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Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking Note

Daniel M. Salton

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Note

STARVING THE DARK MARKETS: INTERNATIONAL INJUNCTIONS AS A MEANS TO CURB SMALL ARMS AND LIGHT WEAPONS TRAFFICKING

DANIEL M. SALTON

International arms sales are a big business. This understatement fails to elucidate the extensive industrial and economic impact of the weapons trade between nations. One of the most influential portions of is the production and sale of Small Arms and Light Weapons (SALW). Yet despite SALW sales valued at billions of dollars per year, little international regulation exists to control these sales.

While most SALW sales occur within the legitimate sphere of business, a large number of SALW are sold and resold through the “grey” and “black” markets: illegal methods of sale that do not conform to any international norms. Combating the growth of these markets has been frustrating not only due to the lack of comprehensive regulation but also because the markets are designed to be as difficult to detect as possible.

This Note sets out an alternative path of preventing SALW from entering the grey and black markets. After engaging in an analysis of existing international law, this Note suggests adoption of stronger export controls and an injunctive mechanism to aid in their enforcement. It draws inspiration from the British Mareva injunction, and after suggesting modifications to international export regulations this Note demonstrates how an injunctive process similar to the Mareva injunction may be used at the International Court of Justice to prevent weapons from entering the grey and black markets.
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STARVING THE DARK MARKETS: INTERNATIONAL INJUNCTIONS AS A MEANS TO CURB SMALL ARMS AND LIGHT WEAPONS TRAFFICKING

DANIEL M. SALTON∗

I. INTRODUCTION

It is not enough to merely claim that the conventional arms trade is a large component of the world economy. Though precious little data is recorded involving arms sales, it is estimated that in 2011 there was over $85 billion in legal sales agreements between nations.1 This constituted an extraordinary ninety-one percent increase in the number of sales agreements from the year before, and only speaks to legal agreements struck between states that report their arms sales figures.2 Remarkably, in

∗ University of Connecticut School of Law, J.D. Candidate 2014. I would like to thank the members of the Small Arms Survey and Lord Lawrence Collins for the great utility of their works, as well as Casey Smith, Jeffrey Wisner, and Cassandra Beckman Widay for their unmatched and tireless editorial assistance.

1 RICHARD F. GRIMMETT & PAUL K. KERR, CONG. RESEARCH SERV., R42678, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2004–2011, at 3 (2012). The value of the global arms market is a matter of some debate. It appears that scholars and organizations have looked at the market through unique metrics, which causes wide disagreement over the exact values of sales and the market as a whole. For example, the Stockholm International Peace Research Institute (SIPRI) claimed that in 2011 the world’s top hundred arms producing companies sold $410 billion of arms and military services. Trends in the Arms Industry 2011, SIPRI, http://www.sipri.org/research/armaments/production/researchissues/long-term_trends (last visited Sept. 20, 2013). However, SIPRI includes computer electronics, aerospace components, and other dual-use technology as part of its measurements, as well as domestic sales, which may explain the disparity between its analysis and the Congressional Research Service’s (CRS’s) conclusions. The CRS, on the other hand, only considers deliveries and contractual agreements, which may be leaving out legal but clandestine or undisclosed sales. GRIMMETT & KERR, supra, at 3.

2 GRIMMETT & KERR, supra note 1, at 3. This is doubly surprising in light of recent budget cuts and new strategic doctrines that have forced the Pentagon to reduce spending, all while attempting to update its military assets for future conflicts. See, e.g., Julian E. Barnes, Branches of Military Battle over Shrinking War Chest, WALL ST. J., Aug. 1, 2013, at A1 (describing how the branches of the U.S. military have begun to struggle over a reduced defense budget, including $742 million diverted from the Navy and Air Force to the Army, while attempting to retool their forces); Sandra I. Erwin, Army Warns Truck Manufacturers of Impending Slowdown, NAT’L DEF. BLOG (June 20, 2013, 4:45 PM), http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?ID=1188 (noting that with the winding down of recent conflicts, the current fleet of tactical trucks will be likely downsized and procurement sharply reduced); Sandra I. Erwin, Marines’ Sequester Bill: 8,000 Troops, Ground Vehicles, Combat Aircraft, NAT’L DEF. BLOG (June 26, 2013, 12:01 PM), http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?ID=1190 (noting that the Marine Corps is forgoing purchases of new armored vehicles, trucks, tactical aircraft, and helicopters as result...
2011, the United States government signed arms sales agreements valued at $66 billion—posting a three hundred percent increase over the prior year. The dollar value of conventional arms sold between states either illicitly or illegally is suspected to be a significant and unreported portion of the market.

While there are varying motivations for participation, the arms trade between nations remains a highly unregulated commerce largely due to its close ties with the national security and economics of participating states. Behind this veil of secrecy, however, is a complex and highly illegal industry that has obfuscated the most determined efforts at international legal regulation and containment, especially involving the sale of Small...
Arms and Light Weapons (SALW).\(^6\)

While it was estimated in 2001 that illegal or illicit small arms sales only composed between ten and twenty percent of the arms trade, this percentage has likely increased over time.\(^7\) The greatest difficulty remains in the tracking and control of weapons from a seller to a legitimate end destination. Efforts to improve the tracing of weapons have failed due to reluctance on the part of major states to sign onto UN Conventions regarding SALW and other armaments.\(^8\) This Note will explore the problems faced by SALW regulators and the challenges of curbing the arms trade. It will suggest a new model for arms control, not through traditional diplomatic and national-security methods, but by the application of a model based upon the injunctive mechanism applied to export controls.

Part II of this Note will explore the background of the international arms trade and the use of illegal “black and grey” markets. Part III will address how current international law has been involved in attempting to curb the illegal trafficking of SALW. This section will focus on the non-binding Wassenaar Arrangement,\(^9\) the Inter-American Convention Against

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\(^{6}\) For a discussion defining SALW, see infra Part II.A.

\(^{7}\) Again, it is very difficult to ascertain what portion of market transactions can be classified as illicit or illegal. And the Small Arms Survey 2001 noted that its estimate of twenty percent was approximately half of the estimate calculated by Jeffrey Boutwell and Michael T. Klare. See Haug, supra note 4, at 168 (disputing Boutwell and Klare’s calculation). The exact figure is not particularly important for the purposes of this Note, but it has likely grown considerably since 2001, in light of the advent of multiple armed conflicts worldwide. Despite this likelihood, some writers on this topic continue to utilize the percentage estimate from the Small Arms Survey 2001. See, e.g., Matt Schroeder & Guy Lamb, The Illicit Arms Trade in Africa: A Global Enterprise, AFR. ANALYST, Third Quarter 2006, at 69, 69 (directly using the Small Arms Survey’s ten to twenty percent estimation); Jorene Soto, Show Me the Money, Part II: The Application of the Asset Forfeiture Provisions of the U.S. Arms Export Control Act and the RICO Act and Suggestions for the Future, 13 OR. REV. INT’L L. 151, 153 (2011) (citing to the Small Arms Survey in asserting that “ten to twenty percent of all small arms and light weapons are traded on the black and grey markets”).

\(^{8}\) See James Bevan et al., Revealing Provenance: Weapons Tracing During and After Conflict, in GRADUATE INST. OF INT’L STUDIES, SMALL ARMS SURVEY 2009: SHADOWS OF WAR 107, 129 (Eric G. Berman et al. eds., 2009) [hereinafter SMALL ARMS SURVEY 2009] (describing the cooperation between states and international organizations to trace weapons as “nascent and ad hoc” and noting that “[e]xisting mechanisms, such as those of INTERPOL, offer unrealized potential”). The United States, in particular, has been called a “reluctant giant” in the field of ratifying arms control provisions. Deborah A. Ozga, The Reluctant Giant of Arms Control, 34 SECURITY DIALOGUE 87, 88 (2003). However, a look across the field of major arms exporters reveals a general unwillingness to sign onto every one of the legally binding SALW treaties. See Sarah Parker, Devils in Diversity: Export Controls for Military Small Arms, in SMALL ARMS SURVEY 2009, supra, at 61, 63 tbl.2.1 (comparing major arms exporters’ treaty obligations).

\(^{9}\) The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is an international cooperative export control regime that became operational in 1996. General information about the Wassenaar Arrangement is available at http://www.wassenaar.org/index.html (last updated June 3, 2013).
Illicit Manufacturing and Trafficking in Firearms,\(^{10}\) the Supplemental Protocol to the United Nations Convention Against Organized Crime,\(^ {11}\) the Programme of Action for the United Nations Office of Disarmament Affairs,\(^ {12}\) the European Union’s Code of Conduct for Arms Exports,\(^ {13}\) and the United Nations Arms Trade Treaty.\(^ {14}\)

Part IV will examine the use of existing international constructs, both regulatory and equitable, that can be used in the regulation of the trade of other controversial goods. This includes legal transactional export controls and injunctive models. Part V of this Note will combine improvements to existing international treaties along with the constructs discussed in Part IV to suggest a procedural and substantive legal model for halting the movement of SALW into the illicit arms trade.\(^ {15}\)

II. THE ORIGIN AND SALE OF SALW AND THE STRUCTURE OF SALW MARKETS

When considering the difficulties in controlling and restricting the trading of SALW, an initial question emerges: What makes them so challenging to regulate? Is the issue purely a matter of legal will, or is there something unique about their nature that makes SALW especially difficult to subject to transactional control? The answer is that it is not one or the other; it is both a question of legal will and unique circumstances. This Part will strive to illuminate those unique characteristics by defining SALW, analyzing the motivations of those who purchase them, and examining the anatomy of the international SALW market.

A. Defining Small Arms and Light Weapons

Attempting to define what constitutes a small arm and/or light weapon is akin to trying to define what constitutes a “tort” in American jurisprudence. Some scholars, when defining the term, will throw a vast

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\(^{15}\) This Note will suggest the general framework for the new model, but will not enter into specifics on application on a national or international level beyond general suggestions.
variety of weaponry into the category of “SALW.” ¹⁶ ¹⁶ For the purposes of ¹⁶ this Note, SALW are defined as “man-made lethal weapons that expel or ¹⁶ launch a projectile by the action of an explosive.” ¹⁷ ¹⁷ SALW encompass a ¹⁷ large variety of conventional weaponry that, while frequently distinct in ¹⁷ purpose, are treated similarly for legal analysis. ¹⁸ ¹⁸ They are generally ¹⁸ portable¹⁹ and may be shipped between areas en mass with ease. ¹⁹ ²⁰ Many ¹⁹ SALW are easily concealable both in use and in shipping. ²⁰ ²¹

They are also relatively inexpensive for the purposes of equipping ²¹ military forces. ²² ²² SALW and the corresponding ammunition can be ²² purchased at extremely low costs both legally and illegally in a variety of ²² countries. ²³ ²³ A number of new organizations are now offering weapons for ²³

¹⁶ By inference, SALW do not include “heavy” arms, weapons of mass destruction (nuclear, ¹⁶ biological, or chemical), tanks, aircraft, armored vehicles or light armor, or hand-to-hand weapons (e.g., combat knives, machetes, etc.). ¹⁶ See Harold Hongju Koh, Lecture, A World Drowning in Guns, 71 ¹⁶ FORDHAM L. REV. 2333, 2334–35 (2003) (excluding the aforementioned in his definition of SALW); ¹⁷ Rachel Stohl, Fighting the Illicit Trafficking in Small Arms, 25 SAIS REV., Winter-Spring 2005, at 60 (same).


¹⁸ See Koh, supra note 16, at 2334 (describing SALW as a single construct for legal purposes). ¹⁸ SALW may be broken down into two distinct divisions. Encompassed within the classification of ¹⁸ “small arms” are such weapons as automatic rifles, handguns, and machine guns. ¹⁸ Id. “Light weapons,” ¹⁸ by contrast, may be two or three-operator weapon systems, or may be single-operator weapons with ¹⁸ other individuals assisting in transportation. ¹⁸ See id. at 2334–35 (“‘Light weapons’ . . . are usually ¹⁸ larger, heavier, and designed to be hand-carried by teams of people . . . .”). Among those devices ¹⁸ classified as “light weapons” are multi-person machine guns, rocket-propelled grenade launchers ¹⁸ (RPGs), mortars, anti-tank weapons, and man-portable air-defense systems (MANPADS). ¹⁸ See Peter ¹⁸ Batchelor & James Bevan, Continuity and Change: Products and Producers, in GRADUATE INST. ¹⁸ OF INT’L STUDIES, SMALL ARMS SURVEY 2004: RIGHTS AT RISK 7, 31–34 (Peter Batchelor & Keith ¹⁸ Krause eds., 2004) (describing a multiplicity of light weapons). The Small Arms Survey 2004 provides ¹⁸ an excellent list of the most popular SALW and their producers. ¹⁸ Id. at 34 tbl.1.10.

¹⁹ Koh, supra note 16, at 2335.

²⁰ See Schroeder & Lamb, supra note 7, at 71 (“As small arms are lightweight, concealable, and ²⁰ durable, the ways in which they can be smuggled are nearly limitless.”). Schroeder and Lamb describe ²⁰ how SALW are smuggled into African states by trucks, planes, and boats, and even carried individually ²⁰ across borders. ²⁰ Id. at 71–72.

²¹ Id. at 71; see also Koh, supra note 16, at 2335 (“[SALW] are portable, easily concealed and ²¹ easily used.”).


²³ There is abundant anecdotal evidence of SALW’s inexpensiveness, especially in areas of the ²³ world where there are few controls on arms sales. ²³ See infra note 25 (describing the inexpensiveness of ²³ Sri Lankan SALW purchases); infra note 66 (discussing the inexpensiveness of the AK-47 in ²³ international markets). More recently, illegal online sites have further facilitated inexpensive weapons ²³ sales. See Sam Biddle, The Secret Online Weapons Store That’ll Sell Anyone Anything, GIZMODO.COM ²³ (July 19, 2012), http://gizmodo.com/5927379/the-secret-online-weapons-store-thatll-sell-anyone-
rent—ostensibly to ease costs for equipping security forces. The inexpensive nature of SALW provides an alternative to states and organizations that lack resources for heavier weapons. However, the greatest advantage to SALW in illegal sales is one of quantity. The sheer number of weapons that may be purchased by a party allows for rapid armament of a large force of individuals.

