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„Can we derive more effective controls on the trade in major conventional weapons?“

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Are arms control laws fit for purpose to prevent arms sales that could facilitate human rights violations in conflict zones? If not, can we derive effective controls on the domestic production and export of arms from other sources?

1. Introduction

Arms, drug and human trafficking are understood to be the root causes of many of the human rights violations that take place around the world today. Effective steps have been taken and a great deal of government attention and resources have been devoted to tackling the illegal trade in humans and drugs as well as clamping down on the "illicit" transfer of arms, but the trade in major conventional weapons continues to thrive.

This thriving trade takes place against the backdrop of the established relationship between arms transfers, the exacerbation of conflicts and human rights violations[1]. A basic argument would go as follows: if the international community could stop the flow of arms, it would go a long way to stopping the root cause of many human rights violations and, consequently, prevent their occurrence. It is a simple argument but with the trade, legal and illegal, in small and light weapons as well as major conventional weapons, at an all time high, there appears to be little willingness on the part of states and arms traders to slow down the production and transfer of these lethal goods. While drug and human trafficking are strictly controlled, the arms trade has somehow avoided the same level of restriction.

The main founding motivation of United Nations was to "save succeeding generations from the scourge of war"[2]. It appears almost counter-intuitive that the prominent states of the global order have done so little to limit the means by which wars, the wars they set out to prevent at the signing of the UN Charter in 1945, are waged. Not only have they done little to prevent the proliferation of arms in areas of conflict, the five permanent members of the UN Security Council rank among the biggest exporters of

[1] S.L. Blanton, 'Promoting human rights and democracy in the developing world: US Rhetoric versus US arms exports', *American Journal of Political Science* 44, 2000, p. 123–131
[2] Charter of the United Nations, 24 October 1945, Preamble

major conventional weapons, with the importers frequently countries associated with human rights violations and breaching international humanitarian law. The arms trade possesses almost enigmatic status – there is an awareness of how arms contribute to wars and suffering, yet it is a trade that flourishes and eludes effective control.

In the past, weapons tended to be produced for use only by the state that would use them. British weapons were made for the British army, navy and air force and used by British servicemen. But with the end of the Cold War and the spread of peace across the European continent, there was a lesser need for countries such as Britain and France to continue producing armaments at the same level as before and maintain huge numbers of conventional arms in storage. Simultaneously, however, the arms industry represented a major source of employment and was a critical feature of many Western economies. There was therefore pressure to maintain the existence of this industry. Arms manufacturers had to seek a new customer base and with this, the modern trade in arms from the nations of the "global north" to the "global south" was born.

Arms companies also had to streamline their operations to cope with new market conditions and also merge with other entities in order to maintain their economic viability. One prominent example was the merger of British Aerospace and Marconi Electronic Systems in the late 1990s to form the current, most prominent British producer of major conventional weapons, BAE Systems[3]. The modern arms trade is one in which state decisions are infused with company motivations, producing a blurred picture between state and non-state action. This thesis will attempt to untangle this web and address the specific legal obligations of the state as well as the expanding discourse of private actor duties to protect human rights in order to ascertain if more effective controls over the global trade in arms can be derived than existing controls.

As well as being an examination into existing and potential arms controls mechanisms; this thesis also aims to expose a double standard that lies behind the global trade in

[3] R. Durnham, *Supplying the Enemy: The Modern Arms Industry & the Military-Industrial Complex*, Columbia MD USA, 2015, p. 81

major conventional weapons. It will explore the gaps in current arms control systems incumbent upon the states themselves and the weapons manufacturers in order to hypothesise about much needed changes. Ultimately this thesis is a study into a phenomenon that facilitates the arbitrary loss of civilian life with minimal accountability for the suppliers of arms and a pursuit of more effective control over the billion-dollar industry.

This thesis will attempt to decipher what the arms trade represents insofar as the rationale behind the supply of weapons from one country to another and to untangle the interwoven roles of the state and non-state actors such as arms manufacturing business in the industry. Most importantly, it will ask, from a human rights perspective, if we can derive obligations firstly on states to limit the arms exports it authorises. This will require an analysis of the state's obligation to abide by various relevant sources of arms control law and international law. It will also involve a consideration of the non-state actors involved in the arms trade, the companies who produce and seek to export major conventional weapons, and ask if a more effective way of controlling the irresponsible flow of arms is to clamp down on the actions of these private actors.

1.1 Past examples of the arms trade-human rights violation link

We know that there is a link between the provision of weapons and the commission of human rights violations because there have been a succession of events which show this. There are several well-known examples of when the transfer of arms has led to an increase in human rights violations in a particular setting or exacerbated an ongoing situation of violations in conflict.

Almost invariably, in the modern era of the arms trade, these examples show a direction of trade where the weapons are produced an exported from Western powers and are delivered to countries with troubling human rights records and those that are embroiled in armed conflict.

The Rwandan genocide of 1994 is one of the best-known cases of mass killing and severe human rights abuse in recent history. Much academic attention has been devoted to how Rwanda has developed international understanding of genocide and war crimes, yet relatively little study has been carried out on how the attacks were facilitated. Groundbreaking investigative research[4] by Human Rights Watch and Amnesty International before and after the 1994 genocide spotlighted the supply of arms from France to the militants that perpetrated the mass killing. Through the early 1990s and up until the onslaught of the genocide, France appeared to have no hesitation in "showering arms"[5] on Rwanda when "ethnic tensions were on the brink of explosion"[6]. In the context of the Rwandan genocide, details later emerged of weapons transfers not only from France but also from Bulgaria, South Africa, Israel and Albania to the African nation before and immediately after the 1994 genocide[7]. Evidence also emerged in late 1996 that a British company had exported weapons to the Rwandan Hutu militia after the government had failed to incorporate a UN arms embargo into UK law[8].

During the civil war in Sierra Leone, the rebels of the Revolutionary United Front who terrorised the innocent citizens of Freetown, were supplied with arms by the Liberian government of Charles Taylor and Russian arms dealer Viktor Bout[9]. The Special Court for Sierra Leone successfully indicted Charles Taylor for his role in the supply of weapons which facilitated the atrocities[10]. The case marked a watershed moment and created a precedent that yes, those who provide the means to commit atrocities and who facilitate them, can and should be held accountable for the human lives lost. While the case of Charles Taylor of course involved an individual, it is symbolic of the principle that those who facilitate severe human rights violations should be held responsible for them. I would argue that this should apply equally to state actors as it does to individual criminals in the illicit arms trade. This thesis aims to clarify if such a finding of

[4] L. Misol, 'Weapons and War Crimes: The Complicity of Arms Suppliers', *Human Rights Watch World Report*, 2004
[5] Misol, p. 279
[6] Misol, p. 279
[7] Misol, p. 279
[8] A. Hinds, 'The arms trade and human rights', *The International Journal of Human Rights*, 1997, p. 32
[9] Misol
[10] *Prosecutor v. Charles Ghankay Taylor*, Special Court for Sierra Leone, 26 September 2013

responsibility against a supplier of major conventional would be possible and, more importantly, if it would lead to more effective control over the trade.

Another prominent example which shows the link between arms received, mass violation of human rights and the flow from Western states to those embroiled in conflict is the first Gulf war, concluding at the beginning of the 1990s. Throughout the 1970s and 1980s France, the UK, the US, the Soviet Union and Germany competed fiercely with each other to sell conventional and unconventional weapons to Iraq.

In the build up to the second Gulf war during 2002 and early 2003, details emerged of the supply of arms from all Permanent Members of the UN Security Council to the oppressive Iraqi regime a decade prior[11]. Years prior to the first Gulf war, in 1984, newspapers reported[12] on material support of the US and UK for the Iraqi chemical and biological weapons program through the sale of chemicals and technology. Specifically, the sale by British firms of "thousands of kilos of the basic ingredients of nerve and mustard gas to Iraq and Iran"[13] was exposed. Four years after that article, in 1988, Amnesty International reported that 5,000 people – mostly civilians, among them many children and women – were deliberately killed and thousands wounded by chemical weapon attacks by Iraqi forces in Northern Iraq[14]. Support also came in the form of artillery, tanks, military vehicles, fighter planes and helicopters from the Security Council Permanent Members.

These examples show the fact that the irresponsible transfer of weapons, whether by individual arms traffickers as in the case of Charles Taylor, or state endorsed weapons transfers such as the cases of Rwanda and Iraq, there is a clear indication that the arrival of weapons has often been the trigger of massive violations of human rights law. There is, I would argue, an undeniable causal relationship. And yet state practice has not

[11] Amnesty International, *'A Catalogue of Failures: G8 Arms Exports and Human Rights Violations'*, 2003, p. 3
[12] ibid
[13] ibid
[14] ibid

changed. Even now Western states maintain arms trade relationships with buyer states who are widely understood to be at risk of committing violations of international law.

1.2 The arms trade and the Saudi-led intervention in Yemen

The UK, among other Western states, is currently involved in the supply of arms to Saudi Arabia who are leading a coalition of Gulf states against Houthi insurgent forces in Yemen, allied with military groups who remained loyal to the former Yemeni President Saleh. The war in Yemen between these Gulf states led by Saudi Arabia and rebel groups is the most prominent current example of a situation where the supply of arms appears to have led to serious human rights violations.

Since the war began in March 2015 until January 2016, civilian casualties totalled 8,119 with the number of fatalities at 2,795[15]. In December 2015 alone, at least 62 civilians were reportedly killed by airstrikes by the Saudi Arabian-led coalition fighting back against the Houthi-led insurgency. During February 2016, at least 168 civilians were killed and 193 injured, around two-thirds of them by Coalition airstrikes[16]. As recently as 27 February, at least 39 civilians, including nine children, were killed by a coalition airstrike that struck Khaleq market in a north-eastern district of the city Sana'a. It was one of the worst single incidents of civilian killings since the start of the war. On top of staggering levels of civilian suffering, airstrikes have also allegedly targeted hospitals and health facilities[17].

Western countries such as the United Kingdom, the United States of America and France are the source for many of the weapons that the Saudi Arabian air force has used in its assaults on Yemeni territory since the start of the war. The UK is a long time

[15] UN News Centre, *'Yemen: civilian casualties top 8,100 as airstrikes and shelling continue, UN reports'*, 5 January 2016 (http://www.un.org/apps/news/story.asp?NewsID=52938#.VynCkhV96Rs accessed 4 May 2016)
[16] UN Multimedia, *'Geneva / Yemen Human Rights'*, 4 March 2016 (http://www.unmultimedia.org/tv/unifeed/asset/1577/1577530/, accessed 4 May 2016)
[17] Médecins Sans Frontières, *'Yemen: Health facilities under attack - MSF wants answers'*, 25 January 2016 (http://www.msf.org/en/article/yemen-health-facilities-under-attack-msf-wants-answers, accessed 4 May 2016)

supplier of weapons to the Saudi kingdom, but since the beginning of hostilities in early 2015, the UK sold $4.4 million worth of weapons to Saudi Arabia – almost 40% of UK arms sales from March to December last year[18]. The company BAE Systems has profited greatly from sales to Saudi Arabia, with 22% of its 2015 revenue originating from the Kingdom[19].

There has been one particularly high profile incident in which it is certain that a British produced missile struck a civilian target and killed one civilian. Amnesty International and Human Right Watch both reported the case. This is demonstrative of the fact that it has almost entirely been left to NGOs to carry out these investigations and issue reports in the absence of investigations by the Saudi authorities. The case involved a British missile sold in the 1990s which struck a ceramics factory on 23 September 2015 and killed one man in the vicinity of the attack, 28 year old Yahya Abd al-Karim al-Sawary[20]. This may be only one incident, but with the millions of dollars worth of weapons sold and the reported widespread nature of attacks against civilians – there is, at the very least, a significant likelihood that weapons originating from the UK, USA, France or other "Western" nation will be used or have been used in the unlawful deprivation of civilian life by Saudi forces.

Saudi Arabia's military intervention in Yemen brought attention back to the arms trade and human rights issues involved. The case has regenerated interest in this area for two reasons. Firstly, the Saudi Arabian forces are widely accused of having killed thousands of civilians in their mission to rid its southern neighbour Yemen of a Houthi backed rebellion. Secondly, many Western states including the UK, the USA and France are involved in supplying arms to Saudi Arabia before and during the intervention in Yemen. While the Saudi intervention is an active situation at the time of writing, it

[18] Bloomberg, *'U.K. Urged to Mull Halting Saudi Arms Sales Over Yemen'*, 4 May 2016 (http://www.bloomberg.com/news/articles/2016-05-03/u-k-should-mull-halting-saudi-arms-sales-over-yemen-panel-says, accessed 4 May 2016)
[19] ibid
[20] Amnesty International, *'Yemen: Coalition used UK missile in unlawful airstrike'*, 25 November 2015 (https://www.amnesty.org/en/latest/news/2015/11/yemen-coalition-used-uk-cruise-missile-in-unlawful-airstrike/, accessed 4 May 2016)

raises important questions about the arms trade in general and the responsibilities of arms supplying states more widely.

1.3 The changing nature of the arms trade

It is important not to consider the case of the arms supply to Saudi Arabia during the war in Yemen in isolation, but to ask what the reasons are for why the arms trade has developed in such a way where human rights promoting countries are willing to facilitate human rights violations.

As noted previously, the end of the Cold War, and the subsequent fall in demand from major powers, led the global conventional arms market to become "an unprecedented buyer's market"[21]. In the reduced-threat security environment of the 1990s, the domestic demand for arms plummeted. The change in market conditions forced arms manufacturers to look beyond their traditional domestic markets and seek to sell their wares more aggressively and more illicitly than before.

The arms trade is such a valuable feature of modern Western economies, in bringing in revenue that adds to a nation's wealth as well as creating a huge number of jobs, that arms transfers are now seen to be an "economic necessity"[22]. This dependence of national economies on arms exports to dangerous importing nations has to be reconciled with the fact that exporting such products to countries who are understood to violate human rights is a "potential obstacle"[23] for any country to maintain a position of promoter of human rights. Erickson considered this balancing act in the post-Cold War, reduced threat environment, between promoting values such as human rights on the one hand and delivering economic prosperity on the other. The sobering conclusion she

[21] J. Erickson, 'Market imperative meets normative power: Human rights and European arms transfer policy', *European Journal of International Relations,* 2011, p. 209
[22] Erickson, p. 209
[23] Erickson, p. 209

arrives at is that "where material interests and human rights clash, member states will follow the money"[24].

1.4 An area of 'double standards' and denials

The human rights world is familiar with the prevalence of double standards between what a state preaches and what it practices. The focus of this thesis is the arms trade, a further area in which human rights promoting states seem to undermine those same values with its actions. Western governments condemn foreign regimes for perpetrating awful atrocities yet at the same time they provide the means to facilitate equally horrific acts, only by our "allies". There is undoubtedly a "questionable relationship"[25] between the norms that arms supplying countries propagate, such as the universal protection of human rights, and their arms transfer practices.

The world has watched in despair as the civil war in Syria has trudged on for over 5 years, with hundreds of thousands of lives lost and accounts of mass atrocity crimes shocking our moral conscience, until the next report emerges. Western states have been largely passive in the Syrian tragedy, with limited engagement assisting "moderate opposition groups" and attempting to bomb targets of the Islamic State. Most of Western public scorn, shock and horror has been directed at the atrocities committed by the Islamic State itself and, on a much larger scale, by the Syrian regime with the support of its Russian partner.

A few thousand miles south of Syria, another atrocity-filled war has been raging. Similar to the Syria story, a failed "Arab Spring" political revolution in Yemen eventually led to the commencement of hostilities and descent into all out civil war, with various factions, complex dynamics and human suffering on a massive scale. But unlike Syria, in Yemen Western States cannot claim passivity or non-involvement.

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[24] Erickson, p. 213
[25] Erickson, p. 209

This is because since the start of the Yemen war in March 2015, Western states have continued to supply weapons to Saudi Arabia, the force that has killed most civilians and committed most atrocities in the conflict through its aerial campaign. It is entirely possible that countries such as the USA, UK and France have potentially facilitated atrocities committed by the Saudi air force including hospital bombs, massacres at weddings, and killing entire families in their sleep. At the very least, they have failed to arrange investigations into alleged war crimes and civilian deaths. They have also failed to fulfil due diligence of verifying the manner in which the Saudi importers have used the arms bought. In this sense, these Western states have facilitated the atrocities that have taken place in Yemen.

But how, two years after the entry into force of the Arms Trade Treaty, also referred to as the ATT, the world's most comprehensive and widely ratified arms control convention, has this been possible? What were the events that led to these controls, and how do the circumstances of what is happening in Yemen apply to international, regional and domestic laws? What are the provisions of this and other regional and national arms control laws that are designed to protect human life by restricting arms transfers, and why have they not worked? What are the human rights provisions of these laws and why does it appear that they are not working? These are some of the questions that this thesis will seek to provide a degree of clarity on.

The weapons supplying nations have reacted to reports of atrocities in Yemen in various ways. The reactions have ranged from denials, to justification of attacks on various legal basis, to absolving themselves of responsibility by claiming that once the arms are in the possession of the buying state, it is the exporting state's responsibility how they are deployed. Whichever means employed, the governments of arms supplying states appear to have avoided the public outcry and condemnation that might be expected to follow news of government involvement in what are potentially war crimes. In this sense, the defence of arms sales to Saudi Arabia that we have seen in the past year appears to resemble the arguments of “plausible legality”[26] that “rationalised”[27] human rights violations in the eyes of the public, committed by the armed forces of the US and UK during the ‘War on Terror’. It is argued that this is indeed the case, that current administrations who permit the export of arms to Saudi Arabia are borrowing from the playbook of previous Presidents and Prime Ministers. However just as those leaders have avoided accountability for their decisions in that era, it is likely that the heads of state who have sanctioned arms exports to Saudi Arabia during the conflict in Yemen will follow suit.

Civilians continue to be killed in Yemen, Saudi Arabia continues to claim these are accidental or necessary in order to strike legitimate targets, and Western governments and companies continue to supply arms while denying responsibility and failing to investigate the end use of exported weapons. When it comes to the well-publicised war crimes and outrageous human rights violations in Syria, the western public has grown used to hearing the need, whenever that war finally ends, to hold the guilty parties accountable. In Yemen, there is no lesser need for accountability, even if that pursuit ends up at the doorsteps of our Western leaders. Part of this thesis will consider the possibility of finding arms supplying states as responsible from violations of human rights and IHL by international rules on complicity, and how this might lead to more effective control of the arms trade.

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[26] R. Sanders, ‘(Im)plausible legality: the rationalisation of human rights abuses in the American ‘Global War on Terror’, *The International Journal of Human Rights*, 2011, p. 605-626
[27] Sanders

2. Analysis of existing arms control

The concept of controlling trade in arms is a relatively novel concept and indeed there is no international rule which obliges states to limit the quantity of arms they possess[28]. The *Nicaragua* case held that, "there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited"[29]. Thus it is perhaps unsurprising that international efforts to stem the trade in deadly weapons are still struggling to achieve total compliance.

As the trend of developed nations supplying arms to less developed or "global south" countries grew, so did awareness of the human cost of uncontrolled transfers as civil wars spread in many parts of the world[30]. Arms control became key and spurred by a wave of atrocities as well as pressure from civil society, states recognised the necessity to adopt minimum arms-transfer criteria at national, regional, and international level.

In the UK, the newly elected Labour government of Tony Blair introduced new national export licensing criteria on weapons in 1997 and the following year a common set of European Criteria quickly followed. After over a decade of concerted campaign by NGOs and civil society activists, the United Nations General Assembly finally approved the Arms Trade Treaty[31] and in December 2014 the ATT entered into force. However, the continued flow of arms from the UK, the USA, France and others to Saudi Arabia has shown that domestic, European and international arms control regimes may not be having the desired effect and still leave a lot of room for governments to approve transfers that appears to endanger human rights. There remains a major deficit in enforcement and implementation of arms control legislation, at all levels. This section will consider these existing arms control instruments.

