

**Responsibilities to Prevent:
Responsibilities of Supply-Side Actors to
Prevent the Adverse Human Rights Impacts of
Arms Exports to Conflict Zones**

THESIS

submitted at the Graduate Institute
of International and Development Studies
in fulfilment of the requirements of the
PhD degree in International Law

by

Hiruni ALWISHEWA

Thesis N° 1503

Geneva

2024

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INSTITUT DE HAUTES ETUDES INTERNATIONALES ET DU DEVELOPPEMENT
GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES

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Sur le préavis d'Andrea BIANCHI, professeur à l'institut et directeur de thèse, d'Andrew CLAPHAM, professeur à l'Institut et membre interne du jury, et d'Anna STAVRIANAKIS, Professor, School of Global Studies, University of Sussex, UK et experte externe, la directrice de l'Institut de hautes études internationales et du développement autorise l'impression de la présente thèse sans exprimer par là d'opinion sur son contenu.

Le dépôt officiel du manuscrit, en 4 exemplaires, doit avoir lieu au plus tard le 29 mars 2024.

Genève, le 29 février 2024

Marie-Laure Salles
Directrice

Thèse N°1503

RESUME / ABSTRACT

Titre de la thèse / Title of thesis : Responsibilities to Prevent: Responsibilities of Supply-Side Actors to Prevent the Adverse Human Rights Impacts of Arms Exports to Conflict Zones

Résumé en français : En raison des intérêts sécuritaires et commerciaux, les incidences négatives sur les droits humains des exportations d'armes vers les zones de conflit sont régulièrement ignorées. Utilisant une approche interdisciplinaire qui comprend des éléments du droit transnational et de l'éthique de la vertu, cette thèse soutient que les exportations d'armes vers les zones de conflit nécessitent la mise en œuvre de responsabilités préventives qui élèvent les considérations des droits humains et s'étendent à tous les acteurs fournissant des armes. Le premier chapitre décrit la portée des enquêtes. Le deuxième présente les caractéristiques essentielles des exportations d'armes vers les zones de conflit. Le troisième illustre la relation historique entre le commerce des armes, la sécurité et les intérêts commerciaux. Le quatrième détaille l'approche à trois volets basée sur la sécurité humaine pour conceptualiser les responsabilités. Le cinquième analyse les principaux instruments internationaux et régionaux de contrôle des armes qui ont été adoptés depuis les années 1990 et qui s'appliquent aux exportations d'armes légères. Le sixième examine les régimes nationaux de contrôle des exportations des six principaux États exportateurs. Le septième étudie les règlements relatifs au courtage pour les intermédiaires et évalue les instruments applicables aux fabricants d'armes et aux banques, ainsi que leurs politiques d'entreprise. Le huitième développe un cadre conceptuel pour la diligence raisonnable en matière de droits humains dans le secteur de l'armement. Le neuvième réfléchit aux défis pratiques et conceptuels pour les responsabilités préventives et à leur potentiel de transformation des pratiques en matière d'exportation d'armes.

English Summary : The adverse human rights impacts of arms exports to conflict zones are routinely ignored in favour of the security and commercial interests that drive the arms trade. Employing an interdisciplinary approach which incorporates elements from transnational law and virtue ethics, this doctoral thesis argues that arms exports to conflict zones require the implementation of preventive responsibilities which elevate human rights considerations and extend to all key supply-side actors. Chapter One explains the scope of the inquiries. Chapter Two details the essential features of arms exports to conflict zones. Chapter Three illustrates the historical relationship between the arms trade, security and commercial interests. Chapter Four particularises the three-pronged human security-based approach to conceptualising responsibilities. Chapter Five analyses the most significant international and regional arms control instruments adopted since the 1990s and applicable to small arms exports. Chapter Six scrutinizes the domestic export control regimes of the six major exporter states. Chapter Seven examines the brokering regulations for intermediaries, and assesses soft law instruments applicable to arms manufacturers and banks, along with their corporate policies. Chapter Eight develops a conceptual framework for human rights due diligence for the arms sector. Chapter Nine reflects on the continuing practical and conceptual challenges for preventive responsibilities and their potential for transforming arms export practices.



Introductory Notes

Research for this doctoral thesis was completed in June 2023 and all links to websites were last checked on 15 September 2023.

Parts of Chapters Six and Seven are based on: H Alwishewa, 'Arms Exports to Conflict Zones and the Two Hats of Arms Companies' (2021) 12 *Transnational Legal Theory* 527.

The image on the preceding page is a decolourised version of the engraving 'Epimetheus opening Pandora's box' by Giulio Bonasone (1531–76). This image is available in the public domain courtesy of The Metropolitan Museum of Art (New York).

Acknowledgements

While not as long or epic as Odysseus' journey home after the Trojan War, the process of researching, writing and editing this doctoral thesis was only possible with the assistance of many others. Words alone are insufficient for conveying to them my deepest gratitude.

Thank you to my thesis supervisor, Andrea Bianchi, for your incomparable direction, discussions and encouragement throughout the years; thank you to my second reader, Andrew Clapham, for your expertise and guidance academically and beyond; and thank you to the external examiner, Anna Stavrianakis, for your thoughtful and incisive comments.

Thank you to the colleagues and support staff from the Geneva Graduate Institute, University of Geneva and ETH Zürich, for your kindness and solidarity.

Thank you to the Swiss Confederation, for funding this research.

Thank you to the Forum on the Arms Trade, for providing a community.

Thank you to my friends from Geneva, for the laughs and inspiration.

Thank you, above all, to my parents, for decades of unwavering support and without whom my endeavours would not have been possible.

And, finally, thank you to my partner, Raphael, for being the best companion throughout this adventure.

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Chapter One – Responsibilities

When it comes to arms (the weapons, not limbs), a number of words spring to mind – war, security, trade, power, defence, sales, gun shows. But one word which remains far down the list is responsibilities.

What are responsibilities? Who are responsibilities for? Who should have responsibilities? What do responsibilities entail? Why are responsibilities even necessary?

The identification, clarification and elaboration of the responsibilities of actors involved in the export of arms to conflict zones is an important step in highlighting the need for arms export practices which respect human rights and do not exacerbate conflict situations. Arms exports to conflict zones involve complex and opaque decision-making and delivery processes, and include a diverse range of actors, different tracks of legality, and multiple levels of law. For millennia, arms have played an integral role in colonisation, the slave trade, and, of course, wars. The trade of arms, between societies, between states, and between groups of people, has been used to strengthen state security and enrich economies. The downsides to the perceived benefits of this dangerous trade are the substantial deaths, destruction and detrimental long term effects for the socio-economic health of affected communities. The commercial and political interests in selling and exporting arms routinely contribute to outbreaks of violence, the plundering of countries and the illicit trafficking of other goods and persons. On top of these consequences, there is a significant lack of transparency relating to arms export decisions, with governments routinely using national security arguments as a reason to keep arms deals and the decision-making processes behind them shrouded in secrecy.

This thesis analyses and conceptualises the responsibilities of the supply-side actors involved in arms exports to conflict zones, and argues that these responsibilities must centre preventive actions, be grounded in morality to elevate human rights considerations, and be extended to all key supply-side actors to minimise potential oversights and unethical behaviours.

The focus of the inquiries into responsibilities is explicated in this introductory chapter. In particular, this chapter specifies how responsibilities should be defined in relation to the arms trade and how the conceptualisation of responsibilities for arms exports to conflict zones will proceed, detailing the aims and objectives, theoretical framework, methodology and scope of the inquiries, as well as providing an overview of the subsequent chapters.

I. Defining Responsibilities

In the beginning there was the word. And so, the first and foremost consideration of responsibilities must, of course, be its definition. Responsibilities is a curious term which, in English, takes on an alternative meaning in its plural form to that of its

singular – responsibility. The differing meanings ascribed to the singular and plural forms of the same noun is one of the many peculiarities of the English language. The authorities command authority. The characters are of questionable character. The force of the forces is strong. The goods are surprisingly good. The wood was harvested from the nearby woods. And that is before the added complications from verbs: the works work for the workers.

To understand responsibilities in the plural, it is necessary to also consider the meanings ascribed to the singular noun. The term ‘responsibility’ has been the subject of numerous conceptual inquiries, including Hart’s seminal taxonomy on the classification of different types of responsibility and Feinberg’s mapping of the variety of ways in which actions and responsibility can be attributed to individuals, among many other examinations of this term.¹ The etymology of the singular form – responsibility – derives from the Latin word ‘*respondeo*’, to answer, conferring a meaning to the singular noun that centres on ‘answer-ability’.² The basic dictionary definition of the English term refers to both the state of being responsible and the thing for which one is responsible.³ In law, responsibility tends to mirror the duality of the dictionary definition, with the ascribed meanings referring to: something which one is responsible for, namely, a thing which one is required to do as part of a job, role, or ‘obligation’; or a synonym for ‘duty’. In the context of arms exports to conflict zones, the assessment of responsibilities requires consideration of the duties and obligations that are required of supply-side actors. While duties and obligations are approximately synonymous, the two terms are distinguished by the ways in which the responsibilities are derived. Duties stem from an actor’s role or position, while obligations ‘may be voluntarily incurred or created’.⁴ The examination of responsibilities in this thesis therefore focuses on both duties and obligations, which, as will be elaborated later in this chapter, may be derived from law and morality.

¹ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd Edition, Oxford University Press 2008) 210–230; Joel Feinberg, *Doing & Deserving; Essays in the Theory of Responsibility* (Princeton University Press 1970) 129–139.

² Volker Roeben, ‘Responsibility in International Law’ (2012) 16 Max Planck Yearbook of United Nations Law 99, 106; Toni Erskine, ‘Moral Responsibility—and Luck?—In International Politics’ in Chris Brown and Robyn Eckersley (eds), *The Oxford Handbook of International Political Theory* (Oxford University Press 2018) 131.

³ See, for example: Merriam-Webster, ‘Definition of RESPONSIBILITY’ (2023) <<https://www.merriam-webster.com/dictionary/responsibility>>.

⁴ RB Brandt, ‘The Concepts of Obligation and Duty’ (1964) 73 *Mind* 374, 374–375. See also: Editors, ‘H. L. A. Hart on Legal and Moral Obligation’ (1974) 73 *Michigan Law Review* 443. This distinction also corresponds with the concepts of duties and obligations in Business and Human Rights. On the duties of states to respect human rights, see, for example: *Velásquez-Rodríguez v Honduras*, Merits, Judgment, Series C, No 4 (29 July 1988) (Inter-American Court of Human Rights), para 154; *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria*, Communication No 155/9 (African Commission on Human and People’s Rights), para 57. On the obligations of corporations, for example, see: Steven R Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *The Yale Law Journal* 443; Carlos Vázquez, ‘Direct vs. Indirect Obligations of Corporations Under International Law’ (2005) 43 *Columbia Journal of Transnational Law* 927.

i. International Responsibility

As many inquiries into the arms trade reference the global or international trade, the focal point of responsibilities for this area has reflexively reverted to 'international responsibility'.⁵ The traditional notion of responsibility under international law – or international responsibility – has a narrowly tailored focus on sanctions for behaviour which violates a specific legal rule, emphasising the attribution of responsibility in order to impose consequences for the failure to adhere to certain expected behaviours. The term 'responsibility' was chosen as the best English word by the International Law Commission during its twenty-fifth session in 1973, in the context of the expression 'responsibility for the international relations of a territory', to be used only in connection with 'internationally wrongful acts'.⁶ This conception aligned with what, in Anglo-Saxon legal tradition, has commonly been termed 'liability', which refers to the consequences levied for the violation of a legal obligation.⁷ While 'responsibility' and 'liability' espouse different meanings in Anglo-American legal traditions, both terms are conveyed by the same word in other Latin languages, such as French (*responsabilité*), Spanish (*responsabilidad*), and Italian (*responsabilità*).⁸

Throughout the years, the conception of responsibility in international law has expanded, revealing it is not a static notion. For example, although damage was a criterion of international responsibility during The Hague Conference for the Codification of International Law, the focus has shifted to the breach of an obligation and whether that breach can be considered an 'act of state'.⁹ International responsibility 'no longer solely plays the role of a compensatory mechanism' and now primarily acts as a basis for condemning breaches of international obligations by its subjects.¹⁰ The expansion of the types of liability, for example, as has occurred under the Articles of State Responsibility, means a state can be held responsible for aiding and abetting the government of another state to commit an internationally wrongful act, such as serious violations of international humanitarian law and human rights.¹¹ More generally, there has been a conceptual diffusion in how the term responsibility is used in international law, which has expanded to include multiple usages. For example, responsibility can refer to a competence of an international body, a primary or fundamental obligation of a state, secondary legal consequences attaching to the violation of a state's primary international law obligations, individual criminal liability, a

⁵ A number of notable works on the arms trade have included in their titles the terms 'international' or 'global', such as: Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (1st Edition, Zed Books 2000); Zeray Yihdego, *The Arms Trade and International Law* (Hart Publishing 2007); Rachel Stohl and Suzette Grillot, *The International Arms Trade* (Polity Press 2009); Andrew Feinstein, *The Shadow World: Inside the Global Arms Trade* (Farrar, Straus & Giroux 2011).

⁶ UN 'Yearbook of the International Law Commission 1973, Volume II' (1973) A/CN.4/SER.A/1973/Add.I.

⁷ André Nollkaemper, 'Responsibility' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar Publishing 2019) 764.

⁸ Julio Barboza, *The Environment, Risk and Liability in International Law* (Brill Nijhoff 2011) 22.

⁹ James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 27.

¹⁰ Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 15.

¹¹ International Law Commission 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) UN GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10, art 16 and 41.

term of accountability, a duty to act, or the division of liability.¹² The conceptual diffusion of international responsibility demonstrates that this version of the term is flexible and adaptable to a variety of contexts and situations. However, for conceptualising responsibilities for arms exports to conflict zones, international responsibility is an unsatisfactory choice because this concept focuses on historical responsibility.

ii. Historical and Prospective Responsibility

Although not an active ingredient in legal rules (except tort law) or even a quintessentially legal term (as it is a regulative principle shared with other disciplines), responsibility is a fundamental legal concept and ‘a basic building block of legal thought and reasoning’.¹³ Responsibility is constituted by three distinct but interrelated aspects: the conduct and mental state of an actor, the consequences and impacts of that conduct on others, and the responsibilities required by that actor.¹⁴ This requires consideration of two equally legitimate but divergent understandings of responsibility: what it means to be responsible (historical responsibility) and what an actor’s responsibilities are (prospective responsibility).¹⁵ The most marked distinction between historical responsibility and prospective responsibility are their temporal standpoints and the type of action which is centred by each of these types of responsibility. Retrospective responsibility is backward-looking and seeks to judge an actor for their actions.¹⁶ In doing so, retrospective responsibility intends to apportion blame or punishment for what an actor has done or failed to do. Retrospectively responsibility thus establishes accountability for conduct that has already been performed, whether it be through the actor’s action or omission.¹⁷ While retrospectively responsibility is undoubtedly necessary for the arms trade, focussing only on

¹² On the different usages of the term in international law, see, as examples: Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi (UN Charter), art 42; Articles on State Responsibility, art 28; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 (UNCLOS), art 22; *Rome Statute of the International Criminal Court*, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute), art 25; UNGA Res 60/1 ‘2005 World Summit Outcome’ (24 October 2005) UN Doc A/RES/60/1, para 138-139. See also, the theory of organisation and global administrative law, which have in some instances treated responsibility as a term of accountability: Ruth W Grant and Robert O Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Review* 29, 35. See, on the division of liability, the concept of shared responsibility: Jean d’Aspremont and others, ‘Sharing Responsibility Between Non-State Actors and States in International Law: Introduction’ (2015) 62 *Netherlands International Law Review* 49, 65. See, generally: Volker Roeben, ‘Responsibility in International Law’ (2012) 16 *Max Planck Yearbook of United Nations Law* 99, 103–4.

¹³ Quote from: Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 1. See also: Roeben (n 2) 104.

¹⁴ Erskine (n 2) 131; Cane (n 13) 55; Feinberg (n 1) 25–26. See also: Christopher Cowley, *Moral Responsibility* (Routledge 2014).

¹⁵ Cane (n 13) 5.

¹⁶ *ibid* 31. See also: Matthew H Kramer (ed), *Rights, Wrongs and Responsibilities* (Palgrave Macmillan UK 2001); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2009); Cowley (n 14).

¹⁷ Cane (n 13) 31. See, also, on the relationship between responsibility and justice in international law: Steven R Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press 2015) ch 2.

international responsibility as the means of determining responsibilities is limiting. International responsibility provides a mechanism for accountability, but remains insufficient for articulating the specific responsibilities an actor must undertake to prevent certain consequences from arising. A focus on prospective responsibility is required when conceptualising the responsibilities of actors for arms exports to conflict zones because of the significant and predictable consequences of these activities and their flow on effects for the individuals and communities exposed to the (mis)use of exported arms.

Like Prometheus, named for his attention to future consequences, prospective responsibility directs an actor to take actions to prevent or mitigate certain risks, including during the pursuit of their interests and in the performance of their obligations and duties. In contrast to historical responsibility, prospective responsibility is forward-looking and focuses on the obligations and duties required of an actor by virtue of their role.¹⁸ Prospective responsibility complements historical responsibility, as clearly defined responsibilities are necessary for accountability mechanisms to be effective.¹⁹ Prospective responsibility serves an important guiding function in preventing and mitigating risks, and attaches to a particular role or is possessed by an actor who acts as a moral agent.²⁰ Prospective responsibility is integral for conceptualising the responsibilities for arms exports to conflict zones as it ensures confidence in a regulatory system for preventing and mitigating foreseeable risks, which in turn provides the basis for applying accountability measures if those risks eventuate. This thesis therefore moves away from determining *who* is responsible for the consequences which arise from the export of arms to conflict zones, and instead clarifies *what* responsibilities actors have to prevent or mitigate those consequences.

II. Scope of the Inquiry into Responsibilities

The following section details the limitations in the scope to the inquiry of this thesis, including the focus on preventive responsibilities, supply-side actors, and arms exports to conflict zones.

i. Preventive Responsibilities

The first limitation in scope in the assessment of responsibilities for arms exports to conflict zones, is the specific focus on ‘preventive responsibilities’: duties and obligations to take actions to prevent adverse consequences. Preventive

¹⁸ Antony M Honoré, *Responsibility and Fault* (Bloomsbury Publishing 1999) 56. See, for example, Young’s conception of responsibility in which she argues that responsibility is forward-looking and is ascribed to an actor because they are required to perform specific obligations: Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) ch 3.

¹⁹ Cane (n 13) 32.

²⁰ This point is presently receiving increased attention in regard to the use of Artificial Intelligence in weapons and warfare. See, for example: Karen Yeung, ‘AI and Responsibility: A Study of the Implications of Advanced Digital Technologies (Including AI Systems) for the Concept of Responsibility within a Human Rights Framework’ (Council of Europe 2019) Study DGI(2019)05. See, generally: RA Duff, *Responsibility* (1st Edition, Routledge 1998).

responsibilities are a form of prospect responsibility which aim to prevent bad outcomes.²¹ Given the inherent risks of exporting arms to conflict zones, preventive responsibilities are the most suitable type of responsibilities for supply-side actors involved in these activities. Although the significant adverse human rights impacts of arms exports to conflict zones has been well documented,²² an outright ban of conventional weapons exports is practically infeasible due to their intimate ties with national security.²³ Conventional arms are considered a necessary part of war and the existence of the arms industry is unavoidable.²⁴ The arms trade business will continue to function in perpetuity, unless all states decide defence is no longer a priority and completely dispense of their militaries. Preventive responsibilities are therefore necessary for preventing or mitigating the adverse human rights impacts of arms exports to conflict zones. As such, the inquiries of this thesis will focus on preventive responsibilities and how they can be conceptualised to minimise or ideally prevent the consequences of arms exports to conflict zones.²⁵ Remedies for these consequences, though undoubtedly an important pillar of responsibility, are beyond the scope of inquiry as the main investigation centres on assessing *how* consequences can be prevented or mitigated. Remedial measures such as sanctions will only be examined where relevant and necessary for the anticipatory actions required by preventive responsibilities.²⁶

ii. Adverse Human Rights Impacts

Second, the type of prevention required by these responsibilities focuses on the prevention of violations of human rights and international humanitarian law in conflict zones, in particular, the right to life, liberty and security that can be impinged upon by the (mis)use of arms for, *inter alia*, violence, torture, extra-judicial killings, slavery, rape, forced prostitution, forced disappearance, targeting of civilians, and child soldiers.²⁷ Global practices have confirmed the excessive availability of arms

²¹ The other type of prospective responsibility is 'productive responsibilities', which seek to produce good outcomes: Cane (n 13) 31.

²² This is examined in Chapter Two.

²³ This point is illustrated in Chapter Three.

²⁴ 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 Publishing 2019) 225; Feinstein (n 5) 529.

²⁵ Cane (n 13) 32; Honoré (n 18) 56.

²⁶ For examinations of the application of international criminal responsibility to actors involved in arms transfers, see: Nina HB Jørgensen (ed), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press 2020). See, in particular, the chapter by Hamilton: Tomas Hamilton, 'Arms Transfer Complicity Under the Rome Statute' in Nina HB Jørgensen (ed), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press 2020). See, on corporate liability for arms exports, the recent report by the Flemish Peace Institute: Machiko Kanetake and Cedric Ryngaert, 'Due Diligence and Corporate Liability of the Defence Industry: Arms Exports, End Use and Corporate Responsibility' (Flemish Peace Institute 2023). See also, the UNGPs which include remedial measures as the third pillar: UN 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04, 27-35.

²⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 3 (right to life, liberty and security of person), art 4 (prohibition of slavery), art 5 (prohibition of torture and cruel, inhuman or degrading treatment or punishment); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

contributes to the commission of war crimes, acts of terrorism, and violations of human rights.²⁸ Even at the most fundamental level, where hostilities are conducted completely in accordance with the laws of war, armed conflicts have significant direct impacts on the physical security, livelihoods and dignity of the individuals and communities embroiled in those conflicts.²⁹ Conflict zones – which is used in this thesis to refer to areas where there is an ongoing international or non-international armed conflict – evidently present heightened risks and higher foreseeability of adverse human rights impacts, providing an especially pertinent context for the assessment of preventive responsibilities. The central focus is therefore the adverse human rights impacts that may occur in these situations. Preventive responsibilities are an essential step in the protection of human rights, and can be incorporated into regulatory and other measures to shift the balance in favour of human rights considerations, including preventing and limiting violations of human rights and international humanitarian law in conflict zones.³⁰ To encapsulate the wide range of human rights and international humanitarian law violations that may be committed through the (mis)use of arms in conflict zones, this thesis employs the broader phrase ‘adverse human rights impacts’, corresponding with the vernacular used in the Business and Human Rights context.³¹

iii. Supply-Side Actors

Third, the focus of preventive responsibilities requires consideration of the main state and non-state actors involved in arms exports, which is why ‘responsibilities’ is defined in this thesis to include duties (which tend to be linked to states) and obligations (which also extend to non-state actors). A multitude of supply-side actors are involved in the export of arms to conflict zones. Collectively, these key actors have been referred to

International Armed Conflicts (Protocol I) (concluded 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Geneva Conventions Additional Protocol I), art 48, 51(2) and 52(2) (principle of distinction between civilians and combatants); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CROC), art 38(3) (prohibition on child soldiers).

²⁸ Tom Coppen, ‘The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty’ (2016) 7 *Goettingen Journal of International Law* 353, 354–355; Yihdego (n 5) 223; Matt Schroeder, Dan Smith and Rachel Stohl, *The Small Arms Trade* (Oneworld 2007) 23; Emanuela-Chiara Gillard, ‘What’s Legal? What’s Illegal’ in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 39.

²⁹ Waseem Ahmad Qureshi, ‘The Response of International Law to the Challenges to Human Security’ (2020) 50 *California Western International Law Journal* 341, 349–350; Zaryab Iqbal, ‘Arms Control In The Human Security Paradigm’ in Robert E Williams and Paul R Viotti (eds), *Arms Control: History, Theory, and Policy*, vol 1 (Praeger Security International 2012) 111.

³⁰ For analysis of the relationship between human rights and international humanitarian law, see: Boyd van Dijk, ‘Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions’ (2018) 112 *American Journal of International Law* 553; Andrew Clapham, ‘The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence’ in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights* (Oxford University Press 2019); Yuval Shany, ‘The End of the War/Peace Limit on the Application of International Human Rights Law: A Response to Andrew Clapham’ in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights* (Oxford University Press 2019); Sarah Joseph and Barrie Sander, ‘Scope of Application’ in Daniel Moeckli and others (eds), *International Human Rights Law* (4th Edition, Oxford University Press 2022).

³¹ UN ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) HR/PUB/11/04, Principle 18.

as the 'arms sector' to take into account the full range of actors involved in the production, transport and sale of arms.³² The key actors in the arms sector are arms states, arms manufacturers, banks, and intermediaries (which includes arms brokers and arms dealers).³³ Due to the 'fluid constellation of actors' involved in arms exports 'whose roles, activities, and identities overlap and shift in form over time, and whose degree of influence varies widely',³⁴ the conceptualisation of responsibilities in this thesis will focus on these four types of key supply-side actors. The 'arms sector' is the preferred collective term for the key supply-side actors, over the more commonly used terms such as 'defence industry', 'arms industry' and 'military-industrial complex', as these latter terms have focussed on the activities of arms manufacturers and their lobby groups, and tend to be used to shield arms manufacturers from direct criticism. References to these latter terms will be used where the analysis or examination focuses specifically on arms manufacturers. The involvement of secondary actors (such as shipping agents and organised crime syndicates, among others) who are contracted by the key actors to undertake specific activities (such as the delivery of weapons stocks), will only be considered in regard to the oversight functions that the key supply-side actors may need to perform.

iv. Small Arms

Fourth, small arms are the primary focus of the conceptualisation of responsibilities, because of the complex regulatory challenges these weapons present. Small arms are viewed as an 'acceptable' type of weapon for use in and export to conflict zones. There is no single, definitive classification of small arms, with national and supranational laws adopting varying specifications.³⁵ A notable reason for this is the technical overlap between small arms and firearms, which are permitted for civilian use in some domestic jurisdictions. Small arms are generally referred to as military weapons which are 'designed for individual use'.³⁶ Types of small arms include revolvers, pistols, rifles, carbines, assault rifles, and machine guns.³⁷ These weapons are also manufactured for civilian use, and there are no specific requirements which render them obviously distinguishable from military small arms, with both categories

³² This term is used by the UN Working Group on Business and Human Rights to refer to 'the full value chain of actors producing or being directly linked to the research, development, design, production, delivery, maintenance, repair and overhaul of military weapons systems, subsystems, parts, components, and ancillary equipment ... [including] actors providing "technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel"'. The Working Group classifies states and arms manufacturers as 'the top of [the value] chain'. See: UN Working Group on Business and Human Rights, 'Information Note - Responsible Business Conduct in the Arms Sector: Ensuring Business Practice in Line with the UN Guiding Principles on Business and Human Rights' (2022) <<https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>> 1–2.

³³ The roles of these actors is examined in Chapter Two.

³⁴ Small Arms Survey, 'Fuelling the Flames: Brokers and Transport Agents in the Illicit Arms Trade' (2001) <<https://www.smallarmssurvey.org/sites/default/files/resources/Small-Arms-Survey-2001-Chapter-03-summary-EN.pdf>> 3; Lina Grip, 'History Never Repeats? Imports, Impact and Control of Small Arms in Africa' (2015) 36 Contemporary Security Policy 79, 80.

³⁵ This point is further elaborated upon in Chapter Three.

³⁶ UN 'Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects 2001' (20 July 2001) UN Doc A/CONF.192/L.5/Rev.1.

³⁷ *ibid.*

capable of being used in conflict zones and for criminal purposes. These weapons also present significant risks of diversion to unintended recipients, due to the ease with which they can be transported. Firearms are also characterised as dual-use items in some jurisdictions, further complicating the regulatory framework.

Due to the technical overlap between the two categories, the assessment of preventive responsibilities will consider the regulatory frameworks for small arms and firearms. The simultaneous inquiries into small arms and firearms are particularly useful for elucidating the complexities of regulating 'acceptable' types of weapons, including conventional weapons and dual-use items, which is especially pertinent to the current issues being discussed regarding the regulation of emerging technologies such as artificial intelligence. These inquiries are also relevant for the regulation of ammunition and torture trade instruments, however, neither is examined in significant detail as the primary focus is on the main regulatory frameworks for small arms and firearms.

v. Arms Sales and Export Controls

The last of the key elements of this thesis is the examination of arms export controls as the primary sources for preventive responsibilities. Arms export controls are a distinct feature of arms control and disarmament which focus on regulating commercial arms sales (referred to interchangeably as 'arms exports' or 'arms deals'). In relevant places, the broader term 'legal transfers' is used where there are illicit elements to the transfer processes. Arms sales are distinguishable from military aid, which a state provides to another state (or armed group) in return for political or ideological alliance, rather than monetary compensation. The decision to provide military aid falls squarely within the purview of political decisions, and thus may not be subject to the same regulatory requirements or oversights as arms exports, especially in 'emergency situations'.³⁸ It is difficult to ascertain the processes for providing military aid, with national security reasons being deployed to maintain secrecy, even more so than for the decision-making behind arms sales.³⁹ Though the decisions to grant export licences for arms sales are often not publicised or are only announced with limited details, reporting requirements and litigation have assisted in making more information and data about these deals publicly available.⁴⁰ Consequently, aside from some consideration of covert military aid in the context of the Cold War, the focus of this thesis remains solely on arms sales.

³⁸ See, for example, the 'Presidential Drawdown Authority' in the United States which permits the President to provide emergency military assistance, taken from the military supplies of the Department of Defence: Foreign Assistance Act of 1961, 22 USC §2318(a)(1).

³⁹ For more on the distinctions between commercial arms sales and military aid, see: Siemon T Wezeman, 'Arms Transfers as Military Aid' in Stockholm International Peace Research Institute (ed), *SIPRI Yearbook 2017: Armaments, Disarmament and International Security* (Oxford University Press 2017).

⁴⁰ See, for example, the claim brought by NGOs in Belgium which, through the course of proceedings, revealed further details about the types of military equipment (small arms, ammunition, and turrets) provided and the arms manufacturers (Belgian manufacturers FN Herstal and Mecar) involved with a number of export licences granted for arms sales to Saudi Arabia: *Judgement on the Claim filed 19 February 2020 against the Walloon Government Council of State* (9 March 2020) Council of State no 247.259, 230.280/XV-4377 (Belgium), p 25.

The sale of arms is regulated by export control laws at the domestic, regional and international levels, and these instruments are therefore the most relevant area for analysing and conceptualising preventive responsibilities. There are also numerous other areas of laws which condition the legality of arms exports, for instance, the legal use of exported arms must adhere to the rules of international humanitarian law. As the focus of this thesis is on the conceptualisation of preventive responsibilities, these other measures are only briefly considered. Likewise, demand for weapons and corruption are also significant issues for the arms trade that are not examined in this thesis. The demand for weapons is an important ongoing issue, and demand-side controls play an essential part in disarmament and post-conflict reconstruction, breaking the cycles of violence, and minimising instability and the risks of crises.⁴¹ Corruption is closely linked with the illicit arms trade, and anti-corruption efforts and instruments are significant factors in this area.⁴² Both these issues warrant their own in-depth studies and thus are excluded from the inquiries of this thesis, which instead seeks to highlight the adverse human rights impacts of the legal arms trade and the reluctance of the arms sector to elevate human rights considerations in arms export decision-making due to the booming business opportunities provided by conflict zones.

III. Conceptualising Responsibilities

In conceptualising the preventive responsibilities of the key supply-side actors involved in arms exports to conflict zones, this thesis incorporates an interdisciplinary approach which combines features from transnational law and virtue ethics. Transnational law provides the overarching framework for the analysis of arms export controls, while the core arguments are grounded in virtue ethics. Accordingly, the analysis and conceptualisation of responsibilities in this thesis emphasises preventive actions, coordination between the key actors, and the incorporation of moral reasoning to counter the pervasive influence of national security and commercial interests in arms export decision-making.

⁴¹ The Report of the UN Disarmament Commission found that '[i]t is well established that excessive accumulation of weapons has destabilising effects and can, in certain circumstances, amount to a threat of the use of force in violation of the Charter. This finding imposes responsibilities on both exporting and importing states to limit the quantity of imports'. See: UN Disarmament Commission 'Guidelines for international arms transfers in the context of General Assembly resolution 46/36 of 6 December 1991' (22 May 1996) UN Doc A/51/42, para 20, 21, 36.

Demand for weapons can be influenced by various social, historical, structural and governance factors, as well as events such as regime collapse, violent conflict or economic crisis which precipitate demand for weapons because of a perceived need for protection and the reinforcement of defensive capabilities: Stohl and Grillot (n 5) 97–99. See also: Johannes Blum, 'Arms Production, National Defense Spending and Arms Trade: Examining Supply and Demand' (2019) 60 *European Journal of Political Economy* (online).

⁴² See, for example, on the links between corruption and human rights violations: Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29 *European Journal of International Law* 1251, 1286.

i. Transnational Legal Order

The export of arms to conflict zones is evidently a transnational human problem, transcending borders in its impact on human lives and livelihoods as well as in its regulation.⁴³ Arms export controls have evolved from being based primarily on national regulations to include regional and international instruments (of both the hard and soft law varieties), as well as other self-regulatory measures such as corporate policies.⁴⁴ These various instruments provide mechanisms for the development, conveyance and settlement of norms transnationally, with different measures penetrating and influencing export controls at various levels and shaping the practices of actors.⁴⁵ Transnational law is therefore a useful framework for the inquiries into the responsibilities for arms exports.⁴⁶ Specifically, Shaffer and Halliday's transnational legal order concept is used to examine the different sources of responsibilities and the contexts of their development.⁴⁷ A transnational legal order is distinguished by three key attributes:

- [1] The norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state;
- [2] The norms, directly or indirectly, formally or informally, engage legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the norms;
- [3] The norms are produced in recognizable legal forms [namely] formalized through the use of formal texts, whether these texts take the form of written rules, standards, model codes or judicial judgments.⁴⁸

The transnational legal order concept is useful for highlighting how the regulatory framework for export controls has developed across borders as well as within the state, and provides a solid foundation for mapping the trajectories and threads of

⁴³ Philip C Jessup, *Transnational Law* (Yale University Press 1956) 32.

⁴⁴ See generally: Terence C Halliday and Gregory Shaffer, 'With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering' in Peer Zumbansen (ed), *Oxford Handbook of Transnational Law* (Oxford University Press 2021).

⁴⁵ Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 3.

⁴⁶ Peer Zumbansen, 'Transnational Law: Theories and Applications' in Peer Zumbansen (ed), *Oxford Handbook of Transnational Law* (Oxford University Press 2021) 36; A Claire Cutler, 'Locating Private Transnational Authority in the Global Political Economy' in Peer Zumbansen (ed), *The Many Lives of Transnational Law* (1st edn, Cambridge University Press 2020) 337; Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 5. See also: Jessup (n 43); Joseph S Nye and Robert O Keohane, 'Transnational Relations and World Politics: An Introduction' (1971) 25 *International Organization* 329; James N Rosenau, 'International Studies in a Transnational World' (1976) 5 *Millennium Journal of International Studies* 1; Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Dr Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate Publishing, Ltd 2013); Susan Block-Lieb and Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge University Press 2017); Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (1st Edition, Cambridge University Press 2020); Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021).

⁴⁷ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 5. See also: Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44); Gregory Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *Annual Review of Law and Social Science* 231; Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37 *Law & Social Inquiry* 229.

⁴⁸ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 12–15.

these developments from the top-down and bottom-up levels of social organization and through a range of state and non-state actors.⁴⁹ The institutionalisation of a transnational legal order can be observed where norms have been adopted at different levels of laws in conformity with each other, and there are changes in the behaviours and practices of the relevant actors based on these norms.⁵⁰ The concept stipulates a framework for examining whether and to what extent a transnational legal order has emerged for regulating the export of arms, and for assessing how key actors have contributed, shaped and hindered the development of the regulatory framework. Although there have been scholarly efforts to piece together the emergence and functions of the international arms trade, there has been a tendency to examine different levels of laws separately, or to presume the existence of a transnational regulatory framework without further delving into the reasons for and significance of this development.⁵¹ The transnational legal order concept provides a basis for investigating the expansion of arms export controls from being purely state-based regulations to include international and regional laws, as well as the self-regulatory measures of corporate actors. The transnational legal order concept is advantageous for the inquiries in this thesis for two central reasons: first, it emphasises the transformations of the law in and beyond the state and the influence of state interests and market forces on these processes; and second, it highlights the involvement of various actors in the development and consolidation of the regulatory framework for arms exports.⁵² Both of these aspects are explored further in the following two sections.

ii. Regulatory Measures

The regulatory framework for arms exports is constituted by multiple levels of laws involving the state but also transcending it, and engages legal institutions across these different levels of laws in the adoption, recognition and enforcement of export controls. In particular, export controls are developed through international laws (hard and soft), regional laws, national laws and regulations, as well as other self-regulatory measures, such as corporate policies, relevant for certain types of actors.⁵³ The transnational legal order concept foregrounds not only the variety of regulatory measures within the legal regime, but also provokes considerations about the political economy within which these measures were elaborated, encouraging the identification of the origins, drivers, and trajectories in the development of transnational norms and standards.⁵⁴ This is especially relevant and necessary for the development of arms export controls

⁴⁹ *ibid* 5.

⁵⁰ *ibid* 51.

⁵¹ For implicit transnational law examinations of the arms trade, see: Stohl and Grillot (n 5); Andrew TH Tan (ed), *The Global Arms Trade: A Handbook* (1st ed, Routledge 2010); Andrew TH Tan (ed), *Research Handbook on the Arms Trade* (Edward Elgar Publishing 2020).

⁵² See generally: Halliday and Shaffer, 'Transnational Legal Orders' (n 45); Shaffer, 'Theorizing Transnational Legal Ordering' (n 47); Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44); Dionysia Katelouzou and Peer Zumbansen, 'Transnational Corporate Governance: The State of the Art and Twenty-First Century Challenges' in Peer Zumbansen (ed), *Oxford Handbook of Transnational Law* (Oxford University Press 2021). See also: Ian Davis, *The Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK* (Oxford University Press, SIPRI 2002) 20–1.

⁵³ See generally: Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44).

⁵⁴ Zumbansen, 'Transnational Law: Theories and Applications' (n 46).

due to the intimate links between arms exports and national security interests, which shape arms export decisions and practices, alongside market forces.⁵⁵

The development, conveyance and settlement of export controls occurs from the bottom-up and the top-down, with international and regional laws penetrating and influencing national export regimes, and national laws and state practices shaping international and regional laws.⁵⁶ Within export control regimes, national laws are emphasised (perhaps overly so) as the first and best line of defence against the irresponsible export of arms to conflict zones because domestic regulations provide the nuts and bolts of export controls. National laws are integral for an effective arms export control regime, and the most efficacious level at which direct duties and obligations for the arms sector are established.⁵⁷ National laws specify the procedures for arms exports while also determining whether actors are subject to contractual liability or criminal sanctions for the improper delivery and/or misuse of arms. While a state's export control regime is mostly tailored to its export capabilities and economic interests, international and regional laws may also require parallel efforts for the regulation of arms exports. By supplementing and complementing domestic export controls, international and regional laws can encourage the alignment of arms export practices with international and regional standards.⁵⁸ International bodies may also play important roles in the diffusion of ethical arms export practices by providing formal settings for states to face social pressure to commit and adhere to 'responsible' export policies.⁵⁹

Other regulatory measures, in particular, the soft law instruments on business and human rights, and governance measures at the corporate level such as company codes of conducts and human rights policies, also establish obligations for states and non-state actors by supplementing the hard laws of the regulatory framework.⁶⁰ While not strict legal regulations, the transnational legal order concept acknowledges that written rules, standards and model codes are recognised legal forms.⁶¹ With the growing emergence of corporate policies, notably of arms manufacturers and banks, which incorporate the requirements from business and human rights instruments and detail the approaches of corporations for preventing and minimising human rights risks, expanding the analysis of export controls to consider corporate self-regulatory measures provide additional relevant sources of responsibilities. As such, all of these types of measures will form the basis for the conceptualisation of responsibilities.

⁵⁵ Gregory Shaffer and Carlos Coye, 'From International Law to Jessup's *Transnational Law*, from Transnational Law to *Transnational Legal Orders*' in Peer Zumbansen (ed), *The Many Lives of Transnational Law* (1st edn, Cambridge University Press 2020) 128; Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 17.

⁵⁶ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 3.

⁵⁷ Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 *Leiden Journal of International Law* 189, 196.

⁵⁸ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 5.

⁵⁹ *ibid.*

⁶⁰ Judith Schrempf-Stirling and Florian Wettstein, 'The Mutual Reinforcement of Hard and Soft Regulation' (2023) 37 *Academy of Management Perspectives* 72.

⁶¹ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 12–15.

iii. Expansion of Actors

In addition to multiple levels of laws, the transnational legal order concept is useful for highlighting the multiplicity of actors involved in the arms trade who are central forces for the development and application of export controls, with the most notable supply-side actors being states, arms manufacturers, banks and intermediaries.⁶² The integrity of the arms export regulatory framework is premised on all key supply-side actors undertaking efforts to adhere to export controls and engage in ethical behaviour.⁶³ These actors are also integral for inferring whether a transnational legal order has become institutionalised, with their actions revealing whether there is sufficient conformity with export controls in practice.⁶⁴ The characterisation of the state as the primary and often times exclusive holder of responsibilities is insufficient for conceptualising responsibilities for the arms trade. While states retain a primary role in arms exports as both a participant and a regulator, and will continue to do so because of the national security and foreign policy implications of these activities, overemphasis on the roles and responsibilities of states ignores significant influence and involvement of other actors in the decision-making and delivery processes, thereby allowing those actors to avoid accountability. With the ever-shifting boundaries between the state and the market in the arms trade, an expansion of responsibilities to include the significant non-state actors is therefore necessary to properly address their roles in arms exports, especially to conflict zones.⁶⁵

There are several notable non-state actors who are central to the development and implementation of arms export controls: arms manufacturers, banks, and intermediaries.⁶⁶ The growing roles of these non-state actors in the decision-making and delivery processes of arms exports, as well as their increasing influence in the development of arms export regulations, reaffirm the importance of preventive responsibilities being extended to non-state actors in order to sufficiently prevent and mitigate the adverse human rights impacts of arms exports to conflict zones. The function of the arms trade as a business necessitates inquiries into responsibilities to be extended to include corporate actors, such as manufacturers and banks (companies may also act as brokers and dealers of arms). Corporations are politically powerful non-state actors who play a major role in the post-Westphalian world and whose rise has the potential to fragment the power in a state, which is illustrative of the 'hollowing out' of the states by 'the exorbitant rise in power and influence' of market forces.⁶⁷ The shifting perception of the corporation as a purely economic actor to one that is socially responsible has been occurring for decades.⁶⁸ Since the 1980s, and

⁶² Shaffer and Coye (n 55) 128.

⁶³ Shaffer, 'The New Legal Realist Approach' (n 57) 203.

⁶⁴ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 51.

⁶⁵ *ibid* 56–7.

⁶⁶ Shaffer and Coye (n 55) 128; Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44) 988–989.

⁶⁷ Zumbansen, 'Transnational Law: Theories and Applications' (n 46). A similar point was also made by Jessup (n 43) 41. See also: Edmund F Byrne, 'Assessing Arms Makers' Corporate Social Responsibility' (2007) 74 *Journal of Business Ethics* 201, 213; MC Bassiouni, 'Introduction: "Crimes of State" and Other Forms of Collective Group Violence by Non-State Actors' in Dawn Rothe and Christopher W Mullins (eds), *State Crime: Current Perspectives* (Rutgers University Press 2011).

⁶⁸ In the 1960s, Milton Friedman encapsulated the social responsibility of these actors as only existing 'to use its resources and engage in activities designed to increase its profits so long as it stays within

especially in the twenty-first century, corporations have developed ‘a new sensitivity to public pressures’ and are required to address environmental and human rights concerns.⁶⁹ The increasing obligations imposed on corporations reflects ‘the changing condominium of market- and state-driven corporate governance regulation’.⁷⁰ Coupled with the transnational operations of these actors, the transnational legal order concept also assists in expanding the inquiries into responsibilities to include notable non-state actors, and in particular corporations, who are integral to the arms trade business.⁷¹

iv. Intersection with Morality

The export of arms to conflict zones illustrates a significant intersection between law and morality. The relationship between law and morality has been the subject to extensive debate, especially on whether the two concepts are necessarily connected.⁷² In the realm of responsibilities, the constitution of this concept has been viewed as including both legal and moral aspects.⁷³ The intersection between law and morality is especially evident in arms exports to conflict zones because of the moral dilemma triggered by such activities, and more generally the morality or lack thereof of the arms trade. The export of arms to conflict zones, even where legal permissibly, nevertheless provokes questions of morality because such activities threaten human security but are predominantly driven by national security and commercial interests rather than human rights considerations.⁷⁴ Due to the discrepancies between the legality and morality of arms export to conflict zones, preventive responsibilities must be significantly grounded in morality to ensure adverse human rights impacts are mitigated and prevented. The reference to morality in this argument is premised on the ‘morality of aspiration’, which emphasises the virtues and ideals which actors should aspire to incorporate into their behaviour, in addition to the legal duties and

the rules of the game’: Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962) 133.

⁶⁹ Jessup (n 43) 20. See also: David Weissbrodt, ‘Roles and Responsibilities of Non-State Actors’ in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 736; Anders Uhlén, ‘Transnational Corporations as Global Political Actors: A Literature Review’ (1988) 23 *Cooperation and Conflict* 231, 231.

⁷⁰ Katelouzou and Zumbansen, ‘Transnational Corporate Governance’ (n 23).

⁷¹ Halliday and Shaffer, ‘Transnational Legal Orders’ (n 45) 5. See also: Terence C. Halliday and Gregory Shaffer, ‘With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering’, in *Oxford Handbook of Transnational Law*, ed. Peer Zumbansen (Oxford University Press, 2021), 987–1006; Gregory Shaffer, ‘Theorizing Transnational Legal Ordering’, *Annual Review of Law and Social Science* 12, no. 1 (27 October 2016): 231–53.

⁷² For example, natural law theorists contend laws should be based on morality and ethics because of the ineluctable entwinement of two concepts. In contrast, positivists insist on the separation of law and morality. Most notably, see the debate between Hart and Fuller on the separability thesis: HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593; Lon L Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630.

⁷³ Matthew H Kramer, *Where Law and Morality Meet* (Oxford University Press 2008) 1; RA Duff, ‘Legal and Moral Responsibility’ (2009) 4 *Philosophy Compass* 978, 978; Cane (n 13) 12. See, on the state being subject to law and morality: Velásquez-Rodríguez v Honduras, Merits, Judgment Series C, No 4 (29 July 1988) (Inter-American Court of Human Rights), para 154. See, on the relationship between legal and moral responsibility in relation to criminal responsibility: David Shoemaker, ‘On Criminal and Moral Responsibility’ in Mark Timmons (ed), *Oxford Studies in Normative Ethics: Volume 3* (Oxford University Press 2013).

⁷⁴ Cutler (n 46) 337.

obligations they are expected to follow.⁷⁵ Morality thus provides ‘a source of ultimate values’ for developing the law and the law, in turn, can transform arms export decisions by integrating ethics into the decision-making process.⁷⁶

Correspondingly, this thesis relies on virtue ethics to navigate the moral dilemma that arises from arms exports to conflict zones, namely, whether arms should continue to be legally exported despite the immorality of such activities because of the significant and foreseeable risks of exporting inherently lethal items to destinations where their misuse is more likely.⁷⁷ Virtue ethics as an approach in the fields of International Law and International Relations draws from the classic Aristotelian tradition of virtue ethics, which has been revived in recent decades.⁷⁸ Going beyond the standard infusion of ethics and ethical concerns into the international order, the inherent and predictable risks of arms exports necessitate the need for high moral standards for the arms trade.⁷⁹ A virtue ethics approach affirms the morality of aspiration notion and advocates for the adoption of ethical reasoning as a basis for resolving moral dilemmas, with ethics being used to guide actors in the performance of their actions.⁸⁰

⁷⁵ Lon L Fuller, *The Morality of Law* (Revised, Yale University Press 1969) 5; Wibren van der Burg, ‘The Morality of Aspiration: A Neglected Dimension of Law and Morality’ in WJ Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999) 169.

⁷⁶ Samantha Besson, ‘The Law in Human Rights Theory’ (2013) 7 *Zeitschrift für Menschenrechte - Journal for Human Rights* 120, 129; Cane (n 13) 42. See also: Steven R Ratner, ‘Ethics and International Law: Integrating the Global Justice Project(s)’ (2013) 5 *International Theory* 1.

⁷⁷ On the point of arms export decisions being a legal decision and the moral judgment of such decisions being beyond the rule of courts, see comments of the Federal Court (Ontario, Canada): *Turp v Minister (Foreign Affairs)* 2017 FC 84, para 76.

⁷⁸ Jan Klabbers, ‘Ethics’ in Jean d’Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 270, 272, 277; Kirsten Ainley, ‘Virtue Ethics and International Relations’ in Nukhet Sandal (ed), *Oxford Research Encyclopedia of International Studies* (Oxford University Press 2017); Roger P Alford and James Fallows Tierney, ‘Moral Reasoning in International Law’ in Donald Earl Childress, III (ed), *The Role of Ethics in International Law* (1st Edition, Cambridge University Press 2011) 11, 23; Lawrence Kohlberg, *Essays on Moral Development* (Harper & Row 1981) 73–74. See also: Stanley Hoffmann, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse University Press 1981); Charles R Beitz, *Political Theory and International Relations* (Revised Edition, 1999); Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press 2001); Peter W Singer, *One World: The Ethics of Globalization* (2nd Edition, Yale University Press 2004); Paul Lauritzen, *The Ethics of Interrogation: Professional Responsibility in an Age of Terror* (Georgetown University Press 2013); Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the Post-9/11 United States* (Oxford University Press 2014); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th Edition, Hachette UK 2015). Virtue ethics also intersects with the International Political Theory subfield of International Relations; see, for example: Mlada Bukovansky and others, *Special Responsibilities: Global Problems and American Power* (Cambridge University Press 2012); David Jason Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge University Press 2014).

⁷⁹ Klabbers (n 78) 268.

⁸⁰ *ibid* 271; Alford and Tierney (n 78) 11, 23; Kohlberg (n 78) 73–74. In the context of psychology, Kohlberg has referred to this type of moral reasoning as ‘Stage 5 reasoning’ that focusses on human rights and social welfare morality. By Stage 5 reasoning, the evaluation of law and social systems is based on ‘the degree to which they preserve and protect fundamental human rights and values’: Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages* (Harper & Row 1984) 634. This approach has been extended by Rest and others in what they term ‘postconventional moral reasoning’, which is ‘based on normative principles about how society *should* be structured’ so that it is ‘ideal, fair, and just’: Alford and Tierney (n 78) 28. See, generally: James R

The incorporation of moral reasoning shifts the focus from a (single) act, to one which considers the practices and character of an actor.⁸¹ Considering acts as standalone actions is insufficient for preventive responsibilities for arms exports to conflict zones because it ignores the competing interests of the actors who drive arms export decisions.

Drawing on this approach, a central argument in this thesis is moral reasoning should be incorporated into arms export decisions to elevate human rights considerations and to counter the pervasiveness of security and commercial interests.⁸² The ubiquity of security justifications has been especially evident in the assertions by various governments that arms exports are necessary to secure international peace and security with regard to the war in Ukraine. Determining whether legitimate business and defence purposes are served by the export of arms involves a fraught decision-making process which is driven by commercial, political or strategic interests, or a combination thereof, and takes place many thousands of miles away from where the human consequences are directly felt. The incorporation of moral reasoning is especially necessary in the case of small arms exports because these weapons provoke complex questions about the overall morality of the arms trade due to their perception as acceptable weapons for use in wars, unlike other controversial and non-conventional weapons which have been increasingly characterised as unacceptable to use, develop and transfer.⁸³ This integration of moral reasoning into arms export decision-making is synergetic with business ethics and corporate social responsibility which are relevant for the examination of the responsibilities of the corporate actors involved in arms exports.⁸⁴

IV. Sourcing Responsibilities

i. Primary Sources

Due to the transnational operation of the arms trade, regulatory and other instruments from various levels of laws are examined in the conceptualisation of preventive responsibilities. The legal instruments examined include international and regional arms control treaties and conventions, notably, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol), the United Nations (UN) Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (Programme of Action), the Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunition and Other Related

Rest and others (eds), *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (Psychology Press 1999).

⁸¹ This approach contrasts with deontology and consequentialism which focus on single acts: Klabbers (n 78) 270, 272.

⁸² Steven R Ratner, 'Fair and Equitable Treatment and Human Rights: A Moral and Legal Reconciliation' (2022) 25 *Journal of International Economic Law* 568, 568; Peter Cane, 'Morality, Law and Conflicting Reasons for Action' (2012) 71 *The Cambridge Law Journal* 59, 85.

⁸³ This argument is elaborated in Chapter Four.

⁸⁴ This is further examined in Chapters Seven and Eight.

Materials, the UN Register of Conventional Arms (UNROCA), the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), the European Union (EU) Common Position on Arms Exports, and the Arms Trade Treaty. At the domestic level, the focus is on the export control regimes of the six largest arms exporter states – China, France, Germany, Russia, the United Kingdom, and the United States. Specific international, regional and domestic laws on brokering activities have also been examined to assess the responsibilities for intermediaries.

In addition, significant instruments on human rights due diligence are also examined, including the UN Guiding Principles on Business and Human Rights (UNGPs), the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct (and related practical guidance), and high-risk sector specific regulations such as the German Supply Chain Act (2021) and the Swiss Ordinance on Due Diligence Obligations and Transparency (2021). As a complement to the legal instruments, the corporate policies of the twenty arms manufacturers and twenty banks have also been assessed in the conceptualisation of responsibilities for corporate actors.

All of the examined primary sources were publicly available. As English is the lingua franca of the arms trade business, most of these sources were available in English.⁸⁵ However, the inquiries into secondary sources, in particular academic scholarship, have predominantly focussed on English-language works, which will undoubtedly have placed some limitations on the arguments of this thesis.

ii. Selection of Actors and Legal Instruments

A comparative analysis of data and reports on arms exports was used to select the key supply-side actors and the legal and other instruments for examination. The datasets, databases and reports from notable arms research bodies were used for this purpose. The most important sources include the arms export data compiled by the Stockholm International Peace Research Institute (SIPRI) and UNROCA, which are both updated annually. Reports, data and other information on small arms was gathered primarily from the Small Arms Survey. Other sources such as the Arms Trade Litigation Tracker created by Saferworld, and reports by Amnesty International, Campaign Against the Arms Trade and PAX were also utilised for ascertaining pertinent case law and arms export scandals.

The selection of the domestic export control regulations was based on SIPRI data on the major arms exporter states. The top six exporter states – China, France, Germany, Russia, the United Kingdom, and the United States – were selected because they

⁸⁵ A key exception to this was national legislations, which were not always available in English. In most instances, I was able to rely on my language skills (French, German, Russian). Unfortunately, my Chinese language skills are non-existent, but English versions of most of the regulatory measures and white papers on China's export controls were available.

provide diversity in terms of age of their export regimes, geography and politics. All six exporters have consistently been the top arms exporters ever since the 1990s and have also been involved in the export of arms to conflict zones.⁸⁶ These exporter states also vary in terms of transparency of their arms sales and their integration of supranational arms control measures into their domestic regimes.⁸⁷ Regulatory measures for arms brokers and dealers consequently also focussed on these exporters, with domestic brokering controls having been adopted by four of these exporters (France, Germany, the United Kingdom, and the United States). The key export control regulations of these exporters were identified through parliamentary reports, strategic papers on arms export controls, and previous scholarship in this area.

The selection of international and regional level instruments was based on three criteria: adoption after 1990 and applicability to small arms or firearms, and the significance of the instrument to some or all of the major exporter regimes or to the arms trade more broadly. The most notable of the examined instruments for preventive responsibilities, the Arms Trade Treaty and EU Common Position on Arms Exports, also provide export criteria that state parties are required to incorporate into their domestic regimes. The latter instrument is applicable to France and Germany, and was previously also relevant for the United Kingdom, when it was still an EU member state.

In addition, the comparative analysis of corporate policies focussed on twenty arms manufacturers and twenty banks.⁸⁸ The selection of twenty manufacturers relied on a combination of factors, including SIPRI data on the top one hundred arms producers since 2015, their involvement in small arms manufacturing, their country of registration (with a focus in particular on manufacturers from the major exporter states), and their involvement in litigation or scandals related to arms exports.⁸⁹ The selection of the

⁸⁶ See, in particular: Pieter Wezeman, Alexandra Kuimova and Siemon Wezeman, 'Trends in International Arms Transfers, 2020' (SIPRI 2021) <https://sipri.org/sites/default/files/2021-03/fs_2103_at_2020.pdf>; Elodie Hainard and Olena Shumska, 'The 2021 Small Arms Trade Transparency Barometer' (Small Arms Survey 2021) <<https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-TB21.pdf>>; Sam Perlo-Freeman, 'Business as Usual: How Major Weapons Exporters Arm the World's Conflicts' (*World Peace Foundation*, 3 March 2021) <<https://sites.tufts.edu/wpf/business-as-usual/>>; Nicolas Florquin, Sigrid Lipott and Francis Wairagu, 'Weapons Compass: Mapping Illicit Small Arms Flows in Africa' (Small Arms Survey and African Union Commission 2019) <<https://reliefweb.int/sites/reliefweb.int/files/resources/SAS-AU-Weapons-Compass.pdf>>.

⁸⁷ Wezeman, Kuimova and Wezeman (n 86); Hainard and Shumska (n 86); Florquin, Lipott and Wairagu (n 86).

⁸⁸ All of the examined corporate policies were available in English, French, German or Russian.

⁸⁹ Appendix I. The criteria was primarily based on data from: SIPRI, 'SIPRI Arms Industry Database' <<https://www.sipri.org/databases/armsindustry>>. See also: European Center for Constitutional and Human Rights (ECCHR), Amnesty International France, Mwatana and the Campaign Against Arms Trade, 'The Responsibility of Arms Manufacturing Company Officers and Government Officials for War Crimes Involving Airstrikes by the Saudi/UAE-led Military Coalition in Yemen committed as of 2015' Communication to the Office of the Prosecutor of the International Criminal Court (11 December 2019) ('Communication to the Office of the Prosecutor of the ICC'). This is a confidential legal filing provided by and cited with permission of the ECCHR. For a publicly available summary of the Communication, see: ECCHR, 'Made in Europe, Bombed in Yemen: How the ICC Could Tackle the Responsibility of Arms Exporters and Government Officials' (2020) Case Report <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAA>

twenty banks involved in financing arms exports, either through providing loans or underwriting services, relied on the following criteria: provision of services to any of the aforementioned twenty manufacturers, and registration in one of the major exporter states.⁹⁰

iii. Transparency and Sources

As is frequently noted in examinations of the arms trade, the lack of comprehensive, reliable or comparable data from national authorities means, at best, the data on arms exports is based on very rough estimates. The lack of transparency is an overreaching issue for the arms trade, as secrecy is tolerated in the interests of national security.⁹¹ Small arms, in particular, are considered to be the least transparent types of weapons because of the tendency to exclude these weapons from reporting initiatives and monitoring efforts, and also because of the difficulties in tracking and tracing small arms due to the ease with which they can be transferred between recipients and through regions and conflict zones.⁹² As a result, due to the persistent secrecy that surrounds the arms trade and its close links with illicit activities such as organised crime, there are severe limits to the availability of comprehensive and accurate information on arms export practices.⁹³ In the few legal cases that have sought to scrutinize arms export decisions by challenging the opacity of government decision-making processes, success has been limited as courts have agreed the lack of public disclosure is justified by national security reasons.⁹⁴ Consequently, rather than focussing on a specific conflict in the assessment of responsibilities, examples have been drawn from ongoing, recent and historical conflicts. Particular attention is given to the Yemen conflict because of the export scandals that have occurred in that

T_Delas_Rete.pdf>. This following manufacturers were identified in this communication: Airbus, BAE Systems, Dassault, Leonardo, MBDA, Raytheon, Rheinmetall and Thales.

⁹⁰ Appendix II. The criteria was primarily based on the 2021 investment data of major banks from:

PAX and ICAN, 'Who Invests? – Don't Bank on the Bomb'

<<https://www.dontbankonthebomb.com/investors/>>. In particular, the following arms manufacturers were identified as clients of the selected banks: Airbus, BAE Systems, Boeing, General Dynamics, L3 Harris Technologies, Leonardo, Lockheed Martin, Northrop Grumman, Raytheon Technologies, Rostec, Thales.

⁹¹ Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 2; Paul Holden (ed), *Indefensible: Seven Myths That Sustain the Global Arms Trade* (1st Edition, Zed Books 2017) 135–152. See also: Orna Ben-Naftali and Roy Peled, 'How Much Secrecy Does Warfare Need?' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013).

⁹² For detailed examination of the transparency issues relating to small arms transfer information and data, see: Pieter D Wezeman, 'Conflicts and Transfers of Small Arms' (SIPRI 2003) s III. Despite this report have been published two decades ago, the issues identified continue to be highly relevant in spite of the adoption of new transparency measures such as UNROCA.

⁹³ Anna Stavrianakis, 'Introducing the Special Section on "Arms Export Controls during War and Armed Conflict"' (2023) 14 *Global Policy* 107, 109.

⁹⁴ For example, the German Constitutional Court has outlined the limits of the access to export decisions and in principle has stated decisions on granting or denying licences do not need to be provided: *Judgment of the Constitutional Court* (21 October 2014) 2 be 5/11 Leitsatz 2. Other cases in which courts have affirmed similar sentiments: *Ordonnance du 26 septembre 2019* (26 September 2019) Paris Administrative Court of Appeal, Order no 19PA02929; *Greenpeace Spain v Ministry of Industry, Commerce and Tourism*, Final Judgement, High Court of Justice of Madrid (15 September 2021) Judgment no 510.

context and the litigation against governments and corporate actors for their involvement in exporting arms to this conflict. The war in Ukraine further spotlighted the issues with the arms trade, however, as many of these exports have been in the form of military aid, export practices for this conflict have not been examined in detail.

For the most part, transparency issues did not hinder the inquiries of this thesis as the foundations of the inquiries centred on evaluating publicly available laws and other documents, including records of treaty negotiations and parliamentary debates, court judgments, legal filings, and policy or strategic papers. The examination of corporate policies proceeded on the presumption that the public availability of such documents was essential for proper scrutinization by stakeholders and the public more generally. As such, corporate policies which were only available as internal documents are viewed as limiting the effectiveness of preventive responsibilities. In addition, this thesis has significantly benefited, particularly in piecing together the practices of actors in the export of arms to conflict zones, from the reports, databases, commentaries and datasets compiled by non-governmental organisations (NGOs), investigative journalists, and research bodies who are dedicated to uncovering and exposing the immorality of the arms trade.⁹⁵ Special mention is also necessary for the Forum on Arms Trade, in particular, the Experts and Emerging Experts who have provided invaluable anecdotal information on behind the scenes discussions during negotiations, conferences, meetings and civil society initiatives.

V. Overview of Chapters

The subsequent chapters of this thesis proceed according to the following four steps. The first step, adding to the explications in this chapter, continues with Chapter Two. That chapter provides a foundation for the conceptualisation of preventive responsibilities, highlighting the essential features of the arms trade pertinent to this conceptualisation, including the methods of acquisition of arms in conflict zones, the roles of the key supply-side actors, and the complexities and consequences of small arms exports.

The second step details the approach to conceptualising responsibilities. Chapter Three illustrates the historical relationship between security and the arms trade, with a focus on the twentieth century up until the end of the Cold War, as a background for the human security-based approach. The literature review is primarily incorporated throughout this chapter and its predecessor. The three-pronged human security-based approach to the conceptualisation of preventive responsibilities is then particularised in Chapter Four, which includes an overview of the emergence of the human security paradigm during the 1990s.

The third step analyses legal regulations and instruments relevant to arms exports, and is primarily concerned with the responsibilities of states. This assessment commences with Chapter Five, which focuses on the most significant supranational arms control instruments adopted since the 1990s and applicable to small arms

⁹⁵ A full list of the databases and other sources are listed in the bibliography.

exports. Chapter Six then scrutinizes the domestic export control regimes of the six major exporter states, comparing how their regulatory frameworks, roles of government agencies, and arms export policies have impacted the performance of preventive responsibilities by states.

The fourth step explores regulatory and other measures through which preventive responsibilities for the key non-state actors have been advanced. Chapter Seven first considers whether brokering regulations have established discrete responsibilities for intermediaries. The second part of that chapter assesses the soft law and self-regulatory instruments applicable to arms manufacturers and banks, and their development of preventive responsibilities for these corporate actors. Chapter Eight expands the search for responsibilities, examining instruments from other high-risk sectors, specifically the mining of conflict minerals and supply chains, and develops a conceptual framework for human rights due diligence for the arms sector, elucidating the standards and processes which should be implemented.

The final chapter, Chapter Nine, reflects on the continuing practical and conceptual challenges for preventive responsibilities and their potential for transforming arms export practices.

Chapter Two – Explanatory Notes

Trying to understand the arms trade is akin to drawing a family tree of the ancient Greek gods. The first step seems comprehensible – dividing the Gods between the Titans and the Olympians. But as additional relationships and beings (such as demigods and heroes) are added, one begins to wonder whether there are enough colours in the Pantone chart to capture the number of different connections between the deities.

The arms trade involves a multitude of actors, different tracks of legality in obtaining arms, and various areas and levels of law. There have been several notable scholarly works that have sought to elucidate specific aspects of the arms trade, including its functions, regulations and consequences, including ones which focussed on small arms specifically.⁹⁶ For the inquiry into responsibilities for arms exports to conflict zones, there are specific threads which must be untangled at the outset, to contextualise the conceptualisation of responsibilities for supply-side actors. This chapter provides an overview of the mechanics of the arms trade most pertinent to this inquiry. Specifically, this chapter examines the legal and illicit methods through which parties to armed conflicts acquire arms, the roles of the key supply-side actors in arms deals, and the complexities and consequences of small arms. The Yemen conflict, in particular, is utilised as a point of reference to underscore the legal controversies and moral dilemmas of exporting arms to conflict zones.

I. Acquiring Arms in Conflict Zones

i. Legal Arms Exports

Arms may be acquired by state and non-state parties to an armed conflict through legal and illicit means. Arms markets can be crudely distinguished into three categories: white (legal); black (illegal); and grey (everything in between). Or, as fictional arms dealer Yuri Orlov from the film *Lords of War* helpfully summarises: ‘There are three basic types of arms deals: white, being legal; black, being illegal; and, my personal favourite colour, grey. Sometimes I made the deal so convoluted, it was hard for me to work out if they were on the level.’⁹⁷

Legal arms sales require compliance with domestic, regional and international laws, and are predominantly used by states to obtain arms. States may import arms for

⁹⁶ Notable literature includes: Lumpe (n 5); Mike Bourne, *Arming Conflict: The Proliferation of Small Arms* (Palgrave Macmillan 2007); Schroeder, Smith and Stohl (n 28); Yihdego (n 5); Stohl and Grillot (n 5); Tan, *The Global Arms Trade: A Handbook* (n 51); Feinstein (n 5); Peter Batchelor and Kai Michael Kenkel (eds), *Controlling Small Arms: Consolidation, Innovation and Relevance in Research and Policy* (Routledge 2013); Jennifer L Erickson, *Dangerous Trade: Arms Exports, Human Rights, and International Reputation* (Columbia University Press 2015); Tan, *Research Handbook on the Arms Trade* (n 51); The International Institute for Strategic Studies (ed), *Arms Sales and Regional Stability: An Assessment* (Taylor & Francis 2023); Stavrianakis, ‘Introducing the Special Section’ (n 93).

⁹⁷ *Lord of War* (2005, Lionsgate).

various security needs, including for police and military forces, as well as for use in conflict zones. The right of a state to import arms is derived from the principle of self-defence enshrined in Article 51 of the UN Charter.⁹⁸ The legality of this right is conditioned by a number of other laws, which at the international level includes, *inter alia*, international humanitarian law, international human rights laws, law on the use of force, Articles on State Responsibility, the Principle of Non-Intervention, the Principle of Non-Use of Force, Security Council Resolutions, customary international law, and private international law. Most notably, the imposition of arms embargoes, at the international, regional or domestic levels, will prohibit the export of arms to a specific actor (including non-state armed groups) or geographical region that is the subject of the embargo.⁹⁹ Arms embargoes require two levels of obligations from states: first, states must comply with the embargo, and second, states must take all necessary steps to ensure individuals and corporations within their jurisdiction are in compliance with the embargo.¹⁰⁰

Furthermore, obtaining arms is an essential task for non-state armed groups in conflict zones. The ability of the group to source and acquire arms 'influences the form, intensity, and duration' of an armed conflict.¹⁰¹ It has generally remained uncontested that the customary rule of non-intervention also applies to arms transfers, thereby limiting the possibilities for non-state parties from obtaining arms legally.¹⁰² During negotiations for arms control instruments, states have collectively sought to restrict non-state actors from acquiring weapons, and especially non-conventional weapons, because many of these groups are outside of the control of states and represent security threats.¹⁰³ The notable exception is when the UN Security Council authorises military assistance, including the provision of military equipment, to a non-state armed group who is a party to an armed conflict.¹⁰⁴ Since the Cold War, some states have provided arms to non-state armed groups without Security Council authorisation, prompting even the International Court of Justice (ICJ) to acknowledge that states frequently breach the rule of non-intervention.¹⁰⁵ Nevertheless, the ICJ also noted there is no 'unprecedented exception to the principle right' which modifies the existing

⁹⁸ See, for example, the view espoused by Alan Thomas, a former head of the Defence Exports Services Organisation of the United Kingdom: 'All countries have a right under the UN Charter, Article 51, to defend themselves and therefore to obtain the means necessary for defence. The United Kingdom claims that right itself and it would be hypocritical to deny it to others': Alan Thomas, 'Attacked from all Sides: the UK 20 Per Cent in the Arms Market?' (1994) 139 RUSI Journal 43-45.

⁹⁹ For further information and data on arms embargo practices, see: SIPRI, 'Arms Embargoes' <<https://www.sipri.org/databases/embargoes>>.

¹⁰⁰ Gillard (n 28) 33.

¹⁰¹ Nicholas Marsh, 'Conflict Specific Capital: The Role of Weapons Acquisition in Civil War' (2007) 8 International Studies Perspectives 54, 54.

¹⁰² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 1986 14, para 292; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 2005 168, para 345.

¹⁰³ Robert E Williams and Paul R Viotti, 'Introduction: Arms Control's Third Era' in Robert E Williams and Paul R Viotti (eds), *Arms Control: History, Theory, and Policy*, vol 1 (Praeger Security International 2012) 5. For a detailed examined of the non-intervention rule and its incorporation in conventional arms controls and arms transfer practices, see: Yihdego (n 5) ch 6.

¹⁰⁴ Charter of the United Nations (1945) 1 UNTS XVI (UN Charter), art 42.

