CAPTAIN OF A SHIP OF FOOLS ON A CRUEL SEA: HOW EUROPEAN UNION LEADERSHIP MAY SINK THE PROPOSED ARMS TRADE TREATY

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I. INTRODUCTION

The past century experienced a marked increase in armed conflict from Europe to the farthest parts of Southeastern Asia. At the heart of modern conflict is a particular class of weaponry—small arms and light weapons. Commentators have noted that small arms and light weapons have become widely used by groups involved in conflict; particularly, groups utilizing asymmetric warfare tactics. For example, small arms and light weapons were utilized in the more than fifty inter-state, intra-state, and insurgent conflicts over the past fifteen years. Notably, 90% of deaths in modern conflicts are attributable to the use of small arms and light weapons. As a consequence of wide utilization, these weapons have destabilized governments and strained economic infrastructure. Moreover, the negative effects also include governmental instability, catastrophic healthcare consequences, and environmental degradation. However, it is imperative to recognize that the current global proliferation of small arms and light weapons did not directly ignite the abovementioned conflict and spur the negative effects, but instead simply acted as a fuel source for the conflict. Commentators estimated there are approximately

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1 See Colonel Stuart W. Risch, Hostile Outsider or Influential Insider? The United States and the International Criminal Court, ARMY LAW., MAY 2009, at 61, 62 (2009) (discussing the conflicts during that dominated the last century).
3 See Hugh Griffiths & Adrian Wilkinson, Guns, Planes and Ships: Identification and Disruption of Clandestine Arms Transfers, SE. & E. EUROPE CLEARRINGHOUSE FOR THE CONTROL OF SMALL ARMS & LIGHT WEAPONS, Aug. 2007, at i (noting the popularity of small arms and light weapons with groups that do not fight using orthodox principles).
4 Id.
5 Michael Renner, Small Arms, Big Impact: The Next Challenge of Disarmament, 137 WORLDWATCH PAPER 1, 5 (1997) (arguing “[b]ut although the firepower, reach, and precision-targeting of . . . major weapons systems dwarf the capacities of [small arms and light weapons], the hundreds of millions of these low-tech, inexpensive, sturdy, and easy-to-use weapons now spread around the world are the tools for most of the killing in contemporary conflicts—causing as much as 90% of the deaths. Though these weapons are small in caliber, they are big, indeed devastating, in their impact.”).
7 Id. “[I]t [has] become[] clear that small arms [are] not just about tribal wars. . . . [small arms] enable drug wars, terrorism, and insurgencies. But small arms did much more long-term damage to countries. They increase[d] the worldwide burden on healthcare systems and allow[] the spread of infectious disease by preventing medical caregivers from entering conflicted areas. Excesses of small arms [led] to severe economic consequences by destabilizing governments and destroying economic infrastructure.” Id.
8 Renner, supra note 5, at 8. “The proliferation of small arms is the fuel of conflict, not the starter. Widespread unemployment, poverty, social inequality, and the pressure of environmental degradation and the resource depletion in the presence of large quantities of small arms make a highly combustible combination.” Id. Specifically, “[M]ilitary weapons and poverty are proving to be a deadly combination.” Id. at 24.
639 million small arms and light weapons worldwide. However, this estimate understates the total number of weaponry because of the tens of millions of unregistered weapons.

Currently, “[t]here is one gun for every ten people on the planet. Yet 8 million small arms and light weapons are manufactured each year.” For instance, each year manufacturers produce enough ammunition to execute each person on earth twice. The major producers and exporters of military grade small arms and light weapons are a diverse group, according to the Small Arms Survey. However, the Small Arms Survey also noted that despite the diversity, the trade is dominated by a very limited number of states, including the United States.

Harold Hongju Koh, Professor of international law at Yale Law School and Legal Advisor to the United States Department of State, remarked that the arms industry is almost entirely unregulated. The current regime that regulates the trade in small arms and light weapons is multifaceted. The facets include arms embargoes, international plans of action, and non-binding agreements regulating the sale and transfer of small arms and light weapons. The European Union (“EU”) has strongly supported arms reform initiatives. For instance, the EU promulgated the European Union Code of Conduct on Arms Exports, an international initiative aimed at governing the conduct of states that export arms. Moreover, in 2010, the global community took the first steps towards creating a legally binding treaty to regulate the arms trade. The EU and ninety-four states provided input to the United Nations about how the treaty should be drafted. In doing so, the EU argued to pattern the proposed arms trade treaty after the EU Code of Conduct.
This Article proceeds in three sections. First, the Article’s Background section will explore the mechanisms associated with the global arms trade. In addition, the Background will examine the ideological principles of the EU, particularly the principles of the European Coal and Steel Community. The Background concludes with a discussion of the EU’s Code of Conduct, current open arms policy, and stance on the proposed arms trade treaty.

Second, this Article’s Argument section will articulate two major issues pertaining to the EU and arms trade reform efforts. In doing so, the Article will argue that the Code of Conduct is not a proper model upon which to base the proposed arms trade treaty. Moreover, the Article posits that the EU would not make the best proponent for the proposed arms trade treaty because the EU’s current common market approach to the arms trade has actually enabled the spread of small arms and light weapons. In doing so, the common market cuts against the ideological underpinnings of the EU. Third, this Article’s Conclusion will briefly discuss how the EU could right the ship and aid in arms reform efforts.

II. BACKGROUND

A. SMALL ARMS AND LIGHT WEAPONS

The phrase ‘small arms and light weapons’ escapes a precise definition. Small arms and light weapons are easily held and transported. As a result, some commentators in the field of arms transfers consider small arms and light weapons to normally include arms that can be utilized by a single combatant. Based on this understanding, small arms include sub-machine guns, assault rifles, and handguns. Light weapons include landmines, light mortars, bazookas, rocket-propelled grenades, light anti-tank missiles, shoulder-fired anti-aircraft missiles, and machine guns. Almost any individual can utilize a small arm or light weapon because of their lightweight nature. For example, children throughout the developing world regularly carry

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24 See infra notes 34-292 and accompanying text.
25 See infra notes 34-97 and accompanying text.
26 See infra notes 98-108 and accompanying text.
27 See infra notes 109-88 and accompanying text.
28 See infra notes 188-278 and accompanying text.
29 See infra notes 197-240 and accompanying text.
30 See infra notes 197-240 and accompanying text.
31 See infra notes 241-78 and accompanying text.
32 See infra notes 279-92 and accompanying text.
33 Renner, supra note 5, at 10.
34 Michael Klare, The Kalashnikov Age, 55 The Bulletin of Atomic Scientists, Jan. 1999, at 18, 20 available at http://bos.sagepub.com/content/55/1/18.full.pdf+html [hereinafter AK Age]. “[Small arms and light weapons] are easy to hide and carry. A single pack-horse can carry a dozen or so rifles through dense jungles over high mountain passes, bypassing government checkpoints; a column of horses can supply a small army.” Id. at 20-21.
35 Aaron Karp, Small Arms – The New Major Weapons, in LETHAL COMMERCE 17, 23 (Jeffery Boutwell et al eds., 1995).
37 Id.
38 See Koh, supra note 2, at 2335 (explaining that small arms and light weapons are widely utilized by both children and adults). For example, the Avtomat Kalashnikova 47 assault rifle, as known as the AK-47, a weapon classified as a small arms and light weapon, weighs only 4.3 Kilograms. See RACHEL J. STOHL ET AL., THE SMALL ARMS TRADE: A BEGINNER’S GUIDE xxviii (2007) (providing a graphical breakdown of the statistics boasted by the AK-47).
small arms and light weapons. Consequently, an estimated 250,000 children have fought in modern conflict.

