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Mexican Law Review
New Series
VOLUME VI
Number 2

THE SECURITY COUNCIL AND THE ILLEGAL TRANSFER OF SMALL ARMS AND LIGHT WEAPONS TO NON-STATE ACTORS

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Abstract. *Small arms and light weapons continue to wreak havoc at an international level, both in areas of conflict and in those at peace. In order to combat this phenomenon, several lines of action need to be explored in the context of multilateral diplomacy. One possible solution lies in arms embargoes sponsored by the United Nations Security Council (UNSC), the main topic of this article. The author addresses several issues in relation to the scope and objectives of existing regional instruments as well as the Arms Trade Treaty, which could enter into force but —unlike UNSC arms embargoes— would bind only ratifying countries.*

Key Words: *Illicit arms trade, disarmament, United Nations Security Council, sanctions, organized crime.*

Resumen. *Las armas pequeñas y ligeras son las causantes de grandes estragos a nivel internacional. Por ello, se presenta la necesidad de proponer diversas líneas de acción en el ámbito de la diplomacia multilateral para combatir este fenómeno, siendo los embargos de armas del Consejo de Seguridad de la Organización de Naciones Unidas (CSONU), el principal tema de análisis de este artículo. Se abordan los aspectos relacionados con el alcance y los objetivos de los instrumentos regionales ya existentes y del Tratado sobre Comercio de*

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Armas que podría entrar en vigor, pero que, a diferencia de los embargos de armas del CSONU, no sería vinculante para todos los países, salvo aquellos que lo ratifiquen.

Palabras clave: *Tráfico de armas, desarme, Consejo de Seguridad, sanciones, crimen organizado.*

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I. Introduction

The illegal manufacture, transfer and use of small arms and light weapons jeopardize social development in several countries. This is a problem that prevents the full development of civilian populations, thus endangering respect for human rights and the ability of governments to implement social welfare in areas in which it is most needed. Small arms and light weapons are the most widely-used weapons in 46 out of 49 international armed conflicts since the 1990's.[1] During the last decade, an average of 52,000 deaths have taken place each year in armed conflicts.[2]

[1] U.N. Development Programme, Light Weapons and the Proliferation of Armed Conflicts, 1 (Apr. 1, 1999), the report does not specify the type of weapons used in the other three conflicts.

[2] Small Arms Survey, Direct Conflict Deaths, *available at* http://www.smallarmssurvey.

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That said, some experts argue that not all small arms and light weapons transfers are by definition destabilizing.[3] This is because some non-state actors have sought small arms supplies to help preserve human rights and fight for democracy in a given country. For the purposes of this work, however, non-state actors[4] will be understood to mean those entities that "fuel armed conflicts and intend to destabilize and topple governments"[5] and not those that are seeking to have democratic regimes or preserve human rights. The reason for this (as analyzed in more detail below) is that the United Nations Security Council (UNSC) has recognized that the illegal traffic[6] of small arms and light weapons to organized crime poses a threat to international peace and security.[7]

This analysis begins with a conceptual study of small arms and light weapons, including their definition, main characteristics and features, including manufacture, transfer and use. A discussion follows of international standards implemented to control their transfer, including but not limited to those that govern transfers to non-state actors. As shown below, the Arms Trade Treaty (ATT) is currently the only universal and legally-binding instrument that covers these transfers. The last section discusses the UNSC arms embargoes, which are currently the only universal and legally-binding mechanisms to curb illegal transfers of small arms and light weapons to non-state actors. New reforms can be implemented, which will be presented as conclusions.

II. Small Arms and Light Weapons, a Global Problem

1. *Introduction*

First, the advantages of small arms and light weapons include their low cost and easy acquisition; easy transport; the ability to be handled and activated by individuals. These features explain why these weapons are the most cost-effective in the world.

It is also interesting to note that, compared with weapons of mass destruction, like nuclear, chemical or biological weapons, small arms and light weapons are commonly transferred and used by illegal groups. One reason for this

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org/armed-violence/conflict-armed-violence/direct-conflict-deaths.html (last visited Jul. 14, 2011).

[3] Zeray Yihdego, The Arms Trade and International Law 163 (Hart, 2007).

[4] The Stockholm International Peace Research Institute [hereinafter SIPRI] also refers to these entities as non-governmental forces.

[5] Lucy Mathiak and Lora Lumpe, , *Government Gun-Running to Guerrillas*, *in* Running Guns: The Global Black Market in Small Arms, 75 (Lora Lumpe comp., 2000).

[6] The term "illegal transfers" refers to all commercial transactions that do not fall under the scope of legal mechanisms on arms transfers.

[7] S.C. Res. 1373, U.N. SCOR 56th Sess., U.N. Doc. S/RES/1373 (September, 28, 2001).

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is that the materials used to construct weapons of mass destruction are highly regulated, whereas those used in the manufacture of small arms and light weapons have few restrictions.

Similarly, there are currently over 875 million small arms and light weapons currently available; of this total, governments control only about 26% percent[8]. Based on these figures, it is unsurprising to discover that these weapons cause 1,000 deaths[9] per day, creating a dangerous epidemic that, if left unattended, can jeopardize the well-being of entire communities.

2. *Manufacture, Transfer and Use of Small Arms and Light Weapons*

The first issue we shall consider are the small arms and light weapons produced by governments and private companies. If we add up both types of productions, governmental and private, the United States of America (US), France, the Russian Federation, the United Kingdom (UK) and Saudi Arabia are home to the world's largest manufacturers and exporters of these types of weapons. Weapons production and export represent significant earnings for these countries. The U.S. alone exports more than the other four countries combined, about USD 732 million.[10]

For large producers, the manufacture of small arms and light weapons represents a significant source of employment. Not only do they provide direct work in factories, but also indirect employment such as that generated by various arms fairs, gun shops, pawn shops, among others. It's not unsurprising that employment is a recurrent argument used by producing countries to block efforts to stop the manufacture of small arms and light weapons. There are currently over 1,250 small arms and light weapons manufacturers, both private and public, in more than 90 countries worldwide.[11]

A study by the Defence Committee of the British Parliament[12] shows that at least 300,000 jobs, directly or indirectly, depend on weapons manufacture. Based on this figure, the study's author, Gideon Burrows, estimated that exports would drop by 50% and result in the loss of 40,000 jobs.[13]

Weapons manufacture benefits more than just developed countries; in recent years, illegal arms manufacturing in developing nations, by handcrafting

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[8] Gun Violence: The Global Crisis, International Action Network on Small Arms 3 (2007).

[9] *Id.*

[10] *Guns and the City*, 2007 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) Annex 3.

[11] *Rights at Risk*, 2004 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) 9.

[12] H. of C., The Defence Industrial Strategy, Seventh Report 2005-2006, 29 (UK, 2006), *available at* http://www.berr.gov.uk/files/file33168.pdf (last viewed May 12, 2013).

[13] Gideon Burrows, The No-Nonsense Guide to the Arms Trade 88 (Verso, 2002).

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them, has greatly benefited producers. In most cases, these manufacturers are located in impoverished areas where the production of small arms and light weapons is often the sole (or most secure) source of work for numerous families. Another factor is the speed with which weapons can be manufactured compared to other products, *e.g.*, the cultivation of grain, a more profitable business that requires much longer periods to produce profits.

