

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.¹ At the heart of modern conflict is a particular class of weaponry—small arms and light weapons.² Commentators have noted that small arms and light weapons have become widely used by groups involved in conflict; particularly, groups utilizing asymmetric warfare tactics.³ 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.⁴ Notably, 90% of deaths in modern conflicts are attributable to the use of small arms and light weapons.⁵ As a consequence of wide utilization, these weapons have destabilized governments and strained economic infrastructure.⁶ Moreover, the negative effects also include governmental instability, catastrophic healthcare consequences, and environmental degradation.⁷ 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.⁸ 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).

² Harold Hongju Koh, *A World Drowning In Guns*, 71 FORDHAM L. REV. 2333, 2334 (2003) (discussing the global elements of small arms and light weapons transfers).

³ See Hugh Griffiths & Adrian Wilkinson, *Guns, Planes and Ships: Identification and Disruption of Clandestine Arms Transfers*, SE. & E. EUROPE CLEARINGHOUSE 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.”).

⁶ LARRY KAHANER, AK-47: THE WEAPON THAT CHANGED THE FACE OF WAR 171-72 (2007).

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.⁹ However, this estimate understates the total number of weaponry because of the tens of millions of unregistered weapons.¹⁰

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.”¹¹ For instance, each year manufacturers produce enough ammunition to execute each person on earth twice.¹² The major producers and exporters of military grade small arms and light weapons are a diverse group, according to the Small Arms Survey.¹³ 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.¹⁴ 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.¹⁵

The current regime that regulates the trade in small arms and light weapons is multifaceted.¹⁶ The facets include arms embargoes, international plans of action, and non-binding agreements regulating the sale and transfer of small arms and light weapons.¹⁷ The European Union (“EU”) has strongly supported arms reform initiatives.¹⁸ For instance, the EU promulgated the European Union Code of Conduct on Arms Exports,¹⁹ an international initiative aimed at governing the conduct of states that export arms.²⁰ Moreover, in 2010, the global community took the first steps towards creating a legally binding treaty to regulate the arms trade.²¹ The EU and ninety-four states provided input to the United Nations about how the treaty should be drafted.²² In doing so, the EU argued to pattern the proposed arms trade treaty after the EU Code of Conduct.²³

⁹ Koh, *supra* note 2, at 2334.

¹⁰ *Id.*

¹¹ *The Devil’s Bargain* (Bashiri Films 2008) [hereinafter *DEVIL’S BARGAIN*], available at <http://www.youtube.com/watch?v=WrlxhbeyT34>. “[G]lobal annual production of [small arms and light weapons] currently stands at approximately 4.3 million.” Griffiths, *supra* note 3, at 3.

¹² *Devil’s Bargain*, *supra* note 11.

¹³ See GRADUATE INST. OF INT’L & DEV. STUD., SMALL ARMS SURVEY 2009 32 (2009) [hereinafter *SMALL ARMS SURVEY*] (presenting empirical data about the 22 largest producers of military grade small arms and light weapons).

¹⁴ *Id.* at 33.

¹⁵ See Koh, *supra* note 2, at 2333, 2339 (explaining how and why the international community neglected to truly regulate the production and exportation of small arms and light weapons).

¹⁶ *At Gunpoint: The Small Arms and Light Weapons Trade*, BROWN J. WORLD AFF., Spring 2002, at 159, 159 [hereinafter *At Gunpoint*].

¹⁷ See Emanuela-Chiara Gillard, *What’s Legal? What’s Illegal*, in *RUNNING GUNS: THE BLACK MARKET IN SMALL ARMS AND LIGHT WEAPONS* 31-45 (1995) (discussing the sources of the law, which govern the transfer of small arms and light weapons).

¹⁸ ELLI KYTÖMÄKI, PROMOTING DISCUSSION ON AN ARMS TRADE TREATY: EUROPEAN UNION—UNIDIR PROJECT 6 (2010), available at <http://www.unidir.org/pdf/activites/pdf18-act431.pdf>.

¹⁹ 2010 O.J. (C21E).

