

Supranational small arms control and the challenges of dichotomization

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Abstract

Since the end of the Cold War, the focal points of international and regional small arms control instruments have expanded to include issues such as lack of transparency, diversion of weapons, and adverse human rights impacts. This article traces the evolution of small arms control since the 1990s and exposes the ongoing challenges posed by entrenched dichotomies. It highlights three critical dichotomies within supranational small arms control instruments: the regulatory distinction between legal arms exports and illicit transfers (structural dichotomy), the definitional divide between small arms and firearms (definitional dichotomy), and the divergent obligations for arms sales and military aid (practical dichotomy). The article argues that, despite significant advancements in small arms control, the potential of these instruments to effectively address issues of transparency, diversion, and human rights impacts continues to be undermined by embedded dichotomies.

Introduction

The Cold War period was a golden age for weapons and supranational arms control. Following a second catastrophic global war, an urgent reassessment of security priorities was necessary to maintain peace and promote international cooperation. The consequent emergence of the notion of ‘international security’ in the aftermath of World War II marked an important progression in the security concept, a modernization that shifted the objectives of arms control to limiting the use, production, and proliferation of weapons for the benefits of the international community broadly.¹ The substantial growth in multilateral arms control instruments during the Cold War coincided with a renewed focus on cooperation and peace amongst states, as well as the creation of new international bodies that provided structures and forums for negotiation.² Despite the centring of disarmament and non-proliferation, the concurrently occurring arms race between the two superpowers resulted in an exponential increase in spending on the development of weapons capabilities and the expansion of military arsenals.³ The growth in arms volumes globally heightened

¹ Stuart Casey-Maslen, *Arms Control and Disarmament Law* (Oxford University Press 2022) 172.

² 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) 2–4; 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.

³ Jonathan A Grant, *Rulers, Guns, and Money: The Global Arms Trade in the Age of Imperialism* (Harvard University Press 2007) 2; David R Stone, ‘Imperialism and Sovereignty: The League of Nations’ Drive to Control the Global Arms Trade’ (2000) 35 *Journal of Contemporary History* 213, 214.

the security dilemma, with increases in the amount and lethality of weapons perpetuating cycles of insecurity as states sought to match the defence expenditures and technological innovations of their enemies and neighbours.⁴

The legal export of conventional arms remained largely outside the remit of international arms control treaties during this period, despite the substantial impacts of these weapons on peace and development, particularly in volatile and conflict-affected regions. With the exception of sensitive weapons or technologies and exports to destinations viewed as potential threats, conventional arms were treated like other standard forms of commerce.⁵ However, because of their links to national security, conventional arms were excluded from the scope of international trade agreements, such as the General Agreement on Tariffs and Trade (GATT), signed in 1947, which included a national security exception to export controls.⁶ Cold War dynamics hindered treaty negotiations for conventional arms, which was especially evident in the tone and conduct of the negotiations, as well as the focus on banning or limiting the use, development, and transfer of non-conventional weapons and certain conventional weapons causing excessive injuries or having indiscriminate effects.⁷ As arms control measures were not extended to conventional arms generally, arms embargoes remained the strongest tools for restricting their transfer.⁸

Although larger weapons with greater single explosive power were the focus of arms control efforts for most of the twentieth century, small arms continue to be the real weapons of mass destruction, responsible for more than 90 per cent of casualties in wars since World War II.⁹ The most proliferated rifles—AK47s, Uzis, G3s, FALs, M16s—regularly serve as tools of conflict, crime, repression, and violence.¹⁰ Their excessive availability contributes to the commission of war crimes, acts of terrorism, and human rights violations, and their diffusion throughout society can impede peacekeeping activities and assistance from humanitarian organizations.¹¹ Additionally, spending on small arms acquisition

⁴ Keith Krause, *Arms and the State: Patterns of Military Production and Trade* (Cambridge University Press 1992) 81–82, 105–106.

⁵ Ian Davis, *The Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK* (Oxford University Press, SIPRI 2002) 23.

⁶ 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. art 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': GATT, art XXI para 1(b)(ii). Following a complaint by Czechoslovakia in 1949, it was clarified the national security exception in art 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: 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> accessed 10 September 2024.

⁷ See, in particular, Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161; 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; 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. See also, for further discussion on this point: 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.

⁸ The UN Security Council is authorized to impose international arms embargoes under art 41 of the UN Charter.

⁹ UNGA, 'Small Arms: Note by the Secretary-General' (19 August 1999) UN Doc A/54/258, para 10.

¹⁰ Zeray Yihdego, *The Arms Trade and International Law* (Hart Publishing 2007) 52.

¹¹ 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; Emanuela-Chiara Gillard, 'What's Legal? What's Illegal' in Lora Lumpe (ed), *Running Guns: The Global Black Market in*

diverts resources from peacebuilding efforts and perpetuates cycles of conflict and poverty.¹² Increased stockpiling of these weapons by government forces may facilitate the consolidation of power by authoritarian regimes, raising concerns about governance and democratic accountability.¹³ Due to their ease of transfer, there is also a higher likelihood of small arms unintentionally ending up with private armies and militias, insurgents, criminal organizations, and terrorist groups.¹⁴ In comparison to other conventional arms, regulating the transfer of small arms faces additional challenges because of the lack of a single and definitive classification of small arms, the technical overlap between civilian and military versions of these weapons, their portability and widespread availability, and concerns about restrictions on military small arms also impacting civilian gun ownership.¹⁵

The third major era in arms control, beginning with the end of the Cold War and coinciding with the rise of the human security paradigm,¹⁶ saw the adoption of international and regional instruments aimed at preventing and mitigating the human security risks created and exacerbated by small arms transfers. The seminal piece of discourse on the new security evolution, the 1994 Human Development Report, explicitly identified excessive militarization, the international arms trade, and military assistance in proxy wars as key sources of insecurity.¹⁷ International bodies, civil society, and scholars reaffirmed that small arms presented a 'leading threat' to human security by facilitating the commission of crimes, increasing the lethality of armed conflicts, perpetuating cycles of violence, instability and insecurity, and undermining development, human rights protections, and democratic governance.¹⁸ This article traces the evolution of small arms control since the 1990s and elucidates the persistent challenges caused by dichotomies embedded in notable international and regional instruments. It commences with an exposition of three critical dichotomies: the regulatory distinction between legal arms exports and illicit transfers (structural dichotomy), the definitional divide between small arms and firearms (definitional dichotomy), and the practical divergence between arms exports and military aid (practical dichotomy). This is followed by an examination of the implications of

Small Arms (Zed Books 2000) 39; Matt Schroeder, Dan Smith, and Rachel Stohl, *The Small Arms Trade* (Oneworld 2007) 23; 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. 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.