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[28] A. Bellal, 'Regulating International Arms Transfers from a Human Rights Perspective', *Geneva Academy of International Humanitarian Law and Human Rights*, 2012, p. 448
[29] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, International Court of Justice, 1986
[30] Misol
[31] United Nations Arms Trade Treaty, New York, 2 April 2013

This section will analyse the existing arms control instruments in order to determine why major conventional weapons are still exported to dangerous end users when that is precisely what arms control is intended to prevent. Yanik[32] considered a snap shot of global arms sales from 1999 to 2003, seeking to establish a pattern between human rights records of buyer countries and arms transfers from Western powers. One would hope that, with a raft of arms control in place to prevent irresponsible arms transfers from taking place, a poor domestic human rights record would lead to less arms imports received from arms producing nations. But her findings were the opposite. State practice showed that in this period, most supplier countries would "uphold their commercial and national security concerns and turn their backs on human rights concerns that they had long championed"[33]. This indicates the clear weakness in the arms control instruments that existed at that time.

Yet this flow of weapons to countries with an obvious lack of respect for human rights principles is not confined to history. Nor are the weaknesses in arms controls, as there have since been important updates and new additions to the international framework controlling the trade in major conventional weapons. But the failure of these instruments to effectively prevent dangerous arms flows seems to persist, as the furore over arms sales from Western nations to Saudi Arabia through 2015 shows. Aside from this example, as has been shown there are several other past and current examples of arms transfers from major powers to countries with problematic human rights records.

There has been limited research on this area of trade and foreign relations and the effectiveness of existing arms trade controls. It is almost as if it is a "no go" area and an accepted reality. Despite the glaring contradiction of countries who promote human rights, peace and security and at the same time selling weapons to states who are known human rights violators, research on how major powers' arms trade relations mirrors

[32] L. Yanik, 'Guns and Human Rights: Major Powers, Global Arms Transfers and Human Rights Violations', *Human Rights Quarterly*, 2006, p. 357-388
[33] Yanik

there normative commitments in the field of human rights is scarce[34]. This thesis is a modest attempt to address this scarcity and challenge this reality by clarifying the responsibilities of arms supplying states. Furthermore it will examine the success of controlling the trade in major conventional weapons and how the international legal regime could be used to derive further controls on the arms trade, in order to prevent the transfer of arms to dangerous end users.

The Saudi intervention in Yemen has shown, once again, that arms exporting states who work in tandem with arms producing companies are willing to continue to sell arms to states with a record of human rights abuse and when there is a clear risk of human rights and IHL violations. In these circumstances it has to be asked, in a first place, what are the current laws and regulations that exist to control the trade in conventional arms and secondly, if those laws and regulations are effective, if they are "fit for purpose". After considering the key provisions of existing legal instruments of conventional arms trade control and their effectiveness, the thesis will explore other sources from which alternative controls on the arms trade could be derived.

Following an analysis of the efficacy and enforcement of the law that is in place, it is important to consider if controls on the domestic production and sale in conventional arms can be derived from other sources. Given the devastating effect on human rights and violations of IHL that can stem from the improper and illegal deployment of conventional arms, the first potential source of controlling the arms trade is the law on state responsibility for internationally wrongful acts. This line of enquiry is premised on the idea that if a weapons exporting state were to be in some way held responsible for human rights or IHL violations on the basis that it provided the means for those violations, it could serve to restrain future state conduct in arms sales. Before considering existing controls on the trade in major conventional weapons, it is important to examine an alternative context in which arms control appears to have had an element of success.

[34] Erickson, p. 209

2.1 Successful control of "pariah weapons", small arms and light weapons

This thesis deals with the trade in major conventional weapons. When we refer to "arms" or "weapons", it is a reference to this specific category of weapons. The Arms Trade Treaty defines the scope of this category and includes: "battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; and small arms and light weapons"[35].

The author acknowledges that separate treaties and regulations have been agreed to and control the trade in other types of weapon, for example chemical, biological, landmines and cluster munitions. Indeed "extensive diplomatic and technical efforts have been made to ban the production, use and spread of nuclear, chemical and biological weapons" as "conventional arms have gone largely untouched by the international community"[36]. The 1993 Chemical Weapons Convention[37] and the 1972 Biological Weapons Convention[38] are generally well adhered to in a way that has eluded attempts to control the trade in major conventional weapons. There seems to be an acceptance among states that the trade or use of biological and chemical weapons is a highly illegal act which would result in condemnation by the international community.

Arms control, has then, to a certain extent, worked. There has been success in controlling the trade of these categories of weapon – those that have come to be known as "pariah weapons". They have achieved this status on the basis of meeting one of three criteria[39]: the weapon's inherent characteristics (for example if it is a weapon that would cause "superfluous injury or unnecessary suffering"[40]); its typical impact (for

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[35] Arms Trade Treaty, Article 2(1)
[36] J. Erickson, *'A Dangerous Trade – Arms Exports, Human Rights and International Reputation'*, Columbia University Press, New York, 2015, p. 5
[37] Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, 1993 (https://ihl-databases.icrc.org/ihl/INTRO/553?OpenDocument)
[38] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972 (https://ihl-databases.icrc.org/ihl/INTRO/450?OpenDocument)
[39] Bellal, p. 449
[40] Article 35(2), Article 51(4) of 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts

example if a weapon could have a disproportionate impact on civilians caught up in armed conflict, or its use in torture); and finally the actors who use the weapon (for example the transfer of weapons to non-state armed groups is internationally condemned).

As a result, the contemporary trade in these weapons is effectively restrained. The widespread international condemnation and subsequent unanimous adoption of Security Council Resolution 2118[41] following the alleged use of biological weapons against civilians in Ghouta by the Syrian regime in 2013[42] is evidence of this. That incident was arguably the closest the international community came to sanctioning an intervention in the long-running Syrian war. This shows the strength of feeling against biological and chemical weapons that it pushed the international community to the point of intervention in a conflict that has largely been allowed to proceed with minimal meaningful interference from the outside world.

Regarding landmines, the International Campaign to Ban Landmines led to the 1997 Ottawa Mine Ban Treaty. This instrument of arms control was met with widespread acceptance and while there remain areas of the world that continue to be adversely effected by landmines[43], generally the 1997 Treaty has let to much greater restraint in their trade and use. The success of the Treaty against landmines also "legitimised the pursuit of arms control based on its relationship to societal security, individual well-being and humanitarian obligations"[44] and added to the growing momentum to effectively deal with the seemingly uncontrollable trade in major conventional weapons. However the control that has successfully been exercised over landmines is not "wrapped up in the same degree of political complexity"[45] as controlling the trade in

[41] S/RES/2118
[42] BBC News, 'Syria chemical attack: What we know', 24 September 2013 (www.bbc.co.uk/news/world-middle-east-23927399, accessed 10 January 2016)
[43] Landmines still have a lethal effect in countries such as Bosnia and Colombia http://www.aljazeera.com/indepth/features/2014/02/bosnia-mines-still-kill-20-years-later-201425131626160304.html, http://lens.blogs.nytimes.com/2015/10/28/a-legacy-of-landmines-in-colombia/?_r=0)
[44] Erickson, *A Dangerous Trade*, p. 62
[45] Erickson, *A Dangerous Trade*, p. 62

major conventional weapons and thus this presents a far greater challenge. This thesis is an attempt to establish if existing legal instruments will be capable of meeting this challenge or if it will be necessary to derive controls from alternative sources of law to progress the struggle against major conventional weapon proliferation.

I believe it is unrealistic to expect that control over the trade in major conventional weapons will achieve the same level of success as control over the trade in “pariah weapons” to effectively control current trends in the arms trade. Some have forwarded the notion of “norm cascades”[46] to explain that it takes time for controls over the trade in major conventional weapons to have the same effect as controls over biological and chemical weapons and landmines. Erickson[47] theorises that it requires times and “tipping points” for new norms, such as the new Arms Trade Treaty, to gain prominence and legitimacy, and presumably, be effectively implemented. While this be the case, and “norm cascades” may over time eventually lead to a change in state behaviour towards trade of major conventional weapons, this thesis is very much focused on events of the present day and implementation of law as it stands. In the immediate term, it is vital to analyse the provisions and potential shortcomings of current law to answer why current, irresponsible trends in arms exports persist.

The attempts to control the trade in major conventional weapons have clearly not had the same level of success at achieving this mission as controls over chemical and biological weapons or landmines. Some academics have argued that these attempts have been unsuccessful because they have “buckled under the weight”[48] of states’ sovereignty, foreign policy and economic interests. While this may be the case, it is important to evaluate these laws, regulations and treaties that have sought to restrain the production, import and export of major conventional weapons and ascertain if their specific provisions also contribute to their lack of effect.

[46] M. Finnemore, K. Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 52 (4), 1998, p. 887–917
[47] Erickson, *A Dangerous Trade*, p. 4
[48] Erickson, *A Dangerous Trade*, p. 5

2.2 Attempts to control the trade in major conventional weapons

There exists a raft of laws and regulations at international, regional and domestic level to control the trade of conventional arms, and to prevent arms exports that risk facilitating human rights violations both in times of peace and in the midst of conflict. The latest of these at the international level is the Arms Trade Treaty. This treaty encapsulates the same ethos of similar attempts to control exports of conventional arms that already exist. The UK Export Control Act 2002, EU Code of Conduct on Arms Exports and the EU Common Position on Arms Exports all contain language and provisions similar to what the ATT codifies at the international level. They are examples of national and regional mechanisms that are intended to restrain the trade in conventional weapons to situations of human rights and IHL violations. These laws and codes should prohibit or in the least "discourage" arms transfers to countries with poor human rights records or where there is a risk of them being used in the commission of violations of humanitarian law.

Since the mid-1990s, in particular following the 'Arms to Iraq' scandal and others in which European states were found to have supplied weaponry to forces which then became enemies, there was a growing recognition of the need for a series of measures, at international and national level, to address concerns over the extent to which arms sales exacerbated human rights concerns[49]. Towards the end of the decade, there seemed to be an awakening of consciousness as states brought new arms control legislation in to law. For the most part, these new laws recognised the importance of taking account of human rights considerations when granting arms export licenses. The necessity of an over-arching arms control convention became evident in order to ensure a uniform consideration of human rights standards in importing countries. An international regime was also important to prevent states with strict national criteria from being penalised by losing out on revenue to those states that liberally exported arms with little checks on the human rights implications of transfers.

[49] Hinds, p. 37

2.2.1 National level

At the domestic level, states have enacted arms export controls as the market in major conventional weapons became more and more of a "buyer's market" in which the arms exporting states could not control how the importing states would deploy the weapons. As it became clear that receiving states could and would use the imported arms against civilians, committing human rights violations and breaching international humanitarian law in the process, arms producing states understood the need to prevent the export of those weapons.

Attention has increasingly been paid to "the nexus" between the availability of arms, conventional and small, and the "perpetuation of violent acts on a large scale". This growing awareness of the nexus between arms availability and the commission of violent, illegal acts in war and in peace, led many states to include "end-use criteria" based on human rights and humanitarian concerns in theirs domestic arms transfer laws and export control regulations.

As this thesis was inspired by problematic nature of the UK's arms trade and particularly the controversial continued supply of arms to Saudi Arabia during the Yemen conflict and amidst reports of civilian targeting, human rights and IHL violations, it is logical to consider the UK system of arms export control.

The UK has had an ostensibly strict system of UK arms export controls since the Scott Report in 1996 following the 'Arms-to-Iraq'[50] affair recommended a thorough review of strategic export controls and export licensing procedures[51]. The Labour party's 1997 election manifesto pledged, following the publication of the Scott Report, to "not permit the sale of arms to regimes that might use them for internal repression or international aggression". Tony Blair's newly elected government promised to "increase the transparency and accountability of decisions on export licences for arms. And we will

[50] It was found after the Scott Report that prior to the first Gulf War in 1991 the British government had endorsed arms from British companies to Iraq under the rule of Saddam Hussein
[51] J. Lunn, 'UK arms export control policy – Briefing Paper', House of Commons Library, 8 May 2015

support an EU code of conduct governing arms sales."[52] To their credit, the government followed through on their promise and introduced new national export licensing criteria[53]. In October 2000 the UK government fulfilled their promise of operating stricter export licensing controls by introducing the Consolidated EU and National Arms Export Licensing Criteria. The 'Consolidated Criteria', as they are known, "brought together the UK's national export licensing criteria with those of the EU Code of Conduct on Arms Exports"[54].

All applications to export arms or weaponry goods from the UK are considered on a case-by-case basis against the Consolidated Criteria by the Export Control Organisation – part of the Department of Business and Skills and after consultation with the Foreign and Commonwealth Office, the Ministry of Defence and the Department for International Development. In applying the Consolidated Criteria, the Export Control Organisation is required to deny the licence for an export if the proposed export would:

- Contravene the UK's international commitments (ie breach arms embargoes or sanctions)
- *Be used for internal repression or the abuse of human rights*
- *Provoke or prolong armed conflicts or aggravate existing tensions in the destination country*
- *Be used aggressively against another country*
- Adversely affect the national security of the UK or allies
- *Be to a destination where the behaviour of the buyer country raises concerns with regard to its attitude to terrorism or respect of international law*
- Be diverted or re-exported under undesirable conditions
- In the case of developing countries, seriously hamper the sustainable development of the recipient country

If the proposed export fails to meet one or more of these criteria, the Export Control Organisation is supposed to refuse the export licence.

[52] *New Labour because Britain deserves better*, Labour Party 1997 General Election manifesto
[53] Lunn, p. 4
[54] Lunn, p. 4

After introducing the 'Consolidated Criteria', the UK government took steps to further review the statutory framework governing export controls and bolster the system to prevent dangerous exports by passing the Export Control Act 2002, which came into force in May 2004. The Act sought to ensure that "greater consideration was given to sustainable development when assessing export licence applications"[55]. Furthermore the Act states controls will be imposed on arms exports in the event of "relevant consequences"[56] such as the "adverse effect on peace, security or stability in any region of the world or within any country"[57] and "breaches of international law and human rights"[58] that exported arms could cause, or contribute to causing.

2.2.2 Regional level

Since the 1990s, the EU has had an export control regime, seeking to create standards against which governments decide upon permitting or denying export applications. The 1998 EU Code of Conduct on Arms Exports sought to formalise standards the EU would use to try and influence how member states made decisions on conventional arms exports. Among the provisions, the Code of Conduct states that member states should not issue export licences when there is "a clear risk that the proposed export might be used for internal repression"[59] or that the arms would "prolong armed conflicts"[60]. Furthermore, states should also "take into account…the record of the buyer country with regard to…compliance under international humanitarian law"[61].

The 1998 EU Code of Conduct became legally binding in 2008, when it became the EU Common Position on Arms Export Controls defining common rules governing control

[55] Lunn, p. 6
[56] UK Export Control Act 2002
[57] UK Export Control Act 2002, 'Relevant Consequences'
[58] UK Export Control Act 2002, 'Relevant Consequences'
[59] Criterion Two
[60] Criterion Three
[61] Criterion Six (b)

of exports of military technology and equipment[62]. The EU Code of Conduct on Arms Exports mirrors the UK Consolidated Criteria and indeed the Consolidated Criteria brought the provision of the 1998 voluntary Code of Conduct into the UK system of export controls.

The Common Position's reference to human rights considerations is explicit. The Common Position contains several criteria which are intended to prevent arms exports to countries or end users who might be deploy them to commit human rights violations, breach international law or exports which would worsen an already active conflict situation. For example, criterion three states that "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". Furthermore, under criterion six EU member states are supposed to consider "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" in the process of either giving or denying permission for arms exports.

At first glance, these EU provisions, if implemented correctly, should lead to applications to export major conventional weapons to dangerous end users being blocked. During the Saudi-led campaign in Yemen, it seems that certain EU countries have correctly implemented the EU provisions and have taken action at national level to block weapons exports to Saudi Arabia as long as evidence of violations of international law continue. The Netherlands, for example, has prevented further exports to Saudi Arabia since March 2016[63]. But the inconsistency in application across the member states suggests there are weaknesses in the EU arms control regime.

[62] COUNCIL COMMON POSITION 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment
[63] 'Dutch parliament votes to ban weapon exports to Saudi Arabia', *Reuters*, 15 March 2016 (http://www.reuters.com/article/us-netherlands-saudi-arms-idUSKCN0WH2U4, accessed 16 March 2016)

2.2.3 International level

The end of the Cold War saw the creation of a series of international laws on arms exports. These were effectively predecessors to the Arms Trade Treaty. This initial raft of international arms control regulations came about partly thanks to pressure from civil society, and partly due to the optimistic environment that emerged in the aftermath of the Cold War, in which the East-West conflict dissipated. Another factor that pushed a first wave of attempts at international conventional arms control was various arms transfer scandals, perhaps the most prominent the supply from European states to Iraq before and during the first Gulf War, which were then used against the very states who had provided the arms and equipment[64]. These scandals were initially blamed on companies but governments eventually admitted their knowledge and acquiescence of such transfers[65]. With states sanctioning arms exports that were not only facilitating human rights violations against civilians, but also endangering the armed forces of the arms producing and exporting states, there was new impetus to develop effective international controls that would block exports when such risks were present.

However these early attempts at international control of the trade in conventional weapons did not reach their goal of a more responsible legal environment for arms transfers. One such creation was the UN Register of Conventional Arms, the “only concrete outcome”[66] from the post-Cold War momentum towards creating an effective international system of control over arms exports. It was a medium for supplier and recipient states to disclose information on the sale and purchase of conventional weapons. It was not a binding document that would stand a strong chance of reigning in irresponsible arms transfers but merely an exercise in encouraging transparency. The Register only required voluntary participation and accordingly its efficiency and effectiveness at preventing arms exports that could endanger civilians was questionable.

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[64] Erickson, *A Dangerous Trade*, p. 115
[65] “It became clear both that the government had supplied arms to Iraq that were used against British troops and that it had made a “secret change of policy” on arms sales, which it kept from the Parliament and the public”, in Erickson, *A Dangerous Trade*, p. 115
[66] Erickson, *A Dangerous Trade*, p. 58

Above the contemporary national and regional arms export laws and legislations in the legal hierarchy; there lies the recently adopted Arms Trade Treaty. The global concerns that eventually led to the adoption of the ATT are manifold. They include, for example, the proliferation of small and light weapons, "the real weapons of mass destruction"[67] in the words of Kofi Annan, which exacerbate and facilitate many wars in the global south and especially Sub Saharan Africa, the use of weapons for internal oppression and the risk that arms end up in the hands of terrorists or international criminals.

The supply of arms from a host of countries to Saudi Arabia during its intervention in Yemen comes soon after the ATT's entry into force in December 2014. As a result, the Saudi intervention and reports of alleged violations of human rights and international humanitarian law provide a useful yardstick to examine the ability and the success of the Arms Trade Treaty to control arms sales and prevent the transfer of major conventional weapons to situations which involve potential violations of international humanitarian and human rights law.

The Arms Trade Treaty is intended to prevent human rights violations and atrocity crimes by providing a framework for states which dictates when an arms transfer should not be made. At the same time, the ATT looks to safeguard the legitimate trade in weapons and protect the right to security which arms are a necessary component of. The key provisions of the Treaty are intended to require countries to refrain from exporting arms when the weapons facilitate the commission of atrocity crimes, human rights abuses and violations of international humanitarian law. As will be seen, the Treaty's final version is lacking in strength and stringency in key areas which effectively provide loopholes for the continued supply of weapons to fulfil key foreign policy alliances that have been discussed – namely supply of security intelligence and energy.

[67] Speech to UN Millennium Summit in 2000, quoted in M. Bourne, *Arming Conflict: The Proliferation of Small Arms*, Palgrave MacMillan UK, 2007, p. 3

The core provisions of the ATT and those that are of most relevance to the role of arms control in preventing human rights violations are Articles 6 and 7.
Article 6(3) states that:

"A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

Article 7 requires state parties to carry out an export risk assessment before issuing an export licence for the transfer of major conventional weapons:

"If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms … shall … assess the potential that the conventional arms or items:
(a) would contribute to or undermine peace and security;
(b) could be used to:
(i) commit or facilitate a serious violation of international humanitarian law;
(ii) commit or facilitate a serious violation of international human rights law
If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export."

2.3 Flaws in existing controls

Having outlined the content of existing arms control at national, regional and international level, it is important to consider how effective these instruments actually are in stemming the flow of major conventional weapons to situations where they can facilitate human rights and IHL violations.

The first conclusion to be drawn is that all of these instruments represent very strict control in theory, but that in practice, they are simply not implemented. The laws aimed at controlling arms transfers, internationally, regionally and domestically are "by no means interpreted uniformly or consistently"[68]. The lack of comprehensive enforcement of arms control law means that there is a "permissive environment for the continued transfer of weapons to recipients likely to use them in violation of international law"[69].