In addition to illegal handcraft, there is also the factor of illegal industrial production[14] realized by organized crime which represents a significant threat not only to individual nations but entire regions.[15] At this time, many groups have been identified in this business, including the Revolutionary Armed Forces of Colombia (FARC, in Spanish); the Liberation Tigers of Tamil Eelam; the Moro Islamic Liberation Front in the Philippines; and the self-declared Republic of Moldova Pridnestrovie,[16] to name just a few large-scale manufacturers of small arms and light weapons.[17] Among the issues these actors face in the manufacturing process is the recruitment of qualified personnel for fabrication, manufacturing, the need to maintain secured areas, and of course their involvement in actions in which such weapons can be used.

The transfer of small arms and light weapons relies heavily on arms brokers who take advantage of various international and domestic legal loopholes to close deals between manufactures and end users. Brokers generally do not own the arms, they only have the contacts and limit their activities to establish the supply chain mechanism between producers and users. In contrast, arms dealers possess the weapons and have direct contact with them while transferring them.

The main problem with illegal brokering emerges when the broker supplies weapons to states or non-state actors either under an arms embargo or for an illegal purpose.[18] In order to make business, illegal brokers use diverse strategies, including the creation of phantom companies, apocryphal registration of shipping and communication lines, and bribes to government officials.[19] Once the arms are in the buyers' possession, they earn a percentage of

[14] Illegal industrial production of small arms and light weapons refers to weapons that are illegally manufactured on a large scale, unlike handcrafted production, which can only be realized one weapon at a time.

[15] The issue of organized crime as a threat to international peace and security was identified by the UN Security Council in the following regions: Guinea-Bissau, Kosovo and Sierra Leone (S.C., Annual Report to the General Assembly (covering the period from 1 August 2009 to 31 July 2010), U.N. Doc. A/65/2 (2010)).

[16] Internationally regarded as a separatist territory of the Republic of Moldova.

[17] These groups produce semi-automatic pistols, sub-machine guns, rocket launchers and grenade launchers, among others. *Risk and Resilience,* 2008 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) 15.

[18] G.A. Report of the Group of Governmental Experts to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, 1, U.N. Docs. A/62/163 (2007).

[19] Burrows, *supra* note 13, at 108.

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the total value. This modus operandi allows the same dealer to often supply weapons to opposing groups.[20]

According to the SMALL ARMS SURVEY 2008, Canada, France, Germany, Saudi Arabia and the U.S. are the largest importers of small arms and light weapons in the world.[21] These imports, however, are legal and comply with international law. For the purposes of this research, only the transfer of weapons to organized crime groups will be analyzed.

Unlike large-scale orders for arms and other military equipment made by states, which can often be extremely costly, organized crime groups rely on retail purchases of small arms and light weapons. This can be seen by analyzing the average price of an *Avtomat Kalashnikova* model 1947, better known as an AK-47, in Latin America (USD $500); whereas in Africa and other regions, this same weapon is sold for less than USD $30. In this line of thought lies the assumption that a higher financial income of the criminal organization, such as those operating in Latin America, would mean weapons are more expensive.

3. *Illegal Transfers of Small Arms and Light Weapons*

It is notable that small arms and light weapons that fall into the hands of organized crime pass through various transfer processes. The first is a purchase or sale agreement in compliance with the laws of the sovereign nation where the transaction takes place. These same weapons later enter the black market to be eventually re-purchased illegally by end-users.

Whereas there are many reasons why small arms and light weapons are transferred illegally in such significant volume, several key recent developments have influenced this phenomenon:[22]

Remnants of the Cold War: During this period, the threat of nuclear weapons and wars in proxy countries of the two super-powers were key elements to define the international environment. The weapons used in these proxy wars, were manufactured in territories that would later become independent countries[23] and distributed mostly in areas of conflict in Africa, Southeast Asia and Latin America. After the Cold War, high manufacturing levels would generate a surplus of weapons both in manufacturing and end-using countries, leading to huge profit margins for corrupt officials who engaged in the unlawful trade of surplus weapons to end-users.[24]

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[20] Douglas Farah, Merchant of Death 39-44 (Wiley ed. 2007).

[21] *Risk and Resilience*, *supra* note 17, at 108.

[22] UNIDIR, Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action Oriented Agenda 14 (Péricles Gasparini & Daiana Belinda eds. 1998).

[23] The two countries with the most registered weapons per soldier are Ukraine and the Czech Republic at a rate of 5.9 and 10 weapons per soldier, respectively. *In* 2008 Small Arms Survey Y.B., *supra* note 17, at 87.

[24] William Godnick, *Illicit Arms in Central America* (Monterey Institute of International Studies, Working Paper, 1998).

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Monetary gains: The production and illicit sale of weapons is a highly profitable business in which all participants end with a significant margin, including the manufacturer, broker and dealer. It is estimated that the illegal arms trade, which supplies most weapons to non-state actors, represents approximately fifteen to twenty percent of total arms transfers, or approximately USD 6 billion.[25]

These illicit transfer to non-state actors thus represent a complex problem. However, as presented in the next chapter, regional efforts have been made to tackle this issue.

III. International Regulations on Small Arms and Light Weapons Transfers

1. *Introduction*

There is the need to analyze how the international community has dealt with the problem of illicit transfers of small arms and light weapons, bearing in mind that present-day conflicts are different than those with which the United Nations was designed to resolve.[26] The only legally-binding provision currently in force, although not yet universal, is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (CTOC), in effect since 2005 and ratified by 97 countries.[27] Although the Arms Trade Treaty (ATT) was enacted, it still needs to enter into force, which will happen ninety days after the fiftieth ratification.[28]

The so-called "micro-disarmament," another term the disarmament negotiations on small arms, has gained prominence in recent discussions at the UN level; however the only universal and legally-binding mechanisms to curb the illegal transfer of small arms and light weapons to non-state actors are the UNSC arms embargoes. This section analyzes current regulations on small arms and light weapons transfers and their evolution.

As will be seen, the current regional instruments are inconsistent in terms of their legal commitment towards states. Therefore, first there is the need to

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[25] *Profiling the Problem*, 2001 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) 167-168.

[26] Jozef Goldblat, Arms Control: The New Guide to Negotiations and Agreements 46-47 (PRIO/SIPRI 2002).

[27] Status of ratification, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UN Treaty Collection, Chapter XVIII, Penal matters, as last reviewed on May 12, 2013.

[28] In accordance with Article 21 of the ATT, it shall be open for signature at the UN Headquarters in New York by all States from 3 June 2013 until its entry into force.

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analyze the prevention of illicit transfer of small arms and light weapons to non-state actors as an issue of customary international law.

The Statute of the International Court of Justice (ICJ) recognizes custom as one of the sources of international law, by stating that the Court shall apply: "[I]nternational custom, as evidence of a general practice accepted as law."[29] In this sense, the concept of international custom seems to be very broad. Nevertheless, the ICJ itself has narrowed the precedent after several case rulings, including the Nicaragua case, as analyzed below.

In line with the above, the ICJ also stated that the elements of international custom include duration, uniform and general practice, and *opinio juris et necessitates*.[30] In this section, the main focus will be on these last two elements. With repect to the establishment of rules as customary law, the ICJ concluded that "the conduct of States should, in general, be consistent with such rules."[31]

In this sense, Petersen concludes "that practice is nothing more than an auxiliary in identifying customary law."[32] Also, Kirgis affirms that customary law can either be backed up by an *opinio juris* without state practice or the other way around.[33] Thus, there is not a clear consensus regarding the importance of each element.

