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Briefing Paper

International law and
small arms and light weapons control:
Obligations, challenges and opportunities

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Contents

Introduction	3
Overview of existing obligations	3
State responsibility for misuse of firearms by private citizens	4
Prohibitions on arms transfers.....	5
The law of State responsibility.....	6
Individual criminal responsibility	7
Prosecution and enforcement.....	8
Emergent international regulations	9
Use of force and firearms by law enforcement agencies.....	9
Regulating guns in the hands of civilians	10
Transfer controls.....	12
Transfers to non-State armed groups.....	14
Regulating arms brokering activity	16
Opportunities for action.....	18
Annex: Relevant sources of international law.....	22

Introduction

In the ideal society functioning under the rule of law, the armed forces and police carry guns so that the rest of the population doesn't have to. The opposite case is one in which no enforcement of the rule of the law leads to vigilantism and high levels of firearm violence and death.¹

For any illegal act there is often a sense that, even if one starts by thinking about the principal perpetrator, there is a need to consider others who: finance, facilitate, encourage, support and assist in the enterprise.²

In the wrong hands, small arms and light weapons³ can be tools of oppression, used to commit violations of human rights and international humanitarian law (IHL); they can exacerbate situations of national and regional instability and armed conflict; and they can hinder post-conflict reconstruction. The close relationship between small arms availability and human insecurity has merited increasing levels of attention by the international community in recent years, resulting in a growing body of relevant international law.

International human rights law, IHL and the UN Charter—including international norms against genocide, war crimes and crimes against humanity—all place limitations on the actions of the State with regard to small arms use and transfer. These limitations apply, to varying degrees, in peacetime and wartime and are intended to prevent threats to human security, whether by law enforcement, the military or private citizens.

This briefing paper explores the legal basis of States' responsibility to prevent small arms misuse and to restrict arms transfers when the weapons are likely to be misused. It identifies areas that warrant further codification of these responsibilities, as well as opportunities in the coming period for strengthening the legal norms around these issues.

Overview of existing obligations

Guns and explosives are used to commit a range of human rights violations, from intentional killings to torture, rape, kidnapping and hostage-taking, to name a few. They are also instrumental in creating conditions that lead to violations of other human rights, such as rights to education, healthcare, development and participation in government.⁴

¹ Weiss, Taya (2003), “A demand-side approach to fighting small arms proliferation”, *African Security Review*, Vol. 12, Issue 2. Available at: www.iss.co.za/Pubs/ASR/12No2/F1.html

² Clapham, A (2002), “On Complicity”, in M. Henzelin & R. Roth (eds), *Le Droit penal à l'épreuve de l'internationalisation*, Bruylant, Bruxelles, p. 241

³ These terms will be used interchangeably in this paper with small arms, guns, firearms, and weapons.

⁴ For a discussion of the availability and misuse of small arms in relation to human rights violations, see *The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms*, Working paper submitted by Barbara Frey in accordance with Sub-Commission decision 2001/120, Economic and Social Council, UN Doc. E/CN.4/Sub.2/2002/39, 30 May 2002. See also Amnesty International & Oxfam International, *Shattered Lives*, Control Arms Campaign, 2003, pp. 24-39, available at: www.controlarms.org

The right to life, perhaps the most important of rights that must always be respected, is often put in jeopardy through the misuse of small arms. Protection of this right imposes both a positive and a negative duty on States—that is, governments must enact laws that maximize the protection of life and they must refrain from arbitrarily depriving anyone of their life. Other non-derogable rights the State must protect are: the right to be free from torture and other inhuman or degrading treatment or punishment; the right to be free from slavery or servitude; and the right to be free from retroactive application of penal laws. States can never suspend these fundamental human rights, even during wartime.

The cornerstones of IHL—the body of law governing the use of weapons in war and protecting non-combatants in times of war—are the four Geneva Conventions of 1949 and two Additional Protocols of 1977. The most important provisions of these treaties are widely recognised as having achieved the status of customary international law even before they were codified in the Geneva Conventions.⁵ These instruments identify certain violations (such as wilful killing, torture or inhuman treatment) as “grave breaches” (commonly known as “war crimes”) and require that States take all measures necessary to prevent them from occurring and to punish those who commit them (or to extradite perpetrators to another State for prosecution). IHL applies in conflicts of both an international or internal nature, though the precise rules vary somewhat in different situations.

State responsibility for misuse of firearms by private citizens

Under international human rights law, States are not only responsible for the actions of their agents (e.g., military and law enforcement), but they also have a duty to prevent patterns of abuse committed by private persons, whether or not they are acting under the control of the State. Failure to exercise “due diligence”—taking effective steps—to protect individuals from organised crimes, such as kidnapping and killing for ransom, can amount to a violation of human rights law.⁶

According to the UN Special Rapporteur on Human Rights and Small Arms, Barbara Frey, given the primacy of the right to life, it is reasonable to suggest that the “due diligence” standard requires States to erect minimum safeguards and controls on the ownership and use of guns.⁷ The State may be liable if it fails to investigate and prosecute crimes committed by State agents or take reasonable steps to regulate arms and ammunition in order to protect citizens from homicides, suicides, accidents, a pattern of intimate partner or family violence and/or organised crime.

⁵ A study on customary international humanitarian law undertaken by the ICRC at the request of the International Conference of the Red Cross and Red Crescent was recently published. See Henckaerts, Jen-Marie and Louise Doswald-Beck (2005), *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press.

⁶ See *Prevention of human rights violations committed with small arms and light weapons*, Preliminary report submitted by Barbara Frey, Special Rapporteur, in accordance with Sub-Commission decision 2002/25, Economic and Social Council, UN Doc. E/CN.4/Sub.2/2003/29, 25 June 2003, at 12-13. The Special Rapporteur discusses the case law of the Inter-American Court of Human Rights and the European Court of Human Rights concluding that: “Under the due diligence standard for determining State liability, therefore, a State may have an affirmative duty under the human rights instruments to ensure that small arms are not used by armed individuals and groups to commit human rights violations.”

⁷ Frey, Barbara (2002), *The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms*, Working Paper submitted in accordance with Sub-Commission decisions 2001/120, para. 46

The “due diligence” standard is also relevant to IHL, which requires States to “ensure respect” for the law. This provision is widely accepted to mean that States have a positive obligation to prevent or punish breaches of IHL abroad. This standard is crucial to the protection of non-combatants in situations of internal armed conflict, where many violations are perpetrated by individuals over whom the State has no direct control.

Prohibitions on arms transfers

In addition to limiting how States may use small arms, international law also limits the freedom of States to transfer weapons, if they are likely to be used in contravention of international law.⁸ While the 2001 UN *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (UN Programme of Action) did not develop guidelines to govern arms transfers, it does acknowledge that there is an already established body of international law that should constrain States’ exports.⁹

Although the UN Charter neither expressly prohibits nor permits the use or transfer of small arms, the prohibition on the threat or use of force (Article 2(4)) has important implications for this issue. For instance, an accumulation of weapons has destabilising effects and can, in certain circumstances, amount to a threat of force. States therefore have a responsibility to limit the quantity of imports, as reflected in the UN Disarmament Commission’s 1996 *Guidelines for International Transfers*¹⁰ which provides that:

20. Arms-producing or supplier States have a responsibility to seek to ensure that the quantity and level of sophistication of their arms exports do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.

