally, it also worth to note that the Mexican delegation proposed the insertion of Article 4 bis, named sovereignty. According to the first paragraph of that draft article, “States Parties shall fulfil their obligations under this Protocol in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States”.²⁵² At the fifth session of the Ad Hoc Committee, however, the proposal was deferred for further consideration because other related provisions of the draft Convention were not enough developed.²⁵³

²⁴⁶ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2006, at 627.

²⁴⁷ *Ibid.*, at 627.

²⁴⁸ *Ibid.*, at 627.

²⁴⁹ *Ibid.*, at 630.

²⁵⁰ *Ibid.*, at 628.

²⁵¹ David McClean, *Transnational Organized Crime*, see above n. 218 at 464.

²⁵² United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime A/AC.254/4/Add.2/Rev.3, at 14.

²⁵³ *Ibid.*, at 14.

III.3.2 The Arms Trade Treaty

III.3.2.1 The First steps

The previous paragraph has shown that the Firearms Protocol, despite being the first universal treaty in force that confronts, amongst others, the issue of firearms supply, it is limited in its scope, as State-to-State transactions are excluded, in the goods encompassed, as it covers only a certain type of arms, and in the field of application, as it is an instrument devoted to combating crime. This also implies that until the entry into force of the ATT, the regulation of supply of arms and weapons was left to regional initiatives or, in relation to specific weapons, to treaties regulating their use. These are analysed in the next paragraph and this section examines what is, therefore, the first universal treaty that deals with the supply of conventional weapons.

While the treaty has entered into force on 24 December 2014 and currently 104 States are party to it, the path has not been devoid of hindrances and setbacks.²⁵⁴ The first initiative for a comprehensive treaty on conventional arms came from civil society with the 1997 Nobel Peace Laureates' International Code of Conduct on Arms Transfers.²⁵⁵ In 2001 a revised version of this text, known as the draft Framework Convention on International Arms Transfers, was circulated by a group of non-governmental organizations (NGOs), who then launched a campaign in order to widen the support for an internationally binding instrument.²⁵⁶ The combined effort of Amnesty International, Oxfam, and the International Action Network on Small Arms (IANSA) who founded the Control Arms campaign, gained momentum when they handed in 2006 to the then UN Secretary-General a global petition called

²⁵⁴ Albania, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Benin, Bosnia & Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cabo Verde, Cameroon, Canada, Central African Republic, Chad, Chile, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea Bissau, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Kazakhstan, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Montenegro, Mozambique, Netherlands, New Zealand, Niger, Nigeria, North Macedonia, Norway, Palau, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines, Samoa, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Suriname, Sweden, Switzerland, Togo, Trinidad & Tobago, Tuvalu, United Kingdom, Uruguay, Zambia.

²⁵⁵ Mark Bromley, Neil Cooper And Paul Holtom, "The UN Arms Trade Treaty: arms export controls, the human security agenda and the lessons of history", *International Affairs* 88: 5, 2012, at 1038.

²⁵⁶ Draft Framework Convention available at <https://armerdesarmer.files.wordpress.com/2010/04/framework-convention-01.pdf>, accessed on 29 July 2019.

Million Faces.²⁵⁷ In its eight preamble UNGA Resolution 61/89 of late 2006 recognised the role played by the NGOs when it requested the Secretary General to convene a group of governmental expert [GGE] in order to examine “the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms”.²⁵⁸

III.3.2.2 The road towards the ATT Conference

In parallel with the establishment of the GGE, Resolution 61/89 also called the Secretary-General to seek and collect the views of Member States on the same matter, namely the feasibility, scope and draft parameters for a comprehensive treaty.²⁵⁹ The response was overall satisfactory as 101 Member States and 2 regional organizations submitted their views to the Secretary-General.²⁶⁰ Under the heading “scope”, States submitted their opinion on the categories of weapons to be covered and the types of transaction to account for.

There was an overall consensus that the ATT should cover all conventional weapons, together with ammunition, parts and components in the categories of items.²⁶¹ In addition to conventional arms, certain support was given to the inclusion of technology²⁶² and a more modest one to dual-use goods,²⁶³ to which Brazil alone opposed, stressing that such inclusion of dual-use would be neither feasible nor desirable.²⁶⁴ In terms of lists, States supported the adoption of existing lists such as those of the

²⁵⁷ Sarah Parker, *Breaking New Ground? The Arms Trade Treaty*, *Small Arms Survey 2014: Women and Guns*, Cambridge University Press, 2014, at 78.

²⁵⁸ United Nations General Assembly Resolution 61/89, A/RES/61/89, voted with 153 yes, 1 no and 24 abstentions.

²⁵⁹ *Ibid*, point 1.

²⁶⁰ Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, A/63/334 at 11.

²⁶¹ Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007, at 5, 6.

²⁶² Albania, Australia, Austria, Bangladesh, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Canada, Colombia, Côte d'Ivoire, Croatia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, Djibouti, Estonia, Fiji, Germany, Hungary, Ireland, Italy, Jamaica, Japan, Kenya, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malawi, Malta, Moldova, Montenegro, Morocco, the Netherlands, New Zealand, Niger, Norway, Paraguay, Peru, Portugal, Republic of Korea, Slovakia, South Africa, Spain, Sweden, Togo, Turkey, the United Kingdom and Zambia.

²⁶³ Albania, Bangladesh, Belgium, Bosnia and Herzegovina, Burkina Faso, Canada, Colombia, Costa Rica, Côte d'Ivoire, Fiji, Hungary, Iceland, Japan, Liberia, Moldova, Netherlands, Niger, Norway, Paraguay, Peru, Philippines, Republic of Korea, South Africa, Sweden, Togo, the United Kingdom and Zambia.

²⁶⁴ United Nations General Assembly, A/62/278 (Part II), at 31.

Wassenaar Arrangement, the EU Code of Conduct on Arms Exports and the UN Register of Conventional Arms. Poland suggested a compromise solution by drawing a list from the terminology used in arms embargoes imposed by the United Nations Security Council.²⁶⁵ The following table summarizes the replies of the States in relation to the goods to be considered by the ATT.²⁶⁶

State	Ammunition	Parts and components	Manufacturing technology	Dual-use goods	Technology	Explosives	Arms for internal security	Manufacturing equipment	Technological development	Existing list
Albania	✓	✓	✓	✓			✓			
Algeria										
Argentina	✓	✓				✓				✓
Australia	✓	✓							✓	✓
Austria	✓	✓			✓			✓		✓
Bangladesh	✓	✓	✓	✓		✓				
Belgium				✓						
Benin										
Bolivia										
Bosnia and Herzegovina	✓	✓	✓	✓						
Brazil	✓									✓
Bulgaria	✓	✓	✓							✓
Burkina Faso	✓	✓	✓	✓		✓	✓			
Burundi										✓
Canada	✓	✓	✓	✓	✓					
Chile	✓									
China										
Colombia	✓	✓	✓	✓	✓	✓	✓			
Costa Rica				✓						
Côte d'Ivoire	✓	✓	✓	✓		✓	✓			
Croatia		✓			✓					
Cuba										
Cyprus									✓	
Czech Republic	✓	✓			✓			✓		
the Democratic Republic of the Congo	✓	✓	✓			✓				
Denmark	✓	✓	✓			✓				
Djibouti	✓	✓	✓			✓				
Ecuador	✓					✓				
Egypt										
El Salvador	✓					✓				✓
Estonia	✓		✓		✓	✓				✓
European Union										✓
Fiji	✓	✓	✓	✓		✓	✓			
Finland										✓
France	✓							✓		✓
Georgia	✓									
Germany	✓	✓	✓					✓		
Greece										
Guatemala										
Hungary	✓	✓		✓	✓					✓
Iceland	✓	✓		✓				✓		
India										
Indonesia										✓
Ireland					✓				✓	✓
Israel										

²⁶⁵ United Nations General Assembly, A/62/278 (Part II), at 168.

²⁶⁶ Table taken from Sarah Parker, Analysis of States' Views on an Arms Trade Treaty, United Nations Institute for Disarmament Research, 2007, at Annex D.

Italy	✓	✓	✓							✓
Jamaica	✓	✓	✓							
Japan		✓	✓	✓				✓	✓	✓
Kenya	✓	✓	✓							✓
Latvia	✓					✓				✓
Lebanon										
Liberia	✓	✓		✓			✓	✓		
Liechtenstein	✓		✓				✓			✓
Lithuania	✓	✓				✓				✓
Luxembourg	✓	✓				✓				
Macedonia						✓				✓
Malawi	✓	✓	✓				✓			
Mali										
Malta	✓	✓	✓							
Mauritius	✓	✓								✓
Mexico	✓	✓								
Moldova	✓		✓	✓						
Montenegro	✓	✓	✓				✓			
Morocco	✓	✓	✓				✓		✓	
Netherlands	✓	✓	✓	✓			✓	✓		
New Zealand	✓					✓				✓
Niger	✓	✓	✓	✓			✓	✓		
Nigeria										
Norway	✓	✓	✓	✓						✓
Pakistan										
Panama										
Paraguay	✓	✓	✓	✓			✓	✓		✓
Peru	✓	✓	✓	✓					✓	
Philippines	✓			✓						
Portugal	✓	✓	✓							
Republic of Korea	✓	✓		✓	✓					✓
Romania	✓									
Russia										
Samoa										
Senegal	✓	✓					✓			✓
Serbia										
Seychelles										
Slovakia	✓	✓				✓				✓
Slovenia	✓									
South Africa	✓		✓	✓			✓			✓
Spain	✓	✓	✓							
Sweden	✓	✓	✓	✓				✓		
Switzerland	✓	✓								✓
Thailand										✓
Togo	✓	✓	✓	✓			✓	✓		
Trinidad and Tobago										
Turkey	✓	✓	✓				✓		✓	✓
United Kingdom	✓	✓	✓	✓						
Venezuela										
Zambia	✓	✓	✓	✓			✓	✓		

In terms of the problem, already seen in the historical treaties, whether to provide a fixed list or to work on the basis of broad definitions, several states suggested annexing a list of weapons in order to reduce ambiguity, although some of them also stressed the need for flexible descriptions to cater for technological advancement and weapon development and also to avoid frequent updating.²⁶⁷ With a

²⁶⁷ Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007, at 6.

view to having a workable and effective solution Italy proposed that “[o]ne or more protocols of the future treaty should be devoted to the categories of military equipment and their technology covered by the treaty, and a review mechanism should be envisaged”.²⁶⁸

Together with the arms and weapons to be covered by the instrument, a second crucial point considered by States was the list of criteria that should guide States in their determination on whether to approve a transfer. In her analysis Parker divides the replies and, therefore, the possible criteria in five “thematic clusters”: the first cluster, consideration based on existing obligations and commitments, includes views on a criterium that would render unlawful a transfer if contrary to existing obligations and commitments.²⁶⁹ These would include not only the UN Charter and Security Council resolutions and, hence, embargoes, but also other international and regional obligations. The inclusion of regional obligations, although it found some support²⁷⁰, could have been seen as troublesome given that, by definition, these obligations are not universally binding, and it would pose States not party to those arrangements in an unsupportive situation.²⁷¹ Canada, although in favour of recalling regional commitments, stated nonetheless that an ATT would overcome the current approach based on national and regional instruments.²⁷²

The second cluster, considerations based on likely user, accounts for the possible end-user and, particularly, whether the arms may be transferred or diverted to criminal groups, terrorists or unauthorized non-state actors.²⁷³ The latter group proved to be a contentious point throughout all the negotiations of the ATT and at the stage of the submission of States’ view, seven States explicitly called to ban the transfer to non-state actors²⁷⁴. Brazil stated that “[t]he instrument must contain a strict

²⁶⁸ United Nations General Assembly, A/62/278 (Part II), at 104.

²⁶⁹ Sarah Parker, *Analysis of States’ Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007, at 9.

²⁷⁰ United Nations General Assembly, A/62/278 (Part II): Australia at 14, Bangladesh at 19, Bosnia and Herzegovina at 27, Brazil at 32, Canada at 42, Costa Rica at 50, Côte d’Ivoire at 52, Czech Republic at 59, Ecuador at 65, Germany at 90, Iceland at 98, Jamaica at 108, Liberia at 121, Netherlands at 145, Niger at 152, Norway at 155, Senegal at 185, Togo at 213, United Kingdom at 228, Zambia at 234.

²⁷¹ Sarah Parker, *Implications of States’ Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2008, at 24.

²⁷² United Nations General Assembly, A/62/278 (Part II), at 43.

²⁷³ Sarah Parker, *Analysis of States’ Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007, at 9.

²⁷⁴ See also Paul Holtom, *Prohibiting Arms Transfers to Non-State Actors and the Arms Trade Treaty*, UNIDIR Resources, 2012.

requirement that all transfers of conventional weapons and small arms and light weapons must be expressly authorized by competent governmental authorities of the importing State, as well as a clear prohibition of transfers to unauthorized non-State actors”.²⁷⁵ On the same line, Cuba, as it expressed the view that “...a conventional arms trade treaty will be effective only if it expressly prohibits arms transfers to non-State actors”.²⁷⁶ India, speaking against the adoption of the ATT, stated that the process towards an international instrument should be developed by “reinforcing commitments concerning the non-transfer and non-diversion of weapons to non-State actors”.²⁷⁷ Indonesia, which supported the ATT, declared that the instrument should prohibit “transfers that are likely to be used in conflicts by non-State actors”.²⁷⁸ Similarly Liberia as it stated that “there must be prohibition of all arms transfers to non-State actors that are not explicitly authorized under international law”.²⁷⁹ Mali emphasised the need of having the authorization of the importing State in case of transfer to NSAs: “Member States should prohibit, without exception, all transfers of arms to non-State actors if such transfer is not authorized by the importing Member State”.²⁸⁰ Finally, Turkey considered that “[t]he main focus of the arms trade treaty should be prevention of the acquirement of arms and weapons by non-State actors”.²⁸¹ Other States, although not explicitly calling for a prohibition on transfers to NSAs, declared that such issue should be carefully weighed and studied during the negotiations.²⁸²

The third cluster, considerations based on likely use, encompasses possible criteria in relation to the likelihood that arms would be used to violate international humanitarian law, human rights, or to commit acts of genocide or crimes against humanity.²⁸³ States were widely supportive of a criterion concerning violations of human rights, which found more support than the one for violation of international humanitarian law. However, as highlighted by Parker, the practical application of such a

²⁷⁵ United Nations General Assembly, A/62/278 (Part II), at 29.

²⁷⁶ *Ibid*, at 55.

²⁷⁷ *Ibid*, at 100.

²⁷⁸ *Ibid*, at 101.

²⁷⁹ *Ibid*, at 121.

²⁸⁰ *Ibid*, at 128.

²⁸¹ *Ibid*, at 221.

²⁸² Colombia, Ecuador, France, Jamaica, Serbia, Sweden and Thailand.

²⁸³ Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007, at 10.

criterion would be troublesome and necessitate of precise guidelines.²⁸⁴ In contrast, for international humanitarian law, the ICRC had, already in 2007, issued a practical guide containing indicators that could be used by States to assess the risk that a proposed transfer of arms could be used in the commission of serious violations of IHL.²⁸⁵

The fourth cluster, considerations based on likely impact, considers whether the proposed transfer may contribute to regional or internal stability or, in contrast, exacerbate existing conflicts or hamper development.²⁸⁶ Most of the States that proposed a criterion based on sustainable development were, in fact, already bound by similar provisions contained in regional instruments. Of the 35 States that overall mentioned it, 16 were Members of the EU and committed to Criterion 8 of the EU Code of Conduct on Arms Exports, while other 8 were part to the ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials and therefore bound by its Article 6.²⁸⁷ The problem surrounding the evaluation of regional stability and exacerbation of conflicts, despite the support coming from respectively 34 States and 27 States, lies in the compound analysis that is required to reach a determination on whether an arms transfer will effectively have a negative, or positive, effect.

The fifth and last cluster, considerations based on the recipient country, accounts to specific factors of the recipient State and includes, amongst others, record of human rights violation, impact on socio-economic conditions, legitimate defence needs and corrupt practices. As per the previous cluster, there are difficulties in relation to some of these parameters. Legitimate defence needs may, for instance, imply an analysis of defence capacity that could breach sovereign prerogatives, while for socio-economic conditions the same considerations done above on regional stability are equally valid.²⁸⁸

²⁸⁴ Sarah Parker, *Implications of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2008, at 29.

²⁸⁵ ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria – a Practical Guide*, available at <https://www.icrc.org/en/publication/0916-arms-transfer-decisions-applying-international-humanitarian-law-criteria>, accessed 30 July 2019.

²⁸⁶ Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007, at 10.

²⁸⁷ Article 6(4)c of the ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials provides that: A transfer shall not be authorised if it is destined to: hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the states involved in the transfer.

²⁸⁸ Sarah Parker, *Implications of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2008, at 36.

The following table summarizes the replies of the States in relation to all the parameters included in the five clusters.²⁸⁹

State	Regional and international commitments	Embargoes	UN Charter	Security Council resolutions	Terrorism	Crime	Risk of diversion	Non-state actors	Human rights	International humanitarian law	Genocide	Regional stability	Sustainable development	Exacerbation of conflict	Internal stability	Corrupt practices	Legitimate defence needs	Economic considerations	Recipient behaviour
Albania	✓	✓	✓	✓	✓				✓		✓			✓			✓		
Algeria																			
Argentina		✓	✓		✓	✓	✓		✓	✓				✓					✓
Australia		✓	✓	✓	✓	✓	✓		✓	✓									
Austria	✓				✓	✓	✓		✓	✓		✓			✓				
Bangladesh	✓	✓	✓	✓		✓	✓		✓	✓	✓		✓			✓		✓	
Belgium					✓	✓	✓		✓	✓				✓			✓	✓	
Benin							✓		✓										
Bolivia									✓										
Bosnia and Herzegovina	✓				✓	✓	✓		✓	✓		✓	✓	✓	✓				
Brazil	✓	✓	✓		✓	✓	✓	✓	✓	✓									
Bulgaria	✓	✓			✓	✓	✓		✓	✓		✓							
Burkina Faso	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓	
Burundi		✓			✓				✓	✓		✓				✓	✓	✓	
Canada	✓	✓			✓		✓		✓	✓		✓	✓	✓	✓				
Chile				✓					✓	✓		✓	✓	✓	✓				
China									✓	✓		✓	✓	✓	✓		✓		
Colombia	✓					✓	✓		✓	✓									
Costa Rica	✓				✓	✓	✓		✓	✓					✓				
Côte d'Ivoire	✓	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓			✓
Croatia		✓			✓	✓			✓	✓		✓	✓			✓			✓
Cuba								✓											
Cyprus	✓	✓		✓	✓	✓	✓		✓	✓		✓							
Czech Republic	✓	✓			✓				✓	✓		✓							
DRC																			
Denmark		✓	✓		✓		✓		✓	✓		✓	✓	✓	✓				
Djibouti									✓	✓									
Ecuador			✓				✓			✓									
Egypt																			
El Salvador																			
Estonia		✓			✓	✓			✓	✓		✓							
European Union	✓	✓					✓		✓	✓		✓	✓	✓	✓		✓	✓	✓
Fiji		✓	✓		✓	✓			✓	✓	✓	✓	✓	✓	✓				
Finland	✓	✓			✓	✓	✓		✓	✓		✓			✓				
France							✓		✓	✓		✓			✓				
Georgia																			
Germany	✓	✓			✓		✓		✓	✓		✓	✓	✓					
Greece																			
Guatemala		✓																	
Hungary	✓	✓			✓	✓			✓	✓		✓							
Iceland					✓	✓			✓	✓		✓			✓	✓			
India																			
Indonesia							✓	✓				✓							
Ireland	✓	✓							✓	✓		✓	✓	✓					
Israel					✓		✓							✓					
Italy	✓	✓	✓	✓	✓	✓	✓		✓	✓		✓	✓				✓		
Jamaica					✓	✓		✓		✓		✓							
Japan	✓		✓	✓					✓	✓	✓	✓							✓
Kenya	✓	✓							✓	✓									
Latvia	✓	✓			✓	✓	✓		✓	✓									

²⁸⁹ Table taken from Sarah Parker, Analysis of States' Views on an Arms Trade Treaty, United Nations Institute for Disarmament Research, 2007, at Annex F.

Lebanon	✓				✓	✓				✓									
Liberia	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓				✓			
Liechtenstein									✓	✓									
Lithuania					✓		✓		✓		✓	✓	✓						
Luxembourg		✓	✓	✓					✓	✓									
Macedonia	✓				✓				✓	✓		✓		✓	✓				
Malawi		✓	✓				✓		✓	✓			✓	✓					
Mali	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Malta					✓		✓		✓	✓		✓	✓	✓	✓	✓			
Mauritius		✓			✓	✓					✓		✓						
Mexico		✓		✓					✓	✓									
Moldova																			
Montenegro						✓	✓							✓					
Morocco					✓					✓									
Netherlands	✓		✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
New Zealand	✓				✓	✓			✓	✓				✓					
Niger	✓	✓			✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓		
Nigeria	✓				✓	✓							✓						
Norway	✓	✓			✓	✓			✓	✓		✓	✓	✓	✓	✓			
Pakistan																			
Panama	✓								✓	✓	✓		✓						
Paraguay	✓	✓			✓	✓	✓		✓	✓	✓								
Peru									✓		✓								
Philippines																			
Poland					✓	✓			✓	✓				✓					
Portugal	✓				✓		✓		✓	✓				✓					
Republic of Korea																			
Romania	✓				✓		✓		✓	✓		✓	✓		✓				
Russia																			
Samoa																			
Senegal	✓	✓		✓					✓	✓	✓	✓							
Serbia	✓	✓			✓		✓		✓	✓	✓	✓	✓		✓				
Seychelles																			
Slovakia																			
Slovenia	✓			✓					✓	✓									
South Africa	✓	✓			✓	✓			✓	✓		✓	✓	✓				✓	
Spain	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓		✓	✓
Sweden					✓	✓	✓		✓	✓		✓	✓	✓		✓			
Switzerland		✓			✓	✓													✓
Thailand																			
Togo	✓	✓			✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Trinidad and Tobago									✓	✓									
Turkey		✓			✓	✓		✓	✓					✓			✓	✓	✓
United Kingdom	✓				✓	✓	✓		✓	✓		✓	✓	✓	✓			✓	
Venezuela																			
Zambia	✓	✓	✓		✓	✓	✓		✓	✓	✓	✓	✓	✓	✓				

As stated above, the collection of States' views was done alongside the work of the GGE, which presented a report endorsed in early 2009 by the UNGA.²⁹⁰ The resolution also established an open-ended working group aimed at further exploring the possibility of creating a consensus around a legally binding instrument on international arms transfers. In December of the same year, the UNGA further endorsed the work of the open-ended group and decided to convene a United Nations Conference on the Arms Trade Treaty in 2012.²⁹¹

²⁹⁰ United Nations General Assembly Resolution 63/240, A/RES/63/240.

²⁹¹ United Nations General Assembly Resolution /64/48, A/RES/64/48, at point 4.

III.3.2.3 The ATT Conference and its adoption

The first United Nations Conference on the Arms Trade Treaty was held in UN Headquarters in New York from 2 to 27 July 2012. It was not until its 15th meeting, on 26 July, that the President, Ambassador Moritán, submitted under his own responsibility and without prejudice to the position of any delegation a draft text²⁹², but the parties were unable to reach consensus on a final text.²⁹³ Nonetheless, the momentum did not fade away and already in December, the UNGA²⁹⁴ decided to convene a final Conference for the following March, with the draft text presented by Moritán to be taken as a basis for the future work and with the same rules of procedure.²⁹⁵

The final Conference was held between 18 and 28 March 2013 and at its 17th meeting, on 28 March, the President proposed the adoption of draft decision A/CONF.217/2013/L.3 to which a draft text of the Arms Trade Treaty was annexed. The decision was not adopted, as Rule 33 of the rules of procedures required that the “Conference shall take its decisions and consider the text of the Treaty by consensus” and such consensus could not be obtained because of opposition from Iran, North Korea, and Syria.²⁹⁶ This obstruction did not, however, prevented the matter to be transferred to the UN General Assembly that formally adopt the ATT by means of resolution 67/234 with an overwhelming majority of 154 votes, 23 abstentions and the opposing vote of the same three States, and the treaty finally opened for signature the next 3 June 2013.²⁹⁷ Before turning to the analysis of the most relevant articles of the

²⁹² United Nations Conference on the Arms Trade Treaty, Draft of the Arms Trade Treaty, A/CONF.217/CRP.1.

²⁹³ United Nations General Assembly, Report of the United Nations Conference on the Arms Trade Treaty, A/CONF.217/4, at point 11.

²⁹⁴ United Nations General Assembly Resolution 67/234, A/RES/67/234.

²⁹⁵ Final United Nations Conference on the Arms Trade Treaty, Draft report of the Final United Nations Conference on the Arms Trade Treaty, A/CONF.217/2013/L.2.

²⁹⁶ United Nations Conference on the Arms Trade Treaty, Provisional rules of procedure of the Conference, A/CONF.217/L.1.

²⁹⁷ United Nations General Assembly Resolution 67/234B, A/RES/67/234B. In favour: Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, El Salvador, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia,

treaty, it is worth to examine the reasons behind the three opposing votes and some of the abstaining States. The reader will certainly see an analogy between certain arguments brought by the delegations and the concerns of some parties to the Arms Traffic Convention back in 1925.

Syria linked its contrary vote to six specific points that tainted the treaty and rendered it unbalanced, unequal and protective of the interests of just some States at the expense of others.²⁹⁸ First, the delegation pointed to the absence in the ATT of a reference to foreign occupation and the inalienable right of peoples under such occupation to self-determination. The second concern centred around the absence of a “categorical prohibition of the supply of arms to unauthorized non-State terrorist actors and groups”.²⁹⁹ As already seen, the issue of NSAs was, already during the preliminary phase and the collection of States’ view, one of the most contentious one and unsurprisingly such reference re-emerged in the declarations on Resolution 67/234B. Third, the ATT lacked a section on definitions and the ambiguities in the terms remained unresolved. Fourth, the crime of aggression was not reflected in the treaty, despite its definition given in resolution 3314. The three last issues were the failure in achieving balance, the absence of consensus and the “interference in the powers of the Security Council”.³⁰⁰

In its brief statement, the Democratic People’s Republic of Korea merged its concerns on the alleged unbalance with that on NSAs: “[t]here is no balance between the interests of exporters and those of importers...the absence of a legal provision prohibiting the diversion of arms to non-State actors also serves the profit interests of exporters”.³⁰¹ In addition, it held the view that not only were the interests of exporters protected, but exporters could politically manipulate the criteria as “it is up to the individual

Solomon Islands, Somalia, South Africa, South Sudan, Spain, Suriname, Sweden, Switzerland, Thailand, former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Zambia. Against: Democratic People’s Republic of Korea, Iran (Islamic Republic of), Syrian Arab Republic. Abstaining: Angola, Bahrain, Belarus, Bolivia (Plurinational State of), China, Cuba, Ecuador, Egypt, Fiji, India, Indonesia, Kuwait, Lao People’s Democratic Republic, Myanmar, Nicaragua, Oman, Qatar, Russian Federation, Saudi Arabia, Sri Lanka, Sudan, Swaziland, Yemen. Note: The delegations of Angola and Cape Verde informed the Secretariat that they had intended to vote in favour.

²⁹⁸ United Nations General Assembly, A/67/PV.71, at 6.

²⁹⁹ United Nations General Assembly, A/67/PV.71, at 7.

³⁰⁰ *Ibid*, at 7.

³⁰¹ *Ibid*, at 16.

exporter to judge whether an importing country has clean hands on the issue of human rights and on the matter of so-called Security Council-imposed embargoes”.³⁰²

Different from the previous two, Iran did not mention the problem of NSAs, yet it did refer to the other concerns brought by Syria. At the outset, it highlighted the failure of the treaty to prohibit the transfer to aggressor and foreign occupiers.³⁰³ Moreover, the treaty also failed to account for international movements of arms by State parties and possibly exempted the transfer of arms between States members of military alliances.³⁰⁴ A third shortcoming was the missed recognition of the “inherent right of the States to acquire, produce, export, import and transfer conventional arms required for the realization of the inalienable rights of any State to security, self-defence and territorial integrity” as well as the recognition of “the inalienable right to self-determination of peoples under foreign occupation, alien and colonial domination”.³⁰⁵ Failing to recognise the right of States to achieve their security need implies, in Iran’s view, that importing States would be subject to the discretionary judgment and subjective assessment of exporting States.³⁰⁶ The delegation also pointed to the lack of clear definition, especially in relation to parts and components mentioned in Article 3, and the possible inclusion of dual-use goods within that category.

States that abstained offered arguments similar to those of Syria, North Korea, and Iran. Nicaragua, for instance, complained about the absence of a ban on arms transfer to non-State actors, of clear definitions, and of a clear statement of States’ sovereign right to act in self-defence.³⁰⁷ It also objected to the absence of a ban on arms transfers to States that commit crimes of aggression against other States or that adopt a policy of the use or threat of use of force.³⁰⁸ Similar concerns were presented by Venezuela and Bolivia, who evidenced the danger of arms transfers to unauthorized NSAs and the missed reference to crimes of aggression and the unrecognized right of all States to acquire, produce, import, export and possess conventional arms for self-defence and security.³⁰⁹ Russia, besides pointing

³⁰² *Ibid*, at 16.

³⁰³ *Ibid*, at 18.

³⁰⁴ *Ibid*, at 18.

³⁰⁵ *Ibid*, at 18.

³⁰⁶ *Ibid*, at 19.

³⁰⁷ *Ibid*, at 8.

³⁰⁸ *Ibid*, at 8.

³⁰⁹ *Ibid*, at 9.

to the supply of weapons to NSAs, highlighted that “[h]umanitarian criteria for risk assessment are insufficiently clearly spelled out, which could lead to curious interpretations that in turn could be used by individual States for political purposes or to improve competitiveness”.³¹⁰ On the same line Sudan, who stated that human rights and international humanitarian law are terms of reference that are open to politicization. Not dissimilarly from the previous ones, it also pointed out the lack of prohibition for import to groups and individuals.³¹¹ India, who has consistently raised the issue of NSAs, also abstained on this ground.³¹² Egypt justified its abstention based on four reasons, namely the lack of clear definition, of reference to aggression and foreign occupation, of “criteria by which an exporter would undermine the implementation of the treaty”, and the overall risk of subjectivity.³¹³

III.3.2.4 The ATT

III.3.2.4.1 Article 2 - Scope³¹⁴

As the title of this Article hints, the provision includes a list of *materiel* and activities that are regulated by the ATT, as well as the matters that, in contrast, fall outside the remit of application of the treaty. At the very outset, it is worth to mention that list of goods included in the article is not exhaustive as Article 2 is complemented by Article 3 and 4, even if the regime applicable to these two articles is in some respects different. The first paragraph sets the list of weapons and arms subject to the rules established by the AT, and similarly to the course of action in the historical treaties, the question around what weapons to include in the ATT was subject to considerable debate.

Two parallel discussions took place during the negotiations, one surrounding the possibility to use the United Nations Register of Conventional Arms (UNROCA) and the second one whether to include also SALW, ammunition, parts and components, technology and dual-use goods.³¹⁵ Established

³¹⁰ *Ibid.*, at 10. See also Belarus, at 15.

³¹¹ *Ibid.*, at 11. See also Ecuador, at 10.

³¹² *Ibid.*, at 13.

³¹³ *Ibid.*, at 14.

³¹⁴ Article 2 read as following: “1. This Treaty shall apply to all conventional arms within the following categories: (a) Battle tanks; (b) Armoured combat vehicles; (c) Large-calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons. 2. For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as “transfer”. 3. This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party’s ownership”.

³¹⁵ Andrew Clapham, Stuart Casey-Maslen, Gilles Giacca, and Sarah Parker, *The Arms Trade Treaty: A Commentary*, Oxford University Press, 2016, at 61.

by resolution 46/36 L and aimed at transparency on international arms transfers and on military holdings, the UNROCA came into effect 1 January 1992 and covers the seven categories listed by Article 2 (a) to (g).³¹⁶ Even if the preparatory sessions already highlighted a preference towards the adoption of these categories, the disagreements centred on whether to embrace also the single weapons listed under each category.³¹⁷ The negotiating parties did not agree on this option and the ATT eventually settled for having just the categories. The draft presented by Moritán in 2012 was no different in this respect, but also included a safeguarding word “as a minimum” before the list of the categories.³¹⁸ While the seven categories of the UNROCA provided a robust reference, they did not include SALW, which, instead, many States felt necessary to include.³¹⁹ This feeling, although diffuse, was not unanimous.³²⁰ Already at the time of the adoption of the UNROCA there was a lack of consensus around the inclusion of SALW in the Register based, amongst others, on the difficulty to trace, count and register SALW, the lack of definition and their relative importance in large scale conflicts.³²¹³²² Nonetheless, as Parker observes, the SALW category was inserted in almost every draft since the preliminary discussions and with this inclusion the overall list became known as the 7+1 configuration.³²³

As seen above, in the general discussion some States held the view that the ATT was affected by a shortcoming given by the absence of definitions and, in this regard, Article 2(1) is no exception. Article 2(1) lacks specifications about the single weapons included in the categories and according to Article 5(3), national definitions apply. In addition, Article 5(3) states that “[n]ational definitions of any of the categories covered under Article 2 (1) (a)-(g) shall not cover less than the descriptions used in the UNROCA”. In contrast, the Protocol on Existing Types of Conventional Armaments and Equipment

³¹⁶ United Nations General Assembly Resolution 46/36 L, A/RES/46/36L.

³¹⁷ Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 63.

³¹⁸ United Nations Conference on the Arms Trade Treaty, Draft of the Arms Trade Treaty, A/CONF.217/CRP.1.

³¹⁹ See, for instance, Australia, Bulgaria, Canada, Chile, Costa Rica, Denmark, Ecuador, France, Germany, Indonesia, Ireland, Japan, Kenya, Malawi, Norway, Pakistan, Poland, Portugal, Saudi Arabia, Sweden, Switzerland, Macedonia, Togo, Trinidad and Tobago, United Kingdom, Vietnam, Zambia, Holy See, European Union (the latter two as observes), see United Nations Conference on the Arms Trade Treaty, Compilation of views on the elements of an arms trade treaty, A/CONF.217/2.

³²⁰ See, for instance, Venezuela in A/CONF.217/2.

³²¹ Paul Holtom, Transparency in transfers of small arms and light weapons, SIPRI Policy Paper No. 22, at 13-14.

³²² It is nonetheless worth to note that since 2003 States can also include data on SALW in their report to the UNROCA.

³²³ Andrew Clapham, *The Arms Trade Treaty: A Commentary*, above n. 315, at 63.

to the Treaty on Conventional Armed Forces in Europe provides a list of types of armaments and equipment subject to that instrument.³²⁴ The absence of both a definition and a list is even more controversial for the category of SALW. According to Article 5(3), “[f]or the category covered under Article 2 (1) (h), national definitions shall not cover less than the descriptions used in relevant United Nations instruments...”, but the only instrument where there appears a definition of SALW is a soft-law instrument, the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (ITI).³²⁵ Parker also notes that besides the broad definition contained in the ITI, there is no agreed description or definition of arms included in of the two categories.³²⁶

Different from paragraph one, the second one contains the only partial definition present in the ATT. Partial because the term transfer is defined by reference to the five mentioned activities – export, import, transit, trans-shipment and brokering – yet these are not further defined. Similarly to the previous paragraph, the definition of the terms can be obtained by reference to other treaties and instruments in force such as the definitions of the World Custom Organisation, for the terms export and import, the 1982 UN Convention on the Law of the Sea and the 1965 Convention on the Transit of Land-Locked States, for the term transit, and the International Convention on the Simplification and Harmonization of Custom Procedures for the term trans-shipment.³²⁷ As per the previous terms, also brokering does not have a universally accepted definition although an early draft paper of Moritán

³²⁴ Treaty on Conventional Armed Forces in Europe, 13 November 1992. In addition, its Article II provides a list of definitions.

³²⁵ Article II(4) provides that: For the purposes of this instrument, “small arms and light weapons” will mean any man portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas will be defined in accordance with domestic law. In no case will antique small arms and light weapons include those manufactured after 1899: (a) “Small arms” are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns; (b) “Light weapons” are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres.

³²⁶ Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 106.

³²⁷ United Nations Convention on the Law of the Sea, entered into force 16 November 1994, United Nations, Treaty Series, vol. 1833, p. 3; Convention on Transit Trade of Land-locked States, entered into force 9 June 1967, United Nations, Treaty Series, vol. 597, p. 3; World Customs Organization, *International Convention On The Simplification And Harmonization Of Customs Procedures*, 1973.

defined all the relevant terms, including brokering.³²⁸ His definition explicitly referenced the report of the GGE on the problem of illicit brokering in small arms and light weapons, which describes the activities that both licit and illicit brokers usually perform.³²⁹

Aside from the definition problem, another contentious issue that surrounds this paragraph is whether the regime established by the ATT encompasses also leases, loans, and gifts. In this regard, the position of States varies and the only three States that have a formal position are Liechtenstein, New Zealand and Switzerland. The first one declared upon ratification that "...monetary or non-monetary transactions, such as gifts, loans and leases, and that therefore these activities fall under the scope of this Treaty". The second one that "...where a non-monetary transaction, such as a gift, loan or lease, involves the transfer of arms or items within the scope of the Treaty, such transaction will be covered by the Treaty". The last one, also upon ratification, that "...Article 2, paragraph 2, includes, in the light of the object and purpose of this Treaty and in accordance with their ordinary meaning, monetary or non-monetary transactions, such as gifts, loans and leases, and that therefore these activities fall within the scope of this Treaty".³³⁰ Germany also considers that the scope of the ATT covers leases, gifts, and loans, as per an official memorandum on the ATT.³³¹ Similarly the US, which published that "[t]he ATT should be limited to international transfers. Imports, exports, transit, transshipment, or brokering of conventional arms, whether the transfers are state-to-state, state-to-private end-user, commercial sales, leases, or loans/gifts".³³² However, as observed by Lustgarten, a literal interpretation of the text does not clear the ambiguity and the risk of loopholes cannot be underestimated.³³³ It is, therefore, a point on which the analysis of State practice could contribute to understanding the extent of the provision. Especially in civil conflict, the potential loophole generated by being gifts outside the scope of the treaty severely undermines the overall regime of the ATT.

³²⁸ Informal Draft Paper from the Chair of the Preparatory Committee of the Conference on the Arms Trade Treaty, 16 February 2011.

³²⁹ United Nations General Assembly, The illicit trade in small arms and light weapons in all its aspects, A/62/163.

³³⁰ All declarations available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=en#EndDec

³³¹ German Federal Foreign Office, Memorandum of the Federal Government on the ATT, 1 March 2014.

³³² US Department of State, Arms Trade Treaty, available at <https://2009-2017.state.gov/t/isn/armstradetreaty/index.htm>

³³³ Laurence Lustgarten, "The Arms Trade Treaty: Achievements, Failings, Future", *International and Comparative Law Quarterly*, vol. 64, July 2015, at 578.

The following table summarizes the position of States in relation to the transactions to be considered by the ATT:³³⁴

State	Brokering	Transit	Trans-shipment	Re-export	Re-transfer	Intangible transfers	Loan/gift	Temporary export	Temporary import	Transport	Licensed production	Lease	Technical assistance	Commercial sales	Financial services	Collection, stockpiling of state-held weapons
Albania		✓								✓						
Algeria																
Argentina	✓	✓	✓													
Australia	✓		✓	✓				✓	✓							
Austria	✓	✓	✓		✓	✓		✓	✓		✓		✓			
Bangladesh	✓	✓	✓				✓					✓	✓	✓		
Belgium	✓	✓	✓													
Benin																
Bolivia																
Bosnia and Herzegovina	✓	✓	✓				✓	✓	✓							
Brazil	✓										✓					
Bulgaria	✓	✓	✓							✓						
Burkina Faso	✓	✓	✓				✓					✓		✓		
Burundi																
Canada																
Chile																
China																
Colombia	✓	✓	✓							✓						✓
Costa Rica	✓	✓	✓													
Côte d'Ivoire	✓	✓	✓	✓						✓						
Croatia	✓	✓		✓												
Cuba																
Cyprus																
Czech Republic	✓	✓	✓	✓									✓			
the Democratic Republic of the	✓	✓														
Denmark	✓	✓	✓	✓		✓				✓	✓					
Djibouti	✓	✓	✓													
Ecuador	✓	✓	✓			✓					✓					
Egypt	✓															
El Salvador	✓	✓	✓													
Estonia	✓	✓	✓	✓									✓			
European Union																
Fiji	✓	✓	✓				✓					✓	✓	✓	✓	
Finland	✓	✓	✓			✓					✓		✓			
France	✓	✓	✓	✓		✓		✓					✓			
Georgia	✓	✓		✓											✓	✓
Germany	✓	✓	✓		✓	✓		✓	✓							
Greece	✓		✓					✓	✓	✓						
Guatemala	✓															
Hungary	✓	✓	✓	✓		✓										
Iceland	✓	✓	✓			✓	✓	✓			✓	✓	✓			
India																
Indonesia																
Ireland	✓	✓	✓	✓		✓							✓			
Israel																
Italy	✓	✓	✓		✓											
Jamaica	✓	✓	✓	✓												
Japan	✓	✓	✓			✓										
Kenya																
Latvia	✓	✓		✓												

³³⁴ Table taken from Sarah Parker, Analysis of States' Views on an Arms Trade Treaty, United Nations Institute for Disarmament Research, 2007, at Annex E.

is the latter requirement, the absence of property changes, that is arguably the most important one.³³⁶ Different scenarios are possible. First, the arms are returned to the territory of the State that moved them and, therefore, the entire arms movement falls outside the scope of the ATT. Second, and with a similar outcome, the arms are destroyed. Third, the arms are transferred to the hosting State by means of a sale. In this case, the exception ceases to apply and the prohibitions and assessments must be considered. Fourth, the arms are transferred as a gift to the hosting State. In this case, whether the ATT applies is a matter of interpretation of the scope of the ATT, which, as seen above, may differ from State to State. Fifth, the arms are lost or stolen, a *de facto* situation that transcends legal qualifications and where naturally the treaty cannot apply. Sixth, the arms are voluntarily left behind and, if the abandonment is proved, the State may be in breach of the ATT as it failed to apply its provisions before the transfer of property occurred.³³⁷

III.3.2.4.2 Article 3 - Ammunition/Munitions³³⁸

As the table above shows, the replies submitted by States on whether the instrument should cover ammunition were not unanimous and commentators contend that this was one of the most controversial points.³³⁹ Notwithstanding the opposition of few, yet powerful, States the clear majority was vocal enough to support their inclusion within the scope of the treaty.³⁴⁰ Nonetheless, the inclusion of ammunition is a compromise solution as the applicable regime is not tantamount the one provided for under Article 2. In particular, while the provisions of Articles 6 and 7, the core of the ATT, still apply, Article 8 to 13 – Import, Transit and Transhipment, Brokering, Diversion, Record Keeping, and Reporting – do not.

³³⁶ *Ibid*, at 132.

³³⁷ *Ibid*, at 135.

³³⁸ Article 3 read as following: “Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions”.

³³⁹ Laurence Lustgarten, “The Arms Trade Treaty”, above n. 333, at 583.

³⁴⁰ USA, China, India, Malaysia, Syria and Sudan opposed the inclusion.

III.3.2.4.3 Article 4 - Parts and Components³⁴¹

The wording of Article 4 resembles the preceding Article and it is, once again, the result of a compromise solution. On the one hand, the necessity to ensure that the treaty is not circumvented by the possibility of having arms covered by Article 2(1) delivered disassembled and, thus, escaping the rules set forth by the treaty. On the other hand, terms such as parts and components can include generic items such as bolts and nuts that could potentially create insurmountable difficulties in the everyday implementation of the ATT. As seen above, Article 3 of the Firearms Protocol defines parts and components, yet this definition applies to firearms and not to SALW. Nonetheless, this definition could be applied by analogy to SALW but not to the other major arms listed under Article 2(1) a-g. Finally, also for Article 4 the provisions of Articles 6 and 7 apply while those of Article 8 to 13 do not.

III.3.2.4.4 Article 6 – Prohibitions³⁴²

Article 6, together with Article 7, can be regarded as the core of the ATT as these two provisions set the conditions for the legality of arms transfers, ammunition, parts and components. The three paragraphs of Article 6 share the same first sentence, which obliges the competent national authorities - demanded to implement the ATT as per Article 5(5) - to deny the authorization if the transfer runs against the conditions set by each of the paragraphs. Additionally, the first two paragraphs share the same legal rationale, inasmuch they link the prohibition to authorize the transfer with obligations already existing. The difference between the two paragraphs is the source of these obligations, as the

³⁴¹ Article 4 read as following: “Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components”.

³⁴² Article 6 read as following: “1. A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.

2. A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3. A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

first paragraph is tied to UNSC measures while the second one to international treaties. It is worth to underline that the prohibitions of Article 6 are absolute and no exception can be granted.

The first paragraph prohibits the transfer in case it would be contrary to a UNSC measure taken under Chapter VII and a special emphasis is given to arms embargo. While the UNSC mandatory embargo regime will be analysed in Chapter 5, suffices here to say that these measures bind UN Member States by virtue of, *inter alia*, Article 25, 41, 48. Hence, one can hold the view that it is not clear “why many states saw it as necessary to include a provision prohibiting what is already prohibited under international law”.³⁴³

Paragraph two prohibits the transfer in case it would violate existing obligations arising from treaties to which a State is party. Here as well, the Article places special emphasis to agreements in the field of conventional arms transfers or trafficking, which are discussed in the next section.³⁴⁴ In fact, the formulation of paragraph two encompasses also regional agreements that may provide stricter rules than those of the ATT. This is the case, for instance, of rules concerning transfers to NSA, as the ATT is silent in this regard. Article 3(2) of the Ecowas Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials posits a full prohibition on transfer to NSA.³⁴⁵ Similarly, Article 4 of the Kinshasa Convention prescribe that “ States Parties shall prohibit any transfer of small arms and light weapons, their ammunition and all parts and components that can be used for their manufacture, repair, and assembly to, through and from their respective territories to non-State armed groups”.³⁴⁶ Thus, a State party to the ATT and to one of these two treaties would breach both the regional instrument and the ATT should it transfer arms to NSA.

³⁴³ Gro Nystuen and Kjølsv Egeland, “The potential of the Arms Trade Treaty to reduce violations of international humanitarian law and human rights law”, in Cecilia M. Bailliet (ed.) *Research Handbook on International Law and Peace*, Edward Elgar, 2019, at 275-276.

³⁴⁴ See above at III.3.1.

³⁴⁵ Ecowas Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Material, 14 June 2006. Article 3(2) sets that: “Member State shall ban, without exception, transfers of small arms and light weapons to Non-State Actors that are not explicitly authorised by the importing Member” and a definition of non-State Actor is given in Article 1(10), according to which “Non-State Actors: Such as any actor other than State Actors, mercenaries, armed militias, armed rebel groups and private security companies”.

³⁴⁶ Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture, Repair and Assembly, 30 April 2010. It defines non-State Actor in Article 1(n): “Non-State armed group: a group that could potentially use weapons as part of its use of force in order to achieve political, ideological or economic goals, but which is not part of the formal military establishment of a State, alliance of States or intergovernmental organization and over which the State in which it operates has no control”.

The third paragraph differs from the previous two in its legal formulation. While in paragraph one and two the prohibition is linked to existing obligation of the State that transfers the goods, paragraph three imposes an assessment vis-à-vis the possible conduct of the transferee. More specifically, the transferor must prohibit the transfer of goods if it has knowledge that the transferee will use the goods in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes. The first element that requires specific consideration is the term knowledge, a term strictly linked to Article 16 of the Draft Article on State Responsibility (DASR).³⁴⁷ A word of caution is, however, required before analysing this term as "...the offending state may be responsible for a breach of the treaty even before any act of genocide takes place; its liability under ATT is for breach of the treaty obligation in authorizing the transfer rather than for consequences of any eventual genocide".³⁴⁸ In other words, even if the term knowledge can be clarified with reference to the DASR, the realm remains the ATT and not the crimes mentioned in Article 6(3).

The ILC Commentary to Article 16 DASR clarifies that "[f]irst, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful...".³⁴⁹ The crux of the matter is, therefore, the degree of awareness required in order for a State to be accountable for aiding and, by analogy, for being obliged not to transfer the goods. At first approximation, a constructive knowledge, meaning that the transferee should have known the transferor's intention of using the goods in committing the crimes, must be excluded, as the wording of Article 16 DASR "is confined to knowledge actually in the possession of the complicit state".³⁵⁰ A confirmation that constructive knowledge unduly lowers the threshold comes from the ICJ that, in the context of genocide, ruled that: "...the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in

³⁴⁷ Responsibility of States for Internationally Wrongful Acts, in UN Doc. A/RES/56/83, 12 December 2001. Article 16 provides that: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State".