¹⁰⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 1986 14, para 206-208.

customary international law on non-intervention.¹⁰⁶ Despite increasing calls for intervention on humanitarian grounds since the 1990s, without Security Council authorisation, such actions remain controversial and legally disputed by most states and legal experts, as was evidenced by the responses to arguments by the United States and several European states in favour of intervening in the Syrian conflict in response to the use of chemical weapons by the Syrian government.¹⁰⁷

Certain types of non-states actors may also obtain or acquire arms as a result of legal arms exports. For example, private military security companies (PMSCs) who provide security assistance in conflict zones may receive arms from their home governments and build up large arsenals and stockpiles of weapons.¹⁰⁸ With arms being distributed to numerous state-controlled and state-employed groups, significant volumes of weapons can accumulate within a state. Consequently, in times of conflict, these weapons may end up being acquired by non-state armed groups, criminal syndicates and terrorist organisations through illicit means such as theft from stockpiles.

ii. Illicit Arms Transfers

Illicit markets, of both the black and grey types, are especially prevalent on a large scale in conflict and post-conflict situations, providing an enticing and often necessary alternative means through which non-state armed groups obtain weapons during armed conflicts.¹⁰⁹ Black market sales are 'illegal in conception and execution', and offer comparative advantages for non-state armed groups, particularly those who are under international, regional or domestic arms embargoes.¹¹⁰ Black markets can offer

¹⁰⁶ *ibid.*

¹⁰⁷ Other instances where there were calls by some states and NGOs for the supply of arms to non-state armed groups on humanitarian grounds are to Iraq (1991) and Kosovo (1999). See, generally: Lucy Mathiak and Lora Lumpe, 'Government Gun-Running to Guerrillas' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 67; Yihdego (n 5) 189.

¹⁰⁸ The practices and legality of exporting arms directly to PMSCs, in particular, when those groups are supplied weapons from another state than their home state, remains unclear: Nicolas Florquin, 'Private Security Companies' Firearms Stockpiles' in Small Arms Survey (ed), *Small Arms Survey 2011: States of Security* (Small Arms Survey 2011) 111–112, 121. On the issue of PMSCs and state responsibility, see: Mario Iván Urueña Sánchez, 'Private Military and Security Companies: The End of State Responsibility?' (2019) 10 *Mediterranean Journal of Social Sciences* 72; Hin-Yan Liu, *Law's Impunity: Responsibility and the Modern Private Military Company* (Hart Publishing 2017); Charlotte Beaucillon, Julian Fernandez and H el ene Raspail, 'State Responsibility for Conduct of Private Military and Security Companies Violating *Ius Ad Bellum*' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press 2011); Heather Elms and Robert A Phillips, 'Private Security Companies and Institutional Legitimacy: Corporate and Stakeholder Responsibility' (2009) 19 *Business Ethics Quarterly* 403; Anna Leander, 'The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies' (2005) 42 *Journal of Peace Research* 605.

¹⁰⁹ See, in general: Feinstein (n 5); Gillard (n 28); Bourne (n 96); Michael T Klare, 'Secret Operatives, Clandestine Trades: The Thriving Black Market for Weapons' (1988) 44 *Bulletin of the Atomic Scientists* 16; Edward J Laurance, 'Political Implications of Illegal Arms Exports from the United States' (1992) 107 *Political Science Quarterly* 501; Aaron Karp, 'The Rise of Black and Gray Markets' (1994) 535 *The ANNALS of the American Academy of Political and Social Science* 175; Wezeman, Kuimova and Wezeman (n 86); Hainard and Shumska (n 86); Florquin, Lipott and Wairagu (n 86).

¹¹⁰ The most notable example of arms embargoes against a non-state actor are those against Al Qaeda and its affiliates: UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390; UNSC Res 1988 (17 June 2011) UN Doc S/RES/1988;

organised and disciplined non-state armed groups access to the weapons stocks of states, which can include weapons stolen from government stockpiles, weapons recycled from other conflicts or weapons illicitly circulated through organised crimes.¹¹¹ For example, up to 90 percent of the weapons acquired by the Islamic State have been through theft from the stockpiles of the Syrian and Iraqi governments and non-state armed groups in Syria.¹¹²

In addition, grey market transfers are used to deliver arms to (usually controversial) recipients through complex arrangements which involve the circumvention of laws, the exploitation of legal loopholes or the diversion of legal stocks, thereby violating terms of sale and end-user agreements.¹¹³ There are a multitude of ways in which this can occur, including the unofficial re-export of arms (on the understanding that the official recipient will re-export some or all of the arms to another party), arms smuggling through covert channels (such as the delivery of foreign weapons to avoid the exported arms being traced to the actual exporter), or through the facilitation of the delivery through secondary actors to circumvent specific regulations.¹¹⁴ A particularly notable type of illicit transfer used during the Cold War was covert aid.¹¹⁵ Arms can also shift from legal to illicit markets in a number of ways, including through sales by corrupt officials, legal arms manufacturers illegally producing guns to sell on the black market (often small private traders), straw purchases from gun shows, or weapons buyback programmes which involve weapons being bought from the black market and then sold to a buyback programme at a higher price.¹¹⁶

An infamous example of illicit arms deals was the Iran-Contra Scandal in the 1980s which was as complex as it was notorious.¹¹⁷ The scandal involved senior officials of the United States' Reagan administration covertly selling arms to Iran, including 1,500 American missiles sold for USD 30 million. The arms sales were part of hostage negotiations between the United States and Iran. At that time Iran was under embargo by the United States and also involved in a war with Iraq. The proceeds from the covert arms sales were used to fund the anti-Communist Contra forces in Nicaragua, who

UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989; UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170; UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253.

¹¹¹ Feinstein (n 5) 524; Marsh (n 101) 54; Bourne (n 96) 111. Bourne also notes organised black markets have been found to be particularly adept at sourcing arms from legal stocks which are haemorrhaging from collapsed states: *ibid* 169.

¹¹² Conflict Armament Research, 'Weapons of the Islamic State: A Three-Year Investigation in Iraq and Syria' (2017) 146.

¹¹³ *ibid* 146–147; Feinstein (n 5) xxii; Bourne (n 96) 112; Lora Lumpe, Sarah Meek and RT Taylor, 'Introduction' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 5.

¹¹⁴ For an examination of how the United States has arranged or been involved in such transfers, particularly with regard to the Syrian conflict, see: Jennifer L Erickson, 'Demystifying the "Gold Standard" of Arms Export Controls: US Arms Exports to Conflict Zones' (2023) 14 *Global Policy* 131, 133–4.

¹¹⁵ Covert aid is further examined in Chapter Three.

¹¹⁶ Stohl and Grillot (n 5) 100–102; Bourne (n 96) 27; Brian Wood and Johan Peleman, 'The Arms Fixers. Controlling the Brokers and Shipping Agents' (Peace Research Institute Oslo 2000) NISAT/PRIO/BASIC Report ch 1.

¹¹⁷ United States Congress, 'Report of the Congressional Committees Investigating the Iran-Contra Affair Senate' (1987) Report No 100-216, House Report No 100-433 <<https://www.cia.gov/readingroom/docs/CIA-RDP89T00142R000500610001-7.pdf>>.

were fighting against the communist Sandinista government. The scandal is illustrative of a number of key issues of arms exports, including the use of arms deals for political influence and bargaining, the commercial interests of arms sales (as arms sellers seek to profit from deals even when through illicit channels), and the complex web of transfers.

While reliable estimates of the volume of illicit transfers are hard to come by, the International Committee of the Red Cross reports that 'it is clear that a large proportion of all illicit transfers begin with weapons which were originally transferred legally'.¹¹⁸ The Small Arms Survey has noted that non-state armed groups have increasingly supplanted traditional state actors and established informal trade routes and alternative delivery methods, resulting in arms transfers to conflict zones becoming more convoluted over recent decades.¹¹⁹ The complex web of transfers that have been used to move arms to and throughout conflict zones highlights the difficulty in tracking who retains possession of the transferred arms, reaffirming the importance of preventive responsibilities for arms exports to conflict zones.

iii. The Conflict in Yemen

This will be the most consequential thing that has happened in the world since World War II.

So predicted, the United States President Joe Biden on 19 January 2022, speaking about the Russian invasion of Ukraine that would occur the following month.¹²⁰ Since February 2022, the full-scale war in Ukraine has seen an exponential growth in news coverage on the impacts of arms exports to conflict zones and the variety of actors involved in their supply. While the Ukraine conflict will undoubtedly mark a significant juncture in the history of international relations, for years another armed conflict has been slowly but surely awakening the public consciousness to the consequences and complexities of arms exports to conflict zones.

Within a few years of the fragile stability created by unification in 1990, civil war began in Yemen in 1994, reigniting again in 2009 with a new insurgency. Following the Arab Spring in 2011, protests and power struggles led to further destabilisation of the Yemeni government. In September 2014, the government was taken over by Houthi forces. Within six months, a coalition of forces from Saudi Arabia, the United Arab Emirates, Bahrain, Jordan, Egypt, Kuwait, Morocco, Sudan and Qatar militarily intervened upon request from the Hadi government.¹²¹ The conflict has accordingly

¹¹⁸ ICRC, 'Arms Availability and the Situation of Civilians in Armed Conflict: A Study Presented by the ICRC' (1999) 6 <<https://www.icrc.org/en/doc/resources/documents/publication/p0734.htm>>.

¹¹⁹ See, for example: Fiona Mangan and Matthias Nowak, 'The West Africa-Sahel Connection: Mapping Cross-Border Arms Trafficking' (Small Arms Survey 2019) Briefing Paper <<https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-West-Africa-Sahel-Connection.pdf>>; Lekh Nath Paudel, 'The Highway Routes: Small Arms Smuggling in Eastern Nepal' (Small Arms Survey 2014) Issue Brief 4 <<https://www.smallarmssurvey.org/sites/default/files/resources/NAVA-IB4-Highway-Routes.pdf>>..

¹²⁰ Presidential News Conference, 19 January 2022.

¹²¹ A number of these states ceased their involvement: Qatar in 2017, and Sudan and Morocco in 2019.

been classified as a non-international armed conflict, even though a number of states continue to be involved, because their involvement was upon request of the legitimate government.¹²² Since March 2015, the coalition forces have been engaged in the land war, air war, and naval blockade.¹²³ In April 2015, the UN Security Council imposed an arms embargo on armed Houthi rebel groups in Yemen due to the worsening humanitarian situation; however, these restrictions were not extended to any members of the coalition states.¹²⁴

While the military conflict has been at a stalemate, the large-scale civilian casualties continue to mount and the population faces a severe humanitarian crisis that has so far resulted in the death of 377,000 people by the end of 2021.¹²⁵ Since the beginning of the conflict close to 15,000 civilians have been killed in direct military actions.¹²⁶ In many instances, civilians have been directly targeted by air raids, in clear violation of international humanitarian law.¹²⁷ Despite these consequences and the vast amounts of documented human rights and international humanitarian law violations, Yemen continues to be flooded with arms, sold by European states, the United States and Iran to coalition states such as Saudi Arabia, the United Arab Emirates, Egypt, Bahrain, Kuwait and Jordan.¹²⁸

The legal and moral questionability of these exports has been affirmed by international bodies as well as by NGOs, who have litigated the issue across a number of jurisdictions. For example, the UN Human Rights Council has questioned the legality of these arms exports (including under the Arms Trade Treaty) and highlighted the potential for the coalition states to be 'held responsible for providing aid or assistance for the commission of international law violations if the conditions for complicity are fulfilled'.¹²⁹ Legal complaints contesting the legality of arms sales to coalition forces have been filed in Belgium, Canada, France, Italy, South Africa, Spain, the Netherlands, the United Kingdom, the United States.¹³⁰ These complaints and cases

¹²² UN Human Rights Council 'Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights' (9 August 2019) A/HRC/42/17, para 9.

¹²³ For a detailed overview of the different military activities, see: Vredesactie, 'War in Yemen, Made in Europe.' (October 2019) <<https://yemen.armstradewatch.eu/index.html>>.

¹²⁴ UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216.

¹²⁵ Taylor Hanna, David K Bohl and Jonathan D Moyer, 'Assessing the Impact of War in Yemen: Pathways for Recovery' (UNDP 2021) 12 <<https://www.undp.org/yemen/publications/assessing-impact-war-yemen-pathways-recovery>>.

¹²⁶ CAAT, 'The War on Yemen's Civilians' (*Campaign Against Arms Trade*, 25 August 2023) <<https://caat.org.uk/homepage/stop-arming-saudi-arabia/the-war-on-yemens-civilians/>>.

¹²⁷ Hanna, Bohl and Moyer (n 125).

¹²⁸ UN Human Rights Council 'Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights' (9 August 2019) A/HRC/42/17, para 96.

¹²⁹ *ibid*, para 92.

¹³⁰ Belgium: *Judgements of the Council of State no 242.022, 242.027, 242.028, 242.031, 242.026, 242.024 of 29 June 2018* (licence suspension); *Judgements no 244.800-244.804 of 14 June 2019* (licence annulment); *Judgement of the Council of State no 248.128 of 7 August 2020* (licence suspension for small arms exports); *Judgement of the Council of State no 249.991 of 5 March 2021* (licence suspension); *Judgement of the Council of State no 250.446 of 27 April 2021* (licence annulment).

have tended to challenge arms export licensing decisions, though some cases have also sought to establish criminal responsibility for arms manufacturers involved in the arms exports, or to halt exports to certain destinations.¹³¹ For the most part, despite these legal challenges, even when combined with public pressure, states such as the United Kingdom and France have continued to export arms to Saudi Arabia. Nonetheless, these cases have been useful for increasing transparency in arms exports and shining a light on the intricacies and competing interests of arms deals.

In addition, there are some instances where governments have changed their practices even where legal challenges have failed. A particularly notable case in this regard, which illustrates the complexities of arms exports to conflict zones, is the criminal complaint filed by the European Centre for Constitutional and Human Rights (ECCHR), Mwatana Organization for Human Rights and Rete Italiana per Il Disarmo with the Public Prosecutor in Rome against the directors of RWM Italia and officials of

Canada: *Turp v Minister (Foreign Affairs)* 2017 FC 84; *Turp v Minister (Foreign Affairs)* 2018 FCA 133 (appeal).

France: *Council of State decision no 436098* (27 January 2023)

ECLI:FR:CECHR:2023:436098.20230127.

The Netherlands: *Court of Noord Holland (Rb Noord-Holland) 25 August 2016*

ECLI:NL:RBNHO:2016:7024; *Court of Amsterdam (Gerechtshof Amsterdam) 24 January 2017*

ECLI:NL:GHAMS:2017:165; *Court of Amsterdam (Gerechtshof Amsterdam) 17 October 2017*

ECLI:NL:GHAMS:2017:4582 (appeal).

South Africa: In June 2021, an application for judicial review of the decision to authorise arms exports to Saudi Arabia and the United Arab Emirates was filed by the Southern Africa Litigation Centre SALC and Open Secrets against the National Conventional Arms Control Committee (NCACC) and Minister of Defense. See further: Open Secrets, 'Yemen: Court Application to Review Arms Sales to Saudi Arabia and the UAE' (*Open Secrets*, 16 April 2021)

<https://www.opensecrets.org.za/what_we_do/using-the-law/ncacc/>.

Italy: Complaint against RWM Italia, see further: fn 132.

United Kingdom: *Campaign Against Arms Trade (CAAT) v The Secretary of State for International Trade* [2019] EWCA Civ 1020 (first administrative challenge by CAAT); *The King (on the application of CAAT) v Secretary of State for International Trade* [2023] EWHC 1343 (Admin) (second administrative challenge by CAAT).

United States: complaint filed against the United States government and arms manufacturers registered, see further: fn 131.

For indexes of cases, see: The Arms Trade Litigation Monitor, 'Cases Index'

<<https://armstradelitigationmonitor.org/cases-index/>>; Action Sécurité Ethique Républicaines, 'Décisions de Justice - ASER' <<https://aser-asso.org/transferts-darmes/justice/>>.

¹³¹ See, most notably: ECCHR and others, Communication to the Office of the Prosecutor of the ICC (11 December 2019) (n 89). The Communication targets the following manufacturers as defendants, along with their respective government: Airbus Defence and Space SA (Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc (United Kingdom), Dassault Aviation SA (France), Leonardo SpA (Italy), MBDA UK Ltd (United Kingdom), MBDA France SAS. (France), Raytheon Systems Ltd (United Kingdom), Rheinmetall AG (Germany) through its subsidiary RWM Italia SpA (Italy), and Thales (France).

In the United States, seven Yemenis civilians have filed a complaint with the Federal Court in Washington DC in March 2023 that accuses, in addition to government and military official, the CEOs of Raytheon, Lockheed Martin, and General Dynamics (all registered in the United States) of aiding in extrajudicial killings in Yemen by supplying arms to coalition forces: Zamone Perez, 'US Defense Companies Sued by Yemenis over Weapons Used in Civil War' *Yahoo News* (12 April 2023) <<https://news.yahoo.com/us-defense-companies-sued-yemenis-202111435.html>>. This case is in its early stages and no filings have been made public yet.

For an analysis of the applicability of individual criminal liability under ICC Statute to arms manufacturers, see: Linde Bryk and Miriam Saage-Maaß, 'Individual Criminal Liability for Arms Exports under the ICC Statute' [2019] *Journal of International Criminal Justice* 1117.

the Italian National Authority for the Armament Licensing and Controls (Unit for the Authorizations of Armament Materials or UAMA).¹³² RWM Italia is the Italian-based subsidiary of the German arms manufacturer Rheinmetall. In March 2018, Germany imposed a ban on arms exports to Saudi Arabia following the murder of the Saudi-journalist Jamal Khashoggi and the involvement of Saudi Arabia in the Yemen war. ECCHR filed its criminal complaint against RWM Italia in April 2018. At the time, arms exports to Saudi Arabia were permitted by Italy, and a large portion of those exports were bombs produced and exported by RWM Italia.¹³³ Following increasing allegations these bombs were used by members of the Saudi-coalition in connection with international humanitarian law violations, Italy initially suspended the export of aircraft bombs, missiles and their components to Saudi Arabia and the United Arab Emirates for 18 months. This was followed by a permanent ban in January 2021. Although the criminal complaint was dismissed on 15 March 2023 by the Judge for Preliminary Investigations, the complaint and public pressure were successful in provoking a change in export policy and reaffirming the obvious human rights risks of exporting arms to states involved in the Yemen conflict.¹³⁴

II. Key Supply-Side Actors

i. States and their Agencies

Given the centuries-old assumptions about state sovereignty and the state's absolute authority for wars and weapons, it is unsurprising states have remained central to the arms trade. States are responsible for developing and enforcing export controls at the national level, including incorporating regional and international standards into national export regimes. States are also the key participants in treaties negotiations at the regional and international levels. The head of state may have final authority over

¹³² On 10 March 2023, the Judge for Preliminary Investigations in Rome dismissed the case concerning the criminal responsibility of the defendants, despite confirming that Italy's National Authority for the Export of Armament (UAMA) was 'in violation of at least Articles 6 and 7 of the Arms Trade Treaty (ATT)' by issuing export licences to RWM Italia SpA. The judge did not consider the suspects prosecutable, as it could not be proven that the main intent of the directors of UAMA was to procure a pecuniary advantage to RWM Italia SpA. The conduct of RWM Italia's CEO was not considered at all by the GIP. A public version of this case is not available. For a case summary, see: ECCHR, 'European Responsibility for War Crimes in Yemen – Complicity of RWM Italia and Italian Arms Export Authority?' <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_RWMItalia_Dec2020.pdf>; ECCHR, 'The Case against UAMA and RWM Italia Is Not about Negligence, It's about Italy's Role in Deadly Saudi/UAE-led-Coalition Airstrike' <<https://www.ecchr.eu/en/press-release/the-case-against-uama-and-rwm-italia-is-not-about-negligence-its-about-italys-role-in-deadly-saudiuae-led-coalition-airstrike>>; Rete Italiana Pace e Disarmo, 'Italy Fails Victims of War Crimes in Yemen despite Prove of Violation of Arms Trade Treaty' (*Italian Network for Peace and Disarmament*, 15 March 2023) <https://retapedisarmo.org/english/2023/italy-fails-victims-of-war-crimes-in-yemen-despite-prove-of-violation-of-arms-trade-treaty>. On 4 July 2023, an application was submitted by the victims of the Deir Al Hajari attack against Italy, to the European Court of Human Rights.

¹³³ See: Giovanna Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (2021) 56 *The International Spectator* 73; Rete Italiana Pace e Disarmo (n 132).

¹³⁴ ECCHR, 'War Crimes in Yemen: Complaint against French Arms Companies' (September 2022) <<https://www.ecchr.eu/en/case/yemen-arms-exports-france/>>.

the approval of arms exports and imports.¹³⁵ Other government departments, particularly the departments of defence, foreign affairs, and trade, may be involved in arms export decision-making, including providing advice to the head of state, approving and executing export licences, and developing arms export policies. These government bodies as well as border control agencies and diplomatic agencies abroad, may also take part in the enforcement of export controls and post-sale responsibilities such as tracking weapons exports. The focus of responsibilities of states for arms exports to conflict zones will centre on the state agencies which have documented direct input in arms export decisions, including the licensing process.

In addition to the state's function as a regulator, there are other state agencies who are involved in promoting and financing arms deals. For instance, many states have agencies which are involved in promoting arms exports overseas, reaffirming the close ties between the arms industry and governments, as well as the commercial functions of arms trade.¹³⁶ Another type of government body commonly involved in arms deals are export credit agencies, which provide financing for arms deals in the form of export credits to protect against risks of foreign transactions being unpaid.¹³⁷ The use of export credits usually occurs when arms manufacturers are given defence contracts by their government to provide military equipment for a foreign sale.¹³⁸ Specific information of export credit guarantees are not generally disclosed by governments in their reporting on (conventional) arms export reports. This lack of transparency renders it difficult to assess the scope of influence export credits can have on arms export decision-making.

ii. Arms Manufacturers

Arms manufacturing and exporting companies (referred to simply as 'arms manufacturers') produce and deliver arms for the militaries of their home states and for the sale of weapons domestically and overseas. These companies may be state-owned and controlled or commercial business entities which are formally separated from the state. Even in cases where arms manufacturers are private businesses, they continue to retain intimate links with states because of the national security implications of arms production and exports. Due to their important roles in the production of arms, these companies maintain a privileged position in the arms trade, and have become 'interwoven into the domestic national security fabric'.¹³⁹ While arms manufacturers do not possess total control over arms deals as states, they wield significant economic and political power in both the creation and implementation of the arms exports regulations and policies. As was evidenced during the post-Cold War

¹³⁵ See, for example, the United States. This is further examined in Chapter Six.

¹³⁶ See, for example, the United Kingdom Defence and Security Exports.

¹³⁷ See, for example, the United States Export-Import Bank, British Export Credits Guarantee Department, Compagnie Française d'Assurance pour le Commerce Extérieur, and Euler Hermes in Germany. This point is reaffirmed by the development of best practice guides for promoting national arms exports, such as: European Economic and Social Committee, 'Study on Best Practices on National Export Promotion Activities' (European Union 2018) <<https://www.eesc.europa.eu/sites/default/files/files/qe-03-18-141-en-n.pdf>>.

¹³⁸ Joel L Johnson, 'Financing the Arms Trade' (1994) 535 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 110, 114–115.

¹³⁹ UN Working Group on Business and Human Rights (n 32) 4.

period, arms manufacturers and their influential economic lobbies can play a direct role in developing export markets, frequently in underdeveloped states and regions which are highly prone to conflict.¹⁴⁰ Many arms manufacturers also maintain close relationships with foreign governments, who are key clients, and can therefore drive decisions regarding the availability of weapons and their price.¹⁴¹ Arms manufacturers have thus accumulated significant power and influence in arms sales.

iii. Banks

As with the sales of other commercial and capital goods, arms deals often require financing, particularly where arms are delivered to less developed countries which spread the payments over a number of years.¹⁴² In addition to arms export credits provided by exporter states, commercial banks provide a second type of financing for arms exports, notably through loans to arms manufacturers. Commercial banks can provide two types of loans, a general purpose loan or 'project finance', which is a loan for a specific planned arms deal.¹⁴³ In addition, commercial banks may provide 'underwriting services' to arms manufacturers, which involves 'providing a loan to a company that is divided into small segments, which are then sold as corporate bonds'.¹⁴⁴ Banks may also invest in the arms trade through ownership of corporate bonds or shares in an arms manufacturer. By financing arms deals, banks derive significant revenue flows from arms deals, including arms exports to conflict zones. Through their financial power, banks have the capabilities to influence arms export decisions.

iv. Intermediaries

Arms brokers and arms dealers are individuals or private companies who either directly sell arms to recipients or who facilitate the transfer of arms to recipients in exchange for a fee. Following the increased privatisation of the functions of the state, arms brokers and arms dealers were able to gain a foothold in negotiating arms deals, in addition to providing services for delivery and financing, as governments became more reluctant to openly provide arms to non-state armed groups in conflict zones.¹⁴⁵ Definitions of arms brokers and arms dealers within national jurisdictions are varied, and in some cases domestic legislation refers to this type of actor as an 'intermediary'

¹⁴⁰ See, generally, Ron Smith, Anthony Humm and Jacques Fontanel, 'The Economics of Exporting Arms' (1985) 22 *Journal of Peace Research* 239; ICRC (n 118).

¹⁴¹ Jan van Lieshout and Robert Beerers, 'Economics of Arms Trade: What Do We Know?' in Robert Beerers and others (eds), *NL ARMS Netherlands Annual Review of Military Studies 2021: Compliance and Integrity in International Military Trade* (TMC Asser Press 2022) 23; Stohl and Grillot (n 5) 44; Andrew Moravcsik, 'The European Armaments Industry at the Crossroads' (1990) 32 *Survival* 65, 72; Smith, Humm and Fontanel (n 140).

¹⁴² Johnson (n 138) 113. Johnson makes this point about large weapons systems, comparing them to transport, power generation and communications. This argument can also be extended to small arms.

¹⁴³ PAX and Profundo, 'High-Risk Arms Trade and the Financial Sector' (PAX 2022) 8

<https://paxvoorvrede.nl/media/download/PAX_REPORT_HIGHRISK_ARMS_TRADE.pdf>.

¹⁴⁴ *ibid.*

¹⁴⁵ Brian Wood and Johan Peleman, 'Making the Deal and Moving the Good – The Role of Brokers and Shippers' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 129–130.

because they facilitate transactions between suppliers and recipients.¹⁴⁶ The activities of arms dealers and arms brokers are both covered by the definitions of 'brokering activities', which often include conduct such as buying, selling or arranging the sale of arms (which arms dealers perform), and the bringing together of buyers, sellers, transporters, financiers and insurers to make a deal and the delivery of arms to the recipient party (which is associated with arms brokers).¹⁴⁷ Due to the overlap between the activities of brokers and dealers, their responsibilities will be considered together, under the umbrella of 'intermediaries'.¹⁴⁸

III. Complexities and Consequences of Small Arms

i. The Weapons of Choice

Despite the attention received by larger weapons with greater single explosive power, small arms are the real weapons of mass destruction. Small arms are responsible for the vast majority (90 percent) of deaths and injuries in wars since World War II.¹⁴⁹ Small arms are the main weapon of choice for many parties to armed conflicts because they are simple to handle, durable, portable, easy to conceal, low cost, widely available, and lethal.¹⁵⁰ The most proliferated rifles – AK47s, Uzis, G3s, FALs, M16s – regularly serve as tools of conflict, crime, repression and violence.¹⁵¹ Since the 1990s, there has been increasing recognition of the destructive potential of small arms. The UN Secretary-General's Report (1999) highlighted the significant impact of the widespread availability of small arms on the scope and level of violence in armed conflicts.¹⁵² The Special Rapporteur on Small Arms found 'small arms are dominant tools in arbitrary killings, detention, forced disappearance, genocide, torture, rape, kidnapping, injuries, and displacement either through actual use or to facilitate such

¹⁴⁶ UNGA 'The illicit trade in small arms and light weapons in all its aspects' (30 August 2007) UN Doc A/62/163, para 8. See also, for example, the United States definition. A 'broker' is defined as 'anyone who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission or other consideration', and 'brokering activities' included 'the financing, transportation, freight forwarding or taking of any other action that facilitates the manufacture, export, import, or transfer of a defense article or service irrespective of its origin': International Traffic in Arms Regulations 22 CFR § 129.2. A broad definition of 'broker' was adopted by Belgium, which defined 'intermediary' as 'anyone who, in exchange for remuneration or free of charge, creates the conditions for the conclusion of a contract to negotiate, export or deliver, or possess to this end arms, munitions or materials for specific military use or related technology abroad, irrespective of where these goods come from or go to, whether or not they enter Belgian territory, and whoever concludes such a contract when the transport is performed by a third party': Law amending the law of 5 August 1991, 23 March 2003 no 2003009419 (Loi modifiant la loi du 5 août 1991 relative à l'importation, à l'exportation, au transit et à la lutte contre le trafic d'armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente), art 10.

¹⁴⁷ Wood and Peleman (n 145) 129.

¹⁴⁸ Small Arms Survey (n 34) 3.

¹⁴⁹ UNGA 'Small Arms: Note by the Secretary-General' (19 August 1999) UN Doc A/54/258.

¹⁵⁰ Robert Muggah and Peter Batchelor, 'Development Held Hostage: Assessing the Effects of Small Arms on Human Development (Co-Publication)' (UNDP and Small Arms Survey 2002) 9 <<https://www.smallarmssurvey.org/resource/development-held-hostage-assessing-effects-small-arms-human-development-co-publication>>; ICRC (n 118) 5.

¹⁵¹ Yihdego (n 5) 52.

¹⁵² UNGA 'Small Arms: Note by the Secretary-General' (19 August 1999) UN Doc A/54/258.

violations'.¹⁵³ The ICRC Report on *Arms Availability* (1999) found greater availability of small arms through legal and illicit channels contributed to the rise in civilian casualties in the 1990s and heightened the lethality of conflicts.¹⁵⁴ Numerous scholars have also reaffirmed the 'leading threat' small arms continue to play in securing human security, because these weapons add to the lethality of armed conflicts, facilitate the commission of crimes, and exacerbate cycles of violence.¹⁵⁵

ii. Definitional Dilemmas

The most widely referenced definition of small arms comes from the multilateral export control regime, the Wassenaar Arrangement: 'weapons intended for use by individual members of armed forces or security forces, including revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns'.¹⁵⁶ A similar definition is also adopted by the UN.¹⁵⁷ Small arms are often grouped together in treaties and other regulations with light weapons, which are not usually as easily portable as small arms and may require several individuals to use, including weapons such as heavy machine-guns, hand held-under barrel and mounted grenade launchers, portable anti-tank and anti-aircraft missile systems.¹⁵⁸ The definition in the Wassenaar Agreement focuses on 'small arms', distinguishing these from 'firearms', which refer to weapons used by civilians. Although the common framing of small arms is they are 'manufactured to military specifications', there is no clear enunciation of what this entails or how the military and civilian versions of these weapons can be distinguished.¹⁵⁹ International and regional laws have maintained this distinction, highlighted by the development of separate instruments for small arms and firearms, due to persistent concerns by some states about regulations impinging on domestic gun sales.¹⁶⁰ In practice, the dichotomy between small arms and firearms creates a false distinction about the use of these weapons, both of which can be modified throughout their life cycle, used in conflict zones and for criminal purposes,

¹⁵³ Barbara Frey, 'The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms' (2002) Working paper submitted by Barbara Frey in accordance with Sub-Commission decision 2001/120, Economic and Social Council UN Doc E/CN.4/Sub.2/2002/39 para 33.

¹⁵⁴ ICRC (n 118) 1–3.

¹⁵⁵ Iqbal (n 29) 115; A Walter Dorn, 'Small Arms, Human Security and Development' (1999) 5 *Development Express* 1, 2–3; Schroeder, Smith and Stohl (n 28) 1.

¹⁵⁶ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Founding Documents (19 December 1995), Initial Elements (12 July 1996, amended 7 December 2001 and 12 December 2003) WA-DOC (17) PUB 001 (Wassenaar Arrangement), Appendix 3 para 8.1.

¹⁵⁷ UN 'Small Arms Review Conference 2006' (7 July 2006) Un Doc A/CONF.192/15, para 4(a); UNGA Report of the Panel of Governmental Experts on Small Arms' (27 August 1997) UN Doc A/52/298, para 26.

¹⁵⁸ Wassenaar Arrangement, Appendix 3 para 8.2. See also: UN 'Small Arms Review Conference 2006' (7 July 2006) Un Doc A/CONF.192/15, para 4(a); UNGA Report of the Panel of Governmental Experts on Small Arms' (27 August 1997) UN Doc A/52/298, para 26.

¹⁵⁹ Mark Bromley and Lina Grip, 'Conventional Arms Control', *SIPRI Yearbook 2015* (SIPRI 2015) 601.

¹⁶⁰ See, in particular, the dual regimes of the United Nations which has the Programme of Action and the Firearms Protocol, and the European Union which covers smalls arms under the EU Common Position on Arms Exports and the EU Firearms Regulations. These instruments are examined in Chapter Five.

and diverted from the original user.¹⁶¹ With the overlap in the technical aspects as well as the consequences of these weapons, the conceptualisation of responsibilities will consider small arms in the broader sense of the term to also include firearms, and thus will consider the regulatory frameworks of small arms and firearms.¹⁶²

iii. Instability and Insecurity

Arms exports to conflict zones contribute to the length, intensity and lethality of those conflicts, accentuate the security and humanitarian consequences, heighten the risks of diversion and human rights violations, fuel arms trafficking, and complicate the achievement of political solutions by exacerbating intra-state tensions, particularly in situations where arms have been sold to all sides of the same conflict.¹⁶³ History has shown that arming parties to armed conflicts can also have lasting adverse consequences for regional stability by hindering peace and post-conflict state-building, destabilising social structures, diminishing democratic states while entrenching undemocratic ones, and stirring conflicts in neighbouring states.¹⁶⁴ The circular process of arms transfers in conflict regions, where arms fuel the instability of the region and the instability of the region drives demand for more arms, further problematises the export of arms to conflict zones.¹⁶⁵ In addition, arms exports have the potential to impact international stability as the accumulation of weapons may lead to the arms trade spiralling into an arms race and then into an armed conflict.¹⁶⁶

The 2010s and 2020s have hosted multiple conflicts in which the export of arms continues to be contentious. In particular, the current armed conflicts in Syria, Yemen and Ukraine, face continuing debates on the legality and morality of such activities in

¹⁶¹ Bromley and Grip (n 159) 601–602. See also: Jim McLay, 'Beyond Stalemate: Advocacy and Action in the UN Small Arms Process' in Peter Batchelor and Kai Michael Kenkel (eds), *Controlling Small Arms: Consolidation, Innovation and Relevance in Research and Policy* (Routledge 2013).

¹⁶² A similar approach is taken by the Small Arms Survey. See, for example: Sarah Parker and Marcus Wilson, 'A Guide to the UN Small Arms Process, Third Edition' (Small Arms Survey 2016) 13–15 <<https://www.smallarmssurvey.org/sites/default/files/resources/UNSA%20TEXT%20WEB.pdf>>.

¹⁶³ Mark Bromley, Neil Cooper and Paul Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History' (2012) 88 *International Affairs* 1029, 1046–7; Tom Ruys, 'The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict' (2014) 50 *Stanford Journal of International Law* 247, 252; Perlo-Freeman (n 86) 7; Wezeman (n 92) 5. See also: UNGA Res 50/70 (L) 'Small Arms' (15 January 1996) UN Doc A/RES/50/70/L.

¹⁶⁴ Quentin Gallea, 'Weapons and War: The Effect of Arms Transfers on Internal Conflict' (2023) 160 *Journal of Development Economics* 1, 12; Zaryab Iqbal and Harvey Starr, 'Bad Neighbors: Failed States and Their Consequences' (2008) 25 *Conflict Management and Peace Science* 315, 316; Ian Anthony, 'Current Trends and Developments in the Arms Trade' (1994) 535 *The ANNALS of the American Academy of Political and Social Science* 29, 32; Erickson, *Dangerous Trade* (n 96) 104; Feinstein (n 5) 525; Schroeder, Smith and Stohl (n 28) 24, 72; Coppen (n 28) 361; The International Institute for Strategic Studies (n 96) ch 2.

¹⁶⁵ 'An Introductory Guide to the Identification of Small Arms, Light Weapons, and Associated Ammunition' (Small Arms Survey 2018) ch 2 <<https://www.smallarmssurvey.org/resource/introductory-guide-identification-small-arms-light-weapons-and-associated-ammunition>>.

¹⁶⁶ Council of Europe 'Drawing up a European code of conduct on arms sales' (10 September 1998) Doc 8188, Pt I para 1-4. See also: Harald Müller, 'Introduction: Where It All Began' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press 2013) 2.

light of the ongoing human rights and international humanitarian law violations which are committed by all sides of these conflicts.¹⁶⁷ In Ukraine, for example, NGOs have highlighted the misuse of weapons by Ukrainian armed forces, yet banned weapons such as cluster munitions continue to be provided to Ukraine.¹⁶⁸ In Syria, the diversion of weapons to terrorist groups has been a persistent problem due to insufficient stockpile security by the non-state armed groups who originally received those weapons.¹⁶⁹ In Yemen, weapons sold to Saudi Arabia have been linked to international humanitarian law violations by coalition forces.¹⁷⁰ These conflicts are current examples of the ‘complex interests, conflicting values, and murky ethics’ inherent to the contemporary arms trade.¹⁷¹

iv. Weapons Spread

The ease of transfer of small arms creates additional consequences. Their geographical proliferation and diffusion throughout society fuels violence and crime, and increases the potential of these weapons ending up in the hands of private armies and militias, insurgent groups, criminal organisations, and terrorist groups, who present additional types of security threats.¹⁷² The diffusion and proliferation of small arms have far-reaching effects: impeding peacekeeping activities, inhibiting assistance from humanitarian organisations, stifling economic growth and development, and overall perpetuating a cycle of conflict and poverty that continues to breed as a result of an insecure environment and growing desperation.¹⁷³ The vast majority of weapons used in recent conflicts have crossed international boundaries – some many times over – fading into the background until the next outbreak of violence.¹⁷⁴ Most weapons spread occurs through legal manufacturing and import, demonstrating the significant contribution of legal arms exports to illicit markets, particularly in conflict zones where weapons trickle steadily into other conflicts.¹⁷⁵

This is further compounded by the diversion of weapons from their intended recipients. Diversion can occur at various stages of the transfer process, including through bribery of officials, falsified documentation, sales by unlicensed manufacturers, soldiers or

¹⁶⁷ On the prudent and appropriate responses to Syria, see: Erickson, *Dangerous Trade* (n 96) 139.

¹⁶⁸ Human Rights Watch, ‘Ukraine: Apparent War Crimes in Russia-Controlled Areas’ (*Human Rights Watch*, 3 April 2022) <<https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>>; Amnesty International, ‘Ukraine: Ukrainian Fighting Tactics Endanger Civilians’ (*Amnesty International*, 4 August 2022) <<https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians/>>; Mark Kersten, ‘Ukraine Must Investigate Alleged War Crimes by Its Forces’ (16 December 2022) <<https://www.aljazeera.com/opinions/2022/12/16/ukraine-must-investigate-alleged-war-crimes-by-its-forces>>.

¹⁶⁹ Conflict Armament Research (n 112).

¹⁷⁰ Communication to the Office of the Prosecutor of the ICC (11 December 2019) (n 89), para 97-131.

¹⁷¹ Erickson, *Dangerous Trade* (n 96) 139; Shannon Dick, ‘The Arms Trade and Syria’ [2019] Georgetown Journal of International Affairs online.

¹⁷² Diffusion is one type of weapons spread which involves broader dissemination in society, involving multiple sources and recipients. Proliferation is the generic term for weapons spread with implications for security.

¹⁷³ Coppen (n 28) 360; Stohl and Grillot (n 5) 136; Bourne (n 96) 16–17; ICRC (n 118) 6.

¹⁷⁴ Bourne (n 96) 16; Schroeder, Smith and Stohl (n 28) 132; ICRC (n 118) 6.

¹⁷⁵ Schroeder, Smith and Stohl (n 28) 138.

other private owners of arms, theft from government stockpiles after delivery due to insufficient stockpile management, or diversion by the recipient to another party in exchange for 'safe passage' during a conflict.¹⁷⁶ The effective monitoring of the flow of arms across state borders is difficult, due to inability or willingness of many states, which in turn can indirectly facilitate weapons diversion.¹⁷⁷ There is also a clear link between corruption and diversion, with increased export controls resulting in forgery or bribery of government officials to obtain false end-user certificates. In recent years, conflicts such as Syria have exemplified the security concerns emanating from the diversion of transferred arms to terrorist groups such as the Islamic State.¹⁷⁸

Small arms diffusion and proliferation are especially problematic because of the dynamic, fluid and amorphous nature of the small arms trade and the significant lack of transparency.¹⁷⁹ The Panel of Governmental Experts on Small Arms in 1997 highlighted the diversion of arms and their acquisition by unauthorised end-users is a particularly problematic issue in relation to the arms trade.¹⁸⁰ Small arms are highly susceptible to diversion as each stage of the export process is vulnerable to exploitation through loopholes or irregularities.¹⁸¹ Small arms are trafficked in various ways, making these weapons 'a smuggler's dream and a law enforcer's nightmare' because of the difficulties in monitoring their use, preventing their theft and unauthorised transfer, and the growing number of manufacturers of these weapons, including small scale producers.¹⁸² Organised crime syndicates have developed sophisticated methods to procure, transport and sell small arms to buyers.¹⁸³ The burgeoning black market for second-hand small arms allows these weapons to be recycled and recirculated throughout a region, which when coupled with their increased availability to various segments of societies, make them more dangerous and harder to track.¹⁸⁴ Small arms typify the law of entropy for arms transfers: the further arms move away from the primary recipient and the higher the degree of proliferation and diffusion, the greater the problems there are with retrieving those

¹⁷⁶ Insufficient management by defence and police forces which continues to be an issue in South Africa, or bribery of officials to divert arms to alternative destinations or falsified documentation which is inadequately checked by officials as occurred with transfers to Angola and Liberia in violation of the arms embargoes imposed on these states. See: Erickson, 'Demystifying the "Gold Standard"' (n 114) 135.

¹⁷⁷ ICRC (n 118) 7.

¹⁷⁸ Erickson, *Dangerous Trade* (n 96) 139.

¹⁷⁹ UNGA 'Small Arms: Note by the Secretary-General' (19 August 1999) UN Doc A/54/258, para 23, 55, 239. The Security Council in Resolution 1467 (2003) recognised proliferation of small arms had led to human rights and international humanitarian law violations in West Africa: UNSC Res 1467 (18 March 2003) UN Doc S/RES/1467.

¹⁸⁰ UNGA 'Report of the Panel of Governmental Experts on Small Arms' (27 August 1997) UN Doc A/52/298.

¹⁸¹ UNGA 'Impact of Arms Transfers on Human Rights: Report of the United Nations High Commissioner for Human Rights' (19 June 2020) UN Doc A/HRC/44/29, para 5-9; Owen Greene and Elizabeth Kirkham, 'Preventing Diversion of Small Arms and Light Weapons: Issues and Priorities for Strengthened Controls' (Saferworld and University of Bradford 2009) 77.

¹⁸² Bourne (n 96) 108–109; Schroeder, Smith and Stohl (n 28) x; Laurance (n 109) 178–179.

¹⁸³ Bourne (n 96) 109; Karp, 'The Rise of Black and Gray Markets' (n 109) 181; ICRC (n 118) 7.

¹⁸⁴ Owen Greene and Elizabeth Kirkham, 'Preventing Diversion of Small Arms and Light Weapons: Issues and Priorities for Strengthened Controls' (Saferworld and University of Bradford 2010) 3; ICRC (n 118) 6.

arms.¹⁸⁵ Preventing small arms from entering the black market is therefore important because diversion renders any apparent control system irrelevant, making it virtually impossible for the weapons to re-enter the legal market.¹⁸⁶

v. Adverse Human Rights Impacts

Arms transfers can have heightened negative impacts on human rights, which are already tenuously respected in conflict zones.¹⁸⁷ The availability of small arms in conflict zones, in particular, have been linked to extra-judicial killings, forced disappearances, torture, violence, slavery, rape, forced prostitution, and child soldiers, and also continue to have significant direct and indirect impacts on development in post-conflict states, illustrating the importance of centring the prevention of adverse human rights impacts in arms export decision-making.¹⁸⁸ Even where arms are transferred legally, they may be used to perpetrate violence and commit crimes and human rights violations.¹⁸⁹ The severe levels of violence and brutality of twenty-first century conflicts have been heightened by the indiscriminate use of weapons and targeting of non-combatants.¹⁹⁰ The number of civilian victims and the grave violations of human rights and international humanitarian law by the warring parties in current armed conflicts continue to call into question the legality and morality of arms exports to conflict zones.¹⁹¹

In the case of Yemen, the UN Human Rights Council has confirmed that the use of military equipment and weapons, including small arms, by the Houthi armed fighters and the coalition forces to cause harm to civilians and to commit human rights violations may amount to war crimes, including murder, torture, cruel or inhuman treatment, rape, outrages upon personal dignity, denial of fair trial, and enlisting of

¹⁸⁵ RT Naylor, 'Gunsmoke and Mirror: Financing the Illegal Trade' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 177.

¹⁸⁶ Bourne (n 96) 27; Naylor (n 185) 177.

¹⁸⁷ See, for example: Perlo-Freeman (n 86) 5.

¹⁸⁸ Human Rights Watch, 'Small Arms and Human Rights: The Need for Global Action' (2003) Briefing Paper for the UN Biennial Meeting on Small Arms 4–6; Small Arms Survey, *Small Arms Survey 2003: Development Denied* (Oxford University Press 2003) ch 4; Jeffrey Boutwell and Michael T Klare, *Light Weapons and Civil Conflict: Controlling the Tools of Violence* (Rowman & Littlefield 1999) 13–15.

See, also, on the impact of arms exports on, for example, the right to health: Rhonda Ferguson and Zarlisht Jamal, 'A Health-Based Case against Canadian Arms Transfers to Saudi Arabia' (2020) 22 *Health and Human Rights* 243.

¹⁸⁹ UNGA 'Impact of Arms Transfers on Human Rights: Report of the United Nations High Commissioner for Human Rights' (19 June 2020) UN Doc A/HRC/44/29, para 9. See, on the impact on the human rights of women and girls, including through the use of small arms: para 14, 18. See also, on the legal framework for due diligence obligations of states to prevent diversion: para 25-30.

¹⁹⁰ Frank Barnaby, 'Mega Bucks and Some Very Big Bangs' (1991) 20 *Index on Censorship* 9, 9; ICRC (n 118) 1, 3; Simone Wisotzki, 'Humanitarian Arms Control: The Anti-Personnel Mine Ban Treaty, the Programme of Action on Small Arms and Light Weapons, and the Convention on Cluster Munitions' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press 2013) 83–84.

¹⁹¹ See, for example: Organization for Security and Co-operation in Europe, 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes And Crimes Against Humanity Committed in Ukraine (1 April – June 2022)' (14 July 2022) ODIHR.GAL/36/22/Corr.1.

child soldiers.¹⁹² In Ukraine, war crimes and violations of international humanitarian law such as the targeting of civilians are alleged to have been committed by both Ukrainian and Russian forces, though the scale of the Russian atrocities are alleged to be at a much larger scale.¹⁹³ The Syrian conflict has shown rape, torture, and violence against civilians are used as weapons of war, particularly by terrorist groups who are also parties to the conflict, such as the Islamic State.¹⁹⁴ The human rights violations and attacks on cities and civilian infrastructure which occur during these conflicts threaten human security on a broader scale, inhibiting development in post-conflict situations. Forced migration and the destruction of cultural property are further consequences that may result from arms availability and misuse. For example, in the Kingdom of Benin, British soldiers used machine guns to loot the Benin Bronzes in 1897, thereby also depriving generations of persons of their cultural heritage. Similar tactics have been used by the Islamic State in Syria to loot cultural heritage as a means to finance terrorism.

IV. Challenges for Conceptualising Responsibilities

The overview of the mechanics of the arms trade highlights the competing concerns that need to be accounted for in the conceptualisation of responsibilities. Even in distilling the arms trade to its core features, it is evident the transnational processes and practices are convoluted and complex. Due to the ambiguities and loopholes in arms export regimes, the categorisation of an arms deal may not necessarily be straightforward, particularly in situations where some national export laws permit the transfer of weapons which would otherwise violate international or regional standards.¹⁹⁵ Often, political and security defences are deployed to justify legally dubious arms supplies to non-state armed groups and states, even when these parties face well-founded allegations of committing or facilitating violations of international humanitarian law or human rights in conflict zones, as has occurred in the conflicts in Syria and Yemen.¹⁹⁶ Ascertaining how and by whom arms will be transferred and used is difficult even in peacetime. In times of conflict, it becomes virtually impossible because of the multiplicity of actors involved, the different markets from which arms may be acquired, and the increased opacity surrounding arms export decisions.

¹⁹² UN Human Rights Council 'Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights' (9 August 2019) A/HRC/42/17, para 96. On the use of small arms, see: para 35.

¹⁹³ Human Rights Watch, 'Ukraine' (n 168); Amnesty International (n 168); Kersten (n 168).

¹⁹⁴ UNGA Res 29/16 (22 July 2015) UN Doc A/HRC/RES/29/16; UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (14 August 2023) UN Doc A/HRC/54/58.

¹⁹⁵ Schroeder, Smith and Stohl (n 28) 12–13; Lora Lumpe, Sarah Meek and RT Taylor, 'Introduction' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 5.

¹⁹⁶ See, for example, on arms transfer practices for the Syrian conflict: Mélanie De Groof, 'Arms Transfers to The Syrian Arab Republic: Practice and Legality' (Research and Information Group on Peace and Security (GRIP) 2013) 54. For an examination of arms export practices to the conflict in Yemen see, for instance: Erickson, 'Demystifying the "Gold Standard"' (n 114) 133–134.

Small arms, in particular, provoke complex questions about the legality and morality of arms exports to conflict zones because they are viewed as acceptable types of weapons for use in wars, despite their well-documented contributions to exacerbating conflict, instability and insecurity, and undermining development, human rights protections and governance.¹⁹⁷ This has been highlighted, for example, by the exemption of small arms exports from the arms embargo against Libya, with states permitted to export small arms to certain actors following notification and in the absence of a negative decision of the Sanctions Committee.¹⁹⁸ Small arms are trafficked in numerous ways, limiting the potential to control the flow of these weapons and inhibiting the possibilities of monitoring their use and preventing their theft from the authorised recipients. The limited restraint of supply-side actors in pursuing arms sales and lack of coordination of transnational arms export controls, including the control over arms brokering and licensed production, has contributed to the increase in illicit small arms trafficking.¹⁹⁹ The complexities of controlling arms flows to regions of conflict is further problematised by the large-scale illicit markets that exist for small arms, which are estimated to be the second highest trafficked commodity after drugs.²⁰⁰ Exercising restraint in the legal export of small arms is therefore integral for preventing adverse human rights impacts, curtailing the growth of illicit small arms markets and breaking the cycles of supply and demand for these weapons.²⁰¹

Moreover, as small arms have largely evaded inclusion in international arms control agreements and in some cases are designated as dual-use goods, these weapons present transnational regulatory challenges.²⁰² The attempts to regulate the small arms trade have been met with significant resistance, particularly due to concerns that regulations may infringe on the civilian acquisition of firearms. Indeed, the inclusion of small arms in the Arms Trade Treaty was not without controversy, with negotiations being stalled as a result of their inclusion in the draft text.²⁰³ Regulatory initiatives are further complicated by the designation of small arms type weapons as dual-use goods which serve civilian and military purposes, and the practical infeasibility of their outright ban.²⁰⁴ Small arms evidently present distinct regulatory and practical challenges that exemplify the heightened need for preventive responsibilities for arms exports to conflict zones.

¹⁹⁷ Grip (n 34) 98; Erickson, *Dangerous Trade* (n 96) 62.

¹⁹⁸ UNSC Libya Sanctions Committee, 'Implementation Assistance Notice No 2' (11 September 2014) <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/1970_ian2.pdf>.

¹⁹⁹ Council of Europe, 'Drawing up a European code of conduct on arms sales' (10 September 1998) Doc 8188, Pt II para 3-10. See also: Schroeder, Smith and Stohl (n 28) 103.

²⁰⁰ Bourne (n 96) 108–9; Laurance (n 109) 178–9; Mathiak and Lumpe (n 107) 75; Schroeder, Smith and Stohl (n 28) x.

²⁰¹ Stohl and Grillot (n 5) 99.

²⁰² For analysis of the efforts to control small arms at the end of the twentieth century, see: Fen Osler Hampson and Jean Daudelin, *Madness in the Multitude: Human Security and World Disorder* (Oxford University Press 2002) ch 6.

²⁰³ Marlitt Brandes, "'All's Well That Ends Well" or "Much Ado About Nothing?": A Commentary on the Arms Trade Treaty' (2013) 5 *Goettingen Journal of International Law* 399, 406.

²⁰⁴ Stohl and Grillot (n 5) 334; Schroeder, Smith and Stohl (n 28) x.

Chapter Three – Security Shifts

Ares and Athena: half-siblings, children of Zeus, and gods of war, but distinguished by their approaches and reputations. Ares represents violence and warfare, and is generally depicted as an armed warrior, fully decked out in armour and weapons. Athena, while also donning armour, wears a helmet decorated in olive leaves, symbolic of her diplomatic and strategic approaches to war. Much like the contrasting styles of Ares and Athena, the concept of security transformed during the twentieth century, shifting the factors for prioritisation.

The concept of ‘security’ refers to a thing which deserves priority.²⁰⁵ In international law, the term ‘security’ has been employed in a variety of areas, ranging from the impact of climate change on food sources (food security) to a policy framework which recognises the instrumentality of the participation of women in peace processes and peacebuilding (Women, Peace and Security). In the context of the arms trade, security is viewed as *the* thing that must be prioritised above all other factors. Throughout history, the security of societies has been tied to the strength of their military arsenals, which in turn has cemented security as an integral component of arms exports and controls. During the early periods of weaponry, limitations of arms – though infrequent and strategic – were used to control military strength by preventing (potential) enemies from strengthening their arsenals at the expense of one’s own.²⁰⁶ From the Middle Ages, there was an expansion of informal understandings among nations regarding the sale of arms to potential enemies, as well as the development of arms embargoes as a tool for restricting arms exports.²⁰⁷ By the mid-fourteenth century, three distinct features of the arms trade, which continue in contemporary practices, had emerged: the commercialisation of war, the nation-state as a political unit, and the transcontinental trade of arms and other goods.²⁰⁸ From the mid-seventeenth century, with the creation of a new state system as the basis for international order, the concept of security became intertwined with the new form of political organisation – ‘the state’ – with territorial integrity and political sovereignty becoming the focal points.²⁰⁹

Arms exports have been and continue to be linked closely to the traditional security interests of the state – frequently referred to as national security – which emphasise the protection of the sovereignty and territory of a state as the primary concern. Security concerns are therefore routinely highlighted as a primary reason why an arms

²⁰⁵ S Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Indiana University Press 2006) 237–238.

²⁰⁶ Michael Roberts, *The Military Revolution, 1560-1660: An Inaugural Lecture Delivered Before the Queen’s University of Belfast* (M Boyd 1956); Keith Krause, *Arms and the State: Patterns of Military Production and Trade* (Cambridge University Press 1992) 35.

²⁰⁷ Stohl and Grillot (n 5) 139; Stefan Stantchev, ‘The Medieval Origins of Embargo as a Policy Tool’ (2012) 33 *History of Political Thought* 373.

²⁰⁸ Krause, *Arms and the State* (n 206) 6. Krause argues these conditions laid the foundations ‘for the emergence of a genuinely global arms transfer and production system in the fifteenth and sixteenth centuries’ – though no such system did emerge following the ‘Military Revolution’ between 1560 and 1660.

²⁰⁹ MacFarlane and Khong (n 205) 237–243; Hasan Mahmud and others, ‘Human Security or National Security: The Problems and Prospects of the Norm of Human Security’ (2008) 1 *Journal of Politics and Law* 67, 69.

export is necessary, whether it be through arms sales or military aid. This chapter examines how the concept of security transformed throughout the twentieth century to prioritise different aspects and how this impacted the development of arms (export) controls. The first section examines the traditional security concept, its ties to the state, and its impact on the adoption of arms controls during the first half of the twentieth century, focussing on the links between security and disarmament, rearmament and domestic industry. The second section considers the emergence of the notion of international security during the Cold War, and its effect on shifting the priorities of security to include avoiding annihilation and restricting the use of 'unacceptable' weapons.

I. Traditional Security and the Protection of National Interests

The traditional state-centric conception of security focussed on protecting states from external threats. States cemented their monopoly on the means of violence, as the principle of sovereignty included the absolute authority of the state over war and weapons.²¹⁰ In practice, this monopoly applied only to great powers and colonial powers (France, Great Britain, Russia, Italy, Austria-Hungary and Prussia) who were able to exercise their sovereignty to the fullest extent possible. Throughout the twentieth century, the possession of military power was a vital characteristic of the international system, and states unable to produce their own weapons purchased them from manufacturing states as a matter of necessity – thus creating ready-made business for exporters.²¹¹

In the decades leading up to World War I, international arms controls were limited by national security concerns. For instance, despite public outcry for warfare to be more humane, the protection of military interests remained an overriding concern of the state parties to the 1899 and 1907 Hague Conferences.²¹² Attempts by the United Kingdom to include limits on armaments were viewed by Germany as a threat to the growth of the German navy, resulting in the exclusion of such provisions in the 1907 Hague Conventions. The adopted Conventions focused only on confirming the rules of conduct developed by the laws and customs of war, rather than placing any limits on the development of new, more destructive military technologies.²¹³ The notable exception to this general reluctance for arms controls was the 1890 Brussels Act, which was adopted in the context of European colonial powers seeking to curtail the slave trade, and ratified by all of those states plus the United States.²¹⁴ The Act

²¹⁰ Edmund F Byrne, 'Assessing Arms Makers' Corporate Social Responsibility' (2007) 74 *Journal of Business Ethics* 201, 202.

²¹¹ Rajan Menon, 'The Soviet Union, the Arms Trade and the Third World' (1982) 34 *Soviet Studies* 377, 377.

²¹² Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49, 68.

²¹³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (1907 Hague Convention IV).

²¹⁴ Jonathan A Grant, *Between Depression and Disarmament: The International Armaments Business, 1919–1939* (1st Edition, Cambridge University Press 2018) 7; Neil Cooper, 'Race, Sovereignty, and Free Trade: Arms Trade Regulation and Humanitarian Arms Control in the Age of

included a provision on restricting arms exports as this was viewed as necessary for safeguarding African populations, revealing a reassertion of colonial interests as the driving force for such measures.²¹⁵

i. Securing Sovereignty through Rearmament

The dramatic political and military changes coupled and the significant technological advancements that occurred throughout the twentieth century – aptly referred to by Hobsbawm as the ‘Age of Extremes’ – forced a reassessment of controls on weapons.²¹⁶ World War I saw the breakdown of empires and the decimation of territories, marking the beginning of ‘The Age of Catastrophe’. During World War I and in its immediate aftermath, major powers such as the United States, the United Kingdom and France, who also possessed the oldest and largest weapons manufacturing industries of the time, developed their earliest national export controls. The United States’ Trading with the Enemy Act (1917) restricted the trade of arms to countries hostile to the United States, with further export control regulations being adopted between 1933 and 1940.²¹⁷ The United Kingdom established a licensing system during World War I, which was expanded in 1921 to become its first peacetime controls for arms exports.²¹⁸ France began to organise its arms production during the war, resulting in the birth of the French military-industrial complex.²¹⁹ Arms embargoes were also increasingly used during the interwar period, with France participating in the embargo against Ethiopia between 1916 and 1930, and the United Kingdom imposing a number of arms embargoes in the 1920s due to national security and imperialist concerns, including embargoes against China, the Soviet Union, African states and other states which had been former enemies of the United Kingdom.²²⁰ Further

Empire’ (2018) 3 *Journal of Global Security Studies* 444, 444–445; David R Stone, ‘Imperialism and Sovereignty: The League of Nations’ Drive to Control the Global Arms Trade’ (2000) 35 *Journal of Contemporary History* 213, 213–215; Elton Atwater, ‘British Control Over the Export of War Materials’ (1939) 33 *American Journal of International Law* 292, 292–296.

²¹⁵ General Act of the Brussels Conference relating to the African Slave Trade (adopted 2 July 1890, entered into force 31 August 1891) 173 CTS 293 (Brussels Act), art 8. The treaty was revised by: Convention for the Control of Trade in Arms and Ammunition, together with Protocol (signed 10 September 1919) 8 LNTS 26 (Saint-Germain Convention).

See also: Raphaël Cheriau, *Imperial Powers and Humanitarian Interventions: The Zanzibar Sultanate, Britain, and France in the Indian Ocean, 1862-1905* (Routledge 2021) 153; Emrys Chew, *Arming the Periphery* (Palgrave Macmillan UK 2012); Grant (n 214) 9; Cooper, ‘Race, Sovereignty, and Free Trade’ (n 214) 449; Stone (n 214) 215–218; Grip (n 34).

²¹⁶ Eric Hobsbawm, *The Age of Extremes: 1914-1991* (Hachette UK 1994). Hobsbawm further distinguished the Age of Extremes into three periods: the Age of Catastrophe, 1914–1950, the Golden Age, 1950–1973, and the Landslide, 1973–1991.

²¹⁷ Trading with the Enemy Act (1917) Public Law 65–91, 40 Stat 411; Emergency Banking Act (1933) Public Law 73-1, 48 Stat 1; Export Control (1940) 32 CFR 800.

²¹⁸ Atwater (n 214) 287–289.

²¹⁹ Laurent Giovachini, *L’armement français au XXe siècle: une politique à l’épreuve de l’histoire* (Ellipses 2000) ch 2.

²²⁰ Most notable was the arms embargo against China imposed between 1919 and 1929 by the United Kingdom alongside the other Great Powers. See, for example: Mary S Barton, *Counterterrorism Between the Wars: An International History, 1919-1937* (Oxford University Press 2020) ch 2. See, on the reasoning for the embargoes: Grant (n 214) 8; Krause, *Arms and the State* (n 206) 73; Atwater (n 214) 314–315.

embargoes were also implemented during the 1930s due to the outbreak of several wars, such as the Sino-Japanese, Chaco, Italo-Ethiopian and Spanish wars.²²¹

Moreover, a particularly problematic consequence of World War I was the substantial accumulation of weapons and ammunition, which presented a significant threat to peace and order in the event of their proliferation.²²² Following the end of the war, efforts were made globally and among key exporter states to reduce arms traffic, to limit the destructive consequences of weapons, and ultimately to prevent another war. In the quest for maintaining international peace and order, disarmament came to be viewed as a critical component of security. The League of Nations, created in 1919 to promote and preserve international order, was at the forefront of controlling the arms trade as part of its larger mission toward disarmament.²²³ The League viewed limitations on arms exports as corresponding with the promotion of peace and the avoidance of war, and a requisite for building a lasting peace.²²⁴ Article 8 of the League of Nations Covenant (1919) recognised that member states accepted ‘the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations’.²²⁵ Despite the explicit link between arms and war, state security still remained the caveat, or justification, for (re)building arsenals and exporting weapons. Indeed, Article 8 also acknowledged, in the context of restricting private arms trade, ‘the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety’, effectively carving out an exception for private sales even though League members agreed ‘the manufacture by private enterprise of munitions and implements of war is open to grave objections’.

Other conventions and treaties during the interwar period also sought to curb arms traffic and the use of certain types of weapons. The Saint-Germain Convention (1919) for the control of the trade in arms and ammunition was adopted primarily in response to the security concerns of the European Allied Powers about the surplus of weapons from World War I ending up in the hands of ‘problem actors’ as well as concerns relating to the role of arms traders in fomenting the first global war.²²⁶ The Washington Naval Conference of 1921–1922 also brought together the world’s largest naval powers to discuss disarmament and reduction of tensions in East Asia. Despite the differing interpretations of the Washington Agreements by the United States, the United Kingdom and France, an unintended consequence of the Conference was that

²²¹ These embargoes included those imposed during Sino-Japanese conflict, a two-week embargo (February 27 to March 13, 1933), and embargo against Bolivia and Paraguay during the Chaco dispute (March, 1935 to July 29 1935).

²²² Stone (n 214) 217.

²²³ Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188, art 8.

²²⁴ Stone (n 214) 222–229; Grant (n 214) 9; Laurance (n 109) 501.

²²⁵ Williams and Viotti (n 103) 3.

²²⁶ Convention for the Control of Trade in Arms and Ammunition, together with Protocol (signed 10 September 1919) 8 LNTS 26 (Saint-Germain Convention). See also: Anthony B Chan, *Arming the Chinese: The Western Armaments Trade in Warlord China, 1920–1928* (University of British Columbia Press 1982) 61; Bromley, Cooper and Holtom (n 163) 1032.

it restricted the purchase of naval weapons, including destroyers and submarines, by small Baltic states such as Poland.²²⁷

However, overall, these efforts proved ineffective in curbing the arms trade, which can be attributed to the differing national security concerns of the major powers and other states. Industrialised states employed national security as a justification for trade barriers and export limitations. For example, the United States refused to sign on to the Saint-Germain Convention due to concerns about the convention's prohibition of arms sales to non-signatory countries in Latin America, which were a key defence supply base for the United States.²²⁸ Smaller states and developing countries who were unable to produce their own arms, such as Greece, Turkey, Romania and Eastern European states, opposed arms control measures, which, in light of their newly won independence, they viewed as threatening their security and infringing on their sovereignty.²²⁹ Even during the negotiations for the 1925 Geneva Protocol, which prohibited the already widely decried use of chemical and biological weapons in international armed conflicts, non-arms producing states, referred to as the 'purchasers of death', submitted reservations against the Protocol.²³⁰ These states were concerned about the obligations of the non-use of prohibited weapons, and capitalised on treaty negotiations to ensure that any impediments to their ability to acquire arms were not included in the final treaty text.²³¹ Consequently, differing national security concerns among states hampered the efforts of the international community and the League of Nations to effectively pursue disarmament and arms control goals.

ii. Protecting Industry and Commercial Interests

In addition to national security concerns, commercial interests have routinely shaped the arms trade.²³² However, the commercial side of the arms trade is often sidelined in the literature in favour of other narratives that focus on diplomatic, military and strategic interests.²³³ Alongside the nation-state as the main principle for arranging the international order, the primary means for organising economic relations became 'the market'.²³⁴ In times of recession, military expenditure was used to spur economic

²²⁷ Donald J Stoker, *Britain, France and the Naval Arms Trade in the Baltic 1919–1939: Grand Strategy and Failure* (Frank Cass 2003) 52–62; Grant (n 214) 11.

²²⁸ Chan (n 226) 61; Bromley, Cooper and Holtom (n 163) 1032.

²²⁹ Grant (n 214) 20; Stone (n 214) 222; Moravcsik (n 141) 72; Ian Davis, *The Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK* (Oxford University Press, SIPRI 2002) 19.

²³⁰ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928) 94 LNTS 65 (Geneva Protocol).

²³¹ Jack M Beard, 'The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention' (2007) 101 *American Journal of International Law* 271, 277; Grant (n 214) 9; Stone (n 214) 222.

²³² Krause, *Arms and the State* (n 206) 97; Davis (n 229) 19.

²³³ Other narrative on the twentieth century focus on the Great Powers and buyer sides. Jonathan A Grant, *Rulers, Guns, and Money: The Global Arms Trade in the Age of Imperialism* (Harvard University Press 2007) 3–6.

²³⁴ Ethan B Kapstein, *The Political Economy of National Security: A Global Perspective* (McGraw-Hill 1992) 13–17; Robert G Gilpin, *The Political Economy of International Relations* (Princeton University Press 1987) 16–21.

growth, by Western governments in particular.²³⁵ Commercial interests effectively became integrated into national security concerns as states sought to protect their domestic manufacturing industries. The profitability of the military-industrial complex made the arms industry impervious to criticism and change. The claim that the arms industry was uniquely valuable to the national economy, because of technological innovation, job creation and the influence of arms exports on foreign policy, remained unchallenged during this time, in spite of the evident negative impacts of the arms trade during peacetime.²³⁶ The proactive pursuit of profits by states reflected the significance of commercial interests in arms sales.²³⁷ At times, arms deals were also accompanied by an imperial mentality, which assumed a purchaser would automatically accept allegiance with the supplier state.²³⁸ Commercial interests also dictated decisions to circumvent arms embargoes. For example, despite the imposition of an arms embargo against China from 1919-1929, some countries such as France and Italy continued to pursue arms deals with China, while others such as Czechoslovakia did not join the embargo so Czechoslovakian arms manufacturers benefitted from very profitable deals.²³⁹ In rare instances, commercial interests indirectly drove disarmament and export controls. For instance, the United Kingdom's fiscal policy during the 1920s restricted arms exports and indirectly contributed to disarmament because exports were not viewed as fiscally sound.²⁴⁰

In addition, the commercial interests of private actors, namely, arms manufacturers and private arms dealers, also significantly impacted arms export decisions and the development of arms control measures. These private actors were at the centre of the international arms trade during the nineteenth century and continued to be largely involved up to and including World War I – a feature that would re-emerge during the Cold War period.²⁴¹ The arms industry was distinguished from states primarily by its capacities to pursue buyers and undertake private arms sales without official sanctioning or authorisation by the state. The arms industry was not inhibited by concerns about diplomatic and security issues, nor was it subject to the same restrictions as states. For example, while states could not supply arms to belligerents without forfeiting their neutrality, the 1907 Hague Conference Third Commission drew a distinction between states and private actors, explicitly preserving the right of the latter to supply arms to parties to armed conflicts, including belligerents.²⁴²

²³⁵ Naylor (n 185) 176.

²³⁶ Emma Soubrier, 'Unpacking the Storytelling around French Arms Sales: Demystifying the "Strategic Autonomy" Argument' (2023) 14 *Global Policy* 112, 118–9; Holden (n 91) 83–116; Naylor (n 185) 176.

²³⁷ Stohl and Grillot (n 5) 50. See also: Cassady Craft, 'Military Diplomacy: The Myths of Arms Influence' in Tamar Gabelnick and Rachel Stohl (eds), *Challenging Conventional Wisdom: Debunking the Myths and Exposing the Risks of Arms Export Reform* (Federation of American Scientists 2003); Holden (n 91).

²³⁸ Grant (n 233) 6–8. Such assumptions were notably pronounced in the case of Ethiopia: Italy provided Ethiopia with arms before its attempted invasion of Ethiopia during the First Italo-Ethiopian War 1895-96.

²³⁹ Guangqiu Xu, 'American—British Aircraft Competition in South China, 1926-1936' (2001) 35 *Modern Asian Studies* 157, 159–60; Grant (n 214) 9.

²⁴⁰ Grant (n 214) 20; Krause, *Arms and the State* (n 206) 73.

²⁴¹ Grant (n 233) 4.

