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# International Conventional Arms Trade and Human Rights

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The convoluted wording of legalisms grew up around the necessity to hide from ourselves the violence we intend toward each other. Between depriving a man of one hour from his life and depriving him of his life there exists only a difference of degree. You have done violence to him, consumed his energy. Elaborate euphemisms may conceal your intent to kill, but behind any use of power over another the ultimate assumption remains: "I feed on your energy."

-Frank Herbert

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## Acknowledgements

When I first approached the topic of international arms transfers, my knowledge on the subject was limited to the political side of the issue, namely how arms transfers are used as an instrument of foreign policy and their implications on security and stability. Now, after various months of reading and writing I have begun to scratch the surface of this subject and the norms that regulate such trade. All this would not have been possible without the guide and support of Dr. Zuccari, which has helped immensely with its expertise and knowledge, without him this thesis would be very different from what it has come to be, or probably would not exist at all. I would also thank Professor Sciso for both agreeing to be my supervisor and having proposed the topic in the first place. Any mistake in this thesis remains my own.

## Introduction

In the past century, conventional arms transfers rarely reached headlines, focusing more on the bribes and scandals than the arms sales themselves.[1] Until the 90s arms transfers were a prerogative of States affecting foreign and economic policies.[2] Historically some form of control, generally informal, has always been done on conventional arms transfers, with the first formal and ratified international agreement for arms control dating to 1890, with the Brussels Conference Act, which mainly aimed at regulating slave trade as well as arms imports to Africa.[3] In the first half of the nineteenth century many other attempts to regulate arms transfers were made: the 1919 Saint Germain Convention for the control of the trade in arms and ammunition , the 1925 Geneva Traffic Convention (both these conventions never entered into force), and in 1935 the US launched the League of Nations Disarmament Conference, which ultimately failed. [4] The Cold War was the time of export control regimes, like the Coordinating Committee for Multilateral Export Controls (COCOM) for soviet countries, but intra-bloc transfers were not regulated. During the Cold War an attempt to control conventional arms transfers between blocs was done between 1977 and 1978 with the Conventional Arms Transfer (CAT) talks between the United States and the Soviet Union, but ultimately did not bear results.[5] The most relevant international agreement developed before the '90s, has been the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), which entered into force in 1983. The Convention has five additional protocols and at least two must be ratified before a State can be bound by it. The main goal is to ban or restrict certain weapons which cause unjustified or unnecessary suffering to combatants and indiscriminately affect civilians. Among the weapons regulated we find: non-detectable fragments, mines, booby traps and blinding lasers. In 1997 the Anti-Personnel Mine Ban Convention (APL or Ottawa Convention) has been adopted, which bans the use, production and transfer of anti-personnel mines. The same principles apply for the 2008 Convention on Cluster Munitions. Lastly, in 2014, the Arms Trade Treaty (ATT) entered into force with the aim of establishing common international standards arms transfers.

[1] Anthony Sampson, 'Lockheed's Foreign Policy: Who, in the End, Corrupted Whom?', *New York Magazine* 9, no. 11 (1976): 53–56.
[2] It should be noted that the Italian Law n. 185 regulating arms transfers has been adopted on 9 July 1990.
[3] Rachel Stohl, 'Understanding the Conventional Arms Trade', in *AIP Conference Proceedings*, vol. 1898 (AIP Conference Proceedings, AIP Publishing LLC, 2017), 2.
[4] Mark Bromley, Neil Cooper, and Paul Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History', *International Affairs* 88, no. 5 (2012): 1032–33.
[5] Rachel Stohl, 'Understanding the Conventional Arms Trade', in *AIP Conference Proceedings*, vol. 1898 (AIP Conference Proceedings, AIP Publishing LLC, 2017), 2.

The process of increasingly international attention at regulating conventional arms transfers has its roots in different causes. Firstly, the attention to arms regulation went hand in hand with the increasing internationalization of the global arms industry since the '80s.[6] Furthermore, arms transfers are good for the economy of both exporters and importers: the former gain in competitiveness of their national industry, reducing unit cost and favour the trade balance; the latter gain new equipment and through offsets gains industrial compensation, foreign direct investments etc.[7]Although it should be noted that arms transfers are still used as a major foreign policy tool and countries are constantly seeking to renew and innovate their arsenals under the legitimate purpose of self-defence (whether it being the real reason or not).[8] Secondly, this regulatory process has also been helped by the growing awareness that conventional arms transfers have a direct impact on human rights, social and economic development and post-conflict reconstruction.[9] Thirdly, the Gulf War made the public aware of States' lack of control over their arms trade and the destabilizing consequences of arms supplies without controls to authoritarian regimes, like the UK Arms to Iraq scandal where UK companies sold weapons to Saddam Hussein's Iraq with the knowledge of the government.[10] Fourth, the civil and ethnic conflicts that arose after the Cold War, like Rwanda and Yugoslavia brought up the problems linked with small arms proliferation and the need for controls systems to prevent conflicts, genocides, human rights and humanitarian law violations.[11] Lastly, the impetus launched by the adoption of the APL and the growing role of NGOs advocating for more controls on arms transfers. This increasing attention to conventional arms transfers led States to adopt different levels of controls based on different principles or a mix of them (with different degrees of success): transparency regimes aimed at increasing security and traceability; national control procedures for controlling the industry and creating accountability; limitations or bans on certain weapons; confidence and security building to balance security issues of recipient States and regional stability; punitive measures to address violations of international agreements as well as national control procedures; and lastly, controls based on humanitarian concerns like the abovementioned CCW, APL and ATT.

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[6] Elisabeth Sköns and Herbert Wulf, 'The Internationalization of the Arms Industry', *The Annals of the American Academy of Political and Social Science* 535, no. 1 (1994): 44.

[7] Ibidem, at 46-47.

[8] Rachel Stohl and Suzette Grillot, The International Arms Trade (Oxford, England: Polity Press, 2009), 42–43.

[9] Jennifer L. Erickson, Dangerous Trade: Arms Exports, Human Rights, and International Reputation, Book, Whole (New York: Columbia University Press, 2015), 44–45, https://doi.org/10.7312/eric17096. The European Code of Conduct for Arms Exports, an, at the time, politically binding set of criteria was adopted in 1998 (later becoming binding) and was aimed at preventing the export of equipment which might have been used for internal repression, international aggression, or contribute to regional instability.

[10] Jennifer L. Erickson, 'Leveling the Playing Field: Cost Diffusion and the Promotion of "Responsible" Arms Export Norms', *International Studies Perspectives* 18, no. 3 (21 August 2017): 334, https://doi.org/10.1093/isp/ekv019.

[11] Jennifer L. Erickson, *Dangerous Trade: Arms Exports, Human Rights, and International Reputation*, Book, Whole (New York: Columbia University Press, 2015), 63, https://doi.org/10.7312/eric17096.

International conventional arms transfers were relevant in the Cold War, with the world divided into two blocs, and today, in a multipolar and unstable world they are even more relevant. The recent war between Ukraine and Russia has brought Europeans' attention back to the defence sector and arms transfers; even though other conflicts already touched the issue of arms transfers like the Libyan civil war and the Saudi-Led intervention in Yemen. However, given the legitimacy for States to acquire and sell conventional weapons, internationalist doctrine and academics have addressed this topic in a limited manner. As a step forward in addressing this issue, the present thesis has various objectives. The first aims at analysing the international, regional (EU) and national (Italian) regulation on arms transfers between States to identify the existence of critical aspects and shortcomings; the second objective is focused on Italian regulatory framework on arms transfers, its compliance with international and EU norms, as well as Italian compliance with such norms in its arms transfers towards Saudi Arabia and Egypt. The last objective aims at analysing States domestic jurisprudence and case law as well as judges' interpretation of the arms transfers norms.

The first chapter focuses on international law and arms transfers. More specifically we will first analyse how arms transfers interact with certain aspects of international customary law like self-determination and non-intervention in internal affairs, self-defence, neutrality and customary international humanitarian law and human rights law. Then, we will focus on treaty law, with the main focus being on the Arms Trade Treaty and the control system that it sets up for arms transfers. Other conventional instruments will also be discussed like the Convention on Certain Conventional Weapons, Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions. Lastly, we will analyse the existing soft-law instruments that have been set up for arms control. The second chapter will shift the attention to a regional perspective, focussing on the role of the European Union in tackling and regulating international arms transfers and whether or not it has impacted its Member States and their control mechanisms and procedures. In the third chapter Italian regulation on arms transfers will be discussed, as well as its compliance with international and European frameworks; furthermore, we will also discuss Italian respect of arms transfers controls and procedures with two case studies on Italian arms transfers towards Saudi Arabia and Egypt. In this section, will also be briefly discussed Italian arms exports towards Ukraine. To conclude, the last chapter will be dedicated to analyse some of the existing case law on arms transfers, given the fact that enforcement of these regulations is mainly left to administrative or executive organs or through judicial review by national courts. Given the European-oriented perspective of this thesis, the case law will mainly address challenges that have been brought before courts of EU member States.

## **Chapter I** – International Regulation and Instruments for Arms Deals' Control

On the 30th of August 2015 Eni announces the discovery of a supergiant gas field in the Mediterranean Sea, inside Egyptian offshore. The gas field, better known as Zohr gas field, was estimated to hold a potential of 850 billion cubic metres of gas (equivalent of 5,5 billion barrels of oil).[12] The discovery was extraordinary for both the Italian company and for Egypt, which would no longer be dependent on import of liquified natural gas (LNG) for its domestic needs.[13] In 2020 Zohr gas field reached 87 million cubic metres per day and more wells have been drilled.[14] A few months later such discovery, at the end of January 2016, news is given that an Italian researcher, Giulio Regeni, had disappeared while studying labour unions' organization and behaviour in Egypt.[15] Less than a week later, his lifeless body is found with evidence of torture. The case rapidly becomes international news and Amnesty International launches the campaign "Verità per Giulio Regeni" (Truth for Giulio Regeni)[16]; an investigation is also opened by Rome's tribunal (Prosecutor of Rome). Two years later, the then Minister of Foreign Affairs, Angelino Alfano, stated before the parliamentary joint commission for foreign affairs that "Egypt is a key partner for Italy just as much Italy is a key partner for Egypt".[17] At the present time the trial has started and the defendant are: general Sabir Tariq, colonels Usham Helmi, Athar Kamel Mohamed Ibrahim, and Magdi Ibrahim Abdelal Sharif, all accused of unlawful detention/kidnapping and Magdi Ibrahim Abdelal Sharif also charged with aggravated personal injury and aggravated homicide; the Italian government requested to be considered civil party.[18] In the meantime, between 2019 and 2020 Italy proceeded to sell to the Egyptian government 32 helicopters (24 AW149 and 8 AW189, the AW149 being sold exclusively for military purposes), 50 ASTER-15 SAAM missiles and 2 FREMM frigates[19]. This led Egypt at becoming, for two consecutive years, the first recipient of individual export licenses, for a value of

[12] 'Eni scopre nell'offshore egiziano il più grande giacimento a gas mai rinvenuto nel Mar Mediterraneo', accessed 20 November 2021, https://www.eni.com/it-IT/media/comunicati-stampa/2015/08/eni-scopre-nelloffshore-egiziano-il-piu-grande-giacimento-a-gas-mai-rinvenuto-nel-mar-mediterraneo.html.

[13] 'Zohr: il giacimento gigante nell'offshore dell'Egitto', accessed 20 November 2021, https://www.eni.com/it-IT/attivita/egitto-zohr.html.

[14] Ibidem.

[15] 'Caso Regeni, le principali tappe della vicenda - Rai News', Rainews.it, 14 October 2021, https://www.rainews.it/dl/rainews/articoli/Caso-Regeni-le-principali-tappe-della-vicenda-badd6e72-af24-424e-ba61-93950160e20d.html?refresh_ce.

[16] 'Verità per Giulio Regeni, la campagna di Amnesty International', Amnesty.it, accessed 20 November 2021, https://www.amnesty.it/campagne/verita-giulio-regeni/.

[17] 'Caso Regeni, le principali tappe della vicenda - Rai News', Rainews.it, 14 October 2021, https://www.rainews.it/dl/rainews/articoli/Caso-Regeni-le-principali-tappe-della-vicenda-badd6e72-af24-424e-ba61-93950160e20d.html?refresh_ce.

[18] Ibidem.

[19] 'Relazione sulle operazioni autorizzate e volte per il controllo dell'esportazione, importazione e transito dei materiali di armamento' -Anno 2020', 7 April 2020, 63, https://www.senato.it/leg/18/BGT/Schede/docnonleg/42351.htm; SIPRI-Stockholm International Peace Research Institute, 'SIPRI Arms Transfers Database'.

€871,7 million in 2019 and €991,2 million in 2020.[20] In December of the same year Regeni's parents sued the Italian government for not complying with the Italian law 185/90 on the export of weapons to countries that do not respect human rights.[21]

The relationship between human rights and conventional arms transfers and deals is immediate, but what are considered "conventional weapons" and what is considered a "transfer" is not so clear. In order to define these concepts, firstly, I would like to give some numbers on the dimension of international arms transfer and trade. The Stockholm International Peace Research Institute (SIPRI) estimated that the global conventional arms trade amounted to $118 billion in 2019[22], with the volume of international arms transfer of the 2016-2020 period being almost the same as the 2011-2015 period.[23] As one would expect the main exporters of conventional weapons are the United States, Russia, France, Germany and China, accounting for 76% of world's exports; the largest importers are Saudi Arabia, India, Egypt, Australia and China.[24] The year 2020 has seen a major downfall in arms exports compared to previous years (16% lower than 2019 according to SIPRI)[25], but it is not clear how much role had the pandemic when compared to the economic crises and supply and demand factors stemming from cyclical national procurement factors.[26] Arms exports are beneficial to countries for different reasons: they help the balance of payments, strengthen national defence industry, reduce unit cost and act as a foreign policy tool[27]; furthermore, it is a sector in which governments play a major role in determining and controlling transactions and prices, linking the arms trade to political necessities and priorities. During the years, many NGOs have expressed criticism towards governments and their lack of control on arms transfers towards countries which did not respect basic human rights or in breach of international law obligations. The Italian case cited above is one of the most recent ones, but there are more, some of which will also be discussed later in this thesis: in 2017-18 a Canadian Academic, Daniel Turp, sued the Canadian Government for exporting light armoured vehicles (LAVs) to Saudi Arabia, citing the risk that such vehicles could be used against civilians populations, particularly in Yemen, since Saudi Arabia was still involved in the

[20] Ibidem.
[21] 'I genitori di Giulio Regeni hanno denunciato il governo italiano', Il Post, 07/01/2021.
[22] Stockholm International Peace Research Institute, *SIPRI Yearbook 2021: Armaments, Disarmament and International Security* (London, England: Oxford University Press, 2021), 15.
[23] Pieter D. Wezeman, Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, 2020', fig. 1, *Sipri.Org*, March 2021, https://doi.org/10.55163/CBZJ9986.
[24] Ibidem.
[25] Stockholm International Peace Research Institute, *SIPRI Yearbook 2021: Armaments, Disarmament and International Security* (London, England: Oxford University Press, 2021), 15.
[26] Ibid.
[27] Rachel Stohl and Suzette Grillot, The International Arms Trade (Oxford, England: Polity Press, 2009), 43–44.

conflict[28]; the 21st of February 2019 the French Government announced the transfer of six semi-rigid inflatable boats to the Libyan Navy, notwithstanding the United Nations embargo set up in 2011 and numerous PESC decisions and EU regulations and the fact that the Libyan Navy would have used such boats to violate paragraph 2 of article 2 of the International Covenant on Civil and Political Rights and articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[29] The United States continues selling weapons and precision-guided missiles to Israel regardless the fact that some of those missiles have been used in the recent attacks on Gaza, and the Office of the High Commissioner for Human Rights (OHCHR) reported that in those strikes 129 civilians were killed, leaving many more to suffer long term disabilities requiring rehabilitation.[30] The US has also sold weapons to Philippines for a total value of more than $2.5 billion, including various F-16C aircraft variants and numerous high precision missiles[31]; with the notice of the transfer coming less than two weeks after the statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to open an investigation on the situation on the Philippines for "crime against humanity of murder".[32] Turkey has recently come into the spotlight as the major supporter of Azerbaijan in the recent Nagorno-Karabakh war, with Azerbaijan becoming Turkey's first arms importer in September 2020 (the Nagorno-Karabakh war started on the 27th of the same month), for what was a de facto aggression to Armenia[33]. The list could go on with countless other examples of States selling weapons, regardless of their use for breach of International Humanitarian Law and/or other international obligations. As already said, international arms sales are strictly linked to foreign policy, security matters and the right to self-defence[34], which make states reluctant to disclose such information to the public, making tracing such transfer particularly difficult; furthermore, arms sales rise and fall internationally, depending on the emergence or resolution of crises[35]. Controlling the transfer of conventional weapons is difficult not only for the reasons stated above, but also due to the

[28] 'Canada, Arms Transfer to Saudi Arabia', ICRC.org, n.d., https://casebook.icrc.org/case-study/canada-arms-transfer-saudi-arabia.

[29] MIGREUROP, 'L'État français livre des bateaux à la Libye: des ONG saisissent la justice!', migregroup.org, 26/04/2019; Tomasetta, 'Il governo francese ha donato sei navi alla Libia: otto Ong chiedono a un tribunale di bloccare la consegna', Amnesty.it, 25/04/2019.

[30] United Nations Office for the Coordination of Humanitarian Affairs, 'Occupied Palestinian Territory (OPt): Response to the Escalation in the OPt - Situation Report No. 5: 18-24 June 2021 - Occupied Palestinian Territory', reliefweb.int, 24/06/2021.

[31] Defense Security Cooperation Agency, 'The Philippines – AIM-9X Sidewinder Block II Tactical Missiles', dsca.mil, 24/10/2021; Defense Security Cooperation Agency, 'The Philippines – F-16 Block 70/72 Aircraft', dsca.mil, 24/10/2021.

[32] Bensouda, 'Statement of the Prosecutor, Fatou Bensouda, on Her Request to Open an Investigation of the Situation in the Philippines', icc-cpi.int 14/06/2021.

[33] SIPRI-Stockholm International Peace Research Institute, 'SIPRI Arms Transfers Database', sipri.org, 2021; Toksabay, 'Turkish Arms Sales to Azerbaijan Surged before Nagorno-Karabakh Fighting', reuters.com, 14/10/2021.

[34] David G Anderson, 'The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War', *Am. UJ Int'l L. & Pol'y* 7 (1991): 752.

[35] Rachel Stohl and Suzette Grillot, The International Arms Trade (Oxford, England: Polity Press, 2009), 3–4.

fact that they are seen as legitimate tool for states, contrary to weapons of mass destruction (WMD)[36]. Even article 51 of the Charter of the United Nations recognizes the "inherent right of individual or collective self-defence"[37] if attacked, meaning that the UN Charter allows for the production and trade of conventional weapons with the purpose of self-defence. Furthermore, due to the strict link between national security and protection of nationals' defence industries, data on arms transfers are not always easy to track.[38]

International Arms Transfers have always been a concern: let's just remember the fact that Christian European countries agreed not to transfer weapons to the Turks.[39] More recently, after World War One, States came together to limit arms trade and its implications on arms races and their influence on triggering escalation of conflicts.[40] After the Second World War, the literature moved towards the effects that arms transfers might have towards the principles of non-intervention, non-interference in internal affairs and self-determination.[41] In 1991 the UN General Assembly (GA) clearly drew a direct connection between the violation of human rights and the "destructive effects"[42] of arms trade (at the time only the illicit arms trade was considered). More recently, in the Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General have established a direct link between arms transfers and their negative impact on the enjoyment of human rights such as the "right to life, liberty and security of the person to the right to be free from slavery and from torture and other cruel, inhuman or degrading treatment or punishment".[43] The report also highlights the link between arms transfers and the opportunity cost related to the impairment of economic social and cultural rights, the exacerbation of poverty in poor countries, the creation or aggravation of humanitarian emergencies and lastly the continuation or intensification of conflicts.[44]

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[36] Rachel Stohl, 'Understanding the Conventional Arms Trade', in *AIP Conference Proceedings*, vol. 1898 (AIP Conference Proceedings, AIP Publishing LLC, 2017), 7.
[37] United Nations, 'United Nations Charter (Full Text) | United Nations', un.org, 1945.
[38] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 4, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.
[39] Rachel Stohl and Suzette Grillot, The International Arms Trade (Oxford, England: Polity Press, 2009), 139.
[40] David G Anderson, 'The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War', Am. UJ Int'l L. & Pol'y 7 (1991): 759
[41] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 5, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.
[42] 'General and complete disarmament: resolutions', no. A/RES/46/36 https://undocs.org/A/RES/46/36 (3 January 1992). https://digitallibrary.un.org/record/134349/files/A_RES_46_36-AR.pdf.
[43] 'Impact of arms transfers on the enjoyment of human rights: report of the Office of the United Nations High Commissioner for Human Rights', no. A/HRC/35/8 (3 May 2017): 15, https://digitallibrary.un.org/record/1298041/files/A_HRC_35_8-AR.pdf.
[44] Ibidem.

When defining conventional weapons under international law, it is rather easy to distinguish them from weapons of mass destruction: atomic, chemical or biological; meaning that all weapons that do not fall under these three categories, are to be considered conventional weapons. However, an international standard to what conventional weapons are, is not always straightforward, given the fact that each State creates its own categories and regulations.[45] Conventional weapons in the instruments can either be listed or identified by a general definition. The Hague Convention (V) on the Rights and Duties of Neutral Powers and Persons in Case of War on Land at art. 7 refers to "arms, munition of war"[46] or anything that can be useful to an army or a fleet;[47] the Hague Convention (XIII) on the Rights and Duties of Neutral Powers in Naval War at art. 6 refers to "war-ships, ammunition, or war material of any kind whatever".[48] More recent instruments, such as the UN Register on conventional arms (UNROCA) and the Arms Trade Treaty (ATT), list what is considered conventional weapons. The UNROCA also gives us a definition of each item on the list: battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft and unmanned combat aerial vehicles (UCAV), attack helicopters, warships (which also includes submarines), missiles and missile launchers (including Man-Portable Air-Defence Systems or MANPADS).[49] The ATT at art. 2 (1)[50] also gives us a list of items, and the negotiators decided to link such items to the definitions and descriptions given by the UNROCA;[51] the only, but significant, addendum to the list are the "small arms and light weapons" (SALW). The Wassenaar Arrangements, a multilateral export regime born in 1996 as the successor of Coordinating Committee for Multilateral Export Controls (COCOM), provides a detailed list of conventional arms, including the categories used by the UNROCA, expanding the definitions in order to include the purpose and intended use of such weapons[52], it also includes the transfer of dual-use items.[53] At regional level, the European Union has laid out an extensive and detailed list of conventional weapons in the Common Military List of the European Union that includes the categories cited above, but also propellants, fire control and surveillance

[45] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 6-8, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.

[46] 'Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (Hague Convention V)', 1907.

[47] 'Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (Hague Convention V)' 1907.

[48] 'Convention Concerning the Rights and Duties of Neutral Powers in Naval War, (Hague Convention XIII)', 1907.

[49] 'ROCA (United Nations Register of Conventional Arms)', n.d., https://www.unroca.org/categories.

[50] Peter Woolcott, 'Arms Trade Treaty - United Nations', 2 April 2013, http://legal.un.org/avl/ha/att/att.html.

[51]Holtom, Paul. 'Taking Stock of the Arms Trade Treaty: Scope'. SIPRI, August 2021, 1. https://www.sipri.org/publications/2021/other-publications/taking-stock-arms-trade-treaty-scope.

[52] Wassenaar Arrangement Secretariat, 'Founding Documents -The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies', December 2019, https://www.wassenaar.org/app/uploads/2019/12/WA-DOC-19-Public-Docs-Vol-I-Founding-Documents.pdf.

[53] Dual-use items are intended as goods, software or technology with applications in both military and civilian contexts.

equipment, equipment specialized for training, infrared or thermal imaging equipment and much more (as the list is quite extensive). The EU Common Military List is the often repeated "for military use"[54], which is used to target only certain types of goods according to their intended purpose. Lastly, I would like to consider the Italian listing of conventional weapons according to the law 185/90 as amended in 2012. At the art. 2 (1) there is a list of military goods intended as those goods that "in the light of their technical, manufacturing and design requirements or characteristics, are considered to be prevalently manufactured for military use or for use by Armed or Police forces";[55] in the following commas (2-3) we then are presented with a more extensive list of what are considered military goods and the military use clause is often repeated[56], with comma 3 including the EU Common Military List annexed to the EU directive 2009/43/CE and its subsequent amendments[57]. As we have seen, the regulation of conventional arms transfer targets specifically *military arms*, which becomes problematic as some arms are used for policing purposes (with the same risk of impinging on human rights), and more difficulties arise when considering replacement parts, upgrades or offsets.[58]

For the purposes of this thesis, I will mainly focus on the transfers between state actors, meaning that transfers between states and non-state actors or between non-state actors will not be considered. According to the ATT, at art. 2 (2), a transfer is considered to be any of "the activities of the international trade comprise export, import, transit, trans-shipment and brokering". For the appropriate functioning of the UNROCA transfer has been defined as "the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment".[59] While the Convention on Certain Conventional Weapons (CCW) in the Protocol II, amended in 1996, states that a transfer "involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control".[60] Lastly, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (APL) at the art. 4 (2) uses the same formula as the CCW. The ATT seems to be the least broad and the least extensive when compared with the others international agreements. However, many commentators

[54] Council, 'Common Military List of the European Union - ST/5470/2020/INIT', 13/03/2020.
[55] Translation of Law 185/90 as found on https://www.esteri.it/it/ministero/struttura/uama/legislazione/
[56] Art. 2 comma 2 paras e, f, g, i, l, m and o.
[57] 'LEGGE 9 Luglio 1990, n. 185 - Normattiva', normattiva.it.
[58] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 7, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.
[59] 'Report on the Continuing Operation of the United Nations Register of Conventional Arms and Its Further Development, A/58/274', 13 August 2003, 49. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/467/11/pdf/N0346711.pdf?OpenElement.
[60] United Nations, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (As Amended on 3 May 1996), 10 October 1980, available at: https://www.refworld.org/docid/4a54bc060.html.

are inclined to interpret the definition of "transfer" with a broad and all-encompassing meaning, in order to include trade and, when possible, military aid and supplies.[61]

### *1.1. Customary International Law*

We can now ask ourselves how arms transfers interact with certain aspects of international customary law. For the sake of completeness, international customary law refers to general norms of international law that originate from two separate aspects: State practice (*usus*), meaning that there is a behaviour repeated over time by most States, and *opinion iuris*, meaning that there is also the belief of States that such behaviour is proper, mandatory and accepted as law. The International Court of Justice's (ICJ) Statute at art. 38 (1(b)) refers to international customary law as "evidence of a general practice accepted as law".[62] The ICJ has also developed and extensive jurisprudence on the identification of customary international law that reiterates the necessity of coexistence of both practice, and the belief that such practice has become obligatory due to an existing rule of law that requires it.[63] The norms of customary law that will be taken into account due to their strict relation to arms transfer will be: self-determination and non-interference in internal affairs, which will be treated together, self-defence and the use of force, and lastly neutrality as a general principle and as a concept of law.

#### *1.1.1. Self-determination and Non-intervention in internal affairs*

The principle of non-intervention can be defined as the prohibition of a State to intervene in matters that pertain the domestic authority and jurisdiction of another State. It is a principle formally grounded in multiple sources of international law: i.e. art. 2 (7) of the UN Charter, and art. 2 (1) which recognizes States' sovereignty; as Kunig states, the principle of non-intervention in itself protects the sovereignty of States.[64] The ICJ, in the Military and Paramilitary Activities in and against Nicaragua Case (*Nicaragua v United States of America*), has also given a more detailed definition of the non-intervention principle as forbidding "all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide

[61] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 9-11, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf. Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study', (University of Lapland, 2014), 32.

[62] 'Statute of the Court', 26 June 1945, accessed 21 November 2021, https://www.icj-cij.org/en/statute.

[63] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14.'. For further jurisprudence see: North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, 3, and Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1. C.J. Reports 1984, 246. For further reading see also: Treves, Tullio. Customary International Law Oxford University Press, 2006.

[64] Philip Kunig, 'Intervention, Prohibition Of', *The Max Planck Encyclopedia of Public International Law* 6 (2012).

freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones".[65] The principle has been repeated and reinforced many times by the UN General Assembly through various acts, to name two: the *Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations* and the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*. The first explicitly links direct or indirect intervention into a State's internal affairs as a breach of international law[66], while the second refers to the duty of states to "refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations".[67] Both Declarations reaffirm the duty of States to refrain from organizing, assisting, instigating or financing terrorist acts or mercenaries in other States and aimed at interfering in a State's internal affairs.[68] From such declarations we can therefore assume that arms transfer from a State, directed to non-state groups, terrorist or rebels operating inside the jurisdiction of another state, would be unlawful according to international customary law. The ICJ in the historical *Nicaragua v. United States of America* has further confirmed such view;[69] more recently, in the judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court has highlighted once more such correlation between arms transfers and breach of principle of non-intervention by directly making reference to the *Nicaragua v. United States of America*.[70] We can therefore safely affirm that arms transfers directed towards non-state actors (NSAs), armed groups or insurgent fighting against a legitimate

[65] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14.'

[66] 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.', no. A/RES/2625(XXV) (24 October 1970). http://digitallibrary.un.org/record/202170, third principle "concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", 24 October 1970.

[67] 'Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: Resolution A/RES/42/22', 17 March 1988, 8.

[68] 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.', no. A/RES/2625(XXV) (24 October 1970). http://digitallibrary.un.org/record/202170, para c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; 'Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations: Resolution A/RES/42/22', 17 March 1988, section I para 7.

[69] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14.', paras 247 and 292.

[70] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168, paras 164 and 345.

government, are unlawful according to international customary law; while on the other hand it is safe to assume that arms transfers towards the legitimate State are lawful and accepted.[71]

The ban on supplying weapons to non-state actors acting in another States changes however when such NSAs are part of a national liberation movement (NLM) aiming at achieving self-determination.[72] NLM are entitled to seek support (moral and material) in order to achieve independence and self-determination; such principle has been stated multiple times, and often with the same wording in a plethora of UN documents, with the *Declaration of friendly relations among States* recognizing that "in pursuit of the exercise of their right to self-determination, peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter".[73] The Resolution 2649 (XXV) of 1970 recognizes the right to "seek and receive all kinds of moral and material assistance".[74] If NLM are entitled to seek support, States have the responsibility and a duty to assist NLMs, a line of reasoning often supported by the UN; in 1965 the General Assembly with in the Resolution 2105 (XX) implemented the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, in which is stated that all States are invited to "provide material and moral assistance to the national liberation movements in colonial Territories"[75]. This invite seems to become a duty in 1970 in the *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, which states that "States shall render all necessary, moral and material assistance" to those people fighting for their right for self-determination and independence.[76] An issue that arises however, is that there is no common definition of "support" between States nor in scholarly literature. Judge Schwebel in his

[71] Cassimatis Anthony E, Drummond Catherine, and Greenwood Kate, 'Arms, Traffic In', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2016).

[72] The right of peoples to self-determination entails their right to determine their political status and organization, as well to pursue freely autonomous economic, social and cultural development, as stated in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Further definition of the right to self-determination has been developed by the UN at paragraph 5 of the Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations. NLM are those organizations/agencies that represent the people fighting for their liberation and self-determination against a colonial regime, foreign occupation or racist regimes; the conflict sprouting from the action of such groups and movements is regulated by the Protocol I to the Geneva Convention of 1977.

[73] 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.', no. A/RES/2625(XXV) (24 October 1970). http://digitallibrary.un.org/record/202170.

[74] 'The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights.', 1990. Other documents that contain the same principle are: A/RES/3314(XXIX) and A/RES/2326(XXII).

[75] 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.', no. A/RES/2105(XX) (1966), http://digitallibrary.un.org/record/203463., 1965.

[76] 'Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.', 1971, para 2.

dissenting opinion to the *Nicaragua case* stated that it is to be considered unlawful conduct that of a State intervening in a self-determination process by providing "arms, supplies and other logistical support in the prosecution of armed rebellion".[77] Ruys also reports that such doubts have never been cleared and various States, among which Australia, United Kingdom, United States, South Africa and Portugal, have highlighted that international law does not specifically entitles States to give military support or armed assistance to Self-governing Territories or elsewhere.[78] The Australian representative gave a clear-cut opinion on the matter stating that "States could not intervene by giving military support or arms in a Non-Self-Governing or Trust Territory"[79], and the US followed by affirming that the principle of equal rights and self-determination of peoples "did not constitute a general licence for an international traffic in arms".[80] Ruys and other commentators report that States of the former Eastern Bloc, Afro-asiatic countries and Middle East countries have endorsed the opposite opinion, confirming that the term "support" should also be intended as the possibility to transfer arms to NLMs. So far, the issue has not been settled, nor between States, nor by the doctrine, and the uncertainty on whether or not the term "support" to NLMs and to people aiming at self-determination includes the transfer of arms. Despite this lack of a general consensus we can infer, that international law does not interdict the supply of arms to NLMs.

In conclusion, the principle of non-intervention and the right of people to self-determination, may appear in contrast when seen in relation to arms transfers, however a closer look shows that: the first has been used repeatedly to avoid and forbid arms transfers towards non-state actors and rebels, which threaten the integrity and stability of the legitimate State/government; the second, while not explicitly allowing for arms transfers, implicitly does so through the justification that States "States shall render all necessary, moral and material assistance". [81]

### *1.1.2. Self-defence*

As mentioned previously, the legitimacy of international arms trade is grounded, among other things, on both sovereignty and the right of States to self-defence. The principle of self-defence is grounded in customary law, and has been further recognized in the Covenant of the League of

[77] ICJ, Nicaragua case (Merits), Dissenting opinion of Judge Schwebel, 1986.
[78] Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance"—Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13, no. 1 (1 March 2014): 13–53, https://doi.org/10.1093/chinesejil/jmu003; 'Summary Record of the 114th Meeting Held on Friday, 1 May 1970', May 1970, 63; 'Summary Record of the 1184th Meeting : 6th Committee, Held at New York, on Monday, 28 September 1970, General Assembly, 25th Session', 1970, 3; 'Summary Record of the 1207th Meeting : 6th Committee, Held at New York, on Tuesday, 27 October 1970, General Assembly, 25th Session', 1970, 7.
[79] 'Summary Record of the 114th Meeting Held on Friday, 1 May 1970'.
[80] Ibidem.
[81] 'Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.'

Nations, the Kellogg-Briand Pact and lastly in the article 51 of the UN Charter. The right of States to acquire arms for self-defence has been recognized by the UN Disarmament Commission, which, in a report of 1996 writes that States have the "the right to acquire arms for their security, including arms from outside sources".[82] Such right has been also acknowledged in the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA) which reaffirms "the right of each State to manufacture, import and retain small arms and light weapons for its self-defence and security needs".[83] The link between arms transfer and the right to self-defence has also been recognized by the States of the African Union (AU) in the Common Position on an Arms Trade Treaty which reaffirms the principle that States have the right to "manufacture, develop, acquire, import, export, transfer and retain conventional arms, related materials and capabilities for self-defence and security needs".[84] Scholars also agree that States have the right to "to embark upon weapons programmes such as testing and development, measures associated with readiness and targeting, and determinations of reliability precisely because they are legally entitled to defend themselves".[85] We can therefore safely assume that arms transfers, when done under the banner of self-defence purposes, are legitimate according to international law. Having cited art. 51 of the UN Charter, we can now ask ourselves, how the collective security system of the UN, self-defence and assistance to an attacked State interact. Article 51 allows the attacked State to immediately respond to the aggression, namely individual self-defence; but the norm also prescribes collective self-defence, meaning that more States can join the conflict supporting the victim State. The ICJ has developed in the *Nicaragua case* three requirements needed for the realization of collective self-defence: at least one State must be entitled to claim individual self-defence (meaning it is being attacked); the attacked State has to declare itself as a victim of an armed attack; and lastly the attacked State shall request assistance.[86] This means that third-party States, not directly involved in the conflict, can assist and transfer arms to the attacked State when it asks for assistance. But it is important to point out, that such practices are considered lawful as long as the Security Council (SC) does not take action to solve the conflict. Such assistance to an attacked State is in close relationship to the laws of neutrality and the definition of third-party States as neutral, belligerent or non-belligerent, which will analysed in the next paragraph. The transfer of arms towards an aggressor

[82] 'Report of the Disarmament Commission.', no. A/51/42 (1996): iii, 20 p.
[83] 'Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001', 2001, iii, 23.
[84] Union, African. 'African Union Common Position on an Arms Trade Treaty' Peace and Security Collection [1731] (2006). https://archives.au.int/handle/123456789/8536.
[85] Den Dekker, *The Law of Arms Control: International Supervision and Enforcement*, Springer Netherlands, 2001, 44-45.
[86] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14.'

State, on the other hand, cannot be considered legitimate according to international law due to the fact that it violates a fundamental law of jus cogens. As the ICJ recognized in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT*, States are not allowed to aid or assist a State in its violation of international law, with the recognition at the time that the building of a wall in the Occupied Palestinian Territory amounted to a violation of both IHL and HRL, as well as the right to self-determination and the Fourth Geneva Convention of 1949.[87] Aggression, as defined by the General Assembly in 1975 constitutes "a crime against international peace" which also "gives rise to international responsibility"[88] of a State; third-party States providing arms to an aggressor can be deemed responsible as well according to art. 16 of the Responsibility of States for Internationally Wrongful Acts.[89]

*1.1.3. Neutrality*

Neutrality can assume different meanings in the context of international relations: when used in a political sense it can reflect a certain conceptualization and practice of foreign policy, which may as well lead to isolation; however, when it is intended as a concept of international law, its connotations can be outlined fairly easily. Ronzitti distinguishes between permanent neutrality and neutrality in times of war.[90] The first is aimed at keeping a State out of any conflict whatsoever and entailing certain obligations such as not being part of military alliances, and its sources are generally based on a specific international agreement, being it bilateral or multilateral.[91] The second can be also referred to as the *law of neutrality*, it applies to sovereign States in situations of armed conflicts between two or more states prescribing neutral States not to support warring parties with military means[92]; such rules have been codified in the Hague V and Hague XIII of 1907, the conventions on the Rights and Duties of Neutral Powers in Land and Naval war. The first convention has 34 States parties, while the second has 30, and both conventions have not been amended since 1907.[93]

[87] United Nations Office for the Coordination of Humanitarian Affairs, 'Occupied Palestinian Territory (OPt): Response to the Escalation in the OPt - Situation Report No. 5: 18-24 June 2021 - Occupied Palestinian Territory', reliefweb.int, 24/06/2021.

[88] 'Definition of Aggression.', 1975, art. 5 par. 2.

[89] 'Responsibility of States for Internationally Wrongful Acts: Resolution A/RES/56/83', 2001. It is however important to remember that such project of articles bears no legally binding value.

[90] Ronzitti, Natalino, *Diritto internazionale*, (Giappichelli Editore, 2019), 79.

[91] Natalino Ronzitti, *Diritto Internazionale Dei Conflitti Armati* (Giappichelli Editore, 2021), 113.

[92] Michael Bothe, 'Neutrality, Concept and General Rules', *Max Planck Encyclopedia of Public International Law.*, 2011, http://opil. ouplaw. com/view/10.1093/law: epil/9780199231690/law-9780199231690-e349.

[93] 'Treaties, States Parties, and Commentaries - Hague Convention (V) on Neutral Powers in Case of War on Land, 1907', accessed 21 November 2021, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=71929FBD2655E558C12563CD002D67AE&action=openDocument; 'Treaties, States Parties, and Commentaries - Hague Convention (XIII) on Neutral Powers in Naval War, 1907', accessed 21 November 2021, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=06A47A50FE7412AFC12563CD002D6877&action=openDocument.

Neutrality law presupposes the existence of a state of war or of an armed conflict; however, war is fared in a radically different manner than in 1907: generally, declarations of war are not presented anymore before the beginning of hostilities, and more likely than not a direct attack is launched and conflict ensues. We can therefore say that is left to States to recognize a state of war and also to declare their position in respect to it.[94] We are now left with two questions: does an international customary law on neutrality exist? And how do arms transfers and neutrality law interact? The answer to the first question is not that clear as one might think. The ICJ, in an advisory opinion to the Legality of the Threat or Use of Nuclear Weapons, recognizes the status of neutrality law as international customary law.[95] In this advisory opinion, the ICJ recalls art. 2 paragraph 4 of the UN Charter,[96] affirming that a "signalled intention to use force if certain events occur is or is not a 'threat' within Article 2, paragraph 4, of the Charter depends upon various factors".[97] In the *Nicaragua case* the Court found that while arming and training the *contras* amounted to threat or use of force, the general assistance given by the US to the *contras* did not amount to use of force.[98] However, despite the general prohibition on both the use of force and the threat of use of force, the Court does not provide clear means of guidance on the interpretation of article 2 paragraph 4, with commentators disagreeing on whether or not only threats of unlawful force as being unlawful or if there exists a "wider prohibition of threats of possibly lawful force, on the basis that such threats may pose a threat to international peace and security".[99]

Gioia reports that scholars are divided on the customary nature of neutrality, with some believing that such concepts has lost its meaning, and others claiming it to still be valid due to the difficult implementation of a collective security system within the United Nations.[100] According to this last view, both Ronzitti and Gioia agree on the fact that, as long as the UN Security Council has not taken an official position and declared one or more States as aggressor, States that are not part to the conflict should declare themselves neutral or non-belligerent, and if they do not, the laws of

[94] I will not dwell on the distinction between neutral and non-belligerent, for more on the subject: Ronzitti, Diritto Internazionale Dei Conflitti Armati, Giappichelli Editore, 2021; Seger, Paul. The Law of Neutrality. Edited by Andrew Clapham and Paola Gaeta. (Oxford University Press, 2014). https://doi.org/10.1093/law/9780199559695.003.0010.
[95] 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, 226'.
[96] Article 2 paragraph 4 reads "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[97] 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226'.
[98] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.', para. 228.
[99] Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2018), 35–36.
[100] Andrea Gioia, 'Neutrality and Non-Belligerency', *Martinus Nijhoff Publishers*, 1994.

neutrality apply automatically.[101] The UN security system seems to have modified to a certain extent how neutrality works and how states can shift between neutrality and belligerent; chapter VII of the UN Charter, specifically arts. 42,43,44 and 45, lays out when member States are allowed, if not compelled to shift from an eventual neutral position, to a belligerent one, but not on the same side as the identified aggressor. Some even argue that neutrality under the UN system has become entirely optional, due to art. 51 of the Charter, allowing states to either become part of a coalition, if the UN creates one, or assist the attacked State.[102] Neutrality has therefore become a debated concept which may put at risk its inclusion within international customary law, notwithstanding an underlying general acceptance that the neutrality laws, as intended in Hague V and Hague XIII, States' practice and the UN security system, with the latter tampering with the application of such norms, the lines between neutrality and other forms of non-belligerency have become blurred.