²⁰ Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 219.

²¹ Edith M. Lederer, *First Steps Toward an Arms Trade Treaty*, BOSTON GLOBE, Jul. 23, 2010, http://www.boston.com/news/nation/articles/2010/07/23/first_steps_toward_arms_trade_treaty/.

²² See U.N. Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 91-92, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (providing the views expressed by the EU pertaining to the proposed Arms Trade Treaty).

²³ *Id.*

This Article proceeds in three sections.²⁴ First, the Article's Background section will explore the mechanisms associated with the global arms trade.²⁵ In addition, the Background will examine the ideological principles of the EU, particularly the principles of the European Coal and Steel Community.²⁶ The Background concludes with a discussion of the EU's Code of Conduct, current open market arms policy, and stance on the proposed arms trade treaty.²⁷

Second, this Article's Argument section will articulate two major issues pertaining to the EU and arms trade reform efforts.²⁸ 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.²⁹ 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.³⁰ In doing so, the common market cuts against the ideological underpinnings of the EU.³¹ Third, this Article's Conclusion will briefly discuss how the EU could right the ship and aid in arms reform efforts.³²

II. BACKGROUND

A. SMALL ARMS AND LIGHT WEAPONS

The phrase 'small arms and light weapons' escapes a precise definition.³³ Small arms and light weapons are easily held and transported.³⁴ 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.³⁵ Based on this understanding, small arms include sub-machine guns, assault rifles, and handguns.³⁶ Light weapons include landmines, light mortars, bazookas, rocket-propelled grenades, light anti-tank missiles, shoulder-fired anti-aircraft missiles, and machine guns.³⁷ Almost any individual can utilize a small arm or light weapon because of their lightweight nature.³⁸ For example, children throughout the developing world regularly carry

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).

³⁶ Michael Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in LETHAL COMMERCE 33 (1995) (explaining the various types of weapons normally considered small arms).

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.³⁹ Consequently, an estimated 250,000 children have fought in modern conflict.⁴⁰

In addition to weight, small arms and light weapons achieved prominence in conflict for a plethora of reasons.⁴¹ These reasons include: low cost, deadly capacities, simplistic design, and resilience.⁴² First, small arms and light weapons are cheap and widely available.⁴³ The current arms trade is influenced only by the principles of supply and demand.⁴⁴ For example, the conclusion of the Cold War dumped millions of weapons upon the world market.⁴⁵ Developing states, such as Afghanistan, were inundated with a flood of weaponry.⁴⁶ Afghanistan is currently the world's leader in unaccounted for weaponry, boasting an estimated 10 million un-accounted for small arms.⁴⁷ As a consequence of the supply of small arms in Afghanistan, the price of an AK-47 has plummeted to around \$10.⁴⁸ 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 \$15.⁴⁹ The low cost makes small arms affordable to a wider range of users, including many non-state groups.⁵⁰

Second, small arms and light weapons are deadly.⁵¹ Annually, small arms and light weapons facilitate the killing of approximately five-hundred thousand people.⁵² An assault rifle can discharge hundreds of rounds per minute, making it possible for a low number of combatants to cause massive carnage.⁵³ Small arms expel ammunition at such a great velocity that any contact with the human body produces death or massive trauma.⁵⁴ The 2008 attacks in Mumbai, India illustrate the amount of damage a small group can inflict with small arms.⁵⁵ During the attacks, ten assault-rifle toting Pakistani terrorists, associated with *Lashkar-e-Taiba*, were able to

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 era 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).

⁴⁷ *Id.* However, the population of Afghanistan is only around 29 million. CIA – THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Mar. 16, 2011).

