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TRANSFER OF ARMS, VIOLATIONS, OBLIGATIONS AND INTERNATIONAL RESPONSIBILITY[1]

TRANSFERENCIA DE ARMAS, VIOLACIONES, OBLIGACIONES Y RESPONSABILIDAD INTERNACIONAL

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Abstract: International practice has shown that the trafficking, trade, import and export of arms are a threat to the violation of rights, world peace and the dignity of the human person. Because weapons fuel forms of internal repression or armed aggression in violation of international law. Because weapons are used for peoples seeking their own self-determination. Because weapons according to their nature and their use are in contrast with the principles and norms of international humanitarian law. The present work will make a doctrinal and jurisprudential excursus to clarify and offer a panorama of the single juridical corpus of armaments that we can define as "international law of disarmament". The main objective of arms regulation is the complete banning of certain types of weapons, which are considered particularly harmful to humans or which have indiscriminate effects on the civilian population, even speaking for the commission of international crimes.

Key words: trafficking of arms, international law, international responsibility, ARSIWA, international criminal law, international jurisprudence, humanitarian law, protection of human rights, UN law, SALW, ATT, ECOWAS, Wassenaar Agreement, CoCom, ILC, due diligence, conventional arms, erga omnes, JCE I, II, III, *mens rea*, aiding, abetting, ICTY, ICTR, STL, ICJ, ITLOS, CFSP, EU security law.

Resumen: La práctica internacional ha demostrado que el tráfico, comercio, importación y exportación de armas son una amenaza para la violación de los derechos, la paz mundial y la dignidad de la persona humana. Porque las armas alimentan formas de represión interna o agresión armada en violación del derecho internacional. Porque las armas son para los pueblos que buscan su propia autodeterminación. Porque las armas según su naturaleza y su uso están en contradicción con los principios y normas del derecho internacional humanitario. El presente trabajo hará un excursus doctrinal y jurisprudencial para esclarecer y ofrecer un panorama del cuerpo jurídico único de armamento que podemos definir como "derecho internacional del desarme". El principal objetivo de la regulación de armas es la prohibición total de cierto tipo de armas, que se consideran particularmente dañinas para el ser humano o que tienen efectos indiscriminados sobre la población civil, incluso hablando de la comisión de crímenes internacionales.

Palabras clave: tráfico de armas, derecho internacional, responsabilidad internacional, ARSIWA, derecho penal internacional, jurisprudencia internacional, derecho humanitario, protección de los derechos humanos, derecho de la ONU, APAL, TCA, CEDEAO, Acuerdo de Wassenaar, CoCom, CDI, debida diligencia, armas convencionales, erga omnes, JCE I, II, III, *mens rea*, complicidad, ICTY, ICTR, STL, ICJ, ITLOS, CFSP, EU security law.

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1.INTRODUCTION

The history of international law in the arms sector has shown up to the present day that attempts at disarmament have failed, despite the "legislative" promotions of a mandatory nature and soft law from the United Nations (UN). The UN organization has not stopped fighting and has not given up the place of its central role for a world organization that seeks to resolve international disputes and establish world peace. The regulation of arms is a necessary tool, both in view of the maintenance of peace and international security for the final purpose of human security, but also in view of the achievement of the sustainable development goals as we have noted from the spirit of the UN Agenda for 2030, based on the spirits of the UN and "to save succeeding generations from the scourge of war"[2].

It dates back to 1925 with the Geneva Convention[3], the idea of creating a single treaty-based discipline regarding the international transfers of weapons of war. We arrived in 1990 when the first attempts to regulate this type of arms transfer were noted through the creation of the Wassenaar Arrangement, as a soft law act to replace the previous Coordination Committee (CoCom)[4] also based informally on NATO Member States and on a general discourse of proliferation at a regional level which had as its objective the fight against the spread of firearms, Small Arms and Light Weapons (SALW), and Mine Action (MA)[5].

The main organ and coordinator of all this attempt was the UN which according to its own principles have tried to cooperate and establish a regime of national, political and legal

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2Preable of the Charter of the UN. See ex multis: H. ABI-SAAB, K. KEITH, G. MARLEAU, C. MARQUET, Evolutionary interpretation and international law, Hart Publishing, Oxford & Oregon, Portland, 2019. F. COUVEINHES MATSUMOTO, R. NOLLEZ GOLDBACH, Les États face aux juridictions internationales, Pedone, Paris, 2019. E. DAVID, Principles de droit des conflits armèes, ed. Larcier, Bruxelles, 2019. J. COMBACAU, S. SUR, Droit international public, LGDJ, Paris, 2019. S. BESSON, Droit international public, Stämpfli Verlag, Bern, 2019. J. DE HEMPTINNE, Les conflits armès en mutation, Pedone, Paris, 2019. U. LINDERFALK, Understanding jus cogens in international law and international legal discourse, Edward Elgar Publishers, Cheltenham, 2020. C.A. CASEY, Nationals abroad: Globalization, individual rights and the making of modern international law, Cambridge University Press, Cambridge, 2020. K. MEHTIYEVA, La notion de coopèration judicaire, LGDJ, Paris, 2020. C. TOMUSCHAT, C. WALTER, Völkerrecht, Nomos, Baden-Baden, 2021. A. ZOURABICHVILI, La Securitè nationale et le droit international, L'Harmattan, Paris, 2021. L.A. ALEDO, Le droit international public, Dalloz, Paris, 2021. D. ALLAND, Manuel de droit international public, PUF, Paris, 2021. A. NOVOSSELOFF, Le Conseil de Sècuritè des Nations Unies, CNRS, Paris, 2021. N. JEVGLEVSKAJA, International law and weapons review. Emerging military technology under the law of armed conflict, Cambridge University Press, Cambridge, 2022. B. VAN DIJK, Preparing the war. The making of the Geneva Conventions, Oxford University Press, Oxford, 2022. W. KÄLIN, A. EPIFANY, M. CARONI, J. KÜNZLI, B. PIRKER, Völkerrecht, Stämpfli Verlag, Bern, 2022. N. NEDESKI, Shared obligation in international law, Cambridge University Press, Cambridge, 2022. P. DAILLIER, M. FORTEAU, A. MIRON, A. PELLET, N. QUOC DINH, Droit international public, ed. LGDJ, Paris, 2022.

3Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed in 1925.

4G. ADLER-KARLSSON, Western economic warfare, Stockolm, Almqvist and Wiksell, 1968, pp. 52ss. P.C. WEBSTER, CoCom: Limitations on the effectiveness of multilateral export controls, in Wisconsin International Law Journal, 106, 1983, pp. 106ss. R. VAN DEN HOVEN VAN GENDEREN, Cooperation on export control between United States and Europe: A cradle of conflict in technology transfer, in North Carolina Journal of International Law and Commerce Regulation, 14, 1989, pp. 391-424.

5A.J. FALODE, Small Arms and Light Weapons (SALW) and transnational crime in Africa, in Vestnik RUDN. International Relations, 20 (1), 2020, pp. 160-168. U. SAMBO, B. SULE, A.U. DERIBE, A. AHMED, The impact of Small Arms and Light Weapons (SALW), in The International Journal of Humanities, Arts and Social Sciences, 64 (4), 2020, pp. 152ss.

control of international inspiration. The last attempt at this effort was the stipulation of the Arms Trade Treaty (ATT)[6] which established the export of arms as a common mandatory

6C. DA SILVA, B. WOOD, Weapons and international law: The Arms Trade Treaty, ed. Larcier, Bruxelles, 2015. L. LUSTGARTEN, The Arms Trade Treaty: Achievements, failings, future, in International and Comparative Law Quarterly, 64, 2015, pp. 569ss. M. BRANDES, All's well that ends well or "much ado about nothing"?: A commentary on the Arms Trade Treaty, in Goettingen Journal of International Law, 5, 2013, pp. 399ss. K. DOERMANN, Adoption of a global Arms Trade Treaty: Challenges ahead, in Chatham House, International Law Summary, 2013. In particular in the section of "Principles" was affirmed that: "The inherent right of all States to individual or collective self-defence as recognized in article 51 of the UN Charter (Preable, principle 1) (…) the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms (…) (Preamble, Principle 7). The art. 1 affirms that: "(…) the object of this Treaty is to: -Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; prevent and eradicate the illicit trade in conventional arms and prevent their diversion (…)". Through the Resolution no. A/71/259 of 29 July 2016, the Register also refers to drones and remotely piloted aerial vehicles, a category of weapons which, on the other hand, remains excluded from the scope of the ATT. Art. 6 affirms that: "(...) that no State party authorizes a transfer of conventional weapons, ammunition or related components, if: -would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations (…); -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 (…)". Par. 3 of art. 6 affirms that: "A State party shall not authorize any transfer (…) if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party (...)". For further analysis see also: P. MEYER, A banner year for Conventional Arms Control? The Arms Trade Treaty and the small arms challenge, in Global Governance, 20, 2014, pp. 207ss: "(…) prohibitions in some cases and authorizations subject to risk assessments in others (…) if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party (...)". According to the US Policy of 2014 in relation to the drone is affirmed that: "(…) all arms transfer decisions will be consistent with relevant domestic law and international commitments and obligations, and will take into account the following criteria: Appropriateness of the transfer in responding to legitimate U.S. and recipient security needs; Consistency with U.S. regional stability interests, especially when considering transfers involving power projection capability, anti-access and area denial capability, or introduction of a system that may foster increased tension or contribute to an arms race; The impact of the proposed transfer on U.S. capabilities and technological advantage, particularly in protecting sensitive software and hardware design, development, manufacturing, and integration knowledge; The degree of protection afforded by the recipient country to sensitive technology and potential for unauthorized third-party transfer, as well as in-country diversion to unauthorized uses; The risk of revealing system vulnerabilities and adversely affecting U.S. operational capabilities in the event of compromise; The risk that significant change in the political or security situation of the recipient country could lead to inappropriate end-use or transfer of defense articles; The degree to which the transfer supports U.S. strategic, foreign policy, and defense interests through increased access and influence, allied burden sharing, and interoperability; rights, democratization, counterterrorism, counterproliferation, and nonproliferation record of the recipient, and the potential for misuse of the export in question; The likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit human rights abuses or serious violations of international humanitarian law, or identify the United States with human rights abuses or serious violations of international humanitarian law; The impact on U.S. industry and the defense industrial base, whether or not the transfer is approved; The availability of comparable systems from foreign suppliers; The ability of the recipient to field effectively, support, and appropriately employ the requested system in accordance with its intended end-use; The risk of adverse economic, political, or social impact within the recipient nation and the degree to which security needs can be addressed by other means (…)" (par. 2). United States Department of State, U.S. Export Policy for Military Unmanned Aerial Systems, Fact Sheet, Office of the Spokeperson, 17 February 2015.

criterion[7]. In particular, the UN Member States initially declare themselves convinced that they will act: "(…) respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949[8], and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights (...)"[9], then establish that each Member State, before authorizing an export, will have to assess whether this transfer: (i)commit or facilitate a serious violation of international humanitarian law; (ii)commit or facilitate a serious violation of international human rights law (...)"[10].

Within this framework, we have the EU's attempts regarding the sale of defense equipment to their respective administrations[11] and on the control of transfers of dual-purpose assets[12],

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A.A.V.V. US policy on the export of Unmanned Aerial Systems (UAS): A detailed look and analysis, Stepoe & Johnson LLP Publication, 7 April 2015. D.L. HALL, B. DANIELS, D. GOREN, U.S. Regulation of the use and export of unmanned aerial systems, in TerraLex Connections Newsletter, 23 April 2015. The United States for the first time, as we can see, have tried to impose certain legal limits referring to the norms of international law regarding drones as the main purpose of protecting human rights during an armed conflict. The historical rules of the UN are repeated regarding the limits of legitimate defense and the prohibition of military drones for surveillance of the civilian population. Along with the legal point, the debate on the competitive market in this sector also remains open, given that the purpose is the oligopoly in this sector and the increase in the rise in the relative demand. Obviously, the international standards on liability for transfer were also reported as well as the general line on the opinio juris relating to international rules on liability. B. KELLMAN, Controlling the Arms Trade: One important stride for humankind, in Fordham International Law Journal, 37, 2014, pp. 687ss. L. LUSTGARTEN, Law and the arms trade: Weapons, blood and rules, Bloomsbury Publishing, New York, 2020. S. CHESTERMAN, D.M. MALONE, S. VILLALPANDO, The oxford handbook of United Nations Treaties, Oxford University Press, Oxford, 2019, pp. 132ss.

7See art. 7 ATT.

8B.VAN DIJK, Preparing the war. The making of the Geneva Conventions, op. cit.,

9S. CHESTERMAN, D.M. MALONE, S. VILLALPANDO, The oxford handbook of United Nations Treaties, op. cit.

10Art. 7 ATT, S. CHESTERMAN, D.M. MALONE, S. VILLALPANDO, The oxford handbook of United Nations Treaties, op. cit.

11See the Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance), OJ L 216, 20.8.2009, pp. 76–136. The Directive was referred to the limitation of the object and purpose in relation to the application of the rules to specific subjects. The purpose of the Directive was to extend the material scope not only to public or governmental authorities in the field of defense (ministries and military departments), but also to those subjects outside the military administration who are constantly involved with the same as for companies in the field of security and industries for the production of armaments, for example.

12CJEU, C-367/89, Aimé Richardt et Les Accessoires Scientifiques snc (Richardt) of 4 October 1991, ECLI:EU:C:1991:376, I-4645. See also in argument: A. CHWIADKOWSKA, J. MASZTALERZ, Defence procurement: The ECJ keeps its ground on "dual-use" products, in European Procurement and Public-Private Partnership Law Review, 4, 2012, pp. 289-292, which is affirmed that: "(…) on the contrary, they suggest that, once the assessment has been made in practice, where the product has already been modified by the supplier offering it a military purpose and the administration intended to purchase that product to use it for that purpose, the derogation pursuant to art. 346 TFEU. The thesis, however, is not convincing: it is difficult to prove that the supplier wanted to assign an exclusively military purpose to his product if the good can also be marketed for civilian use, or the technical characteristics of the same go in the sense of admitting the twofold purpose; this without prejudice to any express provision in the contract for the award of the contract by which this "single conversion" of the asset is admitted. The question, therefore, would no longer be the application of the aforementioned exception, but would go even further upstream of the same, or by evaluating the choice of the administration to start a negotiated procedure without a tender admitted by the relevant legislation (...)". See also in argument the next ruling of the CJEU: C-337/05, Commission v. Italy (Agusta Elicotteri I case) of 08 April 2008, ECLU:EU:C:2008:203, I-02173, par. 14ss. In the conclusions the Advocate General Jacobs affirms

civil and military (dual-use)[13], the related specific resolutions of the Security Council (SC) that through their commercial blocks to imports of a sanctioning nature have established the

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that: "(...) the derogation was effective even without providing for the obligation to publicize the procedure (paragraph 47) (...) if the derogations were envisaged and the situation abstractly fell within these derogations, the violation could be considered justified (...). We continue with the case: C-72/83, Campus Oil of 10 July 1984, ECLI:EU:C:1984:256, 1984-02727, par. 32-37. T. STOREY, A. PIIMOR, Unlocking European Union law, Routledge, London, New York, 2018. C-70/94, Fritz Werner Industrie-Ausrüstungen GmbH v. German Federal Republic of 17 October 1995, ECLI:EU:C:1995:328, I-03189. For further analysis see also: C. BARNARD, The substantive law of the European Union, Oxford University Press, Oxford, 2019. As in the case just cited: Aimé Richardt, here too the factual circumstances of the case: "(...) concerned the export of dual-use material, in particular of induction ovens to Libya. The justification by the German government for adopting restrictive measures against the private sector was related to the possibility that national security was seriously damaged by the supply of such material to the Libyan government, which could have used such technology for the development of missile material. As for the cited case: Aimé Richardt, the considerations regarding trade and export restrictions apply, considering the fact that the CoCom agreement remained at the time of the facts (…)".

13Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. For further analysis see also: E. AALTO, Towards a common defence? Legal foundations after Lisbon Treaty, in M. TRYBUS, The Treaty of Lisbon and the future of European law and policy, Edward Elgar Publishing, Cheltenham, 2012, pp. 305ss. M. TRYBUS, The Taylor-made EU defence and security procurement directive: Limitations, flexibility, descriptiveness, and substitution, in European Law Review, 38 (1), 2013, pp. 3-29. A. GEORGOPOULOS, Legislative comment: The new defence procurement directive enters into force, in Law Review, 19, 2010, pp. 13. According to art. 2 of the Directive: "(…) The distinction between these subjects of private law and military administrations dates back to the beginning of the twentieth century, when there was a progressive "publicization" of the arms trade. This movement made progressively lose the privatistic connotation to the arms trade, making this activity only practicable by the aforementioned administrations. After the end of World War II, and up to the 1990s, the distinction between private industry and administration in some cases was further blurred, as a subsequent movement of share acquisition by military administrations was produced to favor reconstruction of those heavily indebted industries after the end of the war (this is the case of AerMacchi, AgustaWestland, BAE Systems and Boeing). With the end of the twentieth century, the phenomenon of privatization of the public sector also affected various realities of the defense market (the example is that of a privatized holding company whose company shares), gradually restoring the economic situation that existed until the beginning of the last century. A more unique than rare case is that of BAE Systems after the 1999 corporate restructuring, initially controlled by majority shares held by the British Government. These shares were gradually sold to private parties, with the exception of the minimum share (so-called one pound share), which allows the government to sit on the board of directors and exercise its right of veto, which, if offenses are committed as a result of international arms trade, could be understood as the power of direction pursuant to art. 8 of the draft articles of the ILC on the responsibility of States (in this sense, see the interrogation at the House of Lords, following the "Al Yamamah" affair, following ascertained corruption by the government of Saudi Arabia, of the 1997, which led to the UK company's subsequent criminal liability in 2010 before US Courts). To art. 1, and on the basis of what is explained in the guides on the directive, where it is stated that, among the recipients of the application, there are also: "(...) body governed by public law (...) established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character that has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law. This might be the case, for example, for science, research and development establishments, emergency services or police forces (...)". A final exclusion provided for in the directive refers to: "(…) procurement agreements concluded between one or more Member States and one or more third States in the EU. Although there is no explicit reference to either defense or security, it is believed that agreements of this type (at least in most cases) are stipulated for precisely these purposes. This would also derive from the context in which the exclusion is inserted, namely that of defense procurement. Furthermore, the reference is not made to the substantive rules of the agreements in question, but to the procedural ones. According to the interpretation offered by the directive, the reference to these rules should be considered in a restrictive sense, that is, only those rules that establish: "(...) a set of distinct rules that specifically concern the award of contracts and provide a minimum of details setting out the principles and the different steps to be followed in awarding contracts" (art. 12, lett. a). Another

debate on the sale, import and export of weapons to and/or from a specific State or to a specific subject or group of individuals on a parallel path to that which such operations do not violate or threaten international peace and security[14] or as a result of an act of aggression, no international crimes are committed. We are therefore talking about a normative fragmentation based on a varied and different standardization (based on the object, the specific category of conventional weapon). And to a regional or universal discipline with the demonstration of a large space of exceptionality of the discipline. Obviously a different relationship exists between all these disciplines. Taking into account that on the basis of the traditional criteria for the interpretation of covenant and derived sources, the main international law criterion of prevalence of the subsequent norm (lex posterior derogat priori) or that of the more specific norm (lex specialis derogat generalis) will be applied.

2.SALE, TRANSFER OF ARMS AND OBLIGATIONS

The sale and transfer of arms is connected with obligations of a substantial nature, i.e. the limits relating to the stipulation of sale agreements. Obligation of the States when they enter into an agreement for political and military cooperation, or when they enter into a memorandum of understanding for the opening of their national market to companies from the other State and to obligations of a contractual nature, is to refer to the limits to prevailing or imperative character. From a procedural point of view it is necessary to refer to the due diligence obligations relevant to States and individuals and to the positive obligations of the State in the field of human rights which could outline the extremes for an international responsibility of the State authorizing the transfer of arms. This is a dynamic interpretation of the notion that leads to a liability of the exporting State for complicity in illegal acts committed by another State[15].

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typical feature of this directive is flexibility, considered essential in procurement procedures for the purchase of defense materials. Although the directive delineates a special right with respect to that contained in the public procurement directive, the doctrine considers that the procedures set up by Directive 2004/18 (now 2014/24) have not been adapted to national security needs. In particular, certain choices of the European legislator are criticized, relating to the lack of express reference to open procedures as practicable by contracting authorities, or to the use of this procedure only in certain sectors of the arms market (in particular, that of ammunition), requests in which they present considerable rates of technicality, and for which the opening of the procedure to competitiveness and competition would not seem to be reasonable (...)" according to the opinion of: B. HEUNINCKX, The EU defence and security procurement Directive, trick or threat?, in Public Procurement Law Review, 20 (1), 2011, pp. 14ss: "the standard procedure".

14W. KÄLIN, A. EPIFANY, M. CARONI, J. KÜNZLI, B. PIRKER, Völkerrecht, op. cit., N. NEDESKI, Shared obligation in international law, op. cit.,

15The notion of complicity was "founded" in practice by the 19th century. In the Cotesworth and Powell case, the British Colombian Mixed Commission established: "(...) to award claims for damages coming from illegal acts of private individuals in Colombia, found that: (…) one nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not to be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such measures are possible: or from its pardon of the offender when such pardon necessarily deprives the injured party of all redress (…)": (Cotesworth and Powell (Great Britain v Colombia) (1875) reprinted in JB Moore, 2 History and Digest of International Arbitration to which the United States has been a party (1989), Vol. II, p. 2082. In the Fourth Report on State Responsibility, Roberto Ago queried: "(...) on whether, the passage "public concern", refers indeed to the failure of the State to punish a private crime as amounting to a public act of the State (making this way the State "complicit" to the crime), or whether by "public concern", the Commission simply meant that in the event of crimes committed towards aliens by private individuals, failure to punish or granting amnesty were actions contrary to the international duties of the State (…)". See R

In this spirit, we recall the extensive reading of art. 3 of the European Court of Human Rights (ECtHR)[16] in specific extradition cases. As for example in the case of Soering v. United Kingdom of 25 January 1989, where the ECtHR held: "(...) that the applicant's extradition to the United States of America where he could be subjected to inhuman and degrading treatment, would have entailed a liability for violation of art. 3 of the ECHR (…)"[17]. In the Chahal v. United Kingdom case of 15 November 1996 the ECtHR stated that: "(…) it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under art. 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to art. 3 in the receiving country (...)"[18]. In these and many other cases[19], the ECtHR relied on the principle of jurisdiction[20], affirming the terms of the responsibility of a State party to the Convention for acts and violations that could be committed by other States.

Ago, Fourth Report on State Responsibility, (1972) 2 YB ILC 71, UN Doc A/CN.4/264 and Add 1, 101. See also the Montijo case the United States-Colombia Commission argued that: "(...) Colombia would accept "as his owns" the liability of the revolutionists that had seized a US ship in the territorial jurisdiction of Colombia and who had been granted amnesty by the State (…): (Montijo (United States v Colombia) (1898) JB Moore, History and Digest of the International Arbitration to which the United States has been a party (Washington Gov't Print Off, 1898), 1421). The State should: "(…) be held responsible for acts of private individuals committed by manifestations of the actual or implied complicity of the government in the act, before or after it either by (the State) directly ratifying or approving the act, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the guilty individual, or to enable the victim to pursue his civil remedies against the offender (…). In argument see also: E.M. BORCHARD, The diplomatic protection of citizens abroad; or The law of international claims, The Banks Law Publishing, 1915, pp. 217ss. V. LANOVOY, Complicity and its limits in the law of international responsibility, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 33-35. The author contends that: "(…) the origins of complicity may be found in the rights and duties of a neutral State. Arguably, the law of neutrality is very much the source also of the principle of due diligence. On the customary origin of complicity see also P.H. AUST, Complicity and the law of State responsibility, Cambridge University Press, Cambridge, 2011.

16For further analysis see also: S. VAN DROOGHENBROECK, Charte des droits fondamentax de l'Union europèenne. Commentaire article par article, ed. Larcier, Bruxelles, 2019. J. MEYER, S. HÖLSCHEIDT (ed.), Charta der Grundrechte der Europäischen Union, ed. Nomos, Baden-Baden, 2019. A.M. CARMONA CONTRERAS, Las clàusulas horizontales de la Carta de Derecho Fundamentales de la Uniòn Europea, E. Aranzadi, Pamplona, 2020. M. BOBEK, J. ADAMS PRASSL, The EU Charter of fundamental rights in the member States, Hart Publishing, Oxford & Oregon, Portland, 2020. H.P. JARASS, Charta der Grundrecht der Europäischen Union: GRCh, C.H. Beck, München, 2020. R. TINIÉRE, C. VIAL, Les dix ans de la Charte des droits fondamentaux e l'Union europèenne, ed. Larcier, Bruxelles, 2020. S. PEERS et al. (eds.), The EU Charter of Fundamental Rights, A Commentary, Hart Publishing, Nomos, C.H. Beck, Oxford & Oregon, Portland, 2021. S. RIPOL CARULLA, J.I. LIGARTEMENDIA UCEIZABARRENA, La Carta de derechos fundamentales de la Uniòn Europea, Marcial Pons, Madrid, 2022. F. CASAROSA, M. MORARU, The practice of judicial interaction in the field of fundamental rights. The added value of the Charter of the Fundamental Rights of the European Union, Edward Elgar Publishers, Cheltenham, 2022.

17S. RIPOL CARULLA, J.I. LIGARTEMENDIA UCEIZABARRENA, La Carta de derechos fundamentales de la Uniòn Europea, op. cit.

18M. BOBEK, J. ADAMS PRASSL, The EU Charter of fundamental rights in the Member States, op. cit.

19ECtHR, Cruz Varas and Others v. Sweden of 20 March 1991; Vilvarajah and Others v. United Kingdom of 30 October 1991. H. KELLER, R. WALTHER, Evasion of the international law of State responsibility. The ECtHR's jurisprudence on positive and preventive obligations under article 3, in The International Journal of Human Rights, 24 (7), 2020, pp. 960ss.

20The individuals who are victims of the violation suffered were also under the jurisdiction of the state that held itself responsible. In the case of arms exports, on the other hand, the victims of the violation are subject to

The insurance of arms export control and the risks included in this type of operation is obligation of each State participating in this operation, i.e. to act with prudence and in conformity with the balance of interests and needs according to the rules of the international community. Within this framework, individuals are confronted with an obligation of a preliminary nature with respect to export, i.e. the identification of an asset with a military purpose. This is a substantial obligation that assumes the characteristic of a procedural obligation in the sense that from the moment of detection of the military nature of the asset during the phase of issuing the authorization, the competent administration and/or the private person(s) participating must notify the purposes, the modus of activation and due checks of screening, evaluation and control of the case. Both the substantive and procedural avenue have the same remaining outcome: arms control at all stages of trade, sale, import and export as a prestigious commodity that can easily be aligned in its nature since it can be used not for defense of a State but for other purposes that are contrary to the general and customary principles of international law.

In practice, as we have understood, the ATT does not consider non-state actors in relation to the transfer of weapons. The ban on the transfer of weapons to non-state actors was proposed by Latin American and African countries but was not included in the final agreement. This is a lacuna included in articles 61[21] and 7ATT[22], which does not extend the

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the jurisdiction of the importing State and not of the State with respect to which a profile of responsibility is built.

1.21"1.A State party shall not authorize any transfer of conventional arms covered under article 2 (1) or of items covered under article 3 or article 4, if the transfer 5 would violate its obligations under measures adopted by the UN Security Council acting under Chapter VII of the UN Charter, in particular arms embargoes; 2.A State party shall not authorize any transfer of conventional arms covered under article 2 (1) or of items covered under article 3 or article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; 3.A State party shall not authorize any transfer of conventional arms covered under article 2 (1) or of items covered under article 3 or article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party (...)".

1.22"1.If the export is not prohibited under article 6, each exporting State party, prior to authorization of the export of conventional arms covered under article 2 (1) or of items covered under article 3 or article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with article 8 (1), assess the potential that the conventional arms or items: -would contribute to or undermine peace and security; -could be used to: a)commit or facilitate a serious violation of international humanitarian law; b) commit or facilitate a serious violation of international human rights law; c)commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a party; or d) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a party; 2.The exporting State party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States; 3.If, after conducting this assessment and considering available mitigating measures, the exporting State party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State party shall not authorize the export; 4.The exporting State party, in making this assessment, shall take into account the risk of the conventional arms covered under article 2 (1) or of the items covered under article 3 or article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children; 5.Each exporting State party shall take measures to ensure that all authorizations for the export of conventional arms covered under article 2 (1) or of items covered under article 3 or article 4 are detailed and issued prior to the export; 6.Each exporting State party shall make available appropriate information about the authorization in question, upon request, to

obligations of states to non-state actors as well. The two norms are limited to prohibiting transfers of arms that contribute to the violation of human rights, humanitarian law, and the commission of international crimes without precluding the prohibition to a specific category of recipients of the weapons which can be made up of either non-state entities.
Continuing with the arms trade: "(...) worth of billions of dollars annually, and contributes significantly to many nations' international trade balances (...)"[23]. This is an economic aspect that emerges from other considerations, which reveal how "(…) the obvious fact that sales, loans, and gifts of weapons have become a huge global business and a veritable hinge of global politics", and consequently "(…) one might indeed be tempted to claim that the international trade in arms-in all its aspects, from the smuggling of a crate of small arms to a clandestine revolutionary movement, to the transfer of a Phantom, Mirage or MIG jet to governmental clients of major powers-has become the weightiest and most important instrument of international power and diplomacy (...)"[24].
The meaning of the term of "trade" used in Anglo-Saxon legal language and also in the trafficking and sale of arms was reflected in an award of 1902, which took place in the dispute between France and the United Kingdom relating to a military incident that took place in African territories[25]. With the relative decision, the arbitration judges wanted to highlight only the trading activities that: "(...) constitute the fundamental basis of the "trade" in arms, or they aimed to establish in which cases such activities could be permitted . This was found on the basis of the provisions of art. VIII of the Final Act of the Brussels Conference of 1890[26] (…) which established the relevant activities for the exchange of weapons and ammunition, and indicated that the weapons could not be "données, cédées, ou vendues" to third parties (...)"[27]. The arbitral tribunal has intensified an additional activity at the term "trade", namely the donation, which has always generated ambiguity of a legal nature regarding the transfer of weapons. This profile was highlighted by the International Committee of the Red Cross when drafting the text of the ATT Treaty which was opened for signature on 2 April 2013[28].

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the importing State party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies; 7. If, after an authorization has been granted, an exporting State party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State".

23D. MUSSINGTON, The international control of the arms trade, in Revue Belge de Droit International, 1993, n. 1, pp. 43-57. P. COPNISH, Amrs trade and Europe, Chattham House. The Royal Institute of International Affairs, 1995, pp. 111ss. P. LEVINE, R. SMITH, The arms trade, security and conflict, Routledge, London & New York, 2003.

24R.E. HARKAVY, Arms trade and international systems, Ballinger Publishing Company, Cambridge, 1975, pp. 4ss.

25See the Arbitral award relating to the dispute between Great Britain and France, given by Baron Lambermont in Brussels on 15 July 1902, and concerning the case of Sergent Malamine, 1902, in Reports of International Arbitral Awards, 2012, vol. 29, pp. 356-363.

26See the Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors, 2 July 1890. The Convention was amended and revised by the Treaty of Saint Germaine-en-Laye of 10 September 1919, in League of the Nations Treaty Series, n. 202, 1922. For further details see: W.C. WHATLEY, The gun-slave hypothesis and the 18th century British slave trade, in Explorations in Economic History, 7, 2018, pp. 85ss. J.S. MARTINEZ, The slave trade and the origins of international human rights, Oxford University Press, Oxford, 2012.

27J.S. MARTINEZ, The slave trade and the origins of international human rights, op. cit.

28Arms Trade Treaty, A/CONF.217/2013/L.3, adopted by resolution of the UN General Assembly n. 67/234 B, LXXVII section, 2 April 2013.

Within this field, the term "transfer" is considered as an act to include "les activités exportatrices du secteur public et privé qui portent tant sur l'équipement militaire proprement dit que sur les pièces de rechange et qui peuvent impliquer également les services d'assistance technique"[29]. While, the term "transit", is considered to include: "(…) l'opération par laquelle les armes d'un pays sont autorisées à traverser le territoire d'un autre pays sans y trouver leur destination finale"[30]. The term "transit" does not have as its final destination the country in which it is established, because in this way the service of giving is not perfected, but only that of making, that is, the mere passage of arms is allowed by the territorial state on its own as on other territories. In the term "transit" the doctrine has indicated a specific aspect of the "transfer" procedure[31], applied weapons of war. The economic purpose is not relevant in the legal analysis involving the transfer and transit activity. And in the case of the transfer, an agreement is necessarily needed, about an economic consideration that has occurred between the parties and that the completion of the exchange takes place in a synallagmatic world.

In reality, the doctrine[32] chooses the notion of illicit trafficking that was contained in the Inter-American Convention on Firearms of 1997 (art. 1, par. 2)[33] which defines the trafficking activity as "(…) the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State party to that of another State party, if anyone of the State parties concerned does not authorize it (...)". Thus is added a further constitutive aspect emerging from the UN Protocol on firearms of 2001 (art. 3, lett. E)[34], namely the correct marking of the weapon in accordance with the provisions of the same Protocol. The characteristics included in the 1997 Convention and in the 2001 Protocol are considered relevant for the purpose of identifying the characteristics of arms trafficking, i.e. a) the cross-border nature of the transfer, b) the lack of State authorization to carry out the transfer and c) the additional requirement of traceability of weapons under the provisions on marking[35].

29R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, ed. Pedone, Paris, 1980, pag. 14.

30R. YAKEMTCHOUK, Le transit des armes de guerre, in Revue Générale de Droit International Public, 2, 1979, pp. 2ss. R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., par. 2. F. RAMEL, T. BALZACQ, Traitè de relations internationales, SciencesPo, Les Presses, 2013, Paris. G. MAURICIO, B. OLVERA, The Security Council and the illegal transfer of small arms and light weapons to non-State actors, in Mexican Law Review, 6 (2), 2014. X. ZHANG, Dispute settlement under disarmament treaties, in Max Planck Encyclopedia of International Law, 2021.

31R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit.

32Z. YIHDEGO, The arms trade and international law, Hart Publishing, Oxford & Oregon, Portland, 2007, pp. 84ss.

33Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, A-63, signed a Washington (DC) of 14 November 1997. For further analysis see also: C. AHLSTRÖM, The status of multilateral export control regimes: An examination of legal and non-legal agreements in international cooperation, Iustus Forlag, Uppsala, 1999. G. DEN DEKKER, The law of arms control. International supervision and enforcement, Martinus Nijhoff Publishers, Dordrecht, 2001, pp. 50ss. O. GREENE, Conventional arms control. Problems and prospects, in A.T.H. TAN, Research handbook on the arms trade, Edward Elgar Publishers, Cheltenham, 2020.

34See 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, adopted with Resolution of the General Assembly of the UN A/Res/55/255 of 8 June 2001.

35Z. YIHDEGO, The arms trade and international law, op. cit.

The commercial or economic aspect has no relevance because it is not included in the sphere of the character of illegality. There is also a less recognized definition of "trafficking"[36], which includes activities such as: "(…) import, export, acquisition, sale, delivery, movement, or transfer-whether or not for financial gain-of new or surplus conventional weapons and military equipment, including parts, components, and ammunition between States, non-State entities, or between States and non-State entities"[37]. In this case, the activities included in the notion of trafficking are similar to those accepted in the Inter-American Convention of 1997[38] and in the UN Protocol of 2001. The main players in exchanges are therefore highlighted: states and non-state bodies, individuals. This definition prefers to a new requirement recognized in international jurisprudence[39], according to which

36A.E. CASSIMATIS, K. GREENWOOD, Arms, traffic in, in Max Planck Encyclopedia of Public International Law, 2009.

37A.E. CASSIMATIS, K. GREENWOOD, Arms, traffic in, op. cit.

38Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, A-63, signed a Washington (DC), 14 November 1997.

39ICJ, Military and paramilitary activities in Nicaragua (Nicaragua v. United States), precautionary measures, ordinance, 10 May 1984, ICJ Reports 1984. T.D. GILL, The law of armed attack in the context of the Nicaragua case, in Hague Yearbook of International Law, 1988, pp. l32ss. L. DOSWALD-BECK, The legal validity of military intervention by invitation of the Government, in British Yearbook of International Law, 59, 1985, pp. 190ss. J.N. NORTON MOORE, The Nicaragua case and the deterioration of world order, in American Journal of International Law, 77, 1987, pp. 152ss. R.S.J. MACDONALD, The Nicaragua case: New answers to old questions, in Canadian Yearbook of International Law, 24, 1986, pp. 128ss. F.L. MORRISON, Legal issues in the Nicaragua opinion, in American Journal of International Law, 81, 1987, pp. 160ss. D.N. WHITE, C. HENDERSON, Research handbook on international conflict and security law, Edward Elgar Publishers, Cheltenham, 2013, pp. 197ss. J.A. GREEN, The International Court of Justice and self-defence in international law, Hart Publishing, Oxford & Oregon, Portland, 2009. In the same orientation was expressed also judge R. Ago in the separate opinion alleged in the sentence which is stated that: "(...) It can never be sufficiently emphasized that acceptance of court compulsory jurisdiction on the basis of art. 36, par. 2 of ICJ Statute is a sovereign, voluntary act the effects of which are strictly confined to the limits within which it was conceived and intended (...)" (par. 83). See also Separate Opinion of Judge Ago, para. 18. It should noted that the ICJ: "(…) attributed instead the attacks perpetrated by the "Unilaterally Controlled Latino Assets'" (UCLAs) in Nicaragua to the United States. The Court held in fact that "although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the UCLAs while the United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established (…)" (par. 86). For further analysis see also: I. KACZOROWSKA-IRELAND, Public international law, ed. Routledge, London & New York, 2015. I. BUGA, Modification of treaties by subsequent practice, Oxford University Press, Oxford, 2018. I.F. DEKKER, W.G. WERNER, Governance and international legal theory, ed. Springer, Berlin, 2014. AG. OUDE ELFERINK, The delimitation of the continental shelf between Denmark, Germany and the Netherlands, Cambridge University Press, Cambridge, 2014. ICTY, see the case Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, parr. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, Prosecutor v. Krajišnik, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Id, Prosecutor v. Brđanin, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and Id, Prosecutor v. Popović et al., Judgment, Case No. ICTY-05-88-T, 10 June 2010. H. BLAISE NGAMENI, La diffusion du droit international pènal dans les ordres juridiques africaines, ed. L'Harmattan, Paris, 2017. M.A. DRUMBL, Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials, in Columbia Human Rights Law Review, 29, 1998. H. ALONSO, Current trends on modes of liability for genocide, crimes against humanity and war crimes, in C. STAHN, L. VAN DEN HERIK (eds.), Future perspectives on international criminal justice, T.M.C. Asser Press, The Hague, 2010, pp. 522-524. S. MANACORDA, C. MELONI, Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?, in Journal of International Criminal Justice, 9 (1), 2011, pp. 165ss. In the Kvočka et al. case, the Appeals Chamber emphasized that it is the accused person's knowledge that is central, i.e. what was natural and foreseeable to this person. More specifically, the Appeals Chamber

would disclose as arms trafficking also the: "(…) supply of weaponry together with other forms of military assistance, such as technical assistance, technology transfer, and training the personnel of the recipient State or non-State entity (...)"[40].

held that: "(...) Participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him (…)". Kvočka et al., judgment, AC, ICTY, 28 February 2005, para. 86, in the same spirit: Limaj et al., judgment, TC, ICTY, 30 November 2005, par. 512. (D. LIAKOPOULOS, International criminal justice and respect for the rule of law: The view of the EU, in Juris Gradibus, 2018). And have found it confirmation in the next cases from the ICTY: ICTY, Prosecutor v. Boškoski and Tarčulovski, Judgment, AC, IT-04-82-A, 19 May 2010, par. 21. (M.S. ELLIS, C. CHERNOR JALLOH, The International Criminal Court in an effective global justice system, Edward Elgar Publishing, Cheltenham, 2016. L. CARTER, R. MULGREW, D. ABELS, Research handbook on the international penal system, Edward Elgar Publishing, Cheltenham, 2016. W.A. SCHABAS, International criminal law, Edward Elgar Publishing, Cheltenham, 2012.) ICC, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, AC, ICC-01/04-01/06-772, 14 December 2006, par. 293. K. AMBOS, The first judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive analysis of the legal issues, in International Criminal Law Review, 12, 2012, pp. 136ss. ICTY, Prosecutor v. Momčilo Perišić, Trial Judgment, op. cit., par. 72. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, op. cit., par. 682. ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 32. The same definition from the ICC in the next cases: International Criminal Court (ICC), Prosecutor v. Germain Katanga, Décision relative à la peine (article 76 du Statut), TC II, ICC-01/04-01/07, 23 May 2014, par. 1173. ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to article 61(7)(a) and (b), TC III, ICC-01/05-01/08, 21 June 2016, par. 132. The definition was accepted also from the Committee of the International Red Cross: ICRC, Opinion Paper: How is the Term "Armed Conflict" Defined in International Humanitarian Law?, March 2008. See also: D. FLECK, The handbook of humanitarian law in armed conflicts, Oxford University Press, Oxford, 1995, pp. 40ss. E. DAVID, Principes de droit des conflicts armés, ed. ULB, Bruxelles, 2002, pp. 109. H.P. GASSER, International humanitarian law: An introduction, in H. HAUG (ed. by), Humanity for all. The International Red Cross and the crescent movement, Paul Haupt, Berne, 1993, pp. 510ss. D. SCHINDLER, The different types of armed conflicts according to the Geneva Conventions and Protocols, in Recueil des Cours, ed. Brill, Bruxelles, vol. 163, 1979, pp. 131ss. A.A.V.V., Commentary on the second Geneva Convention, Cambridge University Press, Cambridge, 2017.V. DAMNJANOVIC, Die Beteilingunsformen im deutschen und serbischen Stafrecht sowie in der ICTY-Rechtsprechung, BWN Berliner Wissenschafts Verlag, Berlin, 2013, pp. 246ss. A. ORIOLO, International criminal tribunal for the Former Yugoslavia. Legal maxims: Summaries and extracts from selected case law, in The Global Community Yearbook of International Law Journal, 2, 2002. International Criminal Court for Ruanda (ICTR), see the case: ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, TC-II, ICTR-95-1-T, 21 May 1999, par. 138-140. J. KNOOPS, An introduction to the law of international criminal Tribunals. A comparative study, ed. Brill. The Hague, 2014. J. NICHOLSON, Strengthening the validity of international criminal Tribunals, ed. Brill, The Hague, 2018. H. VAN DER WILT, C. PAULUSSEN, Legal responses to transnational and international crimes, Edward Elgar Publishing, Cheltenham, 2017. G. BOAS, P. CHIFFLET, International criminal justice, Edward Elgar Publishing, Cheltenham, 2017.

40B. KELLMAN, Controlling arms trade: One important stride for humankind, op. cit., pp. 687-731. From the historical point of view regarding the limitations on arms transfers we recall the Conference on Conventional Armaments of 10 October 1980, which adopted four instruments (in UN Treaty Series, vol. 137, p. 1342ss.); the Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Cause Excessive Injury or Have Indiscriminate Effects; Protocol (I) on untraceable fragments; Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Traps, and Other Systems; and Protocol (III) on Prohibitions or Restrictions on the Use of Incendiary Weapons. To these were subsequently added the Protocol (IV) on blinding laser weapons of 13 October 1995 (Doc. CCW/CONF.I/16, Part I) and the Protocol (V) on explosive remnants of war of 28 November 2003 (Doc. CCW/MSP/2003/2); the Convention on the Prohibition of the Use, Storage, Production, and Transfer of Anti-personnel Mines and on the Destruction of the same of 18

There is no precise definition or notion in the current state that clearly identifies the conventional weapon. This type of weapon is used as a conventional weapon and is not considered a weapon of mass destruction[41]. Part of the doctrine has tried to make the definition clearer and more comprehensive, meaning by conventional weapon: "(…) all arms, munitions, materiel, instruments, mechanism or devices that have an intended effect of injuring, damaging, destroying or disabling personnel or property (...)"[42]. This orientation also wanted to define the characteristics and purposes that delimit the concept of conventional weapon: "(…) an object, device, munition, or equipment used to apply an offensive capability to object or person (...)"[43].

For the purposes of our present research it would be appropriate to use: a) the terms "trade" or "market" to identify the economic character that qualifies the subject under examination; b) the terms "transfer" and "transit", used in relation to the legal significance of the exchange activities carried out; c) finally, the term "trafficking" for the international transfer of arms carried out illegally, or following the violation of the treaty provisions that provide for such illegality. The doctrine has considered the contractual activities and practices that are perfected in the delivery of the weapon, activities that are not perfected with the delivery of the goods, such as transit by air[44], sea or land and the post-sale activities framed under the terms of "supply" and "economic compensation agreements", or "offset agreements"[45].

The transfer activities and the completion of the same covers the negotiation (including those relating to the production of weapons), the delivery, and finally the execution of the agreements phase. Within this type of classification with regard to related contractual practices, some types of exchange[46] are distinguished: a) the form of the gift[47], the main

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September 1997 (in UN Treaty Series, vol. 211, p. 2056 et seq.), and the Convention on cluster bombs of 30 May 2008 (Doc. CCM/77).

41See: "Conventional weapon", in Dictionary of Military and Associated Terms, 2005.

42International Committee of the Red Cross, A Guide to the Legal Review of New Weapons, Means and Method of Warfare. Measures to Implement Article 36 of Additional Protocol I of 1977, Geneva 2006, pag. 9, n. 17. W. BOOTHBY, Weapons and the law of armed conflict, Oxford University Press, Oxford, 2016, pp. 344ss.

43W. BOOTHBY, Weapons and the law of armed conflict, op. cit.

44M. MILDE, Essential air and space Law, Eleven International Publishing, Utrecht, 2008, pp. 104ss, the Convention: "(...) qualifies these freedoms as" privileges "underlines the exceptional nature that they assume these rights, which must be granted, either through a single authorization, or through the stipulation of a bilateral agreement, or even when a State accedes to the Agreement in question (...)".

45ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27 June 1986, in ICJ Reports, 1986, pp. 14ss., par. 198, "(…) In offset agreements, often stipulated on the occasion of a defense procurement in arms. With these agreements, two States establish a compromise of compensation between the sum of the purchase of the weapons and any previous debts of the purchaser, and in which both the main transfer services and those of supply and military assistance are determined, which are perfected. in the mere maintenance of weapons (carried out primarily or exclusively by the selling State), the training of the local armed forces, and can also establish services not immediately relating to the supply and military assistance service aimed to favor the investments of the supplier's companies, or to exploit the natural resources of the buyer's territory in a completely exclusive way. The offsetting, therefore, would also have the purpose of endorsing any further economic interests on the part of the seller towards the buyer, who has the opposite interest in reducing his debts towards the former. This, obviously, involves a significant "distraction" of resources by the purchasing State (normally, a developing country) (...)", according the opinion of: D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, in European Law Review, 38 (3), 2013, pp. 394ss.

46R. YAKEMTCHOUK, Le transit des armes de guerre, op. cit., pp. 254ss.