In addition, the ICJ has recognized[34] that for the creation of a new rule of customary international law, states acts should "have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[35] In the Nicaragua case, the ICJ made a further ruling and added that for a new customary rule to be established, it "must be accompanied by the *opinio juris sive necessitates*."

On the other hand, there is the Thirlway approach to the *opinio juris,* that mentions that it needs to be deduced from States actions regarding the alleged custom.[36] By doing this identification, then it can be understood that in order to have *opinio juris*, there is the need first to have states actions or prac-

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[29] Statute of the International Court of Justice Article 38, June 26, 1945. I.L.M [hereinafter ICJ Statute].

[30] This term refers to an action that is carried out as a result of a legal obligation. *See* Fisheries case (UK v. Nor.), 1951 I.C,J. (December, 18); *see also* Asylum case (Colom. v. Peru), 1950 I.C,J. (November, 20).

[31] Military and Paramilitary Activities (Nicar. v. U. S.), 1986, I.C,J. 98, para. 186 (June 27).

[32] Niels Petersen, *Customary Law without Custom? Rules, Principles and the Role of State Practice in International Norm Creation*, 23 American University International Law Review 276, 295 (2008).

[33] Frederic Kirgis, *Custom on a Sliding Scale*, 81 The American Journal of International Law 144, 149 (1987).

[34] *See* North Sea Continental Shelf Cases (F.R.G. v. Den. & F.R.G v. Neth.), 1969 I.C,J. 51 & 52 (February 20).

[35] *Id.* at 43, para. 74.

[36] Thirlway, Hugh, *The Sources of International Law*, *in* International Law, 95, 103 (M. Evans ed. 2010).

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tice. This idea is opposite to what Kirgis mention on the existence of *opinion juris* without State practice.

Having said this, the ICJ recognized in its Nicaragua ruling that when arms are supplied to assist certain non-state actors such as armed opposition groups, those transfers may violate customary international law under the scope of the non-intervention principle. The ICJ, found:

> [T]hat no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a *breach of the customary principle of non-intervention* will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations… The Court therefore finds that… *supply of weapons*… constitutes a clear breach of the principle of non-intervention[37] (Emphasis added).

To arrive at this conclusion, the ICJ first analyses the *opinio juris* regarding the violation of the non-intervention principle by means of the transfer of arms to non-state actors. For this, it recalls the UNGA resolutions 2625 (XXV) regarding the Friendly Relations Declaration, adopted without a vote on 24 October 1970 which, among other things, recognized that: "…no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

In this sense, for the ICJ there was a general acceptance of this principle, but not legally binding, especially because the above resolution was adopted without a vote. Nevertheless, it is useful to recall the argument made by the US State Department regarding the practice of using UNGA resolutions as proof of customary law. It says that states may vote in favor of a resolution or support it "for reasons having nothing to do with a belief that the propositions in it reflect customary international law."[38]

Although the ICJ relied on more than just the UNGA resolutions, it also analyzed the possibility that the American arms supply fell under the scope of a new norm in case that the non-intervention principle was terminate. Especially, considering that "example of trespass against the principle are not infrequent."[39] The ICJ concluded, however, that the USA could not justify its conduct pursuant to "a new right of intervention or a new exception to the principle."[40]

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[37] *See* Military and Paramilitary Activities (Nicar. v. U. S.), 1986, I.C.J. 98, 99 para. 209-242 (June 27).

[38] John Bellinger III, *U.S. Initial Reactions to ICRC Study on Customary International Law*, Department of State, United States of America, November 3, 2006.

[39] *See* Military and Paramilitary Activities (Nicar. v. U. S.), 1986, I.C.J. 98, 96 para. 202 (June 27).

[40] *Id.* at 98, para. 207.

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In addition, the Draft Articles on States' Responsibility for Internationally Wrongful Acts of the International Law Commission, which have been invoked as a source of international law by the ICJ,[41] can also be applied to arms transfers. Article 16, in particular, reads as follows:[42] "Article 16. Aid or assistance in the commission of an internationally wrongful act: 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…"

Even though the above article only covers arms transfers between States, it is important to recognize that these transfers may be diverted to the illicit market, thus falling into the hands of outlawed non-state actors. The Commentaries to this Articles further suggest that the provision of aid or assistance is not limited to the prohibition of the use of force, but rather the possibility of considering the transfer of arms that could be used to commit serious human rights violations as prohibited.[43] This idea, if the Draft Articles ever become an international treaty,[44] would use the precepts set forth in several regional provisions to establish an international standard.

Although only politically binding, another international mechanism worth mentioning is the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade of Small Arms and Light Weapons in All Its Aspects (PoA).[45] The PoA mechanism was adopted in 2001 and has since held Biennial Meetings of States in which it has requested annual reports on implementation and Review Conferences every five years.

In sum, there has been a significant improvement in the area of promoting international assistance and cooperation among UN Member States.[46] During its last Review Conference, the States agreed on a six-year plan to further develop its implementation.[47]

2. *Substantive Scope of Treaty Law and Regional Regulations*

In this section, we analyze the Arms Trade Treaty and diverse regional agreements that address the problem of illicit transfers of small arms and

[41] The ICJ invoked a preliminary version of the Draft Article in the Gabčíkovo-Nagyamaros Project (Hungary/Slovakia), 1997 I.C.J., 36 para. 50.

[42] G.A. Report ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Report of the 53rd session, Article 16, U.N. Doc. A/56/10 (2001).

[43] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YBILC, Vol. II., 67 para. 9 (2001).

[44] G.A. Res. 56/83, U.N. GAOR 56th Sess., U.N. Doc. A/RES/56/83 (2002).

[45] G.A., Programme of Action to Prevent, Combat and Eradicate the Illicit Trade of Small Arms and Light Weapons in all its Aspects, U.N.Doc. A/CONF.192/15 (2001).

[46] G.A., Programme of Action Implementation Support Unit, Matching Needs and Resources: 2012-2014 (2012).

[47] G.A., Report of the United Nations Conference to Review Progress made in the implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade of Small Arms and Light Weapons in all its Aspects, U.N.Doc. A/CONF.192/2012/RC/4 (2012).

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light weapons, as well as the lack of a universal and legally-binding instrument on this topic.[48] As will be seen, uniform criteria do not yet exist regarding either the definition of "arms transfers" that is also defined as arms trade, for example. Likewise, not all agreements cover the same scope; some only include arms whereas others also cover ammunitions and other related material. In addition, not every country located in any given region is a party to these agreements.

The ATT mentions that its regulations shall apply to conventional arms, such as small arms and light weapons, but does not specify the characteristics of these weapons.[49] In the future, problems may arise as every region has its own definition regarding "small arms" and "light weapons."

Currently, there are twenty regional instruments intended to combat the illegal transfer of small arms and light weapons. Due to their regional character, however, they are not applied worldwide. The only legally binding and universal mechanisms enacted to curb the transfer of small arms and light weapons for non-state actors are the arms embargoes approved by the UN Security Council. All these issues will be covered below. First we need to compare the scope of each regional agreement by analysing whether the ban on small arms and light weapons transfers is comprehensive or has loopholes.