These advantages lead to SALW being widely used as a means for engendering local, discrete, and especially violent conflicts. SALW are easily procured at low costs and, therefore, allow organizations that under normal circumstances would be unable to engage in military action to suddenly have significant firepower. The European Union has noted that of forty-nine major conflicts in the 1990s, forty-seven of them were fought with SALW as the primary form of armament.

24 Koh, supra note 16, at 2236. However, the potential for abusing a system that allows one to rent a weapon is understandable and may lead to a rise in violent crime with rented weapons. Theresa May Promises Crackdown on Gun Middle Men, BBC NEWS (Oct. 1, 2012), http://www.bbc.co.uk/news/uk-politics-20019914.

25 See, e.g., CHRIS SMITH, SMALL ARMS SURVEY, IN THE SHADOW OF A CEASE-FIRE: THE IMPACTS OF SMALL ARMS AVAILABILITY AND MISUSE IN SRI LANKA 13 (2003) (describing the Liberation Tigers of Tamil Eelam as having at least two assault rifles for every soldier). Notably, in 1998, the Sri Lankan government was able to spend only $3.76 million to acquire over 50,000 SALW from the Chinese—which was significantly less than the cost of a single U.S. tank around that timeframe. Id. at 14 tbl.1; see M1 Main Battle Tank, FED’N AM. SCIENTISTS, http://www.fas.org/man/dod-101/sys/land/m1.htm (last visited Aug. 8, 2013) (listing the replacement cost of a M1 Abrams Main Battle Tank as $4.3 million as of 2000).

26 See, e.g., Man Convicted for His Role in Shipping Weapons, HULL DAILY MAIL, Oct. 27, 2012, at 3 (describing a conviction for smuggling large numbers of SALW into Nigeria). One British smuggler attempted to arrange for 40,000 AK-47 assault rifles, 30,000 rifles, 10,000 pistols, and 32 million rounds of ammunition to be illegally smuggled from the Chinese government to the Nigerian government. Id.

27 See James Bevan, Violent Exchanges: The Use of Small Arms in Conflict, in GRADUATE INST. OF INT’L STUDIES, SMALL ARMS SURVEY 2005: WEAPONS AT WAR 179, 184 (Eric G. Berman & Keith Krause eds., 2005) (describing how, during conflicts in the Solomon Islands and Georgia, dramatic increases in both the scope and intensity of the hostilities were marked by the rapid arming of military forces with large numbers of SALW).


29 See Michael T. Klare, The International Trade in Light Weapons: What Have We Learned?, in CARNEGIE COMM’N ON PREVENTING DEADLY CONFLICT, LIGHT WEAPONS AND CIVIL CONFLICT: CONTROLLING THE TOOLS OF VIOLENCE 9, 13 (Jeffrey Boutwell & Michael T. Klare eds., 1999) (explaining how many SALW-using belligerents “are normally barred from access to major weapons systems and/or lack the training and logistical capacity to operate such systems”). Note that this conclusion is not a new one. Klare elaborated that “there is a close and symbiotic relationship between light weapons trafficking and contemporary forms of violent conflict.” Id. (emphasis omitted).

Despite the dangers that stem from widespread use of SALW in combat, they are not well monitored or tracked by any party or international organization. Following the Cold War, a major shift to focus on the proliferation of weapons of mass destruction has diverted most international arms control experts, and that focus has been reinforced by a perception of increasingly complex non-governmental military organizations worldwide. As discussed later in this Note, the lack of coherent information about the status of SALW is one of the greatest impediments to their regulation.

B. Participants in an Arms Sale

To best understand the nature of the international arms trade, one must consider the perspective of the three major parties involved in each transaction: the seller, the buyer, and the broker. These three parties drive the nature of each sale, the quantity and quality of the sale, and the legality of the sale. Each poses different challenges to international regulation.

A party may sell SALW for a variety of reasons. However, those sellers are almost always either large arms manufacturers or states. While there are a few “craft” or other boutique arms producers, a vast majority of arms exports emerge from large manufacturers or the states in which those manufacturers reside. However, the motivations for each

31 See Parker, supra note 8, at 61, 66 (describing the varying levels of scrutiny applied to arms exports). Consider that despite only corresponding to a small portion of total worldwide military spending, SALW are used in virtually every armed conflict. In 2001, the Small Arms Survey asserted that small arms resulted in the deaths of over 500,000 individuals per year. ROBERT MUGGAH & ERIC BERMAN, SMALL ARMS SURVEY, HUMANITARIANISM UNDER THREAT: THE HUMANITARIAN IMPACT OF SMALL ARMS AND LIGHT WEAPONS 3 (2001).
32 Keppler, supra note 28, at 384–85.
33 Id. at 385.
34 See infra Part III.
35 Unsurprisingly, the largest producers of weapons are the states that are the largest exporters of said weapons. See Industrial Production, SMALLARMSSURVEY.ORG, http://www.smallarmssurvey.org/weapons-and-markets/producers/industrial-production.html (last visited Aug. 8, 2013) (“Main producing countries include all the top exporters [of SALW] . . . .”). While some of the arms manufacturers are fully within the public consciousness (e.g., Remington, Smith & Wesson, Glock, Heckler & Koch), a number of major weapons manufacturers are less well known (e.g., Arsenal AD, Israeli Weapon Industries, Dynamit Noble, Nordic Ammunition Group). See id. (providing a list of major arms producers and exporters).
36 This is not to say that such manufacturers are nonexistent. “Craft” arms manufacturing remains prevalent in places where international arms imports are strictly controlled, where there is significant socioeconomic poverty, and where there are active embargoes. See Eric G. Berman, Craft Production of Small Arms, RESEARCH NOTES: WEAPONS & MKTS. (Small Arms Survey, Geneva, Switz.) Mar. 2011, at 1, available at http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-3.pdf (describing the craft arms production process and citing examples from countries with strict arms regulation). For example, Ghana maintains an intricate matrix of craft gun manufacturers spread throughout all ten regions of its state. Emmanuel Kwesi Aning, The Anatomy of Ghana’s Secret Arms Industry, in SMALL ARMS SURVEY, ARMED AND AIMLESS: ARMED GROUPS,
seller may be distinctly different. The reason why a seller may engage in an arms sale is usually wholly dependent upon circumstances at the time.37

The buyer is an equally amorphous character. Frequently, buyers of arms are legitimate organizations and states that seek to increase their military or armament capacity.38 In seeking to do so, some buyers may be more or less acceptable under international law. Buyers encompass legitimate state militaries and police forces, but they also include states under international sanction and embargo, terrorist organizations, drug cartels, gangs, and other criminal organizations.39 The buyer’s desired use for the weapons may reflect what type and quantity of weapons are sought.40

The purveyor, broker, or “middlemen” of arms sales are the least well-known members of the equation.41 These groups and individuals maintain

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37 See Stohl, supra note 16, at 62–63 (describing the variety of ways small arms can enter the supplier side of the market). Stohl notes that “[s]mall arms can enter illicit networks from legal trade in nine distinct ways.” Id. She cites corrupt governmental officials, theft, governmental instability, and lack of oversight as major motivators for transfers into the illegal market. Id. However, she takes care to note that one of the largest means of which arms are purveyed to the black and grey markets is through “states, companies or individuals . . . violat[ing] national, regional or international sanctions and embargoes in order to ship weapons to barred countries or parties.” Id.

38 Nicolas Florquin, A Booming Business: Private Security and Small Arms, in SMALL ARMS SURVEY 2011: STATES OF SECURITY 101, 102 (Eric Berman et al. eds., 2011) (noting the kind of SALW private military organizations are usually given, and alleging their participation in illegal acquisitions of armaments). Florquin makes note of the rise in private security leading to additional legitimate small arms sales to non-state actors. See id. at 103 (describing the rise in the number of private paramilitary forces). However, he does articulate a belief that they may add to a lack of transparency in arms movements and sales, as they are less likely to report assets to international bodies. See id. at 109 (noting a lack of transparency combined with assumed ability to engage in offensive military operations).

39 See Douglas Farah, Terrorist-Criminal Pipelines and Criminalized States: Emerging Alliances, PRISM, June 2011, at 15, 16 (describing the connections between smuggled arms and terrorist groups, gangs, and cartels).

40 See Klare, supra note 29, at 14–15 (discussing motivations for sales of SALW to non-state actors). Noticeably, Professor Klare pins a great deal of the motivation for the procurement of SALW to internal conflicts and weak governments, which drive a desire for easily accessible and inexpensive weaponry. Id.

41 See Kristen Ashley Tessman, Note, A Bright Day for the Black Market: Why Council Directive 2008/51/EC Will Lose the Battle Against Illicit Firearm Trade in the European Union, 38 Ga. J. INT’L & COMP. L. 237, 244–45 (2009) (discussing the difficulty in assessing broker activity accurately). The definition of a “broker” could vary due to the variety of services offered. However, in the Small Arms Survey 2006, Ms. Silvia Cattaneo divided broker activities into the “core” services (the negotiation and facilitation of arms deals), and “associated” services (transportation, financing, insurance, technical
a necessarily shadowy position within the international arms market to protect themselves from the scrutiny of international law and from the enemies of those to whom they sell arms. Their status and position may be variable dependent upon a sale—they could be dedicated brokers for a single seller or buyer, or they could be negotiators between multiple clients. What connects them is a general motivation for profit and a desire to “facilitate” firearms sales over actual possession of the weapons.

C. Structure of International Arms Markets

International arms markets can generally be broken down into three distinct models. First are the legitimate sales that occur between and among states and companies. Second are the clearly illegal sales of weapons that both the seller and the buyer should not possess—this is known colloquially as the “black market.” The third involves the most difficult to deter: the “grey market.”

Grey markets exploit the weak regulation and loopholes in international law for arms sales. In a grey market transaction, otherwise assistance, etc.). Silvia Catteneo, Targeting the Middlemen: Controlling Brokering Activities, in SMALL ARMS SURVEY 2004, supra note 18, at 141, 142.

42 See Orlovsky, supra note 22, at 345 (describing the typical identity of an arms broker). The degree of secrecy varies depending upon whether the broker operates within the legal arms sales market or conducts illicit deals. Many operate somewhere in between the two, as the hope is “to avoid, not only the watchful eye and punitive force of national or international law, but also the visibility that accompanies such brazen flouting of laws which is characteristic of black marketeers.” Deborah Berlinck & Spyros Demetriou, Fueling the Flames: Brokers and Transport Agents in the Illicit Arms Trade, in SMALL ARMS SURVEY 2001, supra note 4, at 95, 101. While illegally operating brokers utilize a variety of strategies and services, id., there is a general feeling that the lack of information about brokers stems from the “cloak of secrecy surrounding most illicit weapons transfers,” id. at 95.

43 See David Kinsella, The Black Market in Small Arms: Examining a Social Network, 27 CONTEMP. SECURITY POL’Y 100, 113 (2006) (describing the different functions of brokers). Professor Kinsella divides brokers into four groups: (1) “coordinators” who interact among several states that are part of a larger organization; (2) “liaisons” that interact similarly when the states are parts of different groups; (3) “representatives” that control the outflow of goods from a single state; and (4) “gatekeepers” who impact a single states’ inflow. Id. All of these brokerage roles may be of use during a SALW transaction, but may require a different skill set depending upon the relationship between the broker and the clients. See Orlovsky, supra note 22, at 348 n.19 (describing brokers’ different skill sets depending upon their role).

44 Orlovsky, supra note 22, at 345, 348.

45 Keppler, supra note 28, at 386–87.

46 See Anne-Kathrin Glatz & Lora Lumpe, Probing the Grey Area: Irresponsible Small Arms Transfers, in SMALL ARMS SURVEY 2007: GUNS AND THE CITY 73, 74 box 3.1 (Eric G. Berman et al. eds., 2007) [hereinafter SMALL ARMS SURVEY 2007] (“[G]rey market transfers, are transfers that are authorized by a government, but are nevertheless of doubtful legality, at least with reference to international law (significant risk of misuse), or irresponsible in some other sense (significant risk of diversion to unauthorized recipients).” (emphasis omitted)); see also Keppler, supra note 28, at 386–87 (explaining the multiple geopolitical, economic, and military reasons for grey market transactions).

47 See Glatz & Lumpe, supra note 46, at 73 (noting that illicit transfers can be technically legal while still contravening socially-mandated standards). The Small Arms Survey 2007 notes that while
legal arms are sold legitimately from a single dealer or nation to another dealer or nation. However, that second dealer may then sell the received weapons to unauthorized recipients, usually through the aid of loose regulatory structures and weakened domestic legal systems. These sales occur either through an inadvertent failure on the part of the initial seller to conduct due diligence on the legitimacy of the buyer, or through the deliberate use of the buyer as a “transit state” to circumvent international law.

Both legitimate and illegitimate markets tend to function in one of several distinct models. In fact, a large number of SALW shipments do not

“most international efforts concerned with small arms and light weapons have focused on stemming the illicit trade . . . . [the term “illicit”] is often taken to refer to something that is clearly illegal.” Id. The Survey further indicates that “authorized transfers [of SALW] may contravene agreed international law, rules and customs” despite being authorized by the states. Id. These transactions form the core of the grey market.

48 Keppler, supra note 28, at 386.

49 See Glatz & Lumpe, supra note 46, at 81 (noting that the risk of diversion due to lax security or oversight can lead to irresponsible grey market arms transfers). One example of such a resale involved the redirection of legal SALW from Bosnia that were initially slated to be destroyed under U.N. supervision. Instead, without authorization from the U.N., the U.S. military quietly negotiated a deal with the Bosnian authorities to clandestinely redirect the weapons to U.S. allies in Iraq via an independent arms broker. Id. at 84–85. Another example of a grey market transaction is an “arms swap” between two different organizations, where new arms are traded for surplus arms and ammunition. Rather than being decommissioned, the surplus weapons are then resold on the black market. See Theresa A. DiPerna, Small Arms and Light Weapons: Complicity “With a View” Toward Extended State Responsibility, 20 FLA. J. INT’L L. 25, 45–47 (2008) (describing one such sale between the Nicaraguan National Police and Grupo de Representaciones Internacionales).