47Art. 2 of the Agreement governs material weapons delivery activities. In particular, par. 2 reads: "For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment

profile of which is the lack of an economic-financial counterpart, because a potential political interest at the basis of the transfer prevails[48]. This type of placement is also part of political agreements and to the normalization of diplomatic relations[49]. The gift also takes place within the framework of the establishment of international relations with non-state actors[50], but also in an "indirect" way: that is, when the exchange prefigures the granting of a credit, or a consideration of an economic nature, it is subsequently changed into an exchange for free[51]; b) the second form is that of exchange through barter. The weapons would be delivered against payment in kind, i.e. natural resources of economic interest to the counterparty that accepts this type of exchange[52]. This exchange is not easily discernible from the previous one, except when it is demonstrated that the consideration had an economic character, normally having the form of a natural resource. This type takes the form of offset agreements[53]; c) the third form of arms acquisition is completed through a sale for cash. It is the most widespread form among those States that had large sums of liquid money, deriving from the sale of natural resources of particular value (such as crude oil). This contractual practice has spread with regard to US arms transfers[54], through swap

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and brokering, hereafter referred to as "transfer" (...)". This is a cooperation agreement underlying the donations, because it is necessary that the transferring State does not have an interest of an economic nature and does not demand from the counterpart the necessary payment of an economic benefit, such as money. The donation is a free transfer activity, which pushes the donor to enrich, without any compensation, to a second person, or the donee. Thus, it can also be highlighted that the profit to be allocated is not onerous, since: "(...) the profit has an onerous character when it represents the consideration for a patrimonial sacrifice incurred in view of it, or has as a counterweight the compensation of a patrimonial sacrifice of others. In such cases, it is obvious that the counterparty or the third party was entitled from the beginning to wait for it and to assign it according to a principle of equivalence and reciprocity (...)". D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction, op. cit.

48Think of the armaments that were donated by the American government to the European allies according to the Marshall Plan, for the reconstruction of Europe after the end of the Second World War.

49We remember the gift of armaments by Germany to Israel. This donation played a significant role in the Second Arab-Israeli War and which led to the conquest and occupation of the Sinai Peninsula and the consequent crisis of the Suez Canal of 1956.

50Within this framework, we recall the military support by various Western powers to the Kurdish peshmerga, in order to stop the advance in northern Iraq of the jihadist movement of ISIS (Islamic State of Iraq and Syria).

51See the case of the armaments between the former Soviet Union and Cuba, during the Cuban Revolution; in this sense, read the statements of Fidel Castro in his speech in Paris on November 1, 1962.

52As in the cases of the transfers of Soviet MIG aircraft to the Indian Air Force (1960), upon delivery of manganese ore supplies. Within this framework also in the case of France which concluded twenty-year agreements, between 1974 and 1975, with Saudi Arabia, in which the supply of Dassault-Mirage aircraft and other modern armaments was negotiated, in exchange for about 830 tons of crude oil.

53See also in argument: R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 267ss. The practice of arms transfers has known: "(...) also an evolution of after-sales activities, through offset agreements (...) a definition based on the practice of the States, indicating the offset as: "(...) the commitment of a bidder in a defense procurement tender to perform additional business transactions-besides delivery of the procured good or service itself-in the procuring state in order to foster the economic interests of that State (…)". In these agreements it is customary to insert a series of arbitration clauses, which would benefit the recipient party and which may determine a compensation of the pre-existing debts between the parties, a reduction in the cost of arms transferred and therefore a lower impact on the global economy of the container (...)", according to the opinion of: D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pag. 393. K. BALAKRISHNAN, Technology offsets in international defence procurement, in B. HEUNICKX, The law of collaborative defence procurement in the European Union, Cambridge University Press, Cambridge, 2016. D.E. SCHOENI, Defense offsets and public policy beyond economic efficiency, in Air Force Law Review, 76, 2016.

54Some national legislations make a formal reference to Council resolutions establishing arms embargoes, making them an integral part of the national discipline on export control of conventional arms. In this sense we

agreements containing a "cash and carry" clause[55]. This clause is inserted in the discourse of the neutrality of a State during an armed conflict[56], where: "(...) the action of supplying one of the two belligerents with weapons would entail both the loss of one's neutral status and the blocking of commercial relations with foreign countries (...)[57], and "(...) which, if implemented within a short time frame (within 4 months from the date of conclusion of the agreement), makes it more difficult to impute liability for breach of the inherent obligations the neutral status (...)[58]; d) The fourth form is that of the sale on credit. This sale contrasts with the previous one, because the cash payment prefers the speed and the immediate availability of the consideration. On the other hand, with credit, the facilitation of payment is a practical necessity, but with high costs for weapons and their components, and favors the commercial visibility of the armaments industries. This form always relies on: "(...) the buyer's solvency and the trust that can be placed in it; this therefore implies a considerable political discretion of the States in granting the credit[59] (…) it is only a question of "political color"[60] (...) the possibility of accessing credit for payment also depends on the will of the contracting parties. The doctrine finds, on the one hand, cases of general agreements on credit lines, with which a maximum amount is established, below which it is possible to make purchase orders for military material[61] (...) cases of agreements for the stipulation of

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recall the case of the US ITAR, which provides, in section 126.1 (c), that: "(…) whenever the UN Security Council mandates an arms embargo, all transactions that are prohibited by the embargo and that involve U.S. persons anywhere, or any person in the United States, and defense articles or services of a type enumerated on the United States Munitions List (22 CFR part 121), irrespective of origin, are prohibited under the ITAR for the duration of the embargo, unless the Department of State publishes a notice in the Federal Register specifying different measures. This would include, but is not limited to, transactions involving trade by U.S. persons who are located inside or outside of the United States in defense articles or services of U.S. or foreign origin that are located inside or outside of the United States (...)". Special forms of embargo are also envisaged for some States, in particular for Iraq, Afghanistan, brokering activities involving, directly or indirectly, the states subject to embargo, as provided for in section 129.5, lett. (d): "(...) the sanctions for non-compliance with these, as well as with the obligations prescribed by the Arms Export Contro Act (22 U.S.C. 2778 and 2779), consist both in the nullity of the arms sale and transfer agreement, and imprisonment (including for life), or to the payment of a financial penalty or finally to both (section 127.3). DRC, Libya, Haiti and Vietnam (letters from (d) to (l) of the section shown). Brokering activities that directly or indirectly involve States subject to embargo are prohibited, as provided for in section 129.5, lett. (d). The penalties for non-compliance with these, as well as with the obligations prescribed by the Arms Export Against Act (22 U.S.C. 2778 and 2779), consist both in the nullity of the arms sale and transfer agreement, and in imprisonment (even for life), or to the payment of a financial penalty or finally to both (section 127.3).

55D. ZIMMERMANN, Cash and carry clause, in Max Planck Encyclopedia of Public International Law, October 2009, par. 1.

56M. BOTHE, Neutrality, concept and general rules, in Max Planck Encyclopedia of Public International Law, April 2011, parr. 2ss.

57The discipline of neutrality in time of war is contained in the XIII Hague Convention of 1907 (articles 6-9), in which: "(...) the duties of States not participating in an armed conflict, such as the prohibition of the supply of goods of a military nature or purpose (...) according to art. 7 of the Convention, does not apply to exchanges carried out by private parties and for exchanges of another nature or purpose with one of the warring States (…)".

58R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 257ss.

59R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pag. 258.

60R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 259ss.

61The opening of these lines can cause significant problems to the amount disbursed being used outside its purposes. This is the case of the Rambouillet agreement, stipulated in August 1936 between the General States of France and Poland: "(...) for the granting of a credit line amounting to 2 billion and 300 thousand francs to be allocated for manufacturing and storage of military weapons, to be used in the event of a possible aggression (later, in fact, occurred) by Germany or the Soviet Union. The agreement, according to the French

amount of specific credits, in which the total sum for the purchase of the single type of armament is agreed (...)[62]. These two concessions are also accompanied by the setting of variable interest rates, which depend on the guarantee of solvency of the buyer and on the conditions of a political nature, referred to above.

Within this framework, two forms of risk are also identified, namely: a) the factum politicum, the various forms of internal upheaval and armed conflicts; and b) the factum principis, that is an act of the governmental authority which, from the moment in which it was issued, provides for the breaking of international economic relations between two States, or between a State and a private company for the granting of credit. This type of credit insurance evolves and is used in international political life through the creation of new States which involves on the one hand the collapse of the previous regime, and on the other hand the new government to dissolve the legal bond that bound its predecessor to another State. As in the case of a credit brokerage company, or an international financing organization. In this case, a loan with credit insurance is required, as a main guarantee that can be provided by the exporting State, with the aim of solving any delays in payment or unjustified deferrals, or against the objective impossibility of fulfilling the same[63]. The terms of delivery may vary according to the political, economic, military nature and/or the possibility of configuring a non-fulfillment due to an objective supervening impossibility[64], or the termination of the treaty or the possibility of withdrawing from it[65].

So we can talk about a type of arms transit in times of peace and war. In the case of transit during the peacetime, the freedom of transit typical of international trade is based[66]. Transit during the war includes the assumption of an ongoing armed conflict or not. In this case, the restrictions on the export of arms to a particular State that is at war and the provisions relating to neutrality[67] and the omission and avoidance of the embargo[68] are taken into consideration. In all cases, the will is required whether the interested State or not tries to regulate its transit.

The State enjoys maximum freedom of decision[69] and this entails the violation of any international restrictions. The interest is restrictive from public order which is based on the

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ambassador to Warsaw, Léon Noël (L'agression allemande contre la Pologne, Paris, Flammarion, 1946, p. 144ss), would not have been carried out according to the French intentions to assist in the construction and storage immediate weapons from the Polish side, but with the construction of factories, which were then destroyed as soon as production was started, by the German air force in the summer of 1939 (…)". For further analysis see also: P.R. WILLIAMS, The norm of justice and the negotiation of the Rambouillet/Paris peace accords, in Leiden Journal of International Law, 13, 2000, pp. 212ss.

62The procedures for stipulating the specific credit could range (up to the 1980s) from the selection of buyers (as in the practice of Germany), to the fulfillment of the deferred payment in individual phases of the agreement (as in the French case), to the granting of long-term credit (as regards the agreements entered into with the Soviet Union), up to the granting of credit by the United States, which was based on loans from the Export-Import Bank (Ex-Im Bank), later declared an illegal form of investment by Congress.

63R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 261-262.

64R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 261-262.

65R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 263ss.

66R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 333ss.

67On the transit of weapons of war, see art. 7 of the XIIIth Hague Convention of 1907, and, to a similar extent, the same article of the Vth Convention. See also: Research in International Law. Under the Auspices of the Faculty of the Harvard School of Law, in Supplement Section of American Journal of International Law, vol. 33, 1939, p. 283.

68R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 352ss.

69It is recalled from a political point of view: the Barcelona Convention of 1921 codifies this faculty, however, in art. 7, which establishes: "(...) how this principle is to be observed" as far as possible, that is, "except when

needs of national security, so we can distinguish between: a) regulations governing bilateral agreements between States of a conventional nature. Permissive agreements that also concern land transit in peacetime as well as sea and air transits[70]; b) regulations of a specific conventional nature, i.e. through military alliance agreements established by an agreement and relating to the transit of military goods. In this case the transit limit exists only if expressly established by the will of the States from before. In this case, the transit and the relative authorization for the passage of arms are also based on some other criteria such as: safeguarding internal security; the safeguarding of external security[71] and the obligations deriving from international treaties relating to national defense; as well as the obligations deriving from treaties that have economic purposes; any binding resolutions and decisions of international organizations to which the participating State(s) adhere[72]; and respect for the general principle of international protection and human rights[73].

The practice of arms transfers evolves through after-sales activities, i.e. through offset agreements[74]. The doctrine has identified a definition based on the practice of the States, indicating the offset as: "(…) the commitment of a bidder in a defence procurement[75] tender

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there are objective conditions that prevent the provision of consent. The fact that there have been exceptional cases of refusal to transit has led to the presumption of the birth of a principle of international law, contrasted by the evolution of state practice today, which does not recognize the freedom of transit towards countries that are in a situation of conflict (...)". R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pag. 357.

70R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 355ss.

71R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 362-363.

72The issue of transit posed on the occasion of the civil conflict in Congo, the decision of which merged into par. 6 of Resolution: S/RES./5002 (169) of 24 November 1961.

73See art. 6 ATT, which further provides for compliance with the rules of international humanitarian law relating to the use of certain weapons against the civilian population. For further details see also: J.M. HENCKAERTS, L. DOSWALD-BECK, Customary international humanitarian law, Cambridge University Press, Cambridge, 2012, vol. I-Rules, Rule 17, pp. 56ss and Rules 70-71, pp. 237ss. A. ALEXANDER, A short history of international humanitarian law, in European Journal of International Law, 26 (1), 2015, pp. 112ss.

74R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 270ss. S. FINARDI, P. DANSSÄRT, Transparency and accountability. Monitoring and reporting methods under an Arms Trade Treaty, in International Peace Information Service and TransArms, February 2012, pp. 11-17ss. D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 394ss.

75A State for the defense procurement method can choose the Model Law on Public Procurement model drawn up by UNCITRAL, (United Nations Commission on International Trade Law, Model Law on Public Procurement, adopted with General Assembly resolution 66/95 of 9 November 2011. See in argument: C. NICHOLAS, The 2011 UNCITRAL Model Law on public procurement, in Public Procurement Law Review, 21 (3), 2012, pp. NA112-122). Public and defense procurement follow the need to preserve classified information that is sensitive to national security interests. The preferable solution is to assess the need for secrecy and ensure the transparency of the selection procedures for the purchase. For example, the Model Law of 2011 guarantees this security: "(...) through the application of different methods as regards the evaluation of the offer, the negotiation with the contractor and other information relating to the tender itself, when the contracting party considers that national security needs are equally protected through the use of such methods (…)" (art. 2). In particular according art. 30, par. 2 of Model Law it is specified that access to this type of procurement "(...) is guaranteed if one of the following situations is present: - it is not possible for the contracting authority to formulate a detailed description of the object of the procedure procurement, and the same station considers that dialogue with suppliers or contractors is necessary in order to obtain the most satisfactory solution for its acquisition needs; -the contracting authority seeks to enter into a contract for the purposes of research, experimentation, study or development, unless the contract includes the production of the procurement objects in sufficient quantities in order to establish its own commercial flow or to cover the research and development costs; - the contracting authority determines that the method selected is the most appropriate for the protection of the essential security interests of the State; or -a procedure open to multiple

to perform additional business transactions-besides delivery of the procured good or service itself-in the procuring state in order to foster the economic interests of that state"[76]. Thus, an attempt was also made to identify "(...) the types of implications deriving from these acquisitions, that is: the participation by the industries of the purchasing State in the production of the commissioned weapons (direct offset), the whole production of weapons (licensed production) or only non-fundamental parts of the armament (sub-contracting); the purchase, by the supplying States, of certain armaments produced by the purchaser countries becomes, in fact, an indirect military offset; the purchase, from the buyers' wall, of a certain number of goods that have no relationship with the military material that is delivered (indirect civil offset), identified in a specific practice of authorized barter (...)"[77].

The stipulation of these agreements takes place in the form of contracts with the industries of the receiving State, through the authorization of the specifically designated State body[78]. In these contracts, the contractor identifies the consistency of the compensation requirement. In practice, at the time of acceptance of this offer, the contracting authority identifies the type of compensation that it must offer in practice. After the conclusion of the main framework agreement, the contractor will be authorized to enter into a contract with the authorized industry (iura privatorum). For industrialized countries, economic compensation also becomes a form of commercial expansion on the part of their industries, as they will be engaged in the manufacture of pieces of armaments, or in the replacement of certain components.

To obtain such compensation, it is believed that the State must have an advanced degree of industrial development, in order to bear its industrial production obligations[79]. The doctrine seems to be divided, since on the one hand maintains: "(...) the impossibility of being able to endorse such compensatory practices with developing countries and with those countries whose war industry could not afford huge costs production[80], on the other argues that the possibility of experimenting such compensatory practices would allow the progressive industrial development of these countries, also and above all through sub-contracting agreements (...) "[81].

However, the doctrine is in agreement in indicating: "(...) that the possibility of carrying out compensatory practices would allow the supplier State to re-enter the expenses incurred for the production of such armaments, through the relaunch of certain other sectors of the national industry; it would also allow the purchasing State to avoid a negative impact on its economy, by securing revenue from taxes on production, and by guaranteeing a greater contribution of national labor to production itself; finally, for both and for those who in general participate in industrial development agreements, there would be a sharing of

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contractors has been carried out but no one has broken off, or the tender has been canceled by the contracting authority before the acceptance of subsequent offers submitted to it, and where, on the basis of its own judgment, the 'opening of new open procedures or the choice of a procurement method with restricted or selected participation would seem unable to lead to the conclusion of a contract (…)".

76D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 393ss.

77D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 394ss.

78D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 394ss.

79R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 271ss.

80R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 272.

81D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 394ss.

technological know-how, which would therefore allow a progressive innovation of the industries of the most backward countries (…)"[82].

3.INTERACTION AND FRAGMENTATION OF DISCIPLINES RELATED TO ARMS TRANSFERS. INTERNATIONAL RESPONSIBILITY OF STATES FOR ILLICIT TRANSFERS OF CONVENTIONAL WEAPONS

The transfer of international weapons with a purpose other than that established by the rules of international law establishes a violation and the relative responsibility of the State(s) involved. This is a liability inherent in the transfer of material weapons from a State and individual in the event that the transfer was made in the capacity of private individuals.
Martti Koskenniemi analyzed this phenomenon as a type of fragmentation of legal regimes in international law by referring to the related liability for violation of international norms[83]. This type of fragmentation derives above all from the proliferation of specialized regimes that in part enjoy autonomy, so that the former rapporteur of the International Law Commission (ILC) himself reported that: "(...) is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law (...)"[84]. In reality, the creation of systems with rules necessary for their "self-government" did not take into account what was

82R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 27ss. D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 396, "(...) such compensatory practices should now be considered obsolete, both because of a predominantly competitive regime in the arms market, and because of a particular contractual inequity that such agreements entail (the choice of a single supplier, rather than the obligation to purchase a certain quantity of weapons and defense components or products) (…)".

83Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, parr. 123ss. A/CN.4/L.682, par. 478, "because it seems pointless to try to set any general and abstract preference between the past and the present. It is best, once again, to merely single out some considerations that may be relevant when deciding whether to apply article 31 (3) (c) so as to "take account" of those "other obligations" as they existed when the treaty was concluded or as they exist when it is being applied. The starting-point must be, again, the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the "principle of contemporaneity", with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least: (a) Use of a term in the treaty which is "not static but evolutionary" (...) (b) The description of obligations in very general terms, thus operating a kind of renvoi to the State of the law at the time of its application (...)". For further analysis see also: T. BROUDE, Keep calm and carry on: Martti Koskenniemi and the fragmentation of international law, in Temple International & Comparative Law Journal, 27 (2), 2013, pp. 281ss: "(…) Koskenniemi has also highlighted certain dangers that accompany the phenomenon of fragmentation, even if they are not inherent to it, such as the danger of managerial anti-formalism (…) Koskenniemi's writings on fragmentation undoubtedly have played a prominent part in fragmentation's gradual normalization. This is not necessarily to say that they have influenced the practice of creating fragmentation, which is mainly actor-driven, but they have influenced, in at least two ways, how fragmentation is interpreted and understood (…) fragmentation would seem to be the outcome of pushing the diverse envelopes of utopian demands from international law-stretching one way in the field of international trade law, venturing in another way in the area of human rights law, etc. Yet, at the same time, fragmentation is clearly a reflection of what states actually do which is what they consider to be effective for their own, inevitably political and practical ends (…)".

84Fragmentation of International Law, op. cit., par. 8.

created by other systems or what is valid from the rules of general international law. If we can call it: "ignorance of norms", this creation of systems that lead to a certain type of conflict simultaneously made it necessary to resolve these conflicts through general principles[85]. Conflict theory was also analyzed by the special rapporteur based on two different profiles, namely that of the subject matter of a specific treaty that has been signed by one State with another and/or with other participating States; and that of the legal entity bound by a signed clause of the same treaty[86].

For the second type of conflict there is no ad hoc rule that can regulate conflicts, since in the event that a State is party to two successive treaties on the same matter, it will have the right/faculty to decide which of the two to follow, thus accepting with a mediated manner the source responsibility in the event of non-achievement and implementation of the other treaty. As regards the treaties relating to the same matter, is in force the discipline of art. 30 of the Convention on the law of treaties of 1969[87]. In the event of a conflict between treaty provisions on the same matter, the resolution of the related conflict according to the former Rapporteur Martti Koskenniemi: "should be in pre-existing classification schemes of the matter, which however do not seem to exist (...) a formal classification ratione materiae of a treaty (relating to international trade law or international environmental law) is pure data without any legal value (...)"[88].

The rapporteur Martti Koskenniemi based on the trend of recent decades that has also manifested itself in the arms trade and the proliferation of international agreements of the type: third degree acts and soft law promoted by intergovernmental and non-governmental organizations with a limited research direction in the matter and in the nature and at the same time demanding to prevent the commission of international offenses to take a position also in the matter of arms transfers. Proliferation was accompanied by instruments dealing with single types of weapons and exports concerning the international cooperation system on arms trafficking and related establishment agreements according to the rules of due diligence and the prevention of criminal activities related to transfers of weapons. Phenomenon that was "concluded" with the adoption of the Arms Trade Treaty which dates back to 2013. Treaty that sought to establish common international standards to guarantee national control over export, import, transit, transhipment and brokering in transfers of conventional arms according to the rules of international law[89]. But the related treaty resolved the persistent situation and especially in the case of the conflict between rules since it is a general instrument relating to conventional weapons. In reality it was a treaty that can

85Fragmentation of International Law, op. cit., par. 19.

86Fragmentation of International Law, op. cit., par. 21.

87"(…) 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (o) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty (...)".

88Fragmentation of International Law, op. cit., par. 22.

89Art. 1 of the Treaty.

be derogated from specialized agreements as in the case of international conventions which until now have tried to regulate the transfers of individual conventional weapons.
We return ex novo to the positions of the former Rapporteur Koskenniemi who spoke about the harmonization of legal disciplines in the field of international law as a technique without legal value but with the aim of avoiding conflicts, always leaving the path of diplomacy open for the resolution of disputes[90]. The practice has shown that conflict resolution by diplomatic and consultative means has not had excellent and/or genuine results[91]. A solution of legal interpretation could guarantee the participating parties to resolve the related disputes and it would be appropriate to follow this path in the case of disputes resolved in the matter of conventional weapons[92].
According to Martti Koskenniemi, international responsibility for self-sufficient regimes of international law: "(…) is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation (…) the term is used to refer to interrelated wholes of primary and secondary rules,

90Fragmentation of International Law, op. cit., par. 37. In the same spirit see also par. 41: "There is relatively little-in fact, until recently, astonishingly little-judicial or arbitral practice on normative conflicts (…) this must result in part from the wish of States parties to negotiate issues of apparent conflict between themselves and not to give the power to outsiders to decide on what may appear as coordinating difficulties that may have their roots already in the heterogeneous interests represented in national administrations. And negotiation is rarely about the "application" of conflict-rules rather than trying to find a pragmatic solution that could re-establish the disturbed harmony. Although it might be interesting to discuss the way States have resolved such problems by negotiation, the fact that any results attained have come about through contextual bargaining make it difficult to use their results as basis for some customary rule or other (...)".
91Fragmentation of International Law, op. cit., par. 42. See also in argument: C.J. BERGEN, Resolving treaty conflicts, in George Washington International Law Review, 37, 2005, pp. 640ss.
92We recall the UN Protocol of 2001 on firearms, explosives and warnings and the related art. 21 which states that: "(...) where the parties to the agreement are unable to reach a negotiating agreement to resolve conflicts of interpretation of the same agreement, I can appeal to an arbitral tribunal, or to the ICJ itself. Also art. 19 of the Arms Trade Treaty (ATT) presents a rule of this type, which allows for arbitration when the States parties are unable to agree on a negotiated solution on the interpretation and application of the rules of the same agreement (...)". The possible obligation to resolve disputes relating to national security exceptions also goes back to the sector of ex art. XXI GATT (arms transfers are also included). According to art. XXI GATT: "(…) the continued decrease in domestic production has become a critical threat to the emergency planning of Sweden' economic defence as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations (…)" (Sweden-Import Restrictions on Certain Footwear, L/4250, 17 November 1975). Actually, thus they are harmed by the rights of third parties according to the restrictive measures adopted by the former art. XXI GATT, which is considered contrary to the overall spirit of the Agreement. The Council decided to establish procedural guidelines with the aim of establishing the logical procedure that should have led to the correct interpretation of the article. Within this spirit: "(...)1. Subject to the exception in Article XXI: a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI; 2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreements; 3. The Council may be requested to give further consideration to this matter in due course (…)", according to Decision of 30 November 1982 Concerning Article XXI of the General Agreement on Tariffs and Trade, L/5426, 2 December 1982, 3rd Recital). It must therefore be assumed that: "(…) to construe Article XXI as entirely self-judging would in effect mean that a WTO member is entitled to determine the scope and existence of its obligations under the GATT as it would be up to the member to unilaterally determine (with binding effect) when it was obliged to comply with GATT obligations and when national security interests precluded such obligations (…) one must not interpret Article XXI in such an entirely self-judging way that would vitiate the legal effect of the Agreement (…)", according to D. AKANDE, S. WILLIAMS, International adjudication on national security issues: What role for the WTO?, in Virginia Journal of International Law, 43, 2003, pp. 365-404.

sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law (…) A self-contained regime in this third sense has effect predominantly through providing interpretative guidance and direction that in some way deviates from the rules of general law. It covers a very wide set of differently interrelated rule systems and the degree to which general law is assumed to be affected varies extensively (...)"[93].

The issue of fragmentation as well as a type of pluralism in international criminal law[94] and international responsibility was also considered by the drafting of the 2001 draft articles on the international responsibility of States. The special rapporteur Roberto Ago underlined that the general rules referred to in the Project were general criteria that identify an international offense attributed to a subject recognized as receiving the rules of international responsibility. At the same time, the discretion to the same States in the prevention of special regimes of liability and the relative reparation of the damages suffered also remains open[95]. The subsequent Special Rapporteur, William Riphagen, followed a quite different path by arguing that liability and damage reparation are not included in a single model, but in different legal models in which they would have been inspired[96]. In this second case it is a principle of specialty both in the choice and in the application of secondary rules on liability that States should create a different regime and in our opinion more specific and different from that of general international law[97]. The Special Rapporteur Gaetano Arangio-Ruiz based himself on the possibility that States can resort to general instruments, rectius general rules for the resolution of disputes and outside the self-contained regimes[98]. This path opens the discussion for an isolation of these regimes in our opinion and excludes the use of the general criteria that we have already referred[99], as well as the fragmentation of the international liability regime. The Special Rapporteur James Crawford referred to the possibility of establishing different and specific liability regimes and not of a general nature following in this case the rapporteur Martti Koskenniemi who qualified the self-sufficient regime that is not attributable in every case but only in these situations in which the present treaties involve rules relating to the international obligations of States, including also secondary rules on liability for violation of primary rules that damage repair systems and the related regime for the resolution of disputes[100].

However, elements that are not present in the treaty discipline for the export of conventional weapons. The only rules included in this area are inherent to the primary obligations of States in the area of dispute resolution and the interpretation and application of international treaties. As for the secondary rules on liability, they must be found in the context of general international law. The question of the identification of the offense and above all of the subjective element, i.e. the attribution of the offense to the State and the objective element,

93Fragmentation of International Law, op. cit., parr. 128, 132.

94E. VAN SLIEDREGT, Pluralism in international criminal law, in Leiden Journal of International Law, 25 (4), 2012, pp. 847-855. E. VAN SLIEDREGT, S. VASILIEV (eds), Pluralism in international criminal law, Oxford University Press, Oxford, 2014. As we can see the phenomenon of fragmentation in the case of: Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, 6 September 2011.

95R. AGO, Fifth Report on State Responsibility, in Yearbook of International Law Commission, 1976.

96W. RIPHAGEN, Third report on State Responsibility, in Yearbook of International Law Commission, 1982, vol. II, Part one, parr. 28, 34.

97Fragmentation of International Law, op. cit., par. 145.

98G. ARANGIO-RUIZ, Third Report on State Responsibility, in Yearbook of International Law Commission, 1996, vol. II, Part one, p. 25, parr. 84ss.

99In this sense see also: Fragmentation of International Law, op. cit., par. 145.

100Fragmentation of International Law, op. cit., par. 152.

that is the violation itself, remains open[101]. International responsibility that finds its basis in the general criteria in the draft articles on the responsibility of States of 2001. The responsibility for illicit trafficking in conventional arms is attributed to the individual and to the defense industries when the conditions for illicit brokering agreements and diversion are met.

4.LIABILITY FOR ACTIONS AND/OR OMISSIONS OF PUBLIC OFFICIALS

The main culprits in the event of damage and the creation of international offenses are always the States, as owners of a certain number of weapons and armaments that, since the 20th century, state military economies have made public[102] and according to their own political interests have decided to export them, donate them to other Governments[103]. In this spirit and especially after the Cold War, the majority of States have also followed the path of market liberalization and the presence in the world market, including the participation of non-state actors[104].

101See, Sir Michael Wood (Wood, second report (A/CN.4/672, Section IV) stated: "(...) that operating this exclusion would be equivalent to encouraging States to adopt concrete behaviors often with dubious legitimacy in the normative context of modern international law, with particular reference to the extreme case of the use of force (...) other the reason for considering the verbal acts of the State as included in the term 'practice' would be the sufficiently broad scope of this term, although a certain caution must be used in evaluating the declarations of a State (…)". Hussein Hassouna, A/CN.4/SR.3252; A/CN.4/SR.3225, p. 10, affirms that: "(…) written or oral statements or declarations that were attributable to States undeniably played an essential role in the customary process, since they were evidence of the existence of a practice as well as of its acceptance as law. However, such assertions did not, of themselves, constitute practice. Customary norms were based on what States did, not on what they declared, even if their declarations were indispensable for knowing and understanding their behaviour (…)". Maurice Kamto, A/CN.4/SR.3225, p. 12, affirms that: "(…) was it necessary for a verbal act to be transferred to a physical medium in order to be taken into account as practice? Did a verbal act have to be repeated in order to be considered a form of practice? Could one actually identify a general practice if it was solely verbal? (...)". In particular, Mahmoud Hmoud, indicates which declarations are relevant and in particular the internal memoranda, valid, possibly, as an opinio juris (A/CN.4/SR.3226, p. 5) should be excluded. Georg Nolte, suggests using a broader term such as "communicative practice" (A/CN.4/SR.3226, p. 6), that is affirmed: "(…) the word "verbal" should be replaced with "communicative", because non-verbal communication also played a role in that context (…)"). Marie G. Jacobsson: "(…) of the fact that if concrete actions alone were valid only the strongest States could form customary law, similarly to what M. Wood argued in the report, but also because a declaration could prevent, by way of estoppel, the formation of a custom that otherwise it would be formed on the basis of the silence of the other States (...)" (A/CN.4/SR.3226, p. 11).

102J. DELBRÜCK, International traffic in arms. Legal and political aspects of a long neglected problem of arms control and disarmament, in German Yearbook of International Law, 33, 1981, pp. 114-143. In particular see from the doctrine: R. FRYDMAN, A. RAPACZYNSKI, J.S. EARLE, The privatization process in Russia, Ukraine and the Baltic States, Central European University Press, Budapest-New York-London, 1993, pp. 38ss. F. LACHENMANN, R. WOLFRUM, The law of armed conflict and the use of force, Oxford University Press, Oxford, 2017, pp. 96ss.

103Z. YIHDEGO, The arms trade and international law, Hart Publishing, Oxford, 2007, pag. 283: "(…) the main rules on the limits or prohibitions on the transfer of conventional weapons are mainly addressed to the States, which in turn have the obligation to provide for some conduct of private individuals or sub-state subjects according to individual responsibility (...)".

104In this sense see: the document of the Human Rights Council-Office of the High Commissioner, Guiding: Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Prevention" Framework, HR/PUB/11/04, April 2011, and Organization for Cooperation and Development in Europe, Accountability and Transparency. A Guide for State Ownership, 2010, pp. 93ss). See also in argument: ITLOS 2011 Advisory Opinion (Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, in ITLOS Reports 2011, pp. 10), where a liability for damage to the seabed by the companies sponsored by the States is reported (par. 74Ss and par. 103ss). Even in the case of

In the event that a State decides to stop exporting weapons, in this case it assumes the role of international controller of market activity and issues authorizations for the export of weapons to private entities. In this case, we cannot speak of a regime of an international but of national nature and the relative need to establish a common criterion for the export of arms certainly inspired by international rules[105]. Because even the private nature of the

arms transfers, the responsibility of these subjects can be configured, an "attitude" relevant to international criminal law when certain transfers constitute a contribution to assistance in the commission of various types of international crimes. The situation of ascertaining the responsibility of these subjects before an international court or court is quite different. In this sense, the current state of international law does not allow to establish the international criminal responsibility of subjects other than physical ones, such as individuals. In this sense see also according art. 25 of the Statute of the International Criminal Court (StICC): "(…) The Court shall have jurisdiction over natural persons pursuant to this Statute" (par. 1). See also the next case from the Special Tribunal for Lebanon (STL): Al Jadeed [Co.] s.a.l./ New T.V. s.a.l. (N.T.V.) Karma Mohamed Tahsin Al Khayat, STL-14-05/T/CJ, Judgment, 18 September 2015: "(…) there is no relevant international convention with respect to the elements of corporate liability, nor international custom or general principles of law (there is indeed nothing approaching a universal model or a consensus across national systems)" (par. 61) and that it was necessary to identify the physical person who had made use of the corporate instrument to commit the related offense (par. 72). Given the lack of a specific international criminal jurisdiction that can ascertain the responsibility of legal persons, the recognition of the possibility of imputing the responsibility of such subjects is sufficient to allow the creation of an international criminal case and activate state jurisdictions. In the case of the liability of legal persons and the related sanctions see: Resolutions 2253 of 17 December 2015 and 2255 of 21 December 2015, in which: "(...) in addition to individuals who lend their assistance to terrorist groups, they also expressly include "Related" or "connected entities", meaning by this term any other subject that is not physical in nature and has an organizational structure, different from groups of individuals (...)". See also in argument: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing Judgment, 5 September 2016, par. 2. (Akhbar, Sentencing Judgment) the STL established: "(...) the actus reus and mens rea of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...)". New TV S.A.L, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Case No STL-14-05/PT/AP/AR126.1, 2 October 2014; Akhbar Beirut S.A.L., Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Case No STL-14-06/PT/AP/AR126.1, 23 January 2015. For a summary of the cases see N. BERNAZ, Corporate criminal liability under international law: The New TV S.A.L and Akhbar Beirut S.A.L. Cases at the STL, in Journal of International Criminal Justice, 13, 2015, pp. 314ss. See also: Prosecutor v. Ayyash et al., STL-11-01, Public Redacted Version of Judgment on Appeal, par. 2 (STL, Mar. 8, 2016). Contempt charges are based on Rule 60 bis. See STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1 (Apr. 3, 2014). In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, par. 74 (STL, Oct. 2, 2014): The case illustrates how heavily debated is the issue of corporate liability before the international tribunals and under international law. Contempt Judge took: "(...) the traditional view by finding the respective corporate manager criminally liable, but not the corporate entity itself (...) several problems with the premise that the prosecution of responsible, natural persons within the corporation would be sufficient to render effective the contempt authority of the STL (...) the approach to impose criminal liability solely on the responsible individual within the corporation runs the risk of producing significant accountability gaps and would "potentially lead to unacceptable impunity," as the STL Appeals Panel concluded (...)". C. KAEB, The shifting sand of corporate liability under international criminal law, in The Georgetown Washington International Law Review, 49, 2016, pp. 354ss. N. BERNAN, Corporate criminal liability under international law: The new TV S.A.L. Anmd Akhbar Beirut S.A.L. cases at the Special Tribunal for Lebanon, in Journal of International Criminal Justice, 13, 2015, pp. 314ss.

105In this sense see: Decisions relating to the export of light and small arms and dual-use goods under the Wassenaar Arrangement, with which the states agreed to establish a "harmonization" of their export policies; the European Code of Conduct for the export of light and small arms of 1997, later transfused in the common position 2008/944/EC. The Inter-American Convention of 1997, and the corresponding UN Protocol of 2001,

export activity needs a state act as a relevant act of an international nature. Also in this sense the State carries out an authorization for the export of arms, as an act of removal of the relative obstacles from the private sector, thus promising to carry out an activity that "allows" an individual to affect public interests by activating the theory of principles and values of international community, having regard to the authorization of a governmental act or act iure imperii[106] and the principles of prohibition of the use of force, i.e. the peaceful resolution of disputes[107]. This act organized by administrative or military authorities[108] is presented as a type of "guarantee" issued by the State itself which assures that private individual's activities are controlled and not in conflict with domestic law or international obligations.

Even if the act is done by a single organ of the State[109], it should be recognized as a rule of international law[110]. In particular, art. 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts[111] states that:"The conduct of any State organ shall be

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on the control of explosive materials and firearms, which established the fundamental criterion of the traceability of the goods that were exported, in addition to the obligation to provide the necessary documentation by the exporter. A similar control obligation by states is now imposed by Regulation 2009/428/EC on the control of exports of dual-use goods. The binding legislation that soft law needs to control exports which over time has become a matter of interest to the international community, regardless of national laws and regulations on the matter.

106S. SUCHARITKUL, Immunities of foreign States before national authorities, in Recueil des Cours, ed. Bruylant, Bruxelles, vol. 149, 1976, pp. 95ss.

107The proliferation of weapons and small arms and light weapons has been reported as a type of damage to international peace and security. In this sense see the Program of Action against the illicit trafficking of small arms and light weapons, promoted by the General Assembly of 2001), where it was underlined: "(...) the value of tools that express a widespread opinion and welcomed by the majority of States globally including the main producers and exporters of these types of weapons (…)". According the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, adopted on 2005 by the UN: "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 (...)". With the terminology "small arms", however, they must be understood "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". See also in argument the Kinshasa Convention on arms control to enter into force on 8 March 2017. On 6 February 2017, the conditions for the entry into force of the instrument were met, after its ratification by Angola. The Convention will enter into force on 8 March 2017.

108In the United Kingdom, the Department of International Trade, and in particular the Export Control Organization, works to issue the necessary licenses and authorizations for the export of weapons and military material. In France: "Le régime de contrôle des exportations de matériels de guerre et matériels assimilés se base sur des décisions prises par le Premier ministre, sur avis de la Commission interministérielle pour l'étude des exportations de matériels de guerre (CIEEMG). Présidée par le secrétaire général de la Défense et de la sécurité nationale, elle est composée des ministères chargés des Affaires étrangères, de la Défense et de l'Économie" authority was designated on the basis of the ordinance 2004-1374.

109D. MOMTAZ, Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority, in J. CRAWFORD, A. PELLET, S. OLLESON (ed.), The law of international responsibility, Oxford University Press, Oxford, 2010, pp. 237-247.

110United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, p. 32.

111Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), A/56/10, in Yearbook of International Law Commission, 2001, Vol. II, Part. II. For further analysis see also: C. RYNGAERT, Attributing conduct in the law of State responsibility. Lessons from Dutch courts applying the control standards in the context of international military operations, in Utrecht Journal of International and

considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State (...)"[112]. So we are talking about a single individual, a juridical entity[113], where this organ is valid according to the rules of domestic law[114] or the relative powers for the functioning of the assumed official power have been conferred according to the rules of domestic law[115]. This type of appointment equates the appointed body with the State and as a consequence the relative damage to the State can be attributed in the case of an international offense[116]. Arms exports will be identified by legislative act and not by government decree, because these bodies are organs of the State[117]. The related

European Law, 36 (2), 2021, pp. 172ss. M. JACKSON, Complicity in international law, Oxford University Press, Oxford, 2015, pp. 204ss. J. CRAWFORD, State responsibility. The general part, Cambridge University Press, Cambridge, 2013, pp. 412ss.

112Art. 4, par. 1 of the ARSIWA.

113See the relation of the Special Rapporteur R. Ago in Yearbook of the ILC, 1973, vol. I, p. 56, par. 30: "As to the notion of an organ, that involved the whole theory of the organization of the State. In his view an organ was always an instrument capable of acting, whereas the State was not; an organ was necessarily composed of persons (...)".

114D. MOMTAZ, Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority, in J. CRAWFORD, A. PELLET, S. OLLESON (ed.), The law of international responsibility, op. cit., pp. 239ss.

115D. MOMTAZ, Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority, in J. CRAWFORD, A. PELLET, S. OLLESON (ed.), The law of international responsibility, op. cit., pp. 239ss.

116This subject will engage the international responsibility of the State when the close link is ascertained, which in an informal way, which binds it to the State that is committing an offense. This link is not identified in a real legislative conferral, nor in an agreement for the granting of public authorities (as also provided for by art. State and the private sector in a more stringent manner than the provisions of art. 8.

117D. MOMTAZ, Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority, in J. CRAWFORD, A. PELLET, S. OLLESON (ed.), The law of international responsibility, op. cit., pp. 243ss. This is also the letter of art. 4, par. 2 of the Project. See also from the ICJ: Application of the Convention on preventing and suppressing the crime of genocide hereafter Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia), preliminary exceptions, judgment, 11 July 1996, ICJ Reports 1996, pp. 595ss, par. 616, par. 31 ("the rights and obligations enshrined by the (Genocide) Convention are rights and obligations erga omnes"): "[T]he jurisdiction of the Court in this case is based solely on art. IX of the Convention (...). It follows that the Court may rule only on the disputes between the parties to which that provision refers. The Court (...) has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations which protect essential humanitarian values, and which may be owed erga omnes (...)". Judge Shalabuddeen with his dissenting opinion criticised the approach taken by the Appeal Chamber: "(...) stressing the very distinction between Tadić and the Nicaragua case and noting that while Nicaragua had dealt with State responsibility, Tadić was dealing with criminal responsibility, so the relevant question of the case was not whether the Former Republic of Yugoslavia (FRY) was responsible for breaches of international humanitarian law, but whether the FRY had used force through the militia against Bosnia Herzegovina (…)", Separate Opinion of Judge Shalabuddeen, para 17. See also in argument: H. TONKIN, State control over private military and security companies in armed conflict, Cambridge University Press, Cambridge, 2011, pag. 118: arguing that: "(...) Judge Shalabuddeen separate opinion is persuasive as the assessment of the conduct of FRY as a State that used force through a non-state armed group belongs to the realm of primary norms and it has nothing to do with the problem of attributing conduct for the purpose of State Responsibility. Beside the issue of meaning of control in the context of attribution, States have in fact a direct obligation not to use force against other States, regardless of utilising non-state actors to carry out their activities. In other words the assessment of acts of force by non-state groups that operate as proxies to the State serves to ascertain the breach of a primary rule of international law, but in no way are the acts of the non-state actors attributed to the State for the purpose of

decision on the issuance of the authorization also means the responsibility of the State since this act may be in violation of international obligations relating to the export of arms[118]. In the event that the authority responsible for issuing the authorization act fails to fulfill the formal requirements of the act as a rule and does so intentionally and/or by mistake, it commits an offense that is attributed to the State itself. It is necessary that the body to which the responsibility is contributed has been acted as an official body by exercising its powers and within the limits established by state laws[119].

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international responsibility. If a non-state group is acting on behalf of the State in using force against another State, the former will be in breach of its primary obligation not to use force, without the need arising to attribute an unlawful act performed by the non-state group to the State (…)", according to: M. NOORTMANN, A. REINISCH, C. RYNGAERT, Non-State actors in international law, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 170-171. Armed activities on the territory of Congo (new appeal: 2002) (Republic Democratic of Congo v. Rwanda), precautionary measures, order, 10 July 2002, ICJ Reports 2002, pp. 219ss, par. 245, par. 71, and jurisdiction and admissibility, judgment, 3 February 2006, ICJ Reports 2006, pp. 6ss, par. 31, par. 64 ("it follows" that the rights and obligations enshrined by the Convention are rights and obligations erga omnes (...)). R. KOLB, The compromissory clause of the convention, in P. GAETA, The UN genocide convention. A commentary, Oxford University Press, Oxford, 2009, pp. 407ss. P. AKHAVAN, Balkanizing jurisdiction: Reflections on article IX of the genocide convention in Croatia v. Serbia, in Leiden Journal of International Law, 28 (4), 2015, pp. 894ss.

118D. MOMTAZ, Attribution of conduct to the State: State organs and entities empowered to exercise elements of governmental authority, in J. CRAWFORD, A. PELLET, S. OLLESON (ed.), The law of international responsibility, op. cit., pp. 241ss.

119In this sense, see the decision of the Council of the Contracting Parties GATT US-Export Restrictions, II/28, Decision of 8 June 1949, par. 3, in which an excessively restrictive attitude on the part of customs officials was highlighted. The term "transfer" includes not only the traditional export and import activities but also activities that are perfected after the sale, but also of activities considered "non-profit", which is the gift (A. BELLAL, S. CASEY MASLEN, G. GIACCA, Implications of international law for a future Arms Trade Treaty, in UNIDIR Resources, 2018, pp. 6ss): difficult placement in the sphere of transfers due to the failure to pay a benefit of an economic nature. In the final text of the ATT, art. 2, par. 2 defines: "(...) the scope of application of the treaty with reference to the activities considered, which includes not only those traditional import and export activities, but also transit, transit by sea or by air and the 'unauthorized intermediation (brokering) (...)". It is not included, however (and this criticism was raised by the International Committee of the Red Cross: K. DOERMANN, Adoption of a global Arms Trade Treaty: Challenges ahead, op. cit., pp. 4ss). See also the Report of 1996 of the Commission for Disarmament (UN Report of Disarmament Commission, General Assembly, Official Records-Fifty-first Session, Supplement n. 42, A/51/42, 1996) for transfers only those of an illicit nature, such as trafficking (Annex I, pp. 10-15). Part of the doctrine is held that such a broad definition: "(...) does not include military cooperation and assistance agreements, state agreements on national security and conventional arms movements for troops abroad (…)". The prevailing orientation classifies the transfer activities according to the purpose, or identifies: a) transfers with political purposes, which are the exchange activities carried out by the great powers and which have as recipients recognized governments, insurrectional movements or national liberation movements; b) transfers for commercial or lucrative purposes, carried out by any State and which are generally carried out through an authorized private intermediary, subject to public control (...) transfers operated through the clandestine market, carried out with total non-compliance the various national and international regulatory limits (art. 10 of the ATT); finally, transfers of military technology, implemented through manufacturing licenses assigned to foreign subjects who decide to start their own business within a State other than that of nationality or origin, or through agreements that establish co-production systems (Bonn Agreement of 12 November 1996, which established the Joint Organization for Armaments Cooperation (OCCAR)). These transfers would create the conditions for the birth and development of multinationals in the war industries. It is argued that the failure to provide for a criminal liability of the individual-organ of the State is an evident lacuna of the Project itself, which did not take into account the evolution of international criminal law relating to crimes committed by individuals, and in particular of those who are part of the state structure. See in argument: C. TOMUSCHAT, The responsibility of other entities: Private individuals, in J. CRAWFORD, A. PELLET, S. OLLESON, The law of international responsibility, Oxford University Press, Oxford, 2020, pp. 317-329. R. YAKEMTCHOUK, Les Transferts internationaux

In theory, things are understandable but in the circle of the arms trade we believe that it is difficult to configure the offense committed by a person who exercises his powers as required by art. 5 ARSIWA. In particular: "(…) the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance"[120].

The cited article actually regulates the army of government functions that are not state bodies and as identified in the former art. 4 ARSIWA where it refers to subjects or parastatal bodies of a private or privatized nature. As bodies authorized by national law to exercise de jure vested functions[121], i.e. ex post powers respecting the constitution and the work of the body involved as well as the bodies identified pursuant to art. 4. Therefore, the entity involved is entrusted (enpowered) only after the army of the relative functions and prerogatives of each type by the relevant governmental authority[122]. We are talking about the responsibility of the private or privatized body based on art. 5 ARSIWA and as a supervisory body or regulator of the authorization deed. In this case, the State is a player in the arms market which at the same time leaves ample room for private subjects[123] who did not exercise regulatory, control or decision-making powers relating to the national or international arms market, but activities of iure gestionis subjects[124]. The control exercised by the privatized industries of a State comes at a share level, since private shareholders are involved in public participation and do not determine total control of the entity[125]. Therefore, in practice there are "evaluation" functions of the participating public body, such as the appointment of managing directors, the Chairman and the company representative, and the review and approval of the financial statements at the shareholders' meeting. According to

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d'armes de guerre, op. cit., p. 14-15. N. JEVGLEVSKAJA, International law and weapons review. Emerging military technology under the law of armed conflict, op. cit.,

120E.L.A. ORTEGA, The attribution of international responsibility to a State for conduct of private individuals within the territory of another State, in InDret: Revista Para del Anàlisis del Derecho, 2015, n. 1.