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.*

⁵⁵ See Mail Foreign Service, *Sentenced to Death, the Baby-Faced Mumbai Gunman Guilty of Massacre that Killed 166 People*, THE DAILY MAIL, <http://www.dailymail.co.uk/news/worldnews/article-1273592/Mumbai-gunman-Mohammad-Ajmal-Kasab-sentenced-death-2008-massacre.html> (last updated May 7, 2010) (describing the event surrounding the event of the November 26th, 2008 terrorist attack in Mumbai).

kill over 166 people in a series of calculated attacks upon hotels, a train station, and a Jewish-center.⁵⁶

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

Fourth, small arms and light weapons are resilient.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.⁶² Despite the fact that the weapon was underground for at least a year, it fired as if recently serviced.⁶³ Small arms and light weapons last for decades because of their resilient nature.⁶⁴ At the end of a conflict, small arms do not become obsolete.⁶⁵ The weapons are often transferred or sold by combatants in the concluding conflict to combatants in a fresh conflict.⁶⁶ For instance, U.S. weapons left in Vietnam were recycled to conflicts in the Middle East and Central America.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 1915.⁶⁸

B. THE SMALL ARMS AND LIGHT WEAPONS TRADE

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

⁵⁶ *Id.*

⁵⁷ Koh, *supra* note 2, at 2335.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2337.

⁶² See KAHANER, *supra* note 6, at 52 (noting the story of servicepersons in Vietnam using weapons that were badly soiled).

Colonel David H. Hackworth told the story of bulldozers during a base construction project uncovering a buried Vietcong soldier and his AK. Hackworth yanked the weapons out of the mud and pulled back the bolt. "Watch this," he said. "I'll show you how a real infantry weapon works." With that he fired off thirty rounds as if the rifle had been cleaned that morning instead of being buried for a year.

Id.

⁶³ *Id.*

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).

⁶⁵ See *id.* (noting the recycling of weapons after conflict to other conflicts).

⁶⁶ See *id.* (discussing the life cycle of a small arms and light weapon).

⁶⁷ *Id.* at 39.

⁶⁸ See C. J. Chivers, *What's Inside a Taliban Gun Locker?*, N.Y. TIMES, Sept. 15, 2010, <http://atwar.blogs.nytimes.com/2010/09/15/whats-inside-a-taliban-gun-locker/> (explaining that weapons found by the Marines dated back to as far as 1915).

⁶⁹ See *infra* notes 70-73 and accompanying text.

⁷⁰ STOHL, *supra* note 38, at 13.

⁷¹ MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 31 (2007).

the form of either government-to-government transfers or commercial sales negotiated by private entities.⁷² Commentators remarked that despite the legal nature of white market transfers little data is available pertaining to these transfers.⁷³

Grey market transfers are accomplished by exploiting loopholes in international and national law.⁷⁴ Grey market transfers involve sales between states and non-states.⁷⁵ Grey market transfers begin with groups that can legally transfer arms, and result in unauthorized recipients receiving arms.⁷⁶ Transfers from states to insurgent or rebel groups are common forms of grey market transfers.⁷⁷ For example, Iran is known to transfer weapons to fuel Kurdish insurgencies.⁷⁸ Similarly, Pakistan armed Kashmiri rebels in India.⁷⁹ A degree of secrecy is inherent in the nature of grey market transfers.⁸⁰ As a result, very little information is known about the grey market.⁸¹

Black market transfers involve sales of arms in violation of international standards.⁸² Brokers, also known as *merchants of death*, supply illegal groups with small arms and light weapons.⁸³ In exchange for a fee, brokers organize arms transfers among parties.⁸⁴ Brokers connect arms-buyers, arms-sellers, and transport companies.⁸⁵ Brokers arrange deals especially when the parties to a transaction are separated by culture, political ideology, or geography differences.⁸⁶ Basically, brokers serve as the direct link between groups and the international small arms and light weapons market.⁸⁷

Brokers often allow arms transfers to merge and traverse between the legal and illegal market in order to disguise the illegal transfer.⁸⁸ Arms brokering is a lucrative business with little risk if a broker is careful to commingle legal arms with illegal arms.⁸⁹ 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

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 embargoed 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).

⁸⁴ Brian Wood & Johan Peleman, *Making the Deal and Moving the Goods—the Role of Shippers and Brokers*, in RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS 129, 129 (Lora Lumpe ed. 2000).