50 This failure can be of a variety of sizes, ranging from the illegal re-sale of weapons bought at a gun shop or show to the unauthorized or accidental retransfer of weapons provided by a state to a third party. It is estimated that over 190,000 American weapons provided to Iraqi security forces have been resold or “lost.” Glenn Kessler, Weapons Given to Iraq Are Missing: GAO Estimates 30% of Arms Are Unaccounted for, WASH. POST, Aug. 6, 2007, at A1; see also Jordan Lipschik, AG Says Illegal Gun Show Sales Commonplace, N.Y. LEGIS. GAZETTE (Dec. 5, 2011), http://www.legislativegazette.com/Articles-Top-Stories-c-2011-12-05-81105.113122-AG-says-illegal-gun-show-sales-commonplace.html (describing illegal sales and re-sales at New York gun shows).

51 Stohl, supra note 16, at 61; see also LORETTA BONDI & ELISE KEPPLER, THE FUND FOR PEACE, CASTING THE NET?: THE IMPLICATIONS OF THE U.S. LAW ON ARMS BROKERING 15 (2001) (describing how independent smugglers have engaged in singular transactions with implicit support of governments). Again, the range of offenses can be wide—anything from a technical violation during a transfer of power from one government to another or from the deliberate transfer of arms to a third-party country in an effort to circumvent embargoes. See, e.g., DiPerna, supra note 49, at 44–45 (describing the use of a Chiquita Banana subsidiary in smuggling arms into Colombia). One of the most intricate examples of using transit states can be seen in a single illegal arms deal between North Korea and Iran in 2009. OXFAM, CASE STUDY: BROKERS WITHOUT BORDERS 9 (2010), available at http://www.oxfam.org/sites/www.oxfam.org/files/brokers-without-borders-report-181010.pdf. In that deal, a North Korean shipping company chartered a false shipping agreement via a trading company incorporated in Spain and based in Hong Kong. Id. at 11. It utilized a New Zealand plane-chartering company to hire a United Arab Emirates plane registered in Georgia, with a crew supplied by Kazakhstan. Id. The plan was to initially ship the weapons to Ukraine, which would then divert the weapons to Iran, but the flight was intercepted at the Don Muang International Airport in Bangkok, Thailand. Id. at 11–12.
occur in the traditional markets at all; indeed the use of the term “market” may be a misnomer. Rather, these shipments are procured in one-time deals between a buyer and a seller, sometimes officiated by an arms broker.\footnote{Such transactions occur in seven stages and are frequently run through the broker. See Berlink & Demetriou, \textit{supra} note 42, at 100. First, a broker “prospects” for a set of buyers and suppliers. \textit{Id.} Once having made approaches and establishing his credentials with both, the broker offers technical “advice” for the buyer that largely consists of providing the basic parameters of a deal, advice on different weapons systems, and modalities for financing and transport. \textit{Id.} Once it is clear that the buyer has a list of desired weaponry, the broker determines which seller would have the desired goods and acts as the negotiating intermediary between both. \textit{Id.} After the deal has been agreed upon, the broker will assist in financing or credit, which varies depending on the legality of the transaction. \textit{Id.} The broker will then arrange for transport and delivery of the goods, which may involve obtaining the necessary paperwork or providing the required means to circumvent the legal regulatory controls. \textit{Id.} This complex and intricate process may all culminate in a singular deal. See, e.g., Matthew Brunwasser, \textit{Monzer Al Kassar, The Prince of Marbella: Arms to All Sides, FRONLINE P.B.S.} (May 2002), http://www.pbs.org/fronlineworld/stories/sierraleone/alkassar.html (describing a single-time deal between Croatia and Polish arms manufacturer Cenrex).} Singular and independent transactions make up a large quantity of the legal arms sales industry\footnote{It is admittedly not easy to measure exactly how many independent arms transactions there are between the industry and states. In an analysis of United States small arms shipments, scholars at the Small Arms Survey divided legal exports into four categories, two of which were single-transaction sales: industry-negotiated Direct Commercial Sales (DCS) and government-negotiated Foreign Military Sales (FMS). TAMAR GABELNICK ET AL., \textit{SMALL ARMS SURVEY, A GUIDE TO THE U.S. SMALL ARMS MARKET, INDUSTRY, AND EXPORTS}, 1998–2004, at 62 (2006). They noted that foreign customers, including governments, could contract single DCS transactions from different arms manufacturers through the U.S. State Department. \textit{Id.} Looking at the most recent report, the number of single-transaction DCS approvals for Category I weapons, which include firearms, close assault weapons, and combat shotguns, are staggering. U.S. DEP’T OF STATE, 2012 \textit{SECTION 655 REPORT INTRODUCTION 2} (2012), available for download at http://www.pmddtc.state.gov/reports/655_intro.html. The U.S. government authorized almost 30,000 Category I DCS transactions to Afghanistan alone in 2012, for a total authorized value of over $20 million. U.S. DEP’T OF STATE, 2012 \textit{SECTION 655 REPORT 1} (2012), available for download at http://www.pmddtc.state.gov/reports/655_intro.html. \textit{Id.} Looking at the most recent report, the number of single-transaction DCS approvals for Category I weapons, which include firearms, close assault weapons, and combat shotguns, are staggering. U.S. DEP’T OF STATE, 2012 \textit{SECTION 655 REPORT INTRODUCTION 2} (2012), available for download at http://www.pmddtc.state.gov/reports/655_intro.html. The U.S. government authorized almost 30,000 Category I DCS transactions to Afghanistan alone in 2012, for a total authorized value of over $20 million. U.S. DEP’T OF STATE, 2012 \textit{SECTION 655 REPORT 1} (2012), available for download at http://www.pmddtc.state.gov/reports/655_intro.html. Over three million DCS transactions were authorized to Canada the same year. \textit{Id.} at 7. While it is difficult to extrapolate this data into a worldwide estimate of single-transaction SALW sales, this Note asserts that based on this information such sales constitute a significant portion of the market.} and form the basis for many state-to-state sales.\footnote{FMS transactions are significantly more difficult to measure than DCS transactions as reporting is hampered through a lack of oversight and resources to ensure proper monitoring. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-454, \textit{DEFENSE EXPORTS: FOREIGN MILITARY SALES PROGRAM NEEDS BETTER CONTROLS FOR EXPORTED ITEMS AND INFORMATION FOR OVERSIGHT 2–3} (2009). What little information is available indicates that the number of single FMS transactions can vary from state to state. The Federation of American Scientists have attempted to maintain a repository of FMS reports that may provide some picture as to their prevalence across the general market. See \textit{U.S. Arms Transfers: Government Data}, FED’N AM. SCIENTISTS, http://www.fas.org/programs/ssp/asmp/factsandfigures/government_data_index.html#655 (last visited Oct. 10, 2013) (containing a database of recent Section 655 FMS reports). In addition, just because an arms sale is a singular transaction does not imply that there is no prior relationship between the two states or that it is not likely that the states may have a similar transaction in the future. Many arms transactions are supplemental to geopolitical or ideological commonalities between the two states parties, and may result in firmer links between both states. See Kinsella, \textit{supra} note 43, at 104 (claiming that arms transactions forge future commitments between states, and noting that the United} They are also among the most difficult sales to track due to little
actually traceable “network” or infrastructure.55

More substantial transactions—deals that may be ongoing or renewable—occur in organized “networks” or “pipelines” between two or more entities.56 Pipeline transactions operate consistently over time and are used to sustain ongoing criminal operations, military alliances, or open conflict.57 The design of arms pipelines will often take into account the geopolitical and cultural complexities of the region in which it operates as well as the nature of local black markets for other illicit goods.58 Many are tailored to the specific conditions on the ground and designed for continued durability and difficulty of detection.59 Such pipeline transactions also

States and Soviet Union tended to largely supply arms to geopolitical allies and ideologically-compatible nations during the Cold War).

55 While some legitimate sales are reported, arms brokers will frequently use “chain” networks to insulate themselves from the sale. Keppler, supra note 28, at 388. As one report noted in looking at British arms sales:

In some cases the arms will be delivered by a shipping firm based in one country, with its aeroplane registered in a second, which flies out from a third, will pick up the arms in a fourth country, re-fuel in a fifth, be scheduled to land in a sixth, but actually will deliver its lethal consignment in a seventh country.

Id. (quoting OXFAM GB, OUT OF CONTROL: THE LOOPHOLES IN THE UK ARMS TRADE 3 (1998)). The report further notes the ease in which companies can change shipping details or locations. See OXFAM GB, supra, at 4 (using the example of the “Arms to Africa Affair” in which Sandline International, a London-based private security contractor, redirected arms to Sierra Leone in the late 1990s). Furthermore, brokers sometimes attempt to obfuscate tracing the transaction through money laundering or shell companies, which can prevent regulatory authorities from keeping full oversight of the transaction. Berlinck & Demetriou, supra note 42, at 106. The North Korea-Iran arms transaction in 2009 embraced this method in an attempt to hide the sales. OXFAM, supra note 51, at 11.

56 Farah, supra note 39, at 16.

57 See Kinsella, supra note 43, at 103–04 (“Arms transfers are, in many instances, embedded in relationships of mutual defense . . . or in less formal commitments by supplies to the security of recipient states. Those more general military relations . . . may also involve basing and overflight rights, military training and joint exercises, the coordination of strategy and tactics, the sharing of military intelligence, and other forms of collaboration intended to enhance the security of both parties to the transaction.”) Kinsella also believes that such pipelines have a synergistic relationship with associated criminal networks. See id. at 105 (“[T]he parties’ separate interests [in a black market]—economic, military, or otherwise—surely are served by the maintenance of the black market’s infrastructure. . . . [B]ecause black market arms transfers occur in a lawless environment . . . parties to these transactions must rely more heavily on trust (often reinforced by threat) than is the case for legal market transactions.”); see also Stohl, supra note 16, at 62 (describing nine ways by which arms enter black and grey networks and markets).

58 See Stohl, supra note 16, at 63–64 (describing the complexity of illicit arms pipelines derived from regional geopolitics and local illicit commercial conditions). For an excellent example of the design and formation of a network in Africa, demonstrating the complex flow of SALW through state “nodes,” see Kinsella, supra note 43, at 107 fig.1.

59 See, e.g., Farah, supra note 39, at 16–17 (describing the link between terrorist and criminal networks for smuggling). Consider the use of the Ho Chi Minh trail during the Vietnam War, which despite numerous assaults was protected by secrecy, variability, and difficult-to-access terrain. WILLIAM ROSENBAU, SPECIAL OPERATIONS FORCES AND ELUSIVE ENEMY GROUND TARGETS: LESSONS FROM VIETNAM AND THE PERSIAN GULF WAR 7–8 (2001). Indicative of the search for many arms pipelines, counterinsurgency operations to find the Ho Chi Minh trail during the Vietnam War ran into
open up the opportunity for cross-exploitation. While the use of dedicated pipelines for arms sales is acceptable for state actors, criminal organizations may partner with preexisting illicit distribution networks and pipelines in order to co-opt their infrastructure for arms sales.60

The final, most open, and least-used model of international arms market transactions is one of open and transparent sales in marketplace conditions.61 Few producers sell goods in substantial bundled quantities over the open market—most large-scale sales are delivered either through pipelines or one-off contracts.62 Instead, an open market is often utilized by a large number of people to buy a few weapons each from illicit or illegal sources.63

The Kalashnikov AK-47 is the ubiquitous example of a weapon that is sold over an open market model.64 AK-47s may be bought or sold on an individual basis in a variety of markets worldwide with little or no oversight.65 Its ease of mass production and widespread distribution allows problems. See id. at 20 (describing attempts to find “truck parks, weapons depots, and storage facilities”).

60 Stohl, supra note 16, at 63. Many of the “best” pipelines are preexisting infrastructures prevalent in the region. In many regions, this usually takes the form of drug-smuggling pipelines. See id. at 64 (noting that some organizations, such as the Revolutionary Armed Forces of Colombia, will regularly exchange illegal narcotics for illegal weapons, and that illicit drugs and SALW pipelines are linked). The infrastructure to smuggle blood diamonds between West Africa and Europe has also seen a rise in arms smuggling. See id. at 63–64 (describing transactions between Liberia, Togo, and Burkina Faso to arms smugglers in Ukraine, Bulgaria, and Russia and diamond smugglers in Antwerp, Netherlands).

61 Keppler, supra note 28, at 386.

62 See Kinsella, supra note 43, at 103–04 (noting that most large-scale legitimate transactions are directly between states or by pipelines left open for further legitimate transactions).

63 Such markets can exist as physical “bazaars” where thousands of guns can be bought and sold per day. In 2001, the RAND Corporation reported on the Tuk Tla arms bazaar located near Phnom Penh, Cambodia, where a variety of small arms could be sold for between $5 and $120. Peter Chalk, Light Arms Trading in SE Asia, RAND CORP., (Mar. 1 2001), http://www.rand.org/commentary/2001/03/01/JIR.html. RAND also reported on the large “hub” of weapons markets in the northwest region of Pakistan, known as Darra Adam Khel, where weapons are resold from diverted shipments to Afghanistan and from craft manufacturers. Id. In 2006, Suroosh Alvi, founder of the independent media company VICE, personally travelled to Darra Adam Khel to investigate the markets. Suroosh Alvi, The Gun Markets of Pakistan, CNN (Jan. 27, 2010), http://www.cnn.com/2010/WORLD/africa/01/25/vbs.gun.markets.pakistan/index.html. He toured factories that manufactured as many as one thousand guns per day. Id. Open markets do not necessarily maintain a physical presence. Recently there have been reports of a black market in SALW developing over Facebook. See Omar Kibrisli, The Deadly Network: Guns for Sale on Facebook, INDEPENDENT, Sept. 18, 2013, at 32.

64 See Koh, supra note 16, at 2336 (“The most famous example [of easily acquired SALW] is the AK-47, the famous Kalashnikov assault rifle, of which some 70 to 100 million are believed to exist worldwide.”).

