

# Complicity and beyond: International law and the transfer of small arms and light weapons

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## Abstract

*Momentum is growing around a proposed treaty governing the international transfer of small arms and light weapons. Those promoting the new instrument emphasize the existing obligations of States, under the law of State responsibility, not to aid or assist another State in violating international law. This article explores the extent to which the prohibition of “complicity” is a sufficient basis for requiring States to consider the end-use of the weapons they transfer. It offers suggestions for strengthening the effectiveness of the current draft treaty in a way that places respect for international humanitarian law and human rights at its core.*



Small arms and light weapons<sup>1</sup> that fall into the wrong hands often become tools of oppression, used to commit violations of human rights and international humanitarian law. They frequently exacerbate situations of regional instability and armed conflict and hinder post-conflict reconstruction. According to recent figures put forward by the Conventional Arms Branch of the United Nations Department for Disarmament Affairs, there are over 600 million small arms and

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light weapons in circulation worldwide. “Of 49 major conflicts in the 1990s, 47 were waged with small arms as the weapons of choice. Small arms are responsible for over half a million deaths per year, including 300,000 in armed conflict and 200,000 more from homicides and suicides.”<sup>2</sup>

The small arms problem has many interrelated and interdependent facets, from the conditions that create demand for these weapons to the abuses they facilitate and their rampant availability. Controlling cross-border transfers of weapons is a particular challenge for the international community because it cannot be fully addressed without the concerted action of all States. It is a typical collective action problem, where lower regulatory standards or lesser regulatory capacity of a few States can usurp the best intentions of the rest. Too easily, small arms find their way to those who abuse them because States have not sufficiently controlled what leaves their territory and to whom it goes.

Increasingly, attention is being given to the nexus between the availability of small arms and the perpetration of violent acts on a large scale. This has led some States to include end-use criteria based on human rights and humanitarian law in their arms transfer laws and policies. This development is a positive step in the fight against the misuse of small arms. The trend, however, is not followed by all major arms-exporting nations, and the international law standards used to assess whether or not a transfer should be authorized are by no means interpreted uniformly or consistently. The lack of comprehensiveness and uniformity results in a permissive environment for the continued transfer of weapons to recipients likely to use them in violation of international law.

Momentum is growing in support of a proposed international instrument that would codify the notion that States must prevent weapons from leaving their territory when there is a known risk that their end-use will involve serious violations of international law.<sup>3</sup> Building on the message of “no weapons for abuse”, the proposal seeks to prohibit States from becoming accomplices in the violent behaviour of others, whether they are other States,

1 “Small arms are weapons designed for personal use, while light weapons are designed for use by several persons serving as a crew. Examples of small arms include revolvers and self-loading pistols, rifles, sub-machine guns, assault rifles and light machine-guns. Light weapons include heavy machine-guns, some types of grenade launchers, portable anti-aircraft and anti-tank guns, and portable launchers of anti-aircraft missile systems. Most small arms and light weapons would not be lethal without their ammunition. Ammunition and explosives thus form an integral part of small arms and light weapons used in conflicts. They include cartridges (rounds) for small arms, shells and missiles for light weapons, anti-personnel and anti-tank hand grenades, landmines, explosives, and mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems” (description taken from the *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, New York, 9–11 July 2001*, <<http://disarmament.un.org:8080/cab/smallarms/>> (last visited 25 July 2005). In this article, the expression “small arms” is used as shorthand to refer to small arms and light weapons.

2 United Nations Department for Disarmament Affairs, Conventional Arms Branch, “Small Arms and Light Weapons”, available online: <<http://disarmament.un.org:8080/cab/salw.html>> (last visited 25 July 2005).

3 See calls for the adoption of an Arms Trade Treaty, Control Arms Campaign, <<http://www.controlarms.org>> (last visited 2 September 2005).

armed non-State Parties, corporations or individuals. Those promoting the new treaty argue that its underlying principle is rooted in the law of State responsibility. This article explores that argument and discusses some inherent limitations in applying the law of inter-State relations to the problem of arms transfers. It seeks to clarify the legal basis for adopting a global agreement on international arms transfers and to home in on the norms of international law that best support this initiative.

The first section of the article explores the notion of “complicity” under the law of State responsibility, a notion that is conceptually at the heart of the principle expounded by the promoters of the proposed treaty. The conclusion reached is that while it may provide a sound doctrinal grounding for that treaty, the prohibition alone of complicity in inter-State relations offers an insufficient basis for preventing States from licensing weapons transfers to abusers of human rights and humanitarian law. In a second section, primary rules of international law are considered. This enquiry into human rights law, international humanitarian law and international criminal law yields a more complete picture of the legal regime applicable to States and individuals that supply weapons for abuse. The third section is devoted to current regional and international initiatives that lend weight to the proposed treaty, while the fourth and final section of the article offers some thoughts on how to transform the current draft version of the treaty into a compelling and effective legally binding instrument.

## Complicity under the law of State responsibility

International law limits the transfer of small arms in a number of ways. One of these is the specific prohibition on the use — and derivatively on the transfer — of certain weapons by virtue of principles of international humanitarian law.<sup>4</sup> Another is the prohibition of transfers to specific States or parties as dictated by mandatory embargoes imposed by the United Nations Security Council. A less obvious but no less important limitation is contingent upon the end-use of the weapons. In situations where there are no prohibitions affecting the transferred weapons, where the country of destination is not subject to an arms embargo, and where compliance with national licensing requirements is such that the transaction is in line with domestic law, international law may nonetheless prohibit a State from transferring weapons because of the way in which the weapons will be used in the recipient State. Under the law of State responsibility, if the decision to transfer weapons facilitates the commission of an internationally wrongful act, such as the perpetration of a war crime or the abusive behaviour of a police force, then the transferring State may be held responsible for making such violations possible.

The rule prohibiting the complicit behaviour of States is a “secondary” or “derivative” form of responsibility, which targets States that aid or assist others

4 These principles prohibit the use of weapons that are incapable of distinguishing between combatants and civilians or those that are of a nature to cause superfluous injury or unnecessary suffering.

in violating international law. The International Law Commission's Draft Articles on State Responsibility<sup>5</sup> represent the first attempt to codify "complicity" in connection with the law regulating inter-State relations.<sup>6</sup> Articles 16 and 41(2) both prohibit aiding and assisting States in violating international law. Article 16 is more often quoted in the literature on arms transfers because it covers aid and assistance in the context of any violation of international law. Article 41(2) has a narrower application but it contains a powerful basis for arguing that where the most egregious violations of international law are being perpetrated, States face an absolute prohibition against transferring weapons to those responsible for the violations.

## Article 16

Article 16 reads as follows:

"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 the knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State."

Broadly speaking, what this would mean in the context of small arms transfers is that a State transferring weapons to another State which uses them to commit internationally wrongful acts (acts which the transferring State knew about) may be held responsible for doing so if it amounts to providing aid or assistance. According to the International Law Commission's Commentary, responsibility under Article 16 is limited in three ways.<sup>7</sup>

The first limitation, which is contained in the text of the provision, is that the aiding State must have knowledge of the circumstances that make the conduct of the assisted State unlawful. The Commentary explains that in providing material or financial assistance, "a State does not normally assume the risk that its assistance or aid may be used to" violate international law.<sup>8</sup> "Knowledge" as a standard of proof applicable to States can be assessed in light of public statements and official policies of the relevant organs of the State. Today, information about the human rights and humanitarian law record of States is widely available, whether through international organizations, non-governmental organizations or the media. There may frequently, then, be occasions when

5 The Draft 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 Draft Articles).

6 For a thorough analysis of the State practice that led to the codification of complicity, see John Quigley, "Complicity in international law: A new direction in the law of State responsibility", *British Yearbook of International Law*, Vol. 57, 1986, p. 77.

7 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 149, paras. 3–6 (hereinafter *Commentary*).

8 *Ibid.*, para. 4.

constructive knowledge (i.e. that can be expected from exercise of reasonable care) or objective (actual, direct) knowledge contingent on the circumstances prevailing in each case would be an acceptable interpretation of this standard of proof. As such, where the information needed in order to assess whether or not a State is using weapons in an abusive manner is widespread, then the exporting State ought to have knowledge of that information. Proliferation of information about a State's abuse of weapons could satisfy the knowledge requirement of a transferring State when it comes to determining its responsibility for supplying the weapons that aid or assist in the commission of an internationally wrongful act under Article 16.

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 given with a view to facilitating the commission of the wrongful act. According to the Commentary, "[t]his limits the application of Article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct."<sup>9</sup> The Commentary then goes on to say that a State is only responsible if "the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct..."<sup>10</sup> The intent requirement being introduced here is surprising since the Draft Articles claim to be neutral on the question of "wrongful intent", focusing instead on the objective conduct of States and leaving the mental element to be defined by the primary obligations at issue.<sup>11</sup> Moreover, a previous draft version of Article 16 was not interpreted as requiring intent to facilitate the commission of the wrongful conduct. In fact, nothing in the wording of the provision suggests such a condition.<sup>12</sup> Perhaps an interpretation that seems close to the heart of the matter is that the second limitation is really about ensuring that supplying the weapons contributed materially to the wrongful act. In order for the complicit State to be found responsible, there must be a causal relationship between the act of aiding or assisting and the ensuing violation of international law.

