

Gian Ege
Christian Schwarzenegger
Monika Stempkowski
(eds.)

Arms Trafficking


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Editors:

Prof. Dr. Gian Ege, Zürich, Switzerland

Prof. Dr. Christian Schwarzenegger, Zürich, Switzerland

Dr. Monika Stempkowski, Vienna, Austria

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Preface

Trafficking in arms and weapons material is, perhaps, one of the most notorious forms of organised crime, not least because of the involvement of criminal organisations in the international arms trade. Criminal organisations are widely believed to engage in the trafficking of firearms, ammunition, military equipment, and weapons material, including nuclear material. Some of the conceptions have been fuelled by the movie industry and mass media and are not always backed up by real world examples. Importantly, corruption and other forms of collusion with government entities play an essential role in enabling and facilitating trafficking in arms and weapons material, as do links between criminal elements and the arms industry.

As part of their joint teaching programme on transnational organised crime, the University of Queensland, the University of Vienna, and the University of Zurich examined the topic of arms trafficking in a year-long research course in 2020-2021. Students from the three universities researched selected topics and presented their findings in academic papers, some of which have been compiled in this volume. The articles included in this edited book address arms trafficking in all its dimensions, including the international and national legal frameworks against this phenomenon, its levels and characteristics in selected places, and enforcement and industry measures adopted to prevent and suppress this illicit trade.

This publication would not have been possible without the relentless enthusiasm and dedication of the student authors and supporting staff.

Zurich/Vienna, August 2022

Gian Ege, Christian Schwarzenegger, Monika Stempkowski

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Definition of Firearms, their Parts and Components and Ammunition: Concepts and Controversies

ISABELLE ORAZIO

Consistent, clear and comprehensive definitions of firearms, their parts and components and ammunition in international instruments are necessary for states to effectively address the complex transnational problem of firearms trafficking. Frequently linked with organised crime, firearms trafficking has significant consequences for society and the economy at large. This article looks at the current international legal regime on gun control and the definitions contained within. An analysis of their scope and a comparison with regional definitions provides a critical look at the current landscape of definitions addressing firearms trafficking. Controversies in the terminology of the definitions themselves, and the broader structure of definitions in the international legal regime, undermine the international response to global firearms trafficking. A more comprehensive regime and definitions that allow for consistent implementation by states is necessary to address this phenomenon.

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I. Introduction

The trafficking of firearms threatens both human security and development. It is a transnational problem often linked with organised crime that requires coordinated international, regional and national action to address.¹ A poorly or underregulated international arms industry undermines economic, social and political stability, while also fuelling armed violence and conflict.² Firearms, unlike many other illegal commodities, are durable long-lasting

1 UN Office on Drugs and Crime, *Comparative Analysis of Global Instruments on Firearms and Other Conventional Arms: Synergies for Implementation* (2016) 1.

2 Ibid.

goods leading to their episodic rather than constant movement.³ The fact that they are relatively inexpensive, portable, concealable, durable, widely available and extremely lethal makes their regulation both essential and challenging.⁴

Over the past three decades, the response by the international community to this problem has resulted in the development of a number of treaties and agreements under the auspices of the United Nations forming a broad international legal regime on arms control.

This paper primarily focuses upon the definitions of firearms, their parts and components and ammunition contained within this international legal regime. It provides an overview of the definitions within the regime and critically analyses the concepts and controversies of the definitions that impact the regime's effectiveness in addressing firearms trafficking. The challenge is achieving globally agreed consistent international definitions that empower states to comprehensively address the trafficking of firearms, their parts and components and ammunition.

To provide an analysis of the definitions within the regime, after introducing this paper, part II. will provide an outline of the role of definitions generally and their importance within the regime, an overview of the relevant international legal regime and of relevant regional instruments. Parts III., IV. and V. of this paper will individually focus upon firearms, their parts and components and ammunition respectively. Each section will provide an overview of the definitions in the regime, an analysis of the language used in the definitions, and also consider examples of regional approaches to defining the terms while highlighting particular concepts and controversies of the definitions.

In evaluating definitions in the regime addressing firearms trafficking, it is also necessary to consider definitions in the regime on parts and

3 UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Challenges and good practices in the criminalization, investigation and prosecution of illicit firearms trafficking, and measures to enhance international cooperation in criminal matters, including through effective tracing of firearms in ongoing investigations*, UN Doc CTOC/COP/WG.6/2014/2 (11 April 2014) 6.

4 Aaron X. Fellmeth, 'Part II UN Core Conventions on Transnational Organised Crime, 10 The UN Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001' in Pierre Hauck and Peterke Sven (eds), *International Law and Transnational Organised Crime* (2016) 197, 198.

components and ammunition for firearms, acknowledging that for the effective regulation of firearms, the regulation of their parts and components and ammunition is essential. Data from the World Customs Organization revealed that in seizures across 2016–2017 involving weapons and related material, 54 per cent involved ammunition or parts thereof, while 43 per cent involved firearms/[small arms and light weapons], and 14 per cent involved parts and components. Some seizures involved more than one element⁵.

II. Background and Context

1. Role of Definitions

Definitions are critically important, especially in an international legal context. The diverse political, cultural and economic influences of states and individuals makes legal rules at an international level complex.⁶ Clear definitions are vital for the consistent and harmonious development and enforcement of international law.⁷ Definitions provide the opportunity to establish a clear terminology to avoid ambiguity and provide parameters and boundaries for consistent legislating to avoid opportunities to circumvent regulations. Internationally agreed definitions also facilitate information exchange and analysis, as well as strengthen international cooperation.⁸ They also facilitate the ability to have precise and meaningful reporting,⁹ resulting in accurate analysis of the trends and patterns in the flow of these arms, so that effective policy can be crafted.

In the firearms context, the security and humanitarian concerns, amongst others,¹⁰ make clear definitions even more desirable.¹¹ ‘Countries apply

5 UN Office on Drugs and Crime, *Global Study on Firearms Trafficking 2020* (2020) 30.

6 Zeray Yihdego, *The Arms Trade and International Law* (2007) 20.

7 Ibid.

8 UN Office on Drugs and Crime, *UNODC Study on Firearms 2015* (2015) ix.

9 N.R. Jenzen-Jones and Matt Schroeder, ‘Chapter 1, Small Arms Identification’ in N.R. Jenzen-Jones and Matt Schroeder (eds), *An Introductory Guide to the Identification of Small Arms, Light Weapons, and Associated Ammunition* (2018) 25, 27.

10 Ove Bring, ‘Regulating Conventional Weapons in the Future – Humanitarian Law or Arms Control?’ (1987) 24(3) *Journal of Peace Research* 275, 275.

11 Yihdego (n 6) 20.

different definitions [...] depending on their legal, cultural, historical and linguistic traditions and practices”¹². Having unanimous and clear definitions is the first step to establishing a legal regime to counter firearms trafficking. Imposing regulations and restrictions on manufacturing and transferring this material is ineffective if the arms remain undetermined¹³ or there is an inconsistent interpretation and implementation by states parties. Encompassing broad overarching definitions are necessary when legislating, especially when considering that advances in technology have created grey areas in identification where weapons may not fit into existing categories.¹⁴

Therefore, clear definitions within the regime are critical to the successful and effective implementation of regulations on arms to counter firearms trafficking.

2. The International Legal Regime on Arms Control

The regime consists of three legally binding treaties and two political instruments with an international scope focussed on creating global standards on arms control.

2.1. Legally Binding Treaties

The *United Nations Convention against Transnational Organized Crime* (‘Organized Crime Convention’),¹⁵ its supplementary *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (‘Firearms Protocol’),¹⁶ and the *United Nations Arms Trade Treaty* (‘Arms Trade Treaty’),¹⁷ are multilateral treaties that are legally binding and contain mostly mandatory provisions.

¹² UN Office on Drugs and Crime (n 8) 79.

¹³ Yihdego (n 6) 20.

¹⁴ UN Office on Drugs and Crime (n 8) 79.

¹⁵ Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

¹⁶ Opened for signature 31 May 2001, 2326 UNTS 208 (entered into force 3 July 2005).

¹⁷ Opened for signature 3 June 2013, 3013 UNTS 1 (entered into force 24 December 2014).

The *Organized Crime Convention* entered into force on 29 September 2003 and the *Firearms Protocol* on 3 July 2005. The *Firearms Protocol* is particularly relevant for discussion in this paper, as it contains the definitions necessary for inquiry. The purpose of the Protocol is to 'promote, facilitate and strengthen cooperation among states parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition'¹⁸.

In April of 2013, the *Arms Trade Treaty* was endorsed and entered into force on 24 December 2014. With broader objectives than the *Firearms Protocol*, the *Arms Trade Treaty* seeks to 'establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms [and to] prevent and eradicate the illicit trade in conventional arms and prevent their diversion'¹⁹. These standards regulate the international transfer of conventional arms and provides measures to prevent diversion.

2.2. Political Instruments

The United Nations *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* ('Programme of Action')²⁰ and the *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons* ('International Tracing Instrument')²¹ are not legally binding treaties, but rather soft law instruments that call upon a political commitment. They do not require the formal accession process necessary under the multilateral treaties and do not enforce the same legal obligations as the Treaties.

¹⁸ *Firearms Protocol*, art 4.

¹⁹ *Arms Trade Treaty*, art 1.

²⁰ UN, *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, New York 9–20 July 2001, UN Doc A/CONF.192/15 (20 July 2001) 7–17.

²¹ UN General Assembly, *Report of the Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, UN Doc A/60/88 (27 June 2005) 6–13.

The *Programme of Action* was agreed to by the United Nations Assembly in July 2001. Considered a voluntary policy framework²², it addresses preventing the illicit trade in small arms and light weapons with commitments being open-ended.²³ In reviewing the *Programme of Action* in 2005, the *International Tracing Instrument* was developed and adopted. The *International Tracing Instrument* introduced voluntary commitments in marking, recording and tracing small arms and light weapons²⁴ to a greater extent than the previously existing instruments.²⁵

This plurality of legally binding treaties and political instruments reflects the complex and multi-dimensional nature of the firearms problematic and the potential for contradictions and a lack of clarity.²⁶ The United Nations Office on Drugs and Crime ('UNODC') dictates that states parties when developing and implementing national frameworks should not view the instruments in isolation.²⁷ It is recommended that states become party to all legally binding instruments 'to afford full implementation to all international instruments as complementary and mutually reinforcing building blocks of a single comprehensive framework'²⁸. It is also recommended that states take in relevant regional instruments to which they are also party.²⁹ In practice, these recommendations face actionable roadblocks, such as diverging approaches to terminology and definitions utilised by various instruments.

In 2016, the UNODC released a paper³⁰ comparing these instruments to highlight the differences, yet synergies between them to assist states parties in implementing provisions at a national level.³¹ In a working group on the implementation of the *Firearms Protocol*, it was

22 UN Office on Drugs and Crime (n 1) 4.

23 Ibid.

24 Ibid.

25 Sarah Parker and Marcus Wilson, *A Guide to the UN Small Arms Process, 2016 Update* (3rd ed, 2016) 58.

26 UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Good practices, gaps and challenges in countering the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and measures to facilitate the implementation of the Firearms Protocol*, UN Doc CTOC/COP/WG.6/2012/3 (28 March 2012) 4.

27 UN Office on Drugs and Crime (n 1) 2.

28 Ibid 58.

29 Ibid.

30 UN Office on Drugs and Crime (n 1).

31 Ibid ix.

acknowledged that adopting an integrated approach that takes into account the instruments to which each state is party to establish a comprehensive national control regime is challenging.³² Therefore, assisting states parties to implement comprehensive and consistent national control regimes is critical to countering firearms trafficking.

The definitions of firearms, their parts and components and ammunition contained within the various instruments in this regime and the challenges faced by states in their implementation will be examined.

3. Regional Instruments

A number of regional instruments exist that also provide guidance on implementing provisions on arms control. Key regional instruments will be used throughout this paper to analyse the perspective at a regional level and how this relates to the international regime. Regional approaches can both help and hinder progress towards consistent national regulation. It is important to acknowledge that states may be party to one or more international instruments, as well as one or more of the regional instruments.

The regional instruments that will be considered are:

- The *Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 on control of the acquisition and possession of weapons (codification)* ('Firearms Directive')³³ codified *Directive 91/477/EEC* and its amendments;
- The *Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (SADC) Region* ('SADC Protocol');³⁴

³² UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Good practices, gaps and challenges in countering the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and measures to facilitate the implementation of the Firearms Protocol*, UN Doc CTCOC/COP/WG.6/2012/3 (28 March 2012) 4.

³³ Opened for signature 24 March 2021, PE/56/2020/REV/1 (entered into force 26 April 2021).

³⁴ Opened for signature 14 August 2001, Registration Number 52885 (entered into force 8 November 2004).

- The *ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials* ('ECOWAS Convention');³⁵
- 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* ('Nairobi Protocol');³⁶
- The *Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture, Repair and Assembly* ('Kinshasa Convention');³⁷ and
- The *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials* ('The Inter-American Convention').³⁸

III. Firearms

1. Definitions within The International Regime

Two terms that emerged in the 1990 s in work by the United Nations on arms control are 'firearm' and 'small arms and light weapons'. The *Organized Crime Convention* and the *Firearms Protocol* utilise the term 'firearm', while The *Arms Trade Treaty*, the *Programme of Action* and the *International Tracing Instrument* use the term 'small arms and light weapons'.

The *Firearms Protocol* contains a definition of firearm in Article 3(a). Deemed by Fellmeth to be the most important term of the treaty,³⁹ it defines that:

'Firearm' shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their

35 Opened for signature 16 July 1991, 2373 UNTS 233 (entered into force 29 September 2009).

36 Opened for signature 21 April 2005 (entered into force 5 May 2006).

37 Opened for signature 30 April 2010, Registration Number 54327 (entered into force 8 March 2017).

38 Opened for signature 14 November 1997, 2029 UNTS 55 (entered into force 1 July 1998).

39 Fellmeth (n 4) 207.

replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899.⁴⁰

Of the three instruments concerning small arms and light weapons, the *International Tracing Instrument* provides a definition in Article 4 that,

‘Small arms and light weapons’ will mean any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas will be defined in accordance with domestic law. In no case will antique small arms and light weapons include those manufactured after 1899.⁴¹

It further provides more narrow specific definitions of both small arms and light weapons separately that provide non-exhaustive lists of material captured by the terms,⁴²

‘Small arms’ are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns;⁴³

‘Light weapons’ are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres.⁴⁴

This definition was subsequent to the definition of small arms and light weapons developed by the 1997 report of the United Nations Panel of Governmental Experts on Small Arms⁴⁵ and the examples of both small arm and light weapons are the same as the Panel.⁴⁶

The *Arms Trade Treaty*, the legally binding multilateral treaty that utilises the term ‘small arms and light weapons’ does not contain a definition of the

40 *Firearms Protocol*, art 3(a).

41 *International Tracing Instrument*, art 4.

42 Ted Seay and Stuart Casey-Maslen, ‘National control lists’ in Sarah Parker (ed), *The Arms Trade Treaty, A Practical Guide to National Implementation* (2017) 39, 42.

43 *International Tracing Instrument*, art 4(a).

44 *Ibid* art 4(b).

45 UN General Assembly, *General and complete disarmament: small arms*, UN Doc A/52/298 (27 August 1997).

46 *Ibid* [26].

term. The scope of the Treaty extends to the seven categories of weapons on the United Nations Register of Conventional Arms, as well as small arms and light weapons.⁴⁷ National definitions of these terms should not cover less than the definitions provided for in the Register.⁴⁸ However, as small arms and light weapons are not a formal category on the Register, national definitions must at least cover descriptions from relevant United Nations instruments at the time of the Treaty's entry into force.⁴⁹ The relevant description being the definition from the International Tracing Instrument,⁵⁰ thereby endorsing the definition from the soft law instrument.

The Programme of Action, which was initiated prior to the *International Tracing Instrument*, also does not contain a definition of 'small arms and light weapons', despite early attempts in the drafting process.⁵¹

2. Elements of the Definitions

The definition of a firearm under the *Firearms Protocol* consists of three elements: that a firearm is portable; that it is a barrelled weapon; and that it expels a projectile by the action of an explosive. It is not a requirement that the definition be replicated in national legislation, but other provisions must cover the full scope of firearms specified by the Protocol.⁵² It is in considering each of these elements that an understanding of the scope of material that is captured by the definition can be grasped.

In considering each element, a comparison will be made to elements in the *International Tracing Instrument's* definition of small arms and light weapons. This is to aid in an understanding of the overlap between the definitions and where the two terms diverge.

The language utilised by the definition provides certain qualifications that establish limitations on what material constitutes a 'firearm'. It is these

47 *Arms Trade Treaty*, art 2(1).

48 *Ibid* art 5(3).

49 *Ibid*.

50 Jenzen-Jones and Schroeder (n 9) 28.

51 Glenn McDonald, 'Locking onto Target: Light Weapons Control Measures' in Eric G. Berman and Keith Krause (eds), *Small Arms Survey 2005* (2005) 122, 126.

52 UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (2004) 414.

limitations that result in the definition in the *Firearms Protocol* encompassing small arms, but only a narrow range of light weapons.⁵³

2.1. Elements

2.1.1. Portable

The use of the word ‘portable’ in the definition of ‘firearm’ in the *Firearms Protocol* was clarified as encompassing firearms ‘that could be moved or carried by one person without mechanical or other assistance’.⁵⁴ In comparison, the definition of small arms and light weapons in the *International Tracing Instrument* uses the term ‘man-portable’⁵⁵, while the definition of firearm in the *Firearms Protocol* more specifically defines small arms as being weapons for individual use⁵⁶ and therefore ‘portable’. Light weapons are ‘weapons for use by two or three persons serving as a crew’,⁵⁷ therefore not satisfying the definition of firearm under the Protocol.

The definition of small arms and light weapons also imposes the qualification of ‘lethality’, as they are a ‘man-portable lethal weapon’⁵⁸. In the Ad Hoc Committee discussing the *Firearms Protocol*, the word ‘lethal’ was originally included in the definition, however delegations expressed concern over scope of interpretation of the term.⁵⁹ Its inclusion in the *International Tracing Instrument* is thus a further distinction.

53 McDonald (n 51) 126.

54 UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its twelfth session, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/55/383/Add.3 (21 March 2001) [3].

55 *International Tracing Instrument*, art 4.

56 *Ibid* art 4(a).

57 *Ibid* art 4(b).

58 *Ibid* art 4.

59 UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.2/Rev.5 (5 May 2000) 6–7.

2.1.2. Barrelled Weapon

The definition of firearm contained within the *Firearms Protocol* requires the weapon to be 'barrelled'. In the definition of small arms and light weapons in the *International Tracing Instrument*, there is no requirement of the weapon being 'barrelled'. Therefore, light weapons that utilise a tube or rail,⁶⁰ such as man-portable air defence systems, would not constitute a firearm.

2.1.3. Expels a Projectile by the Action of an Explosive

The *Firearms Protocol* provides that a firearm can 'expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive'⁶¹. This element of the definition would exclude self-propelled projectiles, such as missiles or rockets,⁶² captured by the definition of small arms, and light weapons can expel or launch the projectile.⁶³

2.2. Special Categories

Further elements can be drawn from the definitions regarding certain categories of firearms.

2.2.1. Antique Firearms and Replicas

Antique firearms and their replicas are explicitly excluded from the definitions of firearms and small arms and light weapons contained within the *Firearms Protocol* and *International Tracing Instrument*.⁶⁴ Both provisions only qualify an antique firearm as those manufactured up to and during 1899. There was argument for the earlier date of 1870, which would have excluded all automatic and semi-automatic weapons.⁶⁵

60 UN Office on Drugs and Crime (n 1) 21.

61 *Firearms Protocol*, art 3(a).

62 UN Office on Drugs and Crime (n 1) 21.

63 *International Tracing Instrument*, art 4.

64 *Firearms Protocol*, art 3(a); *International Tracing Instrument*, art 4.

65 UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (n 59) 7 n 32.

Defining antique firearms and their replicas has therefore been largely left to national legislating, allowing significant variances in definitions.⁶⁶ The UNODC *Guide for Legislative Implementation of the Firearms Protocol* suggests that when defining antique firearms and their replicas, the criteria should focus upon the capability of these weapons, as opposed to their appearance.⁶⁷ This would ensure that a firearm that may superficially resemble an antique firearm, but has ‘substantial capabilities, owing to new technology not available at the time of manufacture of the original’⁶⁸ would not be excluded as a replica or antique. The *travaux préparatoires* to the *Firearms Protocol* documented suggestions raised by participants in the Ad Hoc Committee that a more precise definition was required of the term ‘antique firearm’ in order to prevent their illicit trafficking.⁶⁹

2.2.2. Emerging Technologies

Both definitions in the *Firearms Protocol* and *International Tracing Instrument* exclude emerging technologies such as directed energy weapons, for example lasers, and electromagnetic projectile accelerators, railguns and coilguns.⁷⁰

2.2.3. Convertible Weapons

In defining firearms and small arms and light weapons, the *Firearms Protocol* and *International Tracing Instrument* attempt to make the proactive step of capturing arms that may be ‘readily converted’. This is because converted weapons pose critical challenges to the regulation of firearms.⁷¹ The

66 See eg UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States, Report of the Secretariat*, UN Doc CTOC/COP/2006/8/Rev.1 (12 August 2008) 4–5.

67 UN Office on Drugs and Crime (n 52) 417.

68 *Ibid.*

69 UN Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 610

70 Andrew Clapham et al, *The Arms Trade Treaty: A Commentary* (2016) [2.231].

71 Benjamin King, *From Replica to Real, An Introduction to Firearms Conversions*, Issue Brief Number 10 (2015) 1.

accessibility of convertible weapons on the legal market in many countries, with minimal control mechanisms and their ease of conversion into firearms capable of firing live ammunition, ‘creates important opportunities for the illicit manufacturing of and trafficking in firearms’.⁷² Two examples relevant for consideration are blank-firing guns and pneumatic weapons.

Blank-firing firearms, also referred to as alarm weapons, typically produce a flash and a noise,⁷³ for example, starting pistols for track and field events. Depending on the specific models, these weapons are capable of easy conversion into firearms,⁷⁴ although they are considered less of a concern because they are generally composed of weak materials.⁷⁵

Without the qualification of being ‘readily converted’ in both definitions, these weapons would not meet the key elements required to be captured by either definition, as they utilise gas or air pressure to expel the projectile, rather than an explosive. However, the term ‘readily’ indicates that not all weapons capable of conversion would necessarily be captured by the definitions. There is also no internationally recognised definition, nor even technical guidelines on what constitutes a ‘convertible weapon’.⁷⁶

Approaches to what is readily convertible vary.⁷⁷ In January 2019, the European Union introduced technical specifications for alarm weapons to improve understanding of what weapons are capable of conversion into firearms.⁷⁸ Having found that leaving it to national legislating resulted in incomplete or improper implementation⁷⁹ that aided the proliferation of

72 UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Responsiveness of the Firearms Protocol and national legislation to new and emerging threats relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.6/2020/2 (14 January 2020) 4.

73 King (n 71) 2.

74 UN Office on Drugs and Crime (n 5) 41; King (n 71) 4.

75 Nicolas Florquin and Benjamin King, *From Legal to Lethal, Converted Firearms in Europe* (2018) 18, 20.

76 UN (n 72) 5.

77 European Commission, *Study to support an Impact Assessment on a possible initiative related to improving rules on deactivation, destruction and marking procedures of firearms in the EU, as well as on alarm weapons and replicas* (2014) 5.

78 UN (n 72) 4.

79 Christian Ponti, ‘An Appraisal of the European Union Legal Framework on Illicit Firearms Trafficking after Directive 2017/853/EU’ (2018) 4(2) *Rivista di Studi e Ricerche sulla Criminalità Organizzata* 13, 27.

converted alarm pistols,⁸⁰ clear agreed international guidance on what constitutes a readily convertible firearm would be beneficial.

However, the argument for a greater regulation of alarm and pneumatic weapons could be countered by concerns over limiting and restricting their legitimate use.

2.2.4. Artisanal, Additively Manufactured and Modified Firearms

Craft or artisanal weapons, 3D Printed (or additively manufactured) firearms and modified firearms⁸¹ all likely satisfy the key three elements of a firearm once assembled, made, or modified. Since they are often manufactured or modified into a portable barrelled weapon that expels a projectile by action of an explosive, they do not pose concerns to the definitions of these respective terms themselves, yet largely pose questions for tracing and enforcement.⁸²

Nonetheless, this could be seen as a reactionary approach that sees the emergence of illicit weapons which are difficult to trace and regulate. This reactionary response is likely a by-product of not over-regulating material that has legitimate uses. ‘Readily converted’ appears to be an attempt at a more proactive definition to capturing these arms.

2.3. Distinction between Firearms and Small Arms and Light Weapons

Firearms are often considered synonymous to small arms, but in analysing the elements of the definition, it is evident that ‘firearms’ do not include all light weapons.⁸³ The terms are therefore not synonymous.

The term ‘small arm’ is more commonly referred to in a military or conflict context, as opposed to firearm often used to describe civilian arms used in

80 Florquin and King (n 75) 51.

81 If the weapon that was altered constituted a firearm at the outset, the alteration is considered a modification. If the weapon that was altered did not constitute a firearm before the alteration but does so afterwards then the alteration is considered a conversion. UN (n 72) 8.

82 UN (n 72) [50]–[51].

83 UN Office on Drugs and Crime, *The Firearms Protocol and the Arms Trade Treaty: Divergence or Complementarity?* (2016) 3.

crime.⁸⁴ Utilising the different terms in these distinct contexts is no longer practicable when in reality arms are not isolated to being used in either 'conflict' or 'crime'.⁸⁵ Organised crime groups that arm 'criminals' may also arm combatants and in some cases, traffic arms to rebels and terrorists. 'Dichotomous distinctions often breakdown when applied to concrete situations and such terms may be used almost as synonyms'.⁸⁶ However, it is necessary that states understand the distinction between the terms to ensure national legislative provisions reflect the scope of the definitions to avoid inconsistent regulation across states.

In this paper, the term 'firearms' will be used synonymously with small arms. However, as the instruments refer to small arms and light weapons as a collective term, the term firearm will be used, and instruments on small arms and light weapons are relevant and utilised for their application in a small arms context.

These two terms create challenges for consistent regional and national understanding and implementation. For the most effective regulation, the intention is for adoption of the entire international regime, therefore both terms. In a paper comparing global instruments on firearms and other conventional arms, the UNODC recommended that states either develop one comprehensive law combining provisions from the *Firearms Protocol* and the *Arms Trade Treaty* or have separate laws.⁸⁷ Although the UNODC provides that a combined approach would 'contribute to higher levels of harmonization at the national and international levels between the various instruments',⁸⁸ arguably resulting in a more effective regime for addressing firearms trafficking.

This 'recommendation' does not address concerns of the challenges in consistently and effectively implementing the provisions, including the definitions, into regional and national instruments and legislation. The section of this paper looking at regional approaches to defining these terms provides examples of varied approaches to adopting and reconciling these terms and definitions. Further guidance on implementing the

84 UN Office on Drugs and Crime (n 8) 77.

85 Ibid.

86 Ibid 79.

87 UN Office on Drugs and Crime (n 1) 59.

88 Ibid.

definitions may be necessary to avoid inconsistencies that may threaten the effectiveness of the provisions.

2.4. Regional Approaches to Firearms and Small Arms and Light Weapons

No regional approach directly reflects the definition of ‘firearm’ from the *Firearms Protocol*. They can instead be categorised into three broad approaches. The first approach is definitions that closely resemble the definition of ‘firearm’ from the *Firearms Protocol*. The second approach is identical to the definition of ‘small arms and light weapons’ from the *International Tracing Instrument*. The third approach contains definitions that have attempted to integrate the terms ‘firearm’ and ‘small arms and light weapons’. The full definitions discussed are contained within appendix A of this paper.

2.4.1. Approach One

Two instruments that provide definitions of firearms similar to the *Firearms Protocol* are the *Inter-American Convention* and the *Firearms Directive*. The definition in the *Inter-American Convention*⁸⁹ is almost identical to that of the *Firearms Protocol*, with two of the three key elements being a barrelled weapon that expels a projectile by the action of an explosive. The term ‘portable’, the first element, is absent from the definition. The similarity is not as a result of the implementation of the definition from the Protocol, but rather the Convention serving as a basic template for the drafting of the *Firearms Protocol*. The United Nations General Assembly made specific recommendation to the Ad Hoc Committee drafting and negotiating the *Firearms Protocol* to take the *Inter-American Convention* into account.⁹⁰

89 *Inter-American Convention*, art I.3.

90 UN General Assembly, *Resolution adopted by the General Assembly on 17 December 1999: Activities of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime: illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, as well as consideration of the need to develop an instrument on the illicit manufacturing of and trafficking in explosives*, UN Doc A/RES/54/127 (26 January 2000) [2].

In the European Union, the *Firearms Directive* implemented the definition of a firearm from the *Firearms Protocol*, containing all three key elements, although substituting ‘action of an explosive’ with ‘action of a combustible propellant’.⁹¹ The definition also provides a definition for what constitutes an object capable of conversion.⁹²

2.4.2. Approach Two

The *Kinshasa Convention* contains a definition of small arms and light weapons that is equivalent to the definition from the *International Tracing Instrument*, being a ‘man-portable lethal weapon’, that ‘expels or launches [...] by the action of an explosive’⁹³.

2.4.3. Approach Three

A third regional approach appears, which attempts to reconcile the terms firearm and small arms and light weapons. The *SADC Protocol*, *ECOWAS Convention* and *Nairobi Protocol* all contain definitions that use a combination of the terms firearm and small arms and light weapons.

The *SADC Protocol* definition takes an approach that is a mix of both definitions. In defining ‘firearm’, the *SADC Protocol* utilises a definition akin to that from the *Firearms Protocol*, touching on all three key elements, although replacing ‘explosive’ with ‘burning propellant’ and also including the word ‘lethal’.⁹⁴ The *SADC Protocol* then extends the definition of firearm as including small arms and light weapons, providing a list of weapons under each term.⁹⁵ Yihdego viewed this definition as a good compromise encompassing elements of both a technical and descriptive definition.⁹⁶ However, it is a broader definition of firearms than at the international level, which only encompasses some light weapons implicitly.

91 *Firearms Directive*, art 1.1(1).

92 *Ibid* art 1.1(1)(a) and (b).

93 *Kinshasa Convention*, art 2.

94 *SADC Protocol*, art 1(a) and (b).

95 *Ibid* art 1(c) and (d).

96 Yihdego (n 6) 31.

The *ECOWAS Convention* defines light weapons and small arms separately.⁹⁷ The definitions substantially contain lists of weapons under each term, and the qualification of being portable by several persons or one. The attempt to reconcile the definitions is made by stating that firearms are an example of small arms, reflecting an interpretation of the international perspective. Under Article 1.11 it explicitly states that small arms and light weapons includes ammunition and other related material, an approach sometimes inferred from international instruments, particularly the *Arms Trade Treaty*.

Both the *SADC Protocol* and the *ECOWAS Convention* utilise lists of weapons satisfying each term as a definition with the added qualification of 'portability'. They adopt definitions in the style of the more narrow definitions from the *International Tracing Instrument* under Articles 4(a) and (b), lacking the broad and flexible approach of overarching definition in Article 4.

The *Nairobi Protocol's* combined definition first defines light weapons and small arms in a similar manner to the narrow definitions from the *International Tracing Instrument*, as done in both the *SADC Protocol* and the *ECOWAS Convention*.⁹⁸ It goes a step further however, by providing that small arms also includes firearms and defines firearms similarly to the *Firearms Protocol*,⁹⁹ containing all three key elements. It additionally includes explosives.¹⁰⁰

These regional approaches demonstrate varying attempts to define and use the terms firearm and small arms and light weapons. They provide a practical example of the various ways the definitions in the regime can be implemented and the inconsistency that can result from attempting to reconcile these two almost synonymous definitions. Alternate attempts at a regional level to define these terms may create confusion for states also party to one or more of the international instruments, creating loopholes by taking an inconsistent approach and undermining the implementation and effectiveness of the regime.

⁹⁷ *ECOWAS Convention*, art 1.

⁹⁸ *Nairobi Protocol*, art 1.

⁹⁹ *Ibid* art 1(a).

¹⁰⁰ *Ibid* art 1(b).

IV. Parts and Components

As parts and components can be used to replace elements of firearms, illegally modify and even assemble arms entirely, their international regulation is necessary to address the problem of firearms trafficking.¹⁰¹ Replacing or fixing parts and components provides the ability to prolong the life of the weapon.¹⁰² As parts and components are usually smaller than assembled arms, they can be easier to traffic.¹⁰³ This ease of trafficking is aided by inconsistencies in domestic legislation¹⁰⁴ that leads to grey trafficking, which is where a legal purchase in one country can illegally supply parts and components in another.¹⁰⁵

Including parts and components in international instruments is essential to ensuring that regulations halting the trafficking of such material cannot be circumvented by disassembling the firearms into their parts.¹⁰⁶ Attempts to avoid restrictions have also been made by selling 'kits' of parts that provide the capability to assemble a functioning device.¹⁰⁷

1. Definitions within The International Regime

The regime provides an indeterminate approach to defining parts and components.

Within the regime, the *Firearms Protocol* is the only instrument that provides a definition of 'parts and components' or reference to one. In Article 3(b) it provides that,

'Parts and components' shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm.¹⁰⁸

101 UN Office on Drugs and Crime (n 5) 27.

102 Yihdego (n 6) 20 part 2.2.4.

103 UN Office on Drugs and Crime (n 5) 27.

104 Ibid.

105 Ibid.

106 UN Office on Drugs and Crime (n 52) 419.

107 Ibid 422.

108 *Firearms Protocol*, art 3(b).

Article 4 of the *Arms Trade Treaty* does provide that states parties are required to:

Establish and maintain a national control system to regulate the export of parts and components, where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorising the export of such parts and components.¹⁰⁹

Rather than defining parts and components, the provision regulates parts and components that provide the capability to assemble the conventional arms covered under Article 2(1).

In the context of small arms and light weapons, Yihdego claims that some national legal systems view parts and components ‘as constituent elements of a weapon’¹¹⁰. resulting in a separate definition not being the prevailing exercise.¹¹¹ This means that all components and accessories are considered to be covered by small arms and light weapons. Yihdego additionally states that for various reasons they could be defined as a sub-category of small arms and light weapons,¹¹² which would appear to be a rational approach. Without a definition, there is no established or referenced definition of parts and components in the small arms and light weapons context, and this approach provides no guidance.

A definition would assist in ensuring that parts and components are being regulated adequately in national legislative frameworks.

2. Elements of the Definitions

The language used in the definition of parts and components limits the potential scope of application and also excludes material that could enhance the lethality of a firearm.

In the definition of ‘parts and components’ in the *Firearms Protocol*, there are two elements to the definition. It must be an element or replacement element specifically designed for a firearm and the element must be essential to the operation of the firearm. The use of the conjunctive ‘and’

¹⁰⁹ *Arms Trade Treaty*, art 4.

¹¹⁰ Yihdego (n 6) part 2.2.4.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

has consequences for the scope of the definition; material must satisfy both elements to be a part and component.¹¹³ The definition further includes a non-exhaustive list of parts and components for clarity.¹¹⁴ Member states have flexibility on whether to include the indicative list or utilise the general description only.¹¹⁵

2.1. Specifically Designed

Standard items that may be used in firearms, but also other devices, such as springs or machine-screws, are not considered parts and components under the protocol, as they are not specifically designed for firearms.¹¹⁶ Nevertheless, standard items can easily and effectively replace essential parts specifically designed for a firearm, such as a nail replacing a firing pin.

2.2. Essential to the Operation

The requirement that parts and components be indispensable to a firearm's operation excludes accessories and components, such as gun cases and carrying slings from the definition.¹¹⁷

By excluding parts and components that are not essential for the function of firearms, the definition also omits silencers or mufflers. This was noted during the drafting of the Protocol and 'any device designed or adapted to diminish the sound caused by firing a firearm'¹¹⁸ was a specific effort to include these items in its scope.¹¹⁹ The intention to include silencers and mufflers in the scope of the definition can be traced to concerns regarding the additional threat they pose once attached to a firearm.¹²⁰ Other

¹¹³ Fellmeth (n 4) 207.

¹¹⁴ UN Office on Drugs and Crime (n 52) 420.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ *Firearms Protocol*, art 3(b).

¹¹⁹ Fellmeth (n 4) 207.

¹²⁰ UN Office on Drugs and Crime (n 52) 420.

accessories, such as sights, continue to not be captured by the definition, despite the fact that sights arguably enhance a weapons lethality.¹²¹

2.3. Regional Approaches

Regional approaches to defining parts and components are varied, demonstrating a further level of inconsistency to effective implementation. Three different terms are used by regional instruments; they are ‘parts and components’, ‘essential component’ and ‘other related materials’. The full definitions discussed are contained within appendix B of this paper.

2.3.1. Approach One

The *Kinshasa Convention* contains a definition of parts and components for small arms and light weapons.¹²² It is interesting to note that an instrument on small arms and light weapons utilises the definition in the *Firearms Protocol* replacing ‘firearm’ in the definition with ‘small arms or light weapons’.

2.3.2. Approach Two

The *Firearms Directive* adopts a definition of ‘essential component’.¹²³ The term contains a list of components similar to those mentioned in the non-exhaustive list contained within the *Firearms Protocol* definition. However, the definition is restricted to this list of components, not including either of the elements contained within the *Firearms Protocol* definition.

2.3.3. Approach Three

The remaining regional instruments considered within this paper, the *SADC Protocol*,¹²⁴ the *ECOWAS Convention*,¹²⁵ the *Nairobi Protocol*,¹²⁶ and the *Inter-*

¹²¹ Matt Schroeder, *Accessories for Small Arms and Light Weapons* (2013) 3–4.

¹²² *Kinshasa Convention*, art 2(i).

¹²³ *Firearms Directive*, art 1.1(2).

¹²⁴ *SADC Protocol*, art 1.

¹²⁵ *ECOWAS Convention*, art 1.4.

¹²⁶ *Nairobi Protocol*, art 1.

*American Convention*¹²⁷, use the term ‘other related materials’. The term ‘other related materials’ was the original term proposed and debated in the Ad Hoc Committee of the *Firearms Protocol*.¹²⁸ The definitions in these instruments stipulate that ‘other related materials’ are components, parts and spare or replacement parts for firearms or small arms and light weapons.

The *SADC Protocol* and the *Nairobi Protocol* do qualify that these components and parts must be essential to the weapons operation. The *ECOWAS Convention* states that these components and parts must be necessary for the arms function, reflecting the element of essentiality from the *Firearms Protocol* definition. The *Inter-American Convention* is arguably broader, with other related material being any component, part, replacement part or accessory that can be attached to a firearm.

These definitions are a departure from the more descriptive approach of the *Firearms Protocol*, failing to provide any understanding or context as to what a part or component is. Notably only the *Inter-American Convention* addresses accessories such as silencers, which would appear to be excluded by the other definitions.

The *ECOWAS Convention* is an example of a regional instrument that despite viewing the term ‘small arms and light weapons’ as encompassing other related material,¹²⁹ includes a definition, in spite of viewing this inclusion as a novelty.¹³⁰ This could be interpreted as a reiteration of the importance of defining these terms to aid their effective regulation.

The various terms used at a regional level regarding parts and components and a reliance on a proscriptive list, as opposed to a more descriptive definition such as from the *Firearms Protocol*, is evidence of inflexible and inconsistent regional approaches. There is no definitive harmonious approach to defining terms across the international and regional levels, making implementation for states unclear, confusing and inconsistent. The definition in the *Firearms Protocol* appears to be the more encompassing approach containing a list of examples of parts and components, as well as a descriptive definition.

127 *Inter-American Convention*, art I.6.

128 UN Office on Drugs and Crime (n 69) 613.

129 *ECOWAS Convention*, art 1.1.

130 Ilhan Berkol, *Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan* (2017) 3.

V. Ammunition

To date, as with parts and components, the implementation of international control measures on ammunition have been less precipitous than those on firearms.¹³¹ This demonstrates a weakness in the regime, for ammunition is the tool that delivers the lethality of firearms. Although the fact that firearms are durable goods is concerning, the fact that ammunition is a consumable good is equally alarming.¹³² The dispensable nature of ammunition creates a high level of demand and thereby supply, resulting in large-scale flows of ammunition around the world.¹³³ As ammunition has a relatively short shelf life, users require stockpiles to be frequently replenished.¹³⁴ Unlike many arms, ammunition itself, especially for light weapons, poses a threat to public safety if not stored correctly or disposed of before expiration.¹³⁵

In the past, ammunition was relegated ‘to a somewhat peripheral rank in [small arms and light weapons] discussions and negotiations’¹³⁶. The reluctance to address ammunition, largely due to the scale of such an endeavour, has plagued developments in international efforts.

1. Definitions within The International Legal Regime

Similar to the regime’s approach to parts and components, the *Firearms Protocol* is the only instrument that provides a definition of ammunition. The Protocol provides that “[a]mmunition’ shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the respective state party”¹³⁷.

¹³¹ UN Office on Drugs and Crime (n 5) 29.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Parker and Wilson (n 25) 23.

¹³⁵ Glenn McDonald, ‘Measures: informing diplomacy – the role of research in the UN small arms process’ in Peter Batchelor and Kai Michael Kenkel (eds), *Controlling Small Arms* (2014) 150, 160.

¹³⁶ Parker and Wilson (n 25) 44 citing Christophe Carle, ‘Small Arms Ammunition: Light at the End of the Barrel?’ (2006) 1 *Disarmament Forum* 49, 50.

¹³⁷ *Firearms Protocol*, art 3(c).

The *Firearms Protocol* defines ammunition to establish a clear meaning for the term under the Protocol, but does not impose a requirement to define the term, as is required in domestic law.¹³⁸ Rather it dictates that states should include or amend an existing definition that at a minimum is in compliance with the definition provided for by the Protocol.¹³⁹

As with parts and components, the *Arms Trade Treaty* provides that '[e]ach State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1)¹⁴⁰. This provision neglects to provide a detailed definition of ammunition/munition.

The drafting of the *International Tracing Instrument* by the Open-Ended Working Group included extensive discussion on whether its scope should cover ammunition. The European Union was the greatest advocate for its inclusion, with the United States the most vocal opponent.¹⁴¹ It was argued that the scale of ammunition and the large volume traded internationally would make implementing the standards and restrictions costly and impractical.¹⁴² Ultimately ammunition was excluded from the scope of the *International Tracing Instrument*. The recommendation was instead made to develop technical guidelines that could be used voluntarily,¹⁴³ which only provides guidance on stockpile management.

Similar disagreement exists regarding the *Programme of Action's* coverage of ammunition. There is uncertainty as to whether ammunition is actually covered by the Programme. The United States consistently purports that ammunition is not covered, however other states include information regarding ammunition in their reports on implementation of the *Programme of Action*.¹⁴⁴

As a result, the only guidance on defining ammunition in the regime is provided by the *Firearms Protocol*. International efforts generally reflect a reluctance to address the regulation of ammunition.

138 UN Office on Drugs and Crime (n 52) 423.

139 Ibid.

140 *Arms Trade Treaty*, art 3.

141 Seay and Casey-Maslen (n 42) 43.

142 Parker and Wilson (n 25) 54.

143 International Ammunition Technical Guidelines were established under the UN SaferGuard Programme. Available at <<https://unsafeguard.org/un-safeguard/guide-lines>>.

144 McDonald (n 135) 152.

2. Elements of the Definitions

The definition in the *Firearms Protocol* has the ability to provide extensive regulation of ammunition. It provides two options; regulating the complete round or the complete round and its component parts, if subject to regulation by the state party. The definition also provides a non-exhaustive list of examples of ammunition. The definition restricts ammunition to being ammunition or components used in a firearm.

The language in the definition reflects the dichotomy of regulating ammunition. On the one hand, there is a need to regulate the basic components of ammunition to regulate it effectively due to the ability for components to be transferred and assembled at destination.¹⁴⁵ On the other hand, the regulatory burden of doing so, considering that components alone without assembly may not constitute a risk, is too onerous.¹⁴⁶ Some states consider this burden to be too heavy and as a result, many only regulate assembled cartridges.¹⁴⁷

Fellmeth counters concern of over regulation, supplying that an extensive definition of ammunition is necessary regardless due to ‘the ease of manufacturing ammunition with minimal, low-technology equipment from prepared components’¹⁴⁸. It is important to note that states may already regulate primers and propellants as explosive material under regional instruments.¹⁴⁹

The definition in the *Firearms Protocol* reflects the conflicting perspectives to regulating ammunition, adopting a broad definition.

3. Regional Approaches

Unlike firearms and parts and components, regional approaches to defining ammunition are mostly comparable, although three approaches could be

¹⁴⁵ UN Office on Drugs and Crime (n 52) 422.

¹⁴⁶ Ibid.

¹⁴⁷ UN Office on Drugs and Crime, *Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (2011) 5.

¹⁴⁸ Fellmeth (n 4) 207.

¹⁴⁹ UN Office on Drugs and Crime (n 147) 5.

extracted from the instruments. The full definitions discussed are contained within appendix C of this paper.

3.1. Approach One

The definition of ammunition from the *Firearms Protocol* is reflected in many of the regional approaches. The *Firearms Directive*,¹⁵⁰ *Nairobi Protocol*,¹⁵¹ *Kinshasa Convention*,¹⁵² and the *Inter-American Convention*¹⁵³ all reflect the definition from the *Firearms Protocol*, regulating the complete round and/or its components, and providing the same list of components. Notably however, the *Nairobi Protocol* uses the term ‘small arm or light weapon’ compared to the rest of these regional approaches and the *Firearms Protocol* that uses the term ‘firearm’.

3.2. Approach Two

The *SADC Protocol* provides a very similar definition to the definition from the *Firearms Protocol*, although only opting to regulate the complete cartridge.¹⁵⁴

3.3. Approach Three

The *ECOWAS Convention* takes a distinctly different approach to defining ammunition. As with parts and components, the *ECOWAS Convention* includes a definition of ammunition, despite this being a novelty,¹⁵⁵ with ammunition captured by the term ‘small arms and light weapons’.¹⁵⁶ Despite the Convention using the term ‘small arms and light weapons’, it defines ammunition as ‘devices destined to be shot or projected through

150 *Firearms Directive*, art 1.1(3).

151 *Nairobi Protocol*, art 1.

152 *Kinshasa Convention*, art 2(d).

153 *Inter-American Convention*, art I.4.

154 *SADC Protocol*, art 1.

155 Berkol (n 130) 3.

156 *ECOWAS Convention*, art 1.11.

the means of *firearms*.¹⁵⁷ The provision then provides ammunition for light weapons as an example of these devices shot or projected through firearms, despite defining firearms as an example of small arms under Article 1.2. Notably, this definition does not appear to cover the components of ammunition either. The definition contained in the *ECOWAS Convention* is a further example of the varied approaches taken in regional instruments to defining these terms and the inconsistencies that can arise.

Whilst the approaches to defining ammunition are more consistent than with firearms and parts and components, the strength of definitions is arguably undermined by a reluctance to commit to regulating components of a round as well as the complete round of ammunition

VI. Conclusion

It is evident that the international legal regime on arms control provides definitions of firearms, their parts and components and ammunition that present minimum standards for implementation by their respective states parties, which in turn offers guidance for consistent national legislating, contributing to the global effort to combat firearms trafficking.

The *Firearms Protocol* contains definitions of firearms, their parts and components and ammunition. The *International Tracing Instrument* defines small arms and light weapons, and this definition was later endorsed by the multilateral legally binding *Arms Trade Treaty*. The term ‘small arms’ is relevant for discussion, as it is synonymous with firearms, and therefore instruments on small arms contribute to efforts addressing firearms trafficking. There is no requirement for the definitions to be replicated in national legislation, but provisions must apply to material that at a minimum would be captured by the definitions.

However, controversies regarding these definitions impact the effectiveness and implementation of the international regime in countering firearms trafficking.

¹⁵⁷ Ibid art 1.3 (emphasis added).

When considering firearms, controversy first lies with the structure of the regime, containing definitions of both ‘firearm’ and ‘small arms and light weapons’. The overlap in the scope of material covered by the definitions, requires definitive guidelines for ‘best practice implementation’ in either reconciling the definitions or crafting separate laws.¹⁵⁸ Inconsistent definitions globally risk the efficacy of the regime in countering the trafficking of such material. Guidance on reconciling the definitions, and a greater continuity between international and regional definitions, would be beneficial for consistent national implementation.

International guidelines on what is capable of being ‘readily converted’ are also necessary to ensure convertible firearms are being captured by the definitions. As well as action on the continual ways, the definitions can respond to emerging technologies and other classes of weapons in a more proactive manner.

On parts and components and ammunition, controversy exists with the *Firearms Protocol* being the only UN instrument providing definitions.¹⁵⁹ In instruments on small arms and light weapons, there are no definitions of parts and components or ammunition, nor is there any reference to definitions in other instruments.¹⁶⁰ This is of particular concern to the scope of this paper as, states that are not also party to the *Firearms Protocol* have no consistent instrument from which to consistently define these terms in the scope of small arms. Shortly after the introduction of the *Arms Trade Treaty*, the Small Arms Survey did highlight that the absence of these definitions is something that states could revisit.¹⁶¹ Regional definitions also vary, particularly with parts and components. A clearer comprehensive approach at the international level is required, as is a greater synergy between international and regional approaches for consistent national implementation.

Within the definitions themselves, the requirement that parts and components have to be specifically designed and essential for a firearm establishes a restrictive definition, albeit excluding accessories. The definition of ammunition allows states to regulate either the complete

158 UN Office on Drugs and Crime (n 1) 59.

159 Sarah Parker, ‘Breaking New Ground? The Arms Trade Treaty’ in Glenn McDonald et al (eds), *Small Arms Survey 2014: Women and Guns* (2014) 76, 82.

160 Ibid.

161 Ibid.

round or also its components, arguably undermining the potential of the regime to comprehensively regulate this material.

What is consistent among these controversies is the need for guidance in defining these terms to create consistent implementation at a national level. The impact of regional definitions should not be overlooked. A greater level of harmony amongst international approaches and also with those at a regional level is necessary, so that states who are party to multiple instruments can more easily implement consistent definitions.

The controversies with the terminology of the definitions themselves appears to be a by-product of the balancing act between underregulating and overregulating the material. This is an inherent difficulty when striving to achieve internationally agreed definitions. Drafting and implementing effective definitions and provisions more broadly in this context involves the setting aside of economic and strategic interests, and instead committing to prioritising human rights, development and security.¹⁶² The effectiveness of the regime is reliant on a global response. This requires consideration of these economic interests, resulting in compromises for the adoption of the regime on the necessary scale. However, many of these also serve practical advantages that may result in a greater adoption of provisions, such as not making the regulation of components of ammunition a requirement.

The Implementation Review Mechanism for the *Firearms Protocol*, due to be operational from 2021, presents an opportunity to see whether states are implementing the definitions under the Protocol, in what form and to what extent.

A clear and comprehensive international approach to defining firearms, their parts and components and ammunition is necessary to create consistent and comprehensive regional and national implementation to assist the global response to countering firearms trafficking.

¹⁶² Susanne Therese Hansen and Nicholas Marsh, 'Normative power and organized hypocrisy: European Union member states' arms export to Libya' (2015) 24(2) *European Security* 264, 265.

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Appendix A

Firearms and Small Arms Light Weapons: Regional Approaches

Approach 1	
Inter-American Convention	<p>Article I(3) 'Firearms': a. Any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or b. Any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.</p>
EU Firearms Directive	<p>Article 1(1)(1) (1)'Firearm' means any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded from that definition for one of the reasons listed in Part III of Annex I. An object shall be considered to be capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if: (a)It has the appearance of a firearm; and (b)As a result of its construction or the material from which it is made, it can be so converted;</p>
Approach 2	
Kinshasa Convention	<p>Article 2 (a) Small arms and light weapons: any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas shall be defined in accordance with domestic law. In no case shall antique small arms and light weapons include those manufactured after 1899; (b) Small arms: weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub machine guns, assault rifles and light machine guns; (c) Light weapons: weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; and mortars of a calibre of less than 100 millimetres;</p>

Approach 3	
SADC Protocol	<p>Article 1.2</p> <p>'Firearm' means:</p> <p>a) Any portable lethal weapon that expels, or is designed to expel, a shot, bullet or projectile by the action of burning propellant, excluding antique firearms or their replicas that are not subject to authorisation in the respective state parties;</p> <p>b) Any device which may be readily converted into a weapon referred to in paragraph a);</p> <p>c) Any small arm as defined in this Article; or</p> <p>d) Any light weapon as defined in this Article;</p> <p>'Light weapons' include the following portable weapons designed for use by several persons serving as a crew: heavy machine guns, automatic cannons, howitzers, mortars of less than 100 mm calibre, grenade launchers, anti-tank weapons and launchers, recoilless guns, shoulder fired rockets, anti-aircraft weapons and launchers and air defence weapons (some).</p> <p>'Small arms' include light machine guns, sub-machine guns, including machine pistols, fully automatic rifles and assault rifles and semi-automatic rifles;</p>
ECOWAS Convention	<p>Article 1.1</p> <p>Light Weapons: Portable arms designed to be used by several persons working together in a team and which include notably:</p> <ul style="list-style-type: none"> · Heavy machine guns; · Portable grenade launchers, mobile or mounted; · Portable anti-aircraft cannons; · Portable anti-tank cannons, non-recoil guns; · Portable anti-tank missile launchers or rocket launchers; · Portable anti-aircraft missile launchers; · Mortars with a calibre of less than 100 millimetres; <p>Article 1.2</p> <p>Small Arms: Arms used by one person and which include notably:</p> <ul style="list-style-type: none"> · Firearms and other destructive arms or devices such as an exploding bomb, an incendiary bomb or a gas bomb, a grenade, a rocket launcher, a missile, · A missile system or landmine; · Revolvers and pistols with automatic loading; · Rifles and carbines; · Machine guns; · Assault rifles; · Light machine guns.

Definition of Firearms, their Parts and Components and Ammunition

<p>Nairobi Protocol</p>	<p>Article 1</p> <p>'Light weapons' shall include the following portable weapons designed for use by several persons serving as a crew: heavy machine guns, automatic cannons, howitzers, mortars of less than 100 mm calibre, grenade launchers, anti-tank weapons and launchers, recoilless guns, shoulder-fired rockets, anti-aircraft weapons and launchers, and air defence weapons;</p> <p>'Small arms' are weapons designed for personal use and shall include: light machine guns, sub-machine guns, including machine pistols, fully automatic rifles and assault rifles, and semi-automatic rifles.</p> <p>'Small arms' shall also include: 'firearms', meaning:</p> <p>(a) Any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899;</p> <p>(b) Any other weapon or destructive device such as an explosive bomb, incendiary bomb or gas bomb, grenade, rocket launcher, missile, missile system or mine</p>
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Appendix B

Parts and Components: Regional Approaches

Approach 1	
Kinshasa Convention	Article 2(i) Parts and components that can be used for the manufacture, repair and assembly of small arms and light weapons and their ammunition: any element or replacement element specifically designed for small arms or light weapons and essential to their operation, including a barrel, frame or receiver, slide or cylinder, bolt or breechblock, and any device designed or adapted to diminish the sound caused by firing a such a weapon, and any chemical substance serving as an active material and used as a propellant or explosive agent;
Approach 2	
Firearms Directive	Article 1(1)(2) 'Essential component' means the barrel, the frame, the receiver, including both upper and lower receivers, where applicable, the slide, the cylinder, the bolt or the breech block, which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted;
Approach 3	
SADC Protocol	Article 1.2 'Other related materials' means any components, parts or replacement parts of a firearm that are essential to the operation of the firearm;
Nairobi Protocol	Article 1 And 'other related materials', meaning any components, parts or replacement parts of a small arm or light weapon, that are essential to its operation.
ECOWAS Convention	Article 1.4 'Other Related Materials': all components, parts or spare parts for small arms or light weapons or ammunition necessary for its functioning; or any chemical substance serving as active material used as propelling or explosive agent;
Inter-American Convention	Article I(6) 'Other related materials': any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm.

Appendix C

Ammunition: Regional Approaches

Approach 1	
Nairobi Protocol	Article 1 'Ammunition', meaning the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a small arm or light weapon, provided that those components are themselves subject to authorisation in the respective state party;
Inter-American Convention	Article I(4) 'Ammunition': the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles that are used in any firearm.
Kinshasa Convention	Article 2(d) 'Ammunition': the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the respective state party;
Firearms Directive	Article (1)(1)(3) 'Ammunition' means the complete round or the components thereof, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the member state concerned;
Approach 2	
SADC Protocol	Article 1.2 'Ammunition' means the complete cartridge including the cartridge case, unfired primer, propellant, bullets and projectiles that are used in a firearm, provided those components are themselves subject to authorisation in the respective state parties;
Approach 3	
ECOWAS Convention	Article 1.3 Ammunition: Devices destined to be shot or projected through the means of firearms including among others: <ul style="list-style-type: none"> · Cartridges; · Projectiles and missiles for light weapons; · Mobile containers with missiles or projectiles for anti-aircraft or anti-tank single action systems; Article 1.11 Small Arms and Light Weapons In this Convention, this shall be deemed to include ammunition and other related materials.

Levels and Characteristics of the Illegal Trade in Conventional Arms

SHANNON SANGIORGIO

When it comes to the transfer of conventional arms, there is a large gap in the available data. This gap stems in part from the existence of a substantial black market for military equipment, allowing for conventional arms to change hands undetected. Despite the massive threat this produces, there is very little literature examining the happenings on the illicit conventional arms market. This article aims to highlight some of the data gaps present in the current literature. The most common methods used to illicitly transfer arms are described and it is explained how arms traffickers use these to circumvent regulations. Some select case studies should help to illustrate the matter further.

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I. Introduction

During the Cold War, many countries set up stocks of arms that exceeded their requirements.¹ The political paranoia produced secret arms caches throughout Europe.² The widespread use of restrictions and embargoes,

1 Peter Lock, *Pervasive Illicit Small Arms Availability: A Global Threat* (1999) 4, 9, 10.

2 Ibid; see also Owen Greene, 'Examining International Responses to Illicit Arms Trafficking' in Mark Phythian (ed), *Under the Counter and over the Border* (2000) 151, 168.

intended to hinder the flow of conventional arms to warring countries, did not affect the need for such material, fuelling the demand for arms through illicit channels at a state level.³ A large fraction of illicitly traded weapons has at some stage been exported from European countries.⁴ Today, every country in the world is in some way involved in the global arms trade.⁵ The modern arms trade is largely motivated by economic interests rather than security concerns.⁶ If an attempt is to be made to control the illicit trade and keep the damage under control, it is crucial to determine how the illicit trade works. However, the existing literature provides very little empirical data on the illicit conventional arms trade. Therefore, and in an attempt to shed some light on this data gap, this article examines known cases of illicit trades in conventional arms to try and identify commonalities between them. As the number of exposed incidents is limited, some of the cases examined date back several years, while certain circumstances, such as geographical regions or conflict areas, differed from today's. To avoid distorting the results as much as possible, these cases were examined under the conditions prevalent at the time.

The first section of this article will provide the definitions for the different categories of conventional arms subject to this paper, while the second section illustrates what is known about the illicit trade in conventional arms today and where the major gaps lie. Some possibilities of preventing or hindering the illicit trade are also discussed. This section is intended to be indicative rather than exhaustive, and aims at providing an idea of the nature of the illicit arms trade, as well as the difficulties in exposing it. Finally, the conclusion will summarise the findings and provide some recommendations for filling the gaps.

3 Mark Phythian, 'The Illicit Arms Trade: Cold War and Post-Cold War' in Mark Phythian (ed), *Under the Counter and over the Border* (2000) 1, 20.

4 Greene (n 2) 168.

5 Rachel Stohl, *Understanding the Conventional Arms Trade* (2017) 1.

6 Laurence Lustgarten, *Law and the Arms Trade, Weapons, Blood and Rules* (2020) 441, 442; Stohl (n 5) 7.

II. Definition of Conventional Arms

The term ‘conventional arms’ includes all arms that are neither chemical, biological, nor nuclear.⁷ The United Nations Register of Conventional Arms (UNROCA) includes battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft and unmanned combat aerial vehicles, attack helicopters, warships, and missiles and missile launchers.⁸ Excluded are small arms and light weapons, as those are subject to separate regulations and controls, and produce a different set of issues.⁹

A *battle tank* is a tracked or wheeled vehicle with high cross-country mobility.¹⁰ It is armoured for protection and carries combat weapons including a direct fire main gun of at least 75 millimetres calibre.¹¹ Similarly, an *armoured combat vehicle* also has armoured protection and either serves to transport at least four infantrymen or is outfitted with a weapon of at least 12.5 millimetres or, alternatively, a missile launcher.¹² Large calibre artillery systems include guns, howitzers (or combinations of the two), mortars or multiple-launch rocket systems with a calibre of 75 millimetres or more.¹³ They deliver primarily indirect fire.¹⁴ Combat aircraft and unmanned combat aerial vehicles are manned or unmanned fixed wing or variable-geometry wing aerial vehicles that engage targets by employing weapons of destruction.¹⁵ Furthermore, any version of these aircraft that performs specialized electronic warfare, suppression of air defence or reconnaissance missions is also included.¹⁶ Attack helicopters are rotary-wing aircraft that engage targets by employing guided or unguided weapons controlled by an integrated fire control and aiming

7 United States Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, 12 April 2001 (As Amended Through 31 October 2009) (2001) 122.

8 UN Register of Conventional Arms, ‘Transparency in the global reported arms trade, Categories of major conventional arms’ (Web page, undated).

9 Stohl (n 5) 2.

10 UN General Assembly, *Continuing operation of the United Nations Register of Conventional Arms and its further development*, Note by the Secretary-General, UN Doc A/74/211 (2 July 2019) annex I.

11 Ibid.

12 Ibid annex IV.

13 Ibid annex I.

14 Ibid.

15 UN Register of Conventional Arms (n 8).

16 Ibid.

system including versions of these aircraft which perform specialized reconnaissance or electronic warfare missions.¹⁷ *Warships* are either vessels or submarines, equipped for launching missiles or torpedoes with a range of at least 25 kilometres.¹⁸ Lastly, *missiles* are guided or unguided rockets or missiles that deliver a warhead or a weapon of destruction to a range of 25 kilometres or more.¹⁹ A *missile launcher* is an object modified specifically to launch such rockets or missiles, if it does not fall under the previously listed categories.²⁰

III. Understanding the Term ‘Illicit’

The 1996 report of the United Nations Office for Disarmament Affairs defines illicit arms trafficking as ‘international trade in conventional arms, which is contrary to the laws of States and/or international law’.²¹ Article 3(e) of the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*²², supplementing the *United Nations Convention against Transnational Organized Crime*²³, describes illicit trafficking as ‘the import, export, acquisition, sale, delivery, movement or transfer of firearms [...] from across the territory of one state Party to that of another state Party if any one of the state parties concerned does not authorise it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol’.

While these are valid attempts in defining the illicit trade, there is no commonly agreed definition of what constitutes an illicit international

17 UN General Assembly (n 10) annex I.

18 Ibid.

19 Ibid.

20 Cf *ibid* for more information on the definition of the seven categories of conventional arms.

21 UN General Assembly, *Report of the Disarmament Commission*, UN Doc A/51/42 (22 May 1996) annex I, I(7).

22 Opened for signature 31 May 2001, 2326 UNTS 208 (entered into force 3 July 2005).

23 Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

arms transfer.²⁴ Where there is a formal definition given, it tends to be vague.²⁵ The difficulty in finding an internationally agreed definition may lie in the understanding that defining what the term ‘illicit’ means is a sovereign act of deciding exceptions.²⁶ The main aspect of working understandings of illicit transfers is the arms flows being unauthorised by the states involved.²⁷ Therefore, for the following article, the term ‘illicit’ shall be understood as the transfer of conventional arms which has not been properly authorised in accordance with the respective national legislation. What the national legislation dictates, varies according to the countries involved in the transfer.

IV. The Illicit Trade

The arms industry generated high annual earning for select countries during the Cold War period²⁸, not least because many countries acquired stocks of arms greater than their actual need.²⁹ Restrictions and embargoes intended to hamper the flow of military and related equipment to warring countries, but had no effect of the demand, forcing several states to acquire their material through illicit channels.³⁰ Combined with the political paranoia of the time, this led to secret arms caches being set up throughout Europe.³¹

Once the Cold War ended, the demand for conventional arms plummeted due to embargoes and pressure from foreign countries.³² Most western countries engaged in worldwide surplus sales and donations.³³ This meant

24 Mike Bourne, ‘Controlling the Shadow Trade’ (2011) 32(1) *Contemporary Security Policy* 215, 216.

25 Ibid 217.

26 Ibid 216 – 217.

27 Ibid 217.

28 Phythian (n 2) 32.

29 Lock (n 1) 4, 9, 10.

30 Jana Arsovska and Panos A. Kostakos, ‘Illicit arms trafficking and the limits of rational choice theory: the case of the Balkans’ (2008) 11(4) *Trends in Organized Crime* 352, 359; Bourne (n 24) 225; Greene (n 2) 153; Phythian (n 2) 32.

31 Lock (n 1) 10; Greene (n 2) 168.

32 Phythian (n 2) 32.

33 Lock (n 1) 10.

a transfer from relatively safe storage towards less protected, more fragile environments.³⁴ Ineffective inventory monitoring and lacking exports controls, as well as official corruption, have enabled some material to leak onto the black market.³⁵ This means that a large proportion of arms sold on the black market was originally manufactured under government control, came from military stockpiles, or was otherwise obtained legally.³⁶

Today, the illicit arms trade is ultimately driven by demand and adjusts to international crises.³⁷ Arms smuggling often involves individuals or institutions who are not part of a criminal organisation, such as national defence ministries, national security agencies, banks, or legitimate arms dealers.³⁸ While there are many different ways of acquiring conventional arms illicitly and there is no 'one size fits all' method, there are some 'actions' that tend to emerge in many cases. While the following means are described separately for better illustration, it must be noted that these methods play together in guiding the actions of perpetrators. It is for this reason that the case studies, while used to demonstrate specific means, often show elements of several methods; it is also important that all means be considered while evaluating an individual case.