²⁴² Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, 26 January 1910) 205 CTS 299 (1907 Hague Convention V), Ch

Implementing restrictions on arms sales by private actors were left to the purview of states, who were not obliged to impose such restrictions.²⁴³

The roles played by arms manufacturers and private arms dealers during World War I significantly contributed to the length and brutality of the war. In particular, four European arms manufacturers – Krupp (Germany), Vickers (United Kingdom), Schneider (France), and Škoda (Austria-Hungary) – ‘anchored the tremendous expansion of military-industrial production within their respective countries during the Great War’.²⁴⁴ These companies also sought guarantee of payment for arms deals from their home governments, which in turn enabled those governments to gain economic and political power over smaller purchaser states.²⁴⁵ Private arms dealers, labelled the ‘merchants of death’, actively pursued arms sales to ‘periphery’ countries for their own commercial interests, even when such sales had the potential to alter strategic balances in a region. Arms dealers went beyond acting as agents of states, and used their positions to convince their home governments that arms sales were in the national interest, including for promoting prestige and foreign influence.²⁴⁶

Following the most brutal and devastating war the world had ever experienced, up to that point, the post-World War I period saw the inviolability of the private trade and private actors called into question. Even during the war, the Women’s International League for Peace and Freedom meeting at The Hague in 1915 found ‘the private profits accruing from the great arms factories [were] a powerful hindrance to the abolition of war’.²⁴⁷ After the war, issues with the roles of private arms manufacturers, in particular, their involvement in fomenting and then profiteering from wars, led to the creation of the Temporary Mixed Commission on Armaments.²⁴⁸ British Prime Minister Lloyd George also observed the ‘very pernicious influence’ of Krupp on the German war spirit and noted the preservation of peace required the elimination of the idea of profit in arms manufacturing.²⁴⁹ Further attention to private actors was provoked by a wave of exposés on the arms industry during the 1930s, which evoked public disgust with the war profiteering of private arms traders and manufacturers. For example, Fenner Brockway’s pamphlet *The Bloody Traffic* (1933) drew attention to the arms

1 art 7; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, 26 January 1910) 209 CTS 305 (1907 Hague Convention XIII), Ch 1 art 6 and 7.

²⁴³ Stone (n 214) 216.

²⁴⁴ Grant (n 233) 4; Grant (n 214) 1–2.

²⁴⁵ Grant (n 214) 4–5.

²⁴⁶ Bernt Engelmann, *The Weapons Merchants* (Crown Inc 1964); Helmuth Carol Engelbrecht and Frank Cleary Hanighen, *Merchants of Death: A Study of the International Armament Industry* (Routledge 1934).

²⁴⁷ Women’s Peace Congress/International Congress of Women, Document 1: ‘Resolutions Adopted at the Hague Congress’, in Jane Addams, Emily Greene Balch and Alice Hamilton (eds), *Women at The Hague: The International Congress of Women and Its Results* (MacMillan 1915), reprinted in Kathryn Kish Sklar and Kari Amidon, *How Did Women Activists Promote Peace in Their 1915 Tour of Warring European Capitals?* (State University of New York at Binghamton 1998).

²⁴⁸ League of Nations, ‘Resolutions of the Assembly on the Subject of Armaments, Memorandum by the Secretary-General’ (26 January 1921) Council Doc 124. See also: Andrew Webster, ‘“Absolutely Irresponsible Amateurs”: The Temporary Mixed Commission on Armaments, 1921–1924’ (2008) 54 *Australian Journal of Politics & History* 373; Stone (n 214) 218–9; Grant (n 214) 9.

²⁴⁹ David Lloyd George, quoted in Anthony Sampson, *The Arms Bazaar: From Lebanon to Lockheed* (Viking Press 1977) 70.

sale practices of arms manufacturers that induced smaller states to take out loans from foreign banks to purchase arms they could not otherwise afford.²⁵⁰

Around the same time, major exporter states such as France and the United Kingdom, which continued to maintain their production capacity at World War I levels, became increasingly sensitive to the political implications of arms exports, coinciding with the increased influence of public sentiment in shaping government behaviour.²⁵¹ In 1936, the United Kingdom's Royal Commission on the Private Manufacture of and Trading in Arms published its report on the arms industry and unanimously concluded there was need for greater state control over private arms manufacturing.²⁵² In France, a parliamentary investigation into Gnome et Rhône found the company's net profit in 1916 had been twice what it had self-reported, exposing the greed at the heart of the arms trade business.²⁵³ In the United States, the Senate Munitions Inquiry (or Nye Committee) in 1936 concluded arms manufacturers played an instrumental role in the eventual entrance of the United States into the war in 1917.²⁵⁴ Despite the greater public scrutiny of the arms industry, the extent to which this transformed practices remained limited, as the growth in rearmament during the 1930s provided further business opportunities for arms manufacturers and private traders.²⁵⁵

In 1936, France nationalised its arms industry so weapons could not be exported without the agreement of the Minister of Foreign Affairs. Months before Hitler invaded Poland, France issued its Legislative Decree of 18 April 1939, which classified war material, arms and ammunition according to eight categories, prohibiting the export of items and equipment in the first three categories which were deemed war material (*les armes de guerre*).²⁵⁶ The Decree established prior government authorisation as a requirement for the production, trade, negotiation of sales, and stockpiling of war materiel, which would be supervised by the government.²⁵⁷ Firearms and their ammunition were included in the first category and exports were therefore prohibited. However, certain types of firearms, such as handguns and target rifles, were listed as

²⁵⁰ Fenner Brockway, *The Bloody Traffic* (Victor Gollancz Ltd 1933). Other examples include: Engelbrecht and Hanighen (n 246); Jean Galtier-Boissieré, 'Les Marchands de Canons Contre La Nation (Octobre 1933)', *Le Crapouillot (Revue mensuelle): 8 Cahiers* (1934); Gaston Gros, *La République Des Coquins* (Baudiniere 1934).

²⁵¹ Krause, *Arms and the State* (n 206) 72.

²⁵² David G Anderson, 'British Rearmament and the "Merchants of Death": The 1935-36 Royal Commission on the Manufacture of and Trade in Armaments' (1994) 29 *Journal of Contemporary History* 5; Clive Trebilcock, 'British Armaments and European Industrialization, 1890-1914: The Spanish Case Re-Affirmed' (1974) 27 *The Economic History Review* 625.

²⁵³ Ann Bostrom, 'Supplying the Front, French Artillery Production during the First World War' (2016) 39 *French Historical Studies* 261; James M Laux, 'Gnome et Rhône – An Aviation Engine Firm in the First World War' in Patrick Fridenson (ed), *The French Home Front, 1914-1918* (Berg Publishers 1992) 149–150.

²⁵⁴ Mark R Wilson, *Destructive Creation: American Business and the Winning of World War II* (University of Pennsylvania Press 2016) 34–40. See also: Matthew W Coulter, *The Senate Munitions Inquiry of the 1930s: Beyond the Merchants of Death* (Greenwood Press 1997); John E Wiltz, *In Search of Peace: The Senate Munitions Inquiry, 1934–1936* (Louisiana State University Press 1963).

²⁵⁵ Robert E Harkavy, 'The Changing International System and the Arms Trade' (1994) 535 *The ANNALS of the American Academy of Political and Social Science* 11, 18–19; Anderson (n 252) 5–8.

²⁵⁶ Decree of 18 April 1939, JORF 13 June 1939 (Décret du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions), art 13.

²⁵⁷ Decree of 18 April 1939, art 13.

commercial weapons (les armes de commerce) and thus not subject to the export prohibition. In the United Kingdom, by 1939, arms sales to certain states were directly conducted by the government.²⁵⁸ On 1 September 1939, the United Kingdom passed emergency legislation which criminalised the export of specific goods to enemy states, and conferred upon the Secretary of State the power to control the import and export of specific items without consulting the Parliament.²⁵⁹

Consequently, the private trade, which effectively continued to be authorised by Article 8 of the League of Nations Covenant, was not to any meaningful extent curtailed by disarmament instruments. The arms industry was able to profit off newly independent states in the aftermath of World War I. Indeed, as one notorious arms dealer, Basil Zaharoff, predicted at the end of the war: 'The first thing these new states will do will be to arm'.²⁶⁰ The arming of new states coupled with the arms race during the inter-war period between all major powers (the United States, the Soviet Union, Japan, Germany, the United Kingdom, France and Italy) provoked an increase in weapons stocks and the expansion of the capabilities of war arsenals, setting the stage for an even more destructive and global war, which began by the end of the decade.²⁶¹

II. International Security and the Golden Age of Arms and Controls

The devastation caused by World War II was viewed as exposing the over-simplistic emphasis of disarmament, which assumed the chances of war would decline as a result of a reduction in armaments.²⁶² Following a second world war, the maintenance of peace and the need for international cooperation necessitated a reassessment of security priorities to include the protection of the international community. The consequent emergence of the notion of 'international security' marked an advancement in the security concept, a modernisation that resulted in a shift in arms control to focus on limiting the use, production and proliferation of weapons.²⁶³

At the same time, the global arms trade network grew 'more dense, clustered and decentralized'.²⁶⁴ The primary suppliers were the two superpowers, whose bipolar rivalry dominated the international system, and led to the creation of their respective

²⁵⁸ Krause, *Arms and the State* (n 206) 73.

²⁵⁹ Import, Export and Customs Powers (Defence) Act 1939, c 39, s 1. The 1939 Act continued to be in force following the end of the World War II and throughout the Cold War. Eventually amended by the Import and Export Control Act 1990, c 45 which replaced s 9(3).

²⁶⁰ Basil Zaharoff in October 1918, quoted in Grant (n 214) 1.

²⁶¹ Harkavy (n 255) 18. For detailed analysis of rearmament during the interwar period, see: Joseph A Maiolo, *Cry Havoc: How the Arms Race Drove the World to War, 1931–1941* (Basic Books 2010); Robert E Harkavy, *The Arms Trade and International Systems* (Ballinger 1975); John Ruggiero, *Neville Chamberlain and British Rearmament: Pride, Prejudice, and Politics* (Greenwood Press 1999); Robert Paul Shay Jr., *British Rearmament in the Thirties: Politics and Profits* (Princeton University Press 1977); Robert Frankenstein, *Le Prix Du Réarmement Français, 1935–1939* (Publications de la Sorbonne 1982); Edward W Bennett, *German Rearmament and the West, 1932–1933* (Princeton University Press 1979).

²⁶² Williams and Viotti (n 103) 3–4.

²⁶³ Stuart Casey-Maslen, *Arms Control and Disarmament Law* (Oxford University Press 2022) 172.

²⁶⁴ Anders Akerman and Anna Larsson Seim, 'The Global Arms Trade Network 1950–2007' (2014) 42 *Journal of Comparative Economics* 535, 548.

political and military alliances: the North Atlantic Treaty Organization (NATO) and the Warsaw Pact.²⁶⁵ The United States and the Soviet Union cemented their place as the top tier producers as a result of the surplus of World War II supplies and the arms race between them.²⁶⁶ A second tier of producers, namely the United Kingdom, France and West Germany, re-emerged as major exporters, who primarily sold arms for commercial purposes, with the former two states also attempting to retain their control, influence and/or presence in their former colonies.²⁶⁷ Between 1965 and 1975, a total of thirty-one countries in Africa, Asia and Latin America (including, most notably, Brazil, Argentina, Egypt, India, Iran and South Africa) began to manufacture arms, resulting in the emergence of a third tier of producers for a variety of weapons and military technologies including small arms, missiles, armoured vehicles, naval vessels, and aeroengines.²⁶⁸

i. Expanding Export Markets

The increase in arms production and the supplier base heightened competition for expanding export markets, which resulted in the establishment or further development of national export regimes by some states. Most notably, the United States developed a comprehensive arms export system following the end of World War II to deal with its role as the world's largest exporter. The first peace-time control, the Export Control Act (1949), established licensing regulations and shifted the focal point of export policy to include protecting the domestic economy, furthering of foreign policy and 'exercis[ing] the necessary vigilance over exports from the standpoint of their significance to the national security'.²⁶⁹ Further restrictions were imposed by the Mutual Defense Assistance Control Act (1951), which prohibited exports of weapons and other materials that potentially posed a threat to the United States and also banned assistance to states which traded with the Soviet Union. A persistent theme from every administration in the United States following World War II until the late 1980s was arms controls were required to advance national security, which regulated commercial and political interests rather than restraining them.²⁷⁰

In contrast, the heavily state-centralised Soviet Union was focussed on expanding its influence through arms exports rather than trying to establish a regulatory system for them. Following the creation of the Soviet Union in 1917, the subsequent heavy domestic focus combined with the availability of only primitive technology meant there was very little arms production and exports by the Soviets during the 1920s.²⁷¹ By the end of World War II, the Soviet Union was positioned for a major role in the

²⁶⁵ Bourne (n 96) 88.

²⁶⁶ Lumpe, Meek and Taylor (n 195) 3; Krause, *Arms and the State* (n 206) 81–84; Menon (n 211) 379–380.

²⁶⁷ Erickson, *Dangerous Trade* (n 96) 57; Krause, *Arms and the State* (n 206) 85–86.

²⁶⁸ Krause, *Arms and the State* (n 206) 84; Menon (n 211) 378.

²⁶⁹ Export Control Act of 1949, 63 Stat 7, s 2. Although the 1949 Act, was initially scheduled to lapse in 1951, due to the Korean War and other Cold War foreign policy concerns the Act was renewed for almost twenty years without any major amendments.

²⁷⁰ Marco Fey and others, 'Established and Rising Great Powers: The United States, Russia, China, and India' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control* (University of Georgia Press 2013) 167.

²⁷¹ Krause, *Arms and the State* (n 206) 78.

international arms market as a result of the dramatic expansion of its domestic production base, the economic reconstruction required following the end of the war, and the decline of previously large exporters such as the United Kingdom, France and Italy which had suffered significant economic losses because of World War II.²⁷² As the Warsaw Pact was strongly centralised around the Soviet Union, this provided the Soviet Union with a key base for exports.²⁷³ Decolonisation during the 1950s and 1960s created further opportunities for Soviet arms sales as the newly independent states sought to acquire military power and their own defence capabilities. These exports also provided the Soviets with the opportunity to offload their obsolete and second-line equipment as the Soviet armed forces modernised their military equipment. As such, the Soviet Union became an attractive supplier because of its willingness to supply large quantities of arms at low cost, rather than because of the quality of its weapons.²⁷⁴ From 1976 to 1980, when the Soviet Union had developed its industries and capacities to compete with the economic power of the United States, Soviet arms sales quadrupled in value compared to the economic aid it provided to the Third World.²⁷⁵

The three European exporters, like the United States, also developed export controls as they rebuilt their domestic arms industries. After World War II, Germany was divided between the Allied powers and eventually established as two separate states in 1949: Federal Republic of Germany (FRG, or West Germany) and German Democratic Republic (GDR, or East Germany). East Germany was subservient to the Soviet Union and possessed limited control over its own arms export system. West Germany, once the armed forces (Bundeswehr) were reconstituted in 1951, immediately joined NATO once its formal occupation ended. Simultaneously, West Germany began rebuilding its defence forces and producing arms based primarily on the designs of the United States. West Germany effectively utilised co-production and licensed production arrangements to rebuild and enhance its defence industrial capabilities, enabling it to become a major arms exporter during the Cold War.²⁷⁶ During the 1960s, its foundational export control regulations were adopted, establishing strict export controls including licensing requirements.²⁷⁷

Similarly, France's arms production infrastructure was almost completely destroyed during World War II. Like West Germany, France capitalised on its involvement in NATO, and in particular military aid from the United States, to rebuild its arms industry to ensure independent production capability for all weapons systems. France aggressively sought out new markets as a means for maintaining a strong and autonomous defence industrial base, viewing arms deals as an instrument of foreign

²⁷² Menon (n 211) 379.

²⁷³ Akerman and Seim (n 264) 537.

²⁷⁴ Menon (n 211) 383; Krause, *Arms and the State* (n 206) 116.

²⁷⁵ Robbin F Laird, 'Soviet Arms Trade with the Noncommunist Third World' (1984) 35 *Proceedings of the Academy of Political Science* 196, 197.

²⁷⁶ Krause, *Arms and the State* (n 206) 129.

²⁷⁷ Act Implementing Article 26(2) of the Basic Law (War Weapons Control Act) (Kriegswaffenkontrollgesetz, KWKG) of 1 June 1961, version published on 22 November 1990, Federal Law Gazette 2506; Foreign Trade and Payments Act of 6 June 2013, Federal Law Gazette 1482 (Außenwirtschaftsgesetz, AWG); Foreign Trade and Payments Ordinance of 2 August 2013, Federal Law Gazette 2865 (Außenwirtschaftsverordnung, AWV).

policy and as a mechanism for assisting recipient countries to become independent from the two superpowers.²⁷⁸ The United Kingdom also sought to delay the decline of its status as a top tier exporter, in order to remain at the technological frontier and to sustain a strong and autonomous industrial base.²⁷⁹ In particular, in 1966, to promote British arms sales abroad, the Defence Exports Sales Organisation (DESO) was established as a branch of the Ministry of Defence. DESO was closely linked to the arms industry, both in terms of personnel (the head of DESO always came from the defence industry) and in financing (the salary for the head of DESO was supplemented by the arms industry).²⁸⁰ Aside from this shift in export policy, the export control systems of France and the United Kingdom adopted prior to World War II were not significantly amended after the war ended.

The sixth major exporter – China – arrived later onto the international arms export scene compared to the others. After spending many decades focussing on internal development after the Communist government came to power in 1949, during the 1970s, China developed its arms production capabilities. Initially, this remained primarily limited to producing Soviet models from the 1950s. China became an important player in the international arms market during later part of the Cold War, particularly as a supplier of covert aid. From the late 1970s, following Deng Xiaoping's emergence as the successor to Mao Zedong, there was a growth in China's domestic defence industry as part of Deng's prioritisation of the 'four modernizations' (defence, agriculture, industry, and science and technology). From 1979 to 1995, China's export controls operated on an ad hoc basis, based on national economic and security interests.²⁸¹ In 1982, several organisations concerned with weapons programs were consolidated into the Commission of Science, Technology, and Industry for National Defense (COSTIND), which became responsible for overseeing research, development, testing, and production in the military and in the defence industries. COSTIND was commanded by the Central Military Commission, the highest commanding power of the military, and answered to the State Council (the highest governmental organ) and the Central Military Commission. The centralised coordination of COSTIND enabled China's military facilities and defence industries to become more efficient and effective.²⁸²

ii. Averting Annihilation

At the international level, arms controls grew substantially during the Cold War period, coinciding with the renewed focus on cooperation and peace amongst states and the creation of new international bodies which provided structures and forums for

²⁷⁸ Lucie Béraud-Sudreau, *French Arms Exports: The Business of Sovereignty* (Routledge 2020) ch 1; Soubrier (n 236) 117.

²⁷⁹ Krause, *Arms and the State* (n 206) 128, 142.

²⁸⁰ David Leigh and Rob Evans, 'The Defence Export Services Organisation' *The Guardian* (7 June 2007) <<https://www.theguardian.com/world/2007/jun/07/bae13>>; Davis (n 52) 21.

²⁸¹ Evan S Medeiros, *Chasing the Dragon: Assessing China's System of Export Controls for WMD-Related Goods and Technologies* (Rand Corp 2005) 6–13.

²⁸² Congressional Research Service, 'China: Commission of Science, Technology, and Industry for National Defense (COSTIND) and Defense Industries' (The Library of Congress 1997).

negotiation.²⁸³ The Cold War was the golden age of international arms control instruments that focussed on disarmament and non-proliferation, led by the newly formed United Nations (UN). Like the League of Nations before it, but in less explicit terms than its predecessor, the foundational instrument of the new international body implicitly acknowledged the right of states to export arms. Article 51 of the UN Charter enshrined the principle of self-defence, which continues to be interpreted as legally sanctioning the right of states to possess arms and, in turn, justifying the export of arms to states seeking to exert that right. At the same time, the arms race between the two superpowers involved an exponential increase in spending to develop weapons capabilities and arsenals, re-awakening the pre-World War I concern of the potential for the arms exports to transform into an arms race, and then from an arms race to war.²⁸⁴ The growth in arms volumes globally heightened the security dilemma, with increase in the size and lethality of military arsenals perpetuating feelings of insecurity between states and resulting in a cycle of insecurity as other states expanded their military spending.

Alongside the consequences of arms accumulation concerns about the arms race instigating a nuclear war provoked greater efforts by states to agree to international arms control instruments.²⁸⁵ Nuclear weapons played a key role in pushing international security concerns to the fore of the disarmament agenda. The development and proliferation of nuclear weapons created a heightened need for 'arms control', which became the more widely used term de jure, replacing the focus on 'disarmament'.²⁸⁶ The idea of strategic arms control as an independent concept emerged at this time, with the prevention of proliferation of nuclear weapons to non-nuclear states and non-state actors being identified as one of the principal challenges for international arms control.²⁸⁷ During the late 1950s and early 1960s there emerged what Hedley Bull termed as 'new thinking' between the two superpowers, which saw the relationship between them shift to one of nuclear deterrence – marking the beginning of 'The Golden Age'.²⁸⁸ To maintain stability in the international order, the primary objective of the United States in domestic policies and bilateral negotiations shifted to managing nuclear weapons, rather than nuclear disarmament and elimination.²⁸⁹ Soviet tolerance for reforms in Eastern Europe and withdrawal from geopolitical confrontations with the United States, following the brinkmanship of the Cuban Missile Crisis and settlement of other conflicts in Central American and Africa during the 1960s, were notable changes that occurred as a result of this policy shift by

²⁸³ Robert E Williams, 'Arms Control And International Law' in Robert E Williams and Paul R Viotti (eds), *Arms Control: History, Theory, and Policy*, vol 1 (Praeger Security International 2012) 55.

²⁸⁴ Grant, *Rulers, Guns, and Money* (n 233) 2; Stone (n 214) 214; Krause, *Arms and the State* (n 206) 81–82, 105–106.

²⁸⁵ Müller (n 166) 2.

²⁸⁶ Williams and Viotti (n 103) 4.

²⁸⁷ Jeffrey A Larsen, 'Strategic Arms Control Since World War II' in Robert E Williams and Paul R Viotti (eds), *Arms Control: History, Theory, and Policy*, vol 1 (Praeger Security International 2012) 221; Dan Caldwell, 'Nuclear Proliferation' in Robert E Williams and Paul R Viotti (eds), *Arms Control: History, Theory, and Policy*, vol 1 (Praeger Security International 2012) 23.

²⁸⁸ Hedley Bull, 'Arms Control: A Stocktaking and Prospectus' in Alastair Buchan (ed), *Problems of Modern Strategy* (Praeger Publishers for the Institute for Strategic Studies 1970) 139–140.

²⁸⁹ Williams and Viotti (n 103) 4.

the United States.²⁹⁰ Other factors, including budgetary concerns, public pressure, and broader policy considerations stemming from the superpower rivalry also influenced export controls, though to a less prominent extent.²⁹¹

Several types of international arms controls emerged during the Cold War, with varying levels of encroachment on state autonomy.²⁹² Most adopted arms control and disarmament measures were domestically unobtrusive and primarily sought to change behaviour in the international sphere by addressing issues related to state-to-state arms transactions.²⁹³ The most successful nuclear arms control efforts began during the period of détente which commenced in the late 1960s and continued into the late 1980s during the *perestroika* and *glasnost* years. Several key treaties were adopted during this period, including the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1968, the Strategic Arms Limitation Talks (SALT) Interim Agreement in 1972, the Anti-Ballistic Missile Treaty (ABMT) in 1972, and the Intermediate Nuclear Forces Treaty (INF Treaty) in 1987.²⁹⁴ The adoption of the NPT was particularly notable as it helped to limit the spread of nuclear weapons beyond the UN Security Council's permanent members.²⁹⁵ The adoption of these treaties emerged from the positive feedback loop of policy changes by the superpowers.²⁹⁶ For example, towards the end of the 1960s, both blocs were influenced by NATO's Harmel Report (1967), which effectively introduced deterrence and détente into their political thinking. The Report made a plea for balanced reductions in arms by NATO as a means of pursuing a more stable relationship with the Warsaw Pact states, while also reaffirming the need to 'maintain adequate military strength' to deter aggression.²⁹⁷ During the Gorbachev

²⁹⁰ Harald Müller, Marco Fey and Carsten Rauch, 'Winds of Change: Exogenous Events and Trends as Norm Triggers (or Norm Killers)' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press 2013) 150.

²⁹¹ Fey and others (n 270) 170–171; Davis (n 229) 19.

²⁹² Patrick M Morgan, 'Elements Of A General Theory Of Arms Control' in Robert E Williams and Paul R Viotti (eds), *Arms Control: History, Theory, and Policy*, vol 1 (Praeger Security International 2012) 19–20. The types of arms controls are categorised by Viotti according to the following stages: the development stage (restrictions or prohibitions on the development of certain types of weapons, for instance, the Biological Weapons Convention); the deployment stage (limits on the numbers, size, and types of specific weapons systems that could be deployed, such as prohibitions on stockpiling); prohibitions on transfer (deterrence to prevent the outbreak of war and severe or harmful consequences); and the decision to use stage (limitations on when or where weapons were permitted to be use, such as to avoid escalation of situations or restraints on use in civilian areas, respectively).

²⁹³ Alyson JK Bails, 'The Changing Role of Arms Control in Historical Perspective' in Christopher Daase and Oliver Meier, *Arms Control in the 21st Century: Between Coercion and Cooperation* (Routledge 2013) 16–17.

²⁹⁴ Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT); Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (signed 26 May 1972) 944 UNTS 3 (SALT I); Treaty on the Limitation of Anti-ballistic Missile Systems (Union of Soviet Socialist Republics – United States of America) (signed 26 May 1972, entered into force 3 October 1972) 944 UNTS 13 (ABMT); Treaty on the Elimination of their Intermediate-range and Shorter-range Missiles (signed 8 December 1987, entered into force 1 June 1988) 1657 UNTS 3 (INF Treaty).

²⁹⁵ Casey-Maslen (n 263) 172–173.

²⁹⁶ Müller, Fey and Rauch (n 290) 150.

²⁹⁷ NATO 'Future Tasks of the Alliance' (18 December 1967) Report of the Council C-M(67)74 (2nd Rev), para 5. See also: Bails (n 293) 17–18. Bails contends the Harmel Report 'shaped national thinking on both sides of the Iron Curtain by presenting toughness in defence as part of a Yin–Yang balance with stabilization, communication and even cooperation across dividing lines'.

years that followed, concerns about the consequences a potential superpower confrontation would have for national security and international security, resulted in the Soviet president taking a number of initiatives to step back from the arms race.²⁹⁸

While the potential for extreme devastation that would be caused by a nuclear war rendered it necessary to control the proliferation of these weapons to prevent the outbreak of nuclear wars and ease tensions between states, national security concerns limited the effectiveness of international arms control instruments in this area. The development of nuclear weapons exacerbated the ongoing tensions between the haves and have-nots – in this case the nuclear states and non-nuclear states – which resulted in differing views on how nuclear arms controls should function. Nuclear powers sought to increase their nuclear arsenals to ensure second strike capabilities, which in theory would enhance stability, premised on the ‘two scorpions in a bottle’ idea where neither scorpion would attack because doing so would be lethal to itself as well as the other.²⁹⁹ Non-nuclear states such as China and Israel sought to develop nuclear weapons to strengthen their security.³⁰⁰ Traditional Confucian and Mencian philosophy continued to influence Communist China’s view that the use of force was legitimate only when ‘exercised defensively and proportionately’.³⁰¹ China was particularly concerned prohibitions on non-nuclear states acquiring nuclear weapons would perpetually skew the balance of power in the favour of nuclear states, and regularly criticised international arms control regimes as being imperialistic.³⁰²

iii. Distinguishing Unacceptable and Acceptable Weapons

With the introduction of nuclear weapons into the equation, arms controls fractured into two categories – conventional and non-conventional weapons – which was apparent in both international law and national export regimes.³⁰³ The emergence of concerns about the use of non-conventional weapons preceded the Cold War and the development of nuclear weapons. In the early decades of the twentieth century, some

²⁹⁸ Matthew Evangelista, ‘Turning Points in Arms Control’ in Richard K Herrmann and Richard Ned Lebow (eds), *Ending the Cold War: Interpretations, Causation and the Study of International Relations* (Springer 2004) 96–98; Fey and others (n 270) 174.

²⁹⁹ J Robert Oppenheimer, ‘Atomic Weapons and American Policy’ (1953) 31 *Foreign Affairs* 525, 529. See also: Williams and Viotti (n 103) 4; Bull (n 288) 139–143.

³⁰⁰ Caldwell (n 287) 26. For a deeper analysis of the reasons states seek to develop, transfer or obtain nuclear weapons, see: Joseph Cirincione, *Bomb Scare: The History and Future of Nuclear Weapons* (Columbia University Press 2007); Matthew Fuhrmann, ‘Taking a Walk on the Supply Side: The Determinants of Civilian Nuclear Cooperation’ (2009) 53 *Journal of Conflict Resolution* 181. Cirincione identifies five key reasons states develop or seek to obtain nuclear weapons: security, politics, prestige, technological advancements, and economics. Fuhrmann posits three strategic reasons states provide nuclear assistance: strengthening allies and alliances, strengthening relationships with the enemies of their enemies, and strengthening democracies and bilateral relationships with democratic states.

³⁰¹ Huiyun Feng, ‘A Dragon on Defense: Explaining China’s Strategic Culture’ in Jeannie L Johnson, Kerry M Kartchner and Jeffrey A Larsen (eds), *Strategic Culture and Weapons of Mass Destruction: Culturally Based Insights into Comparative National Security Policymaking* (Palgrave Macmillan US 2009) 172–173; Jing-Dong Yuan, ‘Culture Matters: Chinese Approaches to Arms Control and Disarmament’ (1998) 19 *Contemporary Security Policy* 85, 87–89; Fey and others (n 270) 181.

³⁰² Geoffrey Hunt, ‘China’s Case Against the Nuclear Non-Proliferation Treaty: Rationality and Morality’ (1986) 3 *Journal of Applied Philosophy* 183, 185–186.

³⁰³ Williams and Viotti (n 103) 3–4.

weapons, such as biological weapons, were viewed as so unconscionable it was imperative to restrict the production and use of such weapons due to their indiscriminate mass casualty capabilities and the inhumane consequences of their use.³⁰⁴ For example, the 1925 Geneva Protocol codified the norm against the use of biological weapons developed at the end of the nineteenth century, and is now regarded as customary international law.³⁰⁵ From 1969 until 1971, negotiations were held for the supplement of the Protocol, culminating in the adoption of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, also known as the Biological Weapons Convention (BWC), which entered into force three years later.³⁰⁶ The BWC eliminated a class of weapons by comprehensively and indiscriminately prohibiting state parties from developing, producing, stockpiling, acquiring or retaining biological agents, toxins or weapons, and requiring the destruction of existing weapons.³⁰⁷ The broad support of the BWC exemplified international security concerns, demonstrating the shifting attitudes toward the acceptability of certain types of weapons.

Moreover, international humanitarian law rules were developed during this period to restrict belligerent parties from choosing their means and methods of warfare by providing guidelines for the protection of individuals in armed conflicts. A fundamental premise of international humanitarian law is the protection of civilians through the regulation of warfare, known as the principle of distinction, which prohibits the use of weapons incapable of discriminating between combatants and non-combatants, thereby also prohibiting the transfer of such weapons.³⁰⁸ Additionally, the principle of unnecessary suffering prohibits the use of weapons or methods that can 'cause superfluous injury or unnecessary suffering'.³⁰⁹ This article implies some forms of suffering are expected and in fact necessary in wars, despite this being at odds with the general prohibition on the use of force. Such contradictions demonstrate that international humanitarian law accepts restrictions on the use of force do not necessarily stop the outbreak of war and thereby aims to provide rules of conduct so military advancement can be achieved with only 'necessary' force. Though international humanitarian law has been successful in changing the views on the acceptability of weapons which cause unnecessary suffering or cannot discriminate between combatants and civilians, it still allows for the use, acquisition and transfer of conventional arms because they are viewed as 'acceptable' weapons of war, so long as these weapons are used in accordance with the rules of conduct.

³⁰⁴ Harald Müller, Una Becker-Jakob and Tabea Seidler-Diekmann, 'Regime Conflicts and Norm Dynamics: Nuclear, Biological, and Chemical Weapons' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press 2013) 60; Wisotzki (n 190) 82–83.

³⁰⁵ See, for practices incorporating this principle: ICRC, 'Practice Relating to Rule 73. Biological Weapons' <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule73>>.

³⁰⁶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (opened for signature 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163 (BWC).

³⁰⁷ BWC, art 1.

³⁰⁸ Geneva Conventions Additional Protocol I, art 51(4).

³⁰⁹ Geneva Conventions Additional Protocol I, art 35(2).

In effect, such distinctions created a dichotomy between ‘acceptable’ and ‘non-acceptable’ weapons. Unlike nuclear and other non-conventional weapons, which were viewed as ‘unacceptable’ weapons of war because of their enormous destructive perimeter and lethality, conventional weapons were, and continue to be, viewed as ‘acceptable’ types of arms. This dichotomy was reaffirmed by 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 (1980), also known as the Convention on Certain Conventional Weapons (CCW), which was adopted to regulate types of weapons, such as landmines, incendiary weapons and blinding laser weapons, that can cause unnecessary suffering.³¹⁰ The treaty aims to protect civilians and to limit the unnecessary suffering of combatants by building on the principle of distinction and the principle prohibiting unnecessary suffering, and indeed helped to clarify the meaning of these important international legal norms.³¹¹ While the CCW did not have an overall effect on the limitation of conventional arms exports, it demonstrates a transition away from the focus on a strict division between conventional and non-conventional weapons to one which distinguishes between acceptable and unacceptable types of arms based on indiscriminate use or the excessive nature of the suffering caused.

iv. Omitting Conventional Arms Controls

Unlike their more destructive and inhumane cousins who were persistently in the spotlight, conventional weapons escaped further scrutiny during the Cold War. As the potential for war continued to hover over the world because of the bipolar division among states and self-determination struggles of soon-to-be-former colonies, ‘acceptable’ conventional arms continued to be viewed as necessary. While there were references to limiting conventional arms during this period, national security was reaffirmed as an important exception to such efforts. For example, the UN General Assembly urged major arms suppliers and recipient countries to consult each other on limiting the transfer of all types of conventional arms ‘with a view of promoting or enhancing stability at a lower military level, taking into account the need of all States to protect their security as well as the inalienable right to self-determination and

³¹⁰ 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 (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137 (CCW); Protocol (I) on Non-Detectable Fragments (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 168 (CCW Protocol I); Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 168 (CCW Protocol II); Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 171 (CCW Protocol III); Protocol (IV) on Blinding Laser Weapons to 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 (adopted 13 October 1995, entered into force 30 July 1998) 1380 UNTS 370 (CCW Protocol IV); Protocol (V) on Explosive Remnants of War to 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 (adopted 28 November 2003, entered into force 12 November 2006) 2399 UNTS 100 (CCW Protocol V).

³¹¹ Stephanie Carvin, ‘Conventional Thinking? The 1980 Convention on Certain Conventional Weapons and the Politics of Legal Restraints on Weapons during the Cold War’ (2017) 19 *Journal of Cold War Studies* 38, 38.

independence of peoples under colonial or foreign domination'.³¹² One state which adopted this approach was West Germany, which became a leader in conventional arms controls and confidence building in Europe and internationally. By the late 1980s, West Germany began promoting strict export controls to enhance international security and avoid 'race to the bottom' policies pursued by other exporters.³¹³

At the international level, the legal export of conventional arms remained largely outside the remit of international arms controls despite these weapons continuing to impact peace and development, particularly in the developing world. Conventional arms were treated like other standard forms of commerce, with the exceptions of sensitive weapons or technologies and exports to destinations viewed as potential threats.³¹⁴ However, because of national security concerns, arms remained outside the scope of international trade agreements. The General Agreement on Tariffs and Trade (GATT), signed in 1947, included a national security exception to export controls.³¹⁵ Specifically, Article XXI of GATT, 'Security Exceptions', stated: 'Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ... relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment'.³¹⁶ Following a complaint by Czechoslovakia in 1949, it was clarified the national security exception in Article XXI rendered each state the final judge of what 'essential security interests' meant for that state, while also remaining cautious as to not undermine the effect of the GATT.³¹⁷ In the context of the arms trade, states were therefore given significant scope to determine the disclosure of arms deals.

For the most part, the Cold War dynamics hindered treaty negotiations for conventional weapons, which was especially evident in the tone and conduct of the negotiations, and the types of weapons and issues which were discussed.³¹⁸ Small arms, in particular, remained absent from any inclusion in arms controls during the Cold War due to their significance in domestic contexts and civil conflicts. With arms control measures lacking, arms embargoes remained the strongest control measures for conventional arms. The UN Security Council is authorised to impose arms embargoes under Article 41 of the UN Charter. As the Security Council remained stifled throughout the Cold War by the veto power possessed by the two superpowers

³¹² UNGA 'Resolution Adopted on the Report of the Ad Hoc Committee of the Tenth Special Session' (30 June 1978) Final Document of Tenth Special Session of the General Assembly, S-10/2, para 85.

³¹³ Una Becker-Jakob and others, 'Good International Citizens: Canada, Germany, and Sweden' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control* (University of Georgia Press 2013) 223.

³¹⁴ Davis (n 229) 23.

³¹⁵ General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948)

55 UNTS 194 (GATT), art XXI. The World Trade Organization adopted the full provisions of GATT: Marrakesh Agreement Establishing the World Trade Organization (with final act, annexes and protocol) (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

³¹⁶ GATT, art XXI para 1(b)(ii).

³¹⁷ GATT, 'Article XXI: Security Exceptions', *Analytical Index of the GATT* (WTO 2012) 600

<https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdf>.

³¹⁸ Carvin (n 311) 38.

(along with China, France and the United Kingdom), the only time a UN arms embargo was imposed during this period was against South Africa in 1978.³¹⁹ The broadest embargoes in place between the two competing blocs – the Coordinating Committee for Multilateral Export Controls (CoCom) established in 1949 by the Western bloc, and the Council for Mutual Economic Assistance (Comecon) established in 1989 by the Eastern bloc – with CoCom embargoing exports to the Comecon.

Moreover, until the end of the Cold War, the only broadly ratified treaty on conventional arms remained the Brussels Act (1890). Preventing the proliferation of conventional arms consequently relied on supply-side controls that placed limits on potential recipients. One instance where multiple major exporters attempted to constrain arms exports was the 1950 Tripartite Declaration agreed to by France, the United Kingdom and the United States, and also Italy from 1955. The purpose of this declaration was to regulate arms sales to the Middle East by establishing a top-secret consultation forum, the Near Eastern Arms Control Committee (NEACC). Despite meetings of NEACC continuing into the 1960s, the forum was stymied by diverging national security policies which started with France's support of arms exports to Israel and was compounded by the United Kingdom's involvement in the Suez Crisis.³²⁰ Like the Brussels Act, the limits on arms supplies by the Tripartite Declaration was motivated by strategic security and political considerations, and its successful agreement was due to the limited number of supplier states involved, because the negotiations did not include potential recipient states, affected groups such as indigenous populations, or less powerful states from the Eastern bloc and the Middle East.³²¹

Political strategies at the regional or bloc level were more effective in the control and reduction of arms.³²² The success in regional limits was linked to the existence of 'two definable sides' and the involvement of only a limited number of states.³²³ This is highlighted by the measures adopted by NATO and the Warsaw Pact which focussed on stabilising the relative numbers of certain convention weapons held by the two alliances.³²⁴ A primary concern between the superpowers was maintaining parity in the size of arsenals, while remaining at the forefront of developing new technologies. This was most starkly evident in the space race, when the Soviet Union's successful launch of Sputnik in 1957 marked a turning point. Although Sputnik was essentially a tin can in the sky, it propelled an exponential increase in spending and development by the United States and consequently became the only time the Soviets were ahead in the space race.

v. Covertly Arming Allies

While arms controls during the Cold War spotlighted nuclear disarmament and non-proliferation, in the shadows a different story was unfolding. A distinctive feature of

³¹⁹ UNSC Res 418 (4 November 1977) UN Doc S/RES/418.

³²⁰ Bromley, Cooper and Holtom (n 163) 1033.

³²¹ *ibid* 1033–1034; Shlomo Slonim, 'Origins of the 1950 Tripartite Declaration on the Middle East' (1987) 23 *Middle Eastern Studies* 135, 136–138.

³²² Bails (n 293) 16–17.

³²³ *ibid* 16–7.

³²⁴ Casey-Maslen (n 263) 103.

arms trade during the Cold War was the use of covert aid to deliver arms to embargoed parties or insurgent groups with aligned political and ideological beliefs, or to insurgent groups who were fighting against regimes allied with the opposing bloc.³²⁵ Covert aid was distinguished by two features. First, a number of different actors were involved in coordinating the supply of covert aid to recipients, generally through a series of consecutive transfers. Officially, arms transfers continued to be viewed as an activity which could only be pursued by states, reflecting the predominant view at the time that arms sales could potentially undermine national security and thus could not be left to market forces.³²⁶ Covert aid involved numerous non-state actors in the export processes, such as private arms dealers who were contracted by states to obtain better security for deliveries. Arms dealers would independently sub-contract the delivery to air-transport companies, which states were not able to publicly do.³²⁷ In some 'hybrid cases', arms dealers sold dual-use equipment to pariah states with the expectation their home governments would 'overlook the risk of the deal for the sake of its foreign policy objectives'.³²⁸ Second, arms supplies were delivered to recipients through arms pipelines developed by the two superpowers, which blurred the line between government operations and transnational crime, as supplier states became reliant on smugglers to procure and deliver weapons.³²⁹

Covert aid increased from the mid-1970s coinciding with the rise in intra-state conflicts, some of which were used as proxy wars by the superpowers. The use of covert aid by the United States was authorised by the National Security Act (1947), and involved the inclusion of arms in aid packages to primary recipients, who were then expected to send their obsolete and overstocked equipment to an unofficial secondary recipient, which unsurprisingly resulted in surplus stocks ending up in illicit markets.³³⁰ Following the experiences in the Vietnam War quagmire, the United States became more reluctant to directly intervene in conflicts, and instead dramatically increased arms supplies (predominantly small arms and light weapons) to friendly insurgent forces in the late 1970s. During the 1980s, the Reagan administration sought to deploy covert aid as a foreign policy tool to counter the potential spread of the Soviet sphere of influence, with the most notorious example being the supply of weapons to the Mujahideen in Afghanistan during the Soviet-Afghan War.³³¹ For the Soviets, covert

³²⁵ Bourne (n 96) 95–99, 149; Schroeder, Smith and Stohl (n 28) 13.

³²⁶ Davis (n 52) 21.

³²⁷ Bourne (n 96) 101.

³²⁸ Stohl and Grillot (n 5) 106.

³²⁹ Bourne (n 96) 105; Mathiak and Lumpe (n 107) 55.

³³⁰ Michael T Klare and David Andersen, *A Scourge of Guns: The Diffusion of Small Arms and Light Weapons in Latin America* (Arms Sales Monitoring Project, Federation of American Scientists 1996) 77–79; Douglas Little, 'Cold War and Covert Action: The United States and Syria, 1945-1958' (1990) 44 *Middle East Journal* 51; Douglas Little, 'Mission Impossible: The CIA and the Cult of Covert Action in the Middle East' (2004) 28 *Diplomatic History* 663. On the involvement of the CIA in covert aid, see: John Stockwell, *In Search of Enemies: A CIA Story* (WW Norton 1978). On the diversion of covert aid to black markets, see: Klare (n 109).

³³¹ Covert aid was supplied by the United States to: the Mujahideen in Afghanistan (approximately USD 670 million worth of arms and equipment annually); União Nacional para a Independência Total de Angola (UNITA) in Angola (USD 30 million each year); and the Nicaraguan right-wing rebel forces via arms sales to Iran, which was under arms embargo at the time (totalling USD 70 million worth): SD Muni, 'Arms and Conflicts in the Post-Cold War Developing World' in Luc van de Goor, Kumar Rupesinghe and Paul Sciarone (eds), *Between Development and Destruction: An Enquiry into the Causes of Conflict in Post-Colonial States* (Macmillan Press 1996) 201–202. See also: John Prados,

aid was perceived as a cheap option for exerting power and influence, with the Soviet Union providing an estimated six to eight times the cost of arms to recipients compared to the United States.³³² The Soviet Union provided covert aid to ideologically allied states and rebel groups from the 1960s onwards, such as Communist rebels in Angola and the Sandinistas in Nicaragua via an arms pipeline which ran through Cuba.³³³

Other exporter states were also involved in covert aid supplies. For example, the United Kingdom and France made use of the United States' pipelines to deliver Blowpipe surface-to-air missiles and Franco-German Milan anti-tank rockets, respectively, to Afghanistan after 1986.³³⁴ China, driven by concerns of potential encirclement by Soviet-allies, supplied covert aid to its neighbours including the Viet Cong in South Vietnam and the Khmer Rouge in Cambodia.³³⁵ China was also as a secondary supplier to insurgent groups, acting as conduit between the primary supplier and recipient, as occurred in Afghanistan where China sold arms to the United States' Central Intelligence Agency which were delivered through the Afghan pipeline.³³⁶ Covert aid presented lucrative economic incentives for arms transfer conduits when pipelines became entrenched networks for the regular supply of arms and integrated into the micro-economies in a region.³³⁷ The prevalence of covert aid during the Cold War suggests even if arms control measures for conventional weapons were adopted they would have likely been circumvented since security, political and ideological interests were at the forefront in supplying arms to numerous intra-state conflicts throughout the world.

III. Security Shifts and Responsibilities

During the twentieth century, which was marked by two destructive world wars and then a stand-off between two superpowers, there was a significant transformation in the perception of security, and in turn its influence on arms controls. The security concept expanded from being centred on national security concerns to include international security as an additional factor for prioritisation. Correspondingly, the arms trade came to serve multiple functions: protecting national security and domestic industries, generating economic benefits from the growth in demand and expansion of arms markets, and providing a means for political and ideological influence. The developments in the arms trade until the end of the Cold War provide three significant

'Notes on the CIA's Secret War in Afghanistan' (2002) 89 *The Journal of American History* 466, 466; Mathiak and Lumpe (n 107) 57–58; Bourne (n 96) 99; Stohl and Grillot (n 5) 105.

³³² Tara Kartha, *Tools of Terror: Light Weapons and India's Security* (Knowledge World 1999) 61; Bourne (n 96) 99.

³³³ Large-scale military aid was supplied by the Soviet Union and Soviet bloc allies to the governments of Angola (the MPLA), Afghanistan, and Nicaragua, and to liberation movements in Africa such as the Movimento Popular da Libertação de Angola (MPLA) in Angola, Frente de Libertação de Moçambique (FRELIMO) in Mozambique, SWAPO. See: Schroeder, Smith and Stohl (n 28) 9; Bourne (n 96) 102–103.

³³⁴ Bourne (n 96) 102.

³³⁵ Karl W Eikenberry, 'Explaining and Influencing Chinese Arms Transfers' (Institute for National Strategic Studies 1995) McNair Paper 36 21–22; Bourne (n 96) 104.

³³⁶ Bourne (n 96) 104–105; Mathiak and Lumpe (n 107) 63.

³³⁷ Bourne (n 96) 42, 95, 101; Stohl and Grillot (n 5) 106.

takeaways for the conceptualisation of responsibilities. The first is the split between arms controls at the international and national levels, with the former predominantly focussing on controlling the use, development and proliferation of non-conventional weapons, while the latter was responsible for establishing the regulatory framework for (conventional) arms exports. The most successful arms control measures at the international level related to 'unacceptable' weapons, which initially centred on non-conventional weapons such as nuclear and biological weapons, before later being extended to include certain types of conventional weapons perceived as inhumane and indiscriminate.

In addition, national security and commercial interests continued to have a pervasive influence on arms export decisions as well as the development of domestic export control regimes. The arms trade continued to be regarded as a legal and legitimate business, and national defence industries were protected as a matter of national security, allowing them to be indispensable for supplying arms to numerous inter-state and intra-state wars. The emergence of international security was a notable change, and to an extent introduced moral concerns about the destruction of humanity into the security paradigm, which was brought about by the fear of nuclear war. Although there were attempts to establish responsibilities for states to prevent and reduce the proliferation of non-conventional weapons, the exercise of these responsibilities was limited or ignored due to resurgent national security concerns and attempts by states to achieve or maintain a balance of power. Due to the bipolarisation during these decades, the perceived necessity for arms was heightened as the cycle of insecurity spiralled, resulting in increased spending on armaments and the growth in the overall volume of arms globally.

Finally, the state was the primary actor during this period. The arms trade during the twentieth century remained characterised by state-owned or controlled industry and typified by state-to-state transactions – at least officially. States maintained responsibilities for the production, delivery and negotiation of arms deals, which were primarily provided to allied and friendly nations based on geopolitical and strategic decisions. The commercial and national security interests throughout the twentieth century enabled non-state actors such as arms manufacturers and arms brokers to gain a strong foothold in domestic arms export regimes, which continued throughout the Cold War with the growth in international arms markets, and grew stronger as the privatisation of the security sector increased towards the end of the century. Despite the attention these non-state actors received following the end of World War I, the heightened concerns of state security during the Cold War resulted in their roles and responsibilities actors being largely ignored. The continuing perception of the arms trade as a state-controlled business resulted in a widespread reluctance to engage with non-state actors or to acknowledge their influence in arms exports. Overall, responsibilities received limited attention when it came to conventional weapons, due to the overriding commercial, ideological, political and military-strategic interests throughout these decades, which undermined any meaningful consideration about the human rights impacts of the arms trade.

Chapter Four – The Human Security Trident

*Poseidon gathered up
the clouds, and seized his trident and stirred round
the sea and roused the gusts of every wind,
and covered earth and sea with fog. Night stretched
from heaven.*³³⁸

Following the end of the Cold War, peace and stability in the world initially seemed within grasping distance. Removed from the dictates of a superpower rivalry and the overarching bloc divisions, the 1990s saw space emerge in the international sphere for the perceptions of security to evolve and for the acceptability of arms exports to be questioned.³³⁹ The post-Cold War period exposed the limitations of the traditional security paradigm and its fundamental presumption that the protection of the state from external threats would lay the foundation for security in other areas, such as economic and social environments.³⁴⁰ The decline in state vulnerability to external threats was starkly contrasted by the increased threats to individuals arising from the actions of their own states, as was exemplified by the civil wars during the 1990s in the Balkans, Africa and South-East Asia.³⁴¹ A notable reason for the increased brutality of these conflicts was the availability of surplus weapons stocks following the abrupt end of the Cold War, which enabled warring parties to acquire increasing amounts of weapons.³⁴² Surplus stocks from the Cold War were sold legally and illicitly to quickly raise money.³⁴³ The flood of arms into conflict-prone areas was further compounded by the arms industries of major exporter states who pushed for the development of new markets as their home states steadily decreased their military expenditure.³⁴⁴

This chapter begins by exploring the emergence of the human security paradigm as an update to the security concept and its particular relevance for the arms trade. It then details how a human security-based approach, which stresses preventive actions and people-centred responses, is useful for the conceptualisation of preventive responsibilities for the key supply-side actors involved in arms exports to conflict zones. Specifically, this chapter elaborates a three-pronged approach for conceptualising responsibilities which emphasises prevention-oriented actions, incorporates moral reasoning and extends responsibilities to key non-state actors.

³³⁸ Homer, *The Odyssey* (Emily Wilson tr, WW Norton 2017) bk 5: From the Goddess to the Storm, lines 292-6.

³³⁹ See, generally: Sverre Lodgaard, 'Human Security: Concept and Operationalization' (United Nations University of Peace 2000) Expert Seminar on Human Rights and Peace 2000.

³⁴⁰ MacFarlane and Khong (n 205) 237–243; Mahmud and others (n 209) 69.

³⁴¹ UNDP, *Human Development Report 1994* (Oxford University Press 1994) 40.

³⁴² Anthony (n 164) 32; Mahmud and others (n 209) 67; Iqbal and Starr (n 164) 316; Iqbal (n 29) 111; Coppen (n 28) 361; The International Institute for Strategic Studies (n 96) ch 2. Mahmud and others (n 209) 67.

³⁴³ Schroeder, Smith and Stohl (n 28) 12.

³⁴⁴ According to SIPRI data, international arms transfers peaked in 1982: SIPRI, 'SIPRI Arms Transfers Database' <<https://www.sipri.org/databases/armstransfers>>. See also: Bails (n 293) 17; Naylor (n 185) 176.

I. The Human Security Paradigm

The post-Cold War period exposed the long term consequences of Cold War arms exports and the limitations of arms controls. The effects of Cold War arms supplies, which had been transferred to diverse parties in an attempt to garner support for the competing political blocs, continued to be felt in the 1990s. The most problematic impact was the blowback of weapons provided to previously 'friendly' or strategic allies that resulted in unintended consequences, including the proliferation of weapons to actors which were enemies of the initial supplier.³⁴⁵ An oft-referenced case of blowback is the supply of weapons during the Iran-Iraq War in the 1980s, when over forty countries sold weapons to Iran and Iraq, enabling Iraq to accumulate weapons and ammunitions stocks to become a significant military power, which fuelled a regional arms race and emboldened Iraq's incursion into Kuwait in 1990.³⁴⁶ Even though a buy-back program was instituted by the United States, not all weapons were required to be returned and some individuals exploited the program to purchase black market weapons to sell back to the United States for a profit or turned over old weapons and used the cash-return to purchase newer models from the black market.³⁴⁷ Similar concerns about blowback are also playing out with the current conflict in Ukraine, highlighting the need for 'the practical value of arms transfers to a besieged friendly state' to be balanced against the potential medium and long term consequences.³⁴⁸

In addition, the attempts to expand the global arms markets further revealed the limitations of arms controls such as arms embargoes when confronted by security and commercial challenges. Despite the imposition of arms embargoes against several states which were in conflict during the 1990s, including Angola, Haiti, Liberia, Libya, Rwanda, Sierra Leone, Somalia, and the six republics of the former Yugoslavia,³⁴⁹ the enforcement of embargoes was generally weak, resulting in them being routinely violated.³⁵⁰ A particularly egregious example was the continuing transfer of arms to

³⁴⁵ Chalmers Johnson, *Blowback, Second Edition: The Costs and Consequences of American Empire* (Henry Holt and Company 2004) ch 1; Anna Stavrianakis, 'Controlling Weapons Circulation in a Postcolonial Militarised World' (2019) 45 *Review of International Studies* 57, 60; Erickson, *Dangerous Trade* (n 96) 61–63; Bromley, Cooper and Holtom (n 163) 1031; Matt Schroeder, Dan Smith and Rachel Stohl, *The Small Arms Trade* (Oneworld 2007) 9–10; Stone (n 214). See also: Chew (n 215); Grip (n 34); Peter Beaumont, 'Why "blowback" Is the Hidden Danger of War' *The Guardian* (8 September 2002) <<https://www.theguardian.com/world/2002/sep/08/september11.terrorism1>>.

³⁴⁶ Mathiak and Lumpe (n 107) 58, 65; Barnaby (n 190) 9; ICRC (n 118) 4.

³⁴⁷ Schroeder, Smith and Stohl (n 28) 31.

³⁴⁸ Erickson, 'Demystifying the "Gold Standard"' (n 114) 135.

³⁴⁹ See, respectively: UNSC Res 864 (15 September 1993) UN Doc S/RES/864 (lifted 9 December 2002); UNSC Res 841 (16 June 1993) UN Doc S/RES/841 (lifted 29 September 1994); UNSC Res 788 (19 November 1992) UN Doc S/RES/788 (lifted 26 May 2016); UNSC Res 748 (31 March 1992) UN Doc S/RES/748 (lifted 12 September 2003); UNSC Res 918 (17 May 1994) UN Doc S/RES/918 (lifted 10 July 2008); UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132 (lifted 29 September 2010); UNSC Res 733 (23 January 1992) UN Doc S/RES/733; UNSC Res 713 (25 September 1991) UN Doc S/RES/713 (lifted 1 October 1996) and UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160 (lifted 10 September 2001).

³⁵⁰ Matthew Moore, 'Arming the Embargoed: A Supply-Side Understanding of Arms Embargo Violations' (2010) 54 *The Journal of Conflict Resolution* 593; Michael Brzoska, 'Measuring the Effectiveness of Arms Embargoes' (2008) 14 *Peace Economics, Peace Science and Public Policy* <<https://www.degruyter.com/view/j/peps.2008.14.issue->

Rwanda following the imposition of an international arms embargo in May 1994. The French government covertly supplied weapons to Rwanda during the genocide, with five deliveries occurring between May and June 1994 which were transported via Zaire (now known as the Democratic Republic of Congo).³⁵¹ Arms were also transferred to the Rwandan government from Seychelles while the genocide was occurring, which were facilitated by a false end-user certificate from Zaire and apparently occurred unbeknownst to the government of Seychelles.³⁵²

Against this background, there was a heightened need for a rethinking of the existing security concept. The significant political and social changes in the post-Cold War period paved the way for greater attention to broader security issues and their implications for states, communities and individuals.

i. Extending the Security Concept

Since the end of the twentieth century there have been increasing efforts to reconceptualise the security concept to include the assessment of the impacts for security in other areas, in addition to the security of the state. In particular, post-positivist schools of thought in International Relations have expanded the emphasis of security considerations beyond the limited focus of the traditional security concept on diplomacy and outright war.³⁵³ The seminal piece of discourse on the new security evolution was the 1994 Human Development Report of the UN Development Programme (UNDP), which formalised the human security agenda and was the first international instrument to centre individuals as the reference point for security.³⁵⁴ Human security shifted the focus to the rights of individuals and their need for protection from two types of threats: constant threats in people's lives (such as repression, disease, poverty and violations of human rights) and threats from catastrophic events (such as natural disasters and violent conflict).³⁵⁵ The Report also explicitly identified critical sources of insecurity to include excessive militarisation, the international arms trade and military assistance in proxy wars.³⁵⁶ The concept of human security elaborated in the Report is built on four essential characteristics:

2/peps.2008.14.2.1118/peps.2008.14.2.1118.xml>; Paul Holtom and others, *United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour* (SIPRI and Uppsala University 2007).

³⁵¹ Human Rights Watch, 'Rearming With Impunity: International Support for the Perpetrators of the Rwandan Genocide' (Human Rights Watch 1995) 6–8
<<https://www.hrw.org/report/1995/05/01/rearming-impunity/international-support-perpetrators-rwandan-genocide>>; Bourne (n 96) 94.

³⁵² ICRC (n 118) 7.

³⁵³ For an overview of the post-positivist schools of thought, see: Paul Sharp, *Introducing International Relations* (Routledge 2018) ch 4.

³⁵⁴ United Nations Development Programme (n 341). See also, for the first explicit reference to human security in the context of the UN: Boutros Boutros-Ghali, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (1992) Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, [ST/DPI/1247].

³⁵⁵ Yu-tai Tsai, 'The Study of Diffusion and Practice of International Norms through the "Human Security": The Case of "Responsibility to Protect"' (2010) 6 *Asian Social Science* 12, 13; Iqbal (n 29) 109.

³⁵⁶ United Nations Development Programme (n 341) x; Anna Stavrianakis, 'Legitimising Liberal Militarism: Politics, Law and War in the Arms Trade Treaty' (2016) 37 *Third World Quarterly* 840, 62.

universalism, interdependence of components, prevention, and people-centricity.³⁵⁷ The human security paradigm called for a 'profound transition in thinking' in the security concept to centre the security of people as 'the chief indicator of global security', and emphasised the need to address issues faced by individuals and communities as a means for enhancing regional and international security.³⁵⁸

The emergence of the human security paradigm, as supporters have contended, represented a transformative and radical approach to the conceptualisation of security.³⁵⁹ While legal institutions and norms are deployed to safeguard human rights, human security is brought about through the implementation of economic, political, or military measures.³⁶⁰ A major criticism of the human security concept is it overbroadens security, either by being overly ambiguous and unclear in its meaning, or by extending it beyond what should be covered by security and thus securitising issues such as development.³⁶¹ On the other hand, due to its broadness, the human security concept has resulted in the development of a number of approaches applicable to broader issue areas, ranging from the centring of human rights as the means to safeguard people, to advocating for direct intervention for human rights protections.³⁶² The development of the Responsibility to Protect doctrine, which advocated intervention on humanitarian grounds where a state was unwilling or unable to act to protect its citizens, is a notable example of the latter approach.³⁶³ Even those that

³⁵⁷ Mahmud and others (n 209) 68.

³⁵⁸ United Nations Development Programme (n 341) 22; Iqbal (n 29) 108.

³⁵⁹ Bromley, Cooper and Holtom (n 163) 1035–6.

³⁶⁰ Tsai (n 355) 15.

³⁶¹ The view espoused in the Human Development Report is that 'the concept of security has for too long has been interpreted narrowly: as security of territory from external aggression, or as protection of national interests in foreign policy or as global security from the threats of nuclear holocaust... Forgotten were the legitimate concerns of ordinary people who sought security in their daily lives: United Nations Development Programme (n 341) 22. For critique of the ambiguity of the meaning of the concept see, for example: Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26 *International Security* 87. For critique of the securitisation of development and other issues, see for example: Mark Duffield, 'Human Security: Linking Development and Security in an Age of Terror' in Stephan Klingebiel (ed), *New Interfaces between Security and Development: Changing Concepts and Approaches* (Deutsches Institut für Entwicklungspolitik 2006).

³⁶² See, for example: Yuen Foong Khong, 'Human Security: A Shotgun Approach to Alleviating Human Misery?' (2001) 7 *Global Governance* 231; Keith Krause, 'The Key to a Powerful Agenda, If Properly Delimited' (2004) 35 *Security Dialogue* 367. Khong argues that the overbroad approach results in nothing being prioritised. Krause further contends that the broad definition renders the concept 'a loose synonym for "bad things that can happen"'. See also: Iqbal (n 29) 110. Iqbal divides these approaches into three categories. The first is concerned with the centring of human rights, the rule of law, and the obligations of the international community to safeguard the security of people. The second emphasises humanitarian considerations and advocates 'direct activism and intervention by the international community to address large-scale violations of human rights, such as genocides' – in effect a similar concept to the Responsibility to Protect. The third group, adopts a broader view of human security that considers economic, political and physical threats to the lives and livelihood of populations.

³⁶³ Yu-tai Tsai, 'The Study of Diffusion and Practice of International Norms through the "Human Security": The Case of "Responsibility to Protect"' (2010) 6 *Asian Social Science* 12. For the foundational document on the Responsibility to Protect doctrine, see: International Commission on Intervention and State Sovereignty, 'Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (<<http://Responsibilitytoprotect.Org/ICISS%20Report.Pdf>> (International Commission on Intervention and State Sovereignty 2001) <<https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/>>. The ICISS report identified two related loci

agree with the overall expansion of the traditional security concept to include economic, social and environmental factors, have argued the over-broadening of the concept renders it superfluous or indeterminate.³⁶⁴ The broadness and malleability of the concept has been criticised for confusing the causes of security challenges and running the risk that a range of issues such as poverty and development become securitised and the solutions to socio-economic or political problems overemphasise military solutions.³⁶⁵ This could enable, for instance, the justification of global militarism to guarantee development despite this being antithetical to the aims of development, which are premised on disarmament.³⁶⁶

ii. Arms Exports and Human Insecurity

While these criticisms are appropriate in regard to some issue areas, such as alleviating poverty or assisting with development, this paradigm is distinctively useful for conceptualising the responsibilities of supply-side actors involved in arms exports. The export of arms presents challenges for traditional security and human security because of the intersection of political, military, humanitarian and human rights concerns. Rather than displacing traditional security, human security acts as a supplement to the existing security concept by including the protection of individuals and communities as factors for consideration when confronting political and military issues.³⁶⁷ The export of arms is a significant human security concern as arms have an effect on both the constant threats in people's lives (for example, by being used as tools for political violence) and contribute to threats from catastrophic events (such as through their use in armed conflicts), increasing the likelihood of the escalation of violent conflicts while also hindering the possibility for their peaceful resolution.³⁶⁸ Armed conflicts significantly impact the economic, political, environmental and physical health of individuals and communities who are exposed to wars.³⁶⁹ Arms

of responsibility in the R2P doctrine: the responsibilities of states toward their own citizens (the internal locus) and 'the responsibility of the international community to act when the host state is unwilling or unable to do so' (the external locus). See also: UNGA Res 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1, para 138-139; Gareth Evans and Mohamed Sahnoun, 'The Responsibility to Protect' (2002) 81 *Foreign Affairs* 99.

³⁶⁴ See, most notably: Barry Buzan, 'A Reductionist, Idealistic Notion That Adds Little Analytical Value' (2004) 35 *Security Dialogue* 369, 369–370.

³⁶⁵ MacFarlane and Khong (n 205) 237–43; Mahmud and others (n 209) 69.

³⁶⁶ Rita Abrahamsen, 'Return of the Generals? Global Militarism in Africa from the Cold War to the Present' (2018) 49 *Security Dialogue* 19, 27–28; Stavrianakis, 'Legitimising Liberal Militarism' (n 356) 67; Robin Luckham, 'Democratic Strategies for Security in Transition and Conflict' in Gavin Cawthra and Robin Luckham (eds), *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (Zed Books 2003) 3–4.

³⁶⁷ UNGA Res 66/290 (25 October 2012) UN Doc A/RES/66/290, para 3(b) and (e). The Resolution provided a comprehensive definition of human security which sought to establish a common understanding of the concept. See also: MacFarlane and Khong (n 205) 237–43; Mahmud and others (n 209) 69.

³⁶⁸ Iqbal (n 29) 109, 115.

³⁶⁹ See, for example: Matthew S Openshaw, 'The Health Consequences of Armed Conflict in Sub-Saharan Africa: How Much Do Conflict Intensity and Proximity Matter?' (2012) 2 *African Conflict and Peacebuilding Review* 1; Namsuk Kim and Pedro Conceição, 'The Economic Crisis, Violent Conflict, and Human Development' (2010) 15 *International Journal of Peace Studies* 29; Hazem Adam Ghobarah, Paul Huth and Bruce Russett, 'Civil Wars Kill and Maim People-Long after the Shooting Stops' (2003) 97 *American Political Science Review* 189; Jakob Kellenberger, 'The Economic and

exports to conflict zones exacerbate these adverse effects for individuals and communities because of their major influence on the incidence, scope and lethality of armed conflicts.³⁷⁰ The excessive availability of arms also contributes to the commission of war crimes, acts of terrorism, and violations of human rights, including forced disappearances, torture, forced migration, slavery, rape, forced prostitution, and child soldiers.³⁷¹ The lethality of conflicts, including violence committed against civilian populations, is also amplified by the greater access to arms in armed conflicts.³⁷²

Arms exports and military aid also divert resources away from humanitarian assistance to conflict zones, which hinders negotiations for peace.³⁷³ The availability and diffusion of arms throughout society impedes peacekeeping activities, assistance from humanitarian organisations, post-conflict state-building and economic growth, which can in turn perpetuate cycles of conflict and poverty.³⁷⁴ Due to their ease of transfer, small arms are especially problematic in conflict zones as they have a higher likelihood of unintentionally ending up with private armies and militias, insurgent groups, criminal organisations, and terrorist groups.³⁷⁵ Defence expenditure on acquiring arms limits the budgets of importer governments and other groups in conflict situations, diverting resources from social spending in favour of military acquisitions.³⁷⁶ Increased stockpiling of weapons by government forces may also enable the consolidation of power by dictatorships and other undemocratic forms of government.³⁷⁷ Indeed, an important tenet of the human security concept is the overall reduction of weapons stocks, and prohibitions on stockpiling.³⁷⁸

iii. A Three-Pronged Approach

The human security concept, when framed narrowly to strive for 'freedom from fear' by 'removing the use of, or threat of, force and violence from people's everyday lives', is particularly useful for the examination of issues related to the arms trade, including

Social Consequences of Armed Conflicts' (2003) 22 Refugee Survey Quarterly 19; CJL Murray and others, 'Armed Conflict As A Public Health Problem' (2002) 324 BMJ: British Medical Journal 346; Frances Stewart and Valpy Fitzgerald, *War and Underdevelopment: The Economic and Social Consequences of Conflict* (Oxford University Press 2001); Judith Gardam and Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 Human Rights Quarterly 148.

³⁷⁰ ICRC (n 118) 9; Barnaby (n 190) 9; Iqbal (n 29) 110, 113.

³⁷¹ Coppen (n 28) 354–5; Yihdego (n 5) 223; Schroeder, Smith and Stohl (n 28) 23; Human Rights Watch (n 188) 4–6; Small Arms Survey (n 188) ch 4; Gillard (n 28) 39; Boutwell and Klare (n 188) 13–15.

³⁷² ICRC (n 118) 1, 3; Barnaby (n 190) 9.

³⁷³ Iqbal (n 29) 115; Dorn (n 155) 2–3; Schroeder, Smith and Stohl (n 28) 1.

³⁷⁴ Bourne (n 96) 16–7; Stohl and Grillot (n 5) 136; Coppen (n 28) 360; ICRC (n 118) 6.

³⁷⁵ Diffusion is one type of weapons spread which involves broader dissemination in society, involving multiple sources and recipients. Proliferation is the generic term for weapons spread with implications for security.

³⁷⁶ Iqbal (n 29) 115. Or as Russett has stated succinctly: 'guns do come at the expense of butter': Bruce M Russett, 'Who Pays For Defense?' (1969) 63 American Political Science Review 412, 417.

³⁷⁷ Schroeder, Smith and Stohl (n 34) 24, 72; Feinstein (n 4) 525; Erickson (n 49) 140.

³⁷⁸ Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017) ch 7. For an argument on the retention of the human security concept of a strong commitment to the production of weapons in peacetime and during wars as a key feature of 'liberal militarism', see: Stavrianakis, 'Legitimising Liberal Militarism' (n 356).

the significant role small arms play in creating insecurity.³⁷⁹ Given the clear intersection between national security and human security concerns provoked by the arms trade, a human security-based approach that centres its foundational tenets – ‘people-centered, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities’ – is distinctively useful for the conceptualisation of responsibilities for arms export to conflict zones.³⁸⁰ In particular, this conception of human security presents three key aspects for prioritisation, providing a three-pronged approach. The first prong focuses on prevention-oriented actions which are necessary to mitigate or prevent the adverse human rights impacts of arms exports to conflict zones. The second prong emphasises the incorporation of morality into responsibilities as a context-specific response to the challenges of the arms trade, in particular to counter the pervasive security and commercial interests which generally dictate arms export decisions. The third prong expands the responsibilities to all key supply-side actors.

II. Preventive Responsibilities

The first prong – prevention – centres the need for responsibilities to be undertaken by supply-side actors to prevent, or at a minimum mitigate, the adverse human rights impacts of arms exports to conflict zones. Prevention has been highlighted as an essential characteristic of human security, alongside an approach which centres people, which should be incorporated into responses at the national, regional and international levels.³⁸¹ The emphasis on prevention-oriented responses by the human security paradigm correlates with the development of preventive responsibilities, which has been evident in areas such as human rights and the environment, particularly at the international level, revealing an expansion of the purposes of international law to include preventive obligations.³⁸² Obligations to perform preventive actions to protect human rights were notably included in the Convention on the Prevention and Punishment of the Crime of Genocide (1948), which requires state

³⁷⁹ Keith Krause, ‘Human Security’ in Vincent Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press 2009) 150–151. The slogan ‘freedom from fear’ was first used by the Human Security Network.

³⁸⁰ UNGA Res 66/290 (25 October 2012) UN Doc A/RES/66/290, para 3(b).

³⁸¹ United Nations Development Programme (n 341) 22–23.

