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The Response from the
European Union on Small Arms
and Light Weapons Control

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Is the EU Conduct on Export of
Arms Good Enough?

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Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Subject and Aim	5
1.2 Disposition and Limitations	5
1.3 Method and Materials	6
1.4 Terminology	6
2 CONTROLLING THE ARMS TRADE	10
2.1 Introductory Remarks	10
2.2 Main Objectives of Arms Control	10
2.3 Arms Control Agreements	12
2.3.1 Wassenaar Agreement	14
2.3.2 Concluding Remarks	15
3 EU CODE OF CONDUCT ON ARMS EXPORT	16
3.1 Introductory Remarks	16
3.2 The Objectives and Evolution of the Code	16
3.2.1 Information Exchange	17
3.2.2 Legal Status of the Code	18
3.2.2.1 Implementation at National Level	19
3.3 The Eight Criteria's of Conduct	19
3.4 Operative Provisions	20
3.4.1 Concluding Remarks	21
4 CUSTOMARY INTERNATIONAL LAW	23
4.1 Introductory Remarks	23
4.1.1 Criterion Four – Preservation of Regional Peace, Security and Stability	24
4.2 Transfer of Arms and Cross-Border Responsibility	24
4.2.1 Aiding or Assisting in International Wrongful Acts	25
4.2.1.1 Article 16 - Aid or Assistance in the commission of an internationally wrongful act	26

4.2.1.2	Article 17 - Direction and control exercised over the commission of an internationally wrongful act	28
4.2.2	Weapons Transfer and The Principle of Non-Intervention	30
4.3	The Laws of War	31
4.3.1	International Legal Instruments	33
4.3.2	Balancing Military Necessity in Armed Conflicts	35
4.3.3	Criterion Three – Provoke or Prolong Armed Conflicts	36
4.4	Respect for International Human Rights Law	37
4.4.1	Article 3 of the Universal Declaration of Human Rights	37
4.4.2	Genocide	39
4.4.3	Criterion Two – Respect for Human Rights	40
4.5	Respect for International Commitments	41
4.5.1	Criterion One – Respect for International Commitments	42
4.5.2	Criterion Six – Acts of Terrorism	43
4.5.2.1	Concluding Remarks	44
5	REGIONAL AGREEMENTS AND CROSS-BORDER COOPERATION WITHIN THE EU	45
5.1	Introductory Remarks	45
5.2	Export Arms Cooperation Within the EU	46
5.2.1	Article 296 of The European Treaty	47
5.3	Regional Security Arrangements and European Political Co-operation	48
5.3.1	EU Common Foreign Policy	48
5.3.2	Article 11 and 17 of the EU Treaty	49
5.4	Licence to Export Arms	51
5.4.1	Operative Provisions (OP) of the Code	51
5.5	Control on Licenced Production	52
5.5.1	Restrictions on Export Licences	54
5.5.2	End-User Certificates – Control Beyond the Date of Delivery	55
5.5.3	End-Use Certificates – ‘End of the Road’ Certificates	57
5.6	OSCE Document on Small Arms and Light Weapons	58
5.6.1	Concluding Remarks	58
6	THE ISSUE OF ARMS BROKERING	60
6.1	Introductory Remarks	60
6.2	Arms Transfer and Legaslative Loopholes	61
6.3	Programmes to Combat the Illicit Trade	62
6.3.1	EU Programme to Combat Illicit Trafficking in Conventional Arms	63
6.3.1.1	EU Joint Action on SALW	65
6.4	Sanction as a Special Measures to Tackle the Illicit Trade	65
6.4.1	Within the legality spectrum of arms embargoes	66
6.5	EU Common Position on Arms Brokering	67

6.5.1	Concluding Remarks	68
7	CONCLUDING ANALYSIS	70
7.1	Introductory Remarks	70
7.2	Reasons for Controlling the Export	70
7.3	The Code of Conduct on the Export of Arms	71
7.3.1	Article 296 (ex Article 223)	73
7.4	Coherence with International Law	73
7.4.1	International Humanitarian Law and Human Rights Law	74
7.4.2	Export to Vulnerable Areas	75
7.5	Final Remarks	76
	SUPPLEMENT A	78
	BIBLIOGRAPHY	83

Summary

There have been several agreements over the years dealing with issue of arms control agreements, but no a specifically small arms and light weapons (SALW) control agreement. Nonetheless, transfer of arms could only be seen as legal when conducted in consistency with international law. There are to our use fundamental international legal principles that define how and when weapons can be engaged and to what extent. The misuse of these principles, mostly within International Humanitarian Law and Human Rights Law, has effect in regions where there is an on-going conflict. It is clear that recent cases of genocide, perpetrated by weapons of choice, small arms and light weapons, have been only made possible through the transfer of SALW. Internationally applied weapon embargoes and other directly aimed sanctions have proven not be sufficient instruments for such international organisations as the United Nations to limit the spread of arms. This illicit spread of SALW has become an obstacle to achieving peace and save mankind from the scourge of war, thus the international community has agreed to put political determination to curb this illicit traffic of arms. But not all arms are illegal. There is a need for legal transfer of arms to be regulated. Those legally transferred arms could be transferred or re-distributed within the buyer country or re-exported under undesirable conditions, thus the exporting state needs to consider and assess the possible impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user. It is the loss of control over export or through licence agreements and the possible space in state regulation, regarding arms control that will contribute to the spread of SALW in areas where there is poor human rights records.

However, restraints and cautions are meaningless unless accurate laws and regulations, both domestic and international, and only if these laws possess effective law enforcement mechanisms, properly back them up. The European Union Code of Conduct on Arms Export (The Code) aims to prevent the export of such conventional weapons to destinations where they might lead to internal repression and external aggression. The Code is a way forward for the Europe to this end, but the Code lacks to some extent credibility, in view of the fact that its wordings provide room for interpretation and there is no reference to international law on the definitions used in the Code Eight Criteria's. The Code is built up as Conduct Guidelines, a political binding document – unfortunately not a legally binding document. One obvious obstacle to achieve greater transparency within this regional environment is EU Treaty Article 296 (ex Article 223), that provides Member States full control over their own military strength. This article has made it difficult to coordinate trade policies in the area of weapons export within the European Union.

Abbreviations

AU	African Union
CCS	Community Certification Scheme
CFSP	Common Foreign and Security Policy
COARM	EU Working Group on Conventional Arms
COARM	EU working group on conventional arms
DCG	Delivery Guarantee Certificate
DDR	Disarmament, Demobilisation, Reintegration
DVC	Delivery Verification Certificate
EDA	European Defence Agency
EPC	European Political Co-operation
EU	European Union
HCOC	Hague Code of Conduct
HR	Human Rights Law
ICJ	International Court of Justice
ICOC	International Code of Conduct against Ballistic Missile Proliferation
ICRC	The International Committee of the Red Cross
IHL	International Humanitarian Law
IIL	International Import Certificate
ISP	Sweden National Inspectorate of Strategic Products
LP	Licensing production
LPO	Licensed Production Overseas
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OP	Operative Provisions of the EU Code of Conduct on Export of Arms
OSCE	Organization for Security and Co-operation in Europe
PCS	EU Political and Security Committee
POA	UN Programme of Action
POLARM	EU working group of armaments policy
SADC	Southern African Development Community
SALW	Small Arms and Light Weapons
SC	United Nations Security Council
SEA	European Single European Act
SOI	Statement of Intent
SPITS	Special Program on the Implementation of Targeted Sanctions
TEU	Treaty on European Union
UN	United Nations
UNDP	United Nations Development Program
WB	World Bank

1 Introduction

“The death toll from small arms dwarfs that of all other weapon systems – and in most years greatly exceeds the toll of the atomic bombs that devastated Hiroshima and Nagasaki. In terms of the carnage they cause, small arms, indeed, could well be described as ‘weapons of mass destruction’. Yet there is still no global non-proliferation regime to limit their spread”.

- UN Secretary-General Kofi Annan, 2000¹

Most victims today in modern armed conflicts are killed by small arms and light weapons (SALW).² The misuse of small arms is responsible for over half a million deaths per year, including 300,000 in armed conflict and 200,000 more from homicides and suicides.³ That is one person killed every minute. Arms are legitimate in their limited role, but the use needs to be regulated through enforceable legislative control by governments. Unlike nuclear, chemical and biological weapons, there are no existing international treaties specifically dealing with these weapons. The proliferation of small arms has contributed much for the rising violence in the world, since it’s ‘the weapon of choice’ in most internal conflicts. These choices of weapons play a crucial role to the outbreak of armed conflict and enlarge the intensification of violence. The speedy growth and flow of small arms can change military balances and destabilise and weaken entire regions and societies with only small use of force. For instance, the political phenomenon of Coup d’état can be a reality with the help of the illicit trade of small arms into those who seek governmental overthrow by force. Current statistics estimates that are over 600 million small arms and light weapons (SALW) in motion worldwide.⁴ Small arms are easy to use, even for a child, and as second-hand weapons often and recycled, they can easily be transported across national borders into other regions of conflict and used as an illicit tool of force. The rapid escalation and flow of small arms have

¹ *We the Peoples: the role of the UN in the 21st Century*, p. 52, Millennium Report to the United Nations General Assembly. Read also the *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999 and Security Council resolution endorsing the report resolution 1265 (1999) of 17 September 1999. The resolution made special reference to the impact of small arms in lengthening conflicts and discouraging the provision of humanitarian aid.

² *Small arms* are those weapons designed for personal use; *light weapons* are designed for use by several persons serving as a crew. See more *on definition infra*, in section 1.4.

³ UN Department of Disarmament Affairs states that out of 49 major conflicts in the 1990s, 47 were waged with small arms as the weapons of choice. <http://www.un.org> (last visited 2005-07-09).

⁴ See <http://disarmament2.un.org/cab/salw.html> (last visited 2005-07-09).

an immediate effect that can change military balances, destabilise and regions and societies, using only a small use of force.

The proliferation of weapons, particularly small arms, is fuelling violations of international human rights and humanitarian law, hampering sustainable development and destabilising regional peace and security throughout the world. United Nations Secretary General Kofi Annan made this clear in the Millennium Report of 2000. There is no to-date existing global non-proliferation regime to limit the spread of small arms, only regional efforts made by different organisations. Therefore is the current spread of small arms of great concern for the international community and within the global responsibility, as stated in the UN Charter, to save succeeding generations for the scourge of war.

Transfer of arms is only legal if conducted in coherence with/and stipulated in international law. In time of peace and war, there are vital international legal principles defining how and when weapons can be engaged, thus placing concrete boundaries on their use. The misuse of these principles has striking consequences in regions where there is a conflict. Recent cases of genocide have been only made possible through transfer of small arms.⁵ In most cases weapon embargoes and other directly aimed sanctions are not sufficient tools to limit the spread of arms.

Concerning the illicit spread of SALW the international community has agreed to put political determination and to effectively implement restraints and use caution when considering arms transfers that may contribute to excessive accumulations of small arms and light weapons and ammunition.⁶ However, such restraints and cautions are meaningless unless accurate laws and regulations, both domestic and international, and only if these laws possess effective law enforcement mechanisms, properly back them up.

The European Unions Code of Conduct on Arms Export⁷ aims to prevent the export of such conventional weapons to destinations where they might lead to internal repression and external aggression. The Code of Conduct was adopted in June 1998 and is of focus in this thesis.

The aim of this thesis is to examine the Code within the area of international concern and international law and how the Code of Conduct on Arms

⁵ An example is the genocide that took place in Rwanda 1994. In 2004 the 7th of April was declared by the UN as the International Day of Reflection on the 1994 Genocide in Rwanda. Visit the website: <http://www.un.org/events/rwanda/> (last visited 2005-07-09).

⁶ United Nations General Assembly, resolution 52/38 J, 9 December 1997, supporting the recommendations in the report *Small Arms* done by a Panel of Governmental Experts on Small Arms.

⁷ EU Code of Conduct on Arms Export, 5 June 1998, 8675/2/98 REV 2. In this thesis I will also use 'The Code' and 'The Code of Conduct' as abbreviations for the EU political export regime.

Exports correspond with the international obligations on human rights and humanitarian law set forth in various international agreements.

1.1 Subject and Aim

With the aim in mind the subject of this thesis will deal with the issue of small arms and global trade, particularly the European regional efforts made, and the effect on national, regional and international legislation in Europe. The aim is two folded. Primarily the aim is to identify the limitations on transfers on small arms, imposed by international law today and how this effect regional legislation and conduct and secondly how the Code of Conduct correspond with this international law. In order to be able identify this area of international law a closer look at the export regime between states and production licence agreements will be necessary, but also on other areas of international customary law and how that affect States' conducting arms transfer.

This paper will in proper order examine two questions:

1. What are the expressed prohibitions on transfer of arms under international law today?
2. How does the international expressed prohibition of transfer of arms correspond with the development of a European regional Code of Conduct on Transfer of Arms – have the European Union incorporated these international obligations into legal and political cooperation?

1.2 Disposition and Limitations

Main focus will be on State behaviour when conducting arms transfer. Where the need arise to reflect on individual behaviour in the area of arms transfer, like the phenomenon on *arms brokering*, this will be addressed briefly. The thesis is divided into five parts. Part one provides an overlook of international arms control. The second part of the thesis will take a look at the European Union Conduct on Arms Transfer and how it is built up. The third part will look into international customary law relating to the transfer of arms and state responsibility's legislation on the subject matter and where the Code of Conduct tries to correspond with international customary law. The fourth part, dealing with the EU development of regional stability and cross-border cooperation on the issue of SALW, and I will try to examine the European regional work being done on the matter of limiting the use of small arms and transfer of arms - this includes the of production licensing and export regimes. The last part of the thesis will include an analysis over the current situation on this subject matter and

make suggestions regarding the export of small arms and legislation within the spectrum of EU Code of Conduct.

1.3 Method and Materials

I will primarily use the work done by scholars that are involved in this area of law. These scholars are for the most part involved projects within some Non-Governmental Organisations (NGO's).⁸ The main sources being used in the thesis are UN documentation, doctrinal texts, documentation and agreements from regional organizations, articles and information from the Internet.

1.4 Terminology

Small arms and light weapons are abbreviated in this thesis to small arms, but sometimes the combined word for small arms and light weapons, *SALW*, will be used. There are several opinions today what constitute small arms and light weapons. This paper adopts the definition of small arms and light weapons used in the 1997 report of the Panel of Governmental Experts on Small Arms.⁹ *Small arms* are those weapons designed for personal use; *light weapons* are designed for use by several persons serving as a crew.¹⁰

The definitions used in the report are:

- (a) *Small arms* as including: revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns.¹¹
- (b) *Light weapons* as including: 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 missiles and rocket systems; portable launchers of anti-aircraft missile systems and mortars of calibres of less than 100 mm;¹²
- (c) *Ammunition* as including: cartridges (rounds) for small arms; shells and missiles for light weapons; mobile containers with missiles or shells for single-action anti aircraft and anti-tank

⁸ See appendix for a full list of the main NGO: s involved in projects on the issue of SALW.

⁹ *Report of the Panel of Governmental Experts on Small arms*, A/52/298, Annex.

¹⁰ *Ibid.* para. 25.

¹¹ *Ibid.*, para. 26.

¹² *Ibid.*

systems; anti-personnel and anti-tank grenades; landmines; and explosives.¹³

The term *arms transfer* refers to all arms transferred outside the State. The term *illegal trade* or *illicit trade* refers to arms transfer made in clear violation of national and international laws, without permission or consent from governments.

This trade often refers to the problem of *arms brokering*, which is the illegal trade by non-state actors. *Brokering* means acting: for a commission, advantage or cause, whether pecuniary or otherwise; to facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of small arms and light weapons; or thereby acting as intermediary between any manufacturer, or supplier of, or dealer in small arms and light weapons and any buyer or recipient thereof.¹⁴ The term *arms brokers* sometimes refer to *shipping agents*,¹⁵ i.e. companies or individuals who engage in any of the above mentioned activities. Arms brokering will not be dealt with in depth, since States and their conduct is the main focus in this thesis.

Manufacturers are those companies who develop, make, assemble, and repair or convert small arms and light weapons and ammunition (and components). In many cases, manufacturing operations involve co-production and other licensing arrangements of an international nature. *Illicit manufacturing* shall in this text mean the manufacturing or assembly of small arms and light weapons from parts and components illicitly trafficked; without a licence or authorisation from a competent authority of the State Party where the manufacture or assembly takes place; or without marking the small arms and light weapons at the time of manufacture.¹⁶ The majority of small arms are sold and transferred legally, thus making this area of trade legitimate in itself and accepted as an economic activity, based on security for both states and individuals.

One could say that there are three main areas of transfer of arms:

- *Legal Transfers* takes place with either active or passive involvement of governments or their authorised agents, and in accordance with national and international law.

¹³ *Ibid.*

¹⁴ For this paper I have decided to use the definitions made in the *Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa*, adopted in Nairobi, on April 21 2004, Article 1.

¹⁵ In their *White Paper on Strategic Export Controls* of July 1998, the UK government defines shipping agents as "Acting as an agent in putting a deal together between supplier and customer, or making the practical arrangements for the supply of the goods." See the website: <http://www.dti.gov.uk/export.control> (last visited 2005-07-09).

¹⁶ *The Nairobi Protocol*, Article 1.

- *Illicit Grey Market Transfers* happens when governments or their agents exploit loopholes or tries to sidestep national and/or international laws or policy; and
- *Illegal Black Market Transfer* are transfers that may involve corrupt government officials, acting on their own personal gain in clear violation of national and/or international laws and without official government consent or control.¹⁷

These above mentioned transfer of arms is the base of the transfer of small arms and light weapons. Within the range of sanctions and embargoes¹⁸ EU adopts the following kind of sanctions, which could have an impact on the proliferation on small arms and light weapons:

- *Political sanctions* are informal government measures, frequently used to express disapproval at the actions of another State-government. The suspension or withdrawal of official visits, visa restrictions and selective travel bans constitute forms of political sanctions.
- *Diplomatic sanctions* refer to restrictions applied to diplomatic relations with two or more states. These measures are more formal, such as *persona-non-grata*, than political protests. Diplomatic restrictions can range from the reduction of the scale of diplomatic representation to the severance of all diplomatic relations.
- *Cultural sanctions* reduce cultural and sports contacts or scientific cooperation, for example. Flight bans between the EU and non-Member States illustrate the use of restrictions applied to transport.
- The EU's economic weight fortifies its application of *commercial and economic sanctions*. Whether applied selectively or comprehensively, these restrictions on exports and/or imports (trade embargoes) constitute the most important instrument of crisis management currently available. Regularly, however, economic sanctions are complemented by humanitarian exemptions applicable to exports of food and medicinal supplies in order to prevent the suffering of the civilian population in the target country.
- *Arms embargoes* are used as non-military instrument of crisis management, to stop the flow of arms to conflict areas. Motivation for arms embargoes is often more humanitarian than punitive, and

¹⁷ Graduate Institute of International Studies, Geneva, *Small Arms Survey 2001- Profiling the Problem*, Oxford University Press, 2001, p.141.

¹⁸ According to EU, sanctions are, "...as a non-military instrument, generally employed to react to violations of international law, violations of human rights, and policies that do not respect the rule of law and democratic principles." To read more, visit the Common Foreign and Security Policy (CFSP) website: http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm (last visited 2005-07-09).

often they are associated with explicitly coercive measures, such as economic sanctions.¹⁹

¹⁹ Definitions on different kind, see the EU Website:
http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm (last visited 2005-07-09).

2 Controlling the Arms Trade

2.1 Introductory Remarks

With the growing proliferation of small arms regional cooperation and collective cross-border cooperation of common strength to battle the illicit trade has grown. Different regions of the world have come to similar agreements in order to tackle the problem of small arms. Some regions have developed instruments, both legal and political and implemented these in the rules of export of arms. On the 19th of January 1995 the European Parliament passed a resolution on the need for European controls on the export or transfer of arms.²⁰ This gave echo within the European cooperation as a consequence the European Union developed a code of conduct, also known as the *EU Code of Conduct on Arms Transfer*.²¹ This is a code for Member States to submit to when export in proper manner when dealing with transfer of arms in the region. The code has been welcomed as a fundamental first step regarding the development of responsible measures over the European arms trade.²² Sure, through its adoption the Code has led to that a distinct European dimension of arms export policy has emerged. The code has developed as being a policy tool. The export criteria's of the Code and its implement will be dealt with in next chapter of the thesis.