21. States receiving arms have an equivalent responsibility to seek to ensure that the quantity and the level of sophistication of their arms imports are commensurate with their legitimate self-defence and security requirements and that they do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.

In other words, the implicit right of States to acquire arms as part of their inherent right to self-defence is subject to limitations.

Most clearly, under Article 41 of the UN Charter, States have a legal obligation to abide by embargoes enacted by the UN Security Council and a duty to implement measures to ensure that persons within their jurisdiction also comply with the

⁸ For a fuller analysis of the impact of international law on decisions to export weapons, see Gillard, E, “What’s Legal? What’s Illegal?”, in Lora Lumpe, ed. (2000), *Running Guns: The Global Black Market in Small Arms*. Zed Books, London, pp. 27-52

⁹ *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All of Its Aspects*, UN Doc. A/CONF.192/15, Article 11 states that applications for export authorisations should be considered according to strict national regulations that “are consistent with the existing responsibilities of States under relevant international law”.

¹⁰ Report of the Disarmament Commission, *Guidelines for international arms transfers in the context of General Assembly resolution 46/36 of 6 December 1991*, UN Doc. A/51/42, 22 May 1996, Annex I. Available at: www.smallarmssurvey.org/source_documents/UN%20Documents/Other%20UN%20Documents/A_51_42.pdf

embargoes.¹¹ It is now common practice for the UN Security Council to impose arms embargoes on parties (State and non-State) to a conflict as a response to the existence or impending threat of violent conflict. Thus, the international community has made clear the connection between its commitment to peace and security, and the availability of arms.

Underlying current efforts to regulate the transfer of guns and ammunition is the principle that governments should prevent weapons from leaving their territory when there is a known risk that their end-use will involve serious violations of international law: the key concept at issue is that of “complicity”. Parties that authorise arms transfers may not share the *intent* of perpetrators, but they may nonetheless incur responsibility under international law for making violations possible by providing material assistance to the perpetrators.¹²

In public international law, the notion of “complicity” has been developed in two separate branches: State responsibility and individual criminal responsibility. The first exclusively concerns inter-state relations,¹³ while the second relates exclusively to the responsibility of individuals.

The law of State responsibility

States have an obligation not to aid or assist another State in breaching international law. This rule of customary international law, binding on all States, is now codified in the International Law Commission’s Articles on State Responsibility,¹⁴ and represents the first attempt to codify “complicity” in connection with the law regulating inter-State relations.¹⁵ By implication, limitations can also be imposed on the right of a State to authorise what would otherwise be a legal transfer of weapons if in fact the weapons will be used in ways that breach international law.

This notion is limited, however, in two important ways.¹⁶ The aiding State must have knowledge of the circumstances that make the conduct of the assisted State unlawful. This standard of proof is not defined anywhere, but it can be argued that, in the context of international law, the appropriate standard is “constructive knowledge”, whereby if certain factors were present, knowledge or awareness could be imputed. A second and related limitation to the attribution of State responsibility under Article 16 concerns the requirement that the aid or assistance (here, the supply of weapons) be

¹¹ Article 41 confers upon the Security Council the power to call for a “complete or partial interruption of economic relations [...] and the severance of diplomatic relations” in response to a threat to or breach of the peace or an act of aggression. It is within the discretion of each State to decide the type of responsibility (administrative offence v. criminal offence) that attaches to a violation of the embargo by a private actor. In a Resolution on the situation in Africa adopted in 1998, the Security Council encouraged Member States to adopt measures making the violation of mandatory arms embargoes a criminal offence (see S/RES/1196, 16 September 1998, para. 2).

¹² For a useful overview, see Misol, L (2004), “Weapons and War Crimes: The Complicity of Arms Suppliers”, *Human Rights Watch World Report 2004*, pp. 279-298.

¹³ The participation of a State in illegal acts by individuals may raise questions of attribution but cannot be qualified as complicity in the law of state responsibility.

¹⁴ Articles 16 and 41(2). The Articles were commended by the General Assembly and annexed to resolution 56/83, *Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/RES/56/83, 12 December 2001 [hereinafter *Articles on State Responsibility*]

¹⁵ For a thorough analysis of the State practice that led to the codification, see Quigley, J (1986), “Complicity in International Law: A New Direction in the Law of State Responsibility”, *British Yearbook of International Law*, Vol. 57, p.77

¹⁶ Crawford, J (2002), *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, p.149 paras 3-6 [hereinafter *Commentary*].

given with *a view* to facilitating the commission of the wrongful act. Although this limitation is not stipulated in the terms of Article 16 itself, the International Law Commission’s commentary on the Articles on State Responsibility states that this is a requirement.¹⁷

One author suggests that, as a rule, whenever an organ of the international community (Security Council, General Assembly, International Court of Justice) establishes that a State threatens international peace, assistance to that State in furtherance of the unlawful conduct is not only a violation of the Charter, but it would also constitute an act of complicity.¹⁸ The same author further suggests that in such cases intent should be presumed, because the wrongful behaviour would be a matter of common knowledge.¹⁹ In the context of arms transfers, this interpretation would assume a close connection between the supply of weapons and the perpetuation of violence, as the State transferring the weapons would then be considered an accomplice to a threat to international peace.

Individual criminal responsibility

Responsibility for violations of international human rights law, IHL or UN Charter obligations does not only fall on States. It can also, directly or indirectly, fall on individuals, for example, arms brokers, transport agents or financiers who help arrange arms transfers. Under international criminal law, the activities of arms traffickers are most likely to fall into the category of the crime of “complicity”. The elements of accomplice liability were defined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in some of its leading decisions.²⁰ While neither the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) or the International Criminal Court (ICC) specifically identify the provision of weapons or other concrete military assistance as constituting practical assistance for the purposes of establishing criminal liability for “aiding” in the commission of a crime, there is a strong basis in international law for interpreting them in this way.