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.⁹⁰ In addition to mixing legal weapon transfers with illegal weapons, brokers often disguise illegal weapons as innocent items.⁹¹ For example, brokers hid weapons intended for guerilla fighters in Columbia amongst a shipment of produce.⁹² Grenades were codenamed pineapples, ammunition codenamed food, and money for payment codenamed lettuce.⁹³ Along the same lines, brokers utilized aid shipments to Africa to hide illegal arms.⁹⁴ This tactic in particular has exacerbated the problems associated with the militarization of refugee camps—a pressing issue facing the global community.⁹⁵ Brokers understand that if they follow well-established practices they will likely not be noticed by authorities.⁹⁶ Nevertheless, brokers understand that if apprehended the likelihood of being prosecuted is minimal.⁹⁷

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.⁹⁸ In 1949, several Western European States formed the Council of Europe.⁹⁹ In addition, six states, under the Schuman plan, cooperated further and began the formation of the European Coal and Steel Community.¹⁰⁰ The underlying purpose of the Coal and Steel Community was the collective management of the heavy industries of coal and steel.¹⁰¹ 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.¹⁰²

In 1951, the states formally created the European Coal and Steel Community.¹⁰³ The Community was viewed as a bold step forward in the realm of cooperative international governance.¹⁰⁴ Subsequently, in February 1953, the common market for coal and steel began.¹⁰⁵ The transition marked the first time highly complex modern national economies voluntarily merged.¹⁰⁶ The transition resulted in six states ceding large parts of their sovereignty in order to

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.*

⁹⁸ *The History of the European Union*, EUROPA.EU, http://europa.eu/abc/history/1945-1959/index_en.htm [hereinafter *History of the European Union*] (last visited March 11, 2011).

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 sought 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.¹⁰⁷ 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.¹⁰⁸

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").¹⁰⁹ Later, the EU expanded the notion of the common market to include people, services, and capital.¹¹⁰ Collateral to the common market, the EU adopted policies aimed at liberalizing world trade.¹¹¹ The EU set out to eradicate any item it equated to a trade barrier in order to liberalize external trade.¹¹² During the liberalization process, the European Commission proposed a directive to simplify arms transfers between Member States.¹¹³ Defense products, including small arms and light weapons, are among the items that freely move within the EU.¹¹⁴

The EU utilized a two-tiered approach in order to eradicate all hindrance to the transfer of arms within the EU.¹¹⁵ First, to simplify intra-community transfers, the EU encouraged the use of general and global licenses for small arms and light weapons.¹¹⁶ The approach entailed certifying individuals who deal in small arms and light weapons, which eradicated the need for multiple licensing requirements.¹¹⁷ 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.¹¹⁸ 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.").

¹¹¹ *External Trade*, EUROPA.EU, http://europa.eu/pol/comm/index_en.htm [hereinafter *EU External Trade*] (last visited March 11, 2011).

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.

¹¹⁴ *Id.*; *See generally* Kristin Ashley Tessman, *A Bright Day For The Black Market: Why Council Directive 2008/51/EC Will Lose The Battle Against Illicit Firearm Trade In The European Union*, 38 GA. J. INT'L & COMP. L. 237 (2009) (discussing how the liberalization of the firearms trade within the EU has exacerbated the problems associated with the black market trade in firearms).

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.¹¹⁹ For instance, several Scandinavian states exempt *all* transfers to EU or North Atlantic Treaty Organization Member States from *all* export licensing requirements.¹²⁰

2. *The European Union Code of Conduct on Arms Exports*

The European Union Code of Conduct on Arms Exports¹²¹ (“Code of Conduct”) is an international scheme to control the conduct of arms exporters.¹²² First, the Code of Conduct requested that Member States make export decisions based upon eight criteria.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.¹²⁴

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

The second criterion suggested the Member State to assess the recipient state’s human rights condition.¹²⁸ The EU desired Member States to deny all transfers that would likely result in oppression in the importing state.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.¹³⁰

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).

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

¹²¹ Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf.

¹²² Marsh, *supra* note 20, at 219.

¹²³ Code of Conduct, *supra* note 121.