121United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, p. 51. In this sense, it is admitted that the granting of public powers, which has a regulatory purpose of a given market, may also include the powers of control.

122United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., par. 52.

123A. FLEUREANT, S. PERLOFREEMAN, P.D. WEZEMAN, S.T. WEZEMAN, N. KELLY, The SIPRI Top-100 Arms-Producing and Military Services Companies, 2014, SIPRI Fact Sheet, December 2015, pp. 3Sss, "(…) Concerning the main defense industries, and in particular those that produce and sell weapons, it is possible to see that about 80% of these industries are entirely private subjects. The case is that of the American and German industries and a good part of the French, Belgian and Spanish ones (…)".

124J.H. BROOKFIELD, Immunities of foreign States engaged in private transactions, in Journal of Comparative Legislation and International Law, 20 (1), 1938, pp. 1-15. P. ABEL, Immunity of foreign States engaged in commercial operations: Hoffmann v. Jiri Draelle, Narodni Sprava Podmokly, Czechoslovakia, in American Journal of International Law, 45 (2), 1951, pp. 354-357. H. FOX, The exception to State immunity: The concept of commerciality, in H. FOX, P. WEBB, The law of State immunity, Oxford University Press, Oxford, 2013, pp. 502-532. D. AKANDE, S. SHAH, Immunities of State officials, international crimes and foreign domestic Courts, in European Journal of International Law, 21 (4), 2010, pp. 819ss. Z. SONG, Going for gold: The meaning of commercial activity, international sovereign immunities Act in the race for buried treasure in Sunken Shipwreck, in American University Law Review, 62 (5), 2013, pp. 1774ss.

125United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., par. 52.

international jurisprudence[126] the personality of this type of subjects is separated from the personality of the State because the related functions are implemented by a person other than the same State that does not affect the state body and that there are issues of immunity from jurisdiction for unlawful acts. The invocation of immunity depends on the exercise of the body in charge and let us not forget that the governmental functions in the field of arms trade are exercised by defense industries with an economic and commercial character[127].

5.LIABILITY OF INDIVIDUALS FOR UNLAWFUL CONDUCT AND FORMS OF CONTROL AND PARTICIPATION IN THE COMMISSION OF THE OFFENSE

As we understood from the previous paragraph, the State responds to international responsibility in relation to the illegal activities of private subjects[128]. Therefore, the State will answer for an offense committed by private individuals in the event that "(…) the

126ICSID, Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award of 27 October 2015, parr. 321 ss. For further analysis see also: A.M. ANDERSON, B. BEAUMONT, The investor-State dispute settlement system: Reform, replace or status quo?, Kluwer Law International, New York, 2020. J.G. OLMEDO, Recalibrating the international investment regime through narrowed jurisdiction, in International & Comparative Law Quarterly, 69 (2), 2020, pp. 304ss. J. FOURET, R. GERBAY, G.M. ALVAREZ, The ICSID Convention, regulations and rules: A practical commentary, Edward Elgar Publishers, Cheltenahm, 2019. A.D. MITCHELL, E. SHEARGOLD, T. VOON, Regulatory autonomy in international economic law. The evolution of Australian policy on trade and investment, Edward Elgar Publishers, Cheltenham, 2017. ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 5 February 1970, in ICJ Reports, 1970, p. 3ss., parr. 39ss. Judge Higgins expressed on the sidelines of the consultative opinion on the Wall when he stated that the reference, in the Barcelona Traction judgment, to the erga omnes obligations "was directed to a very specific issue of jurisdictional locus standi" (Separate opinion, ICJ Reports 2004, p. 207 ss., p. 216, par. 37). M. BYERS, Conceptualising the relationship between jus cogens and erga omnes rules, in Nordic Journal of International Law, 66 (2/3), 1997, pp. 212ss. S. VILLALPANDO, The legal dimension of the international community: How community interests are protected in international law, in European Journal of International Law, 21 (2), 2010, pp. 387ss. See also the confirm from the Barcelona Traction case: "on the universal level (...) embody human rights", that "do not confer on states the capacity to protect the victims of infringements of such rights irrespective of their nationality" (sentence, op. cit., p. 47, par. 91). This is a passage that is in clear contradiction with respect to the qualification, made in a previous passage of the decision, of the obligations deriving from "principles and rules concerning the basic human rights of the person (...) conferred by international instruments of a universal or almost universal character "like erga omnes obligations" (op. cit., p. 32, par. 34). In this regard, see the criticisms expressed by Judge Gross, in the separate opinion attached to the judgment of 20 December 1974 on the case of Nuclear Experiments (Australia v. France), against the attempt made by Australia (as well as by New Zeus) of "make use of paragraphs 33 and 34 of the Judgment in the Barcelona Traction case without taking account of the existence of the inconsistent with these, i.e. paragraphs 89 to 91, which were in fact intended to qualify and limit the scope of the earlier pronouncement "(ICJ Reports 1974, pp. 276, 290ss, par. 24). L. NGOBENI, Barcelona Traction and Nottebohm revisited. Nationality as a requirement for diplomatic protection of shareholders in South Africa law: Notes and comments, in Yearbook of International Law, 37, 2012, pp. 172ss.

127Some doubts arise regarding the violations of erga omnes obligations and international crimes by industries of a privatized nature. The separation of personality ends and is attributed to the responsibility of the State, unless the same is subject to an obligation of due diligence in the control of the activities of the privatized entity. This is the evaluation of the information on the export of weapons which is screened by the authorities that issue the relevant authorization. In the same spirit, the activities of these industries are considered as acta iure gestionis, ie the illegal act committed is attributable to the related industry.

128R. WOLFRUM, State responsibility for private actors: An old problem of renewed relevance, in M. RAGAZZI, International responsibility today. Essay in Memory of Oscar Schachter, Martinus Nijhoff Publishers, Dordrecht, 2011, pp. 423-434. O. DE FROUVILLE, Attribution of the conduct to the State: Private individuals, in J. CRAWFORD, A. PELLET, S. OLLESON, The law of international responsibility, Oxford University Press, Oxford 2010, pp. 257-280.

person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"[129].
On the basis of the principle of effectiveness, this type of responsibility is linked between the private sector and the State[130], as the latter "instructs" the relative private subjects on the performance of the relative operations or functions attributed to its public officials[131].
The link of control or management of the illicit activities[132] is an important element for the attribution of responsibility, because the offense is attributed to the State only in the case in

129Art. 8 of the Draft project of 2001. Art. 8 of the first draft of articles signed by Prof. Brownlie foresaw that "in case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions or articles 42 to 45 of the Vienna Convention on the Law of Treaties". See, International Law Commission, Fifty-seventh session, First report on the effects of armed conflict on treaties (by Prof. I. Brownlie), 2005, op. cit., pp. 38 and 39. Fitzmaurice had proposed his own idea about the methods and the termination or recess process. For further information see also: International Law Commission, Fifty-ninth session, Fourth report on the effects of armed conflict on treaties (by Prof. I. Brownlie, see also: J. CRAWFORD, Brownlie's principles of public international law, Oxford University Press, Oxford, 2019, pp. 289ss), 2007, A/CN.4/589, par. 34. See also: Quentin-Baxter, Fourth Report, (note 215), 213: "(…) the idea of reparation as part of a compound obligation composed of prevention and reparation was advanced by the first Special Rapporteur Baxter in his work presented to the ILC. Baxter explains the nature of this compound obligation as a primary rule that contains its own secondary element, namely the duty to provide reparation as consequential to the causation of harm. Prevention, in the mind of the Special Rapporteur, was a necessary measure-the first bit of this compounded obligation-to be adopted by the State of origin in order to avoid or minimize the risk of transboundary harm (...) the breach of the obligation regarding prevention did not give the affected State any right of action, as provided by rules of international responsibility for wrongful acts. Also the second Special Rapporteur Barboza initially supported Baxter's idea that failure to comply with the obligations provided within the scope of the duty to prevent did not give rise to the application of secondary rules of international law (J. BARBOZA, Second report on international liability for injurious consequences arising out of acts not prohibited under international law, (1986) ILC YB/II, 149. (…) the idea of prevention as linked exclusively with reparation is well described in the 1988 Report where the Special Rapporteur noted that: "(…) if prevention is linked exclusively with reparation, (…) the preventive effect, (…) is achieved through the conditions imposed by the regime with respect to reparation; whoever is carrying out the activity knows that he will have to compensate for injury without there being, in principle, any legal defense whatsoever, as a purely statistical operation (…) he will try to take the preventive measures necessary to avoid the damage and thereby alleviate the burden of such expenses on the management of his enterprise (…) when the activity is carried out in a State's own jurisdiction, there is no difference regarding the basis of attribution of liability between an activity carried on by the State itself and one carried on by private persons. In both cases, liability is attributed by virtue of the mere fact that the activities are carried on in areas under State's jurisdiction. It is important therefore to resist the suggestion that attribution of a certain act to a State when it is the State that carries on the activity in question must have the characteristics of an "act of the State" within the meaning of chapter II of part 1 of the draft articles on responsibility for wrongful acts (ARSIWA). The attribution of an activity to the State is, as noted above, primary on a territorial basis (...). See, J. BARBOZA, Fourth report on international liability for injurious consequences arising out of acts not prohibited under international law, (1988) ILC YB/II, draft art 1, note: 220, 266. J. BARBOZA, The environment, risk and liability in international law, Martinus Nijhoff Publishers, The Hague, 2011, pp. 32ss.
130United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., par. 70.
131R. WOLFRUM, State responsibility for private actors: An old problem of renewed relevance, in M. RAGAZZI, International responsibility today. Essay in memory of Oscar Schachter, op. cit., pp. 428ss, argues that: "(…) the legislative choice set here would not be adequate for the various situations in which it is possible to ascertain the responsibility of a State for acts of private individuals. In particular, with reference to education, the focus of the law is on the functions performed by private individuals vested with powers by public officials, and not also the position of the former; with reference, on the other hand, to management and control, if the requirement is the specific direction of private operations under the supervision of the State, then it is very difficult to admit that this type of responsibility can be outlined for all those situations in which private individuals have acted, but the control requirement was lacking (...)".

which the operation in which the private individuals are involved and are an integral part of a more general state operation[133]. From the jurisprudence we recall the case of the International Court of Justice (ICJ): Military activities in Nicaragua, in which the guerrilla activities of the contras seemed to be supported by the United States by sending weapons[134]. The Court held that: "(...) even if there was a responsibility on the part of the United States

132E.L. ÁLVAREZ ORTEGA, The attribution of international responsibility to a State for conduct of private individuals within the territory of another State, in InDret: Revista para análisis del Derecho, 2015. V.P. TZEVELEKOS, Reconstructing the effective control criterion in extraterritorial human rights breaches: Direct attribution of wrongfulness, due diligence, and concurrent responsibility, in Michigan Journal of International Law, 36, 2014, pp. 129ss. M. LATTIMER, P. SANDS, The grey zone. Civilian protection between human rights and the law of war, Bloomsbury Publishing, New York, 2018, pp. 274ss. R. GEISS, H. KRIEGER, The "legal pluriverse" surounding multinational military operations, Oxford University Press, Oxford, 2020, pp. 211ss. S. VELLUTI, V.P. TZEVELEKOS, Exrraterritoriality of European Union law and human rights after Lisbon. The case of trade and public procurement, in Europe and the World: A Law Review, 2018. A. FERREIRA SNYMAN, G.M. FERREIRA, The application of international human rights instruments in outer space settlements: Today's science fiction. Tomorrow's reality, in Potchefstroom Electronic Law Journal, 22, 2019, pp. 10ss.

133United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., It is commonly believed that, when such activities are only incidentally or occasionally connected with this operation, the criterion of control by the State is not integrated, since such conduct would in reality escape the sphere of direction or control of the State itself.

134ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27 June 1986, in ICJ Reports, 1986, p. 14 ss., par. 205. In particular see par. 153, which is affirmed that: "(…) the Court cannot of course conclude from this that no transborder traffic in arms existed, although it does not seem particularly unreasonable to believe that traffic of this kind. had it been persistent and on a significant scale, must inevitably have been discovered. in view of the magnitude of the resources used for that purpose. The Court merely takes note that the allegations of arms-trafficking are not solidly established; it has not. in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981". See the critics of: K. HIGHET, Evidence, the Court, and the Nicaragua Case, in American Journal of International Law, 81 (1), 1987, pp. 13ss, where he argues that the Court's way of reasoning depends on its composition ("(…) its composition of a large number of judges who tend to be scholars and international lawyers, rather than trial lawyers and courtroom practitioners", p. 14). The Court affirms that "(…) the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty. to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy (...)". A.A. YUSUF, The notion of "armed attack" in the Nicaragua judgment and its influence on subsequent case law, in Leiden Journal of International Law, 25 (2), 2012, pp. 461-470. If the dissenting opinions, in essence, tended to highlight the factual aspect of the matter more, on the contrary, most of the judges, represented by President Singh, believed that the supply of weapons to armed groups could not constitute an armed attack, and consequently could not constitute a violation of the principle of non-intervention: "(…) in regard to the flow of arms from Nicaragua to El Salvador, 1 believe that even if it is conceded that this may have been both regular and substantial, as well as spread over a number of years and thus amounting to intervention by Nicaragua in El Salvador, still it could not amount as such to an "armed attack" against El Salvador. Again, the Applicant may not have been ignorant of this flow involving the supply of arms to the rebels in El Salvador. However, even granting all this, the Court still could not hold that such supply of arms, even though imputable as an avowed object of Nicaragua's policy, could amount to an "armed attack" on El Salvador, so as to justify the exercise of the right of collective self-defence by the United States against Nicaragua". Separate Opinion of President Nagendra Singh, in ICJ Reports, 1986, p. 144. The President then underlined (pp. 154-155): "(...) that the violation of the prohibition of intervention had not been correctly proved, since the cause was between Nicaragua and the United States, while El Salvador had no participated. Even if it is true that there was a Nicaraguan government order that ordered the sending of weapons to rebel groups in that state, it is also true that the United States would not have been entitled to intervene in collective self-defense (...)". M. KOHEN, The principle of non-intervention 25 years after the Nicaragua judgment, in Leiden Journal of International Law, 25 (1), 2012, pp. 157-164.

for having planned, directed or supported the operations of the contras, the control link was not sufficiently proven to consider that the conduct alleged by Nicaragua to these armed groups was attributable to the United States by reason of its control[135] (…) despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf (…) all the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed (...)"[136].

In the same way we recall from the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) the Tadić case[137]. The "source" requirement by the judges for direct control imposed as we have seen in the Nicaragua case required a stringent and responsible level of control on the part of the State to avoid certain "wrong" conduct by private individuals[138]. In the case of financing and support of Bosnian Serb armed groups, the Appeals Chamber judged that the Yugoslav authorities: "(...) were responsible on the basis of an overall control, which had manifested itself through the participation of same authorities in the planning and supervision of the operations of armed groups (...)[139]. Position of the judges that was not in any case adopted by the ICJ, because the situation of the Appeals Chamber's object of investigation was individual responsibility for war crimes and not that of crimes committed by the State[140].

135A. CASSESE, The Nicaragua and Tadić tests revisited in the light of the ICJ judgment on genocide in Bosnia, in European Journal of International Law, 18 (4), 2007, pp. 649-668 and pp. 652-653.

136ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27 June 1986, in ICJ Reports, 1986, p. 14 ss., p. 62, par. 109; pp. 64-65, par. 115.

137ICTY, Prosecutor v. Dusko Tadić, IT-94-I, Trail Chamber, Judgment of 15 July 1999.

138ICTY, Prosecutor v. Dusko Tadić, IT-94-I, Trail Chamber, op. cit., par. 117, which is affirmed that: "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control".

139Appeals Chamber, Prosecutor v. Dusko Tadić, case N. IT-94.1.A, judgment, 14 July 1999, par. 296. And by ICTR jurisprudence see the decision in the Akayesu case. "(...) The Security Council did not depart form international humanitarian law nor did it change the legal ingredients required under international humanitarian law with respect to crimes against humanity. It limited at the very most the jurisdiction of the tribunal to a sub-group of such crimes which in actuality may be committed in a particular situation (…). Consequently apart from this restriction of jurisdiction, such crimes continue to be governed in the usual manner by customary international law (...)". Prosecutor v. Jean Paul Akayesu, case n. ICTR-06-4, judgment, 1st June 2001, parr. 465 and 466.

140United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., pp. 71-78. ICJ, Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia-Herzegovina v. Serbia-Montenegro), Judgment, 26 February 2007, in ICJ Reports, 2007, p. 43, 396ss and 423-424: "(...) the assessment of Serbia's responsibility for complicity represents the intermediate test of accountability between responsibility for direct conduct and responsibility for failure to exercise due diligence. From the perspective of an "integrated" responsibility framework that can effectively capture all the layers of State's involvement in conduct of non-State actors, one may therefore query whether aid or assistance as per art 16 or the ARSIWA constitutes the missing block that stands between

In the case of the arms trade, the notion of control exercised by the State over the activities of individuals would in any case seem to reflect the latter interpretation[141], because the responsibility takes into consideration the regulatory reference that arises in the head of the State in the case that authorizes the export of arms and there are serious risks of human rights or humanitarian law violations. Recalling the 4 Geneva Conventions, it is possible to trace the legal provisions and obligations that are useful for regulating the export of arms carried out by States that are not subject to the legal regime of the ATT. Such as, for example, art. 1 common to the 4 Geneva Conventions[142] which establishes the obligation of States parties to "respect and enforce humanitarian law". Following an extensive interpretation of the obligation to "enforce humanitarian law", a relative ban for States parties could be useful in relation to the transfer of arms to those countries which, in the context of an armed conflict, violate the humanitarian law. The violation of humanitarian law by the State receiving weapons could be based on art. 16 ARSIWA, where it is established that:"(…) a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State" (art. 16)[143]. The supply of armaments is considered to all intents and purposes a form of aid or assistance according to the meaning attributed and the spirit of the ILC. However, two problems arise in relation to the order of implementation of the rule. The draft articles do not assume a legally binding value and this in fact represents a weakness of the instrument for the purpose of identifying the international responsibility of the arms exporting State. However, if it

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a very stringent degree of connection between State and NSA and a broad one. It has been argued indeed that despite being originally conceived as a form of ancillary responsibility based on the commission of an international wrongful act by another State, art. 16 may also find application when NSA carry out the wrongful act. In this case, aid or assistance would operate not just as a form of attribution of responsibility for the international wrongful act of another State but rather as a form of attribution of conduct addressing forms of cooperation between States and NSA that fall short of effective control (…)". For further analysis see also: D. AMOROSO, Moving towards complicity as a criterion of attribution of private conducts: imputation to States of corporate abuses in the US case law, in Leiden Journal of International Law, 2011, pp. 990Ss, against of the above positions see: M. JACKSON, Complicity in international law, op. cit., V. LANOVOY, Complicity and its limits in the law of international responsibility, op. cit., note 24.

141A. CASSESE, The Nicaragua and Tadić tests revisited in the light of the ICJ judgment on genocide in Bosnia, op. cit., pp. 665ss, which argues: "(...) how the Nicaragua test is not supported by international law and that, at the policy level of the States, irresponsibility to support armed and terrorist groups is no longer acceptable, when these are not acting under strict control or supervision of the State (...) ".

142R. ATADJANOV, Humanness as a protected legal interest of crimes against humanity. Conceptual and normative aspects, ed. Springer, Berlin, 2019.

143And in articles: 14-58 of Draft Articles on the Responsibility of International Organizations (ARIO) Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report will appear in Yearbook of the International Law Commission, 2011, vol. II, Part Two. For further analysis see also: M. JACKSON, Complicity in international law, op. cit., N. VOULGARIS, Allocating international responsibility between member States and international organisations, Hart Publishing, Oxford & Oregon, Portland, 2019, pp. 145ss. J. KLABBERS, Reflections on role responsibility. The responsibility of International organizations for failing to act, in European Journal of International Law, 28 (4), 2017, pp. 1136ss. A. NOLLKAEMPER, J. D'ASPREMONT, C. AHLBORN, B. BOUTIN, N. NADESKI, I. PLAKOKEFALOS, D. JACOBS, Guiding principles on shared responsibility in International law, in European Journal of International Law, 31 (1), 2020, pp. 18ss. D. LIAKOPOULOS, Complicity of States in the international illicit, ed. Maklu, Antwerp, Portland, 2020. D. LIAKOPOULOS, Complicity in international law, W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020.

were possible to prove the psychological element based on art. 16, this refers only to an indirect liability borne by the exporting State which "has only a supporting role" and "be responsible to the extent that its own conduct"[144].On the other hand, the international responsibility borne by the State that exports the weapons must in any case be based on art. 1 common to the Geneva Conventions according to which: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"[145]. The contracting parties are obliged not only to comply with the rules contained in the Conventions, but also to enforce them in all circumstances, i.e. the protection of human rights and respect for humanitarian law.

In this spirit, we also remember art. 6, par. 3 of the ATT establishes that:"(…) a State party shall not authorize any transfer of conventional arms (…) if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party (...)"[146]. In reality, this article recalls an older codification of a previous norm of a customary nature. We recall ex novo the Nicaragua case of the ICJ and in particular art. 6, par. 3, in accordance with the jurisprudence of the Tadić case where the responsibility for acts of private individuals exist even in the case of lack of relative control. Of the same ICJ we recall the opinion on the legal consequences of the construction of the Wall in Palestine[147], where the ICJ refers to the 4 Geneva Conventions

144D. LIAKOPOULOS, Complicity in international law, op. cit., pp. 135ss.

145R. ATADJANOV, Humanness as a protected legal interest of crimes against humanity. Conceptual and normative aspects, op. cit.

146The Security Council tried to establish an exception to the regime already set out and in relation to art. 6, par. 3 of ATT through the Resolution 2170 (2014) (S/RES/2170) of 15 August 2014 which gives the constant threat caused by the terrorist group in Iraq and Syria and as consequences it "feels" to the rest of the Middle East region and indirectly on the States close to it, the need to support them by any means is necessary Kurdish populations in the area and especially "by any means" available. The language of the resolution speaks of "urging States" and of preventing the abuses and violations of human rights and international humanitarian law that ISIS carry out in Iraq. It has not been specified whether this prevention should-occupied territories, reaffirming what was expressed in the Resolution 2161 (2014) (S/RES/2161) of 17 June 2014. For further analysis see also: A. BELLAL, S. CASEY-MASLEN, G. GIACCA, Implications of international law for a future arms Trade Treaty, op. cit., pp. 13ss. A. ORAKELASHVILI, Collective security, Oxford University Press, Oxford, 2011, pp. 39ss. S. ARRINGTON SLINEY, Right to act: United States legal basis under the law of armed conflict to pursue the Islamic State in Syria, in University of Miami National Security & Armed Conflict Law Review, 6 (1), 2015, pp. 4ss.

147ICJ, Legal consequences of building a wall in the occupied Palestinian territories, ICJ Reports of 9 July 2004, par. 44. See ex multis: M.E. MAZZAWI, Palestine and the law. Guidelines for the Resolution of the Arab-Israeli conflict, Ithaca Press, London, 1997. J. STONE, Israel and Palestine, John Hopkins Press, London, 1981. A. CASSESE, Powers and duties of an occupant in relation to land and natural resources, in E. PLAYFAIR (ed.), International law and administration of occupied territories, Oxford University Press, Oxford, 1992, pp. 419-442. S. BOWEN STEPHEN (ed.), Human rights, self determination and political changes in the occupied Palestinian territory, ed. Brill, Bruxelles, 1997, pp. 221-290. A.S. MULLER et al. (eds.), The International Court of Justice. Its future after fifty years, ed. Brill, Bruxelles, 1997, pp. 117-140. R.J. ARAUJO, Implementation of the ICJ advisory opinion-legal consequences of the construction of a wall in the occupied Palestinian territory: fences (do not) make good neighbours?, in Boston University International Law Journal, 23, 2004, pp. 349-398. SC. BREAU, Legal consequences of the construction of a occupied Palestinian territory: Advisory opinion, in The International and Comparative Law Quarterly, 54, 2005, pp. 1003-1013. G.F. GAREAU, Shouting at the wall: Self-determination and the legal consequences of the construction of a wall in the occupied Palestinian territory, in Leiden Journal of International Law, 18, 2005, pp. 489-521. M. PERTILE, Palestinian territory: A missed opportunity for international humanitarian law, in The Italian Yearbook of International Law, 14, 2004, pp. 121-161. N. SCHRIJVER, No more walls: The

and the obligation to enforce humanitarian law: "(...) in the present case, the obligation of all contracting parties not to recognize the illegal situation that has arisen due to the construction of the wall and not to provide assistance to Israel, in order to ensure that this State complies with the rules of humanitarian law (...) it is necessary that the State will have to carry out the assessment of any risks that it has probably omitted[148] due to the controls on the activities of private individuals[149] and necessarily that the State has acted according to its own will (knowledge[150]). The knowledge is also based on art. 30 StICC which states that:"(…) knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly (...)"[151]. The term "knowledge" clearly states that the margins for a configuration of state responsibility are widening since a "full conviction" based on "aggregated data" is no longer necessary, but it is sufficient that the exporting State has knowledge of the illicit circumstance (i.e. the commission of the crime of genocide by the receiving State) or of the fact that the ordinary course of events is achieved in a decisive way.

This is a general check given that the provision established by art. 7, par. 2 of ATT requires the State to verify the relative risks of serious violations of international law related to the transfer of arms. This type of assessment in some cases[152], requires the textual interpretation of the provision in question which in reality leaves some further doubts: such as the source responsibility whenever the State has not carried out the related control, rectius the assessment of the related risks that have resulted from violations of human rights and humanitarian law. Consideration that can also be made in the event that the State has legitimately authorized the export and trade in arms, but private individuals have violated

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Palestinian territory, in The Netherlands Quarterly of Human Rights, 22, 2004, pp. 3-5. I. SCOBBIE, Unchart (er) and waters?: Consequences of the advisory opinion on the legal consequences of construction in the occupied Palestinian territory for the responsibility of the UN for Palestine, in The European Journal of International Law, 16 (5), 2005, pp. 941-961. A. ORAKHELASHVILI, International public order and the international court's advisory opinion on the construction of a wall in the occupied palestinian territory, in Archiv des Völkerrechts, 43, 2005, pp. 248. J. CRAWFORD, Multilateral rights and obligations in international law, in Recueil des cours, ed. Brill, Bruxelles, vol. 327, 2007, pp. 325ss. R. WEDGWOOD, The ICJ advisory opinion on the Israeli security fence and the limits of self-defense, in American Journal of International Law, 99, 2005, pp. 52-61. T. RUYS, O. CORTEN, A. HOFER, The use of force in international law. A case-based approach, Oxford University Press, Oxford, 2018. C.F. WHITMAN, Palestine's statehood and ability to litigate in the International Court of Justice, in California Western International Law Journal, 49, 2018.

148See art. art. 3 ARSIWA, which establishes how the offense of the State can have both the commissive and the omissive form.

149Z. YIHDEGO, The arms trade and international law, op. cit., pp. 288ss.

150Seventh Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, in Yearbook of International Law Commission, 1978, vol. II, Part One, p. 58, par. 72.

151N.H.B. JØRGENSEN, State responsibility for aiding or assisting international crimes in the context of the Arms Trade Treaty, in Current Developments, 108 (4), 2014, pp. 722ss. J.D. SORENSEN, United Nations Arms Trade Treaty: Russia's justifications for abstention and the treaty's effectiveness in application, in Brigham Young University International Law & Management Review, 11, 2015, pp. 237ss: "(...) the value to be attributed to the term "knowledge" would be at the origins of the Russian abstention in the adoption phase of the Treaty as: "Under the ATT, any arms transfers from Russia to Assad ruled Syria would not be allowed because of Russia's knowledge that the arms will be used in a way prohibited by the ATT (...)".

152See, art. 4 of Regulation 2009/428/EU. For further analysis see also: I. KOŁAKOWSKA-FAŁKOWSKA, The dual-use trade controls: Poland beyond materiality and borders, in Cahiers de Science Politique, 28, 2013.

the relative authorization that has been given[153]. It is not necessary to ascertain the requirement of effective control by the State, as the obligation to verify the relative risks associated with the export of arms allows to be established the conduct that characterizes state responsibility for failure and due control over both the activities of private individuals and on the final destination of the arms shipment[154]. Requirement that was less referred to art. 11 ARSIWA, which provides that: "conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own (...)"[155]. The aforementioned provision refers to the responsibility of the State when there is a pre-established connection through authorization and/or formal attribution of powers through the individual subject and the State itself. In this case, the conduct of the individual is known to the State at the time of the commission of the offense or immediately thereafter, where in this case the act committed or the relative failure to verify is accepted[156]. This is the attribution of an offense that is configured and the relative conduct is accepted by private individuals. This is a verification prior to the commission of the offense and where the relative preventive measures of the relative risks have not been adopted. In this case we recall from international jurisprudence and in particular from the ICJ in the case of the US Diplomatic Corps in Tehran[157],where it established that: "(...) on 4 November 1979 the

153United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., pp. 73. This happens, for example, when there has been a falsification of end-use or end-user certificates and a diversion has occurred. In this sense, see the Otterloo case below.

154Some doubts remain regarding the two requirements to be ascertained in practice. The knowledge requirement, as required by art. 6, par. 3 of the ATT was considered as a form of will of the State and is to be considered as a direct will to the commission of offenses. This interpretation derives from the consideration of considering arms transfers as a form of complicity in international crimes of the State. Art. 16 of the 2001 Project specifies: "(...) that the attribution of responsibility to the State occurs in cases in which the latter has voluntarily provided its contribution and the violation committed was attributable to the State itself. This would lead to considering how liability is generated only where it is established that the State intended to commit the specified violations. On the other hand, the problem concerns the type of risk that must be ascertained, that is overriding (in the English language version) or prévalent (in the French language version). In this sense, when it is admitted that the State could be responsible as an accomplice in the offenses committed, it is necessary to certify that the risk that such violations were possible was particularly high, or that any reasonable doubt at the time could be eliminated. This consideration, as we will see, leads us to believe that, although the possibility of attributing the conduct of individuals to the State even when there is no specific control requirement, the burden of proof will be particularly heavy (...) ".

155D. LIAKOPOULOS, Complicity in international law, op. cit.

156United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., pp. 92.

157ICJ, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, 24 May 1980, in ICJ Reports, 1980, p. 3, which is affirmed that: "(...) It remains open to that government under the Court's Statute and rules to present its own arguments to the Court (…) either by way of defense in a counter memorial or by way of a counter-claim filed under art. 80 the rules of the Court (...) by not appearing in the present proceedings, the government of Iran, by its own choice, deprives itself of the opportunity of developing its own arguments before the Court (…)". For further analysis see also: J. PAUL, International adjudication, embassy seizure. United States v. Iran, in Harvard Journal of International Law, 21, 1980, pp. 270ss. E. ZOLLER, L'affaire du personnel diplomatique et consulaire des Ètats-Unies a Tèhèran, in Revue Gènèrale de Droit International Public, 84, 1980, pp. 974ss. R. BERNHARDT, The provisional measures procedure of the International Court of Justice to US staff in Tehran. Fiat iustitia, pereat curia?, in Virginia Journal of International Law, 21, 1980, pp. 558ss. L. GROSS, The case concerning United States diplomatic and consular staff in Tehran. Phase of provisional measures, in American Journal of International Law, 74, 1980, pp. 396ss. S. LUCHT, Der Internationale Gerischtshof: zwischen Recht und Politik, Herbert Utz Verlag, Münich, 2011.

Iranian authorities (a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the security of such other persons as might be present on the said premises; (b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part ; (c) had the means at their disposal to perform their obligations; (d) completely failed to comply with these obligations (...)"[158].

We can refer to the attribution of the offense also in the circle of the conventional arms trade, where the responsibility of the State is determined every time it fails to fulfill its control obligations according to art. 11ARSIWA[159]. The lack of adoption of related measures including the confidence and security-building measures that contain any risks deriving from the export of arms as required by art. 7, par. 3 ATT give rise to the responsibility of the State only when the relative violations that have not been foreseen are committed. Also making a literal interpretation of the article just mentioned, we can say that the responsibility is attributed to the State and to "knowledge of the unlawful conduct of individuals (...) has decided to do it as its own". These are two requirements included in the mere unlawful situation and the assessment that according to the ILC and as required by art. 11 ARSIWA results in the offense and to the consequences that may arise from it. The State must voluntarily fail to intervene to repress the conduct of private individuals which would have resulted in the offense[160]. The same ILC[161] has specified that the hypothesis of responsibility is completely distinct from the complicity which is provided for by art. 16, where it was established that: "(…) a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State (...)"[162]. In the case of art. 11, the "knowledge" is understood as "awareness" of the commission of an offense by individuals and in art. 16 the main responsibility lies in the offending State, while the State that supports or assists does so with "knowledge" or the will to help in the commission of the offense.

This is a distinction that is not clearly seen in the discipline of arms transfers, because according to art. 6, par. 3 of ATT it is established that a State must not issue arms export

158ICJ, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), op. cit., p. 94.

159From the international jurisprudence see also: K. ISTREF, C. RYNGAERT, Makuchyan and Minasyan v. Azerbaijan and Hungary: Novel questions of State responsibility, presidential pardon, and due diligence of sentencing transfer meet in a rare case of the right to life, in European Convention on Human Rights Law Review, 3, 2021, pag. 268: "(…) the only two cases cited by the ILC in its Commentary to Article 11 ARSIWA use the terms "approval" and "endorsement", which are rather different to 'acknowledgment' or "adoption". In the Lighthouses arbitration (1956), an arbitral tribunal attributed a particular act to Greece on the ground that it had been 'endorsed by [Greece] as if it had been a regular transaction'.21 And in the famous Hostages Case (1980), the International Court of Justice held that "[t]he approval given to [the occupation of the US Embassy and the detention of its diplomatic and consular staff as hostages] by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State (…) as regards the latter case, the ILC opined that '[t]hese [acts] were sufficient in the context of that case, [but that] as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it (…)".

160United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), op. cit., p. 94.

161United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), op. cit., p. 129.

162D. LIAKOPOULOS, Complicity of States in the international illicit, op. cit.

authorizations when it has knowledge that the weapons can be used for the commission of violations of human rights or humanitarian law and in the same way, art. 7, par. 3 establishes that the State, following evaluation/control, determines the existence of a similar preponderant or prevailing risk that will have to deny the export authorization.
In this case, it is not clear, based on an objective interpretation of the provision which, on the basis of the preparatory work of the evaluation/control level, reveals that the State has full knowledge of the unlawfulness of the conduct of private individuals well before issuing the relevant authorization[163]. The negotiating States have admitted during the preparatory work the experiment of the evaluation/control of possible risks as the only obligation incumbent on the States. We cannot also think of the need for knowledge of the risks to derive from this assessment.
According to the interpretation of the treaties, it is not possible to clarify whether the obligation to ascertain risks also contains the relative knowledge of the offense and in this case it is possible to refer to what is established in the liability regime, i.e. in the case of risk assessment of violations must also be considered an obligation of due diligence, and in particular an obligation of relative conduct. This makes it necessary to evaluate whether or not to issue authorizations for the export of arms. The a priori knowledge of violations, risks and the consequent decision to deny the relative authorization, are elements that arrive at the conclusion of empirical results of the assessment according to our opinion and on the basis of the information possessed and those examined[164]. The adoption of suitable measures by the State is necessary to contain the ascertained risk[165]. The knowledge provided for by art. 6, par. 3 of ATT, in combination with art. 7 par. 3, must be understood in the sense of "aknowledgement" of any illicit types by private individuals, and failure to take action against them will be evaluated as a type of omission and application of the rule provided for by art. 11 ARSIWA[166].

163See in this case the declaration made by Denmark in the Conference of the Preparatory Committee to the Arms Trade Treaty of 30 March 2012 (Compilation of views on the elements of an Arms Trade Treaty, A/CONF.217/2, 10 May 2012) which is affirmed that: "(…) the assessment should be based on robust and ambitious criteria, including strong human rights and international humanitarian law dimensions. In this regard, licences for arms transfers must be denied if there is a risk that the transfer will contribute to, or be used for, violations of international humanitarian and human rights law or exacerbate conflict or armed violence in the recipient country". This, like other statements on this point, only reveal an obligation to ascertain that there is no risk of violations, even serious ones.
164A. BIANCHI, On power and illusion: The concept of transparency in international law, in A. BIANCHI, A. PETERS (eds.), Transparency in international law, Oxford University Press, Oxford, 2013, pp. 1-19.
165A. BIANCHI, On power and illusion: The concept of transparency in international law, in A. BIANCHI, A. PETERS (eds.), Transparency in international law, op. cit., Z. YIHDEGO, The arms trade and international law, op. cit., pp. 291-292, which explains how: "(...) any assistance in the commission of the offense has been poorly defined even in the international context. Previous studies conducted by the Red Cross have expressed only the opinion that "in some cases" such responsibility could be delineated (Arms Availability and the Situation of Civilian in Armed Conflict, 1999, p. 25 ff.). However, also thanks to the general and current structure of arms exports by the States, we certainly do not refer generally to assistance in the commission of offenses by other States through the supply of weapons, but it will only be possible to determine the failure to adopt preventive measures to contain any risks of violations (...)".
166According to the position of the Special Rapporteur Roberto Ago: "(…) The current configuration of the arms market, it is very difficult to demonstrate that the State voluntarily decides to have arms exported to contribute to the commission of an offense. However, alongside an individual responsibility for aiding and abetting in the commission of international crimes or violations in general, it is always possible to admit an international responsibility of the State "in solidarity" and parallel to the individual one, for failing to carry out the necessary checks and assessments. In this sense, see the residuality clause provided for by art. 58 ARSIWA. See, United Nations Legislative Series, Materials on the Responsibility of States for Internationally

Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., pp. 349-350. V. VIJ, Individual criminal responsibility under aiding and abetting after the specific direction requirement in the Taylor and Perišć cases, in Die Friedens-Warte, 2013, pp. 160ss. J. COURTNEY, C. KAOUTZANIS, Proactive gatekeepers: The jurisprudence of the ICC's pre-trial Chambers, in Chicago Journal of International Law, 16, 2015, pp. 525ss. N. VOLKER, The confirmation of charges procedure at the International Criminal Court, advance or failure?, in Journal of International Criminal Justice, 10, 2012, pp. 1342ss. C. WAUGH, Charles Taylor and Liberia: Ambition and atrocity in Africa's lone star State, ed. Zed Books, New York, 2011. N. CHAZAL, The International Criminal Court and global social control: International Criminal Justice in late modernity, ed. Routledge, London & New York, 2015. D. LIAKOPOULOS, Complicity of States in the international illicit, op. cit., C.P. EBY, Aid "specifically directed" to facilitate war crimes. The ICTY's anomalous actus reus standard for aiding and abetting, in Chicago Journal of International Law, 115, 2014. P. BEHRENS, R. HENHAM, Elements of genocide, ed. Routledge, Taylor & Francis, Glass House Book, New York, 2013. P. SULLO, Beyond genocide: Transitional justice and Gacaca Courts in Rwanda, ed. Springer, Berlin. **2018.** A. HUNEEUS, International criminal law by other means: The quasi-criminal jurisdiction of the human rights court, in American Journal of International Law, 107, 2013, pp. 6ss. D. CASSEL, Corporate aiding and abetting of human rights violations: Confusion in the courts, in Northwestern Journal of International Human Rights, 6, 2008, pp. 305ss. See in particular in argument the next cases: judgment Limaj (IT-03-66-T), Trial Chamber, 30 November 2005, par. 509; judgment, Krstić (IT-98-33-A), Appeals Chamber, 19 April 2004, par. 188; judgment, Kunarać (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, par. 390; judgment, Gacumbitsi (ICTR-2001-64-T, Trial Judgment, 17 June 2004, par. 285 ("committing" refers generally to the direct and physical perpetration of the crime by the offender himself"); judgment, Kayishema (ICTR-95-1-A), Appeals Chamber, 1 June 2001, par. 187; judgment, Vasiljević (IT-98-32-T), Trial Chamber, 29 Nov. 2002, par. 62 ("The accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where is it is proved the he personally physically perpetrated the criminal acts in question or personally omitted to do something in violation of international humanitarian law (...)"); judgment, Kamuhanda (ICTR-99-54A-T), Trial Chamber, par. 595 ("(...) to commit a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law (...)"); judgment, Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, par. 188; judgment, Kunarac (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, par. 390; judgment, Krstić (IT-98-33-T), Trial Chamber, 2 August 2001, par. 601; judgment, Krnojelac (IT-97-25-T), Trial Chamber, 15 March 2002, par. 73. judgment, Blagoje Simić (IT-95-9-T) Trial Chamber, 17 October 2003, par. 137 ("(...) any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with requisite knowledge (...)". J. PEAY, Mental incapacity and criminal liability: redrawing the fault lines?, in International Journal of Law and Psychiatry, 42, 2015, pp. 4ss. M.E. BADAR, The mental element in the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective, op. cit., pp. 477ss. According to the above author: "(...) a number of theories have emerged in criminal law to distinguish between dolus eventualis and advertent negligence, among others, consent or approval theory (die Billigungs-oder Einwilligungtheorie), indifference theory (die Gleichgültigkeitstheorie), possibility theory (die Vorstellungs-oder Möglichkeitstheorie), probability theory (die Wahrscheinlichkeitstheorie), combination theory (Kombinationstheorien) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory (...)". R.S. CLARK, The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences, in Criminal Law Forum, 12, 2001, pp. 296ss. R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, Cambridge University Press, Cambridge, 2010. A. ESER, Mental elements-Mistake of fact and mistake of law, in A. CASSESE, P. GAETA, G.R.W.D JONES (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, Oxford, 2002, pp. 890ss. A.G. GIL, Mens rea in co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments against punishment for excesses committed by the agent or the co-perpetrator, in International Criminal Law Review, 14, 2014, pp. 87ss. K.J. HELLER, The Rome Statute of the International Criminal Court, in K.J. HELLER, D. DUBBER (eds.), The handbook of comparative criminal law, Stanford Law Books, Stanford, 2011, pp. 597ss. S. PORRO, Risk and mental element: An analysis of national and international law on core crimes, ed. Nomos, Baden-Baden, 2014. K.M.F. KEITH, The mens rea of superior responsibility as developed by ICTY Jurisprudence, in Leiden Journal of International Law, 14, 2001, pp. 618ss. P.H. ROBINSON, J.A. GRALL, Element analysis in defining criminal liability: The model penal code and beyond, in Stanford Law Review, 35, 1983, pp. 685ss. D. FLECK, The law of non-international armed conflict, in D.

6.VIOLATIONS OF INTERNATIONAL LAW THROUGH THE TRANSFER OF ARMS

To have an offense committed and attributed to a State we need an assessment of the seriousness of the offense and the related objective element[167]. The unlawful conduct that is contributed to the State consists of both an action and an omission[168]. In the arms trade the conduct can be commissive when the State is involved/present in the qualification of the act and decides to supply the weapons to another actor in order to commit certain violations, both of an omissive type and when the State voluntarily decides to omit certain export control activities. The related conduct is identified in complicity and the commission of violations through the use of weapons[169].

The violation attributed to the State can also occur through an omission of a guilty nature which, in my opinion, clearly hides a dolus eventualis. In this case, the assessment of risks relating to arms exports assumes an innovative character in the area of responsibility which is characterized by due diligence obligations that can only be violated through an omission, i.e. the failure to assess all the related necessary or relevant information[170].

The omission and lack of assessment/control on illicit arms transfers becomes instrumental and connected to the main violation, that is to the act of committing or omission made by the recipient of the relative weapons. This is a type of violation that takes the form of three categories, in treaty practice, such as: -violation of arms embargoes[171] established by the Security Council[172]; -violation of international obligations of States, whether they are exporters or importers[173];- violations of human rights and humanitarian law, in the event that

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FLECK (eds), The Handbook of International humanitarian law, Oxford University Press, Oxford, 2013, pp. 581-610. E. WILMSHURTS (eds), International law and the classification of conflicts, Oxford University Press, Oxford, 2012.

167Art. 2 of the draft articles on the responsibility of States of 2001: "(…) there is an internationally wrongful act of a State when conduct consisting of an action or omission: (…) (b) constitutes a breach of an international obligation of the State".

168United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER B/25, 2012, op. cit., par. 13.

169A. BELLAL, S. CASEY-MASLEN, G. GIACCA, Implications of international law for a future arms trade treaty, op. cit., pp. 16ss.

170See, art. 7, par. 3 of ATT, which is affirmed that: "(...) the only information that must be taken into consideration, for the purposes of carrying out the risk assessment, must be relevant (...)". We also see the Wassenaar and EU dual-use regulations and the information that needs to be screened can be of different types, even if the procedures provided therein state that it is usually the exporter who provides the necessary information, which fact are the main ones on which to evaluate the issue of export authorization. In addition to the relevant information, the ATT "(…) also allows the importing State to provide the information necessary to complete the assessment (…) (art. 8, par. 1). But to fully carry out the assessment: "(...) it is established that the States must form both a register in which it is necessary to note all the authorized exports, and even those denied (art. 12) (...) and to draw up annual reports on the measures adopted , so that they are also known by the other States party to the Treaty and can be considered as useful information in subsequent evaluations (art. 13) (...) ". All these obligations can be violated, by omission, unless it is demonstrated that the commission was aimed at favoring the export, for example in the case of attesting false information about an exporter, or by facilitating the transit of a cargo of weapons directed to a region where there is an armed conflict.

171J.VORRATH, Implementing and enforcing UN arms embargoes: lessons learned from various conflict contexts, Corporate Editor Stiftung Wissenschaft und Politik-SWP-Deutches Institut für Internationale Politik und Sicherheit, 2020.

172According to art. 6, par. 1 of ATT.

173Reiterated in art. 6, par. 2 of ATT. It should be noted that the text of the provision speaks of: "(...) relevant international obligations under international agreements to which (the State) is a party", indicating in particular the obligations relating to the prohibition of transfer or contrast to the illicit traffic of weapons. This expression does not seem to create problems of interpretation and understanding of the third degree acts of regional

weapons can be used during an armed conflict for the commission of war crimes, against humanity or genocide[174].

This is an important and not causal order. The case of the arms embargoes of the Security Council is due to the character of the obligations deriving from the UN Charter with respect to the other obligations of the States[175]. Obligations, obviously of a binding nature by the resolutions of the Security Council adopted pursuant to Chapter VII of the Charter[176] of a special nature envisaged by the resolutions, aimed at regulating specific and exceptional situations[177].

The list of the envisaged order is also based on the international obligations of the States, relating above all to the regulation of arms transfers and requires consideration of the relative special nature that complies with the obligation deriving from general international law.

As far as human rights and the principles of humanitarian law are concerned, the general and mandatory character that both have by their nature and how they are assumed in the rules of international law is specified. This reminder is important, because the observance of norms has assumed a pre-eminent value in the international legal system. And this position is also carried out to allow the attribution of responsibility to the exporting States of arms as they are used to commit such violations, which assume obligations of an erga omnes nature.

It is possible to define such violations of a serious nature, because they are considered as violations of particularly stringent international obligations of States such as the arms embargoes of the Security Council and violations of human rights and humanitarian law. This attribute cannot be considered for the other obligations of States, especially when these do not concern arms transfers. In any case, the "significant" obligations regarding the transfer of arms that have an instrumental nature are considered that respect the other two categories of obligations, that is, in the case of arms embargoes[178], obligations instrumental to compliance with these, which facilitate the fulfillment by part of the States; and in the case of human rights and humanitarian law, additional obligations that would become instrumental in protecting them and preventing violations and especially serious ones.