¹² 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) 115; A Walter Dorn, 'Small Arms, Human Security and Development' (1999) 5 *Development Express* 1, 2–3; Schroeder, Smith and Stohl (n 11) 1. 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.

¹³ Schroeder, Smith and Stohl (n 11) 24, 72; Andrew Feinstein, *The Shadow World: Inside the Global Arms Trade* (Farrar, Straus & Giroux 2011) 525; Erickson, *Dangerous Trade: Arms Exports, Human Rights, and International Reputation* (Columbia University Press 2015) 140.

¹⁴ ICRC, 'Arms Availability and the Situation of Civilians in Armed Conflict: A Study Presented by the ICRC' (ICRC 1999) 6–7 <<https://www.icrc.org/en/doc/resources/documents/publication/p0734.htm>> accessed 10 September 2024; Mike Bourne, *Arming Conflict: The Proliferation of Small Arms* (Palgrave Macmillan 2007) 16–7; Rachel Stohl and Suzette Grillot, *The International Arms Trade* (Polity Press 2009) 136; Coppen (n 11) 360.

¹⁵ ICRC (n 14) 5; 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.smallarmsurvey.org/resource/development-held-hostage-assessing-effects-small-arms-human-development-co-publication>> accessed 10 September 2024; UNSC, *Small Arms and Light Weapons: Report of the Secretary-General* (27 April 2015) S/2015/289, paras 7–13.

¹⁶ 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) 3–4.

¹⁷ United Nations Development Programme, *Human Development Report 1994* (Oxford University Press 1994) ch 3. 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].

¹⁸ See, eg, UNGA (n 9); ICRC (n 14); Muggah and Batchelor (n 15). For a recent reiteration of these concerns, see 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, on the impact on the human rights of women and girls, including through the use of small arms, see, in particular, paras 10–24.

the dichotomies for addressing small arms transparency, diversion, and human rights impacts. The article argues that, despite significant advancements in small arms control, the ongoing challenges of dichotomization in international and regional instruments continue to hinder their potential for improving transparency, preventing diversion, and mitigating human rights impacts.

Challenges of dichotomization

The structural, definitional, and practical dichotomies—individually and in combination—pose significant challenges to the effective implementation of small arms control instruments. Commercial, political, and security interests heavily influence decisions to transfer small arms and, in turn, the development of export regulations.¹⁹ Even though small arms continue to be the weapons of choice in wars and other violent acts, an outright ban on these weapons remains practically infeasible, as they are considered essential for defence and internal security. Small arms have consequently been excluded from other restrictions. This is highlighted, for example, by their exemption from the international arms embargo against Libya in 2014, which permits states to export small arms to certain actors following notification and in the absence of a negative decision by the Sanctions Committee.²⁰ International cooperation on arms control has significantly regressed in the 2020s, with rising political divisions and blatant violations of international law leading to a departure from export restraint and transparency, and hampering efforts to prevent diversion and safeguard human rights. Even in the absence of today's politically hostile climate, however, the dichotomies embedded within small arms control instruments undermine their effectiveness in addressing issues of transparency, diversion, and human rights impacts.²¹

The first major challenge is the structural dichotomy between legal arms exports and illicit arms transfers. This dichotomy has resulted in the adoption of distinct instruments and obligations targeted at different types of transfers. The right of states to import arms, derived from the principle of self-defence enshrined in Article 51 of the United Nations (UN) Charter,²² has resulted in a reluctance by states to impose significant restrictions on conventional arms exports, beyond those imposed by domestic export regimes and arms embargoes. As a result, international and regional small arms control instruments have primarily focused on curbing the illicit arms trade, despite the direct correlation between increases in legal arms exports and the growth of illicit arms markets, particularly in conflict zones where weapons steadily trickle into other conflicts and circulate throughout regions.²³ Small arms are highly prone to

¹⁹ Roderic Alley, 'Leaking Like a Sieve? Transfer Restraints on Small Arms, Light Weapons and Ammunition' (2019) 24 *Journal of Conflict and Security Law* 325, 337–338; Gro Nystuen and Kjølve 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.

²⁰ UNSC Libya Sanctions Committee, *Implementation Assistance Notice No 2* (11 September 2014) <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/1970_jan2.pdf> accessed 10 September 2024.

²¹ Jennifer L Erickson, 'Arms Control' in Alexandra Gheciu and William C Wohlforth (eds), *The Oxford Handbook of International Security* (Oxford University Press 2018) 399.

²² Charter of the United Nations (1945) 1 UNTS XVI, art 51; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 1986 14, [232]–[237]. See also, eg, the view espoused by Alan Thomas, a former head of the Defence Exports Services Organisation of the UK: '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.

²³ Roderic Alley, 'Traded Without Restraint? Transfers of Small Arms and Light Weapons' (2022) 32 *Security and Human Rights* 83, 84–85; Simone Wisotzki, 'Efforts to Curb the Proliferation of Small Arms and Light Weapons: From Persistent Crisis to Norm Failure?' (2021) 10 *Zeitschrift für Friedens- und Konfliktforschung* 247, 253; 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. Organized black markets have been found to be particularly adept at sourcing small arms from legal stocks which are haemorrhaging from collapsed states: Bourne (n 14) 169.

diversion, which may occur through unauthorized re-exports, theft from stockpiles, straw purchases at gun shows, or arms smuggling via covert channels designed to avoid being traced to the actual exporter.²⁴ Controlling small arms flows is particularly difficult due to their portability and the large-scale illicit markets for these weapons, which are estimated to be the second highest trafficked commodity after drugs.²⁵ With legal markets directly feeding into illicit ones, a holistic approach to regulating the small arms trade is an integral component in curtailing the growth of illicit markets and breaking cycles of supply and demand.²⁶ The structural dichotomy has resulted in divergent and uncoordinated obligations for regulating legal small arms exports and monitoring illicit transfers, impeding regulatory and practical cooperation between states in preventing diversion and mitigating the human rights impacts.

Adding to the regulatory complexity is the separate legal frameworks for small arms and firearms, entrenching a definitional dichotomy despite their technical overlaps and similar vulnerabilities to modification, diversion, and misuse in conflicts and criminal activities. The most widely referenced definition of ‘small arms’ focuses on ‘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’,²⁷ distinguishing these weapons from ‘firearms’, a term often employed to refer to weapons that can be lawfully acquired and used by domestic law enforcement agencies and by civilians for recreational purposes such as hunting. Although small arms are commonly framed as being ‘manufactured to military specifications’, there is no clear explanation of what this means or how military and civilian versions of firearms can be distinguished.²⁸ This has resulted in regulatory inconsistencies regarding whether small arms are categorized as a subcategory of firearms or as military items. For example, the USA lists automatic firearms under the United States Munitions List (USML), while non-automatic and semi-automatic firearms fall under the Commercial Control List (CCL), which is subject to laxer regulations, even though the latter versions are similar calibres to rifles used by North Atlantic Treaty Organization (NATO) forces, and semi-automatic firearms are easily modifiable into fully automatic ones.²⁹ The definitional dichotomy creates misleading distinctions about the transfer, misuse, and impact of small arms and firearms, which affects

²⁴ Conflict Armament Research, *Weapons of the Islamic State: A Three-Year Investigation in Iraq and Syria* (2017) 146–147; Bourne (n 14) 112; Stohl and Grillot (n 14) 100–102; 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; 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.