In addition to weight, small arms and light weapons achieved prominence in conflict for a plethora of reasons. These reasons include: low cost, deadly capacities, simplistic design, and resilience. First, small arms and light weapons are cheap and widely available. The current arms trade is influenced only by the principles of supply and demand. For example, the conclusion of the Cold War dumped millions of weapons upon the world market. Developing states, such as Afghanistan, were inundated with a flood of weaponry. Afghanistan is currently the world’s leader in unaccounted for weaponry, boasting an estimated 10 million un-accounted for small arms. As a consequence of the supply of small arms in Afghanistan, the price of an AK-47 has plummeted to around $10. Additionally, portions of Africa are so inundated with small arms that weapons can be purchased for the same price as a sack of corn—around $15. The low cost makes small arms affordable to a wider range of users, including many non-state groups.

Second, small arms and light weapons are deadly. Annually, small arms and light weapons facilitate the killing of approximately five-hundred thousand people. An assault rifle can discharge hundreds of rounds per minute, making it possible for a low number of combatants to cause massive carnage. Small arms expel ammunition at such a great velocity that any contact with the human body produces death or massive trauma. The 2008 attacks in Mumbai, India illustrate the amount of damage a small group can inflict with small arms. During the attacks, ten assault-rifle toting Pakistani terrorists, associated with Lashkar-e-Taiba, were able to

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39 Id. “Many small weapons are so lightweight and can be assembled and reassembled with such ease that children as young as 10 years old can use them. While the phenomenon of child soldiers is not a new one, the easy availability of lightweight arms in the contemporary ear has boosted the ability of children to participate in armed conflicts.” Renner, supra note 5, at 11.
40 Renner, supra note 5, at 12; Koh, supra note 2, at 2335.
41 AK Age, supra note 34, at 20.
42 Rachel Stohl, Reality Check: The Danger of Small Arms Proliferation, 6 GEO. J. INT’L AFF. 71, 73 (2005) [hereinafter Reality Check].
43 AK Age, supra note 34, at 20.
44 Griffiths, supra note 3, at 4 (commenting that as result of the unregulated aspects of the arms trade, the only true regulation lies in market forces).
45 AK Age, supra note 34, at 20.
46 See Koh, supra note 2, at 2336 (discussing the global diffusion of small arms and light weapons throughout the world – including Afghanistan).
48 STOHL, supra note 38, at 12.
49 Koh, supra note 2, at 2336.
50 Renner, supra note 5, at 11. “For just $50 million—roughly the cost of a single modern jet fighter—one could equip a small army with some 200,000 assault rifles at today’s ‘fire-sale’ prices.” Id.
51 See Karp, supra note 3, at 179 (discussing the global reaction to the enormous loss of life associated with the use of small arms and light weapons).
52 Id.
53 AK Age, supra note 34, at 21.
54 Id.
kill over 166 people in a series of calculated attacks upon hotels, a train station, and a Jewish-center.\textsuperscript{56}

Third, small arms and light weapons can be easily operated.\textsuperscript{57} Small arms, unlike major weapons systems, do not require substantial upkeep, logistics, support, or instruction.\textsuperscript{58} Children understand how to use small arms with sickening ease.\textsuperscript{59} Even a five-year-old child understands how to point an assault rifle and pull the trigger.\textsuperscript{60}

Fourth, small arms and light weapons are resilient.\textsuperscript{61} For example, Colonel David H. Hackworth, United States Army Colonel, once noted he was able to fire thirty rounds from an assault rifle he found buried underground.\textsuperscript{62} Despite the fact that the weapon was underground for at least a year, it fired as if recently serviced.\textsuperscript{63} Small arms and light weapons last for decades because of their resilient nature.\textsuperscript{64} At the end of a conflict, small arms do not become obsolete.\textsuperscript{65} The weapons are often transferred or sold by combatants in the concluding conflict to combatants in a fresh conflict.\textsuperscript{66} For instance, U.S. weapons left in Vietnam were recycled to conflicts in the Middle East and Central America.\textsuperscript{67} The notion that weapons are often transferred from conflict to conflict is illustrated by the New York Times’ recent report that Marines in Afghanistan found a *Taliban* gun cache containing western style weapons dating back as far as 1915.\textsuperscript{68}

B. THE SMALL ARMS AND LIGHT WEAPONS TRADE

Demand for small arms and light weapons is met through different mechanisms.\textsuperscript{69} Small arms and light weapons are traded through one of three distinct channels: white market, grey market, and black market transfers.\textsuperscript{70} White market transfers involve sales between governments, which conform to international and national law.\textsuperscript{71} Normally, these transfers take

\begin{itemize}
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Koh, *supra* note 2, at 2335.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. at 2337.
\item \textsuperscript{62} See KAHANER, *supra* note 6, at 52 (noting the story of servicepersons in Vietnam using weapons that were badly soiled).
\item \textsuperscript{63} Id.
\item \textsuperscript{64} See Renner, *supra* note 5, at 36-38 (arguing that because of the resilient nature of small arms and light weapons weaponry can circumnavigate the globe jumping from on conflict to another).
\item \textsuperscript{65} See id. (noting the recycling of weapons after conflict to other conflicts).
\item \textsuperscript{66} See id. (discussing the life cycle of a small arms and light weapon).
\item \textsuperscript{67} Id. at 39.
\item \textsuperscript{69} See infra notes 70-73 and accompanying text.
\item \textsuperscript{70} STOHL, *supra* note 38, at 13.
\item \textsuperscript{71} MIKE BOURNE, ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS 31 (2007).
\end{itemize}
the form of either government-to-government transfers or commercial sales negotiated by private entities. Commentators remarked that despite the legal nature of white market transfers little data is available pertaining to these transfers.

Grey market transfers are accomplished by exploiting loopholes in international and national law. Grey market transfers involve sales between states and non-states. Grey market transfers begin with groups that can legally transfer arms, and result in unauthorized recipients receiving arms. Transfers from states to insurgent or rebel groups are common forms of grey market transfers. For example, Iran is known to transfer weapons to fuel Kurdish insurgencies. Similarly, Pakistan armed Kashmiri rebels in India. A degree of secrecy is inherent in the nature of grey market transfers. As a result, very little information is known about the grey market.

Black market transfers involve sales of arms in violation of international standards. Brokers, also known as merchants of death, supply illegal groups with small arms and light weapons. In exchange for a fee, brokers organize arms transfers among parties. Brokers connect arms-buyers, arms-sellers, and transport companies. Brokers arrange deals especially when the parties to a transaction are separated by culture, political ideology, or geography differences. Basically, brokers serve as the direct link between groups and the international small arms and light weapons market.

