

Controlling Arms Transfers to Non-State Actors: From the Emergence of the Sovereign-State System to the Present[†]

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Television media accounts often report with disapproval that large amounts of arms are flowing into the Middle East and North Africa and falling into the hands of non-state armed groups. In fact, states such as Qatar, Saudi Arabia, and the United States have supplied assault rifles, mortars, rocket-propelled grenades, ammunition, and other kinds of weapons to Syrian rebel groups since the conflict began in Syria in 2011. Some of these arms have been diverted to a broader range of groups, including the Islamic State in Iraq and Syria (ISIS). But why, exactly, are arms transfers to non-state actors considered morally, ethically, or legally problematic? The problematization of arms transfers to non-state actors has changed significantly since the formation of the sovereign-state system. This article gives an overview of the shifts in international policy debates on arms transfers to non-state actors from the emergence of the sovereign-state system to the Cold War period. It then introduces how ‘the problem’ has been framed and defined from the 1990s onwards. The article argues that each framing of ‘the problem’ has reflected the predominant conception of statehood in each period. Finally, it outlines the current state of affairs and future prospects for international policy debates.

It has not been uncommon throughout history to problematize arms possession by, or arms transfers to, individuals and groups other than the ruling authority. In medieval Europe, institutions led by the papacy, monarchy, high nobility, and commune competed among themselves while seeking to wrest the authority to use force from lesser ranks and dissidents.¹ Some kings of France, for instance, such as Louis IX (1214-70), Philip IV the Fair (1268-1314), and Philip V (1316-22), sought to ban tournaments and trial by battle as

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¹ Heyn, ‘Medieval’; idem, *Peacemaking*.

efforts to suppress private violence—violence which was not wielded or authorized by the ruling authority—and to consolidate the legitimate right of the central authority to use force on behalf of the kingdom.² The church also prohibited private violence, such as jousts and tournaments, in the canons adopted at councils in the twelfth and thirteenth centuries.³ Such initiatives by secular and religious actors contributed collectively to the gradual separation of public from private violence, the consolidation of the right of the central authorities to use force on their own behalf, and the evolution of the sovereign state.⁴ The modern *jus ad bellum* principle of the right authority—the notion that a just war must be authorized by the sovereign state—also evolved through this process.⁵

In Japan, the prominent feudal lord Hideyoshi Toyotomi (1536-98) issued an edict to expel Christian missionaries in 1587, in part because the mission of the Society of Jesus (*iesusu-kai*) had imported a large number of firearms, artillery systems, ammunition, and other related materials since its members first arrived in Japan in 1549.⁶ Such importation facilitated the militarization of both the mission community and the local feudal lords from whom the mission sought protection.⁷ Hideyoshi saw it as problematic; he was in the process of completing the military unification of Japan and was planning to regulate private violence while transforming local feudal lords into a formal professional warrior class.⁸ In the year after the edict, he also ordered sword hunting (*katanagari*), a measure widely used by Japan's ruling class between the thirteenth and nineteenth centuries to restrict the right to possess and/or carry weapons.⁹

Initiatives to outlaw private violence, or to regulate private ownership of the means of violence, have been prevalent throughout history. However, it was only after the formation of the sovereign-state system that arms transfers from one state to non-state actors (i.e., actors other than sovereign states) located in another state emerged as an issue of concern.¹⁰ In general, non-state actors can include a wide range of actors, such as armed rebel groups, private military or security companies, arms brokers, civil institutions such as museums, and civilians, including sports shooters, hunters, and gun collectors.¹¹ The exact term 'non-state actor' is relatively new, and policy makers have not necessarily agreed upon a detailed definition of the term.¹² Nevertheless, since the emergence of the sovereign-state system, efforts have often been made to reach an international agreement to control arms transfers

² Kaeuper, *War*.

³ For the canons adopted at the Council of Clermont in 1130, see Barker, *The tournament*, p. 70. The canons adopted at the Second Council of the Lateran in 1139, the Third Council of the Lateran in 1179, and the Fourth Council of the Lateran in 1215 are available at the Papal Encyclicals Online. <http://www.papalencyclicals.net/> (Last accessed on 1 Dec. 2016)

⁴ Heyn, 'Medieval'.

⁵ *Ibid.*

⁶ Takahashi, *Buki*.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ It should be remembered that the measure was generally not designed for the total disarmament of those people who were not members of the warrior class. See Fujiki, *Katanagari*; Takei, *Teppou*.

¹⁰ The Peace of Westphalia in 1684 is generally seen as a key moment in the gradual formation of the sovereign-state system, a system of political authority based on territory, mutual recognition, autonomy, and control. See Krasner, 'Rethinking', p. 17. The author thanks Nicholas Marsh for his advice to extend the scope of this study to eras before the late nineteenth century.

¹¹ Biting the Bullet Project, *Developing*.

¹² For instance, there is currently no shared view as to whether sub-national militaries or security agencies such as the Peshmerga and Asayish in the Kurdistan region of Iraq should be considered non-state actors. A more contentious issue is whether entities that have not been recognized by many states, such as Palestine, Somaliland, and Taiwan, should be regarded as non-state actors. See Holtom, 'Prohibiting', pp. 9-10; McDonald, Hassan, and Stevenson, 'Back to basics', p. 123.

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to non-state actors not authorized by the state in which they are located. Given the long history of such efforts and the ongoing controversy over arms exports to Syrian rebel groups, the absence of analysis of the various framings of ‘the problem’ represents a knowledge gap in academic and policy work.

The ways in which ‘the problem’ of arms transfers to non-state actors has been framed in international policy debates are examined herein. Although the cases shown are not exhaustive, it can be argued that the framing of ‘the problem’ in each prominent case has been indicative of the dominant conception of statehood in each period. In this view, the way in which the recently adopted Arms Trade Treaty (ATT)¹³ deals with the issue is a manifestation of the prevalent view of statehood in the first half of the 2010s. However, the language of the ATT regarding arms transfers to non-state actors is not universally accepted, nor is its associated perception of statehood. In future, the dominant discourse within policy circles regarding ‘the problem’ may change even more, just as it has changed throughout history from the creation of the sovereign-state system to today.