³⁴⁸ Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 207.

³⁴⁹ ILC Commentary to Article 16 of the Articles on State Responsibility, paragraph (3).

³⁵⁰ James Crawford, *State Responsibility: The General Part*, Oxford University Press, 2013, at 406.

genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent...”.³⁵¹

The other side of the coin of constructive knowledge is the concept of wilful blindness. According to a tentative definition offered by Moynihan, in international law wilful blindness could be constructed as the “deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality”.³⁵² Two issues arise vis-à-vis this definition, namely identifying what amounts to credible evidence and requiring to perform some type of due diligence. On the former, one could endorse Lowe’s view that States should consider qualified evidence such as fact-finding missions or court judgements, lest the likeliness of being found responsible.³⁵³ By the same token, this would also imply that widespread, yet unqualified, news may not suffice and, thus, a due diligence obligation may arise. However, and this constitutes the latter issue, international law does not impose due diligence obligations in this regard.³⁵⁴ Hence, the doctrine of willful blindness cannot constitute the standard of knowledge required to fulfil the condition set by Article 16 DASR and of Article 6(3) ATT. As a result, one must accept that the degree of awareness required is one “approaching practical certainty as to the circumstances of the principal wrongful act”.³⁵⁵ This conclusion is consistent if one compares the wording of Article 6(3) with those of Article 7, as the following discussion shows.

III.3.2.4.5 Article 7 - Export and Export Assessment³⁵⁶

Article 7 makes it clear already at the outset that the absence of a prohibition as per Article 6 does not imply that the export of items listed under Article 2(1), 3 and 4 is immediately permitted.

³⁵¹ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007 at 421, emphasis mine.

³⁵² Harriet Moynihan, “Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism”, Chatham House Research Paper, November 2016, at 14.

³⁵³ Vaughan Lowe, “Responsibility for the Conduct of Other States”, *Journal of International Law and Diplomacy*, Vol. 101, 2002, at 10.

³⁵⁴ See Stefan Talmon, International Responsibility of Other Actors in Connection with the Acts of the Coalition Provisional Authority, in Phil Shiner and Andrew Williams, *The Iraq War and International Law*, Hart Publishing, 2008, at 219.

³⁵⁵ Miles Jackson, *Complicity in International Law*, Oxford University Press, 2015, at 161.

³⁵⁶ Article 7 read as following: 1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

Different from the preceding Article, the scope of the provision is narrower since the Article only refers to exports and not to transfers in general and, therefore, import, transit, trans-shipment and brokering, are not encompassed by this Article. Also the time in which the assessment takes place differs from Article 6(3); while the latter prescribes that the knowledge that an item would be used in the commission of an international crime should be present at the time of the authorization, the former imposes the export assessment prior to the authorization. In other words, Article 7 does not set a specific timeframe for the assessment and each exporting State is left free to decide according to its internal policies. Only the last paragraph suggests but does not impose any obligation, that an assessment should be reopened in case of new relevant information.

The requirement that the assessment should be objective and non-discriminatory³⁵⁷ mirrors the preamble 8 to the ATT, yet, as observed by Stuart Casey-Maslen and as highlighted already in Chapter 1, “states generally remain free to choose to whom they sell or transfer arms, and political allegiances may be expected to influence their decision-making”.³⁵⁸ Once again, differently from Article 6(1) and

(a) would contribute to or undermine peace and security;

(b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(ii) commit or facilitate a serious violation of international human rights law;

(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or

(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

³⁵⁷ An earlier draft suggested to include in the assessment the legitimate security needs of the importer. See Main Committee I: Criteria/Parameters/Chairman's paper/rev4, 21 July 2012, available at <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference/documents/elements-criteria-rev4.pdf>

³⁵⁸ Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 253.

(2) where a binary choice between allowing and prohibiting is linked to the objective existence of a UNSC measure or an international obligation, Article 7 centres around a risk-assessment procedure where discretion is unavoidably present.

The risk assessment must consider “relevant factors, including information provided by the importing State” and one could argue that, in this case, the standard of information could be lower than the qualified evidence seen above in relation to the knowledge criterion of article 6. In other words, unofficial documents, including NGOs reports, may be considered in the overall assessment. Nonetheless, the choice of what constitute relevant factors pertains to the sole sphere of the exporting State further substantiating the concern around the high degree of discretion. It is worth to note that an early draft provided that the information should be “credible” and included alongside information from the importing State also information from “competent United Nations organs”.³⁵⁹ In relation to the information coming from the importing State, Article 8 states that “[e]ach importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7”. The Article is not of great help in identifying what information is required and leaves room for discretion upon the importing State, who is not under a hard obligation to transmit information, especially as Article 8(1) concedes that national laws of the importer regulate the flow of information. Another condition, which may vaguely support the doctrine of wilful blindness seen above, laid down by Article 8(1) provides that information should be disclosed upon request by the exporter State.

The first point that the risk assessment must consider is the potential that the delivery of the items would have on peace and security. As explained by Clapham the use of the term “would” sets a considerable threshold as there should be a high probability that the items would undermine peace and security and suspicion or firm belief without evidence do not meet this threshold.³⁶⁰ Since the term peace and security is unqualified, in contrast to Article 1 of the UN Charter, the assessment must

³⁵⁹ Main Committee I: Criteria/Parameters Chairman's paper/rev1, 19 July 2012, available at <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference/documents/elements-criteria-rev1.pdf>, accessed on 23 August 2019.

³⁶⁰ Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 256.

encompass the risk of undermining also internal peace and security of the importer. More troublesome is the evaluation of the positive contribution to peace and security that arms deliveries can obtain. In connection with this observation, Lustgarten posits that the formula represents “a convenient get-out for any State seeking political influence or economic gain” and is certainly questionable whether, in case of civil wars, limited delivery of arms can have a positive contribution.³⁶¹ In different terms, it is worth to call into question what, in the context of civil wars, could be a positive contribution of the arms trade. While this enquiry goes beyond the purpose of the present work, one could reflect on the relationship between major conventional weapons, SALWs, and the intensity and duration of civil conflicts. All in all, in theory a preferable solution would have been to use the term would for the potential contribution and the term could for the undermining. By adopting this formula, there could have been two different thresholds that better reflect the risks underpinned in the vague wording of Article 7(1)(a).

In contrast to Article 7(1)(a), paragraph (b), which lays down the second part of the risk assessment, employs the term could and, hence, lowers the threshold required for prohibiting the export. Earlier it has been explained that the term would imply that suspicion or firm belief without evidence may not be enough to stop an export; *a contrario* the use of could may mean that a suspicion or a vague belief may suffice to halt the export should there be the chance that the goods be used to commit or facilitate one of the four listed consequences. Moreover, the threshold gets further lowered as the arms or items may be used not only to commit but also just to facilitate the commission. In this regard, the exported arms or items do not need to prove essential to the performance of the wrongful act, but it is sufficient that they contributed significantly to that act.³⁶² And, as Casey-Maslen and Clapham advance, “the facilitation in this context should involve a significant contribution to the illegal act even if the assistance only contributed in a minor way to the actual harm suffered”.³⁶³

Article 7(1)(b) lists four parameters that must be considered in the risk assessment, namely a serious violation of IHL, of IHRL, an offence under international conventions or protocols relating to

³⁶¹ Laurence Lustgarten, “The Arms Trade Treaty”, above n. 333, at 594.

³⁶² ILC Commentary to Article 16 of the Articles on State Responsibility, paragraph (5).

³⁶³ Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 255.

terrorism, and an offence under international conventions or protocols relating to transnational organized crime.

On IHL, two points are worth to note. First, Article 7(1)(b) speaks about “serious violation”, in contrast to Article 6(3) that states “grave breaches”, and therefore it is necessary to enquire whether the terms are synonyms or whether there are differences amongst them.³⁶⁴ Starting from the text of the treaties, each Geneva Convention and Additional Protocol I contains a definition of grave breaches.³⁶⁵ The four Geneva Conventions do not define serious violation, while Additional Protocol I mentions “serious violation” in Article 89 (Cooperation) and Article 90 (International Fact Finding Commission). Under Paragraph 2(c) this latter Article explicitly states that “[t]he Commission shall be competent to: (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violations...”, hinting at the fact that the two terms are, in fact, not equivalent. This is confirmed by the Commentary, which identifies three courses of actions that may constitute serious violation but not grave breaches:

- isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature;
- conduct which is not included amongst the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;
- "global" violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol.³⁶⁶

In recent publications, the ICRC has apparently been less rigorous in differentiating the two as it subsumed serious violation within war crimes.³⁶⁷ In a similar fashion the Rome Statute of the International Criminal Court which, under Article 8, includes under the term war crime, grave breaches

³⁶⁴ See also Ed Robinson, Arms Exports to Saudi Arabia in the High Court: what is a “serious violation of international humanitarian law”?, in EjiL:Talks, Blog of the European Journal of International Law, available at <https://www.ejiltalk.org/arms-exports-to-saudi-arabia-in-the-high-court-what-is-a-serious-violation-of-international-humanitarian-law/comment-page-1/>

³⁶⁵ Article 50 of the First Convention; Article 51 of the Second Convention; Article 130 of the Third Convention; Article 147 of the Fourth Convention; Article 11 and 85 of Additional Protocol I of 1977.

³⁶⁶ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, 1987, at 3592.

³⁶⁷ See ICRC, Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria — Practical Guide at 10; ICRC, Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty at 4; ICRC, What are “serious violations of international humanitarian law”? Explanatory Note, available at <https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>

and serious violations of IHL.³⁶⁸ The ICTY has provided a definition for serious violation of IHL in *Prosecutor vs Tadic* and linked it to the consequences suffered by the victim. According to the Court, a “violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim”.³⁶⁹

Even if it appears to be an unsettled question, it is tenable to affirm that there exist differences between the two terms, at least if referred to the assessment required under Article 7 of the ATT, especially if one considers the object and purpose of the treaty, as set in Article 1. Therefore, one can sustain that the risk-assessment must consider also conducts that do not amount to war crimes but are of serious concern vis-à-vis IHL. Moreover, and mindful of the lower threshold required to block the export, there is nothing to prevent past conducts to be taken into consideration by the exporting State.³⁷⁰

The second point to consider in the risk assessment as per Article 7(1)(b) is whether the goods could be used to commit or facilitate a serious violation of international human rights law (IHRL), although, as Bellal observes, a universally agreed definition of what constitutes serious human rights violations still lacks.³⁷¹ In addition, competing terms such as gross and/or systematic violation have been used and there is no clarity on whether the terms overlap,³⁷² although the ILC Commentary to the DASR states that “serious breaches will usually be both systematic and gross”.³⁷³ Certainly, violations of human rights that have acquired the status of *jus cogens* amounts to a serious violation, yet a limited set of human rights has been recognised as such. For the rest, one could refer to the criteria mentioned in the ILC commentary to DASR, where it provides that a serious breach has to be gauged according to the character and the scale.³⁷⁴ But also the “intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims”.³⁷⁵

³⁶⁸ Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

³⁶⁹ ICTY, *Prosecutor v. Dusko Tadic*, at 94.

³⁷⁰ On this see ICRC, *Arms Transfer Decisions Applying International Humanitarian Law and International Human Rights Law Criteria A Practical Guide*, 2016.

³⁷¹ Annyssa Bellal, “Arms Transfers and International Human Rights Law”, in Stuart Casey-Maslen, *Weapons Under International Human Rights Law*, above n. 3, at 469.

³⁷² See Geneva Academy of International Humanitarian Law and Human Rights, “What amounts to ‘a serious violation of international human rights law’”, Academy Briefing n. 6, 2014, at 12.

³⁷³ ILC Commentary to the Articles on State Responsibility, at 113.

³⁷⁴ *Ibid.*, at 110.

³⁷⁵ *Ibid.*, at 113.

A further potential problem surrounding Article 7(1)(b)(ii) is the applicability of IHRL to NSAs. However, it is not necessary to dwell on the discussed problem of NSAs as bearers of human rights obligation for the sake of the risk assessment under Article 7. The assessment must include NSAs for the following reasons. First, the Article mentions IHRL and not human rights treaties and, thus, eludes the question on the applicability of treaties to NSAs. Second, it would be in fact odd to consider NSAs for the sake of the assessment under point (i) but exclude them for point (ii). Third, Article 7 poses that the assessment must be performed in a non-discriminatory manner and since the ATT poses at the same level States and NSAs, there is no reason as to why NSAs should escape the human-rights part of the evaluation.³⁷⁶

Finally, according to point (iii) and (iv), the evaluation must consider the possible commission or facilitation of offences relating to terrorism or to transnational crime pursuant to international instruments to which the exporter is party. In addition, Article 7(4) provides that the assessment must also consider the possibility that the goods will be used to commit or facilitate serious acts of gender-based violence or against women and children.

Should the assessment identify weaknesses, the export is not immediately denied, but measures between the exporter and the importer can be agreed, as per Article 7(2). Arguably, the possibility of adopting risk-mitigation measures contributes to further lowering the threshold for export. The confidence-building measures mentioned by the paragraph do not ensure that the identified weakness will be overcome, or it will be overcome in a timely manner. Other measures, such as due diligence on end-user certificates may be more effective in the short period, but do not impact on a more systemic level.³⁷⁷

Pursuant to paragraph 3, following the assessment and the measures set by the preceding paragraph, the exporting State must deny the export if there is an “overriding risk” that one or more of the consequences mentioned in paragraph 1 will materialize. In an early draft,³⁷⁸ the term substantial

³⁷⁶ In addition, the that the UN Human Rights Council reports on human rights and NSAs, see, for instance, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life, 5 June 2018, A/HRC/38/44.

³⁷⁷ See Andrew Clapham, *The Arms Trade Treaty*, above n. 315, at 274.

³⁷⁸ See Main Committee I: Criteria/Parameters Chairman's paper/rev1, 19 July 2012. Besides that, the possibility to adopt mitigation measures was given as an option and was not an obligation as per the final text.

was used instead of the more ambiguous overriding and New Zealand, at the time of ratification, stated that it was going to follow exactly that meaning.³⁷⁹ Other two States felt the need to clarify the meaning of the term. Liechtenstein declared that “the term ‘overriding risk’...encompasses an obligation not to authorise the export whenever the State Party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not...”, and a similar language was used by Switzerland.³⁸⁰

The last paragraph of the core part of the ATT deals with the possibility that the exporting State may obtain new information that could change the assessment. Having in mind that authorizations last for a certain period, it is not unlikely that an exporter may need to reevaluate its exporting position in light of the behaviour of, for instance, the recipient State. However, under this paragraph, there is no obligation to reassess the authorization, but only an encouragement to do so, in what appears to be a rather weak clause.

III.4 Other Treaties

Before the entry into force of the ATT other instruments have been adopted in the field of conventional weapons, as the Firearms Protocol has already shown. While the main focus of these instruments is not the trade, the export or the import but the use or the production of particular weapons and they could, thus, be interpreted as treaties in the field of the law of armed conflict, they also contain certain provisions on the transfer of such weapons.³⁸¹ In addition, the importance of these instruments is linked to the provision of Article 6(2) of the ATT, which, as seen, prohibits a transfer if it is contrary to international agreements to which the transferring State is party.

³⁷⁹ New Zealand declared that: “it considers the effect of the term “overriding risk” in Article 7(3) is to require that it decline to authorize any export where it is determined that there is a substantial risk of any of the negative consequences in Article 7(1)”, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=en

³⁸⁰ Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=en

³⁸¹ William H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Second Edition, 2016, at 95.

*III.4.1 The Additional Protocol II CCW*³⁸²

Since its adoption and for more than 20 years, the Convention on Certain Conventional Weapons (CCW)³⁸³ and its Protocols were not applicable to non-international armed conflicts. In 2000, however, a proposal put forward by the US in the context of the preparatory meetings to the Second Review Conference set the basis for expanding the scope of the CCW.³⁸⁴ The proposal was formally adopted during the Second Review Conference and Article I was amended accordingly.³⁸⁵

The provisions on the transfer are not in the body of the CCW but in Additional Protocol II that, according to its Article 1, include mines, booby-traps and other devices, mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.

*III.4.1.1 Article 2 – Definitions*³⁸⁶

The definition of transfer contained in the Protocol II was borrowed for the Ottawa and Oslo Conventions. The contentious point of the definition is whether the transfer needs physical movement and transfer of title and control, in other words, if these requirements cumulate, or, in contrast, if just one of the two suffices.³⁸⁷ In the context of the Ottawa Convention, although State practice differs, the broader interpretation is favoured.³⁸⁸

*III.4.1.2 Article 8 – Transfers*³⁸⁹

In general terms, Article 8 defines the scope of the prohibition to transfer. Paragraph 1(a) specifies that a State party is prohibited to transfer any mine which is itself prohibited by the Protocol,

³⁸² Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996).

³⁸³ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), Geneva, 10 October 1980, entered into force 2 December 1983, United Nations, Treaty Series, vol. 1342, p. 137.

³⁸⁴ David Kaye and Steven A. Solomon, “The Second Review Conference of the 1980 Convention on Certain Conventional Weapons”, *The American Journal of International Law*, Vol. 96, No. 4, 2002, at 928.

³⁸⁵ Second Review Conference of the States Parties to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, CCW//CONF.II/2.

³⁸⁶ Article 2, in the part related to transfers, reads as follows: “‘Transfer’ involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines”.

³⁸⁷ See Stuart Maslen, *Commentaries on Arms Control Treaties*, Volume I, Oxford University Press, 2004, at 87.

³⁸⁸ *Ibid*, at 87.

³⁸⁹ Article 8 reads as follows: “1. In order to promote the purposes of this Protocol, each High Contracting Party:

namely undetectable mines (Article 4), mines that employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors (Article 3.5), self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning (Article 3.6), and remotely-delivered anti-personnel mines (Article 5).

Letter b) of the first paragraph limits the transfer to States and States' agencies and, thus, excluding NSAs from possible authorised receivers of any mine. Letter c) further limits the recipients to those States that are part to the Protocol or that have accepted to be bound by it. Letter d) further ensures that both the parties to the transaction comply not only with the obligations under the Protocol but also with the applicable IHL.

Paragraph 2 extends the prohibition to transfer any mine to those States that, although bound by the Protocol, have postponed compliance to certain technical provisions related to the use of specific mines. The final paragraph calls for a *bona fide* implementation of the article pending the entry into force of the Protocol. Given the absence of exceptions to the prohibitions, even transfers for the purpose of training or destruction would appear to be unlawful.

Finally, it is worth to note that Article 1 of Protocol IV fully prohibits the transfer, to State and explicitly to NSAs, of laser weapons specifically designed to cause permanent blindness or unenhanced vision.

(a) undertakes not to transfer any mine the use of which is prohibited by this Protocol; (b) undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers; (c) undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and (d) undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.

2. In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the Technical Annex, sub1 (a) of Article shall however apply to such mines.

3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph 1 (a) of this Article”.

III.4.2 The 1997 Ottawa Convention³⁹⁰

Although the adoption of Protocol II to the CCW was considered by some States as a success, several shortcomings surround the instrument. Besides the weak technical provisions, such as the nine-year period of possible deferral and the exception to the requirement of self-destruction and self-deactivation, the greatest failure of Protocol II was the inadequacy to ban anti-personnel mines.³⁹¹ The issue, far from being discarded, got traction and already in mid-1996 several States supported an international prohibition on these weapons, which was achieved by the entry into force of the Anti-personnel Mine Ban Convention (APM).³⁹²

III.4.2.1 Article 1 – General obligations³⁹³

Article 1 emphatically states that no circumstances permit the use, the development, production, acquisition, stockpiling, retaining or transferring of anti-personnel mines. The obligation, subject to the exceptions of Article 3, is absolute and stresses that the transfer can be for the benefit of no one, including therefore States, NSAs or private persons, in a direct or an indirect way. The definition of the term transfer is given by the following Article, and it is the same of Protocol II of the CCW.

Letter c) of Article 1 enlarges the scope of the negative obligations and prohibits assisting, encouraging or inducing anyone, thus including State parties and not, NSAs and private individuals, directly or indirectly to engage in the activities that are prohibited to State parties under the Convention. The provision, therefore, applies not only to the use but also to the development, acquisition, stockpiling, retaining and transferring.

³⁹⁰ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, entered into force 1 March 1999, United Nations, Treaty Series, vol. 2056, p. 211; C.N.163.2003

³⁹¹ See Stuart Maslen, *Commentaries on Arms Control Treaties*, above n. 387, at 23.

³⁹² For a background on the Ottawa Convention see Stuart Maslen, *Anti-Personnel Mines under Humanitarian Law*, Intesentia Transnational Publishers, 2001.

³⁹³ Article 1 reads as follows: “1. Each State Party undertakes never under any circumstances: a) To use anti-personnel mines; b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention”.

*III.4.2.2 Article 2 – Definitions*³⁹⁴

Given that the definition of transfer is the same as that of Protocol II CCW, the same problem of interpretation applies. A broader interpretation is still favoured, meaning that a simple physical movement alone, which includes the concept of transit, or the transfer of title and control alone satisfy the definition of transfer, yet the view is not unanimous.³⁹⁵

*III.4.2.3 Article 3 – Exceptions*³⁹⁶

Although Article 1 poses that transfer shall be prohibited under any circumstances, Article 3 sets the exceptions to the prohibition. Permitted purposes are those listed in the body of the Article, but no specific definition is given for any of the activities (detection, clearance, and destruction). The use of the term retains links to the existing stockpiles, which can, therefore, be used for the permitted purposes of Article 3. Since the term transfer includes import, it is arguable that States parties can acquire from both other States parties and non-parties a number of anti-personnel mines. As explained by Maslen, the Convention does not prescribe a maximum number of permitted mines, but States have generally retained between 1000 and 5000.³⁹⁷

The second paragraph provides for a blank exception to transfer for destruction purposes and it is consistent with Article 1(2) and the possibility to entrust others with the destruction of the mines.³⁹⁸

III.4.3 The Convention on Cluster Munition (CCM)³⁹⁹

Also called the Oslo Convention, thanks to the Oslo Process that spurred interest toward a convention in the field of cluster munitions, the CCM adopts the very same terms and definitions of the

³⁹⁴ Article 2, in the part related to transfers, reads as follows: “‘Transfer’ involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines”.

³⁹⁵ See Stuart Maslen, *Commentaries on Arms Control Treaties*, above n. 387, at 89.

³⁹⁶ Article 3 reads as follows: “1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes. 2. The transfer of anti-personnel mines for the purpose of destruction is permitted”.

³⁹⁷ Stuart Maslen, *Commentaries on Arms Control Treaties*, above n. 387, at 139.

³⁹⁸ Article 1(2): Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

³⁹⁹ Convention on Cluster Munitions, entered into force 1 August 2010, United Nations, Treaty Series, vol. 2688, p. 39.

two treaties previously analysed.⁴⁰⁰ The only difference between Article 1 (General obligations and scope of application) CCM and Article 1 (APM) is the replacement of the term anti-personnel mines with cluster munitions and the same is valid for Article 2 (Definitions). Article 3 (Storage and stockpile destruction) closely resembles Article 3 (Exceptions) of the APM, with very subtle differences.⁴⁰¹ In paragraph 6, the CCM does not mention transfer but instead uses the term acquisition and allows the development and training of cluster munition countermeasures. In paragraph 7, the transfer for destruction purposes is allowed only to other State Parties, in contrast to the APM that does not specify the recipient.

III.5 Conclusion

International binding instruments regulating the export and import of conventional arms and weapons are not a new phenomenon, even if contemporary treaties in the field have been concluded after the end of the Cold War. Already at the end of the XIX century, the Brussels Act was adopted with the intention to regulate some aspects of the arms export. This treaty was followed by other two tentative conventions that ultimately failed to enter into force but are worthy of close examination as many of the arguments and discussions held at that time re-emerged in contemporary debates. Following these efforts, one must wait until the end of the XX century to witness the entry into force of Protocol II to the CCW. Although its main focus is not the transfer of mines but rather their use, the Protocol nonetheless paved the way for other treaties, such as the APM and CCM.

In the realm of firearms, it is only in 2005 that a globally binding instrument was adopted, although in the context of the fight against transnational crime. One could, therefore, advance the observation that, until the entry into force of the ATT at the end of 2014, the regulation of weapon-transfer was incidental to other rules. The ATT, the only legally binding treaty specifically devoted to

⁴⁰⁰ For a detailed analysis of the entire convention see Gro Nystuen and Stuart Casey-Maslen, *The Convention on Cluster Munitions; A Commentary*, Oxford University Press, 2010.

⁴⁰¹ The relevant excerpt of Article 3 reads as follows: “6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes; 7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted”.

regulating, *inter alia*, the export, and import of major conventional weapons and SALWs, is therefore already by itself a milestone in the path towards a more responsible arms trade, despite the weaknesses that this chapter has highlighted.

How all these treaties apply to the provision of arms and weapons to parties in civil war? The ATT, as seen, does not give a straightforward answer to the question. Firstly, it does not prohibit the export to NSAs and, therefore, States have to resort to other norms in order to assess their conduct on this point. Secondly, unless there is an embargo or the State has knowledge at the time of the authorization that the arms will be used to commit grave crimes of the Geneva conventions or other grave crimes, the State is only required to perform an assessment and not to simply deny the provision. And, thirdly, according to this assessment, the provision shall not be authorized if the arms and weapons would contribute, amongst others, to undermine peace and security. This very subjective evaluation is vulnerable to political interests and, unless IHL or human rights violations occur, refuting such evaluation seems problematic. As a result, under the ATT States enjoy flexibility to provide arms and weapons to States and NSAs.

As for the other treaties, the Firearms Protocol excludes from its application state-to-state transactions. Furthermore, it does not regulate the export as such, as the instrument pertains to the realm of fight against organized crime rather than arms control. In contrast, the other four treaties outlaw the transfer of specific items, such as anti-personnel mines and cluster munitions.

Taken as a whole, one could therefore say that, save for the weapons whose export is prohibited by treaties and for embargos, there are no hard lines on States' conduct. Otherwise stated, in principle, both States and NSAs are eligible to receive the arms.

The next chapter will show that the drafting of the ATT was highly influenced by regional instruments already existing at the time and will also consider domestic legislation, respectively the second and the third legal pillars to which EU Member States are subject to.

CHAPTER IV - The Regional and Domestic Legal Framework: EU Law, Other Regional Arrangements, and Some Elements on the Implementing Legislations

IV.1. Introduction

The previous chapter examined the existing conventional framework applicable to arms transfers and stressed the importance of the ATT, the first and only international treaty that aims to regulate ‘holistically’ the trade in conventional arms and weapons. All EU Member States are party to the ATT and are therefore bound by the prohibitions set by Article 6 and by the risk assessment obligation provided by Article 7. The latter Article is particularly relevant in instances of civil war, where serious violations of IHL or human rights law can be committed. Of great relevance is also the second paragraph of Article 6, which prohibits the transfer in case it would violate an international agreement to which a State is party. However, the chapter has also shown that the conventional framework not only encompasses the ATT, but also includes other treaties that deal with specific types of weapons, such as mines, but also small arms and light weapons.

Even before the entry into force of the ATT, the provision of conventional weapons was regulated on the EU level by Council Common Position 944/2008. More specifically, this legally binding act adopted under the umbrella of EU law regulates, once again ‘holistically’, the transfer of conventional weapons from EU Member States to non-members.¹ Arguably, this Common Position represents the bedrock of the EU rules applicable to the export of arms, but by no means is the only relevant EU rule. In fact, the framework offered by EU rules centres around three regimes. First, the one established by the mentioned Common Position, applicable to the export towards third countries. Second, the rules stemming from ICT Directive 2009/43, applicable solely to intra-EU exports, or ‘transit’ as the ICT Directive calls them. The examination of the ICT Directive is necessary in order to understand the risks that lie behind looser rules for intra-EU transfers as well as the issue of coordination with the ATT.² Third, EU restrictive measures that, alongside UN embargos and other regional embargos, will be analysed in the next chapter.

¹ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *OJ L 335, 13.12.2008, p. 99–103*.

² Laurence Lustgarten, “The European Union, the Member States, and the Arms Trade: A Study in Law and Policy”, *European Law Review*, 38(4), at 539.

The chapter is organised as follows: the analysis of the EU rules, the second legal pillar applicable to EU Member States, is analysed in the first part. As will be seen, EU rules recall other arrangements, and these will be covered immediately afterwards. The third and last pillar, namely the domestic legislation of each of the EU Member States, follows and precedes the second part of the Yemeni case study, which concludes the chapter.

IV.2. The EU Legal Framework

Under this heading the chapter analyses the rules applicable to the transfer of conventional weapons both to non-EUMS and to EUMS. The division based on the final destination of the goods is apt for at least three legal and political reasons: the rules have a different anchor in the treaties; the division better highlights the relationship between EU and international rules and specifically the ATT; the different political weight that extra-EU transfers carry, especially in the context of arms transfers to countries involved in civil wars.

IV. 2.1 The EU Legal Framework for Extra-EU Export

IV.2.1.1 From nothing to Council 944

The history of EU arms export controls to non-EU countries can be divided into four periods. The first extends to the end of the Cold War, the second to the mid-1990s, the third to the beginning of the 21st century, while the last to the present. Writing in 2002 Davis proposed a threefold division, yet his analysis must be integrated with an extra period in order to account for the developments that have occurred since then.³ The first period, up to the end of the Cold War, was characterised by an overwhelming predominance of national sovereignty. As observed by Whitman, until the late 1980s “[f]or western European governments there was a clear division of labour between NATO as the framework for the provision of military security and the European Community which focused upon economic collaboration”.⁴ Thus, European integration in the field of foreign and security policies played

³ Ian Davis, *The Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK*, Oxford University Press, 2002, at 45.

⁴ Richard G. Whitman, “NATO, the EU and ESDP: an emerging division of labour?”, *Contemporary Security Policy*, 25:3, 2004, at 431.

a secondary role in respect of economic matters and directly impacted the establishment of a communitarian arms export regime.

In addition to the political environment, a legal barrier, which EUMS interpreted restrictively, further contributed to limiting the scope of European convergence. Under paragraph 1(b) of Article 223 of the Treaty of Rome, any EUMS “may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material...”.⁵ And, according to the second paragraph of this Article, the Council was mandated to draw a list of products to which the EUMS could apply the national interest clause of paragraph 1(b). Even if such list was adopted by the Council acting in unanimity on 15 April 1958⁶, EUMS retained the right not only to apply exemptions to a wider range of products, but also to interpret Article 223 as “embodying a general principle that all areas concerning national security are not covered by the Treaties”.⁷ Even though Article 223 has remained “virtually unchanged” and still looms large today, its interpretation has considerably evolved.⁸

The importance of Article 223 stems from the fact that it concedes a full derogation from all rules relating to the common market and represents a “wholly exceptional situation”.⁹ As anticipated, EUMS initially saw in this Article a *carte blanche* that permitted them to exempt their defence industry from the *acquis communautaire*, and although this interpretation was not challenged for a long time, it nonetheless gradually changed as a result of the intervention of the European Court of Justice.¹⁰

The first case on the matter stemmed from a VAT exemption on imports and acquisitions of armaments, munitions and equipment exclusively for military use, which was provided for by one Spanish Law opposed by the European Commission.¹¹ More specifically, the European Commission contested that the exemption of VAT qualified as a “necessary measure” as per Article 223. In deciding

⁵ Treaty Establishing the European Community, Rome Treaty, 25 March 1957.

⁶ The list was published in the Official Journal of the European Communities C364E/85 of 20 December 2001.

⁷ Commission Of The European Communities, Communication From The Commission: The Challenges Facing The European Defence-Related Industry, A Contribution For Action At European Level, COM(96) 10, at 14.

⁸ Article 223 became under the Treaty of Amsterdam Article 296 and Article 346 under the Treaty of Lisbon.

⁹ Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, para 27.

¹⁰ Pamos Koutrakos, “Application of EC Law to Defence Industries”, in Catherine Barnard and Okeoghene Odudu, *The Outer Limits of European Union Law*, Oxford, Hart Publishing 2009, at 310. See also Pamos Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law*, Oxford, Hart Publishing 2001.

¹¹ Case C-414/97 Commission v Spain [1999] ECR I-5585, at para. 24.

the case, the Court highlighted that the interpretation of the mentioned Article must be narrow and it is up to the EUMS to demonstrate that domestic laws built on the exception provided by Article 223 “are necessary for the protection of the essential interests of its security”.¹² As observed by Trybus, the judgement was relevant not only for the interpretation of the Article, but also for the assertion that the Court was competent to review a EUMS decision to invoke the Article, including the justification offered by the EUMS.¹³ More specifically, in assessing the domestic measure, the Court applied a proportionality test, following which the Spanish measure was ruled out as it “represented a clearly unsuitable and manifestly inappropriate measure to ensure national security”.¹⁴ In other words, the disproportion was found to be in relation to the concept of national security, gauged as a unique exception to the values of the common market safeguarded by the Treaty.¹⁵ In the Case T-26/01 *Fiocchi*, in which an Italian manufacturer of ammunitions complained about the compatibility of state aid granted by Spain to a state-owned arms factory, the Court further curtailed the remit of Article 223 and explicitly stated that the derogation strictly applies to the list and, therefore, just to the military goods identified therein.¹⁶ As a result, only “equipment which is designed, developed and produced for specifically military purposes can be exempted from Community rules on the basis of Article 296(1)(b)” and, thus, dual-use products and goods not specifically intended for military purposes cannot enjoy the same exemption regime.¹⁷

The restrictive interpretation of Article 223 arose after several developments that characterised the second period in the history of the EU regulation of arms export. With the end of the Cold War, three factors, amongst a series of economic and political changes, played a crucial role in developing a renewed approach. First, the emergence of co-productions and joint ventures, alongside mergers in the field of the European arms industry, contributed to elevate the issue of arms export from a domestic to

¹² *Ibid*, at para. 22.

¹³ M Trybus, *European Union Law and Defence Integration*, Oxford, Hart Publishing, 2005, at 153.

¹⁴ *Ibid* at 154.

¹⁵ On the exceptional nature of the provision see also Case C-273/97 *Sirdar* [1999] ECR I-7403; Case C-285/98 *Kreil* [2000] ECR I-69; Case C-186/01 *Dory* [2003] ECR I-2479.

¹⁶ Case T-26/01 *Fiocchi* [2003] ECR II-3951.

¹⁷ COM(2006) 779, Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement.

a Europeanised dimension.¹⁸ The existence of a pan-European arms industry meant that national controls were becoming insufficient, especially considering the reduction in borders inspections thanks to the implementation of the common market.¹⁹ A cross-border industry also meant that the companies with several divisions could forum-shop between countries and exploit the weakest legislations, a problem which is still relevant in the intra-EU market, as it will be seen.²⁰ By the same token, the arms industry itself requested “greater coordination and convergence in arms export-control policies in order to facilitate cross-border cooperation and streamline export efforts”.²¹ The response to this industrial trend could not be left to single EUMS, but required a coordinated and centralised approach.

Second, the increasing emphasis on conflict prevention²², the declining importance of arms exports as a foreign-policy tool as well as a deeper awareness of human rights norms and sustainable development also contributed to encouraging a European response to arms export.²³

Third, following the Gulf war in 1991 EUMS realised that their own forces were fighting enemies equipped with European arms, in spite of domestic regulations and embargoes.²⁴ The scandal brought by this boomerang effect implicated nearly all major arms-producing countries in Europe and proved to be a key driver for several EUMS to enact new legislation and to “offset any potential loss of competitiveness by convincing other governments to support the adoption of stricter policies at the EU level”.²⁵

A signal that a new consensus around the development of a common approach in the field of arms control emerged already during the European Council in Rome at the end of 1990. In its

¹⁸ Mark Bromley and Michael Brzoska, “Towards a Common, Restrictive EU Arms Export Policy? The Impact of the EU Code of Conduct on Major Conventional Arms Exports”, *European Foreign Affairs Review* 13: 2008, at 334.

¹⁹ Sibylle Bauer, “L’Européanisation des Politiques d’Exportation d’Armements”, *Annuaire Français De Relations Internationales*, Volume II, 2001, at 510.

²⁰ Ian Davis, *The Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK*, Oxford University Press, 2002, at 52.

²¹ Mark Bromley, “Arms Transfers and Export-Control Policies”, in Hugo Meijer and Marco Wyss, *The Handbook of European Defence Policies and Armed Forces*, Oxford, Oxford University Press, 2018, at 712.

²² Mark Bromley, “The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports”, SIPRI Policy Paper No. 21, 2008, at 5.

²³ Sibylle Bauer, “L’Européanisation des Politiques d’Exportation d’Armements”, *Annuaire Français De Relations Internationales*, Volume II, 2001, at 510.

²⁴ Kyrre Holm, “Europeanising Export Controls: The Impact of the European Union Code of Conduct on Arms Exports in Belgium, Germany and Italy”, *European Security*, Vol. 15, No. 2, June 2006, at 213.

²⁵ Mark Bromley, “The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports”, SIPRI Policy Paper No. 21, 2008, at 8.

conclusions, the Council draws the first tentative expansion of a common security policy by including issues such as arms control, economic and technological co-operation in the armaments field, but also co-ordination of armaments export policy.²⁶ The conclusions were followed by other proposals from France and Germany acting together, Luxembourg, the Netherlands and the UK, all calling for possible actions in the field.²⁷ The existence of a momentum could be observed also from an inter-institutional perspective: the Commission tried to fully Europeanise the trade in arms by proposing a radical solution to the sovereignty hook given by Article 223. It suggested that “[i]t is in the common interest to bring defence equipment production and trade fully under the discipline of the common market, which would involve, inter alia, the removal of Article 223”.²⁸ The European Parliament offered its full buttress to the proposal in early 1991 and called for the non-utilization of Article 223, its subsequent deletion and the establishment of Community rules on arms exports, which should include a sanction regime against EUMS that did not respect arms embargos.²⁹

In addition to the policy proposals from the different institutional actors, a first tangible result was the establishment by the EU Political Committee of the Ad Hoc Working Group on Conventional Arms Export, which met on 16 April 1991 in order to compare EUMS positions and to explore the possibility of further action.³⁰ The work of the ad hoc group produced an immediate outcome already in June 1991, when the European Council adopted a declaration on non-proliferation and arms exports.³¹ Three points are of particular interest in this declaration: first, that areas where tensions exist – and *a fortiori* where there is a civil war ongoing - should call for restraint and transparency in the transfer of conventional weapons; second, that the comparison of the legislation made in the *ad hoc* group highlighted the existence of the following seven common national criteria:

1. respect for the international commitments of the member States of the Community, in particular the sanctions decreed by the Security Council of United Nations and those

²⁶ European Council, Presidency Conclusions, Rome, 14 And 15 December 1990, SN 424/1/90 (OR. f) Rev 1.

²⁷ Ian Davis, *The Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK*, Oxford University Press, 2002, at 54.

²⁸ Commission Opinion of 21 October 1990 on the Proposal for amendment of the Treaty establishing the European Economic Community, COM(90)600 (final), Brussels, 23 Oct. 1990.

²⁹ European Parliament, Joint resolution replacing B3-0552, 0555, 0562, 0564, 0565 and 0660/91, Resolution on the arms trade, in Official Journal of the European Communities, C129 (20 May 1991), at 140.

³⁰ Paul Cornish, *Arms Trade and Europe*, Bloomsbury Academic (12 March 1995), at 20.

³¹ Declaration on Non-Proliferation and Arms Exports, Annex VII to the European Council Presidency Conclusions, Luxembourg, 28 and 29 June 1991, SN 151/3/91.

- decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations;
2. the respect of human rights in the country of final destination;
 3. the internal situation in the country of final destination, as a function of the existence of tensions or internal armed conflicts;
 4. the preservation of regional peace, security and stability;
 5. the national security of the Member States and of territories whose external relations are the responsibility of a member State, as well as that of friendly and allied countries;
 6. the behaviour of the buyer country with regard to the international community;
 7. the existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.

Third, that these criteria should form the basis of a common approach in the field.³² These seven criteria were complemented by a further one, adopted during the European Council held in Lisbon in mid-1992.

According to the Conclusions, the criterium was:

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that States should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.³³

Despite these results, national interests still loomed large and prevented any further developments. In 1994, the German presidency of the Council decided to modify the mandate of the *ad hoc* working group – in the meantime renamed Committee Armament (or COARM) – and to work towards harmonization of national policies by means of a common interpretation of the eight criteria rather than seek to establish common rules.³⁴ During 1995 and 1996, France and the United Kingdom remarked their preference for intergovernmentalism and, given the weight of these key States, their policy choice hampered any substantial evolution in the field.³⁵ This setback marked the end of the second period, following which, the process regained traction under the Dutch presidency of the Council. Before turning to the third period, it should be noted that, despite its rather limited institutional weight, the Parliament, as a counterbalance to the Council's sovereign-centred approach, pushed for a more restrictive Community approach to arms exports.

³² The term common approach was explicitly used by the European Council. There was, at the time, dispute as to the interpretation of their value. On this, see Geoffrey van Orden, "European arms export controls", in P. Cornish, P. van Ham and J. Krause, *Europe and the Challenge of Proliferation*, Chaillot Paper no. 24 (Western European Union, Institute for Security Studies: Paris, 24 May 1996), at 47.

³³ European Council Presidency Conclusions, 26 and 27 June 1992, SN 3321/2/92, at 28.

³⁴ Ian Davis, *The Regulation of Arms and Dual-Use*, above n. 27, at 89.

³⁵ *Ibid* at 90.

In 1992 the Parliament, in line with the momentum that brought about the outline of the criteria, adopted a resolution in which it called for the arms trade to be absorbed within the Community ambit³⁶; more boldly, it also encouraged the adoption of a further criterion renamed the sufficiency principle. According to this parameter, “Member States should undertake coordinated steps with a view to cutting off supplies of war material to third countries whose military capability is sufficient for their own defence”³⁷; although consistent with the will of the Parliament to halt the practice of credit export for weapons deals with a view to reduce social imbalances in third-world countries, the sufficiency parameter could arguably pose difficulties if seen under the light of sovereign prerogatives of the recipient party.³⁸ The concerns on arms export to third-world countries was reiterated in the 1994 resolution.³⁹ In the same resolution, the Parliament also called for the deletion of Article 223 and guarded against the risk of the internal market being used fraudulently by exporters exploiting weaker legislations.⁴⁰ In this regard, it called the Council to “define and implement” a Code of Conduct also by establishing common interpretative guidelines.⁴¹ The parliamentary wish to effectively and uniformly control the arms export from EUMS was further underlined in its 1995 resolution, where the Parliament suggested to reflect about the opportunity to establish a European Agency.⁴²

As anticipated, the last period according to Davis, which lasted until 2000, was characterised by a more progressive position within the Council. After the setbacks of 1994 and 1995, the interests towards the regulation of arms export saw a renewed approach even if initially focused on the problem of SALWs.⁴³ The focus on SALW should not surprise as, at the same time and on a global scale, discussions around SALWs were getting traction and were about to be discussed in the first UN ad hoc

³⁶ European Parliament, Resolution on the Community’s role in the supervision of arms exports and the armaments industry, Resolution A3-0260/92, 17 Sep. 1992, Official Journal of the European Communities, C284 (2 Nov. 1992), at 140 point 3.

³⁷ *Ibid*, at a139, point 9.

³⁸ *Ibid*, at a139, point 5.

³⁹ European Parliament, Resolution on disarmament, arms export controls and the non-proliferation of weapons of mass destruction, Resolution A3-0111/94, 24 Mar. 1994, Official Journal of the European Communities, C114 (25 Apr. 1994).

⁴⁰ *Ibid*, at 59 points 8 and 11.

⁴¹ *Ibid*, at 59-60 points 14 and 15(i).

⁴² European Parliament, Resolution on the need for European controls on the export or transfer of arms, Resolution 0115/95, Official Journal of the European Communities, C43 (20 Feb. 1995), at 90 point 4.

⁴³ Council of the European Union, EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms, June 1997

committee on the elaboration of a convention against transnational organized crime in the beginning of 1999.⁴⁴ Right before this first session, the Council reinforced its programme on SALWs by adopting a Joint Action on the same topic, which referred to the export criteria of the code of conduct approved few months earlier but only in the form of general commitments.⁴⁵ It is nonetheless worth to highlight that amongst these commitments, EUMS subscribed to export SALWs only to governments. As just mentioned, a first draft of a European code of conduct was circulated on 23 January 1998 and then formally adopted, by means of a Council Declaration, on 5 June.⁴⁶

Although the code of conduct certainly represented a milestone in regulating arms exports, it was nonetheless still a political paper and not a legally binding document.⁴⁷ Not only was it adopted through a declaration, but the wording itself underlined that EUMS should only consider the criteria in their export assessment, and not legally base their decision on them. Furthermore, the criteria themselves were open to diverging interpretation by the different EUMS and, perhaps above all, there was no uniform list of goods to which the code applied. In other words, the Code of Conduct operated on the basis of national control lists, at least until 2000 when the Council adopted a common list of military equipment.⁴⁸ Nonetheless, the code both elaborated further the criteria identified in 1991 and 1992, but also provided for some operational guidelines that paved the way towards a more consistent communitarian approach. In particular, two concrete measures produced greater coordination amongst exporting EUMS: first, that in case of export denial, the denying EUMS had to notify the other EUMS and, in case another EUMS was requested to issue a license for the same transaction, it had to consult the EUMS that denied it. The consultation process did not bar the second EUMS from authorizing the

⁴⁴ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime First session Vienna, 19-29 January 1999, Adoption of the agenda and organization of work, A/AC.254/1.

⁴⁵ Council of the European Union, Joint Action of 17 December 1998 adopted by the Council on the basis of Article J.3 of the Treaty on European Union on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons (1999/34/CFSP), Official Journal L 9, 15.1.1999, at 1–5.

⁴⁶ Council of the European Union, Code of Conduct on Arms Exports (8675/2/98), adopted by the General Affairs Council, 5 June 1998.

⁴⁷ Sibylle Bauer, “L’Européanisation des Politiques d’Exportation d’Armements”, *Annuaire Français De Relations Internationales*, Volume II, 2001, at 517.

⁴⁸ Council of the European Union, Declaration of 13 June 2000, issued on the occasion of the adoption of the common list of military equipment covered by the European Union Code of Conduct on Arms Exports’, Notice no. 2000/C 191/01, Official Journal of the European Communities, C191, vol. 43 (8 July 2000).

transaction, but it had to justify its rationale.⁴⁹ Second, that EUMS had to produce an annual report, which, however, remained confidential and, thus, did not allow for external oversight.⁵⁰ A further, overall, positive effect was the outreach of the code. Shortly after its adoption, Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Norway, Poland, Romania, Slovakia and Slovenia also aligned to the code and, specifically, to its criteria, as the information exchange and the consultation in case of denial did not apply to non-EUMS.⁵¹

The adoption of the code together with the common military list to which the code applied marked the end of the third and last period identified by Davis. However, an additional period must be added to his threefold classification, a period marked by the upgrade of political commitments into legally binding rules.

IV.2.1.2 Council Position 944, the user guide and the new amendments of 2019

It is arguable that the transformation of the code of conduct into common binding rules occurred under the influence of other regional treaties. Already in 1999 States party to the Organization of American States signed its Convention on Transparency in Conventional Weapons Acquisitions, which entered into force in 2002.⁵² In the African context where SALWs had received particular attention, several regional treaties were already in force at the time when Europe had in place only the Joint Action on SALWs but did not have a more comprehensive binding document.⁵³ In other words, Europe was falling behind other regional organizations and could not be, therefore, regarded as a leading organization in the field. Under these circumstances, the code of conduct was elevated to a legal document by the Council in 2008.

⁴⁹ Code of Conduct on Arms Exports, operational point 3.

⁵⁰ *Ibid*, operational point 8.

⁵¹ Ian Davis, *The Regulation of Arms and Dual-Use Exports*, above n. 27, at 103. It is however to be noted that since 2012 information exchange also encompasses States that have aligned themselves to the Common Position (Albania, Bosnia and Herzegovina, Canada, the former Yugoslav Republic of Macedonia, Iceland, Montenegro and Norway).

⁵² Inter-American Convention on Transparency in Conventional Weapons Acquisitions, A-64, Guatemala City, signed on 6 July 1999, entered into force on 21 November 2002.