Brokers often allow arms transfers to merge and traverse between the legal and illegal market in order to disguise the illegal transfer. Arms brokering is a lucrative business with little risk if a broker is careful to commingle legal arms with illegal arms. Commentators have noted that illegal arms brokering over an extended period of time pays more than smuggling other contraband items, such as drugs, because the risk of getting caught is much less and the

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72 Renner, supra note 5, at 32.
73 See, e.g., id. (criticizing the fact that even though white market transfers are legal in nature very little information is made available to researchers and the public at-large to promote transparency and accountability in the field of arms transfers).
74 STOHL, supra note 38, at 13. “Insurgent groups and embargued governments are often the recipients of grey market transfers. Id. The line between white and grey market sales is often blurry. Id. For example, covert sales may be government sponsored but nonetheless violate international law, defy UN arms embargoes, or ignore national policy.” Id.
75 BOURNE, supra note 71, at 31; STOHL, supra note 38, at 13.
76 STOHL, supra note 38, at 13.
77 Id.
78 Renner, supra note 5, at 33.
79 Id.
80 Id. at 32.
81 Id.
82 BOURNE, supra note 71, at 31.
83 Kathi Austin, Illicit Arms Broker: Aiding and Abetting Atrocities, BROWN J. WORLD AFF., Spring 2002, at 203, 204; see also Denise Garcia, Arms Transfers beyond the State-To-State Realm, 10 INT’L STUD. PERSP. 151, 151 (2009) (discussing weapons transfers to non-state groups throughout the world).
85 Id.
86 Id.
87 BOURNE, supra note 71, at 115.
88 Griffiths, supra note 3, at ii.
89 Id.
same transit procedures used for illegal arms can be used to transport legitimate goods. In addition to mixing legal weapon transfers with illegal weapons, brokers often disguise illegal weapons as innocent items. For example, brokers hid weapons intended for guerilla fighters in Columbia amongst a shipment of produce. Grenades were codenamed pineapples, ammunition codenamed food, and money for payment codenamed lettuce. Along the same lines, brokers utilized aid shipments to Africa to hide illegal arms. This tactic in particular has exacerbated the problems associated with the militarization of refugee camps—a pressing issue facing the global community. Brokers understand that if they follow well-established practices they will likely not be noticed by authorities. Nevertheless, brokers understand that if apprehended the likelihood of being prosecuted is minimal.

C. THE EUROPEAN UNION: A UNION CREATED TO COMBAT ARMS PROLIFERATION

In the aftermath of World War II, Europeans were resolute to avert such killing and destruction in the future. In 1949, several Western European States formed the Council of Europe. In addition, six states, under the Schuman plan, cooperated further and began the formation of the European Coal and Steel Community. The underlying purpose of the Coal and Steel Community was the collective management of the heavy industries of coal and steel. The Coal and Steel Community was aimed at regulating the materials necessary to create weaponry; as a result no single state could unilaterally create weapons to turn against the others.

In 1951, the states formally created the European Coal and Steel Community. The Community was viewed as a bold step forward in the realm of cooperative international governance. Subsequently, in February 1953, the common market for coal and steel began. The transition marked the first time highly complex modern national economies voluntarily merged. The transition resulted in six states ceding large parts of their sovereignty in order to

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90 See id. (arguing that the mixing of legal and illegal arms make any regulation effort almost impossible).
91 STOHL, supra note 38, 19.
92 Id.
93 Id.
94 Id.
95 See ROBERT MUGGAH, NO REFUGEE: THE CRISIS OF REFUGEE MILITARIZATION IN AFRICA 15-20 (2006) (discussing the problems pertaining to refugees in African conflict zones gaining small arms and light weapons). “[I]n too many refugee camps there are people with guns. The mere presence of guns turns refugee camps from safe havens in oppressive centers for persecution, as well as for impressing and recruiting child soldiers.” Koh, supra note 2, at 2339.
96 Griffiths, supra note 3, at ii.
97 Id.
99 Id.
100 Id. These states were the Netherlands, France, Italy, Germany, Belgium, and Luxembourg. Id.
101 Id.
102 See id. (noting that the states that formed the Coal and Steel Community sough to prevent one nation again from arming and plunging the entire continent back into war).
103 Heinz L. Kerkeler, European Integration, 47 AM. SOC’Y INT’L L. PROC. 166, 166 (1953).
104 W. Freidmann, The European Steel and Coal Community, 10 INT’L J. 12, 17 (1954).
105 Kerkeler, supra note 103, at 166.
106 Id.
combat a common problem. The ultimate goal of the Coal and Steel Community was to stop the proliferation of weaponry, which could enable one state to again plunge the continent back into war.

D. THE EUROPEAN UNION’S APPROACH TO THE ARMS TRADE

1. The European Union’s Common Market Approach to the Arms Trade

The creation of a common market of goods within Europe is one underlying principle of the European Union (“EU”). Later, the EU expanded the notion of the common market to include people, services, and capital. Collateral to the common market, the EU adopted policies aimed at liberalizing world trade. The EU set out to eradicate any item it equated to a trade barrier in order to liberalize external trade. During the liberalization process, the European Commission proposed a directive to simplify arms transfers between Member States. Defense products, including small arms and light weapons, are among the items that freely move within the EU.

The EU utilized a two-tiered approach in order to eradicate all hindrance to the transfer of arms within the EU. First, to simplify intra-community transfers, the EU encouraged the use of general and global licenses for small arms and light weapons. The approach entailed certifying individuals who deal in small arms and light weapons, which eradicated the need for multiple licensing requirements. Second, in order to harmonize EU transfer policy, the directive required the establishment of a general licensing system for transfers to the armed forces of the member States and to certain companies. As a result of this directive many

107 Id. at 167; History of European Union, supra note 98.
108 History of European Union, supra note 98.
109 See id. (articulating that “[community members eventually] sign[ed] the Treaty of Rome, creating the European Economic Community (EEC), or ‘common market’. The idea [was] for people, goods and services to move freely across borders.”).
110 See Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Sept. 5, 2008, 2008 O.J. (C 115) 59 [hereinafter TFEU] (stating, “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”).
112 See TFEU art. 34 (stating, “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states.”); see also TFEU art. 35 (stating, “Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between member states.”).
113 SMALL ARMS SURVEY, supra note 13, at 77.
115 SMALL ARMS SURVEY, supra note 13, at 77. “First, in order to simplify intra-community transfers, [the EU] encourages the use of general and global licences [sic] for transfers of defense products . . . . Second, in order to harmonize EU transfer policies, the directive requires states to establish general licensing systems for transfers to the armed forces of EU member states and to certified companies in other EU countries.” Id.
116 Id.
117 Id.
118 Id.
Member States eliminated all forms of transfer licensing for other Member States.\textsuperscript{119} For instance, several Scandinavian states exempt all transfers to EU or North Atlantic Treaty Organization Member States from all export licensing requirements.\textsuperscript{120}

2. The European Union Code of Conduct on Arms Exports

The European Union Code of Conduct on Arms Exports\textsuperscript{121} ("Code of Conduct") is an international scheme to control the conduct of arms exporters.\textsuperscript{122} First, the Code of Conduct requested that Member States make export decisions based upon eight criteria.\textsuperscript{123} Second, the Code of Conduct requested that Member States communicate with one another to ensure real time information is available during the export license decision-making process.\textsuperscript{124}

The Code of Conduct’s first criterion suggested that the Member States consider if weapons transfers would violate any current international obligations.\textsuperscript{125} For instance, the Code of Conduct instructed Member States that transfers should be refused if a transfer violates a United Nations arms embargo.\textsuperscript{126} Member States should refuse a transfer if the transfer violates one of the many weapons non-proliferation treaties the European Union ("EU") signed.\textsuperscript{127}

The second criterion suggested the Member State to assess the recipient state’s human rights condition.\textsuperscript{128} The EU desired Member States to deny all transfers that would likely result in oppression in the importing state.\textsuperscript{129} The Member State should consider whether the following items are present when assessing the human rights condition: torture, other cruel, inhuman and degrading treatment or punishment, arbitrary executions, disappearances, irrational detentions, and other major human rights violations.\textsuperscript{130}

\textsuperscript{119} See, e.g., Id. at 78 (providing an example of Member States that exempt arm transfers from export licensing, including Spain, Bulgaria, and the Czech Republic).