*Given the intense publicity about war crimes and other atrocities in Sierra Leone, made known not only in specialized documents such as those issued by the United Nations and international non-governmental organizations but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, small arms suppliers and so on have knowledge of their contribution to the conflict and to the offences being committed.*²¹

In a 1998 decision, the ICTR stated that the elements of the crime of complicity in genocide included “procuring means, such as *weapons*, instruments or any other

¹⁷ A full version of the commentary is available at:

http://law2.biz.uwa.edu.au/law/courses/IntroToPubIntLaw/responsibility_commentaries.pdf

¹⁸ Graefrath, B (1996), “Complicity in the Law of International Responsibility”, *Revue belge de droit international*, Vol. 2, p. 377

¹⁹ Graefrath, B (1996), p. 377

²⁰ *Prosecutor v. Dusko Tadic* (Case IT-94-1), Trial Chamber, 7 May 1997, para. 674 and *Prosecutor v. Furundzija* (Case IT-95-17/1-T), Trial Chamber, 10 December 1998, para. 249

²¹ Schabas, W (2001), “Enforcing international humanitarian law: Catching the accomplices”, *International Review of the Red Cross*, issue 83, p. 451, cited in Clapham (2002), “On Complicity”, p. 256

means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose.”²² In 2003, the Prosecutor of the SCSL indicted Charles Taylor, charging the former Head of State of having “aided and abetted” abuses perpetrated by Sierra Leonean rebels through the provision of financing, training, weapons, and other support and encouragement.²³ The ICC Statute also establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by *providing the means* for its commission.²⁴ In other words, providing the weapons used to commit or attempt to commit one of the crimes for which the ICC has jurisdiction is sufficient to give rise to responsibility as an accomplice.²⁵

Prosecution and enforcement

While the body of law described above is being further developed and codified year by year (and war by war), it does not currently adequately protect people around the world who fall victim to abusive armed forces. Several limitations prevent the articles on State responsibility and international criminal law from effectively sanctioning States and individuals who transfer weapons likely to be misused.

For instance, at this time international criminal law offers only a limited avenue for arguing that individuals who supply weapons to human rights abusers must be brought to justice. The most extreme cases may be covered where there is a will and jurisdiction to prosecute such individuals before national courts,²⁶ or where they fall within the jurisdiction of an international court, such as in the case against Charles Taylor before the SCSL. However, individuals who carry out arms brokering activities still have a great deal of leeway to divert weapons to illegal destinations.²⁷ Their activities remain largely unregulated by States, and even where national regulations exist there are important gaps or loopholes that make it possible for this lucrative business to flourish.²⁸ The prospect of being charged with complicity to a criminal offence is still too distant for most illicit brokers to think twice before

²² *Prosecutor v. Akayesu*, (Case ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 537 [emphasis added].

²³ *Prosecutor v. Charles Ghankay Taylor* (Case SCSL-03-I), Indictment, 7 March 2003, para. 26 [emphasis added].

²⁴ Rome Statute, article 25(3)(c) [emphasis added].

²⁵ Clapham (2002), “On Complicity”, p. 254

²⁶ In 2005 a court in the Netherlands held hearings in a trial involving a Dutch national, Frans van Anraat, accused of helping former Iraqi leader Saddam Hussein commit war crimes and genocide by providing him with materials for chemical weapons. See BBC News, 18 March 2005. Available at: news.bbc.co.uk/2/hi/middle_east/4360137.stm

²⁷ In the context of national and regional regulatory instruments, “brokers” and “brokering activities” are defined in a variety of different ways. In its *Model Convention on the Registration of Arms Brokers and Suppression of Unlicensed Arms Brokering*, the Fund for Peace defines “brokering activities” at article 1(2) as: “[...] acting as a broker, including the importing, exporting, purchasing, selling, transferring, supplying or delivering of arms or arms services, or any action taken to facilitate any of those activities, including transporting, freight forwarding, mediating, insuring or financing.” Available at: www.fundforpeace.org/publications/reports/model_convention.pdf

²⁸ The *Small Arms Survey 2004* enumerates the following loopholes in existing controls: unregulated activities (aside from importing and exporting, much of what arms brokers do is intangible and therefore difficult to regulate); lax control on weapons stock; third-party brokering (deals are arranged without the weapons entering the territory in which the intermediary activity occur); offshore financing; easily circumvented documentation requirements; ease of transport (transport agents exploit the difficulties in enforcing customs controls, particularly in countries with long borders and limited resources). *Small Arms Survey (2004), Small Arms Survey 2004: Rights at Risk*, Oxford University Press, Oxford, pp. 143-146. For an analysis of loopholes in the arms export controls of the United Kingdom, see Oxfam GB (1998), “Out of Control: the Loopholes in UK controls on the arms trade”, pp. 3-12. Available at: www.oxfam.org.uk/what_we_do/issues/conflict_disasters/downloads/control.rtf

diverting weapons to embargoed States or other parties, or to terrorist groups, and human rights offenders.

In human rights law, the unfortunate paradox is that while human rights are said to be universal, prosecution of their violations are usually limited by territory. The responsibility of States toward individuals outside their jurisdiction has been vague and weak; however, the notion of States’ “extra-territorial” responsibility to cooperate in the protection and fulfilment of human rights beyond their borders is gaining strength.²⁹

Emergent international regulations

As illustrated above, weak definitions, inherent subjectivity in international law and limited enforcement mechanisms have undermined the ability of existing international law to adequately protect human security in relation to the misuse of small arms. While law in this area is being further developed and States’ obligations further clarified, the international community has pressed ahead with specific legal remedies—at the national, regional and international levels—to address various specific shortcomings in international law. This section highlights progress at the regional and global level around five key issues:

- lawful use of force and firearms by law enforcement agencies;
- regulation of civilian possession of firearms (ie. National firearms legislation);
- development of criteria for small arms transfers;
- limitation of arms transfers to non-State armed groups; and
- establishment of effective regulatory controls on private arms brokers.

Use of force and firearms by law enforcement agencies

Two international instruments have been developed in the law enforcement arena specifically to promote public security and prevent human rights violations by law enforcement officials: the *UN Code of Conduct for Law Enforcement Officials* (UN Code of Conduct),³⁰ and the *UN Basic Principles on the Use of Force and Firearms* (UN Basic Principles).³¹ These principles are now being further elaborated in the Draft Principles on the Prevention of Human Rights Violations Committed with Small Arms, currently being considered by the UN Sub-Commission on the Promotion and Protection of Human Rights.

Adopted in 1979, the UN Code of Conduct outlines two key concepts that should govern the use of force and small arms by law enforcement officers: *necessity* and *proportionality*. It states that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty”. The

²⁹ See, for example, General Comment 31 of the Human Rights Committee: General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : 26/05/2004; CCPR/C/21/Rev.1/Add.13. (General Comments), which advances the interpretation of territoriality. Available at: [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)

³⁰ UN (1979), *UN Code of Conduct for Law Enforcement Officials*, adopted by UN General Assembly Resolution 34/169 of 17 December. Available at: www.unhcr.ch/html/menu3/b/h_comp42.htm

³¹ UN (1990), *UN Basic Principles on the Use of Force and Firearms*, A/CONF.144/28/Rev.1 at 112

supporting commentary to the UN Code of Conduct indicates that such force should never be “disproportionate to the legitimate objective to be achieved”.³²

The UN Basic Principles, adopted in 1990, are a distillation of best practices, with a good deal of civil society input, especially from human rights advocates. Among the provisions of the UN Basic Principles are requirements for law enforcement to:

- resort to force and the use of guns only when non-violent means are ineffective or without promise of achieving intended results;
- exercise restraint in the use of force and firearms and act in proportion to the seriousness of the offence;
- minimise damage and injury, and respect and preserve human life; and
- report any incidents where injury or death is caused by the use of force and small arms by law enforcement officials.

