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Controlling the Circulation of Small Arms in International Law

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Abstract

International humanitarian law (IHL) and international human rights law (IHRL) have shown an influence on the conventional arms control. A series of negotiations to control the trade of small arms, in particular the diplomatic conference on the arms trade treaty in July 2012, provide some evidence of this increasing influence. The negative impact of the widespread availability of small arms on human security justifies the linking of the use of these weapons with humanitarian and human rights law.

The Security Council arms embargo, a reactive sanction measure imposed retrospectively, the only legal mechanism restricting small arms transfers, is often ineffective in achieving its objective. What is required is preventive action. Other international mechanisms, such as the 2001 United Nations Programme of Action on small arms, the UN Register, and the 2005 International Tracing Instrument cannot be implemented effectively for several reasons, in particular, because they are not legally binding instruments.

The contemporary principle of State responsibility obliges States to regulate the small arms trade in the interest of preventing violence and ensuring security of all peoples. This obligation extends to those within and beyond their boundaries, in other words to the global population as a whole. Therefore, a selling State should not transfer weapons to another State if it is aware that the weapons may be used by the receiving State for internationally wrongful acts which would constitute a violation of international law. States have a responsibility to act in accordance with international norms of human rights and humanitarian law. Hence, a small arms transfer to another State, including for the purpose of self-defence, should be compatible with the requirements of IHL and IHRL.

An examination of the treaties regarding conventional weapons from the 1868 St Petersburg Declaration to the 2008 Convention on Cluster Munitions shows the increasing reference to principles of humanitarian law and human rights law. Their influence is also evident in the regional and sub-regional instruments. The recent adoption of the Mine Ban Convention and the Convention on Cluster Munitions was finalised outside the United Nations with a wide participation of civil society which promotes respect for human rights. This suggests that a future arms control negotiation may have to take into consideration human rights and humanitarian concerns, and can be pursued outside the United Nations framework.

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Abbreviations and Acronyms

1. ASEAN : Association of Southeast Asia Nations
2. ASEANAPOL : ASEAN Chiefs of National Police
3. ATT : Arms trade treaty
4. BWC : Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972)
5. CBM : Confidence building measure
6. CCM : Convention on Cluster Munitions (2008)
7. CCWC : Certain Conventional Weapons Convention (Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1980)
8. CFE : Treaty on Conventional Armed Forces in Europe (1990)
9. CIFTA : Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related Material (1997)
10. CWC : Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993)
11. DDR : Disarmament, demobilization and reintegration
12. ECOWAS : Economic Community of West African States
13. EU : European Union
14. GDP : Gross Domestic Product
15. GGE : Group of Governmental Experts
16. IADB : Inter-American Development Bank
17. IDP : Internally Displaced Person
18. IANSA : International Action Network on Small Arms
19. ICBL : International Campaign to Ban Landmines
20. ICC : Rome Statute of International Criminal Court (1998)
21. ICISS : International Commission on Intervention and State Sovereignty
22. ICJ : International Court of Justice
23. ICRC : International Committee of the Red Cross
24. IHL : International Humanitarian Law
25. IHRL : International Human Rights Law
26. ILC : International Law Commission
27. ITI : International Tracing Instrument (International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, 2005)
28. KLA : Kosovo Liberation Army
29. MANPADs : Man-portable air defence system

30. Mine Ban Convention : Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997
31. NATO : North Atlantic Treaty Organization
32. NGO : Non-Governmental Organization
33. NISAT : Norwegian Initiative on Small Arms Transfer
34. NPT : Treaty on the Non-Proliferation of Nuclear Weapons, 1968
35. NSA : Non-State actor
36. OAS : Organization of American States
37. OSCE : Organization for Security and Cooperation in Europe
38. OPCW : Organization for the Prohibition of Chemical Weapons
39. P5 : Five permanent members of the United Nations Security Council which have veto powers.
40. PrepCom : Preparatory committee meeting
41. RevConf : Review conference
42. RPG : Rocket-propelled grenade
43. RtoP : Responsibility to protect
44. SADC : Southern African Development Community
45. SALW : Small arms and light weapons
46. SIPRI : Stockholm International Peace Research Institute
47. TGF : Transitional Federal Government of Somalia
48. UAV : Unmanned aerial vehicle
49. UNGA res : United Nations General Assembly resolution
50. UNOCHA : United Nations Organization for Coordinating Humanitarian Affairs
51. UNPoA : United Nations Program of Action (United Nations Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, 2001)
52. UNDP : United Nations Development Program
53. UNHCR : United Nations High Commissioner for Refugees
54. UNSC res : United Nations Security Council resolution
55. US : United States of America
56. WMD : Weapons of mass destruction

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- Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864).
- Convention on Cluster Munitions (signed 3 December 2008, entered into force 1 August 2010), CCM/78.
- Convention on the Prevention and Punishment of the Crime of Genocide (adopted by the UNGA resolution 9 December 1948, entered into force 12 January 1951).
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (concluded 10 April 1972, entered into force 26 March 1975), 1015 UNTS 163.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997), 1974 UNTS 45.
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (opened for signature 3-4 December 1997, entered into force 1 March 1999), 2056 UNTS 211.
- Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (concluded 10 October 1980, entered into force 2 December 1983), 1342 UNTS 137; Protocol I (Non-Detectable Fragments, 1980), Protocol II Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 1980, amended in 1996), 1342 UNTS 137, 2048 UNTS 93; Protocol III (Prohibitions or Restrictions on the Use of Incendiary Weapons), 1342 UNTS 137; Protocol IV (Blinding Laser Weapons, 1995), 1380 UNTS 370; and Protocol V (Explosive Remnants of War, 2003), 2399 UNTS100, UN Doc CCW/MSP/2003/2.
- Convention on the Rights of the Child, concluded 20 November 1989, entered into force 2 September 1990, UNGA res 44/25.
- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St Petersburg Declaration) (adopted at St Petersburg by the International Military Commission, 11 December 1868), (1907) 1 AM J Int'l L Supp 95.
- Geneva Convention III Relative to the Treatment of Prisoners of War, concluded 12 August 1949, entered into force 21 October 1950, 75 UNTS 133.
- Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (concluded 12 August 1949, entered into force 21 October 1950), 75 UNTS 287.
- Hague Convention (IV)(1907) Respecting the Laws and Customs of War on Land with Annexed Regulations (concluded 18 October 1907, entered into force 26 January 1910), (1908) 2 Am J Int'l L Supp 90.
- Hague Convention (1899), Declaration (IV.1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosive from Balloons, and Other

- Methods of Similar Nature (adopted 29 July 1899), reprinted in (1907) 1 AM J L Supp 153.
- Hague Convention (1899), Declaration (IV.2) respecting the Prohibition of the Use of Projectile Diffusing Asphyxiating Gases, adopted 29 July 1899, reprinted in 187 CTS 456, 1 Am J Int'l L Supp 159 (1907).
- Hague Convention (1899), Declaration (IV.3) Respecting the Prohibition of the Use of Expanding Bullets, adopted 29 July 1889, reprinted in 187 CTS 459, 1 Am J Int'l L Supp (1907).
- Hague Convention II (1899) regarding Laws and Custom of War on Land.
- Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA) (signed 1 January 1997, entered into force 1 July 2008), 2029 UNTS 55.
- International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, GA res 2200A (XXI).
- International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 UNTS 3.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), 1125 UNTS 609.
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005), 2236 UNTS 208; DOC A/55/383/add.2.
- Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, concluded 17 June 1925, entered into force 8 February 1928, 94 UNTS 65, reprinted in 14 Int'l Leg Mats 49 (1975).
- Protocol on Blinding Weapons (1995), UNTS, vol 1380 at 370; Doc CCW/CONF.I/16 part I.
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90.
- Treaty on the Non-Proliferation of Nuclear Weapons (signed 1 July 1968, entered into force 5 March 1970), 729 UNTS 161.
- United Nations Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001), UN Doc A/CONF.192/15.
- Universal Declaration of Human Rights (adopted 10 December 1948), UNGA res 217A.
- Versailles Treaty (1919), 225 CTS 188.
- Vienna Convention on the Law of Treaties (adopted 23 May 1969), 1155 UNTS 331.

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“You get rich by giving the poorest people on the planet the means to continue killing each other. Do you know why I do what I do? I mean, there are more prestigious assignments. Keeping track of nuclear arsenals. You'd think that's more critical to world security. But it's not. No. Nine out of ten war victims today are killed with assault rifles and small arms. Like yours. Those nuclear missiles, they sit in their silos. Your AK-47, that is the real weapon of mass destruction.”

(Part of dialogue in the film *Lord of War* (2005) between Agent Valentine and arms dealer Yuri Orlov)

Chapter I: Overview of the Small Arms Issue

A. Introduction

This thesis argues that international humanitarian law (IHL) and international human rights law (IHRL) increasingly influence arms control treaties, including the process of negotiations to control small arms. The thesis examines the related treaties on conventional arms control to see the explicit evidence in the texts. Doing so shows the increasing consideration of IHL and IHRL in arms control treaties and negotiations as is evident in the current negotiations of an arms trade treaty. For the purpose of examining this influence, the thesis studies the contemporary concepts of State responsibility including the Articles of Responsibility of States on Internationally Wrongful Acts¹ adopted by the International Law Commission (ILC) and the Responsibility to Protect (RtoP).² In 2001, the ILC adopted the Articles which suggest a responsibility of State³ when it commits an internationally wrongful act. Meanwhile, the RtoP is the commitment of States and the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴

The thesis focuses on normative value describing how the international law should control the circulation of small arms. The arguments to restrict circulation of small arms are based on normative of IHL and IHRL found in international documents of the ILC's Articles of responsibility of States on Internationally Wrongful Acts and the Responsibility to Protect.

¹ Responsibility of States for Internationally Wrongful Acts (2001), as adopted by the UNGA res 56/83 of 12 December 2001. The thesis hereinafter refers to "the Articles".

² Report of the International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001).

³ "State" is written with capital "S" in conformity with the customs in which State is referred to in conventions, the United Nations resolutions and other legal documents. Writing "State" as a noun also makes it easier to differentiate it from "state" as a verb.

⁴ 2005 World Summit Outcome (A/Res/60/1). There are three reference paragraphs of the resolution dealing with this responsibility, namely paragraphs 138, 139, and 140; See also, the International Law Commission articles on responsibility of States in internationally wrongful acts (2001); and "The Responsibility to Protect" (2001), report of the International Commission on Intervention and State Sovereignty, co-chaired by Gareth Evans and Mohamed Sahnoun.

This first chapter consists of background information that explains why the issues relating to small arms and light weapons (hereinafter, small arms)⁵ emerge, affect people's lives, undermine respect for humanitarian law thus becoming concern of international humanitarian law, and come to the attention of the international community. The chapter provides clarification of some important definitions of certain terms, central hypotheses, structures and the methodology used. The thesis will primarily test and probe the notion that international law is now being humanized. That is, the norms of international humanitarian law (IHL) and international human rights law (IHRL) are more likely to be taken into consideration in the adoption of international arms control treaties.⁶ This close examination is focused on conventional arms control, in particular, the negotiations in finding an instrument to control small arms. The relationships between the availability of small arms and their impact on human security will then be analysed.

The research identifies important elements that are involved in addressing the effort to restrict international circulation of small arms. Those elements are State interests; contemporary principles of international norms, and the geo-politics of the post-Cold War era. The research explores theoretical arguments to demonstrate that, in line with the growing norm and contemporary principles of State responsibility, it is a State's responsibility to restrict the circulation of small arms.

1. Significance of the topic

The inspection of the international efforts to find solutions to regulation of small arms is significant because the existing international legal mechanisms are not able to adequately regulate their circulation. The free circulation of small arms contributes, in part, to fuelling, intensifying, or extending conflicts and violence. Small arms can be the tools of genocide and repression.⁷ For such reasons, the world is seeking ways to control the circulation of such weapons in order to limit their humanitarian impact.

⁵ Throughout the thesis, the term "small arms" refers to "small arms and light weapons", unless noted otherwise.

⁶ The terms "treaty" and "convention" are used interchangeably in this thesis.

⁷ Zeray Yihdego *The Arms Trade and International Law* (Oxford, Hart Publishing, 2007) at 9. See ICTY, *Prosecutor v Radislav Krstic*, Judgement, Case no IT-98-33-A, 19 April 2004, at 2-8. The trial

Small arms have killed more people than all other kinds of weapons. Each year, small arms directly kill hundreds of thousands of people before, during, or after conflicts.⁸ These deaths occur in armed conflicts and violence around the world, particularly in developing countries. Most studies on the use of small arms in conflicts reveal that around 80 per cent of the victims in armed conflicts are civilians.⁹ That most casualties are civilians makes the issue an important part of human security, attracting the interest of a wider international community beyond traditional disarmament society.¹⁰

The implications of the wide availability of uncontrolled small arms go beyond killing. They can prevent economic and human development, destabilize countries and regions, increase costs of public health, cause loss of productivity, increase crime and insecurity, force migration, and restrict people from accessing basic needs.¹¹ The wide spectrum of the impact of small arms requires research on small arms to view the issue from a human security perspective in order to reflect multiple implications.

Small arms are known to have a long durability and may last for generations and still work with minimum maintenance. That many small arms in conflict areas are actually weapons from World War II and the Cold War clearly illustrates their durability.¹² For the people in armed conflict, the durability of small arms means that the weapons will continue to be a threat long after the armed conflict ends.

Chamber of the Krstic case found that genocide occurred in Srebrenica in which small arms play a role. The role of small arms in genocides and massacres in Rwanda (1994) and the former Yugoslavia (1995) will be elaborated in Chapter II of this thesis.

⁸ Muggah Robert *Humanitarianism Under Threat: The Humanitarian Impacts of Small Arms and Light Weapons* (2001) at viii; Robert Muggah “Moving Forward? Assessing Normative and Legal Progress in Dealing with Small Arms” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 31.

⁹ 1997 Report of the Panel of Governmental Experts on Small Arms, A/52/298 of 27 August 1997 <www.un.org/Depts/ddar/Firstcom/SGreport52/a52298.html>. Last accessed 4 January 2011.

¹⁰ S Neil MacFarlane and Yuen Foong Khong *Human Security and the UN: A Critical History* (Indiana University Press, 2006) at 197.

¹¹ Koh Harold “Commentary: A World Drowning in Guns” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 61.

¹² Zeray Yihdego *The Arms Trade and International Law* (Oxford, Hart Publishing, 2007) at 17.

The existing current international mechanisms to control small arms proliferation have been proven to be ineffective in most cases; however, States still continue the effort to find an effective way to control these weapons. The transfer of arms to armed conflict zones continues despite various United Nations (UN) arms embargoes. That arms continue to be transferred to countries like Zimbabwe, Sudan or Somalia which were on the brink of, or are in a state of civil war, where respect for IHL and IHRL norms is minimal, further exposes the ineffectiveness of attempts to restrict the transfer of weapons. There is, in fact, no overall and comprehensive international legal instrument to deal with the small arms trade.¹³

The negative impact of free circulation of small arms on human lives, as described further in Chapter II, should be eliminated. The international community does not have a legally binding mechanism to prevent small arms transfers from flowing to countries in the middle of armed conflict or civil war where human rights violations are widespread. There is no international legal instrument, apart from selective Security Council arms embargoes, that prevents a State from transferring arms to another State which oppresses its citizens, and hence potentially would abuse the weapons to continue oppressing its own people. The world does not have a standard in small arms transfer which regulates when an arms transfer is allowed and when it is not, as there are no agreed common criteria. Criteria should be able to prevent the weapons from being used to commit violations of human rights or humanitarian law. While the world has managed to have a set of arms control treaties, there is no treaty to control small arms transfers.

The end of the Cold War had a great impact on small arms availability. Marked by the collapse of the Soviet Union in 1991, this created new directions for the flow of small arms, a departure from pragmatic political-ideological reasons to more economic ones. While the demand for major conventional arms reduced after the end of the Cold War, the number of small arms increased.¹⁴

¹³ Security Council of the United Nations may sanction, on a case by case basis, an arms embargo on a particular State/entity.

¹⁴ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 41.

2. End of the Cold War and the trade trends of small arms

The global political change following the end of the Cold War has greatly affected the direction of small arms transfers. Previously, the small arms flow followed the ideological patterns in the context of great rivalry between the United States and the Soviet Union. The Soviet Union provided its allies and satellite countries with economic and military assistance in the fight for influence against the Liberal West led by the United States which did the same in supplying its allies with economic and military assistance.¹⁵ The global arms race of the Cold War ended in 1991, illustrated by a reduced trade in major conventional weapons, but this had a contrasting impact through increasing small arms availability.¹⁶

The changing world has brought challenges different in nature from those of the Cold War era. For conventional arms, the related challenges are, among other things, the destruction of surplus weapons and the indiscriminate use of the weapons in armed conflicts which create new security and humanitarian problems.¹⁷

Some reasons for the increase in small arms trade after the Cold War are the break-up of the former Soviet Union and the Yugoslav Federation along with ethnic warfare within the successor States of these regions; the breakdown of central authority in Russia and the former Soviet Republics; possession by NATO and Warsaw Pact forces of large stockpiles of surplus weapons; and the proliferation of ethnic, tribal and religious conflicts.¹⁸ Another explanation for the increase is that, after the Cold War, some major producer countries continued to manufacture small arms at their old levels, hence creating a dramatic oversupply.¹⁹

¹⁵ Rachel Stohl and Dan Smith “Small Arms in Failed States: A Deadly Combination” (1999) Center for Defense Information < <http://www.cdi.org/issues/failedstates/march99.html>>. Last accessed on 4 June 2011.

¹⁶ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 41.

¹⁷ Erwin Dahinden “The Future of Arms Control Law: Towards a New Regulatory Approach and New Regulatory Techniques” (2005) 10(2) *J Conflict & Security Law* 263 at 267.

¹⁸ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 41.

¹⁹ Harold Hongju Koh “A World Drowning in Guns” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 63.

The geo-political situation in the early 1990s greatly favoured the uncontrolled spread of small arms. Many Eastern European and former Soviet Union countries had large quantities of small arms as residual weapons from the Cold War. Exporting the surplus weapons, rather than destroying them, was one option to generate a quick economic benefit, taking into account that those countries were economically desperate after the end of the Cold War.²⁰ The surplus weapons then spread freely to other parts of the world at reduced prices. The widespread availability of small arms has multiple effects from changing political stability, narrowing negotiating space, to creating a violent culture to express power.²¹

A new trend in the flow and trade of small arms followed the end of the Cold War. The patterns of supply and demand for arms were no longer dictated by the concerns of the super-power rivalry but directed more by practical economic-based demands and pragmatic political interests.²² Since the direction of supply of small arms is no longer controlled by a certain ideology, it flows relatively freely following demand regardless of the political ideology of the buyers. The weapons now go without restraint to the increased number of major armed conflicts.²³ The total number of major armed conflicts increased from 102 in 1985-1994 to 107 in 1995-2000, and most took place in Asia and Africa.²⁴ This suggests that the end of the Cold War has not necessarily resulted in a more peaceful world.

The end of the Cold War, however, offers new focus and opportunities for arms control to go to the negotiating table. Some important agreements on arms control were reached in the 1990s and early 2000s, particularly some on conventional

²⁰ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 66.

²¹ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Hants, Ashgate, 2009) at 62.

²² Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 31.

²³ Christian P Scherrer *Ethnicity, Nationalism and Violence: Conflict Management, Human Rights, and Multilateral Regimes* (Hants, Ashgate, 2003) at 46. According to the definition, major armed conflict claims at least 1000 deaths per annum; see Chapter II.

²⁴ Christian P Scherrer, *ibid.*

weapons such as Protocol on Blinding Laser Weapons (1995),²⁵ Protocol on Explosive Remnants of War (2003)²⁶ to the Certain Conventional Weapons Convention, and the Mine Ban Treaty (1997)²⁷. It was after the end of the Cold War, the issues of small arms started to be discussed in multilateral forum.

In a region where government and government institutions are fragile and unstable, availability of small arms may enhance the tendency to resort to violence to resolve differences. The weapons enable those who own them to contest for power over government institutions, particularly when small arms are in the hands of an organized armed non-State actor.²⁸ Small arms in the hands of insurgents or separatist groups would, therefore, certainly be used to pursue their interests using force generated from utilizing the weapons. This is how small arms could influence the decision to go to an armed conflict, taken with perception of an enhanced strength of possibility to win. The availability of a supply of arms would prolong and intensify the on-going conflict, which in turn, could bring the whole region into instability. This is particularly true in the case of Africa and to a certain degree, in South America and Southeast Asia.

Under the current international law regime, there is no practical international legal instrument to regulate the trade of small arms. In fact, the trade of small arms can be considered the least transparent of all.²⁹ The world has managed to have conventions to regulate nuclear weapons, chemical weapons, and biological weapons, but nothing to regulate small arms. The total number of the weapons keeps growing. Some studies indicate that the most destabilizing feature of the arms trade after the Cold War is the uncontrolled trade of small arms to intra-State conflicts.³⁰

²⁵ Protocol on Blinding Weapons (1995), 1380 UNTS 370; Doc CCW/CONF.I/16 part I.

²⁶ Protocol on Explosive Remnants of War (2003), 2399 UNTS 126.

²⁷ Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mine and on their Destruction (opened for signature 3 December 1997, entered into force 1 March 1999), 2056 UNTS 211.

²⁸ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Hants, Ashgate, 2009) at 62.

²⁹ Report of the Secretary-General on Small Arms, 5 April 2011 (S/2011/255) at [2-6].

³⁰ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 38.

3. Small arms industry

The producers of small arms are not limited to certain countries, as was the case before the 1990s. There are also more countries or actors now involved in the making and transfer of small arms. Many actors play the role of arms suppliers, no longer exclusively governments, in contrast to a handful of arms suppliers existing during the Cold War.³¹ The weapons flow in diverse directions including to armed conflict areas and even to failed or failing States, such as Somalia and Sudan.

Economic profit generated from the arms trade certainly benefits some States. Small arms exporting countries that publicly profess their commitment to peace are often also major suppliers of arms to conflict-ridden States.³² This contradiction occurs because the small arms trade involves a considerable amount of money and countries' actions are partly influenced by pragmatic economic interests. The US, Italy, Brazil, Germany, Belgium, Austria, Russia, and China are among top exporters of small arms.³³ The considerable value of the arms industry indicates the influence the industry has on governments to discourage any limitation by regulation of small arms production and transfer.

Arms producing companies are generally in developed countries although the recent trend shows an increasing number of developing countries producing weapons. Some of the top manufacturers of small arms, including their ammunition, are Berreta (Italy), a company dating back to 1526, producing about 1,500 guns a day and exporting the weapons to more than 100 countries; Heckler & Koch (UK/Germany), makers of G-36 assaults rifle; Smith & Wesson (US); Colt (US); FN Herstal (Belgium) producing popular FN pistols; Norincho (China), known to produce thousands of cheap pistols for export; Izhmash (Russia); Israel Weapon Industries (former Israel Military Industries-IMI, Israel), makers of the UZI sub-machine gun; KBP (Russia); Saco Defense (US); Sellier & Bellot (Czech Republic); Winchester

³¹ Ibid, at 36.

³² Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 141.

³³ SIPRI database provides information on top exporters and importers of conventional weapons <<http://www.sipri.org/databases/armstransfers>>. Last accessed 5 July 2010.

Olin (US/Belgium); Nammo (Finland/Sweden/ Norway); Giat (France); General Dynamics (US); and Singapore Technologies (Singapore).³⁴ In addition, there are also names like Armalite (US) (maker of M4 and M-16 assault rifles), Walther, Sig Sauer (Germany), and Remington (US).³⁵

Data available at the Norwegian Initiative on Small Arms Transfer (NISAT) on export and import of small arms revealed the scale of economic value from the small arms trade. However, it comes with a note that the values may be underestimated since some countries did not report all their small arms trade.³⁶ Among the top five small arms exporting countries for 2010, the United States was top (US\$674 million), followed by Italy (US\$402 million), Germany (US\$376 million), Brazil (US\$314 million), and Switzerland (US\$209 million).³⁷

Considering the lack of transparency in small arms transfer, it is no surprise to see that Russia and China are not in the top five. In 2010, Russia exported small arms with a value of “only” US\$ 150 million and China US\$40 million.³⁸ However, these figures are considered much lower than actual values.³⁹ The figures come from the available data and authorized trade which, considering the lack of transparency in arms trade, suggest the real value from small arms trade may be much higher. The Small Arms Survey ranks small arms exporters rather differently and includes China, India, North Korea, Pakistan, Russian Federation, and Turkey in top 15, apart from usual countries in authorized small arms trade.⁴⁰

³⁴ Small Arms Survey www.smallarmssurvey.org/files/sas/home/FAQ.html#FAQ5; Hackler & Koch <<http://www.heckler-koch.com/en/company.html>>. Last accessed 14 April 2012. Also BBC “Who Makes the World’s Guns”, Monday, 12 November 2007 <<http://news.bbc.co.uk/2/hi/europe/6294242.stm>>. Last accessed 12 April 2012. Last accessed 9 November 2008.

³⁵ BBC “Who Makes the World’s Guns”, Monday, 12 November 2007 <<http://news.bbc.co.uk/2/hi/europe/6294242.stm>>. Last accessed 12 April 2012.

³⁶ *Small Arms Survey 2011: States of Security* (Cambridge University Press, 2011) at annexe to ch 1.

³⁷ NISAT Database < <http://www.prio.no/NISAT/>>. Last accessed 12 April 2012. The figures rounded to closer number. The year 2010 is the latest data available on the NISAT database.

³⁸ NISAT Database < <http://www.prio.no/NISAT/>>. Last accessed 12 April 2012. The figures rounded to closer number.

³⁹ NISAT Database < <http://www.prio.no/NISAT/>> . Last accessed 12 April 2012. See also *Small Arms Survey 2011: States of Security* (Cambridge, 2011) at annexe to ch 1.

⁴⁰ “Weapons and Markets: Industrial Production” Small Arms Survey <<http://www.smallarmssurvey.org/weapons-and-markets/producers/industrial-production.html>>. Last accessed 13 April 2012.

Some countries are known to trade arms with little or no transparency, which exclude them from top list of exporting countries. The Small Arms Survey 2011 released a transparency barometer which shows Russia, China, South Africa, Singapore, Taiwan, Ukraine, Iran, and North Korea as the bottom eight, among the least transparent exporting countries.⁴¹

From an import perspective, the US was also in the top importing countries list in 2010 with US\$1.1 billion, followed by UK US\$164 million, Canada US\$152 million, Germany US\$133 million, and Australia US\$114 million.⁴² The high economic value of small arms transfer could be threatened once a legally binding treaty was adopted. This partially answers the question of why, apart from strategic and political considerations, States are very cautious about having an arms trade regulation. Companies in the arms industry, generally, are State-owned enterprises, partly owned by States, or highly State-controlled.⁴³ The wave of privatisation of arms industry in 1990s has reduced government-owned companies; however, States still largely finance, provide political support, regulate, and control development and production of arms.⁴⁴ It is then making sense that State policy is most effective in controlling the supply side of arms.