The recent exposé of Western states' arms supply to Saudi Arabia during the conflict in Yemen has made a mockery of these instruments that are supposed to control the arms trade and prevent the facilitation of human rights violations. On any sensible interpretation of the numerous reports from human rights NGOs[70] on what has occurred in Yemen – there is clear evidence that the Saudi-led coalition has committed violations of international humanitarian law. As a result, these findings would suggest that weapons supplying states are violating the provisions outlined above by the continued supply of weapons. Even a report by a United Nations panel of experts on Yemen uncovered "widespread and systematic"[71] attacks on civilian targets and violations of international humanitarian law. The affair has exposed the lack of enforcement of the Arms Trade Treaty, as well as regional and national arms export control systems. It has also shown the flaws in these regulations that permit exporters to continue supplying arms, even in the face of mounting evidence of their illegal use by buyer states.

One of the reasons for the lack of implementation of arms control is the changed nature of the arms trade following the end of the Cold War, as previously discussed. The end of the Cold War marked a decline in the domestic military expenditure of almost all of

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[68] Boivin, p. 468
[69] Boivin, p. 468
[70] For example, "What Military Target Was in My Brother's House?: Unlawful Coalition Airstrikes in Yemen", *Human Rights Watch*, 26 November 2015
[71] The report found that "the coalition had conducted airstrikes targeting civilians and civilian objects, in violation of international humanitarian law, including camps for internally displaced persons and refugees; civilian gatherings, including weddings; civilian vehicles, including buses; civilian residential areas; medical facilities; schools; mosques; markets, factories and food storage warehouses; and other essential civilian infrastructure, such as the airport in Sana'a, the port in Hudaydah and domestic transit routes" and "documented 119 coalition sorties relating to violations of international humanitarian law". 'UN report into Saudi-led strikes in Yemen raises questions over UK role', The Guardian, 27 Jan. 2016

the top ten suppliers of weapons – with the fading away of any perceived threat of relative "imminence", there was less need for nations to invest public money in defence. Arms suppliers were now under pressure to sell unscrupulously to any buyer, including oppressive regimes and aggressors in order to survive market conditions, even if it meant doing so in violation of arms export laws. Arms sales to human rights abusing nations are a "market imperative"[72] that keeps the defence industries in Western countries profitable in the absence of previous levels of domestic investment in arms that had existed throughout the twentieth century. In 2003, Amnesty International concluded that it was "short term profit making and political advantage that guide the bulk of the international arms trade"[73]. I would argue that this attitude persists and continues to undermine states' commitment to measures like the Arms Trade Treaty, EU and domestic arms control.

At international, regional and national level, the relevant laws and codes seem to present "elastic wording"[74] which permit the continuation of irresponsible arms transfers. To take an example from the UK, the Export Control Act 2002 makes direct reference to denying export licenses when to allow the export would endanger human rights. However potential effectiveness of the Act is damaged by its ambiguous wording and repeated clause that export controls "may be imposed"[75] creates uncertainty about the applicability of the law and leaves room for export licences being issued when they should not be. A strong and effective document would state that trade controls "must be imposed" if there were a danger of facilitation human rights or IHL violations.

The arms controls at EU and international level will now be considered in turn to identify specific problematic provisions and analyse political realities and practicalities of multi-state legislation which has led to a lack of implementation.

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[72] Erickson
[73] Amnesty, 'A Catalogue of Failures: G8 Arms Exports and Human Rights Violations'
[74] Yanik, p. 360
[75] UK Export Control Act 2002, Chapter 28, 1. Export Controls

2.3.1 Flaws in EU controls

The EU's attempts to legislate on this area and effectuate conventional arms export control faces the challenge of unifying arms export policy across a group of countries. The EU, as an entity, seeks to project itself as a normative power, with the protection of human rights a core part of its identity. In practice, however, the EU's promotion of human rights is "often constrained by radical differences in the bilateral relations and international interests of its member states"[76]. These different approaches to human rights and divergent international motivations mean that pursuing human rights protection abroad may prove difficult, and that achieving a uniformed behaviour on arms export even more difficult still. It is argued that this has proved a key factor in undermining the strength of EU arms control.

The assumption that the collective foreign policy practices of the EU and its member states are primarily motivated by the promotion of shared values such as human rights is "simply too uni-dimensional"[77]. A key reason why EU arms control seems to be lacking in effect is that arms transfers are "long-time instruments of foreign policy"[78]. Given the diversity of national approaches among a group such as the European Union, who have divergent foreign policy goals, it is perhaps unsurprising that major arms exporting member states do not appear to comply with EU arms control. Their arms exports ultimately are used to serve states' normative agendas and their national interests and the idea that all member states will follow a common set of criteria, and potentially limit revenue to be gained from arms sales, is perhaps premature.

The EU's venture into the realm of arms export control with the Code of Conduct and subsequently the Common Position "simultaneously demonstrates the possibility for common arms exports standards and the difficulties in achieving them effectively"[79].

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[76] T. King, Human rights in European foreign policy: success or failure for post-modern diplomacy? *European Journal of International Law*, 1999, p. 320
[77] Erickson, p. 211
[78] Erickson, p. 213
[79] Erickson, p. 213

Like with other areas in which the EU has legislated, it is laudable in itself to achieve the level of harmony among member states necessary to develop such legislation. However, the practice of major arms exporting member states, particularly the UK in its continued transfer of major conventional weapons to Saudi Arabia, shows that agreement on paper does not necessarily lead to practical implementation. The sale of arms to Saudi Arabia as well as other examples detailed previously demonstrates that individual member states will continue to trade with countries who have questionable human rights records, and would potentially use arms in violation of IHL, all in the name of serving their national interests.

Erickson claims that the empirical relationship between the EU's commitment to human rights and member states arms export practices "has never been put to the test"[80]. This is more evidence that the conventional arms trade is a murky area which has not received the same level of scrutiny that other state practices have been subject to. As a result, there is a lack of empirical data which shows whether EU member states actually abide by the Code of Conduct or Common Position or not. Evidence is mounting however, that certain states, most prominently and contemporaneously the UK, act in almost blatant contradiction of the regulations in their arms sales. Erickson's study into arms exports from EU countries however showed that member states who operate in the major conventional weapons trade are "more responsive to market demands"[81] than they are the protection of human rights and respect of international humanitarian law.

It should be recalled that the 1998 EU Code of Conduct was given legally binding effect when the 2008 EU Common Position superseded it[82]. In theory, these tools are equally as strong in the legal sense as the ATT and ought to be capable of preventing irresponsible arms transfers. On paper, the EU arms export control documents also speak of a commitment of the European Union and its member states to prevent these irresponsible arms transfers. They suggest that member states, if acting correctly, should

[80] Erickson, p. 215
[81] Erickson, p. 215
[82] COUNCIL COMMON POSITION 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment

reduce if not sever arms exports to countries engaged in conflict, or violations of international human rights or humanitarian law. Moreover, these regulations are intended to instil an approach and trend in arms transfers that would “strengthen over time”, according to Erickson[83]. This is clearly not the effect it has had.

In practice, the potency of the EU arms export regulations maybe “greatly subject to national interpretation”[84]. As contemporary arms exports show, most obviously the UK trade with Saudi Arabia, some countries will still be willing to export arms either to reap economic benefits when competitor countries follow the regulations and refuse to sell, or because they feel their national security or strategic needs require it. As a result, the idea that EU arms control has led to ethical arms trade behaviour my member states is better described as a “rhetorical pleasantry”[85] than fact of reality.

Aside from the economic and political reasons which undermine the effective implementation of EU arms control, there are also flaws in the wording of key provisions. The EU Common Position, for example, states that a supplier state must only “take into account”[86] a buyer state’s violations of international humanitarian law. It is argued that this highlights the weakness in the wording of such regulations. It maintains an emphasis on the subjective judgement of the supplying state. When the judgement of the danger that a particular arms transfer represent remains the subjective preserve of the supplier, national economic interests will continue to outweigh human rights considerations and irresponsible arms transfers will persist. After “taking into account” the reasons why a transfer should not take place, there is no secondary step by which an export ban is automatically enforced and the arms exporter can continue to trade arms even in such circumstances. There is no obligation to cut the supply relationship when evidence emerges that the buyer state is committing violations of international humanitarian law.

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[83] p. 214
[84] Erickson, p. 215
[85] Erickson, p. 215
[86] COUNCIL COMMON POSITION 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Article 2(4) Criterion Four

2.3.2 Flaws in the Arms Trade Treaty

After years of advocacy by civil society organisations, which began by the call of a group of Nobel peace prize laureates for an international agreement regulating the trade in conventional arms[87], the Arms Trade Treaty was finally adopted on 2 April 2013 by an overwhelming majority of the UN General Assembly[88]. This was was an impressive moment and the first time in history that "a truly global agreement restricting the transfer of conventional weapons was realised"[89]. The ATT is unique and important because, unlike previous arms treaties which restrict the specific "pariah weapons" such as chemical, biological or cluster munitions, it refers to conventional weapons which are possessed and traded on a regular basis by Western nations to those who are frequently embroiled in conflict or understood to represent a poor record of respect for human rights. Furthermore, the ATT moves to regulate an area in which commerce "is extensive, lucrative, and energetically encouraged by the governments of States in which they are manufactured"[90].

Due to the very divergent approaches among states to the production, use and export of arms, merely bringing the ATT into existence is a major achievement. However there are important exceptions to this success. While there are reasons to celebrate, state practice in the months since its entry into force shows that the Treaty undoubtedly has weaknesses and is lacking in practical effect.

There was momentum and hope during the advocacy process for the ATT that the document would "codify the notion that States must prevent weapons from leaving their territory when there is a known risk that their end-use will involve serious violations of international law"[91]. The entry into force of the ATT in 2014 has indeed resulted in such

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[87] A. Clapham, 'The Arms Trade Treaty: A Call for an Awakening', *European Society of International Law,* Volume 2, Issue 5, May 6 2013, p. 1
[88] 154 states voted in favour of Resolution A/67/L.58 approving of the text of the Arms Trade Treaty, 23 abstained and 3 opposed
[89] Lustgarten, p. 570
[90] Lustgarten, p. 570
[91] Boivin, p. 468

a "codification". The Treaty has been ratified by 87 states to date, with 130 signatory states[92]. However it has not led to a material change in arm exporter behaviour. The ATT has unfortunately not prevented states from transferring weapons where there is a clear or known risk that they will be used in violation of human rights or IHL.

The Arms Trade Treaty is lacking in effect because it does not "build on the positive obligations of States in the real of IHL and human rights law"[93]. Rather it acts as a separate legal regime whereas it should be linked with these other, well-established and generally well-respected regimes. I would argue that the loss of international reputation from breaching the Arms Trade Treaty or other arms control law has not yet reached the level of damage as violating international human rights or humanitarian law treaties incurs. This is one process that needs to happen if the ATT is to ultimately be a beneficial addition to the international legal regime. The ATT currently seems to float on its own, separate from IHL and human rights treaties. It should be anchored in the "entire arsenal of international rules", making it a "more compelling avenue"[94] for states to show their commitment to the protection of human rights and compliance with international humanitarian law.

The ATT fails to effectively control the arms trade because major exporting states never had any intention of allowing their existing trade deals to be effected by the entry into force of the Treaty. The reality is that the major conventional weapons exporting countries such as the UK did not accede to the ATT because it reflects their existing arms export practice. Rather, they did so out of "social concern for their international reputations"[95]. Committing to the ATT is a popular move that, on the face of it, speaks of humanitarian priorities of signatory states. But I would argue that state practice since the ATT entered into force shows that signing the Treaty is more a question of preserving international reputation as a "pro-human rights" country. The major states

[92] Arms Trade Treaty, Basic Facts (https://www.un.org/disarmament/convarms/att/)
[93] Boivin, p. 496
[94] Boivin, p. 496
[95] J. Erickson, *'A Dangerous Trade – Arms Exports, Human Rights and International Reputation'*, Columbia University Press, New York, 2015, p. 5

ensured during the negotiation process that the final ATT text would be one that they could agree to but continue with their arms trade practices. For example the USA, which is a signatory state but has not ratified the Treaty, insisted that "peace and security" considerations[96] could override other criteria in the ATT. The major world powers were successful in watering down the key provisions of the ATT during the negotiation process. This significantly undermined the ability of the Treaty "to make a meaningful impact on reducing human suffering"[97].

The weaknesses in the ATT relate to this watered formulation of the final document which has resulted in the inclusion of weak and problematic provisions. The Arms Trade Treaty has also been crafted in a way that allows the continued transfer of conventional arms, even when they pose a risk to human rights and humanitarian law. Many provisions are the product of compromise in order to ensure the signatures and ratification of major arms supplying states. Though the Resolution approving the Treaty only had three opponents, the states abstaining represented nearly half the world's population and most of the oil-rich Arab states. Thus, to claim that the Treaty represents overwhelming international opinion is "something of an illusion"[98].

Many states wanted the ATT to go further, but in the end more modest provisions had to be accepted as a compromise to gain the ratification of major importing and exporting states. The final Treaty is largely a compromise document in which "no one, state or NGO, was fully satisfied"[99] with what emerged.

The substantive elements of the ATT are the obligations that it imposes on states who export conventional arms, contained in Article 6 and Article 7, the "core" of the treaty

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[96] R. Acheson, 'A meaningful ATT is our "overriding" priority', Reaching Critical Will, 21 March 2013, (http://reachingcriticalwill.org/disarmament-fora/att/negotiating-conference-ii/att-monitor/7559-21-march-2013-vol-6-no-4, accessed 15 June 2016)
[97] R. Acheson, 'A meaningful ATT is our "overriding" priority', Reaching Critical Will, 21 March 2013, (http://reachingcriticalwill.org/disarmament-fora/att/negotiating-conference-ii/att-monitor/7559-21-march-2013-vol-6-no-4, accessed 15 June 2016)
[98] Lustgarten, p. 577
[99] Lustgarten, p. 577

which was outlined in a previous section. Article 6 contains prohibitions of exports, whereas Article 7 refers to the assessment of risk that a given arms transfer poses.

Article 6 flaws

Article 6 contains three prohibitions. Of most relevance to this thesis is that contained in Article 6(3), which is worth repeating here:

"A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

Article 6 is problematic because it allows many potentially dangerous transfers to go ahead due to the contemporaneous knowledge requirement of how the weapon would be used. It is the "least satisfactory element"[100] of the provision but one that also triggers discussion on potential state responsibility through complicity. It is in relation to Article 6 and the contemporaneous knowledge requirement that criminal law on attribution and complicity can inform the actual meaning and potential impact of the provision.

The wording of Article 6(3) creates a subjective requirement of knowledge where the transferring state has to have actual knowledge instead of objectively assessed knowledge of the likely use of transferred arms in illegal acts. The arms exporting state itself can judge if it has that knowledge or not and can also defend their arms sales on the basis of ignorance of conditions in the importing state. The wording that creates the subjective standard is therefore clearly problematic and limits the ability of the ATT to lead to a meaningful change in conduct of arms exporting states.

[100] Lustgarten, p. 588

The subjective standard of knowledge is a departure from the objective standard which is typically used in domestic criminal laws to determine accomplice liability for a wrongful act. It is argued here that a more appropriate wording of Article 6(3) would have included an objective judgement of knowledge by the international community of states. This could allow the United Nations to hold that an arms exporting state had assisted in violations of international human rights or humanitarian law, which could have a deterrent effect on the continuation of such transfers.

The subjective test that is contained in Article 6(3) "permits ignorance, wilful or inadvertent, to be the escape route from liability"[101]. The ATT's subjective standard that requires intent or the demonstration of actual knowledge is too high. It rules out the possibility of supplier state liability for negligently permitting weapons transfer and, as a result, gives states leeway and ample grounds to defend weapons sales which are ultimately used illegally. They can claim they did not have actual knowledge at the time of transfer that the weapon would be used to kill civilians.

Certain academics[102] have suggested that an alternative, preferable wording of Article 6(3) that would allow the provision to serve the function it is supposed to would be: "knows or has reasonable cause to believe", as is found in criminal law systems. With the vast amounts of reports and evidence that are produced by NGOs on civilian deaths from airstrikes, supplier states would have "reasonable cause to believe" that this would be the end use of the supplied weapon. However it is argued that Article 6(3) effectively allows supplier governments to turn a blind eye to reports such as these and continue the supply. I would argue that the hesitance supplier states such as the UK have shown in opening independent investigations[103] or calling for a UN inquiry into alleged violations of international humanitarian law is further proof that Article 6(3) allows states to rely

[101] Lustgarten, p. 589
[102] Lustgarten
[103] 'Foreign Office retracts statements to MPs on Saudi campaign in Yemen', *The Guardian*, 21 July 2016 (http://www.theguardian.com/politics/2016/jul/21/foreign-office-retracts-statements-to-mps-on-saudi-campaign-in-yemen, accessed 21 July 2016)

on a lack of actual knowledge to justify their continued supply of weapons to Saudi Arabia.

Lustgarten claims it "would have been more than reasonable"[104] to include a responsibility "to be aware of violent conflict in States or areas to which approval of a sale of is requested"[105] in the text of Article 6(3). Furthermore, the ATT would be a much stronger and more effective Treaty if it required supplier states to take steps to satisfy themselves that the transfer "would not contribute to grave evils"[106]. The need for a pro-active attitude of arms supplying states to examine closely how their exports are being deployed is completely absent in the ATT. It allows arms exporting states to maintain a *laissez-faire* approach to investigating the situations into which they are delivering major conventional weapons. This is demonstrated by the UK government's failure to open an independent investigation into alleged violations of IHL committed by the Saudi-led coalition in Yemen and, as a result, they deem it permissible to continue the supply.

The Article 6(3) requirement that "at the time of authorization" the arms transferred would be used in the commission of an unlawful act is a further shortcoming of the provision. This requires that there be a direct and immediate danger from a transferred weapon. The result is that unless the arms importing state is clearly about to commit an unlawful attack that violates human rights, then the prohibition of the transfer will not apply – even if circumstances suggest that an attack which results in unlawful civilian casualties is possible if not probable. It is a "major hole in what should be the heart of the Treaty"[107]. It further weakens the Treaty because it does not advance any form of ethical arms trade in which arms exporting nations must also be aware of the unforeseen but likely irresponsible or illegal use of weapons by the importing state.

[104] L. Lustgarten, The Arms Trade Treaty: Achievements, Failings, Future', *International and Comparative Law Quarterly*, 2015, p. 589
[105] Lustgarten, p. 589
[106] Lustgarten, p. 589
[107] Lustgarten, p. 590

The prohibition requirement in Article 6(3) ought to have been phrased in terms of the probability of a future unlawful use of transferred weapons, for example a prohibition based on information available at the time of the transfer. In the case of Yemen, ample evidence has been supplied in reports from Human Rights Watch and Amnesty International that civilians were being struck and potentially targeted on a regular basis. The loose wording of Article 6(3) allows exporting states to continue with transfers even when there is evidence that civilians have been struck and that there is a good chance transferred arms will be used in future attacks. The provision permits the situation where there is no immediate and clear certainty that transferred arms will be deployed illegally but would be in the storage of a country that has committed human rights and humanitarian law violations. It is entirely foreseeable that an imported weapon would not be used immediately but be stored and used illegal in future. There is evidence of this from the Saudi-led coalitions use of cluster munitions against civilians that were transferred several years prior[108] but the ATT fails to tackle this.

Different formulations of the Article 6(3) prohibition on arms transfers were proposed by advocacy groups and NGOs which echoed other conventions and declarations during the long preparatory phase of the Arms Trade Treaty. One suggestion was to imitate the 2006 Convention on Small Arms and Light Weapons of the Economic Community of West African States[109]. The relevant provision, Article 6(3)(b) in that Convention states, "a transfer shall not be authorised if the arms are destined to be used … for the commission of serious violations of international humanitarian law, genocide or crimes against humanity". In 2001, a group of Nobel Peace Prize Laureates drafted a Framework Convention on International Arms Transfers[110] which many hoped would form the basis of the ATT, and contained an alternative wording of what would eventually be Article 6 in the final ATT. Article 3 of the Framework Convention

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[108] Amnesty International UK, 'Saudi Arabia-led coalition has used UK-manufactured cluster bombs in Yemen - new evidence' 23 May 2016 (https://www.amnesty.org.uk/press-releases/saudi-arabia-led-coalition-has-used-uk-manufactured-cluster-bombs-yemen-new-evidence, accessed 1 June 2016)

[109] Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, adopted 14 June 2006

[110] Framework Convention on International Arms Transfers, a draft convention prepared under the auspices of a group of Nobel Peace Laureates convened by former Costa Rican President Oscar Arias (http://www.seesac.org/sasp2/english/publications/2/4_1_Framework.pdf)

suggested a prohibition of "transfers of arms in circumstances in which [the supplier state] has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be … used in the commission of serious violations of human rights … [or] humanitarian law" (sic).