I

Until the first half of the twentieth century, ‘the problem’ of arms transfers to non-state actors tended to be framed as the inadmissibility of arms transfers to people who were regarded as not having the will and ability to form and manage a sovereign state. For instance, a treaty agreed by the United Kingdom and Spain in 1814 stipulated that the former would take the most effective measures to prevent its subjects from supplying arms, ammunition, and other related materials to the American rebels against Spanish rule, so that the ‘subjects of those provinces’ would ‘return to their obedience to their lawful sovereign’.¹⁴ On the other hand, the United Kingdom and other European states supplied arms to American entities which were recognized as ‘lawful sovereign states’.¹⁵ Another example is a convention signed in 1852 by the United Kingdom and the Boers (Voortrekkers), settlers of Dutch descent who had moved to the interior of Southern Africa.¹⁶ The convention recognized the Boers’ right to govern themselves and permitted them access to arms and ammunition while prohibiting ‘all trade in ammunition with the native tribes’.¹⁷

This framing of ‘the problem’, with an additional touch of late-nineteenth-century imperialism, also manifested itself in the first multilateral agreement adopted by most of the great powers to control arms transfers since the formation of the sovereign-state system: the 1890 Brussels Act.¹⁸ The Brussels Act, formally titled the General Act of the Brussels Conference Relative to the African Slave Trade, prohibited the transfer of firearms and ammunition to much of the African continent,¹⁹ into which a substantial number of

¹³ The text of the ATT was annexed to the draft decision submitted by the president of the final conference (UN Doc. A/Conf. 217/2013/L.3, Draft Decision Submitted by the President of the Final Conference, 28 March 2013) and was adopted in the United Nations General Assembly (UNGA) resolution on 2 April 2013 (UN Doc. A/67/L.58, The Arms Trade Treaty, 2 April 2013).

¹⁴ Treaty of Friendship and Alliance between his Britannic Majesty and his Catholic Majesty, Ferdinand the Seventh, 5 July 1814, Article 3.

¹⁵ Gillespie, *A history*, p. 18.

¹⁶ Sand River Convention, 16 Jan. 1852.

¹⁷ *Ibid.* See Yokoi, *Daiei teikoku*, pp. 64-68.

¹⁸ General Act of the Brussels Conference Relative to the African Slave Trade, 2 July 1890.

¹⁹ Article 8 of the Brussels Act states as follows: ‘The importation of firearms, and especially of rifles and improved weapons, as well as of powder, ball and cartridges, is, ... prohibited in the territories comprised between the 20th parallel of North latitude and the 22d parallel of South latitude, and extending westward to the

European-made arms had flooded.²⁰ As the formal name of this treaty indicates, the main subject of the conference was the slave trade from Africa to other parts of the world, especially to the Arab world.²¹

In the policy debates leading up to the adoption of this treaty, African people were generally not depicted as autonomous, rational subjects capable of managing a sovereign state, of exercising treaty-making powers, or of engaging in diplomatic relations with other sovereign states.²² Rather, they were seen as ‘barbaric’ contributors to the slave trade who were unable and unqualified to further the collective social good. Their acts of violence or resistance against the colonizers—the ‘civilized states’—were regarded as irrational, illegitimate, and backward acts of nonsense that rejected the benefits of civilization.²³ Moreover, the wars between African groups were considered a source of humanitarian catastrophe and slave hunting.²⁴ Therefore, the prohibition of arms transfers to such ‘backward’ people was seen as necessary to stop their ‘barbaric’ infighting and slave hunting and to bring the benefits of civilization to them under the protection of the ‘civilized states’.²⁵

The prevailing doctrine at the time of the Brussels Act was the sovereign right of a state to determine for itself whether and when to resort to war.²⁶ From the latter half of the eighteenth century, the ultimate prerogative of a state to wage war came to be regarded as a legitimate and fundamental element of state sovereignty. As such, arms transfers to state actors, or ‘civilized sovereign states’, were largely considered legitimate, unless they were potential or actual enemies of the exporting state.²⁷ At the same time, the *laissez-faire* policy of minimum governmental interference in the economic affairs of individuals and society was prevalent in the late nineteenth century.²⁸ Therefore, governments rarely sought to regulate arms production and transfers by private companies, except in times of war.²⁹

Atlantic Ocean and eastward to the Indian Ocean and its dependencies, including the islands adjacent to the coast within 100 nautical miles from the shore’.

²⁰ Atmore, Chirenje, and Mudenge, ‘Heiki’; Beachey, ‘The arms trade’; Guy, ‘A note’.

²¹ Berlioux, *Slave trade*, pp. 1, 3-4, 72-3, 75-6; Clarke, *Cardinal Lavigerie*, pp. 246-9, 250-2, 254, 332-4, 344; Pasha, *Seven years*, pp. 84-5.

²² Matthews, ‘Free trade’; Miers, *Britain*.

²³ Kurimoto, *Mikai no sensou*, p. 148.

²⁴ Berlioux, *Slave trade*, pp. 1, 76; Casati, *Ten years in Equatoria*, pp. 289, 291; Clarke, *Cardinal Lavigerie*, pp. 250-2, 254, 332-4, 344; Pasha, *Seven years*, pp. 84-5.

²⁵ Bain, *Between anarchy*, p. 68; Louis, ‘Sir Percy Anderson’s’; Matthews, ‘Free trade’.

²⁶ Joyner, *International law*, p. 163.

²⁷ Enomoto, ‘Reisen shuuketsugo’, pp. 168-79.

²⁸ Onozuka, ‘Heiki’, pp. 6-11. It should be born in mind that European states generally sought to control the arms trade prior to the shift in the underlying economic ideology of trade from mercantilism to capitalism. Most of the previous control measures had been characterized by unilateral initiatives and had been designed to protect technological lead or to safeguard scarce weapons. See Krause, *Arms and the state*, pp. 37-48, 59-61; Krause and MacDonald, ‘Regulating’, pp. 708-11.

²⁹ Krause and MacDonald, ‘Regulating’, pp. 711-2. Whether a neutral state could legitimately supply arms to belligerents of war was fiercely debated between the United Kingdom and the United States over the case of the Confederate commerce raider *Alabama* in the 1860s and 1870s. The case reaffirmed the prevailing principle of international law of the time that there was no general obligation of neutral states to prevent private arms transfers to belligerents of war. Several decades later, the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 Oct. 1907 and the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War of 18 Oct. 1907 prohibited the supply of arms by a neutral state to a belligerent state. Yet, arms transfers by private suppliers were outside of the scope of the prohibition. See Garcia-Mora, ‘International law’; Stone, ‘Imperialism’, pp. 214-7.

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II

The interwar period saw a series of negotiations aimed at creating a modified version of the Brussels Act. Joined by the newly independent small states, the Convention for the Control of the Trade in Arms and Ammunition was adopted in 1919,³⁰ and the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War was adopted in 1925.³¹

These treaties literally became dead letters even before the ink was dry as a result of the unwillingness of many states to ratify them.³² Nevertheless, the policy debates leading up to the adoption of these treaties—as well as the actual texts of the documents—do reveal the dominant perception of the time regarding arms transfers to non-state actors. The series of negotiations were led by the great powers, who insisted that it was the moral duty of ‘civilized states’ to prevent arms from falling into the hands of those who did not meet the ‘standard of civilization’ and who were, therefore, not entitled to sovereign equality.³³ As a result, the great powers proposed a broader prohibited zone that included not only parts of Africa, but also Transcaucasia, Persian lands and/or waters, Gwadar, the Arabian Peninsula, and the continental regions of Asia that were part of the Turkish Empire.