⁵³ Southern Africa Development Community, Protocol on the Control of Firearms, Ammunition and Other Related Materials in The Southern African Development Community (Sadc) Region, signed on 14 August 2001 and entered into force 8 November 2004; Nairobi Protocol on the Control, Prevention and Reduction of Small Arms and Light Weapons in the Great Lakes Region, the Horn of Africa and Bordering States, signed on 21 April 2004 and entered into force 5 May 2006; The Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunitions and Other Related Materials, signed on 14 June 2006 and entered into force 9 September 2009

The binding nature of the common position is undisputed. The Treaty of Amsterdam provided that “[t]he Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.”⁵⁴ The same formulation is now listed under Article 29 TUE, with the sole difference that joint actions and common positions are now merged into the overarching term of decision, as per Article 25 TUE. Despite this indication, the Treaty is silent as to the effect and the legal value of common positions and, as Nuttall posits, “this led to interminable discussions about what precisely common positions and joint actions were...”.⁵⁵ At first glance, common positions should not have the value of a legislative act, both according to Article 249 TFUE (Nice version, applicable at the time of adoption of Common Position 944) and to Articles 24(1) and 31(1) post Lisbon. These latter two explicitly provide that “[t]he adoption of legislative acts shall be excluded”, while Article 249 TFUE provided, at that time, that “[i]n order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.”⁵⁶ Hence, Common Positions do not follow the legislative procedures required for the adoption of normative acts such as directives and regulations, which create rights and obligations on third parties, and they are adopted by the Council acting alone. However, the fact that common positions do not produce legal effects to third parties does not imply that they do not produce legal effects vis-à-vis EUMS. In fact, EUMS are required to comply with common positions “by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law.”⁵⁷ The exclusion of direct general normative action and, thus, of direct effects on third parties, makes the absence of the ECJ’s jurisdiction more tolerable.⁵⁸ By the

⁵⁴ Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities And Certain Related Acts, 10 November 1997, Article J.5.

⁵⁵ Simon J Nuttall, *European Foreign Policy*, Oxford University Press, 2000, at 186.

⁵⁶ Article 288 TFUE (former Article 249) now recites as follow: “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.”

⁵⁷ Case C-355/04P *Segi v. Council* [2007] ECR I-1657, at 52.

⁵⁸ Piet Eeckhout, *EU External Relations Law*, Oxford University Press, 2011, at 479.

same token, if individual rights are, in fact, effected by a Common Position then “it has to be possible to make subject to review by the Court” since the content of this legal makes its scope to go “beyond that assigned by the EU Treaty to that kind of act”.⁵⁹ And this is precisely the situation of individuals subject to EU sanctions, which used to be adopted as Common Positions. A further confirmation, if needed, of the binding nature of Common Position 944 stems not only from the language used therein, compared to the one used in the Code of Conduct, but also from EUMS’ practice.

The eight criteria of Common Position 944 can be divided, as per Lustgarten, between those criteria that require EUMS to deny a license in a range of circumstances and those that only require to take into account the factors listed under the specific criteria.⁶⁰ The first four criteria – inconsistency with international and regional obligations including sanctions; respect for human rights and international humanitarian law; internal situation of the recipient country; and preservation of regional peace and security – demand EUMS to deny the export in case it would run against an international obligation, prolong a conflict or aggravate tension, or there is a clear risk that the goods would be used for internal repression, to commit a serious violation of international law or employed aggressively against another country or assert by force a territorial claim. In contrast, the remaining four criteria only impose on EUMS the obligation to consider the elements contained in those criteria in their overall assessment. In terms of language, it is worth to note that while within criteria two and four the term used is “clear risk”, in criterion seven, devoted to diversion, the risk is not further defined and, hence, the threshold is certainly lower.⁶¹

Common Position 944 was very recently amended by the Council, also in order to cater for the entry into force of the ATT.⁶² Two modifications affected Article 1. First, the Council further specified that the assessment of export licences apply both to non-state actors and to “government-to-government transfers”; second, a brand-new paragraph was introduced, in which the Council encourages the

⁵⁹ Case C-355/04P *Segi v. Council* [2007] ECR I-1657, at 54.

⁶⁰ Laurence Lustgarten, “The European Union, The Member States, and the Arms Trade”, above n 2, at 524-525.

⁶¹ See Zeray Yihdego, “The EU’s Role in Restraining the Unrestrained Trade in Conventional Weapons”, *German Law Journal*, Vol. 10, No. 3, 2009, at 288.

⁶² Council of the European Union, Council Decision amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, 10707/19 and Council of the European Union, Council conclusions on the review of Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports, 12195/19 .

reassessment of the licenses in case new information becomes available. The language adopted by the Council reflects Article 7(7) of the ATT, and the same remarks are, therefore, valid in this case. Although this addition is certainly welcome, the Council has perhaps missed the possibility to assert a stricter approach towards re-evaluation of export licences. Besides Article 1, also the first criterion of Article 2 was modified: the ATT, the CCW and the Ottawa convention are inserted in the list that contains the treaties and the commitments that must be taken into account by EUMS in their assessment. In addition, the Council added to the list also the commitment under the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

The Council's recent intervention was not limited just to amend the common position. It also modified the User's Guide, a document whose purpose is to summarise the agreed guidance for the interpretation of the criteria of the Common Position and the implementation of its articles.⁶³ Differently though from the Common Position, the guide is not binding but, nonetheless, shall be consulted by the EUMS national authorities, pursuant to Article 13 of the Common Position. The novelties brought about by the Council to the User's Guide are limited, as a previous amendment occurred in 2015 already revised the document in light of the entry into force of the ATT. The latest insertions relate to a new platform for information sharing and a new searchable database accessible to the public, which should contribute to increased transparency and stakeholder oversight. For what concerns the interpretation of the criteria, the Council added to criterion two, in the part related to human rights, a more inclusive gender-based perspective and a new indicator for the assessment of the recipient country observance of human rights: "[t]he respect for democratic principles in the country of final destination".⁶⁴ According to the Council, "[d]emocracy is inextricably linked to the full respect of all human rights".⁶⁵ As anticipated, these modifications follow those of 2015 where the Council regarded the User Guide as consistent and aligned with the ATT in relation to criterion two.⁶⁶

⁶³ Council of the European Union, User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 12189/19.

⁶⁴ *Ibid*, at 45.

⁶⁵ *Ibid*, at 45.

⁶⁶ User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 10858/15, at 54.

The ongoing fourth phase, besides being characterized by the transformation of political commitments into legal rules, has also seen the EU promoting its regulation and fostering the interests toward effective arms export on a global scale.⁶⁷ However, the rules on the extra-EU export do not exhaust the applicable legal framework, as the intra-EU space has specific rules that apply to it. The two dimensions, although pertaining to separate spheres, should not be seen as detached from each other. As examined, the criteria of the Common Position are interpreted by EUMS and a degree of variation between EUMS exist. In other words, there is still no level playing field in the way EUMS apply the criteria and potential loopholes could be exploited, especially as rules on intra-EU export are facilitated.

IV.2.2 The EU Legal Framework for Intra-EU Export

IV.2.2.1 The creation of a common defence market

Writing in 1997 on defence-related industries, the European Commission evidenced that “[t]he European market is still too fragmented and the level of intracommunity trade in defence equipment is astoundingly low...”.⁶⁸ The concern about the fragmentation of the market and the low level of intra-Community trade was not new and was previously noted by the European Commission a year earlier, when it highlighted that only 3/4 % of procurements of major conventional weapons resulted from the intra-European market.⁶⁹ The absence of harmonized rules and the extent of the controls carried out by EUMS were seen as elements that impeded an efficient market space. In order to simplify, rationalize and coordinate controls on the intra-Community trade, the European Commission already at that time

⁶⁷ See, for instance, Council of the European Union, Joint Action 2008/230/CFSP of 17 March 2008 on support for EU activities in order to promote the control of arms exports and the principles and criteria of the EU Code of Conduct on Arms Exports among third countries; Council of the European Union, 2009/1012/CFSP of 22 December 2009 on support for EU activities in order to promote the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP among third countries; Council of the European Union, 2012/711/CFSP of 19 November 2012 on support for Union activities in order to promote, among third countries, the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP; Council of the European Union, 2013/768/CFSP of 16 December 2013 on EU activities in support of the implementation of the Arms Trade Treaty, in the framework of the European Security Strategy; Council of the European Union, 2015/2309/CFSP of 10 December 2015 on the promotion of effective arms export controls; Council of the European Union, 2017/915 of 29 May 2017 on Union outreach activities in support of the implementation of the Arms Trade Treaty.

⁶⁸ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Implementing European Union Strategy on Defence-Related Industries, COM(97) 583 final, at 4.

⁶⁹ Commission of the European Communities, Communication from the Commission, The Challenges Facing The European Defence-Related Industry, A Contribution For Action At European Level, COM(96) I 0 final, at 8.

proposed to explore the possibility of establishing certain legal instruments.⁷⁰ Despite this intention, no follow up emerged and, as a result, the same concerns were reiterated in a communication of the European Commission dated 2003.⁷¹ In contrast to the previous two communications, the European Commission took a step forward by launching an impact assessment with the view to elaborating a legal text at the end of 2004.

Undoubtedly the more proactive approach stemmed from the novelties brought about by the treaties signed in Amsterdam and Nice in 1997 and 2001, yet a better understanding of the concrete problems in the licensing system also contributed to the line of action. In particular, the European Commission identified two elements that were hampering the common market in defence products. First, lengthy national procedures were time consuming especially as the system was centred around individual licenses.⁷² Individual licences required an ex-ante evaluation, they were granted to a supplier for a defined timeframe, usually one year, and permitted one or several consignments to the specific recipient mentioned in the licence itself.⁷³ Second, that “these procedures apply equally to transfers of defence equipment to Member States as to exports to non-member countries”.⁷⁴ Since there was no difference from the extra-Community exports, the problems in relation to the existence of different national legislations, diverging policy positions on export decisions, and different procedures applied to the common market as well. Moreover, given that since 2003 no license request had been denied for intra-EU transfers, with around 11,500 licenses issued per year, the administrative burden appeared to the European Commission to be out of proportion with the actual control needed.⁷⁵

In response to these concerns, the EU adopted Directive 2009/43/EC on the simplification of the terms and conditions pertaining to the transfer of defence-related products within the EU, known as

⁷⁰ *Ibid*, at 19.

⁷¹ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, European Defence - Industrial and Market Issues Towards an EU Defence Equipment Policy, COM(2003) 113 final.

⁷² *Ibid*, at 13.

⁷³ Christian Mölling, “Options for an EU Regime on Intra-Community Transfers of Defence Goods” in David Keohane (ed.), *Towards a European Defence Market*, Chaillot Paper 113 (Paris: EU Institute of Security Studies, 2008), 51 at 58.

⁷⁴ COM(2003) 113, at 13.

⁷⁵ European Commission, Commission Staff Working Document, Evaluation of the Transfers Directive, SWD(2016) 398 final/2, at 7.

the “Intra-Community Transfers (ICT) Directive”, which was part of the 2007 “Defence Package”.⁷⁶ As per Article 1 of the ICT Directive the main aim of the instrument was to “simplify the rules and procedures applicable to the intra-Community transfer of defence-related products in order to ensure the proper functioning of the internal market”. As observed by Trybus, the greatest innovation of the ICT Directive is the definition of transfer: according to Article 3.2, transfer means “any transmission or movement of a defence-related product from a supplier to a recipient in another Member State”.⁷⁷ By adopting this definition, the ICT-Directive draws a distinction between transfer and export, with the latter term being used exclusively to describe a movement of defence goods outside the EU. In other words, the ICT Directive “draws a qualitative distinction between the movement of defence-related goods between Member States and their export to third countries”.⁷⁸ This is further confirmed by the definition of Article 3.6, which describe “export license” as the “authorisation to supply defence-related products to a legal or natural person in any third country”.

A second novelty is represented by Article 4, under which it is established that (intra-EU) transfers are subject to prior authorization, yet EUMS, in transposing the ICT Directive, can choose to exempt five types of transfers from this authorization: i) when the supplier or the recipient is a governmental body or part of the armed forces; ii) supplies are made by the European Union, NATO, IAEA or other intergovernmental organisations for the performance of their tasks; iii) the transfer is necessary for the implementation of a cooperative armament programme between EUMS; iv) the transfer is linked to humanitarian aid in the case of disaster or as a donation in an emergency; v) the transfer is necessary for or after repair, maintenance, exhibition or demonstration. Not only does the ICT Directive provide for the possibility of these exemptions, but the overall rationale of the instrument is to move from ex ante to ex post controls.⁷⁹ In practice, this is translated in the licence regime.

As written above, before the entry into force of the ICT Directive, the system of licences was centred around individual licences. The ICT Directive modifies this regime and emphasises the

⁷⁶ Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community, Official Journal L146, 10.6.2009, p. 1–36.

⁷⁷ Martin Trybus, *Buying Defence and Security in Europe*, Cambridge University Press, 2014, at 148.

⁷⁸ *Ibid* at 149.

⁷⁹ See recital 29.

preference for general and global licences. The former licenses are called “open licences”, cover a pre-determined array of products to specified recipients or specific purpose. These licenses are published and, thus, the supplier does not need to request or apply for the licence, and verifications rely on ex-post controls.⁸⁰ According to Article 5.2, general licenses are mandatory when the recipient is part of the armed forces of a EUMS or a contracting authority in the field of defence, purchasing for the exclusive use by the armed forces of a EUMS; when the recipient is certified, or when the transfer is made for the purposes of demonstration, evaluation or exhibition or maintenance and repair. The latter are licences that allow for various shipments of a category of products to one or more recipients, usually for the period of three years. Under this new system, individual licences become the exception and must be granted only in specific cases, pursuant to the exhaustive list of Article 7. The pivotal role of general and global licences together with the ex-post controls is not unproblematic, especially with regard to transparency. Deapuw correctly underlines that the directive is silent on how EUMS should report to their parliaments and the potential lack of public oversight is certainly a point that should be further explored.⁸¹

The preference accorded to general licences is tied to the certification exercise, which is the assessment carried out by competent EUMS authorities that a recipient is a reliable entity, in particular as “regards its capacity to observe export limitations of defence-related products received under a transfer licence”. These export limitations, covered by Article 10, should respond to the concern of the transferring EUMS about the possibility of an extra-EU transfer by the recipient.⁸² More specifically, transferring EUMS can attach export (extra-EU) limitations to the goods that are subject to transfer (intra-EU) and the recipient EUMS must ensure that the receiving entity complies with the imposed limitations. However, the ICT Directive does not elaborate on which limitations can be attached to a transfer and leave free EUMS to decide how to implement the provision.⁸³ The importance of limitations

⁸⁰ European Commission, Commission Staff Working Document, above n 74, at 10.

⁸¹ Sara Depauw, “Risks of The ICT-Directive in Terms of Transparency and Export Control”, in Alyson JK Bailes and Sara Depauw (eds.), *The EU defence market: balancing effectiveness with responsibility*, Conference Report, at 70.

⁸² See also recital 30 for the coordination with Common Position 944.

⁸³ So far it appears that limitations are being employed by some EUMS, a point that the European Commission highlighted in the Commission Staff Working Document, above n 74, at 10.

to export are especially relevant to parts and components, which are produced in one EUMS, transferred to another EUMS, where they are assembled into a complete product, and from there exported extra-EU. By imposing restrictions on parts and components, the competitiveness of the defence industry may suffer, as a result of the reduced market value of parts and components not being assembled into a finished product. Clearly, this solution would appear less than sub-optimal to EUMS.⁸⁴ Furthermore, and strictly linked to the issue of limitations, is the possibility of “forum shopping” within the EU where, although Common Position 944 binds EUMS, national policies may adopt a more permissible stance.⁸⁵

IV.2.2.2 A misalignment with the first pillar: the ICT Directive and its compatibility with the ATT

In addition to the critical points just examined, there appears to be a more general issue that touches upon the coordination between the ATT and the ICT Directive. As it has been discussed above, before the entry into force of this latter instrument there was a uniform framework in terms of arms export. Intra-EU and extra-EU arms export were no different and the same rules applied. In other words, up until the adoption of Common Position 944, EUMS decided according to their own domestic policies – and in line with the non-binding Code of Conduct – on requests for authorizations; following the adoption of Common Position 944 and before the entry into force of the ICT Directive (30 June 2009), EUMS should have assessed intra-EU transfers according to the Common Position 944. Since 30 June 2009, the EU has a double regime, one applicable to extra-EU exports and one applicable to intra-EU transfers. However, in addition to EU law, EUMS must consider their international obligations and, in this case, their commitment to the ATT, which applies also to intra-EU transfers.⁸⁶ A question, therefore, emerges: is the ICT Directive compatible with the ATT? The discussion that follows adopts a concentric approach, starting from the data offered by the ICT Directive and progressively zooming out.

Recital 7 of the ICT Directive states that “[h]armonisation of the relevant laws and regulations of Member States should not prejudice the international obligations and commitments of the Member States nor their discretion as regards their policy on the export of defence-related products.” Yet this

⁸⁴ Sara Depauw, “Risks of the ICT-Directive in Terms of Transparency and Export Control”, above n 80, at 72.

⁸⁵ Laurence Lustgarten, “The European Union, The Member States, and the Arms Trade”, above n 2, at 537.

⁸⁶ It is useful to remind that under Article 2 of the ATT transfer include “export, import, transit, trans-shipment and brokering”

clause does not fully answer to the question as it deals more with the transposition of the directive in national laws, and, obviously, since it pre-dates the ATT it does not clarify the role of the ATT. Nonetheless, it is safe to say that the recital fully applies also vis-à-vis the ATT. More in general, it is undisputable that the EU has been fully supportive of the ATT, both in the process of adoption of the treaty and in its implementation. In Annex I to Decision 2013/768/CFSP, the Council specified that “[t]he Treaty's object and purpose are therefore compatible with the Union's overall ambition with regard to foreign and security policy as enshrined in Article 21 of the Treaty on European Union and further specified in the European Security Strategy” and highlighted the “longstanding and committed support to the Arms Trade Treaty by the Union and its Member States”.⁸⁷ Nonetheless, reference to Article 21 TEU makes it clear that the ATT is seen as a foreign policy tool, forgetting that EUMS should apply it also to intra-EU transfers and, therefore, the position taken by the Council is not of great help.

On a more general level, the only provision in EU law that deals with conflicts between the EU Treaties and other international agreements is 351 TFUE, which, however, refers to agreements that were concluded before a State had acceded to the Union.⁸⁸ In contrast, there is no provision that deals with posterior agreements, meaning agreements concluded by EUMS without the participation of the EU. The issue has to be therefore framed in relation to: i) the possibility that a treaty binding all EUMS would also bind the EU, ii) the competencies that are devoted to the Union, and iii) conflict between a treaty and secondary EU legislation enacted pursuant to an EU treaty provision.

Eeckhout notes that the case of a treaty binding all EUMS would bind, as result, also the EU was recognized by the ECJ only in one case relating to the GATT and prior to the establishment of the WTO.⁸⁹ In the case *International Fruit Company* the ECJ ruled that the GATT was binding the Community even if it was not party to the agreement, on the basis of the fact that competencies related to the GATT were transferred to the Community, which started to act as a partner in tariff negotiations.⁹⁰ In brief, the rationale of the decision was based on the concept “that a transfer of powers from the

⁸⁷ Council of the European Union, 2013/768/CFSP of 16 December 2013 on EU activities in support of the implementation of the Arms Trade Treaty, in the framework of the European Security Strategy, at 60.

⁸⁸ Former Article 307.

⁸⁹ Piet Eeckhout, *EU External Relations Law*, above n. 58, at 397.

⁹⁰ Joined Cases 21 to 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

Member States to the EU also entails a transfer of the Member States' international obligations".⁹¹ A *contrario*, where powers are not transferred to the Community, this cannot be bound by the international agreed rules. In the words of the ECJ, "in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those States are parties to Marpol 73/78, be bound by the rules set out therein, which it has not itself approved".⁹² The transfer of powers, also called succession principle, and which directly touches upon point ii), is hardly possible in broad areas of shared competencies. There appears to be an indirect proportion between the wideness of the topic covered by the international treaty and the likelihood that all the competencies of the area have been transferred to the Community. In other words, the broader the area, the less likely is that the Community possesses all the competencies.⁹³ Furthermore, the problem is amplified by the ambiguous division of competencies between the EU and its EUMS.⁹⁴ On the one hand the impasse could be solved by employing the duty of loyalty, which binds not only EUMS but also EU institutions, and is equally relevant between EUMS and the Union as well as between the Union institutions.⁹⁵ Against this context, EU institutions should avoid hindering EUMSs from fulfilling their international obligations, especially when they bind all EUMS.

In addition, settled EU case law provides that the "powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law", while the literature emphasizes that the principle under Article 3(5) TUE shall apply, *mutatis mutandis*, also to the internal sphere.⁹⁶ Hence, if the EU has a duty to act in observance of international law, it must also have a duty to permit EUMS to conduct their affairs in observance with international law. And this should necessarily include the case where an international treaty does not bind the EU, but solely its EUMS, as is the case of the ATT.

⁹¹ Piet Eeckhout, *EU External Relations Law*, above n 58, at 397.

⁹² Case C-308/06 *The Queen on the application of Intertanko and Others v. Secretary of State for Transport* [2008] ECR I-4057, at 49.

⁹³ Piet Eeckhout, *EU External Relations Law*, above n 58, at 400.

⁹⁴ Filip Tuytschaever, *Differentiation in European Union Law*, Hart Publishing, 1999, at 172.

⁹⁵ Geert De Baere and Timothy Roes, "Eu Loyalty as Good Faith", *International & Comparative Law Quarterly*, Vol. 64, Issue 4, at 835-836.

⁹⁶ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, at para 9; Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057, at para 51. For the literature see Hermann-Josef Blanke, Stelio Mangiameli *The Treaty on European Union (TEU): A Commentary*, Springer, 2013, at 179.

The problem could be also reframed in terms of conflict between international law and domestic law.⁹⁷ As seen, Article 351 TFUE deals with conflicts between an earlier treaty and the primary law of the Union. In the case at stake, however, the ATT appears to be clashing just with a secondary law issued by the Union and not with the founding documents to which, on the contrary it is aligned, as also the mentioned Council Decision highlights. Klabbers puts it well when he states, on the hypothesis of a conflict between an international treaty and a regulation, that “[t]he question here is whether the regulation at issue should be regarded as being inextricably connected to the EC Treaty, to such an extent that one can still meaningfully speak of a treaty conflict, or whether it would be more realistic to view the regulation not as a treaty emanation, but rather as a piece of domestic legislation”.⁹⁸ Moreover, here the discourse focuses on a directive that, differently from a regulation, necessitates from EUMS to be transposed into domestic legislation. The only differences from “pure” domestic laws are the initiative to adopt the law, which comes by the Union, and the content of the law, which is tied to the content of the directive. The conflict can be therefore said to be between international law and domestic law and is governed by Article 27 of the Vienna Convention on the Law of Treaties.⁹⁹

Considering this, it may seem that the ICT Directive and the implementing EUMS laws, may be incompatible with the ATT, as the absence of prior authorization, including the case of transit, runs against Article 6 and 7 of the ATT. Does this mean that the EU has an obligation to amend the ICT Directive? Taken from the perspective of the ECJ this may not seem the case. In the judgement *Intertanko*, the Court stated that when the Community concludes an agreement is naturally bound by it and the terms of the agreement take precedence over the Community secondary legislation. However, it also said that when the Community is not party to an international agreement, secondary legislation which is incompatible with this agreement cannot be reviewed, as the term of comparison (*i.e.* the international agreement) for assessing the legality of the secondary legislation was not binding on the Community.¹⁰⁰ This, in spite of the fact that all EUMS were party to the agreement.

⁹⁷ Jan Klabbers, *Treaty Conflict and The European Union*, Cambridge University Press, 2009, at 193.

⁹⁸ *Ibid* at 194.

⁹⁹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

¹⁰⁰ Case C-308/06 *Intertanko*, above n 96, at para 50. See also Joined Cases 21-24/72, *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219, at para7: “Before the incompatibility of a

That said, it must be, however, noted that the Council authorised EU Member States to sign and ratify the ATT.¹⁰¹ From a procedural point of view, the act of the Council was necessary as some of the provisions of the ATT fall within the exclusive competency of the Union, such as trade and commercial policy.¹⁰² In principle, when the Council authorises the conclusion of an agreement the removal of any incompatibility with the *aquis communautaire* is required.¹⁰³ Apparently, the Commission performed such assessment in an explicatory memorandum to the Council and concluded that: “the provisions of the ATT (Articles 6, 7, 9, 26) ensure that the ATT is compatible with the *aquis*. In any case, any potential problem of compatibility could be addressed through article 26(1) [ATT]”.¹⁰⁴ This conclusion, however, seems to be faulty. Under Article 26(1) ATT existing arrangements are not prejudiced by the ATT only where these parallel obligations are compatible with the ATT. And, as it has been shown above, it is tenable to say that the simplified procedures under the ICT Directive frustrate the entire authorization and assessment regime of the ATT.

IV.2.3 The position of the European Parliament and its practice

IV.2.3.1 The resolutions

The role of the EP has already been touched upon when examining the second period of the history of EU arms control. Historically the EP has acted as a counterbalance to the inconsistent approach of the Council and has repeatedly called for stricter communitarian rules in the field. Since the adoption of Common Position 944, the EP has continued to critically engage with the problem of European arms exports and has periodically adopted resolutions on the topic. Some of the observations of the EP are recurrent and worth highlighting.

Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision”.

¹⁰¹ Council Decision 2013/269/CFSP of 27 May 2013 authorising Member States to sign, in the interests of the European Union, the Arms Trade Treaty OJ L 155, 7.6.2013, p. 9–9; Council Decision 2014/165/EU of 3 March 2014 authorising Member States to ratify, in the interests of the European Union, the Arms Trade Treaty OJ L 89, 25.3.2014, p. 44–44.

¹⁰² Council Decision 2013/269/CFSP at recital 4; Council Decision 2014/165/EU at recital 4.

¹⁰³ Marise Cremona, “Member States Agreements as Union Law”, in Ramses A. Wessel, Paolo Palchetti, Enzo Cannizzaro, *International Law as Law of the European Union*, Brill, 2011, at 316.

¹⁰⁴ COM(2013) 482 final, Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Arms Trade Treaty.

The first concern focuses on the diverging interpretation of Common Position 944 by EUMS. The EP is particularly concerned that the eight parameters are interpreted and implemented with different degrees of rigour, and that there is still a lack of consistent definition and implementation.¹⁰⁵ The inconsistent approach has brought the EP to propose the adoption of punitive measures toward EUMS that infringe the criteria.¹⁰⁶ Initially, the EP also encouraged the introduction of a more accurate language in the User's Guide to promote a more uniform interpretation, however this call was not reiterated perhaps signalling that the Guide has undergone improvements deemed sufficient by the EP. A second concern centres around the underrated effect of Article 10 of the Common Position, which states that economic, social, industrial and commercial interests should not take precedence over the criteria. In the view of the EP, EUMS compensate their reduced intra-EU turnover through augmented extra-EU exports, to countries with a debatable track record.¹⁰⁷

In 2015 the EP raised two points that had not been discussed before: it somehow anticipated the amendments of 2019 to the Council Position when it called for EUMS to cancel contracts when a sharply changed situation makes the deal contrary to the Common Position.¹⁰⁸ The position is more ambitious than the actual amendments, insofar as these provide that the availability of new information should encourage EUMS to reassess their licences. By the same token, it also anticipated the 2019 amendments when it called to include in the Common Position some language in relation to gender-based violence.¹⁰⁹ Besides these proposals, the resolution guarded against the risk of licenced production in third country and of overseas production by subsidiaries of EU companies, which would allow to escape the legal framework altogether.¹¹⁰

The resolution adopted in 2017 also contains some novelties compared to the previous two. Firstly, it includes a paragraph devoted to the ICT Directive and affirms that its implementation should

¹⁰⁵ European Parliament resolution of 4 July 2013 on arms exports: implementation of Council Common Position 2008/944/CFSP (2013/2657(RSP)) at point 1; European Parliament resolution of 17 December 2015 on arms export: implementation of Common Position 2008/944/CFSP (2015/2114(INI)), at point 20; European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP (2017/2029(INI)), at point 4; European Parliament resolution of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP (2018/2157(INI)), at point 5 and 27.

¹⁰⁶ EP (2015/2114(INI)), at point 26; EP (2017/2029(INI)), at point 34; EP (2018/2157(INI)), at point 10.

¹⁰⁷ EP (2015/2114(INI)), at point 6; EP (2017/2029(INI)), at point 2.

¹⁰⁸ EP (2015/2114(INI)), at point 19.

¹⁰⁹ *Ibid*, at point 15.

¹¹⁰ *Ibid*, at point 34.

be consistent the Common Position, which “is non-restrictive in scope and, accordingly, the eight criteria also apply to exports within the EU”.¹¹¹ As seen above, this point is debatable as the legal basis for the Common Position is the Common Foreign and Security Policy rather than the internal Union sphere, and the point is further confirmed by a parliamentary question discussed below. Secondly, the EP encourages the addition of a further criterion on the risk of corruption.¹¹² Once again, the EP anticipated the work of the Council that in the recent amendments to the User’s Guide has included some specific questions on the risk of corruption in the recipient country.¹¹³ Thirdly, the EP took note of Brexit and encouraged the United Kingdom to remain bound by Common Position 944.¹¹⁴ Fourthly, the EP deemed that export to Saudi Arabia were not compliant with criterion two, given the grave breaches of IHL as established by the UN.¹¹⁵ It also noted that EUMS had divergent policies vis-à-vis the conflicts in Syria, Yemen and Iraq and called EUMS and the EEAS to embark in discussions on criterion two.¹¹⁶ In 2018 the EP also added the UAE and other members of the Saudi-led coalition as recipients non-compliant with criterion two, while export to Saudi Arabia was deemed not to be compliant also with criterion three, four, five and six.¹¹⁷ Consistently with this position, the EP congratulated those EUMS that had halted the export to Saudi Arabia, citing Germany and the Netherlands, while regretting that not all EUMS followed the example.¹¹⁸ Finally, in 2018 the EP suggested to apply the Common Position also to the transfer of security, military and police personnel, arms export-related services, know-how and training, security technology and to private military and security services.¹¹⁹

IV.2.3.2 The questions

Parliamentary questions are a source of precious information in relation to European practice on arms exports. The majority of the questions addressed to the High Representative revolves around

¹¹¹ EP (2017/2029(INI)), at point 43. The same language was used in EP (2018/2157(INI), at point 24.

¹¹² EP (2017/2029(INI)), at point 25; The same language was used in EP (2018/2157(INI), at point 25.

¹¹³ See User’s Guide, above n. 63, at 129.

¹¹⁴ EP (2017/2029(INI)), at point 9; The same language was used in EP (2018/2157(INI), at point 22.

¹¹⁵ EP (2017/2029(INI)), at point 17.

¹¹⁶ EP (2017/2029(INI)), at point 16.

¹¹⁷ EP (2018/2157(INI), at point 11 and 14.

¹¹⁸ EP (2018/2157(INI), at point 13; EP (2017/2029(INI)), at point O.

¹¹⁹ EP (2018/2157(INI), at point 29.

specific country situations and the reply is, in those cases, uniform and simply states that the responsibility for the decisions on arms exports lies in each exporting EUMS.¹²⁰ Besides these numerous questions, two other specific questions are worth examining because of the content of the reply.

The first question aimed to clarify the relationship between the Common Position and the ATT and enquires whether intra-EU trade should be considered international trade, subject to the ATT regulation. In reply, the HR evidenced that “[t]he EU Common Position notably covers a wider scope of arms than those covered by the ATT” and that the User’s Guide was updated in order to include additional ATT-related guidance. In relation to the second part of the question, the HR stated that “[t]he ATT applies to arms trade between States parties, which can apply to trade between two EU Member States parties to the ATT. The application of the ATT in that case is however neutral on the applicable EU legislation regulating intra-EU arms trade since intra-EU arms trade remains mostly subject to simplified licensing requirements”.¹²¹ This answer raises some concerns, especially in light of the examination of the compatibility of the ICT Directive with the ATT referred to above: firstly, the ATT

¹²⁰ See for instance: Question for written answer E-008025/2014 - Answer given by Vice-President Mogherini on behalf of the Commission (29.1.2015); Question for written answer E-008969/2014/rev.1 - Answer given by Vice-President Mogherini on behalf of the Commission (16.2.2015); Question for written answer E-009655/2014 - Answer given by Vice-President Mogherini on behalf of the Commission (30.1.2015); Question for written answer E-000918/2015 – Reply by the Council (9.4.2015); Question for written answer E-001158/2015 - Answer given by Vice President Mogherini on behalf of the Commission (1.4.2015); Question for written answer E-007917/2015 - Answer given by the High Representative/Vice-President Mogherini (28.7.2015); Question for written answer E-009898/2015 - Answer given by Vice-President Mogherini on behalf of the Commission (13.10.2015); Question for written answer E-010476/2015 - Answer given by Vice-President Mogherini on behalf of the Commission (27.10.2015); Question for written answer E-010815/2015 - Answer given by Vice-President Mogherini on behalf of the Commission (7.10.2015); Question for written answer E-013034/2015 to the Council – Council Reply (1.2.2016); Question for written answer E-000407/2016 - Answer given by Vice-President Mogherini on behalf of the Commission (4.3.2016); Question for written answer E-000616/2016 - Answer given by Vice-President Mogherini on behalf of the Commission (1.4.2016); Question for written answer E-001739/2016 - Answer given by Vice-President Mogherini On behalf of the Commission (24.5.2016); Question for written answer E-006173/2016 - Answer given by Vice-President Mogherini on behalf of the Commission (19.10.2016); Question for written answer E-008936/2016 - Answer given by Vice-President Mogherini on behalf of the Commission (25.1.2017); Question for written answer E-009650/2016 - Answer given by Vice-President Mogherini on behalf of the Commission (14.2.2017); Question for written answer E-002565/2017/rev.1 - Answer given by Vice-President Mogherini on behalf of the Commission (5.7.2017); Question for written answer E-002849/2017/rev.1 - Answer given by Vice-President Mogherini on behalf of the Commission (28.6.2017); Question for written answer E-002695/2018 - Answer given by Vice-President Mogherini on behalf of the Commission (9.7.2018); Question for written answer E-003152/2018 - Answer given by High Representative/Vice-President Mogherini (28.8.2018); Question for written answer E-004685/2018 - Answer given by Vice-President Mogherini on behalf of the European Commission (18.1.2019); Question for written answer E-004817/2018 - Answer given by Vice-President Mogherini on behalf of the European Commission (8.2.2019); Question for written answer E-005252/2018 - Answer given by Vice-President Mogherini on behalf of the European Commission (10.12.2018);

¹²¹ Question for written answer E-011688/2015 - Answer given by Vice-President Mogherini on behalf of the Commission (11.9.2015)

is fully applicable between EUMS; secondly, the relationship between the ICT Directive and the ATT is not elaborated, and the concept of ‘legal neutrality’ remains obscure. Contrary to what the HR said, the ATT applies to its parties, and not to the trade itself; neither is the reference correct that both the States, the sender and the recipient, should be party to the ATT, as it seem to transpire from the reply. Furthermore, the use of the word ‘can’ is incorrect, not only because all EUMS are parties to the ATT, but also because the existence of simplified procedures under the ICT Directive should not prevent the application of the ATT. In addition, the ATT itself includes, under Article 2(3), a specific clause that clarifies in which situations the treaty does not apply.¹²² It is safe to say that the overwhelming majority of the cases where arms are imported, exported or even transited through EUMS do not fall within the exception and it is equally safe to say that the questioning MEP did not refer to that exception. In other words, the legal neutrality that the HR mentions appears erroneous.

The second question linked the distressed finances of Greece with criterion eight of the Common Position, which requires to consider the technical and economic capacity of the recipient country. In reply, the Council definitively clears that “[t]ransfers of defence-related products between Member States are governed by Directive 2009/43/EC” and, thus, not by the Common Position as alluded by the EP in its resolutions.¹²³ In addition, the Council also clarified that “[u]nder Directive 2009/43/EC, criteria against which to assess applications for transfer licences are to be determined by the Member States”, according to Article 4(6) of the ICT Directive. In this case, the ATT was not mentioned, even if, as per the previous question and per the argument above, remains perfectly applicable to intra-Union transfers.

IV.3 Other Arrangements

Apart from the European Union, there are other frameworks and arrangements to which EUMS participate. In particular, in the field of conventional arms exports, EUMS participate in two other fora, namely the Organization for Security and Cooperation in Europe (OSCE) and the Wassenaar

¹²² Article 2(3) reads as follows: “This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party’s ownership”.

¹²³ Question for written answer E-005825/2017 - Council Reply (4.12.2017).

Arrangement.¹²⁴ The rationale for including them in this chapter stems from a twofold reason. On the one hand, EUMS carry a substantial weight in both the organizations, as they form the majority in the Wassenaar Arrangement and are 28 out of 57 States in the OSCE; on the other, the guidelines adopted by these organizations, although not legally binding, are explicitly mentioned by criterion two of Common Position 944, making them a point of reference for EUMS when deciding upon extra-EU exports. In this respect, even if not legally binding, “[t]he importance of those documents should however not be underestimated; they have provided a direction for the development of the law...”.¹²⁵

IV.3.1 OSCE

It has been shown above that, shortly after the end of the Cold War, the twelve EUMS induced, *inter alia*, by the concerns about European arms used against European military forces, found a consensus around the need for stricter control of their arms exports. This revamped interest, what has been described as the second period of the history of the communitarian rules, was not limited to the EU forum and the platform provided by the OSCE was particularly apt for elevating the topic and bringing together actors from without the EU. In 1992, the participating States of the Conference on Security and Co-operation in Europe agreed to start negotiations on a range of security-related issues, including arms control.¹²⁶ Initially conventional arms control was treated together with non-proliferation but following a proposal of the United States the subjects were split and a special gathering was called for the beginning of 1993 devoted solely to conventional arms.¹²⁷ Shortly afterwards, the European Union presented a text on Principles Governing Conventional Arms Transfers, sponsored not only by the EUMS but also by other eleven co-sponsors, which was negotiated in July and finally approved by the Forum for Security and Cooperation’s Special Committee on 25 November 1993.¹²⁸

¹²⁴ All EUMS are party to the OSCE, while 27 EUMS are party to the Wassenaar Arrangement, with the exclusion of Cyprus. There are other frameworks where EUMS participate: the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, and The Hague Code of Conduct against Ballistic Missile Proliferation. These platforms are linked to non-conventional weapons and are, therefore, excluded from the scope of the research.

¹²⁵ Guido Den Dekker, *The Law of Arms Control, International Supervision and Enforcement*, Martinus Nijhoff Publishers, The Hague, 2001, at 60.

¹²⁶ Conference for Security and Co-operation in Europe, 1992 Summit, Helsinki, 9 - 10 July 1992, CSCE Helsinki Document 1992, *The Challenges of Change*, at V(8).

¹²⁷ Joanna van Vliet, “Principles Governing Conventional Arms Transfers”, Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 1995/96, Baden-Baden 1997*, at 267.

¹²⁸ *Ibid.*, at 267.

The Principles establish a two-tier system.¹²⁹ The first tier, set by Article 4(a), includes a series of criteria that States “will take into account” when considering a transfer to a country. From the wording it is unclear whether the specific use of the term “country” implies that the first tier should be applied only when the weapons are to be delivered to States. These criteria should not sound anymore new, yet at the time of their adoption, they were one of the first internationally agreed instruments on conventional arms exports.¹³⁰ Amongst the criteria one can find the respect for human rights and fundamental freedoms; the internal and regional situation in and around the country in the light of existing tensions or armed conflicts; the record of compliance with international commitments in the field of the non-use of force, non-proliferation and other areas of arms control; the nature and costs of the arms in relation to the circumstances of the recipient country, with the objective of the least diversion for armaments of human and economic resources; the requirements for enabling the exercise of the right of individual or collective self-defence; whether the transfer would contribute to an appropriate and proportionate response by the recipient country to military and security threats it is confronted with; and the legitimate domestic security needs.

The second tier is another set of criteria that somehow mirror, but also go beyond, the first set and which require the participating States to avoid transfers in case the transferring arms “would be likely” used to violate or suppress human rights and fundamental freedoms; threaten the national security of other States; contravene their international commitments; prolong or aggravate an existing armed conflict; endanger peace, introduce destabilizing military capabilities into a region, or contribute to regional instability; be diverted; be used for the purpose of repression; support or encourage terrorism; be used other than for the legitimate defence and security needs.¹³¹

In addition to these criteria applicable to the export of conventional arms in general, the OSCE also provided specific criteria for two categories of weapons: SALWs and MANPADS. The criteria

¹²⁹ Organization for Security and Co-operation in Europe, Principles Governing Conventional Arms Transfers, 25 November 1993, adopted at the 49th Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation in Vienna on 25 November 1993, DOC.FSC/3/96.

¹³⁰ Paul Holtom, “The OSCE and the Arms Trade Treaty: Complementarity and Lessons Learned”, Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), OSCE Yearbook 2015, Baden-Baden 2016, at 333.

¹³¹ Article 4(b).

applicable to the former explicitly derive from the Principles, as acknowledged by Section III(A)1.¹³² Consistently with this statement, the first tier re-propose the same parameters, with the additional specification that, within the criterion of compliance with international obligations, the record of respect for international law governing the conduct of armed conflict is taken into account.¹³³ The additional requirement of respect for IHL is mirrored within the second tier and a State “will avoid issuing licences for exports where it deems that there is a clear risk that the small arms” threaten compliance with IHL;¹³⁴ another new requirement is the clear risk that the transfer will create an excessive and destabilizing accumulation of small arms, or whether it will facilitate organized crime.¹³⁵ The unique threat posed by MANPADS brought the OSCE to uphold the wording of the corresponding Wassenaar document and to establish that these weapons should only be transferred to governments on an individual license, as general licenses apparently do not offer sufficient safeguards against the risks posed by this specific weapon.¹³⁶

The OSCE commitments, despite their lack of binding force, nevertheless served as a basis for assessing the legality of the arms transfer by the Russian Federation to separatist groups in eastern Ukraine. In a statement on the risks of uncontrolled spread of SALWs the EU expressed that “[t]heir illegal supply to the separatist groups in eastern Ukraine by the Russian Federation is in violation of the norms and commitments contained in the 1993 Principles Governing CAT and the 2000 OSCE Document on SALW”.¹³⁷ One could hypothesise that the EU deemed the Russian Federation to be in

¹³² Organization for Security and Co-operation in Europe, Osce Document on Small Arms And Light Weapons, adopted at the 308th Plenary Meeting of the OSCE Forum for Security Co-operation on 24 November and reissued pursuant to FSC Decision No. 3/12 on the reissuing of the OSCE Document on Small Arms and Light Weapons adopted at the 686th Plenary Meeting of the Forum for Security Co-operation on 20 June 2012, FSC.DOC/1/00/Rev.1.

¹³³ *Ibid*, Section III(A)2(a).

¹³⁴ *Ibid*, Section III(A)2(b)(v), emphasis mine.

¹³⁵ *Ibid*, respectively Section III(A)2(b)(vi) and Section III(A)2(b)(x).

¹³⁶ Organization for Security and Co-operation in Europe Decision No. 3/04 Osce Principles For Export Controls Of Man-Portable Air Defence Systems (MANPADS), 26 May 2004, FSC.DEC/3/04; on the threat see Australian Government, Department of Foreign Affairs and Trade, Man-Portable Air Defence Systems (MANPADS) Countering the Terrorist Threat, 2008, available at https://dfat.gov.au/international-relations/security/non-proliferation-disarmament-arms-control/conventional-weapons-missiles/Documents/MANPADS_countering_terrorist_threat.pdf; Organization of American States, OAS To Address Threats Associated With Man Portable Air Defense System, Press Advisory, March 5, 2007; US Department of State, MANPADS: Combating the Threat to Global Aviation, available at <https://2009-2017.state.gov/t/pm/wra/c62623.htm>.

¹³⁷ European Union, EU Statement on Conventional Arms Transfers, OSCE Forum for Security Co-operation Nr 790, Vienna, 28 May 2015, FSC.DEL/105/15, at 1. From, Montenegro, Albania, Bosnia and Herzegovina,

breach with principle 4(b)(iv) of the 1993 Principles Governing CAT and principle 2(b)(v) of the Document on SALW, as the supply to the separatist groups prolonged or aggravated an existing armed conflict. This may find a confirmation in a subsequent statement, in which the EU stated that “there is a compelling need for strengthening the OSCE conventional arms control commitments through their full implementation and respect by all participating States”.¹³⁸

On a more general level, the benefit of the OSCE’s normative layer should be seen in the capacity of the organization to operationalize the principles by means of best practices and assistance projects.¹³⁹ Under this rationale, it is possible to understand the position of the EUMS “to maintain the relevance and effectiveness of the OSCE commitments, including the Document on SALW, in the light of the ATT”.¹⁴⁰ Moreover, as not all OSCE participating States signed the ATT, “the OSCE's existing commitments, namely the Principles Governing Conventional Arms Transfers, remain the baseline of our activities and decisions and deserve our continued attention”.¹⁴¹

IV.3.2 The Wassenaar Arrangement

The results achieved during the fertile second period were not limited to remedy the absence of common rules on arms export with non-binding rules, but also encompassed the establishment of a new arrangement.¹⁴² In fact, the Wassenaar multi-lateral arrangement could be seen as a post-Cold War successor of the Coordinating Committee for Multilateral Export Controls (COCOM), which ceased to exist at the end of March 1994.¹⁴³ COCOM was an informal agreement between the United States and its NATO allies, together with Australia and Japan but excluding Iceland, to control exports to countries

Liechtenstein, Norway, Ukraine, the Republic of Moldova, Georgia and San Marino aligned themselves with this statement.

¹³⁸ European Union, EU Statement on Arms Transfers and Arms Transfer Controls Reporting Instruments, OSCE Forum for Security Co-operation N°811, Vienna, 11 February 2016, FSC.DEL/27/16/Rev.1, at 2. From, Montenegro, Albania, Serbia, Bosnia and Herzegovina, Iceland, Liechtenstein, Norway, Ukraine, the Republic of Moldova, Georgia and San Marino aligned themselves with this statement.

¹³⁹ See for instance Organization for Security and Co-operation in Europe, Decision No. 5/03 Best Practice Guides on Small Arms and Light Weapons, V. Best Practice Guide on Export Control of Small Arms and Light Weapons.

¹⁴⁰ European Union, EU Statement on the Arms Trade Treaty, OSCE Forum for Security Co-operation Nr 727, Vienna, 18 September 2013, FSC.DEL/147/13. From, Montenegro, Iceland, Serbia, Albania, Liechtenstein, Norway, Republic of Moldova and Andorra, aligned themselves with this statement.

¹⁴¹ *Ibid.*

¹⁴² The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Final Declaration, Peace Palace in The Hague, the Netherlands, 19 December 1995.

¹⁴³ Ron Smith and Bernard Udis, “New challenges to arms export control: Whither Wassenaar?”, *The Nonproliferation Review*, 8:2, 2001, at 81.

party to the Warsaw Treaty and China. The COCOM was established under the US input to strengthen its efforts to restrict the transfer of strategic goods to the USSR.¹⁴⁴ In the framework of the COCOM, decisions were implemented through national measures and their effectiveness was linked to each member State passing and enforcing laws and regulations on control exports.¹⁴⁵ In essence, it was a non-legally binding forum for coordination, with unfixed procedure and principles and a secret charter.¹⁴⁶ As the Cold War was over, also the existence of an institution that was aimed to limit military-related transfers to Communist countries was no longer needed.

For many aspects the Wassenaar arrangement follows through the COCOM. In particular, the legal character of the arrangement, which can be classified as a non-binding or a gentlemen's agreement, mirrors the informal structure of the COCOM.¹⁴⁷ Thus, not dissimilarly from the Cold War arrangement, Wassenaar relies on national decisions for its effectivity: information exchange is achieved on a voluntary basis and measures taken to respect the arrangement are taken in accordance with national legislation and policies.¹⁴⁸ The arrangement, however, differs from the COCOM as to the membership, which is "open, on a global and non-discriminatory basis" to all States that are producers or exporters of arms, use the control list adopted by the arrangement as a reference, adhere to non-proliferation regimes and to fully effective control exports.¹⁴⁹ The achievement of its scope, namely to contribute to international peace and security, to promote transparency, to cooperate so as to prevent the acquisition of armaments by States whose behaviour is of concern to participating states and by terrorists groups and individual terrorists, is attained through the issuance of guidelines and best practices.¹⁵⁰

¹⁴⁴ John H. Henshaw, "The Origin of the COCOM: Lessons for Contemporary Proliferation Control Regimes", The Henry L. Stimson Center, Report 7, May 1993, at 13.

¹⁴⁵ The Library of Congress, Congressional Research Service, Military Technology and Conventional Weapons Export Controls: The Wassenaar Arrangement, 29 September 2006, at 2.

¹⁴⁶ Christoph Hoelscher and Hans-Michael Wolfgang, "The Wassenaar-Arrangement between International Trade, Non-Proliferation, and Export Controls", *Journal of World Trade*, Vol. 32, Issue 1, 1998, at 50.

¹⁴⁷ *Ibid.*, at 56.

¹⁴⁸ Respectively Article II.2 and II.3 of the Initial Elements, adopted by the Plenary of 11-12 July 1996 and as amended by the Plenary of 6-7 December 2001.

¹⁴⁹ Appendix 4 to the Initial Elements. Currently participating members to the Wassenaar are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

¹⁵⁰ Articles I.1, I.2, I.3 and I.5 of the Initial Elements.