The first region to enact a legally-binding instrument that addresses the role of these actors was the Americas, with its Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Explosives, Ammunition and Other Related Materials[50] (CIFTA) in 1997. It is legally binding for all member States[51] and the Organization of American States is the depository body. Unfortunately, the CIFTA only refers to "firearms" (including ammunition) but fails to address "small arms" and "light weapons."

In 1998, the European Union approved its Code of Conduct on Arms Exports[52] which, as it name suggests, covers a wide range of weapons, including small arms and light weapons.

With respect to Africa, the African Union has not yet adopted a legally-binding instrument concerning the combat of illicit transfers of small arms

[48] The only universal, but not legally binding instrument that seeks to combat the illegal transfer of small arms and light weapons is the International Instrument to Enable States to Identify and Trace, in a timely and reliable manner, illicit small arms and light weapons, adopted by the United Nations General Assembly (U.N.G.A.) in 2005.

[49] G.A., Final United Nations Conference on the Arms Trade Treaty, Article 2, U.N. Doc. A/CONF.217/2013/L.3 (March 27, 2013).

[50] Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Explosives, Ammunition and Other Related Materials, Nov. 14, 1997, O.A.S.T.S. No. A-63.

[51] Only four out of the thirty-four OAS members have not ratified this treaty: Canada, Jamaica, St. Vincent and Grenadines, and the USA. As a result, this treaty does not include the largest exporter of small arms and light weapons in the region, the United States of America.

[52] European Union Code of Conduct on Arms Export, June 5, 1998, No. 8675/2/98 [hereinafter EU Code of Conduct].

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and light weapons: Instead, it enacted the Bamako Declaration as an African Common Position on the illicit proliferation, circulation and trafficking of small arms and light weapons[53] in 2000. This treaty recommends a series of non-binding measures to be taken in order to further combat this problem.

No instrument exists in Asia that includes every country in the region. For this reason, these treaties must be analyzed within a sub-regional context. First, we have the League of Arab States (LAS), which not only includes membership of Asian states, but also some North African nations. Decisions made by the LAS Council are binding pursuant to the Pact of the League of Arab States.[54] The Council adopted Resolutions 6625 and 6447 in 2004 and 2006, respectively, both in regard to Arab Coordination for Combating the Illicit Trade in Small Arms and Light Weapons.

Another Asian sub-regional body that addresses this issue is the Association of Southeast Asian Nations (ASEAN), which so far has only adopted non-binding instruments in this area, such as the Manila Declaration on the Prevention and Control of Transnational Crime, adopted in 1998, by which states expressed their political will to limit the illegal trade in firearms,[55] once again limiting the instrument's scope by failing to define "small arms" and "light weapons." It should also be mentioned that efforts have been realized by the Shanghai Cooperation Organization (SCO), which includes China and Russia, among other members. In 2010, it agreed on a Joint Declaration with the UN about the importance of increasing cooperation in areas such as illicit arms transfers,[56] without making any specific reference to small arms and light weapons.

In the South Pacific and Oceania region, the Pacific Island Forum has dealt with this issue by means of the Forum Island Country on Small Arms and Light Weapons and the Control of Ammunition project, implemented through its Pacific Islands Law Officers' Network to enhance cooperation in order to prevent the illicit transfer of small arms, light weapons and ammunition.[57] In theory at least, it is the most comprehensive regional agreement in terms of scope, including small arms, light weapons and ammunition.

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[53] Organization of African Unity, Bamako Declaration on an African Common Position on the illicit proliferation, circulation and trafficking of small arms and light weapons, Dec. 1, 2000, I.L.M. [hereinafter Bamako Declaration], http://2001-2009.state.gov/t/ac/csbm/rd/6691.htm.

[54] League of Arab States, Pact of the League of Arab States, article 7, March 22, 1945.

[55] Association of Southeast Asian Nations [ASEAN], Asia Regional Ministerial Meeting on Transnational Crime, *Manila Declaration on the Prevention and Control of Transnational Crime*, para. 2 (March 23-25, 1998) [hereinafter Manila Declaration].

[56] Shanghai Cooperation Organization [SCO] & U.N. Secretary-General, *Joint Declaration on Cooperation*, para. 2 (April 5, 2010).

[57] Pacific Islands Forum Secretariat [PIFS], Forum Regional Security Committee completes meeting 35/09 (June 11, 2009).

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3. *Formal Scope of Treaty Law and Regional Regulations*

As mentioned above, twenty regional agreements are currently in effect to combat the illicit transfer of small arms and light weapons. However, not all these agreements take into consideration the issue of preventing arms transfers to non-state actors, something addressed in greater detail below.

In an attempt to include non-state actors, the ATT refers to them as "organized groups" engaged in arms trafficking.[58] In this sense, it should be noted that the drafters of the Treaty decided not to mention the term "organized crime," as it appears in the CTOC itself.

On a regional level, Article 7 of CIFTA, establishes that State parties shall adopt all necessary measures to prevent illicit firearms from falling into the hands of private individuals or businesses.[59] Meanwhile, Criterion Four of the EU Code of Conduct on Arms Exports establishes 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."[60] Thus, by using the word *recipient*, drafters left the door open to include not only countries or States, but also other actors, such as non-state actors. If not, they would have used the word *country*, as at the end of the aforementioned sentence. This Code of Conduct would be later updated into the legally binding Common Position 2008/944/CFSP, adopted on 8 December 2008,[61] which also includes the same Criterion Four that legally binds all Member States.

The Bamako Declaration expects countries to "Accept that trade in small arms[62] should be limited to governments and authorized registered licensed traders."[63] In the Arab region, Article 33 (6) of the Arab Model Law on Weapons, Ammunitions, Explosives and Hazardous Material[64] prohibits the transfer of weapons to unlicensed private individuals. In contrast, the Manila Declaration clearly expresses an intent to fight organized criminal activities.[65]

The EU Code of Conduct on Arms Exports establishes that after assessing the "recipient country's attitude toward… human rights… Member States

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[58] *See* G.A., Final United Nations Conference on the Arms Trade Treaty, Article 11, U.N. Doc. A/CONF.217/2013/L.3 (March 27, 2013).

[59] *See* Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Explosives, Ammunition and Other Related Materials, article 7 (2), Nov. 14, 1997, O.A.S.T.S. No. A-63.

[60] *See* EU Code of Conduct, *supra* note 52, Criterion Four.

[61] Council Common Position defining common rules governing control of exports of military technology and equipment (EC) No. 2008/944/CFSP of 8 December 2008 (2008).

[62] It is noteworthy that the drafters did not include "light weapons" in this sentence, which is included in every other part of the Bamako Declaration.

[63] *See* Bamako Declaration, *supra* note 53, at article 4 (i).

[64] League of Arab States [L.A.S.], *Arab Model Law on Weapons, Ammunitions, Explosives and Hazardous Material*, (2002).

[65] *See* Manila Declaration, *supra* note 55.

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will not issue an export license if there is a clear risk that the proposed export might be used for internal repression."[66] In addition, the OSCE Principles Governing Conventional Arms Transfers not only take into consideration respect for fundamental freedoms in the recipient country, but also requests its members to "avoid transfers which would be likely to be used to violate or suppress human rights and fundamental freedoms."[67]

In Central America, the Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Material, besides covering more than the transfer of small arms and light weapons, refers specifically to certain human rights. For example, it mentions that transfers from or to States should not be realized if the recipient States: "Commit and/or sponsor human rights violations, restrict political participation and lack democratic governments."[68] Given the political turmoil experienced by the region in the 1980's, this language is not surprising.