1. Conduits

As previously mentioned, most weapons originated from legal sources and were at some point diverted to the black market.³⁹ Since conventional arms are often very heavy and large, it is difficult to hide and smuggle them the same way traffickers would transport smaller equipment. One option is to use conduits, meaning that the material is channelled through intermediate countries to avoid arms embargoes or restrictions.⁴⁰

34 Arsovska and Kostakos (n 30) 359; Lock (n 1) 10.

35 Arsovska and Kostakos (n 30) 359; Glenn E. Curtis and Tara Karacan, *The Nexus among Terrorists, Narcotics Traffickers, Weapons Proliferators, and Organized Crime Networks in Western Europe* (2002) 33; Greene (n 2) 168; Lock (n 1) 10.

36 Greene (n 2) 153; Keith Krause, *Small Arms and Light Weapons: Proliferation Processes and Policy Options* (2000) 18.

37 Curtis and Karacan (n 35) 2; Greene (n 2) 153; Stohl (n 5) 7.

38 Curtis and Karacan (n 35) 2.

39 Bourne (n 24) 219; Greene (n 2) 153; Krause (n 36) 18.

40 Phythian (n 2) 9.

In 1991, two Pinochet-era generals were convicted for arms trafficking from Chile to Croatia, in spite of the UN arms embargo in place at the time.⁴¹ The shipment of eleven tonnes of weapons and ammunition, which was intercepted by UN officials in Hungary, was disguised as humanitarian aid to Sri Lanka.⁴²

In another case, European intelligence reported significant activity by Italian and other European crime organisations in 2001⁴³, where the groups were smuggling arms to Palestinian groups in the Middle East.⁴⁴ The arms were channelled through the Syrian government and sold to various Arab clients⁴⁵, using two routes, namely Brussels-to-Beirut and Milan-to-Beirut.⁴⁶ Italian crime organisations have offered to sell a variety of heavy weapons for a price below standard international rates through Arab intermediaries.⁴⁷ Among the weapons on offer was a French-made guided missile.⁴⁸

The national control measures of the individual countries aimed at fighting the illicit trade in conventional arms differ greatly and show varying levels of success.⁴⁹ While some countries have strong control systems and obey international standards, others fail to fulfil even basic control measures, allowing for more or less porous borders.⁵⁰ One important national measure is the implementation of national arms trade legislation.⁵¹ This legislation presents a legal basis for governments to licence and register arms producers, traders, transporters, brokers, and owners and regulates the process of authorising arms transactions.⁵² The case studies have shown that arms traffickers channel shipments through countries with lacking control measures, while porous borders mean the illicit transfer is less likely to be recognized and exposed than is the case in countries with strong control systems. As a consequence, traffickers use this to their advantage.

41 Arsovska and Kostakos (n 30) 362; BBC News, 'Chile generals convicted over 1991 Croatia arms deal' (Web page, 20 January 2012).

42 Ibid.

43 Curtis and Karacan (n 35) 13.

44 Ibid.

45 Ibid; see also Phil Williams, 'Drugs and Guns' (1999) 55(1) *Bulletin of the Atomic Scientists* 46, 46.

46 Ibid.

47 Ibid.

48 Ibid.

49 Stohl (n 5) 3–4; Nicholas Marsh, 'Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms' (2002) 9(1) *Brown Journal of World Affairs* 217, 218.

50 Stohl (n 5) 4.

51 Ibid.

52 Ibid.

2. Diversion

Diversion occurs when seemingly legitimate sales are manipulated, leading to the weapons reaching the actual target state by a devious route.⁵³ Such diversion can occur through deceptive practices in obtaining weapons, government disposals, theft from stockpiles, in-transit diversion to different destinations, or by supposedly legal recipients retransferring the weapons to illicit ones.⁵⁴

The communist regime of Enver Hoxha in Albania placed massive emphasis upon weapon supplies and a powerful army.⁵⁵ After communism fell, many weapons were looted from army stockpiles and continue to circulate in Albania today.⁵⁶

To successfully divert the arms, the perpetrators falsify documentation,⁵⁷ hide shipments, mislabel containers, or pay bribes to corrupt officials for them to issue false paperwork, to name just a few practices.⁵⁸

One example is Leonid Minin, who was based in Italy and received documentation in Belgium. He specialized in Kalashnikov rifles, rocket-propelled grenades and launchers, ammunition, and specialized combat equipment, which he sold in return for gems. Much of the material originated in Russia, Belarus, and Bulgaria, while the deliveries were typically transported from Ukraine to Burkina Faso, the shipment's official destination. By using end-user certificates stating the Burkina Faso military as the recipient, the Ukrainian government officials who licensed the transfer were covered. The material was then flown to Liberia with Minin's private jet and subsequently transported to Sierra Leone.⁵⁹

An effective supplement to national legislation can be provided by developing international export criteria.⁶⁰ These criteria are based on international norms and standards, and can provide a reference point as

53 Lustgarten (n 6) 10.

54 Bourne (n 24) 220; Marsh (n 49) 224; Greene (n 2) 153.

55 Arsovska and Kostakos (n 30) 362.

56 Arsovska and Kostakos (n 30) 362; Greene (n 2) 173.

57 Falsifying documents may include forgery, false, misleading, or incomplete information, and unauthorised diversion of authorised shipments, see Mark Bromley and Hugh Griffiths, 'End-user Certificates: Improving Standards to Prevent Diversion' (2010) 3 *SIPRI Insights on Peace and Security* 1, 7.

58 Bourne (n 24) 220; Marsh (n 49) 225; Phythian (n 2) 9.

59 Curtis and Karacan (n 35) 16–17.

60 Since 2008, the eight export criteria given in the EU Code of Conduct on Arms Exports are legally binding to state parties.

to whether or not a transaction should be authorised.⁶¹ The export criteria are often combined with control lists detailing both the weapons and weapons systems that require an export licence and authorisation by the government, and also include lists of destinations subject to restriction, such as arms embargoes.⁶² Unfortunately, the lists specify only certain categories of weapons and do not encompass all weapons.⁶³ For instance, weapons of mass destruction, such as nuclear weapons, are not included in the register.⁶⁴ The licensing process aims to control the movement of weapons subject to the control lists, meaning the export out of, import into, and transit and trans-shipment⁶⁵ through different states.⁶⁶ In cases where the shipment is likely to be diverted, the denial of an export licence can help to prevent the arms from reaching the intended recipient or at least complicate the transfer.⁶⁷

A licence is granted and a transaction is confirmed by using standardised documentation.⁶⁸ The types of documents required in a licence application vary depending upon the nature of the transfer and may include end-user certificates or statements,⁶⁹ import licences or import certificates, official purchase orders, or delivery verification certificates.⁷⁰ The licensing process includes the verification of this documentation, as well as the registration of the actors involved, risk assessment of the end-users, and special systems for the review of high-risk cases.⁷¹ Although various agreements and best practice guidelines stress the importance of end-user certificates,

61 Stohl (n 5) 4.

62 Ibid.

63 UN Office for Disarmament Affairs, *Assessing the United Nations Register of Conventional Arms* (2009) 11–12.

64 Ibid.

65 'Transit' is the carrying of material through a country, while 'Transshipment' means the process of unloading the material in one country and then re-loading it for the further transport to the destination, see Lustgarten (n 6) 11 n 33.

66 Stohl (n 5) 4.

67 Bromley and Griffiths (n 57) 1.

68 Stohl (n 5) 4.

69 An end-user certificate is a government-issued document which identifies, at a minimum, the wares to be transferred, the end-user and the destination country. Additional information, such as assurances regarding the use and re-transfer or information about the end-user, may be included. End-user statements are privately-issued documents issued by the commercial entity buying the wares, see Bromley and Griffiths (n 63) 2, 5.

70 Bromley and Griffiths (n 57) 2; Stohl (n 5) 4.

71 Bourne (n 24) 220.

several states continue to issue certificates that lack the minimum elements needed to properly assess the shipment in question.⁷² With only little information on the transfer provided, the true intention is hard to recognise, which makes such documents vulnerable to abuse and allow for possible diversion of the material.⁷³ The unfortunate lack of guidance relating to the issuing, monitoring and assessment of privately issued end-user certificates (also referred to as end-user statements)⁷⁴, import licences and import certificates means such documentation must rely on the integrity of the commercial entities issuing the documents to ensure the arms are not diverted.⁷⁵ However, the strategic and economic interests of the suppliers may persuade them to turn a blind eye to the illicit trade, allowing potential diversions and rendering the use of end-user certificates ineffective for international arms control.⁷⁶

In Sweden, Nobel Kemi and Bofors, two subsidiaries of Nobel Industries, were involved in a major operation to supply Iran through conduits, violating Sweden's prohibition to deliver arms to warring states.⁷⁷ Singapore was such an important conduit for Sweden that by 1985, it had become the world's second-biggest importer of Swedish arms.⁷⁸ Following the investigation into the case, several senior Bofors officials resigned, including the managing director, Martin Ardbo.⁷⁹ After evidence was uncovered that Bofors had funnelled illicit shipments through conduits to Iran, Ardbo claimed the government had been involved in the deals, recommending the shipments be routed through conduits like Singapore to avoid attracting attention.⁸⁰

Scandinavian Commodity, a Malmö-based company owned by Karl Erik Schmitz, was an important link between the Swedish companies, the other cartel members, and Iran.⁸¹ Schmitz routed a shipment from Italy through Yugoslavia, from where it would be shipped to Iran through the Suez Canal.⁸² Schmitz admitted to paying Kenya 10'000 US dollars for false end-user certificates stating Kenya as the recipient.⁸³ Those

72 Bromley and Griffiths (n 57) 7.

73 Bromley and Griffiths (n 57) 7.

74 *Ibid.* 5.

75 *Ibid.* 9.

76 Phythian (n 2) 8.

77 *Ibid.* 10.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 *Ibid.* 11.

82 *Ibid.*

83 *Ibid.*

documents were presented at the Suez Canal to avoid the attention of Egyptian authorities, for ships destined for Iran had been seized in the past.⁸⁴

Transparency measures are crucial to maintain an overview of the global conventional arms transfers.⁸⁵ The belief is that by understanding which country is selling which weapon and to whom will increase the security of the international arms trade.⁸⁶ One such control mechanism is the United Nations Register of Conventional Arms ('UNROCA'). Countries can report on the transactions from all the categories of conventional arms described in the registry, as well as on the arms already in their possession, and on the weapons they obtained from domestic production. Additionally, countries can report on their national defence policies or national export legislation.⁸⁷ Unfortunately, the UNROCA specifies only certain categories of weapons and does not encompass all weapons.⁸⁸ Furthermore, the reports to the UNROCA are optional, meaning the individual countries are not obligated to report their transactions.⁸⁹ The degree of transparency depends upon the individual states providing full information on their arms transfers.⁹⁰ Participation levels have fluctuated significantly since the register went into operation.⁹¹ Non-participating states can only be captured indirectly through their role as exporters or importers in the reports or reporting states.⁹² However, should a non-participating state act as importer and exporter in the same transaction, their activities would not be captured.⁹³ In addition, there has been some sensitivity to the full disclosure of information, mainly concerning missiles and missile

84 Ibid.

85 Stohl (n 5) 3.

86 Ibid 3–4.

87 For all three variants the registry includes battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft and unmanned combat aerial vehicles, attack helicopters, warships and missiles and missile launchers as well as small arms and light weapons, see UN Register of Conventional Arms, 'Transparency in the global reported arms trade, About' (Web page, undated).

88 'About', UNROCA – Transparency in the global reported arms trade (web page, undated) <<https://www.unroca.org/about>>.

89 'Home', UNROCA – Transparency in the global reported arms trade (web page, undated) <<https://www.unroca.org/about>>.

90 UN Office for Disarmament Affairs, *Assessing the United Nations Register of Conventional Arms*, UNODA Occasional Paper Number 16, New York: United Nations, 2009 21.

91 Ibid 15.

92 Ibid.

93 Ibid 22.

launchers.⁹⁴ While the UNROCA's objective of transparency is achieved to some extent, the data provided is far from complete, as the register can neither capture all the transfers, nor reliably provide full information on the transactions that are covered by reports.⁹⁵

3. Corruption

Various processes require a certain involvement by the state governments.⁹⁶ Corruption is seemingly endemic in the arms trade and has been central to numerous highly-publicised scandals in countries all over the world.⁹⁷ Enormous amounts of money have been drained from public funds and diverted to the hidden enrichment of officials.⁹⁸ Often governments act as buyers and high civil servants, military officers, prominent business executives, and politicians are their accomplices.⁹⁹ This is particularly detrimental to developing countries, where citizens have health, educational and subsistence needs.¹⁰⁰

Early smuggling channels in Bosnia were set up by the head of the Counter-Intelligence Service.¹⁰¹ Allegedly, he made an agreement with the Bosnian Defense Minister, who himself was involved in arms trafficking from Vienna to Sarajevo, to refrain from interfering with weapons shipments from Serbia through Bosnia to the Serbian-held regions in Croatia.¹⁰² In return, the secret service redirected some of the weapons to the Bosnian-Muslim army.¹⁰³

In the Arms to Iraq affair, Saddam Hussein obtained British arms via a shipment seemingly purchased by Jordan.¹⁰⁴ The Managing Director and two assistants of a machine tool manufacturing company in the UK were prosecuted for selling their products to Iraq, violating export control regulations.¹⁰⁵ However, the trial was aborted

94 Ibid 21.

95 Ibid 22.

96 Bourne (n 24) 226–227.

97 Lustgarten (n 6) 8.

98 Ibid.

99 Lustgarten (n 6) 9; Block, Alan, *East Side, West Side: Organizing Crime in New York, 1930–1950*, London and New York: Routledge, 2017 58.

100 Lustgarten (n 6) 9.

101 Arsovska and Kostakos (n 30) 361.

102 Ibid.

103 Ibid.

104 Lustgarten (n 6) 10–11.

105 Ibid 108–109.

in 1992 by the presiding Judge when it came to light that a Minister who had been involved in making export guidelines more 'flexible' had encouraged the Defendants to mask the possibility of military use and instead highlight the civilian application of the equipment.¹⁰⁶

Legal and constitutional accountability is undermined through different practices.¹⁰⁷ Secrecy is an important factor, as exports are regularly assisted and even encouraged by governments not only for security, but also for economic reasons.¹⁰⁸ This secrecy surrounding the arms trade has made way for corruption to develop.¹⁰⁹ This can be seen in the fact that many exporting countries have experienced scandals relating to corruption in the arms trade.¹¹⁰ The companies engaged in these scandals are often at least partly publicly owned and subsidised by the state, meaning that public funds are being abused.¹¹¹ Investigations into such transactions are often excluded or restricted and any results are withheld from the public.¹¹² Supplementing that is the fact that freedom of information legislation often encompasses general exclusions that fit the arms trade well, undermining its effectiveness for uncovering government cover-ups.¹¹³ This means that evidence of discussions and decisions about how arms deals came to be and what they entailed are excluded from public discussion and parliamentary examination.¹¹⁴ Scandals leading to high profile investigations have managed to penetrate this secrecy, but even then the released documents are often heavily redacted.¹¹⁵

A further prominent example of state-sponsored trafficking is the 'Orao' case.¹¹⁶ The contract was for exporting weapons and military equipment to Iraq, signed between a Serbian arms trading company and the Iraqi government.¹¹⁷ In October 2002, NATO

106 Ibid 109; see also Richard Norton-Taylor, 'Iraq arms prosecutions led to string of miscarriages of justice', *The Guardian* (online), 9 November 2012.

107 Lustgarten (n 6) 20.

108 Ibid.

109 Ibid.

110 Ibid.

111 Ibid.

112 Ibid 20–21.

113 Ibid 21.

114 Ibid.

115 Ibid.

116 Dejan Anastasijevic, *Organized Crime in the Western Balkans* (2006) 11; Arsovska and Kostakos (n 30) 364.

117 Ibid.

forces searched an air force maintenance facility called 'Orao' in Bosnia.¹¹⁸ They found correspondence with the Iraqi Ministry of Defence, which unveiled 'Orao's' involvement in the maintenance and repair of jet engines for Iraqi MiG fighter jets, thus breaching the UN sanctions.¹¹⁹ Investigations further revealed a whole network of factories helping Hussein strengthen his army.¹²⁰ The contracts resulted in a flow of weapons and equipment to Iraq.¹²¹ In addition, while breaching UN arms embargoes, Serbia was selling arms to Libya.¹²² Serbia's official military procurement agency Jugoimport SDPR avoided controls by using supposedly privately owned letter-box companies.¹²³ The Serbian government denied any knowledge of the 'Orao' affair, however replaced the head of Jugoimport along with numerous other executives after a secretive investigation.¹²⁴ The 'Orao' affair may have been the biggest state-sponsored weapons smuggling operation since the end of the Yugoslav wars, but state-sponsored trafficking continues on a smaller scale.¹²⁵ There is ample evidence that the Serbian government is involved in illicit exports of arms and military equipment on a considerable scale to this day.¹²⁶

One of the biggest scandals in France was the Angolagate affair, which came to light in 1999.¹²⁷ The case involved numerous French politicians who were involved in the covert supply of arms to the Angolan government despite a UN arms embargo in place at the time.¹²⁸ The persons involved set up a front company in Eastern Europe, which they used to channel arms from several Eastern European countries to Angola.¹²⁹ Another company was established in Paris to handle the contracts and finances.¹³⁰ Between 1993 and 1998, a large amount of arms was transferred this way, with a total value of 790 million US dollars.¹³¹ A further 56 million US dollars were paid as bribes to Angolan decision-makers and French politicians as payment for their help in arranging the deals, and to ensure those deals were not investigated by the French authorities.¹³² After a long investigation, 42 suspects were charged for arms trafficking, complicity with arms trafficking, influence peddling (including bribery), abuse of corporate assets, abuse of

118 Ibid.

119 Ibid.

120 Arsovska and Kostakos (n 30) 364.

121 Ibid.

122 Anastasijevic (n 116) 12; Arsovska and Kostakos (n 30) 365.

123 Anastasijevic (n 116) 12.

124 Ibid.

125 Anastasijevic (n 116) 12; Arsovska and Kostakos (n 30) 365.

126 Anastasijevic (n 116) 10.

127 Elizabeth P. Allen, 'Anatomy of a Scandal, Angolagate' (2010) 27(1) *World Policy Journal* 14, 14; World Peace Foundation, 'Angolagate' (Web page, undated).

128 Ibid.

129 World Peace Foundation (n 127).

130 Ibid.

131 Ibid.

132 Ibid.

public assets, money laundering, and tax fraud.¹³³ In the end, 36 defendants were convicted in 2009, though some convictions were overturned in 2011.¹³⁴

4. Networks

Criminal networks are relatively common within the illicit conventional arms trade, as they are flexible, adaptable and capable of reacting rapidly to the efforts of law enforcement.¹³⁵ Weapons trafficking is frequently linked to narcotics trafficking and often involves individuals or institutions who are not part of the criminal organisation itself, such as national defence ministries, national security agencies, banks, or legitimate arms dealers.¹³⁶

A major player in the illicit arms trade is the Basque Fatherland and Liberty ('ETA').¹³⁷ Links have been discovered between the ETA and the Camorra crime organisation in Naples, Italy.¹³⁸ An agreement in 2001 called for heavy arms, explosives, and bombs to be supplied to the ETA from Pakistan and Uzbekistan via the Czech Republic.¹³⁹ The agreement saw the Camorra supply the ETA in Spain with heavy weapons, such as missile launchers and missiles for which the ETA paid for with large amounts of cocaine and cannabis, delivered in special drums attached to the bottom of a ship.¹⁴⁰ The arms orders from the ETA allegedly passed through a criminal group in France.¹⁴¹

The perpetrators involved often use globalised financial, commercial, transportation and communications networks to locate one another¹⁴² and individual networks will often work together against law enforcement.¹⁴³ Research has shown that diaspora networks have played a significant role

133 Ibid.

134 Allen (n 127) 14; World Peace Foundation (n 127).

135 Williams, Phil and Roy Godson, 'Anticipating organized and transnational crime' (2002) 37(4) *Crime, Law and Social Change* 311, 332.

136 Curtis and Karacan (n 35) 2.

137 Curtis and Karacan (n 35) 5.

138 Ibid 9.

139 Ibid 10.

140 Ibid.

141 Ibid 12.

142 Phil Williams, 'Organizing Transnational Crime: Networks, Markets and Hierarchies' in Phil Williams and Dimitri Vlassis (eds), *Combating Transnational Crime, Concepts, Activities and Responses* (2001) 58, 58.

143 Williams 'Anticipating organized and transnational crime' (n 135) 326.

in the development of transnational organised crime and may be an important resource for transnational shipments.¹⁴⁴

Since the Balkan conflicts, Albanian diaspora leaders have been shipping large amounts of arms to Kosovo and Macedonia.¹⁴⁵ They often use routes through Muslim Bosnia and Albania and carry on over the borders of Kosovo and Macedonia.¹⁴⁶ The Albanians were able to obtain sophisticated modern weapons by cooperating with international mafia groups, including the Serbian and Russian mafia.¹⁴⁷ There are also some links between the Albanian mafia and Islamic groups operating primarily in Bosnia.¹⁴⁸ In some smuggling cases, the Albanians have used freight companies and shippers under their control to transfer the arms.¹⁴⁹ A large source of funding has been international wire transfers.¹⁵⁰ The FBI has observed suspicious large funds transfers between Albanians in America and the Balkans.¹⁵¹ Certain Western Union shops licensed to Albanians in Macedonia are suspected of also being involved in terrorist funding activities and are being watched by Macedonian investigators.¹⁵² According to a Serbian intelligence source, 3–5 wealthy Albanian diaspora members with assets in Switzerland and Sweden use a front company for building supplies to hide money and to import weapons.¹⁵³

Albanian, Italian, and Russian organised crime groups in Kosovo are transporting arms through various parts of Greece, over Italy and then onto other parts of Europe. A large number of these illicit arms have been stolen from military stockpiles in Albania.¹⁵⁴ The profits of the trade are laundered in Greece and Cyprus, where especially the Russian mafia has strong links with influential officials.¹⁵⁵ Sicilian mafia groups often cooperate with Albanian groups that had begun exploiting Greece's northwestern coastline back in the 1990s.¹⁵⁶ Romanian groups also have a share of the market in Athens.¹⁵⁷ The biggest centre of the arms trade is Crete, but Albanian arms dealers have also established significant markets in the Evros River Delta (northeastern Greece) and the city of Ioannina (northwestern Greece).¹⁵⁸ Greece's permanent

144 Ibid 330f.

145 [s.n.], 'Update on Albanian Diaspora Money Laundering and Weapons Smuggling to Macedonia Militants' (2003) 2 *Balkananalysis.com*.

146 Ibid.

147 Ibid.

148 Ibid.

149 Ibid.

150 Ibid.

151 Ibid.

152 Ibid.

153 Ibid.

154 Curtis and Karacan (n 35) 14.

155 Ibid.

156 Ibid.

157 Ibid.

158 Ibid.

representative to the UN claimed that ‘the Russian mafia, criminal organisations from Albania, the activities of the UCK’s [Kosovo Liberation Army] chiefs, and the remainder of the Foreign Legion in Skopje have laid a tight net around Greece’¹⁵⁹.

Networks seem to be very skilled at concealing their activities, sometimes among or within licit transactions, making it challenging to predict and uncover illicit transfers.¹⁶⁰ Those efforts are further hindered by the involvement of government officials, which has fostered the rise of organised crime on a global scale.¹⁶¹

V. Conclusion

Overall, little is known about the illicit trade in conventional arms. The study of known cases allows the deduction of certain modus operandi, yet at the same time has shown that each case is different and may not correspond to the same pattern as another. This shows the great flexibility of the illicit trade, allowing for quick adaptation to law enforcement efforts in order to vanish out of sight again. The different methods must all be considered parallel to one another, only then is there a chance to comprehend the approach the traffickers take. Nonetheless, it must be said that even then it remains difficult to predict illicit transfers. One difficulty may lay in the fact that little is known about the trafficking routes, rendering it hard to predict where an illicit transfer might occur. This in turn makes it difficult for law enforcement to intervene.

Without the ability to predict the illicit trade, law enforcement is limited to efforts in recognising such activities when they happen. However, the measures that have been put in place today are hampered by the fact that certain countries simply lack the means to effectively enforce them. This makes it easier for traffickers to bypass control systems and can be accomplished by using conduits to channel the weapons through, diverting the arms to a different destination, and corruption. Perpetrators may use false documentation, hide shipments, or mislabel them to avoid detection.

159 Quoted in Ian Davis, Chrissie Hirst and Bernardo Mariani, *Organised crime, corruption and illicit arms trafficking in an enlarged EU, Challenges and perspectives* (2001).

160 Williams ‘Anticipating organized and transnational crime’ (n 135) 311, 314.

161 Williams ‘Anticipating organized and transnational crime’ (n 135) 312.

The great diversity in legislation, export control systems, documentation and levels of enforcement between the different states makes coordinating transfers between them challenging, especially for transit countries because they have difficulty in determining the authenticity of the transfer.¹⁶² This ultimately renders it near impossible to intercept an illicit transfer without prior knowledge.¹⁶³ A possible remedy may lie in the improvement of information exchange between the countries. This would facilitate the process of verification and help licensing officials determine the authenticity of documents.¹⁶⁴ Combining information exchange with the application of best practice guidelines and international standards for documentation could go a long way in recognising illicit transfers and preventing diversion.¹⁶⁵ To ensure any applicable guidelines are enforced, countries needing assistance should receive help. Such capacity building measures should encompass the assistance and education of customs and other enforcement officials in recognising questionable transactions and investigating shipments and paper trails.¹⁶⁶ This way, illicit transfers could be recognised and the authorities could intercept them earlier. Additionally, increasing transparency should be a goal, for this may also make it harder to obscure the illegality of an illicit transfer. One potential approach may be the further development of the UNROCA. The expansion of the register's scope should be considered in order for it to cover a broader variety of weapons and increase its adaptability to new challenges in the future.¹⁶⁷ Participation in the reporting of transfers should be encouraged as well, the long-term goal being universal participation.¹⁶⁸

Ultimately, restrictions and controls create the illicit markets, as the demand for conventional weapons remains. Unfortunately, the traffickers always seem to be one step ahead; as soon as officials uncover information, the perpetrators change the route and method of their smuggling enterprise¹⁶⁹, effectively vanishing out of sight again. The more officials seeking to uncover the illicit trade in conventional arms know about the happenings,

162 Bromley and Griffiths (n 57) 13.

163 *Ibid.*

164 *Ibid.*

165 *Ibid.* 12.

166 Lustgarten (n 6) 11.

167 UN Office for Disarmament Affairs (n 90) 37.

168 *Ibid.* 30–31.

169 Curtis and Karacan (n 35) 2.

the better their chance of anticipating the reaction of the traffickers. This is why it is crucial to obtain as much knowledge and data and to fill as many gaps concerning the illicit trade in conventional arms as possible.

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The United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition

LISA ARMBERGER

This article provides a critical overview and analysis of the *United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* ('*Firearms Protocol*') and examines the barriers to ratification in order to determine a potential future for this underutilised instrument. It is demonstrated that despite valid criticism of its provisions and ratification, the *Firearms Protocol* offers substantial regulatory benefits in comparison to other instruments and is most successful in regulating the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition. This article argues that this is due to the *Firearms Protocol* being specifically adapted to transnational organised crime and particularly responsive to emerging threats and technological trends, inter alia dark web purchases and 3D-printing of firearms. It is further suggested that the relevance of the *Firearms Protocol* may increase in the future, as the recently launched *Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* will help address a number of the barriers to ratification.

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1. Introduction

The *United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (*Firearms Protocol*),¹ supplementing the United Nations Convention against Transnational Organised Crime, was the first international instrument addressing the threat of firearms on a global scale and is, to date, the only instrument in the field adapted specifically to prevent and

1 Opened for signature 31 May 2001, 2326 UNTS 206 (entered into force 3 July 2005).

combat organised crime. However, the *Firearms Protocol* has failed to garner widespread support, especially from major arms producers and exporters, within the past two decades since its opening for signature. As a result, it is often criticised as unnecessary and little attention is paid to it by international organisations, states, as well as academics. Likewise, current, independent, and critical evaluations of the *Firearms Protocol* are lacking. It seems as though the international community has forgotten about it.

This article will provide a critical overview and analysis of the legal instrument and explore the reasons for the failures to ratify, as well as examine the potential future of the *Firearms Protocol*, in order to assess whether the instrument should be reanimated or if its slow death is justified. To do so, the article will, firstly, provide some historical context and background information of the development of the *Firearms Protocol*. Secondly, the key provisions of the *Firearms Protocol* will be evaluated, thereby pointing out achievements and limitations of the requirements. In a third step, potential barriers to the ratification will be identified to provide insights into the lack of international support. Lastly, the *Firearms Protocol* will be compared and contrasted to alternative international initiatives, which will help to identify unique strengths of the *Firearms Protocol* and provide reasons for ratification or accession.

For this purpose, a variety of primary and secondary sources were consulted. The provisions of the *Firearms Protocol* itself, as well as the *travaux préparatoires*, the Legislative Guides and the Interpretative note, along with numerous additional United Nations documents and resolutions formed the basis of the most definitive arguments included in this article. Expanding upon these materials, academic critique and commentary in the form of secondary sources were also consulted and included as part of the discussion beyond the text of the *Firearms Protocol*. Additionally, the chapter on barriers to ratification draws from the structure of existing comparable analyses of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* ('*Trafficking in Persons Protocol*')² and the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations*

2 Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

*Convention against Transnational Organized Crime ('Smuggling of Migrants Protocol')*³.

2. Context and Development

Before 1994, the international community had focussed upon nuclear disarmament and the prohibition of certain indiscriminate weapons.⁴ This focus of attention was potentially a consequence of the Cold War and the constant imminent threat of a nuclear disaster. After the end of the Cold War, the availability of firearms increased while their prices decreased since large quantities of surplus stocks from states formerly part of the Soviet Union were offered for sale.⁵ The international community was suddenly confronted with large-scale private actor possession of firearms. Towards the end of the 20th century, most countries had adopted national legislation to regulate small arms and light weapons, but there was no international framework facilitating their international regulation.⁶ Therefore, attempts to regulate small arms and light weapons at a global level gained considerable momentum, which is, inter alia, demonstrated by the following initiatives. In 1995, the United Nations (UN) Commission on Crime Prevention and Criminal Justice launched the UN Study on Firearms Regulation to highlight the magnitude of the problem of illicit firearms trafficking and related criminal activities, with the aim of promoting the need for an international instrument to regulate the manufacturing of and trafficking in firearms, their parts and components, and ammunition.⁷ At the same time, the Organization of American States

3 Opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004).

4 Aaron Fellmeth, 'Part II UN Core Conventions on Transnational Organised Crime, 10 The UN Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001' in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (2016) 199.

5 Holger Anders, 'The UN Process on Small Arms: All Is Not Lost' (2007) 37(2) *Arms Control Today*, 17, 17.

6 Fellmeth (n 4) 199.

7 James Hayes, 'The United Nations Firearms Protocol' in International Centre for Criminal Law Reform and Criminal Justice Policy (ed), *The Changing Face of International Criminal Law: Selected Papers* (2002) 127, 130–132.

(OAS) Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition⁸ were developed by the Inter-American Drug Abuse Control Commission (CICAD). In 1997, the *Inter-American Convention Against Illicit Trafficking and Production of Firearms, Ammunition, Explosives and Other Related Materials (OAS Convention)*⁹ was signed, which most of the provisions eventually included in the *Firearms Protocol* were modelled after. The commitment of the international community to counter the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition was further confirmed by the G8 summits of 1997 and 1998, where the heads of state of eight major world economies met to discuss economic and political issues, including the threat of transnational organised crime.¹⁰

Following these efforts, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime was established by the General Assembly by its resolution 53/111 on 9 December 1998.¹¹ The Ad Hoc Committee was tasked with finalising the drafts of the Organized Crime Convention and its protocols, including the *Firearms Protocol*, and submitting them to the Assembly for adoption. The Ad Hoc Committee started working on the drafts on 19 January 1999 and held a total of twelve sessions. The *Firearms Protocol* was eventually adopted by the UN General Assembly at its 55th session in resolution 55/255 on 31 May 2001¹² and opened for signature on 2 July 2001, becoming the first legally binding instrument addressing firearms manufacturing and trafficking at a global level. It entered into force on 3 July 2005 and supplements the *UN Convention against Transnational Organized Crime ('UNTOC')*.¹³ The *Firearms Protocol* focusses on illicit manufacturing, trafficking, and offences

8 OAS, *Model Regulation for the Control of the International Movement of Firearms, their Arts and Components and Ammunition*, OAS/Ser. L/XIV.2.22, CICAD/ doc. 905/97 (5 November 1997).

9 Opened for signature 11 November 1997, A-36 (entered into force 1 July 1998).

10 Hayes (n 7) 125–134.

11 UN General Assembly, *Resolution adopted by the General Assembly on 9 December 1998: Transnational organized crime*, UN Doc A/RES/53/111 (20 January 1999).

12 UN General Assembly, *Resolution adopted by the General Assembly on 31 May 2001: Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/RES/55/255 (8 June 2001).

13 Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

regarding markings related to firearms that are transnational in nature and involve an organised criminal group.

The overarching purpose of the *Firearms Protocol* is to ‘promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition’¹⁴. To this end, it provides a legal framework to regulate and monitor licit trade, prevent the diversion of licit firearms into the illegal market, and facilitate the investigation and prosecution of offences under the *Firearms Protocol*, inter alia, by providing technical assistance and calling upon states parties to exchange information.

However, two decades since the *Firearms Protocol* was opened for signature, it only counts 122 parties,¹⁵ with major firearms manufacturing states, such as the United States and Canada,¹⁶ failing to sign or ratify this treaty, as can be seen in the map below.

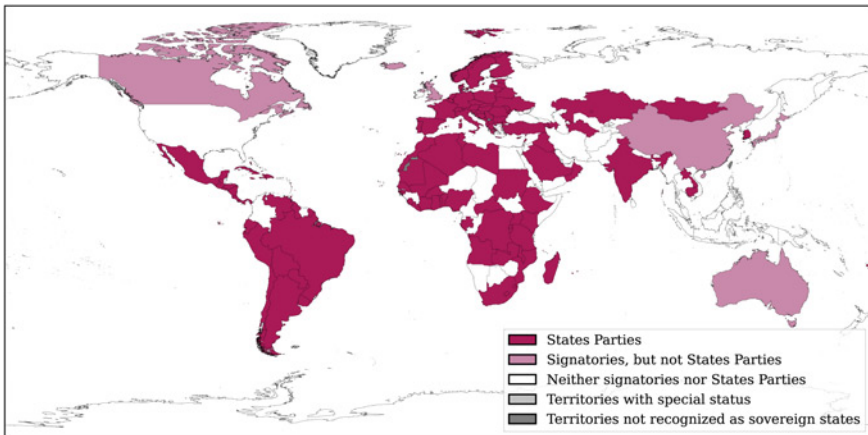


Figure 1: Ratification Status of the Firearms Protocol

¹⁴ Ibid art 2.

¹⁵ As of 31 Juli 2022; including the European Union.

¹⁶ Fellmeth (n 4) 210, 214.

3. Key Provisions

The *Firearms Protocol* is divided into four parts, namely the preamble, general provisions, prevention, and final provisions. Only the most important general and prevention provisions will be discussed in the following in order to give an overview of the content of the *Firearms Protocol* and to provide a critical analysis of its key requirements.

3.1. Scope

Article 4: Scope of application

1. *This Protocol shall apply, except as otherwise stated herein, to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to the investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group.*

2. *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.*¹⁷

3.1.1. Beyond transnational organised crime

While the final text of the article does not limit the scope to transnational organised crime, a few delegations proposed to do so during the negotiations of this article.¹⁸ This proposal was rejected by most delegations arguing that ‘in order to control trafficking in firearms, it was necessary to monitor and place restrictions on all firearms trade, in order to determine what was legal and what was not’¹⁹. In addition, some delegations expressed the concern that strictly limiting the *Firearms*

¹⁷ *Firearms Protocol*, art 4.

¹⁸ This includes the Syrian delegation; Algeria, France, Germany and the Netherlands stated that it ‘should not go beyond the mandate set forth by the General Assembly’; Colombia proposed to limit the scope to ‘illegally manufactured and traded firearms’; see UN Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the protocols thereto* (2006) 625–629.

¹⁹ Such delegations included the US, UK, Sweden, Croatia, Ecuador; Ibid; Fellmeth (n 4) 211.

Protocol to organised crime might lead to technical difficulties.²⁰ The *Firearms Protocol* as eventually adopted applies to all – including legal – firearms manufacturing and trafficking. This was an important achievement in increasing its efficacy, as the wider application facilitates the effective prosecution of offences under the *Firearms Protocol*, which would otherwise have been impeded.

3.1.2. Exemptions from application

Article 4(2) contains two exemptions from the application of the *Firearms Protocol*, specifically state-to-state transactions and state transfers where the application would prejudice the rights of states to take action in the interest of national security consistent with the UN Charter. Regarding the former, delegations generally supported the exclusion of state-to-state transactions during the drafting process, since this limited the scope to crime control rather than arms control.²¹ Whilst there were some concerns about the meaning of the term ‘state-to-state transactions’, most delegations agreed that the term should entail transfers between governments, but not transfers by non-state organisations, including entities owned or operated by states, or individuals.²² A note included in the *travaux préparatoires* further clarifies that the term only refers to transactions in a sovereign capacity.²³ On the one hand, this exemption results in the *Firearms Protocol* neglecting the arguably most significant form of firearms transactions,²⁴ thereby potentially negatively impacting its relevance and effectiveness in tackling firearms-related crime. On the other hand, the focus upon crime control rather than arms control was

20 Such delegations being Mexico, the Republic of Korea and Turkey; UN Office on Drugs and Crime (n 18) 625.

21 UN Office on Drugs and Crime (n 18) 627.

22 *Ibid.*

23 *Ibid* 630; UN General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 12th Session, UN Doc A/55/383/Add.3 (21 March 2001) 2.

24 Daniel Salton, ‘Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking Note’ (2013) 46(1) *Connecticut Law Review* 369, 391.

paramount to the adoption of the *Firearms Protocol*, as it made the instrument less political than other initiatives and fostered compromise between the negotiating states. Without this crime control approach, the adoption of a number of provisions would have been improbable.

In relation to the second exemption, there was considerable debate about the phrase ‘for purposes of national security’ as included in the original Canadian proposal at the informal consultations held during the eighth session of the Ad Hoc Committee. Some delegations viewed it as redundant or were concerned that it would authorise transfers by individuals or non-state organisations in certain cases. During the negotiations, it was discussed that the phrase should cover situations where military forces travelled across borders with their firearms, as well as where personal protection officers and bodyguards travel with senior officers. These examples were acceptable for most delegations.²⁵ However, the wording was neither defined further nor clarified in the interpretative notes. At the eleventh session of the Ad Hoc Committee, the phrase ‘consistent with the Charter of the United Nations’ was added,²⁶ which suggests that ‘interest of national security’ refers to the right of self-defence under the UN Charter.²⁷ Nonetheless, it is unclear to what extent this added wording can be reconciled with the discussion on the provision during the informal consultations. Consequently, it remains unclear which transfers are covered by this exemption and, hence, do not fall within the scope of the *Firearms Protocol*. This uncertainty may hinder the complete and harmonised implementation of it.

Aaron Fellmeth raises the point that the exemptions would anyway be redundant vis-à-vis the reference to organised criminal groups in Article 4(1) of the *Firearms Protocol*, unless the state itself might be considered an organised criminal group.²⁸ However, this argument does not take into account that certain obligations under the *Firearms Protocol*, in particular the trade and tracing provisions, apply to legal firearms trade as well. Therefore, the vague exemptions to the application of the *Firearms Protocol* can be regarded a considerable weakness of the instrument.

²⁵ UN Office on Drugs and Crime (n 18) 628.

²⁶ Ibid.

²⁷ Opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 51.

²⁸ Fellmeth (n 4) 207.

3.2. Offences

Article 5: Criminalisation

1. Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

- (a) Illicit manufacturing of firearms, their parts and components and ammunition;
- (b) Illicit trafficking in firearms, their parts and components and ammunition;
- (c) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

- (a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
- (b) Organising, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.²⁹

Article 5 of the *Firearms Protocol* requires states parties to criminalise certain conduct, as stated above, in order to facilitate its enforcement. Similarly to the discussion on the scope, there was considerable debate on limiting the criminalisation provisions to acts done 'in connection with a criminal organisation'³⁰. The proposal was eventually rejected for being unnecessarily restrictive.³¹ As a consequence, the final text of the article requires the criminalisation of conduct independent of the elements of transnationality or organised crime,³² despite the scope the *Firearms Protocol* being limited to offences that are transnational in nature and involve an organised criminal group.³³ This helps prevent additional evidentiary burden for law enforcement authorities and facilitates the effective prosecution of such crimes.

Although the rejection of the proposal can be regarded a major strength of the criminalisation obligations, the provision as eventually adopted may be

29 *Firearms Protocol*, art 5.

30 UN Office on Drugs and Crime (n 18) 632.

31 *Ibid* 635.

32 UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 411.

33 *Firearms Protocol*, art 4(1).

considered disappointing nevertheless. In comparison to the criminalisation obligations of other instruments on organised crime, in particular the *UNTOC*,³⁴ Article 5 of the *Firearms Protocol* lacks detail and leaves much at the discretion of states parties. While Article 3 further defines the terms ‘manufacturing’ and ‘trafficking’ mentioned in Article 5, the terms included in the definitions, such as ‘import’ or ‘export’, should be interpreted consistent with domestic law and international standards.³⁵ Therefore, harmonised international criminalisation will most likely be lacking. This caution to barely intervene in domestic legal systems is a characteristic found throughout the *Firearms Protocol*. Moreover, the strengths of the *Firearms Protocol* are rather found in the areas of international trade and cooperation, hence giving it the nature of a trade agreement. However, the focus on the cross-border movement is not necessarily a weakness and is mirrored in the purpose of the *Firearms Protocol*.³⁶

Furthermore, the criminalisation requirements under the *Firearms Protocol* do not contain a clause similar to Article 5(2) of *UNTOC* stating that knowledge, intent, aim, purpose or agreement may be inferred from objective factual circumstances. As a result, it may be difficult to prove the required intent in case states do not decide to incorporate a comparable clause themselves. This might further negatively impact the effective prosecution of firearms-related crime.

3.3. Trade and Tracing

Understanding the supply of firearms is essential for developing effective prevention measures. Wendy Cukier identified three main sources of firearms used in criminal activity; the misuse of legal firearms, the illicit manufacture and trafficking of firearms, and, most importantly, the diversion of firearms through theft.³⁷ In addition to identifying the origin and gaining insights into the flow of illicit firearms, provisions on trade and tracing are essential in creating a documentary chain necessary to help the investigation and prosecution of offences under the *Firearms*

34 *UNTOC*, art 5, 6, 8, and 23.

35 UN Office on Drugs and Crime (n 32) 484.

36 *Firearms Protocol*, art 2.

37 Wendy Cukier, ‘International fire/small arms control’ (1998) 6(1) *Canadian Foreign Policy Journal* 79.

Protocol and for evidentiary purposes in criminal proceedings. Therefore, adequate marking, record-keeping, and international cooperation provisions are paramount in curbing firearms-related crime.³⁸

3.3.1. Record-keeping

Article 7: Record-keeping

Each state party shall ensure the maintenance, for not less than ten years, of information in relation to firearms and, where appropriate and feasible, their parts and components and ammunition that is necessary to trace and identify those firearms and, where appropriate and feasible, their parts and components and ammunition which are illicitly manufactured or trafficked and to prevent and detect such activities. Such information shall include:

(a) *The appropriate markings required by article 8 of this protocol;*

(b) *In cases involving international transactions in firearms, their parts and components and ammunition, the issuance and expiration dates of the appropriate licences or authorisations, the country of export, the country of import, the transit countries, where appropriate, and the final recipient and the description and quantity of the articles.*³⁹

The keeping of records is of particular importance in preventing the diversion of firearms into the illegal markets. This is, *inter alia*, demonstrated by the rejection of the proposal by some delegations to reduce the required record-keeping period to five years.⁴⁰ The majority of delegations were concerned about reducing the period, recognising that firearms were very durable and, thus needed to be traceable over long periods.⁴¹ Still, the period of ten years as included in the final text of Article 7 might potentially not cover the whole lifespan of a firearm and the article would have benefitted from more expansive record-keeping requirements. However, the inclusion of the record-keeping obligation may nonetheless be regarded a strength of the *Firearms Protocol*.

The provision would have further been improved by the incorporation of additional specifics. The article neither includes details on who or what

38 Michael Bourne, 'Transnational Trafficking in Weapons' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (2014) 96.

39 *Firearms Protocol*, art 7.

40 These delegations were Mexico, Syria, and the US; UN Office on Drugs and Crime (n 18) 643–644.

41 *Ibid* 643.

institution shall keep the records, nor on how they should be kept. While the original Canadian proposal, for instance, required states parties to use their best efforts to computerise records, this was not included in the adopted provision since it was considered too difficult for developing countries.⁴² Likewise, the information required to be kept is not to be viewed as an exhaustive list, but rather as a minimum standard and states parties should consider collecting additional information in order to guarantee the effective tracing of firearms. Furthermore, Article 7 lacks details on the prevention of the destruction of or tampering with records,⁴³ from which the criminalisation provision would potentially have also benefitted. In contrast to other international attempts to record and trace firearms, in particular the Interpol Firearms Reference Table and the Illicit Arms Records and tracing Management System,⁴⁴ the provision of the *Firearms Protocol*, thus, provides only little guidance to states parties. It also does not arrange for a centralised database where law enforcement officers can access the records of other states parties relevant to ongoing investigations. However, improvements to the record-keeping could be made as part of future technical assistance efforts.

42 Ibid 644.

43 See also Fellmeth (n 4) 208.

44 The Interpol Firearms Reference Table is an online tool facilitating the tracing and identification of firearms. The table, inter alia, encompasses references and images of firearms, information on markings, and definitions of parts and components. Authorized users can conduct searches or make trace requests using unique identifiers of firearms. The Interpol Firearms Reference Table is part of the Illicit Arms Records and tracing Management System (iARMS). iARMS is a database containing over one million firearm records. It is divided into three components, namely The Firearm Records Module, used for international communication of lost, stolen, trafficked, and smuggled firearms, The Trace Request Module, used to facilitate international firearm trace requests, and The Statistics and Reports Module, supporting member states of INTERPOL to analyse data on firearm-related crime and tracing, and to create corresponding reports. Police services, customs agencies, border protection agencies and regulatory authorities may be granted access to the database.

3.3.2. Marking

Article 8: Marking of firearms

1. For the purpose of identifying and tracing each firearm, states parties shall:

(a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all states of the country of manufacture;

(b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;

(c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all states parties of the transferring country.

2. States parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings.⁴⁵

Article 8 was very controversial and subject to considerable debate during the negotiations. The initial Canadian draft was much simpler than the one finally adopted, yet some delegations, most importantly the United Kingdom and the United States, called for more detailed requirements, in particular in relation to the import markings.⁴⁶ However, there were issues, inter alia, the compatibility of systems, the necessity of repeated markings, the marking of ammunition, the content of the markings, and the application of the requirements to firearms exclusively manufactured for the military, which met resistance from a number of delegations, especially from China.⁴⁷ The complexity of the issues is underlined by the fact that delegations asked for input from experts on technical issues, including the UN Panel of Governmental Experts on Small Arms, the Department of Disarmament Affairs of the UN Secretariat, relevant NGOs and the firearms manufacturing industry.⁴⁸ Due to the complicated negotiating history, the amount of detail included in the finally adopted

⁴⁵ *Firearms Protocol*, art 8.

⁴⁶ UN Office on Drugs and Crime (n 18) 649–651.

⁴⁷ *Ibid* 649–658.

⁴⁸ UN Office on Drugs and Crime (n 18) 650.

article, such as the content of markings or the marking on the time of import, is to be viewed as a major success.

Nonetheless, there would have been room for improvement. Although the marking of ammunition was discussed during the negotiations, it was not included in the adopted provision, most likely for financial reasons.⁴⁹ The marking requirement of the *Firearms Protocol* therefore only applies to firearms, not to parts and components, and ammunition. Yet, states parties are required to keep records of marking information of parts and components, and ammunition, where appropriate and feasible, under Article 7 of the *Firearms Protocol*. The practical implications of this lack of consistency are unclear and negatively impact the effective implementation of the *Firearms Protocol*, as well as the identification and the tracing of firearms. David McClean alleges that the relationship to Article 7 was given less consideration due to the lengthy process of finalising Article 8.⁵⁰ More guidance should be given to states parties on how to implement these articles in relation to each other.

Additionally, while the exemption or the application of a different standard for firearms exclusively manufactured for security or military forces were discussed,⁵¹ corresponding wording was not included in the present article. The *Firearms Protocol* benefitted from this exclusion, as the marking of firearms manufactured for the military is paramount in preventing diversion. However, the negotiating history of this issue might obscure the interpretation of Article 8(1)(c) of the *Firearms Protocol*. Since such firearms are not expressly exempted, the general marking requirements at the time of manufacture and import⁵² seem to apply. Consequently, the subparagraph (c) would place an additional obligation upon states parties to require a unique mark permitting the identification of the transferring state.⁵³ This wording was proposed by the chairman of the Ad Hoc Committee at its eleventh session, but no detailed discussion points are

49 The United States has mentioned that it is opposed to the Protocol since the regulation of ammunition would be difficult and costly according to Fellmeth (n 4) 210. While the *travaux préparatoires* do not mention the exact reason why the marking of ammunition was rejected, it can be inferred that it was considered too expensive.

50 David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 475.

51 UN Office on Drugs and Crime (n 18) 653–654.

52 *Firearms Protocol*, art 8(1)(a) and (b).

53 McClean (n 50) 476.

included in the *travaux préparatoires*. However, bearing in mind the negotiating history, it seems unlikely that consent on additional obligations was reached, when delegations had argued for simpler marking requirements for firearms exclusively manufactured for military and security forces in earlier sessions. Due to the controversy surrounding this issue, one could argue that textual interpretation might not mirror the intention of the Ad Hoc Committee. This may obscure the interpretation of the provision and lead to inconsistent implementation of the *Firearms Protocol*, thereby negatively impacting its effectiveness. More guidance on the correct implementation of Article 8 should be given to states.

Lastly, although states parties are obliged to encourage the manufacturing industry to develop measures to prevent the removal or alteration of markings,⁵⁴ the provision does not entail specifics on what such encouragement or measures should look like, thereby severely limiting the impact of this paragraph.

3.3.3. Deactivation

Article 9: Deactivation of firearms

A state party that does not recognise a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms, consistent with the following general principles of deactivation:

(a) All essential parts of a deactivated firearm are to be rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way;

(b) Arrangements are to be made for deactivation measures to be verified, where appropriate, by a competent authority to ensure that the modifications made to a firearm render it permanently inoperable;

(c) Verification by a competent authority is to include a certificate or record attesting to the deactivation of the firearm or a clearly visible mark to that effect stamped on the firearm.⁵⁵

While this provision has been discussed less during negotiations and in research, it is paramount to preventing the illicit trafficking of firearms. In the past, organised criminal groups have exploited the loophole regarding

⁵⁴ *Firearms Protocol*, art 8(2).

⁵⁵ *Ibid* art 9.

deactivated firearms to evade import controls in states with tighter firearms regulation.⁵⁶ Following the transport across the border, firearms would be reactivated. While the original Canadian proposal only called for states to ‘consider taking the necessary measures to prevent the reactivating of deactivated firearms, including through criminalisation, if appropriate’, there was general support for attempting to specify an agreed standard following a proposal by the United Kingdom.⁵⁷ The ultimately adopted provision, which was drafted by the UK and mirrored its domestic practice,⁵⁸ is unique to the *Firearms Protocol* and therefore, a significant strength of the instrument that should not be underestimated.

3.3.4. Trade requirements

Article 10: General requirements for export, import and transit licensing or authorisation systems

1. Each state party shall establish or maintain an effective system of export and import licensing or authorisation, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition.

2. Before issuing export licences or authorisations for shipments of firearms, their parts and components and ammunition, each state party shall verify:

(a) That the importing states have issued import licences or authorisations; and

(b) That, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked states, the transit states have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.

3. The export and import licence or authorisation and accompanying documentation together shall contain information that, at a minimum, shall include the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the firearms, their parts and components and ammunition and, whenever there is transit, the countries of transit. The information contained in the import licence must be provided in advance to the transit states.

4. The importing state party shall, upon request, inform the exporting state party of the receipt of the dispatched shipment of firearms, their parts and components or ammunition.

56 [s.n.], ‘The UN “Firearms Protocol”: Addressing the trafficking problem’ (2001) 7(6) in *Strategic Comments* 1.

57 UN Office on Drugs and Crime (n 18) 661.

58 McClean (n 50) 478.

5. Each state party shall, within available means, take such measures as may be necessary to ensure that licensing or authorisation procedures are secure and that the authenticity of licensing or authorisation documents can be verified or validated.

6. States parties may adopt simplified procedures for the temporary import and export and the transit of firearms, their parts and components and ammunition for verifiable lawful purposes, such as hunting, sport shooting, evaluation, exhibitions or repairs.

Article 11: Security and preventive measures

In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each state party shall take appropriate measures:

(a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and

(b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation.⁵⁹

Article 10 aims at preventing the theft and diversion of firearms, their parts and components, and ammunition while transported across borders by introducing comprehensive procedural requirements. The importance of this article was recognised by the majority of the delegations during the negotiations and there was general agreement on the necessity of import and export controls.⁶⁰ The content requirements of import and export licences and authorisations,⁶¹ which were proposed by the United States during the third session of the Ad Hoc Committee,⁶² provide important guidance to states parties to effectively implement the *Firearms Protocol*. This article, together with the marking obligation, is arguably the most significant part of the *Firearms Protocol*,⁶³ and a major selling point for ratification and accession.

Despite the importance of the provision and the inclusion of additional detail, some issues remain. Importantly, the term 'transit' is not defined in the *Firearms Protocol* despite being subject to considerable discussion. Japan noted that 'transit' requires a clear definition, which should not encompass an 'aircraft merely flying over the territory of the state party; a ship making innocent passage through territorial waters; [an] aircraft in

59 *Firearms Protocol*, art 10, 11.

60 UN Office on Drugs and Crime (n 18) 667.

61 *Ibid* 665.

62 *Ibid* 666.

63 Hayes (n 7) 128, 134.

transit through an airport of the state party; or a ship in transit through the seaport of the State Party⁶⁴. South Korea, Australia and the Netherlands supported this call for clarification,⁶⁵ as did a working group at the seventh session of the Ad Hoc Committee.⁶⁶ Still, a definition was not included in the ultimately adopted version of the *Firearms Protocol*, thereby negatively impacting the effective implementation of this provision. Likewise, while paragraph (6) contains a non-exhaustive list of examples, the vague phrase ‘for verifiable lawful purposes’ is not fully defined.

In addition, Article 10 would have benefitted from a further institutionalisation of the import and export controls, including making the receipt reporting as outlined in paragraph (4) compulsory,⁶⁷ or incorporating procedural requirements for the re-export of firearms, their parts and components, and ammunition, as discussed during the negotiations.⁶⁸ Likewise, paragraph (5) lacks specifics on what ‘measures as may be necessary to ensure that licensing or authorisation procedures are secure and that the authenticity of licensing or authorisation documents can be verified or validated’ exactly entail in practice and gives little guidance to states. Additional detail would be necessary to ensure the effective implementation of this paragraph.

Moreover, Article 11 provides little to no guidance to states parties and leaves the nature of the required measures at their discretion. Specifying such measures, inter alia, by incorporating agreed upon security standards, would have been favourable. Each of these additions would have strengthened the provisions and further prevented the diversion of firearms, their parts and components, and ammunition in transit.

64 UN Office on Drugs and Crime (n 18) 666.

65 Ibid 668.

66 Ibid 669.

67 Fellmeth (n 4) 209.

68 The United States proposed a paragraph requiring states parties to obtain written consent by the exporting state before authorising the re-export, retransfer, trans-shipment or other disposition not included in the original export licence. This proposal was supported by the Holy See, Italy, the Philippines, and Turkey, but objected by China, Pakistan and the Republic of Korea. The Netherlands suggested approval only in cases where exporting countries explicitly requested it and Nigeria proposed that re-exporting states should submit written explanations containing the reason for and the destination of the re-export. The proposal to regulate re-export was eventually rejected for its implications for the sovereignty of states parties; see UN Office on Drugs and Crime (n 18) 668–670.

Lastly, it should be noted that the efficacy of the framework on international transactions strongly depends upon the wide-spread ratification and implementation of the *Firearms Protocol*. As the procedural requirements under Article 10 prevent theft and diversion and increase the risk for organised criminal groups to be detected, the groups may attempt to circumvent these provisions by moving their illicit activities to states where such procedural requirements are not in place. Avoiding the transaction controls may, however, become more difficult if more states become party to and effectively implement the *Firearms Protocol*, thereby ensuring a comprehensive application of its obligations.

3.4. International Cooperation

Article 12: Information

1. *Without prejudice to articles 27 and 28 of the Convention, states parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant case-specific information on matters such as authorised producers, dealers, importers, exporters and, whenever possible, carriers of firearms, their parts and components and ammunition.*

2. *Without prejudice to articles 27 and 28 of the Convention, states parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:*

(a) *Organised criminal groups known to take part or suspected of taking part in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition;*

(b) *The means of concealment used in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition and ways of detecting them;*

(c) *Methods and means, points of dispatch and destination and routes customarily used by organised criminal groups engaged in illicit trafficking in firearms, their parts and components and ammunition; and*

(d) *Legislative experiences and practices and measures to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.*

3. *States parties shall provide to or share with each other, as appropriate, relevant scientific and technological information useful to law enforcement authorities in order to enhance each other's abilities to prevent, detect and investigate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to prosecute the persons involved in those illicit activities.*

4. States parties shall cooperate in the tracing of firearms, their parts and components and ammunition that may have been illicitly manufactured or trafficked. Such cooperation shall include the provision of prompt responses to requests for assistance in tracing such firearms, their parts and components and ammunition, within available means.

5. Subject to the basic concepts of its legal system or any international agreements, each state party shall guarantee the confidentiality of and comply with any restrictions on the use of information that it receives from another state party pursuant to this article, including proprietary information pertaining to commercial transactions, if requested to do so by the state party providing the information. If such confidentiality cannot be maintained, the state party that provided the information shall be notified prior to its disclosure.

Article 13: Cooperation

1. States parties shall cooperate at the bilateral, regional and international levels to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

2. Without prejudice to article 18, paragraph 13, of the Convention, each state party shall identify a national body or a single point of contact to act as liaison between it and other states parties on matters relating to this Protocol.

3. States parties shall seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect the illicit activities referred to in paragraph 1 of this article.⁶⁹

The obligations to exchange information are arguably the strongest part of the *Firearms Protocol*, for they are exceptionally comprehensive, in particular when recognising that they supplement and apply in addition to the cooperation requirements of the *UNTOC*.⁷⁰ The inclusion of ‘case-specific information’ promotes close and customised cooperation between states parties, which sets the *Firearms Protocol* apart from other comparable instruments and facilitates the detection and prevention of offences under Article 5. Similarly, the paragraph on cooperating in tracing is central to preventing the diversion of firearms, their parts and components, and ammunition.

69 *Firearms Protocol*, art 12, 13.

70 States must be parties to the *UNTOC* in order to be able to become party of the *Firearms Protocol*. Therefore, the provisions of the *UNTOC*, including the most important cooperation requirements as stated in Articles 18, 26, 27, and 28, also apply to all States Parties of the *Firearms Protocol*.

Notwithstanding the mandatory nature of the Article 12, the inclusion of the savings clause ‘consistent with their respective domestic legal and administrative systems’⁷¹ might bar the effective implementation of the article and full disclosure of information. David McClean points out that this might particularly apply to disclosing sources of information.⁷²

Whilst the information-sharing requirements are rather detailed, Article 13 offers little guidance to states parties. It merely entails a general call for cooperation in paragraph (1) and while paragraph (3) requires states parties to cooperate with manufacturers, dealers, importers, exporters, brokers and commercial carriers, no guidance is given on what ‘support and cooperation’ shall entail in practice. This is a missed opportunity to improve the *Firearms Protocol* by ensuring the effective cooperation with the private sector, thus facilitating the prosecution of firearms-related crime. Additionally, in contrast to the *UNTOC*, the *Firearms Protocol* neither outlines how to make cooperation requests, nor the content of such requests, although it would make sense if the procedures described in Article 18 of the *UNTOC* also applied to the *Firearms Protocol*, since it is to be interpreted together with the main instrument.⁷³

4. Ratification

Throughout the past two decades, the *Firearms Protocol* has only garnered the support of 122 Parties,⁷⁴ making it the least ratified of the four instruments on organised crime. However, wide-spread ratification is essential to the effective implementation of the *Firearms Protocol*. Despite it providing substantial leeway regarding the details of its implementation, the ratification will arguably be the first step in accepting and complying with the requirements therein.⁷⁵ Harald Koh, for instance, suggested that the compliance with international obligations may stem from the

71 *Firearms Protocol*, art 12(2).

72 McClean (n 50) 489.

73 *Firearms Protocol*, art 1(1).

74 As of 31 July 2022, including the European Union.

75 Andreas Schloenhardt and Ellen Bevan, ‘To Ratify or Not to Ratify? Exploring the Barriers to Wider Ratification of the Trafficking in Persons Protocol’ (2011) 9 *New Zealand Yearbook of International Law*, 626, 167.

normalisation of these obligations via the interaction between states,⁷⁶ which further underlines the role of widespread ratification. Likewise, a number of provisions, especially the transfer system, depends upon the widespread ratification and implementation in order to prevent organised criminal groups from circumventing the controls to be set in place by states parties. The following chapter analyses the current states parties and potential barriers to ratification, in order to explain the reservations of non-party states and assist wider ratification. It should be noted that the analysis might not in fact reflect the actual barriers to ratification by certain non-party states and only draws upon the concerns raised in the *travaux préparatoires*, as well as academic commentary. The reasoning may also not be generalised to apply to all non-party states.

4.1. Current Non-Party States

As stated above, the *Firearms Protocol* has failed to garner widespread international support and currently only counts 122 parties. It should be noted that the ratification is only an option for states parties to the *UNTOC*, which is in turn only possible for territories recognised as sovereign states within the UN system, thereby excluding states such as Kosovo and Taiwan. Yet, there are currently 190 states parties to the *UNTOC*,⁷⁷ meaning that 68 states parties to the *UNTOC* have failed to become party to the *Firearms Protocol*.

Interestingly, the ratification of the *Firearms Protocol* does not correlate with the level of development of states, contrary to the ratification of the *Trafficking in Persons Protocol* and the *Smuggling of Migrants Protocol*.⁷⁸ Western and some of the most developed Asian countries, often major firearms manufacturers and exporters with considerable political influence, make up a significant number of non-party states. As such Canada, China, Israel, Japan, Russia, South Korea, and – potentially most importantly –

76 Ibid 166, quoting Harold Koh, 1998 *Frankel Lecture: Bringing international law home* (1998) 626.

77 As of 31 July 2022, including the European Union.

78 See Schloenhardt and Bevan (n 75) 161–184; see also Andreas Schloenhardt and Hamish MacDonald, 'Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants' (2017) 7 *Asian Journal of International Law* 13, 13–38.

the United States are all non-party states.⁷⁹ Their lack of ratification reduces the radius of application and indirectly the number of firearms that fall under the provisions, thus negatively affecting the relevance of the instrument.

Due to the unique composition of the non-party states, the analysis of the reasons for the wide failure of ratification is exceptionally important, as it might provide new insights into failures of states to ratify international agreements.

4.2. Barriers to ratification

4.2.1. Concerns raised during the negotiations

The *Firearms Protocol* proved very difficult to negotiate and was subject to prolonged deliberation, which is evident from the fact that in contrast to the other three organised crime instruments, which were adopted on 15 November 2000, the *Firearms Protocol* was adopted on 31 May 2001, over half a year later. This suggests that the topics included were highly controversial and could not be discussed sufficiently to reach consensus within the available time frame.⁸⁰ Therefore, the issues that were subject to particularly lengthy debate might provide insights into the reasons states failed to ratify or accede to the *Firearms Protocol*.

4.2.1.1. Scope of the Firearms Protocol

Especially the scope of the *Firearms Protocol* was extensively discussed due to conflicting views of the delegations and even the compromise reflected in the ultimately adopted article was not able to reconcile the interests of all delegations. Some claimed that the *Firearms Protocol* either went too far or not far enough. On the one hand, delegations, inter alia, Colombia, Benin, and Nigeria,⁸¹ argued that the requirements should apply to all transactions and had reservations about the exemptions stated in

79 Fellmeth (n 4) 210, 214.

80 Patrick Pintaske, *Das Palermo-Übereinkommen und sein Einfluss auf das deutsche Strafrecht: Eine Untersuchung der UN-Konvention gegen grenzüberschreitende organisierte Kriminalität und ihrer Zusatzprotokolle* (2014) 318.

81 UN Office on Drugs and Crime (n 18) 629.

Article 4(2). On the other hand, other delegations indicated that the scope was too broad. For instance, Syria and Colombia proposed to limit the scope to illegally manufactured and trafficked firearms,⁸² and the delegations of Algeria, France, Germany and the Netherlands stated, to a similar effect, that the scope 'should not go beyond the mandate set forth by the General Assembly'⁸³. In a similar way, the United Kingdom was not satisfied with the exemptions being as restrictive as eventually agreed upon, claiming that the *Firearms Protocol* would not apply to transfers by, to, from or on behalf of states,⁸⁴ despite being in favour of broadening the scope to include legal firearms trade.⁸⁵ Additionally, the delegations of China, Egypt, Pakistan and Saudi Arabia would have preferred firearms exclusively manufactured for military or security forces to be exempted from the application. China, furthermore, stated that it would have severe difficulties implementing the *Firearms Protocol* without some language to that effect.⁸⁶ The scope, in particular the question on firearms of military and security forces, was only resolved on the very last day of the negotiations and almost prevented the adoption of the *Firearms Protocol*,⁸⁷ thereby demonstrating the controversy surrounding this provision.

4.2.1.2. Prevention provisions

Moreover, there was some concern regarding the prevention provisions, in particular the marking requirements, of the *Firearms Protocol*. While the marking at the time of manufacture was generally agreed upon, there was considerable debate regarding the marking at the time of import, which was opposed by France and China.⁸⁸ There was further disagreement regarding the content of the markings. Many delegations suggested including additional information, inter alia, the model number and the year of manufacture, which was eventually rejected as to not overload the provision.⁸⁹ However, some delegations called for simpler markings, including China, which proposed the exclusion of the name of the

82 UN Office on Drugs and Crime (n 18) 625–626.

83 Ibid 625.

84 [s.n.], 'The UN "Firearms Protocol": Addressing the trafficking problem' (n 53) 2.