In the context of transfers of small arms, imposing a requirement of intent would be particularly unfortunate since it would ignore the lucrative aspect of arms deals. States that transfer weapons are often driven by commercial reasons, which include facilitating money-making deals for important

9 *Ibid.*, p. 149, para. 5.

10 *Ibid.* (emphasis added).

11 See *ibid.*, p. 81, para. 3, and p. 84, para. 10.

12 "Further credence is given to questioning whether there really is an intent requirement by reviewing a recent report of the ILC. In the report, the ILC takes note of government suggestions to get rid of the intent requirement entirely. (...) In response to these suggestions, the Special Rapporteur insinuates that requiring intent within the Article is not obligatory and may be misplaced: 'It is very doubtful whether under existing international law a State takes the risk that aid or assistance will be used for purposes which happen to be unlawful; hence some requirement of knowledge, or at least notice, seems inevitable. It is for consideration whether Article 16 currently strikes the right balance...'" (Kate Nahapetian, "Confronting State complicity in international law", *UCLA Journal of International Law and Foreign Affairs*, Vol. 7, 2002, p. 108, citing "Fourth report on State responsibility", Report by Special Rapporteur James Crawford, Fifty-Third Session, UN Doc. A/CN.4/517/Add. 1, 3 April 2000, p. 3).

domestic manufacturers.<sup>13</sup> In the post-Cold war setting, rarely will weapons transfers be motivated by purely political considerations, making it difficult to establish that a transferring State had the intent to facilitate the commission of, for instance, human rights violations. One author suggests that, as a rule, whenever an organ of the international community (Security Council, General Assembly, International Court of Justice, Human Rights Commission) establishes that a State threatens the international peace, assistance to the perpetrator is not only a violation of the Charter but also an act of complicity.<sup>14</sup> In such cases intention should be presumed because the wrongful behaviour is a matter of common knowledge.<sup>15</sup> Another author recently argued that where violations of international humanitarian law are at issue, ongoing assistance to a known violator should be presumed to be given with a view to facilitating further violations and, as a consequence, such assistance can trigger the application of the rules of State responsibility.<sup>16</sup>

Finally, responsibility under Article 16 is limited by the condition that the obligation breached must be equally opposable to both the violating and complicit States. In the case of weapons transfers, this third requirement is of little consequence. The categories of wrongful conduct that are relevant to small arms and light weapons include serious violations of human rights and grave breaches of international humanitarian law, as well as violations of the prohibition against the use of force and interference in the domestic affairs of a State, all of which are prohibited by norms of international law opposable to all States in the international community.

## Article 41(2)

While the Draft Articles do not recognize the existence of “State crimes” as a special category of wrongful acts, they nonetheless reflect the fact that certain violations of international law attract particular consequences because of their gravity. The drafters refer to these violations as “serious breaches of obligations arising under peremptory norms of general international law”, specifying that in order to be considered “serious”, such breaches must involve a gross or systematic failure by the responsible State to fulfil the obligations.<sup>17</sup>

Today, the norms that are widely accepted as peremptory in nature include the prohibitions of aggression, genocide, slavery, racial discrimination and

13 “A State, which enjoys substantial military sales to an abusive regime and continues those sales, is motivated significantly by economic interests. Regardless of the motivation, however, the effect on the people at the receiving end of the human rights abuses is the same. Article 16 should be designed to prevent human rights and international law abuses, regardless of the assisting State’s intentions” (Nahapetian, *ibid.*, p. 127).

14 Bernhard Graefrath, “Complicity in the law of international responsibility”, *Revue belge de droit international*, Vol. 2, 1996, p. 377.

15 *Ibid.*

16 Marco Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 413.

17 Draft Articles, *op. cit.* (note 5), Article 40 (2).

apartheid, crimes against humanity, torture, and the right to self-determination.<sup>18</sup> By virtue of its interpretation of the International Court of Justice's dictum in the Nuclear Weapons Advisory Opinion,<sup>19</sup> the International Law Commission also includes the basic rules of international humanitarian law in the category of peremptory norms.<sup>20</sup> This characterization was confirmed by the International Court of Justice (ICJ) in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories.<sup>21</sup>

Article 41(2) of the Draft Articles lays down the consequences for third States of a serious breach as defined in Article 40(2). It states:

“No State shall recognize as lawful a situation created by a serious breach (...), nor render aid or assistance in maintaining that situation.”

The first of the two duties of abstention incumbent upon States is one of non-recognition, which includes both acts of formal recognition and acts that imply recognition.<sup>22</sup> Recognition involves accepting the legitimacy of the situation. Transferring weapons could theoretically qualify as an act implying recognition to the extent that the goods legitimize the power of the violating State. It is more likely, however, that transferring weapons would breach the second obligation codified in Article 41(2), namely the obligation not to aid or assist the responsible State in maintaining the unlawful situation.

According to the Commentary, this second prohibition goes beyond Article 16 by including conduct “after the fact” which maintains the situation created by the violation, regardless of whether or not the breach itself is a continuing one.<sup>23</sup> Whereas for less serious internationally wrongful acts, a finding of complicity rests on an established nexus between the aid or assistance and the ensuing violation, it is sufficient where peremptory norms are concerned for the aiding State to have contributed to maintaining the illegal situation. This is directly relevant to the transfer of small arms, given the obvious connection between the availability of weapons and a State's ability to sustain a situation created by its wrongful conduct. The Commentary also mentions that the requirement of knowledge has been left out of Article 41(2) because “it is hardly

18 See *Commentary, op. cit.* (note 7), p. 188, para. 5, and pp. 246–247, paras. 4–5, citing ICJ, *East Timor (Portugal v. Australia)*, Judgment, *ICJ Reports 1995*, para. 29.

19 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 79.

20 *Commentary, op. cit.* (note 7), p. 246, para. 5.

21 Advisory Opinion of 9 July 2004, reprinted in *International Law Materials*, Vol. 43, 2004, p. 1009. Interestingly, in the context of this opinion the Court appears to suggest that grave breaches of international humanitarian law yield consequences for third States regardless of any analysis of intensity. The Court merely refers to “the character and the importance of the rights and obligations involved” rather than to the extent to which the violations involve *gross* or *systematic failures* to respect these rights or fulfil these obligations (*ibid.*, para. 159). For a discussion of this apparent widening of the scope of Draft Article 41, see Andrea Bianchi, “Dismantling the wall: the ICJ's Advisory Opinion and its likely impact on international law”, *German Yearbook of International Law*, Vol. 47, 2004, pp. 39–40.

22 See *Commentary, op. cit.* (note 7), p. 250, para. 5.

23 *Ibid.*, p. 252, para. 12. The examples given by the *Commentary* are those of the illegal situations created by the *apartheid* regime in South Africa and by Portuguese colonial rule, both of which led the Security Council to prohibit any aid or assistance to these States (S/RES/418, 4 November 1977 and S/RES/569, 26 July 1985; S/RES/218, 23 November 1965).

conceivable that a State would not have notice of the commission of a serious breach by another State.”<sup>24</sup>

## Inadequacy of the notion of complicity

As we have seen above, the Draft Articles provide a theoretical basis for the notion of holding States responsible for transferring small arms to other States that use them for illegal purposes, particularly where such purposes involve breaches of obligations arising under peremptory norms of international law. Yet the rules governing complicity under the law of State responsibility suffer from two important limitations. First, they can only cover State-to-State arms transfers and second, their practical usefulness for claiming that States have an affirmative duty to enact tighter controls on arms transfers is questionable.

There does not appear to be any basis to invoke the rules of State responsibility to prevent a State from supplying weapons to non-State Parties who use them in an abusive manner. While it is likely that this type of transaction will be caught by the customary law prohibition against intervening in the internal affairs of another State, the question remains both relevant and controversial.<sup>25</sup> One region, the European Union (EU), prohibits all transfers of small arms to non-State Parties.<sup>26</sup> Other States, most notably the United States, maintain that the right to transfer weapons to sub-State Parties should be preserved as an instrument of foreign policy.<sup>27</sup> In response to a Canadian initiative in favour of a global convention prohibiting small arms transfers to non-State Parties, a number of non-governmental organizations made the point that an outright prohibition would ignore the inherent right of self-defence of people who are fighting oppressive regimes.<sup>28</sup> Given that some States will continue to license weapons

24 *Commentary, ibid.*, p. 252, para. 11.

25 In a case opposing Nicaragua to the United States, the International Court of Justice had this to say about United States' arms transfers to the *contras*: “the support given by the United States (...) to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *ICJ Reports 1986*, para. 242).

26 Under Article 3(b) of the legally binding Joint Action on Small Arms and Light Weapons agreement, “[t]he sale of military-style small arms to sub-State or non-State groups is not permitted and the European Union Member States have renounced this form of military assistance as an instrument in their foreign and security policy”, Joint Action of 17 December 1998 adopted by the Council on the basis of Article J.3 of the Treaty on European Union on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons, 1999/34/CFS, available online: <<http://projects.sipri.se/expcon/eusmja.htm>> (last visited on 25 July 2005). The Joint Action provisions do not cover pistols, shotguns and other types of rifles used in internal conflicts.