Both of the alternative provisions that had been contain much more reasonable wording than the final Article 6. They provide a useful point of comparison to the provision that was eventually settled upon and reveals its unsatisfactory and problematic nature. Furthermore, it confirms that pressure from major arms exporting states led to a final Treaty document that allowed for irresponsible arms trade relationships to continue.

Article 7 flaws

Article 7 of the ATT, which includes an "export assessment", also presents shortcomings. It is worth repeating the wording of the provision here:

"Each exporting State Party, prior to authorization of the export of conventional arms ... shall ... assess the potential that the conventional arms or items:
(a) would contribute to or undermine peace and security;
(b) could be used to:
(i) commit or facilitate a serious violation of international humanitarian law;
(ii) commit or facilitate a serious violation of international human rights law
If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export."

The provision is criticised because it "leaves wide latitude for decisions based on political, economic and other factors that are irrelevant, and may well be contrary, to the objects and purposes of the Treaty"[111]. The provision allows exporting states to apply export restrictions selectively in order to favour arms transfers to allies.

[111] Lustgarten, p. 591

The risk assessment exercise outlined in Article 7 refers to an "overriding risk" that would require an export authorisation to be denied. This is a standard of risk that is so high that it effectively permits the continuation of dangerous arms exports. Similar to Article 6, this provision would have been more acceptable had it been based on pre-existing provisions in other similar treaty documents. For example the EU Code of Conduct on Arms Exports provides that Member States will "not issue an export licence if there is a *clear* risk that the proposed export might be used for internal repression"[112]. The requirement of a "clear" risk over an "overriding" risk is much more reasonable and would enhance the ATT's ability to actually prevent arms exports that endanger civilians. The wording of Article 7 means that the risk of negative consequences need to be almost overwhelming to the point of certain for the arms export to be prohibited. It is an excessively high standard which weakens the utility of the ATT and undermines what it was intended for and its capabilities.

2.4 Conclusion

The foregoing section has assessed the implementation and strength of existing arms control laws and regulations. It has been shown that the wealth of arms control regulation at national, regional and international level is quite simply not being implemented. It is proposed that a reason for this is that these laws, regulations and "codes of conduct" are drafted in a way that creates enormous space in which supplier states can manoeuvre and allows them to continue to trade even when basic human rights and civilian safety are at stake. A major reason for the continued transfer of arms to end users who could use them illegally is that the national and international laws, codes and regulations that ostensibly seek to prohibit transfers to human rights abusing countries are "crafted in a way"[113] that "eventually plays into the hands of the countries and manufacturers that want to transfer"[114].

[112] Council of the European Union, Code of Conduct on Arms Exports, Criterion Two, Doc. No. 8675/2/98 REV2 (1998), (http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf, accessed 22 May 2016)
[113] Yanik, p. 357
[114] Yanik, p. 360

This section has shown the weakness in implementation, structure and drafting of the arms control laws and regulations that exist at national, regional and international level. The lack of implementation and shortcomings in the text of the UK Export Control Act as well as the EU Code of Conduct and Common Position has been exposed. However, the most troubling are the weaknesses in the new and groundbreaking first international treaty on controlling the trade in major conventional weapons – the Arms Trade Treaty. The ATT sits above national and regional codes of conduct and legislation in the legal hierarchy and thus it should provide a strong example of controlling dangerous arms transfer. But as this section has shown, the ATT does not provide this example, and may even do more harm than good[115] in allowing for continued transfers that endanger human rights and IHL protection.

The ATT has loopholes, and states continue to issue export licences for seemingly irresponsible transfers. The requirement of an "overriding risk" is an excessively high test. It means that arms transfer which present, for example, a clear risk of violations of international humanitarian or human rights law, would still be allowed. Furthermore, the arrival ATT has coincided with, and arguably led to, a slackening approach of arms exporting states in their due diligence obligations to verify the conditions and plans of the users to which they are transferring arms.

The pursuit of sales to human rights abusing countries represents a total lack of compliance with the laws and regulations that are supposed to impede such transfers. Furthermore, major supplier countries have been unwilling to develop tighter laws and regulations at domestic and international level that could entirely halt transfers to countries with poor human rights records. The final ATT document is evidence of this. It is weak and leaves space for irresponsible transfers to continue.

[115] 'The Arms Trade Treaty: A historic and momentous failure', Ceasefire Magazine, 29 April 2013 (https://ceasefiremagazine.co.uk/failure-arms-trade-treaty/, accessed 5 July 2016)

This section has revealed that existing arms control is not fit for purpose because the instruments at all levels of the legal hierarchy are simply not accomplishing that task. Either due to a lack of implementation or because they are “crafted in a way” creates permissive loopholes, they do not control the flow of arms, and they do not prevent major conventional weapons from being exported to states even when there is a clear risk they could be used in violation of human rights or international humanitarian law.

As a result, we must look to derive controls on the arms trade from alternative sources.

3. Law on Responsibility of States for Internationally Wrongful Acts

It has been shown that existing arms control laws and regulation are failing to effectively control the flow of arms to situations in which they would be deployed in violation of international human rights and humanitarian law. A first alternative source from which a more effective method to control the trade in arms could be derived is case law on complicity in international crimes and the Law on Responsibility of States for Internationally Wrongful Acts. This is based on the idea that if an arms supplying state was held as responsible for facilitating illegal acts by providing major conventional weapons, this would act as a deterrent from continuing with future exports to importing countries that represent a risk of committing human rights or humanitarian law violations.

In situations where international crimes and severe human rights violations have been committed and there is at least some level of "third state" involvement through the supply of arms, it is important to consider international law on the attribution of secondary or complicit responsibility. With the entry into force of the Arms Trade Treaty, the international regime of arms control has been strengthened. Yet it has been shown that key provisions lack rigidity insofar as assigning responsibility for arms transfers that contribute to atrocities. Pre-existing international law may provide the tools for extending some amount responsibility to supplier states. This could, in theory, act as a deterrent for arms exporting states to continue supplying major conventional weapons who use them in violation of international law.

3.1 Case law on complicity of state officials in the arms trade

The law relating to attribution of state responsibility for aiding or assisting in international crimes and human rights violations is underdeveloped[116]. On the other hand, the law on individual criminal responsibility of state officials for aiding and abetting international crimes by authorising arms transfers has been developed in the

[116] Jorgensen, p. 723

case law of special tribunals. It is proposed that an emergent, strong jurisprudence inferring complicit responsibility on state officials who authorise arms exports in circumstances that risk their deployment in violation of international human rights and humanitarian law could act as a deterrent on future irresponsible arms transfers.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been particularly active in this area. In the recent case *Prosecutor v. Perisic*, the defendant was prosecuted for providing "personnel and logistical assistance to the Army of the Republika Srpska, contributing substantially and materially to their capacity to commit crimes"[117]. In this case, Perisic was chief of the general staff of the Yugoslav Army and he allegedly knew that his assistance was significantly contributing to criminal conduct. These facts speak of a much greater proximity between alleged accomplice and criminal act than the case of arms suppliers, but it provides a useful starting point on the question of state complicity. Perisic was convicted by the ICTY of aiding and abetting crimes including murder and attacks on civilians as war crimes. The ICTY appeals chamber however subsequently overturned the conviction, establishing a new interpretation of "aiding and abetting" that required any assistance providence to be "specifically directed" towards criminal conduct[118].

Many academics and commentators have decried this ruling, stating that the judgement is "indefensible"[119] and sets the bar too high for finding complicity. A dissenting judge in the subsequent *Prosecutor v. Stanisic*[120] case, which applied the "specific direction" standard, warned that the rulings risked reaching a "dark place in international law"[121] if the standard continued to be the test of complicity in international crimes. Soon after, however, in the case against Charles Taylor for his role in supplying weapons to militias in Sierra Leone, the Special Court for Sierra Leone convicted the defendant of

[117] Case no. IT-04-81-T, Trial judgement, para 6 (6 September 2011)
[118] Perisic Appeals Judgement
[119] J. Stewart, "Specific Direction" is Indefensible: A Response to Heller on Complicity, Opinio Juris (http://opiniojuris.org/2013/06/12/specific-direction-is-indefensible-a-response-to-heller-on-complicity, accessed 22 May 2016)
[120] *Prosecutor v. Stanisic*, case no. IT-03-69-T, Trial Judgment 30 May 2013
[121] *Prosecutor v. Stanisic*, Dissenting Opinion of Judge Picard, para 2406

complicity in the crimes, without applying the standard of "specific direction". Even more recently, in the ICTY case of *Prosecutor v. Sainovic et al*[122], also departed from the "specific direction" jurisprudence of the *Perisic* and *Stanisic* cases. This potentially indicates an opening and extension of complicity for those further removed from the direction to commit war crimes. It would appear, then, that officials of an arms exporting state do not need to "specifically direct" the unlawful use of the transferred weapons to derive complicit responsibility for the act.

The aforementioned cases have, according to Aust, arisen in an era of "growing awareness of States of the problem of complicity"[123]. It is submitted here that the apparent departure from a "specific direction" standard that was endorsed in the judgements of *Taylor* and *Sainovic* poses a risk to arms supplying states that have previously enjoyed an apparent impunity from legal challenge. There is growing support for the position that the "specific direction" requirement is not an essential element for accomplice liability[124]. Importantly, it is claimed that the "conceptual journey" surrounding the meaning of complicity in the ICTY jurisprudence has potential ramifications for developing the law on state responsibility for facilitating international crimes in the context of arms transfers.

International criminal cases must concern themselves with the mental element of crimes, the *mens rea*, as do domestic criminal justice systems. This mental element can be intention or recklessness or negligence. It is not the claim of this thesis that arms supplying states have the intention of their arms being exported to be used to committed war crimes. Nor can it be speculated over the intention of the forces that actually drop the bombs and fire the missiles to kill civilians. However, it is claimed that the civilian deaths in recent conflicts are in the least negligent or reckless and that states that have continued to sell arms in these circumstances have acted, in the least, negligently or recklessly.

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[122] *Prosecutor v. Sainovic et al*., case no. IT-05-87-A, 23 January 2014
[123] H. Aust, *'Complicity and the Law of State Responsibility'*, Cambridge, 2011, p. 210
[124] Jorgensen, p. 724

While the "specific direction" requirement has been criticised for establishing a high threshold for proving complicity in the context of supplying weapons, it has also allowed for "a shift in emphasis from the state's intent, which is notoriously difficult to establish, towards the actual or possible use of weapons"[125]. This is encouraging for proponents of stricter arms trade controls, particularly on Western states – the idea that complicity could be established not by proving the supplier state's intent to contribute to war crimes, but by focusing on how the weapons are actually or could potentially be used. As Jorgensen argues, "even if *Perisic* was incorrect in requiring separate proof of "specific direction" in the context of individual criminal responsibility, the standard presented in that case may provide an appropriate statement of the law on aiding or assisting for the purposes of state responsibility in the context of arms transfers"[126].

The case law on complicity for international crimes in the context of arms transfers shows a movement towards the position where state official may derive responsibility for the unlawful acts committed with the weapons that were transferred when there is knowledge of "actual or possible use of weapons". But this is not certain. Indeed there appears to be a "jostling for positions"[127] over the issue of "specific direction" and has cast uncertainty over whether such direction is required to establish secondary responsibility. The *Perisic* and *Taylor* cases "prompted a timely rethinking"[128] of the law on assisting international crimes in the context of the arms trade in anticipation of the ATT's entry into force. While progresses judgements have been made, it is averred that the uncertainty that persists over the requirement of "specific direction" will mean that cases of major conventional weapon export to foreign regimes will still not come within the purview of international criminal law. In this light, it can be said that for the time being, effective controls on the trade in major conventional weapons cannot be derived from international criminal case law.

[125] N. Jorgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty', *The American Journal of International Law*, 2014, p. 725
[126] Jorgensen, p. 725
[127] Jorgensen, p. 748
[128] Jorgensen, p. 748

3.2 Articles on State Responsibility for Internationally Wrongful Acts

Beyond these jurisprudential developments, the principle rules on state responsibility which could lead to restraint on the major conventional weapons trade, are found in the Articles on State Responsibility for Internationally Wrongful Acts[129] (ASR or "Articles") adopted by the International Law Commission in 2001. The Articles are "the first attempt to codify complicity in connection with the law regulating inter-State relations"[130]. The Articles are considered here as part of the investigation into potential alternative sources of controls on the arms trade because if its provisions indicated secondary responsibility of arms supplying states, this could produce a deterrent effect and act as a *de facto* control mechanism.

Boivin[131] argues that states who transfer weapons to conflict zones could be deemed responsible as accomplices in resulting violations of human rights or IHL, under the Articles on State Responsibility. In situations where the transferred arms are not subject of a specific prohibition, where there are no embargoes in place on the recipient country, and where the transaction has satisfied domestic export licensing law, international law may "nonetheless prohibit a State from transferring arms because of the way they will be used in the recipient State"[132]. This is the law of State responsibility. Under this legal regime, if the decision to transfer weapons facilitates the commission of an "internationally wrongful act" – such as human rights or IHL violations – then the state exporting the weapons in question could be held responsible for "making such violations possible"[133].

Article 16 of the ASR contains the relevant rules in the context of arms sales to a state who may commit human rights violations or war crimes:

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[129] Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, United Nations General Assembly Official Records, 56th Session, UN Doc. A/56/10 (2001)
[130] A. Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons', *International Review of the Red Cross*, 2005, p. 470
[131] 'Complicity and beyond: International law and the transfer of small arms and light weapons', *International Review of the Red Cross*, 2005
[132] Boivin, p. 469
[133] Boivin, p. 469

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

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

(b) the act would be internationally wrongful if committed by that state"

Upon first reading of this provision, it seems almost instantly clear that a state who sells arms to another country when there is widely available information and evidence of war crimes or human rights violations committed by the latter state, that the former state would incur responsibility. However this is not necessarily the case, and there is a requirement to show knowledge and intent on the part of the exporting state.

Article 16 has been held to reflect a "rule of customary international law"[134] and is a "potentially wide-ranging principle of ancillary responsibility"[135]. The notion of aid and assistance contained in this provision can influence the interpretation of Articles 6 and 7 of the ATT.

Under Article 16, the potential responsibility of arms supplying "accomplices" is limited in two key ways[136]: the arms exporting state must have knowledge of the circumstances that make the conduct of the importing state unlawful; and there must be a "clear link" between the supply of arms and the subsequent wrongful conduct – in other words, there is a requirement of intent to facilitate the wrongful acts by the arms exporter.

[134] Jorgensen, p. 730, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro),* 2007 ICJ, G. Nolte, H. Aust, 'Equivocal Helpers—Complicit States, Mixed Messages and International Law', 2009, p. 58

[135] J. Crawford, Brownlie's Principles of Public International Law, Oxford University Press, 2012, p. 555

[136] J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Cambridge University Press, 2002, p. 149

According to Crawford's commentary on the ASR, "knowledge" is "awareness of the circumstances in which the aid is intended to be used by the recipient state"[137]. There must also be a causative link, that "the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so"[138]. Crawford's commentary also states, "the particular circumstances of each case must be carefully examined to determine whether the aiding state by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct[139].

3.2.1 Knowledge requirement

As with Article 6 of the ATT, the ability to establish secondary or derivative responsibility through the operation of Article 16 ASR will ultimately boil down to the knowledge that an arms supplying state has or had of the human rights and IHL violations committed by the importing state. This knowledge is the "key criterion" which will distinguish between mere lawful association or general cooperation[140] with states who commit illegal acts, and unlawful aid or assistance, which would have the potential to result in a finding of secondary or derivative responsibility.

As has been outlined in the previous chapter, Article 6 of the ATT requires a prohibition of an arms sale if the supplying state has actual and contemporaneous knowledge that the arms exported will be used in a criminal act. In the previous section it was argued that this standard of knowledge is subject and overly burdensome to prove, depriving the provision of meaningful effect. It is submitted that a "morally defensible concept of complicity"[141] would run along the lines that a supplier state ought reasonably to know that a weapons transfer could contribute to the commission of an international crime or human rights violation. It is averred that the Articles on State Responsibility and surrounding academic discussion support this position.

[137] Crawford, p.149, para. 4
[138] Crawford, p.149, para. 5
[139] Crawford, p.149, para. 9
[140] Crawford, p. 337
[141] Stewart

The judgment of whether an arms supplying state had "knowledge" of the circumstances of illegal conduct by the exporting state can be assessed on the basis of available information. Information on a state's respect for human rights or humanitarian law in this day and age is widely and readily available, quickly gathered and communicated by international organisations, non-governmental organisations or the media. Information on violations of humanitarian law by the Saudi-led coalition in Yemen was widely available and disseminated by Human Rights Watch and Amnesty International, the United Nations also reported their concerns. But even with this vast quantity of credible and reliable evidence of human rights and IHL violations, states continued to sell conventional weapons during the peak of the Saudi-led coalition's attacks on civilian areas in Yemen.

Boivin argues that constructive knowledge, "that can be expected from exercise of reasonable care"[142], or objective "actual, direct" knowledge would both be "an acceptable interpretation of this standard of proof"[143]. This argument would suggest that with the vast amount of available information on the humanitarian law violations taking being committed by the Saudi-led coalition in Yemen, that states assisting the commission of these acts could derive secondary responsibility. The same author further argues, "where the information needed in order to assess whether or not a State is using weapons in an abusive manner is widespread, then the exporting state ought to have knowledge of that information"[144]. On this basis, it would seem undeniable that the availability of reports from numerous NGOs, journalists and the United Nations documenting violations of international law would be sufficient to satisfy the knowledge requirement of Article 16 of the Articles. This is confirmed by the assertion that "proliferation of information about a state's abuse of weapons could satisfy the knowledge requirement of a transferring State"[145].

[142] Boivin, p. 471
[143] Boivin, p. 471
[144] Boivin, p. 471
[145] Boivin, p. 471

It is clear that there is academic opinion to support the argument that widespread availability of information of violations of international law is enough to infer knowledge of those circumstances on the part of a weapons supplying state. This, in effect, is the first "stepping stone" toward the allegation of secondary responsibility of a supplier state for unlawful actions on the basis of the Articles. It must be borne in mind however that this is only academic opinion and not an irrefutable legal decision that confirms this interpretation of Article 16.

3.2.2 Intent requirement

On top of establishing knowledge, an arms exporting state will only be responsible for unlawful consequences of supplying arms if "the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct"[146].

The requirement of intent to facilitate human rights or IHL violation makes it very difficult to prove that states who supply arms to end users who commit whose unlawful acts are complicit in that behaviour. While there may be a level of awareness of the illegal use of imported weapons, it is not certain if such awareness would be sufficient to infer intent. The International Law Commission has addressed the topic of arms transfers specifically and has made it clear that the "majority of arms transfer cases" will not fulfil the requirements of Article 16 because the arms must be supplied "with a view to facilitating the commission of the wrongful act and that they actually do so"[147] and this will rarely be the case with arms exporting states. Furthermore, pure negligence on the part of the exporting state will not be enough to give rise to complicity in unlawful acts and thus states can maintain "weak or ineffective arms export licensing systems"[148] and still escape liability.

[146] Crawford, p. 149
[147] Crawford, p. 156
[148] S. Oeter, 'Neutralität und Waffenhandel', *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (1992), p. 222

The intent requirement that Crawford's Commentary introduces is "surprising"[149] because the Articles on State Responsibility are supposed to be neutral on the question of wrongful intent. Instead the Articles are intended to focus on the "objective conduct of States"[150] and leave "the mental element to be defined by the primary obligations at issue"[151].

The straightforward proof of intent to cause harm by arms suppliers in cases of arms supply from major, Western nations to importing states may be very difficult, if not impossible to find. After all, arms exporting nations such as the USA, UK or France would have no interest in intentionally facilitating human rights violations or unlawful civilian deaths in conflict. However, intent to aid or assist such acts may be inferred from "material contribution to wrongful acts"[152].