To answer the second question, an important distinction must be made between private and public sector: according to art 7 of Hague V, citizens or private companies are free to export weapons, munitions and war materials to belligerent parties (if the neutral State does not impose restrictions),[103] but a neutral State is forbidden to do so according to art. 6 of the Hague XIII; furthermore, any restriction imposed on private arms exports must be applied to all belligerent parties as per arts. 9 of both Hague V and Hague XIII. However, these rules were made when much of the arms' industry was private owned; nowadays such distinction cannot apply anymore (if not only for certain companies), due to the fact that some of the biggest arms manufacturer are partially or completely state-owned. However, this should not be an excuse to neglect such rule even when private defence companies are involved in arms transfers, mainly due to the fact that States have set up numerous systems to check conventional arms transfers through numerous procedures: licensing, legislation, export criteria or lists and many more.[104] Therefore, we might argue that any conventional arms transfer *de facto* is checked and controlled by States and the principle of impartiality of arts. 9 of Hague V and XIII applies, that is, if the UN security system has not been set in motion. For what concerns neutrality and the transfer of arms, intended as transit, art. 2 of Hague V states that "convoys of either munitions of war or supplies across the territory of a neutral Power" cannot be moved by

[101] Ronzitti, Natalino, Diritto Internazionale Dei Conflitti Armati (Giappichelli Editore, 2021); Andrea Gioia, 'Neutrality and Non-Belligerency', Martinus Nijhoff Publishers, 1994.
[102] James Upcher, Neutrality in Contemporary International Law (Oxford University Press, 2020), 8.
[103] 'Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (Hague Convention V)', 1907.
[104] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 19, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf. For a more comprehensive list see also: Stohl R., "Understanding the conventional arms trade", AIP Conference Proceedings 1898, 030005 (2017), https://doi.org/10.1063/1.5009220

belligerents, meaning that the warring parties or belligerents are bound to transfer and move munitions and war supplies on other the territories of allied belligerents, or on territories of non-belligerents that have not declared themselves as neutral. We can definitely affirm that the law of neutrality has an impact on arms transfers, however its nature and the systems to actually respect it are linked to the willingness of neutral States during a conflict, notwithstanding the existence of the Hague Conventions. The role of the UN and its security system should not be seen as a hindrance to the neutrality law, however its ineffectiveness in making that same security system work leaves room for ample States' interpretation and practice to define what neutrality consists of and what is non-belligerency. For what concerns non-belligerency, this is also another position that clouds the law of neutrality, being it an intermediate position that States can adopt by staying out of a conflict while intervening indirectly to it.[105]

### *1.1.4. Customary International Humanitarian Law*

International Humanitarian Law (IHL) is intended as the norms regulating the conduct of war and hostilities, as well as the protection of civilians. Primary focus of IHL when dealing with conventional weapons, is to ban those weapons that cause unnecessary harm, that aggravate suffering and that are generally considered as inhumane.[106] However a ban on use does not necessarily coincide with a ban on transfer, meaning that states can, in theory, trade such weapons. Brehm notes that in the Geneva Conventions of 1949 and the IHL conventions there is only one article that explicitly references transfer: article 36 of the Additional Protocol I of 1977.[107] The article states that "In the study, development, acquisition or adoption of a new weapon… a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party"[108]; the authors of the ICC commentary propose that both suppliers and manufacturers check the legality of the traded weapons.[109] However, we must agree with Brehm that even if article 36 was extended to suppliers, it could not possibly directly affect arms transfers, because it fails to prescribe what

[105] James Upcher, Neutrality in Contemporary International Law (Oxford University Press, 2020), 9.
[106] For example, the St. Petersburg Declaration of 1868 banned any projectile under 400 grams charged with explosive or inflammable materials; the 1899 Hague Declaration concerning Expanding Bullets banned the so-called dum-dum bullets.
[107] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 33-34, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.
[108] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)', 8 June 1977, http://digitallibrary.un.org/record/162042.
[109] Claude Pilloud et al., *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras 1472 and 1473.

States ought to do after they detect the illegality of a certain weapon.[110] Analysing States practice we can affirm that they generally do not feel bound by a particular customary law which prevents them from importing and exporting weapons whose use is banned. Scholars on the matter have different opinions: for some it is only natural that prohibited weapons are also banned from trade;[111] while others believe that without the appropriate limitations on arms transfers, the norms only apply to their use *in bello*, leaving States capable of trading them.[112] What has happened with the later codification in various regional and international instruments seems to prove the latter view: Protocols II (art. 8) and IV (art. 1) to the CCW Convention both include provisions that ban the transfer of the weapons regulated. The link between violation of IHL and HRL has been gradually recognised over the time and has been implemented in regional and international agreements; for example, the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials explicitly bans the transfer of arms that are "destined to be used for the violation of international humanitarian law… [and] for the commission of serious violations of international humanitarian law".[113]

Other regional instruments that also ban the transfer of arms if there is the possibility that they will be used to commit violations of international humanitarian law are: Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture (art. 5 b), Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material (art. 1), European Union common position 2008/944/CFSP (article 2, criteria 2 and 6). The ATT sets as part of its principle the respect of humanitarian law and the Geneva Conventions of 1949 repeating it in article 6 paragraph 3, which states that a State shall not authorize arms transfers "if it has knowledge at the time of authorization that the arms or items would be used in the commission of […] grave breaches of the Geneva Conventions of 1949". The treaty also imposes the burden on States to assess and control whether or not there is the possibility that the transferred arms "could be used to: (i) commit

[110] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 34, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.

[111] Barbara Frey, 'Progress Report of Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons', 2004; Gillard, 'What Is Legal? What Is Illegal? Limitations on Transfers of Small Arms under International Law', 2000.

[112] Claude Pilloud et al., *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987); Harry H. Almond Jr, 'Arms Control and the Law of War: Control over Weapons and Their Use', *Mil. L. & L. War Rev.* 36 (1997): 11.

[113] 'ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials', adopted on 30 April 2010, gsdrc.org, 23, https://gsdrc.org/document-library/ecowas-convention-on-small-arms-light-weapons-their-ammunition-and-other-associated-material/, article 6 para 3.

or facilitate a serious violation of international humanitarian law; (ii) commit or facilitate a serious violation of international human rights law".[114]

The last paragraph was useful to show how, through agreements, the link between IHL, IHRL and arms transfer has been identified and codified; however, IHL *per se* still seems to lack a consuetudinary norm which limits arms transfers, due to the fact that State practice and opinion juris on the matter do not coincide. Scholarly literature has tried to solve this shortcoming by proposing two main alternatives: the first is to consider art. 16 of the Articles on State responsibility, and the second is to focus on art. 1 common to the Geneva Conventions and Protocol I. According to art. 16 of the International Law Commission's Articles on State Responsibility a State which aids or assist another State to commit an internationally wrongful act, will be considered responsible as well. The norm also applies for wrong-doings done with arms transferred from the one State to the one committing wrongful acts.[115] Article 16 has, however, some limitations: the State organ or agency giving the aid must be aware that the other State is carrying out an unlawful conduct, then the assistance must be given with the intention of facilitating such conduct, and should actually do so, and lastly the act must be wrongful even if it was committed by the assisting State.[116] Brehm highlights that the Commission noted the link between arm transfer and the wrongful behaviour of the receiving State, but also knew that a direct link between conscious transfer for facilitating wrongful conduct and the manifestation of such conduct may not happen, plus, in the Commentary to the Articles on State Responsibility the Commission notes that each case in which a State is alleged to have given assistance to another State to commit human rights abuses must be analysed to identify the awareness of facilitation.[117] Sassòli identifies the same issues with article 16, noting that the assisting State needs to have knowledge of the violations and that it should also intend that its support is to be used to commit such violations.[118] The Articles on State Responsibility, while being often cited by the ICJ and other arbitral tribunals, are not binding for States, furthermore the two elements (knowledge of the violation and the intended support of the aid) of article 16 must be proven, which may prove difficult. Nonetheless both Sassòli and Brehm propose an extensive interpretation of article 16 when dealing with IHL, meaning that a State may be deemed responsible when transferring arms to a second

[114] Peter Woolcott. 'Arms Trade Treaty - United Nations', 2 April 2013. http://legal.un.org/avl/ha/att/att.html, article 7.
[115] 'Report of the International Law Commission, 53rd Session (23 April-1 June and 2 July-10 August 2001)', pp 158-159; Barbara Frey, 'Progress Report of Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons', (2004) para 22.
[116] 'Report of the International Law Commission, 53rd Session (23 April-1 June and 2 July-10 August 2001)', 156.
[117] 'Report of the International Law Commission, 53rd Session (23 April-1 June and 2 July-10 August 2001)', p. 159; Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', J. Confl. & Sec. L., 2008, 385.
[118] Marco Sassòli, *International Humanitarian Law* (Cheltenham, UK: Edward Elgar Publishing, 2019), 529-531, https://www.elgaronline.com/view/9781786438546/9781786438546.xml.

State which is violating IHL even if the transfer is not intended to facilitate such wrongful acts.[119] However, State practice and opinio juris, in tandem with the non-binding nature of the Articles on State Responsibility, make it difficult to identify article 16 as norm which prohibits arms transfer when a State is in violation of IHL.

Another way to tackle the issue of arms transfers in light of IHL has been proposed by many scholars, and is that of Common Article 1 to the Geneva Conventions and Protocol I. The article states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.". The first part is an obligation that States impose in themselves, however the second part, specifically to "ensure respect […] in all circumstances" means that the Contracting Parties intended to create a system of obligations *erga omnes partes*. This entails that States not part of a conflict have a twofold obligation to prevent other States to commit violations of IHL and to set up measures and instruments to stop ongoing violations.[120] Brehm highlights the fact that the norms expressed within the Geneva Conventions I-IV are principles of customary law, thus they create obligations *erga omnes* and not only between the contracting parties.[121] Such reasoning finds grounding in the *Nicaragua case* in which the ICJ recognized the obligation to "ensure respect" of the Conventions "in all circumstances" and that such obligation stemmed from the Conventions themselves as well as from "general principles of international law".[122] The Court has once more pointed out such obligation in the *Advisory Opinion on the Legal Consequences of The Construction of a Wall in The Occupied Palestinian Territory* stating that "every State party […] is under an obligation to ensure that the requirements of the instruments in question are complied with" meaning that States party to Geneva IV should not recognize the illegal situation, should not aid nor assist and should ensure compliance of Israel to IHL. If we consider both the *Nicaragua judgment* and the *Advisory Opinion*, we can safely assume that a third State to the conflict has the duty to take all those measures necessary to end or limit the violation committed by a State.[123] If we link this to arms transfer, we can safely affirm that States, according to Common art. 1 to the Geneva Conventions and

[119] Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', J. Confl. & Sec. L., 2008, 384-386; Marco, Sassòli. 'State Responsibility for Violations of International Humanitarian Law'. International Review of the Red Cross 84, no. 846 (2002): 412–413.

[120] Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations', *International Review of the Red Cross* 96, no. 895–896 (2014): 707–36.

[121] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 39, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.

[122] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14' para 220.

[123] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 48-49, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.

Protocol I, States must ensure respect of IHL, meaning that if a State is violating certain norms of IHL, the other States must refrain from supplying and exporting arms to it.

*1.1.5. International Human Rights Law*

The Human Rights Committee defines IHL and Human Rights Law (HRL) complementary, with the former applying to international and certain non-international conflicts, and the latter applying at all times.[124] According to various treaties of HRL, States are responsible of human rights violations when such violations are committed within their jurisdiction, territory of "effective control";[125] meaning that they have positive and negative obligations concerning human rights respect within their jurisdiction. However, can States be held accountable for violations of HR committed by a recipient of arms transfers?

Approaching the matter from a jurisdictional perspective bears no fruit, as Brehm has highlighted, due to the fact that arms suppliers and transit States have little to no control over the area where the arms will be employed to commit violation of HR.[126] Such position has been supported by the European Commission of Human Rights when rejecting the application in *Tugar v Italy*. In the case the applicant Rasheed Haye Tugar complained that he had suffered a life-threatening injury and subsequently a lack of protection of his right to life due to the fact that the Italian Government allowed for the sale and export of anti-personnel mines without self-detonating or self-neutralising mechanism, which impinged on his right to life as laid out in Art. 2 of the European Convention on Human Rights. The Commission noted that the Convention does not limit arms transfers and that Italy's violation can only be linked to a faulty regulation on arms transfer, furthermore the case could not be placed in equal footing with the Soering vs UK in which jurisdiction was directly involved. The court also rejected the application based on the fact that Iraq placed the mines and that Italy had no control over it. Thus, the direct or immediate link between Italy, the selling of arms and the placement of mines was missing was "too remote" to fall under Italian responsibility.[127] The Commission looked past to Italy knowingly selling indiscriminate weapons to Iraq, and as Brehm notes the use of indiscriminate weapons is a violation of IHL and by selling those to Iraq, Italy

[124] 'IHL and Human Rights', casebook.icrc.org, n.d., https://casebook.icrc.org/law/ihl-and-human-rights.

[125] For example, Art. 2 para 1 of the International Covenant on Civil and Political Rights, Art. 1 of the European Convention on Human Rights. For the "effective control" see the Loizidou Case and the Banković case, since the Court has found that the need for a jurisdictional link and the violation is needed, meaning that the State should exercise some sort of public authority.

[126] Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', J. Confl. & Sec. L., 2008.

[127] C.L. ROZAKIS, J. LIDDY, E. BUSUTTIL, A.S. GÖZÜBÜYÜK, A. WEITZEL, M.P. PELLONPÄÄ, B. MARXER, G.B. REFFI, B. CONFORTI, N. BRATZA, I. BÉKÉS, E. KONSTANTINOV, G. RESS, A. PERENIC, C. BÎRSAN, M.F. BUQUICCHIO, 'European Court of Human Rights (22869/93) - Commission (First Chamber) - Decision - TUGAR v. ITALY', 1995.

breached IHL.[128] As seen, jurisdiction imposes a strong limit in human rights convention for arms exporters responsibility. However, many commentators propose to integrate such shortcoming by proposing States' duty to due diligence. The question, when due diligence and arms transfers are brought up together, is whether or not States have other duties than those to prevent, punish and investigate human rights violations.[129] Assuming they do, the concept of due diligence would be stretched to a point which the supplying States cannot be held responsible for the actions committed by the recipient State, which would be beyond the suppliers' jurisdiction and control. As the European Court of Human Rights has recognized in the Osman v the United Kingdom and in Demiray v Turkey, it should be proved that the supplying State "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals".[130] The knowledge-based psychological factor will prove difficult to demonstrate, furthermore, the jurisdictional limits of HRL do not extend suppliers' nor transit states' due diligence.[131] We can conclude by saying that HRL, today, does not provide sufficient means to limit arms transfers even if it is likely that human rights would be violated.

## 1.2. The Arms Trade Treaty

### *1.2.1. History and background*

The Arms Trade Treaty, is the first treaty that specifically aims at regulating weapons exports and circulation in the world, but is not the first one to try achieving such goal. In 1919 the League of Nations tried proposing a Convention for the Control of the Trade in Arms and Ammunition and a linked protocol; the convention aimed at limiting the export of a series of arms of war in article 1 (1), with two exceptions: one to licence exports to meet governments' requirements and the second one for dual use weapons and ammunitions. Ultimately such Convention became dead letter due to the fact that, although it was not established a minimum States for its entry into force, a small number of States ratified it, while arms producers did not ratify it.[132] The League tried again in 1925, but with no success. After the League of Nations and with the rise of the UN Security system and the growing

[128] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 51, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.
[129] Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', J. Confl. & Sec. L., 2008.
[130] CASE OF OSMAN v. THE UNITED KINGDOM, Reports 1998-VIII, 28/10/1998.
[131] Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', J. Confl. & Sec. L., 2008, 382.
[132] 榎本珠良. 'History of Arms Transfer Control and Challenges Facing the Arms Trade Treaty'. Departmental Bulletin Paper, Meiji University, 2019, 5; David R. Stone 'Imperialism and Sovereignty: The League of Nations' Drive to Control the Global Arms Trade'. *Journal of Contemporary History* 35, no. 2 (2000): 213–30.

interest in avoiding mutual assured destruction, talks on weapons of mass destruction began and the UN gradually took its role as a forum and promoter of disarmament, culminating in the creation of the Centre for Disarmament Affairs in 1982, then changed in United Nations Office for Disarmament Affairs (UNODA). The most notable achievements were reached when limiting weapons of mass destruction: Nuclear Non-Proliferation Treaty (1968), Biological Weapons Convention (1972) and the Chemical Weapons Convention (1992). Conventional weapons had to wait until the entry into force of the Convention on Certain Conventional Weapons (CCW), which was followed by the Anti-Personnel Landmines Convention (APL) in 1999 and the Convention on Cluster Munitions (CCM) in 2010. The CCW and its protocols then began to incorporate not only the law of armed conflict, but also supply and transfer of certain weapons. From 1992 the UN General Assembly started recognizing the necessity to address conventional weapons transfers through national, regional and international instruments and the need for transparency in arms transfers.[133] Then, from 2003 over a hundred NGOs, including Amnesty International, Oxfam International and Saferworld, launched a campaign "Control Arms" aimed at supporting the development of a treaty for arms control.[134] The 2006 GA resolution 61/89 "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms" called for the establishment of an expert group to assess the feasibility and scope of an internationally binding instrument for "establishing common international standards for the import, export and transfer of conventional arms".[135] Different working groups were set up, first a Group of Governmental Experts, then an Open-Ended Working Group and in 2009 the GA called for a conference on the Arms Trade Treaty in 2012 to "elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms".[136] The conference adopted its rules on procedure with the need of consensus for substantive matters and a two-thirds majority for procedural matters when consensus would have proved to be unreachable.[137] A general consensus on the draft treaty proved to be difficult to achieve, with North Korea, Syria and Iran objecting certain parts. Ultimately a draft proposal was sent to Ban Ki-Moon, at time Secretary General of the UN, to be approved by the GA. Indeed, on the

[133] See: General and complete disarmament: resolutions adopted by the General Assembly A/RES/46/36[L], Consolidation of peace through practical disarmament measures A/RES/51/45[N], National legislation on transfer of arms, military equipment and dual-use goods and technology : resolution / adopted by the General Assembly A/RES/60/69, Towards an arms trade treaty : establishing common international standards for the import, export and transfer of conventional arms : resolution / adopted by the General Assembly A/RES/61/89.

[134] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study' (University of Lapland, 2014), 6; Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 9.

[135] 'Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms: Resolution 61/89', December 2006, 2.

[136] 'The Arms Trade Treaty: Resolution 64/48', 2010 48.

[137] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 10.

2nd of April 2013 the Arms Trade Treaty (ATT) was adopted by the UNGA by 154 votes.[138] On June the 3rd 2013 the treaty was open for signature and to this day 130 have signed it and it entered into force on the 24th of December 2014, after the fiftieth ratification instrument.[139] The ATT, while certainly being a step further towards arms transfers regulation, did face criticism from both States and NGOs: Egypt criticised the lack of certain definitions and criteria for the best implementation of the treaty, Belarus noted the lack of clarity in the reference of IHL and HRL which could lead to "a wide margin for subjective interpretations of the export criteria and their implementation in bad faith".[140] Ann Feltham from the Campaign Against Arms Trade stated that the ATT legitimised the arms trade, while Glenn McDonald Senior Researcher at the Small Arms Survey criticised the treaty transparency and brokering mechanisms, as well as certain interpretations of many articles.[141]

*1.2.2. Structure and Contents*

The preamble of the treaty is divided in two sections, the first in which art. 26 of the UN Charter is recalled and with it the need to achieve and maintain international peace with the least diversion of resources for armaments. Human rights, peace, security and development are also recognized to be interlinked with each other, and a reference to limit the illicit trade in conventional arms and the humanitarian implications of such trade is also made. States also recognize their political, economic and security interests in the conventional arms trade. The second part of the preamble is focused on a set of principles, which while not being uncommon, is a somewhat novelty to place them in the preamble.[142] Among the principles we note the self-defence principle, recalled first with a link to art. 51 of the UN Charter, and a second time linked to legitimate interest to acquire, produce, import or export conventional arms. Then the principle of non-interreference is recalled, while States are deemed responsible for implementing national control systems on arms transfers. Another principle is linked to the States' respect of the 1949 Geneva Conventions, the UN Charter and Universal Declaration of Human Rights. Lastly, States decided to include among the principles the "Implementing this Treaty in a consistent, objective and non-discriminatory manner" which can either be seen as a procedural principle or as a commitment in itself. Such principles, which are repeated in art. 7 of the treaty are meant to not lead to arbitrary decisions and making sure that States

[138] 'The Arms Trade Treaty: Resolution 67/234B'; Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', *Fordham Int'l LJ* 37 (2013), 700.
[139] Alexander Kena, 'UNODA Treaties - Arms Trade Treaty', *Unoda.Org*, 2013, https://treaties.unoda.org/t/att.
[140] 'General Assembly Official Records, 67th Session: 71st Plenary Meeting, Tuesday, 2 April 2013, New York', 14-15.
[141] Jerome Taylor, 'UN Approves Global Arms Trade Treaty - but How Effective Will It Be?', *Independent*, April 2013; 'Worth the Paper? The Arms Trade Treaty', *E-International Relations*, April 2013, https://www.e-ir.info/2013/04/17/worth-the-paper-the-arms-trade-treaty/.
[142] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study' (University of Lapland, 2014) 15.

reach an impartial decision when transferring arms. In a highly politicised market, with few key suppliers that can determine which country gets what, these criteria certainly seem ambitious.[143]

The object and purpose of the treaty are presented in article 1. The objects of the treaty are to "Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms" and to "Prevent and eradicate the illicit trade in conventional arms and prevent their diversion". The purposes of the ATT are; "Contributing to international and regional peace, security and stability"; "Reducing human suffering" and lastly "Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties". From the beginning, it is clear that this is not a treaty on disarmament or to limit international arms transfers, this is due to a twofold theme that links lack of international regulation on arms transfers and the illicit trade of conventional arms. In the preparatory discussions, States were divided on which aspect was to be emphasized, with those against strict regulation of arms transfers focusing on the issue of illicit arms trade and the role of non-state actors in causing the most human suffering worldwide (among these there were Algeria, Cuba, Pakistan, Russia and Egypt).[144] Such conflict and the need for consensus are at the base of the wording of the article 1.

The treaty covers a set of conventional weapons drawn by the UN Register of Conventional Arms (UNROCA) and also regulates the ammunitions fired by such weapons or the components needed to manufacture them. Articles 2, 3 and 4 cover these aspects. Article 2 provides a list of categories of arms which includes: main battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. Such list was based on the descriptions given by the Group of Governmental Experts (GGE) for the UNROCA; however, it would be noted that the list of categories covered by the treaty, today, does not align perfectly anymore with the GGE definitions since resolution A/71/259 of the 29th July 2016, now includes in the categories of the registry also unmanned combat aerial vehicles (UCAV).[145] The GGE is also now assessing the possibility to include in the registry lethal autonomous weapon system (LAWS), although with no substantive agreement.[146] However, as the International Committee for Robot Arms Control (ICRAC) pointed out in a 2013 paper, the Registry fails to account for all robotic, unmanned or autonomous weapon

[143] Ibidem, 67

[144] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 43.

[145] 'Continuing Operation of the United Nations Register of Conventional Arms and Its Further Development. A/71/259', 29 July 2016, 43.

[146] Sorina, 'GGE on Lethal Autonomous Weapons Systems', *Digital Watch Observatory*, June 2019, https://dig.watch/processes/gge-laws.

systems that for one reason or the other, cannot fall under the definitions given by the GGE.[147] Given these evolutions, it is not to rule out the possibility that in the future, the ATT would need to be amended to include such evolutions of the UNROCA's definitions. In paragraph 2, the concept of transfer is defined as international trade's activities such as export, import, transit, trans-shipment and brokering, but none of them are defined within the treaty; while paragraph 3 excludes from the application of the treaty the case in which arms are transferred from a state to another, but they remain under the former's property. During the negotiation phase there was uncertainty to what "ownership" and its wording would mean, with States preoccupied with the possible change of ownership of weapons while abroad. In the draft text was therefore included that a change of ownership abroad would fall under the treaty[148], with many States proposing to include the concept of "control" to improve clarity and certainty, but in the end, it was not included and the wording was not clarified nor was the concept of ownership, which leads the treaty to apply implicitly to "left-behind" arms.[149] In the draft text of the treaty, the paragraph 3 also included a reference to "armed forces or law enforcement authorities" operating abroad, meaning that the paragraph was "This Treaty shall not apply to the international movement of conventional arms by a State Party or its agents for its armed forces or law enforcement authorities operating outside its national territories, provided the conventional arms remain under the State Party's ownership".[150] This was replaced in the final version with "use", leaving room for a broader interpretation due to the fact that such wording could be interpreted as leaving out certain NSAs like private contractors or allied movements of armed forces.[151]

Articles 3 and 4 regulate the export of munitions/ammunitions and parts and components. Both articles are linked with arts. 2 (1), 6 and 7, and both introduce a national control system to regulate the export of the items. However, the articles seem only to regulate the exports, leaving aside all other types of transfers mentioned in article 2 (2). The debate whether or not to include munitions and parts and components was controversial, with the majority of States that wanted to include them and the US that were against it. It was the belief of many states that if ammunitions/munitions, parts and components and technology were to be left out of the treaty, other States would try to circumvent the provisions of the treaty to sell disassembled weapons without the need to the control systems

[147] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study', (University of Lapland, 2014), 31.
[148] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 67-68
[149] Ibidem, 68.
[150] Stuart Casey-Maslen and Sarah Parker, 'The Draft Arms Trade Treaty', Academy Briefing; No. 2, no. BOOK (2012), http://repository.graduateinstitute.ch/record/295201, 20-21.
[151] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 68 and 132.

necessary for whole assembled weapons or sell munitions to prolong existing conflicts.[152] For what concerns the definition of ammunitions/munitions, the treaty does give one, however the terminology and definitions are well established and agreed: the UNGA with Resolution 66/42 welcomed the development by the UNSaferGuard Programme of the International Ammunition Technical Guidelines (IATG) which lays out definitions for both ammunitions and munitions.[153] While the two are defined separately, the two terms can be used interchangeably. Concerning both articles, some commentators have expressed their doubts, since ammunitions and parts seem to have "one foot inside and another outside of the treaty"[154] and, with the exclusion from the other types of transfers, manufacturers and states would be able to sell weapons via kits to be assembled in the destination country and selling munitions to prolong conflicts, using the loophole within arts. 3 and 4.[155]

Article 5 covers the implementation of the treaty and States' obligations at national level. The provision mandates that States are to set up a national control system for arms transfer as well as a national competent authority. The article also sets out the minimum national definition to be given to the categories set in art. 2 (1), which cannot have a lesser definition than those used by the UNROCA (for points a to g) nor to others UN instruments at the time of the entry into force of the treaty (for point h). In para. 1 of art. 5 we find the same wording as in the last principle, it is required that the treaty shall be implemented in a "consistent, objective and non-discriminatory manner", which we have seen can be interpreted as a procedural principle, a commitment or can be seen the will of States to make clear that the implementation of the treaty is based on good faith.[156] The provision could have been thought as a mean to limit States' arbitrariness and political calculations when licencing and transferring weapons, but it somehow fails to provide a clear instrument for allowing all transfers that do not fall under the criteria of arts. 6 and 7. Article 5 mandates the creation of a national control system for arms exports but leaves to States the freedom to decide the instruments and forms of such systems; with this system, a national control list is required and needs to be presented to the Secretariat. These lists are needed to identify which arms are subjected to special regulation and fall under articles 2 (1) and 5 (3). [157]

[152] Ibidem, 140.
[153] 'Problems Arising from the Accumulation of Conventional Ammunition Stockpiles in Surplus: Resolution A/RES/66/42', 2011, para. 7.
[154] Glenn McDonald, 'Worth the Paper? The Arms Trade Treaty', *E-International Relations*, April 2013, https://www.e-ir.info/2013/04/17/worth-the-paper-the-arms-trade-treaty/.
[155] Kirk Jackson, 'The Arms Trade Treaty: A Historic and Momentous Failure', *Ceasefire Magazine*, April 2013, https://ceasefiremagazine.co.uk/failure-arms-trade-treaty/.
[156] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 168.
[157] Ibidem, 170-171.

Article 6 can be seen as the central provision of the treaty since they list the prohibitions to transfer arms. The prohibitions are three: the first prohibits States to transfer weapons if the transfer would violate any measure adopted by the UN Security Council under chapter VII, in particular arms embargoes; the second prohibits transfers if it would violate a State's obligations under international agreements, in particular those on licit or illicit transfers of conventional arms; the third prohibits transfer if the State has *knowledge* that the arms could be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions or attacks directed against civilian objects or civilians, or any other war crime defined by an international agreement to which the exporting State is party. The first prohibition relating to arms embargoes follows a practice used by the UN Security Council from the Cold War with arms embargoes being preferrable to economic embargoes because they are limited to the conflict and do to worsen civilian lives.[158] However many commentators do not believe that such embargoes to be effective, they claim to have little impact and with few States complying to them, in particular with small arms, which can easily be purchased in the international marketplace[159]; furthermore States that do not integrate such embargoes in their legal systems, national courts have little to no ability to enforce and implement their control over arms embargoes.[160] The UN has set up within the Security Council a Sanctions Committee to monitor and verify the compliance by state to enforce arms embargoes, but the Committee works without a fixed mechanism.[161] Article 6(1) enforces Security Council's arms embargoes, leading to State's responsibility if it fails to abide the treaty; furthermore, the treaty imposes the creation a national control system which further creates a responsibility/duty on States to check private actors that may be trying to supply arms despite the embargo. The second kind of prohibition set in 6(2) reflects prohibitions already set in international law. Among these prohibitions we find that the article explicitly cites "obligations under international agreements", meaning that the first obligations that States parties will have to consider are treaties explicitly banning or restricting the export of certain kinds of weapons, among these we find: the Convention on Certain Conventional Weapons (CCW) amended Protocol II of 1996, the 1997 Anti-Personnel Mine Ban Convention (APL) and the 2008 Convention on Cluster Munitions (CCM). These will all be discussed in further detail later. In

[158] Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ, 2013, 706.
[159] *See also*: Jennifer L. Erickson, 'Stopping the Legal Flow of Weapons: Compliance with Arms Embargoes, 1981–2004', Journal of Peace Research 50, no. 2 (2013): 159–74, https://doi.org/10.1177/0022343312470472; Brian Wood, 'Strengthening Compliance with UN Arms Embargoes — Key Challenges for Monitoring and Verification', in UNODA Occasional Papers No.10: Verifying Non-Proliferation & Disarmament Agreements Today, March 2006 (United Nations, 2003), 53–73, https://www.un-ilibrary.org/content/books/9789210581486s003-c004.
[160] Ramadansyah Hasan, 'Controlling the Circulation of Small Arms in International Law' (Doctoral, Hamilton, New Zealand, University of Waikato, 2013), https://hdl.handle.net/10289/7500, 164-165. *See also* Jennifer L. Erickson, 'Stopping the Legal Flow of Weapons: Compliance with Arms Embargoes, 1981–2004', Journal of Peace Research 50, no. 2 (2013): 159–74, https://doi.org/10.1177/0022343312470472.
[161] Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ, 2013, 707-708.

addition, we can also include the Central African Convention for the Control of Small Arms and Light Weapons (or Kinshasa Convention), which entered into force on March 2017. Could art. 6(2) also include Human Rights Treaties? There is no agreement to this, according to what we have seen, HRL is strictly linked to jurisdiction, and, following the *Tugar* sentence, the remoteness of an act can be used to exempt a State from responsibility; in addition to the constraint of jurisdiction, we can add the difficulty to define the scope of due diligence and the fact that certain human rights would have to be chosen to protect. For what concerns customary law, we can apply the same reasoning as we have done previously for self-defence and neutrality; for non-intervention and self-determination the solution, as we have already seen is not straightforward and only future State practice or a definitive agreement on the matter could clarify it. The last prohibition set in 6(3) reflect the crimes under the jurisdiction of the International Criminal Court (ICC).[162] As Kellman notes, it is the first time since Nuremberg that suppliers of arms are to be considered liable as the perpetrators of the crimes.[163] The key concept to identify responsibility of a State is knowledge that at the time of the authorization the arms transferred would be used to commit one or many crimes prescribed in the norm. As Huttunen puts it "a State must know of the existence of a causal link between an arms transfer and a forthcoming crime".[164] The concept of knowledge is uncertain since there is no clear interpretation to it in the treaty. Various proposals have been made: the first interpretation is based on the link with the definition of knowledge given in the ICC Statute, given that the crimes listed overlap, but given that 122 States have ratified the Rome Statute (against 193 members of the UN) and given that, according to Cassese, the norm relating to the concept of knowledge has not achieved the status of customary norm, we cannot use the Rome Statute as a mean for interpretation.[165] A second, more schematic mean of interpretation could be linked to the national control system and the national competent authority and its officers that may be informed by NGOs, by inquiries carried out by the authorised officers or through public information available in public or UN reports. This second way should satisfy the standard of knowledge, furthermore this could be linked to a failure to carry out a proper control on arms exports.[166] A third form of interpretation may be given by the ICJ and the ILC's Draft Articles on State Responsibility which relate knowledge to awareness of the crimes and knowledge of the facts, meaning that the State has to collect information and intelligence to assess present and future behaviour.[167] This last proposal of interpretation for "knowledge" can solve the issue related to

[162] Schabas, William A. The International Criminal Court. Routledge, 2016, 111.
[163] Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ, 2013, 110.
[164] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study', (University of Lapland, 2014), 48.
[165] Ibidem, 50.
[166] Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ, 2013, 712-713.
[167] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 207.

the time frame imposed on the need for the prohibition to work, but it could result into being too burdensome. As a matter of fact, article 6(3) requires only in a specific time frame, that is the "time of authorization", meaning that if the State is informed after the authorization and the arms are in transit or are yet to be shipped, the transfer can still be valid and lawful according to the treaty and does not constitute a duty for the transferring State to suspend the transfer. This, however creates an issue, due to the fact that between the authorization of the transfer and the actual transfer can pass quite some time, leading to a change of the circumstances which could have not been foreseen by the transferring State. Thus, using the ICJ and ILC interpretation may put an unproportionate burden on the State. So far, no clear interpretation has been given to the term leading to a limit based on case-to-case and State-to-State interpretation on the applicability of the norm.

Article 7 covers all other possibilities that do not fall under art. 6 and gives to transferring States the criteria necessary to assess whether or not authorize the transfer. If a transfer is not prohibited under art. 6, exporting States still have to assess, in an objective and non-discriminatory manner if there is the possibility that the transfer could threaten peace and security (to be intended as both international and national) and if the arms transferred could be used to commit or facilitate serious violations of IHL, HRL or/and facilitate terrorism or organized crime. If there is the potential risk that any of these possibilities could happen, then the request for authorization must be denied. The assessment is linked to the control system (and authority) set up in art. 5 and with the possibility to request relevant information to the importing State as per art. 8(1). Furthermore, if the exporting State, after the authorization is approved, "becomes aware of new relevant information" it is only "encouraged to reassess the authorization with the possibility to consult the importing State. The general interpretation to art. 7 leaves much room to States: they will decide the rules of the controlling system and the procedures that the competent national authority will have to follow ad how information will be collected and analysed; they will decide which "overriding risk" could be used to approve or prohibit an export, leading to the authorization of transfer to a State in order to solve a civil war, notwithstanding its violations of human rights[168]; it is up to the exporting State to request to the importing Party the necessary information to better make an assessment, but it is to the importing Party to decide which information supply due to the "subject to is national laws, practices or policies" clause.

Kellman sees art. 7 and the mandatory assessment as an effective way to remove the "we didn't know" argument while allowing advocacy for NGOs or other advocates against arms

[168] Glenn McDonald, 'Worth the Paper? The Arms Trade Treaty', E-International Relations, April 2013, https://www.e-ir.info/2013/04/17/worth-the-paper-the-arms-trade-treaty/.

transfers.[169] Furthermore, according to his interpretation, the treaty prohibits any arms transfer unless it is approved after an assessment, and the information-gathering system created by the treaty is seen as sufficient.[170] Kellman's interpretation is a good faith interpretation of the article, and, while certain provision of art. 7 help in creating a reliable assessing procedure based on information and dialogue between parties, the norm is far from exhaustive and clear. As we have seen, the general interpretation of the norm leaves much room to States' interpretation. Can this be solved? A stricter interpretation of the "objective and non-discriminatory" manners to employ in the assessment could be the answer, but ultimately States will take into account political and economic factors.[171] Furthermore, the phrase highlights the tension between exporters and importers, because without an interpretation article, nor an interpretative instrument within the treaty, exporters could freely choose which criteria to apply on a case-to-case basis, eventually damaging importers. An example of this tension is reflected in the EU Common Position on arms exports, which contains various criteria to assess arms exports, but fails to determine principles of non-discrimination.[172] To corroborate a broader interpretation of the article, the need to take into account "relevant factors, including information provided by the importing State in accordance with Article 8(1)" does not specify what these factors are. In the draft provision we are given an example of what could be identified as relevant factors: nature of the arms, potential use and end user, risk assessment, situation of the recipient State, regional situation and recipient's compliance to HRL.[173] However, without a clear interpretation of what constitutes relevant factors, exporting States remain free to choose the contents. For what concerns importing States, the norm allows the supplier to request information to the recipient as per art. 8(1). This article requires that an importing State, if requested by the supplier, shall "take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws" to assist the supplier in its export assessment. Such obligation to take measures covers the provision of information, not the failure to do so; meaning that there is no mean to control whether or not the importing State has hidden certain information that could be relevant to the supplying Party.[174] The concept of relevance

[169] Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ, 2013, 715.
[170] Ibidem.
[171] Laurence Lustgarten, 'The Arms Trade Treaty: Achievements, Failings, Future', International & Comparative Law Quarterly 64, no. 3 (2015): 24.
[172] Ibidem; it should also be noted that the European Council, when amending the Common Position 2008/944CFSP, with the Council Decision (CFSP) 2019/1560 of 16 September 2019, included the Arms Trade Treaty among the international obligations in criterion one. The ATT is also further mentioned in the "User's Guide to Council Common Position 2008-944-CFSP" to better assess and evaluate approval or denial of arms exports and licencing. For further analysis on the criteria and the principles of non-discrimination and objectiveness see: Zuccari. "Gli Obbighi Di Valutazione Dello Stato Esportatore Di Armi Verso Zone Di Confitto Secondo La Corte D'appello Del Regno Unito." Rivista di diritto internazionale. 103, no. 2 (2020).
[173] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 248-249 and 253.
[174] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study', 2014, University of Lapland, 94.

is also uncertain, since it is up to the recipient to decide which information is relevant and which is not or which relevant information could be withheld under the excuse of national laws' obligations. The phrasing "pursuant to national law" reflects the request by importing States and such wording is somehow in contrast with art. 27 of the Vienna Convention on the Law of Treaties according to which no State can invoke national provision or laws to justify its failure to uphold a treaty. The prescription, if interpreted in good faith, can be read as a mean to allow States to apply restrictions on information if, let's say, there is a national law that prohibits it for security reasons.[175]

The treaty then deals with diversion and brokering. Diversion has no universal definition agreed upon but can be defined in two ways: the first as the transfer of authorized arms subject to a State control to unauthorized end-users or the transfer to authorized users which utilize them for unauthorized use.[176] The second definition entails international transfers of authorized arms to be delivered to an end user, but which end to unauthorized users or are used by the authorized user to unauthorized end-uses.[177] These two definitions given for diversion could change the scope of application of art. 11; the first definition covers international and domestic issues, such as corrupt officials or poor stockpiling, while the second only convers international transfers. If we are to consider good faith and the entirety of the treaty, the definition to apply should be the broader definition, since art. 1 expressly cites illicit trade of conventional arms and their diversion.[178] Brokering, as defined by the treaty itself in art. 2(2) means the act of being "a middleman negotiating arms bargains between different companies or individuals". Art. 9 moves in this direction requiring that States regulate appropriately transit or trans-shipment of conventional arms under their jurisdiction. Art. 10 regulates brokering, but does so in an indirect way, requiring that States take measures to regulate brokering for the weapons listed in art. 2(1), meaning that ammunitions and components are not within the brokering limitations or regulation. There is no specific indication to what States ought to do specifically to regulate it and we are only given examples such brokers register or written authorization before engaging in brokering activities. Furthermore, just like in art. 8(1) the wording "pursuant to national laws" is repeated, meaning that the article could be interpreted in bad faith, with States trying to avoid taking measures if no national regulation on brokering exists; plus, the article allows for no agreed standards nor quality for the measures adopted by States.[179] Furthermore art. 16 refers to assistance for implementation of the treaty which can include stockpiling

[175] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary, (Oxford University Press, 2016), 293-294.
[176] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 349; Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ 37 (2013), 716.
[177] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 349.
[178] Ibidem, 349-350.
[179] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study', (University of Lapland, 2014), 103.

management. The addition of the stockpiling management was a request from the Economic Community of West African States (ECOWAS) to specifically address diversion.[180] Article 11, in tandem with art. 15(4) pushes States to cooperate and share information to avoid diversion, but beside the exchange of information and measures to prevent diversion (arts. 11(2), 11(3) and 11(5)) the article in itself does little to enforce a system to avoid diversion.

*1.2.3. Control system*

The ATT provides a basic system for arms control and falls short when compared to other treaties such as the Non-proliferation Treaty or the Chemical Weapons Convention.[181] Article 5(2) requires States to establish a control system as well as a control list with the only standard set that the definitions and categories cannot be less than those of the UNROCA, but for the means and procedures of this control system there is no international standard, leaving ample discretion to States. Article 5(5) and 5(6) requires the setup of a national competent authority to control arms transfers and that one or more point of contact are put in place to exchange information to other States or Organizations and to the Secretariat on the implementation of the treaty. Article 12 concerns the record keeping of arms transfers for both exports, imports or transit, and such records should account for: quantity, value, type of weapon but also containment methods and security standards.[182] Article 13 requires that States update the Secretariat on the implementation of the treaty through reports and such reports will then be shared with the States Parties, and it also requires the submission of an annual report concerning exports and imports of armaments under article 2(1) (thus excluding ammunitions and parts and components). These reports can, however exclude some information deemed "commercially sensible" or "national security information". The organs created by the treaty are the Conference of State Parties (CSP) and the Secretariat. According to art. 18 the CSP adopts its rules of procedures via consensus and decides the financial rules for itself, the Secretariat and any other body the Conference creates. Furthermore the CSP shall: "(a) Review the implementation of this Treaty, including developments in the field of conventional arms; (b) Consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular the promotion of its universality; (c) Consider amendments to this Treaty in accordance with Article 20; (d) Consider issues arising from the interpretation of this Treaty; (e) Consider and decide the tasks and budget of the Secretariat; (f) Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of this Treaty; and (g) Perform any other function consistent with this Treaty." The CSP in itself has been perceived as a procedural organ, often managing matters

[180] Stuart Casey-Maslen et al., The Arms Trade Treaty: A Commentary (Oxford University Press, 2016), 350.
[181] Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind', Fordham Int'l LJ, 2013, 727.
[182] Ibidem, 729.

such as administration, human resources and financing, and this is mainly due to the fact that negotiation, and more technical discussions are done at a working group level, and the conclusions are only accepted at the CSP.[183] The Secretariat is regulated by art. 18 and is charged with receive and distribute national reports, maintain and make available national points of contact, promote international cooperation, assist in the treaty implementation, coordinating the CSP and perform the duties deemed necessary by States Parties.

#### *1.2.4. Conclusion*

The treaty could be summarized with the word "discretion", as we have seen the interpretation of the central articles, their wording and contents leaves much room to States for interpretation. In this sense, the role of the CSP is not to be underestimated being it the organ tasked with the interpretation of the treaty. Furthermore, the presence of certain loopholes on ammunitions, parts and components and also the strict reference to the UNROCA categories which only refer to offensive systems will be a hindrance for the general implementation of the treaty.[184] The definitions given in art. 2(1) are no longer updated and will need to be amended since they do not include more modern autonomous systems such UCAVs, unmanned surface vehicles (USVs) or autonomous underwater vehicles (AUVs).

### 1.3. Other Conventional Instruments that regulate international arms transfers

As we have already seen, the ATT, while being the first treaty to regulate specifically arms transfers, is not the first instrument that achieves such goal, nor will probably be the last. While soft instruments have in some sort always existed, and will be treated next, formal means of control have slowly found their way from the Cold War. The first Conventional Arms Transfer talks (CAT) took place between 1977 and 1978 but led to no results.[185] However, these talks gave the necessary input to start negotiating conventional arms bans and limitation, in both use and transfer. In 1981 the Convention on Certain Conventional Weapons (CCW) was signed and now counts 125 members. In 1997 and in 2008 were adopted, respectively, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (or APL) and the Convention on Cluster Munitions (CCM). Each convention defines and regulates transfer in its own way, with some similarities, but none of them creates a comprehensive system to control and regulate transfers, leaving this process be defined to States.