85 UN Office on Drugs and Crime (n 18) 625.

86 Ibid 628.

87 McClean (n 50) 463.

88 UN Office on Drugs and Crime (n 18) 651.

89 Ibid 650.

manufacturer.⁹⁰ In addition, the marking requirement was subject to a similar debate as the scope regarding the inclusion of a separate marking standard for firearms exclusively manufactured for military and security forces, which was ultimately also rejected.⁹¹ Whilst consensus was eventually reached, the provision was not able to meet the diverging expectations of all negotiating states.

4.2.2. Lack of Political Will

Furthermore, the lack of political will is potentially the most prominent reason why states fail to sign or ratify the *Firearms Protocol*. Some commentators have suggested that this was illustrated during the negotiations by delegations watering down the clear language of the *Firearms Protocol*, and that some of the stronger elements of the provisions were only advocated for because of the ‘cynical’ thinking that China would not agree to the final terms due to its restrictive stance during the negotiations.⁹² Three explanations for the lack of political will can be identified, namely the reluctance by some states to take on the binding international obligations of the *Firearms Protocol*, its relevance as perceived by states, especially in relation to alternative international initiatives, and conflicting domestic interests.

4.2.2.1. Hesitation to undertake binding international obligations

States may not ratify the *Firearms Protocol* as a way of not undertaking binding international obligations. As pointed out in comparable analyses in relation to the *Trafficking in Persons Protocol* and *Smuggling of Migrants Protocol*, constructivist theory of state behaviour suggests that states are less inclined to ratify the *Firearms Protocol* if they do not agree with its requirements or do not deem the issue ‘worthy of legislative response’⁹³. In accordance with this theory, the reluctance to ratify may stem from states

90 Ibid.

91 Ibid 653–654.

92 Anis Bajrektarevic, ‘The Justice–Home Affairs Diplomacy: The Palermo Convention, Ten Years After – Towards The Universal Criminal Justice’ (2011) 3(1) *Geopolitics, History, and International Relations* 119, 152.

93 Schloenhardt and Bevan (n 75) 177; Schloenhardt and MacDonald (n 78) 35.

fearing that the *Firearms Protocol* might interfere with state sovereignty. This concern is evident, for instance, from the Mexican proposal during the first session of the Ad Hoc Committee to include an article on sovereignty, which was ultimately deleted since the *UNTOC* already contained substantially similar language.⁹⁴ Despite this concern, it should be noted that the *Firearms Protocol* generally takes an unobtrusive approach⁹⁵ and leaves much at the discretion of states parties.

Furthermore, states may simply be opposed to the binding nature of the *Firearms Protocol*.⁹⁶ The considerable involvement of states, including non-party states, in non-legally binding initiatives such as the Wassenaar Arrangement⁹⁷ and the *Programme of Action (PoA)*⁹⁸ suggests that states may not be reluctant to addressing the offences under the *Firearms Protocol*, but would prefer to do so on a non-binding basis. Although there are some non-party states that have since ratified the Arms Trade Treaty, which is also a legally binding instrument addressing the issue at a global level, other states, including Russia and the United States, thus far solely support non-binding international initiatives.

Additionally, states may not ratify the *Firearms Protocol*, as they do not perceive the issue as requiring a coordinated international response. Holger Anders argues that the limited political will is rooted in the misconception that states already consider their standards sufficient, since they often lack measures for full accountability, which, among other reasons, fosters the undetected diversion of firearms.⁹⁹ This fallacy might

94 UN Office on Drugs and Crime (n 18) 727, 728.

95 Neil Boister, *An Introduction to Transnational Criminal Law* (2nd ed, 2018) 217.

96 Schloenhardt and Bevan (n 75) 175; Schloenhardt and MacDonald (n 78) 35.

97 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was established in 1995. It aims at contributing to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. The Wassenaar Arrangement has 42 participating states as of 5 September 2021 that undertake certain export and reporting requirements. The instrument is politically binding.

98 UN, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Doc A/CONF.192/15 (20 July 2001); Under the *Programme of Action*, short *PoA*, governments agreed to improve national legislation on small arms, import and export controls, and stockpile management, and to engage in international cooperation. The *PoA* is discussed in more detail in Chapter 5.

99 Anders (n 5) 19.

also be the reason why states often argue that agreed upon trade standards are neither necessary nor advisable.¹⁰⁰ This misconception might hence hamper the ratification of the *Firearms Protocol*.

4.2.2.2. Relevance of the Firearms Protocol and Alternative International Initiatives

Another explanation for the lack of political will may be that non-party states perceive the *Firearms Protocol* as irrelevant, especially in relation to alternative international initiatives.

The perception of the *Firearms Protocol* may be affected by how effectively it is implemented by states parties. The full implementation of the *Firearms Protocol* has often been criticised as too slow¹⁰¹ and barred by a lack of detailed enforcement measures provided.¹⁰² In a report on the implementation of the *Firearms Protocol* that was submitted to the Conference of the Parties to the Organized Crime Convention in 2006 and updated in 2008, severe gaps in compliance with the criminalisation requirements in relation to the different marking offences were pointed out. Additionally, numerous states parties indicated that they were still in the process of amending their legislation.¹⁰³ Similarly, in 2012, the Conference of the Parties felt it necessary to urge states parties to 'harmonise their national legislation in a manner consistent with the Protocol'¹⁰⁴. This underlines the slow implementation of the obligations

100 Fellmeth (n 4) 210.

101 Ibid 215.

102 Salton (n 24) 391.

103 UN, Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime: Analytical report of the Secretariat*, UN Doc CTOC/COP/2006/8 (16 August 2006); UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime: consolidated information received from States: Report of the Secretariat*, UN Doc CTOC/COP/2006/8/Rev.1 (12 August 2008).

104 UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its sixth session, held in Vienna from 15 to 19 October 2012*, UN Doc CTOC/COP/2012/15 (5 November 2012) Res 6/2.

even in the years after the *Firearms Protocol* had entered into force, when its momentum was arguably still at its highest.

Furthermore, some states might consider the *Firearms Protocol* unnecessary, arguing that most of its provisions are already covered by alternative international initiatives and that these initiatives are sufficient in the fight against illicit flow of firearms, their parts and components, and ammunition.¹⁰⁵ This point will be further discussed in chapter 5.

4.2.2.3. Conflicting Domestic Interests

In addition, the opposition to the *Firearms Protocol* might stem from non-party states pursuing conflicting domestic interests. The United States, for instance, has repeatedly expressed concern regarding regulations of private gun ownership considering their constitutional right to bear arms. They further voiced the apprehension that the *Firearms Protocol* would prevent supporting rebel groups fighting oppressive regimes by providing firearms.¹⁰⁶ Germany, likewise, reported that constitutional issues had hampered the implementation of the provisions of the *Firearms Protocol*¹⁰⁷, which may have been a factor in its delayed ratification by Germany. Similar domestic issues might, therefore, deter non-party states from ratifying the *Firearms Protocol*.

4.2.3. Lack of Understanding

States may lack an understanding of the obligations required under the *Firearms Protocol*, which may result from a lack of guidance within its provisions. According to the normative theory of state compliance with international rules, states are more inclined to ratify international agreements which obligations are clear and sufficiently detailed.¹⁰⁸ This issue might, thus, prevent non-party states that do not fully understand

¹⁰⁵ Fellmeth (n 4) 2010.

¹⁰⁶ Ibid.

¹⁰⁷ UN, Conference of the Parties to the UNTOC, *Analytical report of the Secretariat* (n 103) 15; UN, Conference of the Parties to the UNTOC, *Report of the Secretariat* (n 103) 15.

¹⁰⁸ Schloenhardt and Bevan (n 75) 171, quoting Anne Gallagher *The International Law of Human Trafficking* (Cambridge University Press, 2010) 464, and Oona A Hathaway, 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1958; see also Schloenhardt and MacDonald (n 78) 34.

the requirements and the threats being addressed from ratifying the *Firearms Protocol*.

The *Firearms Protocol* provides little guidance on the implementation of several complex requirements. This issue might be rooted in the unobtrusive approach taken by the drafters of the *Firearms Protocol* in trying to balance combatting and preventing transnational organised crime and national sovereignty of states.¹⁰⁹ For this reason, several provisions do not expressly specify how or what states should regulate. General statements calling for states to ‘adopt measures as may be necessary’¹¹⁰ can undermine the usefulness of the *Firearms Protocol* and prevent its effective implementation. Similarly, there is a lack of clarity in several articles. Most eminently, the term ‘transit’ is never defined in the *Firearms Protocol* despite such definition being requested repeatedly during negotiations. The marking requirements were also considered too vague by some delegations.¹¹¹ In addition, the marking provision does not consider the marking of ammunition, which is, however, included in the record-keeping obligation and might, thus, prevent a consistent implementation. Furthermore, Article 7 does not specify the method of record-keeping and Article 11 barely entails any specifics on additional security measures at all. Therefore, States may not fully understand the obligations they would be undertaking, which might deter them from signing the *Firearms Protocol*.

Moreover, and although it is certainly not a human rights or humanitarian law instrument, the *Firearms Protocol* touches upon obligations stemming from these legal fields, thereby rendering it difficult and confusing for states to reconcile its requirements with conflicting undertakings. The *Firearms Protocol*, for instance, requires states parties to criminalise ‘counselling’ of illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition as well as of falsifying or illicitly obliterating, removing or altering the markings on firearms.¹¹² However, this requirement might violate certain interpretations of the human right to freedom of expression. It may be argued that to reconcile these

¹⁰⁹ Salton (n 23) 390.

¹¹⁰ See for instance in *Firearms Protocol*, art 5, 6, and 10.

¹¹¹ Benin and Nigeria, for instance, requested report of the Ad Hoc Committee on its twelfth session to indicate their reservations on Article 8 due to the vague marking requirements; UN Office on Drugs and Crime (n 18) 657.

¹¹² *Firearms Protocol*, art 5(2)(b).

conflicting obligations, counselling will have to be interpreted to only entail acts connected to a criminal conspiracy or concrete action by the counselling party.¹¹³ Yet, neither the *Firearms Protocol* nor its accompanying documents provide details on the implementation of the criminalisation of counselling. In addition, Belgium noted that the scope of the *Firearms Protocol* might violate the Geneva conventions in relation to the rules of conflict and asked for a savings clause in relation to international humanitarian law, in particular with regards to domestic armed conflict.¹¹⁴ This proposal was, however, not given much consideration, eventually rejected and included as reservation to the *Firearms Protocol* by Belgium. From this, it is evident that states may not know how to balance the *Firearms Protocol* and already existing international obligations, hence discouraging them to become party to it.

4.2.4. Economic Concerns

Many states may be hesitant to ratify the *Firearms Protocol* due to economic, financial, and institutional considerations.¹¹⁵ This encompasses, on the one hand, states that do not have the necessary resources to comply with the provisions of the *Firearms Protocol* and on the other hand, states that would have the necessary financial means, but are major arms manufacturers or exporters and therefore concerned about losing profit should the *Firearms Protocol* apply.

Some non-party states may lack the necessary financial or institutional resources to implement the obligations under the *Firearms Protocol*. Many of its aspects will require amendments to the existing domestic law, as well as investments in relation to its enforcement, inter alia, in technical equipment and training. Furthermore, states may not have the institutional capacity required to undertake the obligations under the *Firearms Protocol*, including border control, cooperation requests, or, more generally, developing effective prevention measures without guidance.¹¹⁶ Other states may have an economic interest in the firearms business and

113 Fellmeth (n 4) 208.

114 UN Office on Drugs and Crime (n 18) 625.

115 Pierre Hauck and Sven Peterke, 'Organized crime and gang violence in national and international law' (2010) 92(878) *International Review of the Red Cross* 407, 424.

116 See also Schloenhardt and MacDonald (n 78) 31.

therefore be deterred by the considerable investment of resources that would be required. This is evident from the fact that numerous major arms-manufacturing and exporting states, including Canada, China, Israel, Japan, Russia, South Korea and the United States, have not signed or ratified the *Firearms Protocol*.¹¹⁷ Several states have disclosed their financial concerns during the negotiations, in particular in relation to the marking provision. Pakistan and South Africa, for instance, pointed out the importance of inexpensive marking measures,¹¹⁸ while Finland submitted a paper on the financial issues potentially caused by the requirement to mark all imported firearms.¹¹⁹ Some delegations, likewise, expressed concern that the 'systematic tracking'¹²⁰ of firearms in general may be too expensive.¹²¹ Similarly, the United States argued that regulating ammunition would be too costly.¹²² The financial commitment related to the obligations under the *Firearms Protocol* might therefore prevent states with a lack of resources or economic interest in the manufacture of and trafficking in firearms, their parts and components, and ammunition from becoming party to the *Firearms Protocol*.

Financial limitations are, however, taken into account in the text of some provisions by including phrasing such as 'to the greatest extent possible'¹²³ and 'within available means'¹²⁴, and by requiring states to cooperate with each other and relevant international organisations in relation to training and technical assistance, including financial and material assistance.¹²⁵ Similarly, the *UNTOC* expressly calls upon states to enhance their cooperation with developing countries, including providing financial and material assistance.¹²⁶

117 Fellmeth (n 4) 210, 214.

118 UN Office on Drugs and Crime (n 18) 650–651.

119 *Ibid* 652.

120 *Firearms Protocol*, art 3(f).

121 UN Office on Drugs and Crime (n 18) 619.

122 Fellmeth (n 4) 210.

123 *Firearms Protocol*, art 6(1).

124 *Ibid* art 10(5) and 12(4).

125 *Ibid* art 14.

126 *UNTOC*, art 30; see also Schloenhardt and Bevan (n 75) 170 and Schloenhardt and MacDonald (n 78) 32.

5. Relationship to other Treaties and Reasons to Ratify

The reason most often given by states and commentators for the failure to ratify the *Firearms Protocol* is that it is simply unnecessary and that existing obligations under international law are sufficient to curb the illicit flow of firearms, their parts and components, and ammunition.¹²⁷ Although most non-party states do in fact already comply with some of the substantive provisions contained in the *Firearms Protocol* either due to international agreements, including those mentioned in this chapter, or due to having independently adopted corresponding legislation, only a small number of non-party states comply with the *Firearms Protocol* in its entirety.

Despite this misperception, the *Firearms Protocol* is still of great significance, and for good reason.¹²⁸ Whilst there are other instruments addressing similar issues, it has often been commented that a major benefit and reason for ratification was that the *Firearms Protocol* was the only legally binding instrument regulating firearms manufacture and trafficking. However, since the adoption of the *Arms Trade Treaty (ATT)* on 2 April 2013, this no longer remains true. That the *Firearms Protocol* must have additional benefits not covered by other treaties can also be inferred from the increase in states parties since that date, as 23 states and the European Union have become party to it thereafter.¹²⁹

In addition, the nature of the UN approach to firearms regulation should be taken into account. The UN approach is a complementary one, based upon the notion that different instruments should not be considered in isolation, and together form the basis for a comprehensive international framework on small arms and light weapons. This means that the ratification of multiple instruments, including the *Firearms Protocol*, may be essential to effectively prevent and combat illicit flow of firearms, their parts and components, and ammunition.

¹²⁷ Fellmeth (n 4) 210.

¹²⁸ Pintaske (n 80) 319.

¹²⁹ In 2013: Austria, Czechia, Dominica, Ecuador, Guinea-Bissau, Iraq, Liechtenstein, Ukraine, Venezuela; in 2014: Angola, Barbados, European Union, Ghana, Sierra Leone; in 2015: Denmark, South Korea; in 2017: Fiji; in 2018: Bolivia; in 2019: France, Palau; in 2020: Bolivia; in 2021: Comoros, Germany; as of 31 July in 2022: Luxembourg.

This chapter analyses the strengths of the *Firearms Protocol* by comparing and contrasting the provisions of alternative international initiatives, namely the *PoA*, the *International Tracing Instrument (ITI)*, and the *ATT* with the provisions of the *Firearms Protocol* as outlined in chapter 3. Moreover, the importance of ratification of the *Firearms Protocol* is discussed.

5.1. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA)

The *PoA* may be the most prominent cause for the negative perception of the *Firearms Protocol*, in particular regarding the years after the *Firearms Protocol* was adopted, as the negotiations to the *PoA* had overshadowed those of the *Firearms Protocol*. The *PoA* was adopted in July 2001 during the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, which convened in 1999, and therefore was negotiated parallel to the *Firearms Protocol*. Although the *PoA* recognises the efforts of the *Firearms Protocol*,¹³⁰ the preamble of the *PoA* states that the UN is convinced of the ‘need for a global commitment to a comprehensive approach to promote [...] the prevention, reduction and eradication of the illicit trade in small arms and light weapons’¹³¹. The inclusion of this phrase, despite the *Firearms Protocol* already having been adopted and being a legally binding instrument, demonstrates that states did not perceive the *Firearms Protocol* as able to fulfil its purpose and only allocated a supplementary role to it, thereby rendering it unnecessary in the eyes of some states.¹³² Notwithstanding the parallel negotiation of the *Firearms Protocol* and the *PoA*, there are key differences between the two instruments, which are discussed in the following.

5.1.1. Nature and Scope

The *PoA* and the *Firearms Protocol* were negotiated in different thematic contexts and take different approaches in the fight against firearms-related

¹³⁰ *PoA*, Preamble.

¹³¹ *Ibid.*

¹³² Pintaske (n 80) 319.

crime.¹³³ The *PoA* resulted from arms control initiatives, while the *Firearms Protocol* is the only instrument relating to crime control,¹³⁴ which stems from its focus on organised crime. Due to the arms control approach, the *PoA* covers a wider variety of small arms and light weapons than the *Firearms Protocol*, which only covers firearms. However, contrary to the *Firearms Protocol*,¹³⁵ the *PoA* does not include definitions of the weapons it applies to, which may lead to gaps in its implementation. Furthermore, the *PoA* does not apply to parts and components, and ammunition.¹³⁶ The *PoA* does, however, apply to state-to-state transactions, which the *Firearms Protocol* exempts,¹³⁷ thereby neglecting one of the most prominent form of firearms transactions¹³⁸ and limiting the potential impact of the requirements under the *Firearms Protocol*. Whilst the inclusion of state-to-state transactions is an important strength of the *PoA*, the more restrictive scope of the *Firearms Protocol* and its focus on crime control can also be regarded a strength in that it is adapted to address transnational organised crime specifically.¹³⁹ Additionally, the crime control approach of the *Firearms Protocol* made it less political than other international initiatives, including the *PoA*, thereby enabling the adoption of the *Firearms Protocol* as legally binding instrument. The *PoA*, in contrast, is only politically binding, which may negatively impact its implementation.

5.1.2. Enforcement

The enforcement of the provisions of the international instruments is key to their effective implementation. The *PoA* and the *Firearms Protocol* both require states to criminalise certain conduct to ensure their implementation. Under the *PoA* states undertake to criminalise the illegal manufacture, possession, stockpiling, and trade of small arms and light weapons.¹⁴⁰ Additional specifications are however not included. By

133 UN Office on Drugs and Crime, *Comparative Analysis of Global Instruments on Firearms and other Conventional Arms: Synergies for Implementation* (2016) 1.

134 [s.n.], 'The UN "Firearms Protocol": Addressing the trafficking problem' (n 53) 1.

135 *Firearms Protocol*, art 3.

136 UN Office on Drugs and Crime, (n 133) 20–22.

137 *Firearms Protocol*, art 4(2).

138 Salton (n 23) 391.

139 Fellmeth (n 4) 218.

140 *PoA* s II, para 3.

contrast, the *Firearms Protocol* obligates states parties to criminalise illicit manufacturing of and trafficking in firearms, their parts and components, and falsifying or illicitly obliterating, removing or altering the required markings, as well as different *modi operandi* thereof.¹⁴¹ Although leaving details mostly at the discretion of states parties, the *Firearms Protocol* gives further indications of what such offences entail in its use of terms.¹⁴² Although the *Protocol* has often been criticised for its lack of effective enforcement mechanism,¹⁴³ the *Firearms Protocol* contains a stronger enforcement strategy than the *PoA*.

5.1.3. Prevention Provisions

Differences can further be identified in relation to the prevention provisions of the *Firearms Protocol*. Although the *PoA* regulates marking, only minimum standards are included, whereas the *Firearms Protocol* further entails marking requirements when firearms are imported or transferred from government stocks to civilian use.¹⁴⁴ Likewise, the *PoA* only encompasses general record-keeping provisions, whilst the *Firearms Protocol* goes into more detail.¹⁴⁵ In contrast to the *PoA*, the *Firearms Protocol* requires states parties to keep information on marking, and import and transit authorisations, which must include the issuance and expiration dates, the countries of import, export, and transit, and, where appropriate, the final recipient and the description and quantity of the products of the shipment.¹⁴⁶ Additionally, the *PoA* only contains broad transactions provisions that do not touch upon deactivation contrary to the comparably detailed transaction and authorisation system of the *Firearms Protocol*.¹⁴⁷ Furthermore, the *PoA* only includes broad cooperation obligations that merely encourage states to ‘consider’ international cooperation.¹⁴⁸ The *Firearms Protocol* conversely requires states parties to

141 *Firearms Protocol*, art 5.

142 *Ibid* art 3(d), (e).

143 See for instance Salton (n 23) 390.

144 UN Office on Drugs and Crime, (n 133) 26–27.

145 *Ibid* 29–32.

146 *Firearms Protocol*, art 7.

147 UN Office on Drugs and Crime, (n 133) 29, 39–45; *Firearms Protocol*, art 9, 10.

148 *PoA*, s III, para 10; UN Office on Drugs and Crime, (n 133) 49–53.

cooperate on a bilateral, regional and international basis,¹⁴⁹ and contains rigorous information-sharing obligations, which are exceptionally comprehensive, for they even include case-specific information, means of concealment, trafficking routes, as well as scientific and technological information.¹⁵⁰ When considering the *Firearms Protocol* in the context of the *UNTOC*, which encompasses additional equally expansive articles on mutual legal assistance, joint investigative teams, and law enforcement cooperation,¹⁵¹ the instrument provides a comprehensive international cooperation framework, which the *PoA* lacks.

Overall, the general requirements of the *PoA* regarding the comparably detailed prevention provisions of the *Firearms Protocol*, in particular with regards to international cooperation, give the *Firearms Protocol* a significant advantage over the *PoA*. States that are party to the *PoA*, yet not the *Firearms Protocol*, might hence want to consider ratifying the *Firearms Protocol* for more effectively preventing and combatting firearms-related crime.

5.2. International Tracing Instrument (ITI)

The *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (ITI)*,¹⁵² in short, the International Tracing Instrument, was developed and adopted in 2005 in the context of the *PoA* review. The *ITI* was developed as law enforcement tool complimentary to and consistent with existing international obligations, including the *Firearms Protocol*.

149 *Firearms Protocol*, art 13(1).

150 *Ibid* art. 12(1) – (3).

151 *UNTOC*, art 18, 19, and 27.

152 UN General Assembly, *The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, The Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, A/60/88 and Corr.2, annex, adopted by UN Doc A/RES/60/81 (8 December 2005).

5.2.1. Nature and Scope

The *ITI*, like the *PoA*, applies to small arms and light weapons and consequently to a wider variety of weapons than the *Firearms Protocol*, which only covers firearms. However, the *Firearms Protocol* additionally applies to parts and components, and ammunition, which the *ITI* does not.¹⁵³ While the scope of the *ITI* may be similar to other international initiatives, its nature is unique. As a law enforcement tool, the main aim of the *ITI* is to identify and trace, in a timely and reliable manner, illicit small arms and light weapons.¹⁵⁴ While the nature the *ITI* allows it to further specify prevention provision, such as marking, record-keeping and tracing,¹⁵⁵ it prevents the criminalisation of certain conduct as included in Article 5 of the *Firearms Protocol*. Furthermore, the *ITI* only establishes voluntary obligations,¹⁵⁶ in contrast to the *Firearms Protocol*, which is legally binding.

5.2.2. Enforcement

As the *ITI* serves as law enforcement tool, the whole instrument is essentially about enforcement.¹⁵⁷ While the *ITI* does not contain offences, it entails a definition of ‘illicit’ small arms and light weapons in Article 6, thereby complimenting the enforcement strategies of other international initiatives, in particular the *Firearms Protocol*. Although the *ITI* provides additional guidance for law enforcement authorities, it is insufficient to fight and prevent the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition by itself. This is due to its voluntary nature as law enforcement tool and the lack of criminalisation provisions. States should therefore contemplate ratifying the *Firearms Protocol* to further facilitate the effective implementation and enforcement of the international obligations included in both instruments.

153 UN Office on Drugs and Crime, (n 133) 20–22.

154 *ITI*, art 1.

155 *ITI*, art 7–23.

156 UN Office on Drugs and Crime, (n 133) 4.

157 *Ibid* 55.

5.2.3. Prevention Provisions

The *ITI* and the *Firearms Protocol* contain similar, comparably comprehensive marking provisions, which include marking requirements when firearms are imported or transferred from government stocks to civilian use.¹⁵⁸ Moreover, both instruments encompass similar record-keeping obligations, although the *ITI* requires records to be kept for at least twenty to thirty years depending on the information maintained, which is longer than required under the *Firearms Protocol*.¹⁵⁹ One of the most significant weaknesses of the *ITI* in comparison to the *Firearms Protocol* is the lack of international transaction provisions, thereby neglecting the regulation of firearms while moving through different jurisdictions, which is when there is an increased risk of diversion of firearms. Similarly, the *ITI* includes less detailed international cooperation and information-sharing provisions than the *Firearms Protocol*. Whilst the *ITI* entails comprehensive cooperation provisions regarding the tracing of firearms, the more general cooperation obligations are less detailed than the ones included in the *Firearms Protocol*. The *ITI* merely requires states to ‘cooperate on a bilateral and, where appropriate, on a regional and international basis to support the effective implementation of this instrument’, to assist in national capacity building upon request, and to ‘consider international cooperation and assistance to examine technologies that would improve the tracing and detection of illicit small arms and light weapons, as well as measures to facilitate the transfer’¹⁶⁰. In contrast, the *Firearms Protocol*, especially in the context of the *UNTOC*, sets out a comprehensive cooperation and information-sharing framework, as set out in relation to the *PoA* above.

5.3. Arms Trade Treaty (ATT)

The *Arms Trade Treaty (ATT)* was adopted by the UN General Assembly on 2 April 2013.¹⁶¹ Although the *ATT* was adopted more than twelve years after

158 UN Office on Drugs and Crime, (n 133) 26–29.

159 *ITI*, art 11–12; *Firearms Protocol*, art 7; see also UN Office on Drugs and Crime, (n 133) 29–34.

160 *ITI*, art 26–28.

161 Opened for signature 2 April 2013, 3013 UNTS (entered into force 24 December 2014).

the adoption of the *Firearms Protocol* and represents the latest of the international initiatives used in this comparison, the ground stone for the *ATT* was already laid in 2006, when the UN General Assembly began the formal process towards establishing the treaty pursuant to its resolution 61/89. This process was thus started only a year after the *Firearms Protocol* had entered into force. While the *ATT* contains a wider scope than the *Firearms Protocol*, this temporal link could be interpreted as lack of support of the *Firearms Protocol* by the international community. In a similar way to the analysis in the introduction of the *PoA*, this misperception does not do justice to the strengths of the *Firearms Protocol* when compared with the *ATT*, which are analysed below.

5.3.1. Nature and Scope

The *ATT* and the *Firearms Protocol* are both legally binding and have similar objectives, but diverging scopes. Although both aim to prevent and eradicate the weapons trade they apply to by promoting international cooperation,¹⁶² the *ATT* relates to all conventional arms and the *Firearms Protocol* only covers firearms. Both treaties apply to certain parts and components, and ammunition. The *Firearms Protocol*, in addition to firearms trafficking, also applies to their manufacture,¹⁶³ which the *ATT* does not cover, as it aims at setting 'the highest possible common international standards for regulating or improving the regulation of the international trade' only.¹⁶⁴ In contrast to the *Firearms Protocol*, the *ATT* also regulates state-to-state transactions, which represents a major strength of the *ATT* for the relevance and number of these transactions. In addition, it should be noted that like the *PoA*, the *ATT* also takes an arms control, rather than a crime control approach. What is discussed regarding this point in chapter 5.1.1. therefore applies to the *ATT* as well. Despite or because of the incredibly wide scope of the *ATT*, the trafficking of firearms is only a very small part of the treaty and is not put into the context of organised crime. Consequently, the *Firearms Protocol* might be better equipped to prevent and combat the illicit trafficking, and especially the illicit manufacturing, of firearms, their parts and components and ammunition.

¹⁶² *ATT*, art 1; *Firearms Protocol*, art 2.

¹⁶³ *Firearms Protocol*, art 4.

¹⁶⁴ *ATT*, art 1.

5.3.2. Enforcement

Notwithstanding the legally binding nature of the *ATT*, it does not proscribe any enforcement measures. Although options, including the establishment of penalties and the possibility to inspect and seized shipments, were discussed during the negotiations of the *ATT*,¹⁶⁵ they were not adopted in the final text of the treaty. The *ATT* merely requires states parties to ‘take appropriate measures to enforce national laws and regulations that implement’ its provisions.¹⁶⁶ The *Firearms Protocol*, by contrast, entails an enforcement strategy, albeit flawed and often criticised,¹⁶⁷ by requiring states parties to criminalise certain conduct. The presence of an enforcement strategy is essential to ensuring the effective implementation of international instruments. The absence thereof may hence be regarded a major flaw of the *ATT*.

5.3.3. Prevention Provisions

Contrary to the *Firearms Protocol*, the *ATT* does not contain any references to or obligations of the marking of firearms. Furthermore, the *ATT* merely requires states parties to keep records of its issuance of export authorisations or its actual exports.¹⁶⁸ Similarly, states are indirectly required to keep records via the reporting requirement, as records may form the basis of the content of the mandatory annual reports on the authorised and actual exports and imports of conventional arms.¹⁶⁹ The record-keeping obligation under the *ATT* is, therefore, only limited to documents related to international transactions, whilst the record-keeping obligation under the *Firearms Protocol* goes further by also including records of the appropriate markings required under Article 8 of the *Firearms Protocol*, and establishing content requirements for transaction-related information.¹⁷⁰ In addition, the *ATT* encompasses comprehensive transaction provisions. It sets out circumstances when export is prohibited

165 UN Office on Drugs and Crime, (n 133) 55–56.

166 *ATT*, art 14.

167 See for instance Salton (n 23) 390.

168 *ATT*, art 12.

169 *Ibid* art 13(3).

170 *Firearms Protocol*, art 7.

due to potential negative consequences.¹⁷¹ However, it does not expressly prohibit the transfer of firearms to organised criminal groups,¹⁷² and only broadly touches upon imports, while not referring to deactivation at all. The *Firearms Protocol*, in contrast, proscribes a reciprocal authorisation system for international transactions and establishes procedural requirements, including a system for import licensing and obligations regarding deactivated firearms.¹⁷³ These procedural requirements are specifically aimed at preventing the diversion of firearms while moving through different jurisdictions as well as the reactivation of firearms after transfer. Moreover, the *ATT* only entails a general international cooperation requirement, with specified conduct merely being ‘encouraged’¹⁷⁴, while the *Firearms Protocol* establishes a comprehensive framework of obligations as discussed above. Strong marking, records-keeping, trade, and cooperation requirements are paramount in identifying and tracing individual firearms in order to prevent illicit firearms trafficking and the diversion of firearms, especially while crossing borders. They are equally necessary to collect evidence to eventually prosecute firearms-related crime. The detailed provisions of the *Firearms Protocol* that are specifically adapted to organised crime are arguably better equipped to achieve this aim than provisions of the *ATT*.

6. Conclusion and the Way Ahead

This article has illustrated substantial regulatory benefits of the *Firearms Protocol*, especially in comparison to other instruments. In spite of the lack of guidance within its provisions, the *Firearms Protocol* is arguably most successful in regulating the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition, particularly since it is specifically adapted to the threat of organised crime. Notwithstanding the barriers to ratification identified in this article, states that have not yet done so may therefore wish to consider ratifying or acceding to the *Firearms Protocol*.

¹⁷¹ *ATT*, art 7.

¹⁷² Boister (n 95) 220.

¹⁷³ *Firearms Protocol*, art 9, 10.

¹⁷⁴ *ATT*, art 15.

In addition, the newly launched *Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* might help address a number of the concerns raised in the article, and potentially lead to a wider acceptance of the *Firearms Protocol*. The review mechanism was established by the Conference of Parties in October 2018 and launched in October 2020. The review process, which takes eight years, entails a general review in the plenary of the Conference based upon a report by the Secretariat, as well as country reviews, during which each state will provide information on its implementation that will subsequently be reviewed by one state from the same and one from another region.¹⁷⁵ Whilst the overall aim of the review process is to facilitate full implementation of the *Firearms Protocol*, additional aims were identified by the Conference, inter alia, improving the capacity of states parties, helping states identify specific needs for technical assistance, gathering information on successes, good practices and challenges, and promoting and facilitating the exchange of such information.¹⁷⁶ The information gathered during the review will potentially not only help the effective implementation of the provisions, but also address some of the barriers to ratification.

Most of the reasons why states fail to ratify can be addressed by technical assistance. Before the review mechanism, effective technical assistance was hampered by a lack of information on specific needs, since previous attempts to review the implementation only received a limited number of responses and did not encompass the prevention measures. Technical assistance directed at specific needs may especially be suited to address the lack of understanding, as well as capacity and resource limitations. It might further indirectly tackle the lack of political will. Owing to the review of national legislation, the misconception that existing standards of firearms manufacturing and trafficking are sufficient, and that states already comply with the provisions of the *Firearms Protocol* due to other international agreements might be corrected. Likewise, technical assistance

¹⁷⁵ UN, Working Group on Firearms, *Responsiveness of the Firearms Protocol and national legislation to new and emerging threats relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition: Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.6/2020/2 (14 January 2020), Res 9/1, Annex V.

¹⁷⁶ *Ibid.*

will potentially facilitate effective implementation, thus increasing the relevance of the *Firearms Protocol*. Despite the review mechanism not being able to address all barriers to ratification, it is likely that most non-party states are discouraged from ratifying or acceding to the *Firearms Protocol* for a combination of the identified issues. Therefore, resolving a number of the deterrents may give extra incentives and facilitate widespread ratification.

Moreover, emerging threats and technological trends, inter alia, the 3D-printing of firearms, the use of modular weapons, and internet and dark-web purchases may further impact the relevance of the *Firearms Protocol* and its future role.

The additive manufacture, also known as 3D-printing, of firearms,¹⁷⁷ has become increasingly popular at industrial and consumer levels in the past decade. Due to the increased speed of the development of designs, the cheap customisation and the availability of the necessary material, hardware, and software to private individuals,¹⁷⁸ this technology may accelerate the proliferation of firearms, their parts and components, and ammunition and change the nature of their manufacture. Despite the manner of production, the provisions of the *Firearms Protocol* fully apply to 3D-printed products, including the marking, record-keeping and international trade requirements.¹⁷⁹ The additive manufacture, especially on a consumer basis, may, however, hamper the enforcement of such regulations.¹⁸⁰ The *Firearms Protocol's* obligation to criminalise the illicit manufacture of firearms, their parts and components, and ammunition, which specifically entails unlicensed manufacture and manufacture

¹⁷⁷ According to the UN, additive manufacture entails the following steps: 'a 3D printer reads the design from a 3D printable file and lays down successive layers of various materials to build a model from a series of cross sections. The layers are joined or automatically fused to create the final shape'; see UN, Working Group on Firearms, *Responsiveness of the Firearms Protocol and national legislation to new and emerging threats relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition: Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.6/2020/2 (14 January 2020) 11.

¹⁷⁸ Glenn McDonald, *One Meeting After Another: UN Process Update* (February 2015) 72.

¹⁷⁹ N.R. Jenzen-Jones, 'Small arms and additive manufacturing: An assessment of 3D-printed firearms, components, and accessories' in King, Benjamin, and Glenn McDonald (eds), *Behind the Curve: New Technologies, New Control Challenges* (2015) 43, 58–61.

¹⁸⁰ *Ibid* 62.

without applying the required markings,¹⁸¹ may therefore constitute an important tool in combatting 3D-printed firearms.

In addition, the use of modular firearms is an emerging challenge to firearms regulation. This is evident from its inclusion in the 2019 report of the Secretary-General on the illicit trade in small arms and light weapons.¹⁸² Modular weapons consist of a core section around which the key parts and components can be altered,¹⁸³ consequently allowing even private gun owners to convert their semi-automatic firearm to a fully automatic one.¹⁸⁴ Although the *Firearms Protocol* generally applies to parts and components, the marking, as well as the record-keeping provision, do not cover or were rendered useless in this regard. However, the unlicensed or unauthorised assembly of modular firearms may fall under the *Firearms Protocol's* understanding of illicit manufacture and would thus be criminalised under it.¹⁸⁵

Furthermore, the dark web has gained considerable popularity for people looking to illicitly purchase firearms, their parts and components, and ammunition, due to its easy access and the anonymity it offers.¹⁸⁶ Although the obligations of the *Firearms Protocol* technically also apply to online trafficking, a 2017 report found that the transfer provisions are entirely circumvented by the cyber criminals and suggested to strengthen control over marketplace administrators.¹⁸⁷ To this end, brokering regulations would be essential, which are unfortunately not mandatory under the *Firearms Protocol*.¹⁸⁸ However, due to the inherently transnational nature of dark web purchases and its advanced anonymity, effective law enforcement operations will, inter alia, also depend upon information exchange, special investigative techniques, international cooperation, and border control,¹⁸⁹ where the *Firearms Protocol* and its parent Convention provide strong frameworks. The ratification of the

181 *Firearms Protocol*, art 3(d).

182 UN, Working Group on Firearms (n 176) 10.

183 McDonald (n 173) 70.

184 UN, Working Group on Firearms (n 176) 10.

185 *Ibid.*

186 *Ibid.* 12.

187 Giacomo Persi Paoli et al, *Behind the curtain: The illicit trade of firearms, explosives and ammunition on the dark web* (2017) 100.

188 *Firearms Protocol*, art 15.

189 Paoli et al (n 187) 102–104.

Firearms Protocol, therefore, offers major regulatory benefits to tackle this emerging threat, which will potentially increase its relevance in the future.

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The Arms Trade Treaty

ZEYNEP KOLOGLU

This article critically analyses the Arms Trade Treaty (ATT) in light of its object and purpose embedded in Article 1. It evaluates, in a past, present and future-orientated perspective, the successes and limitations of the ATT in establishing the highest common international standards governing conventional arms transfers to prevent and eradicate the illicit trade and diversion of conventional arms, for the purpose of contributing to peace, security and stability, reducing human suffering and promoting cooperation, transparency and responsible action. This chapter demonstrates that in its current form, the ATT has significant shortcomings that may hinder it from achieving its objectives. This chapter argues that there is scope for the ATT to develop its framework under rules of general international law and to realise its potential without having to resort to formal amendment.

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I. Introduction

The ATT¹ was adopted on 2 April 2013 by the United Nations General Assembly ('UNGA'), only days after the failure of the United Nations Final Conference on the ATT to reach consensus.² 154 states voted in favor and only 3 states, namely Iran, North Korea and Syria, opposed acceptance.³ However, this overwhelming support was tempered by the abstention of 23 states, notably including some of the most important actors on both

1 *Arms Trade Treaty*, opened for signature 3 June 2013, UNTS No 52373 (entered into force 24 December 2014).

2 UN General Assembly, *Resolution adopted by the General Assembly on 2 April 2013: The Arms Trade Treaty*, UN Doc A/RES/67/234 B (11 June 2013); Marlitt Brandes, "All's Well That Ends Well" or "Much Ado About Nothing?": A Commentary on the Arms Trade Treaty' (2013) 5(2) *Goettingen Journal of International Law* 399, 400; see *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 18.3; Laurence Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (2020) 399.

3 As cited in Brandes (n 2) 406.

sides of the global arms trade, such as Russia, China and India.⁴ Nevertheless, in the words of Ban Ki-Moon, former United Nations Secretary-General, it was ‘a victory for the world’s people’⁵ as it represented the first time in world history that an international agreement regulating the conventional arms trade had been achieved. In fact, prior to the adoption of the ATT, there were stricter international rules and regulations on selling bananas and MP3 players.⁶ The ATT entered into force on 24 December 2014, and at the time of writing, it has 110 States Parties and 31 Signatories, which are not yet states parties.⁷

Under United Nations (‘UN’) multilateral treaties, the ATT is categorised as a disarmament treaty, belonging in the second category of export control treaties.⁸ These have a long-term goal of promoting peace, though, their main objective is to create common standards for regulating international trade of military-use weapons and technology.⁹ As a novelty of its kind, the ATT represents a shift in how the international community defines and addresses common security challenges.¹⁰ This shift is captured by its object and purpose in Article 1, which represents the essential goals of the treaty, plays an important role in guiding the behavior of states and sets the interpretative framework for the remaining articles of the treaty.¹¹ Pursuant to Article 1, the ATT seeks to regulate the international trade in conventional arms by establishing the highest common international standards, and to prevent and eradicate illicit trade and diversion of

4 Lustgarten (n 2) 73 and 400; Brian Wood and Rasha Abdul-Rahim, ‘The Birth and the Heart of the Arms Trade Treaty’ (2015) 22 *SUR-International Journal on Human Rights* 15, 17.

5 Ban Ki-Moon, ‘United Nations Secretary-General, Statement on the adoption of the Arms Trade Treaty’, (Web page, 2 April 2013).

6 Susan O’Connor, ‘Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and Its New Zealand Application’ (2013) 11 *New Zealand Yearbook of International Law* 73, 78; Oxfam Australia, ‘Action on arms to safeguard millions’ (Web page, 26 November 2012); *Arms Trade Treaty* art 2.1.

7 Arms Trade Treaty, ‘Treaty Status’ (Web Page, undated).

8 Cindy Whang, ‘The Challenges of Enforcing International Military-Use Technology Export Control Regimes: An Analysis of the United Nations Arms Trade Treaty’ (2015) 33(1) *Wisconsin International Law Journal* 114, 117.

9 Ibid 118.

10 Ibid; Clare Da Silva and Brian Wood (eds), *Weapons and International Law: The Arms Trade Treaty* (2015) 23.

11 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31 and 31.2; Da Silva and Wood (n 10) 23.

conventional arms.¹² Conventional arms are understood to include all arms other than weapons of mass destruction.¹³ In the context of the ATT, the term ‘conventional arms’ is used to refer to all arms that fall within the following categories: battle tanks, armored combat vehicles, large-calibre, artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.¹⁴ The purpose of the ATT is to contribute to international and regional peace, security and stability; reduce human suffering; and promote cooperation, transparency and responsible action among the international community, thereby building confidence among states parties.¹⁵

The treaty has now been in force for six years, and yet global arms trading is still on the rise and continues to fuel human rights abuses.¹⁶ This is influenced by the fact that some of the largest arms exporters, such as the United States (‘U.S.’) and Russia, have not ratified the treaty.¹⁷ The U.S. signed the ATT in September 2013, yet the Trump administration communicated to the UN in 2019 that the U.S. does not intend to become a state party and thus, has no future legal obligations stemming from signature.¹⁸ However, even several states parties appear to be in direct violation of legally binding obligations of the ATT, especially of those that lie at the heart of the treaty.¹⁹ These are provisions that contain the moral and legal imperatives that led to the heartfelt campaign to regulate arms transfers; the life of the treaty is dependent on them functioning

12 *Arms Trade Treaty* art 1.

13 Stuart Casey-Maslen et al, *The Arms Trade Treaty, A Commentary* (2016) N 0.02.

14 *Arms Trade Treaty* art 2.1.

15 *Ibid.*

16 Amnesty International, ‘Arms Control’ (Web Page, 14 August 2019).

17 *Ibid.*; The Russian foreign ministry stated that the ATT is a defective treaty and declared that Russia has no intention of signing it, see Julian Cooper, ‘Russian Arms Exports’ in Laurence Lustgarten (ed), *Law and the Arms Trade, Weapons, Blood and Rules* (2020) 293, 313; Pieter D. Wezeman, Alexandra Kuimova and Siemon T. Wezeman, *Trends in International Arms Transfers, 2020* (2021) 1.

18 Pablo Arrocha Olabuenaga, ‘Why the Arms Trade Treaty Matters – and Why It Matters That the US Is Walking Away’ (Web Page, 8 May 2019); Signatories are not legally bound to implement the ATT until they have ratified it, but they are still required to refrain from acts that would defeat the Treaty’s object and purpose, see *Vienna Convention on the Law of Treaties* art 18.

19 Amnesty International (n 16); ATT Monitor, *Dealing in Double Standards: How Arms Sales to Saudi Arabia Are Causing Human Suffering in Yemen* (2016) 7.

properly.²⁰ This implies that there are certain deficits in the ATT, which allow states parties to behave in this manner and keep others from joining.

The aim of this paper is to provide a critical overview and analysis of the ATT in light of its object and purpose enshrined in Article 1. To understand both the accomplishments and the deficiencies of the treaty, it is necessary to first examine its background and historical development, which is outlined in the first chapter. In the second chapter, core articles of the ATT are analysed, with a focus on those that speak more specifically to the obligations states parties are required to implement in order to achieve its object and purpose embedded in Article 1.²¹ This chapter reveals the shortcomings of the ATT, including its loopholes, which provides the necessary anchor for exploring regulatory alternatives, and making recommendations for reform in the fourth chapter. The organs of the ATT are presented in the third chapter and analysed in the fourth, with regard to their role in developing the legal framework of the treaty, despite their limited mandate. This paper argues that in its current form, the ATT has significant shortcomings that may prevent it from achieving its object and purpose.

II. Rationale for a Global Arms Trade Treaty

1. Challenges of Regulating the Global Conventional Arms Trade

Attempts to regulate arms transfers at a global level are not new.²² Especially since the Cold War, several regional and international instruments have been agreed upon that regulate or affect conventional arms transfers.²³ However, these existing instruments were proving insufficient or inadequate in tackling the illicit trade in conventional arms, and ensuring responsible transfers because they vary widely in terms of scope, level of commitment and implementation.²⁴ Some are less comprehensive than others in terms of the transactions and categories of weapons they cover, some are legally

²⁰ Casey-Maslen et al (n 13) N 6.02.

²¹ Da Silva and Wood (n 10) 23.

²² Sarah Parker, *Implications of States' Views on an Arms Trade Treaty* (2008) 2.

²³ For more examples see *ibid* 58–59.

²⁴ *Ibid* 9.

binding, but the majority are only politically binding, and some are less rigorously applied and enforced than others.²⁵

Part of the problem as to why existing instruments have provided insufficient or inadequate lies in the nature of conventional arms: It is their ordinariness that makes the task of regulating their transfers appear, at a first glance, nigh on impossible.²⁶ There are three main aspects of conventional arms trade that help explain the challenges of its regulation. Firstly, the supply and demand for conventional arms, both legal and illegal, ebbs and flows as international crises emerge and/or are resolved.²⁷ Secondly, the international trade in conventional arms is a multi-billion-dollar business engaged in some part by virtually every country in the world.²⁸ Therefore, conventional arms are profitable.²⁹ Thirdly, the control of and trade in conventional arms are more complicated than that of other weapons systems: Unlike weapons of mass destruction, conventional arms do not primarily serve a deterrence function, but are tools that can be legitimately used by governments, militaries, police forces, and civilians.³⁰ They are dual-use, in that they can be obtained and used for legitimate purposes, as well as for committing violations of national and international laws.³¹ Thus, any multilateral action on the trade in conventional arms as a whole must take the form of regulation rather than abolition or a ban, and discussions about the international arms trade are limited to identifying ways in which the trade and use can be controlled, overseen and made transparent.³² Article 51 of the *United Nations Charter* ('UN Charter'), which recognises the inherent right of all states to individual or collective self-defense and consequently the right to manufacture, import, export, transfer, and retain conventional arms toward

25 Ibid 10.

26 O'Connor (n 6) 78–79.

27 Rachel Stohl, 'Understanding the conventional arms trade' (2017) 1898(1) *American Institute of Physics Conference Proceedings* 030005–2.

28 Rachel Stohl, 'Putting the Arms Trade Treaty into Context: Perspectives on the Global Arms Trade, Existing Arms Trade Initiatives, and the Role of the United States' (2009) 103 *Proceedings of the American Society of International Law Annual Meeting* 333, 334.

29 Stohl (n 27) 030005–1.

30 Ibid 030005–2.

31 Tom Coppen, 'The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty' (2016) 7(2) *Goettingen Journal of International Law* 353, 354.

32 Anna Stavrianakis, 'Legitimising liberal militarism: politics, law and war in the Arms Trade Treaty' (2016) 37(5) *Third World Quarterly* 840, 842; Stohl (n 28) 334.

that end, frames arms trade discussions.³³ Due to the fact that conventional arms serve legitimate purposes and are the source of a multi-billion dollar business, the role of the major arms producers and exporters cannot be understated. The U.S., Russia, Germany, France, China, and the United Kingdom ('UK') have been holding the lion's share of the global arms market, with the U.S. leading the way.³⁴ Their hesitance to enhance conventional arms trade controls is likely to have a significant influence on the will and capability of the entire international community to engage in stricter arms trade practices.³⁵

2. Towards the Arms Trade Treaty

The roots of the ATT can be traced back to the late 1990 s and the beginnings of a civil society campaign supported by a group of Nobel Peace Prize Laureates.³⁶ In July 2006, 7 governments sponsored the first UN General Assembly Resolution 'Towards an Arms Trade Treaty', which recognised that 'the absence of common international standards on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development'³⁷. The Resolution was adopted by a large majority during the meeting of the First Committee in October 2006 and by an even larger majority in the UNGA in December 2006.³⁸ The U.S. was the only state to

33 Stohl (n 28) 334.

34 Paul Holtom et al, *Trends in International Arms Transfers, 2012* (2013) 1; Stohl (n 27) 030005–7; Pieter D. Wezeman et al, *Trends in International Arms Transfers, 2019* (2020) 1; Wezeman, Kuimova and Wezeman (n 17) 1.

35 Stohl (n 27) 030005–7.

36 Da Silva and Wood (n 10) 13.

37 Mark Bromley, Neil Cooper and Paul Holtom, 'The UN Arms Trade Treaty: arms export controls, the human security agenda and the lessons of history' (2012) 88(5) *International Affairs* 1029, 1040; Parker (n 22) 5; UN General Assembly, *Draft Resolution – Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, UN Doc A/C.1/61/L.55 (12 October 2006); Peter Woolcott, *Arms Trade Treaty* (2014) 2.

38 Parker (n 22) 5; UN General Assembly (n 39); UN General Assembly, *Resolution adopted by the General Assembly on 6 December 2006: Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, UN Doc A/RES/61/89 (18 December 2006).

vote against, but foreshadowing the outcome of the process in 2013, important states such as Russia, China and India abstained.³⁹

The road from 2006 to 2013, the adoption of the ATT, was not straightforward. States approached the negotiations from a broad range of perspectives.⁴⁰ One of the main dividing lines was between states that were interested in a human security instrument and those which would accept only a treaty based upon state security interests.⁴¹ The support of the U.S., for instance, came at a high price: The U.S. demanded that the negotiations be held on the basis of consensus and even though it supported the inclusion of certain human security concerns in the treaty, it wanted state security interests to be paramount.⁴² A second important dividing line was between states that viewed the ATT as an arms control instrument and those that saw it as an attempt to raise standards in arms export controls.⁴³ Both of these divisions lay at the heart of two issues during the negotiations: putting human security into prohibitions and criteria for arms transfers, and the scope of the items covered.⁴⁴ The wording of articles of the ATT reflect these issues.

The first UN Diplomatic Conference in July 2012 ended without a treaty being adopted.⁴⁵ Although it appeared that a compromise text had been agreed on, the U.S., supported by Russia, Cuba, Venezuela and DRP Korea, announced on the last day that further negotiations were necessary.⁴⁶ In December 2012, the UNGA decided to convene another diplomatic conference in March 2013, utilising the modalities of the July 2012 Conference.⁴⁷ The Final Conference produced a document which managed to gain widespread agreement, but consensus could not be achieved due to the objections of the delegations of Iran, North Korea and Syria.⁴⁸ However, within a week of the closing of the Final Conference, the treaty was approved by the UNGA Resolution,

39 Lustgarten (n 2) 398; Parker (n 22) 5.

40 Da Silva and Wood (n 10) 13.

41 Bromley, Cooper and Holtom (n 37) 1040.

42 Ibid; Lustgarten (n 2) 399.

43 Bromley, Cooper and Holtom (n 37) 1042.

44 Ibid.

45 Lustgarten (n 2) 399.

46 Ibid.

47 Ibid.

48 Woolcott (n 39) 4.

where consensus is not required.⁴⁹ Therefore, in essence, the consensus requirement governing the negotiations had a profound impact upon the contents of the ATT text that was adopted.⁵⁰ With all negotiating parties practically given a veto, the treaty had to be designed with a view to accommodating the states least interested in a strong and effective agreement.⁵¹ For the negotiations to result in something that could pass for diplomatic success, many states thought it was crucial that the U.S., Russia and China did not oppose the draft, and thus the treaty was written with their interests in mind.⁵² Due to the restrictions stemming from the consensus rule, the ATT became a stronger text than one could have expected.⁵³ Had it been negotiated under the ordinary rules of the law on treaties, however, it could have become even more robust.⁵⁴

III. The Arms Trade Treaty

1. Object and Purpose (Article 1)

The faithful interpretation and implementation of the ATT requires an understanding of its underlying aims and objectives.⁵⁵ Taken together, the preamble, its principles and the object and purpose in Article 1 create the overall framework for the interpretation of the ATT and illustrate the broad range of interests that the states were pursuing in its elaboration.⁵⁶

49 Stuart Casey-Maslen, Gilles Giacca and Tobias Vestner, *Academy Briefing No. 3, The Arms Trade Treaty (2013)* (2013) 6; Lustgarten (n 2) 399; *Charter of the United Nations* art 18.3.

50 Cecilia M. Bailliet, *Research Handbook on International Law and Peace, Research Handbooks in International Law* (2019) 272.

51 *Ibid.*

52 *Ibid* 274.

53 *Ibid* 272.

54 *Ibid*; *Vienna Convention on the Law of Treaties* art 9.

55 International Committee of the Red Cross, *Understanding the Arms Trade Treaty from A Humanitarian Perspective* (2016) 13.

56 A preamble forms part of a treaty for purposes of interpretation, see *Vienna Convention on the Law of Treaties* art 31.2; It is not typical for treaties to have a provision that purports explicitly to identify their object and purpose. Therefore, the normative effect of Article 1 is unclear, except insofar as it assists in the interpretation of other provisions in the treaty, see Casey-Maslen, Giacca and Vestner (n 49) 17; *Vienna Convention on the Law of Treaties* art 31 states that a 'treaty shall be interpreted in good faith in accordance with

1.1. Object of the ATT

The treaty contains two distinct, yet interconnected objectives: creating the highest international standards for the legal trade and preventing and eradicating the illicit trade in conventional arms.⁵⁷ While establishing standards can be seen as an output of the treaty negotiation, eradicating illicit trade in conventional arms is a long-term aim.⁵⁸

Since it was understood during the negotiation process that some states would want to restrict arms transfers even in situations and to recipients not prohibited by the ATT, the twelfth preambular paragraph recognises that via national policies or laws, states have the right to place additional restrictions on transfers of weapons. In this sense, the ATT creates a ‘floor not a ceiling’⁵⁹.

The ATT aims to prevent and eradicate the illicit trade and prevent diversion of conventional arms to the illicit market, or for unauthorised end use and end users.⁶⁰ The term ‘illicit’ is not defined in the ATT and there is no universally accepted or agreed definition of what constitutes ‘illicit trade’⁶¹. However, under the 1996 UN Disarmament Commission Guidelines on International Arms Transfers, recalled in the seventh preambular paragraph of the ATT, illicit arms-trafficking is understood to cover the international trade in conventional arms, which is in conflict with national law, treaty law, or customary international law.⁶² Overall, the notion of illicit trade remains broad, and what can be considered ‘illicit’ in the context of the ATT, will largely depend upon the legal framework established by individual states.⁶³

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ and uses the term eight times: arts 18, 19(c), 20(2), 31, 33, 41, 58(1) and 60, which shows that that the object and purpose plays is a fundamental component in a treaty; Casey-Maslen et al (n 13) N 1.03; Da Silva and Wood (n 10) 23.

57 Da Silva and Wood (n 10) 24.

58 Casey-Maslen et al (n 13) N 1.18.

59 Ibid N 0.41 and N 1.21.

60 *Arms Trade Treaty* preambular paragraph 3 and 8.

61 Casey-Maslen et al (n 13) N 1.26.

62 Ibid N 0.19 and 1.27; UN General Assembly, *Report of the Disarmament Commission*, 51st sess, Supp No 42, UN Doc A/51/42 (22 May 1996) 10.

63 Casey-Maslen et al (n 13) N 1.34.

1.2. Purpose of the ATT

The ATT's purpose is to contribute to international and regional peace, security, and stability; to reduce human suffering; and to promote co-operation, transparency, and responsible action by states parties in international trade in conventional arms, thereby building confidence among them.⁶⁴ The purposes of the ATT are interlinked and mutually reinforcing.⁶⁵ They refer to the longer-term goals that the treaty's drafters sought to achieve by creating international standards regulating the arms trade and preventing illicit trade.⁶⁶

While Article 1 will be achieved through the collective implementation of all the obligations in the ATT, certain provisions speak more specifically to the obligations states parties are required to implement to realise or contribute to the achievement of the object and purpose of treaty.⁶⁷ These provisions, however, are not without problems, and are to be analysed next.

2. Scope of the ATT (Articles 2, 3 and 4)

2.1. Weapons and Items Covered by the ATT (Articles 2.1, 3 and 4)

2.1.1. Conventional Arms (Article 2.1)

The categories of conventional arms covered by the ATT are directly relevant to many of the provisions of the treaty and serve as a point of reference for the scope of the items covered by Article 3 (ammunition/munitions) and Article 4 (parts and components).⁶⁸

Predictably, the categories of weapons (and transactions) to be covered by the ATT were central questions throughout the deliberations, both before and during the actual treaty negotiations.⁶⁹ Debate centered on whether the treaty should apply to all conventional arms or whether the scope

64 *Arms Trade Treaty* art 1.

65 See also *Arms Trade Treaty* preambular paragraph 6, which recognizes that peace and security, development and human rights are interlinked and mutually reinforcing; International Committee of the Red Cross (n 55) 14.

66 *Ibid*; Casey-Maslen et al (n 13) N 1.39.

67 Da Silva and Wood (n 10) 26.

68 *Ibid* 29.

69 Casey-Maslen et al (n 13) N 2.06.

should be more limited.⁷⁰ Most states wanted the treaty to cover all conventional arms, approaching the issue through an export control lens.⁷¹ A number of states also supported developing an agreed list of weapons, similar to the control lists adopted under the *Wassenaar Arrangement* ('WA') and by the European Union ('EU'), or simply adopting an existing list, such as the 7 major conventional arms of the *UN Register of Conventional Arms* ('UNROCA').⁷² Others, expressed concern that the UNROCA was not comprehensive and suggested it might be necessary to adopt a list containing categories broader than those in the UNROCA, especially containing small arms and light weapons ('SALW').⁷³ However, the states skeptical of the value of the ATT, including China and India, initially advocated that the scope should not go beyond the 7 categories.⁷⁴ Including SALW in the list of items covered was for most states, especially in regions most affected by their proliferation, the *raison d'être* for the treaty, without which they argued it would have little relevance.⁷⁵ As a result, during the UN Diplomatic Conference, China, India and other states in a minority agreed to the inclusion of SALW within the scope of the ATT, provided states were prepared to compromise in other areas of the treaty.⁷⁶ Therefore, the 8 categories of conventional arms in Article 2.1 ATT have a clear origin: they are the 7 found in the UNROCA, with the addition of SALW.⁷⁷

The UNROCA was established in 1991 and reflecting the concerns of that era, is limited to heavy weaponry.⁷⁸ It also reflects the state of technology of a generation ago, even though the development of weapons has progressed

70 Ibid.

71 Ibid N 2.08; Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty* (2007) 5.

72 Casey-Maslen et al (n 13) N 2.08; Parker (n 83) 12; UN Register of Conventional Arms, 'Transparency in the global reported arms trade, Categories of major conventional arms' (Web page, undated).

73 As cited in Casey-Maslen et al (n 13) N 2.09.

74 Bromley, Cooper and Holtom (n 37) 1043; Da Silva and Wood (n 10) 30.

75 Da Silva and Wood (n 10) 32; Jo Adamson and Guy Pollard, 'Chapter 9, The Arms Trade Treaty: making a difference' in Larry MacFaul (ed), (2015) *Verification & Implementation, A biennial collection of analysis on international agreements for security and development, 2015* (2015) 143, 153; Casey-Maslen et al (n 13) N 2.15.

76 Bromley, Cooper and Holtom (n 37) 1043–1044; Da Silva and Wood (n 10) 32.

77 Lustgarten (n 2) 403.

78 Ibid; see Paul Holtom, 'Nothing to Report: The Lost Promise of the UN Register of Conventional Arms' (2010) 31(1) *Contemporary Security Policy* 61.

rapidly ever since.⁷⁹ This origin contributes significantly to major shortcomings of the list in the ATT, 2 of them regarding the limitation in nature and size.⁸⁰ Firstly, instead of including all ‘military’ vehicles, aircraft, and helicopters, as once proposed in a draft text in 2011, the ATT only covers ‘armored’, ‘combat’ and ‘attack’ versions of this equipment, which leads to various exclusions, such as training equipment, transport vehicles, unmanned aerial vehicles (‘UAV’) used as unarmed vehicles for the surveillance of target populations and the gathering of intelligence, and surveillance equipment in general.⁸¹ Another shortcoming is that weapons technology is left out of the scope of the ATT entirely.⁸² The inclusion of technology was once proposed in a draft text, but it was not considered a high-profile issue and the matter was eventually dropped.⁸³ As a result, all guidance systems for weapons covered by the scope of the ATT are now excluded.⁸⁴ Equally important, if a state imports technology that it then incorporates into equipment locally produced, or separately purchased in kit form for local assembly, the transfer, which provides the brain and the heart of the weaponry, also lies outside the scope of the ATT.⁸⁵ Additionally, technology for cyberwarfare, in which the technology is itself the weapon, and technology guiding autonomous weapons fall outside the treaty.⁸⁶ Secondly, regarding the category of SALW, an important and controversial issue concerns the line of demarcation between small arms and ammunition. The question arises as to how small a weapon must be before it ceases to count as a conventional armament.⁸⁷ This question of

79 Lustgarten (n 2) 403.

80 Ibid; Da Silva and Wood (n 10) 36.

81 See Reaching Critical Will, ‘Chairman’s Draft Paper’ Documents from the 3rd PrepCom (PDF Document on Web Page, 14 July 2011); Ghazala Yasmin Jalil, ‘Arms Trade Treaty: A Critical Analysis’ (2016) 36(3) *Strategic Studies* 78, 88; Laura Louca, *Der Arms Trade Treaty und die Kontrolle von Dual-use-Gütern* (2018) 112; Lustgarten (n 2) 404–405; Simone Wisotzki, *Rüstungsexporte unter verschärfter Kontrolle? Eine Bewertung des internationalen Waffenhandelsvertrags* (2013) 17–18.

82 Lustgarten (n 2) 405; Jalil (n 96) 89; Wisotzki (n 81) 18.

83 Lustgarten (n 2) 405; Reaching Critical Will, ‘Elements of provision on Scope in an ATT’ (PDF Document on Web Page, 13 July 2012) 1.

84 Lustgarten (n 2) 405.

85 Ibid; Denise Garcia, ‘Global Norms on Arms: The Significance of the Arms Trade Treaty for Global Security in World Politics’ (2014) 5(4) *Global Policy* 425, 430.

86 Lustgarten (n 2) 405; Nathalie Weizmann, *Academy Briefing No. 8, Autonomous Weapon Systems under International Law* (2013) 6.

87 Lustgarten (n 2) 403.

classification is of practical importance because SALW and ammunition are treated differently in the ATT, with exports of ammunition subject to lesser controls.⁸⁸ The size issue arises because Article 5.3 of the ATT states that national definitions for SALW shall not cover less than the descriptions in the International Tracing Instrument ('ITI'). However, the ITI appears to exclude hand grenades and manually emplaced landmines.⁸⁹ Contrariwise, the 1997 Report of the UN Panel of Governmental Experts on Small Arms applies a broad definition of SALW based upon 'an assessment of weapons actually used in conflicts'⁹⁰, in which it *inter alia* includes hand grenades.⁹¹ It seems that an item unquestionably capable of causing death had to be of a certain minimum size before experts would classify it as 'small arms' rather than 'ammunition'⁹². Read together with Article 3 of the ATT regulating the export of ammunition/munitions, which limits the scope of ammunition/munitions covered by the treaty to those 'fired, launched or delivered by the conventional arms covered under Article 2 (1)', explosive devices laid by hand (emplaced) or thrown, such as grenades and manually emplaced landmines, are excluded.⁹³

2.1.2. Ammunition/Munitions (Article 3)

A further shortcoming of Article 2.1 regards the failure to include ammunition within its scope and the discussions regarding its possible inclusion were perhaps the single most contentious issue during the negotiations.⁹⁴ The great majority of states wished to see ammunition/munitions included under the same terms as the classes of conventional arms listed in Article 2.1.⁹⁵ Others, notably the world's two largest conventional arms and ammunition manufacturers and exporters, the U.S. and Russia, would likely have preferred a treaty with no provisions on

88 Ibid; see *Arms Trade Treaty* art 3.

89 Several classes of arms are entirely excluded or omitted by definition from the ITI, see Casey-Maslen et al (n 13) N 2.231.

90 See UN General Assembly, *General and Complete Disarmament: Small Arms*, UN Doc A/52/298 (27 August 1997) 11.

91 International Committee of the Red Cross (n 55) 20.

92 Laurence Lustgarten, 'The Arms Trade Treaty: Achievements, Failings, Future' (2015) 64(3) *International & Comparative Law Quarterly* 569, 581.