The logic behind the prohibition was made apparent in the treatment of Iran throughout the negotiations for these two treaties. During the 1910s, Iran underwent a series of occupations and invasions by Britain, Russia, and other forces,³⁴ and it was not part of the negotiations for the treaty adopted in 1919, which designated Iran and its waters (the Persian Gulf and the Sea of Oman) as part of the ‘prohibited zone’.³⁵ In 1921, the Reza Khan regime emerged, and it sought to re-establish Iran’s sovereignty under a strong modern central government.³⁶ Iran thus took part as a ‘civilized sovereign state’ in the negotiations for the treaty adopted in 1925. During this round of negotiations, Iran argued that as a ‘civilized sovereign state’, the country would not accept being included in the ‘special zone’³⁷, stressing that it refused to be treated in an unequal and discriminatory manner.³⁸ As a result, Iranian land was excluded from the ‘special zone’.³⁹ However, Britain vehemently insisted that the Persian Gulf and the Sea of Oman must remain in this zone, and many other states either took Britain’s side or avoided taking any position.⁴⁰ In the end, Iran walked away from the negotiations, claiming that banning arms transfers to its gulf would in practice prevent the country from importing arms via the sea.⁴¹

³⁰ Convention for the Control of the Trade in Arms and Ammunition, 10 Sept. 1919.

³¹ Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, 17 June 1925.

³² The treaty adopted in 1919 did not specify a fixed number of states to express their consent for its entry into force; instead, its Article 26 stated that it ‘would come into force for each Signatory Power from the date of the deposit of its ratification’. Therefore, the treaty did enter into force for a small number of states which deposited their instruments of ratification. However, it was widely seen as a dead letter by 1923, which prompted the next round of negotiation. See Stone, ‘Imperialism’, pp. 219-20.

³³ *Ibid.*, p. 218.

³⁴ Daniel, *The history*, pp. 127-9.

³⁵ Convention for the Control of the Trade in Arms and Ammunition, 10 Sept. 1919, Article 6.

³⁶ Daniel, *The history*, pp. 133-5.

³⁷ This expression was used to sound less aggressive during this round of negotiation. See LNA, A.13.1925.IX, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, held in Geneva, 4 May to 17 June 1925, pp. 254-5; Stone, ‘Imperialism’, p. 221.

³⁸ Stone, ‘Imperialism’, pp. 224-5.

³⁹ LNA, A.13.1925.IX, p. 12; Stone, ‘Imperialism’, p. 225.

⁴⁰ LNA, A.13.1925.IX, pp. 380-1; Stone, ‘Imperialism’, p. 226; TNA ADM 1/8699/113.

⁴¹ Krause and MacDonald, ‘Regulating’, p. 717; LNA, A.13.1925.IX, pp. 12, 375-80, 401, 704, 709, 711; Stone, ‘Imperialism’, pp. 225-6.

The logic that Britain used to justify the inclusion of Iranian waters in the ‘special zone’ is of great significance. Britain did not argue for the need to prevent arms flows to Iran itself, but it asserted that Iranian waters constituted a hotbed of arms traffic to the ‘backward’ peoples living in the surrounding regions, especially to those disturbing the ‘public order’ in India, which was under British control.⁴² Whether or not this logic fully reflected the real intent of Britain,⁴³ it certainly embodied the view that transferring arms to sovereign states should not be prohibited, whereas transferring arms to ‘backward’ people who did not meet the standard of civilization was indeed problematic and should be prevented.

In addition, it is critical to recognize that these interwar treaties included some control over arms transfers between states, which had been entirely outside the scope of the 1890 Brussels Act. On both sides of the Atlantic, a growing public outcry for regulation of the ‘merchants of death’⁴⁴ necessitated some efforts to control arms transfers,⁴⁵ and the idea of war as legitimate violence between equal sovereign states was increasingly called into question.⁴⁶ Thus, the treaties of this period included the prohibition of arms transfers, except for those transfers sanctioned by both the exporting and importing states.⁴⁷ They also included reporting mechanisms for licensed arms exports and imports. Such measures could have placed the ‘merchants of death’ under some control by governments and could have limited arms transfers to non-state actors not authorized by the state in which they were located. They could have also facilitated public scrutiny over authorized arms transfers.

However, the licensing and reporting measures were criticized by smaller arms-importing states, which saw them as infringements to their sovereignty and security. These critics claimed that licensing would put smaller importing states at the mercy of producers who might recognize a rebel group instead of the legitimate government of an importing state.⁴⁸ They also argued that publishing arms imports and exports meant that the armaments of importing states would be revealed, while the producing states would enjoy secrecy as to their armaments.⁴⁹ While these measures were included in the treaties at the insistence of the great powers, few importing states rushed to ratify them.⁵⁰

Despite the divergent positions among participant states on the scope of the prohibited, or special, zone, as well as on the licensing and reporting measures, the view that states should not transfer arms to people who were regarded as unable or unqualified to form and manage a sovereign state and to pursue the collective good was widely shared throughout

⁴² LNA, A.13.1925.IX, pp. 399-400; Stone, ‘Imperialism’, pp. 225-6; TNA ADM 1/8699/113.

⁴³ Britain in fact faced repeated uprisings and resistance against the British rule in the surrounding regions of Iran, especially in India, at the time of the negotiation of the treaty. See Chew, *Arming the periphery*.

⁴⁴ This term refers to arms manufacturers and dealers who were accused of having instigated and perpetuated the First World War in order to maximize their profits from arms sales.

⁴⁵ Anderson, ‘British rearmament’; Cortright, *Peace*, pp. 98-100; Harkavy, *The arms trade*, p. 215; Onozuka, ‘Heiki’; Stone, ‘Imperialism’, p. 217; Yokoi, *Daiei teikoku*.

⁴⁶ Cortright, *Peace*, pp. 62-3. There were other sets of initiatives to control arms transfers to particular states during this period. For instance, the 1920s peace treaties with the defeated states (Germany, Austria, Hungary, Turkey, and Bulgaria) in the First World War imposed prohibition of imports and exports of arms on these states. There were also some unilateral and multilateral arms embargoes in specific conflicts, such as those in China in the 1910s and 1920s and the Chaco war between Bolivia and Paraguay between 1932 and 1935. See Krause and MacDonald, ‘Regulating’, pp. 714, 720-722; Yokoyama, ‘Chugoku’.