¹²⁴ *Id.*

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 Toxin 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.

Id. at 3.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Marsh, *supra* note 20, at 220.

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).

¹³⁰ *Id.*

The third and fourth criteria requested the exporting Member State to examine any armed conflict present in the recipient state.¹³¹ The Code of Conduct desired Member States to deny exports to states embroiled in armed conflict.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.¹³³ When considering the risk of regional instability, the Member State must consider whether the recipient acted aggressively towards regional neighbors in the past.¹³⁴ Also, the Member State must determine if the weapons will be used by the recipient for legitimate national security and defense.¹³⁵

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

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

¹³¹ Marsh, *supra* note 20, at 220.

¹³² *Code of Conduct*, *supra* note 121, at 4.

¹³³ *Id.* at 5.

¹³⁴ *Id.*

When considering these risks, Member States will take into account inter alia:

- a) the existence or likelihood of armed conflict between the recipient and another country;
- b) 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;
- c) whether the equipment would be likely to be used other than for the legitimate national security and defence [sic] of the recipient;
- d) the need not to affect adversely regional stability in any significant way.

Id.

¹³⁵ *Code of Conduct*, *supra* note 121, at 4-5.

¹³⁶ *Id.* at 5-6.

¹³⁷ *See id.* (discussing that the exporting nation should consider the security interests of allies before authorizing a transfer).

¹³⁸ *Id.*

¹³⁹ *Id.* at 6.

Member States will take into account inter alia the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organized crime;
- b) 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;
- c) 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.

Id.

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).

¹⁴¹ *Id.*

¹⁴² *Id.*

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.¹⁴³ Member States must consider if the recipient state has effective controls to keep weapons from objectionable end-users.¹⁴⁴ The Member State must also consider the recipient state's capability to use the technology.¹⁴⁵ In particular, the Member State should carefully consider the export of anti-terrorist technologies.¹⁴⁶

Finally, the eighth criterion suggested that Member States consider whether the proposed weapons export would seriously obstruct the sustainable development of the recipient state.¹⁴⁷ The Member State must look at the economic and technological development of the state.¹⁴⁸ Member States can accomplish this through analyzing data provided by the International Monetary Fund, United Nations Development Programme, and World Bank.¹⁴⁹ 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.¹⁵⁰

The Code of Conduct is a non-binding agreement.¹⁵¹ The EU has articulated that the Code of Conduct must not jeopardize any Member State's ability to transfer weapons.¹⁵² As

¹⁴³ *Id.* at 7.

The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions. 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 organisations [sic] (anti-terrorist equipment would need particularly careful consideration in this context).

Id.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The concern of diversion is paramount when dealing with anti-terrorism technologies. *Id.*

¹⁴⁷ *Id.*

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence [sic] with the least diversion for armaments of human and economic resources Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

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.¹⁵³ Moreover, the Code of Conduct does not curtail the defense industry of Member States.¹⁵⁴

E. THE ARMS TRADE TREATY

The European Union (“EU”) is not the only institution to promulgate regulatory schemes to restrain the proliferation of arms.¹⁵⁵ Specifically, the global community’s major focus has been preventing the spread of chemical, nuclear, and biological weapons.¹⁵⁶ In order to regulate major weapons systems, the global community engaged in discourse to establish regulatory and reform schemes.¹⁵⁷ Small arms and light weapons were absent from the resulting control framework.¹⁵⁸

In the 1990s, a focus upon micro-disarmament supplemented major weapons regulation.¹⁵⁹ Micro-disarmament concentrated on the reduction of readily available, cheap, and highly lethal weapons that kill thousands of people every day.¹⁶⁰ Originally, micro-disarmament focused only on curtailing the use and manufacture of anti-personnel landmines.¹⁶¹ However, slowly the global community, along with non-governmental organizations, took aim at the current proliferation of small arms and light weapons.¹⁶²

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.¹⁶³ In December 2006, the United Nations General Assembly proposed a binding framework to help stem the problems associated with small arms and light weapons.¹⁶⁴ The United Nations, in initiating the process, called for the convening of governmental experts to discuss the feasibility of an arms trade treaty.¹⁶⁵

The United Nations requested the perspectives of Member States on the scope, feasibility, and possible parameters of an arms trade treaty.¹⁶⁶ The United Nations requested Member States

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.*

¹⁶¹ See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 5, Dec. 3, 1997, 2056 U.N.T.S. 211 (articulating the aims of micro-disarmament, specifically the eradication of landmines).