93 Casey-Maslen et al (n 13) N 3.24.

94 Lustgarten (n 2) 406.

95 Da Silva and Wood (n 10) 56.

ammunition/munitions at all.⁹⁶ Opposition against the inclusion of ammunition came most vocally from the U.S. and its position prevailed, though only in part: Given the decision very early in the negotiating process to proceed by consensus, some compromise was inevitable.⁹⁷ By the end of the negotiations, it was agreed that ammunition/munitions could only be included in the ATT if it were done in a partial way and not subjected to the same requirements as items in Article 2.1.⁹⁸ Therefore, it was agreed that ammunition would have its own dedicated provision in Article 3, according to which, each state party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2.1, and shall apply the provisions of Article 6 and Article 7 prior to authorising the *export* of such ammunition/munitions.

2.1.3. Parts and Components (Article 4)

Efforts to achieve an acceptable compromise on the inclusion of ‘parts and components’ reflected those on ammunition, with the provision being moved from Article 2.1 into a new stand-alone provision, specifically Article 4.⁹⁹ This provision requires each state party to ‘establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2(1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components’. The precise meaning of the qualification ‘where the export is in a form that provides the capability to assemble’ such arms is unclear and leaves room for interpretation.¹⁰⁰ Indeed, it constitutes an example of constructive ambiguity within the treaty designed to accommodate several contradictory views and allows for a range of possible interpretations. The responsibility of states under the international law of treaties to interpret and apply treaties in good faith¹⁰¹ is of particular importance with regards to Article 4 to prevent a state

96 Ibid.

97 Ibid; Lustgarten (n 2) 406.

98 Da Silva and Wood (n 10) 56; Lustgarten (n 2) 407.

99 Casey-Maslen et al (n 13) N 4.13.

100 Ibid N 4.16.

101 *Vienna Convention on the Law of Treaties* art 26; Casey-Maslen, Giacca and Vestner (n 49) 21.

party from circumventing its international legal obligations by sending several separate shipments of parts and components for a conventional armament falling under Article 2.1, as otherwise Article 4 could amount to a significant loophole in the treaty.¹⁰²

2.2. Transfers Covered by the ATT (Articles 2.2 and 2.3)

Article 2.2 states that the activities of the international trade comprise export, import, transit, trans-shipment and brokering, collectively referred to as ‘transfer’. Regulating the international trade in conventional arms is one of the central goals of the ATT in Article 1, therefore defining what constitutes ‘international trade’ is key to the treaty’s implementation. In fact, Article 2.2 provides the only explicit definition in the entire agreement.¹⁰³ Curiously though, defining the term ‘international trade’ by listing the 5 activities that the concept includes, without providing their definitions.¹⁰⁴

One of the central issues debated in the context of Article 2.2 of the treaty was whether transactions that do not involve financial considerations and/or the transfer of title should be included, namely, leases, loans or gifts.¹⁰⁵ Many states called for an explicit reference to such transactions, and such a reference did briefly appear in a draft text.¹⁰⁶ Others argued that the concept of export includes leases, loans and gifts by virtue of the fact that it involves the movement of items from a state’s territory, and that if their inclusion was made explicit, this could have the effect of narrowing the definition of export or transfer outside the treaty.¹⁰⁷ Ultimately states settled for constructive ambiguity in the text, mainly due to opposition from China, and as such, gifts, loans, leases are neither explicitly included, nor explicitly excluded.¹⁰⁸ States parties will have to determine in their

102 Casey-Maslen et al (n 13) N 4.17; Casey-Maslen, Giacca and Vestner (n 49) 21.

103 Casey-Maslen et al (n 13) N 2.02.

104 See *ibid* N 2.233–2.261 for possible definitions; Da Silva and Wood (n 10) 36.

105 Casey-Maslen et al (n 13) N 2.21; Louca (n 97) 113.

106 See Reaching Critical Will (n 102) 15.

107 Casey-Maslen et al (n 13) N 2.21.

108 See ATT Working Group on Transparency and Reporting, *Reporting Authorized or Actual Exports and Imports of Conventional Arms under the ATT, Questions & Answers*, No ATT/CSP5.WGTR/2019/CHAIR/533/Conf.Rep.Rev1 (26 July 2019) 10; Brian Wood, *The Arms Trade Treaty. Prospects and Challenges as it “enters into force”* (2014) 5.

national definitions of the component elements of ‘transfer’ whether such transactions are covered and subsequent state practice will therefore influence the interpretation of Article 2.2.¹⁰⁹

Article 2.3 excludes certain arms transfers from the application of the ATT, namely the international movement of conventional arms by, or on behalf of, a state party for its own use as long as the state retains ownership of the arms in question.¹¹⁰ The rationale for such a provision is that states should not face the ‘burden’ of having to assess risks associated with the movement of weapons to their own forces overseas, since there is no change in control, and thus no ‘transfer’ within the meaning of the ATT takes place.¹¹¹ A big concern among negotiators was that such weapons subject to the exception may be left behind by the forces upon their departure and either sold or given to the host state, or abandoned.¹¹² Thus, a *de facto* transfer would take place and the departing state would not be under any obligation to apply the provisions of the treaty to the transfer.¹¹³ Despite the concerns regarding the potentially ambiguous nature of Article 2.3, the phrase was not amended and consequently, the application of the treaty to weapons ‘left behind’ is implicit.¹¹⁴ Moreover, the word ‘use’ implies that there is no qualification or limitation on the nature of the end user, only the end use.¹¹⁵

3. Transfer Prohibitions (Article 6)

Article 6 contains the absolute prohibitions that sit at the heart of the ATT and forbids a state party from authorising any transfer of conventional arms, ammunition/munitions and parts and components (Articles 2.1, 3 and 4) in 3 circumstances.¹¹⁶

109 Casey-Maslen et al (n 13) N 2.21; *Arms Trade Treaty*, art 5.2.

110 Ibid N 2.03.

111 Ibid N 2.262.

112 Ibid N 2.26.

113 Ibid.

114 Ibid.

115 Ibid N 2.28.

116 Brandes (n 2) 409.

3.1. UN Security Council Chapter VII Measures (Article 6.1)

Any transfer of conventional arms and related items is prohibited under Article 6.1 where the transfer would violate a state party's obligation to comply with measures adopted by the UN Security Council ('UNSC') acting under Chapter VII of the *UN Charter*, in particular arms embargoes. The importance of Article 6.1 has been dismissed by some scholars on the grounds that it merely reiterates an already existing obligation.¹¹⁷ However, this is a short-sighted view, particularly because one of the persistent criticisms of UN arms embargoes is their lack of effectiveness. Arms embargoes 'have suffered from uneven (or sometimes almost non-existent) implementation and are seen increasingly as being weak political positions that are not enforced'¹¹⁸. Since states parties are subject to the broader regulatory framework of the ATT, which requires them to designate competent national authorities and have an effective and transparent national control system to regulate the transfer of conventional arms and related items (Article 5 ATT), Article 6.1 has the potential to strengthen the implementation and enforcement of arms embargoes.¹¹⁹ Such a national control system must include the capacity to take the necessary measures to effectively implement an arms embargo, through national legislation and enforcement.¹²⁰ Furthermore, states parties to the ATT are required, *inter alia*, to report on steps taken to implement the treaty; to take measures to regulate brokering and transit and trans-shipment; to facilitate international cooperation including information exchange; and to take enforcement measures.¹²¹ Thus, the ATT has the potential to create a more uniform approach to the implementation and monitoring of UN arms embargoes.¹²²

117 Ibid 410; Silke Zwijzen, Machiko Kanetake and Cedric Ryngaert, 'State Responsibility for Arms Transfers: The Law of State Responsibility and the Arms Trade Treaty' (2020) *Ars Aequi* 151, 156.

118 Bonn International Center for Conversion, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'* (2001) 99–100.

119 Da Silva and Wood (n 10) 91.

120 Ibid 92.

121 *Arms Trade Treaty* arts 13, 10, 9, 15 and 14.

122 Da Silva and Wood (n 10) 92.

3.2. Relevant International Obligations (Article 6.2)

Article 6.2 prohibits the authorisation of any transfer that 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’. Since the violation must relate to international agreements, specifically entered into by a state, this provision does not create any new substantive obligations and the obligations that a state party already has under other international agreements remain, regardless of whether or not they are considered ‘relevant’ to the ATT.¹²³ The significance of Article 6.2 is that it makes certain transfers of conventional arms that breach ‘relevant international obligations’, a breach of the ATT as well.¹²⁴ Interestingly, the provision excludes customary international law.¹²⁵ This gap may be at least partially closed in Article 6.3, where recipients engage or are likely to engage in war crimes, crimes against humanity or genocide or targeting civilian objects. However, Article 6.3 requires ‘knowledge’ rather than the strict liability standard in Article 6.2.¹²⁶

In the context of Article 6.2, the question arises whether the ATT prohibits arms transfers to non-state actors (‘NSAs’). In fact, one of the main objections pressed by states which refused to sign the ATT was that it imposes no restrictions on transfers to NSAs.¹²⁷ Some states were seeking an absolute and explicit ban, whilst others preferred to keep their options open.¹²⁸ The failure of the ATT to eventually tackle this issue head on should not, however, lead to conclude that arms transfers to NSAs are unregulated by the ATT.¹²⁹ Firstly, there is no question that if an NSA is subject to a UN embargo, any transfer is forbidden.¹³⁰ Secondly, the prohibitions of Article 6.3 apply to NSAs in the same manner as they do to states, as these are directed at the uses to which the equipment is put, not the identity of the perpetrator.¹³¹ The same goes for the application of

¹²³ Ibid 93.

¹²⁴ Ibid.

¹²⁵ Da Silva and Wood (n 10) 96; Lustgarten (n 2) 409.

¹²⁶ Da Silva and Wood (n 10) 97.

¹²⁷ Casey-Maslen et al (n 13) N 6.54; Lustgarten (n 2) 430.

¹²⁸ Casey-Maslen et al (n 13) N 6.54; Paul Holtom, *Prohibiting arms transfers to non-state actors and the Arms Trade Treaty* (2012) 3–6.

¹²⁹ Casey-Maslen et al (n 13) N 6.55.

¹³⁰ Lustgarten (n 2) 430.

¹³¹ Ibid.

Article 7, as a matter of its structure.¹³² A reading of Article 6.2 though could prevent any transfer to such a group, even if there were no risk of them being used to commit the crimes in Article 6.3. Therefore, the contentious question is whether the provisions of Article 6.2 can be said to extend to them.¹³³ The legal scholar Andrew Clapham has argued that armed NSAs are prohibited by the reference in Article 6.2 to international agreements, particularly those relating to the transfer of, or illicit trafficking in, conventional arms, since such an international agreement is the *UN Charter* and one of its fundamental principles is the prohibition on the use of force in Article 2.4 *UN Charter*.¹³⁴ However, the wording of Article 6.2 clearly signals that the drafters were concerned primarily with other international agreements restricting arms transfers, and not general provisions or constitutive instruments, such as the *UN Charter*.¹³⁵ Clapham's argumentation stretches the treaty language to breaking point to include the *UN Charter* within Article 6.2 and his argument does not consider the clear message emerging during the negotiations and from the statements recorded in the UNGA debates: A significant number of states did not believe that the treaty forbade transfers to NSAs, and this omission was, for many though not all, the main reason that they refused to sign it.¹³⁶ Having that said, the U.S. strongly opposed any ban on transfers to NSAs, consistent with its longtime position in various international negotiations.¹³⁷ This confluence of interpretation amongst states convincingly refutes any expansive interpretation of Article 6.2.¹³⁸

3.3. Knowledge of Genocide, Crimes Against Humanity and War Crimes (Article 6.3)

The most controversial part of Article 6 is found in Article 6.3, which forbids the authorisation of transfers if a state party has 'knowledge at the time of

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Casey-Maslen et al (n 13) N 6.56; See *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgement) [1986] ICJ Rep 160, 166 and 167.*

¹³⁵ Lustgarten (n 2) 431.

¹³⁶ Ibid.

¹³⁷ Holtom (n 128) 6; Lustgarten (n 2) 431.

¹³⁸ Lustgarten (n 2) 431.

the authorization' that the conventional arms, ammunition/munitions and parts and components 'would be used in the commission of' one or more of the following crimes under international law: 'genocide, crimes against humanity, grave breaches of the Geneva Conventions on 1949, attacks directed against civilian objects or civilians protected as such' and 'other war crimes as defined by international agreements to which it is a party'. While this provision represents one of the ATT's most commendable achievements, its wording raises some questions of interpretation.

3.3.1. Genocide, Crimes Against Humanity and War Crimes

The ATT does not provide definitions for 'genocide' or 'crimes against humanity' and, unlike the case of 'war crimes', does not refer to definitions in other treaties. Article 6.3 refers to 3 types of violations of the laws of war: grave breaches of the 1949 Geneva Conventions; attacks directed against civilian objects or civilians protected as such; and other war crimes that are defined by international agreements to which a state party is a party.¹³⁹ War crimes are serious violations of international humanitarian law ('IHL') that occur during international armed conflicts or armed conflicts of a non-international character.¹⁴⁰ Article 6.3 makes no reference to the definition of war crimes in customary international law by which all states parties to the ATT are bound, which may have provided the provision with a more solid basis for uniform interpretation and application, given the limited applicability of the Geneva Conventions to non-international armed conflicts.¹⁴¹ Additionally, the explicit reference to common Article 3 of the Geneva Conventions applicable in non-international armed conflicts was removed during the negotiations, although the vast majority of armed conflicts occurring in the world are not of an international character.¹⁴² Although common Article 3 does not regulate the situation of non-international armed conflicts conclusively, it outlines the 'fundamental standard rules of protection that must be observed in all armed conflicts'¹⁴³. What is also missing from Article 6.3 is

139 Casey-Maslen et al (n 13) N 6.153.

140 Sarah Parker, *The Arms Trade Treaty, A Practical Guide to National Implementation* (2016) 60.

141 Brandes (n 2) 415; Da Silva and Wood (n 10) 102.

142 Brandes (n 2) 415.

143 Ibid.

a prohibition of transfers if the relevant state party has knowledge that the arms or items would be used to commit violations of international human rights law ('IHRL'), although many states had called for such a provision.¹⁴⁴ Though there is significant cross-over between crimes against humanity and gross and systematic abuses of human rights, meaning that many violations of IHRL will fall under Article 6.3, this remains an anomaly.¹⁴⁵ Given that the treaty is being touted as a 'powerful new tool' to 'prevent grave human rights abuses', the text of the ATT should make this clear.¹⁴⁶ The above claim and the purpose in Article 1 of reducing human suffering are undermined by the absence of a clause prohibiting arms transfers to human rights abusers.¹⁴⁷

3.3.2. Knowledge Requirement

The major point of controversy regarding Article 6.3 is centered on the interpretation of the requirement of 'knowledge'. Article 6.3 sets out a knowledge requirement, yet fails to define what constitutes it. There is a question whether the requirement of 'knowledge' includes an objective standard of constructive knowledge, whereby the state party 'should have known', based upon credible publicly available information providing substantial grounds to believe that the arms would be used to commit the listed crimes, or whether it refers to a subjective standard of actual knowledge in the possession of the state party.¹⁴⁸

'Knowledge' in Article 6.3 should be interpreted in light of the ATT's object and purpose, which includes the text of the treaty.¹⁴⁹ One object of the ATT is to establish the 'highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms'¹⁵⁰. The ATT is preventative in the sense that it seeks to prevent a range of negative consequences set out in Articles 6 and 7.¹⁵¹

144 Ibid; UN General Assembly, *Compilation of Views on the Elements of an Arms Trade Treaty: Background Document Prepared by the Secretariat*, UN Doc A/CONF.217/2 (10 May 2012) e.g. 9 (Australia), 23 (Costa Rica), 49 (Kenya), 55 (Malawi).

145 O'Connor (n 6) 86.

146 Ki-Moon (n 5).

147 O'Connor (n 6) 86.

148 International Committee of the Red Cross (n 55) 27.

149 Da Silva and Wood (n 10) 102; *Vienna Convention on the Law of Treaties* arts 31.1 and 31.2.

150 Da Silva and Wood (n 10) 102; *Arms Trade Treaty* art 1.

151 Da Silva and Wood (n 10) 103.

This suggests an interpretation which facilitates that object. States parties are required to establish and maintain a national control system to implement the treaty provisions (Article 5.2), which typically require applicants to disclose all relevant information when applying for permissions.¹⁵² Information can also be requested from other states under Article 15 and nowadays, there is access to information through the internet.¹⁵³ It is therefore almost inconceivable that a state implementing the ATT as required will not have considered whether Article 6.3 might be implicated in an arms transfer authorisation and through that process, have actual knowledge or knowledge that can be presumed.¹⁵⁴ In other words, it would be contrary to the object and purpose of the ATT, and a breach of Article 6.3, if it did not include cases where the contracting party must have known that the arms would be used for the listed crimes. This would be the case where the circumstances are notorious and widely known of, or the state official had reasonable suspicions about the prohibited acts, but chose to turn a blind eye, or if there were a failure to conduct due diligence by checking readily available and credible information (e.g. information published by reliable sources).¹⁵⁵ The latter serves to emphasise the important role of Article 15 of the ATT and civil society; the more that relevant information is circulated by states parties and NGOs, the more difficult it will be for a state to argue lack of knowledge.¹⁵⁶ Moreover, virtually all states devote considerable resources to attaining foreign intelligence and the larger and wealthier ones, which includes almost all major exporters, have dedicated intelligence agencies for this purpose.¹⁵⁷ Therefore, the focus should be on what is ‘reasonably foreseeable’, rather than what was actually foreseen.¹⁵⁸ The goal is to place states under an obligation to inquire diligently about how the weapons, whose export they have approved, are likely to be used and consequently reinforcing and making explicit, the obligation to prevent the occurrence

152 Ibid 102–103.

153 Ibid 102–103.

154 Ibid 103.

155 Ibid.

156 *Arms Trade Treaty* preambular paragraph 15 recognizes the voluntary and active role that civil society, including non-governmental organizations, and industry can play in raising awareness of the object and purpose of the ATT, and in supporting its implementation.

157 Lustgarten (n 2) 411.

158 Ibid.

of harms that international law generally imposes on all states.¹⁵⁹ A formulation such as ‘knows or has reasonable cause to believe’ is not too demanding and would have been preferable, since the ATT does not impose criminal sanctions, nor any form of direct civil liability.¹⁶⁰ In any case, Article 6.3 refers to knowledge that the weapons ‘would’ be used to commit the listed crimes, which indicates a lower burden of evidence to deny the transfer than knowledge that the weapons ‘will’ be used for such ends.¹⁶¹ Hence, the level of knowledge required to prohibit a transfer under Article 6.3 is not one of absolute certainty.¹⁶²

Regarding the temporal dimension of the knowledge requirement, Article 6.3 speaks of knowledge ‘at the time of authorization’, which is a serious shortcoming since the danger must be direct and immediate.¹⁶³ There is no explicit reference in Article 6.3 to the need for reassessment and revocation of export licenses, if information on international crimes is obtained after authorisation has been granted, but in relation to the less severe restrictions in Article 7.7, this issue is explicitly addressed; where an exporter ‘becomes aware of new relevant information it is encouraged to reassess the authorization’, though it may consult with the importing state before taking the decision. Due to the possibility of a time delay between an authorisation being granted and the arms or items being exported, which may be months or even years, it is not unreasonable to expect a state party to conduct a reassessment.¹⁶⁴ Strangely in Article 6, cases where the most serious concerns exist, strong enough to justify an outright ban, the issue is not addressed at all. This is clearly in contradiction with the objects and entire structure of the treaty and seems to have been a drafting oversight.¹⁶⁵

4. Export and Export Assessment (Article 7)

If an export of conventional arms, ammunition/munitions or parts and components has not been prohibited under Article 6 of the ATT, a state

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ International Committee of the Red Cross (n 55) 27–28.

¹⁶² Ibid 28.

¹⁶³ Lustgarten (n 2) 412.

¹⁶⁴ Casey-Maslen et al (n 13) N 7.21.

¹⁶⁵ Lustgarten (n 2) 412.

party is required to carry out a further multi-step assessment under Article 7. Unlike the judgements under Article 6, those in Article 7 are expressed in terms of balance or overall ‘assessment’, which leaves room for decisions based upon political, economic and other factors, which may well be contrary, to the objects and purposes of the treaty.¹⁶⁶ Articles 6 and 7 are intended to stigmatise and prevent transfers that contribute to violations of international law.¹⁶⁷ Looking at Article 7 on its own, it can be interpreted as an attempt to correct the flaws in Article 6, as a ‘catchall provision’ designed to regulate situations that, while serious, are not so severe as to fall within the Article 6 prohibitions.¹⁶⁸ Another interpretation is that Article 7 is a clawing back of states that are not entirely committed to the ATT ideals.¹⁶⁹ Instead of establishing a comprehensive prohibition regime, issues that could not be resolved under Article 6 have been tucked away into the ‘too hard basket’ that is Article 7.¹⁷⁰

4.1. Risk Assessment (Article 7.1)

4.1.1. Peace and Security (Article 7.1.a)

Before deciding whether to authorise any export of conventional arms, ammunition/munitions, or parts or components within the scope of the ATT, the exporting state party must assess the potential that the export concerned would contribute to or undermine peace and security (Article 7.1.a). The use of the word ‘would’ implies that there must be a high level of probability, therefore suspicion or vague possibility is insufficient.¹⁷¹ To be able to make a substantially positive contribution, the arms or items themselves must be significant in the prevailing circumstances.¹⁷² This might mean that a small shipment of arms or ammunition would be more difficult to justify as a contribution to peace and security, since its potential impact would be minimal or even non-existent. It also means that the nature of the arms being exported is a

166 Ibid 414.

167 As cited in O’Connor (n 6) 87.

168 O’Connor (n 6) 87.

169 Ibid.

170 Ibid.

171 Casey-Maslen et al (n 13) N 7.38.

172 Ibid N 7.33.

relevant factor.¹⁷³ Furthermore, the *UN Charter* refers to international peace and security, while Article 7.1.a of the ATT only refers to peace and security concerns, which is a considerably broader concept, covering ‘the likely impact of the export for the proposed recipient state and its surrounding region, as well as the wider international community’¹⁷⁴. This broad definition can also be reasonably interpreted from the preamble and principles, as well as the object and purpose of the treaty.

4.1.2. Violations or Offences (Article 7.1.b.)

If, on balance, and despite any mitigation measures that can be undertaken in accordance with Article 7.2, it assesses that the export of arms or items would undermine peace and security, the request for authorisation must be denied.¹⁷⁵ If, however, the exporting state party determines that the proposed export of arms or items would contribute to peace and security, the exporting state party’s assessment must then take into account, according to Article 7.1.b, the potential that the arms or items could be used to commit or facilitate a serious violation of IHL or IHRL or, as set out in a treaty to which the exporting state is party, an act of terrorism or transnational organised crime.¹⁷⁶ In contrast to the previous sub-paragraph, on the contribution to, or undermining of, peace and security, it is necessary to assess the potential that the arms ‘could’ be used to commit or facilitate a violation or offence listed in sub-paragraph (b). Therefore, one does not need to show that they ‘would’ be so used, indicating that a lower probability is sufficient.¹⁷⁷

According to the International Committee of the Red Cross (‘ICRC’), serious violations of IHL are war crimes and the two terms are interchangeable.¹⁷⁸ Serious violations of IHL can take place in international or non-international armed conflicts.¹⁷⁹ The scope of the notion of a serious

173 Ibid.

174 *Charter of the United Nations* preamble and arts 1, 2, 11, 15, 18, 23, 24, 26, 33, 34, 37, 39, 42, 43, 47, 48, 51, 52, 54, 73, 76, 84, 99, and 106; Da Silva and Wood (n 10) 122.

175 Casey-Maslen et al (n 13) N 7.01.

176 Ibid N 7.02.

177 Ibid N 7.38.

178 International Committee of the Red Cross, *What are “serious violations of international humanitarian law”?* (2016).

179 Parker (173) 60.

violation of IHL in Article 7.1.b.i is broader than the scope of Article 6.3 because it also applies to serious violations of customary IHL, since there is no limitation to ‘war crimes as defined by international agreements’ to which the exporting state is a party.¹⁸⁰ In contrast to serious violations of IHL, there is less convergence on what constitutes a serious violation of IHRL.¹⁸¹ Whether a violation of human rights is ‘serious’ under Article 7.1.b.ii needs to be determined on a case-by-case basis.¹⁸² The exporting state, generally more developed than the importing state, will make this decision.¹⁸³

As with Article 6, a potential problem arises in respect of NSA. It is not clear whether the phrase ‘a serious violation of international human rights law’ can cover the behavior of NSAs.¹⁸⁴ Given that there is a clear prohibition on transferring arms to NSAs where they would be used for the acts listed in Article 6.3, and that potential serious violations of IHL are covered by the previous clause related to a serious violation of IHL in Article 7.1.b.i, it would be odd if arms transfers would be scrutinised for potential to commit or facilitate a violation of IHRL by the government’s police and security forces, but not by the armed groups they were opposed by.¹⁸⁵ There is in fact a long-running doctrinal debate over whether human rights obligations extend to NSAs.¹⁸⁶ The resistance to include NSAs as potential bearers of human rights obligations and therefore potential human rights violators stems from a legal analysis that focuses upon the fact that human rights treaties are ratified by states and not by armed groups.¹⁸⁷ In addition, resistance can be traced to a political reluctance to allow a ‘recognition’ of armed groups by treating them as though they were states, and thus, subject to international human rights obligations.¹⁸⁸ The fact that such groups are undoubtedly said to be bound by IHL only adds to the controversy, for it highlights for some a need to keep IHL and

180 Brandes (n 2) 417.

181 Da Silva and Wood (n 10) 125.

182 Amnesty International, *How To Apply Human Rights Standards To Arms Transfer Decisions* (2008) 3; Brandes (n 2) 419.

183 O’Connor (n 6) 88.

184 Casey-Maslen et al (n 13) N 7.70.

185 *Ibid.*

186 *Ibid.*

187 *Ibid* N 7.71.

188 *Ibid.*

human rights separate.¹⁸⁹ For present purposes, it can be assumed that NSAs are covered by this provision, *inter alia*, because Article 7.1.b.ii does not refer to human rights treaties, but rather to international human rights law.¹⁹⁰ Ironically, an importing state that does not want NSA operating on its territory to have conventional arms will utilise Article 7 to stop an export authorisation when providing information to assist the export assessment pursuant to Article 7.1 and Article 8.1.¹⁹¹ There is nothing to stop the importing state from providing information that will jeopardise the NSA import attempt. Therefore, in some ways, the ATT may make it harder for NSAs to obtain weapons.¹⁹²

4.2. Risk Mitigation Measures (Article 7.2)

Pursuant to Article 7.2 of the ATT, the exporting state party must consider means to mitigate the risks identified in Article 7.1.a and 7.1.b. Numerous measures are theoretically available to it, though in practice, the options of an exporting state will often be constrained by its resources.¹⁹³ Certain measures entail co-operation between the exporting and importing state, which is reflected in the wording of Article 7.2 with reference to confidence-building measures and jointly developed or agreed programs. A measure already practiced by many states is the issuance of end-user certificates, which declare the final user and the end-use of imported arms and primarily serve to verify that the arms will not be further transferred to a third party without the exporting state's consent.¹⁹⁴ In addition, the requirement of risk mitigation measures, particularly with regard to IHL and IHRL, can also be seen as an undermining of the humanitarian concerns of the treaty, simply by its inclusion. Its existence is anomalous with the purpose of the ATT: IHL and IHRL abuses should 'automatically warrant denial of the transfer request'¹⁹⁵. The fact that they do not weakens the ATT.¹⁹⁶

¹⁸⁹ Ibid.

¹⁹⁰ See *ibid* N 7.74 for a detailed discussion.

¹⁹¹ O'Connor (n 6) 89.

¹⁹² Ibid.

¹⁹³ Casey-Maslen et al (n 13) N 7.88.

¹⁹⁴ Brandes (n 2) 420.

¹⁹⁵ Ray Acheson, *A tale of two treaties* (2013) 3; O'Connor (n 6) 88.

¹⁹⁶ O'Connor (n 6) 88.

4.3. Overriding Risk (Article 7.3)

Article 7.3 requires the refusal of authorisation if the assessment of the exporting state concludes that despite any mitigation measures in Article 7.2 that can be taken, the risk of any of the negative consequences listed in Article 7.1.b ATT is ‘overriding’. The use of this term is contentious and has led to a lack of clarity as to the meaning of the provision.¹⁹⁷ Article 7.3 is central to the entire assessment and the controversy surrounding it, for it addresses the point of decision.¹⁹⁸

The term ‘overriding risk’ is not defined in existing international law and is ambiguous.¹⁹⁹ It could be understood to mean that a national control authority must balance the predictable positive and negative consequences of exports of arms and items.²⁰⁰ Following this reading, a state party could consider the contribution of the arms transfer to peace and security more important and then authorise the export, even if there was a very high risk that the arms would be used in violation of international law.²⁰¹ During the negotiations, persistent attempts were made by certain states to replace ‘overriding’ with ‘substantial’ or an adjective that has a similar meaning, to avoid balancing and create a clear red line defined by the negative consequences outlined in Article 7.1.²⁰² Having failed to achieve a change in the wording of the treaty text, a number of states parties have stated upon ratification that they will interpret the term ‘overriding’ as ‘substantial’ or ‘clear’, while others have stated their understanding that an ‘overriding risk’ would exist whenever any of the negative consequences listed in the provision are more likely to materialise than not, even after mitigation measures are considered.²⁰³ In the view of the ICRC, such

197 Casey-Maslen et al (n 13) N 7.02.

198 Ibid N 7.90.

199 Ibid N 7.91.

200 Ibid; Mika Hayashi, ‘Export Control in the Arms Trade Treaty: Can It Have an Impact on the Prevention of Serious Violations of International Humanitarian Law?’ in Dai Tamada and Philippe Achilleas (eds), *Theory and Practice of Export Control, Balancing International Security and International Economic Relations* (2017) 127, 130.

201 Brandes (n 2) 421.

202 Casey-Maslen et al (n 13) N 7.92.

203 International Committee of the Red Cross (n 55) 36; International Committee of the Red Cross, 2013 *Arms Trade Treaty* (2020) 3.

interpretations are consistent with the ATT's purpose of reducing human suffering and the obligation of states to ensure respect for IHL.²⁰⁴

4.4. The Special Case (Article 7.4)

When making risk assessments under Article 7.1.a and Article 7.1.b, exporters must also 'take into account' the 'risk' (there is no qualifying adjective) whether the arms or items under consideration are being used (present continuous tense) to commit or facilitate serious acts of gender-based violence or serious acts of violence against children (Article 7.4).²⁰⁵ Article 7.4 is a commendable advance of the ATT, as it represents the first time that a treaty links arms transfer decisions to the risk of gender-based violence.²⁰⁶ What is less satisfactory is that exporters are only required to 'take account' of the possibility of such violence and there is no indication as to the weight to be given to that prospect.²⁰⁷

5. Import, Transit, Transshipment and Brokering (Articles 8, 9, 10)

Once it became clear that the assessment in Article 7 would apply to exports only, it was necessary to include provisions governing other transfer-related activities in order to ensure the applicability of the ATT to all states parties, not just those engaged in export.²⁰⁸ It was also evident that the object of the ATT in Article 1 would not be achieved by a treaty that regulated only the export of arms.²⁰⁹

Article 8 compliments Article 7 of the ATT by obliging importing states to provide appropriate and relevant information to the exporting state party for their export assessment and requires each importing state party to take measures that will allow it to regulate, 'where necessary', imports

204 International Committee of the Red Cross (n 55) 37.

205 Da Silva and Wood (n 10) 131; Lustgarten (n 2) 418.

206 Ray Acheson, *Gender Based Violence and the Arms Trade Treaty* (2019) 4; International Committee of the Red Cross (n 55) 35.

207 Lustgarten (n 2) 418.

208 Casey-Maslen et al (n 13) N 8.02.

209 Ibid.

under its jurisdiction.²¹⁰ According to Article 9, each state party shall take ‘appropriate measures’ to regulate ‘where necessary and feasible’ the transit or trans-shipment of arms through its territory and under its jurisdiction. As suggested by the terms ‘where necessary’ in Articles 8 and 9, the ATT gives discretion to arms-importing and transit or trans-shipment states parties on whether or not to regulate arms importing or transit under their jurisdiction.²¹¹ In contrast, there is no such qualifier in Article 10 that applies to brokering, which states parties are obliged to regulate.²¹² Article 10 requires each state party to ‘take measures’ to regulate arms brokering taking place under its jurisdiction, but is not prescriptive or detailed in terms of identifying how states should regulate brokers and brokering activities.²¹³ Furthermore, Article 10 defines neither the term ‘broker’ nor ‘brokering’ and does not contemplate extraterritorial jurisdiction, which would have been relevant, since brokers are often located in and operating from one jurisdiction, while the transactions of the arms that they arrange take place in another.²¹⁴ In summary, Article 10 is less detailed and weaker than existing commitments in this area.²¹⁵

6. Preventing Diversion (Article 11)

Unlike the transfers governed by Articles 6 and 7, diverted shipments of conventional arms are marked out by their illegality.²¹⁶ There was broad agreement among states that diversion should be addressed, considering an object of the ATT is to prevent and eradicate the illicit trade in conventional arms and prevent their diversion.²¹⁷ Diversion to the illicit market increases the uncontrolled availability of arms and their misuse, and is also of humanitarian concern where there is a risk that the

²¹⁰ Brandes (n 2) 422.

²¹¹ International Committee of the Red Cross (n 55) 41.

²¹² *Ibid.*

²¹³ Casey-Maslen et al (n 13) N 10.39.

²¹⁴ *Ibid.*

²¹⁵ See for example *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 31 May 2001 (entered into force 3 July 2005) art 15; Casey-Maslen et al (n 13) N 10.37–10.38.

²¹⁶ Lustgarten (n 2) 419.

²¹⁷ *Ibid.* 421; *Arms Trade Treaty* art 1.

unauthorised recipients would use the conventional arms to commit serious violations of IHL or serious violations of IHRL.²¹⁸ However, the manner in which diversion is addressed in the ATT is rather odd; initially, it was included in the assessment in Article 7, but was removed therefrom when several references to it were gathered in one self-contained provision, which is Article 11.²¹⁹ This was the compromise between states that wanted very detailed provisions, and others which argued that diversion is not a sufficiently 'objective' concept and did not consider it acceptable to apply any diversion criteria to the export of ammunition.²²⁰ Therefore, Article 11 addresses only the diversion of conventional arms covered under Article 2.1, not of ammunition/munitions or parts and components.

Article 11.1 requires all states parties involved in a transfer of conventional arms under Article 2.1 to 'take measures' to prevent diversion, although no specific measures are stated or suggested in the provision. Unlike the general obligation in paragraph 1, Article 11.2 pertains only to exporting states parties. It outlines how exporting states parties should 'seek to' prevent the diversion through their national control systems (established under Article 5.2) by assessing the risk of diversion prior to authorising an export and considering mitigation measures.²²¹ The wording of Article 11.2 clearly illustrates that it follows the same process as the assessment contained in Article 7. Contrary to Article 7, where exporting states parties must assess the 'potential' that the 'conventional arms or items' could be used for one of the outcomes described in Article 7.1.b, Article 11.2 requires the exporting state to assess the 'risk' of diversion of the 'export'.²²² The reference to the diversion of the 'export' rather than the diversion of the 'conventional arms' being exported arguably has ramifications for the nature or extent of the risk assessment the exporting state must conduct.²²³ Put another way, it may limit the extent of the foresight an exporting state must have and the investigations it should conduct as part of its due diligence when assessing the risk.²²⁴ The implication is that exporting states parties would only need to assess the risk of diversion

218 International Committee of the Red Cross (n 55) 44.

219 Casey-Maslen et al (n 13) N 1.38; Lustgarten (n 2) 421.

220 Ibid.

221 Casey-Maslen et al (n 13) N 11.44.

222 Ibid.

223 Ibid N 11.45.

224 Ibid.

occurring while the conventional arms are in the process of being exported, meaning in the pre-shipment, in-transit, and point-of-delivery stages of the transfer, not post-delivery.²²⁵ This interpretation is consistent with the list of other prevention measures suggested in Article 11.2, which all concern the pre-shipment stage of the transfer.²²⁶ This is a completely different outcome from what was originally envisioned when a diversion criterion was first proposed, where the risk to be assessed related almost exclusively to whether the arms would be diverted post-delivery.²²⁷

Another difference to the export assessment is that Article 7.3 includes an obligation of not authorising an export if the exporting state party determines there is an 'overriding risk' of any of the negative consequences in Article 7.1, while Article 11.2 lists 'not authorizing the export' as a possible diversion prevention measures, but there is no explicit obligation to deny the export where a risk of diversion is detected.²²⁸ In fact, the term 'overriding risk' and the corresponding obligation to deny the export were intentionally left out of Article 11.2 because it had proved to be such a contentious phrase during the negotiations on Article 7 and the drafters did not want to repeat the debate for Article 11.²²⁹ As a consequence, there is no explicit threshold against which states parties are required to assess the risk of diversion.

In practice, states parties must consider the risk of diversion of an export during the assessment conducted in accordance with Article 7.²³⁰ Taking the treaty as a whole, the aims of Articles 11 and 7 are interlinked in that they both attempt to prevent the diversion of weapons to end-users where there is a risk of their committing or facilitating the serious violations and offences listed in Article 7.²³¹ Additionally, the fact that the process for considering risk of diversion in Article 11.2 follows the same logic as the export assessment process under Article 7, suggests that the assessment of the risk of diversion is an element of the mandatory export assessment mechanism.²³² Therefore, the same threshold of 'overriding risk' would

225 *Ibid.*

226 *Ibid.*

227 *Ibid* N 11.46.

228 *Ibid* N 11.48.

229 *Ibid* N 11.49.

230 Casey-Maslen et al (n 13) N 11.50.

231 Da Silva and Wood (n 10) 122; International Committee of the Red Cross (n 55) 36.

232 Casey-Maslen et al (n 13) N 11.50; Casey-Maslen, Giacca and Vestner (n 49) 34.

need to be applied when assessing the risk of diversion.²³³ Accordingly, while the assessment required by Article 11.2 only refers to ‘conventional arms’ in Article 2.1 and not to ammunition or parts and components, it would seem impractical for a state party to exclude these items from its diversion risk assessment, although they would be subject to the risk assessment under Article 7.²³⁴ Article 11.2 also requires exporting states parties to consider establishing mitigation measures, ‘such as confidence-building measures or jointly agreed programs by the exporting and importing States’. Notably, although the object of the ATT is to prevent diversion, the obligation in Article 11.2 is not to eliminate any identified risk of diversion altogether, but to mitigate it, which means to make it less severe or serious.²³⁵

7. Ensuring Implementation and Compliance

7.1. Implementation and Enforcement (Articles 5 and 14)

7.1.1. National Control System and National Control List (Articles 5)

Article 5 sets out the obligation on each state party to implement the ATT at national level, by establishing and maintaining a national control system for the transfer of conventional arms, ammunition/munitions and parts and components.²³⁶ However, the ATT does not articulate in detail the architecture or composition of the system for a state party’s national control regime, only that it must have one and that the system must contain a national control list stating which conventional arms, ammunition/munitions, and parts and components are to be regulated by that control regime.²³⁷ Therefore, there is no ‘one size fits all’ solution for a national system to implement the ATT, and the reality is that its implementation requirements are not any more onerous than existing obligations under soft law instruments such as the WA, the PoA and UNROCA.²³⁸ Collectively, under these instruments, states are required to

²³³ Casey-Maslen et al (n 13) N 11.50.

²³⁴ Da Silva and Wood (n 10) 122; International Committee of the Red Cross (n 55) 36.

²³⁵ Casey-Maslen et al (n 13) N 11.51.

²³⁶ Ibid N 5.01.

²³⁷ Ibid N 5.17.

²³⁸ O’Connor (n 6) 90.

compile a national control list, regulate exports of most, if not all, conventional arms, ammunitions and munitions, and parts and components, and provide regular reports on national control measures.²³⁹ The ATT has not expanded these existing implementation mechanisms, which is disappointing. As these instruments have proven to be incapable of combatting the humanitarian effects of arms transfers, the use of the same implementation mechanism in the ATT is redundant.²⁴⁰

7.1.2. National Enforcement (Article 14)

The enforcement of the ATT strongly resembles the enforcement mechanisms since the Cold War-era, where a prevalent concern for states implementing export control regimes was the possibility that an external export control standard will infringe on national sovereignty and national security, leaving enforcement standards to each state party.²⁴¹ The ATT emphasises that all countries have the right of self-defence and that it will not intervene in issues that are regarded as under domestic jurisdiction.²⁴² Thus, the ATT 'establishes no administrative authority, policing body, or adjudicative forum. Nor does it require any specific form of enforcement – neither enactment of criminal penalties nor civil liability for violation'²⁴³. According to Article 14, entitled 'enforcement', all states parties are required to take 'appropriate' measures to enforce national laws and regulations that serve to implement the treaty.²⁴⁴

The ATT provides a dispute resolution system in Article 19, which could resolve disagreement pertaining to the interpretation or application of ATT standards and potentially improve treaty enforcement.²⁴⁵ Article 19 operates under a notion of mutual consent, and negotiations, mediation,

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Whang (n 8) 36.

²⁴² Ibid; *Arms Trade Treaty* principles 4 and 7.

²⁴³ Nina H. B. Joergensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108(4) *The American Journal of International Law* 722, 729; Lustgarten (n 2) 426; Laura Spano and Philip Alpers, *Reinvigorating the Narrative: The Broader Benefits of the Arms Trade Treaty* (2017) 26.

²⁴⁴ Such an enforcement is typically achieved by a range of legislative and administrative measures, policies, and programmes, including penal sanctions, see Casey-Maslen et al (n 13) N 14.16.

²⁴⁵ Whang (n 8) 137.

conciliation, judicial settlement, and arbitration are used as peaceful means to resolve disputes. Due to the cooperative efforts among states parties, no international entity has been listed as the venue for dispute settlement, although the International Court of Justice ('ICJ') has been acknowledged as a possible venue for ATT dispute settlement.²⁴⁶ In essence, the enforcement of ATT standards and process of dispute settlement relies heavily upon self-policing, which once again, highlights the enforcement issue left unresolved by the ATT.²⁴⁷

7.2. Reporting (Article 13)

During the negotiations, states made it clear that Article 13 is intended to promote compliance and serve as a confidence-building measure in line with a central purpose of the treaty: to promote co-operation, transparency, and responsible action by states parties, 'thereby building confidence among them', as stated in Article 1.²⁴⁸ Consequently, Article 13 imposes two mandatory reporting requirements for states parties: an initial and an annual report. Pursuant to Article 31.1, each state party must provide an initial report of measures it has taken to implement the treaty to the ATT Secretariat within the first year after the treaty's entry into force for it. Thereafter, they are to report to the Secretariat on new measures taken to implement the treaty on an *ad hoc* basis.²⁴⁹ States parties are also obliged, in accordance with Article 13.3, to report annually by 31 May on detailing authorised or actual exports and imports of conventional arms covered under Article 2.1 of the ATT for the preceding calendar year, though commercially sensitive or national security information may be excluded.²⁵⁰ Further, according to Article 13.2 states parties are encouraged to report on measures taken that have proven effective in addressing the diversion of transferred conventional arms on an *ad hoc* basis. In accordance with Article 13.3, reports on implementation and transfers are made available and distributed to states

²⁴⁶ Ibid; Casey-Maslen, Giacca and Vestner (n 49) 41; See *Statute of the International Court of Justice*, opened for signature 26 June 1945 (entered into force 24 October 1945) art 36.

²⁴⁷ Whang (n 8) 139.

²⁴⁸ Casey-Maslen et al (n 13) N 13.02.

²⁴⁹ Ibid N 13.01.

²⁵⁰ *Arms Trade Treaty* arts 13.1 and 13.3.

parties by the ATT Secretariat. It is not explicitly stated in Article 13.3 that annual reports will be made publicly available, though in practice they are, if the state party does not submit the report with the preference of it only being posted on the restricted area of the ATT website.²⁵¹

An analysis conducted by Paul Holtom in 2019 suggests that the ATT can increase transparency in international arms transfers by increasing the number of states that report on imports and exports of conventional arms, although there are several worrying tendencies.²⁵² Holtom states that while the number of ATT states parties providing an annual report to the ATT Secretariat has increased year-on-year, the percentage of states parties that are fulfilling their annual report obligations is in decline.²⁵³ Moreover, although still at a low level, the number of states parties choosing to limit access to their reports only to ATT states parties is increasing.²⁵⁴ In addition, states parties that previously reported regularly, and with detailed information on their imports and exports of conventional arms, have started to aggregate their data and no longer provide information on exporting or importing states.²⁵⁵ Therefore, it is not possible to determine if these states parties have record-keeping systems in place or whether their transfers are carried out in accordance with Articles 6, 7 and 11 of the ATT, as they do not indicate the states to which conventional arms are being exported to or imported from.²⁵⁶ The ATT should not allow states parties to take advantage of the flexible approach to reporting contained in Article 13.3 to aggregate data and omit information from ATT annual reports that makes it impossible for other states parties or interested stakeholders to use them in assessing compliance with Articles 6, 7, and 11.²⁵⁷ Holtom concludes that the ATT can still fulfil its purpose and increase transparency, but this requires states parties' willingness to implement the treaty's reporting obligations in good faith, and for NGOs to stay 'vigilant and highlight backsliding in reporting before obfuscation

251 Arms Trade Treaty, 'Annual Reports' (Web page, 25 October 2021).

252 ATT Working Group on Transparency and Reporting, *Sixth Conference of States Parties, Co-Chairs' Draft Report to CSP6*, No ATT/CSP6.WGTR/2020/CHAIR/607/Conf.Rep (17 July 2020) 6; Paul Holtom, 'Can the Arms Trade Treaty Increase Transparency in International Arms Transfers?' (2019) 8 *History of Global Arms Transfer* 19, 35.

253 Ibid.

254 Holtom (n 252) 35.

255 Ibid.

256 Ibid.

257 Ibid 36.

of information becomes a ‘norm’ in transparency in international transfers of conventional arms’,²⁵⁸

IV. Organs of the Arms Trade Treaty

1. Conference of the States Parties (Article 17)

Article 17 of the ATT governs the Conference of States Parties (‘CSP’), which meets annually.²⁵⁹ A range of tasks are assigned to the CSP under Article 17: review of the treaty’s implementation, including developments in the field of conventional arms; adopting recommendations on treaty implementation and operation, in particular the promotion of its universality; considering amendments to the treaty in accordance with Article 20 of the ATT; considering issues arising from implementation of the treaty; deciding on the tasks and budget of the Secretariat; considering the establishment of subsidiary bodies to improve the functioning of the ATT; and performing any other function consistent with the treaty.²⁶⁰ The current subsidiary bodies of the ATT are the Bureau, the Management Committee, the Voluntary Trust Fund Selection Committee, and three Working Groups.²⁶¹ The Working Groups allow for focused work and information exchange on all aspects of treaty Implementation, Universalisation or Transparency and Reporting.²⁶² In addition, three Sub-working Groups of the Working Group on Effective Treaty Implementation (‘WGETI’) were established to focus upon specific areas of implementation, in particular on Article 5, Articles 6 and 7, and Article 11.²⁶³ In 2019, the Article 5 Sub-Working Group was replaced by the Sub-Working Group on Article 9.²⁶⁴ Over the years, both the Working Groups and the Sub-Working Groups have created a wide range of tools and guidelines that were welcomed and accepted by the

²⁵⁸ Ibid.

²⁵⁹ Casey-Maslen et al (n 13) Rule 11.1.

²⁶⁰ Casey-Maslen et al (n 13) N 17.02–17.03.

²⁶¹ Arms Trade Treaty, ‘Subsidiary bodies’ (Web page, undated); *Rules of Procedure, Arms Trade Treaty*, ATT/CSP1/CONF/1 (25 August 2015) Rule 42; *Arms Trade Treaty* art 17.4.

²⁶² Arms Trade Treaty (n 261).

²⁶³ Arms Trade Treaty, ‘Working Group on Effective Treaty Implementation (WGETI)’ (Web Page, undated).

²⁶⁴ Ibid.

CSPs as living documents of a voluntary nature to be reviewed and updated regularly.²⁶⁵ Such documents include reference documents to be considered by states parties in the implementation of the core articles, in conducting risk assessments, in preventing and addressing diversion and voluntary guides.

As for decision making, the *Rules of Procedure* for CSPs underline the importance of consensus, obliging states to ‘make every effort to achieve consensus on matters of substance’²⁶⁶. If this is not possible, there is an obligatory suspension of proceedings for 24 hours and only if after such a grace period consensus remains unattainable, the CSP can take decisions by a majority of two-thirds.²⁶⁷ The importance of consensus ensures a large share of control of individual states parties over future direction and implementation of the treaty. This way, it safeguards state sovereignty over ATT-related decisions and limits the flexibility of the treaty regime.²⁶⁸ This conclusion is reinforced by the limited mandate of the Secretariat.²⁶⁹

2. Secretariat (Article 18)

The ATT has established a Secretariat to ‘assist States Parties in the effective implementation’ of the treaty.²⁷⁰ However, the ATT restricts the Secretariat to an administrative and facilitating function, minimises its structure, and emphasises its subordination to states parties and the CSP, avoiding all references to any form of decision-making power for the Secretariat.²⁷¹ It is the states parties, through the CSP that are designated by the ATT to define the role of the Secretariat, which they have done at the first CSP, specifying the tasks of the Secretariat under its mandate of Article 18.3 ATT.²⁷² Pursuant to Article 18.3, the Secretariat undertakes the following responsibilities: receiving, making available, and distributing the reports in

265 Arms Trade Treaty, ‘Tools and Guidelines’ (Web page, undated).

266 *Rules of Procedure* (n 261) Rule 33.1.

267 *Rules of Procedure* (n 261) Rule 33.1 and 33.2.

268 Coppen (n 31) 363.

269 *Ibid.*

270 *Arms Trade Treaty* art 18.1.

271 *Arms Trade Treaty* art 18.3 states that the Secretariat has a minimal structure; Coppen (n 31) 364.

272 See *Directive of the States Parties to the Secretariat of the Arms Trade Treaty*, ATT/CSP1/CONF/3 (25 August 2015); Coppen (n 31) 364.

accordance with Article 13; maintaining and making available to states parties the list of national points of contact in accordance with Article 5.4 and Article 5.6; facilitating the matching of offers of and requests for assistance for treaty implementation and promoting international co-operation on request pursuant to Articles 15 and 16; facilitating the work of the CSP, including making arrangements and providing the necessary services for meetings under the treaty as set out in Article 17; and lastly, performing other duties as decided by the CSPs. It also provides administrative and substantive support to the three established ATT Working Groups.²⁷³ In addition, although not explicitly mentioned in Article 18.3, other provisions in the ATT call for action by the Secretariat.²⁷⁴

V. The Way Ahead

Having explored the limits and deficiencies of the legal framework established by the ATT and the role of its organs, the question to be addressed now is whether the organs of the ATT have the capabilities, under international law, to develop the legal framework of the ATT despite their limited mandates.²⁷⁵ This question arises because the ATT envisions the CSP playing a key role in the consideration and adoption of formal amendments to the treaty.²⁷⁶ In reality though, this function will not affect the role of the CSP much, since the procedure for amendment is complicated and burdensome.²⁷⁷ In accordance with Article 20.4, amendments to the treaty require the support of three-quarter votes and remain a purely political matter, since states parties that do not formally accept any particular amendment would not be bound by it.²⁷⁸ However, Article 17.4 also attributes certain other functions to the CSP related to

²⁷³ ATT Secretariat, *Third Conference of States Parties, Report on the ATT Secretariat's Activities for the Period 2016/2017*, No ATT/CSP3/2017/SEC/154/Conf.SecRep (20 July 2017) 3, listed under 'mandatory responsibilities'.

²⁷⁴ See Articles 11.6, 20.2 and 16.3; Casey-Maslen et al (n 13) N 18.11.

²⁷⁵ Coppen (n 31) 367; Stefan Kadelbach, 'International Law Commission and role of subsequent practice as a means of interpretation under Articles 31 and 32 VCL' (2018) 46 *Questions of International Law-QIL, Milão, Zoom-in* 5, 5.

²⁷⁶ Coppen (n 31) 367.

²⁷⁷ *Ibid.*

²⁷⁸ Lustgarten (n 2) 436.

implementation, interpretation and review of the treaty, which may make it possible for the CSP, based on general rules of treaty interpretation in the *Vienna Convention on the Law of Treaties* ('VCLT'), to develop the legal framework of the ATT without resorting to its formal amendment procedure.²⁷⁹

Articles 31 and 32 VCLT combine three main approaches to treaty interpretation; textual, subjective, and teleological.²⁸⁰ The first two are more static than the teleological approach, as they emphasise the text itself and the text as a reflection of the intention of the drafters.²⁸¹ The teleological approach aims to interpret the terms of a treaty primarily in light of its object and purpose, which may 'go beyond, or even diverge from, the original intentions of the parties as expressed in the text' and therefore leaves room for the development of the law.²⁸² It can be used to fill gaps, make corrections, expand or supplement a text, as long as this is 'consistent with, or in furtherance of, the objects, principles and purposes in question'²⁸³. This may include looking at how the interpretation of the treaty's terms has evolved over time, particularly if they are abstract or undefined, as many of the ATT's terms are.²⁸⁴ In the VCLT, the teleological approach to treaty interpretation is enshrined in Article 31.1, which states that a treaty must be interpreted 'in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'²⁸⁵. Article 31.3 VCLT embodies a dynamic element of treaty interpretation by stating that together with the context of the treaty text, the interpretation of a treaty should take into account any subsequent agreement between the parties regarding the application of the treaty or the application of its provisions, as well as any subsequent practice in the application of the treaty, which establishes the

279 Coppen (n 31) 367–368.

280 Ibid.

281 Ibid; Francis G. Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18(2) *The International and Comparative Law Quarterly* 318, 319.

282 Coppen (n 31) 368; International Law Commission, 'Law of Treaties' (1964) II *Yearbook of the International Law Commission* 5, 54; Jacobs (n 281) 319.

283 As cited in Coppen (n 31) 368.

284 Coppen (n 31) 368; Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 77–78.

285 Coppen (n 31) 368.

agreement of the parties regarding its interpretation.²⁸⁶ There is no hierarchy between the elements of Article 31; they form a singular, integral approach.²⁸⁷ However, it is argued that when interpreting the ATT, a teleological, dynamic approach primarily based upon Article 31.3 VCLT should take precedence over the other approaches for three reasons. The first is related to the type of treaty that the ATT is.²⁸⁸ Its nature and the modalities of its inception have led to the inclusion of numerous ambiguous and undefined terms within the treaty text.²⁸⁹ Secondly, at the adoption of the ATT, 98 states supported a political declaration stating that the treaty enables its members ‘to make it stronger, and through its implementation, to adapt it to future developments’²⁹⁰. Hence, the ATT is widely viewed as a work in progress.²⁹¹ Thirdly, the ATT can be classified as a law-making treaty, rather than a contract treaty.²⁹² In contrast to the latter, which ‘contain specific obligations for each member, or group of members, in a *quid pro quo*, law-making treaties create general norms for the future conduct of the parties, containing obligations that are basically the same for all parties’²⁹³. The teleological method of interpretation is widely recognised as best suited for law-making treaties.²⁹⁴ Article 1 states that the object of the ATT is the establishment of the highest possible common standards for arms transfers. This can only be achieved by the adaptation of its provisions and its development into a more precise and elaborated legal framework to guarantee the continued relevance of the ATT in response to military, political or technological changes.²⁹⁵ The CSPs may play an important role in the creation of subsequent agreement and practice.

The terms subsequent agreement and subsequent practice are defined vaguely in the VCLT and the distinction between them is also rather unclear.²⁹⁶ To determine whether the discussions and documents of ATT

286 Ibid 368–369.

287 UN General Assembly, *Report of the International Law Commission*, 70th sess, Supp No 10, UN Doc A/73/10 (2018) 13.

288 Coppen (n 31) 369.

289 Ibid.

290 Ibid.

291 Ibid.

292 Ibid 370.

293 As cited in Coppen (n 31) 370.

294 Ibid.

295 Coppen (n 31) 370.

296 See *Vienna Convention on the Law of Treaties* art 31.3.a and 31.3.b.

CSPs can be considered subsequent agreement and subsequent practice in the sense of the VCLT, one must turn to the case-law of the ICJ and examine the comments by the International Law Commission ('ILC') to identify certain parameters.²⁹⁷ This illustrates that there are no specific requirements for the form subsequent agreement and practice must take, and that organs such as the CSP, which are established by the treaty itself, may play a role in its subsequent interpretation, even if they lack international legal personality.²⁹⁸ The Draft conclusion 11 of the 2018 ILC Report states that a decision adopted within the framework of the CSP embodies a subsequent agreement or subsequent practice under Article 31.3 VCLT, in so far as it 'expresses agreement in substance between the parties regarding the interpretation of the treaty, *regardless of the form and the procedure* by which the decision was adopted, *including adoption by consensus*'²⁹⁹. The legal effect of decisions by CSPs 'depends primarily on the treaty in question and any applicable rules of procedure'³⁰⁰. In 1952, the ICJ consulted documentation of a committee established by the 1906 General Act of Algeciras for the interpretation of the terms of the latter.³⁰¹ Though more recently, the ICJ rejected an interpretation of the Whaling Convention based on resolutions issued by the International Whaling Commission, in which the resolutions in question were not adopted by consensus.³⁰² In essence, what matters most appears to have less to do with the form of the subsequent agreement or practice, but more with the intention behind it and whether states parties agree that it should be a basis for interpretation or not.³⁰³ It certainly appears that the ATT CSPs have the potential to meet this standard.³⁰⁴ Article 17.4 mandates the CSP is to review the implementation of the ATT, consider recommendations, amendments, and, notably, 'issues arising from its interpretation' and gives the CSP full control over the size, mandate and activities of the ATT Secretariat. The CSP has also established various

297 Coppen (n 31) 370.

298 Ibid; UN General Assembly (n 287) 14–15 and 49–50.

299 UN General Assembly (n 287) 15, emphasis added.

300 Ibid 84.

301 *Case Concerning Rights of Nations of The United States of America in Morocco (France v. United States of America) (Judgement)* [1952] ICJ Rep 176, 211; Coppen (n 31) 371.

302 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (Judgement)* [2014] ICJ Rep 226, 26; Coppen (n 31) 371–372.

303 Coppen (n 31) 372; UN General Assembly (n 287) 15.

304 Coppen (n 31) 372.

Working Groups and Sub-Working Groups for focused work on the ATT provisions. These have developed numerous documents, which have been accepted by the CSPs as documents of living nature to be reviewed and updated regularly. The current focus of the WGETI Sub-Working Group on Articles 6 and 7 is the unpacking the key concepts of Articles 6 and 7 and thereby discussing the interpretation of the language and standards in these articles.³⁰⁵ Nevertheless, based upon the judgment of the ICJ in the Whaling-case, it is likely that CSP decisions would have to be taken by consensus to have interpretative value.³⁰⁶ Therefore, it is doubtful that the CSP will be able to adopt formal amendments to the ATT, yet it does have potential to contribute to the development of the legal regime on arms transfers through the progressive interpretation of the terms of the ATT.³⁰⁷ This does not mean that every declaration or document of a CSP meeting amounts to subsequent agreement.³⁰⁸ Discussions at CSP meetings must reflect the intention of ATT states parties to interpret the treaty and this intention should be supported by state practice.³⁰⁹ Developments could take years or decades.³¹⁰ In the case of the ATT, it is most likely that such practices will be stimulated, encouraged and documented by the Secretariat.³¹¹

The ATT Secretariat is not given any explicit law-making or interpretive mandate.³¹² It also lacks international legal personality and the power to enforce compliance by recommending or enacting punitive measures against states.³¹³ This should, however, not lead to the conclusion that the Secretariat cannot contribute to the development of the treaty in other ways, for instance by carrying out supervisory tasks.³¹⁴ This is relevant for the ATT because non-compliance may be difficult to detect in the case of the ATT, but states will nevertheless demand certainty that others are

305 ATT Working Group on Transparency and Reporting, *Multi-year work plan for the WGETI Sub-working Group on Articles 6&7 (prohibitions & Export and export assessment)* (March 2021).

306 *Ibid.*

307 *Ibid.* 374.

308 *Ibid.*

309 *Ibid.* 375.

310 *Ibid.* 374–375.

311 *Ibid.* 375.

312 *Ibid.*

313 *Ibid.*

314 *Ibid.* 376.

adhering to the rules of the treaty. The process for doing so is known as ‘supervision’³¹⁵. Supervision ‘entails more than simply ensuring compliance with treaties. It also includes the stages of the process that help determine whether states have breached certain norms’³¹⁶. There are four phases of a supervisory process: information gathering, review, assessment, and compliance management.³¹⁷ The Secretariat simply lacks the mandate to carry out capacities and/or mandates for assessing and enforcing ATT compliance, though this does not mean that it is not a supervisory organ, as supervision entails much more than assessment and enforcement.³¹⁸ As such, the Secretariat can contribute to the development of the ATT treaty regime, which starts with its information-gathering and transparency-related tasks.³¹⁹ Therefore, through supervising the implementation of the ATT, the Secretariat harbours the potential to contribute to the establishment of standard practices under the ATT and it is not required to have international legal personality, or to be part of an existing UN structure for this purpose.³²⁰ Based on its current tasks and mandate, it can already play a role and disseminating information, best practices, assist in facilitating cooperation and capacity-building, as well as streamline reporting and interpretation of the treaty, thus furthering its harmonised implementation.³²¹ The CSP may also elect to expand the mandate and structure of the Secretariat over the years (Article 17.4.e and Article 18.3.d), further increasing its impact on international practice.³²²

VI. Conclusion

The ATT establishes international standards governing conventional arms transfers to prevent and eradicate illicit trade and diversion of

315 Ibid.

316 Ibid.

317 As cited in Coppen (n 31) 376.

318 Coppen (n 31) 378.

319 Ibid; Sibylle Bauer, Paul Beijer and Mark Bromley, *The Arms Trade Treaty: Challenges for the First Conference of States Parties* (2014) 6.

320 Coppen (n 31) 380.

321 Ibid.

322 ATT Secretariat, *Fifth Conference of States Parties, Final Report*, No ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1 (30 August 2019) 380–381.

conventional arms for the purpose of contributing to peace, security and stability, reducing human suffering and promoting cooperation, transparency and responsible action.³²³ This paper has analysed the ATT in a past, present and future-oriented perspective to discover whether the ATT can indeed fulfil its object and purpose set out in Article 1.

What can be learned from history is that regulating the global conventional arms trade is not an easy endeavor, since there are many challenges that need to be overcome and taken into consideration. Against this background and negotiated under strict rules of consensus, the ATT had to be designed with a view to accommodating the states least interested in a strong and effective agreement.³²⁴ Noteworthy is the fact that there was a considerable pushback against the human security framework and reassertion of the primacy of state security.³²⁵ In essence, the price paid for consensus are several defects: inadequate provisions, ambiguous language or of loopholes in the scope of the treaty and the obligations it imposes.³²⁶ This is a major issue because the fulfilling of the object and purpose of the ATT is especially dependent upon Articles 2, 6, 7 and 11 functioning properly. In this regard, there are also worrying tendencies in ATT reporting under Article 13, in which states parties are aggregating data and omitting information from ATT annual reports, which makes it no longer possible to assess whether their transfers are being undertaken in accordance with Articles 6, 7, and 11 of the ATT.³²⁷ This is an issue for assessing compliance with these provisions, thus impeding the promotion of transparency and confidence building amongst states parties. Furthermore, since there is no international enforcement body with powers of authoritative interpretation, arms export control practices will continue to vary even though states parties have adhered to common and legally binding commitments in the field of conventional arms trade.³²⁸ The challenge of enforcement will continue to exist, even as states ratify the treaty. In essence, it can be concluded that the ATT in its current

³²³ *Arms Trade Treaty* art 1.

³²⁴ Bailliet (n 50) 272.

³²⁵ Bromley, Cooper and Holtom (n 37) 1046.

³²⁶ Lustgarten (n 2) 435.

³²⁷ Holtom (n 252) 35.

³²⁸ Lustgarten (n 2) 436; Maletta, Giovanna, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (2021) 56(1) *International Spectator* 73, 85.

form has significant shortcomings that may prevent it from achieving its objectives.

Despite the many shortcomings, there are certain positive features of the ATT which stand out.

For one, it includes SALW fully within its scope, which was of central importance for certain states, which would not have ratified the treaty without it.³²⁹ Moreover, the definition of ‘transfer’ in Article 2.2 is broad enough to capture almost all forms of passage of materiel from one state to another.³³⁰ Although ammunition/munitions and parts and components are treated differently in the ATT than conventional arms, the compromise achieved is likely to ensure that the treaty covers virtually all exports, which is the central point of the transfer process.³³¹ In addition, the insertion of IHRL in Article 7 of the ATT facilitates the engagement of international and national human rights institutions in the assessment of states’ arms trade practices.³³² The requirement in Article 7.4 that a state party must take into account the risk of the arms or items ‘being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children’ represents the first time that a treaty recognises the link between arms transfer decisions to the risk of gender-based violence, and is a commendable achievement of the ATT.³³³ So too is Article 6, although the wording is a product of compromise, it should overall be regarded as a significant achievement in defining global standards for when authorisations of the transfer of conventional arms and related items within the ATT are to be prohibited.³³⁴ Finally, the creation and widespread acceptance of the treaty itself is perhaps the most important accomplishment of the whole process.³³⁵ The regulation of arms transfers by a global legal instrument and acceptance by the majority of sovereign states is unprecedented, and now with the accession of China in 2020, the world’s fifth largest arms exporter and importer, the ATT’s

329 Lustgarten (n 2) 434.

330 *Ibid.*

331 *Ibid.*

332 Zwijsen, Kanetake and Ryngaert (n 117) 160.

333 International Committee of the Red Cross (n 55) 35.

334 *Ibid.* 26.