³⁸² Krieger et al contend that international law is composed of three layers: the first and oldest layer is the law of coordination (in which accountability primarily operates retroactively); the second layer is the law of cooperation (which extended considerations beyond international security and establish interests and values; the third layer consists of multilateral legal regimes and international institutions which engage in law production that interacts with national laws: Heike Krieger, Anne Peters and Leonhard Kreuzer, ‘Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates’ in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 18–19. See, on preventive obligations in international law: Eva Rieter, ‘Preventive Obligations: Some Introductory Comments’ (2021) 68 *Netherlands International Law Review* 373, 374–375; Helen Keller and Reto Walther, ‘Evasion of the International Law of State Responsibility? The ECtHR’s Jurisprudence on Positive and Preventive Obligations under Article 3’ (2020) 24 *The International Journal of Human Rights* 957, 959; Constantin P Economides, ‘Content of the Obligation: Obligations of Means and Obligations Of Result’ in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 372–374.

parties to undertake to prevent the commission of genocide.³⁸³ In the seminal Velásquez-Rodríguez case (1988), which concerned the forced disappearance practices of the government of Honduras, the Inter-American Court of Human Rights elaborated that the duty to prevent requires states ‘to take reasonable steps to prevent human rights violations’, including legal, political, administrative and cultural measures which ‘promote the protection of human rights and ensure that any violations are considered and treated as illegal acts’.³⁸⁴ In international environmental law, the prevention principle has been a fundamental tenet since the 1972 Stockholm Declaration on the Human Environment.³⁸⁵ The importance of preventive responsibilities for the protection of the environment have been further affirmed, for example, by the International Court of Justice and the International Tribunal for the Law of the Sea with regard to the prevention of pollution.³⁸⁶

i. Due Diligence and Arms Exports

For the arms trade, preventive responsibilities are necessary to prevent and mitigate the adverse human rights impacts of arms exports to conflict zones. Arms are inherently dangerous items, designed specifically to kill and cause injury. Most conventional weapons, and especially small arms, continue to be viewed as acceptable instruments of violence despite the predictable short and long term consequences of their (mis)use, and the flow-on effects of their diffusion and proliferation for communities and their development. In addition, national security interests make it practically unfeasible for the outright ban of these weapons. As such, the imposition of preventive responsibilities for supply-side actors provides an

³⁸³ Convention on the Prevention and Punishment of the Crime of Genocide, (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention), art I. See, generally: Etienne Ruvebana, *Prevention of Genocide Under International Law: An Analysis of the Obligations of States and the United Nations to Prevent Genocide at the Primary, Secondary and Tertiary Levels* (Intersentia 2014). For discussions on the relationship between obligation to prevent genocide and the Responsibility to Protect, see: Louise Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (2008) 34 *Review of International Studies* 445; Stephanie Carvin, ‘A Responsibility to Reality: A Reply to Louise Arbour’ (2010) 36 *Review of International Studies* 47; Andreas Zimmermann, ‘The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?’ in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011); Zachary A Karazsia, ‘An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention’ (2018) 11 *Journal of Strategic Security* 20.

³⁸⁴ *Velásquez-Rodríguez v Honduras*, Merits, Judgment Series C, No 4 (29 July 1988), para 174-175.

³⁸⁵ UNGA ‘1972 Declaration of the United Nations Conference on the Human Environment’ (16 June 1972) UN Doc A/RES/2994(XXVII) (Stockholm Declaration), principle 21. For examination of preventive obligations with regard to the environment, see: Ilias Plakokefalos, ‘Prevention Obligations in International Environmental Law’ (2012) 23 *Yearbook of International Environmental Law* 3; Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (1st Edition, Cambridge University Press 2018); Nicolas de Sadeleer, ‘The Principle of Prevention’ in Nicolas de Sadeleer (ed), *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2020); Leslie-Anne Duvic-Paoli and Mario Gervasi, ‘Harm to the Global Commons on Trial: The Role of the Prevention Principle in International Climate Adjudication’ (2023) 32 *Review of European, Comparative & International Environmental Law* 226.

³⁸⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 78, para 140; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 195; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) ITLOS Reports 2011, para 110, 117–20.

essential recourse for preventing and mitigating the risks associated with arms exports, especially for human rights. Preventive responsibilities allow for the foregrounding of individuals and the consequences they may suffer as a result of arms exports. These concerns are often subverted or discounted in favour of pursuing security or commercial interests, which continue to be the core considerations of the arms trade business. The elaboration and clarification of preventive responsibilities therefore serves an important guiding function for preventing and mitigating the adverse human rights impacts of arms exports, and in turn assists with holding actors accountable for their involvement in the decision-making, production and delivery processes.³⁸⁷

In particular, due diligence is an important tool for prevention, and an especially pertinent form of preventive responsibilities for supply-side actors involved in arms exports.³⁸⁸ The concept of due diligence has its origins in the common law system, referring to an investigation carried out by purchasers or investors prior to concluding an agreement. In corporate law, due diligence serves dual functions: securing accountability and managing risks.³⁸⁹ Due diligence evolved in civil law systems (particularly in Europe) to become analogous with tort law in common law systems, which aims to deter certain behaviours rather than specifically protecting rights.³⁹⁰ Due diligence obligations have also emerged in international law, where they have been conceptualised as ‘a component of certain primary obligations rather than an element relevant for secondary rules on state responsibility’.³⁹¹ One specific type of due diligence that has evolved in international law is human rights due diligence, which requires actors to identify and address the adverse human rights impacts of their business activities. Human rights due diligence, like tort law, aims to protect the interests of individuals by imposing standards of care on actors who are subject to a duty of care to protect human rights.³⁹² Such provisions are often formulated as requiring due diligence to be exercised as part of a state’s duty to protect human rights, which has been affirmed, for instance, by the UN Committee Against Torture as requiring states ‘to exercise due diligence to prevent, investigate, prosecute and punish such non-state officials or private actors’.³⁹³

³⁸⁷ Cane (n 13) 32.

³⁸⁸ Rieter (n 382) 68.

³⁸⁹ Heike Krieger and Anne Peters, ‘Due Diligence and Structural Change in the International Legal Order’ in Heike Krieger and Anne Peters, *Due Diligence in the International Legal Order* (Oxford University Press 2020) 14.

³⁹⁰ Gerhard Wagner, ‘Tort Law and Human Rights’ in Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains*, vol 6 (Springer International Publishing 2021); Jane Wright, *Tort Law and Human Rights: The Impact of the ECHR on English Law* (Bloomsbury Academic 2001).

³⁹¹ Marco Longobardo, ‘The Relevance of the Concept of Due Diligence for International Humanitarian Law’ 37 *Wisconsin International Law Journal* 44, 52.

³⁹² Björnstjern Baade, ‘Due Diligence and the Duty to Protect Human Rights’, *Due Diligence in the International Legal Order* (Oxford University Press 2020) 92–93; Wagner (n 390) 218–9; Robert McCorquodale and Justine Nolan, ‘The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses’ (2021) 68 *Netherlands International Law Review* 455, 459.

³⁹³ UN Committee Against Torture ‘General Comment No. 2: Implementation of Article 2 by States Parties’ (24 January 2008) CAT/C/GC/2, para 18. See also: *Velásquez-Rodríguez v Honduras*, Merits, Judgment Series C, No 4 (29 July 1988), para 79, 172; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 197. Keller and Walther note that the common

Due diligence obligations direct actors to take actions to prevent or mitigate certain risks which emanate from their pursuit of security or commercial interests. Specifically, the incorporation of due diligence into arms export regimes at the national, regional, international and corporate institutional levels can assist in establishing coordinated measures between supply-side actors and minimise the potential for oversights or recklessness. Due diligence is useful for addressing structural problems with the arms trade because 'its generality and comprehensive outlook' requires actors to take preventive actions rather than only reactive measures.³⁹⁴ Structural change is particularly necessary for the arms trade because at present it continues to function primarily as a business and a tool for protecting national interests, even though the nature of the exported items are inherently lethal and have significant potential to negatively impact the human rights of individuals and communities. By emphasising anticipatory actions, due diligence obligations can introduce new systemic requirements that require supply-side actors to engage proactively with preventive responsibilities and to balance national security and commercial interests against adverse human rights impacts.

III. Incorporation of Morality

Correspondingly, balancing the competing factors in arms export decisions, namely national security and commercial interests with human rights considerations, necessitates the incorporation of morality into preventive responsibilities to promote ethical decision-making practices. Human security emphasises the protection of the well-being of people, thereby spotlighting concerns about the morality of arms exports, which affect the constant threats in people's lives and exacerbate the threats from catastrophic events such as armed conflicts. By transforming the discourse on security to prioritise individual security needs over national security concerns, the human security paradigm allows for the centring of human rights considerations.³⁹⁵ The

formulation of due diligence obligations is 'Article...requires states to take reasonable measures to ensure that individuals under their jurisdiction are not subjected to...': Keller and Walther (n 382) 959. For examination of due diligence for the protection of other types of human rights, see: Carla Ferstman, 'Do Guarantees of Non-Recurrence Actually Help to Prevent Systemic Violations? Reflections on Measures Taken to Prevent Domestic Violence' (2021) 68 *Netherlands International Law Review* 387; Paulo de Tarso Lugon Arantes, 'The Due Diligence Standard and the Prevention of Racism and Discrimination' (2021) 68 *Netherlands International Law Review* 407; Larissa van den Herik and Emma Irving, 'Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020); BG Ramcharan, 'Preventive Strategies: Obligations To Prevent Under International Human Rights Treaties And Jurisprudence', *The Fundamentals of International Human Rights Treaty Law* (Brill Nijhoff 2011).

³⁹⁴ Baade (n 392) 104. This point has been discussed, in particular, with regard to violence against women. See, for example: Jeremy Sarkin, 'A Methodology to Ensure That States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40 *Human Rights Quarterly* 1; Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence', *Due Diligence and Its Application to Protect Women from Violence* (Brill Nijhoff 2009).

³⁹⁵ Deepayan Basu Ray, 'Navigating the "National Security" Barrier: A Human Security Agenda for Arms Control in the Twenty-First Century' in Mary Martin and Taylor Owen (eds), *Routledge*

elevation of human rights considerations in arms export decision-making is necessitated by the inherent lethality of the exported items and the significant and predictable short and long term consequences of these activities on the lives and livelihoods of individuals and communities, who are often thousands of miles away from where the export decisions are made.

The decision-making processes for arms exports involve balancing competing commercial, political and strategic interests, which regularly subsume human rights considerations.³⁹⁶ National security concerns, above all, are regularly deployed to limit the transparency of arms export decision-making, with such decisions being depicted as too sensitive or too technical to be discussed outside of a selected group of elite individuals.³⁹⁷ Indeed, national courts have affirmed arms export decisions are political decisions and have declined to pass moral judgment on decisions which were conferred in accordance with the law,³⁹⁸ thereby limiting the potential for moral concerns to be asserted even after the fact. Consequently, the incorporation of morality into preventive responsibilities is necessary to balance security and commercial interests in arms export decisions against the significant and predictable adverse human rights impacts, and in turn to encourage ethical practices.

i. Moral Concerns About Unacceptable Weapons

Moral considerations were incorporated into arms controls for 'unacceptable' weapons long before the emergence of the human security paradigm.³⁹⁹ The incorporation of morality into arms controls was explicitly evident in relation to nuclear weapons, for which the 'ethical imperative' continues to be affirmed as a basis for the control, reduction and, ultimately, elimination of these weapons because of the 'catastrophic humanitarian consequences and risks' they pose.⁴⁰⁰ The intersection between moral concerns about the adverse human rights impacts of arms and controlling their development, transfer and use was also visible in the 1970s during the push by the International Committee of the Red Cross (ICRC) for the regulation of weapons that caused unnecessary suffering, culminating in the adoption of the Convention on Certain Conventional Weapons (1980).⁴⁰¹ The prohibitions on the use of indiscriminate weapons recognised by Protocol I to the Geneva Conventions and the Conventional

Handbook of Human Security (Routledge 2013) 197; Qureshi (n 29) 349; Neil Cooper, 'Humanitarian Arms Control and Processes of Securitization: Moving Weapons along the Security Continuum' (2011) 32 *Contemporary Security Policy* 134, 136; Mahmud and others (n 209) 67.

³⁹⁶ Stavrianakis, 'Introducing the Special Section' (n 93) 107; Erickson, *Dangerous Trade* (n 96) 5.

³⁹⁷ Soubrier (n 236) 118–9; Holden (n 91).

³⁹⁸ *The King, on the application of CAAT, v Secretary of State for International Trade* [2023] EWHC 1343 (Admin), para 117 (United Kingdom); *Council of State decision no 436098* (27 January 2023), para 3 (France); *Landgericht (District Court) of Stuttgart, Judgment* (21 February 2019) Az: 13 KLs 143 Js 38100/10, p 15 (Germany); *Turp v Minister (Foreign Affairs)*, 2017 FC 84, para 76 (Canada).

³⁹⁹ Jacques Derrida, Catherine Porter and Philip Lewis, 'No Apocalypse, Not Now (Full Speed Ahead, Seven Missiles, Seven Missives)' (1984) 14 *Diacritics* 20, 25–26; Richard Wasserstrom, 'War, Nuclear War, and Nuclear Deterrence: Some Conceptual and Moral Issues' (1985) 95 *Ethics* 424; Onora O'Neill, 'Who Can Endeavour Peace?' (1986) 16 *Canadian Journal of Philosophy* 41.

⁴⁰⁰ UNGA Res 70/50 'Ethical imperatives for a nuclear-weapon-free world' (11 December 2015) UN Doc A/RES/70/50, Preamble.

⁴⁰¹ See, on the ICRC and the protection of people from violent threats: Hampson and Daudelin (n 202) 17, 82.

Weapons Convention are grounded in the immorality of such weapons due to the unnecessary suffering they cause and their inability to distinguish between civilians and combatants.⁴⁰² Following the emergence of the human security paradigm, and as a result of the successful campaigning of NGOs and civil society, additional arms controls were adopted which ban and/or restrict the use of certain types of weapons technologies, such as landmines and cluster munitions.⁴⁰³ The development of prohibitions on these types of weapons, which had been indiscriminately used in intra-state conflicts, reflected the insufficiency of international humanitarian law rules in practice. Notably, the principle of military necessity has been used to underscore military efficiency and subordinate humanitarian objectives, highlighting the need for stronger moral considerations to be incorporated into arms control.⁴⁰⁴

While the changing acceptability of certain types of weapons demonstrates the presence of moral considerations in arms controls over the last few decades, small arms and firearms have specifically been excluded from these discussions. For example, the EU ban on torture trade instruments prohibits the export and import of 'goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment', but excludes firearms, small arms and dual-use items from its list of such goods.⁴⁰⁵ At the international level, the ongoing treaty process on torture trade instruments includes instruments and equipment that are inherently abusive and can be used by law enforcement for purposes of torture and ill treatment but similarly

⁴⁰² The Certain Conventional Weapons Convention of 1986 extended principles in Protocol I of the Geneva Conventions prohibiting the use of indiscriminate weapons.

⁴⁰³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on the Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211 (Anti-Personnel Mine Ban Convention); Convention on Cluster Munitions (adopted 3 December 2008, entered into force 1 August 2010) 2688 UNTS 39. The successful campaign of the International Campaign to Ban Landmines resulted in the adoption of the Anti-Personnel Mine Ban Convention in 1997, and the Oslo Process yielded the Convention on Cluster Munitions in 2008. On the roles of NGOs in these campaigns, see: Ved P Nanda, 'The Contribution of Non-Governmental Organizations in Strengthening and Shaping International Human Rights Law: The Successful Drives to Ban Landmines and to Create an International Criminal Court' (2011) 19 *Willamette Journal of International Law and Dispute Resolution* 256; Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law' (2009) 31 *Human Rights Quarterly* 934; Bronwyn Leebaw, 'The Politics of Impartial Activism: Humanitarianism and Human Rights' (2007) 5 *Perspectives on Politics* 223; Diana O'Dwyer, 'First Landmines, Now Small Arms? The International Campaign to Ban Landmines as a Model for Small Arms Advocacy' (2006) 17 *Irish Studies in International Affairs* 77; Stefan Brem and Ken Rutherford, 'Walking Together or Divided Agenda? Comparing Landmines and Small-Arms Campaigns' (2001) 32 *Security Dialogue* 169; Adam Chapnick, 'The Ottawa Process Revisited: Aggressive Unilateralism in the Post-Cold War World' (2003) 58 *International Journal* 281; Kenneth R Rutherford, 'The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines' (2000) 53 *World Politics* 74; Jody Williams, 'David with Goliath: International Cooperation and the Campaign to Ban Landmines' (2000) 22 *Harvard International Review* 88.

⁴⁰⁴ cf Jochnick and Normand (n 212) 56–7; Wisotzki (n 190) 82–3; Michael N Schmitt, *Essays on Law and War at the Fault Lines* (TMC Asser Press 2011) ch 3.

⁴⁰⁵ EU Regulation 2019/125 on trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (31 January 2019) Official Journal of the European Union L 30/1. Article 11 specifically excludes from the scope of this regulation: (a) firearms controlled by Regulation (EU) No 258/2012; (b) dual-use items controlled by Regulation (EC) No 428/2009; (c) goods controlled in accordance with European Union Common Position on the Control of Arms Brokering, 2003/468/CFSP of 23 June 2003.

excludes firearms and small arms from its scope.⁴⁰⁶ Small arms are a key component of militaries around the world and a weapon of choice in conflict zones. Small arms are also used in domestic contexts for law enforcement, and in some domestic jurisdictions have a special status, notably in the United States which guarantees its citizens the right to bear arms. Consequently, an outright ban of this type of weapon due to moral concerns is not feasible and export restraint is often not undertaken because small arms are considered an acceptable alternative to other more destructive and inhumane weapons.

ii. Resolving Moral Dilemmas

Alternatively, morality can be incorporated into preventive responsibilities, to include considerations of the adverse human rights impacts of 'acceptable' weapons such as small arms, by centring moral reasoning in the performance of these responsibilities. The incorporation of moral reasoning was evident during the 1970s, when calls began for 'responsible' arms transfer policy, which was included in President Carter's 1976 presidential campaign in the United States.⁴⁰⁷ Rather than being an across-the-board export restraint, 'responsible' arms transfer policy focussed on 'moral' arms transfers that balanced the economic pressures for arms sales to limit the acquisition of arms by certain types of recipients, whose character and behaviour towards their people were deemed unacceptable, particularly in regard to human rights.⁴⁰⁸ The addition of 'responsible' into the arms transfer policy configuration was an attempt to encourage engagement by states, by focussing on the elimination of 'irresponsible' arms exports rather than halting the arms trade altogether.⁴⁰⁹ The policy gained wider traction in the 1980s as a result of the growing evidence of the consequences of arms transfers and the advocacy of NGOs, civil society and affected states, which incidentally put small arms controls on the international agenda in the 1990s.⁴¹⁰ Though the focus on 'responsible' arms transfer policy continues to legitimise the prioritisation of arms exports over other non-military measures and the continuing acceptability of the business of the arms trade more generally, the 'responsible' arms transfer policy concept nevertheless affirms the importance of assessing the past practices and character of a potential recipient party rather than merely viewing each export as a single and discrete act.⁴¹¹

The human security concept lends itself to the reinvigoration of the 'responsible' arms transfer policy, and in turn the incorporation of moral reasoning into preventive responsibilities. The supplementation of traditional security with human security forces a balancing of the distinct priorities emphasised by the different security paradigms,

⁴⁰⁶ See: UN 'Report of the Secretary-General: Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards' (28 July 2020) UN Doc A/74/969.

⁴⁰⁷ Lucy Wilson Benson, 'Turning the Supertanker: Arms Transfer Restraint' (1979) 3 *International Security* 3; Emma Rothschild, 'Carter and Arms Sales' *The New York Times* (10 May 1978) <<https://www.nytimes.com/1978/05/10/archives/carter-and-arms-sales-foreign-affairs.html>>.

⁴⁰⁸ Erickson (n 96) 61, 63.

⁴⁰⁹ *ibid* 60; Jennifer L Erickson, 'Leveling the Playing Field: Cost Diffusion and the Promotion of "Responsible" Arms Export Norms' (2017) 18 *International Studies Perspectives* 323, 324.

⁴¹⁰ Erickson, 'Leveling the Playing Field' (n 409) 9.

⁴¹¹ Cane (n 82) 85.

suggesting security should be viewed in terms of levels and not merely as one form of security having overriding precedence over all others. This is especially evident in situations of moral dilemmas, when actors are confronted in the choice of ‘us[ing] instrumental, social, and intrinsic arguments in making moral judgments about compliance with international norms’ that may be conflicting or inconsistent.⁴¹² The typical case of a moral dilemma in international law has been humanitarian intervention, where non-interference in internal affairs of a state must be balanced against the protection of the human rights of citizens of a state unwilling or unable to intervene, with the intervention in Kosovo by NATO in 1999 being a prime example.⁴¹³ Arms exports to conflict zones create a moral dilemma for supply-side actors who must balance security and commercial interests against human rights protections.⁴¹⁴ The success of this balancing act in protecting human rights depends on the level of prioritisation states and other actors give to national security concerns, commercial interests and other issues. By emphasising moral reasoning in the performance of preventive responsibilities, the protection of human rights can be more fairly balanced against security and commercial interests, thereby providing a mechanism for integrating ethical practices into arms export regimes and allowing for the interests of the people whose human rights are adversely impacted by exported arms to be better included in the export decisions.⁴¹⁵

Furthermore, emphasising ethical conduct in the performance of preventive responsibilities can impel a transformation in the regulatory framework for arms exports, from one which continue to be geared towards achieving security and commercial benefits, to one which elevates the protection of human rights as the foremost consideration.⁴¹⁶ A key reason why unethical behaviour may occur is because actions are integrated into a system which is structurally unfair.⁴¹⁷ Arms export control systems in the twentieth century were evidently geared towards ignoring the obvious immorality and consequences of arms exports to conflict zones. Despite the increased expectations for businesses to act ethically and socially responsibly, until the past few years, the arms trade largely remained outside such discussions because of the persistent deferral to national security as a deflection from further

⁴¹² Alford and Tierney (n 78) 11, 23; Kohlberg (n 78) 73–74.

⁴¹³ Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1, 21–22; Martti Koskeniemi, ‘“The Lady Doth Protest Too Much” Kosovo, and the Turn to Ethics in International Law’ (2002) 65 *The Modern Law Review* 159, 161–162; Alford and Tierney (n 78) 44, 47; Klabbers (n 78) 268, 270. Other examples include the absolute prohibition of torture, the discussions on just and unjust wars, and the moral dilemma of capturing or killing combatants. See, on the latter: Ryan Goodman, ‘The Power to Kill or Capture Enemy Combatants’ (2013) 24 *European Journal of International Law* 819; Schmitt (n 404) ch 3; David Rodin, ‘The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right’ in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (1st Edition, Oxford University Press 2008).

⁴¹⁴ See, for example, on the distinctions between the justifications of the United Kingdom for its continuing exports of arms to Yemen and Ukraine: Stavrianakis, ‘Introducing the Special Section’ (n 93) 107.

⁴¹⁵ Klabbers (n 78) 267.

⁴¹⁶ For an elaboration of this argument with regard to state duties in international investment law, see: Ratner, ‘Fair and Equitable Treatment and Human Rights: A Moral and Legal Reconciliation’ (n 82). Notably, Ratner argues that international political morality requires human rights to be placed ‘on a higher plane’ than other commitments: *ibid* 268, 279.

⁴¹⁷ Klabbers (n 78) 269.

scrutiny.⁴¹⁸ By elevating human rights considerations through the integration of ethical practices into arms export decision-making, preventive responsibilities can act as a vehicle for transforming the arms trade business and the arms sector, similar to the shift that has occurred, for example, in regard to climate change where human survival is asserted as a moral imperative for action by states and businesses.

IV. Expansion of Actors with Responsibilities

Human security is an overarching goal that requires the participation of all key supply-side actors for its fulfilment. States continue to be central to the institutionalisation of human security norms at different levels of laws, including the adoption of domestic regulations and practices which encapsulate preventive responsibilities, and in the incorporation of these obligations at the regional and international levels through the negotiation of treaties and other instruments.⁴¹⁹ In recent decades, non-state actors have expanded their roles in the international security sphere and have been delegated functions previously been within the exclusive domain of states, breaking the monopoly on violence previously held by states.⁴²⁰ In moving away from the state-centric security concept, the human security paradigm opens the door for the inclusion of other actors in the protection of individuals and communities from adverse human rights impacts. In addition to the recognition of the significant impacts the activities of these non-state actors can have on human security, there are also growing expectations for these actors to act in ways which promote and engage with human security, and contribute to the development and enforcement of the regulatory framework.⁴²¹

⁴¹⁸ Notable recent developments including: UN Working Group on Business and Human Rights (n 32); American Bar Association Center for Human Rights, 'Defense Industry Human Rights Due Diligence Guidance' (2022)

<https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/chr-due-diligence-guidance-2022.pdf>. These guidance notes are examined in Chapters Seven and Eight.

⁴¹⁹ Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44); Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 17; Erickson, *Dangerous Trade* (n 96) 151.

⁴²⁰ Sánchez (n 108); Peter W Singer, 'Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security' (2001) 26 *International Security* 186; Peter W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2004).

⁴²¹ Cedric Ryngaert and Math Noortmann (eds), *Human Security and International Law: The Challenge of Non-State Actors* (Intersentia 2013); Markos Karavias, 'States and Non-State Actors and Human Security' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford University Press 2021); Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005); Elke Krahmman, 'From State to Non-State Actors: The Emergence of Security Governance' in Elke Krahmman (ed), *New Threats and New Actors in International Security* (Palgrave Macmillan US 2005). See also: Gregory Shaffer and Carlos Coye, 'From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Order' in Peer Zumbansen (ed), *The Many Lives of Transnational Law* (1st Edition, Cambridge University Press 2020) 128.

i. Notable Non-State Actors

The arms trade involves the interaction of a multiplicity of actors. A human security-based approach is therefore useful for expanding preventive responsibilities to other actors who are directly involved in the export of arms to conflict zones. The boundaries between the state and the market have continued to shift with regard to the arms trade, resulting in non-state actors taking on new roles and expanding their operations and influence on the arms export decision-making of states.⁴²² Overemphasis on state responsibilities because of the persisting links between arms exports and national security interests, diminishes the responsibilities of other key supply-side actors, namely, arms manufacturers, banks and intermediaries. These non-state actors may significantly influence arms export decisions and play important roles in producing, financing and delivering arms to recipient parties.⁴²³ Arms manufacturers are in a unique position to influence arms export decisions due to their intimate ties with their home states, who rely on these companies to produce weapons to supply their military arsenal and advance their defence capabilities. These companies have also established powerful economic lobbies which are instrumental in driving the commercial, strategic and political objectives of arms exports.⁴²⁴ Banks maintain close links with arms manufacturers, by providing loans for arms sales, underwriting services which accept financial risk and guarantee payment in the event of financial loss, and in some cases through ownership of corporate bonds or shares in these companies. Intermediaries are utilised by states and arms manufacturers to facilitate the delivery of arms. The involvement of these key non-state supply-side actors in arms sales may be critical for those deals proceeding, thus preventive responsibilities are necessary for all of these actors to ensure the adverse impacts on human rights are comprehensively considered throughout all stages of the export processes.

ii. Capacities to Prevent

In terms of performing preventive responsibilities, it is necessary to assess the capacities of the relevant actors.⁴²⁵ The capacity of an actor to undertake specific preventive actions refers to their abilities, faculties and opportunities for doing so, contrasting with a cognitive model, which assigns 'autonomy principally in terms of the agent's conscious choice of ends or conduct'.⁴²⁶ A capacities model, as elaborated by Sistare, is useful for conceptualising preventive responsibilities as it stresses the abilities of an actor 'to control conduct and outcomes', thereby directing responsibilities to be conceptualised in a way which is commensurate to the actor's geopolitical and economic power, their influence in the decision-making process, their level of

⁴²² Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 56–7.

⁴²³ The oft cited example with regard to this being the rise in private military security companies following the end of the Cold War. See: Sánchez (n 108); Singer, 'Corporate Warriors' (n 420); Singer, *Corporate Warriors* (n 420). See, generally, on the growing roles of non-state actors: Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44); Shaffer and Coye (n 421); Cutler (n 46).

⁴²⁴ Smith, Humm and Fontanel (n 140) 239.

⁴²⁵ Shaffer and Coye (n 55) 128.

⁴²⁶ CT Sistare, *Responsibility and Criminal Liability* (Kluwer Academic Publishers 1989) 2. A capacities model for responsibility is different to Hart's capacity-responsibility which is focussed on contrasting capacity and opportunity. See also: Brenda M Baker, 'Theorizing about Responsibility and Criminal Liability' (1992) 11 *Law and Philosophy* 403, 405–6.

involvement in and control over the delivery process, and their practical abilities to undertake due diligence obligations such as risk assessments.⁴²⁷ As argued by Sistare, a capacities model is morally superior as a model of responsibility because it 'focuses on an agent's capacity to conform to law', and unlike a cognitive model where 'conscious agent choices are the hallmark of responsible conduct ... the capacities model emphasizes an agent's ability to control conduct and outcomes as central to their responsibility for these'.⁴²⁸

Though Sistare's model focuses on historical responsibility and the attribution of consequences, it is also pertinent for conceptualising preventive responsibilities because it centres the capacities and abilities required by an actor to undertake preventive actions, including where these actions are performed recklessly and negligently.⁴²⁹ Adapting the four pertinent conditions from Sistare's model, a capacities model for preventive responsibilities for arms exports would require assessment of the capacity of an actor to undertake these responsibilities based on: 1) the ability of the actor to voluntarily perform or cause an action; 2) the possession of the actor, at the time of the conduct, various capacities and abilities to control their actions, reasoning and intent; 3) the ability to know and understand 'crucial facts'; and 4) adequate opportunity for the actor to exercise those capacities and abilities.⁴³⁰ Sistare's model also includes the requirement of specific mental states for certain consequences. However, due to the anticipatable and inherent risks of the arms exports to conflict zones, it is not necessary for an actor to be consciously aware or have 'knowledge' of the risks, as the failure to adequately perform these responsibilities, including through recklessness or negligence, will have adverse impacts on human rights.

All of the four types of actors examined in this thesis possess the capacities to perform preventive responsibilities. States, through their representatives, are participants in and regulators of the arms trade, and are subject to laws at the national, regional and international levels which they are also involved in developing. The three non-state actors – arms manufacturers, banks and intermediaries – do not possess the same level of control as states over the arms export decision-making and delivery processes, but are nevertheless key actors in the arms sector that play significant roles in the production, financing and delivery of arms. Each of these actors possesses significant capabilities to exercise preventive responsibilities, including due diligence obligations such as risk assessments.⁴³¹ For example, the roles and activities of intermediaries in acquiring, selling and moving arms are undertaken autonomously, thereby giving them control over the acquisition and delivery processes. These activities often are undertaken by circumventing regulations and exploiting loopholes, illustrating their capacities to perform convoluted arms deals. Their involvement in

⁴²⁷ Sistare (n 426) 2; Brenda M Baker, 'Theorizing about Responsibility and Criminal Liability' (1992) 11 Law and Philosophy 403, 403. A similar approach is taken by the Organisation for Economic Co-operation and Development (OECD) in its Due Diligence Guidance, which is examined in Chapter Seven: OECD 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018) <<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>> (OECD Due Diligence Guidance).

⁴²⁸ Sistare (n 426) 133.

⁴²⁹ *ibid.*

⁴³⁰ *ibid* 20; Baker (n 426) 405–6.

⁴³¹ Krieger and Peters (n 389).

arranging complex arms transfers, including the delegation of activities to secondary actors such as shipping agents, is further indicative of the capacities of these actors to undertake preventive responsibilities.

Moreover, arms manufacturers and banks are two notable corporate actors whose involvement in arms sales have received increased attention in recent years. Arms manufacturers produce weapons for commercial sales, while also serving significant roles in the military-industrial complex and holding a privileged position in the arms trade. Many arms manufacturers also maintain close relationships with foreign governments, who may be significant clients, and may drive decisions on the availability of weapons and their price.⁴³² Arms manufacturers evidently wield significant economic and political power in both the development and implementation of the arms export regulations. Correspondingly, through their financing, banks are integral to securing and executing arms sales. Banks generate significant profits from the financing of arms deals, and have the capability to enable or prevent arms exports by restricting their financing. Consequently, both of these corporate actors exhibit clear capacities to influence arms deals and to undertake preventive responsibilities.

iii. Moral Agents

Moreover, the export of arms to conflict zones is a problem involving human agency and one which is defined by the social and political construction of what is regarded as responsible behaviour.⁴³³ Thus, to ensure the effective incorporation of moral reasoning into preventive responsibilities, actors must be capable of acting as moral agents.⁴³⁴ There has been an increasing acceptance within political theories that corporations and other formal organisations qualify as moral agents.⁴³⁵ Determination of whether an actor is capable of moral judgment is based on two criteria: first, ‘the moral agent must possess capacities for understanding and reflecting upon moral requirements’, and second, ‘the moral agent must experience some degree of “independence from other forces and agents”’, that is, they must have the freedom to act.⁴³⁶ States, arms manufacturers and banks are all governed by a managerial body which is capable of making independent decisions, and in fact is often responsible for executing those decisions. In the case of arms dealers and brokers, individual persons may solely represent this type of actor. All of these actors are capable of acting independently of each other and have the option to decline participation in arms exports, as well as the capacities to act to prevent or mitigate adverse human rights impacts. All of the key supply-side actors are also primarily motivated by interests

⁴³² van Lieshout and Beeres (n 141) 23; Stohl and Grillot (n 5) 44; Moravcsik (n 141) 72; Smith, Humm and Fontanel (n 140).

⁴³³ Shaffer and Coye (n 55) 129; Halliday and Shaffer (n 45) 17.

⁴³⁴ Erskine (n 2) 132. The scope of moral assessment in international politics is profoundly affected by which actors are recognised as moral agents.

⁴³⁵ See, in particular, works in International Political Theory, where corporations as institutional moral agents is a starting assumption: *ibid* 130–132; Karp (n 78); Bukovansky and others (n 78). See also: Peter A French, *Collective and Corporate Responsibility* (Columbia University Press 1984); O’Neill (n 399); Toni Erskine, ‘Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States’ (2001) 15 *Ethics & International Affairs* 67; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press 2011).

⁴³⁶ Erskine (n 2) 132; O’Neill (n 399) 51.

(either security, commercial or both) which tend to be at odds with the realisation of human security. Incorporating moral reasoning into arms export decision-making therefore pushes these moral agents to balance of their own security and/or commercial interests with the adverse human rights impacts of their activities, which in turn encourage the adoption of ethical practices.⁴³⁷

V. Wielding the Trident

*Like the famed weapon of the sea, forged by the Cyclops for Poseidon himself. The trident has three prongs, like my approach.*⁴³⁸

The human security concept emerged against a background of upheaval in the international order that included civil and ethnic conflicts, decline in arms markets, and blowback of Cold War arms transfers. Human security transformed how security was viewed, shifting from the state-centric focus of traditional security to one which centred the protection of people. The human security concept calls for the threats to individuals and communities to be addressed through comprehensive, context-specific responses which are people-centric and focus on preventing the threats to human rights from eventualising. The export of arms has significant impacts on people's lives, and evidently bears a natural affinity to the concerns and issues raised by the human security paradigm. The emergence of the new security concept was proclaimed as representing the third major era in arms control, distinguished by a transformation of the discourse on security to include consideration of the effects of arms transfers.⁴³⁹ A human security-based approach to responsibilities which emphasises comprehensive, context-specific and people-centric responses, provides a prudent mechanism for preventing and limiting the adverse human rights impacts of arms exports to conflict zones.

Poseidon's trident represented his dominion over the sea and gave him the power to exhibit violence or calm the water with a mere stroke.⁴⁴⁰ For the most fulsome protection of human rights, a human security-based approach to conceptualising responsibilities for arms exports requires three distinct but interdependent features, much like a trident. The first focuses on prevention-oriented actions which are necessary to mitigate or prevent the adverse human rights impacts of arms exports. The second incorporates moral reasoning into the performance of preventive responsibilities to counterbalance security and commercial interests of arms exports and to promote ethical arms export decision-making practices. The third expands preventive responsibilities to non-state actors so that all key supply-side actors are involved in the efforts to prevent and mitigate the adverse human rights impacts of arms exports to conflict zones.

⁴³⁷ Cane (n 82) 85.

⁴³⁸ Captain Holt, Brooklyn 99, Season 8 Episode 3 – 'Blue Flu' (first aired 19 August 2021).

⁴³⁹ Williams and Viotti (n 103) 5.

⁴⁴⁰ Mark Morford, Robert J Lenardon and Michael Sham, *Classical Mythology* (11th Edition, Oxford University Press 2018).

Taken together, these three features create a three-pronged approach to conceptualising responsibilities for arms exports to conflict zones. Due to the competing interests and complex processes which characterise the arms trade business, comprehensive and multifaceted preventive actions are necessary to address the predictable short and long term consequences and flow-on effects of arms exports. As will be developed in the later chapters, an extension of responsibilities to all key supply-side actors is essential for the effective integration of preventive responsibilities into arms export regimes because if all actors are required to perform these responsibilities, then it can promote ethical practices across the arms sector and discourage the circumvention of responsibilities by hiding behind the obligations of other actors. The expansion of responsibilities to include all key supply-side actors acts as the centre prong – the most important prong in the trident – providing the strongest mechanism for ensuring that preventive responsibilities are performed comprehensively, potential oversights are minimised and ethical practices are disseminated, and therefore providing the sturdiest reinforcement for the whole structure.⁴⁴¹

⁴⁴¹ 'Prong two, the center prong, is the most important prong on a trident. It's the longest and straightest and breaks the least often.' Captain Holt: Brooklyn 99, Season 8 Episode 3 – 'Blue Flu' (first aired 19 August 2021).

Chapter Five – Supra-State Rules

The development of the human security paradigm during the final decade of the twentieth century marked a new era in arms control which was distinguished by the incorporation of human rights considerations into supranational controls.⁴⁴² The previous focus on non-interference in national security interests was displaced by an emphasis on human rights, transparency and responsible behaviour.⁴⁴³ From the early 1990s, even before the emergence of the human security concept, efforts were undertaken by states to expand the state security focus of arms export decision-making.⁴⁴⁴ Notably, attempts were made by the Permanent Five members of the Security Council to establish a more comprehensive export regime with eight criteria for restraining arms transfers.⁴⁴⁵ By the mid-1990s, concerns about small arms and combatting the illicit trade cemented their place in the international arms control agenda.⁴⁴⁶ Throughout this decade and also during the early 2000s, instruments on small arms control were adopted at the international and regional levels which sought to increase transparency in arms transfers and curtail the illicit trade. By the 2010s, the calls for more comprehensive conventional arms controls grew louder, highlighted by NGO campaigns about bananas being more tightly regulated than arms.⁴⁴⁷ In 2013, after years of negotiation, a global arms control treaty was finally adopted which incorporated human rights considerations.⁴⁴⁸

⁴⁴² Mark Bromley, Neil Cooper and Paul Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History' (2012) 88 *International Affairs* 1029, 1030; Williams and Viotti (n 103) 3–4.

⁴⁴³ Müller, Fey and Rauch (n 290) 141. See, generally, on norm cascades: Erickson, *Dangerous Trade* (n 96).

⁴⁴⁴ Colombia pushed the issue in UN resolutions in 1988 and 1991: UNGA Res 43/75 (I) (7 December 1988) UN Doc A/RES/43/75I; UNGA Res 46/36 (H) (6 December 1991) UN Doc A/RES/46/36H.

⁴⁴⁵ Conference on Disarmament of October 1991, 'Guidelines for conventional arms transfers' (26 November 1991) CD/1113, Meeting of the Permanent Five Members on Arms Transfers and Non-Proliferation, London, 17–18 October 1991. Reproduced in Annex of Supplement No. 42 of the Report of the Disarmament Commission (1995): UNGA 'Report of the Disarmament Commission for 1995' (27 July 1995) UN Doc A/50/42(SUPP).

⁴⁴⁶ See, for example, the creation of the UN Group of Governmental Experts on Small Arms in 1995, which was tasked with preparing a report on small arms affirmed the need for combatting the illegal trade: UNGA Res 50/70 (12 December 1995) UN Doc A/RES/50/70/B 1995.

⁴⁴⁷ See, for example, the campaigns by Amnesty International and Oxfam, respectively: Amnesty International USA, 'Amnesty International Stages New York City "Bananafesto" Action in Times Square June 27, Ahead of Historic Arms Treaty Talks at United Nations' (*Amnesty International USA*, 20 June 2012) <<https://www.amnestyusa.org/press-releases/amnesty-international-stages-new-york-city-bananafesto-action-in-times-square-june-27-ahead-of-historic-arms-treaty-talks-at-united-nations/>>; Scott Stedjan, 'What's the Deal with Bananas and the Global Arms Trade?' (*Oxfam America*, 26 June 2012) <<https://politicsofpoverty.oxfamamerica.org/comparing-bananas-to-the-global-arms-trade/>>. See also: AD McKenzie, "'Arms Easier to Trade than Bananas'" *Helsinki Times* (16 February 2012) <<https://www.helsinkitimes.fi/world-int/1364-arms-easier-to-trade-than-bananas-2.html>>.

⁴⁴⁸ UNGA Res 61/89 (December 2006) UN Doc A/RES/61/89; UNGA 'Report of the Secretary-General' (17 August 2007) UN Doc A/62/278; UNGA 'Report of the Secretary-General' (24 September 2007) UN Doc A/62/278/Add.1; UNGA 'Report of the Secretary-General' (19 October 2007) UN Doc A/62/278/Add.2; UNGA 'Report of the Secretary-General' (27 November 2007) UN Doc A/62/278/Add.3; UNGA 'Report of the Secretary-General' (15 February 2008) UN Doc A/62/278/Add.4; UNGA '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' (26 August 2008) UN

Supra-national laws are often regarded as the top of the legal food chain because of their potential to impact a wider range of jurisdictions and provoke the development of laws in national regimes. International laws encourage the alignment of arms transfer policies and practices on a broader, and potentially global, scale and provide rhetorical entrapment as a means for promoting accountability of states.⁴⁴⁹ International institutions also play integral roles in the diffusion of 'responsible' arms trade norms by providing formal settings for states to face social pressure and commit to new policies.⁴⁵⁰ At the regional level, where there are two definable sides to a transaction, actual arms reductions and ceilings have been more successful 'because of the preoccupation with balance, or at least with the symmetry of effect and obligation'.⁴⁵¹ The regional level is also where many illicit arms markets thrive, thus regional arms control efforts are important for harmonising policies and practices across a region and preventing the exploitation of the laxer rules of neighbouring states.⁴⁵² The evolution in arms controls at the regional and international levels coincided with the emergence of the human security paradigm, and resulted in a number of multilateral measures on small arms and firearms which incorporated preventive responsibilities.

This chapter examines international and regional arms control measures adopted from the 1990s to restrict and regulate small arms transfers, including the UN Register of Conventional Arms (1992), the Wassenaar Arrangement (1996), the ECOWAS Convention on small arms (2006), the OAS Convention on illicit firearms, the UN Firearms Protocol (2001), the UN Programme of Action on small arms (2001), the EU

Doc A/63/334; UNGA 'Report of the First Committee: General and complete disarmament' (10 November 2008) UN Doc A/63/389; UNGA Res 63/240 (24 December 2008) UN Doc A/RES/63/240; Open-ended Working Group towards an Arms Trade Treaty 'Report of the Open-ended Working Group towards an Arms Trade Treaty: establishing common international standards for the import, export and transfer of conventional arms' (20 July 2009) UN Doc A/AC.277/2009/1; UNGA Res 64/48 (2 December 2009) UN Doc A/RES/64/48; UN 'Draft decision on the modalities of attendance of non-governmental organizations at the sessions of the Preparatory Committee' (9 July 2010) A/CONF.217/PC/L.2; UN Conference on the Arms Trade Treaty 'Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty' (7 March 2012) UN Doc A/CONF.217/1; UN Conference on the Arms Trade Treaty 'Provisional rules of procedure of the United Nations Conference on the Arms Trade Treaty' (7 March 2012) UN Doc A/CONF.217/L.1; UN 'Compilation of views on the elements of an arms trade treaty' (10 May 2012) UN Doc A/CONF.217/2; UN 'Compilation of views on the elements of an arms trade treaty' (27 June 2012) UN Doc A/CONF.217/2/Add.1; UN 'Draft provisional agenda' (28 June 2012) UN Doc A/CONF.217/L.2; UN 'Draft of the Arms Trade Treaty' (1 August 2012) UN Doc A/CONF.217/CRP.1; UN 'Report of the United Nations Conference on the Arms Trade Treaty' (1 August 2012) UN Doc A/CONF.217/4; UNGA Res 67/234 (24 December 2012) UN Doc A/RES/67/234; UN 'Draft provisional agenda of the Final United Nations Conference on the Arms Trade Treaty' (25 January 2013) UN Doc A/CONF.217/2013/L.1; UN 'Draft indicative programme of work of the Final United Nations Conference on the Arms Trade Treaty' (14 March 2013) UN Doc A/CONF.217/2013/INF/1/Rev.1; UN 'Draft decision of the Final United Nations Conference on the Arms Trade Treaty' (27 March 2013) UN Doc A/CONF.217/2013/L.3.

⁴⁴⁹ Halliday and Shaffer, 'Transnational Legal Orders' (n 45) 5; Erickson, *Dangerous Trade* (n 96) 149.
⁴⁵⁰ *ibid.*

⁴⁵¹ Alyson JK Bails, 'The Changing Role of Arms Control in Historical Perspective' in Christopher Daase and Oliver Meier, *Arms Control in the 21st Century: Between Coercion and Cooperation* (Routledge 2013) 17.

⁴⁵² Sarah Meeks, 'Combating Arms Trafficking: Progress and Prospects' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 184; Stohl and Grillot (n 5) 109.

Common Position on Arms Exports (2008), and the Arms Trade Treaty (2013).⁴⁵³ This chapter considers how these treaties and other instruments have introduced preventive responsibilities into small arms controls at the supranational levels. The examination of these instruments proceeds according to the type of preventive responsibilities they predominantly emphasise, which roughly corresponds with the decade they were developed and adopted. In many cases, the instruments presented multiple aims, as such these divisions should be viewed as loose categorisations which elucidate the evolution of preventive responsibilities in regional and international instruments.

I. Prevention of Proliferation and Accumulation

In the early post-Cold War years, international cooperation on export controls was pursued to restrict the proliferation of weapons, particularly non-conventional weapons and dual-use items to states which were viewed as pariahs, many of whom were located in the Global South.⁴⁵⁴ Attempts were also made by states adversely affected by small arms proliferation to further discuss the issue at international and regional organisations. As the Cold War was marked by heightened secrecy, increased transparency became a central feature of early arms control measures in the post-Cold War period. Transparency initiatives became particularly necessary to prevent accumulation and proliferation of weapons due to the limitations of controls and weak enforcement measures at local levels and the significant growth and liberalisation of the arms trade.⁴⁵⁵ The need for transparency and cooperation between states for small arms reflected the increasing recognition of the destabilising effects of these weapons, particularly through their accumulation and their entry into illicit markets through theft and diversion.⁴⁵⁶ Accordingly, transparency initiatives were adopted which emphasised the prevention of accumulation and proliferation, including the UN Register of Conventional Arms (UNROCA), Wassenaar Agreement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, and ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials.

i. UN Register of Conventional Arms

A particularly notable development was the UN Register of Conventional Arms (UNROCA), a voluntary political measure established in 1992 that became the first mechanism since the 1930s through which states made arms export data publicly available.⁴⁵⁷ Prior to UNROCA, most states did not issue reports on arms exports, the notable exception being the United States, which has published national reports since

⁴⁵³ Full citations of these instruments are provided in their respective sections.

⁴⁵⁴ Davis (n 229) 31.

⁴⁵⁵ Grip (n 34) 98–9; Mirko Sossai, 'Transparency as a Cornerstone of Disarmament and Non-Proliferation Regimes' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 392.

⁴⁵⁶ Yihdego (n 5) 141.

⁴⁵⁷ UNGA Res 46/36 (L) 'Transparency in Armaments' (6 December 1991) UN Doc A/RES/46/36L.

1961.⁴⁵⁸ UNROCA recognised ‘increased openness and transparency in the field of armaments would enhance confidence, ease tensions, [and] strengthen regional and international peace and security’ and, in turn, decrease the accumulation and proliferation of arms, particularly in conflict zones and unstable regions.⁴⁵⁹ As was the standard in arms control measures prior to and after the establishment of UNROCA, the ‘legitimate security needs of States’ stands as an exception to the emphasis on restraint, and the right of states to self-defence and acquisition of arms is reaffirmed in its provisions.⁴⁶⁰ Although UNROCA encourages restraint in arms production and accumulation in its Preamble, reports are not expected or required to include such details. The failure to match the limitations on arms sales with reductions in arms production suggests the preventive focus of UNROCA is geared towards preventing proliferation rather than accumulation through domestic production.⁴⁶¹ Though arms transfers declined during the 1990s, throughout the 2000s and 2010s they began to consistently increase.⁴⁶² As such, it is difficult to gauge the extent to which UNROCA has impacted long term export trends.

Nevertheless, UNROCA has had some success, including introducing into the security concept ‘the principle of undiminished security at the lowest possible level of armaments’.⁴⁶³ UNROCA ‘requests’ members states to provide annual data on arms exports and imports for eight categories of military equipment, one of which is small arms.⁴⁶⁴ Since the publication of the first Register in 1993, annual registers have been published, with varying levels of participation by 175 member states, though the larger exporters have tended to be regular participants.⁴⁶⁵ All six major exporter states have

⁴⁵⁸ Arms Export Control Act of 1976, 22 USC §2776.

⁴⁵⁹ UNGA Res 46/36 (L), para 1, 2 and Preamble.

⁴⁶⁰ UNGA Res 46/36 (L), art 3.

⁴⁶¹ William D Hartung, ‘Curbing the Arms Trade: From Rhetoric to Restraint’ (1992) 9 World Policy Journal 219, 236. As pointed out by Hartung, the failure to match limitations on arms sales to the Global South with reductions in arms production and the capacity to intervene by industrialised states could in effect cause export restraint ‘to be viewed as a mere adjunct to a renewed policy of big-power interventionism, another point of leverage to be used by the nations of the North in policing and manipulating conflicts in the South for their own benefit’. See also: Davis (n 229) 11.

⁴⁶² SIPRI data from 1990 to 2020: SIPRI, ‘SIPRI Arms Transfers Database’ (n 344).

⁴⁶³ UNGA Res 46/36 (L), para 1, 2 and Preamble. See also, the introduction of the draft resolution establishing UNROCA by the representatives of the Netherlands and Japan, respectively: UNGA ‘Verbatim Record of the 26th Meeting’ (5 November 1991) UN Doc A/C.1/46/PV.26, 14–20 and 21–23.

⁴⁶⁴ The original seven categories were: battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warship, missiles or missile systems. In 2003, states were also provided the option of including information on small arms and light weapons ‘made or modified to military specifications and intended for military use’: UNGA ‘Continuing operation of the United Nations Register of Conventional Arms and its further development (13 August 2003) UN Doc A/58/274, para 69, 112–114; UNGA Res 58/54 (8 January 2004) UN Doc A/RES/58/54, para 3, 4.

⁴⁶⁵ UNROCA Reports 1992–2022: UN, ‘UNROCA (United Nations Register of Conventional Arms)’ <<https://www.unroca.org/>>. Following the adoption of the recommendations for the inclusion of small arms and light weapons, these weapons have been included in yearly reports. Following the inclusion of a standardized form in 2006, the number of submission increased for five in 2003–2005 to 36 in 2006: UNGA ‘Report on the continuing operation of the United Nations Register of Conventional Arms and its further development’ (15 August 2006) UN Doc A/61/261, para 125; UNGA Res 61/77 (6 December 2006) UN Doc A/RES/61/77. See also: Paul Holtom, *Transparency in Transfers of Small Arms and Light Weapons: Reports to the United Nations Register of Conventional Arms, 2003–2006* (SIPRI 2008) 1 <<https://www.sipri.org/publications/2008/sipri-policy-papers/transparency-transfers-small-arms-and-light-weapons-reports-united-nations-register-conventional>>.

regularly contributed to UNROCA since its creation, though China and Russia have omitted the inclusion of small arms in their reports, and the United States has only reported disaggregated data on small arms transfers since 1996.⁴⁶⁶ Consequently, some experts have suggested the transfer data in the Register relating to small arms exports represents 'only a fraction of international transfers'.⁴⁶⁷ Overall, despite being a soft law instrument, UNROCA has made inroads into arms export transparency, particularly with regard to major exporters, and combined with other measures it continues to be a tool for promoting export restraint.

ii. **Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies**

Another soft law instrument introduced as a transparency measure and continues to be utilised by a large group of states is the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which came into effect in 1996.⁴⁶⁸ Following the end of the Cold War, members of the Western bloc's Coordinating Committee for Multilateral Export Controls (CoCom) recognised 'a new mechanism was needed to address risks related to the spread of conventional weapons and dual-use goods and technologies', spawning the creation of the Wassenaar Arrangement as a multilateral export control regime.⁴⁶⁹ Forty-two states have become participants in the regime, with India being the most recent in 2017.⁴⁷⁰ All major exporter states are participants of the regime, with the exception of China, which had engaged in talks about joining the regime during the 2000s, but no further progress followed. The Wassenaar Arrangement is comprised of two pillars, or Lists: the Munitions List which focuses on conventional arms, and the List of Dual-Use Goods and Technologies. The dual-use pillar is further divided based on the sensitivity of items, into the Basic list, Sensitive list, and Very Sensitive list. Both Lists are regularly updated by the Expert Group of the Wassenaar Arrangement.

The Wassenaar Arrangement establishes responsibilities for states which include the incorporation of the control lists into national controls. The regime also seeks to promote transparency and the exchange information between participating states,

⁴⁶⁶ UNROCA Reports 1992-2022: UN, 'UNROCA (United Nations Register of Conventional Arms)' (n 465). All six states have submitted reports annually, except for China between 1997 to 2005 when it suspended its participation because of other states reporting arms transfers to Taiwan.

⁴⁶⁷ Holtom (n 465) 6. Additionally, as the data provided in UNROCA includes export data, recipients and origin of exports, the data on exporters and importers of small arms is skewed because of an overrepresentation of submissions by European states.

⁴⁶⁸ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Founding Documents (19 December 1995), Initial Elements (12 July 1996, amended 7 December 2001) WA-DOC (17) PUB 001 (Wassenaar Arrangement). At the first plenary meeting in April 1996, the founding members adopted the 'Initial Elements' of the Wassenaar Arrangement, including the List of Dual-Use Goods and Technologies and the Munitions List.

⁴⁶⁹ Casey-Maslen (n 263) 143.

⁴⁷⁰ The 42 participating states in the Wassenaar Arrangement are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States.

which has been pertinent for raising awareness of, for instance, emerging trends or the accumulation of specific types of weapons.⁴⁷¹ In particular, state parties agree to share details of export control policies, companies and organisations involved in arms exports, routes and methods of acquisition, acquisition networks inside and outside the country, the use of foreign expertise, sensitive end-users, and acquisition patterns.⁴⁷² The purpose of doing so is ‘to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations’.⁴⁷³ These aims are reaffirmed in the requirements outlined in the List of Dual-Use Goods and Technologies, which requires state parties to provide notification of the denial of licences to non-participant states, ‘where the reasons for denial are relevant to the purposes of the Arrangement’.⁴⁷⁴ By clarifying the distinctions between different types of weapons and requiring member states to participate in information sharing, the Wassenaar Arrangement has been a successful soft law instrument for increasing transparency and, in turn, enabling the detection of the accumulation and proliferation of conventional weapons.⁴⁷⁵ However, as with UNROCA, it remains unclear to what extent these measures have encouraged export restraint.

iii. ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials

In contrast to political measures at the international level, at the regional level legally binding instruments have been adopted to prevent the proliferation and accumulation of small arms. Specifically, in 2006 the fifteen member states of the Economic Community of West African States (ECOWAS) adopted the Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, which entered into force in 2009 following its ratification by ten ECOWAS member states.⁴⁷⁶ The Convention represents a culmination of efforts by the sub-region to build a legally binding instrument on small arms following the earlier adoption of voluntary political instruments, namely, the 1998 Declaration of the Moratorium and the 1999 Code of Conduct (which sought to organise the implementation of the Moratorium by providing administrative, operational and institutional arrangements).⁴⁷⁷ While the Moratorium outlined key principles for prohibiting the import, export and manufacture of small arms

⁴⁷¹ Wassenaar Arrangement, Initial Elements Part I para I-4.

⁴⁷² Wassenaar Arrangement, Initial Elements Part VI para 1.

⁴⁷³ Wassenaar Arrangement, Initial Elements Part I para I-4.

⁴⁷⁴ Wassenaar Arrangement, Initial Elements Part V para 1.

⁴⁷⁵ Sossai (n 455) 395.

⁴⁷⁶ Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, Economic Community of West African States (adopted 14 June 2006, entered into force 29 September 2009) 49 Official Journal of ECOWAS 5 (ECOWAS Convention).

The fifteen member states of ECOWAS are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. The five states which have not yet ratified the treaty are Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau.

⁴⁷⁷ ECOWAS ‘Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa’ (signed 31 October 1998) 35 Official Journal of ECOWAS 3; ECOWAS ‘Code of Conduct for the Implementation of the Moratorium on the Importation, Exportation and Manufacture of Light Weapons’ (signed 10 December 1999) 37 Official Journal of ECOWAS 4.

and light weapons, it lacked efficacy due to its voluntary nature and state-centric interpretations that ignored the human security concerns expressed in the Moratorium.⁴⁷⁸ Consequently, in 2003, ECOWAS decided to strengthen its capacities to fight against illicit small arms, and worked with member states, external state partners and civil society in West Africa to develop a legally binding instrument. The adoption of the ECOWAS Convention highlights the importance of regional level efforts in combatting region-specific arms transfer issues and the growing role of Africa's subregions in this area.⁴⁷⁹

Compared to the two international instruments, the ECOWAS Convention has a much broader goal, seeking to control, regulate and prohibit the transfer, manufacture and possession of small arms to prevent and combat the excessive and destabilising accumulation of small arms. In addition to increasing transparency, the Convention includes strict controls which require member states to 'ban the transfer of small arms and light weapons into, from or through their territory'.⁴⁸⁰ Member states can request an exemption on the grounds of 'legitimate security needs' or as a means to 'participate in peace support operations'.⁴⁸¹ In addition, member states are required to control the small arms production on their territories and to 'prohibit the possession, use and sale of light weapons to civilians' and 'implement a strict control regime for civilian possession of small arms'.⁴⁸² Further provisions are included in the treaty to ensure the safe and effective management of small arms, including stockpile security, marking, tracing and brokering controls.⁴⁸³ The ECOWAS Convention represents a significant development in the incorporation of human security concerns into arms controls, particularly in relation to strict controls on the transfer, manufacture and possession of small arms.⁴⁸⁴ The ECOWAS Convention also demonstrates the importance of complementing transparency initiatives with export control measures and is illustrative of the successes of transforming soft law obligations into a binding treaty to prevent the accumulation and proliferation of weapons, particularly at the regional level where there are common interests in stemming the flow of small arms.

II. Prevention of Diversion

Preventing the diversion of weapons to illicit markets in many ways goes hand-in-hand with transparency measures for preventing weapons accumulation, as excessive

⁴⁷⁸ Mohamed Coulibaly, 'From Moratorium to a Convention on Small Arms: A Change in Politics and Practices for the 15 Member Countries of the Economic Community of West African States (ECOWAS)' (Oxfam International 2008) 2 <<https://policy-practice.oxfam.org/resources/from-moratorium-to-a-convention-on-small-arms-a-change-in-politics-and-practice-112514/>>; Abdel-Fatau Musah, *The ECOWAS Moratorium on Light Weapons: Pitching Political Will against Reality* (Foundation for Security and Development in Africa (FOSDA) 2004) 11.

⁴⁷⁹ Harald Müller, Alexis Below and Simone Wisotzki, 'Beyond the State: Nongovernmental Organizations, the European Union, and the United Nations' in Harald Müller and Carmen Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control* (University of Georgia Press 2013) 306; Coulibaly (n 478) 2.

⁴⁸⁰ ECOWAS Convention, art 3(1).

⁴⁸¹ ECOWAS Convention, art 4(1).

⁴⁸² ECOWAS Convention, art 14.

⁴⁸³ ECOWAS Convention, art 8 (marking), 16 (stockpiling), 19 (tracing), 20 (brokering).

⁴⁸⁴ Coulibaly (n 478) 1.

weapons stocks feed into illicit markets, either through theft or illicit resales. Weapons diversion occurs because of inadequate export controls, ineffective management or insufficient security of weapons stockpiles.⁴⁸⁵ The growth in the production and legal export of arms expands the sources of weapons stocks and in turn increases the possibilities of arms being diverted.⁴⁸⁶ Since the end of World War II, however, arms control measures have focused on preventing the diversion of conventional weapons to illicit markets without coinciding attempts to limit arms production or legal exports. Indeed, a noticeable trend in the early initiatives, including the establishment of the UNROCA, was the focus on reducing proliferation centred on combating the illicit arms trade, even though there was increasing recognition of legal arms exports contributing to the level of violence and length of wars.⁴⁸⁷ During the late 1990s and 2000s, the renewed attention on stemming the flow of weapons from illicit markets saw the adoption of treaties by regional organisations and international bodies which reaffirmed the need for states to undertake responsibilities to prevent diversion. Three significant instruments adopted during these years highlight the importance of this type of preventive responsibilities are the Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol), and the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (Programme of Action).

i. OAS Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

One of the earlier measures in the post-Cold War period that centred the prevention of diversion is the Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA) adopted by the Organization of American States (OAS) in 1997, entering into force in 1998.⁴⁸⁸ The CIFTA is a legally binding multilateral agreement signed by all thirty-four member states of the OAS and ratified by thirty-one, with the three member states opting against ratification being Canada, Jamaica, and the United States. The broad ratification of the treaty affirms the collective acknowledgement of the importance of controlling and regulating the illicit manufacturing and trafficking of firearms. The CIFTA provides a model for the development of other legally binding instruments for combatting illicit firearms transfers in other regional areas and also internationally. As with UNROCA, the CIFTA seeks to promote and facilitate cooperation and exchanges

⁴⁸⁵ Greene and Kirkham (n 184) 3.

⁴⁸⁶ This is especially the case for small arms, which require less technical capabilities to manufacture compared to larger weapons systems. Pete Abele, 'Manufacturing Trends – Globalising the Source' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 81.

⁴⁸⁷ UNGA 'Report of the Panel of Governmental Experts on Small Arms' (27 August 1997) UN Doc A/52/298

⁴⁸⁸ Organization of American States, Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (adopted 14 November 1997, entered into force 1 July 1998) A-63 (CIFTA).

of information and experiences among states parties, which is important in increasing transparency and a first step towards arms export restraint. In contrast to the use of 'small arms' by UNROCA, the CIFTA focuses on 'firearms', which are defined as 'any barrelled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive'.⁴⁸⁹

The CIFTA incorporates human security concerns, recognising the urgent need for preventing, combating, and eradicating illicit manufacturing and trafficking of small arms due to the security implications for states and the region, the adverse effects on 'the well-being of peoples, their social and economic development, and their right to live in peace', and the links between these activities 'with drug trafficking, terrorism, transnational organized crime, and mercenary and other criminal activities'.⁴⁹⁰ In particular, the CIFTA requires state parties to incorporate several provisions into their domestic regulations, including: the marking of firearms to allow them to be traced and for their origin, import, and custody to be identified; the criminalisation of the illicit manufacturing of and trafficking in firearms; the management of confiscated and seized firearms; the establishment of a licensing regime for firearms exports, imports, and transit; and the establishment of other security measures, including stockpile management and security.⁴⁹¹ The imposition of these various requirements to counter the illicit trade of firearms, coupled with its broad ratification, suggests the CIFTA has significant potential for providing extra-regional and international guidance on the development of strict controls for firearms trafficking.⁴⁹² However, the preventive responsibilities in the treaty is limited to preventing diversion. The CIFTA does not sufficiently link the prevention of diversion with the prevention of adverse human rights impacts, because the legal firearms trade is excluded from treaty's scope, thereby ignoring the correlation between excessive weapons stocks and the risks of diversion, and, in turn, the potential for diverted arms to end up in the hands of human rights violators.⁴⁹³

ii. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition

At the international level, the first legally binding instrument on firearms, which set obligations for state parties to prevent and combat illicit manufacturing of and

⁴⁸⁹ CIFTA art 1.3. The Convention also applies to 'any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine'. Exception: 'antique firearms manufactured before the 20th Century or their replicas'.

⁴⁹⁰ CIFTA Preamble.

⁴⁹¹ CIFTA art IV (Legislative Measures), VI (Marking of Firearms), VIII (Security Measures), IX (Export, Import, and Transit Licenses or Authorizations). Member states are also supported in their implementation of the Convention by the OAS, which drafts model laws, facilitates exchanges of best practices, collects and analyses statistical information, and provides technical assistance and equipment. See, for example, the OAS Model Regulations for controlling brokers: OAS-CICAD, 'Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition' (2003) CICAD/doc1271/03. Available at: <https://www.oas.org/juridico/english/cicad_brokers.pdf>

⁴⁹² Matthew Schroeder, 'Small Arms, Terrorism and the OAS Firearms Convention' (Federation of American Scientists 2004) 37.

⁴⁹³ CIFTA Preamble.

trafficking in firearms, their parts and components, and ammunition, was adopted in 2001. The Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol),⁴⁹⁴ which entered into force in 2005 with forty ratifications, is as an additional protocol of the UN Convention Against Transnational Organized Crime (UNTOC), a multilateral treaty against transnational organised crime.⁴⁹⁵ There are currently 122 state parties to the protocol, with notable absences including Russia and the United States. Out of the other major exporters, two are signatories (China and the United Kingdom) and two only ratified the treaty in recent years (France in 2019 and Germany in 2021). One reason for the delayed ratification generally, was the ongoing negotiations for the creation of a verification mechanism, as required by Article 32 of UNTOC. Intersessional meetings on a review mechanism, led by Argentina and Norway, commenced in 2008 and subsequently resulted in negotiations, led by Mexico.⁴⁹⁶ However, despite being included in the seventh session of the Conference of the Parties to UNTOC in October 2014, no progress was made.

The adoption of the Firearms Protocol in the context of UNTOC demonstrates a continuation of the 1990s trend of focussing on firearms and small arms in the context of illicit trafficking and their intersection with transnational crimes such as money laundering. Accordingly, the principal aims of the Firearms Protocol are the adoption of control measures for criminal activities relating to the illicit trafficking of firearms, including: the establishment of a criminal offence in domestic law for the illicit manufacturing of and trafficking in firearms; the adoption of effective control, security and disposal measures to prevent the theft and diversion of firearms to illicit markets; the establishment of a licensing system for firearms; and the maintenance of adequate records and ensuring marking and tracing of firearms.⁴⁹⁷ As with the CIFTA, the Firearms Protocol reaffirms the focus of the treaty on combatting illicit arms flows does not intend to hamper legal exports of small arms.⁴⁹⁸ Despite the Protocol's push for further transparency, cooperation and exchange of information between states, the extent to which this has been achieved is unclear. Overall, the Protocol's effectiveness draws from the specific commitments state parties are required to incorporate into their domestic export regimes. However, the success of this instrument in implementing preventive responsibilities for diversion is debatable due to the lack of ratification by

⁴⁹⁴ United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

⁴⁹⁵ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 5 July 2005) 2326 UNTS 208 (Firearms Protocol). See also, the UNGA Resolution which established the Protocol: UNGA Res 55/255 (31 May 2001) UN Doc A/RES/55/255.

⁴⁹⁶ UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Austria, France, Italy and Mexico: revised draft resolution' (10 October 2014) UN Doc CTOC/COP/2014/L.4/Rev.2. See also: Bromley and Grip (n 159) 604–5.

⁴⁹⁷ Firearms Protocol art 5 (criminalization), 6 (seizure and disposal), 7 (record keeping), 8 (marking), 10 (licensing system), 11 (security). See also: UN, 'Ratification Kit: Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime' 2 <https://www.unodc.org/documents/organized-crime/Firearms/12-56168_Firearm_booklet_ebook.pdf>.

⁴⁹⁸ Firearms Protocol art 4(2).

many large exporters, which may also be linked to its development alongside the following instrument.

iii. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons

Almost concurrently with the Firearms Protocol, the UN Conference on Illicit trade of Small Arms and Light Weapons developed the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (Programme of Action).⁴⁹⁹ The Programme of Action is not a legally binding instrument like the Firearms Protocol, but a voluntary policy framework which addresses a wide range of issues relating to the prevention of illicit small arms and light weapons transfers. The Programme of Action is accompanied by the International Tracing Instrument (adopted in 2005) which seeks to enable the timely and reliable identification and tracing of illicit small arms and light weapons. From the outset, the potential for the Programme of Action to consolidate stronger responsibilities for states to prevent diversion were stymied by disagreement and the lack of harmonisation with the Firearms Protocol. Despite efforts by the EU to include the legal arms trade within its framework during the negotiations, the focus remained exclusively on the illicit trade due to the hostility of certain large exporter states, most notably the United States. During the negotiations, the United States and the World Forum of Sports and Shooting Societies opposed the inclusion of any restrictions on ownership of weapons by private individuals or any commitments for discussions on legally binding instruments to begin, and also opposed the exclusion of actors other than governments in the legal trade and manufacturing of small arms.⁵⁰⁰

The Programme of Action establishes ten pillars where action for preventing and combating illicit small arms transfers are to be undertaken, including: national points of contact and coordination; legislation, regulation and administrative procedures; criminalisation regimes; stockpile management and security; weapons collection and disposal; export, import and transfer controls and regulations; brokering; marking, tracing and record-keeping; disarmament, demobilisation and reintegration of ex-combatants; and assistance and international cooperation.⁵⁰¹ According to data from the 2022 national reports, the majority of UN member states have not provided any information on a number of these areas, including national action plans, domestic manufacturing, brokering, international tracing, marking and recording keeping.⁵⁰² In all of these key areas, more than half of the member states have not provided any data for the 2020-2021 reporting period.

In addition to the limited participation of states in submitting national reports, the Review Conferences, which are convened every six years and with the next one

⁴⁹⁹ UN 'Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects 2001' (20 July 2001) UN Doc A/CONF.192/L.5/Rev.1 (Programme of Action).

⁵⁰⁰ Erickson, *Dangerous Trade* (n 96) 149.

⁵⁰¹ Programme of Action Section II.

⁵⁰² Data on 2022 reports: UN, 'Programme of Action on Small Arms and Light Weapons' <<https://smallarms.un-arm.org/statistics>>.

scheduled for 2024, have revealed the ongoing contentions which hinder the potential for broader implementation of the Programme of Action. Since the First Review Conference in 2006, disagreements between member states have continued on the inclusion of language pertaining to civilian possession and arms transfers to non-state actors.⁵⁰³ While attempts were also made during these review conferences ‘to bridge this divide and build links between’ the Programme of Action and the Firearms Protocol, concrete efforts remain limited.⁵⁰⁴ Combined with the shift in attention and resources to the negotiations of the Arms Trade Treaty from 2006, the potential effectiveness of the Programme of Action in implementing preventive responsibilities for diversion, as well as in increasing cooperation and transparency for small arms, has been hindered by the stagnation in efforts to address the issues of civilian firearms possession and the overlapping commitments and unnecessary duplication of efforts with the Firearms Protocol.