In sum, the regional instruments analysed in the last section demonstrate States' willingness to recognize that countries that export arms should take into account the human rights situation in recipient countries. This in itself can open the door to the future adoption of the Draft Articles for the purpose of establishing worldwide legally-binding rules that would address this issue head-on. The next section addresses how the UN Security Council arms embargoes can be used as a legal mechanism to prevent the illegal transfer of small arms and light weapons to non-state actors.

IV. UNSC and Arms Embargoes to Non-State Actors

1. *Introduction*

Based on Article 26 of the UN Charter, the UNSC is responsible "for the establishment of a system for the regulation of armaments," which has not only focused on disarmament efforts, but also on arms control negotiations. This was reinforced with the request made by the UNGA to the UNSC, while acting under Article 11 of the UN Charter, to consider negotiations to "formulate… practical measures to provide for the general regulation and reduction of armaments."[69]

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[66] EU Code of Conduct, *supra* note 52, Criterion Two.

[67] Organization for Security and Co-operation in Europe [O.S.C.E.], *Principles Governing Conventional Arms Transfers*, Article 4, DOC.FSC/3/96 (November 25, 1993) [hereinafter OSCE Principles].

[68] U.N. Conference to Review Progress Made in 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, *Working paper submitted by Nicaragua: Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material*, Article 1, A/CONF.192/2006/RC/WP.6 (June 30, 2006) [hereinafter Central American Code of Conduct].

[69] G.A. Res. 41 (I), U.N. GAOR 1st Sess., U.N. Doc. A/RES/41(I) (December 14, 1946).

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Article 47 of the UN Charter also establishes "a Military Staff Committee to advise and assist the Security Council on… the regulation of armaments, and possible disarmament." Nevertheless, this body has been qualified as having "little relevance"[70] within the structure of the UNSC, specially because it does not have an agenda of items to discuss.

2. *Substantive Scope*

Regarding the scope of arms embargoes, it is first worth mentioning that the council focuses on two types of weapons at the moment of implementing different disarmament and arms control measures. With respect to weapons of mass destruction, the Security Council has a Committee established under resolution 1540[71] of 2004 that specifically focuses on preventing the proliferation of these weapons. This Committee is responsible for reporting on the implementation of this resolution, which calls states, *inter alia*, to refrain from helping non-State actors[72] to develop, acquire, manufacture, possess, transport, transfer, or use nuclear, chemical or biological weapons and their delivery systems.

This body established four working groups[73] to review the implementation of this resolution, which also requires all member states to establish domestic controls to prevent the proliferation of such weapons. The resolution requested to intensify international cooperation in this area in accordance with international non-proliferation treaties in force as well as promote universal adherence to these treaties.

That said, resolution 1540 did not include small arms and light weapons in its scope, despite earlier recognition by the UNSC of the potential threat posed by terrorists.

Aside from weapons of mass destruction, not a single body specifically covers only small arms and light weapons proliferation, even though the UNSC acknowledged in resolution 1373 (2001) the threat to international security

[70] Murray, P., Peacekeeping and Stability Operations Institute and US Army War College, Renewing the United Nations Military Staff Committee (2009), available at http://pksoi.army.mil/PKM/publications/perspective/perspectivereview.cfm?perspectiveID=5 (last visited August 12, 2013).

[71] This resolution was unanimously adopted after the A. Khan nuclear terrorist network was dismantled in 2004. *Cfr.* Collins, C. & D. Frantz, Fallout from the AQ Khan Network and the Clash of National Interests at International Atomic Energy Agency [IAEA] Symposium on International Safeguards Preparing for Future, (Nov. 2, 2010), available at http://www.iaea.org/safeguards/Symposium/2010/Documents/PapersRepository/201274978938219803076 6.pdf.

[72] The resolution defines these as: individuals or entities, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.

[73] The working groups are on: (i) Monitoring and national implementation; (ii) Assistance; (iii) Cooperation with international organizations; and, (iv) Transparency and media outreach.

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that the illicit transfer of small arms and light weapons represents. In that ruling, the UNSC adopted the following paragraph:[74]

> Notes with concern the close connection between international terrorism and transnational organized crime… *illegal arms trafficking*… and in this regard emphasizes the need to enhance coordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and *threat to international security*;

This was not the first time the UNSC addressed the small arms issue. Besides references in several arms embargoes (as discussed below), the UNSC under the Presidency of the Netherlands held its first[75] open debate about "small arms"[76] in 1999. In the end, the UNSC did not adopt a resolution but agreed to a so called "Presidential Statement" a non-legally binding declaration made by the current UNSC President; thus the UNSC could have further commit by seeking a legally binding resolution or at least a request to the Secretary-General to report on the issue. That said, important steps were taken to prevent non-state actors from acquiring illegal arms, in particular terrorists:[77] "The Security Council emphasizes that the prevention of illicit trafficking is of immediate concern in the global search for ways and means to curb the wrongful use of small arms, including their use by terrorists."

Despite this first effort, the UNSC remained silent and failed to consider an open debate on this issue until August 2001, under the Presidency of Colombia, which had chaired the PoA meeting the year before. Since 2010, the UNSC has held yearly open debates[78] on small arms, excluding 2007; these have resulted in the adoption of Presidential Statements. And since 2007 it has requested a biennial report from the Secretary-General.[79] It is also important to mention that the only regional debate on this issue was held in 2010, when the UNSC discussed the illicit trade of small arms and light weapons in Africa.[80]

The primary responsibility of the UNSC, in accordance with Article 24 of the UN Charter, is "the maintenance of international peace and security."

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[74] *See* S.C. Res. 1373, *supra* note 8.

[75] S.C. [Press] SC/7114 (August 2, 2001).

[76] In that occasion, even though the main topic of the debate did not consider light weapons, they were also addressed by states during the exchange of views.

[77] S.C. President, Statement on small arms, U.N. Doc. S/PRST/1999/28 (September 24, 1999).

[78] The verbatim records of the open debates since 2001 are [specifically for search in U.N. Doc. nomenclature]: S/PV.4355, 2 August 2001; S/PV.4623, 11 October 2002; S/PV.4720, 18 March 2003; S/PV.4896, 19 January 2004; S/PV.5127 17 February 2005; S/PV. 5390, 20 March 2006; S/PV.5881, 30 April 2008.

[79] S.C. President, Statement on Small Arms, U.N. Doc. S/PRST/2007/24 (June 29, 2007).

[80] See S.C. Presidential, Statement of Central African Region, U.N. Doc. S/PRST/2010/6. (March 19, 2010).

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One of its tasks in this regard is to decide what is a threat to international peace, and shall apply different measures to prevent the aggravation of a given situation.[81]

In order to achieve this objective in accordance with Article 41 of the Charter, the UNSC may call upon member States to apply measures not involving the use of force to maintain or restore international peace and security. These measures are known as sanctions, and one example are arms embargoes. In this way, sanctions are meant to pressure States to meet objectives set by the UNSC without resorting to the use of force. In such a way, sanctions imposed by the UNSC are important instruments to enforce its decisions.

These sanctions shall be decided with an affirmative vote of nine members, including the concurring votes of permanent members. In other words, each permanent member has veto power regarding approval. For the purpose of understanding the evolution of arms embargoes, it is important to analyze both their commonalities and differences.