335 Lustgarten (n 2) 434.

rules apply to a significantly greater volume of arms transfers and activities.³³⁶

This paper also pointed out that there is scope for the ATT to develop its framework under rules of general international law to realise its potential without having to resort to formal amendment. Both the CSP and the Secretariat can play an important role therein without transgressing the boundaries set by the treaty to their mandates.³³⁷ As a result, the treaty regime could evolve to effectively carry out the task it was intended to, enshrined in Article 1. Since this process is based upon existing practices, although they may be stimulated by the organs of the ATT, the progressive development of the treaty will have a substantial state-driven aspect to it, which should satisfy state sovereignty concerns.³³⁸ In addition, the requirement of consensus, which was newly stressed by the ICJ, should ensure that treaty development through subsequent agreement and practice will not bind states against their will.³³⁹ Whilst the ATT may yet be inadequate to fulfill the promise of an effectively regulated and controlled international arms trade, it is undeniable that the ground has shifted because it now exists.³⁴⁰ The ATT provides the foundation for a more comprehensive legal framework on conventional arms trade and international law provides the means to develop it; the realisation of its aim is now up to those involved.³⁴¹

336 Vestner, Tobias, 'The New Geopolitics of the Arms Trade Treaty' (2020) 50(10) *Arms Control Today* 14, 14.

337 Coppen (n 31) 381.

338 *Ibid* 382.

339 *Ibid*.

340 *Ibid*; Lustgarten (n 2) 434.

341 Coppen (n 31) 382.

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International law relating to the Illegal Trade in Nuclear Material

CHLOE SCRIGGINS

The ongoing illegal trade in nuclear material creates the potential for a nuclear terrorist attack because all material that is outside official state control could end up in criminal or terrorist hands. For this reason, the illegal trade of nuclear material is a global threat that requires a global response, making international law an important tool in addressing this issue. This chapter examines the international treaties that deal with the illegal trade of nuclear material. The scope and operation of each treaty is considered to show how it seeks to prevent the illegal trade. There has been progress in international law requirements concerning the physical protection of nuclear material and recognition of non-state actors as potential users of nuclear material. Nonetheless issues of enforceability and overlap between each treaty limit the effectiveness of international law in dealing with the illegal trade of nuclear material.

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I. Introduction

In 1946, the scientist largely responsible for weaponising nuclear technology, Robert Oppenheimer, was asked whether a small group of individuals could blow up New York City using a smuggled nuclear weapon; he responded, with certainty, in the affirmative.¹ When asked how this could be prevented, Oppenheimer's only solution was to use a screwdriver to open and check all luggage and freight being brought into the city.² In other words, it was an impossible feat. These statements show that as early as 1946, warning bells were sounding over the risk posed by the illegal trade of nuclear material. It was clear that each instance of nuclear smuggling created the potential for a nuclear terrorist attack.

While there are many steps between possessing nuclear material and manufacturing a nuclear bomb, experts stress that the most effective way to prevent nuclear terrorism is to stop non-state actors from obtaining nuclear material in the first place.³ In this context, international law is an essential tool, because the global nature of a nuclear threat necessitates a global response. As then Secretary of the United Nations (UN) Kofi Annan commented, 'were a nuclear terrorist attack to occur, it would cause not only widespread death and destruction, but would stagger the world economy and thrust tens of millions of people into dire poverty'⁴. This widespread and multifaceted impact of a nuclear attack means a state is not safe simply because their own nuclear facilities are secure. Rather, 'a

1 Rolf Mowatt-Larssen, *The Armageddon Test*, (2009) 1.

2 Ibid.

3 Paige Willan, 'The Convention on the Suppression of Acts of Nuclear Terrorism: An Old Solution to a New Problem' (2008) 39 (Spring) *Georgetown Journal of International Law* 527, 534.

4 Graham Allison, 'The ongoing failure of imagination' (2006) 62(5) *Bulletin of the Atomic Scientists* 34, 37.

malicious act anywhere is a threat to everyone everywhere⁵, and nuclear security is only ‘as good as its weakest link’⁶. To this effect, it is in each state’s own security interests to ensure all nuclear material around the globe is secure, which means international cooperation is crucial.⁷ The role of international law is to facilitate this cooperation and set a universal standard for nuclear security, so that states are not left vulnerable by the illegal trade of nuclear material occurring outside their own territory.

This chapter considers these treaties that relate specifically to the illegal trade of nuclear material, including:

- The *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*;⁸
- The *Convention on the Physical Protection of Nuclear Material (CPPNM)*;⁹
- UN Security Council *Resolution 1540*;¹⁰
- *Amendment to the Convention on the Physical Protection of Nuclear Weapons (Amendment to the CPPNM)*;¹¹ and
- The *International Convention for the Suppression of Acts of Nuclear Terrorism (NTC)*.¹²

The purpose of this chapter is to explore the scope and operation of these treaties in dealing with the illegal trade of nuclear material. To do so, the chapter presents a timeline of these treaties, individually highlighting the historical and political context which prompted their development. Provisions that deal with the illegal trade of nuclear material are identified and analysed. The strengths and weaknesses of each treaty is then discussed to assess to what extent this framework functions collectively.

5 Anthony C Wetherall, ‘Strengthening the international legal framework for nuclear security: Better sooner rather than later’ (2016) 2(98) *Nuclear Law Bulletin* 7, 10.

6 IAEA, *Calculating the New Global Nuclear Terrorism Threat* (27 October 2001).

7 Wetherall (n 5).

8 Opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

9 Opened for signature 3 March 1980, 1456 UNTS 101, (entered into force 8 February 1987).

10 UN Security Council, *Resolution 1540 (2004) adopted by the Security Council at its 4956th meeting on 28 April 2004*, UN Doc S/RES/1540 (28 April 2004).

11 Opened for signature 8 May 2016, INFCIRC/274/Rev.1/Mod.1, (entered into force 8 July 2005).

12 Opened for signature 13 April 2005, 2445 UNTS 89 (entered into force 7 July 2007).

The individual examination of these treaties has been the subject of much academic research and commentary in the early to mid 2000s, when nuclear security was re-assessed in the post 9/11 era. This chapter fills a gap in the literature, for there has been little research specifically focused upon illegal nuclear material trade, as opposed to nuclear security as a whole. In researching this topic, the most significant challenges were the lack of specific case law or substantive information on instances of illegal trade of nuclear material. This limitation means the chapter does not include a discussion on how these treaties are being used by states in practice to prevent and suppress the illegal trade of nuclear material.

The chapter ultimately shows that the current international legal framework is not wholly effective in mitigating the nuclear terrorism threat posed by non-state actors. While these treaties establish the international community's agenda to target the illegal trade of nuclear material, the desired consistent and global response is undermined by the system's reliance on individual states to implement protection measures when there are no mandatory minimum standards of physical protection.

II. Background and Overview

The agreements discussed in this paper are the product of three main historical periods: the Cold War, the breakdown of the Soviet Union and the post-9/11 era. The ideological Cold War conflict between the United States and Soviet Union brought with it a nuclear arms race and the threat of mutually assured destruction, if either state launched a nuclear attack.¹³ This context prompted the development of both the *NPT* and *CPPNM*. Negotiations for the *NTC* were kickstarted by the disintegration of the Soviet Union in 1991 which led to 'loose nuke' fears, as nuclear facilities across former Soviet States were abandoned and nuclear material began to go missing.¹⁴ However it was not until 9/11, which made clear terrorists actors could independently plan and carry out large scale attacks

13 Hendrik A. Strydom, *Weapons of Mass Destruction*, Max Planck Encyclopedias of International Law (February 2017) [8].

14 Thomas Burch, 'Non-State Actors in the Nuclear Black Market: Proposing an International Legal Framework for Preventing Nuclear Expertise Proliferation & Nuclear Smuggling by Non-State Actors' (2004) 2(1) *Santa Clara Journal of International Law* 84, 88.

without state support, that more action was taken to target the possibility of a nuclear attack by non-state actors.¹⁵ This context led *Resolution 1540*, the *Amendment to the CPPNM* and the *NTC* to enter into force across 2004 and 2005. There have been no further international treaties specifically targeting the illegal trade of nuclear material since 2005.

In these treaties, the term nuclear material is referring to ‘weapons-grade’ uranium or plutonium, which indicates it has been enriched to a level that would allow for the manufacture of a nuclear bomb.¹⁶ These agreements characterise the illegal trade of nuclear material in several ways. It can occur between states, where one party is a designated non-nuclear state under the *NPT*, and therefore banned from possessing nuclear material for military purposes, between a state and a non-state actor, or between two non-state actors.¹⁷ This third form, trade between two non-state actors, is the focus of this chapter and is an example of the relationship between organised crime networks and terrorist groups. This narrow scope has been chosen, as the non-traditional nature of the security threat posed by these non-state actors, challenges the effectiveness of traditional State-based mechanisms, such as international law.¹⁸ This is because terrorist and criminal actors ‘rely on the same global transportation, communication and financial infrastructures for illegal ploys. They take advantage of the same breakdowns in authority and enforcement in states under siege’.¹⁹ This refers to the way globalisation has empowered non-state actors. Their lack of defined physical territory and exclusion from a state-centric international system means terrorist and criminal groups can take advantage of global trade networks to effectively move people and goods between states unnoticed.²⁰ At the

15 Christopher C Joyner, ‘Countering Nuclear Terrorism: A Conventional Response’ (2007) 18(2) *European Journal of International Law* 225, 226.

16 *CPPNM*, art. 1(a) and *NTC*, art. 1(2): ‘nuclear material means plutonium except that with isotopic concentration exceeding 80% in plutonium-238; uranium-233; uranium enriched in the isotopes 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore-residue; any material containing one or more of the foregoing’.

17 Barry Kellman and David S Gualtieri, ‘Barricading the Nuclear Window: A Legal Regime to Curtail Nuclear Smuggling’ (1996) 3 *University of Illinois Law Review* 667, 677.

18 *Ibid.*

19 Lyudmila Zaitseva, ‘Organized Crime, Terrorism and Nuclear Trafficking’ (2007) 6(5) *Strategic Insights* [2].

20 *Ibid.*

same time, a globalised world has inhibited traditional mechanisms like international law, which relies on states individually upholding protection measures and maintaining control of their sovereign borders.²¹

When considering the illegal trade of nuclear material by non-state actors, it becomes difficult to separate the illegal trade from nuclear terrorism. The fear of a 'nuclear 9/11' remains, but how likely is a nuclear terrorist attack? In 2010, President Barack Obama designated nuclear terrorism as 'the single biggest threat to US security... [in the] short-term, medium-term, and long-term'²². In the same year, academic John Mueller compared concern about nuclear terrorism to believing in the 'tooth fairy'²³. Broadly, academic consensus sits somewhere between these two views. Even if a terrorist group were successfully to acquire the quantity of weapons grade uranium or plutonium needed, much technical expertise and funding would be required to turn this material into the kind of nuclear weapon seen in World War Two.²⁴ However, creating a more crude, yet still devastating, nuclear explosive device is said to be more than possible, 'if you had a softball-sized lump of enriched uranium, some materials mostly available at Radio Shack [an electronics store] and an engineering grad from an American university'²⁵. This speaks to the capacity of non-state actors to engineer a nuclear attack should they obtain this material.

However, there is a strong view that it would not be strategically beneficial for terrorist groups to use this nuclear material due to the consequent military backlash from states.²⁶ It is also noted that 'there is no hard evidence to link organised crime groups with nuclear smuggling activities' and this trade is likely unprofitable for criminal groups.²⁷ The relative lack of data available on instances of nuclear material trade due to state secrecy over their nuclear stores makes it all the more challenging to

21 Ibid.

22 Barack Obama, as cited in, David Jackson, 'Obama: Nuclear terrorism is 'the single biggest threat' to U.S.', *USA Today* (online), 11 April 2010.

23 Mueller, John, *Atomic Obsession: Nuclear Alarmism from Hiroshima* (2010), 210.

24 World Nuclear Association, 'Safeguards to Prevent Nuclear Proliferation' (Web Page, September 2018).

25 Burch (n 14) 87.

26 Christopher McIntosh and Ian Storey, 'Between Acquisition and Use: Assessing the Likelihood of Nuclear Terrorism' (2018) 62(2) *International Studies Quarterly* 289, 294.

27 Lyudmila Zaitseva and Kevin Hand, 'Nuclear Smuggling Chains: Suppliers, Intermediaries, and End-Users' (2003) 46(6) *American Behavioural Scientist* 822, 830.

determine the scale of the illegal nuclear material trade, and whether this connection exists between organised crime and terror groups. In 2019, the IAEA confirmed 3,686 incidents of illegal trade in nuclear material since 1993.²⁸ The majority of these incidents, where there had been suspected involvement by organised crime networks, occurred in the former Soviet Union, specifically Ukraine, Russia, Georgia, Belarus and Kazakhstan.²⁹ This seems largely a legacy of the ‘Cold War’ which led to these states possessing a much greater amount nuclear material.³⁰ Per year, the number of nuclear trafficking cases confirmed by the IAEA is a very small number, with a peak of 20 cases in 2006, and only 6 known cases in 2019.³¹ Despite these low numbers and lack of evidence which links these instances to organised crime and terror groups, underestimating the likelihood of nuclear terrorism is a strategic gamble. Given the potentially large scale of devastation and disruption just one attack could have upon global peace and security, ‘the only acceptable level of this crime [nuclear terrorism] is zero’³². It is for this reason that the illegal trade of nuclear material should be considered very seriously. Similarly, despite lacking evidence, the potential involvement of organised crime has significant consequences, given their proven ability to efficiently move and sell illegal goods undetected.³³ These considerations, coupled with the instability of the current global system and the growing nuclear programs of Iran and North Korea, make clear that it is best to remain prepared for the threat of nuclear terrorism.³⁴ An examination of the international legal framework relating to the illegal trade of nuclear material thus remains relevant.

28 IAEA Incident and Trafficking Database, *Incidents of nuclear and other radioactive material out of regulatory control: 2020 Fact Sheet* (2020) 2.

29 Zaitseva (n 19) [Table 1].

30 Kellman and Gualtieri (n 17) 673–4.

31 IAEA Incident and Trafficking Database (n 28) 2.

32 Willan (n 3) 533.

33 Zaitseva and Hand (n 27) 830.

34 Matthew Bunn, Nickolas Roth and William H Tobey, *Revitalizing Nuclear Security in an Era of Uncertainty* (2019) 18.

III. Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

1. Historical Context and Purpose

The *Treaty on the Non-Proliferation of Nuclear Weapons* is relevant to the illegal trade of nuclear material because it establishes an underlying principle of the non-proliferation regime; only states can possess and use nuclear material. A product of the Cold War, the *NPT* was the first international agreement to regulate the production and transfer of nuclear weapons.³⁵ Ireland was the first state to propose a resolution at the UN to manage the risk posed by the Cold War's nuclear arms race.³⁶ Speaking to the General Assembly in 1958, Ireland's representative argued: 'the danger now exists that an increase in the number of states possessing nuclear weapons may occur aggravating international tension and the difficulty of maintaining world peace and thus rendering more difficult the attainment of the general disarmament agreement'³⁷. This references the global nuclear arms race and suggests that the *NPT* was desired not only to regulate the number of nuclear-weapon states, and thus decrease the risk of conflict, but also to act as a first step towards nuclear disarmament.³⁸ In 1965, negotiations for the treaty finally began, with the *NPT* open for signature in July 1968 and entering force in March 1970.³⁹

2. Relevant Provisions

The goal first articulated by Ireland is reflected in the Preamble of the *NPT*, which sets out the agreement's purpose 'to further the easing of international

35 Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary* (2019) 26.

36 UN General Assembly, *Question of Disarmament – Ireland: Draft Resolution*, 13th session, Agenda Item 64, UN Doc A/C.1/L.206 (17 October 1958) [2].

37 Ibid.

38 Christopher C Joyner and Alexander Ian Parkhouse, 'Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime' (2009) 45(2) *Stanford Journal of International Law* 203, 224.

39 Bertrand Goldschmidt, 'The Negotiation of the Non-Proliferation Treaty' (1980) 22(3) *IAEA Bulletin* 73, 73.

tension and the strengthening of trust between states in order to facilitate the cessation of the manufacture of nuclear weapons⁴⁰. The treaty seeks to achieve this through the division of the global community into 'nuclear-weapon' states and 'non-nuclear-weapon' states. The Treaty contains 11 Articles that outline and regulate this division, but Article 1 and 2 are most relevant to this enquiry.

Article 1 asserts that nuclear-weapon states must not 'transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices' and must 'not in any way to assist, encourage, or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices'⁴¹. Article 2 then places the corresponding obligations on non-nuclear states who undertake 'not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices' and 'not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices'⁴². Through these two articles, the *NPT* seeks to manage the risk posed by nuclear weapons by controlling the number of states in possession of these materials and devices. While not achieving total compliance, the *NPT* has constrained state behaviour with only 8 known nuclear weapon states today, and an almost universal acceptance of the treaty by 190 states parties; the only exceptions being India, Israel, Pakistan, South Sudan and North Korea.⁴³

3. Strengths and Weaknesses

In relation to the illegal trade of nuclear material, it is this almost universal acceptance that allows the *NPT* to have some impact, despite its failure to consider non-state actors. This is due to the normative effect of a universally recognised framework. The *NPT* limits what is acceptable state behaviour because a failure to comply with the norms it establishes has repercussions from other states, such as sanctions, and inhibits a state's ability to participate in the international system.⁴⁴ This motivates state parties to take appropriate caution in protecting their nuclear stores, thus

40 *NPT*, Preamble.

41 *Ibid* art 1.

42 *Ibid* art 2.

43 Casey-Maslen (n 35) 36.

44 World Nuclear Association (n 24).

to some extent making it more difficult for non-state actors to gain access to nuclear material.

This normative influence is undermined by the *NPT*'s assumption that only state actors are capable of using nuclear material, and that by regulating which states parties have access to nuclear material, it will not be accessible to malicious actors. At its best, the *NPT* could only conceive of a rogue state passing nuclear material or weapons on to non-state actors, which continues to place emphasis upon the role of the state in support of terrorist groups. Through their independent suicide attacks, extremist groups, such as Al Qaeda and the Islamic State, have demonstrated this support is unnecessary to generate terror. The result is a 'phase-lag' between the reality envisaged by the *NPT* and the reality of today, where nuclear material is not under the sole control of designated nuclear states, but accessible to non-state actors through the illegal trade.⁴⁵ Imrana Iqbal argues that for this reason the *NPT* is incompetent in preventing non-state actors' possession and use of nuclear material.⁴⁶ David Jonas and Christopher Swift acknowledge that emphasising the role of states does accurately reflect the challenges non-state actors face in acquiring and using nuclear material.⁴⁷ However, they ultimately agree with Iqbal explaining that, 'the rouge state proliferation paradigm... risk[s] exacerbating strategic paralysis by locating the non-state proliferation threat within legal and institutional structures designed to regulate the transfer and the use of nuclear technology among sovereign states'⁴⁸. Here, Jonas and Swift draw attention to an even greater consequence of the *NPT*'s lack of consideration of non-state actors. That with the *NPT* as its foundation, the non-proliferation framework is state-centric. This means that while later treaties may reference non-state actors, they still attempt to deal with this threat within a state system due to the ongoing influence of the *NPT*.

45 Imrana Iqbal, 'International Law of Nuclear Weapons Nonproliferation: Application to Non-State Actors' (2018) 31 (Winter) *Pace International Law Review* 1, 55.

46 Ibid.

47 David S Jonas and Christopher Swift, 'Reformulating the Nuclear Nonproliferation Regime: Al-Qaeda, Global Terrorism and the Rogue State Paradigm' (2008) 13 (Fall) *UCLA Journal of International Law and Foreign Affairs* 337, 347.

48 Ibid.

IV. Convention on the Physical Protection of Nuclear Material (CPPNM)

1. Historical Context and Purpose

The *Convention on the Physical Protection of Nuclear Material* strengthened nuclear security through its protection regime, yet key loopholes in the treaty allow the illegal trade to continue. In March 1980, the *CPPNM* opened for signature, similarly as a product of the Cold War era, and a direct result of the *NPT*'s lack of security obligations for nuclear material. While the *NPT* set out a non-proliferation regime, it did not place any obligations on nuclear states to protect their nuclear facilities.⁴⁹ This oversight was recognised by the international community at the General Conference of the IAEA in 1975 and a resolution was passed calling for options for physical protection to be explored.⁵⁰ This resolution provided for *CPPNM* negotiations and reflects the Convention's overarching purpose: to prevent the unlawful taking and use of nuclear material by creating protocols for the physical protection of nuclear material when in international transport.⁵¹ To do so, the Convention sets out detailed protection requirements for nuclear material transport between states and criminalises the theft, smuggling, threat to use, or use, of nuclear material.⁵² The *CPPNM* therefore has a dual impact: physical protection, which makes it more difficult for non-state actors to access nuclear material, and criminalisation in order to hold offenders to account.

2. Relevant Provisions

In addressing the illegal trade of nuclear material, Article 7(1)(a) is of particular importance, as it requires the criminalisation of 'an act without lawful authority which constitutes the receipt, possession, use, transfer,

49 [s.n.], 'The Incentive Gap: Reassessing U.S. Policies to Secure Nuclear Arsenals Worldwide' (2008) 121(7) *Harvard Law Review* 1864, 1869.

50 IAEA, General Conference, *Resolution adopted during the 183rd plenary meeting on 26 September 1975*, Doc No GC(XIX)/RES/328 (9 October 1975), 2 [6].

51 *CPPNM*, Preamble.

52 *Ibid* Annex I & II.

alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property⁵³. Here receipt, transfer and dispersal cover the trade of material, making the *CPPNM* the first international law to criminalise the illegal trade of nuclear material.⁵⁴ The impact of the article is that all states parties to the *CPPNM* must legislate an equivalent offence for nuclear material trade in their domestic legislation.⁵⁵ Article 9 and 10 establish the *aut dedere aut judicare* principle, meaning states must either allow the extradition of those charged under Article 7 or themselves pursue prosecution.⁵⁶ Of importance to this is Article 11, which specifies the *CPPNM* can act as the basis for extradition if the relevant states have no existing arrangement.⁵⁷ Article 13 promotes legal assistance and cooperation between states, specifically regarding the supply of evidence.⁵⁸ These provisions complement the purpose of the *CPPNM* by giving states more mechanisms to address nuclear material trade in their territory.

3. Strengths and Weaknesses

The main strength of the *CPPNM* is its adoption under the auspices of the IAEA, which means it is supplemented by their technical guidance.⁵⁹ This allows the IAEA to inform states parties of the security measures consistent with compliance, giving the *CPPNM* strength and specificity, without these technical details needing to be agreed upon during negotiations.⁶⁰

Several loopholes have been identified in the *CPPNM* which, in combination, mean it has little substantial impact on the illegal trade of nuclear material. Firstly, non-state actors remain without mention, restricting its ability to deal with criminal and terrorist groups, for they are not contemplated by the

53 Ibid art 7(1)(a).

54 Kellman and Gualtieri (n 17) 860.

55 D.L Siazon, 'The Convention on the Physical Protection of Nuclear Material' (1980) 22(3/4) *IAEA Bulletin* 57, 60.

56 Joyner and Parkhouse (n 38) 228.

57 *CPPNM*, art 11.

58 *CPPNM*, art 13.

59 Wetherall (n 5) 27.

60 Siazon (n 55) 60.

Convention as a potential threat. Secondly, the *CPPNM* only applies to nuclear material for peaceful purposes, and so military stockpiles are not subject to the same levels of physical security when transported internationally.⁶¹ This means that 83% of the world's fissile material is excluded from the scope of the *CPPNM*.⁶² A meaningful protection regime cannot be created by an agreement that does not apply the majority of nuclear material. Moreover, the *CPPNM* only applies to this non-military nuclear material when it is in international transport and does not create any security obligations for material being used, stored or transported within the state.⁶³ Instead, the protection of nuclear material domestically is left up to the state. This is considered by some to be the *CPPNM*'s 'most serious flaw', as it means 'states have unconstrained discretion to implement and enforce physical protection measures...[and] [t]here is no way to verify whether a nation is, in fact, protecting its nuclear materials or implementing suggested measures'⁶⁴. In particular, leaving states in control results in uneven implementation because the disparity of economic and technical resources between states means some have a greater ability to implement protection measures than others.⁶⁵ Despite its impact on the efficacy of the *CPPNM*, leaving domestic protection obligations up to the individual state was never questioned during negotiations.⁶⁶ This demonstrates the maintenance of state sovereignty being prioritised over effective nuclear security. The international community was willing to compromise their response to the illegal nuclear material trade if it meant they maintained exclusive control and autonomy over nuclear stores within their territory.

The effect of this exclusion became evident in the 1990s when the Soviet Union disintegrated. At that time, more than 30,000 weapons were held across Russia and the former Soviet republics Ukraine, Belarus and Kazakhstan.⁶⁷ These conditions created the so-called 'loose nukes' threat,

61 Wetherall (n 5) 17.

62 Ibid.

63 Nicholas D Smith, 'Guarding Pandora's Box: Strengthening physical protection at facilities that house weapons of mass destruction and related materials' (2009) 32 *Fordham International Law Journal* 1043, 1063.

64 Kellman and Gualtieri (n 17) 702.

65 Burch (n 14) 87.

66 IAEA, *Convention on the Physical Protection of Nuclear Material*, (1980) 34.

67 Joyner and Parkhouse (n 38) 207.

as former Soviet nuclear facilities were abandoned.⁶⁸ Within these facilities, nuclear material was described at the time by one US official as protected with ‘the equivalent to bicycle locks’⁶⁹. Unsurprisingly, this excess availability and minimum security led to large amounts of fissionable material disappearing to be smuggled through Europe and into the Middle East and Central Asia.⁷⁰ These events demonstrate the *CPPNM*’s limited effectiveness due to its failure to mandate the practice of states domestically. Although the former Soviet states may not have had the resources to implement protection measures themselves at this time, required standards of protection in the *CPPNM* would have facilitated other states and the IAEA to provide assistance.

V. United Nations Security Council Resolution 1540

1. Historical Context and Purpose

In an attempt to overcome the shortcomings of the *CPPNM*, the UN Security Council was utilised to remove the treaty negotiation process, with *Resolution 1540* the resulting international agreement. The Resolution specifically targets non-state actor use of weapons of mass destruction (WMDs), either chemical, biological or nuclear, representing a great step forward from the *CPPNM* and *NPT*. Yet, despite this new mechanism, *Resolution 1540* still did not provide a specific and enforceable nuclear material protection regime.

The breakdown of the Soviet Union, and the vulnerabilities it revealed in state protection of nuclear material, was just one of many significant events leading up to *Resolution 1540*’s adoption in April 2004. In 2001, the terrorist attacks of 11 September brought a new reality where major terrorist attacks could be planned independently of a state sponsor, with these terrorist actors having both the capacity and desire to inflict

68 Burch (n 14) 87.

69 Ibid.

70 Rohan Perera, ‘International Convention for the Suppression of Acts of Nuclear Terrorism: Introductory Note’, *United Nations Audiovisual Library of International Law* (Webpage, 2008).

maximum destruction on civilian populations.⁷¹ While not involving any nuclear material, 9/11 had major implications for nuclear security, as it undercut ‘[the] presumption, which up to [then], played a major role behind assessments of what is required to defend nuclear materials and facilities against terrorists and sabotage’.⁷² This assumption was that nuclear weapons would not be sought out by terrorist organisations because of the cost of their own life in such an attack.⁷³

At this point, the United States was leading calls for a revision of the *CPPNM* and increased measures to fight the global terrorist threat.⁷⁴ With the *NTC* still stalled in negotiations, the idea of utilising the Security Council to improve nuclear security was raised. At the UN General Assembly in 2003, the representative of the United Kingdom noted, ‘we all know that proliferation is one of the greatest threats we face. Much good work is being done by UN agencies...but the SC itself has not addressed this issue for 10 years. It is time that it did’⁷⁵. Yet inaction continued until 2004 upon the discovery of the ‘A Q Khan’ network. This discovery revealed that Pakistan’s top nuclear scientist, Abdul Qadeer Khan, had been heading a global criminal network to trade nuclear material, technology and expertise for more than two decades.⁷⁶ It is at this point that the international community decided to act.

Resolution 1540 is thus both the specific response of the international community to this revelation, and more broadly a response to almost two decades of legislative paralysis in treaty negotiations, despite vast changes to the strategic climate worldwide, specifically the capacity of non-state actors.⁷⁷ It follows that the purpose of *Resolution 1540* is strictly focused on preventing non-state actors from accessing WMDs or their related material.⁷⁸

71 Joyner (n 15) 226.

72 Larry D Johnson, ‘The Threat of Nuclear Terrorism and September 11th: Wake-up Call to Get the Treaties Right’ (2002) 31(Fall) *Denver Journal of International Law and Policy* 80, 80.

73 Ibid.

74 David Albright and Corey Hinderstein, ‘Unraveling the A. Q. Khan and future proliferation networks’ (2005) 28(2) *Washington Quarterly* 109, 121.

75 Merav Datan, ‘Security Council Resolution 1540: WMD and Non-State Trafficking’ (2005) 79 *Disarmament Diplomacy*.

76 Albright and Hinderstein (n 74) 111.

77 Smith (n 63) 1044.

78 UN Security Council (n 10) Preamble [8].

2. Relevant Provisions

Addressing the illegal trade of nuclear material is specifically raised as necessary to achieve the Resolution's purpose. The preamble sets out the illegal trade of nuclear material as 'a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security'.⁷⁹ This sets *Resolution 1540* apart from the nuclear proliferation regime envisaged by the *NPT*, and continued by the *CPPNM*, which does not contemplate the capacity of this new actor as a threat to nuclear security.⁸⁰

As a Resolution of the Security Council, *Resolution 1540* is legally binding on all UN Member states and requires them to:

1. Refrain from supporting non-state actors in endeavours 'that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear...weapons and their means of delivery'⁸¹.
2. 'Adopt and enforce appropriate effective laws' to prohibit non-state actors from manufacturing, acquiring, possessing, financing, transporting or using nuclear weapons;⁸² and
3. Develop 'effective measures to establish domestic controls to prevent the proliferation of nuclear...weapons and their means of delivery' ncluding 'appropriate effective physical protection measures'⁸³.

Here, illegal trade of nuclear material is addressed by the 'appropriate effective' laws that prevent non-state actor possession and transportation of nuclear material, as well as 'appropriate effective' measures to secure the nuclear material.

79 Ibid [9].

80 Iqbal (n 45) 19.

81 UN Security Council (n 10) 1.

82 Ibid [2].

83 Ibid [3].

3. Strengths and Weaknesses

Resolution 1540 is considered by some academics as the most important part of the international framework dealing with the illegal trade of nuclear material because it specifically targets non-state actors.⁸⁴ This signalled a change in the international community's approach to nuclear security to face the reality of 21st century threats. The symbolic shift brought by the Resolution is complemented by other key strengths, which set it apart from other agreements. Firstly, as the *CPPNM* at this time only applied to nuclear material in international transport, the Resolution was 'essentially the only international legal instrument requiring physical protection of nuclear material in storage for domestic use'⁸⁵. This not only closed a major loophole left by the *CPPNM*, but also helped the international community adjust to an international agreement interfering within a state's territory to mandate nuclear material protection measures. The Resolution created the '1540 Committee', which provides for a built-in accountability mechanism, as States are required to report on their implementation progress, so that compliance can be monitored.⁸⁶ In the most recent report from 2016, the Committee made clear that states were broadly improving their levels of compliance, but it also noted 17 States that were still to submit their first progress report.⁸⁷ The Resolution has a specific enforcement mechanism through its adoption under Chapter 7 of the *UN Charter*⁸⁸, which means the Security Council can (at least theoretically) respond to violations that they deem a threat to 'international peace and security' with a range of non-military or military options under Article 41 and 42.⁸⁹ This is another distinguishing feature of *Resolution 1540*; the other conventions impose obligations, yet do not provide explicitly for how these obligations should be enforced.⁹⁰

84 [s.n.] (n 49) 1870.

85 Wetherall (n 5) 19.

86 [s.n.] (n 49) 1870.

87 UN Security Council, *Report of the Security Council Committee established pursuant to resolution 1540 (2004)*, Security Council Committee established pursuant to resolution 1540 (2004), UN Doc S/2016/1038 (9 December 2016) 2.

88 *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

89 *Charter of the United Nations*, art 39.

90 [s.n.] (n 49) 1871.

Given the difficulty of achieving consensus in the Security Council, robust enforcement action is unlikely to be politically viable. The 2016 report exemplifies this, as many states reported their compliance with the Resolution as incomplete, yet no action was taken, much less the use of military force be contemplated.⁹¹ The political viability of enforcing *Resolution 1540* is further impacted by its vagueness. The text talks of ‘appropriate effective’ laws and measures, but the essential elements of an ‘appropriate effective’ nuclear security regime are not defined, and so the implementation approach taken by states varies greatly.⁹² This lack of specificity was acknowledged by states at the time of negotiating, for example one representative criticised the text for being ‘riddled with ambiguities’⁹³. There are two views expressed in academia as to why this was not fixed. On one side, Jonas and Swift acknowledge the difficulty of creating a ‘one size fits all’ approach, thus arguing that the vagueness is representative of ‘the absence of a meaningful international consensus regarding the most appropriate instrument for curbing nuclear proliferation’.⁹⁴ In comparison, Wetherall argues that specific measures and protections do exist, but international law does not facilitate their implementation, rather provisions are necessarily vague to ensure consensus can be reached.⁹⁵ Either way, for *Resolution 1540* this ambiguity means it is difficult, if not impossible, for the Security Council to consistently define when a state is in violation of the agreement, and therefore it is unlikely assertive enforcement action could be agreed upon.⁹⁶

91 UN Security Council (n 89) 2.

92 [s.n.] (n 49) 1877.

93 Smith (n 63) 1044.

94 Jonas and Swift (n 47) 352.

95 Wetherall (n 5) 19.

96 [s.n.] (n 49) 1877.

VI. Amendment to the Convention on the Physical Protection of Nuclear Material

1. Historical Context and Purpose

The *Amendment to the Convention on the Physical Protection of Nuclear Material*, which opened for signature in July 2005, was prompted by the same political and strategic context as *Resolution 1540*.

Following 9/11, the physical protection of nuclear material was a high priority given the new recognition of threats originating from non-state actors, operating independently and outside of the target state's territory. The Academic Larry Johnson makes clear this new understanding after 9/11, stating:

*...what happens in other parts of the world can have a direct impact upon America's safety and security. While we strive to make sure our own nuclear facilities are safe... a potential terrorist might well be able to obtain material through theft or illegal purchase in other countries for delivery to our doorstep.*⁹⁷

This highlights the view that the physical protection of nuclear material was to be prioritised over criminalisation or other measures to prevent trade between non-state actors from even occurring in the first place. Thus, adapting the *CPPNM* to ensure it suited this new globalised world became a necessary next step.

2. Relevant Provisions

The *Amendment's* key change from the original *CPPNM* is the inserted Article 2 A, which requires States to establish a physical protection regime for nuclear material in *domestic* transport, storage or use, rather than international transport only.⁹⁸ Article 5.5 of the *Amendment to the CPPNM* facilitates State cooperation to develop and enforce these protection obligations, where it 'enables direct cooperation and consultation between

⁹⁷ Johnson (n 72) 81.

⁹⁸ *Amendment to the Convention on the Physical Protection of Nuclear Material (Amendment to the CPPNM)*, opened for signature 8 July 2005, 1456 UNTS 101 (entered into force 8 May 2016) art 2 A.

state parties or...through the IAEA, with a view of obtaining guidance on the design, maintenance and improvement of physical protection systems for nuclear material⁹⁹.

Furthermore Article 7, which defines nuclear smuggling, is altered by the *CPPNM Amendment*. Here, the scope of liability for nuclear material trade is widened to include action that causes or is likely to cause damage to the environment, rather than previously only to people or property.¹⁰⁰ Subsections (h) and (i) have been added, meaning that individuals are liable for attempt or directing others.¹⁰¹ Subsection (k) further decrees that ‘an act which contributes to the commission’ of any of the offences, ‘shall be intentional’, and be done with the aim of furthering criminal activity or knowledge of it.¹⁰² This means prosecutors do not have to establish the intention or actual knowledge of offenders as was required in the original *CPPNM*. The *Amendment to the CPPNM* also makes reference to non-state actors, signalling in the preamble that states are ‘deeply concerned by the worldwide escalation of acts of terrorism in all its forms and manifestations, and by the threats posed by international terrorism and organised crime’¹⁰³. This acknowledgement that terrorist organisations can access nuclear material from criminal networks, with no need of a state sponsor, makes the Convention fit for the strategic reality of the 21st century.

3. Strengths and Weaknesses

The *Amendment’s* strengths come from these changes to the *CPPNM*; however, perhaps the two biggest weaknesses of the original Convention remain unchanged. Firstly, military nuclear material and facilities remain excluded from physical protection obligations. Rauf identifies that this reflects the wishes of nuclear armed states, who during negotiations proved ‘unwilling to formally accept an internationally legally binding regime for the physical protection of military nuclear materials, associated

99 Peri Lynne Johnson, ‘Facilitating the entry into force and implementation of the Amendment to the Convention on the Physical Protection of Nuclear Material: Observations, challenges and benefits’ (2014) 2(94) *Nuclear Law Bulletin* 9, 20.

100 *Amendment to the CPPNM*, art 2 A.

101 *Ibid* art 7(1)(h) – (i).

102 *Ibid* art 7(1)(k).

103 *Ibid* Preamble [9].

facilities and warheads¹⁰⁴. Here, the transparency required to impose protection obligations on military nuclear material is deemed unacceptable by nuclear states, who view it as an attack on their strategic autonomy.¹⁰⁵ This again exemplifies state sovereignty interfering with the development of an effective protection regime.

Moreover, implementation of the protection regime remains up to the state, consequently there are the same issues of uneven implementation due to the technical capacity and political will of individual states. This is exacerbated through the lack of a specified minimum level of protection for domestic stocks and the inclusion of a legitimate 'opt out' clause.¹⁰⁶ Subsection 4(a) of Article 2 A provides that the *Amendment to the CPPNM* does not apply to nuclear material that the state 'reasonably decides does not need to be subject to the physical protection regime'¹⁰⁷. The effect of this is significant, for it means 'states could presumably fulfill their obligations by establishing rules that provide merely a modicum of physical protection, even if these measures did not substantially reduce the likelihood of theft'¹⁰⁸. This makes it clear that the *Amendment to the CPPNM* did not meaningfully improve the international legal framework's impact on the illegal nuclear material trade because states still have the power to disregard physical protection obligations for domestic nuclear stores.

VII. International Convention for the Suppression of Acts of Nuclear Terrorism (NTC)

1. Historical Context and Purpose

The *NTC* focuses upon the criminalisation of acts relating to nuclear terrorism. Opening in September 2005, this Convention was also first prompted by the collapse of the Soviet Union and fears about nuclear

104 Tariq Rauf, *The entry into force of the Amendment to Convention on the Physical Protection of Nuclear Material: A key step in strengthening nuclear security – but is it enough?* (May 2016) 3.

105 *Ibid.*

106 *Ibid.*

107 *Amendment to the CPPNM*, art 2 A(4)(a).

108 [s.n.] (n 49) 1875.

security in the 1990s, which led to the establishment of the UN Ad Hoc Committee to Eliminate Terrorism in 1996.¹⁰⁹ The purpose of this committee was to ‘to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related international implements’¹¹⁰.

The first draft of the *NTC* was submitted to the Committee by the Russian Federation in 1998 based on the view that existing international treaties, specifically the *CPPNM*, were insufficient to address nuclear terrorism.¹¹¹ Given the majority of nuclear trafficking incidents at the time were taking place in Russia and other parts of the former USSR, it seems likely these were more specific fears driving Russia’s proposal.¹¹² The *NTC* is thus focused upon defining what constitutes ‘nuclear terrorism’. It does so by setting out a series of offences, which it criminalises as acts of nuclear terrorism and which state parties are required to legislate into their domestic law.¹¹³ These provisions cover the intentional and unlawful possession, threat to use or use of nuclear materials, or devices to cause injury to others.¹¹⁴

2. Relevant Provisions

Through the offences set out in the *NTC*, the illegal trade of nuclear material is designated as an act of nuclear terrorism that had not been specifically legislated by previous agreements. Under Article 2(1)(a), an offence is committed if any person lawfully and intentionally ‘possesses radioactive material or makes or possesses a device’ with the intent to cause death, injury, damage to property or damage to the environment.¹¹⁵ Here,

¹⁰⁹ Iqbal (n 45) 13.

¹¹⁰ UN General Assembly, *Resolution adopted by the General Assembly: Measures to eliminate international terrorism*, UN DOC A/RES/51/210 (16 January 1997) 5.

¹¹¹ UN General Assembly, *Explanatory Note to the draft convention on the suppression of acts of nuclear terrorism submitted by the Russian Federation*, Ad Hoc Committee established by General Assembly Resolution 51/210, 2nd Session, UN Doc A/AC.252/L.3/Add.1 (14 January 1998) [4].

¹¹² Perera (n 70).

¹¹³ Iqbal (n 45) 15.

¹¹⁴ *NTC* art 4.

¹¹⁵ *Ibid* art 2(1)(a), (a)(i) – (ii).

‘radioactive material’ is defined to include nuclear material.¹¹⁶ The requirement to prove intention does make it more difficult to prosecute criminal groups who are trading in nuclear material, for when they have possession of the material, it could be argued they have no intention to use it to cause harm, merely to make a profit. Article 2(4) attempts to deal with this issue by focusing upon accomplices. Here, a person commits an offence if they organise, direct others, or contribute to the commission of an offence.¹¹⁷ This covers the illegal trade as enabling terrorist actors to access nuclear material contributes to the possessory offence.¹¹⁸ However, there is again an intention requirement, where the individual must have acted with the aim of furthering terrorist activity or with knowledge of the group’s intention.¹¹⁹ While this likely does not preclude criminal groups selling to terrorist organisations, it does make it more difficult to prosecute a nuclear facility where the criminal group acts as a middle man between nuclear facility employees and the terrorist organisation.¹²⁰

3. Strengths and Weaknesses

It is difficult to illustrate the value of the *NTC* as the latest treaty dealing with this issue because it does not contribute any significantly different solutions or mechanisms to those established in the *NPT*, *CPPNM*, *Amendment* and *Resolution 1540*. While the *NTC* is the first Convention to designate the illegal trade of nuclear material as ‘nuclear terrorism’, the actual significance of this is yet unclear.¹²¹ It is unlikely to deter either criminal networks or terrorist groups, and appears largely symbolic for the benefit of state parties.¹²² Moreover, the offences covered by the *NTC* broadly already existed through the *CPPNM* and *Resolution 1540*. For example, no change was required in the Russian or American criminal laws to comply with the *NTC*.¹²³ Based upon IAEA statistics, the illegal trade of nuclear

¹¹⁶ Ibid art 1(1) and 1(2).

¹¹⁷ Ibid art 2(4)(a) – (c).

¹¹⁸ Ibid.

¹¹⁹ Willan (n 3) 536.

¹²⁰ Ibid.

¹²¹ Burch (n 14) 86.

¹²² Willan (n 3) 532.

¹²³ Ibid 537.

material continues to occur in Russia, and so this lack of change in Russian criminal provisions suggests that the *NTC* has not impacted the illegal trade or reduced the risk of nuclear terrorism.¹²⁴ Similarly, the *NTC* attempts to promote the physical protection of nuclear material, yet these provisions only require a 'best effort' from states and without any mandated minimum level of protection, they are redundant given what is covered by the *Amendment to the CPPNM*.¹²⁵ When considered alone, the *NTC* does contribute to nuclear security, however when considered in conjunction with the *CPPNM* and *Resolution 1540*, it is simply a reiteration of existing measures.

VIII. Observations and Conclusions

Assessing the impact of these international treaties against the illegal trade of nuclear material is difficult given they do not exist in isolation. There are many other state initiatives that contribute to global nuclear security. For example, the United States' Proliferation Security Initiative launched in 2003 and the Global Initiative to Combat Nuclear Terrorism jointly launched by Russia and the United States in 2006 both help to coordinate efforts to secure nuclear material.¹²⁶ These unilateral and bilateral agreements, along with the work of the IAEA, mean that despite data showing a decrease in trafficking incidents since 2006, it is unclear if this is the result of an improved international framework or other factors.¹²⁷

The Harvard Kennedy School's *Project on Managing the Atom* produces an annual report on nuclear security and in particular considers the difficulty of measuring improvements in nuclear security. To overcome uncertainty in quantitative data, they have considered the effectiveness of these laws in contributing to agenda setting, capacity building and norm creation.¹²⁸ Firstly, there is evidence that the process of negotiating and implementing these agreements has drawn attention to nuclear security in the global community and contributed to 'nuclear security upgrades that were not

¹²⁴ Ibid.

¹²⁵ Ibid 534.

¹²⁶ Joyner and Parkhouse (n 38) 222–3.

¹²⁷ IAEA Incident and Trafficking Database (n 28).

¹²⁸ Bunn, Roth and Tobey (n 34) 18; Casey-Maslen (n 35) 178.

strictly required¹²⁹. For example, the Global Initiative to Combat Nuclear Terrorism was prompted by the *NTC* to help achieve the Convention's purpose, despite not being required by the agreement.¹³⁰ This, secondly, contributes to capacity building, where access to resources, knowledge and assistance is improved by these international agreements because of the subsequent bilateral arrangements and elevation of the IAEA.¹³¹ Thirdly, the framework's normative impact is demonstrated by the number of state parties, with non-signatory states in the minority globally, as Figure 1 displays. Analysis using these measures therefore suggests that these international laws have contributed to the prevention of nuclear material trade.

Figure 1: Non-Party States to International Nuclear Agreements¹³²

<i>CPPNM</i>	<i>Amendment to the CPPNM</i>	<i>NTC</i>
Iran	Belarus	Iran
North Korea	Iran	Israel
Syria	North Korea	North Korea
	South Africa	Pakistan
	Syria	Syria

Figure 1 draws further attention to some of the limitations of this international framework, where these states were free to decline joining the agreements, despite key nuclear security risks existing in their territory. For example, Belarus has one of the highest rates of the illegal trade of nuclear material,¹³³ yet they are not party to the amended *CPPNM* that would require the state to focus some effort on protecting domestic nuclear facilities and stores. Similarly, a destroyed reactor site in Syria was under Islamic State control between 2014 and 2017, with the location of the reactor's uranium unknown even today.¹³⁴ Given the Syrian Civil War, it is unclear that being party to these Conventions would have prompted government action to physically protect the uranium, but it would have provided a basis for other states to intervene or offer assistance. While *Resolution 1540* is not dependent upon state ratification, it does not

129 Bunn, Roth and Tobey (n 34) 18; Casey-Maslen (n 35) 129.

130 Willan (n 3) 543.

131 Bunn, Roth and Tobey (n 34) 128.

132 Bunn, Roth and Tobey (n 35) 128; Casey-Maslen (n 35) 128.

133 Zaitseva (n 19).

134 Nuclear Threat Initiative, 'Syria' (Web Page, March 2021).

mandatorily impose any specific security obligations regarding nuclear material, meaning it does little to bridge this gap.¹³⁵ This demonstrates that in respecting state sovereignty, the framework's effectiveness is limited, as non-compliance from one high-risk state impacts upon nuclear security for all states globally.

The *Project for Managing the Atom* also makes clear that despite international law's capacity to inform a global agenda and norms, this only provides the illusion of progress rather than actual change. This report puts forward a dual critique of the international framework: that it does not force states to make any radical nuclear security improvements, yet their adoption is celebrated, consequently hiding the lack of progress actually achieved on the ground.¹³⁶ This critique is best exemplified by considering what each agreement attempts to achieve: criminalisation or prevention. With the exception of the *NPT*, they all attempt both. While each has their own specific focus, the texts of the agreements are remarkably similar and overall require the same levels of physical protection and criminalisation.

This chapter's historical analysis assists in understanding this large overlap between the international agreements. It seems to frame the current international framework as a result of political forces, rather than of deliberate and calculated legislative action. The historical timeline shows that each major event relating to nuclear security is followed by a push for action at an international level. Yet each time this occurs, the same mechanisms are used in solution. The result is multiple international agreements with no significant difference in their structure, aims, enforceability or implementation process.

While not yet achieving a consistent global response, the international legal framework regarding the illegal trade of nuclear material does form a foundation for universal nuclear security. These agreements do facilitate physical protection for nuclear material and criminalise the illegal trade. However, these measures are undermined by the state-centric nature of international law that prioritises state sovereignty over more robust measures, which would effectively manage the nuclear terrorism threat. While much progress has occurred since the *NPT*, particularly with the

135 [s.n.] (n 49) 1877.

136 Bunn, Roth and Tobey (n 34) 129.

recognition of non-state actors, necessary improvements continued to be held back by the consensus requirement of treaty negotiations and the prioritisation of state sovereignty. It remains critical that there is a consistent and universal response to the illegal trade of nuclear material because in nuclear security, insecurity anywhere is insecurity everywhere.

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Illegaler Handel mit Feuerwaffen und Munition – Strafbarkeit nach den Strafbestimmungen des schweizerischen Waffengesetzes

STEPHANIE SALZGEBER

Der vorliegende Beitrag untersucht die Strafbestimmungen im schweizerischen Waffengesetz mit Blick auf ihre Anwendung im Kontext des illegalen Handels mit Feuerwaffen und Munition. Obwohl im Waffengesetz wiederholt auf den Waffenhandel Bezug genommen wird, fehlt eine Definition des legalen oder illegalen Waffenhandels. Unter Verwendung der Literatur zu illegalem Waffenhandel und internationalen Abkommen, wird im vorliegenden Beitrag versucht, eine erste Einschätzung zu präsentieren, welche Straftatbestände überhaupt auf den illegalen Waffenhandel zur Anwendung gelangen können und somit zur Bekämpfung des illegalen Waffenhandels beitragen können.

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I. Einleitung

Fragen zum gesellschaftlichen und damit auch zum rechtlichen Umgang mit Waffen sind in der Schweiz als stark bewaffnetes Land mit einer weit zurückreichenden Schiesstradition und einer Milizarmee sehr präsent. Mit einer geschätzten Zahl von 2'332'000 Feuerwaffen in zivilem Besitz, hat jeder vierte Schweizer¹ eine Feuerwaffe.² In der Rangliste von Small Arms Survey, welche die Anzahl Waffen pro 100 Einwohner international vergleicht, liegt die Schweiz weltweit auf dem 16. Platz.³ Die 'Gun Policy'⁴ der Universität Sydney, Australien, schätzt, dass sich sogar bis zu 3'400'000 Feuerwaffen in privatem Besitz befinden könnten, wovon etwa 1,5 bis 3 Millionen nicht registrierte und somit illegale Waffen sind.⁵ Die Anzahl und Verfügbarkeit von Feuerwaffen spielt insbesondere bei Gewaltdelikten eine Rolle: je grösser die Verfügbarkeit von Schusswaffen ist, desto grösser ist die Gefahr des Miss-

1 Im Interesse der leichteren Lesbarkeit wird in der Regel nur die männliche Form verwendet. Im Sinne der Geschlechtergleichbehandlung sind die entsprechenden Begriffe als geschlechtsneutral zu verstehen.

2 Aaron Karp, *Estimating Global Civilian-held Firearms Numbers* (2018) 4 und Annex.

3 Ibid.

4 Die Webseite GunPolicy.org sammelt und veröffentlicht Daten und Erkenntnisse zu Waffengewalt, Waffenrecht und Waffenkontrolle.

5 Philip Alpers und Michael Picard, 'Switzerland – Gun Facts, Figures and the Law' (Webseite, 18. März 2021) <<https://www.gunpolicy.org/firearms/region/switzerland>>.

brauchs.⁶ Ebenso birgt ein legaler Markt mit Feuerwaffen, wie er etwa in der Schweiz vorliegt, stets die Gefahr, dass die Feuerwaffen im illegalen Umfeld landen.⁷ Eine Nachfrage nach illegalen Feuerwaffen besteht vor allem in zwei Gruppen: Die einen, die Waffen für kriminelle Zwecke benötigen, und die anderen, die sie für politische Zwecke verwenden wollen.⁸

So werden etwa viele Gewaltdelikte, insbesondere Tötungsdelikte, mit Waffen ausgeführt und erleichtert. Auf politischer Ebene tragen und fördern Waffen Bürgerrechtskriege und regionale Konflikte, unterstützen die organisierte Kriminalität und terroristische Organisationen, ebenso wie Drogenkartelle und andere bewaffnete Gruppen.⁹ Die entsprechende Nachfrage nach Waffen, die im legalen Markt wegen Einschränkungen nicht befriedigt werden kann, lebt sich im illegalen Markt aus.¹⁰ Feuerwaffen als Handelsgut sind aufgrund ihrer Verknüpfung mit deliktischen Tätigkeiten und der politischen Instrumentalisierung besonders gefährdet, auf den illegalen Markt abzudriften.

Zur Bekämpfung von illegalen Märkten sind verschiedene Instrumente denkbar, darunter auch die Strafverfolgung.¹¹ Dadurch sollen einerseits illegale Waffen ausfindig gemacht und sichergestellt werden und somit weitere Straftaten – darunter auch weiterer illegaler Waffenhandel durch die Täter – verhindert werden. Andererseits kann der Anreiz, illegalen Waffenhandel zu betreiben, durch die Erhöhung der Bestrafungsintensität oder der Entdeckungswahrscheinlichkeit reduziert werden.¹²

Die vorliegende Arbeit befasst sich mit den Strafbestimmungen im schweizerischen Waffenrecht als Instrument gegen den nationalen und internatio-

6 Daniel Jositsch, 'EU-Waffenrichtlinie, Unverständlicher Widerstand der Schützen', *Neue Zürcher Zeitung* (online), 26. März 2019; Martin Kiliyas und Henriette Haas, 'The Role of Weapons in Violent Acts: Some Results of Swiss National Cohort Study' (2002) 17(1) *Journal of Interpersonal Violence* 14, 20.

7 Theodore Leggett, *Transnational Firearms Trafficking: Guns für Crime and Conflict* (2009) 37, 38.

8 Ibid, 37.

9 Nicolas Florquin, 'Chapter 2, Understanding the Trade in Small Arms: Key Concepts' in N.R. Jenzen-Jones und Matt Schroeder (Hrsg.), *An Introductory Guide to the Identification of Small Arms, Light Weapons, and Associated Ammunition* (2018) 45, 48; UN Office on Drugs and Crime, *Global Study on Firearms Trafficking 2020* (2020) 15.

10 Hanno Beck und Aloys Prinz, 'Ordnungspolitik auf illegalen Märkten: Der Drogen- und Waffenmarkt' (2002) 3 *Perspektiven der Wirtschaftspolitik* 23, 23.

11 Ibid 24, weitere Instrumente nach den Autoren wären Eingriffe auf der Nachfrageseite, Legalisierung von Teilmärkten und eine Einkommenspolitik.

12 Ibid.

nalen illegalen Handel mit Feuerwaffen und Munition. Hierbei wird der Fokus auf das Waffengesetz¹³ gelegt, welches nach seinem Art. 1 Abs. 1 WG bezweckt, die missbräuchliche Verwendung von Waffen, Waffenbestandteilen, Waffenzubehör, Munition und Munitionsbestandteilen zu bekämpfen. Zunächst wird der Kontext des Waffengesetzes erläutert und auf die zentralen Begriffe der Feuerwaffen, Munition und des illegalen Waffenhandels eingegangen (Kapitel II). Der illegale Handel wird eingegrenzt auf den Handel mit Feuerwaffen und Munition in der Schweiz und von der Schweiz aus durch nicht-staatliche Akteure. Im Zentrum der Arbeit steht schliesslich die Frage, welche Strafbestimmungen im Waffengesetz auf den illegalen Waffenhandel angewendet werden können (Kapitel III). Hierfür werden die Tatbestände zunächst erläutert und mit den Bestimmungen des Allgemeinen Teils des Waffengesetzes in Verbindung gebracht. Nicht berücksichtigt werden daher jene Strafbestimmungen, die klarerweise nicht auf den illegalen Waffenhandel angewendet werden können. Bei Grenzfällen oder solchen Strafbestimmungen, die zwar nicht auf den illegalen Waffenhandel angewendet werden können, aber trotzdem für diesen von Relevanz sind, wird dies konzis dargestellt. Zuletzt wird die Arbeit mit einem Schlusswort (Kapitel V) abgerundet.

II. Kontext und Begrifflichkeiten

1. Entwicklung des Waffengesetzes

Das Waffengesetz wurde mit der dazugehörigen *Waffenverordnung*¹⁴, dem *Reglement über die Prüfung für die Waffenhandelsbewilligung*¹⁵ und der *Verordnung über die Mindestanforderungen für Geschäftsräume von Waffenhandlungen*¹⁶ auf den 1. Januar 1999 in Kraft gesetzt. Es regelt den Erwerb, das Verbringen in das schweizerische Staatsgebiet, die Ausfuhr, das Aufbewahren, den Besitz, das Tragen, den Transport, das Vermitteln, die Herstellung von und

13 *Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997* (Waffengesetz, WG), SR 514.54.

14 *Verordnung über Waffen, Waffenzubehör und Munition vom 21. September 1998* (Waffenverordnung, WV), SR 514.541.

15 *Reglement über die Prüfung der Waffenhandelsbewilligung vom 21. September 1998*, SR 514.544.1.

16 *Verordnung über die Mindestanforderungen für Geschäftsräume von Waffenhandlungen vom 21. September 1998*, SR 514.544.2.

den Handel mit Waffen i. w. S.¹⁷ und Munition i. w. S.¹⁸ (Art. 1 Abs. 2 WG). Die Grundlage für die Waffengesetzgebung bildet auf Verfassungsstufe Art. 107 Abs. 1 BV¹⁹, mit welchem dem Bund die Kompetenz erteilt wurde, Vorschriften gegen den Missbrauch von Waffen, Waffenzubehör und Munition zu erlassen.²⁰ Die Waffengesetzgebung und insbesondere auch das Waffengesetz hat seit seinem Erlass zahlreiche Änderungen erfahren.²¹ Hervorzuheben ist insbesondere der Einfluss des internationalen Rechts im Bereich der Waffengesetzgebung. Die Schweiz hat sich im Assoziierungsabkommen zu Schengen²² zwischen der Schweiz und der Europäischen Union (SAA)²³ verpflichtet, die Schengener Waffenvorschriften in das nationale Recht umzusetzen.²⁴ Die Anpassung an das Schengener Recht beschränkt sich auf jene Aspekte, die zwingend vorgenommen werden müssen; sie beschränkt sich somit auf den Schengener Mindeststandard.²⁵ Die massgeblichen waffenrechtlichen Vorschriften im Schengen-Besitzstand beziehungsweise im Recht der Europäischen Union finden sich in der *Richtlinie 91/477/EWG des Rates vom 18. Juni 1991 über den Erwerb und des Besitzes von Waffen (EG-Waffenrichtlinie)*²⁶, welche bezweckt, den (Handels-)Verkehr mit Feuerwaffen und Munition zu

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- 17 Nachfolgend werden Waffen, wesentliche oder besonders konstruierte Waffenbestandteile und Waffenzubehör nach dem Waffengesetzes zur Vereinfachung als Waffen i. w. S. respektive Feuerwaffen i. w. S. bezeichnet.
- 18 Nachfolgend werden Munition und Munitionsbestandteile nach dem Waffengesetz zur Vereinfachung als Munition i. w. S. bezeichnet.
- 19 *Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (BV)*, SR 101.
- 20 Markus H.F. Mohler, 'Art. 107 BV' in Bernhard Ehrenzeller et al (Hrsg.), *Die schweizerische Bundesverfassung, St. Galler Kommentar* (3. Aufl., 2014) 1942, 1944 [7]–[8].
- 21 Cf die Übersicht in Jürg Marcel Tiefenthal, *Kantonales Polizeirecht der Schweiz* (2018) 572–576; siehe auch den Überblick der Entwicklungen im Waffengesetz in Bundesamt für Polizei fedpol, 'Wie sich das Waffengesetz entwickelt' (Webseite, 3. September 2020).
- 22 Cf Art. 4 Abs. 2^{ter} WG, wonach als Schengen-Staat ein Staat gilt, der durch eines der Schengen Assoziierungsabkommen gebunden ist. Die Schengen-Assoziierungsabkommen sind im Anhang des Waffengesetzes aufgeführt.
- 23 *Abkommen zwischen der Schweizerischen Eidgenossenschaft, der Europäischen Union und der Europäischen Gemeinschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen Besitzstands (SAA)*, eröffnet zur Unterzeichnung am 26. Oktober 2004, AS 2008 481 (in Kraft getreten 1. März 2008).
- 24 *Botschaft zur Änderung des Bundesgesetzes über die Waffen, Waffenzubehör und Munition vom 11. Januar 2006*, BBl 2006 2713, 2720–2721 ('Botschaft Änderung Waffengesetz 2006').
- 25 *Botschaft zur Genehmigung der bilateralen Abkommen zwischen der Schweiz und der Europäischen Union, einschliesslich der Erlasse zur Umsetzung der Abkommen ('Bilaterale II') vom 1. Oktober 2004*, BBl 2004 5965, 6170–6171 ('Botschaft Bilaterale II 2004').
- 26 *Richtlinie 91/477/EWG des Rates vom 18. Juni 1991 über die Kontrolle des Erwerbs und des Besitzes von Waffen*, ABL L 256 vom 13. September 1991 ('EG-Waffenrichtlinie').

gewährleisten.²⁷ Die Anpassung an die *EG-Waffenrichtlinie* wurde zusammen mit der anstehenden ‘nationalen’ Revision zur Schliessung der noch bestehenden Lücken in der Waffengesetzgebung auf den 12. Dezember 2008 in Kraft gesetzt.²⁸ Im Assoziierungsabkommen erfasst ist auch die Verpflichtung der Schweiz, den weiterentwickelten ‘Schengen-Besitzstand’ grundsätzlich zu übernehmen (Art. 2 Abs. 3 und Art. 7 SAA). Folglich mussten in den nachfolgenden Jahren Änderungen an der *EG-Waffenrichtlinie* ebenfalls im Schweizer Recht übernommen werden. Soweit im Verlauf der Arbeit auf die *EG-Waffenrichtlinie* aus dem Jahr 1991 mit Einbezug der neusten Änderung aus dem Jahr 2017 Bezug genommen wird, wird deswegen vereinfacht von der *geänderten EU-Waffenrichtlinie*²⁹ gesprochen.³⁰

Neben der fortlaufenden Anpassung an das Schengener Recht wird das Schweizer Waffenrecht durch die Beteiligung der Schweiz an weiteren internationalen Abkommen im Bereich des Waffenrechts beeinflusst.³¹ Zu nennen ist hierbei das *UN-Feuerwaffenprotokoll* und das *UN-Rückverfolgungsinstrument*, wobei letzteres das *UN-Feuerwaffenprotokoll* in den Teilbereichen Markierung, Registrierung und grenzüberschreitende Zusammenarbeit ergänzt und präzisiert.³² Das *UN-Rückverfolgungsinstrument* ist im Gegensatz zum *UN-Feuerwaffenprotokoll* nur politisch, nicht aber rechtlich bindend.³³

27 Botschaft *Bilaterale II 2004* (n 25) 6104.

28 Zu den vorgenommenen Änderungen cf *Botschaft Änderung Waffengesetz 2006* (n 24) 2721 und *Botschaft zur Volksinitiative ‘Für den Schutz vor Waffengewalt’ 2009 vom 16. Dezember 2009*, BBl 2010 137, 161.

29 *Richtlinie (EU) 2017/853 des europäischen Parlamentes und des Rates vom 17. Mai 2017 zur Änderung der Richtlinie 91/477/EWG des Rates über die Kontrolle des Erwerbs und des Besitzes von Waffen*, ABl. L 137 vom 24. Mai 2017 (‘geänderte EU-Waffenrichtlinie’).

30 Siehe zu den vorgenommenen Änderungen *Botschaft zur Genehmigung und Umsetzung des Notenaustauschs zwischen der Schweiz und der EG betreffend die Übernahme der Richtlinie 51/2008/EG des Europäischen Parlaments und des Rates vom 21. Mai 2008 zur Änderung der Waffenrichtlinie (Weiterentwicklung des Schengen-Besitzstands) und zu einer Änderung des Waffengesetzes (Anpassung der Umsetzung des Schengen-Besitzstands) vom 13. Mai 2009*, BBl 2009 3649, 3668–3673 (‘Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009’). Siehe auch die neuste *Richtlinie (EU) 2021/555 des Europäischen Parlaments und des Rates vom 24. März 2021 über die Kontrolle des Erwerbs und des Besitzes von Waffen*, ABl. L 115 vom 6. April 2021, welche jedoch für den vorliegenden Beitrag keine massgeblichen Änderungen enthält.

31 Benjamin Amsler und Ludvine Calderari, ‘La réglementation des armes à feu par la loi fédérale sur les armes’ (2014) (3) *Aktuelle Juristische Praxis* 309, 312.

32 *Botschaft betreffend die Genehmigung und Umsetzung des UN-Feuerwaffenprotokolls (Entwurf I) und die Änderung des Waffengesetzes (Entwurf II) vom 25. Mai 2011*, BBl 2011 4555, 4557 (‘Botschaft UN-Feuerwaffenprotokoll und Änderung Waffengesetz 2011’).

Der Vollständigkeit halber ist im Bereich des illegalen Waffenhandels noch das rechtlich nicht bindende *Kleinwaffenaktionsprogramm der Vereinten Nationen*³⁴ und der multilaterale *Vertrag über den Waffenhandel* ('Arms Trade Treaty')³⁵ zu nennen. Der *Arms Trade Treaty* regelt den internationalen Handel mit konventionellen Waffen und ist für die Schweiz am 30. April 2015 in Kraft getreten.

2. Begrifflichkeiten

2.1. Begriff der Feuerwaffe im Waffengesetz

Das Waffengesetz setzt sich insgesamt mit vier Regelungsobjekten auseinander und unterscheidet zwischen der Waffe (mit den wesentlichen Bestandteilen), dem Waffenzubehör (Art. 4 Abs. 2 WG), der Munition (Art. 4 Abs. 5 WG) und den gefährlichen Gegenständen (Art. 4 Abs. 6 WG).³⁶ In Art. 4 Abs. 1 WG wird in sieben Grundkategorien abschliessend aufgezählt, was als Waffe im Sinne des Waffengesetzes zu verstehen ist.³⁷ Wie einleitend festgehalten, befasst sich die vorliegende Arbeit nur mit Feuerwaffen und Munition, womit das Tatobjekt in den Strafbestimmungen auf diese beschränkt wird. Gemäss Art. 4 Abs. 1 lit. a WG gelten Geräte, mit denen durch Treibladung Geschosse abgegeben werden können und die eine einzige Person tragen und bedienen kann, oder Gegenstände, die zu solchen Geräten umgebaut werden können (Feuerwaffen), als Waffen.

Das Erfordernis einer Treibladung schliesst jene Schusswaffen aus, zu deren Antrieb keine Munition beziehungsweise 'Treibladung' verwendet wird, womit etwa Armbrüste und Pfeilbögen nicht erfasst sind.³⁸ Das ebenfalls

33 Ibid.

34 UN, *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, New York 9–20 July 2001, UN Doc A/CONF.192/15 (20 July 2001) 7–17.