For the purposes of this study, three best practices/guidelines are of relevance. The first one, also in chronological terms, aids participating States during the “deliberation process associated with considering transfers or denials” of all conventional weapons.¹⁵¹ The non-legally binding paper provides a series of qualitative and quantitative questions that support the assessment performed by national authorities vis-à-vis the recipient. It includes political, economic, and military elements alongside legal questions. Amongst the latter, participating States should consider in their exports the existence of a “clearly identifiable risk” that the weapons might be used to commit or facilitate the violation and suppression of human rights, fundamental freedoms and IHL, the compliance with international obligations including arms control regime and the existence of UNSC sanctions and arms embargos¹⁵²; it is also important to note that the document explicitly mentions civil wars as an element to consider. The assessment should indeed consider the existence of civil wars and the influence that the to-be-exported weapons could exert in these conflicts.¹⁵³ Unfortunately, this reference seems to be a *unicum*, since no other document of the Wassenaar makes any further reference to civil war. Nor, by the same token, is the concept of ‘influence’ further elaborated, thus leaving a gap in the legal understanding of the provision.

The second best practice serves as a guideline for SALWs export.¹⁵⁴ Compared to the broad, all-encompassing nature of the first document, this one establishes a detailed two-tier system similar to that of the OSCE.¹⁵⁵ The first tier, set by point 1 of the document, includes a series of parameters that States “will take into account” when considering a transfer to a country. Also in the case of these guidelines, the first tier may seem applicable only when arms transfers are destined to States, given the consistent use of the term “country”.¹⁵⁶ In this respect, point 5 clarifies that “[p]articipating States will

¹⁵¹ Wassenaar Arrangement, Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons, adopted by the Plenary in 1998 and amended in 2004 and 2011.

¹⁵² Respectively points 1.e, 3.a, 2.g and 2.f of the Elements for Objective Analysis.

¹⁵³ Point 3.a of the Elements for Objective Analysis.

¹⁵⁴ Wassenaar Arrangement, Best Practice Guidelines for Exports of Small Arms and Light Weapons, adopted by the Plenary in 2002 and amended in 2007.

¹⁵⁵ See IV.3.1.

¹⁵⁶ See also Wassenaar Arrangement, Best Practice Guidelines on Subsequent Transfer (Re-Export) Controls for Conventional Weapons Systems Contained in Appendix 3 to the WA Initial Elements, at point 1 where this Best Practice hints to the fact that re-export should be consistent with the formal government-to-government agreement that should “include, as appropriate, a provision that subsequent transfer (re-export) of those conventional weapons systems to third governments...”

take especial care when considering exports of SALW other than to governments...”, but does not shed light on how the first tier should be interpreted when transfers are for the benefit of NSAs, as the criteria include, amongst others, the internal and regional situation in and around the recipient country; compliance with international obligations and commitments, including IHL; respect for human rights and fundamental freedoms; the nature and costs of the arms to be transferred in relation to the circumstances of the recipient country; the legitimate domestic needs of the recipient country. The second tier is another set of criteria that require the participating States to avoid transfers in case there is a “clear risk” that the transferring arms would be used to support or encourage terrorism, threaten the security of other States, be diverted, contravene international commitments including arms control agreements, prolong or aggravate an existing armed conflict or threaten compliance with IHL, endanger peace and create regional instability, be used for repression or violation of human rights, be used other than for legitimate defence.¹⁵⁷

The third best practice, on MANPADS, is the one already mentioned in the corresponding OSCE document.¹⁵⁸ Driven by the concerns on their potential use against civil aviation, the Wassenaar guideline on MANPADS underlines that the export of this type of weapon should be limited only to government-to-government transactions and subject to individual licenses.¹⁵⁹ In this respect, this is the only direct prohibition that one encounters in the entire regional legal framework. A prohibition, or better, a soft law prohibition, to provide non-governmental entities with a specific type of weapon. Nevertheless, it must be noted that the commitments made in the Wassenaar Arrangement have been rendered binding by Criterion One of Common Position 944. In this regard, one could therefore say that, indirectly, EU law may restrict the provision of MANPADs only to governments.

IV.4 Domestic Legislation

Domestic rules represent the last pillar that completes the legal framework applicable to the EUMS. Although a thorough and complete comparative analysis of the laws and regulations of all the

¹⁵⁷ Best Practice Guidelines for Exports of Small Arms and Light Weapons, at point 2.

¹⁵⁸ Wassenaar Arrangement, Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS), Adopted by the Plenary in 2000 and amended in 2003 and 2007.

¹⁵⁹ *Ibid*, point 3.1 and 3.2.

EUMS is beyond the scope of this study, this section will nonetheless provide an examination on the most relevant points of the legislations.¹⁶⁰ Before dwelling upon them, there are still few points worth noting from the outset. First, the domestic framework differs greatly from State to State and no standard or uniform seem to be present, despite being EUMS all parties to the ATT and, obviously, subject to Council Conclusion 944. Some States regulate the export of arms in one single legal instrument, others have several laws applicable with potential overlaps between them. Also in terms of legal hierarchy differences are relevant as some States have adopted primary laws on the subject, others have regulated it by means of governmental or ministerial decrees.

Second, some States explicitly mention in the domestic instruments the criteria used to evaluate the requests for export licence. Others, in contrast, spell out the criteria in political declarations. Finally, few States do not even mention the criteria, neither in the laws nor in political declarations. Third, within the group of States that mention the criteria directly in the law, some explicitly refer to Council Position 944 while other simply describe the criteria without referencing to any legal act. It is noteworthy that no State recalls the provisions of the ATT in their laws, but generally refer to applicable international law obligations. Overall, there appears to be a high degree of diversity in the laws of the EUMS. The degree of coordination between the three different pillars is certainly a topic that deserves further research.

Austria has one of the most complete laws on the subject.¹⁶¹ Not only does the Austrian act rank as a primary norm, being a federal law, but it also contains a detailed grid of criteria that must be satisfied for a licence to be issued. It mentions Austria's obligations under EU and international law, including embargos and arms control agreements. As part of the criteria, the law mentions respect for human rights and IHL, which must be assessed also in light of the past conduct of the country of destination.¹⁶² It also reflects Criteria 3 and 4 of Common Position 944 as it indicates that the intended supply must consider the effects on the internal situation of the destination country and the stability and

¹⁶⁰ Annex I contains the relevant excerpts from the legislations.

¹⁶¹ Gesamte Rechtsvorschrift für Außenwirtschaftsgesetz 2011, available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20007221>

¹⁶² See §6(1).6

peace of the region.¹⁶³ Furthermore, it also includes a sustainable development criterion according to which the license is subject to the assessment that the development of the country of destination will not be impaired by the arms being provided.¹⁶⁴

In contrast to Austria, Belgium does not have a unified federal law, but three different laws applicable to the regions of Flanders, Wallonie and Brussels. The Flemish law stresses that the application for an export and transit must be assessed according to the criteria of Common Position 944, which are then reported.¹⁶⁵ The law then specifies for each of the eight criteria of Common Position 944, the parameters for a license authorization. In this regard, it is worth noting that the law specifies that “great caution and vigilance is applied to applications for countries where there are domestic tensions”, as this situation may turn into an internal armed conflict.¹⁶⁶ And, if there is risk that arms would provoke an internal armed conflict or prolong existing armed conflicts or tensions, then licences shall be denied.¹⁶⁷ Accordingly, one can conclude that pursuant to the Flemish law providing arms and weapons to both the legitimate government and to the opposition may not conform to its own regulation if the situation on the ground amounts to an internal armed conflict and the arms to be provided may aggravate or prolong it. The Wallonian law is akin to that of its Flemish counterparts, though a different approach is taken vis-à-vis civil conflicts.¹⁶⁸ In specifying the parameters under the third criteria of Common Position 944, the law states “[l]e Gouvernement refuse la licence d’exportation de technologie ou d’équipements militaires susceptibles de provoquer ou de prolonger des conflits armés ou d’aggraver des tensions ou des conflits existants ou en cas de guerre civile dans le pays de destination finale”.¹⁶⁹ Differently, therefore, from the Flemish law, the Wallonian one does not require that the arms may prolong or aggravate the conflict and a literal interpretation of the norm suggests that the mere existence

¹⁶³ See §7 and §8.

¹⁶⁴ See §12(1).

¹⁶⁵ Government of Flanders 15 June 2012 - Flemish Parliament Act on the import, export, transit and transfer of defence-related products, and other materials for military use, law enforcement materials, civilian firearms, components and ammunition, available at <https://www.fdfa.be/sites/default/files/atoms/files/Flemish%20Ams%20Trade%20Act%20of%2015%20June%202012.pdf>

¹⁶⁶ Article 26 §4.

¹⁶⁷ *Ibid.*

¹⁶⁸ Region Wallonne, Décret relatif à l’importation, à l’exportation, au transit et au transfert d’armes civiles et de produits liés à la défense, in *Moniteur Belge*, Jeudi 5 Juillet 2012 n 220, available at <http://www.ejustice.just.fgov.be/>.

¹⁶⁹ Article 14. § 1(3), emphasis mine.

of an armed conflict may suffice to deny a license. A similar provision is found in the Bruxelles law, which states that an authorization shall be denied “si la demande concerne des biens pouvant être utilisés dans un conflit armé et si l'utilisateur final est engagé dans un conflit armé interne au sein du pays d'utilisation finale”.¹⁷⁰ Also in this case, one can, therefore, take the view that providing arms and weapons to any party involved in civil war may be unlawful under the law of the Region of Brussels.

Bulgarian's Export Control act provides that the export of defence-related products shall be carried out consistently with the country's international obligations, including those arising from its membership in international organisations.¹⁷¹ The criteria against which a licence is approved are not contained in the law itself, but in Article 5 of Decision 91 of the Council of Minister, which provides that licence requests must be assessed against the criteria of Council Position 944.¹⁷²

Croatia introduced a law specifically in order to harmonize its laws with the EU regulations.¹⁷³ Article 21 of the law provides the criteria for export assessment by reference to a list of EU laws that includes Council Common Position 944 and the ICT Directive. It is worthwhile that Article 38, which deals with the provision of services – defined by the law as “acquisition of benefits, transfer of rights and other business activities relating to military goods, including brokers' services and technical assistance” -, specifies that the authorization shall be denied if it “would incite trouble in the end user state”. Croatia, therefore, directly refers to the criteria of Common Position 944 when it assesses licences requests and no specific provision or ban is applied in relation to civil conflicts.

¹⁷⁰ Region De Bruxelles-Capitale, Ordonnance relative à l'importation, à l'exportation, au transit et au transfert de produits liés à la défense, d'autre matériel pouvant servir à un usage militaire, de matériel lié au maintien de l'ordre, d'armes à feu à usage civil, de leurs pièces, accessoires et munitions Moniteur Belge, Vendredi 21 Juin 2013 n 176, available at <http://www.ejustice.just.fgov.be>.

¹⁷¹ Defence-Related Products and Dual-Use Items and Technologies Export Control Act, Promulgated, State Gazette No. 26/29.03.2011, effective 30.06.2012, available at https://www.mi.government.bg/files/useruploads/files/exportcontrol/defencerelated_products_and_dualuse_items_and_technologies_export_control_act.pdf.

¹⁷² Decision n. 91 of the Council of Ministers of 9.04.2001, available at http://www.micmrc.government.bg/files/normativna_uredba/OLD-----POSTANOVLENIE_91_na_MS_ot_9042001_g_za_utvyrjdavane_na_Spisyk_na_dyrjavite_i_organizaciite_spr_qmo_ko.pdf

¹⁷³ Decision Promulgating The Act On The Trade Control Of Military Goods And Non-Military Lethal Goods, 24 June 2013, available at https://www.mingo.hr/public/trgovina/ENG_Zakon_NN_80_2013.doc.

In its Regulation 522/2011 Cyprus also incorporates the Criteria of Common Position 944 by reference, while Annex III of the Regulation reports all the Criteria.¹⁷⁴ In addition, the body of the Regulation further states that User Guidelines shall serve as a baseline for the implementation of the Regulation.

The law adopted by the Czech Republic, besides describing in detail the procedure for a licence application, gives few indications on the criteria used to assess them.¹⁷⁵ At the outset, the law specifies that trade in military material means both export and import from non-EUMS and intra-EU trade, seemingly disregarding the double regime provided by Council Common Position 944 and the ICT Directive.¹⁷⁶ Nonetheless, as stated, the law is rather scant in the description of the criteria: Section 18 solely states that an application shall be rejected if the applicant has breached an EU law, a law of a EUMS or an international treaty binding the Czech Republic in the field of arms trade. In addition, an application shall be rejected if it is not in the interests of the Czech Republic or for the “protection of public order, security, and protection of the population”.¹⁷⁷ This latter clause could potentially be interpreted as applying to country in civil wars, but caution is needed in the absence of any other positive indication. Overall, the law concentrates more on the procedural steps needed to file and obtain a licence rather than on the qualitative assessment of the application, as no reference is made neither to Common Position 944 nor to the ATT.

The relevant Danish laws explicitly provide criteria for intra-EU transfers but are silent in relation to extra-EU exports. In particular, for intra-EU transfer it is stated that the transfer shall not run contrary to Denmark’s international obligations and no UN, EU or OSCE embargo should be in place against the recipient country.¹⁷⁸

¹⁷⁴ Article 8-1 of Regulation 522/2011 by the Council of Ministers of Cyprus for the carrying into effect of Law (1(I)/2011) on Import and Export of Controlled Items and the Conduct of Controlled Activities, available at <http://www.mcit.gov.cy/mcit/trade/ts.nsf/All/346E846DB57D039EC2257BE10030C685?OpenDocument>.

¹⁷⁵ Act No. 38/1994 Coll. effective as of 30.6.2012, available at <https://www.mpo.cz/assets/dokumenty/37640/52627/591452/priloha001.pdf>.

¹⁷⁶ Section 2(1).

¹⁷⁷ Section 18(c)

¹⁷⁸ Act on Weapons and Explosives N. 704 of 22 June 2009, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=142859>; Order on Weapons and Ammunition, BEK No. 1444 of 1 December 2016, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=185167>; Armed Forces Act, LBK No. 1004 of 22 October 2012, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=142858>.

The Estonian Strategic Goods Act, similarly to the law of the Czech Republic, does not refer neither to the criteria of Common Position 944, nor to the ATT.¹⁷⁹ Rather, it lists a number of applicable restrictions, including treaty-banned weapons and restrictions arising from sanctions, and it also generically refers to goods that may be used to commit human rights violations.¹⁸⁰

Also the Finnish law seems to disregard the division between the regime of the ICT Directive and that of Council Common Position 944, as it states that exports and transfers are subject to licence and the law does not differentiate between the two.¹⁸¹ In other words, both the export and the transfer are subject to the evaluation, which “takes into consideration the common position of the Council”.¹⁸² No additional criteria or reference to any other instrument is given, apart from the due consideration that is given to foreign and security policy of Finland.

The French legal framework is characterized by having different laws applicable the extra-EU export and to the intra-EU transfer. The regime for the former is contained in the Décret n°2012-901 of 20 July 2012, while the latter regime is given by Loi n°2011-702 of 22 June 2011.¹⁸³ None of the two acts mentions the criteria used to evaluate the licence applications, yet an official report mentions that the Interministerial Commission for the study of military equipment exports assesses both types of applications on the basis of Common Position 944.¹⁸⁴

The German legal framework relies on two documents: the War Weapons Control Act and the political principles adopted by the Government of the Federal Republic of Germany for the export of war weapons and other military equipment of 26 June 2019. The former, a federal law, provides in its Section 6 that a ground for refusal of an authorisation is the risk that the weapons would be used in a war of aggression, or otherwise violate Germany’s obligations under international law.¹⁸⁵ This reference

¹⁷⁹ Strategic Goods Act, 7 December 2011, RT I, 22.12.2011, 2, available at <https://www.riigiteataja.ee/en/eli/ee/511072014011/consolide>.

¹⁸⁰ Article § 5.

¹⁸¹ Section 5 and Section 6 of 282/2012 Act on the Export of Defence Materiel, available at <https://www.finlex.fi/en/laki/kaannokset/2012/en20120282.pdf>.

¹⁸² *Ibid*, Section 9.

¹⁸³ Respectively available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024228630&categorieLien=id> and <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026209273&categorieLien=id>

¹⁸⁴ Ministère de la Défence, France and Arms Control, 2016, at 13.

¹⁸⁵ Act Law on the Control of War Weapons (Implementing Act on Article 26 Paragraph 2 of the Basic Law), available at <https://www.bmwi.de/Redaktion/DE/Gesetze/Aussenwirtschaft/KrWaffKontrG.html>.

makes it clear how the ATT finds room in the legal text. The latter document, albeit not strictly speaking a legal text but rather a high-level political commitment, provides a very complete picture.¹⁸⁶ The first point of the principles clarifies that the export decisions are taken on the basis of the above mentioned law, of Common Position 944 and of the ATT. It also states that the criteria of Common Position 944 form an integral part of the principles. But the most relevant and innovative provision is given by point 4 of section III, which states that the export of small arms to third countries should in principle no longer be authorized. The point goes beyond the existent legal commitments and establishes a global principle of restraint in relation to small arms. In addition, point 6 of the same section adds that in principle authorizations are not granted if the situation in the country prevents this, such as armed internal conflicts and systematic violations of human rights. As a result, the German framework seems to impede the provision of arms and weapons to all sides involved in a civil conflict and, furthermore, it greatly restricts the provision of small arms also during peace time.

Greek law 4028/2011 mentions that the applicable criteria consider the commitments of Greece arising from EU law and other international regimes relating to the movement of controlled materials.¹⁸⁷ In addition, such evaluation should take into account the risks for human rights, peace, security and stability.¹⁸⁸

There are two facets to the Hungarian Decree 156/2017. (VI. 16.).¹⁸⁹ Firstly, in its annexes it copies and pastes the criteria of Common Position 944 and includes the entire EU Military List. Secondly, it explicitly states that the decree represents the implementation of the ATT.¹⁹⁰ In addition, the Decree provides other limited additional criteria, such as a global reference to the international commitments of Hungary and the security interests of the country.¹⁹¹

¹⁸⁶ Available at https://www.bmwi.de/Redaktion/DE/Downloads/P-R/politische-grundsaeetze-fuer-den-export-von-kriegswaffen-und-sonstigen-ruestungsguetern.pdf?__blob=publicationFile&v=4.

¹⁸⁷ Article 3a(5) of Law 4028/2011 of November 11, 2011 (Government Gazette 242), modifying Law 2168/93 of September 3, 1993 (Government Gazette 147), available at <http://www.ypeka.gr/LinkClick.aspx?fileticket=8nIRpHCM%2BR0%3D&tabid=555&language=el-GR>

¹⁸⁸ Article 8.3(a).

¹⁸⁹ Government Decree on the detailed rules for licensing military activities and certification of businesses, 156/2017. (VI. 16.), available at http://njt.hu/cgi_bin/njt_doc.cgi?docid=202579.339992.

¹⁹⁰ *Ibid*, Section 36.§(1)(l).

¹⁹¹ *Ibid*, Section 9(1).

The Irish legal framework is very limited and is governed by the Statutory Instrument 216 of 2012.¹⁹² It is perhaps due to the absence of an arms industry that the Irish legislation does not present any reference to criteria or other legal acts.¹⁹³ A parliamentary question nonetheless reveals that Ireland fulfil its obligations under EU law and screens against the criteria of Council Position 944 in evaluating exports.¹⁹⁴

The Italian Law, aside from recalling the criteria of Council Position 944, also provides for additional criteria: the export and the transit must be in line with the Constitution and with the international commitments of the country.¹⁹⁵ Furthermore, exports and transits are forbidden when there are not adequate guarantees on the end destination of the arms and to States which are in a state of armed conflict in contrast with Article 51 of the UN Charter. However, this latter prohibition can be derogated by the Council of Ministers and, naturally, one cannot include States which are involved in civil war in this specific provision.

In contrast to Italy, the criteria adopted by Latvia for arms exports are not within the law, but are contained in secondary legislation, namely a Cabinet regulation.¹⁹⁶ Amongst them, the regulation generically mentions the international obligations of Latvia while, in a subsequent point, the act specifies that licences shall not be issued if the equipment to be exported will be used in internal repressions or armed conflicts.¹⁹⁷ The use of the plural and the generic reference to ‘armed conflicts’ may suggest that internal conflicts could also be encompassed by the provision. Thus, one could hold the view that under Latvian law the provision of arms and weapons to any party of a civil conflict may be unlawful. This conclusion is reinforced by the fact that the regulation says that the body assessing

¹⁹² Statutory Instrument No. 216 Of 2012, Control Of Exports (Goods And Technology) Order 2012, available at <http://www.irishstatutebook.ie/eli/2012/si/216/made/en/pdf>.

¹⁹³ On the absence of an industry see parliamentary question 3665/18, available at <https://www.oireachtas.ie/en/debates/question/2018-01-25/7/#pq-answers-7>.

¹⁹⁴ See Parliamentary question 20564/19, available at <https://www.oireachtas.ie/en/debates/question/2019-05-14/67/?highlight%5B0%5D=council&highlight%5B1%5D=position&highlight%5B2%5D=944>.

¹⁹⁵ Law 185 of 1990 as amended by D.L. 105/2012, available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990-07-09:185>.

¹⁹⁶ Law On the Circulation of Goods of Strategic Significance, effect on 1 August 2004, lastly amended on 14 December 2014, available at <https://vdd.gov.lv/en/useful/legal-acts/>. Cabinet Regulation No. 657 Adopted 20 July 2010, Procedures for Issuing or Refusal to Issue a Licence for Goods of Strategic Significance and Other Documents Related to the Circulation of Goods of Strategic Significance, available at <https://vdd.gov.lv/en/useful/legal-acts/>.

¹⁹⁷ *Ibid*, Article 45.1.1.

the licence request shall deny the request if it detects that “in the recipient country” the arms are going to be used in armed conflicts, therefore opening the door to both State and non-State entities.

The law governing arms exports of Lithuania specifies that licences shall not be issued in contravention of the country’s international commitments and of the European criteria of Council Position 944.¹⁹⁸ The law also explicitly provides the cases where a licence may be suspended. One of them is particularly relevant as it states that licences shall be suspended if a military or political conflict occurs in the importing country.¹⁹⁹ One might argue that in issuing the license, the law is more permissive than in suspension cases. While the authorities can interpret Council Position 944 requirements in a rather elastic manner when granting the license, it appears that the wide reach of the suspension may allow the country to suspend the license even in cases of severe political turmoil which, however, would not qualify as civil wars.

The law that Luxembourg recently adopted underlines that the criteria of Council Position 944 apply to the export as well as the transit and the guidelines shall serve as a reference for licensing decisions. In addition, it states that authorizations shall also consider the risk to the peace that the goods to be exported may create. However, and perhaps this is a missed opportunity given that the law is recent, the law does not refer to ATT.²⁰⁰

The Regulations that govern the Maltese framework are very similar to those of Ireland, in that they do not present any reference to criteria, commitments, or obligations of Malta.²⁰¹ In other words, the Regulations only deal with the administrative process of licensing and authorizations. In the official website of the Commerce Department of the Government of Malta it is clarified that authorizations are issued in accordance with the criteria of Council Position 944.²⁰²

¹⁹⁸ Article 10.1.1 of Law on the Control of Strategic Goods, available at <https://e-seimasx.lrs.lt/portal/legalAct/lt/TAD/TAIS.18275/annxdHZbLU>.

¹⁹⁹ *Ibid*, Article 10.2.5

²⁰⁰ Loi du 27 juin 2018 relative - au contrôle de l’exportation, du transfert, du transit et de l’importation des biens de nature strictement civile, des produits liés à la défense et des biens à double usage ; - au courtage et à l’assistance technique ; au transfert intangible de technologie; - à la mise en œuvre de résolutions du Conseil de sécurité des Nations unies et d’actes adoptés par l’Union européenne comportant des mesures restrictives en matière commerciale à l’encontre de certains États, régimes politiques, personnes, entités et groups, available at <http://legilux.public.lu/eli/etat/leg/loi/2018/06/27/a603/jo>.

²⁰¹ Subsidiary Legislation 365.13 Military Equipment (Export Control) Regulations, available at https://commerce.gov.mt/en/Trade_Services/Documents/Military_Equipment_Export_Control_Regulations.pdf.

²⁰² See https://commerce.gov.mt/en/Trade_Services/Pages/Exportation-of-Military-Equipment.aspx.

The Dutch Strategic Goods is very similar in nature to the Maltese Regulations in that it requires a prior authorization for export and transfer but is overall silent as to the criteria against which such authorization is granted.²⁰³ According to an official report published by the Ministry for Foreign Trade, every licence application is assessed against the criteria of Council Position 944.²⁰⁴

The Polish law on arms export provides a detailed list of criteria that reflect those of Council Position 944.²⁰⁵ Differently from the EU criteria, though, the Polish law is more rigorous in relation to domestic repression, IHL violations and exacerbations or provocation of armed conflicts. While under criterion 3 of Council Position 944 EUMS shall deny an authorization if the goods would provoke or prolong armed conflicts, and criterion 2 speaks about “clear risk” of the goods being used for internal repression, the Polish law says that the authorization shall be denied already, and solely, if “there is a risk” that the goods could be used for provoking armed conflicts or for internal repression.²⁰⁶ Stated differently, Polish authorities are required to anticipate the decision and not to wait until the risk becomes evident.

Article 22 of the Portuguese Law 37 of 2011 simply provides that exports are subject to a licence granted according to the criteria of Council Position 944.²⁰⁷ In contrast to the Portuguese law, the Romanian one is more articulated.²⁰⁸ The list of criteria under Article 8 refers to Council Position 944, but also mentions the international obligations of Romania and, in addition, refers to the “fundamental guidelines of Romania’s foreign policy”.²⁰⁹ This open-ended formulation is therefore dynamic, as these policies may change over time. One should therefore analyse Romanian’s stance vis-

²⁰³ Strategic Goods Decree, 24 June 2008, available at <http://wetten.overheid.nl/BWBR0024139/2015-04-01>.

²⁰⁴ Minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs on the export of military goods, Dutch Arms Export Policy in 2018, available at <https://www.government.nl/binaries/government/documents/reports/2019/07/01/dutch-arms-export-policy-in-2018/BZ129065+EN.pdf>.

²⁰⁵ Act of 29 November 2000 on Foreign Trade in Goods, Technologies and Services of Strategic Significance for State Security and for Maintaining International Peace and Security, available at <https://www.msz.gov.pl/resource/03311c99-5d96-4074-84e9-37c535d8d3bb:JCR>.

²⁰⁶ *Ibid*, Article 16(3) and 16(4).

²⁰⁷ Law 37 of 22 June 2011, available at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1435&tabela=leis&so_miolo=.

²⁰⁸ Government’s Emergency Ordinance No. 158/1999 on the control regime of exports, imports and other operations with military goods, republished in the Romanian Official Journal, Part I, no. 610, from 26 September 2013, available at http://www.ancex.ro/upload/OUG_158_republicata_2013_engleza_Cor.pdf.

²⁰⁹ *Ibid*, Article 8(a).

à-vis civil conflicts to understand whether the country would admit the provision of arms in those circumstances.

Another example of utter silence on the criteria used to grant licenses is given by Slovakia, as its Regulation No. 392/2011 deals exclusively with the administrative processes.²¹⁰ Understanding which criteria are applied by the country can be achieved by examining the questionnaire compiled by the Permanent Mission of Slovakia to the OSCE.²¹¹ In reply to the question on the basic principles governing arms export, the Mission stated that the country is committed to its international obligations and to the criteria set out in Council Position 944.

The Slovenian law governing arms export mentions four criteria used for assessing arms export and does not refer to Council Position 944. In a nutshell, an authorization shall be denied if it runs against Slovenia's international commitments or its security interests or if the goods would promote or facilitate armed conflict, a wording that reflects Criterion 3 of the Council Position 944.

Spanish Law 53 of 2007 offers a comprehensive regime for arms export.²¹² Not only does the law provide clear criteria, but it also states that the criteria are used for granting the authorization, for suspension and revocation. Article 8(1)(a) uses a very broad language when it states that authorization shall not be grounded if there is a "reasonable suspicion" that the items to be exported could be used to "disturb the peace, stability or security on a global or regional scale, could heighten tensions or latent conflicts".²¹³ The use of the words "reasonable suspect" is even more pre-emptive when compared to the language used by the Polish law, which uses the word "risk". In addition, although very vague, the disturbance of the peace may mean that the Spanish authorities should deny exports to country where the level of violence has not reached the intensity needed to qualify for civil war. Furthermore, the law also states that authorizations should be denied when they "contravene the limits arising from

²¹⁰ Act No. 392/2011 of 19 October 2011 on Trading with Defence Industry Products and on amendments and supplements of certain acts, available at <https://www.economy.gov.sk/uploads/files/dUj4OixE.pdf>.

²¹¹ Permanent Mission of Slovakia to the OSCE, FSC.EMI/214/18 28 June 2018, available at <https://www.osce.org/forum-for-security-cooperation/389984?download=true>.

²¹² Law 53/2007 of 28 December on control of external trade in defence and dual-use material, available at <http://www.comercio.gob.es/en/comercio-exterior/informacion-sectorial/material-de-defensa-y-de-doble-uso/PDF/legislation/Ley532007INGL%C3%89S.pdf>.

²¹³ *Ibid*, Article 8(1)(a).

international law”.²¹⁴ This ample wording implies that if, under general international law, the provision to one or more parties in civil war is deemed unlawful, then the Spanish authorities should deny the authorisation.

The Swedish legal framework, like the German system, includes a law and a political statement. The law does not provide any detailed criteria apart from the need of ensuring that licences do not conflict with the international obligations of Sweden and with its foreign policy considerations.²¹⁵ The political declaration mentions the commitments under the EU umbrella, as well as the OSCE and other international agreements. Unlike any other domestic legislation, the declaration ties the recipient country's democratic status to the probability of awarding the license.²¹⁶ Furthermore, it also states that exports should not be allowed to countries that have internal armed unrests. This should also be a ground to revoke a licence, yet, in this case, the prohibition can be overruled if the authorisation is in line with international law and with the principles governing Swedish's foreign policy.

The United Kingdom also adopted a framework comprising legislation alongside a political declaration. The legislation is contained in two acts, of 2002 and 2008. The former generically states that export can be controlled in order to comply with EU and international law, while the latter deals with administrative processes.²¹⁷ In contrast, the political declaration spells out all the eight criteria, which fully reflect those of Council Position 944, with one relevant exception.²¹⁸ Under criterion four of Council Position 944, EUMS commit to preserve regional stability and shall deny an export to a country that would use the items aggressively against another country. In performing this assessment EUMS shall consider “the need not to affect adversely regional stability in any significant way”. The UK position interprets this latter point and clarifies that it will not affect regional stability “taking into account the balance of forces between the states of the region concerned, their relative expenditure on

²¹⁴ *Ibid*, Article 8(1)(d).

²¹⁵ Military Equipment Act 1992:1300, available at http://www.opbw.org/nat_imp/leg_reg/sweden/mil_equip.pdf.

²¹⁶ Guidelines for export and other international cooperation (Riktlinjer för utförelse och annan utlandssamverkan), available at <https://isp.se/media/1258/riktlinjer2018.pdf>.

²¹⁷ Export Control Act 2002, available at <http://www.legislation.gov.uk/ukpga/2002/28/contents>; Export Control Order 2008, available at <http://www.legislation.gov.uk/uksi/2008/3231/contents/made>.

²¹⁸ Consolidated EU and National Arms Export Licensing Criteria, available at <https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm#1403256600018>.

defence, the potential for the equipment significantly to enhance the effectiveness of existing capabilities...”.²¹⁹ In fact, this interpretative statement helps the UK to transcend the constraint, as the qualitative decision on the balance of power seems so arbitrary – and perhaps based on information that cannot be revealed – that it is hard to disprove.

IV.5. Case Study: Yemen²²⁰

The Yemeni case study is now continued in order to gauge the response of EU Member States IHL and human rights violations, which have been documented by the UN Human Rights Council. In its reports, the UN body also emphasized that coalition air strikes have been of concern, given the high number of civilian victims involved.²²¹ Before analysing governments’ statements, it is worth recalling that in Chapter II, this case study highlighted that the provision of arms and weapons to the Houthis was criticised by the UK in light of the existence of an arms embargo, but the one to Saudi Arabia was regarded as legal.²²² The case study also showed that concerns about respect for IHL were part of the debate and were addressed to both the Houthis and the Saudi led coalition. In addition it must be also warranted that the murder of journalist Jamal Kashoggi in the Saudi consulate in Istanbul at the end of 2018 triggered a general outcry in several EU Member States and appears to have played a role in some EU Member States’ decision to stop supplying arms to Saudi Arabia.

IV.5.1 The European Parliament

The European Parliament has consistently denounced the delivery of arms and weapons to Saudi Arabia and has found it to be contrary to Common Position 944 of the Council and, in particular, to its criterion 2. In its three resolutions, the Parliament used a clear wording to describe how arming the Saudis would amount to a breach of the existing EU rules:

... serious allegations of breaches of international humanitarian law by Saudi Arabia in Yemen and the fact that the continued licensing of weapons sales to Saudi Arabia

²¹⁹ *Ibid.*

²²⁰ The first part of this case study at II.6.

²²¹ See Human Rights Council, Situation of human rights in Yemen, including violations and abuses since September 2014, 17 August 2018, A/HRC/39/43, at point 28; Human Rights Council, Situation of human rights in Yemen, including violations and abuses since September 2014, 9 August 2019, A/HRC/42/17, at point 24.

²²² See above II.7.3.

would therefore be in breach of Council Common Position 2008/944/CFSP of 8 December 2008.²²³

...serious allegations of breaches of international humanitarian law by Saudi Arabia in Yemen and the fact that the continued licensing of weapons sales to Saudi Arabia would therefore be in breach of Common Position 2008/944/CFSP.²²⁴

Calls on the Council to effectively promote compliance with international humanitarian law, as provided for in the relevant EU guidelines; reiterates, in particular, the need for the strict application by all EU Member States of the rules laid down in Common Position 2008/944/CFSP; ... urges all EU Member States in this context to refrain from selling arms and any military equipment to Saudi Arabia, the UAE and any member of the international coalition, as well as to the Yemeni Government and other parties to the conflict.²²⁵

IV.5.2 Denmark

Denmark is one of the EU Member States that decided to halt their export to Saudi Arabia after the murder of the journalist Kashoggi. It is therefore clear that Denmark justifies the suspension of arms exports in accordance with criterion 2 of Common Position 944. However, neither the ATT nor the Common Position 944 nor the domestic legislation were explicitly referred to in the official declaration:

“...with the continued deterioration of the already horrific situation in Yemen and the killing of Saudi journalist Jamal Khashoggi, we are now in a new situation. That is why I have decided that the Ministry of Foreign Affairs suspends the export of weapons and military equipment to Saudi Arabia”.²²⁶

IV.5.3 Finland

Finland followed the same course of action of Denmark and stopped the provision of arms to Saudi Arabia and the United Arab Emirates after the death of Kashoggi. Differently from Denmark, the Finnish Government explicitly refers to the EU criteria for arms exports. It is worth noting that Finland mentioned alongside criterion 2 also criterion 4, “preservation of regional peace, security and stability”.

In a written statement the Finnish Government stated that:

“The Government discussed arms export matters and decided that in the current situation there are no foundations for new arms export authorisations to Saudi Arabia or the United Arab Emirates...We observe the European Union's arms export

²²³ European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen, TA(2016)0066, at 7.

²²⁴ European Parliament resolution of 30 November 2017 on the situation in Yemen, TA(2017)0473, at 15.

²²⁵ European Parliament resolution of 4 October 2018 on the situation in Yemen, TA(2018)0383, at 20.

²²⁶ The Ministry of Foreign Affairs suspends arms export licenses to Saudi Arabia, 22 November 2018, available at <https://um.dk/nyheder-fra-udenrigsministeriet/NewsDisplayPage/?newsID=BDBBFF5A-060C-41FF-BD7C-FC55D691C7F5>.

criteria, in which special attention is paid to human rights and to the protection of regional peace, security and stability.”²²⁷

IV.5.4 Sweden

Sweden was one of the first countries to partly change its policies vis-à-vis Saudi Arabia, well before the death of the journalist. However, the Nordic country did not halt its supplies, but solely decided to terminate a Memorandum of Understanding on military cooperation, as the following statement clarifies: “[t]he agreement with the Kingdom of Saudi Arabia is not a trade agreement. Commercial agreements regarding the export of defense products to the Kingdom of Saudi Arabia will not be affected.”²²⁸ Reference to the country's domestic legislation can be found in a statement following the murder of the journalist, which explains that exports have not been stopped.²²⁹

IV.5.5 Germany

In reply to an interview, the German Foreign Minister justified stopping both new exports and those already approved in light of human rights, as well as regional peace concerns:

we’ve not only banned any new exports to Saudi Arabia, we’ve even stopped exports which had already been approved...so not only in the light of the Khashoggi case but also because we want to exert pressure and make it clear that we expect Saudi Arabia and the United Arab Emirates to help foster a peace process in Yemen²³⁰

He then highlighted that such decision was taken on the basis of “German laws and regulations” and that “Germany’s arms export policy is restrictive, and it will remain so in future”. Reference to the domestic framework also meant that European policies differ, despite the applicable EU framework, and “[i]t’s not as if Germany has always insisted on imposing its own conditions on EU partners”.²³¹

²²⁷ Ministry of Foreign Affairs of Finland, No foundations for arms export authorisations to Saudi Arabia or the United Arab Emirates, 22 November 2018, available at https://um.fi/press-releases/-/asset_publisher/ued5t2wDmr1C/content/ei-edellytyksia-uusille-asevientiluville-saudi-arabiaan-tai-arabiemiraatteihin.

²²⁸ Government of Sweden, The Memorandum of Understanding with the Kingdom of Saudi Arabia on military cooperation will not be renewed, 8 May 2015, available at <https://www.government.se/articles/2015/03/the-memorandum-of-understanding-with-the-kingdom-of-saudi-arabia-on-military-cooperation-will-not-be-renewed/>.

²²⁹ Sweden not stopping Saudi weapons exports after 'horrible' journalist death, available at <https://www.thelocal.se/20181023/sweden-not-stopping-saudi-weapons-exports-after-horrible-journalist-death>.

²³⁰ Federal Foreign Office, “This is about equipment, not rearmament”, 10 March 2019, available at <https://www.auswaertiges-amt.de/en/newsroom/news/maas-tagesspiegel/2198588>.

²³¹ *Ibid.*

IV.5.6 Netherlands

Also the Netherlands adopted a restrictive policy vis-à-vis Saudi Arabia. In contrast to Germany, which stopped altogether the exports, the Dutch enforced a “presumption of denial”, meaning that the country stopped issuing export licences unless it could be “incontrovertibly demonstrated that these goods will not be used in the conflict in Yemen”. This “presumption of denial”, still in force, applies to Saudi Arabia, but also to the United Arab Emirates and Egypt, and was taken in response to the reports about violations of IHL.²³²

IV.5.7 France

Differently from the above positions, France explicitly refers to its obligations stemming from the ATT and from Council Position 944, with specific emphasis on human rights, IHL and regional peace and security, as per criteria 2 and 4 of Council Position 944. In replying to a parliamentary question, the Minister of Foreign Affairs stated that:

La délivrance des autorisations se fait dans le strict respect des obligations internationales de la France, notamment les dispositions du Traité sur le commerce des armes et les huit critères de la position commune européenne 2008/944, à l'issue d'un examen au cas par cas. L'évaluation tient notamment compte de la nature des matériels, de l'utilisateur final, du respect des droits de l'Homme dans le pays de destination finale et du respect du droit international humanitaire par ce pays, ainsi que la préservation de la paix, de la sécurité et de la stabilité régionale.²³³

In a separate question, the same Minister affirmed that the assessment on arms exports includes, alongside regional stability, also the “objectifs de la France en matière de soutien à la lutte contre le terrorisme”, a criterion which is not present in any of the applicable legislation.²³⁴ In reply to a separate question concerning the reasons for France's failure to stop supplies to Saudi Arabia, the Minister seems to give primacy to the right of self-defence of Saudi Arabia over the criteria for arms exports, as he stated that:

La France reconnaît à l'Arabie saoudite son droit à agir en vertu du principe de légitime défense. Mettre un terme, dans leur ensemble, aux exportations d'armement n'est donc pas une option raisonnable au vu des intérêts nationaux dont le gouvernement est comptable.²³⁵

²³² Dutch Arms Export Policy, above n 203, at 7.

²³³ Assemblée Nationale Français, 15ème législature, Question N 15543, government response of 30 July 2019.

²³⁴ Assemblée Nationale Français, 15ème législature, Question N 10231, government response of 5 February 2019.

²³⁵ Assemblée Nationale Français, 15ème législature, Question N 19420, government response of 17 December 2019.

And, on the different stance adopted by France, he stressed that arms exports decisions are linked to sovereign prerogatives and interests:

En tout état de cause, ces choix relèvent de prérogatives souveraines; l'Allemagne n'a ni les mêmes intérêts dans la zone, ni le même profil militaire, ni les mêmes responsabilités internationales.²³⁶

IV.5.8 Italy

Writing in response to a Parliamentary question in 2015, the Governmental representative stated that neither sanctions nor restrictive measures were in force against Saudi Arabia and that all EU Member States kept on authorizing arms export to the country, which was part of the anti-ISIS coalition. No reference was made to export criteria:

Saudi Arabia is part of the anti-Daesh coalition. Furthermore, no embargo has been imposed on Riyadh internationally, nor have restrictive measures been taken by the EU towards that country and the coalition led by it. Indeed, the consultations with the other Member States show that almost all EU partners continue to authorize, in the context of a "case by case" assessment, the export of materials, in all categories of the European common military list, to the countries engaged in the intervention.²³⁷

In the same year, the Minister of Foreign Affairs, stated in front of the Parliament that in the arms export Italy considers its domestic legislation, as well as international and European law: “[i]t is important to reiterate that Italy, however, obviously respects the laws of our country, the rules of the European Union and international ones, both as regards embargoes and prohibited weapon systems”.²³⁸ In 2017, in front of the Parliament, the Undersecretary of State for Foreign Affairs and International Cooperation gave a

²³⁶ *Ibid.*

²³⁷ Senato della Repubblica, XVII Legislatura, Interrogazione A Risposta Scritta 4/04870. In original: “l'Arabia saudita fa parte della coalizione anti Daesh. Inoltre, a livello internazionale nessun embargo è stato imposto su Riad, né da parte della UE sono state adottate misure restrittive verso tale Paese e la coalizione da esso guidata. Dalle consultazioni con gli altri Stati membri risulta anzi che quasi tutti i partner UE continuano ad autorizzare, nell'ambito di una valutazione "caso per caso", l'esportazione di materiali, in tutte le categorie della lista militare comune europea, verso i Paesi impegnati nell'intervento”.

²³⁸ Camera dei Deputati, XVII Legislatura, Resoconto stenografico dell'Assemblea Seduta n. 530 ,26 November 2015. In the original version: “È importante ribadire che l'Italia, comunque, rispetta, ovviamente, le leggi del nostro Paese, le regole dell'Unione europea e quelle internazionali, sia per quanto riguarda gli embargo che i sistemi d'arma vietati”.

full account on how authorization requests are examined and included an assessment on the countries that are part to the Yemeni conflict:

Arms exports are regulated by law no. 185 of 1990 and following modifications and the authorizations of the relative licenses involve, previously, different between Ministries and bodies, both in the analysis of the merit of the single operation and in terms of opinions for non-EU-NATO countries ... there are no individual embargoes, sanctions or other forms of restrictions established at international and European level. In the specific case of the members of the coalition, which, among other things, are also part of the anti-Daesh coalition, the requests of Italian companies to obtain the export license for armaments are assessed in a particularly rigorous and articulated way, case by case , based on Italian, European and international standards ... Of course, if any violations were ascertained in the United Nations or the European Union, Italy would immediately adapt to prescriptions or prohibitions.²³⁹

In 2017, the Government, by means of its representative, wrote to an MP that the arms exports take into account the embargo against Yemen. However, the Undersecretary of State for Foreign Affairs and International Cooperation also wrote that arms exports are assessed against political and economic considerations such as, amongst others, the fight against terrorism. He wrote that:

in addition to applying the international arms embargo on Yemen, the Government will pay particular attention so that all requests for the authorization of export of armament material continue to be assessed with extreme attention and particular rigor. It will not fail to exercise its prerogatives in balancing political considerations with economic-industrial ones...The assessments take place within a framework of concertation between Allied countries and the EU, also taking into account bilateral relations and international cooperation in the fight against terrorism, with particular attention to reflections on the Mediterranean regional framework.²⁴⁰

In a further question about the legality of the arms supply to Saudi Arabia, the Undersecretary of State for Foreign Affairs and International Cooperation stated: “[a]ll the licenses granted so far are

²³⁹ Camera dei Deputati, XVII Legislatura, Resoconto stenografico dell'Assemblea, Seduta n. 835, 17 July 2017. In the original version: “Le esportazioni di armamenti sono regolate dalla legge n. 185 del 1990 e seguenti modifiche e le autorizzazioni delle relative licenze coinvolgono, previamente, diversi fra Ministeri ed enti, sia nell'analisi del merito della singola operazione che in termini di pareri per i Paesi extra UE-NATO...Vorrei ricordare che nei confronti dei singoli membri della coalizione non esistono embarghi, sanzioni o alter forme di restrizione stabiliti a livello internazionale ed europeo. Nel caso specifico dei membri della coalizione, che, tra l'altro, fanno anche parte della coalizione anti-Daesh, le richieste di imprese italiane per ottenere la licenza d' esportazione di armamenti sono valutate in modo particolarmente rigoroso ed articolato, caso per caso, sulla base delle norme italiane, europee ed internazionali... Naturalmente, ove in sede di Nazioni Unite o Unione europea fossero accertate eventuali violazioni, l'Italia si adeguerebbe immediatamente a prescrizioni o divieti”.

²⁴⁰ Camera dei Deputati, XVIII Legislatura, Interrogazione a Risposta in Commissione 5/00054. In the original version: “oltre ad applicare l'embargo armi internazionale sullo Yemen, il Governo presterà particolare attenzione affinché tutte le richieste autorizzative di esportazione di materiale d'armamento continuino ad essere valutate con estrema attenzione e particolare rigore. Non mancherà di esercitare le proprie prerogative nel bilanciare considerazioni politiche con quelle economico industriali,... Le valutazioni avvengono in un quadro di concertazione fra Paesi Alleati ed UE, tenendo anche conto dei rapporti bilaterali e della cooperazione internazionale nella lotta al terrorismo, con particolare attenzione ai riflessi sul quadro regionale mediterraneo”.

legitimate, having been adopted following the dictation and procedures established by national and international legislation”.²⁴¹

IV.5.9 United Kingdom

The United Kingdom, together with France, is the major European weapon supplier to Saudi Arabia.²⁴² Furthermore, in a similar fashion to France, it did not suspend its export in response to the IHL violations. The lawfulness of export licences for the sale or transfer of arms and military equipment to the Kingdom of Saudi Arabia for its possible use in the conflict in Yemen was the focus of a legal challenge initiated by several NGOs against the Trade Secretary.²⁴³ The court of first instance decided against the claimants on the basis that, amongst others, the Saudi led Coalition established process to secure respect for IHL and was investigating the incidents and, therefore there was no ‘clear risk’ of serious violations of IHL. However, in mid-2019 the Court of Appeal stated that the criteria for arms export were not followed correctly in relation to the assessment in relation to the risk of IHL violation.²⁴⁴ Of the four grounds of appeal, the claimants successfully reversed the Divisional Court decision, on the ground that it was “irrational and therefore unlawful” not to consider past IHL violations as a relevant indicator for considering risks of future violations, as the User Guide to Council Position 944 suggests.²⁴⁵ In response to the judgement, the Secretary of State for International Trade stated the Government is “carefully considering the implications of the judgment for decision making. While we do this, we will not grant any new licences for exports to Saudi Arabia and its coalition partners that might be used in the conflict in Yemen”.²⁴⁶ In addition, he also stated that the “approach is in line with

²⁴¹ Camera dei Deputati, XVIII Legislatura, Interrogazione a Risposta in Commissione 5/00487. In the original version: “Tutte le licenze sinora concesse sono legittime, essendo state adottate seguendo il dettato e le procedure stabilite dalla normativa nazionale ed internazionale”.

²⁴² SIPRI, Arms Exports to Saudi Arabia by Supplier 2013-2017, available at <https://www.sipri.org/commentary/topical-backgrounder/2018/saudi-arabia-armaments-and-conflict-middle-east>.

²⁴³ High Court of Justice, *Campaign Against Arms Trade (CAAT) v The Secretary of State for International Trade*, Case No CO/1306/2016, 10 July 2017, [2017] EWHC 1726 (QB).