7.ARMS EMBARGOES ESTABLISHED BY THE SECURITY COUNCIL AND RELATED VIOLATIONS

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organizations that impose arms embargoes (...) on soft law acts, notoriously non-binding for the States that have approved them, without prejudice to the possibility of invoking, in specific situations, the effect of lawfulness that arises from these, in addition to the general duty to behave in good faith in the execution of the act voted on (...) ".

174Reiterated in art. 6, par. 3 of the ATT, which specifies how the violations referred to therein must be foreseeable because there is knowledge of their possible commission.

175Art. 103 of the Charter of the UN.

176Art. 25 of the Charter of the UN. For further analysis see also: B. SIMMA, D.E. KHAN, G. NOLTE, A. PAULUS, The charter of the UN. A commentary, Oxford University Press, Oxford, 2011. A. PELLET, The charter of the UN. A commentary, op. cit.

177The specialty lies both in the individual situations considered, both in the recipients affected, and finally in the individual measures to be adopted.

178This prohibition is usually imposed: "(...) through a legal wording according to which: the sale, supply, transfer or export to Belarus of arms and related material of any kind, including weapons and ammunition, vehicles and military equipment, paramilitary equipment and related spare parts, as well as equipment that could be used for internal repression, by nationals of Member States or from the territory of Member States or by ships or aircraft flying their flag, are or less originating from those territories (...) Council Decision 2011/357/CFSP of 20 June 2011 amending Decision 2010/639/CFSP concerning restrictive measures against certain officials of Belarus (…)".

The obligation and violations of arms embargoes established by the Security Council find a legal basis on art. 6, par. 1 of ATT, where it is established that: "(…) a State party shall not authorize any transfer of conventional arms (...), if the transfer would violate its obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes (...)"[179].

Based on a textual interpretation, arms embargoes are not the only measures available to the Security Council[180]. The relative reference is established for this type of decision, in which the most specific and best tested form of transfer prohibition is established[181]. Within this framework we recall the sanctioning system established in Afghanistan with Resolution 1333 of 19 December 2000 by which the Security Council decides that "(…) all States shall: (a) Prevent the direct or indirect supply, sale and transfer to the territory of Afghanistan under Taliban control as designated by the Committee established pursuant to resolution 1267 (1999)[182], hereinafter known as the Committee, by their nationals or from their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned (...)"[183]. This sanctioning system assumes particular characteristics in particular with the subsequent Resolution n. 1822 of 2008 which loses all territorial dimension in relation to the restrictions that concern more than one: "the territory of Afghanistan under the Taliban control" but act "with respect to Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them (...)"[184].

The identification of the subjects and entities participating in the restrictive measures is left to the Sanctions Committee which, after reporting by the States, is obliged to draw up a list to which any transfer of arms is precluded[185]. Starting from 2015, with the adoption of

179See ex multis: A. PELLET, The Charter of the UN. A commentary, Oxford University Press, Oxford, 2014. J.E. SCHWARTZBERG, Transforming the UN system designs fore a workable world, Brookings Institution Press, Tokyo, New York, Paris, 2016. A. HAMONIC, Les relations entre l'Union europèenne et l'ONU dans le domaine de la gestion des crises, ed. Larcier, Bruxelles, 2018. J. MARC DE LA SABLIÉRE, Le Conseil de sècuritè des Nations Unies, ed. Larcier, Bruxelles, 2018. R. HIGGINS, P. WEBB, D. AKANDE, S. SIVAKUMARAN, J. SLOAN, Oppenheim's international law: United Nations, Oxford University Press, Oxford, 2018.

180In this sense, see the resolutions that impose an obligation to cease hostilities on the parties to the conflict in question, in which it is also possible to include the obligations relating to the transfer of arms to them. This type of measure falls within the more general category of acts that can be adopted by the Council as a form of arms regulation pursuant to art. 26, par. 2 of the UN Charter. See in argument: N. KRISCH, Article 41, in B. SIMMA (eds), The Charter of the United Nations. A Commentary, Oxford University Press, Oxford, 2012, pp. 1305ss.

181Z. YIHDEGO, The role of Security Council arms embargoes in stemming destabilizing transfers of small arms and light weapons (SALW): Recent developments and challenges, in Netherlands International Law Review, 54 (1), 2007, pp. 115-132 and 116-118. N. KRISCH, Article 41, in B. SIMMA et al. (eds), The Charter of the United Nations. A Commentary, op. cit., pp. 1306ss, identifies the function of regulating the presence of weapons in the world as the main justification for the adoption of such decisions.

182S/RS/1267 (2001) UN Security Council.

183S/RS/1333 (2000) UN Security Council.

184S7RES/1822 (2008) UN Security Council. For further analysis see also: B. FASSBENDER, Securing human rights. Achievements and challenges of the United Nations Security Council, Oxford University Press, Oxford, 2011, pp. 1644.

185The adoption of the list system has raised a number of problems with references to human rights legislation, as, at least in the first phase, the procedure for including the subject in the list did not provide adequate defense possibilities for the individual entered. With the adoption of resolution no. 1904 (2009) an Ombudsperson was established: "(...) impartial body, charged with evaluating requests for removal from the

Resolution n. 2253, the sanctioning measures will also affect members and individuals similar to the Islamic State. The sanctions system established in Yemen[186] imposes a military embargo aimed at: "(…) prevent the direct or indirect supply, sale or transfer to, or for the benefit of Ali Abdullah Saleh, Abdullah Yahya Al Hakim, Abd Al-Khaliq Al-Huthi (...)"[187]. In this case, the Security Council for the first time adopts a system of military sanctions by directly identifying the subjects to whom any kind of arms export is precluded[188]. With regard to sanctioning measures, the need to introduce measures is established "sufficient to deter and/or punish violations of export control and applicable brokering, transit, and transshipment laws. Such deterrents may include, as appropriate, fines, civil or administrative actions, criminal sanctions, and restriction or denial of export privileges, along with making public the outcomes of violation proceedings (...)"[189].

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list, partially remedying the problems that emerged in relation to human rights legislation. In 2012, with resolution no. 2083, a focal point is set up competent to evaluate removal requests limitedly with respect to the lists relating to economic sanctions and flight bans (…)".

186Council Decision (CFSP) 2015/1333 of 31 July 2015 concerning restrictive measures in view of the situation in Libya, and repealing Decision 2011/137/CFSP. Where it establishes a power of inspection, in addition, the Council of the Union also provides for safeguard formulas according to which such inspections must be conducted: "(…) in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements". Council Decision (CFSP) 2015/1333 of 31 July 2015 concerning restrictive measures in view of the situation in Libya, and repealing Decision 2011/137/CFSP; Council Decision 2010/127/CFSP of 1 March 2010 concerning restrictive measures against Eritrea; Council Decision 2010/231/CFSP of 26 April 2010 concerning restrictive measures against Somalia and repealing Common Position 2009/138/CFSP; Council Decision (CFSP) 2015/882 of 8 June 2015 amending Decision 2014/932/CFSP concerning restrictive measures in view of the situation in Yemen. Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Dàesh) and Al Qaeda and associated persons, groups, businesses and entities and repealing Common Position 2002/402/CFSP. Similar sanctions have been taken in the situation concerning the Democratic Republic of the Congo. Council Decision 2010/788/CFSP of 20 December 2010 concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP, the Council of the Union, applying Security Council resolution no. 1533 (2004), states that: "(…) the direct or indirect supply, sale or transfer of arms and any related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned to all non-governmental entities and individuals operating in the territory of the Democratic Republic of the Congo (DRC) (...) shall be prohibited". In this sense see also: Council Decision 2010/788/CFSP of 20 December 2010 concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP; Council Decision 2013/798/CFSP of 23 December 2013 concerning restrictive measures against the Central African Republic; Council Decision 2014/450/CFSP of 10 July 2014 concerning restrictive measures in view of the situation in Sudan and repealing Decision 2011/423/CFSP.

187Resolution 2216, S/RS/2216 UN Security Council of 14 April 2015.

188Before 2012, targeted sanctions were used to implement economic sanctions to limit the freedom of movement of specific individuals, but never to institute restrictive military measures.

189The introduction of criminal sanctions is a tool used above all in the instruments relating to disarmament and regulation of transfers as it plays the role of deterrent against any violations of the obligations/commitments undertaken by the States. See also in argument: B. TUZMUKHAMEDOV, Disarmament, in Max Planck Encyclopedia of Public International Law, May 2011, par. 1ss, which underlines: "(...) the close interconnection between the law of disarmament and the rules on the use of weapons. This inclusion would not seem to be reflected in the approach of the French and German schools, which prefer to speak of disarmament as an autonomous branch with respect to the entire legal corpus of armed conflicts and public international law, having a different application compared to the normal rules applicable to situations war (...)". E. DAVID, Principes de droit des conflits armes, Bruylant, Bruxelles, IV° ed., 2008, pp. 383ss. D. FLECK, Arms control and disarmament law: Its role in addressing new security threats, in Revue de Droit Militaire et de Droit de la Guerre, 52 (1), 2013, pp. 62ss, according to the author: The law of disarmament is a branch of the law of armed conflicts with a "preventive" value of the conflict.

8.VIOLATIONS AND OTHER TYPES OF STATE LIABILITY OBLIGATIONS

Art. 6, par. 2 of ATT affirms that: "(…) a State party shall not authorize any transfer of conventional arms (…) if the transfer would violate its relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms (...)". Thus, we can understand that arms transfers are considered illegal in case the violation comes from some relevant state obligations. The first obligations of violation are those relating to prohibitions or restrictions on the transfer of conventional weapons. How these obligations are prior to the violation of other norms are presented in international law[190].

Such obligations that presuppose violation of the State are characterized in the arms market as a fragmented and unspecialized discipline where the technique of interpretation relating to the conflicts between the different obligations is harmonized through relevant regulations that seek to regulate the fundamental basis of the conventional arms market.

In this spirit, we recall few international instruments that have a binding nature, such as the Inter-American Convention of 1997[191], the UN Protocol of 2001[192] (both refer to the illicit manufacture and trafficking of firearms, explosives and other related material) and the ECOWAS Convention on the illicit transfer of Small Arms and Light Weapons (SALW)[193]. Obviously, these are not sources of obligations that are relevant to States[194], as most of the

190Doubts may arise when: "(...) the violation occurs with respect to other obligations of the States but which do not directly concern the transfer of arms, eg. when the transfer may be in violation of the basic principles of international trade law (...) since the arms market is subject to several disciplines, both of a specific nature and relating to general principles of international law, the application of these additional obligations must be examined at a later time, or when the various agreements and rules of a customary nature that guide the discipline of arms transfers are incomplete or the application of which leads to unreasonable results. As far as this area of research is concerned, we will concentrate above all on exposing the relevant disciplines relating to arms transfers (…)".

191Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, signed a Washington of 14 October 1997.

192Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, adopted with Resolution A/55/255 of 31 May 2001 and annexed to the Palermo Convention on transnational organized crime.

193ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials, signed in Abuja on June 14, 2006.

194As for the sanctions that can be adopted by international organizations or states against certain recipients, which impose bans on the export and supply of weapons. In fact, the sanctions of the Security Council of the UN and those of the EU are adopted with binding acts for the Member States, constituting that core of third-degree sources. In this sense, see: The European Parliament report entitled "EU sanctions: A key foreign and security policy instrument" where it is argued, in no uncertain terms, that: "(…) sanctions have become an increasingly central element of the EU's common and foreign security Policy". Similar conclusions are reached if we look at the legal content of the council decisions establishing military embargoes. These resolutions find their legal basis precisely in art. 29 of the TEU, according to which the Council, in the context of the common foreign and security policy, defines: "the position of the Union on a particular issue of a geographical or thematic nature". Council Decision 2011/357/CFSP of 20 June 2011 amending Decision 2010/639/CFSP relating to restrictive measures against certain officials of Belarus; Council Decision 2011/273/CFSP of 9 May 2011 on restrictive measures against Syria; Council Decision 2010/638/CFSP of 25 October 2010 concerning restrictive measures against the Republic of Guinea. As regards the doctrinal opinions, they are homogeneous in considering that: "the European Union has made extensive use of sanctions as a foreign policy tool". K. GEBERT, Shooting in the dark? EU sanctions policies, in European Council on Foreign Relations, 11 January 2013, pp. 2ss, affirms that: "(…) sanctions are becoming one of the European Union's favourite foreign- policy tools". F. GIUMELLI, How EU sanctions work: A new narrative, in Institute for Security Studies, Chaillot paper n. 129, May 2013, affirms that: "(…) imposing sanctions is considered a foreign policy

rules regarding limits on arms transfers have a broad nature of soft law acts, as we have seen with the UN Program of Action for the combating illicit trafficking in SALW[195], or the EU Common Position 2008/944/ PESC[196] on the export of SALW by EU Member States[197], or

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decision, therefore the EU can adopt them in order to attain any of the objectives indicated by article 21". As an example, the consultation of Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela is recommended. The Council specified that "it is appropriate to impose targeted restrictive measures against certain natural and legal persons responsible for serious violations or abuses of human rights or for the repression of civil society and democratic opposition and of persons, entities and bodies that with their actions, policies or activities undermine democracy or the rule of law in Venezuela, as well as towards persons, entities and bodies associated with them (...)".

195Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, adopted with the Resolution A/CONF.192/15 of 20 July 2001.

196Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipmen, OJ L 335, 13.12.2008, p. 99–103. See in argument: M.E. BROMLEY, M. BRZOSKA, Towards a common, restrictive EU arms export policy? The impact of the EU Code of Conduct on Major Conventional Arms Exports, in European Foreign Affairs Review, 13, 2008, pp. 333-356. S. BAUER, The EU Code of conduct on arms exports. Enhancing the accountability of arms export policies?, in European Security, 12, 2004, pp. 129ss, affirmed that: "(…) the EU Code of Conduct on Arms Exports, formally adopted on June 8, 1998, was the first detailed agreement between governments within the EU framework in the field of arms exports (...)". S. WISOTZKI, M. MUTSCHLER, No common position! European arms export control in crisis, in Zeitschrift für Friedens und Konfliktforschung, 10, 2021, pp. 276ss. S. GSTOHL, The European neighbourhood policy in a comparative perspective. Models, challenges, lessons, ed. Routledge, London, New York, 2016, pp. 300ss. M.R. MARTINEZ, El Código de Conducta de la Unión Europea en material de exportación de armas, in Boletin Economico de ICE, 2004. S.T. HANSEN, Taking ambiguity seriously: Explaining the indeterminacy of the European Union conventional arms export control regime, in European Journal of International Relations, 22, 2016, pp. 192ss. J. GREBE, Harmonized EU arms exports policies in times of austerity? Adherence to the criteria of the EU common position on arms exports, in Bonn International Center for Conversion, 2013. M. BROMLEY, The review of the EU Common Position on Arms Exports: Prospects for strengthened controls, in EU Non-Proliferation Consortium, 2012, n. 7. I. MARRERO ROCHA, El Régimen de Comercio de Armas Convencionales en la Unione Europea, in Revista de Derecho Comunitario Europeo, 40, 2011, pp. 669-770 and especially pag. 677, affirmed that: "El principal logro del Código de Conducta ha consistido en sentar las bases para la constitución de un régimen europeo de exportación de armamento convencional". J. STOEL, Codes of conduct on arms transfers-The movement toward a multilateral approach, in Law and Policy in International Business, 2000, pp. 185ss. Among the main objectives recalled in the preamble it should be remembered: "(…) high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all Members States (…) to prevent the export of equipment which might be used for internal repression or international aggression or contribute to regional instability (…) if approval would be inconsistent with, inter alia: (a) the international obligations of Member States and their commitments to enforce UN, OSCE and EU arms embargoes; (b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention; (c) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement (...)". Pursuant to criterion no. 5, before authorizing an arms export "Member States will take into account: (a) the potential effect of the proposed export on their defense and security interests and those of friends, allies and other Member States, while recognizing that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability (...)". The textual formulation of criteria n. 6 and 8 according to which exporting Member States "will take into account" if the Member State supports terrorism and organized crime (criterion 6) and if "the proposed export would seriously hamper the sustainable development of the recipient country" (criterion n. 8). The 8 criteria just mentioned, the Code also provides for a series of operational measures according to which: "(…) Member States will circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused (...)". EU Code of Conduct on arms exports, operative provisions, par. 3. "(...) The refusal of any export licenses appears, in substance, very similar to the wording contained in Section II, par. 4, of the Wassenaar agreement, which has been extensively discussed in chapter I of this paper. Also in the Code, the obligation to

the main acts adopted by the Wassenaar Arrangement[198] on the export of SALW and MANPADS[199].

Apart from these few sources of an international nature, we have no other sources of international obligations regarding conventional arms transfers. Soft law acts actually have a duty of a good faith nature on the part of the States that have participated in and voted in favor of adopting such acts. They do not have a regulatory effectiveness capable of imposing international obligations on States. These non-binding acts allow States to be free to implement them fully within a wide margin of appreciation granted.

For these acts there is also an evident power of the States to decide how to implement the provisions of the act voted and approved. For these acts it may be useful to highlight a precise opinio juris that is formed at international level, that is the assessment/control of the

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communicate any export denials, not having a legal nature, triggers the same consequences illustrated with reference to the Wassenaar Agreement. For further details, please refer to Chapter I, par. 2 of this paper. A novelty is introduced, however, in criterion n.7 which, in the Code, established the commitment of the Member States to assess "the risk that the technology or military equipment is diverted within the purchasing country or re-exported under inadmissible conditions".

Basically, in criterion n. 7 the States undertook to assess the risk of diversion of the exported arms and, in this sense, they should have assessed: the actual security needs of the importing State and; the technical capacity of the importing country to use the imported technology and the capacity of the importing country to exercise effective control over any re-exports. Common Position 2008/944/CFSP specifically introduces the obligation to assess "the risk of diversion of technology or equipment to terrorist organizations or individual terrorists" or any other "unwanted technology transfer". With the criterion n. 3 a ban on the export of weapons "that provoke or prolong armed conflicts or aggravate ongoing tensions or conflicts in the country of final destination" is established; with the criterion n. 4 the prohibition on exporting weapons is given mandatory character "if there is a clear risk that the intended recipient will use the technology or military equipment to be exported for the purpose of aggression against another country; the criterion n. 5 imposes a mere obligation on States to assess "the risk of using the technology or military equipment in question against their own forces or those of Member States of friendly and allied countries"; with the criterion n. 6 before exporting arms, States must assess whether the State of final destination supports or encourages terrorism and international organized crime (…)". See also: European Parliament resolution of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP (2018/2157(INI)) OJ C 363, 28.10.2020, p. 36–44, "On arms exports: implementation of Common Position 2008/944/CFSP (2018/2157(INI))" which is affirmed that: "Notes that the eight criteria are applied and interpreted in different ways by Member States" poi "calls for a uniform, consistent and coordinated application of the eight criteria and full implementation of the Common Position with all its obligations". In this sense see also: Jan Grebe, in un report elaborated for the Bonn International Center for Conversion, which is affirmed that: "(...) how the EU member states had offered different interpretations of the 8 criteria with reference, in particular, to arms exports to Saudi Arabia, Russia and North Africa (...)". J. GREBE, Harmonized EU arms exports policies, op. cit., pp. 7ss. In this report it is possible to find: "(...) a long and detailed list of situations in which EU Member States have offered inconsistent interpretations of the 8 criteria contained in the position (...) it has been noted as in 2009, while some EU member states refused to issue export licenses for armed vehicles to Libya, other EU states, in particular France, proceeded with the same export (…)". M. BROMLEY, The review of the EU Common Position on Arms Exports, op. cit., pp. 10ss. T. HANSEN, N. MARSH, Normative power and organized hypocrisy: European Union Member States' Arms Export to Libya, in European Security, 24 (2), 2015, pp. 264-286.

197Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335, 13.12.2008, p. 99-103

198C. HOELSCHER, H.M. WOLFFGANG, The Wassenaar-arrangement between international trade, non-proliferation, and export control, in Journal of World Trade, 32, 1998, pp. 45ss. K.K. SHEHADEH, The Wassenaar arrangement and encryption exports: An effective export control regime that compromises United States economic interests, in American University International Law Review, 15, 1999, pp. 271ss. A. KENNETH, From containment to cooperation: Collective action and the Wassenaar arrangement, in Cardozo Law Review, 19, 1997, pp. 1079ss.

199K.K. SHEHADEH, The Wassenaar arrangement and encryption exports: An effective export control regime that compromises United States economic interests, op. cit.

risk deriving from the export of arms, as a type of risk that ascertains which preventive measures must be adopted.

Some limitations are encountered by resorting to general international law and to the regulatory areas of international law relating to the arms trade, such as the law of commercial contracts, the law of international trade and the law of armed conflicts and neutrality. Therefore, between the three covenant sources cited above there may be both affinities, divergences and particularities.

The 1997 Inter-American Convention is the first treaty-based international law instrument that focuses on the connection between arms transfers and the commission of violations of international law[200]. Violations that can occur due to the lack of necessary controls and allow terrorist groups[201] or transnational organized crime to get into possession of the weapons[202].

The 2001 UN Protocol as an integral part of the Convention against Transnational Organized Crime[203] is made clear by the 1st recital of the Resolution of the General Assembly, the 1st Recital of Preamble[204] and art. 1, which establishes that the Protocol and its provisions must be interpreted in the spirit of the Convention on Transnational Crime, both as regards the provisions of a general nature, and those that States must adopt criminal measures to suppress certain behaviors[205].

The III Additional Protocol to the UN Convention against transnational organized crime represents a legal instrument mainly oriented "to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms (...)". With respect to the field of application,

200Preamble, 3rd Recital: "REAFFIRMING that States parties give priority to preventing, combating, and eradicating the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials because of the links of such activities with drug trafficking, terrorism, transnational organized crime, and mercenary and other criminal activities".

201United Nations Convention against Transnational Organized Crime, adopted with the Resolution A/CONF.55/25 of 15 November 2000.

202Preamble, 7rd Recital: "STRESSING the need, in peace processes and post-conflict situations, to achieve effective control of firearms, ammunition, explosives, and other related materials in order to prevent their entry into the illicit market"; 10rd Recital: "RECOGNIZING that international trade in firearms is particularly vulnerable to abuses by criminal elements and that a "know-your-customer" policy for dealers in, and producers, exporters, and importers of, firearms, ammunition, explosives, and other related materials is crucial for combating this scourge (...)".

203United Nations Convention against Transnational Organized Crime, adopted with the Resolution A/CONF.55/25 of 15 November 2000. See also the Resolution 55/255 of 8 June 2001, A/RES/55/255: "Recalling its resolution 53/111 of 9 December 1998, in which it decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in women and children, combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and illegal trafficking in and transporting of migrants, including by sea". For further analysis see also: E. MASSINGHAM, A. MCCONNACHIE, Ensuring respect for international humanitarian law, ed. Routledge, London & New York, 2020.

204"Aware of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of each State, region and the world as a whole, endangering the well-being of peoples, their social and economic development and their right to live in peace". This recital seems to follow the corresponding recital of the Inter-American Convention.

205Art. 1: "1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention. 2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein. 3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention".

art. 4 provides that: "(…) this Protocol shall apply (…) to the prevention of illicit manufacturing of and trafficking in firearms (…) 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 (...)".
Unlike the Inter-American Convention, the Protocol is mentioned as a relevant regulatory instrument for the ATT and with reference to the assessment of the preponderant and/or prevalent risks to arms exports[206]. This instrument actually "escapes" from the classic international and regional regulations on the contrast and relating to the illicit trafficking of firearms[207], without forgetting the Inter-American Convention and the ECOWAS Convention[208].
The ECOWAS Convention constitutes[209] the setting of greater controls on the proliferation of light and small arms in the region in order to contribute to stability and peace throughout the continent[210]. The scope of application of the three international instruments is an overlap of one against the other but also a completion of the rules applicable to the procedures envisaged, i.e. illicit trafficking[211], which also establishes controlled delivery, or "(…) the technique of allowing illicit or suspect consignments of firearms, ammunition, explosives, and other related materials to pass out of, through, or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offenses referred to in article IV of this Convention (...)"[212]. We can understand the close link concluded between the arms traffickers and the transfer control authorities which results in a corruptive link. In reality, the Convention makes it applicable in cases where there may be omissions of control by

206Art. 7, par. 2, lett. b), hypothesis iv).
207With regard to "illicit trafficking" and according to art. 3 must be understood as: "(…) the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State party to that of another State party if any one of the States parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol" (art. 3). The Protocol establishes a series of legal obligations which commit States parties to 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 (…) (art. 5 of the Protocol). Within this spirit we see art. 10, where it is specified that: "(…) before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State party shall verify: That the importing States have issued import licences or authorizations; and (…) 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" (art. 10, par. 2). Art. 10 establishes a double obligation for the exporting State which is called, on the one hand to verify that the country of destination has issued the authorization for the relative importation and on the other hand to ascertain that all the transit States have given their consent to the passage of firearms in their territories.
208Preamble, 3rd Recital: "Convinced, therefore, of the necessity for all States to take all appropriate measures to this end, including international cooperation and other measures at the regional and global levels (...)".
209Moratorium on the Importation, Exportation and Manufacture of Light Weapons, adopted on 31 October 1998.
210See the Preamble, recitals: 12 and 16.
211Art. II, par. 2: "The import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State party to that of another State party, if any one of the States parties concerned does not authorize it (...)".
212Art. II, par. 7.

these authorities. This type of offense can be considered configured if the authorities are aware of the transit of weapons and that such transit comes under their own supervision.
We also encountered the definition of "illicit trafficking" that is given by the Protocol[213], in the Inter-American Convention where the requirement of the lack of marking of weapons was established since the unlawfulness of the transfer[214] can be configured. We can also meet the definition of "tracing", which means:"(…) the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking (...)"[215].
Unlike the Inter-American Convention, the Protocol seems to be oriented towards the prevention of a further obligation, in order to effectively combat organized crime[216], to control and follow the movement of firearms and ammunition from the manufacturer to the buyer, as an obligation that corresponds to a standard of a technical nature repeatedly revealed within the General Assembly[217].
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 UN Charter"[218].
In this way, the relative regulation of the arms trade is defined and clearly excludes exchanges between States with the aim of not damaging the exercise of the right to legitimate defense, as provided for by art. 51 of the UN Charter[219]. And the mention of an "action in the interest of national security" suggests that military cooperation agreements between States, aimed at "anticipating" some forms of aggression, must also be excluded from the scope of application[220].
The ECOWAS Convention does not seem to be very far from the spirit of the Inter-American Convention and the UN Protocol as regards the drafting form and the obligations that are imposed. With regard to application[221], the Convention also establishes what is meant by "illegal". In reality, it is established that the unlawfulness: "(...) covers all that is carried out in violation of this Convention"[222]. The unlawfulness would not be included in the violation of internal rules adopted under the Convention, but in the violation of the Convention itself. This definition does not seem to impose direct effects on individuals but establishes what is to be considered illegal for the States party(ies). In this sense, the Convention establishes what are the cases of violation, regardless of the transposition into

213Art. 3, lett. e).
214Z. YIHDEGO, The arms trade and international law, op. cit., pp. 34ss.
215Art. 3, lett. f).
216This is the purpose of the Protocol itself, as explained by art. 2.
217See in particular the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, integral part of the Program of Action.
218Art. 4, par. 2.
219A. PELLET, The charter of the UN. A commentary, op. cit.
220The expression also includes those forms of preventive or anticipatory legitimate defense, and in particular with reference to international terrorism. Agreements between states, where the first is a donor and the second is a donee, aimed at creating both an alliance of a military and political nature, and finally at allowing the second state to update its knowledge on firearms. A similar exception was taken up by art. 2, par. 3 of the ATT relating to arms transfers that remain available to the State: "This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State party for its use provided that the conventional arms remain under that State party's ownership (...)".
221Art. 1 of the Convention.
222Art. 1, par. 5.

specific cases of national legislation. A similar finding is possible on the basis of art. 3, which establishes: - a general prohibition on the transfer or production of SALW by States[223]; and a specific prohibition on transferring SALW to armed groups[224].
These prohibitions are applicable unless the Member States have requested, pursuant to art. 5, the due exceptions for transfers. With reference to these, art. 4 states that: "(…) a Member State can request exemption from the provisions of art. 3 (b) in order to meet legitimate national defence and security needs, or to participate in peace support or other operations in accordance with the decisions of the United Nations, African Union, ECOWAS, or other regional or sub-regional body of which it is a member"[225].
The second reason appears legitimate and well measured[226], as regards the inclusion of legitimate defense, this justification is admissible only in cases where a State party has not adopted any ad hoc and control measures provided for by art. 5. The need to ensure legitimate defense is subject to the provision of an adequate national control system and not based on the rules of public international law.
This type of illegality of arms transfers is also found in the inadmissibility of the exceptions granted pursuant to art. 5, where the Convention establishes that: "(…) -the authorization to transfer takes place to allow the donation of arms and at the same time this form of transfer has not been provided for in the prohibition exceptions by the States concerned; - the ECOWAS General Secretariat has not received all relevant information about exports; - the weapon marking procedure has not been carried out (...)"[227].
The due diligence obligations envisaged by the Inter-American Convention include the procedure for the marking of explosives (art. VI) and the procedure for issuing export, import and transit authorizations or licenses (art. IX).
The Convention states that explosives must be marked for identification purposes. The marking is foreseen in three situations: "(...) -at the moment of production of the explosive, in order to identify the manufacturer, the place of production and the serial number (which allows to understand in which load it can be sent, or in which lot can be placed)[228], resulting in an immediate tracing of the explosives; - at the time of import, especially when the importer has his production site in a State where production marking is not required[229]; finally, when the explosives have been produced or transferred illegally and have been confiscated or seized pursuant to art. VII; this procedure is required in the event that the explosives may be destined for official uses, as also clarified by the final part of the provision (...)"[230].

223Art. 3, par. 1: "Member States shall ban the transfer of small arms and light weapons and their manufacturing materials into their national territory or from/through their national territory".
224Art. 3, par. 2: "Member State shall ban, without exception, transfers of small arms and light weapons to non–state actors that are not explicitly authorised by the importing Member".
225Art. 4, par. 1.
226A register of peacekeeping operations has been provided (article 11), through which it is possible to establish which and how many weapons are used or used during these operations, as well as how many and which weapons have been seized during these operations and subsequently destroyed.
227Art. 6, par. 1.
228Art. VI, lett. a): "For the purposes of identification and tracing of the firearms (…) States parties shall a. require, at the time of manufacture, appropriate markings of the name of manufacturer, place of manufacture, and serial number".
229Art. VI, lett. b): "(...) States parties shall b. require appropriate markings on imported firearms permitting the identification of the importer's name and address".
230Art. VI, lett. c): "(…) States parties shall: c. require appropriate markings on any firearms confiscated or forfeited pursuant to article VII.1 that are retained for official use (...)".

With reference to the procedures for marking and issuing authorizations, the three instruments seem to be presented in a different way, establishing specific and non-overlapping obligations.

With regard to the issue of authorizations and licenses, art. IX provides that the States equip themselves with an (administrative) apparatus for the control of movements and the issue of authorizations or licenses for the export, import and transit of weapons, ammunition and explosives[231]. In particular, the Convention imposes more stringent obligations in three cases: "(...) - when the transit State has the obligation not to release the means of loading the weapons until the authorities of the receiving State have provided for the release of corresponding authorization or license; - when the State is obliged to allow the means of embarkation to leave its territory until the authorities of the importing State or of the transit States have issued a specific license or authorization; - when the importing State is obliged to duly inform the authorities of the exporting State that the shipments of weapons for which the latter has issued the authorization or license have reached their destination (...)"[232].

All these obligations, in our opinion, are characterized by the necessary due diligence that every State must comply and demonstrate and are also characterized by the principle of reciprocity[233]. When the obligation for the exporting State is established, the corresponding obligation for the other States is also confirmed[234]. Thus, liability arises whenever the fulfillment of the procedure by the receiving or transit State fails, or the non-fulfillment by the exporting or last transit State. Reciprocity also requires consideration of the obligations placed on the States that are party to the same agreement[235]. This procedure would seem to be the only one in the field of international law and this obligation does not apply to those States that are not party to the Convention.

To a broad interpretation we can say that the State that is about to issue the authorization with the relevant act corresponds in cases where the other State is not a party to the Convention. The authorization act must be provided for and issued in at least one of the two States. If the other State is a party to the Convention, the word: “party” to the agreement must be referred to in the authorization. The request for corresponding authorization should free the operating State from any form of responsibility unless it decides otherwise for the seizure or confiscation of weapons, ammunition and explosives pursuant to art. VII, as a preventive measure. The granting of the authorization also means in the near future the responsibility for serious or not serious international offenses, and in the case in which they are committed. The obligation to request information could go beyond the letter of this provision and within the scope of the Convention. However, some international agreements, such as in the case of ATT[236] provide that States must collaborate in the prevention and dissemination of information regarding the weapons to be exported.

The principle of prevention as a consequence and obligation of every democratic State and which respects the principles of international law is also included in the protocol which is much more detailed than the Inter-American Convention. We refer to the obligation relating to the marking of firearms which is specified as we have seen in art. VI of the

231Art. IX, par. 1.
232Art. IX, par. 2.
233B. SIMMA, Reciprocity, in Max Planck Encyclopedia of Public International Law, April 2008.
234This procedure is unique in the arms trade, as there are no corresponding rules that impose reciprocal obligations of this nature.
235B. SIMMA, Reciprocity, op. cit.
236Art. 12 and the following.

aforementioned Convention[237]. The reference to the obligations of States on the export, import and transit of firearms is not clear, as we have provided for in art. 10, par. 2: "(…) before issuing export licences or authorizations 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 authorizations; 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 (...)".

Art. 10 of the Protocol merely states in a general and non-analytical manner an obligation for the exporting State. There is no type of reciprocity to the importing and sending State to the respective authorizations or licenses. The prerequisite for the exporting State to issue its authorization is taken into consideration only following the issuance of the same authorization by the importing State, i.e. the condicio sine qua non is provided for and does not allow the exporting State to "solicit" the import one to provide as soon as possible. This feature emerges from the article in question and in particular it is established that the importing State must inform the exporting State for the arrival of the load of weapons[238] and the related main requirements of the licenses or authorizations issued[239].

The procedure for the marking of weapons and ammunition in the ECOWAS Convention is equally detailed: since it is established in which cases it must be carried out and a distinction is made between weapons existing before the entry into force of the Convention (classic marking)[240] and those subsequently produced (security marking)[241]. This distinction is also

237Art. 8: "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 (...)".

238Art. 10, par. 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 (...)".

239Art. 10, par. 3: "The export and import licence or authorization 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 (...)".

240Art. 18, par. 2, lett. a): "'Classic marking' shall include a unique serial number, the manufacturer's identity, as well as the identification of the country and year of manufacture. Information concerning the purchaser's identity and the country of destination should also be included if known at the time of manufacture. The markings shall be expressed alphanumerically. They must be legible and should be featured on a maximum number of main parts of the weapon, and at the very least on the part designated by the manufacturer as essential as well as on one other important part of the arm".

241Art. 18, par. 2, lett. b): "A "Security marking" shall be applied to all weapons produced after the entry into force of this Convention. This will permit the identification of the weapons in the event that classic markings have been destroyed or falsified. Security markings must be undertaken on component parts that are not easily manipulated after the weapon's manufacture, and the falsification of which would render the weapon unusable".

imposed in the case in which the weapons are imported[242] as well as when the weapons have not been marked in the country of production, in which case it is mandatory to provide the competent authority of the importing State[243]. Thus, together with the marking procedure, the traceability of weapons is foreseen[244]. This institutional activity is carried out through the exchange of information between the various States parties, especially where these relate to illicit activities of production or trafficking of arms and information on the regulatory measures (by the various States) is also added[245]. The provision is not limited only to an exchange obligation, but also to the most stringent cooperation as we can see in art. 19: "(…) to ensure smooth and effective cooperation in tracing, requests for assistance in tracing illicit small arms or light weapons will contain sufficient information including, inter alia: -Information describing the illicit nature of the small arm and light weapon, including the legal justification thereof and circumstances under which the small arm and light weapon was found; -Markings, type, calibre and other relevant information; -Intended use of the information being sought (...)"[246].

Cooperation is based on the communication of the relative measures that must be motivated and related to the seizure of the weapons, or with which the alleged illegality of the load is communicated. This obligation is similar to that provided for in various international agreements on the control of arms transfers (first of all, the Wassenaar Agreement[247]), where the relative notification of export authorization denials is necessary. With respect to the general obligations of collaboration between the police forces or the various state authorities[248], this type of cooperation places a significant obligation on the States to justify the relative denial and seizure measures and at the same time also ensures that the information for the related cases of illegality may circulate for the purpose of providing other States with useful elements for repressing their illicit conduct and preventing the commission of both international and national crimes, whether serious or not.

The three instruments provide for the same incriminating measures. The impact that these treaty crimes may have on national legislation is different. According to art. IV, par. 2 of the Inter-American Convention, complicity in violations must ("shall") be punished with a criminal[249] measure of national nature. The sanctioning case in point must be taken into consideration and must provide for the various conducts of participation, competition and contribution to illicit trafficking activities as punishable. The criminal and non-international character of the measures is also evident from the form of punishment provided for by art.

242Art. 18, par. 2, lett. c), hypothesis i) and ii).
243Art. 18, par. 2, lett. c), hypothesis iii).
244Art. 19. ATT
245Art. 19, par. 1.
246Art. 19, par. 5.
247Guidelines and Documents including Initial Elements, 11-12 July 1996, and subsequent amendments until July 2014, in particular, the section I of Initial Elements, in this sense, clarifies the purpose of the Agreement, namely: "contribute 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".
248See art. 13 and the following of ATT.
249"Subject to the respective constitutional principles and basic concepts of the legal systems of States parties, the criminal offenses established pursuant to the foregoing paragraph shall include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of said offenses".

VI, par. 1 for weapons illegally produced or trafficked, identified in the confiscation or seizure of these[250].

The criminal sanction is necessary for States that adopt such measures on the basis of the legal principles of their own system. This safeguard clause is also evident from art. III, which specifies that: "(…) 1. States parties shall carry out the obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of nonintervention in the domestic affairs of other States. 2. A State party shall not undertake in the territory of another State party the exercise of jurisdiction and performance of functions which are exclusively reserved to the authorities of that other State party by its domestic law (...)".

In this way the principle of sovereignty in the adoption of measures is guaranteed and the Convention itself also saves the principle of application of the territorial jurisdiction of the States, through the determination of the impossibility of proceeding with extraterritorial applications of jurisdiction and compliance with the rules of international law, such as the admission of the consent of the territorial State to operate in the case of the arrest of arms traffickers.

This principle is also included in art. V of the Convention, which establishes that States parties must provide for adequate measures to apply their jurisdiction on the basis of the criterion of the locus commissi delicti[251], of the criterion of subjective territorial connection[252] and of objective extraterritorial connection[253]. The exercise of jurisdiction takes place according to the principles of universal jurisdiction and extradition (aut dedere aut iudicare)[254], i.e. according to rules of international law and according to the relative measures listed above that have been adopted. With regard to the measures to be adopted to combat illicit arms trafficking, the Protocol goes beyond what is established by the Inter-American Convention, given that it is expressed with the relative legislative measures that must be adopted by the States parties and which must be of a criminal nature, establishing what these measures should be. In particular, art. 5 provides "(...) that States criminalize the following cases: -illicit production of weapons; -illicit arms trafficking; -forgery or illicit obliteration, removal or alteration of the markings on weapons (...)"[255].

Further forms of criminalization are therefore added and envisaged, and in particular the attempt to commit some of the cases mentioned above and the forms of assistance and help in the commission of the same[256]. Unlike the Convention, the Protocol does not refer to the principle of state sovereignty in establishing the exact measures of repression. We refer to the provisions of art. 5 where it must be read in combination with the provisions of art. 1 of the Protocol in the light of the Convention for the Suppression of Transnational Organized Crime, which provides for the related criminal repression measures for certain offenses or

250"States parties undertake to confiscate or forfeit firearms, ammunition, explosives, and other related materials that have been illicitly manufactured or trafficked".

251Art. V, par. 1.

252Art. V, par. 2.

253Art. V, par. 3.

254M.P. SCHARF, Aut dedere aut iudicare, in Max Planck Encyclopedia of Public International Law, June 2008. C. SOLER, Aut dedere aut judicare, in C. SOLER, The global prosecution of core crimes under international law. T.M.C. Asser Press, The Hague, 2019, pp. 319ss.

255Art. 5, par. 1.

256Art. 5, par. 2. In particular, it should be noted that here there was a codification of what was established in the jurisprudence of the Tribunal for the former Yugoslavia relating to aiding and abetting in the commission of international crimes through illicit arms transfers.

crimes. A certain safeguard clause which includes the principle of sovereignty and mentioned in the following art. 6 regarding the types of ancillary penalties applicable in cases in which the crimes referred to in art. 5, remains open[257].

Art. 6 of the ECOWAS Convention also provides for the relative prohibitions of transfers on the basis of violations referring to the international obligations of the States or on the basis of the employment that may derive from them. Two types of "risk" are distinguished and it is established that a State must not authorize the transfer when violations of international obligations may arise, such as: "(…) Obligations under the UN Charter including: Binding resolutions of the United Nations Security Council such as those imposing arms embargoes; The prohibition on the use or threat of use of force; iii. The prohibition on intervention in the internal affairs of another State; -Universally accepted principles of international humanitarian law; -Any other treaty or decision by which the Member States are bound, including: binding decisions, including embargoes, adopted by relevant international, multilateral, regional and sub-regional bodies, such as the African Union Peace and Security Council, to which a State is party; Prohibitions of arms transfers that arise in particular treaties which a State is party to, such as OTTAWA Convention on Antipersonnel Mines, the 1980 Convention on Certain Conventional Weapons and its Protocols (...)[258]".

The issuance of an authorization concerns the destination and use that are part of SALW. In particular, art. 6 divides two types of violation: -when the use of weapons may involve serious violations of international law and human rights, humanitarian law, the principle of non-interference in internal affairs and the prohibition of aggression; and -other violations of particular importance that are provided for by relevant conventions and agreements[259]. The Convention does not require an assessment of the related risks, as established by art. 7, par. 3 of ATT, but may request that the ECOWAS Executive Secretary, together with the States parties, determine the "elements of proof" of such violations, which will be directly applicable by the States[260]. Therefore, the evaluation that must be carried out by the States is no longer considered a discretionary activity, but is defined as a binding activity. Furthermore, these parameters can be compared with the "elements of crime" of the International Criminal Court (ICC), which establish the fundamental criteria for the recognition and ascertainment of violation prescribed by the incriminating law[261]. This

257Art. 6: "1. Without prejudice to article 12 of the Convention, States parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of firearms, their parts and components and ammunition that have been illicitly manufactured or trafficked. 2. States parties shall adopt, within their domestic legal systems, such measures as may be necessary to prevent illicitly manufactured and trafficked firearms, parts and components and ammunition from falling into the hands of unauthorized persons by seizing and destroying such firearms, their parts and components and ammunition unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those (…)".

258Art. 6, par. 2.

259Art. 6, par. 4: "A transfer shall not be authorised if it is destined to: a) be used for or to facilitate the commission of violent or organised crime; b) adversely affect regional security; endanger peace, contribute to destabilising or uncontrolled accumulations of arms or military capabilities into a region, or otherwise contribute to regional instability; c) hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the States involved in the transfer; d) involve corrupt practices at any stage-from the supplier, through any middlemen or brokers, to the recipient (...)".

260Art. 6, par. 6: "The Executive Secretary and all Member States shall provide elements of proof to apply the criteria enunciated in paragraphs a, b, c, d and e of the present article and to indicate the refusal of exemption request made by a Member State (...)".

261W.K. LIETZAU, Checks and balances and elements of proof: Structural pillars for the International Criminal Court, in Cornell Journal of International Law, 32, 1999, pp. 477-479 and 483ss.

assessment obligation just set out and based on art. 7ATT was included in various soft law instruments adopted by the Plenary Assembly established by the Agreement. Ex multis, we can say the guidelines for the marketing of light and small arms, adopted in 2002, where it is established that: "(…) each participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms[262] in question might (…) contravene its international commitments, in particular in relation to sanctions adopted by the UN Security Council, agreements on non-proliferation, small arms, or other arms control and disarmament agreements (...)"[263].

The Convention imposes the harmonization of national laws and seeks to establish a minimum standard relating to the control of the export of arms, national regulations that place transfer prohibitions on the basis of embargoes by international organizations or the provisions of the Convention itself[264].

The art. 16 of the Protocol provides that: "(…). States parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation; 2.Any dispute between two or more States parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States parties are unable to agree on the organization of the arbitration, any one of those States parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court (...)".

The main tool to use in the event of disputes is negotiation, as a result of the related consultations. When the dispute arises and is not resolved by negotiation "within a reasonable time", one of the States involved may request an arbitration appeal, or if there is no agreement on the rules for the appointment of arbitrators and ritual procedure, it is possible refer the dispute to the ICJ. In this case, the irreconcilability of the dispute and the unreasonable persistence in tempis will be examined by one or more parties in order to resort to the instrument of arbitration. The appeal is not mandatory and the parties to the dispute always have the relative power to decide. When the two requirements are evident and not eludable, the choice left to one of the parties will be directed to a solution that can be experienced at a third and impartial body.

What must be assessed, for the purposes of this last request, is the incurability of the dispute that arose and the unreasonable temporal persistence of the same. These requirements, if present, will be examined by one or more parties in order to resort to the instrument of arbitration. There is, however, no obligation to appeal. The parties to the dispute always have the power to decide how to settle it. However, when the two requirements ascertained

262O. GREENE, E. KIRKHAM, Preventing diversion of small arms and light weapons: Strengthening border management under the UN Programme of Action, Saferworld, London, 2010.

263Although the Agreement does not establish legal obligations for States, through the Common Position 2008/944/CFSP of the Council of the Union: "(...) the political commitments contained in the agreement represent, today, mandatory requirements for the Member States of the EU which, pursuant to art. 2 of that position undertook to refuse export licenses "if the approval was incompatible inter alia with: the commitments of the member states under (...) the Wassenaar Agreement". This instrument has been a source of inspiration for other legal instruments such as, for example, the EU Code of Conduct on the export of conventional arms.

264Art. 21.

above are evident and not eludable, the choice of at least one of the parties will always be directed to a solution that can be experienced at a third and impartial body[265].

9.VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

The violations as we have predicted from the previous paragraphs in relation to human rights and humanitarian law are of a serious nature as a result of illicit arms transfers without control. Humanitarian law has sought to protect such violations through erga omnes obligations[266].

These obligations are mandatory or ius cogens rules from the moment in which the violations are considered equivalent to international crime[267]. The protection of human rights has been widely considered for years and is also the subject of the current Arms Trade Treaty where they are referred to with various rules already in its preamble[268]. Also in this agreement, the meaning of the expression "serious violations of human rights law"[269] had some limits regarding the understanding of the phenomenon worldwide[270]. Even during the negotiation discussions and subsequent to the adoption of the text, there were different opinions of the States that fueled this debate[271]. The difficulty is not only of a political

265See in argument: J. CRAWFORD, Continuity and discontinuity in international dispute settlement: An inaugural lecture, in Journal of International Dispute Settlement, 1 (1), 2010, pp. 14ss.

266Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, Academy Briefing n. 6/2014, August 2014, pp. 9 ss. G. GAJA, Do States have a duty to ensure compliance with obligation erga omnes?, in M. RAGAZZI, International responsibility today. Essay in Memory of Oscar Schachter, Martinus Nijhoff Publishers, Dordrecht, 2011, pp. 31-36.

267A. CASSESE, The character of the violated obligation, in J. CRAWFORD, A. PELLET, S. OLLESON, The law of international responsibility, op. cit., pp. 415-426. J. CRAWFORD, International crimes of the State, op. cit., pp. 405-414. D. CARON, State crimes: Looking at municipal experience with organizational crime, in M. RAGAZZI, International responsibility today. Essay in Memory of Oscar Schachter, Martinus Nijhoff Publishers, Dordrecht, 2011, pp. 23-30. H.G. ESPIELL, International responsibility of the State and individual criminal responsibility in the international protection of human rights, in K. CREUTZ, State responsibility in the international legal order. A critical appraisal, Cambridge University Press, Cambridge, 2020, pp. 151-160. V.V. SUHR, Reinbow jurisdiction at the protection of sexual and gender minorities under the Rome statute, ed. Springer, New York, 2021.