65 Admittedly, it is difficult to say whether any single AK-47 is necessarily produced by Kalashnikov. The weapon pattern has been licensed and copied to a whole variety of countries, including India, China, Egypt, Iraq, and states formerly a part of Yugoslavia, among others. See Koh, supra note 16, at 2336–37 (describing a number of countries that now manufacture AK-47 variants).
for extremely low prices, which in turn generates favor among those seeking to arm themselves with limited resources.\textsuperscript{66} This leads to open-market transactions as an avenue for organizations or single actors who wish to engage in illegal activity but cannot sustain the resources of a larger state actor.\textsuperscript{67}

Together, these three models create the framework for transactions in the international arms market. Virtually all transactions within the arms market conform to one of the three methods of shipping SALW.\textsuperscript{68} While the shadowy nature of the black and grey markets still occludes full analysis of their structure and provides a major disadvantage to their regulation,\textsuperscript{69} the general principles of how to conduct arms sales remain consistent regardless of legality. This pattern of methodology provides an opportunity for regulation in both the short and long term.\textsuperscript{70}

III. SALW REGULATORY AND TREATY STRUCTURES

The international arms market remains a sophisticated and complex creature. While the regulatory structures and treaties intended to control the market generally fail to achieve their desired goal, it is not fair to claim that such regulations are non-existent. Currently, a variety of reporting, regulating, and enforcement mechanisms exist that arise out of legally binding and non-binding treaties. It is important to understand and compare these various treaties in order to identify both their strengths and deficiencies. This Part will discuss and analyze several of the treaties most

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\textsuperscript{66} Phillip Killicote, \textit{Weaponomics: The Global Market for Assault Rifles} 4 (World Bank Policy Research Working Paper No. 4202, 2007). This popularity is in spite of the Kalashnikov weapons having several known defects. \textit{Id.} As of 2005, the average price of the AK-47 globally stabilized around $534. \textit{Id. at 21 tbl.II.} However, that price was dramatically lower in particularly unstable regions, such as Africa and the Middle East. \textit{Id.} In Asia, prices as low as $40 have been reported. \textit{Id. at tbl.1.} The \textit{Small Arms Survey} 2007 claimed to find minimum prices in Africa at $12, with an average price hovering around $156. Phillip Killicote, \textit{What Price the Kalashnikov? The Economics of Small Arms}, in \textit{SMALL ARMS SURVEY 2007}, supra note 46, at 257, 261 tbl.8.1. One scholar stated that AK-47s could be found for sale in Bangkok for as little as $10. Koh, \textit{supra} note 16, at 2336.

\textsuperscript{67} See \textit{Stohl, supra} note 16, at 60 (noting that new asymmetric conflicts in the post-Cold War era are frequently fought with SALW and noting the advantages).

\textsuperscript{68} See \textit{Kinsella, supra} note 43, at 101 (describing that illicit arms markets conform within a spectrum between the pure anarchic free market and the highly controlled pipeline network).

\textsuperscript{69} Bondi & Keppler, \textit{supra} note 51, at 16 (describing how a lack of regulation has left arms smuggling virtually undisturbed).

\textsuperscript{70} See \textit{infra} Part IV (describing a method in which existing arms regulatory structures can be used to curb illicit SALW shipments).
involved in SALW regulation.

A. Legally-Binding Treaty Sources

Three major, existent, and legally binding treaties currently regulate the shipment, trade, and exportation of conventional arms: The U.N. Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition;71 the European Union Code of Conduct on Arms Exports; and the Inter-American Convention Against Illicit Manufacturing and Trafficking in Firearms. These binding treaties are supplemented by dozens of equally legally binding national treaties that regulate trade within individual countries’ jurisdictions.72 Each of these major treaties warrants separate examination.

1. U.N. Protocol Against the Illicit Manufacturing and Trafficking in Firearms (The Palermo Protocol)

The United Nations has struggled to produce a legally binding convention for controlling the arms trade. Most U.N. action on SALW regulation has been in non-binding form.73 As of current writing, the Palermo Protocol remains the single legally binding U.N. treaty that regulates SALW.74 As part of the U.N. Convention Against Transnational Organized Crime (UNCATOC), the Palermo Protocol specifically targets a variety of conventional-arms related acts, mostly by urging independent action by treaty parties.75 It requires that treaty parties criminalize the illegal manufacture, transit, and sale of firearms within their borders.76 It also requires the seizure and disposal of illegal firearms, as well as cooperation between treaty parties in executing the provisions of the

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71 A protocol is a supplemental portion to a U.N. Convention (i.e., a treaty) that has been adopted with the same force as the existing treaty. Definition of Key Terms Used in the UN Treaty Collection, UNITED NATIONS, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml #protocols (last visited Aug. 6, 2013).
72 Parker, supra note 8, at 62 (noting that in addition to national regimes to control arms exports, “[v]arious multilateral arrangements attempt to regulate . . . . small arms”).
73 See infra Part III.C.3 (discussing the advent of the U.N. Arms Trade Treaty, which as of this writing has not entered into force and thus remains non-binding).
74 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, opened for signature May 31, 2001, 2326 U.N.T.S. 211 (entered into force July 3, 2005) [hereinafter “Palermo Protocol”]. Importantly, the Protocol is not a standalone document, but rather supplements the UNCATOC. Id. art. 1(1). What can be inferred by this method of adoption is a focus by the General Assembly on deliberately targeting black market brokers through the Convention and encouraging states to shut down those manufacturers and brokers specifically. Id. pmbl. ¶ 1.
75 See id. art. 2 (“The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition”).
76 Id. art. 5. Note that the Palermo Protocol does not speak to illicit shipments by states themselves.
Most important among the Palermo Protocol’s provisions are the broad regulatory requirements that each state party must adopt. These treaty provisions require not only the stamping of weaponry with serial numbers or other identifiers, but also the permanent deactivation of weapons no longer in service and the use of theft-prevention measures. Significantly, Article 10 of the Palermo Protocol mandates a variety of standards that must be adopted by each treaty party in order to allow for the shipment of SALW. These include a requirement that as part of the authorization of sale, minimum information must be conveyed with every export of arms between states. Without such information, the sale of arms is prohibited under the provisions of the Palermo Protocol.

The Palermo Protocol has garnered significant regulatory benefits. It has been signed and/or ratified by many of the major arms exporting countries, with a total of fifty-two signatories and one hundred and four parties to the treaty itself. It has also encouraged uniformity among

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77 Id. art. 6, 11, 13. However, note the quasi-complementarity principles ascribed within the Protocol, as Article 6 requires compliance with the entirety of Article 12 of the U.N. Convention Against Transnational Organized Crime. Id. art. 6(1). The Convention’s Article 12 limits the acts of seizure so that they do not contravene domestic law. See U.N. Convention Against Transnational Organized Crime, art. 12, opened for signature Nov. 15, 2000, 2225 U.N.T.S. 209, 275 (entered into force Sept. 29, 2005) (“Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with . . . the domestic law of a State Party”). This limitation raises serious questions over whether the Palermo Protocol can act effectively without complementary domestic guidelines.

78 These components are found within Part II of the Protocol (“Prevention”). Palermo Protocol, supra note 74, art. 7–11.

79 Id. art. 8. These identifiers include both serial numbers and other information about year of import and place of manufacturing. Id. art. 8(1)(a)–(b). Notably, it also encourages the identification of country of origin, though not for “temporary imports of firearms for verifiable lawful purposes.” Id. art. 8(1)(b). What a “verifiable lawful purpose” is under the circumstances is speculative. The language in this subsection may lead to a legal loophole in which countries can covertly ship weapons to buyers as long as the buyers are using them for “verifiable lawful purposes.” However, based on Article 10(6), the term may mean purposes more analogous to hunting, sport shooting, etc., rather than a more nefarious reading of the terminology. Id. art. 10(6).

80 Id. art. 9.

81 See id. art. 11 (requiring “appropriate measures” be taken to prevent theft of firearms); see also id. art. 8(2) (requiring measures be taken to prevent the removal of stamped identifiers).

82 Id. art. 10(1).

83 Id. art. 10(3). This includes the date and place of authorization, an expiration date, countries of import and export, the final recipients, description of the firearms, and any countries of transit. Id.

84 Id. art. 10(2).

85 Status of Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdg_no=XVIII-12-c&chapter=18&lang=en (last visited Sept. 29, 2013). The Russian Federation, Israel, France, Czech Republic, Switzerland, and the United States have all refused to sign the Protocol, which account for a major number of world arms exports. See Parker, supra note 8, at 63 tbl.2.1 (discussing major exporter’s signatory status under the Protocol). At the same time, most of these states have adopted
licensing and export mandates so that now most major exporting states embrace the identical basic legal requirements to authorize the export of firearms.86

2. European Union Code of Conduct on Arms Exports

The European Union has enacted more formulaic SALW regulations that take advantage of its integrated hierarchy as a multinational organization. Specifically, the Council of the European Union87 has adopted legally binding regulations concerning the sale of weaponry that apply to every member of the EU.88 The EU’s Code of Conduct on Arms Exports (EUCCAE)89 is the main set of legal guidelines for exports of weaponry both between member states and to non-member states.90 The EUCCAE operates as a series of legal requirements and prohibitions that moderate arms exports.91 Export methods used by EU members, which are guided in part by the EUCCAE and in part by domestic legal requirements, require compliance with the EUCCAE’s prohibitions.92

The EUCCAE describes eight substantial criteria under which an export sale’s authorization must be denied within the European Union. First and foremost are prohibitions on exports that violate arms embargoes and the non-binding Wassenaar Arrangement.93 The EUCCAE also bans the sale of arms if “there is a clear risk that the proposed export might be used for internal repression.”94 In the most recent incarnation of the national measures that essentially comply with the Protocol’s requirements. See id. at 70–74 tbl.2.2 (listing licensing requirements for major exporter states).

86 Parker, supra note 8, at 70–74 tbl.2.2. For a discussion on export controls, see infra Part IV.A.
87 The governing body of the European Union.
88 Notably, these regulations are designed to comply with the free movement of goods provisions within the Treaty of the European Union. See Consolidated Version of the Treaty on the Functioning of the European Union, Sept. 5, 2008, arts. 30–35, 2008 O.J. (C 115) 60–61 (establishing a free trade system between member states). Most of the regulations proposed by the Council are supported under the Article 36 ability for states to prohibit imports or exports “justified on grounds of public morality, public policy or public security.” Id. art. 36.
89 The updated version is now titled “Council Common Position 2008/944/CFSP.” The “Code of Conduct on Arms Exports” was the common position’s original and colloquial name.
91 Id. pmbl. ¶¶ 3–5.
92 Id. pmbl. ¶ 5, 17. The purpose behind the code of conduct is more to “harmoniz[e] practices across the EU,” despite granting member states the “power to grant or deny applications.” Alan Hudson, Case Study: EU Code of Conduct on Arms Exports, OVERSEAS DEV. INSTIT. 1 (July 2006), http://www.odi.org.uk/publications/2801-eu-code-conduct-arms-exports.
93 EUCCAE, supra note 90, art. 2(1). Note that this codifies the Wassenaar Arrangement as legally binding within the EU, despite it not being so outside of the EUCCAE’s reach. See infra Part III.C.1.
94 EUCCAE, supra note 90, art. 2(2). In the context of the document, “repression” mostly refers to violations of the International Covenant on Civil and Political Rights, but does not necessarily encompass human rights violations that are not codified under international law. Id.
EUCCAE, the Council of the European Union banned the sale of weapons to states or parties in violation of international human rights or humanitarian law.\textsuperscript{95}

The EUCCAE further bans the sale of arms to fuel conflicts\textsuperscript{96} or the sale of arms for the purposes of starting aggressive warfare.\textsuperscript{97} Criterion Seven of the EUCCAE demands that EU members consider the likelihood that the arms will be resold or diverted to an “undesirable” user, which essentially requires that EU countries not export into the grey market.\textsuperscript{98}

Most effectively, the EUCCAE demands that member states prepare and circulate reports on their military technology and equipment exports.\textsuperscript{99} In turn, this information is synthesized into one EU annual report that is eventually made public.\textsuperscript{100} Though it deals only with military technology and equipment, the EUCCAE is supplemented by additional EU regulations that establish contract requirements and controls on dual-use exports.\textsuperscript{101}

3. \textit{Inter-American Convention Against Illicit Manufacturing and Trafficking in Firearms}

The Inter-American Convention Against Illicit Manufacturing and

\begin{footnotes}
\item[95] Id. art. 2(2)(b), (c). To clarify the distinction, international humanitarian law is only applied in international tribunals when the factual allegations are tied to periods of intense armed conflict, either between states or in intrastate conflict depending upon its intensity. See Prosecutor v. Tadic, No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached . . . .”).
\item[96] See EUCCAE, \textit{supra} note 90, art. 2(3). (“Member States shall deny an export license for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.”).
\item[97] See id. art. 2(4). (“Member States shall deny an export license if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim.”)
\item[98] Id. art. 2(7). Note that this section is not a prohibition on the sale, but rather only demands consideration. However, elaboration on Criterion Seven is expected within the next revision of the EUCCAE. Hudson, \textit{supra} note 92, at 1.
\item[99] EUCCAE, \textit{supra} note 90, art. 8.
\item[100] For the most recent report, see Thirteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Export of Military Technology and Equipment, 2011 O.J. (C 382) 1 (E.U.).
\end{footnotes}
Trafficking in Firearms (CIFTA)\textsuperscript{102} is a primarily regional treaty that is controlling on all states parties and is open to members of the Organization of American States (OAS). CIFTA defines its goals as striving to “prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials,” and promoting “cooperation and exchange[s] of information and experience among States Parties.”\textsuperscript{103} The treaty directs each party to adopt legislative measures necessary to restrict illegal manufacturing and trafficking,\textsuperscript{104} and orders the creation of criminal penalties for participation in illegal arms sales.\textsuperscript{105} CIFTA also provides a crucial directive that requires the seizure or confiscation of all illegally sold armaments within a state party.\textsuperscript{106}

As with the EUCCAE, CIFTA contains a variety of export regulations.\textsuperscript{107} While CIFTA does not establish definitive practices for the authorization of exports, it does contain provisions demanding explicit recordkeeping so to “trace and identify . . . illicitly trafficked firearms.”\textsuperscript{108} CIFTA also contains provisions for controlled delivery techniques, which act as a specific enforcement mechanism against illicit shipments of SALW.\textsuperscript{109} This mechanism, which does not appear in the EUCCAE, codifies a practice in international law that is normally utilized on the national level and distinctly advantages the CIFTA as a regulatory

\textsuperscript{102} Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunitions, Explosives, and Other Related Materials, July 1, 1998, 2029 U.N.T.S. 55 [hereinafter “CIFTA”].

\textsuperscript{103} Id. art. II.

\textsuperscript{104} Id. art. IV.

\textsuperscript{105} See id. art. IV(1) (“States Parties that have not yet done so shall adopt the necessary legislative or other measure to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.”). 

\textsuperscript{106} See id. art. VII (“States Parties shall undertake to confiscate or forfeit firearms, ammunition, explosive, and other related materials that have been illicitly manufactured or trafficked.”).