27 David Capie, “Armed groups, weapons availability and misuse: An overview of the issues and options for action”, background paper for a meeting organized by the Centre for Humanitarian Dialogue in advance of the Sixth Meeting of the Human Security Network, Bamako, Mali, 25 May 2004, p.11, available online: <<http://www.hdcentre.org/index.php?aid=64>> (last visited on 25 July 2005).

28 *Ibid.* The Canadian proposal was circulated in 1998 in the form of a discussion paper entitled “A proposed global convention prohibiting the international transfer of military small arms and light weapons to non-State actors”, available online: <[http://www.nisat.org/export\\_laws-regs%20linked/canada/discusion\\_papera\\_proposed.htm](http://www.nisat.org/export_laws-regs%20linked/canada/discusion_papera_proposed.htm)> (last visited on 25 July 2005).

transfers to non-State Parties, it is desirable to ensure that the international standards advanced in the context of a proposed treaty apply to all transfers, regardless of the recipient's State or non-State character. The Draft Articles and the notion of complicity therein are, alone, insufficient to support such an approach.

For our purposes, the other inadequacy of the notion of complicity concerns the lack of guidance it offers regarding the specific steps required to control the undesirable flow of small arms to abusers of the weapons. As a practical matter, to be effective requires more than holding States responsible after the fact, even where such responsibility can be established under the criteria of Articles 16 and 41(2). For the small arms victim of an abusive security force, there is little comfort in knowing that the State that supplied the tools of their oppression may bear secondary responsibility under international law. Effective control of small arms transfers begins with the adoption of measures implemented by States in advance, such as establishing and operating a licensing regime that includes end-use criteria grounded in international law and provides for sanctions against individuals operating outside the regime.

## Beyond complicity

A key entry point for introducing notions of human rights and humanitarian law is the authority of the State to license companies that manufacture small arms and light weapons and persons that export, import, transport, insure and finance arms deals. While licensing may not solve the variety of problems associated with the illicit trade in small arms, it is nonetheless an important way in which States can begin to implement their commitment to the protection of those fundamental rights that are constantly being flouted with the assistance of these weapons. This section explores how the scrutiny that is needed for a credible and effective licensing process can be supported by the primary obligations of States under international law. The relevant areas of international law include obligations deriving from international humanitarian law, obligations associated with international human rights law and recent developments in the field of international criminal law.

### Obligation to “ensure respect” for international humanitarian law

A distinguishing feature of international humanitarian law is the customary obligation incumbent upon States not only to respect the law but also to ensure its respect by other contracting States, as laid down in Article 1 common to the four Geneva Conventions.<sup>29</sup> In a judgment delivered in January 2000, the

29 “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances” (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereinafter GC I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter GC II); Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949

Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) had this to say about compliance with humanitarian norms:

“As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather (...) they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a ‘legal interest’ in their observance and consequently a legal entitlement to demand respect for such obligations.”<sup>30</sup>

There is still some debate as to how exactly States are expected to implement their obligation to “ensure respect” for international humanitarian law. However, what is clear is that, in the face of serious violations of the Geneva Conventions or of Additional Protocol I, States are under a duty to act in order to bring the violations to an end. This obligation is codified in Article 89 of Additional Protocol I<sup>31</sup> and echoed in Article 41(1) of the Draft Articles, which stipulates that “States shall cooperate to bring to an end through lawful means any serious breach” of an obligation arising under a peremptory norm of international law. This duty to act or to cooperate generally finds expression in the behaviour of States within the United Nations. In response to violations of humanitarian principles, the General Assembly, the Security Council or the Commission on Human Rights will call on perpetrators to abide by the rules; offer the good offices of the Secretary-General; dispatch observer missions; launch peacekeeping operations; etc.<sup>32</sup> All of these measures fall “within the purview of a collective willingness to ensure respect for international humanitarian law in cases where serious violations occur.”<sup>33</sup>

In the framework of the United Nations, imposing arms embargoes is one of the ways in which the international community is increasingly responding to the existence or impending threat of violent conflict involving violations of

(hereinafter GC III); Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter GC IV)). This provision is reiterated in Article 1(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter AP I). The obligation to respect and ensure respect applies to international conflicts and to non-international conflicts to the extent that the latter are covered by common Article 3. While conflicts of a non-international character as defined by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (hereinafter AP II) are not explicitly covered by the obligation to respect and to ensure respect, they can nonetheless be considered as indirectly falling within the purview of the provision, insofar as the Second Additional Protocol is merely an elaboration of common Article 3, a fact stated in its Article 1(1). See Laurence Boisson de Chazournes & Luigi Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 82, No. 837, 2000, p. 69.

30 ICTY, *Prosecutor v. Zoran Kupreskic and others*, Case No. IT-95-16-T, Judgement (Trial Chamber), 14 January 2000, para. 519.

31 “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”

32 Boisson de Chazournes & Condorelli, *op. cit.* (note 29), pp. 78–79.

33 *Ibid.*, p. 79.

international humanitarian law.<sup>34</sup> Whether the UN Security Council calls upon States to halt the flow of arms to a conflict zone without pronouncing a mandatory embargo<sup>35</sup> or decides that all States shall take the necessary measures to prevent the direct or indirect supply, sale or transfer of arms to a party, its action recognizes that weapons transfers into conflict zones are rarely innocent. There are currently mandatory territorial arms embargoes in force against the States of Ivory Coast,<sup>36</sup> Liberia<sup>37</sup> and Somalia.<sup>38</sup> Non-State Parties are also subject to arms embargoes. At the moment, every State in the international community is prohibited from transferring arms to groups in the Democratic Republic of Congo,<sup>39</sup> Liberia,<sup>40</sup> Rwanda,<sup>41</sup> Sierra Leone<sup>42</sup> and Sudan,<sup>43</sup> as well as to Al-Qaeda and associated persons.<sup>44</sup> Under Article 41 of the United Nations Charter, States

- 34 Embargoes are also imposed by regional organizations, most notably by the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE). In October 2004, there were EU arms embargoes against ten States: Afghanistan, Bosnia-Herzegovina, Burma (Myanmar), China, Democratic Republic of Congo, Liberia, Sierra Leone, Somalia, Sudan and Zimbabwe (<<http://www.sipri.org/contents/armstrad/embargoes.html#tab>> (last visited 28 July 2005)). In 1993, the OSCE imposed a politically binding embargo on Armenia and Azerbaijan, aimed at "all deliveries of weapons and munitions to forces engaged in combat in the Nagorno-Karabakh area". *Decisions based on the Interim Report on Nagorno-Karabakh*, available online: <<http://projects.sipri.se/expcon/csceazbarm.htm>> (last visited 25 July 2005). An important expression of political will, such embargoes do not carry the weight of their UN counterpart if only because "they are, by their very nature, regional in scope and can be thus undermined by countries outside the arrangement who may not subscribe to the same political view" (Basic, International Alert, and Saferworld, *Combating the Illicit Trade in Small Arms and Light Weapons: Enhancing Controls on Legal Transfers*, Briefing 6, p. 11, available online: <[http://www.saferworld.org.uk/iac/btb\\_brf6.pdf](http://www.saferworld.org.uk/iac/btb_brf6.pdf)> (last visited 28 July 2005)).
- 35 In a recent resolution on the situation in Burundi, the Security Council expressed "its deep concern over the illicit flow of arms provided to armed groups and movements, in particular those which are not parties to the peace process under the Arusha Agreement" and called upon "all States to halt such flow" (S/RES/1545, 21 May 2004, at para. 18).
- 36 S/RES/1572, 15 November 2004 (for a period of 12 months); S/RES/1584, 1 February 2005 (reaffirming the embargo).
- 37 S/RES/1521, 22 December 2003 (for a period of 12 months); S/RES/1579, 21 December 2004 (renewed for a period of 12 months).
- 38 S/RES/733, 23 January 1992; most recently reaffirmed in S/RES/1519, 15 December 2003; S/RES/1558, 17 August 2004; and S/RES/1587, 15 March 2005.
- 39 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, expiring on 31 July 2005). In its latest resolution, the Security Council decided that the embargo now applies "to any recipient in the territory", S/RES/1597, 3 May 2005.
- 40 S/RES/1521, 22 December 2003, targeting the LURD (Liberians United for Reconciliation and Democracy) 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).
- 41 S/RES/1011, 16 August 1995, targeting "non-governmental forces" inside Rwanda and persons in neighbouring States that intend to use arms and related matériel in Rwanda.
- 42 S/RES/1171, 5 June 1998, targeting "non-governmental forces in Sierra Leone".
- 43 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"; S/RES/1591, 29 March 2005, extending the measures "to all parties to the N'djamena Ceasefire Agreement and any other belligerents in the States of North Darfur, South Darfur and West Darfur".
- 44 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).

have a legal obligation to abide by embargoes enacted by the Security Council and a duty to implement measures to ensure that persons within their jurisdiction also comply with those embargoes.<sup>45</sup>

While the legal basis for imposing and enforcing arms embargoes falls outside the realm of international humanitarian law, a quick glance at the parties currently embargoed reveals that this type of response on the part of the international community is closely related to the perpetration of serious violations of the laws of war. In the past two years, with the Security Council becoming more active on the question of child soldiers, arms embargoes have been threatened against parties that recruit children into their ranks.<sup>46</sup> This suggests that beyond the general association of small arms with violations of international humanitarian law, a specific link is being authoritatively established between the availability of small arms and violations of the rights of children in armed conflict. One may reasonably conclude that embargoes in such circumstances are a reflection of States' Common Article 1 obligation to ensure respect for international humanitarian law.