The UN Basic Principles also state that exceptional circumstances, such as internal instability or public emergency, may *not* be invoked to justify departure from the principles, and that governments must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law. This second provision is particularly important, as the judiciary needs to act independently and efficiently to appropriately prosecute and punish misconduct by individual law enforcement officials.

At the regional level, in 1994 the Organisation of Security and Co-operation in Europe (OSCE) promulgated a Code of Conduct on Politico-Military Aspects of Security,³³ which provides that “[e]ach participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy. Each participating State will provide controls to ensure that such authorities fulfil their constitutional and legal responsibilities.”³⁴ This provision gives added weight to the proposition that States are under a duty to ensure their agents, law enforcement agencies and militaries are held accountable.

Regulating guns in the hands of civilians

In growing recognition of States’ obligation to exercise “due diligence” to protect their populations from patterns of serious armed crime committed by civilians, several recent and ongoing regional and multilateral processes have encouraged greater control over private ownership and use of small arms and light weapons.³⁵

³² *UN Code of Conduct*, paras. a and b; see also Small Arms Survey (2004), ‘Critical triggers: Implementing international standards for police firearm use’, in: *Small Arms Survey 2004*, p. 214

³³ Organisation for Security and Co-operation in Europe (1994), *Code of Conduct on Politico-Military Aspects of Security*, DOC.FSC/1/95. Available at: www.osce.org/documents/sg/1994/12/702_en.pdf

³⁴ OSCE (1994), *OSCE Code of Conduct*, art. 21

³⁵ The UN Special Rapporteur on Human Rights and Small Arms has included a set of articles on “due diligence to prevent human rights abuses by private actors” in her Draft Principles on the Prevention of Human Rights Violations Committed with Small Arms. Draft article 10 requires, for instance, governments to incorporate licensing requirements into their national laws, including—at a minimum—a screening for “age, mental fitness, requested purpose, prior criminal record and prior acts of domestic violence”. Licenses are to be renewed periodically.

In May 1997, 33 countries sponsored a resolution in the UN Commission on Crime Prevention and Criminal Justice that emphasised the importance of State responsibility for effective regulation of civilian possession of small arms, including licensing owners, record keeping for guns, safe storage requirements and appropriate penalties for illegal possession.³⁶ This effort led to the adoption in 2001 of a protocol to the Transnational Crime Convention on firearms trafficking, which criminalises illicit trafficking and requires guns to be marked at the point of manufacture, import and transfer from government into private hands (the Firearms Protocol).³⁷ The June 2005 Instrument on Marking and Tracing³⁸ (Marking and Tracing Instrument) also provides that all small arms and light weapons must bear a unique marking, and that weapons transferred from government stocks to permanent civilian use, if not yet marked, must at least be marked to identify the country from which the transfer is made.

Several recent regional agreements also include provisions calling for careful regulation of small arms in the hands of civilians. The most relevant agreements include the European Union (EU) Joint Action (1998), the Bamako Declaration (2000),³⁹ the Nadi Framework (2000),⁴⁰ the Southern African Development Community (SADC), the Andean Plan (2003)⁴¹ and the Nairobi Protocol (2004).⁴²

The Nairobi Protocol is one of the most specific on the regulation of guns in the hands of civilians. One of its objectives is to “encourage accountability, law enforcement and efficient control and management of small arms held by States Parties and civilians”. Each of the eleven East African States that ratifies it is responsible for incorporating into its national law:

- prohibition of unrestricted civilian possession of small arms;
- total prohibition of civilian possession and use of all light weapons and automatic rifles, semi-automatic rifles and machine guns;
- regulation and centralised registration of all civilian-owned small arms in its territories;
- provisions for effective storage and use of civilian-held firearms, including competency testing of prospective owners;

³⁶ UN Commission on Crime Prevention and Criminal Justice, Sixth Session (1997). The resolution was sponsored by Angola, Australia, Botswana, Brazil, Brunei, Burundi, Canada, Colombia, Croatia, Fiji, France, Gambia, Germany, Greece, Haiti, Italy, Japan, Lesotho, Malaysia, Mexico, Morocco, the Netherlands, the Philippines, Poland, Qatar, South Korea, Romania, the Russian Federation, Saudi Arabia, Sweden, Tanzania, Thailand, and Tunisia.

³⁷ *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, UN Doc. A/RES/55/255, 8 June 2001. It entered into force in 2005.

³⁸ *Draft International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, A/60/88, 27 June 2005.

³⁹ *Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons*. Available at: www.smallarmssurvey.org/source_documents/Regional

⁴⁰ South Pacific Chiefs of Police Conference and Oceania Customs Organisation (2000), *Towards a Common Approach to Weapons Control* (‘Nadi Framework’), Nadi, 10 March. Available at: www.smallarmssurvey.org/source_documents/Regional

⁴¹ OAS (2003), *Andean Plan to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, OAS Decision 552, 25 June 2003. Available at: www.comunidadandina.org/normativa/dec/D552.htm

⁴² The countries that negotiated the agreement are Burundi, the Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Seychelles, Sudan, Tanzania, and Uganda. For the text of the agreement, see www.saferAfrica.org/DocumentsCentre/NAIROBI-Protocol.asp

- monitoring and auditing of licences held and restriction of the number of guns that may be owned by individuals;
- prohibitions on pawning or pledging of small arms; and
- registration to ensure accountability and effective control of all guns owned by private security companies.

In addition, States Parties agree to encourage the surrender of illegal guns by civilians and to develop local, national and regional public education programmes aimed at encouraging responsible ownership and management of guns.

Transfer controls

In order to avoid complicity in violations of international law—and in furtherance of all States’ existing obligation to “ensure respect” for IHL—States must develop and rigorously apply detailed criteria to guide them in making decisions about the transfer of small arms and light weapons. Given the commercial and competitive nature of the international arms trade, the development of a global approach to such decision-making would be most effective.

As noted above, the UN Programme of Action on small arms agreed in 2001 does not clearly enumerate transfer criteria, but rather calls on States to “assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law”.⁴³ The Firearms Protocol also omits criteria for States to consider when licensing firearms for export.⁴⁴ However, several regional instruments—albeit of a non-binding nature—have started to elaborate such a list.

The 1998 EU Code of Conduct for Arms Exports (EU Code of Conduct) represents the most comprehensive international arms export control regime in force today.⁴⁵ It sets forth eight criteria for the issuance of export licenses. These are divided into two categories: conditions under which the denial of licences is mandatory⁴⁶ and elements that must be taken into consideration when deciding whether or not to issue a licence.⁴⁷ While respect for IHL is incumbent upon all States, the EU Code of

⁴³ UN Programme of Action, article 11

⁴⁴ *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, UN Doc. A/RES/55/255, 8 June 2001.