Related to the subject matter of the embargo and compared to other UN instruments on arms control, the UNSC does not specify any particular kind of arms or weapons to be considered under the embargo. Instead, it establishes that the embargo is for: "arms and related materiel of all types, including weapons and ammunition." So, first, it is not clear how the UNSC defines "weapons," either as part of a broader category which includes arms or as a specific materiel related to arms. Secondly, it also includes ammunition, in contrast to the position taken by some permanent members in other forums such as the ATT negotiations, in which the inclusion of ammunition was opposed.[82] However, it can be identified that the UNGA requested, few months before the adoption of Resolution 197, for the adoption of measures to prevent the illicit transfer of ammunitions.[83]

Regarding the above, arms embargoes have explicitly excluded small arms and light weapons from their scope, and merely advise states to exercise caution while transferring those arms to recipient states, as happened with the embargo to North Korea in 2009.[84]

3. *Formal Scope*

At this point it would be helpful to comment on the difference between two types of embargoes classified by the SIPRI[85] as voluntary and mandatory

[81] U.N. Charter arts. 30, 39 & 40.

[82] Both, China and Russia, did not support the inclusion of ammunitions on a possible Arms Trade Treaty. *See* Sarah Parker, United Nations Institute for Disarmament Research [UNIDIR], Analysis of States' Views on an Arms Trade Treaty 7 (2007).

[83] G.A. Res 65/67, U.N. GAOR 65th Sess., U.N. Doc. A/RES/65/67 (Jan. 13, 2011).

[84] S.C. Res. 1874, U.N. SCOR 63rd Sess., U.N. Doc. S/RES/1874 (Jun. 12, 2009).

[85] Stockholm International Peace Research Institute [SIPRI] & Department of Peace

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arms embargoes, both adopted under Chapter VII. Voluntary embargoes are those imposed by the UNSC when it "Calls upon all States" to refrain from supplying arms; meanwhile mandatory embargoes are established when the UNSC "Decides that all Member States" shall stop the transfer of arms. Two main differences exist between them: the first pertains to the rigor of the decision and the second, the targeted entity. Voluntary embargoes address all States in general while mandatory ones only apply to Member States. This latter may be due to the fact that the UNSC can request compliance by member states, but its decisions are binding only on UN members pursuant to that set forth in Article 25 of the UN Charter.

Another difference, besides its compulsory status, relates to the targeted entity. Sometimes arms embargoes are directed at a specific State, whereas other times they target specific groups of individuals or terrorist/criminal organizations under the umbrella of non-state actors.

Universal arms embargoes are new within the UN agenda. This is revealed by the fact that during the past 20 years, almost 90 percent of all UNSC arms embargoes had been implemented.[86] This is a significant percentage if we consider that sanctions were first imposed by the League of Nations in 1935 against Italy in response to its invasion of Ethiopia.[87]

In 1965, the UNSC discussed the situation in Southern Rhodesia (now Zimbabwe) in the light of the recent declaration of independence that its "illegal authorities" made from the UK. The UNSC effectively recognized the situation as a threat to international peace and security and approved a series of sanctions under resolution 217 (1965). In this sense, the very first paragraph by which the UNSC implemented an arms embargo read as follows: "8. Calls upon all States to refrain from any action which would assist and encourage the illegal regime and, in particular, to desist from providing it with arms, equipment and military material…"

Meanwhile, the most recent arms embargo declared by the UNSC related to Libya, approved in February 2011, after a general uprising and subsequent repression by Qadhafi forces. On that occasion, the UNSC issued the following ruling:[88]

> Arms embargo
>
> 9. Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment…

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and Conflict Research, Uppsala University, United Nations Arms Embargoes. Their Impact on Arms Flows and Target Behavior (2007).

[86] *See* Yihdego, *supra* note 3, at 105.

[87] George Baer, Test Case: Italy, Ethiopia, and the League of Nations 23 (Leland Stanford Junior University, 1976).

[88] S.C. Res. 1973, U.N. SCOR 65th Sess., U.N. Doc. S/RES/1973 (March 17, 2011).

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As can been seen, the UNSC's arms embargo mechanism has evolved positively since it was first implemented. The first and most notable change was the way in which member States were called upon to stop arms transfers; first in 1965 by means of an invitation to "desist from providing;" then in 2011 as a request to take all necessary measures to prevent the direct or indirect supply, sale or transfer of arms. Even though this last phrase can be seen as a broader and more robust expression, the "desist from providing arms" language has also been used by the ICJ in the Genocide Convention case in 1993.[89]

Prohibited actions include, *inter alia*, the supply, sale or transfer of arms. These terms, however, cover a broad scope, and some transactions may not be covered at all, as suggested by some Member States in the most recent Arms Trade Treaty negotiations within the UNGA, *e.g.*, lease, loans or gifts.[90] The above could thus be understood as a translation of non-binding measures applied by the UNGA into binding measures applied by the UNSC. The "other assistance" term also fails to cover many types of private activities related to arms transfers such as arms brokering or the use of intermediaries who do not own or have any direct contact with arms.

Another innovation is that it takes into account the direct or indirect supply by nationals from Member States. In this way, it not only focuses on state-to-state transfers, but also on private corporations. As analyzed below, the application of this obligation in particular depends completely on the legislative framework adopted by each country.[91] This approach was first used in 1993, when the UNSC approved an arms embargo on Haiti, and has been used ever since.[92]

Unfortunately, the above only applies to supplier states and not recipients, as the embargo only mentions the name of the targeted state, in this case Libya, and not Libyan nationals or any other state-related entity. For this reason, additional wording that mentions non-state actors is needed to facilitate the effectiveness of embargoes.

It would also be useful to analyze the position of permanent members which as noted above, have veto power and are themselves big arms suppliers. From 1946 to 2008, this veto power was invoked a total of 261 times in relation to arms embargoes.[93] Since no nation needs to explain why it vetoes

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[89] The ICJ in its Ruling of 8 April 1993: "(q) That Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from all support of any kind - including the provision of… arms, ammunition…" *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Provisional Measures.* I.C.J. Reports 1993.

[90] Sarah Parker, United Nations Institute for Disarmament Research [UNIDIR], Analysis of States' Views on an Arms Trade Treaty 7 (2007).

[91] *Id.*

[92] S.C. Res. 841, U.N. SCOR 47th Sess., U.N. Doc. S/RES/841 (Jun. 16, 1993).

[93] S. Bailey, *Changing Patterns in the Use of the Veto in the Security Council*, Global Policy Forum

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a resolution, no one knows how many vetoes were related to the fact that the opposing country or countries exported arms. One of the last occasions in which this could be clearly identified occurred in July 2008,[94] when China and Russia opposed a resolution to approve an arms embargo against Zimbabwe, as China was the African nation's main arms supplier.[95]

With respect to international supervision of these embargoes, once they are imposed on a State or group of individuals, the UNSC has the power to create a subsidiary body to monitor its implementation, known as the Sanctions Committee. Once this committee is established, it can call for the creation of an Experts Group to analyze the onsite situation and make sure that the embargo is not being breached. It must also be mentioned that this Group must periodically report to the UNSC.