[183] Allison Pytlak, 'Are Arms Trade Treaty Meetings Being Used to Their Full Potential?', Global Responsibility to Protect 12, no. 2 (2020): 160-166, https://doi.org/10.1163/1875984X-01202003.
[184] Mikko Huttunen, 'The Arms Trade Treaty: An Interpretive Study', (University of Lapland, 2014), 105.
[185] Rachel Stohl, 'Understanding the Conventional Arms Trade', in *AIP Conference Proceedings*, vol. 1898 (AIP Conference Proceedings, AIP Publishing LLC, 2017), 2.

*1.3.1. Convention on Certain Conventional Weapons (CCW)*

In 1981 UN states members adopted 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 (or the Inhumane Weapons Convention or CCW). The Convention entered into force in 1983 and, so far, has 125 States Parties to it. The Convention includes five additional protocols with the adoption of at least two protocols to be bound by the treaty.[186] The protocols are: Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (amended in 1996), Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons (adopted in 1995) and Protocol V on Explosive Remnants of War (adopted in 2003). For a State to become party to the CCW, a State must deposit an instrument of ratification and it must also declare its consent to be bound by at least two Protocols of the Convention, given this fact that, not all States Parties have ratified every protocol. Article 1 of the Convention has also been amended in 2001 to include non-international conflicts. The Convention aims at limiting or banning the use, and in some cases transfer, of weapons that can cause unnecessary or unjustifiable suffering to combatants or that can have indiscriminate effects on civilians. The Convention could also be intended as an umbrella Convention under which other kinds of weapons can be regulated.[187] For what concerns arms transfers, the protocols that explicitly mention them and form a base of regulation are Prot. II, Prot. IV and Prot. V.

Protocol II defines transfers in a broad way as "the physical movement of mines into or from national territory" and as the "transfer of title to and control over the mines", but the transfer of territory containing emplaced mines. The definition worded as such can include all types of transfers contained in art. 2(2) of the ATT, but can also include gifts, loan and leasing of mines. Article 8 specifically regulates transfers of mines. It first bans entirely any transfer of those mines prohibited by the Protocol, and then requires that State parties "not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers", giving a precise limit to who can access the transferred mines, meaning that States transferring mines (anti-personnel or anti-vehicle), booby-traps or improvised explosive device (IED) to non-State actors will be in breach of the treaty. Furthermore, "restraint" should be used by the supplying State when transferring mines which use is

[186] International Committee of the Red Cross, '1980 Convention on Certain Conventional Weapons and Its Protocols - Ratification Kit' International Committee of the Red Cross, icrc.org, 2004.

[187] Maaike Verbruggen Ian Davis, 'I. The Convention on Certain Conventional Weapons : SIPRI Yearbook 2018', *Sipriyearbook.Org*, 2018, https://www.sipriyearbook.org/view/9780198821557/sipri-9780198821557-chapter-9-div1-013.xml.

restricted by the Protocol, with specific care for transfer towards non-States parties. For what concerns the mechanism to control compliance of States, the Protocol does not provide any indication, but, contrary to the ATT, it prescribes at art. 14(1) and 14(2) that States shall take measures to control and persecute penally any infraction of the Protocol that happens under their jurisdiction. Protocol IV on Blinding Laser Weapons bans entirely both use and transfer of blinding laser weapons to State and to non-State entities. Is should be noted however that the CCW has been implemented not without difficulties suffering from inconsistencies in control lists and the lack of consensus to monitor States' compliance to the treaty and its protocols.[188] Recently, problems have arisen concerning the inclusion of Lethal Autonomous Weapons Systems (LAWS) as an additional protocol, but so far, only general principles have been adopted.[189]

*1.3.2. Anti-Personnel Landmines Convention (APL)*

The Anti-Personnel Mine Ban Convention (or Ottawa Convention or APL) resulted from the intuition, in 1996, of Ralph Lysyshyn, former Director-General of the International Security Division at the Canadian Department of Foreign Affairs and International Trade, which launched the so-called Ottawa Process, a fast-paced negotiation of the ban, outside the UN.[190] After a year, in 1997 the Convention was adopted. So far, 164 States have adopted it. In art. 1(a) the Convention clearly sets out that States Parties undertake under no circumstances to "a) To use anti-personnel mines; b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, antipersonnel mines; c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.". This is a complete ban on anti-personnel mines and should be interpreted as such, as the Maputo Declaration, adopted at the first meeting of States Parties on May 1999 stated that 'the enduring value of this unique international instrument rests in fully realizing the obligations and the promise contained within the Convention: to ensure no new use; to eradicate stocks; to cease development, production and transfers".[191] Furthermore, the treaty creates a system to control compliance between States Parties, which involves multiples intergovernmental steps and good offices of the UN Secretary general, as well as fact-finding

[188] Rachel Stohl and Suzette Grillot, The International Arms Trade (Oxford, England: Polity Press, 2009), 142.
[189] 'Stopping Killer Robots', *Human Rights Watch*, August 2020, https://www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and; 'Background on LAWS in the CCW – UNODA', *Www.Un.Org*, n.d., https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/background-on-laws-in-the-ccw/.
[190] Stuart Casey-Maslen. The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction. (Oxford University Press Oxford Commentaries on International Law, 2005), 26-27.
[191] 'Maputo Declaration, Maputo, Mozambique, 7 May 1999 : President's Paper', May 1999, 4.

missions. Lastly, as the APL, art. 9 requires national implementation measures to prevent and suppress any activity prohibited by the Convention.

### *1.3.3. Convention on Cluster Munitions (CCM)*

The Convention on Cluster Munitions (or CCM) was inspired by the Ottawa Process and found its core States within the CCW Review Conference in Oslo in February 2007.[192] From there, after a year of debate, the diplomatic conference took place in May 2008 in Dublin. The convention entered into force in 2010. For what concerns the ban and limitations, art.1 is formulated in the same way as art. 1 of the APL, and the same goes for art. 9.

### *1.3.4. Soft Law Instruments*

Informal arrangements to improve export controls or proliferation have been adopted mainly by the US, but at the end of the cold war States began moving towards informally regulating conventional arms transfers. Such instruments encompass international registers of arms, like the United Nations Register of Conventional Arms (UNROCA) and soft law instruments to regulate small arms and light weapons, like the UN Programme of Action or the International Tracing Instrument; others, like the Wassenaar Arrangement aim at harmonize and coordinate States' approval standards and practices.[193]

#### *1.3.4.1. United Nations Register of Conventional Arms*

The United Nations Register of Conventional Arms (UNROCA) was created in 1991, by Resolution A/RES/46/36 of the General Assembly, as a voluntary instrument to track and trace international transfer of arms, specifically those related to battle tanks, combat aircraft (manned and unmanned), warships, large-calibre artillery systems, attack helicopters, missiles and missile launchers; small arms can also be included to States' discretion. Notwithstanding its voluntary nature, the UN Office for Disarmament Affairs (UNODA) states that the register is able to trace 90 per cent of global arms transfers, including those States that do submit a report, being already included in other States reports. While not being a mandatory instrument the UNROCA has definitely proved an effective instrument for confidence building and transparency in conventional arms transfers.[194]

#### *1.3.4.2. Wassenaar Arrangement*

[192] Gro Nystuen and Stuart Casey-Maslen, The Convention on Cluster Munitions: A Commentary (Oxford University Press, 2010): 17-18.
[193] Cassimatis Anthony E, Drummond Catherine, and Greenwood Kate, 'Arms, Traffic In', in Max Planck Encyclopedia of Public International Law (Oxford University Press, 2016), paras 22-23.
[194] Stuart Casey-Maslen, Arms Control and Disarmament Law (Oxford University Press, 2022), 142.

At the end of the Cold War, members of the Coordinating Committee for Multilateral Export Controls (COCOM), an export control set up by Western European countries, recognized the need to expand its focus. The need to control the risks associated with regional and international security and stability associated to conventional weapons and dual-use goods and technologies, became increasingly relevant.[195] Negotiations then began in 1994 and in 1996 the 33 (currently 42) founding States established the Wassenaar Arrangement (WA), which creates a voluntary export regime for the exchange of information and transparency concerning transfers of conventional weapons, dual-use goods and technologies.[196] We should however remember that, while being a voluntary export regime, it is not legally binding, only politically binding, and creates a policy and guiding framework for exports of arms and dual use technology. The WA works also as a coordinating instrument to harmonize national policies to avoid regional destabilization. The national control systems are maintained for all items on the agreed lists, which are also periodically reviewed and updated, States report regularly and also meet on a regular basis in Vienna at the Arrangement headquarters, with a decision process based on consensus.[197] The WA, besides the categories already seen in the UNROCA, deals also SALW transfers. The Arrangement has created guidelines to help States ensure their responsibility in arms transfer, among the elements that States should consider, we find many similarities to those mentioned in the ATT, for example UN Security Council arms embargoes and if the weapons exported "might be used to commit or facilitate the violation, suppression of human rights and fundamental freedoms or the laws of armed conflicts"[198], consistency of the use of the weapons in line with the UN Charter and also how the arms transfers could influence an existing conflict. The Best Practice for Effective Export Control Enforcement, adopted in 2000 and amended in 2016, provides a list of preventive enforcement instruments for evaluating export transaction, but it also advises to establish effective penalties, both civil and criminal to deter and punish any possible "violation of export control and applicable brokering, transit, and transhipment laws".[199] The Arrangement also provides guidelines on how to address and regulate brokering. With the adoption of the ATT, the WA has become complementary to it, and has also served to WA Parties as a mean to help other States in establishing national control systems as requested by the treaty, and WA officials have manifested their availability to share experience and support in implementing the

[195] Daryl Kimball, 'The Wassenaar Arrangement at a Glance', Armscontrol.Org, December 2017, https://www.armscontrol.org/factsheets/wassenaar.
[196] 'Genesis Of', Wassenaar.org, 07/2015.
[197] 'What Is the Wassenaar Arrangement?', wassenaar.org, July 2015, https://www.wassenaar.org/the-wassenaar-arrangement/., Wassenaar.org, 07/2015.
[198] Plenary, '"Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons."', 12/1998, para 1(e).
[199] Plenary, 'Best Practices for Effective Export Control Enforcement', Wassenaar.org, 12/12/2016.

ATT.[200] However, insofar, no effective system to link the WA and the ATT has been created, ad it would be difficult to do so, since the binding nature of the Treaty and the non-binding nature of the arrangement (which could also be the very same reason it has been able to be so prolific and detailed).

*1.3.4.3 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*

Small Arms and Light Weapons (SALW) were defined by Kofi Annan as "weapons of mass destruction" in terms of carnage and death they spread.[201] It is estimated that there are around 1 billion small arms in circulation and that they are the cause of 200,000 death every year.[202] Small arms, if compared to other kinds of weapons are easier to access, transport, maintain and conceal, in addition, they are the base instruments used in conflict by soldiers, contractors or any other kind of militia and armed forces. SALW proliferation and devastation are not limited to armed conflicts, but also to organized crime and terrorism, leading to aggravation of ongoing conflicts, destabilizing peace efforts and development efforts.[203] Investigative organization Conflict Armaments Research, in the period 2016-2017 has traced the full transaction chain of some weapons produced in Europe, which after only two months ended under the Islamic State's control[204], furthermore, recent UN analysis reveals that the tracing instruments for weapons seized between 2016 and 2017 have a rate of success less than 13 per cent.[205] Currently there are some instruments at both regional and international levels, beside the ATT, to regulate, trace and limit the transfer of SALW, but these instruments mainly concern the illicit transfer of such weapons.

In 2001 the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (or PoA) was adopted. While not being a legally binding act, it is to be considered as a policy framework and guide. It is an instrument to harmonize, coordinate and promote the action of States in regulating SALW and SALW transfers. It gives three levels of action: national, regional and international. At national level the PoA calls for adequate laws and regulations to control production, import, export and transfer of SALW, as well as creating a control system and authority and enhancing marking, tracking and brokering controls, with the

[200] Tobias Vestner, 'Synergies Between the Arms Trade Treaty and the Wassenaar Arrangement', GCSP Strategic Security Analysis, no. 5 (2019): 6.
[201] 'We the Peoples: The Role of the United Nations in the 21st Century: Report of the Secretary-General, A/54/2000, 2000, para. 238.
[202] 'Spread of 1 Billion Small Arms, Light Weapons Remains Major Threat Worldwide, High Representative for Disarmament Affairs Tells Security Council', un.org.
[203] 'Small Arms and Light Weapons: Report of the Secretary-General, S/2019/1011.', December 2019, 16.
[204] 'Weapons of the Islamic State', conflictarm.com, 2017.
[205] 'Spread of 1 Billion Small Arms, Light Weapons Remains Major Threat Worldwide, High Representative for Disarmament Affairs Tells Security Council', un.org.

objective to tackle illicit manufacturing, trafficking and diversion. It also calls for criminalization of illicit manufacturing, stockpiling and transfer of SALW. At regional level the PoA encourages States to create points of contacts for liaison with the PoA implementation, as well as establishing binding instruments and organizations to eradicate and preventing illicit SALW trade. At international level the PoA establishes the same instruments as those at regional level, but it also encourages states to respect and enforce UN arms embargoes and to cooperate for tracing SALW. Contrary to the Firearms Protocol, the PoA tries to solve the issue left of brokering, which should be assessed through legislation, registration of brokers, licensing and authorization for brokering activities within a State's jurisdiction.[206] However, the PoA has proved to be ineffective in regulating State's transfer of SALW providing only general indication on how controls on States' exports authorization should be assessed.

An output of the PoA has been the creation of the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (International Tracing Instrument or ITI). Much like the PoA, it is not a legally binding document, but provides a guide on tracing, marking and recording small arms and light weapons. This instrument requires that States mark their weapons properly and keep records of them, it also provides a cooperation framework for tracing SALW. The scope and purpose of the ITI is to "enable States to identify and trace, in a timely and reliable manner, illicit small arms and light weapons" and to "promote and facilitate international cooperation and assistance in marking and tracing".[207] It also gives a definition of SALW not contained in the PoA and that differs from that of the Firearms Protocol due to the fact that also Light weapons such as heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, and portable launchers of anti-aircraft missile systems are included. The Instrument also gives a definition of tracing and links tracing to unique marking. States can also submit to other States tracing request, which however can be refused if the information given with the request "would compromise ongoing criminal investigations or violate legislation providing for the protection of confidential information, where the requesting State cannot guarantee the confidentiality of the information, or for reasons of national security consistent with the Charter of the United Nations".[208] To do so a State must give reason for such denial, but as

[206] Ibidem.
[207] International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, paras. 1 and 2.
[208] Ibidem, para 22.

Boister notes, para 22 leads to ample discretion of the State and implies unwillingness to allow other States to interfere with a State's arms trade.[209]

[209] Neil Boister, An Introduction to Transnational Criminal Law, (Oxford University Press, 2018), 218.

## Chapter II - The Role of the EU in tackling International Arms Deals

Having analysed the international framework for arms transfers, the focus will now be on a more regional level on the European Union's framework, its evolution and whether or not it has impacted in a meaningful way on its Member States and their procedures, licences approvals and general behaviour towards arms transfers.

### *2.1. The arms transfers' stance within European Union legal framework*

After the Gulf War, it became apparent that one of the causes that led to the conflict was linked to the unregulated arms market, and that Iraq had taken advantage of it to amass an outstanding number of weapons.[210] This was followed by post-Cold War consequences linked to lower defence budgets, consolidation and internationalization of arms industries which led to a change of the sector and a need for more harmonized European export policies.[211] Many States began to realize that there was the need for more stringent arms control. Talks began at both international and regional levels. We have seen in the previous chapter what were the outcomes of such talks at international level, in this chapter the focus will be on regional level, specifically the focus will be on European Union's regulation. Before giving an historical outline of the development of European arms control systems and procedures, it is important to remember that, as per art. 346 of the Treaty on the Functioning of the European Union, former art. 296 of the Treaty Establishing the European Community, the arms trade and production fall under the responsibility of Member States (MS), in so far as those activities guarantee the essential interests of the Member States. This reflects the division of competences enshrined in the Rome Treaty, then the Maastricht Treaty and lastly in the Lisbon Treaty. Furthermore, as per section 2 on the Common Security and Defence Policy of the Treaty on European Union (TUE), MS are responsible for their military capabilities, with a support role left to the European Defence Agency "to strengthen the industrial and technological base of the defence sector" and "assist the Council in evaluating the improvement of military capabilities".[212] Furthermore, any decision on the common security and defence policy are to be adopted by the Council.[213]

According to article 346, MS are not obliged to provide any information that which may put their security at risk, and each Member State can take any measure considered necessary to protect

[210] David G Anderson, 'The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War', *Am. UJ Int'l L. & Pol'y* 7 (1991): 771.
[211] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 1, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.
[212] Art. 42 comma 3 Treaty on European Union (TUE), 2012.
[213] Art. 43 comma 4 TUE.

its security interests linked to the production or arms trade, provided that such measures do not endanger competition in the common market "regarding products which are not intended for specifically military purposes".[214] The Commission even published an interpretative communication on art. 346 (at the time art. 296) which left little to no room outside an exemption for "the protection of a Member State's essential security interests".[215] The article then references a list the Council drew on 15 April 1958, which has not been modified since; in this list are included both non-conventional weapons and conventional ones. As Palladino notes, there is a limit to the list and the article which consist in the specifically military purposes of the items.[216] Palladino recalls the Court of Justice of the European Union (CJEU) jurisprudence which states that when an item of the list has a dual use, art. 346 TFEU applies depending on the usage of the contracting authority and the intrinsic characteristics of the item.[217] Furthermore, the CJEU has weakened the States' interpretation of the article as a general derogation of EU competence on arms exports. According to the Court the article should be read as case-by-case exemption with a restricted interpretation and with the burden of proof falling on MS[218]. Application of exemption is restricted by art. 348 TFEU, which requires consultation between the MS adopting the measures and the Commission, if such restrictions might hamper the efficiency of the Internal market. It seems appropriate to highlight the fact that article 346, given the interpretation adopted by MS, seems to be a safeguard clause much like article 4 TEU, which restricts EU competence, leaving to Member States competence on "territorial integrity of the State, maintaining law and order and *safeguarding national security*".[219]

Despite not having a direct competence laid out in the Treaties on the matter, EU reaches arms trade through other domains and policies, also through its general objectives.[220] The preamble of the TEU promotes peace and security in both Europe and the world. In order to that arts. 3(5) and 21(2)(c) reinforce the aim at contributing to and preserve world peace and security as well as to respect international law, UN principles and Charter, the Helsinki Final Act and the Charter of Paris. These

[214] Art. 346 para 1(b) TFEU.
[215] Commission of the European Communities, 'Interpretative communication on the application of Article 296 of the Treaty in the field of defence procurement', *Europa.eu*, December 2006, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52006DC0779, Section 4, para 3.
[216] Rossana Palladino, 'Il controllo sulle esportazioni di armi in zone di conflitto: regole e responsabilità dell'Unione Europea' (Ordine internazionale e diritti umani, 2015), 1173.
[217] Ibidem.
[218] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 11, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.
[219] 'Consolidated Version of the Treaty on European Union TITLE I - COMMON PROVISIONS Article 4', 202 OJ C § (2016), http://data.europa.eu/eli/treaty/teu_2016/art_4/oj/eng, article 4, emphasis mine.
[220] Ramses A. Wessel, 'Legal Competences of the European Union in International Arms Control', 2020, https://foreignpolicynewrealities.eu/event/contemporary-challenges/, 4.

aspects are also recalled in the Common Foreign and Security Policy which covers "all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence".[221] Wessel also notes that art. 29 of the TEU has been used as the legal basis for setting up the European arms export controls system.[222]

The EU, with its Common Foreign and Security Policy (CFSP) established with the Maastricht Treaty, has gradually developed numerous activities and initiatives to address arms transfers.[223] The Council of the European Union, with time, has begun developing arms embargoes beyond those adopted by the UN, and currently the EU has set up 20 arms embargoes.[224] Some of these are UN embargoes implemented by the EU, while others are adopted by the EU *motu propriu* (like in Belarus, Bosnia & Herzegovina, Burundi, China, Guinea…).[225] In addition the EU promoted its standards for conventional arms control during the negotiation of the ATT, and since its adoption it has worked towards the implementation of the treaty worldwide, setting up a specific implementation support programme.[226] Furthermore, the EU has worked since 2008 to develop initiatives in order to disseminate the Common Position 944/CFSP on arms transfers with non-EU States.[227] It is important to remember that among the top ten arms exporters in the period 2016-2020 we find the major EU countries: France, Germany, Spain and Italy, and they account for 19,1 percent of the global share of arms exports.[228] Furthermore, many American companies have a strong presence in Europe and we should also account for mergers and joint ventures between companies both at trans-European and transatlantic levels.[229] European countries supply mainly Middle East countries such as Qatar and Egypt, and Asia and Oceania countries, like India and Malaysia;[230] considering the number of non-

[221] Art. 24 TEU.

[222] Ramses A. Wessel, 'Legal Competences of the European Union in International Arms Control', 2020, https://foreignpolicynewrealities.eu/event/contemporary-challenges/, 4. Article 29 TEU reads as follow "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions".

[223] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 4, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

[224] 'Arms Embargoes | SIPRI', sipri.org, accessed 26 February 2022, https://www.sipri.org/databases/embargoes.

[225] 'EU Sanctions Map', Sanctionsmap.Eu, accessed 26 February 2022, https://sanctionsmap.eu.

[226] Mark Bromley and Paul Holtom, *Arms Trade Treaty Assistance: Identifying a Role for the European Union* (EU Non-Proliferation Consortium, 2014), 1.

[227] Council decision (CFSP) 2018/101 of 22 January 2018 on the promotion of effective arms exports controls, Official Journal of the European Union, L17/40, 23 January 2018.

[228] Stockholm International Peace Research Institute, 'SIPRI YEARBOOK 2021' (Stockholm International Peace Research Institute, 2021), JSTOR, http://www.jstor.org/stable/resrep34859, 15.

[229] LUCIE BÉRAUD-SUDREAU et al., 'MAPPING THE INTERNATIONAL PRESENCE OF THE WORLD'S LARGEST ARMS COMPANIES' (Stockholm International Peace Research Institute, 2020), JSTOR, http://www.jstor.org/stable/resrep28291, 5-7.

[230] Pieter D. Wezeman, Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, 2020', *Sipri.Org*, March 2021, https://doi.org/10.55163/CBZJ9986, 2; PIETER D. WEZEMAN et al., 'TRENDS IN INTERNATIONAL

EU States involved, it is clear how MS could use arms transfers as a common foreign and security policy instrument and promote a more responsible arms trade worldwide.[231] In order to fully address how arms transfers fit within the EU framework, we should also remember two of the main issues that EU legislation has always faced: harmonization and national vs supranational nature of the system. Many commentators highlight the fact that, notwithstanding the current common regulations, harmonization is yet to be reached on the matter, which hinders the effective capability to create a solid regime for arms exports and also limits the capacity to build a solid coordinated European industrial base.[232] On this matter, I would like to spend a few words on harmonization, focusing on the fact that States' compliance with the EU export regulation is non-homogenous, meaning that different ministries, departments and agencies assess licences and that they have different roles, some have veto power, and others have not[233], meaning that licensing authorities come from different policy domains.[234] Furthermore, MS have different interpretations of what are goods "designed for military use", a difference in definition grounded in different foreign and security policies.[235] Various commentators highlight differences in the assessment and control of the end use of weapons both pre and post-shipment.[236] Lastly, the issue of transparency: national reports lack transparency and completeness, with not all MS making a full submission to the European External Action Service.[237]

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ARMS TRANSFERS, 2019' (Stockholm International Peace Research Institute, 2020), JSTOR, http://www.jstor.org/stable/resrep24437, 5.

[231] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 4, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

[232] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 6, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

[233] Sibylle Bauer, Mark Bromley, and Giovanna Maletta, 'The Implementation of the EU Arms Export Control System', in *Europa.Eu* (Policy Department, DG EXPO - European Parliament, 2017), 23, 7.

[234] Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 187, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States, 187.

[235] Ibidem, 188.

[236] Stella Hauk and Max M. Mutschler, Five Ways to Make the European Peace Facility a Role Model for Arms Export Control, vol. 6/2020, BICC Policy Brief (Bonn: Bonn International Center for Conversion (BICC), 2020), 4; Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 188-189, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States, 188-189.

[237] Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 188-190, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States, 188-190; Sibylle Bauer, Mark Bromley, and Giovanna Maletta, 'The Implementation of the EU Arms Export Control System', in *Europa.Eu* (Policy Department, DG EXPO - European Parliament, 2017), 23, pp 8-9. The Common Position 2008/944/CFSP, at article 8, requires that Member States submit annually a report on the exports of military technology and equipment and their actions for the implementation of the Common Position.

Cops, Duquet and Gourdin identify the source of this lack of harmonization in the two faced difficulty in creating an internal and external defence market and defence industry, which leaves the harmonization only for formal aspects, but not substantial ones, leaving foreign and security concerns at national level, and the different interpretation given to the criteria set out in the Common position are based in different foreign policies and security issues.[238]

Following the focus of this thesis, weapons of mass destruction will not be assessed, nor will chemical weapons; suffice it to say that there have been numerous strategies to address non-proliferation like the 2003 Strategy against Proliferation of Weapons of Mass Destruction, the nomination of a Principal Adviser and Special Envoy for Disarmament and Non-proliferation by the European Union's High Representative for Foreign and Security Policy and the existence of numerous think tanks on disarmament and non-proliferation. In the field of chemical weapons, the EU works closely with the Organisation for the Prohibition of Chemical Weapons (OPCW) and the EU generally targets with sanctions those individuals that are linked with the usage of chemical weapons, as it has been the case with Russia or Syria.[239]

Before starting with a more in-depth analysis, I would like to provide a brief timeline of the various norms adopted for arms transfer control. We can look at the 1998 as a starting year, with the adoption of the EU Code of Conduct on Arms Exports which was a politically-binding instrument with a set of criteria to assess arms transfers and some operative measures, among which a consultation mechanism. This Code of Conduct failed to meet the expectations on both legal incentives and harmonization and was then replaced by the European Common Position on Arms Exports Control (or Council Common Position 2008/944/CFSP), which is a legally binding instrument and that differs slightly from the Code of Conduct with an explicit reference to the IHL, and, after 2019, also includes references to the ATT. A User's Guide for the interpretation of the criteria and the Common Position has also been developed. Since 2000, a Common List of military equipment, based on the Munition Lis of the Wassenaar Arrangement has been developed and MS must control the exports of the goods in such list.[240] The EU has also worked on SALW, adopting in 1998 the "EU Strategy on illicit firearms, small arms and light weapons (SALW) and their

[238] Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 190-191, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.

[239] Ramses A Wessel, 'Legal Competences of the European Union in International Arms Control', in Contemporary Challenges in the Field of Non-Proliferation/Arms Control Policy and EU Responses, 2020, 9.

[240] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 3, 0https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

ammunition", which has been modified various times, with the last adoption in 2018; furthermore, the Council has also adopted a legally binding Joint Action (2002/589/CFSP) on SALW, which will be discussed briefly later in this chapter. The objectives of the strategy are to guide EU institutions and MS in their actions against the both the legal and illicit proliferation of firearms and SALW.[241] In 2003, the Common Position on 2003/468/CFSP on the control of arms brokering has been adopted, but it does not create an harmonized common framework to assess arms brokering, it is limited at setting certain measures that MS should adopt when controlling arms brokering within, and in certain cases outside, their national jurisdictions.[242] Furthermore the position also asks MS to set up a framework to regulate brokering activities in line with the Common Position 2008/944/CFSP.[243] The two last components to the EU framework on arms transfers are: the Directive 2009/81/EC on defence procurement and the Directive 2009/43/EC on Intra Community Transfers of defence equipment (ICT Directive). These two Directives form the "EU defence package".[244] The first Directive was adopted on July 2009, and aims at regulating supply and service contracts over €412.000 and contracts over €5.1 million and in providing transparency in defence contracts; this transparency is reached through the publication of the contracts awarded under such directive in the Tenders Electronic Daily database (TED).[245] The second Directive, the 2009/43/EC, has the objective to simplify the rules and the procedures, as well as reduce administrative costs, for intra Community defence transfers.[246] The Directive also aims at harmonizing licensing procedures drawing out a list of exception on the obligation of authorization. The directive was a direct consequence of the costs associated to national licensing systems and it impacted directly on the efficiency of the common market. Fiott notes the existence of a strategic meaning behind the Directive, highlighting the fact that MS did not believe

[241] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 9, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf; Nils Duquet, 'The 2018 EU SALW Strategy: Towards an Integrated and Comprehensive Approach', *Non-Proliferation and Disarmament Paper*, no. 62 (April 2019), 1-7.

[242] Rossana Palladino, 'Il controllo sulle esportazioni di armi in zone di conflitto: regole e responsabilità dell'Unione Europea' (Ordine internazionale e diritti umani, 2015), 1177.

[243] Ibidem, 1178.

[244] Daniel Fiott, Defence Industrial Cooperation in the European Union: The State, the Firm and Europe (Routledge, 2019), https://ereader.perlego.com/1/book/1376345/14?element_plgo_uid=ch14__5&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[245] Ibidem, https://ereader.perlego.com/1/book/1376345/15?element_plgo_uid=ch15__5&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[246] Daniel Fiott, Defence Industrial Cooperation in the European Union: The State, the Firm and Europe (Routledge, 2019); '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', June 2009.

that the same measures should apply for extra-EU and infra-EU arms transfers, and liberalization in the common market could enhance security for European militaries.[247]

*2.2. European Common Position on Arms Exports Control – Council Common Position 2008/944/CFSP;*

In 1991/1992 the European Council began working on a set of criteria that MS would have committed to in order to assess arms export licences, the Council also set up a Working Group on Arms Exports (COARM) to allow States to compare and try to harmonize exports controls.[248] This process led to the adoption in June 1998 of the EU Code of Conduct on Arms Exports, which was a politically-binding instrument that set a list of criteria to adopt when assessing arms exports and licensing, it also included some operative provisions such as a consultation mechanism and the restriction to use the information for commercial advantage, as well as the adoption of a Common Military List. In the Code of Conduct MS agreed to "set high common standards", strengthening "the exchange of relevant information" to achieve a "greater transparency", to "prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability" and to "reinforce their cooperation and to promote their convergence in the field of conventional arms exports".[249] However, not being a legally binding document, its effectiveness has been limited, this however changed in 2008 when the Code of Conduct was "transferred" into a Common Position legally binding for MS. The final document was the Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (hereafter CP), adopted under art. 15 of the TEU (now currently art. 29 of the consolidated version)[250] which allowed the Council to adopt decisions to approach "particular matter of a geographical or thematic nature".[251] The CP also has a User's Guide on how to interpret the criteria and as implementation guidance for the Common Position. The CP has been reviewed two times so far, the first in 2015 and the second in 2019. Article 15 of the CP required the Common Position to be reviewed three years after its adoption, thus in 2011 the COARM began its evaluation on the

[247] Daniel Fiott, Defence Industrial Cooperation in the European Union: The State, the Firm and Europe (Routledge, 2019), https://ereader.perlego.com/1/book/1376345/14?element_plgo_uid=ch14__19&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[248] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 2, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

[249] 'EU Code of Conduct on Arms Exports', *Armscontrol.Org*, n.d., https://www.armscontrol.org/act/1998-05/eu-code-conduct-arms-exports.

[250] Rossana Palladino, 'Il controllo sulle esportazioni di armi in zone di conflitto: regole e responsabilità dell'Unione Europea' (Ordine internazionale e diritti umani, 2015), 1176.

[251] 'Consolidated Version of the Treaty on European Union', 2009.

efficacy of the Position and its overall implementation.[252] The process took three years and various proposal to improve the efficacy of the CP were submitted, among these there were: the inclusion of governance and democracy of the assessment criteria, the improvement of COARM meetings, the improvement of information used by licensing officials and the creation of a more substantial role for EU delegations in assisting MS in the implementation of the CP. The reviewing process also coincided with the Arab Spring which demonstrated how little convergence there was among EU States on arms exports to Middle East or North Africa countries, with many MS failing to observe the arms embargo on Syria.[253] In the end, the Council adopted a preliminary conclusion in 2012 and then another one in 2015, in both the conclusions the CP was deemed appropriate to achieve the goals and objectives laid out in the Position.[254] Two outcomes of these conclusions were the expansion and adaptation of the User's Guide and the implementation of an electronic system for sharing information export licence denials' information.[255] The second review of the CP started in 2018 and ended in 2019. The main political issue at the time related to arms exports was the war in Yemen and the supply of weapons to Saudi Arabia, which was using them to violate IHL and HRL, with some States continuing the supply (like UK and France) and others banning it (like Germany).[256] The reaction to the event in the Yemen war were not unanimous and MS reacted differently and there was an overall lack of coordinated European response, which was reflected in the debate on arms exports to those countries involved in Yemen; without this coordination both MS and civil society shifted towards national level.[257] By September 2019 the review process was finished and the new text was adopted with some changes: art. 1 was modified to include reassessment, references are made in art. 2 to the ATT and the CCW and its Protocols, as well as direct reference to the Ottawa Convention; to improve transparency art. 8 has been modified to add a searchable online database for the EU Annual Report and Member States' contributions as well as a deadline for MS submission relative to the information on exports of military technology and equipment and on the implementation of the

[252] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 5, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.
[253] Nils Duquet, 'Business as Usual? Assessing the Impact of the Arab Spring on European Arms Export Control Policies' (Brussels: Flemish Peace Institute, March 2014), 72-74, https://vlaamsvredesinstituut.eu/en/report/business-as-usual/.
[254] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 5, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.
[255] Ibidem, 6.
[256] Sophia Besch and Beth Oppenheim, 'Up in Arms: Warring over Europe's Arms Export Regime', Centre for European Reform (Centre for European Reform, September 2019), 4–7, https://www.cer.eu/publications/archive/policy-brief/2019/arms-warring-over-europes-arms-export-regime.
[257] Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 7, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

CP. Lastly, an additional chapter on the User's Guide on transparency was added.[258] However, it should be noted that the CP does not have an enforcement mechanism and is currently positioned outside the EU legal enforcement system[259], meaning that the Commission cannot exercise any enforcement measures, nor can the CJEU, due the fact that the Common Foreign and Security Policy is outside its jurisdiction.[260]

Having given an outline on the evolution of the CP, we should now start to assess the Position and its criteria. The Position applies to "all exports of military technology or equipment by MS, and to dual use items as specified in Article 6 of the Common Position".[261] Furthermore, MS are encouraged to reassess exports licences when new relevant information is available.[262] The User's Guide gives no definition on what "information" means, but provides a list of sources from which information for reassessment can be acquired such as foreign affairs desk officers dealing with the country to which the transfer is to be approved, "the opinion of Member States diplomatic missions and other governmental institutions, including intelligence sources"[263], EU Heads of Mission (HOMs) reports, the EU denials database, EU Council conclusions/statements on the country or security issues, reports and documents of the UN and other relevant international organisations, Member States diplomatic missions and other intergovernmental, regional or international bodies (such as the ICRC), reports from international, regional or local NGOs as well as civil society. In the annexes to the User's Guide various websites where to acquire information are also listed to help MS to better assess approval of licenses.

[258] Ibidem.

[259] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020), https://ereader.perlego.com/1/book/1690614/12?element_plgo_uid=ch12__86&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[260] Art. 24 of the TEU, with the exception of art. 275 of the TFEU which allows the legal competence of the CJEU on "decisions providing for restrictive measures against natural or legal persons". However, there is always the possibility that the Court might be able to expand to some extent its competences. For further reading see: 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case', Verfassungsblog (blog), accessed 26 June 2022, https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/ and Christina Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?', (2015), 20, European Foreign Affairs Review, Issue 4, 535-552, https://kluwerlawonline.com/journalarticle/European+Foreign+Affairs+Review/20.4/EERR2015044.

[261] General Secretariat of the Council, 'User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment', *Europa.Eu*, 16 September 2019, https://www.consilium.europa.eu/media/40659/st12189-en19.pdf, 14.

[262] Art. 1 para 1a. of the CP 2008/944/CFSP.

[263] General Secretariat of the Council, 'User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment', *Europa.Eu*, 16 September 2019, https://www.consilium.europa.eu/media/40659/st12189-en19.pdf, 14.

The criteria to assess export licences applications are set out in art. 2 of the CP and allow for a preventive approach to arms transfers.[264] The first four criteria set out the explicit prohibitions, while the other four lay the conditions to assess arms transfers on a case-to-case basis. The first criterion is straightforward MS shall deny a licence approval if it would be inconsistent with: internationals obligations and commitments of Member States, UN, EU and OSCE embargoes and measures adopted by the UNSC. MS are also bound to evaluate inconsistencies with the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention, as well as the CCW and its Protocols, the APL, the ATT, the commitments undertaken under the PoA and the Wassenaar Arrangement.

Criterion two covers the respect of HR of the country of destination as well as its respect of IHL, with caution to be exercised if violations in the destination country have been established by competent bodies of the UN, EU or the Council of Europe. MS shall also deny an export licence if there is the risk that the transferred military equipment could be used for internal repression (diversion is also taken into account). Internal repression is specified to include "torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions"[265] as well as other serious violations of HR and fundamental freedoms as defined in various international human rights instruments like the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. On internal repression Lustgarten raises two questions. The first concerns the possibility that a State might have reached a point of repression that no enforcement is needed and is mainly seeking to accumulate weapons to sedate future possible uprisings[266]; in this case MS could potentially authorize the exports without incurring the violation of the criterion. The second case concerns the case-by-case approach which is limited in the coverage of items, end-use and end-user. Meaning that military materiel used for internal repression differs from that used for border patrol or military ships and aircrafts, meaning that a state could potentially deny the export of SALWs, while approving the delivery of anti-air systems.[267] This is somewhat confirmed by the User's Guide which states that in their case-to-case analysis MS should also consider the nature of the to be transferred items. The caveat in this case-to-case analysis is that MS

[264] Ludvig Öhrling, 'Arms Trade, Human Rights and the Jurisdictional Threshold: On the Responsibility of Arms Transferring States Under the European Convention on Human Rights', 2021, 22.
[265] Art. 2 para 2 of the CP 2008/944/CFSP.
[266] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020), https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__259&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.
[267] Ibidem, https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__261&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego

should also take into account the "recipient country's attitude"[268] towards both HRL and IHL. This attitude means, according to the User's Guide, a set of actions, behaviours and policies adopted by the recipient countries which include the adoption and ratification of relevant international and regional human rights instruments through national policy, the respect of international and regional HR mechanisms, and the respect of democratic principles (the User's Guide directly links inextricably democracy with the respect of HR), as well as the respect of IHL instruments.[269] Concerning the seriousness of the HR violations the Guide requires a case-to-case analysis, which can include both systematic and/or widespread violations, but which can also include the recognition from a competent international body to establish that such violations have occurred, but the final assessment is nonetheless left to MS (Annex IV to the Guide provides a list of HR instruments to consider). On the side of the serious violation of IHL, the Guide references the four Geneva Conventions and the definitions of grave breaches within them, as well as the additional Protocol I and the Rome Statute of the International Criminal Court that incorporates which serious violations of IHL for international and non-international armed conflicts constitute war crimes (in Annex V to the Guide we are also given a comprehensive list, with articles of what constitutes grave breach of IHL). Whilst the User's Guide mentions the Geneva Conventions and the additional Protocol I, the article and criterion do not mention it. Furthermore, IHL issues are less detailed in the CP when compared to HR violations, with no equivalent to the instructions to be considered for internal repression.[270] This may lead to a strict interpretation of the "serious violations of international humanitarian law", further supported by the general lack of a definition in the CP of what a serious violation is. One source for giving a broader definition of what a serious violations consist of might come from the case *Prosecutor v. Tadic* given under the jurisdiction of the Appeal Tribunal of the International Criminal Tribunal for the former Yugoslavia. The Court stated that, in interpreting the Statute as a whole, "serious violations" of IHL are, as a matter of fact, "violations of the laws or customs of war".[271] The Guide also recalls art. 7 of the ATT and its content which are similar to criterion 2 of the CP, but which also include gender-based violence.

[268] Art. 2 of the CP 2008/944/CFSP.

[269] General Secretariat of the Council, 'User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment', *Europa.Eu*, 16 September 2019, https://www.consilium.europa.eu/media/40659/st12189-en19.pdf, 45-52.

[270] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020). https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__94&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego

[271] Antonio Cassese et al., Decision on the defence motion for interlocutory appeal on jurisdiction. Prosecutor v. Tadic (International Criminal Tribunal for the former Yugoslavia 1996), para 90.

Criterion three states that MS shall deny an export licence if it would provoke or prolong armed conflicts or aggravate tensions in the recipient country. This means that a MS has to take into account the economic, social and political situation of the recipient country and also has to consider eventual tensions within its borders (may it be racial, religious, ethnic, political…) that may lead to tumult, violent actions or private militia not controlled by the State. Lustgarten notes that the criterion takes a strict position on intervention and support, even if indirect, by banning completely any supply, even if it was directed to the legitimate government of the recipient county.[272]

The fourth criterion concerns the "preservation of regional peace, security and stability".[273] It requires MS to deny an export licence if there is the clear risk that the exported military items could be used aggressively towards another country or to claim with force a territory. The criterion has been invoked between 12 and 15 percent of denials in the period 2012-2017[274], denoting further unevenness in EU Member States. The four paragraphs of the criterion lay out the cases to be taken into account: existence or likelihood of a conflict between the recipient and another country, territorial claim of the recipient which has been previously threatened to obtain with force, different end-use of the equipment other than self-defence and the need to consider regional stability. A real-life example could be the contested region of Kashmir between India and Pakistan and the avoidance to supply either party.

Criterion five is the first criterion of the second batch, which does not set prohibitions, but requires that MS take into account certain factors when assessing the authorization of export licences. The criterion states that MS should not allow export of military equipment that could be used to endanger their security or that of their allies and friendly countries. It is a criterion that Lustgarten defines as "confusingly written, and begins by stating what hardly needs saying".[275] The wording "territories whose external relations are the responsibility of a Member State" is then explained in the User's Guide as covering those territories of the NATO Treaty, the outermost regions (ORs), and the overseas countries and territories, which are covered in articles 198 to 204 of the TFEU.[276] While

[272] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020), https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__314&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[273] Art. 2 para 4 of the CP 2008/944/CFSP.

[274] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020), https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__346&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[275] Ibidem, https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__360&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[276] General Secretariat of the Council, 'User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment', *Europa.Eu*, 16 September 2019, https://www.consilium.europa.eu/media/40659/st12189-en19.pdf. The ORs can be: the four French overseas

allied countries are easy to define, the criterion does not specify what "friendly countries" means, leaving it to interpretation. On this, the Guide defines those countries as States with which the MS has "longstanding bilateral relationships"[277] especially if in the area of defence and security. The criterion can also be seen as a way to avoid what happened in 1990 with the Gulf war, where Western countries found themselves fighting against their own weapons supplied in the years to Iraq.[278]

Criterion six deals with terrorism and alliances of the recipient State, it has been used few times in denials submitted by MS.[279] The criterion further stresses the need for MS to assess the compliance of the recipient State with IHL and its respect and commitment to arms control and non-proliferation. It can be seen as a reiteration of criteria one and two, with the addition of terrorism and international crime.

Criterion seven directly assess the risk of diversion. The Guide signals that diversion can happen at different levels: transfer towards a country or within it, it can be retransfer or re-export to a third non-authorised county or entity. Following this, it could be useful to remember that diversion has no clear definition in international law, nor in the ATT. However, stemming from the Guide, we can identify a three-faced view on what diversion can entail. The first concerns the end-user, which may be different from the purchaser or the end-user declared by the purchaser, which is strictly linked to the actual capabilities of the recipient country to use the exported military items.[280] To avoid this diversion of end users, MS should also consider if the recipient country has the capability to effectively enforce export control and the paras (c) and (d) cover the effective export control and the re-export of military technology and equipment. The second view on diversion can be on the end-use, which may differ from the one declared by the purchasing country. This is also linked with internal diversion[281] and the second criterion, with military equipment which could be used by either the government which bought the equipment or by an agency which was given authorization by it to use the materiel for repression. The last paragraph concerns the diversion towards terrorist organizations or individual terrorists. The Position then also includes, as a last point the risk of reverse engineering

departments, the Portuguese autonomous regions of the Azores and Madeira, the Spanish Canary Islands; while the overseas countries and territories can be seen as those listed in Annex II to the TFEU.