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).

¹⁶³ See David Kopel, ET. AL., *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 PENN. ST. L. REV. 891, 893-94 (2010) (discussing the road leading up to the proposal of the Arms Trade Treaty).

¹⁶⁴ See G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 6, 2006) (describing the UN’s commitment to forging a workable standard for small arms and light weapons transfers).

¹⁶⁵ *Id.* at 2.

¹⁶⁶ U.N. Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 3, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses I*].

reflect on the features that might contribute to the development and acceptance of an arms trade treaty.¹⁶⁷ Subsequently, the EU, along with ninety-four states, tendered views to the United Nations.¹⁶⁸

The EU noted it was receptive to the possibility of a legally binding arms trade treaty.¹⁶⁹ The EU articulated that the treaty was of “great importance.”¹⁷⁰ However, the EU conceded the United Nations was the only forum capable of producing a universal instrument.¹⁷¹ The EU continued its response by sharing its opinions on a proposed arms trade treaty.¹⁷²

First, the EU articulated the feasibility and urgent need for an arms treaty.¹⁷³ 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.¹⁷⁴ The EU noted that the absence of a framework contributes to conflicts, dislocation of people, and terrorism.¹⁷⁵ In the EU’s opinion, the lack of workable framework undermined peace, understanding, security, stability, and development.¹⁷⁶

The EU articulated that the arms trade treaty should integrate many of the aspects featured in the Code of Conduct.¹⁷⁷ According to the EU, the treaty must provide clear definitions of the weapons and transactions within the arms trade treaty’s purview.¹⁷⁸ 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.¹⁷⁹ Additionally, the EU wanted to include equipment and technology for the production of arms.¹⁸⁰

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.¹⁸¹ The criteria would guide export-licensing officials.¹⁸² 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

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; see also *A Global Arms Trade Treaty: What States Want*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/document.php?lang=e&id=ENGPOL340042007> (last visited Mar. 22, 2011) (noting that the global community desires and needs a “legally binding instrument”), *Arms Trade Treaty: What We Want*, CONTROLARMS, <http://www.controlarms.org/en/arms-trade-treaty> (last visited Mar. 22, 2011) (articulating that in order to ensure global peace the Arms Trade Treaty Must be “a legally binding international instrument, which will draw together and consolidate states’ current obligations under international law”).

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 See *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.¹⁸³ The EU contended that these criteria did not deprive national governments of the ultimate ability to import or export weaponry.¹⁸⁴

In closing, the EU's response noted a commitment to future participation and consultation in the process leading to an arms trade treaty.¹⁸⁵ The EU also called upon other Member States of the United Nations to participate in the negotiation of an arms trade treaty.¹⁸⁶ Finally, the EU noted that an international weapons export control framework can have a major impact on stability, security, and sustainable development.¹⁸⁷

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.¹⁸⁸ The European Union ("EU") has noted that it would like to continue to participate in the consultation process to produce the proposed treaty.¹⁸⁹ During the preliminary drafting process, the EU tendered its views about the treaties possible parameters.¹⁹⁰ The EU proposed patterning the treaty's parameters after the European Union Code of Conduct on Arms Exports¹⁹¹ ("Code of Conduct").¹⁹² The EU's proposals and policies are problematic for two reasons.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶

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.*

¹⁸⁸ See G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 6, 2006) (noting the commitment of the global community to produce a binding instrument to regulate the arms trade).

¹⁸⁹ *U.N. Responses II*, *supra* note 22, at 92.

¹⁹⁰ *Id.* at 90.

¹⁹¹ Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf.

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.