2.2 Main Objectives of Arms Control

There have been several agreements over the years dealing with issue of arms control agreements, but not specifically a small arms control agreement. Organized efforts to control arms go way back to The Hague Peace Conference in 1899. Arms control proposals, as a rule, rest solid on the assumption that even ones enemies share a common interest in war or conflict avoidance.

Arms control can be explained as having four main objectives:

²⁰ See EU documents B4-0050, 0066, 0071, 0081, 0111 and 0115/95.

²¹ The *EU Code of Conduct on Arms Export*, formally approved by the European Union General Affairs Council on the 8th of June 1999. Full text can be Councils website: http://ue.eu.int/uedocs/cmsUpload/8675_2_98_en.pdf (last visited 2005-07-09) and in Supplement A of this thesis.

²² Small Arms Survey, *Small Arms Survey 2001: Profiling the Problem*, Oxford, Oxford University Press, 2001, p. 270.

- reducing the likelihood of war, especially by trying to impose limits on the evolution and proliferation of weapons that may destabilize strategic relationships and thus create incentives for preventive attacks;
- reducing suffering and damage in the event of war;
- reducing the expenditure on armaments and saving resources; and
- contributing to conflict management by providing a framework for negotiation between opposing sides, by reducing suspicion and by generally contributing to an atmosphere conducive to relaxation of tensions.²³

These four objectives are primarily attended to understand nuclear development, but I believe they can be applied also to micro-disarmament, i.e. SALW. These four objectives are in line with national security, development and political independence.²⁴ There are two intertwined ways of achieving security, primarily aimed at controlling the nuclear weapons, without reliance on a build-up of arms:

- through arms control agreements; and
- through collective international security arrangements.²⁵

These ways could be adopted to also include conventional arms, such as small arms and light weapons. Since there is today no international binding legal document concerning export of SALW the co-operation in this area of concern varies in form and dedication. As I touched on in previous sections there are today various agreements and conduct on arms control. For example one of them is the *International Code of Conduct against Ballistic Missile Proliferation (ICOC)*,²⁶ which has the sole purpose to curb ballistic missile proliferation worldwide and to further delegitimize such proliferation. This is one of those arms control agreements that exists today on multi-lateral export of arms.

²³ Daniel Frei, *International humanitarian law and arms control*, IRRC, No. 267, November-December 1988, p. 491.

²⁴ See *Infra*, section 4.2.2 Weapons Transfer and the Principle of Non-Intervention.

²⁵ *Ibid.* The EU has through its Code of Conduct and related Guidelines collectively agreed on regional security arrangements.

²⁶ The Convention was formally brought into effect on November 25, 2002, at a Launching Conference hosted by the Netherlands at The Hague. The Convention is also known as *The Hague Code of Conduct (HCOC)*. As of January 1, 2004, 111 countries have subscribed to the ICOC.

2.3 Arms Control Agreements

Formal arms control,²⁷ i.e. diplomatic negotiations leading to treaties relating to arms, may also be controlled informally in terms of unilateral actions controlling arms spread. The term *arms control* was originally meant to represent rules for limiting arms competition (i.e. the nuclear weapons race) rather than reversing it.²⁸ The term used in this field has over the years come to include a wide range of measures in the field of arms control, in particular those intended to:

- freeze, limit, reduce or abolish certain categories of weapons;
- prevent certain military activities;
- regulate the deployment of armed forces;
- proscribe transfer of some military important items;
- reduce the risk of accidental war;
- constraint of prohibit the use of certain weapons or methods of war; and
- build up confidence among states through greater transparency in military matters.²⁹

Arms control sometimes incorporate partial (as opposed to general and complete) disarmament, generally under the label 'arms reduction'.³⁰ The term *arms control* is often used to describe the situations of *arms regulation*, *arms limitation* or even *disarmament*.³¹ Arms controllers see military means more as things to enhance security if accurately managed, but may cause serious risks of unwanted conflict and expenses if left untended.³² When it comes to the issue of certain kind of weapons there could be a need to freeze, limit, and reduce certain categories of weapons - such as small arms. The actual agreement over the control of transfer or the effort to limit certain types of weapons as such, can vary, as we will see in the following chapters, in its functional form – and can include everything from treaties, conventions, declarations, protocols or documents, to guidelines or common understandings or charters and in its nature either be

²⁷ For a total list of various arms control agreements of today (on primarily nuclear weapons) visit *Federation of American Scientist* website on arms control: <http://www.fas.org/nuke/control/> (last visited 2005-07-09).

²⁸ Josef Goldblat, *Arms Control*, International Peace Research Institute, Oslo, Sage Publications Ltd, University Press, Cambridge, 1994, p. 3.

²⁹ *Ibid*, p. 3

³⁰ Barry Buzan and Eric Herring, *The Arms Dynamics in World Politics*, Lynne Rienner Publisher, Inc., Boulder, 1998, p.211.

³¹ Goldblat (1994), p.3.

³² Buzan and Herring (1998), p.211.

multilateral or bilateral.³³ Usually, if an agreement over controlling arms is decided by sovereignly states: “/...freely arrived at a time of peace through a process of formal inter-governmental negotiation; *it must provide for both mutual rights and mutual obligations* [own emphasis added].”³⁴ In time of war arms control agreements may be violated or ‘set out of play’.

The EU Code of Conduct, although still only a political binding agreement, as a first step has arrived in a time of peace through formal inter-governmental negotiations, with rights and instructions of export transfer, but with no definite legal obligations on Member States. It is important, however, to mention, that certain agreements, such as internationally agreed treaties, which may be bilateral or multilateral, regional or, for that matter, universal, are to be seen as truly expressed declarations by States to be legally bound by the wordings of that treaty.

Once a treaty has entered into force, legal obligations apply to the States party to it.³⁵ For the most part has traditional arms control and disarmament concentrated on controlling the threat caused by nuclear, chemical and biological weapons. Within the broad definition on conventional arms, such as SALW, arms control includes the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects³⁶ which covers a number of specific conventional weapons, as well as the recently concluded 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.³⁷ The focus on nuclear weapons as the big threat to peace has somewhat change to also include the spread of small arms. This has been become clear when UN Secretary General Kofi Annan said in his report to the United Nations General Assembly: “/...*In terms of the carnage they cause, small arms, indeed, could well be described as “weapons of mass destruction”*”.³⁸ The international attention has been drawn to the dangers of unregulated trade in conventional weapons, which could, according to some, in the long run threaten world peace, although up to date responses to these

³³ Goldblat (1994), p.4.

³⁴ *Ibid.*

³⁵ For further rules regarding the interpretation of treaties the see the 1969 Vienna Convention on the Law of Treaties (UNGA, 1969).

³⁶ 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, 1342 U.N.T.S. 137, 19 I.L.M. 1524, entered into force Dec. 2, 1983.

³⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 I.L.M. 1507, entered into force March 1, 1999.

³⁸ *We the Peoples: the role of the UN in the 21st Century*, p. 52, Millennium Report to the United Nations General Assembly. Read also the *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999 and Security Council resolution endorsing the report resolution 1265 (1999) of 17 September 1999. The resolution made special reference to the impact of small arms in lengthening conflicts and discouraging the provision of humanitarian aid.

dangers are limited to a voluntary register of the transfer of certain conventional weapons.³⁹

Treaties especially designed on the issue of small arms are rare in the international field of SALW; hence customary international law is a therefore a more important source of norms and a guideline in this field of export.⁴⁰ With the need of controlling the spread of arms the functions of it vary in its purpose and structure, i.e. agreements or political settlements on controlling arms may have different purposes depending on time. The purpose of such an agreement could be to: (a) to try to reduce the risk of war started by accident (usually with in the case of the nuclear race); (b) slow down global and regional arms races (building small arms resources); (c) increase predictability in the relations between opposing states and reduce fears of the intentions of a potential adversary; (d) minimize the disparities be between heavily and lightly armed states and thus remove an important source of instability; (e) encourage states to resort to peaceful means in solving their disputes; (f) save resources needed for economic and social development; (g) mitigate the destruction and suffering in armed conflicts which may break out despite negotiated arms limitations; (h) diminish the dangers to the environment; and (i) promote trust and better understanding among nations.⁴¹

2.3.1 Wassenaar Agreement

An important international agreement, which is closer linked to conventional arms, is the *Wassenaar Agreement on Export Controls for Conventional Arms and Dual-Use Goods Technologies (Wassenaar Agreements)*.⁴² The Wassenaar Agreement promotes transparency and greater responsibility in transfer of conventional arms and dual-use goods and technologies. The actual agreement is not directed to any certain group of States or any State for that matter, and has no explicit prohibition on arms export. The decision on export is laid exclusively on the supplier state, and member state has no veto on the supplier state decisions. The Agreement

³⁹ E.g. *EU Code of Conduct Register* and *UN Conventional Arms Register*. Read an interesting discussion on this view in Robert J. Mathews and Timothy L.H. McCormack, *The influence of humanitarian principles in the negotiation of arms control treaties*, International Review of the Red Cross No. 834, pp. 331-352.

⁴⁰ Graduate Institute of International Studies, Geneva, *Small Arms Survey 2003 – Development denied*, Oxford University Press 2003, p.217.

⁴¹ Goldblat (1994), p. 5.

⁴² State representatives of 33 States, of which whom several were EU Member States, met in Vienna, Austria on 11 and 12 July 1996 and decided to implement the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*. Members to the agreement: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

calls upon members to report twice a year on transfer of arms and specified dual-use goods to non-Member States of the Arrangement. Information on model and type model is to be described in their reports, with an exception on missiles category. Within this co-operation sphere on arms export the Wassenaar Member States Plenary went one step further and adopted on the 12 December 2002 a *Best Practice Guidelines for Export of Small Arms and Light Weapons (SALW)*,⁴³ which encourage participating State to avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might endanger peace, create an excessive and destabilising accumulation of small arms, or otherwise contribute to regional instability;⁴⁴ be used for the purpose of repression;⁴⁵ or be used for the violation or suppression of human rights and fundamental freedoms.⁴⁶ Member States should be aware and avoid situations where export of SALW could be either re-sold (or otherwise diverted) within the recipient country, re-produced without licence, or be re-exported.⁴⁷ To bear in mind is that these are just guidelines, not binding legal documents.

2.3.2 Concluding Remarks

Treaties especially designed on the issue of small arms are rare in the international field of SALW. One must therefore look into other areas of international regulation and custom. It is not only nuclear weapons that might pose a threat to peace to world peace. As previously mentioned an agreement over controlling arms is decided by sovereignty states at time of peace through a process of formal inter-governmental negotiations. The following chapter will briefly introduce the European concept on political regulation on this area of concern and highlight its criterions through the rest of this thesis. More or less an international agreement, a Code of Conduct provides for both mutual rights and mutual obligations. Today focus of all regional efforts is linked to curb the illicit trade in conventional arms. The dangers of unregulated trade in conventional weapons, such as SALW, which may in the long run threaten world peace as a whole and uninstalise regions.

⁴³ See full text on the Wassenaar Arrangement website:

http://www.wassenaar.org/docs/best_practice_salw.htm (last visited 2005-07-09).

⁴⁴ *Best Practice Guidelines for Export of Small Arms and Light Weapons (SALW)*, Section I, Article 2(f).

⁴⁵ *Ibid*, Section I, Article 2(h).

⁴⁶ *Ibid*, Section I, Article 2(i).

⁴⁷ *Ibid*, Section I, Article 2(g).

3 EU Code of Conduct on Arms Export

3.1 Introductory Remarks

On the one hand, the main responsibility of the production and trade in military equipment primarily falls in the hand of the State in question.⁴⁸ This we will see in the coming sections of this thesis. In EU it comes apparent due to the EU Member States exclusivity on state security and armament according to article 296 (ex article 223) of the Treaty.⁴⁹ Disregarding State sovereignty and exclusivity on armament, there has evolved, on the other hand, a need for co-operation relating to issues of security, both regional but with a spill-over effect on the international scene.

The most significant progress concerning this issue of concern is the *European Union Code of Conduct on Arms Transfer*, also known as the Code of Conduct. The Code was adopted on the 5 June 1998 and is mainly built upon and evolved through the *Common Criteria's for Arms Export*, which were adopted and approved by the Luxembourg and Lisbon European Councils in 1991 and 1992. The Code of today includes mechanisms for Member State for consultations and a denial function for export licenses. The consultation mechanism is the first ever consultation mechanism applied to conventional arms exports.

3.2 The Objectives and Evolution of the Code

The Code has to be considered, in the light of arms export control, as a very important component in the development of a collective approach towards regulating and harmonising arms exports amongst EU Member States. In the preamble of the Code, the EU Member States recognise the special responsibility of arms exporting states, and are therefore determined to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all EU Member States. In order to achieve this common view EU Member States need to strengthen the exchange of relevant information, with a view to achieving greater transparency.

⁴⁸ EU's export control, Sweden National Inspectorate of Strategic Products (ISP) website: <http://www.isp.se> (last visited 2005-07-09).

⁴⁹ Read more on this article in section *infra* 5.2.1.

Furthermore, EU Member States are determined to prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability, within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports. The Code has gained status of a political commitment within this field, and its total eight criteria's are highly normative standards, which have established a common regime on contribution arms information on brokering, and those arms exports licenses that are either granted or denied by Member States through respective authority.

A development after the introduction of the conduct has been the *LOI/Framework Agreement*, that has been decided between six of the EU's biggest arms producers,⁵⁰ on measures to facilitate the restructuring and operation of the European Defence Industry, has reference to the Code of Conduct in the Agreement. Also the *Dual-Use Regulation of 2000*⁵¹ refers to the Code Criteria's, when determining on an export license for dual-use items.⁵² This is important to highlight when talking of the political 'spill-over' or expanding effect of the evolution of the Code and regulation and corporation on export.

3.2.1 Information Exchange

Information exchange, consultation and reporting procedures apply to all Member States. The Code of Conduct have had a 'spill-over' effect on national law (See especially regulation in this area in the countries of Austria, Belgium, Finland and the UK) and in other policy areas.⁵³ Throughout its introduction and evolution a somewhat harmonisation of reporting has nonetheless been achieved and the Code is reviewed on an annual basis and the reports are made public.⁵⁴

⁵⁰ France, Germany, Italy, Spain, Sweden and the United Kingdom.

⁵¹ Council Regulation no.1334/2000 of June 2000 setting up a Community Regime for the Control of Exports of dual-use items and technology, OJ L 159, 30 June 2000, pp.1-215.

⁵² Dual-use items include software and technology, which can be used for both civil and military purposes. The Regulations place obligations on exporters that they must provide the necessary information to the authority responsible for the authorisation decision. They must also keep records on their exports of dual-use items, which must include a description of the item, quantity, end use and end user.

⁵³ Sibylle Bauer, *The EU Code of Conduct on Arms Exports – much accomplished much to be done*, Stockholm International Peace Research Institute (SIPRI), 2004, p.4. Herein after called 'Bauer'.

⁵⁴ See Annual Report in Conformity with Operative Provision 8 of The European Union Code of Conduct on Arms Exports (1999/C 315/01), Second Annual Report According to Provision 8 of The European Union Code of Conduct on Arms Exports (2000/C 379/01), Third Annual Report According to Provision 8 of The European Union Code of Conduct on Arms Exports (2001/C 351/01), Fourth Annual Report According to Provision 8 of The European Union Code of Conduct on Arms Exports (2002/C 319/01), Fifth Annual Report According to Provision 8 of The European Union Code of Conduct on Arms Exports (2003/C 320/01).

3.2.2 Legal Status of the Code

The Code of Conduct is not legally binding, only politically for EU Member States. Nonetheless, from first being an EU Council Declaration with political commitments, the Code has evolved into a powerful policy tool for setting high standard when exporting arms.⁵⁵ The legal and political status of the code is important for its enforcement actions and effective implementation. Although only a politically binding agreement among EU Member States since 1998, much progress has been made in both transparency in arms exports and information sharing on denials of export licenses, due to the standards of the Code. There is though still a need for to improvement in the system of annual reports and developing the denial and consultation mechanisms more, as well as introduces effective measures to control arms brokering and end-use controls. Number of areas, such as the 'regional unified legal control' of international arms brokering, licensed production agreements, end-use certification and monitoring has not yet been addressed within the EU on a legislative level.

There are various concerns that the Code, due to its limited political ambition and commitment, fall short of not being a legal binding instrument for the Member States and therefore not being addressed properly and fail to uphold those criteria stated in the Code.⁵⁶ The Code has been signed, but there are still many criticisms about it that is falling short of establishing effective and adequate monitoring instruments of sales and transfers by Member States. The Code may be defined as not being a legal document, but nevertheless still legally binding at some legal point of view, since it is referred to in both the above-mentioned Dual-Use Regulation and the Framework Agreement – both legally binding documents. Several Member States, such as Belgium, has integrated certain aspects of the criteria (CR) and Operative Provisions (OP) of the Code into national legislation. The Code's political guidelines have also been addressed nationally by some Member States to be binding on the national export administrations.⁵⁷ Within the legal context this is a way forward for making the Code more a legislative instrument than just a political argument. Today licensing decisions⁵⁸ fall on the national governments authorisation and supervision.⁵⁹

To make the Code into European Law is a most difficult task for the European Union. Such an assignment will fall short, due to obstacles that are enshrined in the Treaty – Article 296 (ex. Article 233) – which is a foundation for Member States to exempt from Community Competence.⁶⁰ If the EU would make the Code into European Law, a revision of this Treaty article would probably be necessary.

⁵⁵ Bauer (2004), p.7.

⁵⁶ Non Governmental Organisations such as Oxfam, Amnesty International, BASIC, have raised concern that the Code lack the status of a legally binding document.

⁵⁷ Ibid.

⁵⁸ On how these licenses are decided see *infra*, section 5.5.1.

⁵⁹ Ibid.

⁶⁰ Read more about Article 296 (ex Article 233) see *infra*, section 5.2.1.

The Code has been criticised of falling short to provide full respect for international humanitarian law and establishing sufficient EU mechanisms and procedures for Member States to take corresponding actions in an aura of transparency, in order to effectively monitor and control transfers by the Member States. Criticism has been raised on issue that the Code could be interpreted to have loopholes that will allow arms transfers to human rights abusers. According to some Criterion two of the Code adds to this weak formulation, as the term 'internal repression' is used in terms of summary is defined without reference to the obligations set out in international humanitarian law - which has been primarily designed to protect those not actively participating in hostilities during both international and non-international conflicts.⁶¹ This loose definition could make governments thus claim that the Code allows them to “/...authorise arms transfers to recipient forces even if they are likely to commit breaches of humanitarian law in the context of an internal armed conflict.”⁶²

3.2.2.1 Implementation at National Level

Due to different national export policies, defence export interest, legal secrecy provisions and lack of transparency the Code has been interpreted differently how it supposed to be implemented at national level. This evolution of subjective interpretation has unfortunately given the Code a twist of lack of trust and capability to stop illicit flow of arms into regions not suitable for such export. Therefore the *Users' Guide*, as previously mentioned above, been created to restrict violations of the Code by Member States and give guidance how to share information of denials.⁶³

3.3 The Eight Criteria's of Conduct

The Code is made up of three parts. The preamble recognises that Member States have a right to transfer means of self-defence, i.e. arms, as long its in “/...consistent with the right of self-defence recognised by the UN Charter.../” [own emphasis added].⁶⁴ The second part of the Code contains the eight criterions, which spells out what would constitute a breach of the Code. The criterions of the Code set high principles on the intention of:

1. Respect for international commitments
2. Respect for rights

⁶¹ Read Oxfam evaluation of the Code. Available at http://www.oxfam.org.uk/what_we_do/issues/conflict_disasters/conflict_eurocode_final.htm (last visited 2005-04-09).

⁶² Ibid.

⁶³ Ibid. Read more about the Users' Guide infra, in section 3.4.

⁶⁴ Ibid, and Article 51 of the UN Charter.