\textsuperscript{107} Id. arts. IX–XI. Notably CIFTA requires a full authorization by both sending and receiving parties before arms are allowed to be shipped between states. Id. art. IX. Like EUCCAE, CIFTA also demands authorization from countries through which the goods would be shipped (known as “transit” states). Id.; see also EUCCAE, supra note 90, art. 1 (describing the EUCCAE’s demand for transit state authorizations or licenses).

\textsuperscript{108} CIFTA, supra note 102, art. XI.

\textsuperscript{109} Id. art. XVIII. “Controlled Delivery” is the technique of allowing for shipments of illicit goods to pass from start to destination without being intercepted as a means of tracing the distribution network and identifying persons responsible for the illegal shipments. See United Nations Convention Against Transnational Organized Crime, opened for signature Nov. 15, 2000, 2225 U.N.T.S. 209, 275 (entered into force Sept. 29, 2005) (defining controlled delivery). Controlled Delivery as a mechanism has been widely adopted for the purposes of intercepting narcotics and other illegal goods. See, e.g., id. at 291 (establishing a case-by-case basis for controlled delivery practices for fighting organized crime); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature Dec. 20, 1988, 1582 U.N.T.S. 95, 188–89 (entered into force Nov. 11, 1990) (describing the use of controlled delivery practices for combating narcotics trafficking).
framework.\textsuperscript{110} CIFTA has been widely adopted by the OAS, with only the United States, Canada, and Jamaica failing to ratify the treaty in its entirety.\textsuperscript{111} Nevertheless, all three states have become signatories to CIFTA, which indicates near universal acceptance within the OAS.\textsuperscript{112}

B. Critiques of Legally Binding Treaties

The current manifestation of “hard law” treaties that govern arms shipments can be subjected to criticism for a variety of reasons. First, current legally binding treaties regarding SALW regulation are not specific enough in their proscriptions, especially in determining when shipments should not be authorized. Second, these treaties lack widespread adoption and ratification, and many of the largest arms exporters refuse to be bound by their substantive requirements. Finally, the treaties lack appropriate enforcement mechanisms to be effective.

All three of the treaties discussed lack significant detail as to what exactly states should or should not regulate. This lack of clarity seems to stem in part from the desire to balance the national sovereignty of states with their own national security interests. The general statement that states should “adopt measures” or “consider the following” to regulate SALW consistently undermines the usefulness of existing legally binding treaty obligations.\textsuperscript{113} CIFTA and the Palermo Protocol both suffer significantly from this unwillingness to force definitive requirements. Notably, CIFTA fails to detail any actual licensing requirements that must be adopted by states, instead only requiring that they adopt some manner of shipment authorizations.\textsuperscript{114} Without specificity, the CIFTA treaty lacks the

\textsuperscript{110} Note that CIFTA’s controlled delivery provision maintains state parties’ ability to intercept shipments at their discretion and then allow them to resume with the illegal materials removed or replaced. CIFTA, supra note 102, art. XVIII. While the UNCATOC does provide for a controlled delivery mechanism, it is uncertain how much interaction that mechanism has with the Protocol attached to the convention. See Palermo Protocol, supra note 74, art. 1(1) (implying an extension of UNCATOC provisions to apply to the Protocol as well).

\textsuperscript{111} See Dep’t of Int’l Law, Signatories and Ratifications: A-63 Inter-American Convention Against the Illicit Manufacturing and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, ORG. AM. STATES, http://www.oas.org/juridico/english/sigs/a-63.html (last visited Aug. 6, 2013) (listing those parties who have signed and/or ratified CIFTA).

\textsuperscript{112} Id.


\textsuperscript{114} See CIFTA, supra note 102, art. IX (detailing requirements for licensing in the CIFTA treaty).
compulsive power to create true uniformity among signatory states, and some claim CIFTA’s failure to adopt uniform standardized export controls has led to numerous violations of the treaty by state members.

While the Palermo Protocol delves into significantly more detail than CIFTA when addressing tracking mechanisms, its scope of application is flawed. The Palermo Protocol does not apply to contracting states, and as a result has no jurisdiction over state-to-state arms sales. Although the Protocol contains rigorous tracking and export controls, it essentially undercuts its own rigor by ignoring one of the most prevalent forms of SALW transactions.

Despite being the most detailed of the three treaties, the EUCCAE has nevertheless been critiqued for failing to establish exactly how a state should decide whether a shipment violates a “criterion.” Because the EUCCAE demands that states review exports on a case-by-case basis, it is easy for states intent on sending SALW into the grey market to claim that specific cases simply “passed” their interpretation of the Article 2 criteria. Indeed, because of the inherent lack of detail and flexibility in the EUCCAE’s language, it has been described mostly as “well-intentioned legal feebleness.”

In addition, the failure of all three treaties to embrace specific enforcement mechanisms has severely hampered their implementation. The Palermo Protocol in particular provides only the minimum guidance in sharing information and customs enforcement between parties. While it details the desired type of information that should be shared, it fails to set out the methodology for sharing the information and further contains no
enforcement mechanism to penalize a failure to share.123
Together these critiques demonstrate the major flaws of legally binding
international law concerning arms regulation: they are too vague, too
weakly enforced, and lack procedural components that will actually allow
for meaningful and effective regulatory oversight.

C. Non-Binding Regulatory Sources

Numerous informal, non-binding guidelines and models supplement
regulation of the international SALW trade.124 These sources lack the
binding authority of international treaties and have no mechanism for
enforcement or obligation of conformity.125 Nevertheless, a number of the
non-binding constructs have heavily influenced attempts to regulate the
arms trade on a national level, and frequently provide more detailed
requirements than legally binding treaties.126 This Section discusses three
of the most influential sources of non-binding sources: the Wassenaar
Arrangement; the U.N. Office of Disarmament Affairs (UNODA)
Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in
Small Arms and Light Weapons; and the U.N. Arms Trade Treaty.

1. Wassenaar Arrangement

The Wassenaar Arrangement is a powerful, but informal, tool to
regulate SALW markets and exports.127 The purpose of the Arrangement
is to “promot[e] transparency and greater responsibility in transfers of
conventional arms and dual-use goods and technologies, thus preventing
destabilising accumulations.”128 The Arrangement combines numerous
guidelines and authorizes their implementation based upon two distinct
lists of goods—munitions and dual-use items.129 Each distinct set of
guidelines is adopted by participating states. The states then implement the
guideline recommendations in their own national legal regimes.130

Among these guidelines is the “Best Practice Guidelines for Exports of
Small Arms and Light Weapons,” which operates in a similar fashion to
aforementioned treaty obligations.131 The Best Practice Guidelines

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123 See id. art. 12(2)–(3) (detailing the information shared between state parties).
124 Richard L. Williamson, Jr., Hard Law, Soft Law, and Non-Law in Multilateral Arms Control:
125 Id. at 62–63.
126 See id. at 74 (asserting a non-binding legal value when dealing with non-proliferation).
128 Wassenaar Arrangement on Exp. Controls for Conventional Arms & Dual-Use Goods &
Techs. [WA], Guidelines & Procedures, Including the Initial Elements, § I(1) (Dec. 2011) [hereinafter
129 EVANS, supra note 127, at 184.
130 WA Initial Elements, supra note 128, § II(5).
131 Id. § II(7).
encourage states to impose “strict national controls on the export of SALW, as well as on transfers of technology related to their design, production, testing and upgrading.” As with the EUCCAE, the guidelines set out a group of criteria detailing when states should deny licenses. The guidelines also demand that re-export assurances be provided to original shipping states, that states implement tracing mechanisms on weaponry and ammunition, and that states share information with other participating states about SALW shipments.

Currently forty-one member states adhere to the principles of the Wassenaar Arrangement. Membership is open universally to all states, though association and compliance with the regulations of the Wassenaar Arrangement is voluntary, as the Arrangement is non-binding and non-obligatory. The United States recently affirmed its commitment to the Wassenaar Arrangement’s SALW Guidelines, moving to adopt stronger controls in conformity with its most recent recommendations.

2. Programme of Action & International Small Arms Control Standards

The U.N. Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (“Programme”) is the most ambitious model of SALW regulation yet adopted by the U.N. Originally adopted in 2001, the Programme seeks to have states adopt legislation at the national, regional, and global level to ensure SALW do not enter the grey or black markets.

The Programme details over a dozen systems to be adopted at the national level, including criminalizing illegal “craft” manufacturing.

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133 Id. at 2–3. The WA SALW Guidelines require that states avoid issuing licenses if there is a risk the SALW would support terrorism, threaten the nationality of other states, be diverted from the reported end party, violate international treaties, prolong conflicts, endanger peaceful relations, violate human rights, promote the repression of groups, or be used in organized crime. Id.
134 Id. at 3–4.
135 CTR. FOR NONPROLIFERATION STUDIES, THE WASSENAAR ARRANGEMENT ON EXPORT OF CONVENTIONAL ARMS AND DUAL-USE GOODS AND TECHNOLOGIES I (June 12, 2012).
136 Id. at 1–2.
139 See id. § 2(3) (“To adopt and implement . . . the necessary legislative or other measures to establish as criminal offences under their domestic law the illegal manufacture, possession, stockpiling and trade of small arms and light weapons within their areas of jurisdiction . . . .”).
establishing tracing standards for all weapons produced, requiring licensing for manufacturers to produce SALW, establishing export controls, and ensuring that surplus weapons are deactivated or destroyed. At the regional level, the Programme requires regional analysis of stockpile destruction, regional standards of transit of SALW, and information sharing—albeit on a voluntary basis. At the global level, the Programme focuses more on coordination between various U.N. departments, non-governmental organizations, and states to encourage greater SALW tracing and data sharing.

The wide scope of the Programme has earned it significant praise from a number of organizations. The EU has stated that “[t]he [Programme] remains the key universal starting point for further action on SALW at national, regional and international levels.” Many scholars believed that the Programme’s benefits and drawbacks would make it an effective inspiration for an arms trade treaty.

In August 2012, to support the Programme’s implementation, the U.N.’s Coordinating Action on Small Arms (CASA) launched a set of International Small Arms Control Standards (ISACS). The ISACS are designed to provide guidance on effective SALW controls to the full breadth of U.N. agencies, as well as non-U.N. policymakers. While only the standards on operational support between states have been completed at the time of this Note’s publication, they demonstrate an impressive degree

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140 See id. § 2(7) (“To ensure that henceforth licensed manufacturers apply an appropriate and reliable marking on each small arm and light weapon as an integral part of the production process.”).
141 See id. § 2(2) (“To put in place, where they do not exist, adequate laws, regulations and administrative procedures . . . over the production of small arms and light weapons . . . and over the export, import, transit or retransfer of such weapons . . . .”).
142 See id. § 2(11) (“To establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit, for the transfer of all small arms and light weapons, with a view to combating the illicit trade in small arms and light weapons.”).
143 See id. § 2(19) (“To destroy surplus small arms and light weapons designated for destruction . . . .”).
144 Id. § 2(28), (30), (31).
145 Id. § 2(35)–(37).
147 See Biggs, supra note 113, at 1327–28 (discussing scholastic views of the Programme and noting that an arms trade treaty would address the Programme’s “shortcomings”).
149 Id.
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of scrutiny in coordinating and unifying standards.150

3. The U.N. Arms Trade Treaty

Recently, the United Nations has approved the consideration of the
U.N. Arms Trade Treaty (ATT), which originally was suggested in
2006.151 The ATT has been a fairly controversial topic in the international
community because it must conform to the Article 51 right to self-defense
found within the U.N. Charter.152 In January 2013, the ATT finally was
placed on the agenda for the purposes of considering its adoption.153

By comparison to the current Palermo Protocol, the ATT sets out in
considerably more detail such terms as when and how to regulate export
controls and coordinate state action.154 Unlike the Palermo Protocol, the
ATT sets out a six-point “assessment”155 that must be implemented before
allowing the export of weaponry from a country.156 The treaty flatly bans
the shipment of weaponry in violation of current U.N. embargoes157 or pre-
existing international treaties,158 or in cases that would result in a crime
subject to the jurisdiction of the International Criminal Court.159 It also

150 For a list of completed standards, see Coordinating Action on Small Arms, Standards Modules,
22, 2013). Among those completed are standards on tracing and collecting illicit SALW stockpiles. See
generally Coordinating Action on Small Arms [CASA], Collection of Illicit and Unwanted Small
Arms and Light Weapons, ISACS Doc. 05.40:2012(E)V1.0 (Aug. 27, 2012), available at
http://www.smallarmsstandards.org/isacs/0540-en.pdf (providing a fully written standard on SALW
collection); CASA, Tracing Illicit Small Arms and Light Weapons, ISACS Doc. 05.31:2012(E)V1.0
written standard on SALW tracing).

(suggesting that the U.N. may wish to consider the imposition of an arms treaty).

152 See U.N. Charter art. 51 (detailing an individual or collective right for states to act and arm
themselves for the purposes of self-defense).


154 Id. art. 7(1).

155 Id. art. 7(3).

156 Id. art. 6(1).

157 Id. art. 6(2).

158 See id. art. 6(3) (“A State Party shall not authorize any transfer of conventional arms . . . if it
has knowledge at time of authorization that the arms or items would be used in the commission of a
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.”). A reasonable inference can be made that the “international
agreements” specified in this section specifically speak to the Rome Statute, which sets out the
jurisdiction of the International Criminal Court and grants it the power to hear cases involving the
aforementioned violations. See Rome Statute of the International Criminal Court, arts. 5, 8, opened for
signature July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (noting that the court has
jurisdiction to hear cases involving crimes against humanity, genocide, and war crimes, which is in part
defined as attacks against civilians and grave breaches of the Geneva Conventions of 1949).
uniquely carries a requirement that states engage “measures” to regulate arms brokering “within its national laws.” The ATT requires that states engage in a sophisticated reporting and public information system, which requires not only detailed yearly assessments of exports from states, but also information on where the weapons are shipped and confirmation from the recipient. While the ATT does not prohibit the transfer of weapons to non-state groups, it provides some language to further regulate their sale.

On April 2, 2013, the United Nations General Assembly voted to pass the treaty with a one-hundred and fifty-four countries voting in favor, three—Iran, Syria and North Korea—voting in opposition, and twenty-three abstentions. While the United States and a number of other countries have become signatories to the ATT, domestic tensions have hampered the treaty’s entry into force. As of this writing, while one

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160 Arms Trade Treaty, supra note 154, art. 10.
161 Id. arts. 12–13.
162 Biggs, supra note 113, at 1335.
hundred and thirteen countries have become signatories to the ATT, only seven have fully ratified its provisions.  