⁴⁷ Convention for the Control of the Trade in Arms and Ammunition, 10 Sept. 1919, Article 1; Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Articles 2-5.

⁴⁸ LNA, A.13.1925.IX, pp. 178-182; 583-5; Stone, ‘Imperialism’, pp. 222-4.

⁴⁹ Stone, ‘Imperialism’, pp. 226-8.

⁵⁰ The interwar negotiations did not yield any tangible agreement, yet they facilitated the institutionalization of peacetime licensing mechanisms for arms transfers in many of the great powers. See Stone, ‘Imperialism’; Krause and MacDonald, ‘Regulating’.

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the negotiations.

III

The decades following the end of the Second World War saw a significant shift in policy debates on arms transfers to non-state actors. Against a backdrop of the independence of most of the former colonies, the dominant conception of sovereignty changed during this period, which affected the framing of arms transfers to non-state actors.

As Robert Jackson argues, the game of international relations shifted after the Second World War from one based on positive sovereignty, or a demonstrated ability for effective self-governance and the fulfilment of the ‘standard of civilization’, to a new game based on negative sovereignty, the formal legal entitlement to freedom from outside interference.⁵¹ In the new rules of the game, the principles of sovereign equality and non-intervention were respected for all states regardless of their empirical capabilities as organized political systems.

For instance, the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the United Nations General Assembly (UNGA) in 1960, stated that all peoples have the right to self-determination and that inadequacies in political, economic, social, or educational preparedness should never serve as pretexts for delaying independence.⁵² The idea that the principles of sovereign equality and non-intervention, which had been formulated through the development of the sovereign-state system,⁵³ should be respected for any state regardless of its conditions was strongly held by the newly independent states and was confirmed in UNGA resolutions in the 1960s and 1970s.⁵⁴

The new negative sovereignty norms were emphasized by southern states between the 1950s and 1970s, when western states sought to regulate international arms transfers, including transfers to states. At the UNGA, western states proposed resolutions to examine the matter of international arms transfers in order to consider the possibility of developing an international arms transfer registration and publicity system.⁵⁵

Malta, for example, submitted a draft UNGA resolution in 1965 which invited the Eighteen-Nation Committee on Disarmament to consider the question of arms transfers between states ‘with a view to submitting to the General Assembly proposals for the establishment of a system of publicity through the United Nations’.⁵⁶ Malta argued for the need to address the problem of local arms races in the third world, expressing concerns that they were hindering economic and social development by diverting scarce resources. It also stressed that an effective system of international arms transfer registration and publicity would build confidence among states.⁵⁷ Similar draft resolutions were proposed by

⁵¹ Jackson, *Quasi-states*, pp. 25-29.

⁵² UN Doc. A/RES/15/1514, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 Dec. 1960.

⁵³ Krasner, ‘Rethinking’.

⁵⁴ UN Doc. A/RES/20/2131, Resolution 2131 (XX): Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 Dec. 1965; UN Doc. A/RES/25/2625, Resolution 2625 (XXV): Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 Oct. 1970.

⁵⁵ Catrina, *Arms transfers*, p. 138; Stockholm International Peace Research Institute (SIPRI), *The arms trade*, pp. 100-8; Wulf, ‘United Nations’, p. 230.

⁵⁶ Draft resolution submitted by Malta, in SIPRI, *The arms trade*, pp. 102.

⁵⁷ *Ibid.*, pp. 101-2.

Denmark, Ireland, Malta, and Norway in 1968,⁵⁸ and again by eighteen states including Ireland, Denmark, Japan, and Norway in 1976.⁵⁹ However, states in the global south generally criticized the proposals, insisting that they were based on discriminatory ideas against smaller arms-importing sovereign states and that they could be used as an instrument for ‘the haves’ to intervene in the internal affairs of ‘the have-nots’.⁶⁰ As a result, the proposed resolutions were never adopted in the UNGA between the 1950s and 1970s.

In these circumstances, the dominant argument of the time regarding arms transfers to non-state actors also reflected a shift in the conceptualization of state sovereignty. This is embodied in one of the most well-known legal cases for students of international law: the case brought to the International Court of Justice (ICJ) by Nicaragua against the United States concerning military and paramilitary activities in and against Nicaragua.

In 1979, the Sandinista National Liberation Front (FSLN) established a revolutionary government in Nicaragua. In the following years, the United States suspended its aid to Nicaragua and instead provided assistance, including the provision of arms, to the Contra rebel militants.⁶¹ In April 1984, the Nicaraguan government brought its case against the United States to the ICJ. Nicaragua argued that the United States had resorted to the use of force against Nicaragua, intervened in its internal affairs, and threatened its sovereignty, territorial integrity, and political independence.⁶²

In its 1986 judgment, the ICJ held that the principle of non-intervention and the prohibition of the threat or use of force had been established in customary international law.⁶³ On the matter of arming non-state actors within the territory of another state, the ICJ concluded that such assistance might amount to intervention in the internal or external affairs of another state and could be regarded as a threat or use of force.⁶⁴ Moreover, the court ruled that by arming the Contra militants, the United States had acted in breach of its obligations under the customary international law principles of non-intervention and of the prohibition of the threat or use of force.⁶⁵ Considering the background, it can be said that the ICJ’s judgment in 1986 reflected the view of statehood predominant during that era—that whether or not a certain state is considered to meet the ‘standard of civilization’, its state sovereignty and the principle of non-intervention should be respected.

It should be remembered, though, that the ICJ admitted that there had been a number of instances of foreign intervention for the benefit of forces opposed to the government of another state.⁶⁶ In fact, both the western and eastern blocks, as well as newly independent states in the global south, supplied arms to southern anti-colonial movements and anti-government groups during the Cold War.⁶⁷ For instance, the Soviet Union supplied arms to ‘socialist-oriented’ non-state actors, such as anti-colonial movements in Angola and

⁵⁸ *Ibid.*, pp. 103-5.

⁵⁹ Catrina, *Arms transfers*, p. 138.

⁶⁰ Krause, ‘Controlling the arms trade’, p. 1030; Muni, ‘Third World’, pp. 203-7.

⁶¹ It is known as the ‘Iran-Contra affair’, a scandal that occurred during the second term of Ronald Reagan’s administration. The administration secretly supplied weapons to Iran in hopes of securing the release of American hostages held in Lebanon by *Hezbollah*, a group linked to the Iranian government, and then diverted a portion of the proceeds from the weapon sales to arm the Contra. See Busby, *Reagan and the Iran-Contra affair*.

⁶² Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, para. 15.

⁶³ *Ibid.*, paras. 188-190, 192, 193, 195.

⁶⁴ *Ibid.*, para. 195.

⁶⁵ *Ibid.*, paras. 228, 238, 242, 292.

⁶⁶ *Ibid.*, para. 206.