III. Prevention of Adverse Human Rights Impacts

The prevention of adverse human rights impacts is the latest evolution in the incorporation of human security concerns into arms controls. The earliest measure was the EU’s Code of Conduct on Arms Exports adopted in 1998, which unlike other instruments of the time, applied to the legal transfers of arms and incorporated human rights considerations.⁵⁰⁵ A regional-level export system was developed by the EU in response to the growing push for transparency in arms transfers, the First Gulf War and other armed conflicts in south-eastern Europe and Africa, revelations of European arms export scandals in the aftermath of the invasion of Kuwait by Iraq in 1990, declining domestic and external markets for arms, and an industrial restructuring of arms production that resulted in its trans-nationalisation.⁵⁰⁶ The politically binding EU Code of Conduct aimed to harmonise export criteria to avoid undercutting by other member states, that is, an EU member state approving a licence already denied by another member state.⁵⁰⁷ These eight criteria were guided by the Permanent Five members of the UN Security Council’s earlier attempts of establishing criteria for restraining arms transfers, as part of a more comprehensive export control regime which ultimately did not materialise.⁵⁰⁸ As expected for the time, the EU Code of

⁵⁰³ The World Forum of Sports and Shooting Societies, which received diplomatic backing from the United States, effectively restricted the inclusion of any provisions into the Programme of Action which could potentially affect civil gun ownership during the negotiations of the Programme of Action and the Review Conference in 2006. See: Müller, Below and Wisotzki (n 479) 304; Bromley and Grip (n 159) 603.

⁵⁰⁴ Bromley and Grip (n 159) 602; McLay (n 161) 289, 296.

⁵⁰⁵ Council of the European Union ‘The European Union Code of Conduct on Arms Exports’ (5 June 1998) Doc 8675/2/98 Rev 2 (EU Code of Conduct). The Code of Conduct was complemented by the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms which focussed on measures against illicit transfers

⁵⁰⁶ Sibylle Bauer and Mark Bromley, ‘The European Union Code of Conduct on Arms Exports Improving the Annual Report’ (SIPRI 2004) SIPRI Policy Paper No 8 2. Davis (n 229) 39. Bauer and Bromley 2.

⁵⁰⁷ EU Code of Conduct, Preamble. See also: Bauer and Bromley (n 506) 2.

⁵⁰⁸ Conference on Disarmament of October 1991, ‘Guidelines for conventional arms transfers’ (26 November 1991) CD/1113, Meeting of the Permanent Five Members on Arms Transfers and Non-Proliferation, London, 17–18 October 1991. Reproduced in Annex of Supplement No. 42 of the Report

Conduct found most of its success in increasing transparency of armed export policies and implementing oversight mechanisms, including the establishment of parliamentary oversight measures.⁵⁰⁹ From the mid-2000s, two significant hard law arms control instruments incorporating preventive responsibilities for adverse human rights impacts were adopted at the regional and international levels: the EU Council adopted the Common Position on Arms Exports, and the Arms Trade Treaty.

i. EU Common Position on Arms Exports

In 2008, the legally binding EU Common Position on Arms Exports was adopted, superseding the EU Code of Conduct.⁵¹⁰ Like its predecessor, the Common Position seeks to institutionalise ‘a more restrictive and convergent European arms export policy’ and defines common rules for arms exports for EU member states.⁵¹¹ The Common Position required all member states to adopt domestic regulations consistent with its provisions by 30 June 2011, which were to come into effect from June 2012. In particular, member states were required to establish or update their arms export licensing systems to include the Common Military List and eight (updated) criteria for arms export authorisations, licensed production, brokering, transit and transshipment, transfer of intangible items such as software and technology, and reporting requirements.⁵¹² Small arms, including smooth-bore weapons specially designed for military use or which are fully automatic, semi-automatic or pump-action type weapons, are included in the Common Military List.⁵¹³ Some states, notably, France and Germany (and also the United Kingdom when it was still an EU member state)

of the Disarmament Commission (1995): UNGA ‘Report of the Disarmament Commission for 1995’ (27 July 1995) UN Doc A/50/42(SUPP). See also: Davis (n 229) 281–2.

⁵⁰⁹ Simone Wisotzki and Max Mutschler, ‘No Common Position! European Arms Export Control in Crisis’ (2021) 10 *Zeitschrift für Friedens- und Konfliktforschung* 273, 278. See also: Sibylle Bauer, ‘The EU Code of Conduct on Arms Exports—Enhancing the Accountability of Arms Export Policies?’ (2003) 12 *European Security* 129.

⁵¹⁰ EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (13 December 2008) Official Journal of the European Union L 335/9 (EU Common Position on Arms Exports).

⁵¹¹ Wisotzki and Mutschler (n 509) 278.

⁵¹² Article 12 of the EU Common Position on Arms Exports refers to the Common Military List.

⁵¹³ The Common Military List was adopted in 2000 and is periodically revised. The latest version: Common Military List of the European Union adopted by the Council on 17 February 2020 (13 March 2020) Official Journal of the European Union C 85/1. Small arms are listed under category ML1 and ML2:

ML1 Smooth-bore weapons with a calibre of less than 20 mm, other arms and automatic weapons with a calibre of 12,7 mm (calibre 0,50 inches) or less and accessories, as follows, and specially designed components therefor:

a. Rifles and combination guns, handguns, machine, sub-machine and volley guns;

b. Smooth-bore weapons as follows:

1. Smooth-bore weapons specially designed for military use;

2. Other smooth-bore weapons as follows:

a. Fully automatic type weapons;

b. Semi-automatic or pump-action type weapons;

ML2 Smooth-bore weapons with a calibre of 20 mm or more, other weapons or armament with a calibre greater than 12,7 mm (calibre 0,50 inches), projectors specially designed or modified for military use and accessories, as follows, and specially designed components therefor:

a. Guns, howitzers, cannon, mortars, anti-tank weapons, projectile launchers, military flame throwers, rifles, recoilless rifles and smooth-bore weapons;

include additional items on their control lists and implement additional requirements pertaining to the type of authorisation required and the assessment of export destinations.⁵¹⁴ The EU Common Position on Arms Exports has been amended, most notably in 2019, to make reference to international and regional instruments which were created after its adoption, including the Arms Trade Treaty and the EU Strategy against illicit firearms, small arms and light weapons and their ammunition (2018).⁵¹⁵

The EU Common Position incorporates due diligence obligations into arms export controls, detailing eight strict criteria, which expand the language from the EU Code of Conduct to include, for example, references to international humanitarian law and risk of diversion.⁵¹⁶ Criterion 2 of Article 2 elaborates the risk assessment requirements for arms exports in relation to adverse human rights impacts, including significant violations of human rights and international humanitarian law. Specifically, Criterion 2 requires member states to:

- (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;
- (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

Internal repression is defined to include 'inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments', thereby referring to significant human rights violations exported arms can be used to commit or facilitate.

⁵¹⁴ Further examined in Chapter Six.

⁵¹⁵ 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' (9 September 2019) Doc 10707/19; Council of the European Union 'Council Conclusions on the Adoption of an EU Strategy Against Illicit Firearms, Small Arms & Light Weapons & Their Ammunition' (19 November 2018) Doc 13581/18.

⁵¹⁶ Article 2 Criterion 2 and 7, respectively. The eight criteria require consideration of the following: whether the export contradicts international commitments, such as a UN embargo or a treaty (criterion 1); whether the recipient respects human rights and international humanitarian law (criterion 2); whether the export would 'provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination' (criterion 3); whether the export there is a 'clear risk' that the export would be used 'aggressively against another country or to assert by force a territorial claim' (criterion 4); whether the export is necessary for the 'national security of member states as well as that of friendly and allied countries' (criterion 5); how the recipient country behaved 'with regard to the international community' (criterion 6); whether there are risks that exported could be 'be diverted within the buyer country or re-exported under undesirable conditions', including 'the risk of the arms being re-exported or diverted to terrorist organisations' (criterion 7); and whether the exported arms are compatible 'with the technical and economic capacity of the recipient country' (criterion 8). See also: Bauer and Bromley (n 506) 4–5.

The reference to 'clear risk' in Criterion 2 mirrors the position taken by the Wassenaar Arrangement on the denial of export licences for small arms exports, and similarly does not define the meaning of this term.⁵¹⁷ The determination of a 'clear risk' requiring the denial of export licences as per subsections (a) and (c) of Criterion 2, has been elaborated by the User's Guide for the Common Position as involving: 'A thorough assessment of the risk that the proposed export of military technology or equipment *will be used* in the commission of a serious violation of international humanitarian law'.⁵¹⁸ This assessment includes inquiring into the recipient's 'past and present record of respect for international humanitarian law', their 'intentions as expressed through formal commitments', and their 'capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law'.⁵¹⁹ Linking 'clear risk' to the assessment an export 'will be used' in the commission of a serious violation, is a high standard that effectively incorporates a knowledge requirement into the risk assessment. Consequently, states may deploy justifications, such as the export being only for defensive weapons or for use by internal security forces, as reasons for circumventing this requirement. This is particularly problematic in relation to small arms exports as it is often difficult to ascertain in advance exactly by whom and how the weapons will be used by the recipient because of the ease with which they can be diverted and the use of these weapons by civilians, internal police forces, military forces and non-state armed groups. The continuing export of arms to Saudi Arabia by some EU member states, despite the available evidence of its involvement in violations of human rights and international humanitarian law in Yemen, provide a stark illustration of the subversion of human rights considerations in the interpretations of 'clear risk' embraced by these states.

The need for the convergence of the export policies of member states has been recognised during triennial reviews of the Common Position.⁵²⁰ However, progress has been stymied as these reviews have coincided with years when member states have had differing export practices to controversial destinations or recipients. This occurred, for example, before the second triennial review, where there were divergent

⁵¹⁷ Wassenaar Arrangement 'Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)' (adopted by the Plenary of 11-12 December 2002), art 2 subsection 6.

⁵¹⁸ 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' (20 July 2015) Doc 10858/15, para 2.13. Article 13 of the EU Common Position on Arms Exports refers to a 'User's Guide' which is to 'serve as guidance for the implementation of the Common Position', para 2.13. The User's Guide was last updated 20 July 2015.

⁵¹⁹ *ibid.* See also: *Campaign Against Arms Trade (CAAT) v The Secretary of State for International Trade* [2019] EWCA Civ 1020 (first administrative challenge by CAAT), para 21.

⁵²⁰ In 2012 and 2015, the EU Council noted 'that further progress was achievable in the implementation of the Common Position in order to maximize convergence among Member States in the field of exports of conventional arms': Council of the European Union 'Council conclusions on the review of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment' (19 November 2012) 3199th Foreign Affairs Council meeting Brussels

<https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133569.pdf>. See also: Council of the European Union 'Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT)' 10671/15 COARM 174 CFSP/PESC 353, para 7.

positions on whether to allow exports to non-state armed groups in the Syrian conflict, with Austria standing against the 2013 proposal of lifting the embargo put forward by the United Kingdom and backed by France.⁵²¹ One potential way to drive greater convergence in practices is through the adoption of inter-governmental commitments between member states, which would provide a framework for broader regional coordination and create political pressure on other member states to follow suit. For example, in the Franco-German agreement on defence export controls signed on 23 October 2019 in accordance with the Treaty of Aachen, France and Germany agreed to formulate a common position on arms exports involving joint Franco-German defence projects, though there were disagreements as to whether strict German export regulations should also apply to joint projects.⁵²² Inter-governmental agreements between major exporter states such as Germany and France could be particularly effective for harmonising state responsibilities, while also subjecting some of the largest European arms manufacturers to stricter obligations, which may then have a flow-on effect for other manufacturers in the region.

Moreover, another key issue that limits the effectiveness of the preventive responsibilities in the Common Position is the separate but parallel legal and policy frameworks of the EU for firearms (which are regarded as lawful weapons for civilian operations) and small arms (which fall within the category of military items). As the Common Position is applicable to small arms exports, states maintain competence over the control of these weapons defence remains a matter for national jurisdictions.⁵²³ In contrast, there have been increasing efforts for transparency and cooperation at the EU level for firearms controls.⁵²⁴ Since the 1990s, the EU has adopted numerous measures on 'civilian firearms', defined as firearms manufactured for civilian use, even though they may share characteristics with military models.⁵²⁵

⁵²¹ The 2019 review was also stymied in pushing for meaningful policy convergence, though it did provide NGOs with leverage 'to scandalise the failure to adhere to IHL and international human rights law and prompted them to initiate legal proceedings': Wisotzki and Mutschler (n 509) 277.

⁵²² *The Treaty of Aachen (France-Germany)* (signed 22 January 2019, entered into force 22 January 2020)

<<https://www.auswaertiges-amt.de/blob/2192638/ccd486958222bd5a490d42c57dd7ed03/treaty-of-aachen-data.pdf>>. See also: Der Spiegel Staff, 'Crisis Smolders Between Berlin and Paris' *Der Spiegel* (21 February 2019) <<https://www.spiegel.de/international/europe/franco-german-fragility-a-friendship-held-together-by-secret-pacts-a-1254178.html>>.

⁵²³ Common Foreign and Security Policy (CFSP).

⁵²⁴ Bromley and Grip (n 159) 601.

⁵²⁵ Regulation 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) (11 June 2021) Official Journal of the European Union L 206/1. Category A prohibits firearms, including for instance explosive military missiles and launchers, automatic firearm; Category B firearms subject to authorisation, including various types of repetitive and semi-automatic long firearms not already covered by Category A; and Category C firearms and weapons subject to declaration, including types of long firearms not covered by Categories A or B.

The earliest adopted instrument was the Firearms Directive No 91/477/EC on 18 June 1991, which categorised civilian firearms into four groups according to their level of lethality, and set minimum standards for civilian firearms acquisition and possession: Council of the European Union 'Council Directive of 18 June 1991 on control of the acquisition and possession of weapons (91/477/EEC)' (13 September 1991) Official Journal of the European Communities L 256/51. Member states were required to implement the Directive into their national legal systems by 1 January 1993. The 1991 Directive was amended on multiple occasions, most notably by the 2008 Directive (which brought it in line with the UN Firearms Protocol) and EU Directive 2017/853 (which reclassified firearms into three

The EU's firearms regulations require state export authorities to 'take into account all relevant considerations', including: the state's obligations and commitments to international export control arrangements and relevant treaties; 'considerations of national foreign and security policy'; and 'considerations as to intended end use, consignee, identified final recipient and the risk of diversion'.⁵²⁶ Consideration of adverse human rights impacts are not explicitly required by the firearms regulations, however, these would still be applicable due to their inclusion in the Common Position.

In the 2019 Council Decision on the Common Position on Arms Exports, the consultation requirement in Article 4 was extended to include dual-use items specified in Annex I to the dual-use export controls 'where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country'.⁵²⁷ This amendment represents a productive step towards limiting the potential circumvention of the Common Position in relation to firearms exports. Since firearms and small arms both continue to present significant risks for diversions and human rights violations, particularly when acquired in conflict zones, the proposed revision of the EU's firearms import and export rules, announced in October 2022 as part of the 2020-2025 action plan on firearms trafficking, should include further amendments which seek to bridge the divide for the export requirements for small arms and firearms.⁵²⁸ Such amendments would also represent an important development in connecting preventive responsibilities for diversion and for adverse human rights impacts.

categories): Council of the European Union 'Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons' (8 July 2008) Official Journal of the European Union L 179/5.

Specific provisions on the export of firearms were elaborated by the Regulation No 258/2012 of 14 March 2012, which implemented Article 10 of the United Nations Firearms Protocol: Regulation No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing Article 10 of the United Nations' Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol), and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition (30 March 2012) Official Journal of the European Union L 94/1.

The 2017 Directive was adopted in response to the terrorist attacks in several EU cities that occurred in 2015. This Directive faced resistance from some member states due to the expansion of listed prohibited firearms: Council of the European Union 'Directive 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons' (24 May 2017) Official Journal of the European Union L 137/22.

⁵²⁶ EU Regulation No 258/2012, art 10.

⁵²⁷ EU Regulation 2021/821.

⁵²⁸ European Commission 'Proposal for a Regulation of the European Parliament and of the Council on import, export and transit measures for firearms, their essential components and ammunition, implementing Article 10 of the United Nations' Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol) (recast)' (27 October 2022) COM/2022/480 final. See also: European Commission 'Explanatory Memorandum' (27 October 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0480&from=EN>>; European Commission 'Firearms – Review of Export Rules and Import & Transit Measures: Public Consultation' (July 2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12855-Firearms-review-of-export-rules-and-import-&-transit-measures/public-consultation_en>.

ii. Arms Trade Treaty

The Arms Trade Treaty is the most comprehensive arms control treaty at the international level, building on earlier arms control instruments.⁵²⁹ In addition to states, a coalition of NGOs and civil society organisations, collectively working as the Control Arms Campaign, played a key role in the treaty negotiations, and the process itself was initiated by a group of Nobel peace prize laureates.⁵³⁰ The success of this campaign, which is illustrative of how ‘bottom-up’ dynamics have pushed for stricter regulation of arms exports, is especially impressive as the negotiations of the treaty commenced at the same time arms transfers grew by 22 percent in 2005-2009, after reaching the lowest point in the post-Cold War period in 2002.⁵³¹ The Arms Trade Treaty is the first major global treaty to include regulations for the export of small arms.⁵³² The decision to include small arms within the scope of the treaty was not without controversy, with some states opposing their inclusion from the beginning and the negotiations being held up as a result of their inclusion in the draft text.⁵³³ Overall, the treaty has received broad support, with ratification or accession by 113 states. In addition to the three major exporter states from Europe, China acceded to the treaty in 2020, despite abstaining during the treaty vote. The United States and Russia are once again not state parties. Russia abstained from the vote to further assess the treaty, and later concluded the treaty ‘lacked substance’ and appeared unlikely to help restrict the flow of arms to terrorist groups.⁵³⁴ The United States, despite its significant involvement in the treaty negotiations voted against the final product, and in 2019 signalled its intention not to become a party to the treaty.⁵³⁵

The Arms Trade Treaty represents the incorporation of human rights considerations into arms controls, which is reflected in the establishment of global standards for the legal and transparent transfer of arms and encouragement of export restraint. Despite the emphasis on these achievements by its proponents,⁵³⁶ the Arms Trade Treaty has

⁵²⁹ Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269. For a full list of UN resolutions and reports see: fn 448.

⁵³⁰ Helena Whall and Allison Pytlak, ‘The Role of Civil Society in the International Negotiations on the Arms Trade Treaty’ (2014) 5 *Global Policy* 453.

⁵³¹ SIPRI data from 2000 to 2010: SIPRI, ‘SIPRI Arms Transfers Database’ (n 344). See also: Terence C Halliday and Gregory Shaffer, ‘Transnational Legal Orders’, *Transnational Legal Orders* (Cambridge University Press 2015) 58.

⁵³² Other landmark developments such as the inclusion of gender-based violence as a necessary consideration for arms export authorisations by states: Arms Trade Treaty art 7(4).

⁵³³ Brandes (n 203) 406.

⁵³⁴ Joshua Sorenson, ‘United Nations Arms Trade Treaty: Russia’s Justifications for Abstention and the Treaty’s Effectiveness in Application’ (2015) 11 *Brigham Young University International Law & Management Review* 237.

⁵³⁵ Bill Chappell, ‘Trump Moves To Withdraw U.S. From U.N. Arms Trade Treaty’ *NPR* (26 April 2019) <<https://www.npr.org/2019/04/26/717547741/trump-moves-to-withdraw-u-s-from-u-n-arms-trade-treaty>>. The communication from the United States was formally transmitted on 18 July 2019.

⁵³⁶ See, for example: Erickson, *Dangerous Trade* (n 96) 88, 140; Gro Nystuen and Kjølv 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 Publishing 2015) 209; Coppen (n 28) 355; Erickson, ‘Leveling the Playing Field’ (n 409); Pablo Arrocha Olabuenaga, ‘Why the Arms Trade Treaty Matters – and Why It Matters That the

also been criticised for accommodating global or liberal militarism and not representing progress of the human security agenda, because of the attempts to balance maximalist approaches that seek to prioritise humanitarian considerations with minimalist approaches that focus on protecting national security and commercial interests.⁵³⁷ This was evident, for example, in the disagreements on whether to include ammunition in the formulation of Article 11 on diversion. While numerous Latin American and Caribbean states viewed ammunition as representing significant concerns for national and human security, the United States sought to exclude ammunition because of its involvement at the time in the war in Afghanistan, where it was continuing to supply vast amounts of ammunition despite the known risks of diversion.⁵³⁸

Nevertheless, the Arms Trade Treaty establishes minimum standards for arms exports which provide a core normative evolution in preventive responsibilities, that is, the incorporation of human rights considerations. In particular, the treaty incorporates human rights considerations by requiring export decisions to assess the risks of a proposed export for human rights. For example, Article 6(3) requires a state party not to authorise the transfer of conventional arms if it has knowledge the arms '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'. The requirement that the arms 'would' be used to commit violations is an especially high threshold to prove because it requires either knowledge of how the recipient party intends to use the arms or awareness of a real risk the recipient party will commit violations of international humanitarian law and human rights.⁵³⁹ While the

US Is Walking Away' (*Just Security*, 8 May 2019) <<https://www.justsecurity.org/63968/why-the-arms-trade-treaty-matters-and-why-it-matters-that-the-us-is-walking-away/>>.

⁵³⁷ The minimalist approach was promoted by major arms exporter states who were keen to protect strategic, political and commercial interests in having expansive arms exports. Civil society and NGOs, namely, Amnesty International, Oxfam and the International Action Network on Small Arms, launched the Control Arms campaign in 2003 which advocated for a maximalist approach: Matthew Bolton and Katelyn E James, 'Nascent Spirit of New York or Ghost of Arms Control Past?: The Normative Implications of the Arms Trade Treaty for Global Policymaking' (2014) 5 *Global Policy* 439, 440. See also: Cooper, 'Humanitarian Arms Control and Processes of Securitization' (n 395) 150, 152. Stavrianakis has argued that the treaty 'has been mobilised by liberal democratic states primarily to legitimise their arms transfer practices': Stavrianakis, 'Controlling Weapons Circulation in a Postcolonial Militarised World' (n 345) 61. Maletta also contends that the balancing of these opposing approaches created fundamentally different views as to who should be protected: exporter states were 'mostly concerned with the reputation of their defence industry and the security of their armies abroad', while NGOs focused on 'preventing populations in the global South from suffering the consequences of poorly regulated arms trade in terms of IHL and human rights violations': Maletta (n 133) 79.

⁵³⁸ For example, out of the bullets and cartridges found of Taliban casualties in 2009, over fifty percent of a sample of rifle magazines were identical to the ones provided to the Afghan government's military forces from the United States: Stavrianakis, 'Legitimising Liberal Militarism' (n 356) 73.

⁵³⁹ Stuart Casey-Maslen and others, *The Arms Trade Treaty: A Commentary* (1st Edition, Oxford University Press 2016) 242. One test for 'knowledge' could be drawn from the ICJ's Genocide case, in which establishment of state complicity required finding that 'an accomplice must have given support in perpetrating the genocide with full knowledge of the facts': *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Rep 43. See also, on this point: Stuart Casey-Maslen,

latter point shifts the focus to the past behaviour and reputation of the recipient party, the specification in Article 6(3) of international crimes under international treaties of which a state is party to, results in disparate obligations between state parties because not all states are also parties to international treaties such as the Rome Statute, which lists certain international crimes.

Article 7, which acts as a fall-back provision to Article 6, requires state parties to prohibit arms exports when there is an 'overriding risk' the exported arms will be used to, *inter alia*, commit or facilitate serious violations of human rights or international humanitarian law. Article 7(1)(a) requires states to conduct risk assessments which consider whether the export 'would contribute to or undermine peace and security'. This provision does not detail the standard of due diligence required for the risk assessment. Similarly, the risk assessment in Article 11 relating to the prevention of diversion does not clarify the required standard of due diligence, only stating state parties are to assess 'the risk' of the export being diverted and to consider whether mitigation measures may be established.⁵⁴⁰ Moreover, the meaning of 'overriding risk' in Article 7 remains undefined in the Arms Trade Treaty, which has resulted in differing interpretations. One view contends the 'overriding risk' threshold 'suggest[s] that the risk of negative consequences needs to be significant for the export to be precluded'.⁵⁴¹ Another interpretation is that the risk assessment by exporter states must balance the risk of the exported arms being used to commit or facilitate serious violations of human rights or international humanitarian law, against the likelihood for those exported arms contributing to peace and security.⁵⁴² Thus, if the exported arms are more likely to contribute to peace and security than negative consequences for human rights, then it is argued 'there is no obligation under the Arms Trade Treaty to deny the authorization'.⁵⁴³ This was commonly assumed to have been the preferred interpretation of the United States during the treaty negotiations; however, its most recent Conventional Arms Transfer Policy indicates the United States has moved away from this approach.⁵⁴⁴

A further view, which has been adopted most notably by New Zealand, is 'overriding risk' means 'substantial risk', therefore where there is a substantial risk of the misuse of arms then the export authorisation must be denied even if there are risk mitigation measures in place.⁵⁴⁵ In situations where arms are exported to conflict zones such as

The Arms Trade Treaty: A Practical Guide to National Implementation (Small Arms Survey 2016) 59 <<https://www.smallarmssurvey.org/sites/default/files/resources/ATT%20Handbook%20Text%20WEB.pdf>>.

⁵⁴⁰ Arms Trade Treaty art 11(2).

⁵⁴¹ Nina HB Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108 *American Journal of International Law* 722, 728.

⁵⁴² Casey-Maslen (n 539) 68.

⁵⁴³ *ibid*.

⁵⁴⁴ The new Conventional Arms Transfer Policy of the United States is further examined in Chapter Six.

⁵⁴⁵ Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 (New Zealand). See also: Government of New Zealand, 'Updated Initial Report on Measures Undertaken to Implement the Arms Trade Treaty, in accordance with its article 13(1)' (July 2019)

<<https://thearmstradetreaty.org/download/6cbd8770-a0be-3676-9932-d4fda67bf9ac>>; UN 'Overwhelming Majority of States in General Assembly Say 'Yes' to Arms Trade Treaty to Stave off Irresponsible Transfers that Perpetuate Conflict, Human Suffering' (2 April 2013) UN Doc GA/11354.

Syria and Yemen, this approach is the most preferable in preventing adverse human rights impacts as it elevates human rights considerations above other interests and underscores the importance of ethical arms export decision-making practices. However, the continuing practices of states in exporting arms to controversial destinations or recipients, such as to the coalition forces in Yemen, illustrate the lack of clarity in the treaty text on what constitutes a 'risk' and how this risk can be objectively determined.⁵⁴⁶ Consequently, while the Arms Trade Treaty represents a significant advancement in preventive responsibilities by including human rights considerations, the lack of clarity of the provisions requiring due diligence for human rights risks allows states to broadly interpret these provisions in ways which favour their national security and commercial interests.

IV. Supra-National Arms Controls and Preventive Responsibilities

There are three key takeaways from the development of preventive responsibilities in supra-national arms controls. The first is the evolution in the object of prevention, with the focus expanding, simultaneously but also somewhat concomitantly, from preventing accumulation and proliferation, to preventing diversion, and then culminating in preventing adverse human rights impacts. The most notable international and regional small arms control measures developed during the early half of this period focus on increasing transparency and cooperation, reflecting heightened recognition of the destabilising effects of small arms, particularly through their accumulation and their entry into illicit markets through theft and diversion. The latter half of the period saw the development of instruments which built on the aims of earlier measures, and incorporated preventive responsibilities that emphasised human rights considerations, most notably the EU Common Position on Arms Exports and the Arms Trade Treaty. The preventive responsibilities in these instruments establish due diligence obligations for states and the consideration of the human rights risks of arms exports. This latest regulatory evolution, which centres the prevention of adverse human rights impacts, is evidently symbiotic with the efforts for preventing the accumulation, proliferation and diversion of weapons, as the greater availability of arms and the entry of arms into illicit markets can increase the potential for their acquisition by irresponsible actors who are more likely to misuse them.

The incorporation of the prevention of adverse human rights impacts into supranational arms controls has coincided with the emergence of the human security paradigm, and been labelled as representing the third major era in arms control brought about by the end of the Cold War; the first era began with World War I and focussed on disarmament, the second era commenced during the 1950s and continued throughout the Cold War and was characterised by deterrence and controlling proliferation.⁵⁴⁷ The incorporation of preventive responsibilities for adverse

See also: Andrew Clapham, 'The Arms Trade Treaty: A Call for an Awakening' (2013) 2 ESIL Reflections 1, 3–4. See, for further discussion on the decision to include 'overriding risk' in the treaty text: Casey-Maslen and others (n 539) 249–250.

⁵⁴⁶ Shaffer, 'The New Legal Realist Approach' (n 57) 202; Jessup (n 43) 107.

⁵⁴⁷ Williams and Viotti (n 103) 3–4.

human rights impacts has also corresponded with the adoption of hard laws at the international level. While earlier treaties established during this period were concentrated at the regional level, the Firearms Protocol and Arms Trade Treaty demonstrate that hard laws and soft law instruments such as UNROCA and the Programme of Action, played important roles in developing norms at the international level and expanding the scope of supranational controls to include small arms.

In addition, despite the correlation between these three types of preventive responsibilities, the focal points of these supranational controls have tended to be on different types of preventive responsibilities. In particular, the continuing distinction between controlling the legal arms trade and illicit markets resulted in the adoption of separate instruments or different provisions and standards within the same instrument. This is illustrated, for example, by the disparate due diligence obligations incorporated into the EU Common Position on Arms Exports and Arms Trade Treaty for preventing diversion and preventing adverse human rights impacts. The effective prevention of adverse human rights impacts is linked to the prevention of diversion, as the acquisition of arms by problematic actors increases the likelihood of their misuse, thus these preventive responsibilities should be viewed as two points in a continuum rather than as divergent obligations. Small arms, in particular, elucidate the importance of doing so, as the diversion of small arms assists known human rights violators and other controversial recipients to acquire these weapons through illicit markets.⁵⁴⁸ This issue is further compounded by the limited transparency of small arms transfers, which is especially problematic in conflict zones as these weapons can easily end up with parties who commit violations of international humanitarian law or human rights. The synergies between the prevention of diversion and the prevention of adverse human rights impacts therefore requires a coordinated approach between different types and levels of controls and their synchronisation, which should also be complemented by measures for improving transparency.

Furthermore, the distinction between regulating legal arms exports and illicit transfers is also observable in the separate instruments for regulating small arms and firearms, which is exemplified by the dual regulatory frameworks of the EU, with laxer export control requirements adopted for (civilian) firearms despite them being technically similar to military small arms. The persistence of this false dichotomy, which exists due to concerns that restrictions on military firearms will impact civilian gun ownership, was also visible in the simultaneous development of the UN Programme of Action and the Firearms Protocol as separate instruments for combatting the illicit trade of small arms and firearms, respectively. The ongoing challenges in developing a unified legal regime for small arms and firearms highlight the continuing influence of political, economic and national security concerns, despite the widespread acknowledgment of the destructive potential of these weapons. At the supranational level there evidently is more disorder than harmony in the regulatory framework for (small) arms exports.

⁵⁴⁸ See, for example, the human rights violations committed by the Islamic State in Syrian conflict following acquisition of illicit weapons: Conflict Armament Research (n 112) 146.

Chapter Six – House Rules

During the twentieth century many states developed domestic arms export regimes, which predominantly focussed on national prerogatives, often informed by economic, political, security and strategic military interests.⁵⁴⁹ Elements of arms controls at the national level tend to include licensing procedures, export criteria and control lists, interagency coordination, interagency cooperation, customs authority and border controls, verification documentation (such as import and export certificates), penalties and enforcement, transparency and oversight (including annual reports of transfer data), marking and tracing of weapons, stockpile management, weapons collection and destruction, and regional and international cooperation.⁵⁵⁰ As arms exports are commonly perceived as necessary for sustaining domestic defence industries and economic well-being, national export regimes have mostly been tailored according to a state's export capabilities and import needs.⁵⁵¹

Following the emergence of the human security paradigm and its incorporation into international and regional level arms controls, there has been increased pressure for states to adopt arms export rules and policies that include human rights considerations.⁵⁵² National laws are essential for the settlement of international and regional arms control standards, such as those elaborated by the Arms Trade Treaty and the EU Common Position on Arms Exports (for the EU exporter states), through the ratification of these instruments and the development of corresponding practices.⁵⁵³ National laws may reflect the standards developed at the international and regional levels, thereby contributing to the strengthening of these standards and their normative settlement.⁵⁵⁴

Throughout the Cold War five states (or their predecessors) dominated the international arms export market.⁵⁵⁵ The United States and Soviet Union maintained the top two spots, cementing their place as the top tier producers.⁵⁵⁶ A second tier of producers, namely, the United Kingdom, France and West Germany, re-emerged as major exporters, increasing their share of the export market from the late 1960s.⁵⁵⁷ China was a late entry to international arms market, but became a large supplier of arms towards the end of the twentieth century.⁵⁵⁸ Since the 1990s, these six states have dominated the global arms trade, consistently holding more than seventy percent of the market share in exports.⁵⁵⁹

⁵⁴⁹ Erickson, *Dangerous Trade* (n 96) 5.

⁵⁵⁰ Stohl and Grillot (n 5) 165–175.

⁵⁵¹ Erickson, *Dangerous Trade* (n 96) 6.

⁵⁵² *ibid* 14.

⁵⁵³ Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44).

⁵⁵⁴ *ibid*.

⁵⁵⁵ SIPRI data from 1950 to 1990: SIPRI, 'SIPRI Arms Transfers Database' (n 344).

⁵⁵⁶ Krause, *Arms and the State* (n 206) 81–4; Menon (n 211) 379–380.

⁵⁵⁷ *ibid*.

⁵⁵⁸ From 1971, the People's Republic of China took the position as a Permanent 5 Member of the Security Council, along with the United States, the Soviet Union, the United Kingdom and France, replacing the Republic of China which had previously held the seat from 1945.

⁵⁵⁹ SIPRI data from 1990 to 2022: SIPRI, 'SIPRI Arms Transfers Database' (n 344).

This chapter assesses the current arms export regimes of the six major exporter states – the United States, the United Kingdom, France, Germany, Russia, and China – according to the chronological order in which their export regimes were established. The examination of these domestic regimes focuses on the following features: first, the regulatory requirements of the regime and the context of their development; second, the main government agencies involved in the export control processes; and third, the export policies and other factors which guide arms export decision-making. The analysis of these three areas provides the foundation for determining the extent to which preventive responsibilities emphasising human rights considerations have been integrated into these national export control regimes.

I. United States

i. The ‘Gold Standard’ Export Controls

The arms export regime of the United States is one of the oldest and most complex in the world, with the earliest regulations being adopted during World War I.⁵⁶⁰ The foundations of the current arms export control regime are the Foreign Assistance Act (1961) and the Arms Export Control Act (1976), which govern the transfer of all defence articles (including weapons, weapons systems, and implements of war) and services originating from the United States.⁵⁶¹ The Foreign Assistance Act specifies defence articles and services ‘to any country shall be furnished solely for’: internal security, legitimate self-defence, participation in regional or collective arrangements or measures consistent with the UN Charter, or participation in collective measures requested by the UN.⁵⁶² The Arms Export Control Act governs the sale and export of weapons manufactured in the United States and designated as part of the United States Munitions List (USML), and confers the primary authority over arms exports and imports to the President.⁵⁶³

The Arms Export Control Act is implemented by the International Traffic in Arms Regulations (ITAR), which regulates transfers of defence articles and services, details the licensing requirements for exports (and temporary imports) of items on the USML (with almost all exports on this list requiring a licence), and specifies the criminal and civil penalties for export control violations.⁵⁶⁴ A distinctive feature of ITAR is the ‘See-Through Rule’ (or ‘ITAR taint’), which subjects any item containing a part or a

⁵⁶⁰ Chapter Three.

⁵⁶¹ Foreign Assistance Act of 1961, 22 USC §2151, et seq (FAA); Arms Export Control Act of 1976, 22 USC §2751, et seq (AECA). The Arms Export Control Act came into being under a different title, the Foreign Military Sales Act of 1968, Public Law 90–629, and incorporates requirements that had previously been codified in the earlier Act. The definition of ‘defence articles’ includes ‘any weapon, weapons system, munition, aircraft, vessel, boat or other implement of war’: FAA §2403, s 644.

⁵⁶² FAA §2302, s 502.

⁵⁶³ AECA §2778.

⁵⁶⁴ International Traffic in Arms Regulations 22 CFR 120-130 (ITAR). Violations of the ITAR can result in criminal and civil penalties, including a criminal sanction of up to USD 1 million per violation and up to 10 years imprisonment for an individual person, and a civil penalty of up to USD 500,000 per violation of the International Traffic in Arms Regulations and debarment from exporting defence articles: AECA § 2778.

component of a defence article listed on the USML to the regulatory control of ITAR, thereby potentially extending ITAR requirements to foreign companies.⁵⁶⁵ The sales and exports of weapons primarily occur through the Foreign Military Sales program and Direct Commercial Sales licences; the other option is the sale of current stocks from the Department of Defence as Excess Defense Articles. Foreign Military Sales involve the federal government acting as an intermediary to procure defence articles for an 'international partner', which refers broadly to a foreign government which is allied and partnered with the United States or NATO.⁵⁶⁶ Direct Commercial Sales allow arms manufacturers and arms brokers, who are registered with the State Department's Office of Defense Trade Controls, to directly sell defence articles to an 'international partner' after obtaining an export licence, which must be approved by the relevant government body.⁵⁶⁷

The Arms Export Control Act has been touted as the 'gold standard' in arms control, providing the basis for standards in the Arms Trade Treaty, which resulted in the existence of the Act being used as the justification for and against the United States joining the treaty.⁵⁶⁸ Most notably, the Act details the export criteria for arms exports, which include requirements for arms export decisions to 'take into account' whether the export would 'increase the *possibility* of outbreak or escalation of conflict' and other security-related considerations, such as contributing to an arms race or aiding in the development of weapons of mass destruction.⁵⁶⁹ In addition, recipients are permitted to use the defence articles only for the purposes of constructing public works, engaging in activities which assist economic and social development, or participating in regional and collective security measures consistent with the UN Charter.⁵⁷⁰ The Act imposes end use monitoring and mandatory Congressional reporting requirements.⁵⁷¹ It also confers the Congress with a power to veto (by joint resolution) proposed sales of greater than USD 50 million, though the President can circumvent this requirement in instances where an arms export decision is categorised as an 'emergency situation'.⁵⁷² In practice, the Congressional veto has only been used once and the end use monitoring system has focussed on high-tech weapons systems.⁵⁷³ Thus, while the regime includes stringent measures which support the imposition of preventive responsibilities, these have tended to be employed sparingly and political justifications are inbuilt into this system.

Automatic firearms are listed in Category I of the USML, with congressional notification required for automatic firearms sales over USD 1 million.⁵⁷⁴ End use monitoring is also

⁵⁶⁵ ITAR §120.6 The issue of extraterritoriality is examined in Chapter Seven.

⁵⁶⁶ FAA §2302.

⁵⁶⁷ AECA §2778 and 2794(7).

⁵⁶⁸ Supporters contended that the United States should join the treaty because it incorporated the high standards already existing in the domestic regime, while opponents argued that joining the treaty would be redundant because of the stricter domestic standards already in place in the United States. See: Erickson, 'Demystifying the "Gold Standard"' (n 114) 132, 135–136.

⁵⁶⁹ AECA §2778(2) (emphasis added).

⁵⁷⁰ AECA §2751.

⁵⁷¹ ITAR 22 CFR § 120.17 and § 123.15, respectively.

⁵⁷² AECA §2776(b).

⁵⁷³ Erickson, 'Demystifying the "Gold Standard"' (n 114) 133.

⁵⁷⁴ AECA §2776.

required for small arms exports, though in practice have had limited effect due to the practical challenges of accurately and comprehensively tracking large shipments of arms, especially in conflict zones where there are greater logistical challenges in tracking supply chains and ensuring stockpile security.⁵⁷⁵ Non-automatic and semi-automatic firearms, including non-automatic and semi-automatic rifles, carbines, revolvers or pistols, are listed on the Commercial Control List, and instead regulated by the Export Administration Regulations, which regulate most commercial and some military item exports, re-exports and in-country transfers.⁵⁷⁶ Licensing procedures under the Export Administration Regulations require assessment of the impact of a proposed export on the United States defence industrial base, examination of foreign ownership interests of the consignee, and review and evaluation of the interagency export licensing referral, review, and escalation procedures.⁵⁷⁷ Consequently, the different regulatory requirements for small arms and non-automatic firearms has led to separate preventive responsibilities, with the latter types of weapons not being held to the same 'gold standard'.

ii. Agencies involved in Licensing and Monitoring

Numerous state agencies are involved in implementing export controls. The State Department, with input from the Department of Defense, determines which items are added to the USML. The licensing process includes an extensive review process which can involve the Department of Defense, Department of State, Department of Energy, the intelligence community, and the National Aeronautics and Space Administration. These agencies review, in particular, the parties involved in the transaction, the eligibility of the applicant to export defence-related items, the appropriateness of the quality and quantity of the proposed export to the end-user and stated end use, and whether the proposed export faces any legal impediments.⁵⁷⁸ In addition, the review process also requires assessment of the foreign policy implications of the proposed export, including the potential effect on regional stability and human rights, thereby imposing appropriate preventive responsibilities on these agencies to prevent and mitigate adverse human rights impacts.⁵⁷⁹ The State Department is responsible for congressional reporting for Direct Commercial Sale export licences and proposed Foreign Military Sale cases.⁵⁸⁰ End use monitoring is conducted through two programmes – the Golden Sentry programme of the Defence

⁵⁷⁵ Erickson, 'Demystifying the "Gold Standard"' (n 114) 133.

⁵⁷⁶ Export Administration Regulations 15 CFR § 730-774 (EAR). The eventual adoption of the Export Controls Reform Act of 2018, 50 USC §4801, et seq (ECRA), which repealed the Export Administration Act of 1979 that had expired in 2001, included new provisions which created an interagency process to establish new controls on emerging and foundational technologies, and to review licence requirements for exports, reexports, or in-country transfers of items to countries subject to a comprehensive United States arms embargo, including China. The Commercial Control List was last updated 24 February 2023 and includes non- automatic and semi-automatic firearms of equal to or less than .50 inch calibre (12.7 mm), and non-automatic and non-semi-automatic rifles, carbines, revolvers or pistols with a calibre greater than .50 inches (12.7 mm) but less than or equal to .72 inches (18.0 mm): EAR Supplement No. 1 to Part 774.

⁵⁷⁷ ECRA §4815-4822.

⁵⁷⁸ FAA §2301; AECA §2302.

⁵⁷⁹ *ibid.*

⁵⁸⁰ *ibid.*

Department for Foreign Military Sales transfers, and Blue Lantern programme of the State Department for Direct Commercial Sales transfers – and benefits from the extended diplomatic and military network the United States has internationally.⁵⁸¹ Implementation and enforcement of the Export Administration Regulations is only undertaken by the Bureau of Industry and Security, therefore the export of Commercial Control List items are not subject to the same strict, multiagency review process of Direct Commercial Sales.

iii. Conventional Arms Transfer Policy

Since the 1970s, and commencing with the Carter administration, the Conventional Arms Transfer Policy (CAT Policy) has provided the policy framework for the United States' decision-making on arms transfers. In February 2023, the Biden-Harris administration published its CAT Policy, which established a new baseline presumption for arms exports emphasising the protection of human rights globally as a means for bolstering the national security of the United States.⁵⁸² This CAT Policy is especially notable as it affirms 'no arms transfer will be authorized where the United States assesses that it is *more likely than not* that the arms to be transferred will be used by the recipient to commit, facilitate the recipients' commission of, or to aggravate risks that the recipient will commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions ... or other serious violations of international humanitarian or human rights law'.⁵⁸³ The policy shift reinforces preventive responsibilities by promoting export control practices which incorporate stronger human rights considerations, creating a 'race to the top', as opposed to a 'race to the bottom' for lax arms export policies. The elevation of human rights considerations is particularly significant given the authority of president under the Arms Export Control Act to override decisions to export arms if the proposed export assists in securing peace and security or the President deems it an 'emergency situation', irrespective of whether human rights risks have been identified during the review process.⁵⁸⁴ The new CAT Policy presents a notable shift in the approach of the United States, and when combined with the strict export regulations, the CAT Policy has the potential to transform arms export practices to elevate human rights considerations and centre ethical decision-making.

iv. Preventive Responsibilities

Despite the strict export requirements, the United States has consistently been significantly involved in arming conflicts during the twenty-first century, including being the largest arms supplier to states involved in armed conflicts (such as Saudi Arabia and its involvement in Yemen), and the largest exporter of arms to conflict zones

⁵⁸¹ AECA §2785. See also: Erickson, 'Demystifying the "Gold Standard"' (n 114) 132.

⁵⁸² The White House, 'Memorandum on United States Conventional Arms Transfer Policy' (*The White House*, 23 February 2023) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>>. There have been four CAT Policies over the four previous administrations.

⁵⁸³ *ibid* (emphasis added).

⁵⁸⁴ AECA §2778(e).

overall.⁵⁸⁵ The United States continues to supply large amounts of weapons to Ukraine, however, these have been provided through military aid or through the 'Presidential Drawdown Authority', which permits the President to provide emergency military assistance taken from the military supplies of the Department of Defence without congressional approval (only notification is required) – though Congress has the potential to control future drawdowns by restricting defence spending in future budgets.⁵⁸⁶ The drawdown authority has most controversially been used in this war to provide cluster munitions to Ukraine.⁵⁸⁷ There has also been a push by arms manufacturers for expedited export licences to sell weapons to Ukraine,⁵⁸⁸ which further indicates the previous approach of exporting arms as a means for securing peace and international security is still adopted in practice.

Moreover, other recent policy decisions of the United States may also undermine the performance of preventive responsibilities. In particular, the decision by the previous administration, which has not been reversed by the current one, to move semi-automatic firearms to the Commercial Control List. This decision has been criticised for a number of reasons, including because the ease with which a semi-automatic firearm can be modified to operate as a fully automatic one renders the distinction meaningless.⁵⁸⁹ Non-automatic and semi-automatic firearms and other guns which are listed on the Commercial Control List are of a similar calibre size to the standard rifles used by NATO forces and many other countries, including in numerous wars since World War II. The designation of these weapons on the Commercial Control List, thereby affirming their civilian as well as military use, is problematic as it enables arms manufacturers and arms brokers to circumvent the stricter controls on USML items imposed by the Arms Export Control Act. This, in turn, increases the potential volume of small arms and firearms sales to overseas markets, which runs counter to limiting their proliferation and provides greater opportunities for arms traffickers and human rights violators to acquire these weapons.⁵⁹⁰ As such, even with 'gold standard' export controls, there are still policies and mechanisms integrated into the export control system of the United States which hinder the implementation of preventive responsibilities elevating human rights considerations.

⁵⁸⁵ Perlo-Freeman (n 86) 15; A Trevor Thrall and Caroline Dorminey, 'Risky Business: The Role of Arms Sales in U.S. Foreign Policy | Cato Institute' (CATO Institute 2018) Policy Analysis 836 <<https://www.cato.org/policy-analysis/risky-business-role-arms-sales-us-foreign-policy>>. For twentieth-century practices, see: William D Hartung, 'US Conventional Arms Transfers: Promoting Stability or Fueling Conflict?' (1995) 25 Arms Control Today 9, 9–13; Davis (n 52) 161–2.

⁵⁸⁶ FAA §2318(a)(1). The weapons provided to Ukraine have been through drawdowns and military aid: Kiel Institute, 'Ukraine Support Tracker' <<https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>>.

⁵⁸⁷ Anthony J Blinken, 'Additional U.S. Security Assistance for Ukraine' *United States Department of State* (7 July 2023) <<https://www.state.gov/additional-u-s-security-assistance-for-ukraine-8/>>.

⁵⁸⁸ Nabih Bulos, 'Who's Benefiting from Russia's War on Ukraine? Arms Dealers and Manufacturers' *Los Angeles Times* (2 March 2023) <<https://www.latimes.com/world-nation/story/2023-03-02/ukraine-war-beneficiaries-arms-dealers-manufacturers>>; Justin Scheck, 'She's a Doctor. He Was a Limo Driver. They Pitched a \$30 Million Arms Deal.' *The New York Times* (6 October 2022) <<https://www.nytimes.com/2022/10/06/world/europe/ukraine-private-arms-deals.html>>.

⁵⁸⁹ Amnesty International USA, 'Strengthening Human Rights For All in 2021' (Amnesty International USA 2020) 10 <https://bidenhumanrightspriorities.amnestyusa.org/wp-content/uploads/2020/11/Strengthening-Human-Rights-For-All-in-2021_110620.pdf>.

⁵⁹⁰ *ibid.*

II. United Kingdom

i. **Export Controls and Scandals**

The United Kingdom is another state which has one of the oldest arms industries and implemented its earliest domestic export controls during World War I. The export controls adopted during the 1930s, such as the 1939 Import, Export and Customs Powers (Defence) Act, remained largely unchanged until the end of the Cold War. In the 1990s, revelations of arms scandals forced a modernisation of the United Kingdom's arms export control system. In particular, the 'Arms-to-Iraq affair', which involved arms sales to Iraq by British arms manufacturers during the 1980s, including during the Iran-Iraq War, and resulted in a government-commissioned judicial inquiry. The subsequent report of the inquiry identified several limitations of the 1939 Act, including the lack of transparency and lack of accountability of the government to the parliament for export control procedures, and criticised the government's failure to disclose its adoption of a 'more liberal policy on defence sales to Iraq'.⁵⁹¹ In 1997, the newly elected Labour party sought to revamp the export control system, commencing with a White Paper on Strategic Export Controls published in July 1998 proposing 'a new legislative framework for strategic export controls and improvements to export licensing procedures', including updating the export control powers in light of technological developments and brokering deals.⁵⁹²

In the early 2000s, shortly after the EU adopted its Code of Conduct (1998), the United Kingdom adopted the Export Control Act (2002) as its main regulatory framework for controlling the export of military and dual-use items, replacing the 1939 Act.⁵⁹³ The 2002 Act is complemented by the Export Control Order (2008), which consolidated Orders made under the Export Control Act and introduced regulations for dual-use goods (including firearms), including provisions on licensing and penalties for these types of items, including civil and criminal sanctions.⁵⁹⁴ The United Kingdom's export control regime consists of two elements: Strategic Export Control Lists (the consolidated list of military and dual-use items which require export licences) and Strategic Export Licensing Criteria (the eight criteria for assessing export licence applications). These regulations have been amended in recent years primarily to address 'the inoperabilities and deficiencies' following the United Kingdom's formal withdrawal from the EU, such as removing references to reciprocal agreements.⁵⁹⁵

⁵⁹¹ House of Commons, Scott Report HC Deb 15 February 1996 Vol 271 Cc1139-64 (Hansard, 15 February 1996) <<https://api.parliament.uk/historic-hansard/commons/1996/feb/15/scott-report>>. For further examination of the report, see: James Radcliffe, 'The Scott Inquiry, Constitutional Conventions and Accountability in British Government' (1996) 26 Crime, Law and Social Change 239.

⁵⁹² Government of the United Kingdom, 'White Paper - Strategic Export Controls' (July 1998) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20040117083021/http://www.dti.gov.uk/export.control/policy/whitepaper/index.htm>>.

⁵⁹³ Export Control Act 2002, c 26; Export Control Order 2008, No 3231.

⁵⁹⁴ Violations of the Export Control Act 2002 and Export Control Order 2008 which are deliberate or premeditated can result in up to 10 years in prison and an unlimited fine: Export Control (Amendment) (EU Exit) Regulations 2022, No 1300.

⁵⁹⁵ Export Control (Amendment) (EU Exit) Regulations 2022, No 1300; Export Control (Amendment) (EU Exit) (No 2) Regulations 2020, No 1510; Export Control (Amendment) (EU Exit) Regulations 2020, No 1502; Export Control (Amendment) (EU Exit) Regulations 2019, No 137. Quote from the explanatory memorandum of the 2019 Amendment.

The 2002 Act established two types of licences (standard and open). Small arms are listed as military goods in the 2008 Order, and thus require a standard or open general export licence under the 2002 Act.⁵⁹⁶ Unlike the requirements for a standard licence, an Open General Export Licence does not require the inclusion of certain information that is publicly available for standard licences, including the value of the export. Firearms are listed on the Dual-Use List and require an export licence under the 2008 Order.⁵⁹⁷ Under the 2008 Order, firearms require either an Open General Export Licence or, where the terms and conditions of that type of licence cannot be met, a standard individual export licence or an open individual export licence.⁵⁹⁸ Prior informed consent is also required by the destination country, which involves submitting either a form which confirms prior informed consent from the destination country or an end-user undertaking form (where the former form or equivalent is not issued by the destination country).

In December 2021, the Strategic Export Licensing Criteria was adopted to revise and replace the Consolidated EU and National Arms Export Licensing Criteria, which had incorporated the criteria of the EU Common Position and was in force between 2014 and 2021.⁵⁹⁹ A key amendment was the inclusion of the words ‘The Government will not grant a licence *if ... it determines*’. These words were added to several criteria relating to risk assessments the government must undertake prior to the granting of an export licence, including Criterion 2 on the respect for human rights and fundamental freedoms.⁶⁰⁰ This amendment has been criticised for diverging from the EU approach, narrowing the reasons for the refusal of licence applications (including by not elaborating on the meaning of ‘exceptional circumstances’ or significant impact of the exported arms on ‘the international relations of the United Kingdom’), narrowing the scope for potential future legal challenges, and effectively enabling the government to ignore evidence necessitating export restraint.⁶⁰¹

ii. Agencies and Industry

Since 2023, the export control and licensing systems for military and dual-use goods have been administered by the Export Control Joint Unit, which is part of the

⁵⁹⁶ Export Control Order 2008, Schedule 2 and art 26.

⁵⁹⁷ Export Control Order 2008, art 15, 16.

⁵⁹⁸ Committees on Arms Export Controls, ‘Developments in UK Strategic Export Controls: First Joint Report of Session 2022–23’ (House of Commons 2022) HC 282 9 <<https://committees.parliament.uk/publications/30529/documents/176077/default/>>.

⁵⁹⁹ Anne-Marie Trevelyan, ‘Trade Policy Update: Statement UIN HCWS449’ (8 December 2021) <<https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/hcws449>>.

⁶⁰⁰ This amendment was also added to: Criterion 3 (preservation of internal peace and security), Criterion 4 (preservation of peace and security) and Criterion 6 (the behaviour of the buyer country with regard to the international community).

⁶⁰¹ Control Arms UK, ‘Supplementary Written Evidence Submitted by Control Arms UK, Written Evidence UK Arms Exports in 2019 (UKA0017)’

<<https://committees.parliament.uk/writtenevidence/43608/html/>>; Anna Stavrianakis, ‘Missing in Action: UK Arms Export Controls during War and Armed Conflict’ (World Peace Foundation 2022) <<https://sites.tufts.edu/reinventingpeace/2022/03/15/missing-in-action-uk-arms-export-controls-during-war-and-armed-conflict/>>. See also: Anna Stavrianakis, ‘Debunking the Myth of the “Robust Control Regime”’: UK Arms Export Controls during War and Armed Conflict’ (2023) 14 Global Policy 121, 123.

Department for Business and Trade and brings together the operationalisation and policy expertise of this department as well as the Foreign, Commonwealth and Development Office and Ministry of Defence. The latter two departments provide advice on whether export licences should be granted or denied to the Department for Business and Trade, who then executes the decision. In 1997, the government created the Committees on Arms Export Controls to provide parliamentary scrutiny of government export policies and processes, which demonstrated a growing shift towards transparency in the parliamentary system as a whole. The United Kingdom has a specialised government agency for promoting arms exports abroad, known as United Kingdom Defence and Security since 2020. The original body, Defence Export Services Organisation (DESO), was created in 1966 and intimately linked to the arms industry, with the head of DESO selected from the arms industry and their salary also supplemented by the arms industry.⁶⁰² DESO was disbanded in 2008 because of another arms export scandal investigation. The agency was transferred to the Department of International Trade (which at the time was called United Kingdom Trade and Investment) and renamed the Defence & Security Organisation (DSO).

In 2006, an investigation was initiated by the Serious Fraud Office into British arms manufacturer BAE Systems concerning the creation of a Saudi slush fund to solidify an arms deal pushed by DESO and the Thatcher government in the 1980s.⁶⁰³ This scandal was particularly egregious due to the close ties between the government and BAE Systems. The company is involved in a large amount of Ministry of Defence contracts, and the government retains a 'golden share' in the company. The government's 'golden share' in BAE Systems and Rolls-Royce, another large manufacturer, allows it to retain a controlling share in these companies and block ownership changes which are deemed not to be in the national interest, usually in cases of foreign takeovers.⁶⁰⁴ BAE Systems continues to be directly contracted by the government to act on its behalf in some arms export deals, specifically with regard to arms deals with Saudi Arabia.⁶⁰⁵ The persisting intimate links between the arms industry and the government of the United Kingdom reflect the significant commercial interests which can drive arms exports, and may consequently limit the effective performance of preventive responsibilities which centre human rights considerations.

iii. Uncovering Export Processes

The United Kingdom has long maintained a tradition of secrecy about arms exports, with scandals and litigation functioning as the two main sources for uncovering export

⁶⁰² Leigh and Evans (n 280); Davis (n 52) 21.

⁶⁰³ Tim Jarrett and Claire Taylor, 'Bribery Allegations and BAE Systems' (House of Commons Library 2010) Standard Note SN/BT/5367
<<https://researchbriefings.files.parliament.uk/documents/SN05367/SN05367.pdf>>.

⁶⁰⁴ The British government's golden shares in BAE Systems and Rolls-Royce are not time limited: Mick Hillyard, 'International Development - Eighth Report, Annex II: The Golden Share' (Select Committee on International Development, House of Commons 1998). See also: Stavrianakis, 'Debunking the Myth' (n 601) 123; Alan Tovey, Richard Evans and Lucy Burton, 'Britain Must Take "golden Share" in Defence Firms like Meggitt, Say MPs' *The Telegraph* (4 August 2021)
<<https://www.telegraph.co.uk/business/2021/08/04/britain-must-take-golden-share-defence-firms-like-meggitt-say/>>.

⁶⁰⁵ Stavrianakis, 'Debunking the Myth' (n 601) 123.

decisions and practices. For example, the United Kingdom did not maintain internal statistics of export-licensing until 1987, and it was only following the Arms-to-Iraq scandal, which had ironically been kept secret due to fear of public backlash, that export data transparency was substantially increased.⁶⁰⁶ The continuing lack of transparency has also received recent attention because of the government's lack of explanation for its imposition of large monetary fines on arms manufacturers for export control violations, and the criticism by the Committees on Arms Export Controls about the government not disclosing changes to the Strategic Export Criteria to the Committee in advance.⁶⁰⁷

Litigation by NGOs has been particularly effective in uncovering parts of the export decision-making process and spotlighting the discrepancies between regulations and the arms export practices of the United Kingdom. For example, the Campaign Against Arms Trade (CAAT) filed a first administrative challenge against the government in 2017, on the legality of export of arms to Saudi Arabia due to the 'clear risk' the arms 'might' be used to commit serious violations of international humanitarian law, specifically in the Yemen conflict.⁶⁰⁸ The Appeal Court found the government's export decision to be unlawful and required the government to follow a lawful decision-making process that considered the breaches of international humanitarian law in Yemen before rendering a fresh decision.⁶⁰⁹ The government reconducted the risk assessment, but came to the same conclusion that there was no clear risk of the exports being used in the Yemen conflict.⁶¹⁰ In response, CAAT filed a second administrative challenge, but this was dismissed by the High Court on 6 June 2023, with the court finding the government had not acted 'irrationally' in granting the new export licences to Saudi Arabia.⁶¹¹

iv. Preventive Responsibilities

While the CAAT judgment exposed some aspects of export practices, and forced the government to accept risk assessments are a necessary exercise in export licensing, whether it altered the performance of preventive responsibilities is questionable. In its second risk assessment, the government once again concluded there was no clear risk and affirmed the difficulties in knowing the facts on the ground in Yemen.⁶¹² The latter argument stands in stark contrast the position it has espoused in regard to the Ukraine conflict, where it has recognised serious violations of international humanitarian law are being committed, including targeted attacks on civilians and the

⁶⁰⁶ Radcliffe (n 591). See, generally, on export scandals: Erickson, *Dangerous Trade* (n 96).

⁶⁰⁷ AOAV, 'UK Arms Export Fines Quadruple in Two Years' (*Action on Armed Violence*, 16 February 2022) <<https://aoav.org.uk/2022/uk-arms-export-fines-quadruple-in-two-years/>>; Committees on Arms Export Controls (n 598) 16–17.

⁶⁰⁸ *The Queen (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade and Intervenors* [2017] EWHC 1726 (QB).

⁶⁰⁹ *The Queen (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade* [2019] EWCA Civ 1020 (Court of Appeal).

⁶¹⁰ *The King, on the application of CAAT, v Secretary of State for International Trade* [2023] EWHC 1343 (Admin), para 26.

⁶¹¹ *ibid*, para 173.

⁶¹² *ibid*, para 118-121.

destruction of civilian infrastructure.⁶¹³ The narrow interpretation of the scope for licence refusals hinders the performance of comprehensive preventive responsibilities by allowing human rights considerations to be subverted, which could be further exacerbated by the updated export criteria. This is especially concerning in regard to the arms sales to conflict zones, for which the United Kingdom has been the second highest exporter.⁶¹⁴ It is also illustrated by the continuing exports to Saudi Arabia despite the significant evidence detailed in domestic litigation, of the involvement of this recipient in violations of human rights and international humanitarian law in the Yemen conflict.

In addition, the United Kingdom maintains a close relationship between the state and the arms industry, which may further frustrate the effective performance of preventive responsibilities which elevate human rights considerations because other interests, including commercial benefits of arms sales, are more likely to be determinative factors. Consequently, the effective implementation of preventive responsibilities for adverse human rights impacts is inhibited by the significant influence and commercial interests of the arms industry, including large arms manufacturers such as BAE Systems, as well as those of state, which may result in export licenses being granted without proper assessment of the risks associated with a potential recipient.

III. France

i. **Dual Regimes of Export Controls**

France is another major exporter with one of the oldest arms industries in the world, and an early adopter of export controls. The foundations of the French export control system were established around the World War II years, with the Legislative Decree of 18 April 1939, prohibiting the export of items and equipment classified as war material (*les armes de guerre*) and requiring prior government authorisation for arms exports.⁶¹⁵ The 1939 Decree was mostly notably amended in 1967 to include conditions necessary for the authorisation of exports such as licensing procedures.⁶¹⁶ Further significant changes were only undertaken in the 2000s. In 2007, a new strategic direction for arms exports was announced by the French Defence Minister, who prioritised the modernisation of France's export control process.⁶¹⁷ This new strategic direction sought to support arms export controls through the development of

⁶¹³ Oxfam, 'Fueling Conflict: Analyzing the human impact of the war in Yemen' (11 January 2023) <<https://policy-practice.oxfam.org/resources/fueling-conflict-analyzing-the-human-impact-of-the-war-in-yemen-621478/>>; Foreign, Commonwealth and Development Office, 'Press Release: New UK sanctions target senior Russian commanders following strikes on Ukrainian civilian infrastructure' (13 December 2022) <<https://www.gov.uk/government/news/new-uksanctions-target-senior-russian-commanders-following-strikes-on-ukrainian-civilianinfrastructure>>.

⁶¹⁴ Perlo-Freeman (n 86) 15–16. On earlier practices, see, for example: Lerna K Yanik, 'Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations' (2006) 28 *Human Rights Quarterly* 357.

⁶¹⁵ Décret du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions, JORF no 138 of 13 June 1939, art 13.

⁶¹⁶ Décret du 30 janvier 1967 Procédures d'Exportation, JORF no 0026 of 31 January 1967.

⁶¹⁷ Stohl and Grillot (n 5) 69.

a national strategic plan, modernise the coordination of support measures, and reorganise the procedures relating to the sale and disposal of surplus and second-hand equipment.

Following the entry into force of the EU Directive on intra-community transfers of defence related products (2009), France revised its export control system to establish two distinct regimes: one for transfers of defence-related products to other EU member states, and another for export of military technology and equipment to states which are not EU member states (referred to as 'third countries').⁶¹⁸ The export controls for these two regimes are constituted by a number of laws, resulting in a convoluted system which required streamlining, such as the harmonisation of terminology in the Defence Code and the Internal Security Code.⁶¹⁹ The Defence Code provides the general regime applicable to war materials, arms and munitions, which operates on a principle of prohibition unless authorised by the state, and includes the penalty provisions for export control violations.⁶²⁰ The EU Common Military List is integrated into the export regime through the Order of 27 June 2012, which lists the war materials and equipment requiring prior authorisation for export and transfer, and is updated annually.⁶²¹ Prior to obtaining an export licence, an arms manufacturer must register with the relevant department, which grants a five year renewable permit to manufacture and trade arms.⁶²²

Exports within the EU require a transfer licence, while exports to third countries require an export licence. Both export and transfer licences can be requested as an individual licence (for export/transfer to a single recipient), a global licence (for export/transfer to one or more identified recipients for a specified period of time but without a restriction on the quantity or amount), and a general licence (for export/transfer to recipients specified by the French government).⁶²³ Small arms designed for military use and other smooth-bore weapons which are fully automatic, or semi-automatic or pump-action, are listed in category ML1 of the Military List and therefore require export

⁶¹⁸ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (10 June 2009) Official Journal of the European Union L 146/1.

⁶¹⁹ Ordonnance no 2019-610 du 19 juin 2019 portant harmonisation de la terminologie du droit de l'armement dans le code de la défense et le code de la sécurité intérieure, JORF no 0141 of 20 June 2019.

⁶²⁰ Code de la défense. Penalties can involve a fine of up to EUR 150,000 and the suspension, modification or revocation of an export licence for administrative sanctions, and five years' imprisonment and a fine of EUR 75,000 for criminal sanctions or ten years' imprisonment and a fine of EUR 500,000 when committed by an organized criminal syndicate: art L.2335-2, L2339-2 to L2339-4-1. For violations relating to WMD materials, the fine can be up to EUR 500,000 or fifteen years' imprisonment, which increases to EUR 3,000,000 and twenty years' imprisonment when committed by an organized criminal syndicate: art L2339-14.

⁶²¹ Arrêté du 27 juin 2012 relatif à la liste des matériels de guerre et matériels assimilés soumis à une autorisation préalable d'exportation et des produits liés à la défense soumis à une autorisation préalable de transfert, JORF no 0151 of 30 June 2012 (Arrêté du 27 juin 2012). This order was last amended on 31 March 2023.

⁶²² The relevant department (the Ministry of the Interior or by the Ministry of the Armed Forces) depends on the type of military equipment that is sought to be manufactured and trade: Ministry of the Armed Forces, 'Report to Parliament on the Export of French Armaments' (Government of France 2022) 31 <<https://www.defense.gouv.fr/rapport-au-parlement-2022-exportations-darmement-france>>.

⁶²³ *ibid*.

licences for third country exports and transfer licences for exports within the EU.⁶²⁴ For small arms exports, the export criteria in the EU Common Position are applicable for assessing licences, thus preventive responsibilities such as risk assessments are required.⁶²⁵ Additional conditions are required for a general licence, which are defined by a ministerial order, and in most cases require the arms manufacturer to obtain commitments from its client on end use, and imposes re-export prohibitions without obtaining prior agreement from the French government.⁶²⁶ Corresponding with the EU's dual regimes, the export restrictions for firearms are governed by different rules, specifically the Internal Security Code, and require an import licence from the recipient state or a transit certificate, but does not have strict export criteria as with small arms, thereby requiring less stringent preventive responsibilities.⁶²⁷

ii. The Interministerial Commission

The export licensing system is overseen by the Interministerial Commission for the Study of Military Equipment Exports (CIEEMG), which was established in 1955 and is chaired by the General Secretariat for Defense and National Security. Licence applications are assessed in three phases: the admissibility phase, the ministerial instruction phase, and the inter-ministerial instruction phase.⁶²⁸ Several phases of admissibility or investigation are carried out for complex cases, indicating additional preventive responsibilities may be required in some situations.⁶²⁹ The ministerial instructions phase is carried out in parallel by the three ministries which have voting rights in the CIEEMG: the Ministry of Armed Forces, the Ministry for Europe and Foreign Affairs, and the Ministry of Economics and Finance. This is followed by the inter-ministerial consultation within the CIEEMG, led by the General Secretariat for Defense and National Security, which recommends whether an individual or global licence should be granted to the Prime Minister, who then executes the decision. General licences are not assessed by the CIEEMG and can only be obtained following registration with the Ministry of Defence. The export of civilian firearms must be authorised by the Minister of Customs, who may be advised by the Ministers of home affairs, foreign affairs or defence on specific cases. Since 2010, export controls for dual-use goods have been centralised, following the establishment of the Service des Biens à Double Usage (SBDU) in the Ministry of Economy, Industry and Employment. The SBDU includes experts from different agencies and its creation introduced some clarity and transparency for dual-use exports. The French Defence Procurement Agency is responsible for undertaking *ex-post* controls to monitor the risk of diversion to non-authorised end users, however these preventive responsibilities do not require monitoring of human rights risks as a complementary measure.⁶³⁰

⁶²⁴ Arrêté du 27 juin 2012.

⁶²⁵ Ministry of the Armed Forces (n 622) 28.

⁶²⁶ *ibid.*

⁶²⁷ Code de la sécurité intérieure, s R316-38 to R316-50. France also applies the EU regulations on civilian firearms: Regulation No 258/2012 of the European Parliament and of the Council of 14 March (30 March 2012) Official Journal of the European Union L 94/1.

⁶²⁸ Ministry of the Armed Forces (n 622) 26.

⁶²⁹ *ibid.*

⁶³⁰ *ibid* 31.

iii. Strategic Autonomy and Industry Influence

Arms exports have been and continue to be regarded as a pillar of French defence policy and are an integral part of France's overall response to security issues, which include responding to the legitimate defence needs of partner countries, enabling the French arms industry to supply equipment and capabilities consistent with France's strategic ambitions, and respecting international arms control commitments.⁶³¹ The production and export of arms continue to be a feature of the 'strategic autonomy' France expounded throughout the Cold War, which includes expanding its recipient base to new arms markets and maintaining its highly developed defence industry, which retains close relations with the government.⁶³² In its annual reports on arms exports, France emphasises that the export of arms ultimately remains 'a sovereign act' and 'the business model' for French sovereignty, reaffirming the centrality of the arms industry to the state and highlighting the significance of commercial interests in arms export decision-making.⁶³³

In addition, the emphasis on arms export decisions as being intrinsically political has intensified the secrecy attached to these decisions, with protection of national security being deployed as the primary justification for limiting transparency.⁶³⁴ The lack of transparency saw fourteen NGOs issue a press release in 2020 urging the French government to 'end its opacity on arms sales'.⁶³⁵ However, the French government continues to resist the calls for greater transparency. For example, in response to the Maire-Tabarot Report published in November 2020, which recommended parliamentary oversight and consultation for the arms exports and increasing transparency of the government decision-making process, the government cited the preservation of national defence secrets, business secrets, and confidentiality of strategic partnerships as reasons for maintaining secrecy for export decision-making.⁶³⁶ Though efforts were also made to increase transparency in regard to dual-use items, with a Report to Parliament being provided in 2022, the debate for the Report occurred behind closed doors, thereby limiting opportunities for scrutiny.⁶³⁷

⁶³¹ *ibid* 10.