3. Exports should not provoke or prolong armed conflicts or aggravate existing tensions or conflicts
4. Preserve regional peace, security and stability
5. Respect for national security
6. The behaviour of the buyer country on the international arena
7. Risk of diversion and re-export under undesirable conditions
8. Export would seriously hamper the sustainable development of the recipient country⁶⁵

The final part and third part of the Code encloses Operative Provisions for the decisions on licensing. The Code of Conduct recognises the special responsibility of arms exporting states⁶⁶ and tries to set high common standards for the supervision of, and control in, conventional arms transfers by all its Member States. These standards are made to strengthen the exchange or relevant information and to achieve greater transparency in arms transactions.⁶⁷ Article 296 (ex article 223) of the EU Treaty can be seen as a obstacle in achieving this objective,⁶⁸ but the integration of national export policies and progress of the development of common EU controls over the arms trade, is in compliance with the aspiration of Member States to endorse a defence industry as a constituent of their industrial stand as well as within their defence endeavours.⁶⁹

3.4 Operative Provisions

Enclosed in the Code are details of *12 Operative Provisions*, including denial notification, consultation mechanisms, and to some degree limited provisions for transparency measures.⁷⁰ According to Operative Provision three of the Code of Conduct, are Member States to circulate details of licences refused together with an explanation of why that applicant-licence has been refused.⁷¹ This 'list of details' for denials is less detailed due to national secrecy regulations of that particular Member State.

On 6 November 2003 the *EU Working Group on Conventional Arms* (COARM) reached an agreement on a *User's Guide*,⁷² with an aim to gather Member States' practices on sharing information on denials. The guide is supposed to be used as a tool for agreed conduct of Member States in the field of sharing information on denials, according to the implementation of

⁶⁵ The EU Code of Conduct on Arms Export.

⁶⁶ See the preamble of the Code.

⁶⁷ In the Code's operative provision 8, every year the Code is undergoing an annual review. In its annex there is information on Member States conventional arms exports and implementation of the Code of Conduct.

⁶⁸ See particularly Article 296 (1) (a) ECT.

⁶⁹ See the preamble of the Code.

⁷⁰ See Supplement A.

⁷¹ See *infra*, section 5.4. on denial notification and consultation.

⁷² *User's Guide to the European Union Code of Conduct on Arms Exports*, agreed at the Working Party on Conventional Arms Exports on 28 October 2003 (14283/03).

the Codes Operative Provisions. The Users' Guide to the Code entails the details of what kind of information necessary to be passed on when issuing a denial notification, when to submit proper information and when to engage in bilateral consultations.⁷³ Since the transparency is of less degree in the Code the obligations to notify denials have been subject to strong interpretation. Implementation, which to some extent lacks verification from the EU, is up to each Member State on their own national level. Looking at the Operative Provisions of the Code in the Code there is no direct provision that addresses risks that may occur, posed by the proliferation of LPO (Licensed Production Overseas).⁷⁴ The lack of no operative provision in the Code that address the massive risk of LPO is clearly a major weakness.

3.4.1 Concluding Remarks

EU Member States has to consider the following criterions before conducting a transfer or issuing an export license:

- the country of final destinations respect for international human rights and humanitarian law;
- the situation of the country of final destination;
- the risk of fuelling internal or external armed conflict;
- the existence of tensions or an internal armed conflict in the country of final destination;
- the behaviour of the buyer country especially towards its attitude to terrorism, international commitments and respect for international law;
- the risk of diversion and re-export of the equipment under undesirable conditions within the buyer country.

The Code's aim and objective is clear: licences should not be granted where there are concerns that the equipment for export could be used to commit human-rights violations, fuel internal or external armed conflict, or increase poverty by undermining sustainable development. The Conduct however is less objective, depending on the Member State interpretation of the Code. Without going into selective Member States, It may be so that Member States are not breaking the letter of the Code but might the actual spirit of the agreement. If it is so that the agreement fails to provide full respect for international humanitarian law and falls short of establishing adequate EU mechanisms and procedures for Member States to take coordinated action to effectively monitor and control transfers by the Member States, the Code is

⁷³ Bauer (2004), p. 9.

⁷⁴ See *infra*, section 5.5.on the licensing through the LPO.

not strong enough on the level it is at the moment. The EU expansion to include new members adds some additional states with noteworthy arms deals - a great task for the EU, but also a great way to place new states under the Code. In the following chapter I will take a closer look at international customary law and try to adopt the Criteria within this area of regulation, what rules there are on restrictions on transfer of arms.

4 Customary International Law

4.1 Introductory Remarks

International law⁷⁵ is based primarily on three sources: international conventions, international custom and general principles of law recognized by civil nations.⁷⁶ International treaty law is comprised of obligations states expressly and voluntarily accepted between themselves in treaties. International customary law is derived from a consistent practice of States accompanied by *opinio juris*, i.e. the conviction of States that the practice set is required by law. Customary law refers to the *Law of Nations* or the legal norm that have evolved through the customary exchange between states over time, whether based on diplomatic means or through acts of aggression. Certain norms of international law achieve the binding force of *jus cogens*, to where there are no allowed exceptions, e.g. the fundamental principle of the prohibition of genocide.⁷⁷

States have a right to resort to arms in order to protect life and liberty of its citizens against internal or external attack. However, neither states nor armed opposition has the right to use unlimited force. It has been accepted through practice and through declarations that States have a duty to protect individuals within their state boundaries.⁷⁸ The two bodies of international law – International Humanitarian Law (IHL) and Human Rights Law (HR) seek to protect the individuals from those kinds of aggressions that may occur within states.⁷⁹

This section will pay attention to state responsibility according to customary international law. How does customary international law affect the transfer on small arms? Although states are the primary subjects of international law there are also other actors involved conducting illicit small arms transfers, such as private individuals, i.e. arm brokers or shipping agents. These individual activities are only vaguely regulated by international law. State practice and state responsibility under international law is main focus in this thesis; hence this section will only deal with state responsibility conducting arms transfers according to international law.

⁷⁵ This chapter is heavily drawn on the article written by Emanuela Gillard -Chiara (2000) *What is legal? What is illegal?* In Laura Lumpe, ed. *Running Guns: The Black Market in Small arms*. London: Zed Books, pp.27-35.

⁷⁶ Article 38 of the Statute of the International Court of Justice, adopted in San Francisco 26 June 1945.

⁷⁷ See *infra*, Section 4.4.2. Genocide.

⁷⁸ See UN Charter, Article 51.

⁷⁹ Debbie Hillier of Oxfam and Brian Wood of Amnesty International, *Shattered Lives – the case for tough international arms control*, Colibri Press Ltd., Hackney 2003, p. 9.

4.1.1 Criterion Four – Preservation of Regional Peace, Security and Stability

“Preservation of regional peace, security and stability

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

- a) the existence or likelihood of armed conflict between the recipient and another country;
- b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
- c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;
- d) the need not to affect adversely regional stability in any significant way”⁸⁰

The European Union has committed to be a responsible collective force when it comes to reduce the factors that might threaten regional peace, security and stability. The export of arms is one responsible area with such undermining factors

4.2 Transfer of Arms and Cross-Border Responsibility

The issue of cross-border responsibility of states has been addressed by the European Code of Conduct, particularly in Criterion Four, as mentioned above, but also in Criteria Six and Seven. When states’ transfer arms over state borders, customary international law comes into effect. The main purpose of international law, and this includes both treaties and customary law, is to lay down rules for the conduct of states and not regulate the behaviour of individuals.⁸¹ In this forum states have a responsibility towards the international community and towards other states to act respectfully according to international law. When states’ transfer arms over state borders, customary international law comes into affect, but international law and the regulation on small arms creates somewhat of a legal void in international law regulating arms transfers. So, up to date there are almost no expressed legal boundaries on small arms transfers. In order to understand what boundaries there might be in this area, we have to look at regulation in bordering areas - through disarmament treaties and through several state embargoes, mostly conducted through the work of the United Nations.

⁸⁰ Criteria four of the EU Code of Conduct on Export of Arms.

⁸¹ Graduate Institute of International Studies, Geneva, *Small Arms Survey 2002- Counting the Human Cost*, Oxford University Press, 2002, p.179.

When looking deeper into these neighbouring areas of law, within the international law system, and legal obligations regarding International Humanitarian Law⁸² together with Human Rights Law⁸³, it becomes evident that there exist important restrictions on States' transfer or authorisation of transfer of small arms.⁸⁴ These views will be dealt with in the coming sections.

Briefly looking at some international customary rules, which limit arms transfers, some aim at within the context of small arms transfer. These are the:

- Prohibition on the use of force (UN Charter Article 2(4));
- Prohibition on interference in the internal affairs of another state;
- Prohibition on the provisions of assistance to terrorists;
- International humanitarian law;
- Human rights law; and
- The prohibition of genocide⁸⁵

All these rules concern the situation when states transfer small arms, directly or indirectly, across state boundaries. It is essential to recognize that, when it comes to the use, export or transfer of arms, States have an obligation not to violate international customary rules that could have devastating affect. If a State is overrunned with SALW, then the export to such region could have devastating effects on the peace-progress of that country, region or even the continent for that matter. The arms that are used in one country could easily be transferred across borders, smuggled into other countries or re-distributed through governments with less control over its borders or defence industry through licensing. The flow of such arms into conflict areas will destabilize peacekeeping operations and obstruct the process of development in some countries especially vulnerable for the continuing of internal conflict. To come to terms with these devastating effects of the illicit trade the EU has addressed the issue and tried to develop somewhat strong arms controls, due to many of its Member states are large arms exporters.

4.2.1 Aiding or Assisting in International Wrongful Acts

State responsibility is one of the most fundamental principles of international law - developed through the doctrine of state sovereignty and

⁸² International Humanitarian Law, see *infra*, section 2.2.3.

⁸³ Human Rights Law, see *infra*, section 2.2.4.

⁸⁴ Read C.G. Weeramantry, *Traffic in Armaments: A Blind Spot in Human Rights and International Law, Justice without Frontiers: Furthering Human Rights*, 1997, Vol.1, p.228.

⁸⁵ Graduate Institute of International Studies, Geneva, *Small Arms Survey 2003 – Development denied*, Oxford University Press 2003, p.224.

equality of states. If a state violates a rule of customary international law or disregard an obligation of a treaty it is party to, the state commits a breach of international law, a breach also known as an *international wrongful act*.⁸⁶ Article 1 of the International Law Commission (ILC) draft, the Articles on Responsibility of States for Internationally Wrongful Acts, states the basic principle that “Every internationally wrongful act of a State entails the international responsibility of that State.”⁸⁷ This act of a state could be in one or more actions or omissions or even a combination of both. In the *Phosphates in Morocco* case, the Permanent Court of Justice affirmed that when a State commits an internationally wrongful act against another State, international responsibility is established immediately as between the two States.⁸⁸ The International Court of Justice (ICJ) has on numerous occasions applied or referred to this principle. For example in the *Corfu Channel* case,⁸⁹ the *Military and Paramilitary Activities* case,⁹⁰ *Reparation for Injuries* case,⁹¹ and in the *Gabčíkovo-Nagymaros Project* case.⁹²

4.2.1.1 Article 16 - Aid or Assistance in the commission of an internationally wrongful act

Concerning the responsibility of a State, in connection with the act of another State, the International Law Commission addressed this issue of aid or assistance in the commission of an internationally wrongful act, and concluded that:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

⁸⁶ *Akehurst's Modern Introduction to International Law*, 7th rev. ed., 1997, Peter Malanczuk. New York, Routledge, p. 255.

⁸⁷ Article 1, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ICL Draft)*. The Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, 56th session, Supplement No.10 (A/56/10), Chapter IV.E.1*. The complete list of the International Law Commissions work on state responsibility is to be found on the UN website: <http://www.un.org/law/ilc/archives/statresp.htm> (last visited 2005-07-09).

⁸⁸ *Phosphates in Morocco, Preliminary Objections*, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28. See also *S.S. Wimbledon*, 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No. 17, p. 29.

⁸⁹ *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 4, at p. 23.

⁹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, I.C.J. Reports 1986, p. 14, at pp. 142, para. 283, 149, para. 292.

⁹¹ *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174, at p. 184.

⁹² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 38, para. 47.

- (b) (b) The act would be internationally wrongful if committed by that State⁹³

The above-mentioned article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts focuses on the situation where one state provides aid or assistance to another State, with a view to support the commission of an internationally wrongful act by the latter. It is clear the main responsibility is on the State that commits the international breach. Indirect the responsibility can be held accountable on supporting states as consequence of the first states actions. This responsibility may be secondary by its nature, but is still an international wrongful act according to international law. If a transferring State has *knowledge of the circumstances* that it's transferred arms will most likely be used to commit violations of international human rights law or humanitarian law, and then is clearly committing a breach under international law.⁹⁴ Depending on the violation that particular State can later be held accountable for the breach according to international law.⁹⁵

As a result of this, exporting states are prohibited from transferring small arms to another state if that state is fully aware that the recipient state will use the weapons in violation of international law (one of those violations could be the act of genocide, a peremptory norm criminal under international customary law as well as under conventional international law). It is important to recognize that the assisting State only has a supporting role in these situations. Their assistance should not be confused with the primary responsibility of the acting State. The aiding or assisting State will be held responsible to the extent that its own conduct has result in or in anyway assisted to the internationally wrongful act.⁹⁶

For this reason the United Nations General Assembly has on number of occasions called upon Member States to refrain from supplying or exporting arms and other military aid or assistance to countries that have been found to be committing grave human rights violations.⁹⁷ If an allegation is brought upon an assisting State that their transfer has assisted human rights abuses by another State, then the particular circumstances of each case must be

⁹³ Article 16, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

⁹⁴ See *infra*, respectively section 4.3. and 4.4. This should be interpreted with the wordings of the EU Code of Conduct, Criteria Four that stipulates that if there is a 'clear risk' that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim, then the export should not be granted.

⁹⁵ i.e., UN Charter, Chapter VII (violating arms embargoes), Geneva Conventions of 1949, Common Article 1, UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty, Declaration on the Enhancement of the Effectiveness of the Principles of Refraining from the Threat or Use of Force in International Relations, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts.

⁹⁶ Article 16, Report the International Law Commission on the work of its 53rd session, Chapter IV: *State Responsibility* (2001), pp. 155-160, para.1.

⁹⁷ Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, Draft Resolution XVII, 14 December 1982, A/37/745, p.50.

carefully examined to determine whether the aiding state by its aid was aware of and intended to facilitate the commission of the international wrongful conduct.⁹⁸ This means that the assisting State is always responsible for its own conduct and acts, when deliberately assisting another State to breach international obligation by which they both are bound. By assisting another State, that State should not be held responsible for all the consequences of the act, but only for those which, in accordance with the principles, stated in article 2 (5) of the UN Charter, flow from its own conduct.⁹⁹ If a State sends small arms to a State, that is in clear violation of article 2 (5), and have intent to use these weapons, a violation will occur from both states.

Furthermore, Article 47 of the ILC Draft¹⁰⁰ deals with the situation where there is a *plurality of responsible States* in respect of the same wrongful act and injury. Several States may be responsible for the same internationally wrongful act depending on the circumstances. If, for example, two or more States come together in carrying out together an internationally wrongful act in circumstances they may be regarded as acting jointly in respect of the entire process and the injured State can hold each responsible State to account for the wrongful conduct as a whole.¹⁰¹ In the *Corfu Channel Case*, it seems that Yugoslavia laid the mines and would have been responsible for the damage they caused. The International Court came to the conclusion in the *Corfu Channel Case* that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines in the area.¹⁰² The knowledge might be of interest if a *plurality of states* transfers arms to an area of conflict, to them a legitimate warring party in that State, and apparently without that actual State consent. When several States transfer arms to an area where they will be used to commit human rights abuses, each State will most likely be separately held accountable for the circumstances caused by their action¹⁰³ and could be described within the terms of *joint legal responsibility*, which derives from different legal traditions.¹⁰⁴ This term and description of solidarity act should be applied in such cases with great care and will be not be a matter of further discussion in this section.

4.2.1.2 Article 17 - Direction and control exercised over the

⁹⁸ Article 16, Report the International Law Commission on the work of its 53rd session, Chapter IV: *State Responsibility* (2001), pp. 155-160, para.9.

⁹⁹ *Ibid*, p.159, para.10.

¹⁰⁰ Article 47 on Plurality of Responsible States: “1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. 2. Paragraph 1: (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered; (b) Is without prejudice to any right of recourse against the other responsible States.”

¹⁰¹ Article 47, Report the International Law Commission on the work of its 53rd session, Chapter IV: *State Responsibility* (2001), pp. 313-318, para.2.

¹⁰² *Corfu Channel, Merits*, ICJ. Reports 1949, p. 4, pp. 22-23.

¹⁰³ Article 47, pp.313-318, para.2.

¹⁰⁴ See J.A. Weir, *Complex Liabilities*, in A.Tunc (ed.), *International Encyclopaedia of Comparative Law* (Tübingen, Mohr, 1983), vol. XI, Torts, pp. 43-44, Sections 79-81.

commission of an internationally wrongful act

It is important, when discussing state responsibility concerning arms transfer, to also refer to Article 17 on the Draft Articles on Internationally Wrongfully Acts. This article refers to the responsibility of a state for exercising command and control over the authority of an internationally wrongful act, and states that:

“A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) if 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”¹⁰⁵

This article deals also with *secondary responsibility*, in that sense that the exercise of direction and control by one state over the commission of an internationally wrongful act by a third state. This could as a result affect the restrictions on arms transfers. So far as State responsibility is concerned, the position of Federal States is no different from that of any other States. Meaning, the normal principles specified in articles 4 to 9 of the ILC draft articles apply, and the federal “/...State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.”¹⁰⁶ Article 17 is limited to cases where a dominant State directs and controls conduct, which is a breach of an international obligation of the dependent State. A number of international tribunals have refused to assume responsibility on the part of a dominant State simply because State may have the power to interfere in matters of administration internal to a dependent State, but have not done so.¹⁰⁷ One Arbitral Tribunal held, in the *Brown (United States) vs. Great Britain* case,¹⁰⁸ that the authority of Great Britain, as superior over the South African Republic prior to the Boer War, “/...fell far short of what would be required to make her responsible for the wrong inflicted upon Brown.”¹⁰⁹ The Commission, in its comments, mean that if a State has power over another State and that State transfer weapons into a not appropriate area, then the principal State can not be held accountable for the transferring states’ action just because it has influence over it. Only if it has control over that states’ conduct and is aware of the transferring states actions and consequently does not interfere in the actual transfer of arms.

¹⁰⁵ Article 17, Report the International Law Commission on the work of its 53rd session, Chapter IV: *State Responsibility* (2001), pp. 160-165, para.1.

¹⁰⁶ *Ibid*, p. 162, para.4.

¹⁰⁷ *Ibid*, p. 162, para.6.

¹⁰⁸ See *Brown (United States) vs. Great Britain*, UNRIAA, vol. VI, p. 120 (1923).

¹⁰⁹ *Ibid*, p.130.

4.2.2 Weapons Transfer and The Principle of Non-Intervention

International law prohibits States from interfering directly or indirectly in the internal or external affairs of any other state, i.e. the disruption of territorial integrity.¹¹⁰ This peremptory norm limits the transfer on small arms and is also related to *the principle of non-intervention*.¹¹¹ Even in the case of transferring arms from one State to militant forces in another state is prohibited under international law. The first attempt to regulate the prohibition on this type of weapons was done by the League of Nations in 1937, establishing the Convention for the Prevention and Punishment of Terrorism.¹¹² This Convention, although never entered into force, gave birth to the view that transfer of arms, with the purpose of being used in terrorist acts, should be prohibited under international law. This view has been lasting over the years in several international resolutions and instruments.¹¹³ This prohibition of non-intervention especially applies to the transfer of small arms to terrorist or other armed activities.¹¹⁴ Although small arms transfer might be legal in its nature, in accordance to current national legislation and rules of conduct, it is forbidden to assist terrorist activities by “/...supplying arms for the purpose of such activities”, and thus “/...undermining the free exercise by that state of its sovereign rights”.¹¹⁵

¹¹⁰ Territorial integrity is the principle under international law that nation-states should not attempt to promote secessionist movements or to promote border changes in other nation-states. The principles states that border changes that are imposed by force are acts of aggression. See the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty, General Assembly Resolution 2131 (XX), 21 December 1965. These principles are also to be found in the Declaration on Principles of International Law concerning Friendly Relations among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24 October 1970.

¹¹¹ E.g. the state or habit of not intervening or interfering; as, the non-intervention of one state in the affairs of another.

¹¹² See in particular Article 2(5) of the Convention for the Prevention and Punishment of Terrorism, 16 November 1937, C.546.M.383.1937.V, *série de publications de la Société des Nations, Questions Juridiques*, 1937, V10.

¹¹³ See *supra*, the Declaration on Principles of International Law concerning Friendly Relations among States in Accordance with the Charter of the United Nations. This prohibition to aid terrorist is reaffirmed in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat of Use of Force in International Relations, General Assembly Resolution 42/22 (1988), 17 March 1988, para.I.6: “States shall fulfil their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts”.