⁴⁵ *EU Code of Conduct for Arms Exports*, adopted by the Council of the European Union on 8 June 1998.

Available at:

www.smallarmssurvey.org/source_documents/Regional%20fora/European%20Union/EUCodeofConduct.pdf

⁴⁶ Respect for the international commitments of Member States, such as obligations arising under UN embargoes and treaties (criterion 1); respect for human rights in the country of destination (criterion 2); not contributing to a situation of armed conflict or aggravating existing tensions or conflicts in the country of destination (criterion 3); respect for the prohibition on aggression: transfers are prohibited where there exists a *clear risk* that the export would be used aggressively against another country or to assert by force a territorial claim (criterion 4).

⁴⁷ The national security of Member States as well as that of friendly and allied countries (criterion 5); the behaviour of the recipient country toward the international community, with particular consideration being given to its support or encouragement of terrorism and international organised crime; its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts; its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions (criterion 6); the risk that the equipment be diverted within the buyer country or re-exported under undesirable conditions (criterion 7); the compatibility of arms exports with the technical and economic capacity of the recipient country: reports from the UNDP, World Bank, IMF and OECD are to be taken

Conduct only mentions violations of IHL in criterion 6, which is non-mandatory, whereas respect for human rights law and for the prohibition against the use of force form the basis of mandatory criteria (criterion 2 and criterion 4).

The International Committee of the Red Cross (ICRC) has urged EU Member States to amend the list by including a separate and explicit criterion prohibiting weapons transfers if they are likely to be used to violate IHL. As the guardians of the Geneva Conventions, the ICRC has also produced a set of indicators that could assist States in exercising “due diligence” to ensure that weapons they transfer will not be used in violation of IHL.⁴⁸

The OSCE Document on Small Arms and Light Weapons,⁴⁹ adopted in 2000, includes a similar list of criteria to govern exports of small arms, including factors to take into account in weighing export decisions, and eleven criteria for when export licenses should be denied.⁵⁰ The document further provides that the issuance of licences should be avoided where they might “threaten compliance with international law governing the conduct of armed conflict.”⁵¹

Further criteria were adopted in 2002 by the Wassenaar Arrangement. These guidelines are contained in a politically binding document that specifies a number of criteria for the issuance of export licences, including respect for human rights and fundamental freedoms. Furthermore, States will also have to take into consideration the importing State’s “record of respect for international law governing the conduct of armed conflict.”⁵²

Significantly, the EU Code of Conduct, OSCE Document on Small Arms and Light Weapons and Wassenaar Best Practice Guidelines all provide that licence applications should be refused when there is clear risk that the exported goods will be used in violation of international law. This standard of “likelihood” of misuse is a lower threshold than the standard of “knowledge” included in the Articles on State responsibility, providing indication that these regional bodies are *de facto* advancing the state of law in this area.

into account in assessing the likelihood that the proposed export would seriously hamper the sustainable development of the recipient country (criterion 8)

⁴⁸ The indicators proposed by the ICRC include:

1. Whether the recipient has ratified humanitarian law instruments or made other formal engagements to apply the rules of international humanitarian law;
2. Whether the recipient has trained its armed forces in the application of international humanitarian law;
3. Whether the recipient has taken the measures necessary for the repression of serious violations of international humanitarian law;
4. Whether a recipient (which is, or has been, engaged in an armed conflict) has taken measures to cause breaches of international humanitarian law to cease and to punish those responsible for serious violations;
5. Whether stable authority structures capable of ensuring respect for international humanitarian law exist in the area under control of the recipient

(“Comments of the International Committee of the Red Cross on Criterion Six of the EU Code of Conduct on Arms Exports”)

⁴⁹ Adopted by the OSCE Forum for Security Cooperation on 24 November 2000, FSC.DOC/1/00. Available at: www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm

⁵⁰ OSCE Document article III.A.2

⁵¹ OSCE Document article III.A.2.b

⁵² *Best Practice Guidelines for Exports of Small Arms and Light Weapons*, adopted by the Plenary on 11-12 December 2002. See in particular article 1 and 2. Available at: www.wassenaar.org/docs/best_practice_salw.htm

A number of States confirmed their support for stronger transfer controls during the January 2006 PrepCom,⁵³ and this appears to be an area where genuine progress may be achieved at the Review Conference.

Transfers to non-State armed groups⁵⁴

The issue of State “complicity” is also raised, potentially, by arms transfers to non-State armed groups—if those groups go on to commit human rights violations or war crimes with the weapons. While not all transfers to such groups would rise to this threshold, many States object strenuously to *any* arms transfers to non-State forces because of the threat to human security these groups pose. However, there is an inherent tension in international law relating to the question of the legality of arms supply to armed groups that leaves the matter subject to widely varying interpretation.

The UN Charter enshrines two fundamental principles that have special significance for the issue. One is the principle of respect for equal rights and the self-determination of peoples. The other is the principle of non-intervention in domestic affairs (Article 2(7)) and the suppression of aggression against nations.

Whether support of insurgency is either permissible or desirable in any particular situation ultimately will depend upon the relative weights one accords these principles. In light of the Charter’s stated purposes, these two principles were designed to be mutually reinforcing. In the context of insurgencies and national liberation movements, striking the balance between these has become a continuing source of controversy within the international legal community.⁵⁵

The principle of non-intervention in the domestic affairs of another State also exists in customary international law and imposes additional limitations on transfers of small arms. If a State transfers small arms into the territory of another State without complying with the recipient’s import regulations, for instance, not only does the failure to respect the applicable rules make the transfer illegal under *national* law, but the supply of small arms can amount to unlawful interference in the recipient State’s domestic affairs under *international* law (especially if they are supplied to opposition forces in the recipient State). This was confirmed in the International Court of Justice case between Nicaragua and the US,⁵⁶ in which the Court found that by training, arming, equipping and financing the contra forces in and against Nicaragua, the US had acted in breach of the obligation under customary international law not to intervene in the affairs of another State.⁵⁷

⁵³ A total of 23 statements (including the African Group, the EU, Colombia on behalf of the nine States, and the US) called for stronger transfer controls at the PrepCom. See: www.hdcentre.org/UN+process+on+small+arms+control.

⁵⁴ The Geneva Call defines non-state actors as “Any armed actor with a basic structure of command operating outside state control that uses force to achieve its political or allegedly political objectives.” See Geneva Call (2005), *Armed non-state actors and landmines*, PSIO, Geneva, Volume I, p. 10. Available at: www.genevacall.org/resources/testi-publications/gc-ansal-oct05.pdf

⁵⁵ Captain Benjamin P. Dean, “Self-Determination and US Support of Insurgents: A Policy-Analysis Model”, *Military Law Review*, Fall 1988.