⁶³² Soubrier (n 236) 117.

⁶³³ *ibid* 113, 117.

⁶³⁴ Ordonnance du 26 septembre 2019 (26 September 2019) Paris Administrative Court of Appeal, Order no 19PA02929, para 3. On 27 January, 2023, the first administrative case was dismissed on appeal by the Council of State due to a lack of jurisdiction to scrutinize general arms exports licensing decisions: Conseil d'État 436098, lecture du 27 janvier 2023, ECLI:FR:CECHR:2023:436098.20230127.

⁶³⁵ FIDH, 'A Call for the Establishment of Parliamentary Control over French Arms Sales' (*International Federation for Human Rights*, 26 November 2020) <<https://www.fidh.org/en/region/europe-central-asia/france/call-for-parliamentary-control-over-french-arms-sales>>.

⁶³⁶ Ministry of the Armed Forces (n 622) 37. The Maire-Tabarot Report is confidential, for a publicly available summary, see: Disclose, 'Arms Exports: The French Government Offensive against Parliament' (*Disclose*, 11 December 2020) <<https://disclose.ngo/en/article/arms-exports-the-french-government-offensive-against-parliament>>.

⁶³⁷ Soubrier (n 236) 114.

iv. Preventive Responsibilities

As an EU member state, France incorporates the principles and criteria enunciated in the EU Common Position, in addition to the Arms Trade Treaty, and integrates preventive responsibilities for adverse human rights impacts into its national export regime. However, the language of these instruments has not been explicitly incorporated into the Code of Defence, nor is it clarified in the Code how these instruments can be invoked in court, which presents a challenge for accountability measures.⁶³⁸ While France contends its export control system imposes strict requirements, it simultaneously promotes itself as a reliable export partner, which has the potential to hinder the performance of preventive responsibilities as it enables other concerns, including political, diplomatic and commercial interests, to take precedence over human rights considerations.⁶³⁹ The subversion of human rights considerations in French export decision-making is highlighted by the continuing export of arms to warring parties on multiple occasions, with 40 percent of France's total arms exports between 2012 and 2021 being supplied to Egypt, Qatar, Saudi Arabia and the United Arab Emirates, all of whom have been involved in the Yemen conflict since 2015.⁶⁴⁰ The coincidence of increased arms sales with the Yemen conflict is highlighted in particular by Egypt, which has become a significant customer of France since the beginning of the conflict.⁶⁴¹ Recent arms export data has also revealed France 'is one of the exporters for which conflict appears to be associated with a higher probability of transfers'.⁶⁴² Based on these practices, it can be inferred the implementation of preventive responsibilities emphasising human rights considerations remain limited due to competing interests and the influence of the arms industry.

IV. Germany

i. Complex but Strict Export Controls

The current arms export regime of Germany is made up of a number of laws and political principles, many of which have been in place since the 1960s. This continuity is a result of the decentralisation of power by the (West) German constitution, the federal model of governance, a strong Constitutional Court, and proportional election rules requiring collaboration between all parties. The main export control regulations are the Foreign Trade and Payments Act and the War Weapons Control Act (which incorporates the War Weapons List), both of which were originally adopted in 1961, and the Foreign Trade and Payments Ordinance, which was adopted as an amendment to the export regime in 1986 to regulate exports of military and dual-use

⁶³⁸ ATT Expert Group, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice' (Saferworld 2021) Briefing No 8 27. See, for example: Ordonnance du 26 septembre 2019 (2019) Paris Administrative Court of Appeal, Order no 19PA02929.

⁶³⁹ Soubrier (n 236) 117.

⁶⁴⁰ Perlo-Freeman (n 86) 16; Soubrier (n 236) 114; Cécile Fauconnet, Julien Malizard and Antoine Pietri, 'French Arms Exports and Intrastate Conflicts: An Empirical Investigation' 30 *Defence and Peace Economics* 176, 176–177.

⁶⁴¹ Perlo-Freeman (n 86) 16.

⁶⁴² *ibid* 5; Fauconnet, Malizard and Pietri (n 640) 276.

items.⁶⁴³ Although the main export regulations have been in place since the 1960s, there have been numerous amendments, resulting in complex legal texts. Notably, in 2013, the Foreign Trade and Payments Act was amended, alongside the Foreign Trade and Payments Ordinance, in accordance with the coalition agreement between the Christian Democratic Union (Christlich Demokratische Union Deutschlands, CDU)/Christian Social Union (Christlich-Soziale Union in Bayern, CSU) and the Free Democratic Party (Freie Demokratische Partei, FDP). The purpose of these amendments were to streamline the legislation, to make them more easily understandable, and to remove provisions allegedly disadvantaging German manufacturers against their European competitors.⁶⁴⁴ The amended Foreign Trade and Payments Act created new opportunities for companies to voluntarily disclose any negligent breaches of the regulations and updated the administrative and criminal penalties for individuals and companies for violations of national and European export control laws.⁶⁴⁵

The export of military items, including weapons, ammunition and armament materials, which are listed under Part I Section A of the Export List require an export licence under Foreign Trade and Payments Regulation (in conjunction with the Foreign Trade and Payments Ordinance).⁶⁴⁶ Part 1 Section B of the Export List focuses on dual-use items, which also require a licence under the Foreign Trade and Payments Regulation (in conjunction with the Foreign Trade and Payments Ordinance) when exported to certain destinations.⁶⁴⁷ Items also listed on the War Weapons List, including non-conventional weapons and some conventional weapons such as military planes and tanks, must obtain licences under the War Weapons Control Act in addition to a licence under the Foreign Trade and Payments Act.⁶⁴⁸ Small arms which are smooth-bore weapons, including those designed for military purpose and others which are fully automatic or semi-automatic, are included in the Export List.⁶⁴⁹ Some small arms, including machine guns, rifles, pistols and portable firing devices for projectiles, are also listed on the War Weapons List, thereby requiring additional preventive responsibilities as per the War Weapons Control Act.⁶⁵⁰ Firearms which are

⁶⁴³ The current versions of these regulations are: Act Implementing Article 26(2) of the Basic Law (War Weapons Control Act) (Kriegswaffenkontrollgesetz, KWKG) of 1 June 1961, version published on 22 November 1990, Federal Law Gazette 2506; Foreign Trade and Payments Act of 6 June 2013, Federal Law Gazette 1482 (Außenwirtschaftsgesetz, AWG); Foreign Trade and Payments Ordinance of 2 August 2013, Federal Law Gazette 2865 (Außenwirtschaftsverordnung, AWW).

⁶⁴⁴ CDU, CSU and SPD, 'Coalition Agreement 2013 - Deutschlands Zukunft Gestalten Koalitionsvertrag Zwischen CDU, CSU Und SPD' 13 <http://ruetzungsexport-info.de/fileadmin/media/Dokumente/R%C3%BCstungsexporte___Recht/Koalitionsvereinbarungen/koalitionsvertragCDUCSUSPD-2013.pdf>.

⁶⁴⁵ Penalties can include a fine of up to EUR 500,000 for negligence by an individual and up to EUR 1,000,000 when the breach involves supervisory obligations: Foreign Trade and Payments Act, s 19. For companies, the penalties for intent or negligence can be a fine of up to EUR 10,000,000 for criminal offences of persons in a leading position or a fine of up to EUR 500,000 for administrative offences of persons in a leading position: Act on Regulatory Offences of Act of 19 February 1987, Federal Law Gazette 4607 (Gesetz über Ordnungswidrigkeiten, OWiG), s 30.

⁶⁴⁶ Foreign Trade and Payments Act, s 1; Foreign Trade and Payments Ordinance, s 8(1).

⁶⁴⁷ Foreign Trade and Payments Act, s 1; Foreign Trade and Payments Ordinance, s 8(1).

⁶⁴⁸ War Weapons Control Act, s 2; Foreign Trade and Payments Act, s 1; Foreign Trade and Payments Ordinance, s 8(1).

⁶⁴⁹ Foreign Trade and Payments Ordinance, Annex 1.

⁶⁵⁰ War Weapons Control Act, Annex.

regulated by the 2012 EU Firearms Regulation require a licence in accordance with Article 4 this regulation, unless a licence is already required under Section 8 (1) of the Foreign Trade and Payments Ordinance for exports to all non-EU member states (excluding Switzerland, Liechtenstein and Iceland).⁶⁵¹

The German regulations evidently impose strict export licensing requirements, though the multiple and overlapping rules have resulted in a complex export regime with differing licensing standards. The War Weapons Control Act imposes stricter licensing requirements than the Foreign Trade and Payments Regulation. Under the Foreign Trade and Payments Regulation, the presumption is licences should generally be granted and only exceptionally denied. The general presumption under the War Weapons Control Act is licences are prohibited and granted only exceptionally. In addition to export licences, the War Weapons Control Act requires prior licensing by the federal government for all activities in connection with war weapons, including their production, acquisition and brokering transaction.⁶⁵² Article 6(3) of the War Weapons Control Act requires a licence to be denied if, *inter alia*, ‘there is a danger of the war weapons being used for an act detrimental to peace’ or ‘there is a reason to assume that the granting of a licence would violate the international obligations of the Federal Republic of Germany or endanger their fulfilment’, which are much lower hurdles for restricting exports than those required by the EU Common Position or Arms Trade Treaty. There is also a duty to revoke a licence under Article 7(2) if one of the reasons outlined in Article 6(3) to deny a licence subsequently becomes evident or materialises, suggesting preventive responsibilities require ongoing evaluation of the recipients and destinations of export to ascertain whether ‘a danger’ or ‘a reason to assume’ has arisen with regard to their respective areas of concern.

ii. Agencies involved in Export Decisions

Various government agencies are involved in approving export licensing decisions pursuant to the War Weapons Control Act, including the Federal Ministry of Finance, Federal Ministry of the Interior, Building and Community, and Federal Ministry of Defence. Input from the Federal Foreign Office and the Federal Ministry for Economic Affairs and Climate Action must also be taken into account, as required by the Political Principles. In situations where the views of the decision-making ministries differ or when cases are of particular significance, the Federal Security Council (Bundessicherheitsrat) will render the decision on whether to grant the export licence. The federal parliament (Bundestag) is not directly involved, though the Federal Security Council reports the results of the secretly conducted decisions to the Bundestag’s Committee on Economic Affairs after the decisions are made. A number of German government agencies are involved in arms export promotion, including the Ministry for Economic Affairs and Climate Action (which is responsible for managing arms exports promotion), Germany Trade and Invest (the export promotion agency), German chambers of commerce abroad, and foreign missions. The involvement of government agencies in export promotion is particularly notable as there had been a

⁶⁵¹ Regulation No 258/2012 of the European Parliament and of the Council of 14 March (30 March 2012) Official Journal of the European Union L 94/1, art 12.

⁶⁵² War Weapons Control Act, s 4.

longstanding reluctance by successive governments to be involved in advocating arms sales abroad because of the sensitivity of the issue in domestic politics. From the 1990s, the German government commenced with small-scale efforts, such as arms promotion tours by the German Navy, in response to the increasing pressure from its arms industry.⁶⁵³

iii. Political Principles

During the early stages of the development of the export regime, moral concerns about providing arms to developing countries were highlighted through the advocacy of civil society, who called for export restraint. These concerns became imbued into German political culture, with the Social Democratic Party (Sozialdemokratische Partei Deutschlands, SPD) vociferously opposing exports to the Third World and promising to ban such exports once in power. As the SPD had to govern in coalition with the FDP, the guidelines implemented in 1971 were a watered-down version from the previous commitments.⁶⁵⁴ Since 1971, Germany has been guided in its arms export decision-making by its Political Principles for the Export of War Weapons and Other Military Equipment (Political Principles). The Political Principles provide the basis for how export decisions are made and have been updated in 1982, 2000 and, most recently, 2019.⁶⁵⁵

The current version of the Political Principles, which have been updated to reflect the EU Common Position and the Arms Trade Treaty, operates under the presumption an export will only 'exceptionally' be authorised to 'third countries' (that is, countries other than NATO states, EU member states, and states with NATO-equivalent status), if that individual case serves German foreign or security policy interests.⁶⁵⁶ The human rights situation in the recipient country is a principal factor that must be considered in arms export decisions.⁶⁵⁷ Additionally, export decisions must take into account the past practice of the recipient third country in respecting human rights and international humanitarian law, and the licence must be denied if there is 'sufficient suspicion' the exported arms will be used for internal repression (as defined in the EU Common Position) or for other ongoing systematic human rights violations.⁶⁵⁸

In addition, exports of small arms are also guided by the Principles for the Issue of Licences for the Export of Small and Light Weapons, Related Ammunition and Corresponding Manufacturing Equipment to Third Countries (Small Arms

⁶⁵³ GTAI, Germany's economic development agency, connects arms manufacturers with relevant actors such as AHKs, who companies regard as the most important for arms export promotion. See also: Davis (n 52) 161–2; Michael Brzoska, 'The Erosion of Restraint in West German Arms Transfer Policy' (1989) 26 *Journal of Peace Research* 165.

⁶⁵⁴ Becker-Jakob and others (n 313) 217.

⁶⁵⁵ Political Principles of the Federal Government for the Export of Weapons of War and other Military Goods (26 June 2019) (Political Principles), available at: <<https://www.bmwk.de/Redaktion/DE/Downloads/P-R/politische-grundsaeetze-fuer-den-export-von-kriegswaffen-und-sonstigen-ruestungsguetern.pdf>>.

⁶⁵⁶ Political Principles, Part II Principle 2.

⁶⁵⁷ Political Principles, Part I Principle 3.

⁶⁵⁸ Political Principles, Part I Principle 4.

Principles).⁶⁵⁹ The Small Arms Principles aim to reduce the risks of small arms proliferation by restricting the recipients of small arms exports (in particular by excluding non-state recipients), requiring the destruction of old small arms models as a corollary to the import of new models by recipients, and requiring small arms to be marked to allow for their tracking.⁶⁶⁰ The Political Principles and Small Arms Principles further demonstrate the incorporation of preventive responsibilities into the German export control regime as a means to prevent adverse human rights impacts and the proliferation of small arms, respectively.

Previously, the strict requirements for German export licences were circumvented, for example, by German arms manufacturers with subsidiaries in NATO countries, EU member states, and countries with NATO-equivalent status or through cooperative ventures between German manufacturers and companies registered in the aforementioned countries, who were subject to lower standards than 'third states'. Such circumventions were evident, for instance, in the export of bombs to the Yemen conflict under Italian export licences by RWM Italia, the Italian subsidiary of the German manufacturer Rheinmetall.⁶⁶¹ The updated Political Principles of 2019 address these issues and also require licensing decisions to consider whether German exports may end up being used, *inter alia*, in human rights violations or internal repression, even though in principle exports to NATO countries, EU member states, and countries with NATO-equivalent status are not restricted unless there is a special reason.⁶⁶²

iv. Preventive Responsibilities

The export policies of Germany, combined with its strict licensing regime, including for small arms, have established one of the most restrictive arms export control regimes of the major exporters. Despite the imposition of preventive responsibilities, how and the extent to which these are implemented in export decision-making practices remains unclear, due to the secrecy surrounding arms export decisions. German courts have affirmed restrictions on arms exports remain a purely political decision and there are limits to the transparency of export decisions as a result.⁶⁶³ Germany has continued to supply arms to conflict zones, including to some of the largest arms purchasing states such as Egypt, India, Pakistan, and Turkey, and was also the largest European supplier of arms to Israel and Russia (prior to the Ukraine war).⁶⁶⁴ Due to limited transparency surrounding arms export decision-making, it is difficult to ascertain how the strict rules have been applied in practice to permit exports to countries such as Egypt with problematic involvement in conflict zones. Recently there

⁶⁵⁹ Principles of the Federal Government for Export Licensing Policy for the Supply of Small Arms, Light Weapons, Associated Ammunition and Corresponding Manufacturing Equipment to Third Countries (8 May 2015) (Small Arms Principles), available at: <<https://www.bmwk.de/Redaktion/DE/Downloads/G/grundsaeetze-der-bundesregierung-fuer-die-ausfuhrgenehmigungspolitik-bei-der-lieferung-von-kleinen-und-leichten-waffen.html>>.

⁶⁶⁰ Small Arms Principles, Principle 6, 7, 9, respectively.

⁶⁶¹ See Chapter Two for more detail.

⁶⁶² Political Principles, Part II Principle 2, 4.

⁶⁶³ *Landgericht (District Court) of Stuttgart, Judgment* (21 February 2019) Az.: 13 KLS 143 Js 38100/10; *Judgment of the Constitutional Court* (21 October 2014) 2 be 5/11 Leitsatz 2.

⁶⁶⁴ Perlo-Freeman (n 86) 16.

have been indications of a push towards more transparency. For example, Germany published its first ever National Security Strategy in June 2023 and is currently working on legislation which incorporates the Political Principles into export control regulations.⁶⁶⁵ The adoption of legislation which mandates human rights considerations in export decision-making and further transparency, have the potential to strengthen the performance of preventive responsibilities for adverse human rights impacts by requiring ethical practices to be incorporated into these decisions and by making it easier for export decisions to be challenged, including through litigation.

V. Russia

i. Centralised Exports and Controls

In comparison to the other major exporters, the Russian arms export regime is less developed and, in turn, less convoluted as it is largely centralised. Following the dissolution of the Soviet Union, it was necessary for the Russian government to develop arms export policies and procedures while also sustaining its arms industry to compete in the international arms market.⁶⁶⁶ Initially, the arms industry was granted the control, coordination and management of arms exports. From the late 1990s, Russia developed its national export control regime based on international regulations, primarily the Wassenaar Arrangement, though Russia did not exactly replicate its provisions. In 1997, the state-controlled company Rosvooruzhenie (the predecessor of Rosoboronexport) was created to take over the control of arms exports. In 1998, the Federal Law on Military and Technical Cooperation between the Russian Federation and Foreign States was enacted, creating the legal basis for the export regime.⁶⁶⁷ Article 4 of this law explicitly recognises the need for compliance with international obligations on arms exports, and Article 5 reaffirms the state monopoly in the field of military technical cooperation, including over export licensing of military products.⁶⁶⁸

In 1999, the Federal Law on Export Controls was adopted, establishing the basic principles of the Russian export control regime, including provisions on export licensing.⁶⁶⁹ Exports are conducted through the state-owned company Rosoboronexport, which acts as the state's intermediary for arms export licensing. Exports can only be conducted by a partner firm of the recipient state, and the partner firm must be registered in Russia.⁶⁷⁰ Each individual export requires an export licence, an end-user certificate issued by the recipient state, and an import-export agreement signed by both parties. Lists of controlled goods and technologies are periodically

⁶⁶⁵ Federal Government of Germany, 'Robust. Resilient. Sustainable. Integrated Security for Germany' (Federal Government of Germany 2023) National Security Strategy. The legislation was initially expected in 2022, but has been delayed until at least the end of 2023.

⁶⁶⁶ Stohl and Grillot (n 5) 59.

⁶⁶⁷ Federal Law No 114-FZ 'On Military-Technical cooperation between the Russian Federation and Foreign States' (9 July 1998), art 4, 5. Article 5 was amended by Federal Law No 4-FZ (4 June 2018).

⁶⁶⁸ Federal Law No 114-FZ of 19 July 1998, art 4, 5.

⁶⁶⁹ Federal Law No 183-FZ 'On Export Control' (18 July 1999), as amended by Federal Law No 183-FZ (8 December 2020); Federal Law No 99-FZ 'On Licensing Certain Activities' (4 May 2011).

⁶⁷⁰ Federal Law No 99-FZ (4 May 2011).

updated by resolution of the Russian government.⁶⁷¹ Small arms and dual-use goods are listed as controlled goods, and require a licence.⁶⁷² Firearms exports are similarly permitted with an export licence.⁶⁷³ Civil, administrative and criminal penalties apply to individuals (citizens) and officials of organisations who violate export controls.⁶⁷⁴ At present, the lists of controlled export items are not in force as arms exports are restricted due to the war with Ukraine.⁶⁷⁵

ii. Agencies and the Intermediary

The Federal Service for Military and Technical Cooperation (FSVTS), housed under the Ministry of Defence and managed by the Russian President, is responsible for controlling and supervising Russia's military-technical cooperation with foreign states, including participating in state policy on military-technical cooperation.⁶⁷⁶ The FSVTS works in cooperation with the Ministry of Defense and other government authorities (including the Ministry of Foreign Affairs, Ministry of Finance, Ministry of Economics, State Customs Service, Foreign Intelligence Service and Federal Security Service). The FSVTS has a central office in Russia and representatives in foreign countries. The Russian Federal Service for Technical and Export Controls (FSTEK) is responsible, in particular, for export control over dual-use items, including issuing export licences and permits and auditing Russian companies involved in arms exports and foreign trade. Additionally, customs clearance and control over controlled items is undertaken by the Federal Customs Service.

A particularly unique feature of the Russian export control system is the involvement of Rosoboronexport as an intermediary for the export and import of military goods, technologies and services. Since 2011, when Rosoboronexport was fully acquired by Rostekhnologii (the Russian-state owned defence conglomerate, which currently operates under the name Rostec), Rosoboronexport has functioned as the state's intermediary for arms exports to the international arms market.⁶⁷⁷ Weapons and military product developers and manufacturers are able to conduct foreign trade activities if fifty-one percent or more of the company shares are owned by the Russian federal government and the remainder of the shares are owned by Russian entities or

⁶⁷¹ *ibid.*

⁶⁷² Decree of the President of the Russian Federation 'Questions of military and technical cooperation of the Russian Federation with foreign states' (1 December 2000) No 1953.

⁶⁷³ Federal Law No 150-FZ 'On Firearms' (13 December 1996); Criminal Code of the Russian Federation No 63-FZ (13 June 1996), Ch 1 art 1.

⁶⁷⁴ Penalties for the falsification of information, non-compliance with licensing procedures and refusal to provide requested information, can include up to a fine of between 100,000 and 500,000 roubles or imprisonment of up to three years (which increases to up to 1 million roubles and 7 years imprisonment if the exported material, technology or information relates to weapons of mass destruction): Criminal Code, art 189; Federal Law No. 183-FZ (18 July 1999), art 30, 31.

⁶⁷⁵ Federal Law No 183-FZ (18 July 1999), art 6. Article 6 was recently amended by Federal Law No. 26-FZ of March 2022. See also: Decree of the President of the Russian Federation 'On Amending and Invalidating Certain Decrees of the President of the Russian Federation' (25 August 2022) No 573, Appendix II.

⁶⁷⁶ Decree of the President of the Russian Federation No 1083 (16 August 2004) 'Issues of the Federal Service for Military-Technical Cooperation', art 1, 2, 3, 5.

⁶⁷⁷ Rostec is short for the State Corporation for Assistance to Development, Production and Export of Advanced Technology Industrial Product Rostec.

individuals. Thus, authorised export firms in effect have close links to the Russian state, which retains tight control over the arms export regime. The development of export licensing requirements evidently seek to maintain and reinforce state control, rather than incorporate preventive responsibilities into the system.

iii. Security Interests and Secrecy

Export controls are viewed as an integral part of Russian domestic and foreign policy, and arms exports must be for the sole purposes of ensuring the security of the state, including its political economic and military interests.⁶⁷⁸ Russian foreign and security policy since the early 2000s has emphasised 'stability and equal security for all' as a means to countering the United States push for unchallenged superiority, mirroring Soviet foreign policy during the Cold War.⁶⁷⁹ Russia is driven by geopolitical strategy to sell arms and military equipment to maintain and expand its power while also generating revenue and extending production for its arms industry, which is one of its few high-tech export sectors.⁶⁸⁰ Russian export control regulations affirm the goals of its export system are protecting the interests of the Russian state, implement the requirements of international treaties including those related to export controls for military products and dual-use goods, create conditions for Russia's economic integration into the world economy, and counter international terrorism.⁶⁸¹ The reference to international treaty obligations is notable as Russian involvement in international arms controls has remained tempered in the post-Cold War period, with the 2000s signalling a recession into passivity under President Putin, whose positions and attitudes mirrored those of the pre-Gorbachev Soviet Union.⁶⁸² More than other export regimes, the Russian export regime is also shrouded in secrecy, a tradition which has continued since the Soviet era.⁶⁸³ A notable exception to Russia's overall lack of engagement with international instruments and transparency measures, is its regular submission of UNROCA annual reports.⁶⁸⁴ Whether this is a consequence of a desire to increase transparency, as opposed to disclosure of arms exports being a source of national pride, remains contestable.

Russian export controls are evidently focussed on balancing national security and commercial interests, which are closely linked as the state retains significant shares in arms manufacturers. Preventive responsibilities which incorporate human rights considerations are excluded from export constraints both in terms of policy and in practice. In the area of small arms, in particular, the balance between Russian economic interests and arms controls have been even more weighted in favour of the former, as Russia is the second largest exporter of small arms worldwide, with the

⁶⁷⁸ Federal Law No. 183-FZ (18 July 1999), art 5(1).

⁶⁷⁹ Müller, Fey and Rauch (n 290) 154.

⁶⁸⁰ Stephen Blank and Edward Levitzky, 'Geostrategic Aims of the Russian Arms Trade in East Asia and the Middle East' (2015) 15 *Defence Studies* 63, 63.

⁶⁸¹ Federal Law No. 183-FZ (18 July 1999), art 4.

⁶⁸² Fey and others (n 270) 179.

⁶⁸³ Julian Cooper, 'Russian Arms Exports' in Laurence Lustgarten (ed), *Law and the Arms Trade: Weapons, Blood and Rules* (Hart Publishing 2020) 294.

⁶⁸⁴ UNROCA Reports 1992-2022: UN, 'UNROCA (United Nations Register of Conventional Arms)' (n 465).

Kalashnikov rifle continuing to be the most exported and used small arms in the world and in conflict zones.⁶⁸⁵ Russia has continued to supply weapons to states and non-state armed groups involved in active armed conflicts, acting as ‘the most prolific supplier of arms’ to twenty-first century conflicts.⁶⁸⁶ Russia has also provided Iran with large quantities of small arms as well as surface-to-air missile defence systems and upgrades to tanks and aircrafts, with some of the small arms reportedly being re-exported to Hamas and Hezbollah.⁶⁸⁷ Russia has used its position on the UN Security Council to block attempts to impose embargoes, such as against Syria, where it has continued to export arms to the Syrian government since 2011.⁶⁸⁸ With the ongoing war in Ukraine, Russia has restricted its arms exports, and is engaging in restrictive export practices for self-serving reasons and as part of its own war efforts.

VI. China

i. A New Export Control Regime

China arrived later onto the international arms export scene, compared to the other major exporters, spending several decades focussing on internal development after the Communist government came to power in 1949. From 1979 to 1995, China’s export controls operated on an ad hoc basis, and were based on national economic and security interests.⁶⁸⁹ From the 1990s, in response to various developments, including international criticism of its arms sales, such as its sale of Silkworm missiles to Iran in the 1980s, China began developing its arms export control system. In 1992, China established the Military Exports Leading Small Group within its People’s Liberation Army, to approve and oversee the export of sensitive military equipment and technologies.

From 1995 to the early 2000s, China’s export control system evolved to one of strategic controls, which included the introduction of several new export regulations to better align the domestic regime with international standards. In 1995, China adopted Regulations on Administration of Controlled Chemicals and published a white paper on arms control and disarmament, which represented the first public declaration of its non-proliferation strategy.⁶⁹⁰ In 1997 and 1998, China issued Regulations on Export Control of Military Products, which provided more detailed procedures for military sales, including the arms export licensing processes.⁶⁹¹ The Regulations did not

⁶⁸⁵ Fey and others (n 270) 177.

⁶⁸⁶ Perlo-Freeman (n 86) 16.

⁶⁸⁷ Stohl and Grillot (n 5) 61.

⁶⁸⁸ Lama Fakih, ‘Russia Makes a Killing off Its Military Support to Assad’ (*Human Rights Watch*, 13 March 2018) <<https://www.hrw.org/news/2018/03/13/russia-makes-killing-its-military-support-assad>>.

⁶⁸⁹ Medeiros (n 281) 59–64.

⁶⁹⁰ Regulations on Administration of Controlled Chemicals, Decree No 190 of the State Council of the People’s Republic of China on 27 December 1995; State Council of the Republic of China, ‘White Paper: Arms Control and Disarmament’ (Information Office of the State Council 1995)

<<https://nuke.fas.org/guide/china/doctrine/wparms.htm>>. China has administrative and legal regulations. Administrative regulations are made by the State Council.

⁶⁹¹ Regulations on Nuclear Export Control, Decree No 230 of the State Council of the People’s

contain a control list for military items until an update in 2002 also included regulations for missile-related technologies.⁶⁹² Throughout the 1990s, China joined the International Atomic Energy Agency, ratified numerous arms control treaties and began submitting annual reports to UNROCA (except between 1997 and 2005 when it suspended its participation due to other states reporting arms transfers to Taiwan).⁶⁹³ Notably, however, China has not joined the Wassenaar Arrangement.

In recent years, China has taken further steps to develop its export control regime. In 2020, China joined the Arms Trade Treaty, despite having previously abstained from voting on the treaty. That same year, China enacted the Export Control Law, which codified the previous administrative regime for export controls and established a unified export control system on 'controlled items', including dual-use goods, military items, and nuclear items.⁶⁹⁴ Both military items and dual-use items require export licences.⁶⁹⁵ Military items are listed on the Administrative List of Export of Military Products. The current version of this is not publicly available, however, in the Control List for earlier regulations, small arms and firearms were listed in Category 1.⁶⁹⁶ Article 3 of the Export Control Law affirms the need for export controls to 'adhere to the holistic view of national security, safeguard international peace, balance security and development, and improve administration and services in relation to export control', evidently placing a premium on security interests in arms export decisions.

The export of military products can only be undertaken by an exporter which has been accredited for the export of military products, with the state practicing a 'monopoly system' over arms exports, which includes review and approval.⁶⁹⁷ An accredited exporter can apply for a licence to the relevant export control department.⁶⁹⁸ For licensing of dual-use items, state export control authorities are required to review export licences, 'taking into full consideration' China's national security and interest, its international obligations and commitments, and the type of export.⁶⁹⁹ General licences for dual-use items may be granted to exporters with an effectively established internal compliance program and must include details about the end user and end use.⁷⁰⁰ Violations of the Export Control Law, including unlicensed exportations, violations of the terms of the export licence, fraud in obtaining export licences and the

Republic of China on 10 September 1997; Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies, Decree No 245 of the State Council of the People's Republic of China on 10 June 1998,

⁶⁹² Regulations on Administration of Arms Export, Decree No 366 of the State Council of the People's Republic of China and the Central Military Commission of the People's Republic of China on 15 August 2002.

⁶⁹³ These treaties were: Biological Weapons Convention (ratified in 1984); Chemical Weapons Convention (signed in 1992, ratified in 1997), the Nuclear Non-Proliferation Treaty (accession in 1992), and the Comprehensive Nuclear-Test-Ban Treaty (signed in 1996).

⁶⁹⁴ Export Control Law, Order of the President of the People's Republic of China No 58 issued on 17 October 2020, effective from 1 December 2020.

⁶⁹⁵ Section 2, Section 3

⁶⁹⁶ Export Control Law, art 9 references the control list.

⁶⁹⁷ Export Control Law, art 23, 24.

⁶⁹⁸ Export Control Law, art 25.

⁶⁹⁹ Export Control Law, art 13, 15.

⁷⁰⁰ Export Control Law, art 14.

facilitation of export control violations, are subject to administrative penalties as well as the suspension of export activities and revocation of export accreditation.⁷⁰¹

ii. Agencies and State Corporations

The Chinese arms export regime involves government agencies and Chinese state-controlled companies. The departments of the State Council and the Central Military Commission are designated as the state export control authorities, and are in charge of export control-related work ‘as mandated by their duties and responsibilities’.⁷⁰² These departments include the Ministry of Commerce, the Ministry of Industry and Information Technology, the General Administration of Customs, the State Administration of Science, Technology and Industry for National Defense (SASTIND), China Atomic Energy Authority, and the Equipment Development Department of the Central Military Commission.⁷⁰³ The Ministry of Foreign Affairs formulates official arms export policies. The Department of Arms Control and Disarmament, founded in 1997, reports on issues related to arms export controls and works with other agencies, such as with the Department of International Organizations and Conferences on international treaty negotiations. In 2008, the Ministry of Industry and Information Technology was established, and Commission of Science, Technology, and Industry for National Defense (COSTIND), which had been responsible for overseeing defence production, was merged into this new agency and renamed SASTIND.

iii. Export Policy Updates

Throughout the twenty-first century, China has published numerous white papers which explicate its arms export policies and regulations. In 2003, China published a whitepaper on non-proliferation policy and measures, which publicised its commitment to non-proliferation and specified the requirements for its licensing system and criteria, end-user certificates, and criminal and civil liabilities for the violation of export controls.⁷⁰⁴ Following this, in 2004 China requested to join the Missile Technology Control Regime, however, its admission remains pending due to concerns about the standards of its export control regime. Most notably, in 2021, China published a white paper on export controls which sought ‘to provide a full picture of its export control policies’.⁷⁰⁵ The 2021 white paper affirmed its commitment to ‘regulating the trade in conventional arms, combating illicit trafficking of weapons, and mitigating humanitarian issues triggered by the abuse of conventional arms’.⁷⁰⁶ The commitment

⁷⁰¹ Penalties can include a fine of up to RMB 5 million or ten times the profits resulting from the illegal activities. Violations which also constitute crimes, such as fraud, bribery and forgery, may additionally result in criminal penalties: Export Control Law, Ch IV.

⁷⁰² Export Control Law, art 5.

⁷⁰³ State Council of the Republic of China, ‘White Paper: China’s Export Controls’ (Information Office of the State Council 2021)
<https://english.www.gov.cn/archive/whitepaper/202112/29/content_WS61cc01b8c6d09c94e48a2df0.html>.

⁷⁰⁴ State Council of the Republic of China, ‘White Paper: Nonproliferation Policy and Measures’ (Information Office of the State Council 2003)
<<https://www.caea.gov.cn/english/n6759377/c6792767/content.html>>.

⁷⁰⁵ State Council of the Republic of China, ‘White Paper: China’s Export Controls’ (n 703) Preamble.

⁷⁰⁶ *ibid* III s 4.

to mitigating humanitarian issues is a new addition to China's arms export policy which suggests a shift towards the potential development of preventive responsibilities which centre human rights considerations. This would indeed be a significant transformation for China, which decades earlier, during the negotiations for the UN Programme of Action, blocked the adoption of a clause in its Preamble which called for the protection of human rights by banning small arms.⁷⁰⁷

Despite these new commitments, there has not been an elaboration of what is entailed by 'mitigating humanitarian issues' and whether this would involve preventive responsibilities for adverse human rights impacts being integrated into the export control regime. Contrary to this new policy direction, China's arms export practices during this century have involved importing significant volumes of arms, including from Russia, which have subsequently been re-exported to other states, fuelling violent insurgencies and armed conflict in these countries.⁷⁰⁸ While China appears to be aligning itself with international standards, most notably by signing the Arms Trade Treaty, its export practices continue to include arms exports to controversial recipients such as Saudi Arabia and the United Arab Emirates, and do not reflect its stated policy of mitigating humanitarian issues.⁷⁰⁹

VII. National Export Controls and State Responsibilities

With national export controls providing the primary regulatory frameworks for arms exports, states hold numerous responsibilities including authorising arms exports, assessing and reviewing export licence applications, imposing sanctions for non-compliance including civil, criminal and administrative penalties, and maintaining oversight of arms exports processes and non-state actors, including through end use monitoring. The adoption of supranational controls has evidently influenced domestic export regimes, and vice versa. For example, the distinction between small arms and firearms present at the supranational levels is also reaffirmed in the domestic export control regimes of all major exporters, with laxer regulations applying to firearms for civilian use, thereby reconfirming the regulatory issues in controlling these weapons in practice, particularly in relation to the curtailing the potential for firearms diversion. Most of the export regimes include a registration system for arms manufacturers as part of a two-stage licensing process, and this tends to be a required in states that maintain control of or interests in these companies. There is some correlation with the age of an export control system and the complexities of the requirements, as highlighted by the regimes of the United States and Germany. In contrast, China and Russia have less complex systems, though this may be because of the higher level of state control of arms manufacturers.

⁷⁰⁷ Fey and others (n 270) 185.

⁷⁰⁸ Stohl and Grillot (n 5) 74.

⁷⁰⁹ AOAV, 'Case Studies: China before and after ATT Accession - Assessing the Effectiveness of the Arms Trade Treaty, Part 11' (Action on Armed Violence 2023) <<https://aoav.org.uk/2023/case-studies-china-before-and-after-att-accession-assessing-the-effectiveness-of-the-arms-trade-treaty-part-11/>>.

Additionally, most of the major exporter states have updated their national export controls over the past two decades, primarily by strengthening export licensing criteria and enunciating policies for arms export decision-making which include human rights considerations. Whether the emergence of the human security paradigm alone has driven these developments remains debatable, as export scandals have also played a role in regulatory changes. The United States is a particularly novel case as its adoption of strict export criteria preceded the supranational developments. Germany too has adopted strict export controls, though these were initially in response to export scandals, and then amended to harmonise with regulatory developments at the EU and international levels. The United Kingdom and France have updated their export control regimes in response to scandals and following the adoption of arms control measures by the EU. China was the most recent state to incorporate human rights considerations into its arms export processes, but has not yet clarified what this entails. Russia is the only state that does not include human rights as a factor for assessment in export decisions or incorporate any type of preventive responsibilities into its export regime, instead continuing to focus on the national security implications of arms exports and strengthening state control over the export process.

The practices of the six major exporter states indicate arms exports to conflict zones have continued, even for those with strict export control regimes. In some cases, references to the 'robustness' of an arms control system have in fact been deployed to dull or nullify criticisms of arms export practices, particularly with regard to controversial arms exports.⁷¹⁰ As such, it is debatable whether stricter export licensing criteria and export policies have altered export practices to elevate human rights considerations. The extent to which arms export decisions have been impacted by human rights considerations is also difficult to ascertain to any significant degree due to the secrecy surrounding export decisions. The work of NGOs, particularly in bringing litigation against governments for continuing to export arms to controversial recipients such as Saudi Arabia, as was the case with the CAAT litigation, have been effective in drawing attention to export practices and revealing the narrow interpretations of the human rights risks which effectively circumvent the requirements of strict export criteria incorporating human rights considerations.

Moreover, the practices of these major exporter states reveal the heavy influence of national security, commercial and other interests on their decisions to export arms to conflict zones, which consequently subvert human rights considerations. The significant and foreseeable adverse human rights impacts of arms exports to conflict zones necessitates an elevation of human rights considerations, especially since the individuals and communities whose human rights are adversely impacted by these activities are not able to assert their interests in arms export decision-making. It is therefore incumbent on states, along with the key non-state supply-side actors, to incorporate human rights considerations into their decision-making processes to counterbalance the persistent and pervasive security and commercial interests, and in turn centre ethical behaviour in arms export decisions.

⁷¹⁰ For example, the United Kingdom where successive governments used this excuse in response to criticisms from NGOs, ministers of parliament and the media about controversial arms transfers to coalition states in Yemen: Stavrianakis, 'Introducing the Special Section' (n 93) 108–9.

Chapter Seven – Special Rules

The practical implementation of preventive responsibilities incorporating human rights considerations for arms exports has focussed on the development of due diligence. The incorporation of due diligence obligations into arms export controls at the international, regional and domestic levels have centred on the responsibilities of the state and its agencies. Consequently, the application or extension of these obligations to the key non-state supply-side actors in the arms sector remains unclarified. For arms exports to conflict zones, it is insufficient for the non-state actors' responsibilities to be derived purely through state responsibilities because the magnitude of the human rights risks requires all key supply-side actors to engage in preventing and mitigating the adverse human rights impacts. Clarifying the scope and requirements of the preventive responsibilities of the key non-state actors is necessary for their comprehensive performance and, in turn, for limiting the potential for oversights or reckless behaviour.

The non-state supply-side actors examined in this thesis – arms manufacturers, banks and intermediaries – are actively and substantially engaged in the arms export decision-making and delivery processes, and in some instances arms deals may not proceed without the participation or approval of one of these actors.⁷¹¹ Previously, there had been a tendency by non-state actors to emphasise the roles and responsibilities of states as an excuse for reducing or avoiding their own capabilities and capacities to perform preventive responsibilities. In particular, arms manufacturers frequently argued the imposition of discrete and independent responsibilities would undermine the legitimacy of licensing regimes. As the spotlight has brightened on the roles and influence of these non-state actors in arms deals, such arguments have become increasingly untenable, especially due to the concurrent development of corporate social responsibilities with the evolution of arms export controls transnationally, and the increasing public awareness of the substantial profits of arms sales.

The following chapter assesses two types of measures which assist in the conceptualisation of preventive responsibilities for the notable non-state actors in the arms sector, broadly corresponding with arms brokers and dealers on one hand, and with arms manufacturers and banks on the other. The first part of this chapter examines the special regulatory requirements at the domestic, regional and international levels created for intermediaries. The second part considers supplementary measures – soft law instruments on human rights due diligence and corporate policies – to ascertain the preventive responsibilities of arms manufacturers and banks.

⁷¹¹ Shaffer and Coye (n 55) 128.

I. Specific Rules for Brokering Activities

The activities of arms dealers and brokers, who are examined together under the umbrella of ‘intermediaries’, may involve in a range of brokering activities including: negotiation or arrangement of transactions; buying, selling or arranging arms; gaining a financial or other advantage; and acting as an intermediary between manufacturers, suppliers and purchasers or recipients. In particular, arms dealers purchase arms for subsequent resale to clients, who may not be able to legally obtain those weapons. For example, the notorious Saudi arms dealer Adnan Khashoggi, even after being discovered to have been a key player in the Iran-Contra scandal, continued to be ‘actively involved in the rogue business’ deals and acted as agent for the Middle East for the arms manufacturer Lockheed Martin (registered in the United States).⁷¹² Arms dealers have continued to supply weapons to conflict zones, which has been highlighted by the Ukrainian conflict where private arms sales have been fast-tracked by the United States to supply weapons to Ukraine.⁷¹³

Furthermore, arm brokers are multipurpose actors who directly provide arms or services to negotiate, secure and deliver arms transfers. For instance, a Hungarian broker, Geda Mezosy, used a network of couriers to purchase weapons via Croatian militias who exploited surplus stocks from the Bosnia and Herzegovina war, with the intention of reselling these weapons to prospective clients.⁷¹⁴ Arms brokers are particularly adept at exploiting inconsistencies in national laws, taking advantage of Cold War supply lines and corrupt officials, arranging complex financial transactions, subcontracting transport agents with the physical transport of weapons, and strengthening the links between the trade of arms and other commodities.⁷¹⁵ Arms brokers and arms dealers play central roles in illicit arms transfers, which have included the transfer of weapons to actors who are under embargo.⁷¹⁶ Attempts to control the activities of intermediaries has received attention since the early the twentieth century due to concerns about their practices and autonomy, which has allowed them to act beyond the control of the state in engaging with arms deals.⁷¹⁷ As concerns mounted about arms brokering practices, there was a renewed push for the development of new arms control instruments at the national and supra-national levels which specifically addressed the activities of intermediaries.

i. Multilevel Measures

During the early 2000s, efforts to control brokering activities eventuated in the adoption of specific regulations imposing strict requirements for intermediaries by a number of

⁷¹² Wood and Peleman (n 122) ch 1.

⁷¹³ See, for example: Bulos (n 588); Scheck (n 588).

⁷¹⁴ Small Arms Survey (n 34) 3. Mezosy’s illegal operations were discovered by the Belgian authorities in May 1996 (Peleman, 2000a)

⁷¹⁵ Stohl and Grillot (n 5) 108; Schroeder, Smith and Stohl (n 28) 17, 20; Wood and Peleman (n 116) ch 1.

⁷¹⁶ Wood and Peleman (n 116) ch 3.

⁷¹⁷ Chapter Three.

states, including the United States, France, Germany and the United Kingdom.⁷¹⁸ Belgium is a notable example in this area as it adopted some of the earliest laws on brokering activities, preceding those at the EU level, in response to scandals involving the use of Belgian territory as a base for illicit activities, including the illicit trafficking of arms from Eastern Europe to countries in Africa including Angola, Burundi, Rwanda and Zaire.⁷¹⁹ The establishment of national brokering regulations represented a major step in preventing and minimising illicit arms trafficking, particularly to conflict zones, and involved the implementation of a number of measures including registration and licensing systems. These measures sought to establish state oversight of brokering activities, and in turn improve transparency in international arms sales.

Numerous initiatives have also been undertaken at the regional level in attempt to control brokering activities. For example, in 2003 the EU Council adopted the Common Position on the Control of Arms Brokering, which requires member states 'to establish a system of exchange of information on brokering activities, relating to, *inter alia*, legislation, registered brokers, denials of registering applications and licensing applications'.⁷²⁰ Also in 2003, the Inter-American Drug Abuse Commission (CICAD) of the Organization of American States (OAS) approved the Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition (OAS Model Regulations), a soft law instrument which recommended a number of measures member states should adopt, including the establishment of a control system for brokering activities, a registration system for brokers, and a licensing system for brokering transactions.⁷²¹ In 2004, eleven African states agreed to the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, a legally binding instrument which sought to deal with the proliferation of small arms and light weapons in the Great Lakes Region and the Horn of Africa.⁷²² State parties to the Protocol, which entered into force in 2006, are required to establish a national system for regulating dealers and brokers of small arms and light weapons.⁷²³

At the international level, the 2001 Programme of Action recognised the need for coordinated national and international controls on brokering activities to address global small arms trafficking, and adopted the recommendations of the UN Group of Governmental Experts on Small Arms for the establishment of national controls to

⁷¹⁸ Chapter Six. See also: Virginie Moreau and Holger Anders, 'Arms Brokering Controls and How They Are Implemented in the European Union' (GRIP 2009) 24 <https://archive.grip.org/en/siteweb/images/RAPPORTS/2009/2009-11_EN.pdf>.

⁷¹⁹ Loi modifiant la loi du 5 août 1991 relative à l'importation, à l'exportation, au transit et à la lutte contre le trafic d'armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente (23 March 2003) no 2003009419.

⁷²⁰ EU Council Common Position on the Control of Arms Brokering 2003/468/CFSP (23 June 2003) Official Journal of the European Union L 156 (EU Common Position on Arms Brokering), art 5.

⁷²¹ OAS-CICAD, 'Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition' (2003) CICAD/doc1271/03, art 2, 3, 4.

⁷²² Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (adopted 21 April 2004, entered into force 5 May 2005).

⁷²³ Nairobi Protocol, art 11.

effectively deal with illicit arms transfers.⁷²⁴ The complementary 2001 Firearms Protocol also emphasised the need for preventing and combatting the illicit manufacturing of and trafficking in firearms and their parts, components and ammunition, and recommended states establish national controls for brokering activities.⁷²⁵ Provisions on brokering activities were subsequently included in the Arms Trade Treaty, mirroring the concerns of the earlier instruments. In particular, Article 10 requires state parties to implement measures ‘pursuant to its national laws, to regulate brokering taking place under its jurisdiction’, which may include the registration of intermediaries or requirements they obtain written authorisation from the state before engaging in brokering activities. Articles 8 and 9 also require state parties to implement measures such as end use and end-user documentation for the import, transit or transshipment of conventional arms.

ii. Extra-territoriality and Reasserting State Control

A particularly notable feature of brokering regulations which is emphasised as an essential component at all regulatory levels, has been their extra-territorial application. Extra-territoriality in many areas of law is contentious as it enables states to control actors whose activities are performed in overseas jurisdictions. This has been especially evident in the divergent views on extraterritoriality in relation to humanitarian intervention abroad to protect human rights, the duty of states to comply with human rights law when engaging in activities abroad, and the criminal jurisdiction of states to punish individuals for human rights abuses which occur in foreign territories.⁷²⁶ The extraterritorial application of United States’ export control regulations is another frequent point of reference, with extraterritoriality straining relations between the United States and other states, including close allies, who view such practices as an overextension of domestic control.⁷²⁷ These concerns continue to be highlighted by the ‘See-Through Rule’ in the International Traffic in Arms Regulations (ITAR), also

⁷²⁴ UN Programme of Action, Part II para 14, 39. See also: Holger Anders and Silvia Cattaneo, ‘Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process’ (GRIP 2005) 5, 18, 21 <<https://archive.grip.org/fr/siteweb/images/RAPPORTS/2005/2005-hs1.pdf>>.

⁷²⁵ Firearms Protocol, art 15(1).

⁷²⁶ Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (n 17) chs 8, 9. See also: Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press 2009) pt II, ch 1.

⁷²⁷ AV Lowe, ‘The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution’ (1985) 34 *International & Comparative Law Quarterly* 724; Andrea Bianchi, ‘Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony between European and U.S. Approaches’ (1992) 35 *German Yearbook of International Law* 366; Detlev F Vagts, ‘Extraterritoriality and the Corporate Governance Law’ (2003) 97 *American Journal of International Law* 289; Cedric Ryngaert, ‘Extraterritorial Export Controls (Secondary Boycotts)’ (2008) 7 *Chinese Journal of International Law* 625; William S Dodge, ‘The New Presumption against Extraterritoriality’ (2019) 133 *Harvard Law Review* 1582; Joop Voetelink, ‘Limits on the Extraterritoriality of United States Export Control and Sanctions Legislation’ in Robert Beer and others (eds), *NL ARMS Netherlands Annual Review of Military Studies 2021: Compliance and Integrity in International Military Trade* (TMC Asser Press 2022); Joop Voetelink, ‘The Extraterritorial Reach of US Export Control Law: The Foreign Direct Product Rules’ (2023) 1 *Journal of Strategic Trade Control* (online). Similar concerns are also presently being raised with regard to China’s export controls. See, for example: Jeannette Chu, ‘The New Arms Race: Sanctions, Export Control Policy, and China’ (*Center for Strategic & International Studies*, 25 March 2022) <<https://www.csis.org/analysis/new-arms-race-sanctions-export-control-policy-and-china>>.

referred to as the 'ITAR taint', which imposes the ITAR provisions on any item containing a part or a component of a defence article listed on the United States Munitions List (USML).⁷²⁸ The 'See-Through Rule' has been criticised for its indiscriminate application and for hindering technical cooperation and engagement between the United States and overseas companies, with foreign entities expressing concerns about losing control over their technological developments even in cases where the partner company based in the United States is only minimally involved in creating that technology.⁷²⁹

In the specific context of brokering controls, however, extra-territoriality has been viewed more favourably. The requirement for extra-territoriality enables brokering controls to be applied to activities which are conducted abroad by a citizen or permanent resident of a state but do not involve the exports being transferred through the home state. Three of the major exporters, Germany, the United Kingdom and the United States, require licences for extra-territorial brokering.⁷³⁰ The most stringent requirements are those detailed in the United States' ITAR, which require licensing for third-country brokering, licensing for brokering of exports from national territory, and controls on brokering-related activities involving third-country transfers.⁷³¹ Most international and regional regulations present extra-territorial controls as optional. For example, the EU Common Position on the Control of Arms Brokering encourages member states 'to consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory'.⁷³² The OAS Model Regulations also include a provision which expands the regulations on brokers and brokering activities to third countries.⁷³³

At all levels of laws, there has been recognition that the extraterritorial application of brokering controls is an important component of the comprehensive regulation of brokering activities.⁷³⁴ This is indeed highlighted by, for instance, the case of Leonid Minin, a Ukrainian arms trafficker who played a key role in organising illicit arms transfers to Liberia and Sierra Leone while both countries were under UN arms embargoes.⁷³⁵ Although Minin was arrested in Italy in 2000, because the transfers had not taken place on Italian territory he was released without charge, despite numerous documents found in his possession attesting to his involvement in the illicit transfers; Minin continues to live in Israel and has not faced further charges.⁷³⁶ The imposition of extraterritorial brokering controls exemplifies a key theme in the development of preventive responsibilities for intermediaries, namely, the focus on

⁷²⁸ ITAR §120.6.

⁷²⁹ Deborah Cheverton, 'Export Controls: A Surprising Key to Strengthening UK-US Military Collaboration' (*Atlantic Council*, 7 June 2023) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/export-controls-a-surprising-key-to-strengthening-uk-us-military-collaboration/>>.

⁷³⁰ Germany: War Weapons Control Act, art 4, 4a. United Kingdom: Trade in Goods (Control) Order 2003, art 4, 7.

⁷³¹ ITAR § 129.

⁷³² EU Common Position on the Control of Arms Brokering, art 1.

⁷³³ OAS Model Regulations, art 8.

⁷³⁴ Anders and Cattaneo (n 724) 18. 30

⁷³⁵ Liberia: UNSC Res 788 (19 November 1992) S/RES/788. Sierra Leone: UNSC Rec 1132 (8 October 1997) S/RES/1132.

⁷³⁶ Moreau and Anders (n 718) 27.

reasserting state control over these actors, especially when they engage in brokering activities outside of the state's physical border.

II. Responsibilities for Intermediaries

The main arms brokering regulations at the international, regional and national levels detail a number of key features for regulating brokering activities that have been broadly adopted. The Arms Trade Treaty, EU Common Position on the Control of Arms Brokering, and national brokering regulations of the major exporter states were selected for comparative analysis due to their applicability to one or more of the major exporter states. For broader comparison, the OAS Model Regulations, Nairobi Protocol, and the national controls of some additional European states (in particular, Belgium and Portugal) were also examined, with these instruments being selected due to the stringency of the requirements imposed and their specific application to small arms transfers, allowing for a wider assessment of preventive responsibilities for intermediaries. While these regulatory measures primarily aim to stem the flow of illicit arms and prevent illicit trafficking, they are nevertheless relevant for preventing and mitigating the adverse human rights impacts of arms exports to conflict zones, since the diversion of arms can exacerbate human rights risks, particularly if acquired by problematic actors.

i. Registration

The most notable requirement of brokering regulations, in terms of rigour and potential for controlling brokering activities, is the establishment of a registration system, generally included as part of a two-stage licensing process.⁷³⁷ Individuals or companies seeking to carry out brokering activities are first required to register as part of a domestic register, prior to applying for a licence for a specific export.⁷³⁸ Both brokers and dealers would be required to register as part of this system. The establishment of a national register for intermediaries enhances the ability of the state to identify brokers, dealers and other actors such as transporters and financial agents who may be involved in the diversion of small arms.⁷³⁹ The Nairobi Protocol is the only supranational instrument mandating the registration of brokers operating within a state party's territory.⁷⁴⁰ The EU Common Position on Arms Brokering includes registration as an optional measure, and also notes a registration system 'would not replace the need for individual transaction licences'.⁷⁴¹

Several EU member states require the registration of brokers and dealers. For example, France only permits intermediaries to engage in the trade of war material, weapons (including firearms), ammunition and their components after an intermediary is authorised by the state to carry out those activities, thus establishing a presumption

⁷³⁷ *ibid* 11.

⁷³⁸ EU Common Position on the Control of Arms Brokering, art 4 (1).

⁷³⁹ Anders and Cattaneo (n 724) 29.

⁷⁴⁰ Nairobi Protocol, art 11 (ii).

⁷⁴¹ EU Common Position on the Control of Arms Brokering, art 4 (1).

that this actor is then acting under the control of the state.⁷⁴² The United Kingdom also has similar registration requirements.⁷⁴³ Other EU member states which require registration of arms brokers before they can undertake in brokering activities include Belgium, Spain and Portugal.⁷⁴⁴ In particular, Portugal has a rigorous system involving the detailed examination of the registration application by the Portuguese Security Authority, the Ministry of Finance and the Ministry of Economy, and includes a database of all registered individuals and entities, including those from other EU member states who are permitted to act as brokers.⁷⁴⁵

Likewise, the United States' brokering controls, which were introduced in 1996 as amendments to the Arms Export Control Act, also utilise a two-stage process for the manufacture, export, import, or transfer of any defence articles or services listed on the USML that originate from the United States or involve foreign defence articles or services. The registration system requires any person who engages in the business of brokering activities to register with the State Department's Office of Defense Trade Controls; the exception from registration is a person acting in their official capacity as an employee of the United States or a foreign government.⁷⁴⁶ This requirement extends to any citizen of the United States regardless of their location, and any foreign person located in the United States.⁷⁴⁷ Overall, the registration systems reassert state control over intermediaries, creating an additional element of states' preventive responsibilities, rather than imposing discrete preventive responsibilities for intermediaries themselves.

ii. Licensing

A more common feature of brokering regulations is the establishment of a licensing system, which requires intermediaries to obtain government authorisation for each individual brokering transaction. The EU Common Position on the Control of Arms Brokering requires member states to 'establish a clear legal framework for lawful brokering activities', which should include a licensing system for assessing licence applications against the export criteria detailed in Article 2 of the EU Common Position on Arms Exports.⁷⁴⁸ The licensing provisions in other regulatory instruments are also notable. For example, the licensing system required by the Nairobi Protocol extends the licensing requirement to the civilian possession of small arms, though the criteria

⁷⁴² Defence Code, art L2332-1.

⁷⁴³ Trade in Goods (Control) Order 2003, No 2765, art 6; The Trade in Controlled Goods (Embargoed Destinations) Order 2004, No 318, art 5.

⁷⁴⁴ Moreau and Anders (n 718) 12.

⁷⁴⁵ Law No. 49/2009 of 5 August 2009 (Regula as condições de acesso e exercício das actividades de comércio e indústria de bens e tecnologias militares); Law No. 37/2011 of 22 June 2011 (Simplifica os procedimentos aplicáveis à transmissão e à circulação de produtos relacionados com a defesa, transpõe as Directivas n.os 2009/43/CE, do Parlamento Europeu e do Conselho, de 6 de Maio, e 2010/80/UE, da Comissão, de 22 de Novembro, e revoga o Decreto -Lei n.º 436/91, de 8 de Novembro).

⁷⁴⁶ ITAR §129.3.

⁷⁴⁷ *ibid.*

⁷⁴⁸ EU Common Position on the Control of Arms Brokering, art 2(2), 3(1). The original reference is to the EU Code of Conduct, however, following its supersession by the EU Common Position on Arms Exports, Article 2 of the latter instrument became the relevant reference point for the export criteria.

for licensing are not elaborated in the Protocol.⁷⁴⁹ In contrast, the OAS Model Regulations list several prohibitions for granting licences, including the refusal of a licence if the arms transfers may lead to: 'acts of genocide or crimes against humanity; the violation of humans rights contrary to international law; the perpetration of war crimes contrary to international law; violations of UN Security Council embargoes or other multilateral sanctions to which the country adheres, or that it unilaterally applies; support of terrorist acts; the diversion of firearms to illegal activities, in particular, those carried out by organised crime; or a breach of a bilateral or multilateral arms control or non-proliferation agreement'.⁷⁵⁰ As such, licensing requirements have the potential to incorporate human rights considerations, though these would apply to the preventive responsibilities of the state rather than the intermediary.

Several major exporter states impose licensing requirements for brokering activities. Germany requires licences for brokering activities in addition to general authorisation for brokers transporting 'weapons of war' on German registered ships or planes between two non-EU countries.⁷⁵¹ The United Kingdom requires licensing for brokering of restricted goods, namely long-range missiles and torture equipment.⁷⁵² In the United States, the ITAR requires persons engaged in the business of brokering activities to obtain an export licence for each brokering transaction. Licence applications are reviewed to assess whether the quality and quantity of the proposed export is appropriate for the stated end-user and end use, and whether there are any foreign policy implications including the potential effect on regional stability, human rights impacts and compliance with multilateral control regimes.⁷⁵³ Overall, the licensing requirements in national export regimes do not require intermediaries to conduct their own risk assessments, nor do these actors adopt and abide by codes of conduct which outline measures they might undertake prior to or in coordination with licensing applications. Consequently, rather than imposing discrete responsibilities on intermediaries, licensing systems extend the preventive responsibilities of states to include the authorisation and oversight of brokering activities, further illustrating the reassertion of state control over these actors.

iii. Reporting

Another common feature for brokering regulations is the requirement for intermediaries to report on their activities. The maintenance of comprehensive records by intermediaries is a necessary corollary to the good record-keeping practices of state authorities. These records should 'at a minimum, identify quantity, type, and origin of the transferred arms, their destination and end user as well as indicate the transport and financial agents who were involved in the deals'.⁷⁵⁴ The Nairobi Protocol requires member states ensure 'all brokering transactions provide full disclosure on import and export licences or authorisation and accompanying documents of the names and

⁷⁴⁹ Nairobi Protocol, art 5.

⁷⁵⁰ OAS Model Regulations, art 5.

⁷⁵¹ War Weapons Control Act, art 4, 4a.

⁷⁵² Trade in Goods (Control) Order 2003, art 3, 4; Trade in Controlled Goods (Embargoed Destinations) Order 2004 art 3.

⁷⁵³ ITAR §129.6-7.

⁷⁵⁴ Anders and Cattaneo (n 724) 18.

locations of all brokers involved in the transaction'.⁷⁵⁵ The EU Common Position on the Control of Arms Brokering similarly requires EU member states to keep records of licence details for a minimum of ten years, which include information on registered brokers, records of brokers, and denials of registration applications.⁷⁵⁶

The EU Common Position on the Control of Arms Brokering does not elaborate on what 'records of brokers' entails. The requirement has been interpreted somewhat differently by current and former member states. For example, France requires brokers to maintain records and to report on their activities, including those involving transfers through a third-country.⁷⁵⁷ Germany requires intermediaries to maintain a 'weapons book' which details the transport agents involved, the end-user, and the date of exportation.⁷⁵⁸ The United Kingdom has similar requirements to Germany.⁷⁵⁹ Furthermore, the United States requires registered intermediaries to provide annual reports to the Office of Defense Trade Controls which enumerate and describe the activities which have been carried out according to licences and any other activities which were undertaken based on exemptions.⁷⁶⁰ Reporting requirements are an important step towards transparency, and further demonstrate the focus of brokering controls on reasserting state control over intermediaries rather than creating discrete preventive responsibilities for them. As intermediaries frequently engage illicit arms transfers and exploit regulatory loopholes, state control over their activities is a preferable alternative to unmonitored independent preventive responsibilities.

III. Supplementary Rules for Corporations

In contrast to other corporations who pursue their economic activities in free markets, the political, security and foreign policy implications of arm exports intimately link the activities of the state and corporations. The corporations involved in arms exports routinely deploy this close association with the state as a reason for why discrete responsibilities should not be imposed. However, with the rising recognition of corporate social responsibilities, corporations are expected to consider who can be impacted by their operations in addition to whom they operate for, obliging these actors to perform preventive responsibilities independently to the responsibilities of states.⁷⁶¹ In particular, the development of key soft law instruments, including the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines),

⁷⁵⁵ Nairobi Protocol, art 11(iv).

⁷⁵⁶ EU Common Position on the Control of Arms Brokering, art 3, 5(2)

⁷⁵⁷ Trade in Goods (Control) Order 2003, art 3.

⁷⁵⁸ War Weapons Control Act, art 4, 4a.

⁷⁵⁹ Trade in Goods (Control) Order 2003, art 7; Trade in Controlled Goods (Embargoed Destinations) Order 2004 art 6.

⁷⁶⁰ ITAR §129.10.

⁷⁶¹ UN 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> (UNGPs); OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, 2023) (OECD Guidelines).

reaffirm the expectations for corporations to perform human rights due diligence to prevent and mitigate the adverse human rights impacts of their business activities.⁷⁶²

While national export controls establish licensing requirements for arms exports, overall, there is limited specification of the preventive responsibilities required by arms manufacturers and banks which finance arms deals. The soft law instruments on human rights due diligence provide a pertinent supplement to arms export control regimes, which can be utilised to integrate ethical behaviour into the activities of these corporations actors and, in turn, reaffirm their roles as moral agents.⁷⁶³ The export of small arms and firearms, in particular, exemplifies the business of the arms trade, as these weapons are sold to pursue commercial interests, and transferred to security forces and civilians, albeit in different forms and according to differing regulations. The UNGPs and OECD Guidelines are therefore useful for counterbalancing the commercial interests that continue to be at the heart of the arms trade, and for incorporating moral reasoning into preventive responsibilities to elevate human rights considerations.

i. Soft Law Instruments

The regulatory framework for arms exports is supplemented by soft law instruments such as the UNGPs and OECD Guidelines, which ‘have proven a solid foundation for the increased recognition of a (human) rights responsibility of companies’,⁷⁶⁴ and reveal the growing utility of soft law measures for developing preventive responsibilities for corporations. These general guidance instruments on human rights

⁷⁶² See, generally, on Business and Human Rights: David Weissbrodt and Muria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *American Journal of International Law* 901; Karin Buhmann, ‘Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions’ (2015) 6 *Transnational Legal Theory* 399; Florian Wettstein, ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 14 *Journal of Human Rights* 162; Dorothee Baumann-Pauly and Justine Nolan, *Business and Human Rights* (Routledge 2016); Olivier DE Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1 *Business and Human Rights Journal* 41; Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017); César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017); Robert McCorquodale and others, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2 *Business and Human Rights Journal* 195; Steven R Ratner, ‘Introduction to the Symposium on Soft and Hard Law on Business and Human Rights’ (2020) 114 *AJIL Unbound* 163; Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020); Florian Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives* (New Edition, Cambridge University Press 2022). See also, on the roles of corporations within transnational legal orders: Byrne (n 210); Katelouzou and Zumbansen, ‘Transnational Corporate Governance’ (n 52).

⁷⁶³ David Jason Karp, ‘Business and Human Rights in a Changing World Order: Beyond the Ethics of Disembedded Liberalism’ (2023) 8 *Business and Human Rights Journal* 135, 146–147; McCorquodale and Nolan (n 392) 460; Andreas Graf and Andrea Iff, ‘Respecting Human Rights in Conflict Regions: How to Avoid the “Conflict Spiral”’ (2017) 2 *Business and Human Rights Journal* 109, 111–112.

⁷⁶⁴ Kai Ambos, ‘International Economic Criminal Law’ (2018) 29 *Criminal Law Forum* 499; Kai Ambos, ‘Corporate Complicity in International Crimes through Arms Supplies despite National Authorisations?’ (2021) 21 *International Criminal Law Review* 181, 192.

due diligence affirm the responsibilities of corporations to mitigate risks directly linked to human rights violations, and emphasise the need for corporations to integrate human rights expectations throughout their enterprises and to establish systems to track and monitor human rights impacts.⁷⁶⁵ The UNGPs and OECD Guidelines are useful for conceptualising the preventive responsibilities of arms manufacturers and banks, two types of corporate actors to whom these instruments are applicable. Accordingly, these instruments provide an important supplement to arms export regulatory framework for ascertaining the human rights due diligence requirements for the non-state actors, which have not yet been specified by national or supranational regulations.

The UNGPs draw together law and social expectations to set an accepted standard, or baseline responsibility, to which states and companies are required to carry out human rights due diligence.⁷⁶⁶ These principles provide a prudent supplementary measure for developing the preventive responsibilities for arms manufacturers and banks, including the implementation of specific human rights due diligence measures such as risk assessments, human rights impact statements, mechanisms for tracking and monitoring of human rights, and the integration of human rights expectations throughout a business enterprise.⁷⁶⁷ In particular, Principle 14 affirms: '[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure', thus extending compliance to all corporate actors involved in arms exports. Principle 17 details some human rights due diligence processes, including risk assessments and tracking responses, while Principle 18 specifies 'to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships'.⁷⁶⁸ Principle 7 also places special obligations on states where corporations operate in conflict zones due to the heightened risks in these areas, which is a feature that should be taken into account by the arms sector generally.⁷⁶⁹

In 2022, the UN Working Group on Business and Human Rights published an information note on 'Responsible Business Conduct in the Arms Sector' with the purpose of highlighting how the duties of states and obligations of corporations outlined by the UNGPs would apply to the arms sector.⁷⁷⁰ The Working Group briefly listed a number of recommendations for states and corporations, including for companies to implement human rights due diligence processes throughout all aspects of their business operations, to conduct discrete human rights due diligence in all cases irrespective of licensing decisions taken by states, and to conduct due diligence which is 'enhanced in situations of heightened risk, such as armed conflicts or internal

⁷⁶⁵ UNGPs, Principle 13.

⁷⁶⁶ UN Human Rights Council, 'Protect, respect and remedy: a framework for business and human rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5; HRC Res 17/4 (6 July 2011) UN Doc A/HRC/RES/17/4.

⁷⁶⁷ UNGPs, Principles 17–21.

⁷⁶⁸ UNGPs, Principles 17, 18.

⁷⁶⁹ UNGPs, Principle 7.

⁷⁷⁰ UN Working Group on Business and Human Rights (n 32) 7–8.

upheaval'.⁷⁷¹ The recommendations also require companies to publicly communicate information about their human rights due diligence processes for arms deals, to commit to ceasing the circumvention of export controls through the use of subsidiaries in other states, and to establish grievance mechanisms.⁷⁷² Also in 2022, the American Bar Association Center for Human Rights published its 'Defense Industry Human Rights Due Diligence Guidance', outlining key components of human rights due diligence that should be implemented by the arms industry as part of a comprehensive due diligence regime, including risks assessments, prevention and mitigation measures, end use monitoring, and investigation and remediation of human rights violations.⁷⁷³ The publication of these guidance notes reaffirm the applicability of the human rights due diligence to corporate actors in the arms sector, and reinforce the need for discrete preventive responsibilities by arms manufacturers and banks to prevent and mitigate the adverse human rights impacts of their business activities.

Moreover, as many of the largest arms manufacturers and banks are registered corporate entities in OECD member states, the OECD Guidelines are also relevant for determining the preventive responsibilities of these corporate actors.⁷⁷⁴ Chapter IV of the OECD Guidelines, which focuses on the obligations of corporations to respect human rights, reaffirms corporations should implement human rights due diligence to prevent or mitigate the adverse human rights impacts of their business activities.⁷⁷⁵ The OECD Guidelines call for corporations to '[c]arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts'.⁷⁷⁶ The OECD Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance) provides broad practical guidance on the implementation of human rights due diligence as recommended by the OECD Guidelines, and in doing so seeks to promote a common understanding of due diligence obligations among stakeholders, including states and corporations.⁷⁷⁷ The comprehensive framework elaborated by the OECD Due Diligence Guidance was developed through a multi-stakeholder process which included representatives from OECD and non-OECD countries, international organisations, business, trade unions and civil society, and represents the first government-backed reference on due diligence.⁷⁷⁸ The OECD Due Diligence

⁷⁷¹ *ibid* 7.

⁷⁷² *ibid* 7–8.

⁷⁷³ American Bar Association Center for Human Rights (n 418).

⁷⁷⁴ The OECD member states: Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Türkiye, the United Kingdom, and the United States.

⁷⁷⁵ OECD Guidelines, Chapter IV, para 1 and 3.

⁷⁷⁶ *ibid*, Chapter IV, para 5.

⁷⁷⁷ OECD 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018) <<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>> (OECD Due Diligence Guidance).