¹¹⁴ See also Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22 of 18 November 1987: “States have the duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter”, Annex, para.6.

¹¹⁵ The International Law commissions work on the Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the International Law Commission*, 1988, paras.246-255.

This situation has been addressed by the ICJ in the *Nicaragua Case*, where the United States had by training, arming, equipping, financing and supplying a rebel force (the Contras) against Nicaragua, and thereby violated customary law not to intervene in the domestic affairs of another state.¹¹⁶ Therefore, to support and assist opposition or rebellious forces against the legitimate government could amount to the use of force under international customary law.¹¹⁷ The prohibition on the use of force exists under customary international law, expressed as *jus cogens* under Article 2 (4) of the UN Charter.

The *UN Panel of Governmental Experts on Small Arms* addressed the ‘grey area’ of legality surrounding covert governmental arms transfer and noted in the report that, although ‘secret transfer’ are not necessarily illegal, “Any transfer not approved by the competent authorities in the recipient State could, however, be classified by that State as interference in its internal affairs and therefore illegal”.¹¹⁸ The General Assembly Declaration on the Inadmissibility of Intervention clearly restates this principle of non-intervention that no State has “/...the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned”; and that no States “/...shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State or interfere in civil strife in another State”.¹¹⁹ If exporting States transfer weapons into the territory of the recipient State without fulfilling that state’s domestic rules for import of small arms and without that’s State’s authorisation, makes the transfer illegal under national legislation and the supply of weapons can amount to unlawful interference in the recipients internal affairs.¹²⁰

4.3 The Laws of War

“The proliferation of small arms, and munitions and explosives has also aggravated the violence associated

¹¹⁶ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986, I.C.J. Reports 1986, p.14. para. 292 (3). The judgement can be found on the Website of the International Court of Justice: <http://www.icj-cij.org/> (last visited 2005-07-09).

¹¹⁷ This has been established in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)* case, Judgement of 27 June 1986, ICJ. Reports 1986.

¹¹⁸ *Report of the Panel of Governmental Experts on Small Arms*, A/52/298, United Nations, 27 August 1997, p.17.

¹¹⁹ See *supra*, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty United Nations General Assembly Resolution 2131(XX), 21 December 1965, respectively para. 1 and 2.

¹²⁰ Gillard (2000), pp. 37.

with terrorism and organized crime. Even in societies not beset by civil war, the easy availability of small arms has in many cases contributed to violence and political instability. These, in turn, have damaged development prospects and imperilled human security in every way.”
- Kofi Annan, UN Secretary-General

The body of rules operating under international humanitarian law (IHL) is also known as *laws of war* or *rules of war*.¹²¹ IHL is the body of laws and principles that seek to limit and prevent human suffering in times of armed conflict and prohibit indiscriminate force against civilians or disproportioned attacks on anyone who is not taking an active part in the conflict. It also prohibits the use of weapons and tactics that are excessively injurious to combatants. IHL applies to all parties to the conflict, including in civil wars those armed groups operating outside state command. According to these instruments and advisory opinions from the International Court of Justice it is obvious that parties to any conflict can not choose with total freedom their means and method of warfare.¹²² Most small arms are not by nature prohibited under IHL, and therefore, the violation of IHL often comes from the misuse of these weapons by governments and irregular forces. The International Committee of the Red Cross (ICRC) has stated that they are “/...gravely concerned that efforts to teach respect for the norms of international humanitarian law are being undermined by the flow of weapons.”¹²³ Arms-control expert Jozef Goldblat, has suggested that all laws of war suffer from one common weakness: “/...the rules of conduct established for belligerents in time of peace may not resist the pressure of military expedience generated in the course of hostilities, and the attempts to ‘humanise’ war may sometimes prove futile. The danger that the weapons prohibited may, under certain circumstances, be resorted to — as has occurred on several occasions — will not disappear as long as these weapons remain in the arsenals of States. Hence the intrinsic link between the development of the humanitarian laws of war and progress in the field of disarmament.”¹²⁴ Goldblat view of nuclear disarmament, might also be drawn and included, to my point of view, in the proliferation and use of small arms in escalating conflicts since they will to be a danger as long as they are a remain in the arsenal of states consisting of warring parties. The attempts to humanise war has therefore proven to be a difficult mission.

¹²¹ The laws of War (*Jus in bello*) define the conduct and responsibilities of nations and individuals engaged in warfare. The conduct of war has always been subject to specific principles and behaviour on the field of battle. These rules are deep rooted in ancient cultures and have evolved and been collectively codified during the nineteenth century. For a thorough collection of laws of armed conflict visit University of Minnesota Human Rights Library, available at <http://www1.umn.edu/humanrts/instree/auoy.htm> (last visited 2005-07-10).

¹²² See the *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion of 8 July 1996*, I.C.J. Reports 1996, para.75.

¹²³ International Committee of the Red Cross (ICRC), Statement on *Arms Transfers, Humanitarian Assistance and International Humanitarian Law*, 19 February 1998. Visit their webpage: www.icrc.org (last visited 2005-07-09).

¹²⁴ Jozef Goldblat, *Agreements for arms control – a critical survey*, International Peace Research Institute, Stockholm, 1982, p. 89.

4.3.1 International Legal Instruments

There is no up to date specific international convention that regulates small arms transfer,¹²⁵ but there exists conventions that deals with specific limitations on certain weapons transfers that can be held in the light of transfer of arms. These are important to mention when trying to seek answers to what restrictions there are on the transfer of arms, especially small arms. Without going into details of each specific declaration or convention, primary sources of international humanitarian law relating to small arms could be therefore, in reflection of weapon-specific prohibitions and limitations, being concluded as the following:

- 1868 St Petersburg Declaration Renouncing the Use of, in Time of War, of Exploding Projectiles;
- The Hague Conventions of 1899 and 1907;
- The four Geneva Conventions adopted by 1949, and;
- The two Additional Protocols to the Geneva Conventions adopted in 1966 and entered into force in 1977.¹²⁶

The four mentioned Geneva conventions relate to:

- The improvement of the condition of the sick and wounded armed forces in the field (1864);
- The sick and wounded and shipwrecked members of the armed forces at sea (1899);
- The treatment of prisoners of war (1929); and
- The protection of civilians during times of war (1949)¹²⁷

Protocol of 1977 regulates the protection of victims of international armed conflict, and the protection of victims of non-international armed conflicts.¹²⁸ Also included in the body of essential sources of international law, relating to transfer of arms and '*weapon-specific*' prohibitions are the following declarations or conventions:

¹²⁵ A group of Nobel Peace Prize laureates, under the chairmanship of Oscar Arias, have been since 1996 pursuing an international campaign for a global code of conduct to regulate global arms transfers. The code would require the code of arms transfers based on a set of criteria similar to those adopted by the European Union, but more exclusive norms. The Nobel laureate's initiative is coordinated by the Arias Foundation, San José, Costa Rica.

¹²⁶ *The question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms* submitted by Ms. Barbara Frey in accordance with Sub-Commission decision 2001/120, E/CN.4/Sub.2/2002/39, dated 30 May 2002, para.56.

¹²⁷ Small Arms Survey (2002), p.179.

¹²⁸ Ibid.

- The Declaration concerning Expanding Bullets, from 1899;
- The Protocol of the Prohibition of the Use and War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, from 1925;
- The Biological Weapons Convention with may be Considered Excessively Injurious, from 1972;
- The Chemical Weapons Convention, from 1993, and;
- The Convention on the Prohibition on Use, Stockpiling, Production and Transfer of Anti-Personnel Mines also known as the “*Ottawa Treaty*”, from 1997.¹²⁹

These international legal instruments will not be dealt with further in this thesis, but it is important to mention them as part of the expressed restrictions on arms transfer. The way which small arms may be used in the receiving state is of vital importance for the limitations of transferring these weapons of choice.

The use of weapons is regulated through the fundamental principles of international humanitarian law:

- (i) To protect the civilian population and civilian objects and make a clear distinction between combatants and non-combatants;¹³⁰ and
- (ii) The prohibition on the use of weapons causing “superfluous injury or unnecessary suffering” to combatants”.¹³¹

To the extent that small arms availability causes violations of these fundamental principles, the international community has evidently an obligation to regulate and control the flow of such arms.¹³²

States always have responsibility, under the common article 1 of all the four 1949 Geneva Conventions, to respect and ensure respect for the rules of IHL. A state that transfers weapons in situations where it is likely they will be used to commit serious violations of IHL or other areas of international law would clearly be failing its obligation to ensure respect for IHL.¹³³ States have responsibility under international humanitarian law certain code of conduct and especially under article 3 of all the Geneva Conventions,

¹²⁹ Gillard (2000), p.32

¹³⁰ Article 51(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (“Protocol I”)

¹³¹ Article 35(2) Protocol I. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p.226, para.78.

¹³² Frey (2002), E /CN.4/Sub.2/2002/39, para.57.

¹³³ The International Committee of the Red Cross (ICRC) argues, in their 1999 Geneva-report on *Arms Availability and the Situations of Civilians in Armed Conflicts*, that not only states but also business engaged in the production and export of small arms should bear the same responsibility for the use made of the weapons and ammunition they. This is though an area of international law that will not be discussed further in this thesis.

which wording is the foundation of humanitarian law applicable to all armed conflicts. The text of article 3 is repeated in all four Geneva Conventions, and is the only part of the conventions that applies explicitly to internal armed conflicts.¹³⁴

It is also important to have in mind that states have an obligation not to use small arms to commit grave breaches stated in the four Geneva Conventions, applicable in international armed conflict.¹³⁵ Grave breaches are identified as “/...wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer of a protected person and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly”.¹³⁶ The most recent codification of such violations collectively referred to as “war crimes” is to be found in the Rome Statute of the International Criminal Court (ICC) adopted in 1998.¹³⁷ The Rome Statute reaffirms customary international human rights norms, prohibiting *crimes against humanity*¹³⁸ in time of peace or in time of war. The articles of the ICC Statute also apply to individuals, whether acting as state or non-state actors. This is often the case when dealing with war crimes, like the jus cogens prohibition – genocide.¹³⁹

4.3.2 Balancing Military Necessity in Armed Conflicts

International humanitarian law aims first at balancing military necessity in armed conflict with humanitarian principles.¹⁴⁰ This balance gives rise to a number of legal boundaries on states freedom to transfer weapons.¹⁴¹ Once intended for inter-state conflict between states, international humanitarian law now has adapted itself to reflect modern internal conflicts.¹⁴² This

¹³⁴ Article 3 of the Geneva Conventions, sometimes recognised as a “*treaty in miniature*”, sets forth the minimum protections and standards of conduct to which the State and its armed opponents must adhere. Article 3 is the core of international humanitarian law. Additional Protocol II of 1977 covers also internal armed conflicts, but is less universally accepted among States than the 1949 Conventions.

¹³⁵ Frey (2002), E/CN.4/Sub.2/2002/39, para.59.

¹³⁶ Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions of 1949.

¹³⁷ Rome Statute of the International Criminal Court (ICC), adopted at Rome on 17 July 1998, Article 8, UN Doc.PCNICC/1999/INF/3. Found on the website: <http://www.un.org/law/icc/statute/romefra.htm> (last visited 2005-07-09).

¹³⁸ ICC Statute, Article 7 – Crimes Against Humanity.

¹³⁹ The concept *genocide* applies in times of peace as well as war. Genocide is an attempt to destroy a national, ethnic, racial or religious group. International law defines the crime as comprising all or some of the following elements: killing, causing serious bodily or mental harm, deliberately inflicting conditions calculated to bring about a group's destruction, imposing measures to prevent births within a group and forcibly transferring children from the group. The concept applies in times of peace as well as war. It also includes conspiracy to commit genocide, public incitement to commit genocide and complicity in genocide.

¹⁴⁰ Gillard (2000), p.31.

¹⁴¹ Ibid.

¹⁴² Small Arms Survey (2002), p.179.

change has proven to be necessary in order to adapt humanitarian law into modern warfare and protect civilians. The need of applying other areas of international law is de facto essential for upholding state responsibility (since there is no legal instrument or non-proliferation regime explicitly regulating the small arms transfer as such). Transfer of small arms is one area of concern, where the rules manifested through humanitarian law needs to be applied, in order to protect the civilians of the armed conflict.

4.3.3 Criterion Three – Provoke or Prolong Armed Conflicts

“The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.”¹⁴³

According to the Codes’ third criterion exports of arms should not be exported to areas of tension or conflict, where they could provoke or prolong armed conflicts or aggravate existing tensions in the country of final destination. EU has made a commitment to the international community to abide by international efforts made within the area of peace and security.¹⁴⁴ In regard to the Geneva Conventions¹⁴⁵ and the way small arms may be used in the receiving state is therefore of vital importance for the limitations of transferring weapon. To the extent that small arms availability causes violations of these fundamental principles, EU Member States has evidently an obligation to regulate and control the flow of such arms. A state that transfers weapons in situations where it is likely they will be used to commit serious violations of IHL and provoke or prolong armed conflicts would clearly be failing its obligation to ensure respect for IHL and international commitments.

Regions of conflict that are over-flooded with small arms could undermine the peace efforts made in that area. It is therefore important to recognise that the use of small arms in armed conflicts has a potential to lengthen the conflict and as a consequence make them more difficult to resolve by peaceful means. If weapons are still in the close presence of armed group there is an imminent risk that these groups will resort to arms if one party breaches the peace. Non-state actors and several governments for that matter, in violated regions of the world, can often get hold of small arms very easily, since they are cheap, easy to use and often available. In modern warfare violations of IHL is occurring more frequently in conflicts, since

¹⁴³ Criteria Three, EU Code of Conduct on Export of Arms.

¹⁴⁴ Article 17 of ECT.

¹⁴⁵ See supra, section 4.3.1, on the relevant Geneva Conventions and other Conventions.

purposely targeting of non-combatants/civilians has become a more integral part of the tactics of some governments and irregular forces alike.¹⁴⁶

4.4 Respect for International Human Rights Law

International human rights law (HR) is a fundamental source of limitations on transfers of weapons. HR law seeks to preserve and protect the physical integrity and human dignity, i.e. the individual civil and social rights and fundamental freedoms. The current availability of small arms threatens the full completion of all human rights in times of war and in times of peace.¹⁴⁷ The Universal Declaration on Human Rights, from 1948,¹⁴⁸ does not enjoy full treaty status, but together with the International Covenant on Civil and Political Rights¹⁴⁹ and the International Covenant on Economic, Social and Cultural Rights¹⁵⁰ together are more or less accepted as a mean of judging compliance with human rights obligations under the UN Charter.¹⁵¹ These international instruments are to be fully respected when conducting arms transfers.

4.4.1 Article 3 of the Universal Declaration of Human Rights

Small arms are often used against civilians in internal conflicts. The most fundamental principle of human rights law is the right to life. The United Nations has embodied the right to life for example in article 3 of the Universal Declaration of Human Rights¹⁵² and in article 6 (1) of the International Covenant on Civil and Political Rights.¹⁵³ The High Commissioner of Human Rights has commented on article 6 of the mentioned above Covenant and stated that “States have the supreme duty to

¹⁴⁶ Small Arms Working Group, *Facts Sheets on Small Arms*, 2001, p.10. Full text could be found on this website <http://www.fas.org/asmp/campaigns/smallarms/sawg/ihl.pdf> (last visited 2005-07-09).

¹⁴⁷ E/CN.4/Sub.2/2002/39, para.29.

¹⁴⁸ General Assembly resolution 217 A (III) of 10 December 1948.

¹⁴⁹ Adopted by United Nations General Assembly Resolution 2200A [XXI] of 16 December 1966.

¹⁵⁰ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A [XXI] of 16 December 1966.

¹⁵¹ Small Arms Survey (2002), p.179. There are also other binding treaties and additional instruments whose provisions also apply in armed conflicts, concerning the relationship small arms and human rights. These includes the 1951 Convention Relating to the Status of Refugees, the 1984 Convention Against Torture, the 1989 Convention on the Rights of the Child, and the 1989 Convention on the Elimination of all Forms of Discrimination Against Women.

¹⁵² Article 3 of the Universal Declaration of Human Rights, “Everyone has the right to life, liberty and security of person.”.

¹⁵³ Article 6 of the International Covenant on Civil and Political Rights, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”.

prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.”¹⁵⁴ Certain provisions of human rights treaties are suspended during periods of armed conflict, but some fundamental non-derogable rights continue to apply. This includes the right to life and prohibition on inhumane and degrading treatment.¹⁵⁵

Article 1 of the United Nations Charter¹⁵⁶ lists the purposes of the United Nations, which includes the “/...promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.../”.¹⁵⁷ Article 55 of the UN Charter states that the Organisation shall work for and promote the purposes set out in the opening paragraph, i.e. universal respect and observance of human rights and fundamental freedoms. This is important for States to acknowledge when the right to life will be in danger, due to the transfer or use of small arms. Even if the recipient state is not physically participating in an armed conflict does not eliminate the limitations based on humanitarian and human rights law from applying. Even during armed conflict or in time of public emergency, which may threaten the life of the nation, states may not derogate from this right of life.¹⁵⁸ The international commitment and obligation to protect life place unconditional limitations on State actions, involving weapons and their transfer across national borders. If small arms will be used in the recipient state to commit serious violations on human rights and humanitarian law then the exporting states are prohibited from supplying such arms. The misuse of small arms to commit human rights violations, such as rape, torture, forced displacement, genocide etc., are prohibited under international human rights law. It is the responsibility of the recipient state to protect the right to life, but there is also a “derivative responsibility”¹⁵⁹ of the exporting state to not violate this non-derogable right, and fail its duty to protect life. If the recipient state is unable to control the flow of weapons used by private actors within the state territory, the prohibition of transfer could be applicable. Exporting states should in those situations refrain from supplying such weapons to states of ‘inner turmoil’, if it is likely that these weapons will be used to violate human rights and if the recipient state is incapable of controlling the situation and exercise functional control over their domestic territory.

¹⁵⁴ General Comment No. 06: The right to life (art. 6). 30/04/82.

¹⁵⁵ The International Covenant on Civil and Political Rights, Article 7.

¹⁵⁶ Charter of the United Nations (UN Charter) adopted in San Francisco 26 June 1945, 1 UNTS XVI.

¹⁵⁷ UN Charter, Article 1 (3).

¹⁵⁸ The International Covenant on Civil and Political Rights, Article 4 (2).

¹⁵⁹ The liability of accomplices, instigators and aiders is derived from the liability of the main perpetrator, which in German language is called “Akzessorietät” and in French “*emprunt de la criminalité*”.

4.4.2 Genocide

When dealing with transfer of small arms states must pay close attention to the risk of genocide¹⁶⁰ within the receiving state. Whether committed in time of peace or in war genocide is, according to Article I of The Convention on the Prevention and Punishment of the Crime of Genocide from 1948,¹⁶¹ a crime under international law. States can be held responsible for conspiracy to commit genocide,¹⁶² direct and public incitement to commit genocide¹⁶³, attempt to commit genocide¹⁶⁴ and complicity in genocide¹⁶⁵ following the declaration in Article III of the Convention mentioned, i.e. if export states are providing weapons or assisting in any way with the perpetrator committing genocide.¹⁶⁶ Although states may supply weapons it is most unlikely that these “assisting states” have a clear “/...intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.¹⁶⁷ According to article II of the Genocide Convention is the *intent* necessary for give rise to a violation of international law. If the assisting state claims that the intent is absent, and consequently denying any assistant to the genocidal activity, the supply of weapons is still a violation of international law if it is clear that the weapons will be used to carrying out genocide.¹⁶⁸

The issue of state responsibility under the crime of genocide has been brought to the attention of the International Court of Justice.¹⁶⁹ ICJ stressed in its *Advisory Opinion on Reservations to the Genocide Convention*,¹⁷⁰ those rights and obligations contained therein were clearly rights and obligations *erga omnes*. According to the Court, the obligation upon each state to prevent and punish the crime of genocide was not dependent upon

¹⁶⁰ The word genocide was first formulated by Raphael Lemkin, a Polish Jew, who in the year 1944 put together the Greek word *genos* (meaning family, tribe or race), with the Latin word for killing *-cide*. Lemkin struggled hard for establishing the concept in international laws. He achieved his goal in 1951, when the Convention on the Prevention and Punishment of the Crime of Genocide, that’s defining and prohibit the act of genocide, came into effect. The issue of genocide has been highlighted on numerous conferences, most recently on the Stockholm International Forum 2004 on the issue of Preventing Genocide. Visit their website: <http://www.preventinggenocide.com/> (last visited 2005-07-09).