For political reasons, arms embargoes do not follow a consistent pattern of imposition and, when they are pronounced, considerable difficulties plague their implementation and enforcement. Respecting arms embargoes involves an exporting State refraining from selling arms, but it also includes restricting companies and individuals within the exporting State's jurisdiction from doing so. Such restrictions are typically borne out in the exporting State's arms export licensing regime, although they can also be included in legislation specifically prohibiting transfers to a particular country or party. Hence the relevance of discussing the adoption of international standards for licensing arms transfers and the importance of placing respect for international humanitarian law at the heart of the discussion.

In a 1999 study on arms availability, the International Committee of the Red Cross (ICRC) recommended the development of national and international codes of conduct limiting arms transfers according to indicators of the level of respect for international humanitarian law by the recipient State.<sup>47</sup> On the basis of Common Article 1, the ICRC suggested that licensing States should assess the extent to which recipient States are formally committed to respecting norms of international humanitarian law. Does the recipient State

45 Article 41 of the United Nations Charter 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 party. 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).

46 See S/RES/1379, 20 November 2001; S/RES/1460, 30 January 2003; S/RES/1539, 22 April 2004; S/RES/1612, 26 July 2005. See also "Children and armed conflict", Report of the Secretary-General, UN Doc. A/59/695 — S/2005/72, 9 February 2005, para. 57.

47 *Arms Availability and the Situation of Civilians in Armed Conflict*, International Committee of the Red Cross, Geneva, 1999, p. 65.

disseminate the laws of war to its armed forces?<sup>48</sup> Has the recipient State enacted enforcement measures for the repression of grave breaches?<sup>49</sup> Such implementation measures form part of a recipient State's "due diligence" obligation to prevent and punish violations of international humanitarian law within its territory or by parties for which it is responsible. This obligation is particularly relevant to situations of internal armed conflict where many violations are perpetrated by individuals over whom the State has no direct control.

Ensuring respect for international humanitarian law would therefore mean that States from which weapons are to be transferred would have to deny a licence not only when they are destined for States that are responsible for serious violations of the law but also for States that fail to diligently implement preventive and enforcement measures within their jurisdiction. The obligation for all States to ensure respect for the laws of war constitutes a strong basis for arguing that States must enact tighter licensing regimes for arms transfers — a strength that goes beyond the more limited notion of complicity.

### Human rights: A duty to cooperate in their protection and fulfilment

In human rights law, the unfortunate paradox is that while human rights are said to be universal, their violations are limited by territoriality as well as by citizenship. The responsibility of States toward individuals outside their jurisdiction is vague and weak.<sup>50</sup> "Territoriality of law conflicts with the postulated universality of human rights because individuals cannot hold a State other than their own responsible for violating their rights; it is their State that should hold another responsible. This, however, seldom happens."<sup>51</sup>

The notion that States should be obliged to investigate the end-use of the weapons they authorize for international transfer has been compared to their obligation to ensure that persons who are removed, expelled or extradited from their jurisdiction will not face persecution.<sup>52</sup> The similarity between the duty of 'non-refoulement' under refugee law<sup>53</sup> and the law regulating international arms transfers lies in action at home ('refoulement' of a refugee or licensing the

48 The obligation to disseminate IHL is set out in GC I, Article 47; GC II, Article 48; GC III, Article 127; GC IV, Article 144; AP I, Articles 83 and 87(2); and AP II, Article 19.

49 The obligation to prosecute grave breaches is set out in GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146; and AP I, Articles 11(4), 85 and 86.

50 For a discussion of transnational human rights focusing primarily on economic, social and cultural rights, see *Duties Sans Frontières*, International Council on Human Rights Policy, Versoix, Switzerland, 2003.

51 Mark Gibney, Katarina Tomasevski & Jens Vedsted-Hansen, "Transnational State responsibility for violations of human rights", *Harvard Human Rights Journal*, Vol. 12, 1999, p. 267.

52 "If a government may not return or expel a person to a State in which his or her life or freedom will be at risk on grounds of race, religion, nationality, membership of a social group or political opinion, nor may it sanction the transfer of arms to a country in which the risk arises of serious violations of human rights or humanitarian law." (Susan Marks & Andrew Clapham, *International Human Rights*, Oxford University Press, Oxford, 2005, p. 13).

53 Geneva Convention relating to the Status of Refugees, 28 July 1951, Article 33 (1): "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

transfer of weapons) being prescribed on the basis of an expected violation of human rights abroad. In practice, the difficulty with this analogy is in establishing causation. Whereas the act of returning a person to another State is a *sine qua non* cause of their eventual persecution, it is very difficult to show that supplying weapons to human rights abusers will be the direct and decisive cause of ensuing violations.

This causation problem is highlighted in the 1995 decision of the European Commission of Human Rights not to admit the claim of an Iraqi national against the State of Italy, in *Tugar v. Italy*.<sup>54</sup> The plaintiff argued that Italy had failed to protect his right to life under the European Convention because the State had not enacted an effective arms transfer licensing system. Mr Tugar had suffered a life-threatening injury as a result of stepping on an anti-personnel mine that had been supplied to Iraq by an Italian arms manufacturer. Counsel for the plaintiff drew a parallel with the expulsion cases, citing the *Soering* judgment of the European Court of Human Rights,<sup>55</sup> and maintained that the Italian authorities had exposed the plaintiff to the risk of “indiscriminate” use of mines by Iraq. In dismissing the claim, the Commission stated that:

“the applicant’s injury can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible ‘indiscriminate’ use thereof in a third country, the latter’s action constituting the direct and decisive cause of the accident which the applicant suffered.”<sup>56</sup>

The *Tugar* decision illustrates the difficulties that are inherent in attempting to link a State’s affirmative duty in the realm of arms licensing to a right of action for victims beyond its borders. Clearly, more work is needed to flesh out the positive obligation of States to cooperate in the transnational protection and fulfilment of human rights. The adoption of a treaty on arms transfers whereby States recognize some responsibility in preventing the perpetration of serious human rights violations outside their jurisdiction would go some of the way toward making international law relevant to small arms victims. However, without such a treaty, there appears to be little in international human rights law that can be interpreted as imposing an obligation for States to investigate the end-use of the weapons they allow out of their territory. This does not mean that international human rights law is irrelevant to the development of the law in this area. Indeed, it may shed considerable light on the assessment of recipient States’ behaviour, which will be useful in developing standards for such licensing regimes as may be required.

Under international human rights law, States are not only responsible for the actions of their agents. They also have a duty to prevent and punish patterns

54 EComHR, *Tugar v. Italy*, Application No. 2869/93, 18 October 1995.

55 ECHR, *Soering v. United Kingdom*, Judgment, 7 July 1989, Series A, Vol. 161.

56 EComHR, *Tugar v. Italy*, *op. cit.* (note 54), p. 3.

of abuse committed by private persons operating within their jurisdiction, whether or not they are acting under the control of the State. Failing to take the necessary steps to protect individuals from acts of violence perpetrated by non-State parties may render the State as guilty as if its officials had committed the violation.<sup>57</sup> In some cases, the obligation to protect individuals from violations perpetrated by private parties is part and parcel of the State's obligation not to commit the violation itself. This is the case for the prohibition of torture, which is particularly sweeping due to the importance it has been accorded by the international community.<sup>58</sup> The failure to adopt the necessary measures to prevent acts of torture from being carried out on one's territory may amount to more than a violation of the "due diligence" standard and be treated as a breach of the international norm itself.

In order that international standards for licensing arms transfers take into account the due diligence obligation of recipient States, it may be useful for the drafters of a treaty on arms transfers to follow the approach proposed by the ICRC in the field of international humanitarian law. This would involve enumerating a number of objective criteria that would serve as human rights benchmarks in deciding whether or not licences should be granted. For instance, authorization might be given for the export of guns to a police force that operates in accordance with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>59</sup> Conversely, failure to implement these basic principles could form the basis for refusing to grant a licence.

### International criminal law: The individual responsibility of arms traffickers

The picture that is unfolding of the international obligations of States in the field of arms transfers would not be complete without mentioning international criminal law. Even when governments enact adequate controls over private

57 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, pp. 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." For the latest version of the Special Rapporteur's "Draft principles on the prevention of human rights violations committed with small arms", see UN Doc. E/CN.4/Sub.2/2005/35, 16 June 2005.

58 In a 1998 judgment, the Trial Chamber of the ICTY wrote: "States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. (...) international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition." (ICTY, *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, para. 148).

59 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990, available online: <<http://www.smallarmsnet.org/docs/saun17.pdf>> (last visited 28 July 2005).

arms traffickers, there continue to be individuals who act beyond the reach of national law. Logically and practically, a commitment to human rights and humanitarian norms in the licensing process should be accompanied by measures of enforcement against the middlemen who facilitate circumventions of licensing schemes. In fulfilling their Common Article 1 obligation to ensure respect for international humanitarian law, States have a duty to repress grave breaches of the laws of war. It is therefore relevant to enquire into the nature of the international criminal responsibility that attaches to the act of supplying weapons to persons responsible for committing war crimes, crimes against humanity or genocide.