4. Arms control

An arms control agreement, particularly a multilateral one, seeks to limit or constrain particular weapons; regulate military force structure; prevent the spread of particular capabilities; create security, stability, and predictability; reduce the cost of an arms race; reduce suffering should war occur; and improve confidence and transparency.⁴⁵

⁴¹ *Small Arms Survey 2011: States of Security* (Cambridge, 2011) at 16-17. Small Arms Trade Transparency Barometer 2011 has a range from 0 to 25. Russia gets total 6.00 and is fifth from the bottom (with only Saudi Arabia, South Africa, Iran and North Korea being lower). Meanwhile, China gets total 8.00, ranking nine from the bottom.

⁴² *Small Arms Survey 2011: States of Security* (Cambridge, 2011) at annexe to ch 1.

⁴³ Sam Perlo-Freeman "Arms Production" in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (New York, Oxford University Press, 2009) at 286.

⁴⁴ SIPRI "Transparency in Arms Industry"

<http://www.sipri.org/research/armaments/production/researchissues/transparency>. Last Accessed 14 April 2012.

⁴⁵ John Freeman "Is Arms Control in Crisis?" (2004) 9 J Conf & Sec L 303 at 307.

This illustrates that arms control has a wide range of purposes which serve as multiple reasons to motivate control of particular arms. These could be a combination of economics, strategic politics, security, and humanitarian.

Arms control agreements between countries have existed for centuries. In this instance, a treaty would be signed between countries to reduce or prohibit the use of certain weapons. In the early history of war, arms control, or disarmament to be precise, was imposed by the victor on the defeated or was a term imposed by the stronger State on a weaker one. This is illustrated in the negotiation between Rome and Carthage before the Third Punic war, where Carthage was obliged to destroy its fleet and vast stocks of weapons to avert war.⁴⁶

Following defeat in World War I, disarmament was imposed on Germany in the Treaty of Versailles (1919).⁴⁷ The number of infantry, guns, machine guns, trench mortars, rifles and ammunition were all set down.⁴⁸ The Versailles treaty imposed arms restriction on Germany but not to the victorious Allies, as the treaty instructs, “the German military forces shall be demobilised and reduced”.⁴⁹ Limitations were set on the navy, air force, and Germany was prohibited from export and import of all kinds of arms.⁵⁰ This was to ensure the defeated would never be a military power again, at least in the near future. Similarly, demobilization and disarmament were imposed on Germany and Japan by the allied forces following the end of World War II. Such dictated arms control only takes place after the war situation when the victors dictate the number and type of arms the defeated may have.

Arms control and disarmament agreements were also negotiated between sovereign States based on an equal footing. An arms control treaty may have been agreed to ban

⁴⁶ Adrian Goldsworthy *The Fall of Carthage: The Punic Wars 265-146 BC* (Cassel, London, 2003) at 338.

⁴⁷ Versailles Treaty (1919), the Avalon Project, Document in law, history and diplomacy, Yale Law School < <http://avalon.law.yale.edu/imt/parti.asp>>. Last accessed 14 April 2012.

⁴⁸ Versailles Treaty (1919), art 183 and 199, the Avalon Project, Document in law, history and diplomacy, Yale Law School < <http://avalon.law.yale.edu/imt/parti.asp>>. Last accessed 14 April 2012.

⁴⁹ Ibid, art 159; see also discussion of forced arms reductions after the First World War in Alexander Gillespie *A History of the Laws of War: The Customs and Laws of War with regards to Arms Control* (Oxford, Hart Publishing, 2011) vol 3, at 29.

⁵⁰ Versailles Treaty (1919), art 165 and 170, the Avalon Project, Document in law, history and diplomacy, Yale Law School < <http://avalon.law.yale.edu/imt/parti.asp>>. Last accessed 14 April 2012.

the armament for political, security, humanity, and economic reasons. From an economic perspective, an arms race consumes huge amounts of the State's budget. From a political and security perspective, an arms control agreement achieved would bring a feeling of security. Humanitarian concerns demonstrate that they also can be a rationale for the prohibition of the use of certain weapons for their indiscriminate nature or the superfluous or unnecessary injury that they cause to combatants. This will be discussed in Chapter III.

An agreement on arms control could be made by either a bilateral agreement involving only two concerned States or a multilateral process involving many States. The 1868 St Petersburg Declaration⁵¹ to prohibit the use of incendiary bullets is one example of multilaterally agreed conventional arms control. During the Cold War, the world witnessed a series of bilateral arms control talks between the two blocs. One example of bilateral negotiation is the agreement between the US and the Soviet Union on the Strategic Arms Reduction Treaty (START). The bilateral negotiation between the US and Russia on the reduction of nuclear weapons warheads continued after the Cold War with 2002 Strategic Offensive Reductions Treaty (SORT)⁵² and, recently, the agreement on the New START (2010).⁵³

Bilateral agreements on conventional weapons are less common than bilateral agreements on nuclear weapons, because only a few countries own nuclear weapons while conventional weapons are owned by almost all sovereign countries. Hence, a conventional weapon agreement needs a multilateral agreement to be effective to restrict, ban or limit the use of a particular type of conventional weapon. Because of the universality of conventional weapons' ownership, a multilateral mechanism is required to achieve a universal and widely adhered to norm on particular arms control. The international community has previous experience in dealing with some conventional weapons, such as with anti-personnel mines and cluster munitions,

⁵¹ Declaration Renouncing the Use, in Time of war, of Explosive Projectiles Under 400 Grammes Weight, adopted at St Petersburg by the International Military Commission, 11 December 1868, (1907)1 Am J Int'l L Supp 95.

⁵² Treaty between the Russian Federation and the United States of America on Strategic Offensive Reductions (concluded in Moscow, 24 May 2002), 2350 UNTS I-42195.

⁵³ Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (signed 8 April 2010).

which focuses on the indiscriminate effects of the weapons or weapons causing excessive injuries, but not much experience with the small arms issue.

States' achievement of an agreement on an arms control treaty is encouraged by the factors that serve their interests. One of the most important factors is the perception that an agreed arms control treaty would provide more stable security for them. When presented with a concrete arms control proposal, each State will cautiously scrutinize its own security⁵⁴ and only sign it if the proposal helps increase the feeling of security or at the very least does not pose a danger to its security. This thesis not only views small arms from the security angle but links this with the efforts to control the proliferation of small arms with humanitarian reasons.

5. Framing focus of the thesis: State's supply of small arms

The effort to reduce avoidable deaths caused by small arms can be seen from several perspectives. The first is the supply side focus which is to see the problem of small arms as caused by excessive availability of the weapons; hence, the transfer of small arms should be restricted and regulated. States play a dominant role in restricting the supply by applying regulations limiting the trade. The international trade restriction by regulating of supply by States is what the thesis examines.

In examining States' efforts to control small arms, the thesis analyses considerations and rationales in arms control. The analysis weighs the importance of IHL and IHRL development and their influence on the adoption of an arms control instrument.

There is a second focus which analyses the issue from the demand side. This is to explain why there is demand for weapons and how to reduce the demand for small arms. The demand side deals with the perception that conflict can be resolved using weapons. The belief that weapons have the power to resolve conflicts persuades people to possess weapons. From the demand approach, to reduce violence caused by small arms is to change the view that weapons could resolve problems. The

⁵⁴ Guido Den Dekker *The Law of Arms Control: International Supervision and Enforcement* (Leiden, Martinus Nijhoff Publishers, 2001) at 31.

perspective of the demand side focuses on peace, conflict resolution, and peace education in dealing with the small arms problem. This thesis does not examine this issue.

Another approach examines the issue of the misuse of small arms. The weapons may be properly owned, legally acquired and be in legitimate hands, such as armed forces personnel; however, even they may misuse the weapons in their hands to attack civilians.⁵⁵ The main idea is that the weapons should not endanger civilians, instead, the legally acquired weapons in the hands of governments should bring security to civilians.

Legally acquired weapons belonging to security personnel for legitimate use, in certain circumstances, may also be a problem. Weapons in military stockpiles may also disappear because of lack of discipline and weak regulation on stockpiling. An answer to the misuse issue is to hold the perpetrators responsible, improve discipline, restrict access to weapons by repeat offenders, and adopt a strict domestic regulation on arms stockpiling. This thesis reviews some aspects of this issue, in particular to demonstrate that legally acquired weapons may also become a threat to civilians.

Lastly, there is a focus on reducing the existing pool of weapons. Some of the UN peace keeping missions have been given the task to collect weapons.⁵⁶ In collecting weapons, there should be a well planned policy on disarmament and destruction of weapons, particularly in post-armed conflict situations where small arms are prevalent. Security in a post conflict situation depends on the success of the program of the disarmament, demobilization and reintegration of ex-combatants into civilian life (DDR). The thesis does not directly examine this issue. Rather, it focuses primarily on small arms transfers in the first instance, not arms disposal after the conflict.

⁵⁵ Amnesty International “Gaza: Misuse of Weapons” (19 Feb 2009) <www.amnesty.org.nz/news/gaza-misuse-weapons>. Last accessed at 22 December 2010. Amnesty International indicates that both parties to the conflict in Gaza, Palestine, misuse the conventional weapons they have to attack civilians.

⁵⁶ UNSC resolutions on several UN peace keeping forces have given the mandate to include the DDR programme. See the resolutions on the peace keeping mission in Congo, for example the resolution 1925 (2010) of 28 May 2010.

The thesis restricts its focus to the States' effort to restrict supply as it examines what States can do based on contemporary State responsibilities and the principles of IHL and IHRL. While the thesis acknowledges the need for a coordinated effort of all approaches in combating the free circulation of small arms, for the purpose of the research, the thesis focuses on what is the most effective way for States to restrict the global supply of small arms. The focus on State supply is based on the practical realization that the international system is founded on States. States are still dominant and not replaceable in the foreseeable future, even though non-state actors such as transnational companies and international non-governmental organizations (NGOs) are increasingly present.⁵⁷

As the thesis deals with the focus on State supply of small arms, it therefore inspects the efforts of States to control the small arms trade in multilateral fora. Hence, it examines efforts under the UN framework which include small arms negotiations in the Security Council and General Assembly. The thesis, in addition, also observes the response of regional organizations to the threat of small arms in complementing the global effort.

6. Human Security in the small arms discussion

The human security approach applies in this thesis' analysis. The human security approach on small arms is intended to observe the issues from a broader perspective. The thesis analyses the issue of small arms by not restricting it only to a humanitarian focus which is mainly limited to an armed conflict, or a traditional arms control view that only looks at the issue from the geo-politics of State interests, but also from a broader context. Applying a human security approach justifies the thesis' observation of the implications of small arms from multiple humanitarian perspectives: social development, and human rights. International human rights law is increasingly being

⁵⁷ Joseph S Nye Jr *Understanding International Conflicts: An Introduction to Theory and History* (7th, Longman, 2009) at 2.

used to provide standards in evaluating some areas of international law, including arms control.⁵⁸

The thesis uses the concept of human security as defined by the Commission on Human Security: “to protect the vital core of human lives in ways that enhance human freedom and human fulfilment”.⁵⁹ The concept of human security is concerned with violent conflict, is associated with non-traditional security issues, and focuses more on humans in general and protection of individuals rather than of States.⁶⁰ Human security, in the view of the 2003 Report of the UN Commission on Human Security, has goals that include protecting people from violent conflict and from the proliferation of arms.⁶¹ It benefits this thesis to study the issue of small arms beyond restricted concepts of only humanitarian law or arms control. The framework of human security views human rights as a security problem, a notion that is in agreement with the emerging norm of the Responsibility to Protect.⁶² This will be discussed further in Chapter IV.

The significance of applying a human security approach to control of small arms is that the excessive supply of weapons is a threat and has had a destructive effect on human security. The most important reason for international society to strictly regulate the trade of these weapons is based on the fact that most victims are civilians.⁶³ In addition to humanitarian concerns, the wide availability of small arms before, during and after armed conflict, is often associated closely with widespread

⁵⁸ Saladin Meckled-Garcia and Basak Cali “Lost in Translation: The Human Rights Ideal and International Human Rights Law” in Saladin Meckled-Garcia and Basak Cali (eds) *The Legalization of Human Rights: Multidisciplinary Perspective on Human Rights and Human Rights Law* (New York, Routledge, 2006) at 12.

⁵⁹ Commission on Human Security *Human Security Now* (New York, Commission on Human Security, 2003) at 4.

⁶⁰ Commission on Human Security *Human Security Now* (New York, Commission on Human Security, 2003) at 4-6, 57; Michael E Smith *International Security: Politics, Policy, Prospects* (Hampshire, Palgrave Macmillan, 2010) at 42.

⁶¹ Commission on Human Security *Human Security Now* (New York, Commission on Human Security, 2003).

⁶² Ibid; also Michael E Smith *International Security: Politics, Policy, Prospects* (Hampshire, Palgrave Macmillan, 2010) at 42.

⁶³ S Neil MacFarlane and Yuen Foong Khong *Human Security and the UN: A Critical History* (Indiana University Press, 2006) at 197.

criminality and violence which is a case for human security as small arms become a threat to peace building.⁶⁴

7. Central questions

The thesis will address the central issue of why the international community has difficulty in restricting the flow of small arms. The central question asked by the thesis is:

How does international law control the small arms supply?

Additional questions are:

- How extensive is the influence of IHL and IHRL in small arms control negotiations?
- What are the limitations of current mechanisms in the control of small arms?
- What are the contemporary global principles of State responsibilities in preventing small arms proliferation?
- What is the role of civil society and international organizations, including the UN, in establishing norms on the use of small arms?
- What are the challenges and opportunities in adopting an international legal instrument to regulate the small arms trade?
- How do regional organizations respond to the small arms issue?

The central and additional questions could be developed into the statements below.

- a. Statement 1: *The contemporary global principles of State responsibility demand that States regulate and restrict the flow of small arms*

⁶⁴ Ibid.

The conclusion of the Cold War has brought to an end some ideological hostilities and promoted greater respect for human rights.⁶⁵ Respect for human rights is now a well accepted global norm which States have to observe.⁶⁶ The contemporary principles of State responsibility demand that States protect their populations from any crimes against humanity.⁶⁷ States have a responsibility toward the international community and must behave in accordance with acceptable human rights and humanitarian norms.⁶⁸ Louis Henkin has long advocated this view, as he argues that human rights have in fact been deeply implicated in the realities of international politics.⁶⁹ State responsibility refers to obligations which result from any of the sources of international law.⁷⁰

A situation where there is no global restriction in small arms transfer, so that these weapons are widely available, is not in conformity with the principles of State responsibility and respect for human rights. In theory, restricting and controlling the flow of small arms will help prevent these weapons from causing serious human rights violations, and threatening economic and social development.⁷¹ The thesis argues that restricting the flow of small arms is part of a State's responsibility to protect its population.

- b. Statement 2: *IHL and IHRL are increasingly influential in arms control negotiations, which are particularly evident in the negotiation of an arms trade treaty.*

⁶⁵ Gennady M Danilenko "Russia and International Human Rights" in Sienho Yee and Wang Tieya (Eds) *International Law in the Post-Cold War World* (New York, Routledge, 2001) at 182.

⁶⁶ Saladin Meckled-Garcia and Basak Cali "Lost in Translation: The Human Rights Ideal and International Human Rights Law" in Saladin Meckled-Garcia and Basak Cali (eds) *The Legalization of Human Rights: Multidisciplinary Perspective on Human Rights and Human Rights Law* (New York, Routledge, 2006) at 12.

⁶⁷ Responsibility of States for Internationally Wrongful Acts (2001), as adopted by the UNGA res 56/83 of 12 December 2001..

⁶⁸ Theodor Meron *Humanization of International Law* (Leiden, Martinus Nijhoff Publishers, 2006) at 249; see also, Louis Henkin *The Age of Rights* (Columbia University Press, 1990) at 11-65.

⁶⁹ Louis Henkin, *ibid* at 27. Henkin gives example on colonialism which was once a domestic affair, but now (at least in its traditional form) is illegal.

⁷⁰ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (New York, Cambridge University Press, 2005) at 14.

⁷¹ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 140. Internal armed conflicts, in which small arms are widely used, are the fertile places for potential crimes against humanity. ICTY and ICTR trials show that massacres in Rwanda and Bosnia were executed with the help of small arms.

Human rights have long been influencing international law.⁷² The effort in adopting a new arms control treaty, including a treaty dealing with small arms control, is influenced by IHL and IHRL. The effect of the widely available, unrestricted flow of small arms is destructive to human security and thus requires the inclusion of IHL and IHRL considerations in the negotiation to control small arms trade. The influence of IHL and IHRL is substantially reflected in the process of negotiation as reflected in the draft and final text of recent arms control treaties. Significantly, the same influence is apparent in the negotiation of any arms trade treaty which is to include small arms. The efforts to regulate the uncontrolled proliferation of small arms cannot escape the argument of humanitarian law and human rights law, in particular when the weapons are used in violation of humanitarian and human rights law.

International law has been growing rapidly since the end of the World War II. Respect for humanity and human rights values have been codified and incorporated more into international conventions.⁷³ The trauma of unprecedented deaths of civilians and combatants, pushed the international community to establish a set of international laws to agree on what was and was not allowed, both in time of war and peace with respect for humanity and human rights norms, that went beyond what had been agreed before World War II. After 1945 the rules were considerably advanced as particularly codified in the Geneva Conventions and their Additional Protocols.⁷⁴ Among these rules, the 1949 Fourth Geneva Convention on the protection of civilians in times of war was the first international instrument to focus on civilian needs in armed conflicts.⁷⁵ The Geneva Conventions cover only civilians in the Fourth

⁷² Ibid, at 45.

⁷³ See for example, the Convention Relating to the Status of Refugees (1951), reprinted in Shirley V Scott *International Law and Politics: Key Documents* (Boulder, Lynne Rienner Publishers, 2006) at 341; the International Convention on the Elimination of All Forms of Racial Discrimination (1965), reprinted in Shirley V Scott *International Law and Politics: Key Documents* (Boulder, Lynne Rienner Publishers, 2006) at 359; the International Covenant on Civil and Political Rights (1996), reprinted in Shirley V Scott *International Law and Politics: Key Documents* (Boulder, Lynne Rienner Publishers, 2006) at 371; the Convention on the Elimination of All Forms of Discrimination Against Women (1979), reprinted in Shirley V Scott *International Law and Politics: Key Documents* (Lynne Rienner Publishers, 2006) at 406; and the Geneva Conventions (1949), reprinted in Shirley V Scott *International Law and Politics: Key Documents* (Boulder, Lynne Rienner Publishers, 2006) at 439.

⁷⁴ Alexander Gillespie *A History of Laws of War* (Oxford, Hart Publishing, 2011) vol 1 and 2.

⁷⁵ Geneva Convention to the Protection of Civilian Persons in Time of War (IV) (1949), 75 UNTS 287; see Alexander Gillespie *A History of Laws of War* (Oxford, Hart Publishing, 2011) vol 2 at 183 .

Convention. More attention to civilian protection, both in international and non-international armed conflict, is covered in the Additional Protocols I and II adopted in 1977.⁷⁶ The 1949 Geneva Conventions and their additional Protocols were among fundamental treaties most States have ratified that stress the laws of armed conflict and protection of civilians. By the end of 2011, 194 States had ratified the Geneva Conventions, which reflects the universal acceptance.⁷⁷

The establishment of the United Nations after the end of the World War II marked the new international order. The decisions of the Security Council resolutions bind all member States of the United Nations, and thus become highly persuasive. States agreed and bound themselves by signing treaties in social, economic and security areas that further promote international law.⁷⁸ In the era following World War II, treaties have increased greatly in number.

The end of the Cold War further expedited the rapid growth of international law. The subsequent absence of ideological competition was conducive to the opening of more negotiations of treaties containing more respect for humanity and human rights. The

⁷⁶ Geneva Convention to the Protection of Civilian Persons in Time of War (IV) (1949), 75 UNTS 287; Additional Protocol II (1977), 1125 UNTS 609; see also, Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011) vol II at 183-197.

⁷⁷ ICRC <<http://www.icrc.org>>. Last accessed on 16 April 2012.

⁷⁸ Among economic and social treaties, there are nine human rights treaties, namely the Convention on the Elimination of All Forms of Racial Discrimination (open for signature 21 December 1965, entered into force 4 January 1969); the International Covenant on Civil and Political Rights (CCPR) (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171; the International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3; the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 1979, entered into force 3 September 1981); the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987); the Convention on the Rights of the Child (concluded 20 November 1989, entered into force 2 September 1990), UNGA res 44/25.; the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families (adopted 18 December 1980, entered into force 1 July 2003); the Convention on the Rights of Persons with Disabilities (open for signature 30 March 2007, entered into force 3 May 2008); the International Convention for the Protection of All Persons from Enforced Disappearances (open for signature 6 February 2007, entered into force 23 December 2010). Among the security treaties are: the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997); the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (opened for signature 3-4 December 1997, entered into force 1 March 1997); the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (concluded 10 October 1980, entered into force 2 December 1983).

codification of international human rights law has developed rapidly, shown by the number of international treaties with respect for humanity and human rights values in them. The adoption of a number of international human rights treaties is among the examples. Another example is the adoption of the Rome Statute of the International Criminal Court (1998), which prosecutes individuals for war crime and crime against humanity.⁷⁹

The United Nations has been endeavouring, with no success, to establish a meaningful international legal instrument to regulate small arms. The attempts to address the issue started in the 1990s and increased, leading to the United Nations conference on small arms in July 2001.⁸⁰ The conference, however, failed to produce a legally binding instrument. Over the following decade, the discussion of small arms centres on a series of following meetings of the 2001 UN Program of Action with no prospect towards more binding instruments. However, in 2006 States agreed to start a negotiation on an arms trade treaty (which includes small arms), which culminated in a diplomatic conference in July 2012. The thesis then argues that IHL and IHRL are increasingly influential in arms control negotiations.

B. Definitions and Terms

1. Small arms and light weapons

The combination term of “small arms and light weapons” gained popularity in the 1990s and became frequently found in reports, papers, or media as more people were concerned with the problems created by the easy access and wide availability of these weapons. There are several definitions of the terms “small arms” and “light weapons”. The definitions by research institutions, academia, States, regional organizations, and the United Nations differ slightly from one to another. Hence, it is

⁷⁹ The adoption of the Rome Statute of the International Criminal Court (1998), was based on the codification of international law by the International Law Commission (ILC) with its “Draft Statute for International Criminal Court (1994)”. See, *Draft Statute for an International Criminal Court 1994* (United Nations, 2005).

⁸⁰ Robert Mungah “Moving forward? Assessing Normative and Legal Progress in Dealing with Small Arms” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theories and Practices* (New York, Routledge, 2007) at 32.

central to use a definition appropriate for the purpose of the thesis. The Oxford dictionary defines small arms (in plural noun) as “portable firearms, especially rifles, pistols, and light machine guns”.⁸¹ This dictionary includes light machine guns in the definition of “small arms” and, reasonably, does not have an entry on “light weapon”.

Realizing the need for an exact definition of the term, the United Nations has worked on the definition. A working group,⁸² formed by the United Nations to find an international instrument on tracing small arms, formulated a definition which is employed in the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (here after International Tracing Instrument or ITI). Adopted by the UNGA in 2005, the ITI defines “small arms and light weapons” as:

[A]ny man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas.⁸³

The instrument further describes the small arms and light weapons in detail as follows:

a)[S]mall arms are, broadly speaking, weapons designed for individual use. They include, *inter alia*, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns;

b)[L]ight weapons are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, *inter alia*, heavy machine guns, hand-held under barrel and mounted grenade launchers, portable anti-craft guns, portable anti-tanks guns, recoilless rifles, portable launcher of anti-tank missile and rocket systems, portable launchers of anti-air craft missiles systems, and mortars of a caliber of less than 100 millimeters.⁸⁴

⁸¹ *Oxford Dictionary of English* (revised 2nd ed, Oxford University Press, 2005).

⁸² United Nations General Assembly Resolution 58/241 of 23 December 2003. The Working Group is to negotiate an international instrument to enable states to identify and trace illicit trade of small arms and light weapons. The working group uses the definition produced by a previous panel to study the definition of small arms mandated by the GA resolution 50/70 B of 12 December 1995.

⁸³ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (2005), UNGA Decision 60/519 of 8 December 2005.

⁸⁴ *Ibid.*

Based on the definition above, swords, knives, axes and landmines,⁸⁵ do not fall into the definition of small arms and light weapons since they are not designed to expel or launch a shot, bullet, or projectile. For the sake of clarity: in the case of an armoured tank, it cannot be classified as a light weapon as it cannot be carried by three or fewer persons.

The thesis uses the definition above provided by the ITI and adopted by the UN, for all discussion. The thesis employs the term “small arms” to include “light weapons” throughout all chapters. Some publications favour the abbreviation of SALW referring to small arms and light weapons instead of small arms. In the thesis, any quotation including SALW is then regarded as referring to small arms. For research purposes, the thesis takes the terms “firearms” or “hand guns” as sub-parts of small arms.

The choice to employ the definition provided by the ITI is based on the priority to ensure the definition of the most common value agreed within international relations.⁸⁶ The ITI definition is the most current definition adopted by the international order, namely the United Nations General Assembly.

a. Other definitions

While the thesis uses the ITI definition on small arms and light weapons, there are some other definitions. The 2001 Protocol on Firearms, as the title suggests, uses the term “firearms”. The thesis regards these as included in the term “small arms”. The Protocol definition is:

“Firearm” shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or

⁸⁵ A broad definition as employed in the 1997 Report of the Panel of Governmental Experts on Small Arms includes anti-personnel landmines. Paragraph 6 of the Report explains that “[t]he issue is, however, being addressed in other forums. The Panel, therefore, agreed to avoid duplication of effort and different approaches by excluding anti-personnel landmines from its deliberations.” <www.un.org/Depts/ddar/Firstcom/SGreport52/a52298.html>. Last accessed 4 January 2011.

⁸⁶ Zerah Yihdego *The Arms Trade and International Law* (Oxford, Hart Publishing, 2007) at 46.

projectile by the action of an explosive, excluding antique firearms or their replicas.⁸⁷

Similarities can be seen in the “firearm” definition in the Protocol and the “small arms” definition in the ITI in which both definitions are based on the portable barrelled weapon that expels a shot by the action of an explosive.

Inter-governmental organizations and non-governmental organizations define small arms based on their perspective. The North Atlantic Treaty Organization (NATO) defines small arms and light weapons slightly different from the ITI:

“Small arms” are, broadly speaking, weapons designed for individual use. They include, *inter alia*, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.⁸⁸

Here, it is noticeable that the NATO definition does not include the idea that the projectile should be expelled or propelled by an explosion. Hence, having no indication of whether the bullet is expelled or propelled makes the NATO’s definition rather loose in comparison, as more weapons may fall into this definition as long as they are designed for individual use.