[277] Ibidem, 96.

[278] David G Anderson, 'The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War', *Am. UJ Int'l L. & Pol'y* 7 (1991), 752–53.

[279] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020), https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__375&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[280] Art. 2 para 7(b).

[281] Laurence Lustgarten, Law and the Arms Trade: Weapons, Blood and Rules (Bloomsbury Publishing, 2020), https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__404&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

or unintended technological transfers, meaning that MS should take into account the capabilities of the recipient (either State or private) to reverse engineer and divert the technology contained in the military equipment to be transferred. This criterion has been one of the most used by Member States for denial of transfers, circa 43 percent of the times[282]; furthermore, it is a detailed criterion in the cases needed to assess before giving the authorization for exports, and requires that MS "do their homework" by acquiring correct information and intelligence to evaluate all the possible risk, much more than for criterion six.

Lastly, the eighth criterion requires to assess the compliance between the arms transfers towards the recipient country with the economic capacity of the country; MS should also take into account the balance between the security needs of the recipient and the diversion of human and economic resources into the resources for armaments acquisitions. MS should take into consideration the nature of the payment and the effects it might have on the recipient's economy, its development and national debt and if the recipient is balancing military and social spending. The Guide also provides a two-steps filter to facilitate the assessment process, with the first level on the development of the recipient and the second on the financial value of the transfer and the impact it could have.

The rest of the Common Position focuses on more procedural norms which deal mainly with transparency.[283] Article 4 para 1 requires MS to circulate transfers denials under the criteria of the CP with an explanation of the denial. Furthermore, if a MS wants to approve a transfer after it has already been denied by another MS within three years, it shall consult the Member State that denied the transfer. To avoid the exploitation of such denials' notifications, para 3 includes a provision on not to use such notifications for commercial advantages. Lastly, it is important to underline that paragraph 2 of article 4 leaves to MS full discretion on the approval or denial of licencing military equipment or technology. However, as it has already been said, the lack of existence of an enforcement mechanism can render such provision dead letter.[284] Article 6 extends the criteria of art. 2 and the informational procedure in art. 4 also to dual-use items without prejudice to Regulation (EC) No 428/2009 on the control of exports, transfer, brokering and transit of dual-use items. Following the principle of enhancing transparency, art. 8 requires MS to submit annually a report to the European External Action Service on their exports of military items and technology, as well as their implementation of the CP. The information is then gathered and published in the EU Annual Report

[282] Ibidem, https://ereader.perlego.com/1/book/1690614/13?element_plgo_uid=ch13__423&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego

[283] Rossana Palladino, 'Il controllo sulle esportazioni di armi in zone di conflitto: regole e responsabilità dell'Unione Europea' (Ordine internazionale e diritti umani, 2015), 1178.

[284] Ibidem.

and are also available on the COARM online database. Article 11 regulates the promotion of the criteria for their usage outside EU borders. Article 12 requires MS's legislation to be able to effectively control the export of items in the Common Military List, which should be the point of reference of national military lists, but that does not replace them. Lastly art. 15 states that the CP will be reviewed after five years of the new adoption, meaning that the CP will be reviewed again in 2024.

To conclude, I would like to recall, as it has already been said, that EU Member States, whilst having agreed on the previously analysed common criteria, are far from achieving harmonization. The lack of an enforcement mechanism is also at the source of the lack of harmonization and full compliance to the criteria. MS are not always precise on the application of the CP, and France even decided not to include the criteria into its national laws for arms control.[285] Furthermore, as it has already been noted for criterion two, the case-by-case analysis for the authorization of licences can be used by MS to avoid applying the criteria, with the possibility to approve an authorization for a country which is committing IHL and HR violations if the competent authority decides that the items to be exported are to be used, say, for police uses and not for committing the violations.[286] The ineffectiveness of the criteria has been proved in the exports of weapons to Saudi Arabia. The UK and France supplied to the monarchy with weapons in the period 2013-2017, with the UK supplying licences worth billions of pounds, later found to be unlawful by a national Court of Appeal, leading to the full stop of weapons supply to Saudi Arabia form the UK.[287] The French government has not stopped supplying weapons to the monarchy. European States disunity emerged also with the case of Syria, where MS were not able do decide on the renewal of the arms embargo in 2013 and with European weapons, while not being directly sold to the Syrian rebels (which were reported by the UN to commit war crimes), ended up in their hands nonetheless.[288] Various proposal have been made to fix the harmonization problem and the lack of application of the criteria. The most unrealistic proposals concern the reform of the treaties or overhaul of EU exports' regime[289]. Others, are more practical and aim at modifying the wording of the CP in order to clear the uncertainties and the

[285] Session Ordinaire de 2010- Assemblée nationale XIIIe législature, 'Première Séance Du Mardi 12 Avril 2011', *Assemblee-Nationale.Fr*, December 2011, https://www.assemblee-nationale.fr/13/cri/2010-2011/20110161.asp.
[286] Sophia Besch and Beth Oppenheim, 'Up in Arms: Warring over Europe's Arms Export Regime', Centre for European Reform (Centre for European Reform, September 2019), 6, https://www.cer.eu/publications/archive/policy-brief/2019/arms-warring-over-europes-arms-export-regime.
[287] Beth Oppenheim, 'UK Arms Sales to Saudi Arabia Have Been Found Unlawful – This Could End the War in Yemen', Independent, June 2019, https://www.independent.co.uk/voices/saudi-arabia-yemen-bombing-bae-systems-weapons-court-of-appeal-a8967521.html.
[288] Sophia Besch and Beth Oppenheim, 'Up in Arms: Warring over Europe's Arms Export Regime', Centre for European Reform (Centre for European Reform, September 2019), 8, https://www.cer.eu/publications/archive/policy-brief/2019/arms-warring-over-europes-arms-export-regime.
[289] Ibidem, 9-10.

freedom of interpretation of it, others involve post-shipment controls on the exports,[290] and others involve the improvement of both the Annual Report and the national reports to create a standardized form for MS.[291] However, the lack of agreement between MS makes it impossible to reach an agreement on the matter, one could hope that from the catastrophe that is the ongoing war in Ukraine, something positive for more harmonization and a more organized policy on security foreign could sprout.

*2.3. EU Intra-Community Transfers Directive 2009/43/EC*

Over the past years EU Member States have kept increasing their military spending, reaching €198 billion in 2020 (a 5 percent increase compared to 2019).[292] This follows what happened at the Versailles summit where European governments tasked the Commission and the European Defence Agency (EDA) to analyse the gaps in defence investments by mid-May, and propose initiatives to strengthen the European technological and industrial base.[293] Later, Italy and Germany announced that they will reach the 2 percent quota as per the NATO treaty.[294] This comes after many years of increasing military spending for European States, and with a sudden boost to military budgets, it will become imperative to strengthen the transfer capabilities within the EU. This could be achieved through the Directive which aims at simplifying the rules and procedures for intra-Community transfer of defence-related for a proper functioning of the common market. However, before analysing the Directive, its contents and a short consideration on its implementation, it could be helpful trace how the Directive came to be.

The process that led to the Directive involved not only MS, which were the most reluctant at the beginning, and the Commission, but also the industry and various NGOs.[295] The industry wanted a clear distinction between the intra and extra European market and a support system to help develop

[290] Stella Hauk and Max M. Mutschler, Five Ways to Make the European Peace Facility a Role Model for Arms Export Control, vol. 6/2020, BICC Policy Brief (Bonn: Bonn International Center for Conversion (BICC), 2020), 3-4.
[291] Sibylle Bauer, Mark Bromley, and Giovanna Maletta, The Further Development of the Common Position 944/2008/CFSP on Arms Exports Control: Workshop Report (European Parliament, 2018), 24.
[292] European Defence Agency, 'Defence Data 2019-2020 Key Findings', *Europa.Eu*, 2021, https://eda.europa.eu/docs/default-source/brochures/eda—defence-data-report-2019-2020.pdf.
[293] 'Informal Meeting of Heads of State or Government, Versailles, 10-11 March 2022', *Europa.Eu*, n.d., https://www.consilium.europa.eu/en/meetings/european-council/2022/03/10-11/.
[294] Maria Sheahan and Sarah Marsh, 'Germany to Increase Defence Spending in Response to "Putin's War" - Scholz', *Reuters*, February 2022; Gianluca De Rossi, 'Ucraina. «L'Italia aumenta le spese militari al 2% del Pil», sì dalla Camera. Quanto spendono Russia e Nato per le armi', *Il Messaggero*, March 2022, https://www.ilmessaggero.it/politica/ucraina_guerra_italia_armi_spese_militari_russia_nato_quanto_spendono-6569481.html.
[295] Chiara Bonaiuti, 'Convergence around What? : Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Newcastle University, 2020), 9–14, http://theses.ncl.ac.uk/jspui/handle/10443/4964.

and consolidate the European defence market *vis-à-vis* the US market.[296] The NGOs wanted a regulatory framework on arms transfers.[297] However, for quite some time the preferences between the industry, civil society, Commission and MS did not align. During the legislative process, France needed to restructure its defence market and saw the Directive as a mean to achieve this result;[298] Germany, with the economic crisis of 2008, supported the directive as a mean to protect its own industry, a way to secure defence supply and as instrument to participate in defence cooperation programmes.[299] The other European countries followed the same reasoning as France and Germany and soon endorsed the Directive.[300] The Commission, on the other hand, has pushed for some form of regulation for an intra-community transfers since 2003, with the publication first of the Communication "Towards an EU Defence Equipment Policy" in which it asked for more cooperation on the regulation of the defence industry, with a focus on standardization, intra-community transfers, competition, procurement and research. Furthermore, in a 2003 Green Paper on defence procurement and future development, the Commission reframed the issue not on the basis of External Action, but on the basis of internal market, shifting its competence on the matter.[301] This is consolidated by the fact that the Directive was adopted under art. 114, which allows the EU to enact legislation for the harmonization of MS laws and provide the correct functioning of the internal market.[302] All these factors mentioned above, led to the adoption of the directive on the 6th of May 2009

As seen, the EU Intra-Community Transfers Directive 2009/43/EC was adopted on May 2009 and came to be after a long process of negotiations and even a longer process of gestation carried out by various MS and the Commission. The aim of the ICT directive is to alleviate the costs associated with licensing and its administrative burdens, with the final goal to increase security of supply and stabilization of EU market.[303] The existence of different national licencing systems for intra-EU arms

[296] Ibidem, 12-13.
[297] Ibidem, 14.
[298] Daniel Fiott, Defence Industrial Cooperation in the European Union: The State, the Firm and Europe (Routledge, 2019), https://ereader.perlego.com/1/book/1376345/14?element_plgo_uid=ch14__44&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.
[299] Ibidem, https://ereader.perlego.com/1/book/1376345/14?element_plgo_uid=ch14__48&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.
[300] Ibidem.
[301] Chiara Bonaiuti, 'Convergence around What? : Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Thesis, Newcastle University, 2020), 19-20, http://theses.ncl.ac.uk/jspui/handle/10443/4964.
[302] Luke R.A. Butler and Martin Trybus, 'The Internal Market and National Security: Transposition, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products', *Common Market Law Review*, 2017, 408.
[303] Daniel Fiott, Defence Industrial Cooperation in the European Union: The State, the Firm and Europe (Routledge, 2019),

transfers often resulted in extra costs, delays, and confusion associated with these different regimes.[304] The Directive does not affect MS competence on policy exports of defence items -it only applies to licensing- but also gives a definition of transfer which is separated from export, with the first referring for intra-EU supply, and the latter for supply to third non-EU countries.[305] By differentiating the exports and intra-EU transfers, the Directive can better tackle the issue of excessive control procedures within the common market. The Directive creates a licencing regime that applies to the items in the Common Military List (CML) which creates three types of transfer licences: *general*, which allows for transfers of defence "to suppliers established on their territory, which fulfil the terms and conditions attached to the general transfer licence, to perform transfers of defence-related products"[306]; the *global* transfer licence is based on a single EU MS and allows for transfers of multiple items for a three-year period; and lastly, the *individual* licence which is limited on a one-time transfer for a "specified quantity of specified defence-related products".[307] To avoid abuse of individual licences, the cases in which those can be issued are limited in the article.

According to the Directive, *general* transfer licences are to be preferred. This kind of licences should be published to any enterprise fulfilling the criteria defined in each general transfer licence (Recital 21).[308] According to art. 5 comma 5 this kind of licences are mandatory in four circumstances: a) if the recipient is part of the armed forces of a MS or a contracting authority in defence purchasing for the exclusive use of the armed forces of a MS; b) if the recipient is certified according to the Directive; c) if the transfer is done for demonstration, evaluation or exhibition purposes; d) if the transfer is done for maintenance and repair by the original supplier of the defence-related goods. The mandatory use of such licences means a reduced risk for MS' national security due to the fact that the company has already been checked or is an allied country, as well as an improved security of supply since certified companies or national armed forces are able to prove their ability to honour their obligations regarding the export.[309] This system should also drastically reduce ex-ante controls in

https://ereader.perlego.com/1/book/1376345/14?element_plgo_uid=ch14__5&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

[304] Martin Trybus, Buying Defence and Security in Europe (Cambridge University Press, 2014), 143-144.

[305] Article 3, paras 2 and 6 of the Directive 2009/43/EC.

[306] Article 5 of the Directive 2009/43/EC.

[307] Article 7 of the Directive 2009/43/EC.

[308] Recital 21 reads: "In order to facilitate transfers of defence-related products, general transfer licences should be published by Member States granting authorisation to transfer defence-related products to any undertaking fulfilling the terms and conditions defined in each general transfer licence".

[309] Luke R.A. Butler and Martin Trybus, 'The Internal Market and National Security: Transposition, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products', Common Market Law Review, 2017, 420.

favour of ex-post controls.[310] For companies, the general transfer licences and the certification process proves their reliability in the industry, with the EU register of the Certified Defence-related Enterprises (CERTIDER) website being the main point of reference for the publications of general transfer licences, which should also simplify the process. However, the industry has lamented the inefficiency of these general transfer licences linked to: the existence of 27 controls systems, lack of training and knowledge on the matter, the marginal number of general transfer licences issued, lack of common interpretation among MS, and the non-binding nature of Commission's recommendations on general transfer licences during the Directive revision.[311]

*Global* transfer licenses are the second-best option. This kind of licences is a middle ground between individual and general licences. They allow for the authorization to send to one or more recipients, one or more shipments. MS can decide to grant global transfer licences to an individual supplies, upon its request, authorising the transfer of defence-related goods to one or more MS.[312] In each global transfer licence, MS have to specify the category of products or specific items covered by the licence, as well as the authorized recipients. Global transfer licences have been generally used before the Directive by MS, and have been considered helpful for routine shipments or for regular customers, as well as for small and medium enterprises (SMEs).[313] Being a proven method the Commission wanted to use it together with the general transfer licences, with the ultimate objective of eliminating individual transfer licences. They were also a way for SMEs to avoid incurring the perceived costs associated with the registration required into the CERTIDER.[314] However, the EC probably had not clear in mind what this kind of transfer licence was supposed to achieve: they seem

[310] Chiara Bonaiuti, 'Convergence around What? : Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Thesis, Newcastle University, 2020), 28, http://theses.ncl.ac.uk/jspui/handle/10443/4964.

[311] Jean-Pierre Maulny et al., 'EU Defence Package: Defence Procurement and Intra-Community Transfers Directives' (European Parliamentary Research Service, October 2020), 123–30, https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654171; Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 173, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.

[312] Chiara Bonaiuti, 'Convergence around What? : Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Thesis, Newcastle University, 2020), 26, http://theses.ncl.ac.uk/jspui/handle/10443/4964.

[313] Butler and Trybus, 'The Internal Market and National Security: Transposition, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products', 428.

[314] 'REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Transposition of Directive 2009/43/EC Simplifying Terms and Conditions for Transfer of Defence-Related Products within the EU' (2012), sec. 6, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52012DC0359.

not to cover routine shipments anymore, there are no particular circumstances in the directive to use it, and Member States have to define the items and the recipients they apply to.[315]

Lastly, *individual* transfer licences are the most issued transfer licences, and are those that generally distort the Internal Market. In 2017, individual transfer licences accounted for 66 percent of total licences[316], notwithstanding the limited case in which they can be issued: a) when it is limited to one transfer, b) if it is necessary for the MS security issues, c) is necessary for compliance with international obligations of MS, d) there is the belief that the supplier would not be able to comply with all the terms needed for a global transfer licence.

While the Directive was a welcomed rationalizing and harmonizing instrument, so far it has been underused which has hindered its operational effectiveness.[317]

The objective of the Directive, as previously stated, is to reduce the administrative and licencing costs for intra-community transfers of defence-related products, by treating them more as standard goods than defence material and applies to the items contained into the Common Military List (which is in annex to the Directive). A Directive was best suited to regulate the internal market than a Regulation due to the fact that a more detailed framework was needed at national level.[318] The Directive deals with intra-Community transfers, which becomes EU competence, while leaving to MS the export of defence-related products.[319] Directly, the Directive only applies to licencing, but as Trybus notes, it also influences MS policies, while not outlining clear boundaries between EU's and MS' competences on transfers.[320] At article 3 we find the definitions, and it is important to note the distinction between "transfer" and "export licence". A transfer is defined as "any transmission or movement of a defence-related product from a supplier to a recipient in another Member State"[321], while a licence export is "an authorisation to supply defence-related products to a legal or natural

[315] Ibidem, 429.
[316] Jean-Pierre Maulny et al., 'EU Defence Package: Defence Procurement and Intra-Community Transfers Directives' (European Parliamentary Research Service, October 2020), 121, https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654171; Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 173, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.
[317] Ibidem, 12–13.
[318] Martin Trybus, Buying Defence and Security in Europe (Cambridge University Press, 2014), 148.
[319] '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', June 2009, art. 1 paras 1 and 2.
[320] Martin Trybus, Buying Defence and Security in Europe (Cambridge University Press, 2014), 148.
[321] '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', June 2009, 43, art. 3 para 2.

person in any third country".[322] This means that a transfer is considered as such only if it involves Member States, *de facto* taking it away from the controls that it would have if it was considered as a transfer towards a third-country.[323] Article 4 paragraph 1 states that the transfer between MS of defence-related products shall be subject to prior authorization, but no other authorization is needed for transit, which is in contrast with recital 29 that advocates for the gradual replacement of ex-ante control with ex-post controls. However, in paragraph 2 the Directive lists the cases in which prior authorization may not be given: if the recipient or supplier is a governmental body or part of the armed forces, if the supplies are made by the EU, NATO IAEA or other international organization performing its tasks, if the supplies are manufactured by the EU, NATO, IAEA other international organization performing its tasks, if the transfer is necessary for a cooperative armament programme between MS, if it is necessary for maintenance, demonstration, exhibition or maintenance. However, not all MS have transposed these exceptions into their legal system, with 20 MS notifying the Commission of their transposition measures, but with an overall misalignment between Members on which exceptions were implemented.[324] At para 6, MS are asked to also consider, when granting licences, limitations on exports of defence items to legal or individual persons in third countries with regard to the impact of the transfer on human rights, security, peace and stability.

To briefly summarise what we have seen concerning the types of licences laid down in the Directive, it allows for three types of licences: general, global and individual, with the aim at strongly reduce the last ones. A general licence is mandatory if the recipient is part of the armed forces or a contracting authority in the field of defence of a MS, if the recipient is a certified company as per art. 9, or if the transfer is done for demonstration, evaluation, maintenance or repair purposes[325]. If two or more MS have a defence cooperation programme on development they may issue as well a general licence to the Member States parties of the programme. A *global* transfer licence can be granted to a supplier on a case-to case basis for a period of three years. The last kind of licence, the *individual*, is the one that the tries to make the most onerous, since it is the most used among licences. It can be issued when the request is limited to one transfer, when it is necessary on the grounds of public policy or security, when it is needed to comply to international commitments or obligation of MS, and when there is a doubt on the capability of the recipient to comply with all the terms and conditions necessary

[322] Ibidem, art. 3 para 6.
[323] Martin Trybus, Buying Defence and Security in Europe (Cambridge University Press, 2014), 149.
[324] 'REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Transposition of Directive 2009/43/EC Simplifying Terms and Conditions for Transfer of Defence-Related Products within the EU' (2012), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52012DC0359. It should also be noted that in 2016 in the follow up to the Commission's Report, no new MS notified the Commission on new transposition measures.
[325] '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', June 2009, art. 5 para 1, letters a-d.

for a general transfer licence. Letter (b) on security is a way to bypass MS usage of article 346 TFEU, thus derogating from the Directive and keeping the licencing within Internal Market rules.[326] The Directive also sets up the bases for a certification regime for the industry by establishing common criteria for certifying authorities. Article 9 tasks MS to nominate one or more competent authorities for the certification of recipients of defence-related products on their territory for general transfer licences. This certification is created and needed to prove the reliability of the recipient and prove its capacity to respect and observe the export limitations under the transfer licence from another MS. MS must also recognize the certifications of another MS.[327] On July 2011 to help the interpretation of the criteria, the Commission published a Recommendation with the guidelines on certification for national authorities. There is also the Register of Certified Defence-related Enterprises (CERTIDER) available for public consultation, with the list of certified enterprises, the list of general licences issued and the national authorities. Article 10 is concerned with the limitations on exports, which is still a great issue of security for MS, and MS shall ensure that recipient of defence-related products when applying for an export licence for goods received under a transfer licence, must declare to the national competent authority if there are any export limitations attached to the licence from the supplier State. Article 11 puts a last custom control on the goods to be exported and the respect of the necessary formalities, but in the end, MS retain full control over arms exports to third countries. Lastly, at article 16, the Directive requires MS to define penalties for the infringement of the provisions of the Directive, in particular if the information required per art. 8 para 1 are incomplete or false or if a recipient of a transfer licence fails to comply with art. 10.

The Directive has however its limits. The first is article 36 TFEU which states that restrictions on imports or exports can be set up if they are justified on the grounds of "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property".[328] The restriction on security is relevant to the case as the free movement of goods principle can still be circumvented by art. 36 and 346 TFEU, with a limited jurisdiction of the ECJ.[329] A second limit is the already mentioned fact that the directive only applies to intra-community transfers and not to exports to third countries, which still falls under the CFSP. The last

[326] Martin Trybus, Buying Defence and Security in Europe (Cambridge University Press, 2014), 150.
[327] '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', June 2009, 43, art. 9 para 6.
[328] 'Consolidated Version of the Treaty on the Functioning of the European Union', 326 OJ C § (2012), http://data.europa.eu/eli/treaty/tfeu_2012/oj/eng.
[329] Chiara Bonaiuti, 'Convergence around What? : Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Thesis, Newcastle University, 2020), 24-25, http://theses.ncl.ac.uk/jspui/handle/10443/4964.

limit concerns the update of the Annex. The Directive applies only on those goods mentioned in the Annex, which has to be identical to the CML; however, amending the Annex each time the CML is reviewed can take some time and even more time can pass between the amendment and the adoption by MS, leaving a gap where certain licences are issued on old versions of the CML. To try and limit this discrepancy, the Directive has been amended to include the possibility for the Commission to adopt Delegated Acts under art. 290 TFEU and the procedures of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.[330]

We can now ask the question: how effective have the Directive 2009/43 and its implementation been? According to a research paper of the European Parliamentary Research Service, there is not sufficient quantitative data to assess the implementation of the Directive and political accountability.[331] This is due to the differences in national reports which hinders the ability to read and compare data, no clear account of licences used; furthermore, nor national authorities nor enterprises have statistical data stemming from their reporting obligations under the Directive.[332] According to the same report, general transfer licences have not brought the expected results with a limited use and with insufficient scope and attached conditions, while enterprises still lament the Directive inefficacy. Furthermore, MS believe that the implementation of the Directive will lead to a limitation on their export policies. MS make a wide use of the export limitations attached to licences, one most recent example was not long before the Russian invasion of Ukraine, when the German government banned the export of German-made howitzers from Estonia to Ukraine.[333] According to the authors of the research paper, the Europeanization of transfer controls has not been reached yet.[334]

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[330] 'Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 Adapting a Number of Legal Acts Providing for the Use of the Regulatory Procedure with Scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union (Text with EEA Relevance)', 198 OJ L § (2019), http://data.europa.eu/eli/reg/2019/1243/oj/eng.

[331] Jean-Pierre Maulny et al., 'EU Defence Package: Defence Procurement and Intra-Community Transfers Directives' (European Parliamentary Research Service, October 2020), 120, https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654171; Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 173, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.

[332] Ibidem, 120-121.

[333] 'Germany Blocks Estonia from Transferring Weapons to Ukraine', accessed 31 March 2022, https://www.baltictimes.com/germany_blocks_estonia_from_transferring_weapons_to_ukraine/; Michael R. Gordon and Bojan Pancevski, 'Germany Blocks NATO Ally From Transferring Weapons to Ukraine - WSJ', wsj.com, 21 January 2022, https://www.wsj.com/articles/germany-blocks-nato-ally-from-transferring-weapons-to-ukraine-11642790772.

[334] Jean-Pierre Maulny et al., 'EU Defence Package: Defence Procurement and Intra-Community Transfers Directives' (European Parliamentary Research Service, October 2020), 132–133, https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654171; Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 173,

The lack of harmonization entails various levels: the institutional framework differs from State to State, with authorities often being part of different policy domains (circling between foreign affairs, defence or economy), the material scope is also heavily influenced by the different interpretations given to which goods are defence-related or are designed for military purpose, notwithstanding the CML, while the Directive aims at harmonizing licencing between MS, not many transfer general transfer licences have been issued and their used is linked to a MS tradition, MS also have different policies on re-export limitations and, lastly, transparency still seems to be an issue.[335]

In Italy, the Directive has been transposed into the law 185/90 with Legislative Decree 105/2012 and Decree 19/2013 of the Ministry of Foreign Affairs and of the Ministry of Defence; the impact of the Directive on Italian law will be analysed in more detail in the next chapter.

Directive on intra-Community arms Transfers, together with the Defence procurement Directive (Directive 2009/81/EC) constitute the "EU defence package"[336]. The Directive 2009/81 not being on arms transfers, but on defence procurement, will not be object of this study. However, it should be briefly mentioned. It came to be as a mean to improve and facilitate the creation of a European defence market through a cross-border procurement framework.[337] It came after the realization that the previous framework, composed of directives 2004/18/EC and 2004/17/EC, was unfit to regulate the defence market and MS were often too keen on utilizing exceptions provided for in article 346 TFEU to remove directly the contract from the possible scope of the two directives.[338] Notwithstanding the Commission interpretative note, MS applied art. 346 whenever they could, even

https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.

[335] Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 187-189, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.

[336] Ioannides Isabelle, 'EU Defence Package: Defence Procurement and Intra-Community Transfers Directives' (European Parliamentary Research Service, October 2020), 1 https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654171m.

[337] Jay Edwards, 'The EU Defence and Security Procurement Directive: A Step towards Affordability?' (Chatham House London, 2011), 3.

[338]Daniel Fiott, Defence Industrial Cooperation in the European Union: The State, the Firm and Europe (Routledge, 2019), https://ereader.perlego.com/1/book/1376345/15?element_plgo_uid=ch15__12&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

for firemen's T-shirts and equipment[339], and the Court's jurisprudence was too limited to provide the necessary enforcement wished by the Commission.[340]

*2.4. The EU's policy on SALW*

As briefly introduced in the first part of this chapter, the EU has been also active on SALWs. The first document adopted on SALWs was the Joint Action 1999/34/CFSP, which was repealed by the updated Joint Action 2002/589/CFSP, which is a legally binding instrument. The Joint Action aimed at combating the spread and accumulation of small arms together with consensus building on the matter and applies to small arms designed for military use (light and heavy machine-guns, sub-machine guns, fully automatic and semi-automatic rifles…), but also to man or crew-portable light weapons (anti-tank missiles and launchers, MANPADS, grenade launchers, howitzers and mortars less than 100 mm calibre…). Among the tasks to achieve the objectives, the Union should promote States' commitment to supply small arms only to governments, to establish and maintain national inventories of legally-held weapons, as well as establishing national weapons legislation for small arms, penal sanctions and effective administrative controls.[341] In addition to these outreach and assistance activities, the EU should also promote the removal and destruction of small arms surplus reintegration of combatants into civil life, while MS should help the resolution of conflicts through agreements that include "demobilisation, elimination of surplus weapons and their ammunition and integration of ex-combatants".[342] The Joint Action was a step forward towards EU SALW policy due to the fact that it allowed both Council and the Commission to adopt measures to implement it.[343] However, the following measures adopted by the Council did not have a legally binding nature.

On the basis of the Joint Action, the EU has also developed a SALW Strategy. The new strategy was adopted in 2018, substituting the strategy of 2005. The purposes of this new strategy are: "to guide [an] integrated, collective and coordinated European action to prevent and curb the illicit acquisition of SALW and their ammunition by terrorists, criminals and other unauthorised

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339 Ibidem, https://ereader.perlego.com/1/book/1376345/15?element_plgo_uid=ch15__12&utm_medium=share&utm_campaign=share-with-location&utm_source=perlego.

340 Hélène Masson and Kévin Martin, 'The Directive 2009/81/EC on Defence and Security Procurement under Scrutiny', Recherches & Documents, no. 3 (2015): 13–14.

341 'Council Joint Action of 12 July 2002 on the European Union's Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons and Repealing Joint Action 1999/34/CFSP', 191 OJ L § (2002), http://data.europa.eu/eli/joint_action/2002/589/oj/eng.

342 Ibidem.

343 Hans Merket, 'The EU and the Security-Development Nexus: Bridging the Legal Divide', *European Foreign Affairs Review* 18, no. 4 (2013): 98.

actors, and to promote accountability and responsibility with regard to the legal arms trade".[344] The action at EU level for tackling firearms, small arms and light weapons have been numerous over the years, and some concern SALWs and have been adopted by the Council under the CFSP (like the overmentioned CP, the Directive 2009/43/EC or arm embargoes), others have been adopted by the Commission to regulate firearms in possess of civilians (like the Directive 91/477/EEC on control of the acquisition and possession of weapons or Regulation 258/2012 implementing Article 10 of the UN Firearms Protocol). However, given the fact that the difference between firearms and SALWs is cloudy and debated, and that either can find their way in terrorists or criminal hands, the 2018 Strategy addresses both kinds.[345] The new Strategy draws from the experience and criticism accumulated over the years and from analyses carried out by Member States. The Strategy is grounded on a Joint Communication to the European Parliament and the Council by the European Commission and the High Representative of the Union for Foreign and Security Policy, which is itself based on another Council document produced by an ad hoc SALW Strategy Task Force.[346] The strategy follows four main guiding principles: strengthening the normative framework, implementation of norms in different life cycle phases of firearms/SALW, compliance through monitoring and enforcement, and lastly international cooperation and assistance.

In the section dedicated to strengthening the normative framework we find the main international documents on SALWs, firearms and arms exports. The UN Programme of Action on SALW and International Tracing Instrument are the first mentioned, with the aim of fully implementing at all levels both instruments, with a focus on regional cooperation and support (which translate, among the others, into collection and destruction of surplus SALW, stockpile management and capacity development for marking, trancing and record keeping). The UN Firearms Protocol is also recalled as well as the ATT, which the EU strongly supported[347], with a focus on the support for its implementation to be carried out by the EU.

The part on implementation of norms in different life cycle phases of firearms/SALW addresses firearms and SALWs in their full life cycle: from manufacture and export to storage and disposal. For the manufacturing the issue of modular design and the need for an update of the ITI is addressed as well as marking. The EU in this sector should focus on addressing the illicit

[344] General Secretariat of the Council, 'Council Conclusions on the Adoption of an EU Strategy Against Illicit Firearms, Small Arms & Light Weapons and Their Ammunition', *Europa.Eu*, 2018, https://data.consilium.europa.eu/doc/document/ST-13581-2018-INIT/en/pdf, 4.
[345] Nils Duquet, 'The 2018 EU SALW Strategy: Towards an Integrated and Comprehensive Approach', *Non-Proliferation and Disarmament Paper*, no. 62 (April 2019), 2.
[346] Ibidem, 6.
[347] Sara Depauw, The European Union's Involvement in Negotiating an Arms Trade Treaty (EU Non-Proliferation Consortium, 2012), 14.

manufacturing and 3D printing of components and the thorough record-keeping of licit firearms. The focus for the export is on diversion and how to avoid it by enhancing tracing capabilities, with direct reference to CP 2008/944/CFSP and Regulation 258/2012. For supporting proper procedure for stockpiling, thus avoiding further diversion the EU aims at strengthening its support to third countries in their management efforts and supporting more effective national legislative and administrative frameworks. Lastly, on disposal it is remembered that the Commission has adopted common guidelines on deactivation standards.

The compliance through monitoring and enforcement focuses on the actions taken with Europol and Frontex, with informational support also from the EU Intelligence and Situation Centre (EU-INTCEN) and training provided to Member States' law enforcement officials by the EU Agency for Law Enforcement Training (CEPOL).

Lastly, for international cooperation and assistance the Strategy lists both international and regional activities with the involvement of the UN Office on Drugs and Crime (UNODC) and its firearms programme, the continuous support to the Interpol's Illicit Arms Records and tracing Management and cooperation with the World Customs Organisation (WCO) for the implementation of the Strategy. This last section also has a focus on the so called "Eastern neighbourhood" with a focus on Ukraine and the spread and proliferation of illicit firearms and SALWs on its territory. The EU recognized the impact that such proliferation might have if such weapons were to find their way into the EU while also recognizing that it is an issue for Ukraine itself. The actions to be taken in order to tackle the problem were: identify contact points for cooperation and awareness, sharing expertise and the creation of a permanent technical roundtable. On Ukraine, it should be mentioned that the EU has recently approved the employment of the off-budget instrument "European Peace Facility" to fund the purchase and delivery of military equipment to the recently attacked country. The European Peace Facility is an off-budget funding mechanism for EU actions which involve military and defence implications under the CFSP, with a total budget of €5.69 billion. It should also be noted that the Treaties ban the usage of the standard budget for financing military operations.[348] For supporting the Ukrainian effort, €450 million will be used for supplying lethal weapons and other €50 million will be for non-lethal supplies.[349] As Von der Leyen noted, it is a huge shift in EU

[348] Maïa de La Baume and Jacopo Barigazzi, 'EU Agrees to Give €500M in Arms, Aid to Ukrainian Military in `watershed' Move', *POLITICO*, February 2022, https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid/.

[349] Reuters, 'EU Tightens Russian Sanctions and Buys Weapons for Ukraine', *Reuters*, February 2022.

policy[350], and opens the possibility to a much wider margin for EU intervention in security and military matters.

As a last point, it should be noted that the EU has recently adopted the Directive 2021/555 on the regulation of firearms, and which does not apply to acquisition made by armed forces, the police or the public authorities, nor to transfers regulated under Directive 2009/43/EC.

*2.5. The Arms Trade Treaty impact on EU legal framework*

The EU has supported the development of an arms trade treaty since 2005, however the only forum that could achieve such result was the UN, and the EU aimed at playing an "active role" in developing such instrument.[351] To support the discussion for the ATT, the EU presented its framework on arms transfers, while EU Member States also participated in the Group of Governmental Experts.[352] The Council even created a sub-group on the ATT together with Working Party on Global Disarmament and Arms Controls (CODUN) and the COARM,[353] allowing for the convergence of MSs' positions. However, during negotiations for the ATT various MS adopted different positions on: firearms, import, transit control. This culminated in the adoption of a Council conclusion on the ATT supporting the success of the ATT's negotiation, the inclusion of SALW, munitions, technology as well as the coverage of brokering; the Council also supported the respect of HR and IHL.[354] However, the adoption of a conclusion and not of a Council Decision of CFSP means that there was no sufficient agreement to adopt a more significant act on the matter. It should also be noted that EU effectiveness in the ATT negotiations was mixed: it was successful in including human security, and the scope, however the leadership capacity to involve third countries into accepting or discussing positively its proposals was unsuccessful nor was the EU fully successful in organizing MS positions which lead to tensions concerning legal competences between the Council and the Commission.[355] For what concerns the direct impact of the ATT on the EU legal framework for arms transfers, there has not

[350] Maïa de La Baume and Jacopo Barigazzi, 'EU Agrees to Give €500M in Arms, Aid to Ukrainian Military in `watershed' Move', POLITICO, February 2022, https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid/.

[351] Council of the European Union, '2678th Council Meeting General Affairs and External Relations General Affairs', *European Commission - European Commission*, October 2005, https://ec.europa.eu/commission/presscorner/detail/en/PRES_05_241.

[352] Sara Depauw, The European Union's Involvement in Negotiating an Arms Trade Treaty (EU Non-Proliferation Consortium, 2012), 4.

[353] Ibidem.

[354] Council of the European Union, '3179th Council Meeting Foreign Affairs, 11688/12', *Europa.Eu*, June 2012, 20–21, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131188.pdf.

[355] Iulian Romanyshyn, 'Explaining EU Effectiveness in Multilateral Institutions: The Case of the Arms Trade Treaty Negotiations', *JCMS: Journal of Common Market Studies* 53, no. 4 (2015): 880–85, https://doi.org/10.1111/jcms.12236.

been much impact, besides the Treaty being an addition to the European framework[356], the development of an internal policy on arms transfers aided the EU in trying to achieve its goals to fit into the ATT strong export criteria and a broader scope for the Treaty.[357] The CP, as we have seen, has been modified to include the ATT in its criteria (criterion one), and the User's Guide recalls the ATT to clarify their interpretation.

The major impact that the ATT had on the EU concerns the role of the Union in its assistance to the Treaty and its implementation. So far, the EU has moved through outreach and assistance projects and efforts. Outreach consists of informing States on practices, principles and standards on arms transfers and promoting their adoption; this can also be done through workshops, study visits and consultations.[358] Assistance involves direct help in helping States in implementation of the practices, principles and procedures on arms transfers, which can involve: assistance in regulation drafting, promotion of inter-agency cooperation etc.[359] The EU has started funding several projects to support the ATT implementation and outreach. However, before activities concerning the ATT, the EU was also working on projects concerning SALWs and dual-use items transfers.[360] The first project to support the ATT started in 2013, with the objective to support States to strengthen their arms transfer control capabilities and ATT implementation and increase awareness through assistance in drafting, updating, and implementing legislative and administrative instruments, as well as promoting transparency in arms transfers and increase expertise on the subject.[361] The whole process is done with the support of the German Federal Office of Economics and Export Control (BAFA). The project has been renewed in 2017 with the involvement of Expertise France[362] and has recently been updated for the third time.[363] Lastly, on April 2021 the Council adopted a decision to support the ATT Secretariat on the implementation of the ATT, in which the High Representative is responsible for the strengthening of the institutional set-up of the ATT Secretariat and supporting "States Parties to the ATT in strengthening their arms transfer control systems for the effective implementation of the

[356] Giovanna Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen', *The International Spectator* 56, no. 1 (2021): 78.
[357] Iulian Romanyshyn, 'Explaining EU Effectiveness in Multilateral Institutions: The Case of the Arms Trade Treaty Negotiations', JCMS: Journal of Common Market Studies 53, no. 4 (2015): 880, https://doi.org/10.1111/jcms.12236.
[358] Mark Bromley and Paul Holtom, Arms Trade Treaty Assistance: Identifying a Role for the European Union (EU Non-Proliferation Consortium, 2014), 5.
[359] Ibidem.
[360] Ibidem, 9-10.
[361] 'Council Decision 2013/768/CFSP of 16 December 2013 on EU Activities in Support of the Implementation of the Arms Trade Treaty, in the Framework of the European Security Strategy', 341 OJ L § (2013), http://data.europa.eu/eli/dec/2013/768/oj/eng.
[362] 'Council Decision (CFSP) 2017/915 of 29 May 2017 on Union Outreach Activities in Support of the Implementation of the Arms Trade Treaty', 139 OJ L § (2017), http://data.europa.eu/eli/dec/2017/915/oj/eng.
[363] 'Council Decision (CFSP) 2021/2309 of 22 December 2021 on Union Outreach Activities in Support of the Implementation of the Arms Trade Treaty', 461 OJ L § (2021), 23, http://data.europa.eu/eli/dec/2021/2309/oj/eng.

ATT".[364] The budget for the project is €1.3 million and the project involves the strengthening and setting up of national points of contacts, training and rationalization of Treaty assistance programs to avoid overlaps.[365] Notwithstanding the ATT and the Common Position, MS still retain much discretion on arms transfers and implementation of those two instruments, which results different practices and controversial arms transfers[366], much like has happened in Libya and Saudi Arabia.[367] Insofar, no instrument has proved to be fully effective in tackling the issue.

Furthermore, it should be noted that the CP 2008/944/CSFP implements the ATT, meaning that the when assessing arms exports, the assessment should be carried out in an objective and non-discriminatory manner (with all the issues this entails being without definition). This concept is not however present in the rest of EU regulation on arms transfers. Although, one might argue that, given the rules of the treaties, the creation of an Internal Market "including the abolition between Member States of obstacles to the free movement of goods and services, and for the institution of a system ensuring that competition in the internal market is not distorted"[368] the non-discrimination and objective assessment are still respected.

On the other hand, an issue that remains to be resolved is the how the CP has to be interpreted vis-à-vis the ATT. The Treaty at article 7 states that an authorization to export shall not be given if there is an "overriding risk"[369] that, among others, the transferred items could "commit or facilitate a serious violation of international human rights law".[370] On the other hand, the CP with the second criterion, at art. 2 comma 2 letter b, states that MS shall "exercise special caution and vigilance in issuing licences […] 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", meaning that there is no direct ban for arms transfers issued towards those countries committing certified serious violations of HR, leaving to MS ample discretion when authorizing arms transfer.

[364] 'Council Decision (CFSP) 2021/649 of 16 April 2021 on Union Support for Activities of the ATT Secretariat in Support of the Implementation of the Arms Trade Treaty', 133 OJ L § (2021), http://data.europa.eu/eli/dec/2021/649/oj/eng.
[365] 'Arms Trade Treaty: EU Steps up Support in Fight against Illicit Arms Trade', accessed 25 March 2022, https://www.consilium.europa.eu/en/press/press-releases/2021/04/16/arms-trade-treaty-eu-steps-up-support-in-fight-against-illicit-arms-trade/.
[366] Giovanna Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen', The International Spectator 56, no. 1 (2021): 78.
[367] Nils Duquet, 'Business as Usual? Assessing the Impact of the Arab Spring on European Arms Export Control Policies' (Brussels: Flemish Peace Institute, March 2014), 72-74, https://vlaamsvredesinstituut.eu/en/report/business-as-usual/.
[368] Recital 1 of the Directive 2009/43/EC.
[369] Art. 7 comma 3 of the ATT.
[370] Art. 7 comma 1 letter (ii) of the ATT.