⁵⁶ *Case concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v United States of America)*, ICJ Reports 1986, p.14

⁵⁷ This principle was further elaborated on in the context of the transfer of small arms for use in acts of terrorism. Article 17 of the ILC’s 1988 Draft Code of Crimes Against Peace and Security of Mankind, for instance, classified

Unfortunately the Articles on State responsibility are not helpful on this subject. The transferring State could only be held responsible for an internationally wrongful act if weapons transferred were subsequently used in violation of international law by another State, and the Articles have no application where a State supplies arms to a armed group (except where such a group becomes the new government of the State or succeeds in establishing a new State).⁵⁸ Moreover, due to the “knowledge” requirement, the practical usefulness of this developing body of law appears limited to some of the most egregious violations of international law. As a result, it is difficult to conclude that the law regulating inter-State relations currently requires States to fully investigate the end-use of the weapons they plan to transfer, and that failure to do so could amount to complicity in violating international law.

When it passes comprehensive arms embargoes, the UN Security Council creates international law prohibiting States from transferring arms to certain States or entities. Increasingly, non-State armed groups are the explicit subject of such embargoes. Currently, every State in the international community is prohibited from transferring arms and related material, including ammunition, to groups in the Democratic Republic of Congo⁵⁹, Liberia⁶⁰, Rwanda⁶¹, Sierra Leone⁶² and in Sudan⁶³, as well as to Al-Qaida and associated persons.⁶⁴

The issue of arms transfers to non-State armed groups is not addressed in the 2001 UN Programme of Action. The conference failed to reach a consensus on how to address the issue, and a deadlock emerged, preventing constructive efforts to reduce the destruction arising from armed violence committed by many armed groups. At the

intervention in the affairs of a State as crime against peace and defined it as “*forming [armed] subversive or terrorist activities by organising, assisting or financing such activities or by supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights*”. Ultimately, however, this Article was not adopted by the Commission in part because of the decline in the number of situations which qualified as strictly *internal* affairs. Nevertheless, there was agreement that non-intervention was recognised as a fundamental principle of customary international law. See *Yearbook of the International Law Commission 1995 Volume II Part Two and Report of the International Law Commission*, 1988, paras. 246-255 for further analysis.

⁵⁸ See Article 10 of the ILC Articles on State Responsibility. For a discussion of arms transfers to armed groups, see Capie, David (2004), *Armed groups, weapons availability and misuse: An overview of the issues and options for action*, Background paper for the meeting organised by the Centre for Humanitarian Dialogue in Bamako (Mali), 25 May. Available at: www.hdcentre.org (small arms/Putting People First/Bamako meeting)

⁵⁹ S/RES/1493, 28 July 2003, targeting “all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement, in the Democratic Republic of Congo” (for a period of 12 months); S/RES/1552, 27 July 2004 (renewed for a period of 12 months); S/RES/1596, 3 May 2005 extended the embargo to *any* recipient in the DRC to 31 July 2005; S/RES/1616, 29 July 2005 (renewed for a period of 12 months).

⁶⁰ S/RES/1521, 22 December 2003, targeting the LURD and the Movement for Democracy in Liberia (MODEL), as well as “all former and current militias and armed groups” (for a period of 12 months); S/RES/1579, 21 December 2004 (renewed for a period of 12 months); S/RES/1647, 20 December 2005 (renewed for a period of 12 months).

⁶¹ S/RES/1011, 16 August 1995, targeting “non-governmental forces” inside Rwanda and persons in neighbouring States that intend to use arms and related materiel in Rwanda.

⁶² S/RES/1171, 5 June 1998, targeting “non-governmental forces in Sierra Leone”.

⁶³ S/RES/1556, 30 July 2004, targeting “all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur”.

⁶⁴ S/RES/1390, 28 January 2002 (for a period of 12 months); S/RES/1455, 17 January 2003 (decision to improve the implementation of the measures over a further period of 12 months); S/RES/1526, 30 January 2004 (decision to improve the implementation of the measures over a further period of 18 months); S/RES/1617, 29 July 2005 (decision to review measures with view to possible further strengthening in 17 months, or less).

Biennial Meeting of States to discuss the UN Programme of Action in July 2005,⁶⁵ 97 States – including the African Group and the EU – called for a ban on arms transfers to such groups. Again, in January 2006 at the Preparatory Committee, at least 97 States mentioned this issue.

The Firearms Protocol provides that exporting States must first verify “that the importing States have issued import licences or authorizations” before issuing export licenses, thereby subjecting transfers to non-State actors to prior approval by the State.⁶⁶ However, the Firearms Protocol covers only commercial transactions, thereby exempting State-to-State transfers, and does not specify the criteria against which arms transfer decisions should be weighed.

A provision requiring the importing government’s approval before arms can be transferred is often included in regional instruments on arms transfers,⁶⁷ also ensuring that transfers to armed groups can only be made with the approval of the government where the group is operational. The EU Joint Action goes further, including “a commitment by exporting countries to supply small arms *only to governments* (either directly or through duly licensed entities authorised to procure weapons on their behalf)”.⁶⁸

Regulating arms brokering activity

Another potential issue of State “complicity” is raised by the practice of private arms brokering—when private citizens negotiate or facilitate the transfer of weapons.⁶⁹ Most clearly, States have a legal obligation to ensure that their private citizens do not violate arms embargoes mandated by the UN Security Council. And yet most States do not currently regulate this area of activity – in 2005 less than 40 countries had regulations governing the brokering of arms deals.⁷⁰

The UN Programme of Action on small arms raises the issue of licensing arms brokers⁷¹ and since the 2001 conference there has been a growing recognition in the international community of the need to more tightly regulate the arms brokering business. After a long series of consultations, during the UNGA First Committee⁷² meeting in October 2005 a resolution was finally adopted which included provisions

⁶⁵ United Nations Second Biennial Meeting of States to Consider the Implementation of the Programme of Action (PoA) to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

⁶⁶ UN Firearms Protocol art. 10.2(a)

⁶⁷ See Nairobi Protocol art. 10.b.i; *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials* (1997) article IX.2 and 3; OSCE Document art. III(B)3. See also the UN Firearms Protocol, art. 10.2.a. The Wassenaar *Best Practice Guidelines* provide that “Participating States will take especial care when considering exports of SALW other than to governments or their authorised agents.”

⁶⁸ *EU Joint Action of 17 December 1998 Adopted by the Council of the European Union on the Basis of Article J.3 of the Treaty of the European Union on the European Union’s Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons*, 1999/34/CFSP of 17 December 1998 [emphasis added]. Available at: projects.sipri.se/excon/eusmja.htm. The *Joint Action* only covers small arms and accessories specially designed for military use. In 2002 the *Joint Action* was amended to include ammunition.

⁶⁹ See footnotes 26 and 27 for a fuller definition of brokering activities and the loopholes that brokers exploit.