\textsuperscript{120} See id. (explaining that some states exempt transfers from regulation based upon the importer or end-use).


\textsuperscript{122} Marsh, supra note 20, at 219.

\textsuperscript{123} Code of Conduct, supra note 121.

\textsuperscript{124} Id.

\textsuperscript{125} Id. at 3.

Respect for the international commitments of EU Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations. An export licence [sic] should be refused if approval would be inconsistent with, inter alia:

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

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Marsh, supra note 20, at 220.

\textsuperscript{129} See Code of Conduct, supra note 121, at 4 (articulating that Member States must determine if the weapons may possibly be used for repressive purposes).

\textsuperscript{130} Id.
The third and fourth criteria requested the exporting Member State to examine any armed conflict present in the recipient state.\textsuperscript{131} The Code of Conduct desired Member States to deny exports to states embroiled in armed conflict.\textsuperscript{132} Moreover, if the recipient state was likely to use the weapons to destabilize the region or incite conflict, then the Member State should deny the transfer.\textsuperscript{133} When considering the risk of regional instability, the Member State must consider whether the recipient acted aggressively towards regional neighbors in the past.\textsuperscript{134} Also, the Member State must determine if the weapons will be used by the recipient for legitimate national security and defense.\textsuperscript{135}

The fifth criterion suggested that Member States consider how the transfer affects allies of the Member State.\textsuperscript{136} Member States must consider whether the export comports with their allies’ defense and security interests.\textsuperscript{137} In doing so, Member States should consider if the weapons, could at some point, be used against an ally.\textsuperscript{138}

The sixth criterion suggested that Member States examine a recipient state’s attitude towards terrorism.\textsuperscript{139} In doing so, the Member State should conduct an investigation into the behavior of the buyer.\textsuperscript{140} Along the same lines, criterion six also asked Member States to examine the recipient state’s dedication towards non-proliferation and disarmament.\textsuperscript{141} Moreover, the Member States should note the recipient state’s compliance with international humanitarian law.\textsuperscript{142}

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  \item When considering these risks, Member States will take into account inter alia:
    \begin{itemize}
      \item the existence or likelihood of armed conflict between the recipient and another country;
      \item a claim against the territory of a neighbouring [sic] country which the recipient has in the past tried or threatened to pursue by means of force;
      \item whether the equipment would be likely to be used other than for the legitimate national security and defence [sic] of the recipient;
      \item the need not to affect adversely regional stability in any significant way.
    \end{itemize}
  \item Member States will take into account inter alia the record of the buyer country with regard to:
    \begin{itemize}
      \item its support or encouragement of terrorism and international organized crime;
      \item its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
      \item its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para b) of Criterion One.
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\textsuperscript{131} Marsh, supra note 20, at 220.
\textsuperscript{132} Code of Conduct, supra note 121, at 4.
\textsuperscript{133} Id. at 5.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 6.
\textsuperscript{136} Code of Conduct, supra note 121, at 4-5.
\textsuperscript{137} See id. (discussing that the exporting nation should consider the security interests of allies before authorizing a transfer).
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 6.
\textsuperscript{140} See id. (explaining the multifaceted investigation process that must be undertaken in order to make a determination, as to the attitudes of the buyer).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
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The seventh criterion requested that Member States assess the potential risk that the weapons may be diverted inside the recipient state to undesirable end-users. Member States must consider if the recipient state has effective controls to keep weapons from objectionable end-users. The Member State must also consider the recipient state’s capability to use the technology. In particular, the Member State should carefully consider the export of anti-terrorist technologies.

Finally, the eighth criterion suggested that Member States consider whether the proposed weapons export would seriously obstruct the sustainable development of the recipient state. The Member State must look at the economic and technological development of the state. Member States can accomplish this through analyzing data provided by the International Monetary Fund, United Nations Development Programme, and World Bank. Member States should consider the desirability of the recipient state to achieve their legitimate needs of security and defense against the risk of weapons diversion.

The Code of Conduct is a non-binding agreement. The EU has articulated that the Code of Conduct must not jeopardize any Member State’s ability to transfer weapons. As

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143 Id. at 7.
144 Id.
145 Id.
146 Id. The concern of diversion is paramount when dealing with anti-terrorism technologies. Id.
147 Id.
148 Id.
149 Id.
150 Id.
151 Alexandra Boivin, Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons, 87 INT’L REV. OF THE Red Cross 467, 486 (2005) (describing how the Code of Conduct is only politically binding); Marsh, supra note 20, at 220.
152 See Code of Conduct, supra note 121, at 7 (noting that the Code of Conduct was not meant to usurp the abilities of the states to make transfers).
such, the Code of Conduct does not delineate any punishments for a violation. Moreover, the Code of Conduct does not curtail the defense industry of Member States.

E. THE ARMS TRADE TREATY

The European Union ("EU") is not the only institution to promulgate regulatory schemes to restrain the proliferation of arms. Specifically, the global community’s major focus has been preventing the spread of chemical, nuclear, and biological weapons. In order to regulate major weapons systems, the global community engaged in discourse to establish regulatory and reform schemes. Small arms and light weapons were absent from the resulting control framework.

In the 1990s, a focus upon micro-disarmament supplemented major weapons regulation. Micro-disarmament concentrated on the reduction of ready available, cheap, and highly lethal weapons that kill thousands of people every day. Originally, micro-disarmament focused only on curtailing the use and manufacture of anti-personnel landmines. However, slowly the global community, along with non-governmental organizations, took aim at the current proliferation of small arms and light weapons.

Recently, many states recommended the abandonment of the current structure and advocated for the establishment of a framework of controls built upon a universal set of factors, which would be consistent with international law. In December 2006, the United Nations General Assembly proposed a binding framework to help stem the problems associated with small arms and light weapons. The United Nations, in initiating the process, called for the convening of governmental experts to discuss the feasibility of an arms trade treaty.