# Chapter III – Italian arms transfers: domestic regulation and practice

## *3.1. Italian Regulation on Arms Trade*

In the period 2016-2020, Italy ranks tenth in the list of the top twenty-five largest exporters of major arms redacted by SIPRI, and ranks fifth among European arms exporters, with its main clients being Turkey, Egypt and Pakistan,[371] reaching €4,647 billion in 2020.[372] Furthermore, Italian arms exports in the period 2015-2019 amounted to 45 percent of all arms exports since the adoption of the Law 185/90 in July 1990.[373] In line with SIPRI's founding, it should also be noted that, over the last thirty years, more than 50 percent of Italian exports have been towards non-EU, non-NATO and non-OSCE countries. These data concern the export of military items; however, it should be noted that Italy is also a major exporter of SALWs, in 2015 (period for which there is the last available data) Italy ranked second in worldwide SALWs commerce.[374] Contrary to what happens with military items and the 185/90 law, in Italy does not exist a "twin" law specifically designed to regulate SALW trade. The current Italian framework on SALW can be identified with the law 110/75 "Rules supplementing existing rules on the control of arms, ammunition and explosives", and the Consolidated Text of the Laws of Public Security (TULPS) which concerns private ownership of firearms. These two however lack the capacity to build a framework similar to the one of the 185/90, lack definitions in line with international and European standards, lack the capacity to restrain arms producers from selling these weapons regardless of their end-use or end-user.[375] At the same time however, according to art. 2 paragraph 2 letter b, the Law 185/90 regulates certain SALWs like "automatic firearms and their ammunition", which are specified in the list of military goods established by the Ministry of Defence in agreement with the Ministries of Foreign Affairs, of the Interior, of the Economy and Finance and of Economic Development with reference to the Common Military List of the European Union (art. 2 paragraph 3). This list includes "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" like: rifles and combination guns, handguns, machine, sub-machine and volley guns, smooth-bore

[371] Pieter D. Wezeman, Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, 2020', *Sipri.Org*, March 2021, https://doi.org/10.55163/CBZJ9986, 2.
[372] 'Export italiano di armamenti nel 2020' (Roma: Istituto di Ricerche Internazionali ARCHIVIO DISARMO, 24 May 2021), 1, https://www.archiviodisarmo.it/view/9uYPmHIMSDCnXNlWQJNAeuWSo00PmZjc17U9EqZGtjM/analisi-iriad-relazione-export-2020.pdf.
[373] Francesco Vignarca, Giorgio Beretta, and Maurizio Simoncelli, '30 anni della Legge 185/90 sull'export militare: dati ed analisi di tre decenni di vendita di armi italiane' (a Rete Italiana per il Disarmo e Rete della Pace, 9 September 2020), 7, https://www.disarmo.org/rete/docs/5346.pdf.
[374] Alessandro Ricci, 'Armi Leggere, Guerre Pesanti', IRIAD Review (Istituto di Ricerche Internazionali ARCHIVIO DISARMO, 2021), 105, https://www.archiviodisarmo.it/view/hew4RJtuTcKE7Q6v-VTcRZUX7LlKtvEhs1_mPUJf_wc/iriad-review-settembre-2021.pdf.
[375] Ibidem, 97-102.

weapons specially designed for military use, fully automatic type weapons and semi-automatic or pump-action type weapons.[376]

The chapter will focus on Italy as an arms exporter, its legislation and its conduct in the arms trade. The focus will first be on the Constitution, specifically article 11, which states that Italy rejects war as a mean to solve international disputes as well as mean to limit other peoples' freedom, and how this article relates to arms transfers. Then an analysis of Italian law 185/90 on arms transfers will be carried out together with its National Authority for the authorization of arms transfers (UAMA, Unit for the Authorizations of Armament Materials), then I will focus on the effects that European regulations on arms transfers had on Italian law and Italian exports. Lastly, I will provide some cases in which Italy transferred weapons to countries, which are not fully compliant with IHL and HRL, European law and its own regulations.

### *3.1.1. Article 11 of the Italian Constitution*

Before analysing the Italian regulation on arms transfers, it could be helpful to assess how the use of violence and war are placed within the constitutional framework and what is the debate around that. While the Constitution does not mention in any way arms transfers, it could also be helpful to try assessing if and how, from a general rejection of war could stem interpretative restrictions on arms transfer.

Article 11 of the Italian Constitution, part of fundamental principles, clearly states that "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends".[377] The article allows Italy to use war as a mean of self-defence, but not as a mean of politics. The reasons behind it are entrenched in the beliefs of what the members of the Constitutional Assembly had witnessed and lived during Mussolini's dictatorship and during the second world war. This refusal of war however, does not mean a full neutrality, and according to some doctrine it might allow for certain kind of wars or international conflicts.[378] Furthermore, the article is worded in a way that excludes

[376] Common Military list of the European Union adopted by the Council on 21 February 2022 (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment) (updating and replacing the Common Military List of the European Union adopted by the Council on 17 February 2020 (OJ C 85, 13.3.2020, 1.)) (CFSP) 2022/C 100/03 (1 March 2022).

[377] Translation provided by the Italian Senate, retrievable at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

[378] Cartabia, M. Commento all'art. 11. in Raffaele Bifulco, Alfonso Celotto, and Marco Olivetti (a cura di), *Commentario alla Costituzione*, vol. 1, Book, Whole (Torino: UTET giuridica, 2006), sec. Art. 11, p 270–278; Giuseppe De Vergottini,

full neutrality of the country, meaning that, in theory, Italy takes part to international military operations that do not limit the freedom of other peoples but that promote peace and justice, like the UN peacekeeping missions for example. This can be derived by the will of the Constitutional Assembly not to opt for full neutrality and instead lean towards the collective defensive system within the UN Charter, and has been proved by Italian participation to various peacekeeping operations over the years, like: the United Nations Operation in Congo (UNC) in 1960, UNOSOM II in 1992 (which was also a turning point for Italian participation to UN-sponsored operations, followed by UNMIK in 1999, and more recently the MINUSMA in 2013.[379] The Constitution stays silent on whether or not Italy can take part to international missions that may require, at a certain point, the use of violence, but this issue has been solved thorough parliamentary and government praxis.[380] Italian participation to armed conflicts can be divided in two categories[381]: collective action with the Security Council (SC) authorization and collective action without the Security Council authorization. The first category involves a collective action to restore peace and that the SC has deemed the situation a threat to peace and security and has decided to intervene against an aggressor.[382] Within such category falls the first Gulf war and, at the time, the vote of the Parliament was requested; the same can be said for the Libyan intervention in 2011. The second category includes the Italian intervention in Kosovo in 1999, in which the Parliament was not involved, and was informed of the participation only after the operations had begun.[383] Furthermore, it should be noted that the concept of war, as outlined in the Constitution is, to some extent, limited when compared to its evolution in International Law, which now allows for a wider range of conflicts, nomenclature, definitions, different levels of intensity and different actors. Among these we find the "war on terror", "humanitarian war", "international armed conflict" and "serious international crisis".[384] The "war on terror", as theorized by the United States,

'Guerra e attuazione della Costituzione' (Guerra e Costituzione, Roma: Associazione Italiana dei Costituzionalisti, 2002), 60–62.

[379] Giuseppe De Vergottini, 'Guerra, difesa e sicurezza nella Costituzione e nella prassi', *Rivista dell'associazione italiana costituzionalisti*, no. 2/2017 (4 April 2017): 4; Giulia Tercovich, 'Italy and UN Peacekeeping: Constant Transformation', *International Peacekeeping* 23, no. 5 (19 October 2016): 681–85, https://doi.org/10.1080/13533312.2016.1235094.

[380] Giuseppe De Vergottini, 'Guerra e attuazione della Costituzione' (Guerra e Costituzione, Roma: Associazione Italiana dei Costituzionalisti, 2002), 63. Giuseppe De Vergottini, 'Guerra, difesa e sicurezza nella Costituzione e nella prassi', Rivista dell'associazione italiana costituzionalisti, no. 2/2017 (4 April 2017): 2.

[381] Actions with the authorization of the interested State can be seen as negligible in the case at hand, given the fact that this kind of operations foresee Italy's individual participation, the consensual nature of the action and the absence of the use of force. For more see: Lippolis V., La crisi del Golfo persico in Parlamento: le problematiche della guerra e le missioni militari all'estero, in Giurisprudenza Costituzionale, vol. 42 fasc. 2 (1991), 1728.

[382] Paolo Viafora, 'L'Italia in guerra? Prassi e problematiche costituzionali del coinvolgimento italiano nei conflitti armati' (Roma, Luiss Guido Carli, 2021), 98, https://tesi.luiss.it/id/eprint/30088.

[383] Ibidem, 127.

[384] The latter has found its way into Italian law through Law n. 331 of 14 November 2000 concerning norms for the establishment of professional military service; while Law n. 15 of 25 February 2002 defined what an armed conflict is. However, no instrument defines how a serious international crisis should be identified or declared.

inherently bears a two-sided connotation: the first of "preventive war", given the fact that a State has to consider future potential attacks and wars coming from different foreign countries, and the second as a "just war).[385] The war on terror then becomes a particular kind of war, one that is continuous, with an unspecified or to be identified enemy, and is carried out on a global scale. While the intervention in Afghanistan answered a collective self-defence need,[386] and while the moral justification behind the war on terror is commendable, accepting the idea that any State might use the concept of the "war on terror" and attack with a "preventive war" another country is unacceptable, and, in contrast with art. 11 of the Constitution given the fact that it would amount to aggression. [387]

Leaving aside the American war on terror, which has not been endorsed by Italy, nor the doctrine, it should be noted that the concept of humanitarian war bears a connotation linked to aggressive war, which oversteps the principle of non-intervention in internal affairs and it has been accepted by Italy.[388] How does this reject of war as an instrument links with arms transfers? An immediate interpretation could be in line with what has been said in the first chapter concerning self-defence, meaning that Italy can supply weapons to those countries that are defending themselves from an aggression and are exercising their right to self-defence, but cannot supply weapons to the aggressor or in an indiscriminate way[389] -with the most recent case the transfers, free of charge, given to Ukraine to fight against the Russian aggression. Furthermore, given the wide interpretation of the term "war" the doctrine has tried to find what can be identified or linked to such term, and according to some,

[385] Giuseppe De Vergottini, 'Guerra e attuazione della Costituzione' (Guerra e Costituzione, Roma: Associazione Italiana dei Costituzionalisti, 2002), 2.

[386] Paolo Viafora, 'L'Italia in guerra? Prassi e problematiche costituzionali del coinvolgimento italiano nei conflitti armati' (Roma, Luiss Guido Carli, 2021), 134, https://tesi.luiss.it/id/eprint/30088.

[387] The concept of "preventive war" is linked with the interpretation of art. 51 of the UN Charter, where two kinds of interpretations can be given: a restrictive one, based on the wording which states that without an armed attack, self-defence cannot be exercised, while the expansive theory includes the anticipatory attack, under certain circumstances. These circumstances include "necessity", "proportionality" and "immediacy". However, Ago notes that the three requirements are already within the concept of self-defence and do not entail a particular right to "preventive self-defence". Given this assumption, a preventive strike or attack would inevitably amount to aggression, thus being in contrast with art. 11 of the Constitution. However, it is not within the scope of this dissertation to dwell deeper into the matter. For more on the subject see: Giuseppe de Vergottini, Guerra e Costituzione, in "Quaderni costituzionali, Rivista italiana di diritto costituzionale" 1/2002, 19-34, doi: 10.1439/4913, Costituzione e guerre di globalizzazione. Interpretazione evolutiva o violazione dell'art.11 Costituzione?, in [Questione giustizia: bimestrale promosso ua Magistratura Democratica. Fascicolo 1, 2003] [Milano: Franco Angeli, 2003.] - Permalink: http://digital.casalini.it/10.1400/65977; Leo Van den hole, "Anticipatory Self-Defence under International Law," American University International Law Review 19, no. 1 (2003): 69-106.

[388] Giuseppe De Vergottini, 'Guerra e attuazione della Costituzione' (Guerra e Costituzione, Roma: Associazione Italiana dei Costituzionalisti, 2002), 60; Giuseppe De Vergottini, 'Guerra, difesa e sicurezza nella Costituzione e nella prassi', Rivista dell'associazione italiana costituzionalisti, no. 2/2017 (4 April 2017): 16.

[389] Lorenzo Chieffi, Il valore costituzionale della pace: tra decisioni dell'apparato e partecipazione popolare (Liguori, 1990), 194.

those actions that are not directly linked to the self-defence may amount to an indirect support to a war.[390]

The second part of article 11 states that Italy accepts limitations on its sovereignty deemed be necessary to ensure peace and justice among the Nations. Some have interpreted it as a way to expand the sources that limit Italian sovereignty in order to include military defence treaties, which would legitimise different kinds of wars beside the general rejection of war stated in the first part of the article.[391] Others, like Cartabia and De Vergottini, believe that this part of the article allows Italy to participate in actions that support the collective defence based on art. 51 of the UN Charter which must, however, be balanced with the rule in the first part of art. 11.[392]

Article 11 is not the only limit that can be considered when assessing international arms transfers. States can sign international agreements on defence cooperation. Given the intrinsic political nature of such agreements and the fact that they often entail the import/export of military items they also have a financial aspect to them. Therefore, these treaties should be adopted following art. 80 of the Constitution, which states "Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation".[393] This creates a parliamentary supervision on these treaty and the subsequent transfers that result from them, furthermore, with law n. 839 of 11 December 1984, all treaties must be published and publicly available. However, as Ronzitti notes, the compliance of such agreements with art. 11 of the constitution should be assessed both prior the ratification and with keeping in mind the effects of the treaty after it comes into force.[394]

Having assessed the constitutional framework on war and its interpretations and how these interpretations can impact on arms transfers, we can now move on, focusing on Italian legislation on arms transfers.

### *3.1.2. Law 185/90 and its amendments*

[390] Ibidem, 137; Cartabia, M. Commento all'art. 11. in Raffaele Bifulco, Alfonso Celotto, and Marco Olivetti (a cura di), *Commentario alla Costituzione*, Book, Whole (Torino: UTET giuridica, 2006), 267.

[391] Mario Dogliani, 'Il valore costituzionale della Pace e il divieto della Guerra' (Guerra e Costituzione, Roma: Associazione Italiana dei Costituzionalisti, 2002), 5–6, https://files.studiperlapace.it/spp_zfiles/docs/20060811163101.pdf.

[392] Cartabia, M Commento all'art. 11, in Raffaele Bifulco, Alfonso Celotto, and Marco Olivetti (a cura di), *Commentario alla Costituzione*, vol. 1, Book, Whole (Torino: UTET giuridica, 2006); Giuseppe De Vergottini, 'Guerra, difesa e sicurezza nella Costituzione e nella prassi', *Rivista dell'associazione italiana costituzionalisti*, no. 2/2017 (4 April 2017): 4–5.

[393] Translation provided by the Italian Senate, retrievable at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

[394] Natalino Ronzitti, 'Le basi americane in Italia: problemi aperti', *IAI Istituto Affari Internazionali*, Approfondimenti, no. 70 (June 2007): 6.

Before analysing the Law 185/90 itself, it could be useful to explain how it came to be and what was the normative framework before it. The regime for arms transfers previous the Law 185/90 was regulated by a fragmented framework and ministerial decrees used to solve short-term issues. During the Cold War period the main reference was the Royal Decree 635/1940 which was the first text to introduce transfer licences and gave effect to the Consolidated Text of the Laws of Public Safety (Testo Unico delle leggi di pubblica sicurezza, TULPS in Italian). The Royal Decree was the first text that required the need of an authorization from the Ministry of the Interior for arms transfers, and in particular cases the intervention of the Interministerial Committee with the involvement of the Foreign Affairs Ministry.[395] A following Royal Decree established the secrecy of the whole process.[396] For a long time, even after the fall of the authoritarian regime and the establishment of the Republic, the process remained unchanged, and the secrecy level established by the Royal Decree was transformed after 1949, into NATO secret.[397] Some norms on civilian weapons were made in 1967 and 1975. In this year the Interministerial Decree of 20 march 1975 n. 5044 established a Committee on Matters relating to the Export of Certain Specific Materials and Products, where officials of different ministries had to give a unanimous opinion on the export of certain military products to certain countries, and they did so by following some parameters based on the type of weapons, the democratic reliability of the country in order to approve or deny the transfer licence.[398] Later, a Ministerial Decree was issued on arms transfer, which requires the evaluation of the transfer with a regard to the economic, political and national security implications of the transfer as well as the end-use of the materials.[399] The Decree also required the exporter to list the recipient, the voyage stages and the carrier of the goods, as well as provide proof of the delivery to the recipient. This was done to avoid the issue of final destination which was a recurrent problem at the time, with weapons ending into different recipients than those authorized.[400] The whole process was still subjected to secrecy and there was no parliamentary control over it. At the same time, during the period 1970 to 1985, Italian arms exports grew while at the same time numerous scandals began to rise, with the most popular cases being the Loockheed scandal which culminated with the resignation of at the time President of the Republic Giovanni Leone, the bypassing of UN embargo on South Africa by Aermacchi in 1989 and the scandal involving the Banca Nazionale del Lavoro (BNL) and arms exports to Saddam

[395] Fabio Sparagna, 'Dal secondo dopoguerra all'approvazione della legge', *IRIAD Review*, June 2020, 9.
[396] Royal Decree 11 July 1941 n. 1161.
[397] Fabio Sparagna, 'Dal secondo dopoguerra all'approvazione della legge', IRIAD Review, June 2020, 9.
[398] Lorenzo Chieffi, Il valore costituzionale della pace: tra decisioni dell'apparato e partecipazione popolare (Liguori, 1990), 140-141.
[399] Art. 4 of the DM 4 December 1986 "Disciplina relativa al rilascio delle autorizzazioni all'esportazione e al transito di materiale di armamento".
[400] Lorenzo Chieffi, Il valore costituzionale della pace: tra decisioni dell'apparato e partecipazione popolare (Liguori, 1990), 142.

Hussein in Iraq.[401] Furthermore, at the time the industry was heavily plagued by bribes, lack of transparency, lobbying and the existence of an informal market for weapons.[402] Ultimately, Italian arms export began to fall and the space for normative intervention opened together with the increasingly growing pacifist movements both at a global and national levels.[403] This culminated with the adoption of Law 9 July 1990 n. 185 which aims rationalize procedures, criteria and criminal sanctions for arms transfers.

The Law has been amended several times. One of the first major changes were adopted after the lengthy process that first created the Organisation for Joint Armament Cooperation (OCCAR), which then led to a Letter of Intent between Italy, Spain, United Kingdom, France and Sweden for the creation of a cooperative framework to facilitate the restructuring of European defence industry and to amend national regulation to provide a more effective security of supply, export provisions, research and harmonization of military requirements. This Letter of Intent was then followed by the "Framework Agreement concerning measures to Facilitate the Restructuring and Operation of the European Defence Industry" signed at Farnborough on 27 July 2000, which involved a section on export procedures for cooperative armament programmes. These allowed for a Global Project Licence which removed the need for specific authorization for the transfer of the defence materials towards those countries included in the licence.[404] The point of the agreement was to simplify the procedures and administrative burdens and accelerate the times of production. Furthermore, the Global Project Licence applied also to the finished products, not only parts and components. This kind of licence can apply to co-productions either through the ratification of the Framework Agreement and preceded by an intergovernmental agreement, or through a mere arrangement (which would escape parliamentary control as per art. 80 of the Constitution).[405] The agreement also reduces drastically the need for controls, as per art. 16 para 2, which foresees a limited request for end-user certificates. This Framework Agreement was integrated into the Law 185/90 with the Law 17 June 2003, n. 148. Other

[401] 'I CATTOLICI CONTRO I MERCANTI DI MORTE "L" ITALIA VENDE AEREI AL SUDAF - la Repubblica.it', Archivio - la Repubblica.it, accessed 14 April 2022, https://ricerca.repubblica.it/repubblica/archivio/repubblica/1988/03/11/cattolici-contro-mercanti-di-morte.html; 'LA STORIA INFINITA DELLO SCANDALO PER PAGARE LE ARMI DI SADDAM - la Repubblica.it', Archivio - la Repubblica.it, accessed 14 April 2022, https://ricerca.repubblica.it/repubblica/archivio/repubblica/1991/07/28/la-storia-infinita-dello-scandalo-per-pagare.html.

[402] Maurizio Simoncelli, 'Armi, Affari, Tangenti', *Ascesa e Declino Dell'industria Militare Italiana Tra Il 1970 e Il 1993*, 1994.

[403] Fabio Sparagna, 'Dal secondo dopoguerra all'approvazione della legge', IRIAD Review, June 2020, 14–20.

[404] Carlo Pezzoli, 'La legislazione italiana sul controllo delle esportazioni di armi', *Centro Studi per La Pace*, 2006, 17.

[405] Ibidem.

two amendments were made, one in 2010 to modify the law according to the Codice dell'ordine militare, and the other in 2012 for the transposition of EU Directive 2009/43.[406]

*3.1.2.1. Contents and scope*

Before starting it should be reminded that the Law 185/90 does not apply to firearms, defined as those weapons used for self-defence, hunting or games or any other kind of weapons as per art. 2 of the Law 18 April 1975 n. 110.

Article 1 lays out the principles and a list of prohibitions and limitations to arms exports. The principles on which the law is based are: the respect of the Italian Constitution and its reject of war as a mean to solve international disputes, the compliance with Italian foreign and defence policies, State authorisations and controls on export, import, transit, intra-Community transfer, intermediation of military equipment as well as the transfer of production licences and the relocation of production, the gradual differentiation of production and the conversion of defence industries for civilian purposes, and lastly the operations involving military products can be carried out only with foreign governments or with companies authorised by the government of the country of destination (with a different regime for Intra-Community transfers). These principles allow for a shift from the economic perspective of the previous regime, to a foreign and defence perspective, with an emphasis on State control on the matter (both the Italian government and the recipient one). Furthermore, it recalls art. 11 of the Constitution, meaning that any transfer should be done considering both foreign and defence policy vis-à-vis the constitutional reject of war and its pacifistic nature. The article then proceeds listing the prohibitions. The fifth paragraph gives a general overview stating that an arms transfer is prohibited if it is against the Constitution, international agreements on non-proliferation, State's security, war on terror and if they are against the good relations with other States or if there are insufficient guarantees on the final destination of the military goods. Paragraph 6 provides a more detailed list on such prohibitions: the first being the prohibition to export arms towards countries at war in breach of art. 51 of the UN Charter, which should however be read as a prohibition to export arms towards aggressors, in line with what we have seen in chapter one. However, the norm allows for an exception, with the Council of Ministers to able to adopt measures to supply weapons to aggressor with the consultation of the Parliament. If the case were to present itself, the supply of weapons to an aggressor will be in contrast of both article 11 of the Constitution and article 51 of the UN Charter and international law and with the law itself. At letter c) there is the prohibition to export to those countries under UN, EU or OSCE embargoes. While this rule can be read in a restrictive

[406] How the Directive has been transposed into the Law and its effects will be discussed later in this chapter.

way, needing the existence of an explicit embargo declared by one of these institutions, the letter d), that prohibits arms transfers to States that violate human rights can be interpreted in a way that it is needed only the verification from the UN, EU or Council of Europe, with no mention on the nature of the act (binding or non-binding). Although, it should be noted that the interpretation of the criteria was left to the Interministerial Committee for the Exchange of Defence Equipment (CISD)[407], which had a great influence on their application.[408] At paragraph 7 the prohibition to produce and transfer (both import and export) biological, nuclear and chemical weapons is introduced, as well as the prohibition to sell and produce anti-personnel mines and cluster munitions with a link to the Ottawa Convention (discussed in the first chapter) adopted in 1997 and the Oslo Convention, adopted in 2008 Paragraph 8 heavily restricts imports, allowing only for some exceptions like: purchases made by the Government or if done by registered enterprises under art. 3 of the Law and with the authorization required by art. 13. The ninth paragraph on the other hand outlines the exemptions which are: a) temporary exports, for national military programme, and, at letter b), State-to-State or infra-Community exports for providing military assistance according to international agreements. This latter norm is one that could be used to for the arms transfers done in favour of Ukraine. Paragraph 11 specifies what we already mentioned: that the Law 185/90 does not apply to those weapons used for self-defence, hunting or games or any other kind of weapons as per art. 2 of the Law 18 April 1975 n. 110.

Article 2 defines what are considered military goods. Military goods therefore are those goods that for technical-constructive or design requirements or characteristics, are considered to be built for a prevalent military or armed or police use. The definition of "prevalent military use" is based on the use of the goods, which includes also dual use items.[409] The following paragraph then outlines the categories in which the military goods can be divided. The weapons that fall under the scope of Law 185/90 are: a) nuclear, biological and chemical weapons (namely weapons of mass destructions, which are also banned from transfer as per art. 1 paragraph 7), b) automatic firearms and their ammunition, c) medium and large calibre arms and weapons and their ammunition (like smooth-bore weapons with a calibre of 20 mm or above and other weapons or armament with a calibre greater than

[407] It was a committee established by art. 6 of the law 185/90 tasked with the establishment of general guidelines for trade policies in the field of defence and general guidelines for arms transfer, as well as supervise the activities of law enforcement bodies and create the list of countries to which transfers are prohibited as per art. 1 paragraph 6. However, this list has never been done. The CISD has been dissolved with Law n. 537 del 24 December 1993 and its functions have been taken by the Interdepartmental Committee for Economic Planning and Sustainable Development (CIPESS) with the DPR 20/4/1994 n.373. The CIPESS has then transferred such competence to the Foreign Affairs Ministry with a Resolution 6 August 1999.

[408] Carlo Pezzoli, 'La legislazione italiana sul controllo delle esportazioni di armi', *Centro Studi per La Pace*, 2006, 11 note 13.

[409] Ibidem, 5.

12,7 mm), d) bombs, naval mines, land mines, rockets, missiles and torpedoes, e) tanks and vehicles built for military use; f) ships and relative equipment built for military use; g) aircrafts and helicopters and their equipment built for military use; h) gunpowder, explosives, propellants, except those destined for the weapons listed as per Law 110/75; i) military grade electronic, electro-optical and photographic systems or equipment; l) military grade special armoured material; m) specific material for military training; n) machines, apparatus and equipment built for the manufacturing, testing and control of arms and ammunition; o) military grade special equipment.

Paragraph 3 receives the list from EU directive 2009/43 and states that the Ministry of Defence shall compile and update the list of military goods together with the Ministry of Foreign Affairs and the Ministry of Economy and Finance and Economic Development. Parts and components also fall under scrutiny of the law according to paragraph 4.

Article 3 which created the National Trade Register has been repealed by the Legislative Decree 15 March 2010, n. 66 and the registry is now regulated by art. 44 of the same Decree, and the requirements needed for the registration the registration are listed in both art. 44 of the Decree and in arts. 123 to 130 of the Decree of the President of the Republic, 15 March 2010, n. 90.

Article 5 requires the government to present each year a report on all transfers authorized the previous years, including those approved for intergovernmental programmes or part of a global project licensing, those for global transfer authorisation and general authorisation or in relation to them. It should be noted, however, that these reports have grown increasingly incomplete and difficult to read, hindering the inherent transparency they should have for parliamentary and public control.[410]

*3.1.2.2. Procedures for the transfer*

The law sets up a regime for arms controls and the approval of licences and authorizations; the export towards EU countries is simplified for the transposition of Directive 2009/43/EC which involves less controls. The process involves numerous steps. Once, there was a preliminary phase which involved the previously mentioned CISD, which was tasked with the definition of general guidelines for trade policies as well as the definition of general guidelines for arms transfer, but since its suppression and the assignment of its task to the CIPE and then to the Foreign Affairs Ministry, this preliminary phase ceased to exist. The procedure is outlined by the combined provisions in the Law 185/90 and the decree of the Ministry of Foreign Affairs and International Cooperation n. 19 of the 7 January 2013. The first step requires registered enterprises to notify the Foreign Affairs Ministry

[410] Maurizio Simoncelli, 'Presentazione', *IRIAD Review*, June 2020, 5; Fabio Sparagna, 'Dal secondo dopoguerra all'approvazione della legge', IRIAD Review, June 2020, 21.

that they have begun negotiations for the transfer. The notification must contain: details of registration in the Trade Register, name and address of the participants in the negotiations a brief description of the type of materials under negotiations with reference to the list drawn by the Defence Ministry (art. 18) or with reference to the list at art. 2 paragraph 3, estimated value of the object of the negotiation, level of secrecy[411], Country of final destination in case of export or Country of origin in case of import. The Ministry, within 60 days, can stop or set limitations according to art. 1 of the Law or other national interests. According to art. 7 of the Decree n. 19, if the Ministry does not answer within 60 days, it counts as tacit consent, and the negotiations can proceed. If there are any modifications, the enterprise must notify both the Defence and Foreign Affairs Ministries, and if there are substantial modifications, a new procedure must be opened.[412]

After this phase the UAMA is responsible for giving the authorization for transfers and becomes the main authority in the process. According to art. 7-bis of the Law the UAMA is "the national authority competent for issuing the licence to trade in military goods and for issuing the certification for the companies and on their compliance with the obligations in the matters considered in this law". After the negotiations are closed, the enterprise must apply for the authorization for "export, import, brokering, transfer of production and production delocalisation, intangible software or technology transfers and transit" to the Foreign Affairs Ministry. The application will need, among others: the type and quantity of military goods object of the operation, the value of the contract and the final term of delivery, the value of brokerage fees, the identification of the recipient, any offsets involved and the final Country of destination or "other intermediate or final destination Countries, entities, companies and persons". At paragraph 3 the application also requires 1) an export certificate released by the Government authorities of the recipient Country if it is party of any control agreement on exports of military goods with Italy, 2) an End-Use Certificate released by the recipient Country's Government attesting its final use and that no re-export will be done without prior authorization from Italian authorities. This measure is in line with what we have seen on diversion and re-export, with the Italian Government trying to effectively exercise control on the matter to avoid that the military goods could be diverted or end up in illicit arms or to countries which policies are against the criteria set out in article 1 of the Law. After having consulted with UAMA and having assessed the documentation provided in the application the Ministry of Foreign Affairs authorises, with an

[411] An authorization by the Presidency of the Council of Ministers - Security Information Department is needed when classified information is involved (art. 1 paragraph 11-quater).

[412] Art. 7, paragraphs 10 and 11 of the Decree of the Ministry of Foreign Affairs and International Cooperation n. 19 of the 7 January.

individual licence,[413] "the brokering, delocalisation of production and intangible software and technology transfers and, in conjunction with the Minister of Finance, the export and import, permanent or temporary, and the transit of military goods as well as the transfer abroad of the licence to industrially produce the material and its re-exportation by importing Countries".[414] Any deny to such authorization must be justified by the Ministry. Furthermore, if the transfer is done within an intergovernmental programme, it can take the form of a global project licence. This kind of licence can be granted to companies of EU and NATO Member Countries with which Italy has underwritten specific agreements that, on the matter of the transfer and export of military goods, but also within the Framework Agreement of 2000. A last step is given by ex-post controls at art. 20. Accordingly, an enterprise shall notify the Ministry of Foreign Affairs when the operations are concluded (even if partially), and within 180 days from the conclusion of the operation it shall deliver to the Ministry "the check list, or the intra-Community transfer and transit declaration (DTTI), or the customs bill of entry into the Country of final destination, or the statement of acceptance of delivery by the importing agency, or an equivalent document issued by a local governmental authority", any document that could prove the successful transfer.

As briefly mention at the beginning of the paragraph, a simplified process is needed for intra-Community transfers as required by Directive 2009/43/EC. The directive has been transposed into the Italian law through the Legislative Decree 22 June 2012 n. 105. The whole process is regulated by art. 10-bis to 10-octies. Article 10-bis specifies the range of the regime and its applications only to registered entities, as per art. 3. For intra-EU transfer there is the need for one of the three kinds of licences: general, global and individual; on the other hand, for those goods already authorised that are entering or passing another member Country, no other authorization is needed. The Ministry of Foreign Affairs approves, through a decree, the general transfer licences between European Union member States, directly authorising the Italian suppliers, complying with the terms and conditions indicated in the licences, to transfer military goods to one or more categories of recipients located in another member State. For global licences the Ministry of Foreign Affairs issues a global transfer licence at the request of the single supplier that needs to transfer military goods to authorised recipients or to one or more MS, with no restrictions on quantity nor value for a period of 3 years (renewable). Lastly, the Directive envisages also the possibility to issue individual licences, albeit it tries to restrict their usage. The Law transposes them at art. 10-quinquies, with roughly the same wording as in the Directive, with the Ministry of Foreign Affairs issuing an individual transfer licence

[413] This licence should be intended as valid only for the specific transaction, that particular enterprise and the declared recipient, valid for the expected time period for it to be completed.
[414] Article 13 of the Law 185/90.

at the request of a single supplier for a specific quantity and value of certain military goods, to a specific recipient. This can happen only if certain situations present themselves, like: to protect the crucial interests of security and public order, to meet international obligations and commitments or there are serious reasons to believe that the supplier will not be capable to fulfil all the terms and conditions necessary for the release of a global transfer licence. The intra-Community regime also requires the enterprises to be registered, as per art. 10-sexies to prove the reliability of the companies and their capacity to comply with the export restrictions of military goods received from another Member State (although this is mostly valid for both general and global licences). Furthermore, certified enterprises are not required to send to the Ministry of Foreign Affairs the documentation on the closed trade.

Italian terminology on weapons, military goods, common firearms, weapons of war and armaments differs widely, and so does their regulation. The Law 185/90 applies to military goods, but not to sporting or hunting weapons and the relative munition, ordinary firearms and munition listed in Article 2 of Law No. 110 of 18 April 1975, nor to handguns, as long as not automatic.[415] Furthermore, according to arts. 1 and 2 of Law No. 110 of 18 April 1975 we find three more kinds of weapons: weapons of war (armi da guerra), war-like weapons (armi tipo guerra) and common firearms (armi comuni da sparo). Weapons of war are those kinds of weapons that due to their strong potential for offense, are or can be intended for the modern armament of national or foreign troops for the use of war (including bombs and their components, chemical, biological or radioactive warfare agents, as well as deadly weapons of any kind, explosive or incendiary bottles or shells). War-like weapons are those that while being weapons of war, may use the same ammunition as war weapons or are designed for automatic firing, or have common characteristics with weapons of war. Lastly, common firearms are: rifles, semi-automatic or not, with one or more smooth-core barrels, rifles with two rifled-core barrels loading with manual action, rifles with two or three mixed barrels, with smooth or striped cores, loading with manual action, rifles, carbines and muskets with a rifled-core barrel, even if designed for semi-automatic operation, rifles and carbines employing ring percussion ammunition, as long as they are not automatic, revolvers, semi-automatic pistols, replicas of antique muzzle with a front loading mechanism. As per art. 1 paragraph 11 of Law 185/90, this last kind of weapons is not subject to the law itself. However, what can be said for the weapons of war and war-like weapons? For what concerns the weapons of war, we can, with a safe margin, affirm that the Law 185/90 applies to them, even though they are defined by their destructive capacity in Law 110/75 and not their final use. Furthermore, part of the doctrine is in favour to include them under Law 185/90,

[415] Art. 1 paragraph 11 of the Law 185/90.

mostly due to their automatic nature and by the fact that the law itself does not mention long-barrelled weapons, excluding only "handguns, as long as not automatic".[416] The war-like weapons will find a more difficult application. The Law 185/90 considers military goods those items that as their technical, manufacturing and design requirements or characteristics, are considered to be prevalently manufactured for military use or for use by Armed or Police forces. This means that the main criteria for the application of the law, is the intended use of such weapons. On the other hand, Law 110/75 defines the war-like weapons as those weapons that, while not being weapons of war, can use their same munition and are capable of automatic fire or have similar characteristics or employment as weapons of war. Therefore, certain small calibre weapons could fall out from Law 185/90 and be regulated by the TULPS.[417] The difference between "manufactured for military use" and "prepared for automatic fire" could be a substantial one when differentiating between which weapons fall under Law 185/90 and which ones do not. The Supreme Court of Cassation has stated that not the final use, nor the reversibility from civil to military use, nor the possibility and easiness of modification are sufficient to qualify weapons as military goods, but there must be a special construction rationale already in place to satisfy a military use.[418] Following this reasoning, war-like weapons, with the exception of automatic ones (art. 2 paragraph 2 letter c Law 185/90), are outside the scope of Law 185/90.[419]

### *3.2. Italian Regulation compliance with International Law, the Arms Trade Treaty and European Law*

#### *3.2.1. International law: customary and treaty law*

As a general consideration, it should be noted that the Law 185/90 does not mention any of the principles of international customary law we have analysed in the first chapter. Self-determination, non-intervention and self-defence are not mentioned in the text.[420] While not being mentioned in the law, these principles still find a way in Italian legal framework through art. 10 of the Constitution which allows for an automatic adjustment for the execution of generally recognised

[416] Gianni Bellagamba and Piero Luigi Vigna, Armi, munizioni, esplosivi: disciplina penale e amministrativa, vol. 11 (Giuffrè Editore, 2008).
[417] Chiara Gallo, 'La regolamentazione del mercato europeo della difesa' (Pisa, University of Pisa, 2015), 99, https://core.ac.uk/display/79620169.
[418] Cassazione, Sezione Prima Penale, 18 maggio 1993, n. 7011.
[419] Chiara Gallo, 'La regolamentazione del mercato europeo della difesa' (Pisa, University of Pisa, 2015), 102, https://core.ac.uk/display/79620169.
[420] Although, concerning self-defence, art. 51 of the UN Charter is mentioned.

norms of international law.[421] This means that, authorities when approving transfer licences or operating under the Law 185/90 must consider those principles of international law. Furthermore, it should be noted that the Geneva Conventions are not mentioned, nor respect of the general principles of IHL by the recipient State is a parameter for assessing legality of an arms transfer. In light of that, one might say that the Law 185/90 does not comply with art. 7 of the ATT. On the other hand, we can note that the respect of the Geneva Conventions and the respect of common art. 1 by the recipient State for arms transfer within the Italian framework is reached through the ratification of the ATT in 2013 with the Law 4 October 2013, n. 118; thus, allowing the consideration of the Conventions through arts. 6 and 7. However, the ATT prescribes a prohibition when considering arms transfers, if there is "knowledge at the time of authorization that the arms or items would be used in the commission […] grave breaches of the Geneva Conventions of 1949" while also considering the possibility that such items could be used to "commit or facilitate a serious violation of international humanitarian law".[422] On the other hand, art. 1 common to the Geneva Conventions prescribes more general obligations to States in all circumstances.[423] For what concerns the respect of arms embargoes the respect is guaranteed for all embargoes issued by the UN, EU and OSCE at art. 1 paragraph 6 letter c. The Law 185/90 does not mention the ATT, but, as mentioned, the ATT has been ratified with the Law 4 October 2013, n. 118, making its rules binding for Italian authorities. The CCM and the APL are both included in the text of the law, while the CCW is not mentioned. Overall, we can say that Italian Law 185/90 is one of the most advanced regulations on the international scenario[424], one example is the total ban towards those countries where certified violations of human rights (art. 1 paragraph 6 letter d). At the same time, the ATT binds States no to "not authorize any transfer" if the State has knowledge that the weapons might be used to commit "genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians" (art. 6 para 3) and if there is there is "an overriding risk" that the transferred weapons might be used to commit or facilitate violations of IHL and HR (art. 7 paragraph 1 and 3). On the other hand, the CP 2008/944/CFSP is more vague, only requiring a State to exercise "special caution" before authorizing a transfer towards a country 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" and "deny an export licence if there is a clear risk that the military technology or

[421] Sergio Maria Pisana, 'Parte prima : Introduzione e concetti fondamentali - 3. L'adattamento automatico e l'adattamento caso per caso : l'art. 10 della Costituzione italiana', in *Diritto comunitario europeo di fronte alla Costituzione italiana. - ( Quaderni d'Europa ; 1)* (Roma: Cadmo, 1988), 19–20, https://doi.org/10.1400/29142.
[422] Articles 6 and 7 of the Arms Trade Treaty.
[423] Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', *International Review of the Red Cross* 82, no. 837 (2000): 67–87.
[424] Fabio Sparagna, 'Dal secondo dopoguerra all'approvazione della legge', IRIAD Review, June 2020, 18.

equipment to be exported might be used in the commission of serious violations of international humanitarian law" after having assessed the recipient country attitude towards IHL (criterion two, art. 2 para 2).

For what concerns SALWs, it should be reminded that Italian regulation has four definitions that can be applied to them: military goods, weapons of war, war-like weapons and common firearms. Not all of these are subject to Law 185/90 and distinction among them is not always straightforward. Therefore, while Italy is part to binding and non-binding instruments on SALWs, their definition within the internal legal framework does not fully coincide with the international one and so far, the issue has not been resolved.

### *3.2.2. Italian Compliance with European regulation: Common Position 2008/944/CFSP and Directive 2009/43/EC*

As we have seen the CP 2008/944/CFSP is the main binding point of reference for arms exports at European level, mainly for transfers to non-EU countries. The central aspect of the CP are its eight principles on how to carry out arms transfers. The CP is mentioned in the Law 185/90 at art. 1 paragraph 11-bis which states that the operations of export, import, transit, intra-Community transfer and brokering in military goods, as well as the transfer of the relative production licences and the delocalisation of production are carried out according to the common position 2008/944/CFSP. The Common position, much like the ATT, can be seen as a safeguard clause for Italian law, which does not take into account for IHL violations and, by recalling the CP, IHL becomes one of the criteria that need assessment before authorizing an arms transfer. Following a step-by-step analysis of the eight criteria we see that the first criterion, concerning the respect of international obligations of MS and embargoes issued by the UN, EU or OSCE, is transposed in art. 1 paragraphs 5 and 6 of Law 185/90. Criterion two, on the respect of HR and IHL in the country of destination is not fully transposed into the national law with two main issues: the first being that according to art. 1 paragraph 6 letter d) the ban on transfers can be done only if there are certified by the competent organisations of the United Nations, the EU or the Council of Europe; the second issue is linked to the lack of a direct mention of IHL in the text of the law, although through the ratification of the ATT such control should happen. Furthermore, it should be noted that MS retain ample discretion when assessing the transfers on case-by-case basis according to the second criterion. The third criterion which limits and bans the transfers if they would provoke or prolong armed conflicts in the recipient country, lacks a transposition into internal law. Art. 1 paragraph 6 letters a) and b), concerned with the ban on transfers to Countries engaged in armed conflict or whose policies are in contrast with the principles of Article 11 of the Constitution fully transpose the fourth criterion which bans the authorization of an export

licence "if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim".[425] Criteria six and seven deal with terrorism and international organised crime and diversion and these are fully part of Law 185/90 at art. 1 paragraph 5 which bans any activity in contrast with the Constitution, international commitments, the security of the state, fight against terrorism and maintaining good relationships with other countries. Criterion five could also be seen as being transposed into such phrasing.[426] The last criterion, criterion eight focuses on the compatibility of the exports of the military goods with the technical and economic capacity of the recipient country and how many resources are diverted to armaments and is transposed, albeit not fully, by art. 1 paragraph 6 letter e, which bans any operation towards those countries receiving "aid from Italy pursuant to Law No. 49 of 26 February 1987 that allocate the resources in excess of their Country's defence spending needs to their military budget". It is not a full transposition mainly due to the fact that the ban on transfers or any other operations is tied to whether or not that country is receiving aid received from Italy.

Overall, excluding the few exceptions mentioned, we can say that the CP has been transposed effectively into Italian legislation.

As mentioned before, the Directive has been transposed into Law 185/90 through the Legislative Decree 22 June 2012 n. 105 in order to simplify intra community transfers. The procedure has also been extended for the delocalisation of production and the transfer of the relative production,[427] the Decree also allowed for the issuing of the three kinds of licences for intra-Community transfers: general, global and individual. Lastly it introduced a new certification system for enterprises, shifting the responsibility of exports control from the State to companies. As mentioned in the previous chapter, the Directive was seen as way to innovate and reform Italian norms on arms transfer, which however meant that much work had to be done in order to transpose it correctly.[428] Bonaiuti notes that the transposition of the Directive, for what concerns general transfer licences is flexible, exploiting all mandatory and non-mandatory opportunities that the Directive lays

[425] EU Council, 'Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment'', *Official Journal of the European Union* 335 (2008), art. 2 paragraph 4.

[426] Criterion five involves the consideration of National security of the Member States and of friendly and allied countries.

[427] Emilio Emmolo, 'Le modifiche del 2012 alla disciplina sui controlli delle esportazioni di armi della Legge 185 del 1990', Sistema Informativo a Schede (Istituto di Ricerche Internazionali. Archivio Disarmo, 2013), 2, https://www.archiviodisarmo.it/view/rc4IYf9R7gH2k7NU0UJMqQlzz_Wav3Ty73APdyt0C5o/2013-2-emmolo.pdf.