To require simple intent on the part of arms supplier is "unfortunate"[153] as it ignores the "lucrative aspect"[154] of the arms trade. It is submitted that most arms exporting states have no interest in human rights or IHL violations being committed with the weapons they transfer, let alone have intention that they be committed. Rather commercial and security interests are the primary motivations behind the deals. In the post-Cold war era, states will rarely transfer weapons to openly support the military objectives of a belligerent state involved in conflict. As a result it will be "difficult to establish that a transferring State had the intent to facilitate the commission of human rights violations"[155]. But the assertion by academics such as Boivin that intent could be inferred from the material contribution of a state to a situation of human rights and IHL violations provides encouragement to those who wish to restrain the flow of arms from exporting states.

[149] Boivin, p. 471
[150] Crawford, p. 81
[151] Crawford, p. 84
[152] Boivin, p. 493
[153] Boivin, p. 471
[154] Boivin, p. 471
[155] Boivin, p. 472

Graefrath[156] proposes another method to circumvent the undue requirement of intent in the context of the trade in major conventional weapons. He suggests that whenever an organ of the international community such as the Security Council, General Assembly or International Court of Justice establishes that a State "threatens the international peace" then "assistance to the perpetrator is not only a violation of the Charter but also an act of complicity"[157]. Graefrath argues further that "in such cases intention should be presumed because the wrongful behaviour is a matter of common knowledge"[158]. It is averred that the case of Saudi Arabia whose attacks have killed thousands of civilians in Yemen would fall into this category of "common knowledge", given that NGOs have documented and disseminated information on violations of human rights and IHL. Even the UN has published reports with details of "widespread and systematic"[159] attacks by the Saudi-led coalition on civilian targets. This information is widely available and therefore commonly known.

Sassòli[160] also believes that proving intent in the context of supplying arms that are used in violation of international law must be possible other than straightforward proof that the arms supplier intended that crimes be committed. He argues that when IHL violations are generally accepted as occurring and widely known, "ongoing assistance to a known violator should be presumed to be given with a view to facilitating further violations"[161] and consequently this assistance should trigger derivative or secondary responsibility under Article 16.

From the foregoing analysis there emerges a confused picture on the requirement of intent in the establishment of secondary responsibility under Article 16 of the Articles. Crawford's authoritative commentary suggests that the case of arms transfers will not

[156] B. Graefrath, 'Complicity in the law of international responsibility', *Revue belge de droit international*, Vol. 2, 1996, p. 377
[157] Graefrath, p. 377
[158] Graefrath, p. 377
[159] 'UN report into Saudi-led strikes in Yemen raises questions over UK role', The Guardian, 27 January 2016 (https://www.theguardian.com/world/2016/jan/27/un-report-into-saudi-led-strikes-in-yemen-raises-questions-over-uk-role, accessed 26 April 2016)
[160] M. Sassòli, 'State responsibility for violations of international humanitarian law', *International Review of the Red Cross*, 2002, p. 413
[161] Sassòli, p. 413

normally satisfy the intent requirement. However academics such as Boivin, Graefrath and Sassòli propose that ongoing assistance through provision of arms when there is widespread knowledge of its unlawful conduct is sufficient to establish intent. It cannot be stated with certainty that the case of arms suppliers would give rise to complicity or secondary responsibility on application of the Law on State Responsibility for International Wrongful Acts. In any case, the next section will show that such a finding would be inadequate to contribute effective control of the arms trade.

3.3 Inadequacy of complicity

A limiting factor on the Articles on State Responsibility being a source of more effective control on the arms trade is their "practical usefulness for claiming that States have an affirmative duty to enact tighter controls on arms transfers"[162] which is deemed to be "questionable"[163].

Boivin argues that the notion of complicity is inadequate because of the lack of guidance on specific steps required to control the undesirable flow of weapons to irresponsible end users once a finding of complicity has been made. The Articles provide a theoretical basis for holding arms supplying states responsible for the resulting harm, but that is what it is limited to. To be effective, it would require more than just a finding that a state that supplied arms irresponsibly is complicit or secondarily responsible. Such a decision would not prevent the flow of weapons. Effective control has to be that which is implemented in advance, such as a strong export licensing criteria and regime that is actually implemented, or not crafted in such a way that allows continued transfers. But where domestic export criteria may fall short – Boivin argues that this "end use" export criteria should be "grounded in international law"[164] and provide for sanctions against individuals who operate outside such a regime.

[162] Boivin, p. 474
[163] Boivin, p. 474
[164] Boivin, p. 475

They might be found as complicit, but such a finding would, in practical terms, be lacking in effect. Yes, granting an export licence for arms when there is a clear risk of their use to commit serious violations of human rights or IHL could result in a finding of responsibility for "aiding and assisting" those acts. Such a finding would "constitute a valid platform from which to advocate stronger export controls"[165] but it would be lacking in any real effect, as it does not present international legal obligations to prevent such transfers. For the victims of imported arms, a finding of secondary responsibility with not subsequent measures or action would be of "little comfort"[166].

Ultimately, this shows that the law on state responsibility is an insufficient alternative source from which to derive controls over the domestic production and export of major conventional weapons. The next section of this thesis will consider the ability of international human rights and humanitarian law to act as a source from which to derive effective controls over the domestic production and export of major conventional weapons.

[165] Boivin, p. 496
[166] Boivin, p. 475

4. International human rights law and international humanitarian law

The legality of arms transfers, and the ability to control arms transfers, has typically been treated exclusively as a question of arms control law. However the first section of this thesis showed that existing arms control law is ineffective because of a combination of flaws in the laws themselves and lack of implementation by the states who establish the controls. This section will consider the notion that more effective control over the trade in major conventional weapons can be derived from two sources of law which are more fully entrenched in the legal hierarchy and, it is argued, are better respected. Recent debate about legal restrictions on states' liberty to transfer arms has increasingly "invoked international humanitarian and human rights law"[167]. This section will analyse the possibility of deriving direct and clear obligations on states to control their production and trade in major conventional weapons from these two well-established and well-abided legal paradigms.

4.1 Human rights law

Human rights treaties do not specifically address arms transfers. As a result, academics are sceptical of the ability of human rights law to provide a basis from which to prohibit arms transfers when it is likely or there is a serious risk that they will be used to commit human rights violations abroad[168]. This ability will be more closely assessed here.

International humanitarian law is applicable during times and in situations of conflict whereas international human rights law applies both in times of conflict and in times of peace. For this reason, some claim[169] that international human rights law is a more likely source from which to derive controls over the domestic production and export of conventional arms. After all, the major exporting states, including the UK in the Saudi Arabia case study, are invariably not themselves involved in the conflict to which they

[167] M. Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', *Journal of Conflict & Security Law*, 2008, p. 359
[168] Brehm, p. 384
[169] E. Gillard, '*What is Legal, What is Illegal, Limitations on Transfers of Small Arms under International Law*', in L. Lumpe (ed), *Running Guns: The Global Black Market in Small Arms,* London, 2000, p. 9

are transferring arms. From this perspective, it is logical to argue that human rights law could act as an important source of limitations on the conventional arms trade.

The human right that is most directly threatened by the production, export, import and use of major conventional weapons is, of course, the right to life. Bombs, missiles and fighter jets not only have the capability of taking away life but are *specifically designed* to kill people. In the cases that this thesis address, those people are innocent civilians who should not to be targeted and do not deserve to be killed. Their right to life, plainly speaking, is violated. It is a largely settled dispute that human rights will continue to apply in times of war as in times of peace, and thus this is not a barrier of the potential contribution of human rights law to control the arms trade.

The basic situation at stake is this: a citizen of state A who is located in state A is killed by a bomb dropped either by state A itself or an interfering state B, acting on behalf state A, who was provided with the weapon by state C. In the context of arms sales therefore, we are not considering the human rights relationship between citizen of state A and his or her own government, nor are we addressing the relationship between citizen of state A and the "killer" state, which could be either A or B, depending on the circumstances. Rather we are looking at the relationship from citizen of state A through to state C – the state who produced and provided the weapon in the first place. This is a distant relationship and one that potentially poses problems for the applicability of human rights law in this context.

Most of the developed, Western states that supply arms are signatories to or have ratified the treaties which impose an obligation on the state not to violate the right to life[170]. However the utility of human rights law from a victim's perspective boils down to questions of jurisdiction and territoriality.

[170] For example the United Kingdom is a party to the European Convention on Human Rights and the International Covenant on Civil and Political Rights which both protect the right to life in Articles 2 and 6 respectively

The base rule of most human rights treaties is that state obligations are applicable to citizens within a state's jurisdiction or subject to that jurisdiction[171]. In recent years, the human rights legal regime has began to catch up with the ever more globalised, interconnected and borderless nature of international affairs and world order. This has led to a growing recognition that states not only have human rights obligations to those on their own land, but also to individuals located in foreign territory. A recent example is the European Court of Human Rights' decision that Iraqi civilian victims and their family members had legal claim against the United Kingdom government for unlawful killing that took place in Iraq[172].

While there is growing acceptance and jurisprudence of the extraterritorial application of human rights law, there remains another significant hurdle in the path of citizens of one state claiming that their human rights were violated by a foreign state, such as the victims of arms produced and sold by foreign governments. That hurdle is "effective control"[173]. Jurisprudence has developed to the point now where states can be held to have human rights obligations abroad and to foreigners when they have "effective control" over either the person whose right is allegedly violated or the situation in which the rights violation occurs. However it is highly unlikely that in the context of arms transfers, an exporting state could be held to exercise any form of effective control over the civilians who are ultimately affected.

In the case *Al-Skeini and Others v. UK*[174], effective control was held to exist because of the UK military occupation in an Iraqi city. Five of the applicants in the case were allegedly killed by British troops on patrol in Basra. The sixth applicant was arrested by British troops and taken to a UK detention facility, where he was mistreated and ultimately killed. The European Court of Human Rights sought to bring clarity to the

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[171] See, for example, Article 1 ECHR, Article 1 ICCPR

[172] *Al-Skeini and others v. the United Kingdom*, European Court of Human Rights, Grand Chamber, Application no. 55721/07, Judgment, Strasbourg, 7 July 2011

[173] *Bankovic and Others v. Belgium and Others*, European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001

[174] European Court of Human Rights, Grand Chamber, Application no. 55721/07, Judgment, Strasbourg, 7 July 2011

law of extraterritorial jurisdiction in this case and outlined the personal and spatial models of jurisdiction. The Court applied a personal model of jurisdiction to the case of all six deceased applicants. The UK, as an occupying force in a country who was awaiting a new government after the removal of the previous regime, was exercising public powers in Iraq which would normally be exercised by a sovereign government.

It will be extremely difficult to argue that a weapons-exporting state has any effective control over the way its exported bombs are dropped or missiles are targeted, and therefore extraterritorial obligations to civilians who might be armed. In spite of this, scholarly experts on the extraterritoriality of human rights have begun to consider "complicity scenarios, dealing with the state's responsibility connected to killing by third parties"[175]. Milanovic argues that killings by third parties can engage a positive obligation of a state under human rights law to do all it reasonably can to prevent such killings, and the obligation to investigate them"[176]. He cites the example of China who sold weapons to Sudan when the Chinese state knew or had reason to suspect that the weapons would be used by the importing state against civilians in Darfur[177]. My personal conclusion is that jurisprudence on the extraterritorial application of human rights law has simply not evolved far enough yet to capture cases of arms exports which materially contribute to violations of the right to life.

Brehm acknowledges that the notion and definition of human rights jurisdiction is in a state of flux[178], but summarises that state obligations under human rights law are in principle limited to their territory and jurisdiction and apply to individuals within a state's effective control. Arms supplier states "usually do not exercise effective control over the area where violations of human rights law are committed with weapons supplied by them, nor over the victims of such violations"[179]. At this stage, the

[175] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Laws, Principles and Policy*, Oxford Monographs in International Law, 2011, p. 123
[176] Milanovic, p. 123
[177] BBC News, 'China defends arms sales to Sudan', 22 February 2008 (http://news.bbc.co.uk/2/hi/asia-pacific/7258059.stm, accessed 9 May 2016)
[178] Brehm, p. 380
[179] Brehm, p. 380

competence of human rights law to produce effective controls over the arms trade is already in doubt due to the limit of states' jurisdiction.

The UN Special Rapporteur on Small Arms and Light Weapons Barbara Frey wrote in her final report that, "states have a duty to prevent the transfer of small arms and light weapons across borders when those weapons are likely to be used to violate human rights or IHL"[180]. It is acknowledged that the subject matter of Frey's work were small arms and light weapons and not the major conventional weapons that are at the core of the UK's controversial trade with Saudi Arabia. However it is submitted that the basic concept of preventing weaponry coming into the hands of dangerous end users ought to apply and is intended to apply to major conventional weapons. States may have such a duty to prevent these exports – the complicating factor however appears to be the lack of enforcement method within the human rights law paradigm, given the issues of extraterritoriality that have already been discussed.

An argument in favour of deriving controls over the domestic trade in arms from human rights law is that domestic arms transfer decisions "produce effects abroad"[181]. However it would be hard, if not impossible, to derive controls on this basis because the arms export authorisation is not an act with "sufficiently proximate repercussions"[182] on the victims of the conflict. Brehm explains that, "in light of recent case law, it would in all probability be going too far to assert that [victims of conflict] are brought within the jurisdiction of the transferring state"[183]. A "direct and immediate link"[184] between the action of the state and human rights violation seems to be required. This is normally not the case with a state that authorises an arms export which is then potentially used to commit an arbitrary killing. The two events are too remote.

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[180] B. Frey, 'Specific Human Rights Issues, Prevention of Human Rights Violations Committed with Small Arms and Light Weapons', A/HRC/Sub.1/58/27 (27 July 2006), para. 6
[181] Brehm, p. 380
[182] *Case of Illascu and others v Moldova and Russia,* European Court of Human Rights, 8 July 2004, para. 317
[183] Brehm, p. 381
[184] *Bankovic and Others v. Belgium and Others*

The case of *Tugar v. Italy*[185] considered the applicability of human rights law in the cases of exported arms that cause human rights violations in the jurisdiction of a foreign country. It involved the transfer of over 5 million anti-personnel landmines from Italy to Iraq between 1982 and 1983 and the life-threatening injury of a mine clearer. The judgement held that a direct and immediate link was essential between the arms export and human rights violation and accordingly the applicant's case against the state that had exported the landmines was held to be inadmissible. This case demonstrates a reluctance of human rights courts to deal with arms trade cases and that human rights law is an inappropriate source from which to derive arms trade controls. Furthermore it shows the difficulty in establishing a link between a supplier state's export authorisation and the violation of a victim's human rights abroad and in "holding arms supplying and transit states responsible on this basis"[186].

The foregoing analysis shows that human rights law does not apply to harm caused by transferred arms in a straightforward sense. However a state duty of due diligence stemming from human rights law could impact upon the way in which states conduct arms export business. Brehm raises the question of whether human rights law creates a duty to exercise due diligence over the arms export practice, asserting that states violate their duty of due diligence by supplying weapons that may be used in a recipient state in contravention of international human rights law. But what exactly the due diligence obligation of a state under human rights law entails today is debatable[187].

The case of *Osman v. UK*[188] established that for a state to be in violations of its duty to exercise due diligence, it has to be established that a state "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual"[189]. According to Brehm, this is "hardly ever be the case in the vast

185 *Rasheed Haye Tugar v Italy*, European Commission of Human Rights, Application no. 22869/93,1995
186 Brehm, p. 381
187 S. Farrior, 'State Responsibility for Human Rights Abuses by Non-State Actors', *American Society of International Law*, 1998, p. 302
188 *Osman v the United Kingdom*, European Court of Human Rights, Application no. 23452/94, 28 October 1998, para. 116
189 *Osman v the United Kingdom*

majority of arms transfers"[190] because a state that exports a missile or bomb is unlikely to have knowledge of an identified individual who the weapon might eventually injure or kill. An arms supplying state's duty to exercise due diligence "does not extend the jurisdictional limit of its obligations under human rights instruments"[191]. This is further evidence that human rights law can only make a limited contribution to the control of the domestic production and export of major conventional weapons, from a jurisdictional and due diligence perspective.

As the law stands, the application of human rights law hinges upon the test of effective control, under the personal or spatial model. It is difficult to imagine an expansion of the current jurisprudence to cover arms transfers and hold arms supplier states in violation of human rights law for harm to civilians committed by another state in a foreign territory. Academic opinion also suggests that a state duty to exercise due diligence under human rights law will also not give rise to liability of arms exporters. It is submitted accordingly that effective controls over the export in major conventional weapons will not be derived from human rights law. The author would suggest however that human rights courts have been known for bold and innovative decisions in the past. Such an innovative move in the context of arms transfers would be timely required to send a strong message to states that maintain irresponsible arms export relations.

4.2 International humanitarian law

It has been shown that meaningful and effective controls over the domestic production and trade in major conventional weapons cannot be derived from human rights law as it currently stands. However international humanitarian law is another powerful body of law which has the potential to contribute controls over the arms trade. This section will assess the potential of international humanitarian law and specifically the "duty to ensure respect" for international humanitarian law as an alternative source of controls. This duty is found Article 1 common to all four Geneva Conventions, which states,

[190] Brehm, p. 382
[191] Brehm, p. 382

"The High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances".

There is continued debate over the meaning of this undertaking to "ensure respect" for international humanitarian law and whether it imposes a legally enforceable obligation on states. Furthermore, there is uncertainty regarding the application of such an obligation to states who are not involved in armed conflict. According to Kessler[192], the provisions of the Geneva Conventions are not to be "performed in a bilateral way towards only one state"[193], but rather that every state is obliged towards the community of contracting parties and obligations are imposed on them *erga omnes partes* – towards all other contracting parties, including those who are not actively involved in a conflict. The provisions would therefore apply to states who supply arms to belligerent forces in conflicts.

There is strong doctrinal opinion[194] that "tends to affirm"[195] that the undertaking to ensure respect for humanitarian law extends to third states, such as arms exporting states. However whether common Article 1 merely entitles "third states" to take action to "ensure respect", or whether it actually obliges them to do so has also been subject to debate. The International Court of Justice in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* sought to provided clarity on this issue. The Court concluded that "every State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with"[196]. Accordingly it is submitted that there is indeed a binding obligation on states to ensure

[192] B. Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts', *German Yearbook of International Law*, 2001, p. 498–516
[193] Brehm, p. 369
[194] K. Sachariew, 'States' entitlement to take action to enforce international humanitarian law', *International Review of the Red Cross*, 1989; D. Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law', *Journal of Conflict and Security Law*, 2006
[195] Brehm, p. 370
[196] Judgement in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Paragraph 58

respect for humanitarian law, including those not involved in conflict, by preventing the transfer of arms which could facilitate IHL violations. The "altogether trickier"[197] question is what the duty to ensure respect of humanitarian law actually entails.

In the *Nicaragua*[198] case, the ICJ derived from the terms of common Articles 1 an obligation "not to encourage others to act in violation of common Articles 3"[199]. In the Advisory Opinion in the *Wall* case, the ICJ found that "all states are under an obligation not to recognise an illegal situation" and not to "render aid or assistance in maintaining that situation"[200]. As a result, common Articles 1 may require acts of abstention and even positive measures to ensure the respect for international humanitarian law[201]. This, it is argued, would include taking steps to prohibit the export of arms to situations where there is evidence that they could be used in violation of international humanitarian law, such as the case of British arms exports to Saudi Arabia during its intervention in Yemen. In practical terms, it would require governments to refuse export authorisations.

The foregoing analysis shows that states' positive obligation to ensure respect for humanitarian law could be interpreted as a prohibition on supplier states from delivering weapons in situations when the state knows that the weapons are likely to be used in breach of international humanitarian law or "if there is a serious risk that they will be so used"[202].

To refrain from transferring arms to a state who is involved in armed conflict and understood to be violating humanitarian law, is a measure that "may reasonably be expected"[203] of states in the exercise of the duty to ensure respect for humanitarian law. Considering the importance of the humanitarian norms at stake, "it would also be

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[197] Brehm, p. 373
[198] *Military and Paramilitary Activities in and against Nicaragua*, ICJ
[199] *Military and Paramilitary Activities in and against Nicaragua*, paragraph 220
[200] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 159
[201] Brehm, p. 374
[202] Brehm, p. 376
[203] Brehm, p. 376

justified and may be required to suspend military cooperation agreements"[204]. Following Brehm's line of argument, it would support the idea that under its humanitarian law obligations, the UK would be reasonably expected to halt arms sales to Saudi Arabia given widespread reports of violations of humanitarian law.