²⁴⁴ See also Luca Ferro, “Western Gunrunners, (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?”, *Journal of Conflict & Security Law*, 2019, Vol. 24, N. 3, at 22.

²⁴⁵ Court of Appeal, *CAAT v. The Secretary of State for International Trade*, Case No T3/2017/2079, 20 June 2019, [2019] EWCA Civ 1020, at 145 and 139.

²⁴⁶ House of Commons Hansard, Export Licences: High Court Judgment, 20 June 2019, Volume 662, at column 376.

the EU common position; it is therefore focused on a predictive evaluation of risk as to the attitude and future conduct of the Saudi-led coalition”.²⁴⁷

IV.6 Conclusion

The examination of the second and third pillar has highlighted several discrepancies within each pillar. In the second pillar, the different treatment of intra-EU transfers as opposed to extra-EU exports questions the degree of controls that EUMS perform for intra-EU transfers. For extra-EU exports, Common Position 944 and the ATT are mutually reinforcing to the point that, according to the European Commission, Common Position 944 subsumes the requirements of the ATT. Although the interpretation of Common Position 944 is not uniform amongst different EUMS and there is no European coordinating authority on the matter, the legal framework is robust. In case of civil wars occurring in the territory of a non-EUMS, it could be argued that criterion three of Common Position 944 endorses a general precautionary principle inasmuch as the supply of arms should not prolong or aggravate the conflict. In addition, criterion two would put a halt to exports where the parties to the civil war commit serious IHL violations or the arms would be used for internal repression. However, it must be clearly stated that EU law does not prohibit the provisions of arms and weapons to neither of the parties involved in a civil war. In other words, EU law provides parameters which only indirectly can cast doubt on the lawfulness of the transfer of arms, especially in cases where this would undermine the regional peace or risk exacerbating the internal situation of the country of destination.²⁴⁸

In contrast, intra-EU transfers are subject to a different communitarian regime that aims at fostering and facilitating the internal market. However, some of the rules that the directive sets forth openly contrast with the ATT. In particular, the emphasis on *ex post* control, as opposed to *ex ante*, raises serious doubt of compatibility with the international treaty. As already seen in Chapter III, the ATT provides that prior to the authorization, States have to conduct an assessment against different criteria. In contrast, the ICT-Directive allows the possibility of exempting certain transfers from authorization. Furthermore, the absence of rejected applications confirms that the communitarian

²⁴⁷ *Ibid*, at column 375.

²⁴⁸ Respectively Criteria 4 and 3 of Common Position 944.

regime may facilitate an uncritical granting of licenses and a generally relaxed export regime. In response to the clash of rules, the chapter has offered a solution considering that the contrast is not between the ATT and the TUE or the TFUE, but between a treaty and a directive, a regional legal act that must be implemented by each EUMS.

The second pillar has also highlighted the existence of non-binding rules adopted in other regional or multi-lateral fora. Even if these rules are non-enforceable, the political commitment taken in these venues add an extra layer of obligations to the EUMS. The adoption of rules in the form of soft law is consistent with the period during which these arrangements were put in place, but some of their specific requirements are nowadays questionable. On the one hand, the quest for security and stability may still justify the requested standards in the field of transparency, yet, on the other hand, the duplication of similar obligations in the different pillars may not necessarily be an added value as States may become overburden by different reporting standards and, as a result, even hard obligations may be disregarded.²⁴⁹ Nonetheless, it should also be noted that the only explicit prohibition on the transfer of a specific weapon originates from these non-binding rules. Aviation safety concerns have led the participating State to the OSCE and Wassenaar to restrict the transfer of MANPADs solely to governments and on the basis of individual licences. Thus, the provision of MANPADs to insurgents would violate the commitments made.

In the third pillar, the hierarchical level and the concrete wording of the different laws and regulations shows that national regimes are far from being uniform and may also contribute to explain the different rigour applied to the European criteria, as the case study also shows. Domestic legislations vary from both a formal and substantial perspective. Formal, as the criteria for arms export are contained in acts that are not necessarily primary legislation and, in some cases, are included within political declarations. Substantial, as some EU Member States decided to endorse a more stringent approach, excluding, for example, the provision of small arms to non-EU Member States.

²⁴⁹ For instance, see the EP complaints on the delays or incompleteness of the annual reports: (2013/2657(RSP)) at 8; (2015/2114(INI)) at 36; (2017/2029(INI)) at 33; (2018/2157(INI)) at 33.

CHAPTER V - The Sanction Regimes: UN embargos, EU restrictive measures, and other Regional Measures

V.1 Introduction

Sanctions are the last layer of regulation that must be examined in order to assess the legality of the provision of arms to parties involved in civil wars. Sanction is a term that has informally been used in relation to collective sanctions, such as those adopted by the UN and by regional organisations, but also by States unilaterally. Put differently, the term encompasses a triple layer: the one provided by the UN, the one stemming from the EU, which, as will be shown, can be linked to the first layer but can also be autonomous, and the last layer, that of individual States.

The importance of UN sanctions arises from two reasons: on the one hand, transferring items to the targeted entity to which the sanction adopted pursuant to Chapter VII applies is in itself unlawful. More specifically, when an arms embargo is in place, the transfer of arms to the addressee of the sanction is unlawful if the transfer does not comply with the specific terms of the sanction regime. On the other hand, as has been seen, compliance with sanctions is one of the international and regional criteria to assess the legality of a transfer. As a result, transferring arms to the addressee of a sanction in a non-compliant way with the terms of the sanctions, not only breaches the sanction itself, but also international, regional, and national laws. More often than not, UN sanctions are accompanied by regional and/or national unilateral measures, which often precede UN sanctions. According to Eckert's data, these measures follow UN sanctions in 90% of cases and precede them in 70% of cases.¹ Their frequency must not be interpreted as a sign of legality. Both regional and unilateral measures are surrounded by legal issues and their adoption can be still controversial.

The chapter reflects the overall order of the dissertation and, therefore, moves from the point of view of international law and subsequently restricts the perspective to regional law. Accordingly, at the outset, it examines sanctions adopted by the UN, while EU restrictive measures follow immediately afterward, together with sanctions adopted by other regional organizations.

¹ Sue E. Eckert, "The evolution and effectiveness of UN targeted sanctions", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar, 2017, at 64.

V.2 Sanctions

The analysis of sanctions having an impact on the provision of arms and weapons cannot but start with those adopted by the UN and, more specifically, by the UNSC. The adoption of sanctions is not a novelty introduced by the UN Charter as its predecessor, the Covenant to the League of Nations, also envisaged that, under its Article XVI, economic sanctions could have been adopted in case a Member State waged war in disregard of Articles XII, XIII or XV.² Despite this positive indication, the lack of clarity in the Covenant as to the power of the Council to “organise the economic sanctions and to graduate them according to the specific case” brought about a concrete ineffectiveness of the League’s sanction regime.³ In fact, the ineffectiveness of the regime was tied to being each Member of the League free to determine whether a breach of Article XVI occurred and, consequently, to apply the sanctions provided for by the same Article.⁴ It is therefore not surprising that the League managed to apply sanctions only in one case, in response to the Italian invasion of Abyssinia in 1935. Shortly after the invasion, dated 3 October 1935, 50 Member States of the League concluded that Italy breached the covenant and agreed to implement sanctions as per Article XVII. The Coordinating Committee that was subsequently established recommended, *inter alia*, to prevent the export of arms and arms-related material to Italy and this proposal was endorsed by the Assembly of the League on 3 November.⁵

V.2.1 UN Sanctions

In contrast to the experience of the League of Nations, sanctions under UN architecture have been established and enforced in a more consistent way. In particular, since the end of the Cold War,

² League of Nations, Covenant of the League of Nations, 28 April 1919, Article XVI: 1. Should any Member of the League resort to war in disregard of its covenants under Arts. 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their national and the national of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, where a Member of the League or not.

2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed force to be used to protect the covenants of the League.

³ Anton Bertram, “The Economic Weapon as a Form of Peaceful Pressure”, *Transactions of the Grotius Society*, Vol. 17, Problems of Peace and War, Papers Read before the Society in the Year 1931, at 169.

⁴ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, London: Steven & Sons, 1951, at 726.

⁵ League of Nations, *The League from Year to Year*, Geneva: League of Nations Information Section, 1935, at 53–85.

sanctions have become the main tool, short of the use of military force, utilised by the UNSC to maintain international peace and security.⁶ This is not to say that before the Cold War sanctions were not part of the toolbox, as the sanctions dated 1966 against Southern Rhodesia and those of 1977 against South Africa confirm, but that the veto power of the permanent members of the UNSC played a significant role in curtailing the effective deployment of these measures.⁷

Under the UN Charter, sanctions are set up by a determination of one of its organs, namely the UNSC, which is granted, under Article 24(2), the power to adopt decisions that bind all the UN Member States by virtue of Article 25. It is also worth noting that, besides the adoption of coercive measures such as sanctions, in the field of arms and weapons, the UNSC should formulate recommendations “for the establishment of a system for the regulation of armaments”.⁸ Not dissimilarly from sanctions, the aim of these recommendations should be, aside from the promotion of international peace and security, also its maintenance.⁹ In other terms, by employing the recommendations mentioned in Article 26 and the sanctions under Chapter VII, the UNSC should be in the position to ensure the promotion, the maintenance and the restoration of international peace and security, at least vis-à-vis arms and weapons.

However, the UN practice over the years shows that reference to Article 26 has been rather scant, and since 1979 no UNSC decisions or presidential statements has been adopted on this Article.¹⁰ This may be seen, in hindsight, as a missed opportunity to further contribute to the establishment and maintenance of peace and security. The dead letter of the Article should not surprise, as already the drafters of the UN Charter gave little significance to that provision.¹¹ Since the war was still ongoing, the issue of armaments regulation was not prioritized and, on the contrary, the production of arms was seen as necessary to bring the war to an end.¹² According to Article 26, the UNSC is assigned the

⁶ See Thomas G. Weiss, “Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses”, *Journal of Peace Research*, Vol. 36, No. 5, 1999, at. 499-509.

⁷ UNSC Resolution 232 of 16 December 1966 and UNSC Resolution 418 of 4 November 1977.

⁸ Article 26 of the UN Charter.

⁹ *Cfr.* Article 26 and Article 41 of the UN Charter.

¹⁰ See Repertory of Practice of United Nations Organs Supplement No 6 (1979–1984), volume 3; Repertory of Practice of United Nations Organs Supplement No 7 (1985–1988), volume 3; Repertory of Practice of United Nations Organs Supplement No 8 (1989–1994), volume 3; Repertory of Practice of United Nations Organs Supplement No 9 (1995–1999), volume 3; Repertory of Practice of United Nations Organs Supplement No 10 (2000–2009), volume 3.

¹¹ Hans-Joachim Schütz, “Article 26”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.), *The Charter of the United Nations A commentary*, 3rd edition, Oxford University Press, 2012, at 857.

¹² *Ibid.*, at 857 and 861.

responsibility for developing plans aimed at establishing a “system of regulation of armaments”. The wording is ample enough to include disarmament but also limitations to the production and trade in armaments.¹³ The plans for such a regulation would not be immediately binding and Member States would have to ratify the plans in accordance with their domestic procedures.¹⁴ However, as stated, there has been no practical relevance to the Article and sporadic calls have been made for a reform of this Article.¹⁵

Sanctions established by the UNSC are measures adopted in order to maintain and restore international peace and security and follow a determination that one of the three circumstances envisaged by Article 39 had occurred. Differently stated, it can be warranted that international peace and security is violated when there is a threat to the peace, a breach of the peace, or an act of aggression. And the determination that one of these three situations has materialised provides the basis for the adoption of sanctions.¹⁶ However, the issue surrounding such determination is that the Charter does not define these terms and, therefore, some scholars argue that the UNSC enjoys an unfettered discretion as to what constitutes a threat and a breach of the peace or an act of aggression.¹⁷ As a result, “[the] Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion”.¹⁸ The idea that the UNSC operates solely on the basis of political rather than legal criteria is challenged in the literature. De Wet argues that the terms used in Article 39 have “nothing inherently special...that would *ab initio* remove them from the ambit of legal interpretation”, implying

¹³ *Ibid.*, at 864.

¹⁴ *Ibid.*, at 859.

¹⁵ See, for instance, Costa Rica S/2008/697; India S/PV.2608;

¹⁶ T.D. Gill, “The Second Gulf Crisis and the Relation between Collective Security and Collective Self-Defense”, *Grotiana*, Vol. 10, 1991, at 59; L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations*, 3rd Revised Edition, Columbia University Press, 1969, New York, at 204-5.

¹⁷ Vera Gowlland-Debbas, “Security Council Enforcement Action and Issues of State Responsibility”, *The International and Comparative Law Quarterly*, Vol. 43, No. 1, 1994, at 61.

¹⁸ Dissenting opinion of Judge Weeramantry in Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, ICJ Rep 1992, at 66; Philip Alston, “The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath”, 13 *Australian Yearbook of International Law* (1990/ 1991), at 172; Gérard Cohen-Jonathan, Commentaire de l’Article 39 in Jean-Pierre Cot et Alain Pellet, *La Charte des Nations Unies : Commentaire Article par Article*, 3e éd., CEDIN, Paris, Economica, 2005, at 655.

that while a certain discretion exists, there is no evidence that it is unlimited.¹⁹ The problem of whether the UNSC is devoid of any legal constraint warrants a further examination.

As hinted, there is a division between some scholars who consider the UNSC substantially as *legibus solutus* and those that, on the contrary, deem the UNSC to be bound – fully or at least to some extent – by international law.²⁰ An indication that, although enjoying a wide discretion, the UNSC is nonetheless subject to legal constraints emerges from the ICTY. In *Prosecutor v Tadic*, the Tribunal highlighted that the UNSC, as an organ of an international organization established by treaty, must act within the boundaries of the “constitutional limitations” provided by the treaty itself.²¹ And, in this respect, the UN Charter poses procedural and substantive limitations. The former types of limits obviously refer to the rules of procedures of the UNSC, which encompass, amongst others, issues linked to participation, voting, and agenda.²² The latter type relates to the *quomodo* the UNSC exercises its conferred powers. It is argued that the UNSC is indeed bound by the principle of proportionality, as not only must the measures adopted by the UNSC be “necessary in order to maintain international peace and security”,²³ but also the Charter itself contains provisions on proportionality requirements, which may, therefore, be interpreted analogically.²⁴

The UN Charter alone does not, however, exhausts the limits applicable to the UNSC. *Jus cogens*, already examined earlier, also applies to the UNSC²⁵: Tsanakopoulos puts it well when he states that “...if States cannot escape the operation of *jus cogens*, they certainly cannot create an IO which is unbound by it”.²⁶ In the same vein the ILC: “like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under

¹⁹ Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, 2004, at 136; Benedetto Conforti and Carlo Focarelli, *Le Nazioni Unite*, 8th Edition, CEDAM, 2010, at 210.

²⁰ Benedetto Conforti Carlo Focarelli, *Le Nazioni Unite*, above 19, at 209; Alain Pellet and Alina Miron, “Sanctions”, in Max Planck Encyclopedias of International Law, at 15. See also Enzo Cannizzaro and Paolo Palchetti, “Ultra Vires Acts of International Organizations”, in Jan Klabbers and Åsa Wallendahl, *Research Handbook on the Law of International Organizations*, Edward Elgar Publishing, at 369-375.

²¹ ICTY, *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, at 28.

²² See in this respect Note by the President of the Security Council, 30 August 2017, S/2017/507.

²³ Stefan Talmon, “The Security Council as World Legislature”, *American Journal of International Law*, Vol. 99, 2005, at 184.

²⁴ See UN Charter, Arts. 40, 42, 43(1), 51.

²⁵ See above, at II.2.2.

²⁶ Antonios Tzanakopoulos, *Disobeying the Security Council*, Oxford University Press, 2011, at 71.

a peremptory norm”.²⁷ More controversial is whether UNSC is also bound by general international law, as the Charter, as well as the *travaux préparatoires*, are inconclusive on the point.²⁸

V.2.2 Establishing sanctions

It has already been hinted that, before establishing sanctions, the UNSC should determine the existence of one of the situations set forth by Article 39. Before analysing them more in detail and putting them in relation to arms embargos, it is worth underlying that the determination according to Article 39 is not always explicit. Whereas this Article suggests that the UNSC should ideally refer to one of the three hypotheses of Article 39 in its course of action, the practice shows that this is not without exception. As observed by Matam Farrall, the immediate adoption of a sanction without a preliminary qualification does not render the sanction invalid and the determination must be deemed as implicit in the adoption of the sanction itself.²⁹ By the same token, also an explicit reference to Article 41 appears to be non-mandatory and the UNSC has referred to this Article only sporadically and, in most cases, it has simply and generically invoked Chapter VII.³⁰

Sanctions established according to Article 41, or, as just noted, according to Chapter VII, represent a response to one or more acts that threaten the peace, constitute a breach to the peace or constitute aggression. It is clear that these three instances are ordered according to a concentric rationale, the threat to peace being the broadest concept, whereas the act of aggression the narrowest.³¹ Although this may sound like a truism, it is key to understanding why the UNSC has not made use of the notion of aggression in order to justify the enactment of sanctions. Since the means at disposal of the UNSC do not change whether it is established that a threat to the peace or an act of aggression had occurred, it is more pragmatic for the UNSC not to employ the notion of aggression and characterize the facts as a threat or breach to the peace. With a view to negotiating with the parties involved, or to offer good

²⁷ International Law Commission, Draft articles on the responsibility of international organizations, with commentaries 2011, sub Art. 25, at 75.

²⁸ See Antonios Tzanakopoulos, *Disobeying*, above n 26, at 72-74; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. United States; Libya v. United Kingdom*), Provisional Measures, 14 April 1992, ICJ Reports (1992) 115, at 142 (Judge Shahabuddeen).

²⁹ Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge University Press, 2007, at 84.

³⁰ *Ibid.*, at 105.

³¹ Jochen A. Frowein and Nico Kirsch, “Article 39”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.), *The Charter of the United Nations A commentary*, 3rd edition, Oxford University Press, 2012, at 1278.

offices, it may be counterproductive for the UNSC to label one side as an aggressor, and, therefore, the UNSC may pragmatically qualify the facts differently from aggression.³² Thus, it is no surprise that the UNSC has never qualified facts as aggression in order to set up sanctions. Even in the case of South Africa, despite having recognised in the second preambular that the country had committed acts of aggression against its neighbours, the situation was nonetheless qualified as a threat to the peace.³³ In contrast to aggression, the notion of breach of the peace has been employed once as a basis for sanctions. The UNSC qualified the Iraqi invasion of Kuwait of 2 August 1990 as a breach to the peace and subsequently established an embargo on the invader on that basis.³⁴

As it is now clear, with the only exception just mentioned, sanctions have been employed as a measure to counter threats to the peace. Differently from aggression and breach of the peace, the elasticity of the concept makes it suitable to account for events that are not characterised by the use of armed violence and more in general, by any use of force and, thus, makes it apt to cover “the widest range of behaviour”.³⁵ Malanczuk puts it well when he says that, in a nutshell, “a threat to the peace in the sense of Article 39 seems to be whatever the Security Council says is a threat to the peace”.³⁶ This wide discretion also implies, *inter alia*, that domestic situations may be labelled as threats to the peace³⁷ and that threats to the peace may originate from NSAs.³⁸ Given the amplitude of cases that justify such a determination, classifying the different cases gives a better understanding of the wide discretion of the UNSC.³⁹ Within the contours of this discretion, data show that the UNSC has, over the years,

³² Irina Kaye Müller-Schieke, “Defining the Crime of Aggression Under the Statute of the International Criminal Court”, *Leiden Journal of International Law*, 14, 2001, at 421.

³³ UNSC Resolution 418 of 4 November 1977, preambular 2 and point 1.

³⁴ UNSC Resolution 660 of 2 August 1990 and UNSC Resolution 661 of 6 August 1990.

³⁵ Benedetto Conforti, *The Law and Practice of the United Nations*, Third Revised Edition, Martinus Nijhoff, 2005, at 172. See also Yoram Dinstein, *War Aggression and Self Defence*, Fifth Edition, Cambridge University Press, 2011, at 310.

³⁶ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition, Routledge, 1997, at 426.

³⁷ De Wet describes the labelling of an internal situation as a threat to the peace in terms of double strategy, see De Wet, *The Chapter VII Powers*, above n. 19, at 150-155.

³⁸ Andrew Garwood-Gowers, “Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy”, *Australian Yearbook of International Law*, Vol 23, 2004, at 13.

³⁹ Matam Farrall provides an interesting taxonomy as he initially divides the factual cases depending on whether they stem from international and non-international events. Within the former category he identified the sub-cases of aggressive foreign policy combined with the potential to possess or to produce weapons of mass destruction; international terrorism; international conflict and interference. Within the latter category he identified the sub-cases of denial of the right to self-determination by a racist minority; policy of apartheid; general civil war with no entity in effective control; seizure of power from a democratically elected government; cases where a

increasingly focused on internal conflicts⁴⁰ when applying sanctions and, moreover, that Africa is the main continent where sanctions are applied.⁴¹

V.2.3 Monitoring and termination of sanctions

As soon as sanctions are established by the UNSC, their management passes to an auxiliary body of the UNSC. According to Article 29 of the UN Charter, “[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions”, and, for sanctions, this auxiliary body is a sanctions committee. The committee mirrors the composition of the UNSC and derives its mandate and powers usually from the same UNSC resolution that established the sanction.⁴² The mandate of the committee can vary, but in general terms, it covers the assistance of Member States with sanction implementation, it designates individuals and entities to be included in the listing, it manages exemptions, it carries out periodic reviews, and it reports to the UNSC.⁴³ In most of the cases⁴⁴ the committee, which is a political body, is supported in its mandate by a team of experts who advises the committee in its tasks and particularly in the information-gathering on non-compliance with the sanctions, on new threats and aides the committee to liaise with the Member States.⁴⁵ In the field of arms embargos, the committee, together with the panel of experts, plays an important role specifically in relation to exemptions. An example helps clarify this point. Under UNSC resolution 2009, modifying the terms of the arms embargo adopted against Libya, the embargo imposed by resolution 1970, does not apply to the “supply, sale or transfer to Libya arms and related materiel of all types, including technical assistance, training, financial and other assistance, intended solely for security or disarmament

government has been subject to or threatened by the use of military force by a rebel group; cases of serious humanitarian crisis; and cases where a government has used oppressive force against a minority. See Jeremy Matam Farrall, *United Nations Sanctions*, above n. 29, at 86-102.

⁴⁰ *Cfr.* Repertoire of the Practice of the Security Council, Article 39 – Determination of threat to the peace, breach of the peace, or act of aggression; albeit with data until 2011 see Andrea Charron, *UN Sanctions and Conflicts: Responding To Peace And Security Threats*, Routledge, 2011, at 9.

⁴¹ Andrea Charron and Clara Portela, “The UN, regional sanctions and Africa”, *International Affairs*, 2015, Volume 91, Issue 6, at 3. See also Kristen E. Boon, “U.N. Sanctions as Regulation”, *Chinese Journal of International Law*, Volume 15, Issue 3, 2016, at 546.

⁴² United Nations, Department of Political and Peacebuilding Affairs, *Subsidiary Organs of the United Nations Security Council*, 2019 Factsheets, 3 October 2019, available at <https://www.un.org/securitycouncil/content/committees-working-groups-and-ad-hoc-bodies>, at 4.

⁴³ Richard Gordon, Michael Smyth, Tom Cornell, *Sanctions Law*, Hart Publishing, 2019, at 23.

⁴⁴ Currently, out of the 14 ongoing sanction regimes, 11 are supported by a team of experts. See <https://www.un.org/securitycouncil/sanctions/information>

⁴⁵ Richard Gordon, *Sanctions Law*, above n. 43, at 25.

assistance to the Libyan authorities and notified to the Committee in advance”⁴⁶. The committee evaluates this request and, in case it does not provide a negative opinion within five days from the request for exemption, the “sale, supply or transfer” can be legally pursued.

The team, or panel of experts, also supports the committee in the termination of sanctions. As observed by Boon, termination procedures of UN sanctions follow three models: through sunset clauses, through the adoption of a further resolution that terminates an indefinite sanction, and sanctions adopted with a commitment to review.⁴⁷ The first method is the adoption of a time bar on the measure, which is, therefore, limited to a specific date in the future. Sanctions adopted with a sunset clause cease their effect as soon as the expiration date is reached and unless a further decision is adopted by the UNSC. The second method, rather than being strictly speaking a termination procedure, defines the nature of a sanction. By being indefinite, it does not expire or terminate and, thus, becomes permanent, unless a decision adopted by the UNSC terminates the sanction. In an opposite fashion to the first method, the second decision of the UNSC is needed to terminate the measure rather than to extend it. The third method greatly resembles the second one as the sanction is indefinite until the committee or the panel of experts decides otherwise.⁴⁸ Similarly to the second method, sanctions subject to a commitment to review also necessitate another UNSC resolution in order to be terminated. Given these similarities, it is arguable that the third method, rather than being a distinct termination procedure, could be instead classified as a sub-group of the indefinite sanctions. The sole difference between the two is the explicit reference to a review procedure, which is absent in the purely permanent measures.

In addition to these three general procedures, it has to be warranted that further means to terminate sanctions exist vis-à-vis individual sanctions. These are a type of targeted sanction, which, in turn, is a type of sanction that it is not directed against a state, but against selected persons or entities.⁴⁹ Individual sanctions, although they may encompass also arms especially if adopted against an entity

⁴⁶ UNSC Resolution 2009 of 16 September 2011.

⁴⁷ Kristen E. Boon, “Timing matters: termination policies for UN sanctions”, in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar, 2017, at 239-240.

⁴⁸ *Ibid*, at 241.

⁴⁹ Larissa van den Herik, “The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual”, *Leiden Journal of International Law*, 20 (2007), at 798; Marco Gestri, “Legal Remedies Against Security Council Targeted Sanctions: *de Lege Lata* and *de Lege Ferenda* Options for Enhancing the Protection of the Individual”, *The Italian Yearbook of International Law*, Volume 17, Issue 1, 2007, at 25.

such as NSAs, are typically asset freeze and/or travel bans directed against persons explicitly listed.⁵⁰ The absence of any judicial review of these measures has sparked considerable criticism amongst practitioners and academics alike.⁵¹ In response to these criticisms, there are now limited possibilities to challenge the individual listing at the level of focal points and of the ombudsman.⁵² Although it is not straightforward to assume that an individual who is barred from receiving arms would resort to the applicable remedies, the theoretical possibility exists. By the same token, it is to be noted that resort to focal points and/or ombudsman does terminate the sanction at the single person level and not in relation to the other listed persons. In other words, the sanction does not terminate in its entirety but only with regard to those that successfully challenged the measure.

V.2.4 The content and the target of arms sanctions

The discretion to determine whether a situation constitutes a threat to the peace is coupled with the discretion to adopt measures “not involving the use of force”, which may encompass the “complete or partial interruption of economic relations”.⁵³ The array of measures at the UNSC’s disposal fits the principle that the effectiveness of sanctions is directly related to the vulnerabilities of their targets.⁵⁴

⁵⁰ See, for instance, UNSC Resolution 1390; UNSC Resolution 1988.

⁵¹ See for instance, Clemens Feinaugle, “The UN Security Council Al Qaeda and Taliban Sanctions Committee: Emerging Principles of International Law for the Protection of Individuals”, *German Law Journal*, vol. 9, 2008, 1513-1539; Michael Bothe, “Security Council’s Targeted Sanctions Against Presumed Terrorists: The Need to Comply with Human Rights Standards”, *Journal of International Criminal Justice*, Volume 6, Issue 3, July 2008, 541–555; Peter Guthrie, “Security Council Sanctions and the Protection of Individual Rights” (2004) 60 *New York University Annual Survey of American Law*, Vol. 60, 2004, 491-541; Elin Miller, “The Use of Targeted Sanctions in the Fight Against International Terrorism – What About Human Rights?”, *Proceedings of the ASIL Annual Meeting*, 97, 2003, 46-51.

⁵² On the ombudsman and on the issues of sanction reviewal see Kimberly Prost, Security Council sanctions and fair process, in in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar, 2017, at 213-235; Paul Eden, “United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson”, in Matthew Happold and Paul Eden, *Economic Sanctions and International Law*, Hart, 2016, at 172-197; Ian Johnstone, “The UN Security Council, Counterterrorism and Human Right,” in Andrea Bianchi and Alexis Keller, *Counterterrorism: Democracy’s Challenge*, Hart Publishing, 2008; Bardo Fassbender, “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights”, *International Organisations Law Review*, 3, 2006, at 437-485; Thomas J. Biersteker, “Targeted Sanctions and Individual Human Rights.” *International Journal*, Vol. 65, no. 1, 2010, at 99–117; Erika de Wet, “From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions”, *Chinese Journal of International Law*, Volume 12, Issue 4, December 2013, at 787–808.

⁵³ UN Charter, Article 41.

⁵⁴ Enrico Carisch, Loraine Rickard-Martin, Shawna R. Meisterat, *The Evolution of UN Sanctions*, Springer, 2017, at 81. On the debate on the effectiveness of sanctions see, amongst others, David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner Publishers, 2000; Thomas J. Biersteker, Sue E. Eckert, and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of UN Action*, Cambridge University Press, 2016; Andrew Mack and Khan Asif, “The Efficacy of UN Sanctions”, *Security Dialogue*, vol. 31, no. 3, 2000, at. 279–292; Lisa Hultman and Peksen Dursun, “Successful or Counterproductive Coercion? The Effect of International Sanctions on Conflict Intensity”, *Journal of Conflict*

This is naturally met mainly with regard to military supplies and, still nowadays, the great majority of UN sanctions aim to restrict the provision of weapons.⁵⁵ A review of all the arms embargo highlights that there is no consistent wording, despite the similarities that obviously can be spotted amongst all the resolutions. Nonetheless, consistency has improved thanks to efforts, such as the Bonn-Berlin Process, aimed at finding a standardised language with respect to the scope of the embargos.⁵⁶

The first arms embargo adopted was against Southern Rhodesia in 1966. The resolution states that Member States were called to prevent “any activity by their nationals or on their territory which promotes or are calculated to promote the sale or shipment to Southern Rhodesia of arms, ammunition of all types, military aircraft, military vehicles and equipment and materials for the manufacture and maintenance of arms and ammunition in Southern Rhodesia notwithstanding any contract entered into or licences granted before the date of the present resolution”.⁵⁷ In terms of goods covered, the resolution explicitly mentions arms – but not weapons – military aircraft and vehicles and all types of ammunition; it is uncertain whether the term equipment refers to military equipment or to equipment, together with material, destined to the manufacture and maintenance of arms. In terms of conducts, Member States are called to prevent the sale and shipment, thus arguably including gifts, and the target is defined by the geographical borders of Southern Rhodesia. Finally, the resolution specifies that the embargo shall take precedence over any contract and licence, even if signed or granted before the entry into force of the resolution.

The subsequent arms embargo was established against South Africa. Together with the one against Southern Rhodesia, this was the only one adopted before the end of the Cold War. The resolution called all States to “cease forthwith any provision to South Africa of arms and related *matériel* of all

Resolution, vol. 61, no. 6, July 2017, at 1315–1339; Pekse Dursun, “Better or Worse? The Effect of Economic Sanctions on Human Rights”, *Journal of Peace Research*, 2009, 46 (1), at 59–77; Michael Brzoska, “From Dumb to Smart? Recent Reforms of UN Sanctions”, *Global Governance*, Vol. 9, no. 4, 2003, at 519-35.

⁵⁵ 10 out of the 14 embargos in place contain an arms embargo, see UNSC, Subsidiary Organs of the United Nations Security Council, Fact Sheets 2019, available at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organ_factsheets.pdf.

⁵⁶ The Bonn-Berlin process, which was specifically dedicated to arms embargos and travel and aviation sanctions, consisted in a series of seminars attended by governments, academia and NGOs back in 1999-2000. The result of these meetings was the adoption of standard clauses to be adopted by the UNSC. See Michael Brzoska, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions. Results of the ‘Bonn-Berlin Process’*, Bonn International Center for Conversion, 2001.

⁵⁷ UNSC Resolution 232 of 16 December 1966, point 2 (d).

types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, para-military police equipment and spare parts for the aforementioned”. It also added that all States “shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned”.⁵⁸ Compared to the previous resolution this one differs on several points. Firstly, it is addressed to all States and not just to Member States of the UN. While the issue of the legal force of UNSC decisions on non-UN Member States is nowadays more theoretical than practical, at the time of adoption of the resolution the question was not settled.⁵⁹ Secondly, in terms of goods covered, the resolution expands the items listed as it includes weapons, para-military police equipment, spare parts. In addition, it also refers to the rather unclear notion of “*matériel*” and it includes spare parts and supplies. In terms of conduct, the resolution refers to sale, transfer – and therefore including any possible gift – but also calls on States to suspend licensing arrangements. Similarly to the Southern Rhodesia case, the target is defined by the geographical borders of South Africa.

The wording of the embargo against Iraq, the first adopted after the end of the Cold War, draws from both the previous experiences.⁶⁰ On the one hand, it is directed to all States, despite their membership to the UN, in a similar fashion to the embargo against South Africa. In this respect, the resolution also stresses the importance of respecting the terms of the resolution for both UN Member States and non-UN Member States, in spite of the existence of contracts that pre-date the resolution.⁶¹ On the other hand, it calls all States to prevent “the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other

⁵⁸ UNSC Resolution 418 of 4 November 1977, point 2.

⁵⁹ The fundamental rule of customary international law ‘*pacta tertiis nec nocent nec prosunt*’ lies at the root of the dispute over the legal impact of Art 2(6) UN Charter on non-members. Kelsen’s view, according to which international peace and security could justify the imposition of obligations upon non-member States was rejected. Rather, it was the customary status of the first four principles of Art 2 that bound non-member States. On this debate see, amongst others, Hans Kelsen, “Sanctions in International Law under the Charter of the United Nations”, *Iowa LR*, 31, 1945, at 499; *contra* Kelvin Widdows, “Security Council Resolutions and Non-Members of the United Nations”, *The International and Comparative Law Quarterly*, Vol. 27, No. 2 (Apr., 1978), at 459-462; Christian Tomuschat, “Obligations Arising for States against Their Will”, *Recueil des Cours* 241 (1993-IV), 195-373; Rain Liivoja, “The Scope of the Supremacy Clause of the United Nations Charter”, *The International and Comparative Law Quarterly*, Vol. 57, No. 3 (Jul., 2008), at. 583-612; Stefan Talmon, “A Universal System of Collective Security Based on the Charter of the United Nations: A Commentary on Article 2(6) UN Charter”, *Bonn Research Papers on Public International Law*, Paper No 1/2011, 20 November 2011.

⁶⁰ UNSC Resolution 660 of 6 August 1990.

⁶¹ *Ibid*, point 5.

military equipment”, a wording that bears similarities to the arms embargo against Southern Rhodesia.⁶² However, one can also observe that “weapons and other military equipment” are treated as a sub-category of products, arguably then including the widest possible array of items. Once again, the target of the embargo is defined by the physical boundaries of Iraq and Kuwait.

Analogously to the Iraqi embargo, the embargo against Yugoslavia covers the same items as Resolution 713 provides that all States shall “immediately implement a general complete embargo on all deliveries of weapons and military equipment to Yugoslavia...”.⁶³ The employment of the term “deliveries” leaves no room for ambiguity and includes lucrative and non-lucrative transactions destined to anyone within the geographical limits of the State of Yugoslavia. A few months after having established the embargo against Yugoslavia, the UNSC adopted an embargo against Libya.⁶⁴ Despite the short period between the two measures, the wording adopted differs as the Libyan measure resorts to the exact same wording of the arms embargo against South Africa. In addition, the embargo also encompasses technical assistance, advice, and training.⁶⁵ A return to the Yugoslavian clause occurred with the embargos against Somalia and Liberia, which were, therefore, subject to a “general and complete embargo on all deliveries of weapons and military equipment”.⁶⁶

The shifting in the wording occurred again with the subsequent resolution against Haiti, where the clause adopted against Libya (and South Africa) was re-employed.⁶⁷ However, in this case, the target was not defined in geographical terms as the resolution called all States to prevent the supply of “arms and related *matériel*...to any person or body in Haiti”.⁶⁸ The Haiti case paved the way for the Angolan embargo, the first one to be adopted against an NSA that, hence, represents the first instance of a targeted measure.⁶⁹ With the view to pressing UNITA to respect the peace agreements and in order to prevent the group from acquiring more territory, the UNSC decided to adopt a wording very similar to the Haiti resolution – save for the police equipment – and direct it against the NSA. The resolution

⁶² *Ibid*, point 3(c).

⁶³ UNSC Resolution 713 of 25 September 1991, point 6.

⁶⁴ UNSC Resolution 748 of 31 March 1992.

⁶⁵ *Ibid*, point 5(b).

⁶⁶ UNSC Resolution 733 of 23 January 1992, point 5 and UNSC Resolution 788 of 19 November 1992, point 8.

⁶⁷ UNSC Resolution 841 of 16 June 1993.

⁶⁸ *Ibid*, point 5.

⁶⁹ UNSC Resolution 864 of 15 September 1993.

achieves this result by permitting the entrance of weapons in the territory of Angola only through a specific point of entry, to be provided by the Government of Angola.⁷⁰ In this way, the “sale or supply to UNITA of arms and related matériel and military assistance” would be curbed and the NSA would be forced to the negotiating table.⁷¹

The four embargos established afterwards, namely against Rwanda⁷², Sierra Leone⁷³, Federal Republic of Yugoslavia⁷⁴, Eritrea and Ethiopia⁷⁵, were all similar in nature, as their target was geographical and coincided with the borders of each State and the items covered were practically identical.⁷⁶ Also the embargo established by Resolution 1333 covered the same items, but the target, although identified by geographical references, differed from the four preceding ones as the territory did not include the entire target country, but only the territories under the control of the Taliban.⁷⁷ The identification of the precise borders was left to the Committee set up pursuant to Resolution 1267.⁷⁸ In addition, the wording in relation to the prohibited conducts changed as Resolution 1333 mentioned the “direct or indirect supply, sale and transfer”⁷⁹, in contrast to the earlier four that mentioned solely “sale or supply”⁸⁰.

The Taliban, together with Usama Bin Laden, members of the organization Al-Qaida and other “individuals, groups, undertakings and entities associated with them” were subject to a further arms embargo.⁸¹ Resolution 1390 adopts the very same wording of Resolution 1333 and differs from this latter decision in relation to the target. Under Resolution 1390 the target is not set in geographical terms but is identified by reference to a list of individuals, groups, and entities drawn by the Committee.⁸² In

⁷⁰ *Ibid*, point 19.

⁷¹ *Ibid*, point 19 and 11.

⁷² UNSC Resolution 918 of 17 May 1994.

⁷³ UNSC Resolution 1132 of 8 October 1997.

⁷⁴ UNSC Resolution 1160 of 31 March 1998.

⁷⁵ UNSC Resolution 1298 of 17 May 2000.

⁷⁶ Typically, “arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts”.

⁷⁷ UNSC Resolution 1333 of 19 December 2000.

⁷⁸ UNSC Resolution 1267 of 15 October 1999, which established an asset freeze against the Taliban.

⁷⁹ UNSC Resolution 1333, at point 5.

⁸⁰ See, for instance, UNSC Resolution 1298 at point 6(a), UNSC Resolution 1160 at point 8.

⁸¹ UNSC Resolution 1390 of 16 January 2002, at point 2.

⁸² *Ibid*, point 2.

other words, listed individuals and groups were not to receive any items covered by the Resolution wherever they may have been located.

The adoption of a non-geographical target was reiterated in Africa. The arms embargo established by Resolution 1493 in the case of the Democratic Republic of the Congo identifies a double target: on the one hand, it states that “all foreign and Congolese armed groups and militias” operating in the regions of North and South Kivu and Ituri shall be prevented the direct and indirect sale, supply or transfer of “arms and related materiel”⁸³; on the other, the same should apply to all “groups not party to the Global and all-inclusive Agreement” in the entire territory of the Democratic Republic of Congo.⁸⁴ It is also worth noting that the Resolution only speaks about arms and related materiel and does not include weapons or other military items, arguably because the conflict at issue was characterized by the extensive use of small arms.

The embargo established in Sudan follows the same technique vis-à-vis the identification of the target, yet it identifies the actors by referring to “all non-governmental entities and individuals, including the Janjaweed” that acted in the regions of North, South and West Darfur.⁸⁵ Differently from the Resolution on the Democratic Republic of Congo, the notion of transfer was, in this case, discarded and Resolution 1556 speaks only about “sale or supply” as was the distinction between direct and indirect supply and/or sale, while the items covered go beyond the “arms and related materiel” and include also “weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts”.⁸⁶ The explicit reference to direct and indirect supply, sale and transfer was re-adopted in the embargo against Côte d’Ivoire, together with the adoption of a purely geographical indication of the target. For the very first time, the UNSC emphasized the need to prevent the supply of a particular type of weapons, *i.e.* military aircraft.⁸⁷

Resolution 1701, which established the embargo in Lebanon, offers a new means to identify the target. In fact, it establishes a blank ban on all sale or supply but mentions neither the transfer, nor

⁸³ UNSC Resolution 1493 of 28 July 2003, at point 20.

⁸⁴ *Ibid.*, point 20.

⁸⁵ UNSC Resolution 1556 of 30 July 2004, at point 7.

⁸⁶ *Ibid.*, at point 7.

⁸⁷ UNSC Resolution 1572 of 15 November 2004, at point 7.

specify if direct/indirect, to all individuals and entities save for those that are authorized by the Government of Lebanon, or destined to the United Nations Interim Force in Lebanon.⁸⁸ In terms of items, the Resolution uses the already seen formula “arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts”.⁸⁹

The embargo against the Democratic People’s Republic of Korea also provides an array of novelties.⁹⁰ Firstly, the resolution refers to the UN Register on Conventional Arms for the definition of battle tanks, armoured combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems.⁹¹ Secondly, the prohibited conducts also include the purchase of the same weapons from the DPRK. Stated differently, the embargo now covers also the export by the DPRK of the items subject to embargo.⁹² Finally, the UNSC decided to address only UN Member States and not all States as the embargos that directly preceded this one.⁹³

Another ban on the export of “arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts” was also established against Eritrea in 2009.⁹⁴ Member States were called to prevent the import from, as well as the export to, Eritrea, in the second embargo that was set against the State of Eritrea. The Resolution does not distinguish between a direct and indirect sale or supply and identifies the target by reference to the geographical borders of Eritrea.

The arms embargo against the Central African Republic did not differ from the one just analyzed against Eritrea in terms of items.⁹⁵ In contrast, it reintroduced the notion of transfer and the difference between a direct and indirect sale, supply and transfer. Besides encompassing also training, technical assistance, and the “provision of armed mercenary”, one of the exceptions provided exempts the security forces of the State from the embargo if the Sanction Committee so approved.⁹⁶ Thus, the

⁸⁸ UNSC Resolution 1701 of 11 August 2006, at point 15.

⁸⁹ *Ibid*, at point 15.

⁹⁰ UNSC Resolution 1718 of 14 October 2006.

⁹¹ *Ibid*, at point 8(i).

⁹² *Ibid*, at point 8(b).

⁹³ *Ibid*, at point 8(a).

⁹⁴ UNSC Resolution 1907 of 23 December 2009, at point 6.

⁹⁵ UNSC Resolution 2127 of 5 December 2013.

⁹⁶ *Ibid*, at point 54(e).

embargo could be seen as directed towards both State and non-state entities, yet with the possibility given to State entities to receive “arms and other related lethal equipment” in case of a positive opinion of the Committee. The last two arms embargos established by the UNSC cover the very same items and conducts of the Central African one. The Yemen embargo is an individual-targeted measure and calls Member States to prevent the sale, supply, and transfer of arms to the individuals mentioned in the Resolution and to those listed by the Committee.⁹⁷ The South Sudan embargo is, conversely, defined geographically by the territory of South Sudan.⁹⁸

V.2.5 The content and the target of non-mandatory arms embargos

On the four occasions where the UNSC has imposed non-mandatory embargos – South Africa, Nagorny-Karabakh, Afghanistan, Eritrea and Ethiopia, and - it did not formally act under Chapter VII, nor it referred to Article 41 of the Charter as a basis for the adoption of the measures. However, a review of the four resolutions shows that in one case the UNSC determined that the situation was a threat to peace and security, a wording that is fully aligned with the determination under Article 39.⁹⁹ In other two cases, the UNSC labelled the situation as endangering peace and security¹⁰⁰ or “seriously disturbing peace and security”¹⁰¹, while in one case the UNSC did not express any determination.¹⁰²

In the first non-mandatory arms embargo, the UNSC called all States to cease “the sale and shipment of arms, ammunition of all types and military vehicles”¹⁰³ using, therefore, a wording that includes fewer categories than those of the mandatory embargo enacted against the same State, while the target was identified in South Africa, in full analogy to the mandatory embargo.¹⁰⁴ The second non-mandatory arms embargo also uses a scant language to describe the items that States should “refrain” from supplying.¹⁰⁵ In particular, the UNSC urged States not to supply “weapons and munitions which might lead to an intensification of the conflict” and did not further qualify which type of weapons risked

⁹⁷ UNSC Resolution 2216 of 14 April 2015, at point 14.

⁹⁸ UNSC Resolution 2428 of 13 July 2018, at point 4.

⁹⁹ UNSC Resolution 1227 of 10 February 1999, at preamble 4.

¹⁰⁰ UNSC Resolution 853 of 29 July 1993, at preamble 6.

¹⁰¹ UNSC Resolution 181 of 7 August 1963, at preamble 8.

¹⁰² UNSC Resolution 1076 of 22 October 1996.

¹⁰³ UNSC Resolution 181, at point 3.

¹⁰⁴ See above, p. 9.

¹⁰⁵ UNSC Resolution 853, at point 10.

bearing consequences on the conflict. The target is not unequivocally identified, and it could be argued that it encompassed the fighting forces in the Nagorny-Karabakh region.¹⁰⁶ The third non-mandatory embargo spoke about the supply of “arms and ammunition” and, also in this case, identified in an equivocal way as the target was defined as “all the parties to the conflict”, thus possibly including States and NSAs alike.¹⁰⁷ The last non-mandatory embargo was explicitly directed against the States of Eritrea and Ethiopia, while the only conduct prohibited was the sale and therefore not including the supply of “arms and munitions” as part of non-monetary transactions.¹⁰⁸ By contrast to the mandatory embargos, the list of items is very succinct.

V.3 EU Restrictive Measures

The quest of the EU to assert itself as a world player independent of its EUMS is neither a new nor a recent phenomenon and can be traced back to the establishment of the European Political Cooperation (EPC) in 1970.¹⁰⁹ This platform provided EUMS with a forum where to discuss and coordinate foreign policies and filled the vacuum left in this respect by the Treaty of Rome.¹¹⁰ With the institutionalization of the EPC into the Common Foreign and Security Policy (CFSP) by the Treaty of Maastricht, cooperation between EUMS became more structured, with clearer objectives, procedures, and instruments. Consistently with the improvements in the institutional architecture, also the use of the tools at the EU’s disposal has evolved and sanctions are certainly no exception. The extent with which the use of sanctions has been employed brought some commentators to speak about the EU restrictive measures, the term used for sanctions under EU jargon, as the “strong suit of the CFSP”.¹¹¹

¹⁰⁶ *Ibid.*, at points 3 and 9.

¹⁰⁷ UNSC Resolution 1076, point 4.

¹⁰⁸ UNSC Resolution 1227, point 7.

¹⁰⁹ The European Political Cooperation was born as a European response to the discontent that emerged with the United States, in particular after the beginning of the war in Vietnam. Economic motives, divergent views over the Middle East, oil and nuclear weapons brought European States to establish an intergovernmental mechanism of coordination in the realm of foreign policy. This was then institutionalized within the EPC and allowed, through biannual meetings, to greatly coordinate their foreign policy. See Wayne Sandholtz and Alec Stone Sweet, *European Integration and Supranational Governance*, Oxford University Press, 1998, at 269; Wolfgang Wessels, “European Political Cooperation: a New Approach to European Foreign Policy”, in David Allen, Reinhardt Rummel and Wolfgang Wessels, *European Political Cooperation: Towards a foreign policy for Western Europe*, Butterworth Scientific, 1982, at 1-18.

¹¹⁰ Roy H. Ginsberg, *The European Union in International Politics*, Rowman & Littlefield, 2001, at 2-3.