For light weapons, the NATO definition is:

“Light weapons” are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, *inter alia*, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimeters.⁸⁹

On the other hand, the International Committee of the Red Cross (ICRC) defines small arms as referring to “assault rifles, machine guns, hand grenades, and other

⁸⁷ 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 (2001), 2326 UNTS 208, art 3(a).

⁸⁸ NATO *Small Arms and Light Weapons and Mine Action*

<www.nato.int/cps/en/natolive/topics_52142.htm>. Last accessed 4 January 2011.

⁸⁹ Ibid.

weapons designed for military use by an individual combatant.”⁹⁰ The definition comes with the explanation that it includes “commercial firearms such as handguns and hunting rifles.”⁹¹

As for “light weapons”, the ICRC refers to them as “portable weapons designed for use by several persons as crew, such as heavy machine-guns, mounted grenade-launchers, portable anti-aircraft guns, portable anti-tank guns, portable launchers of anti-tank missiles, and mortars.”⁹² Here the ICRC does not clearly limit the size of mortar as do the UN and NATO definitions, defining it as less than 100 mm. Although there are some slightly different definitions, they generally refer to the same weapons.

2. Civilian or non-combatant

To present a strong argument on the possible danger to civilian lives of excessive availability of small arms, the term civilian needs to be defined. Norms of both war and international humanitarian law seek to mitigate the effects of violent conflicts and protect civilians, therefore the parties to the conflict must at all times distinguish between civilians and combatants.⁹³

For the purpose of the research, the definition below of civilian from the Geneva Conventions shall apply to the thesis. A civilian or non-combatant is defined by article 50 of Additional Protocol I to Geneva Conventions:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third

⁹⁰ “Centre, Unregulated Arms Availability, Small Arms & Light Weapons, and the UN Process” (2006) Report, ICRC Resource Centre <www.icrc.org/eng/resources/documents/misc/small-arms-paper-250506.htm>. Last accessed 4 January 2011.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, chapter I, at 3. The customary international law rules that: “Attacks may only be directed against combatants. Attacks must not be directed against civilians”.

Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.⁹⁴

Reading this definition together with article 4 A(1)(2)(3) and (6) of the Third Convention and article 43 of the Protocol I, civilians are any persons who are not members of an armed force, members of other militias including those of organized resistance movements, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power, and inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces.⁹⁵

3. Non-State actors

Non-State actors are defined as “actors other than States and organizations of States.”⁹⁶ They, among others, are non-governmental organizations, religious groups, individuals, indigenous peoples, ethnic minorities, and business enterprises.⁹⁷ The thesis discusses NGOs to identify whether they have any role in international efforts to combat small arms. NGOs have found that they can be important players in the creation, interpretation, and enforcement of international law on matters of interest to them. The NGOs increasingly participate as active observers in multilateral treaty negotiations, commenting on draft treaty text and otherwise seeking to influence the views of States.⁹⁸ The NGOs are active in monitoring the conduct of States, such as

⁹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1977), 1125 UNTS 3, art 50 (1,2,3). The prohibition to attack civilians by distinguishing civilian from combatants as to protect them against effect of hostilities is spelled out in the article 51 (1,2) of Protocol I; for discussion on distinction between civilians and combatants see Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at ch I.

⁹⁵ Third Geneva Convention (1949), art 4 A(1)(2)(3)(6); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1977), 1125 UNTS 3, art 43;

⁹⁶ Jeffrey Dunoff, Steven R Ratner and David Mippman *International Law Norms, Actors, Process: A Problem-Oriented Approach* (Aspen, 2006) at 27.

⁹⁷ *Ibid.*

⁹⁸ Sean D Murphy *Principles of International Law* (St Paul, Minnesota, Thomson/West, 2006) at 59.

on matters of implementation of human rights regimes, as a means of shaming States into compliance, and play important roles in the promotion of international law and in its observance.⁹⁹

Technology and the information age are changing the allocation of power and authority in the international system, with non-State actors, to some extent, assuming decision-making roles previously reserved primarily for States.¹⁰⁰ Some argue that the greater role of non-State actors should not be seen merely as a threat to State authority, and propose a partnership between public and private entities to formulate a global public policy using a “cross-national culture of public interest” and the creation of “more dynamic and responsive institutions of governance”.¹⁰¹ As far as non-State actors are concerned, some of them have a different agenda from the governments and in some cases even equip themselves with weapons to pursue their own political agenda. Many of them fight the government and are known as rebels, insurgents, separatist groups, guerrillas, freedom fighters, and/or terrorists.¹⁰²

In acknowledging the presence of non-State actors in international relations, the question arises of who decides who should enjoy access to small arms.¹⁰³ In the current international system, governments are probably still the easiest possible answer although the answer is open for further debate.¹⁰⁴

This thesis recognizes the role of civil society in campaigning for international arms trade control, particularly the role played by non-governmental organizations such as the ICRC, the International Action Network on Small Arms (IANSA), and the Human Rights Watch, in developing and promoting norms relating to the regulation of small arms. The NGOs have been sources of norm development emphasizing

⁹⁹ Ibid, at 59-60.

¹⁰⁰ John King Gamble and Charlotte Ku “International Law-New Actors and New Technologies: Center Stage for NGOs?” in Charlotte Ku and Paul F Diehl *International Law: Classic and Contemporary Readings* (Boulder, Lynne Rienner, 2003) at 505-507.

¹⁰¹ Ibid, at 506.

¹⁰² Siemon T Wezeman and Mark Bromley “International Arms Transfer” in *SIPRI Yearbook 2005* (Oxford, 2005) at 452. SIPRI Yearbook 2005 put the term non-state actor and rebel group in the same category by having them written by slash (non-state actor/rebel group).

¹⁰³ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Hants, Ashgate, 2009) at 254.

¹⁰⁴ Ibid.

concerns about the effects of small arms.¹⁰⁵ Some scholars acknowledge the emergence of a civil society that plays a supporting role in efforts to find a small arms control mechanism.¹⁰⁶ Following this line of thinking, the thesis views the increasing involvement of the NGOs in international efforts is by support, applying pressure, conducting research, and presenting recommendations for policy makers in designing policies on small arms issues. A multilateral process, in which small arms are discussed, rather than in a more exclusive secretive bilateral process, gives more room for the NGOs to be involved.

4. Genocide, war crimes, and crimes against humanity

This thesis will frequently use the terms genocide, war crimes, and crimes against humanity. The wide availability of small arms creates the potential for their use in armed conflicts that may include in commission of “genocide,” “war crimes,” and “crimes against humanity”. For this reason, the thesis needs to clarify these terms.

For “genocide”, the thesis adopts the definition provided by the Convention on the Prevention and Punishment of the Crime of Genocide (1948):

[A]ny of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious groups, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.¹⁰⁷

For “war crimes”, the thesis uses the definition provided by article 8 of the ICC which is grave breaches of the Geneva Conventions of 12 August 1949 that include wilful killing, torture or inhuman treatment, and other serious violations of the laws

¹⁰⁵ Muggah Robert “Moving Forward? Assessing Normative and Legal Progress in Dealing with Small Arms” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theories and Practices* (New York, Routledge, 2007) at 27.

¹⁰⁶ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Hants, Ashgate, 2009) at 4.

¹⁰⁷ Convention on the Prevention and Punishment of the Crime of Genocide (1948), UNGA res 263 A (III), art 2.

and customs applicable in both international and non-international armed conflict. Article 8 of the ICC has an extensive list of what it means by war crimes when “committed as part of a plan or policy or as a large-scale commission of such crimes”.¹⁰⁸

For “crimes against humanity”, the thesis uses the definition of the ICC:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁰⁹

The definitions of genocide, war crimes, and crimes against humanity are used in the thesis to clarify when in later discussion those terms appear in relation to the use of small arms.

5. Arms control

Arms control refers to action to change the total amount of armament; to reduce or increase the number of weapons. By the 1960s, as the emphasis moved towards the reduction of nuclear weapons, the meaning of arms control in the context of

¹⁰⁸ Rome Statute of the International Criminal Court (1998), 218 UNTS 90, art 8 (1,2,3); see discussion on war crimes in Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 568.

¹⁰⁹ Rome Statute of the International Criminal Court (1998), 218 UNTS 90, art 7.

deterrence changed to “the reduction of the chance of war, particularly nuclear war; reduce damage in case war did occur and reduce the cost of defence”.¹¹⁰ A realization of an arms control could mean States increasing their armaments to reduce the chance of war.¹¹¹ Arms control, therefore, could mean the increase, not the decrease, of armament. Arms control is also defined as a State action in a process to “enhance security by cooperation with other States”.¹¹² Some scholars define “arms control” as an agreement among States to regulate some aspect of their military capability which includes the location, amount, readiness, types of military forces, weapons, and facilities.¹¹³ In short, the term arms control is to “denote internationally agreed rules limiting the arms competition rather than reversing it”.¹¹⁴ That implies that arms control may not mean to reduce arms.

6. Conventional arms

In practical terms, conventional arms are differentiated from weapons of mass destruction (WMD) by the inherent nature of these weapons. Basically, any weapon which does not fall into WMD is then a conventional weapon. Currently, recognized WMDs are biological, chemical and nuclear weapons, thus other weapons fall into the conventional weapons category.¹¹⁵ Generically, conventional weapons range from the old era sword, cross-bow, grenade, pistol and rifle up to an attacking helicopter,

¹¹⁰ Guido Den Dekker *The Law of Arms Control: International Supervision and Enforcement* (Leiden, Martinus Nijhoff Publishers, 2001) at 24.

¹¹¹ Gregory J Rattray “Introduction” in Jeffrey A Larsen & Gregory J Rattray (eds) *Arms Control: Toward the 21st Century* (Boulder, Colorado, Lynne Rienner Publishers, 1996) at 8.

¹¹² *Ibid.*

¹¹³ Jeffrey A Larsen “An Introduction to Arms Control” in Jeffrey A Larsen (ed) *Arms Control: Cooperative Security in a Changing Environment* (Boulder, Lynne Rienner Publishers, 2002) at 8.

¹¹⁴ Jozef Goldblat *Arms Control Agreements: A Handbook* (Praeger Publishers, 1982).

¹¹⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993), 1974 UNTS 45, provides in details the definitions of chemical weapons, toxic chemicals and precursor (Article II). However, the Treaty on the Non-Proliferation of Nuclear Weapons (1968), 729 UNTS 161, does not provide a definition of nuclear weapon. Likewise, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972), 1015 UNTS 163, has no definition provision but article 1 demands each State party to undertake never to develop, produce, or stockpile: “Microbiological or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful uses; Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.”

warship, or missile. The subject of the discussion in the thesis, small arms, falls into the category of conventional weapons.

Conventional weapons have been the subject of arms control efforts since the early history of war. In the Cold War era, attention on arms control focused on WMD disarmament, particularly nuclear, for the obvious reason that the world could not afford to have a nuclear war as a nuclear war would assure mutual destruction. However, even during the Cold War, based on humanitarian concerns, States successfully managed to adopt the 1980 CCWC. The importance of the adoption of the CCWC was that it demonstrated that even in the middle of sharp ideological confrontation, the international community could unite to ban and control certain weapons based on humanity and humanitarian concerns as they recalled “the general principle of the protection of the civilian population against the effects of hostilities”.¹¹⁶

Internationally, the world has managed to have legally binding treaties on WMD to control and regulate biological, chemical, and nuclear weapons.¹¹⁷ It was after the end of the Cold War that the world paid more attention to the danger and impact of uncontrolled conventional arms, small arms in particular. A series of negotiations have been organized, although resulting in non-legal documents only. The end of the Cold War proves that the complexities of States’ interests, although they are less on an ideological basis, remain strong, as reflected in the negotiations on arms control. Nevertheless, the world has witnessed the successful adoption by the majority of States of the legally binding 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and the 2008 Convention on Cluster Munitions.

¹¹⁶ Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects (concluded 10 October 1980, entered into force 2 December 1983), preamble para 2.

¹¹⁷ They are the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972), 1015 UNTS 163; the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993), 1974 UNTS 45; and the Treaty on the Non-Proliferation of Nuclear Weapons (1968), 729 UNTS 161.

The non-legal instruments arguably remain important to promote transparency and create confidence building measures. Non-legal instruments, including the General Assembly resolutions, are significant in establishing norms and initiating agenda setting, particularly in multilateral processes.

7. IHL and IHRL

The thesis frequently uses the terms IHL and IHRL in the discussion, particularly in demonstrating the influence of IHL and IHRL in the adoption of an arms control treaty, so clarity about those terms is needed. While the international humanitarian law and human rights law have different characters, both are concerned with the protection of people against abuses.¹¹⁸ Definitions on the difference of the terms can be based on who has the rights and duties or when the abuses take place.

Some commentators, for instance McCoubrey suggests international humanitarian law as the branch of laws of armed conflict:

Concerned with the protection of the victims of armed conflict, meaning those rendered *hors de combat* by injury, sickness or capture, and also civilians. It is founded upon the ideas that the legitimate scope of military action is not unlimited and that those who are or have been rendered non-combatant are entitled to impartial humanitarian concern and that both they and those charged with their care and welfare in the rendering of humanitarian aid are not legitimate targets in hostilities.¹¹⁹

The International Committee of the Red Cross (ICRC) defines international humanitarian law, the definition which the thesis uses, as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict”.¹²⁰ The ICRC

¹¹⁸ Saladin Meckled-Garcia and Basak Cali “Lost in Translation: The Human Rights Ideal and International Human Rights Law” in Saladin Meckled-Garcia and Basak Cali (eds) *The Legalization of Human Rights: Multidisciplinary Perspective on Human Rights and Human Rights Law* (New York, Routledge, 2006) at 15.

¹¹⁹ Hilaire McCoubrey *International Humanitarian Law* (Dartmouth Publishing, 1990) at 1; Louis Henkin and others *International Law: Cases and Material* (3rd ed, West Publishing, 1993) at 1025.

¹²⁰ “ICRC Advisory Service on International Humanitarian Law” (2004) ICRC [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). Last accessed on 8 July 2011.

differentiates the terms of IHL and IHRL, stating that “humanitarian law applies in situation of armed conflict, whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike”.¹²¹ The ICRC further explains that some human rights treaties may permit governments to derogate in state of emergency but no derogations are permitted under IHL.¹²² Another scholar, Yihdego, defines IHL as “deal[ing] with the rules and customs of war and constitut[ing] a part of international customary law.”¹²³

C. Research Methodology

The methodology used in this research is to gather and examine information from primary sources i.e. conventions, protocols, the United Nations resolutions, as well as secondary sources such as publications, books, reports, journals, and websites. There are on-going developments in events relating to the issue of small arms in the United Nations as there have been series of preparatory meetings in 2010 and 2011 before a scheduled diplomatic conference on arms trade treaty in 2012. The thesis examines the primary sources of the process to adopt an arms trade treaty up to July 2012, before the adoption of the Arms Trade Treaty in April 2013.

The information collected was critically reviewed, analysed and organized logically for the writing of the thesis. The argument in the thesis is developed by using deductive research, which is testing or extending existing theory. The thesis expands the argument that IHL and IHRL influence international law by showing that IHL and IHRL also greatly influence the negotiation process on small arms.

¹²¹ “What is the difference between humanitarian and human rights law” (2004) ICRC <<http://www.icrc.org/eng/resources/documents/misc/5kzmuuy.htm>>. Last accessed on 9 August 2011.

¹²² Ibid; see also, Louise Doswald-Beck and Sylvain Vite “Origin and Nature of Human Rights Law and Humanitarian Law” in Judith Gardam (ed) *Humanitarian Law* (Hants, Ashgate, 1999) at 100. There is no concept of derogation in humanitarian law because it is made precisely for the situations of emergency and war.

¹²³ Zeray Yihdego *The Arms Trade and International Law* (Oxford, Hart Publishing, 2007) at 195. See also Chris af Jochnick and Roger Normand “The Legitimation of Violence: A Critical History of the Laws of War” (1994) 35(1) *Harv Int’l L J* 49 at 52, referring to humanitarian law as Geneva laws, “which protect specific classes of war victims”.

1. Theoretical approach: Arms control is increasingly influenced by IHL and IHRL

The research of this thesis examines whether the concept of humanization of international law also applies specifically in international efforts to find a restriction on small arms trade. In critically examining the issue, the thesis employs a theoretical approach in international law to help to structurally understand the international effort to control the small arms trade. The approach employed is the basic argument that over the years there has been a trend toward the humanization of the law of war. As the thesis demonstrates in the following chapters, IHL and IHRL have increasingly influenced the conventional arms control process, including small arms. There is a trend to respect the principles of humanity, including respect for human rights. IHL and IHRL have become quoted more often in the negotiation of arms control and grown into strong rationales.

Significant contributions in explaining the influence of human rights and humanitarian law on general international law have been published by several scholars. One of them, Theodor Meron, argues that under the influence of human rights “the law of war has been changing and acquiring a more humane face; the fostering of accountability; the formation, formulation and interpretation of rules.”¹²⁴ Meron points out that the term “humanitarian law” has increasingly replaced the “law of war” or the “law of armed conflict” as the result of increasing influence of the human rights movement.¹²⁵

Human rights law, as Meron notes, has a “major influence on the formation of customary rules of humanitarian law”.¹²⁶ This argument is supported by Henkin

¹²⁴ Theodor Meron *The Humanization of International Law* (Leiden, Martinus Nijhoff Publishers, 2006) at 1.

¹²⁵ *Ibid*; see also the discussion of the relationship between human rights and humanitarian law in L C Green “Enforcement of International Humanitarian Law and Threats to National Sovereignty” (2003) 8 J Conflict & Sec L 101; Kenneth Watkin “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict” (2004) 98 Am J Int’l L 1 at 2.

¹²⁶ *Ibid*, at 3; see also, Louis Henkin *The Age of Rights* (New York, Columbia University Press, 1990) at 16; Marko Milanovic “A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law” (2010) 14 J Conf & Sec L 459 at 459.

stating that human rights influence international law.¹²⁷ Henkin refers to this influence as the humanisation of international law as a result of internationalisation.¹²⁸ He argues that internationalisation has brought agreement, at least in political-legal principle and in rhetoric, that human rights are subject to international concern, and thus have become subject to diplomacy, international institutions, and international law.¹²⁹

International law, in facing the challenges of armed conflicts, is responding with considerations for human situations. Consideration of humanity is present in contemporary international law, which, with recognition of human rights, can play a role in curbing the arms trade.¹³⁰ It hints that international law has undergone a development of its humanization.¹³¹

Linking the development of international law to the main concern of the thesis, namely small arms, the research is discussing not specific rights given by treaties, but rather a general growth in ethical awareness that seeks to restrain the violence, especially towards civilians, helped by easy access to small arms, and how international law may support this.

In describing the increasing humanization of international law, it has been acknowledged that the greatest impetus comes from international human rights instruments and the creation of international processes of accountability.¹³² The norm established requires the law of war to focus not only on the State interests but also the component of human being's protection.¹³³ It suggests a shift of attention from the

¹²⁷ Louis Henkin *The Age of Rights* (New York, Columbia University Press, 1990) at 16-17.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*; see also, Kenneth Watkin "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" (2004) 98 *Am J Int'l L* 1 at 2, 9-10.

¹³⁰ Antonio Augusto Cancado Trindade *International Law for Humankind: Towards a New Jus Gentium* (Leiden, Martinus Nijhoff Publishers, 2010) at 399.

¹³¹ *Ibid.*, at 635.

¹³² Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, Leiden, 2006) at 5; see, Antonio Augusto Cancado Trindade *International Law for Humankind: Towards a New Jus Gentium* (Leiden, Martinus Nijhoff Publishers, 2010) at 635.

¹³³ Theodor Meron *The Humanization of International Law* (Leiden, Martinus Nijhoff Publishers, 2006) at 5; Commission on Human Security *Human Security Now* (New York, Commission on Human Security, 2003) at 4.

security of State to the security of the people.¹³⁴ The report of the Human Security Commission supports the notion that all parties in armed conflict should equally protect human rights and uphold humanitarian law.¹³⁵

Furthermore, in the humanization of the State responsibility, there is a shift from bilateralism to multilateralism.¹³⁶ This change also helps explain the growing involvement of civil society in the discussion of international arms control treaties.¹³⁷ Multilateralism implies that more States with various interests are involved in negotiations. Consequent to the growing norm, a specific link between IHL, IHRL and arms transfer has been advocated by some scholars. Arms sale to a State, recognized to abuse human rights of its citizens and being in a state of civil war, has been questioned, as it may violate international law.¹³⁸ Based on the arguments above, this thesis analyses the influence of IHL and IHRL in the context of arms control to see how and to what extent this is reflected in the texts of arms control treaties.

2. Structure

The thesis will be organised in eight chapters which are described in the following sections.

Chapter I: Overview of the small arms issue. This introductory chapter explains important definitions frequently used in the research, among other things, small arms and light weapons; civilian or non-combatant; non-State actor; conventional arms;

¹³⁴ Ibid, at 4. It argues that: “The State remains the fundamental purveyor of security. Yet it often fails to fulfill its security obligations – and at times has become a source of threat to its people. That is why attention must now shift from the security of State to security of the people.”

¹³⁵ Commission on Human Security *Human Security Now* (New York, Commission on Human Security, 2003) at 28.

¹³⁶ Theodor Meron *The Humanization of International Law* (Leiden, Martinus Nijhoff Publishers, 2006) at 247.

¹³⁷ Ibid, at 247-281.

¹³⁸ Stephanie L Kotecki “The Human Rights Costs of China’s Arms Sales to Sudan: A Violation of International Law on Two Fronts” (2008) 17 *Pac Rim L & Pol’y J* 209 at 222.

human security; and arms control and disarmament. This chapter also describes the importance of the topic, the methods, and approaches employed in the thesis.

Chapter II: Small Arms, Human Security, and Armed Conflict. The chapter describes the impact on human lives of the excessive availability of small arms, particularly the impact on civilians. Small arms are weapons of first choice in armed conflicts either intra-State or inter-State. An intra-State conflict with asymmetric methods of war favours the employment of small arms for their portability and light weight. This part explains why the easy access to small arms promotes and prolongs conflicts. Hence, conflict, and its relation to the availability of small arms is discussed.

Most parts of the world have been affected, to various extents, by the free proliferation and wide availability of small arms. This chapter shows the humanitarian impact of the wide availability of small arms on people's lives in various countries to illustrate that the problem caused by small arms is indeed a global issue. The particular impact of small arms from the human security perspective is analysed, such as the role of the weapons in forced displacement, as well as small arms relationship with crime, public health and development.

Chapter III: Arms Control and Humanitarian Law. The thesis examines the rationale for the adoption of the existing conventional arms treaties from the St Petersburg Declaration (1868) which bans the use of the explosive projectile and establishes the principle and norm; the Hague Conventions (1899 and 1907);¹³⁹ the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (Certain Conventional Weapons Convention or CCWC, 1980);¹⁴⁰ to the Convention on Cluster Munitions (2008).¹⁴¹ The thesis then argues that humanitarian concern as shown in some of the treaties is one important rationale in banning and regulating

¹³⁹ Hague Convention IV with three Declarations (1899), reprinted in (1907) 1 Am J Int'l L Supp 153; Hague Convention IV respecting the Laws and Customs of war on Land (1907), printed in (1908) 2 Am J Int'l L 90.

¹⁴⁰ Convention on Certain Conventional Weapons (1980), 1342 UNTS 137.

¹⁴¹ Conventions on Cluster Munitions (2008), MTDSG Chap XXVI(6); CCM/77.

certain weapons. However, the humanitarian rationale alone, perhaps, is not sufficient to encourage States to find a legal instrument to control the trade of small arms.

Chapter IV: State Responsibility and its Association with Small Arms. In an interdependent world, a State has a responsibility to act in accordance with norms embraced by the international community of States. This chapter evaluates the State responsibility by scrutinizing related documents, including the emerging responsibility to protect (RtoP) and International Law Commission's (ILC) Articles on State responsibility, to identify a link between the RtoP, ILC's Articles and small arms. All the discussion on concepts and norms in both humanitarian and human rights law is seen with the view to finding a way to control small arms.

Chapter V: International Efforts in Restricting the Uncontrolled Circulation of Small Arms. The chapter discusses the effectiveness or ineffectiveness of the control of small arms in existing international instruments, both legally and politically binding instruments. The particular documents discussed are the 2001 UNPoA,¹⁴² the 2005 United Nations International Tracing Instruments,¹⁴³ and the United Nations Security Council resolutions on arms embargoes. Limitations of each instrument are analysed to describe why the world is still not able to control the proliferation of small arms.

Chapter VI: Regional Response to Small Arms: The regional mechanisms are analysed in order to discover a comprehensive view of the efforts of the international community to regulate small arms. The thesis examines how the small arms issue is tackled regionally. Some regional mechanisms are more advanced than others, such as the established mechanisms in Europe or newly adopted mechanisms in Africa and South America. In discussion, the research reveals the different approaches regional organizations take in responding to the issue.

Chapter VII: Challenges and Opportunities in Establishing a Legally Binding Instrument to Regulate Small Arms. This chapter investigates the challenges and

¹⁴² United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001) (UNPoA), UN Doc A/CONF.192/15.

¹⁴³ International Tracing Instrument (2005), UNGA Decision 60/519 of 8 December 2005.

opportunities of the current international efforts to adopt the Arms Trade Treaty, focusing on how the IHL and IHRL increasingly influence the arms control process. It observes the discussion in the United Nations from both political and legal perspectives and explores the likely future of international legal instruments dealing with the small arms trade. It discusses the balance between rights and responsibility *vis-a-vis* small arms. The right to self-defence, enshrined in article 51 of the Charter of the United Nations, implies that the right to acquire weapons for self-defence is a legitimate right for a sovereign State under international law. On the other hand, it has to be noted that a State has a responsibility to protect and respect the rights of its population.¹⁴⁴

The chapter analyses elements of a prospective mechanism to control the arms trade that is being discussed in the United Nations. The central challenge is how to have an international legal mechanism which is effective enough to tackle the problem, concurrently, well accepted by States. The behaviour of exporting and importing countries is analysed. The position of the Security Council five permanent members (P5), in particular, is examined which may reflect the prospect of having a legal instrument to control the small arms trade.

Chapter VIII: Conclusion. As the last chapter, the conclusion is drawn based on the analysis and findings in the previous chapters. The conclusion is a restatement of research and the questions. The thesis conclusion shows to what extent IHL and IHRL influence the efforts to control small arms; and how the contemporary principles of State responsibility demand that States regulate the small arms trade.

¹⁴⁴ Individual State's commitment to the responsibility to protect was adopted in an Outcome Document of 2005 World Summit of the United Nations General Assembly. Some of the United Nations Security Council Resolutions also recognize of individual State's responsibility to protect.

Chapter II: Small Arms, Human Security and Armed Conflict

A. Introduction

This chapter describes the multifaceted impacts of small arms¹⁴⁵ on human lives. It starts by assessing the enhanced military technology in the weapons which decide the fate of a war and bring more deaths. The chapter continues to identify the link between violence, armed conflicts, human rights violations, and small arms to highlight the impact of small arms from the perspective of human security. The linkage between small arms and human security is to demonstrate the statement that the wide availability of small arms needs to be strictly controlled because of their potential impact on human security. Although small arms can be fundamental in situations of self-defence, the impact of their use can also result in human rights violations; this may justify the trend towards a greater influence of human rights considerations in arms control negotiations.