268ATT, Preamble 5th Principle: "Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the UN Charter and the Universal declaration of Human Rights (...)".

269Present in art. 7, par. 1 about the reference made to the States to ascertain any risks associated with the transfer of arms.

270With regard to "serious violations", we moved on to "serious breaches" (also present in art. 6, par. 3, reference standard in this case), up to considering the seriousness also from the point of view of the systematic nature of the violations. See: Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, op. cit., pag. 3.

271See the intervention of New Zealand during the negotiation, which argued that "(...) it considers the reference to "grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party" in article 6(3), encompasses acts committed in international and in non-international armed conflict, and includes serious violations of Common Article 3 to the Geneva Convention of 1949 as well as, for States parties to the relevant agreements, war crimes as described in the Hague Convention IV of 1907 and its Regulations, the Additional Protocols of 1977 to the Geneva Conventions and the Rome Statute of the International Criminal Court". Finally, see also the interpretative declarations of Switzerland and Liechtenstein, which have argued that: "the term grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party" in article 6, paragraph 3, encompasses acts committed in international and in non-international armed conflicts,

nature but also according to the economic interests of various States. The "gap" in this position (of various States) has been filled in practice by international jurisprudence[272].
In reality, the violations envisaged in the ATT have a certain fairly low legal significance, because they not only include serious violations, that in practice correspond to international crimes, but also violations of other rights, especially those of an economic and social, cultural, political and civil nature[273]. They also included the main criteria that are presented in institutional practice and where serious violations of international law are identified. The criteria are: -the extent of the violation; -the status of the victims; -the obligation involved in the violation; -the impact of violations. Criteria established by the practice of international organizations that for years have shown "serious violations" and as a consequence international crimes also including civil rights during an armed conflict as well as the excessive use of the internal form and the dispersion of the civilian population, sexual violence, inhuman or degrading treatment, deprivation of the right to life and violations of the right to property. In fact all that list of rights that go as far as reduction and slavery as violations of humanitarian law in general[274]. The link between these rights and the seriousness of the violation of human rights are identified as erga omnes obligations[275]. In

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and includes, among others, serious violations of common article 3 to the Geneva Conventions of 1949; as well as, for States parties to the relevant agreements, war crimes as described in the Hague Convention IV of 1907 and its Regulations, the Additional Protocols of 1977 to the Geneva Conventions and the Rome Statute of the International Criminal Court of 1998 (...)".

272Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, op. cit., pag. 5.

273A. BELLAL, S. CASEY-MASLEN, G. GIACCA, Implications of international law for a future arms trade treaty, op. cit., pp. 18ss. Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, op. cit.

274Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, op. cit.

275For further analysis see also: G. ABI-SAAB, The concept of "international crimes" and its place in contemporary international law, in J. WEILER, M. SPINEDI, A. CASSESE (eds.), International crimes of State: A critical analysis of the ILC's draft Article 19 on State responsibility, De Gruyter, Berlin/NewYork, 1989, pp. 141-150. J. BARBOZA, State crimes: A decaffeinated coffee?, in L. BOISSON DE CHAZOURNES, V. GOWLLAND-DEBBAS, The international legal system in quest of equity and universality. Liber amicorum Georges Abi-Saab, Kluwer Law International, The Hague, 1998, pp. 164ss. M. BYERS, Conceptualizing the relationship between jus cogens and erga omnes rules, op. cit., pp. 4ss. J. CRAWFORD, Responsibility to the international community as a whole, in Indian Journal of Global Legal Studies, 9, 2001-2002, pp. 304ss. A. DE HOOGH, Obligations erga omnes and international crimes: A theoretical inquity into the implementation and enforcement of the international responsibility of states, Martinus Nijhoff Publishers, Brill, The Hague, Boston, London, 1996. R. GAJA, Should all references to international crimes disappear form the ILC draft articles on state responsibility?, in European Journal of International Law, 12, 1999, pp. 366ss. A. KORKEAKIVI, Consequences of "higher" international law: Evaluating crimes of state and erga omnes, in Journal of International Legal Studies, 2, 1996, pp. 82ss. P.S. RAO, Comments on article 19 of the draft articles on state responsibility adopted by the International Law Commission, in Indian Journal of International Law, 37, 1997, pp. 694ss. S. ROSENNE, State responsibility and international crimes further reflections on article 19 of the draft articles on state responsibility, in New York Journal of Law & Policy, 30, 1998, pp. 146ss. J.M. SOREL, L'avenir du "crime" en droit international à la lumière de l'expèrience du jus congens, in Polish Yearbook of International Law, 23, 1997-1998, pp. 70ss. The point in comunis of the doctrine just mentioned is the intention that the work of the ILC was to stigmatize the extreme gravity of certain violations through the use of a term "crime" condemning with rhetoric emphasis some continuous behaviours or practices referable as international crimes in the State as a whole, understood as an international subject. It was intended to differentiate from the ordinary illicit facts the violations in question,

our case, what interests us is not the list or identification of human rights but the connection that the transfer of arms that causes any type of violation of these rights invokes the international responsibility of the State and as a consequence also of the international community. The issue of gravity also includes the field of international criminal law where responsibility arises from arms transfers in violation of human rights and humanitarian law, which in this case can be assessed according to individual responsibility. Responsibility that ascertains the identity of the subject as well as the presence of discriminating causes and the related conduct that is considered[276].

Illicit arms transfer is linked with the principles of international criminal law and the general framework of conduct which includes the regulatory framework of international responsibility[277].

In cases where it is difficult to connect, rectius to evaluate the contribution of sending arms to the commission of international crimes, the individual configuration of responsibility prevails over the international one of the State. In relation to arms transfers we can report some serious types of violations, such as: - violations deriving from armed conduct. As provided for by international humanitarian law and those relating to the use of internal force massively against the civilian population; - violations connected indirectly with arms transfers that include the systematic use of torture, any other inhuman and degrading treatment and violations related to economic and social rights, such as the right to property and the sustainable development of a State[278]. Within this framework, we must also add the serious violations concerning the basic principles of the international community such as interference in internal affairs, the sovereign equality of States, the principle of self-determination of peoples, the principles of international peace and stability which in this case there is the link and the competence of the UN Security Council. In any case, the result is the same, that is the massive violation of human rights and the responsibility that can be attributed to the State or to the individual that the existing incidence will have to be assessed

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connoting them with a notion that allowed to foresee in the pertinent regime of responsibility the presence of a further sanctioning aspect with respect to the reparative and self-protection aspect of the injured State, typical of ordinary offenses already. The most shared aspect would be in the necessary involvement of the international community or rather of representative organs of this so-called community in order both to coordinate the most severe reaction and the offenses in question would deserve both to achieve greater efficacy and a safer and impartial protection of the common interest affected by the offense. This as a counterpart to the fact that these would be offenses qualified as crimes because they are considered as such, not from that or this State unilaterally, but precisely to the international community as a whole considered. Also in this phase of the codifying affair it is undeniable that within the ILC it has continued to clearly emerge as a shared and crucial requirement that of not leaving to the mere discretion of the single States the determination of the eventuality and the modalities of reaction to the eminent violations of the international law in order to avoid both the risks of abuses on the part of the paladins on duty of international legality and the absence of reactions in the face of certain serious violations and the consequent impunity for States against the fundamental principles of international legality. In the face of a crime, a concerted and coordinated reaction is considered indispensable, so that it can effectively and objectively guarantee not only the repair of the serious damage that the Commission of a crime generally involves but above all the full respect for the present and for the future the rules protecting a common interest of all States.

276See the typical relativity of illicit brokering and diversion of arms loads and the detection of illicit arms transfers as an autonomous case of international crime.

277Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, op. cit.

278Geneva Academy of International Humanitarian Law and Human Rights, What Amount to "A Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, op. cit.

through the illegal transfer in the commission of violations and adequate proof that the military contribution actually facilitated the violation of these rights.

10.PRINCIPLE OF TRANSPARENCY AND RESPONSIBILITY FOR ILLICIT ARMS TRANSFERS. THE CASE OF INFORMATION IN CONVENTIONAL ARMS TRANSFERS

The principle of transparency is connected with the transfer of arms from a theoretical point of view. This principle also includes national security and the trade and transfer of arms that are in a "gray zone" and require the principle of informing. States have a wide margin of discretion to manage the related information to national security but at the same time are responsible to provide this type of information[279].

The principle of transparency is connected with the signing of treaties and has the purpose of avoiding that the conclusion of certain agreements in the field of arms transfer are in conflict with international obligations. This category also includes secret treaties which, even if they do not consider themselves invalid, are still subject to sanctions before the UN organs[280]. These are invalid in the object and/or purpose of committing an international offense. In the event that an agreement is stipulated to transfer weapons from one State to another and does not follow international rules but the purpose is the violation of international law, meaning the commission of international crimes in this case the principle of transparency has the purpose of obligation to cooperate and disseminate information[281]. The high number of agreements signed by a large number of States[282] allows us to say that the obligation of cooperation and information takes on a mandatory, customary rectius nature. The principle of transparency also makes it possible to assess whether or not international rules are violated in the case of arms exports. In this case, the principle of transparency is comparable with that of information. But there is also a space that the information also includes the ability to access and elaborate other further purposes[283], since the information refers to the interesting object[284]. Information including and applying the transparency filter means clarity and what can also be useful for purposes other than those established. Information is a decisive tool on proceedings or situations in order to resolve important issues that may arise from difficult situations and avoid the commission of international crimes and violations of international rules.

279A. PETERS, Towards transparency as a global norm, in A. BIANCHI, A. PETERS (eds), Transparency in international law, Cambridge University Press, Cambridge, 2013, pp. 534-607.

280M. BRANDON, The validity of non-registered treaties, in British Yearbook of International Law, 29, 1952, pp. 186-204.

281R. CADDELL, Treaties, secret, in Max Planck Encyclopedia of Public International Law, June 2006, par. 2.

282In this sense, see articles 12 et seq. of the ATT, in addition to section 2.1.2 of the Wassenaar Arrangement, as explained by K.A. DURSHT, From containment to cooperation: Collective action and the Wassenaar arrangement, in Cardozo Law Review, 19 (3), 1997, pp. 1079-1082. See articles 12 and following of the ATT, in addition to the articles on cooperation in the field of transnational organized crime (Palermo Convention of 2001, articles 13 and following), in the field of combating corruption (articles 37 and following of the Palermo Convention of 2005) and on the fight against the financing of international terrorism (articles 12 and following of the New York Convention of 1999).

283A. BIANCHI, On power and illusion: The concept of transparency in international law, in A. BIANCHI, A. PETERS (eds), Transparency in international law, op. cit., pp. 1-19.

284A. BIANCHI, On power and illusion: The concept of transparency in international law, in A. BIANCHI, A. PETERS (eds), Transparency in international law, op. cit.

Many times the information can also have a space of harmfulness if it applies to arms transfers since it includes elements that enter the national security of a State. The risk is great not so much for the international community but for the State itself as it includes information regarding the characteristics and production of the weapons, the relative figures for the purchase, the consequences on public finances and their illegal use[285].
Governments try to maintain a certain confidentiality regarding the sensitivity of the transferred legal asset, therefore the elements involved must be confidential, given the sensitive information since it can be used by parties outside the negotiation to prevent arrival at destination or to divert the loading of weapons[286] with the purpose of ascertaining military and industrial advantages that can be generated by sensitive information[287]. Information is also essential when public financial resources are reported as we have seen in the case of NGOs that have tried to purchase arms from governments[288]. In this case, the issue is whether the transfer mode commits a certain number of resources which can be used to finance other necessary public services and which are not only necessary for the defense of the State[289]. Also the expenses and resources involved in the use of these weapons are not in conflict with international obligations and the general prohibition of armed aggression.

285M. TRYBUS, Defence procurement, in M. TRYBUS, R. CARANTA, G. EDELSTAHM (eds), EU public contract law: Public procurement and beyond, Bruylant, Bruxelles, 2014, pp. 249-283. S. SETTY, The rise of national security secrets, in Connecticut Law Review, 44 (5), 2012, pp. 1563-1583.
286Diversion is currently considered an illegal form of arms transfer. In the ATT (art.11) it is established that: "(…) in order to better comprehend and prevent the diversion of transferred conventional arms covered under article 2 (1), States Parties are encouraged to share relevant information with one another on effective measures to address diversion. Such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion (par. 5)". In an extremely sensitive area, secrecy, or the lack of transparency, assumes ex se a value of protection and a measure of limitation of any risks that may arise (confidence and security building measure).
287This aspect was relevant during the Cold War period. The coordination and control mechanism on the exports of technological material to certain states was one of the methods of increasing the technological advantage over one's enemies, also determining the impossibility of accessing military know-how. This form of "military industrial secrecy" now does not seem to apply fully to arms transfers, but only to the information held by the various defense industries commissioned by arms and armaments. One exception is noted in the Agreement OCCAR (Convention on the Establishment of the Organization for Joint Armament Cooperation, concluded in Farnborough on 9 May 1998, which is affirmed that: "(...) the secrecy or confidentiality of certain information pertaining to the production of certain weapons (...) (Article 2 of the Information Security Agreement, concluded in 2005) (...), however, it is not known whether this provision may also apply to transfers of the same armaments (...) ". For further analysis see also: H. ODA, CoCom: Its past, present and future, in H. ODA, Law and politics of west-east technology transfers, Martinus Nijhoff Publishers, Dordrecht, 1991, pp. 3ss. R.C. DREYFUSS, K. STRANDBURG (eds.), The law and theory of trade secrecy. A handbook of contemporary research, Edward Elgar Publisher, Cheltenham, 2009. J. HULL, Commercial secrecy: Law and practice, Sweet & Maxwell, London, 1998.
288The first reports that considered issues related to public spending on arms were issued by groups of experts, appointed by the UN Secretary General, in 1997 and 1999. In such situations, albeit with specific reference to SALW, it was emphasized that state expenditure it was not proportionate to the real economic value of the asset, as well as the problem relating to certain disruptions of public finances, which were increasingly channeled for the purchase of new armaments. Even in those cases, states were invited to drastically limit their spending to the sole needs of self-defense.
289This aspect is also linked to the question of sustainable development and the impact of military expenditure by states on public social services in some developing States. See in particular the: Oxfam International, Practical Guide: Applying Sustainable Development to Arms-Transfer Decision, Oxfam International Technical Brief, April 2009. E. KYTÖMÄKY, How joining the arms trade treaty can help advance development goals, Chatham House Research Paper, December 2014.

In this case the international community has overcome the general principle of information and has also based itself on transparency as a positive principle to the standards of publicity of transfers[290].

The positive aspect of transparency has resulted in the UN Register (UNROCA) established with Resolution of the General Assembly n. 46/36 of 1991[291] which included conventional weapons by publishing relatively only the information relating to the destination of the armaments and the overall military expenditure on a voluntary basis and without the obligation of responsibility for non-publication[292]. This type of transparent information results in the evaluation of exports which allow to determine whether there is a preponderant, prevalent or evident risk of the commission of serious violations of international law. In this way, the systems of legitimate defense of a State and the assurance of compliance with other rules of international law are also ensured. The ATT has concretized a standard of a customary nature based on precaution or on the weighting of the relevant needs for a State when it exports weapons. This type of assessment must be based on relevant information in the possession of a State about the recipient or the destination of the cargo.

The related information, however, does not concretely ascertain the relative risk of committing international crimes but allows for a general precautionary principle from arms transfers. The precaution is used and is effective in arms transfers given the identification of the common or recurring elements of the precaution. It may be useful to refer to the

290This is the case of the group of experts promoted by the Secretary General in 1992, in charge of studying the ways of promoting transparency in the transfer of conventional arms: Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms, A/46/301, 1992, in particular the paragraphs: 81 and following.

291According to the Assembly, greater transparency: "(…) in the field of armaments could enhance confidence, ease tensions, strengthen regional and international peace and security and contribute to restraint in military production and the transfer of arms (...)". P. WIECKZOREK, The UN Register of conventional arms: Status and prospects, in Polish Quarterly of International Affairs, 3, 1994, pp. 67-80. T. TAYLOR, Understanding the United Nations conventional arms register, in Fletcher Forum of World Affairs, 18 (2), 1994, pp. 111ss. E. LAURENCE, Managing the global problems created by the conventional arms trade: An assessment of the United Nations register of conventional arms, in Global Governance, 11, 2005, pp. 225ss. To ensure greater transparency in the conventional arms trade, the General Assembly: "(…) requests the Secretary-General to establish and maintain at United Nations Headquarters in New York a universal and non-discriminatory Register of Conventional Arms, to include data on international arms transfers as well as information provided by Member States on military holdings, procurement through national production and relevant policies". According to par. 9 of the Resolution of the Assembly: "(…) calls upon all Member States to provide annually for the Register data on imports and exports of arms", prefiguring a political commitment of a certain importance (Although the language adopted by the Assembly refers to a legal obligation on the part of the Member States, it is good to remember that the resolutions of the Assembly assume a merely recommending character and establish only political commitments.), in the following paragraph 10 the United Nations body only: "(…) invites Member States (…) also to provide to the Secretary- General (…) available background information regarding their military holdings, procurement through national production and relevant policies, and requests the Secretary-General (…) to make it available for consultation by Member States at their request". Finally, the United Nations Register for Conventional Weapons which can be considered in various respects the precursor of the Wassenaar Agreement, although it does not represent, strictly speaking, a measure aimed at disarmament, certainly appears to define the notion from time to time. of conventional arms and introducing new political commitments on the part of States with a view to a more transparent arms trade.

292The role of specialized UN agencies such as ICAO have attempted to establish rules relating to transparency in arms transfers; as we have seen from the ATT) which sought to establish a general duty to ascertain the destination of the weapons load, through "relevant" information and establishing a transfer standard focused on transparency and the information evaluated.

metaphor of Arie Trouwborst[293] which involves the environment and human health together with transparency and information. The author refers to a balance of information choices as elements of precaution, uncertainty, danger and action. Arie Trouwborst refers to uncertainty in environmental law, identifying it "as scientific or epistemological uncertainty about a given situation"[294]. The lack of scientific knowledge on the part of those who have to decide allows them to have responsibility if the export and import of certain goods are harmful to the environment and human health in a safe manner. The person who will issue the relevant export authorization or license should act with caution so as not to infringe the fundamental rights or essential values of the international community. If the risk of committing serious violations or even just aggression is a minimal result and is not covered by the export ban[295]. The need to ensure the free movement of goods together with that of ensuring an effective defense in the event of armed attacks[296] prevail in the face of the need for precaution or to cancel the related risk. The risk reaches a high degree from the moment the precaution has not been taken into account and the consequences can result from the transfer of weapons without the slightest effort to cancel or contain them[297]. The assessment of exports in the context of arms transfers also includes some agreements of an international nature through which a State and its export control authority assesses, weighs the different needs underlying the transfer which, from the moment in which a certain risk arises, the State must stop the dangerous activity[298].

On the one hand, the principle of due diligence by the State even when it requires the private individual to set up export security measures, must be identified in the confidence and security-building measures (CSBM) or measures that make it possible to limit any damage caused by the transfer of weapons. The evaluation can be concluded during the negotiation phase[299]. This type of evaluation also makes it possible to acquire the relevant information[300]

293A. TROUWBORST, Precautionary rights and duties of States, Martinus Nijhoof Publishers, Dordrecht, 2006, pp. 30ss.

294A. TROUWBORST, Precautionary rights and duties of States, op. cit., pp. 37.

295See art. 7, par. 2 of ATT, the risk that violations following an arms transfer must prevail or prevail. If this probative status is not reached, it is possible to assume that the authorization can be granted.

296Preamble of the ATT, recital IV and Principle I and VII.

297This can be deduced, for example, from the letter of art. 7, par. 4 of ATT.

298N. CRAIK, Principle 17: Environmental impact assessment, in J. VINUALES (eds.), The Rio Declaration on Environment and Development, Oxford University Press, Oxford, 2015, pp. 451-470. ICJ, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, in ICJ Reports, 2010, p. 14, parr. 203-219. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Merits) (2015), ICJ Rep; Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Merits) (2015) ICJ Rep. Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for an Advisory Opinion submitted to the Seabed Dispute Chamber) ITLOS Reports 2011, 35 para. 111; Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Case No. 21) ITLOS Reports 2015, 129 para 127. For further details see: S. COTE, Protesting pulp Argentina battles Pulp Mills on the river Uruguay, in Law and Business Review of the Americas, 17 (4), 2011, pp. 738ss. ITLOS, Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1st February 2011.

299See art. 4 of reg. 2009/428/EU. It is also possible that these essential requirements are already present in the contractual context: think of the cases of some ethics of contracts prepared by numerous defense industries, in which the international regulations on production control are referred to as the law applicable to the concluded contract. and arms sales. International Law Association, Final Report of the Committee-International And National legal regulation for Arms Control and Disarmament, Berlin, 2004, para. 5. This would appear to be true at least in the case of nuclear weapons and of mass destruction in general. Such an obligation would not be present or found in the field of conventional weapons, where the same Report

based on the principle of information available to the State and on a specific purpose or on a specific subject. Of course, it remains questionable whether there are limits to information and whether the information is intended to adequately assess the risk that could result from a particular transfer. The information can be considered the minimum required to fulfill the due diligence obligation[301]. And if a State does not have a continuous information system or one that can be evaluated according to scientific standards, what can it do? Definitely look at other sources relating to the arms trade where it is possible to request information from the receiving State on the measures it has prepared to avoid the relative risks and also not to commit serious violations due to arms transfers[302]. Prevention does not refer to the import and/or export of weapons but in the context of the protection of international environmental law, the protection of human health and the degree of acquisition of a certain scientific level for risk prevention[303]. In the case of obvious risk, precaution as a degree of caution approaches the object that must be exported or imported. The asset is subjected to subsequent restrictive measures in order to limit the negative consequences of the risk. The basis of this position is reflected in the WTO case law where the uncertainty parameter is specified unless specifically requested and not limited to the import of goods[304]. However, the EU environment is excluded where an absolute ban on imports prevails and there is an obvious risk[305].

Finally, according to Max Huber[306] we are faced with concentric circles, in which it is easy to move from one level to another in a consequential manner. Therefore, recourse to customary law tries to cover any gaps or silences of the treaties[307], acting in turn as a metaphorical "bridge" between the pact disciplines. This position also applies to the conventional arms market. From the moment in which a fragmentation between the disciplines is no longer apparent, it is logical that there will be norms of a customary nature that try to form and complete with a "general" way. These rules must be identified within the limits of the contractual activity of individuals and States, in the obligations relating to the identification of a possible military use of technological goods, in the preventive assessment of any risks deriving from the export and trade of arms and in the fight against to some forms of complicity in international crimes, such as illicit brokering and diversion[308].

The practice up to now is not constant, continuous and wide in relation to the connection of the import and export of arms. Because the practice depends on the type of risk that occurs

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(paragraph 11 et seq.) Only mentions the exhortative nature of the instruments of international law and the implementation and consultancy role that NGOs play in the matter.

300See art. 7, par. 3ATT.

301A. TROUWBORST, Precautionary rights and duties of States, op. cit., pp. 121ss.

302According to art. 8 par. 1ATT: "(…) each importing State party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State party, to assist the exporting State party in conducting its national export assessment under article 7. Such measures may include end use or end user documentation (...)".

303A. TROUWBORST, Precautionary rights and duties of States, op. cit., pp. 71ss.

304G. GOH, Precaution, science and sovereignty: Protecting life and health under WTO agreements, in The Journal of World Intellectual Property, 6 (4), 2003, pp. 441-471.

305K.H. LADEUR, The introduction of the precautionary principle into the EU Law: A pyrrhic victory for environmental and public health law?, in Common Market Law Review, 40 (6), 2003, pp. 1455-1479.

306In Annuaire de l'Institut de Droit International, 1952, vol. I, pp. 200ss.

307Second Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur-The Internationally Wrongful Act of the State, Source of International Responsibility, UN Doc., A/CN.4/307, 4 July 1978, Yearbook of International Law Commission, 1978, Vol. II, Part One, p. 57, par. 465.

308See, K.H. LADEUR, The introduction of the precautionary principle into the EU Law: A pyrrhic victory for environmental and public health law?, op. cit., pp. 1455-1479. Economic Studies, 88 (2), 2021, pp. 886ss.

and the type of violation that follows. There are cases where only when there is a high risk of violations is it necessary to block the export[309]. In other cases the risk may not be high but certainly ascertained according to an evaluation parameter, applied in a totally discretionary manner by the exporting State[310]. The type of violation verified and the prevention has the purpose of acting to protect the asset that can be damaged directly[311] and in this case the export ab initio is blocked or an attempt is made to protect the asset that is damaged indirectly[312]. The difference in this type of violation also entails a different course of action. Because in the first case the preventive evaluation and the related due diligence obligations of the State take place directly and in the second case there is a certain different nuance of the remuneration type and only on the occasion of the event generated and before it is ascertained with some form of international responsibility[313].

11.DUE DILIGENCE AND PREVENTION OF SERIOUS VIOLATIONS V. ASSESSMENT OF THE "OVERRIDING RISK" IN ARMS TRANSFERS

There is no absolute prohibition for all transfers of conventional weapons[314] but only for those that are prohibited in general[315]. The objective established for the ban on arms exports

309See art. 7, par. 3 of ATT.

310This is the case with the assessment provided for in the Wassenaar Arrangement, which does not specify which entity should have the risk that needs to be ascertained.

311Various human rights violations, including genocide.

312Such as, for example, the violation of embargoes.

313This is evident from the practice of the Security Council let us refer to the prohibitions of support (therefore also of the supply of weapons) to international terrorism. The measure adopted assumes: "(...) the forms of a preventive security measure (such as listing or freezing), while the measure coming from a subsequent assessment will prepare the containment of the negative consequences for international peace and security (...)". See also the Resolution 2249 of 2015, which requires the freezing of the assets of persons linked to ISIS. For further analysis see also: P. HILPOLD, The fight against terrorism and Security Council Resolution 2249 (2015): Towards a more Hobbesian or a more Kantian international society?, in Indian Journal of International Law, 55, 2015, pp. 540ss.

314On the basis of a need, mentioned several times, to guarantee the trade and industrial production of these goods, the export of which allows the various national defenses to continuously "update" their instruments in the exercise of individual self-defense.

315See in this sense the 1997 Ottawa Convention on Anti-Personnel Mines and the 2008 Dublin Convention on Cluster Munitions. The danger of this type of weapon had already been underlined starting from the 1980 Conference, which led to the stipulation of the II Protocol, subsequently amended, relating to the prohibition of anti-personnel mines. The difficulty in implementing the instrument stemmed above all from the complexity and technicality of its provisions, in addition to the fact that a rather long sector period was foreseen for the adoption of the restrictive measures. In particular, art. 3 of the 1997 Convention expresses this prohibition in relation to two types of activities relevant for the purposes of our analysis, namely acquisition and transfer. Referring to the activity of "acquisition in another way", he believes that this type of activity is to be considered as inclusive of the transfer activity. Acquisition activity should be understood as ensuring that the State party cannot obtain or withhold any type of anti-personnel mine. Added to this is the interpretation of the term "otherwise", which allows for the acceptance of the general prohibition imposed by the Convention. The treaty discipline makes it impossible to acquire anti-personnel mines in any way, either through non-profit activities or without an economic advantage (gift and barter), or through coercion, internal and warfare (seizure and confiscation ordered in against civilians, capture as a result of armed conflict against another State or armed group). With regard to the term "transfer", the prohibition is less general. The Convention provides for some exceptions which would refer to the transfer of an unlimited number of mines for the purpose of destroying them, or to a minimum number of mines that can be used for research training and defusing training purposes. The acquisition activity is to be considered as all-encompassing, the term "transfer" which is delimited by the Convention itself. The definition contained in art. 2 (4) would be somewhat ambiguous. This provision establishes that transfer is to be understood as: "(…) in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not

in general is set according to the principle of transparency and the destinations of uses of conventional weapons[316]. Within this framework, as we predicted above, the UN Register of Conventional Arms was established in 1992, and subsequently also with the use of user and end-user certificates[317].

In tempis, the need to prevent the commission of violations of international obligations by States through the transfer of conventional arms has opened the way to institutionalize evaluation procedures. We refer to the Initial Elements of the Wassenaar Arrangement[318] which contain some provisions relating to the invitation, addressed to States parties for the

involve the transfer of territory containing emplaced anti-personnel mines (...)". The interpretative question would derive above all from the formula: "in addition", before the main period. The formula can be understood in a broad sense, that is, that the transfer can take place physically (through or from a territory of a State, or by carrying out a transit activity), or in a non-physical way (which is the transfer of the title of possession of the weapon, or of control over it, between two States). This broadening of the interpretation is read in the light of the exceptions provided for by art. 3: "(…) it is necessary to carry out a transfer for the purpose of destroying the device, first of all the physical movement of the weapon must be taken into consideration; moreover, the transfer of the title would take place, depending on the circumstances, only at the time of destruction, in order to prevent the receiving State, or the specialized company identified for the operation, from taking possession of it (…)". The same considerations are also experienced with reference to the "acquisition in another way", pursuant to art. 1, para. 1 (b). The exception to the prohibition derives from the second part of the provision in question, which excludes that the transfer of the firearm also entails the transfer of the legal title or control over the part of the territory of the State that contains the residues. Doctrine admits that this exception: "(...) may lead a State to extend its sovereignty over a specific territory in order to fulfill the obligations arising from the Convention (...) as for mines, such weapons are also allowed the exceptions referred to in art. 3, para. (6) and (7) of the Convention, or in relation to transfers that are carried out for reasons of destruction of the armament or for reasons of training in the tracing and destruction of the device (...)". For further analysis see also: G. NYSTUEN, S. CASEY-MASLEN, The Convention on cluster munitions. A commentary, Oxford University Press, Oxford, 2010, pp. 126ss. A. BELLAL, S. CASEY MASLEN, G. GIACCA, Implications of international law for a future Arms Trade Treaty, op. cit., pp. 6ss.

316The principle of transparency is characterized by international law: alongside the need to make documents relating to international decisions of international organizations accessible (G. HAFNER, The emancipation of the individual form the State in International Legal Order, in Recueil des cours, ed. Brill, Bruxelles, vol. 358, 2013, pp. 299-314), "(...) There were also needs relating to individual regulatory sectors, such as access to information on environmental matters (in the Aarhus Convention), access to information relating to negotiations on the economic interests of a State, when there is a particular impact on the finances of the same and citizens ask to be informed, as well as to have information about the involvement of their Government in any arms transfers to States that can use them to commit violations (...)", see: Z. YIHDEGO, Arms trade and public controls: The right to information perspective, in Northern Ireland Law Quarterly, 59 (4), 2007, pp. 379-394.

317Even if the initiatives seemed "noble" at least in their intentions, they were not binding on the States: the UN Register, in reality, only invites States to provide detailed reports on the number and type of conventional weapons that are exported and their destinations. of such armaments; the reports sent arrive only in 2012. There are, however, unofficial initiatives for the registration of the main arms transfers between states. Unlike the Registry, "(...) end-use and end-user certificates are not provided for in any pact (or at least not in the form of a binding obligation for the States: for example, article 11, par. 3 of the ATT, referred to in the next paragraph), but the need for it was revealed only through recommendations provided by groups of experts who have studied the phenomenon of the proliferation of SALW (for example, the aforementioned reports of 1997 and 1999) and have identified the possibility of combating the proliferation of such weapons precisely through the use of such tools, the use of which, however, remains a discretionary choice of States whether or not to certify their exports (...) ".

318The Wassenaar Agreement has provided for the obligation of evaluation to be borne by the exporting state. See the Code of Conduct of the States of the European Community for the export of arms, adopted by a decision of the Council on 5 June 1998, which states that: "(…) Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim (...)".

purpose of carrying out export risk assessments. In the same spirit, the Organization for Security and Cooperation in Europe (OSCE) where it prepared its own document on the principles of disarmament[319], according to the principle of transparency, inviting States to always carry out transparent assessments on the destination of conventional weapons produced in their own jurisdiction[320]. Continuing within the EU where the assessment for arms export is based in the context of transfers of dual-use and sensitive or very sensitive goods[321], and in relation to the export control of SALW. The assessment of risks seems to impose an obligation of a customary nature on the States that must effectively control the destination and possible use of weapons.

The assessment procedure assumes the character of a mere administrative or governmental procedure[322], thus reinvigorating the initial discourse we made on state international responsibility and the role of individuals and/or state organizations as the main players in the control of the conventional arms market. The legal obstacles present in the export process can thus be removed by issuing a favorable provision for the purpose. Otherwise, the denial of the issuance of authorizations blocks the export and thus they will be able to take measures to contain risks or request additional guarantees from exporters. Therefore, we are talking about a first phase relating to the proposition of the request by the private individual and subsequently carried out by the relevant authorities where the real evaluation of the request and after the necessary and acquired information will assess compliance with international and national obligations (preliminary phase).In order to decide whether the authorization will be given or whether the export authorization will be denied, as a decision-making phase.

The first phase is left and managed by private individuals. The exporter will be able to notify his intention to export to the state authorities proposed for inspection. The application in many disciplines takes place through the related allegations of irrelevant information by the exporter himself through the compilation of end-use or end-user certificates as required by state law[323]. The private individual may also provide information regarding insurance for the transport of weapons or provide the relative names and the social causes of the third parties involved in the transport[324].

319Principles governing the transfer of conventional armaments, adopted at the 49th Plenary Session of the Special Committee of the CSCE Forum for Security Co-operation in Vienna on 25 November 1993, DOC.FSC/3/96/Rev.1.

320Art. II, lett. a) and b).

321Regulation 2009/428/CE, art. 10.

322Only in a few cases is the parliamentary passage for the export of arms foreseen. "(…) As for example in cases where the export takes place for arms owned by the State and the need to respect certain agreements (especially bilateral, such as the Memoranda of Understandigs of reciprocal defense procurement). There are also pact systems that establish the need to bring members together in "joint bilateral talks", in which the concessions of any advantages, especially of a commercial nature, that a State claims towards others are discussed (…)", according to: M. MILDE, Essential air and space law, op. cit.

323B. WOOD, P. DANSSÄRT, Study on the development of a framework for improving end-use and end-user control systems, UNODA Occasional Paper n. 21, December 2011, pp. 2ss.

324It is possible to consider the contractual models of transport envisaged in the INCOTERMS of the International Chamber of Commerce to be applicable. These models respond to the logic of understanding who is responsible for any liability for damage or theft of the goods to be delivered. INCOTERMS have their own specific ratio that allows us to understand if the responsibility following diversion of the arms load can be attributed to the seller or the buyer, or if this responsibility can emerge "(...) also with reference to the lack of necessary documentation for the purpose of determining the end-use or the end-user of a shipment of weapons (...) ". INCOTERMS, therefore, take the form of "a series of standard delivery or return clauses, intended to promote uniformity in the negotiation of a precise definition and discipline of the main typical clauses used in

The exporter must notify the relevant authorities only in the event that the exported good is susceptible to military application[325]. This type of notification is not mandatory in cases where dual-use assets are transferred. The obligation is provided only in Regulation 2009/428/EC[326], while nothing is provided for other types of exports of civil technology, or

international trading (...)". In particular, "(...) a) group E includes only the EXW model (Ex Work, Ex Works), which provides for the packing and ground delivery obligations of the goods, or that they are not loaded, on the vehicle or vehicle owned by the buyer; the obligations relating to the seller are inherent to the facilitation for the buyer to purchase the goods (making the goods available, producing commercial documentation, obtaining the necessary certificates and documentation, carrying out customs operations only if expressly agreed with the buyer, incurring costs for the ordinary checks of the goods), while for the buyer there are obligations inherent in the transport of the goods (in addition to the supply of all non-commercial documentation, which also includes end-use certificates, proxy for proof of delivery, and the incurring of inspection costs); b) group F includes the contractual models that provide for free delivery up to a specific place, from where the main transport agreed with the buyer begins. Among these we find the FCA (Free Carrier, Franco Carrier), in which the seller delivers the goods cleared through customs to a carrier appointed by the buyer, and therefore the former will be subject to obligations to supply the goods to the carrier and to provide proof of delivery, as well as to the obligation to facilitate the acquisition of the transport document for the buyer and the incurring of the ordinary costs of control, while the buyer will bear the obligations of appointing the carrier and taking delivery of the goods, in addition to responsibility for any anomalies in the transport from part of the carrier and the costs of the inspection; c) Group C includes delivery clauses with principal transport obligations borne by the seller without any liability and risk to the same. Among these models we can find: 1) the CPT (Carriage Paid to, Transport Paid to), designed for any mode of transport, which guarantees ample freedom of choice of methods, and the related costs, for the seller, and that stands out for the possibility of payment in COD or international cash on delivery. As in the FCA contract, the risks for delivery are borne by the seller, but only up to the agreed point of delivery. Furthermore, the seller is obliged to provide all proof of delivery and transport documentation, while the buyer is obliged to bear the costs of inspecting the goods before shipment and which may be required for the fact of export (except in if they have been ordered by the authorities of the exporting country); 2) the CIP (Carriage and Insurance Paid to, Transport and Insurance Paid to) provides, in addition to the obligations set out above, for the payment of a travel insurance fee (...) d) Group D concerns the place where the goods. It is composed of two main contractual models: 1) DAT (Delivered at Terminal, Return to Terminal): with this model, the seller assumes the obligations inherent in the appointment of the shipper (assuming all possible risks), the delivery of the goods cleared through customs, the supply of the necessary documentation to release the goods by the buyer, in addition to the well-known incurring of the ordinary costs of control, while the buyer assumes the obligation to take delivery of the goods as soon as available in the agreed place, provides for the operations of import (including the compilation of the necessary documents for the end-user certificate, with which he proves to be the recipient of the goods), and bears the costs of inspection, except in the case of inspections carried out by the authorities of the exporting State; 2) the DDP (Delivered Duty Paid): it is perhaps the most complex contractual delivery model, as well as being the model that presents a wide range of obligations pending on the seller. These are carried out in various customs clearance operations, carried out both at the time of export and at the time of importation, thus making the same contractor take on rather serious risks. In this sense, it is understood how the seller is overburdened by the burdens incumbent on the transport of the goods, or the seller is obliged to carry out the entire procedure for the issue of the various certificates of use and final user of the weapon, which must be fulfilled, necessarily be verified both at the time of departure and upon arrival of the goods (...)". The use of these models always depends on the express willingness of the parties to refer to them in the contract itself. Some obligations must be equally fulfilled by one or both parties. Here too it is understood the interaction existing between certain legislative measures prepared for export or import by the States, with reference to the transfer of arms and which have an imperative nature, and the preparation of such contractual models, which evidently indirectly refer to these limits.

325See art. 4 of Regulation 2009/428/EC.

326Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 134, 29.5.2009, p. 1–269. The legislation contained in Regulation 2009/428 would find immediate application of direct effects also with regard to individuals of the nationality of the State in question. In this sense, however, what is expressed by the CJEU in the Kadi ruling: C-415/05 P, Kadi & Al Barakaat Int'l Foundation v. Council of 8 November 2008,

about the duty of the private individual to inform the authorities of this application always using good faith[327]. The procedure then enters its second phase, namely that of the investigation and evaluation where the authorities take into consideration the application in order to assess both the formal completeness and the applicable rules of domestic and international law, as well as any risks associated with the export[328].

With regard to the formal completeness of the application we must report the ATT where in art. 7, par. 5 affirms that:"(…) each exporting State party shall take measures to ensure that all authorizations for the export of conventional arms (…) or of items covered under article 3 or article 4 are detailed and issued prior to the export (...)". However, it does not refer to which elements of the application to be evaluated or the degree of completeness of the same

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ECLI:EU:C:2008:461, I-6351. In particular the CJEU declared that: "(…) the indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United 'ations may derogate because they constitute 'intransgressible principles of international customary law" (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of 'uclear Weapons, Reports 1996, p. 226, par. 79. For further details see: R. UERPMANN-WITTZACK, Rechtsfragen und Rechtsfolgendes Beitritts der Europäischen Union zur EMRK, in Europarecht, 2012, pp. 167ss. C. NOWAK, Europarecht nach Lissabon, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, European Union law, Cambridge University Press, Cambridge, 2014. J. TILLOTSON, N. FOSTER, Text, cases and materials on EU law, Gavedish Publishing, New York, 2013. M. HORSPOOL, M. HUMPHREYS, European Union law, Oxford University Press, Oxford, 2012, pp. 552ss. H. SATZGER, International and European criminal law, Hart Publishing, Oxford & Oregon, Portland, 2017. T. OPPERMANN, C.D. CLASSEN, M. NETTESHEIM, Europarecht, C.H. Beck, München, 2016. The general respect for the fundamental rights of the individual. Furthermore, considering that the decisions of international organizations are in any case subsumable within the discipline of international agreements, direct effects of the same can be excluded where there is no similar effectiveness for all Member States. It may be appropriate to point out that: "(...) there is an asymmetry similar to that which the Court wants to avoid and indeed more marked, since rules formed in the context of non-legal agreements become mandatory and directly applicable in the Member States, while for third States participating in the same agreements not only do they not produce similar direct effects, but they are not even legally binding. The external partners are in fact favored by the super-compliant behavior of the Union. This is a result in itself certainly not in contrast with the law, but whose opportunity deserves to be evaluated in relation to the individual case (...)". A. PAULUS, From dualism to pluralism: The relationship between international law, European law and domestic law, in P.H.F. BEKKER, R. DOLZER, M. WAIBEL (eds.), Making transnational law work in the global economy. Essays in Honour of Detlev Vagts, Cambridge University Press, Cambridge, 2010, pp. 132-153. CJEU, C-584/10 P, C-593/10P and C-595/10P, Kadi II of 18 July 2013, ECLI:EU:C:2013:518, published in the electronic Reports of cases. For futher details see also: V. FIKFAK, Kadi and the role of the Court of Justice of the EU in the international legal order, in Cambridge Yearbook of European Legal Studies, 15, 2013, pp. 592ss. M. WIMMER, Inward and outward-looking rationales behind Kadi II, in Maastricht Journal of European and Comparative Law, 21 (4), 2014, pp. 678ss. V. ARSLANIAN, Great accountability should accompany great power. The ECJ and the UN Security Council in Kadi I & II, in Boston College of International and Comparative Law Review, 35 (3), 2012, pp. 4ss. M. OVÁDEK, External judicial review and fundamental rights in the EU: A place in the sun for the Court of Justice, EU Diplomacy paper of the College of Europe, 02/2016.

327See the Best Practices of the Wassenaar Arrangement relating to the harmonization of culture regarding the export of dual-use goods.

328M. TRYBUS, L. BUTLER, The internal market and national security: Transposition, impact ans reform of the EU Directive on intra-community transfers of defence products, in Common Market Law Review, 54, 2017, pp. 403-442 H. MASSON, L. MARTA, P. LEGER, M. LUNDMARK, The "transfer Directive": Perceptions in European countries and recommendations, in Fondation pour la recherche stratégique, 2010, recherché and documents, n. 4/2010. M. TRYBUS, Buying defence and security in Europe, Cambridge University Press, Cambridge, 2014.

and/or which are the measures to be adopted in the event that the application is incorrect or incomplete. In this case, the path opens up for evaluating obligations similar to those provided for in other international conventions and agreements. We recall the form of checking the completeness of the information request that is issued by the authorities to the exporter as well as the military application of a dual-use good[329]. The correctness of the application can also be substantiated in necessary conditional requirements such as the sending of the same authorization by the authorities of the importing State and/or the transit for the release of the load of weapons[330]. However, the situation is different when the obligation to examine the information provided by the exporter and that in the possession of the same authorities is based on art. art. 7, par. 1 where it is stated that: "(…) If the export is not prohibited under article 6, each exporting State party, prior to authorization of the export of conventional arms (…) or of items (...), under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with article 8 (1), assess the potential that the conventional arms or items: (a) would contribute to or undermine peace and security; (b) could be used to: -commit or facilitate a serious violation of international humanitarian law; -commit or facilitate a serious violation of international human rights law; -commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a party; or -commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a party (...)"[331].

Continuing with art. 8 which establishes that in the case requested by the importing State to send the relevant information to help the exporting State in its assessment, the end-use and/or end-user documentation provided for in its legal system can also be included[332].

329Obligation provided for by art. 4 of Regulation 2009/428/EC.

330Art. IX of the Inter-American Convention.

331For further analysis see also: V.J. PROULX, Transnational terrorism and State accountability: A new theory of prevention, Hart Publishing, Oxford & Oregon, Portland, 2012, pp. 64ss, arguing that: "(...) the dichotomy between direct and indirect responsibility still remains a prevalent dimension of State responsibility (…) the final analysis culminates in three possible scenarios: the acts of the state agents are binding on the host state; non-state actors are deemed to be de facto government agents; or the acts of terrorist groups or insurgents are directly attributable to the host state without labelling them former instrumentalities or agents of the state per se. When considering the events of 9/11, it seems improbable that the attacks could in fact be attributed to the Taliban Government, even if analysed through the lens of subsequent endorsement(…) it is nonetheless possible to conclude that, in some circumstances, the action of a non-state actor amount to the acts of the government itself, as though committed through a prolongation of the State (...)". The ILC Draft Rules concerning "complicity": "(...) as a basis for state responsibility. (…) Conversely (…) the Draft Rules render states responsible for ostensibly private conduct only if the state directs or controls the unlawful conduct of the "private" actors. The question arises why "complicity" establishes responsibility for the acts of another state, but not the acts of private entities. The structure of the rules suggest that the lower threshold suffices for imputing the conduct of another state because the public character of any such act is clear- that is other states clearly have international legal personality. Attribution of the private acts, on this view, is appropriate only if the nexus between the state and the ostensibly private actor confers a public character on the conduct in question-recasts the private acts as "state action" (…) the emergent rule arguably reconfigures the distinction between the public and the private conduct (…)", as noted by: T. BECKER, Terrorism and the State: Rethinking rules of State responsibility, Hart Publishing, Oxford & Oregon, Portland, 2006.

332Art. 8, par. 1: "Each importing State party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State party, to assist the exporting State party in conducting its national export assessment under article 7. Such measures may include end use or end user documentation".

Reciprocally, the importing State may ask the exporting State for all relevant information relating to pending authorizations which have as their final purpose the loading of weapons[333].

Interpreting together art. 7, par. 1 with art. 8 we can meet ex novo the reciprocity discourse where relevant information is requested. This feature is made more evident when read in conjunction with the rules relating to international cooperation concerning the exchange of information to arms exports[334].

It is a power based on the States themselves. This interpretation derives from the aforementioned provisions which speak of "suitable measures to be taken by the State". The adoption of measures can also take place in an atypical way with respect to the provisions of the Treaty, without prejudice to the general obligation not to act in contrast with the object and purpose of the agreement[335]. If the measures adopted are such as to achieve the aim of the Treaty, in this case the State will not pass into a situation of wrongdoing.

The aforementioned reciprocity also emerges from the text of the provision of art. 7, par. 2 of ATT, which establishes that:"(…) the exporting State party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States (...)". Reciprocity establishes confidence and security-building measures even where they have been agreed with the importing State and only if the application of these measures does not seem necessary about the risk is minimal or when the State does not have sufficient information to adequately assess the risk. The information must be considered relevant especially that coming from the importing State in accordance with the wording of art. 8. If the State fails to notify the requested information, there is no violation of the obligation as well as whether the State should block or not[336].

However, the point of the inaccurate nature of this type of relevant information remains unclear. Because if it should only be information from official bodies and institutions or if it is possible to refer to information from non-governmental institutions, so can it be non-governmental organizations; in this case the information must be accepted only that presented by the private individual, or if it can also be assumed ex officio.

The exporting State will have to examine and assess whether the activity of the private individual may prejudice the obligations referred to in the provision and/or may generate risks of violations. Within this spirit, we recall art. 7, par. 3 of ATT states that: "If, after

333Art. 8, par. 3: "Each importing State party may request information from the exporting State party concerning any pending or actual export authorizations where the importing State party is the country of final destination".