D. Critiques of Non-Binding Regulatory Sources

Non-binding sources suffer the same general criticism as that associated with legally binding treaties. The sources are considered to be incredibly unspecific, lack compliance or enforcement mechanisms, and are easily obfuscated or broken by the states committed to their imposition.

The Wassenaar Arrangement is most criticized for failing to demand that its member parties take any specific acts. The organization’s voluntary and non-obligatory membership position allows for virtually any state to join without having to implement any of its protocols. There is also a widespread belief that parties may join under “bad faith”; essentially putting their name to the Arrangement as a means of claiming an international moral high ground while ignoring the substance of the guidelines. The guidelines also fail to help states determine which groups are supposed to be considered problematic when considering export licenses. This deficiency forces state parties to the Arrangement to simply enforce the guidelines on nations already under sanction by the Palermo Protocol or other U.N. embargoes, thus making the Arrangement, at best, redundant. Because the Arrangement cannot adequately specify what licenses should be denied, its guidelines lack appropriate teeth for SALW regulation.
The Programme, unlike the Wassenaar Arrangement, attempts to take concrete steps in the interdiction of illegal arms. However, the Programme is so generalized in its approach that when it was reaffirmed last year, the U.N. Conference on Disarmament requested that UNODA clarify what the Programme exactly recommended. Due to the Programme’s attempts to impose literally dozens of new regulatory regimes, it cannot and does not go into significant detail over the methods or forms that those regulations should adopt. While the ISACS system has added new detail to the Programme’s recommendations, it is still too early to know how it will approach many of the more difficult regulatory issues, including export controls.

The ATT, on the other hand, still remains somewhat of an unknown entity at this point. Many scholars believe that if the treaty enters into force—even in an imperfect form—it will constitute a major step forward in arms regulation and may finally force real, legally-binding arms regulation throughout the U.N. But it is difficult to predict whether major states will agree to comply with the ATT’s provisions. The United States Congress, in particular, has signaled ambivalence about the ATT and seems unlikely to ratify it in the near future. Furthermore, the ATT still does not delineate, in sufficient detail, how states should determine whether a sale violates one of the ATT’s criteria. Nevertheless, with possible entry into force occurring in the next few years, the ATT has the

173 See Biggs, supra note 113, at 1353 (encouraging use of the International Criminal Court to punish those found contravening the Treaty).
174 The likelihood that the United States will now ratify the treaty after becoming a signatory is still unclear, as it would result in a congressional struggle between the Obama Administration and the influential National Rifle Association. See Louis Charbonneau, National Rifle Association Vows to Block Arms Trade Treaty at U.N., REUTERS (Dec. 28, 2012), http://www.reuters.com/article/2012/12/28/us-arms-treaty-nra-idUSBRE8BR0320121228 (”[NRA President David Keene] also made clear that the Obama administration would have a fight on its hands if it brought the [Arms Trade] treaty to the U.S. Senate for ratification.”). The situation is further impeded by the NRA and like-minded associates spreading false information as a means of increasing popular sentiment in the United States against the treaty. Compare Aaron Dykes, Bombshell: Leaked UN Treaty Does Ban Guns, PRISONPLANET.COM (July 26, 2012), http://www.prisonplanet.com/bombshell-leaked-un-treaty-does-ban-guns.html (containing patently false information about the ATT, including that it bans gun possession domestically and that it was “leaked”), with Lee Fang, Does the NRA Represent Gun Manufacturers or Gun Owners?, NATION (Dec. 14, 2012), http://www.thenation.com/blog/171776/does-nra-represent-gun-manufacturers-or-gun-owners/ (correcting misinformation in NRA statements).
175 Biggs, supra note 113, at 1352–53.
IV. INTERNATIONAL TRANSACTIONAL CONTROLS AND PROVISIONAL RELIEF CONCEPTS FOR SALW REGULATION

While it is clearly understood that the international legal structures previously discussed form the foundation for any substantive SALW regulation, these structures lack an adequate procedural process to enforce the enacted regulations. This Part will examine two different components that may provide a sufficient procedural model of enforcement. First, it will scrutinize the general design of SALW export and import controls. Second, it will look at one type of injunctive mechanism that has significant transnational applications. Together, these components will serve as the base for the model that this Note advocates.

A. Legal Transactional Controls on SALW Exports/Imports

International arms export and import controls are the means in which countries regulate the flow of arms in and out of their country. While weapons that enter the black market sometimes avoid legal exports through black market “pipelines,”\(^\text{177}\) the vast majority of arms that end in the grey or black markets are exported legally and are therefore subject at some point to state export or import controls.\(^\text{178}\) Export points are the “weak link” in the illicit arms markets, since most arms that enter the markets must necessarily gain approval for export by a state.\(^\text{179}\) This makes export controls an optimal point of attack for any model that seeks to halt illegal arms shipments, as the weapons are still in the hands of states and not yet within the black market.\(^\text{180}\) By halting shipments destined to the market at the outset, export controls could theoretically “starve” the grey and black

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\(^{177}\) See supra Part II.C.

\(^{178}\) Stohl, supra note 16, at 61–62. These arms are then diverted to a secondary destination, or are exported legally with fraudulent paperwork either from the manufacturing state or the purchasing state. See Glenn McDonald, Who’s Buying? End-User Certification, in SMALL ARMS SURVEY 2008: RISK AND RESILIENCE 155, 157–58 (Eric G. Berman et al. eds., 2008) (describing how arms may either be diverted or retransferred once imported, and noting that “[o]pportunities for transfer diversion arise once the weapons clear customs at the port of export”).

\(^{179}\) McDonald, supra note 178, at 158 (“Once [traffickers] obtain an export license, it is usually relatively easy to get weapons past the customs authorities in the exporting country and transport them to the (undeclared) destination of their choice.”).

\(^{180}\) See id. (“Licensing offers exporting states the greatest opportunity to prevent the diversion of weapons and ammunition; yet this is also where illicit traffickers focus their attention.”).
On the other hand, SALW export controls on the national level are convoluted and difficult to understand. Because of the lack of a singular set of requirements for export controls among the various international legal treaties, SALW export controls vary widely from state to state, with little consistency or method to the legislation. The United States in particular has an incredibly complex variety of legal and administrative mechanisms that may or may not regulate foreign arms sales depending upon who is buying or selling the arms. That said, legal export controls generally follow the same basic structure—the devil, as always, is in the details.

Most legal export controls break into two components: (1) a license to export weaponry in general; and (2) a license or authorization to export firearms in specific instances. Many states require that manufacturers have both for each arms sale. Complexity arises in determining when,
where, and how those licenses are issued.187 Licenses vary from specific permissions for transactions with single parties to permissions to export on a global basis.188 A single authority that monitors and enforces their authorization generally issues those licenses; however, some states bifurcate the process into licenses for private manufacturers (independent corporations) and licenses for public manufacturers (partially or wholly owned by the state).189

General licenses given prior to a transaction form a poor basis for regulating individual shipments of weapons. The wide variety of how and when they are approved makes international oversight impracticable.190 General licenses do not specify the nature of export transactions but merely guarantee an ability to export; therefore, they are less likely to be objectionable.191 Additionally, many states contain a variety of exceptions to the general licensing requirement, which creates uncertainty over which parties are officially approved without a license and which parties are illegally exporting goods.192

A more advantageous consideration for regulatory purposes is the use of End-User Certificates (EUCs) as a means of tracing shipments. Most states require certificates or documentation—known collectively as EUCs—that must be scrutinized before shipments are authorized or licenses are issued between parties.193 These certificates often contain information detailing the goods that are to be exported, the end user and use of the SALW, their value, and the recipient location.194 EUCs are utilized by all major SALW-exporting states, and most will not authorize

manufacturer) the Bulgarian arms industry can be considered a major supplier of the global market. See id. at 22 (describing the manufacturing practices of Arsenal AD and Arcus Corp.).

187 Parker, supra note 8, at 70 tbl.2.2. For example, Israel requires registration of its exporters with the government and individually issued licenses for each transaction, although it maintains some exceptions. Id. at 71 tbl.2.2. Sweden, by contrast, does not require registration and issues generalized export licenses. Id. However, the Swedish Inspectorate of Strategic Exports has to be notified of each transaction and may halt any transaction that violates the Wassanaar Agreement. Id. at 72 tbl.2.2. Yet, notification is not required if the buyer had been approved in the last three years. Id. The United Kingdom does not require registration or specific licenses, nor does it need to authorize transactions. Id. Italy requires both registration and an authorization to negotiate a contract, but issues licenses for exports that apply globally for three years. Id. at 71 tbl.2.2.

188 Id. at 79.

189 Id. at 87.

190 Marsh, supra note 120, at 217–18.

191 Parker, supra note 8, at 79.

192 Id. at 78. Among the states that contain exceptions are Norway, Spain, Finland, the United States, Israel, the Russian Federation, Belgium, Germany, Switzerland, Canada, Bulgaria, the Netherlands, Sweden, and the Czech Republic. Id. at 78–79.


194 Parker, supra note 8, at 81–82.
any shipment without a valid EUC.\textsuperscript{195}

Along with a standard EUC, some countries also employ re-export provisions.\textsuperscript{196} These provisions act not only as a form of “guarantee” that recipient states cannot re-export SALW covered by the EUC, but require that any modification or desire to re-export the weapons be approved by the original supplying state.\textsuperscript{197} These forms act as a contractual obligation between the two states to ensure control over the shipped weapons and to keep them out of illicit markets.\textsuperscript{198}

Despite their prevalence, there are plenty of disadvantages associated with the use of EUCs. Many cite the fact that they are easily forged or copied.\textsuperscript{199} The Small Arms Survey boldly claimed in their 2008 report that “for as little as [two hundred U.S. dollars], an arms trafficker can buy a blank end-user certificate (EUC) from the right (corrupt) government official.”\textsuperscript{200} Of greater concern is the ease in which they can be altered so that shipments may be diverted after authorization.\textsuperscript{201} One notable example involved a shipment of British AK-47s that was initially approved for shipment to Bosnia by the UK government, but was redirected by the arms shipping company to the provisional government of Iraq.\textsuperscript{202} Some states now require a retrospective physical search as part of the EUC authorization to ensure that SALW are delivered according to the approved certificate.\textsuperscript{203}

\textsuperscript{195} Id. at 82. Occasionally exceptions to the provision of EUCs will be entertained if the entity is an especially verifiable source of import, such as one EU state to another, or shipments between NATO allies. Id.

\textsuperscript{196} Id. at 83.

\textsuperscript{197} Id. This does not always mean greater oversight on the part of the exporting country. For example, British body armor intended for a humanitarian de-mining organization was mistakenly marked as a “temporary export” and a resale was expected, which resulted in lesser governmental oversight for the initial sale than had the armor been properly marked as “permanent.” See BUSINESS, INNOVATION AND SKILLS, DEFENCE, FOREIGN AFFAIRS AND INTERNATIONAL DEVELOPMENT COMMITTEES, SCRUTINY OF ARMS EXPORTS (2012), 2012–13, H.C. 419-I, at 33 (U.K.), Parker, supra note 8, at 83.

\textsuperscript{198} BROMLEY & GRIFFITHS, supra note 193, at 7. Bromley and Griffiths show an example of a forged EUC from the government of Chad, demonstrating the flaws in the document. Id. at 8.

\textsuperscript{199} BROMLEY & GRIFFITHS, supra note 193, at 8–10.

\textsuperscript{200} Jamie Doward & Johnny McDevitt, British Firm Under Scrutiny for Export of Bosnian Guns to Iraq, OBSERVER, Aug. 12, 2007, at 5. Another notable example of diverted weapons comes from an approved sale in 2003 from Poland where the EUC provided was issued from the “People’s Democratic Republic of Yemen,” despite the county having ceased to exist two year earlier. McDonald, supra note 178, at 158.

\textsuperscript{201} Id. at 82. The United States, for example, has two distinct programs for post-delivery monitoring. The first of these, known as the “Golden Sentry” Program, allows for visits of stockpiles in the recipient countries, review of end-user records, and regular inventory checks. McDonald, supra note 178, at 170 box 5.3. However, the intensity of the program’s search varied dependant upon the “trust” the United States has of the recipient country. Id. The second program, called “Blue Lantern,” applies to all commercial small arms exports. Id. During 2006, the U.S. conducted 613 Blue Lantern end-use checks, which represented less than one percent of that year’s
Re-export provisions face similar problems in enforcement. The essential assumption that the guarantee of the importing state is facially trustworthy inevitably results in many re-export provisions being broken when that guarantee is proved false. The great difficulty that states have in monitoring shipped SALW once they are no longer in their control is only one aspect of the problem, as some states engage in lackadaisical enforcement of the agreements.

Despite this enforcement difficulty, most scholars agree that an improved and strengthened system of EUC compliance is essential to combating grey and black markets. Even with the risks associated with abuse, “[t]he careful examination and the verification of documents produced in support of an export license application are among the most effective means of assessing the risk that the goods being exported will be diverted to the illicit market[s].” A number of critics of the current EUC model believe that with some restructuring, increased consistency of international standards, and a more robust set of re-export provisions, the export control system will be far more effective.

B. Utilizing the Mareva Injunction

In considering provisional techniques for use in an international legal model, there are a number of constructs that can be derived from common granted licenses. Id. Ninety-four of the checks resulted in “unfavorable” ratings by the government. Id. Yet Mr. McDonald points out that “U.S. export authorities initiate post-delivery checks only in response to allegations of a violation of retransfer or end-use restrictions.” Id.

Parker, supra note 8, at 83. Ms. Parker notes that “[o]nce the original exporting state has surrendered physical control of the arms, it is difficult to monitor their use and any subsequent transfer. Costs are one factor, problems in securing cooperation from recipient governments another.” Id.

Ms. Parker cites the Bulgarian case, which allows for authorization by any national authority that is also a member to the Wassenaar Arrangement. Id. But see Weapons Under Scrutiny, supra note 186, at 30 (noting that the Bulgarians compare shipments to the standards of the Wassenaar Arrangement and ensure they comport with their shipping requirements). She notes that “[c]learly, this removes any control the original exporting country may have over the final destination of the small arms.” Parker, supra note 8, at 83. In addition, the United Kingdom has come under critique for not requiring or enforcing EUCs out of Singapore, which resulted in almost one hundred and forty 20mm GAM B01 Light Naval Canons (SALW mounted on patrol boats) being redirected from Singapore to Iran. Oxfam GB, supra note 55, at 24.