²⁵ Council of Europe, *Drawing up a European Code of Conduct on Arms Sales* (10 September 1998) Doc 8188, Pt II paras 3–10. See also, Edward J Laurance, ‘Political Implications of Illegal Arms Exports from the United States’ (1992) 107 *Political Science Quarterly* 501, 178–179; 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) 75; Bourne (n 14) 108–109; Schroeder, Smith and Stohl (n 11) 103.

²⁶ UNGA (n 18) paras 5–9.

²⁷ 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. 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: Wassenaar Arrangement, Appendix 3, para 8.2. The UN adopts a similar definition: 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.

²⁸ Mark Bromley and Lina Grip, ‘Conventional Arms Control’, *SIPRI Yearbook 2015* (SIPRI 2015) 601.

²⁹ Automatic firearms are listed in Category I of the USML, with congressional notification required for automatic firearms sales over USD 1 million: Arms Export Control Act of 1976, 22 USC s 2776. Items on the CCL are regulated under the Export Administration Regulations 15 CFR ss 730–774. The CCL was last updated 24 February 2023 and includes non-automatic and semi-automatic firearms of equal to or less than 0.50 inch calibre (12.7 mm), and non-automatic and non-semi-automatic rifles, carbines, revolvers, or pistols with a calibre greater than 0.50 inches (12.7 mm) but less than or equal to 0.72 inches (18.0 mm): EAR Supplement No 1 to Part 774. For criticism on this distinction, see 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> accessed 10 September 2024.

reporting data, monitoring and tracking efforts, and the implementation of measures to prevent diversion and mitigate human rights abuses.³⁰

The practical dichotomy between arms sales and military aid presents a further regulatory challenge, despite both being types of legal arms exports. The terminology in international and regional arms control instruments often conflates ‘arms exports’ with commercial arms sales, which involve one state (or an entity with governmental approval) selling arms to another state. In contrast, military aid involves one state providing arms to another state (or, in some instances, a non-state armed group) in exchange for political, strategic, or ideological alliance, rather than monetary compensation.³¹ Military aid decisions are typically driven by political considerations and, therefore, in many jurisdictions fall outside the scope of regulatory obligations and oversight for commercial arms sales. This is especially the case in emergency situations, which may authorize the relevant government authority to bypass certain rules and reporting obligations to oversight bodies such as parliamentary committees.³² The fractured approach to regulating arms sales and military aid creates confusion over applicable laws, enforcement loopholes, and inconsistent obligations, complicating international efforts to track and control exported weapons, as has been evidenced by the attempts to track military aid to Ukraine.³³ By allowing states to bypass regulatory standards, the distinction between arms sales and military aid consequently weakens measures to increase transparency and prevent diversion, and hinders global efforts to regulate the arms trade.

The evolution of small arms control and the persistence of dichotomies

From the 1990s, as the human security paradigm garnered prominence in the security concept, the focal points of arms control at the international and regional levels expanded to consider the impacts of arms transfers beyond the traditional state-centric focus.³⁴ This shift underscored the growing importance of improving transparency, combatting diversion, and incorporating human rights considerations into the regulatory framework for conventional arms transfers.³⁵ In addition, small arms were finally included in arms control

³⁰ Control Arms, ‘ATT Monitor 2024’ (Control Arms 2024) 41–43 <https://attmonitor.org/wp-content/uploads/2024/08/ATT_Monitor-Report-2024.pdf> accessed 10 September 2024.

³¹ 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) 80–89.

³² See, eg, the ‘Presidential Drawdown Authority’ in the USA 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 s 2318(a)(1). The President is only required to notify US Congress of the drawdown but does not need congressional approval.

³³ See, on data transparency: Christoph Trebesch and others, ‘The Ukraine Support Tracker: Which countries help Ukraine and how?’ Kiel Working Papers No 2218 (Kiel Institute February 2023) 7–9 <<https://www.ifw-kiel.de/publications/the-ukraine-support-tracker-which-countries-help-ukraine-and-how-20852/>> accessed 10 September 2024.

³⁴ Erickson (n 13) 61–62; Lina Grip, ‘History Never Repeats? Imports, Impact and Control of Small Arms in Africa’ (2015) 36 *Contemporary Security Policy* 79, 79. On the intersection between human security and arms controls generally, see Waseem Ahmad Qureshi, ‘The Response of International Law to the Challenges to Human Security’ (2020) 50 *California Western International Law Journal* 341; 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; Neil Cooper, ‘Humanitarian Arms Control and Processes of Securitization: Moving Weapons along the Security Continuum’ (2011) 32 *Contemporary Security Policy* 134; Fen Osler Hampson and Jean Daudelin, *Madness in the Multitude: Human Security and World Disorder* (Oxford University Press 2002) ch 6.

³⁵ Demand-side controls also play an essential part in disarmament and post-conflict reconstruction, breaking the cycles of violence, and minimizing instability and the risks of crises: 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, paras 20, 21, 36. However, arms controls have predominantly focused on supply-side controls that are linked to addressing technical factors, as opposed to demand-side factors that tend to be more political: Callum Watson and Aline Shaban, *What Happened To Demand?*

developments. The following sections examine three interconnected issues that small arms control instruments have sought to address: transparency, diversion, and human rights impacts. Efforts to regulate small arms transfers have been severely constrained by political concerns, particularly with regard to civilian firearms ownership, resulting in a mixture of legally binding and non-binding measures. Accordingly, a comprehensive assessment of the supranational regulatory framework for small arms requires the examination of treaty-based obligations and soft law instruments to fully capture the scope of international and regional cooperative efforts.³⁶

Transparency

From the late 1980s, international cooperation in arms control has aimed to counter the significant growth and liberalization of the arms trade and reverse the trend of increased secrecy that characterized the Cold War period.³⁷ With states recognizing the destabilizing effects of weapons accumulation and proliferation, transparency initiatives were introduced to enhance collaboration and improve detection.³⁸ One of the earliest developments was the adoption of the UN Register of Conventional Arms (UNROCA), a voluntary political measure established in 1992 that became the first international mechanism since the 1930s through which states could publicly report their arms export data.³⁹ Recognizing the importance of 'increased openness and transparency' as a corollary to reducing arms accumulation and proliferation, UNROCA introduced into the security concept 'the principle of undiminished security at the lowest possible level of armaments'.⁴⁰ However, a notable gap in reporting is data on military aid, which remains largely omitted due to political sensitivities and national security concerns that are routinely deployed to justify limiting the accessibility of this information. The exclusion of military aid from UNROCA is symptomatic of the persistence of the practical dichotomy between types of legal arms transfers. Without accurate and comprehensive reporting on small arms exports, which includes deliveries via military aid, monitoring and detecting weapons accumulation and proliferation in a state or region becomes even more difficult.