334Art. 12 and following of ATT. And the articles 6 ss. of the Anti-Personnel Mine Convention and the Cluster Munitions Convention.

335Art. 18 of the 1969 Vienna Convention on the Law of Treaties. For further details see also: I. BUGA, Modification of treaties by subsequent practice, op. cit., I. PEAT, Comparative reasoning in international courts and tribunals, Cambridge University Press, Cambridge, 2019. L. CHANG-TUNG, T. GARCIA, La Convention de Vienne sur le droit des traitès. Bilan et perspectives 50 ans après son adoption, Pedone, Paris, 2019. D.B. HOLLIS, The oxford guide to treaties, Oxford University Press, Oxford, 2020. M. FITZMAURICE, P. MERKOURIS, Treaties in motion. The evolution of treaties from formation to termination, Cambridge University Press, Cambridge, 2020, pp. 282ss.

336On the contrary, in the Inter-American Convention it is established that the exporting State must not release the load of weapons until the requested information has been released to the importing State, or the corresponding authorization (which, in turn, presupposes that all necessary information has been collected and not just relevant information).

conducting this assessment and considering available mitigating measures, the exporting State party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State party shall not authorize the export (...)".

Turning to the assessment risk as we have seen and what is provided for by art. 7, par. 2 it seems that the consolidated form of a customary norm is also detectable in other international instruments. Thus, we recall the Wassenaar Agreement[337], and how the organization invited States parties to carry out this assessment to ascertain that there is no risk of violations[338]. In reality, the Wassenaar Agreement[339] stands out not only as a privileged forum for debate that has been reserved for exporting States, where the criteria laid down for the commercialization of conventional weapons are discussed, but also as "a field of political experimentation to initiate new practices on arms trade (...)"[340].

Even within the EU, the assessment of any export-related risks can be found in the export of dual-use goods. In particular, the Regulation 2009/428/EU requires States to ascertain whether the risks of violations of human rights and national security of the Member States do not exist or can be contained with the final aim of denying authorization[341]. This risk assessment was specified and expanded in the Code of Conduct on the export of SALW, transfused later in Common Position 2008/944/EU. The risks considered here can be grouped into 5 macro-categories: "(...) a) risks deriving from the commission of violations of human rights and international humanitarian law (article 2, par. 2, letters a, b and c) and risks to the stability of international peace and security (article 2, par. 4, letters a, b, c, and d). States must deny the export authorization when the risk of violation is "evident", to be understood as a clear risk; b) risks related to the internal stability of the country of destination (article 2, par. 3) and risks related to the security of the Member States (article 2, par. 5) (...) only requires that they must be ascertained or taking into account the potential effects of the transfer and the risks of employment against Member States or allied States.

337The question of compatibility between the Wassenaar and EU law on the control of the proliferation of dual-use goods also refers to the role: "(...) that the EU itself intends to assume in the context of its external action. This role would, in turn, be characterized by two main profiles: 1) a profile of responsibility of the EU and its Member States, which would allow both of them to intervene rapidly in crisis situations determined by indiscriminate proliferation; 2) a profile of uniqueness of the nature and structure of the EU itself, which lead it to be a first level actor in the context of combating the proliferation of dual-use goods. However, with respect to the inclusive discipline of non-listed dual-use contained in the derivative acts of the Wassenaar Arrangement, the EU discipline has tended to apply this clause only in relation to specific weapons and components, such as missile systems and weapons of mass destruction. With the reg. 1334/2000, amending the previous one, the clause was also extended to goods that could be used for military purposes, but without placing the specification required by the 1994 regulation. Therefore, this clause applies even if the destination of said goods is one State subjected to an arms embargo (so-called "Catch More" clause) (Art. 4, par. 5-6, which also emphasizes the duty to inform about the measures adopted with regard to unlisted assets.). Although the 2009 Regulation provides for clauses for the inclusion of non-listed goods, the possibility remains for States to identify other goods, as well as to establish limitations on the circulation of the same for other reasons (this possibility is provided for by art. Regulation 1969/2603/EEC relating to the export of goods to third countries) (…)".

338The Initial Elements, above all, it highlights the risk that dual-use weapons and goods could reach the hands of illegitimate or unrecognized terrorist groups and armed groups.

339M. BRANDES, All's well that ends well" or "much ado about nothing"?: A commentary on the Arms Trade Treaty, op. cit., pp. 400ss. M. HUTTUNEN, The Arms Trade Treaty: An interpretive study, Lapland, 2014.

340See the List of Dual-Use Goods and Technologies adopted in 2006 or the Best Practices for Effective Legislation on Arms Brokering of 2003 which represented an absolute novelty in the field of dual-use products and intermediation in the arms trade.

341Regulation 2009/428/EC, art. 9.

Evidence of the risk is not foreseen, and this could lead, first of all, to believe that there is a grading of the risk, which must be ascertained concretely and on the basis of all the necessary information; moreover, the weighting thus envisaged should also favor a balancing of the interests of the States, where the export could compromise their external relations, the Member States can adopt restrictive measures or just deny the authorization (...)"[342]; c) the risks of violations inherent in the international obligations of the Member States. This category can in turn be divided into three main groups, namely i) obligations deriving from participation in the United Nations and in its programs relating to non-proliferation o embargoes, ii) the obligations imposed by the European Union on non-proliferation and iii) the other international obligations of the Member States on the control of the proliferation of arms (article 2, par. 1, letters a, b and c). In this case, the Common Position does not prescribe the type of risk that must be ascertained, but only establishes an assessment of compatibility between the granting of the authorization and the requirements to fulfill these obligations. In the event that the authorization is incompatible with these obligations, it will be denied; d) risks relating to the diversion or diversion of loads of weapons (article 2, par. 7)[343]. This type of risk is also envisaged, in turn, in the Inter-American Convention[344]. In this case, the degree of risk is not prescribed, but only any factors and elements to be taken into account when issuing the authorization[345]; e) risk relating to the possibility that the sustainable development of a State will be hindered (article 2, par. 8). This particular assessment takes into account what has been previously expressed[346] about the understanding of social and economic rights among serious violations. In particular, taking into account the fact that arms transfers for gainful purposes can be particularly costly and that there may be risks of entering into industrial

342C. MCLEAN, A. CRAIG-PATTERSON, J. WILLIAMS, Risk assessment, policy-making and the limits of knowledge: The precautionary principle and international relations, in International Relations, 23 (4), 2009, pp. 548-566. L. TRENTA, Risk and presidential decision making. The emergence of foreign policy crises, ed. Routledge, London & New York, 2016.

343N. SCHEFFEL, Europäische Verteidigen. Von der EUG zur Europäiscehn Armee? Analyse und Modell aus europa-und verfassungsrechtlicher Perspecktive, Mohr Siebeck, Tübingen, 2022.

344Art. XII.

345In particular, it is prescribed that due account must be taken of: “a) legitimate defense and internal security interests of the recipient country, including participation in peacekeeping initiatives at the level of the UN or other organizations; b) the recipient country's technical capacity to use the technology or equipment; c) the recipient country's ability to exercise effective export control; d) risk of re-exporting the technology or equipment to unacceptable destinations and the behavior of the recipient country in complying with the provisions on the issue of authorization for the export of dual-use goods and the provision of sanctions for contrary behavior in accordance with the provisions of is established in its own legal system (...) the Commission had proposed to directly provide for criminal measures for individuals who had not complied with the provisions of Community legislation (...) this proposal was rejected by the Member States, as it was considered that the choice of the type of measure to be adopted to combat these types of behavior fell within its legal scope (…); CJEU, C-478/11P and C-482/11P, Gbango v. Council of 23 April 2013, ECLI:EU:C:2013:258, published in the electronic Reports of cases, par. 56; C-415/05 P, Kadi & Al Barakaat Int'l Foundation v. Council of 8 November 2008, op. cit., pp. 241-244), the restrictive measures: “(...) refer to acts of general application, as they prohibit a category of recipients determined in general and abstract terms, in particular, from making capital and economic resources available to persons and entities whose names they can be found in the lists contained in their annexes and, at the same time, they can be traced back to a set of individual decisions towards such persons and entities. This interpretation would be opposed by the Member States on the basis of the principle of certainty of criminal law and the sanctions it provides, otherwise there would be a clear violation of the nulla poena sine lege principle (…)”.

346Par. 1, 2, 3.

compensation agreements[347], the assessment to be carried out must take into account relevant information, i.e. information from reliable international economic organizations (such as the World Bank), and the levels of military expenditure of the individual States involved. (...) The risk to be ascertained is not considered as evident, but it is possible to believe, on the basis of what has been seen above, that there may now be an obligation to also consider these factors as relevant (...)"[348].

The risks set out above are of different nature and types. We can say that in relation to the former it is possible to believe that the assessment must be rigorous, because there are factors relating to the presence of armed conflicts or a possible use of weapons to commit various types of violations. Beyond the discussion just made regarding the graduation of risk, a comparison with the adjective "overriding" provided for by art. 7, par. 3 of ATT should be useful. The cited article refers to the "overriding" risk which can have the preponderant meaning. Despite the fact that in the French version we encounter the term "prèvalent" thus letting us understand that the evidence of risk as well as in Common Position n. 2008/944 refers to a situation that needs to be ascertained on the basis of important information. Information that allows the relevant supervisory authorities to examine and evaluate the situation of the private petition submitted. The preponderance other than the information of the destination of the cargo where it emerges can be used to commit violations and the State must authorize the export. The preponderance test allows the risk to be ascertained as well as the needs of the private individual, without prejudice to the power of the State to adopt measures to contain any risks, even of a minor nature[349].

The speech just concluded reaches the affirmative position of the use of the precautionary principle. Principle that allows us to weigh different needs in the field of international trade. Because if the economic needs of the private individual exist, they may also have relevance only following an assessment according to which no risk for the importing State causes damage to collective interests deriving from the activity of the private individual. While the assessments and precautions normally understood in the context of international trade would have a scientific or epistemological basis for risk in the arms trade and assume a human nature or based on other factors highly determined by the probability of contrary behavior to common interests; when the link between the violations that may be determined and the sending of weapons to that destination is ascertained, where the State will have the obligation to block the export[350].

The degree of risk assessment does not allow us to understand whether the preventive action should be carried out or whether this remains at the discretion of the exporting State. Reading art. 7, par. 3 and par. 4 of ATT, this interpretative statement may refer to the position maintained by Switzerland and Liechtenstein affixed to the ATT regarding the donation of arms, where in particular the Switzerland stressed that: "(…) it is the understanding of Switzerland that the term "overriding risk" in article 7, par. 3, encompasses, in the light of the object and purpose of this Treaty and in accordance with the ordinary meaning of all equally authentic language versions of this term in this Treaty, an obligation not to authorize the export whenever the State party concerned determines that any of the negative consequences set out par. 1 are more likely to materialize than not, even

347D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit., pp. 393ss.
348D. EISENHUT, Offset in defence procurement: A strange animal. At the brink of the extinction?, op. cit.
349Art. 7, par. 4.
350A. TROUWBORST, Precautionary rights and duties of States, op. cit., pp. 100ss.

after the expected effect of any mitigating measures has been considered"[351]. The adoption of risk containment measures is understood as an obligation and not as a power of the State, where the term "overriding" is intended as potential and not as preponderant. The assessment will not be based on the preponderance of the risk with respect to the needs of the private individual but on the mere presence of doubts, i.e. the possible consequences of the export. The risk in the assessment for the export of weapons in this case resembles that present in the Genocide Convention[352] and in the Torture Convention, with reference to the prohibition of refoulement[353]. The assessment must be conducted in an impartial and non-discriminatory manner[354] and must determine the risks "beyond any reasonable doubt".

This import also makes it possible to detect what type of instrument can lead to the prevention of even serious violations of international law[355]. The link between the sale of arms and the commission of violations has always been evident and used as a mean of preventing similar situations. The precaution in the environment and human health, also in the arms trade and the precautionary principle can be understood as a type of criterion to ensure prevention[356].

This assessment intend the obligation and the standards for the States that are parties to the ATT or of any other State. The same treaty on the arms trade has as its object to: "(...) establishes the highest possible common international standard for regulating or improving the regulation of the international trade in conventional arms (...)"[357].

So, we can evaluate art. 7 as a mere technical tool to ascertain any risk[358]. However, based on a systematic interpretation of the Treaty, we can understand that this instrument is mandatory for the States parties to the treaty. This position also states that the States must carry out the assessment of the relevant factors when the transfer is not prohibited pursuant to art. 6., even during the provisional application phase of the former art. 23 it was established that the States could ratify or accept the treaty by applying the provisions of arts. 6 and 7 for which the intention was to temporarily oblige States to adapt to this instrument. However, interpreting the Treaty according to the only interpretative declarations made, this instrument is intended as mandatory[359] and potentially violated are obligations of an erga omnes nature.

351Ratification of Switzerland in 15 January 2015 and of Liechtenstein in 16 December 2014.

352Art. 11.

353Art. 4, par. 3, as well as in the 1951 Geneva Convention relating to refugees (art. 34).

354Art. 5, par. 3 and preamble, principle 8 of ATT.

355See the Frey Rapport.

356A. TROUWBORST, Precautionary rights and duties of States, op. cit., pp. 240ss.

357Art. 1, par. 1.

358H. THIRLWAY, The Sources of International Law, Oxford University Press, Oxford, 2014, pp. 3ss.

359Art. 2 of the Agreement governs material weapons delivery activities. Par. 2 reads: "(...) for the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as "transfer" (...)". It can be highlighted that the profit to be allocated is not onerous, since: "(…) the profit has an onerous character when it represents the consideration for a patrimonial sacrifice sustained in view of it, or has as a counterweight the compensation for a patrimonial sacrifice of others. In such cases, it is obvious that the counterparty or the third party was entitled from the beginning to wait for it and to assign it according to a principle of equivalence and reciprocity (...)". Between December 2014 and January 2015, Liechtenstein and Switzerland ratified the Treaty by affixing their interpretative declarations (According to Principle 1.2 of the Guide to Practice on Reservations to Treaties of the International Law Commission (in Yearbook of the International Law Commission, 2011, vol. II, Part, II), an "interpretative declaration" is defined as: "(...) the unilateral ruling of one or more States, or one or more organizations, which intend to specify or clarify the meaning or scope of the terms contained in a treaty to which they are parties or certain of its provisions (...)). Both States have understood the term "transfer" in a

The link between evaluation and compliance with erga omnes obligations suggests the mandatory nature of the former. We can also speak of obligation in relation to greater compliance with the object and purpose of the Treaty in the action that States must take to fulfill it. Reading the assessment according to the precautionary principle, it is possible to believe that there is certainly an obligation of prevention where there are risks, even of a potential nature, and that such violations are committed.

12.INDIVIDUAL RESPONSIBILITY FOR TRAFFICKING AND OTHER ILLICIT ARMS TRANSFERS. THE CASE OF VIOLATION OF THE RULES ON ARMS TRANSFERS THROUGH ILLICIT BROKERING AND DIVERSION

As we have predicted, not only the State but also private individuals can be responsible for international offenses as a consequence of the illicit arms trafficking.

In the Frey Report[360] it was reported that the main responsibility of the States was that of not providing sufficiently and with due diligence the relative measures that could repress individual conduct in relation to the use of weapons[361]. The Special Rapporteur of the aforementioned report highlighted how this due diligence could be the real means to ensure the protection of fundamental rights otherwise harmed by arms transfers not aimed at self-defense[362].

However, there are various international agreements that provide for the obligation to regulate and criminalize these two cases. With regard to the prevention obligations imposed on States parties, the Protocol establishes the provision of registration systems and the issue of export authorizations for brokers[363]. The provision just referred to invites States to adopt such a system, despite the fact that the cumulative nature of the measures to be adopted is not established. The principle of sovereignty is not enucleated in the Protocol but finds its application in the choice of the method of control of arms sales activities. This state discretion cannot be completely effective in combating the phenomenon of illicit brokering,

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broader sense than that expressed in art. 2 of the Treaty, the States have asserted that: "(…) it is the understanding (...) that the terms "export", "import", "transit", "transshipment" and "brokering" in art. 2, paragraph 2, include, in light of the object and purpose of this Treaty and in accordance with their ordinary meaning, monetary or non monetary transactions, such as gifts, loans and leases, and that therefore these activities fall under the scope of this Treaty (...)". The interpretation offered to these statements seems to make the two main interpretative criteria coincide, both the textual and the teleological one. Free-of-charge activities (which include loans or leases of armaments) fall within the scope of application of the Treaty rule.

360Prevention of human rights violations committed with small arms and light weapons. Final report submitted by Barbara Frey, Special Rapporteur, in accordance with Sub-Commission Resolution 2002/25, A/HRC/Sub.1/58/27, 27 July 2006. For further details see also: J. PETROVIC, Accountability for violations of international humanitarian law. Esssays in honour of Tun McCormack, ed. Routledge, London, New York, 2015. S. CASEY-MASLEN, Weapons under international human rights law, Cambridge University Press, Cambridge, 2014. B.A. FREY, Due diligence to prevent foreseable harm. The international human rights agenda on civilian gun violence, in Washington University of Law & Policy, (60), 2019, pp. 94ss.

361Par. 8 ss.

362Par. 42.

363Art. 15, par. 1: "(…) with a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as: (a) Requiring registration of brokers operating within their territory; (b) Requiring licensing or authorization of brokering; or (c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction".

because the choice of only one of the envisaged systems does not always guarantee the prevention of activities deemed illicit.
This type of gap can be relatively filled with the general obligation for States to provide for the exchange of information including the activities of brokers on their territory[364]. Obviously, according to the most common practice on this point, it is possible to affirm the fight against illicit brokering even outside of one's own jurisdiction and through the request for intervention made by a State that is part of the same agreement (remember the ATT).
The ECOWAS Convention itself provides that the brokering of conventional weapons is established through the necessary registration in special registers for those (individuals or companies) who carry out such services while operating in the territories of the States parties[365]. With regard to the issuing of authorizations to such brokers, the Convention reports that the States and their authorities must collect all the information relevant to the operating entity and its destination, implicitly also establishing an assessment of any related risks[366]. Where the intermediate type activities are carried out illegally, or this type of intermediation is omitted to register or are operating in the absence of specific authorization, States may provide that such activities are considered as offenses of a criminal nature[367].
This obligation is also established by the ATT and in particular through articles 10 and 11 which provide for the adoption of measures to repress the two cases analyzed here.

13.(FOLLOWS) TYPICALLY OF RELEVANT CONDUCT

The cases of illicit brokering and diversion can be analyzed according to the type of two different objective elements, that is, as a criminal case in itself.
In particular, illicit brokering is perfected when a subject (of a private nature) performs its function as an intermediary (broker) between supply and demand in the arms market[368], or

364Art. 15, par. 2: "States parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol".
365Art. 20, par. 1.
366Art. 20, par. 3: "Member States shall require that all small arms and light weapons brokering license applications for authorisation provide full disclosure of relevant import and export licences or authorisations and associated relevant documents, the names and locations of all brokering and shipping agents involved in the transaction and the transit routes and points of the small arms and light weapons shipments".
367Art. 20, par. 4.
368See also in argument: Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, OJ L 156, 25.6.2003, p. 79–80. This legal instrument, according to what has been noted in the doctrine: "(…) contains agreed minimum standards as well as more restrictive provisions that Member States may include in their national control systems", according to: K.T. O'FARRELL, Arms brokering controls how are they implemented in the EU?, in GRIP, 2013/2. Report on "The Implementation of the EU Common Position on the Control of Arms Brokering, by SEESAC and UNDP, 2009. V. MOREAU, H. ANDERS, Arms brokering controls and how they are implemented in the European Union, GRIP, 2009/11. C. TORBEY, The most egregious arms broker: Prosecuting arms embargo violators in the International Criminal Court, in Wisconsin International Law Journal, 25 (2), 2007, pp. 335ss. M. BROMLEY, Prosecuting illicit arms brokers: Improving the European record, in Center for Security Studies, 2012. H. ANDERS, S. CATTANEO, Regulating arms brokering taking stock and moving forward the United Nations process, in GRIP, 2005. D. LUBAN, J.R. O'SULLIVAN, D.P. STEWARD, International and transnational criminal law, Wolters Kluwer Law & Business, 2018, pp. 547ss. According to paragraph 3 of the rule, in fact: "(...) brokering activities mean the activities of persons and entities: who negotiate or organize transactions that may involve the transfer of assets listed in the common list of military equipment from a country third party to any other third country, or who buy, sell or arrange the transfer of such goods in their possession from a third country to any other third country (...) the rule limits the meaning of the term "intermediation" to those activities of persons and entities

between the producer and the buyer[369]. ATT has as its object the provision of a high standard that is possible to regulate arms transfers and therefore prevent illicit trafficking[370], where it provides that the States:"(…) shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering (...)"[371].

Brokering is mentioned as an arms transfer activity according to art. 2, par. 2 of the Treaty. The basis of this lies in the close connection existing between brokering and these types of transfers, given the possibility of resorting to the services of a third party to assist the individual sales operations. In many cases the broker itself becomes the transferring subject from the moment in which it purchases and holds the weapons for a certain period of time, to then resell them and make a profit.

The rival criminal conduct, according to the United Nations Office for Disarmament Affairs (UNODA)[372] constitutes all the effects of the brokering activity both in the intermediation service between supply and demand and the meeting of the same but also to all related services to the sale (including the preparation of the necessary documentation, up to the negotiation of the contract and the transport of the load, up to the services relating to the payment). The proceeds from the brokering operation may not necessarily be just a cash

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(...) who negotiate or organize transactions (...) from a third country to any other third country (...) although Member States are obliged to control the brokering activities that take place in their territory, this it only applies to activities involving transactions between third countries. On the contrary, Member States are not obliged to regulate intermediation activities which, although taking place in their territory, concern transactions between member countries or between a member country and a third state (...) affirmed is confirmed in the second line of the paragraph 3 where it is established that there is nothing to prevent a Member State from defining intermediation activities in national legislation in order to understand the cases in which such goods are exported from its own territory or from the territory of another Member State". Common Position 2003/468/CFSP, art. 2, par. 3. It has been noted that: "(…) The Common Position explicitly requires Member States to control arms brokering leading to the transfer of arms between countries outside the EU but it also allows any Member State that so desires to include in its national definition of arms brokering the sale of articles listed on the EU's military list from its own territory or from any other Member State (...)". S. FINARDI, B. JONHSON-THOMAS, P. DANSSAERT, From deceit to discovery: The strange flight of 4L-AWA, in International Peace Information Service Report (I.P.I.S.), IPIS and Transarms, Brussels, 21 December 2009. H. GRIFFITHS, A. WILKINSON, Guns, planes and ships, Identification and disruption of clandestine arms transfers, SEESAC, Belgrade, 2007. I. CAMERON, EU sanctions and defence rights, in New Journal of European Criminal Law, 6 (3), 2015. F. GIUMELLI, How EU sanctions work: A new narrative, op. cit., K. GEBERT, Shooting in the dark? EU sanctions policies, op. cit., E. GADJANOVA, Coercing, constraining and signalling: Explaining UN and EU sanctions after the cold war, ECPR Press, 2011.

369S. FINARDI, P. DANSSÄRT, Transparency and accountability. Monitoring and reporting methods under an Arms Trade Treaty, op. cit., B. WOOD, International initiatives to prevent illicit brokering of arms and related materials, in Disarmament Forum, 2009, n. 3, pp. 5-16. E. KEPPLER, Preventing human rights abuses by regulating arms brokers: The US. brokering amendment to the arms export control act, in Berkeley Journal of International Law, 19 (2), 2001, pp. 381-411.

370Art. 1: "The object of this Treaty is to: -Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; -Prevent and eradicate the illicit trade in conventional arms and prevent their diversion".

371Art. 10.

372United Nations Office for Disarmament Affairs (UNODA), Arms Trade Treaty Implementation Toolkit-Module 9: Brokering, p. 2. This interpretation must be made according to art. 5 of the Treaty where it is established that: "(…) each State party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under article 2 (1) and of items covered under article 3 and article 4 (...)".

profit but may also consist of another benefit in favor of the intermediary, especially of a political nature[373].

The regulation of this activity also allows the identification of the relevant criminal conduct, given that two fundamental requirements must be met: on the one hand the transnational nature of the intermediation activity and on the other hand the lack of authorization to export or carrying out the activity. The first regulatory reference is provided by art. 10 of the ATT, where it is established that the regulatory measures that the States parties must adopt concern intermediation activities "taking place under its jurisdiction". The normative expression in ex art. 10 means that the activity can start within the jurisdiction of a State, but it can also be perfected outside of it. The arms transfer may also not directly involve the state of residence or registration of the broker and the latter may not necessarily take possession of the cargo to be delivered. The brokering activity can also be separated from a material connection with the State in which the broker lives or operates regularly[374].

If the broker starts up its activity in States that are party to the ATT, these can regulate the intermediation activity for all the phases of the intermediation service provided, therefore they must also include and understand the phases that take place outside their own jurisdiction. According to art. 10 which refers in a generic way to the measures that must be adopted by States to regulate intermediation services[375], in combination with art. 5, par. 5 ATT we can consider that the activity to be regulated may also be that in which the broker operates in a third State, but at the same time has a connection with a State party to the ATT[376].

In the event that the intermediation activity is carried out outside the scope of application of the national jurisdiction, it will be necessary to regulate this type of activity through specific rules of national law that allow the extraterritorial exercise of jurisdiction over brokers based on ratione materiae or ratione loci connection criteria[377]. According to the articles of the ATT just referred to, we can say that these connection criteria seem to be compatible with the object of the Treaty, that is, the widest possible regulation of arms transfer activities[378]. This observation also emerges in state practice as we can see from US examples in which the contrast of certain criminal activities is also operated on an extraterritorial level and based on certain connection criteria between the private sector and the State[379]. The main

373R. YAKEMTCHOUK, Les transferts internationaux des armes de guerre, op. cit., pp. 14ss.

374United Nations Office for Disarmament Affairs (UNODA), Arms Trade Treaty Implementation Toolkit-Module 9: Brokering, op. cit.

375United Nations Office for Disarmament Affairs (UNODA), Arms Trade Treaty Implementation Toolkit-Module 9: Brokering, op. cit., p. 4.

376United Nations Office for Disarmament Affairs (UNODA), Arms Trade Treaty Implementation Toolkit-Module 9: Brokering, op. cit., p. 5.

377United Nations Office for Disarmament Affairs (UNODA), Arms Trade Treaty Implementation Toolkit-Module 9: Brokering, op. cit., p. 6.

378"Establish the highest possible common international standards for regulating or improving the regulation (...)".

379This is the case of section 127.1 (b) of the International Traffic in Arms Regulation (ITAR), which expressly states that: "(...) All persons abroad subject to U.S. jurisdiction who obtain temporary or permanent custody of a defense article exported from the United States or produced under an agreement described in part 124 of this sub chapter, and irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transfer (…) this way of understanding the exercise of jurisdiction would not be incompatible with the principles of international law on the jurisdiction of States (…)". From jurisprudential practice, this form of exercise of jurisdiction has always found the positive opinion of US national jurisprudence, for example in cases: U.S. v. Evans (1987) 667F and US. v. Hendron (820 F. Suppl. 715, E.D.N.Y. 1993, 17 May 1993). With regard to the extraterritorial

requirement is to be able to operate in a legislative manner, that is, a specific provision of domestic law is required that admits this approach as lawful. It is necessary to point out with certainty that the connection criterion is of an objective or subjective type[380] and for the sake of completeness it must consider this exercise to be admissible where the consent from the territorial State operates[381]. Respect for the fundamental freedoms of the suspect or arrested,

application to criminal intermediation conducts in favor of armed groups and terrorists that can target US troops stationed abroad, see the cases: US. v. Vintila et al. and US. v. Georgescu (14-CR-799 (RA) S.D.N.Y., 7 December 2015) and the case of the notorious arms dealer Viktor Bout (US. v. Bout, 121487-cr, S.D.N.Y., 27 September 2013).

380A. BIANCHI, On power and illusion: The concept of transparency in international law, in A. BIANCHI, A. PETERS (eds.), Transparency in international law, op. cit.

381According to art. 20 ILC. It seems to us that the rule that is considered special sets a positive obligation which is susceptible to infringement "where the action or omission found to have occurred is in fact not in conformity with the conduct specifically required of the responsible organ for the action or omission". The violation exists in this hypothesis regardless of the circumstance for which it originated: "Consequences that were actually harmful" In Yearbook of International Law Commission, vol. II, part 2, p. 15, it is the comment to art. 20 of the project on state responsibility approved in the first reading on the conduct of obligations. The circumstance indicated in the text is one of the distinctive elements of this type of illegal with respect to that resulting from the violation of an obligation to prevent a given event, which the same project provided for in art. 23, in the Yearbook of International Law Commission, vol. II, part. 2, p. 81ss: "(…) when the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result (…) if the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence ofthe event, just as the non-occurrence of the event is the key indication of fulfillment of the obligation (…)". See, Commentary to the Draft Articles on Responsibility of States for International Wrongful Acts, (note 81), art 23(4), 173. See also R. Ago that affirms: "(…) it does seems clear that, in order to be able to establish the breach of an obligation in this category, two conditions are required; the event to be prevented must have occurrence, and it must have been made possible by a lack of vigilance on the part of State organs (…) a State cannot be alleged to have breached its obligation to prevent a given event so long as the event as not actually occurred, and the same is true where the feared event has occurred but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach (...)", R. AGO, Seventh report on State responsibility, (1978) ILC YB/II, UN Doc A/CN.4/SER.A/1978, 36 (note 92) 32 para. 3. For further analysis see also: C.H.M. WALDOCK, Forum prorogatum or acceptance of a unilateral summons to appear before the international Court, in The International and Comparative Law Quarterly, 2, 1948, pp. 378ss. P. STILLMUNKES, The "forum prorogatum" devant the permanent court of international justice and the cour internationale de justice, in Revue Gènèrale de Droit International Public, 13, 1964, par. 656ss. J. SOUBEYROL, Forum prorogatum et la Cour Internationale de Justice. De la procèdure contentieuse à la procèdure consultative, in Revue Gènèrale de Droit International Public, 21, 1972, pp. 1099ss. D. NÉGULESCO, The evolution of the consultative services of the permanent Court of international justice, in Recueil des cours, ed. Brill, Bruxelles, vol. 57, 1936, pp. 20ss. D. PRATAP, The advisory jurisdiction of the international Court, Oxford University Press, Oxford, 1972, pp. 15ss. S. YEE, Forum prorogatum in the international court, in The German Yearbook of International Law, 49, 1999, pp. 148ss. T.F. MAYR, J.M. SINGER, Keep the wheels spinning. The contributions of advisory opinions of the International Court of Justice to the development of international law, in Zeitschrift für ausländisches Recht und Völkerrecht, 76, 2016, pp. 426ss. Note also that the ICJ Regulation foresees in art. 38, par. 5 a special procedure precisely to take into account the possibilities offered by this form of institution of the jurisdiction of the judicial body by establishing that the chancellery may receive an appeal without the indication of any applicable jurisdictional title. In this case the request will be forwarded to the named party without proceeding with the registration until the latter has expressed its consent to the activation of the procedure. An example of the application of the indicated procedure is the controversy over certain criminal provisions in France, Republic of Congo v. France. Order of 17 June 2003, in ICJ Reports, 2003, parr. 3 and 6.

as well as the possibility of having a hearing and being judged impartially are rights included for the fundamental protection of individuals.
The identification of an illegal brokering activity is given by the lack of authorization or license to carry out its activity. This private economic activity does not differ from other private initiatives for the export or sale of goods at an international level, given that the certainly sensitive nature of the exported goods requires a pervasive control activity, since legal obstacles are placed to the private activity. To remove these obstacles, the private individual needs to have contact with the national authorities for the proposition of an application, with which he asks to be authorized to provide his own intermediation activity. In this case, the authorization also acts as a means of effective control by the State over the transfer operations carried out by the private individual[382]. In many state jurisdictions the broker can also operate freely and not only will have to request a specific authorization for the transfer, but will also have to be registered in special registers, duly kept by the national authorities. This registration has a constitutive value of the activity itself and unlike the authorization which has only a declaratory value of the activity carried out by the private sector with a view to removing obstacles.
It is worth mentioning the US law which provides for a form of registration of the broker for the purpose of carrying out its economic activity. In particular, section 129.3 (a) of the ITAR, which incorporates the provisions of section 38 (b) (1) (a) (ii) of the Arms Export Control Act 2014, states that: "(…) any U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States (notwithstanding §120.1(c)), who engages in the business of brokering activities (as defined in this part) with respect to the manufacture, export, import, or transfer of any defense article or defense service subject to the controls of this sub-chapter (see part 121) or any "foreign defense article or defense service" (as defined in par. 129.2) is required to register with the Directorate of Defense Trade Controls (...)"[383].
Within this registration, a specific export authorization or license is also requested[384]. If registration is missing or specific authorization is missing, ITAR provides for the criminal liability of those who carry out intermediation activities without the aforementioned requirements[385].
The provision and possession of these requirements can be considered under international law as an obligation for States. In ATT, and expressly through art. 10 it is clearly established that: "(...) among the measures that must be adopted by the States parties to regulate brokering, there are also the registration in special registers or the obtaining by the private individual of a specific and prior written authorization[386] (...) the lack of the same requisites will not only invalidate the contract concluded between the private individual and the importing State or the state enterprise, but will also make the conduct put in place by the individual or by unregistered or unauthorized industry (...)"[387].
With regard to diversion, it is evident in a conduct aimed at diverting the load of weapons with respect to the original, documented and authorized destination. The ATT does not

382In particular with regard to the control exercised (and due) by the State, as well as with regard to the prior export assessment.
383J.R. LIEBMAN, R.C. THOMSEN, J.E. BARLETT, United States export controls, Wolters Kluwer, new York, 2011, pp. 406 (c).
384Par. 129.6.
385Par. 126.4(c) ss.
386Art. 10.
387See section 126 of the 'ITAR.

define this type of activity in legal terms. This lack is relatively compensated by the fact that the authorization must be issued, in all cases through the presentation of appropriate end-use or end-user certificates, which therefore allow the recipient or destination to be established with certainty. Diversion may occur in these cases where the transfer of weapons is diverted from an authorized person to an unauthorized one, or when the actual destination is different from that originally certified[388]. This case can also occur in cases in which a re-export of the load of weapons takes place. Normally, diversion is the method of obtaining used by States subject to arms embargoes, by terrorist and criminal organizations and other subjects that may commit violations of international law[389].

Both brokering and diversion require the prerequisite of lawfulness, that is, the authorization to export the arms shipment. If it can intervene in any phase of the negotiation and sale, it is also obvious that the phase in which this conduct is perfected is that of the transport of the load[390]. It is possible to believe that, more than illicit brokering, the diversion can be configured only when the transfer of the weapon asset has been authorized, since the transport takes place only when the state authorities believe that there are no direct impediments to the same[391].

The ATT has not given a specific definition of the conduct of diversion but only imposes due diligence obligations on the States to prevent its commission of wrongdoing through the adoption of appropriate measures by all the States involved in the related transfers[392]. The prevention obligations are distinguished according to whether it is an exporting State or another State: "(…) -as regards the exporting State, the ATT prescribes that prevention must take place through the assessment of diversion risks. In addition to the aforementioned instrument[393], prevention also takes place through confidence and security-building measures and programs established and developed in agreement with the importing States. However, diversion can also be prevented through other measures, where deemed appropriate (...)"[394].

In particular, the ATT requires an assessment of the subjects involved in the export of weapons, in the request for separate and additional documentation relating to diversion risks, in the preparation of end-use or end-user certificates and prevention guarantees by of the private[395]; - where it is a matter of another State (be it import or transit), the prescribed obligation of prevention concerns only the cooperation and exchange of information to mitigate the connected risks (…) also according to the letter of art. 11, the main obligation will be imposed on the exporting State, so that prevention can be anticipated. However, given this constraint and the preparation of the only useful tool in this sense, that is the risk

388UNODA, Arms Trade Treaty Implementation Toolkit-Module 10: Preventing Diversion, p. 2.

389O. GREENE, E. KIRKHAM, Preventing diversion of small arms and light weapons: Strengthening border management under the UN programme of action, op. cit.

390Doubts may arise regarding the diversion made during the production phase. The weapons have not yet been assembled (making, therefore, more inclined towards the theft of components) and it must be assumed that only on the occasion of the transport of weapons or components is it possible to configure this criminal offense. Under the Inter-American Convention and the UN Firearms Protocol, diversion can be made on explosives that have not yet been marked and numbered by industries. The rule would have an abstract danger character, as the marking and numbering perform the task of making this weapon lawful in its use.

391In particular, the transport insurances mentioned above are mainly aimed at avoiding the various forms of diversion, and remain active until the cargo has arrived at the identified destination.

392Art. 11, par. 1.

393Par. 1.3.

394Par. 1.3.

395Art. 11, par. 2.

assessment for the purpose of issuing the authorization, the obligation is completed only with the examination of the necessary information. (…) For the assessment of the predominant risk prevailing, the importing State will provide all the necessary information (...)"[396]. (...) A State party to the ATT recognizes some risk of diversion in transfers that directly or indirectly involve its territory, the latter has the duty to report any risks or violations to the States involved. Furthermore, it will be able to take the necessary measures "according to its own law and in accordance with international obligations (...)"[397].
This situation occurs when the shipment of weapons has entered the jurisdiction of the State in question, without the latter having had the possibility to authorize such transfer in advance. If there has been a landing and the state authorities suspect a diversion, the State can resort to a marking and numbering perform the task of making this weapon lawful in its use, including the institution of the visit on board ships[398] or aircraft[399]. In accordance with

396Art. 11, par. 4.
397Art. 11, par. 4.
398Art. 30 of the 1982 UN Convention for the Law of the Sea (UNCLOS). For further details see: R.P. DUNNE, N.V.C. POLUNIN, P.H. SAND, M.L. JOHNSON, The creation of the Chagos marine protected area: A fisheries perspective, in Advances in Marine Biology, 69, 2014, pp. 82ss. D.A. COLSON, B.J. VOHRER, In re Chagos marine protected area (Mauritius v. United Kingdom), in American Journal of International Law, 109 (4), 2015, pp. 847ss. P.H. SAND, Fortress conservation Trumps human rights?, The "marine protected area" in the Chagos archipelago, in The Journal of Environment and Development, 21 (1), 2012, pp. 38ss. T. APPLEBY, The Chagos marine protected arbitration. A battle of four losers?, in Journal of Environmental Law, 27 (3), 2015, pp. 530ss. D.M. ONG, Implications of the Chagos marine protected area arbitral tribunal around for the balance between natural environmental protection and traditional maritime freedoms, in S. ALLEN, C. MONAGHAN (eds.), Fifty years of the British Indian ocean territory. The world as wall states, ed. Springer, Berlin, 2018, pp. 264ss. A. DEL VECCHIO, R.VIRZO, Interpretations of the United Nations Convention on the law of the sea by international courts and tribunals, ed. Springer, Berlin, 2019, pp. 194ss. The scope of art. 283 would be to assure the defendant state that part of a dispute is not taken by surprise by the decision of the other state that is part of that dispute to resort to mandatory procedures that lead to binding decisions without appropriate consultations but also "to facilitate recourse to peaceful dispute settlement (including compulsory procedures) by encouraging parties to consider different procedures as soon as a dispute arises and not to preclude or unduly delay the resolution of the dispute (...)", according to case: Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation), award on the merits, 15 August 2015, par. 154). For the analysis of art. 283 UNCLOS see also: M. YU, Q. XIE, Why the award on jurisdiction and admissibility of the South China Sea arbitration is null and void? Taking article 283 of the UNCLOS as an example, in China Oceans Law Review, 45, 2017, pp. 50ss. P. PHAM, The South China Sea finally meets international law, in Chicago-Kent Journal of International and Comparative Law, 16 (2), 2016, pp. 8ss. S. RAO PEMMARAJU, The South China Sea arbitration (The Philippines v. China): Assessment of the award on jurisdiction and admissibility, in Chinese Journal of International Law, 15 (2), 2016, pp. 269ss.. P. DE CASTRO SILVERIA, G. LADEIRA GARBACCIO, Protest at sea: The Arctic Sunrise case and the clarification of coastal states rights, in Seqüência, 3, 2019. It is an obligation of conduct and not an obligation of result. In this sense, it may be useful to recall the jurisprudence of the ICJ which has had the opportunity to specify that: "(...) the obligation to negotiate is an obligation not only to enter into negotiations, but also to pursue them as far and possible with a view to concluding agreements (even if) an obligation to negotiate does not imply an obligation to reach agreement (...)". The obligation to exchange views does not an empty formality to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith and its is the duty of the tribunal to examine whether this is being done (...) as we can see in the ITLOS, Land reclamation in and around the Straits of Johor (Malaysia v. Singapore), provisional measures, order of 8 October 2003, separate opinion of Judge Rao, par. 11. The rule in question does not express itself on the consequences of failure to fulfill this obligation, that is, whether the consequence must be a rejection of the appeal by the court or the international court seised. See also in argument: C.A. MILES, Provisional measures before international courts and tribunals, Cambridge University Press, Cambridge, 2017. Y. TANAKA, Provisional measures prescribed by ITLOs and marine environmental protection, in American Journal of International Law, 108, 2014, pp. 365ss. K. MOHAMAD, Malaysia-Singapore: Fifty years of contentions 1965-2015, ed. The Other Press, Kuala

the international standards that regulate these institutions and on the basis of the principles of international law that allow to act in this way, the State will have to act for this purpose and the news that the diversion load has landed in its jurisdiction may be legitimately disseminated to other state authorities[400].

Lumpur, 2015. T. TRUONG THUY, J.B. WELFIELD, L.T. TRANG, Building a normative order in the South China Sea. Evolving disputes expanding options, Edward Elgar Publishers, Cheltenham, 2019. D. ATTARD, M. FITZMAURICE, N.A. MARTINEZ GUTIERREZ, The IMLI manual on international maritime law, vol. 1: The law of the sea, Oxford University Press, Oxford, 2014. P.H.G. VRANCKEN, South Africa and the law of the sea, Martinus Nijhoff, The Hague, Boston, 2011, par. 13.5. A. VON BOGDANDY, I. VENZKE, In whose name? A public law theory of international adjudication, Oxford University Press, Oxford, 2014. A solution has been given since ITLOS in case: M/V "Norstar", which is affirmed that: "the absence of a response from one State party to an attempt by another State party to exchange views on the means of settlement of a dispute arising between them does not prevent the tribunal from finding that the requirements of article 283 have been fulfilled (...) (ITLOS, The M/V "Norstar" case (Panama v. Italy), preliminary objections judgments of 4 November 2016, par. 215). N. LUCAK, Georgia v. Russia Federation. A question of the jurisdiction of the International Court of Justice, in Maryland Journal of International Law, 27, 2012, pp. 328ss. This interpretation seems to go against the spirit of the rule which has as its objective not to take a state by surprise about the possibility of an appeal to a court or tribunal brought under section 2 of Part XV. An extension or modification of the claims of the applicant state to what emerged in the exchange of views between the parties would result in a surprise for the defendant state. For further details see also: B. KINGSBURY, International courts: Uneven judicialisation in global order, in J. CRAWFORD, M. KOSKENNIEMI (eds.), The Cambridge companion to international law, Cambridge University Press, Cambridge, 2012, pp. 217ss. J. BARRETT, R. BARNES (eds.), Law of the sea: UNCLOS as a living treaty, ed. British Institute of International and Comparative Law, London, 2016, pp. 386ss. S. YEE, Conciliation and the 1982 UN Convention on the law of the sea, in Ocean Development & International Law, 43, 2013, pp. 316ss. A. SARVARIAN, R. BAKER, F. FONTANELLI, V. TZEVELEKOS, (eds.), Procedural fairness in international courts and tribunals, British Institute of International and Comparative Law, London, 2015, pp. 260ss. C. WARD, The South China Sea arbitration (The Republic of the Philippines v. The People's Republic of China), in Australia International Law Journal, 22, 2015-2016, pp. 137ss. K.E. BOON, International arbitration in highly political situations: The South China Sea dispute and international law, in Washington University Global Studies Law Review, 13, 2014, pp. 489ss. C. WHOMERSLEY, The South China Sea: The award of the tribunal in the case brought by Philippines against China. A critique, in Chinese Journal of International Law, 15 (2), 2016, pp. 240ss. A. PROELSS, United Nations Convention on the law of the sea. A commentary, Hart Publishing/C.H. Beck, Oxford, München, 2017. Y. TANAKA, The South China Sea arbitration. Toward an international legal order in the oceans, Bloomsbury Publishing, New York, 2019. L. LANGER, The South China Sea as a challenge to international law and to international legal scholarship, in Berkeley Journal of International Law, 36(3), 2018, pp. 383-417. B.H. OXMAN, Courts and tribunals: The ICJ, ITLOS, and arbitral tribunals, in R.R. ROTHWELL, A.G. OUDE ELFERINK, K.N. SCOTT, T. STEPHENS, The Oxford handbook of the law of the sea, Oxford University Press, Oxford, 2015, pp. 398ss. M.D. EVANS, S. GALANI, Maritime security and the law of the sea: Help or hindrance?, Edward Elgar Publishers, Cheltenham, 2020, pp. 115ss. O. JENSEN, N. BANKES, Compulsory and binding dispute resolution under the United Nations Convention on the law of the sea: Introduction, in Ocean Development and International Law, 48 (3-4), 2017, pp. 212ss. K. FACH GÓMEZ, Key duties of international investment arbitrators: A transnational study of legal and ethical dilemmas, ed. Springer, Berlin, 2018. S. WU, K. ZOU, Arbitration concerning the South China Sea: Philippines versus China, ed. Routledge, New York, 2016, pp. 238ss. S. JAYAKUMAR, T. KOH, R. BECKMAN, T. DAVENDORT, H. DUY PHAN, The South China Sea arbitration. The legal dimension, Edward Elgar Publishers, Cheltenham, 2018, pp. 234ss. F.K. LIU, J. SPANGLER, South China Sea lawfare. Illegal perspectives and international responses to the Philippines v. China arbitration case, ed. China Sea Think Tank, Taiwan Center for Security Studies, Taipei, 2016. H. DUY PHAN, L. NGOC NGUYEN, The South China Sea arbitration: Bindingness, finality and compliance with UNCLOS dispute settlement decisions, in Asian Journal of International Law, (81), 2018, pp. 38ss.

399Art. 16 of the Civil Aviation Convention, signed in Chicago on 7 December 1944.

400In this sense, parr. 5 and 6 of art. 11, relating to the invitations: "(...) to the dissemination of information on the measures adopted, in relation to corruption, the trade routes of traffickers, unauthorized intermediaries,

Diversion can also be prosecutable. Actions by States parties to the ATT must comply with principles of international law based on freedom of sea and air transit. Furthermore, national measures have been adopted to prevent and counter diversion when all States are invited, but not required, to disseminate the news through reports on these measures. Within this spirit, the reference to compliance with "one's own national laws on the subject" must also be read.
Some doubts arise in the case of diversion attributable to a State. This consideration is based on the case that was discussed in OAS[401] which took place in 2001 when a diversion of a load of semi-automatic weapons of the Nicaraguan police was noted which was destined for the Panamanian police authorities, in favor of the rebels of the Fuerzas Armadas de Colombian Revolución (FARC). The group of experts that was called to examine and evaluate the related responsibilities found that the operations of three brokers (two individuals of Israeli nationality, operating in Guatemala and Panama, and a company registered in Mexico called Otterloo) for the disposal of semi-automatic weapons by the Nicaraguan police have placed the Nicaraguan authorities in the post of responsibility for failing to carry out the correct procedures followed and provided for by the 1997 Inter-American Convention, relating to the verification of the issuance of an authorization by the Panamanian authorities, recipients of the arms shipment[402]. The omitted experiment was justified on the basis of the application of the Nicaraguan national legislation, which did not provide for the screening/evaluation of the certification on the final destination. This inefficiency was found to be the main cause of the diversion to Colombia. The use of national legislation was found to be in violation of articles IX and XIII of the Convention, relating to the request for information and the authorities of the country of destination and the procedure for issuing export authorizations. Failure to prove that such communication had reached the Panamanian authorities would have determined that the diversion would have been entirely predictable[403].
This is a not unusual case that allows us to understand any types of state liability in practice due to the failure to prevent and determine the attribution of illicit conduct according to the criteria prescribed by the Draft articles on liability[404]. The obligation of due diligence and the lack of respect, especially during the procedure for the issuance of the export authorization[405] places the State according to art. 32 ARSIWA[406] as the main responsible for non-compliance. Even domestic legislation cannot be invoked as an excuse when a violation of an international obligation is committed. In this sense, only through a concrete adaptation to the international norm will the State be exempt from responsibility.