⁶⁷ Garcia, ‘Arms transfers’; Smith, ‘Weapon transfers’, p. 46.

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Mozambique and anti-government groups in El Salvador.⁶⁸ As Stephen Krasner argues, the principles associated with both Westphalian sovereignty, such as the exclusion of external actors from domestic authority configurations, and international legal sovereignty, such as mutual recognition, have in reality been violated frequently since the formation of the sovereign-state system.⁶⁹ Nevertheless, it can rightly be said that the ‘the problem’ of arms transfers to non-state actors was framed and defined differently in the Cold War period than it had been in previous periods, reflecting the dominant idea of statehood and the game of negative sovereignty which states ostensibly played during this time.

IV

Since the 1990s, three approaches, or schools of thought, have emerged about the legitimacy and admissibility of arms transfers to non-state actors. This section will examine these approaches one by one.

What could be called a ‘blanket-ban’ approach was proposed in the 1990s and early 2000s. Since the 1990s, the so-called ‘new wars’ have been problematized in policy circles.⁷⁰ It has been argued that these new wars are not necessarily fought between states but within states or beyond states, often involving a number of non-state actors that receive arms from other states, commit atrocities, bring human suffering, and undermine the fruits of development.⁷¹ In order to address this problem, during the 1990s and early 2000s Canada and some European states proposed that states should agree on a blanket ban on all non-state-sanctioned arms transfers to non-state actors—that is, arms transfers to parties not authorized by the states in which they are located.⁷²

Many southern states, especially those in Africa, have supported the blanket-ban approach.⁷³ They tend to claim that non-state groups and individuals are the roots of evil and that they misuse arms and bring enormous suffering to their populations. They also tend to insist that non-state-sanctioned arms transfers to non-state actors constitute a violation of the principle of non-intervention.

However, it is not only acts of violence by non-state actors which has been problematized since the 1990s. In the new wars literature as well as in policy debates, the violations of international human rights law and/or international humanitarian law by national military and security forces, especially those of states in the global south, have also been matters of concern.⁷⁴ In other words, the ability and will of states, especially states in the global south, to ensure human security, respect human rights, and pursue the collective social good have been seriously brought into question, along with the legitimacy of state violence. Since the latter half of the 1990s, the notion of a ‘responsibility to protect’ has received a certain extent of support from actors including governments, scholars, and non-governmental organizations (NGOs), especially those in the global north.⁷⁵ According to this notion,

⁶⁸ Shultz, *The Soviet Union*.

⁶⁹ Krasner, *Power*, p. 197. On the other hand, arms transfers to non-state actors generally took place covertly, which may be interpreted as implicit acknowledgement of the illegality of such acts. See Henderson, ‘The provision’, p. 643.

⁷⁰ Kaldor, *New and old wars*.

⁷¹ Smith, ‘Weapon transfers’, pp. 45-7.

⁷² Canada, Ministry of Foreign Affairs, *A proposed global convention*; Capie, *Armed groups*, pp. 10-1; Holtom, ‘Prohibiting’, p. 7; Poitevin, ‘European Union’, p. 17; Yihdego, ‘The Arms Trade’, pp. 150-1.

⁷³ There are exceptions, such as some Arab countries and Iran, which export arms to Palestine. See Garcia, ‘Arms transfers’, pp. 154-7; Holtom, ‘Prohibiting’, p. 9.

⁷⁴ Anderson, *Do no harm*; Collier, *Wars, guns, and votes*; Kaldor, *New and old wars*.

⁷⁵ Clapham, ‘Weapons’, pp. 167-8.

Westphalian sovereignty and international legal sovereignty are not inherent rights of states but are contingent on a state's positive sovereignty. In other words, they are conditioned upon a state's capacity and willingness to protect its population. Failure to fulfil this responsibility may lead to intervention by outside actors, who should now bear responsibility. Some of these outside actors may interpret this responsibility as including the supply of weapons to non-state actors such as rebel groups.⁷⁶

As the ability and will of states to protect their own populations and pursue the collective good rapidly came under suspicion, a UNGA resolution to establish an international arms transfer register system, a measure which never materialized during the Cold War period, was adopted in 1991.⁷⁷ Moreover, the idea of evaluating the risk of misuse before exporting states decide whether to authorize arms transfers to other states gained momentum. In the 1990s and 2000s, the permanent members of the United Nations Security Council (P5),⁷⁸ the European Council,⁷⁹ the European Union (EU),⁸⁰ the Organization for Security and Co-operation in Europe (OSCE),⁸¹ the United Nations Disarmament Commission (UNDC),⁸² the Wassenaar Arrangement,⁸³ the Organization of American States (OAS),⁸⁴ East and Central African states,⁸⁵ the Central American Integration System (SICA),⁸⁶ and the Economic Community of West African States (ECOWAS)⁸⁷ developed and agreed upon a common criteria against which the potential risks of misuse should be assessed on a case-by-case basis before authorizing arms transfers.

At the same time, from within the policy circles of governments, NGOs, and academics, especially those in the global north, there emerged what could be called a 'hard case' approach to the issue of arms transfers to non-state actors. It was argued that there could be certain hard cases where non-state-sanctioned arms transfers to non-state actors were indeed legitimate.⁸⁸ They suggested that in cases, for example, in which a group facing repression or genocide by its state was trying to acquire arms to protect itself, non-state-

⁷⁶ Holtom, 'Prohibiting', pp. 13-4; Stavrianakis, Xinyu, and Binxin, *Arms and the responsibility to protect*.

⁷⁷ UN Doc. A/RES/46/36L, Transparency in Armaments. It must be recalled that the resolution was based on a report prepared by a UN Group of Government Experts (UN Doc. A/46/301, Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms. Report of the Secretary-General), which was set up by a UNGA resolution adopted before the end of the Cold War in 1988 (UN Doc. A/RES/43/751, International Arms Transfers).

⁷⁸ Guidelines for Conventional Arms Transfers. Communique issued following the meeting of the P5 in London, 18 Oct. 1991.

⁷⁹ Conclusions of the Presidency: Declaration on Non-Proliferation and Arms Exports, adopted at the European Council Meeting in Luxembourg, 28-29 June 1991; Conclusions of the Presidency: Non-Proliferation and Arms Exports, adopted at the European Council Meeting in Lisbon, 26-27 June 1992.

⁸⁰ EU Council, 8675/2/98, Rev. 2, European Union Code of Conduct on Arms Exports, 5 June 1998.

⁸¹ FSC/3/96, Principles Governing Conventional Arms Transfers, 25 Nov. 1993; FSC.DOC/1/00/Rev.1, OSCE Document on Small Arms and Light Weapons, 24 Nov. 2000.