Here, we return to the notion of “complicity”, but this time as it applies to the individual criminal responsibility of the traffickers concerned. Under international criminal law, the activities of arms traffickers are most likely to be caught by rules that prohibit supplying material assistance to the perpetrator of a crime. Although the test for individual accomplice liability differs from that used to establish the complicity of States, the underlying sentiment is the same. This test was set out in 1997 by the Trial Chamber of the ICTY in the *Tadic* case:

“First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise *aiding and abetting* in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.”<sup>60</sup>

The notion of “aiding and abetting” was further defined by the same Chamber in a 1998 decision:

“[T]he legal ingredients of aiding and abetting in international criminal law [are as follows]: the *actus reus* consists of *practical assistance*, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist in 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.”<sup>61</sup>

The “aiding and abetting” provision of the Statute of the International Criminal Court (ICC) 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.<sup>62</sup> In other words, supplying 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

60 ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Judgement (Trial Chamber), 7 May 1997, para. 674 (emphasis added).

61 *Furundzija*, *op. cit.* (note 58), para. 249 (emphasis added).

62 Rome Statute of the International Criminal Court, 17 July 1998, Article 25(3)(c) (emphasis added).

as an accomplice.<sup>63</sup> In terms of the *actus reus* (objective element), there is no requirement that the means have contributed to the ensuing crime; nor is there a requirement that the means have had a substantial effect on the crime. Clearly, the Rome Statute defines the crime of complicity in a wider manner than its *ad hoc* counterparts since “a direct and substantial assistance is not necessary and (...) the act of assistance need not be a *condition sine qua non* of the crime.”<sup>64</sup> Nevertheless, the *culpa* (subjective element) remains higher than what is provided for in the context of State responsibility, for the obvious reason that the consequences of a finding of guilt are far greater for individuals whose liberty is at stake. Mere knowledge is not enough; the accomplice must intend to facilitate the perpetration of the crime.

None of the Statutes of the current international tribunals (ICTY, International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and ICC) specifically identify, for the purpose of establishing criminal liability for “aiding” in the commission of a crime, the provision of weapons or other concrete military assistance as constituting practical assistance. However, there are indications of a growing trend toward interpreting them as such.

In a 1998 decision, the Trial Chamber of the ICTR stated that the elements of the crime of complicity in genocide included “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.”<sup>65</sup> 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.<sup>66</sup>

Reflecting on who might be criminally liable for complicity in Sierra Leone, a leading expert in the field of international criminal law writes:

“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.”<sup>67</sup>

63 Andrew Clapham, “On complicity”, in M. Henzelin & R. Roth (eds), *Le Droit pénal à l'épreuve de l'internationalisation*, Bruylant, Brussels, 2002, p. 254.

64 Kai Ambos, “Article 25”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos, Baden-Baden, 1999, p. 483.

65 ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 537 (emphasis added).

66 SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-I, Indictment, 7 March 2003, para. 26 (emphasis added).

67 William Schabas, “Enforcing international humanitarian law: Catching the accomplices”, *International Review of the Red Cross*, Vol. 83, No. 842, 2001, p. 451, quoted in Clapham, “On complicity”, *op. cit.* (note 63), p. 256.

This hypothesis appears to be supported by the SCSL's Chief of Investigations, Alan White, who, in an interview with Human Rights Watch, stated: "If a person is the principal supplier of arms and also knows that the weapons will be misused, then this person certainly would have individual criminal responsibility and would be prosecuted [by the Court]."<sup>68</sup>

Although international criminal law provides an avenue for prosecuting private arms traffickers, for the time being this avenue remains largely unexplored.<sup>69</sup> Practically speaking, individuals who carry out brokering activities still have a lot of leeway to divert weapons to illicit destinations.<sup>70</sup> The prospect of being charged with complicity to an international crime still appears too remote for most brokers to think twice before diverting weapons to embargoed destinations or parties, or to known human rights abusers. To a large extent, their activities remain unregulated and even where regulations exist, there are important gaps or loopholes that make it possible for this lucrative business to flourish.<sup>71</sup> Many States are reluctant to extend their jurisdiction to nationals having taken up residence abroad or to illicit brokering activities carried out by nationals abroad. Moreover, the political weight of certain arms brokering circles is not to be underestimated in terms of its ability to hinder any process aimed at curbing the business. However, the wind may be changing as momentum grows among various segments of the international community for tighter regulation of brokering activities.<sup>72</sup>

68 Quoted in Lisa Misol, "Weapons and war crimes: The complicity of arms suppliers", *Human Rights Watch World Report 2004: Human Rights and Armed Conflict*, available online: <[http://hrw.org/wr2k4/13.htm#\\_Toc58744962](http://hrw.org/wr2k4/13.htm#_Toc58744962)> (last visited 28 July 2005).

69 Potentially paving the way for reversing this trend, a court in the Netherlands is currently holding hearings in a trial involving a Dutch national, Frans van Anraat, who is accused of helping former Iraqi leader Saddam Hussein to commit war crimes and genocide by providing him with materials for chemical weapons. See BBC News, 18 March 2005, available online: <[http://news.bbc.co.uk/2/hi/middle\\_east/4360137.stm](http://news.bbc.co.uk/2/hi/middle_east/4360137.stm)> (last visited 28 July 2005).

70 In 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 online: <[http://www.fundforpeace.org/publications/reports/model\\_convention.pdf](http://www.fundforpeace.org/publications/reports/model_convention.pdf)> (last visited 25 July 2005).

71 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 occurs); 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: Rights at Risk*, Oxford University Press, Oxford, 2004, pp. 143–146 (hereinafter *Small Arms Survey 2004*)). For an analysis of loopholes in the arms export controls of the United Kingdom, see "Out of control: The loopholes in UK controls on the arms trade", Oxfam GB, 1998, pp. 3–12, available online: <[http://www.oxfam.org.uk/what\\_we\\_do/issues/conflict\\_disasters/downloads/control.rtf](http://www.oxfam.org.uk/what_we_do/issues/conflict_disasters/downloads/control.rtf)> (last visited 28 July 2005).

72 In January 2004, the UN General Assembly adopted Resolution 58/241 on the illicit trade in small arms and light weapons in all its aspects, by which, *inter alia*, it requested the Secretary-General "to hold broad-based consultations (...) with all Member States, interested regional and subregional organizations, international agencies and experts in the field, on further steps to enhance international

## Paving the way to a global agreement on arms transfers

In July 2001, the United Nations convened an international conference with a view to encouraging the development of national, regional and international strategies that tackle the many problems associated with small arms and light weapons. The Programme of Action endorsed by the United Nations only indirectly refers to the issue of government-authorized transfers, choosing instead to focus on what it calls the “illicit trade in small arms”. Nevertheless, in one provision the Programme of Action does refer to the obligation of 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.”<sup>73</sup> Also included is a commitment on the part of participating States to develop adequate legislation regulating brokering activities.<sup>74</sup> A number of recent regional initiatives, mostly of a politically binding nature, have echoed this commitment.<sup>75</sup>

Earlier in 2001, on 31 May, the General Assembly adopted the UN Firearms Protocol,<sup>76</sup> an international instrument aimed at improving cooperation in clamping down on the illegal manufacturing of and trade in firearms.<sup>77</sup> The Protocol is the third to complement the November 2000 UN Convention against Transnational Organized Crime<sup>78</sup> — the other two are aimed at stopping the smuggling of migrants and the trafficking in persons, particularly women and children. It calls on signatories to mark each legally produced, exported, and imported weapon with identifying information and to set up proper licensing and authorization procedures for the commercial export of firearms. States

cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (...) and requested him to report to the General Assembly at its fifty-ninth session on the outcome of his consultations” (UN Doc. A/58/241, 9 January 2004). See the background paper prepared by the Department for Disarmament Affairs, “Broad-based consultations on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons” (GA Resolution 58/241), available online: <<http://disarmament.un.org:8080/cab/brokering/Consultations-paper.pdf>> (last visited 29 July 2005) (hereinafter Background Paper of the Department of Disarmament Affairs). In his report entitled “In larger freedom: Towards development, security and human rights for all”, the Secretary-General urged the international community to expedite negotiations on a legally binding instrument to combat illicit brokering in small arms and light weapons (UN Doc. A/59/2005, 21 March 2005, para. 120).

73 See “Programme of action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all of its aspects”, Part II, Article 11 (in *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, New York, 9–20 July 2001, UN Doc. A/CONF.192/15) (hereinafter UN Programme of Action).

74 UN Programme of Action, *ibid.*, Part II, Articles 14 and 39.

75 For a review of these initiatives, see Background Paper of the Department for Disarmament Affairs, *op. cit.* (note 72), pp. 2–6.

76 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/RES/55/255, 8 June 2001. At 15 July 2005, there were forty-two (42) States Parties.