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sources of illicit supply and known destinations of organized crime, and information for the report on the fight against diversion (…) ".

401Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defence Forces of Colombia, OEA/Ser.G, CP/doc. 3687/03, 29 January 2003. M. SCHRÖDER, Small arms, terrorism and the OAS firearms Convention, in Federation of American Scientists, Occasional Paper n. 1, March 2004.

402M. SCHRÖDER, Small arms, terrorism and the OAS firearms Convention, op. cit., pp. 28-29.

403Art. 11, par. 1.

404The responsibility rests with the State for the failure to adopt measures aimed at avoiding the commission of an offense by private individuals, as prescribed by art. 11 of the Project.

405Art. IX of the Convention establishes: "(...) a more articulated and detailed procedure for issuing the required authorizations: only where the State of import or the State of transit confirm the destination or the passage of the load of arms, then the State of export will be able to grant authorization (…)".

406J. VIDMAR, Some observations on wrongfulness, responsibility and defences in international law, in Netherlands International Law Review, (63), 2016, pp. 338ss.

14.UNLAWFUL ARMS TRANSFERS AND RESPONSIBILITIES OF THE INDIVIDUALS INVOLVED

States decide to adopt criminal measures to repress the conduct as we have predicted by simultaneously evaluating the forms of attribution of the offense to individuals. Illicit brokering and diversion are two types of treaty crimes[407] which can assess individual responsibility according to the general principles of international criminal law.

Illicit intermediation in arms transfers is the common form of individual responsibility, i.e. is the direct or immediate authority[408], which provides that the person who commits the crime is personally responsible[409]. The crime can also be committed by a single individual who has arranged for the issuance of the required authorizations. Only if the State of importation or of transit confirm the destination or passage of the load of weapons, then the State of export can issue the authorization.

The subject has acted in conjunction with other subjects and it is required that the subject is operating while is in an unlawful situation, or having failed to register duly (where provided for by internal law) and not having obtained the authorization to lend brokerage services for arms transfers. There may also be a form of individual responsibility for legal persons, when the decision to act in an unlawful situation comes from the top management and is aimed at using the corporate instrument to pursue the criminal purpose[410].

407B. BROOMHALL, Article 22: Nullum Crimen Sine Lege, in O. TRIFFTERER (eds), Commentary on the Rome Statute of the International Criminal Court, Beck-Hart-Nomos, München-Oxford-Baden Baden, 2008, pp. 713-729, affirms that: "(...) it is very difficult to identify new criminal offenses in international agreements and conventions (...) in most cases, the relevant provisions are limited to providing for the obligation on the part of States parties to adopt measures, including at a criminal level , to repress certain behaviors, generically identified (...) statement that is also true in relation to the two cases noted here. However, if in the ATT it is established only that the conduct envisaged therein must be considered criminally unlawful, it is also true that the conditions for such illegality are identified, or for illicit brokering it is established that the activity, in itself lawful, is must be considered illegal when the private individual is acting in the absence of due registration or issuance of a specific authorization; this provision can also be found in the UN Protocol (article 15, read in conjunction with article 1) and in the ECOWAS Convention (Article 20, paragraph 4), as well as various other soft law acts in which it clearly emerges the need to regulate this activity and to consider illicit arms transfers that occur in the absence of registration and/or authorization. For diversion, on the other hand, States are required to punish those conducts whose purpose is to divert the load of weapons from the original legitimate destination, to supply unauthorized subjects or recipients. In this sense, obligations are established, respectively, to provide for the conditions of the actus reus and the mens rea of the two cases, thereby fully identifying two cases in a nutshell of international criminal law (…)".

408Art. 25, lett. a) StICC; art. 7, par. 1 Statute of the ICTY.

409A. CASSESE, International criminal law, Oxford University Press, Oxford, 2013, pp. 96ss.

410As we can notice from the domestic courts: Australia: Commonwealth v. Beneficial Finance Co, 275 NE 2d 33 (1971) Hamilton v. Whitehead (1988) 161 CLR 121; Canada: R v. Hibbert, 1995 CanLII 110 (S.C.C.); New Zealand: R v. Samuels (1985) 1 NZLR 350 (CA); United Kingdom: Anon (1701) 12 Mod 88 ER 1518 Director of Public Prosecutions v. Kent & Sussex Contractors Ltd (1944) KB 146 Lennard‟s Carrying Co Ltd v Asiatic Petroleum Co Ltd (1915) AC 705 Meridian Global Funds Management Asia Ltd v. Securities Commission [1995] AC 500 Moore v. I Bresler Ltd (1944) 2 All ER 515; R v. ICR Haulage Ltd (1944) KB 551; P & O European Ferries (Dover) Ltd (1991) 93 Cr App R 72 Salomon v. Salomon & Co Ltd (1897) AC 22 Spiliada Maritime Corp. v. Cansulex Ltd (1987) AC 460 Tesco Supermarkets Ltd v. Nattrass (1972) AC 153, HL; United States: Adra v. Clift, 195 F Supp 857 (D Md 1961); Boimah Flomo, et al v. Firestone Natural Rubber Co, No. 10-3675 (11 July 2011) Boim v. Holy Land Foundation, 549 F 3d 685 (3 December 2008); Bolchos v. Darrel, 1 Bee 74, 3 F Cas 810 (DSC 1795); Filártiga v. Peña-Irala, 630 F 2d 876 (2nd Circuit, 1980); Inland Freight Lines v. United States, 191 F 2d 313 (10th Circuit, 1951) In Re South African Apartheid Litigation (relates to the matters of Lungisile Ntsebeza, et al v Daimler AG, et al and Khulumani, et al v. Barclays National Bank Ltd, et al) 02 MDL 1499 (SAS) (8 April 2009); John Doe VIII v Exxon Mobil Corporation, No. 09-7125 (8 July 2011); New York Central & Hudson River Railroad Co. v. United States,

Unlike illicit brokering, diversion could not be configured solely on an individual basis. The diversion of the load of weapons and its implementation can hardly be implemented autonomously by an individual, but it may be necessary to implement it in a participatory manner by at least two subjects. It is necessary to divert the load from its original and legitimate destination and this diversion is carried out by assaulting the transport convoy. The operation can be carried out by several individuals, who will operate in competition with each other with different forms of participation. It will be necessary to evaluate the commission of the crime according to the principle of the joint criminal enterprise, which is set out immediately below.

Another model of individual responsibility consists in indirect perpetration[411]. The ICC mentions the possibility of an imputation as an author or, alternatively, of a mediated co-author: "Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect corpetrator (...)"[412]. According to art. 25 lett. A) StICC a person can be held personally liable: "(...) when he has committed the crime through another person, deemed an innocent agent, or a person not attributable (...)"[413]. The mediated author can be considered responsible and the connection between the two subjects must be demonstrated, while at the

212 U S 481(1909); Standard Oil Co. of Texas v. United States, 307 F 2d 120 (5th Circuit, 1962); Steere Tank Lines v. United States, 330 F 2d 719 (5th Circuit, 1964); United States v. Hilton Hotels Corp., 467 F 2d 1000 (9th Circuit, 1972); United States v. Bank of New England, 821 F 2d 844 (1st Circuit, 1987); United States v. Peoni (1938) 100 F 2d 401; Wiwa v. Royal Dutch Petroleum Co, et al, 96 Civ 8386 (KMW) (HBP) (April 23, 2009). V. NERLICH, Core crimes and transnational business corporations, in Journal of International Criminal Justice, 8, 2010, pp. 896ss. D. LUBAN, After the honeymoon: Reflections on the current state of international criminal justice, in Journal of International Criminal Justice, 11, 2013, pp. 506ss. J. MBOKANI, La cour pénale internationale: Une cour contre les africains ou une cour attentive À la souffrance des victimes Africaines?, in Quebec Journal of International Law, 26 (2), 2013, pp. 48ss. A.G. KIYANI, Third world approaches to international criminal law, in American Journal of International Law, 109, 2016, pp. 256ss. S. KENDALL, Commodifying global justice: Economies of accountability at the International Criminal Court, in Journal of International Criminal Justice, 13, 2015, pp. 114ss. P. MUCHLINSKI, The changing face of transnational business governance: Private corporate law liability and accountability of transnational groups in a post financial crisis world, in Indiana Journal of Global Legal Studies, 18 (2), 2011, pp. 667, 685-690. U. KOHL, Corporate human rights accountability: The objections of western governments to the Alien Tort Statute, in International and Comparative Law Quarterly, 63, 2013, pp. 668ss. D. LIAKOPOULOS, Multilateral corporations and international criminal responsibility. The case of United States, in International and European Union Legal Matters, working paper series, 2018.

411K.M. CLARKE, Refining the perpetrator culpability history and international criminal law's impunity gap, in The International Journal of Human Rights, 19, 2015, pp. 594ss.

412Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC, 4 March 2009, par. 7. For further analysis see also: V.F. JESSBERGER, J. GENEUSS, On the application of a theory of indirect perpetration in Al Bashir. German doctrine at The Hague?, in Journal of International Criminal Justice, 6, 2008, pp. 855ss. E. VAN SLIEDREGT, Individual criminal responsibility in international law, Oxford University Press, Oxford, 2012, pp. 8ss. H. KELSEN, Collective and individual responsibility in international law with particular regard to the punishment of war criminals, in California Law Review, 31, 1943, pp. 530ss. N.H.B, JØRGENSEN, State responsibility for aiding or assisting international crimes in the context of the arms trade treaty, in *The American Journal of International Law*, 108 (4), 2014, pp. 722-749. C. BRANDTS, Guilty landscapes: Collective guilt and international criminal law. Cosmopolitan justice and its discontents, ed. Routledge, London, 2010, pp. 53-68.

413See articles 26 (minors under the age of 18), 27 (irrelevance of the qualification of public official), 31 (bases for excluding individual responsibility) and 33 (order of the superior and duty according to law). For further analysis see also: M.D. BURBER, T. HÖRNLE, The Oxford handbook of criminal law, Oxford University Press, 2014. J. ALMEVIST, C. ESPOSITO, The role of courts in transitional justice. Voices from Latin America and Spain, ed. Routledge, London & New York, 2013, pp. 177ss. V. BOSTER, An introduction to transnational criminal law, Oxford University Press, Oxford, 2012, pp. 24ss.

same time there has been an influence on the materially acting subject. The model is suitable for military or political structures, but it can also give rise to interpretative problems regarding the distinction with coauthor[414]. Illicit brokering seems difficult to apply: it is also assumed that a person is involved in the performance of intermediation services. We must evaluate the hierarchical structure that exists between the two subjects. Outside the corporate context[415], a hierarchical relationship typical of paramilitary organizations can be configured: we recall that in the context of brokering, any relationship between employee and employer would not seem to be identified in a real hierarchical relationship relevant to international criminal law[416]. The material perpetrator of the crime must be considered a non-attributable subject, according to the principles of international criminal law, but he must be inferior in the fulfillment of a duty[417]. Whether this person has acted in a situation of material incapacity to also realize the relative consequences of its actions[418]. This form of

414D. LIAKOPOULOS, Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechun, in International and European Union legal Matters, 2012. G. TURAN, Responsibility to prosecute in an age of global governamentality: The International Criminal Court, in Cooperation and Conflict, 50, 2015. M. ODRIOZOLA GURRUTZAGA, Responsabilidad penal por crìmenes internacionales y coautoria medita, in Revista Electrònica de Ciencia Penal y Criminologia, 17, 2015, pp. 7ss. N. JAIN, Perpetrators and accessories in international criminal law. Individual modes of responsibility for collective crimes, Hart Publishing, Oxford and Portland, Oregon, 2014. B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, **in International Criminal Law Review, 12, 2012, pp. 5ss.**

415International Commission of Jurists, Corporate Complicity and Legal Accountability, vol. II-Criminal Law and International Crimes, pp. 12ss.

416Even if the civil law principle of employer liability remains active (provided, for example, in art.2041 of the Italian Civil Code) and of the employer for offenses committed by the employee or subordinate.

417The other two situations of non-attributable person are found in a person in a state of psychophysical alteration or under the age of 18, pursuant to art. 31 StICC. According to our opinion we could say that we have four possibilities for application of duress, which would look, first of law: Justification excuse means duress as a consequential justification and duress as a consequential excuse according to the spirit of a deontologist duress we could faced up as a deontological justification and duress as a deontological excuse. Far from being dead letter law, this principle was reaffirmed in the 1987 English case of Regina v. Howe: Lord Hailsham described the common law rule: "(...) as "good morals" and categorically rejected the conclusion "that the law must "move with the times" in order to keep pace with the immense political and social changes since what are alleged to have been the bad old days of Blackstone and Hale (…) the question of excusing a coerced killer should not be determined by juries (…) it is one of principle (...)". J. DRESSLER, Exegesis of the law of duress: Justifying the excuse and searching for its proper limits, in Southern California Law Review, 63, 1989, pp. 1332ss. In the Einsatzgruppen case tried before an American military tribunal, it's stated that: "(...) let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever (...)". See in argument also the Flick Case, United States of American against Friedrich Flick, Tribunal IV, case No. 5, Vol. VI, Trials of war criminals before the Nuremberg Military Tribunals, 2012-2 (1949). In argument also: N. WIENER, Excuses, justifications, and duress at the International Criminal Tribunals, in Pace International Law Review, 26, 2014, pp. 94ss. V. BERGELSON, A fair punishment for Humbert: Strict liability and affirmative defenses, in New Criminal Law Review, 14, 2011, pp. 66-67. B.J. RISACHER, No excuse: The failure of the ICC's art. 31 "duress" definition, in Notre Dame Law Review, 90, 2014, pp. 1406ss. B. KREBS, Justification and excuse in article 31 (1) of the Rome statute, in Cambridge Journal of International and Comparative Law, 63, 2013, pp. 384ss.

418It is excluded that the subject may be attributable to factual error (art. 32StICC), but without this subject having shared the same criminal design as the principal.

authorship can only be considered if the broker is inserted within a military or political organization[419].

A priori of the configuration of the model of mediated authorship as regards the diversion of the load of weapons, this crime is abstractly commissable by armed groups[420] and the material conduct is configured through a mediated author who gives an order to the material author. As in the case of a paramilitary commander to one of his hierarchical subordinates and/or in the case of the leader of a group of terrorists or criminals towards other associates[421].

The cases set out above can also be committed in the form of co-authorship or joint criminal enterprise (JCE). It will be possible to determine the commission through JCE I[422] and JCE

419Although not immediately verifiable in practice, it cannot be excluded in the abstract. Brokering is a private economic activity and it will be necessary to prove that the intermediary was acting on the indication or instruction of the bidder or buyer. The mere contractual relationship with one of these subjects cannot be considered as a relationship of mediated authorship.

420T. WEIGEND, Intent, mistake of law, and co-perpetration in the Lubanga decision on confirmation of charges, in Journal of International Criminal Justice, 6, 2008, pp. 478ss.

421As in the Otterloo case, where the responsibility: "(...) is attributable to state bodies, even if only for having omitted the necessary controls, thus facilitating the conduct of diversion, the responsibility will be attributable directly to the hierarchical superior, to rule of art. 28 of the Statute of the International Criminal Court (...)", according to: R. YAKEMTCHOUK, Les transferts internationaux d'armes de guerre, op. cit., pp. 272, op. cit., pp. 257ss.

422Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-A, A. Ch., 17 September 2003, paras. 30, 73; Prosecutor v. Krstić, Judgment, Case No. IT-98-33-A, A. Ch., 19 April 2004, parr. 266-269; Prosecutor v. Kvocka et al., Judgment, Case No. IT-98-30/1-A, A. Ch., 28 February 2005, parr. 79-91.Similarly, in the case of Renzaho, Judges Güney and Pocar opined that the Trial Chamber's finding that the accused was aware of a "likely outcome" meets the standard of awareness of a substantial likelihood, Tharcisse Renzaho v. The Prosecutor (ICTR-97-31-A), Judgment, Appeals Chamber, 1 April 2011, partially dissenting opinion of Judge Güney, parr. 3-4; partially dissenting opinion of judge Pocar, parr. 5-6, 10. The Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09-121-Corr-Red), Corrigendum of the "Decision on the Confirmation of Charges", Pre-Trial Chamber I, 7 March 2011, para. 156. François Karera v. The Prosecutor (ICTR-01-74-A), Judgment, Appeals Chamber, 2 February 2009, para. 211; Ferdinand Nahimana et al. v. The Prosecutor (ICTR-99-52-A), Judgment, Appeals Chamber, 28 November 2007, para. 481; Renzaho Appeal Judgment, par. 315; partially dissenting opinion of judge Güney. See also Blaškić Appeal Judgment, par. 471. Ephrem Setako v. The Prosecutor (ICTR-04-81-A), Judgment, Appeals Chamber, 28 September 2011, par. 240; Jean de Dieu Kamuhanda v. The Prosecutor (ICTR-99-54A-A), Judgment, Appeals Chamber, 19 September 2005, par. 75. The Prosecutor v. Clément Kayishema & Obéd Ruzindana (ICTR-95-1-T), Judgment and Sentence, Trial Chamber II, 21 May 1999, par. 200. Prosecutor v. Alex Tamba Brima et al. (SCSL-04-16-T), Judgment, Trial Chamber II, 20 June 2007, par. 776; confirmed on appeal: Prosecutor v. Alex Tamba Brima et al. (SCSL-2004-16-A), Judgment, Appeals Chamber, 22 February 2008, para. 243. In the same spirit the case from ICTY: The Prosecutor v. Laurent Semanza (ICTR-97-20-T), Judgment and Sentence, Trial Chamber III, 15 May 2003, para. 385; Orić Trial Judgment, par. 280; for the distinction between the two concepts see: The Prosecutor v. Sylvestre Gacumbitsi (ICTR-2001-64-T), judgment, Trial Chamber III, par. 286 and Semanza Trial Judgment, par. 384. Prosecutor v. Radoslav Brđanin (IT-99-36-A), Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004, par. 10. According to the Appeals Chamber of the Special Tribunal for Lebanon (STL), the better approach under international criminal law is not to allow convictions under Joint Criminal Enterprise (JCE) III for specific intent crimes: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I), Appeals Chamber, 16 February 2011, par. 249. The STL Appeals Chamber argued that: "(...) applying JCE III to specific intent crimes would lead to the "serious legal anomaly" that a person is convicted as a co-perpetrator of a specific intent crime without possessing the specific intent (...)", par. 248. See in argument also: B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, op. cit., pp. 5ss. A. AZZOLINI BIANCAZ, La construcciòn de la responsabilidad construcciòn de la responsabilidad penal individual en el àmbito internacional, **in Alegatos Revista, 18, 2018.** H. ALONSO, Current trends on modes of liability for genocide, crimes against humanity

III[423]. As regards illicit brokering, JCE I, or the sharing of the same criminal design and intent: "(...) by all the partners in the conduct, will manifest itself when all the members of an agreement to transfer arms through supply of intermediation services will carry out their own conduct without proceeding with the registration of the company, or without having to request specific authorization (...)[424]. The same will happen with reference to the diversion of the load of weapons, which is a case in point of necessary co-authorship, as seen where all the elements of the criminal group decide to act to divert this load, they will share the same criminal intent[425].

The third model of JCE[426], appears to be more difficult, relating to sharing the risk that another crime may be committed during the conduct of the main crime. This form of responsibility where the co-authors will answer for the crime other than the one for which the criminal agreement was concluded only if they have all had the possibility to foresee the consequences of the second crime. Such criminal activities are reported and have found a basis in the ICTY jurisprudence, where this form is configured that there must be a standard of possibility, which cannot take into account the implausibility of the future scenario as a consequence of the secondary crime, since the risk of commission it must be "sufficiently substantial" to allow the accused to foresee the crime[427]. According to civil law, this form of co-authorship would allow the sharing of the so-called possible fraud, or the acceptance of the risk that a more serious violation may occur. This form can manifest itself, in addition to a common criminal design (such as that of JCE I) also including that the co-authors not

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and war crimes, in C. STAHN, L. VAN DEN HERIK (eds.), Future perspectives on international criminal justice, op. cit., pp. 522-524. S. MANACORDA, C. MELONI, Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?, op. cit., pp. 165ss. A. CASSESE, The nexus requirement for war crimes, in Journal of International Criminal Justice, 10, 2012. B. DON TAYLOR III, Crimes against humanity in the Former Yugoslavia, in R. BELLELLI (eds), International criminal justice. Law and practice from the Rome Statute to its review, Ashgate Publishing, London, 2010, pp. 285-294.

423The configuration of JCE II for these two cases does not seem possible: in fact, this form of responsibility manifests itself within situational frameworks, such as detention or concentration camps. It is difficult to think in the abstract that such cases can take place in such situational contexts. Beyond wanting to hypothesize that the broker or diverter acts within a broader situational framework and that responds to the characteristics of the JCE II, this model of responsibility has not yet been revealed in practice, nor would it otherwise seem admissible. For further details see: J. DRESSLER, Reassessing the theoretical underpinnings of accomplice liability: New solutions to an old problem, in Hastings Law Journal, 37, 1985, pp. 91ss. J.D. OHLIN, Group think: The law of conspiracy and collective reason, in Journal of Criminal Law and Criminology, 16, 2008, pp. 147ss. According to our opinion the third form of JCE can be considered integrated when one or more members of a JCE I or II commit crimes that fall outside the common plan. It is therefore understandable, as in this case, the attribution of the responsibility of the individual rotates entirely around the subjective element, which often risks slipping towards border figures, such as recklessness, or even guilt. This declination of the Joint Criminal Enterprise has been approached to the so-called Pinkerton rule of US matrix, built in a similar way.

424K. ORLOVSKY, International criminal law: Towards new solutions in the fight against illicit arms brokers, in Hastings International and Comparative Law Review, 29, 2006, pp. 343ss.

425O. GREEN, E. KIRKHAM, Preventing diversion of small arms and light weapons: Strengthening border management under the UN Program of action, op. cit., pp. 10 ss.

426The JCE-doctrine has been introduced by the Appeals Chamber of the ICTY in Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, parr. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, Prosecutor v. Krajišnik, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Id, Prosecutor v. Brđanin, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and Id, Prosecutor v. Popović et al., Judgment, Case No. ICTY-05-88-T, 10 June 2010.

427ICTY, Prosecutor v. Karadžić (Decision on Prosecution's Motion Appealing trial Chamber's Decision on JCE III Foreseeability), AC, 25 June 2009, par. 18.

responsible for the secondary crime to be able to foresee the consequences of this action and to have shared this design and without having prevented the occurrence event other than the one sought.

By applying this form of co-authorship to the cases in question here, we can argue that: "(...) with reference to prohibited intermediation, this form of responsibility will only manifest itself in the event that the participants have outlined a first criminal agreement (providing services without registration or authorization) and had the possibility to foresee that their actions could also be directed to provide help or support in the commission of international crimes (...)[428]. This situation occurs when one of the co-authors, having news of the destination and possible use of the weapons transferred, represented himself and accepted the risk of his commission. In practice we can refer to the Kouwenhoven[429] and Van Anraat[430] cases, in which the supply of weapons through illicit brokering was contested, substantially contributing to the commission of crimes in Sierra Leone and Iraq. In both cases, the domestic judges disputed that the defendants not only transferred arms in the absence of any authorization, but also provided authorizations and predicted that they would be used to commit international crimes.

With regard to diversion, this form of responsibility can manifest itself only in the event that the deviation is functional or instrumental to the commission of further international crimes. If, for example, the load of weapons is diverted from the original destination and the weapons are subsequently used to commit terrorist attacks or other international crimes, JCE III[431] may be configured in the event that one of the co-authors has decided to transfer the

428K. ORLOVSKY, International criminal law: Towards new solutions in the fight against illicit arms brokers, op. cit., pp. 352ss.

429The Public Prosecutor v. Guus Kouwenhoven, Supreme Court of the Netherlands, n. case: 17/02109 of 18 December 2018. For further details see also: G.K. SLUITER, S. YAU, Aiding and abetting and causation in the commission of international crimes. The case of dutch businessman Van Anraat and Kouwenhoven, in J. JØRGENSEN, The international criminal responsibility of war's funders and profiteers, Cambridge University Press, Cambridge, 2020.

430District Court of The Hague, Criminal Law Section, Judgment of 23 December 2005, 09/751003-04,. the Districh Court of the Hague affirmed that "(…) the accused has knowingly and willfully accepted the reasonable chance that this TDG, as a component of poison gas, would be used for chemical attacks (mentioned in the judicial finding of fact). Needless to say, the court considers that the conditional intent of the accused already results from his knowledge stated under 1., 2. and 3. After all, a person who supplies chemicals of which he knows that they will be used for the production of poison gas by a country that is engaged in a long lasting war that was also started by that same country, justifies the conclusion that he consciously accepted the chance that the poison gas to be produced would also end up on the battle field (…)". G.K. SLUITER, S. YAU, Aiding and abetting and causation in the commission of international crimes. The case of dutch businessman Van Anraat and Kouwenhoven, op. cit.

431According to the Appeals Chamber of the Special Tribunal for Lebanon (STL), the better approach under international criminal law is not to allow convictions under Joint Criminal Enterprise (JCE) III for specific intent crimes: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I), Appeals Chamber, 16 February 2011, par. 249. The STL Appeals Chamber argued that: "(...) applying JCE III to specific intent crimes would lead to the "serious legal anomaly" that a person is convicted as a co-perpetrator of a specific intent crime without possessing the specific intent (...)", par. 248. See in argument also: In the Kvočka et al. case, the Appeals Chamber emphasized that it is the accused person's knowledge that is central, that is, what was natural and foreseeable to this person. More specifically, the Appeals Chamber held that: "(...) participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him (...)". Kvočka et al., judgment, AC, ICTY, 28 February 2005, para. 86, in the same spirit: Limaj et al., judgment, TC, ICTY, 30 November 2005, par. 512. B.

weapons diverted to commit such crimes, while the other participants, while foreseeing the possibility, did nothing to prevent such conduct, thus accepting the derived risk. This finding was supported in the Otterloo investigation[432].

Individual responsibility for illicit brokering and diversion can also manifest itself: "(...) in an attempt to commit an international crime. As also specified by authoritative doctrine, the crimes attempted are such as they are acts that: a) are preparatory to punishable criminal acts; b) have not completed, and therefore have not caused any damage or danger; and c) are punishable in themselves. In the cases in question, these characteristics are equally recognizable: - both for brokering and for diversion, the possibility of acting according to the behaviors just seen can also lead to the commission of international crimes; in this sense, both cases can be considered preparatory to the commission of crimes[433]; - it is possible to believe that both cases do not come to completion due to the intervention of further and hindering causes; this can happen, for brokering, in the event that starting to carry out the services by paying in an illegal situation (lack of registration or authorization), but are blocked by the police authorities[434]; while for diversion, the act would not be perfected when the conduct was arrested before the start of operations, eg. by intervention of the police forces or by voluntary withdrawal of one of the perpetrators[435]; in both cases, only a preventive act of contrast would determine a disqualification of the offense towards the attempt; -the punishment of these cases is evident, not only because various international conventions, therefore the juris general opinion, place obligations on the States to prevent the commission of such conduct, but also because different state systems punish the two cases in the attempted form (...)"[436].

Some of the circumstances set out above exclude unlawfulness or causes of justification typical of international criminal law are applicable to the cases in question[437].

GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, op. cit., pp. 5ss.

432Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defence Forces of Colombia, OEA/Ser.G, CP/doc. 3687/03, 29 January 2003.

433See artt. 10 and 11 ATT.

434In this sense see the next cases: US v. Evans, US v. Hendron, US v. Vintila et al. and US v. Bout. In the first two cases, the national judge: "(...) had to acquit the accused of all charges, as the arrest would have taken place with the deception of the police (...)". In the other two, the judge: "(...) made the exception relating to terrorism prevail, as the accused would have provided brokering services in order to facilitate the commission of offenses against US troops stationed abroad (...)".

435The issue of planning to commit international crimes is different, and in particular to commit illicit brokering and diversion. These two cases are intended as instrumental to the commission of other international crimes, both of which will fall within the more general area of punishment of planning as an attempt to commit international crimes (e.g., see article 6, par. 1, of the ICTR Statute, which provides: "(...) how planning is part of individual responsibility as it implies the preparation of the crime itself (...)). According to A. CASSESE, The international criminal law, op. cit., pp. 204-205: "(…) the gravity of the international crimes that are intended to be committed entails a preventive action in the repression of planning; therefore, the need to prevent illicit brokering and diversion conducts also allows the prevention of the planning of subsequent international crimes that are intended to be committed with the weapons transferred. On the other hand, in the case in which the two cases are considered as autonomous criminal figures, one can think that planning is even at the origin of the illicit conduct themselves, or it should be shown that the conduct was preparatory to the commission of these two crimes. This would make the burden of proof on the prosecution difficult, since, in addition to demonstrating that there was an obvious intent to commit illicit brokering and diversion (therefore, on the mere basis of circumstantial evidence), it would also have to be shown that the preparatory to the commission of such crimes were the basis for the planning of the same (...)".

436A. CASSESE, The international criminal law, op. cit., pp. 209ss.

437A. CASSESE, The international criminal law, op. cit., pp. 209ss.

Among the causes of justification there is the state of necessity[438], where the agent will commit a criminally unlawful act when he considers it necessary to avoid a danger to himself or to others[439]. We can believe that this cause is abstractly applicable in cases of arms diversion. If the diversion is carried out by private individuals and with the aim of preventing a shipment of weapons from reaching a government that could use them for illicit purposes and/or to armed or terrorist groups, the cause of justification would be based on the evidence and of how much it is ascertained that "the end had justified the means". It is not possible to apply this cause of justification to illicit brokering, as the case envisages that the agent is already in a situation of unlawfulness.

Less problematic is the application of causes excluding unlawfulness, such as error of law[440] and error of fact[441]. Regarding the error of law, in general ignorance or lack of knowledge of legal norms cannot be excused (ignorantia legis non excusat), even if there are limited exceptions, as for example in the case of the error that could not be avoidable[442],or when the standard has not been published or otherwise made available[443]. Therefore, only in cases where there has been an objective impossibility of accessing the legislation can this exclusionary cause be invoked. In both cases, it seems difficult to argue that the legislation, criminal or administrative, cannot be known at the time of the commission of the fact. In the case of diversion, only the implementation of the conduct is in itself considered illegal. With regard to illicit brokering, in addition to having to deal with one's own crime, the relative model of agent other than the common man is also necessary, who should be aware of all the regulations applicable to his activity. It is admitted that the application of this cause at the moment occurs because the broker has not detected, without fault, the military purpose of the exported civil property and/or that it has not been able to know of the inclusion of its products in a list of assets dual-use[444]. The technicality of the legislation could act as a cause excluding unlawfulness only if the objective inability to be able to know the purpose or the inclusion in a list was demonstrated.

In the case of a factual error, it is commonly believed that it concerns an erroneous perception of the facts that prevented the conduct committed from being perceived as criminally relevant[445]. The application of this circumstance would therefore seem to deny

438A. CASSESE, The international criminal law, op. cit., pp. 211ss.

439See also: the U.S. Model Penal Code, section 3.02(1)(a). P.H. ROBINSON, M.D. DUBBER, The american model-penale code: A brief overview, in New Criminal Law Review, 10 (3), 2007, pp. 322ss. French penal code, art. 122-127: T. DIAS, Beyond imperfect justice: Legality and fair labelling in international criminal law, Martinus Nijhoff Publishers, Bruxelles, 2022, pp. 66ss. F.W. KORSTEN, Art as an interface of law and justice. Affirmation, disturbance, disruption, Bloomsbury Publishers, New York, 2021. J. HODGSON, Suspects, defendants and victims in the french criminal process. The context of recent reform, in International & Comparative Law Quarterly, 51 (4), 2002, pp. 784ss. German criminal code, section 34: O. YAHOVLEVA, A. SHAMNE, Circumstances precluding wrongfulness in Russian and German criminal law, in SHS Web of Conferences, (50), 2018, pp. 2ss. A. WETTER, Enforcing European Union law on exports of dual use goods, Oxford University Press, Oxford, 2009, pp. 97ss. A. SEREBRENNIKOVA, A. TREFILOV, Classification of criminal offenses according the criminal procedure legislation of Germany, Austria and Switzerland, in LU Journal “Juridical Science”, 2015, pp. 27ss.

440A. CASSESE, The international criminal law, op. cit., pp. 219ss.

441A. CASSESE, The international criminal law, op. cit., pp. 222ss.

442A. CASSESE, The international criminal law, op. cit., pp. 222ss.

443U.S. Model Penal Code, section 2-04(3).

444In this sense see also: art. 9 of Regulation 2009/428/EU.

445A. CASSESE, The international criminal law, op. cit., pp. 223ss.

the mens rea of the acting subject from its origin[446]. This situation occurs when both diversion and illicit brokering have been put in place to supply weapons to a specific recipient, but there has not been sufficient awareness of the future use of these weapons. The factual error has to do with the requirement of knowledge, typical of responsibility for aiding and abetting, when the subject has not been able to represent himself in relation to the future consequences of his own conduct. This case provides that the burden of proof necessarily lies with the accused, who will have to demonstrate the circumstances in which he found himself when he acted and the demonstration of the relative and complete ignorance of the factual situations that had arisen and/or that would have been created at the time of the completion of the arms transfer[447].

15.DEFENSE INDUSTRIES, STATE ECONOMICS AND INTERNATIONAL RESPONSIBILITY

A specific case for illicit brokering and diversion is encountered in the case in which legal persons or multinationals can act like this as we have seen many times of criminal liability at international level[448]. And why does this happen? Because in the conventional weapons market, private actors/subjects participate at an international level and these subjects can have an associative type organization with the ultimate aim of making a profit from their entrepreneurial activities[449].

446The mens rea purpose test is not unique to the ICC. The provisions for complicity by aiding and abetting- which appear in the legal instruments of the East Timor Panels of Judges and the IHT955Article 15(2)(c) of the IHT Statute. A similar purpose test is applied in a number of domestic jurisdictions: Canada's Section 21(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 and New Zealand's Section 66(1) Crimes Act 1961; the Model Penal Code of the American Law Institute; Section 14(3)(c) of Regulation 2000/15. East Timor was annexed as a province to Indonesia from 1975 up until 1999 when the East Timorese population voted for their independence. Following a violent campaign allegedly perpetrated by pro-Indonesian militias against the Timorese population, East Timor gained its independence in 2002. UNTAET, the provisional authority established in East Timor in the aftermath of Indonesia's withdrawal, set up Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts to deal with the grave violations of international humanitarian law and human rights that were committed in East Timor during 1999 (see generally, United Nations Mission of Support in East Timor. Farrell's approach here seems to be in keeping with the brief observations made by the Pre-Trial Chamber in The Prosecutor v. Callixte Mbarushimana, and also the manner in which the Panels of Judges attributed accomplice liability in East Timor. See, Deputy Prosecutor General for Serious Crimes and the U.C. Berkeley War Crimes Studies Center American Law Institute, Model Penal Code: Official Draft and Explanatory Notes, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985); The Prosecutor v Callixte Mbarushimana (Decision on the Confirmation of Charges) (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) (281), where the Chamber noted that: "(...) the jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime (...)". and for the UNTAET, see, Section 14(3)(c) of Regulation 2000/15. See also in argument: M.E. BADAR, Rethinking mens rea in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in O. OLUSANYA (ed.), Rethinking international criminal law: The substantive part, Europa Law Publishing, 2007, pp. 13-33.

447A. CASSESE, The international criminal law, op. cit., pp. 253ss.

448S. TULLY, Introduction, in S. TULLY (eds), International corporate legal responsibility, Wolters Kluwer, New York 2006, pp. 3ss.

449S. TULLY (eds), International corporate legal responsibility, op. cit., "(...) which identifies companies also through other classifications, such as a) an association of individuals aimed at pursuing a common purpose, b) a link or series of contracts between different internal subjects (shareholders, managers, creditors and even the State), c) a juridical creation (persona ficta, according to the traditional German dogmatic of Von Savigny) or

The strong privatization of the economy and the development of the military industry have qualified these companies as subjects of international law and distinguished them between transnational and multinational companies, obviously maintaining a legal unity of their person. On the other hand, the globalization of the international market has led to the creation of a strong network of companies made up of smaller ones scattered around the world[450] with their own tangible and intangible assets and always having relations with the parent company. Participating subjects certainly have a limited and functional capacity that derives from the jurisdictional power of the State that have their headquarters as well as the faculty to establish their own internal law as subjects worthy of legal protection. Within this circle, there is the possibility that multinationals enjoy specific provisions of contracts stipulated with the States that have their headquarters[451].

In practice, alongside the main corporate forms of enterprise, there are individual companies with various sectors of specialization and states of operation such as, for example, Lockheed-Martin and/or the case of the composition of companies from corporate assets located in different legal systems as we have noted in the case of the Italian-British Augusta-Westland or the French AirBus[452]. We are talking about companies with autonomous and

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d) an organic entity capable of establishing juridical transactions and being the holder of rights and obligations (...)".

450The return to the scene of these actors dates back to the end of the 1980s, when a progressive movement of liberalization of the industrial sectors of various states began to be generated. This phenomenon, of course, also affected the defense industry sector, where many companies were wholly owned by the state and exercised a real monopoly (in particular, state-owned industries were recorded at that time in Italy, the Soviet Union, India, Chin, Brazil, Argentina, France and the United Kingdom, with only BAE Industries), while other entirely private companies had managed to position themselves in market regimes characterized mainly by the form of oligopoly (in particular, these are the cases, still current, of United States, Canada, Germany, Australia and New Zealand). Since the 1990s, the end of the Cold War and the crisis of the welfare state led the arms market towards a more competitive "route". This is because it was generally believed that the opening of the various markets, including those of public services, would guarantee a development of competitiveness, technological progress and a simultaneous reduction in the presence of the State in the economy. This phenomenon was also recorded in the conventional arms market. This progressive change has also occurred in other States: in Russia, for example, the privatization laws of 1992 led many defense industries to take a privatized form, even if in that case the limit on the sale of shares was set no more than 30% of the entire share package; in the United Kingdom, on the other hand, privatization took place in reverse, i.e. by selling off only the entire share package to private individuals, but allowing the government to own a single share.

451The stipulation of these contracts between states and private companies would ensure: "(...) that the latter assume international subjectivity only when the contractual agreement provides for recourse to international jurisdictions. In this sense, the stipulation deed would be seen as a granting power by the State to regulate the subject matter of the contract also in the light of international law (…)", according to: I. MARBOE, A. REINISCH, Contracts between States and foreign private law persons, in Max Planck Encyclopedia of Public International Law, May 2011, par. 3.

452"(…) A separate but strictly connected problem concerns the connection between investee companies and the controlling State. In the event that an offense has been committed by an investee company, the immunity that is generated is of a managerial or economic type (iure gestionis), but at the same time it is established that the personality of the company and the State are separate". This is also based on the theory of the separation of personalities between company and shareholders, according to: S. TULLY (eds), International corporate legal responsibility, op. cit., continuing that: "(…) this principle is now also expressed by art. 10 of the 2004 New York Convention on the Immunity of States from the Jurisdiction of Other States". In jurisprudence see also ICSID, Al Tamimi cited above. If, on the other hand, the company had the nature of a totally private entity, the connection with the State would take place on the basis of the nationality of the company itself, determined by domestic law and without international law being able to intervene directly (...) for legal persons, the identification of nationality takes place concretely and in court, not a priori by means of an ad hoc law (p. 13 et seq.) (...) which identifies other criteria of nationality of companies, such as the place of business, the registered office and the nationality criteria connected with the shareholders and with those who control the

distinct personalities but certainly limited since they must respect national rules while enjoying rights and obligations at an international level[453].
Therefore we can speak of a form of responsibility also for this type of company and we identify the fundamental parameters through which they can be expressed and refer to: a) lack of measures, adopted by the same company or company, to prevent violations of fundamental rights due to any links with the State which actually authorizes the company's activities by domestic law and with a specific type of individual, or better, corporate responsibility; b) when it is not possible to identify any stringent link between the company and the victim, in this case we report the responsibility for complicity with the State, if the obligation incumbent on the latter is demonstrated due to control or management or even prevention of serious and systematic violations of human rights[454].
There are several theories relating to the attribution of responsibility to companies and legal persons in general: in particular, according to S. Tully, we can say that "(...) a first form of corporate responsibility can be similar to that of civil law. The company is liable for any damage caused by its employees or when the damage is caused to the employees themselves (for example, in the case of failure to set up a safety system for accidents at work); however, this form of liability will be applicable only in a limited number of cases, such as those of procured danger[455]; moreover, it proves to be ineffective with reference to individual liability in criminal law, where the hypotheses of objective liability are extremely limited; b) more articulated, but no less interesting, is the theory of the alter ego, formulated within the British legal system[456]. This theory is based on the assumption that, although the subjective element and mens rea are not immediately detectable in the criminal offenses committed by companies[457], they act as an "organic body"[458]: the employees of the company would be

company. In case law, see from the ICJ, Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports, 1970, pp. 3-25 and 26ss.
453S. TULLY (eds), International corporate legal responsibility, op. cit., pp. 13ss.
454S. TULLY (eds), International corporate legal responsibility, op. cit., pp. 17ss, which believes there is also a political responsibility of the State, when it has significantly influenced its own authorities, facilitating the commission of the criminal offense by the legal person.
455S. TULLY (eds), International corporate legal responsibility, op. cit., pp. C. WELLS, Corporate criminal responsibility, in S. TULLY (eds.), Research handbook on corporate legal responsibility, Edward Elgar Publishers, Cheltenham, 2006, pp. 147-158 and 150ss.
456C. WELLS, Corporate criminal responsibility, op. cit., pp. 122ss.
457ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA), submitted to the UN General Assembly as part of the Report of the International Law Commission on the work of its 53rd session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, with commentaries on the articles. The General Assembly included the articles in Resolution 56/83, "Responsibility of States for internationally wrongful acts" (28 January 2002) UN Doc A/RES/56/83. The ultimate case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (30 April 1990), XX UNRIAA 215 ("Rainbow Warrior"), par. 75. see, P.P. MIRETSKI, S.D. BACHMANN, The UN norms on the responsibility of transnational corporations and other business enterprises with regard to human rights: A requiem, in Deakin Law Review, 17 (1), 2012, pp. 12ss. K.E. BOON, New directions in responsibility: Assessing the International Law Commission's Draft Articles on the responsibility of International Organizations, in Yale Journal of International Law, 37, 2011.
458G.R. SULLIVAN, Knowledge, belief, and culpability, in S. SHUTE, A. SIMESTER (eds.), Criminal law theory: Doctrines of the general part, Charges, Oxford University Press, Oxford, 2002) (ICC, Case No ICC-01/04-01/10, 16 December 2011) (281), where the Chamber noted that: "(...) the jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime (...)", and for the UNTAET, see, Section 14(3)(c) of Regulation 2000/15. G.

considered the "limbs", while executives would impersonate the “brain” or “mind” of the company. In the criminal field, this theory would make it possible to identify the corporate mens rea[459] when it was the top decision-makers who acted, as they have the power to express the will of the entity outside.

This theory seems to have been devised for hypotheses of particularly serious crimes, such as murder or fraud against the State, in addition to the hypothesis of corruption[460]; c) less convincing, on the other hand, is the holistic theory, which wants the company to be responsible only when it is not possible to impute the offense to the individual employee, since, despite having acted to implement the will of the company itself, it becomes extremely onerous demonstrate that in reality the latter acted beyond the mere powers attributed and the instructions given by the same company. Equally, the aggregation theory does not appear convincing, according to which whether the employee had represented himself or had knowledge (to use the Anglo-Saxon concept of knowledge) of a certain situation, the company will always be responsible for the offense committed; this theory, as well as seeming a re-proposal of the vicariate theory, is absolutely incomplete, since it does not include the idea of society, in which several employees act and in which each one will have his own representation of the illicit situation that is emerging; d) certainly more current, in the light of recent national legislative innovations[461], appears to be the systemic theory of Peter French[462], which wants to take into consideration the three fundamental elements of a corporate structure: the basic responsibility of the company, the procedural rules and its conduct and company policies[463]. By combining these three elements, it is possible to determine both the degree of responsibility of the company itself, and any internal rule violated, which in turn will make it possible to exactly identify the responsible office of the company (thus connecting to the previous requirement of graduation), and finally it allows us to understand whether the action constitutes a pathological or physiological symptom of the system outlined, or even is attributable to an illegal and recidivist behavior of the same society. This theory is also useful to explain the creation, in some civil law systems, of the provision of Organizational, Management and Control (OMC) models, which would allow to identify the exact office responsible for the offense or to assess the violation of the internal procedures; in the context of common law, this hypothesis would result in the preparation of codes of conduct (CoC), of a more ethical and less binding value, which only recommend acting according to certain principles (...)[464]”.

PLOMP, Aiding and abetting. The responsibility of business leaders under the Rome statute of the International Criminal Court, in Utrecht Journal of International and European Law, 30, 2014, pp. 8ss. Oxford University Press, Oxford, 2002, pp. 209ss. J. VAN DER VYVER, The International Criminal Court and the concept of mens rea in international criminal law, in University of Miami International and Comparative Law Review, 12, 2004, pp. 50ss. O. KUCHER, A. PETRENKO, International criminal responsibility after Katanga: Old challenges, new solutions, in Russian Law Journal, 3, 2015, pp. 145ss.

459K.M.F. KEITH, The mens rea of superior responsibility as developed by ICTY Jurisprudence, op. cit., pp. 618ss. K. AMBOS, Treatise on international criminal law. Volume I: Foundations and general part, Oxford University Press, Oxford, 2013, pp. 97ss.

460C. WELLS, Corporate criminal responsibility, op. cit., pp. 151-152.

461C. WELLS, Corporate Criminal Responsibility, op. cit., pp. 147-158.

462P. FRENCH, The corporation as a moral person, in American Philosophical Quarterly, 16 (3), 1979, pp. 207-215.

463C. WELLS, Corporate Criminal Responsibility, op. cit., pp. 153ss.

464See the Document of Montreux for private military companies of 2006, or even the OECD Model Law on corporate governance by states. Think also of a model addressed to the States, such as the EU Code of Conduct

The criminal liability of legal persons operating in the conventional arms market is identified within this panorama. We recall in this point art. 25 StICC which establishes that: "The Court shall have jurisdiction over natural persons pursuant to this Statute"[465]. According to par. 1 of art. 25 StICC private industries hold responsibility when the offense was committed by order of a decision-making summit and endowed with its own powers. Obviously, State and privatized industries are excluded because in this case they are linked to state control and the separation of personalities[466]. However, they are responsible from the moment the offense was committed by order of a decision-making summit and endowed with its own powers. Already the conference of the Statute of the ICC rejected this hypothesis for three fundamental reasons: a) the inclusion in the jurisdiction ratione personae of legal persons would not have been compatible with the customary legal framework on individual responsibility for international crimes; b) the main problem would have arisen from the probative difficulties of proving a precise mens rea[467] and therefore a will of the same company[468], separating it from that of the top management body; c) finally,

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for the export of SALW (transposed into the Common position 2008/928/CFSP) or the Code of Conduct on the 2006 offset agreements.