⁸² Guidelines for International Arms Transfers in the Context of General Assembly Resolution 46/36 H of 6 Dec. 1991.

⁸³ Best Practice Guidelines for Exports of Small Arms and Light Weapons, 11-12 Dec. 2002.

⁸⁴ Draft Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition, approved at the 34th Regular Session of the Inter-American Drug Abuse Control Commission (CICAD), 17-20 Nov. 2003.

⁸⁵ Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, approved at the Third Ministerial Review Conference of the Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 20-21 June 2005.

⁸⁶ Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material, 2 Dec. 2005.

⁸⁷ ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 14 June 2006.

⁸⁸ *Biting the Bullet Project, Developing*.

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sanctioned arms transfers to such a group could be considered legitimate if the group's prospects for success in achieving its just cause were high and if the group had the will and ability to use the arms with proper restraint and to prevent diversion through safe storage.⁸⁹

In addition, during the 2000s and 2010s an idea that could be termed a 'criteria approach' gradually evolved, meaning that common criteria are to be applied to all arms transfers, regardless of whether the recipient is a state actor. By the time of the final negotiation stages of the ATT between 2010 and 2013, all three competing approaches were available for consideration.

The following section discusses the choices states have taken regarding the three approaches described above within the context of each international agreement since the 1990s.

V

First, some agreements prohibit arms transfers to non-state actors. The United Nations Security Council (UNSC) resolutions adopted under the authority of Chapter VII, Article 41, of the Charter of the United Nations impose arms embargoes against the entire territories of particular states or against non-state individuals and groups operating in particular territories.⁹⁰ UNSC resolution 1373 prohibits arms transfers to entities or persons involved in terrorist acts.⁹¹ UNSC resolution 1540 prohibits transfers of weapons of mass destruction to non-state actors.⁹² UNSC resolution 1390 prohibits arms transfers to individuals, groups, undertakings, and entities associated with Al-Qaida and the Taliban, whose scope is not limited to the territory of a particular state.⁹³ There are also some multilateral forums, such as the EU and the OSCE, which have imposed arms embargoes against the entire territories of certain states or against certain non-state actors.⁹⁴ Some other agreements prohibit non-state-sanctioned transfers of man-portable air-defence systems (MANPADs), such as UNGA resolutions,⁹⁵ documents adopted at the Wassenaar Arrangement in 2000, 2003, and 2007,⁹⁶ an Action Plan adopted by the Group of Eight (G8) in 2003,⁹⁷ an agreement at the Asia-Pacific Economic Cooperation (APEC) in 2003,⁹⁸ and documents adopted at the OSCE in 2004 and 2008.⁹⁹ These prohibition measures are based on the idea to problematize particular non-state actors and/or the provision of

⁸⁹ Ibid.

⁹⁰ See the list of UN arms embargoes targeting non-state actors, 1991-2011, in Holtom, 'Prohibiting', p. 11.

⁹¹ UN Doc. S/RES/1373, Resolution 1373, 28 Sept. 2001.

⁹² UN Doc. S/RES/1540, Resolution 1540, 28 April 2004. The resolution defines a non-state actor as an 'individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution'.

⁹³ UN Doc. S/RES/1390, Resolution 1390, 16 Jan. 2002.

⁹⁴ See SIPRI's website for the list of arms embargoes agreed at the UN and other multilateral forums. <https://www.sipri.org/databases/embargoes> (Last accessed on 1 Dec. 2016)

⁹⁵ UN Doc. A/RES/59/90, Prevention of the Illicit Transfer and Unauthorized Access to and Use of Man-Portable Air Defence Systems, 3 Dec. 2004; UN Doc. A/RES/60/77, Prevention of the Illicit Transfer and Unauthorized Access to and Use of Man-Portable Air Defence Systems, 8 Dec. 2005.

⁹⁶ Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS), 1 Dec. 2000. Amended versions were adopted on 12 Dec. 2003 and at the Plenary meetings held between 4 and 6 Dec. 2007.

⁹⁷ Enhance Transport Security and Control of Man-Portable Air Defence Systems (MANPADS): A G8 Action Plan, 2 June 2003.

⁹⁸ 2004/AMM/035, APEC Guidelines on Controls and Security of Man-Portable Air Defense Systems (MANPADS), 17-18 Nov. 2004.

⁹⁹ FSC.DEC/3/04, Decision No. 3/04, OSCE Principles for Export Controls of Man-Portable Air Defence Systems (MANPADS), 26 May 2004; FSC.DEC/5/08, Decision No. 5/08, Updating the OSCE Principles for Export Controls of Man-Portable Air Defence Systems, 26 May 2008.

particular weapons to non-state actors; they do not relate to arms transfers to non-state actors in a general sense. Therefore, the scope of weapons and/or non-state actors included in these agreements is substantially limited. Nevertheless, generally speaking, they were agreed upon against a backdrop of increasing concern over the atrocities and disturbances brought about by non-state actors in the age of ‘new wars’.

Meanwhile, some regional agreements express the will to develop an international consensus on the need to prohibit non-state-sanctioned arms transfers to non-state actors. For instance, the EU joint action adopted in 1998 and then updated in 2002 stated that the EU would aim to build consensus in the relevant international forums, and in regional contexts as appropriate, for the realization of a commitment by exporting countries to supply small arms and light weapons only to governments in accordance with appropriate international and regional restrictive arms export criteria.¹⁰⁰ Moreover, the ministers of the member states of the Organisation of African Unity (OAU) agreed in 2000 that they would strongly appeal to the wider international community and, in particular, to arms supplier countries to accept that trade in small arms should be limited to governments and traders that are authorized, registered, and licensed.¹⁰¹

In addition, the Inter-American Convention in 1997,¹⁰² the Nairobi protocol adopted by east and central African states in 2004,¹⁰³ and a document agreed upon at the OSCE in 2000¹⁰⁴ include clauses that require participating states to ensure the permission of the importing state before authorizing arms transfers, whether the recipient is a state actor or not.

A few other regional agreements, such as the ECOWAS Convention adopted in 2006¹⁰⁵ and the Central African Convention adopted in 2010,¹⁰⁶ more clearly oblige their states parties not to transfer arms to non-state actors. For instance, Article 3 (2) of the ECOWAS Convention states that ‘Member States shall ban, without exception, transfers of small arms and light weapons to Non-State Actors that are not explicitly authorised by the importing Member’.¹⁰⁷ Article 4 of the Central African Convention specifies that ‘States Parties shall prohibit any transfer of small arms and light weapons, their ammunition and all parts and components that can be used for their manufacture, repair and assembly to, through and from their respective territories to non-State armed groups’.¹⁰⁸

During the negotiation of the United Nations Firearms Protocol adopted in March 2001,¹⁰⁹

¹⁰⁰ 1999/34/CFSP, Joint Action of 17 Dec. 1998 adopted by the council on the basis of Article J.3 of the Treaty on European Union on the European Union’s Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons; 2002/589/CFSP, Council Joint Action of 12 July 2002 on the European Union’s Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons and Repealing Joint Action 1999/34/CFSP.