77 Article 3(a) defines “firearms” as “any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas”.

78 Adopted by the General Assembly on 15 November 2000; see UN Doc. A/RES/55/25, 8 January 2001.

Parties are to pass legislation criminalizing any illicit manufacturing and trafficking of firearms, establish an effective export control system, and share information as well as technical experience and training with each other to enable cooperation in preventing illegal shipments of firearms. Signatories are also expected to keep records for at least 10 years on their marking and transfer activities so that it will be possible to trace the movement of firearms across borders.

The Protocol, which came into force on 3 July 2005, focuses on organized crime and does not apply to State-authorized sales. However, on the question of arms brokering, it represents a useful step to the extent that it requires the registration of brokers operating within the territory of States Parties as well as the licensing or authorization of brokering activities. Moreover, all information relating to brokers must be shared. To date, the Protocol remains the first legally-binding international agreement on small arms to have been successfully negotiated.

At a regional level, a number of initiatives (model regulations, handbooks, best practice guidelines, etc.) call upon States to consider the risk that transferred weapons will be used in violation of international law when deciding whether or not to grant arms exporting and brokering licences.<sup>79</sup> Other regional initiatives adopt a tougher stance. Two of these are well on their way to imposing legally binding measures for their Member States and, as such, merit some exploration here. The first is the European Union Code of Conduct for Arms Exports, which, along with the EU Council Common Position on Arms Brokering, represents the most important attempt at introducing human rights and humanitarian criteria into the arms export and brokering licensing process of European Member States. The second is the West Africa Moratorium on Importation, Exportation, and Manufacture of Small Arms and Light Weapons, which is unique in its attempt at keeping small arms out of an entire region and, through its shortcomings, illustrates the need for global standards rooted in international law.

## European Union Code of Conduct

Adopted by the Council of the European Union in 1998, the Code of Conduct for Arms Exports<sup>80</sup> — though only politically binding — is by far the most

79 The most recent initiatives include: the Model Brokering Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, adopted by the Organization of American States 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; the Great Lakes and Horn of Africa Best Practice Guidelines for the Import, Export and Transit of Small Arms and Light Weapons, adopted at the 3rd Ministerial Review Conference of the Nairobi Declaration, 20–21 June 2005; the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies: Guidelines & Procedures, including the Initial Elements (as amended and updated in December 2003 and July 2004), see also note 99 below; and the 2003 OSCE *Handbook of Best Practice Guides*, a comprehensive manual providing a set of best practice guides relating to all stages of a gun's life and aiming at enhancing the implementation of the 2000 OSCE *Document on Small Arms and Light Weapons*.

80 European Union Code of Conduct for Arms Exports, adopted by the Council of the European Union on 8 June 1998, available online: <[http://europa.eu.int/comm/external\\_relations/cfsp/sanctions/codeofconduct.pdf](http://europa.eu.int/comm/external_relations/cfsp/sanctions/codeofconduct.pdf)> (last visited 25 July 2005) (hereinafter EU Code). “Support for the principles of the EU Code has been declared by third countries — notably the EU Associated States of Eastern and Central Europe, Cyprus, the

comprehensive international arms export control regime in force today.<sup>81</sup> Currently under review as to its content and legal status,<sup>82</sup> the EU Code is noteworthy for setting forth eight criteria for the issuance of export licensing. These are divided into two categories: conditions under which the denial of licences is mandatory,<sup>83</sup> and elements that must be taken into consideration when deciding whether or not to issue a licence.<sup>84</sup>

Application of the EU Code by Member States has been anything but uniform, given the distinct political and economic agendas pursued by individual States and the wide margin of interpretation left by both the operative provisions<sup>85</sup> and the criteria. This has triggered significant criticism, mainly on the part of

European Free Trade Area (EFTA), members of the European Economic Area and Canada. It is also referred to in the EU-US and EU-Canada Small Arms Declarations of December 1999. In November 2000, the second Consolidated Report of the EU Code recorded that Malta and Turkey had also pledged to subscribe to the principles of the EU Code, which would guide them in their national export policies." (*Undermining Global Security: the European Union's Arms Exports*, Amnesty International, 1 February 2004, pp. 2-3, available online: <<http://web.amnesty.org/library/index/ENGA300032004>> (last visited 25 July 2005).

81 For a recent account of the history of the EU Code of Conduct, see Sibylle Bauer & Mark Bromley, *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, SIPRI Policy Paper No. 8, November 2004, pp. 2-4 available online: <<http://editors.sipri.se/pubs/policypaper8.pdf>> (last visited 25 July 2005).

82 In its latest report, COARM (Working Party on Conventional Arms Exports, whose mandate is to make recommendations to the Council in the field of conventional arms exports in the framework of the Common Foreign and Security Policy) announced that it had "conducted in depth discussions in order to bring forward the review of the Code which it decided to undertake in December 2003." It further stated that it expected the Code to be "significantly reinforced by including several new elements in the text, most notably: brokering, transit/transshipment, licensed production overseas, intangible transfer of software and technology, end-user certification and national reporting." However, no agreement has yet to be reached to transform the Code into a legally binding instrument. (COARM, *Sixth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports*, of which the General Affairs and External Relations Council took note on 22 November 2004, *Official Journal C 316*, 21/12/2004, p. 1, available online: <[http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CEL\\_EX:52004XG1221\(01\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CEL_EX:52004XG1221(01):EN:HTML)> (last visited 31 July 2005).

83 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).

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

85 The operative provisions outline reporting procedures as well as intergovernmental denial notification and consultation mechanisms where governments hold different views regarding the application of the EU Code criteria to licence requests. With the adoption of a User's Guide in January 2004, which has been recently revised and is soon to be published, it is expected that procedures will be improved and clarified.

international NGOs<sup>86</sup> and Members of the European Parliament.<sup>87</sup> An analysis of the criteria agreed upon by EU Member States yields two general observations.

The first observation concerns the standard of proof chosen by the EU and how it relates to our earlier discussion of the prohibition of complicity under the law of State responsibility.<sup>88</sup> Under Criteria 2 and 4 of the EU Code, licence applications should be refused where there exists a clear risk that the exported goods will be used in violation of international law. This standard appears more objective than “knowledge”, despite the high threshold conveyed by the use of the adjective “clear”. This suggests that the EU has gone further than the Draft Articles by prohibiting transfers regardless of whether or not the supplying State actually or constructively knows the circumstances of a violation of international law or, indeed, facilitates the commission of such a violation. It is not merely a matter of refraining from cooperating in the violations of others. Indeed, the serious nature of the conduct at issue entails a positive obligation on the part of States to enquire into the end-use of the weapons they allow out of their territory. The wording chosen by the EU Member States arguably reflects an evolution in the law applicable to small arms transfers by placing potential victims of these weapons at the centre of the licensing process.

The second observation concerns what may be the most significant weakness in the criteria put forward by the EU Code. Despite the fact that respect for international humanitarian law is incumbent upon all States, it is only mentioned in Criterion 6 as an element to be taken into account by Member States, whereas respect for human rights law forms the basis of a mandatory criterion (Criterion 2).<sup>89</sup> What’s more, the reference to international humanitarian law in Criterion 6 is ambiguous. It could be read as associating the obligation to respect the laws of international and non-international armed conflict with the non-use of force. This absurd association was certainly not intended by the drafters of the EU Code but the choice of language bears mention because, apart from anything else, it reveals a perception that respect for the laws of war or *jus in bello* is somehow subsidiary to respect for *jus ad bellum*.

86 See, *inter alia*, Amnesty International’s report documenting specific cases of questionable arms transfers since the adoption of the Code, *Undermining Global Security: the European Union’s Arms Exports*, *op. cit.* (note 80); *Taking Control: The Case for a More Effective European Union Code of Conduct on Arms Exports*, report by European Union non-governmental organizations, Saferworld, September 2004, available online: <<http://www.saferworld.co.uk/publications/Taking%20control.pdf>> (last visited 25 July 2005); “Comments of the International Committee of the Red Cross (ICRC) on Criterion Six of the EU Code of Conduct on Arms Exports”, ICRC, September 2004 (unpublished: copy on file with the author).

87 See, *inter alia*, yearly European Parliament Reports on the Code of Conduct, available online: <<http://www.sipri.org/contents/expcon/euparl.html>> (last visited 25 July 2005).

88 See section above on “Complicity under the law of State responsibility”.

89 Criterion Six reads: “Member States will take into account *inter alia* the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para b) of Criterion One.”

The discrepancy in the importance the EU Code appears to be giving to respect for human rights and humanitarian law is not unusual. Arms transfer documents adopted by States and regional organizations more commonly refer to the recipient's respect for human rights and the risk of weapons being used for internal repression than to the recipient's respect for international humanitarian law. Commenting on this fact, the ICRC recently stated:

“[I]n our experience, it is a common misperception that a separate humanitarian law criterion is unnecessary when a reference to human rights already exists, because the reference to human rights is believed to implicitly cover humanitarian law as well. While some violations of humanitarian law would be covered by a requirement to consider the risk of human rights violations, many serious violations of humanitarian law would fall outside such a provision. This includes violations related to the conduct of hostilities, which are particularly relevant to the use of weapons.”<sup>90</sup>

While commitments relating to the non-use of force and respect for human rights are particularly important for States to consider in the licensing process, humanitarian law commitments are also (distinct and) relevant, especially when the weapons transferred constitute military equipment.