Compounding this issue is the definitional dichotomy between small arms and firearms. Due to the dynamic and often covert nature of the small arms trade, a significant lack of transparency has facilitated the diversion of these weapons into illicit markets through theft, unauthorized transfers, and covert smuggling.⁴¹ Small arms were added to UNROCA's categories in 2003, but states are only encouraged to report on small arms 'made or modified to military specifications and intended for military use'.⁴² UNROCA's definition reflects the definitional dichotomy within early arms control instruments and has resulted in an incomplete picture of the amount of weapons in circulation, as firearms

Getting Small Arms Control Back on Track, Non-Proliferation and Disarmament Papers No 88 (SIPRI, March 2024) 5 <https://www.sipri.org/sites/default/files/2024-03/eunpdc_no_88.pdf> accessed 10 September 2024.

³⁶ Erickson (n 21) 399.

³⁷ Grip (n 34) 98–99; 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.

³⁸ Yihdego (n 10) 141.

³⁹ UNGA Res 46/36 (L), 'Transparency in Armaments' (6 December 1991) UN Doc A/RES/46/36L.

⁴⁰ UNGA Res 46/36 (L) paras 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.

⁴¹ UNGA (n 9) paras 23, 55, 239. The Security Council in Resolution 1467 (2003) recognized 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.

⁴² 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, paras 3, 4.

designated for civilian use may be excluded based on non-technical aspects, despite otherwise falling within the definitional requirements.⁴³ Experts have argued that UNROCA's small arms transfer data represents 'only a fraction of international transfers', with major exporter states, such as China and Russia, omitting the inclusion of small arms in their reports and the USA only reporting disaggregated data.⁴⁴ Consequently, while UNROCA has made crucial inroads into arms export transparency, the definitional and practical dichotomies limit the potential for this instrument to effectively address transparency challenges.

Similar issues are evident in the Wassenaar Arrangement, a multilateral export control regime that came into effect in 1996 and currently has 42 participating states.⁴⁵ The Wassenaar Arrangement promotes the exchange of information between participating states, which is pertinent for raising awareness of emerging trends in weapons spread or the accumulation of specific weapons, including small arms.⁴⁶ In particular, participating states agree to share details of export control policies, companies and organizations 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.⁴⁷ 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 destabilizing accumulations'.⁴⁸ While the Arrangement represents a significant advancement in transparency efforts, as with UNROCA, it remains unclear to what extent military aid is encompassed by the Arrangement's notification measures. The explicit mention of licensed exports in the section relating to the scope of the treaty suggests that the focus is on arms sales, which, unlike military aid, require a licence for export.⁴⁹ The absence of specific provisions for reporting military aid further entrenches the practical dichotomy, weakening monitoring efforts by allowing states to transfer arms under the guise of military aid without adequate oversight.

In contrast to the international level, where political measures were the focus, at the regional level, legally binding instruments were adopted to improve transparency and prevent the proliferation and accumulation of small arms. Most notably, in 2006, the 15 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 10 Member States. Compared to the two international instruments, the ECOWAS Convention has a much broader goal, seeking to prevent and combat the excessive and destabilizing accumulation by controlling, regulating, and prohibiting the transfer, manufacture, and possession of small arms. In addition to increasing transparency, the Convention obligates Member States to 'ban the transfer of small arms and light weapons into, from or through their

⁴³ UNGA *ibid.*

⁴⁴ UNROCA Reports 1992–2022, available at UN, 'UNROCA (United Nations Register of Conventional Arms)' <<https://www.unroca.org/>> accessed 10 September 2024. China did not submit any reports between 1997 and 2005 when it suspended its participation because of other states reporting arms transfers to Taiwan. Quote from: Paul Holtom, *Transparency in Transfers of Small Arms and Light Weapons: Reports to the United Nations Register of Conventional Arms, 2003–2006* (SIPRI 2008) 6 <<https://www.sipri.org/publications/2008/sipri-policy-papers/transparency-transfers-small-arms-and-light-weapons-reports-united-nations-register-conventional>> accessed 10 September 2024. Additionally, as the data provided in UNROCA includes export data, recipients and origin of exports, the data on exporters and importers of small arms are skewed because of an overrepresentation of submissions by European states.

⁴⁵ 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.

⁴⁶ Wassenaar Arrangement, Initial Elements Part I paras 1–4.

⁴⁷ Wassenaar Arrangement, Initial Elements Part VI para 1.

⁴⁸ Wassenaar Arrangement, Initial Elements Part I paras 1–4.

⁴⁹ Wassenaar Arrangement, Initial Elements Part II para 4.

territory'.⁵⁰ The Convention represents an important step in introducing binding commitments on small arms manufacturing, possession, and transfers. However, as with the international instruments, the practical dichotomy is reinforced by the ECOWAS Convention. By not explicitly addressing military aid in its obligations, the Convention leaves room for states to exploit this omission to bypass the stringent controls on small arms transfers. This can be especially problematic when combined with the security exemption in Article 4, which allows a Member State to request an exemption on the grounds of 'legitimate security needs' or as a means to 'participate in peace support operations'.⁵¹ Evidently, even with the establishment of strict binding commitments, by integrating the practical dichotomy, the ECOWAS Convention's potential for increasing transparency and limiting proliferation is hindered by omissions in the text, enabling Member States to continue small arms transfers under the guise of military aid.

Measures to improve transparency were a hallmark of early post-Cold War arms control measures, marking a noticeable shift towards openness and cooperation between states in response to the destabilizing impact of small arms accumulation and proliferation. Instruments such as UNROCA and the Wassenaar Arrangement were introduced to promote transparency and accountability in conventional arms trade. However, these efforts continue to face challenges due to the entrenched practical dichotomy between arms sales and military aid, which enables states to circumvent reporting obligations when weapons are transferred as military aid. This issue is further compounded by the definitional dichotomy between small arms and firearms, which limits the scope of reporting and the availability of comprehensive data, thus hampering monitoring efforts. At the regional level, legally binding instruments such as the ECOWAS Convention further demonstrate the persistence of the practical dichotomy, which enables states to exploit loopholes in regulations to continue transferring small arms through military aid. The current decline in international cooperation and the deteriorating human rights situation globally underscore the pressing need for coordinated efforts to address the practical and definitional dichotomies in small arms control instruments.