Small arms are continuously designed to improve their lethality and performance. The newest small arms kill more effectively. The search for more effective weapons continues as industrialized countries are involved in intense competition to achieve military technology improvement and devote enormous amounts of funding to military research projects.¹⁴⁶ The advanced weapon technology raises a central issue with regard to small arms; the advanced capability of military weaponry means more efficiency in causing death, or, simply more deaths. Whilst these weapons are meant to target at opposing combatants, if they are wrongfully used against civilians they may be contrary to the efforts to protect civilians as is stated goal of humanitarian laws.¹⁴⁷

¹⁴⁵ References throughout the thesis to “small arms” include light weapons as well, unless noted otherwise as defined in Chapter I.

¹⁴⁶ Jack M Beard “Law and War in Virtual Era” (2009) 103 Am J Int’l L 409 at 411.

¹⁴⁷ *Ibid.*, at 409.

B. Small Arms and Human Security
1. Small arms development

All small arms began with the invention of gunpowder. Gunpowder was initially invented in China and introduced into Europe in the thirteenth century.¹⁴⁸ Gunpowder was used for limited military purposes as early as the tenth century, before cannons were invented.¹⁴⁹ This invention raised the idea of having portable handheld small cannon which became known as firearms. The first written reference found was from the town of Perugia, Italy, which in 1364, ordered 500 bombards which were to be portable and fired from the hand.¹⁵⁰ These handheld portable cannons were later claimed as the early form of pistol. The cannon and small arms are the same in mechanical principle, the weapon must be charged with propellant and projectile, it must be directed towards the target, and it must be discharged by igniting the propellant charge.¹⁵¹ All advances in small arms have been derived from attempts to make this process rapid, effective and efficient.¹⁵²

The efficiency of firearms has improved over the years through continuous research in military technology. More than ever, military technology has a propensity to decide the fate of a war. Not long after the introduction of gunpowder in Europe at the end of the 1400s, Europeans started to make firearms in great quantity and variety as they produced a range from enormous cannons to handheld arquebuses.¹⁵³ In 1364, small arms in the form of the hand gun were introduced and improved, and towards the end of the fifteenth century had become the first true infantry firearm.¹⁵⁴ Gunpowder became a reliable ammunition and was specifically used in the fifteenth

¹⁴⁸ Kenneth Chase *Firearms: A Global History to 1700* (Cambridge, Cambridge University Press, 2003) at 31. Chase argues that it was also Chinese who invented the firearms and the European who perfected them.

¹⁴⁹ Ibid.

¹⁵⁰ WY Carman *A History of Firearms; From Earliest Times to 1914* (London, Routledge and Kegan Ltd, 1963). Carman explains that the weapons are most likely to have been mounted on wooden supports or shaft. The specimens preserved in Berne and Prague had yet another improvement—the gun was made with a hollow section at the touch-end so that the wooden stock could actually fit into the metalwork.

¹⁵¹ James H Willbanks *Machine Guns: An Illustrated History of Their Impact* (Santa Barbara, California, Abc-clio, 2004) at 5.

¹⁵² Ibid.

¹⁵³ Max Boot *War Made New: Technology, Warfare, and the Course of History* (New York, Gotham books, 2006) at 22.

¹⁵⁴ JFC Fuller *Armament and History: The Influence of Armament on History from the Dawn of Classical Warfare to the End of the Second World War* (New York, De Capo Press, 1998) at 85-86.

century as demonstrated by Charles VIII of France when he and his army, in the fall of 1494, with the help of better artillery, successfully invaded Italy.¹⁵⁵

By the end of the fifteenth century, the rifle had been invented.¹⁵⁶ In the eighteenth century, rifles were used by military personnel in wars. States by then needed to produce weapons on large scale and started building arsenals. The first State-sponsored arsenal was built in the 1600s, 154 miles south of Moscow, by the order Tsar Boris Godunov at Tula.¹⁵⁷

The main objective of firearm development has consistently been military effectiveness in reliability, speed and accuracy of firing. Research was conducted to achieve the objective by improving firearm performance overall. The major developments and refinement of small arms took place in Europe. The matchlock *mosquetes* (muskets) fielded by Spanish infantry were introduced first in France and then England.¹⁵⁸ One of the earliest forms of this weapon, known as the wheel lock, was invented in Germany around 1517.¹⁵⁹ The development continued in Europe as the next major improvement came from Spain. In the beginning of seventeenth century, the Spanish developed the *miquelet* (or Spanish lock), which combined the simplicity of matchlock with the spark ignition of the wheel lock.¹⁶⁰ Around the same period, the Dutch developed a similar design known as *snaphance*.¹⁶¹

The early firearms were not easy to use. In Italy in the sixteenth century, to use the wheel lock pistol was a challenge, apart from difficulty in loading, this handgun

¹⁵⁵ Max Boot *War Made New: Technology, Warfare, and the Course of History* (New York, Gotham Books, 2006) at 4-25. The French modern enhanced artillery breached the castle and fortress wall in only hours, something had not known to Italians before.

¹⁵⁶ WY Carman *A History of Firearms; From Earliest Times to 1914* (London, Routledge and Kegan Ltd, 1963). A Zurich inventory of 1544 lists a rifled gun. The Viennese collection of weapons has several dated between 1550 and 1560 and rifles dated 1616 in Paris museum.

¹⁵⁷ Joe Poyer *Kalashnikov Rifles and Their Variations* (3rd ed, California, North Cafe Publications, 2009) at 1. In 1712 Tsar Peter the Great turned the then small village of Tula into a complex of the first State-owned arsenals. By 1810, by order of Tsar Alexander I, the other great arsenal was established at Izhevsk.

¹⁵⁸ James H Willbanks *Machine Guns: An Illustrated History of Their Impact* (Santa Barbara, California, Abc-clio, 2004) 10-19.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

weighed 1.02 kg and was 394 mm long.¹⁶² The next improvement was marked by the invention of a scent-bottle lock in Scotland around 1800, which enabled the weapon to fire instantly without the normal delay between the firing of the priming charge and the main charge.¹⁶³ The invention of a new type of bullet by a French army officer in 1849 led to widespread adoption of the rifled musket.¹⁶⁴

The advance in technology, the designs, and techniques that began with the early cannons and resulted in the modern infantry rifles provided the foundation of the development of the automatic weapons or machine guns to follow.¹⁶⁵ In 1718, the first portable weapon was introduced; called “defence” it could discharge many bullets and be quickly reloaded.¹⁶⁶ The first patent using the term “machine gun” was issued in the United States in 1829 which was followed by the invention of a rapid fire weapon in 1871 which fired 300 or 400 rounds per minute.¹⁶⁷

In the early use of the newly invented weapons, trained soldiers were required to load ammunition into the firearms known as muskets. It was a case of one shot then reload, hence there was no continuous shooting from a musket. By 1692, the Europeans had invented fixed cartridges and rifled pistols which enabled soldiers to fire and reload rapidly.¹⁶⁸ Firearms became important tools of warfare by the twentieth century and firearms were widely used by soldiers as primary weapons in World Wars I and II, which together with other improved weapons, contributed to the unprecedented number of human casualties.

The commencement of modern small arms era was in second part of the nineteenth century, recognized by the development of a robust metallic cartridge which enabled

¹⁶² Chris McNabb *The Great Book of Guns: An Illustrated History of Military, Sporting, and Antique Firearms* (Thunder Bay Press, 2004) at 16.

¹⁶³ James H Willbanks *Machine Guns: An Illustrated History of Their Impact* (Santa Barbara, California, Abc-clio, 2004) at 10-19.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid, at 19.

¹⁶⁶ John Ellis *The Social History of the Machine Gun* (The John Hopkins University Press, 1986) at 13.

¹⁶⁷ James H Willbanks *Machine Guns: An Illustrated History of Their Impact* (Santa Barbara, California, Abc-clio, 2004) at 30-40.

¹⁶⁸ JFC Fuller *Armament and History: The Influence of Armament on History from the Dawn of Classical Warfare to the End of the Second World War* (De Capo Press, 1998) at 86.

a fast firing weapon and high velocity of ammunition.¹⁶⁹ The basics of modern small arms had been established by the end of the century, and by the end of World War I in 1918 the technological revolution was complete.¹⁷⁰ Since then, small arms and their ammunition have been the subject of gradual refinement with very few new operating principles.¹⁷¹

Although small arms era began in mid-nineteenth century, it became firmly established in 1911 as the year in which the semi-automatic pistol was finalized and the United States Army adopted the new pistol.¹⁷² The modern era of modern small arms can be traced from the time of their increasingly common use as primary weaponry in warfare. The industrial revolution greatly accelerated the development of small arms, leading to more effective and efficient weaponry.¹⁷³

The invention of gunpowder, and subsequently guns, changed the history of the world. It significantly changed the way people fight a war in terms of military tactics, and increased the human casualties of war. The invention of gunpowder paved the way to the development of more advanced weapons such as bombs, explosives, cannons, grenades, and small arms, which in some instances led to new expression of brutality and a horrendous scale of killings in armed conflicts.

Max Boot describes the enhanced effectiveness of firearms in 1915 compared to a century previously:

A Napoleonic battalion in 1815 armed with 1,000 flintlock muskets could fire 2,000 rounds a minute to a range of one hundred yards. A century later, a battalion armed with 1,000 magazine rifles and four machine guns could fire 21,000 rounds a minute to a range of 1,000 yards. This meant that, in a bayonet assault, a comparable unit could expect to receive two shots per soldier in 1815 and two hundred shots per soldier in 1915.¹⁷⁴

¹⁶⁹ Maxim Popenker and Anthony G Williams *Sub-Machine Gun: The Development of Sub-Machine Guns and their Ammunition from World War I to Present Day* (Marlborough, Wiltshire, the Crowood Press Ltd, 2011) at 7.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Patrick Sweeney *1911: The First 100 Years* (Iola, Wisconsin, Gun Digest Books, 2010) at 1-15.

¹⁷³ Ibid, at 21.

¹⁷⁴ Max Boot *War Made New: Technology, Warfare, and the Course of History* (New York, Gotham books, 2006) at 168.

By the 1970s, as experienced in the War in Indochina, an assault rifle such as the AK-47 could fire 600 rounds a minute.¹⁷⁵ This means that a battalion with 1,000 AK-47s would be capable of firing 600,000 rounds per minute, compared to the 21,000 rounds per minute in 1915.

All types of small arms - such as pistols, rifles, and machine guns - continue to be improved. The machine gun made its initial appearance in the American civil war from 1861-65 and since then has developed rapidly.¹⁷⁶ During World War I, the machine gun was the most important weapon, and all warring parties used it.¹⁷⁷ The machine gun continued to be one of the most important weapons in World War II. Today, with the improved capability, the machine gun is universally used in military operations in armed conflicts.

The enhanced military warfare technology results in many deaths in an armed conflict. For instance, there were 54,470 British casualties killed, wounded and missing on 1 July 1916, which was the first day of the battle of the Somme in World War I in France.¹⁷⁸ In the battle of Somme alone, a total 1.3 million were killed and wounded.¹⁷⁹ This demonstrated the unprecedented number of casualties that occurred in any single battle. Advanced weaponry, artillery, and small arms technology including repeating rifles and machine guns, made it possible for armies to carry out unprecedented destruction.¹⁸⁰ As the fighting at Somme showed, the enhanced weaponry not only resulted in more deaths but also helped extend the scale of combat.¹⁸¹

¹⁷⁵ Larry Kahaner *AK-47: The Weapon that Changed the Face of War* (New Jersey, John Wiley & Sons, 2007) at 3.

¹⁷⁶ John Ellis *The Social History of the Machine Gun* (Johns Hopkins, 1986) at 21.

¹⁷⁷ *Ibid*, at 113.

¹⁷⁸ Max Boot *War Made New: Technology, Warfare, and the Course of History* (New York, Gotham books, 2006) at 168

¹⁷⁹ Joseph S Nye Jr *Understanding International Conflicts: An Introduction to Theory and History* (7th ed, Longman, 2009) at 71.

¹⁸⁰ Max Boot *War Made New: Technology, Warfare, and the Course of History* (New York, Gotham books, 2006) at 196.

¹⁸¹ Gidepon Burrow *The Arms Trade* (New International Publication, 2002) at 28.

After the Cold War ended in 1991, new armed conflicts began in many countries as ethnic-nationalism rose.¹⁸² The nature of armed conflict has shifted from predominantly international to non-international in character (also generally referred to as inter-State and intra-State), often involving a wide variety of actors: governments, rebel groups, militias and criminal organizations who use small arms as weapons of choice. One of the important characteristics of all conflict-related deaths in these intra-State armed conflicts is that a large proportion of victims are civilians.¹⁸³

There is a distinction in analysing inter-State conflicts and intra-State conflicts. Inter-State conflicts involve large, organized and well-disciplined national forces which observe the international laws including humanitarian laws, while intra-State conflicts may involve small, diverse, and often ill-disciplined groups relying on small arms to fight their enemies with very little observation of humanitarian law.¹⁸⁴

Small arms are the primary weapons of choice for the parties involved in intra-State conflicts, mainly because they need to fight mobile wars in difficult terrain.¹⁸⁵ Small arms are not only portable, easy to use, and deadly, but also cheap. In Southern Africa, where small arms are widely available, a used Kalashnikov AK-47 rifle can be bought for as little as US\$15, the same price as a bag of maize.¹⁸⁶ In conflict zones such as Afghanistan which are flooded with weapons, the price of a used AK-47 is even lower, i.e. as cheap as US\$10 and slightly more expensive at US\$40, in Cambodia.¹⁸⁷

¹⁸² Christian P Scherrer *Ethnicity, Nationalism and Violence: Conflict Management, Human Rights, and Multilateral Regimes* (Ashgate, 2003) at 31.

¹⁸³ Camilla Waszink *Small Arm Survey 2001* (Small Arms Survey, 2001) <www.smallarmssurvey.org/files/sas/publications/w_papers_pdf/DP/DP_HumanRights.htm>. Last accessed on 28 April 2008.

¹⁸⁴ Renata Dwan and Caroline Holmqvist "Major Armed Conflicts" in *SIPRI Yearbook 2005* (New York, Oxford University Press, 2005) at 97.

¹⁸⁵ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 140.

¹⁸⁶ Harold Hongju Koh "A World Drowning in Guns" in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theories and Practices* (New York, Routledge, 2007) at 60.

¹⁸⁷ *Small Arms Survey 2002* (New York, Oxford University Press, 2002).

As the enhanced military warfare technology results in more destruction, it inevitably also causes more human casualties. New heights of weaponry destructiveness were reached in World War II, as fatalities caused by multiple weapons amounted to fifty-five million deaths, with more civilians being killed than in any other armed conflicts.¹⁸⁸ While in World War II the civilian casualties were killed mainly by bombs, in the recent conflicts - in particular internal armed conflicts - small arms play a greater role in causing civilian deaths, as armed conflicts are fought primarily with small arms.¹⁸⁹

There are at least two important consequences of the improvements in technology of small arms. Firstly the use of small arms helps in making an armed conflict more violent as killing is much faster and easier with improved modern weapons. The total deaths in World Wars I and II demonstrate the effectiveness of weapons technology, including small arms. Secondly, there is a strong likelihood that small arms are used against civilians, particularly in the intra-State conflicts or civil wars.¹⁹⁰ The armed conflicts in the modern era, such the war in Bosnia and Herzegovina (1992-1995) and the war in Iraq that started in 2003, showed increased intensity of violence against civilians. The war in Iraq, discussed below, further demonstrates the role of small arms in the violent death of civilians in war.

A research report from the Iraq Body Count suggested that the total number of civilian deaths from violence in Iraq from the war starting in 2003 up to June 2011 is between 101,658 and 111,068.¹⁹¹ The research group suggested that a gap in the reporting of civilian casualties may imply that the number could be even bigger. When looking at the weapons used in the violence causing civilian deaths, from 2003-2010, on average deaths per day from suicide attacks and vehicle bombs were 9.9; while deaths per day from gunfire/executions in the same period of time were

¹⁸⁸ Max Boot *War Made New: Technology, Warfare, and the Course of History* (New York, Gotham Books, 2006) at 299.

¹⁸⁹ See Report of the UN Secretary-General on Small Arms (S/2008/258, 17 April 2008, at 3.

¹⁹⁰ Report of the UN Secretary-General on Small Arms (S/2008/258, 17 April 2008, at para 3 and 4.

¹⁹¹ "Documented Civilian Deaths from Violence" (2011) Iraq Body Count

<www.iraqbodycount.org/database/>. Last accessed on 6 July 2011.

22.6.¹⁹² This number of civilian deaths per day from gunfire is much larger, more than double the rate of deaths from suicide attack and vehicle bombs, reflecting the major role small arms play in the civilian deaths from violence.

In the war in Iraq, wide availability and proliferation of small arms in the hands of many actors have helped to cause high civilian casualties. This uncontrolled proliferation is a threat to civilians. For the destruction they caused, small arms are actually the main concern of the developing and least developed States, greater than their concern about WMD.¹⁹³

2. Early attempts to control small arms

From a historical perspective, there has been limited or no success for efforts to create a convention on the trade of arms. The early measures to control firearms have to do with chivalry as firearms enable a commoner to kill a king, which made Henry VIII (1491-1547) prohibit ownership of firearms to anyone with an income of less than 100 pounds per year.¹⁹⁴ The same policy to limit firearms to the nobility only was adopted by many countries although they were still willing to trade them internationally.¹⁹⁵

The early international measures to control the arms trade include the 1890 Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunitions, and Spirituous Liquors.¹⁹⁶ As the title suggests, the purpose of the Act was limited to making an end to slavery, thus the arms transfer was not the main purpose of the Act. Another multilateral attempt at armaments limitations was

¹⁹² Ibid.

¹⁹³ Michael E Smith *International Security: Politics, Policy, Prospects* (Hampshire, Palgrave Macmillan, 2010) at 137.

¹⁹⁴ Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011), vol 3, at 14.

¹⁹⁵ Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011), vol 3, at 14.

¹⁹⁶ Convention Revising the General Act of 26 February 1885 and the General Act and Declaration of Brussels of 2 July 1890. Australian Treaty Series (1920) No 17 at 65.

suggested by Russia in the 1899 Hague Conference, but did not get much support in the final act.¹⁹⁷

The following effort resulted in the adoption of the 1919 Convention for the Control of Trade in Arms and Ammunition,¹⁹⁸ which was intended to restrict flows of arms into Africa, but failed to get sufficient ratifications. Six years later, in 1925, States again convened to regulate the international arms trade and adopted the 1925 Geneva Convention for the Supervision of International Trade in Arms and Ammunition.¹⁹⁹ The Convention distinguishes five categories of arms; (a) arms exclusively designed and intended for land, sea and air warfare; (b) arms capable of use both for military and other purposes; (c) war vessels and their normal armament; (d) aircraft (assembled or dismantled) and aircraft engines; and (e) gunpowder, explosives and arms not covered by the first two categories.²⁰⁰

The Convention's purpose was not to reduce the legitimate international arms trade, but rather to prevent illicit traffic.²⁰¹ The purpose of the Convention to prevent illicit trade of arms, together with the five categories of arms distinction, implies that the regulation it tried to achieve is based more on military and security than humanitarian concerns.

The 1925 Geneva Convention on Arms Trade, however, has never come into force. Many of the arms-importing countries refused to sign the Convention, mainly because of the imbalanced approach of the treaty which needed export licensing by governments, while no supervision for arms production was provided for.²⁰²

¹⁹⁷ Final Act of the International Peace Conference, 29 July 1899, available at Yale Law School <http://avalon.law.yale.edu/19th_century/final99.asp>. Last accessed 22 June 2012.

¹⁹⁸ Convention for the Control of Trade in Arms and Ammunition (signed at Saint-Germain-en-Laye, 10 September 1919) (1921) 15 Supplement Am J Int'l L 297.

¹⁹⁹ Convention for the Supervision of International Trade in Arms and Ammunition and in the Implements in War (1925), (1928-1929) 12 Int'l Conciliation 295 at 310.

²⁰⁰ Convention for the Supervision of International Trade in Arms and Ammunition and in the Implements in War (concluded in Geneva, 1925), (1928-1929) 12 Int'l Conciliation 295 at 310, art 1; (1925) 33 League of Nations O J Spec Sup 117ff; See Jozef Goldblat *Arms Control Agreements: A Handbook* (Praeger Publishers, 1983) at 5; see also Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011) vol 3, at 35.

²⁰¹ Jozef Goldblat, *ibid*, at 6.

²⁰² *Ibid*. Meanwhile, the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Protocol to the 1899 Hague Conventions),

No attempts to control arms trade achieved their purpose for the trade continued. Controlling arms trade has been difficult in the past because of, inter alia, domestic industry, power, political influence, jobs, and tax revenue,²⁰³ which are still the valid causes of difficulties in controlling the arms trade in the present time.

The contemporary attempts to control small arms proliferation in the new century have been boosted by the success of the Mine-Ban Convention (1997), and civil society has started supporting a campaign for a regulation on the small arms trade. In 2001, the global meeting organized by the United Nations to negotiate the issue of illicit trade of small arms sparked optimism that finally the world would be able to have a global legal mechanism to control small arms trade. That hope has not yet materialized. The meeting was not able to adopt a legal document and had to be satisfied with political agreement of the United Nations Program of Action instead. The case of small arms is very different from that of anti-personnel mines which are well accepted as cruel and indiscriminate weapons attracting a worldwide outcry to ban them. Small arms have different characteristics, the weapons are central tools of defence, and indispensable in an armed conflict, and for a country to defend itself. A modern war can be fought without deploying anti-personnel mines, but is highly unlikely without small arms.

The strong resistance from countries to agreement on a strict regulation on small arms trade is predictable, taking into account how it is regarded as a main means of self-defence. The complexity of the issue of small arms, is, perhaps best described by the words of Jan Egeland, former head of the United Nations Organization for Coordinating Humanitarian Affairs (UN-OCHA):

which was signed simultaneously, was successfully accepted by many countries. The Protocol provided basis for further discussion and paved the way for the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972) (or Biological Weapons Convention–BWC) and The Convention on the Prohibition of the Development, Production, and Stockpiling of Chemical Weapons and on their Destruction (1993) (or Chemical Weapons Convention-CWC) whose provisions are now more universally adhered to.

²⁰³ Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011), vol 3, at 18.

We are not talking about arms which are prohibited, but ordinary weapons which most people agree are needed by public authorities to defend themselves and maintain order. It is thus not a question of mobilizing against an indiscriminate, particularly cruel weapon of limited military value, as was the case with anti-personnel landmines. We are getting into a much more sensitive area when it comes to the issue of small arms because of the way it relates to State security and national sovereignty. Nor are the economic stakes inconsiderable.²⁰⁴

The recent and current negotiations on small arms indeed reflect the complexity of the issue which includes the States' diverse interests in security and economics. The conflicting interests among States are, so far, still too wide to bridge and they bring too much difficulty for them to agree on how to deal with the wide availability of small arms.

3. Small arms and culture of violence

Violence in intra-state wars is more intense than in inter-state wars, where the proportion of civilian war victims is estimated at 75 per cent and even more in some cases.²⁰⁵ In this context, the excessive availability of small arms arguably facilitates the armed violence and contributes to the civilian casualties.

For their natural characteristics, particularly the concealable and transferable factors, small arms have a large civilian market base and hence are very difficult to police across borders.²⁰⁶ The availability and easy-to-use factor means small arms play a crucial part in many areas of armed violence. The intra-State wars provide an environment where excessive violence and high casualties²⁰⁷ are most likely to occur, and are difficult and less likely than inter-State wars to end in a negotiated settlement.²⁰⁸ It is in the heat of violence that conflicts are worsened to the point

²⁰⁴ Jan Egeland "Arms Availability and Violations of International Humanitarian Law" (1999) ICRC <www.icrc.org/eng/resources/documents/misc/57jq3m.htm>. Last accessed on 14 April 2010.

²⁰⁵ Eva La Haye *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008) at 1.

²⁰⁶ Michael E Smith *International Security: Politics, Policy, Prospects* (Hampshire, Palgrave Macmillan, 2010) at 136.

²⁰⁷ Ann Hironaka *Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War* (Harvard University Press, 2005) at 2.

²⁰⁸ Michael E Smith *International Security: Politics, Policy, Prospects* (Hampshire, Palgrave Macmillan, 2010) 114. Smith quotes a study that shows 55 per cent of interstate wars between 1950

where crimes against humanity or genocides are more likely to take place. Unless carefully decommissioned, small arms problems will continue long after the conflict ends.

A wide availability of weapons helps to form a culture of violence in society. In many parts of the world, particularly in areas of prolonged armed conflict, small arms are the symbol of power, position, pride and manhood.²⁰⁹ In neighbouring Pakistani and Afghanistan cities in the 1980s, Russian-made AK-47 rifles seemed to be owned by almost every male.²¹⁰ This situation, the “Kalashnikov culture,” encourages widespread violence, affecting and involving children.²¹¹ On 4 January 2002, the first American soldier was shot and killed in the Afghanistan’s war by a fourteen-year old Afghan boy armed with an AK rifle.²¹² That boy is a perfect example of a product of violence in the conflict-torn Afghanistan society.

This culture of violence is conditioned by Afghanistan being one of the most weaponised countries on Earth, with at least 10 million small arms in circulation.²¹³ As the war continues there as the thesis is being written, the weapons continue flowing through military importation and illegal acquisition by combatants. Afghanistan has been in constant conflict for a long time, and that has broken down law and order and the people would not know law other than law of the gun.

Small arms may contribute to the reality that more than two-thirds of African countries have experienced violent transitions of government.²¹⁴ This may suggest that the culture of violence may make a partial contribution, as this legitimizes the use

and 1990 were resolved by bargaining, while only 20 per cent of intra-state wars ended in the same manner.

²⁰⁹ Dan M Kahan and Donald Braman “More Statistic, Less Persuasion: A Cultural Theory of Gun-Risk Perception” (2003) 131 U Pa L Rev 1291 at 1291.

²¹⁰ Larry Kahaner *AK-47: The Weapon that Changed the Face of War* (New Jersey, John Wiley & Son, 2007) at 68.

²¹¹ *Ibid.*

²¹² *Ibid.*, at 75.

²¹³ Watchlist on Children and Armed Conflict (2001) < www.watchlist.org >. Last accessed on 7 July 2011.

²¹⁴ William Reno “Small Arms, Violence, and the Course of Conflicts” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 47.

of weapons to resolve disputes, polarizes social relations among races, classes and sexes, and creates further demand for small arms.²¹⁵

As a large number of small arms in existence are illegal or unlicensed, there is no exact figure for the total number in current circulation. The Small Arms Survey in 2011 estimated that around 900 million small arms were in circulation.²¹⁶ Since the current world population is seven billion, this means one weapon for every eight people.²¹⁷ The number of small arms is increasing as producers of small arms keep producing and supplying the world with these weapons, and there is no effective international legally binding agreement controlling small arms. Meanwhile, other sources suggest a slightly different figure as discrepancies cannot be avoided, because the trade of small arms is not transparent.