[428] Chiara Bonaiuti, 'Convergence around What?: Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Thesis, Newcastle University, 2020), 118 http://theses.ncl.ac.uk/jspui/handle/10443/4964.

out, allowing for a greater liberalization of licencing.[429] The same things can be said for what concerns global transfer licences, leaving the definition of the terms and conditions for the grant of a global licence to secondary legislation, the Decree of the Ministry of Foreign Affairs and the Ministry of Defence 7 January 2013 n. 19.[430] Individual transfer licences are also transposed faithfully into Italian legislation, with the only difference from global transfer licences being the request to specify the quantity and value of the military goods.[431] The transposition however falls short for what concerns the controls on re-exports towards third countries, stating at art. 10-bis paragraph 2 that re-export "may be subject to prohibitions, restrictions or conditions, and guarantees may be requested as to the use made of the materials, including a final use certification". The "may" has strong implications on such controls, which become a possibility under the national authority discretion. However, the Decree of the Ministry of Foreign Affairs and the Ministry of Defence 7 January 2013 n. 19 allows for the control of re-export towards non-European countries of previously approved intra-Community transfers (art. 10). Furthermore, at art. 11 paragraph 2 letter c, it required that companies utilizing intra-community transfer licences shall inform the UAMA of any changes in the intermediate and final recipients following the authorization. Through this mechanism the government still maintains control over the final destination, but there are some issues: the Decree is a secondary law instrument, meaning that it can be modified without the intervention of the Parliament, there is no clear indication on whether or not the final destination of re-exported goods should be indicated in the annual report to the Parliament and lastly the procedure only requires the involvement of UAMA without a clear specification of the passages needed for the approval of re-export.[432] However, we can say that the transposition of the Directive into the Italian law has been achieved.

### *3.3. Italian arms deals*

As mentioned at the beginning of the Chapter, Italy is among the top ten world's exporters and the fifth European one. Among Italy's clients we find Turkey, Pakistan, Egypt, Saudi Arabia, Qatar, United Arab Emirates (UAE).[433] Most of these countries have had some issues when dealing

[429] Ibidem, 126.
[430] Ibidem, 127.
[431] Art. 10-quinquies of Law 185/90.
[432] Chiara Bonaiuti, 'Convergence around What?: Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43 into National Arms Exports Control Legislation' (Thesis, Newcastle University, 2020), 130-131 http://theses.ncl.ac.uk/jspui/handle/10443/4964.
[433] Pieter D. Wezeman, Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, 2020', Sipri.Org, March 2021, https://doi.org/10.55163/CBZJ9986, 2; 'Export italiano di armamenti nel 2020' (Roma: Istituto di Ricerche Internazionali ARCHIVIO DISARMO, 24 May 2021), 3, https://www.archiviodisarmo.it/view/9uYPmHIMSDCnXNlWQJNAeuWSo00PmZjc17U9EqZGtjM/analisi-iriad-relazione-export-2020.pdf.

with HR and their respect, others have had problems with respecting IHL when in conflict.[434] In this paragraph, we will take into consideration two States, Saudi Arabia and Egypt, in which the arms transfers from Italy violate international, European and national law. Lastly, given the war in Ukraine and the numerous shipments of arms done in favour of Kiev's government, a brief assessment will be done on the Italian's shipments towards Ukraine, done under exemption from Law 185/90.

*3.3.1. Italian arms exports to Saudi Arabia*

In 2021 Saudi Arabia ranked as the first world's arms importer, keeping the lead since 2016, with the US being the its first supplier.[435] Over the years, the Italian arms industry, among the other major European ones, has begun dealing with Saudi Arabia. In the period 2015-2018 the value of Italian arms exports reached a total of € 700 million.[436] Among the items there were and the export of MK80 aircraft bombs produced by RWM Italia, a Rheinmetall's Italian subsidiary, which proved to be controversial as various NGOs claimed they were being used for indiscriminate bombing in Yemen, thus killing and injuring civilians.[437]

However, before further discussing the relations between Saudi violations of IHL and HR and legality of Italian arms transfers towards it, it could be useful to assess such violations in the context of the Saudi-led intervention in Yemen and how it came to be.

The roots of the conflict trace back in a series of issues linked to the history of Yemen, its conflict between the north and south, and the power struggle between Saudi Arabia and Iran, which also has a religious connotation.[438] Before 1990 Yemen has rarely been a unite country, and when it has been unite, civil wars were easy to sprout. The unification of 1990 was brought by the need to

[434] 'United Arab Emirates Archives', *Amnesty International*, n.d., https://www.amnesty.org/en/location/middle-east-and-north-africa/united-arab-emirates/report-united-arab-emirates/; 'The Turkish Government's Violations of the Principles of International Humanitarian Law in Northeastern Syria - Maat Foundation for Peace, Development and Human Rights', 16 June 2021, //www.maatpeace.org/en/%d8%a7%d9%86%d8%aa%d9%87%d8%a7%d9%83%d8%a7%d8%aa-%d8%a7%d9%84%d8%ad%d9%83%d9%88%d9%85%d8%a9-%d8%a7%d9%84%d8%aa%d8%b1%d9%83%d9%8a%d8%a9-%d9%84%d9%85%d8%a8%d8%a7%d8%af%d8%a6-%d8%a7%d9%84%d9%82%d8%a7/; 'Egypt: Massive Sinai Demolitions Likely War Crimes', *Human Rights Watch* (blog), 17 March 2021, https://www.hrw.org/news/2021/03/17/egypt-massive-sinai-demolitions-likely-war-crimes.

[435] Stockholm International Peace Research Institute, 'SIPRI YEARBOOK 2021', 15; 'Saudi Arabia', in *The World Factbook* (Central Intelligence Agency, 24 April 2022), https://www.cia.gov/the-world-factbook/countries/saudi-arabia/#military-and-security; Pieter D. Wezeman, Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, 2020', Sipri.Org, March 2021, https://doi.org/10.55163/CBZJ9986, 11.

[436] Giovanna Maletta, 'Legal Challenges to EU Member States' Arms Exports to Saudi Arabia: Current Status and Potential Implications', *SIPRI Topical Backgrounder*, 2019.

[437] 'Made in Europe, Bombed in Yemen', *Ecchr.Eu*, April 2022, https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/.

[438] Max Fisher, 'How the Iranian-Saudi Proxy Struggle Tore Apart the Middle East', *The New York Times*, 19 November 2016, sec. World, https://www.nytimes.com/2016/11/20/world/middleeast/iran-saudi-proxy-war.html.

use the newly discovered oil between north and south, but ultimately, a civil war ensued in 1994 leaving the north victorious and the new republic never achieved the monopoly on the use of force.[439] Ali Abdullah Saleh became president and adopted a "divide and conquer" policy using Sunni and tribal Islamic militias to counter the Marxist in the south, but when these grew too strong, he allowed the growth of the e Believing Youth, which would later become the Houthi, based in northern Yemen.[440] On a religious point of view, the Houthi religious practices differ from the common Shi'a, following the Zaydi branch, and have had a complex relation with the Sunni in Yemen, sometimes allying with them, others discriminating them.[441] Zaydis represent between 30-35 percent of Yemen's population.[442] The objectives of the Houthi at the beginning were to end economic inequality, Zaydi discrimination, political marginalization and the end of Saudi-sponsored Wahhabi proselytism in the north.[443] From 2004 various rounds of fighting between the Houthis and the government began, with the last taking place between 2009-2010. When the Arab Spring in 2011 reached Yemen, the tensions exploded, resulting in mass protests brewing a civil war, this led to an agreement, sponsored by e Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates (the Gulf Cooperation Council or GCC) which saved Saleh from prosecution, while still being able to exercise power over its party (the General People's Congress or GPC).[444] The agreement led to the election of Abd Rabbu Mansour al-Hadi as president which began a reformation process in which the Houthi took an active role. However, the reformation did not bring the expected result, failing to dismantle Saleh's feudal system and integrating the marginalized fringes of the population and with a proposed federalism that threatened Houthi's unity and autonomy. The Houthis, using the end of Hadi's mandate, the government paralysis and the growing discontent, seized Sana'a in September 2014.[445] The Houthis made their way to the south while Hadi first resigned, then fled and rescinded his resignation and on 24 March 2015 he requested the intervention of the GCC on the ground of collective self-defence.[446] Following Hadi' request, from 2015, Saudi Arabia launched an armed intervention together with other nine States (United Arab Emirates, Sudan, Bahrain, Kuwait, Qatar, Egypt, Jordan, Morocco and Senegal), called "Decisive Storm". The conflict that ensued can be categorized as a full-fledged non-

[439] Thomas Juneau, 'Iran's Policy towards the Houthis in Yemen: A Limited Return on a Modest Investment', *International Affairs* 92, no. 3 (1 May 2016): 651, https://doi.org/10.1111/1468-2346.12599.
[440] Noel Brehony, 'Yemen and the Huthis: Genesis of the 2015 Crisis', *Asian Affairs* 46, no. 2 (2015): 232–50.
[441] Ibidem, 237.
[442] Thomas Juneau, 'Iran's Policy towards the Houthis in Yemen: A Limited Return on a Modest Investment', International Affairs 92, no. 3 (1 May 2016): 651, https://doi.org/10.1111/1468-2346.12599.
[443] Ibidem.
[444] Noel Brehony, 'Yemen and the Huthis: Genesis of the 2015 Crisis', Asian Affairs 46, no. 2 (2015): 232–50, 238.
[445] Thomas Juneau, 'Iran's Policy towards the Houthis in Yemen: A Limited Return on a Modest Investment', International Affairs 92, no. 3 (1 May 2016): 653, https://doi.org/10.1111/1468-2346.12599.
[446] Luca Ferro and Tom Ruys, 'The Saudi-Led Military Intervention in Yemen's Civil War-2015', in *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), 899–911.

international armed conflict, given the fact that the Houthis are categorized as an organized non-state group, which means that the Common Article 3 to the Geneva Conventions, the Additional Protocol I and II, apply to the conflict, allowing for a minimum standard of IHL to be applicable to both parties involved in the conflict.[447]

The UN has set up a Panel of Experts on Yemen following the Security Council resolution 2140 (2014) which concluded that both parties (the Saudi-led coalition and the Houthis), have violated IHL and HR.[448] For the purpose of this thesis, we will be looking at the violations committed by Saudi Arabia. Since the beginning of the conflict over 23.000 airstrikes have been carried out, with more than 18000 dead or injured Yemeni; according to the Office for the Coordination of Humanitarian Affairs circa 20.7 million Yemeni people require humanitarian and protection assistance.[449] The whole situation has also been aggravated by the "worst cholera epidemics in recent history" and the COVID pandemic.[450] The UN Group of Eminent International and Regional Experts (GEE) reached the conclusion that the GCC, in particular Saudi Arabia "may have conducted airstrikes in violation of the principles of distinction, proportionality and precaution, acts that may amount to war crimes […] including murder of civilians, torture, cruel or inhuman treatment, rape and other forms of sexual violence, outrages upon personal dignity, denial of fair trial, and enlisting children under the age of 15 or using them to participate actively in hostilities".[451] The Panel of experts found the coalition targeting civilians through air strikes, bombing residential neighbourhoods and treating the city of Sa'dah and region of Maran as military targets, *de facto* ignoring the principle of distinction.[452] Furthermore, air strikes to camps for internally displaced persons and refugees have been carried out.[453] To list some air strikes:

- On 28 September 2015 a coalition air strike hit a wedding party hall in Wahijah, a village outside of al-Mokha, killing at least 135 people, 12 of which were children;[454]
- On 8 October 2016 the Saudi Arabia-led coalition bombed the Salah al-Kubra community hall where the funeral of the father of the Sana'a-based acting minister of the interior was being

[447] Waseem Ahmad Qureshi, 'The Crisis in Yemen: Armed Conflict and International Law', *NCJ Int'l L.* 45 (2019): 247–56.
[448] 'Letter Dated 22 January 2016 from the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014) Addressed to the President of the Security Council', January 2016, 259.
[449] 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen', September 2021, 4–5.
[450] 'Cholera Epidemic in Yemen: 2020 Update', *The Global Alliance Against Cholera (G.A.A.C)*, n.d., https://www.choleraalliance.org/en/ressources/news/cholera-epidemic-yemen-2020-update.
[451] 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014 : Report of the Group of Eminent International and Regional Experts on Yemen', 17.
[452] 'Letter Dated 22 January 2016 from the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014) Addressed to the President of the Security Council', 36.
[453] Ibidem, 38.
[454] Ibidem, Annex 53.

held. To the event many Houthi-Saleh affiliated military and political leaders were expected. The air strike caused 132 dead and 695 injured. According to the panel, Saudi Arabia violated the rule 14 of customary international humanitarian law, on proportionality of the attack, which should be balanced between the expected loss of civilian life and the direct military advantage anticipated.[455]

- On 16 March 2017 an attack against Somali migrant boat was carried out in the Red Sea. The Panel of expert could not link this attack directly to the Saudi-led coalition; however, they were the only ones capable to carry out an aerial attack towards such boar. Furthermore, an UAE state news agency published a statement attributed to an UAE official which highlights the knowledge of the boat carrying civilians, but no operations were done to either protect them from the attack, nor to rescue the wounded at sea.[456]
- On 22 April 2018 an airstrike hit a wedding men's section in Ar-Raqa village of Bani Qis, in Hajjah, which led to the deaths of 21 persons, 11 of which children, leaving 90 people injured. The coalition admitted the strike and the non-compliance with engagement and IHL rules.[457]
- On 2 August 2018 a mortar attack hit Athawra Hospital in the city of Al Hudaydah. The coalition denied the attack, but the fin assembly was traced to Rheinmetall (German manufacturer) and the coalition is the only actor capable of acquiring such ammunition.
- On 31 August 2019 the coalition hit a Houthi the Dhamar community college, used as a prison, killing approximately 100 people, leaving 40 injured. The coalition denied that the building was a prison, claiming it as a military site, but it had been used as a prison from 2017, and it was also cited numerous times by the Panel.[458] We should remember that detainees, either civilians or fighters hors de combat, are to be considered as not taking part to the hostilities, and are therefore protected against a direct attack under IHL.[459]

The list of strikes goes further, and we could also list the violations of IHL and HR associated with the cases of arbitrary detention carried out by the coalition and Saudi Arabia.[460] Ultimately, the Panel has repeatedly reported "violations of international humanitarian law and international human rights law continued to be widely committed by all parties in Yemen with impunity. The air strikes

[455] 'Letter Dated 27 January 2017 from the Panel of Experts on Yemen Addressed to the President of the Security Council', no. S/2018/193 (January 2017): 46–48.
[456] 'Letter Dated 22 January 2016 from the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014) Addressed to the President of the Security Council', pt. Appendix A to Annex 58.
[457] 'Letter Dated 16 December 2019 from the Chair of the Security Council Committee Established Pursuant to Resolution 2140 (2014) Addressed to the President of the Security Council', no. S/2019/969 (December 2019): pt. Appendix 33.B.
[458] 'Letter Dated 27 January 2020 from the Panel of Experts on Yemen Addressed to the President of the Security Council', April 2020, 37–38.
[459] Ibidem, Annex 27, Appendix 6.
[460] 'Letter Dated 27 January 2020 from the Panel of Experts on Yemen Addressed to the President of the Security Council', 41.

conducted by the Coalition to Support Legitimacy in Yemen, led by Saudi Arabia, and the indiscriminate use of explosive ordnance, including landmines, by Houthi forces continue to disproportionately affect civilians and civilian infrastructures".[461] The Panel has confirmed multiple times that the principles of distinction, proportionality and precaution have not been respected by the coalition.[462] In addition to the violations of these IHL principles, the coalition can also be found responsible of violating art. 7 paragraph 1 and art. 13 paragraph 2 of Protocol II to the Geneva Convention. Article 7 paragraph 1 concerns the protection and assistance to wounded, sick and shipwrecked and can be linked to the Somali boat case; while article 13 paragraph 2 concerns the protection of civilians from being object of attack, prohibiting any acts or threats of violence aimed at spreading terror and the violation of such article can be linked to most of the strikes listed. According to what has been presented here, and to the findings of the Panel of Experts, we can safely say that arms export done towards Saudi Arabia is violating art. 7 of the ATT and the second criterion of the CP 2008/944/CFSP, specifically art. 2 para 2 letter c).

As briefly mentioned, Saudi Arabia has also committed serious violations of HR which involved involving arbitrary arrest and detention, ill-treatment, torture and enforced disappearance.[463] In the 2019 Report of the Group of Eminent International and Regional Experts submitted to the United Nations High Commissioner for Human Rights, the Group of Experts signalled the lack of cooperation from all parties involved to support the investigations.[464] Furthermore, cases of incommunicado detention, regular torture, including through electrocutions, mock executions and forced nudity, were documented in an unofficial joint Yemeni armed forces/Saudi Arabia AlTin detention facility.[465] Saudi Arabia, between October 2016 and April 2018 arrested 148 fishermen, which were taken to detention facilities and were left incommunicado, with 18 missing and many beaten and interrogated.[466] The Group then concludes that they have "reasonable grounds to believe

[461] Ibidem, 3.

[462] 'Letter Dated 22 January 2016 from the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014) Addressed to the President of the Security Council', 35–36; 'Letter Dated 25 January 2019 from the Panel of Experts on Yemen Addressed to the President of the Security Council', no. S/2019/83 (January 2019): 49–51; 'Letter Dated 27 January 2020 from the Panel of Experts on Yemen Addressed to the President of the Security Council', 36–38. The principle of distinction requires the parties involved in a conflict to only target combatants, thus distinguishing between military and civilians. The principle of proportionality requires the balancing between the expected loss of civilian life and the expected direct military advantage. The principle of precaution requires that attacks should be carried out taking precautions to avoid or minimize loss of civilian life or injury and damage to civilian objects.

[463] 'Letter Dated 27 January 2020 from the Panel of Experts on Yemen Addressed to the President of the Security Council', 41.

[464] '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', no. A/HRC/42/17 (August 2019): 3.

[465] Ibidem, 12.

[466] 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014 : Report of the United Nations High Commissioner for Human Rights Containing the Findings of the Group of Eminent International and

that the Governments of Yemen, the United Arab Emirates and Saudi Arabia are responsible for human rights violations, including enforced disappearance. As most of these violations appear to be conflict related, they may amount to the following war crimes: rape, degrading and cruel treatment, torture and outrages upon personal dignity".[467] It should be reminded that such acts are against both IHL (customary and not[468]) and HR, with the last one also requiring the humane treatment of detainees.[469]

Saudi Arabia was also responsible for the murder of Jamal Khashoggi in the Saudi consulate in Istanbul. The Saudi government admitted the murder, which was also confirmed by the UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, confirming the extrajudicial killing, the violation of the Vienna Convention on Consular Relation, the violation of protection of freedom of expression, with action that amount to torture "under the terms of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Saudi Arabia."[470] Furthermore, on the internal political situation of the Saudi Kingdom, the UN Committee against Torture in 2016, highlighted its concern towards Saudi flogging/lashing and amputation of limbs and the continued sentencing to corporal punishments.[471] Furthermore, in the 2022 List of issues the Committee is waiting to discuss "the murder, detention and torture of other human rights defenders, journalists and dissidents" while also noting that the 2016 recommendations were not implemented.

According to the cases presented, we can now assess whether or not Italian arms exports towards Saudi Arabia are compliant international, European and Italian norms.

According to the findings presented by the various experts' groups, we can affirm that any arms transfer done to Saudi Arabia are in breach of article 7 of the ATT, which states at paras 1 and 3 that States Parties should take into account in the assessment the possibility that the exported weapons might be used to commit or facilitate serious violations of IHL and HR and that an overriding risk is present, the authorization for export should be denied. Furthermore, at para 2 the exporting state is

Regional Experts and a Summary of Technical Assistance Provided by the Office of the High Commissioner to the National Commission of Inquiry', no. A/HRC/39/43 (August 2018): 11. Incommunicado means that the prisoners were not allowed to talk to anyone, nor their families, nor their attorneys.

[467] Ibidem.

[468] Specifically, see customary international humanitarian law rules 90, 98, 99, 100, 117, 123 and 126.

[469] Waseem Ahmad Qureshi, 'The Crisis in Yemen: Armed Conflict and International Law', NCJ Int'l L. 45 (2019): 262.

[470] 'Investigation of, Accountability for and Prevention of Intentional State Killings of Human Rights Defenders, Journalists and Prominent Dissidents: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', no. A/HRC/41/36 (October 2019): 3–4; Al Jazeera, 'Timeline of the Murder of Journalist Jamal Khashoggi', *Al Jazeera*, February 2021, https://www.aljazeera.com/news/2021/2/26/timeline-of-the-murder-of-journalist-jamal-khashoggi.

[471] 'Concluding Observations on the 2nd Periodic Report of Saudi Arabia : Committee against Torture', June 2016, 3.

required to "consider whether there are measures that could be undertaken to mitigate risks identified" in para 1. We can safely assume that these steps were not done during the assessment, especially given the fact that the UN and NGOs reports have started since the beginning of the conflict and the overriding risk that such weapons would have been used for committing or facilitating serious violations of IHL and HR was indeed present. For what concerns the grave breaches, article 50 of the Geneva Convention I lists which actions are considered "grave breaches": "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". The attacks on hospitals can be seen as a grave breach of the Convention as well as a breach of art. 19 which requires that "medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict".[472] Furthermore, indiscriminate attack took place, with no regard towards civilian life and security (like the airstrikes done to the weddings and the funeral), which is grave breach of the Additional Protocol I (although the protocol does not apply to non-international conflicts). The transfers are also in breach of art. 7 of the ATT, which requires States to "assess the potential that the conventional arms or items" could be used to commit serious violations of IHL and HR. Given the need of an evaluation from the State and the existence of numerous reports on the usage of weapons used to commit serious violations of IHL and HR, we can affirm that the authorization given for the transfers towards Saudi Arabia did not have a sufficient assessment from Italian authorities, therefore breaching art. 7 of the ATT.

The second criterion of the CP 2008/944/CFSP is similar to Art. 7 of the ATT due to the fact that it requires the Member State to assess "the recipient country's attitude towards relevant principles established by instruments of international humanitarian law" and 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".[473] Like article 7, there must be the "clear risk"[474] that such materials might be used to commit serious violations of IHL. The assessment of such risk should involve the actions and behaviours carried out by the recipient towards IHL and HR like: the adoption and ratification of relevant international and regional human rights instruments and the respect of international and regional HR mechanisms.[475] In relation to Italians arms exports

[472] Shavana Musa, 'The Saudi-Led Coalition in Yemen, Arms Exports and Human Rights: Prevention Is Better than Cure', *Journal of Conflict and Security Law* 22, no. 3 (2017): 447–48.
[473] Council, 'Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment'', Article 2 para 2 letter c.
[474] On the definition of such risk, it has been discussed in Chapter 2.
[475] General Secretariat of the Council, 'User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment', 45–52.

towards Saudi Arabia, we can affirm, like already said for art. 7 of the ATT, that such assessment has not been carried out, or if it has been done, it was not realized in an objective and non-discriminatory manner, as art. 7 of the ATT prescribes, by the competent authority, given the ample sources and investigations carried out by the UN Panel of Experts on Yemen.

Lastly, the arms transfers done towards Saudi Arabia are violating Law 185/90 itself, specifically art. 1 paragraph 6 letter d), which states that any export, transit, intra-Community transfer and intermediation in military goods, as well as the transfer of the relative production licences and the delocalisation of production are prohibited to "Countries whose governments are responsible of serious violations of international conventions on human rights, verified by competent organisations of the United Nations, the EU or the Council of Europe". In this case, the requirements needed are: the responsibility of the recipient State in committing serious violations of HR and the verification of such violations from competent organizations of the UN, EU or Council of Europe. As previously mentioned, the norm lacks a rule on IHL, but the ATT and the CP 2008/944/CFSP allow for its coverage. For what concerns the identification and the seriousness of the violations of HR, we have already seen the various Experts Groups and Panels of Experts confirm such serious violations, as well as the Committee against Torture reports. The fact that these violations have been reported, documented and certified by such organs fulfils the second condition of the article. Therefore, we can safely assume that the arms transfers done after 2015 (the beginning of the certified violations) are against Law 185/90.

To limit arms transfers to Saudi Arabia and UAE a motion from the Italian Parliament has been adopted by the government on June 2019, following the actions already taken by Germany, Netherlands, Finland and Denmark.[476] Furthermore, on January 2021, the Italian Government revoked six authorizations (which were already suspended) for the export of missiles and air bombs to Saudi Arabia and the UAE.[477]

*3.3.2. Italian arms exports to Egypt*

[476] Giovanna Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen', The International Spectator 56, no. 1 (2021): 85.

[477] 'Il Governo revoca l'export di bombe verso Arabia Saudita ed Emirati Arabi: soddisfazione delle organizzazioni della società civile', *Rete Italiana Pace e Disarmo* (blog), 29 January 2021, http://retepacedisarmo.org/2021/il-governo-revoca-lexport-di-bombe-verso-arabia-saudita-ed-emirati-arabi-soddisfazione-delle-organizzazioni-della-societa-civile/; Gianni Rosini, 'Governo revoca l'export di bombe verso Arabia Saudita ed Emirati: "Fermati 12.700 ordigni sui 20mila autorizzati durante mandato Renzi"', Il Fatto Quotidiano, 29 January 2021, https://www.ilfattoquotidiano.it/2021/01/29/governo-revoca-lexport-di-bombe-verso-arabia-saudita-ed-emirati-fermati-12-700-ordigni-sui-20mila-autorizzati-durante-mandato-renzi/6082510/.

Egypt's arms imports increased heavily between the periods 2011-2015 and 2016-2020 making it in 2020 the third global importer.[478] Following the trend, Italy has gradually intensified its relationship with the north-African country, notwithstanding the issues that arose from public's opinion, from Giulio Regeni to Patrick Zaki and the sale of two FREMM (Fregata Europea Multi-Missione) Frigates already bought for the Italian Navy. The arms exports towards Egypt saw a steady growth, reaching € 871 million in 2019, and € 991 million in 2020, with a slight decrease in 2021 reaching € 645 million.[479] However, before dwelling too deep into Italian arms supplies to Egypt, it could be useful to assess Egyptian behaviours and stance towards HR and IHL.

Egypt is part of the Saudi-led coalition which has launched an intervention in Yemen since 2015. Egypt has taken part to the offensive with four warships supporting the Saudi blockade of Yemen and patrol of the Gulf of Aden, while also providing air support and ground troops. However, while some evidences of violations of IHL were found, none were linked to Egypt.[480]

The main issues concerning IHL were raised after the beginning of a military operation in northern Sinai to eliminate the Wilayat Sinai, a branch of the Islamic State in Iraq and Syria that has set its roots in the Sinai Peninsula. To such conflict, the minimum standards that apply are provided by Common Article 3 to the Geneva Conventions, which prohibits mutilation, murder, cruel, inhuman and degrading treatment, torture, hostage taking and unfair trials. In addition, the parties are bound by customary international humanitarian law applicable to non-international armed conflict and by international human rights law which applies at all times.[481]

The conflict steadily increased its intensity from 2013 overthrow of President Mohammed Morsi, with an escalation that led to the beginning of the "Comprehensive Operation Sinai 2018", a military campaign launched by President Abdel Fattah el-Sisi.[482] However, "extrajudicial killings by the government or its agents […]; torture and cases of cruel, inhuman, or degrading treatment or

[478] Pieter D. Wezeman, Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, 2020', Sipri.Org, March 2021, https://doi.org/10.55163/CBZJ9986, 10.

[479] Maurizio Simoncelli, 'Presentazione', IRIAD Review, June 2020, 6; 'Export armi italiane: n el 2020 autorizzati quasi 4 miliardi, Egitto primo acquirente', *Rete Italiana Pace e Disarmo* (blog), 27 April 2021, http://retepacedisarmo.org/2021/export-armi-italiane-2020-4-miliardi-egitto-primo-acquirente/; Presidenza del Consiglio dei Ministri, 'Relazione sulle operazioni autorizzate e svolte per il controllo dell'esportazione, importazione e transito dei materiali di armamento', Doc. LXVII (Rome: Presidenza del Consiglio dei Ministri, 5 April 2022), fig. AA1, https://www.senato.it/service/PDF/PDFServer/DF/368692.pdf.

[480] 'Letter Dated 27 January 2017 from the Panel of Experts on Yemen Addressed to the President of the Security Council'; 'Letter Dated 25 January 2019 from the Panel of Experts on Yemen Addressed to the President of the Security Council'.

[481] It is surely naive to assume that the Wilayat Sinai, an ISIS branch, would abide by such laws, yet Egypt is still bound by these rules.

[482] Rule of Law in Armed Conflicts project (RULAC), 'Non-International Armed Conflict in Egypt | Rulac', Rulac, 7 April 2022, https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-egypt.

punishment" carried out by the government have been reported, as well as failure to prosecute officials who committed abuses.[483] Among the violations of HR and IHL, NGOs have reported: deaths due to the denial of medical care, due to torture, detainment of persons because of their political beliefs and destruction of "approximately 3,600 homes and commercial buildings and hundreds of acres of farmland in North Sinai".[484] Furthermore, Human Rights Watch, Amnesty International denounced the usage of US-made cluster bombs and Mk 118 cluster munition; furthermore, Egypt had stockpiled 321,000 cluster-bomb submunitions.[485] To date, Egypt is not part to the CCM, has stopped participating in its meetings since 2013, and from 2019 it has abstained from voting the key UN annual resolution for the promotion of the convention.[486] These violations however, not being certified by any UN, EU or the Council of Europe, as per art. 1 paragraph 6 letter d of the Law 185/90; furthermore, nor art. 2 paragraph 2 letter b of the CP 2008/944/CFSP (second criterion), nor art. 7 of the ATT that require the risk or the facilitation of "serious violations of international humanitarian law" would be applicable as long as the conflict is officially recognized as a non-international armed conflict (NIAC). On the matter I would like to spend a few words on the classification of such conflict. First it is helpful to remember that, the Common Article 3 to the Geneva Conventions, which is the one that allows for a minimum standard of IHL to be applicable to NIAC, does not provide a definition of non-international conflict, however, through the 2016 Commentary we can define it as a conflict in which at least one party is a non-State entity, however, there is no clear indicator of the degree of intensity that the hostilities need to achieve to be classified as such.[487] Thus far, no international organization, nor Egypt, have categorized the conflict in North Sinai as a NIAC, only NGOs and the Geneva Academy have done so. The debate on how to categorize and identify such conflicts has been long and extensive and, while not being the focus of this thesis, it is important to remember the lack of definition and scope which limit the applicability of IHL to conflicts and the arms transfers regimes associated to their respect.[488] The usage of cluster bombs by Egypt in the conflict is certainly a

[483] Bureau of Democracy, Human Rights, and Labor, '2020 Country Reports on Human Rights Practices: Egypt' (United States Department of State, 30 March 2021), 2, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/egypt/.

[484] Bureau of Democracy, Human Rights, and Labor, 4, 19, 21–22; 'Egypt'.

[485] Amnesty International, 'Egypt: Use of Banned Cluster Bombs in North Sinai Confirmed by Amnesty International', Amnesty International, 1 March 2018, https://www.amnesty.org/en/latest/news/2018/03/egypt-use-of-banned-cluster-bombs-in-north-sinai-confirmed-by-amnesty-international/; Amr Magdi, 'If You Are Afraid for Your Lives, Leave Sinai!': Egyptian Security Forces and ISIS-Affiliate Abuses in North Sinai' (Human Rights Watch, 2019), 99–100.

[486] Landmine and Cluster Munition Monitor, 'Egypt Cluster Munition Ban Policy', Landmine and Cluster Munition Monitor, 4 September 2020, http://www.the-monitor.org/en-gb/reports/2020/egypt/cluster-munition-ban-policy.aspx.

[487] International Committee of the Red Cross, 'Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field', Commentaries on the 1949 Geneva Conventions (Cambridge University Press, 2016), https://doi.org/10.1017/9781316755709.

[488] For further reading on the subject, please see: Anthony Cullen, 'The Concept of Non-International Armed Conflict in International Humanitarian Law', vol. 66 (Cambridge University Press, 2010); Andreas Paulus and Mindia Vashakmadze,

violation of customary IHL since these attacks can be categorized as indiscriminate attacks, however, this is not sufficient to trigger the ban on arms transfers, and their illegitimacy, towards Egypt.

The violations however become serious if we look at Egypt's conduct during the Libyan crisis and the repeated violations of the UN arms embargo, first established with Resolution 1970, then modified by Resolution 1973. The UN has repeatedly found Egypt, among other countries, to be in violation of the embargo. Egypt was found supporting Tobruk by supplying weapons and ammunition and a number of aircrafts with highly resemblance to MiG-21MF aeroplanes and a Mi-8 helicopter, with the insignias and identification marks painted over.[489] More recently the Egyptian government has been found responsible for providing TAG/AOI Terrier LT79 AFV armoured vehicles to the Haftar Affiliated Forces.[490] Unfortunately, the breach of UN arms embargoes, much like the use of cluster bombs, does not constitute a basis to limit or ban arms transfers towards Egypt. However, following criterion two of the CP, these behaviours constitute the "recipient country's attitude towards" IHL, and should be assessed by the Italian authorities before granting authorization towards Egypt.

The real issue with allowing arms transfer to Egypt however, as mentioned briefly when presenting the situation in the North Sinai, is linked to the respect of HR. A 2017 UN Committee against torture reported the systematic presence and practice of torture in the country carried out by governmental authorities,[491] while a 2019 report of the UN Human Rights Council's Working Group on Enforced or Involuntary Disappearances (WGEID) stressed the high number of enforced disappearances of detained individuals happening in the country. The report also raised concerns on "reprisals against relatives and civil society organizations working on their behalf".[492] Religious freedom is also another issue that has been highlighted by the UN, which on December 2019 with a press release publicly called on the government to release Ramy Kamel Saied Salid, a Coptic Christian rights defender which was arrested, questioned, and tortured on November 4 and November

'Asymmetrical War and the Notion of Armed Conflict–a Tentative Conceptualization', *International Review of the Red Cross* 91, no. 873 (2009): 95–125; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP Oxford, 2012); Lindsay Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949', *International & Comparative Law Quarterly* 47, no. 2 (1998): 337–61.

[489] 'Letter Dated 27 January 2017 from the Panel of Experts on Yemen Addressed to the President of the Security Council', paras 167 and following.

[490] 'Letter Dated 25 January 2019 from the Panel of Experts on Yemen Addressed to the President of the Security Council', 24.

[491] 'Report of the Committee against Torture, 58th Session (25 July-12 August 2016), 59th Session (7 November-7 December 2016), 60th Session (18 April-12 May 2017)', no. A/72/44 (2017): 12–14.

[492] 'Working Group on Enforced or Involuntary Disappearances: Report of the Working Group on Enforced or Involuntary Disappearances', no. A/HRC/42/40 (July 2019): 17.

23.[493] The European parliament has issued numerous texts on the deterioration of human rights in Egypt, the most recent one being of 18 December 2020, which recalls numerous official human rights violations verified by UN citing also the various statements made by the European External Action Service (EEAS) Spokesperson for Foreign Affairs and Security Policy on Egypt on arrests of human rights activists.[494] The list of human rights violations could go on, especially if we begin to include international and local NGOs reports and claims. However, these violations of human rights are sufficient to raise the issue of whether or not art. 1 paragraph 6 letter d of Law 185/90 has been respected, and if the arms transfers done towards Egypt are lawful according to the article which bans any operation towards those countries whose government is responsible of committing "serious violations of international conventions on human rights, verified by competent organisations of the United Nations, the EU or the Council of Europe". In addition, we could also inquire whether or not the transfers are compliant to criterion two of the CP which requires to assess if the exported material could be used for internal repression and to assess the export towards 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"[495], although the case-by-case assessment, as mentioned in chapter two, leaves room for Member States interpretation and autonomy.

### *3.3.3 Italian arms exports to Ukraine*

Since the beginning of the Russian attack to Ukraine on February 2022, many States have been supplying Ukraine with ammunitions, rifles, anti-air systems, helicopters, drones, MANPADS, anti-tank missiles systems, armoured vehicles and many more.[496] Even the EU has provided €500

[493] Office of the United Nations High Commissioner for Human Rights, 'Egypt Must Free Coptic Christian Rights Defender Reportedly Held on Terror Charges, Say UN Experts', OHCHR, accessed 27 April 2022, https://www.ohchr.org/en/press-releases/2019/12/egypt-must-free-coptic-christian-rights-defender-reportedly-held-terror.

[494] The European Parliament has also adopted resolutions to condemn Egypt's human rights violations condemning the arrest of over 4300 people in response to peaceful demonstrations that began on 20 September 2019 and for jailing human rights lawyers, journalists, activists and members of the opposition. See: European Parliament resolution of 24 October 2019 on Egypt (2019/2880(RSP)) and European Parliament resolution on the deteriorating situation of human rights in Egypt, in particular the case of the activists of the Egyptian Initiative for Personal Rights (EIPR) (2020/2912(RSP)).

[495] Art. 2 paragraph 2 of the Common Position 2008/944/CFSP.

[496] Al Jazeera, 'Germany to Deliver Gepard Anti-Aircraft Tanks to Ukraine', *Al Jazeera*, April 2022, https://www.aljazeera.com/news/2022/4/26/germany-to-supply-ukraine-with-heavy-weaponry-for-first-time; David M Herszenhorn, Lili Bayer, and Hans von der Burchard, 'Germany to Send Ukraine Weapons in Historic Shift on Military Aid', *POLITICO*, February 2022, https://www.politico.eu/article/ukraine-war-russia-germany-still-blocking-arms-supplies/; Davide Basso, 'France Delivers €100 Million in Weapons to Ukraine', *EURACTIV*, April 2022, https://www.euractiv.com/section/politics/short_news/france-delivers-e100-million-in-weapons-to-ukraine/; Al Jazeera, 'Germany to Deliver Gepard Anti-Aircraft Tanks to Ukraine'; Valerie Insinna, 'As Battle for Ukraine Enters a New Phase, so Does Lethal US Aid', *Breaking Defense* (blog), 2 May 2022, https://breakingdefense.sites.breakingmedia.com/2022/05/as-battle-for-ukraine-enters-a-new-phase-so-does-lethal-us-aid/.

million to provide weapons to Ukraine.[497] The Italian government has also started giving weapons and military items to Ukraine, among the supplied items we find Stinger MANPADS, the MG 42/59 machine-gun, and the anti-tank Panzefaust.[498] Italy adopted on the 28th of February 2022 a Decree-Law (n. 16) which authorized the "transfer of military equipment and equipment to the government authorities of Ukraine, by way of derogation from the provisions of Law No. 185 of 9 July 1990, article 310 and 311 of the Military Code as per Legislative Decree 15 March 2010 n. 66, and the related implementing provisions". Such decree was then repealed by Law 5 April 2022 n. 28, which converted the Decree-Law 25 February 2022 n. 14 and the disposition contained in the Decree-Law n. 16 were transferred into the text of Decree-Law n. 14. It should be noted that art. 1 paragraph 9 letter d), affirms that the law 185/90 does not apply to transfers State-to-State, if there is an agreement for military assistance before. If there is no military agreement between Ukraine and Italy, the law 185/90 applies. Currently, Italy and Ukraine have two agreements on the subject of defence. The first has been signed the 17th of March 1998 and ratified with Law 27 January 2000 n. 12, the second has been signed on the 24th of July 2007, but with no ratification, both cited in the 2021 Annual Relation to the Parliament required per art. 5 of Law 185/90. The first agreement is on cooperation in the field of defence, but contrary to the cooperation agreements signed with other countries (Turkmenistan, Law 5 June 2020 n. 65, Mongolia, Law 12 October 2020 n. 139, Angola, Law 25 January 2017 n. 11 and Indonesia Law 29 December 2004 n. 322 to name a few), the agreement does not explicitly mention arms transfers but mentions "procurement of materials for the armed forces […] to be governed by specific agreements" and lists among the activities the "presentation of new armaments and military technologies that the parties may propose to each other for use by the respective Armed Forces".[499] The second agreement concerns technical and military cooperation, however, according to the Ministry of Defence, it should concern a closer cooperation both in the field of joint modernisation projects for existing materials and in the field of standardisation and interoperability of armament systems. Given the fact that the Decree-Law derogates from the Law 185/90, we can infer that the 1998 agreement is not valid for arms transfers, and no further framework agreement, as envisioned in art. 4 letter b of the agreement itself, has been taken. This is further corroborated if compared with other cooperation agreement that involve arms transfers, which explicitly mention arms transfers like, for example, the agreement with Indonesia which states, at art. 2 "cooperation in

[497] Maïa de La Baume and Jacopo Barigazzi, 'EU Agrees to Give €500M in Arms, Aid to Ukrainian Military in `watershed' Move', POLITICO, February 2022, https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid/.

[498] Europea, 'Contro l'aggressione russa | Quali armi ha inviato l'Italia in Ucraina (e quali potrebbe inviare ancora)', *Linkiesta.it* (Linkiesta, April 2022), https://www.linkiesta.it/2022/04/aiuti-militari-italia-ucraina/.

[499] Articles 2, 3 and 4 of the Agreement in Annex to Law 27 January 2000, n. 12.

the transfer of items, facilities and services of defence", or like the one with Angola which reads at art. 2 "supply, maintenance, repair and modernisation of armaments and military technology".

Given the fact the existing agreement between Italy and Ukraine does not explicitly involve arms transfers, nor further framework agreements on arms transfers have been made, we can affirm that the applicable law is Law 185/90. Being the case, a first question we can ask is how the Decree-Law derogates from Law 185/90. Above all, we should first understand if the term "cessione" is among the operations by regulated by said Law. A *prima facie* interpretation could lead to affirm that there would be no need for the derogation, if the "cessione" is already outside the scope of the Law 185/90. However, this interpretation is far too approximate and it could prompt the claim that the derogatory norm of Decree-Law 16/2022 is purely superfluous. Such cannot be the case. Therefore, we can deepen the analysis and ask ourselves whether or not the cession can be considered an operation of export. To answer the aforementioned question, we can take advantage of the Decree of the President of the Republic 26 October 1972, n. 633, a ruling from the Civil Cassation Court (sez. trib. 24/06/2021, n. 18082) and another ruling from the Provincial Tax Commission of Milan (sez. III, 16/05/2019, n. 2154).

Before going further it is however necessary define what the definition of "cessione" is in the Italian language: the dictionary definition of cession refers to the act whereby a tangible or intangible asset is ceded to others, but said definitions may vary when it acquires a technical meaning in the different institutes of law.[500] The article of interest for the D.P.R. 633/72 is article 8 paragraph 1, which refers to the exemption of VAT tax on the "cessioni all'esportazione" (which can be translated to English with "export sales") done for goods exported outside the EU. The transfer is done between the assignor and the transferee is exporting the goods. The norm however does not draw a clear distinction between the "cessioni all'esportazione" and the export itself. On the other hand, the Civil Cassation Court in the sentence 24/06/2021, n. 18082 stated that the cession done from subsidiary companies, located in Italy and registered for VAT tax reasons, towards the home company, are actions related to art. 8 paragraph 1 letter a) of the DPR 633/72, and represent "*direct exports*". Lastly, the Provincial Tax Commission of Milan uses interchangeably the words export, cession, transferee, forwarding agent, assignor and seller. Even though the presented legislation and judicial interpretations are related to fiscal legislation, we can infer a more general principle and assume that a cession is comparable to an act of export, given the seeming interchangeability of these terms that emerges from

[500] Treccani, 'cessióne', *Treccani.it* (Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, n.d.), https://www.treccani.it/vocabolario/cessione.

the case law of the Italian Supreme Court and Territorial Courts and the apparent lack of a clear definition from the Italian legislator.[501]

From this assumption we can now ask to which parts of the Law 185/90 the derogation applies. From a substantial point of view, the transfer of arms towards Ukraine respects the rules in the norm, as well as international obligations, given the fact that the arms transfers are given to Ukraine to defend itself against an invasion.[502] The issue might arise when we compare the operational rules of the Law and the text of the Decree-Law. The Decree-Law 25 February 2022 n. 14 on urgent provisions on the crisis in Ukraine lays out at article 2-bis the provisions concerning the export of military items and equipment to Ukraine. The first paragraph specifies that the actions will be carried out in derogation from Law 185/90 and articles 310 and 311 of the Military Code as per Legislative Decree 15 March 2010 n. 66. The second paragraph tasks the Ministry of Foreign Affairs, the Ministry of Defence and the Ministry of Finances to define the military means, materials and equipment to be transferred as well as the modality of the transfer. Lastly, the third paragraph requires these three ministries to report at least quarterly on the evolution of the situation, in light of the arms transfers mentioned in paragraph 1 and the list of transferred military goods drawn by both ministries, as per paragraph 2. Article 6 concerns the financial and budgetary dispositions.