¹⁶¹ Signed in New York, 9 December 1948, 78 UNTS, p.277.

¹⁶² The Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Article III (b).

¹⁶³ Ibid, Article III(c).

¹⁶⁴ Ibid, Article III (d).

¹⁶⁵ Ibid. Article III (e).

¹⁶⁶ Gillard (2000), p.40.

¹⁶⁷ The Convention on the Prevention and Punishment of the Crime of Genocide, Article II.

¹⁶⁸ Gillard (2000), p.40.

¹⁶⁹ Read the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, ICJ Reports, 1993, pp. 3 and 325.

¹⁷⁰ ICJ Reports of Judgements, Advisory Opinions and Orders (ICJ Reports), 1996, para. 31.

the type of conflict involved in the particular situation and was not territorial limited by the Convention.¹⁷¹

4.4.3 Criterion Two – Respect for Human Rights

“The respect of human rights in the country of final destination

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will:

- a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression;*
- b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.”¹⁷²*

The second criterion deals with the respect for human rights situation in the country of final destination. Much substance on issuing export licenses to countries should be on the recipient country's attitude towards relevant principles established and recognised by relevant human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Export licenses should under no circumstances be issued if there is a “/...clear risk that the proposed export might be used for internal repression”.¹⁷³ Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, such as those above mentioned instruments. For these purposes, equipment which might be used for internal repression will include, inter alia, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. The second criteria is in line with operative provision one of the Code, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes, on a case-by case basis. The concept of ‘internal repression’ is not a commonly used word within the sphere of human rights law or international humanitarian law, hence within this context of the code, be interpreted as meaning ‘violations of international human rights standards and/or humanitarian law’.

Furthermore, according to Criterion Two of the Code, states will “/...exercise special caution and vigilance in issuing licences, on a case-by-

¹⁷¹ Ibid. Also *supra*, section 4.2 on State Responsibility.

¹⁷² Criteria Two, EU Code of Conduct on the Export of Arms.

¹⁷³ Criterion Two (a).

case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU”.¹⁷⁴

4.5 Respect for International Commitments

States that wants to transfer arms to another State has to be cautious of the numerous weapon embargoes established by the United Nations or by other international or regional organisations. The European Union, OSCE or other regional organisation, have their own ‘powers’ to prohibit weapons transfers by regulations, either legally, by legislative measures, or by political force through decision making on ministerial level.¹⁷⁵ International arms embargoes are usually, as a ‘political guideline’, declared by the UN Security Council, under Article 39 of the UN Charter and should be respected by affiliated Member States of the UN and by other regional organisations, if there is an “imminent threat to the peace, breach of the peace or act of aggression”.¹⁷⁶

Specific weapon sanctions are rightly imposed through a UN Security Council resolution under Chapter VII of the UN Charter.¹⁷⁷ Decisions on arms embargoes from the UN Security Council are binding on all Member States and give rise to obligations for States to abide by. Firstly, State should not transfer weapons to embargoed states, and secondly, followed by Article 25 of the UN Charter, UN Member States must take necessary measures to implement, apply and enforce the embargo and make it effective within their national jurisdiction.¹⁷⁸ States who violates these prohibitions, either domestically, by not implementing them properly, or by neglecting the prohibition to transfer arms to a specific State, will give rise to State responsibility under the UN Charter. Those individuals who will commit violations of the embargoes will be held accountable under national domestic legislation. The UN Security Council has, through numerous resolutions over the last decades, called upon Member States to adopt and adjust their national legislation to make violations of arms embargoes a criminal offence.¹⁷⁹ Not to forget, on the issue of embargoes, is that States together can commit themselves to bilateral or unilateral embargoes on

¹⁷⁴ Ibid, (b)

¹⁷⁵ This section will deal mainly with the United Nations weapon imposed embargoes. EU and other regional organisations and their mechanism to abide to resolutions on weapon embargoes will be dealt *infra*, and in chapter six.

¹⁷⁶ United Nations Charter, Article 39. In recent decades, sanctions have been imposed against Iraq, the former Yugoslavia, Libya, Haiti, Liberia, Rwanda, Somalia, UNITA forces in Angola, Sudan, Sierra Leone, FRY (including Kosovo), Afghanistan and Eritrea and Ethiopia. For a complete sanction list imposed by the Security Council Website visit: <http://www.un.org/Docs/sc/> (last visited 2005-07-09).

¹⁷⁷ Art 41, the UN Charter: “/...measures not involving the use of force.../”.

¹⁷⁸ Gillard (2000), p.33.

¹⁷⁹ Security Council resolution 1196 (1998) of 16 September 1998, para. 2.

transfer of arms to certain states. This has been done by regional organisations like the European Union and OSCE.¹⁸⁰

4.5.1 Criterion One – Respect for International Commitments

“Respect for the international commitments of EU Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations

An export licence should be refused if approval would be inconsistent with, inter alia:

- a) the international obligations of Member States and their commitments to enforce UN, OSCE and EU arms embargoes;
- b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- c) their commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;
- d) their commitment not to export any form of anti-personnel landmine.”¹⁸¹

The Codes first criteria emphasises the importance of respect for the international commitments of EU Member States, in particular regarding the sanctions decreed by the UN Security Council and those decreed by the Community. According to the first criteria should a license of exporting arms be refused if an approval would be inconsistent with, inter alia: “/...the international obligations of Member States and their commitments to enforce UN, OSCE and EU arms embargoes;”¹⁸² or “/...the Wassenaar Arrangement.../”.¹⁸³

It has been concluded that EU Member States share a common view that mandatory arms embargoes, imposed by the United Nations, should be respected in line with the international commitment and responsibility.¹⁸⁴ No deviation from the principle, not to violate regional or international sanctions, is allowed when delivering small arms to targeted states or individuals. This criterion underlines the commitment made by Member States that an export would be refused if it runs in contradiction to the

¹⁸⁰ OSCE Member States has imposed weapons embargoes on Nagorno-Karabakh (Azerbaijan), See Committee of Senior Officials, Journal No. 2, Annex 1, Seventh Committee on Senior Officials meeting, Prague, 27-28 February 1992. Full text found on website: <http://projects.sipri.se/expcon/csceazbarm.htm> (last visited 2005-07-09).

¹⁸¹ Criterion One, EU Code of Conduct on the Export of Arms.

¹⁸² Criterion One (a).

¹⁸³ Ibid, (b).

¹⁸⁴ Article 17 ECT: “/...to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter.../”.

international commitments made by the Union, including UN arms embargoes or other international efforts made within the field of peace and security.

4.5.2 Criterion Six – Acts of Terrorism

“The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law

Member States will take into account inter alia the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para b) of Criterion One.”¹⁸⁵

Acts of Terrorism, financing, supporting, supplying arms for such activities are condemned by the international community. Criterion six of the EU Code only requires Member States to "take into account" the record of the recipient in terms of its compliance with international law. This is somewhat weak language, but in practice, however, it is to be hoped that the Member States will deny exports of arms to countries where the arms may be used in a manner which fails to comply with the international commitments of the recipient. Criterion seven (d) addresses the issue of undesirable re-export or risk of diversion to terrorist groups and activities.¹⁸⁶ Acts of terrorism could fall into that category. To confront and stop acts of terrorism governments have agreed upon to take certain preventive measures.¹⁸⁷ The principle of refraining from the threat or use of force in international relations is accepted as a ground rule in state relations. Intervening in the affairs of other states and subsequently undermining that state of its sovereign rights,

¹⁸⁵ Criteria Six, EU Code of Conduct on the Export of Arms.

¹⁸⁶ EU Code of Conduct, Criterion Seven “/...In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered: d) the risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context)”.

¹⁸⁷ In 1937 the League of Nations tried but failed to adopt the Convention for the Prevention and Punishment of Terrorism, which aimed to criminalise “/...the manufacturing, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever.../”, article 2.5. These principles of State-restraint in organising, assisting or participating in terrorist acts, have later been upheld in the Declaration on Principles of International Law (UNGA Resolution 2625 (XXV) of 1970) and in General Assembly resolution 42/22 of 1988.

is neither accepted nor supplying arms for the purpose of terrorist acts. Transfer of arms is prohibited if its purpose is to assist such activities of undermining state structure.¹⁸⁸

4.5.2.1 Concluding Remarks

With these rules and obligations in mind it is not up to the state if they decide to transfer arms. There is an international commitment to the legality of the transfer. If a state violates these international norms and obligations of state conduct there will be consequences, often in the form of Security Council resolutions. If a State breaches rules of human rights or humanitarian standards these conflict states will be confronted with arms embargoes from the international community, through the UN or/and also by regional organisations like the European Union or OSCE.¹⁸⁹ For better understanding of the above-mentioned rules and their correlation with the transfer of small arms, but also with the regional legislation on small arms transfer, these limitations will now be addressed starting with regional responsibility relating to the small arms transfer, namely the progress made within the European Union. To the extent that small arms availability causes violations of these fundamental principles, EU Member States has evidently an obligation to regulate and control the flow of such arms.

¹⁸⁸ Gillard (2000), p.8.

¹⁸⁹ See *infra*, section 6.2.

5 Regional Agreements and Cross-border Cooperation within the EU

5.1 Introductory Remarks

“Light weapons recognise no borders, regions or continents. They are an international problem which demands an international response.”¹⁹⁰

It is a well-known fact that Europe is an important source of small arms, both in production and transfer respectively within and outside the region.¹⁹¹ Today, there are nearly 639 million small arms and light weapons spread around the world, of all have been produced by more than 1,135 companies in at least 98 countries.¹⁹² As one of the major arm producing regions in the world, EU is working towards limit that illicit spread of arms through various programs and joint actions.¹⁹³ Since the end of the Cold War thousands of small arms are circulating in Europe and these weapons have been a major factor in several serious conflicts that have occurred in certain parts of Europe, mostly south east of Europe,¹⁹⁴ but also in other instable areas of the world. Small arms are by their size easy to conceal and to smuggle, why these weapons have ended up in areas where they were not supposed to end up in the first place. Due to the loopholes in domestic

¹⁹⁰ Paul Eavis, *Awash with Light Weapons, The World Today*, April 1999, p. 19-21.

¹⁹¹ 23 countries in Europe are listed as medium producers of SALW, Russia being ranked as major producer. *Small Arms Survey*, 2002, p.20. For a total list of the 100 largest arms-producing companies in the OECD and developing countries, 2000, visit the Stockholm International Peace Research Institute (SIPRI) homepage:

<http://projects.sipri.org/milex/aprod/100largest2000.pdf> (last visited 2005-07-09).

¹⁹² Debbie Hillier of Oxfam and Brian Wood of Amnesty International, *Shattered Lives – the case for tough international arms control*, Colibri Press Ltd., Hackney 2003, p.19.

¹⁹³ See *infra*, section 4.5.1. and 4.5.2.

¹⁹⁴ More on arms proliferation in Central and Eastern Europe, see Abdel Fatau Musah and Robert Castle paper, ‘*Eastern Europe’s arsenal on the loose: Managing light weapons flows to conflict zones*’, BASIC Occasional Papers on International Security Issues, London: BASIC, May 1998; Chris Smith article, ‘*Areas of major concentration in the use and traffic in small arms*’, in Lora Lumpe and Tamar Gabelnick, eds, *Small Arms Control: Old Weapons, New Issues*, Aldershot, Ashgate, 1999, pp. 85–90; Oszkar Fuzes, ‘*East-bloc connections fuel war*’, at <http://www.nisat.org> (last visited 2005-07-09), 21 April 2001; and Small Arms Survey, *Small Arms Survey 2001: Profiling the Problem*, Oxford, Oxford University Press, 2001, pp. 34–8.

legislation on and legislative lack of controlling the spread, these weapons in circulation are an obstacle in achieving peace and order to the region of Europe as a whole. The use of small arms in organised crime and illicit trafficking in various fields has worsened the proliferation of SALW and their impact on several areas, such as human security, regional development and economic growth and prosperity.

5.2 Export Arms Cooperation Within the EU

Cooperation among EU member's states to combat small arms proliferation is a relatively recent behaviour.¹⁹⁵ In 1997 the EU Commission presented a communication titled *A Union Strategy for the Defence Industry*.¹⁹⁶ The document was one of the first real steps made in the area of transferring military equipment within the EU together with proper and more harmonised arms regulations on export control. Most of the European States regulate their import and export of small arms, but Member States of the Union show difference in their attitude and approaches concerning regulation on arms trade and principles of conduct on arms in this concern of growth.¹⁹⁷ Since 1997 several decisions have been taken in the area of armament.

In recent years EU Member States have politically bound themselves by the Code of Conduct on Arms Export. The Code is interpretation on previous agreed criteria's within the Union on arms export.¹⁹⁸ Emphasis has been added on several aspects when conducting trade, such as the respect for human rights, especially in the recipient country, and the effect of the arms export contribution to insecurity in certain fragile States or regions, both as pre-condition to obtain an export licence. Export licences of arms are usually granted by case-by-case basis, but within the EU certain procedures are simplified for Member States and close alliance-organisations, such as NATO. Within the co-operation area of sanctions regimes EU has developed, through its *Common Foreign and Security Policy* (CFSP), ways and guidelines to implement regional and international arms or other embargoes. This section of the thesis will deal with these regional agreements and cross-border cooperation, all within the European Union.

¹⁹⁵ Article 296 of the Treaty of European Union (ex art 223) specifies that questions relating to the arms production and trade will remain within the competence of the EU Member States. In reality this means that arms related issues must be dealt with by the EU's intergovernmental body, the council of the European Union. *Infra*, section 4.2.

¹⁹⁶ COM (97) 583.

¹⁹⁷ For more thorough information on different EU Member States and their regulation, see the report from POA.

¹⁹⁸ The European Union expressed its determination to promote common high-level standards in the field of armament with the adoption in 1991 and 1992, by the Luxembourg and Lisbon European Councils, of the first set of common criteria for arms exports.

5.2.1 Article 296 of The European Treaty

Although its shortcomings,¹⁹⁹ significant progress towards the development of common EU controls over the arms trade has been made. European countries differ in the issuing Export Licenses, Categorisation of arms products, Export Criteria's, Parliamentary transparency, End-user certifications, End-use verifications and on brokering.²⁰⁰ The European Union has been effective in the harmonisation of trade policies in many areas, but less effective in the area of production and procurement of arms due to Member States own national security and competence. This is much due to Article 296 (ex article 223) of the Treaty of European Union, which has made it difficult to coordinate trade policies in the area of weapons export. Article 296 states that:

1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to *the essential interests of its security* [own emphasis added];

(b) *any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material* [own emphasis added]; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

This article has been over the years restrictively interpreted by EU Member States, which means that all matters relating to the production transfer and purchase of arms falls within the competence of each individual State. No subsequent EU agreement has yet changed this status. Over the years, the European Union has tried, in different forums,²⁰¹ to coordinate its trade policies in most community areas, but article 296 has effectively excluded issues regarding the manufacturing, and acquisition of arms from EU

¹⁹⁹ Number of areas, such as the 'regional unified legal control' of international arms brokering, licensed production agreements, end-use certification and monitoring has not yet been addressed properly within the EU on a legislative level.

²⁰⁰ See *infra*, in section 5.5., on these related issues.

²⁰¹ There are two main working groups under the Council of Ministers, are the working group on conventional arms (COARM) and the working group of armaments policy (POLARM). COARM plays a vital role when it comes to issues regarding the EU Code of Conduct. POLARM has discussed and examined procedures on exports and policy issues concerning the trade in military equipment between EU Member States and how this could be simplified. Recently this has led to the establishment of a European Defence Agency (EDA), an Agency in the field of defence capabilities development, research, acquisition and armaments. The General Affairs and External Relations Council met on 14 of June 2004, and EU foreign ministers approved the creation of the European Defence Agency. See Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency (OJ L 245 of 17.07.2004, p. 17).

community competence. The progress of unified regulation has been slow since EU has no clear competence in this field. Restrictions on exports fall subsequently under the Member States' exclusive jurisdiction, according to the article 296, meaning that EU institutions lack formal powers to influence the EU Member States' policies in this field of trade. Progress have been made over the years, through multilateral cooperation, but Europe still faces serious important challenges relating to the supply, proliferation, availability and misuse of SALW. EU Member State transfer arms and this trade has grown, hence the need of further progress in State responsibility has grown with it as well.

5.3 Regional Security Arrangements and European Political Co-operation

If agreements of arms should be effective, then export controls of arms should be applied consistently and on a common political ground. Such a common political ground has EU tried to develop and position itself in recent years, through a *Common Foreign and Security Policy* (CFSP).²⁰² Coordinating national policies are of importance, since there is always a danger of unilateral action being undermined by other suppliers with less tough export control policies and practices.²⁰³ Since the spread of small arms are to a great extent driven by the demand for weapons in certain regions of the world, who often are infested with conflicts and great tension, there is a huge need for harmonisation of European arms export control - not only for those with the same opinion and understanding on international and regional security, but also for those who are sharing that same point of view.²⁰⁴

5.3.1 EU Common Foreign Policy

The expression '*Common Foreign Policy*' has had no place in European Treaties since the start of the 1970's. It was not until the October 1970 the Member States of the European Community started to cooperate and made

²⁰² Further information on the CFSP is to be found on the website of the Council of the European Union: <http://europa.eu.int/scadplus/leg/en/lyb/r00001.htm> (last visited 2005-07-09). CFSP legislation *in force* is available on the EU's Law Portal, EUR-Lex, <http://europa.eu.int/eur-lex/> (last visited 2005-07-09).

²⁰³ Read Benson, William, *Light Weapons Controls and Security Assistance: A Review of Current Practice*. London, International Alert & Saferworld, September 1998, p.22.

²⁰⁴ Conventions may be concluded between the Member States of the European Union in various fields, such as Company Law, Double Taxation, Consular Protection and the simplification of formalities governing the mutual recognition and enforcement of judgements of courts or tribunals and of arbitration awards (Article 293 of the Treaty establishing the European Community) and conventions may be established for adoption by the Member States of the European Union in matters concerning cooperation in the field of Justice and Home Affairs (Article 34 of the Treaty on European Union).

an attempt to consult each other on vital international policy problems, in accordance under second pillar of the Union. This started out on intergovernmental level, within the context of *European Political Cooperation (EPC)*.²⁰⁵ European Political Cooperation was introduced informally in and was formalised by the *Single European Act (SEA)* with effect from around 1986/87. The Member States of the Union are to have regard for the views of the European Parliament and thereby, wherever possible, take common positions in international organisations. EPC was outdated in 1993, due to political crises, such as the Gulf War, the civil war in former Yugoslavia, and the ending of the Soviet Union that made it very apparent that the foreign and security policy instrument was not sufficient to make possible for the EU to bring pressure on world issues. The change followed the signing in Maastricht 1993 where, for the first time, Member States incorporated the objective of a common foreign policy in the *Maastricht Treaty (EU Treaty)*. In the EU Treaty, the Heads of State or Government have agreed to develop a common foreign and security policy and since then, the European Union can make its voice heard on the international arena, express its position on armed conflicts, human rights and any other subject linked to the fundamental principles and common values which form the basis of the European Union and which it is committed to defend.²⁰⁶ After 1993 the European Union has taken a number of actions in the area of arms control, disarmament, non-proliferation and export control.

5.3.2 Article 11 and 17 of the EU Treaty

The provisions on the CFSP were revised by the Amsterdam Treaty, which first entered into force in 1999. Articles 11 to 28 of the Treaty on European Union are since then committed exclusively to the CFSP.²⁰⁷ The adoption of the Code of Conduct on Arms Transfer has led to a new phase in the EU development of a common approach to arms exports, in accordance with

²⁰⁵ European political cooperation (EPC) was introduced informally in 1970. It was formalised by the Single European Act with effect from 1987. Member States have regard for the views of the European Parliament and wherever possible take common positions in international organisations, such as the UN. EPC was superseded by the common foreign and security policy in the EU Treaty.

²⁰⁶ Article 2 of the common provisions of the EU Treaty mentions one of the objectives of the CFSP. The article stipulates that one of the Union's objectives is “/...to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive *framing of a common defence policy* [own emphasis added].../” Read more on the evolution of a common foreign and security policy structure within the union, at http://europa.eu.int/eur-lex/en/about/abc/abc_12.html (last visited 2005-07-09).