There are about 1200 companies in at least 90 countries which are involved in some aspect of small arms production.²¹⁸ Developed countries are still among the top producers of small arms and include the US, Italy, Brazil, Germany, Belgium, Austria, Russia, and China.²¹⁹ The value of the global trade in small arms and their ammunition is estimated at more than US\$7 billion per year in authorized trade alone,²²⁰ and it is more difficult to assess the value in unauthorized trade.

The supply of small arms continues flowing because the demand continues. This demand has three dimensions: demand by the defence and security sectors, demand

²¹⁵Michael Fleshmen “Small Arms in Africa: Counting the Cost of Gun Violence”(2001) 15(4)Africa Recovery 1 at 1.

²¹⁶ Small Arms Survey “Weapons and Market”<www.smallarmssurvey.org/weapons-and-markets.html>. Last accessed on 25 January 2011. Another estimation comes from the UNDP with the figure of 875 million. See UNDP *Fast Fact: Armed Violence and Small Arms and Light Weapons*. <www.undp.org/cpr/we_do/armed_violence.shtml>. Last accessed on 17 March 2009.

²¹⁷ United Nations Department of Economic and Social Affairs “World Population to Reach 10 Billion by 2100 If Fertility in All Countries Converges to Replacement Level” (Press Release, 3 May 2011).

²¹⁸ Robert Muggah “Moving Forward? Assessing Normative and Legal Progress in Dealing with Small Arms” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (Routledge, 2007) at 30.

²¹⁹ *Small Arms Survey 2009: Shadows of War* (New York, Cambridge University Press, 2009) at 8.

²²⁰ Report of the Secretary-General on Small arms, S/2011/255 of 5 April 2011, at 2, para 4.

by non-State groups, and micro-level demand by individuals.²²¹ The nature of demands by the State and non-State actors, or individuals is well portrayed in the following paragraph:

State demand is conditioned by a number of independent variables like defense policies, procurement and budgetary constraints, civilian control of the defence sector, force structures and mobilization strategies, and historical precedents. On the other hand, there is also demand from non-State actors during ongoing conflicts. This includes arming before and during the outbreak of violence, sustaining stocks during cease-fires, and the use of weapons as a bargaining tool during the post-conflict period.²²²

The supply of weapons is not only obtained by new procurement but, in many cases, also by obtaining recycled weapons from previous conflicts. Studies indicate that small arms can remain operational up to 40 years and some weapons are still usable even though they are over 60 years old.²²³ The case of weapons left over from war time in Southeast Asia is a classic example of how recycled weapons are re-utilized.

While there is no authoritative figure, a vast number of small arms continue to circulate in several Southeast Asia countries long after open conflict has ended. Because of their durability, many of the small arms in current circulation came from the Cold War period or conflicts within that time frame. Vietnam and Cambodia inherited some two million firearms and 150,000 tons of ammunition after the US withdrawal in 1975.²²⁴ Among them were 800,000 M-16 rifles and 100 self-propelled guns.²²⁵ These weapons may have found their way to other armed conflicts around the world. Reports show that some weapons recovered in buy-back programmes in El Salvador had been used in Vietnam, Uganda, and Angola.²²⁶ Similar reports confirm

²²¹ Robert Mungah “Move Forward? Assessing Normative and Legal Process in Dealing with Small Arms” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 33.

²²² Ibid.

²²³ Harold Hongju Koh “A World Drowning in Guns” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 60.

²²⁴ David Capie “Sovereignty under Fire: Small Arms Smuggling in Southeast Asia” (2000) 4 (1) *Panorama* 57 at 61.

²²⁵ Alexander Gillespie *History of the Laws of War* (Oxford, Hart Publishing, 2011), vol 3, at 47.

²²⁶ Helbert L Colhun “Small Arms and Light Weapons: Can They be Controlled?” (US Department of State, Washington DC,

that AK-47s and M-16s used by combatants in Vietnam's war have resurfaced in Nicaragua 30 years later.²²⁷ Meanwhile, various ethnic conflicts occurring in Africa since the late 1980s were fed and prolonged by the inflow of cheap small arms from Afghanistan, Pakistan, and Eastern Europe.²²⁸ How a region responds to the threat of small arms is discussed in Chapter VI of the thesis.

South America also inherited small arms from various armed conflicts in the Cold War era. Small arms flooded Latin America during civil wars in many Central American countries in the 1980s. After decades of uncontrolled proliferation, up to 80 million small arms are circulating throughout the region.²²⁹ According to the World Health Organization estimation, gunshots kill between 73,000 and 90,000 people each year in Latin America, while guns are the leading cause of deaths among Latin Americans between the ages of 15 and 44.²³⁰

The excessive availability of small arms is not only a threat during armed conflicts but also after the conflicts end. This premise applies to South America, as gun violence in many South American countries actually increased after war ended. For example, El Salvador, which experienced one of Latin America's most violent civil wars from 1980 to 1992, had the highest percentage of homicides caused by firearms with an increase from 55 per cent in 1990-1995 to 75 per cent in 1999.²³¹ Brazil is another country heavily affected by a culture of violence. Brazilian cities in the 1990s became the most violent places due to the unrestricted gun culture combined with organized crime and police corruption.²³²

Other South America and Caribbean countries such as Costa Rica, El Salvador, Honduras, Colombia, Guatemala, and Panama experience the same humanitarian,

1998)<www.fas.org/asmp/campaigns/smallarms/1998CalhounSALWessay.htm>. Last accessed on 7 May 2009.

²²⁷ Robert Mungkah and Peter Batchelor *Development Held Hostage: Assessing the Effect of Small Arms on Human Development* (UNDP, 2002).

²²⁸ Larry Kahaner *AK-47: The Weapon that Changed the Face of War* (John Wiley & Son, 2007) at 76.

²²⁹ Rachel Stohl and Doug Tuttle "The Small Arms Trade in Latin America" (2008) Center for Defense Information <www.cdi.org/pdfs/Small_Arms_Latin_America.pdf>. Last accessed 21 September 2011.

²³⁰ Ibid.

²³¹ Ibid.

²³² *Small Arms Survey 2009: Shadows of War* (New York, Cambridge University Press, 2009) at 170.

social, and economic consequences of the wide availability of small arms. Guatemala, for example, suffers from social problems and armed violence which hinder its development. The highest homicide statistic in 2006 occurred in Guatemala City, with 110 homicides among 100,000 inhabitants, with 85 per cent of the killings caused by small arms.²³³

Such impacts also obstruct economic development. The Inter-American Development Bank (IADB) estimates that almost a quarter of Central American countries' annual GDP (14.2%) is spent addressing the increasing violence.²³⁴ Yet weapons continue to stream, mostly from the United States, into El Salvador and the rest of Central America.²³⁵

C. Armed Conflict and Small Arms

1. Armed conflict

Armed conflicts have occurred and been recorded as long as human civilization. Humans have been waging war, as discovered in written evidence about 3000 years ago, whenever they have something to fight for. Armed conflicts have been fought with various weapons and methods of war, from spears and crossbows used by the knights on horses to missiles and rocket used by current combatants on fighter jets or, increasingly, UAVs. Parties to armed conflicts try to defeat their enemies by using the most deadly weapons they could have, including with what we know today as weapons of mass destruction (WMDs) such as chemical, and biological weapons. The twentieth century also saw the addition of the deadly nuclear weapon to the WMD arsenal. However, among the weapons used in armed conflicts, small arms are the most common means of warfare.

²³³ Arturo Matute "Guatemala, Tackling Small Arms and Weapons at All Levels" (2007) UNDP <www.undp.org/cpr/documents/we_do/guatemala_article.pdf>. Last accessed on 10 March 2009.

²³⁴ Ibid.

²³⁵ Ibid.

In the history of civilization, the world has experienced many small and large scale armed conflicts. The Uppsala Conflict Data Program (UCDP) defines an armed conflict as:

[A] contested incompatibility which concerns government and/or territory where the use of arms force between two parties, at which at least one is a government of a State, results in at least 25 battle-related deaths.²³⁶

This UCDP definition is State-based conflict as opposed to non-State conflict, “in which none of the warring parties is a government”.²³⁷ The definition reveals that a case needs to meet at least three criteria of armed conflict, the incompatibility, the identity or level of organization of a party, and the minimal number of deaths.²³⁸

The UCDP divides armed conflicts into three categories based on the number of deaths during the year, namely; minor armed conflict, intermediate armed conflict, and war.²³⁹ Minor armed conflict causes less than “1,000 battle-related deaths during the course of the conflict”, intermediate armed conflict causes more than “1,000 battle-related deaths recorded during the course of the conflict, but fewer than 1,000 in any given year”, and war causes “more 1,000 battle-related deaths in any given year”.²⁴⁰ Later, this categorization has been simplified into two, namely; minor armed conflicts, and war.²⁴¹

Describing who is involved, the Uppsala Conflict Data Program divides conflicts according to the types of armed conflict:

- *InterState armed conflict* occurs between two or more States.

²³⁶ Uppsala Conflict Data Program
<http://www.pcr.uu.se/research/ucdp/definitions/definition_of_armed_conflict/>. Last accessed on 1 April 2012.

²³⁷ Ibid.

²³⁸ Lotta Themner and Peter Wallensteen “Armed Conflict, 1946-2010” (2011) 48(4) *Journal of Peace Research* 525 at 536.

²³⁹ Peter Wallensteen and Margareta Sollenberg “Armed Conflict, 1989-2000” (2001) 38(5) *Journal of Peace Research* 629 at 631.

²⁴⁰ Ibid.

²⁴¹ Lotta Themner and Peter Wallensteen “Armed Conflict, 1946-2010” (2011) 48(4) *Journal of Peace Research* 525 at 532.

- *Internationalised internal armed conflict* occurs between the government of a State and internal opposition groups, with intervention from other States in the form of troops.
- *Internal armed conflict* occurs between the government of a State and internal opposition groups.²⁴²

International humanitarian law, as shown by Geneva Conventions and its Protocols, distinguishes armed conflicts into international and non-international armed conflicts. The ICRC identifies the involvement of State as an important element in international armed conflicts that are “opposing two or more States”, but that it may not exist in non-international armed conflicts, which are “between governmental forces and non-governmental armed groups, or between such groups only.”²⁴³ The type of a war, whether international or non-international, may not be easy to identify when the application comes to the wars, such as in Iraq or Afghanistan, which were international armed conflicts in the beginning turned into non-international at later stages. The ICRC does not entertain the idea of another type of armed conflict existing in between, as “legally speaking, no other armed conflict exists” but underlines that “a situation can evolve from one type of armed conflict to another”.²⁴⁴

The ICRC proposes the following definitions, after an analysis on the IHL treaties, jurisprudence, and doctrine, that:

1. International armed conflicts exist whenever there is a resort to armed force between two or more States.
2. Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontations must reach a minimum level of intensity and the parties involved in the conflict must show a *minimum of organisation*.²⁴⁵

Definition of non-international armed conflict is clarified to distinguish it from “situations of internal disturbances and tensions, such as riots, isolated and sporadic

²⁴² Ibid. See also the UCDP <<http://www.pcr.uu.se/research/ucdp/definitions/>>. Last accessed on 1 April 2012.

²⁴³ ICRC *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* Opinion Paper, March 2008 at 1. Available at <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>

²⁴⁴ Ibid.

²⁴⁵ Ibid.

acts of violence”.²⁴⁶ This is particularly significant as governments have the responsibility to defend national unity and maintain law and order, by all legitimate means.²⁴⁷

In its decision, the International Criminal Tribunal for the former Yugoslavia (ICTY) has used the general term of armed conflict to refer to both international and non-international armed conflict. The ICTY states in the *Tadic case* that:

[An] armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.²⁴⁸

The ICTY continues by stressing that international humanitarian law applies to such armed conflicts.²⁴⁹ The criteria for the existence of an armed conflict in the *Tadic case* have been consistently applied in subsequent jurisprudence.²⁵⁰

Many of the United Nations reports and the Security Council resolutions use the generic term of “armed conflict” to refer to either minor armed conflicts or wars.²⁵¹ Some reports of the UN Secretary-General simply use “conflict”.²⁵² In armed conflicts, both international and non-international, small arms are indispensable weapons for combatants, which bring the relevance of the discussion of armed conflict to the issue of small arms.

²⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) (adopted 8 June 1977, entry into force 7 Dec 1978), 1125 UNTS 609, art 1(2).

²⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) (adopted 8 June 1977, entry into force 7 Dec 1978), 1125 UNTS 609, art 3(1).

²⁴⁸ ICTY, *Prosecutor v Dusko Tadic a/k/a “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, paragraph 70.

²⁴⁹ *Ibid.*

²⁵⁰ ICTY, *Prosecutor v Vlastimir Dordevic*, Public Judgement with Confidential Annex, Vol II of II, IT-05-87/1-T, 23 February 2011, paragraph 1522.

²⁵¹ United Nations, Report of the Secretary-General on Children and Armed Conflict in the Sudan (S/2011/401), 5 July 2011. Also, Report of the Secretary-General on Children and Armed Conflict in Afghanistan (S/2011/55), 3 February 2011; see UNSC res S/RES/1998 (2011), 12 July 2011 on Children and Armed Conflict.

²⁵² United Nations, Report of the Secretary-General, the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies (S/2011/634), 12 October 2011.

2. Wide availability of small arms promotes armed conflict

The relationship between small arms and intra-state conflicts is an obvious one. As a rule, small arms are portable and therefore the rebels or parties in the conflicts are extremely mobile and able to shift the locale of the conflict with comparative ease.²⁵³ High civilian casualties usually occur during long, violent intra-State armed conflicts, in which small arms are widely used. Some intra-State armed conflicts, in countries such as Colombia, Guatemala, Nicaragua, Sierra Leone, Angola, Liberia, Sudan, Democratic Republic of Congo, Sri Lanka and the Philippines, have not ended or only ended after 20 years of conflict.²⁵⁴ These long-lasting armed conflicts are ideal places to generate violence that becomes vicious cycles. Most people in the regions where the conflict occurs, watch, feel and experience violence first hand and become accustomed to it. Violence affects all, including children. Children living in areas of armed conflict grow up knowing nothing but violence,²⁵⁵ and this may create further vicious cycles of the culture of violence.

Among armed conflicts, an armed ethnic conflict is the ultimate lethal form of mass violence with the highest number of casualties.²⁵⁶ An ethnic conflict and easy access to small arms is a deadly combination which would be likely to result in mass violence, particularly in developing countries. The role of small arms here is to speed up and cause more civilian casualties from violence. As studies suggest, the violence associated with the wide availability of, and easy access to, small arms predominantly takes place in low-income countries.²⁵⁷ The low income countries face greater risk of armed violence. The UNDP indicates that half of the countries with the lowest human development indicators are in, or emerging from, armed conflict.²⁵⁸

²⁵³ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 140

²⁵⁴ Chandra Lekha Sriram *Peace as Governance: Power-sharing, Armed Groups and Contemporary Peace Negotiations* (Hampshire, Palgrave Macmillan, 2008) at 44-71.

²⁵⁵ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 142.

²⁵⁶ Christian P Scherer *Ethnicity, Nationalism and Violence: Conflict Management, Human Rights, and Multilateral Regimes* (Hants, Ashgate, 2003) at 28.

²⁵⁷ Preventing Violence and Reducing Its Impact: How Development Agencies Can Help (WHO, Geneva, 2008) at 11.

²⁵⁸ "Armed Violence Prevention" United Nations Development Programme: Crisis Prevention and Recovery <www.undp.org/cpr/we_do/avmasa.shtml>. Last accessed on 28 January 2011.

The unregulated aspect of the small arms trade that makes the weapons easily accessible is one of the primary factors in fuelling conflicts and making violence likely to break out.²⁵⁹ Wide availability of small arms makes it possible for militias, rebels, militant groups, and criminal gangs to field well-equipped combatants and resort to conflict rather than dialogue.²⁶⁰ And conversely, widespread weapons for governments without respect for human rights can be used to subdue civilian populations. The main concern in this situation is the increase in crime, human rights abuses, and human suffering.²⁶¹

To deal with such problems, many parties or countries in armed conflicts are targeted with arms embargoes by the Security Council. However, as many reports suggest, the arms embargoes (as discussed in Chapter V) sanctioned by the United Nations have failed to stop the flow of weapons to conflict areas.²⁶² The wide availability of small arms ensures the warring parties in conflicts always find alternative sources of weapons, including from the black market. Reports mention a continued violation of arms embargoes. For example, the arms embargo against Somalia has not stemmed the flow of weapons into the country, as arms are entering from Yemen and neighbouring Ethiopia.²⁶³ Other reports suggested a violation of the United Nations arms embargo against the Democratic Republic of Congo occurred as large quantities of up to 200 tons of arms from the Balkans and Eastern Europe flowed to the country.²⁶⁴

An analysis on small arms relative to conflicts suggests that small arms inevitably promote conflicts as the weapons are the key ingredients in shaping the opportunity

²⁵⁹ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 141.

²⁶⁰ CJ Chivers “Small Arms, Big Problems: The Fall Out of the Global Gun Trade” (2011) 90 *Foreign Aff* 110 at 117.

²⁶¹ *Ibid.*

²⁶² Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1587 (2005), S/2005/625.

²⁶³ UN News Centre “UN Group Report Jumps in Violations in Arms Embargo against Somalia” (7 October 2005) <www.un.org/apps/news/story.asp?NewsID=16139>. Last access on 28 January 2011.

²⁶⁴ Amnesty International “Congo: Illegal Arms Export Fuelling Killings” (Press release, 6 June 2005) <www.scoop.co.nz/stories/WO0507/S00076.htm>. Last accessed on 6 August 2009.

structures of combatants.²⁶⁵ In other words, with weapons in hand, conflicting parties are encouraged to believe that they could win the war. Armed conflict is the end product of the combination of the opportunity to pursue interest by force, injustice, limited or absent rule and order, easy availability of arms, and a culture of violence.

Available data indicates that most contemporary conflicts take place in the underdeveloped or developing parts of the world. Between 1945 and 1999, there were 127 intra-State wars occurring in 73 States with a conservative estimate of the total deaths amounting to 16.2 million as a direct result of these conflicts.²⁶⁶ From 1989 to 2008, most attacks that caused civilian deaths took place in the regions of Sub-Saharan Africa, Central and South Asia, and Middle East and North Africa.²⁶⁷ This matches the picture that these regions were flooded with small arms. Looking at the main party responsible for civilian deaths, in 1989 it was governments who were responsible, but data in 2008 showed this had changed, and it was now non-State armed groups who were the perpetrators.²⁶⁸

International humanitarian law determines to protect civilians in armed conflicts through international instruments. The efforts to protect civilians, however, are more difficult to carry out in an intra-State conflict as the parties are often less observant of international law. Because of this, to a certain extent, many intra-State conflicts are characterized by high numbers of civilian casualties, and the use of non-combatants as instruments and objectives of warfare.²⁶⁹

There are various factors that motivate a group to become involved in an armed conflict. One of them is self-determination which continues to be an important motivation for some groups seeking control over government for autonomy, or

²⁶⁵ William Reno “Small Arms, Violence, and the Course of Conflicts” in Thomas J Biersteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (New York, Routledge, 2007) at 45.

²⁶⁶ James D Fearon and David D Laitin “Ethnicity, Insurgency, and Civil War” (2003) 97(1) *Am Pol Science Review* 75 at 75.

²⁶⁷ Human Security Report 2009/2010 (2010) Human Security Report Project <http://www.hsrgroup.org/human-security-reports/20092010/text.aspx>. Last accessed on 8 July 2011.

²⁶⁸ *Ibid.*

²⁶⁹ Marie-Joelle Zahar “Protégé, Clients, Cannon Fodder: Civil-Militia Relations in Internal Conflicts” in Simon Chesterman (ed) *Civilians in War* (Boulder, Lynne Rienner, 2001) at 43.

territory for secession.²⁷⁰ Studies of conflicts reveal that the causes of an intra-State conflict are numerous and could be either one or combinations of the following factors, deprivation, ideology, economic, ethnicity, religion, and poverty.²⁷¹ These factors alone are not sufficient to lead a group of people into an armed conflict to settle their differences if they do not have the instruments to fight a war. This is where the easy access to small arms plays a crucial role in instigating an armed conflict. Generally, although there are many exceptions, the more weapons that are available in a society, the more likely they are to be used.²⁷²

While States may obtain small arms from a legal international market, it is generally more difficult for armed non-state actors to procure the weapons through lawful channels. This forces the armed non-state actors to go to the black market to gain weapons where brokers and arms dealers can obtain and supply significant quantities of used military hardware at affordable prices.²⁷³

A few years before and after the collapse of the Soviet Union, there was a chaotic situation in its allied Eastern Europe countries. Soldiers and army commanders sold their AK-47s to raise cash. For example, the East German National People's Army, in Hungary, Bulgaria, and Ukraine began selling hundreds of thousands or perhaps millions of weapons to the highest bidders.²⁷⁴ When the Albanian government fell in 1993, criminals looted State arsenals and took up to a million weapons.²⁷⁵ The legal transfer of small arms may also contribute to the illegal market through uncontrolled cascading, where newly purchased weapons replacing the old models which are then released into the black markets.²⁷⁶ When a modern military force modernizes its

²⁷⁰ Renata Dwan and Caroline Holmqvist "Major Armed Conflicts" in *SIPRI Yearbook 2005* (New York, Oxford University Press, 2005) at 89.

²⁷¹ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (New York, Routledge, 2008) at 8-18.

²⁷² *Small Arms Survey 2001: Profiling the Problem* (New York, Oxford University Press, 2001).

²⁷³ David Capie "Sovereignty under Fire: Small Arms Smuggling in Southeast Asia" (2000) 4(1) *Panorama* 57 at 57.

²⁷⁴ Larry Kahaner *AK-47: The Weapon that Changed the Face of War* (New Jersey, John Wiley & Son, 2007) at 69.

²⁷⁵ *Ibid.*, at 70.

²⁷⁶ *Small Arms Survey 2001: Profiling the Problem* (New York, Oxford University Press, 2001) at ch 4.

arms, it updates and replaces obsolete models, then its government is most likely to pass much of the old stock on to the global arms market at cheap prices.²⁷⁷

Another problem identified is the lack of discipline and poor military/police stockpile management systems in certain countries. The once-legal weapons in government institutions may leak into the black markets and to non-state actors, or armed criminals. For example, in Northern Kenya, 40 per cent of 7.62x39 mm ammunition in the illicit market came from the Kenyan armed forces.²⁷⁸ In addition, the new supply of weapons sometimes involves dubious players in international arms supply chains, and lack of accountability of governments involved, leading to diversion of weapons to armed groups and illicit markets.²⁷⁹

Armed conflicts may provide opportunities for acts of violence, genocide, war crimes, and crimes against humanity to occur. Most recorded crimes against humanity, including massacres in the former Yugoslavia and Rwanda, took place with armed conflicts as the backdrop. The wide availability of small arms helps in making the mass killings easier. An armed conflict creates a violent environment that may lead to a worse situation where gross human rights violations can take place. The wide availability, easy access, and enhanced technology of small arms, combined with a lack of respect for humanitarian law are the contributing factors facilitating human rights violations.²⁸⁰

Small arms and their impact on human life are global issues. No part of the world escapes the impact of the flood of small arms. However, the most affected countries happen to be developing countries such as many countries in Africa, Asia, or Latin

²⁷⁷ CJ Chivers “Small Arms, Big Problems: The Fall Out of the Global Gun Trade” (2011) 90 Foreign Aff 110 at 115.

²⁷⁸ *Small Arms Survey 2008: Risk and Resilience* (New York, Oxford University Press, 2008) at 52.

²⁷⁹ “Arms Trade Treaty Could Fail without Human Rights” (2008) Amnesty International <www.amnesty.org/en/news-and-updates/report/arms-trade-treaty-could-fail-without-human-rights-20080917>. Last accessed on 28 January 2011.

²⁸⁰ Historically, mass killings and genocides have also been carried out with other weapons, for example the use of gas by Nazi German in World War II.

America. The worst affected by small arms are countries in Africa such as Liberia, Sierra Leone, Mozambique, South Africa, Rwanda, and Uganda.²⁸¹

Even after the situation in such armed conflict zones became well known to the outside world, facts show that the weapons kept flowing to the African countries including those which were in the middle of conflict, despite the clear danger that the weapons might be potentially used by a regime to suppress its people. While the practice of sending weapons to countries in armed conflicts or countries on the brink of armed conflict may be seen as unacceptable, particularly from a moral point of view, it is not regulated by any international law. This situation highlights the absence of an internationally legal instrument that could prevent those transfers of arms to conflict zones.

A classic example was when China shipped weapons to Zimbabwe in May 2008, showing that in transfer of arms no consideration was given to potential civilian casualties or human rights violation. Despite Zimbabwe's high record of human rights abuses, a Chinese cargo ship, *An Yue Jiang* made its way to Zimbabwe transporting tonnes of arms and ammunition.²⁸² In response to the public protest to such shipment and the refusal of port workers to unload the weapons, the South African authorities initially let the ship dock and said that they "could do nothing to stop a perfectly legal and properly documented transaction between two sovereign States".²⁸³ A similar response came from a Chinese official claiming that such trade is "perfectly normal".²⁸⁴ It underlines the differences between public moral perception on the "wrongness" of transferring weapons to Zimbabwe, a country in political uncertainty and on verge of civil war, and on the other hand the cold reality that there is no international legal instrument to prevent such shipment.

²⁸¹ *Small Arms Survey 2009: Shadows of War* (New York, Cambridge University Press, 2009) at 184-185.

²⁸² Desmond Tutu "Arms Scandal Shows Need for Treaty" *The New Zealand Herald* (New Zealand, 9 May 2008). See also "Civil Society's Triumph on Zimbabwe" (25 April 2008) BBC report <<http://news.bbc.co.uk/2/hi/africa/7366599.stm>>.

²⁸³ "Civil Society's Triumph on Zimbabwe" (25 April 2008) BBC report <news.bbc.co.uk/2/hi/africa/7366599.stm>.

²⁸⁴ "China May Recall Zimbabwe Weapons" (22 April 2008) BBC News <<http://news.bbc.co.uk/2/hi/africa/7360438.stm>>. Last accessed on 2 February 2011.

The Cold War was one of the reasons for the flood of small arms into Latin America. Both the United States and the Soviet Union supplied their Latin American allies with large quantities of weapons through proxy arms dealers.²⁸⁵ The Soviet Union and their Warsaw Pact allies sent weapons to Cuba which then went to Sandinistas in Nicaragua, while the United States provided its Central American allies, like the counter-revolutionary Nicaraguan Contras, with weaponry.²⁸⁶ Due to the long life span of small arms, a large number of these weapons may still be in circulation.