Pursuant to the above and in accordance with Article 25 of the UN Charter, Member States are obliged to comply with UNSC rulings, including arms embargoes. The effectiveness of these embargoes, however, depends largely on their implementation by states. The UNSC states that its "resolutions are inconsiderate of the legal institutional and political weakness of… supplier states."[96]

In compliance with UNSC resolutions that establish arms embargoes, we must also recall that states should submit periodic reports to the UNSC about their national implementation of arms embargoes, as well as the legislative and administrative measures taken either by individuals, private corporations or tribunals. In this way, States are committed to do something about implementation; otherwise, their reports would be worthless and they risk violating their international treaty obligations under the UN Charter.

In contrast to the first arms embargo, the UNSC now considers the possibility of breach under certain conditions. In the last part of the treaty text, it states that the embargo shall not apply to sales and supplies approved in advance by the corresponding Committee. This requires analysis of the UNSC subsidiary rules, like those covering the Sanctions Committee or the Peacekeeping Operations.

Each Sanctions Committee establishes its own guidelines for its daily work. These guidelines establish that each committee shall: *a)* monitor the embargo; *b)* seek from all Member States information regarding actions they have

(2008), available at http://www.globalpolicy.org/security-council/tables-and-charts-on-the-security-council-0-82/use-of-the-veto.html (last viewed May 19, 2011).

[94] D. Nasaw, *China and Russia veto Zimbabwe Sanctions,* The Guardian, July 11, 2008 available at http://www.guardian.co.uk/world/2008/jul/11/unitednations.zimbabwe (last viewed May 19 2011).

[95] According the UN Commtrade Database, China alone exported small arms and light weapons with a value of $370,539 to Zimbabwe, representing 65% of the total small arms and light weapons imported in 2007 to that African country (*See* UN Commtrade Database, available at http://comtrade.un.org).

[96] *See* Yidhego, *supra* note 3, at 111.

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taken to implement it effectively; *c)* examine information regarding alleged violations; and identify possible cases of non-compliance; and *d)* rule on exemptions.[97]

It is also important to mention that an arms embargo targeting non-state actors did not lead to the immediate creation of a Sanctions Committee on three occasions: the arms embargoes to Liberia in 1992; Darfur, Sudan in 2004; and more recently to Lebanon in 2006. The latter was monitored by the UN Peacekeeping Operation in the field;[98] the one in Darfur was not supervised until one year later, when the specific Sanctions Committee[99] was created. The same situation also occurred with Liberia which had no supervisory body until 1995,[100] during which its UN Peacekeeping Operation was in charge.[101] Since 2001, the Secretary-General has recognized the need to have an "extensive monitoring mechanism for arms embargoes and to consider the imposition of secondary measures in cases of proven violations."[102] This occurred after the conclusion of the Bonn-Berlin process that analyzed different ways to better implement UNSC sanctions.

Besides states, one actor that can request an exception to an embargo is the UN Peacekeeping Mission deployed by the UNSC in the targeted state or other UN agencies, as the case may be. For this reason, the Principles and Guidelines for UN Peacekeeping Operations should be followed. Nevertheless, the only reference these guidelines make is under its Logistics section, and it mentions that the Chief of Mission Support (CMS) has "direct access to all available means of acquiring items,"[103] and arms should be considered among those items. It then further explains that the CMS acts under the supervision of the Mission Head, who has direct contact with the UN Department of Peacekeeping Operations, which is the final arbiter for contacting the appropriate Sanctions Committee regarding prior notification.

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[97] Working guidelines of the Security Council Committee pursuant to resolutions 751 and 1907 concerning Somalia and Eritrea, 30 March 2010, S.C. Res. 751, U.N. SCOR 46th Sess., U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 1907, U.N. SCOR 52nd Sess., U.N. Doc. S/RES/ 1907 (Dec. 23, 2009).

[98] The United Nations Interim Force in Lebanon, established in 1978, has as its mandate since 2006, to prevent the entry in Lebanon without its consent of arms or related materiel, according to S. C. 1701, U.N. Doc. S/Res/1701 (August 11, 2006).

[99] The Sanctions Committee for Darfur was created in 2005 upon resolution 1591.

[100] The Sanctions Committee for Liberia was created in 1995 upon resolution 985.

[101] The United Nations Observer Mission in Liberia was in operating from 1993 to 1997, and had as its mandate "to assist in the monitoring of compliance with the embargo on delivery of arms and military equipment to Liberia", S.C. Res. 866, U.N. SCOR 47th Sess., U.N. Doc. S/RES/866 (Sep. 22, 1993).

[102] Secretary General, Letter to the President of the General Assembly, U.N. Doc. A/56/529 (2001).

[103] United Nations Peacekeeping Operations [U.N. D.P.K.O.], United Nations Peacekeeping Operations: Principles and Guidelines (2008).

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In addition, the Military Staff Committee established by the first UNSC resolution ever,[104] in accordance with the UN Charter, is also responsible for overseeing the implementation of arms embargoes. This committee, however, has not even adopted its rules of procedure and has spent the last five years reforming its working methods.[105]

4. *Sanctions Targeted at Non-State Actors*

There are several notable discussion topics involving targeted sanctions, such as arms embargoes and non-state actors. Among those topics, we find the matters of applicability, the scope of embargoes, compliance and breaches committed by them. The fact that these types of embargoes may also raise several questions regarding the applicability of international law in diverse domestic or regional courts is discussed below.

An arms embargo on a non-governmental armed force or terrorist group would be applicable in case its activities represent a threat to international peace and security. In addition, the application of Resolution 1540 would be inadequate, as the most common type of weapon used by these groups are small arms and light weapons, not weapons of mass destruction. In this way, a total arms embargo on these entities would be appropriate. It is thus interesting to see how the UNSC has adopted new measures against non-state actors by establishing targeted sanctions against individuals or entities associated with these groups, applying measures that until recently were only used against states.

In contrast to that established in arms embargoes against states regarding the boundaries of specific territories, transnational non-state actors operate freely across borders. For this reason, the UNSC eliminated the requirement that the arms embargo applies only "to the territory under [non-state actor] control"[106] and changed it to the phrase "to these entities,"[107] without specifying any location.

This idea could also be applied if the UN Security Council considers the application of arms embargoes to one important type of transnational group: drug cartels. This is because these organizations represent a significant threat to international security.[108] Within the complex illicit drug chain, small arms and light weapons are used with greater frequency during transportation. The period of transportation is the one in which they both, arms and drugs match, although sometimes in opposite directions, In other words, drugs en-

[104] S.C. Res. 1, U.N. SCOR 1st Sess., U.N. Doc. S/RES/1(Jan. 25, 1946).

[105] *S.C. Annual Report 2009-2010*, U.N. Doc. S/65/2, 163.

[106] S.C. Res. 1333, U.N. SCOR 55th Sess., U.N. Doc. S/RES/1333 (December 19, 2000).

[107] S.C. Res. 1390, U.N. SCOR 56th Sess., U.N. Doc. S/RES/1390 (January 16, 2002).

[108] *See* S.C. Res. 1373, *supra* note 7.