35 Eröffnet zur Unterzeichnung 3. Juni 2013, 3013 UNTS 1 (in Kraft getreten 24. Dezember 2014), SR 0.518.61 (für die Schweiz in Kraft getreten 30. April 2015).

36 Stefan Miori, 'Waffenrecht in der Praxis der Strafverfolgung' (2017) 1 *Sicherheit und Recht* 3, 5.

37 Hans Wüst, *Schweizer Waffenrecht* (1999) 27.

38 *Botschaft zum Bundesgesetz über Waffen, Waffenzubehör und Munition (Waffengesetz, WG) vom 24. Januar 1996*, BBl 1996 I 1053, 1058 ('Botschaft Waffengesetz 1996'); Philippe

vorausgesetzte Kriterium der Tragbarkeit erfüllen Geräte, die von einer Person üblicherweise ohne fremde Hilfe getragen werden können, wobei die Schussabgabe aus der Hand erfolgt.³⁹ Dementsprechend erfasst das Waffengesetz keine schweren, nicht tragbaren, sowie nicht von einer Person bedienbare Feuerwaffen wie fahrbare Werfer, Kanonen, Geschütze, Standböller, Abschussrohre für Grossfeuerwerke oder fest montierte Selbstschussanlagen zur Vertreibung von Tieren (eg in Rebbergen) und Einbrechern. Sie werden selbst dann nicht vom Waffengesetz erfasst, wenn sie keinem anderen Gesetz – wie etwa dem Kriegsmaterial- oder Sprengstoffgesetz – unterstellt sind.⁴⁰ Antike Waffen sind gemäss Art. 2 Abs. 2 WG vom Geltungsbereich des Waffengesetzes grundsätzlich ausgenommen, vorbehaltlich den Bestimmungen über das Waffentragen (Art. 27 WG) und dem Waffentransport (Art. 28 WG) sowie die entsprechenden Strafbestimmungen dazu. In Anlehnung an die *geänderte EU-Waffenrichtlinie* sollen Gegenstände dann als umbaubar gelten, wenn sie kumulativ zwei Voraussetzungen erfüllen: Sie müssen das Aussehen einer Feuerwaffe haben und sich aufgrund ihrer Bauweise oder des verwendeten Materials zum Umbau eignen.⁴¹ Wird jedoch eine Feuerwaffe technisch endgültig unbrauchbar gemacht, wie etwa deaktivierte Feuerwaffen, fällt sie nicht mehr unter Art. 4 Abs. 1 lit. a WG.⁴² Schreckschuss- und Signalwaffen gelten nach Art. 4 Abs. 1 lit. a WG i.V.m. Art. 1 Abs. 1 WV nur dann als Feuerwaffen, wenn sie die technischen Spezifikationen im Anhang der *Durchführungsrichtlinie (EU) 2019/69*⁴³ nicht erfüllen.⁴⁴ Die Waffenverordnung verweist in dieser Bestimmung somit direkt auf den Anhang der *EU-Durchführungsrichtlinie*, wiederholt sie jedoch nicht.⁴⁵

Weissenberger, 'Die Strafbestimmungen des Waffengesetzes: unter Berücksichtigung von Art. 260^{quater} StGB' (2000) 2 *Aktuelle Juristische Praxis* 153, 157.

39 Weissenberger (n 38) 157.

40 Ibid.

41 *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3652; Fatih Aslantas, 'Allgemeine Bestimmungen, Art. 1–4 WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG), Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 1, 16 [4].

42 Aslantas (n 41) 16 [4].

43 *Durchführungsrichtlinie (EU) 2019/69 der Kommission vom 16. Januar 2019 zur Festlegung technischer Spezifikationen für Schreckschuss- und Signalwaffen gemäss der Richtlinie 91/477/EWG des Rates über die Kontrolle des Erwerbs und des Besitzes von Waffen*, ABL L 15 vom 17. Januar 2019, 22 ('Durchführungsrichtlinie (EU) 2019/69').

44 Bundesamt für Polizei fedpol, *Erläuternder Bericht zur Änderung der Waffenverordnung vom 24. Juni 2020* (2020) 5.

45 Ibid.

Der Begriff der Feuerwaffe und die aktuelle Definition wurde erst auf den 22. Juni 2007 im Rahmen der Umsetzung der Schengener Waffenvorschriften in das nationale Recht in das Waffengesetz aufgenommen.⁴⁶ Die Terminologie wurde in Anlehnung an die Begrifflichkeiten der *EG-Waffenrichtlinie* angepasst und löste die Begriffe Hand- und Faustfeuerwaffe ab.⁴⁷ In dem Sinne kann für Auslegungsfragen auch auf den Schengen-Besitzstand zurückgegriffen werden.

2.2. Waffenkategorien

Neben der Terminologie wurde auch die Zuordnung und Einteilung von Waffen in verschiedene Kategorien aus der *EG-Waffenrichtlinie* übernommen.⁴⁸ Im Schweizer Recht werden Waffen im Waffengesetz in meldepflichtige Waffen (Art. 10 WG), in bewilligungspflichtige Waffen (Art. 8 Abs. 1 WG) und in verbotene Waffen (Art. 5 Abs. 1 und 2 WG)⁴⁹ eingeteilt. Diese Einteilung erfolgt aufgrund des abstrakten Gefährdungspotenzials der jeweiligen Waffe, wobei dementsprechend auch unterschiedlich strenge Erwerbsanforderungen gelten.⁵⁰ Die Zentralstelle Waffen weist den drei Kategorien zur Veranschaulichung die Farben grün, gelb und rot zu und führt bebilderte Beispiele auf.⁵¹ So ist am Beispiel eines Gewehres folgende Einteilung ersichtlich: einschüssige und mehrläufige Jagdgewehre fallen in die Gruppe Grün und sind somit nur meldepflichtig (Art. 10 Abs. 1 lit. a WG). Ein halbautomatisches Gewehr fällt hingegen in die Gruppe Gelb der bewilligungspflichtigen Waffen (Art. 8 Abs. 1 WG), wobei die Kapazität des Magazins 10 Patronen nicht übersteigen darf (Art. 5 Abs. 1 lit. c. Ziff. 2 WG i.V.m. Art. 4 Abs. 2^{bis} lit. b WG i.V.m. Art. 4a Abs. 1 WV). Wird diese Kapazität von 10 Patronen in der Ladevorrichtung überschritten (Art. 5 Abs. 1 lit. c Ziff. 2 WG) oder handelt es sich um eine umgebaute halbautomatische Feuerwaffe, die ursprünglich eine Serief Feuerwaffe war (Art. 5 Ziff. 1 lit. b WG) oder um eine Serief Feuerwaffe selbst (Art. 5

46 Cf *Bundesbeschluss über die Genehmigung und die Umsetzung der bilateralen Abkommen zwischen der Schweiz und der EU über die Assoziierung an Schengen und an Dublin vom 17. Dezember 2004*, AS 2008 447, 463 ('Bundesbeschluss Schengen').

47 *Botschaft Bilaterale II 2004* (n 25) 6263.

48 *Botschaft Bilaterale II 2004* (n 25) 6171, 6172, 6264.

49 Seit August 2019 sind in Abs. 1 nur noch alle verbotenen Feuerwaffen aufgeführt und die Nichtfeuerwaffen werden in Abs. 2 geregelt.

50 *Bundesbeschluss Schengen* (n 46) 6105.

51 Bundesamtes für Polizei fedpol, *Waffen in Kürze* (2014) 8–17.

Ziff. 1 lit. a WG), fällt die Waffe in die Gruppe Rot der verbotenen Waffen.⁵² Serief Feuerwaffen sind 'Waffen, die solange schiessen, als der Abzug der Waffe vom Schützen betätigt wird (durchgezogen bleibt) und aus einem Magazin Patronen zugeführt werden (Serie- oder Dauerfeuer)'.⁵³

2.3. Begriff der Munition und Munitionsbestandteile im Waffengesetz

Als Munition gilt nach Art. 4 Abs. 5 WG Schiessmaterial mit einer Treibladung, deren Energie durch Zündung in einer Feuerwaffe auf ein Geschoss übertragen wird. Das Waffengesetz beschränkt sich demgemäss auf Munition, welche mit einer Feuerwaffe verschossen werden kann.⁵⁴ Da das Waffengesetz nur Feuerwaffen erfasst, die von einer einzigen Person getragen und bedient werden können, fallen etwa Artilleriegeschosse und Kanonenkugeln nicht unter das Waffengesetz, obwohl auch hier mittels Zündung eine Energieübertragung auf ein Geschoss stattfindet.⁵⁵ Zudem soll nur solche Munition dem Waffengesetz unterstellt werden, welche, in Anlehnung an Art. 1 Abs. 1 WG, ein bestimmtes Mindestmass an Missbrauchspotential in sich birgt.⁵⁶ Aus diesem Grund umfasst der Munitionsbegriff bspw. keine Pfeile, Armbrustbolzen, Geschosse aus Druckluft- und CO₂-Waffen oder Platzpatronen, da diese nur selten missbräuchlich verwendet werden.⁵⁷ Das Waffengesetz regelt neben der Munition auch die Munitionsbestandteile (Art. 1 Abs. 1 und Abs. 2 lit. b WG). Hierbei handelt es sich um Geschoss, Zündhütchen beziehungsweise Zündsatz, Patronenhülse und Pulver.⁵⁸ Der Begriff umfasst ebenfalls Schiesspulver, mit dem Munitionshülsen nachgeladen werden können.⁵⁹ Auch bei der Munition sind Verbote und Einschränkungen im Zusammenhang mit gewissen Munitionsarten zu beachten (Art. 6 Abs. 1 WG i. V. m. Art. 26 Abs. 1 WV).

52 Cf zu der ganzen Einteilung *ibid.*

53 Wüst (n 37) 284.

54 *Ibid.* 52, welcher jedoch noch auf die Begriffe der Hand- oder Faustfeuerwaffe im Sinne der ursprünglichen Fassung des Waffengesetzes Bezug nimmt.

55 Benjamin Leupi-Landtwing, 'Erwerb und Besitz von Munition und Munitionsbestandteilen, Art. 15–16a WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG), Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 126, 128 [6].

56 *Botschaft Waffengesetz 1996* (n 38) 1059.

57 *Ibid.*

58 Wüst (n 37) 52.

59 *Botschaft Änderung Waffengesetz 2006* (n 24) 2727.

3. Handel mit Feuerwaffen und Munition

3.1. Waffenhandel nach dem Waffengesetz

In der Literatur wird der illegale Waffenhandel definiert als der Handel mit Waffen, der gegen Waffenembargos, nationale und multilaterale Gesetze, Vereinbarungen und Regelungen oder internationales Recht verstösst.⁶⁰ Demnach findet sich das illegale Element im Verstoss gegen Gesetzesbestimmungen und sonstigen Regelungen, sei dies auf internationaler oder nationaler Ebene. Da in der vorliegenden Arbeit die Strafbestimmungen im Waffengesetz untersucht werden, stehen die Regelungen des Waffengesetzes im Vordergrund. Im Waffengesetz selbst und den zugehörigen Erlassen findet sich keine Definition zum Begriff des Waffenhandels, obwohl es nach seiner Zweckbestimmung in Art. 1 Abs. 2 WG den Handel mit Waffen und Munition i. w. S. regelt und das 4. Kapitel⁶¹ im Waffengesetz dem Waffenhandel und der Waffenherstellung gewidmet ist. Somit wird durch die Literatur und das Waffengesetz insbesondere die Frage offen gelassen, welche Tätigkeiten vom Begriff des Waffenhandels erfasst sind. Nach der Systematik des Waffengesetzes kann angenommen werden, dass zumindest jene Personen, die eine Waffenhandelsbewilligung nach Art. 17 Abs. 1 WG benötigen, auch als Waffenhändler anzusehen sind und somit ihre Tätigkeiten als Waffenhandel gelten. Diese Annahme wird durch die Überschrift des 1. Abschnitts, 'Waffenhandel', verstärkt. Demnach wären der Erwerb, das Anbieten, die Weitergabe und das Vermitteln von Waffen und Munition i. w. S. als Tätigkeiten des Waffenhandels anzusehen. Hierbei ist jedoch zu beachten, dass Art. 17 Abs. 1 WG sich nur auf den gewerbsmässigen Waffenhandel bezieht.

Obwohl die gewerbsmässige Waffenherstellung nach Art. 18 WG ebenfalls eine Waffenhandelsbewilligung erfordert, erfolgt die Anknüpfung hieran nicht aus begrifflichen Gründen, sondern weil die Voraussetzungen von Art. 17 Abs. 2 WG Anwendung finden. Damit soll sichergestellt werden, dass auch die Waffenhersteller über die notwendigen fachtechnischen Kenntnisse und

60 Claudio Besozzi, *Illegal, legal – egal? Zu Entstehung, Struktur und Auswirkungen illegaler Märkte* (2001) 44; Maya Brehm, *Conventional Arms Transfers in the light of humanitarian and human rights law* (2005) 11; Andrew Feinstein, *The shadow world: Inside the Global Arms Trade* (2011) xxiii; David Furger, *Völkerrechtliche Staatenverantwortlichkeit für grenzüberschreitende Waffentransfers* (2013) 26; Philip L. Reichel, *An Encyclopedia of Cyber Theft, Weapons Sales and Other Illegal Activities, Volume 2, M – Z* (2019) 642.

61 Art. 17 – Art. 22 WG.

Einrichtungen verfügen und auch die übrigen Voraussetzungen während der gesamten Gültigkeitsdauer der Waffenhandelsbewilligung erfüllt sind.⁶² Somit besteht keine inhaltliche Verknüpfung an die Waffenhandelsbewilligung und die Waffenhersteller sind nicht als Waffenhändler zu qualifizieren.

Im Fall des Verbringens von Feuerwaffen in das schweizerische Staatsgebiet gestaltet sich die Lage etwas anders. Die Botschaft zum Waffengesetz von 1996 spricht in diesem Zusammenhang ebenfalls vom Handel und es wird wieder die Bezeichnung Waffenhändler verwendet.⁶³ Somit ist das Verbringen in das schweizerische Staatsgebiet zusätzlich zu den aufgeführten Handlungen in Art. 17 Abs. 1 WG als Waffenhandel zu qualifizieren.

2.2. Waffenhandel im europäischen Recht und internationalen Abkommen

Wie ersichtlich, ergibt sich nach dem Waffengesetz eine eher schwammige und unbefriedigende Eingrenzung der Begriffe des Waffenhändlers, des Waffenhandels und insbesondere des illegalen Waffenhandels. Um der Begriffsbestimmung weitere Struktur zu geben, kann noch auf das europäische Recht und auf die internationalen Abkommen zurück gegriffen werden. In der *geänderten EU-Waffenrichtlinie* findet sich sowohl eine Definition des Waffenhändlers als auch eine Definition des Waffenhandels, welche durch die Änderungen der Richtlinie den jeweiligen Gegebenheiten und Herausforderungen angepasst wurden. Gemäss der Botschaft aus 2009 zu der Weiterentwicklung des Schengen-Besitzstandes, kann davon ausgegangen werden, dass das Schweizer Recht die EU-Begrifflichkeiten genügend widerspiegelt, weshalb auch die Begriffsbestimmungen in der *geänderten EU-Waffenrichtlinie* berücksichtigt werden können.⁶⁴

Nach Art. 1 Ziff. 9 lit. a und b der *geänderten EU-Waffenrichtlinie* wird ein Waffenhändler definiert als jede natürliche oder juristische Person, deren Beruf oder Gewerbe ganz oder teilweise in einer der folgenden Tätigkeiten besteht: Der Herstellung, Vertrieb, Tausch, Verleih, Reparatur, Veränderung oder Umbau von Feuerwaffen oder wesentlichen Bestandteilen nach lit. a oder der Herstellung, Vertrieb, Tausch, Veränderung oder Umbau von Munition

62 *Botschaft Waffengesetz 1996* (n 38) 1067.

63 *Botschaft Waffengesetz 1996* (n 38) 1069; *Botschaft Änderung Waffengesetz 2006* (n 24) 2740.

64 *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3663.

nach lit. b. In dieser Definition wird – im Unterschied zum schweizerischen Recht – begrifflich nicht zwischen dem Waffenhandel und der Waffenherstellung unterschieden.⁶⁵ In der Definition des unerlaubten Handels in Art. 1 Ziff. 12 der *geänderten EU-Waffenrichtlinie* wird die Waffenherstellung hingegen nicht mehr erfasst. Ein unerlaubter Handel ist nach Art. 1 Ziff. 12 der *geänderten EU-Waffenrichtlinie* der Erwerb, der Verkauf, die Lieferung, die Durchfuhr oder die Verbringung von Feuerwaffen, ihren wesentlichen Bestandteilen oder Munition aus dem Hoheitsgebiet eines Mitgliedstaats oder durch dessen Hoheitsgebiet in das Hoheitsgebiet eines anderen Mitgliedstaats, sofern die vorgeschriebenen Genehmigungspflichten missachtet wurden beziehungsweise die Feuerwaffen, wesentliche Bestandteile oder Munition nicht vorschriftsgemäss gekennzeichnet sind.⁶⁶ Eine Kennzeichnungspflicht für Feuerwaffen, wesentliche Bestandteile und Munition ergibt sich aus Art. 4 Ziff. 1 lit. a der *geänderten EU-Waffenrichtlinie*, wonach diese mit einer lesbaren, dauerhaften und eindeutigen Kennzeichnung zu versehen sind.

Der Begriff des unerlaubten Handels in der *geänderten EU-Waffenrichtlinie* wurde aus dem *UN-Feuerwaffenprotokoll* übernommen.⁶⁷ Mit Genehmigung vom 23. Dezember 2011 ist die Schweiz ebenfalls dem *UN-Feuerwaffenprotokoll* beigetreten.⁶⁸ Das *UN-Feuerwaffenprotokoll* bezeichnet in Art. 3 lit. e den unerlaubten Handel als die Einfuhr, die Ausfuhr, den Erwerb, den Verkauf, die Lieferung, den Transport oder die Verbringung von Schusswaffen, dazugehörigen Teilen und Komponenten und Munition aus dem Hoheitsgebiet eines Vertragsstaates oder durch dessen Hoheitsgebiet in das Hoheitsgebiet eines anderen Vertragsstaates, sofern einer der betreffenden Vertragsstaaten dies nicht im Einklang mit diesem Protokoll genehmigt oder wenn die Schusswaffen nicht im Einklang mit Artikel 8 gekennzeichnet sind. In dieser Definition sind zwei essenzielle Elemente enthalten: Einerseits der transnationale Charakter der Regelung und andererseits die Verletzung von Regulierungsmassnahmen (eg das Fehlen einer Genehmigung oder eine unrichtige Kennzeichnung).⁶⁹

65 Botschaft *Bilaterale II 2004* (n 25) 6271.

66 Botschaft *Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3667.

67 Ibid 3658.

68 Bundesbeschluss *über die Genehmigung und die Umsetzung des UN-Feuerwaffenprotokolls vom 23. Dezember 2011*, AS 2012 6777.

69 UN Office on Drugs and Crime (n 7) 20.

Wie oben dargelegt, richtet sich die Begriffsbestimmung in der *geänderten EU-Waffenrichtlinie* nach dem *UN-Feuerwaffenprotokoll*. Durch die stete Anpassung der Schweiz an den Schengen-Besitzstand hat das *UN-Feuerwaffenprotokoll* bereits vor dem eigentlichen Beitritt der Schweiz auf das Schweizer Recht gewirkt. Zum Zeitpunkt des Beitritts erfüllte die schweizerische Rechtsordnung weitgehend die Anforderungen des *UN-Feuerwaffenprotokolls*.⁷⁰

Aufgrund der aufgezeigten starken Beeinflussung und der Anpassung des Schweizer Rechts an die *EG-Waffenrichtlinie* und ihre jeweiligen Änderungen, sowie an das *UN-Feuerwaffenprotokoll* kann auf die Begriffsbestimmung in der Richtlinie und im Vertrag zur Auslegung der Begriffe des Waffenhändlers, des Waffenhandels und des unerlaubten respektive illegalen Waffenhandels zurückgegriffen werden. Die Begriffsbestimmungen sind aber nicht als absolut zu betrachten, sondern dienen vielmehr als Leitlinie bei der Auslegung im Rahmen des Waffengesetzes.

III. Die Strafbestimmungen des Waffengesetzes

1. Übersicht über die Strafbestimmungen

Die Strafbestimmungen bei Widerhandlungen gegen das Waffengesetz finden sich im 8. Kapitel des Waffengesetzes. Es handelt sich hierbei um Nebenstrafrecht, also um Strafbestimmungen des Bundes ausserhalb des Strafgesetzbuches.⁷¹ Nach Art. 333 StGB sind auch die allgemeinen Bestimmungen des Strafgesetzbuches auf die Straftatbestände des Waffengesetzes anwendbar. Das Waffengesetz enthält bei vorsätzlichen Widerhandlungen einen Vergehenstatbestand in Art. 33 Abs. 1 WG mit einer Androhung von bis zu drei Jahren Freiheitsstrafe oder Geldstrafe. Bei einer fahrlässigen Tatbegehung liegt nur eine Übertretung vor, da diese mit Busse bedroht wird (Art. 33 Abs. 2 WG). Bei den in Art. 33 Abs. 3 WG aufgeführten Tatbeständen handelt es sich aufgrund der Strafandrohung von einer Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe um Verbrechen (siehe Art. 10 Abs. 2 StGB). Zuletzt findet sich in

⁷⁰ *Botschaft UN-Feuerwaffenprotokoll und Änderung Waffengesetz 2011* (n 32) 4557.

⁷¹ *Schweizerisches Strafgesetzbuch vom 21. Dezember 1937* (StGB), SR 311.0; Marianne Johanna Hilf, 'Art. 333 StGB' in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht II, Art. 137–392 StGB* (4. Aufl., 2019) 5637, 5643 [5].

Art. 34 WG ein Übertretungstatbestand mit einer Busse als Strafe. Die aufgeführten Tatbestände können auch fahrlässig begangen werden, da Art. 34 WG nicht explizit nur die vorsätzliche Begehung unter Strafe stellt (cf Art. 333 Abs. 7 StGB).

Die Strafbestimmungen enthalten verschiedene Unter-Tatbestände, welche jeweils direkt oder indirekt auf die allgemeinen Bestimmungen des Waffengesetzes verweisen. Somit erschliesst sich die Tragweite der Strafrechtsnormen nur in Verbindung mit den verwaltungsrechtlichen und anderen besonderen rechtlichen Regelungen des Waffengesetzes.⁷²

Nachfolgend werden in einem ersten Schritt die Straftatbestandsmerkmale der Bestimmungen herausgearbeitet und mit dem Hintergrund der allgemeinen Gesetzesbestimmungen des Waffengesetzes in Verbindung gebracht. Die Straftatbestandsmerkmale werden beim ersten Straftatbestand noch umfassend ausgeführt, bei den folgenden Straftatbeständen wird dagegen nur auf solche Elemente eingegangen, die sich von den Ausführungen zum ersten Straftatbestand unterscheiden. In einem zweiten Schritt werden die Straftatbestimmungen darauf untersucht, ob diese Strafbestimmungen auf ein Verhalten, welches als illegaler Waffenhandel zu qualifizieren ist, anzuwenden sind. Dass hierbei gegen ein nationales Gesetz verstossen wird ergibt sich schon daraus, dass Handlungen unter Strafe gestellt werden, welche entgegen den Vorschriften des Waffengesetzes vorgenommen werden.

2. Art. 33 Abs. 1 lit. a WG

Art. 33 Abs. 1 lit. a WG stellt eine Anzahl an Tätigkeiten unter Strafe, die ohne Berechtigung vorgenommen werden.⁷³ Demnach macht sich nach Art. 33 Abs. 1 lit. a WG strafbar, wer ohne Berechtigung Waffen und Munition i. w. S. anbietet, überträgt, vermittelt, erwirbt, besitzt, herstellt, abändert, umbaut, trägt, in einen Schengen-Staat ausführt oder in das schweizerische Staatsgebiet verbringt.

⁷² Weissenberger (n 38) 164.

⁷³ Ibid.

2.1. Objektiver Tatbestand

2.1.1. Täter

Der Täter wird in Art. 33 Abs. 1 lit. a WG ohne eine weitere Beschränkung nur mit dem Ausdruck 'Wer' bezeichnet. Somit kann jedermann Täter sein (sog. Allgemeindelikt).⁷⁴ Zu beachten ist jedoch, dass gewisse Personengruppen vom Geltungsbereich des Waffengesetzes nach Art. 2 Abs. 1 WG ausgenommen sind. Somit sind Personen, welche der Armee, dem Nachrichtendienst des Bundes, den Zoll- oder Polizeibehörden angehören nicht dem Waffengesetz und somit auch nicht den Strafbestimmungen des Waffengesetzes unterworfen, ausser sie sind in privater Funktion tätig.⁷⁵ In diesem Sinne entschied das Bundesgericht, dass ein Polizist nach dem Waffengesetz beurteilt werden musste, als dieser zu einem rein privaten Zweck Waffen erwarb.⁷⁶ Obwohl äusserlich der Anschein bestand, dass die Waffenbestellung für polizeiliche Zwecke geschah – so war der Beschuldigte beim Lieferanten als Polizist bekannt gewesen und der Lieferschein wurde auf die Kantonspolizei Solothurn ausgestellt – war letztlich der tatsächliche private Zweck der Waffen massgebend.⁷⁷

2.1.2. Tatobjekt

Tatobjekt sind Waffen (Art. 4 Abs. 1 WG), wesentliche oder besonders konstruierte Waffenbestandteile (Art. 4 Abs. 3 WG i.V.m. Art. 3 und Art. 4 WV), Waffenzubehör (Art. 4 Abs. 2 WG), Munition (Art. 4 Abs. 5 WG) und Munitionsbestandteile nach dem Waffengesetz. Wird ein Gegenstand nicht als Waffe respektiv Munition vom Waffengesetz erfasst, liegt ein untaugliches Tatobjekt vor.⁷⁸

74 Zum Begriff 'Allgemeindelikt' (auch 'gemeinen Delikten') siehe Andreas Donatsch, Gunhild Godenzi und Brigitte Tag, *Strafrecht I, Verbrechenlehre* (10. Aufl., 2022) 102.

75 *Botschaft Waffengesetz 1996* (n 38) 1057; *Botschaft Änderung Waffengesetz 2006* (n 24) 2728; einzelne kantonale Polizeigesetze halten die Anwendung des Waffengesetzes bei der Waffenverwendung durch Private überflüssigerweise noch mittels Verweis fest (wie etwa das Schaffhauser Gesetz über die Organisation des Polizeiwesens vom 21. Februar 2000, SHR 354.100 in Art. 28 Abs. 1), Tiefenthal (n 19) 571 m. w. H.

76 BGE 143 IV 347.

77 Ibid E. 3.2.

78 Cf die Ausführungen unter Kapitel II.2.1.

2.1.3. Tathandlung

Der Straftatbestand in lit. a stellt zahlreiche Tathandlungen unter Strafe, welche ohne Berechtigung vorgenommen werden: das unberechtigte Anbieten, Übertragen, Vermitteln, Erwerben, Besitzen, Herstellen, Abändern, Umbauen, Tragen, das Ausführen in einen Schengen-Staat oder das Verbringen in das schweizerische Staatsgebiet. Der Begriff 'ohne Berechtigung' erfasst in diesem Straftatbestand den Umgang ohne die erforderlichen Bewilligungen (Waffenerwerbsschein, Waffentragebewilligung, Waffenhandelsbewilligung etc), den Umgang mit gesetzlich verbotenen Waffen⁷⁹ oder gesetzlich verbotener Munition⁸⁰, oder die Abgabe von Waffen an Dritte, welche keine Berechtigung für den Umgang haben (eg Abgabe an unberechtigte Minderjährige).⁸¹ Auch das Ausführen ohne Begleitschein ist erfasst.⁸² Um zu verstehen welche Handlungen lit. a pönalisiert, sind gewisse Ausführungen zum allgemeinen Teil des Waffengesetzes von Nöten, insbesondere welche Bewilligungen beim Umgang mit Feuerwaffen und Munition i. w. S. erforderlich sind.

Grundlage für den Erwerb von Feuerwaffen und Munition und den hierzu erforderlichen Bewilligungen bildet die Einteilung von Waffen i. w. S. in drei Kategorien⁸³, woraus ein dreistufiges Erwerbsregime erwächst.⁸⁴ So ist entweder eine Ausnahmbewilligung für verbotene Waffen nach Art. 5 Abs. 1 WG erforderlich, ein Waffenerwerbsschein nach Art. 8 Abs. 1 WG für bewilligungspflichtige Waffen oder ein schriftlicher Vertrag nach Art. 11 WG für meldepflichtige Waffen. Die Waffenerwerbsscheinpflicht gilt unabhängig davon, ob der Erwerb im Handel oder unter Privaten erfolgt und wird unter den kumulativen Voraussetzungen von Art. 8 Abs. 2 lit. a–d WG erteilt.⁸⁵ Der Grundsatz der Waffenerwerbsscheinpflicht wird in Art. 10 WG im Falle von gewissen privilegierten Waffen (Gruppe Grün⁸⁶) durchbrochen. Die in Art. 10 Abs. 1 WG aufgezählten Waffen sowie ihre wesentlichen Bestandteile dürfen

79 Cf Art. 5 Abs. 1 und 2 WG und die Ausführungen unter Kapitel II.2.2.

80 Cf Art. 6 Abs. 1 WG i. V. m. Art. 26 Abs. 1 WV und die Ausführungen unter Kapitel II.2.3.

81 *Botschaft Waffengesetz 1996* (n 38) 1073; Fatih Aslantas, 'Strafbestimmungen, Art. 33–36 WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG): Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 333, 338 [5].

82 *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3672.

83 Cf dazu die Ausführungen unter Kapitel II.2.2.

84 *Botschaft Bilaterale II 2004* (n 25) 6171.

85 *Ibid*; früher war für den Erwerb unter Privaten kein Waffenerwerbsschein erforderlich, siehe *Botschaft Waffengesetz 1996* (n 38) 1062.

86 Bundesamt für Polizei fedpol (n 58) 10–11.

ohne Waffenerwerbsschein mittels eines schriftlichen Vertrages (Art. 11 Abs. 1 WG) erworben werden. Zuletzt ist beim Erwerb zu beachten, dass die dritte Kategorie von Waffen, die verbotenen Feuerwaffen nach Art. 5 Abs. 1 WG (Gruppe Rot⁸⁷), grundsätzlich nicht erworben, im Inland vermittelt oder in das schweizerische Staatsgebiet verbracht werden dürfen. Die kantonale Behörde kann jedoch unter den äusserst restriktiven Bedingungen von Art. 28b WG eine Ausnahmegewilligung für Feuerwaffen sowie wesentliche oder besonders konstruierte Bestandteile erteilen. Munition i. w. S. dürfen durch jene Personen erworben werden, die zum Erwerb der entsprechenden Waffe berechtigt sind (Art. 15 Abs. 1 WG).

Wird ein gewerbsmässiger Umgang mit Waffen und Munition i. w. S. gepflegt, so schreibt Art. 17 Abs. 1 WG eine Waffenhandelsbewilligung vor. Die Botschaft zum Waffengesetz von 1996 führt aus, dass Gewerbsmässigkeit dann vorliegt, wenn jemand ein regelmässiges Einkommen aus einer Tätigkeit erzielen will, also die Absicht hat, sich ein Erwerbseinkommen zu sichern.⁸⁸ Ausserdem verweist die Botschaft auf die bundesgerichtliche Praxis im Bereich des Strafrechts,⁸⁹ welche vom Begriff des berufsmässigen Handelns ausgeht.⁹⁰ Demnach handelt der Täter berufsmässig, 'wenn sich aus der Zeit und den Mitteln, die er für die deliktische Tätigkeit aufwendet, aus der Häufigkeit der Einzelakte innerhalb eines bestimmten Zeitraums sowie aus den angestrebten und erzielten Einkünften ergibt, dass er die deliktische Tätigkeit nach der Art eines Berufes ausübt. [...] Wesentlich für die Annahme von Gewerbsmässigkeit ist, dass der Täter durch die deliktischen Handlungen relativ regelmässige Einnahmen erzielt und anstrebt, die einen namhaften Beitrag an die Kosten zur Finanzierung seiner Lebensgestaltung darstellen'.⁹¹

Schliesslich sind noch die Bewilligungsvorschriften im Zusammenhang mit Auslandsgeschäften zu betrachten. Aufgrund der Delegation in Art. 22a Abs. 1

87 Ibid 16–19.

88 *Botschaft Waffengesetz 1996* (n 38) 1066.

89 Ibid 1074, unter Verweis auf BGE 116 IV 319 E. 4 und 4c und BGE 117 IV 119 E. 1c.

90 Marcel Alexander Niggli und Christof Riedo, 'Art. 139 StGB' in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht II, Art. 137–392 StGB* (4. Aufl., 2019) 2898, 2926 [88].

91 BGE 116 IV 219 E. 4; diese Rechtsprechung wurde beibehalten und verschiedentlich bestätigt, siehe etwa BGE 116 IV 319 E. 1.2.; 117 IV 119 E. 1c; 119 IV 129 E. 3a; 123 IV 113 E. 2c; 124 IV 59 E. 3b/bb; 129 IV 188 E. 3.1.2.; 129 IV 253 E. 2.2.; Urteil des Bundesgerichts 6B_611/2015 vom 17. Dezember 2015 E. 3.4.

WG auf die Kriegsmaterial-⁹² und Güterkontrollgesetzgebung⁹³ richtet sich die Aus- und Durchfuhr, die Vermittlung an Empfänger im Ausland und der Handel im Ausland von schweizerischem Territorium aus mit Waffen und Munition i. w. S. nicht nach der Waffengesetzgebung. Entgegen dieser Delegation sieht Art. 22a Abs. 2 WG allerdings vor, dass die Art. 22b, 23, 25a und 25b des Waffengesetzes vorbehalten bleiben, da die darin geregelten Sachverhalte einen Bezug zu der inneren Sicherheit aufweisen.⁹⁴ So schreibt das Waffengesetz einen Begleitschein vor bei der definitiven Ausfuhr von Feuerwaffen, deren wesentlichen Bestandteilen oder Munition in einen Schengen-Staat im Sinne von Art. 22b Abs. 1 WG, ausser diese sind von der Kriegsmaterialgesetzgebung erfasst und die Ausfuhr erfolgt gewerbmässig (Art. 22b Abs. 2 WG). Eine Waffenausfuhr in Nicht-Schengen-Staaten ist der Güterkontrollgesetzgebung unterstellt, sofern das Gut nicht auch von der Kriegsmaterialgesetzgebung erfasst ist.⁹⁵ Auch wer nur vorübergehend im Reiseverkehr Feuerwaffen und die dazugehörige Munition in das schweizerische Staatsgebiet verbringen⁹⁶ will, benötigt eine Bewilligung (Art. 25a Abs. 1 WG). Gemäss der Botschaft zur Änderung des Waffengesetzes vom 11. Januar 2006 bezeichnet der Ausdruck Verbringen 'den Realakt des Beförderns einer Ware ins Staatsgebiet der Schweiz, somit auch die als Ein- und Durchfuhr bezeichneten Sachverhalte'.⁹⁷ Vorliegend bezieht sich Art. 25a WG wohl primär auf die Durchfuhr von Feuerwaffen und Munition, da Art. 25a Abs. 1 WG von einem vorübergehenden Verbringen spricht.⁹⁸

Für die vorliegende Arbeit besonders relevant ist, welche der Tathandlungen in Art. 33 Abs. 1 lit. a WG auf den illegalen Waffenhandel angewandt werden

92 *Bundesgesetz über das Kriegsmaterial vom 13. Dezember 1996* (Kriegsmaterialgesetz), SR 514.51.

93 *Bundesgesetz über die Kontrolle zivil und militärisch verwendbarer Güter, besonderer militärischer Güter sowie strategischer Güter vom 13. Dezember 1996* (Güterkontrollgesetz), SR 946.202.

94 *Botschaft Bilaterale II 2004* (n 25) 6272.

95 Urteil des Bundesstrafgerichts SK.2015,52 vom 1. April 2016 E. 2.2.

96 Die ursprünglich im Waffengesetz verwendeten Begriffe Ein- und Durchfuhr wurden auf den 12. Dezember 2008 der zollrechtlichen Terminologie angepasst und durch den Ausdruck 'Verbringen in das schweizerische Staatsgebiet' ersetzt, *Botschaft Änderung Waffengesetz 2006* (n 24) 2727–2728.

97 *Botschaft Änderung Waffengesetz 2006* (n 24) 2728.

98 Benjamin Leupi-Landtwing, 'Auslandsgeschäfte, Art. 24–25 WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG), Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 175, 197 [1].

könn. Nach den einleitend zum Waffenhandel gemachten Ausführungen⁹⁹, wären der Erwerb, das Anbieten, die Weitergabe, die Vermittlung und das Verbringen ins schweizerische Staatsgebiet als Handel mit Waffen anzusehen, wobei jedoch zu beachten ist, dass die Weitergabe gar nicht als mögliche Tathandlung in lit. a aufgeführt wird. Das Übertragen wird zwar nicht in Art. 17 Abs. 1 WG erwähnt, dafür aber bei zahlreichen anderen Stellen im Waffengesetz im Zusammenhang mit dem Erwerb von Waffen und Munition i. w. S., so etwa bei der Meldepflicht der übertragenden Person nach Art. 9c WG. Somit kann dies als Bestandteil des Erwerbes ebenfalls erfasst werden. Hierbei ist jedoch zu beachten, dass obwohl die Waffenhandelsbewilligung und die Tathandlungen in Art. 17 und Art. 24 WG mit einem gewerbsmässigen Vorgehen verknüpft sind, dies kein kennzeichnendes Element des Waffenhandels darstellt, sondern ein Qualifizierungsmerkmal. Dies fällt insbesondere bei Betrachtung der weiteren Strafbestimmungen auf: In Art. 33 Abs. 1 lit. b, e und f WG sind Strafbestimmungen für den Inhaber einer Waffenhandelsbewilligung vorgesehen. Die gewerbsmässige Begehung wird hingegen separat in Art. 33 Abs. 3 WG mit einer qualifizierenden Strafandrohung bei einer vorsätzlichen und gewerbsmässigen Begehung geregelt. Somit kann es sich auch bei einer konkreten Zuwiderhandlung – wie etwa beim illegalen Waffenhandel – durch den Inhaber einer Waffenhandelsbewilligung um eine einmalige Angelegenheit handeln und somit nicht um ein gewerbsmässiges Vorgehen.¹⁰⁰ Es ist aber trotzdem festzuhalten, dass bei den Inhabern einer Waffenhandelsbewilligung zumeist gleichzeitig auch gewerbsmässig handelnde Akteure vorliegen.¹⁰¹ Eine Tathandlung, die als illegaler Waffenhandel qualifiziert wird, kann ungeachtet der Anlehnung an die Waffenhandelsbewilligung auch durch eine Privatperson im Einzelfall oder auch gewerbsmässig vorgenommen werden.

Die Aus- und Durchfuhr richten sich grundsätzlich nach der Kriegsmaterialgesetzgebung (respektive der Güterkontrollgesetzgebung), weswegen im Waffengesetz nicht näher auf die Ausfuhr eingegangen wird (cf Art. 22a Abs. 1 WG). So wird hierfür auch keine Waffenhandelsbewilligung nach Art. 17 Abs. 1 WG verlangt, sondern eine Ein-, Aus- und Durchfuhrbewilligung nach dem Kriegsmaterialgesetz (Art. 2 lit. d und Art. 17 Abs. 1 KMG). Art. 33 Abs. 1 lit. a WG erwähnt die unberechtigte Ausfuhr jedoch als Tathandlung.

⁹⁹ Siehe II.3.1.

¹⁰⁰ Aslantas (n 81) 343 [21].

¹⁰¹ Amsler und Calderari (n 31) 321.

Soweit das Waffengesetz somit eine Strafbarkeit für die unberechtigte Ausfuhr und das Verbringen vorsieht, sind diese dem illegalen Waffenhandel zurechenbaren Tathandlungen¹⁰² unter dem Waffengesetz kriminalisiert.

Die *geänderte EU-Waffenrichtlinie* erwähnt zusätzlich die Herstellung, die Reparatur, die Veränderung und den Umbau von Feuerwaffen als eine Tätigkeit eines Waffenhändlers (Art. 1 Ziff. 9 lit. a *geänderte EU-Waffenrichtlinie*).¹⁰³ Wie unter der Begriffsbestimmung zum Waffenhandel ausgeführt, nimmt das schweizerische Waffengesetz im Gegensatz zu der *geänderten EU-Waffenrichtlinie* eine Unterscheidung zwischen dem Waffenhandel und der Waffenherstellung vor. Obwohl diese Unterscheidung bei der Definition des Waffenhändlers in der *geänderten EU-Waffenrichtlinie* fehlt, wird die Herstellung, die Reparatur, die Veränderung und der Umbau von Feuerwaffen trotzdem nicht als Tätigkeit des unerlaubten Handels in Art. 1 Ziff. 12 der *geänderten EU-Waffenrichtlinie* aufgeführt. Auch das *UN-Feuerwaffenprotokoll* führt diese Tathandlungen nicht beim unerlaubten Handel auf. Somit sind die Herstellung, die Reparatur, die Veränderung und der Umbau von Feuerwaffen nicht als Tathandlung des illegalen Waffenhandels einzustufen.

Das unberechtigte Besitzen und Tragen von Feuerwaffen wird in keiner der Quellen erwähnt und ist somit ebenfalls als möglicher Tatbestand des illegalen Waffenhandels auszuschliessen.

Zusammenfassend kann festgestellt werden, dass eine Vielzahl an Handlungsformen des illegalen Waffenhandels ein tatbestandsmässiges Verhalten nach Art. 33 Abs. 1 lit. a WG darstellen. Auch die Botschaft aus dem Jahr 2009 führt bei der Anpassung der Umsetzung des Schengen-Besitzstands auf, dass der unerlaubte Handel etwa bedeuten kann, dass die erforderliche Genehmigung, also bei bewilligungspflichtigen Waffen der Waffenerwerbsschein, fehlt beziehungsweise falls die Waffe ins schweizerische Staatsgebiet verbracht wurde, die Bewilligung für das Verbringen fehlt.¹⁰⁴ Daneben ist noch an eine Vielzahl weiterer Tatbestände zu denken mit den ausgearbeiteten fünf Tathandlungen, wie etwa folgende: Das Anbieten von Feuerwaffen und Munition ohne eine Waffenhandelsbewilligung, wenn eine solche nach Art. 17 Abs. 1 WG erforderlich wäre, die Übertragung von Feuerwaffen und Munition an unberechtigte Dritte (Art. 10a Abs. 1 und Abs. 2 WG) oder das Übertragen,

¹⁰² Vgl. dazu vorne Kapitel II.3.

¹⁰³ Die Tathandlungen Vertrieb, Tausch und Verleih sind wohl bereits in den Begriffen Anbieten und Erwerb enthalten (siehe dazu die *Botschaft Waffengesetz 1996* (n 38) 1057).

¹⁰⁴ *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3667.

Erwerben oder Vermitteln an Empfänger im Inland von verbotenen Feuerwaffen ohne eine Ausnahmegewilligung nach Art. 28c WG. Zusätzlich sind noch zahlreiche weitere Konstellationen denkbar.

2.2. Subjektiver Tatbestand

Im subjektiven Tatbestand wird Vorsatz vorausgesetzt, das heisst das Ausführen der Tat mit Wissen und Willen, wobei Eventualvorsatz genügt (Art. 33 Abs. 1 WG i.V.m. Art. 12 Abs. 2 Satz 1 StGB). Der Vorsatz muss sämtliche objektive Tatbestandsmerkmale umfassen.¹⁰⁵ Somit muss sich der Täter bewusst sein, dass er eine der in lit. a aufgezählten Tathandlungen ohne Berechtigung vornimmt oder er muss das Fehlen der Berechtigung zumindest in Kauf nehmen. Dem Täter muss zudem die Waffeneigenschaft des Tatobjektes bewusst sein. Geht ein Beschuldigter davon aus, dass es sich gar nicht um eine Waffe nach dem Waffengesetz handelt, fehlt es ihm am tatbestandsmässigen Vorsatz.¹⁰⁶ Es stellt sich hierbei die Frage, welche Vorstellungen dem Täter als Wissen und Willen zuzurechnen sind, da von juristischen Laien nicht ein umfassendes Wissen des Waffengesetzes und der Qualifikation als Waffe erwartet werden kann ('Parallelwertung in der Laiensphäre').¹⁰⁷ So hält das Bundesgericht in ständiger Rechtsprechung fest, dass bei der Wertung eines Tatbestandsmerkmals das Wissen als Bestandteil des Vorsatzes (cf Art. 12 Abs. 2 StGB) nicht die juristisch exakte Erfassung des gesetzlichen Begriffes voraussetzt. Im Sinne der Parallelwertung in der Laiensphäre genügt es vielmehr, wenn der Täter den Tatbestand so verstanden hat, wie es der landläufigen Anschauung eines Laien entspricht. Dies setzt eine zutreffende Vorstellung des Täters von der sozialen Bedeutung seines Handelns voraus, er muss aber die Tatbestandsmerkmale nicht in ihrem genauen rechtlichen Gehalt erfassen.¹⁰⁸

¹⁰⁵ Donatsch, Godenzi und Tag (n 74) 117.

¹⁰⁶ Ludwig A. Minelli, 'Entscheidungsbesprechungen, Bezirksgericht Zürich, 4. Abteilung – Einzelgericht, 16. 4. 2014 (GG130292-L/U)' (2016) 8 *Aktuelle Juristische Praxis* 1106, 1106; anderer Auffassung, Urteil des Bundesgerichts vom 12. Oktober 2020 SB_311/2020 E. 3.2., welches die Vorstellung des Beschuldigten, es handle sich bei einer Schreckschusspistole nicht um eine Waffe nach dem Waffengesetz, als vermeidbaren Irrtum qualifizierte.

¹⁰⁷ Miori (n 36) 17.

¹⁰⁸ BGE 129 IV 238 E. 3.2.2; 138 IV 130 E. 3.2.1; siehe auch BGE 127 IV 122 E. 4b/aa.

3. Art. 33 Abs. 1 lit. a^{bis} WG

Nach Art. 33 Abs. 1 lit. a^{bis} WG ist strafbar, wer ohne Berechtigung die nach Art. 18a WG vorgeschriebenen Markierung von Feuerwaffen, deren wesentlichen Bestandteile oder deren Zubehör entfernt, unkenntlich macht, abändert oder ergänzt. Die in Art. 18a Abs. 1 WG verankerte Markierungspflicht verpflichtet die Hersteller von Feuerwaffen i. w. S. diese Gegenstände zum Zweck der Identifizierung und der Rückverfolgbarkeit einzeln und unterschiedlich zu markieren. Die Markierungen müssen so angebracht werden, dass sie ohne mechanischen Aufwand weder entfernt noch abgeändert werden können (Art. 18a Abs. 3 WG). Infolge einer weiteren Anpassung an den Schengen-Besitzstand im Jahr 2008 (Inkrafttreten am 28. Juli 2010) wurde auch eine Markierungspflicht für Munition eingeführt und die daraus folgende Verpflichtung, die kleinste Verpackungseinheit von Munition zu markieren (Art. 18b Abs. 1 WG).¹⁰⁹ Der Straftatbestand in Art. 33 Abs. 1 lit. a^{bis} WG erwähnt jedoch nur die Markierung bei Feuerwaffen i. w. S.

Die in Art. 33 Abs. 1 lit. a^{bis} WG aufgeführten Tätigkeiten sind nicht unter dem illegalen Waffenhandel zu qualifizieren, da nicht der Umgang mit falsch oder nicht markierten Feuerwaffen und Munition im Vordergrund steht, sondern das Verändern der Markierungen. Darin ist kein Handelselement ersichtlich, jedoch gehen die entsprechenden Handlungen häufig mit dem illegalen Handel einher. Durch die Markierung einer Feuerwaffe wird der Weiterverkauf weniger attraktiv, womit geringere Gewinne auf dem Schwarzmarkt erzielt werden können. Auch in präventiver Hinsicht ist die Markierung von Bedeutung, da der Erwerb dadurch erschwert wird und somit potenzielle Straftäter weniger leicht an eine Waffe kommen.¹¹⁰ Gerade im Rahmen der transnationalen organisierten Kriminalität ist diese Problematik vordergründig, was insbesondere dadurch zu erkennen ist, dass Art. 5 Abs. 1 lit. c *UN-Feuerwaffenprotokoll* die Fälschung oder die unerlaubte Unkenntlichmachung, Entfernung oder Änderung der erforderlichen Kennzeichnung(en) auf Schusswaffen ebenfalls unter Strafe stellt.

¹⁰⁹ Cf *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3668.

¹¹⁰ Cf zum Ganzen Amsler und Calderari (n 31) 320.

4. Art. 33 Abs. 1 lit. b WG

Nach lit. b macht sich strafbar, wer als Inhaber einer Waffenhandelsbewilligung Waffen, wesentliche oder besonders konstruierte Waffenbestandteile, Waffenzubehör, Munition oder Munitionsbestandteile in das schweizerische Staatsgebiet verbringt, ohne diese Gegenstände anzumelden oder richtig zu deklarieren. Die entsprechende Anmeldepflicht findet sich in Art. 23 Abs. 1 WG, welches eine Anmeldung nach den Bestimmungen des Zollgesetzes vom 18. März 2005¹¹¹ vorschreibt.¹¹² Auf Verordnungsebene sind gestützt auf die Kompetenz des Bundesrates in Art. 23 Abs. 2 WG in Art. 43 WV Ausnahmen von der Zuführungs- und Anmeldepflicht beim Verbringen in das schweizerische Zollgebiet vorgesehen.

4.1. Objektiver Tatbestand

Lit. b gibt vor, dass der Täter Inhaber einer Waffenhandelsbewilligung sein muss. Somit handelt es sich um ein unechtes Sonderdelikt. Die Eigenschaft als Inhaber einer Waffenhandelsbewilligung wirkt strafscharfend (cf Art. 34 Abs. 1 lit. f WG).¹¹³ Eine Person ohne Waffenhandelsbewilligung kann bei einer Verletzung der Anmeldepflicht allerdings den Übertretungstatbestand in Art. 34 Abs. 1 lit. f WG erfüllen.¹¹⁴

Tatobjekt sind erneut Waffen, wesentliche oder besonders konstruierte Waffenbestandteile, Waffenzubehör, Munition und Munitionsbestandteile.

Tathandlung ist das Verbringen in das schweizerische Staatsgebiet, ohne die Waffen richtig anzumelden oder richtig zu deklarieren nach dem Zollgesetz. Gemäss der Botschaft zur Änderung des Waffengesetzes vom 11. Januar 2006 bezeichnet der Ausdruck Verbringen 'den Realakt des Beförderns einer Ware ins Staatsgebiet der Schweiz, somit auch die als Ein- und Durchfuhr bezeichneten Sachverhalte'.¹¹⁵

111 *Zollgesetz vom 18. März 2005 (ZG)*, SR 631.0; die relevanten Bestimmungen sind Art. 21 und Art. 25 ZG.

112 *Aslantas* (n 81) 339 [10].

113 *Ibid*; zum Begriff des unechten Sonderdelikts cf Donatsch, Godenzi und Tag (n 74) 103 und Mark Forster, 'Art. 26 StGB' in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht I, Art. 1–III StGB* (4. Aufl., 2019) 466, 467–468 [3].

114 *Ibid*.

115 *Botschaft Änderung Waffengesetz 2006* (n 24) 2728.

Wie unter dem Tatbestand lit. a aufgezeigt, ist insbesondere das unberechtigte Verbringen eine Handlungsform des illegalen Waffenhandel. Beim Tatbestand in lit. b steht jedoch nicht das Verbringen im Vordergrund, sondern die Nichtanmeldung beziehungsweise die unrichtige Deklaration. Bei der Anmeldepflicht nach Art. 23 WG handelt es sich um eine Verpflichtung, die sich aus dem Verbringen in das schweizerische Staatsgebiet ergibt. Somit ist dies als Bestandteil des Verbringens anzusehen und kann ebenfalls auf den illegalen Waffenhandel angewandt werden. Eine Verletzung der Anmeldepflicht liegt erst dann vor, wenn keine Anmeldung nach Art. 23 WG beziehungsweise nach dem Zollgesetz vorgenommen wird, ohne dass eines der Ausnahmen in Art. 43 lit. a bis 3 WV einschlägig ist, oder wenn nicht richtig deklariert wurde.

4.2. Subjektiver Tatbestand

In subjektiver Hinsicht erfordert Art. 33 Abs. 1 WG Vorsatz bezüglich aller objektiven Tatbestandsmerkmale, wobei Eventualvorsatz genügt. Der Täter muss sich bewusst sein, dass er die Feuerwaffen oder Munition beim Verbringen in das schweizerische Staatsgebiet gesetzeswidrig nicht angemeldet hat oder nicht richtig deklariert hat oder er muss dies zumindest in Kauf nehmen.

5. Art. 33 Abs. 1 lit. c WG

Art. 33 Abs. 1 lit. c WG sanktioniert die Erschleichung einer Waffenhandelsbewilligung mit falschen oder unvollständigen Angaben. In lit. c wird, wie auch in lit. d und lit. e, eine strafbare Handlung im Zusammenhang mit dem Waffenhandel erfasst.¹¹⁶ Es wird hierbei aber kein eigentlicher illegaler Waffenhandel vorgenommen, da es bloss um das Erschleichen der Waffenhandelsbewilligung geht. Es wird nicht verlangt, dass von der Bewilligung auch Gebrauch gemacht werden kann.¹¹⁷ Dies würde sich ohnehin nach dem Straftatbestand in Art. 33 Abs. 1 lit. a WG richten, da hierbei ein Umgang mit Waffen stattfinden würde ohne die erforderliche Waffenhandelsbewilligung, da die Waffe unrechtmässig erworben wurde.

¹¹⁶ *Botschaft Waffengesetz 1996* (n 38) 1074.

¹¹⁷ *Ibid.*

6. Art. 33 Abs. 1 lit. f WG

In Art. 33 Abs. 1 lit. f WG werden drei Straftatbestände für den Inhaber einer Waffenhandelsbewilligung aufgelistet. Nach Ziff. 1 macht sich strafbar, wer Feuerwaffen i. w. S. oder Munition herstellt oder in das schweizerische Staatsgebiet verbringt, ohne diese Gegenstände mit einer Markierung nach Art. 18a oder 18b WG zu versehen. Nach Ziff. 2 macht sich strafbar, wer Feuerwaffen i. w. S. oder Munition anbietet, erwirbt, überträgt oder vermittelt, die nicht nach Art. 18a oder 18b WG markiert worden sind. Zuletzt wird in Ziff. 3 unter Strafe gestellt, wer Feuerwaffen i. w. S. oder Munition anbietet, erwirbt, überträgt oder vermittelt, die unrechtmässig ins schweizerische Staatsgebiet verbracht worden sind.

6.1. Objektiver Tatbestand

Als Täter kommt, wie bereits bei lit. b, nur der Inhaber einer Waffenhandelsbewilligung in Frage. Im Gegensatz zum Straftatbestand in lit. b, handelt es sich hierbei jedoch nicht um ein unechtes Sonderdelikt, da kein Grundtatbestand für eine Privatperson besteht und somit die Eigenschaft als Inhaber einer Waffenhandelsbewilligung nicht strafscharfend wirkt. Es handelt sich vorliegend also um ein echtes Sonderdelikt, da der Inhaber des Waffenhandelspatents einer bestimmten Pflichtenstellung obliegt, wobei die besondere Eigenschaft in diesem Fall nicht strafscharfend wirkt.¹¹⁸

Das Tatobjekt wird in lit. f auf Feuerwaffen, deren wesentliche Bestandteile, Waffenzubehör oder Munition eingeschränkt, womit andere Waffen nach dem Waffengesetz nicht erfasst sind. Mit der Einführung der Markierungspflicht für die kleinste Verpackungseinheit von Munition im Rahmen der Anpassung an den Schengen-Besitzstand, wurde die fehlende Markierung entsprechend auch in Art. 33 Abs. 1 lit. f WG sanktioniert.¹¹⁹ Seit dieser Anpassung ist auch die Munition als Tatobjekt aufgeführt, nicht jedoch Munitionsbestandteile.

Im Zusammenhang mit der Tathandlung ist festzuhalten, dass drei Verhaltensweisen unter Strafe gestellt werden. Beim Straftatbestand in Ziff. 1 ist die Tathandlung das Herstellen oder das Verbringen in das schweizerische

¹¹⁸ Donatsch, Godenzi und Tag (n 74) 103.

¹¹⁹ *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3672.

Staatsgebiet, ohne die Tatobjekte mit den erforderlichen Markierungen zu versehen. Es wird somit ein Unterlassen unter Strafe gestellt. Die Markierungspflicht nach Art. 18a Abs. 1 und Art. 18b Abs. 1 WG richtet sich an die Waffenhersteller. Dieser Tatbestand ist somit nicht als illegaler Waffenhandel zu qualifizieren. In den beiden Ziff. 2 und 3 werden die Tathandlungen Anbieten, Erwerben, Übertragen oder Vermitteln aufgeführt. Diese Handlungen werden bei ersterem mit Feuerwaffen i. w. S. und Munition vorgenommen, welche nicht nach Art. 18a oder 18b WG markiert wurden. Bei zweiterem wurden die Feuerwaffen i. w. S. und Munition unrechtmässig ins schweizerische Staatsgebiet verbracht. Gemäss der Botschaft sollen durch die Ziffern 2 und 3 Waffenhändler sanktioniert werden, die Feuerwaffen, Teile davon und Munition, welche nicht die erforderlichen Markierungen aufweisen, in den Handel bringen, um dem illegalen Waffenhandel entgegen zu wirken.¹²⁰ Somit verweist die Botschaft bereits auf eine Handelstätigkeit. Zudem bezeichnet die *geänderte EU-Waffenrichtlinie* als unerlaubter Handel in Art. 1 Ziff. 12 auch den Umgang mit Feuerwaffen, wesentlichen Bestandteilen oder Munition, welche nicht die erforderlichen Markierungen aufweisen. Auch das *UN-Feuerwaffenprotokoll* greift als einen Aspekt des unerlaubten Handels in Art. 3 lit. e die nicht gesetzmässige Markierung auf. Die *geänderte EU-Waffenrichtlinie* bezeichnet jedoch nur die Tathandlungen des Erwerbs und des Verkaufs – welches dem Übertragen entspricht – nicht jedoch das Anbieten und Vermitteln. Nach der Auslegung der Bestimmungen im schweizerischen Recht ist das Anbieten und Vermitteln aber als eine Tätigkeit des Waffenhändlers erfasst (cf Art. 17 Abs. 1 WG).

Wird nun differenziert der Tatbestand in Ziff. 2 betrachtet, kann festgestellt werden, dass die Handlungen Anbieten, Erwerben, Übertragen oder Vermitteln somit auch hier als Tätigkeiten des Handelns anzusehen sind. Diese Tathandlungen werden an Feuerwaffen und Munition vorgenommen, welche nicht die gesetzlich vorgeschriebenen Markierungen aufweisen, also entgegen den nationalen gesetzlichen Bestimmungen zum Umgang mit Waffen, nach denen der Handel mit markierten Feuerwaffen und Munition zu erfolgen hat.

Nach einer anderen Betrachtungsweise könnte das illegale Element auch in den Feuerwaffen und der Munition selbst liegen, da diese nicht die erforderlichen Markierungen aufweisen. Somit handelt es sich bei den unmarkierten Waffen gewissermassen um illegale Waffen. Hierbei kann auch auf den

¹²⁰ Ibid; die Botschaft spricht vom Buchstaben ^fbis, welcher jedoch auf die Ziff. 2 und 3 aufgeteilt wurde, cf dazu Geschäft des Bundesrats Nr. 09.044 Fahne 2009 IV N3.

Ansatz von *Claudio Besozzi* zurückgegriffen werden, welche die Qualität der Waffen – also etwa verbotene oder wie hier nicht vorschriftsgemäss gekennzeichnete Waffen – als einen Schritt in die Gesetzlosigkeit aufzählt.¹²¹

Der letzte Tatbestand von lit. f in Ziff. 3 bezieht sich schliesslich auf Feuerwaffen i. w. S. und Munition, welche unrechtmässig ins schweizerische Staatsgebiet verbracht worden sind. Das Verbringen ist in der *geänderten EU-Waffenrichtlinie* und dem *UN-Feuerwaffenprotokoll* als Bestandteil des unerlaubten Handels aufgeführt.¹²² Es wird dann unrechtmässig, wenn es entgegen den Vorschriften oder Verboten des Waffengesetzes vorgenommen wird. Folgende Bestimmungen kommen etwa als unrechtmässiges Verbringen in Betracht: Verbringen von verbotenen Waffen und Munition in die Schweiz gemäss Art. 5 Abs. 1 WG sowie Art. 6 Abs. 1 WG, Verletzung der Anmeldepflichten nach Art. 23 Abs. 1 WG, Verbringen von Waffen und Munition i. w. S. ohne Bewilligung gemäss Art. 24, 24a–24c sowie 25 WG.¹²³ Somit kann auch die Tathandlung in Ziff. 3 auf den illegalen Waffenhandel angewandt werden.

6.2. Subjektiver Tatbestand

Vorausgesetzt ist in subjektiver Hinsicht für alle drei Tatbestandsvarianten in Art. 33 Abs. 1 lit. f Ziff. 1–3 WG erneut Vorsatz bezüglich aller objektiven Tatbestandselemente, wobei Eventualvorsatz genügt.

7. Art. 33 Abs. 1 lit. g WG

Strafbar nach Art. 33 Abs. 1 lit. g WG macht sich, wer Personen nach Art. 7 Abs. 1 WG, die keine Ausnahmewilligung nach Art. 7 Abs. 2 WG vorweisen können, Waffen und Munition i. w. S. anbietet, überträgt oder vermittelt. Art. 7 Abs. 1 WG befugt den Bundesrat, den Erwerb, den Besitz, das Anbieten, das Vermitteln und die Übertragung von Waffen i. w. S. und Munition i. w. S. sowie das Tragen von und Schiessen mit Waffen durch Angehörige bestimmter Staaten zu verbieten. Ein Land wird unter eines der beiden folgenden Voraussetzungen in die Länderliste aufgenommen: Einerseits, wenn eine erhebliche Gefahr der missbräuchlichen Verwendung besteht (lit. a), oder ande-

¹²¹ Besozzi (n 60) 44.

¹²² Art. 1 Ziff. 12 der *geänderten EU-Waffenrichtlinie* und Art. 3 lit. e *UN-Feuerwaffenprotokoll*.

¹²³ Aslantas (n 81) 341 [15].

rerseits, um Beschlüssen der internationalen Gemeinschaft oder den Grundsätzen der schweizerischen Aussenpolitik Rechnung zu tragen (lit. b). Durch diese Delegationsnorm wird dem Bundesrat ein erhebliches Ermessen bei der Bestimmung der vom Verbot umfassten Staatsangehörigen bzw. der Definition der Länderliste erteilt.¹²⁴ So stehen momentan Serbien, Bosnien und Herzegowina, Kosovo, Nordmazedonien, die Türkei, Sri Lanka, Algerien und Albanien auf der Länderliste nach Art. 12 Abs. 1 WV. Dieses generelle Waffenverbot wird etwas aufgeweicht durch die Möglichkeit, eine Ausnahmebewilligung nach Art. 7 Abs. 2 WG für einen Waffenerwerb zu beantragen.¹²⁵

Täter kann in lit. g erneut jedermann sein. Tatobjekt sind Waffen und Munition i. w. S. nach dem Waffengesetz.

Die vom Straftatbestand erfassten Handlungen Anbieten, Übertragen und Vermitteln können wie bereits dargelegt auf den Waffenhandel angewandt werden. Die fehlende Berechtigung findet sich auf der Seite der Abnehmer der Waffen oder Munition i. w. S., da diese aufgrund ihrer Staatsangehörigkeit einem Verbot nach Art. 7 Abs. 1 WG unterliegen. Die Strafbarkeit eines Täters nach lit. g ergibt sich somit daraus, dass er an eine unberechtigte Person Waffen oder Munition i. w. S. abgibt. Dies erinnert an eine bereits aufgeführte Konstellation unter lit. a, bei der die strafbare Handlung darin besteht, dass eine Waffe an Dritte abgegeben wird, welche keine Berechtigung für den Umgang haben, zum Beispiel an unberechtigte Minderjährige.¹²⁶ Es handelt sich in lit. g somit gewissermassen um einen Spezialtatbestand, wenn die fehlende Berechtigung der Dritter im Verbot nach Art. 7 Abs. 1 WG i. V. m. Art. 12 WV liegt.

Vor der Übertragung sollte folglich die Nationalität des Erwerbers mittels Vorlage eines Passes oder einer ID verifiziert werden.¹²⁷ Allenfalls kommt auch eine fahrlässige Begehung nach Art. 33 Abs. 2 WG in Frage, wenn die übertragende Person aufgrund der konkreten Umstände nicht erkennen konnte,

124 Boris Etter, 'Allgemeine Verbote und Einschränkungen, Art. 7 und 7a WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG): Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 33, 45; Tobias Tschumi, 'Waffenverbote für Angehörige bestimmter Staaten im Konflikt mit der Rechtsgleichheit' (2015) 2 *Sicherheit und Recht* 72 m. w. H.