Diversion

Correspondingly, increased production and export of arms heighten the risk of their diversion to illicit markets and acquisition by problematic actors, such as terrorist groups and organized crime syndicates. This is especially the case for small arms, which require less technical capabilities to manufacture and service compared to larger weapons systems.⁵² The diversion of arms occurs due to inadequate export controls, insufficient management or security of weapons stockpiles, and a lack of transparency between states, which enables the build-up of excessive weapons stocks and feeds illicit markets.⁵³ The high susceptibility of small arms to diversion at each stage of the export process because of regulatory loopholes or irregularities, necessitates the effective monitoring of the flow of legal small arms exports to prevent and combat diversion.⁵⁴ Although preventing diversion has been a focal point in arms control instruments since the end of World War II, it was not until the late 1990s and early 2000s that measures were adopted to prevent the diversion of small arms.

One particularly notable regional initiative is the Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other

⁵⁰ ECOWAS Convention art 3(1).

⁵¹ *ibid* art 4(1).

⁵² UNGA (n 27); Pete Abele, 'Manufacturing Trends—Globalising the Source' in Lora Lumpe (ed), *Running Guns: The Global Black Market in Small Arms* (Zed Books 2000) 81.

⁵³ 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) 9–13.

⁵⁴ UNGA (n 18) paras 31–34; Owen Greene and Elizabeth Kirkham, 'Preventing Diversion of Small Arms and Light Weapons: Strengthening Border Management under the UN Programme of Action' (Saferworld and University of Bradford 2010) 9–12.

Related Materials (CIFTA), which was adopted by the Organization of American States (OAS) in 1997 and entered into force in 1998.⁵⁵ CIFTA is a legally binding multilateral agreement signed by all 34 Member States of the OAS and ratified by 31 Member States; Canada, Jamaica, and the USA opted against ratification due to concerns about the treaty's domestic political and constitutional implications.⁵⁶ The broad ratification of the treaty demonstrates the collective recognition of the importance of controlling the illicit manufacturing and trafficking of firearms and provides guidance for the development of extra-regional and international controls for firearms trafficking.⁵⁷ CIFTA requires state parties to incorporate several provisions into their domestic regulations that assist in preventing diversion, including the marking of firearms to allow them to be traced and for their origin, import, and custody to be identified, as well as the establishment of other security measures such as stockpile management.⁵⁸ CIFTA's focus on 'firearms'—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'—avoids the definitional dichotomy in other instruments by providing a broad definition based on technical specifications.⁵⁹

On the other hand, by excluding legal firearms exports from its scope and not explicitly emphasizing the correlation between excessive weapons stocks and diversion risks, CIFTA exemplifies the structural dichotomy. A harmonized approach to firearms diversion is necessary to comprehensively account for the links between the accumulation and diffusion of these weapons through legal sales and their acquisition through illicit markets. Small arms and firearms typify the law of entropy for arms transfers: the further arms move away from the primary recipient, the higher the degree of proliferation and diffusion, and the greater the problems there are with retrieving those arms.⁶⁰ As such, small arms are 'a smuggler's dream and a law enforcer's nightmare', and once these weapons are diverted, their control systems become irrelevant and their re-entry into the legal market becomes virtually impossible.⁶¹ Bridging the structural dichotomy between legal and illicit transfers is essential for preventing firearms from entering illicit markets and requires coordinated efforts to monitor export volumes and stockpiles to prevent diversion.

Likewise, the structural dichotomy is also present in international arms control measures addressing diversion. For example, the Firearms Protocol, the first legally binding international instrument on firearms, was adopted in 2001 as an additional protocol to the UN Convention Against Transnational Organized Crime (UNTOC) and entered into force in 2005, with 40 ratifications.⁶² The Firearms Protocol sets control measures for illicit

⁵⁵ 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).

⁵⁶ The US' concerns relate to the potential impact of CIFTA on domestic firearms ownership: Jeff Mason, 'Obama Backs Treaty to Curb Flow of Guns over Border' *Reuters* (Mexico City, 17 April 2009) <<https://www.reuters.com/article/world/us-politics/obama-backs-treaty-to-curb-flow-of-guns-over-border-idUSTRE53F61J/>> accessed 10 September 2024. Canada's lack of ratification has been attributed, in part, to its lack of business record-keeping requirements: Regulations Amending Certain Regulations Made Under the Firearms Act: SOR/2022-91, Canada Gazette, Part II, Vol 156, No 10. In September 2022, Jamaica recently updated its firearms regulation in response to rising gun violence and illicit trafficking: 10_2022-The Firearms (Prohibition Restriction and Regulation) Act 2022. This new regulation references the CIFTA in its Schedule, which could suggest a move towards ratification.

⁵⁷ Matthew Schroeder, *Small Arms, Terrorism and the OAS Firearms Convention* (Federation of American Scientists 2004) 37.

⁵⁸ CIFTA, arts VI and VIII, respectively.

⁵⁹ 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'.

⁶⁰ 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.

⁶¹ Bourne (n 14) 108–109; Naylor (n 60) 177; Laurance (n 25) 178–179.

⁶² 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

firearms trafficking, including licensing, record-keeping, and marking.⁶³ As the Firearms Protocol was adopted as an additional protocol to the UNOC, however, it followed the 1990s trend of addressing firearms-related issues in the context of illicit trafficking and their intersection with transnational crimes such as money laundering, thereby excluding legal arms exports from the protocol's scope. This is highlighted, in particular, by the assertion in Article 4(2) that the focus on combatting illicit firearms flows is not intended to hamper legal exports of small arms.⁶⁴ By limiting its scope to crime prevention and law enforcement, the Firearms Protocol does not adequately address the broader issues stemming from legal exports and the associated increase in diversion. In addition to practical implications resulting from the structural dichotomy, the Firearms Protocol is also hindered in its aim to prevent diversion by its limited ratification. Despite its entry into force over two decades ago, the Firearms Protocol remains the least ratified protocol of the UNOC. A key reason for the delayed ratification was disagreement over the financing and participation of civil society in a review mechanism of the protocol, as required by Article 32 of UNTOC.⁶⁵ While some major exporters, such as France, Germany and China, have ratified the protocol since a review mechanism was agreed upon in 2018, it remains unratified by major firearms producers like the USA and Russia.⁶⁶