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ter from one end and guns go out the other, and vice versa. These two products together represent the highest percentage of black market merchandise in the world.[109]

The idea of applying an embargo to a non-state actor without considering its location differs from how arms embargoes are applied to non-state actors operating in a single country, as shown in the case of the Revolutionary United Front (RUF), a rebel group in Sierra Leone. This embargo was clearly applied "to non-governmental forces *in* Sierra Leone"[110] (emphasis added). By limiting the embargo to just Sierra Leone, the UNSC apparently underestimated the possibility of the RUF fleeing across the border to buy arms, just as they did before the embargo was authorized.[111]

Another development is that non-state actors are not just members of one specific group, but include a wide range of affiliated actors. For this reason, the UNSC establishes that arms embargoes should apply to non-state actors "and other associated individuals, groups, undertakings and entities,"[112] once again, without mentioning location. Although this is good language with broad scope, it is disappointing that the provision has been applied only once since 2002 in resolutions concerning the Taliban

Regarding how states comply with these restrictions through their national law making bodies, there are widely opposing views, as shown by what happened in Europe in 2010, when the European Court of Justice contested the implementation of UNSC sanctions on individuals' frozen assets.[113] For this reason, a challenge to the ruling could likely occur if the arms embargo includes actors that may invoke a violation of their human rights for being blacklisted without having a fair trial.[114]

If the UNSC is challenged, then there will be a debate on the protection of human rights in the fight against terrorism, while applying a smart sanction that supposes to target a specific group and not a whole country.

Interestingly, the administrative process in which these lists are created or updated involves a government's assumption that an individual or entity is linked with a terrorist group. This allegation is then submit to members of

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[109] Daniel Camacho, *Interrelationship between Drug Trafficking and the Illicit Arms Trade in Central America and Northern South America* , *in* Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action Oriented Agenda, *supra* note 22.

[110] S.C. Res. 1171, U.N. SCOR 52nd Sess., U.N. Doc. S/RES/1171 (1998).

[111] In October 1997, the RUF leader, Foday Sankoh was detained in Nigeria on arms charges, in: Letter dated 97/10/15 from the Permanent Representative of Sierra Leone to the United Nations addressed to the Secretary-General (S.C., Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the Secretary-General, 2, U.N. Doc. S/1997/800 (1997)).

[112] *See* S.C. Comm Res 1267, Guidelines for the conduct of its work, January 26, 2011.

[113] *Kadi case*, Judgment, Eur. Ct. J., Seventh Chamber, T-85/09 (2010) 179 [hereinafter Kadi case].

[114] *Id.*

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the sanctions committee for consideration, at which point they must decide if the names are to be included within 10-days.[115]

How do members of this committee determine whether or not to include a certain individual or entity? Especially, when a member state lacks diplomatic representations in areas in which the UNSC has a great influence.[116] This thought, is in line with what the ECJ concluded about the procedure of requesting for a removal from the blacklist by saying that it is a political process and not a well-defined research.[117]

To overcome this situation, the UNSC went a step forward by appointing in 2010 an ombudsperson for the Taliban Sanctions Committee, while recognizing "the need to combat by all means… including applicable international human rights... threats to international peace and security caused by terrorist acts."[118]

In conclusion, arms embargoes targeting non-state actors, and particularly those operating in a transnational basis could be applicable more often. In sum, arms embargoes remain the only universal and legally-binding rules enacted to prevent the illicit transfer of small arms and light weapons to non-state actors.

V. Conclusions and Recommendations

After reviewing the main issues of arms embargoes implemented by the UNSC, we recommend the following:

First, with respect to real threats to international peace and security, the UNSC should reform arms embargoes applicable to non-state actors, individuals and all associated entities, which are the main cause of threats to international peace and security. These actors include but are not limited to transnational organized crime groups like drug cartels, pirates or human traffickers, all of them users of small arms and light weapons.

This work has shown that there is currently no universal and legally-binding instrument that covers small arms and light weapons transfers to non-state actors. Therefore, those arms embargoes implemented by the UNSC to non-state actors are currently the only universal and legally binding mechanisms to prevent the acquisition of small arms and light weapons by these type of actors.

These rules, however, have not been applied consistently; for this reason, they need to be reformed. This is especially true in light of the fact that the arms embargo against the Taliban, resolution 1267 (1999), was deemed am-

[115] S.C. Comm Res 1267, Guidelines for the conduct of its work, 26 January 2011.

[116] *I.e.* Peru, which was a non-permanent member of the UNSC for the 2006-2007 period and has only one embassy in the Middle East: Israel.

[117] Kadi case, *supra* note 113, at 323.

[118] S.C. Res. 1904, U.N. SCOR 58th Sess., U.N. Doc. S/RES/1904 (December 17, 2009).

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biguous, and its Committee was forced to draft an ancillary document to fully explain its terms.[119] It is thus recommended that arms embargos are drafted in more detail or supplemented by documents that explain the terms to all those Sanctions Committees that could implement an arms embargo to non-state actors. If done properly, this may help facilitate a common practice for the future.

It can also be seen that the activities performed within the framework of the 1540 Committee have prevented the acquisition of weapons of mass destruction by terrorist groups. Since the main weapons used by non-state actors have been small arms and light weapons, the UNSC should discuss the possible inclusion of these armaments into the scope of the 1540 Committee. In this way, States would be obligated to refrain from providing any support to non-State actors in their attempt to illegally transfer and acquire small arms and light weapons.

This research has also identified that illicit transfers of small arms and light weapons to non-state actors, is a frequent theme in a several topics discussed at the UNSC and should receive the same treatment as other frequent themes. For this reason, the UNSC should implement a review mechanism of arms embargo. This mechanism could focus solely on the implementation of arms embargoes and prevention of the illicit transfer of small arms and light weapons.

The UNSC should implement this mechanism as it has with other issues, including the protection of children in armed conflict, issue which is frequent in different situations that are being analyzed by the UNSC. Therefore, this theme is now discussed in a special working group created specifically to "review progress in the development and implementation of the action plans and make recommendations to the Council."[120]

Pursuant to Article 53 of the UN Charter,[121] the UNSC should also collaborate with other international organizations and regional agencies that implement their own arms embargoes, such as the ECOWAS or the EU, as well as with organizations like the International Civil Aviation Organization, World Customs Organization or Interpol, all involved in the implementation of arms embargoes. Coordination would allow the UNSC to implement better and more robust embargoes. This can be accomplished through regular, open debates and meetings coordinated with these organizations.

Finally, as commented above, in 2001 the Bonn-Berlin process[122] reviewed the progress made on the implementation of sanctions, and specially-targeted

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[119] *See Explanation of Terms: Arms Embargo, Committee Pursuant Resolution 1267 (1999)* available at http://www.un.org/sc/committees/1267 (last viewed May 12, 2013).

[120] S.C. Res. 1612, U.N. SCOR 59th Sess., U.N. Doc. S/RES/1612 (July 26, 2005).

[121] The article reads as follows: "The Security Council shall, where appropriate, utilize… regional arrangements or agencies for enforcement action under its authority."

[122] M. Brzoska, Bonn International Center for Conversion, Results of the Bonn-Berlin Process (2001).

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arms embargoes. Over ten years have passed, however, and the dynamics of international security have changed, requiring a new process that can integrate the comments and recommendations of prior embargoes, especially those targeting non-state actors.

It would be useful to create an internet site that includes all relevant information in relation to arms embargoes. The Office for Disarmament Affairs of the UN Secretariat currently administrates a site on the Programme of Action Implementation Support System[123] which, although its mission is to be a "*one-stop shop* for anyone working on small arms in the UN context," still lacks thematic section on the work of the UNSC and small arms.

[123] U.N. Office for Disarmament Affairs, Implementation Support System, available at http://www.poa-iss.org.

Recibido: 13 de marzo de 2013.
Aceptado para su publicación: 14 de junio de 2013.