125 Tschumi (n 124) 74.

126 Siehe die Ausführungen unter Kapitel III.2.1.; *Botschaft Waffengesetz 1996* (n 38) 1073.

127 Aslantas (n 81) 342 [16].

dass die erwerbende Person einem Verbot nach Art. 7 Abs. 1 WG i. V. m. Art. 12 WV unterliegt.¹²⁸

8. Gewerbsmässige Begehung nach Art. 33 Abs. 3 WG

Bei einer vorsätzlichen und gewerbsmässigen Begehung sieht Art. 33 Abs. 3 WG für gewisse Tatbestände aus Abs. 1 eine qualifizierende Strafandrohung mit einem Strafraumen von bis zu fünf Jahren oder Geldstrafe vor.¹²⁹

So handelt es sich bei Art. 33 Abs. 3 lit. a WG um das Korrelat zu den Grundstrafbestimmungen in Art. 33 Abs. 1 lit. a WG. Zusätzlich wird in Abs. 3 noch das gewerbsmässige Reparieren ohne Berechtigung unter Strafe gestellt, welches aufgrund eines gesetzgeberischen Versehens früher auch noch in Abs. 1 aufgenommen war.¹³⁰ Wie dargelegt können die folgenden in Art. 33 Abs. 1 lit. a WG pönalisierte Tathandlungen auf den illegalen Waffenhandel angewandt werden: Anbieten, Übertragen, Vermitteln, Erwerben und Ausführen in einen Schengen-Staat oder Verbringen in das schweizerische Staatsgebiet. In der Folge kann die gewerbsmässige Begehung hiervon ebenfalls als illegaler Waffenhandel betrachtet werden. Gerade für den internationalen illegalen Waffelhhandel nimmt das gewerbsmässige Vorgehen eine grosse Bedeutung ein, da für Profit agierende Akteure regelmässig illegalen Waffengeschäften nachgehen um den Profit zu maximieren.¹³¹

Art. 33 Abs. 1 lit. c WG entspricht den Grundstrafatbeständen in Art. 33 Abs. 1 lit. f Ziff. 2 und 3 WG. Da diese beiden Tatbestände auf den illegalen Waffenhandel anwendbar sind, ergibt sich dies ebenfalls für die gewerbsmässige Begehung in Art. 33 Abs. 1 lit. c WG. Die höhere Strafandrohung bei einem gewerbsmässigen Vorgehen ist für die Bekämpfung des internationalen illegalen Waffenhandels von besonderer Bedeutung, da ein besonderes Gefahrenpotenzial von den gewerbsmässig handelnden Akteuren ausgeht, welche nicht nur vereinzelt, sondern gezielt auf Gewinn ausgelegte illegale Waffengeschäfte vornehmen.

Zuletzt kann die Frage aufgeworfen werden, ob die unterschiedlichen Strafbestimmungen für gewerbsmässig handelnde Personen und die Inhaber einer

¹²⁸ Ibid.

¹²⁹ Aslantas (n 81) 342 [18].

¹³⁰ *Botschaft Weiterentwicklung und Anpassung Schengen-Besitzstand 2009* (n 30) 3672.

¹³¹ Cf Leggett (n 7) 37, 38.

Waffenhandelsbewilligung überhaupt erforderlich sind. Die Inhaber einer Waffenhandelsbewilligung sind zumeist auch gewerbsmässig handelnde Akteure.¹³² In der Folge könnte es unsachgerecht erscheinen, das Anbieten, den Erwerb und die Veräusserung von nicht markierten Feuerwaffen durch den Inhaber einer Waffenhandelsbewilligung der geringeren Strafandrohung in Abs. 1 zu unterwerfen – mit der zusätzlichen Möglichkeit einer Anerkennung auf Fahrlässigkeit in Abs. 2 oder gar einer Straffreiheit – wohingegen das gewerbsmässige Vorgehen ein Verbrechen darstellt. Deswegen schlagen *Amsler und Calderari* vor, diese Differenzierung aufzuheben und die Tat-handlungen durch den Inhaber einer Waffenhandelsbewilligung ebenfalls Art. 33 Abs. 3 lit. c WG zu unterwerfen.¹³³ Obwohl die Überlegungen, ob eine solche Unterscheidung sachgemäss ist, durchaus angebracht sind, ist zu beachten, dass der Inhaber einer Waffenhandelsbewilligung und eine gewerbsmässig handelnde Person nicht deckungsgleiche Begriffe sind. Wie bereits kurz erwähnt, muss der Inhaber einer Waffenhandelsbewilligung nicht immer gewerbsmässig vorgehen. Somit erscheint die Differenzierung bei der Gewerbsmässigkeit in Abs. 3 durchaus als gerechtfertigt.¹³⁴

9. Übertretungen nach Art. 34 WG

Zuletzt finden sich in Art. 34 Abs. 1 WG eine Reihe weiterer Strafhandlungen, welche aufgrund der Busse als Sanktion Übertretungen darstellen (cf Art. 103 StGB). Die Bedeutung der Übertretungstatbestände ist für die vorliegende Arbeit eher gering, da die meisten Tatbestände den gesetzeswidrigen, privaten Umgang mit Waffen unter Strafe stellen, wie das Schiessen ohne Berechtigung (lit. b), die Verletzung der Sorgfaltspflichten bei der Übertragung, dem Aufbewahren, Transport und Tragen von Waffen (lit. c, e, n und h) oder eine Verletzung von Administrativ- (lit. d), Deklarations- und Meldepflichten (lit. f, b und i). Allenfalls könnte der Tatbestand in Art. 34 Abs. 1 lit. k WG ebenfalls als Bestrafung des illegalen Waffenhandels gereichen. Demnach ist mit Busse strafbar, wer verbotene Formen des Anbietens nach Art. 7b WG anwendet, also das anonyme Anbieten nach Art. 7b Abs. 1 WG oder das Anbieten an öffentlich zugänglichen Ausstellungen und Märkten. Zu denken ist hierbei etwa an das Anbieten im Darknet. Besitzt der Anbietende daneben die Waffe

¹³² *Amsler und Calderari* (n 31) 321.

¹³³ Siehe zum Ganzen *ibid.*

¹³⁴ Gleicher Meinung *Aslantas* (n 81) 343 [21].

illegal, kommt es zu einem Verkauf oder geht er dem Anbieten im Darknet gewerbsmässig nach, können nebst Art. 7b Abs. 1 WG eine weitere Anzahl an Straftatbeständen einschlägig sein. Ebenso ist noch der Tatbestand in Art. 34 Abs. 1 lit. 1^{bis} WG Beachtung zu schenken, wonach sich strafbar macht, wer Feuerwaffen i. w. S. oder Munition in einen Schengen-Staat ausführt, ohne dass der Begleitschein der Sendung beiliegt. Der Tatbestand erinnert an die Konstellation in Art. 33 Abs. 1 lit. b WG, bei dem die Anmeldepflicht als Bestandteil des Verbringens angesehen wird. Ebenso verhält es sich bei der Verpflichtung, einen Begleitschein nach Art. 22b WG bei der Ausfuhr beizulegen. Somit liegt auch bei Art. 34 Abs. 1 lit. 1^{bis} WG ein Tatbestand des illegalen Waffenhandels vor, da eine Ausfuhr entgegen den gesetzlichen Bestimmungen im Waffengesetz vorgenommen wird.

In leichten Fällen kann im Sinne von Art. 34 Abs. 2 WG von einer Bestrafung abgesehen werden. Unter Umständen wird man einen leichten Fall auch bei vorsätzlicher Tatbegehung bejahen können.¹³⁵

V. Schlusswort

In diesem Beitrag wurde untersucht, welche Strafbestimmungen des Waffengesetzes auf den illegalen Waffenhandel angewandt werden können und somit durch die Pönalisierung dieser Handlungen zum Missbrauch von Feuerwaffen und Munition i. w. S. beitragen können.

Im Verlauf des Beitrags wurden insbesondere die Schwierigkeiten bei der Begriffsbestimmung des illegalen Waffenhandels im schweizerischen Recht ersichtlich. Zugleich konnte aber beim Rückgriff auf die *geänderte EU-Waffenrichtlinie* und auf die verschiedenen internationalen Abkommen die Einbettung des schweizerischen Gesetzes im internationalen Raum erkannt werden. Als Grundlage der Begriffsbestimmung diente die Definition in der Lehre, wonach der illegale Waffenhandel definiert wird als der Handel mit Waffen, der gegen Waffenembargos, nationale und multilaterale Gesetze, Vereinbarungen und Regelungen oder internationales Recht verstösst.¹³⁶ Bei der Auseinandersetzung mit dem Begriff des Waffenhandels im Waffengesetz und in dem europäischen Recht und internationalen Abkommen, hat sich

¹³⁵ Weissenberger (n 38) 167.

¹³⁶ Siehe die Ausführungen unter Kapitel II.3.1.

dannach in einem weiteren Schritt herauskristallisiert, welche Tathandlungen des Waffengesetzes als Tätigkeiten des Waffenhandels qualifiziert werden könnten und somit für die Bestrafung des nationalen und vor allem auch des internationalen illegalen Waffenhandels in Frage kommen.

Nachdem der Blick auf die Strafbestimmungen im Waffengesetz übergeleitet wurde, fiel zuerst die komplexe Form der Strafbestimmungen auf. Dies ist einerseits auf die zahlreichen Verweise auf die allgemeinen Bestimmungen im Waffengesetz zurückzuführen und andererseits auf die verschiedenen Tathandlungen, die in einem einzigen Straftatbestand enthalten sind, wie etwa im Art. 33 Abs. 1 lit. a WG. Bei der Auslegung und Bewertung der relevanten Bestimmungen im Waffengesetz, konnten die Tatbestandshandlungen in Art. 33 Abs. 1 lit. a, lit. b, lit. f Ziff. 2 und 3 und lit. g WG sowie die gewerbsmässige Begehung hiervon in Art. 33 Abs. 3 lit. a und lit. c WG als für anwendbar auf den illegalen Waffenhandel erkannt werden. Zudem sind die Übertretungstatbestände Art. 34 Abs. 1 lit. k und lit. l^{bis} WG ebenfalls als Tatbestände des illegalen Waffenhandels anzusehen.

Mit diesen Straftatbeständen wird in umfassender Weise die zahlreichen Erscheinungsformen des Handels mit Feuerwaffen und Munition unter Strafe gestellt, wenn dieser nicht den Vorgaben des Waffengesetzes entspricht. Somit steht ein umfangreiches Konstrukt zur Bekämpfung des illegalen Waffenhandels zur Verfügung, welches aufgrund seines Strafrahmens von einer Busse bis zu einer Freiheitsstrafe von 5 Jahren oder einer Geldstrafe dem Verschulden und der kriminellen Energie des Täters in angemessener Weise Rechnung tragen kann.

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Die Strafbarkeitsbegründung des illegalen Waffenhandels

GIAN EGE & MARVIN STARK

Die Strafbarkeit des illegalen Waffenhandels ist in den meisten Staaten eine Normalität. Selten stellt sich indes die Frage der theoretischen Begründung dieser Kriminalisierung. Am Beispiel des Schweizer Waffenrechts prüfen die Autoren, ob die Legitimierung der entsprechenden Strafnormen gelingt. Tatsächlich können die Delikte theoretisch begründet werden, allerdings bloss teilweise und auf einem schwachen Fundament. Obwohl die Begründung weitestgehend gelingt, bleibt festzuhalten, dass der Rückgriff auf das Strafrecht selbst im Waffenrecht nicht unbesehen auf jegliche Teilbereiche ausgedehnt werden kann, ohne dass dadurch auch die Legitimierung entfällt.

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I. Einleitung

Waffen sind Gegenstände, die dazu bestimmt und geeignet sind, andere Lebewesen zu verwunden oder zu töten.¹ Diese primäre 'Verletzungseigenschaft' einer Waffe ergibt auch die Wichtigkeit der Regulierung des Umgangs und insbesondere des Handels damit. Seit dem 19. Jahrhundert wurden vermehrt auch internationalrechtliche Ansätze bedeutsam. Diese Entwicklung erklärt sich durch eine Kombination von technologischen Fortschritten, welche die Waffenproduktion in grossen Mengen ermöglichte, und der Weiterentwicklung der Kriegsführung, was zu einer stetig steigenden Nachfrage nach technologisch hoch entwickelten Waffen führte.² Als Reaktion darauf wurden etwa in den 1970er Jahren der *Nuclear Non-Proliferation Treaty* (NPT)³, in den 1990er Jahren die *UN Convention on Certain Conventional Weapons* (CCW)⁴, oder in jüngerer Zeit der *Arms Trade Treaty* (ATT)⁵ ausgearbeitet und verabschiedet.

Teilweise angeregt durch die internationalen Vorgaben, teilweise unabhängig davon haben die meisten Staaten eigene Regulierungen des Waffenhandels erlassen. In Deutschland wurde das Waffengesetz beispielsweise 1973 eingeführt.⁶ Entsprechende Gesetze traten in Österreich 1996⁷ und in der Schweiz 1997⁸ in Kraft. In diesen werden jeweils insbesondere der Erwerb, der Besitz und sowie der Handel von Waffen geregelt. Die meisten Waffengesetze ent-

1 Cf etwa die rechtliche Waffendefinition in der Schweiz, statt vieler Andreas Roth und Anne Berkemeier, 'Art. 123 StGB' in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht I, Art. 1–111 StGB* (4. Aufl., 2019) 2646, 2652–2653 [17].

2 David Furger, *Völkerrechtliche Staatenverantwortlichkeit für grenzüberschreitende Waffentransfers* (2013) 4.

3 Nuclear Non-Proliferation Treaty, eröffnet zur Unterzeichnung 1. Juli 1968, 729 UNTS 161 (in Kraft getreten 5. März 1970).

4 UN Convention on Certain Conventional Weapons, eröffnet zur Unterzeichnung 10. April 1981, 1342 UNTS 137 (in Kraft getreten 2. Dezember 1983).

5 Arms Trade Treaty, eröffnet zur Unterzeichnung 2. April 2013, 3013 UNTS 1 (in Kraft getreten 24. Dezember 2014); cf dazu auch der Beitrag von Zeynep Kologlu in diesem Band.

6 Waffengesetz (WaffG) vom 11. Oktober 2002 (BGBl. I 3970, 4592; 2003 I 1957), das zuletzt durch Artikel 228 der Verordnung vom 19. Juni 2020 (BGBl. I 1328) geändert worden ist.

7 Bundesgesetz über die Waffenpolizei (Waffengesetz 1996, WaffG), BGBl. I Nr. 12/1997.

8 Bundesgesetz über Waffen, Waffenzubehör und Munition (Waffengesetz, WG), SR 514-54; cf ausführlich zu den Strafbestimmungen des WG der Beitrag von Stephanie Salzgeber in diesem Band.

halten zudem Strafnormen, welche Widerhandlungen gegen die getroffenen Regeln sanktionieren. Da die staatliche Pönalisierung von Verhalten allerdings *ultima ratio* ist,⁹ stellt sich die Frage der Legitimierung entsprechender Strafnormen. Lassen sich Strafnormen, die über die Verletzungsvorschriften der Strafgesetzbücher hinausgehen, rechtfertigen? Die Begründungsansätze für eine entsprechende Strafbarkeit sind in einem zweiten Schritt auch bedeutsam zur Beantwortung von Folgefragen: Wie stehen Widerhandlungen gegen das Waffengesetz in Konkurrenz zu anderen Delikten? Was ist ein angemessener Strafrahmen für entsprechende Delikte? Solche Fragen lassen sich letztlich nur unter Berücksichtigung der Hintergründe der Kriminalisierung beantworten. Im vorliegenden Aufsatz werden verschiedene theoretische Ansätze untersucht, die dazu dienen sollen, die Kriminalisierung von Aktivitäten im Bereich des Waffenhandels zu rechtfertigen. Dafür wird einleitend kurz dargestellt, wie der Waffenhandel in der Schweiz reguliert ist (II.), bevor die theoretische Begründung der Strafbarkeit besprochen wird (III.). Zudem wird aufgezeigt, dass tatsächlich weitere Gründe für die Schaffung der Strafvorschriften verantwortlich sind (IV.). Anschliessend wird kurz auf verschiedene Auswirkungen der theoretischen Strafbarkeitsbegründung eingegangen (IV.) bevor der Beitrag mit einem Fazit endet (V.).

Der vorliegende Beitrag beschränkt sich dabei auf eine Berücksichtigung des Waffengesetzes. Der Umgang und Handel mit bestimmten Waffen wird teilweise auch durch andere Gesetze – wie insbesondere das Kriegsmaterialgesetz (KMG)¹⁰ und die Kriegsmaterialverordnung (KMV)¹¹ – reguliert. Auch in KMG finden sich Strafnormen, wobei sich die Gründe für die Kriminalisierung verschiedentlich mit denjenigen für die Strafnormen im WG überschneiden. Da in diesem Rahmen jedoch auch aussenpolitische Grundsätze bedeutsam sind,¹² ist das öffentliche Interesse in diesem Bereich noch entscheidender.¹³

9 Andreas Donatsch, Gunhild Godenzi und Brigitte Tag, *Strafrecht I, Verbrechenlehre* (10. Aufl., 2022) 5; Christopher Geth, *Strafrecht, Allgemeiner Teil* (7. Aufl., 2021) [9]; José Hurtado Pozo und Thierry Godel, *Droit pénal général, Théorie, Tableaux synoptiques, Méthodologie de résolution de cas pénaux, Lexique pénal, Répertoire des termes allemands* (3. Aufl., 2019) [35] – [36]; Stefan Trechsel, Peter Noll und Mark Pieth, *Schweizerisches Strafrecht, Allgemeiner Teil I, Allgemeine Voraussetzungen der Strafbarkeit* (7. Aufl., 2017) 23; Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (4. Aufl., 2011) 73–74.

10 Bundesgesetz über das Kriegsmaterial (Kriegsmaterialgesetz, KMG), SR 514.51.

11 Verordnung über das Kriegsmaterial (Kriegsmaterialverordnung, KMV), SR 514.511.

12 Art. 1 KMG.

13 Cf Urteil des Bundesstrafgerichts vom 18. April 2008 SK.2007.19 E. 1.2.2.

Die folgenden Ausführungen beziehen sich jedoch nur noch auf die Strafnormen des Waffengesetzes und klammern den Bereich des illegalen Umgangs mit Kriegsmaterial weitestgehend aus.

II. Strafbarkeit des illegalen Waffenhandels am Beispiel der Schweiz

In der Schweiz wird unter anderem der Erwerb und der Besitz von sowie der Handel mit Waffen durch das Waffengesetz (WG)¹⁴ geregelt und durch die Waffenverordnung (WV)¹⁵ konkretisiert.¹⁶ Im 8. Kapitel des WG finden sich die Strafbestimmungen.¹⁷ In Art. 33 wird für die Verbrechen und Vergehen eine Abstufung zwischen vorsätzlichen Taten, Fahrlässigkeit und einer Qualifikation der Gewerbsmässigkeit vorgenommen. In Abs. 1 werden unterschiedliche Vorsatzdelikte mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft. Hierzu gehören etwa das Anbieten von Waffen, deren Übertragung, Vermittlung, Erwerb, Besitz, Herstellung, Abänderung, Umbau, Ausführung in einen Schengen-Staat, Verbringen in das schweizerische Staatsgebiet ohne Berechtigung (lit. a), das Erschleichen einer Waffenhandelsbewilligung mit falschen oder unvollständigen Angaben (lit. c) oder das Anbieten, Erwerben, Übertragen oder Vermitteln von Feuerwaffen die unrechtmässig ins schweizerische Staatsgebiet verbracht worden sind durch einen Inhaber einer Waffenhandelsbewilligung (lit. f Ziff. 3). Für Fahrlässigkeitsdelikte sieht Abs. 2 Busse vor, in leichten Fällen die Möglichkeit einer Strafbefreiung. In Abs. 3 folgt eine Qualifizierung mit der Strafandrohung von bis zu fünf Jahren oder Geldstrafe für das vorsätzliche und gewerbsmässige Begehen gewisser Handlungen ohne Berechtigung. Zuletzt werden in Art. 34 verschiedene Handlungen als Übertretungen mit Busse bestraft.

14 Bundesgesetz über Waffen, Waffenzubehör und Munition (Waffengesetz, WG), SR 514.54.

15 Verordnung über Waffen, Waffenzubehör und Munition (Waffenverordnung, WV), SR 514.541.

16 Art. 1 WG.

17 Ausführlich zu den Strafbestimmungen des WG der Beitrag von Stephanie Salzgeber in diesem Band.

III. Begründung der Strafbarkeit

1. Rechtsguttheorie

1.1. Allgemeines

Im deutschsprachigen Raum wird die Pönalisierung eines bestimmten Verhaltens meist mit der *'Rechtsguttheorie'* begründet, die im frühen 19. Jahrhundert von Johann Birnbaum entwickelt wurde.¹⁸ Der Fokus der Theorie liegt auf den sogenannten Rechtsgütern, also individuellen oder allgemeinen Werten, die nach der Auffassung des Gesetzgebers Schutz bedürfen, damit ein friedliches Zusammenleben in der Gesellschaft möglich ist. Deren Umfang ist von diversen Faktoren wie dem moralischen Konsens in einer Gesellschaft, dem technischen Fortschritt oder ethischen Konzepten abhängig und somit einem steten Wandel unterworfen. Handlungen und Unterlassungen, die rechtlich geschützte Interessen schädigen oder gefährden, sollen strafrechtlich sanktioniert werden können.¹⁹ Der Begriff bildet indes immer noch Gegenstand von Diskussionen. Kritische Stimmen beanstanden, dass die Rechtsguttheorie keine genügend normativen Kriterien anbietet, um festzulegen, welche Güter oder Interessen strafrechtlichen Schutz erhalten sollen und dass sie eine Vorfeldkriminalisierung ermöglicht, ohne limitierende Prinzipien dafür anzubieten.²⁰ Die Theorie unterscheidet immerhin zwischen Individual- und Kollektivrechtsgütern. Während erstere unmittelbar Interessen Einzelner schützen (z. B. Leib und Leben), zielen letztere auf die Gesamtheit (den Staat oder die Gesellschaft) ab und schützen höchstens indirekt Individualinteressen.²¹ Ein Teil der Lehre verneint allerdings die Existenz von Kollektivrechts-

18 Stratenwerth (n 9) 67; Johann Birnbaum, 'Über das Erfordernis einer Rechtsverletzung im Begriffe des Verbrechen mit besonderer Rücksicht auf den Begriff der Ehrenkränkung' (1834) *Archiv des Criminalrechts* 149, 149–194.

19 Donatsch, Godenzi und Tag (n 9) 5–6; Wolfgang Frisch, 'Rechtsgut, Recht, Deliktstruktur und Zurechnung im Rahmen der Legitimation staatlichen Strafens' in Roland Hefendehl, Andrew von Hirsch und Wolfgang Wohlers (Hrsg.), *Die Rechtsguttheorie – Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel* (2003) 215, 216.

20 Kai Ambos, 'The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL' (2015) 9 *Crim Law and Philos* 301, 306–307; cf auch Stratenwerth (n 9) 68–70.

21 Marianne Johanna Lehmkuhl und Jan Wenk, 'Gemeinwohltopoi im Strafrecht' in Christian Hierbaum (Hrsg.), *Handbuch Gemeinwohl* (2022) 1, 5–6; Winfried Hassemer und

gütern und ist der Auffassung, dass sich Interessen der Gesellschaft bloss aus den Interessen Einzelner ableiten und daher keine eigenständige Bedeutung haben.²²

1.2. Begründung der Strafbarkeit von illegalem Umgang mit Waffen

Zur Begründung der Strafnormen im WG gibt es nur wenige Hinweise. Die Botschaft und Teile der Literatur nennen als Ziel die Bekämpfung des Missbrauchs von Waffen und den Schutz der öffentlichen Sicherheit insgesamt.²³ Es sollen Gefahren abgewehrt werden, welche durch die Nutzung – beziehungsweise den Missbrauch – von Waffen und Munition typischerweise hervorgerufen werden.²⁴ Dabei wird insbesondere auf den Schutz von Leib und Leben verwiesen.²⁵ Eine tiefgehende Begründung der Wahl des Strafrechts fehlt jedoch weitgehend. Der ins Zentrum gestellte Schutz von Leib und Leben wird durch das Waffengesetz nur indirekt bewirkt, er ist nur eine – wenn auch erwünschte – Nebenfolge.

Fraglich ist nun, ob die Strafbestimmungen des Waffengesetzes den Anforderungen der Rechtsguttheorie gerecht werden. Hierbei werden die zwei genannten Argumentationslinien geprüft: Einerseits, dass der Verweis auf den indirekten Schutz von Leib und Leben ausreicht (sogenannte Vorfeldkrimi-

Ulfrid Neumann, 'Vorbemerkungen zu § 1' in Urs Kindhäuser, Ulfrid Neumann und Hans-Ullrich Paeffgen (Hrsg.), *Nomos Kommentar zum Strafgesetzbuch* (2017) [127].

22 Zu dieser sogenannten monistischen Rechtsgutlehre siehe die theoretischen Ausführungen in Detlev Sternberg-Lieben, 'Rechtsgut, Verhältnismässigkeit und die Freiheit des Strafgesetzgebers' in Roland Hefendehl, Andrew von Hirsch und Wolfgang Wohlers (Hrsg.), *Die Rechtsguttheorie, Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?* (2003) 65, 68; Hassemer und Neumann (n 21) [132]; Lehmkuhl und Wenk (n 21) 6–7.

23 Cf etwa *Botschaft zum Bundesgesetz über Waffen, Waffenzubehör und Munition vom 24. Juni 1996*, BBl 1996 I 1053, 1056 ('Botschaft 1996'); *Botschaft zur Änderung des Bundesgesetzes über Waffen, Waffenzubehör und Munition vom 11. Januar 2006*, BBl 2006 2713, 2753; Fatih Aslantas, 'Allgemeine Bestimmungen, Art. 1–4 WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG), Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 1, 2 [2]; Philippe Weissenberger, 'Die Strafbestimmungen des Waffengesetzes: unter Berücksichtigung von Art. 260^{quater} StGB' (2000) 2 *Aktuelle Juristische Praxis* 153, 155–156.

24 Weissenberger (n 23) 155–156; cf auch Gunther Dietrich Gade, *WaffG, Waffengesetz, Kommentar* (2. Aufl., 2018) 13 [28].

25 Siehe bspw. Urteil des Bundesgerichts 2C_125/2009 vom 4. August 2009 E. 6.

nalisierung), und andererseits, dass die 'öffentliche Sicherheit' das geschützte Rechtsgut ist.

1.2.1. (Indirekter) Schutz von Individualrechtsgütern

Ein mögliches Argument für die Begründung der Strafbarkeit der Verhaltensweisen in Art. 33 f. WG ist der (indirekte) Schutz der Rechtsgüter Leib und Leben.²⁶ Bei der Kriminalisierung von Erwerb, Besitz und Handel mit Waffen und Munition letztlich um eine *Vorfeldkriminalisierung*, ähnlich wie beispielsweise bei Art. 260^{ter} StGB (Kriminelle und terroristische Organisationen).²⁷ Da hierdurch das kriminalisierte Verhalten weiter vom im Zentrum stehenden Rechtsgut wegrückt, ist die Rechtfertigung der Wahl des Strafrechts von umso grösserer Bedeutung.

Die Rechtsgüter Leib und Leben werden bereits durch das Kernstrafrecht umfassend geschützt. Zum Schutz dieser Rechtsgüter sieht das Strafgesetzbuch im ersten Titel des zweiten Buches diverse Strafbestimmungen vor, welche auch die reine Gefährdung mitumfassen (Art. 127–136 StGB). Argumentiert man, dass die Gefährdung durch Waffen besonders schwer wiegt, so trägt das StGB auch dem Rechnung und sieht in diversen Straftatbeständen eine höhere Strafandrohung bei der Verwendung von Waffen vor (Art. 123 Ziff. 2 Abs. 1, Art. 139 Ziff. 3 Abs. 2, Art. 140 Ziff. 2, Art. 189 Abs. 3, Art. 190 Abs. 3). Schliesslich kennt das StGB mit Art. 260^{quater} sogar eine eigene Strafbestimmung zur Gefährdung der öffentlichen Sicherheit mit Waffen, die das Verkaufen, Vermieten, Schenken, Überlassen oder Vermitteln von Schusswaffen, gesetzlich verbotenen Waffen, wesentlichen Waffenbestandteilen, Waffenzubehör, Munition oder Munitionsbestandteile unter Strafe stellt, sofern der Täter oder die Täterin weiss, dass sie zur Begehung eines Vergehens oder Verbrechens dienen sollen. Die Bestimmung wurde beim Erlass des schweizerischen Waffengesetzes ins Strafgesetzbuch aufgenom-

26 So Weissenberger (n 23) 169 zu Art. 260^{quater} StGB: 'Es geht darum, den (unbestimmten) Einzelnen vor Gefährdungen und Verletzungen hochwertiger Rechtsgüter (Leib und Leben, sexuelle Integrität, Freiheit) durch vorsätzlichen Missbrauch von Waffen abzusichern. Die Wahrung des friedlichen Zusammenlebens ist dabei erwünschte Nebenfolge des Schutzes der genannten konkreten Rechtsgüter'.

27 Marc Engeler, 'Art. 260^{ter} StGB' in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht II, Art. 137–392 StGB* (4. Aufl., 2019) 4533, 4536–4537 [3]–[4].

men.²⁸ Auch diese Bestimmung soll Leib und Leben (und andere Individualrechtsgüter) indirekt schützen;²⁹ obwohl ihr Name dafürspricht, dass der historische Gesetzgeber sie mit dem sogleich zu prüfenden Rechtsgut der ‘öffentlichen Sicherheit’ begründen wollte. Insgesamt kann festgehalten werden, dass es dem oben angesprochenen strafrechtlichen Ultima-ratio-Prinzip widerspricht, Rechtsgüter zusätzlich durch weitere Strafnormen im Vorfeld zu einer eigentlichen Verletzung zu schützen, wenn sie durch die bestehende Strafrechtsordnung bereits umfassend geschützt sind. Die *alleinige* Begründung der Strafbarkeit anhand des (indirekten) Schutzes von Individualrechtsgütern erscheint somit ungenügend. Es bräuchte immerhin ein zusätzliches Unrecht, das sich in Form eines anderen geschützten Rechtsguts manifestiert. Ob sich die ‘öffentliche Sicherheit’ dazu eignet, wird sogleich geprüft.

1.2.2. Schutz der öffentlichen Sicherheit

Argumentiert man, dass die Strafbestimmungen des WG die ‘öffentliche Sicherheit’ schützen, ist die Vorfrage zu klären, wie dieser Begriff zu verstehen ist. Naheliegender wäre es, ihn mit dem Terminus ‘öffentlicher Frieden’ gleichzusetzen, welcher insbesondere durch den zwölften Titel des schweizerischen Strafgesetzbuches geschützt werden soll. Hierfür spricht, dass sich Art. 260^{quater} StGB in diesem Titel befindet. Allerdings ist sich die herrschende Lehre einig, dass der ‘öffentliche Frieden’ kein eigenständiges Rechtsgut für spezifische Delikte bilden kann.³⁰ Als Rechtsgut kommt nur in Frage, was eine Strafbestimmung spezifisch schützen will, und nicht, was das Strafrecht allgemein schützt.³¹ Der im 12. Titel geschützte ‘öffentliche Frieden’ ist somit eine bloße Bezeichnung für ein ‘Sammelbecken’ von Bestimmungen, die sich nicht

28 Marc Engeler, ‘Art. 260^{quater} StGB’ in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht II, Art. 137–392 StGB* (4. Aufl., 2019) 4547, 4548 [1].

29 Engeler (n 28) 4548 [1]; Stefan Trechsel und Hans Vest, ‘Art. 260^{quater} StGB’ in Stefan Trechsel und Mark Pieth (Hrsg.), *Schweizerisches Strafgesetzbuch, Praxiskommentar* (4. Aufl., 2021) 1339, 1339 [1].

30 Cf etwa Andreas Donatsch, Marc Thommen und Wolfgang Wohlers, *Strafrecht IV, Delikte gegen die Allgemeinheit* (2017) 183; Gerhard Fiolka, ‘Vor Art. 258 StGB’ in Marcel Alexander Niggli und Hans Wiprächtiger (Hrsg.), *Basler Kommentar, Strafrecht II, Art. 137–392 StGB* (4. Aufl., 2019) 4483, 4484 [2]; Lehmkuhl und Wenk (n 1153) 4–5; Günter Stratenwerth und Felix Bommer, *Schweizerisches Strafrecht, Besonderer Teil II: Straftaten gegen Gemeininteressen* (2013) 190 [1].

31 Fiolka (n 30) 4484 [2].

anderweitig sinnvoll ins StGB einordnen liessen.³² Folgerichtig müsste die ‘öffentliche Sicherheit’ ein eigenes, selbstständiges Rechtsgut sein, welches vom ‘öffentlichen Frieden’ zu unterscheiden ist. Obwohl ein Teil der Lehre die beiden Begriffe synonym zu verstehen scheint,³³ nennen Lehmkuhl und Wenk die ‘öffentliche Sicherheit’ als typisches Beispiel für ein Kollektivrechtsgut. Es handle sich um ein ‘spezifisches kollektives Interesse’. Letzteres verdeutlichen sie mit folgendem Beispiel: Findet ein Körperverletzungsdelikt an einer einzelnen Person statt, ist der ‘öffentliche Friede’ gestört. Die ‘öffentliche Sicherheit’ ist dagegen nicht (zwingend) tangiert, weil der Begriff mehr als ein blosses Sicherheitsgefühl umfasst, sprich auch eine objektive Komponente aufweist.³⁴ Dieser Auffassung ist zuzustimmen. Zwei Fragen bleiben allerdings offen: Einerseits, wie der Begriff genau definiert werden soll. Andererseits, ob sich die ‘öffentliche Sicherheit’ ein schützenswertes Kollektivrechtsgut ist, dessen Beeinträchtigung die Strafbestimmungen des WG zu legitimieren vermag. Für die Definition kann zunächst auf das allgemeine Sprachverständnis zurückgegriffen werden: Sicherheit meint vor Gefahr oder Schaden geschützt und bestmöglich von Gefährdungen frei zu sein.³⁵ Im strafrechtlichen Sinne meint es demnach die Absenz von Individualrechtsgutsverletzungen und -gefährdungen, insbesondere von Gewaltstraftaten. Insoweit umfasst die ‘öffentliche Sicherheit’ mehr als eine subjektive Komponente. Es geht um eine objektiv tatsächlich bestehende Situation, in der Individualrechtsgutsverletzungen konkret drohen. Diese wiederum betrifft nicht nur die Träger der einzelnen Individualrechtsgüter, weshalb eine über die Sammlung der Individualrechtsgüter hinausgehendes schutzwürdiges Kollektivrechtsgut besteht.

Nun zur Frage, ob der Schutz der ‘öffentliche Sicherheit’ die Strafnormen des Waffengesetzes legitimieren kann: Dies kann nur bejaht werden, wenn jegliche Verhaltensweisen, die durch Art. 33 f. WG unter Strafe gestellt werden, die öffentliche Sicherheit in gewisser Weise objektiv tangieren und nicht bloss ein

32 Donatsch, Thommen und Wohlers (n 30) 183; Fiolka (n 30) 4483 [1]; Stratenwerth und Bommer (n 30) 190 [1].

33 Stratenwerth und Bommer (n 30) 241 [37] ‘Es geht hier nicht, wie bei den eigentlichen Friedensdelikten [...], um eine unmittelbare Gefahr für die öffentliche Sicherheit’; Trechsel und Vest (n 29) 1339 [1], wonach das geschützte Rechtsgut von Art. 260^{quater}, der Gefährdung der öffentlichen Sicherheit mit Waffen, der öffentliche Frieden sei.

34 Lehmkuhl und Wenk (n 21) 5.

35 Duden, ‘Sicherheit’ (Webseite, undatiert) <<https://www.duden.de/rechtschreibung/Sicherheit>>.

Gefühl von Unsicherheit in der Gesellschaft auslösen. Um die Auswirkungen auf die objektive Sicherheit festzustellen, müsste also belegt werden können, dass das im Waffengesetz pönalisierte Verhalten insgesamt zu mehr Individualrechtsgutverletzungen oder -gefährdungen führt. Diesbezüglich kann angenommen werden, dass die Verbreitung von Waffen unter Privaten die Gefahr allgemein erhöht, dass gefährdende Personen an die Waffen gelangen,³⁶ oder dass in eskalierenden Situationen auf Waffen zurückgegriffen wird.³⁷ Sobald Waffen tatsächlich gegen andere Menschen (oder deren Besitz) eingesetzt werden, liegen Individualrechtsgutsverletzungen und/oder -gefährdungen nahe. Im Allgemeinen konnten Studien nachweisen, dass strengere Schusswaffengesetze mit weniger Tötungsdelikten korrelieren,³⁸ bzw. Gesetze zu Schusswaffen mit einer geringeren Anzahl von Todesfällen durch Schusswaffen verbunden sind.³⁹ Hierbei deutet einiges darauf hin, dass besonders die Bewilligung für Schusswaffen und die vorherige Überprüfung der Personen, die die Waffen erwerben möchten, hilfreiche Massnahmen sind.⁴⁰ Demzufolge kann grundsätzlich festgehalten werden, dass die im WG unter Strafe gestellten Verhaltensweisen die öffentliche Sicherheit tatsächlich tangieren. Mit Blick auf die erwähnten Studien ergibt sich dies allerdings hauptsächlich mit Blick auf Feuerwaffen (Art. 4 Abs. 1 lit. a WG). Bei Schlag- und Stichwaffen sind die Grenzen zu alltäglichen Gegenstände, die auf dieselbe Weise verwendet werden können zu schwammig.⁴¹ Durch die Kriminalisierung des Umgangs mit solchen Gegenständen ist die Gesellschaft nicht besser vor der Gefahr durch stumpfe oder scharfe Gewalt geschützt. Gleichwertiges Gefährdungspotential besteht nämlich bereits durch legale Gegenstände. Spezifisch auf Schusswaffen bezogen, eignet sich die Rechtsgutstheorie

36 Von solchen 'high risk owners' (im Gegensatz zu 'low risk owners') sprechen auch Alan J. Lizotte et al, Patterns of adolescent firearms ownership and use (1994) 11(1) *Justice Quarterly* 51, 53.

37 Wobei letzteres insbesondere Ordonanzwaffen des schweizerischen Militärs betrifft, für welche es spezielle Regeln zur Aufbewahrung gibt, welche wohl auch der Senkung von Risiken dienen (cf Ziff. 91 des Reglements 51.024 d, Organisation der Ausbildungsdienste (ODA), wonach Ordonanzwaffen zu Hause unter Verschluss aufzubewahren sind und der Lauf und Verschluss getrennt von der Schusswaffe aufbewahrt werden müssen).

38 Lois K. Lee et al, Firearm Laws and Firearm Homicides, A Systematic Review (2017) 177(1) *JAMA Intern Med.* 106, 118.

39 Julian Santaella-Tenorio et al, What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries? (2016) 38(1) *Epidemiologic Reviews* 140, 152.

40 Lee et al (n 38) 118; Santaella-Tenorio et al (n 39) 152.

41 Zu denken ist etwa an Küchenmesser, Baseballschläger, Motorsägen, Äxte, Hämmer etc.

somit als Strafbarkeitsbegründung im Waffengesetz. Weitergehend scheint die Theorie den Art. 33 f. WG allerdings nicht zur kriminalpolitischen Existenzberechtigung zu verhelfen.

1.2.3 Verhältnismässigkeit

Grundsätzlich hat jedes staatliche Verhalten dem Verhältnismässigkeitsgrundsatz zu entsprechen.⁴² Gerade wenn sich der Gesetzgeber zur Durchsetzung eines von ihm auferlegten Verbots der ultima ratio einer Strafnorm bedient, ist dies von besonderer Bedeutung. Eine entsprechende Prüfung von Strafvorschriften wird insbesondere in Deutschland vom Deutschen Bundesverfassungsgericht (BVerfG) vorgenommen. Es prüft anhand des Verhältnismässigkeitsgrundsatzes, ob die Strafbewehrung eines Verhaltens oder Unterlassens gerechtfertigt ist.⁴³ Entscheidend ist dabei in der Regel die Verhältnismässigkeit i. e. S. Diese kann nur bejaht werden, wenn 'die eingesetzten Mittel der Strafverfolgung und Bestrafung unter Berücksichtigung der davon ausgehenden Grundrechtsbeschränkungen für den Betroffenen noch in einem angemessenen Verhältnis zu dem dadurch erreichbaren Rechtsgüterschutz stehen'⁴⁴. Obschon dieser Begründungsansatz bisher in der Schweiz nur wenig rezipiert wurde, könnte er im vorliegenden Kontext weitere Anhaltspunkte bieten.

Dass die Waffendelikte mit der öffentlichen Sicherheit und indirekt auch Leib und Leben grundsätzlich geeignete Rechtsgüter schützen, wurde oben bereits festgestellt. Für die Frage der Verhältnismässigkeit der Strafbestimmungen stellt sich daher noch die Frage, ob sie in einem angemessenen Verhältnis zu den dadurch bewirkten Grundrechtsbeschränkungen stehen. Damit geht die Frage einher, ob und – falls ja – inwiefern die Schweizer Bevölkerung durch die Art. 33 f. WG in ihren Grundrechten tangiert wird. Vorweg ist darauf hinzuweisen, dass die allgemeinen Verbotsvorschriften des WG und insbesondere die Beschränkung des freien Handels und Besitzes von Waffen insbesondere das Recht auf persönliche Freiheit (Art. 10 Abs. 2 BV), die Eigentumsgarantie (Art. 26 Abs. 1 BV) und die Wirtschaftsfreiheit (Art. 27 Abs. 1 BV) berührt. Es gilt indessen kein absolutes Waffenverbot in der Schweiz. Die Beschränkungen des Waffengesetzes ermöglichen es Personen unter gewissen

42 Art. 5 Abs. 2 Bundesverfassung der Schweizerischen Eidgenossenschaft (BV), SR 101.

43 Z. B. Beschluss des Deutschen Bundesverfassungsgerichts vom 15. Mai 1995, Az. 2 BvL 19/91 E. C.V.1.

44 Ibid.

Umständen, Waffen zu verkaufen und zu erwerben. Es soll bloss der Missbrauch von Waffen bekämpft werden, Freiheiten aber insbesondere auch im Hobby-Bereich beibehalten werden.⁴⁵ Durch die Legalisierung soll bis zu einem gewissen Masse gesteuert werden, wer Waffen unter welchen Bedingungen und zu welchen Zwecken verwenden darf. Dies schmälert das Risiko, dass Waffen in falsche Hände geraten.⁴⁶ Tatsächlich kommen in der Praxis Tatwaffen sehr selten aus dem legalen Waffenhandel.⁴⁷ Die Strafvorschriften ermächtigen den Staat nun zu weiteren Grundrechtseingriffen: Die potentiellen Freiheitsstrafen ermöglichen insbesondere einen Eingriff in die Bewegungsfreiheit (Art. 10 Abs. 2 BV) und die Geldstrafen bzw. Bussen einen Eingriff in die Eigentumsgarantie (Art. 26 BV). Auch diesbezüglich ist allerdings zu beachten, dass sich die Strafbarkeit nur auf einen Teil des Umgangs mit Waffen bezieht und dass die Strafdrohung in angemessenem Rahmen bleibt.⁴⁸ Die für die Waffendelikte im Vordergrund stehenden Rechtsgüter 'öffentliche Sicherheit' sowie (indirekt) Leib und Leben sind hochrangige Güter, welche das Sicherheitsgefühl der in der Schweiz lebenden Bevölkerung stärken sollen und dem tatsächlichen Schutz vor Gefahren und Schaden (durch Waffen) dienen. Diese Ziele und die genannten Grundrechtseinschränkungen stehen wenigstens für Schusswaffen in einem angemessenem Verhältnis. Zumindest in diesem Bereich werden die Grundrechte der Bevölkerung durch die Strafbestimmungen des Waffengesetzes nicht übermässig tangiert. Bei Schlag- und Stichwaffen sind die Grundrechtseinschränkungen allerdings zu einschneidend, wenn man bedenkt, dass bei den meisten dieser Waffen ein legaler Ersatzgegenstand dieselbe Wirkung entfalten könnte – mit anderen Worten wird die Schweiz durch das Verbot dieser Waffen beziehungsweise der Kriminalisierung des Umgangs damit nicht sicherer, als wenn die Gegenstände erlaubt wären.

45 Botschaft 1996 (n 23) 1056, wonach im Waffengesetz auch den Anliegen von Waffensammler*innen und Sportschütz*innen Rechnung getragen werden sollte.

46 Hierfür sprechen auch die oben genannten Studien, cf n 40.

47 Weissenberger (n 23) 160.

48 Dazu hinten V.3.

2. Alternative Begründungsmöglichkeit: das 'harm principle'

In Folge stellt sich die Frage, ob sich das in der anglo-amerikanischen Rechtstradition verbreitete 'harm principle' ebenso oder gar besser dazu eignet, die Strafbarkeit des illegalen Umgangs mit Waffen zu begründen.

Das 'harm principle' wurde durch John Stuart Mill entwickelt. Demnach ist ein staatlicher Eingriff in die Handlungsfreiheit des Einzelnen nur mit dem Ziel gerechtfertigt, jemand anderen vor einer Schädigung zu bewahren.⁴⁹ Joel Feinberg entwickelte diese Theorie insofern weiter, als dass er den Schaden als diejenigen benachteiligten Interessen sieht, welche die Folge von unrechtmässigen Handlungen oder Unterlassungen anderer sind.⁵⁰ Hierbei unterscheidet er zwischen Allgemein- und Eigeninteressen. Während er erstere als eine notwendige Bedingung für alle Interessen schlechthin sieht, sind letztere mit persönlichen Vorhaben verbunden. Feinberg konkretisiert damit das sehr allgemein gehaltene 'harm principle'. Allerdings bleibt noch immer sehr viel Gestaltungsspielraum für die Gesetzgebenden übrig. Im Gegensatz zur Rechtsguttheorie gibt es immerhin gewisse Leitkriterien für die Vorverlagerung der Strafbarkeit aufgrund der Gefahr möglicher Delikte. Feinberg spricht vom 'risk to harm other' und führt die drei Faktoren 'magnitude of the harm', 'probability of the harm' und 'independent value of the risk-creating conduct' auf.⁵¹

Es stellt sich nun die Frage, ob die Kriminalisierung des Erwerbs und Besitzes von und Handel mit Waffen anhand des 'harm principles' gerechtfertigt werden kann. Durch den reinen Erwerb, Besitz und Handel von Waffen wird niemand direkt an Leib und Leben geschädigt, weshalb die Begründung der Strafbarkeit einzig durch eine Gefährdung erfolgen kann. Hierzu muss einerseits das Ausmass des möglichen Schadens sowie die Wahrscheinlichkeit, dass ein solcher eintritt, gross sein. Andererseits darf der Wert der eingeschränkten Verhaltensweisen nicht so gross sein, als dass sie die Kriminalisierung unsachgemäss erscheint. Unbestritten ist, dass Waffen und insbesondere Feuerwaffen enormes Schädigungspotential besitzen und bei missbräuchlichem Einsatz grosse Gefahren für Leib und Leben anderer mit sich bringen können. Weniger offensichtlich ist die Wahrscheinlichkeit, mit

49 John Stuart Mill, *On Liberty* (2001; ursprünglich 1859 veröffentlicht) 13.

50 Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 1, Harm to Others* (1984) 215.

51 Cf Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 2, Offense to Others* (1985) 191.

der illegaler Waffenhandel zu Aggression an Leib und Leben von Menschen führt. Dasselbe gilt für die Frage, was Faktoren sind, welche reine Risiken in tatsächliche Schädigungen umwandeln. Im Allgemeinen kommt es wohl am ehesten zu Rechtsgutsverletzungen an Leib und Leben, wenn potentiell gefährliche Personen (auf illegale Weise) an Waffen gelangen. Solche verwenden die Waffen nicht wie vorgesehen im berufsmässigen, militärischen oder sportlichen Kontext, sondern um Straftaten an anderen Personen zu begehen (z. B. Körperverletzungen, Sexual-, Vermögens- oder Tötungsdelikte). Wie viele solche Personen es gibt und wie hoch die Wahrscheinlichkeit ist, dass sie andere schädigen, wenn sie Waffen in die Hände bekommen, ist höchst unklar und lässt sich schwer bis gar nicht erfassen. Da bei Verwirklichung der Gefahr potentiell ein enormer Schaden entsteht, erscheint allerdings ein grosszügiger Massstab angebracht. Das Gefährdungspotential, das einer einzelnen Person durch (Schuss-)Waffen zukommt ist sehr gross, weshalb auch die Regulierung des Umgangs mit und Handels von Waffen entsprechend streng sein muss. Das Risiko, andere zu schädigen ist somit in der Gesamtabwägung gross, weshalb sich die schweizerische Waffenkriminalisierung grundsätzlich durch das 'harm principle' begründen lässt; zumindest im Bereich der Schusswaffen. Dass die Begründung durch das 'harm principle' glückt, mag aber insbesondere durch die Unklarheit der Definitionsbegriffe und die Schwierigkeit von Prognosen zu erklären sein.

3. Zwischenfazit

Der Versuch die Strafbarkeit des illegalen Umgangs mit Waffen zu begründen, glückt zumindest in gewisser Weise und bis zu einem gewissen Masse. Sie gelingt sowohl anhand des Rechtsgutsprinzip als auch des 'harm principles'. Die Argumentation ist dabei immer eine Ähnliche: Die grosse Gefahr, die mit Feuerwaffen einhergeht, beeinträchtigt die Sicherheit in der Gesellschaft in objektiver Weise, weshalb es sich rechtfertigt den freien Umgang mit solchen Gegenständen einzuschränken und Zuwiderhandlungen mit strafrechtlichen Sanktionen zu belegen. Die Argumentation versagt allerdings, soweit es um andere Arten von Waffen geht. Gerade Schlag- und Stichwaffen unterscheiden sich oft nicht von alltäglichen Gegenständen, weshalb es sich schwer bis gar nicht begründen lässt, dass die Existenz dieser Waffen die Sicherheit in der Gesellschaft mehr beeinträchtigt, als es ähnliche, aber erlaubte Gegenstände tun.

IV. Weitere Gründe für die Strafbarkeit

Wie bisher gesehen, gelingt die theoretische Begründung der Strafbestimmungen des Waffengesetzes nur teilweise. Nichtsdestotrotz sind die entsprechenden Strafvorschriften anzuwenden. Der Grundsatz der Massgeblichkeit von Bundesgesetzen⁵² führt dazu, dass in Bundesgesetzen vorgesehene Strafvorschriften auch dann angewendet werden, wenn ihnen die theoretische Begründung fehlt. Insofern überrascht es nicht, dass die Strafbestimmungen des Waffengesetzes auch auf über die theoretische Legitimierung hinausgehende Gründen beruhen.

1. Durchsetzung des Waffenrechts

Wie an anderen Orten im Nebenstrafrecht dürfte es auch bei den Strafvorschriften des Waffengesetzes mehrheitlich darum gehen, den administrativrechtlichen Anordnungen des Gesetzes Nachdruck zu verleihen. Die Strafvorschriften sollen mit anderen Worten eine wirksame Durchsetzung des Waffenrechts gewährleisten. Dabei wäre indessen zu prüfen, ob es nicht mildere Alternativen gegenüber dem Erlass von Strafnormen gäbe. So verlangt das Legitimierungsbedürfnis von Strafvorschriften und die Verhältnismässigkeit reglmässig, dass zunächst geprüft wird, ob andere Regulierungsformen auch den gewünschten Rechtsgüterschutz herbeiführen können.⁵³ Entsprechend mildere Sanktionen – etwa administrative Sanktionen – sind in gewissen Bundesgesetzen vorgesehen.⁵⁴ Auch das Waffengesetz selber kennt administrative Sanktionen wie den Entzug von Bewilligungen (Art. 30a) sowie die Einziehung und Beschlagnahme (Art. 31). Weshalb für die kriminalisierten Verhaltensweisen auf das Mittel des Strafrechts zurückgegriffen wurde und wie sich diese Wahl sowie der angedrohte Strafrahmen rechtfertigt, ist nicht ersichtlich.

Damit reiht sich das Waffengesetz in eine grosse Zahl von Erlassen ein, in denen – in der Regel ohne Bezugnahme auf die theoretische Legitimierung – zur Absicherung administrativer Vorschriften nebenstrafrechtliche Bestim-

52 Art. 190 BV.

53 Vgl. zur theoretischen Fundierung dieses Ansatzes allgemein Andrew Ashworth und Lucia Zedner, *Prevention and Criminalization Justifications and Limits* (2012) *New Criminal Law Review: An International and Interdisciplinary Journal* 542, 542–571.

54 Vgl. z.B. Art. 121 ff. AIG.

mungen erlassen wurden.⁵⁵ Insofern scheint es zuweilen zum gesetzgeberischen Standardprogramm zu gehören, Spezialgesetze mit blankettartigen Strafvorschriften zu ergänzen: Wer gegen die ihm auferlegten Vorschriften verstösst, macht sich strafbar. Worin allerdings der jeweilige Unrechtsgehalt entsprechenden Verhaltens liegt und wie die angedrohten Strafen legitimiert bzw. begründet werden, wird meistens nicht explizit erörtert.

Dieses Vorgehen des Gesetzgebers erscheint fragwürdig. Der reine Wille, die Durchsetzung von auferlegten Regeln zu gewährleisten, vermag die fehlende Legitimierung nicht zu ersetzen. Im Gegenteil: Das entsprechende Streben verdeutlicht die Wichtigkeit der theoretischen Legitimierung von Strafvorschriften, könnte anderenfalls doch jeder Verstoss gegen staatliche Vorschriften mit Strafe belegt werden, was letztlich zur grenzenlosen Kriminalisierung und damit zum Abschied vom Ultima-ratio-Charakter des Strafrechts führen würde. So dürfte die wirksame Durchsetzung von staatlich auferlegten Handlungsvorschriften vielfach eine entscheidende Motivation für den Erlass von Strafvorschriften sein, sie entbindet den Staat jedoch nicht von einer sauberen Rechtfertigung.

2. Internationale Vorschriften

Ein weiterer Grund für waffenspezifische Strafbestimmungen, bilden internationale Vorgaben. Sobald eine übergeordnete Instanz vorschreibt, bestimmtes Verhalten zu sanktionieren, haben die Vertragsstaaten dieser Anordnung, unabhängig von einer theoretischen Begründung, zu entsprechen, um nicht vertragsbrüchig zu werden.

Im Waffenrecht ist insbesondere das UN-Protocol against the Illicit Manufacturing of and Trafficking in Firearms⁵⁶ von Bedeutung. Dieses rechtlich bindende Zusatzprotokoll zur Palermo-Konvention wurde auch von der

55 Vgl. statt vieler Art. 33 ff. WG, Art. 115 ff. Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration (Ausländer- und Integrationsgesetz, AIG, SR 142.20), Art. 33 ff. KMG etc. Der Drang gesetzlich auferlegte Handlungsvorschriften strafrechtlich abzusichern zeigte sich nicht zuletzt exemplarisch in den sehr strengen und von der Exekutive auferlegten Strafbestimmungen in den Covid-Verordnung 2; vgl. dazu Gian Ege und David Eschle, Das Strafrecht in der Krise, Eine Untersuchung der Strafbestimmungen in der COVID-19-Verordnung 2 und welche Lehren daraus zu ziehen sind (2020) *sui generis* 279, 287–289 [17] – [21].

56 Eröffnet zur Unterzeichnung 31. Mai 2001, 2326 UNTS 208 (in Kraft getreten 29. September 2003), SR 0.311.544 (für die Schweiz in Kraft getreten 27. Dezember 2012).

Schweiz unterzeichnet und ratifiziert und verpflichtet die Mitgliedsstaaten in Art. 5 zur Kriminalisierung der vorsätzlichen illegalen Herstellung und des vorsätzlichen illegalen Handels mit Schusswaffen.⁵⁷ Ein Teilbereich der in Art. 33 f. WG pönalisierten Verhaltensweisen wird somit bereits auf internationaler Ebene vorgeschrieben.⁵⁸ Keine Grundlage in einer internationalen Vorgabe finden allerdings die fahrlässigen Straftaten nach Art. 33 Abs. 2 WG sowie die Herstellung und den Handel von anderen als Schusswaffen.

V. Auswirkungen der Begründung

Die theoretische Legitimation der Strafbarkeit erscheint gerade im schweizerischen Rechtssystem eine primär rechtstheoretische bzw. rechtspolitische Frage zu sein; die Behörden sind unbeachtlich der theoretischen Fundierung verpflichtet, die bestehenden Strafnormen in Bundesgesetzen anzuwenden.⁵⁹ Die Auseinandersetzung über die theoretische Fundierung haben aber durchwegs Bedeutung über die reine Anwendbarkeit der Strafnorm hinaus. Aus den bisher gewonnenen Erkenntnissen lassen sich Schlüsse für die Anwendung der Strafbestimmungen des Waffengesetzes und deren Folgen ziehen.

1. Problematik Vorfeldkriminalisierung

Die Bestrafung von Verhaltensweisen, die einer konkreten Verletzung individueller Rechtsgüter vorausgeht wird gemeinhin als 'Vorfeldkriminalisierung' bezeichnet.⁶⁰ Das Bestehen von entsprechenden Strafvorschriften – sowie

57 Vgl. UNODC, Legislative guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 465–467; siehe dazu auch der Beitrag von Lisa Armberger in diesem Band.

58 Siehe Botschaft betreffend die Genehmigung und Umsetzung des UNO-Feuerwaffenprotokolls (Entwurf I) und die Änderung des Waffengesetzes (Entwurf II) vom 25. Mai 2011, BBl 2011 4555 ff., 4570 und 4601 ff.

59 Grundsatz der Massgeblichkeit von Bundesgesetzen gemäss Art. 190 BV.

60 Vgl. dazu statt vieler Wolfgang Beck, *Unrechtsbegründung und Vorfeldkriminalisierung, Zum Problem der Unrechtsbegründung im Bereich vorgelagerter Strafbarkeit – erörtert unter besonderer Berücksichtigung der Deliktstatbestände des politischen Strafrechts* (1992) 19–20; Volker Bützler, *Staatsschutz mittels Vorfeldkriminalisierung, Eine Studie zum*

auch die klare Tendenz zu immer mehr entsprechenden Normen – wird berechtigterweise kritisiert und es wird auf die prinzipielle Grenzenlosigkeit der Gefahrenabwehr hingewiesen.⁶¹ Jedes potentiell gefährliche Verhalten kann zur Tathandlung werden.⁶² Für eine mutmasslich erhöhte Sicherheit der Bevölkerung wird die Freiheitssphäre der Bürgerinnen und Bürger eingeschränkt.⁶³ Die vermehrt präventive Ausrichtung des Strafrechts gewichtet die Sicherheit klar stärker als die Freiheit.⁶⁴ Die Anknüpfung der Strafbarkeit an bestimmte Absichten oder Handlungen im Vorbereitungs- bzw. Vorfeldstadium führt zu einer Entwicklung des Tatstrafrechts zu einem systemwidrigen Täterstrafrecht.⁶⁵

Diese Kritik würde direkt auch die Strafbestimmungen des WG betreffen, wenn diese einzig den vorgelagerten Schutz von Individualrechtsgütern zum Zwecke hätte. Wie die vorangehenden Ausführungen zeigten, schützen diese Bestimmungen jedoch nicht primär, sondern höchstens indirekt auch die Individualrechtsgüter Leib und Leben. Im Vordergrund steht der selbständige Schutz der ‘öffentlichen Sicherheit’. Da diese, wie gesehen, eine eigene Schutzbedürftigkeit aufweist, lässt sich die Problematik der Vorfeldkriminalisierung zumindest etwas abschwächen. Es ist allerdings klar, dass es sich bei den Straftaten des WG um höchst abstrakte Gefährdungsdelikte handelt. Eine tatsächliche Verletzung der öffentlichen Sicherheit muss nicht nachgewiesen werden. Dementsprechend handelt es sich um eine gewisse Vorverlagerung der Strafbarkeit. Zusammen mit gewissen Begründungsdefiziten führt dies dazu, dass sich der Staat hier an der äussersten Grenze des legitim

Hochverrat, Terrorismus und den schweren staatsgefährdenden Gewalttaten (2017) 1ff.; Fabio Manfrin, *Ersatzmassnahmenrecht nach Schweizerischer Strafprozessordnung, Ein Beitrag zur Konkretisierung des Verhältnismässigkeitsprinzips im Haftrecht* (2014) 4; Arndt Sinn, ‘Vorverlagerung der Strafbarkeit – Begriff, Ursachen und Regelungstechniken’, in Arndt Sinn, Walter Gropp und Ferenc Nagy (Hrsg.), *Grenzen der Vorverlagerung in einem Tatstrafrecht, Eine rechtsvergleichende Analyse am Beispiel des deutschen und ungarischen Strafrechts* (2011) 13, 15.

61 Statt vieler Uriel Moeller, *Definition und Grenzen der Vorverlagerung von Strafbarkeit, Diskussionsstand, Rechtsgeschichte und kausalitätstheoretische Bezüge* (2018) 57–58.

62 Vgl. Günther Jakobs, ‘Kriminalisierung im Vorfeld einer Rechtsgutverletzung’ (1985) 97 *Zeitschrift für die gesamte Strafrechtswissenschaft* 751, 753; Moeller (n 63) 60–61.

63 Bützler (n 62) 20.

64 Statt vieler Anna Coninx, *Das Strafparadigma der Gegenwart: Was bedeutet das alles, und wohin führt es?* (2019) *recht* 25, 25 ff.; Moeller (n 63) 57–58; Niggli, Marcel Alexander und Stefan Maeder, ‘Was schützt eigentlich Strafrecht (und schützt es überhaupt etwas)?’ (2011) *Aktuelle Juristische Praxis* 443, 454; Sinn (n 62) 15.

65 Sinn (n 62) 15.

Bestrafbaren befindet und man diesem Umstand mit anderen Umständen – insbesondere der Strafdrohung⁶⁶ – Rechnung zu tragen hat.

2. Konkurrenzen

Die theoretische Legitimierung und insbesondere die damit zusammenhängende Frage nach dem Rechtsgut spezifischer Delikte hat zudem eine entscheidende Auswirkung auf die Frage der Konkurrenzen. Da die Delikte des Waffengesetzes die Individualrechtsgüter Leib und Leben nur indirekt schützen und im Vordergrund ein eigenständiger Schutz der öffentlichen Sicherheit steht, ist zu Delikten gegen Leib und Leben richtigerweise echte Konkurrenz anzunehmen.⁶⁷ Anders ist dies im Verhältnis zur Gefährdung der öffentlichen Sicherheit mit Waffen nach Art. 260^{quater} StGB. Dieser hat die entsprechende Schutzausrichtung wie die Delikte des Waffengesetzes, weshalb unechte Konkurrenz bestehen muss. In der Lehre wird demgegenüber teilweise das Gegenteil vertreten.⁶⁸

3. Strafraumen

Der Strafraumen eines Delikts hat dem Gewicht des geschützten Rechtsguts sowie dem Umfang der potentiell mit dem Delikt einhergehenden Verletzung bzw. Gefährdung des Rechtsguts zu entsprechen.⁶⁹

Art. 33 WG sieht einen abgestuften Strafraumen vor. Die vorsätzliche Tatbegehung wird mit Freiheitsstrafe bis 3 Jahren oder Geldstrafe sanktioniert,⁷⁰ bei Fahrlässigkeit ist nur eine Busse möglich.⁷¹ Nur wenn der Täter gewerbmässig handelt, ist eine höhere Strafe, nämlich bis 5 Jahre Freiheitsstrafe, möglich.⁷²

66 Vgl. dazu sogleich V.3.

67 Weissenberger (n 23) 165.

68 Fatih Aslantas, 'Strafbestimmungen, Art. 33–36 WG' in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG): Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 333, 338 [4]; andeutungsweise ebenso BGE 130 IV 20.

69 Vgl. dazu etwa Botschaft zur Harmonisierung der Strafraumen und zur Anpassung des Nebenstrafrechts an das geänderte Sanktionenrecht vom 25. April 2018, BBl 2017 2827 ff., 2835.

70 Art. 33 Abs. 1 WG.

71 Art. 33 Abs. 2 WG.

72 Art. 33 Abs. 3 WG.

Damit handelt es sich bei den Varianten des Grundtatbestand nach Art. 33 Abs. 1 WG um Vergehen nach Art. 10 Abs. 3 StGB, wobei die maximale Strafdrohung dieser Deliktsart ausgeschöpft wurde. Nur die Qualifikation nach Art. 33 Abs. 3 StGB stellt ein Verbrechen nach Art. 10 Abs. 1 StGB dar. Art. 34 WG sieht zudem verschiedene mit Busse zu sanktionierende Übertretungen vor.

Diese Sanktionsdrohung ist niedriger als diejenige von Art. 260^{quater} StGB, der eine Strafobergrenze von fünf Jahren vorsieht. Dementsprechend scheint die Strafdrohung von Art. 33 WG einerseits angemessen zu berücksichtigen, dass Waffen – insbesondere Schusswaffen – ein erhebliches Schädigungspotential und damit auch erhebliche Gefahren für die öffentliche Sicherheit einhergehen können. Gleichzeitig handelt es sich dabei nur um Gefahren und somit um eine Verlagerung der Strafbarkeit ins Vorfeld. Diesem Umstand wird immerhin dadurch Rechnung getragen, dass es sich 'lediglich' um ein Vergehen handelt. Die Qualifizierung zum Verbrechen bei Gewerbsmässigkeit lässt sich durch die erhöhte Gefahr, die von entsprechenden Tätern für die öffentliche Sicherheit einhergeht, rechtfertigen. Ausserdem dürfte sie auch damit zusammenhängen, dass bei solchen Tätern häufig ein Konnex zur Organisierten Kriminalität bestehen dürfte.⁷³ Als Anlasstaten für kriminelle Organisationen nach Art. 260^{ter} StGB gelten dabei nur Verbrechen. Insofern ist die erhöhte Strafdrohung für gewerbsmässig handelnde Täter auch Voraussetzung, um entsprechende Personen gegebenenfalls als Teil einer kriminellen Organisation zu verurteilen.

V. Fazit

Die Frage nach der Begründung der Strafbestimmungen des Waffengesetzes wird kaum gestellt und daher so gut wie gar nicht beantwortet. Im vorliegenden Beitrag konnte aufgezeigt werden, dass sich sowohl durch den Schutz des Rechtsgutes der 'öffentlichen Sicherheit' als auch durch weitere Begründungsmöglichkeiten eine Grundlage für die entsprechenden Normen finden lässt. Die theoretische Legitimierung steht allerdings auf einem schwachen

73 Die Verpflichtung diesen Zusammenhang ernstzunehmen und gegebenenfalls zu bestrafen ergibt sich auch aus dem Zusatzprotokoll gegen die unerlaubte Herstellung von Schusswaffen, dazugehörigen Teilen und Komponenten und Munition und gegen den unerlaubten Handel damit.

Fundament. Für den illegalen Handel und Umgang mit Schusswaffen erscheint sie sachgerecht. Für andere Waffentypen aber auch für einzelne Tathandlungsvarianten vermag sie nicht zu gelingen. Dieser Umstand zeigt gleichzeitig, dass für den Gesetzgeber wohl nicht der Schutz der 'öffentlichen Sicherheit', sondern vor allem die wirksame Durchsetzung des Waffenrechts im Vordergrund stand und dass er durch die Strafbestimmungen des Waffengesetzes ausserdem internationalen Vorgaben nachkommt.