If states are bound by the Geneva Conventions to ensure that other states respect IHL, an important question is when the occurrence of misuse of transferred arms can be considered "likely" under the international humanitarian law regime. If serious and widespread violations of humanitarian law are being committed in an ongoing-armed conflict, supplied weapons are likely to also be misused and they should hence not be transferred, if transferring states are to satisfy their obligations under international humanitarian law. However the risk of misuse of transferred arms can be "difficult to assess"[205]. To counter this difficulty, others have argued that the common Articles 1 obligations extend to "continuous monitoring"[206] of conflict situations and the violations of humanitarian law therein. It could be argued, therefore that a government's failure to sufficiently monitor a conflict situation through, for example, the denial of reports of violations of humanitarian law, may suggest a failure to live up to its own humanitarian law obligations. I would propose that this has effectively been the conduct of the British government during the supply of arms to Saudi Arabia throughout the conflict in Yemen and thus they could be held to account under IHL.

Sassòli argues that once the supplier state "knows that the receiving State systematically commits violations of international humanitarian law with certain weapons"[207], then the supplier state must "deny further transfers thereof, even if those weapons could also be used lawfully"[208]. Perhaps most importantly, Sassòli argues that one a supplier state "knows" about IHL violations then "ongoing assistance" such as through the continued

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[204] Brehm, p. 376
[205] Brehm, p. 376
[206] D. Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law', *Journal of Conflict and Security Law*, 2006, p. 182
[207] Sassòli, p. 413
[208] Sassòli, p. 413

provision of arms must be deemed as “necessarily given with a view to facilitating further violation”[209]. This strict standard that Sassòli proposes goes further than the ILC Articles of State Responsibility and its Commentary and would appear to cast a wider net to catch states who perhaps negligently continue with the supply of arms. The standard is supported by the “special obligation of the third state…not only not to assist” and the duty of third states to ensure respect for humanitarian law, as outlined previously in this section. Sassòli concludes that a state who continues to provide assistance, for example through the continued supply of arms, knowing that they could be used for violations, is “certainly not complying with that specific obligation”[210].

States that authorise arms transfers may incur responsibility on the basis of not ensuring respect for IHL, even if it cannot be established that they transferred the arms “with a view to facilitating the commission of a wrongful act”, as was required under the Law on State Responsibility. Accordingly, international humanitarian law represents a stronger possibility from which to derive more effective controls over the production and export of major conventional weapons to importing countries who pose a risk of violating IHL. The state obligation under the Common Articles 1 of the Geneva Conventions to ensure respect by other states for humanitarian law that has been analysed in this section “could lead to more state accountability in the area of state sanctioned international arms transfers”[211].

With arms controls treaties and regulations at international and domestic level seemingly ineffective, the Law on State Responsibility unclear and human rights law limited by jurisdictional concerns, international humanitarian law and specifically the duty to “ensure respect for humanitarian law” arguably represent the strongest alternative source from which to derive effective controls over states operating in the arms trade. The next section will turn to consider the role of non-state actors in the arms trade – companies and corporations who produce and export arms – and ask if controls can be derived over their activities in order to protect potential victims of traded arms.

[209] Sassòli, p. 413
[210] Sassòli, p. 413
[211] Brehm, p. 386

5. Business and human rights

The early section of this thesis exposed the fact that sales of major conventional arms to Saudi Arabia and other alleged authors of international crimes continue unabated. While the arms trade is dominated by states and it is national governments who make the final decision on what can be exported, there is also a critical involvement of corporate actors. Major conventional weapons are produced and exported by corporations, though the state plays a crucial role by permitting the exports, securing contracts and determining to whom the corporations sell to. A clear example of this is the role the British government[212], and even the British Royal Family[213] played in extending the UK's place as a key supplier of arms to the Kingdom of Saudi Arabia. But corporations such as Lockheed Martin and BAE Systems conduct the physical act of producing and exporting the weapons. As a result, it is important to consider if controls over the non-state, corporate actors can be derived in order to more effectively restrain the flow of major conventional weapons to dangerous end users.

It has been shown that existing arms control laws and regulations fail to effectively control the dangerous trade in major conventional weapons from predominantly industrialised, Western countries to those with flawed human rights records or who are accused of humanitarian law violations. The law of state responsibility, international human rights and humanitarian law have all been analysed to consider if more effective arms trade could be "derived" from these alternative legal sources. It has been shown that, while an arms exporting state may be found as complicit for the wrongful acts committed with those arms, such a finding would be inadequate. Human rights law is also very limited in its ability to contribute effective and binding controls, primarily due to its largely territorial applicability. The present examination has shown that the duty to ensure respect for international humanitarian law under the Geneva Conventions is most

[212] The Guardian, 'David Cameron arrives in Gulf on arms trade trip', 5 November 2012 (http://www.theguardian.com/politics/2012/nov/05/david-cameron-gulf-arms-trip, accessed 20 June 2016)
[213] The Guardian, 'The future British king, Saudi princes, and a secret arms deal', 24 February 2014 (https://www.theguardian.com/uk-news/defence-and-security-blog/2014/feb/24/arms-gulf-prince-charles, accessed 20 June 2016)

likely alternative source from which to derive legally enforceable controls over states and their arms transfer decisions. All of those legal regimes have states at the centre. This section will consider how non-state activity in this industry can potentially be controlled in order to protect the human rights of civilians who suffer from the use of imported major conventional weapons.

The arms trade is a complex and unique area. The interests of business collide and merge with the interests of states. Profits are the driving factor for the former with the maintenance of strategic alliances and preservation of an important feature of national economies often being the goals of the latter. In this context, it can be difficult to untangle the web of legal obligations that apply to either state or non-state actors, or both, particularly with regard to human rights. While there are legal uses of weaponry, arms are invariably involved in arbitrary and unlawful killings and in these circumstances, the human rights regime ought to contribute to developing regulation over the businesses that operate in this area. This section of the thesis will attempt to address this complex web of state and non-state action within the arms trade and ask what obligations may apply to the corporations involved.

A major reason for the prominent role of companies in the international arms trade is, as was discussed in a previous section, the changed nature of the arms trade towards the end of the 1980s. The increased security environment following the Cold War led to a fall in domestic demand for arms. The changed market conditions meant that previously state-run defence manufacturers were required to merge with private companies in order to remain economically viable. A prominent example of the shift of arms and military equipment production into the private sector is the merger of the state entity British Aerospace and the company Marconi Electronic Systems in 1999 to form BAE Systems[214]. The conventional arms market had also increasingly become a “buyer’s market”. In order to offset the decline in home state military expenditure and remain profitable, arms manufacturers started to pursue “more aggressive policies in their

[214] The Independent, ‘BAe and Marconi merge to form £15bn defence giant’, 18 January 1999 (http://www.independent.co.uk/news/business/bae-and-marconi-merge-to-form-pounds-15bn-defence-giant-1074901.html, accessed 25 June 2016)

international sales"[215] of conventional arms, including selling billions of dollars worth of arms and military equipment to human rights abusing countries[216].

Perhaps the strongest chance of deriving controls on the conventional arms trade is from the emergent business and human rights discourse. Companies that produce conventional weapons such as BAE Systems are public limited companies. As such, they fall within the scope of the expanding business and human rights sector. However the utility of business and human rights standards may be limited as they typically refer to "supply side" human rights issues that occur in the course of doing business of multinational companies.

High profile business and human rights cases have involved the working conditions in clothes companies' factories[217], the destruction of local peoples' living environments by oil and food companies[218] and the plundering of natural resources for use in production. I would argue that with these "typical" business and human rights cases, human rights issues, abuses and violations emerge as unforeseen or unintended consequences of companies pursuing their business objectives. The human rights violations could not be said to be part of the business model.

I would argue that this contrasts with the situation of companies that operate in the conventional arms trade. Their business is based on producing objects that are intended to kill. Death, essentially, is what their business aims to achieve. Of course these companies seek to supply weapons to those who use them in a legal manner, and thus who only kill within the confines of international law, such as the killing of enemy combatants. But operating in this sector, the death of civilians cannot be said to be "unforeseeable" and this is what marks companies in the conventional arms trade out

[215] J. Nolan, 'Report of the Presidential Advisory Board on Arms Proliferation Policy', *Defense Institute of Security Assistance Management Journal*, Fall 1996

[216] Stockholm International Peace Research Institute, 'Financial value of the global arms trade' (https://www.sipri.org/databases/financial-value-global-arms-trade, accessed 10 May 2016)

[217] For example the Rana Plaza case in which 1,134 people were killed when the building holding clothing factories collapsed

[218] The case against Texaco/Chevron by Ecuadorian and Peruvian citizens who alleged that the oil companies' operations had damaged their living environment and health

from the operations of other companies who have been considered by the business and human rights discourse.

5.1 UN progress on business and human rights

The business and human rights discourse has greatly advanced during the course of John Ruggie's mandate as Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises. Ideas of ethical business practice and corporate social responsibility had floated about for years, typically as voluntary agreements which companies would sign up to if they believed it would assist their business model, such as the UN Global Compact[219]. Ruggie was tasked with bringing the business and human rights discourse into something more coherent and enforceable.

The business and human rights movement grew in momentum through the 1990s as multinational companies "emerged robustly" and "weaved together integrated spheres of transnational economic activity", subject to a "single global vision"[220]. Arms companies, whose role was formerly only to provide arms to their home state, were certainly part of this globalisation and explosion of multinational activity by businesses through the 1990s.

With the increasing spread of business across borders, there was a need to bring business and human rights into a more coherent document. Individuals and communities, "adversely affected by corporate globalisation began to invoke the language of human rights to express their grievances, resistance and aspirations"[221]. Ruggie's mission was to ask how human rights norms could effectively be embedded into state and corporate practice to change business conduct. He focused on developing

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[219] United Nations Global Compact (https://www.unglobalcompact.org/)
[220] J. Ruggie, *'Just Business – Multinational Corporations and Human Rights'*, New York, 2013, p. xv
[221] Ruggie, p. xvi

a system of "central regulation" in order to foster a global understanding of business and human rights.

In the late 1990s, the UN Subcommission on the Promotion and Protection of Human Rights commenced the drafting process of the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'[222]. It was a "treaty-like" document which would have been a huge stride forward – it would have imposed the same human rights obligations on companies within their sphere of influence that states are subject to in the treaties they ratify.

In 2003 the Subcommission presented the Norms for approval by the Commission on Human Rights. However the Norms triggered a deeply divisive debate between human rights advocacy organisations and the business community and, ultimately, the Norms never came to see the light of day. From a human rights perspective and considering the role of business entities in maintaining the major conventional arms trade, this was certainly a setback. Article 3 of the Norms would have had a particular effect on arms companies. It stated that businesses "shall not engage in or benefit from war crimes or crimes against humanity"[223]. Had the Norms come to fruition, this provision could have put much greater pressure on arms producing and exporting companies to pay attention to demand side issues such as the contribution of their produce to human rights and humanitarian law violations.

Unsurprisingly, human rights advocates were "fervently in favour"[224] of the Norms, whereas the multinational business community "vehemently opposed them"[225]. The businesses saw them as a threat to their operations and interpreted them as "the privatisation of human rights"[226] that threatened the way did business and, most

[222] UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)
[223] UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)
[224] Ruggie, p. xvii
[225] Ruggie, p. xvii
[226] Ruggie, p. xvii

importantly, their profit margins. The business community wielded such strength that the Norms failed to enter law. However the process to develop them added new momentum to the business and human rights movement. Even though this particular attempt at central regulation of business and human rights had been unacceptable to the business community, enough governments from various regions of the world believed that the area warranted further attention. Given the divisive nature of the topic, a "reasonably objective and authoritative source"[227] was sought to deliver further progress. The position of an individual expert was created.

After a six-year mandate, during with John Ruggie sought to find common ground between the human rights and business worlds, he developed and received the endorsement of the Human Rights Council for the Guiding Principles on Business and Human Rights. They lay out the steps required for states and businesses to implement the "Protect, Respect, Remedy" framework that the Human Rights Council had adopted three years earlier in 2008. They are a set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations[228]. The resolution that endorsed the Guiding Principles also established the Working Group on Business and Human Rights. The Guiding Principles provide a "common global platform of normative standards and authoritative policy guidance for states, business and civil society"[229]. They represent a compromise between what human right advocates were campaigning for on the one hand and what the business community was willing to accept on the other.

There is now momentum to create a binding treaty on business and human rights. This process began in June 2014 when two resolutions were tabled for adoption by the council: one drafted by Ecuador and South Africa "to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with

[227] Ruggie, p. xviii
[228] Business and Human Rights Resource Centre, UN Guiding Principles (https://business-humanrights.org/en/un-guiding-principles, accessed 22 June, 2016)
[229] Ruggie, p. xx

respect to human rights"[230]; the other[231] drafted by Norway, supported by 44 co-sponsors and "adopted by consensus by all regions"[232]. As recently as July 2015 states met in Geneva to discuss the proposed binding treaty, which is necessary in order to "add teeth" to the Guiding Principles[233]. An eventual binding treaty on business and human rights could lead to more influence on the activities of arms companies, and potentially produce controls on how they operate.

Currently the Guiding Principles have very limited impact on the activities of arms companies. This is primarily because they are very much focused on "supply side" impact of business and protecting against the adverse side effects of business activities. The primary source of concern for human rights protection regarding arms companies, however, is "demand side" issues, and namely how the customers of arms "products" decide to deploy them. The research behind this investigation revealed that the business and human rights discourse has not began to touch the arms industry and the only academic treatment it has received is in relation to corporate social responsibility, which will be discussed. I would argue that the Guiding Principles also have limited impact on the "demand side" operations of arms companies because these entities are very heavily involved in the activities of a state and it is thus not clear if business and human rights is a suitable discourse to consider arms companies under.

Business and human rights advocates are still struggling against the traditional conception of human rights as a set of norms and practices to protect individual citizens from threats by the state. It is still a relatively new idea that businesses might have human rights obligations, "independent of legal requirements in their countries of

[230] 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/26/L.22/Rev.1, 25 June 2014
[231] 'Human rights and transnational corporations and other business enterprises', A/HRC/26/L.1, 23 June 2014
[232] Business and Human Rights Resource Centre, UN Guiding Principles (https://business-humanrights.org/en/un-guiding-principles, accessed 22 June, 2016)
[233] 'Negotiating and fighting for a binding treaty on business and human rights', The Guardian, 27 July 2015 (http://www.theguardian.com/global-development-professionals-network/2015/jul/27/negotiating-and-fighting-for-a-binding-treaty-on-business-and-human-rights, accessed 22 June 2016)

operation"[234]. There is hope for a binding treaty on business and human rights but the subject requires time to "ripen" before this step becomes likelihood. It remains to be seen how business and human rights can contribute to controlling the global trade in conventional arms. It is, I would argue, unrealistic to expect arm companies to limit their sales of their own accord. As businesses, one would expect them to "follow the money"[235]. The fact that literature on business and human rights barely even addresses the arms trade is perhaps telling. From my analysis, companies involved in the arms trade continue to operate in an environment of "secrecy"[236] and they still have not been opened up to the scrutiny of business and human rights standards that other industries have been subject to.

5.2 Corporate social responsibility

The foregoing analysis shows that the companies operating in the major conventional weapons trade are yet to be adequately addressed by the developing discourse on business and human rights. It has tended to focus on other industries and "supply side" issues where human rights concerns arise during the course of business operations as opposed to addressing human rights abuses that are caused as a direct result of business operations, which I argue is more descriptive of the case of arms companies. In this respect, the "demand side" human rights concerns where individuals are adversely affected by the business output of arms corporations are perhaps better addressed under an alternative approach of ethical business practice. Some academics have chosen to apply corporate social responsibility (CSR) to arms companies in an attempt to derive controls on their activities.

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[234] Ruggie, p. xxii
[235] Erickson, p. 213
[236] The Guardian, 'BAE Systems is a British success story – so why the secrecy?', 17 October 2012 (https://www.theguardian.com/commentisfree/2012/oct/17/bae-systems-british-success-story-secrecy, accessed 25 June 2016)

The notion of corporate social responsibility, that businesses as well as states owe citizens protection from harm from their activities, arose in the late 1980s and 1990s[237]. Many companies take on corporate social responsibilities to improve their image in the eyes of their customers. By appearing more 'ethical' they hope they will become more popular, in order to get an edge on competitors. Companies in the arms trade however, do not have this problem. Their customers are states will buy their product regardless of ethics. Rather the CSR of arms firms ought to consider what kind of country the firm sells weapons to, as opposed to how it produces its product, because this is how undue harm to individuals is likely to arise from their activities.

The "demand side" aspect of the arms trade appears to be ignored by arms companies and has been neglected in CSR studies. BAE Systems, for example, claim to maintain ethical conduct[238] in their business practices and refer to their supply chain and the procurement of the metals and components that go into the final product. But it is argued that their CSR should also focus on the end use of their product. It should contain an awareness of who they are selling to and how the buyer intends to use the product. While BAE Systems claim to ask themselves in their Product Trading Policy whether their "product's end use can reasonably be expected to violate civil liberties or human rights?"[239], their company practice suggests otherwise. As a result, subjecting arms companies to a CSR assessment could be an important step in deriving alternative controls over the arms trade from a business, non-state perspective.

5.2.1 Applying corporate social responsibility to the arms trade

Academic study of the ethical obligations of private business over the past half-century has led to the development of CSR. The most widely accepted definition of corporate social responsibility is that it includes the responsibilities of a company or business to

[237] A. Voiculescu, H. Yanacopulos, *The Business of Human Rights: An Evolving Agenda for Corporate Social Responsibility*, London, 2011, p. 166
[238] BAE Systems, Suppliers (http://www.baesystems.com/en/our-company/corporate-responsibility/working-responsibly/working-with-suppliers/supplier-standards)
[239] BAE Systems, 'Internal Controls', (http://www.baesystems.com/en-us/our-company/corporate-responsibility/working-responsibly/how-our-business-works/the-sales-process/internal-controls)

society in four areas, namely: economic, legal, ethical, and discretionary[240]. Arms manufacturers, along with "sin industries" such as tobacco and alcohol producers, have however largely avoided research under the banner of corporate social responsibility. Some argue that the "sin industries" have avoided scrutiny because it is simply presumed that they clearly violate CSR standards from an ethical standpoint[241].

Arms companies are not like other companies. Their product is one that is designed to kill. One of the questions we seek to answer here is whether business and human rights principles apply to arms companies in the same way as other companies and, if not, if they should. This is a difficult question to answer, an apparently oxymoronic question which has been posed by Baker[242]: can companies that make products that kill be socially responsible?

Baker argues that corporate social responsibility should apply to arms companies. For arms manufacturers, "there are choices to be made about how products are developed, to whom they are sold, and how they are ultimately used"[243]. Arms companies should be held to account not only for the process by which they produce armaments, but also for the states and end users to whom they decide to sell. There ought to be processes that require arm companies to stop and think about how they run their business – including who they sell their product to, taking into account how a customer state might use that product. Thus far, there is insufficient attention to the demand side of the business practices of arms companies which thorough examination under the corporate social responsibility discourse could help to resolve.

The corporate social responsibility paradigm has emerged as a means to restrict the potentially damaging effects of businesses on humans or the environment. There are

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[240] A. B. Carroll, 'A Three Dimensional Conceptual Model of Corporate Performance', *Journal of Business Ethics*, 1979, 927
[241] B. Halpern and K. Snider, 'Products That Kill and Corporate Social Responsibility: the Case of U.S. Defense Firms', *Armed Forces and Society*, 2012, p. 605
[242] M. Baker, 'Can companies that make products that kill be socially responsible?' Business Respect, 2005 (http://www.businessrespect.net/page.php?Story_ID=1492, accessed 15 June 2016)
[243] Baker

many contributing definitions to CSR, but a point in common is that it seeks to ensure that companies conduct their business in a way that is ethical. Herein lies the "built in oxymoron" of speaking about CSR in the context of the arms manufacturers: how is it possible to talk about ethical activities of a business whose goal is to successfully produce and sell objects that not only have the potential, but are designed specifically to kill? As a result of this oxymoronic situation, it is proposed that the arms industry has been allowed to operate in a "lacuna"[244] of zero scrutiny in terms of its CSR. Few, if any, studies on CSR have addressed the arms trade directly.