It is important to remember that the list of materials transferred as well as how the transfers will be carried out are still under secrecy and are not disclosed to the public. When comparing this decree with Law 185/90 there are few dispositions that we can assume are derogated, either partially or completely.

The first assumption we can make is that the exemption is done for the authorization processes needed to transfer arms towards a non-EU country.[503] In addition, it is important to note a Ministerial Decree by the ministries of Foreign Affairs, of Defence and of Finances of the 22nd of April 2022 which authorizes the transfer of the military equipment in attach (the document is classified). Furthermore, art. 3, the Decree authorizes the Defence Staff (Stato Maggiore della Difesa) "to adopt the fastest procedures to ensure the prompt supply of the materials at art. 1".[504] In relation to this freedom to act, we can also highlight the fact that no indication on the brokers has been released, and the overall derogation from Law 185/90, although highly unlikely, could potentially mean the entrusting of

[501] On a side note, it may not be farfetched the idea that the provision of the Decree-Law 25 February 2022, n. 14 has been written in a hurry, with doubts concerning the norms derogated.
[502] On this, a more in-depth analysis has been carried out in Chapter I and paragraph 3.1.1 of the present Chapter.
[503] See articles 9, 11 and 13 for extra-EU transfers.
[504] Autorizzazione alla cessione di mezzi, materiali ed equipaggiamenti militari alle Autorità governative dell'Ucraina ai sensi dell'articolo 2-bis del decreto-legge 25 febbraio 2022, n. 14, convertito, con modificazioni, dalla legge 5 aprile 2022, n. 28. Gazzetta Ufficiale Serie Generale n.97 del 27-04-2022.

brokering activities to entities not registered in the National Trade Register. Another point which derogates from the Law is the process as per Section II (arts. 11 to 14) for operations for Countries not belonging to the European Union. According to art. 11 a certain amount of information is needed before authorizing the export, among the information required we find that, due to time procedural constrains, some may need derogation; among these we find: the "amount of the contract and the final term of delivery" which are not clear, since the list, as per Decree-Law 25 February 2022 n. 14 is to be defined by the Ministries of Foreign Affairs, Defence and Finances; the "other intermediate or final destination Countries, entities, companies and persons as defined in Para. 3, letter c)", at the moment we know that the Ministry of Defence and the army are tasked with the shipments of military items to Poland, but from there we have no indications on how and by who these items are shipped to Ukraine.[505] Article 12 of Law 185/90 requires the Ministry of Foreign Affairs to carry out a vetting process and involves UAMA for the compliance of the operations with the Law, which also gives an opinion to the Ministry. It is also believable that the derogation would involve this process, given the fact UAMA has not been mentioned in the Decree-Law 25 February 2022 n. 14. Article 13 concerns the authorization for the export licences, but given the fact that the previous steps have been derogated to, the authorization itself is not needed anymore, given also the fact that the authorization could not be issued if the documentation required ex art. 11 would be incomplete or missing (para 5, art. 13). Lastly, another potential issue might arise under the provisions of art. 19, Law 185/90, given the fact that it requires either the record for ten years by the exporter of "every useful indication on the means of transport and the relative itinerary, as well as on any modification that might have occurred during the transport" or that for ex-works operations the exporters must notify the Ministries of Foreign Affairs, of Defence, of the Interior and of Finance with the date and modes of delivery as well as providing every useful information on the shipper or carrier in charge of the operation. However, given the fact that the transfers towards Ukraine are done on behalf of the State, these rules would not have applied in any case, as per last paragraph of art. 19.[506]

The last assumption concerns whether or not such transfers will be included in the annual report to the Parliament as per article 5. Indeed, the report to the Chambers is still present, but its contents are not clearly defined as article 5 requires. For instance, according to the Decree the report needs only to list the transferred military equipment and the modality in which the transfer has happened or is to

[505] Cristiana Mangani, 'Ucraina, tutte le armi inviate dall'Italia: mortai, cannoni e sistemi radar ultrasofisticati', 16 May 2022, https://www.ilmessaggero.it/italia/armi_italia_ucraina_quali_sono_cosa_succede-6692852.html.
[506] Art. 19 paragraph 4 of the Law 185/90.

happen, while article 5 requires analytical indications, like type of weapons, quantities and monetary value as well as the list of entities involved registered in the National Trade Register.[507]

[507] Article 5 of the Law 185/90 states at paragraph 3: "The report provided for under Paragraph 1 shall have to contain analytical indications – by types, quantities and monetary value – of the items referred to in the contractual transactions, indicating the annual state of progress of the export, import and transit of military goods and of the export of services falling under the controls and licences provided for under this law. The report shall also have to contain the list of Countries indicated in the final licences, the list of the revocations of licence following a violation of the final destination clause and of the prohibitions envisaged under Articles 1 and 15, as well as the list of registrations, suspensions or cancellations from the National Trade Register referred to in Art. 3. Lastly, the report shall contain the list of the programmes subjected to a global project licence, indicating the Countries and the Italian companies participating therein, as well as the licences issued by partner Countries relatively to programmes in which Italy participates and that are subjected to a global project licence".

## Chapter IV – Case Law on International Arms Trade

As we have seen, numerous individual and collective rights protected by International Law are directly or indirectly impacted by arms transfers. The means through which such rights are protected, however, are also enforced through domestic courts especially when these rights stem from obligations of IHL and HRL. Furthermore, International Law requires States to provide remedies for individuals whose rights under IHL and HR were violated.[508] In addition, when the violations amount to war crimes, States are required to prosecute the perpetrators and held them legally responsible, outlining an individual criminal responsibility.[509] The prosecution can be carried out either by the International Criminal Court, if the States are parties of the Statute of Rome (article 12 of the Statute), or it can be carried out by States through extradition if one or more States are mot parties to the Statute.[510] Given that the case law on arms control is relatively recent, there are not enough judgments and cases for the courts to be able to interpret and judge the few cases that do arrive. Furthermore, it should be noted that at an international level there is no enforcement system, due to the fact that the ATT leaves enforcement to the States Parties (art. 14) and no system to assess States' compliance or enforce it if there is a transgression has been developed. Furthermore, the Conference of State Parties established under art. 17 is only tasked with considering and adopting recommendations on the implementation, operation and promotion of universality of the treaty, and any dispute that may arise from the interpretation or application of the treaty is to be solved through mutual consensus of the parties (art. 19). The fact that the ATT allows States Parties for ample discretion in how they regulate arms transfers, with no enforcement or international controls, weakens the ATT enforcement and the possibilities for affected individuals to obtain remedies. At EU level, the CP 2008/944/CFSP, while binding for Member States, does not provide an enforcement system and, being part of the Common

[508] Cordula Droeg, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, Practitioners' guide series n°2 (Geneva: International Commission of Jurists, 2006), 23; 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : Resolution A/RES/60/147', March 2006, 2–3.

[509] 'Yearbook of the International Law Commission 1950, Volume II : Documents of the 2nd Session Including the Report of the Commission to the General Assembly', no. A/CN.4/SER.A/1950/Add.1 (1957): pt. 97.

[510] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf. Although, it would seem unlikely that a State exporting arms to a recipient, which is later proved to have committed war crimes, would prosecute the individuals deemed responsible of such acts. This is even more compelling given the fact that the prosecution should also be carried out towards those companies and authorities that have exported the military items used to commit such crimes. For further reading on the subject see: Linde Bryk, Miriam Saage-Maaß, Individual Criminal Liability for Arms Exports under the ICC Statute: A Case Study of Arms Exports from Europe to Saudi-led Coalition Members Used in the War in Yemen, Journal of International Criminal Justice, Volume 17, Issue 5, December 2019, Pages 1117–1137, https://doi.org/10.1093/jicj/mqz037, and Ingadottir, Thordis. "The ICJ Armed Activity Case – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions", Nordic Journal of International Law 78, 4 (2009): 581-598, doi: https://doi.org/10.1163/090273509X12506922939999

Foreign and Security Policy, it is also outside the jurisdiction of the Court of Justice of the European Union.[511] This situation ultimately leaves the control over the compliance of licensing decisions with international laws and standards to administrative or executive organs or through judicial review by national courts, according to each State's organization and law. Such control is also exercised on government's officials' actions and on enterprises, and often has both civil and criminal sanctions. The access to remedies for IHL and HR violations is then left to national jurisdictions which have to be considered vis-à-vis the ATT, national norms and, for EU Member States, the CP 2008/944/CFSP. For the purpose of this thesis, it should be noted that both the ATT and the CP are a preventive regime, while the Law 185/90 requires some sort of ex-post controls. The reviewability of licencing decisions is crucial to the enforcement of both national norms on arms transfers and IHL and HRL, some might also argue it to be necessary to enforce International Criminal Law for entrepreneurs supplying weapons to states violating IHL and HR or governments' officials authorizing such transfers.[512]

Beside the responsibility of States to provide remedies for those individuals who have been victim of violations of IHL and HR, States are also required to prosecute those who have violated IHL and HRL.[513] Furthermore, States are prohibited from assisting or aiding another State in its wrongful acts and from certain acts, including business activities, that they support or regulate.[514] These rules, while not being binding, are codified by articles 16 and article 41 of the International Law Commission's "Responsibility of States for Internationally Wrongful Acts".[515] States are therefore required to prosecute, regardless of the jurisdiction and nationality, those who have committed or assisted in the commitment of grave breaches of IHL, genocide, war crimes, crimes against humanity and of aggression, regardless of the nationality and jurisdiction. Allowing the assessment of their judicial for a could be a way for States "to respect and to ensure respect" the

[511] Art. 24 of the TEU. For further references, see note 51 at Chapter 2.

[512] Marina Aksenova, 'Arms Trade and Weapons Export Control', in *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge, 2021), 384.

[513] International Committee of the Red Cross, 'Practice Relating to Rule 158. Prosecution of War Crimes', icrc.org, accessed 13 May 2022, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule158; Theo Van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', *United Nations Audiovisual Library of International Law* 7 (2010). As we have seen in Chapter I States are also required to ensure the respect of the Geneva Conventions under Common Article 1.

[514] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 6.

[515] Article 16 reads: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.". While article 41 reads "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40." Which refers to "serious breach by a State of an obligation arising under a peremptory norm of general international law.

Geneva conventions as envisioned by Common Article 1.[516] This extraterritorial feature also applies to violations of HRL if the affected individuals are under the "power or effective control" of the State Party to the International Covenant on Civil and Political Rights (ICCPR).[517] The Human rights Committee has also stated that "States Parties participating in the deployment, use, sale or purchase of existing weapons and in the study, the development, acquisition or adoption of new weapons and new means or methods of combat must always take into account the impact of these devices on the right to life."[518] This has implications on the decisions done to authorize licences on arms transfers and the existence or not of ex-post controls to ensure that the transferred military items are not used to commit serious violations of IHL and HRL, given the fact that the supplying States has an informational advantage vis-à-vis the wrongdoing State.[519] Furthermore, States are required to regulate corporations located or headquartered in their jurisdiction and control and prevent any violations of HRL that these may commit or facilitate, both within and outside their jurisdiction.[520] The UN Guiding Principles on Business and Human Rights outline a set of guidelines for States and companies to prevent, remedy and assess HR abuses or violations committed in business operations, outlining a duty for States and companies to respect and protect HR.[521]

As previously said, a consistent case law on arms transfer does not exist, but there are some domestic proceedings, especially in Europe, where the normative framework is more advanced, that can provide us with some guidance on how accountability for arms transfers has been judged. The Chapter will first focus on which actions have been taken, before international courts, to prosecute arms transfers associated with serious violations of IHL and HRL. Then we will take a look at the cases present in Europe, given the fact that the regulation concerning arms transfers is one of the most developed and that the cases, while not being numerous, still reach a number worth analysing, especially for the UK where the NGO Campaign Against Arms Trade challenges are the most relevant

[516] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 7; International Committee of the Red Cross, 'Practice Relating to Rule 158. Prosecution of War Crimes'.

[517] 'General Comment No. 31 (80), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant : International Covenant on Civil and Political Rights : Adopted on 29 March 2004 (2187th Meeting) /', May 2004, para. 10.

[518] 'General Comment No. 36 :Article 6, Right to Life : Human Rights Committee', no. CCPR/C/GC/36 (3 September 2019): para. 65.

[519] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 7.

[520] 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', no. E/C.12/GC/24 (10 August 2017): para. 26, http://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

[521] 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', no. [ST/]HR/PUB/11/4 (2011): 35.

cases. Lastly, we will focus at the Italian level. Before starting it could be useful to know that other challenges on arms transfers have been carried out outside Europe: in Canada, a professor of constitutional and international law, Daniel Turp, challenged three times the Canadian government decision to sell light armoured vehicles to Saudi Arabia.[522] Two of these challenges did not bear results in stopping Canadians exports to Saudi Arabia, while the latter has been put on hold due to the COVID-19 pandemic. In the United States, in 2020, the New York Center for Foreign Policy and Affairs (NYCFPA) filed a complaint asking for judicial review of the authorization of arms exports to the United Arab Emirates done by the US Government.[523] To date, the Court has yet to decide on the matter.[524] A last case, which is still ongoing, concerns South African arms transfers done to Saudi Arabia and UAE. The Southern Africa Litigation Centre and Open Secrets filed a joint application at the North Gauteng High Court (Pretoria) seeking the names of permit holders authorised to export arms to Saudi Arabia and the United Arab Emirates (UAE) to be involved in the proceedings and seeking a judicial review of the authorization for arms transfers done by the National Conventional Arms Control Committee (NCACC).[525]

*4.1. International Case Law: Communication by 8 NGOs to the Office of the Prosecutor (OPT) of the International Criminal Court (ICC) to investigate European arms companies' executives on contributing violations of international humanitarian law in Yemen.*

On the 19th of December 2019 six NGOs, European Center for Constitutional Human Rights (ECCHR), Mwatana for Human Rights, Amnesty International, CAAT, Centre d'Estudis per la Pau J.M. Delàs (Centre Delàs) and Rete Italiana per il Disarmo submitted a communication to the Office of the Prosecutor (OTP) to the International Criminal Court (ICC). The purpose of the communication was to ask the Prosecutor to investigate certain European economic and political actors and their

[522] La Presse Canadienne, 'Arabie Saoudite: Les Blindés Canadiens Bientôt Contestés En Cour… et En Cours', *Devoir*, 8 February 2016, https://www.ledevoir.com/politique/canada/462403/arabie-saoudite-les-blindes-canadiens-bientot-contestes-en-cour-et-en-cours.

[523] New York Center for Foreign Policy and Affairs, 'NYCFPA Files Complaint in US District Court Against US Department of State to Block Sale of F-35 Aircraft to the United Arab Emirates', 30 December 2020, http://nycfpa.org/12/30/nycfpa-files-complaint-in-us-district-court-against-us-department-of-state-to-block-sale-of-f-35-aircraft-to-the-united-arab-emirates/.

[524]Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 42.

[525] Atilla Kisla, 'Back to Old Habits? South African Arms Exports to Saudi Arabia and the UAE', southernafricalitigationcentre.org, Southern Africa Litigation Centre, accessed 14 May 2022, https://www.southernafricalitigationcentre.org/2021/06/07/back-to-old-habits-south-african-arms-exports-to-saudi-arabia-and-the-uae/; Staff Writer, 'South African Arms Trade Case: Human Rights Organisations Ask the Courts to Review Decisions to Export Arms to Saudi Arabia and the United Arab Emirates – Southern Africa Litigation Centre', 6 July 2021, https://www.southernafricalitigationcentre.org/2021/06/07/south-african-arms-trade-case-human-rights-organisations-ask-the-courts-to-review-decisions-to-export-arms-to-saudi-arabia-and-the-united-arab-emirates/.

potential involvement in alleged war crimes committed by the Saudi led Coalition in Yemen.[526] The actors that should be investigated are: Airbus Defence and Space S.A. (Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc. (UK), Dassault Aviation S.A. (France), Leonardo S.p.A. (Italy), MBDA UK Ldt. (UK), MBDA France S.A.S. (France), Raytheon Systems Ltd. (UK), Rheinmetall AG (Germany) through its subsidiary in Italy RWM Italia S.p.A., Thales France, and government officials that have authorized the transfers towards the Coalition. The NGOs believe that the authorizations have been given notwithstanding the knowledge that the transferred weapons would have been used to commit serious violations of IHL that can amount to war crimes. The aim is to challenge the responsibility of corporate and political actors who may have contributed to serious violations of IHL by authorizing arms exports to the Coalition. The violations committed in Yemen may amount to war crimes under article 8 para 2 letter c of the Rome Statute.[527] The court can act on three cases: if the crimes have been committed in the territory of a State party, the accused is a national of a state party, or if a non-state party accepts the court's jurisdiction (article 12 of the Rome Statute). For the case at hand, the Court has jurisdiction on the crimes, but not on the countries where these crimes have happened, given the fact the States of the Coalition are not part of the ICC; however, the court has jurisdiction on the countries where the authorizations have been made (Italy, Germany, France, UK and Spain) and the nationals involved.[528] The ICC does not have jurisdiction on corporations, but it does have jurisdiction on individuals, furthermore, under art. 15 the OTP may initiate investigations *proprio motu* on the basis of information received on crimes within the jurisdiction of the Court. On such cases a preliminary analysis is done and if there is a reasonable basis to proceed the Prosecutor shall submit to the Pre-Trial Chamber a request for authorization of an investigation. The basis of the complaint is under article 25 para 3 letter c) of the Statute, on individual criminal responsibility "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission". The idea was that the material and mental elements of the article were met given the fact that the accused individuals provided weapons to the Coalition members well

[526] 'Made in Europe, Bombed in Yemen', Ecchr.Eu, April 2022, https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/.

[527] Article 8, para 2 letter c states: "In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii)Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable."

[528] The full list of States Parties can be found here: https://asp.icc-cpi.int/states-parties/states-parties-chronological-list.

knowing that such weapons would have been used to commit war crimes.[529] So far, the OTP has stated in the 2020 Report on Preliminary Examination Activities that it will decide on 2021 whether or not to proceed on the second phase with the aim of opening an investigation. To date there has not been any news on the matter.[530]

*4.2 European States Domestic Case Law*

*4.2.1. United Kingdom: CAAT Challenges*

In the UK, arms transfers are regulated by the Export Control Act of 2002 and the Export Control Order 2008 enacted by the Secretary of State, Export Control Organisation, Department for International Trade, which is also tasked with granting authorizations for arms exports.[531] The Export Control Order 2008 prohibits any transfer done without the authorization (article 3), with the exception of those transferred under an authorized licence granted by the Secretary of State (article 26). The secretary of State can also amend, suspend or revoke the licences (article 32). The approval of licences, before Brexit, was also carried out considering the CP 2008/944/CFSP, Regulation 1236/2005/EC of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, the Directive 2009/43/EC and Council regulation 428/2009/EC of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. Furthermore, the Secretary of State also used the "Consolidated EU and National Arms Export Licensing Criteria" which transpose the criteria of CP 2008/944/CFSP.[532]

From 2016 the Campaign Against Arms Trade (CAAT) launched a series of challenges against the Secretary of State to requested judicial review on different licences granted towards Saudi Arabia. In the next paragraphs we will analyst these challenges.

*4.2.1.1. First CAAT Challenge*

The first challenge was launched on 9 March 2016, asking for judicial review on the Secretary of State for International Trade decision to authorize transfer licences towards Saudi Arabia, despite the growing sources, from both NGOs and institutional bodies, proving the evidence of serious

[529] Marina Aksenova, 'Arms Trade and Weapons Export Control', in The Routledge Handbook on Extraterritorial Human Rights Obligations (Routledge, 2021), 46.
[530] Office of the Prosecutor of the International Criminal Court, 'Report on Preliminary Examination Activities 2020', 14 December 2020, https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf.
[531] Article 26 Export Control Order 2008, available at: https://www.legislation.gov.uk/uksi/2008/3231. Accessed on 15/05/2022.
[532] Vince Cable, 'Statement by the UK's Then-Secretary of State for Business, Innovation and Skills, Vince Cable, to Parliament, 25 March 2014', Pub. L. No. Column 9WS (2014).

violations of IHL being committed in Yemen.[533] To the challenge joined as intervenors Amnesty International, Human Rights Watch, Rights Watch (UK) and Oxfam. CAAT challenged the Secretary of State on three grounds: 1) the failure to ask correct questions or make sufficient inquiries, 2) the failure to apply the 'suspension mechanism' which requires existing licences to be suspended when there is not sufficient information to carry out a risk assessment, and lastly, 3) the irrational conclusion that Criterion 2c was not satisfied, given the evidence of IHL violations being committed in Yemen by the Saudi-led Coalition.[534] The Secretary of State argued that the decision-making process involved "the very top of Government" officials and is continuously reviewed in both a prospective and predictive way.[535] Ultimately, the Divisional Court rejected all three grounds: the first based on the fact that the Secretary of State had made "correct evaluations for the purposes of the Consolidated Criteria", the second based on the fact that decision not to suspend the transfer was rational because it was able to compare NGOs, and UN findings, vis-à-vis Saudi investigations, and the third ground on the basis that the risk assessment was conducted with caution and evidence, with the Secretary of State reaching the correct conclusion that there was no "no "clear risk" that there might be "serious violations" of International Humanitarian Law (in its various manifestations) such that UK arms sales to Saudi Arabia should be suspended or cancelled under Criterion 2c".[536]

CAAT then appealed the Divisional Court's decision on four grounds: 1) the Secretary of State's analysis on Saudi Arabia past and present respect of IHL was deficient; 2) the Secretary of State failed to ask the questions set out in the User's Guide to CP 2008/944/CFSP; 3) the Divisional Court approached the review with an incorrect standard; 4) the Divisional court failed to answer whether or not "serious violations of IHL according to Criterion 2c was synonymous with "grave breaches" of the Geneva conventions an war crimes according to international law.[537] The Court allowed the appeal but only under grounds 1, 2 and 4 and at the judgment on 20 June 2019, the Court of Appeal rejected grounds 2 and 4, but accepted ground 1. The second ground was rejected because the User's Guide is not binding and does not require any question to be asked nor answered considering them "questions […] which the decision-maker may or may not consider".[538] With regard to Ground 4, it was rejected because the Divisional Court did not misunderstand the term "serious

[533] Campaign Against Arms Trade, 'Legal Challenge Details', November 2021, https://caat.org.uk/homepage/stop-arming-saudi-arabia/caats-legal-challenge/legal-challenge/.
[534] R (on the application of Campaign Against The Arms Trade) -v- The Secretary of State for International Trade and interveners, No. CO/1306/2016 (High Court of Justice, Queen's Bench Division, Administrative Court Divisional Court 10 July 2017).
[535] Ibidem, para 57.
[536] Ibidem, paras 192, 198 and 210.
[537] The Queen (on the application of Campaign Against Arms Trade) -v- Secretary of State for International Trade and others (Court of Appeal (Civil Division) 20 June 2019).
[538] Ibidem, para 150.

violations of IHL".[539] On the contrary, the Court noted the "serious violations" cited by Criterion 2c can include both "serious violations" of IHL as well as "grave breaches", with the difference that the latter kind involves criminal responsibility as a war crime.[540] The Appeal Court also recalls the Divisional court reference to the Rome Statute for non-international armed conflicts and its definition of war crimes for this particular kind of conflicts (like the Yemen conflict), specifically art. 8 para 2c and 2e, which include direct "attacks against the civilian population as such or against individual civilians not taking direct part in hostilities".[541] The Appeal Court also highlights that the serious violations of IHL do not entail criminal individual responsibility as war crimes do.[542] Ground 1 was accepted due to the fact that a pattern on Saudi Arabia breaches of IHL could be found and that the Secretary of State failed to assess previous violations and "the question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced".[543] The Court concluded that the matter would have been remitted to the Secretary of State in order to reconsider it in accordance with the correct legal approach. On the 7th of July 2020, the government announced that the review was completed and that the "analysis has not revealed any such patterns, trends or systemic weaknesses", labelling the violations as "isolated incidents".[544] This conclusion allowed the UK government to continue the issuing of transfer licences to Saudi Arabia.[545] CAAT then began a second challenge for judicial review before the High Court. Before continuing with the analysis of the second challenge, it could be useful to assess the limitation of a judicial review. The first issue concerns the limited scope of it, given the fact that the Court was not concerned with scrutinizing the merits of the Secretary of State's position in the application of criterion 2c, the Court of Appeal was only tasked with judging whether or not the Secretary of state erred in the approach to the assessment.[546] Secondly, the Division Court ruled that, while no "legitimate military target" was identified by the Ministry of Defence, this did not mean that there was no legitimate target.[547] The Court of Appeal did not ban all transfers, instead the Secretary of

[539] Ibidem, para 158.
[540] The Queen (on the application of Campaign Against Arms Trade) -v- Secretary of State for International Trade and others, T3/2017/2079 paragraph 158.
[541] Luigi Zuccari, 'Gli obblighi di valutazione dello Stato esportatore di armi verso zone di confitto secondo la Corte d'appello del Regno Unito', *Rivista Di Diritto Internazionale* 103, no. 2 (2020): 555.
[542] The Queen (on the application of Campaign Against Arms Trade) -v- Secretary of State for International Trade and others, T3/2017/2079 paragraph 161.
[543] Ibidem, paras 138-145.
[544] Elizabeth Truss, 'Statement Made by Elizabeth Truss, Secretary of State for International Trade to the House of Commons' (2020), https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339.
[545] Ibidem.
[546] The Queen (on the application of Campaign Against Arms Trade) -v- Secretary of State for International Trade and others, T3/2017/2079 paragraph 56.
[547] R (on the application of Campaign Against The Arms Trade) -v- The Secretary of State for International Trade and interveners paragraphs 183–185.

State was instructed not to grant new licences but not to suspend or revoke existing ones, which proved to be a limited order.[548]

*4.2.1.2. Second CAAT Challenge*

The second CAAT challenge was launched on the 26th of October 2020 asking for judicial review on the government's decision to not suspend the old licences and issue new ones arguing that the government's conclusions were irrational.[549] Specifically CAAT claimed that the Secretary of State failed the risk-assessment as required by criterion 2c of the Consolidated Criteria, namely "not grant a licence if there is a clear risk that the items might be used for internal repression".[550] The claim is based on four grounds: 1) the Secretary of State failed to identify IHL committed by the Coalition in Yemen; 2) labelling the violations as isolated cases and with no pattern was an irrational conclusion, even more so when acts of torture and enforced disappearances were included; 3) failure to take into account a "clear risk" of future violations (which, from the point of view of the Secretary is logical, given the fact that it was claimed that no pattern existed); 4) the Secretary of State failed to consider the impunity in Saudi Arabia for these serious violations.[551]

On the 20th of April 2021 CAAT was granted permission to access the High Court and a new hearing was expected in the following months to decide the lawfulness of government's decision to resume the authorization of transfer licences to Saudi Arabia.[552] The challenges faced this time involve: the closed proceedings meaning that CAAT will have to prove the inadequacy of the risk assessment process without access to all relevant details, CAAT will also have to prove that the government has made an irrational assessment without knowing the information and evidence used by the government.[553] Another challenge that we ought to consider concerns the end of UK membership to the EU on 31st January 2020 and how this will affect this judgement and future

[548] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 17.
[549] Campaign Against Arms Trade, 'Arms Sales to War in Yemen Back in Court', 22 April 2021, https://caat.org.uk/news/arms-sales-to-war-in-yemen-back-in-court/.
[550] Vince Cable, Statement by the UK's then-Secretary of State for Business, Innovation and Skills, Vince Cable, to Parliament, 25 March 2014.
[551] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 18.
[552] Campaign Against Arms Trade, 'Arms Sales to War in Yemen Back in Court'; Dan Sabbagh, 'High Court to Hear Legal Battle over UK Arms Sales to Saudi Arabia', *Guardian*, 22 April 2021, https://www.theguardian.com/world/2021/apr/22/campaigners-to-challenge-decision-to-resume-selling-arms-to-saudi-in-high-court.
[553] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 19.

judgements, considering that the CP 2008/944/CFSP is not binding anymore for the UK. The "Consolidated EU and National Arms Export Licensing Criteria" are at stake and may undergo amendments which might undermine their effectiveness. The choice to stray from the criteria and make new agreements could lead to a competition between UK and EU enterprises for new markets, worsening the respect of both IHL and HR.[554] The respect of EU arms embargoes might also be another area of concern given the fact that the UK has already enacted in 2019 a set of regulations that establishes a national regime in the UK independent from EU sanctions and embargoes.[555]

*4.2.2 France*

French arms transfers and the licences authorization processes are regulated by the *Code de la Défense* (Code of Defence), specifically by the III section of the III book in the Second Regulatory section. Authorizations are granted by the Prime Minister (PM) after the recommendation of the InterMinisterial Commission for the Study of War Material Exports (Commission Interministérielle pour L'exportation des Matériels de Guerre – CIEEMG). Article L2335-1 and following regulate the procedure which also allows the PM to suspend, amend and revoke licences on the basis of the advices received by the CIEEMG. It is important to highlight that the Code of Defence does not include the ATT nor the CP 2008/944/CFSP and does not specify whether or not they can be invoked in Court.[556] However, licencing decisions can be challenged under the French Code of Administrative Justice for: interim relief or suspension of a decision fur urgent reasons (Article L.521-1) and for the protection of fundamental freedom affected by an administrative decision (Article L.521-2).[557]

French case law appears to be at the same time consistent and inconsistent with its own decisions: it is consistent in generally ruling against the refusal of suspending or revoking transfer licences and decisions concerning arms transfers, but it appears to be inconsistent when deciding the Court competence and the which rights are covered under the articles L.521-1 and L.521-2.

[554] Ben Tonra, 'Brexit and Security', *Eur. J. Legal Stud.* 11 (2018): 231.
[555] Ibidem.
[556] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 27.
[557] Article L.521-1 reads: "Quand une décision administrative, même de rejet, fait l'objet d'une requête en annulation ou en réformation, le juge des référés, saisi d'une demande en ce sens, peut ordonner la suspension de l'exécution de cette décision, ou de certains de ses effets, lorsque l'urgence le justifie et qu'il est fait état d'un moyen propre à créer, en l'état de l'instruction, un doute sérieux quant à la légalité de la décision. Lorsque la suspension est prononcée, il est statué sur la requête en annulation ou en réformation de la décision dans les meilleurs délais. La suspension prend fin au plus tard lorsqu'il est statué sur la requête en annulation ou en réformation de la décision". While Article (Article L.521-2 reads Saisi d'une demande en ce sens justifiée par l'urgence, le juge des référés peut ordonner toutes mesures nécessaires à la sauvegarde d'une liberté fondamentale à laquelle une personne morale de droit public ou un organisme de droit privé chargé de la gestion d'un service public aurait porté, dans l'exercice d'un de ses pouvoirs, une atteinte grave et manifestement illégale. Le juge des référés se prononce dans un délai de quarante-huit heures".

*4.2.2.1 First ASER Challenge*

On the 1st of March 2018 the NGO Action Sécurité Ethique Républicaines (ASER) requested the French Prime Minister to suspend French arms export licences to Saudi Arabia.[558] The claim is based on the fact that the licences violated articles 6 and 7 para 7 of the ATT, given the fact that there was strong evidence of the coalition violating IHL and HR in Yemen.[559] Not having received a response by the PM, ASER submitted the claim to the Parisian Administrative Court challenging the decision not to suspend the licences as well as challenging the procedure adopted to approve these licences.[560] ASER challenged the refusal to suspend the licences on three grounds: 1) the CIEEMG was not involved in the procedure and was not consulted before approving the licences, thus rendering the licences invalid; 2) the licences violated art. L.2335-4 of the Code of Defence, which states that the administrative authority may suspend, amend, revoke or withdraw the export licences it has issued, for reasons of compliance with France's international commitments and the individual or global licences can be suspended, amended, revoked or withdrawn by the PM (art. 2335-15). Specifically, the licences were against the articles 6 and 7 para 7 of the ATT as well as article 1 and 2 of the CP 2008/944CFSP; 3) lastly, the PM had violated art. L. 243-2 which states that the administration is obliged to expressly repeal a regulatory act that is illegal or devoid of purpose, whether this situation has existed since it was issued or whether it results from subsequent legal or factual circumstances, unless the illegality has ceased. The Secretary General of Defence and National Security rejected ASER grounds arguing that the Administrative Court had no jurisdiction on the matter.[561] The Court gave its judgment on 8 July 2019, recognizing its competence and jurisdiction given the fact that the decision of the Prime Minister to refuse the suspension of an arms export licence was an administrative decision detachable from the conduct of France's diplomatic

[558] Giovanna Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen', The International Spectator 56, no. 1 (2021): 83.

[559] Matteo Bonaglia, 'Demande de Suspension Des Licences d'exportation de Matériels de Guerre et Matériels Assimilés à Destination Des Pays Membres de La Coalition Menée Par l'Arabie Saoudite et Impliqués Dans La Guerre Au Yémen (Articles L2335-4 et R2335-15 Du Code de La Défense)', 1 March 2019, https://aser-asso.org/wp-content/uploads/2018/03/Demande-de-suspension_ASER_01-mars-2018.pdf.

[560] Action Sécurité Ethique Républicaines (ASER), 'Requête Sommaire' (Tribunal Administratif de Paris, 7 May 2018), https://aser-asso.org/wp-content/uploads/2018/07/Saisine-Tribunal-Administratif-transfert-darmes-du-gouvernement-fran%C3%A7ais-vers-la-coalition-des-pays-en-guerre-au-Yemen-ASER-07-Mai-2018.pdf.

[561] Matteo Bonaglia, 'Mémoire En Réplique', 25 January 2018, 4, https://aser-asso.org/wp-content/uploads/2019/03/Memoire-en-replique-Tribunal-administratif-transfert-darmes-du-gouvernement-fran%C3%A7ais-vers-la-coalition-des-pays-en-guerre-au-Yemen-ASER-25-janvier-2019.pdf.

relations.[562] However, the Court dismissed the claim stating that the ATT and the CP 2008/944/CFSP deal with relations between States and do not create any rights which individuals can directly invoke, thus they have no direct effect on domestic law.[563] ASER appealed the decision on 8 September 2019 challenging the Court conclusion that the provisions of the ATT and the CP 2008/944/CFSP did not amount to international commitments as art. L.2335-4 of the Code of Defence.[564] The Court however, denied its jurisdiction on the PM's decision and dismissed the appeal, and did so on the basis that the licencing decision was considered an intrinsically political decision and the court had no power to scrutinizing it.[565] ASER appealed again but to the Council of State where the case is still pending.[566]

We can however highlight the fact that the Parisian Administrative Court confirmed with the first judgement its jurisdiction on the matter while on the 10th of May of the same year, on a challenge launched by 8 NGOs (Amnesty international France, Groupe d'information et de soutien des immigrés (GISTI), Médecins sans frontières, Migreurop, Associazione per gli studi sull'immigrazione, Comité inter-mouvements auprès des évacués (CIMADE), Ligue française pour la défense des droits de l'homme et du citoyen (LDH) and Avocats sans frontières France) concerning the French government's decision to transfer six military vessels to the Libyan Coast Guard free of charge, the Court had stated that the decision to make supply without charge the Libyan armed forces could not be detached from the conduct of France's foreign policy and that the annulment of that decision, did not fall within the jurisdiction of the administrative court.[567] The NGOs stated that the use of the boats was likely to contribute directly to violations of Article 2(2) of the International Covenant on Civil and Political Rights and the rights and the constitutional right to asylum and the fundamental rights protected by Articles 2 and 3 of the and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, making France responsible given the fact that the intercepted migrants are then systematically transferred to detention centres where they are kept in inhumane conditions where they are exposed to rape, torture, extrajudicial executions and forced labour.[568] Nonetheless the Court rejected the challenge on the basis of it not being within its jurisdiction. The NGOs appealed the decision, but in the end the French government cancelled the transfer given the

[562] Tribunal administratif Paris, Arrêt n° 1807203/6-2 (Tribunal administratif Paris 10 May2019).
[563] Ibidem, para 8.
[564] Matteo Bonaglia, 'REQUÊTE ET MEMOIRE D'APPEL - COUR ADMININISTRATIVE D'APPEL DE PARIS', 8 November 2019, paras 10–22, https://aser-asso.org/wp-content/uploads/2019/09/Requ%C3%AAte-et-m%C3%A9moire-dappel_Cour-administrative-de-Paris-ASER-08-septembre-2019.pdf.
[565] Ordonnance n°19PA02929, No. 19PA02929 (Cour administrative d'appel 26 September 2019).
[566] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 29.
[567] 1908601/9 (Tribunal administratif Paris 8 July 2019).
[568] MIGREUROP, 'L'État français livre des bateaux à la Libye : des ONG saisissent la justice!'

massive pressure from civil society.[569] Before continuing with the French case law, it seems important to note that the Court stated that the ATT and the CP, while regulating relations between States, do so on the basis of certain principles: the ATT objectives at art. 1 are to contribute to international and regional peace, security and stability and reduce human suffering, in addition, the principles reference directly the Geneva Conventions of 1949 and the respect for human rights in accordance with Charter of the United Nations and the Universal Declaration of Human Rights.[570] The CP on the other hand references the aim to limit internal repression or international aggression or contribute to regional instability in recital 4 and at article 2, criterion 1 which requires MS to respect their international obligations and commitments, which include the Geneva Conventions of 1949 (and Common Article 1) as well as the agreements done to ensure respect and promote HR.

*4.2.2.2 Second ASER Challenge*

ASER second challenge was launched on 7 May 2019, with the same ground as the previous one, but they requested the case to be assessed under the urgency procedure under art. L.521-1 of the Code of Administrative Justice.[571] This was based on the fact that the French arms company NEXTER signed a contract with Saudi Arabia on December 2018, with a shipment planned on 9 May 2019 from the port of Le Havre to Jeddah.[572] Relying on art. L.521-1 of the Code of Administrative Justice ASER hoped to obtain an annulment or modification of the decision by the "interim relief judge", but the Court dismissed the claim based on the fact that there was no urgency since the shipment was annulled.[573]

*4.2.2.3. Third ASER Challenge*

The third ASER challenge was submitted on 5 February 2020, with the same urgent procedure as the second one, in order to achieve the cancellation of custom permits obtained by the Bahri Yanbu, a Saudi cargo ship transporting arms to Saudi Arabia with arrival at Cherbourg scheduled on 6 February 2020.[574] The claim concerned the custom permits granted to the ship for the transit of arms

[569] Bénédicte Jeannerod, 'France Drops Plan to Give Boats to Libya', 4 December 2019, https://www.hrw.org/news/2019/12/04/france-drops-plan-give-boats-libya.

[570] Luigi Zuccari, 'Diritti umani e commercio internazionale di armi. Alcune riflessioni alla luce della recente giurisprudenza francese', 28 April 2020, https://www.masterdirittiumanisapienza.it/diritti-umani-e-commercio-internazionale-di-armi-alcune-riflessioni-alla-luce-della-recente.

[571] Matteo Bonaglia, 'Requête et Mémoire d'Appel', 9 May 2019, para. 16, https://aser-asso.org/wp-content/uploads/2019/05/Requ%C3%AAte-et-m%C3%A9moire-R%C3%A9f%C3%A9r%C3%A9-Suspension-Tribunal-administratif-ASER-07-mai-2019.pdf.

[572] Ibidem.

[573] Ordonnance n° 1909737, No. 1909737 (Tribunal administratif Paris 13 May 2019).

[574] Matteo Bonaglia, 'Requête et Mémoire', 5 February 2020, https://aser-asso.org/wp-content/uploads/2020/02/Requ%C3%AAte-et-m%C3%A9moire-R%C3%A9f%C3%A9r%C3%A9-Libert%C3%A9-Tribunal-administratif-ASER-05-f%C3%A9vrier-2020.pdf.

from a French port and much like the second challenge, ASER requested urgent measures to be taken in order to avoid that an administrative process would have infringed fundamental freedom given that the arms transferred would have.[575] The Court recognized the existence of a link between such authorisation and the suffering of the Yemeni population, however the challenge was dismissed due to a lack of sufficient information to link correctly the authorization to the infringed right to life of the Yemeni people.[576]

### *4.2.3. Belgium*

Belgium has regionalized the competence for arms transfers from 2003, meaning that the Federal government has no say on the matter and the Regions (Flanders, Wallonia and Brussels Capital) are tasked with the development of their own legal frameworks and policies for arms transfers, while licensing exports for the Belgian Armed Forces are still competence of the federal government.[577] The main challenges that have been submitted in Belgium have been against the Walloon government, and arms transfers in the Wallonia region are regulated by the 21 June 2012 Decree "on import, export, transit and transfer of civilian weapons and defence-related goods". The Decree transposes the CP 2008/944/CFSP into Belgian law at article 14 and establishes the Commission d'avis sur les licences d'exportations d'armes (Advisory Committee on Arms Export Licences) tasked with formulating reasoned and confidential opinions based on geopolitical, ethical and economic considerations on the requests for defence-related products (these opinions can be given autonomously or with a request by the Walloon government).[578] The competent Court with the power to annul or suspend administrative decision is the Council of State, as established by the Royal Decree of 12 January 1973.[579] The challenges launched against the Walloon government have all been made by Belgian NGOs Ligue des Droits de l'Homme (LDH) and Coordination Nationale d'Action pour la Paix et la Démocratie (CNAPD).

#### *4.2.3.1 First challenge to the Walloon government*

[575] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 30-31.
[576] Arrêt n°2002311, No. 2002311 (Tribunal administratif Paris 7 February 2020).
[577] Diederik Cops, Nils Duquet, and Gregory Gourdin, 'Scrutinizing Arms Exports in Europe: The Reciprocal Relationship Between Transparency and Parliamentary Control', *Sicherheit & Frieden* 35 (1 January 2017): 82, https://doi.org/10.5771/0175-274X-2017-2-79.
[578] WALLEX, 'Décret Relatif à l'importation, à l'exportation, Au Transit et Au Transfert d'armes Civiles et de Produits Liés à La Défense', 21 June 2012, https://wallex.wallonie.be/eli/loi-decret/2012/06/21/2012203690/2012/07/15?doc=22677&rev=23794-15545, Article 19.
[579] 'Lois Sur Le Conseil d'État', Pub. L. No. 1973011250 (1973), https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?languag e=fr&nm=1973011250&la=F.

The first challenge done by the Ligue des Droits de l'Homme (LDH) and the Coordination Nationale d'Action pour la Paix et la Démocratie (CNAPD) involved a series of licences authorized by the Prime Minister of the Walloon region to Saudi Arabia.[580] The LDH, on 19 October 2017, requested the Prime Minister a copy of the decisions taken, but the Prime Minister responded simply with a general answer on some aspects of the policy regarding the granting of export licences for military equipment, with no reference to the export licences.[581] On December 2017, LDH and CNAPD started 14 ordinary procedures looking for the annulment of 24 licences granted in October by the government to Saudi Arabia.[582] They challenged the licences and government's action on three grounds: 1) the government had violated articles 14, paragraph 1, and 19 of the Decree 21 June 2012 Decree "on import, export, transit and transfer of civilian weapons and defence-related goods", which lay out a procedure that involves the opinion of the Advisory Committee on Arms Export Licences; the government not having followed such procedure had adopted unlawful decisions; 2) the government had violated Articles 1, 2 and 10 of the CP 2008/944/CFSP as well as articles 14 para 2, 14 para 4 and 14 para 6 of the Walloon Decree which transpose criteria 2, 4 and 6 of the Common Position; furthermore, the government did not provide any information on the assessment done for Saudi Arabia human rights record, its ability to fight terrorism and its involvement in serious violations of IHL in Yemen; 3) the government violated the principle of care and prudence (due diligence) and prohibition of abuse of power, committing errors in assessing the export and meeting the criteria 2, 4 and 6, especially given the fact that there was substantial information of the abuses and violations of IHL and HR committed in Yemen by the coalition.[583] The Council of State dismissed 4 of the 14 claim on 6 March 2018 as the licences had been already executed, while for the other 10 procedure, the Council dismissed ground 1 on the basis that the failure to follow the procedure by the government would have not altered the decision taken; ground 2 was dismissed on the basis that the licences were renewals and a lack of formal justification did not affect the validity of the government's decision.[584] Ground three was however accepted and led to the suspension of six export

[580] Coralie Mampaey, 'Exportation d'armes Wallonnes En Arabie Saoudite : La Justice Appelée Au Secours Des Droits Fondamentaux', 8 May 2019, http://www.cnapd.be/exportation-darmes-wallonnes-en-arabie-saoudite-la-justice-appelee-au-secours-des-droits-fondamentaux/.