A. THE PROPOSED ARMS TRADE TREATY SHOULD NOT BE PATTERNED AFTER THE EUROPEAN UNION CODE OF CONDUCT BECAUSE THE CODE OF CONDUCT IS AN ANALYTICALLY FEEBLE DOCUMENT

The proposed arms trade treaty should not be patterned after the European Union Code of Conduct on Arms Exports¹⁹⁷ (“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

¹⁹⁷ Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf.

¹⁹⁸ See *infra* notes 199-240 and accompanying text.

¹⁹⁹ Compare *A Global Arms Trade Treaty: What States Want*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/document.php?lang=e&id=ENGPOL340042007> (last visited Mar. 22, 2011) (noting that the global community desires and needs a “legally binding instrument”), and *Arms Trade Treaty: What We Want*, CONTROLARMS, <http://www.controlarms.org/en/arms-trade-treaty> (last visited Mar. 22, 2011) (articulating that in order to ensure global peace the Arms Trade Treaty must be “a legally binding international instrument, which will draw together and consolidate states’ current obligations under international law”), with Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT’L REV. OF RED CROSS 467, 486 (2005) (describing how the Code of Conduct is only politically binding).

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.²⁰⁹ However, the Code of Conduct sets no threshold level for what constitutes an acceptable human rights record.²¹⁰ The Code of Conduct is unrealistic to recommend that such a finely calibrated determination could be made in every situation.²¹¹ For instance, pertinent information may not be available to gauge the exact human rights record of each state because human rights regulation is reactionary.²¹² 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.²¹³

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.²¹⁴ The third and fourth criteria request the exporting Member State to examine political conflict present in the recipient state.²¹⁵ These criteria miss the mark because the criteria fail to consider that illegal groups or embargoed states many times receive weapons *via* diversion.²¹⁶ The exchange of weaponry between Libya and Liberia illustrated this

there is a clear risk that the proposed export might be used for internal repression. [sic] (b) exercise special caution and vigilance in issuing licences [sic], on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.

Id.

²⁰⁹ *Id.*

²¹⁰ *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).

²¹¹ *Compare Country Reports on Human Rights Practices 2009*, UNITED STATES DEPARTMENT OF STATE, <http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm> (last visited Feb. 23, 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 (expressing that an export official, on a case-by-case basis, must make an export decision based upon the human rights situation of the importing state).

²¹² *See* Ann-Louise Colgan, *A Tale of Two Genocides: The Failed U.S. Response to Rwanda and Darfur*, PEACEWORK Oct. 2006, available at <http://www.peaceworkmagazine.org/tale-two-genocides-failed-us-responses-rwanda-and-darfur> (noting the fact that theoretically many human rights abuses go undisturbed until the act is complete).

²¹³ *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).

²¹⁴ *See infra* note 221 and accompanying text.

²¹⁵ *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.*

²¹⁶ *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.”).

²²⁸ Foreign Terrorist Organizations, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited Mar. 23, 2011).

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

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.

²³⁶ 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), *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).

²³⁷ 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).

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.²³⁹ 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.²⁴⁰

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.²⁴¹ The free movement of goods, people, services, and capital amongst Member States is one of the underlying principles of the EU.²⁴² The common market is the nucleus of today’s EU.²⁴³ In recent years, the EU developed a no-nonsense common market approach to small arms and light weapons regulation between Member States.²⁴⁴ The common market approach to weapons is contradictory to the underlying principles of the EU and detrimental to the global community.²⁴⁵

In the pursuit of the common market, the EU attempted to eradicate all internal barriers to trade.²⁴⁶ 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.²⁴⁷ Additionally, the EU attempted to liberalize world trade whenever possible.²⁴⁸ As Member States removed barriers to trade, internally and externally, they also reconciled tariffs amongst Member States on goods imported from non-member States.²⁴⁹

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.²⁵⁰ 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.

²⁴² *Activities of the European Union*, EUROPA.EU, http://europa.eu/pol/comm/index_en.htm (last visited November 19, 2010).

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).