Furthermore, the definitional distinction between firearms and small arms in preventing diversion is a further dichotomization challenge, which is highlighted by the concurrent development of the Firearms Protocol with the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons.⁶⁷ The Programme of Action is a voluntary policy framework developed by the UN Conference on the Illicit Trade of Small Arms and Light Weapons to address a wide range of issues relating to the prevention of illicit small arms transfers and 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. The Programme of Action established 10 pillars for preventing and combating illicit small arms transfers, including measures directly relevant to preventing diversion, such as stockpile management and security, weapons collection and disposal, and marking, tracing, and record-keeping.⁶⁸ According to data from the 2022 national reports, the majority of UN Member States have not provided any information on brokering, international tracing, marking, and recording keeping, among other key areas, with over half failing to submit any data for 2020–2021.⁶⁹

From the outset, the potential for the Programme of Action to develop stronger measures for preventing diversion was stymied by disagreements between states and its lack of

UNGA Resolution which established the Protocol: UNGA Res 55/255 (31 May 2001) UN Doc A/RES/55/255; United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

⁶³ Firearms Protocol, arts 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* (New York, 31 May 2001) 2 <https://www.unodc.org/documents/organized-crime/Firearms/12-56168_Firearm_booklet_ebook.pdf> accessed 10 September 2024.

⁶⁴ Firearms Protocol art 4(2).

⁶⁵ Cecily Rose, 'The Creation of a Review Mechanism for the UN Convention Against Transnational Organized Crime and Its Protocols' (2020) 114 *American Journal of International Law* 51, 56–60.

⁶⁶ Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its ninth session, held in Vienna from 15 to 19 October 2018' (1 November 2018) CTOC/COP/2018/13, resolution 9/1 (Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto). See also 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.

⁶⁷ 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).

⁶⁸ Programme of Action, s II.

⁶⁹ Data on 2022 reports, available at: UN, 'Programme of Action on Small Arms and Light Weapons' <<https://smallarms.un-arm.org/statistics>> accessed 10 September 2024.

harmonization with the Firearms Protocol. Despite efforts by the European Union (EU) to include legal arms exports within its framework,⁷⁰ the focus remained exclusively on illicit transfers due to the hostility of major exporter states. During the negotiations, the USA and the World Forum of Sports and Shooting Societies opposed the inclusion of any restrictions on ownership of weapons by private individuals, the agreement on any commitments for discussions to begin for legally binding agreements, and the exclusion of non-state actors in the legal trade and manufacturing of small arms.⁷¹ The Programme of Action was thus also impacted by the structural dichotomy, as resistance from major exporters prevented the inclusion of legal small arms exports within its scope. The ongoing contention between states, evident during sexennially convened review conferences, further reveals the persisting impact of the definitional dichotomy. Since the First Review Conference in 2006, disagreements over the inclusion of language on civilian possession of firearms have stalled further progress.⁷² Although attempts were made during these review conferences to bridge the divide and build links between the Programme of Action and the Firearms Protocol, concrete efforts remained limited.⁷³ After 2006, as states turned their focus to negotiations for the Arms Trade Treaty, efforts to address the definitional challenges within the Programme of Action stagnated.

Instruments such as the CIFTA, the Firearms Protocol, and the Programme of Action represent significant advancements in international and regional arms control, in particular, for addressing the issue of small arms and firearms diversion through measures like stockpile management, recording-keeping, marking, and tracing, all of which work synergistically with transparency initiatives. However, effective implementation of these measures requires sustained international cooperation and concerted efforts to bridge the divides created by the structural and definitional dichotomies embedded within these regulatory frameworks. The inability or unwillingness of many states to provide comprehensive information on small arms transfers, including civilian firearms and military aid, further hinders cross-border cooperation and indirectly facilitates weapons diversion.⁷⁴ Despite the heightened need for transparency and tracking efforts, vast amounts of small arms continue to be diverted to and used in ongoing armed conflicts, underscoring the significant implications of the persistence of these dichotomies and the retreat in international cooperation.

Human rights impacts

The latest evolution in small arms control has been the incorporation of obligations to address the adverse human rights impacts of arms transfers, foregrounding individuals and the consequences they may suffer, which are often subverted or discounted in favour of security, political, and commercial interests. An early indication of this shift was the establishment of regional export regulations by the EU in response to the growing push for transparency in arms transfers, the First Gulf War, armed conflicts in Southeastern 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 transnationalization.⁷⁵ In

⁷⁰ Small Arms Survey, *Small Arms Survey 2002: Counting the Human Cost* (Oxford University Press 2002) 219, 222–225.

⁷¹ Erickson (n 13) 149.

⁷² 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) 304; Bromley and Grip (n 28) 603.

⁷³ 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) 289, 296; Bromley and Grip (n 28) 602.

⁷⁴ ICRC (n 14) 7.

⁷⁵ 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 <<https://www.sipri.org/publications/2004/sipri-policy->

1998, the EU adopted its Code of Conduct on Arms Exports, which, unlike other instruments of the time, applied to legal arms exports.⁷⁶ The politically binding Code of Conduct aimed to harmonize export criteria to prevent undercutting by Member States, whereby one Member State would approve an export licence that had already been denied by another.⁷⁷ These eight criteria were guided by earlier attempts by the Permanent Five members of the UN Security Council to establish criteria for restraining arms transfers as part of a more comprehensive export regime, which ultimately did not materialize.⁷⁸

A decade later, the EU Code of Conduct was superseded by the EU Common Position on Arms Exports, a legally binding agreement that required all Member States to adopt domestic regulations consistent with the Common Position by 30 June 2011, which were to come into effect from June 2012.⁷⁹ Like its predecessor, the Common Position sought to institutionalize ‘a more restrictive and convergent European arms export policy’ and define common rules for arms exports for EU Member States.⁸⁰ This included the Common Military List categorizing types of weapons, and eight updated criteria for arms export authorizations.⁸¹ Most notably, Criterion 2 of Article 2 stipulates the risk assessment requirements, stating that Member States must ‘(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.’ The reference to ‘clear risk’ mirrors the position taken by the Wassenaar Arrangement on the denial of export licences for small arms exports, though the meaning of ‘clear risk’ remains undefined in both instruments.⁸² The User’s Guide for the Common Position links ‘clear risk’ to an assessment that an export ‘will be used’ in the commission of a serious violation—a high threshold that effectively incorporates a knowledge requirement. The continuing export of arms by some EU Member States to coalition forces in the Yemen conflict, in spite of extensive evidence of their involvement in violations of human rights and international humanitarian law, illustrates the divergent approaches to risk assessments.⁸³ The implications of such divergences for mitigating human rights impacts are compounded by the practical dichotomy between arms sales and military aid, which has been notably evident in the EU Council’s decisions to provide military aid to Ukraine. Despite acknowledging the long-term impacts of military aid, the EU Council’s decisions do not explicitly reference the Common Position as providing the framework for its decision-making or the risk assessment obligations in Article 2.⁸⁴

[papers/european-union-code-conduct-arms-exports-improving-annual-report](#)> accessed 10 September 2024; Davis (n 5) 39.