¹⁰¹ Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 1 Dec. 2000.

¹⁰² Inter-American Convention against the Illicit Manufacturing and Trafficking in Firearms, Ammunition, Explosives and other Related Materials, 14 Nov. 1997.

¹⁰³ The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 21 April 2004.

¹⁰⁴ FSC.DOC/1/00/Rev.1, OSCE Document on Small Arms and Light Weapons, 24 Nov. 2000.

¹⁰⁵ ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 14 June 2006.

¹⁰⁶ Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition, Parts and Components that Can be Used for Their Manufacture, Repair and Assembly, 30 April 2010. It has not entered into force as of 1 Dec. 2016.

¹⁰⁷ It defines non-state actors in Article 1 (10).

¹⁰⁸ Its scope for non-state actors is limited to a ‘non-State armed group’, which is defined in Article 2 (n).

¹⁰⁹ UN Doc. A/RES/55/255, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational

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some states, especially African states, argued that the protocol provision should be applied to arms transfers to non-state actors, while others sought an exemption for such transfers.¹¹⁰ Article 10 (2) of the adopted text stated that before issuing export licences or authorizations for shipments of firearms, their parts and components, and ammunition, each state party should verify that ‘the importing States have issued import licences or authorizations’.¹¹¹ Yet Article 4 (2) of the protocol included compromise language proposed by the United States: ‘This Protocol shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations’.¹¹² While exporting arms to non-state actors without explicit permission of the importing state would be contrary to Article 10 (2), Article 4 (2) in effect allows states parties to determine for themselves whether the protocol should be applied to a specific transfer from a state to a non-state actor.¹¹³

Arms transfers to non-state actors became a thorny issue once again during the negotiation of the United Nations Small Arms Programme of Action, which was adopted in July 2001. Negotiating states diverged sharply in their views on whether non-state-sanctioned arms transfers to non-state actors should be prohibited in this document. Many states, especially African states, supported the blanket-ban approach, while the United States was firmly against the ban.¹¹⁴ In the end, the issue was not clearly addressed in the adopted programme.¹¹⁵ During the review conference of the Programme of Action in 2006, the issue was raised again but never settled.¹¹⁶

The language of the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)¹¹⁷ was vague but indicated a more permissive approach than a blanket-ban. It stated that ‘participating States will take especial care when considering exports of SALW other than to governments or their authorized agents’.¹¹⁸ This implied that such a transfer might be permitted after it was considered with ‘especial care’.

The final negotiation stages of the ATT between 2010 and 2013 thus unfolded amid competing approaches regarding arms transfers to non-state actors. During the negotiations, many southern states, especially African states, supported, as usual, the blanket-ban approach.¹¹⁹ The United States was against the blanket-ban approach, just as it had been before.¹²⁰ But European states and the NGOs and academics involved in the negotiation tended to avoid furthering this issue. As previously mentioned, European states had supported the blanket-ban approach in the 1990s and early 2000s. But in the early 2010s,

Organized Crime, 31 May 2001.

¹¹⁰ McDonald, ‘Strengthening’, p. 239.

¹¹¹ UN Doc. A/RES/55/255, Article 10 (2).

¹¹² *Ibid.*, Article 4 (2).

¹¹³ McDonald, ‘Strengthening’, p. 240.

¹¹⁴ Garcia, ‘Arms transfers’, pp. 156-7; Holtom, ‘Prohibiting’, pp. 7-8.

¹¹⁵ UN Doc. A/CONF.192/15, Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

¹¹⁶ Holtom, ‘Prohibiting’, p. 9; McDonald, Hassan, and Stevenson, ‘Back to basics’, pp. 123-4.

¹¹⁷ Best Practice Guidelines for Exports of Small Arms and Light Weapons, 11-12 Dec. 2002.

¹¹⁸ *Ibid.*

¹¹⁹ According to Holtom, Brazil, China, Côte d’Ivoire, Cuba, India, Indonesia, Liberia, Mali, Nigeria, Turkey, and Zimbabwe supported the blanket ban. Statements from the African Group (a group of 54 African states that are UN Members), CARICOM, ECOWAS, and a joint statement from Argentina, Chile, Colombia, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, and Uruguay were also in favour of the blanket ban. See Holtom, ‘Prohibiting’, pp. 4-5. The common position agreed at the African Union also called for the blanket ban. See African Union, African Union Common Position on an Arms Trade Treaty, 2011, para. 19.

¹²⁰ Holtom, ‘Prohibiting’, p. 6.

some European states, such as France and the United Kingdom, were willing to consider engaging in transfers of arms, security equipment, and other related materials to opposition movements in the Middle East and North Africa (MENA) region following the upsurge of the Arab Spring.¹²¹ Some of these states thus preferred to keep their options open,¹²² while many other states seemed to avoid discussing the issue all together, possibly fearing delay or breakdown in the ATT negotiations.

In the end, the adopted text of the ATT does not include an explicit reference to arms transfers to non-state actors.¹²³ It simply stipulates that all arms transfers, with the exceptions clarified in Article 2 (3),¹²⁴ are subject to the common criteria enshrined in the treaty. In other words, transferring arms to non-state actors without the permission of importing states is not clearly prohibited in the treaty. While one may claim that arming non-state actors without the consent of the importing state constitutes a violation of the Charter of the United Nations and is thus prohibited by Article 6 (2) of the ATT,¹²⁵ a more prevalent interpretation seems to be that the states parties of the ATT have the obligation to assess the potential risk of arms transfers against the criteria on a case-by-case basis, whether the recipient of the arms is a state actor or not.¹²⁶

As such, some states parties of the ATT may assess arms transfers to non-state actors on a case-by-case basis against the criteria enshrined in the ATT and may authorize transfers without the permission of the importing state when they deem that the risk of misuse is not ‘overriding’.¹²⁷ However, since the criteria approach leaves the decision to transfer or deny the transfer of arms to the discretion of each state, the decision regarding whether to transfer arms to a certain actor may differ between one state party of the ATT and another. In a sense, the criteria approach is not based on the premise that certain actors are capable of defining the collective good of others or of the international community, which was the assumption embedded in the Brussels Act of 1890.¹²⁸ Instead, it is based on the idea that any actor has a lesser or greater degree of risk of falling into dysfunction, irrationality, and

¹²¹ Poitevin, ‘European Union’, pp. 17-8. It should be noted that some arms deliveries, such as those supplied by France to the National Interim Council (NIC) of Libya, took place after the exporting state recognized the opposition movement as the legitimate government of the importing state, although recognition of an opposition movement when it does not have effective control of most of the country can be of dubious legality. The author thanks Nicholas Marsh for pointing this out. See Henderson, ‘The provision’, pp. 665-8; Holtom, ‘Prohibiting’, pp. 13-5.