⁷⁰ Biting the Bullet and International Action Network on Small Arms (2005), *International action on small arms 2005: Examining implementation of the UN Programme of Action*, BtB and IANSA, London, p. 6

⁷¹ UN Programme of Action, articles 14 and 39

⁷² The First Committee on Disarmament and International Security is one of 6 Main Committees of the UN General Assembly. The First Committee meets every year in October for a 4-5 weeks session, after the General Assembly General Debate.

for establishing another Group of Governmental Experts (GGE) to look at the issue of illicit brokering and report to the General Assembly at its 62nd session. However, States disagreed over whether the GGE should be mandated to look at the feasibility of a legally binding international instrument on brokering, and ultimately this particular proposal was withdrawn so that further consultations on the issue could be conducted.

Increasingly, States are taking the view that in licensing transfers brokered by private dealers they should adopt criteria similar to those established for transfer controls. In the meantime, the Firearms Protocol encourages the registration of brokers operating within the territory of States Parties as well as the licensing or authorisation of brokering activities. Moreover, information relating to licensing or authorisation of brokers and brokering should be shared with other States Parties.⁷³

Several regional instruments have also tackled the issue since 2001. The 2001 Southern Africa Development Community (SADC) *Protocol on the Control of Firearms, Ammunition and Other Related Materials*⁷⁴ calls on Member States to incorporate into their national laws as a matter of priority, “provisions that regulate firearm brokering in the territories of State Parties.” Almost identical provisions have been incorporated into the 2004 *Nairobi Protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes Region and the Horn of Africa*,⁷⁵ which includes a requirement to adopt uniform minimum standards with respect to arms transfers and brokering activities.

While these two documents provide for useful definitions of arms brokers and brokering activities, they remain limited in their scope, as they only apply to activities carried out within the territory of the State. The same point is valid for the OSCE *Document on Small Arms and Light Weapons*, which only requires the registration of brokers “operating within their territory.”⁷⁶ Other States are promoting provisions that control brokers and brokering activities carried on outside their territory. The EU took this approach in its *Common Position on arms brokering* (EU Common Position), adopted in June 2003.⁷⁷ It also appears to be the position favoured by a number of participants who gathered in Oslo in 2003 at the initiative of the Governments of the Netherlands and Norway to discuss common approaches towards ensuring effective controls on brokering activities.⁷⁸

⁷³ UN Firearms Protocol art. 15

⁷⁴ Adopted on 14 August 2001. Available at: www.sadc.int/index.php?action=a1001&page_id=protocols_firearms

⁷⁵ Nairobi Protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes Region and the Horn of Africa, 21 April 2004. Available at: www.saferafica.org/DocumentsCentre/NAIROBI-Protocol.asp

⁷⁶ OSCE Document article III.D.1(i)

⁷⁷ EU Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, article 2(1). Available at: www.smallarmssurvey.org/source_documents/. For an overview of the EU Common Position, see Anders, H (2004), *Controlling Arms Brokering: Next Steps for EU Member States*, Groupe de recherche et d’information sur la paix et la sécurité, in cooperation with IANSA, Pax Christi Vlaanderen, Pax Christi Netherlands, Brussels, January.

⁷⁸ *Dutch-Norwegian Initiative on Further Steps to Enhance International Co-operation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons*, Oslo, 23-24 April 2003, Conference Report, at 11. Available at: www.nisat.org/Brokering/Conference%20Report%20fulltext.pdf

The *Model Brokering Regulations for the control of brokers of firearms, their parts and components and ammunition*,⁷⁹ adopted in 2003 by the Organisation of American States (OAS), enumerates a set of criteria for prohibiting brokering activities and refusing to grant licenses, including if the brokering activities “seriously threaten to (a) result in acts of genocide or crime against humanity; (b) violate human rights contrary to international law; (c) lead to the perpetration of war crimes contrary to international law; (d) violate a United Nations Security Council embargo or other multilateral sanctions to which the country adheres, or that it unilaterally applies; (e) support terrorist acts; (f) result in a diversion of firearms to illegal activities, in particular, those carried out by organized crime; or (g) result in a breach of a bilateral or multilateral arms control or non-proliferation agreement.”⁸⁰ Interestingly, its provisions apply “to all brokers and brokering activities whether or not: (a) the brokers carry on their brokering activities in _____ (country) or in other countries; or (b) the firearms, parts and components and ammunition enter into the territorial jurisdiction of _____ (country).”⁸¹

In December 2003, the Wassenaar Arrangement⁸² followed suit by adopting the *Elements for Effective Legislation on Brokering*,⁸³ whereby members agreed to strictly control the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations. Its provisions apply “whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State. Similarly, a licence may also be required regardless of where the brokering activities take place.”⁸⁴

Opportunities for action

The 2001 UN Programme of Action is currently the most comprehensive global framework on small arms, and, although it is not legally-binding, its global scope has helped build wide consensus and momentum around some broad principles and measures to reduce armed violence by controlling small arms and light weapons. In addition, in July 2005 the Firearms Protocol became the first legally-binding global instrument on small arms.

Despite these positive developments, gaps remain in international law with respect to the use and transfer of guns and ammunition remain, with profound negative implications for the protection of human security. For instance, how could States’ obligation to prevent patterns of abuse by private individuals translate into regulation

⁷⁹ Adopted in the context of the Inter-American Drug Abuse Control Commission, Thirty-Fourth Regular Session, 17-20 November 2003, Montreal, Canada, OEA/Ser.L/XIV.2.34 (CICAD/doc1271/03), 13 November 2003. Available at:

www.smallarmssurvey.org/source_documents/Regional%20fora/Americas/CICADFinalBrokeringMODELREGS13NOV03.pdf

⁸⁰ OAS Model Regulations art. 5

⁸¹ OAS Model Regulations art. 8

⁸² The Wassenaar Arrangement is an organisation of 33 of the world’s largest arms exporters from five continents dedicated to promoting transparency and greater responsibility regarding the arms trade, including Argentina, Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, South Korea, Romania, the Russian Federation, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, the UK and the US.

⁸³ Agreed at the 2003 Plenary. Available at: www.wassenaar.org/2003Plenary/Brokering_2003.htm

⁸⁴ Wassenaar Elements for Effective Legislation of Arms Brokering, art. 1

of private ownership and use of firearms? According to which criteria must States assess the appropriateness of an arms transfer, and what level of knowledge would make them complicit in a wrongful deed if weapons were nevertheless misused? What rules should govern arms transfers to non-State armed groups, or arms transfers arranged through brokers? Do these rules cover only small arms, or do they extend also to light weapons and ammunition? How can relevant laws be better enforced?

As profiled above, these questions have often been addressed at the regional level, providing useful models and lessons learned. However, this reliance on regional arrangements can result in a fragmented patchwork of provisions, susceptible to gaps, inconsistencies and loopholes. These gaps need to be closed at the global level in order to provide protections to all people. A crucial opportunity for action will present itself in June/July 2006, during the First Review Conference (RevCon) of the UN Programme of Action on small arms.

Importantly, as long as the small arms process continues to produce multilateral instruments that are politically rather than legally binding, progress in the area will be dependent on *political will* rather than legal compulsion. Only by making restrictions binding on all States will the commercial aspects driving the arms trade be addressed. During the Preparatory Committee held in January 2006 (PrepCom) several States called for the Marking and Tracing Instrument to be strengthened towards a legally-binding regime. Calls for legally binding instruments were also heard on the issue of transfer controls, and brokering.