In Jamaica, small arms were responsible for the increase of gun-related murders accounting for 77 per cent of the murders in 2009.²⁸⁷ The guns, which mainly originated from the US, were used in 66 per cent of robberies in the same year.²⁸⁸ In Bogota, Colombia, one of the most violent countries in the world, 40 per cent of deaths due to an external cause can be attributed to small arms.²⁸⁹ Observing regions flooded with small arms, it is not a coincidence that regions most affected by violent crime and with the highest homicide rates are Southern Africa, Central America and South America, with homicide rates of between 25 and 35 per 100,000 people.²⁹⁰

3. Threat of small arms post-armed conflict

An armed conflict, at some point, will stop when the warring parties agree to make peace. After the fighting ends there will be a programme for disarmament, demobilization and reintegration of ex-combatants (DDR). There is a crucial process to ensure the DDR process is a relative success, since a failure of DDR would be likely to result in a new war. Small arms, the weapons of choice in most armed conflicts, are a target of decommissioning in a DDR programme.

²⁸⁵ Rachel Stohl and Doug Tuttle “The Small Arms Trade in Latin America” (Center for Defense Information, 2008) at 14.

²⁸⁶ Ibid.

²⁸⁷ Glaister Leslie *Confronting the Don: The Political Economy of Gang Violence in Jamaica* (Geneva, Small Arms Survey, 2010) at 3.

²⁸⁸ Ibid, at 8.

²⁸⁹ Katherine Aguirre, Oscar Becerra, Simon Mesa Y Jorge A Restrepo Assessing the Effects of Policy Interventions on Small Arms in Bogota, Colombia (CERAC, 2009) at 25.

²⁹⁰ Ekaterina Stepanova “Armed Conflict, Crime and Criminal Violence” in *SIPRI Yearbook 2010: Armaments, Disarmament and International Security* (New York, Oxford University Press, 2010) at 40.

The first step in the DDR is a disarmament process. In a post-conflict situation, disarmament means to disarm the non-state forces, which may be small quantitatively but can be the most important for domestic security.²⁹¹ In a peace agreement, the parties agree on the number of weapons to be officially handed in. The number of weapons in the disarmament process after the peace agreement “is best for symbolic disarmament designed to reassure former enemies of peaceful intentions, not for the sustainable removal of large quantities or proportions of lethal equipment”.²⁹²

Facts from post-armed conflict situations have shown that in the disarmament process, only a fraction of weapons are successfully collected from the estimated total arsenal. Disarmament in Angola in 1991-1992 collected 32,731 weapons (15%) from the 214,862 estimated total arsenal; Colombia in 2003-2006 collected 36 per cent; and Nepal in 2007 collected 11 percent.²⁹³ When the war ended in Mozambique, out of 5 to 10 million weapons, the United Nations only managed to collect 170,000 small arms.²⁹⁴ More weapons were still in the hands of individuals or went to black markets and were transported to other countries. In general, disarmament outcomes in 45 DDR programmes showed only a 14 per cent proportion collected, even though there were cases where weapons collected were more than the estimated total arsenal; for example, in Afghanistan in 2003 as much as 130 per cent was collected, and Solomon Islands in 2002-2004 where 164 per cent of the estimated total was collected.²⁹⁵ The success rate of over 100 per cent of the total number estimated further emphasizes the difficulties in getting correct figures of weapons in circulation when there is no transparent arms trade.

There are reasons for the low total of collected weapons as the bulk of the weapons remain in the hands of ex-combatants. One is the cautious action of combatants in anticipating the resumption of armed conflict. If that happens, and they have handed over all their weapons, they would find themselves in a very vulnerable position.

²⁹¹ *Small Arms Survey 2009: Shadows of War* (New York, Cambridge University Press, 2009) at 159.

²⁹² *Ibid*, at 175.

²⁹³ *Ibid*, at 184-185.

²⁹⁴ Larry Kahaner *AK-47: The Weapon That Changed the Face of War* (New Jersey, John Wiley & Son, 2007) at 100.

²⁹⁵ *Small Arms Survey 2009: Shadows of War* (New York, Cambridge University Press, 2009) at 184-185.

Another reason is that the combatants have little faith in the DDR programme or that the truce will last. This is why a DDR programme is measured not by the weapons collected, but by security outcomes.²⁹⁶ A DDR programme is successful if the security in general is considered good, although the weapons collected are only a fraction of the estimated number.

The next steps of the DDR programme are the demobilization and reintegration of combatants. While the demobilization is relatively easy, the process to reintegrate ex-combatants into society is a more tricky process. When the ex-combatants try to live back in society, they usually possess no civilian skills to support their life. They are at risk of feeling marginalized and isolated. The reintegration process is to give ex-combatants the skills needed to survive as civilians. The failure of integrating ex-combatants into civilian life would easily tempt them to remain as combatants and unearth their small arms. This situation, combined with failed disarmament, makes the truce fragile.

D. Impacts of Small Arms Excessive Availability

1. Forced displacement

Observing the impact of small arms from a human security perspective requires its assessment beyond the armed conflict situation. The excessive availability of small arms affects many aspects of human security ranging from human rights, through social cost, to economic development. This thesis takes a few examples out of many, of the impact of small arms contributing to forced displacement, harm to women and children, obstruction of development and human rights violations.

Small arms play an important role in the human rights violation of forced displacement. Forced displacement has been exercised by parties in armed conflict to gain political benefit. Small arms greatly contribute to forcing people out of their homes at gun point, leaving their village, farms, cattle and belongings. Forced

²⁹⁶ Ibid.

displacement, to which the wide availability of small arms may contribute, is an important indicator of human insecurity.²⁹⁷

The widespread availability of small arms combined with the lack of respect for IHL and IHRL have increased the duration, incidence, and the lethality of armed conflicts, causing rampant and widespread displacements of people.²⁹⁸ In the UNHCR report, more than six million Sudanese refugees/IDPs were only willing to return to their homes if there was real security. What they feared most was not tanks or sophisticated missiles but armed groups and militias armed with small arms.²⁹⁹ The continuing conflicts in places such as Sudan, Chad, Liberia, Democratic Republic of Congo, and Zimbabwe increased the number to 12.7 million internally displaced persons (IDPs) on the African continent in 2007.³⁰⁰

Recent conflicts have resulted in an increase in IDPs and not refugees.³⁰¹ There are several reasons for this. The IDPs are absorbed in a larger territory in a way that was the case in West African countries in 1990s; going across the border may not be safer; and the neighbouring countries perhaps apply less liberal asylum policies.³⁰² Tanzania and Kenya have learned from their past experiences, that absorbing refugees means also absorbing some social service cost and an inflow of small arms, consequences which destabilize security of the regions around the camps.³⁰³

Armed conflicts drive people who are worried about their safety away from their homes, lands, towns, jobs, families, properties, and villages. With lack of respect for humanitarian law as background in conflicts, small arms are effective weapons to

²⁹⁷ Barbara Von Tigerstrom *Human Security and International Law: Prospects and Problems* (Oxford, Hart Publishing, 2007) at 113.

²⁹⁸ Edward Mogire “A Preliminary Exploration of Linkages between Refugees and Small Arms” (2005) Bonn International Center for Conversion <www.smallarmsnet.org/Reports/biccpaper35.pdf>. Last accessed on 24 February 2009.

²⁹⁹ UNHCR “Sudanese Refugees Need ‘Real Security’ for Any Return” (Press Release, 17 March 2004).

³⁰⁰ Constance G Anthony “Africa’s Displaced Peoples: State Building Realpolitik and Stunted Globalization” (2009) 31(3) *Harvard International Review* 50 at 50-56.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ Constance G Anthony “Africa’s Displaced Peoples: State Building Realpolitik and Stunted Globalization” (2009) 31(3) *Harvard International Review* 50 at 50-56.

threaten and intimidate displaced persons during the displacement and force these people into refugee camps. These people may experience harassment, fatal and non-fatal injuries, physical and psychological trauma. Many refugees and internally displaced persons continue to be at risk from armed threats in so-called safe areas, as small arms are easily available and commonly used to intimidate, assault and kill, even within refugee and IDP camps.³⁰⁴ Report suggests, for example, refugees in camps at Dadaab and Kakuma in Kenya, on the borders of Kenya, Sudan, Ethiopia and Central Africa are subjected to armed violence on a daily basis.³⁰⁵

The continued widespread availability of, and easy access to, small arms has direct implications for conflicts and contributes to the increasing number of refugees and IDPs. The office of the United Nations High Commissioner for Refugees (UNHCR) showed that the number of IDPs and refugees under UNHCR's care rose by 2.5 million in the course of one year, reaching an unprecedented figure of 27.1 million by the end of the reporting period.³⁰⁶ By the end of 2007, the total number of refugees under UNHCR responsibility had risen from 9.9 to 11.4 million and the total IDPs from 24.4 to 26 million.³⁰⁷

The remaining small arms, combined with poor implementation of the DDR process, particularly the integration of ex-combatants into society, may allow conflicts to reignite. Even if a new war is avoided, small arms continue to act as instruments for other forms of violence such as criminal activities, disruption of development assistance, and interference with efforts to deliver food, medicine, and supplies to children in dire need of relief.³⁰⁸ Refugees are often afraid to return home because weapons are still in the hands of former combatants, and public facilities such as schools do not function well.³⁰⁹ Furthermore, small arms proliferation and the

³⁰⁴ "Unregulated Arms Availability, Small Arms and Light Weapons, and the UN Process" (2006) ICRC <www.icrc.org/eng/resources/documents/misc/small-arms-paper-250506.htm>. Last accessed on 2 February 2011.

³⁰⁵ Robert Muggah and Peter Batchelor *Development Held Hostage: Assessing the Effect of Small Arms on Human Development* (UNDP, 2002) at 31.

³⁰⁶ *2007 UNHCR Statistical Yearbook* (UNHCR, 2008).

³⁰⁷ Ibid.

³⁰⁸ Rachel Stohl "Targeting Children: Small Arms and Children in Conflict" 9(1) *Brown J World Aff* (2002) 281 at 281.

³⁰⁹ Ibid.

insecurity this causes may minimize job opportunities, resulting in increased poverty and hardship.³¹⁰

2. Obstruction to development

Excessive availability of small arms may impede development and create a burden on public service costs. Small arms related problems may divert much needed funds and hinder development or redevelopment in a post-conflict society. This is the particular problem faced by developing countries in post-armed conflict situations widely affected by a flood of small arms. The most harmful effect of the weapons is their impact on the vulnerable and making unstable regions weak economically.³¹¹

The uncontrolled proliferation of small arms feeds and fuels conflicts. Armed conflicts and violence are predominantly concentrated in the developing and least developed countries, reducing and even reversing economic development. In 1998, armed violence cost Latin America an estimated 12 per cent of its GDP in lost human capital, investment and capital flight.³¹² The use of small arms in violence, and armed criminals has a destructive impact on economy and threatens to commercial activity. For instance, in South Africa in 2000/2001, violence and armed conflict forced the government to spend more on law and order (US\$ 1,96 billion) and less on social services (US\$ 1,56 billion).³¹³

Small arms are a public health problem, even when linked not to conflict but to crime, as they clearly fit the criteria for public health issues: they are preventable and are the cause of widespread death, injury and suffering.³¹⁴ Armed violence caused by the widespread availability of small arms places enormous pressure on a health service as

³¹⁰ Ibid.

³¹¹ CJ Chivers “Small Arms, Big Problems: The Fallout of the Global Gun Trade” (2011) 90 Foreign Aff 110 at 117.

³¹² *Small Arms Survey 2001: Profiling the Problem* (New York, Oxford University Press, 2001).

³¹³ Robert Muggah and Peter Batchelor *Development Held Hostage: Assessing the Effect of Small Arms on Human Development* (UNDP, 2002) at 33; see also the discussion of the cost of armed conflict in Africa in Rachel Stohl “Putting the Arms Trade Treaty into Context: Perspectives on the Global Arms Trade, Existing Arms Trade Initiatives, and the Role of the United States” (2009) 103 Am Soc’y Int’l L Proc 331 at 335.

³¹⁴ IANSA (International Action Network on Small Arms) “The Public Health Approach to Prevent Gun Violence” <www.iansa.org/issues/public_health.htm>. Last accessed on 15 March 2009.

it diverts scarce resources that should be available to serve the people. A study in the US reveals, that for males, the injuries caused by gunshot caused the greatest burden on medical costs, accounting for 52 per cent.³¹⁵ For both males and females, firearms injuries cause the highest loss of productivity of all types of violent trauma.³¹⁶ A study by the Small Arms Survey in Rio de Janeiro, Brazil, found that the average medical cost of a single gunshot wound was \$4,500, almost three times the cost of a stab wound.³¹⁷ Gun violence extracts almost \$90 million in health costs in Brazil and \$40 million in Colombia, while productivity losses are estimated at \$10 billion and \$4 billion for these countries, respectively.³¹⁸

The easy access to small arms leads not only to deaths but also non-fatal injuries during armed conflicts, assaults, or accidents which will be a burden to public health and social cost. These weapons also often have mental health consequences for victims and their families. In more specific accounts, small arms cause a substantial burden on the health sector especially in surgery, prolonged hospitalization, and long term disability which is very costly.³¹⁹

3. Impact of small arms excessive availability on the vulnerable

In any armed conflicts, women and children are in the most vulnerable position. They suffer the most either directly or indirectly as gun violence may also be associated with gender perceptions of masculinity.³²⁰ Sometimes, even refugee camps are not safe places for women and children.³²¹ Women and children are the disproportionate

³¹⁵ Phaedro S Corso and others “Medical Cost and Productivity Losses Due to Interpersonal and Self-Directed Violence in the United States” (2007) 32(6) Am J Prev Med 474 at 476.

³¹⁶ Ibid. This journal article also notes that homicides in the US, for both males and females, most frequently involved a firearm.

³¹⁷ Rachel Stohl and Doug Tuttle “The Small Arms Trade in Latin America” (2008) Center for Defense Information < www.cdi.org/pdfs/Small_Arms_Latin_America.pdf> at 16.

³¹⁸ Ibid.

³¹⁹ “Small Arms, Landmines and Health”

WHO<www.who.int/mip2001/files/1965/SmallArmsLandminesandHealth.pdf>. Last accessed on 27 April 2011.

³²⁰ Julliete Pattinson “‘Turning a Pretty Girl into a Killer’: Women, Violence and Clandestine Operations during the Second World War” in Karen Throsby and Flora Alexander (eds) *Gender and Interpersonal Violence: Language, Action and Representation* (Hampshire, Palgrave Macmillan, 2008) 11 at 11.

³²¹ Ibid.

victims of conflicts. The presence of small arms hinders people, particularly women and children, in the provision of basic needs.³²² Women are often forced to endure rape and other sexual abuse and violence, as well as abductions and forced slavery, including prostitution at the point of a gun, when IHL and IHRL are ignored.³²³

Many armed conflicts use the services of child soldiers. Reports state that between 3000 and 4000 children took part as combatants in the conflict in the former Yugoslavia, a thousand other child soldiers were also involved in the Colombian conflict, Sierra Leone, Sri Lanka, and Uganda.³²⁴ The age of a child soldier could be as young as seven.³²⁵ A report said that in Sierra Leone during the civil war from 1991 to 2001, as many as 80 per cent of all combatants were between seven and fourteen.³²⁶ The activities to recruit children to take part in armed conflict violate rules of international laws, which, inter alia, established by the Fourth Geneva Convention of 1949 Relative to the Protection of Civilians in Time of War³²⁷ and international human rights instruments.³²⁸

The important point to relate small arms and child soldiers is the fact that small arms are very easy to operate. This encourages war lords or parties in armed conflicts to recruit children and train them to be soldiers. In the civil war in Liberia between 1989 and 1992, Charles Taylor recruited a large number of child soldiers for his rebel

³²² Rachel Stohl “Targeting Children: Small Arms and Children in Armed Conflicts” (2002) 9(1) *Brown J World Aff* 281 at 285.

³²³ *Ibid.*

³²⁴ Jenny Kuper *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Leiden, Martinus Nijhoff Publishers, 2005) at 216-223.

³²⁵ Larry Kahaner *AK-47: The Weapon that Changed the Face of War* (New Jersey, John Wiley & Son, 2007) at 88.

³²⁶ *Ibid.*

³²⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (fourth Geneva Convention) (1949), art 24, 50, 68, 78, 82, 89 and 94: see Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011) vol 1, at 75

³²⁸ For examples, the United Nations Convention on the Rights of the Child (1989); the International Covenant on Economic, Economic, Social and Cultural Rights (1966).

forces.³²⁹ Charles Taylor's child soldiers under 18 were among an estimated 300,000 child soldiers involved in later conflicts.³³⁰

The familiarity of child soldiers with the weapons was described by a former child soldier in Northern Uganda as he told how he learnt to live on the run and use weapons: "I especially knew how to use an AK-47 twelve-inch, which I could dismantle in less than one minute. When I turned 12 they gave me an RPG, because I had proved myself in battle."³³¹

In the period 1995-2005, about two million children were killed by conflict, 12 million were made homeless, six million injured or disabled, and at least 300,000 at any given time were actively involved in armed conflict.³³²

The child soldier problem is most critical in Africa, where children as young as nine have been involved in armed conflicts.³³³ The use of child soldiers, however, is not unique to Africa. Children are also used as soldiers in various Asian countries and in parts of Latin America, Europe and the Middle East.³³⁴ Most of the time, children are recruited not to play non-combat roles, but to become soldiers. In addition, they are also used as spies, messengers, porters, servants, or to lay or clear anti-personnel mines, and of those children, girls are particularly at risk of rape and other sexual abuse.³³⁵

³²⁹ Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011) vol 1, at 75; Cynthia B Eriksson and Elizabeth A Rupp "Bereavement in a War Zone; Liberia in the 1990s" in James Marten (ed) *Children and War* (New York University Press, 2002) at 88-89.

³³⁰ Graca Machel *The Impact of War on Children* (London, Hurst & Company, 2001) at 119; see also Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011) vol 1, at 73-77.

³³¹ Graca Machel *The Impact of War on Children* (Hurst & Company, London, 2001) at 119.

³³² Jenny Kuper *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff Publishers, 2005). Kuper quotes several UNICEF publications for the figures.

³³³ "Some Fact" (2011) Coalition to Stop the Use of Child Soldier <<http://www.child-soldiers.org/childsoldiers/some-facts>>. Last accessed on 8 July 2011.

³³⁴ Ibid.

³³⁵ "Children and Human Rights" Amnesty International <www.amnesty.org/en/children>. Last accessed on 17 March 2009.

4. Small arms facilitate human rights violations

The widespread availability of and easy access to small arms make them weapons of “mass destruction” of the poor³³⁶ and this availability of small arms helps facilitate human rights violations. Small arms contribute to human rights abuses in many ways: the enhancement of the power of abusive forces to suppress individuals and groups; and their use against civilians in armed conflicts. Small arms are employed in a wide variety of human rights abuses, including extrajudicial executions, forced disappearances and torture.³³⁷

Small arms played a major role in facilitating genocide in Rwanda and Bosnia, as researchers have argued that the proliferation of small arms and light weapons in the Hutu government and Tutsi exiles between 1990 and 1993 expanded the conflict and increased human rights abuse in Rwanda.³³⁸

The widespread availability of small arms also “[helped] the Hutu extremists carry out their slaughter on a horrendous scale” during the genocide in 1994.³³⁹ Although the genocide in Rwanda was predominantly carried out by knives, axes and blades, small arms played an important role in preparing for the event to come to fruition. In January 1994, three months before the conflict, the government bought assault weapons and distributed them to civilians as part of a civilians’ self-defence programme.³⁴⁰ When the genocide took place, small arms were used to force the victims to gather. Militia men with guns also set up check points to sort the Tutsis from the Hutus. “It is often noted that although the majority of killings in the

³³⁶ Graca Machel *The Impact of War on Children* (London, Hurst & Company, 2001) at 119; Noel Stott “Small Arms Proliferation in Southern Africa: Reducing the Impact of ‘the Real Weapons of Mass Destruction’” *Africafiles* < <http://www.africafiles.org/article.asp?ID=14228>>. Last accessed 31 July 2012.

³³⁷ “Small Arms and Human Rights” Amnesty USA <www.amnestyusa.org/artists-for-amnesty/lord-of-war/small-arms-and-human-rights/page.do?id=1104970>. Last accessed 15 March 2009.

³³⁸ Stephen D Goose and Frank Smyth “Arming Genocide in Rwanda” (1994) 73(5) *Foreign Aff* 86 at 88-91.

³³⁹ *Ibid*; see also Dorinda Lea Peacock “‘It Happened and It Can Happen Again’: The International Response to Genocide in Rwanda” (1996-1997) 22 *NCJ Int’l & Com Reg* 899.

³⁴⁰ Cecele Meijer and Philip Verwimp *The Use and Perception of Weapons before and after Conflict: Evidence from Rwanda* (Geneva, Small Arms Survey, 2005) at 32; see also a report of the use of small arms, Uzis, in the killings in Dorinda Lea Peacock “‘It Happened and It Can Happen Again’: The International Response to Genocide in Rwanda” (1996-1997) 22 *NCJ Int’l & Com Reg* 899 at 916.

Rwandan genocide were committed with knives, axes and blades, guns were needed to round up the victims and keep them surrounded before killing them”.³⁴¹

The army’s policies and plans might have indicated the possibility of ethnic violence. In 1991, the plan to arm civilians was disclosed by Colonel Sylbain Nsabimana, Chief of Staff of the Rwandan Army. The plan was to arm at least one person in every ten households.³⁴² The preparation, training, and arms distribution were carried out in 1993.³⁴³ Among the arms distributed were Kalashnikovs, machine guns, grenades, and large quantities of bullets, as well as machetes.³⁴⁴ The weapons were then distributed to a young male in each of the lowest administrative units.³⁴⁵ During that time, the Rwandan army also trained and armed civilian militias, and just prior to the start of the massacres, peacekeepers estimated that 85 tonnes of weapons had been distributed throughout the country.³⁴⁶ More than a dozen countries helped to fuel the war with the majority of weapons being provided by France, apartheid-era South Africa and Egypt.³⁴⁷

The sourcing of some weapons and their transport to Rwanda was organized by a Kenyan-based company that brokered the delivery of seven large cargoes of small arms worth \$6.5 million in London, using the off shore company, MilTec

³⁴¹ IRIN (Integrated Regional Information Networks) “Guns Out of Control, Small Arms: The Real Weapons of Mass Destruction” (Nairobi, 9 May 2006) <www.irinnews.org/IndepthMain.aspx?IndepthId=8&ReportId=58952>. Last accessed on 7 May 2009.

³⁴² Cecele Meijer and Philip Verwimp *The Use and Perception of Weapons before and after Conflict: Evidence from Rwanda* (Geneva, Small Arms Survey, 2005) at 22.

³⁴³ Alison Liebhafsky Des Forges *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch, 1999) <www.hrw.org/legacy/reports/1999/rwanda/>. Last accessed on 8 August 2009.

³⁴⁴ Cecele Meijer and Philip Verwimp *The Use and Perception of Weapons before and after Conflict: Evidence from Rwanda* (Geneva, Small Arms Survey, 2005) at 22.; see also the distribution of large number of machetes in Alison Liebhafsky Des Forges *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch, 1999).

³⁴⁵ Ibid.

³⁴⁶ Camilla Waszink “The Proliferation of Small Arms: A Threat to International Human Rights” (Small Arms Survey, 2001) <www.smallarmssurvey.org/files/sas/publications/w_papers_pdf/DP/DP_HumanRights.htm>. Last accessed on 8 May 2009.

³⁴⁷ Camilla Waszink “The Proliferation of Small Arms: A Threat to International Human Rights” (Small Arms Survey, 2001) <www.smallarmssurvey.org/files/sas/publications/w_papers_pdf/DP/DP_HumanRights.htm>. Last accessed on 8 May 2009.

Corporation.³⁴⁸ They worked with another United Kingdom air cargo broker in Windsor to arrange secret charter flights from Tirana and Tel Aviv in 1994.³⁴⁹ The arms deliveries to the Rwandan armed forces arrived as they were carrying out the genocide in Rwanda and continued even during the time when the mass killings were being reported daily by the international news media.³⁵⁰ This shows the crucial roles small arms played in the preparation of the Rwandan genocide.

Likewise, small arms played a role in the Bosnia genocide. A survivor of a mass execution, on 14 July 1995, told the ICTY hearing that Serb soldiers armed with rifles, separated men from their family, gathered and transported them from Srebrenica to a different place before they were shot.³⁵¹ The witness told the Tribunal as recorded:

Two soldiers opened the back of the truck and the prisoner and the other men were taken off and told where to stand up and to keep quiet...As soon as the truck left, the soldiers opened fire on the men standing up in the row...As he lay still, he saw the TAM truck returned and another group of prisoners arrived. They were taken off, lined up in four rows, and shot. The witness saw this happening over and over again as he lay there.³⁵²

Civilians often become targets of killings using small arms. ICTY, in its judgment of the *case Vlastimir Dordevic*, recounts when Kosovan Albanians who were not participating in conflict,³⁵³ were forced out of their village and shot by small arms:

They carry AK47 rifles and had long knives in scabbards attached to their belts...The group of police approached the 14 people...[and] a policeman shout "shoot". The police then opened fire on the group...of the 14 people who were shot at in the Belaja River, 10 were women and children [footnotes omitted].³⁵⁴

³⁴⁸ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 93.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ ICTY, Court Record, IT-95-5/18: *Karadzic and Mladic*, Public Transcript of Hearing dated 24 November 2011 at 21917, (witness KDZ039, examination by Mr Nicholls), Trial Chamber III.

³⁵² *Ibid.*, at 21921.

³⁵³ *Prosecutor v Vlastimir Dordevic*, ICTY, Public Judgement with Confidential Annex, IT-05-87/1-T, 23 February 2011, vol I of II, at 172.

³⁵⁴ *Ibid.*, at 171-172.

In the next chapter, the thesis examines the contemporary concept of State responsibility in relation to small arms. As the use of small arms in armed conflicts may lead to acts which are against the international humanitarian laws and human rights laws, it is significant to examine the concept of the responsibility of the State to protect, relative to the control of small arms so as to help prevent the crimes against humanity, and human rights violations from happening. Such analysis offers an insight as to what degree the concept of State responsibility could apply to the issue of small arms.

D. Summary

The impact of small arms is multi-dimensional, ranging from human security to socio-economic development. From the perspective of human security, small arms are closely associated with forced displacements, crimes against humanity and facilitating war crimes and genocide. The excessive availability of small arms can also fuel conflicts and undermine human rights and humanitarian law. The genocides in Rwanda and Bosnia demonstrate how small arms could contribute to the perpetration of atrocities and crimes against humanity. The wide availability of small arms in post-conflict situations, apart from being a threat to peace, can be a threat to women and children as the most vulnerable in the society.

The weapons may also impede the social reconstruction and economic redevelopment and in post-conflict situations. Small arms related problems may create a burden on public service costs and divert much needed funds. As illustrated, small arms' involvement in violence and criminal activities in Latin America and Africa has caused their governments to lose billions of dollars in human capital, investment, capital flights and increasing fund on law and order.