¹²² Clapham, ‘Weapons’, p. 164.

¹²³ Article 11 of the ATT stipulates that the ‘exporting State Party shall seek to prevent the diversion of the transfer of conventional arms covered under Article 2 (1) through its national control system’. Yet, the term ‘diversion’ is not clearly defined in the treaty. See Olabuenaga and Gramizzi, ‘Article 11 diversion’, p. 194; Parker, ‘Article 11. diversion’, pp. 348-50. It is generally understood that ‘if a state deliberately authorizes the transfer of arms to an illicit end user (such as an armed group operating in another state), this would not constitute “diversion”’. Parker, ‘Article 11. diversion’, p. 349.

¹²⁴ Article 2 (3) of the ATT says, ‘This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party’s ownership’.

¹²⁵ Article 6 (2) of the ATT states, ‘A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms’. Clapham argues that arming non-state actors may constitute a violation of the UN Charter and thus may come within the purview of Article 6 (2). See Clapham, ‘Article 6. Prohibitions’, pp. 195-9.

¹²⁶ Casey-Maslen, Giacca, and Vestner, *The Arms Trade Treaty (2013)*, p. 9; Da Silva and Nevil, ‘Article 6 Prohibitions’, pp. 90, 96-7; Henderson, ‘The provision’; ICRC, *Arms transfer decisions*, p. 11.

¹²⁷ The term ‘overriding’ was used in Article 7 (3). For the implication of this term, see Casey-Maslen, ‘Article 7’, pp. 274-6.

¹²⁸ Enomoto, ‘Reisen shuuketsugo’.

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immorality, and thus requires an external risk assessment.¹²⁹ At the same time, no actor is assumed to be capable of providing any universal judgement as to the level of risk of a specific actor or of defining the collective good on behalf of the potentially affected population or of the international community.¹³⁰ As a result, some states parties of the ATT may conclude that the risk of arms being used to commit or facilitate serious violations of international humanitarian law is ‘overriding’ should they authorize certain arms to a certain non-state actor at a certain time, but other states parties may think that the risk is not sufficiently ‘overriding’ to reject the licence for a transfer.

VI

After reviewing the history of the policy debates on arms transfers to non-state actors, it becomes clear that the ATT’s language on this matter is characteristic of the present era. Since the emergence of the sovereign-state system until the interwar period, policy makers tended to frame ‘the problem’ of arms transfers to non-state actors as the inadmissibility of arms transfers to people who were regarded as unable and unqualified to further the collective social good. The framing was premised on the idea that people had to fulfil the ‘standard of civilization’ to be recognized as a sovereign state. In the late nineteenth century, arms transfers between states were rarely problematized except in times of war, and the interwar initiatives to regulate such transfers failed in part due to the lack of support by smaller states, which saw them as infringements to their sovereignty and security. During the Cold War period, the dominant argument against arms transfers to non-state actors, articulated in the ICJ’s judgment on military and paramilitary activities in and against Nicaragua, was based on the conception that the principles of sovereign equality and non-intervention should be respected for all states regardless of their empirical capabilities as organized political systems. At the same time, while western states proposed international registration and publicity measures for arms transfers between states at the UNGA, this initiative met fierce criticism by importing states, which saw them as an instrument for exporting states to illegitimately intervene in the internal affairs of importing states.

Since the 1990s, as much as the atrocities and disturbances caused by non-state actors concerned policy circles, the ability and will of states to protect their own populations and to pursue the collective good came under increasing suspicion. Governments, NGOs, and academics, especially those in the global north, sought to develop the common criteria against which exporting states should assess the potential risks of misuse before authorizing arms transfers to other states. As their efforts culminated in the negotiation of the ATT, the ability and will of states, especially states in the MENA region, to provide security to and protect the human rights of their own populations were cast in serious doubt. The idea that the international community could provide military assistance to peoples fighting against oppressive regimes also gathered some support and sympathy, especially from states, NGOs, academics, and the media in Europe and North America. In a sense, the language of the ATT was developed against the background in which the right to Westphalian sovereignty and international legal sovereignty were increasingly seen as contingent on a state’s ability and will to protect its own population, and the primacy of the principle of non-intervention was severely eroded.

¹²⁹ Ibid.

¹³⁰ Ibid.

However, some of the non-state parties of the ATT, such as the United States, are likely to decide whether to authorize arms transfers to non-state actors based on their own rules and regulations. In addition, the ATT's inability to address the issue of arms transfers to non-state actors has been criticized by many of those states that abstained or voted against the adoption of the ATT, as well as by some of the states that voted for it, including African and Caribbean states.¹³¹ Such states may prohibit the export of arms to non-state actors without the explicit permission of the importing state, although their actual practices may not necessarily conform to the principle that they claim to espouse.¹³² Some prominent individuals have also voiced doubts about the approach taken in the ATT. Ben Emmerson, United Nations Special Rapporteur on human rights and countering terrorism, insisted at the time that the ATT entered into force that 'further consideration on the issue of prohibiting the sale of weapons to non-state entities is needed'.¹³³ Therefore, it is difficult to conclude that the criteria approach embodies the currently established international norms. In the longer term, the ways in which people frame 'the problem' of arms transfers to non-state actors may change further, just as it has changed substantially from the emergence of the sovereign-state system to present.

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¹³¹ UN Doc. GA/11354, United Nations Department of Public Information (UNDPI) press release. Overwhelming majority of states in General Assembly say 'yes' to Arms Trade Treaty to stave off irresponsible transfers that perpetuate conflict, human suffering: Adopted by vote of 154 in favour to 3 against, 'robust and actionable' text requires arms exporters to assess possible misuse, sixty-seventh General Assembly, plenary, 71st & 72nd meetings (AM & PM), 2 April 2013.

¹³² For instance, Russia was one of the states which criticized the ATT for its failure to explicitly prohibit non-state sanctioned arms transfers to non-state actors at the time the treaty was adopted on 2 April 2013. See *Ibid.* However, the country was reported to have transferred arms to Ukrainian opposition forces, the Donetsk People's Republic, in the following year. See Anthony, 'The Ukraine crisis', p. 59.

¹³³ The Office of the United Nations High Commissioner for Human Rights, Arms Trade Treaty: UN human rights experts urge all States to ratify it and consider disarmament, (Geneva, 23 Dec. 2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15455&LangID=E#sthash.0tgi2RfZ.dpuf> (Last accessed on 1 Dec. 2016)

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