²⁰⁷ Title V, Provisions on a Common Foreign and Security Policy, Article 11 states that: “The Union shall define and implement a common foreign and security policy... strengthen the security of the Union in all ways... develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”, which will lead to adopting common positions (article 12 and 15) and adopting joint actions (article 12 and 14).

Articles 11 and 17 of the Treaty of European Union - as a new component of the EU common foreign and security policy.

Article 11 of the Treaty of the European Union states that: “/...the Member States shall support the Union's external and security policy actively and unreservedly *in a spirit of loyalty and mutual solidarity* [own emphasis added].”²⁰⁸ Furthermore, shall Member States “/...refrain from *any action* which is contrary to the interests of the Union or *likely to impair its effectiveness as a cohesive force in international relations* [Own emphasis added]”.²⁰⁹

Article 17 of the Treaty of European Union states that:

“The common foreign and security policy shall include all questions relating to the security of the Union, including the *progressive framing of a common defence policy* [own emphasis added], which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by *cooperation between them in the field of armaments* [own emphasis added]”.²¹⁰

Concerning the issue of arms embargoes, in the Treaty of Nice, which entered into force on 1 February 2003, contains new CFSP provisions. It especially increases the areas that fall under qualified majority voting and enhances the role of the *Political and Security Committee* (PSC) in crisis management operations. Through this it is obvious Member States shall refrain from action, which is contrary to the interest of the Union or likely impair its effectiveness, which a transfer of arms could amount to.

²⁰⁸ Treaty of European Union, Title V, *Provisions on a common foreign and security policy*, Article 11.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*, Article 17

5.4 Licence to Export Arms

Most Member States try to regulate their import and export of SALW by passing laws in the field of domestic arms control.²¹¹ The actual granting of a licence of export is determined by two elements: i) the nature of the recipient and ii) the level of sensitivity of the goods or military technologies to be exported.²¹² The regulations concerning granting a licence of export needs to be efficient in order to minimise the risk that the licence may be in the long run escalate a conflict in an export area. Decisions on granting an export licence are usually made by a certain licensing authority, often in consultation with different government departments, such as Ministries of Trade, Development, Foreign Affairs and others alike. Some countries have institutionalised these processes, such as Belgium.²¹³

5.4.1 Operative Provisions (OP) of the Code

In accordance with Operative Provision 5 of the Code, on 13 June 2000 the Council adopted the Common list of Equipment covered by the EU Code of Conduct, together with Declaration 2000/C/191/01. On 17 November 2003 the Council adopted a revised version of the Common list, entitled *Common Military List of the European Union*.

In the operative provision of the Code, especially OP 3, states that the decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State. Member States are to circulate, through diplomatic channels, details of licences refused together with an explanation of why the licence has been refused. Denial notifications are confidential. A serial number indicating the country of origin and the number of the denial will be introduced for denial notifications.²¹⁴ Denials still subject to appeal under national procedures will be notified under the Code with an indication to that effect. Denial notifications that have been circulated in the international export regimes will also be circulated as Code of Conduct denial notifications if relevant to

²¹¹ Sweden has for example passed *The Military Equipment Act* (1992:1300), with amendments up to and including SFS 2000:1248 (*Swedish Code of Statutes*), which regulates activities requiring a licence which incorporate production, provision, export, agreements regarding production rights, co-operation agreements and military training. Permits under this Act can only be granted for security policy and defence policy reasons and provided they do not conflict with Sweden's foreign policy.

²¹² Benson, Williams *Light Weapons controls and Security Assistance: a review of current practice*, 2000, International Alert, p.4.

²¹³ In March 1997, EU Member State Belgium established an Interministerial Co-ordination Committee for Combating Illicit Weapons transfer (ICIW).

²¹⁴ Practices established and agreed amongst EU Member States, see the Fifth Annual Review of the Code of Conduct (20003/C 320/01) published in Official Journal of the European Union, OJ C 320, 31.12.2003, p. 4

the scope of the Code. When arms embargo²¹⁵ is lifted, denials solely based on the embargo will expire.²¹⁶

Furthermore, the provision states a denial of a licence is understood to take place “/...When the Member State has refused to authorize the actual sale or physical export of the item of military equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order”.

5.5 Control on Licenced Production

One important aspect on the controlling the transfer of arms, is the manufacturing of licenses. This is an alternative way of licensing the export of small arms by governments granting manufactures to sell technology and the means for the production of light weapons to foreign companies and/or governments. If a company, from the exporting state, takes part in the manufacturing process, the term *joint production* is used. When the entire manufacturing process is exported to another it is called *licensed production*.

Licensing production overseas (LPO), or strictly *Licensing production (LP)* is not only an agreement used for military purposes, but is also common in other areas of export, such as the music industry or sports equipment industry.²¹⁷ Licensing production agreements are also known as *licensed manufacturing agreements, co-production agreements, and technology-transfer agreements*, sometimes referred to as ‘*offsets*’.²¹⁸ Licensing of weapons production, such as SALW production, is the practice by which one company allows and enables a second company in another country to

²¹⁵ Within the European Union arms embargoes are in force against the following countries: Afghanistan, Bosnia-Herzegovina, Democratic Republic of Congo, Iraq, China, Liberia, Libya, Myanmar (Burma), Sierra Leone, Sudan and Zimbabwe.

²¹⁶ Denial notifications includes country of destination, full description of the goods concerned, buyer (private natural or legal person) and if denial is based on criterion 7 of the Code - the name of the natural or legal person, description of the end-use, reasons for denial and date for denial.

²¹⁷ The scope of the licence must be defined in the agreement, in need for granting such a licence. The licensee pays royalties to the licensor, either as a section sum payment, annual fixed sum payments, fixed sum per unit produced, a percentage of the selling price of the product, or through any combination of these methods. See Ian Davis, *EU and US Cooperation on arms export controls in a post 9/11 world: A roundtable discussion* organised by the British American Security Information Council (BASIC), p.2.

²¹⁸ In Ian Davis, *EU and US Cooperation on arms export controls in a post 9/11 world: A roundtable discussion* organised by the British American Security Information Council (BASIC) and Saferworld 23 January 2003 Session 2 Discussion Paper: *Licensed Production Overseas: Time for a New Control Initiative?* p.4.

manufacture its products under license. This includes any ‘technical assistance’.²¹⁹

*The Wassenaar Best Practices Guidelines*²²⁰ outlines that States “/...affirm that they apply strict national controls on the export of SALW, as well as on transfer of technology related to their design, production, testing and upgrading.”²²¹ Similar within the EU, COARM has agreed that when States are reviewing an application for production technologies and military equipment “/...account will be taken of the potential use of the finished product in the country of production and the risk that the finished product might be diverted or exported to an undesirable end user.”²²² Within the EU, the Common Joint Action has developed guidelines on technical assistance. The sale of military-style small arms to sub-state or non-state groups is not permitted and the EU Member States have renounced this form of military assistance as an instrument in their foreign and security policy. The Joint Action therefore permits the EU to provide financial and technical assistance to solve problems caused by existing accumulations of small arms and light weapons.

As a background note, on the 20th of June 2000 the EU Council adopted a *Joint Action Concerning the Control of Technical Assistance Related to Certain Military End-uses*.²²³ Article 3 of the Joint Action provides for a second step by foreseeing the possibility of controlling technical assistance related to conventional military end-uses provided in countries subject to European Union, OSCE or United Nations Security Council arms embargoes.²²⁴ Though embargoes could be effective embargoed States may already have the know-how and technology to have their own small arms production. The blueprints of the manufacturing process may not be included in the licensed production agreement, but the experience in licensing production could provide a basis for starting more ambiguous projects. It is clear that the spread of licensed production has to be seen as part of the general spread of arms production capabilities.²²⁵

²¹⁹ In arms context the term ‘technical assistance’ means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, training, transmission of control of exports of dual-use items and technology, working knowledge or skills or consulting services.

²²⁰ See *supra*, section 2.3.1.

²²¹ *Best Practice Guidelines for Export of Small Arms and Light Weapons (SALW)*, Section I, *in fine*.

²²² *Fourth Annual Report According to Operative Provision 8 of the European Union Conduct of Conduct of Arms Export (13779/02)*.

²²³ EU Council Joint Action of 22 June 2000 Concerning the Control of Technical Assistance Related to Certain Military End-uses (2000/401/CFSP).

²²⁴ For a complete list of negative measures applied by the European Union to third countries, visit the website:

http://ue.eu.int/cms3_fo/showPage.asp?id=407&lang=en&mode=g (last visited 2005-07-09).

²²⁵ Catrina, Christian of United Nations Institute for Disarmament Research, *Arms Transfer and Dependence*, Taylor & Francis Ltd, New York 1988, p.270.

Agreements like these often are of confidentially character, given that they are in the sphere of commercial confidentiality. Governments often prefer licensed small arms production over straight arms transfer due to their expectation that licensed arms production enhances national security by increasing self-sufficiency. The perception of a threat, together with an insecure arms supply, or experience with an embargo, adds emphasis to this purpose. The capability to produce own arms together with enhanced status, as less vulnerable to arms embargoes, can be perceived as supporting national security.²²⁶ This is the case when States who violate international standards and are less vulnerable to embargoes. A term used in this process is *undercutting* - the process whereby one state grants a licence despite another EU member refusing a licence for the same or similar transaction. Operative provision 3 of the EU Code is intended to limit undercutting, stipulating that EU members will circulate through diplomatic channels details of arms export licences refused in accordance with any of the Code criteria, and that before any member state grants a licence which has been denied by another member state for an in essence identical transaction within the last three years, that State should first consult the member state or states which issued the denial/s.

5.5.1 Restrictions on Export Licences

According *Criterion Seven* of the EU Code the existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions, the exporting state needs to consider and assess the possible impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user.

The loss of control over licence agreements and the possible space in state regulation, regarding arms control, will contribute to the spread of SALW in areas where there is poor human rights records. Such States would probably have never been granted licences to produce small arms in the first place. Restrictions could be laid on the actual granting or refusal on export licenses.

Restrictions can be placed by the 'licensor' on the export manufacturing licence in three main areas: *subject matter, territory and improvements*. It is through restrictions the licensee can regulate and control the licence production, but more than often fails in this respect due to the lack of control where the licensees can export weapons produced under licence to third countries in violation of the original licence agreement.²²⁷ It is in these third

²²⁶ Catrina (1988), pp.273.

²²⁷ *Ibid.* According to the Swedish National Inspectorate of Strategic Products (ISP) a production licence "...should be granted for the export of equipment classified as other military equipment on condition that the recipient state is not engaged in armed conflict with any other state nor has internal armed disturbances, nor are there extensive and serious infringements of human rights and provided that no unconditional obstacles are encountered." See the Guidelines for strategic export products on ISP website

countries where there is a risk that the weapons can be used in conflicts or redistributed to other areas of conflict, either through governmental agents or through the help of arm brokers in both the illicit black and grey small arms market. If there is a clear and imminent risk that export of small arms could aggravate a State internal disturbances or regional aggressions, or those arms could be used to in external or internal aggression, or used to abuse human rights,²²⁸ or divert in any way from the stated end-user, these licences should not be given.

This is also the case when restrictions are laid on an export licence if the licensor is not complying with certain export criteria's made up, such as those laid down in code of conducts. Restrictions are also laid on different type of weapons. Due to industrial confidentiality and other security measures countries use different categorisation for different weapons, depending on their type and size. In accordance with Operative Provision 5 of the Code of Conduct, the European Council decided on the 17th of November 2003 to adopt a *Common Military List of The European Union* (equipment covered by the European Union Code of Conduct on Arms Exports) which updated and replaced the Common List of military equipment covered by the European Union Code of Conduct on arms exports adopted by the Council on 13 June 2000.²²⁹ Furthermore, embargoes are implemented on those countries that violate these export guidelines or misuse their imported arms.²³⁰

5.5.2 End-User Certificates – Control Beyond the Date of Delivery

If conducting a legal small arms export from one state to another there will be an end-user certificate involved. Through the end-user certificate agreement the supplier tries to control the transfer, often beyond the date of delivery by putting restrictions on the use of arms to purpose they consider legitimate and thereby stipulating conditions for retransfer in order to: “/...prevent the exported systems from ending up in hostile third countries and enhancing their military power.”²³¹ EU Member States are more or less obliged to take into account when transferring small arms the recipient country's previous human right records and that particular States potential

<http://www.isp.se> (last visited 2005-07-09). Swedish Guidelines covering the export of military equipment and other overseas co-operation are laid down in the Government Bill 1991/92:174 *the Military Equipment Act*, the *Committee Report of the Standing Committee on Foreign Policy* 1992/93:UU1, and the *Parliamentary Communication* 1992/93:61.

²²⁸ See for example Criteria's 2 and 3 of the EU Code of Conduct.

²²⁹ See EU Council Declaration 2003/C 314/01 and Council Declaration of 13 June 2000, which was issued on the occasion of the adoption of the common list of military equipment covered by the European Union code of conduct on arms export (2000/C 191/01).

²³⁰ Security Council Resolution of 31 October 2002 (S/PRST/2002/30), Section 13: “Arms embargoes help to reduce arms flows to the targeted regions and groups, but do not address weapons already existing in conflict areas.”

²³¹ *Ibid*, pp.115.

for retransfer those arms, hence contributing to insecurity or instability in certain regions, as the new Europe.²³²

The *EU Joint Action* in its Article 3 defines that states are the only legitimate end-users by including a commitment by exporting countries to supply small arms only to governments.²³³ At the international level has the UN Security Council urged its Member States to consistently and responsibly use end-user certificates in their transfers of small arms and light weapons and called upon States in several resolutions to establish an effective national end-user certificate system and to study the feasibility as appropriate of developing an end-user certificate system at the regional and global.²³⁴

The usual end-user certificate is an assurance from the recipient States' government to the licensing giving State that the acquired small arms will not be sold exclusive of the permission from the first country. International legal modus operandi concerning the shipment of those arms requires that the licensor have a certificate of end use in which the buyer declares that the weapons are for its use only, and will not be retransferred in any way.²³⁵

In violation of this assurance the classic re-export is when those small arms imported from a producers country, used by the first recipients armed forces and later retransferred to a second recipient.²³⁶ It is often within this context of small arms trafficking an arms broker is involved.²³⁷ This trade could go from being first a legal transfer to become an illicit grey market transfer and finally become an illegal black market transfer. It is within these stages of

²³² Criteria 2 and 6 of the EU Code of Conduct. See *infra* section X. See also the Stability Pact for South Eastern Europe's *Joint Declaration on Responsible Small Arms Transfers* and *Statement on Harmonization of End-Use/End-User Certificates* (Sofia, Bulgaria, 15 December 1999). On 10 June 1999, at the EU's initiative, the Stability Pact for South Eastern Europe was adopted in Cologne. More than 40 partner countries and organisations have undertaken to strengthen the countries of South Eastern Europe in their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region. They have declared that they share the understanding that end-use/end-user certificates issued on the basis of best existing provisions and practices would further reduce the danger of illegal transfers. EU is one member of the Pact. Visit their website: www.stabilitypact.org (last visited 2005-07-09).

²³³ Article 3 of the Joint Action states that there exists "...a commitment by exporting countries to supply small arms only to governments (either directly or through duly licensed entities authorised to procure weapons on their behalf) in accordance with appropriate international and regional restrictive arms export criteria, as provided in particular in the EU code of conduct, including officially authorised end-use certificates or, when appropriate, other relevant information on end-use."

²³⁴ Security Council Resolution of 31 October 2002 (S/PRST/2002/30), Section 4.

²³⁵ For an example of how an end-user certificate can look like please visit the Frontline World website: <http://www.pbs.org/frontlineworld/stories/sierraleone/enduser.html> (last visited 2005-07-09).

²³⁶ Catrina (1988), p.115.

²³⁷ In its efforts to curb the illicit transfer of small arms and light weapons the Council adopted on 23 June a Common Position (*Council Common Position 2003/468/CFSP*) aimed at regulating arms brokering in order to avoid the circumvention of United Nations, EU or OSCE embargoes on arms exports. This will be dealt further *infra*, in section 6.3.1.

transfer the arms broker is acting as an agent, in putting a deal together between supplier and customer, or making the practical arrangements for the supply of the goods.²³⁸ Small arms have a longer service life (imported spare parts are also considered retransfer), easy to use and conceal when shipping - therefore it is the object of more frequent retransfer and they do not cause so much publicity, as when transferring a military aircraft or a major weapons system.²³⁹

5.5.3 End-Use Certificates – ‘End of the Road’ Certificates

End-Use Certificates addresses weapons destined for final destination. The end-user certificate (not be confused with the *end-use certificate*) is a statement from the importing company giving the final destination for the goods and the use to which they will be put. The minimum information required in all end-use/end-user certificates is: name and address of foreign end-user; end-use, as applicable; country of ultimate destination; commodity and its description; quantity; intermediate consignees and purchasers, and review or certification by the respective government institution.²⁴⁰ When the goods of transfer, i.e. SALW and its components, have reached its final destination the arms should remain there if there is nothing else stipulated in the end-user agreement. If a written assurance from the import company is needed, to confirm that the arms will not be retransferred or sold for export, an *International Import Certificate (IIL)* is usually demanded. A *Delivery Guarantee Certificate (DGC)* / *Delivery Verification Certificate (DVC)* is issued to confirm that the arms have arrived in the recipient country. The system is used by certain EU Member State although it was first put into system with the purpose that goods would not be retransferred to the Soviet Union and its allies.²⁴¹ This is a certificate that needs to be used in order to avoid that the small arms will be re-distributed to other destinations than the final destination given in the contract. Countries governments and arm brokers will issue false documents in a way to try to circumvent these rules of conducts.

²³⁸ The issue of arms brokering will be dealt with in chapter six, *infra*.

²³⁹ Catrina (1988), p.115.

²⁴⁰ See OP 5 of the Code.

²⁴¹ William Benson, *Light Weapons controls and Security Assistance: a review of current practice*, 2000, International Alert, p.7. Countries like Italy, Germany and the Netherlands require such a certificate.

5.6 OSCE Document on Small Arms and Light Weapons

Another forum of security in the European region is the *Forum for Security Co-operation*, within the Organization for Security and Co-operation in Europe (OSCE).²⁴² OSCE is the largest regional security organization in the world today and their document on small arms, the *OSCE Document on Small Arms and Light Weapons*, adopted in November 2000,²⁴³ includes recommendations on steps that States should take to make common import, export and transit procedures and documentation. These recommendations have evolved into a best practise handbook, *The Handbook of Best Practices on Small Arms and Light Weapons*,²⁴⁴ which is set of guidelines in order to help reduce the amount of illegally held arms in circulation. Although its width in the subject area the OSCE Document is by word only politically binding. This comes especially apparent considering the establishment of SALW-transfer-controls in certain transit States. According to the OSCE Document such control is voluntary with the transit State only having to indicate whether or not it requires measures in place to effect control over the arms while they are on its territory.²⁴⁵

5.6.1 Concluding Remarks

The European Union has taken several steps towards a more coherent approach towards the export and licensing of arms. Since the cooperation between EU member's states to prevent unwanted effects of small arms export is a relatively recent behaviour. Most of the European Member States have regulation regarding their import and export of SALW, but there is a difference in attitude and approaches regarding regulation on arms trade and principles of conduct on arms. EU has been unfortunately less effective in the harmonisation of trade policies in the area of production and procurement of arms. According to Article 296 (ex article 223) Member States own their national security and competence, which has made it difficult to coordinate trade policies in the area of weapons export. The EU

²⁴² The Forum was established by Chapter V of the Helsinki Document 1992 (special reference is made to the Helsinki act in article 11 of the Treaty of the European Union). The participating States agreed to start new negotiations on arms control, disarmament and confidence- and security-building measures. They also agreed to enhance regular consultation and to intensify co-operation on security issues, and to work to reduce the risks of conflict.

²⁴³ This document was adopted at the 308th Plenary Meeting of the OSCE Forum for Security Co-operation on 24 November 2000 (see FSC.JOUR/314). Available at: <http://www.osce.org> (last visited 2005-07-09).

²⁴⁴ *The Handbook of Best Practices on Small Arms and Light Weapons (SALW)*, FSC. GAL/43/03/Rev. 3, 19 September 2003.

²⁴⁵ Michael Crowley, Roy Isbister and Sarah Meek, *Building Comprehensive Controls on Small Arms Manufacturing, Transfer and End-Use* (Briefing 13), Basic – International Alert – Saferworld, 2001, p.17.