⁷⁷⁸ OECD Due Diligence Guidance, 10. See also: Rachel N Birkey and others, 'Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010' (2018) 152 *Journal of Business Ethics* 827; Charlotte Villiers, 'Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation' in Beate Sjøfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and*

Guidance details measures which apply directly to corporations, for instance, encouraging companies to embed responsible business conduct into policies and management systems and to implement due diligence measures ‘commensurate to the severity and likelihood of the adverse impact’.⁷⁷⁹ The OECD Due Diligence Guidance specifically notes the imposition of due diligence obligations on companies is not an attempt to shift the responsibilities of states, but to create parallel responsibilities for corporations which these actors can ‘leverage to effect change, individually or in collaboration with others’.⁷⁸⁰

ii. Self-regulatory Measures

The growing public awareness of the roles of arms manufacturers and banks in arms deals, the development of soft law instruments on corporate human rights due diligence, and the implementation of supra-national arms controls measures which centre human rights considerations have led to developments in the self-regulatory measures of arms manufacturers and banks. The inclusion of human rights considerations in their corporate policies reflects the increasing expectations for both of these corporate actors to identify, assess and address the adverse human rights impacts of their business activities, and the emergence of self-regulatory measures as additional supplements for identifying and elaborating preventive responsibilities.⁷⁸¹ These corporate policies have become interwoven into the regulatory framework for arms exports and in effect act as ‘instruments of co-regulation’ for preventive responsibilities.⁷⁸² In specific circumstances, namely, EU companies dealing with dual-use items, corporations have been encouraged to establish self-regulatory measures, such as Internal Compliance Programmes (internal controls for companies to obtain an export licence), to ensure compliance with EU and national dual-use export control regulations.⁷⁸³ Some arms manufacturers and banks already publicly circulate corporate policies incorporating human rights considerations, including corporate codes of conduct, human rights policies, export compliance statements and/or defence sector policies. The corporate policies by arms manufacturers and banks are therefore relevant for conceptualising the preventive responsibilities of these actors, and also have the potential to clarify regulatory standards for arms exports.

Sustainability (Cambridge University Press 2019); Katelouzou and Zumbansen, ‘Transnational Corporate Governance’ (n 52).

⁷⁷⁹ OECD Due Diligence Guidance, 17.

⁷⁸⁰ *ibid.*

⁷⁸¹ Katelouzou and Zumbansen, ‘Transnational Corporate Governance’ (n 23) 50.

⁷⁸² Jan Eijsbouts, ‘Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement’ (2017) 24 *Indiana Journal of Global Legal Studies* 181; Dionysia Katelouzou and Peer Zumbansen, ‘The New Geographies of Corporate Governance’ (2020) 42 *University of Pennsylvania Journal of International Law* 51, 119; Dionysia Katelouzou and Peer Zumbansen, ‘The Transnationalization of Corporate Governance: Law, Institutional Arrangements and Corporate Power’ (2021) 38 *Arizona Journal of International and Comparative Law* 1, 48.

⁷⁸³ EU Commission ‘Recommendation 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009’ (5 August 2019) *Official Journal of the European Union* L 205/15.

The examination of corporate policies focussed, first, on the comparative analysis of twenty arms manufacturers.⁷⁸⁴ Determining the extent to which arms manufacturers are involved in the production and export of small arms is especially complicated, as there are over one thousand small arms producers worldwide, including large manufacturers who produce small arms in addition to many other weapons systems, and the manufacturing of small arms through licensing agreements and joint-ventures.⁷⁸⁵ Accordingly, the selection of arms manufacturers for comparison was based on the following factors: whether the company is a top manufacturer of small arms or conventional weapons (according to SIPRI's data on the top 100 arms producing companies); the country of registration of the company (with a focus on manufacturers from the six major exporter states); the involvement of the company in 'controversial exports' including exports to conflict zones or, specifically, coalition states involved in the Yemen conflict; the involvement of the company in any litigation or scandals related to arms exports.⁷⁸⁶ The selected companies include nine manufacturers of small arms, including large manufacturers of these weapons and manufacturers which have significant brand recognition (such as Heckler & Koch and Kalashnikov). Seven of these nine manufacturers have previously been found to be among the largest exporters of small arms in the world.⁷⁸⁷ The other eleven manufacturers were chosen due to their status as top conventional weapons producers, and also their involvement in arms exports to conflict zones or to recipients engaged in conflict zones such as Saudi Arabia, the United Arab Emirates and Egypt.⁷⁸⁸ Out of these eleven, eight manufacturers are registered in the six major exporter states. The three manufacturers registered in other states include two trans-European companies (Airbus and MBDA) and one Italian manufacturer (Leonardo), whose subsidiary was amalgamated into MBDA and which has also been identified as having one of the most comprehensive corporate policies for human rights.⁷⁸⁹

⁷⁸⁴ Appendix I. Citations to all of the policies of these arms manufacturers are provided in the Appendix.

⁷⁸⁵ NR Jenzen-Jones, 'Producers of Small Arms, Light Weapons, and Their Ammunition' (Small Arms Survey 2014) Research Note 43 1 <<https://www.smallarmssurvey.org/resource/producers-small-arms-light-weapons-and-their-ammunition-research-note-43>>.

⁷⁸⁶ Data and information from: SIPRI, 'SIPRI Arms Transfers Database' (n 344); ECCHR, 'Made in Europe, Bombed in Yemen: How the ICC Could Tackle the Responsibility of Arms Exporters and Government Officials' (n 89); Facing Finance, 'Out of Control: Irresponsible Weapon Transfers and Future Weapon Systems' (Facing Finance 2019) Dirty Profits 7 <https://www.facing-finance.org/files/2019/05/ff_dp7_ONLINE_v02.pdf>; Jenzen-Jones (n 785). See Annex I for further details.

⁷⁸⁷ In particular, NORINCO, Thales, Heckler & Koch, Rheinmetall, Rostec, BAE Systems, and Raytheon. Though not a recent report, the Small Arms Survey report on small arms manufacturers is useful in illustrating the vast number of small arms manufacturing firms and why small arms manufacturing may be one of many weapons that are manufactured, with small arms tending to be one of the smaller and less profitable types. Jenzen-Jones (n 785) 2. See also: Eric G Berman, 'Craft Production of Small Arms' (Small Arms Survey 2011) Small Arms Survey Research Notes 3 <<https://www.smallarmssurvey.org/sites/default/files/resources/SAS-Research-Note-3.pdf>>.

⁷⁸⁸ Excluded companies include, for example, Thyssenkrupp. Although a top 100 manufacturer, Thyssenkrupp was excluded as its arms production is primarily focussed on submarines and conducted through its subsidiary Thyssenkrupp Marine Systems. Airbus, BAE Systems, MBDA, Boeing, Leonardo, Lockheed Martin, Raytheon, Thales, Northrop Grumman, General Dynamics, Rheinmetall have provided weapons to one or more of the following states: UAE, Saudi Arabia, Jordan, Egypt, Jordan, Kuwait, and Bahrain. Data from: Facing Finance (n 786) 42–45.

⁷⁸⁹ PAX and ICAN (n 90) 34–37.

In addition, twenty banks involved in financing arms deals, by providing arms manufacturers with loans or underwriting services, were also selected for the comparative analysis of their corporate policies.⁷⁹⁰ These banks were selected based on the following criteria: the monetary value of the financing provided to the arms manufacturers selected for comparative analysis (based on PAX's 2021 finance data); and registration in one of the six major exporter states.⁷⁹¹ The selection process also aimed to maintain a relatively even distribution between the states of registration. As such, four banks registered in France and in the United Kingdom, and two banks registered in Germany, Russia and China were selected based on the overall amount of financing they have provided to arms manufacturers in 2021, including to several of the top arms manufacturers also selected for examination. Six banks were selected from the United States because the highest proportion of banks which financed arms export deals are registered in the United States.

IV. Responsibilities of Arms Manufacturers

Since the end of the Cold War, arms manufacturers have largely operated as private enterprises, with mergers and acquisitions by major arms manufacturers resulting in a significant accumulation of political and market power.⁷⁹² Arms manufacturers have can directly and indirectly influence the development of arms export policies and practices, by compelling governments to make specific export decisions, imposing pressure through their powerful economic lobbies, and driving discussions on arms exports policies through their involvement in policy debates and treaty negotiations. Indeed, the arms industry was involved in the negotiations of the Arms Trade Treaty, pushing its agenda through states, mirroring similar efforts in the past to influence arms controls.⁷⁹³ There was also speculation the arms industry would be included in the EU Commission's Taxonomy for Sustainable Activities as a 'socially harmful' activity. It has been suggested the reason this did not ultimately occur was because of the war in Ukraine and the consequent increased reliance of states on arms manufacturers.⁷⁹⁴ The significant influence of the arms industry was acknowledged by the UN Working Group on Business and Human Rights, which recommended states adopt measures to protect arms export decisions from undue corporate pressure,

⁷⁹⁰ Appendix II. Citations to all of the policies of these banks are provided in the Appendix.

⁷⁹¹ Data from: PAX and ICAN, 'Don't Bank on the Bomb – Who Profits from Producing Nuclear Weapons?' (2022) <<https://www.dontbankonthebomb.com/>>. Banks on this database provided financing to arms manufacturers including, most notably: Airbus, BAE Systems, Boeing, General Dynamics, L3Harris Technologies, Leonardo, Lockheed Martin, Northrop Grumman, Raytheon Technologies, Rostec, Thales. See Annex II for further details.

⁷⁹² Stohl and Grillot (n 5) 79.

⁷⁹³ Rachel Stohl, 'Understanding the Role of U.S. Industry in the Arms Trade Treaty, Stimson Center' (Stimson Center 2019) <https://www.stimson.org/wp-content/files/file-attachments/US%20Industry%20and%20ATT_Web_0.pdf>. An early example of the influence of the arms industry on arms controls, was the Burton Resolution of 1926 when the general embargo of arms sales to aggressor or belligerent parties was opposed by the United States' War and Navy Departments on the grounds that its domestic private armaments industry would be weakened: Krause, *Arms and the State* (n 206).

⁷⁹⁴ See, for the counter argument of NGOs: European Coalition for Corporate Justice, 'NGOs: Corporate Due Diligence Must Cover Arms Sector' (13 March 2023) <<https://corporatejustice.org/news/ngos-corporate-due-diligence-must-cover-the-arms-sector/>>.

including safeguards for lobbying activities to ensure export decisions are conducted transparently and responsibly.⁷⁹⁵

The powerful positions of arms manufacturers in the arms sector, including their instigation of arms sales, has received increasing attention in recent years. As a result, it has become untenable for arms manufacturers to avoid scrutiny of their roles and responsibilities by hiding behind those of the state. The integrity of arms export regimes relies on arms manufacturers playing their part in upholding the law. Arms manufacturers also generate billions of dollars in profits each year through their arms sales, highlighting the significant resources at their disposal to implement independent preventive responsibilities. It is also in the commercial and reputational interests of arms manufacturers to mitigate chances of their products being used to commit violations of human rights or international humanitarian law. In addition, unlike other large corporations, such as those involved in mining resources or supply chains, whose human rights impacts are a supplementary issue to their primary functions, arms manufacturers need to ensure their core business activities (producing, selling and exporting inherently lethal items) do not contribute to or exacerbate adverse human rights impacts.⁷⁹⁶ This is especially the case for arms exports to conflict zones, where the availability of arms has been linked to increases in violations of human rights and international humanitarian law, as has been amplified by the conflicts in Syria and Yemen.⁷⁹⁷ The imposition of independent preventive responsibilities, and specifically human rights due diligence, for arms manufacturers is therefore essential to preventing and mitigating the adverse human rights impacts of arms exports to conflict zones, because the core functions of their business activities present heightened risks for human rights.

From the comparative analysis of twenty large arms manufacturers, there are some indications these companies are responding to changing societal expectations, even if only reluctantly following the exposure of their involvement in illegal and problematic practices. In particular, three common features are evident from the examination of the publicly available corporate policies, namely, affirmations of the importance of compliance with export controls, the establishment of human rights policies, and the implementation of risk assessment processes.

i. Licensing Compliance

A licensing system is an integral component of the export control regimes of all major arms exporter states, and reaffirmed as a key requirement in international and regional laws. In the past few years, in some instances likely due to scandals, arms manufacturers have included in their corporate policies a reiteration of the importance of complying with national export licensing regimes, which some companies, like

⁷⁹⁵ UN Working Group on Business and Human Rights (n 32) 7–8.

⁷⁹⁶ For examination of the motivations for these supplementary activities, see: Dana L Brown, Antje Vetterlein and Anne Roemer-Mahler, 'Theorizing Transnational Corporations as Social Actors: An Analysis of Corporate Motivations' (2010) 12 *Business and Politics* 1.

⁷⁹⁷ See, on the impact of business activities generally on conflict zones: Graf and Iff (n 763).

Lockheed Martin, referring to this as a ‘special responsibility’.⁷⁹⁸ Rheinmetall is another manufacturer that asserts the ‘special responsibility’ all companies of the Rheinmetall Group have to comply with the strict German and EU export controls.⁷⁹⁹ Rheinmetall’s inclusion of this statement in its 2023 policy is particularly noteworthy as the company had, only a few years earlier, threatened to sue the German government over the ban on arms sales to Saudi Arabia and attempted to circumvent this ban by using its Italian-based subsidiary RWM Italia.⁸⁰⁰ Heckler & Koch, a well-known German small arms manufacturer, goes further in its statements, noting the special importance of ethical standards and values for the company because the weapons it produces provide ‘protection and security only in the right hands and in compliance with legal regulations and moral principles’.⁸⁰¹ This affirmation is likewise notable as Heckler & Koch was fined EUR 3.7 million in 2019 for illegally selling assault rifles to Mexico.⁸⁰² Non-compliance with export controls, more generally, have also been acknowledged by Airbus, BAE Systems and Rolls-Royce as representing a reputational risk for the company, which may be accompanied by loss of business, perception as an unreliable export partner, and financial penalties.⁸⁰³

Moreover, previously there had been a tendency by arms manufacturers, and the arms industry more broadly, to argue against the imposition of discrete preventive responsibilities for arms manufacturers, claiming this could potentially undermine business confidence in the export licensing regime of a state.⁸⁰⁴ Now, however, many arms manufacturers accept the importance of independent and additional internal preventive measures, often as part of their internal compliance programmes. Several companies acknowledge that obtaining a licence is one step in a multi-stage process for compliance with export controls and preventive responsibilities by the companies are also necessary. For example, General Dynamics, L3Harris and Raytheon all affirm

⁷⁹⁸ See, for example, Lockheed Martin, ‘Setting the Standard: Code of Ethics and Business Conduct’ 24 <<https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/ethics/ethics-code-of-conduct-2020.pdf>>.

⁷⁹⁹ Rheinmetall, ‘Export Controls: Global, Complex Rules for Import and Export of Goods and Services’ (2023) <<https://www.rheinmetall.com/en/company/corporate-governance/export-controls>>.

⁸⁰⁰ Maletta (n 133) 81–82. See also, the discussion of RWM Italia bombs exported to Yemen in Chapter Two.

⁸⁰¹ Heckler & Koch, ‘Trade Compliance of Heckler & Koch GmbH’ (*Heckler-Koch*, 2023) <<https://www.heckler-koch.com/en/Company/Governance/Export%20control>>.

⁸⁰² *Landgericht (District Court) of Stuttgart, Judgment* (21 February 2019) Az.: 13 KLs 143 Js 38100/10. An appeal of this case was rejected by the Federal Court of Justice in 2021: *Federal Court of Justice, Judgment 069/2021* (30 March 2021) 3 StR 474/19. See, for news articles relating to this case: Ben Knight, ‘Heckler & Koch Fined over Illegal Arms for Mexico’ *Deutsche Welle* (21 February 2019) <<https://www.dw.com/en/heckler-koch-fined-37-million-over-illegal-arms-sales-to-mexico/a-47610975>>; Deutsche Welle, ‘Heckler & Koch to Pay for Illegal Arms Sales to Mexico’ *Deutsche Welle* (30 March 2021) <<https://www.dw.com/en/court-heckler-koch-must-pay-for-illegal-arms-sales-to-mexico/a-57047654>>.

⁸⁰³ Airbus, ‘Code of Conduct’ 36 <<https://www.airbus.com/sites/g/files/jlcbta136/files/2021-07/Airbus-Ethics-Compliance-Code-Conduct-EN.pdf>>; BAE Systems, ‘Policy Summaries: Product Trading’ (*BAE Systems*, 2023) <<https://www.baesystems.com/en/sustainability/governance/oversight/policy-summaries/product-trading-policy>>; Rolls-Royce, ‘Export Control and Sanctions Policy’ (2023) <<https://ourcode.rolls-royce.com/act-with-integrity/group-policy/export-control-and-sanctions-policy.aspx>>.

⁸⁰⁴ Christian Schliemann and Linde Bryk, ‘Arms Trade and Corporate Responsibility: Liability, Litigation and Legislative Reform’ (Friedrich-Ebert-Stiftung 2019) 21 <<https://library.fes.de/pdf-files/iez/15850.pdf>>.

their commitment to regulatory compliance while also undertaking additional internal processes to the licensing process of the United States.⁸⁰⁵ The inclusion of these statements by L3Harris is particularly notable as the company, following its voluntary disclosure of the majority of its violations, agreed to a USD 13 million settlement with the United States State Department in 2019 for alleged breaches of export control regulations, and consequently implemented additional compliance measures to improve its compliance programme.⁸⁰⁶

Furthermore, BAE Systems similarly recognises 'stringent internal controls' are necessary in addition to strict regulatory controls, and reaffirms its commitment 'to maintaining an effective system of export control compliance designed to avoid violations, detect them promptly if they occur, and provide timely investigations and appropriate remedial actions'.⁸⁰⁷ BAE Systems' inclusion of such statements is noteworthy as it is another company that has been involved in numerous export scandals, and it also continues to maintain close links with the government of the United Kingdom, including ongoing involvement in a large amount of Ministry of Defence contracts.⁸⁰⁸ BAE Systems' strongest commitments to compliance are confirmations the company does not manufacture or sell certain types of internally banned weapons such as cluster munitions or anti-personnel mines.⁸⁰⁹ Similarly, the Chinese state-owned manufacturer NORINCO states it has an internal compliance programme to ensure the non-proliferation of weapons of mass destruction, which is a particularly sensitive issue for China.⁸¹⁰ Such statements are in effect restatements of export control requirements, as these weapons are banned by international treaties their home states have ratified.⁸¹¹

Affirmations about internal measures for ensuring licensing compliance by arms manufacturers represent important foundations for the establishment of independent preventive responsibilities which incorporate human rights considerations. Overall, the shift in recognition by arms manufacturers of the need for internal measures and

⁸⁰⁵ L3Harris, 'Maintaining Strict Trade Compliance' (14 March 2022)

<<https://www.l3harris.com/newsroom/editorial/2022/03/maintaining-strict-trade-compliance>>;

Raytheon Technologies, 'Raytheon Technologies Human Rights Policy' (April 2022)

<<https://investors.rtx.com/static-files/ea19fb9b-cb9c-4232-b8ae-500b9db23675>>; General Dynamics, 'General Dynamics Corporation Policy Statement on Human Rights' (2023)

<<https://www.gd.com/responsibility/human-rights>>.

⁸⁰⁶ Office of the Spokesperson, 'U.S. Department of State Concludes \$13 Million Settlement of Alleged Export Violations by L3Harris Technologies, Inc.' (*United States Department of State*, 23 September 2019) <<https://2017-2021.state.gov/u-s-department-of-state-concludes-13-million-settlement-of-alleged-export-violations-by-l3harris-technologies-inc/>>.

⁸⁰⁷ BAE Systems, 'Policy Summaries: Export Control' (*BAE Systems*)

<<https://www.baesystems.com/en/sustainability/governance/oversight/policy-summaries/export-control-policy>>.

⁸⁰⁸ See, Chapters Two and Six.

⁸⁰⁹ BAE Systems, 'BAE Systems Human Rights Statement 2023' 5–6

<<https://www.baesystems.com/en-media/uploadFile/20230329080614/1434662025833.pdf>>.

⁸¹⁰ NORINCO, 'Corporate Statement on Nonproliferation-Export Control and Internal Compliance' <<https://www.norinco.com.tr/wp-content/uploads/2017/09/NORINCO-Corporate-Statement-on-Nonproliferation-Export-Control-and-Internal-Compliance.pdf>>; NORINCO, 'Non-Proliferation and Export Control' (2014) <<http://en.norinco.cn/col/col6517/index.html>>.

⁸¹¹ See, for example: Convention on Cluster Munitions (adopted 3 December 2008, entered into force 1 August 2010) 2688 UNTS 39.

controls for licensing compliance suggests arms manufacturers are adapting to changing societal expectations, even if only reluctantly or as a result of their involvement in export scandals being exposed.

ii. Human Rights Policies

The OECD Guidelines recommend corporations ‘express their commitment to respect human rights through a publicly available statement of policy’.⁸¹² Many of the examined manufacturers have adopted policies which include human rights considerations. Some of these policies are focused on employees and communities affected by manufacturing operations, including supply chains.⁸¹³ Notably, a number of arms manufacturers have adopted human rights policies, though many of these companies only make reference to the existence of a human rights policy without disclosing them publicly, thereby limiting opportunities for scrutiny.⁸¹⁴ From the publicly available human rights policies, there is some acknowledgement by arms manufacturers of the potential adverse human rights impacts of their activities. An example of a stronger statement is Raytheon’s human rights policy, which acknowledges ‘that the human rights issues associated with our defense products and services are a dynamic and complex subject’ and ‘carry potential risks associated with their misuse’.⁸¹⁵ Other companies, such as BAE Systems, implicitly recognise the adverse impacts: ‘We understand that some of our stakeholders have views and perceptions of defence companies and human rights, particularly in the area of exports and how our products are used’.⁸¹⁶

Human rights policies are useful tools for arms manufacturers to detail their human rights due diligence processes. For example, L3Harris includes an option in its human

⁸¹² OECD Guidelines, Chapter IV, para 4 (and commentary at 27).

⁸¹³ See, for example: Rheinmetall, ‘Global Framework Agreement on Principles of Social Responsibility of the Rheinmetall Group’ (12 October 2018) <<https://www.rheinmetall.com/en/responsibility/employees/global-framework-agreement>>; Rheinmetall, ‘Code of Conduct of the Rheinmetall Group’ (June 2022) 5, 10–11 <https://www.rheinmetall.com/Rheinmetall%20Group/Unternehmen/Corporate_Governance/PDFs/Rheinmetall-AG-Code-of-Conduct-en-2022.pdf>; Raytheon Technologies, ‘Stronger Together: Code of Conduct’ (2020) 44 <<https://www.rtx.com/who-we-are/ethics-and-compliance>>; Thales Group, ‘Thales Corporate Responsibility Integrated Report 2019-2020’ 22 <https://www.thalesgroup.com/sites/default/files/2021-09/Thales_Integrated_Report_Corporate_Responsibility_2019-2020.pdf>; Northrop Grumman, ‘Standards of Business Conduct’ 40 <<https://www.northropgrumman.com/wp-content/uploads/NGC-Standards-of-Business-Conduct-English-UK.pdf>>; Rolls-Royce (n 803).

⁸¹⁴ The following companies only may references to these policies but do not disclose them publicly: Thales: Thales Group, ‘Thales Corporate Responsibility Integrated Report 2019-2020’ (n 813) 22; MBDA, ‘Code of Ethics’ 18 <https://www.mbda-systems.com/wp-content/uploads/2020/09/MBDA-Code-of-Ethics-2020-report_UK-online.pdf>.

BAE provides summaries of its policies, including Product Trading policy, Responsible Trading Principles, but does not publicly disclose these policies: BAE Systems, ‘Policy Summaries: Product Trading’ (n 803). This is also the case with Rolls-Royce: Rolls-Royce (n 803).

⁸¹⁵ Raytheon Technologies (n 805).

⁸¹⁶ BAE Systems, ‘BAE Systems Human Rights Statement 2023’ (n 809) 5–6. Northrop Grumman similarly acknowledges the potential risks of unintended use, particularly over time: Northrop Grumman, ‘Northrop Grumman Human Rights Policy’ (*Northrop Grumman*, 22 December 2019) <<https://www.northropgrumman.com/corporate-responsibility/northrop-grumman-human-rights-policy>>.

rights policy to terminate a business relationship in the event there is a breach of that policy, though the focus of such options are on the termination of relationships with suppliers rather than customers, who are not referenced despite them posing the ‘most salient risks’.⁸¹⁷ Heckler & Koch states it excludes potential clients from arms sales by limiting deals to ‘green countries’ which are ‘democratic, not corrupt and either NATO states or their equivalents’.⁸¹⁸ Northrop Grumman asserts the company will decline a potential sale where the risk to human rights or company reputation are unacceptable irrespective of whether that sale would be legally permissible.⁸¹⁹ Leonardo, which has the most comprehensive human rights policy of the companies examined, explicitly references the human rights standards elaborated in the UN Universal Declaration on Human Rights and OECD Guidelines.⁸²⁰ Leonardo also maintains a list of states it does not export weapons to, referred to as the List of Sensitive Countries, which is updated every year. This list is compiled based on factors including breaches of international human rights law, and currently includes several states involved in the Yemen conflict, namely Saudi Arabia, United Arab Emirates and Egypt (but not Kuwait and Qatar), in addition to Yemen.⁸²¹ While these policies provide some information of how these companies identify, assess and/or address human rights risks, the details provided on their human rights due diligence processes are limited, and therefore it is not possible to examine whether these policies are comprehensive.

Overall, there is still a reluctance by the examined arms manufacturers to implement human rights due diligence for arms sales, and, in some cases, even explicitly recognising the human rights risks of arms exports. Nevertheless, the adoption of human rights policies by some arms manufacturers demonstrate their increasing acceptance of the need to integrate human rights considerations into business practices. These policies also represent an important step toward disseminating ethical business practices and leveraging potential recipients into changing their behaviours, such as by ceasing future arms deals where weapons have been misused by a recipient.⁸²² Human rights policies should be used by arms manufacturers to detail their human rights due diligence processes and be made publicly available to allow for scrutinization.

⁸¹⁷ L3Harris, ‘Global Human Rights Policy’ <https://www.l3harris.com/sites/default/files/2023-01/L3H_Human_Rights_Policy_2023_final.pdf>; Raytheon Technologies (n 805).

⁸¹⁸ Heckler & Koch states that its arms sales outside Germany are primarily to other EU member states, NATO countries and NATO-equivalent countries, and that it ‘does not intend to generate new business with countries outside NATO’s sphere of influence’: Heckler & Koch, ‘Group Management Report 2017’ 19 <<https://www.heckler-koch.com/Downloads/Investor%20Relations/Abschl%C3%BCsse/2017/Abschlussbericht/2017%20Group%20Accounts%20HKAG-EN.pdf>>.

⁸¹⁹ Northrop Grumman (n 816).

⁸²⁰ Leonardo, ‘Leonardo Policy on Human Rights’ 5 <https://www.leonardo.com/documents/15646808/16737734/Group+Policy+Human+Rights_general+use_new.pdf>.

⁸²¹ *ibid*; Leonardo, ‘Leonardo Group Trade Compliance Program’ (2023) <<https://www.leonardo.com/en/investors/ethics-compliance/trade>>.

⁸²² UNGP, Commentary to Principle 19. See also: Amnesty International, ‘Outsourcing Responsibility: Human Rights Policies in the Defence Sector’ (Amnesty International 2019) ACT 30/0893/2019 40 <<https://www.amnesty.org/en/documents/act30/0893/2019/en/>>.

iii. Risk Assessments

A risk assessment is an integral component of human rights due diligence which is specifically identified in the UNGPs.⁸²³ Risk assessments are also required by national export regimes and supranational laws.⁸²⁴ Risk assessments have been an important part of due diligence processes of arms manufacturers for identifying and addressing the risks of diversion. The inclusion of human rights considerations in risk assessments is comparatively a much newer feature included by some companies in their corporate policies. Several arms manufacturers have incorporated risk assessments into their company policies to identify and mitigate the human rights risks associated with the sale of their products. For example, BAE Systems states its risk assessments consider the type of product and its intended use, the end user, and the country of sale.⁸²⁵ Likewise, Raytheon operates a due diligence process which 'screen[s] potential sales involving certain types of products in countries identified as presenting a higher risk of human rights violations from product misuse'.⁸²⁶ Raytheon is also has its own Human Rights Council which 'is responsible for assisting the businesses in their assessment of specific sales opportunities that may present heightened human rights risks', reflecting the requirements of UNGP Principle 18.⁸²⁷

Only a few companies elaborate on the specific criteria and processes required by their risk assessments. For example, Rheinmetall and Heckler & Koch state, in compliance with German, EU and international laws, they have developed due diligence processes which include risk identification, risk mitigation, results tracking, and complaints procedures.⁸²⁸ General Dynamics is one company providing further information on what its risk identification processes involve, including its 'use [of] a variety of tools, techniques, and analyses', which may include site visits and meetings, open source and web searches for adverse media, and specialised database searches, among other methods.⁸²⁹ Leonardo states its risk assessment includes risk identification, qualitative and quantitative analyses of risk, a risk treatment action plan to reduce the impact of risks on a project, contingency management, risk monitoring and review, and quarterly reporting on risk trends.⁸³⁰ Leonardo also identifies four criteria which it uses to assess whether the sale of arms to a state would pose an unacceptable risk: domestic export controls, sanctions, 'know your customer', and territory.⁸³¹

⁸²³ UNGP Principle 17.

⁸²⁴ See Chapters Five and Six. See also: EU Commission 'Recommendation 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009' (5 August 2019) Official Journal of the European Union L 205/15.

⁸²⁵ BAE Systems, 'Policy Summaries: Product Trading' (n 803).

⁸²⁶ Raytheon Technologies (n 805) 3.

⁸²⁷ *ibid.*

⁸²⁸ See, for example: Rheinmetall, 'Code of Conduct of the Rheinmetall Group' (n 813); Heckler & Koch, 'Code of Ethics and Business Conduct: Heckler & Koch Group' <<https://www.heckler-koch.com/Downloads/Compliance/HK%20Code%20of%20Ethics%20and%20Business%20Conduct%2010-2019-EN.pdf>>.

⁸²⁹ General Dynamics (n 805).

⁸³⁰ Leonardo, 'Project Risk Management' (2023) <<https://www.leonardo.com/en/investors/industrial-plan/risk-management/project-risk-management>>.

⁸³¹ *ibid.*

For the most part, however, the steps these companies are required to undertake for identifying, assessing and addressing risks are not specified in their public policies. In addition, the extent to which human rights due diligence is integrated throughout the business enterprise, as required by the UNGPs, is limited. Some of the examined companies only assess the human rights risks for activities under their full and direct control, thereby limiting the risk assessments to their supply chains and not extending them to include potential clients.⁸³² While there have been positive developments towards the development of preventive responsibilities by arms manufacturers, the implementation of human rights due diligence remains unclear or underdeveloped, particularly with regard specific processes such as risk assessments.

V. Responsibilities of Banks

Private, commercial banks are notable financiers of the arms trade, providing loans and underwriting services to arms manufacturers for arms deals, and also owning corporate bonds or shares in these companies.⁸³³ The roles of banks in financing arms deals, and the arms trade more generally, has received greater attention since the 2010s due to the work of NGOs to highlight the associated issues. Most notably, since 2013 PAX, in collaboration with the International Campaign to Abolish Nuclear Weapons (ICAN), has released regular reports on the involvement of banks in the arms trade, with a focus on the financing of nuclear weapons.⁸³⁴ In 2021, PAX published a study on the ‘financial links between major European banks and the companies profiting from the arms trade with controversial destinations’, which found all fifteen of Europe’s top banks had provided financial services (loans and underwritings) to one or more of the selected fifteen arms manufacturers which had exported arms to ‘controversial destinations’, providing a combined total of EUR 87.7 billion in financing.⁸³⁵ There have also been efforts by civil society, particularly in Europe, to push for changes in financial practices in relation to high-risk sectors or controversial sectors, including the arms industry and the fossil fuels industry. For example, in November 2020, following a citizens’ initiative that proposed changes to the Swiss Federal Constitution, Switzerland voted on the Popular Initiative ‘For a ban on financing war material manufacturers’ which sought to ban investments in the arms industry.⁸³⁶

As with arms manufacturers, there is growing acknowledgement that banks, including by these corporate actors themselves, should incorporate human rights considerations into their decisions to finance arms deals, mirroring the increased expectations for corporate social responsibilities more generally. Indeed, the significant risks

⁸³² UNGPs, Principles 17–21. See, for example, Dassault Aviation, ‘Corporate Social Responsibility. Higher, Together’ (*Dassault Aviation*, 2023) <<https://www.dassault-aviation.com/en/group/about-us/corporate-social-responsibility/>>; Airbus, ‘Human Rights: Our Commitment to Respecting Human Rights’ (8 July 2021) <<https://www.airbus.com/en/sustainability/valuing-people/human-rights>>.

⁸³³ Underwriting services involve the bank taking on financial risk in exchange for a fee. Banks provide underwriting services by guaranteeing payment in event of damage or financial loss and accepting the financial risk for liability arising from such guarantee.

⁸³⁴ See, the ‘Don’t Bank on the Bomb’ reports and website: PAX and ICAN (n 791).

⁸³⁵ PAX and Profundo (n 143) 8.

⁸³⁶ The vote failed with a 57.5 percent vote against the measure. The turnout was 46.95 percent.

associated with the production and export of arms directly contradict the emergence of the notion of 'ethical finance', which requires greater attention by financial institutions to the environmental, social and governance impacts of their investments and services. Banks directly contribute to the impacts of arms exports, because without financing the production and export of these weapons, arms deals would not be able to proceed. Banks therefore need to ensure they do not contribute to or exacerbate adverse human rights impacts, especially in conflict zones. Failure to do so can result in reputational damage and public backlash, which the financial industry is increasingly facing in general, and has resulted in the divestment from banks that fund activities which contribute to climate change.⁸³⁷ Banks can capitalise on their business relationships with arms manufacturers to push for more ethical policies and practices for arms exports to conflict zones. Additionally, where major banks take measures to prevent and mitigate adverse human rights impacts, including by declining to finance arms deals, there is potential for flow on effects among other financial institutions, which can further contribute to the incorporation and dissemination of ethical conduct, including the integration of human rights considerations into policies for financing arms deals.

From the examination of the selected twenty banks, it is apparent many of the largest financiers of arms deals have adopted corporate policies, including codes of conduct, human rights policies and defence sector policies, which incorporate human rights considerations and acknowledge the human rights risks associated with the arms trade and the arms industry. In some cases, these selected banks did not publicly disclose their corporate policies but made reference to their existence in other public communications.⁸³⁸ Other banks stated their policies regarding the arms sector are currently under review.⁸³⁹ From the examination of the publicly available corporate policies, it is evident major banks have increasingly adopted specific measures for financing arms deals and arms manufacturers, including defence sector policies, exclusion of services, and risk assessments, which contribute to the development of preventive responsibilities and the implementation of human rights due diligence.

⁸³⁷ Isabella Kaminski, 'Climate Campaigners Sue BNP Paribas over Fossil Fuel Finance' *The Guardian* (27 February 2023) <<https://www.theguardian.com/business/2023/feb/27/climate-campaigners-sue-bnp-paribas-over-fossil-fuel-finance>>.

⁸³⁸ For example, JPMorgan Chase has a 'Human Rights' section on website but not policy. JPMorgan Chase & Co, 'Human Rights' (2023) <<https://www.jpmorganchase.com/about/our-business/human-rights>>. Public statements by Deutsche Bank has made reference to a defence sector statement though this appears to apply to 'controversial weapons'. See also: Deutsche Bank, 'Deutsche Bank Upgrades Its Policy on Controversial Weapons' (23 May 2018) <https://www.db.com/news/detail/20180523-deutsche-bank-upgrades-its-policy-on-controversial-weapons?language_id=1>; Deutsche Bank, 'Deutsche Bank Has Expanded Its Defence Policy and External Transparency' (28 March 2019) <https://www.db.com/news/detail/20190328-deutsche-bank-has-expanded-its-defence-policy-and-external-transparency?language_id=1>.

⁸³⁹ Commerzbank AG, 'Positions and Policies' (9 May 2023) <https://www.commerzbank.de/en/nachhaltigkeit/nachhaltigkeitsstandards/positionen_und_richtlinien/positionen_und_richtlinien.html>.

i. Defence Sector Policies

The expectations for banks to adhere to international human rights standards have been reaffirmed by the corporate policies of numerous major banks, particularly those registered in Europe. In addition to broader policies referencing human rights, some banks have also established specific policies on the arms industry, commonly referred to by these banks as ‘defence sector’ policies. Some of these policies incorporate the regulatory standards from the Arms Trade Treaty and EU Common Position on Arms Exports.⁸⁴⁰ A number of these policies incorporate human rights commitments, and include explicit references to the adverse human rights impacts of the arms trade, indicating an awareness of the risks associated with providing financial services to arms manufacturers.⁸⁴¹ In some cases, as evidenced by the defence sector statement of Lloyds Banking group, ‘the inherent ethical, social and environmental risks associated with the sector’ are recognised, alongside the risks of corruption and money laundering.⁸⁴² The Defence Policy of Natixis, a company under Groupe BPCE, similarly recognises the ‘specific risks ... inherent to the defence sector’, including: ‘risk of diversion of weapons, especially in sensitive countries; risk of corruption and money laundering (financing of terrorist groups); long term impacts on human lives, on the safety and health of civilian populations, in particular when using “controversial weapons”’.⁸⁴³ Crédit Agricole also details in its policy the specific and inherent risks of the arms industry and the arms trade, including longer term impacts such as ‘excessive public expenditure’ and ‘serious violations of international humanitarian law that could contribute to regional instability’, which further demonstrates a strong awareness the human rights risks of arms exports.⁸⁴⁴

The approaches of banks in responding to these risks have tended to reaffirm the importance of due diligence for their dealings with the arms industry. For example, Deutsche Bank states its internal defence policy requires assessment of whether the

⁸⁴⁰ BNP Paribas, ‘Sector Policy - Defence & Security’ <https://cdn-group.bnpparibas.com/uploads/file/bnpparibas_csr_sector_policy_defense_security.pdf>; Lloyds Banking Group, ‘Defence Sector Statement’ <https://www.banktrack.org/download/defence_sector_statement/190415_defence_sector_statement_jan2019.pdf>; Crédit Mutuel Alliance Fédérale, ‘Sector Policy - Defence & Security Sector’ <https://www.creditmutuel.fr/fr/vitrine/medias/docs/groupe/informations-financieres/politiques-sectorielles/CM11-RSE-secteur-defense-et-securite_version-anglaise.pdf>; Société Générale, ‘Defense & Security Sector Policy’ <<https://www.societegenerale.com/sites/default/files/documents/CSR/Defense-and-security-sector-policy.pdf>>; Crédit Agricole SA, “Arms Industry and Arms Trade” Policy’ <<https://www.credit-agricole.com/en/pdfPreview/198936>>.

⁸⁴¹ Barclays, ‘Defence & Security Statement’ 1 <<https://home.barclays/content/dam/home-barclays/documents/citizenship/our-reporting-and-policy-positions/policy-positions/Barclays-Statement-on-the-Defence-Sector.pdf>>.

⁸⁴² Lloyds Banking Group, ‘LBG External Sector Statements’ <<https://www.lloydsbankinggroup.com/assets/pdfs/who-we-are/responsible-business/downloads/group-codes-and-policies/lbg-external-all-sector-statements-may-23.pdf>>.

⁸⁴³ Natixis, ‘ESR Sector Policy Applicable to the Defence Industry’ (9 September 2020) 1 <https://natixis.groupebpce.com/wp-content/uploads/2022/08/200909_final_amended_cl_defense_policy_eng_v7.pdf>. Natixis is the part of Groupe BPCE that offers wholesale banking services and other financial services to larger companies. Natixis has a specific defence sector policy which applies worldwide to all services offered by the bank.

⁸⁴⁴ Crédit Agricole SA (n 840) 1.

transaction or relationship with the arms manufacturer ‘could undermine peace and security’ and whether the exported arms ‘could be used to commit or facilitate a violation of international humanitarian law and human rights law as established by the United Nations, European Union or the Council of Europe’.⁸⁴⁵ NatWest Group notes it undertakes additional due diligence, separate from government export licence processes, and makes ‘case by case decisions whether to facilitate defence transactions’ which ‘consider the product type, jurisdiction and end use of the product, and do not support transactions going to jurisdictions with a track record of human rights abuse, or where the country’s adherence to international standards in the conduct of military action undermines confidence in the end use of the weapon’.⁸⁴⁶ Citigroup also acknowledges the leverage it possesses to transform behaviours of clients such as arms manufacturers by proactively engaging with them to increase their awareness to human rights risks and to improve business practices.⁸⁴⁷

The development of defence sector policies by banks represents an important step in the implementation of preventive responsibilities for these actors. The explicit recognition by banks of the inherent and significant risks of arms exports indicates an appropriate level of awareness of their need for preventive responsibilities when financing arms deals. In addition, the use of leverage by banks is a significant feature of their human rights due diligence that should be harnessed by banks when dealing with arms manufacturers, to encourage arms manufacturers to likewise perform human rights due diligence as part of their arms deals. Broadly, defence sector policies demonstrate banks are aware of and engaging in effectively incorporating human rights considerations into their business activities.

ii. Exclusion of Services

The defence sector policies of banks tend to focus on two types of measures for limiting or excluding their involvement in the arms trade. The first type of measure focuses on the limitation of the types of financial services provided to arms manufacturers. For example, the Crédit Mutuel banking group’s defence sector policy states it will ‘refrain’ from providing banking and financial services for specific transactions if there is ‘insufficient knowledge of the purpose, the client and its counterparties and of whether the country concerned is a “sensitive country” or not’.⁸⁴⁸ However, the Crédit Mutuel policy carves out an exclusion to this provision, noting the financing of an arms sale to non-EU states would be permitted where the manufacturer is domiciled in an EU member state, government authorisation has been obtained and the ‘client eligibility rules’ are fulfilled, though the eligibility rules are not specified.⁸⁴⁹

⁸⁴⁵ Deutsche Bank, ‘Deutsche Bank Has Expanded Its Defence Policy and External Transparency’ (n 838).

⁸⁴⁶ NatWest Group, ‘Defence: Risk Acceptance Criteria’ 2
<https://www.natwestgroup.com/content/dam/natwestgroup_com/natwestgroup/pdf/NWG-2023-ESE-Pdfs-Defence.pdf>.

⁸⁴⁷ Citigroup, ‘Statement on Human Rights’ 7–8
<https://www.citigroup.com/rcs/citigpa/akpublic/storage/public/citi_statement_on_human_rights.pdf>.

⁸⁴⁸ Crédit Mutuel Alliance Fédérale (n 840).

⁸⁴⁹ *ibid* 2.

The second type of measure is a clause which excludes banks from providing services to an arms manufacturer. The exclusion of financing of arms exports tends to be based on the location of the company and the risks associated with defence-related transactions. The most notable type of exclusion clause is the all-encompassing ban on services to the arms industry incorporated in the defence-equipment-related sector policy of HSBC, after the bank withdrew from financing weapons sale and manufacturing in 2000.⁸⁵⁰ However, this policy applies only to new clients, with the bank still providing loans to arms manufacturers in situations where the loan was agreed to prior to the implementation of the policy. The policy also does not prevent HSBC from owning shares in arms manufacturers, thus in practice it is not all-encompassing in its exclusion of the arms industry.⁸⁵¹ A more common type of exclusion clause, which in effect is a restatement of regulatory requirements, is the exclusion of services to manufacturers which are under embargo (usually UN or EU embargoes).⁸⁵² Another prominent type of exclusion clause relates to arms manufacturers producing 'controversial weapons', generally referring to weapons prohibited by international treaties such as nuclear weapons, chemical or biological weapons, cluster munitions and anti-personnel mines.⁸⁵³ Many of the banks registered in the United States also include civilian firearms on their controversial weapons lists, which has increased in recent years in response to mass shootings in the United States, particularly in schools.⁸⁵⁴

The most pertinent types of exclusion for arms exports to conflict zones are those which restrict services to arms manufacturers who produce and export arms to active conflict zones or areas with high potential for the outbreak of violence or who involve intermediaries in the arms exports. BNP Paribas, Société Générale and NatWest Group are three banks which exclude or restrict the financing of arms exports which involve intermediaries such as arms dealers or arms brokers.⁸⁵⁵ Natixis excludes services to companies which are 'subject to major controversies' and takes into account whether an arms sale involves a country which has been involved in human rights violations or non-compliance by a manufacturer with European export controls.⁸⁵⁶ The Natixis' exclusion policy requires the company to perform due diligence measures for defence transactions that require consideration of human rights

⁸⁵⁰ HSBC, 'Defence Equipment Sector Policy' 2 <<https://www.hsbc.com/-/files/hsbc/our-approach/risk-and-responsibility/pdfs/221215-defence-equipment-sector-policy.pdf>>.

⁸⁵¹ *ibid.*

⁸⁵² Crédit Agricole SA (n 840) 4; Société Générale (n 840).

⁸⁵³ HSBC (n 850) 1; Société Générale (n 840) 6; NatWest Group (n 846) 2; Morgan Stanley Investment Funds (MS INVF), 'Global Balanced Fund Exclusion Policy' 2, 3 <https://www.morganstanley.com/im/publication/msinvf/material/esg_exclusionpolicy_msinvf_globalbalancedfund.pdf>; Citigroup, 'Environmental and Social Policy Framework' 25 <<https://www.citigroup.com/rcs/citigpa/storage/public/Environmental-and-Social-Policy-Framework.pdf>>.

⁸⁵⁴ Citigroup (n 853) 24–25; Bank of America, 'Bank of America Corporation Environmental and Social Risk Policy (ESRP) Framework' 10 <https://about.bankofamerica.com/content/dam/about/pdfs/ESRPF_ADA_Tagged_Secure_June_2022_Final.pdf>; Morgan Stanley Investment Funds (MS INVF) (n 853) 2, 3.

⁸⁵⁵ Société Générale (n 840) 7; NatWest Group (n 846) 3; BNP Paribas, 'Sector Policy - Defence & Security' (n 840) 7.

⁸⁵⁶ Natixis (n 843) 4, 5.

and other sector-specific risks.⁸⁵⁷ BNP Paribas also excludes transactions involving countries where the UN has identified grave violations against children in armed conflict situations, and countries involved in grave human rights violations including through the use of small arms.⁸⁵⁸

The inclusion of exclusion clauses in defence sector policies is a significant development in the preventive responsibilities of banks. Further efforts should be undertaken by banks emphasise arms export restraint to controversial destinations and recipients. In addition, the due diligence processes should be comprehensive and ensure exclusion criteria is not circumvented through technicalities. Strengthening the exclusion clauses would effectively implement the preventive responsibilities for banks, particularly when applied in combination with other human rights due diligence measures such as risk assessments.

iii. Risk Assessments

The policies of the examined banks generally state they conduct risk assessments for human rights risks to ensure they do not finance arms exports which may be problematic. Many of these policies reference the Equator Principles, a risk management framework adopted in 2003 by financial institutions based on the environmental and social policy frameworks established by the International Finance Corporation, which are used to identify, assess and manage environmental and social risk in projects. A number of banks also refer to the 'enhanced' or 'reinforced' due diligence required for the arms industry because it is a high-risk sector associated with inherent human rights risks.⁸⁵⁹ The exception is Bank of America, whose 'primary focus [is] on managing reputational risk concerns'.⁸⁶⁰ The enhanced due diligence often includes measures such as additional oversight, particularly for small arms exports due to the prolific illicit trade of these weapons.⁸⁶¹ From the banks examined, the most effective statement on the need for strengthened due diligence is by BNP Paribas, which requires 'reinforced due diligence' for transactions involving military equipment, and includes criteria such as the identifying whether the potential recipient country has a known record of grave violations of human rights or the recipient is located in an area with an ongoing armed conflict.⁸⁶²

This enhanced or reinforced due diligence incorporates human rights considerations into risks assessments, in effect requiring banks to perform human rights due diligence. There is limited elaboration of the specific requirements for enhanced due diligence. The most notable and commonly identified requirements are verification measures of export recipients and destinations, and mapping of risks that countries may pose (risk mapping). For example, BNP Paribas requires risk mapping, the

⁸⁵⁷ BPCE Group, 'Ethics and Compliance: Groupe BPCE's Actions and Commitments' (*BPCE Group*) <<https://groupebpce.com/en/the-group/compliance>>.

⁸⁵⁸ BNP Paribas, 'Sector Policy - Defence & Security' (n 840) 7.

⁸⁵⁹ *ibid* 3; Citigroup (n 853) 20.

⁸⁶⁰ Bank of America (n 854) 10.

⁸⁶¹ Natixis (n 843) 4; BNP Paribas, 'Sector Policy - Defence & Security' (n 840) 6; Société Générale (n 840) 8; Bank of America (n 854) 10.

⁸⁶² BNP Paribas, 'Sector Policy - Defence & Security' (n 840) 3.

identification of the final destination of exported arms, and the identification of any intermediaries involved in arms exports.⁸⁶³ Société Générale likewise utilises country mapping to designate states with a risk level, which ranges from being 'low risk' to 'excluded' because of a high level of risk.⁸⁶⁴ Société Générale also includes consultations with internal experts as part of its risk assessment process,⁸⁶⁵ but does not reference any consultation with potentially affected groups as required by UNGP Principle 18. Deutsche Bank implements a specific due diligence framework for arms industry clients and transactions, which requires the reviewal of the purpose and nature of the exported products, the country of destination, the end user of the products, and other client considerations and drivers of risk.⁸⁶⁶ Deutsche bank also Barclay states its approach to providing services to the arms industry requires evaluating each proposed transaction 'on a case-by-case basis' and applies an 'enhanced due diligence process to clients' according to its 'defence and security standard', but does not elaborate on what the process or standard involve.⁸⁶⁷

Although banks affirm the need for risks assessments for arms deals involving enhanced due diligence processes, there are limited details provided on the specific processes involved in identifying, assessing and addressing the adverse human rights impacts of arms exports, in particular exports to conflict zones. Consequently, the precise scope and requirements of the human rights due diligence undertaken by banks remain unclear, limiting the possibility for assessing the comprehensiveness of this strengthened due diligence.

VI. Responsibilities of Non-State Actors

Several notable features of the preventive responsibilities have been developed for the key non-state supply-side actors involved in arms exports to conflict zones. For arms brokers and dealers, who were previously state agents but are now private actors that may be employed by the state for certain activities, the attempts to regulate brokering activities have centred on reasserting state control. Specific regulations on arms brokering have been developed at the international, regional and national levels, which distinctly emphasise the need for state control over brokering activities due to the correlation between these activities and illicit transfers. Consequently, rather than developing distinct preventive responsibilities for these actors, arms brokers and dealers are required to perform obligations that reaffirm state control, including registration and reporting requirements, which are aimed at preventing the diversion of arms. Considering the proclivity of intermediaries to engage in illicit activities and their talents in circumventing rules and exploiting loopholes, it is preferable states

⁸⁶³ BNP Paribas, 'BNP Paribas Human Rights Risk Mapping' 11–12 <https://group.bnpparibas/uploads/file/bnp_paribas_human_rights_risk_mapping.pdf>.

⁸⁶⁴ Société Générale (n 840) 8.

⁸⁶⁵ Société Générale, 'Environmental and Social General Principles' 6 <<https://www.societegenerale.com/sites/default/files/documents/2020-10/environmental-and-social-general-guidelines-oct2016.pdf>>.

⁸⁶⁶ See: PAX and Profundo (n 143) 58–9.

⁸⁶⁷ Barclays, 'Barclays PLC Annual Report 2022' 253 <<https://home.barclays/content/dam/home-barclays/documents/investor-relations/reports-and-events/annual-reports/2022/AR/Barclays-PLC-Annual-Report-2022.pdf>>.

take additional efforts to control brokering activities, as it seems very unlikely these intermediaries would properly perform preventive responsibilities.

In contrast, for arms manufacturers and banks, the parallel development of soft law instruments on human rights due diligence has resulted in increased expectations for these corporate actors to perform independent preventive responsibilities which identify, assess and address the adverse human rights impacts of their business activities. Soft law instruments, namely the UNGPs and OECD Guidelines, thereby supplement the transnational regulatory framework for arms exports. The influence of these instruments on the development of the corporate policies of arms manufacturers and banks has varied. While most policies affirm the importance of discrete preventive responsibilities for these corporate actors, there are limited references to the human rights due diligence outlined in these instruments, aside from statements confirming risk assessments are required to be undertaken.

There is an evident foundation for the elaboration of discrete preventive responsibilities for arms manufacturers and banks (and theoretically also for arms brokers and dealers who are registered companies), which require comprehensive and coordinated efforts to be undertaken by these actors to prevent and mitigate adverse human rights impacts. There are a number of ways in which arms manufacturers and banks can clarify and strengthen their human rights due diligence for arms exports to conflict zones, including the integration of due diligence standards into their corporate policies which, at a minimum, reflect the standards outlined in the UNGPs and OECD Guidelines, and the establishment of strict due diligence processes. Further transparency, including the public availability of corporate policies, is an important complement to the effective performance of preventive responsibilities. Arms manufacturers and banks should therefore make their corporate policies publicly available to enable scrutiny by stakeholders and civil society and, in turn, to strengthen accountability measures.

Chapter Eight – A Framework for Human Rights Due Diligence

While the introduction of due diligence obligations into arms export controls at the various levels of laws have been useful for incorporating human rights considerations into the regulatory framework, the responsibilities of the arms sector for preventing adverse human rights impacts remain unclear and underdeveloped. The most obvious regulatory mechanism at the institutional level for clarifying and elaborating these preventive responsibilities is the adoption of domestic, regional or international regulations which detail specific due diligence processes for the arms sector. At the international level, there are currently ongoing efforts to draft a legally binding instrument for regulating the activities of transnational corporations and other business enterprises, which may eventually provide an additional mechanism for strengthening the preventive responsibilities of the arms sector.⁸⁶⁸ The responses by corporations to mandatory human rights due diligence laws, such as the French Duty of Vigilance Law (2017) and the United Kingdom's Modern Slavery Act (2015), reveal regulatory measures are effective in transforming practices, including strengthening oversight mechanisms, increasing transparency through reporting requirements, establishing human rights impact assessments and mitigation strategies, and integrating human rights considerations into business practices generally.⁸⁶⁹

In its 2022 information note, the UN Working Group on Business and Human Rights identified a number of deficiencies regarding the current state of human rights due diligence for the arms sector: lack of comprehensiveness in the regulatory framework including the lack of clarity on the definitions of 'clear' or 'overriding' risk; lack of transparency and oversight; lack of human rights due diligence requirements for companies; the failure of arms manufacturers to conduct human rights due diligence; and the lack of remedies and accountability in the arms sector.⁸⁷⁰ The UN Working Group recommended states amend their national export control regulations 'to include reference to the standalone responsibility of all businesses in the sector to conduct HRDD [human rights due diligence] in line with the [UN] Guiding Principles', and adopt 'mandatory HRDD legislation with enhanced HRDD obligations for the arms sector'.⁸⁷¹ If some of the major exporter states were to adopt such legislation, these developments could potentially create regulatory models which could be disseminated

⁸⁶⁸ HRC, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Cooperation and other Business Enterprises (Revised Draft 16 July 2019) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>. See, for example: art 5(2) which encourages state parties to ensure that all companies, including transnational corporations, undertake human rights due diligence. See also: Ratner, 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights' (n 762).

⁸⁶⁹ Modern Slavery Act 2015, c 30 (United Kingdom); Modern Slavery Act 2018, No 153 (Australia). See, for example: Commerzbank AG, 'Policy Statement of Commerzbank AG on Human Rights and Environmental Due Diligence' 6

<https://www.commerzbank.com/media/konzern_1/comp/LkSG_Statement_HumanRights_Environment.pdf>; Deutsche Bank, 'Deutsche Bank Statement on Human Rights' 5 <<https://www.db.com/files/documents/csr/sustainability/Statement-on-Human-Rights.pdf>>.

⁸⁷⁰ UN Working Group on Business and Human Rights (n 32) 4–7.

⁸⁷¹ *ibid* 7.

transnationally.⁸⁷² The adoption of human rights due diligence regulations addressing these deficiencies requires significant political will, something which continues to be severely lacking in regard to the arms trade. Indeed, this has been a key reason why the arms sector has faced limited accountability, especially relative to the significant and inherent risks of the arms exports for human rights and the substantial profits which are accumulated through arms sales. Arms exports continue to be highlighted as a necessary feature of national security, ignoring the functions of the arms trade as a business. Despite the successes of NGOs and civil society in spotlighting the detrimental human rights impact of the arms business, the lack of political will renders it highly unlikely that human rights due diligence regulations for the arms sector will be introduced in the near future.

Even without such regulatory measures for the arms sector, arms manufacturers and banks have increasingly affirmed the importance of preventive responsibilities for arms deals, particularly with regard to sales of controversial weapons and sales to problematic recipients or destinations. Additionally, there are some indications these large corporations accept the need for their business practices to incorporate human rights considerations. In fact, some of these businesses acknowledge that promoting human rights considerations is actually in the commercial interests of the corporation, particularly for multi-sector corporations or corporations with clients from multiple sectors who have the possibilities to share and disseminate ethical practices across different sectors.⁸⁷³ Clarifying and elaborating the human rights due diligence required by arms manufacturers and banks, as well as by states, therefore has the potential to assist with and push for the effective integration of ethical practices into the decision-making and delivery processes of the arms sector, thereby elevating human rights considerations in the performance of preventive responsibilities. The development of a human rights due diligence framework for the arms sector is also useful for addressing a notable structural problem for responsibilities in this sector: the focus on the responsibilities of the state to the exclusion of other key actors.⁸⁷⁴

A number of human rights due diligence instruments already adopted for other high-risk sectors provide pertinent guidance for strengthening the human rights due diligence processes of the arms sector and for overcoming the deficiencies in the regulatory framework for arms exports. This chapter develops a framework for human rights due diligence for the arms sector, guided by the regulations and guidance, in particular, for supply chains and the mining of conflict minerals. Following an overview of the relevant instruments, this chapter delves into clarifying the standards and elaborating the key elements of human rights due diligence that should be implemented by the arms sector to elevate human rights considerations and, in turn, institutionalise ethical practices for arms exports to conflict zones.

⁸⁷² Halliday and Shaffer, 'With, Within, and Beyond the State' (n 44); Halliday and Shaffer, 'Transnational Legal Orders' (n 531) 51. See also: Baade (n 392) 104.

⁸⁷³ See, for example: Citigroup (n 847) 5.

⁸⁷⁴ Baade (n 392) 104.

I. Sources for Human Rights Due Diligence

Over the past decade, there have been a number of human rights due diligence laws which address high-risk sectors adopted in several jurisdictions, primarily in Europe. The instruments for supply chains and the mining of conflict minerals, in particular, provide pertinent guidance for developing the human rights due diligence processes of the arms sector. The mining of conflict minerals is a relevant and symbiotic high-risk sector for the arms trade because the mining of resources in politically unstable areas present moral dilemmas about conducting business activities in conflict zones. In addition, supply chain management is an integral feature of the arms sector due to the involvement of numerous actors at different stages of the export processes, including secondary actors which require oversight of their delegated activities.

Two recently adopted legislative measures, Germany's Supply Chain Due Diligence Act (2021) and Switzerland's Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (2021), and the OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas (2016) provide the primary basis for clarifying and elaborating a human rights due diligence framework for the arms sector. In addition, where relevant, the European Commission's proposal for a Corporate Sustainability Due Diligence Directive (2022) and other 'third generation' due diligence legislation which impose mandatory due diligence, are used as additional reference points for this framework.⁸⁷⁵ Along with the UNGPs, OECD Guidelines and OECD Due Diligence Guidance, these human rights due diligence instruments are utilised to develop a human rights due diligence framework for the arms sector clarifying and elaborating the standards and processes that should be implemented by the supply-side actors. This framework can, in turn, assist with future regulatory developments such as the adoption of arms sector-specific human rights due diligence legislation.⁸⁷⁶

i. Human Rights Due Diligence Regulations

The German Supply Chain Due Diligence Act (German Act) is of particular note because it requires companies to establish a risk management system which identifies, prevents and mitigates risks of human rights violations and environmental damage.⁸⁷⁷ Specifically, the German Act requires German companies with more than 3000 employees to undertake mandatory human rights due diligence based on the requirements of the UNGPs and the OECD Guidelines. This includes the establishment and implementation a risk management system which identifies, prevents and mitigates risks of human rights violations (and environmental damage)

⁸⁷⁵ These include, most notably: Child Labour Due Diligence Law (2019) Staatsblad 2019, 401 (The Netherlands); Corporate Duty of Vigilance Law (2017) (JORF no 0074 of 28 March 2017) (Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) (France).

⁸⁷⁶ McCorquodale and Nolan (n 392) 475.

⁸⁷⁷ Supply Chain Due Diligence Act of 16 July 2021, Federal Law Gazette 2959 (Lieferkettensorgfaltspflichtengesetz, LkSG) (German Supply Chain Due Diligence Act). This Act has been in force since 1 January 2023.

by companies and their indirect suppliers.⁸⁷⁸ Such provisions are notable because they requires companies to go beyond limited risk assessments and engage in the continuous identification, prevention and mitigation of risks of human rights violations.⁸⁷⁹ The Act also requires the identification of human rights and environmental risks by direct suppliers to German companies, identification of these risks for indirect suppliers where there is ‘substantiated knowledge’ of the risks, the establishment of a grievance system and implementation of remedial measures, and imposes substantial sanctions for infringements of the regulatory requirements.⁸⁸⁰

Likewise, the Swiss Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (Swiss Ordinance) imposes human rights due diligence obligations for supply chain management, with a specific focus on child labour and minerals containing tin, tantalum, tungsten, gold or metals from conflict-affected and high-risk areas.⁸⁸¹ The Swiss Ordinance applies to companies ‘whose seat, domicile, head office or principal place of business is in Switzerland’, which is particularly notable as over 900 companies in the commodities trading industry are located in Switzerland.⁸⁸² The Ordinance requires a company to establish a supply chain policy that identifies, assesses, eliminates or mitigates ‘the risks of potential adverse impacts in its supply chain’ which can include ‘on-site checks; information, in particular from public authorities, international organisations and civil society; consulting experts and specialist literature; obtaining assurances from economic operators in the supply chain and other business partners; using recognised standards and certification systems’.⁸⁸³ The Ordinance provides useful guidance on traceability measures such as the adoption of a supply chain policy, a traceability system for supply chains, and the identification and evaluation of risks based on the supply chain policy and tracing system. The Ordinance also aims to improve transparency to promote corporate accountability, which is particularly relevant to preventive responsibilities for small arms exports as the outright ban of these weapons remains practically unfeasible.⁸⁸⁴

ii. Human Rights Due Diligence Guidance

The OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas (OECD Supply Chain Guidance) provides apposite human rights due diligence guidance for supply chains for conflict mineral

⁸⁷⁸ *ibid*, s 3.

⁸⁷⁹ *ibid*, s 4.

⁸⁸⁰ *ibid*, ss 5, 7, 9. Companies with a global annual revenue of more than EUR 400 million can be sanctioned up 2 percent of their global annual revenue for non-compliance: s 23.

⁸⁸¹ Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (3 December 2021), No 221.433, AS 2021 847 (Verordnung vom 3. Dezember 2021 über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit, VSoTr) (Swiss Ordinance on Due Diligence and Transparency). This Act has been in force since 1 January 2022.

⁸⁸² *ibid*, art 2.

⁸⁸³ *ibid*, art 10.

⁸⁸⁴ See, generally: Nicolas Bueno and Christine Kaufmann, ‘The Swiss Human Rights Due Diligence Legislation: Between Law and Politics’ (2021) 6 *Business and Human Rights Journal* 542.

extraction.⁸⁸⁵ The OECD Supply Chain Guidance, developed in collaboration with stakeholders and backed by governments, aims ‘to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices’.⁸⁸⁶ The Guidance details a five-step due diligence framework, which has been adopted by regulations in the EU and the United States, strengthening the normative force of this guidance.⁸⁸⁷ The five-step framework involves designing and implementing a strategy to respond to identified human rights risks, which include reporting findings to senior management, adopting a risk management plan, and devising risk management strategies such as temporary suspension of trade while pursuing risk mitigation or terminating a supplier relationship.⁸⁸⁸ The Guidance includes a number of annexes which provide detailed model policies for developing supply chain policies and strategies important for high-risk areas such as conflict zones.⁸⁸⁹

Furthermore, the European Commission’s proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) seeks to establish a corporate sustainability due diligence duty to address adverse human rights and environmental impacts.⁸⁹⁰ Although the arms sector is currently not included in the CSDDD, this instrument provides a useful example of the current expectations for corporate human rights and environmental due diligence obligations.⁸⁹¹ Notably, the CSDDD submits a corporate sustainability due diligence duty should be established by states as a part of their responsibilities to monitor and enforce the due diligence obligations of corporate actors, which provides a reference point for how state and corporate preventive responsibilities can be integrated for the arms sector.⁸⁹²

⁸⁸⁵ OECD, ‘Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas’ (Third Edition, 2016) (OECD Supply Chain Guidance)

<<https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>>..

⁸⁸⁶ *ibid*, 9.

⁸⁸⁷ State of California, United States: California Transparency in Supply Chains Act 2010, California Civil Code Section §1714.43. The Netherlands: Child Labour Due Diligence Law (2019) Staatsblad 2019, 401 (Wet Zorgplicht Kinderarbeid).

⁸⁸⁸ See, in particular: OECD Supply Chain Guidance, step 3.

⁸⁸⁹ OECD Supply Chain Guidance, step 3, Annex II (Model Supply Chain Policy for Responsible Global Supply Chains of Minerals from Conflict-Affected and High-Risk Areas), and Annex III (third party auditing).

⁸⁹⁰ European Commission ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937’ (23 February 2022) COM/2022/71 final (Corporate Sustainability Due Diligence Directive).

⁸⁹¹ See, for arguments by NGOs why the arms sector should be included in the CSDDD: European Coalition for Corporate Justice, ‘NGOs: Corporate Due Diligence Must Cover Arms Sector’ (13 March 2023) <<https://corporatejustice.org/news/ngos-corporate-due-diligence-must-cover-the-arms-sector/>>; PAX, ‘PAX: Europe, include arms industry under corporate social responsibility law’ (13 March 2023) <<https://paxforpeace.nl/news/pax-europe-include-arms-industry-under-corporate-social-responsibility-law/>>.

⁸⁹² In addition, the CSDDD includes provisions for action by national supervisory authorities and civil liability of companies for harm to human rights and/or the environment caused by due diligence failures. See: Claire Methven O’Brien and Olga Martin-Ortega, ‘Commission Proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights Perspective’ (Directorate General for External Policies of the EU 2022) In-Depth Analysis PE 702.560 16–17 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO_IDA\(2022\)702560_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO_IDA(2022)702560_EN.pdf)>.

II. Standards of Human Rights Due Diligence

The UNGPs and OECD Guidelines, have conceptualised due diligence as having dual functions: a standard of care and a process for managing risk.⁸⁹³ For example, the UNGPs employ due diligence as a standard of conduct ‘while also referencing the typical business usage of the term which refers to the process conducted by a company to mitigate financial, reputational, legal or other risks to itself’.⁸⁹⁴ On one view, this dual usage of the term results in incoherency and it has been argued, for instance, the ambiguity of the meaning of due diligence in the UNGPs and its conception as both a risk management tool and as a standard of conduct has created difficulties in ascertaining how these concepts can be reconciled.⁸⁹⁵ On the other hand, it is evident this framing is useful for encouraging companies to protect human rights as it employs a concept that is already a part of the business vernacular and emphasises the importance of human rights compliance using a primary operational principle of business activities: economic self-interest.⁸⁹⁶ Clarification and elaboration of the standards of due diligence and the key elements or processes that should be implemented by the arms sector are essential for comprehensive human rights due diligence. Before ascertaining the specific processes, it is necessary to first determine the standards of due diligence required by the arms sector. The following section details three areas essential for the clarification of the standards of due diligence: the level of due diligence, the foreseeability of risks, and the ongoing and parallel nature of these obligations.

i. **Level of Due Diligence**

Preventive responsibilities require actors to undertake measures which are commensurate to their position of privilege in the arms export decision-making and delivery processes, their level of involvement in arms exports, and the severity of risks based on the types of exported products, recipients and destinations.⁸⁹⁷ The standard of conduct required for due diligence has developed from the general standard of reasonableness.⁸⁹⁸ Ascertaining what is ‘reasonable’ involves a balancing act, in which the adverse human rights impacts are weighed against other countervailing interests. The level of due diligence required by the arms sector should reflect the capacities of the supply-side actor and be commensurate to their geopolitical and economic power, influence in the decision-making process, their level of involvement in the export process, and their ability to undertake risk assessments.⁸⁹⁹ All key actors in the arms sector are driven by security and/or commercial interests and possess the

⁸⁹³ John Gerard Ruggie and John F Sherman, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 *European journal of international law* 921, 928.

⁸⁹⁴ UNGPs, Principles 15–21. See also: Baade (n 392) 95; Surya Deva, ‘Guiding Principles on Business and Human Rights: Implications for Companies’ (2012) 9 *European Company Law* 101, 106, 109.

⁸⁹⁵ Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F Sherman, III’ (2017) 28 *European Journal of International Law* 929, 932.

⁸⁹⁶ Baade (n 392) 95; Deva (n 894) 106.

⁸⁹⁷ See, for a similar formulation, OECD Guidelines, Chapter IV, para 5.

⁸⁹⁸ Baade (n 392).

⁸⁹⁹ UNGP, Principle 14; OECD Due Diligence Guidance, 16.

capacities to identify, assess and address the human rights risks emanating from arms exports to conflict zones. Even with actors such as banks, which perform a specific role by financing arms deals, there is significant scope for their decisions and actions to affect the overall export decision and delivery processes.

In addition, the level of due diligence required should reflect the contextual situation, which for arms exports to conflict zones necessitates consideration of the lethality of the product exported and the risk levels of the recipient and destination of the exports. The risk factors in the conditions of the receiving location require special caution and vigilance because of the heightened potential for the misuse of arms and the diversion of these weapons in conflict zones.⁹⁰⁰ As required by the UNGPs and OECD Due Diligence Guidance, a high standard of due diligence for arms exports to conflict zones which is commensurate to the severity and likelihood of the adverse human rights impacts.⁹⁰¹ Exporting products designed for the purposes of killing and causing injury, to destinations which heighten the potential for their misuse and create practical difficulties in managing the security of stockpiles, present significant, foreseeable and inherent risks for human rights. In addition, the increased demand for weapons acquisition in conflict zones and conflict-prone areas generates greater tensions between commercial interests and human rights protections, which in turn increases the potential for human rights considerations being subverted. To effectively prevent or mitigate the adverse human rights impacts of arms exports to conflict zones, a high level of due diligence is necessary from the outset and at every stage of the transfer process, to elevate human rights considerations above other interests and to anticipate practical difficulties that may arise from the dynamic nature of conflict situations.

ii. Foreseeability of Risks

A significant issue with the due diligence provisions in arms control instruments is the foreseeability threshold requiring actual knowledge or the lack of clarity on the level of foreseeability required and how this can be objectively determined. Ascertaining the foreseeability requirement is another factor which is essential for clarifying the standards of due diligence required by the arms sector. Foreseeability requires consideration of the likelihood of the risk eventuating and the potential severity of the risk, with risks more likely to occur and to have significant adverse consequences requiring more rigorous due diligence.⁹⁰² Several factors can heighten the likelihood

⁹⁰⁰ Working Group on Effective Treaty Implementation 'Documents Annexed to the Draft Report to the Fourth Conference of States Parties (CSP4)' (2018) ATT/CSP4WGETI/2018/CHAIR/355/ConfRep 3 <https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN1/ATT_CSP4_WGETI_Draft_Report_EN.pdf>.