The ICRC has urged EU Member States to amend the Code: a separate and explicit criterion should be included prohibiting weapons transfers if they are likely to be used to violate international humanitarian law.<sup>91</sup> The ICRC has also reiterated its plea<sup>92</sup> for a set of indicators that could assist States in assessing the likelihood of weapons being used in violation of international humanitarian law, arguing that “[a] strict criterion on paper cannot effectively prevent weapons from falling into the hands of those likely to use them to commit abuses, unless all Member States consistently apply it.”<sup>93</sup> These indicators point to the “due diligence” obligation of States to take measures to prevent and punish breaches of IHL, reinforcing the notion that the duty to ensure respect for

90 ICRC, Report to the Second Biennial Meeting of States to Consider the Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 11–15 July 2005, pp. 3–5, available online: <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/arms-weapons-united-nations-120705/\\$File/ICRC\\_002\\_arms\\_120705.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/arms-weapons-united-nations-120705/$File/ICRC_002_arms_120705.pdf)> (last visited 29 July 2005).

91 The ICRC has meanwhile announced that its advocacy efforts were successful: “The new EU Code is expected to contain an express requirement not to authorize exports when there is a clear risk that the military equipment to be exported might be used in the commission of serious violations of humanitarian law.” *Ibid.*, p. 3.

92 See above, text accompanying note 47.

93 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 ICRC on Criterion Six”, *op. cit.* (note 86); reiterated more recently in “Report to the Second Biennial Meeting of States”, *op. cit.* (note 90), Annex 2).

international humanitarian law should be at the heart of any attempt to codify limitations on arms transfers.

In June 2003, the EU Member States adopted a Common Position on arms brokering<sup>94</sup> whereby they are now required to “take all the necessary measures to control brokering activities taking place within their territory.”<sup>95</sup> Brokering activities are defined as “activities of persons and entities negotiating or arranging transactions that may involve the transfer of items on the EU Common List of Military Equipment or who buy, sell or arrange the transfer of such items that are in their ownership from a third country to another third country”. With this definition, the EU captures activities that are central to the transfer of small arms and that had, until then, remained unregulated in most Member States.<sup>96</sup> The Common Position explicitly links the licensing of brokering transactions to the arms export licensing process at Article 3(1), when it states: “Member States will assess applications for a licence or written authorization for specific brokering transactions against the provisions of the European Union Code of Conduct on Arms Exports”. In other words, the criteria laid down by the Code of Conduct for licensing small arms exports also apply to the licensing of brokering activities.

The EU Code of Conduct for Arms Exports and the EU Council Common Position on arms brokering represent important, welcome attempts to make States more responsible for transfers of arms from within their territories — particularly to the extent that account must be taken of the likely consequences of transfers to human rights and humanitarian law abusers. It may be hoped that the EU will continue to offer leadership in this area as the law evolves.

## The Economic Community of West African States Moratorium

In response to the particularly severe nature of the problem of small arms proliferation in West Africa, the Economic Community of West African States (ECOWAS)<sup>97</sup> decided in 1998 to embargo itself voluntarily, so to speak. The regional organization concluded a politically binding agreement proclaiming a moratorium on “the importation, exportation and manufacture of light weapons in ECOWAS Member States,”<sup>98</sup> with exemptions being permitted for reasons of security. The Moratorium was intended to pave the way for the development of

94 EU Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, available online: <<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32003E0468:EN:NOT>> (last visited 31 July 2005) (hereinafter EU Common Position).

95 EU Common Position, *Ibid.*, Article 2(1). For an overview of the EU Common Position, see Holger Anders, *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 (International Action Network on Small Arms), Pax Christi Vlaanderen, Pax Christi Netherlands, Brussels, January 2004.

96 Anders, *ibid.*, p. 6.

97 ECOWAS currently comprises 15 West African States: Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

98 Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa, 21st Ordinary Summit of the Authority of Heads of State and Government, Abuja, 30-31 October 1998, available online: <<http://www.grip.org/bdg/g1649.html>>. Initially adopted for a period of three

a region-wide strategy on arms proliferation, in particular, and disarmament in general. Strongly supported by the international community, the Moratorium was publicly adhered to by a number of States outside the region, thereby broadening the scope of its effects. Member States of the Wassenaar Arrangement (a grouping of the world's largest arms exporting nations),<sup>99</sup> the EU and the Organization for Security and Co-operation in Europe (OSCE)<sup>100</sup> have all pledged their commitment to the Moratorium and some have made substantial financial contributions to assist in its implementation.<sup>101</sup> Between 1999 and 2004, the United Nations Programme for Coordination and Assistance for Security and Development (PCASED) was active in the region, building internal capacity, advising on legislative reform and enforcing border controls to sustain implementation efforts. Since early 2005, PCASED has been replaced by the ECOWAS Small Arms Project (ECOSAP), which focuses on providing technical advice on the implementation of small arms control and reports directly to ECOWAS.<sup>102</sup>

Despite the enthusiasm that the Moratorium has elicited, its track record in effectively curbing the proliferation of small arms and light weapons in West Africa is disappointing. Aside from the problems associated with lack of political will, weakness of national security institutions and violations by some ECOWAS Member States,<sup>103</sup> the Moratorium faces built-in obstacles. The ban it proclaims may be far-reaching, encompassing private companies and governments, but it lacks enforceable sanctions and the exemption procedure does not include an oversight mechanism to ensure that those weapons that may be imported are used as intended. The projected conversion of the Moratorium into a legally binding

years, the Moratorium was extended for a further three years in 2001. ECOWAS is planning to strengthen the Moratorium and to replace it with a mandatory convention. In December 2004, the Council of the European Union adopted a Decision offering "a financial contribution and technical assistance to set up the Light Weapons Unit within the ECOWAS Technical Secretariat and convert the Moratorium into a Convention on small arms and light weapons between the ECOWAS Member States." (Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, Article 1(2), *Official Journal L* 359, 04/12/2004, pp. 65-67, available online: <[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexdoc!prod!CELEXnumdoc&lg=EN&numdoc=32004D0833&model=lex](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexdoc!prod!CELEXnumdoc&lg=EN&numdoc=32004D0833&model=lex)> (last visited 25 July 2005)).

99 The Wassenaar Arrangement promotes transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies. Participating States are: 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, the Republic of Korea, Romania, the Russian Federation, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and the United States.

100 The OSCE is the largest regional security organization in the world with 55 participating States from Europe, Central Asia and North America.

101 According to the *Small Arms Survey 2004*, a number of EU governments (including France and the UK), as well as Canada, have been among the financial supporters of the Moratorium; *op. cit.* (note 71), p. 112. On 2 December 2004, the EU Council adopted a Decision pledging financial support and technical assistance to the implementation of the Moratorium, see *op. cit.* (note 98).

102 Biting the Bullet Project, *International Action on Small Arms 2005, Examining Implementation of the UN Programme of Action*, p. 47, available online: <<http://www.iansa.org/documents/2005/red-book/red-book-2005.pdf>> (last visited on 11 September 2005).

103 See "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, para. 11.

agreement will go some of the way to addressing the obstacles to enforcement.<sup>104</sup> However, the new instrument will remain weak if it fails to oblige Member States to take into account the humanitarian impact of legally transferred weapons.

Currently, Member States must ask permission from the ECOWAS Secretariat to derogate from the Moratorium, and they may do so only to fulfil “legitimate national security needs or international peace operations requirements.”<sup>105</sup> Such exemptions appear to have been liberally granted, with the result that the Moratorium has had little effect on authorized weapons transfers toward West Africa.<sup>106</sup> This is problematic when one considers the number of legally imported small arms and light weapons that are finding their way into the wrong hands.<sup>107</sup> At a minimum, a legally binding Moratorium ought to provide for a monitoring body that would track the end-use of weapons imported under an exemption.

The fact that numerous obstacles stand in the way of its enforcement should not detract from the importance of the ECOWAS Moratorium as an initiative in a constructive direction. It symbolizes the recognition that controlling arms supply is a necessary step in order to guarantee stability in the region and ensure the security of the people of West Africa.

## The Draft Framework Convention

In October 2003, the International Action Network on Small Arms (IANSA), Amnesty International and Oxfam International launched the Control Arms campaign, which promotes the adoption of an international treaty on arms transfers. The Draft Framework Convention (Arms Trade Treaty — ATT)<sup>108</sup> proposed is now officially backed by the government of the United Kingdom<sup>109</sup>

104 In early 2005, UN Secretary-General Kofi Annan recommended that the Security Council take action to support the Moratorium by naming violators and by prosecuting those responsible for trafficking in human beings and natural resources. He also urged ECOWAS members to convert the agreement into a legally-binding instrument “at the earliest opportunity” (UN News Centre, “Annan urges West Africa to make regional arms moratorium permanent”, 15 February 2005, available online: <<http://www.un.org/apps/news/story.asp?NewsID=13351&Cr=west&Cr1=africa>> (last visited 25 July 2005)).