Byrne addresses the oxymoron of CSR and the arms trade in a "scathing critique"[245] and offers reasons why arms companies have not been exposed to corporate social responsibility assessments as a potential means by which to control their activities.

The arms industry has barely been discussed in literature on corporate social responsibility leading some to speculate that scholars on business and human rights have dared to question this industry because of its "privileged status as an instrument of national sovereignty"[246]. It is also suggested that the arms industry has avoided scrutiny from a human rights perspective because of the issue's "built-in oxymoron"[247] – namely what is the utility in examining the human rights record of entities whose existence is based on the taking of human life. Furthermore, it is argued that the corporate social responsibility framework has not been sufficiently applied to the arms trade due to "centuries old assumptions about political sovereignty"[248], including "the nation-state's absolute authority and responsibility regarding war and weapons"[249]. Byrne here proposes that arms companies evade the same scrutiny that other business are subjected to because they are, in essence, performing a function of the state, or at least performing a function for the state in being the sole provider of defence equipment.

[244] E. Byrne, 'Assessing Arms Makers' Corporate Social Responsibility', *Journal of Business Ethics,* 2007, p. 202
[245] Halpern and Snider, p. 605
[246] Byrne, p. 201
[247] M. Baker, 'Can companies that make products that kill be socially responsible?' Business Respect, 2005 (http://www.businessrespect.net/page.php?Story_ID=1492, accessed 15 June 2016)
[248] Byrne, p. 202
[249] Byrne, p. 202

Arms companies view themselves as outside the purview of CSR because their "harm-facilitating business enjoys the collaboration, endorsement, and generosity of its principal customer, that is, government"[250]. Porter argues that the arms industry and government have basically worked in tandem, supporting each other and coalescing since "organised political entities began warring against one another to determine which powers will control which parts of the world"[251].

The arms industry of course played an important role during the world wars of the twentieth century and the weapons, airplanes and vehicles that won those wars for the allies were produced by the state, for the state. Since the end of the Cold War however, the arms industry has become a "paradigm of corporate dominance"[252] in which it is companies who produce the arms for use by the state. Byrne argues that in a world where the traditional concept of absolute sovereignty "retains its hold", "it is hard to get a hearing for any claim that an industry devoted to 'national defence' could possibly be involved in fundamentally unethical activity"[253]. But the use of sovereignty in defence of the arms trade is flawed because "the primary beneficiaries of nation-state arms procurement are not citizens needing protection but private corporations needing profits"[254].

The lack of application of business ethics or CSR to arms companies is dangerous and I would argue that the failure to adequately examine the practices of arms companies under this discourse is partly responsible for their lack of restraint in selling to client states who clearly present a risk of committing human rights or IHL violations with the products. By allowing the assumption that CSR does not apply to arms companies to

[250] Byrne, p. 202
[251] B.D. Porter, *'War and the Rise of the State: The Military Foundations of Modern Politics'*, Free Press, New York, 1994, Chapter 4
[252] Byrne, p. 202
[253] Byrne, p. 202
[254] Byrne, p. 202

persist, this simply serves to "exonerate the arms industry of all responsibility for what is done with its products"[255] and this is a situation that should not be so easily accepted.

Byrne concludes that the arms industry violates CSR standards, arguing that arms industry products cause "negative externalities to the planet and people" and "their weapons business are profitable only because of amoral government priorities that the industry fosters and largely controls"[256]. Arms companies "are not entitled to unfettered autonomy but should be made subject to appropriate legal constraints"[257]. By extension, "arms manufacturers should be held liable for foreseeable negative externalities brought about by user of their weapons if these involve violations of human rights"[258].

The key issue, according to Byrne, is whether arms manufacturers' ethical failings can be discounted because they are "inseparable from government and its purportedly sovereign responsibilities"[259]. I would argue that arms companies should certainly not be allowed to escape CSR scrutiny on grounds that their activity is inherently linked with actions and decisions of the state. Their corporate identity and confirms that arms companies operating in the modern arms trade "are not just docile servants of a nation-state"[260]. Even if arms companies did come within the purview of corporate social responsibility, it is still not certain that their activities that lead to human harm could be more effectively controlled.

The foregoing discussion suggests that, if subject to a CSR assessment, arms companies would fail to meet those standards. It is argued, however, that greater controls on the trade in major conventional weapons could not be derived from arms companies' failure to meet corporate social responsibility standards. A failed CSR assessment is "of no concern to anyone unable to look beyond Westphalian assumptions, which render a

[255] Byrne, p. 202
[256] Byrne, p. 202
[257] Byrne, p. 202, K. Davis, 'Can Business Afford to Ignore Social Responsibilities?', *California Management* Review, 1960, 70–76
[258] Byrne, p. 202
[259] Byrne, p. 205
[260] Byrne, p. 205

violence facilitator blameless if it is acting at the behest of a sovereign government"[261]. Arms companies would, it is argued, continue to operate in the same unethical fashion even with recognition of corporate social irresponsibility, because their activities will ultimately always be driven by the state. A corporation cannot be said to be acting responsibly "if it unhesitatingly transfers weapons to any group expressing a need, whether government guidelines preclude the transfer or not"[262]. The "blood-drenched reality" of the arms trade "suggests a need to reconsider the justification for assigning limited liability to any corporation regardless of its products' negative externalities"[263]. Byrne argues that governmental systems of export checks are "token" efforts and are "no substitute for comprehensive cost-benefit analyses and human rights standards that take peoples' lives and well-being into account"[264]. Such constraints need to be in place, and they need to be put in place by the arms companies themselves. The risk however is that governments might always push corporations to supply arms, even in unethical circumstances.

If assumptions that the arms manufacturers are acting "as the state" are disallowed, and CSR is properly applied to them, then these companies should not be able to operate unethically by making sales to dangerous customers and taking no responsibility for dreadful consequences. Given the political power of arms manufacturers and the defects in arms control, "some liability for the harm caused by…weapons that are used abroad should be assigned to their manufacturers if the latter arrange transfers knowing the likely consequences of their action"[265]. I consider Byrne's conclusions to be idealistic. If viewed through the lens of realism, the application of corporate social responsibility is unlikely to effectively constrain the activities of arms companies.

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[261] Byrne, p. 212
[262] Byrne, p. 213
[263] Byrne, p. 213
[264] Byrne, p. 213
[265] Byrne, p. 212

5.2.2 Defence of arms companies' corporate social responsibility

Authors Halpern and Snider have also addressed how corporate social responsibility could apply to the arms industry. They pick up Byrne's "scathing critique" of the arms trade under CSR terms and argue that he presents an "ideological bias against the social responsibility of defence firms"[266]. Halpern and Snider seek to offer a defence of the arms industry, arguing critiques of arms companies ignore that they "might serve to help accomplish legitimate state ends" and that such businesses might take "socially redeeming actions through, for example, community service or philanthropic contributions"[267].

Halpern and Snider seek to provide evidence that arms companies can maintain some form of corporate social responsibility. But in order to establish this, they believe a "more nuanced analysis"[268] of the arms industry is required. For example, they would argue that a company like Boeing, who produce commercial airplanes as well as military-unique lethal weapons such as Harpoon missiles, be treated differently to Raytheon, who produce ancillary equipment such as radar that, while not inherently lethal, direct and enable lethal weapons.

They look to establish that different firms are involved at different levels and thus it may be asked how harmful a product is and for what purposes a defence product is used before its producer is deemed socially irresponsible. Following this line of thought, presumably they are seeking to exonerate companies that produce components of weaponry that while they aid the lethal aspect, are in themselves not a "killer" product. Some defence companies may perform better in a CSR analysis than others, and to categorically claim that all defence firms would fail a CSR analysis would lead to "a failure to account for variations and nuances in these firms' products and services and how they might be used"[269].

[266] Halpern and Snider, p. 605
[267] Halpern and Snider, p. 605
[268] Halpern and Snider, p. 608
[269] Halpern and Snider, p. 608

Halpern and Snider conclude that companies who "make products that kill" exhibit "similar social responsibility tendencies as other industries"[270]. Furthermore, they claim to provide "empirical support" that arms companies may indeed be considered as socially responsible. Most interestingly, they claim on the basis of their study – which measured and compared the CSR of managers from a range of different businesses (1,082) – that under ethical considerations, arms companies may in fact perform better than other firms. They offer potential explanations for this surprising result: arms company managers may "see their business as fulfilling some higher public purpose such as enhancing national security"[271]; and high-level executives in defence firms may be especially sensitive and wary of ethical issues "due to past wrongdoing"[272]. The authors also suggest that because arms company managers operate in a market which is highly regulated and under export controls which often refer to human rights considerations, they would "naturally perceive"[273] that compliance with those processes inherently constitutes ethical behaviour.

Halpern and Snider provide an interesting response to Byrne's "scathing critique" of the arms industry and a CSR perspective. Their defence of arms companies seems logical and their arguments make sense; however the approach also seems to suspend the arms industry in an abstract form that does not take into account the actual circumstances in which these companies presently operate. Suspended in the abstract, it does indeed seem that arms manufacturers could, depending on the perspective you take, be seen to satisfy a CSR assessment.

But this thesis is not an examination of the arms trade in abstract terms. It seeks to specifically address the situation of arms companies when the customer is known to, or is highly likely to, be involved in human rights abuses or violations of IHL, such as the Saudi-led coalition who have killed thousands of Yemeni civilians. While it may be

[270] Halpern and Snider, p. 618
[271] Halpern and Snider, p. 616
[272] Halpern and Snider, p. 616
[273] Halpern and Snider, p. 616

possible for arms companies to maintain a record of corporate social responsibility through means forwarded by Halpern and Snider such as improvements that allow for more precision and control in lethal effects and the contribution weapons and equipment may make to public ends, e.g, national security, it is how they act in times when their clients are likely to be involved in human rights violations that this thesis is most concerned with. When there is evidence that client states are acting in violation of human rights and IHL, this author would argue that arms companies fail a CSR assessment. This failure would not lead to greater controls over arms companies, but it does add to the body of evidence outlined in this thesis for a more effective mechanism to control the unrestrained, irresponsible flow of arms to dangerous end users, from both a state and non-state, corporation perspective.

To conclude this section on the contribution of business and human rights to deriving controls on the arms trade, it is interesting to consider the case of two other types of business who are equally involved in the "industry of death" – the pharmaceutical industry and private security companies. Companies in these areas appear to have made progress in controlling their businesses' harmful effects on human rights and it is interesting to consider if they could act as a model for a more controlled arms industry to follow.

5.3 The drugs companies example

A parallel can be drawn between the supply of arms and their use in human rights violations and the supply of drugs for use in death penalty executions. It is a valid comparison because in both cases, the company is not the actor who commits the human rights violation. However they perform a vital role in supplying the means by which the human rights violation, and humanitarian law violations in the case of arms companies, is committed.

Like with the drug companies who stopped their supplies destined for use in US executions[274], arms companies do not commit human rights violations themselves. It is the end user that is the human rights violator. In the scenario of drugs companies, it is the US state that maintains the death penalty and conducts executions who is the end user that violates a human right. In the case of arms companies, it is national armed forces that fire missiles and drop bombs who are the end users and who violate human rights. It then becomes a question of if the business involved can recognise the role it is playing in facilitating a human rights violation and take steps to prevent those consequences or an intermediary intervenes to prevent the supply-violation relationship.

This is what happened with drugs companies involved in the death penalty. The abolitionist activism[275] of European states against the death penalty led European governments and European drugs manufacturers to stop supplying drugs used for lethal injections[276]. European drugs companies refused to supply the product because of a vehement opposition[277] to capital punishment. Simultaneously, the European Union began to impose strict export controls on drugs destined for use in US executions[278]. Academics on the international market in pharmaceuticals argue that the refusal of European companies to supply drugs used in lethal injections is not just down to the EU controls, but is actually due to a "richer tale of morality in the marketplace"[279].

From a human rights perspective, the ceased flow of drugs from Europe to the USA for use in lethal injections has been a great success. Executions have become "increasingly problematic"[280] with states struggling to procure the drugs used in lethal injections. Gibson and Lain claim that European governments were the "true instigators" behind

[274] The Atlantic, 'Pfizer v. Lethal Injections', May 13 2016 (http://www.theatlantic.com/politics/archive/2016/05/pfizer-lethal-injection-drugs/482811/, accessed June 3 2016)
[275] J. Gibson and C. Lain, 'Death Penalty Drugs and the International Moral Marketplace', *The Georgetown Law Journal*, 2015, p. 1236
[276] Gibson and Lain, p. 1217
[277] J. Gibson and C. Lain, 'Death Penalty Drugs and the International Moral Marketplace', *The Georgetown Law Journal*, 2015, p. 1217
[278] 'EU imposes strict controls on 'execution drug' exports', BBC News, 5 March 2012 (http://www.bbc.com/news/world-europe-16281016, accessed 20 June 2016)
[279] Gibson and Lain, p. 1217
[280] Gibson and Lain, p. 1217

the blockade of drug exports to the USA which were destined for use in executions. European governments took these steps to impose their abolitionist position on the death penalty on the Americans. After years of trying to stop the death penalty in the USA by means of traditional instruments of human rights norms, it was the manipulation of the market that resulted in successfully spreading the anti-death penalty mission. Where traditional instruments failed, “the market succeeded”[281].

After the success in the context of drug exports, it must be asked whether the same could happen with arms exports and prevent the human rights violations that they facilitate. The European Union can and indeed has taken similar steps to prevent the export of arms. The European Community imposed an arms embargo on China in 1989 following the crackdown on pro-democracy protests in Tiananmen Square[282]. More recently the EU Parliament called on the European Union to impose an arms embargo on Saudi Arabia[283]. That call has no legally binding effect and the transfers have continued in its aftermath. This shows the difference between the drugs and arms industries. Whereas drugs companies have been sensitive to human rights concerns, civic pressure and embargoes, arms companies resist the same forces and carry on with “business as usual”.

The main question is, do arms companies want themselves to be associated with war crimes and human rights violations? Will this affect their business? Is there an incentive to be more scrupulous? I would argue that, unlike with drug companies who have the incentive of gaining individual consumer’s trust not to be associated with executions, arms companies do not have this concern as there customers are completely different and there is accordingly not the same incentive for arms companies.

It is argued, however, that the conventional weapons trade is unlikely to follow the example of the drugs companies that have restrained their activities, through a

[281] Gibson and Lain, p. 1217
[282] Erickson, p. 218
[283] ‘European Parliament calls for Saudi arms embargo’, Reuters, 25 February 2016 (http://www.reuters.com/article/us-eu-saudi-arms-idUSKCN0VY1K1, accessed 20 June 2016)

combination of state intervention and marketing strategy, to prevent their involvement in the abuse of human rights. As previously mentioned, companies who produce and export major conventional weapons do not have the same economic incentive to be more scrupulous about which states they sell to. Their customers will continue to invest millions of dollars in their product, even if the company has been accused of selling arms to regimes that use the product to repress their populations or commit violations of international humanitarian law against civilians in neighbouring countries.

The comparison of drugs and arms companies also exposes an interesting contrast in the approach of European states to the promotion of human rights. European states took interventionist measures to prevent the export of drugs in order to materially affect the ability of American states to perform the death penalty. This was done, it would seem, because European governments felt so strongly about their commitment to the global abolition of the death penalty in order to protect the human right to life. At the same time, these same European states have continued to authorise arms exports to countries such as Saudi Arabia when there is a clear risk that they could be used to commit human rights violations, and at the very least they bolster the strength of a regime who is widely known to commit human rights violations. This paints a picture of complete contradiction in behaviour of these exporting states. Why take steps to prevent the activity of business to prevent human rights violations in one context, and in other fail to intervene with business transactions which facilitate human rights violations?

I believe there are two reasons to explain this contradictory approach of European states to these two contexts of exports and their impact on human rights abuse. Firstly, these states know that they can take such interventionist action and still maintain their alliance with the USA. They do not have to fear for retribution for their action and, arguably, the highest political echelons of the USA may be thankful for the external action that helps to promote the end of the death penalty which they support[284]. The other reason is that while European states clearly support human rights, as evidenced by their progressive

[284] 'In party platform, Democrats call for end to death penalty', *CNN*, 1 July 2016 (http://www.cnn.com/2016/07/01/politics/democrats-death-penalty/, accessed 12 July 2016)

steps to abolish the death penalty, they cannot support them above their strategic interests in areas such as the Gulf and the Middle East. European states cannot cut off their arms business relationship with states such as Saudi Arabia in the same way they did with drugs exports and the USA because it would result in the loss of a key strategic ally in the region. In an era where access to oil and gas resources and intelligence on international terrorism are the most valuable commodities, these relationships cannot be threatened.

There is another important reason for why, in my opinion, even the most stringent of business and human rights legal provisions, would not change the current dynamics in the international trade in major conventional weapons. It is because, even if corporations who produce and export these arms – BAE Systems, Lockheed Martin, Raytheon, Boeing, etc. – suddenly decided they no longer wanted to sell arms to human rights abusing and war crime committing states, the States in which they operate would ensure that they continued to do so. All empirical research shows that the arms trade is essentially a state-run activity. Non-state companies of course play an essential role in the creation and delivery of weapons, but the question of where they are and where they are not delivered to will always be one that is determined by the relevant government.

This final section has sought to separate the business element of the arms trade and scrutinise the companies who produce and export major conventional weapons. It has been shown that the arms trade represents an infusion of state and business activity and, as a result, it is difficult to assess the business side in isolation. It is apparent that, despite major developments in recent years, the business and human rights discourse has not developed to the extent that it could effectively control the activities of arms companies. It is clear that the arms trade merits greater scrutiny under the paradigm of corporate social responsibility and that the combined picture of business and government action should not exonerate arms companies for unethical behaviour. Realistically, however, it was adjudged that failure to pass corporate social responsibility assessments would not serve to effectively control the arms trade. Lastly, it was asked if the arms trade could follow the example of the drugs trade, in which state and business action to stop exporting lethal drugs for use in death penalty executions has led to greater protection of human rights. It has been explained that in this author's opinion, the arms trade will not follow that example because it operates in different conditions. Ultimately, it must be concluded on the basis of this chapter's analysis that we cannot derive effective controls on the trade in major conventional weapons from business and human rights or corporate social responsibility.

6. Conclusion

The opening section of this thesis sought to determine if existing arms control laws and regulations at national, regional and international level are fit for purpose to effectively restrain the trade in major conventional weapons and prevent their transfer to end users who would deploy them in violation of human rights and international humanitarian law. The analysis of these existing legal instruments showed that, through a combination of state unwillingness to implement them and problematic drafting that allows the continuation of dangerous trade relationships, they are not fit for purpose.

The investigation then turned to explore potential alternative sources of law from which to derive effective and enforceable controls over the global arms trade, to protect civilians and prevent human rights violations in conflict and breaches of international humanitarian law. While it cannot be said definitively which alternative source would lead to greater control, the foregoing analysis shows that certain legal sources present better prospects than others.

The law on the responsibility of states for internationally wrongful acts, embodied by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, contains rules for establishing derivative or secondary responsibility for states which "aid or assist" the commission of illegal acts. This thesis considered whether states who sell arms to other states who them use them in commission of war crimes or human rights violations could be held as complicit for that wrongful conduct. The ILC Commentary explains that "majority of arms transfer cases" will not fulfil the requirements of secondary responsibility, primarily due to the absence of any intention on the part of an arms supplier to commit such wrongful acts. It was shown however that certain academics support a position where intent could be inferred in the case of continued supply of arms when the violations of international law by the importing state are "common knowledge". However the strength of this legal regime to provide effective controls on the international arms trade is jeopardised because, even in what appears to be the unlikely event that an arms supplying state was found as complicit, there is a lack of a follow up process which would prevent future dangerous arms sales. Such a finding would be inadequate and only serve as a reminder to strengthen existing export controls at domestic, regional and international level.

The ability of international human rights and humanitarian law to provide controls over the domestic production and export of major conventional weapons was then considered. Human rights law is hindered in its capacity to effectively restrain the arms trade behaviour of states because it is rooted in the idea of application to those who come within the territorial jurisdiction of the state in question. While the strict doctrine of territoriality continues to loosen and apply to more cases of extraterritorial human rights violations, it has not yet extended to the extent that it would cover arms transfer cases, mainly because an exporter state does not have “effective control” over identifiable victims of deployed weapons that it has sold.