The United Nations requested the perspectives of Member States on the scope, feasibility, and possible parameters of an arms trade treaty. The United Nations requested Member States

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153 See id. (providing no repercussions for the violation of the Code of Conduct).
154 See id. (Acknowledging the wish of "EU Member States to maintain a defence [sic] industry as part of their industrial base as well as their defence [sic] effort.").
155 See Gillard, supra note 17, at 31-39 (noting the various institutions that institute prohibitions upon arms transfers).
156 Id.
157 Id.
158 See STOHL, supra note 38, at 39 (discussing the former legal regimes, which neglected small arms).
159 At Gunpoint, supra note 16, at 159.
160 Id.
162 See STOHL, supra note 38, at 39 (explaining how non-governmental organizations and the United Nations have shifted their focus from major weapons systems towards small arms and gun control since 1997).
165 Id. at 2.
reflect on the features that might contribute to the development and acceptance of an arms trade treaty. The EU noted it was receptive to the possibility of a legally binding arms trade treaty. The EU articulated that the treaty was of “great importance.” However, the EU conceded the United Nations was the only forum capable of producing a universal instrument. The EU continued its response by sharing its opinions on a proposed arms trade treaty.

First, the EU articulated the feasibility and urgent need for an arms treaty. The EU also stated that, as a result of current responsibilities of Member States under international law, solid ground existed for the creation of such a treaty. The EU noted that the absence of a framework contributes to conflicts, dislocation of people, and terrorism. In the EU’s opinion, the lack of workable framework undermined peace, understanding, security, stability, and development.

The EU articulated that the arms trade treaty should integrate many of the aspects featured in the Code of Conduct. According to the EU, the treaty must provide clear definitions of the weapons and transactions within the arms trade treaty’s purview. For example, the EU noted that the European Union Common Military List contained weapons ranging from small arms to components specially engineered for military use. Additionally, the EU wanted to include equipment and technology for the production of arms.

Moreover, The EU expressed that an arms trade treaty should include a thorough set of criteria that an arms exporter must consider before a transfer is authorized. The criteria would guide export-licensing officials. Amongst the criteria were respect for United Nation’s sanctions, respect for human rights in the country of end-use, critical inquiry into the political environment in the country of end-use, promotion of peace, the state’s legitimate security needs, and the state’s interest in the transaction.

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167 Id.
169 U.N. Responses II, supra note 22.
170 Id.
171 Id.
172 Id.
173 Id. “The European Union feels that a binding universal instrument is not only feasible, but urgently needed.” Id.
174 Id.
175 Id. at 92.
176 Id. at 91-92.
177 See id. at 92 (arguing for the adoption of the Code of Conduct and listing the provisions of the Code).
178 See id. (noting “[i]n order to be effective, an international instrument needs clear definitions of the goods and transactions to be covered.”).
179 Id.
180 Id.
181 Id. (describing the EU’s proposal to have a detailed set of criteria provide guidance to import and export officials).
182 Id.
interests, the buyer’s behavior, and the risk of diversion. The EU contended that these criteria did not deprive national governments of the ultimate ability to import or export weaponry.

In closing, the EU’s response noted a commitment to future participation and consultation in the process leading to an arms trade treaty. The EU also called upon other Member States of the United Nations to participate in the negotiation of an arms trade treaty. Finally, the EU noted that an international weapons export control framework can have a major impact on stability, security, and sustainable development.

III. ARGUMENT

In the coming years, the global community plans to draft an arms trade treaty to regulate the small arms and light weapons trade. The European Union (“EU”) has noted that it would like to continue to participate in the consultation process to produce the proposed treaty. During the preliminary drafting process, the EU tendered its views about the treaties possible parameters. The EU proposed patterning the treaty’s parameters after the European Union Code of Conduct on Arms Exports (“Code of Conduct”). The EU’s proposals and policies are problematic for two reasons. First, patterning the proposed arms trade treaty after the Code of Conduct would produce an ineffective document because the Code of Conduct is analytically feeble. Second, allowing the EU to steer the drafting process is problematic because the EU’s current common market policy, pertaining to small arms and light weapons, has encouraged weapons proliferation. As a result, applying common market principles to the transfer of weapons is in direct contradiction to the underlying principles of the EU aimed at curtailing the illegal arms trade.

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183 Id. at 92.
184 Id.
185 Id. at 93.
186 Id. “We reiterate our call upon all States Members of the United Nations to actively engage in the negotiations for an arms trade treaty.” Id.
187 Id.
189 U.N. Responses II, supra note 22, at 92.
190 Id. at 90.
192 See id. at 92 (detailing that the only parameters put forward by the EU were parameters from the EU Code of Conduct on Arms Exports).
193 See infra notes 188-278 and accompanying text.
194 See infra notes 197-240 and accompanying text.
195 See infra notes 241-78 and accompanying text.
196 See infra notes 241-78 and accompanying text.

The proposed arms trade treaty should not be patterned after the European Union Code of Conduct on Arms Exports\(^{197}\) ("Code of Conduct") because the Code of Conduct is weak and unworkable.\(^{198}\) First, the Code of Conduct is weak because it is only a non-binding agreement.\(^{199}\) As a consequence, Member States are under no obligation to follow the principles set forth in the document.\(^{200}\) Second, the Code of Conduct is weak because it sets out no repercussions for the violation of the criteria.\(^{201}\) Third, the Code of Conduct defers to a Member States’ ability to make transfers.\(^{202}\) Fourth, the notion that each transfer should be judged on a case-by-case basis has led states to rely upon assurances by importers.\(^{203}\) In previous instances, false assurances led to weapons being used in human rights violations.\(^{204}\) Fifth, the Code of Conduct is weak because the criteria are vague and open to interpretation and manipulation by each Member State.\(^{205}\) As one author noted, the Code of Conduct is “well-intentioned legislative feebleness.”\(^{206}\)

1. Criterion Two

The second criterion is flawed because export officials cannot be expected to make a finely tuned determination of the human rights condition in an importing state.\(^{207}\) The second criterion requests the Member State to gauge the importing state’s human rights condition.\(^{208}\) In


\(^{198}\) See infra notes 199-240 and accompanying text.


\(^{200}\) See Code of Conduct, supra note 121, at 7 (articulating that the Code of Conduct is a set of guidelines and does not compel Member States to perform any task).

\(^{201}\) Compare Code of Conduct, supra note 121 (articulating no punishment mechanism to punish violators of the Code of Conduct), with Austin, supra note 83, at 205 (arguing that black market arms brokers “[u]ndaunted by fear of prosecution or retribution . . . will continue to thrive.”), and Griffiths, supra note 3, at ii (discussing that the brokers who enable illicit arms sales are emboldened because they know that if they are caught, then the punishment will be lacking).

\(^{202}\) U.N. Responses II, supra note 22, at 93.

\(^{203}\) Marsh, supra note 20, at 220.

\(^{204}\) Id.

\(^{205}\) See Gillard, supra note 17, at 43 (arguing that the Code of Conducts criteria are ambiguous and have been open to manipulation by Member States).

\(^{206}\) Marsh, supra note 20, at 220.

\(^{207}\) See infra note 240 and accompanying text.

\(^{208}\) Code of Conduct, supra note 121, at 3-4.

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will: (a) not issue an export licence [sic] if
doing so, the Code of Conduct suggested that the Member State analyze the importer’s human rights record. However, the Code of Conduct sets no threshold level for what constitutes an acceptable human rights record. The Code of Conduct is unrealistic to recommend that such a finely calibrated determination could be made in every situation. For instance, pertinent information may not be available to gauge the exact human rights record of each state because human rights regulation is reactionary. Thus, the second criterion is flawed because export officials cannot be expected to make a correct determination of the human rights condition in all importing states.