105 Article 9 of the Code of Conduct for the Implementation of the Moratorium, 22nd Ordinary Summit of the Authority of Heads of State and Government, Lomé (Togo), 10 December 1999. Requests are circulated to Member States, who may object to the decision to grant an exemption. If an objection is circulated, then requests are submitted to the ECOWAS Mediation and Security Council. For the text of the Code of Conduct, see *The Making of a Moratorium on Small Arms*, UN Regional Centre for Peace and Disarmament in Africa, April 2000, pp. 49 ff., available online: <[http://www.nisat.org/publications/moratorium/the\\_making\\_of\\_a\\_moratorium.pdf](http://www.nisat.org/publications/moratorium/the_making_of_a_moratorium.pdf)> (last visited 31 July 2005).

106 For facts and figures, see *Small Arms Survey 2004*, *op. cit.* (note 71), pp. 112–114.

107 See Eric Berman, “The provision of lethal military equipment: French, UK, and US peacekeeping policies towards Africa”, *Security Dialogue*, Vol. 34, No. 2, 2003, p. 195.

108 For the latest working draft of the Framework Convention, see Draft Framework Convention on International Arms Transfers, Control Arms Campaign, 25 May 2004, available online: <[http://www.controlarms.org/the\\_issues/ATT\\_0504.pdf](http://www.controlarms.org/the_issues/ATT_0504.pdf)> (last visited 25 July 2005) (hereinafter Draft Framework Convention).

109 The Foreign Secretary, Jack Straw, publicly confirmed the UK government’s commitment to work for an international Arms Trade Treaty and to “use its unique position, as the president of the G8 this July, to do everything in its power to get an international treaty on political agenda...”. See Amnesty International press release, “Campaigners welcome Straw commitment on Arms Trade Treaty and urge swift action”, 15 March 2005, available online: <[http://www.controlarms.org/latest\\_news/straw.htm](http://www.controlarms.org/latest_news/straw.htm)> (last visited 25 July 2005)

and also benefits from the support of a growing number of States as well as numerous non-governmental organizations.<sup>110</sup> This section offers some observations on the Draft Framework Convention in light of our discussion of international law limitations on small arms transfers.

Article 3 of the current version of the Draft Framework Convention is the key provision embodying the principle of “no weapons for abuse”. It is titled “Limitations Based on Use” and reads as follows:

“A Contracting Party shall not authorise international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

- a. used in breach of the United Nations Charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations;
- b. used in the commission of serious violations of human rights;
- c. used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;
- d. used in the commission of genocide or crimes against humanity;
- e. diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this Article.”

### Underlying principle of international law

The commentary appended to the draft document explains that “[t]he responsibility of the Contracting Party of export to prohibit arms transfers under [draft Article 3] flows from the obligation not to participate in the internationally wrongful acts of another State.”<sup>111</sup> It further states that the principle underlying Article 3 of the Draft Framework Convention is rooted in Article 16 of the Draft Articles on State Responsibility. The drafters’ decision to limit the legal basis to Article 16, on the one hand, and to rely entirely on the language of State responsibility, on the other hand, raises two issues.

First, were reference also made to Article 41(2) of the Draft Articles, the drafters might strengthen their case. When the most egregious violations of international law are at issue, the threshold of application of the law of State responsibility is considerably lower than for situations covered by Article 16. The prohibition codified in Article 41(2) can be invoked without having to establish that the transferring State “knew” the circumstances of the wrongful conduct. Moreover, it covers acts of aid or assistance that do not materially contribute to the wrongful conduct, as long as these helped to maintain the illegal situation.

110 “Thirteen more governments announce support for Arms Trade Treaty”, Control Arms Campaign, 15 July 2005, available online: <[http://www.controlarms.org/latest\\_news/thirteen-governments.htm](http://www.controlarms.org/latest_news/thirteen-governments.htm)> (last visited 25 July 2005).

111 Draft Framework Convention, *op. cit.* (note 107), p. 5, para. 9.

Second, by relying solely on the law of inter-State relations, the drafters run the risk of limiting the application of the envisaged instrument to State-to-State arms transfers. More importantly, they may be missing an opportunity to incorporate primary obligations of international law. As discussed earlier in this article, the prohibition of complicit behaviour under the law of State responsibility is a helpful starting point, but it cannot be made to encompass a positive obligation for States to investigate the end-use of the weapons they transfer. A more compelling commentary to Article 3 of the Draft Framework Convention might therefore place more emphasis on the international law obligation of States to prevent threats to the security and peace of the international community, to ensure respect for international humanitarian law, and to cooperate in the protection and fulfilment of human rights.

### Standard of proof

Article 3 of the Draft Framework Convention states that the transferring State must have actual knowledge or constructive knowledge of the “likely” misuse of the weapons it licenses for export. It does not, however, specify indicators that can be used to determine when knowledge or awareness should be imputed. Providing specific indicators might reduce the risk that States that lack diligence or turn a blind eye to abusive behaviour on account of a lucrative deal will not be caught by the prohibition.

An alternative to “ought to have knowledge” is the use of an objective standard such as the “clear risk” standard chosen by the EU Code of Conduct. This standard would also be strengthened were it substantiated with indicators. It could be stipulated that the “likelihood” of weapons being used to perpetrate violations of international law will be assessed in light of statements made by the appropriate UN bodies or will depend on the adoption and effective implementation by the recipient State of certain measures concerning, for instance, use of force by law enforcement officials or the repression of violations of international humanitarian law.

### Licensing of brokering activities

The Draft Framework Convention does not address brokering activities. The appended commentary explains that in choosing to focus on the obligation of States in respect of arms transfers, the drafters have proceeded “on the basis that important related issues such as brokering, licensed production and end-use monitoring will be addressed in subsequent instruments.”<sup>112</sup>

The question of regulating brokers and their activities (core and related) is complex and multifaceted. Still, it appears desirable to enshrine in a future convention on arms exports, such as the Draft Framework Convention purports to be, the principle that those facilitating cross-border arms deals ought to be

112 *Ibid.*, p. 4, para. 1.

licensed and that licensing practices in this field are only really effective if they are universally accepted. Criteria that will be agreed upon internationally for regulating arms exports could just as easily be applied to the issuance of brokering licences — the avenue chosen by the EU in its Common Position.<sup>113</sup> 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.<sup>114</sup>

According to the Small Arms Survey, criteria for the licensing of brokering activities at the national level tend to follow closely those established by export controls and are usually considered as belonging to broader export controls.<sup>115</sup> It is also common practice for States to make the national interest a criterion for licensing, and to refuse licences for brokering transfers that might endanger national economic policy, foreign policy, or security interests.<sup>116</sup>

## Enforcement

The effectiveness of the Draft Framework Convention would be reinforced if it included a number of enforcement measures, most notably the obligation for States to criminalize serious violations, such as the conduct of an unlicensed broker; the conduct of a State official who issues a licence knowing that the transfer or brokering activity fails to meet the criteria; or the conduct of an arms manufacturer that circumvents domestic export controls.

Another important aspect of successful enforcement depends upon the establishment and funding of some kind of oversight body to monitor and report on the implementation of the treaty, since States will often have divergent interpretations of what constitutes a serious violation of international law. No matter how many indicators are codified in an eventual treaty, there will always be room for disagreement. The infamous case of Belgium, which in 2002 agreed to sell machine-guns to the government of Nepal on account of its status as a “fragile democracy” when other European governments had refused to do so, serves as a reminder of the difficulty of translating the criteria into reality.

An international body or agency may also offer a neutral forum for States that seek to argue their right to self-defence in order to import weapons despite their poor human rights record or their involvement in an armed conflict. The absence of this type of mechanism is currently one of the built-in problems of the ECOWAS Moratorium.<sup>117</sup>

113 EU Common Position, *op. cit.* (note 94), Article 3(1).

114 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, p. 11, available online: <<http://www.nisat.org/Brokering/Conference%20Report%20fulltext.pdf>> (last visited 28 July 2005).

115 *Small Arms Survey 2004*, *op. cit.* (note 71), p. 157.

116 *Ibid.*

117 See note 104 above, and accompanying text.

## Conclusion

The obligations of arms-exporting States toward the victims of small arms and light weapons beyond their borders are not merely moral. When serious violations of international law are threatened or perpetrated, States have a legal duty to act in a lawful manner in order to bring such violations to an end. One of the ways this can be done is by ensuring that the export and transit of weapons from their territory are tightly controlled by a licensing regime that gives due regard to the level of respect for international law in the countries of destination. Granting a licence when it is clear that the weapons will be used to commit serious violations of human rights or humanitarian law can result in a finding of responsibility for aiding another State in the commission of an internationally wrongful act. This is all the more the case where the violations are gross and systematic and are prohibited by an obligation arising under a peremptory norm of international law, grave breaches of international humanitarian law being the obvious example.

While the language of complicity under the law of State responsibility is evocative and constitutes a valid platform from which to advocate stronger export controls, it fails to capture international legal obligations to prevent and enforce. A treaty regulating international arms transfers ought to build on the positive obligations of States in the realm of international humanitarian law and human rights law, while providing objective indicators for assessing the risk that transferred weapons will fall into the wrong hands. Moreover, requiring States to criminalize the behaviour of those who thwart the licensing process would reinforce the current movement toward seeing illicit small arms suppliers as subjects of international criminal law. Anchoring the proposed treaty in the entire arsenal of international rules would make it more compelling as an avenue for States to show their commitment to the potential victims of small arms and light weapons.