International humanitarian law on the other hand, represents greater promise from which to derive controls. Common Article 1 of the Geneva Conventions that creates a duty “to ensure the respect” of other states of international humanitarian law is one that could be readily applied in the context of the major conventional weapons trade. This is a strong legal source and an unambiguous obligation on states which could certainly lead to greater accountability of states which export arms in an irresponsible manner. However academic and legal opinion is divided on the ability of this provision to create effective controls. The author argues that its potential to create change would ultimately be determined by the willingness of states to enforce it. State practice in the present day does not appear to show signs of seeking accountability against other states that maintain dangerous arms trade relations. It is argued this is due to the fact that all major powers are also all major arms exporters and it is not in their interests to begin calling into question arms exports that could jeopardise its own operations, and risk undesirable economic and security consequences.

This thesis has also acknowledged that the modern trade in major conventional weapons represents a fusion of state and non-state action. Corporations occupy a crucial role because they actually produce and deliver the missiles, bombs and fighter aircraft that are transferred to foreign states. The expanding area of business and human rights was considered to examine its ability to constrain the activities of arms producing corporations. Great strides have been made in agreeing a coherent centrepiece of the human rights obligations of businesses in the form of the Guiding Principles – the crowning achievement of John Ruggie's mandate as UN Special Representative of the Secretary General – with activities of business in the garment and energy industries in particular operating under stricter controls. However, after considering this emerging regime, it was argued that business and human rights is still very focused on "supply side" issues and has still not developed enough to control companies whose operations are more likely to cause human harm on the "demand side". Corporate social responsibility has been suggested as another platform from which to control the arms trade. There are mixed views on how an arms companies would perform under a CSR assessment but ultimately, it was shown that this would not prevent arms companies from trading with dangerous state customers because they do not have the economic incentives to operate "ethically" that other companies, such as those is the pharmaceutical trade, do in order to maintain customer confidence and profitability.

We therefore arrive at the point of concluding that existing arms control instruments are not implemented effectively or honestly; they are flawed in their content and leave scope for states to continue trading with countries who are widely understood to be deploying weapons illegally, such as Saudi Arabia during its intervention in Yemen since 2015. The investigation to establish the ability of alternative sources to control arms production and export has revealed a picture of uncertainty. Even in cases where there appears to be a strong legal grounding to deny arms export licences when civilians are threatened by those exports, such as the Geneva Convention duty to ensure respect for IHL, state practice suggests this will not be enforced.

We ask ourselves then, can the trade in major conventional weapons ever be effectively controlled? The unfortunate conclusion that I arrive at, is no. If the arms trade is uncontrollable, it is because states refuse to accept controls, and this attitude is engendered by the prevailing nature of international relations and maintenance of strategic alliances, including at the expense of human rights protection.

6.1 'Foreign policy writ large'

When academics speculated at "the future of arms control"[285] in the middle of the last decade, they probably envisaged a system – the optimists among them at least – whereby arms sales would be determined or limited by the respect for human rights and humanitarian law of buying states. Almost two years after the entry into force of the Arms Trade Treaty and it is clear that this is not the situation we have arrived at. It appears that nothing has changed since the days of the 1980s and 1990s when it emerged Western powers had supplied arms that facilitated reprehensible actions against civilians[286]. Even with the entry into force of the Arms Trade Treaty in 2014, most comprehensive international arms control treaty to date, arms continue to be sold by human rights promoting states to human rights abusing states. Furthermore, the example of major conventional weapons exports from the UK and other states to Saudi Arabia shows that this trade continues to be maintained even when there is general recognition of breaches of human rights and international humanitarian law.

I would argue that this occurs because the modern state of international affairs dictates it to be this way. David Cameron, Barack Obama, Justin Trudeau, François Hollande and Angela Merkel do not want to provide the arms that are potentially used to commit war crimes; but the current state of geo-politics forces them into a position where they consider that they have to. As Andrew J. Pierre puts it, arms sales are more than just an "economic occurrence"[287]. They play a much more important role in the actions of a state – arms sales are in fact "foreign policy writ large"[288]. The dominant themes of Western states' foreign policy in the modern era is the preservation of national security and maintenance of high standards of living at home, dependent on continued supply of

[285] M. Levi and M. O'Hanlon, *'The Future of Arms Control'*, New York, 2004
[286] For example the arms exported to Iraq in the 1980s and to Rwanda in the 1990s
[287] A. Pierre, *'The Global Politics of Arms Sales'*, New Jersey, 2013, p. 3
[288] Pierre, p. 3

resources from abroad. From my analysis, the sale of major conventional weapons to countries who clearly abuse human rights, seems to be a price these leaders are willing to pay to maintain that situation.

An agreement in 2006 between the UK and Saudi Arabia to supply 72 Eurofighter Typhoon aircraft, known as Project Salam, ensured that the UK would become the dominant supplier to the Saudi Kingdom ahead of the US[289]. However Project Salam is emblematic of the ethical problems that are associated with the arms trade[290]. Many UK NGOs opposed these arms sales – grounded in human rights concern and the "unavoidable fact that the purpose of the commodities in question revolves around the capability to kill and/or repress"[291]. Project Salam is particularly demonstrative of the dynamics and politics that drive the arms trade, and force arms supplying countries to continue their supply in the interests of national security. That particular deal was almost called off due to an investigation by the UK's Serious Fraud Office into the weapons manufacturer BAE Systems. Upon news of the investigation, Saudi Arabia declared that it would withhold 'war on terror' intelligence cooperation if the operation proceeded – the fraud investigation was terminated due to 'national interest' and the multimillion-pound Eurofighter deal went ahead. It is argued that the Project Salam case clearly demonstrates the way in which the state approved arms exports are linked to state priorities, such as receiving intelligence on terrorism. It shows that a state's arms trade is a key function of its foreign policy to main strategic relationships, including at the cost of undermining human rights.

No matter how much damage major conventional weapons can cause, there is a recognition that this trade must exist and that any attempts to control it will have to battle hard with the reality that the major states want to continue trading these items. As argued by Stohl, "because the global trade in conventional arms is a necessary and

[289] 'BAE agrees price on Typhoon jet deal with Saudi Arabia government', The Guardian, 19 February 2014 (https://www.theguardian.com/uk-news/2014/feb/19/bae-typhoon-jet-deal-saudi-prince-charles, accessed 14 June 2016)
[290] M. Phythian, 'The Politics of the Contemporary Trade in Major Conventional Weapons, in Buckley and Kassimeri, *The Ashgate Research Companion to Modern Warfare*, New York, 2010, p. 170
[291] Phythian, p. 176

integral part of global security and international commerce, States have been hesitant to place conditions on and criteria for the transfer of conventional weapons"[292].

The continuation of conventional arms sales from major powers to potentially irresponsible end users is about more than loopholes in the law and the economic imperative. Major power supplier states need to continue the trade to human rights abusing countries for geopolitical factors – for oil, for "security" and for intelligence. Indeed, I believe it is precisely for these reasons that arms control export regulations, laws and codes of conduct are "crafted" to allow these transfers to continue, as was discussed in Chapter 2.

The practice of arms exporting states such as the UK, the US and France seems to indicate a pattern in which arms transfers increase "as levels of conflict and repression – and therefore recipient demand – increase"[293], and not the opposite position one might expect where human rights-promoting states would stop selling arms to states violate human rights. As the case of Saudi Arabia shows, who have purchased billions of dollars of major conventional weapons in the last few years from Western countries, states that are more willing and able to invest in arms procurement are more likely to receive arms exports, "whatever their human rights record"[294].

While the EU and individual member states will continue to proclaim that they operate to protect human rights and civilians in conflict, their arms trade behaviour will always be "governed by more practical considerations"[295] – such as security and strength of domestic economies. This conclusion, that so called "practical considerations" will trump human rights in the conventional arms trade, sits uncomfortably with Western nations' self-proclaimed role of human rights promoter and conventional arms control

[292] R. Stohl, *'U.S. Policy and the Arms Trade Treaty'*, Chatham House, April 2010, p. 5
[293] Erickson, p. 215
[294] Erickson, p. 215
[295] Erickson, p. 215

"leader". After all, it was Western countries such as the UK who led the way in securing the Arms Trade Treaty[296].

For the many who thought that the ATT was going to fundamentally change the global trade in major conventional arms, this was perhaps naïve. Indeed certain academics perhaps foretold the alleged "historic and momentous"[297] failure of the ATT. Others foretold that the Treaty would make only a "modest contribution to the protection of civilians in conflict"[298]. Even in the event of strong implementation of the ATT, this would not have stopped the overall supply of major conventional weapons to dangerous end users. As Pierre has commented; even if one country stopped selling arms, another would readily fill the void and thus attempts at international restraints on the arms trade, such as the ATT, are "will-o'-the-wisp"[299] and incapable of being controlled.

Pierre tells us that the arms trade "must be seen in political terms"[300]. Accordingly, he believes that controls such as the ATT are insufficient. An alternative system of "international management"[301] of the transfer of weapons is more likely to achieve a reduction in the suffering as a result of illegal use of arms that are "lawfully" sold.

Arms sales, according to Pierre, are "fraught with policy dilemmas"[302] – and even when a supplier country has general policy guidelines on when it will and when it will not transfer arms, "each weapons transfer decision will involve complex judgements and trade-offs"[303]. A dilemma pertinent to the present study is when one foreign policy goal, such as "strengthening an alliance relationship or a nation's capacity for self-defence"[304] runs counter to another goal, such as promoting human rights. Such alliance

[296] 'A foreign policy with a conscience', (http://humanrights.brightblue.org.uk/blog-1/2016/3/11/conscience, accessed 1 July 2016)
[297] 'The Arms Trade Treaty: A historic and momentous failure', Ceasefire Magazine, 29 April 2013 (https://ceasefiremagazine.co.uk/failure-arms-trade-treaty/, accessed 17 May 2016)
[298] Jorgensen, p. 749
[299] Pierre, p. 3
[300] Pierre, p. 3
[301] Pierre, p. 8
[302] Pierre, p. 7
[303] Pierre, p. 7
[304] Pierre, p. 7

relationships seem to be the deciding factor in many of the world's current controversial arms trade relationships.

The result of all of the foregoing is that exporting states find themselves "trapped in a cycle of targeting for sales countries with poor human rights records and downplaying the significance of ethical or human rights concerns relating to key markets in international fora"[305]. Western states involved in the contemporary trade of major conventional weapons are guilty of a "schizophrenic approach"[306] and I believe my analysis has shown that this will persist due to the lack of political will on the one hand and properly worded, legally enforceable arms control instruments on the other.

From a human rights perspective, it is a question of fundamental importance how far justifications of national security[307] can be allowed to proceed in defence of arms trade relations. There is indeed no empirical evidence to justify the claims that maintaining trade relations with "unsavoury allies"[308] which results in intelligence sharing is actually strengthening national security of Western nations. From the author's perspective, it is concerns over continued access to energy resources in the Middle East that are perhaps the driving factor behind the maintained arms trade relations with countries such as Saudi Arabia.

Advocacy efforts for a more ethical trade in major conventional arms will continue, however this trade will also continue to be an aspect of contemporary international affairs which receives disproportionately little attention for the huge destruction it causes. It is averred that greater civic awareness and pressure in Western arms

[305] Phythian, p. 177
[306] Phythian, p. 182
[307] "The reason we have the [arms trade] relationship [with Saudi Arabia] is our own national security. There was one occasion since I've been prime minister where a bomb that would have potentially blown up over Britain was stopped because of intelligence we got from Saudi Arabia. "Of course it would be easier for me to say: 'I'm not having anything to do with these people, it's all terribly difficult etcetera, etcetera.' For me, Britain's national security and our people's security comes first." David Cameron, 6 October 2015, interview with Channel 4 News (https://www.youtube.com/watch?v=mkjGqOg5-Kw, accessed 4 March 2016)
[308] K. Roth, 'Barack Obama: Dump These 8 Unsavory Allies', *Foreign Policy*, January 2 2013 (https://www.hrw.org/news/2013/01/02/barack-obama-dump-these-8-unsavory-allies, accessed May 10 2016)

producing and exporting nations is needed to shine light on an area of state behaviour that has for so long operated in the shadows. I believe there is now a greater awareness among the public of the dynamics of the trade in major conventional weapons. It can only be hoped that in the near future this translates into more effective implementation of arms controls, holding governments to account through the alternatives mechanisms discussed in this thesis, or the development of future controls that leave less scope for public promotion of human rights but practical support for the forces that violate them.

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8. Abstract

8.1 English

Since March 2015, a coalition of Gulf States led by Saudi Arabia has been conducting bombing raids inside Yemen to quell a rebellion that had previously forced the country's leader to flee the country. According to reports from several non-governmental organisations and the United Nations, airstrikes from the Saudi-led coalition have struck civilian targets including wedding parties, residential areas and factories. Thousands of civilians have been killed and the Saudi-led coalition is accused of committing violations of international humanitarian law, human rights law and possibly even war crimes.

The alleged breaches of international humanitarian and human rights law come amid the continued sale of major conventional weapons from several Western states to Saudi Arabia. On at least one occasion, there is evidence that a British-sold weapon was used in a lethal airstrike on a civilian target. It is the latest case in a long list of arms exports to countries where there is a risk that the buyer state will use the weapons in contravention of international law. This thesis shows that it was the changed market environment following the end of the Cold War, in which Western states' demand for major conventional weapons fell, that led to this pattern of trade in order to sustain domestic arms industries.

A series of laws exist at national, regional and international level which seek to prevent the export of major conventional weapons when there is a risk that they would be used in violation of human rights or international humanitarian law. The latest of these is the Arms Trade Treaty, the first international treaty to regulate the trade in major conventional weapons. The continued flow of arms to Saudi Arabia amid reports of violations of international has exposed the frailties of these arms control laws. This thesis analyses the key provisions and shows that for a variety of reasons, including problematic drafting that imposes an excessively high standard of risk; these existing laws are unsuitable to effectively restrain the export of arms to dangerous end users.

The thesis then considers a variety of other sources of law and asks if we can derive more effective control on the trade in major conventional weapons from these alternative sources. An analysis of the Law on Responsibility of States for Internationally Wrongful Acts shows that a state who supplies arms that are used in the commission of illegal acts could derive secondary or complicit responsibility, but that such a finding is inadequate to prevent further dangerous exports. The thesis then shows that human rights law is unable to make a significant contribution to arms export control but that the "duty to ensure respect" for international humanitarian law under the Geneva Conventions could be a potential source of more effective control. The final chapter considers the role of companies in the global arms trade and asks if the emergent discourse on business and human rights or corporate social responsibility could force arms companies to stop exporting to dangerous destinations. It is explained that these controls on business are not yet strong enough, and that states would ultimately always dictate the conduct of arms companies.

The thesis concludes with the assertion that, while controls may be derived from the Law on Responsibility of States for Internationally Wrongful Acts and international humanitarian law, it will be difficult, if not impossible to ever meaningfully control the global trade in major conventional weapons. This is because the export of arms is an essentially political act and manifestation of foreign policy. The current motivation of Western states to ensure continued access to dwindling energy resources and intelligence in the struggle against international terrorism mean that they must maintain relations with "unsavoury allies" such as Saudi Arabia, whatever the cost. I argue that the delivery of arms that facilitate violations of international humanitarian and human rights laws is a price that arms exporting states are willing to pay.

8.2 Deutsch

Seit März 2015 führt die Saudi-Arabien geführte Militärkoalition der Golfstaaten, Bombenangriffe in Jemen aus, um eine Rebellion niederzuschlagen, welche den Präsidenten des Landes zur Flucht zwang. Nach Berichten von nichtstaatlichen Organisationen und den Vereinigen Nationen, trafen die Luftangriffe der von Saudi-Arabien angeführten Koalition zivile Ziele wie Hochzeitsfeiern, Wohngebieten und Fabriken. Tausende Zivilisten worden getötet und die Saudi-Arabien geführte Koalition wird beschuldigt Verstöße gegen humanitäre Völkerrechte, Rechte der Menschenrechte (im Folgenden kurz als Menschenrechte bezeichnet) und möglicherweise sogar Kriegsverbrechen begangen zu haben.

Die angeblichen Brüche der humanitären Völkerrechte und Menschenrechte kommen inmitten der fortlaufenden Verkäufe von konventionellen Waffen aus einigen westlichen Staaten an Saudi-Arabien. Nach Beweisen sollen britische Waffen bei zumindest einem Vorfall bei einem tödlichen Luftangriff auf zivile Ziele verwendet worden sein. Es ist der aktuellste Fall auf einer langen Liste von Waffenexporten an Länder, bei denen ein Risiko besteht, dass die Käuferstaaten die Waffen im Gegensatz zu Völkerrecht verwenden werden. Diese Thesis stellt dar, dass wegen des Wechsels des Weltmarkts von Waffen nach dem Kalten Krieg, welche die Nachfrage an konventionellen Waffen von den westlichen Staaten sank, dass eine neue Handelstrend entwickelt, um die inländische Waffenindustrie aufrecht zu erhalten.

Es existiert eine Reihe von Rechten auf den nationalen, regionalen und internationalen Ebenen, welche den Export von konventionellen Waffen vorbeugen, wenn das Risiko besteht, dass sie zur Verletzung von Menschenrechten und humanitären Völkerrechten eingesetzt werden könnten. Das aktuellste Gesetz aus dieser Reihe ist das Waffenhandelsabkommen, das erste internationale Abkommen um den Handel von konventionellen Waffen zu regulieren. Der fortlaufende Waffenfluss an Saudi-Arabien inmitten von Berichten der Völkerrechts Verletzungen, hat die Schwächen dieser Waffenkontrollgesetzen aufgedeckt. Diese Thesis analysiert die Hauptvorschriften des

Abkommens und zeigt, dass für eine Vielzahl von Gründen, einschließlich problematischer Gestaltung, die ein übermäßig großes Risiko darstellt, diese bestehenden Gesetze sind ungeeignet, um den Export von Waffen an gefährlichen Endnutzer effektiv einzuschränken.

Diese Thesis betrachtet eine Vielzahl anderer Gesetzesquellen und fragt, ob wir davon effektivere Kontrolle auf den Handel von konventionellen Waffen entwickeln können. Eine Analyse des „Law on Responsibility of States for Internationally Wrongful Acts" zeigt, dass ein Staat, welcher Waffen liefert, die in illegale Tätigkeiten benutzt werden, zumindest nebensächliche oder mitschuldige Verantwortung erhalten können, aber so eine Ermittlung ist inadäquat, um zukünftige gefährliche Exporte zu unterbinden. Im weiteren zeigt die Thesis auf, dass Menschenrechte nicht signifikante Kontributionen in der Kontrolle von Waffenexporten machen können, aber dass „die Pflicht von garantiertem Respekt" für humanitäre Völkerrechte in den Genfer Konventionen können eine mögliche Quelle für eine effektivere Kontrolle sein. Das letzte Kapitel behandelt die Rolle von Unternehmen im globalen Waffenhandel und fragt, ob der auftauchende Diskurs von Wirtschaft und Menschenrechte oder korporative soziale Verantwortung Waffenunternehmen zum Beenden des Exports an gefährliche Ziele zwingen zu können. Es wird erklärt, dass diese Kontrollen von den Waffenunternehmen noch nicht stark genug sind und diese Staaten letztendlich immer die Führung von Waffenunternehmen vorschreiben werden.

Zum Schluss zeigt die Thesis, dass obwohl die Kontrollen von dem „Law on Responsibility of States for Internationally Wrongful Acts" und humanitären Völkerrechten abgeleitet werden können, wird es schwierig oder sogar fast unmöglich, den globalen Handel der konventionellen Waffen bedeutungsvoll zu kontrollieren. Dies ist so, weil der Waffenexport eine politische Tätigkeit und ein Aspekt der Außenpolitik ist. Die derzeitige Motivation der westlichen Staaten, einen fortlaufenden Zugang der Energiequellen und Intelligenz in den Kämpf gegen internationalen Terrorismus zu haben, bedeutet, dass sie Beziehungen mit „abstoßenden Verbündeten" wie Saudi-Arabien erhalten müssen -- kostet es, was es wolle. Ich argumentiere, dass die Lieferung von Waffen, die Verletzungen von humanitären Völkerrechten und Menschenrechten erleichtert. Dies ist ein Preis, den waffenexportierende Staaten bereit zu bezahlen sind.