465Art. 25, par. 1 StICC. See the International Commission of Jurist, Corporate Complicity and Legal Accountability. Report of the International Commission of Jurist Expert Legal Panel on Corporate Complicity in International Crimes, 2008, vol. II, p. 52ss. K. AMBOS, Article 25-Individual criminal responsibility, in O. TRIFFTERER, Commentary on the Rome Statute of the International Criminal Court, Beck-Hart-Nomos, München-Oxford-Baden Baden, 1999, pp. 744ss.

466This theory was actually taken up in the French Code Pénal, art. 121-4. For further details see also: H. VAN DER WILT, Corporate criminal responsibility for international crimes: Exploring the possibilities, in Chinese Journal of International Law, 12 (1), 2013, pp. 43-77 A. CLAPHAM, The question of jurisdiction under international criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court, in M.T. KAMMINGAS, S. ZIA-ZARIFI (eds), Liability of multinational corporations under international law, Kluwer Law International, The Hague, 2000, pp. 139-195. R. HIGGINS, Problems and process: International law and how we use it, in J. ZERK, Multinationals and corporate social responsibility, Cambridge University Press, Cambridge, 2006, pag. 74. In the same opinion see. O.K. FAUCHALD, J. STIGEN, Corporate responsibility before International institutions, in George Washington International Law Review, 40, 2008, pp. 1025, 1029ss. M. NOORTMANN, A. REINISCH, C. RYNGAERT, Non-State actors in international law, op. cit., pp. 154ss. Mental states and conduct on the part of different individuals are joined together and considered as a whole. The underlying rationale is that a combination of personal transgressions or minor failures might reveal a gross breach of duty on the part of the company, or collective awareness that warrants the entity's responsibility for a criminal consequence. Some jurisdictions have been hesitant to extend the application of aggregation to crimes requiring proof of intent as opposed to only knowledge. Other legal systems have recognised the utility of the principle with regard to situations entailing recklessness and even gross negligence. See also in argument: E. POSNER, A. PORAT, Aggregation and law, in J.M. Olin Program in Law and Economics Working Paper No. 587, 2012. M. FINDLAY, J. CHAH HUI YUNG, Principled international criminal justice: Lessons form tort law, ed. Routledge, London & New York, 2018. M. FINDLAY, R. HENHAM, Exploring the boundaries of international criminal justice, ed. Routledge, London & New York, 2016, pp. 83ss.

467M.E. BADAR, Mens rea-mistake of law and mistake of fact in German criminal law: A survey for international criminal tribunals, in International Criminal Law Review, 5 (2), 2005, pp. 203-246.

468In particular see from the Special Court for Siera Leone the next cases: The Prosecutor v. Sam Bockarie (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-04-I-022, 8 December 2003); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Trial Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009); The Prosecutor v. Sesay, Kallon & Gbao (RUF Case) (Appeal Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-15-A, 26 October 2009); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Trial Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007); The Prosecutor v. Brima, Kamara & Kanu (AFRC Case) (Appeal Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-16-A, 22 February 2008); The Prosecutor v. Johnny Paul Koroma (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-I, 7 March 2003); The Prosecutor v. Fofana

there was no principle of law widely diffused among the States that envisaged the criminal liability of legal persons (...)"[469].

In favor of this position lies the practice and the own jurisdiction of the ICC. Mandatory jurisdiction only for States party to the Statute of Rome[470], except in cases of referral by UN the Security Council[471] or by a State party[472] and ICC where according to the principle of complementarity[473] it operates to the applicable law and obtaining the norms of a customary nature in time and space[474]. In particular, in the common law and in Great Britain the Corporate and Homicide Act of 2007[475] transposed the national jurisdiction providing that

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and Kondewa (CDF Case) (Trial Judgment) (Special Court-xxii-for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007); The Prosecutor v. Fofana and Kondewa (CDF Case) (Appeal Judgment) (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 28 May 2008); The Prosecutor v. Foday Saybana Sankoh (Withdrawal of Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-02-PT-054, 8 December 2003); The Prosecutor v. Charles Ghankay Taylor (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007).

469International Commission of Jurists, Corporate Complicity and Legal Accountability, vol. II – Criminal Law and International Crimes, pp. 12ss.

470Art. 12 StICC: "A State which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5".

471Art. 13 StICC: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (…) (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter (...)".

472Art. 14: "1. A State party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation".

473Art. 17 StICC: "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; c) The person concerned has already been tried for conduct which is the subject of the complaint and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; d) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings (...)".

474R. MACKENZIE, C. ROMANO, Y. SHANY, P. SANDS (eds.), The manual on international courts and tribunals, Oxford University Press, Oxford, 2010, pp. 167 and 195ss. G. METTRAUX, International crimes and the ad hoc tribunals, Oxford University Press, Oxford, 2005, pp. 4ss.

475Corporate Manslaughter and Corporate Homicide Act 2007 (2007 ch. 19), 27 July 2007. For further details see also: D. ORMEROD, R. TAYLOR, The corporate manslaughter and corporate homicide Act 2007, in

serious crimes such as murder could also be attributed to companies. In US, the concept of corporate liability can be seen in the moment of structural or procedural deficiencies[476].
In France, liability of this kind has been included in the French criminal code and in art. 121-122 where criminal responsibility is distinguished from that of the individual subjects that comprise them. The criminal liability of legal persons is admissible as a principle of internal criminal law where the same ICC refers according to art. 21 StICC[477].
With regard to the mens rea, it is possible to evaluate the hypothesis in which the liability between agent-employee[478] and company[479] includes illegal activities carried out by

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Criminal Law Review, 2008, pp. 590ss. P. ALMOND, Corporate manslaughter and regulatory reform, Palgrave Macmillan, London, 2013.

476Model Penal Code of 1962, section 207 and following.

477ICC, Prosecutor v. Katanga, pre trial Chamber, 01/04-01/07, 21 November 2012, par. 1396. H. VEST, Problems of participation-Unitarian, differentiated approach, or something else?, in Journal of International Criminal Justice, 12, 2014, pp. 299ss. A. HERZIG, Die Tatherrschaftslehre in der Rechtsprechung des Internationalen Strafgerichtshofs, in Zeitschrift für Internationale Strafrechtsdogmatik, 17 (1), 2013, pp. 190ss.

478Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber judgment, 15 July 2016 (Akhbar, Trial Chamber judgment) the Court: "(...) stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international law (...) held that the mens rea can only be fulfilled if the natural accused has knowingly and wilfully interfered with the administration of justice and that the act has been committed merely knowingly and willfully in order to show culpability (...) the Amicus had to prove that the accused (1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses (...) actual knowledge that the disclosure poses a threat to the public's confidence in the Tribunals work can be inferred from various circumstances (...) if only willful blindness is established, that alone suffices knowledge which gives reason to impute criminal liability (...)". See also: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing judgment, 5 September 2016, par. 2. (Akhbar, Sentencing judgment) the STL established: "(...) the actus reus and mens rea of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...)".

479The SRSG's original mandate is set out in Human Rights and Transnational Corporations and Other Business Enterprises, Commission on Human Rights (CHR), UN Doc. E/CN.4/RES/2005/69, 20 April 2005. The UN Human Rights Council (HRC) extended the SRSG's mandate for a further three years in 2008. HRC, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/8/7, 18 June 2008. HRC, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5, 7 April 2008, parr. 47-49. HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/31, 21 March 2011, Principle 7, pp. 10-11. HRC, Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/32, 27 May 2011. According to Seck: "(...) the Guiding Principles refer only to the inability of the host state to protect human rights in conflict contexts due to a lack of effective control, international criminal law teaches us that another factor often at play is an unwillingness on the part of host states to protect against international crimes due to the state's own involvement in such crimes (...)". S.L. SECK, Collective

employees of a company or multinational. We are talking about a fundamental mens rea for corporate criminal liability that is connected with the same company or the generation of profit from its commercial activity[480]. If the mens rea is intentional[481] it is necessary that the company has been aware of the action of the relative employee involved in this type of conduct and that consequently has voluntarily accepted the action committed[482].

Even the form of aiding and abetting as provided for by Act 10 of the Control Council[483] was taken up by national jurisprudence in the Van Araant and Van Kouwenhoven cases, where the Dutch judges held that the supply of weapons and military material, subsequently used to commit crimes against humanity and war crimes could constitute a form of complicity in the same crimes. In the Van Anraat case, the judges of the Hague Court of Appeal held that the Dutch businessman: "(...) was actually aware that his products would be used by Saddam Hussein in Iraq to commit war crimes against the Kurdish populations of Northern Iraq (...)"[484].

In the Van Kouwenhoven case: "(...) not only was the individual mens rea[485] (and conversely, corporate) proved[486] that is to have knowledge that the weapons supplied would

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responsibility and transnational corporate conduct, in T. ISAACS, R.VERNON, Accountability for collective wrongdoing, Cambridge University Press, Cambridge, 2011, pp. 142ss. N.JEVGLEVSKAJA, International law and weapons review. Emerging military technology under the law of armed conflict, op. cit.,

480C. WELLS, Corporations and criminal responsibility, Oxford University Press, Oxford, 1993, pp. 118ss. The authors underline: "(...) that the liability of the company will arise only in relation to the acts performed during the exercise of the employee's working duties, avoiding the attribution of ultra vires acts (...)". H. VAN DER WILT, Corporate criminal responsibility for international crimes: Exploring the possibilities, op. cit.,

481See the case: Khbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber judgment, 15 July 2016 (Akhbar, Trial Chamber judgment).

482H. VAN DER WILT, Corporate criminal responsibility for international crimes: Exploring the possibilities, op. cit., pp. 48ss.

483Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Article II, par. 2(b).

484Van Anraat, parr. 11.6-11.13, where the Court of Appeal argued: "(...) how the behavior of the entrepreneur, both before the delivery of the chemical material, and after this, would have provided evidence of guilt about his knowledge and awareness that the materials would not be been used for peaceful purposes (...)". H. VAN DER WILT, Corporate criminal responsibility for international crimes: Exploring the possibilities, op. cit., pp. 62ss, "(...) it would not have been difficult to extend this guilt also to the industry which Van Haarant headed, since the raison d'être was fully satisfied (...)".

485Albeit in the third degree, since the same Dutch businessman was acquitted in the second degree of complicity in war crimes in Sierra Leone.

486R.S. CLARK, The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences, in Criminal Law Forum, 92 (2), 2001, pp. 296ss. R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, op. cit., J.N. CKARK, Elucidating the dolus specialis. An analysis of ICTY jurisprudence on genocidal intent, in Criminal Law Forum, 26, 2015, pp. 499ss. M.E. BADAR, Dolus eventualis and the Rome Statute without it?, in New Criminal Law Review, 12, 2009, pp. 436ss. M.E. BADAR, N. HIGGINS, General principles of law in the early jurisprudence of the ICC, in T. MARINIELLO (ed.), The International Criminal Court in search of its purpose and identity, ed. Routledge, London & New York, 2014. M.E. BADAR, S. PORRO, Rethinking the mental elements in the jurisprudence of the ICC, in C. STAHN (ed.), The law and practice of the International Criminal Court, Oxford University Press, Oxford, 2015. A.G. GIL, Mens rea in co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments against punishment for excesses committed by the agent or the co-perpetrator, op. cit., pp. 85ss. M. GRANIK, Indirect perpetration theory: A defence, in Leiden Journal of International Law, 28, 2015, pp. 980ss. K.J. HELLER, The Rome Statute of the International Criminal Court, in K.J. HELLER, D. DUBER (eds.), The Handbook of comparative criminal law, op. cit., pp. 594ss. S. PORRO, Risk and mental element: An analysis of national and international law on core crimes, op. cit., G. WERLE, F. JESSBERGER, Principles of international criminal law, 3rd ed., Oxford University Press, Oxford, 2014, pp. 795ss. S. FINNIN, Mental elements under article 30 of the Rome statute of

be used to commit international crimes in Sierra Leone, but it was also demonstrated that such the supply of weapons would have occurred in violation of the resolutions of the Security Council which imposed embargoes on both Liberia[487] and Sierra Leone (...)"[488].
Some other important cases where the responsibility has been directly affected the head of the legal entities is under the application of the Coordination Committee (CoCom), relating to the Toshiba and Kongsberg industries; the second case concerned the targeting sanctions of the Security Council on subjects responsible for having financed or supported terrorist groups.
The Toshiba/Kongsberg case presents some aspects of anomaly. In reality, two companies, respectively of Japanese and Norwegian nationality, had exported to the Soviet Union technological material and armament for submarines: "(…) whose export to the communist bloc was prohibited under the CoCom[489]. The dispute regarding the illegal behavior of the two companies was raised by the United States within the CoCom itself[490]. This contestation had the effect of imposing on Japan and Norway the criminal investigation of the conduct of the two companies: in Japan, Toshiba was held responsible for having circumvented the prohibitions imposed by the national legislation that incorporated the CoCom lists[491], and the sanction imposed it was the ban on the export of technological material to Communist Σtates for one year[492]; in Norway, Kongsberg was not only held responsible for circumventing these bans, but criminal proceedings were also initiated against the company's president, while a ban on the employment of persons involved in the prohibited

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the International Criminal Court. A comparative analysis, in International & Comparative Law Quarterly, 65, 2012, pp. 328ss. D. PIRAGOFF, D. ROBINSON, Mental element, in K. AMBOS, O. TRIFFTERER, The Rome statute of the International Criminal Court. A commentary, Nomos, Baden-Baden, 2016, pp. 114ss. K. JANJAC, The mental element in the Rome statute of the International Criminal Court, Wolf Legal Publishers, The Hague, 2013.

487This process has received particular attention from the media, due to the testimony given to the Court by the model Naomi Campbell, regarding a diamond that she received as a gift-presumably from the former dictator-during a party at home. Nelson Mandela in 1997, both of whom were guests. Naomi Campbell claims she was woken up the night after the party by two men, who would have given her a huge diamond, but did not tell her who the gift was. On the contrary, according to the testimony given to the court by the actress Mia Farrow-also a guest of the party-for breakfast, the model, in reporting to the actress the gift received during the night, would have clearly stated that the diamond was given to her from Charles Taylor.

488As ascertained by the Special Chamber for Sierra Leone in the Charles Taylor case (par. 5821 et seq.), Which highlighted how the supplies of arms came from several vessels commissioned to private individuals and from different geographical origins.

489W.A. WRUBEL, The Toshiba-Kongsberg incident: Shortcomings of Cocom, and recommendations for increased effectiveness of export controls to the east bloc, in American University International Law Review, 24 (4), 1989, pp. 241-273. K.N. MAKSAD, The Toshiba-Kongsberg technology diversion. A case study in East-West strategic trade control, in E.A. STUBBS, Soviet foreign economic policy and international security Routledge, London, New York, 1991.

490See: House of Representatives, Enforcement of Multilateral Export Controls, Hearing before the Subcommittee on International Economic Policy on Trade of the Committee on Foreign Affairs, 100th Congress, First Session, November 3rd, 1987, pp. 35ss. W.A. WRUBEL, The Toshiba-Kongsberg incident: Shortcomings of Cocom, and recommendations for increased effectiveness of export controls to the east bloc, op. cit.

491This case was seen as a form of diversion, as the circumvention of the prohibitions would have occurred through the falsification of export documents. For further analysis see also: J.W. MOREHEAD, Controlling diversion: How can we convert the Toshiba/Kongsberg controversy into a victory for the west?, in Northwestern Journal of International Law and Business, 9 (2), 1988, pp. 277-295, "(...) where they underline the "dangerousness" of export for the United States, considering such conduct as criminally punishable (...)".

492J.W. MOREHEAD, Controlling diversion: How can we convert the Toshiba/Kongsberg controversy into a victory for the west?, op. cit.

export in that company was imposed[493]. To the sanctions of both national jurisdictions were added thoσε imposed by the US regulations of the Omnibus Trade and Competitiveness Act of 1988[494], whose section 2443 established the prohibition for US administrations to purchase technology from the two companies for a period of three years, except for the exceptions expressly provided for therein (...)"[495]. The legal points just outlined concern the effective application of non-binding international legislation within the States, given that the electronic and technological components exported by the two companies were included in the CoCom lists. There would be no doubt regarding the ineffectiveness of the same lists and "(…) the agreement constituting the CoCom (assuming there was any trace of it) was considered non-binding for most of the States that were part of it; only the United States believed that it would comply with the decisions of the CoCom sessions (...) when the nationality of the two companies had transposed the decisions, transforming them into internal criminal legislation, the two companies were subject to legal obligations internal about export (...)"[496].

However, it is not the same way of forecasting ad hoc sanctions after conduct deemed illegal as was adopted by the UN and as we have seen according to the Omnibus Trade and Competitiveness Act[497]. In this case, the lack of any connection with the two companies by the US jurisdiction and the problem of retroactivity of the sanctions was considerable and created serious doubts not for the conduct but for the responsibility[498]. No official objection was made either by Japan and Norway or by the two companies. As far as the States were concerned, they considered that the sanctioning measures adopted were lawful under international law[499].

The cases presented demonstrate a necessary approach relating to the personality of companies and other legal entities that international sanctions can be adopted and applied to each case that a certain type of offense occurs. The personality and the consequences of liability are examined in this case. These are based on the internal level since national laws prohibited the export and the indirect effectiveness of international decisions shows that States do not have a margin of appreciation on the type of measure to be adopted nor as

493J.W. MOREHEAD, Controlling diversion: How can we convert the Toshiba/Kongsberg controversy into a victory for the west?, op. cit.

494H.R. 4848, in Public Law, 100-418, 23 August 1988.

495Section 2443 (c).

496J.W. MOREHEAD, Controlling diversion: How can we convert the Toshiba/Kongsberg controversy into a victory for the west?, op. cit., pp. 200ss.

497Introduced with the Executive Order 12661 of December 27, 1988, Implementing the Omnibus Trade and Competitiveness Act of 1988 and related International Trade Matters, 54 FR 779, 3 CFR, 1988 Comp., pp. 618ss.

498"(…) the United States Court of International Trade by all the American companies damaged by the ad hoc legislation. The Court limited itself to rejecting the request, considering that the only parties entitled to stand in court were the two affected companies, as expressly referred to in the sanction, while the other indirectly affected companies would not have had any legitimacy on the basis of the mere implications of economic nature (...)". The decision was confirmed by the U.S. Court of Appeal for Federal Circuit, 7 December 1989, in International Trade Reporter, 1989, vol. 6, pp. 1655ss.

499J.W. MOREHEAD, Controlling diversion: How can we convert the Toshiba/Kongsberg controversy into a victory for the west?, op. cit., considers: "(...) that the sanctioning measures comply both with general international law (lacking a specific obligation to have a commercial partner), and in relation to multilateral treaty law (since art. XI GATT on the prohibition of import restrictions concern only goods, and not also the choice of commercial partners) and bilateral (FCN agreements with Japan and Norway impose, like GATT, prohibitions of import restrictions, but nothing is specified about the prohibition to discriminate against a certain company over another)".

regards the choice of recipients to apply it. The missing measures is not the result of the will to act on a criminal level but a phenomenon of enforcement of international cooperation[500]. Typical phenomenon also of arms control law[501]. This method opens the way to impose sanctions and exert their effects also on subjects other than State and/or legal entities.
Within this framework we report the criminal liability of industries and the related sanctions that come from the UN Security Council[502]. Sanctions against armed and terrorist groups where the Security Council has ascertained that the activity of such groups had harmed international peace and stability[503], according to the principles of th UN and international law. The Security Council's sanctions were aimed at targeting not only and not so much directly these types of groups that surely have a relationship with any type of lawful or unlawful armament, but also the attitude of "cover" that these types of organizations use to export, sell and/or use weapons for terrorist actions[504]. The ratio of sanctions in this case derives from the need not to amplify their collateral effects against States[505].
The Security Council with the Resolution 1267 of 1999[506] has set a new way of proceeding to target individual behaviors that seek to harm international peace and security. We recall the possibility of sanctions not only against physical subjects but individually responsible for supporting financing for terrorist actions, but also groups or entities that are affiliated or associated with terrorist groups. With the Security Council's Resolution of 17 December it was established to arms transfers that participating States should: "(…) prevent the direct or indirect supply, sale, or transfer to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance or training related to military activities (...)"[507]. The support of the form for terrorist activities is also identified in the model of responsibility for aiding and abetting, which the Security Council: "(…) decides that acts or activities indicating that an individual, group, undertaking or entity is associated with ISIL or Al-Qaida and therefore eligible for inclusion in the ISIL (Da'esh) & Al-Qaida Sanctions List include: a)Participating in the financing, planning, facilitating, preparing, orperpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

500J.W. MOREHEAD, Controlling diversion: How can we convert the Toshiba/Kongsberg controversy into a victory for the west?, op. cit.
501G. DEN DEKKER, The law of arms control: International supervision and enforcement, op. cit., pp. 334ss. E. WEISS BROWN, Rethinking compliance with international law, in E. BENVENISTI, M. HIRSCH (eds.), The impact of international law on international cooperation. Theoretical perspectives, Cambridge University Press, Cambridge, 2004, pp. 134-165, "(...) where, moreover, he argues that in this sector the strategy of implementation and fulfillment of the agreements stipulated on the subject also becomes important (...)".
502See in argument: C. MICHAELSEN, The competence of the Security Council under the UN Charter to adopt sanctions targeting private individuals, in A. BYRNES, M. HAYASHI, C. MICHAELSEN (eds.), International law in the new age of globalization, Martinus Nijhoff Publishers, The Hague, 2013, pp. 11-40.
503A. BYRNES, M. HAYASHI, C. MICHAELSEN (eds.), International law in the new age of globalization, op. cit.
504A. BYRNES, M. HAYASHI, C. MICHAELSEN (eds.), International law in the new age of globalization, op. cit.
505A. BYRNES, M. HAYASHI, C. MICHAELSEN (eds.), International law in the new age of globalization, op. cit.
506S/RS/1267 (1999), UN Security Council. See also in argument: L. CINSBORG, M. SCHEININ, Judicial powers, due process and evidence in the Security Council 1267 terrorist sanctions regime: The Kadi II conundrum, EUI working paper, EUI RSCAS, 2011/44, 2011.
507Resolution 2253, S/RS/2253 (2015), UN Security Council, par. 2, lett. b).

b) Supplying, selling or transferring arms and related materiel to; c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof (...)"[508].

In the event that the Security Council identifies the physical or legal subjects responsible for supporting the terrorist phenomenon, it must be the States that expressly provide for such conduct that will be punished with criminal measures. Within this spirit the Resolution of 28 September 2001, where the Security Council affirms that the States: "(…) shall: (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts (...)"[509].

From the foregoing and from the role of the Security Council to take a position in cases of criminal liability of legal entities, it is revealed that these measures have the purpose of considering the actus reus[510], i.e. the criminal conduct relevant at national and in many cases international level. Obviously the mens rea is not clearly specified but it is taken into account that in corporate mens rea and of a customary nature on aiding and abetting it is necessary the legal entity to acted through a decision of its top management, that is a higher and well "organized order"[511]according to national rules on which the companies are based

508Resolution 2253 (2015), par. 3.

509Resolution 1373, S/RS/1373 (2001), par. 2, "(…) The effective application of individual sanctions must be reiterated here as expressed by the internationalist doctrine and by the Kadi I sentence: beyond the procedural mechanisms provided for by Resolution n. 1267 of 1999, it is also necessary for the States to ensure adequate jurisdictional mechanisms to ensure cross-examination and a just trial of the accused and involved subjects; moreover, minimum fundamental rights must always be guaranteed when it is possible to proceed against these (…)".

510Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2nd Cir. 2009) (finding that purposes and not knowledge is required for aiding and abetting with the ATS context, and interpreting purpose as going to the consummated offence). For cases applying a "knowledge" standard, see In Re South African Apartheid Litigation 617 F. Supp. 2d 288 (2009); Romero v. Drummond Co., 552 F3d 1303 (11th Cir. 2008); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009). Khulumani v. Barclay National Bank Ltd, 504 F.3d 254 (2d Cir. 2007); Ntsebeza v. Daimler Chrysler Corp, 504 F.3d 254 (2d Cir 2007), n.15. In expressing apprehension about the curious idea of "specific direction" as a form of actus reus, one appellate judge in the Khulumani litigation pointed out that: "(...) a possible tension in the tribunals' definition aiding and abetting under which the necessary mens rea is knowing assistance (...) yet requires that the act of assistance be specifically directed to assist the perpetration of a specific crime (...) this possible tension might be resolved. In the same spirit (...)". The ICTY overturned its own previous case law that had upheld the "specific direction" standard. See Prosecutor v. Šainović et al, case No. IT-05-87-A, Judgment, 2014: (...) I have pointed to the need to consider these types of considerations as justifications in international criminal law (...). See also the ICTY Trial Chamber in Furundžija adopted a knowledge test for aiding and abetting, the Rome Statute of the ICC adopted a purpose test. Article 25(3)(c) of the Rome Statute makes one who, "(...) for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission (...) criminally responsible (...)". This phrase introduced a mental element that went beyond the ordinary mens rea requirement of intent and knowledge required for other crimes under the Rome Statute and from the knowledge test. S. DROUBI, Transnational corporations and international human rights law, in Notre Dame Journal of International & Comparative Law, 6 (1), 2016.

511ICTY, Prosecutor v. Halilović, Trial Chamber I, par. 78, "(...) dans l'affaire Čelebici (ICTY, Prosecutor v. Delalić and others-Čelebici case, Trial Chamber, judgment, op. cit., par. 398), la Défense n'a pris comme référence que l'ouvrage (...)", according to opinion of de M. CHERIF BASSIOUNI, The law of the International Criminal Tribunal for the Former Yugoslavia, ed. Transnational Publisher, ardsley, New York, 1996, pp. 350-351: "(...) qui parle de l'existence d'un lien de causalité comme d'un élément essentiel de la théorie de la responsabilité du supérieur hiérarchique (...)". D. LIAKOPOULOS, Die Hybridität des Verfahrens

and as a consequence every decision made can facilitate and support the commission of terrorist acts and international crimes.

16.RESPONSIBILITY FOR AIDING AND ABETTING

Practice until now has shown that the configuration of responsibility allowed the identification as responsible for those who have provided a form of material support in the commission of such crimes. The act of reus of this form of responsibility normally takes the form of "(…) aid [ing], abett [ing] or otherwise assist [ing] in its commission or its attempted commission, including the means for its commission"[512]. As regards the crime of genocide, the Akayesu judgment[513] in the International Criminal Tribunal for Rwanda (ICTR) established that: "(…) for the purposes of interpreting article 2(3)e) of the Statute, which does not define the concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus: complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose (…)[514] (…) the Court has identified knowledge[515] as the fundamental mens rea of the aider, so that the latter understands that he is providing help or support in the commission of an international crime, such as genocide[516], but it is not necessary that the same mens rea has been shared, or the aid was not provided with the intent of committing genocide.

The rulings of the ICTY have established the parameters for aiding and abetting to be configured in such crimes. The jurisprudence has held that the assistance provided: "(...) was characterized by the mere knowledge that one's contribution would lead to the commission of international crimes. Thus, in the Furundžija[517] case, the Court ruled that: "(…) the mens

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der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechun, op. cit., G. TURAN, Responsibility to prosecute in an age of global governamentality: The International Criminal Court, op. cit., M. ODRIOZOLA GURRUTZAGA, Responsabilidad penal por crìmenes internacionales y coautoria medita, op. cit., pp. 7ss. N. JAIN, Perpetrators and accessories in international criminal law. Individual modes of responsibility for collective crimes, op. cit., B. GOY, Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals, op. cit., pp. 5ss.

512K. AMBOS, Criminal responsibility, modes of, in Max Planck Encyclopedia of Public International Law, 2013, par. 13ss.

513ICTR, Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-A, op. cit.

514Prosecutor v. Jean Paul Akayesu, case n. ICTR-06-4, op. cit.

515It is believed that this term can be translated with the Italian term "awareness", given that, following knowledge of the consequences deriving from one's help, the acting subject becomes aware of his own conduct.

516Prosecutor v. Jean Paul Akayesu, case n. ICTR-06-4,, op. cit.

517ICTY, Prosecutor v. Anto Furundžija, Judgment, TC, IT- 95-17/1-T, 10 December 1998, par. 162. "(...) the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...)". For further analysis see also: P. WEINER, The evolving jurisprudence of the crime of rape in international criminal law, in Boston College Law Review, 54, 2013, pp. 1210ss. A. HAGAY-FREY, Sex and gender crimes in the new international law: Past, present, future, op. cit., pp. 80ss. See in the same spirit also: Case No. SCSL-04-15-T, Trial Judgment, parr. 146-148. The second element of the actus reus of rape refers to the circumstances; "(...)

rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate[518] (...) the subjective element therefore implies that the aider merely represented the consequences of his action. In this sense, the requirement of knowledge implies that there was a literal "knowledge" of the potential consequences and that the subjects to whom the aid was provided intended to commit international crimes (...)"[519].

The jurisprudence did not agree on the effect that such support must have had in the commission of the crime, and as regards the psychological element of aiding and abetting. It is noted that the majority considers international jurisprudence and establishes that the help or support must have been provided only with knowledge and that they have ended up constituting a substantial effect in the commission of this type of crime. In this sense, we recall the aforementioned Furundžija judgment, which is also associated with the judgment in the Blaškić[520] and in the Blagojević and Jokić[521] cases. Finally, the ruling in the Taylor case also adopted and confirmed this orientation.

In the Blaškić judgment the ICTY established that: "(…) in this case, the Trial Chamber, following the standard set out in Furundžija, held that the actus reus of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime". It further stated that the mens rea required is "the knowledge that these acts assist the commission of the offense". The Appeals Chamber considers that the Trial Chamber was correct in so holding (...)"[522].

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which would render the sexual act in the first element criminal. The essence of this element is that it describes those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act. The use or threat of force provides clear evidence of non consent, but it is not required (…) true consent will not be possible (...) the last part of this element refers to those situations where, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the son may not, for instance, be capable of genuinely consenting if he or she is too young, under the influence of some substance, or suffering from an illness or disability (...)". In particular Paragraph 147 of the decision refers to the Kunarac et al. appeal judgment as describing circumstances relating to "lack of consent". The definition derives from the ICC elements of the crime of rape, where "lack of consent" was rejected as an element adopted, in the area was generally very difficult. It is unclear what this reasoning in Sesay (Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-A, Appeal Judgment, parr. 85-92 (Oct. 26, 2009)) was intended to accomplish. According to the Court: it may be deemed proven: "(...) if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent (...)". S. MOUTHAAN, Sexual violence against men and international law criminalising the unmentionable, op. cit., pp. 667ss. R.S. REVERTE, Referencia al crimen de genocidio aprocimation genocide crime, in Revista de Estudios Juridicos, 16, 2016. J. RAMJI-NOGALES, Questioning hierarchies of harm: Women, forced migration and international criminal law, in International Criminal Law Review, 11, 2011. G. CAGGIOLI, Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, in International Review of the Red Cross, 96, 2014, pp. 506ss. M. AYAT, Quelques apports des tribunaux pènaux internationaux ad hoc et notamment le TPIR, à la lute contre les violences sexuelles subies par les femmes durant les genocides et les conflicts armès, in International Criminal Law Review, 10, 2010, pp. 789ss. P.V. SELLERS, Wartime female slavery: enslavement?, in Cornell International Law Journal, 44, 2011, pp. 116ss. X.A. AGIRRE ARANBURU, Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases, in Leiden Journal of International Law, 23, 2010, pp. 610ss.

518ICTY, Prosecutor v. Anto Furundžija, Judgment, TC, IT- 95-17/1-T, op. cit., par. 249.

519ICTY, Prosecutor v. Anto Furundžija, Judgment, TC, IT- 95-17/1-T, op. cit., par. 250.

520ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, TC, IT-95-14-T, 3 March 2000, par. 220.

521ICTY, Prosecutor v. Vidoje Blagojević and Dragan Jokić, AC, IT-02-60-A, 9 May 2007.

522ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, TC, IT-95-14-T, op. cit., par. 222.

The judges recognized that the causal effect, between the assistance given and the commission of the crime, is not necessary in order to prove the mens rea of who has provided the necessary help: "(…) the Appeals Chamber reiterates that one of the requirements of the actus reus of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the actus reus of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the actus reus takes place may be removed from the location of the principal crime (…)"[523].

In the Blagojević and Jokić judgment, the judges based the responsibility for aiding and abetting as a figure of help or support oriented towards a specific (ad hoc) direction. The judges implicitly found that specific direction was part of the actu reus, and was determined by the substantial effect of the aid provided. "(…) The Appeals Chamber observes that while the Tadić definition has not been explicitly departed from, specific direction has not always been included as an element of the actus reus of aiding and abetting. This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime (...)"[524].

This position was also accepted in the Taylor ruling, in which the Special Chamber for Sierra Leone ruled that the supply of weapons to the Rebel United Front (RUF) rebels had been the sine qua non for the commission of crimes, but that had only had the substantial effect of facilitating this commission: "(…) in order to find the Accused criminally responsible pursuant to article 6.1 of the Statute for aiding and abetting the planning, preparation or execution of the crimes charged in Counts 1 to 11 of the Indictment, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused provided practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (actus reus). Furthermore, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist the commission of the crime, and that the Accused was aware of the "essential

523ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, TC, IT-95-14-T, op. cit., par. 48: "(…) They argued (par. 286) how it was possible to admit that the accomplice could provide assistance in the commission of the crime (intent), but also that assistance was considered as a possible and foreseeable consequence of the conduct (recklessness). In this way, it also opens up to the possibility that the aider did not really want to provide his assistance to commit that crime (…)". This approach was also taken up in the Taylor judgment (para. 2604, 2647-2652). M. VAN ROOSMALE et al., (eds), Fundamental rights and principles, Liber amicorum Pieter Van Dijk, ed. Intersentia, Antwerp, Oxford, 2013, pp. 49-71.

524ICTY, Prosecutor v. Blagojević and Jokić, Trial Judgment, TC, IT-02-60-T, 17 January 2005, par. 186. In the same argument see alsoo the enxt cases: Lukić and Lukić, Trial Judgment (par. 1045); Popović et al., Trial Judgment (par. 2114); Tolimir, Trial Judgment (par. 1204); Karadžić, Trial Judgment (par. 6020), Mladić, Trial Judgment (par. 5175). ICTR, see: Ntakirutimana and Ntakirutimana, Appeals Judgment (par. 542); Bisengimana, Judgment and Sentence (par. 103); Nchamihigo, Judgment and Sentence (par. 344); Gatete, Trial Judgment (par. 665); Ndindiliyimana et al., Trial Judgment (par. 2037); Bagosora and Nsengiyumva, Appeals Judgment (par. 416); Ntabakuze, Appeals Judgment (par. 261); Nzabonimana, Judgment and Sentence (par. 1794); Nizeyimana, Judgment and Sentence (par. 1553). See, for the above cases: G. WERLE, F. JESSBERGER, Principles of international criminal law, op. cit., pp. 389ss.

elements" of the crime committed by the principal offender, including the state of mind of the principal offender (mens rea)" (...)"[525].

Hypothesis that seems to be based on all cases in which a subject provides his own help in the commission of international crimes and also has the opportunity to represent the consequences of his own conduct. In the context of the arms trade, this requirement has also been underlined by national jurisprudence. In the Prosecutor v. Van Haarant case[526], the Hague District Court argued that: "(…) by supplying large quantities of TDG to SEORGI (...), the accused has knowingly and willfully accepted the reasonable chance that this TDG, as a component of poison gas, would be used for chemical attacks (mentioned in the judicial finding of fact). Needless to say, the court considers that the conditional intent of the accused already results from his knowledge stated under 1., 2. and 3. After all, a person who supplies chemicals of which he knows that they will be used for the production of poison gas by a country that is engaged in a long lasting war that was also started by that same country, justifies the conclusion that he consciously accepted the chance that the poison gas to be produced would also end up on the battle field (...)"[527].

Concept that was also taken up in the appeal judgment of Prosecutor v. Kouwenhoven. It has been argued, both by doctrine[528] and jurisprudence, that this criterion belongs to rules included in customary law. The relevant mens rea, also for the purposes of detecting an autonomous and customary crime: "(...) will be the knowledge of providing a substantial contribution in the commission of the crime, without having to share the same mens rea as those who materially commit the main crime (...) ".

We are faced with an inclusive and broad orientation that considers the supply of weapons as substantial assistance in the commission of international crimes and a minority and restrictive position of the opposite design. As we saw in the appeal sentence of the Perišić case[529], in fact, the judges of the ICTY argued: "(...) that assistance in the commission of a

525The Prosecutor v Charles Ghankay Taylor (Indictment) (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007). M.J. KELLY, The parameters of vicarious corporate criminal liability for genocide under international law, in A. BYRNES, C. HAYASHI-MICHAELSEN, International law in the age of globalization, ed. Brill, The Hague, 2013. R. BEHRENS, J. HENNAM, Elements of genocide, op. cit., pp. 194ss. Y. BEIGBEDER, International Criminal Tribunals, op. cit., M.J. KELLY, The debate or genocide in Darfur, Sudan, in University of California, Davis Journal of International Law & Policy, 19, 2012, pp. 208ss. C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, in Genocide Studies and Prevention: An International Journal, 9, 2016, pp. 80ss. D.S. BETTWY, The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?, in Notre Dame Journal of International and Comparative Law, 1, 2011, pp. 102ss. S. MOUTHAAN, Sexual violence against men and international law. Criminalising the unmentionable, in International Criminal Law Review, 13, 2013, pp. 668ss. P. KIRBY, How is rape a weapon of war?, Feminist international relations, modes of critical explanation and the study of wartime sexual violence, in European Journal of International Relations, 18, 2012. J.R. MCHENRY, The prosecution of rape under international law: Justice that is long overdue, in Vanderbilt Journal of Transnational Law, 35, 2002, pp. 1310ss. N. LAVIOLETTE, Commanding rape: Sexual violence, command responsibility and the prosecution of superiors by the international criminal Tribunals for the Former Yugoslavia and Rwanda, in The Canadian Yearbook of International Law, 36, 1998, pp. 94ss. J.A. WILLIAMSON, Some consideration on command responsibility and criminal liability, in International Review of the Red Cross, 90, 2008, pp. 306ss. D.A. NEBESAR, Gender-based violence as a weapon of war, in U.C. Davis Journal of International Law and Policy, 4, 1998, pp. 148ss. I. PICCOLO, The crime of rape in international criminal law, International Courts Association, 2013.

526District Court of The Hague, Criminal Law Section, Judgment of 23 December 2005, 09/751003-04.

527Par. 11.

528E. VAN SLIEDREGT, Individual criminal responsibility in international law, op. cit., pp. 112ss.

529Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, 6 September 2011, par. 387. ICTY, Prosecutor v. Prlić et al., Judgment, TC-III, IT-04-74-T, 29 May 2013, par. 1254. SCSL, Prosecutor v. Sesay et al. (RUF),

crime should not only be done with awareness of one's own action, but it is also necessary to provide it for the specific commission of that international crime[530] and the Chamber of Appeal, therefore (…) considers that specific direction remains an element of the actus reus of aiding and abetting liability (...)"[531].

The judges, in order to prove that the subject has provided assistance in the commission of a crime, have tried to demonstrate the culpable link between the assistance provided and this commission[532]. However, they did not consider it mandatory to demonstrate that the specific direction of the aid derives from acts close to or connected to the conduct charged[533].

Setting that seems to adapt to geographical, temporal or other contexts in which there is no proximity, since in such cases there would be no real perception of one's assistance and it should be necessary to demonstrate in a stringent manner that the aider wanted to facilitate the commission of that crime[534]. It is necessary to demonstrate: "(...) that the help with specific direction was provided, "beyond any reasonable doubt", with the sharing of the same mens rea and the sending of aid to facilitate the commission of that specific crime[535]. (...) The psychological element that is taken into consideration will be the specific malice, and not even the simple knowledge (...)"[536].

What was said in the Perisic judgment was also taken up in the Stanišić and Župljanin case[537]. The Trial Chamber I, took up what was expressed in the Perišić judgment regarding the specific direction: "(...) also attempting to carry out an orderly reconstruction of the principle expressed therein[538]. (...) The judges of first instance were in agreement in considering that, in evaluating the responsibility of the aider, it is not only necessary that the substantial effect in the commission of the crime be demonstrated, but that there is also a specific direction given to such assistance (…) when assessing whether the acts carried out by the aider and abettor have a substantial effect on the perpetration of a crime, the Trial Chamber must find that they are specifically directed to assist, encourage, or lend moral support to the perpetration of that crime. The element of specific direction may be considered explicitly or implicitly in the context of analyzing the substantial effect. However, specific direction must be analyzed explicitly in cases where the person is remote

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Judgment, TC, SCSL-04-15-T, 2 March 2009, par. 1191. ICTR, Prosecutor v. Grégoire Ndahimana, Judgment and Sentence, TC-II, ICTR-01-68-T, 30 December 2011, par. 839. ICTY, Prosecutor v. Lukić and Lukić, Judgment, AC, IT-98-32/1-A, 4 December 2012, par. 536. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, AC, IT-05-88/2-A, 8 April 2015, par. 724. ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 44.

530The use of specific direction introduces: "(...) a specific purpose in the definition of the objective element", but also that this jurisprudential approach "(...) is in evident contrast with the psychological element of the crime, which, as confirmed by the same Chamber of Appeal, is represented by knowledge (...)".

531Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, op. cit., par. 36.

532Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, op. cit., par. 37.

533Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, op. cit., par. 98.

534Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, op. cit., par. 39-41.

535Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, op. cit., par. 36, 53.

536Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, op. cit., par. 48.

537ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 219. ICTY, Prosecutor v. Mitar Vasiljević, Trial Judgment, TC-II, IT-98-32-T, 29 November 2002, par. 227, which is noted that: "(...) responsibility for one or for a limited number of such killings is insufficient (...)". Against this position see: G. BOAS, J.L. BISCHOFF, N.L. REID, Elements of crimes under international law, International criminal law practitioner library series, Volume II, Cambridge University Press, Cambridge, 2008, pp. 62ss.

538ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 102.

from the crimes he or she is alleged to have aided and abetted. Factors defining remoteness in this respect include temporal or geographic distance (...)"[539].

Such a jurisprudential path can only be provided with a direct link between those who provide assistance and those who commit the crime. In the event that there is evidence relating to the assistant's mens rea, these will be evaluated as circumstantial: "(…) proof of specific direction in such circumstances requires evidence establishing a direct link between the aid provided by an accused and the relevant crimes committed by principal perpetrators. Specific direction may involve considerations that are closely related to questions of mens rea and evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes (...)"[540].

The specific mens rea consists in the knowledge of contributing to the commission of the crime, but also in the awareness of what the crime will be committed. "(…) The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the principal perpetrator. The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind. This includes the specific intent of the principal perpetrator, if the crime requires such intent (...)"[541]. It is emphasized that is not necessary that the aider has provided his assistance in order to facilitate that specific crime, but the mere knowledge that crimes will be committed is sufficient. "(…) The aider and the abettor do not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed (...)"[542]. In the appeal ruling[543], however, the Appeals Chamber changed direction from the approach offered by the judges of the first instance and the Perišić ruling. The second instance judges also resorted to the subsequent judgments to Perišić to demonstrate that the specific direction, understood as follows: "(...) was not to be considered as a customary element of the rule on aiding and abetting (...) the Šainović and Popović cases[544]. The judges of the second instance rejected Perišić's interpretation, arguing that: "(…) this approach was "in direct and material conflict with the prevailing jurisprudence on the actus reus of aiding and abetting liability and with customary international law" (...)[545].

The Appeals Chamber underlined that the responsibility for aiding and abetting: "(…) consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"[546]. The judges argued that mens rea is identified in the knowledge for which the supporting acts and actions have provided assistance in the commission of the crime[547] and that specific direction in no way constitutes an element of that responsibility under the customary law[548].

539ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 102.
540ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 103.
541ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 103.
542ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 103.
543ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 103.
544Prosecutor v. Popović et al., Judgment, Case n. ICTY-05-88-T, 10 June 2010.
545ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit., par. 104.
546ICTY, Prosecutor v. Stanišić and Župljanin, op. cit.
547ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit.
548ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, op. cit.

In the case of a "fragmentation of international criminal law" as regards abetting and aiding and in cases of legal insecurity and inability of international law to be predictable, the question of the jurisprudential precedent is feared, which perhaps cannot lead to self-fragmentation of the jurisprudence. In reality, jurisprudence and doctrine have considered the substantial effect criterion of a customary nature and therefore prevalent and it is possible to ascertain what was stated in the Perišić judgment has been superseded by the following sentences: Šainović[549], Popović and Stanišić and Simatović[550], where the specialty of specific direction is recognized for the purposes of configuring aiding and abetting in international crimes and the previous jurisprudential breach has been healed[551].
In the arms trade, responsibility for aiding and abetting is configured through a substantial effect in the commission of international crimes and which must include the awareness that one's contribution in arms will facilitate and support this type of crime commission. It does not seem that further requirements are necessary to determine the responsibility of those individuals or legal persons who carry out illicit arms transfers, which will significantly affect the commission of international crimes.

17.CONCLUDING REMARKS

ICJ's jurisprudence seems to dispel any doubt, pointing out that the conduct of individual members is susceptible of a separate legal assessment with respect to that relating to the normative act that they combine to determine. In particular, the responsibility of these States for the vote expressed within a given body can be based on at least two different legal titles. The norm on complicity is therefore declined here in partially different terms from those reconstructed in chapter II of this work. The fundamental difference lies in the causal link between the accessory fact, constituted by members vote and the main fact constituted by the act approved by the organization and attributable to it. This requirement appears to be in terms of conditionality in the sense that is considered satisfied if the main act would not have taken place without the intervention of the accessory conduct. In assessing the factual circumstances, the actual contribution of the Member State is relevant, which can also be measured in light of the weight assigned to it by the internal law of the principal responsible organization.
As a paradigm of this hypothesis, the role played within the UN Security Council by the permanent members who, based on UN rules, are able to influence the adoption or not the

549Prosecutor v. Šainović et al., IT-05-87-A (Appeals Chamber Judgment), January 23, 2014. L. SADAT, Can the ICTY Šainović and Perišić cases Be reconciled?, in American Journal of International Law, 108(3), 2014, pp. 475-485.
550Prosecutor v. Jovica Stanišić and Franko Simatović., IT-03-69-T, 30 June 2021. S. LYONS, Prosecutor v. Stanišić and Simatović, Appeal Judgment (ICTY), in International Legal Materials, 56(4), 2017, pp. 657-725. A. MEIJKNECHT, A Hague case law: Latest developments, in Netherlands International Law Review, 68, 2021, pp. 367ss.
551In this case, it is possible to believe that: "(...) the specialty characteristic of Perišić had to succumb to the prevalence of the general opinion of the judges of the Court regarding the customary nature of the substantial effect. However, also given the lack of a nomophilactic function of the international courts, it would not seem to be excluded that, due to a differentiation of the concrete situations that may occur, we may also be faced with the option of specific direction, where it is believed that traditional requirements may lead to unreasonable results, based on the evidence offered. This would also seem to be demonstrated by the ICTY's constant practice of having recourse to an almost legislative power, characterized by the decision to implement, also through general principles of law, the statutory rules where a legal gap is evident in relation to a single concrete case (...)" according to: G. BOAS, J.L. BISCHOFF, N.L. REID, B.D. TAYLOR III, International criminal procedure, Cambridge University Press, Cambridge, 2011, pp. 30ss.

decisions of the board on the basis of Chapter VII of the UN Charter[552].
I will conclude with the words of the International Military Tribunal, which famously noted that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced(...)"[553]. The same idea on the need to effectively protect human rights in the light of new challenges is echoed in the discussion of the responsibility of transnational corporations. What has changed is the legal subject whose responsibility is in question; what remains is the need for the international legal order to face the reality of today.

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552For further analysis see also: A. HAMONIC, Les relations entre l'Union europèenne et l'ONU dans le domaine de la gestion des crises, op. cit., J. MARC DE LA SABLIÉRE, Le Conseil de sècuritè des Nations Unies, op. cit., R. HIGGINS, P. WEBB, D. AKANDE, S. SIVAKUMARAN, J. SLOAN, Oppenheim's international law: United Nations, op. cit.,
553Trials of the Major War Criminals Before the International Military Tribunal, vol I (1947), pp. 223ss.

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