¹¹¹ Christina Eckes, “EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions”, *Common Market Law Review*, 51(3), 2014, at 872. See also Tarcisio Gazzini and Esther Herlin Karnell, “Restrictive Measures Adopted by the European Union from the Standpoint of International and EU

Before examining in depth the nature and type of the EU restrictive measures (EURMs), it is important to clarify that these sanctions are never adopted against EUMS.¹¹² Sanctions against them follow a different legal path and are not part of the CFSP, but instead follow the procedure set by Article 7 TUE, in case of grave and systemic breaches to the fundamental values of the Union, or the infringement procedure as per Article 258 TFUE, in case of failure to fulfil an obligation arising from the Treaties.¹¹³

V.3.1 The nature of EU Restrictive Measures

EU Restrictive Measures (EURM) can be classified according to different criteria, such as geography or items covered, but also according to the nature of the measures.¹¹⁴ One of the main classifications considers the aetiology of the sanction: EURMs can be established as an implementing measure of a UNSC sanction adopted under Chapter VII and, hence, mirror the sanction adopted by the UN; EURMs can also be established pursuant to a UNSC measure, with additional provisions extending the scope and/or the items included in the EURM and, hence, going beyond the sanction adopted by the UN; finally, EURMs can be totally autonomous and not linked to any UNSC sanction. This partition is partially reflected in the Basic Principles, a policy document adopted by the Council that explicates the rationale of the EURMs.¹¹⁵ In relation to the first group of sanctions, namely those that reflect those adopted by the UNSC, the document states that the Council, which is the main institution acting in the realm of EURMs, “will ensure full, effective and timely implementation by the European Union of

Law”, *European Law Review*, N. 6, 2011, at 798-817. On EU Restrictive Measures see also Jan Wouters, Dominic Coppens, Bart De Meester, “The European Union’s External Relations after the Lisbon Treaty”, in Stefan Griller and Jacques Ziller, *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?*, Springer, 2008, at 144-198; Panos Koutrakos, “Legal Basis and Delimitation of Competence in EU External Relations”, in Marise Cremona and Bruno de Witte, *EU Foreign Relations Law Constitutional Fundamentals*, Hart, 2008, at 171-198; Piet Eeckhout, *EU External Relations Law*, Oxford University Press, 2011, at 501-548; Piet Eeckhout, “EC law and UN Security Council Resolutions – in search of the right fit”, in Alan Dashwood And Marc Maresceau, *Law and Practice Of EU External Relations*, Cambridge University Press, 2008, at 104-128.

¹¹² See Tom Ruys, “Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework”, in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar, 2017, at 22.

¹¹³ Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on European Union (TEU) A Commentary*, Springer 2013, at 353.

¹¹⁴ See for instance the criteria used by Clara Portela, “Where and Why Does the EU Impose Sanctions?”, *L’Harmattan*, 2005/3 n° 17, 83-111.

¹¹⁵ Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions), 7 June 2004, 10198/1/04.

measures agreed by the UN Security Council”.¹¹⁶ As regards the EURMs adopted independently of those adopted by the UNSC, the document clarifies that the objectives of these EURMs are the fight against terrorism and the proliferation of weapons of mass destruction, but autonomous EURMs can also be employed to ensure respect for human rights, democracy, rule of law and good governance.¹¹⁷ In all these cases of autonomous sanctions, the Council pledged to act in conformity with international law and with the support of the “widest possible range of partners”.¹¹⁸ The document does not consider the second hypothesis, the one where the EURM reflects the UNSC sanction and, at the same time, tops it up. A clarification in this respect comes from another policy document issued by the Council, where it is stated that in these cases, “it is understood that the EU may decide to apply measures that are more restrictive”.¹¹⁹

When the EU implements a UNSC sanction, the EU gives effects not just to the relevant UNSC resolution that established the measure, but also to any subsequent modification.¹²⁰ In the field of arms embargos, the benefit of having a measure adopted by the EU is mostly linked to the certainty of the items covered by the embargo. The Guidelines explain that when the EU decides upon an arms embargo, this shall cover as a minimum all the goods included in the EU Common List of Military Equipment.¹²¹ An example may clarify the point: by means of Resolution 2127, the UNSC banned the direct and indirect sale, supply and or transfer of “arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts”.¹²² The Council adopted shortly after a decision that mirrors the wording of the Resolution, yet, thanks to the interpretation given in the Guidelines, EUMS have full certainty about what items are covered by the measure.¹²³ All in all, by implementing the sanction imposed universally by the UNSC, the regional decision of the EU does not trigger any legal issue, even if the EU is not a member of the UN and

¹¹⁶ *Ibid*, at point 2.

¹¹⁷ *Ibid*, at point 3.

¹¹⁸ *Ibid*, at points 3 and 4.

¹¹⁹ Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, 4 May 2018, at point 3.

¹²⁰ Christina Eckes, “The Law and Practice of EU Sanctions”, in Steven Blockmans and Panos Koutrakos, *Research Handbook on CFSP/CSDP*, 2018, at 210.

¹²¹ Council of the European Union, Guidelines, above n.119, at point 63.

¹²² UNSC Resolution 2127, above n 95, at point 54.

¹²³ Council of the European Union, Council Decision 2013/798/CFSP of 23 December 2013 concerning restrictive measures against the Central African Republic, (OJ L 352 24.12.2013, p. 51).

derives its obligation to enact UN sanctions from the obligation of its individual EUMs.¹²⁴ In contrast, the same conclusion cannot be reached vis-à-vis autonomous EURMs.

When the EU, or more precisely, when the Council adopts on behalf of the EU restrictive measures *motu proprio* there are issues of compatibility with international law that must be examined. In this regard, EURMs can potentially fit within either the notion of retorsion or of that countermeasure.¹²⁵ The commentary to Article 22 of the Articles on State Responsibility (ASR) clarifies that the category of sanction, a term which is usually employed in a non-technical way, should be reserved to “measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations.”¹²⁶ The same commentary also explains that retorsions encompass conducts that are not inconsistent with any international obligation of the State adopting them and, hence, they may be labelled as unfriendly conducts.¹²⁷ Retorsions can be a response to both a breach of international law or to another unfriendly act and may include the restriction of normal diplomatic relations and other contacts, various kinds of embargoes or the removal of voluntary assistance programs.¹²⁸ Retorsions are legal to the extent that the State adopting them does not infringe international obligations vis-à-vis the target State. Dupont puts it well when he says that “[t]he intrinsic lawfulness of the measure... serves to distinguish retorsion and counter-measures”.¹²⁹ As a result, in the absence of specific agreements regulating the arms export with the target entity, the adoption of a EURM in the form of an arms embargo would fall within the discretion of the EU and be a lawful measure. The intrinsic legality of retorsions justifies the interruption

¹²⁴ Daniel Bethlehem, “The European Union”, in Vera Gowlland-Debbas, *National Implementation of United Nations Sanctions A Comparative Study*, Martinus Nijhoff, 2004, at 127.

¹²⁵ See Alexander Orakhelashvili, “Sanctions and Fundamental Rights of States: The Case of EU Sanctions Against Iran and Syria”, in Matthew Happold and Paul Eden, *Economic Sanctions and International Law*, Hart, 2016, at 61; Pierre-Emmanuel Dupont, “Unilateral European Sanctions as Countermeasures: The Case of the EU Measures Against Iran”, in Matthew Happold and Paul Eden, *Economic Sanctions and International Law*, Hart, 2016, at 70-78; Natalino Ronzitti, “Sanctions as Instruments of Coercive Diplomacy”, in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, Brill, 2016, at 10-14; Alexander Orakhelashvili, “The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria”, in Ali Z. Marossi and Marisa R. Bassett, *Economic Sanctions under International Law*, Springer, 2015, at 16-19.

¹²⁶ Report of the International Law Commission on the Work of its Fifty-third Session (2001), Yearbook of the UN International Law Commission, vol. 2, at 75, para 3 U.N. Doc. A/CN.4/SER.A/2001/Add.1 (part 2).

¹²⁷ *Ibid*, at 123, para 3.

¹²⁸ Malcom N. Shaw, *International Law*, Cambridge University Press, 2008, at 1128.

¹²⁹ Pierre-Emmanuel Dupont, “Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran”, *Journal of Conflict & Security Law*, 2012, Vol. 17 No. 3, at 312.

of, for instance, the provision of arms to a country involved in a security sector programme funded by the EU. However, this conclusion is true only with the adoption of a specific caveat. Although retorsion measures do not have to stand the test of necessity and proportionality, they nonetheless may become illegal if used for an illegal objective.¹³⁰ If one considers that the EU postulates that it upholds the use of autonomous sanctions in order to promote good governance or democracy, then the suspension of an assistance programme, which encompasses the provision of weapons, may be deemed as illegal as the EURM would be a coercive means employed with the objective of affecting a sovereign right of the target entity, and, thus, resulting in an intervention, or at least an interference, within the *domaine réservé* of the targeted State.¹³¹

An even more complex answer is warranted if the notion of countermeasure is used to classify EURMs. At the outset, it is useful to remind that international organizations are entitled to adopt countermeasures, as Article 22 of the Draft Articles on the Responsibility of International Organizations (DARIO) confirms.¹³² This is in line with the idea of decentralisation of the enforcement of fundamental norms, as opposed to the primacy and exclusivity of a centralized mechanism as the UNSC.¹³³ As anticipated, in contrast to retorsions, countermeasures represent a response to a previous unlawful conduct of a State or an international organization. In other terms, countermeasures are not a response to acts that are merely unfriendly as they entail the performance of an international wrongful act. Therefore, in order to avoid international responsibility when imposing EURMs which breach international obligations, the EU must be able to qualify the act as a countermeasure.¹³⁴ Speaking about the subjective assessment on the occurrence of a previous wrongful act in order to resort to countermeasures, Dupont, paraphrasing Gazzini, asserts, perhaps too emphatically, that “[i]t is

¹³⁰ Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, 1991, at 199.

¹³¹ In the context of countermeasures, Boisson De Chazournes, stated that “economic and political countermeasures may be illegal if they are aimed at coercing a State to subordinate the exercise of its sovereign rights or its independence”. If that is true for countermeasures, *a fortiori* must be equally true for retorsion. See Laurence Boisson De Chazournes, “Other non-Derogable Obligations”, in James Crawford et al, *The law of International Responsibility*, Oxford University Press, 2010, at 1211.

¹³² Articles on the Responsibility of International Organizations, UNGA Res 66/10, Annex, U.N. Doc A/RES/66/10/Annex (9 December 2011).

¹³³ For an historical survey on the issue see Martin Dawidowicz, “Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council”, *British Yearbook of International Law*, Volume 77, Issue 1, 2006, at 333–418.

¹³⁴ Antonios Tzanakopoulos, “Sanctions Imposed”, in Ali Z. Marossi and Marisa R. Bassett, *Economic Sanctions*, above n. 125, at 149.

uncontroversial that EU enforcement measures adopted independently from any mandatory or exhortatory Security Council resolution...can be resorted to only as a reaction to an internationally wrongful act”.¹³⁵

This process is underpinned by a number of substantive and procedural steps. First, the EU can take countermeasures only against a State/IO allegedly responsible for an internationally wrongful act. Given the nature of self-help of countermeasures, the EU does so at its own peril, depending on its own judgement as to the responsibility of the target State and, hence, risking incurring responsibility if its determination is found to be unfounded by a judicial body.¹³⁶ Second, the EU must qualify as “injured”¹³⁷: this may be the case in the event of a breached obligation owed to the EU as per Article 42(a) ASR; it can take the form of a breach of an *erga omnes* obligation¹³⁸ and, finally, it can be subsumed under the collective sphere provided by Article 42(b) ASR.¹³⁹ Third, the countermeasure must be directed against those responsible for the alleged internationally wrongful act and, fourth, with the intention to “induce the responsible state to comply with its international obligations”.¹⁴⁰ Fifth, countermeasures must comply with the principle of proportionality with the consequence that a disproportionate countermeasure may result in the responsibility of the party adopting it.¹⁴¹ As for the procedural conditions, Article 52(1) of the ASR provides that a State should usually first call upon the responsible State to fulfil its obligations and notify the target State of its intentions to adopt a countermeasure and offer to negotiate. Only the case of urgent countermeasures may derogate to these procedural steps.¹⁴²

¹³⁵ Pierre-Emmanuel Dupont, “Unilateral European Sanctions”, above n 125, at 80; T Gazzini, ‘The Normative Element Inherent in Economic Collective Enforcement Measures: United Nations and European Union Practice’ in Linos Alexander Sicilianos and Laura Picchio Forlati, *Les sanctions économiques en droit international/Economic sanctions in international law*, Leiden, Nijhoff, 2004, at 302.

¹³⁶ James Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, at 686.

¹³⁷ Article 49 ASR and Article 51 DARIO.

¹³⁸ Pierre-Emmanuel Dupont, “Countermeasures and Collective”, above 129, at 329; Marco Gestri, “Sanctions Imposed by the European Union: Legal and Institutional Aspects”, in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, above n 125, at 76.

¹³⁹ This hypothesis would occur if the EU qualify as a “specially affected” by the violation (Article 42(b)(i)) or if the violation changes radically the EU’s position with respect to the further performance of the obligation (Article 43(b)(ii)).

¹⁴⁰ International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, at 87.

¹⁴¹ James Crawford, *State Responsibility*, above n. 136, at 698.

¹⁴² James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, at 297

Both the substantive and procedural conditions put into question the practice of autonomous EURM. In particular, the link between obligations *erga omnes* and the injury suffered by the EU as a whole appears to be based on shaky foundations. The ICJ has so far admitted that non-directly injured parties are entitled to invoke the responsibility of the injuring one, but it has not admitted the possibility of taking direct action, *i.e.* countermeasures, by the same actors.¹⁴³ On the contrary, it has denied such a possibility.¹⁴⁴ In addition, the stated aim of the autonomous EURMs puts into question whether these measures are truly adopted in response to a breach of *erga omnes* obligations. If a reference to “respect for human rights” can supposedly be “beatified” and, thus, treated as an *erga omnes* obligation, it is at least debatable whether “respect for democracy, the rule of law and good governance” deserve the same status of human rights.¹⁴⁵ As Ruys argues, if, on the one hand, countermeasures adopted by non-injured parties would contribute to improving the rule of law as they raise the costs of non-compliance with international law, on the other, enforcement by action of a specific group of States bears the risk of leaving the enforcement of collective interests to powerful organizations acting on the basis of their understanding of international legality.¹⁴⁶ This point must be further explored also in light of the fact that EU autonomous measures can be qualified as a delegated third-party countermeasures, delegated inasmuch EU Member States act through the agency of the EU, but, in principle, each of them could adopt its own countermeasure.

The possibility of resorting to countermeasures even without qualifying as directly injured is still contentious.¹⁴⁷ Furthermore, the problem partly persists also thanks to the non-solution arising from the ILC, which has merely postponed the problem.¹⁴⁸ As observed by Dawidowicz, third-party countermeasures have been adopted in response to breaches of *erga omnes* obligations, mostly in the field of human rights.¹⁴⁹ However, none of the main human rights treaties provides for an explicit

¹⁴³For the possibility of invoking responsibility see International Court of Justice, *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)* [2012] ICJ Rep. 422, at 69;

¹⁴⁴ International Court of Justice, *Nicaragua*, at 249.

¹⁴⁵ Christian J. Tames speaks about beatification of *erga omnes* obligations, in Christian J. Tames, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, 2005, at 118.

¹⁴⁶ Tom Ruys, “Sanctions, Retortions”, above n. 112, at 47.

¹⁴⁷ Martin Dawidowicz, “Third-party countermeasures: A progressive development of international law?”, *QIL*, Zoom-in 29 (2016), at 4.

¹⁴⁸ Tom Ruys, “Sanctions, Retortions”, above n. 112, at 46.

¹⁴⁹ Martin Dawidowicz, *Third-Party Countermeasures in International Law*, Cambridge University Press, 2017, at 262.

conferral to third parties of the right to resort to countermeasures, yet “there is good reason to assume that human rights agreements implicitly grant each contracting State the right to respond to violations of the agreement by other States using any one of the entire range of ‘self-help’”, lest the establishment of simple natural obligations.¹⁵⁰ In its review of State practice, Dawidowicz also concludes that there exists a risk of abuse of these measures, as the content of many *erga omnes* human rights obligations is *nebulosus*.¹⁵¹ Despite his extensive and persuasive review, one cannot take the view that the issue of admissibility has been resolved, especially in light of the lack of practice from the South American States.¹⁵² Moreover, a rapid glance to the voting records of recent UNGA resolutions on the topic shows that there still exists a rift between States. This is certainly a rather superficial assessment, yet it is undeniably an indicator as to the contentiousness of the subject.¹⁵³

Furthermore, the risks of abuses, which lie not just in the simple adoption of countermeasures, but, perhaps, mostly with the abusive effects of these measures, calls for increased attention on the topic. In addition, even when taken as a response to previous breaches of peremptory human rights norms, the effect of unilateral measures on the same human rights is, to say the least, questionable.¹⁵⁴ One of the problems linked to unilateral measures is their potential of having extra-territorial effects, equating them *de facto*, with blockades.¹⁵⁵ It should not come as a surprise that some of these measures, such as the American Helm Burton Act, received an overwhelming condemnation in the UNGA, as 189 Member States expressed their concern on the “continued promulgation and application by Member States of laws and regulations...the extraterritorial effects of which affect the sovereignty of other

¹⁵⁰ Christian Hillgruber, “The Right of Third States to Take Countermeasures”, in Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules of The International Legal Order*, Martinus Nijhoff Publishers, 2006, at 273.

¹⁵¹ Martin Dawidowicz, *Third-Party*, above n 149, at 272.

¹⁵² Antonios Tzanakopoulos, “State Reactions to Illegal Sanctions”, in Matthew Happold and Paul Eden, *Economic Sanctions and International Law*, Hart, 2016, at 103.

¹⁵³ UNGA Resolution A/RES/71/193 was adopted by 133 votes to 54; UNGA Resolution A/RES/73/167 was adopted by 133 votes to 53, with 3 abstentions;

¹⁵⁴ See, for instance, UNGA Resolution A/RES/73/167, at para 1: “Urges all States to cease adopting or implementing any unilateral measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature, with all their extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights 18 and other international human rights instruments, in particular the right of individuals and peoples to development”

¹⁵⁵ Idriss Jazairy, “Unilateral Economic Sanctions, International Law, and Human Rights”, *Ethics & International Affairs*, Vol. 33, N.3, 2019, at 291.

States”.¹⁵⁶ And, although in a very politicized context such as the embargo against Cuba, the Austrian delegation, on behalf of the EU stated that: “[w]e have firmly and continuously opposed any such measures, owing to their extraterritorial impact on the European Union, in violation of commonly accepted rules of international trade”.¹⁵⁷

The intermediary case of EURMs that on the one hand, reflect UNSC sanctions and, on the other, provide for supplementary measures against the target brings about a different set of problems. For the part of the measure that coincides with the one adopted by the UNSC, the embargo imposed by the EURM does not prompt specific legal issues. At most, the EURM may even help to clarify the list of arms and weapons covered by the sanction. In contrast, the additional measures that supplement the original sanction trigger a deeper reflection. According to an approach initially proposed by Pellet, resort to countermeasures would be possible only in case the UNSC had not decided the application of sanctions. In other words, “[i]f the Security Council had decided on measures within the meaning of Articles 41 and 42, States were no longer free to decide as they wished on countermeasures of their own”.¹⁵⁸ The rationale of this thought stems from the primary role of the Security Council within a system of collective security. A system where Member States have delegated their individual power to the Security Council in order to better secure their collective interest in the maintenance of peace of security. It follows that it is up to the Security Council to determine the content of this collective interest in single instances and to make it operational in the context of a collective response, should it decide to do so.¹⁵⁹

In line with this rationale, which applies an analogy with Article 51 of the Charter, EURMs that go beyond what had been set by the UNSC would be illegitimate.¹⁶⁰ By the same token, this argument may impair the idea that the reference to the EU Common Military List is clarificatory. As has been shown, the wording of arms embargos established by the UNSC is not always consistent. Should a

¹⁵⁶ UNGA Resolution A/RES/73/8.

¹⁵⁷ UNGA, A/73/PV.30.

¹⁵⁸ Yearbook of the International Law Commission, Summary Records of the Meetings of the 44th Session, 1992, A/CN.4/SER.A/1992, at 144.

¹⁵⁹ Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford University Press, 2000, at 6.

¹⁶⁰ See also Domingo Acevedo, “The US Measures Against Argentina Resulting from the Malvinas Conflict”, 78 *American Journal of International Law*, 1984, 323, at 343–344.

UNSC sanction, for instance, only make reference to arms, but not to weapons or to any other major conventional arms, it is reasonable to question whether the reference to the entire EU Military List by the reflecting EURM creates an additional sanction in respect of the original UNSC's one. This argument is in line with Sicilianos' idea that, as soon as the UNSC decides upon a measure under Chapter VII, States – and in the case of the EUMS, the EU – become an agent for the execution of the sanction.¹⁶¹ This agency also implies that States not directly injured have a duty to suspend countermeasures already taken at the individual level if they differ or are inconsistent with the UNSC measures and, in any case, to harmonize them. He also adds that “[a] *fortiori*, the States in question should not adopt ‘collective’ countermeasures after the pronouncement of mandatory sanctions, but only measures which are necessary and sufficient for the execution of those mandatory sanctions”.¹⁶² All in all, the adoption of measures under Chapter VII signifies the end of the discretion of non-individually injured States to react at the individual level.

A different approach stems from the idea that the law of state responsibility continues to apply despite the exercise by the UNSC of its powers according to Chapter VII.¹⁶³ This interpretation notes that the Charter is silent on whether there would exist a limitation on its Member States to adopt countermeasures in case the UNSC had already acted and relies on certain State practice.¹⁶⁴ Put in the context of the EURM, this stance would render the supplementary measures adopted regionally fully compliant with literal provisions of the Charter. Nonetheless and despite the valuable State practice, this reading fails to identify the risks that a complete decentralization of the measures taken after a determination under Article 39 of the Charter brings about in terms of stability and, potentially, of peace and security. Permitting States and regional organizations to go beyond measures taken by the UNSC appears to be a less-than-satisfactory solution to fill a gap in the wording of the Charter, which could be, instead, met through an interpretation that values the role and the mandate of that body. If the

¹⁶¹ Linos-Alexandre Sicilianos, “Countermeasures in Response to Grave Violations of Obligations Owed to the International Community” in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett, *The Law of International Responsibility*, Oxford University Press, 2010, at 1142.

¹⁶² *Ibid.*, at 1142.

¹⁶³ Karel Wellens, “The UN Security Council and New Threats to the Peace: Back to the Future”, *Journal of Conflict and Security Law*, Vol. 8 No. 1, 2003, at 50.

¹⁶⁴ Jansen Calamita, “Sanctions, Countermeasures, and the Iranian Nuclear Issue”, *Vanderbilt Journal of Transnational Law*, Vol. 42 No. 5, 2009, at 1439.

primary purpose of the UN is to maintain peace and security and the Charter confers this role on the UNSC, then the very object and the purpose of the Charter may risk being frustrated if one is to admit the possibility of adopting countermeasures when the UNSC had already acted. Moreover, in the context of EU law, it must be also warranted that a literal reading of Article 21 TUE cannot but stress that the foreign policy of the Union in the field of peace maintenance, conflict prevention, and international security shall take place “in accordance with the purposes and principles of the United Nations Charter”. Commentators have stressed that this point refers in particular to Article 2(4) and Article 51 of the Charter and, as stated above, this latter Article constitutes the basis of the analogical interpretation of the illegality of restrictive measures imposed after a decision of the Security Council on the matter has been taken.¹⁶⁵

V.3.2 Imposition, monitoring and termination

The nature of EURM does not, of course, affect the procedure by which the measure is adopted. This factor is key to understanding the rationale adopted by the Court of Justice of the EU in its famous dicta on the autonomy of the EU legal order: even if the original source of a sanction stems from a decision of the UNSC, the adoption of the corresponding implementing measure by the EU gives rise to the right to judicial review of the EURMs.¹⁶⁶ In terms of procedure, in both the cases of autonomous and non-autonomous EURMs, the Council plays a central role since their adoption requires a Council Decision.

The whole process begins with a request that can come from any EUMS or the High Representative, aided by the European External Action Service. The proposal will then be discussed at the level of the Political and Security Committee (PSC) and, in addition, it will be discussed by the working party of the Council responsible for the geographical area to which the country concerned belongs.¹⁶⁷ Once the delegates have agreed by consensus on the set of steps to be implemented, the plan will be forwarded to the Foreign Relations Counselors Working Group (RELEX). RELEX is the

¹⁶⁵ Stefan Oeter, “Article 21”, in Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on European Union (TEU): A Commentary*, Springer, 2013, at 858.

¹⁶⁶ Case C-402/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

¹⁶⁷ Richard Gordon, *Sanctions Law*, above n. 43, at 40.

working party responsible for reviewing the overall planning and implementation of Council decisions in the realm of external action and focuses on all aspects of the CFSP including the administrative, legal, technical and financial sides.¹⁶⁸ Following the agreement at RELEX level, the proposal passes for approval to the Committee of Permanent Representatives II and from there to the Council, where it has to be adopted unanimously.¹⁶⁹ As observed by Gestri, at this stage the procedure can follow two different paths, depending on whether the EU has the competence to adopt operative measures.¹⁷⁰

For what concerns arms embargos, the procedure terminates with the adoption by the Council of the relevant decision, as the EU has no competence in the field of arms exports consistently with Article 346 TFUE, as already seen in the previous chapter. By contrast, for other measures, such as trade or financial freezes, that fall within the competence of the EU, the Council will adopt an implementing Regulation in order to operationalize the measures. Needless to highlight that the choice of a Regulation facilitates the uniform application within Europe of the EURM. Typically, these secondary measures are adopted at the same time, or shortly after, the adoption of the CFSP decision. Despite the different paths that the procedure follows in respect of the concrete EURM, the implementation of all EURM is delegated to each EUMS, who is then responsible for setting up monitoring mechanisms and penalties for those who violate the measures.

A distinction between autonomous and non-autonomous EURMs arises again with regard to termination. EURMs that follow a UNSC decision, should “be repealed with the minimum possible delay” when the UNSC decides to lift its own measures.¹⁷¹ If the UNSC measure expires on a particular date then the Guidelines clarify that the EU legal acts should not have an expiry date in order to cater for a possible extension of the measures at the UN level. In that case, the EURMs should be amended or repealed in accordance with the concrete determination of the UNSC.¹⁷² In the case of autonomous EURMs, the Council decision either sets a fixed date for the application of the measures or sets a review

¹⁶⁸ *Ibid.*, at 40.

¹⁶⁹ *Ibid.*, at 40.

¹⁷⁰ Marco Gestri, “Sanctions Imposed by the European Union”, above n. 138, at 83.

¹⁷¹ Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures, above n. 101, at point 45.

¹⁷² *Ibid.*, at point 44.

clause, meaning a period of validity of the measure, following which the measure can be terminated or extended.¹⁷³

V.3.3 Arms embargos as restrictive measures of sector-specific application and their judicial review

Arms are one of the many commodities that can be subject to embargo and that can be imposed against States, entities and individuals. A review of the autonomous arms embargos adopted by the EU highlights that no such measure has been adopted against individuals.¹⁷⁴ In fact, the Guidelines hint to the fact that targeted restrictive measures encompass in particular asset freezes and measures that target individuals and entities in their own rights.¹⁷⁵ In the light of this data, it is tenable to argue that arms embargos, even if potentially used against individuals, at present only constitute sector-specific measures, which resemble measures of general application. This feature makes their judicial review rather challenging, as the *Rosneft* and *Mellat* cases confirm.¹⁷⁶

In the former case, Rosneft, an oil and gas company established in Russia, challenged Decision 2014/512 and Regulation No 833/2014 adopted by the EU that provided for some export limitation to the oil sector in response to the actions of the Russian Federation against the territorial integrity and sovereignty of Ukraine.¹⁷⁷ The Court found that it lacked jurisdiction as the “measures do not target identified natural or legal persons, but are applicable generally to all operators involved in the sale, supply, transfer or export of certain technologies” and that “do not constitute restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU, but rather measures of general application”, thus, confirming that measures of general application, as sectoral measures, are taken according to the first paragraph of Article 275 TFEU, which excludes the Court jurisdiction on the matter.¹⁷⁸

¹⁷³ *Ibid*, at points 91 and 92. For concrete examples see, for instance, Council of the European Union, Council Common Position 2004/661/CFSP of 24 September 2004 concerning restrictive measures against certain officials of Belarus; Council of the European Union, Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

¹⁷⁴ See www.sanctionmap.eu.

¹⁷⁵ Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures, above n. 101, at point 16.

¹⁷⁶ Case C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and Others; C-430/16 P Bank Mellat v Council of the European Union.

¹⁷⁷ Case C-72/15 PJSC Rosneft, at 29.

¹⁷⁸ *Ibid*, at points 97, 98, and 99.

A similar conclusion was reached in the latter case: Bank Mellat, an Iranian commercial bank, moved a claim against its inclusion in Annex II to Council Decision 2010/413/CFSP concerning restrictive measures against Iran. These measures, implementing UNSC resolutions, imposed a freeze on the bank's funds and economic resources, as it was deemed that the bank was involved in the Iranian nuclear proliferation plans. Also in this case, the Court reached the conclusion that "sector-specific restrictive measures, in so far as they apply generally to all banks and financial institutions ...are of a very different nature than the individual fund and asset freezing measures...In that regard, it is necessary to recall that restrictive measures of general application, such as the sector-specific measures in question, do not target identified natural or legal persons...".¹⁷⁹

V.4. Other Regional Sanctions - OSCE

For the sake of completeness, the existence of one arms embargo, of voluntary nature, imposed by the OSCE in 1992 in response to the situation in Nagorno-Karabakh must be reported. The relevant provision states that the OSCE "requests that all participating States and all states in the region impose an immediate embargo on all deliveries of weapons and munitions to forces engaged in combat in the Nagorno-Karabakh area...".¹⁸⁰ A literal analysis of the clause highlights, besides the voluntary nature of the embargo emphasized by the term "request", that the embargo is targeted against State and NSAs operating in the geographical space of the Nagorno-Karabakh. In addition, it also requests from States that are not a party to the OSCE to implement the embargo, which mentions "all deliveries of weapons and munitions", without, however, referencing any specific weapons and/or military list. The indeterminacy of the items included in the embargo resembles the wording adopted by the UNSC.

V.5 Conclusion

Arms embargoes have been adopted by the United Nations, as well as by regional organizations and EU Member States, for reasons ranging from resolving hostilities, negotiating peace settlements, enforcing peace agreements, and respecting human rights.¹⁸¹ They have also been used as a tool to

¹⁷⁹ C-430/16 P Bank Mellat, at points 54, 55, and 56.

¹⁸⁰ Committee of Senior Officials, Journal No. 2, Annex 1, Seventh Committee on Senior Officials meeting, Prague, 27-28 February 1992.

¹⁸¹ Jeremy Matam Farrall, *United Nations Sanctions*, above n 129, at 133-139.

support counterterrorism, to support democracy and to counter nuclear proliferation.¹⁸² All these instances are, therefore, encompassed by the notion of “threat to the peace” as per Article 39 of the Charter. Within the limits described, the discretion of the UNSC to decide what constitutes a threat to the peace means that the mentioned cases are only illustrative and do not exhaust the potentially endless *de facto* situations that may be regarded as threatening peace and security. By the same token, Article 41 grants the United Nations Security Council the elasticity to decide what type of measure to adopt and, in this regard, arms embargos are only one of the instruments at its disposal. Furthermore, the UNSC has a broad discretion to decide against which States, NSAs and individuals to apply sanctions.

UN practice shows that this freedom has resulted in resolutions whose wordings have changed over time. The practice has shown that UN arms embargos can be directed to States as well as to NSAs; they can encompass a wide variety of arms and weapons or be limited solely to major weapons. They can be targeted to regions, such as regions where NSAs operates, or to the entire territory of a State. Although the degree of consistency amongst resolutions has improved, the lack of any reference to lists or to categories of arms, such as those of the ATT, makes sanctions prone to interpretative problems, with possible manifold consequences. Firstly, EURMs that simply implement UNSC sanctions risks going beyond what the UNSC proscribed, as arms embargos established by EURMs cover the entire EU Military List. And, from the wording of some UNSC sanctions, it is sometimes apparent that the arms embargo is limited to certain arms or weapons and, therefore, is not intended to cover the entire spectrum of items included in the EU Military List.¹⁸³ As a result, it is questionable, at least theoretically, whether there truly exist fully non-autonomous EURMs, and, moreover, whether the supplementary part of the EURM may be entirely legitimate. On this, although it is still subject to debate, part of the literature argues that as soon as measures are adopted by the UNSC, resort to autonomous countermeasures is no longer a viable option. Thus, the part of the EURM that does not coincide with

¹⁸² Sue E. Eckert, “The Evolution and Effectiveness of UN Targeted Sanctions”, above n.1, at 63.

¹⁸³ See for instance UNSC Resolution 1718, where the focus is clearly on major weapons and not on small arms and light weapons. This resolution was firstly amended in 2009, allowing the export to the Democratic Republic of North Korea of small arms and light weapon, subject to notification to the relevant committee. It was further amended in 2016 by means of UNSC Resolution 2270, in order to include in the embargo small arms and light weapons. Another example is UNSC Resolution 1493, where the wording is restricted to arms and related material, possibly excluding major weapons from the embargo.

the UNSC sanction may be unlawful. Secondly, it must be remembered that the presence of a UNSC arms embargo is one of the main criteria used to determine the legality of a transfer of arms under both the ATT and Council Common Position 944.¹⁸⁴ Hence, the lack of clarity in the wording can play a role in undermining the enforcement of the embargo.

Besides implementing UNSC arms embargos, the EU also implements restrictive measures on its own initiative against States that are not EUMS. In legal terms, these measures can amount either to retorsions, which are merely unfriendly acts, or to countermeasures and their adoption assume that the EU can qualify itself as a party injured by the conduct of the target of the countermeasures, or to third-party countermeasures. However, in the former case, it is questionable whether, in fact, the EU could claim to have been injured by the target party. In the latter case, it is also questionable whether the EU could act on the basis of the concept of third-part countermeasures: not only are third-party countermeasures still contentious, but also the indeterminacy of the substance of human rights, or at least some of them, makes it difficult to treat them not just as *erga omnes partes* but as *erga omnes* and, thus, of a customary nature. This tension is exacerbated by the stated aim of the EURMs, such as good governance and rule of law, which certainly do not amount to *erga omnes* obligations. The issue of third-party countermeasures is to be followed very closely: although EU restrictive measures are not adopted with extra-territorial effect, their use is debatable in light of the detrimental effects that they may have on the same rights that they wish to safeguard.

¹⁸⁴ See above at IV.2.2.

Conclusion

This research has investigated the provision of arms and weapons by the EU Member States to parties involved in civil wars with the stated aim of answering the question “to whom EU Member States can legally provide arms and weapons during a civil war”. Taken in a vacuum, third States are confronted with three theoretical options vis-à-vis the parties involved in civil wars: abstaining from supporting any of them; providing support to the legitimate government; and providing support to opposition forces. The choice of supporting one of these parties follows political, economic, but also legal considerations and, for the EU Member States, these latter arise from international, European, and domestic laws. In order to understand the legality of such support, this study had to consider the applicable norms of all the three bodies of rules.

A very preliminary assessment shows that there is no positive indication about the existence of an explicit prohibition to provide arms neither to the legitimate government nor to its opposing forces. In other words, existing treaties, regional instruments, and domestic legislations do not shed light *prima facie* on who is legally endowed to receive the arms. The examination departed by adopting the broadest lens, that of general international law. This was indeed the aim of Chapter II. Its point of departure is the acknowledgement that every State has the right to arm itself, as a consequence of its sovereign prerogatives. This is true in peacetime, but the question must be answered for times of civil war. Although part of the literature argued that third States should provide assistance to neither of the fighting parties, the dominant approach, according to which States are entitled to receive arms and weapons from third States, still holds true. The analysed practice confirmed this point. Not only did States openly remarked that providing arms to the legitimate government was fully legal under international law, but also those that provided support to the rebels did not contest the legality of the provision to the government. The Syrian case study has, in this respect, shown that the support given by Russia to the legitimate government was not legally contested by the other States, and was defined as legally compliant with international law by Russia. The same can be said in relation to the Yemeni case, where the issues of the Saudi-led intervention are linked to the *quomodo* and not to the *an*. In other words, the

discussion around the intervention upon request centres around the ways and means, and not around the legality of the intervention itself.

In contrast, providing arms to rebels is still regarded as contrary to the principle of non-intervention, with the possible exception of counter-intervention when the conflict is of high-intensity and the adoption of third-party countermeasures in specific instances. On the high-intensity conflict, the intervention in support of the opposition forces rests on the assumption that the conflict reached – and perhaps broke – such a threshold where one cannot presume that the legitimate government speaks for the State. In this case, a prior intervention in favour of the probably less-than-fully legitimate government can be interpreted as an intervention against the political independence of the State and of the *sui generis* self-determination of the opposition forces. While this may be sound reasoning, there is a lack of *opinio iuris* on this position and the Syrian case aptly proves this. The most acute phase of the Syrian conflict, when Syria was controlled by different groups, reasonably represents a high-intensity conflict. If one is to take the opposing view, the question that, therefore, arises is what could truly constitute a high-intensity conflict. Yet, the States that supported the opposition forces did not rely on counter-intervention when they provided arms to opposition forces but rather depicted the government as lacking legitimacy.

With regard to third-party countermeasures, the hypothesis rests on the assumption that third States are legally entitled to resort to measures in response to a previous violation of *erga omnes* (including *erga omnes partes*) obligations. Translated into an example, opposition forces would be entitled to receive support to fight a legitimate government that commits genocide during a civil war, or human rights violations in case the State is party to the relevant treaties. This may be legally tenable, and it seems that a division between *erga omnes* obligations and *erga omnes partes* may be apt. In the former case, it seems tenable to say that States anticipate the breach of *erga omnes* obligations. The Libyan and Syrian cases can be taken as examples. In both cases, the legitimate government applied, perhaps more in the Syrian case, extreme violence, yet the States that materially supported the rebels did not argue that they were acting in response to the government failing its *erga omnes* obligations. The option of third-party countermeasure in response to an *erga omnes partes* obligation seems to be a more robust reasoning as the State practice, although inconclusive, displayed recurrent statements about

massacres and, hence, of widespread violations of human rights. In fact, in both cases, it seems that States resorted to an argument that relied on the lack of legitimacy, which, in turn, is linked to Syrian and Libyan governments applying violence on their own population.

It is apparent that the fulcrum of this scheme lies within the concept of recognition and its link with the criterion of legitimacy. State practice has highlighted that the traditional concept of effectiveness is coupled with that of legitimacy. In other words, control of the territory appears not to be sufficient in itself and, at least for the UK, France, the US, and Italy, must be accompanied with legitimacy. In this respect, recognition may resemble an hourglass and as the top part empties itself, the down part fills up. Whereas the *de jure* authority loses effectiveness, the rebels gain broader control. Applying severe violence on the population may contribute to the sand flowing down quicker in the hourglass. And, taken from the opposite perspective, the sand that collects in the bottom may prompt third States to recognise the changing environment. The Libyan and Syrian case studies are, on this point, consistent with Talmon's examination of the different degrees of recognition of governments.¹ The first stage of the recognition is bestowing the group as being "a" representative of the people. As the sand accumulates, this "a" becomes "sole" and eventually the recognition moves from *de jure* to *de facto*. The image of the hourglass also helps in understanding the flow of arms. As soon as some sand had deposited on the bottom part so as to prompt third States to recognise its presence, the provision of arms seems to be facilitated. This point must be further clarified: the research cannot univocally affirm that there is a causal relationship between the *de facto* recognition and the provision of arms. In the absence of a univocal indication on this point, as the provision of arms from the US occurred before the *de facto* recognition, a more prudent approach is warranted. Nonetheless, one can affirm that there seems to be at least a certain degree of correlation, as the study has shown that from a chronological perspective the provisions of arms from France followed the recognition of the rebels as a *de facto* authority both in Syria and Libya. The same can be stated for the UK in the Syrian case. Italy, although it did not openly provide arms, did not fully exclude it in the Libyan case, after having *de facto* recognised the NTC.

¹ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 2001, at 60.

States that decide to provide arms to rebels do not seem to consider their treaty obligations in their initial decision to pursue this policy: no such indication emerges in relation to France for both Libya and Syria, and the UK for Syria. This must be further clarified vis-à-vis both the case studies. The ATT, examined in Chapter III, entered into force at the end of 2014 and, therefore, the position taken by States in the first period of the wars in Libya and Syria cannot be taken as a yardstick for an overall assessment of the treaty. Nevertheless, even when the treaty came into force the obligations under its Articles 6 and 7, which are arguably the most significant achievement of the ATT, have received little attention from the exporting EU Member States. More precisely, the legality of the support to the rebels in Syria was not gauged vis-à-vis the criteria of the treaty. These, in contrast, form part of the legality assessment only when the legality of further supplies is debated, particularly in light of blunt violations of IHL, as in the Yemeni case. At present, therefore, it seems that States do not employ them as a means to comprehensively assess the legality of the initial arms supply.

The same remark is valid for the criteria listed in Council Common Position 944, which Chapter IV accounts for. The examined practice in Chapter II reveals that EU Member States, in deciding whether to start providing any of the parties with arms, do not explicitly recall the parameters of legality enshrined in the Position. This binding secondary legislation provides for criteria that are similar but go even further, those of the ATT. It is, therefore, surprising that EU Member States disregard that their supplies may *ab initio* “provoke or prolong armed conflicts or aggravate existing tensions”. Furthermore, since the EU Member States are bound by the same criteria on arms exports, one can claim that there should exist a *de minimis* approach common to all the 28 EU Member States. If this is true in theory, the practice does not seem to reflect the theory as individual EU Member States apply the criteria in different ways, also in light of the exclusive competence conferred to the matter by Article 346 TFEU. As a result, one cannot argue that Europe speaks with one voice: whereas some EU Member States are more rigid in their export assessment, others, despite the existence of authoritative proofs about IHL and human rights violations, are more relaxed. Chapter IV highlighted these inconsistencies by examining the Saudi Arabia case. Despite growing evidence of IHL violations by the coalition led by Riyadh, not all EU Member States have halted their provisions. Whereas some States, such as Finland, Denmark, and Germany, decided to stop their arms export to Saudi Arabia, others, such as

France and the UK, continued their exports. Two aspects are worth being noted. First, domestic legislations of some EU Member States are particularly emphatic on the criterion linked to the respect of human rights, such as Germany, and this may have influenced the decision to stop the export after the killing of the journalist Khashoggi. Second, the UK did, in fact, discontinue its arms export, but solely as a result of a Court case which deemed that the process for licence authorization was ‘irrational’, as it did not consider previous violations of IHL as a sign of the risk of future violations.

The application of different standards at the national level on the same EU law criteria is highly problematic, especially given the EU legislation for intra-EU exports currently in force. As Chapter IV has shown, the authorization regime for these exports, defined by the ICT-Directive as transfers, raises questions in terms of compatibility of the secondary EU legislation with the obligations stemming from the ATT. The risk of legal conflict between EU and international norms was present already during the negotiations of the ATT and was eventually dismissed by the Commission. On the basis of Article 26 of the ATT, the Commission suggested to the Council to proceed with authorizing the EU Member States to sign and ratify the treaty. However, the argument adopted is not fully convincing as Article 26 of the ATT explicitly reads that the competing obligation of the States party to the treaty cannot impair the implementation of the treaty. Even if the judicial review cannot be possible, as the EU is not party to the ATT, EU law cannot disregard the international obligations of all its Member States and the solution may rest in considering the ICT-Directive as a domestic law for the purposes of resolving the conflict between the treaty and the secondary legislation of the EU. The different standards applied by the EU Member States coupled with the facilitated regime for intra-EU transfers have practical application that must be considered. One cannot but reflect about the risk that such a combination may foster forum shopping and encourage exporters to exploit the differences in the system by exporting from countries where the controls are known to be more relaxed. The example of Italy is telling. In the Yemeni case, Chapter IV reported that the Italian assessment for arms exports also considers economic motives. There is, therefore, no compelling reason, from the point of view of the arms industry, not to take advantage of this fact and the problem can be only emphasised in light of the increased integration of the European defence industry.

Both the ATT and Council Position 944 set that the export shall not be authorized if it is inconsistent with the obligations stemming from the application of arms embargos. Chapter V recalled that this type of sanction was already employed under the League of Nations against Italy. While under the League of Nations the decision on the application of sanctions was left to the discretion of each Member State, the Charter adopted a centralized approach and bestowed the UNSC with such power. The Chapter then analysed the limits and the procedure that the UNSC should follow when it adopts these measures. In terms of arms embargos, the Chapter has evidenced that the wording of the resolutions establishing such sanction has not always been consistent: the UNSC has adopted different formulations such as “all arms and related material including weapons”, but also “arms and related material of all type” without the inclusion of “weapons”. This may potentially create interpretive problems in relation to the measures adopted by the EU. The regional organization always reflects in its own legal acts the sanctions imposed by the UNSC, yet the EU arms embargos encompass all the items included in the EU Military List and, as a result, it is uncertain whether the measures may go further than the ones adopted by the UNSC. The activity of the EU in the field of restrictive measures is not limited to replicating the sanctions adopted by the UNSC. It also applies its own restrictive measures independently from the UNSC and there are legal problems surrounding these autonomous measures. These legal problems arise from the qualification of the EU restrictive measures as countermeasures. In particular, the Chapter highlighted the tension between qualifying the EU as an injured party and the stated aim of the EU restrictive measures. Moreover, not only is it doubtful whether the substantial conditions are met, but there are also concerns surrounding the procedural steps that must be taken prior to the adoption of countermeasures. Alternatively, the Chapter showed that one could qualify the EU restrictive measures as third-party countermeasures. Whereas there is growing evidence of the use of such measures, they are not without controversies, as the decentralization of sanctions and their detachment from the UNSC are making them more prone to abuses.

Having surveyed the main contributions of this study, one is also in the position of responding to the research questions that guided the dissertation and, specifically, to whom the EU Member States can provide arms during a civil conflict. Subject to the caveats highlighted throughout the chapters, in the absence of a UN sanction or an EU or OSCE restrictive measure, EU Member States can provide

legitimate governments that respect international law and do not support terrorism with all arms that are not banned by treaty, after having assessed that the arms would not undermine peace and security, would not be used to commit serious IHL and human rights violations as well as serious acts of gender-based violence or violence against women and children, and, in general, provoke or prolong armed conflicts or aggravate existing tensions or conflicts. In the exceptional cases where providing arms to rebels may be legally sustained, such as the case of counter-intervention and third-party countermeasures, the same remark is valid, with the additional caveat that EU Member States shall not provide them with MANPADs, as EU Member States have agreed in the context of OSCE and Wassenaar to restrict their export solely to States, and these commitments are considered by Criterion one of Council Common Position 944.