Oxfam GB, supra note 55, at 26; see also Bromley & Griffiths, supra note 193, at 2 (encouraging strengthened EUC use); Biggs, supra note 113, at 1342 (noting that enhanced EUC detail would allow for easier analysis of the risks of shipment).

Bromley & Griffiths, supra note 193, at 15.

Biggs, supra note 113, at 1341–44; see also Helen Close & Roy Isbister, Good Conduct?: Ten Years of the EU Code of Conduct on Arms Exports 23 (2008) (“Member States should be building provision[s] for comprehensive end-use checking, delivery verification, follow-up monitoring and information-sharing as the means by which the risks and consequences of diversion can be minimised.”).
Indeed, international litigators have increasingly considered the value of provisional models as a means of expediting litigation, especially due to their frequently determinative effect. Litigation techniques, especially transnational injunctive actions similar to the preliminary injunction in the United States, have frequently gone under-analyzed. Among those injunctive models, the *Mareva* injunction is a standout design for the purposes of SALW regulation.

The *Mareva* injunction operates similarly in form to an attachment or prejudgment remedy. Unlike a traditional attachment, which is considered in the context of assuring payment of damages, a *Mareva* injunction freezes a defendant’s assets. The purpose behind this freeze is to prevent defendants from moving assets outside of a jurisdiction so as to render them judgment-proof. The United Kingdom, where the *Mareva* injunction originated, has traditionally used the device as a way to prevent defendants from moving liquid assets overseas so as to avoid having to satisfy judgments against them. However, use of the *Mareva* injunction does not appear limited to the halting of liquid assets.

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209 In particular, this Note focuses on injunctive mechanisms that are extra-territorial in jurisdiction. See Lawrence Collins, Essays in International Litigation and the Conflict of Laws 80 (1994) (describing extraterritorial injunctions across numerous states). There are a number of reasons for this preference, the largest of which being because extra-territorial injunctions are already respected in the international sphere. See, e.g., id. at 81 (noting that French judges both respect and demand comity for their provisional orders without ruling on their validity).

210 See id. at 189 (noting that “as a matter of justice to plaintiffs” *Mareva* injunction and disclosure orders assist in the location of assets, thus expediting the litigation process).

211 Id. at 190; see also Fed. R. Civ. P. 65 (describing steps to gain provisional relief in the United States, including preliminary injunctions).

212 This is named for the case where the concept was originally suggested. See Steven Gee, *Mareva Injunctions & Anton Pillar Relief* 4 (1990) (“The breakthrough came in 1975 when in two cases the Court of Appeal granted injunctions prohibiting the defendants from disposing of money by removing it from the jurisdiction. . . . from which the *Mareva* injunction derives its name.”). Note that while English rules of civil procedure demand that the *Mareva* injunction be described as a “freezing order,” it is considered conceptually interchangeable with preliminary injunctions and other models, and this piece elects to use interchangeable conceptual language. Stephen G.A. Pitel & Andrew Valentine, The Evolution of the Extraterritorial *Mareva* Injunction in Canada: Three Issues, 2 J. Private Int’l L. 339, 339 n.1 (2006).

213 Collins, supra note 209, at 85. However, while it may be similar in form, the *Mareva* injunction is *not* an attachment or lien. See Cretanor Mar. Co. v. Irish Marine Mgmt. Ltd., [1978] 1 W.L.R. 966 at 974 (Eng.) (rejecting the equation of a *Mareva* injunction to an attachment and noting that it “does not effect a seizure of any asset”).

214 Collins, supra note 209, at 85–86.


216 Id. at 70. This is also the purpose generally ascribed to them in Canada, which has adopted an extra-territorial *Mareva* injunction following the British model. See Pitel & Valentine, supra note 212, at 342–43 (describing the Canadian process for freezing foreign assets before they are moved).

217 Iraqi Ministry of Def., [1980] 1 Q.B. at 70. The determination of exactly what constitutes an asset under the *Mareva* injunction is not completely clear. It is true that the United Kingdom has used the injunction mostly for the freezing of monetary transfers. In *Iraqi Ministry of Defense*, the court noted that “[t]he *Mareva* injunction is only to be granted where there is a danger of the money being
The use of a *Mareva* injunction is essentially similar to the extra-territorial injunctive mechanisms found within the United States. Notably, the United States Court of Appeals for the Ninth Circuit has established an injunction model that mirrors the language in *Mareva*.218 The use of the *Mareva* injunction, however, contains some significant benefits over the traditional forms of provisional relief in the United States. Initially, from the perspective of international acceptance, *Mareva* injunctions have been adopted in Canada, New Zealand, Malaysia, Australia, and the European Union.219 The ability for a *Mareva* injunction to compel disclosure and

taken out of the jurisdiction so that if the plaintiffs succeed they are not likely to get their money.” *Id.* at 70. On the other hand, Lord Justice Brian Kerr of the Supreme Court of the United Kingdom, when addressing *Mareva* stated that:

> [O]n being apprised of the [impending] proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment . . . . The defendant can then largely ignore the plaintiff’s claim in the courts of this county . . . . It has always been my understanding that the purpose and scope of the exercise of this jurisdiction is to deal with cases of this nature.

*Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [1978] 1 Q.B. 644, 660–61 (Eng.).* From this debate it appears that while *Mareva* injunctions were originally mostly concerned with liquid assets, strictly speaking the liquidity of the asset is not a prerequisite to imposition of the provisional relief. Indeed, *Rasu Maritima* originally contained an injunction that stopped the defendants “from removing . . . any assets from the West Gladstone Dock at Liverpool” or transferring them to anyone. *Id.* at 657. Mark Holye, in a comparative analysis of *Mareva* injunctions and other freezing orders, asserted that “[t]he *Mareva* applies to all assets tangible and intangible within the jurisdiction . . . . It covers land, motor-cars and other chattels, bank accounts, ships and aircraft . . . and even goodwill.” MARK S.W. HOYLE, THE *MAREVA* INJUNCTION AND RELATED ORDERS 44 (1989) (footnotes omitted). Ultimately this Note adopts Hoyle’s assertion and embraces the concept that *Mareva* injunctions may be perceived as a broader form of freezing order that applies to more than just liquid assets.219

See Republic of Phil. v. Marcos, 862 F.2d 1355, 1363–64 (9th Cir. 1988) (describing extra-territorial injunctions in U.S. law). Notably, the court devoted the following reasoning to delineating injunctions from territorial jurisdiction:

> The injunction is directed against individuals, not against property; it enjoins the Marcoses and their associates from transferring certain assets wherever they are located. Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach. A court has the power to issue a preliminary injunction to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies.

*Id.* (citations omitted). This is essentially similar to the model advocated by the *Mareva* injunction. See *Cretanor Mar.*, [1978] 1 W.L.R. at 974 (using similar language).

prevent third parties from interfering in the freezing of assets demonstrates effective tools to enforce order compliance.220 The lack of controversy has also allowed for the injunction to reach almost any part of the world when the necessary elements can be demonstrated.221

There are some limitations to the use of *Mareva* injunctions as traditionally understood. Generally, *Mareva* injunctions cannot be used to halt transactions in “the ordinary course of [a party’s] business or for living expenses.”222 However, the degree to which a transaction is considered in the ordinary and proper course of business is not contemplated when the transaction’s materials are the assets at issue.223 In addition, *Mareva* injunctions do not confer any property right or lien on the part of the moving party.224 Instead, *Mareva* injunctions act as a means of restraining the defendant from dissipating the assets.225

and noting that “Mareva order jurisprudence has developed in Australia for the last 30 years”). In a comparison among legal systems, Høyle argues that analogies to the *Mareva* injunction can be seen in France, Italy, Belgium, and Sweden. Høyle, *supra* note 217, at 190–93.

220 See Collins, *supra* note 209, at 87 (noting that restricting third parties from knowingly aiding in breach of a freezing order frequently is incorporated as part of a *Mareva* injunction, usually to prevent that party from interfering with the administration of justice); Campbell McLachlan, *Transnational Applications of Mareva Injunctions and Anton Pillar Orders*, 36 INT’L & COMP. L.Q. 669, 676 (1987) (designating the use of *Mareva* injunctions as a way to assist in third party foreign judgments).


222 *Z Ltd. v. A-Z & AA-LL*, [1982] 1 Q.B. 558, 584 (Eng.). There are a number of other limitations that have been placed on use of *Mareva* orders, including a refusal to extend their coverage to commercial subsidiaries with some “degree of independence” from a parent company. *Atlas Mar. S.A. v. Atlas Mar. Ltd. (No. 3)*, [1991] 1 W.L.R. 917, 925 (Eng.). Collins also notes that the injunction “must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading.” Collins, *supra* note 209, at 86. One could argue that the use of a *Mareva* injunction to deal with SALW shipments would contravene this sentiment. However, the object of stopping SALW shipments from heading into the black market is protected from this limitation for two reasons. First, the illegal shipment of weapons should not be considered an “ordinary” form of transaction. Nor does SALW regulation through *Mareva* injunctions constitute destruction of SALW trades in their entirety, as it seems unlikely that an arms manufacturer would have all of its trade halted due to a single injunction.

223 *See JSC BTA Bank v. Ablyazov*, [2011] Bus. L.R. Digest 119, 125 (Eng.) (“We do not . . . accept that any transaction . . . can properly be described as one in the ordinary course of business.” (emphasis added)). The Court in Ablyazov also rejected the necessity of demonstrating “intent” to disperse the assets so as to prevent a proper judgment. *See id.* at 126 (“[T]he freezing order . . . deliberately does not limit the scope of the injunction to transactions carried out with an intention to dissipate.”).

224 *Cretanor Mar. Co. v. Irish Marine Ltd.*, [1978] 1 W.L.R. 966, 974 (Eng.) (rejecting the idea that the *Mareva* injunction attaches to property and instead holding that it is an in personam form of relief, attaching to the person targeted by the injunction).

225 *See id.* (“[Mareva] does not effect a seizure of any asset. It merely restrains the owner from dealing with the asset in certain ways. The asset . . . might be said to have been in a sense arrested, but only in a loose sense. All that the injunction achieves is in truth to prohibit the owner from doing certain things in relation to the asset.”).
There are three requirements for imposing a *Mareva* injunction in the United Kingdom. First, there must be a cause of action and the plaintiff must demonstrate a “good arguable case.” Second, the defendant must have assets within the jurisdiction of the court. Finally, there must be risk of harm by allowing the defendant to dissipate the assets outside of the jurisdiction. So long as these requirements can be met, a *Mareva* injunction can be imposed.

*Mareva* injunctions are considered powerful tools for international litigation. Their ability to limit asset movement without territorial discretion creates a distinct advantage when dealing with multiple nations, organizations, and individuals. Because of this advantage, the injunctive model is an excellent component for any SALW regulation.

V. THE MODIFIED *MAREVA* INJUNCTION MODEL FOR SALW REGULATION

Despite the plethora of both binding and non-binding treaty obligations currently in effect, the continued spread of SALW into the grey and black markets demonstrates the need for a new injunctive model to halt such transactions. This Part will suggest one possible model that combines strengthened international export regulations with the use of *Mareva* injunctions.

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226 Ninemia-Mar. Corp. v. Trave Schiffahrtsgesellschaft m.b.H. und Co., [1983] 1 W.L.R. 1412, 1421–22 (Eng.). In an international setting, violations of international treaties can constitute a cause of action and can be arbitrated before the International Court of Justice. See U.N. Charter, art. 92 (establishing the ICJ’s purpose as a judicial organ); Statute of the International Court of Justice, art. 36(1), (2)(c) (granting the ICJ substantive jurisdiction over determining whether a factual scenario has lead to a breach in international obligations).

227 Ninemia-Mar. Corp., [1983] 1 W.L.R. at 1422. The International Court of Justice has predetermined compulsory jurisdiction over all state parties of the U.N. See U.N. Charter, art. 93, para. 1) (“All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”); Statute of the International Court of Justice, art. 36(2), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (“The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement . . . the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of international obligation . . . .”).

228 Ninemia-Mar. Corp., [1983] 1 W.L.R. at 1422. This aspect of the *Mareva* test is the most likely to become contentious in the international setting. What is or is not a “risk of harm” for *states* is unclear and hasn’t been considered seriously. However, a state seeking a *Mareva* injunction against a second state’s arms shipments could claim that the shipments’ likelihood of entering the black market represent an indirect harm, as those weapons could then be used in an illegal action against the moving state.

229 See COLLINS, supra note 209, at 190 (noting that *Mareva* injunctions have a number of international implications). For example, Lord Collins speaks specifically to the enforceability of *Mareva* injunctions worldwide, particularly when dealing with the movement and shifting of liquid assets. He notes that “the widespread abolition of exchange controls and the growth of offshore havens for cash and securities have made it easier for defaulters involved in international business to make themselves judgment proof, and for dishonest fiduciaries to enjoy the legal fruits of breaches of trust.” *Id.* Collins advocates the use of *Mareva* injunctions as a means of influencing domestic and international banking systems.

230 Capper, supra note 221, at 343.
injunctions to halt illicit transactions before they even begin.

A. Stronger International Regulations for Licensing and Authorizing Exports

Under the current international legal models, most sources encourage or demand a form of licensing before arms may be shipped to parties or countries. Exactly what information is submitted with that license varies between treaties. The Palermo Protocol, CIFTA, and the EUCCAE all stipulate that no state should authorize transactions if they do not contain a proper license, but differ with respect to the information needed in a license and whether the license should be publicly available.231 The first step in any new regulatory model must be to strengthen the authorization requirements. Some scholars articulate that stricter and more definite regulations for firearms would further chill participation in legally binding international treaties.232 However, the current economic climate of the arms industry suggests that states are more likely to comply with increased regulation so as to continue participation in the lucrative market.233

The most important component to any new authorization regulation must be its uniformity across trade markets. As noted earlier, the current model of licensing differs wildly between states.234 To be effective in the future, those models must be made uniform among states. A recommended model would be to adopt general licensing for arms manufacturers that is periodically renewed, and also require specific licenses for arms sales that have a heightened propensity to result in weaponry entering the black market.235

In conjunction with stricter licensing requirements for sellers, all buyers must provide uniform and verifiable information before any international export sale is authorized. As most states utilize the EUC model, this practice should be codified by international treaty and specific criteria must be established for what information should be provided from

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231 See Palermo Protocol, supra note 74, art. 10 (containing export controls); CIFTA, supra note 102, art. IX (same); EUCCAE, supra note 90, art. 1–2 (same).