2. Criteria Three & Four

The third and fourth criteria are flawed because they request Member States to focus upon the political stability of only the importing state, while ignoring the political stability of the importer’s regional neighbors. The third and fourth criteria request the exporting Member State to examine political conflict present in the recipient state. These criteria miss the mark because the criteria fail to consider that illegal groups or embargoed states many times receive weapons via diversion. The exchange of weaponry between Libya and Liberia illustrated this.

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Id. 209 See id. (listing the provisions of the Code of Conduct; however, absent from the Code of Conduct is any notion of what constitutes a suitable human rights situation).


212 Compare Code of Conduct, supra note 121 (listing the provisions of the Code of Conduct; however, the Code of Conduct is standard-less as to what constitutes an acceptable human right situation), and Country Reports on Human Rights Practices 2009, UNITED STATES DEPARTMENT OF STATE, available at http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm (last visited Mar. 22, 2011) (listing the 197 different human rights situations being monitored by the United States Department of State), with Code of Conduct, supra note 121, at 3-4 (requesting that export officials examine the human rights situations in each importing state).

213 See infra note 221 and accompanying text.

214 Code of Conduct, supra note 121, at 4-5. Criterion three articulated that “[t]he internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.” Id. Further, criterion four articulated that “Member States will not issue an export licence [sic] if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.” Id.

215 Compare Code of Conduct, supra note 121, at 4-5 (requesting that export officials examine the political environments of the importing states, not the environments of the surrounding states), with BOURNE, supra note 71, at 144-48 (displaying the regional facilitation that occurs when states field arms to their non-state and state neighbors).
point.217 In that instance, states in Eastern Europe sent small arms and light weapons to Libya, a state that possessed the right to purchase arms.218 However, once the small arms and light weapons reached Libya they were diverted to Liberia, a state under an arms embargo.219 Later, Charles Taylor, the embargoed leader of Liberia, armed Ivorian rebels in order to destabilize West Africa.220 Thus, the third and fourth criteria are flawed because they request Member States to focus upon the political stability of only the importing state, while ignoring the political stability of the importer’s regional neighbors.221

3. Criterion Six

Criterion six is subjective and vague because no universally accepted definition of terrorism exists.222 The sixth criterion suggests that Member States examine a recipient state’s attitudes towards terrorism.223 However, it is unclear what definition of terrorism is used in conducting this analysis.224 The problem lies in fact that the definition of terrorism is dependent upon a state’s perspective.225 For instance, after the Soviet invasion of Afghanistan in 1979, the United States supplied millions of dollars worth of small arms and light weapons to the Mujahedeen, an Afghan group aimed at repelling the Soviets.226 To the United States, determined to repel communism, the Mujahedeen were freedom fighters.227 However, thirty-two years later the United States included the Mujahedeen on the Foreign Terrorist Organization List.228 Without a threshold standard to determine what groups constitute a terrorists group, the sixth criterion is impossible to implement in reality.229

217 See STOHL, supra note 38, at 32 (discussing how two hundred tons of small arms and ammunition were diverted from Europe via Libya, Nigeria and France to Liberia, a nation under arms embargo).
218 Id. at 18.
219 See id. (discussing the diversion process from Europe to Liberia, a nation under an arms embargo).
220 Id. at 32.
221 Compare STOHL, supra note 38, at 32 (noting that legal importers, France, Nigeria, and Libya, later facilitated another embargoed state), with Code of Conduct, supra note 121, at 4-5 (explaining that the export official should examine the stability just the importing state – ignoring the other states that can be regionally destabilized via diversion).
222 See infra notes 229 and accompanying text.
223 Code of Conduct, supra note 121, at 6. “Member States will take into account inter alia the record of the buyer country with regard to: . . . its support or encouragement of terrorism and international organized crime.” Id.
224 See id. (requesting that arms transfer not be sent to terrorist groups; however, devoid from the criterion is a definition of whom constitutes a terrorist group).
225 Garcia, supra note 83, at 151 (noting that “a non-state actor may be a freedom fighter or a terrorist depending on different perspectives.”).
226 See STOHL, supra note 38, at 71 (noting that the majority of the aid to the Afghan rebellion came from United States because of fear of the Soviets).
227 See id. at 70 (explaining the United States’ support for the Afghan resistance; including, the their motivation as both, “visceral—pay-back for Vietnam—and pragmatic—damaging the Soviet war machine.”).
229 Compare Garcia, supra note 83, at 151 (explaining that one man’s terrorist is another man’s freedom fighter), Garcia, supra note 83, at 154 (noting that Hamas, a terrorist group to the Israel, receives arms from Egypt, Saudi Arabia, Iran, Jordan, and Lebanon), and Garcia supra note 83, at 155 (detailing the Chinese support for the Viet Cong during the American Vietnam War), with Code of Conduct, supra note 121, at 6 (asking export officials to examine importing states’ record pertaining to the supply of arms to terrorist without providing any standard for who constitutes a terrorist).
4. **Criterion Seven**

In similar fashion to criterion six, criterion seven is unworkable because it is standard-less as to who constitutes an improper end-user.\(^{230}\) Criterion seven suggested Member States to assess the risk that small arms and light weapons will be diverted to improper end-users.\(^{231}\) The criterion is silent as to which perspective a state must utilize in making the determination.\(^{232}\) In doing so, criterion seven is vague and subjective because the Code of Conduct does not shed any light upon who qualifies as an improper end-user.\(^{233}\) Criterion seven is standard-less as to who constitutes an improper end-user, as a result the criterion is unworkable.\(^{234}\)

The proposed arms trade treaty must not be patterned after the Code of Conduct because the Code of Conduct is an analytically feeble document.\(^{235}\) The second criterion is flawed because export officials cannot be expected to make a correct determination of the human rights condition in all importing states.\(^{236}\) Further, the third and fourth criteria are unsound because they request Member States to focus upon the political stability of only the importing state, while ignoring the political stability of the importer’s regional neighbors.\(^{237}\) The sixth criterion is troublesome because it is standard-less towards who constitutes a terrorist.\(^{238}\) Finally, criterion

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\(^{230}\) See infra note 234 and accompanying text.

\(^{231}\) *Code of Conduct*, supra note 121, at 7. “In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered: (a) the legitimate defence [sic] and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity; (b) the technical capability of the recipient country to use the equipment; (c) the capability of the recipient country to exert effective export controls; (d) the risk of the arms being re-exported or diverted to terrorist organizations (anti-terrorist equipment would need particularly careful consideration in this context).” \(^{Id.}\)

\(^{232}\) See *Code of Conduct*, supra note 121, at 7 (explaining the requirement that exporting states should examine if the weapons will likely be diverted to improper end-users; however, providing no way to determine who constitutes an improper end-user).

\(^{233}\) Compare *Code of Conduct*, supra note 121, at 7 (articulating that a state must determine if an export may be diverted to an undesirable end-user), with *Code of Conduct*, supra note 121, at 7 (providing no guidance on what a state should consider when making a determination of an undesirable end-user).