Chapter III: Arms Control, Humanitarian Law and Human Rights Law

A. Introduction

A series of conventional weapons treaties will be analysed in the thesis of this chapter to identify the humanitarian rationale, the connection and influence of international humanitarian law (IHL) and international human rights law (IHRL), if any, to the adoption of an arms control treaty. Small arms fall under the category of conventional weapons, hence the analysis focuses on conventions or documents related to conventional weapons. Reference to humanitarian law and human rights law in each treaty is noted to identify the development of the influence of IHL and IHRL on arms control over the years. For this purpose, the thesis studies rationales in related conventions such as the 1868 St Petersburg Declaration,³⁵⁵ the 1899 and 1907 Hague Conventions,³⁵⁶ the 1980 Certain Conventional Weapons Convention,³⁵⁷ the 1997 Mine Ban Convention, and the 2008 Convention on Cluster Munitions.³⁵⁸

The rationales in these treaties will show whether the reasons and rationales to prohibit, ban, or control weapons may also apply to regulation of the proliferation of small arms. As will be discussed, some conventions control or prohibit the use of weapons based on humanitarian reasons because they cause unnecessary suffering and are indiscriminate in nature. One of the purposes of IHL is to protect civilians.³⁵⁹ The humanitarian rationales, namely indiscriminate and superfluous injury or unnecessary suffering, reflect the principles of humanitarian law of distinction

³⁵⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St Petersburg Declaration, adopted 11 December 1868), reprinted (1907) 1 Am J Intl L Supp 95.

³⁵⁶ Hague Convention Regarding Laws and Customs of War on Land (Convention II) (1899); and Hague Convention Respecting the Laws and Customs of War on Land (Convention IV) (concluded 18 October 1907, entered into force 26 January 1910), reprinted (1908) 1 Am J Int'l L Supp 90 .

³⁵⁷ Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (1980), 1342 UNTS 137..

³⁵⁸ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), 2056 UNTS 211.

³⁵⁹ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Law Humanitarian Law* (Cambridge University Press, 2005) vol 1 at ch 1.

between civilian and combatants, and proportionality.³⁶⁰ Hence, it is a subject of discussion that the proliferation of small arms should not endanger the effort of protecting civilians.

The rationales of a convention are usually revealed in its preamble. The preamble of a treaty also typically explains its background, and reasons for being, although there is no legal requirement to do so.³⁶¹ The paragraphs in the preamble provide the “context for the purpose of the interpretation of a treaty”.³⁶² Hence, reading the preamble paragraphs of conventional weapon treaties is helpful to gain a comprehensive understanding of their rationale, purpose, and context.

B. Humanitarian Rationales in Several Arms Control Treaties

1. Rationales

“Humanity” as one of the important reasons informing the prohibition of certain weapons has been evident since the adoption of the 1868 St Petersburg Declaration.³⁶³ The later international conventions, particularly the conventions adopted after the Second World War, demonstrate that “humanity” is one of the reasons for controlling certain weapons. It is also worth noting that humanity and humanitarian reasons are increasingly cited and referred to in arms control conventions or documents adopted after the end of the Cold War.

When Henry Dunant (1828-1910) witnessed the result of the battle of Solferino in 1859, he noticed that suffering makes no distinction between the wounded of the

³⁶⁰ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at part I (chp 1 and 4).

³⁶¹ Stuart Maslen *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* (New York, Oxford University Press, 2004) vol I at 53.

³⁶² Vienna Convention on the Law of Treaties (adopted 23 May 1969), 1155 UNTS 331, art 31 (2). The Convention does not have any provision to explain that there is a legal requirement of having preamble paragraphs in a treaty.

³⁶³ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868), reprinted (1907) 1 Am J Int'l Supp 95.

victors and those of the vanquished.³⁶⁴ The suffering of the wounded convinced Dunant that there is a common humanity for all, irrespective of side.³⁶⁵ “Humanity” in this discussion is used to describe the principles of humanity as the desire to avoid unnecessary suffering to humans, in counter-measures to the military necessity in armed conflict.³⁶⁶ The prohibition of certain means of warfare and rules of the conduct of war, known as the law of armed conflict, has been the matter of the balance between “the requirement of humanity” and “military necessity”.³⁶⁷

Human rights are fundamental rights inherent to all human beings which are essential for life as a person as “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment”.³⁶⁸ Every human person is expected to be treated humanely because each human person has the same human rights.³⁶⁹ The Charter of the United Nations has several references to human rights in its articles; inter alia, articles 1(3) and 55(c).³⁷⁰ The most important recognition of human rights was established by the 1948 Universal Declaration of Human Rights which has, since then, been providing the authoritative articulation and respect for human rights of individuals.³⁷¹ By examining the existing humanitarian law treaties, it is evident that human rights law

³⁶⁴ Paul Gordon Lauren *The Evolution of International Human Rights* (University of Pennsylvania Press, 2003) at 60. It is in his book *Un Souvenir de Solferino*, Henry Dunant vividly described the reality of suffering in a war which aroused public opinion. His vision to have an international principle for relief of the wounded led to Geneva International Conference in 1863; see the English edition of the book in Henry Dunnant *A Memory of Solferino* (Geneva, ICRC, 2004).

³⁶⁵ Paul Gordon Lauren *The Evolution of International Human Rights* (University of Pennsylvania Press, 2003) at 60

³⁶⁶ For the discussion on the definition of humanity see Robin Coupland “Humanity: What Is It and How Does It Influence International Law” (2001) 83(844) IRRC 968. Coupland explains the ambiguity of the term humanity and explains that “humanity arises from and signifies restraining the capacity for armed violence and limiting its effects on security and health”.

³⁶⁷ Theodor Meron *The Humanization of International Law* (Leiden, Martinus Nijhoff Publishers, 2006) at 69.

³⁶⁸ Universal Declaration of Human Rights (adopted 10 December 1948, UNGA res 217A), art 5; Rabecca MM Wallace and Olga Martin-Ortega *International Law* (Thomson Reuters, 2009) at 235. See also the explanation of human rights from the United Nations Office of the High Commissioner for Human Rights. Available at <www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>. Last Accessed on 18 October 2009; see also ICRC for further information on the difference between human rights and humanitarian law. Available at

<www.icrc.org/web/eng/siteeng0.nsf/htmlall/5kzmyuy?opendocument>. The ICRC is of the view that humanitarian law applies in armed conflicts, whereas human rights protect individuals at all times.

³⁶⁹ Universal Declaration of Human Rights (adopted 10 December 1948, UNGA res 217A), art 1.

³⁷⁰ Charter of the United Nations (sign 26 June 1945, came into force 24 October 1945), art 1(3) and 55 (c).

³⁷¹ Universal Declaration of Human Rights (adopted and proclaimed by UNGA res 217A (III) 10 December 1948).

has had a major influence on the formation of customary rules of international humanitarian law.³⁷² Humanitarian concern relates to the injury and suffering experienced by victims of armed conflicts. Hence, the prohibition of weapons causing unnecessary suffering is one of the fundamental principles of international humanitarian law.³⁷³

Military operations in armed conflicts may bring collateral damage to the people in terms of civilian casualties as reported in World War II, where civilian casualties outnumbered military.³⁷⁴ It was the large civilian cost in World War II that provided impetus for further codifying the laws of war as set forth in the Fourth Geneva Convention, which include the principle of distinction between civilians and combatants in time of war.³⁷⁵ The concern for civilian protection was furthered in additional Protocols I and II, the International Tribunals as well as the Rome Statute.³⁷⁶

2. Arms control and international humanitarian law

After two devastating world wars, the international community of States realized that in order to avoid further tragedies of human suffering and to help those who were suffering in armed conflict, they needed to create a new international mechanism.³⁷⁷ This realization led to the establishment of the United Nations, where its charter defines the respect for humanity as “to re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small”.³⁷⁸

³⁷² Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) at 3.

³⁷³ Marco Sassoli and others *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC, 1999) at 112.

³⁷⁴ Frederic de Mulinen “The Law of War and the Armed Forces” (1978) 202 IRRC. Updated article <www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jmeb?opendocument>. Last accessed on 15 Dec 2009.

³⁷⁵ Geneva Convention IV (concluded 12 August 1949, entered into force 21 October 1950), 75 UNTS 287; Additional Protocol (I) (1977), 1125 UNTS 3; Additional Protocol (II) (1977), 1125 UNTS 609; see, Jack M Beard “Law and War in Virtual Era” (2009) 103 Am J Int’l L 409

³⁷⁶ Additional Protocol (I) (1977), 1125 UNTS 3; Additional Protocol (II) (1977), 1125 UNTS 609; Rome Statute of the International Criminal Court (adopted 17 July 1998), 2187 UNTS 90.

³⁷⁷ Paul Gordon Lauren *The Evolution of International Human Rights* (University of Pennsylvania Press, 2003) at 160

³⁷⁸ Charter of the United Nations (26 June 1945), 1 UNTS XVI.

Supplementing the international order set by the United Nations was a raft of new international humanitarian law codified in the Geneva Conventions. Humanity is the basis of the Geneva Conventions' concerns to treat the wounded and sick (Convention I and II)³⁷⁹ and the necessity to protect civilians in time of war (Convention IV).³⁸⁰ The particular reference to the Fourth Geneva Convention in protecting civilian lives is pertinent in the discussion because armed conflicts are fought mostly with small arms as primary instruments of war. Respect for the lives of civilians enshrined in the Fourth Geneva Convention demands that the international community strictly apply it in armed conflict as civilians increasingly become the predominant victims in an armed conflict. Article 1, common to the 1949 Geneva Conventions and the Protocol I, requires all States to have a solemn obligation to "respect and ensure respect"³⁸¹ for humanitarian law. This implies that not only do States have to respect the law, but they also have a responsibility to ensure respect by others.

In the case of a serious violation occurring, a collective willingness to ensure respect for international humanitarian law might be enforced by various measures, by the United Nations Security Council,³⁸² or imposed as moral pressure by the resolutions of the General Assembly or the Human Rights Council.³⁸³ The measures include the adoption of a resolution to call a perpetrator to abide by the law, offer good offices of Secretary-General, dispatch observer missions, or launch peace keeping operations.³⁸⁴

³⁷⁹ Geneva Convention I (1949), 75 UNTS 31; Geneva Convention II (1949), 75 UNTS 85.

³⁸⁰ Geneva Convention IV (1949), 75 UNTS 287.

³⁸¹ Geneva Conventions have the common wording of article 1: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". A similar sentence also exists in the article 1 (1) of the Additional Protocol I (1977, 1125 UNTS 3): "The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances".

³⁸² Based on the Charter of the United Nations, the Security Council may take measures to maintain international peace and security based on Chapter VII which include imposing an economic or arms embargo, and the use of force. In exercising its mandate, for example, the Security Council authorized the creation of International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) to try those responsible for the genocide and crimes against humanity.

³⁸³ The United Nations General Assembly and Human Rights Council resolutions are not legally binding but have a moral force as they reflect the opinion of the majority of States.

³⁸⁴ Alexandra Boivin "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87(859) IRRC at 476.

In essence, humanitarian law is a part of laws of armed conflict which protect civilians in time of war and avoid needless suffering among combatants.³⁸⁵ It seeks to protect persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.³⁸⁶ Hence, the definitions of “arms control” and “international humanitarian law”, suggest that the arms control is agreement dealing with military capability in terms of restricting the use of weapons, while international humanitarian law regulates the laws of war to limit the impact of armed conflict.

Protecting civilians, one of the main noble ideas of the Fourth Geneva Convention, is in conformity with the effort to restrict the proliferation of small arms, as the weapons kill mainly civilians. States parties to the Geneva Conventions reaffirmed the responsibility to respect international humanitarian law, stressed the importance of humanitarian consideration in arms transfer and undertook to "make respect for international humanitarian law as one of the fundamental criteria on which arms transfer decisions are assessed" and were encouraged to incorporate such criteria in national laws and policies, as well as regional and global norms.³⁸⁷

Humanitarian law has been raised in the discussion related to arms control, such as on legal status of the use of a weapon. For example, in the Advisory Opinion of the ICJ on *the Legality of Threat or Use of Nuclear Weapons*, many States invoked the consideration of international humanitarian law, including Additional Protocol I of 1977 to the Geneva Conventions of 1949.³⁸⁸ In examining the possible prohibition by international humanitarian law, the Court drew an example by treating the nuclear weapon the same way as a poisoned weapon and inspected the second Hague

³⁸⁵ Richard L Williamson Jr “Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypothesis” (2003) 4(1) *Chi J Int'l L* 59.

³⁸⁶ “ICRC Advisory Service on International Humanitarian Law” (2004) ICRC [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). Last accessed on 8 July 2011.

³⁸⁷ “The Development of An International Arms Trade Treaty”, ICRC statement dated 18 March 2008 www.icrc.org/Web/Eng/siteeng0.nsf/html/small-arms-statement-180308 . Last accessed 29 June 2012.

³⁸⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226, at 241, para 27.

Declaration (1899), the Hague Convention IV (1907), and the Geneva Protocol (1925).³⁸⁹

The Court does not find that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned instruments.³⁹⁰ However, it does acknowledge that “[t]he pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments”.³⁹¹ By this, the Court refers to the prohibition of the use of other weapons of mass destruction, namely chemical by the Chemical Weapons Convention (1993) and the Biological Weapons Convention (1972).³⁹²

The citation of international humanitarian law in the discussion of the use of weapons, such as demonstrated by the ICJ Advisory Opinion above, suggests that particular weapons, because of the humanitarian concerns of the inherent indiscriminate nature or unnecessary suffering they cause, are considered as being against humanitarian law and may need to be prohibited.³⁹³

3. Arms Control and International Human Rights Law

International human rights law has been developing progressively since the end of War World II. Mention of human rights is made in the preamble of the Charter of the United Nations (1945) that the peoples of the United Nations determined to “reaffirm faith in fundamental human rights”.³⁹⁴ The same commitment is repeated in article

³⁸⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226, at 248.

³⁹⁰ *Ibid.*, at 248, para 56.

³⁹¹ *Ibid.*, at 248, para 57.

³⁹² *Ibid.*

³⁹³ Besides weapons of mass destruction namely the 1972 Biological Weapons Conventions (1015 UNTS 163) and the 1993 Chemical Weapons Convention (1974 UNTS 45), the prohibition of certain conventional weapons has already been codified in the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (1980), UNTS, vol 1342, I-22495.

³⁹⁴ Charter of the United Nations (1945), preamble paragraph 2, printed in *International Instruments of the United Nations* (New York, United Nations, 1997) at 405; Charter of the United Nations (1945), reprinted (New York, United Nations, 1997).

1(3) and meant as one of the purposes of the establishment of institution “in promoting and encouraging respect for human rights”.³⁹⁵ This is an open promise and acknowledgement of existence of such rights by States. A series of international human rights conventions have since been adopted which further reflect States’ acceptance of human rights.³⁹⁶

Internationalization of international human rights “has brought agreement, at least in political-legal principle and in rhetoric,” that human rights are of international concern, and have become a proper subject for diplomacy and international law.³⁹⁷ As international law is the subject of international law and politics, which derives principally from contemporary international agreements which States undertake to recognize,³⁹⁸ then the international human rights law may also influence States in adopting or negotiating arms control treaties.

The reference to human rights law was also invoked in the ICJ’s case on the *Legality of the Use by A State of Nuclear Weapons in Armed Conflict* (requested by the WHO) as some countries argued the use of such weapon is in contrary to human rights law, in particular, to the right to life.³⁹⁹ The same argument to arms control and human rights in the *Legality of the Threat or Use of Nuclear Weapons* (by the request of the UN General Assembly) was restated in the written comments by States to the ICJ.⁴⁰⁰

³⁹⁵ Charter of the United Nations (1945), art 1(3), printed in *International Instruments of the United Nations* (New York, United Nations, 1997) at 405.

³⁹⁶ Among others, the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). All are reprinted in *International Instruments of the United Nations* (New York, United Nations, 1997).

³⁹⁷ Louis Henkin *The Age of Rights* (1990) at 17.

³⁹⁸ *Ibid*, at 17-19.

³⁹⁹ *Legality of the Use of Nuclear Weapons in Armed Conflict* (request of an ICJ Advisory Opinion by the WHO), written statement of the Government of the Solomon Islands, 9 September 1994, at IIB; written statement of the Government of Nauru, 20 September 1994, vol I, at 48-51; written statement of the Government of Mexico, 9 June 1994, at 8-9. Documents are available at ICJ <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=93&code=anw&p3=1>>. Last accessed 20 April 2012.

⁴⁰⁰ *Legality of the Threat or Use of Nuclear Weapons* (request of an ICJ advisory opinion by the UN General Assembly), written statement of the Government of Solomon Islands, 19 June 1995, at IIB; written statement of the Government of Egypt, communication dated 20 June 1995, at 15-16; written statement of the Government of Malaysia, 19 June 1995, at 13-14. The statements are available at ICJ <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=1>>. Last accessed 23 April 2012.

The arguments invoke the applicability of human rights law in discussing the use of weapons, in particular the application of article 6 of the International Covenant on Civil and Political Rights that stipulates that every human being has an inherent right to life.⁴⁰¹ The Court observes that the protection of the Covenant of Civil and Political Rights, in particular respect for the right to life, “does not cease in times of war...In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities.”⁴⁰² However, whether the loss of life because of the use of certain weapon in warfare is contrary to the article 6 of the Covenant to be determined by the applicable of *lex specialis*, as the Court is of the view that it “can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.⁴⁰³

Further application of the link between arms transfer and human rights has been adopted by the member States of the European Union in their common position on arms exports,⁴⁰⁴ in which the human rights situation in a receiving State is a precondition to execute an arms export. The member States are asked to respect the human rights in the country of final destination, and will “deny an export licence if there is a clear risk” such transfer of military equipment might be used for internal repression.⁴⁰⁵ Participating States in the Wassenaar Arrangement agree to take into account the situation of human rights in the recipient country, and avoid exporting small arms if there is a clear risk that the weapons might “be used for the violation or suppression of human rights and fundamental freedoms”.⁴⁰⁶

⁴⁰¹ Convention on Civil and Political Rights (1996), UNGA res 2200A (XXI), art 6 (1).

⁴⁰² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ Reports 226 at 240, para 25.

⁴⁰³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ Report 226 at 240, para 2: see also, L C Green “Enforcement of International Humanitarian Law and Threats to National Sovereignty” (2003) 8 J Conflict & Sec L 101 at 102-103. Green states that “it may well be argued that the protection of human rights as such is a matter of universal concern constituting *lex generalis*, while humanitarian law in the sense of its concern with armed conflict is a constituent part of this amounting to *les specialis*.”

⁴⁰⁴ EU Common Position (2008 /944/CFSP of 8 December 2008), OJ L335.

⁴⁰⁵ Ibid, art 2(2)(a). This common position was adopted to replace the 1998 EU Code of Conduct of Arms Export. Available at European Union External Action <<http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>>. Last accessed 19 April 2012.

⁴⁰⁶ Best Practice Guidelines for Export of Small Arms and Light Weapons (SALW) (adopted at the 1992 plenary and amended at the 2002 Plenary 2007), at I.1 (i), and 2 (i). Available at <<http://www.wassenaar.org/guidelines/index.html>>. Last accessed 19 April 2012.

Based on the paragraphs above, the IHL and IHRL are closely related, intertwined, with discussion of arms control. It is confirmed by the references to IHL and IHRL in discussion of the legality of the use of nuclear weapons by the ICJ and their inclusion in the criteria in arms trade by the European Union as well as the Wassenaar Arrangement. It is then logical that the discussion on small arms in this thesis inevitably also involves IHL and IHRL.

4. Civilian protection

The distinction between civilians and combatants is one of the fundamental principles of international humanitarian law recognized by civilized nations.⁴⁰⁷ The effort to distinguish between civilians and combatants was set forth in St Petersburg Declaration, which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.⁴⁰⁸

In order to protect civilians, the principle of distinction is enshrined in articles 48, 51, and 52 of Additional Protocol I to Geneva Conventions which require that all parties to armed conflict must at all times distinguish between combatants and civilians, and attacks must not be directed against civilians and civilian objects.⁴⁰⁹ “[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objects...”⁴¹⁰ In addition, “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”⁴¹¹ and “shall not be the object of

⁴⁰⁷ Marco Sassoli and others *How Does Law Protect in War? Cases, Documents ad Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC, 1999) at 112.

⁴⁰⁸ St Petersburg Declaration (1868), (1907) 1 Am J Int'l L Sup 96, preamble para.

⁴⁰⁹ Additional Protocol I (1977), 1125 UNTS 3, art 48; 51; and 52.

⁴¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 UNTS 3, art 48.

⁴¹¹ *Ibid.*, art 51(1).

attack”.⁴¹² Since distinction between combatants and civilians must be made, discriminate attacks are prohibited by article 51(4) Additional Protocol I.⁴¹³

The Protocol I in article 57(2)(a)(iii) further provides civilian protection by asking parties in armed conflicts to refrain from launching attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁴¹⁴ As armed conflict inevitably victimizes civilians, the Protocol I acknowledges that any attack in armed conflict, even with cautious execution, may still cause collateral damage.⁴¹⁵

Parties to an armed conflict should be able to respect principles of humanitarian law in armed conflict not of an international character, including the respect for those who are not taking part in the hostilities. As insisted by the Protocol II, “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities...are entitled to respect for their person, honour and convictions and religious practices.”⁴¹⁶ The importance of these rules is that, in time of war, the parties involved in an armed conflict must make a distinction between combatants and non-combatants. With regards to small arms, the uncontrolled proliferation of small arms may make the distinction very difficult.

With civilian protection in mind, one must set a clear definition. The thesis, as stated in Chapter I, uses the definition set forth in article 50 of Additional Protocol I.⁴¹⁷ There are some other definitions. For example, the International Criminal Tribunal for the Former Yugoslavia defined civilians as “persons who are not, or no longer,

⁴¹² Ibid, art 51(2).

⁴¹³ Ibid, art 51(4); see Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) at 37.

⁴¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), art 57(2).

⁴¹⁵ Thomas M Franck “On Proportionality of Countermeasures in International Law” (2008) 102 Am J Int’l L 715.

⁴¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), art 4(1).

⁴¹⁷ Additional Protocol I (1997), art 50.

members of the armed forces”.⁴¹⁸ Defining civilian in modern, particularly in asymmetric, war seems more problematic, and triggers a discourse of redefining the meaning of protected persons with the focus on who are soldiers or combatants as legal targets of killing, instead of who are not combatants.⁴¹⁹

Civilian protection may be regarded as one of the central reasons for the control or prohibition of certain weapons for there are concerns regarding the impact of weapons on civilians who are not taking an active role in the combat.⁴²⁰ The parties involved in war should be able to differentiate between combatants and civilians or those who are taking no active part in the combat as the Fourth Geneva Convention, Protocol I and II demand, both in international armed conflicts⁴²¹ and non-international armed conflicts.⁴²²

The prohibition on targeting civilians is also emphasized in Protocol II and Protocol III of the CCWC, the Mine-Ban Treaty, and the Rome Statute of the International Criminal Court.⁴²³ Similarly, States Parties to the recent Convention on Cluster Munitions (2008) promise to base themselves on principles and rules of humanitarian law “that the parties to a conflict shall at all times distinguish between civilian population and combatants”.⁴²⁴

⁴¹⁸ *Prosecutor v Tihomir Blaskic*, judgement, the International Criminal Tribunal for the Former Yugoslavia, no IT-95-14-T, 3 March 2000, at 60.

⁴¹⁹ Claire Finkelstein, Jens David Ohlin, and Andrew Altman (eds) *Targeted Killings: Law and Morality in an Asymmetric World* (Oxford University Press, 2012); also Alexander Gillespie *A History of the Laws of War* (Hart Publishing, Oxford, 2011) vol 1 at 247-248.

⁴²⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949), art 3, demands parties to the Convention protect persons taking no active part in the hostilities. The definition of civilians and civilian populations is further explained in the article 50 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977).

⁴²¹ Additional Protocol I (1977), 1125 UNTS 3, art 48 and 51.

⁴²² Additional Protocol II (1977), 1125 UNTS 609, art 13.

⁴²³ Amended Protocol II to the CCWC, art 3(7); Protocol III to the CCW, art 2 (1); Mine-Ban Treaty, preamble para 11; Rome Statute, art 8(2)(b).

⁴²⁴ Convention on Cluster Munitions (2008) (signed 3 December 2008, entered into force 1 August 2010), UNTS I-47713.

5. Indiscriminate weapons, methods and means of war

Article 35 (1) of Additional Protocol I to the Geneva Conventions explains the rules regarding the use of methods of warfare:

In any armed conflicts, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.⁴²⁵

This clearly indicates that the methods and means of warfare are actually limited, as not all weapons and methods of warfare could be applied in the hostilities. The terms *method* and *means of warfare* have overlapped in meaning, although historically the terms have different interpretations. Hays Parks explains the subtle differences of the terms:

Method of warfare is one of two historic phrases in the law of war. Although neither phrase has an agreed definition, *means of warfare* traditionally has been understood to refer to the effect of weapons in their use against combatants, while *method of warfare* refers to the way weapons are used in a broader sense.⁴²⁶

From the small arms perspective, the above-mentioned explanation may imply that lawfulness of small arms as means of war have never been disputed, it is the method or the way weapons are used that could be problematic. The easy access of weapons may facilitate the application of method of warfare that is against human rights law and humanitarian law. The method of the use of weapons is particularly problematic when the weapons are used against civilians. Small arms are discriminate weapons therefore are legitimate means of warfare. However, when they are used against civilians, children and other non-combatants then this method of the use is against IHL and IHRL. The easy access and easy availability of small arms undermine respect to international humanitarian law and thus become the concern of IHL.

⁴²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) (1977), art 35 (1).

⁴²⁶ W Hays Parks “*Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol” (1997) 1997 Army Law 33 at 33.

Humanity limits the methods and means of warfare in accordance with general principles of international humanitarian law which include the principles of necessity, proportionality, and the prohibition of the use of weapons causing superfluous injury and unnecessary suffering.⁴²⁷ Armed conflict, carried out by the method of indiscriminately attacking civilians and civilian population is unlawful, as article 51 (4) of the Protocol I to the Geneva Conventions elaborates:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁴²⁸

Observing humanitarian law and humanity applies to all use of weapons. There are weapons which cannot be directed a specific military target and are by nature indiscriminate thus are prohibited by the above-mentioned article. State practice establishes the prohibition of the use of indiscriminate weapons as a norm of customary international law applicable in international and non-international armed conflicts as set forth in many military manuals and the UNGA resolutions.⁴²⁹

The prohibition of the use of indiscriminate weapons was reaffirmed in the Statute of the Rome Statute of the International Criminal Court:

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause *superfluous injury* or *unnecessary suffering* or which

⁴²⁷ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, 2005) at 46, 237 ; Marco Sassoli, Antoine A Bovier, Laura Olson, Nicolas A Dupic and Lina Milner *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC, 1999) at 112.