Appendix I – Domestic Legislation: Selected Articles

Country	Provision in the original language or in the translation in English/French provided by the authorities	Unofficial translation
Austria	<p>2. Hauptstück Genehmigungskriterien</p> <p>Allgemeine Grundsätze</p> <p>§ 3. (1) Bei Erteilung von Genehmigungen aufgrund dieses Bundesgesetzes oder aufgrund von unmittelbar anwendbarem Recht der Europäischen Union im Sinne von § 1 Abs. 1 Z 24 lit. a oder b für Vorgänge im Sinne von § 1 Abs. 1 Z 10 lit. a sind die Auswirkungen des konkreten Vorgangs im Hinblick auf die in den §§ 4 bis 12 genannten Kriterien eingehend zu prüfen und es ist zu beurteilen, ob Verweigerungsgründe vorliegen. Bei dieser Prüfung ist insbesondere Folgendes zu beachten:</p> <ol style="list-style-type: none"> 1. Art und Menge der betroffenen Güter oder Art und Umfang des betroffenen technischen Wissens; 2. das vorgesehene Bestimmungsland, 3. der vorgesehene Endempfänger und 4. der vorgesehene Endverwendungszweck. <p>(2) Eine Genehmigung ist zu erteilen, wenn die Einhaltung der in den §§ 4 bis 12 genannten Kriterien, gegebenenfalls durch geeignete Auflagen gemäß § 54, gewährleistet ist.</p> <p>(3) Eine Genehmigung gemäß Abs. 1 ist überdies nur zu erteilen, wenn der Antragsteller eine Bewilligung zur Ausübung der Erwerbstätigkeit besitzt, in deren Rahmen der beantragte Vorgang durchgeführt werden soll, sofern eine</p>	<p>2nd main piece approval criteria</p> <p>General principles</p> <p>§ 3. (1) Upon granting of licenses on the basis of this Federal Act or on the basis of directly applicable law of the European Union within the meaning of § 1 para 1 no. 24 lit. a or b for transactions within the meaning of section 1 (1) no. 10 lit. a the effects of the specific transaction with regard to the criteria set out in §§ 4 to 12 shall be examined in detail and it shall be assessed whether there are grounds for refusal. In particular, the following should be noted during this test:</p> <ol style="list-style-type: none"> 1. The nature and quantity of the goods concerned or the nature and extent of the technical knowledge involved; 2. the intended destination country, 3. the envisaged final recipient and 4. the intended end use. <p>(2) A license shall be granted if compliance with the criteria specified in Sections 4 to 12 is ensured, if necessary by means of appropriate conditions in accordance with Section 54.</p> <p>(3) In addition, an authorization in accordance with paragraph (1) shall only be granted if the applicant has a license to perform the occupation in which the requested application is to be carried out, if such authorization is required to carry out such work.</p>

	<p>solche Genehmigung zur Ausübung dieser Erwerbstätigkeit erforderlich ist.</p> <p>(4) Bei der Entscheidung über einen Antrag und der Vorschreibung von Auflagen ist zu berücksichtigen, inwieweit Maßnahmen gemäß § 49 erforderlich und bereits getroffen worden sind.</p> <p>§ 4 Text</p> <p>Einhaltung der internationalen Verpflichtungen</p> <p>§ 4. Eine Genehmigung ist zu verweigern, wenn der Vorgang im Widerspruch zu den Verpflichtungen Österreichs aufgrund von Rechtsvorschriften der Europäischen Union oder anderer völkerrechtlicher Regelungen, insbesondere Verpflichtungen zur Durchführung von restriktiven Maßnahmen oder zur Durchführung von Übereinkommen im Bereich der Rüstungskontrolle und der Kontrolle des Technologietransfers, stehen würde.</p> <p>§ 5 Text</p> <p>Einhaltung der internationalen Mechanismen zur Kontrolle von Waffenausfuhren</p> <p>§ 5. (1) Eine Genehmigung ist zu erteilen, wenn kein begründeter Verdacht besteht, dass die Güter ganz oder teilweise zum Zweck der Entwicklung, der Herstellung, der Handhabung, des Betriebs, der Wartung oder der sonstigen Instandhaltung, der Lagerung, der Ortung, der Identifizierung, der Prüfung oder der Verbreitung von chemischen oder biologischen Waffen, von Kernwaffen oder sonstigen Kernsprengkörpern oder zum Zweck der Entwicklung, der Herstellung, der Wartung oder der sonstigen Instandhaltung, der Prüfung, der Lagerung oder der Verbreitung von Flugkörpern und anderen</p>	<p>(4) When deciding on an application and prescribing conditions, it must be taken into account to what extent measures pursuant to § 49 have been required and have already been taken.</p> <p>§ 4 Text</p> <p>Compliance with international obligations</p> <p>§ 4. Authorization shall be refused if the operation conflicts with Austria's obligations under European Union legislation or other international law, in particular obligations to implement restrictive measures or to implement arms control and technology transfer control agreements , would stand.</p> <p>§ 5 Text</p> <p>Compliance with international arms export control mechanisms</p> <p>§ 5. (1) A license shall be granted if there is no reasonable suspicion that the goods are wholly or partly for the purpose of development, manufacture, handling, operation, maintenance or other maintenance, storage, location the identification, testing or dissemination of chemical or biological weapons, nuclear weapons or other nuclear explosive devices or for the purpose of the development, manufacture, maintenance or other maintenance, testing, storage or distribution of missiles and other carrier systems for: such weapons would be used.</p> <p>(2) When assessing the condition referred to in subsection (1), particular consideration shall be given to:</p> <p>1. the commitment of the country of destination in the field of non-proliferation and in other areas of arms control and disarmament,</p>
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	<p>Trägersystemen für derartige Waffen verwendet werden würden.</p> <p>(2) Bei Beurteilung der in Abs. 1 genannten Voraussetzung sind insbesondere zu berücksichtigen:</p> <ol style="list-style-type: none"> 1. das Engagement des Bestimmungslandes im Bereich der Nichtverbreitung und in anderen Bereichen der Rüstungskontrolle und Abrüstung, 2. die Unterzeichnung, Ratifizierung und Durchführung der einschlägigen Rüstungskontroll- und Abrüstungsübereinkommen durch dieses Land, 3. die Teilnahme dieses Landes an internationalen Mechanismen zur Kontrolle von Waffenausfuhren. <p>§ 6 Text</p> <p>Achtung der Menschenrechte und des humanitären Völkerrechts</p> <p>§ 6. (1) Eine Genehmigung ist zu erteilen, wenn kein eindeutiges Risiko besteht, dass die Güter zu interner Repression, zu schwerwiegenden Menschenrechtsverletzungen oder zu schwerwiegenden Verletzungen des humanitären Völkerrechts verwendet werden könnten.</p> <p>(2) Bei Beurteilung der in Abs. 1 genannten Voraussetzung sind insbesondere zu berücksichtigen:</p> <ol style="list-style-type: none"> 1. die Haltung des Bestimmungslandes und des konkreten Endverwenders zu den einschlägigen Grundsätzen der internationalen Menschenrechtsinstrumente, 2. die Einhaltung der Übereinkünfte und sonstigen Bestimmungen des humanitären Völkerrechts durch das Bestimmungsland und den konkreten Endverwender, 	<ol style="list-style-type: none"> 2. the signature, ratification and implementation of the relevant arms control and disarmament agreements by that country; 3. the participation of this country in international mechanisms for the control of arms exports. <p>§ 6 Text</p> <p>Respect for human rights and international humanitarian law</p> <p>§ 6. (1) A license shall be granted where there is no clear risk that the items could be used for internal repression, serious human rights violations or serious violations of international humanitarian law.</p> <p>(2) When assessing the condition referred to in subsection (1), particular consideration shall be given to:</p> <ol style="list-style-type: none"> 1. the attitude of the country of destination and the actual end-user to the relevant principles of international human rights instruments; 2. compliance by the country of destination and the actual end user with the conventions and other provisions of international humanitarian law, 3. the particular risk of injury within the meaning of paragraph (1) in the case of serious human rights violations in the country of destination, 4. the type of goods for which approval is requested, 5. the fact that the goods are intended for internal security purposes, 6. the particular risk of injury as defined in (3) if the goods have already been used for internal repression by the specified end-user in this or similar form. <p>(3) Internal repression includes, among other things:</p>
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	<p>3. die besondere Gefahr von Verletzungen im Sinne von Abs. 1 im Fall festgestellter schwerwiegender Menschenrechtsverletzungen im Bestimmungsland,</p> <p>4. die Art der Güter, für die die Genehmigung beantragt wird,</p> <p>5. der Umstand, ob die Güter für Zwecke der inneren Sicherheit bestimmt sind,</p> <p>6. die besondere Gefahr von Verletzungen im Sinne von Abs. 3, wenn die Güter vom angegebenen Endverwender in dieser oder ähnlicher Form schon zur internen Repression benutzt worden sind.</p> <p>(3) Interne Repression umfasst unter anderem:</p> <p>1. Folter und andere grausame, unmenschliche und erniedrigende Behandlung oder Strafe,</p> <p>2. willkürliche oder Schnell-Hinrichtungen,</p> <p>3. das Verschwinden lassen von Personen,</p> <p>4. willkürliche Verhaftungen,</p> <p>5. andere schwere Verletzungen der Menschenrechte und Grundfreiheiten, wie sie in den einschlägigen Menschenrechtsinstrumenten, einschließlich der Allgemeinen Erklärung der Menschenrechte und des Internationalen Pakts über bürgerliche und politische Rechte, niedergelegt sind.</p> <p>§ 7 Text</p> <p>Auswirkungen auf die innere Lage im Bestimmungsland</p> <p>§ 7. (1) Eine Genehmigung ist zu erteilen, wenn kein begründeter Verdacht besteht, dass die Güter im Bestimmungsland bewaffnete Konflikte auslösen oder</p>	<p>1. Torture and other cruel, inhuman and degrading treatment or punishment,</p> <p>2. arbitrary or quick executions,</p> <p>3. the disappearance of persons,</p> <p>4 arbitrary arrests,</p> <p>5. other serious violations of human rights and fundamental freedoms, as laid down in relevant human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.</p> <p>§ 7 Text</p> <p>Effects on the internal situation in the country of destination</p> <p>§ 7. (1) A license shall be granted if there is no reasonable suspicion that the goods in the country of destination would trigger or prolong armed conflicts or aggravate existing tensions or conflicts.</p> <p>(2) When assessing the prerequisites pursuant to (1), in particular the internal situation in the country of destination shall be examined in detail with regard to existing or impending tensions or conflicts.</p> <p>§ 8 Text</p> <p>Maintaining peace, security and regional stability</p> <p>§ 8. (1) A license shall be granted if there is no clear risk that the specified consignee will use the goods for the purpose of aggression against another country or for the purpose of enforcing a territorial claim or in another way safeguard the security interests of another country or the Could endanger stability in the region.</p> <p>(2) When assessing the conditions specified in subsection (1), particular account shall be taken of:</p>
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	<p>verlängern würden oder bestehende Spannungen oder Konflikte verschärfen würden.</p> <p>(2) Bei Beurteilung der Voraussetzungen gemäß Abs. 1 ist insbesondere die innere Lage im Bestimmungsland im Hinblick auf bestehende oder drohende Spannungen oder Konflikte eingehend zu prüfen.</p> <p>§ 8 Text</p> <p>Aufrechterhaltung von Frieden, Sicherheit und regionaler Stabilität</p> <p>§ 8. (1) Eine Genehmigung ist zu erteilen, wenn kein eindeutiges Risiko besteht, dass der angegebene Empfänger die Güter zum Zwecke der Aggression gegen ein anderes Land oder zur gewaltsamen Durchsetzung eines Gebietsanspruchs benutzen oder auf andere Weise die Sicherheitsinteressen eines anderen Landes oder die Stabilität in der Region gefährden könnte.</p> <p>(2) Bei der Beurteilung der in Abs. 1 genannten Voraussetzungen sind insbesondere zu berücksichtigen:</p> <ol style="list-style-type: none"> 1. das Bestehen oder die Wahrscheinlichkeit eines bewaffneten Konflikts zwischen dem Bestimmungsland und einem anderen Land, 2. Ansprüche auf das Hoheitsgebiet eines Nachbarlandes, deren gewaltsame Durchsetzung das Bestimmungsland in der Vergangenheit versucht oder angedroht hat, 3. die Wahrscheinlichkeit, dass die Güter zu anderen Zwecken als für die legitime nationale Sicherheit und Verteidigung des Bestimmungslandes verwendet werden, 	<ol style="list-style-type: none"> 1. the existence or likelihood of an armed conflict between the country of destination and another country, 2. Claims to the territory of a neighboring country whose enforcement by force has been attempted or threatened by the country of destination in the past, 3. the likelihood that the goods will be used for purposes other than legitimate national security and defense of the country of destination; 4. compliance with international obligations with regard to the non-use of force by the country of destination; 5. the danger that regional stability could be significantly impaired. <p>§ 9 Text</p> <p>Impact on the security interests and foreign relations of Austria and on the security interests of other EU Member States</p> <p>§ 9. (1) A license shall be granted if there are no reasonable grounds for suspecting that the operation would violate the security interests of Austria or other EU Member States or that Austria's foreign relations would be significantly disturbed.</p> <p>(2) When assessing the conditions set out in paragraph 1, particular consideration shall be given to:</p> <ol style="list-style-type: none"> 1. the potential impact of the operation on the defense and security interests of Austria and the other EU Member States, 2. the risk that the goods against the forces of Austria and other EU Member States are used, and 3. the impact of the operation on Austria's external relations, including its participation in international mechanisms for the control of arms exports.
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	<p>4. die Einhaltung der internationalen Verpflichtungen im Hinblick auf die Nichtanwendung von Gewalt durch das Bestimmungsland,</p> <p>5. die Gefahr, dass die regionale Stabilität wesentlich beeinträchtigt werden könnte.</p> <p>§ 9 Text</p> <p>Auswirkungen auf die Sicherheitsinteressen und auswärtigen Beziehungen Österreichs und auf die Sicherheitsinteressen anderer EU-Mitgliedstaaten</p> <p>§ 9. (1) Eine Genehmigung ist zu erteilen, wenn kein begründeter Verdacht besteht, dass durch den Vorgang Sicherheitsinteressen Österreichs oder anderer EU-Mitgliedstaaten verletzt werden würden oder die auswärtigen Beziehungen Österreichs erheblich gestört werden würden.</p> <p>(2) Bei Beurteilung der in Abs. 1 genannten Voraussetzungen sind insbesondere zu berücksichtigen:</p> <ol style="list-style-type: none"> 1. die möglichen Auswirkungen des Vorgangs auf die Verteidigungs- und Sicherheitsinteressen Österreichs und der anderen EU-Mitgliedstaaten, 2. das Risiko, dass die Güter gegen die Streitkräfte Österreichs oder anderer EU-Mitgliedstaaten eingesetzt werden, und 3. die Auswirkungen des Vorgangs auf die auswärtigen Beziehungen Österreichs einschließlich seiner Teilnahme an internationalen Mechanismen zur Kontrolle von Waffenausfuhren. <p>§ 10 Text</p> <p>Auswirkungen im Hinblick auf terroristische Aktivitäten und die internationale Kriminalität</p>	<p>§ 10 Text</p> <p>Impacts on Terrorist Activities and International Crime</p> <p>§ 10. (1) A license shall be granted if there is no reasonable suspicion that the goods would be used to promote terrorism or international crime.</p> <p>(2) When assessing the conditions set out in paragraph 1, particular consideration shall be given to:</p> <ol style="list-style-type: none"> 1. the previous conduct of the country of destination towards the international community, the nature of the alliances it has entered into, and compliance with international law; 2. its attitude towards terrorism and whether it supports or promotes terrorism, 3. whether it supports or promotes international organized crime, 4. the past behavior of the specific end-user, including his attitude towards terrorism and international crime, and whether he supports or promotes terrorist or criminal activities. <p>§ 11 Text</p> <p>Danger of a deflection for undesired purposes</p> <p>§ 11. (1) A license shall be granted if there is no reasonable suspicion that the goods would be diverted to an end use which would contradict the criteria set out in §§ 4 to 10.</p> <p>2) When assessing the extent to which a diversion referred to in subsection (1)</p>
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	<p>§ 10. (1) Eine Genehmigung ist zu erteilen, wenn kein begründeter Verdacht besteht, dass die Güter zur Förderung des Terrorismus oder der internationalen Kriminalität verwendet werden würden.</p> <p>(2) Bei Beurteilung der in Abs. 1 genannten Voraussetzungen sind insbesondere zu berücksichtigen:</p> <ol style="list-style-type: none"> 1. das bisherige Verhalten des Bestimmungslandes gegenüber der internationalen Gemeinschaft, die Art der von ihm eingegangenen Bündnisse sowie die Einhaltung des Völkerrechts, 2. seine Haltung zum Terrorismus und der Umstand, ob es den Terrorismus unterstützt oder fördert, 3. der Umstand, ob es die internationale organisierte Kriminalität unterstützt oder fördert, 4. das bisherige Verhalten des konkreten Endverwenders einschließlich seiner Haltung zum Terrorismus und zur internationalen Kriminalität und des Umstandes, ob er terroristische oder kriminelle Aktivitäten unterstützt oder fördert. <p>§ 11 Text</p> <p>Gefahr einer Umlenkung zu unerwünschten Zwecken</p> <p>§ 11. (1) Eine Genehmigung ist zu erteilen, wenn kein begründeter Verdacht besteht, dass die Güter zu einer Endverwendung umgelenkt werden würden, die den in den §§ 4 bis 10 genannten Kriterien widersprechen würde.</p> <p>(2) Bei Beurteilung, inwieweit es zu einer in Abs. 1 genannten Umlenkung kommen könnte, sind insbesondere zu berücksichtigen:</p> <ol style="list-style-type: none"> 1. die legitimen Interessen der Verteidigung und der inneren Sicherheit 	<p>could arise, particular account shall be taken of:</p> <ol style="list-style-type: none"> 1. the legitimate interests of the defense and internal security of the country of destination, including participation in United Nations peacekeeping operations; 2. the technical capability of the country of destination to use the goods, 3. the ability of the country of destination to carry out effective export controls, 4. the risk that the goods in the country of destination are to be used for a use referred to in paragraph 1 or re-exported for such use from the country of destination; 5. the risk of goods being diverted for purposes of terrorism or international crime, 6 the risk of replication or unintentional technology transfer. <p>(3) In assessing the risk of unwanted re-export within the meaning of paragraph 2 (4), the previous compliance by the country of destination and the specific final recipient of re-export clauses or authorization requirements established by Austria and other EU Member States must be taken into account.</p> <p>§ 12 Text</p> <p>Permanent development</p> <p>§ 12. (1) A license shall be granted if there is no reasonable suspicion that the operation will seriously impair the sustainable development of the country of destination.</p> <p>(2) When assessing the condition referred to in subsection (1), particular consideration shall be given to:</p> <ol style="list-style-type: none"> 1. the fact that a state should use as few manpower and economic resources for
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	<p>des Bestimmungslandes einschließlich einer Beteiligung an friedenserhaltenden Maßnahmen der Vereinten Nationen,</p> <p>2. die technische Fähigkeit des Bestimmungslandes, die Güter zu benutzen,</p> <p>3. die Fähigkeit des Bestimmungslandes, wirksame Ausfuhrkontrollen durchzuführen,</p> <p>4. das Risiko, dass die Güter im Bestimmungsland einer in Abs. 1 erwähnten Verwendung zugeführt werden oder zu einer solchen Verwendung aus dem Bestimmungsland wiederausgeführt werden,</p> <p>5. das Risiko, dass die Güter zu Zwecken des Terrorismus oder der internationalen Kriminalität umgeleitet werden,</p> <p>6. die Gefahr eines Nachbaus oder eines unbeabsichtigten Technologietransfers.</p> <p>(3) Bei Beurteilung der Gefahr einer unerwünschten Wiederausfuhr im Sinne von Abs. 2 Z 4 sind insbesondere die bisherige Befolgung von Wiederausfuhrbestimmungen oder Genehmigungspflichten, die von Österreich und anderen EU-Mitgliedstaaten festgelegt wurden, durch das Bestimmungsland und den konkreten Endempfänger zu berücksichtigen.</p> <p>§ 12 Text</p> <p>Dauerhafte Entwicklung</p> <p>§ 12. (1) Eine Genehmigung ist zu erteilen, wenn kein begründeter Verdacht besteht, dass der Vorgang zu einer ernsthaften Beeinträchtigung der dauerhaften Entwicklung des Bestimmungslandes führt.</p> <p>(2) Bei Beurteilung der in Abs. 1 genannten Voraussetzung sind insbesondere zu berücksichtigen:</p>	<p>armaments as possible in fulfilling its legitimate security and defense needs;</p> <p>2. the technical and economic capacity of the country of destination,</p> <p>3. the proportion of armaments and social expenditure of the country of destination, taking into account any aid from the European Union or at bilateral level.</p>
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	<p>1. der Umstand, dass ein Staat bei Erfüllung seiner legitimen Sicherheits- und Verteidigungsbedürfnisse möglichst wenige Arbeitskräfte und wirtschaftliche Ressourcen für die Rüstung einsetzen sollte,</p> <p>2. die technische und wirtschaftliche Leistungsfähigkeit des Bestimmungslandes,</p> <p>3. der jeweilige Anteil der Rüstungs- und Sozialausgaben des Bestimmungslandes unter Berücksichtigung jedweder Hilfe der Europäischen Union oder auf bilateraler Ebene.</p>	
<p>Belgium - Flanders Region</p>	<p>Article 26. §1.</p> <p>Any application for export or transit is assessed against the following criteria, based on Article 2 of the Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. These criteria comprise: 1. respect for the international obligations and commitments of Belgium, in particular the sanctions adopted by the UN Security Council or the EU, agreements on non-proliferation and other subjects, as well as other international obligations; 2. respect for human rights in the country of end use as well as respect by that country of international humanitarian law; 3. the internal situation of the country of end use, as a function of the existence of tensions or armed conflicts; 4. the preservation of peace, security and stability in the recipient region; 5. national security of the Flemish Region and Belgium, of the EU Member States, of territories whose external relations are the responsibility of a Member State, as well as that of friendly or allied countries; 6. the behaviour of the buyer country with regard to the international community, particularly its attitude towards terrorism, the nature of its alliances and respect for international law; 7. the risk that the</p>	

	<p>goods or technology in question will be diverted within the country of destination or country of end use or re-exported under undesirable conditions; 8. compatibility of the exports of the goods or technology in question with the technical and economic capacity of the country of end use, taking into account the desirability that States should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.</p> <p>§2. In view of the first criterion, referred to in paragraph 1, point 1, the licence shall be denied if approval would be inconsistent with, inter alia: 1. the international obligations of Belgium and its commitment to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes; 2. the international obligations of Belgium under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; 3. the commitments of Belgium in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.</p> <p>§3. In view of the second criterion, referred to in paragraph 1, point 2, the attitude of the country of end use is assessed towards relevant principles established by international human rights instruments and relevant principles established by international humanitarian law. The licence is denied if the application relates to goods that can be</p>	
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	<p>used for internal repression and the relevant competent bodies of the UN, Council of Europe, the EU or any other intergovernmental organisation of which the Flemish Region or Belgium is a member have established, with regard to the end user, serious violations of international humanitarian law or serious violations of such human rights, that potentially can be violated with the use of defence-related products, other materials for military use or law enforcement materials. Regardless of the end user, the licence shall be denied if there is a clear risk that the goods or technology in question might be used to commit serious violations of human rights or international humanitarian law.</p> <p>§4. In view of the third criterion, referred to in paragraph 1, point 3, the licence shall be denied if the application concerns goods that can be used in an armed conflict and the end user is a party involved in internal armed conflict in the country of end use, subject to the relevant obligations and commitments of the Flemish Region and Belgium in respect of the EU, NATO and their Member States, and in respect of the UN and any other intergovernmental organisations of which the Flemish Region or Belgium is a member, and subject to the necessity to comply with the legitimate national security and defence needs of the EU Member States, of territories for which the external relations are the responsibility of one of the Member States, as well as of friendly or allied countries, without prejudicing the second criterion relating to respect for human rights and international humanitarian law. Regardless of the end user, the licence shall be denied if there is a clear risk that the goods or technology in question would provoke internal armed conflict or domestic tensions or prolong or aggravate existing armed conflicts or tensions. The greatest caution and</p>	
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	<p>vigilance is applied to applications for countries where there are domestic tensions.</p> <p>§5. In view of the fourth criterion, referred to in paragraph 1, point 4, the licence shall be denied if the application concerns goods that can be used in an armed conflict and the end user is a party involved in regional armed conflict, subject to the relevant obligations and commitments of the Flemish Region and Belgium in respect of the EU, NATO and their Member States, and in respect of the UN and any other intergovernmental organisation of which the Flemish Region or Belgium is a member, Article 51 of the Charter of the United Nations and the necessity to comply with the legitimate national security and defence needs of the EU Member States, of territories for which the external relations are the responsibility of one of the Member States, as well as of friendly or allied countries, without prejudicing the criterion referred to in paragraph 1, point 2 relating to the respect of human rights and international humanitarian law. Regardless of the end user, the licence shall be denied if there is a clear risk that the goods or technology in question will provoke armed conflict or tensions in the region or prolong or aggravate existing armed conflicts or tensions. The greatest caution and vigilance is applied to applications for countries in a region where there are tensions.</p> <p>§6. In view of the fifth criterion, referred to in paragraph 1, point 5, the licence shall be denied if there is a clear risk that the proposed export or transit would directly or indirectly threaten the defence and security interests of the Flemish Region and Belgium or other Member States of the EU or NATO or of friendly or allied countries or that the goods or technology in question will be used</p>	
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	<p>against the own forces or those of other Member States of the EU or NATO, or of friendly or allied countries.</p> <p>§7. In view of the sixth criterion, referred to in paragraph 1, point 6, there will be an examination of the record of the country of end use with regard to its support for or encouragement of terrorism and international organised crime, its compliance with its international commitments and its commitment to non-proliferation and other areas of arms control and disarmament, in particular by signing, ratifying and implementing the conventions referred to in paragraph 2, point 2. The licence shall be denied in any event if the respective competent authorities of the UN, the Council of Europe, the EU or any other intergovernmental organisation of which the Flemish Region or Belgium is a member have established that the country of end use supports or encourages or systematically or manifestly does not comply with its international obligations and commitments regarding the non-use of force as referred to in Article 2 of the Charter of the United Nations, international humanitarian law, non-proliferation and disarmament.</p> <p>§8. In view of the seventh criterion, referred to in paragraph 1, point 7, account is taken of the legitimate defence and domestic security interests of the country of end use, including participation in UN or other peacekeeping operations; of the technical capability of the country of end use to use the goods or technology; of the capability of the country of end use to perform effective export controls; of the risk that the goods or technology will be re-exported to undesirable destinations; of the record of the country of end use in respecting any re-export provision or consent prior to reexport which were</p>	
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	<p>imposed in the past; of the risk of the goods or technology being diverted to terrorist organisations or to individual terrorists; and of the risk of unintended technology transfer. The licence shall be denied in any event denied if there is a clear risk that the goods or technology in question will be diverted from their purpose or destination or will be re-exported in a manner that is contrary to the provisions of this Flemish Parliament Act or its implementing provisions. The licence shall be denied all the more if there is a clear risk that the goods or technology in question would be diverted to persons for whom serious violations of human rights or of international humanitarian law have been established by the respective competent bodies of the UN, the Council of Europe, the EU or any other intergovernmental organisation of which the Flemish Region or Belgium is a member or to persons who are involved in an internal or regional armed conflict, as referred to in the criteria listed in paragraph 1, points 2, 3 and 4.</p> <p>§9. In view of the eighth criterion, referred to in paragraph 1, point 8, there will be an examination into whether the proposed export or transit would seriously hamper the sustainable development of the country of end use and account is taken of the financial value of the concerning export or transit, of the levels of the military expenditure of the recipient country as compared to the social expenditure, including the support of the European Union and bilateral aid.</p> <p>Article 27. The export and transit licences that are denied on the grounds of the criteria referred to in Article 26 and the reasons why they have been denied are communicated to the other EU Member States. Before a licence is granted which has been denied by another EU Member State or States for an essentially identical transaction within the last three years, the Member State or States which issued the</p>	
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	<p>denial(s) shall be consulted. On the basis of that consultation it shall be decided to also deny the licence or nevertheless to grant it. If, following consultations, it is nevertheless decided to grant a licence, the Member State or States issuing the original denial(s), shall be notified and giving a detailed explanation of the reasoning. The denials and consultations remain confidential, in accordance with the provisions of the Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. Article 28. Besides the cases referred to in Article 26, any application for export or transit can also be denied, taking into account the following criteria: 1. the external interests and international objectives of the Flemish Region and Belgium; 2. the rights of the child in the country of end use. For example, an application shall be denied if it is established that children have been used in the regular armed forces; 3. the attitude of the country of end use towards capital punishment; 4. the prevalence of a high level of fatal victims following firearms-related violence in the country of end use; 5. the prevalence of gender-related violence, in particular rape and other forms of sexual violence; 6. the presence of peace-building initiatives and reconciliation processes.</p>	
<p>Belgium - Wallonia Region</p>	<p>Art. 14. § 1er. Le Gouvernement délivre les licences en vue de l'exportation vers un pays qui n'est pas membre de l'Union européenne de produits liés à la défense sur la base d'une procédure qu'il détermine. Les demandes d'exportation sont rejetées après examen au regard des critères suivants, basés sur la Position commune 2008/944/PESC du Conseil du 8 décembre 2008 définissant des règles communes régissant le contrôle des exportations de technologie et d'équipements militaires :</p>	

	<p>1. Premier critère : respect des obligations et des engagements internationaux de la Wallonie et de la Belgique, en particulier des sanctions adoptées par le Conseil de sécurité des Nations unies ou l'Union européenne, des accords en matière, notamment, de non-prolifération, ainsi que des autres obligations internationales. Une licence d'exportation est refusée si elle est incompatible avec, entre autres :</p> <p>a) les obligations internationales de la Belgique et les engagements pris d'appliquer les embargos sur les armes décrétés par les Nations unies, l'Union européenne et l'Organisation pour la sécurité et la coopération en Europe;</p> <p>b) les obligations internationales incombant à la Belgique et de la Région wallonne au titre du traité sur la non-prolifération des armes nucléaires, de la convention sur les armes biologiques et à toxines et de la convention sur les armes chimiques;</p> <p>c) l'engagement pris par la Belgique et de la Région wallonne de n'exporter aucun type de mine Terrestre antipersonnel;</p> <p>d) les engagements que la Belgique a pris dans le cadre du groupe Australie, du régime de contrôle de la technologie des missiles, du comité Zangger, du groupe des fournisseurs nucléaires, de l'arrangement de Wassenaar et du code de conduite de La Haye contre la prolifération des missiles balistiques. Le Gouvernement refuse la licence d'exportation lorsqu'il apparaît que l'exportation contreviendrait gravement aux intérêts extérieurs de la Belgique ou aux objectifs internationaux que poursuit la Belgique;</p> <p>2. Deuxième critère : respect des droits de l'homme dans le pays de destination finale et respect du droit humanitaire international par ce pays. Après avoir évalué l'attitude du pays destinataire à l'égard des principes énoncés en la matière dans les instruments</p>	
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	<p>internationaux concernant les droits de l'homme, le Gouvernement :</p> <p>a) refuse la licence d'exportation s'il existe un risque manifeste que la technologie ou les équipements militaires dont l'exportation est envisagée servent à la répression interne ou s'il existe suffisamment d'indications à l'égard d'un pays destinataire donné que l'exportation y contribuera à une violation flagrante des droits de l'homme ou lorsqu'il est établi que des enfants-soldats sont alignés dans l'armée régulière;</p> <p>b) fait preuve, dans chaque cas et en tenant compte de la nature de la technologie ou des équipements militaires en question, d'une prudence toute particulière en ce qui concerne la délivrance de licences aux pays où de graves violations des droits de l'homme ont été constatées par les organismes compétents des Nations unies, par l'Union européenne ou par le Conseil de l'Europe. A cette fin, la technologie ou les équipements susceptibles de servir à la répression interne comprennent, notamment, la technologie ou les équipements pour lesquels il existe des preuves d'utilisation, par l'utilisateur final envisagé, de ceux-ci ou d'une technologie ou d'équipements similaires à des fins de répression interne ou pour lesquels il existe des raisons de penser que la technologie ou les équipements seront détournés de leur utilisation finale déclarée ou de leur utilisateur final déclaré pour servir à la répression interne. La nature de la technologie ou des équipements sera examinée avec attention, en particulier si ces derniers sont destinés à des fins de sécurité interne. La répression interne comprend, entre autres, la torture et autres traitements ou châtiments cruels, inhumains et dégradants, les exécutions sommaires ou arbitraires, les disparitions, les detentions arbitraires et les autres violations graves des droits de l'homme</p>	
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	<p>et des libertés fondamentales que mentionnent les instruments internationaux pertinents en matière de droits de l'homme, dont la déclaration universelle des droits de l'homme et le pacte international relatif aux droits civils et politiques. Après avoir évalué l'attitude du pays destinataire à l'égard des principes énoncés en la matière dans les instruments du droit humanitaire international, le Gouvernement;</p> <p>c) refuse la licence d'exportation s'il existe un risque manifeste que la technologie ou les équipements militaires dont l'exportation est envisagée servent à commettre des violations graves du droit humanitaire international;</p> <p>3. Troisième critère : situation intérieure dans le pays de destination finale (existence de tensions ou de conflits armés). Le Gouvernement refuse la licence d'exportation de technologie ou d'équipements militaires susceptibles de provoquer ou de prolonger des conflits armés ou d'aggraver des tensions ou des conflits existants ou en cas de guerre civile dans le pays de destination finale;</p> <p>4. Quatrième critère: préservation de la paix, de la sécurité et de la stabilité régionales. Le Gouvernement refuse la licence d'exportation s'il existe un risque manifeste que le destinataire envisagé utilise la technologie ou les équipements militaires dont l'exportation est envisagée de manière agressive contre un autre pays ou pour faire valoir par la force une revendication territoriale. Lorsqu'il examine ces risques, le Gouvernement tient compte notamment des éléments suivants : a) l'existence ou la probabilité d'un conflit armé entre le destinataire et un autre pays; b) une revendication sur le territoire d'un pays voisin que le destinataire a, par le passé, tenté ou menacé de faire valoir par la force; c) la probabilité que la technologie ou les équipements militaires soient utilisés à des fins autres que la sécurité et la défense nationales légitimes du</p>	
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	<p>destinataire; d) la nécessité de ne pas porter atteinte de manière significative à la stabilité régionale;</p> <p>5. Cinquième critère: sécurité nationale de la Belgique et de la Région wallonne et des territoires dont les relations extérieures relèvent de leur responsabilité, ainsi que celle des pays amis ou alliés. Le Gouvernement tient compte des éléments suivants : a) l'incidence potentielle de la technologie ou des équipements militaires dont l'exportation est envisagée sur leurs intérêts en matière de défense et de sécurité ainsi que ceux d'Etats membres de l'Union européenne et ceux de pays amis ou alliés, tout en reconnaissant que ce facteur ne saurait empêcher la prise en compte des critères relatifs au respect des droits de l'homme ainsi qu'à la paix, la sécurité et la stabilité régionales; b) le risque de voir la technologie ou les équipements militaires concernés employés contre leurs forces ou celles d'Etats membres de l'Union européenne et celles de pays amis ou alliés; 6. Sixième critère : comportement du pays acheteur à l'égard de la communauté internationale et, notamment, son attitude envers le terrorisme, la nature de ses alliances et le respect du droit international. Le Gouvernement tient compte, entre autres, des antécédents du pays acheteur dans les domaines suivants: a) le soutien ou l'encouragement qu'il apporte au terrorisme et à la criminalité organisée internationale; b) le respect de ses engagements internationaux, notamment en ce qui concerne le non-recours à la force, et du droit humanitaire international; c) son engagement en faveur de la non-prolifération et d'autres domaines relevant de la maîtrise des armements et du désarmement, en particulier la signature, la ratification et la mise en œuvre des conventions pertinentes en matière de maîtrise des</p>	
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	<p>armements et de désarmement visées au point b) du premier critère;</p> <p>7. Septième critère : existence d'un risque de détournement de la technologie ou des équipements militaires dans le pays acheteur ou de réexportation de ceux-ci dans des conditions non souhaitées. Lors de l'évaluation de l'incidence de la technologie ou des équipements militaires dont l'exportation est envisagée sur le pays destinataire et du risque de voir cette technologie ou ces équipements détournés vers un utilisateur final non souhaité ou en vue d'une utilisation finale non souhaitée, il est tenu compte des éléments suivants : a) les intérêts légitimes du pays destinataire en matière de défense et de sécurité nationale, y compris sa participation éventuelle à des opérations de maintien de la paix des Nations unies ou d'autres organisations; b) la capacité technique du pays destinataire d'utiliser cette technologie ou ces équipements; c) la capacité du pays destinataire d'exercer un contrôle effectif sur les exportations; d) le risque de voir cette technologie ou ces équipements réexportés vers des destinations non souhaitées et les antécédents du pays destinataire en ce qui concerne le respect de dispositions en matière de réexportation ou de consentement préalable à la réexportation que l'Etat membre exportateur juge opportun d'imposer; e) le risque de voir cette technologie ou ces équipements détournés vers des organisations terroristes ou des terroristes; f) le risque de rétrotechnique ou de transfert de technologie non intentionnel;</p> <p>8. Huitième critère: compatibilité des exportations de technologie ou d'équipements militaires avec la capacité technique et économique du pays destinataire, compte tenu du fait qu'il est souhaitable que les Etats répondent à leurs besoins légitimes de sécurité et de défense en consacrant un minimum de ressources humaines et économiques aux</p>	
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	<p>armements. Le Gouvernement examine, à la lumière des informations provenant de sources autorisées telles que les rapports du Programme des Nations unies pour le développement, de la Banque mondiale, du Fonds monétaire international et de l'Organisation de coopération et de Développement économiques, si le projet d'exportation risque de compromettre sérieusement le développement durable du pays destinataire. A cet égard, il examine les niveaux comparatifs des dépenses militaires et sociales du pays destinataire, en tenant également compte d'une éventuelle aide de l'Union européenne ou d'une éventuelle aide bilatérale.</p>	
<p>Belgium - Brussels Capital Region</p>	<p>Art. 36. § 1er. Toute demande d'exportation ou de transit est évaluée sur la base des critères suivants, se fondant sur l'article 2 de la position commune 2008/944/PESC du Conseil du 8 décembre 2008 définissant des règles communes régissant le contrôle des exportations de biens et technologie militaires. Les critères incluent :</p> <p>1° le respect des obligations et des engagements de la Belgique, en particulier des sanctions adoptées par le Conseil de sécurité de l'ONU ou l'Union européenne, des accords notamment en matière de nonprolifération, ainsi que des autres obligations internationales;</p> <p>2° le respect des droits de l'homme dans le pays d'utilisation finale et le respect du droit humanitaire international par ce pays;</p> <p>3° la situation intérieure dans le pays de destination finale à la suite de tensions ou de conflits armés;</p> <p>4° le maintien de la paix, de la sécurité et de la stabilité régionales;</p> <p>5° la sécurité nationale de la Région de Bruxelles-Capitale et de la Belgique, des Etats membres de l'Union européenne, des territoires dont les relations extérieures relèvent de la responsabilité</p>	

	<p>d'un Etat membre, ainsi que de celle des pays amis ou alliés;</p> <p>6° le comportement du pays qui achète les biens ou la technologie concernés à l'égard de la communauté internationale, et notamment son attitude envers le terrorisme, la nature de ses alliances et le respect du droit international;</p> <p>7° l'existence d'un risque de détournement de biens ou technologie dans le pays de destination ou d'utilisation finale ou sont de nouveau exportés dans des conditions indésirables;</p> <p>8° la compatibilité des exportations de biens ou technologie avec la capacité technique et économique du pays d'utilisation finale, compte tenu du fait qu'il est souhaitable que les Etats répondent à leurs besoins légitimes en matière de sécurité et de défense en consacrant un minimum de ressources humaines et économiques aux armements.</p> <p>§ 2. A la lumière du premier critère, visé au paragraphe 1er, 1°, l'autorisation est refusée si son octroi est incompatible avec, entre autres : 1° les obligations internationales de la Belgique et les engagements qu'elle a pris d'appliquer les embargos sur les armes décrétés par l'ONU, l'Union européenne et l'OSCE; 2° les obligations internationales incombant à la Belgique au titre du traité sur la non-prolifération des armes nucléaires, de la convention sur les armes biologiques et à toxines, de la convention sur les armes chimiques, de la convention sur les armes à sous-munitions et la convention relative à l'interdiction d'utilisation, de stockage, de production et de transfert de mines anti-personnel et à leur destruction; 3° les engagements que la Belgique a pris dans le cadre du groupe Australie, du régime de contrôle de la technologie des missiles, du Comité Zangger, du Groupe des fournisseurs nucléaires, de l'Arrangement de</p>	
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	<p>Wassenaar et du Code de conduite de La Haye contre la prolifération des missiles balistiques. § 3. A la lumière du deuxième critère, visé au paragraphe 1er, 2°, l'attitude du pays de destination finale est évaluée sur la base des principes importants énoncés dans les instruments internationaux concernant les droits de l'homme et des principes essentiels du droit humanitaire international. L'autorisation est refusée si la demande concerne des biens pouvant être utilisés à des fins de répression interne et si les instances compétentes de l'ONU, du Conseil de l'Europe, de l'Union européenne ou d'un autre organisme intergouvernemental auquel la Région de Bruxelles-Capitale ou la Belgique adhère, ont constaté, vis-à-vis de l'utilisateur final, des violations graves du droit humanitaire international ou des droits de l'homme pouvant être potentiellement commises par l'utilisation des produits liés à la défense ou d'autre matériel pouvant servir à un usage militaire ou lié au maintien de l'ordre. Quel que soit l'utilisateur final, l'autorisation est refusée s'il existe un risque manifeste que les biens ou la technologie concernés servent à commettre des violations graves aux droits de l'homme ou du droit humanitaire international.</p> <p>§ 4. En vertu du troisième critère, visé au paragraphe 1er, 3°, l'autorisation est refusée si la demande concerne des biens pouvant être utilisés dans un conflit armé et si l'utilisateur final est engagé dans un conflit armé interne au sein du pays d'utilisation finale, à l'exception des obligations et engagements pertinents de la Région de Bruxelles Capitale et de la Belgique à l'égard de l'Union européenne, de l'OTAN et de leurs Etats membres, et à l'égard de l'ONU et d'autres organisations intergouvernementales auxquelles la Région de Bruxelles Capitale ou la Belgique adhère, et à l'exception de la nécessité de satisfaire aux besoins</p>	
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	<p>légitimes de sécurité nationale des Etats membres de l'Union européenne, des territoires dont les relations extérieures relèvent de la responsabilité d'un des Etats membres ainsi que des pays alliés ou amis, sans porter préjudice au deuxième critère en matière de respect des droits de l'homme et du droit humanitaire international. Quel que soit l'utilisateur final, l'autorisation est refusée s'il existe un risque manifeste que les biens ou la technologie concernés soient utilisés dans un conflit armé interne ou puissent créer des tensions nationales ou encore prolonger ou aggraver des conflits armés ou des tensions existants. La plus grande prudence est de mise lors de l'analyse des demandes émanant de pays dans lesquels des tensions internes sont constatées</p> <p>§ 5. En vertu du quatrième critère, visé au paragraphe 1er, 4°, l'autorisation est refusée si la demande concerne des biens pouvant être utilisés dans un conflit armé et si l'utilisateur final est engagé dans un conflit armé régional, à l'exception des obligations et engagements pertinents de la Région de Bruxelles Capitale et de la Belgique à l'égard de l'Union européenne, de l'OTAN et de leurs Etats membres, et à l'égard de l'ONU et d'autres organisations intergouvernementales auxquelles la Région de Bruxelles-Capitale ou la Belgique adhère, l'article 51 du Manifeste de l'ONU et à l'exception de la nécessité de satisfaire aux besoins légitimes de sécurité nationale des Etats membres de l'Union européenne, des territoires dont les relations extérieures relèvent de la responsabilité d'un des Etats membres ainsi que des pays alliés ou amis, sans porter préjudice au critère visé au paragraphe 1er, 2°, relatif au respect des droits de l'homme et du droit humanitaire international. Quel que soit l'utilisateur final, l'autorisation est refusée s'il existe un risque manifeste que les biens ou la technologie concernés génèrent un conflit armé ou des tensions</p>	
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	<p>dans la région ou puissent prolonger ou aggraver des conflits armés ou des tensions existants. La plus grande prudence est de mise lors de l'analyse des demandes émanant de pays se situant dans une région dans laquelle des tensions ont été constatées.</p> <p>§ 6. Conformément au cinquième critère, visé au paragraphe 1er, 5°, l'autorisation est refusée s'il existe un risque manifeste que l'exportation ou le transit proposé menace directement ou indirectement les intérêts de défense et de sécurité de la Région de Bruxelles Capitale et de la Belgique ou d'autres Etats membres de l'Union européenne ou de l'OTAN ou encore de pays amis ou alliés ou que les biens ou la technologie concernés soient utilisés contre ses propres troupes ou celles d'autres Etats membres de l'Union européenne ou de l'OTAN ou encore de pays amis ou alliés.</p> <p>§ 7. Conformément au sixième critère, visé au paragraphe 1er, 6°, il est examiné si le pays d'utilisation finale a soutenu ou encouragé le terrorisme ou la criminalité internationale organisée, a respecté ses engagements internationaux et s'il s'est engagé en faveur de la non-prolifération et d'autres domaines de la maîtrise des armements et du désarmement, notamment par la signature, la ratification et l'implémentation des traités visés au paragraphe 2, 2°. L'autorisation est de toute façon refusée si les instances compétentes de l'ONU, du Conseil de l'Europe, de l'Union européenne ou d'un autre organisme intergouvernemental auquel la Région de Bruxelles Capitale ou la Belgique adhère, ont constaté que le pays d'utilisation finale, soutient ou encourage le terrorisme ou la criminalité internationale organisée ou ne respecte pas de manière systématique et manifeste ses obligations et engagements internationaux relatifs à l'interdiction de la violence visés à l'article 2 de la Charte de l'ONU, le droit humanitaire</p>	
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	<p>international, la non-prolifération et le désarmement.</p> <p>§ 8. Conformément au septième critère, visé au paragraphe 1er, 7°, il est tenu compte des intérêts légitimes du pays d'utilisation finale en matière de défense et de sécurité nationale, y compris sa participation à des opérations de maintien de la paix de l'ONU ou d'autres organisations, de la capacité technique du pays d'utilisation finale d'utiliser cette technologie ou ces biens, de la capacité du pays d'utilisation finale d'exercer un contrôle effectif sur les exportations, du risque de voir cette technologie ou ces biens réexportés vers des destinations non souhaitées et des antécédents du pays d'utilisation finale en ce qui concerne le respect de dispositions en matière de réexportation ou de consentement préalable à la réexportation, du risque de voir cette technologie ou ces biens détournés vers des organisations terroristes ou des terroristes et du risque de transfert de technologie non intentionnel. L'autorisation est de toute façon refusée s'il existe un risque manifeste que les biens et la technologie concernés, soient détournés de leur utilisation ou de leur destination ou réexportés d'une manière non conforme aux dispositions de cette ordonnance ou à ses modalités d'exécution. L'autorisation est en outre refusée s'il existe un risque manifeste que la technologie ou les biens en question aboutissent chez des personnes qui pourraient les utiliser pour commettre des violations graves aux droits de l'homme ou du droit humanitaire international constatées par les organismes compétents de l'ONU, par le Conseil de l'Europe ou par l'Union européenne ou une autre organisation intergouvernementale dont la Région de Bruxelles-Capitale ou la Belgique est membre ou qui sont partie prenante dans un conflit armé interne ou régional, visé aux paragraphes 1er, 2, 3 et 4.</p>	
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	<p>§ 9. Conformément au huitième critère, visé au paragraphe 1er, 8°, il est examiné si l'exportation ou le transit risque de compromettre sérieusement le développement durable du pays d'utilisation finale et il est tenu compte des niveaux comparatifs des dépenses militaires et sociales du pays destinataire, en tenant également compte d'une éventuelle aide de l'Union européenne ou d'une aide bilatérale.</p>	
Bulgaria	<p>Чл. 5. (Нов - ДВ, бр. 85 от 2005 г., изм., бр. 92 от 2009 г.) Контролните органи по чл. 71, ал. 1 от Закона за експортния контрол на оръжия и изделия и технологии с двойна употреба да осигурят изпълнението на ангажиментите на Република България, произтичащи от Обща позиция 2008/944/ОВППС на Съвета на Европейския съюз от 8 декември 2008 г., определяща общи правила за режим на контрол върху износа на военни технологии и оборудване, обнародвана в "Официален вестник" на Европейския съюз, бр. 335/99 от 13 декември 2008 г.</p>	<p>Art. 5. (New, SG No. 85/2005, amended, SG No. 92/2009) The control bodies under Art. 71, para. 1 of the Law on export control of weapons and articles and technologies with double use shall ensure the fulfilment of the Republic of Bulgaria's commitments stemming from Council Common Position 2008/944 / CFSP of 8 December 2008 laying down common rules for the export control regime for military technologies and equipment promulgated in the Official Journal of the European Union, Issue no. 335/99 of 13 December 2008.</p>
Croatia	<p>Article 2</p> <p>This Act contains provisions that are in accordance with the following acts of the European Union:</p> <ol style="list-style-type: none"> 1. Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of defence-related products within the Community (OJ L 146, 10. 6. 2009); 2. Commission Directive 2012/47/EU of 14 december 2012 amending Directive 2009/43/EC of the European Parliament and of the Council as regards the list of defence-related products (OJ L 31, 31. 1. 2013); 3. Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control 	