[581] Michel Leroy, Arrêt n°240.901, No. 240.901 (Conseil d'Etat Belge - Section du Contentieux Administratif 6 March 2018).

[582] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 20.

[583] Leroy, Arrêt n°240.901 at 6–15; Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 20-21.

[584] Ibidem.

licences on 29 June 2018 with the Council stating that the Committee had correctly assessed the situation under criterion 4, but failed to assess Saudi Arabia "conduct towards the international community and in particular its attitude to terrorism, the nature of its alliances and its compliance with international law" and invited the government to take into account the track record of the buyer country in the areas of compliance with its international commitments regarding the non-use of force and international humanitarian law.[585] The same reasons have been used to annul other 8 licences on 14 June 2019.[586]

*4.2.3.2 Second challenge to the Walloon government*

The second challenge was brought by LHD and CNAPD with the addition of another NGO Forum Voor Vredesactie (FVV) and concerned more licences issued to Saudi Arabia in December 2019.[587] The claim was submitted on 19 February 2020 under the "extreme urgency procedure" to challenge "the decision(s) taken at an unknown date by the Minister-President of the Walloon Region to issue one or more licences for the export of arms to the Kingdom of Saudi Arabia".[588] The claim was based on three grounds: 1) the government had violated articles 1 and 6 para 2 of the ATT, and Common Article 1 to the four Geneva Conventions (namely the obligation to "to ensure respect, in all circumstances, for humanitarian law"); 2) the government also failed to ensure the respect tof HR and the prohibition of adopting decisions contrary to "elementary considerations of humanity"; 3) lastly, the government did not have a formal basis for the decision with the risk assessment, as per art. 14 of the 2012 Decree, presenting errors.[589] With the judgement of 9 March 2020, the Council of State decided to suspend the licences motivated by the fact that the government did not "adequately justified in terms of the clear risk that the military technology or equipment proposed for export will be used to commit serious violations of international humanitarian law in Yemen", ignoring the Committee opinion that such risk existed, thus the Council suspended all challenged arms exports licences.[590]

*4.2.3.3. Third challenge to the Walloon government*

[585] Pascale Vandernacht, Arrêt n°242.025, No. 242.025 (Conseil d'Etat Belge - Section du Contentieux Administratif 29 June 2018); Pascale Vandernacht, Arrêt n°242.023, No. 242.025 (Conseil d'Etat Belge - Section du Contentieux Administratif 29 June 2018).

[586] 'Licences d'exportation d'armes Vers l'Arabie Saoudite: Annulation', 14 June 2019, http://www.raadvanstate.be/?page=news&lang=fr&newsitem=541.

[587] Pascale Vandernacht, Arrêt n°247.259, No. 247.259 (Conseil d'Etat Belge - Section du Contentieux Administratif 9 March 2020).

[588] Ibidem, 1.

[589] Pascale Vandernacht, Arrêt n°247.259 at 20–21.

[590] Ibidem, at 30.

The same NGOs on 21 February 2021 challenged a new set of licences authorized by the government on 19 December 2020 using the same legal basis and the same grounds as the previous cases.[591] As in the second challenge, the Council concluded that the government failed the risk assessment concerning the potential of such weapons to be used to commit violations of IHL or for internal repression, annulling the first licences.[592] This conclusion was, however, valid only for the first of the two contested licences, for the second one, the Council concluded that the government had carried out a correct assessment as no risk was present due to the fact that the military items to be transferred were directed to the Saudi Royal Guard, which had no record of misconduct.[593]

*4.2.3.4. Fourth challenge to the Walloon government*

On 19 December 2020 the government authorized new licences to Saudi Arabia and on 20 February 2021 the same claimants as before, with the same grounds, challenged these new licences.[594] On 5 March 2021 the Council of State concluded that the government failed again the risk assessment on considering the existence of a clear risk that the military items to be transferred would have been used to commit serious violations of IHL in Yemen, thus the Council suspended the contested licences.[595]

Much like the cases in UK, the main issue always concerns the limited access to the information concerning the licences, the process they have to follow to be approved and the assessment carried out by the government. In addition to this, there is an overall lack of transparency which hinders the ability of civil society to be informed of the issued licences, often discovering them after years or before their expiration.[596] The cases we have seen were raised mainly due to the fact that newspapers gave news of the licences being issued. [597] Lastly, these legal challenges have a limited scope, with the result of only reaching the suspension of the contested licences without the

[591] Marc Joassart and Florence Van Hove, Arrêt n° 248.128, No. 248.128 (Conseil d'Etat Belge - Section du Contentieux Administratif 7 August 2020).
[592] Ibidem, at 10-14.
[593] Marc Joassart and Florence Van Hove, Arrêt n° 248.129, No. 248.129 (Conseil d'Etat Belge - Section du Contentieux Administratif 7 August 2020).
[594] Frederic Quintin and Marc Joassart, Arrêt n° 249.991, No. 249.991 (Conseil d'Etat Belge - Section du Contentieux Administratif 5 March 2021).
[595] Ibidem, 17.
[596] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 24.
[597] Mampaey, 'Exportation d'armes Wallonnes En Arabie Saoudite : La Justice Appelée Au Secours Des Droits Fondamentaux'.

ability to influence the government's decision, which more often than not, simply proceeds with issuing new licences on top of the previous ones. [598]

*4.2.4. Italy*

As we have seen, arms transfers in Italy are regulated by Law 185/90 which recalls the CP 2008/944/CFSP at art. 1 para 11-bis. Furthermore, the ATT has been ratified by Law 4 October 2013 n. 118. The UAMA is the competent authority for the authorizations of licences within the Foreign Affairs Ministry and also expresses opinions on the transfers together with the Ministry of Defence and Ministry of Finances. Specifically, for non-EU and non-NATO countries UAMA is involved in the analysis of the merits of individual transactions with opinions through all the phases of the authorization process, together with the Inter-Ministerial Advisory Committee composed of the Ministries of Foreign Affairs, Defence and Finances.

Italian case law presents, at the moment, only two cases neither concluded. The first challenge has been made against UAMA officials and RWM Italia managers, while the second one is in its formative stages and has been filed against the government by Regeni's family for the sale of FREMM frigates to Egypt.

*4.2.4.1. Criminal complaint against UAMA officials and RWM Italia S.p.A managers*

On 8 October 2016 an airstrike led by the Saudi-led coalition struck a civilian home in the Deir Al-Hajari village in Yemen, killing a family of six, including four children and their pregnant mother. At the site of the bombing an MK80 model bomb was found with the serial number indicating that it was produced by RWM Italia, a Rheinmetall AG Italian subsidiary.[599] The killings were not considerable collateral damage since the bomb was a guided one and the military checkpoint was 300 metres away from the site of the airstrike.[600] In April 2018, the European Centre for Constitutional and Human Rights (ECCHR), Rete Italiana Pace e Disarmo and Mwatana for Human Rights filed a criminal complaint to the e Public Prosecutor's Office in Rome (Procura della Repubblica del Tribunale di Roma) against UAMA senior officials and RWM Italia managers.[601] The complaint asks the Prosecutor to investigate the criminal liability of UAMA officials for granting the authorization

[598] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 22.
[599] European Center for Constitutional and Human Rights (ECCHR), 'European Responsibility for War Crimes in Yemen', European Center for Constitutional and Human Rights (ECCHR), April 2018, 1, https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/.
[600] Ibidem.
[601] Ibidem.

for the exports to Saudi Arabia and UAE as well as abuse of power (article 323(2) of the Italian Criminal Code), and the liability of RWM Italia managers for having exported such bombs and "their complicity through gross negligence in murder and personal injury under articles 589, 590, together with 61 n.3 of the Italian Criminal Code".[602] Given the kind of the alleged crimes a subjective element, *mens rea*, must be qualified and identified by the prosecutor and the complainants affirm that the defendants had been voluntarily or involuntarily part of the chain of events that led to the airstrike of 8 October 2016.[603] UAMA officials were accused of abuse of power for granting export licences to RWM Italia notwithstanding the clear risk that the arms could have been used to commit violations of IHL and HR.[604] The Prosecutor on October 2019 argued in favour of a dismissal of the investigation stating the absence of subjective elements of crime and that no factual nor legal grounds for proceeding existed.[605] UAMA had conducted the risk assessment, following the intended procedure and highlighting that no agreement between UAMA and RWM Italia existed for committing a crime thus eliminating the mental element needed for the abuse of power.[606] The Prosecutor confirmed however, that the suspension ring found at the airstrike site of October 2016 belonged to a batch of bombs sent to Saudi Arabia between 9 April and 15 November 2015, when the Coalition had already began its operation in Yemen.[607] The NGOs appealed the Prosecutor decision to the Judge of Preliminary Investigations (Giudice per le Indagini Preliminari – GIP), which on February 2021 asked the Prosecutor to continue the investigation given the fact that they were incomplete and also for allowing the defendants to exercise their rights.[608] In addition, the GIP argued that a common criminal accord between the defendants was not needed and argued that the UAMA officials could have acted independently to favour an Italian private company over international competition given also the fact that the opinions from other offices were not binding, such behaviour, contrary to the Prosecutor's conclusions, would have further confirmed the subjective element.[609] Lastly, the GIP clarified the applicable law to the case: Law 185/90, the ATT and the CP 2008/944/CFSP which should be interpreted according to Italy's international obligations. To date, the investigation is still ongoing.

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[602] Ibidem, at 2.
[603] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 26.
[604] European Center for Constitutional and Human Rights (ECCHR), 'European Responsibility for War Crimes in Yemen', 3.
[605] Coordinamento Campagne Rete Italiana Pace e Disarmo, 'Indagine per armi verso conflitto in yemen: la decisione del GIP', Rete Italiana Pace e Disarmo, 5 March 2021, https://retepacedisarmo.org/2021/indagine-per-armi-verso-conflitto-in-yemen-la-decisione-del-gip/.
[606] Ibidem.
[607] Ibidem.
[608] Ibidem.
[609] Ibidem.

What differs this case from the ones presented in the chapter is its criminal nature. While the others had an administrative nature, this is the first case in which criminal individual responsibility is brought to the attention of the Court. The addition of a criminal factor will add complexity to the case. Furthermore, abuse of power is a high threshold to demonstrate on the complainants' side, but could allow access to documents that are generally undisclosed, like the risk assessment process carried out by the government.[610] However, this kind of criminal challenges against individuals or companies tried for complicity in war crimes for supplying weapons to warring parties are not new. The Anraat and Kouwenhoven cases are two examples: the first involved a Dutch businessman who sold thiodiglycol (used for used sulfur-based mustard gases) to Saddam Hussein from 1984 until 1988, while the second concerned another Dutch businessman, Guus Kouwenhoven, which was first charged of war crimes for supplying weapons to Liberia, but was later found that he could not be convicted the charges due to lack of evidence.[611]

*4.2.4.2. Challenge to the Italian Government by Regeni's family*

On December 2021, Giulio Regeni's parents, the young researcher kidnapped, tortured and killed between January and February 2016, on December 2021 challenged the Italian government's decision to supply Egypt with two FREMM frigates.[612] The basis of the challenge lies in a violation of Law 185/90 given the fact that "selling arms to countries that have been guilty of 'serious violations of international human rights conventions, as determined by the organs of the United Nations or the European Union'." is against Law 185/90.[613] More specifically, the claim challenges the transfer of two FREMM frigates, 50 ASTER-15 SAAM missiles for a total value between €9 and 11 billion

[610] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 27.

[611] International Crimes Database project, 'The Public Prosecutor v. Guus Kouwenhoven', 2013, https://www.internationalcrimesdatabase.org/Case/2239; International Crimes Database project, 'Public Prosecutor v. Frans Cornelis Adrianus van Anraat', 2013, https://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/; Giovanna Maletta, 'Le sfide legali alle esportazioni di armi dall'UE verso l'Arabia Saudita: situazione attuale e potenziali implicazioni', *Human Security*, no. 11 (2020).

[612] Giuliano Foschini, 'Navi all'Egitto, la partita non è ancora chiusa. Di Maio in Commissione Regeni: "Sono certo che arriveremo alla verità su giulio"', Repubblica, 16 July 2020, https://www.repubblica.it/politica/2020/07/16/news/navi_all_egitto_la_farnesina_risponde_ai_parlamentari_la_partita_non_e_ancora_chiusa-262104881/; Redazione, 'Omicidio Regeni, i genitori denunciano il governo italiano per vendita armi all'Egitto', *Repubblica*, 31 December 2020, https://www.repubblica.it/politica/2020/12/31/news/regeni_genitori_denunciano_governo-280641258/.

[613] Giuliano Foschini, 'Navi all'Egitto, la partita non è ancora chiusa. Di Maio in Commissione Regeni: "Sono certo che arriveremo alla verità su giulio"', Repubblica, 16 July 2020, https://www.repubblica.it/politica/2020/07/16/news/navi_all_egitto_la_farnesina_risponde_ai_parlamentari_la_partita_non_e_ancora_chiusa-262104881/

euro.[614] Furthermore, it should be noted that much like the Enrica Lexia case, the Italian government has been unwilling to take advantage of the tools to protect the rights of its citizens abroad and its institutions. More specifically, the Italian government has not activated the procedure under article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which allows the Parties that do not agree on the interpretation or application of the convention to either set up an arbitration and if it is not possible, to dispute the case before the International Court of Justice[615] Moreover, Sciso highlights that the authorization given by UAMA, allowing the transfer of two frigates and other military items conflicts with the norms stemming from Law 185/90 as well as conflicting with international and EU obligations.[616] Focussing on domestic law, article 1 para 6 letter c of the Law 185/90 states that it is prohibited to transfer military goods to "Countries whose governments are responsible of serious violations of international conventions on human rights, verified by competent organisations of the United Nations, the EU or the Council of Europe". However, the "Report of the Working Group on the Universal Periodic Review: Egypt" published in 2019 reports human rights violations, specifically: the arrest of over 4300 people, jailing of human rights lawyers, journalists, activists and members of the opposition and torture.[617] As briefly mentioned in chapter III, the European Parliament has also condemned Egypt actions and in 2013 the Council has adopted a Conclusion to "suspend export licenses to Egypt of any equipment which might be used for internal repression and to reassess export licences of equipment covered by Common Position 2008/944/CFSP and review their security assistance with Egypt".[618] Notwithstanding these information, the Italian government has long since decided to act as little as possible to pursue Giulio Regeni's tortures and killers, favouring its foreign policy and arms transfers. The challenge launched by Regeni's parents is still in its formative state and is a reminder of the government's choices.

[614] Elena Sciso, 'Il caso Regeni: la difficile sintesi tra diritti inviolabili dell'uomo, protezione diplomatica e interessi dello Stato', *Rivista Di Diritto Internazionale* 104, no. 1 (2021): 197; 'Relazione sulle operazioni autorizzate e volte per il controllo dell'esportazione, importazione e transito dei materiali di armamento' -Anno 2020', 7 April 2020, 3, https://www.senato.it/leg/18/BGT/Schede/docnonleg/42351.htm.

[615] Elena Sciso, 'Il caso Regeni: la difficile sintesi tra diritti inviolabili dell'uomo, protezione diplomatica e interessi dello Stato', Rivista Di Diritto Internazionale 104, no. 1 (2021): 199.

[616] Ibidem, at 200.

[617] 'Report of the Working Group on the Universal Periodic Review :Egypt', 27 December 2019, https://digitallibrary.un.org/record/3849203/files/A_HRC_43_16-AR.pdf; 'Report of the Working Group on the Universal Periodic Review :Egypt : Addendum', 5 March 2020, https://digitallibrary.un.org/record/3869445/files/A_HRC_43_16_Add.1-AR.pdf.

[618] Foreign Affairs Council meeting, 'Council Conclusions on Egypt' (2013), para. 8, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138599.pdf.

## Conclusions

With this thesis we have seen how different sources of law, at different levels, interact and regulate arms transfers. We have analysed the strengths and weaknesses of the international and EU instruments to regulate arms transfers. (magari una mini considerazione su questi testi e le loro mancanze)

We have also seen how Italian law complies with international obligations. Law 185/90, while being and advanced piece of regulation, when challenged has proved its limitations and we had the opportunity to assess its shortcomings. A first issue with Law 185/90 concerns the complete absence of International Humanitarian Law in its text, although the Geneva Conventions find their way in Italian legal framework through art. 10 of the Constitution, the text of the law does not mention at all IHL. Of similar nature is the fact that the Law does the law mention the ATT, nor its obligation not to transfer weapons to those States committing serious violations of IHL set out at art. 7. Similarly, the law, while mentioning CP 2008/944/CFSP, does not mention IHL nor criterion 2 letter c in any way. On a side note, although art. 1 para 6 letter d prohibits the exports to those countries who are responsible of serious violations of international conventions on human rights, verified by competent organisations of the United Nations, the EU or the Council of Europe, the requirement of an official verification allows for a considerable dilation of time between the verification and the stop on issuing licences, thus allowing licences to continue to be authorised while potential violations of human rights are being committed.

Analysing Italian arms transfers towards Saudi Arabia and Egypt, we have found that those two countries have committed respectively serious violations of IHL and HR. Concerning the respect of Law 185/90 for arms transfers towards Saudi Arabia, we have seen that, given the amount of verified information coming from the UN Panel of Experts on Yemen, we can affirm that Saudi Arabia has committed serious violations of IHL, with complete disregard of the principles of distinction proportionality and precaution and violation of art. 7 paragraph 1 on the protection and assistance to wounded, sick and shipwrecked and art. 13 paragraph 2 of Protocol II to the Geneva Convention on the protection of civilians from being object of attack. The decision to transfer arms to Saudi Arabia would put the exporter in violation of art. 7 of the ATT and the second criterion of the CP 2008/944/CFSP, specifically art. 2 para 2 letter c). Furthermore, Saudi Arabia has been found to commit serious violations of HR by the Group of Eminent International and Regional Experts such as arbitrary arrest and detention, ill-treatment, torture and enforced disappearance. The assessment required by art. 7 of the ATT to identify the possibility, or the overriding risk, that the exported weapons might be used to commit or facilitate serious violations of IHL and HR was not done

appropriately by the Italian authorities, resulting in a breach of art. 7 of the ATT by Italian authorities. The same reasoning applies to criterion two of the CP, which requires an assessment to identify the existence of 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" (art. 2 para 2 letter c) and much like for the ATT, the Italian authorities did not carry out an appropriate, objective and non-discriminatory assessment. Lastly, Italian arms exports to Saudi Arabia violate Law 185/90 itself, specifically art. 1 paragraph 6 letter d which states that any export of military goods are prohibited to "Countries whose governments are responsible of serious violations of international conventions on human rights, verified by competent organisations of the United Nations, the EU or the Council of Europe". The two requirements of responsibility of the recipient State in committing serious violations of HR, and the verification of such violations from competent organizations are present, as we have seen, thus putting Italian arms transfers, done after 2015, to Saudi Arabia against Law 185/90. Italian arms transfer to Egypt follow the same reasoning as the ones towards Saudi Arabia, however, the main issue is not linked to serious violations of IHL, but to serious violations of HR committed in Northern Sinai. Both the UN Committee against torture and the UN Human Rights Council's Working Group on Enforced or Involuntary Disappearances (WGEID) reported tortures and enforced disappearances of detained individuals happening in the country, which should trigger article art. 1 paragraph 6 letter d of Law 185/90, thus prohibiting arms transfers to Egypt. However, Italian authorities still authorize arms exports to Egypt, with no regard to national norms. Lastly, in chapter three we have seen how Italian arms transfers to Ukraine, while being perfectly legal under international law, as per right to self-defence of States enshrined in art. 51 of the UN Charter, derogate Law 185/90 in its procedural aspects, limiting the procedural aspects of the law, thus hindering its transparency.

For what concerns the jurisprudence and case law, although a consistent case law on arms transfer does not exist, we have found that, so far, the challenges presented before national courts have had a limited impact on enforcing arms transfers. This is mainly due to the fact that courts generally suspend existing licences, but cannot order to stop issuing new ones.[619] A second issue is that of transparency, meaning that there is limited access to the information concerning the licences, the process they have to follow to be approved and the assessment carried out by the governments, with civil society discovering the licences years after their issuing.[620]

[619] Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, 'Domestic Accountability for International Arms Transfers: Law, Policy and Practice', ATT Expert Group (London: Saferworld, August 2021), https://www.icj.org/wp-content/uploads/2021/09/domestic-accountability-for-international-arms-transfers.pdf, 22.
[620] Ibidem, 24.

To conclude, we can say, the existing arms transfer regimes have their limitations, while being overall advances, have their limitations, especially if we look at their ability to limit arms transfers when special foreign policy or economic interests are present and must be balanced vis-à-vis the respect of IHL and HR. What could greatly improve the efficacy of such norms, at least at a European level, would be a coordinating regime as well as more transparency. The former would allow for coordinated export policies that could improve general security and stability both in Europe and in the recipient countries (a process which could also be developed with a coordinated foreign policy); the latter would entail more transparency and publicity from the licencing authorities in their assessment processes, allowing the scrutiny of civil society.

## Summary

The Stockholm International Peace Research Institute (SIPRI) estimated that the global conventional arms trade amounted to $118 billion in 2019[621], with the volume of international arms transfer in the 2016-2020 period being almost the same as the 2011-2015 period[622]. Arms exports are used by States for a variety of reasons, firstly they are economically beneficial: helping the balance of payments, strengthening national defence industry, reducing unit cost and can act a foreign policy tool.[623] Furthermore, arms transfers are a crucial foreign policy instrument as it is a sector in which governments play a major role in determining and controlling transactions and prices, linking the arms trade to political necessities and priorities. Over the years, many NGOs have expressed criticism towards governments and their lack of control on arms transfers towards countries which did not respect basic human rights or in breach of international law obligations. This thesis is focused on the relation between the international, regional (EU) and national (Italian) regulation on arms transfers between States and the respect of human rights and international humanitarian law criteria set out in these norms.

A clear-cut definition of conventional weapons is not straightforward, and generally they are either listed or identified by a general definition in law instruments, with the Hague Convention (V) on the Rights and Duties of Neutral Powers and Persons in Case of War on Land referring to "arms, munition of war"[624], the Hague Convention (XIII) on the Rights and Duties of Neutral Powers in Naval War referring to "war-ships, ammunition, or war material of any kind whatever".[625] More recent instruments, on the other hand, opted for a general listing of the weapons regulated, like the UN Register on conventional arms (UNROCA) and the Arms Trade Treaty (ATT). For more detailed list and definitions we have to look at regional or national instruments (either binding or not), like: the Common Military List of the European Union which also includes propellants, fire control and surveillance equipment, equipment specialized for training, infrared or thermal imaging equipment and much more; the Wassenaar Arrangements a multilateral export regime provides a detailed list of conventional arms, including the categories used by the UNROCA. The focus will be on arms transfers between State actors, meaning that transfers between States and non-state actors or between

[621] Stockholm International Peace Research Institute, *SIPRI Yearbook 2021: Armaments, Disarmament and International Security* (London, England: Oxford University Press, 2021), 15.
[622] Wezeman, Pieter D., Alexandra Kuimova, and Siemon T. Wezeman, 'Trends in International Arms Transfers, Stockholm International Peace Reaserch Institute, 2021'.
[623] Rachel Stohl and Suzette Grillot, The International Arms Trade (Oxford, England: Polity Press, 2009), 42–43.
[624] 'Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (Hague Convention V)', 1907.
[625] 'Convention Concerning the Rights and Duties of Neutral Powers in Naval War, (Hague Convention XIII)', 1907.

non-state actors will not be considered. A first analysis on international law, both customary and conventional, is due. To provide a definition of arms transfer, we can use the Arms Trade Treaty which, at art. 2 (2), defines transfer to be any of "the activities of the international trade comprise export, import, transit, trans-shipment and brokering". The first principle linked with arms transfers, is that of non-intervention in internal affairs, grounded in multiple sources of international law: i.e., art. 2 (7) of the UN Charter, and art. 2 (1) which recognizes States' sovereignty. It has also been more clearly defined by the International Court of Justice in the Military and Paramilitary Activities in and against Nicaragua Case (*Nicaragua v United States of America*) forbidding "all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must, accordingly, be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones".[626] With the *Nicaragua v United States of America* and the judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the ICJ has also endorsed the conclusion that arms transfer from a State, directed to non-state groups, terrorist or rebels operating inside the jurisdiction of another state, would be unlawful according to international customary law.[627] We can, therefore, affirm that the principle of non-intervention in internal affairs limits arms transfers to non-state-actors (NSAs) fighting the legitimate government. Things change, however, when the NSA is also a national liberation movement (NLM) seeking self-determination. In theory, NLMs are entitled to receive "moral and material assistance". However, States' practice and interpretation on the matter differ widely. UN Resolution 2649 (XXV) of 1970 recognizes the right to "seek and receive all kinds of moral and material assistance"[628], while various States, among which Australia, United Kingdom, United States, South Africa and Portugal, have highlighted that international law does not specifically entitles States to give military support or armed assistance to Self-governing Territories or elsewhere.[629] On the other hand, States of the former Eastern Bloc, Afro-asiatic countries and Middle

[626] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14.'

[627] ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 14.', paras 247 and 292. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168, paras 164 and 345.

[628] 'The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights.', 1990. Other documents that contain the same principle are: A/RES/3314(XXIX) and A/RES/2326(XXII).

[629] Ruys, 'Of Arms, Funding and "Non-Lethal Assistance"—Issues Surrounding Third-State Intervention in the Syrian Civil War'; 'Summary Record of the 114th Meeting Held on Friday, 1 May 1970'; 'Summary Record of the 1184th Meeting: 6th Committee, Held at New York, on Monday, 28 September 1970, General Assembly, 25th Session'; 'Summary Record

East countries have endorsed the opposite opinion, confirming that the term "support" should also be intended as the possibility to transfer arms to NLMs. This indeterminacy has been ultimately interpreted based on convenience. The principle of non-intervention and the right of people to self-determination, may appear in contrast when seen in relation to arms transfers. However, a closer look shows that: the first has been used repeatedly to avoid and forbid arms transfers towards non-state actors and rebels, which threaten the integrity and stability of the legitimate State/government; the second, while not explicitly allowing for arms transfers, implicitly does so through the justification that States "shall render all necessary, moral and material assistance".[630] On self-defence and arms transfers we can say that the right of States to acquire arms for self-defence has been recognized by the UN Disarmament Commission, which, in a report of 1996 writes that States have the "the right to acquire arms for their security, including arms from outside sources".[631] This means that arms transfers done under the banner of self-defence purposes, are legitimate according to international law. Furthermore, supplying weapons to an attacked State is to be considered legitimate if the Security Council has not taken action to solve the conflict. The transfer of arms towards an aggressor State, on the other hand, cannot be considered legitimate according to international law due to the fact that it violates a fundamental law of jus cogens. Conventional arms transfers have also a direct relationship with the principle of neutrality. If we intend it as the *law of neutrality*, it applies to sovereign States in situations of armed conflicts between two or more states prescribing neutral States not to support warring parties with military means.[632] The interaction between arms transfers and neutrality can be tricky, mainly due to the fact that we have to distinguish between private and public sector: according to art 7 of Hague V, citizens or private companies are free to export weapons, munitions and war materials to belligerent parties (if the neutral State does not impose restrictions), but a neutral State is forbidden to do so according to art. 6 of the Hague XIII; furthermore, any restriction imposed on private arms exports must be applied to all belligerent parties as per arts. 9 of both Hague V and Hague XIII. Such distinction is no longer fitting, given the fact that the arms' industry is no longer a majorly private-owned sector. We might, however, argue that any conventional arms transfer *de facto* is checked and controlled by States and the principle of impartiality of arts. 9 of Hague V and XIII applies, if the UN security system has not been set in motion. The role of the UN and its security system should not be seen as a hindrance to the neutrality law, however its ineffectiveness in making

of the 1207th Meeting: 6th Committee, Held at New York, on Tuesday, 27 October 1970, General Assembly, 25th Session'.

[630] 'Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.'

[631] 'Report of the Disarmament Commission.', no. A/51/42 (1996): iii, 20 p.

[632] Michael Bothe, 'Neutrality, Concept and General Rules', Max Planck Encyclopedia of Public International Law., 2011, http://opil. ouplaw. com/view/10.1093/law: epil/9780199231690/law-9780199231690-e349.

that same security system work leaves room for ample States' interpretation and practice to define what neutrality consists of and what is non-belligerency. International arms transfers also impact directly on International Humanitarian Law (IHL) and its respect. IHL generally bans those weapons that cause unnecessary harm, that aggravate suffering and that are generally considered as inhumane.[633] However a ban on use does not necessarily coincide with a ban on transfer, meaning that states can, in theory, trade such weapons. Only the Additional Protocol I of 1977 to the Geneva Conventions explicitly references transfer at article 36,[634] which states "In the study, development, acquisition or adoption of a new weapon… a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party".[635] However, it does not prescribe what States ought to do after they detect the illegality of a certain weapon.[636] Overall, IHL *per se* still seems to lack a consuetudinary norm which limits arms transfers, due to the fact that State practice and opinion juris on the matter do not coincide. A way to solve this gap has been identified in the Common Article 1 to the Geneva Conventions and Protocol I which states "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.". The first part is an obligation that States impose in themselves, however the second part, specifically to "ensure respect […] in all circumstances", meaning that the Contracting Parties intended to create a system of obligations *erga omnes partes*. This entails that States not taking part in a conflict have a twofold obligation to prevent other States to commit violations of IHL and to set up measures and instruments to stop ongoing violations.[637] For what concerns HR and arms transfer, we have seen that HRL does not provide sufficient means to limit arms transfers even if it is likely that human rights. This is due to the fact that jurisdiction plays an important role, given that arms suppliers and transit States have little to no control over the area where the arms will be employed to commit violation of HR. Although, various binding instruments and national laws require States to

[633] For example, the St. Petersburg Declaration of 1868 banned any projectile under 400 grams charged with explosive or inflammable materials; the 1899 Hague Declaration concerning Expanding Bullets banned the so-called dum-dum bullets.

[634] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), 33-34, https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.

[635] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)'.

[636] Maya Brehm, 'Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law' (Geneva, University Centre for International Humanitarian Law, 2005), https://www.prix-henry-dunant.org/wp-content/uploads/2005_Thesis_Brehm_en.pdf.

[637] Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations', International Review of the Red Cross 96, no. 895–896 (2014): 707–36.

assess HR respect in the recipient countries and whether or not the exported military items could be used to commit violations of HR.

Moving our attention to conventional international law, we analyse the most recent and important international agreement for regulating weapons exports, the Arms Trade Treaty (ATT), entered into force in 2014. The objectives and purposes of the ATT, while aiming at "regulating or improving the regulation of the international trade in conventional arms",[638] ultimately faced the need to achieve consensus between States in favour of a stricter regulation and those wanting to shift the focus on arms supplies to non-state actors. An important step brought forth by the treaty is listing the conventional weapons regulated by it, with the inclusion of small arms and light weapons, as well as ammunitions, munitions and parts and components, thus filling the gaps left by international customary law and other treaty law. The central part of the treaty is the total ban of conventional weapons in three cases (art. 6): if measures adopted under chapter VII of the UN Charter have been adopted by the Security Council, in particular arms embargoes, if the transfer would violate a State's obligations under international agreements, particularly those on licit or illicit transfers of conventional arms and lastly, if the State has knowledge that the arms could be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions or attacks directed against civilian objects or civilians. The main issue identified with the treaty's central provision is the knowledge requirement, which has not been defined and could potentially hinder the effectiveness of the provision. Another important article of the treaty is art. 7, which covers the cases not regulated by art. 6, in particular serious violations of IHL, HRL or/and facilitation of terrorism or organized crime, but leaves more room for States Parties' interpretation, leaving the assessment procedure on a case-to-case basis. Concerning the treaty's control system, it is left to States national laws and procedures, providing ample discretion. Such word could indeed summarize the entire treaty, given the ample room left in the provision for interpretation. Beside the ATT there are other treaties that limit or ban the transfer of conventional weapons. Among these we find 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 (or the Inhumane Weapons Convention or CCW), adopted in 1997, which includes five additional protocols: Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (amended in 1996), Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons (adopted in 1995) and Protocol V on Explosive Remnants of War (adopted in 2003). The Convention aims at limiting or banning the use, and in some

[638] 'Arms Trade Treaty', entry into force on 24 December 2014 thearmstradetreaty.org, 12, https://thearmstradetreaty.org/hyper-images/file/ATT_English/ATT_English.pdf?templateId=137253, article 1.

cases transfer, of weapons that can cause unnecessary or unjustifiable suffering to combatants or that can have indiscriminate effects on civilians. We then have the Anti-Personnel Mine Ban Convention (Ottawa Convention or APL) which bans the production, usage and transfer of anti-personnel mines. With similar contents to the APL there is also the Convention on Cluster Munitions (or CCM) which entered into force in 2010. Among the soft law instruments, we find the United Nations Register of Conventional Arms (UNROCA), created in 1991, which is a voluntary instrument to track and trace international transfer of arms, specifically those related to battle tanks, combat aircraft (manned and unmanned), warships, large-calibre artillery systems, attack helicopters and missiles and missile launchers. Another instrument is the already mentioned Wassenaar Arrangement which creates a voluntary export regime for the exchange of information and transparency concerning transfers of conventional weapons, dual-use goods and technologies.[639] The last soft law instrument considered is the 2001 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (or PoA), a policy framework and guide to harmonize, coordinate and promote the action of States in regulating Small Arms and Light Weapons and their transfers.

Concerning the European Union's framework, we have to take a look first at the treaties at the basis of European law and then at the Common Position 2008/944/CFSP on Arms Exports Control and the Intra-Community Transfers Directive 2009/43/EC. According to article 346 of the Treaty on the Functioning of the European Union, MS are not obliged to provide any information which may put their security at risk, and each Member State can take any measure considered necessary to protect its security interests linked to the production or arms trade, provided that such measures do not endanger competition in the common market "regarding products which are not intended for specifically military purposes". The article puts arms transfers outside EU competence as well as outside European Court of Justice's jurisdiction. Despite not having a direct competence laid out in the Treaties on the matter, the EU reaches arms trade through other domains and policies, also through its general objectives.[640] The preamble of the Treaty on European Union (TEU) promotes peace and security in both Europe and the world. Articles 3(5) and 21(2)(c) reinforce the aim at preserving world peace and security as well as respecting international law, UN principles and Charter, the Helsinki Final Act and the Charter of Paris. These aspects are also recalled in the Common Foreign and Security Policy which covers "all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common

[639] 'Genesis Of', Wassenaar.org, 07/2015.

[640] Ramses A. Wessel, 'Legal Competences of the European Union in International Arms Control', 2020, https://foreignpolicynewrealities.eu/event/contemporary-challenges/, 4.

defence"[641], with art. 29 of the TEU used as the legal basis for setting up the European arms export controls system.[642]

The first instrument to be analysed is the Common Position 2008/944/CFSP, binding for member States since 2008, and successor of a politically binding Code of Conduct on Arms Exports adopted in 1998. It lays out eight criteria to adopt when assessing arms exports and licensing to non-EU countries, like: refusal of a licence approval if it would be inconsistent with internationals obligations and commitments of Member States, UN, EU and OSCE embargoes or measures adopted by the UNSC; refusal of an export licence if there is the risk that the transferred military equipment could be used for internal repression; refusal of an export licence if it would provoke or prolong armed conflicts or aggravate tensions in the recipient country; refusal of an export licence if there is the clear risk that the exported military items could be used aggressively towards another country or to claim with force a territory; not allowing export of military equipment that could be used to endanger their security or that of their allies and friendly countries and assessment of the compliance between the arms transfers towards the recipient country with the economic capacity of the country. However, the criteria have shown some limitation, especially concerning the case-by-case approach of criterion two to assess the recipient's attitude towards IHL and respect of HR, although IHL violations are far less detailed than HR violation within the CP. Harmonization on the matter has been lacking, and without an enforcement mechanism, leading to some MS not even including the criteria in their own national laws or lacking of precision in their adoption. This lack of enforcement and application is due to the fact that the CP is outside ECJ's jurisdiction and the case-by-case approach of some criteria. This has been widely demonstrated by French, UK and Italian exports to Saudi Arabia. The Directive 2009/43/EC on the other hand, focuses on intra-community transfers, setting up a particular licencing regime between MS with three kinds of licences: general, global and individual. Contrary to the CP, the Directive falls under EU competence but its application has been found to be limited due to differences of national reports and their clarity, due to few general transfer licences issued, different policies on re-export limitations and, lastly, an overall lack of transparency. Many commentators highlight the fact that, notwithstanding the current common regulations, harmonization is yet to be reached on the matter, which hinders the effective capability to create a solid regime for arms exports while also limiting the capacity to build a solid coordinated European

[641] Art. 24 TEU.

[642] Ramses A. Wessel, 'Legal Competences of the European Union in International Arms Control', 2020, https://foreignpolicynewrealities.eu/event/contemporary-challenges/, 4. Article 29 TEU reads as follow "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions".

industrial base.[643] States' compliance with the EU export regulation is non-homogenous, meaning that different ministries, departments and agencies assess licences and that they have different roles, some have veto power, and others don't[644], meaning that licensing authorities come from different policy domains.[645] Furthermore, MS have different interpretations of what are goods "designed for military use", a difference in definition grounded in different foreign and security policies.[646] Some commentators identify the source of this lack of harmonization in the two faced difficulty in creating an internal and external defence market and defence industry, which leaves the harmonization only for formal aspects, but not substantial ones, leaving foreign and security concerns at national level, and the different interpretation given to the criteria set out in the Common position are based in different foreign policies and security issues.[647]

The focus on Italian regulation on arms transfers is on Law 185/90, as well as the Italian government's behaviour and respect of international, EU and national laws for the transfers towards Saudi Arabia and Egypt. An additional consideration should be done for what concerns Italian arm transfers towards Ukraine, which are enacted in derogation of national law. Article 1 of Law 185/90 lays out the principles and a list of prohibitions and limitations to arms exports. Arms transfers are generally prohibited if they are against the Constitution, international agreements on non-proliferation, State's security, war on terror and if they are against the good relations with other States or if there are insufficient guarantees on the final destination of the military goods. Transfers are also prohibited towards countries at war in breach of art. 51 of the UN Charter and to those countries under UN, EU or OSCE embargoes. Another prohibition concerns exports towards States where violations of human rights are verified by the UN, EU or Council of Europe. The law also prohibits the production and transfer of biological, nuclear, chemical weapons, anti-personnel mines and cluster munitions. Furthermore, the Law 185/90 creates two regimes for arms transfers: one for intra-community

[643] Leonie Grünhage et al., 'The EU Common Position on Arms Export Policies: Europeanising Transparency', *MaRBLe* 2 (2013); Diederik Cops and Nils Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute, 2019), 4, https://vlaamsvredesinstituut. eu/wp-content/uploads/2019/12/VI_policybrief_EU_arms_export_2019highres. pdf.

[644] Sibylle Bauer, Mark Bromley, and Giovanna Maletta, 'The Implementation of the EU Arms Export Control System', in *Europa.Eu* (Policy Department, DG EXPO - European Parliament, 2017), 23, 7.

[645] Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 187, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States, 187.

[646] Ibidem, 188.

[647] Diederik Cops, Nils Duquet, and Gregory Gourdin, Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States (Artoos, 2017), 190-191, https://www.researchgate.net/publication/317615961_Towards_Europeanised_arms_export_controls_Comparing_control_systems_in_EU_Member_States.

transfers, thus transposing the Directive 2009/43/EC, and the other for extra-EU countries. The authority responsible for issuing the authorizations is the Unit for the Authorizations of Armament Materials (UAMA). Concerning the respect of Law 185/90 for arms transfers towards Saudi Arabia, we have seen that, given the amount of verified information coming from the UN Panel of Experts on Yemen, we can affirm that Saudi Arabia has committed serious violations of IHL, with complete disregard of the principles of distinction proportionality and precaution and violation of art. 7 paragraphs on the protection and assistance to wounded, sick and shipwrecked and art. 13 paragraph 2 of Protocol II to the Geneva Convention on the protection of civilians from being object of attack. The decision to transfer arms to Saudi Arabia would put the exporter in violation of art. 7 of the ATT and the second criterion of the CP 2008/944/CFSP, specifically art. 2 para 2 letter c). Furthermore, Saudi Arabia has been found to commit serious violations of HRL by the Group of Eminent International and Regional Experts such as arbitrary arrest and detention, ill-treatment, torture and enforced disappearance. The assessment required by art. 7 of the ATT to identify the possibility, or the overriding risk, that the exported weapons might be used to commit or facilitate serious violations of IHL and HR was not done appropriately by the Italian authorities, resulting in a breach of art. 7 of the ATT by Italian authorities. The same reasoning applies to criterion two of the CP, which requires an assessment to identify the existence of 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" (art. 2 para 2 letter c) and much like for the ATT, the Italian authorities did not carry out an appropriate, objective and non-discriminatory assessment. Lastly, Italian arms exports to Saudi Arabia violate Law 185/90 itself, specifically art. 1 paragraph 6 letter d which states that any export of military goods are prohibited to "Countries whose governments are responsible of serious violations of international conventions on human rights, verified by competent organisations of the United Nations, the EU or the Council of Europe". The two requirements of responsibility of the recipient State in committing serious violations of HRL, and the verification of such violations from competent organizations are present, as we have seen, thus putting Italian arms transfers, done after 2015, to Saudi Arabia against Law 185/90. Italian arms transfer to Egypt follow the same reasoning as the ones towards Saudi Arabia, however, the main issue is not linked to serious violations of IHL, but to serious violations of HRL committed in Northern Sinai. Both the UN Committee against torture and the UN Human Rights Council's Working Group on Enforced or Involuntary Disappearances (WGEID) reported tortures and enforced disappearances of detained individuals happening in the country, which should trigger article art. 1 paragraph 6 letter d of Law 185/90, thus prohibiting arms

transfers to Egypt. However, Italian authorities still authorize arms exports to Egypt, with no regard to national norms. Lastly, in chapter three we have seen how Italian arms transfers to Ukraine, while being legal under international law, derogate Law 185/90 in its procedural aspects, thus hindering its transparency.

Lastly, we analyse the case law on arms transfers, with a focus on European countries. As we have seen, enforcement procedures are left to States and, for EU countries, the Common Position lies outside the jurisdiction of the Court of Justice of the European Union. The whole situation ultimately leaves the control over the compliance of licensing decisions with international, regional and national laws and standards to administrative or executive organs or through judicial review by national courts, according to each State's organization and law. Although a consistent case law on arms transfer does not exist, there are some domestic proceedings, that can provide us with some guidance on how accountability for arms transfers has been judged. Having analysed cases from UK, France, Belgium and Italy, we can conclude that, so far, these cases have had a limited impact on enforcing arms transfers and this is mainly due to the fact that courts generally suspend existing licences, but cannot order governments to stop issuing new ones. A second issue is that of transparency, meaning that there is limited access to the information concerning the licences, the process they have to follow to be approved and the assessment carried out by the governments, with civil society discovering the licences years after their issuing.

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