⁹⁰¹ UNGPs, Principle 14; OECD Due Diligence Guidance, 16. See also: ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Nauru v Tonga)*, Advisory Opinion (1 February 2011) Case No 17, ITLOS Report 9, para 36.

⁹⁰² The European Court of Human Rights has determined that there are different degrees to foreseeability, that should be assessed using a sliding scale from how close to how remote a risk maybe be: *Mukhitdinov v Russia*, Judgment (21 May 2015) Application No 20999/ 14, para 62. The Inter-American Court of Human Rights has used a similar scale concept to distinguish between general and strict due diligence, with 'the latter referring to a more imminent, rather than an abstract, danger': *González et al (Cotton Field) v Mexico*, Judgment (16 November 2009), Series C No 205,

and severity of risks of arms exports to conflict zones. The first, and likely most compelling, factor is the destination of the export, with conflict zones presenting an inherently high-risk location for weapons diversion and the commission of human rights and international humanitarian law violations. The risk factors in the conditions of the receiving location thus require special caution and vigilance to assess and monitor foreseeable human rights risks and risks of diversion at all stages of the transfer process.⁹⁰³ Several corporate policies of banks recognise an export destination can increase human rights risks and have accordingly included the destination of export as a key indicator in their risk mapping.⁹⁰⁴

Moreover, a second aspect which impacts the foreseeability of risks for arms exports to conflict zones is the possibility a recipient party will be defeated or otherwise lose control of the exported weapons. The Ukrainian conflict is exemplary of how these concerns have factored into arms export decision-making, with the EU and United States exhibiting a strong reluctance to provide Ukraine with high-tech weapons due to fears those weapons may be stolen by Russian troops.⁹⁰⁵ Where a recipient is completely defeated in a war, namely, the defeat is widespread and further offensives or counteroffensives are unlikely to alter the overall outcome of hostilities, there is an extremely high likelihood another party will capture the defeated party's weapons.⁹⁰⁶ Consequently, the defeat of a recipient party can, rather abruptly, alter the performability of due diligence obligations because of the significant practical challenges supply-side actors will face in retrieving the exported arms, which in effect creates an abdication of responsibilities. The recent situation in Afghanistan, where the Taliban was able to takeover military stockpiles left behind by the Coalition forces, highlights the possibilities for parties with known histories of human rights violations gaining access to weapons originally delivered and stockpiled for other purposes.⁹⁰⁷

para 281-283. Where a risk of severe consequences is foreseeable then preventive actions will be more necessary to prevent or minimise these risks: *Budayeva and Others v Russia*, Judgment (20 March 2008) Applications No 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (European Court of Human Rights), para 147-160. See also: Baade (n 22) 52; Robert Kolb, 'Reflections on Due Diligence Duties and Cyberspace' (2015) 58 *German Yearbook of International Law* 113, 123.

⁹⁰³ Working Group on Effective Treaty Implementation (n 900) 3.

⁹⁰⁴ See, for example, the Natixis defence industry policy which uses a 'grid' to analyse credit risks and assess whether a destination country is 'currently involved in an armed conflict': Natixis (n 843).

⁹⁰⁵ Jen Kirby, 'Can Europe Keep Supplying Ukraine with Weapons?' (*Vox*, 17 September 2022)

<<https://www.vox.com/world/2022/9/17/23355120/ukraine-wants-more-weapons-can-europe-provide>>;

Courtney Kube and Dan De Luce, 'U.S. Military Leaders Are Reluctant to Provide Longer-Range Missiles to Ukraine' *NBC News* (17 September 2022)

<<https://www.nbcnews.com/politics/national-security/us-military-leaders-are-reluctant-provide-longer-range-missiles-ukrain-rcna48072>>.

⁹⁰⁶ Customary international humanitarian law rules allow for the capture of an enemy's weapons as part of war booty in international armed conflicts, and in non-international armed conflicts customary *jus in bello* on war booty indicates that parties to civil conflicts to capture the enemy's movable property: Yoram Dinstein (ed), 'LONIAN Customary International Law', *Non-International Armed Conflicts in International Law* (2nd edn, Cambridge University Press 2021) 291–2. This is both theoretically and practically problematic as it effectively authorises, for example, the theft of weapons from government stock piles by non-state armed groups in conflict situations: Andrew Clapham, 'Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law' (2021) 97 *International Law Studies* 1200, 1211.

⁹⁰⁷ Agence France-Presse, 'Taliban Parade Captured US Military Equipment in Kandahar' *The Guardian* (1 September 2021) <<https://www.theguardian.com/world/2021/sep/01/taliban-parade-captured-us-military-equipment-in-kandahar>>.

In such instances, the obvious and foreseeable risks of diversion and practical difficulties in reacquiring weapons from conflict zones reinforces the importance of restraint from the outset and a high level of human rights due diligence before an arms sale proceeds. At the early stages of negotiating an arms deal, measures such as investigations into the security of stockpiles should be undertaken by the supply-side actors to confirm the capabilities of a recipient party to protect the exported arms from theft, as part of a comprehensive assessment of the foreseeability of risks.

A third important factor of foreseeability is the temporal element, namely, determination of the imminency of a risk. The Administrative Court of Paris, in denying a request submitted by Action des Chrétiens pour l'Abolition de la Torture (ACAT) to prevent a Saudi ship transporting French arms from transiting and exiting from France in May 2019, found there was no imminent danger to human rights, and in particular people's lives, presented by the ship's activities.⁹⁰⁸ Similarly, when the British government was required to reassess the risks of granting an export licence for arms exports to Saudi Arabia, the government adopted a narrow interpretation of temporality to justify its findings that there was no clear risk the arms exports would be used to commit violations of international humanitarian law.⁹⁰⁹ The narrow framing of the temporal proximity of risk that focuses only on imminent danger is overly restrictive and hinders the comprehensive assessment of medium and long term adverse human rights impacts. Instead, the temporal proximity of a risk should, at a minimum, to include human rights and diversion risks which are reasonably foreseeable in the medium term. Put another way, the potential misuse or diversion of the exported arms should be considered to be reasonably foreseeable in the medium term when a recipient is involved in an ongoing conflict where human rights violations have already been committed by that party or by its allies. Accordingly, for the Yemen conflict, arms exports to coalition states should be viewed as presenting reasonably foreseeable risks of further human rights violations in the medium term, because of the ample evidence available of such violations have already been committed.

iii. Ongoing and Parallel Due Diligence

Correspondingly, the standards of due diligence should also take into account how long preventive responsibilities can or will be performed and how the performance of these obligations should occur between different actors. The first question requires a determination of whether there is a temporal end point to human rights due diligence. The importance of performing ongoing due diligence for arms exports to conflict zones is necessitated by heightened and significant risks of these activities and the high likelihood for changes in circumstances because conflict situations are constantly evolving.⁹¹⁰ Some national regulations contemplate the continuous appraisal of recipient behaviour. For example, German laws require the revocation of an export permit if reasons for denying the permit, such as the risk of the exported arms being

⁹⁰⁸ *Ordonnance du 26 septembre 2019* (26 September 2019) Paris Administrative Court of Appeal, Order no 19PA02929. See also: Soubrier (n 236) 115.

⁹⁰⁹ *The King, on the application of CAAT, v Secretary of State for International Trade* [2023] EWHC 1343 (Admin).

⁹¹⁰ OECD Supply Chain Guidance, 44 (step 3).

used for an act detrimental to peace, manifest after an export licence is granted.⁹¹¹ This effectively requires ongoing responsibilities by arms manufacturers, who would be obligated to inform the licensing authority of changes in behaviour or context which eventuate even after the arms have arrived at the intended destination and with the intended recipient. Such requirements underscore the necessity for human rights due diligence to continue throughout the lifecycle of weapons because the human rights risks can be heightened in dynamic situations such as armed conflicts.

Furthermore, such requirements indicate that preventive responsibilities (for example, of the manufacturer) do not end because of the involvement of another actor (in this case, the involvement of the state through the licensing process). In fact, as several arms manufacturers have acknowledged in their corporate policies, the existence of a licensing regime of a state does not excuse the manufacturer from also undertaking due diligence obligations, particularly in assessing the risks associated with potential clients and destinations.⁹¹² As such, with regard to how due diligence should be performed among different actors, preventive responsibilities should be viewed as functioning in parallel, with the obligations applying horizontally between two actors. While certain actors, due to their greater capabilities and resources or specialisation in carrying out specific tasks, may be in a better position to perform some specific human rights due diligence measures, the comprehensive implementation of human rights by the arms sector would require states and corporate actors to perform their preventive responsibilities to the fullest extent of their capacities.⁹¹³ Even if or where there is an overlap and duplication of preventive actions, this can be beneficial for preventing and mitigating the adverse human rights impacts by limiting potential oversights, recklessness or circumvention of human rights considerations in favour of commercial and security interests. Indeed, assistance to an importing state before an arms export is authorised, either from other states, the UN or other external sources, has been found to be beneficial for some states for conducting thorough risk assessments to mitigate the risk of diversion.⁹¹⁴ Similar coordination and parallel efforts should be undertaken by all key actors in the arms sector to ensure the effective implementation of human rights due diligence.

III. Key Elements of Human Rights Due Diligence

A high standard of due diligence, which takes into account the reasonable foreseeability of adverse human rights impacts and involves ongoing and parallel human rights due diligence by the key supply-side actors, should be complemented with specific processes that reflect the diverse roles and capacities of these actors.⁹¹⁵

⁹¹¹ War Weapons Control Act, art 6(3) and 7(2).

⁹¹² L3Harris, 'Maintaining Strict Trade Compliance' (n 805); Raytheon Technologies (n 805); General Dynamics (n 805).

⁹¹³ Sistare (n 426) 2; Baker (n 427) 403. See also: Esther Hennchen, 'Royal Dutch Shell in Nigeria: Where Do Responsibilities End?' (2015) 129 *Journal of Business Ethics* 1.

⁹¹⁴ UNIDIR, 'Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings' (UNIDIR 2017) <<https://www.unidir.org/files/publications/pdfs/strengthening-end-use-r-control-systems-to-prevent-arms-diversion-en-686.pdf>>.

⁹¹⁵ Graf and Iff (n 763) 113.

Although many of the corporate policies of arms manufacturers and banks referenced the need for strengthened due diligence, limited details were provided of the types of processes involved in performing due diligence obligations. Drawing on the human rights due diligence instruments of other high-risk sectors, this section recommends four key elements of due diligence obligations that should be undertaken by the arms sector to prevent or mitigate the adverse human rights impacts of arms exports to conflict zones: assessment of past practices, risk reduction and management plans, traceability measures, and oversight mechanisms. These elements are relevant for identifying, assessing and addressing the risks of diversion and the risks of human rights violations, reinforcing that these risks should be viewed as two points on a continuum, rather than discrete types of responsibilities.

i. Assessment of Past Practices

The assessment of past practices of a recipient is a notable area in which states have adopted a narrow approach which subverts the human rights considerations required by export control regulations and policies. The practices of the United Kingdom provide a damning example of how this narrow approach hinders the effective implementation of human rights due diligence. In the CAAT case, past practices of violations of international humanitarian law by potential recipients were treated by the British government as 'isolated incidents' rather than a pattern of past behaviour, to justify the continuing export of arms to Saudi Arabia.⁹¹⁶ In contrast, a preferable approach has been taken by Belgian courts. In March 2021, the main administrative court of Belgium, the Council of State, suspended four export licences to Saudi Arabia, effectively halting 75 percent of Belgium's arms exports.⁹¹⁷ In its judgment, the Council of State considered the EU Common Position's risk assessment requirements and found there was not adequate justification for the Walloon government to grant export licences to Saudi Arabia, in light of the human rights violations in Yemen.⁹¹⁸ The Council noted there was not adequate evidence to confirm the exported arms would not be used to commit further human rights violations, and the risks of the arms being used for such purposes was not properly considered by the government.⁹¹⁹

Corresponding with the approach of the Belgian court, investigations into the past behaviour of recipient parties should be comprehensive in scope and temporality to properly assess their past practices. Accordingly, the assessment of past practices should consider long-standing patterns of practice rather than merely focussing on recent practice, given the long term impacts of arms transfers.⁹²⁰ Arms exports to recipients who are involved in war crimes, crimes against humanity and genocide should be automatically prohibited by national export controls, similar to United States' Leahy laws which prohibit assistance by the United States to foreign security force

⁹¹⁶ Elizabeth Truss, 'Trade Update: Statement UIN HCWS339' (7 July 2020) <<https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339>>. See also: Stavrianakis, 'Debunking the Myth' (n 601) 127.

⁹¹⁷ *Judgment no 249.991 (5 March 2021) A. 232.975/XV-4690* (Conseil d'État, section du contentieux administratif le Président de la XV^e chambre siégeant en référé arrêt no 249.991 du 5 mars 2021).

⁹¹⁸ *Judgment no 249.991 (5 March 2021) 14.*

⁹¹⁹ *ibid.*

⁹²⁰ Stavrianakis, 'Debunking the Myth' (n 601) 127.

units when there is credible information the unit has committed a gross violation of human rights.⁹²¹ As the focus is on the past conduct of a recipient, rather the type of weapons exported, where there is evidence of human rights violations having been committed by a recipient, exports should not proceed, irrespective of whether different types of weapons (often less lethal weapons referred to as ‘defensive’ weapons) are supplied that were not used in the previous violations.

Even without regulatory amendments, states could implement such changes in their decision-making by elevating human rights considerations in their export policies, similar to the latest CAT Policy of the United States and the Political Principles of Germany. In addition, arms manufacturers and banks could utilise risk identification and mapping processes to comprehensively assess past practices of potential recipients or destinations. Where these processes indicate that previously exported arms have been misused by a recipient or have been diverted for use in conflict zones, then those actors should not proceed with the arms deal or terminate an existing business relationship where evidence of past practices emerges at a later stage.⁹²² An even stronger response would be to exclude arms exports to recipients with problematic past practices altogether, much like the exclusion clauses for ‘controversial weapons’ in the policies of some banks.⁹²³ A widespread imposition of such restrictions could in effect create a corporate-led arms embargo against certain recipients, thereby potentially disseminating ethical practices throughout the arms sector and pushing states to reconsider providing arms to those recipients (particularly through military aid).

ii. Risk Reduction and Management Plans

As an alternative to blanket or automatic bans on arms exports to certain destinations or recipients, risk reduction and management plans should be used as corollaries to risk assessments. Risk reduction and management plans establish processes to prevent, manage and mitigate the risks identified by risk assessments, and are required by the Germany Act and Swiss Ordinance.⁹²⁴ The OECD Supply Chain Guidance also encourages companies to devise a risk management strategy which includes mitigation measures, temporary suspension of trade, or disengagement with a supplier where mitigation is insufficient or mitigation attempts fail.⁹²⁵ The OECD Supply Chain Guidance further notes the adoption of the correct strategy depends on the ability of the company to influence and possibly leverage suppliers to minimise

⁹²¹ FAA §2378d; General Military Laws 10 USC §362. See also: Erickson, ‘Demystifying the “Gold Standard”’ (n 114) 135.

⁹²² BNP Paribas, ‘BNP Paribas Human Rights Risk Mapping’ (n 863) 11–12; L3Harris, ‘Code of Conduct’ <<https://www.l3harris.com/sites/default/files/2020-08/l3harris-code-of-conduct.pdf>>; Raytheon Technologies (n 805).

⁹²³ HSBC (n 850) 1; Société Générale (n 840) 6; NatWest Group (n 846) 2; Morgan Stanley Investment Funds (MS INVF) (n 853) 2, 3; Citigroup (n 853) 25.

⁹²⁴ German Supply Chain Due Diligence Act, s 3-6; Swiss Ordinance on Due Diligence and Transparency, art 10.

⁹²⁵ OECD Supply Chain Guidance, Annex I (Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain).

risks.⁹²⁶ The reasonability of corrective or preventive actions is also recognised as being affected by the reality of the sector, practical issues, as well as practices which have created substandard actions due to, for instance, malpractice or cost minimisation.⁹²⁷

The arms trade necessitates high levels of risk reduction and management because of the lethality of the exported products and the significant foreseeability of diversion and human rights risks. Given the inherent risks of arms exports to conflict zones, in particular, risk reduction would in effect require export restraint because risk management would likely be insufficient and difficult to practically implement. Nonetheless, in cases where the immediate risks are less obvious, risk management plans should ascertain whether the potential recipient has committed or facilitated human rights violations or unauthorised re-exports, and detail strategies to control or minimise the risks of misuse or diversion of the exported arms. Verification mechanisms should be integrated into risk management plans for arms exports to ensure the destinations, intermediaries, end users, and storage facilities are properly verified before an export proceeds. This could involve engaging with local authorities prior to concluding arms deals to confirm their capacities to acquire the weapons without diversion risks and to secure weapons stockpiles upon delivery.⁹²⁸ Once arms exports are in transit, efforts should be made to properly inspect export and end use certificates.⁹²⁹ Upon delivery, storage facilities and stockpiles should be verified to confirm adequate security measures against diversion.⁹³⁰ Other post-sale responsibilities may include post-delivery inspections, conducted unilaterally by exporter states or arms manufacturers, jointly with the importing state, or by a designated independent team.⁹³¹ A growing number of states implement post-delivery verification as part of their stringent end use controls and transport security.⁹³²

Moreover, risk management plans should require actors to continuously appraise whether the recipients are not misusing the exported arms to commit or facilitate violations of human rights or international humanitarian law, thereby imposing an onus on supply-side actors to verify whether the exported arms are being lawfully used. If or when internal and external reporting indicate that human rights violations are being committed, efforts should be made to minimise further risks, for example, by leveraging political and commercial relationships to push for changes in recipient behaviour. For arms exports to conflict zones, however, the practical capabilities of actors to address and mitigate these risks may be severely limited, thus remedial measures should be included in risk management plans as a means of redress. In

⁹²⁶ *ibid*, Annex II (Model Supply Chain Policy for Responsible Global Supply Chains of Minerals from Conflict-Affected and High-Risk Areas).

⁹²⁷ Baade (n 392).

⁹²⁸ Hugh Griffiths, 'Supporting Effective Implementation of UN Sanctions on North Korea' (Small Arms Survey 2020) Strengthening Implementation and Enforcement of the Arms Embargo on North Korea (SAENK) project 37–43.

⁹²⁹ *ibid*.

⁹³⁰ *ibid*.

⁹³¹ See, generally, on post-ship controls and on-site inspections: Andrea Edoardo Varisco, Kolja Brockmann and Lucile Robin, 'Post-Shipment Control Measures: European Approaches to on-Site Inspections of Exported Military Materiel' (SIPRI 2020).

⁹³² Anders and Cattaneo (n 724) 18.

addition, the feasibility of undertaking post-sale inspections, for instance, should also be factored into the risk management plans of states and arms manufacturers, and the intractable challenges of performing such inspections in conflict zones should be emphasised as a need for exercising export restraint. This is another area where banks can utilise their leverage to verify that effective preventive measures are in place from the outset, before financing arms deals.

iii. Traceability Measures

Weapons tracking and tracing measures are another key element of human rights due diligence for the arms sector as the prevention of weapons diversion is an important prerequisite for preventing and mitigating the risks of human rights violations. Specific rules on preventing diversion have been adopted by the EU, and common elements of end-user certificates have been detailed by the Council Decision 2021/38 (2021).⁹³³ Article 6 includes optional requirements such as a commitment by the end-user to notify the exporter EU member state in case of loss or theft of the goods covered by the end-user certificate; assurances by the end-user that demonstrate its capacity for safe and secure weapons and ammunition management, including its capacity for safe and secure management of the stockpiles where the goods will be stored; or a commitment by the end-user on decommissioning surplus military equipment.⁹³⁴ Traceability measures for preventing illegal re-exports or diversion to illicit markets are symbiotic with preventing and mitigating human rights risks, as known human rights violators are more likely to acquire weapons through illicit markets because of limited access to legal arms sales. As traceability measures emphasise the monitoring of arms exports, they can also be a critical component for accountability efforts and breaking cycles of violence.

Traceability measures are an important feature for monitoring adverse human rights impacts in conflict zones, as required for supply chains. Arms manufacturers could utilise similar steps from the Swiss Ordinance to track arms shipments to ensure the exported arms are not diverted to unintended recipients and are not misused to commit human rights violations. The Swiss Ordinance requires companies importing or processing minerals or metals in Switzerland, which originate from conflict-affected and high-risk areas, to take a number of steps to trace the supply. These include the adoption of a supply chain policy, a traceability system for supply chains that includes the establishment of a documentary system, and the identification and evaluation of risks based on this supply chain policy and tracing system.⁹³⁵ The establishment of a documentary system for tracking arms deliveries is particular importance for arms exports as there currently is no global or regional system of marking weapons and ammunition.

⁹³³ Council of the European Union 'Decision (CFSP) 2021/38 of 15 January 2021 establishing a common approach on the elements of end-user certificates in the context of the export of small arms and light weapons and their ammunition (18 January 2021) Official Journal of the European Union L 14/4 (EU Council Decision 2021/38).

⁹³⁴ EU Council Decision 2021/38, art 6 (a), (d), (e), respectively.

⁹³⁵ Swiss Ordinance on Due Diligence and Transparency, art 12.

Even without the establishment of a standardised marking system, arms manufacturers can use their own marking procedures to track and trace arms shipments using a documentary system. This is especially necessary for small arms because these weapons are highly susceptible to diversion and continue to lack an independent verification mechanism, as has been implemented for certain non-conventional weapons.⁹³⁶ For small arms, manufacturers should mark weapons with unique identification numbers, strengthen record keeping standards and auditing processes, and increase cooperation and targeted enforcement strategies which link police agencies, customs and other government officials.⁹³⁷ In addition, reporting by NGOs and civil society which identify the transfer practices and patterns for specific conflict zones are useful sources of public information supply-side actors can consider when developing their traceability measures.⁹³⁸ The effectiveness of these measures would be further increased if combined with strategies to destroy old and obsolete weapons or remove them from circulation,⁹³⁹ and if monitoring efforts are coordinated between supply-side actors, further reinforcing the importance of parallel human rights due diligence.

iv. Oversight Mechanisms

Although states and corporate actors should undertake parallel human rights due diligence for arms exports to conflict zones, there remains a need for oversight mechanisms. State oversight of other key actors, in particular arms manufacturers and intermediaries, has been incorporated into the national export regimes of each of the six major exporters, to varying degrees, and is primarily executed through the licensing process. In addition to the state, oversight mechanisms are also necessary for other key actors. For example, many major arms manufacturers have subsidiaries which are registered in different states to the principal company. While Germany has some of the most stringent laws in the EU, German arms manufacturers with subsidiaries in other EU states have sought to circumvent these strict rules. This occurred, for instance, during the Yugoslavian conflict in 1991, when the weapons of German small arms manufacturer Heckler & Koch ended up in the conflict zone despite the prohibition of exports in Germany. The weapons were manufactured in the United Kingdom through a Royal Ordnance licensing agreement as the United Kingdom did not prohibit exports to Yugoslavia.⁹⁴⁰

More recently, RWM Italia, the Italian subsidiary of the German arms manufacturer Rheinmetall, sold weapons to Saudi Arabia which were used in airstrikes in Yemen, bypassing the strict German licensing requirements and the imposition of a ban by

⁹³⁶ Wendy Cukier and Steve Shropshire, 'Domestic Gun Markets: The Licit-Illicit Links' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 118–9; Grip (n 34) 98.

⁹³⁷ Cukier and Shropshire (n 936) 118–9.

⁹³⁸ See, for example: Conflict Armament Research (n 112); Kiel Institute (n 586); Alessandra D'Addetta, 'UK Arms Exports to Libya (2012-2022)' (AOAV, 24 May 2023) <<https://aoav.org.uk/2023/uk-arms-exports-to-libya-2012-2022/>>.

⁹³⁹ Grip (n 34) 98.

⁹⁴⁰ This pattern of transferring licensing products to circumvent national laws occurred in later conflicts: Abele (n 486) 90–1.

Germany on the export of weapons to the Yemen conflict.⁹⁴¹ The UNGPs implicitly recognise the difficulties in relation to subsidiaries, by requiring a duty of care and due diligence by all members of a supply chain, including those which are separate legal entities.⁹⁴² In a recent Dutch case, the extension of the duty of care of parent companies to include the actions of their subsidiaries was confirmed by the Dutch Court of Appeal.⁹⁴³ The court found Royal Dutch Shell, the parent company, also owed a duty of care to affected villagers and was liable for a failure to prevent future oil spills, thereby affirming the importance of oversight mechanisms of parent companies over their subsidiaries.⁹⁴⁴

Supply chain legislation goes further and requires oversight mechanisms for other secondary actors within production and delivery supply chains, such as transport or shipping agents. The German Act requires risk assessments to be conducted with regard to direct suppliers, though the requirement for indirect suppliers comes into effect only when the primary company has ‘substantiated knowledge of violations’.⁹⁴⁵ The Swiss Ordinance imposes similar requirements for direct and indirect suppliers.⁹⁴⁶ These provisions are highly relevant to the arms sector as numerous actors are involved in the production and delivery processes for arms exports. Accordingly, primary supply-side actors such as arms manufacturers and banks should implement oversight mechanisms which extend to subsidiaries within their direct operational control and to other secondary actors with whom they have business relationships, including intermediaries and recipients of arms exports.⁹⁴⁷ The primary corporate actor’s responsibilities would therefore require the monitoring of a secondary actor’s compliance with human rights due diligence processes and a recipient’s compliance with international human rights law and international humanitarian law.

Another oversight mechanism that would be particularly useful for arms exports is the introduction of directors’ duties to establish and oversee the implementation of due diligence which identifies, prevents and mitigates potential and actual adverse human rights impacts and is integrated into corporate strategy. Article 25 of the CSDDD on Directors’ Duty of Care states ‘when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the

⁹⁴¹ See Chapter Two.

⁹⁴² UNGPs, Principles 15, 17. The UNGP approach has been adopted by France, which has imposed a duty of care (*devoir de vigilance*) on large business corporations registered in France with respect to their subsidiaries, contractors and suppliers: Corporate Duty of Vigilance Law (2017), art 1(3). See also: Wagner (n 390) 225.

⁹⁴³ *Oguru, Efanaga & Milieudéfensie v Shell* (29 January 2021), ECLI:NL:GHDHA:2021:132 (Court of Appeal of The Hague).

⁹⁴⁴ *ibid*, para 7.26-7.62. The Hague Court of Appeal (at para 3.28-3.32) also referred to the precedent from English courts where ‘the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations ... of the subsidiary’: *Vedanta v Lungowe* [2019] UKSC 20 (UK Supreme Court), para 44. For an overview of other cases which have considered the liability of parent companies for their subsidiaries, see: Nicolas Bueno and Claire Bright, ‘Implementing Human Rights Due Diligence Through Corporate Civil Liability’ (2020) 69 *International & Comparative Law Quarterly* 789, 312–316.

⁹⁴⁵ German Supply Chain Due Diligence Act, s 3.

⁹⁴⁶ Swiss Ordinance on Due Diligence and Transparency, art 2, 11.

⁹⁴⁷ This is mentioned, for example, in BNP Paribas’ risk mapping document: BNP Paribas, ‘BNP Paribas Human Rights Risk Mapping’ (n 863) 4.

consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long terms'.⁹⁴⁸ The CSDDD also includes potential criminal sanctions for directors who fail to comply.⁹⁴⁹ Oversight mechanisms which impose specific obligations on directors is an effective way of promoting ethical conduct in decision-making, which is especially necessary for the arms sector because the corporations involved produce, export and finance highly lethal products. The inherent risks of arms exports can make it more tempting for risk assessments to superficially acknowledge these risks because they are obvious and difficult to completely avoid. The inclusion of oversight mechanisms such as directors' duties can therefore reinforce the importance of supply-side actors comprehensively identifying, assessing and addressing the human rights and diversion risks of arms exports to conflict zones.

IV. Reinforcing Responsibilities

Ascertaining the standards of due diligence and the key processes that should be implemented are essential for developing a framework for human rights due diligence by the arms sector. While due diligence obligations have been incorporated into the regulatory framework and supplementary measures of corporate actors, these instruments have primarily focussed on preventing the diversion of weapons. The responsibilities to prevent and mitigate the adverse human rights impacts of arms exports remain unclarified and unelaborated by these instruments. The regulations and other instruments for other high-risk sectors, in particular, supply chains and the mining of conflict minerals, provide pertinent guidance for the arms sector to develop and strengthen human rights due diligence processes without the need for regulatory intervention. The instruments from these symbiotic high-risk sectors are useful for clarifying and elaborating preventive responsibilities for the arms sector, aligning and mutually reinforcing the human rights due diligence processes of states and corporate actors, and encouraging ethical practices by all supply-side actors in the arms sector.

The framework for human rights due diligence developed in this chapter has focussed on elucidating two areas which are necessary for strengthening the preventive responsibilities of supply-side actors in the arms sector. First, the standards of due diligence must be clarified, which requires determining the level of due diligence, the foreseeability of risks, and the temporality and congruence of due diligence obligations. The UNGPs, OECD Guidelines and OECD Due Diligence Guidance are important sources for clarifying these factors and establishing a high level of due diligence for the arms sector due to the significant and foreseeable short, medium and long term risks of arms exports to conflict zones. Second, the key elements of human rights due diligence for the arms sector must be identified and elaborated, including the assessments of past practices, traceability measures, risk reduction and management plans, and oversight mechanisms. The German Act, Swiss Ordinance and OECD Supply Chain Guidance, along with other mandatory due diligence laws

⁹⁴⁸ Corporate Sustainability Due Diligence Directive, art 2(1) and 25.

⁹⁴⁹ This is similar to the Dutch Child Labour Due Diligence Law.

and the CSDDD, assist in identifying and elaborating these essential features for the comprehensive implementation of human rights due diligence by the arms sector.

The short, medium and long term adverse human rights impacts of arms exports to conflict zones necessitate the implementation of human rights due diligence by the arms sector to prevent and mitigate human rights and diversion risks. Human rights due diligence is evidently an important form of preventive responsibilities that can incorporate moral reasoning into arms export decision-making, elevate human rights considerations over security and commercial interests, and, ideally, encourage export restraint. Human rights due diligence can, in turn, shift how human rights are characterised by the arms sector, so that human rights are regarded as an interest requiring protection, as opposed to the adverse human rights impacts being viewed as a risk which merely needs to be taken into account. This shift in characterisation does not necessarily require the adoption of regulations or amendment of existing ones, but could be achieved through the implementation of comprehensive, ongoing and parallel human rights due diligence by states and corporate actors, which centre the elevation of human rights considerations and involve the dissemination of ethical practices throughout the arms sector.

Chapter Nine – Responsibilities Reevaluated

*Prometheus stole fire from the gods and gave it to man. For this he was chained to a rock and tortured for eternity.*⁹⁵⁰

In the preceding chapters, this thesis has conceptualised the preventive responsibilities of supply-side actors involved in arms export to conflict zones. The identification and elucidation of these responsibilities relied on transnational law as the framework for analysis and virtue ethics as the theoretical basis for the central argument: responsibilities for arms exports to conflict zones must focus on preventive actions, be grounded in morality to elevate of human rights considerations, and be extended to all key supply-side actors to minimise potential oversights and unethical behaviours.

This concluding chapter reflects on the key arguments and themes of this thesis. The first section commences with a summary of the four steps in the conceptualisation of the preventive responsibilities of supply-side actors involved in arms exports to conflict zones. The remainder of the chapter illuminates the main threads and issues that have emerged from this analysis, drawing on some notable tales from Greek mythology to illustrate these points.

I. The Four Steps

The conceptualisation of responsibilities was divided into four steps. The first step explicated the scope and sources for the examination of responsibilities and the fundamental features of the arms trade relevant to this conceptualisation. Chapter One detailed the scope of this thesis, including the focus on preventive responsibilities, the interdisciplinary approach which combined features from transnational law and virtue ethics, and the sources examined. Chapter Two contextualised the fundamental aspects of the arms trade relevant to the conceptualisation of responsibilities, providing an overview of the methods of acquisition of arms in conflict zones, the roles of the key supply-side actors, and the specific regulatory challenges and consequences of small arms exports to conflict zones.

The second step highlighted the intimate links between the arms trade and security, and expounded the three-pronged human security-based approach to conceptualising responsibilities. Chapter Three illustrated the historical relationship between the arms trade, security and commercial interests, with a focus on the period from World War I to the end of the Cold War. This chapter underscored the shift in the security concept from national security to international security and its impact, along with commercial interests, on the development of arms controls during most of the twentieth century. Chapter Four began by examining the emergence of the human security paradigm

⁹⁵⁰ Opening sequence from *Oppenheimer* (2023, *Universal Pictures*). Prometheus was the son of a Titan (either Iapetus or Atlas). Many of the Titans were banished to Tartarus by the Olympians after their defeat during the Titanomachy.

during the 1990s and considering the implications of the latest evolution of the security concept for the conceptualisation of responsibilities for arms exports to conflict zones. The chapter then particularised a human security-based approach involving three interrelated features: preventive actions, the incorporation of morality through an emphasis on ethical conduct, and the extension of responsibilities to all key supply-side actors. This approach presumed the incorporation of ethical standards into all regulatory and supplementary measures is necessary for identifying, assessing and addressing the adverse human rights impacts of arms exports, and that export restraint is the optimal default response to preventing these adverse impacts.

The third step centred on analysing the legal instruments that form the transnational regulatory framework for arms exports, and determined the practical implementation of preventive responsibilities has focussed on the incorporation and development of due diligence obligations. Chapter Five commenced this assessment by examining significant supranational arms control instruments applicable to small arms and adopted from the 1990s. This chapter tracked the evolution of preventive responsibilities in these instruments, with the latest stage being the integration of the human security paradigm, which has resulted in the incorporation of human rights considerations into supranational export control regulations and consequently led to the development of due diligence obligations for states. Chapter Six scrutinized the domestic export control regimes of the six major exporter states, comparing how their regulatory frameworks, roles of government agencies, and arms export policies have integrated preventive responsibilities. This assessment revealed the development of preventive responsibilities in the domestic export control regimes has primarily centred on state responsibilities and the incorporation of human rights considerations into export licensing decision-making. While these export licensing regimes include some obligations for arms manufacturers and intermediaries, the imposition of independent preventive responsibilities remains underdeveloped.

The fourth step considered supplementary soft law instruments and corporate policies and their utility for clarifying their preventive responsibilities of the key non-state supply-side actors, specifically, and for the arms sector, more generally. The first part of Chapter Seven explored the specific regulations for intermediaries (arms brokers and arms dealers), finding brokering regulations are geared towards reasserting state control over these actors rather than establishing discrete preventive responsibilities for them. However, given the predisposition of these actors towards exploiting loopholes and engaging in illicit arms transfers, the extension of state responsibilities to include the oversight of intermediaries is a preferable option in this instance. The second part of the chapter assessed the soft law and self-regulatory instruments applicable to arms manufacturers and banks, with specific attention given to the UNGPs, the OECD Guidelines and the corporate policies of arms manufacturers and banks. While there is some promise, mostly in the acknowledgment that these actors should perform discrete responsibilities in addition to the regulatory requirements imposed by export licensing regimes, the specification of their preventive responsibilities is limited.

Accordingly, Chapter Eight detailed a framework for human rights due diligence for the arms sector based on the previously examined soft law instruments and guidance from

other high-risk sectors, namely, supply chains and the mining of conflict minerals. The development of this framework involved, first, the clarification of the standards of due diligence and, second, the identification of the key elements of human rights due diligence. This chapter elaborated a comprehensive human rights due diligence framework for the arms sector, which elevates human rights considerations and promotes ethical conduct in arms export decision-making, by requiring a high standard of due diligence, a broad approach to the foreseeability of risks, and parallel and ongoing efforts by all key supply-side actors. For the effective implementation of human rights due diligence by the arms sector to prevent and mitigate risks of diversion and the risks of adverse human rights impacts, this high standard must be complemented with specific processes, including the assessment of past practices, the implementation of risk reduction and management plans, the establishment of traceability measures, and the strengthening of oversight mechanisms.

II. Transnational Legal Dis/Order

*Eris whose wrath is relentless, walked through the onslaught making men's pain heavier.*⁹⁵¹

*Harmonia, the Theban goddess, has, it seems, been moderately gracious to us.*⁹⁵²

Eris and Harmonia are opposing deities, with the former symbolising chaos and discord while the latter seeks to restore cosmic balance.⁹⁵³ Their distinctions reflect the start and end points of the transnational legal ordering process, which has been an underlying theme in the conceptualisation of responsibilities for arms exports to conflict zones. The investigation into the responsibilities of supply-side actors has been grounded in the assessment of arms export controls at the domestic, regional and international levels. Since the 1990s, coinciding with the development of the human security paradigm, national and supra-national arms export controls have increasingly implemented preventive responsibilities which incorporate human rights considerations. At the international level, the adoption of Arms Trade Treaty has served as confirmation of the arrival of a third major era in arms control.

Despite some synchronisation between the laws at different levels, it is not possible to conclusively claim, based only on the assessment of the export regimes of six major exporter states, that an arms trade transnational legal order has emerged, developed or settled, as the extent of the harmonisation of export controls at the different levels of laws remains varied. For example, the United States is a novel case as its licensing regime provided the basis for the provisions in the Arms Trade Treaty, which is reflective of the reciprocal influence of national laws (especially those of powerful states) on supranational instruments. Russia's tightening of its export controls in recent decades appears to have been driven by attempts to strengthen state control

⁹⁵¹ Homer, *The Iliad of Homer* (Richmond Lattimore tr, University of Chicago Press 2011) 441.

⁹⁵² Plato, *Plato in Twelve Volumes: With an English Translation* (Harold North Fowler tr, W Heinemann ; Harvard University Press 1914) 95.

⁹⁵³ Unfortunately, as Harmonia received a cursed necklace on her wedding day which brought her great misfortune, her actual impact on cosmic rebalancing is questionable.

over the arms industry, reinforcing that national security implications continue to be a protected interest in Russian arms export decision-making. In contrast, China recently amended its arms export control regime to reflect international standards, including those in the Arms Trade Treaty, suggesting supranational laws have influenced this transformation.

The alignment of export regulations of the European states with the EU Common Position on Arms Exports also demonstrate the increased influence of supranational controls over domestic export control regimes, although this may be an EU specific phenomenon due to the overall structure of the regional organisation and the recognition of its member states of the authority of EU regulations. Germany's strict export controls and policies surpass the requirements of the EU Common Position, but it still amended its domestic regime to align with the regulatory developments at the EU and international levels. The United Kingdom and France also similarly updated their export control regimes following the adoption of arms control measures by the EU, as well as in response to scandals. The strongest evidence of legal ordering is the introduction of brokering controls by some of the major exporter states, in particular the three European states whose brokering controls correlate with the requirements of the EU Common Position on Arms Brokering. In general, however, national laws continue to be the most efficacious level at which preventives responsibilities have been developed, primarily for states, through the establishment of licensing regimes, oversight mechanisms, and monitoring requirements.

Overall, the transnational legal framework for arms export controls stands somewhere between harmony and discord, with moves towards the latter gradually occurring in the current discordant international political climate. The Ukraine war is a significant reason for this regression toward disunity. While the conflict itself has so far not led to any noteworthy regulatory amendments, it has revived division and tensions between states and within supranational bodies, which hampers further efforts for cooperation and collaboration. Like Eris' golden apple of discord, which provoked disputes and strife that eventually culminated in the Trojan War, the practices in relation to the Ukraine conflict are illustrative of the heightened impact of political and security interests and the consequent demotion of human rights considerations in arms export decisions, which hinder the development of an arms trade transnational legal order as well as the implementation of preventive responsibilities.

III. Supplementary Soft Law

Demigods hold a special place in Greek mythology. They are often, though not exclusively, the offspring of a god and mortal, like Heracles, whose special abilities allow them to act as the heroes of many tales. Soft law instruments are akin to the demigods of the transnational regulatory framework for arms exports. While they are perceived as not having the same god-level status as hard laws, soft laws undoubtedly play an integral role in supplementing their stricter counterparts.

Although arms export control laws at the domestic, regional and international levels have introduced preventive responsibilities, and specifically due diligence obligations,

these have overwhelmingly focussed on the preventive responsibilities of states. Despite the key roles states play in arms exports, a central argument of this thesis has been the effective prevention and mitigation of the adverse human rights impacts of arms exports to conflict zones requires preventive responsibilities to be extended to all key actors in the arms sector. For the two types of corporate actors – arms manufacturers and banks – a wider net for legal sources had to be cast, as the regulatory framework for arms exports provided limited articulation of their preventive responsibilities. The notable soft law instruments for human rights due diligence supplemented the determination of these responsibilities, with the UNGPs, OECD Guidelines and OECD Due Diligence Guidance providing useful general guidance. The regulations and guidance for high-risk sectors relating to supply chains and the mining of conflict minerals supported the clarification and elaboration of human rights due diligence for the arms sector, with the OECD Supply Chain Guidance, the German Supply Chain Act and the Swiss Ordinance on Due Diligence and Transparency proving especially pertinent in this regard.

Correspondingly, the growing force of these soft law instruments is reflected in the development and adoption of corporate policies, which act as additional supplements to the existing regulatory framework for arms exports. The influence of these human rights due diligence instruments is clearly evident in the inclusion of human rights considerations in the corporate policies of arms manufacturers and banks. While the preventive responsibilities outlined in these documents are generally lacking in detail, affirmations of the importance of independent due diligence obligations highlight the increased acceptance by these corporate actors that they too must undertake discrete preventive responsibilities. The examination of these instruments confirmed effective human rights due diligence for the arms sector requires proper monitoring and oversight of business practices and the ongoing performance of due diligence even after the delivery of arms, including additional end use monitoring requirements. The incorporation of these requirements into corporate practices can mutually strengthen the existing obligations in arms export regimes. Further research into how corporate policies can be integrated into the regulatory framework, for example, through their use in litigation, would be useful for ascertaining the normative force of these policies and whether they could potentially revolutionise arms export practices.

IV. Human Rights and Conceptual Malleability

*I can add colours to the chameleon,
Change shapes with Proteus for advantages,
And set the murderous Machiavel to school.
Can I do this, and cannot get a crown?
Tut, were it farther off, I'll pluck it down.*⁹⁵⁴

Triton is the more famous son of Poseidon, perhaps due to the Disney retelling of his story linking his lineage with the mermaid Ariel. But his brother Proteus, the prophetic sea god, is an equally compelling descendant, with an ever-shifting form that rendered

⁹⁵⁴ Shakespeare, *Henry VI*, Part III, Act III, Scene ii.

him elusive to capture and ideal for literary allusions.⁹⁵⁵ As with advantageousness of Proteus' shape-shifting, a key argument in this thesis is the strength of conceptual malleability, with the dual functions of due diligence as a standard and as a process allowing for a more comprehensive conceptualisation of preventive responsibilities. A corollary to this due diligence focus has been the emphasis on identifying, assessing and addressing the human rights risks of arms exports to conflict zones.

However, given the practices in the Yemen and Ukraine conflicts, where arms continue to be exported despite the obvious risks to human rights, it is necessary to reflect on whether the emphasis on risks to human rights is the most appropriate conceptual framing for preventive responsibilities. The incorporation of moral reasoning has the potential to transform the focus on 'risk' by elevating human rights to the status of an 'interest' and, in turn, generating expectations for ethical conduct. By characterising human rights as an interest, greater emphasis is placed on the protection of the human rights of people who are impacted by arms exports, but unable to exercise the protection of their interests in arms export decisions. The current CAT Policy of the United States and the Political Principles of Germany suggest there is potential for the framing of human rights to be altered to one which confers human rights with an 'interest' status. The focus of these policies in creating a race to the top with stricter standards, and reaffirming the importance of export restraint, present significant potential for the elevation of human rights considerations in arms export decision-making, which could be further complemented by the characterisation of human rights as a hard interest.

On the flip side, the resurgence of the argument that arms exports are necessary for maintaining peace and security, even when there are likely to be adverse human rights impacts, suggests the potential demotion of human rights considerations may become more prevalent in future practices, particularly as these conflicts continue to rage. Recent practices with regard to the Yemen conflict, including the sales of arms to members of the coalition states despite the widely available evidence of previous arms exports being used in the commission of human rights and international humanitarian law violations, underscore the subversion of human rights protections and the move away from centring human rights as an interest. The recent practices in relation to the Ukraine war, where the United States has delivered cluster munitions to Ukraine despite these weapons being banned by an international treaty, reinforce these issues. Future research (probably well into the future given the current unlikelihood of peace) could elucidate why and how arms export practices have been able to utilise the conceptual malleability of human rights as a means for subverting human rights considerations, even in the face of the significant and foreseeable adverse human rights impacts of arms exports to conflict zones.

⁹⁵⁵ Philostratus, *Philostratus, The Life of Apollonius of Tyana: Volume I* (FC Conybeare tr, Loeb Classical Library 1912).

V. Intractable Challenges

*'You see?' said Prometheus. 'It is your fate to be Heracles the hero, burdened with labours, yet it is also your choice.'*⁹⁵⁶

The Labours of Heracles were a series of seemingly impossible tasks assigned to the hero by King Eurystheus, through which Heracles sought to atone for murdering his wife and children after he was driven mad by the queen of the Olympian gods (Hera), the wife of his father (Zeus). The intractable challenges in transforming arms export decision-making practices feels very much like Heracles' labours. While incremental and, sometimes, monumental changes have been introduced into arms export controls, there continue to be persistent issues which hinder the protection of human rights of the individuals and communities impacted by the export of arms to conflict zones. Not all of these challenges are equally obstinate, and there remains the possibility that if some of these challenges are overcome, then progress will be easier to achieve for the others.

One of these challenges is the distinction between types of preventive responsibilities, with export control regulations conferring different requirements for preventing the diversion of arms and preventing adverse human rights impacts. This issue emerged from the separate focal points of regulations for legal arms exports and for illicit transfers. The effective prevention of adverse human rights impacts also involves the prevention of diversion, and the two types of preventive responsibilities should be viewed as two points on a continuum rather than as unrelated objects of prevention. Small arms, in particular, elucidate the importance of doing so, as the diversion of small arms assists known human rights violators and other controversial recipients in acquiring arms, which may be used to commit or facilitate violations of human rights or international humanitarian law. The synergies between the prevention of diversion and the protection of human rights therefore requires a coordinated approach between different types and levels of controls, as well as the synchronisation of the preventive responsibilities for preventing diversion and preventing adverse human rights impacts, which should be further complemented by measures for improving transparency. There are some indications, particularly through the supplementation of soft law, that these two types of preventive responsibilities are being brought closer together or even becoming consolidated under a broader umbrella of preventive responsibilities, as due diligence obligations require the contemplation of both the risks of diversion and the risks of adverse human rights impacts.

A further and related challenge is the continuing false dichotomy between small arms and firearms, which is illustrated by the development of the separate instruments for regulating these weapons at the domestic, regional and international levels. The persistence of this false dichotomy, due to concerns restrictions on military firearms will impact civilian gun ownership, was most notably visible in the simultaneous development of the UN Programme of Action and the Firearms Protocol, and the dual regulatory frameworks of the EU, despite firearms being technically similar to military small arms. The challenge of developing a unified regulatory framework for small arms

⁹⁵⁶ Stephen Fry, *Heroes: Mortals and Monsters, Quests and Adventures* (Penguin 2018) 400.

and firearms further contributes to the disorder in the transnational regulatory framework, while also highlighting the political, economic and national security concerns that continue to hinder progress on this front.

Correspondingly, these challenges also inhibit the effective incorporation and elevation of human rights considerations into these practices, which has become increasingly evident in two intertwined areas: decreasing transparency efforts and arms export practices with regard to the Ukraine conflict. Exposing the true motives of arms deals is an uphill battle for transparency, as the national security defence will undoubtedly be furnished to maintain secrecy over arms export deals and decision-making processes. Arms manufacturers and banks too have refrained from detailing their due diligence processes for arms exports, including the publication of full and comprehensive policies, citing security and competition concerns as reasons for limiting transparency. Further transparency, especially in regard to making detailed policies (and not summaries) publicly available, is necessary to enable the scrutinization of these policies and practices by stakeholders and civil society, which would increase the possibilities for state and corporate actors being held accountable for their involvement in arms exports to conflict zones.

There have been indications, particularly from the behaviour of state representatives at international forums, that a significant impact of the Ukraine war has been the retreat in transparency efforts and international cooperation.⁹⁵⁷ The success of preventive responsibilities in encouraging export restraint is very much dependent on the practices of actors, including increased transparency and cooperation. Further efforts to reaffirm export restraint and ethical practices are needed more than ever, especially as the provision of military aid becomes increasingly linked to countering existential threats to a state's (and its people's) existence. The latter two challenges – diminished transparency and the increasing use of security justifications – are analogous to the final labours of Heracles. After the hero completed his first ten tasks, some accounts claim King Eurystheus voided two of those tasks and demanded Heracles perform two more. The progress that has been made, especially over the past two decades, in incorporating human rights considerations into arms export controls has stalled as a result of the Ukraine conflict and growing international discord. As a consequence, additional and more difficult tasks – as arduous as stealing the golden apples from Hera and beheading the three-headed dog of Hades – may need to be attended to before human rights considerations are sufficiently elevated in arms export decisions.

VI. A Way Forward

The eternal torture of Prometheus for his theft of fire was not enough for Zeus. The king of the Olympians 'planned to create an evil so enticing men would scramble to embrace it before they realised its dangers'.⁹⁵⁸ That evil was the first human woman, Pandora, made of soil and water and blessed by the gods with numerous gifts. Zeus

⁹⁵⁷ Informal discussions, Forum on the Arms Trade.

⁹⁵⁸ This summary is based on: Sarah Iles Johnston, *Gods and Mortals: Ancient Greek Myths for Modern Readers* (Princeton University Press 2023) 61–64.

offered Pandora as a bride to Epimetheus, Prometheus' brother. Years earlier, Prometheus, living up to the meaning of his name of 'forethought', had warned Epimetheus not to accept gifts from Zeus. Epimetheus forgot this wise advice and accepted Pandora as his wife. One day, many years into the future, Pandora discovered in their pantry an extra jar (or 'box', as has become the reference for popular culture), which curiosity convinced her into opening.⁹⁵⁹ From that jar darted the evils of the world – Greed, Jealousy, War, among many others – 'that would plague humans forevermore'.⁹⁶⁰ By the will of Zeus, however, one final evil, too slow to get away, remained: Hope.⁹⁶¹

After reviewing the worst of the intractable challenges, one begins to wonder whether there is any reason to believe there is hope for creating an arms trade geared towards morality. Is it even possible for an inherently dangerous business to ever be a moral one? Though the arms trade provokes such philosophical questions, this thesis has focussed on more practical assessments, such as whether this business can become more ethical, through the implementation of preventive responsibilities which elevate human rights considerations. Despite the intractable challenges in making an immoral business slightly more ethical, there continues to be some hope that the efforts to provoke such transformations are not entirely futile. This hope derives from changing behaviours of the supply-side actors themselves, and the NGOs and civil society who seek to hold them accountable. Of the supply-side actors, the increasing acceptance of discrete and parallel preventive responsibilities by arms manufacturers and banks suggests there is further potential for these responsibilities to be reinforced in a way which is conducive to the protection of human rights, which may slowly but surely transform business practices. The important roles arms manufactures and banks play in the arms export processes enables them to leverage change in the arms export decision-making of states so the protection of human rights is elevated, which these corporate actors have significant commercial and reputational interests in doing.

Furthermore, throughout the decades, civil society and NGOs have been integral to transforming arms export control regimes. The roles of these actors have had a marked impact on the development on supranational arms controls, as evidenced by the adoption of the Ottawa Mine Ban Treaty, Convention on Cluster Munitions, and the Arms Trade Treaty. NGOs have also sought to hold the arms sector accountable for controversial arms sales, including through litigation, which has proven useful for exposing export practices even in cases where courts have not forced governments to improve those practices. The litigation against the arms sector has been important for increasing transparency and questioning the deferral to secrecy for arms export decisions. The increasing push for transparency by NGOs and civil society has the potential to force supply-side actors to publicly disclose their motives to citizens and stakeholders. Greater transparency and exposure of problematic practices can, in turn, provoke the adoption of ethical behaviours and encourage export restraint.

⁹⁵⁹ 'Pandora's box' was a mistranslation by Erasmus of Rotterdam in 1508 which has stuck throughout the centuries.

⁹⁶⁰ Johnston (n 958) 62.

⁹⁶¹ *ibid* 64.

Finally, there are areas of further research that would assist in addressing these challenges. The continuing acceptability of small arms as a weapon for export to conflict zones, coupled with the regulatory division between small arms and firearms, suggests these weapons would be one of the last types to be restricted from conflict zones. However, concerns about conventional arms exports have tended to focus on larger weapons and weapons systems. Further research on the specific adverse effects of small arms in current and ongoing conflicts could provide a useful basis for encouraging across-the-board export restraint, because if even the 'acceptable' weapons are being misused, then the complete prohibition of arms exports to conflict zones becomes a more tenable solution. Such inquiries should also be complemented by further investigation into the roles and misuse of (civilian) firearms in conflict zones to reaffirm the need for a unified regulatory framework, at the very least in regard to preventing the diversion of these weapons. The symbiosis of these challenges with the difficulties in regulating potentially dangerous dual-use technologies such as artificial intelligence is a further area requiring attention, particularly in regard to the significance of preventive responsibilities, as the full scope of potential risks of these technologies may not yet be readily evident.

Hope was the last thing left in Pandora's box. And perhaps, it remains the greatest tool we have during this third era of arms control.

Appendices

I. Appendix I – Table of Arms Manufacturers

| Manufacturer | State of Registration | Ranking (top 100: 2017-2021) ⁹⁶² | Small Arms Manufacturer ⁹⁶³ | Relevant Corporate Policies | Exports to Countries linked to Conflicts ⁹⁶⁴ | Involvement in Recent Scandals and/or Litigation ⁹⁶⁵ |
|--------------|--|---|--|--|--|---|
| Airbus | Netherlands (operating in France, Germany and Spain) | Yes (consistent top 15) | | Code of Conduct; Human Rights policy ⁹⁶⁶ | exports to coalition states in Yemen (Saudi Arabia, the UAE, Egypt and Kuwait) | Subsidiaries are named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |
| Almaz-Antey | Russia | Yes (top 20) | Yes | N/A | missiles to Saudi Arabia | |
| AVIC | China | Yes (consistent top 10) | | N/A | aircrafts to Saudi Arabia | Supplies to Myanmar government |
| BAE | United Kingdom | Yes (consistent top 5-6) | Yes | Human Rights Statement; Product Trading Summary; Supplier Principles; Export Control Policy Summary ⁹⁶⁷ | exports to coalition states in Yemen (Saudi Arabia, the UAE, Jordan and Bahrain) | Named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |
| Boeing | United States | Yes (consistent top 2-3) | | Code of Basic Working Conditions and Human Rights - applies to employees ⁹⁶⁸ | long term contracts Saudi Arabia; exports to coalition states in | |

⁹⁶² Data from 2016 to 2022: SIPRI, 'SIPRI Arms Transfers Database' (n 344).

⁹⁶³ Jenzen-Jones (n 785).

⁹⁶⁴ Information primarily from: Facing Finance (n 786) 42–45.

⁹⁶⁵ Information primarily from: ECCHR, 'European Responsibility for War Crimes in Yemen – Complicity of RWM Italia and Italian Arms Export Authority?' <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_RWMItalia_Dec2020.pdf>

⁹⁶⁶ Airbus (n 803); Airbus (n 832).

⁹⁶⁷ BAE Systems, 'BAE Systems Human Rights Statement 2023' (n 809); BAE Systems, 'Policy Summaries: Product Trading' (n 803); BAE Systems, 'Supplier Principles' (BAE Systems, 2023) <<https://www.baesystems.com/en/sustainability/responsible-supply-chain/suppliers/supplier-principles>>; BAE Systems, 'Policy Summaries: Export Control' (n 807).

⁹⁶⁸ Boeing, 'Human Rights' (Boeing, 2023) <<https://www.boeing.com/principles/human-rights.page>>.

| | | | | | | |
|-------------------|---------------|--------------------------|---|---|--|--|
| | | | | | Yemen (Saudi Arabia, the UAE, Egypt, Jordan and Kuwait) | |
| Dassault | France | Yes (top 50) | | CSR Statement; Good Practices (2019) - reference to oversight plan ⁹⁶⁹ | aircrafts to Saudi Arabia; weapons sales to Egypt | Named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |
| General Dynamics | United States | Yes (consistent top 5-6) | | Policy Statement on Human Rights ⁹⁷⁰ | tanks and APC exports Saudi Arabia exports to coalition states in Yemen (Saudi Arabia, Egypt and Kuwait) | |
| Heckler & Koch | Germany | No | Yes - leading small arms manufacturer for NATO and EU countries | Code of Ethics and Business Conduct; Trade Compliance statement ⁹⁷¹ | | licensed production of the G36 assault rifle to Military Industries Corporation, a state-owned enterprise in Saudi Arabia; illegal sales to Mexico scandal |
| Kalashnikov Group | Russia | No | Yes - leading small arms manufacturer in Russia - 95% (Rostec subsidiary) | N/A - only has Anti-Corruption Policy ⁹⁷² | | |

⁹⁶⁹ Dassault Aviation (n 832); Dassault Aviation, 'Global Compact: Good Practices 2019 (Financial Year 2018)' <<https://www.dassault-aviation.com/wp-content/blogs.dir/2/files/2019/09/DE-Global-Compact-2019-12-juillet-2019.pdf>>.

⁹⁷⁰ General Dynamics (n 805).

⁹⁷¹ Heckler & Koch, 'Code of Ethics and Business Conduct: Heckler & Koch Group' (n 828); Heckler & Koch, 'Trade Compliance of Heckler & Koch GmbH' (n 801).

⁹⁷² Kalashnikov Group, 'Anti-Corruption Policy' <<https://kalashnikovgroup.ru/upload/iblock/1ed/Anti-Corruption%20Policy.pdf>>.

| | | | | | | |
|-----------------------|---|-------------------------|-----|--|--|---|
| L3Harris Technologies | United States | Yes (consistent top 20) | | Code of Conduct; Human Rights policy; Trade Compliance statement ⁹⁷³ | no controversial exports | Settlement of USD 13 million with US Department for hundreds of alleged violations of US export control laws |
| Leonardo | Italy | Yes (consistent top 15) | Yes | Code of Ethics; Group Policy on Human Rights; Trade Compliance Program; Project Risk Management ⁹⁷⁴ | exports to coalition states in Yemen (Saudi Arabia, the UAE and Egypt) | Named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |
| Lockheed Martin | United States | Yes (consistent no 1) | | Code of Ethics; Human Rights Policy ⁹⁷⁵ | exports to coalition states in Yemen (Saudi Arabia, the UAE, Egypt, Jordan, Kuwait and Bahrain); missiles to Ukraine | |
| MBDA | France, Italy + UK (merger of subsidiaries of Airbus, BAE and Leonardo) | Yes (consistent top 40) | | Code of Ethics ⁹⁷⁶ | exports to coalition states in Yemen (Saudi Arabia, the UAE, Egypt and Kuwait) | Subsidiaries named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |

⁹⁷³ L3Harris, 'Code of Conduct' (n 922); L3Harris, 'Global Human Rights Policy' (n 817); L3Harris, 'Maintaining Strict Trade Compliance' (n 805).

⁹⁷⁴ Leonardo, 'Code of Ethics'

<https://www.leonardo.com/documents/15646808/16737549/Code+of+Ethics_26+September+2019.pdf>; Leonardo, 'Group Policy on Human Rights' (n 820); Leonardo, 'Leonardo Group Trade Compliance Program' (n 821); Leonardo, 'Project Risk Management' (n 830).

⁹⁷⁵ Lockheed Martin (n 798); Lockheed Martin, 'Corporate Policy Statement CPS-021: Good Corporate Citizenship and Respect for Human Rights'

<<https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/ethics/cps-021.pdf>>.

⁹⁷⁶ MBDA (n 814).

| | | | | | | |
|--------------------------|------------------|--------------------------------|-----|---|--|--|
| NORINCO | China | Yes (consistent top 10) | Yes | Corporate Statement on Non- Proliferation ⁹⁷⁷ | N/A | AVIC and NORINO were found to have provided arms and military equipment (tanks and aircraft) to the Tatmadaw in Myanmar. NORINCO continues supply raw materials to the Myanmar Directorate of Defense Industry. In the late 1990s, Chinese-made Norinco pistols reportedly flooded the market in South Africa. |
| Northrop Grumman | United States | Yes (consistent top 3-4) | | Human Rights Policy; Standards of Business Conduct ⁹⁷⁸ | exports to coalition states in Yemen (Bahrain); long term contracts with Saudi Arabia | |
| Raytheon Technologies | United States | Yes (consistent top 2-4) | Yes | Code of Conduct; Human Rights Policy ⁹⁷⁹ | exports to coalition states in Yemen (Saudi Arabia, the UAE, Egypt, Jordan, Kuwait and Bahrain) | Settlement with US State Department for civil penalty of USD 8 million to resolve hundreds of alleged violations of US export control laws; UK subsidiary (Raytheon Systems) named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human |

⁹⁷⁷ NORINCO (n 810).

⁹⁷⁸ Northrop Grumman (n 816); Northrop Grumman (n 813).

⁹⁷⁹ Raytheon Technologies (n 813); Raytheon Technologies (n 805).

| | | | | | | |
|-------------|----------------|---|---|--|--|--|
| | | | | | | rights/international humanitarian law violations in Yemen conflict |
| Rheinmetall | Germany | Yes (consistent top 30) | Yes | Code of Conduct; Export Control policy; CSR policy ⁹⁸⁰ | exports to coalition states in Yemen (Saudi Arabia, Egypt and Kuwait) | Subsidiary (RWM Italia) in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |
| Rolls-Royce | United Kingdom | Yes (consistent top 30) | | Export Control and Sanctions Policy; Human Rights Policy - summary only, full policy not available publicly ⁹⁸¹ | | |
| Rostec | Russia | Yes (subsidiary High Precision Systems is top 50) | Yes (through High Precision Systems subsidiary) | CSR policy ⁹⁸² | | |
| Thales | France | Yes (consistent top 20) | Yes | Code of Ethics; Compliance statement ⁹⁸³ | exports to coalition states in Yemen (Saudi Arabia, the UAE, Egypt, Jordan and Kuwait) | Named in ECCHR Communication to ICC Prosecutor for involvement in arms exports used for human rights/international humanitarian law violations in Yemen conflict |

⁹⁸⁰ Rheinmetall, 'Code of Conduct of the Rheinmetall Group' (n 813); Rheinmetall, 'Export Controls: Global, Complex Rules for Import and Export of Goods and Services' (n 799); Rheinmetall, 'Global Framework Agreement on Principles of Social Responsibility of the Rheinmetall Group' (n 813).

⁹⁸¹ Rolls-Royce (n 803); Rolls-Royce, 'Human Rights Policy' (2023) <<https://ourcode.rolls-royce.com/trusted-to-deliver-excellence/group-policy/human-rights-policy.aspx>>.

⁹⁸² Rostec, 'CSR: The Combination of Business Interests with the Needs of Society' (2023) <<https://www.rostec.ru/en/csr/>>.

⁹⁸³ Thales Group, 'Code of Conduct: Prevention of Corruption and Influence Peddling' <https://www.thalesgroup.com/sites/default/files/2022-03/Code%20of%20conduct%202021_2.pdf>; Thales Group, 'Setting the Bar High on Integrity and Compliance' (*Thales Group*) <<https://www.thalesgroup.com/en/global/corporate-responsibility/governance/setting-bar-high-integrity-and-compliance>>.

II. Appendix II – Table of Banks

| Bank ⁹⁸⁴ | State of Registration | Loan total (USD millions) >1billion | Loans to | Underwriting total (USD millions) >1billion | Underwriting to | Relevant Corporate Policies |
|---------------------|-----------------------|-------------------------------------|--|---|--|---|
| Bank of America | United States | 19492.6 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Northop Grumman, Raytheon + others | 12811 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Northop Grumman, Raytheon + others | ESG policy; Human Rights statement; Defence Sector Policy - referenced in ESG policy, not publicly available ⁹⁸⁵ |
| Bank of China | China | 1011.7 | Airbus, Boeing, Leonardo + others | No | No | N/A - only CSR reports available |
| Barclays | United Kingdom | 3521.4 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Raytheon, Thales + others | 1915.9 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Raytheon, Thales + others | Human Rights Statement; Defence & Security Statement ⁹⁸⁶ |
| BNP Paribas | France | 7194.7 | Airbus, BAE Systems, Boeing, Leonardo, Raytheon, | 5143.2 | Airbus, BAE Systems, Boeing, Leonardo, Northop Grumman, | Defence Sector Policy; Human Rights Risk Mapping; Human Rights Statement ⁹⁸⁷ |

⁹⁸⁴ Data on 2021 financing from: PAX and ICAN (n 90).

⁹⁸⁵ Bank of America (n 854); Bank of America, 'Bank of America Corporation Human Rights Statement' <<https://about.bankofamerica.com/content/dam/about/report-center/hrs/2022/human-rights-statement.pdf>>.

⁹⁸⁶ Barclays, 'Barclays Group Statement On Human Rights' <<https://home.barclays/content/dam/home-barclays/documents/citizenship/our-reporting-and-policy-positions/policy-positions/Barclays-Statement-on-Human-Rights-2016.pdf>>; Barclays, 'Defence & Security Statement' (n 841).

⁹⁸⁷ BNP Paribas, 'Sector Policy - Defence & Security' (n 840); BNP Paribas, 'BNP Paribas Human Rights Risk Mapping' (n 863); BNP Paribas, 'Statement of BNP Paribas on Human Rights' <https://cdn-group.bnpparibas.com/uploads/file/uk_declaration_bnp_sur_droit_de_l_homme.pdf>.

| | | | | | | |
|-------------------------|---------------|---------|--|--------|--|---|
| | | | Thales + others | | Raytheon, Thales + others | |
| BPCE Group | France | 2103.4 | Airbus, Leonardo, Thales + others | 826.3 | Airbus, Thales + others | Ethics and Compliance statement; Natixis Defence Sector Policy ⁹⁸⁸ |
| Citigroup | United States | 24246.8 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Northop Grumman, Raytheon, Thales + others | 9096 | BAE Systems, Boeing, L3Harris, Leonardo, Lockheed Martin, Northop Grumman, Raytheon + others | Environmental and Social Policy Framework; Human rights statement ⁹⁸⁹ |
| Commerzbank | Germany | 3018 | Airbus, BAE Systems, Boeing, Leonardo, Raytheon, Thales + others, Rheinmetall | 2019.2 | Airbus, BAE Systems, Boeing, Thales + others | Human Rights & Environmental Due Diligence Statement; Defence Sector Statement - only summary available publicly ⁹⁹⁰ |
| Crédit Agricole | France | 6108.6 | Airbus, BAE Systems, Boeing, Leonardo, Lockheed Martin, Raytheon, Thales + others | 3603.5 | Airbus, Boeing, Leonardo, Lockheed Martin, Raytheon, Thales + others | Human Rights Charter; Arms Industry and Arms Trade Policy ⁹⁹¹ |
| Crédit Mutuel CIC Group | France | 2307.5 | Airbus, BAE Systems, General Dynamics, L3Harris, Leonardo, | 775.1 | Thales + other | Defence & Security Sector Policy ⁹⁹² |

⁹⁸⁸ BPCE Group (n 857); Natixis (n 843).

⁹⁸⁹ Citigroup (n 853); Citigroup (n 847).

⁹⁹⁰ Commerzbank AG (n 869); Commerzbank AG (n 839).

⁹⁹¹ Crédit Agricole SA, 'Human Rights Charter within Crédit Agricole S.A. Group' <<https://www.credit-agricole.com/en/pdfPreview/189196>>; Crédit Agricole SA (n 840).

⁹⁹² Crédit Mutuel Alliance Fédérale (n 840).

| | | | | | | |
|--|----------------|---------|---|---------|--|---|
| | | | Lockheed Martin, Thales + others | | | |
| Deutsche Bank | Germany | 6816.6 | Airbus, BAE Systems, Boeing, L3Harris, Leonardo, Raytheon, Thales + others | 6726 | Airbus, BAE Systems, Boeing, L3Harris, Raytheon, Thales + others | Statement on Human Rights; Defence Policy - not publicly available, mentioned in press release ⁹⁹³ |
| Goldman Sachs | United States | 5825.2 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Lockheed Martin, Raytheon + others | 7087.6 | Airbus, BAE Systems, Boeing, Leonardo, Lockheed Martin, Northop Grumman, Raytheon + others | Sector Guidelines ⁹⁹⁴ |
| HSBC | United Kingdom | 4426.9 | Airbus, L3Harris, Leonardo, Raytheon, Thales + others | 1773.5 | Airbus, L3Harris, Leonardo, Thales + others | Human Rights Statement; Defence Equipment Sector Policy ⁹⁹⁵ |
| Industrial and Commercial Bank of China (ICBC) | China | 1101.6 | Airbus, Boeing, Raytheon + others | No | No | Code of Ethics; Anti-Money Laundering Policy ⁹⁹⁶ |
| JPMorgan Chase | United States | 14208.3 | Airbus, BAE Systems, Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Northop | 10777.8 | Boeing, General Dynamics, L3Harris, Leonardo, Lockheed Martin, Northop Grumman, | Human Rights statement ⁹⁹⁷ |

⁹⁹³ Deutsche Bank, 'Deutsche Bank Statement on Human Rights' (n 869); Deutsche Bank, 'Deutsche Bank Has Expanded Its Defence Policy and External Transparency' (n 838).

⁹⁹⁴ Goldman Sachs, 'Sector Guidelines' (*Goldman Sachs*) <<https://www.goldmansachs.com/our-commitments/sustainability/sustainable-finance/environmental-and-social-risk-management/sector-guidelines/>>.

⁹⁹⁵ HSBC, 'HSBC Human Rights Statement' <<https://www.hsbc.com/-/files/hsbc/who-we-are/pdf/230710-hsbc-human-rights-statement.pdf>>; HSBC (n 850).

⁹⁹⁶ ICBC, 'CBC's Code of Ethics' <<https://www.icbc.com/about-icbc/company-info/documents/icbc-code-of-ethics.pdf>>; ICBC, 'Anti-Corruption Policy' <https://v.icbc.com.cn/userfiles/Resources/ICBC/haiwai/ICBCThailand/download/2020/POLICYForwebsite_2020.pdf>.

⁹⁹⁷ JPMorgan Chase & Co (n 838).

| | | | | | | |
|-------------|---------------|---------|--|------|--|--|
| Wells Fargo | United States | 11636.2 | BAE Systems, Boeing, General Dynamics, L3Harris, Lockheed Martin, Northop Grumman, Raytheon + others | 6921 | BAE Systems, Boeing, General Dynamics, L3Harris, Lockheed Martin, Northop Grumman + others | Human Rights Statement ¹⁰⁰³ |
|-------------|---------------|---------|--|------|--|--|

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¹⁰⁰³ Wells Fargo Bank, 'Human Rights Statement' <<https://www08.wellsfargomedia.com/assets/pdf/about/corporate-responsibility/human-rights-statement.pdf>>.

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