\(^{234}\) Compare *Code of Conduct*, supra note 121, at 7 (requesting states to examine if arms will be used by improper end-user; however, the Code does not explain who is a proper or improper end-user), with Garcia, supra note 83, at 159 (noting that “[s]tates transfer arms to groups they deem legitimate knowing that these groups are likely to misuse these weapons.”).

\(^{235}\) See infra notes 236-39 and accompanying text.


\(^{237}\) Compare Stoehr, supra note 38, at 32 (noting that legal importers, France, Nigeria, and Libya, later facilitated another embargoed state), with *Code of Conduct*, supra note 121 at 4-5 (explaining that the export official should examine the stability just the importing state – ignoring the other states that can be regionally destabilized via diversion).

\(^{238}\) Compare Garcia, supra note 83, at 151 (explaining that one man’s terrorist is another man’s freedom fighter), Garcia, supra note 83, at 154 (noting that Hamas, a terrorist group to the Israel, receives arms from Egypt, Saudi Arabia, Iran, Jordan, and Lebanon), and Garcia supra note 83, at 155 (detailing the Chinese support for the Viet Cong during the American Vietnam War), with *Code of Conduct*, supra note 121, at 6 (asking export officials to examine importing states’ record pertaining to the supply of arms to terrorist without providing any standard for who constitutes a terrorist).
seven is standard-less as to who constitutes an improper end-user. The Code of Conduct should not form the basis for a new arms trade treaty because it fails to provide concrete guidance to Member States.

B. THE COMMON MARKET FOR SMALL ARMS AND LIGHT WEAPONS V. THE ROOTS OF THE EUROPEAN UNION

The European Union ("EU") should not steer the drafting process of the proposed arms trade treaty because the EU’s common market policy, pertaining to small arms and light weapons, has perpetuated the proliferation of weaponry. The free movement of goods, people, services, and capital amongst Member States is one of the underlying principles of the EU. The common market is the nucleus of today’s EU. In recent years, the EU developed a no-nonsense common market approach to small arms and light weapons regulation between Member States. The common market approach to weapons is contradictory to the underlying principles of the EU and detrimental to the global community.

In the pursuit of the common market, the EU attempted to eradicate all internal barriers to trade. To eradicate barriers substantial legislation was needed to remove the technological, regulatory, legal, and ceremonial barriers that muffled the free movement of goods, people, and services. Additionally, the EU attempted to liberalize world trade whenever possible. As Member States removed barriers to trade, internally and externally, they also reconciled tariffs amongst Member States on goods imported from non-member States.

On December 16, 2008, the Council of the European Union and the European Parliament promulgated a directive allowing the free movement of defense products, including small arms and light weapons, amongst Member States. The European Commission recommended the directive to simplify transfers between Member States based upon the results of a study that

239 Compare Code of Conduct, supra note 121, at 7 (requesting states to examine if arms will be used by improper end-user; however, the Code does not explain who is a proper or improper end-user, with Garcia, supra note 38, at 159 (noting that “[s]tates transfer arms to groups they deem legitimate knowing that these groups are likely to misuse these weapons.”).
240 See supra notes 235-239 and accompanying text.
241 See infra notes 242-78 and accompanying text.
243 Id.
244 See SMALL ARMS SURVEY, supra note 13, at 77 (detailing the EU’s attempts to eradicate all barriers to the trade of small arms and light weapons).
245 Compare SMALL ARMS SURVEY, supra note 13, at 77 (noting that the “risk of diversion for arms exports, raises questions about the desirability of the . . . market liberalization”), and Marsh, supra note 20, at 219 (explaining that the provisions of the Code of Conduct are open to interpretation by the Member States; hence, repressive regimes have received arms under the Code of Conduct), with The History of the European Union, supra note 98 (explaining that the European Coal and Steel Community, the predecessor of the EU, was founded upon the principles of collective management of the heavy industry – consequently, the European Coal and Steel Community was formed to stop arms proliferation).
248 External Trade, supra note 111.
249 Id.
250 SMALL ARMS SURVEY, supra note 13, at 77.
claimed that internal barriers, to the transfer of small arms and light weapons, impaired trade. 251 Based upon the study, the EU concluded that the various licensing requirements imposed by Member States were an uneven administrative burden disconnected from the actual control needs. 252 The study reached this conclusion because transfers, between Member States, were seldom rejected. 253

The EU noted that the initiative meant to benefit European defense firms and other arms exporters. 254 The initiative aimed to increase the European defense industry’s competitiveness. 255 The concern was if better collaboration and assimilation were not promoted, then European defense firms would cease to compete on the world level. 256 The EU reasoned that the repercussions would not simply be economic but also security-based because the barriers would hamper the pursuit of EU defense and security policy. 257 This notion would benefit Member States substantially because six of the fifteen largest exporters of small arms and light weapons are Member States of EU. 258

The elimination of safeguards on the transfer of small arms and light weapons caused the EU to become unmoored from its roots established under the European Coal and Steel Community. 259 As aforementioned, the roots of the EU began in the aftermath of World War II. 260 The European Coal and Steel Community aimed to cooperatively manage heavy industry in order to prevent the creation and spread of weapons. 261 However, the recent removal of due process apparatuses, meant to curb the transfer of small arms and light weapons, is in direct contradiction to the founding principle of non-proliferation. 262 The current system sacrificed the goal of stopping the spread of small arms and light weapons upon the altar of economic gain. 263 The current system advocates the spread of weaponry with a disregard for both the tremendous impact small arms and light weapons have upon the global community and the founding principles of the EU. 264

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251 Id.
252 Id.
253 Id. However, several transfers have been rejected intended for Baltic States. Id.
254 Id.
255 Id. The directive was promulgated with intention to promote the European defense industry – the EU was concerned that the industry would cease to be competitive on the world level without the directive. Id.
256 Id.
257 Id.
258 Compare Industrial Production, SMALLARMSSURVEY.ORG, http://www.smallarmssurvey.org/weapons-and-markets/producers/industrial-production.html (last visited Nov. 5, 2010) (listing the fifteen largest producers or small arms and light weapons, including Italy, Germany, France, Belgium, Austria, the United Kingdom, and Spain), with SMALL ARMS SURVEY, supra note 13, at 77 (explain that the directive passed by the EU was aimed at making the trade of small arms easier).
259 See infra notes 241-78 and accompanying text.
260 The History of the European Union, supra note 98.
261 Id.
262 Compare The History of the European Union, supra note 98 (discussing how the Coal and Steel Community was formed to eliminate the spread and accumulation of weaponry and prevention of further global conflict), with SMALL ARMS SURVEY, supra note 13, at 77 (noting that the liberalization of the defense market would likely exacerbate the problems associated with diversion and other aspects of proliferation), SMALL ARMS SURVEY, supra note 13, at 77 (explaining that EU promoted the liberalization of the arms trade because it would benefit the defense industry).
263 Compare SMALL ARMS SURVEY, supra note 13, at 77 (explaining that the liberalization of the defense market, including the lower of trade barriers, would likely promote arms proliferation), with SMALL ARMS SURVEY, supra note 13, at 77 (explaining that EU promoted the liberalization of the arms trade because it would help European defense companies to economically compete on the world level).
264 Compare The History of the European Union, supra note 98 (discussing how one of the major reasons the Coal
Additionally, the problems associated with the lowering of barriers will be obvious if Serbia gains Member State status. Serbia, an EU candidate country, has a track record of conflict. Also, Serbia is a diversion point for small arms and light weapons earmarked for global conflict. The transfers from Serbia to Libya, which were promptly diverted to Charles Taylor, the embargoed leader of Liberia, illustrates this point. If Serbia gains acceptance and utilizes the common market policy on weapons, then Serbia would likely serve as a conduit for the flow of weaponry to conflict worldwide. The common market approach contradicts the underlying principles of the EU and is detrimental to the global community because it promotes the proliferation of small arms and light weapons.