232 See Carlson, supra note 115, at 639 (discussing some scholars’ views on avoidance of SALW treaties with tight control mechanisms).

233 Id. Ms. Carlson also emphasizes placing additional burdens on buyers rather than purveyors, noting that “the addition of . . . end-user requirements to CIFTA’s text would be a feasible and realistic step towards enhancing the security of CIFTA’s states parties.” Id. at 639–40.

234 See Brian Wood & Peter Danssaert, U.N. Office for Disarmament Affairs, Study on the Development of a Framework for Improving End-Use and End-User Control Systems at 49, U.N. Sales No. E.12.IX.5 (2011) (“End use/user control systems—both the content and the procedures—are frequently not harmonized between States involved in transferring arms, and sometimes not even applied consistently by a single State, which renders them less effective than they could be.”).

235 These sales may be judged based upon a number of factors, e.g., the number of weapons, the continuity of the sale (repeated sales over a number of years), the type of weaponry sold, etc.
sellers and buyers.\textsuperscript{236} This submission should include, at the very least, information regarding the parties involved in the sale, the destination of the firearms, the number of firearms, a listing of the markings or identifying serials of each firearm in the transaction, the end location of each firearm, and the purported use of each firearm.\textsuperscript{237} The international community should also increase communication between states regarding EUCs and mandate their use in all transactions, as exceptions currently allow for the circumvention of the regulatory structure.\textsuperscript{238}

Finally, the international community should adopt uniform criteria for the denial of authorization for sales. While the EUCCAE criteria are by far the most specific in place for providing reasons for the denial of authorization, they should be strengthened to elicit a more specific analysis of what satisfies each criterion.\textsuperscript{239} The EUCCAE criteria have been haphazardly adopted by other national and governmental agencies.\textsuperscript{240} For any international model to function effectively, criteria substantively similar to that of the EUCCAE must be adopted \textit{uniformly} by every exporting state.\textsuperscript{241} Under a uniform system, an arms manufacturer will know how to determine if sales are in compliance with legal regulations—regardless of where the sale occurred.

While the ATT is not the most optimal model for equalizing import and export controls, it is a significant step toward this goal. Numerous groups have encouraged its adoption as a means not to decrease the sale of

\textsuperscript{236} WOOD \& DANSSAERT, \textit{supra} note 234 at 72.

\textsuperscript{237} Id. at 66. Note that the Arms Trade Treaty requires confirmation and specific record keeping by states in Article 12. \textit{See} Arms Trade Treaty, \textit{adopted} Apr. 2, 2013, art. 12, http://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf#page=21 (ratification pending, not entered into force). The treaty requires that states provide “quantity, value, model/type, authorized international transfers of conventional arms under [the Treaty], conventional arms actually transferred, details of exporting State(s), importing State(s), transit and trans-shipment State(s) and end users, as appropriate.” \textit{Id.} However, without uniform and U.N.-mandated EUC design, it will still be very easy for arms traffickers to falsify one of dozens of different types of documentation that satisfy the ATT’s requirements, or to simply not report them to the inquiring state authority.

\textsuperscript{238} See BROMLEY \& GRIFFITHS, \textit{supra} note 193, at 13–14 (encouraging global standardization in EUCs).

\textsuperscript{239} For example, Article II of the EUCCAE demands that no authorizations be issued if the arms are likely to be used in violation of international humanitarian law. EUCCAE, \textit{supra} note 90, art. 2. However, the regulation does not specify which form of humanitarian law applies to this requirement. Beyond reference to the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the EUCCAE limits the provision by noting that the parties must “assess[] the recipient country’s attitude towards relevant principles established by instruments of international humanitarian law.” \textit{Id.} Specificity in this regard would clarify the provision enormously.

\textsuperscript{240} Parker, \textit{supra} note 8, at 92–94 tbl.2.4 (examining the implementation of EUCCAE criteria).

\textsuperscript{241} This idea has been echoed by the United Nations General Assembly. \textit{See} Preventing and Combating Illicit Brokering Activities, U.N. G.A. Res. 63/67, U.N. Doc. A/RES/63/67 (Jan. 12, 2009) (“Encourages Member States to fully implement relevant international treaties, instruments and resolutions to prevent and combat illicit brokering activities.”).
arms, but to better understand and regulate the arms market. While it is theoretically possible under existing legal mechanisms to adopt the Mareva injunction model, uniformity, consistency, and transparency are vital to making the model efficient and effective.

B. Use of Modified Mareva Injunctions to Halt Shipments of Illicit SALW

It is not enough to assume that strengthened export controls will suddenly halt the entry of weapons into the grey or black markets. Inefficient application, lack of proper investigative services, or even state complicity could allow for grey or black market deals to pass the strictest export or import controls. To prevent shipments that will likely enter these markets from being allowed through the export network, there must be some legal means to halt the shipments before the sale is completed. It is at this point that the Mareva injunction is most valuable.

If a uniform model of export regulation can be adopted for SALW, states or groups can review the licenses issued for exports. To prevent states or manufacturers from engaging in sales that would result in black market shipments, those observer states or groups could then bring a claim before the appropriate international legal tribunal and apply for the immediate imposition of provisional relief—specifically, a Mareva injunction to freeze the assets of the sale.

The claim would be predicated on a belief by an observing party that a state is authorizing a sale in violation of the international export controls—either due to a clear violation of treaty law or due to a violation of the authorization criterion. The imposition of a modified Mareva-style injunction would require demonstration of probable success on the merits of the claim as well as the likelihood of irreparable injury without injunctive relief. These requirements can be satisfied when challenging EUC authorizations. Assuming that one can prove a violation of international law, there is a real probability of irreversible harm through allowing the transaction to occur. The international public interest shared by all states in combating illicit arms trafficking demonstrates a harm that may be created if a single state inadvertently authorizes a sale likely to end

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243 Those assets being the arms about to be shipped.
in the black market.\textsuperscript{244} Utilizing a \textit{Mareva} injunction for the purposes of interdicting shipments of SALW necessitates that the injunctive process fits within existing international procedure. However, the procedural statute of the International Court of Justice (ICJ) clearly grants the court the right to engage in provisional measures and to provide for injunctive relief.\textsuperscript{245} While the ICJ has not, as yet, applied a \textit{Mareva} injunction against a state, it has considered and applied provisional relief on other occasions, and the standard required under the ICJ’s procedure is significantly lower than the required showing in both the UK and the United States.\textsuperscript{246} The methodology used by the ICJ for determining provisional relief is substantively similar to the imposition of an injunction in a common law system.\textsuperscript{247}

There are a few disadvantages to the utilization of the \textit{Mareva} injunction within the ICJ. The first and most severe of these disadvantages is that only states have standing to bring claims in the ICJ.\textsuperscript{248} While many states are dedicated to the control of SALW, the willingness of those states to diligently investigate and prosecute claims against violations of international law is questionable, especially given the large number of transactions per year. The political ramifications of acting as an “arms police” for the ICJ may be unpalatable for many states.\textsuperscript{249}

Ultimately the imposition of the \textit{Mareva} injunction model of SALW

\textsuperscript{244} See Orlovsky, \textit{supra} note 22, at 369–70 (denoting the human cost that comes from black market arms sales as a state interest).

\textsuperscript{245} See Statute of the International Court of Justice, art. 41(1) (describing the ICJ’s ability to provide for provisional relief).

\textsuperscript{246} The case of \textit{Questions Relating to the Obligation to Prosecute or Extradite} (Belg. v. Sen.), 2009 I.C.J. 139 (May 28), is illustrative of the ICJ’s procedure for provisional matters. In that case, the court articulated that to demonstrate the need for provisional relief, the moving party needed to establish only a \textit{prima facie} showing of jurisdiction. \textit{Id.} at 147. It then needs to establish a “plausible” link between the asserted violation of rights and the provisional measures. \textit{Id.} at 151. Having shown that, the moving party merely needs to show real and immediate urgency to the imposition of the provisional act. \textit{Id.} at 152–54.

\textsuperscript{247} The imposition of the \textit{Mareva} injunction is particularly useful in conjunction with the ICJ because both care little about the moving party’s interest in the asset itself. Rather, as noted earlier, \textit{Mareva} injunctions are essentially in personam actions, while the ICJ considers the supposed violation of rights rather than the assets themselves. \textit{See id.} at 151. \textit{But see Z Ltd. v. A-Z \\& A\textsuperscript{1} A-L\textsuperscript{2}, [1982] 1 Q.B. 558, 573 (Eng.)} (opining that \textit{Mareva} injunctions might be in rem as to the location of the asset rather than in personam to the nonmoving party).

\textsuperscript{248} Statute of the International Court of Justice, art. 34(1). While the ICJ may ask for advisory opinions or information similar to an amicus brief from non-governmental parties, they may not bring claims on their own before the court. \textit{Id.} art. 34(2).

\textsuperscript{249} However, there may be an alternative to having a single state dedicate resources to injunctive investigations. It may be feasible to encourage the UNODA to investigate the EUC of pending transactions and based on their investigation then institute proceedings in the name of the state chairing the UNODA. The degree of feasibility in implementing this method is uncertain both legally and politically.
regulation confers advantages that outweigh any forum-based disadvantages. The _Mareva_ injunction is a public mechanism of enforcement of international arms treaties. No state desires the public shame that comes from being subjected to an injunction for selling arms likely to end up on the black market.\(^{250}\) Because of the antipathy towards a poor public perception, states are more likely to take the threat of a _Mareva_ action filed against them in the ICJ as an opportunity to reexamine the EUC at issue. This antipathy will inform states to take a risk-adverse position and elect to deny authorizations that, under other circumstances, would be more likely approved in the absence of potential controversy. In addition, even if the challenge to the authorization through a _Mareva_ injunction is ultimately denied by the ICJ, the delay in the transaction will still sap the financial benefits of the sale from being received by the manufacturer. The possible severe delay in transactions will further motivate manufacturers to avoid selling SALW to organizations or states that may result in the violation of international law. The risk of injunction will encourage manufacturers to ensure that the weapons sold will not likely end up in the grey and black markets.

The end result of the _Mareva_ injunction model encourages both avoidance of its imposition and a strong regulatory mechanism to reduce the sale of SALW that may end up in the grey and black markets. In attacking the weapons transactions before SALW enter the market, the _Mareva_ injunction model circumvents the problems that enforcers have in tracing arms in the underground weapons markets while starving them of resources.\(^{251}\)

### C. Testing the Modified Mareva Injunction in the European Union

The greatest advantage of the use of the _Mareva_ injunction on an international scale to combat SALW is that the _Mareva_ injunction already exists within the European Union. As noted earlier, the United Kingdom has frequently imposed the _Mareva_ injunction on international assets in the past.\(^{252}\) In addition, the injunctive model was recently adopted by the

\(^{250}\) See, e.g., C.J. Chivers, _A Trail of Bullet Casings Leads from Africa’s Wars Back to Iran_, N.Y. TIMES, Jan. 12, 2013, at A1 (connecting the Islamic Republic of Iran to illegal ammunition shipments in Africa and criticizing Iran for violating embargo treaties).

\(^{251}\) See Koh, _supra_ note 16, at 2339 (describing the lack of data on black and grey markets). The _Mareva_ injunction model helps to fulfill the desired goals that Professor Koh articulated in his lecture. In particular, the _Mareva_ injunction model demonstrates how to “internalize” international legal mechanisms to attack the illicit shipment of SALW through a broader but still approachable structure. _Id._ at 2354–55. Because the _Mareva_ injunction model combines both existing legal norms adopted by most states and codifies it with a procedural mechanism that has been widely recognized, most states will have problems avoiding its imposition.

\(^{252}\) See _supra_ Part IV.B (discussing British use of the _Mareva_ injunction).
European Union. Because the EUCCAE already embraces a uniform set of criteria for regulating SALW sales, the European Union can implement the recommended legal model with ease.

In doing so, the EU can act as a “test” of the model before its adoption in the larger international community. Should the EU find that Mareva injunctions are effective at halting shipments that violate the EUCCAE, it would generate greater pressure for the model to be adopted by the international community and would reduce the natural hesitancy to adopt novel and untested legal mechanisms. Furthermore, imposition of the Mareva injunction model of SALW regulation in the EU would be substantially easier as the European Court of Justice does not restrict standing to state parties. This allows for non-governmental organizations or individuals to bring injunctive acts against states or arms manufacturers. When considered in conjunction with the European Court of Justice having already considered cross-border injunctions and has approved their use in the EU, there is a strong argument that the Mareva injunction model is easily imposed in the EU’s international legal system.

VI. CONCLUSION

As former Legal Advisor to the State Department Harold Hongju Koh noted, we live in a world that is “drowning in guns.” Despite the best efforts of many states, international organizations, advocates, and NGOs, the world continues to see an increase in the use of SALW without appropriate regulatory structures in place to control them.

Many writers advocate either imposition of new international norms, a more comprehensive treaty to create binding international law, or a stronger international enforcement of existing regulations. These are all
admirable approaches that should be considered in turn. However, what is lacking in the debate on SALW control are practical legal mechanisms that may be applied efficiently, uniformly, and above all with great speed.

The greatest problem with SALW is that once they enter the grey or black markets, they become incredibly difficult to interdict. The legal restrictions on sales are at best vague and uncertain, and violations of those regulations carry no adequate relief, equitable or otherwise. This Note has suggested one possible route that re-tailors an existing injunctive model already applied and known in the international sphere. It preserves national sovereignty for self-defense and at the same time protects the legal integrity of the *Mareva* injunction’s common law origins. While, by all means, it is not the only possible way to seek injunctive restrictions on SALW shipments—and this author wholeheartedly encourages contemplating other, more effective models—it provides a possible alternative to the current status quo by providing what is most needed: effective legal enforcement. With a new procedure to combat SALW sales, international advocates will no longer need to focus purely on changing substantive law. This new procedure will take the battle for SALW regulation out of the theoretical halls of law journals and into the courtrooms where these battles must ultimately be fought.