Die aufgezeigte theoretische Fundierung der Strafbestimmungen des WG entkräftet gewisse Vorbehalte hinsichtlich der Vorfeldkriminalisierung und zeigt Auswirkungen auf die Konkurrenzen zu anderen Delikten. Schliesslich trägt der abgestufte Strafrahmen von Art. 33 und 34 WG den entsprechenden Problemen Rechnung.

Die beschriebene Schwierigkeiten der Legitimierung entsprechender Strafvorschriften zeigt aber auch deutlich Grenzen für den Einsatz strafrechtlicher Normen auf. Selbst im Bereich der Regulierung von offensichtlich gefährlichen Gegenständen wie Waffen kann nicht unbesehen auf strafrechtliche Durchsetzungsmechanismen zurückgegriffen werden, da die Legitimierung nur in eingeschränktem Rahmen gelingen kann. Insofern ist der vorliegende Beitrag auch ein Hinweis darauf, dass der fast schon standardmässige Einsatz von Strafnormen als Durchsetzungsmechanismus für staatliche Regulierungen nicht unserem Strafrechtsverständnis und insbesondere dem zugrundeliegende Legitimierungsbedürfnis nicht entsprechen kann.

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Gun-related homicides in Switzerland

JOSHUA B. WEISS

This paper examines and describes the situation of gun-related homicides in Switzerland and their recent development in the last 30 to 40 years. After a brief explanation of the term ‘gun-related crime’ and its understanding in Switzerland, potential trends in firearm use in general, as well as in homicides, are being shown to the reader using different graphs. For this purpose, national and cantonal data are examined and compared to find out whether similar developments can be deducted. As a result of this comparison, the major data gaps will then be highlighted and some suggestions to overcome these issues are made. Before drawing a conclusion, the development of gun-related homicides in recent years is chronicled, as the attempted and completed offences are analysed in greater detail.

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I. Introduction

The Swiss Legal System and its different laws regulate various gun-related offences. In practice, these events remain a rare phenomenon. Therefore, there is generally little available data on gun-related crime. In the years

2005 and 2006, a series of so-called 'family tragedies' led to reforms in the Swiss Weapon Law and a widespread consciousness about gun-related crime in this specific sphere.¹ Such cases are mostly understood as homicides of family members, followed by the subsequent suicides of the offenders.² The investigation of 75 cases of homicide-suicide in western and central Switzerland over the period of 23 years (1981–2004) showed that in 76% of the cases, the most commonly used instrument to commit this crime is a gun.³ In 25% of those cases, the lethal gun was an army weapon, in 28%, however, it was not possible to determine the type and origin of the gun due to incomplete reports.⁴ Unfortunately, it is not possible to make a clear and profound analysis of the origins of the weapons (military weapon or not), as in almost one third of all cases, this indication is missing in the records.⁵

1. Aim of the Paper

This paper collects different information about gun-related homicides in Switzerland to present an overview of the current situation. The aim is to evaluate the available statistics on a federal, as well as on a cantonal level to analyse gun-related killings and their development in Switzerland. This paper abstains from analysing the various cases in detail, as each case is completely different and could not suit as a representative example. To receive such a result, every single case would have to be analysed separately, or, as a consequence, any choice of a case would be arbitrary and not reflective of the general situation. For this reason, the individual cases and their analysis are not in the scope of this paper.

This research paper will be limited to attempted and completed homicides that involve a firearm when committed. To fulfil the aim of this paper, it is important to define the term 'gun' or rather 'firearm', which are used as

1 Silke Grabherr et al, 'Homicide-Suicide Cases in Switzerland and Their Impact on the Swiss Weapon Law' (2010) 31(4) *The American Journal of Forensic Medicine and Pathology*, 335- 335.

2 Ibid.

3 Ibid 336

4 Ibid.

5 Ibid 337.

synonyms in this paper, and therefore to understand the terminology ‘gun-related crime’.

2. Definition ‘gun-related crime’

In Swiss law, the term ‘gun’ or rather ‘firearm’ is rarely utilised in legal provisions. More often, the general term ‘weapon’, with or without a specifying adjective, is applied.⁶ This is a much broader term including numerous objects that can be employed to commit a crime or as a threatening instrument. In addition, the legislatures could not find a consistent way of adopting the terms ‘weapon’ or ‘gun’, creating a diffuse and complex situation when it comes to ‘gun-use’ in the Swiss Criminal Code.⁷ For example, there might be a provision that applies the inclusive and wide term ‘weapon’ for a qualification of a general crime, whereas other provisions utilise the more restrictive term ‘firearm’ and in combination with the term ‘weapon’.⁸ This complicates the understanding, research, and analysis of this topic. Nevertheless, to conduct this research, a common definition of the term ‘gun’ or rather ‘firearm’ is required:

Fortunately, the Swiss Weapons Act⁹ defines in Article 4 Paragraph 1 what is to be understood under the term ‘weapon’.¹⁰ Yet, this definition is only applicable for violations of the Weapons Act and hence not binding when applying the Swiss Criminal Code.¹¹ To prevent confusion and provide a consistent way of using and understanding the term ‘weapon’, the definition of the Weapons Act in Article 4 Paragraph 1 Litera A will be applied: ‘devices that allow projectiles to be fired by means of a propellant

6 See for example art 123 para 2 SCC, art 189 para 3 SCC, art 190 para 3 SCC.

7 *Swiss Criminal Code of 21 December 1937 (SCC)*, SR 311.0.

8 See for example art 139 para 3 SCC, art 140 para 2 SCC, art 260quater SCC.

9 *Federal Act on Weapons, Weapon Accessories and Ammunition of 20 June 1997* (Weapons Act, WA), SR 514.54.

10 Fatih Aslantas, ‘Art 4 WG’ in Nicolas Facincani und Reto Sutter (Hrsg.), *Waffengesetz (WG), Bundesgesetz über Waffen, Waffenzubehör und Munition vom 20. Juni 1997 (WG)* (2017) 11, 15 [1].

11 Aslantas (n 11) 15 [2]; Marcel Alexander Niggli and Christof Riedo, ‘Art 139 StGB’ in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar, Strafrecht II, Art 137–392 StGB* (4th ed, 2019) 2898, 2940–2941 [170].

charge and that can be carried and operated by a single person, or objects that can be converted into such devices (firearms).¹²

Decisive for the definition in the Weapons Act are the following conditions that must appear cumulatively: the projectile must be fired by means of a propellant charge and the device must have the characteristic to be carried and operated by a single person. Where one of these characteristics is missing, yet can be added easily by a simple modification, the device must count as a firearm as well.¹³ Thus, cannons or bigger weapons are excluded, as they cannot be carried by a single person. The legislator, willing to clarify the situation, introduced the term 'firearms' at the end of the provision in parentheses.¹⁴ As soon as a device unfit to shoot can be converted into a functional firearm without much effort, it has to be classified as a weapon or rather a firearm.¹⁵ Even if the general list of weapons is not congruent with its use in the Swiss Criminal Code and the judges are free in their verdicts whether an object should be counted as a weapon or not, this research paper orientates the findings around the definition of a firearm given in the Weapons Act.¹⁶

3. Methodology

The method chosen to reach the aim of this research paper is the descriptive evaluation and analysis of available federal and cantonal statistics. By analysing these different statistics, the information can exclusively be based upon the officially reported crime. Therefore, it is not possible to reflect the actual situation, for there is always the so-called dark figure of crime, which is crime that happens beyond public or official knowledge.¹⁷ In addition, it cannot be assumed that a specific offence is committed more than others by relying on the official numbers, as there are various reasons that may or may not lead to an official process, such as different reporting behaviour for different types of crimes, the available resources of

¹² Aslantas (n 11) 16 [4].

¹³ Art 4 para 1 lit a WA; Hans Wüst, *Schweizer Waffenrecht* (1999) 28.

¹⁴ *Ibid* 29.

¹⁵ *Ibid* 30.

¹⁶ Art 4 para 1 lit a WA; Aslantas, (n 11) 15 [3].

¹⁷ Federal Statistical Office, *Police crime statistics 2020*, FSO No 1116 – 2000 (Bern 2021) 6; Tim Newburn, *Criminology*, (2017) 45.

the law enforcement authorities, cantonal differences in the regime of criminal policing, as well as legislative changes.¹⁸

Having defined the term ‘gun’, or rather ‘firearm’ (chapter I.2.), this paper focuses on an analysis of the different crime statistics and the various data collected by the officials (chapter II.) before highlighting the major data gaps (chapter II.2.). Ensuing, the research will continue with an analysis of the trends (chapter III.) before concluding the research paper with a summary of the results (chapter IV.).

II. Current Situation in Switzerland

The majority (86 %) of the Swiss population voted on September 26th 1993, for the generalisation of a common national weapons law.¹⁹ The Weapons Act was introduced on June 20 1997 and came into force on September 21st 1998. The corresponding regulation came into force on January 1st 1999.²⁰ From that moment on, Switzerland no longer had 26 different cantonal weapon laws, but one commonly binding Weapons Act (and corresponding Regulation).²¹ The Weapons Act regulates the situation from a general point of view, and the Weapons Regulation defines the different issues in more detail.²² The purpose of the Weapons Act is the protection of the population, individuals, as well as the society itself, from violent criminality. This goal is aspired to be achieved with a wide and preventive regulation in the branch of weapons trade, weapons possession, and the carrying of weapons. The main goal of the Weapons Act is the prevention of weapons abuse and the harmonisation of the previously cantonally regulated weapons laws.²³ Its introduction had a visible effect on the use of weapons while committing crimes; in 1998, firearms were used in 18.5 % of the robbery cases, but the share decreased to 10.6 % in 2005. A similar tendency can be observed in the use of sharp objects.²⁴ The private

18 Ibid.

19 Wüst (n 14) 1.

20 Ibid 8.

21 Ibid 9.

22 Ibid.

23 Ibid 15; BBl 1996 I 1054.

24 Nora Markwalder, *Robbery Homicide, A Swiss and International Perspective* (2012) 224 [348].

possession of weapons also decreased: in 2000, 35 % of the Swiss households possessed at least one firearm. Five years later, this percentage decreased to 28 %. Yet, this reduction must be explained by the downsizing of the Swiss Army, and not only by the introduction of the WA.²⁵

It can be concluded that the legislatives of a country can influence the behaviour of criminals by changing the legal framework.²⁶

Various legal provisions foresee a harsher punishment if there is a (mis)use of a weapon.²⁷ Nevertheless, it should be noted that a weapon, or more specifically a firearm, is a tool that can be used to commit more than just the crimes that specifically mention a gun-related commission. It is also important to note that despite the seriousness of an offence involving a firearm, there is no general database of every gun-use in criminal offences. Although there is statistical information collected about gun-related deaths including suicides and other reasons, there is unfortunately little information statistically collected about other crimes than homicides. A general decreasing trend in the use of firearms for committing all types of crime can be observed, with a mirroring increasing trend in the use of sharp objects.²⁸ It can be argued that weapon availability influences the commission of an offence and whether the outcome is fatal or non-fatal.²⁹

When analysing gun-related deaths, there is one undeniable fact that stands out: most of the gun-related deaths are not due to a criminal offence, but the result of suicide (graph 1). Out of 436 gun-related deaths in 1995, only 44 (10.09 %) were not suicides (graph 1). Ten years later, in 2005, there have been 299 gun-related deaths with 27 (9.03 %) cases of other reasons than suicide (graph 1). Another ten years further on, in 2015 and also in 2018, only 20 (8.66 %) of the 231 respectively 20 (9.85 %) of the 203 deaths had nothing to do with suicide. Consequently, there is an overall decreasing trend both in gun-related suicides, as well as in other gun-related deaths (graph 1).³⁰ It can be observed that the proportion of 9 to 1 has not

25 Martin Killias, Sandrine Haymoz and Philippe Lamon, *Swiss Crime Survey, Die Kriminalität in der Schweiz im Lichte der Opferbefragungen von 1984 bis 2005* (2007) 94.

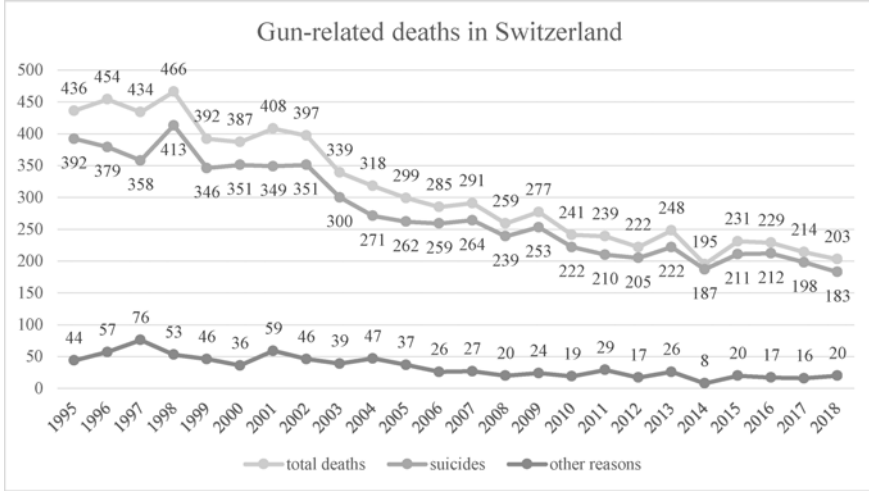
26 Ibid 229 [357].

27 See for example art 139 para 3 SCC, art 140 para 2 SCC, art 260quater SCC.

28 Federal Statistical Office, *Schusswaffentote nach Geschlecht*, FSO je-d-14.03.04.01.13. (Bern 2020).

29 Markwalder (n 25) 225 [350].

30 Ibid.



Graph 1: Gun-related deaths in Switzerland

significantly changed over the last 25 years, but remained more or less stable.³¹

Whether these decreasing trends are due to the Weapon's Act or due to other reasons cannot be statistically evaluated. If one follows the results of the Swiss Crime Survey that bases its data on numerous nationally and internationally held crime victimisation surveys, the observed tendency is a decreasing trend in weapon-related crime.³²

1. Available statistics

One of the most important statistics in Switzerland are the Police Crime Statistics ('PCS'), which are annual papers analysing and mainly summarising the current crime trends in Switzerland. On the national level, they are published by the Federal Bureau of Statistics, on the cantonal levels, it is mostly the police departments that publish the detailed statistics. Since 2009, all the cantonal cases are collected and compiled in these statistics in a detailed and consistent way.³³

³¹ Ibid.

³² Killias, Haymoz and Lamon (n 26) 1.

³³ Federal Statistical Office, *Police crime statistics 2019*, FSO No 1116–1900 (Bern 2020) 7.

As earlier mentioned (chapter I.3.), the PCS can only list the crimes known to the police. There will always be the so-called dark figure of crime. Therefore, what the actual situation is can only be estimated.³⁴ Furthermore, various other factors influence the number of statistics; most importantly, these are the available resources for the prevention of some categories of crime, the cantonal differences in crime policy and guidelines, as well as changes in the law.³⁵

1.1. Analysis of the federal statistical information

In 2020, there have been 47 completed and 206 attempted homicides, which is an increase of 22.2% compared to the year before (graph 2). Even though the main instrument to commit or attempt a homicide has been a sharp instrument (53%), nearly 10% of the completed or attempted homicides were committed with a firearm (24 cases resp. 9.5%). This means that the 24 cases of gun-related (completed such as attempted) homicides in 2020 are below the average of absolute numbers of the preceding 11 years, which would be 42 (41.9 resp. 19.29%) of an average of 217.2 cases. The most absolute gun-related cases can be counted in the years 2009 (21.6%) and 2012 (22.3%), with a total of 51 cases each year (graph 2). The fewest gun-related cases occurred in 2014, with a total of 18 homicides (10.4%) (graph 2). In the year 2020, 59.6% of all the completed homicides (meaning 28 cases) took place in the domestic sphere, which shows a decrease compared to the year before (with its 29 domestic homicides), but still above the average of the last ten years (which would be 25 domestic homicides).³⁶

The cases of gun-related homicides overall in Switzerland are decreasing, as the number has been reduced by half over the last 12 years, from 51 cases in 2009 to 24 cases in 2020 (graph 2).³⁷ Nonetheless, graph 2 shows that trend is

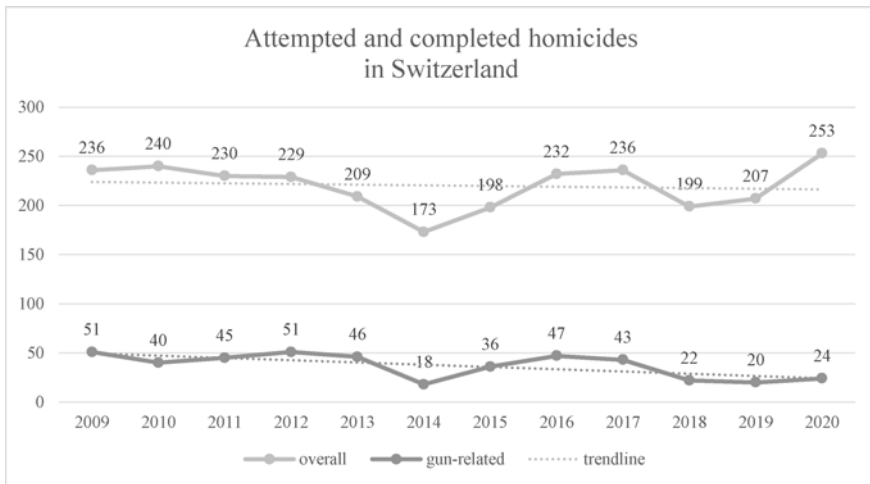
34 Ibid.

35 Ibid.

36 Federal Statistical Office (n 18) 8.

37 Federal Statistical Office, *Polizeiliche Kriminalstatistik (PKS), Jahresbericht 2017 der polizeilich registrierten Straftaten*, FSO No 1116–1700 (Bern 2018) 63; The total number of homicides of the year 2013 differs in the police crime statistics from 2017, where there are 210 cases, see Federal Statistical Office, *Polizeiliche Kriminalstatistik (PKS), Jahresbericht 2013*, FSO No 1116–1300 (Bern 2014) 63.

not continuously decreasing. The lowest number of gun-related homicides can be found in 2014, where also the overall number of homicides is the absolute lowest. A clear and statistically valid reason for this could not be found, as the overall number shows a correlation in some years (vast decrease from 2013 to 2014), but then in other years, there is no correlation (decrease in gun-related cases, but increase in overall numbers from 2019 to 2020). The share of gun-related homicides compared to other methods has been between 22% and 9% over the last 12 years, with a decreasing trend in the use of firearms (graph 2).³⁸ Hence, cases of homicides where firearms are being used are less frequent, yet the number of homicides in general remained stable over time.³⁹



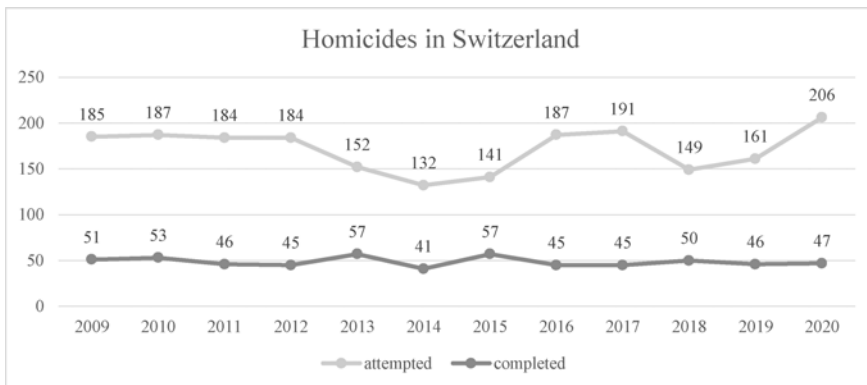
Graph 2: Attempted and completed homicides in Switzerland

The overall number of completed homicides remains stable, whereas the number of completed gun-related homicides is heavily decreasing (graph 4).⁴⁰ This trend can also be observed with the attempted gun-related homicides (graph 5):

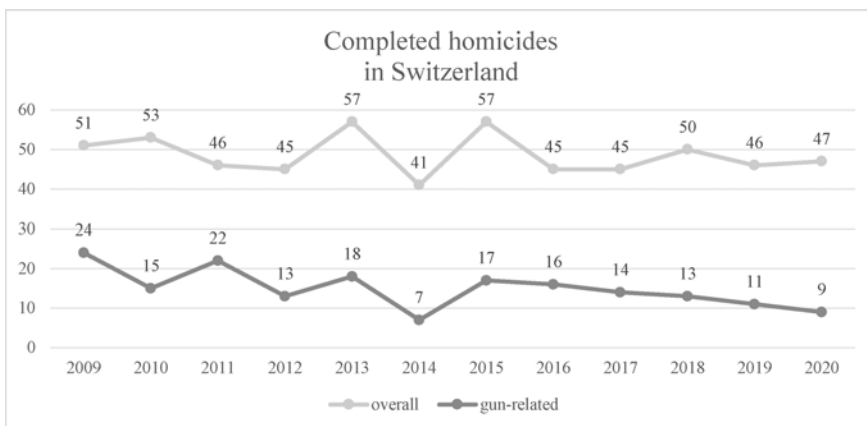
³⁸ Federal Statistical Office (n 38 [2013]) 63; Federal Statistical Office (n 38 [2017]) 63; Federal Statistical Office (n 18) 67.

³⁹ Ibid.

⁴⁰ Ibid.



Graph 3: Homicides in Switzerland

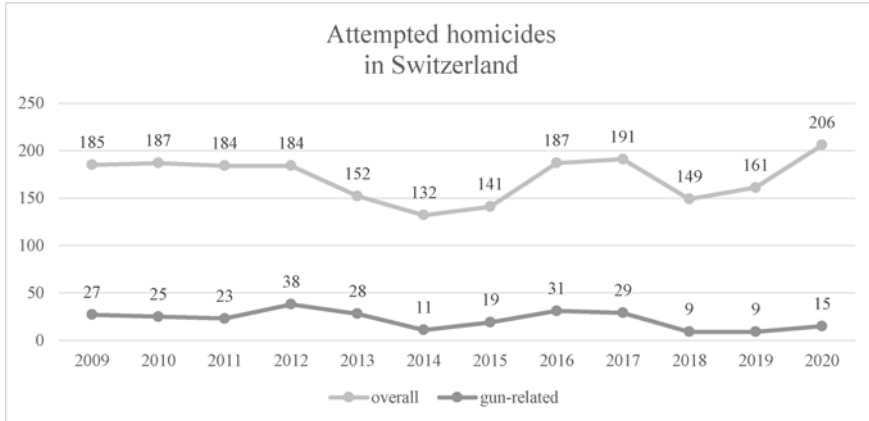


Graph 4: Completed homicides in Switzerland

1.2. Analysis of the cantonal statistics

In this chapter, the cantonal police crime statistics are analysed to determine whether the federal police crime statistics are a reflection of all the Cantons or whether there are notable differences between the regions of Switzerland. Thus, the following chapter will analyse Cantons with not only a high, but also with a low population. The detailed graphs⁴¹ can be found in the annex.

⁴¹ The sources of all the following graphs are the cantonal PCS, listed in the bibliography. If a Canton is not listed, it means that the data used for the graph has only been received



Graph 5: Attempted homicides in Switzerland

The Cantons with more than one million inhabitants, being Zurich and Bern,⁴² will be analysed first. After these two Cantons, the eleven Cantons with a population between 250'000 and 850'000 inhabitants will be analysed. These are the Canton of Vaud, Aargau, St. Gallen, Geneva, Lucerne, Ticino, Valais, Fribourg, Basel Landschaft, Thurgau and Solothurn.⁴³ In a third step, Cantons with a population higher than 100'000, but lower than 200'000 inhabitants, will be analysed as examples of average populated Cantons. This will be Graubünden, Basel Stadt, and Neuchâtel.⁴⁴ Finally, certain Cantons with a population smaller than 100'000 inhabitants will have to be looked at in greater detail, specifically Nidwalden, Glarus, Obwalden, Uri, and Appenzell Innerrhoden.⁴⁵ With this selection, the different linguistic regions of Switzerland are being taken into account in a balanced manner, and thus a comparison could be made more easily.⁴⁶ In addition to this, Cantons with larger cities, such as

via email from the specific cantonal police department. This is the case for the Cantons of Aargau, Basel Landschaft, Thurgau, Solothurn, Obwalden, Neuchâtel and Graubünden. If there is no data visible in the graph, that means that the cantonal police could not provide any numbers for this specific year.

42 Federal Statistical Office, *Die Bevölkerung der Schweiz 2019*, FSO No 348–1900 (Bern 2020)

9.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

Basel Stadt, Geneva or Zurich are analysed, as well as Cantons with smaller cities, namely Appenzell Ausserrhoden, Uri or Nidwalden.

The statistically published numbers of gun-related homicides include both attempted and completed cases. There is no detailed and consistent way of publishing the attempted and completed gun-related homicides on the cantonal level. This is the reason why the 26 cantonal authorities had to be contacted to receive such a separate listing. Unfortunately, not all Cantons could provide such information. Where available, it will be looked at in a differentiated way. Due to the low absolute numbers of homicides in general and gun-related cases specifically, there is not a clear trend to be deducted from the different statistics. The highest cantonal number was in 2019, where 52 overall homicides (16 completed cases and 36 attempts) took place in Zurich, thereof 9 that were gun-related (7 completed cases and 2 attempts). The lowest numbers can be found in Nidwalden with only 3 homicides from 2009 to 2020, thereof 2 being gun-related (2010 and 2018). It can be generally said that the gun-related homicide cases remain below 10, except for some extraordinary years and Cantons (for Zurich: 13 cases in 2009, for Geneva: 12 cases in 2009, 13 cases in 2012, 18 cases in 2016, for Lucerne: 11 cases in 2013). There are even Cantons where the cumulated case-number from 2009 to 2020 is below 10 (for Ticino: 8 cases, for Appenzell Innerrhoden: 0 cases, for Uri: 2 cases, for Glarus: 2 cases, for Nidwalden: 2 cases, for Neuchâtel: 7 cases, for Graubünden: 2 cases, for Thurgau: 9 cases, for Obwalden: 1 case). There have not been many cases of gun-related homicides in several Cantons, where more than half of the years taken into account show no such cases at all (for Ticino: 9 out of 12 years with 0 cases, for Appenzell: 0 cases overall, for Uri: 9 out of 11 years with 0 cases, for Glarus: 8 out of 10 years with 0 cases, for Nidwalden: 10 out of 12 years with 0 cases, for Neuchâtel: 8 out of 12 years with 0 cases, for Thurgau: 6 out of 10 years with 0 cases, for Graubünden: 11 out of 12 years with 0 cases, for Obwalden: 11 out of 12 years with 0 cases).

What can be stated is that the absolute numbers in all the different Cantons are very low and there is a decreasing, as opposed to an increasing trend in the use of firearms for committing homicides. In addition to this, it can not statistically be proven that a high population density would increase the chances of the occurrence of gun-related homicides, even though the Cantons with the highest number of inhabitants show higher absolute case numbers as well, for example, Zurich or Bern. Yet, it has to be

clarified that the number of cases does not change in a calculatable correlation with the number of people living in a Canton. One case does, due to the low absolute numbers, influence the statistics out of proportion and hence has a huge impact on the whole situation. It would be arbitrary to rely on these mere numbers without taking into account more characteristics.

It can generally be stated that the cases of completed homicides have been stable at an annual number of 50, yet the completed gun-related homicides have decreased from 24 cases in 2009 to 9 cases in 2020 overall seen in Switzerland. The same image can be seen on a cantonal level, where the numbers of completed gun-related homicides during the last five years have been between 0 and 3 cases per year and Canton, except for Zurich.

2. Major data gaps

One of the biggest issues of the different data collections is the lack of a uniform and binding use of the terms ‘weapon’, ‘gun’ and ‘firearm’. Whereas the colloquial use of the term ‘weapon’ is often meant to describe firearms, the legal perspective of this is much broader.⁴⁷ Such an inconsistency complicates the comparison and analysis of the current situation, as it cannot always be determined whether the author is aware of this issue or chooses to ignore it. However, even their knowledge would not improve the situation sustainably, as the problem lies in the lack of a consistent definition. The legal provisions with the non-uniform way of using the different terms do not make matters easier either, leaving a dissatisfying situation of conviction statistics without any specification of the type of weapons. The result is a diffuse and unclear database.

It is difficult to differentiate between the various types of homicides already, as a lot of research does not undertake the step to distinguish between the different subtypes. As a result, it is nearly impossible to detect the particularities of the different cases. Unfortunately, this may then lead to a situation where preventative measures may be too general and unsuitable for specific types of homicides.⁴⁸ Nora Markwalder proposes the introduction or continuation of the homicide surveillance system, which

⁴⁷ Art 4 para 1 WA.

⁴⁸ Markwalder (n 25) 229 [357].

would require annual updates. This would allow researchers and the police to detect trends and may enable them to do some data-based forecasting. As this is a very time-consuming task, she also proposes that a possible solution could be a general data storage system accessible and editable by various authorities.⁴⁹ Not negligible are the data protection necessities, as well as organisational concerns, which might be a burden. Nevertheless, other countries, such as Finland, have already introduced such an electronic information system on inhabitants.⁵⁰ This information is accessible for researchers as well, and would therefore be a good solution to comply with data protection issues.⁵¹

Another problem is the lack of detailed statistical information, for gun-related attempts or completed offences of the police crime statistics are not listed separately. This renders it nearly impossible to find out how many of the completed cases of homicides have been committed with a gun. The benefit of such knowledge would be the easily visible number of completed gun-related homicides and therefore their importance compared to the overall number of completed homicides. Moreover, it could be more easily determined whether a gun has an influence on the homicide being completed or attempted, or whether the used instrument is of little importance for the outcome of this offence.

III. Development

The number of homicides committed with a gun has been decreasing from 34% of all homicide cases in the years 2000 to 2004, to 20% in the years 2009 to 2016⁵² and to 12% in the years 2017 to 2020. In general, it can be concluded that there is a moderate decreasing trend in the number of completed homicides. However, it must be noted that the average number of victims has remained stable, which consequently means that there has

49 Ibid 229–230 [358].

50 Ibid 230 [358].

51 Markwalder (n 25) 230 [358].

52 Federal Statistical Office, *Polizeilich registrierte Tötungsdelikte 2009–2016, Innerhalb und ausserhalb des häuslichen Bereichs*, FSO No 797–1600–05 (Bern 2018) 5

been a shift from the completed to the attempted homicides,⁵³ as the share of completed homicides is decreasing.⁵⁴

In cases of domestic violence, the share of gun-related homicides is slightly lower, but decreasing comparably. In the years 2000 to 2004, 27% of the domestic homicides were committed with a gun.⁵⁵ In the years 2009 to 2016, there were 67 gun-related domestic homicide cases, which is a share of 17% of all homicide cases. Only 4 of the used guns were categorised as being an ordnance weapon, 1 of active service possession and 3 were transferred into private ownership after the end of the military service.⁵⁶ Whilst guns are not the most common instrument for committing a domestic homicide, they are the deadliest instrument for this offence.⁵⁷ When it comes to domestic homicides between family members (defined as a current or former partner or other family member),⁵⁸ only 22% of the cases between 2009 and 2016 were committed with a gun. Out of these 44 cases, only 1 was committed with an ordnance weapon that was transferred into private ownership after the end of military service.⁵⁹

The number of homicides and attempted homicides remained stable for the years 2015–2019, yet there is a considerable downward trend visible when it comes to the use of firearms: whereas in 2015, 36 cases were reported to be gun-related, the number of such homicides or attempted homicides decreased to 20 in 2019.⁶⁰ The cases of (attempted) gun-related serious assaults equally decreased from 16 in 2015 to the number of 8 in 2019.⁶¹

In 2011, 38.1% of the violent crimes fell under the category ‘domestic violence’. However, the share of domestic homicides is even higher, with a percentage of 55% of all completed homicide cases being committed within the domestic area. Since 41% of the domestic homicide deaths are

53 Ibid.

54 Ibid 6.

55 Ibid 15.

56 Ibid.

57 Ibid.

58 Ibid 9.

59 Ibid 20.

60 Federal Statistical Office (n 34) 65.

61 Ibid.

gun-related, it is vital to analyse this specific type of crime when talking about gun-related crime in general.⁶²

IV. Conclusion

This paper has brought to light various information concerning gun-related homicides in Switzerland and their recent development. Amongst other things, it highlighted the fact that the general use of firearms has been decreasing ever since the WA was introduced. As a result, gun-related deaths were reduced by half over the last 20 years.

As it became more difficult in Switzerland to possess firearms, the trend of transferring army weapons into private ownership has been decreasing steadily. Although the case of gun-related crime ending lethally has fallen to a low level, the number of suicides performed with a firearm is still very high. An important fact is that the share of gun-related suicides compared to other means remained stable, with 9 gun-related suicides to 1 other gun-related death. However, this is not within the scope of this paper and was not discussed in more detail. Yet as any death that can be prevented is a life that can be saved, the focus should not only be on fighting crime by restricting gun policies, but also on reducing the total number of gun-related deaths. This is a considerable area identified during the research conducted, and the research problem could be further explored by including the gun-related suicides and what possible prevention policies could be introduced to also reduce the number of gun-related suicides.

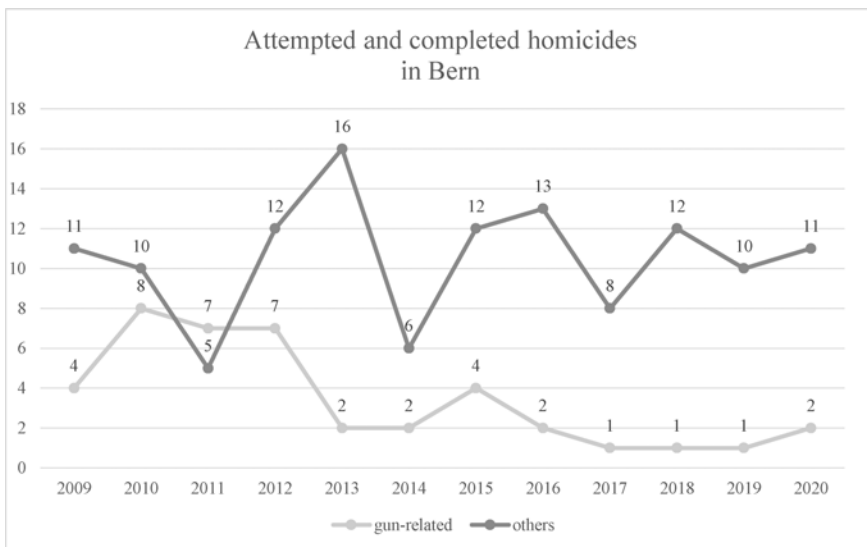
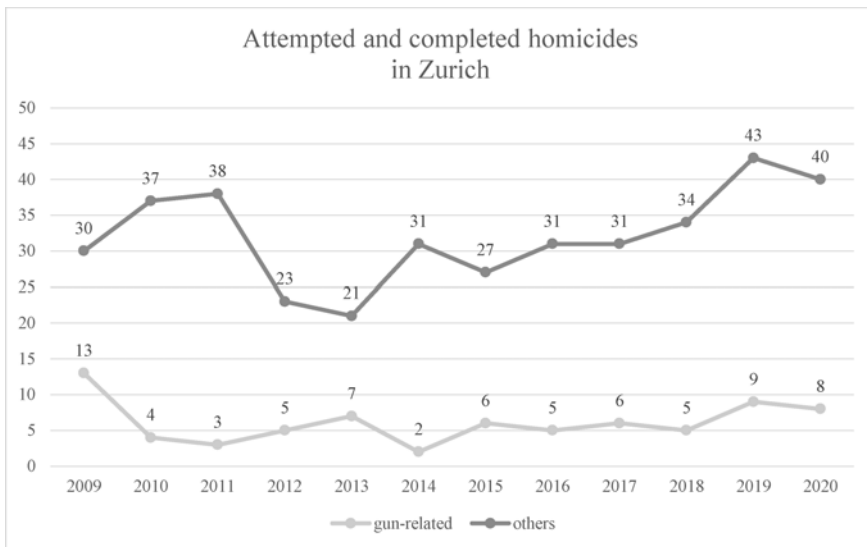
In my opinion, the main goal should be to reduce gun availability to an absolute minimum, offering the possibility to store any firearm at the armoury or even making it obligatory to do so. One could argue that the right of any person should be the right to defend him-/herself. However, if the legal restrictions that exist nowadays are respected, one would, for example, not be able to defend oneself in a gun-related robbery, as there would be no time to obtain the firearm and the ammunition from two separate rooms in a stressful situation of a robbery. In addition to this,

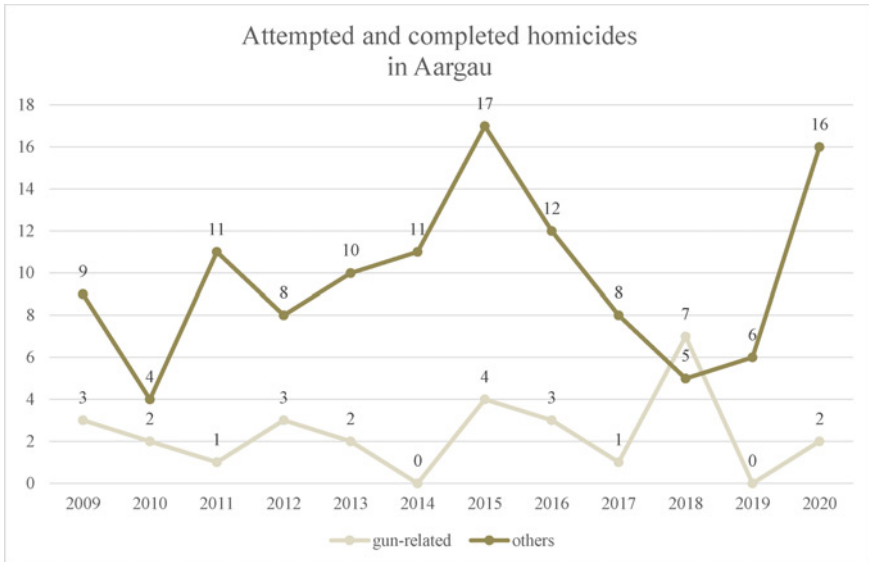
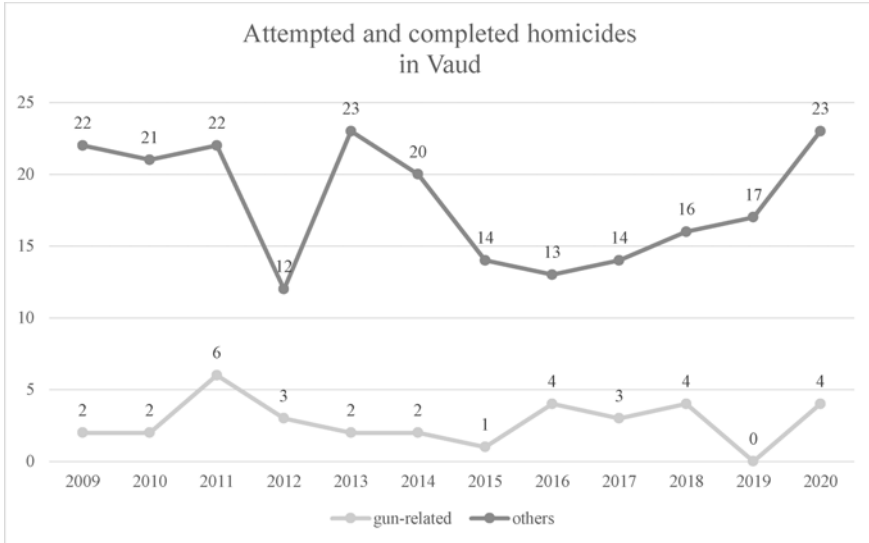
62 Federal Statistical Office, *Polizeilich registrierte häusliche Gewalt, Übersichtspublikation*, FSO No 797-1200-05 (Bern 2012) 5.

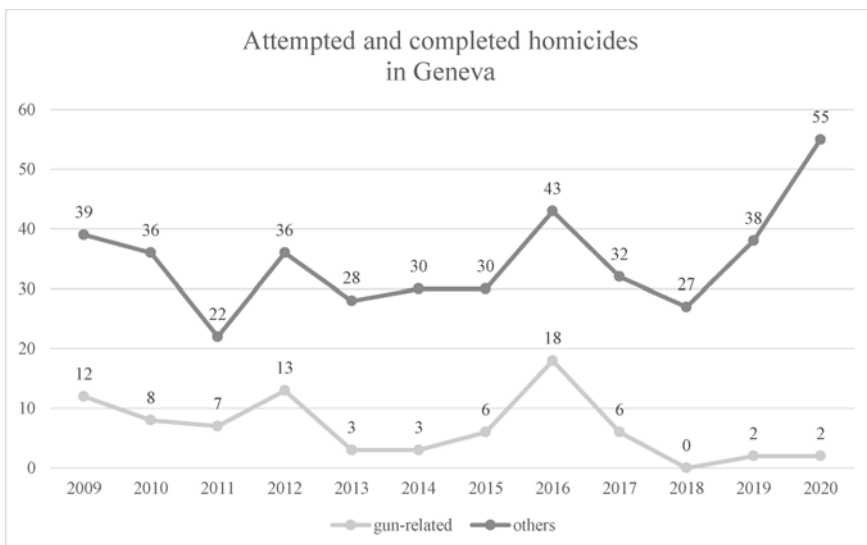
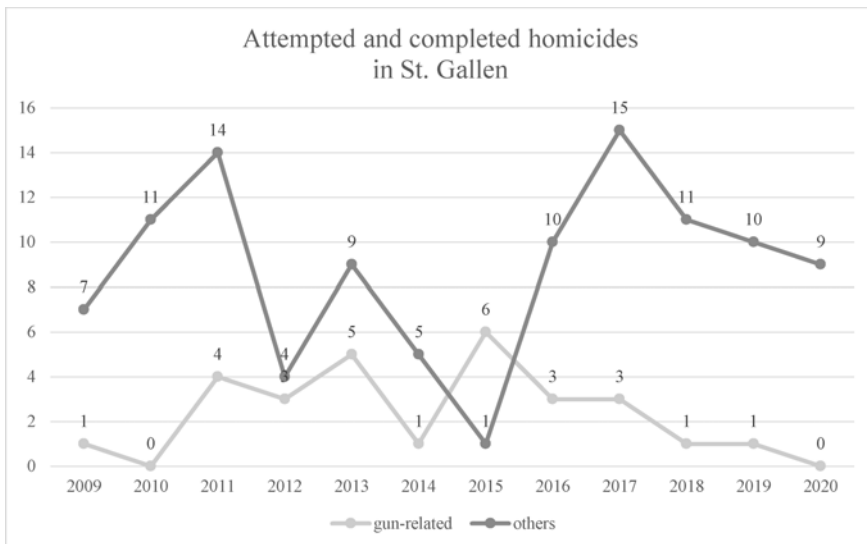
the mere presence of a firearm already endangers the situation drastically and increases its use, as well as the risk of a lethal outcome of the crime.

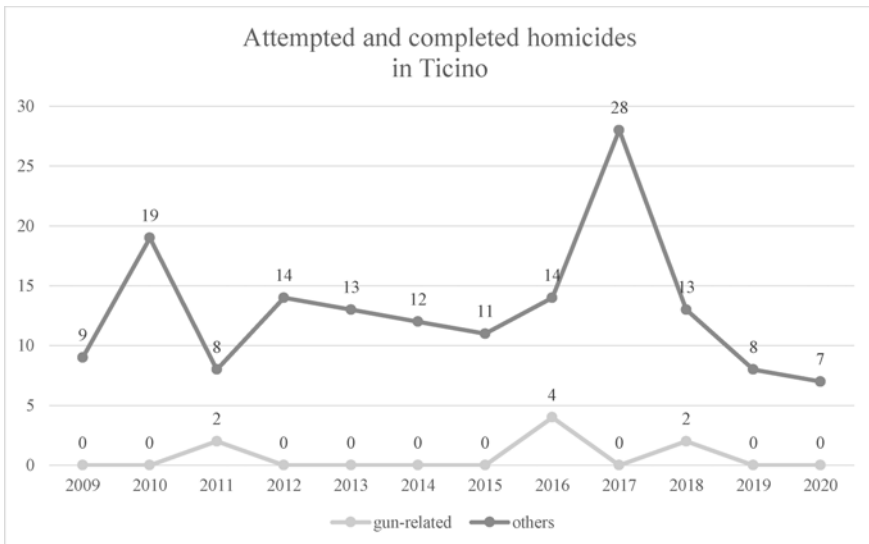
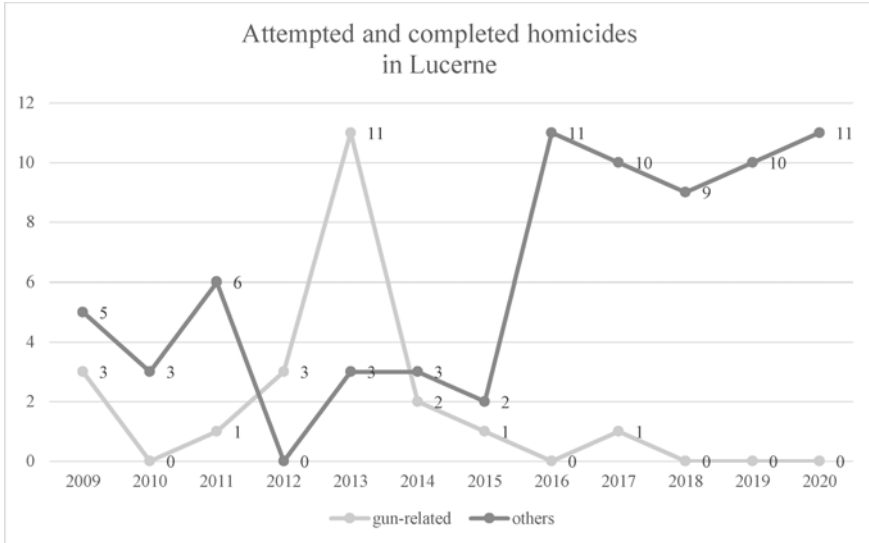
The most important and also nearly the only source of data are the (gun-related) deaths due to homicides where guns have been involved. It is for this reason that statistics should be more detailed when it comes to a specific norm of the SCC. Instead of merely putting all the different types of a crime in one category, the *modus operandi* should be listed separately as well, so that one could see how often a gun was used (as an instrument of threat, as a weapon to harm someone or to take a person's life).

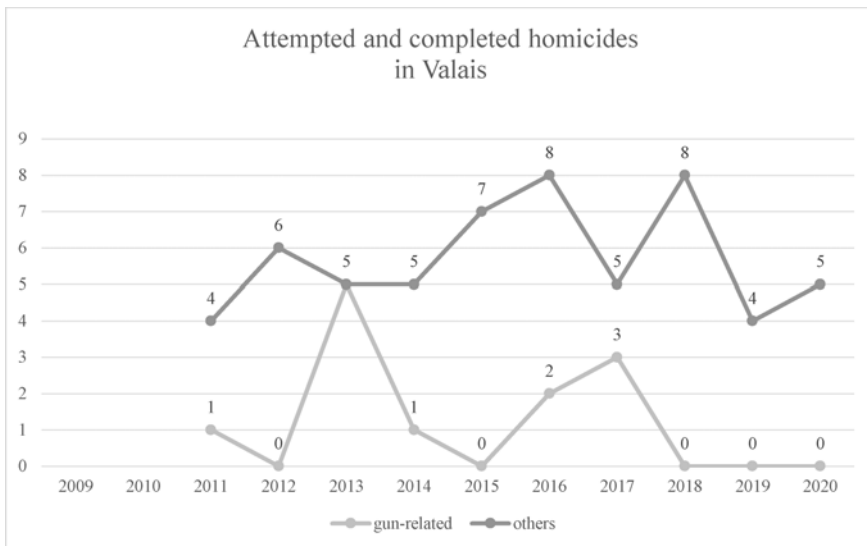
Annex



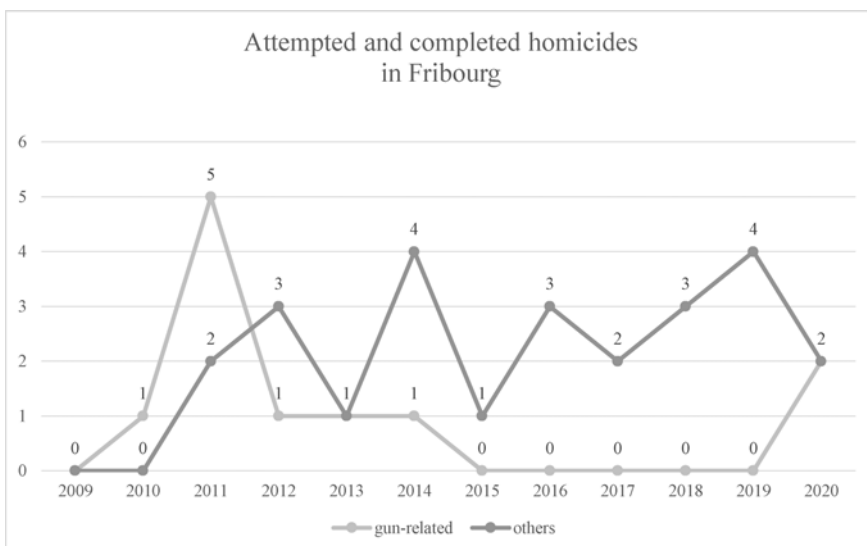






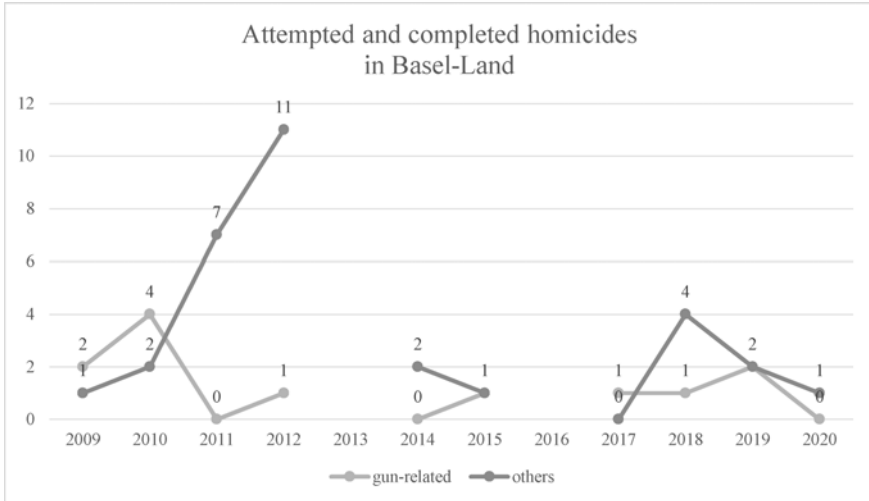


63

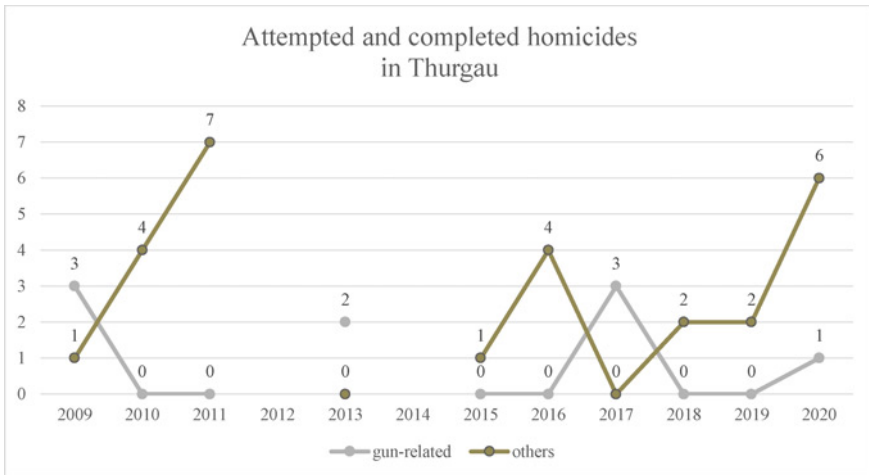


63 For the years 2009 and 2010, the Canton of Valais could not provide statistical numbers.

64

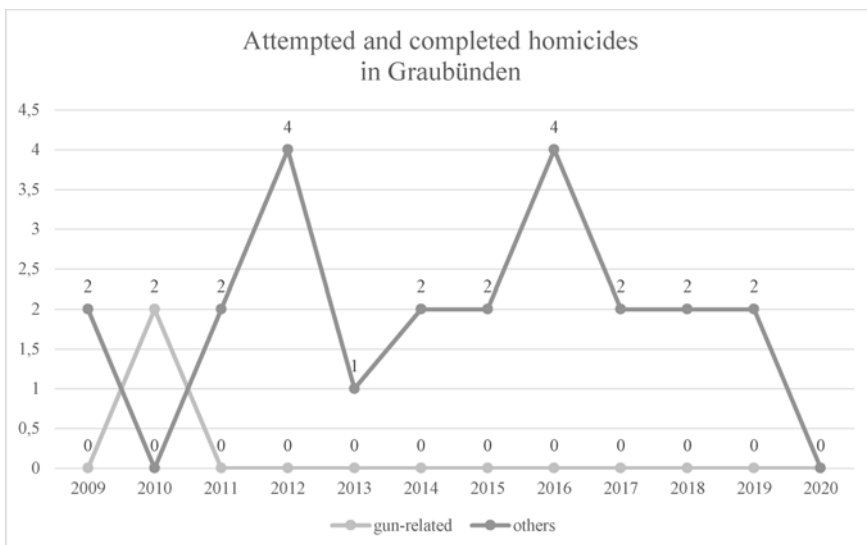
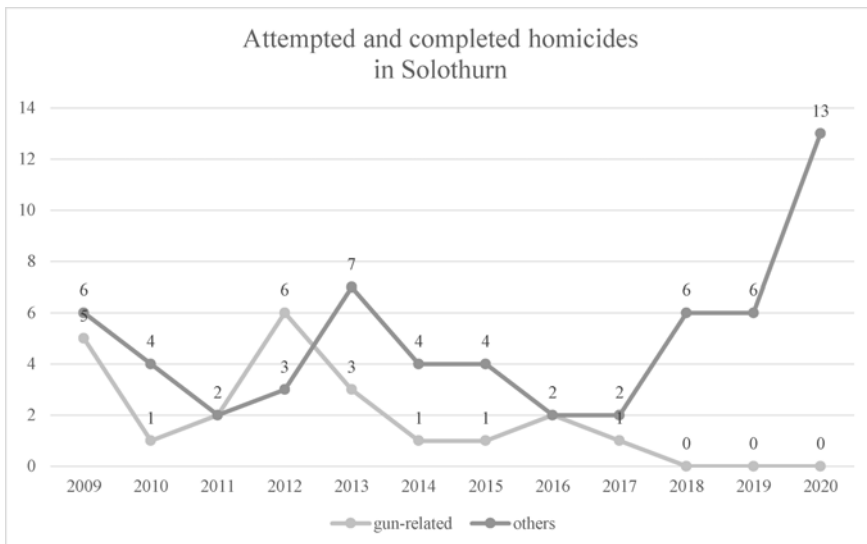


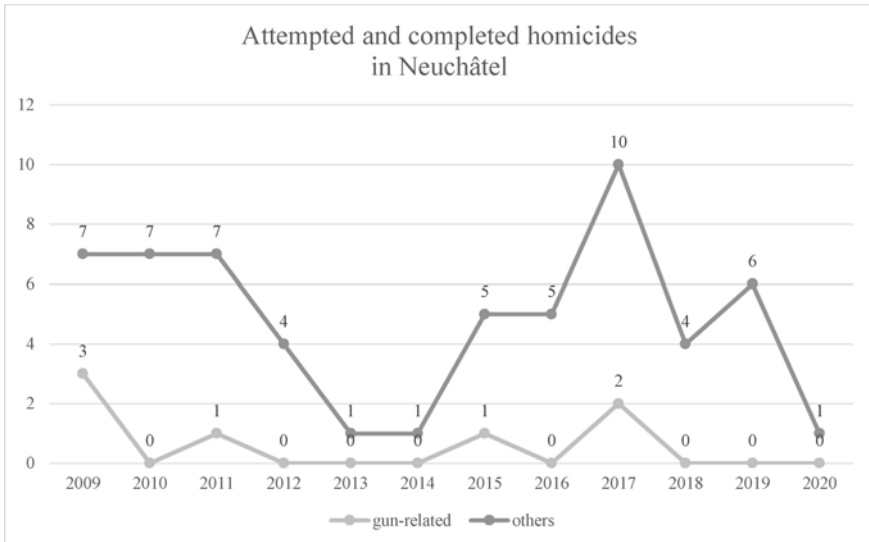
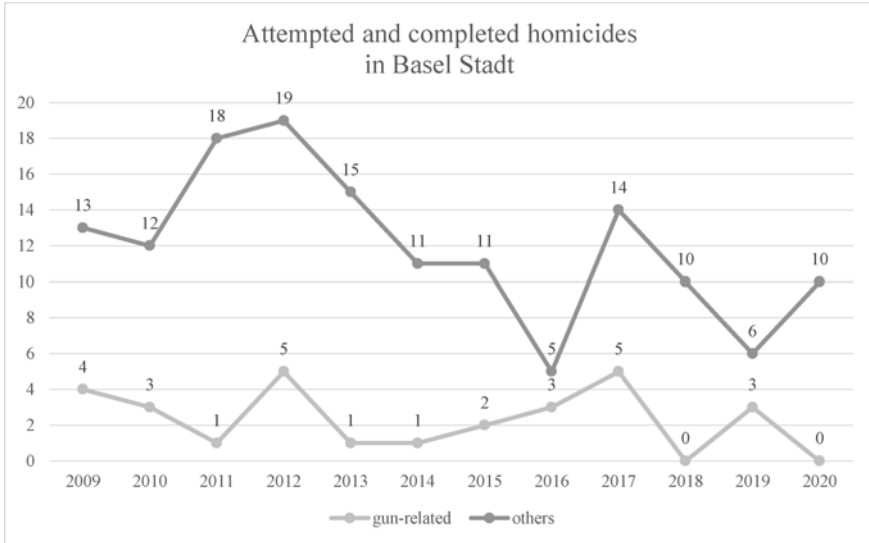
65

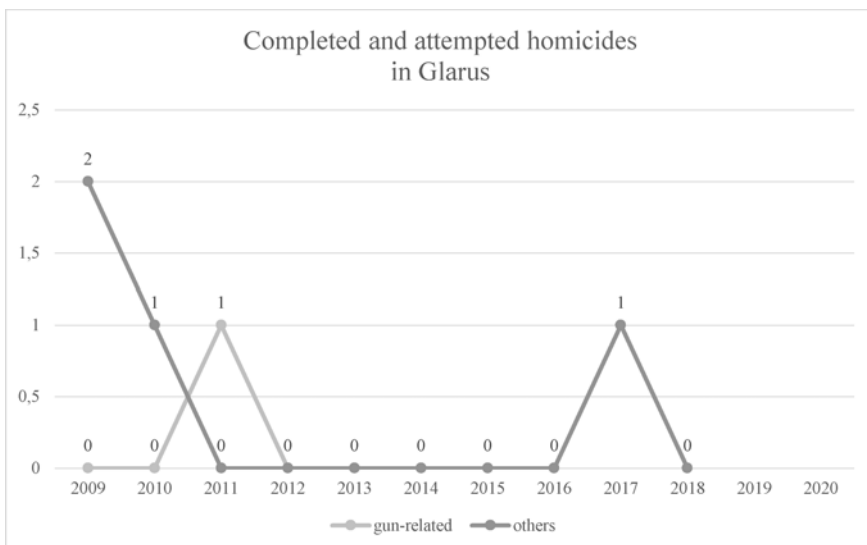
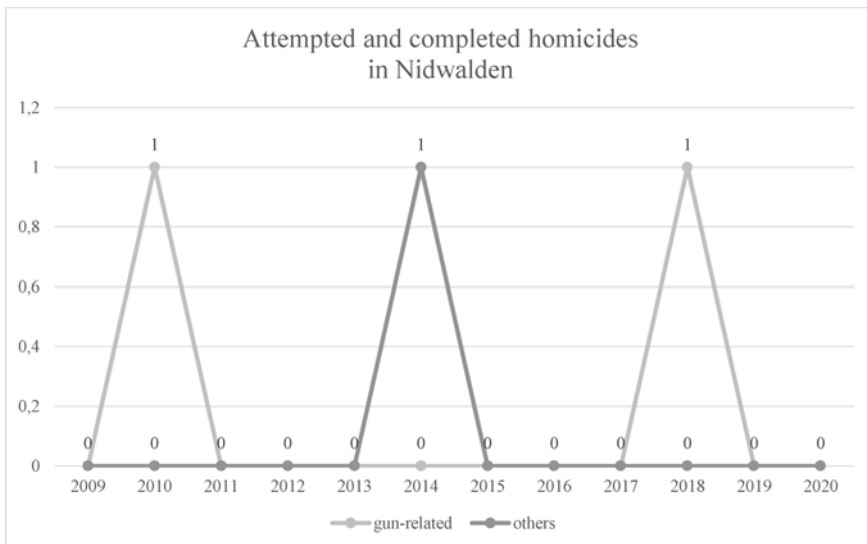


64 The gaps in 2013 and 2016 are due to the incomplete data basis received from the Canton of Basel Landschaft.

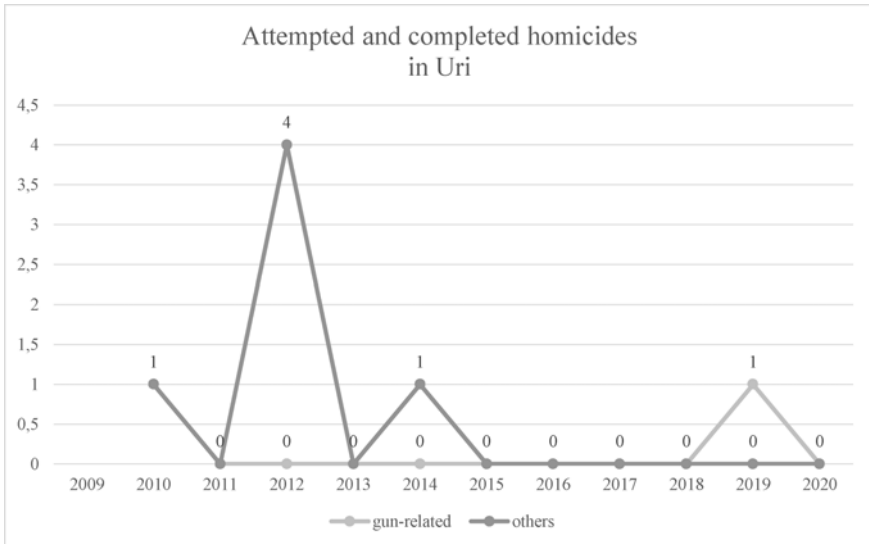
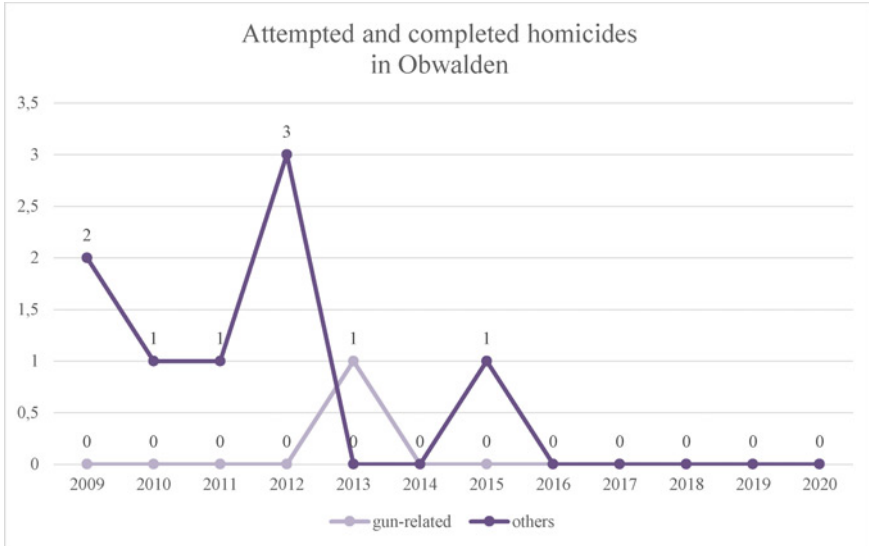
65 The gaps in 2021 and 2014 are due to the incomplete data basis received from the Canton of Thurgau.

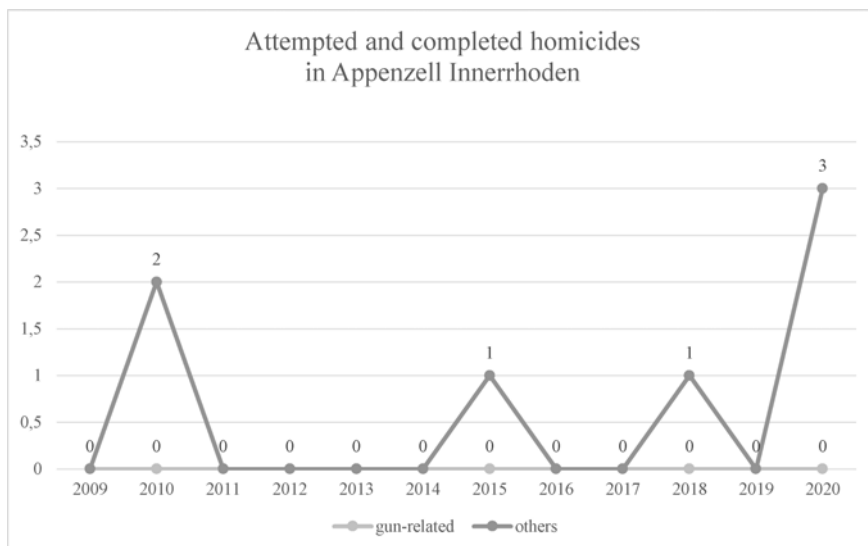






66 At the time of collection, there was no data available for 2019 and 2020.





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