The consensus rule governing the UN process on small arms should not be used to create ‘lowest common denominator resolutions’ that involve obligations which are weaker and less prescriptive than existing regional arrangements. This point was emphasised by Mexico and Jamaica, who abstained from voting on provisions calling on States to implement the Marking and Tracing Instrument during the First Committee meeting in October 2005 because, they argued, the provisions did not make reference to existing regional and universal instruments such as CIFTA,⁸⁵ which *are* binding upon members.

Of the issues raised in this briefing paper, the development of arms transfer criteria – including restrictions on brokering activities – is currently generating the most attention within the international community at a global level. Ongoing processes include the Group of Governmental Experts on brokering, which is scheduled to meet for the first time from 4 to 8 September 2006,⁸⁶ and the Transfer Controls Initiative led by the United Kingdom.⁸⁷

The ‘Control Arms’ campaign, launched in October 2003 by the International Action Network on Small Arms (IANSA), Amnesty International and Oxfam International, promotes the adoption of an international Arms Trade Treaty (ATT). At the July 2005 Biennial Meeting of States, 36 States expressed their support for the ATT or their interest in developing a similarly legally-binding instrument on small arms transfers; a

⁸⁵ The *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials* adopted by the Organisation of American States.

⁸⁶ This meeting has been scheduled by the UN and appears on the UN calendar of conferences and meetings at: www.un.org/events/index.html

⁸⁷ For a summary report of the conference held at UN Headquarters in Geneva on 17 November 2005 on this issue visit: www.geneva-forum.org/Reports/20051117pdf.pdf

further 35 States expressed support for common standards regulating the international trade in small arms.⁸⁸ By January 2006, with the support of the African Group and the European Union, this had reached a total of some 119 States.

As it currently stands, the draft ATT codifies existing international law with reference to the obligation of States under the law of State responsibility.⁸⁹ As highlighted above, this law prohibits States from aiding and assisting other States in the commission of an internationally wrongful act, which can include serious breaches of IHL or human rights law. As mentioned, however, the law of State responsibility does not directly cover cases where small arms are transferred to non-State armed groups.

In parallel, the UN Special Rapporteur on Small Arms and Human Rights, Barbara Frey, is developing a number of Draft Principles on the prevention of human rights violations committed with small arms, which usefully combine obligations with regard to State officials, measures to prevent human rights abuses by private actors and a prohibition on governments transferring small arms in circumstances where they are likely to be used to commit serious human rights violations.

As noted above, the coming year provides an important opportunity for the international community to link these two initiatives. At the Review Conference to discuss the further implementation of the 2001 UN Programme of Action, several mechanisms for further development and strengthening of the UN Programme of Action will be up for debate. While the Programme of Action itself will not be re-opened for negotiation, several States and non-government organisations are encouraging the development of annexes or associated guidance documents to be appended to it.⁹⁰

Furthermore, a number of States at the PrepCom called for the adoption of an informal intersessional programme of work that would involve meetings between the Biennial Meetings and Review Conference(s) proscribed by the UN Programme of Action. This would enable States to develop substantive ideas and recommendations for consideration during formal meetings and Review Conference(s). There was also a suggestion that the RevCon should initiate processes to develop international standards and instruments in areas where globally harmonised standards and regulations are needed to successfully combat the illicit trade.

The issues profiled above—all of which already have achieved a significant degree of consensus—could form the basis of such initiatives. In particular, in addition to reaffirming their existing obligations, such as the obligation to ensure that official security forces do not directly violate human rights and IHL responsibilities, States could also usefully develop international legal standards in a number of respects, for example through:

⁸⁸ See IANSA BMS Report 2005, p. 2. Available at: www.iansa.org

⁸⁹ Text of the draft treaty is available at: www.controlarms.org/the_issues/ATT_0504.pdf

⁹⁰ See ‘International Action on Small Arms 2005: Examining Implementation of the UN Programme of Action’ (‘Red Book’ produced by Biting the Bullet in association with IANSA), pp. 319-20. Available at: www.iansa.org/documents/2005/red-book/red-book-2005.pdf; and Biting the Bullet (International Alert, Saferworld and University of Bradford), *Promoting Effective Global Action on Small Arms: Priorities for the 2006 UN Review Conference*, available at: www.international-alert.org/publications/241.php

- Best practices on the regulation of private ownership and use of small arms;
- Clear and specifically enumerated guidelines for assessing the legality of potential arms transfers, based on existing IHL and human rights obligations⁹¹;
- Further guidance on the legality of arms transfers to non-State armed groups—perhaps through the establishment of a Group of Governmental Experts⁹²; and
- A legally binding global agreement on the stringent regulation of arms brokers and brokering activities.

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⁹¹ Consideration should be given also to identifying situation-specific criteria that would address directly the types of cases in which transfers should always be prohibited. For example, criteria could prohibit transfer to any state or territory where the International Criminal Court is investigating or prosecuting war crimes or crimes against humanity, or to any state that has not met minimum international standards in regard to national use, control, and stockpiling of guns and ammunition. See also ICRC criteria enumerated in footnote 47 .

⁹² Some suggestions are presented in Centre for Humanitarian Dialogue (2004), *Putting Guns in Their Place: A resource pack for two years of action by humanitarian agencies*, HD Centre, Geneva, pp. 48-51. Available at: www.hdcentre.org (small arms/publications)

Annex: Relevant sources of international law

I. Global Treaties

United Nations Charter (especially Articles 2(4), 2(7), 41)

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime, 31 May 2000.

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)

International Covenant on Civil and Political Rights (1976)

1949 Geneva Conventions & 1977 Protocols

First Geneva Convention - for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949)

Second Geneva Convention - for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949)

Third Geneva Convention - relative to the Treatment of Prisoners of War (Geneva, 12 August 1949)

Fourth Geneva Convention - relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)

Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Protocol II (1977) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem

II. UN Documents

Security Council Resolutions

S/RES/1539, 22 April 2004 (children in armed conflict)

S/RES/1460, 30 January 2003 (children in armed conflict)

S/RES/1379, 20 November 2001 (children in armed conflict)

S/RES/1196, 16 September 1998 (implementation of arms embargoes)

General Assembly Resolutions

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty, resolution 2131 (XX), 21 December 1965.

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, resolution 2625 (XXV), 24 October 1970.

Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83, 12 December 2001.

The Illicit Trade in Small Arms and Light Weapons in all its Aspects, UN Doc. A/58/241, 9 January 2004.

Reports

The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms, Working paper submitted by Barbara Frey in accordance with Sub-Commission decision 2001/120, Economic and Social Council, UN Doc. E/CN.4/Sub.2/2002/39, 30 May 2002.

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Report of the Secretary-General on ways to combat subregional and cross-border problems in West Africa, UN Doc. S/2004/200, 12 March 2004.

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