²⁴⁶ See Kristin Ashley Tessman, *A Bright Day for the Black Market: Why Council Directive 2008/51/EC Will Lose the Battle Against Illicit Firearm Trade in the European Union*, 38 Ga. J. INT’L & COMP. L. 237, 238 (2009) (explaining the short-comings of the current system in the EU).

²⁴⁷ *Internal Market*, EUROPA.EU, http://europa.eu/pol/singl/index_en.htm (last visited Mar. 23, 2011).

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

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*, SMALLARMSURVEY.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.²⁶⁵ Serbia, an EU candidate country, has a track record of conflict.²⁶⁶ Also, Serbia is a diversion point for small arms and light weapons earmarked for global conflict.²⁶⁷ The transfers from Serbia to Libya, which were promptly diverted to Charles Taylor, the embargoed leader of Liberia, illustrates this point.²⁶⁸ 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.²⁶⁹ 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.²⁷⁰

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.²⁷¹ 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.²⁷² 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.²⁷³ 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).

²⁶⁵ *SMALL ARMS SURVEY*, *supra* note 13, at 77. For example:

[t]he European Union has grown considerably in recent years, with ten new Member States admitted in 2004 and two in 2007. Three countries are awaiting admission: Croatia, the former Yugoslav Republic of Macedonia, and Turkey. Many of these new candidate countries are exporters of small arms and other conventional weapons. Clearly, whatever the sophistication of their export control systems, these states do not have the same experience as older EU members in implementing the Code of Conduct. This, plus the acknowledged risk of diversion for small arms exports, raises questions about the desirability of the proposed market liberalization.

Id.

²⁶⁶ See *Serbia*, EUROPA.EU, http://europa.eu/about-eu/member-countries/countries/other-countries/serbia/index_en.htm (last visited Mar. 23, 2010) (detailing Serbia's status as a potential candidate country to the EU); MICHAEL KELLY, NOWHERE TO HIDE: DEFEAT OF THE SOVEREIGN IMMUNITY DEFENSE FOR CRIMES OF GENOCIDE AND THE TRIALS OF SLOBODAN MILOSEVIC AND SADDAM HUSSEIN 91-92 (2005) (detailing the history of war and genocide perpetrated in Serbia).

²⁶⁷ 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.").

²⁶⁸ 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).

²⁶⁹ 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).

²⁷⁰ 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).

²⁷¹ *SMALL ARMS SURVEY*, *supra* note 13, at 77.

²⁷² See Renner, *supra* note 5, at 50.

²⁷³ 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.²⁷⁴ These stockpiles were looted and weapons diverted to conflict.²⁷⁵ Weapons from these stockpiles helped source and facilitate civil wars, genocide, and crime throughout the world.²⁷⁶ 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.²⁷⁷ 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.²⁷⁸

IV. CONCLUSION

The European Union ("EU") attached vast importance to the drafting of a legally binding arms trade treaty to govern weapons transfers.²⁷⁹ The EU expressed that an arms trade treaty is not simply feasible—but is needed without delay.²⁸⁰ In doing so, the EU proposed that the arms trade treaty be patterned after the European Union Code of Conduct on Arms Exports²⁸¹ ("Code of Conduct").²⁸² 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.²⁸³ First, the Code of Conduct is a non-binding document that provides no repercussions for a violation.²⁸⁴ Second, criterion two is flawed because export officials will likely not be able to correctly assess the human rights circumstance in all importing states.²⁸⁵ Third, criteria three and four are imperfect because they do not consider the role that diversion plays in illicit sourcing of weapons.²⁸⁶ Fourth, criterion six is defective because it is standard-less in the call to assess the impact of an arms transfer on terrorism.²⁸⁷ Fifth, criterion seven is problematic because it, like criterion six, is standard-less in its request to determine if improper end-users receive arms.²⁸⁸

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.*

²⁸¹ Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf.

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.²⁸⁹

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.²⁹⁰ 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.²⁹¹ Allowing the EU to direct the proposed arms trade treaty draft would be challenging because of the EU's contradictory views on global trade.²⁹²

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.²⁹³

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.