⁷⁶ 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 focused on measures against illicit transfers.

⁷⁷ EU Code of Conduct, Preamble. See also Bauer and Bromley (n 75) 2.

⁷⁸ 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).

⁷⁹ EU Council Common Position 2008/944/CFSP of 8 December 2008 (EU Common Position).

⁸⁰ Simone Wisotzki and Max Mutschler, ‘No Common Position! European Arms Export Control in Crisis’ (2021) 10 *Zeitschrift für Friedens- und Konfliktforschung* 273, 278.

⁸¹ EU Common Position art 12 refers to the Common Military List.

⁸² 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 ss 6.

⁸³ Members of the coalition include Saudi Arabia, the United Arab Emirates, Bahrain, Jordan, Egypt, Kuwait, Morocco, Sudan, and Qatar, who militarily intervened in Yemen upon request from the Hadi government. Qatar (in 2017), Sudan and Morocco (both in 2019) have ceased involvement.

⁸⁴ Tomas Hamilton, ‘Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis’ (2022) 1 *European Law Open* 635, 363.

Another key issue limiting the effectiveness of the Common Position's risk assessment obligations is the EU's separate but parallel legal and policy frameworks for firearms (which are regarded as lawful weapons for civilian operations) and small arms (which fall within the category of military items), exemplifying the definitional dichotomy.⁸⁵ Small arms, including smooth-bore weapons specially designed for military use or those that are fully automatic, semi-automatic, or pump-action type weapons, are included in the Common Military List.⁸⁶ Since the Common Position is applicable to small arms exports, states maintain competence over the control of these weapons, as defence remains a matter for national jurisdictions.⁸⁷ In contrast, since the 1990s, there has been extensive regional cooperation on controlling the possession and transfer of 'civilian firearms', which are defined as firearms manufactured for civilian use, even though they may share characteristics with military models.⁸⁸ 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'.⁸⁹ Although human rights risk assessments are not explicitly required, the reference in Article 4(2) to a unified procedure for firearms within the scope of the Common Position presents an opportunity for bridging the definitional dichotomy.⁹⁰ The proposed revision of the EU's import and export rules for firearms, under the 2020–2025 action plan on firearms trafficking,

⁸⁵ The earliest adopted instrument was the Firearms Directive No 91/477/EC on 18 June 1991, which categorized 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) Official Journal of the European Communities L 256/51 (13 September 1991). The 1991 Directive has been amended on multiple occasions, most notably, by the 2008 Directive which brought it in line with the UN Firearms Protocol and by Directive 2017/853, which reclassified firearms into three categories: Category A prohibited firearms, including for instance explosive military missiles and launchers, automatic firearm; Category B firearms subject to authorization, 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; 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, Official Journal of the European Union L 179/5 (8 July 2008); 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, Official Journal of the European Union L 137/22, art 1(19) (24 May 2017). Specific provisions on the export of firearms were elaborated by the Regulation 258/2012, which implemented art 10 of the Firearms Protocol: Regulation No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing art 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 authorization, and import and transit measures for firearms, their parts and components, and ammunition, Official Journal of the European Union L 94/1 (30 March 2012).

⁸⁶ 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. Some states, notably, France and Germany (and also the UK when it was still a part of the EU) include additional items on their control lists and implemented additional requirements pertaining to the type of authorization required and the assessment of export destinations.

⁸⁷ Common Foreign and Security Policy (CFSP).

⁸⁸ Regulation No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing art 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 authorization, and import and transit measures for firearms, their parts and components, and ammunition, Official Journal of the European Union L 94/1, Annex I, Parts I and 2 (30 March 2012).

⁸⁹ EU Regulation No 258/2012, art 10. Similar requirements are included in the 2021 EU legislation on dual-use items: 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), Official Journal of the European Union L 206/1, art 15 (11 June 2021).

⁹⁰ EU Regulation No 258/2012, art 4(2).

provides a further opportunity to harmonize the two frameworks and address the definitional divide in the near future.⁹¹

At the international level, the push for more comprehensive regulations on conventional arms, driven by civil society campaigns highlighting the tighter regulation of bananas than those weapons,⁹² culminated in the adoption of the Arms Trade Treaty in 2013 after years of negotiation.⁹³ Although the Arms Trade Treaty is a landmark advancement in conventional arms control and the first major global treaty to include small arms within its scope,⁹⁴ the treaty is also embedded with the same dichotomies plaguing earlier instruments. For example, 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.⁹⁵ Similar concerns played out during the treaty negotiations as with the Programme of Action.⁹⁶ While the final treaty text includes small arms in the list of categories in Article 2(1), the meaning of this category remains undefined. Instead, definitions from other instruments are relied upon as a supplement, specifically, the definition from the International Tracing Instrument: “Small arms” are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.⁹⁷ The treaty consequently, by its omission, reinforces the definitional dichotomy.

Correspondingly, the lack of clarity in the treaty text in other areas also creates practical challenges. Military aid is not referenced in the treaty, which is highlighted by the focus on ‘trade’ and not ‘transfers’. During the treaty negotiations, China actively sought to exclude ‘gifts’, an element of military aid.⁹⁸ This exclusion reflects China’s distinction between ‘trade’ (referring to commercial arms sales) and ‘transfers’ (which include military aid or bilateral military assistance).⁹⁹ The USA, another key player in the negotiations, maintains a

⁹¹ 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 art 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), COM/2022/480 final (27 October 2022). See also European Commission, ‘Explanatory Memorandum’ (27 October 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0480&from=EN>> accessed 10 September 2024; 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> accessed 10 September 2024.

⁹² Notable examples of the civil society campaigns include those 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* (New York, 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/>> accessed 10 September 2024; Scott Stedjan, ‘What’s the Deal with Bananas and the Global Arms Trade?’ *Oxfam America* (Boston, 26 June 2012) <<https://politicsofpoverty.oxfamamerica.org/comparing-bananas-to-the-global-arms-trade/>> accessed 10 September 2024. See also AD McKenzie, ‘“Arms Easier to Trade than Bananas” *Helsinki Times* (Helsinki, 16 February 2012) <<https://www.helsinkitimes.fi/world-int/1364-arms-easier-to-trade-than-bananas-2.html>> accessed 10 September 2024.

⁹³ Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269.

⁹⁴ Another highly significant development is the treaty’s inclusion of gender-based violence as a necessary consideration for arms export authorizations by states by art 7(4).

⁹⁵ 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.

⁹⁶ Erickson (n 13) 149.