The eradication of safeguards surrounding small arms and light weapons transfers within the EU not only allows for the proliferation of such arms within the Member States but also encourages global arms to spread. Most states within the EU have the monetary and political power to fight the adverse effects of an accumulation of small arms and light weapons. On the other hand, poorer, less stable, and more geographically remote Member States will not be able to fight the detrimental effects of a small arms and light weapons surplus. For instance, the

and Steel Community was formed was to eliminate the spread and accumulation of weaponry and prevention of further global conflict, with SMALL ARMS SURVEY, supra note 13, at 77 (explaining EU directives articulating that barriers to the transfer of small arms and light weapons must be eliminated to ensure the economic property of defense firms within the EU and to promote the common market principle).

See id. (explaining how the diversion process works; particularly, in the Balkan states, which have served to source some of the worse human rights abusers in history).

Compare STOHL, supra note 38, at 18 (noting that Serbia has a track record for supplying arms to conflict), with SMALL ARMS SURVEY, supra note 13, at 77 (explaining the EU directive allowing liberalized trade in arms).

Compare SMALL ARMS SURVEY, supra note 13, at 77 (noting that the “risk of diversion for arms exports, raises questions about the desirability of the . . . market liberalization”), Marsh, supra note 20, at 219 (explaining that the provisions of the Code of Conduct are open to interpretation by the Member States; hence, repressive regimes have received arms under the Code of Conduct), with The History of the European Union, supra note 98 (explaining that the European Coal and Steel Community, the predecessor of the EU, was founded upon the principles of collective management of the heavy industry – consequently, the European Coal and Steel Community was formed to stop arms proliferation).

See STOHL, supra note 38, at 18 (noting that ‘When Liberia . . . [was] under a UN arms embargo, arms brokers relied on corrupt governments and officials to transfers arms. Traffickers used false end-user certificates to ship weapons from Eastern Europe to Liberia through countries such as Libya and Nigeria. Between May and August 2002, two hundred tons of guns and ammunition were shipped to Monrovia from Belgrade using false Nigerian end-user certificates.’).

See id. (listing the failed attempts of Nicaragua, El Salvador, Mozambique, Somalia, and Cambodia to manage a
former Soviet bloc states still deal with huge Soviet stockpiles of small arms and light weapons left after the Cold War. These stockpiles were looted and weapons diverted to conflict. Weapons from these stockpiles helped source and facilitate civil wars, genocide, and crime throughout the world. Thus, the spread of small arms and light weapons through lowered internal standards will simply allow brokers to dump small arms and light weapons into former bloc states, already saturated with weapons, in the hopes of later diverting the small arms and light weapons. As a consequence of the EU’s hypocritical policies, which perpetuate the spread of small arms and light weapons, the EU should not steer the drafting process of the proposed arms trade treaty.

IV. CONCLUSION

The European Union (“EU”) attached vast importance to the drafting of a legally binding arms trade treaty to govern weapons transfers. The EU expressed that an arms trade treaty is not simply feasible—but is needed without delay. In doing so, the EU proposed that the arms trade treaty be patterned after the European Union Code of Conduct on Arms Exports (“Code of Conduct”). However, allowing the Code of Conduct to serve as the blueprint for the proposed arms trade treaty is ill advised because the Code of Conduct is a feeble document. First, the Code of Conduct is a non-binding document that provides no repercussions for a violation. Second, criterion two is flawed because export officials will likely not be able to correctly assess the human rights circumstance in all importing states. Third, criteria three and four are imperfect because they do not consider the role that diversion plays in illicit sourcing of weapons. Fourth, criterion six is defective because it is standard-less in the call to assess the impact of an arms transfer on terrorism. Fifth, criterion seven is problematic because it, like criterion six, is standard-less in its request to determine if improper end-users receive arms.

surplus of small arms and light weapons).

274 See id. at 33-39 (describing the instances of arms depot looting that are pervasive throughout the former block states of the former Soviet Union).
275 Id.
276 See id. at 39 (explaining that small arms and light weapons leaked from depots have “allegedly ended up in the hands of either governments or armed opposition groups of far flung places . . . [including] rebel groups in Angola and Nicaragua.”).
277 See SMALL ARMS SURVEY, supra note 13, at 77 (noting a concern for diversion because many new member states have little or no experience dealing with the Code of Conduct).
278 See supra notes 241-78 and accompanying text.
279 U.N. Country Responses II, supra note 22, at 91.
280 Id.
282 See Code of Conduct, supra note 281, at 92 (expressing that the UN should utilize the criteria of the Code of Conduct).
283 See supra notes 197-240 and accompanying text.
284 See supra notes 199-201 and accompanying text.
285 See supra note 213 and accompanying text.
286 See supra note 221 and accompanying text.
287 See supra note 229 and accompanying text.
288 See supra note 234 and accompanying text.
As a result of the flaws contained in the Code of Conduct, the pattern of the proposed arms trade treaty would undermine global security.  

Further, allowing the EU to steer the drafting process would also be problematic because the EU’s current common market policy aided the proliferation of small arms and light weapons. The common market policy is in direct contradiction to the underlying principles of the EU; particularly, the principles of the European Steel and Coal Community, a community with the underlying purpose of stopping the proliferation of arms. Allowing the EU to direct the proposed arms trade treaty draft would be challenging because of the EU’s contradictory views on global trade.

The global community is in dire need of a binding arms trade treaty to curb armed violence, human rights abuses, and the undermining of sustainable development. While the EU desires to a driving force during the drafting of the proposed arms trade treaty, a more appropriate place for the EU would be in an auxiliary role. It must be conceded that the EU does have a place within the drafting process. However, the EU has not demonstrated the competence or consistency on small arms and light weapons reform to enable it to be an effective leader. As a result, the EU would better serve the world community by providing copious amount of aid to developing states to cure the inherent social issues that lead to armed violence.

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289 See supra notes 235-39 and accompanying text.
290 See supra notes 241-78 and accompanying text.
291 See supra notes 241-78 and accompanying text.
292 See supra notes 241-78 and accompanying text.
293 This Article is dedicated to Arthur Louis Biggs Jr. & Andrew Paul Biggs—two guiding forces in my life. During the writing process a passage from the Bhagavad-Gita constantly ran through my mind. “Now, I am become Death, the destroyer of worlds.” This line plagued me because it is this line that must truly encapsulates the experience of child-soldiers when they wield a small arm for the first time. This illustrates the need for arms reform efforts—efforts to ensure that no child ever again must have this heartrending revelation.