Code of Conduct is a positive way forward, a first step towards a more coherent regulation in this field of joint commerce. Through the CFSP progress have been made to develop and position EU in this field. More progress than several other regional organisations. The need for a harmonisation of European arms has led to new phase in the EU development of a common approach to arms exports. A phase resting on the backbones of Articles 11 and 17 of the Treaty of European Union, which aims to “/...in a spirit of loyalty and mutual solidarity...as a cohesive force in international relations.../” and “/...by cooperation between them in the field of armaments.”.²⁴⁶ This is much needed, due to loss of control over arms licence agreements and the potential gap in receiving state regulation over the issue of arms control, will most likely contribute to the spread of SALW into unwanted areas. Restrictions on licensing is a tool to regulate and control the licence production, but more than often fails in this respect due to the lack of control where the licensees can export weapons produced under licence to third countries and undesirable end-user in violation of the original licence agreement. Equipment that may be diverted within the buyer country or re-exported under undesirable conditions needs to be considered and assessed more thoroughly by the exporting country. Also the lack of reporting and regulation on military, security and policing training provided by various military and security companies and lack of monitoring of end-use certificates is to be seen as making the Code weak.

²⁴⁶ Article 11 and 17 of the European Treaty.

6 The Issue of Arms Brokering

6.1 Introductory Remarks

Illegal arms brokering has been a thorn in the legal arms export side for a long period of time.²⁴⁷ The United Nations has defined illicit arms trafficking as “...that international trade in conventional arms, which is contrary to the laws of states and/or international law.”²⁴⁸ In a post-war/conflict situation it is often extremely difficult for the legitimate state authorities to regain control of the arms that have circulated within its national territory or across borders its borders. When the conflict or war is over, ex-combatants keep their weapons for use or trade in their weapons on the civilian market for other goods of trade. More than often these arms are used in other ways of survival, such as hostilities or in the field of mercenary.²⁴⁹ These arms become a form of hard currency and it's in these situations arm brokers grow strong and make the peace-struggling situation most difficult.

²⁴⁷ See the efforts made in this area especially in the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related Materials, Organisation of American States (OAS), General Assembly Resolution AG/RES.1 (XXIV-E/p7), 24th Special Session, 13 November 1997 and the OECD Convention on Combating Bribery of Officials in International Business Transactions, DAF/IME/BR (97) 20, signed in Paris on 17 December 1997. For an example of a model convention on registration on arms brokers, see the Fund for Peace Model Convention on the Registration of Arms Brokers and the Suppression of Unlicensed Arms Brokering, Prepared for the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspect, New York, July 9-20, 2001. The Model draws upon a number of sources, most particular existing national and international laws regulating a variety of areas, including arms brokering. Full text of the model convention could be found on the Fund for Peace Website: www.fundforpeace.org (last visited 2005-07-09).

²⁴⁸ See *Guidelines for International Arms Transfer in the Context of General Assembly Resolution 46/36H of 6 December 1991*. The Guidelines has been reprinted in *Review of the Implementation of the Recommendations and Decisions Adopted by the General Assembly at its Tenth Special Session: Report of the Disarmament Commission, A/51/182*, United Nations, 1 July 1996, pp. 64-69.

²⁴⁹ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, General Assembly Resolution A/RES/44/34, from 4 December 1989, Annex I, Article 1(1) states that: “A mercenary is any person who is specially recruited locally or abroad in order to fight in an armed conflict.” See also Protocol Additional to the Geneva Conventions (GC) of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art 47. Mercenaries.

6.2 Arms Transfer and Legaslative Loopholes

Arm brokers have worked effectively within the ‘grey’ or ‘black’ of the small arms transfer market and the international concern over the illicit trade has raised voices over several countries lack of, or loopholes, in domestic legislation over tackling the small arms trade. As a consequence of these legislative loopholes arms-exporting countries have been encouraged to exercise the highest degree of responsibility in small arms and light weapons transactions, since it’s upon all States and within their responsibility to prevent the illegal diversion and re-export of small arms and light weapons.²⁵⁰ The interchange of commodities, usually illegal, such as ‘conflict diamonds’,²⁵¹ small arms, and drugs or even human beings have turned into a global black market and is in need to be regulated and confronted in all dimensions, i.e. in national, regional and international co-operation and legislation. This thesis aims specifically at the small arms export control efforts and State responsibility, but all above mentioned commodities are linked together, since they feed of each other in a sense and affect human beings and security in regions.

Small arms may be sidetracked from different legal channels, stolen from weapons storage facilities, or smuggled across borders. Such arms, could for example, be transfer from one state in order to arm militant groups in another state or being supplied to warring parties of a conflict, and thereby circumventing arms embargoes placed upon those parties, as a result of their conduct been decided being not in conformity under international law. Various methods are used in transferring weapons, through transport carrier, human beings, and car transport or even through ships, sailing under false registration or flags of convenience.²⁵² Professional arm brokers are experts at using “covert” companies, shipping agents and other distributors to set up sales of small arms and weapons headed for lucrative human rights crisis and conflict areas.

²⁵⁰ See for example Security Council Resolutions S/PRST/2004/1 of 19 January 2004, S/PRST/2002/30 of 31 October 2002 and S/PRST/2001/21 of 31 August 2001.

²⁵¹ Conflict diamonds, also known as ‘*blood diamonds*’, are rough diamonds used by rebel movements or their collaborators to finance armed conflict aimed at undermining legitimate state governments. *The Kimberley Process* is an international certification scheme that regulates the trade in rough diamonds. More information can be found on the website <http://www.kimberleyprocess.com> (last visited 2005-07-09). EU has addressed this issue and ratified a *Community Certification Scheme, CSS* (see Council Regulation (EC) No 2368/2002), amended by Council Regulation (EC) No 254/2003, Commission Regulation (EC) No 762/2003, Commission Regulation (EC) No 1214/2003, Commission Regulation (EC) No 1459/2004 and Commission Regulation (EC) No 1474/2004 for the international trade in rough diamonds. The purpose of the scheme is to stop conflict diamonds from fuelling armed conflicts, as those in Sierra Leone and the Democratic Republic of the Congo (DRC).

²⁵² *Report of the Panel of Governmental Experts on Small Arms, A/52/298*, United Nations, 27 August 1997, p.17. Read also overview of the illicit trafficking in the report from Susan Dyer and Geraldine O’Callaghan, *Combating Illicit Light Weapons Trafficking: Developments and Opportunities*, British American Security Information Council (BASIC), 1998, p.6.

Furthermore, the techniques used in smuggling weapons involves concealment, mislabelling and false documentation, for example false end-user certificates, and through legal diplomatic channels. Within the context of regional cooperation the governments were first unwilling to tackle the issue of brokering because of the extra-territorial implications concerned. Now, States are more or less convinced that export controls are most effectively when applied consistently and on a multilateral basis.²⁵³ With that attitude towards tackling the illicit trade of small arms and light weapons EU is not the only regional organisation to address this issue.²⁵⁴ On The issue of concern over the growing illicit trade in SALW has been raised high on the international agenda.²⁵⁵

6.3 Programmes to Combat the Illicit Trade

In the sphere of arms brokering a lot of work has been done to reduce the weapons in conflict areas through collecting small arms and light weapons through various disarmament,²⁵⁶ demobilization²⁵⁷ and re-integration programmes²⁵⁸ (DD&R-processes) in post-conflict societies. In order to

²⁵³ Benson (2000), p.vii.

²⁵⁴ The Organisations for American States (OAS) agreed in 1997 to adopt an *Inter-American Convention against the Illicit Manufacturing of Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, A/53/78. The Convention entered into force on the on 1 July 1998. The issue of illicit trade is especially great on the Continent of Africa. In Nairobi, on the 21 April several African States addressed this issue and agreed to adopt the *Nairobi protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes Region and the Horn of Africa*.

²⁵⁵ Both in reports from the SRSG and in GA resolutions focus has been on the illicit trade of SALW. In 1995 the UN established a *Panel of Governmental Experts on Small Arms* and a follow group in 1998 to implement the recommendations from the original panel, one reporting in 1997 (A/52/298), and the second in 1999 (A/54/258).

The UN's Economic and Social Council's *Commission on Crime Prevention and Criminal Justice* passed a resolution, in April 1998, calling for a legally binding convention to combat firearms trafficking.

²⁵⁶ Disarmament is the collection, control and disposal of small arms, ammunition, explosives, light and heavy weapons of combatants and often also from the civilian population. Read more in UN Department for Disarmament Affairs, *A Destruction Handbook*, United Nations, July 2001.

²⁵⁷ Demobilisation the process by which armed forces (government and/or opposition or factional forces) either downsize or completely disband, as part of a broader transformation from war to peace. Furthermore, demobilization involves the assembly, quartering, disarmament, administration and discharge of former combatants, who may receive some form of compensation to encourage their transition to civilian life. Read more in the *A Destruction Handbook*, United Nations, July 2001.

²⁵⁸ Reintegration assistance measures are provided to former combatants that would increase the potential for their and their families' economic and social reintegration into civil society. Reintegration programmes could include money assistance or compensation in some kind, as well as employment training, income activities and participation in sustainable development programmes. Read more in the *A Destruction Handbook*, United Nations, July 2001.

achieve peace in the area the process of getting rid of weapons in the area is done through demilitarisation. Demilitarisation is the complete range of processes of small arms and ammunition unfit for their originally intended purpose. These arms could be arms sold to governments, but then re-transferred to armed militia in other regions - a transfer that was not intended in the first place. Demilitarization is therefore a process that not only involves the final destruction process of arms,²⁵⁹ but also includes all of the other transport, storage, accounting and pre-processing operations that are equally as critical to achieving the final result of peace in one area. These programmes, which also include 'buy-back-guns' programmes,²⁶⁰ is directed to all whom have been in line with the work of combat the illicit trade. In these work former combatants play a critical role in the transitions from war to peace. Small arms could be returned through programs of voluntary surrender, i.e. the physical return by an individual or by community of small arms and light weapons to the legal government or an international organization with no further penalty or repression. All the work done concerning this transition of illicit arms are often carried out by and under the supervision of international organisations, such as the World Bank (WB)²⁶¹ or the United Nations Development Program (UNDP),²⁶² but also under EU support.

6.3.1 EU Programme to Combat Illicit Trafficking in Conventional Arms

One of the programmes to curb the illicit trade was agreed by the EU, in June 1997. EU agreed to work towards assisting other countries in their efforts of combat the illicit trafficking in conventional arms and the EU Council of Ministers working group, COARM, adopted a programme called *EU Programme for Preventing and Combat Illicit Trafficking in Conventional Arms*.²⁶³ This programme has called upon EU Member States to strengthen their efforts against the illicit trafficking of arms on and through their territories. The programme calls for special attention to

²⁵⁹ Destruction is the process of final conversion of weapons, ammunition and explosives into an inert state that can no longer function as designed.

²⁶⁰ Buy-back schemes have been practised in the past, but the concept has often proven undesirable by international donors. There is a perception that such programs reward irresponsible armed personnel who may have already harmed society and the innocent civilian population. They also provide the opportunity for an individual to conduct low level of trading in SALW. Read more in the *A Destruction Handbook*, United Nations, July 2001.

²⁶¹ For more information on the World Banks' work on Conflict Prevention and Reconstruction, visit their website on these issues:

<http://lnweb18.worldbank.org/ESSD/sdvext.nsf/67ByDocName/ConflictPreventionandReconstruction> (last visited 2005-07-09).

²⁶² To read more about the work on small arms and demobilization of the UNDP, visit their website: <http://www.undp.org/bcpr/smallarms/index.htm> (last visited 2005-07-09).

²⁶³ *The Programme for Preventing and Combating Illicit Trafficking in Conventional Arms*, A Council Declaration, 9057/97 DG E - CFSP IV, 26 June 1997.

countries in post-conflict situations and in regions of low security and instability and to develop appropriate measures to collect weapons and setting up reintegration programmes for those needed.²⁶⁴ This programme aims at the EU Member States will:

1. Strengthen their collective efforts to prevent and combat illicit trafficking of arms particularly of small arms, on and through their territories, through co-ordination and co-operation among intelligence, custom, and law enforcement agencies, and through the improving on the exchange of information and data on illicit trafficking of arms;²⁶⁵
2. Take concerted action to assist other countries in preventing and combating illicit trafficking of arms, particularly of small arms, through providing capacity building measures to other countries. This means by setting up or strengthen adequate bodies of laws and administrative measures for regulating and monitoring effectively transfers of arms and adopting strict measures, and provide an adequate number of appropriately trained police and customs officials, for the enforcement of national arms export control legislation;
3. Developing measures to reduce the number of weapons in circulations, by assisting affected countries, especially in post-conflict situations and in situations where a minimal degree of security and stability exists. Specifically, they could aim to ensure the incorporation of appropriate measures for suppressing the illicit circulation and trafficking of arms in peace keeping operations and cease-fire or peace agreements preceding such operations, setting up weapons collection, buy back and destruction programmes and promote the integration of former combatants in civilian life.

Important to notice is that the program is only a *Statement of Intent (Sol)* by EU Member States, a political declaration rather than a legally binding document. Up to date, concerning the programme, the most significant effort made within this model of the programme has been the development of a small arms programme for Southern Africa, in cooperation with Southern African Development Community (SADC), which has led to the adoption of the *Southern Africa Regional Action Programme on Light Arms and Illicit Arms Trafficking* in 1998.²⁶⁸ A first annual report of the EU programme was published on 9 July 1998, and a second on the 19 January

²⁶⁴ The programmes 5th preambular paragraph gives support for Member States desire to “/...take concrete measures to curb the illicit traffic and use of conventional arms.../”.

²⁶⁵ Ibid, para.1.

²⁶⁶ Ibid, para.2.

²⁶⁷ Ibid, para.3.

²⁶⁸ Members of SADC includes: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

2000.²⁶⁹ The programmes reporting procedure is closely linked with the *EU Joint Action on Small Arms and Light Weapons*.

6.3.1.1 EU Joint Action on SALW

Within the sphere of small arms and legislation EU adopted on the 17 December of 1999 an *EU Joint Action on Small Arms and Light Weapons*,²⁷⁰ on the basis and reflection of Article 13 (Ex Article J.3) of the Treaty on European Union. This was EU's response to combat the destabilising accumulation and spread of small arms and light weapons. The Joint Action emphasizes the importance of strengthening national legislation in the field of small arms and especially in the field of arms brokering. Although the Joint Action is implemented through national laws and procedures, it is legally binding on the Member States.

6.4 Sanction as a Special Measures to Tackle the Illicit Trade

Another way to battle the arm brokering has been through sanctions. Often are the profits of illicit weapons transactions held secret in different bank institutions. These tactical manoeuvres by the brokers have caused problems to apprehend those involved in brokering activities. The problem has been highlighted through a long process of revitalising the sanction system, especially concerning UN sanctions that have not been effective enough. With the international focus on problems with implementing sanctions several measures has been taken, within then international community. Switzerland has, via the *Interlaken Process*, together with Germany in the *Bonn/Berlin Process*, focused on drawing up models for targeted financial sanctions, arms embargoes and travel and aviation related sanctions on those breaking international law. The final stage of the process has been done by the Sweden-based *Stockholm Process* - a process now called *The Special Program on the Implementation of Targeted Sanctions (SPITS)*.²⁷¹ The Stockholm Process has focused on how these targeted sanctions can be implemented and monitored. All these efforts are important to come to terms with the easiness getting around embargoes laid upon them, especially in cases of proliferation of small arms trade.

²⁶⁹ Second annual report, (2000/C 15/01), Official Journal of the European Communities, 19.1.2000.

²⁷⁰ EU Council Resolution 1999/34/CFSP, OJ L 9, 15.1 1999, p 1.

²⁷¹ Visit the website www.smartsanctions.se (last visited 2005-07-09) for more information on these special sanction regimes.

6.4.1 Within the legality spectrum of arms embargoes

EU Member States share a common view that mandatory arms embargoes, imposed by the United Nations, should be respected in line with the international commitment and responsibility.²⁷² If such sanctions are imposed they should be respected and consequently not violated by any Member State avoid that sanction by delivering small arms to such states or individuals. According to Article 296 of the Treaty Establishing the European Community does arms embargoes and restrictions fall exclusively under Member States jurisdiction. The means that EU formal institution lack power in this field,²⁷³ but with the context of the Treaty on European Union (TEU) and the introduction of the Common Foreign and Security Policy (CFSP), EU Member States now rely solely on Article 12²⁷⁴ and Article 15²⁷⁵ of the Treaty on the European Union to introduce such common actions. Now, arms embargoes are implemented by a Common Position, according to article 15 of the TEU, specifying the kind of material covered by the embargo and the conditions for its implementation.²⁷⁶ Smart sanctions, i.e. investment prohibition, freezing of assets, restrictions on persons' movements etc., have been adopted in certain cases (mostly over the last years). Such actions can cover prohibiting the export of equipment that might be used for internal oppression or terrorist acts. In many cases both a Common Position and an EC Regulation are needed. The Common Position cover article 12 or Article 15 as legal basis and the legal basis of the EC regulations has included Article 60 (TEC)²⁷⁷ relating to the movement of capital as well as Article 301.²⁷⁸

²⁷² Article 17 ECT: “/...to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter.../”. Between the years 1973 to 1992 EU Member States used the informal foreign policy coordination process, called the *European Political Cooperation*, to develop a common approach on the subject of embargoes, where Member States agreed that arms embargoes mandated by the United Nations should be fully respected. From time to time, Member States, under the umbrella of the Council of Ministers, issued joint declarations to impose embargoes (on the evolution on CFSP, see *supra*, section 4.3.). Read more about EC law on sanctions in Bohr, S., *Sanctions by the United Nations Security Council and the European Community*, *European Journal of International Law*, vol. 4, no. 2 (1993), 262–265.

²⁷³ Article 296 (ex 223) ECT. See section *supra*, section 4.2.

²⁷⁴ Article 12 (ex Article J.2) of the Treaty states that: “The Union shall pursue the objectives set out in Article 11 by: defining the principles of and general guidelines for the common foreign and security policy; deciding on common strategies; adopting joint actions; adopting common positions; strengthening systematic cooperation between Member States in the conduct of policy.”

²⁷⁵ Article 15 (ex Article J.5) states that: “The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.”

²⁷⁶ The Council periodically updates its *List of Negative Measures Applied by the Union to Third Countries*. For a full list of these measures visit the EU webpage: http://ue.eu.int/cms3_fo/showPage.asp?id=407&lang=en&mode=g (last visited 2005-07-09).

²⁷⁷ Article 60 (ex Article 73g) states that “If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the

Certain arms embargoes on particular countries are sometimes decided under the agenda of the EU Council of Ministers. These arms embargoes will be either 'full scope' embargo, or as a less than 'full scope'. If an agreement is that it is to be full scope, then the embargo is defined as being on 'arms, munitions *and* military equipment'. In such a case, it will apply to all the goods on the common embargo list, as previously mentioned above. In the case of an arms embargo less than full scope, it will be defined as 'an embargo on arms and munitions'. The Member States will then agree to specify the categories within the common list, which the embargo will cover.²⁷⁹

6.5 EU Common Position on Arms Brokering

In regard to Treaty of the European Union and in particular article 15 of the EU Treaty, EU shall adopt Common Positions, The EU Council adopted on 23 June 2003 a *Common Position on Brokering*,²⁸⁰ aimed at regulating arms brokering in order to avoid the circumvention of United Nations, EU or OSCE embargoes on arms exports. This Common Position establishes a set of provisions to be implemented through national legislation, requiring the Member States to take all the necessary measures to control brokering activities on their territory or carried out by brokers of their nationality. In particular, it requires the Member States to assess licence applications for specific brokering transactions against the provisions of the European Union code of conduct on arms exports, to establish a system for the exchange of information on brokering activities, and to establish adequate sanctions to ensure that controls are effectively enforced. This Common Position was a

movement of capital and on payments as regards the third countries concerned. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest. The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.”

²⁷⁸ Article 301 (ex Article 228a) defines that: “Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.”

²⁷⁹ Information is from the website: <http://www.eurunion.org/legislat/Sanctions.htm> (last visited 2005-07-09).

²⁸⁰ See *Council Common Position on the Control of Arms Brokering*, 2003/468/CFSP, OJ, 25.6.2003.

result of discussions on arms trafficking and brokering activities done by Member.²⁸¹

Furthermore, in the Wassenaar Arrangement Participating States agreed on a Statement of Understanding on Arms Brokerage, to consider the adoption of national measures regulating arms brokering activities.²⁸² The international initiated *United Nations Programme of Action on Small Arms and Light Weapons (SALW)*, also known as POA, commits States to develop adequate national legislation or administrative procedures to regulate small arms and light weapons brokering activities.²⁸³ The EU has been working towards meeting those commitments.