⁹⁷ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, GA Decision 60/519, UN Doc A/60/88 annex, 27 June 2005, 6, 7, para 4

⁹⁸ Mark Bromley, Mathieu Duchâtel, and Paul Holtom, ‘China’s Exports of Small Arms and Light Weapons’ (SIPRI 2013) 10 <<https://www.sipri.org/publications/2013/sipri-policy-papers/chinas-exports-small-arms-and-light-weapons>> accessed 10 September 2024.

⁹⁹ Anna Stavrianakis and Yun He, *China and the Arms Trade Treaty: Prospects and Challenges* (Saferworld 2014) 14 <<https://www.saferworld.org.uk/resources/publications/811-china-and-the-arms-trade-treaty-prospects-and-challenges>> accessed 10 September 2024.

similar distinction in its domestic export control regulations, which provided the basis for the standards and provisions in the treaty.¹⁰⁰ Specifically, the USA distinguishes between Direct Commercial Sales (direct sales by arms companies to foreign states that require a US government-approved export license), Foreign Military Sales (direct sales between the US government and a foreign government), Foreign Military Financing (grants provided to recipients to purchase US defence articles and services), and drawdowns (weapons provided from US military stocks). The entrenchment of the practical dichotomy in the Arms Trade Treaty allows states significant discretion on the performance of risk assessments required by Articles 6 and 7, consequently undermining the effective implementation of the treaty's obligations to address human rights impacts.

Moreover, the treaty also reaffirms the structural dichotomy between legal and illicit transfers. This is highlighted by the dual purposes of the treaty: 'Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms [and] Prevent and eradicate the illicit trade in conventional arms and prevent their diversion.'¹⁰¹ Despite its applicability to legal exports and illicit transfers, the structural dichotomy remains ingrained in the treaty through the separate risk assessment requirements for diversion and human rights. Article 11 relating to the prevention of diversion merely requires state parties to assess 'the risk' of the export being diverted and to consider whether mitigation measures can be established.¹⁰² In contrast, Article 6(3) requires a state party not to authorize the transfer of conventional arms if it has knowledge that 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'.¹⁰³ Article 7, the fallback provision to Article 6, requires a state party to prohibit arms exports when there is an 'overriding risk' that the exported arms will be used to, inter alia, commit or facilitate serious violations of human rights or international humanitarian law.¹⁰⁴ Article 7(1)(a) requires states to conduct risk assessments that consider whether the export 'would contribute to or undermine peace and security', which is closely linked to the prevention of diversion.¹⁰⁵ The synergies between diversion and human rights impacts require a coordinated and comprehensive approach to risk assessments that maps these issues as differing points on a continuum. This approach would require complementary efforts to address diversion and human rights impacts, which can in turn assist with overcoming the challenges of the structural dichotomy.

While the Arms Trade Treaty and the EU Common Position represent important advancements in arms control that reaffirm the symbiosis between efforts to improve transparency, prevent diversion, and mitigate human rights impacts, the effectiveness of these instruments in addressing these issues is challenged by entrenched definitional, structural, and practical dichotomies. The structural dichotomy creates significant loopholes through which states can circumvent the requirements to prevent diversion and mitigate human rights impacts. This is compounded by the definitional dichotomy, which has resulted in the exclusion of firearms from the scope of the Arms Trade Treaty and, in the EU's case, the development of the parallel framework for firearms with a lower standard of obligations. Additionally, the practical dichotomy further exacerbates these issues, as states do not subject military aid to the same rigorous risk assessment required for arms sales, undermining the core aims of these instruments to promote responsible arms transfers.

¹⁰⁰ Jennifer L. Erickson, 'Demystifying the "Gold Standard" of Arms Export Controls: US Arms Exports to Conflict Zones' (2023) 14 *Global Policy* 131, 132, 135–136. In April 2019, the USA signalled its intention to withdraw its signature from the treaty.

¹⁰¹ Arms Trade Treaty art 1.

¹⁰² *ibid* art 11(2).

¹⁰³ *ibid* art 6(3).

¹⁰⁴ *ibid* art 7.

¹⁰⁵ *ibid* art 7(1).

Conclusion

The evolution of supranational small arms control since the 1990s has seen an expansion of measures to confront the challenges of transparency, diversion, and human rights impacts. However, the potential of these instruments to effectively address these issues continues to be impacted by embedded dichotomies. The structural dichotomy between legal arms exports and illicit transfers has led to fragmented and uncoordinated obligations. Despite the evident correlation between transparency and diversion prevention, divergent regulations for legal exports and illicit transfers have created challenges for comprehensive reporting and tracking of the transfer and use of weapons. In addition to improving transparency and monitoring measures, the increased likelihood of small arms being diverted to actors with records of human rights abuses necessitates a coordinated approach to preventing diversion and mitigating human rights impacts that maps these issues as points on a continuum rather than viewing them as discrete concerns.

Correspondingly, the definitional dichotomy distinguishing small arms and firearms has resulted in the adoption of separate instruments for regulating weapons with similar and overlapping technical designs and capabilities. The persistence of this definitional dichotomy, due to concerns that restrictions on military versions will impact civilian gun ownership, was evident in the simultaneous development of the UN Programme of Action and the Firearms Protocol, as well as the EU's dual regulatory frameworks governing small arms and firearms. Even though civilian firearms and military small arms are similar in design and use, firearms are subject to laxer export controls, undermining obligations to prevent diversion and mitigate human rights impacts, while also complicating reporting and monitoring efforts. Harmonizing these regulatory frameworks and obligations is an important step towards bridging the definitional divide and countering persisting political, economic, and national security concerns that hinder the development of robust firearms controls.

Furthermore, the practical dichotomy that differentiates arms sales and military aid has exacerbated challenges in effectively addressing transparency, diversion, and human rights impacts. Although both types of exports have similar human security implications, military aid has not been referenced in any major small arms control instruments adopted since the 1990s. This gap allows states to evade risk assessment obligations, which is particularly problematic when arms are transferred to conflict-affected regions due to heightened risks of diversion and human rights violations. The conflicts in Palestine, Syria, Ukraine, and Yemen serve as stark examples of the complex legal and moral questions raised by the continuing export of arms to conflict zones. Irrespective of whether weapons are delivered through arms sales or military aid, the most effective means of limiting the significant international and human security implications of these transfers is through greater export restraint.

Even with increasing acknowledgement of the destructive potential of small arms and firearms in recent decades, these weapons present unique challenges for improving transparency, preventing diversion, and mitigating human rights impacts. Overcoming the challenges of dichotomization in small arms control, therefore, requires consideration of the interplay between structural, practical, and definitional dichotomies, and the implementation of coordinated obligations, harmonized regulations, and unified definitions. Additionally, as success in responding to the complexities of contemporary security and human rights challenges relies heavily on the political will of states, international cooperation remains critical to ensuring uniformity in and accountability for arms transfer practices.

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