	<p>of exports of military technology and equipment (OJ L 335, 13. 12. 2008);</p> <p>4. Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering (OJ L 156, 25. 6. 2003);</p> <p>5. Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (OJ L 159, 30. 6. 2000);</p> <p>6. Joint list of defence-related products of the European Union including equipment from Council Common Position 2008/944/CFSP (OJ C 90, 27.03.2013);</p> <p>7. Commission Recommendation of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence- related products within the Community (SL L 11, 15.1. 2011).</p> <p>Article 21</p> <p>(1) The Ministry shall reject the application for a license to import or export if the Commission denies approval for the requested application because it found that the issuance of the requested license would be contrary to the foreign policy or economic interests of the Republic of Croatia or if it is contrary to the established criteria in the document referred to in Article 2 item 3 of this Act, as well as in the following cases, if</p> <ul style="list-style-type: none"> – it would jeopardise the fulfilment of Croatia's international obligations, – it would pose a risk to Croatia's security or defence interests of the Republic of Croatia, – it is contrary to the National Security Strategy of the Republic of Croatia, – the issuance of licenses for the export would allow to undesirable persons, contrary to the will of the exporter, to 	
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	<p>come into possession of the exported goods,</p> <p>– it is established that the goods for which an export license is required are subject to police investigation or litigation.</p> <p>(2) If the application shall contain a flaw that prevents compliance with the request, or if the request is incomprehensible or incomplete, and the applicant within the prescribed time to does</p> <p>(3) The decision referred to in paragraph 2 of this Article may be submitted in writing, by e-mail or verbally about which will be made up a note.</p> <p>(4) The decision referred to in paragraphs 1 and 2 of this Article may not be appealed, but an administrative dispute may be brought.</p> <p>Article 22</p> <p>If the issuance of export licence is requested for a country on the list of countries subject to restrictive measures introduced by UN, EU, OSCE or other international organisations whose restrictive measures the Republic of Croatia joined, the licence may be issued only for humanitarian purposes or for the needs of peace keeping forces.</p>	
<p>Cyprus</p>	<p>8.- (1) Κατά την εξέταση αίτησης, που υποβάλλεται σύμφωνα με τις διατάξεις των παρόντων Κανονισμών, λαμβάνονται υπόψη όλα τα κριτήρια αξιολόγησης που καθορίζει η Κοινή Θέση 2008/944/ΚΕΠΠΑ, που καταγράφονται στο Παράρτημα ΙΙΙ και λαμβάνεται επίσης υπόψη οποιοδήποτε στοιχείο σχετικό με προηγούμενες παράνομες δραστηριότητες του αιτητή, όπως καθορίζεται στις διατάξεις του άρθρου 12 του Νόμου:</p> <p>Νοείται ότι, παρ' όλο που δεν θίγεται το δικαίωμα της Δημοκρατίας να εφαρμόσει πιο περιοριστική εθνική πολιτική, η</p>	<p>8.- (1) When considering an application submitted in accordance with the provisions of these Regulations, all the evaluation criteria set out in Common Position 2008/944 / CFSP, listed in Annex III shall be taken into account and any relevant information shall also be taken into account. with the applicant's past unlawful activities as set forth in section 12 of the Law:</p> <p>It is understood that, whilst not violating the right of the Republic to implement a more restrictive national policy, the Competent Authority shall take into account the impact of the planned</p>

	<p>Αρμόδια Αρχή λαμβάνει υπόψη την επίπτωση των σχεδιαζόμενων εξαγωγών στα οικονομικά, κοινωνικά, εμπορικά και βιομηχανικά συμφέροντα της Δημοκρατίας, οι παράγοντες όμως αυτοί δεν πρέπει να επηρεάζουν την εφαρμογή των ανωτέρων κριτηρίων:</p> <p>Νοείται περαιτέρω ότι η Αρμόδια Αρχή καταβάλλει κάθε δυνατή προσπάθεια για να παροτρύνει και άλλα κράτη που εξάγουν στρατιωτική τεχνολογία ή εξοπλισμό να εφαρμόζουν τα ανωτέρω κριτήρια και ανταλλάσσει τακτικά εμπειρίες με τρίτες χώρες που εφαρμόζουν αυτά τα κριτήρια, όσον αφορά τις πολιτικές ελέγχου των εξαγωγών στρατιωτικής τεχνολογίας και εξοπλισμού και την εφαρμογή των πιο πάνω κριτηρίων.</p> <p>(2) Οι οδηγίες χρήσης του ευρωπαϊκού κώδικα συμπεριφοράς για τις εξαγωγές στρατιωτικού εξοπλισμού, όπως αναθεωρούνται κατά καιρούς, χρησιμεύουν ως κατευθυντήριες γραμμές για την εφαρμογή των παρόντων Κανονισμών.</p>	<p>exports on the Republic's economic, social, commercial and industrial interests, but these factors must not affect the application of the above criteria:</p> <p>It is further understood that the Competent Authority shall make every effort to encourage other States exporting military technology or equipment to apply the above criteria and regularly exchange experiences with third countries applying these criteria with regard to military technology export control policies and equipment and application of the above criteria.</p> <p>(2) The User's Guidelines, as amended from time to time, serve as guidelines for the implementation of these Regulations.</p>
<p>Czech Republic</p>	<p>Section 18</p> <p>The Ministry shall not grant a licence if</p> <p>a) the applicant has failed to comply with the requirements set out in Section 15¹, or</p> <p>b) the applicant has seriously breached the provisions of this Act or a legal regulation of the European Union, legal regulation of a European Union country, or an announced international treaty by which the Czech Republic is bound, provided that they regulate the trading in or handling of military material, or</p> <p>c) it is supported by foreign-policy reasons or the trade interests of the Czech Republic, or for the protection of public</p>	

¹ Section 15 sets the individual requirements of good standing in order to obtain a licence.

	order, security, and protection of the population.	
Denmark	<p>§ 35 Produkter omfattet af de kategorier fra Den Europæiske Unions fælles liste over militært udstyr, der er opført i bilag 1 til denne bekendtgørelse, kan udføres til et andet EU- eller EØS-land (generel tilladelse), hvis:</p> <p>Stk. 5. Der kan dog ikke udføres produkter i medfør af stk. 1, hvis de pågældende produkter udføres til sanktionsramte entiteter, eller hvis den fysiske eller juridiske person, der udfører produkterne, er bekendt med, at de pågældende produkter vil blive videreudført til et land, der er underlagt en våbenembargo vedtaget i FN, OSCE eller EU, eller til andre sanktionsramte entiteter.</p> <p>Stk. 6. Der kan endvidere ikke udføres produkter i medfør af stk. 1, hvis de pågældende produkter udføres i strid med Danmarks internationale forpligtelser, eller hvis den fysiske eller juridiske person, der udfører produkterne, er bekendt med, at de pågældende produkter vil blive videreudført i strid med Danmarks internationale forpligtelser.</p> <p>Stk. 7. Der kan endvidere ikke udføres produkter i medfør af stk. 1, hvis den fysiske eller juridiske person, der udfører produkterne, er bekendt med, at de pågældende produkter vil blive videreudført til en slutbruger uden for et EU-, EØS- eller NATO-land.</p>	<p>§ 35. Products covered by the categories of the European Union common list of military equipment listed in Annex 1 to this Order may be exported to another EU or EEA country (general permit) if:</p> <p>PCS. 5. However, products may not be exported pursuant to paragraph 1. 1 if the products concerned are exported to sanctioned entities or if the natural or legal person making the products is aware that the products concerned will be exported to a country subject to a UN embargo, OSCE or EU arms embargo , or to other sanctioned entities.</p> <p>PCS. 6. Furthermore, products may not be exported pursuant to subsection (1). 1, if the products in question are exported in violation of Denmark's international obligations or if the natural or legal person making the products is aware that the products in question will be further exported in violation of Denmark's international obligations.</p> <p>PCS. 7. Furthermore, products may not be exported pursuant to subsection (1). 1 if the natural or legal person making the products is aware that the products in question will be further exported to an end user outside an EU, EEA or NATO country.</p>
Estonia	<p>§ 5. Prohibitions on transfer of strategic goods and service</p> <p>(1) The following is prohibited:</p> <p>1) the export and transit of strategic goods and the provision of service to a subject of international sanctions;</p> <p>2) the diversion from their intended destination of goods subject state supervision over the import and enduse of</p>	

	<p>strategic goods without the written consent of the Strategic Goods Commission and the re-export of such goods without special authorisation;</p> <p>3) the transfer of weapons of mass destruction, of any materials, hardware, software and technology used for the production thereof and the related services regardless of their country of destination excluding when it is absolutely necessary for the demolition thereof;</p> <p>4) the transfer of antipersonnel mines and the related services, except in the case when it is absolutely necessary for the purpose of training or the demolition thereof;</p> <p>5) the transfer of goods used for human rights violations and the related service regardless of the country of destination unless the goods are used for public exhibition in a museum due to their historical significance;</p> <p>6) The transfer and service of other strategic goods that is prohibited by a treaty.</p> <p>§ 19. Refusal to issue licence</p> <p>(1) The commission shall refuse to issue a licence, if:</p> <p>1) the transfer of strategic goods or the provision of services endangers the interests or security of Estonia or an ally of Estonia;</p> <p>2) the strategic goods are subject to the prohibitions specified in § 5 of this Act;</p> <p>3) there is reason to believe that the strategic goods may be used to commit human rights violations in the country of destination;</p> <p>4) there is reason to believe that the strategic goods may be used for violations of international humanitarian law;</p>	
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	<p>5) there is reason to believe that the strategic goods may be used to endanger national, regional or international security, including acts of terrorism;</p> <p>6) there is reason to believe that, in the country of destination, the strategic goods may be diverted from their original destination or re-exported under conditions endangering security;</p> <p>7) the transfer of strategic goods or the provision of services is in conflict with the international obligations of Estonia.</p>	
Finland	<p>Section 9</p> <p>General requirements for evaluating a licence application</p> <p>The licence referred to in Chapter 2 will be issued or published only if it is in line with Finland's foreign and security policy and does not jeopardise Finland's security. The issuance and publication of a licence is based on overall evaluation which takes into consideration the common position of the Council of the European Union defining common rules governing control of exports of military technology and equipment (2008/944/CFSP).</p> <p>Further provisions on the general requirements referred to in subsections 1 and 2 may be given by government decree.</p>	
France	<p>Article L2335-2</p> <p>L'exportation sans autorisation préalable de matériels de guerre et matériels assimilés vers des Etats non membres de l'Union européenne ainsi que des territoires exclus du territoire douanier de l'Union européenne est prohibée.</p> <p>L'autorité administrative définit la liste de ces matériels de guerre et matériels assimilés soumis à autorisation préalable ainsi que les dérogations à cette autorisation.</p>	

	<p>Article 1</p> <p>Il est institué auprès du Premier ministre une commission qui a pour mission :</p> <p>1° D'étudier l'orientation à donner à la politique d'exportation des matériels de guerre et matériels assimilés et de transferts intracommunautaires des produits liés à la défense ou des matériels mentionnés à l'article L. 2335-18 du code de la défense ;</p>	
<p>Germany</p>	<p>I. Allgemeine Prinzipien</p> <p>1. Die Bundesregierung trifft ihre Entscheidungen über Exporte von Kriegswaffen und sonstigen Rüstungsgütern nach dem Gesetz über die Kontrolle von Kriegswaffen (KrWaffKontrG) und dem Außenwirtschaftsgesetz (AWG) in Übereinstimmung mit dem „Gemeinsamen Standpunkt 2008/944/GASP des Rates der Europäischen Union vom 8. Dezember 2008 betreffend gemeinsame Regeln für die Kontrolle der Ausfuhr von Militärgütern und Militärtechnologie“ („Gemeinsamer Standpunkt“), dem am 24. Dezember 2014 in Kraft getretenen Vertrag über den Waffenhandel („Arms Trade Treaty“) sowie den Grundsätzen der Bundesregierung für die Ausfuhrgenehmigungspolitik bei der Lieferung von Kleinen und Leichten Waffen, dazugehöriger Munition und entsprechender Herstellungsausrüstung in Drittländer vom 18. März 2015 bzw. jeweils etwaigen Folgeregelungen. Die Kriterien des „Gemeinsamen Standpunkts“ und etwaiger Folgeregelungen sind integraler Bestandteil dieser Politischen Grundsätze.</p> <p>Soweit die nachfolgenden Grundsätze im Verhältnis zum „Gemeinsamen Standpunkt“ restriktivere Maßstäbe vorsehen, haben sie Vorrang.</p>	<p>I. General Principles</p> <p>1. The Federal Government makes its decisions on exports of war weapons and other armaments under the War Weapons Control Act (KrWaffKontrG) and the Foreign Trade Act (AWG) in accordance with Council Common Position 2008/944 / CFSP European Union of 8 December 2008 on common rules for the control of exports of military equipment and technology ("the Common Position"), the Arms Trade Treaty, which entered into force on 24 December 2014, and the Principles of the Federal Government for the export licensing policy for the delivery of small arms and light weapons, ammunition and related manufacturing equipment to third countries of 18 March 2015 or any subsequent regulations. The criteria of the Common Position and any subsequent regulations form an integral part of these Political Principles. Insofar as the following principles provide for more restrictive standards in relation to the "common position", they have priority.</p> <p>2. Attention to human rights in the country of destination and final destination is given special weight in the decisions on exports of war and other military equipment.</p> <p>3. Permits for exports of war weapons and other armaments are generally not granted if there is reasonable suspicion</p>

	<p>2. Der Beachtung der Menschenrechte im Bestimmungs- und Endverbleibsland wird bei den Entscheidungen über Exporte von Kriegswaffen und sonstigen Rüstungsgütern besonderes Gewicht beigemessen.</p> <p>3. Genehmigungen für Exporte von Kriegswaffen und sonstigen Rüstungsgütern werden grundsätzlich nicht erteilt, wenn hinreichender Verdacht besteht, dass diese zur internen Repression im Sinne des „Gemeinsamen Standpunkts“ oder zu sonstigen fortdauernden und systematischen Menschenrechtsverletzungen missbraucht werden. Für diese Frage spielt die Menschenrechtssituation im Empfängerland eine hervorgehobene Rolle.</p> <p>4. In eine solche Prüfung der Menschenrechtsfrage werden Feststellungen der EU, des Europarates, der Vereinten Nationen (VN), der OSZE und anderer internationaler Gremien einbezogen. Berichte von internationalen Menschenrechtsorganisationen werden ebenfalls berücksichtigt.</p> <p>5. Der Endverbleib der Kriegswaffen und sonstigen Rüstungsgüter beim vorgesehenen Endverwender ist in wirksamer Weise sicherzustellen. Die Bundesregierung führt dazu entsprechend der international geübten und vereinbarten Praxis eine ex-ante-Prüfung zum Endverbleib durch. Vor Erteilung einer Genehmigung für die Ausfuhr von Rüstungsgütern werden alle vorhandenen Informationen über den Endverbleib umfassend geprüft und bewertet. Wenn Zweifel am gesicherten Endverbleib beim Endverwender bestehen, werden Ausfuhranträge abgelehnt.</p>	<p>that these are for internal repression within the meaning of the "Common Position" or other persistent and systematic violations of human rights. The human rights situation in the recipient country plays a prominent role for this question.</p> <p>4. Such an assessment of the human rights issue will include findings from the EU, the Council of Europe, the United Nations (UN), the OSCE and other international bodies. Reports from international human rights organizations are also considered.</p> <p>5. The final destination of the war weapons and other armaments at the intended end user shall be effectively ensured. In accordance with the internationally practiced and agreed practice, the Federal Government carries out an ex ante examination of the final destination. Before issuing a permit for the export of arms, all existing end-use information will be fully examined and assessed. If there are any doubts about the end user's assured end-use, export applications will be rejected.</p>
<p>Greece</p>	<p>3 α (5): Οι αρμόδιες αρχές, προκειμένου να εκδώσουν τις ανωτέρω άδειες εξαγωγής ή επανεξαγωγής για υλικά με στρατιωτικό προορισμό, λαμβάνουν υπόψη κριτήρια που σχετίζονται με τη</p>	<p>3a (5): The competent authorities shall, in order to issue the above export or re-export licenses for military destined materials, take into account criteria relating to the safeguarding of the</p>

	<p>διασφάλιση των εθνικών συμφερόντων της χώρας και με δεσμεύσεις που απορρέουν είτε από τη νομοθεσία της Ε.Ε. και τις αποφάσεις του Συμβουλίου Ασφαλείας των Ηνωμένων Εθνών είτε από τη συμμετοχή της χώρας μας σε Διεθνείς Οργανισμούς και καθεστώτα που σχετίζονται με την διακίνηση ελεγχόμενων υλικών.</p> <p>8(3): Με κοινή απόφαση των Υπουργών Εξωτερικών, Εθνικής Άμυνας, Ανάπτυξης, Ανταγωνιστικότητας και Ναυτιλίας και Προστασίας του Πολίτη καθορίζονται οι όροι, οι προϋποθέσεις, τα δικαιολογητικά και η διαδικασία χορήγησης και ανάκλησης των εν λόγω αδειών, ως και κάθε άλλο σχετικό θέμα. Για τον καθορισμό των όρων και προϋποθέσεων λαμβάνονται ιδίως υπόψη:</p> <p>α. Οι κίνδυνοι που ενέχει η μεταφορά για τη διαφύλαξη των ανθρωπίνων δικαιωμάτων, της ειρήνης, της ασφάλειας και της σταθερότητας, με βάση τους οποίους μπορεί να απαιτείται έγγραφη διαβεβαίωση τελικής χρήσης.</p>	<p>national interests of the country and to commitments arising either from EU law and the UN Security Council resolutions or our country's participation in International Organizations and regimes related to the movement of controlled materials.</p> <p>8 (3): By common decision of the Ministers of Foreign Affairs, National Defense, Development, Competitiveness and Shipping and Citizenship, the terms, conditions, supporting documents and procedure for granting and withdrawing such licenses and any other relevant matter shall be determined. In determining the terms and conditions, account shall be taken in particular of:</p> <p>a. The risks involved in transport for safeguarding human rights, peace, security and stability, which may require written end-use assurance.</p>
<p>Hungary</p>	<p>9. § (1) A kérelmet el kell utasítani, ha</p> <p>a) a kérelmezett tevékenység ellentétes Magyarország nemzetközileg vállalt kötelezettségeivel,</p> <p>b) a kérelmezett tevékenység ellentétes Magyarország ellátásbiztonsági érdekeivel,</p> <p>c) a kérelmezett tevékenység, a kérelmező, a kérelmező tulajdonosa, felelős vezetője, vagy a kérelmezett tevékenységhez közvetlenül kapcsolódó munkakörben foglalkoztatott alkalmazottja az Alkotmányvédelmi Hivatal, az Információs Hivatal, a Nemzetbiztonsági Szakszolgálat vagy a Katonai Nemzetbiztonsági Szolgálat írásos véleménye alapján nemzetbiztonsági érdeket sért vagy</p>	<p>Section 9 (1) An application shall be rejected if:</p> <p>a) the requested activity is contrary to the international commitments of Hungary,</p> <p>b) the requested activity is contrary to the security of supply interests of Hungary,</p> <p>(c) on the basis of a written opinion of the applicant, the applicant's owner, responsible manager or an employee directly related to the requested activity, the Constitutional Office, the Information Office, the National Security Service or the Military National Security Service or, in the written</p>

	<p>nemzetbiztonsági kockázatot jelent, vagy a Terrorelhárítási Központ írásos véleménye alapján terrorveszélyt jelent,</p> <p>d) a kérelmezett tevékenység akadályozná vagy ellehetetlenítené a honvédelmi, rendvédelmi, valamint nemzetbiztonsági szervek jogszabályban meghatározott tevékenységének ellátását,</p> <p>e) a kérelmezőnek a Hatósággal szemben korábbi eljárásból származó, befizetetlen bírságtartozása van,</p> <p>f) a kérelmezett tevékenység ellentétes a 2. mellékletben meghatározott kritériumokkal,</p>	<p>opinion of the Counter-Terrorism Center, represents a terrorist threat,</p> <p>d) the requested activity would obstruct or render impossible the carrying out of the activities of the defense, law enforcement and national security bodies as defined by law,</p> <p>(e) the applicant has unpaid fines due to him in previous proceedings against the Authority,</p> <p>(f) the activity requested does not comply with the criteria laid down in Annex 2²</p>
Ireland	<p>4. Subject to Article 5, the exportation to a third country of any goods or technology, or both, specified in the Schedule is prohibited save under, and in accordance with, a licence.</p>	
Italy	<p>5. L'esportazione, il transito, il trasferimento intracomunitario e l'intermediazione di materiali di armamento, nonche' la cessione delle relative licenze di produzione e la delocalizzazione produttiva, sono vietati quando sono in contrasto con la Costituzione, con gli impegni internazionali dell'Italia, con gli accordi concernenti la non proliferazione e con i fondamentali interessi della sicurezza dello Stato, della lotta contr il terrorismo e del mantenimento di buone relazioni con altri Paesi, nonche' quando mancano adeguate garanzie sulla definitiva destinazione dei materiali di armamento.</p> <p>6. L'esportazione, il transito, il trasferimento intracomunitario e l'intermediazione di materiali di armamento sono altresì vietati:</p> <p>a) verso i Paesi in stato di conflitto armato, in contrasto con i principi dell' articolo 51 della Carta delle Nazioni Unite, fatto salvo il rispetto degli obblighi internazionali dell'Italia o le diverse deliberazioni del Consiglio dei Ministri,</p>	<p>5. The export, the transit, the intra-community transfer and the brokerage of armament materials, as well as the sale of the relative production licenses and the production relocation, are prohibited when they are in contrast with the Constitution, with the international commitments of Italy , with the agreements concerning non-proliferation and with the fundamental interests of the security of the State, of the fight against terrorism and of the maintenance of good relations with other countries, as well as when adequate guarantees on the definitive destination of the armament materials are lacking</p> <p>6. The export, transit, intra-community transfer and brokering of armament materials are also prohibited:</p> <p>a) to countries in a state of armed conflict, in contrast with the principles of Article 51 of the United Nations Charter, without prejudice to Italy's international obligations or the different decisions of the Council of Ministers, to</p>

² Annex 2 includes the criteria of Council Common Position 944/2008.

	<p>da adottare previo parere delle Camere;</p> <p>b) verso Paesi la cui politica contrasti con i principi dell'articolo 11 della Costituzione;</p> <p>c) verso i Paesi nei cui confronti sia stato dichiarato l'embargo totale o parziale delle forniture belliche da parte delle Nazioni Unite o dell'Unione europea (UE) o da parte dell' Organizzazione per la sicurezza e la cooperazione in Europa (OSCE);</p> <p>d) verso i Paesi i cui governi sono responsabili di gravi violazioni delle convenzioni internazionali in materia di diritti umani, accertate dai competenti organi delle Nazioni Unite, dell'UE o del Consiglio d'Europa;</p> <p>e) verso i Paesi che ricevendo dall'Italia aiuti ai sensi della legge 26 febbraio 1987, n. 49, destinino al proprio bilancio militare risorse eccedenti le esigenze di difesa del paese; verso tali Paesi è sospesa la erogazione di aiuti ai sensi della stessa legge, ad eccezione degli aiuti alle popolazioni nei casi di disastri e calamità naturali.</p> <p>7. Sono vietate la fabbricazione, l'importazione, l'esportazione, il transito, il trasferimento intracomunitario e l'intermediazione di mine terrestri anti-persona, di munizioni a grappolo di cui all' articolo 3, comma 1, della legge 14 giugno 2011, n. 95, di armi biologiche, chimiche e nucleari, nonché la ricerca preordinata alla loro produzione o la cessione della relativa tecnologia. Il divieto si applica anche agli strumenti e alle tecnologie specificamente progettate per la costruzione delle suddette armi nonché a quelle idonee alla manipolazione dell'uomo e della biosfera a fini militari.</p> <p>11-bis. Le operazioni di cui al presente articolo sono effettuate nel rispetto dei principi di cui alle posizioni comuni 2003/468/PESC del Consiglio, del 23</p>	<p>be adopted following the opinion of the Chambers;</p> <p>b) to countries whose policies conflict with the principles of article 11 of the Constitution;</p> <p>c) to countries against which the total or partial embargo of war supplies has been declared by the United Nations or the European Union (EU) or by the Organization for Security and Cooperation in Europe (OSCE);</p> <p>d) towards countries whose governments are responsible for serious violations of international conventions on human rights, ascertained by the competent bodies of the United Nations, the EU or the Council of Europe;</p> <p>e) to countries that receive aid from Italy pursuant to the law of 26 February 1987, n. 49 and allocate resources exceeding the defense needs of the country to its military budget; the granting of aid pursuant to the same law is suspended with respect to these countries, with the exception of aid to the population in cases of natural disasters and disasters.</p> <p>7. The manufacture, import, export, transit, intra-community transfer and brokerage of anti-personnel landmines, of cluster munitions referred to in Article 3, paragraph 1 of the Law n. 95 of 14 June 2011 are prohibited, of biological, chemical and nuclear weapons, as well as the research aimed at their production or the sale of the related technology. The prohibition also applies to instruments and technologies specifically designed for the construction of the aforementioned weapons as well as to those suitable for the manipulation of man and the biosphere for military purposes.</p> <p>11-bis. The operations referred to in this article are carried out in compliance with the principles set out in the Council Common Positions 2003/468 / CFSP, dated 23 June 2003, and 2008/944 /</p>
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	giugno 2003, e 2008/944/PESC del Consiglio, dell'8 dicembre 2008.	CFSP of the Council, of 8 December 2008.
Latvia	<p>44. The Committee is entitled to refuse the issuance of a licence for export, transit, and brokering transactions to the goods of the Common Military List of the European Union, including sending of software and technologies, using means of electronic communication, on the basis of the following criteria:</p> <p>44.1. the international obligations of Latvia and the duty to conform to the arms embargo imposed by the United Nations Organization, the European Union, and the Organization on Security and Cooperation in Europe;</p> <p>44.2. the international obligations of Latvia arising from the Nuclear Non-Proliferation Treaty of 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972, as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 3 September 1992;</p> <p>44.3. the obligations of Latvia not to export land mines of any kind;</p> <p>44.4. the obligations of Latvia in relation to participation in the Hague Code of Conduct and Ballistic Missile Non-Proliferation.</p> <p>45. Export and transit licences shall not be issued, if any of the following criteria exist in relation to the recipient country of goods:</p> <p>45.1. the Committee has detected that in the recipient country of goods:</p> <p>45.1.1. the military technology or equipment intended for export or transit</p>	

	<p>has been or will be used in internal repressions or armed conflicts;</p> <p>45.1.2. the military technology or equipment intended for export or transit has been or will be used in aggression against another country or for maintaining territorial claims, as well as for other inhumane purposes;</p> <p>45.1.3. the military technology or equipment intended for export or transit has been or will be used for purposes, which support or promote terrorism and internationally organised crime;</p> <p>45.1.4. the military technology or equipment will be directed from the recipient country or re-exported to an undesirable end-user or for an undesirable end-use;</p> <p>45.2. structures of the United Nations Organization, the European Union or the European Council has detected serious violation of human rights in the recipient country of goods.</p> <p>46. In taking a decision to refuse to issue a licence, the Committee shall take into account:</p> <p>46.1. whether the recipient country fulfils the obligations in the fields of nonproliferation of weapons and in other fields of control and disarmament – whether it has signed, ratified and is implementing the armament control and disarmament conventions referred to in Sub-paragraph “b” of the first criterion of the Code on Conduct on Arms Export of the European Union;</p> <p>46.2. the participation of the recipient country in peacekeeping measures of the United Nations Organization or other peacekeeping measures;</p> <p>46.3. technical possibilities of the recipient country to use the military technology or equipment to be sent;</p>	
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	46.4. the ability of the recipient country to implement an efficient export control.	
Lithuania	<p>10 straipsnis. Atsisakymas išduoti licencijas, licencijų galiojimo sustabdymas, licencijų galiojimo sustabdymo panaikinimas ir jų galiojimo panaikinimas</p> <p>1. Licencija neišduodama, jeigu:</p> <p>1) jos išdavimas prieštarauja Lietuvos Respublikos tarptautinėms sutartims, sankcijoms, įgyvendinamoms pagal Lietuvos Respublikos ekonominių ir kitų tarptautinių sankcijų įgyvendinimo įstatymą, kriterijams, nurodytiems 2008 m. gruodžio 8 d. Tarybos bendrojoje pozicijoje 2008/944/BUSP, nustatančioje bendrąsias taisykles, reglamentuojančias karinių technologijų ir įrangos eksporto kontrolę, tarptautinių neplatinimo susitarimų nuostatomis, Lietuvos Respublikos užsienio politikos ir valstybės saugumo interesams;</p> <p>2) yra įsiteisėjęs apkaltinamasis teismo nuosprendis ir neišnykęs ar nepanaikintas teistumas dėl strateginių prekių eksportuotojo, importuotojo, tiekėjo, gavėjo ar tarpininko padarytų nusikaltimų žmoniškumui ir karo nusikaltimų, nusikalstamų veikų Lietuvos valstybės nepriklausomybei, teritorijos vientisumui ir konstitucinei santvarkai, visuomenės saugumui, nuosavybei, turtinėms teisėms ir turtiniams interesams, ekonomikai ir verslo tvarkai, finansų sistemai, valdymo tvarkai;</p> <p>3) paaiškėja aplinkybių, susijusių su strateginių prekių galutinio panaudojimo ar galimybių panaudoti jas masinio naikavimo ginklų gamybai rizika;</p> <p>.</p>	<p>Article 10. Refusal, suspension, revocation and cancellation of licenses</p> <p>1. No license shall be granted if:</p> <p>1) its issuance contravenes international agreements of the Republic of Lithuania, sanctions implemented in accordance with the Law on the Implementation of Economic and Other International Sanctions of the Republic of Lithuania, the criteria specified in December 8th Council Common Position 2008/944 / CFSP laying down common rules governing control of exports of military technology and equipment, provisions of international non-proliferation agreements, foreign policy of the Republic of Lithuania and national security interests;</p> <p>2) [those who request] has a valid conviction and a conviction for crimes against humanity and war crimes, crimes against the independence of the State of Lithuania, territorial integrity and constitutional order, public security, property and property rights committed by an exporter, importer, supplier, consignee or agent of strategic goods; and property interests, economics and business order, financial system, management order;</p> <p>(3) there is evidence that there is a risk of end-use or potential use of strategic goods for the production of weapons of mass destruction;</p>

<p>Luxembourg</p>	<p>Art. 7.</p> <p>(1) Pour les produits liés à la défense, les ministres délivrent les autorisations compte tenu des risques créés par le transfert en ce qui concerne la sauvegarde des droits de l’homme, de la paix, de la sécurité nationale et extérieure et de la stabilité.</p> <p>Aux fins de délivrance de telles autorisations, les ministres peuvent demander des certificats d’utilisateur final comprenant des garanties ou indications quant à l’utilisation finale du ou des produits liés à la défense.</p> <p>(2) Les critères prévus par l’article 2 de la position commune 2008/944/PESC du Conseil du 8 décembre 2008 définissant des règles communes régissant le contrôle des exportations de technologie et d’équipements militaires sont également applicables pour l’octroi des autorisations visées par les articles 24 et 35.</p> <p>Dans l’évaluation des demandes d’autorisations visées par le présent paragraphe, les ministres tiennent compte des lignes directrices et guides d’utilisation adoptés sur base de la position commune visée à l’alinéa 1er du présent paragraphe.</p>	
<p>Malta</p>	<p>3. (1) An authorization by the Director shall be required for the export of the items listed in the First Schedule.</p> <p>(2) Any authorization so granted by the Director in pursuance of these regulations may be:</p> <p>(a) limited so as to expire on a specified date unless renewed;</p> <p>(b) subject to or without conditions, and any such condition may require or prohibit any act before or after the export of items under that authorization;</p> <p>(c) annulled, suspended, modified or revoked by the Director.</p> <p>(3) When applying for an export authorization, exporters shall supply the Director with all the relevant information</p>	

	<p>required for their applications. Applications shall be submitted on a form as set out in the Second Schedule.</p> <p>4. (1) Subject to the provisions of these regulations no person shall make any export of items specified in the First Schedule, to any destination except under and in accordance with an authorization as specified in regulation 3.</p> <p>(2) These regulations apply also to items in transit</p>	
<p>Netherlands</p>	<p>1It is forbidden to export military goods from the Netherlands without an individual, global or general export license.</p> <p>2The first paragraph does not apply to the export from the Netherlands of military goods as referred to in Article 3, first paragraph, of the Chemical Weapons Convention Implementation Act.</p> <p>3A permit is in any case not granted to the extent that this results from international obligations.</p> <p>From the 2018 Report by the Minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs on the export of military goods:</p> <p>“Licence applications for the export of military equipment are assessed on a case-by-case basis against the eight criteria of Dutch arms export policy, with due regard for the nature of the product, the country of final destination, the end user and the intended end use. These eight criteria were initially defined by the European Councils of Luxembourg (1991) and Lisbon (1992) and were subsequently incorporated in the EU Code of Conduct on Arms Exports (1998). On 8 December 2008 the Council of the European Union decided to transform the 10-year-old Code of Conduct into Common Position 2008/944/CFSP defining common rules</p>	

	governing control of exports of military technology and equipment...”	
Poland	<p>Article 16. 1. The trade control authority shall refuse, by way of a relevant administrative decision, an individual or a global authorisation for trade in military goods if:</p> <p>1) such refusal is required to guarantee the defence or security of the Republic of Poland;</p> <p>2) if granted, such an authorisation would contravene the Republic of Poland’s international commitments arising from international agreements and arrangements, in particular the international commitments:</p> <p>a) to impose embargo on weapons or introduce sanctions adopted by the United Nations, the European Union and Organization for Security and Co-operation in Europe,</p> <p>b) under the Treaty on Non-Proliferation of Nuclear Weapons, done at Moscow, Washington and London on 1 July 1968 (Journal of Laws of 1970, No 8, item 60), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Moscow, London and Washington on 10 April 1972 (Journal of Laws of 1976, No 1, item 1), and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993 (Journal of Laws of 1999, No 63, item 703).</p> <p>c) as part of Australia Group, Missile Control Technology Regime, Zangger Committee, Nuclear Suppliers Group, Wassenaar Arrangement and Hague</p>	

	<p>Code of Conduct Against Ballistic Missile Proliferation;</p> <p>3) there is a risk that the military goods intended for export could be used in:</p> <p>a) domestic repressions, b) actions violating international humanitarian law;</p> <p>4) there is a risk that the military goods intended for export could be used to start or prolong a military conflict or to deepen existing tensions or conflicts in the end user's country;</p> <p>5) there is a risk that a foreign consignee's country will use the military goods intended for export against another country, in particular in the case of an ongoing or a likely military conflict between a foreign consignee's country and another country, or when a foreign consignee's country makes territorial claims against another country, which has attempted or threatened to enforce such claims by force in the past;</p> <p>6) an entity cannot provide a guarantee that trade is carried out in conformity with the law;</p> <p>7) there is a risk that the military goods intended for export may be used, in their entirety or in part, for illegal purposes or contrary to the interests of the Republic of Poland, i.e. for the production, operation, handling, maintenance, storage or identification of military goods.</p> <p>2. The trade control authority may refuse, by way of a relevant administrative decision, an individual or a global authorisation for trade in military goods if:</p> <p>1) if granted, such an authorisations would adversely affect:</p> <p>a) defence and security interests of the Republic of Poland, other EU Member States, as well as allied countries,</p> <p>b) respect for human rights,</p>	
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	<p>c) peace, security and stability in the region;</p> <p>2) there is a risk that the military goods intended for export will be used against the armed forces of EU Member States and allied countries;</p> <p>3) the end user's country:</p> <p>a) supports terrorism or international organized crime,</p> <p>b) fails to honour international commitments, in particular regarding the non-use of force and international humanitarian law,</p> <p>c) is not involved in the non-proliferation of nuclear weapons, arms control and disarmament, in particular it has failed to sign, ratify or implement the Treaty on the Non-Proliferation of Nuclear Weapons and the conventions referred to in paragraph 1 (1) (b);</p> <p>4) there is a risk of change of the end user and final destination, or that military goods will be re-exported on undesirable terms;</p> <p>5) military goods intended for export do not correspond with the technical and economic capabilities of the consignee's country;</p> <p>6) the entity is in breach of regulations concerning trade in items of strategic significance</p>	
Portugal	<p>2 — A presente lei define ainda as regras e os procedimentos para simplificar o controlo do comércio internacional de produtos relacionados com a defesa, observando a Posição Comum n.º 2008/944/PESC, do Conselho, de 8 de Dezembro, no que respeita ao controlo das exportações dos referidos produtos.</p>	<p>2 - The present law also defines the rules and procedures to simplify the control of international trade in defense-related products, observing the Council Common Position No 2008/944 / CFSP of 8 December as regards export controls of those products.</p>
Romania	<p>Article 8 – The control regime for exports, imports and other operations with military goods shall be accomplished in compliance with:</p>	

	<p>a) the fundamental guidelines of Romania's foreign policy;</p> <p>b) Romania's national security and economic interests;</p> <p>c) the principles and criteria referred to in the Common Position 2008/944/CFSP of the European Council from December 2008 defining common rules governing the control of exports of military technology and equipment;</p> <p>d) the obligations stemming from the implementation of embargoes on weapons transfers established by the United Nations Security Council Resolutions, a common position or joint action adopted by the Council of the European Union, a decision of the Organisation for Security and Cooperation in Europe, or established by other EU or NATO Member States;</p> <p>e) the objectives of non-proliferation of weapons of mass destruction, of vectors carrying such weapons, and of other military goods used for the purpose of destabilizing accumulations;</p> <p>f) the international conventions, treaties and agreements, the non-proliferation mechanisms Romania is a party to, and other international undertakings assumed by Romania as a participating state in the international non-proliferation and export controls regimes;</p> <p>g) the principle of co-operation with the states promoting non-proliferation policies similar to Romania's policies in this field.</p>	
Slovakia	<p>Section 10</p> <p>Obligations of permission holder to perform intermediary activity Holder of permission to perform intermediary activity shall:</p> <p>e) refrain from any intermediary activity with defence industry products if it harmed foreign- policy, safety or business interests of the Slovak Republic,</p>	

	international obligations of the Slovak Republic or interests of international organizations and institutions which the Slovak Republic is a member of or which the Slovak Republic has acknowledged based on multilateral and bilateral agreements.	
Slovenia	<p>77. člen (promet z vojaškim orožjem in opremo)</p> <p>(2) Za vsak izvoz, uvoz ali tranzit vojaškega orožja in opreme čez državno ozemlje je potrebno predhodno dovoljenje ministrstva, če ni drugače določeno z mednarodno pogodbo.</p> <p>(3) Dovoljenje iz prejšnjega odstavka se zavrne v primeru:</p> <ul style="list-style-type: none"> - če bi bilo ogroženo izpolnjevanje mednarodnih obveznosti Republike Slovenije, - če bi bili ogroženi varnostni ali obrambni interesi Republike Slovenije, - če bi se pospeševalo ali omogočalo oborožene spopade v državi, ki je končni uporabnik vojaškega orožja ali opreme, - če obstaja utemeljen sum, da bo iz države uvoznice vojaško orožje ali oprema preprodana v tretjo državo in bi bilo to v nasprotju z obrambnimi in varnostnimi interesi države. 	<p>Article 77 (arms and equipment trade)</p> <p>(2) Unless otherwise stipulated in an international treaty, any export, import or transit of military weapons and equipment across national territory shall be subject to prior authorization by the Ministry.</p> <p>(3) The permit referred to in the previous paragraph shall be refused in the case of:</p> <ul style="list-style-type: none"> - if the fulfillment of the Republic of Slovenia's international obligations would be jeopardized, - if the security or defense interests of the Republic of Slovenia were endangered, - to promote or facilitate armed conflict in a country that is the end user of military weapons or equipment, - if there are reasonable grounds for believing that military weapons or equipment will be resold from a country of import to a third country and would be contrary to the defense and security interests of the country.
Spain	<p>Artículo 8. Denegación de las solicitudes de autorización y suspensión y revocación de las autorizaciones.</p> <p>1. Las solicitudes de autorización serán denegadas y las autorizaciones, a las que se refiere el artículo 4, suspendidas o revocadas, en los siguientes supuestos:</p> <p>a) Cuando existan indicios racionales de que el material de defensa, el otro material o los productos y tecnologías de doble uso puedan ser empleados en acciones que perturben la paz, la estabilidad o la seguridad en un ámbito mundial o regional, puedan exacerbar</p>	<p>Article 8. Denial of authorisation requests and suspension and nullification of authorisations.</p> <p>1. Authorisation requests shall be denied and the authorisations referred to in Article 4 shall be suspended or revoked under the following circumstances:</p> <p>a) When there are reasonable suspicion that the defence material, other material or dualuse items and technologies may be used for actions which could disturb the peace, stability or security on a global or regional scale, could heighten tensions or latent conflicts, could be</p>

	<p>tensiones o conflictos latentes, puedan ser utilizados de manera contraria al respeto debido y la dignidad inherente al ser humano, con fines de represión interna o en situaciones de violación de derechos humanos, tengan como destino países con evidencia de desvíos de materiales transferidos o puedan vulnerar los compromisos internacionales contraídos por España. Para determinar la existencia de estos indicios racionales se tendrán en cuenta los informes sobre transferencias de material de defensa y destino final de estas operaciones que sean emitidos por organismos internacionales en los que participe España, los informes de los órganos de derechos humanos y otros organismos de Naciones Unidas, la información facilitada por organizaciones y centros de investigación de reconocido prestigio en el ámbito del desarrollo, el desarme y los derechos humanos, así como las mejores prácticas más actualizadas descritas en la Guía del Usuario del Código de Conducta de la Unión Europea en materia de exportación de armas.</p> <p>b) Cuando se contravengan los intereses generales de la defensa nacional y de la política exterior del Estado.</p> <p>c) Cuando vulneren las directrices acordadas en el seno de la Unión Europea, en particular los criterios del Código de Conducta, de 8 de junio de 1998, en materia de exportación de armas, y los criterios adoptados por la OSCE en el documento sobre Armas Pequeñas y Ligeras de 24 de noviembre de 2000, y otras disposiciones internacionales relevantes de las que España sea signataria. Para la aplicación de los criterios del Código de Conducta se atenderá a las mejores prácticas más actualizadas descritas en la Guía del Usuario.</p> <p>d) Cuando se contravengan las limitaciones que se derivan del Derecho internacional, como la necesidad de respetar los embargos decretados por</p>	<p>used in such a way as to disrespect the inherent dignity of human beings, which could be used for domestic repression or in situations of human rights violations or are destined to countries with a track record of diverting transferred material or which could violate international commitments undertaken by Spain. In determining reasonable suspicion, due consideration shall be given to the reports on transfers of defence material and the final destination of these operations issued by international organisations in which Spain participates, reports issued by human rights bodies and other United Nations organisations, information furnished by organisations and research centres of acknowledged prestige in the areas of development, disarmament and human rights and the most up to date best practices described in the User's Guide of the European Union Code of Conduct on Arms Exports.</p> <p>b) When they contravene the State's general interests in terms of national defence and external policy.</p> <p>c) When they violate the European Union agreed guidelines, especially the criteria laid down in the 8 June 1998 Code of Conduct regarding arms export, the criteria adopted by the OSCE in the 24 November 2000 Small Arms and Light Weapons document and other relevant international provisions of which Spain is a signatory state. The most up to date best practices described in the User's Guide shall be used in applying the criteria of the Code of Conduct.</p> <p>d) When they contravene the limits arising from international law such as, inter alia, the need to respect embargoes ordered by the United Nations and the European Union.</p>
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	Naciones Unidas y la Unión Europea, entre otras.	
Sweden	<p>1 § Inledande bestämmelser</p> <p>Tillstånd enligt denna lag får lämnas endast om det finns säkerhets- eller försvarspolitiska skäl för det och det inte strider mot Sveriges internationella förpliktelser eller Sveriges utrikespolitik i övrigt.</p> <p>From the Government's guidelines for export:</p> <p>Tillstånd till utförsel eller annan utlandssamverkan enligt krigsmateriellagen ska inte beviljas, om det skulle strida mot en internationell överenskommelse som Sverige har biträtt, ett beslut av FN:s säkerhetsråd, Organisationen för samarbete och säkerhet i Europa (OSSE) eller Europeiska unionen eller mot folkrättsliga regler om export från neutral stat under krig (ovillkorliga hinder).</p> <p>Respekt för mänskliga rättigheter och den mottagande statens demokratiska status utgör centrala villkor vid tillståndsprövningen. Ju sämre den demokratiska statusen är desto mindre utrymme finns för att tillstånd beviljas. Ifall det förekommer allvarliga och omfattande kränkningar av mänskliga rättigheter eller grava brister i den demokratiska statusen utgör det hinder för beviljande av tillstånd. I tillståndsprövningen ska det också beaktas om utförseln eller utlandssamverkan motverkar en rättvis och hållbar utveckling i mottagarlandet.</p> <p>Tillstånd till utförsel av krigsmateriel för strid, eller till annan utlandssamverkan som avser krigsmateriel för strid eller</p>	<p>1 § Introductory provisions</p> <p>Permits under this law may only be granted if there are security or defense policy reasons for it and it does not conflict with Sweden's international obligations or Sweden's foreign policy in general.</p> <p>From the Government's guidelines for export:</p> <p>Permits for export or other international cooperation under the Armed Forces Act shall not be granted whether it would conflict with an international agreement that Sweden has consulted, a decision by the UN Security Council, the Organization for Cooperation and Security in Europe (OSCE) or European Union or international law on exports from a neutral state during war (unconditional obstacles).</p> <p>Respect for human rights and the democratic status of the receiving state central conditions in the permit test. The worse the democratic status, the less space is available for permission to be granted. If it is serious and extensive violations of human rights or grave deficiencies in the democratic status constitute barriers to granting permits. In the permit testing, consideration should also be given to whether the export or foreign cooperation counteracts a fair and sustainable development in the recipient country. Permits for export of military equipment for combat, or for other foreign cooperation which is intended military equipment for combat or other military equipment, should not be granted if it</p>

	<p>övrig krigsmateriel, bör inte beviljas om det avser en stat som befinner sig i väpnad konflikt med en annan stat, oavsett om krigsförklaring har avgetts eller ej, en stat som är invecklad i en internationell konflikt som kan befaras leda till väpnad konflikt eller en stat som har inre väpnade oroligheter.</p> <p>Denna presumtion gäller om den mottagande staten inte befinner sig i väpnad konflikt med en annan stat eller har inre väpnade oroligheter, det i den mottagande staten inte förekommer allvarliga och omfattande kränkningar av mänskliga rättigheter, det inte finns grava brister i den mottagande statens demokratiska status och det inte finns ett ovillkorligt hinder.</p> <p>Ett tillstånd bör också återkallas om den mottagande staten kommer i väpnad konflikt med en annan stat eller får inre väpnade oroligheter. Undantagsvis bör det, i de två senare fallen, vara möjligt att avstå från att återkalla ett tillstånd, om det är förenligt med de folkrättsliga reglerna och med principerna och målen för Sveriges utrikespolitik.</p>	<p>refers to a state that is in armed conflict with another state, regardless of whether a declaration of war has been issued or not, a state that is embroiled in an international conflict that can be feared to lead to armed conflict or a state that has internal armed unrest.</p> <p>This presumption applies if the receiving state is not in armed conflict with another state or has internal armed disturbances, there are no serious and extensive violations of human rights in the receiving state, there are no serious deficiencies in the receiving state's democratic status and there is no unconditional obstacle.</p> <p>A permit should also be revoked if the receiving state comes into armed conflict with one another state or receive internal armed unrest. Exceptionally, in the latter two cases, it should be possible to refrain from revoking a permit, if it is in accordance with international law and with the principles and goals of Sweden's foreign policy.</p>
<p>United Kingdom</p>	<p>5 General restriction on control power</p> <p>(2) Controls of any kind may be imposed for the purpose of giving effect to any [EU] provision or other international obligation of the United Kingdom.</p> <p>(3) In subsection (2) “international obligation” includes an obligation relating to a joint action or common position adopted, or a decision taken, by the Council</p> <p>9 Guidance about the exercise of functions under control orders</p> <p>2) The Secretary of State may give guidance about any matter relating to the</p>	

	<p>exercise of any licensing power or other function to which this section applies.</p> <p>(3) But the Secretary of State must give guidance about the general principles to be followed when exercising licensing powers to which this section applies.</p> <p>(4) The guidance required by subsection (3) must include guidance about the consideration (if any) to be given, when exercising such powers, to—</p> <p>(a) issues relating to sustainable development; and</p> <p>(b) issues relating to any possible consequences of the activity being controlled that are of a kind mentioned in the Table in paragraph 3 of the Schedule; but this subsection does not restrict the matters which may be addressed in guidance.</p> <p>Schedule:</p> <p>2 (1) Export controls may be imposed in relation to any goods the exportation or use of which is capable of having a relevant consequence.</p> <p>RELEVANT CONSEQUENCES</p> <p>National security of the United Kingdom and other countries</p> <p>A An adverse effect on—</p> <p>(a) the national security; or</p> <p>(b) the security of members of the armed forces, of the United Kingdom (or any dependency), any Member state or any other friendly State.</p> <p>Regional stability and internal conflict</p> <p>B An adverse effect on peace, security or stability in any region of the world or within any country.</p> <p>Weapons of mass destruction</p> <p>C The carrying out anywhere in the world of acts which facilitate the development,</p>	
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	<p>production or use of weapons of mass destruction.</p> <p>Breaches of international law and human rights</p> <p>D The carrying out anywhere in the world of (or of acts which facilitate)—</p> <p>(a) acts threatening international peace and security;</p> <p>(b) acts contravening the international law of armed conflict;</p> <p>(c) internal repression in any country;</p> <p>(d) breaches of human rights.</p> <p>Terrorism and crime</p> <p>E The carrying out anywhere in the world of (or of acts which facilitate) acts of terrorism or serious crime anywhere in the world</p>	
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