6.5.1 Concluding Remarks

Regions of conflict provide fruitful ground for illicit arms trafficking. Small Arms and Light Weapons kill hundreds of thousands of people every year as an effect of the illicit trade of arms. Several countries lack or give room for legislative loopholes, in domestic legislation over small arms trade. It is clear that a lot of difference illegal commodities such as have turned into a global black market. Small arms proliferation is therefore in need to be regulated and confronted in all dimensions and all aspects of national, regional and international co-operation and legislation. Professional arm brokers are experts at using “covert” companies, shipping agents and other distributors, using concealment, mislabelling and false documentation methods, to set up sales and distribution of small arms and light weapons

²⁸¹ See Fourth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (2002/C 319/01). The Council assesses implementation of the Code on an annual basis.

²⁸² See also Best Practice Guidelines for Exports of Small Arms and Light Weapons as adopted by the 2002 Wassenaar Plenary Meeting and the Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS) as adopted by the 2003 Wassenaar Plenary Meeting; Elements for Effective Legislation on Arms Brokering, which was agreed at the 2003 Plenary.

²⁸³ See the *UN Program of Action (PoA) to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Document A/CONF.192/15, 20 July 2001. The First Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (1st BMS) was held at the UN headquarters in New York, in July 2003. In accordance with the General Assembly resolution 59/86 entitled “The illicit trade in small arms and light weapons in all its aspects”, which was adopted on 3 December 2004, the United Nations Second Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2nd BMS) will take place in New York from 11 to 15 July 2005. The 2nd BMS is part of the follow-up process to the 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, which unanimously adopted the PoA. Collected documents relevant for this process visit <http://disarmament.un.org:8080/cab/images/bookletsalw2005.PDF> (last visited 2005-07-09) and program for the meeting at <http://www.un.org/events/smallarms2005/> (last visited 2005-07-09).

headed for crisis and conflict areas. The EU has through its legally binding EU Joint Action, implemented through national laws and procedures, focused on the importance of providing for strong national legislation in the field of small arms, especially in the field of arms brokering. The Joint Action contains in its structure both political and strategic guidelines for Member States arms exporting procedures, therefore an authoritative legal document for Member States to stand by. The Joint Action refers to the control and registration of exports, greater transparency within the Union and better evaluation of import candidates.

7 Concluding Analysis

7.1 Introductory Remarks

The aim of this thesis has been to deal with the issue of small arms and light weapons and to what extent relevant conventions and treaties, but also looking at neighbouring areas of international law, that could be used in this field to regulate state behaviour towards the conduct of export and licensing of such arms. Certain actions have been taken, both regional and international, but still export is the export of SALW contributing much for the rising violence in the world. There is no to-date existing global non-proliferation regime to limit the spread of small arms, only regional efforts made by different organisations. Transfer of arms is only legal if conducted in coherence with/and stipulated in international law. In time of peace and war, there are vital international legal principles defining how and when weapons can be engaged, thereby placing concrete boundaries on their use. The misuse of these principles has striking consequences in regions where there is a conflict.

SALW has become the obvious weapon of choice, especially in small intra-state conflicts, and plays a crucial role to the outbreak of armed conflict; hence adding to the intensification of violence in certain vulnerable areas of the world. The growing issue of the illicit spread has made it clear that a thorough regulation is needed in this area and the EU Code of Conduct has become, although regional aimed in Members, a step forward for at first, regional legislation, but also perhaps in a wider range.

7.2 Reasons for Controlling the Export

There are several reasons for controlling the export of small arms and light weapons. One is that there are over 600 million small arms and light weapons in flow worldwide. This large number of circulating weapons, particularly small arms, add to breaches of international human rights and humanitarian law, hampering sustainable development and destabilising regional peace and security in several regions of the world. With the four main objectives of arms control, i) reducing the likelihood of war; especially by trying to impose limits on the evolution and proliferation of weapons that may destabilize strategic relationships and thus create incentives for preventive attacks, ii) reducing suffering and damage in the event of war, iii) reducing the expenditure on armaments and saving resources, and iv) contributing to conflict management by providing a framework for

negotiation between opposing sides; by reducing suspicion and by generally contributing to an atmosphere conducive to relaxation of tensions.

The European Code of Conduct on the Export of Arms ought to be seen as an effort made to enforce limits on arms export targeted to political unwanted vulnerable regions. As a pre-emptive measure, but also aimed for strengthening vulnerable states' national security, development and political independence, and not to hinder post-conflict reconciliation and reconstruction. The Cod, within the context of IHL, is in line with the articles of the Geneva Conventions that have been previously mentioned in this thesis. Overall, the aim for reduction of tension between states or groups is within the spirit of wordings of the UN Charter, and has drawn in recent decade's international attention to the dangers of unregulated trade in conventional weapons, which could, according to many, in the long run threaten world peace.

7.3 The Code of Conduct on the Export of Arms

No doubt, Europe has a Code which is unique in the regional environment of arms export. There is no international agreed treaty of today on the export of small arms and light weapons; hence the Code of Conduct is thus a unique effort by a region consisting of large exporters of especially small arms. As previously mentioned in this thesis, EU Member States (the expansion of the Union to include new members will add more countries with noteworthy arms deals) has to consider the following criterions before conducting a transfer or issuing an export license:

- the country of final destinations respect for international human rights and humanitarian law;
- the situation of the country of final destination;
- the risk of fuelling internal or external armed conflict;
- the existence of tensions or an internal armed conflict in the country of final destination;
- the behaviour of the buyer country especially towards its attitude to terrorism, international commitments and respect for international law;
- the risk of diversion and re-export of the equipment under undesirable conditions within the buyer country.

The EU *Strategy for the Defence Industry* was the first step that was taken in the area of transferring military equipment within the EU together with

proper and more harmonised arms regulations on export control. When the European Union introduced the Code of Conduct on the Export of Arms in June 1998, it was established as an instrument to guide EU Member States for proper export of arms and issuing of licenses. The Code includes an innovate mechanisms for EU Member State for consultations and denial function for export licenses. The denial mechanism comes into effect when there is one Member State that refuses a license then will notify its partners of the Code its decision. Any State considering the same request is to consult with the State which denied the license before proceeding with the transaction. Important to acknowledge is that the consultation procedure is the first consultation mechanism ever applied to conventional arms exports. The implementation of such an instrument, although of more political will than of political regulation status, the Code of Conduct was introduced with an aim to curb the illicit trade in arms export identified as manufactured on European soil or through badly regulated licensing in other countries close by.

The Code of Conduct was firstly adopted as part of a legally binding “joint action” by member States in 1998, which included a commitment to provide practical assistance to developing countries in their efforts to stem the flow of arms across their borders and internally. Since the start, the Code has developed its mechanism of conduct, through annual reports, but nonetheless not to be seen as being a complete code, more as a Code that has rather has set the agenda for export of such material. The Criteria’s of the Code is therefore to reflect the objectives of international law concerning state relations and respect for humanitarian principles and human rights of countries; to prevent the export of such conventional weapons to destinations where they might lead to internal repression and external aggression contrary or as a breach to international law. For its enforcement actions and effective implementation the legal and political status of the Code is most important.

Through the effect and strength of international regulation on humanitarian principles EU Member States has recognised the special responsibility of arms exporting states. There has been much progress made in both transparency in arms exports and information sharing on denials of export licenses, due to the standards of the Code, but there is though still a need for EU Member States to strengthen the exchange of relevant information for licensing; for improvement in the system of annual reports, developing the denial and consultation mechanisms, as well as introduces effective measures to control arms brokering and end-use controls. Number of areas, such as the ‘regional unified legal control’ of international arms brokering, licensed production agreements, end-use certification and monitoring has not yet been addressed within the EU on a legislative level. It is clear that the EU export criteria may be challenged and interpreted in, unfortunately, several different ways makes the Code not providing the right level of parliamentary and transparency on exports which supporters had wished for, it is still to be considered as an important development in EU standards of arms export.

7.3.1 Article 296 (ex Article 223)

One obvious obstacle to achieve greater transparency within this regional environment is EU Treaty Article 296 (ex Article 223), that provides Member States full control over their own military strength. This article has made it difficult to coordinate trade policies in the area of weapons export. This difficulty of coherence of a clear trade policy and course of action has made it clear that national sovereignty over defence measures, clearly can serve as an obstacle for a more coherent regional regulation and control measures in this area of export. In the harmonisation of trade policies in many areas EU has been effective, but the organisation has been less effective in the area of production and acquiring of arms, owing to Member States own competence and national security.

EU Member States differ in the issuing export licenses, categorisation of arms products, export criteria's, parliamentary transparency, end-user certifications, and end-use verifications and on brokering. EU has no independent role in managing arms transfer in or out Member States territories and the Council of Ministers is the only EU body with power to make decisions concerning armament related issues. Due to Article 296 (ex article 223), it has become difficult to coordinate coherent approaches of trade policies in the area of weapons export. According to this common article arms production and trade are exempted from EU regulation. This has without a doubt affected the development of a regional legally binding convention on the transfer of small arms and light weapons. Such an important issue, coherent policies of trade and production of armaments, lies therefore at the crossroads of defence and industrial policies within the Union. The establishment of national and international norms for weapons transfers could, over some time, create broad political support to develop international, regional and national rules and regulation for arms exports. This could be a way, an approach, to have stronger future regulation on the availability and export of arms, due to the fact that restraints and cautions when issuing licenses or exporting SALW are meaningless in not accurate laws and regulations, both domestic and international, and only if these laws possess effective law enforcement mechanisms, properly back them up.

7.4 Coherence with International Law

As an important component in the development of a collective approach towards regulating and harmonising arms exports amongst EU Member States, the Code is still very much criticised of falling short in certain areas as previously mentioned. One criticism is that the Code is not establishing enough effective monitoring of sales and transfers by a Member State. Looking at the Code from an international law point-of-view, it is to be seen

as in line with laid down regulations of humanitarian principles, such as those clearly stated in the Geneva Conventions or International Human Rights Conventions. Noteworthy to mention, is that the European Union Code of Conduct mentions respect for international humanitarian law in the text. No other national export regulations refer to this body of law. International customary law is applicable when states transfer arms over state-borders. Although there is somewhat of a legislative void in international regulation regarding the special transfer of small arms and light weapons, answers to proper state behaviour concerning transfer of SALW, lies in other areas of international law.

7.4.1 International Humanitarian Law and Human Rights Law

The UN has in several resolutions concluded that transfer of arms into regions of conflicts is contrary to UN Charter, especially the prohibition on the use of force according to Article 2(4) and the prohibition on interference in the internal affairs of another state that has been declared in various conventions. It comes obvious looking at International Humanitarian Law and Human Rights Law that are restrictions on transfer of arms, including small arms and light weapons. Arms that are being exported to regimes that is in 'clear risk' of misusing such transferred arms, are not being able to monitor them properly on sovereign territory, or are running a risk of being misused – such a export are in clear danger of being in violation or breach of International Humanitarian Law or Human Rights Law. Looking at the IHL conventions and advisory opinions of the ICJ, it is obvious that parties to any conflict can not choose with total freedom their means and method of warfare. International Humanitarian Law applies to all parties to the conflict and seek to limit and prevent human suffering in times of armed conflict prohibit the use of weapons and tactics that are excessively injurious to combatants, which makes it a responsibility for states not to make such means available in those regions most likely to violate IHL.

The violation of IHL often comes from the misuse of these weapons by governments and irregular forces, contrary to their responsibility to "respect and ensure respect" for international humanitarian law. In Article 1 of all the four Geneva Conventions of 1949, it is stated that states have a responsibility 'to respect and ensure respect' for the rules of the IHL. If weapons are transferred or shipped to areas where it is likely they will be used to commit violations of IHL or other areas of international law would be clearly failing its obligation to ensure respect for IHL. The EU Code of Conduct tries to reflect this view on responsibility in its eight criteria's, such as prohibition on the interference in the internal affairs of another state, prohibition on the provision of assistance to terrorist, rules that are laid down in the IHL and HR conventions, and the responsibility of states and individuals of the prohibition of aiding or committing genocide. Transfer of arms could direct or indirect, when transferred across borders, be misused in

violation of such laid down rules. Aiding or assisting in international wrongful acts is a breach of international customary law.

7.4.2 Export to Vulnerable Areas

It is not until recent decades little attention has been given to the transfer of small arms and light weapons, which have inflicted most of the death and injury in recent conflicts. The arms that are used in one country could easily be transferred across borders, smuggled into other countries or re-distributed through governments with less control over its borders or defence industry through licensing. Regions that are overrun with SALW, then the export to such regions could have devastating effects on the peace-progress of that country, region or even the continent for that matter. The flow of such arms into conflict areas will destabilize peacekeeping operations and obstruct the process of development in some countries especially vulnerable for the continuing of internal conflict.

Looking at the Code and if there is fear that the equipment identified for export is of any risk of being misused, to might be used to commit human-rights violations, fuel internal or external armed conflict, undermine peace efforts, provoke or prolong armed conflicts, or add to poverty by undermining development, then such a licence for export should not be granted given that it is not in line with the criterions of the Code. Criteria four of the Code aims at limiting these factors, and states that export that might threaten regional peace, security and stability should not granted. EU Member States should not issue transfer licences of arms into areas where there is clear risk or if there is internal repression that these weapons will be used aggressively against another country. The use of the wording 'a clear risk' or 'internal repression' is somewhat diminish the operational force and denial mechanism of the criteria. From an evidence-point-of-view, 'a clear risk' could be subject of heavy interpretation. The lack of reference to international law provides Criteria Four open for interpretation. According to Article 16 of the ILC Draft, 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 that State does so with knowledge of the circumstances of the internationally wrongful act. Member States that rely on their own interpretation of the wordings of ILC Article 16, should be read together wit Creation Four, since its states that Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

Considerations, according to the criterions of the Code, that Member States should take into account inter alia, before issuing licenses, are good but could be interpreted in favour of the licensee or exporter. If the state has not proper information regarding country facts and evaluation, or if the information is classified by other Member States, or the second-hand

information received from other Member States could make the interpretation in favour of export or licensing. Nevertheless, according to both articles 16 and 17 of the ILC Draft, States could be held accountable to the extent that its own conduct, if that assisting State conduct has resulted in or that state in anyway have assisted to an international wrongful act. This has been acknowledge by the UN Security Council, referring to article 2 (5) of the UN Charter, that if a State send small arms and light weapons to another State with an intent to use these weapons in violation of international law, makes the transferring state conduct in clear violation of this article.

Therefore the preservation of regional peace, security and stability is much an issue of aiding or assisting other States of committing violations or breaches of international law. Sending arms, or issuing licences of export of arms, could amount to the use of force in some cases, and violate *jus cogens*, stipulated in Article 2 (4) of the UN Charter. Without the authorisation of the recipient state, an EU Member State that transfer arms across that particular state borders, consequently without fulfilling national rules for import of arms, the total amount of arms could constitute an illegal action - under that state's national legislation and subject for unlawful interference in the recipients internal affairs.

7.5 Final Remarks

Overall, the EU Code has to be seen as an imperative accomplishment within this area of concern and should therefore be seen as at step forward in the long progress towards the development of common EU controls over the arms trade. The political and legal status of the EU Code has to be seen as crucial to its effective implementation at national level. One obvious obstacle to achieve greater transparency within this regional environment is EU Treaty Article 296 (ex Article 223), that provides Member States full control over their own military strength. This article has made it difficult to coordinate trade policies in the area of weapons export within the European Union and the view towards this article needs to be changed.

Nonetheless, Member States have only agreed to adopt the EU Code of Conduct on Arms Exports as a Council Declaration under the CFSP – this gives it a status of open for interpretation. Firstly, the Code could be interpreted to have loopholes that will allow arms transfers to human rights abusers. That some provisions are weak, for example that Member States need only to ‘take into account’ the level of human rights in the receiving country, is a vague phrase and will lead to different interpretations and provide loopholes for such export. Secondly, as we have seen the Code is criticised of lacking transparency and accountability. The shortage of no operative provision in the Code that address the massive risk of LPO is a major weakness. Thirdly, is the shortage of reporting and regulation on military, security and policing training provided by various military and

security companies. Fourthly, is the shortage of monitoring of end-use certificates is also poor and finally the shortage of not addressing the issue of brokering properly in the Code. It's a difficult task to come to terms with the illicit trade of unregulated arms around the world. The Code needs therefore to address this issue more vigorously than before. Small arms are the weapon-of choice in intra-state conflicts, arms that have been produced by some company, in one country, exported and used in violation of international law. IHL is repeatedly the essence of law most relevant to the stated purpose for which military arms and ammunition are transferred. It is obvious that Criteria based on humanitarian law considerations should there become an important component of any new limitations developed within this area in the years to come.

Supplement A

EU Code of Conduct for Arms Exports, 8 June 1998

The Council of the European Union,

BUILDING on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992,

RECOGNISING the special responsibility of arms exporting states,

DETERMINED to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all EU Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency,

DETERMINED to prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability,

WISHING within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports,

NOTING complementary measures taken by the EU against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms,

ACKNOWLEDGING the wish of EU Member States to maintain a defence industry as part of their industrial base as well as their defence effort,

RECOGNISING that states have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter,

have adopted the following Code of Conduct and operative provisions:

CRITERION ONE

Respect for the international commitments of EU member states, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations

An export licence should be refused if approval would be inconsistent with, inter alia:

- a) the international obligations of member states and their commitments to enforce UN, OSCE and EU arms embargoes;
- b) the international obligations of member states under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- c) their commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;

d) their commitment not to export any form of anti-personnel landmine.

CRITERION TWO

The respect of human rights in the country of final destination

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will:

- a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression;
- b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.

For these purposes, equipment which might be used for internal repression will include, inter alia, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with operative paragraph 1 of this Code, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

CRITERION THREE

The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

CRITERION FOUR

Preservation of regional peace, security and stability

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

- a) the existence or likelihood of armed conflict between the recipient and another country;
- b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
- c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;
- d) the need not to affect adversely regional stability in any significant way.

CRITERION FIVE

The national security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States will take into account:

- a) the potential effect of the proposed export on their defence and security interests and those of friends, allies and other member states, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;
- b) the risk of use of the goods concerned against their forces or those of friends, allies or other member states;
- c) the risk of reverse engineering or unintended technology transfer.

CRITERION SIX

The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law

Member States will take into account inter alia the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-paragraph b) of Criterion One.

CRITERION SEVEN

The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

- a) the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;
- b) the technical capability of the recipient country to use the equipment;
- c) the capability of the recipient country to exert effective export controls;
- d) the risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context).

CRITERION EIGHT

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources

Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

OPERATIVE PROVISIONS

1. Each EU Member State will assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct.
2. This Code will not infringe on the right of Member States to operate more restrictive national policies.
3. EU Member States will circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused. The details to be notified are set out in the form of a draft pro-forma at Annex A. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it will first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it will notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

The decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State. A denial of a licence is understood to take place when the member state has refused to authorise the actual sale or physical export of the item of military equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

4. EU Member States will keep such denials and consultations confidential and not to use them for commercial advantage.

5. EU Member States will work for the early adoption of a common list of military equipment covered by the Code, based on similar national and international lists. Until then, the Code will operate on the basis of national control lists incorporating where appropriate elements from relevant international lists.

6. The criteria in this Code and the consultation procedure provided for by paragraph 2 of the operative provisions will also apply to dual-use goods as specified in Annex 1 of Council Decision 94/942/CFSP as amended, where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country.

7. In order to maximise the efficiency of this Code, EU Member States will work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports.

8. Each EU Member State will circulate to other EU Partners in confidence an annual report on its defence exports and on its implementation of the Code. These reports will be discussed at an annual meeting held within the framework of the CFSP. The meeting will also review the operation of the Code, identify any improvements which need to be made and submit to the Council a consolidated report, based on contributions from Member States.

9. EU Member States will, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of arms exports from EU Member States, in the light of the principles and criteria of the Code of Conduct.

10. It is recognised that Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the above criteria.

11. EU Member States will use their best endeavours to encourage other arms exporting states to subscribe to the principles of this Code of Conduct.

12. This Code of Conduct and the operative provisions will replace any previous elaboration of the 1991 and 1992 Common Criteria.

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