⁴²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977), 1125 UNTS 3, art 51(4).

⁴²⁹ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, 2005) at 245, referring to the military manuals of Australia, Belgium, Canada, Columbia, Ecuador, France, Germany, Israel, South Korea, New Zealand and others; see UNGA res 1653 (XVI); UNGA res 3032 (XXVII); 38/66; UNGA 39/56; UNGA res 40/84; UNGA res 43/67; UNGA res 45/64; UNGA res 46/40; UNGA res 47/56; UNGA res 48/79; UNGA res 49/79; UNGA res 50/74; UNGA res 51/49; UNGA res 52/42; UNGA res 53/81; UNGA res 54/58.

are *inherently indiscriminate* in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition...[emphasis added].⁴³⁰

Following the logic of the rationale of the unlawfulness of indiscriminate weapons, all types of weapons of mass destruction, nuclear, chemical, and biological, have the characteristic of being indiscriminate in their application and therefore are argued to be unlawful. Specific international treaties on the WMD confirm this unlawfulness, the Chemical Weapons Convention and the Biological Weapons Convention prohibit the use, development, and stockpiling of chemical and biological weapons.⁴³¹ However, there is no prohibition of the use of nuclear weapons in the Treaty on the Non-Proliferation of Nuclear Weapons.⁴³²

In rendering its advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*, in 1996, the International Court of Justice (ICJ) based its opinion on humanitarian law, advising that:

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law....⁴³³

This view, therefore, supports the argument that weapons which kill indiscriminately or have an indiscriminate effect in their application are not compatible with international humanitarian law.

⁴³⁰ Rome Statute of the International Criminal Court (1998), 2187 UNTS 90, art 8 (2)(b)(xx); the ICC review conference in Kampala, Uganda in 2010 amended article 8 (2)(e) to add certain weapons to elements of crimes and extended the jurisdiction of the Court to the conduct which took place in armed conflict not of an international character (Res RC/Res.5, 10 June 2010).

⁴³¹ Chemical Weapons Convention (1993), 1974 UNTS 45; the Biological Weapons Convention (1972), 1015 UNTS 163.

⁴³² Treaty on the Non-Proliferation of Nuclear Weapons (signed 1 July 1968, entered into force 5 March 1970), 2187 UNTS 90; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Report 226, at 266, para 105(2)(E) which may open to the possibility of the use of nuclear weapons as “the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

⁴³³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Report 226, at 266, para 105(2)(D).

Humanity is a strong reason for prohibiting weapons which inflict superfluous injury or unnecessary suffering on their victims. States parties to Additional Protocol I agree that “[it] is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”⁴³⁴ Previously, such a rule was set forth in the 1899 Hague Convention II, as it was prohibited to “employ arms, projectiles, or material of a nature to cause superfluous injury”.⁴³⁵

Conventional arms control treaties generally cite the principles of humanity as the reason for prohibiting certain weapons and these principles, in essence, reflect the desire to protect humans from certain weapons considered inhumane. The weapons which in nature fit the character of indiscriminate or cause superfluous injury and unnecessary suffering, hence are also known as “inhumane weapons”.⁴³⁶

6. Declaration Renouncing the Use, in Time of war, of Explosive Projectile under 400 Grammes Weight (St Petersburg Declaration) (1868)

The link between arms control and humanitarian law can be observed in the early period of international arms control by examining each convention agreed by participating States. In the conventions, whether there has been the link between arms control to IHL or/and IHRL is researched. The 1868 St Petersburg Declaration is one of the first international conventions that restricts the use of particular conventional weapons based on humanitarian considerations.⁴³⁷ The treaty was signed in St Petersburg, 11 December 1868 by all major powers at that time, including Austria,

⁴³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), art 35 (2).

⁴³⁵ Hague Convention II with Respect to the Laws and Customs of War on Land (1899), annex art 23(e); Printed in D Schlinder and J Toman *The Laws of Armed Conflicts* (Martinus Nihjoff Publisher, 1988) at 69-93.

⁴³⁶ Zdzislaw Lachowski and Svenja Post “Conventional Arms Control” in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford University Press, 2009) at 435. The “inhumane” term to refer to the use of certain weapons is controversial as it suggests that other weapons are “humane”.

⁴³⁷ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868), (1907)1 Am J Int’l Supp 95.

Belgium, Denmark, France, Bavaria, Great Britain, Greece, the Netherlands, Russia, Italy, Ottoman, and Sweden.⁴³⁸

The Declaration set a rule of avoiding superfluous injury and unnecessary suffering based on humanity rationale. It gives a picture of the balance between military necessity and humanity as the Declaration states in its preamble “[t]hat the only legitimate object ... is to weaken the military forces of the enemy”.⁴³⁹ The St Petersburg Declaration establishes the principle of military necessity, which suggests that the parties in the hostilities cannot harm their enemies unnecessarily.⁴⁴⁰ The concern for humanity in the Petersburg Declaration demonstrates one of three preconditions for an international arms control negotiation: documented humanitarian harm, widespread public concerns, and declining military utility.⁴⁴¹

The explosive projectile referred to by the Declaration was a bullet which would explode on contact with a soft substance.⁴⁴² The humanitarian concern in the treaty to prohibit the use of explosive projectiles under 400 grammes is explicitly reflected in the following wording found in the text of the Declaration:

[T]he necessities of war ought to yield to the requirements of humanity... [t]hat this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.⁴⁴³

⁴³⁸ Ibid.

⁴³⁹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868), (1907)1 Am J Int'l Supp 95, second consideration paragraph.

⁴⁴⁰ Bonnie Docherty “The Time Is Now: A Historical Argument for A Cluster Munitions Convention” (2007) 20 Harvard Human Rights Journal 53.

⁴⁴¹ Ibid.

⁴⁴² ICRC introduction on the “Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight <www.icrc.org>. Last accessed on 29 October 2009; see also Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) at 272.

⁴⁴³ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868), (1907)1 Am J Int'l Supp 95; reprinted in M Cherif Bassiouni *A Manual on International Humanitarian Law and Arms Control Agreements* (New York, Transnational Publishers, 2000).

The main point of the quotation is that the unnecessary suffering caused was not considered in conformity with considerations of humanity.⁴⁴⁴ Hence, the parties agreed to: “engage mutually to renounce...the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances”.⁴⁴⁵ The projectile was not more effective than the ordinary bullet, but caused superfluous injury and unnecessary suffering beyond what was required to render a soldier *hors de combat*.⁴⁴⁶ The use of explosive projectiles under 400 grammes had no significance in winning a war from military strategy’s point of view, therefore it was understandable the countries could be brought together to sign the treaty.

The significance of the St Petersburg Declaration is not only that it is the first multilateral formal agreement in modern history to prohibit a certain weapon in war, but also it establishes a number of fundamental principles which set the subsequent development of humanitarian law.⁴⁴⁷ Those principles establish that the only legitimate objective of war is to weaken the military forces of the enemy, and the use of weapons which uselessly aggravate suffering is unjustified.⁴⁴⁸ The principles established by the St Petersburg Declaration, over 140 years ago, demonstrate that there should be a limitation of means of war.

⁴⁴⁴ Stuart Maslen *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* (New York, Oxford University Press, 2004) vol I at 65. The prohibition of certain weapons on the basis of humanity is actually not new, the prohibition of the use of weapons inflicting superfluous injury or unnecessary suffering dates back to ancient time. The Indian *Book of Manu* declares that arrow with hooked spikes, which after entering human flesh would be difficult to remove, are unlawful. See S Oeter “Methods and Means of Combat” in D Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflict* (New York, Oxford University Press, 1995) at 113.

⁴⁴⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868), (1907)1 Am J Int’l Supp 95.

⁴⁴⁶ Louis Maresca and Stuart Maslen (eds) *The Banning Anti-Personnel Land Mines: The Legal Contribution of the International Committee of the Red Cross* (Cambridge, Cambridge University Press, 2000) at 10.

⁴⁴⁷ *Ibid*, at 15.

⁴⁴⁸ Speech by Jakob Kellenberger, president of the ICRC, International Conference on IHL dedicated to the 140th Anniversary of the 1868 St. Petersburg Declaration, St Petersburg, 24 November 2008 <www.icrc.org/web/eng/siteeng0.nsf/html/st-petersburg-declaration-281108>. Last accessed on 5 October 2009.

7. Hague Conventions (1899 and 1907)

Like the St Petersburg Declaration, the first Hague Peace Conference of 1899 was initiated by the Czar of Russia, Nicholas II, with the purpose of “seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments”.⁴⁴⁹ The Conference ran from 18 May 1899 to 29 July 1899, where 26 governments were present, including those from outside Europe such as the United States, China, Japan, and Mexico.⁴⁵⁰ The second Hague Conference was held in 1907 and resulted in the laws of war declarations, which dealt with naval war in particular, and did not specifically relate to arms control.

When Tsar Nicholas II invited the other major powers to the first Hague peace conference in 1899, his main purpose was to seek an arms control agreement to reduce soaring budget costs of armament.⁴⁵¹ Besides the limitation on the armament and war budget, the conference sought prohibitions on certain types of arms and military practices, revision and extension of the codified laws and customs of war, and other methods for preventing war.⁴⁵² However, the historic conference could only agree on a few of its many ambitious goals. It could not support the Russian proposal that each country freeze its troop strengths for a five year period and set up its naval budget for a three year period.⁴⁵³ The proposals particularly did not sit well with the United States which had just emerged victorious from a war against Spain.⁴⁵⁴

The negotiations of 1899 nevertheless produced an arms control convention, out of four conventions, which prohibited the launching of projectiles from balloons, the use of gas and expanding bullets. These four 1899 Hague Conventions are:

⁴⁴⁹ “Final Act of the International Peace Conference, The Hague, 29 July 1899” ICRC <www.icrc.org/ihl.nsf/INTRO/145?OpenDocument>. Last Accessed on 30 October 2009.

⁴⁵⁰ ICRC introduction to “Final Act of the International Peace Conference, The Hague, 29 July 1899” ICRC <www.icrc.org/ihl.nsf/INTRO/145?OpenDocument> Last Accessed on 30 October 2009.

⁴⁵¹ Devlev F Vagts “The Hague Conventions and Arms Control” (2000) 94(1) Am J Int’l L 31.

⁴⁵² Michael O Wheeler “A History of Arms Control” in Jeffrey A Larsen (ed) *Arms Control: Cooperative Security in A Changing Environment* (Lynne Rienner Publishers, 2002) at 21.

⁴⁵³ Devlev F Vagts “The Hague Conventions and Arms Control” (2000) 94(1) Am J Int’l L 31.

⁴⁵⁴ Devlev F Vagts “The Hague Conventions and Arms Control” (2000) 94(1) Am J Int’l L 31.

- (I) Convention for Pacific Settlement of International Disputes;
- (II) Convention regarding Laws and Customs of War on Land;
- (III) Convention for the Adaptation of Maritime Warfare of Principle of Geneva Convention of 1864; and
- (IV) Three Declarations:
 1. To prohibit the launching of projectiles and explosives from balloons or by other similar new methods;
 2. To prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases;
 3. To prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core or is pierced with incisions.⁴⁵⁵

It is the Fourth Convention which consists of three declarations that is the particular subject of the present analysis, for it is an arms control convention which prohibits the use of certain weapons. Meanwhile, the Convention II provides general reference to the laws and customs of war on land. Prohibition and limitation of the means of war are found in article 23 of the annex, which prohibits the States parties “to employ poison or poisoned arms” and “projectiles, or material of a nature to cause superfluous injury”.⁴⁵⁶ The term “superfluous injury” later became the term which is often quoted in describing an inhumane cause of injury to its victims.⁴⁵⁷

The three Declarations have common references to the St Petersburg Declaration, stating that they were “inspired by the sentiments which found expression in the

⁴⁵⁵ Hague Declaration (IV,1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature (1899), reprinted in (1907) 1 Am J Int'l L Sup 153; the Hague Declaration (IV, 2) Respecting the Prohibition of the Use of Projectile Diffusing Asphyxiating Gases (1899), reprinted in (1907) 1 Am J Int'l L Sup 159; the Hague Declaration (IV, 3) Respecting the Prohibition of the Use of Expanding Bullets (1899), reprinted in (1907) 1 Am J Int'l L Sup 155; M Cherif Bassiouni *A Manual on International Humanitarian Law and Arms Control Agreements* (New York, Transnational Publishers, 2000) at 97-101. See ICRC “Final Act of the International Peace Conference, The Hague, 29 July 1899” <www.icrc.org/ihl.nsf/FULL/145?OpenDocument>. Last accessed on 15 September 2009.

⁴⁵⁶ Hague Convention (II) regarding Laws and Custom of War on Land (1899), art annex 23 (a, e); printed in D Schindler and J Toman *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers, 1988) at 69-93.

⁴⁵⁷ See Louis Maresca and Stuart Maslen (eds) *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955-1999* (Cambridge University Press, 2000) at 9-10.

Declaration of St Petersburg”.⁴⁵⁸ The Declarations, therefore, explicitly share the sentiment of humanity which is the basis of the 1868 St Petersburg Declaration in prohibition of the use of a particular weapon. The importance of the St Petersburg Declaration (1868) and The Hague Conventions (1899) from the perspective of rationale used is that they have confirmed standards for making humanity a reason to prohibit certain types of arms in arms control agreements; something that would be used in later treaties.

The Declaration (IV,1) prohibits, for the term of five years, the launch of projectiles and explosives from balloons,⁴⁵⁹ which was later renewed by the 1907 Hague Convention (IV).⁴⁶⁰ It is also worth noting that Declaration (IV, 2)⁴⁶¹ prohibits the use of chemical weapons by banning the use of asphyxiating or deleterious gases, a predecessor of a more extensive prohibition of chemical and biological weapons which was addressed by the Geneva Protocol of 1925.⁴⁶² The prohibition of the use of chemical and biological weapons in the 1907 Hague Convention and 1925 Protocol was later improved and revised with the adoption of the current CWC (1993)⁴⁶³ and the BWC(1972).⁴⁶⁴

The Declaration (IV, 3) prohibits the expanding bullet, also known as dum-dum bullet.⁴⁶⁵ The British designers in India created the bullet with a soft metal nose that

⁴⁵⁸ Hague Convention IV (Declaration 1, 2, and 3) (1899), common preamble para; printed in M Cherif Bassiouni *A Manual on International Humanitarian Law and Arms Control Agreements* (New York, Transnational Publishers, 2000) at 97-101.

⁴⁵⁹ Declaration (IV,1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and other Methods of Similar Nature, adopted 29 July 1899, reprinted in (1907) 1 AMJ L Supp 153

⁴⁶⁰ Hague Convention (IV) Respecting the Laws and Customs of War on Land with Annexed regulations (concluded 18 October 1907), reprinted (1908) 2 Am J Int'l L Supp 90.

⁴⁶¹ Hague Convention (IV,2) respecting the Prohibition of the Use of Projectile Diffusing Asphyxiating Gases, adopted 29 July 1899, reprinted (1907) 1 Am J Int'l Supp 159.

⁴⁶² Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 1925.

⁴⁶³ Chemical Weapons Convention (signed 13 January 1993, entered into force 29 April 1997), 1974 UNTS 45.

⁴⁶⁴ Biological Weapons Convention (concluded 10 April 1972, entered into force 26 March 1975), 1015 UNTS 163.

⁴⁶⁵ Hague Convention (IV,3) respecting the Prohibition of the Use of Expanding Bullets, adopted 29 July 1899, reprinted in (1907) 1 Am J Int'l L Supp 155 ; see Devlev F Vagts “The Hague Conventions and Arms Control” (2000) 94(1) *The American Journal of International Law* 31. The expanding bullet is called “Dum-Dum” after the British arsenal near Calcutta where the bullet was first made; see also

expands after the bullet penetrates its target.⁴⁶⁶ Similarly to the 1868 St Petersburg Declaration, the humanitarian concern for the unnecessary suffering the weapon caused is the main rationale for the prohibition of the expanding or dum-dum bullet. The same sentiment of humanity of the declaration continues inspiring the recent arms control negotiations as shown by the 1980 Certain Conventional Weapons Convention,⁴⁶⁷ the 1997 Mine Ban Convention,⁴⁶⁸ and the 2008 Convention on Cluster Munitions.⁴⁶⁹

The prohibition of the use of asphyxiating gas set forth in the 1899 Hague Convention (IV, 2) is confirmed in the Rome Statute of the International Criminal Court (1998) to be a serious violation of international law.⁴⁷⁰ Likewise, the prohibition of the use of expanding bullets has been listed as a war crime in article 8(2)(b)(xix) of the Rome Statute:

- (b) Other serious violations of the laws applicable in international armed conflicts...namely, any of the following acts:...
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.⁴⁷¹

ICRC's information on "Declaration Concerning Expanding Bullet"

www.icrc.org/ihl.nsf/INTRO/170?OpenDocument. Last accessed on 1 November 2009.

⁴⁶⁶ Ibid; see also allegedly the modern use of similar bullet, Annabel Ferriman "Palestinian Territories Face Huge Burden of Disability" (2002) 324 (7333) *British Medical Journal* 320. Report in the *British Medical Journal* shows the injuries lead to permanent disability inflicted by the fragmented bullet by Israeli M-16s. The Journal reports that the bullet "often breaks into pieces after penetration, ripping up muscle and nerve and causing multiple internal injuries, much like the internationally banned dum-dum bullet". The British army found it superior to the ordinary hard-covered bullet and valued it for use against non-European adversaries.

⁴⁶⁷ Convention on the Prohibition or Restrictions of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (concluded 10 October 1980, entered into force 2 December 1983), 1342 UNTS 137.

⁴⁶⁸ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (signed 3-4 December 1997, entered into force 1 March 1999), 2056 UNTS 211.

⁴⁶⁹ Convention on Cluster Munitions (opened for signature 3 December 2008, entered into force 1 August 2010), MTDSG chapter XXVI (6).

⁴⁷⁰ Rome Statute of the International Criminal Court (1998), art 8(2)(b)(xviii); see discussion of the use of chemical weapons in Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) at 259.

⁴⁷¹ Rome Statute of the International Criminal Court (1998), 2187 UNTS 90, art 8(2)(b)(xix).

a. Martens clause

The principles of humanity as the basis of regulating certain types of arms made a breakthrough in the 1899 Hague Convention II regarding laws and customs of war. The second preamble paragraph of the Convention II stresses the “desire to serve, even in the extreme hypothesis, the interests of humanity and the ever increasing requirement of civilization”.⁴⁷² The sentiment of humanity and civilian protection is reflected in the well accepted wording of Martens clause that states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.⁴⁷³

The Martens clause in the preamble of this Convention then went on to become a key principle in international humanitarian law, particularly in prohibiting weapons, and is a reference in Nuremburg jurisprudence, the International Court of Justice, human rights bodies, and modern humanitarian law and disarmament treaties.⁴⁷⁴ The Martens Clause, with slightly different wording, is referred to by the 1977 Protocol I to the Geneva Conventions,⁴⁷⁵ the 1980 CCWC,⁴⁷⁶ the 1997 Mine-Ban Treaty,⁴⁷⁷ and the

⁴⁷² Hague Convention (II) regarding Laws and Custom of War on Land (1899), printed in D Schindler and J Toman *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers, 1988) at 69-93.

⁴⁷³ Hague Convention (II) regarding Laws and Custom of War on Land (1899), preamble para 8; printed in D Schindler and J Toman *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers, 1988) at 69-93; See also, Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) at 17.

⁴⁷⁴ Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) at 16.

⁴⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 UNTS 3, art (2). The wording here says: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.

⁴⁷⁶ Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (1980), 1342 UNTS 137, preamble para 5. The parties “[confirm] their determination that in cases not covered by this Convention and its annex Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.

2008 Convention on Cluster Munitions.⁴⁷⁸ Today, it is commonly believed that the clause “has the status of general international law”, which provides protection to civilians and combatants in cases not covered by specific international agreements.⁴⁷⁹

The second peace conference in 1907 resulted in 14 Conventions and a Declaration, which also dealt with naval war in particular. These include the Convention Respecting the Laws and Customs of War on Land (Convention IV), which was animated by desire to serve, even in extreme case, “the interests of humanity”.⁴⁸⁰ The Convention IV refers to principle rules reflecting and repeating humanitarian concerns that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited” (article 22) and to forbid the use of “arms, projectiles, or material calculated to cause unnecessary sufferings” (article 23.e).⁴⁸¹ Meanwhile, Declaration (XIV) of the Hague conference in 1907 on the Prohibiting the Discharge of Projectiles and Explosives from Balloons, renewed the same prohibition imposed by the 1899 Hague Declarations which by then had expired.

Both the Hague Conventions 1899 and 1907 affirm the previous humane concerns enshrined in the 1868 St Petersburg Declaration by prohibiting the use of weapons which inflict unnecessary suffering or/and cause excessive injury.⁴⁸² The same reiteration of humanitarian concern is shown by acknowledging that the means of warfare is not unlimited.⁴⁸³

⁴⁷⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), 2056 UNTS 211, preamble para 8. Its wording says: “Stressing the role of public conscience in furthering the principle of humanity...”.

⁴⁷⁸ Convention on Cluster Munitions (signed 3 December 2008, entered into force 1 August 2010), UNTS CN 776.2008, preamble para 11. The States parties, “[r]eaffirming that in cases not covered by this Convention and by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience”.

⁴⁷⁹ Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, United Nations, GAOR A/49/10, at 317.

⁴⁸⁰ Hague Convention IV Respecting the Laws and Customs of War on Land with Annex Regulations (concluded 18 October 1907, entered into force 26 January 1910), preamble para 2, printed in (1908) 2 Am J Int'l L Supp 90.

⁴⁸¹ Hague Convention IV Respecting the Laws and Customs of War on Land with Annex Regulations (concluded 18 October 1907, entered into force 26 January 1910), printed in (1908) 2 Am J Int'l L Supp 90.

⁴⁸² Ibid, art 23 (e).

⁴⁸³ Ibid, art 23(e).

8. Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (Certain Conventional Weapons Convention – CCWC) (1980)

The principle of humanitarian law prohibiting weapons causing unnecessary suffering was applied to later conventions. The world was in the middle of the Cold War and had experienced two world wars and many armed conflicts when the first Expert Meeting on Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effect was held in Geneva in 1973 to start negotiations on the restriction on certain conventional weapons.⁴⁸⁴ Since the Second World War, mines and booby traps had been commonly used in armed conflicts, including the deployment of anti-personnel mines in the war in Vietnam.⁴⁸⁵ Several attempts to address the issue of anti-personnel mines and certain weapons were responded to by some States with reluctance before they finally agreed on the 1980 CCWC. The CCWC was built up from the diplomatic conference 1974-1977 which negotiated the Additional Protocols to the 1949 Geneva Conventions.⁴⁸⁶ For the indiscriminate effect, superfluous injury and excessive unnecessary suffering the weapons caused, they were restricted or prohibited by the Convention. These weapons are also known as “inhumane weapons”.⁴⁸⁷

The Convention prohibits and restricts the use of certain conventional weapons, as its name suggests. It serves as an umbrella for five protocols to prohibit the use of certain weapons which inflict excessive injury and are indiscriminate: the Protocol on Non-Detectable Fragments (Protocol I, 1980);⁴⁸⁸ the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II, 1980,

⁴⁸⁴ Louis Maresca and Stuart Maslen (eds) *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1995-1999* (Cambridge University Press, 2000) at 19.

⁴⁸⁵ Stuart Maslen *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* (Oxford University Press, 2004) vol I at 15.

⁴⁸⁶ David Kaye and Stephan A Solomon “Current Development: The Second Review Conference of the 1980 Convention on Certain Conventional Weapons” (2002) 96 Am J Int’l L 922.

⁴⁸⁷ See, Lachowski, Zdzislaw and Svenja Post “Conventional Arms Control” in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford, 2009) at 435. The term “inhumane”, however, is not welcomed by others for it suggests that some other weapons are “humane”.

⁴⁸⁸ Protocol I on Non-Detectable Fragments (1980), 1342 UNTS 137.

amended 1996);⁴⁸⁹ the Protocol on Prohibitions or Restriction on the Use of Incendiary Weapons (Protocol III, 1980);⁴⁹⁰ the Protocol on Blinding Laser Weapons (Protocol IV, 1995);⁴⁹¹ and the Protocol on Explosive Remnants of War (Protocol V, 2003).⁴⁹² To be bound by the Convention, a State party needs to ratify, accept, approve, or accede to at least two out of five protocols.⁴⁹³ As articles in the Convention contain only general provisions, the prohibitions and restrictions are regulated separately in each protocol.

The Convention states that one of the purposes of the prohibitions and restrictions of the use of certain conventional weapons is meant to protect civilians, as reflected in its preamble. Paragraph two of the preamble states “[f]urther recalling the general principle of the protection of the civilian population against the effects of hostilities”.⁴⁹⁴ The Convention then stresses the importance of the principle of international humanitarian law, and, in the third paragraph of the preamble, that the means of warfare is not unlimited:

Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.⁴⁹⁵

Paragraph five of the preamble repeats the Martens clause, with slightly different wording:

Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁴⁹⁶

⁴⁸⁹ Protocol II (1980, as amended 3 May 1996), 2048 UNTS 93.

⁴⁹⁰ Protocol III (1980), 1342 UNTS 137.

⁴⁹¹ Protocol IV (1995) on Blinding Laser Weapons, 1380 UNTS 370.

⁴⁹² Protocol V (2003) on Explosive Remnants of War, 2399 UNTS 100 (Doc.CCW/MSP/2003/2).

⁴⁹³ CCWC (1980), 1342 UNTS 137, art 4.

⁴⁹⁴ Ibid, preamble para 2.

⁴⁹⁵ Ibid, preamble para 3.

⁴⁹⁶ Ibid, preamble para 5.

The Convention's title itself reflects the humanitarian reasons for its adoption, as also evidenced by the word "humanity" in preamble paragraph 5. The Convention was adopted in the middle of the Cold War period, when the concept of human rights was not as widely accepted as it has become today. And although it does not use the words "human rights", paragraph 6 of the Convention recognizes the right to live in peace, which, it can be argued is a human right.⁴⁹⁷

In current practices, the States Parties to the Convention convene annual meetings and evaluate the overall progress in a review conference every five years. The first review conference was held in 1995 and 1996, the second in 2001, and the third in 2006. The second review conference in 2001 amendment to article 1, as proposed by the United States, was to make the Protocols apply in non-international conflict.⁴⁹⁸

A more significant progress was made in the second review conference, which tried to expand the discussion on the small-calibre weapons system proposed by Switzerland, which had been working to update the prohibition of expanding bullets prohibited by the 1899 Hague Declaration.⁴⁹⁹ The proposed protocol from Switzerland was concerned with small-calibre ammunition "which does not correspond to the narrow technical definitions found in the Hague Declaration but which nonetheless produces similar wounds, owing to a high initial deposit of energy when it enters the human body".⁵⁰⁰ It implies that the principle of humanity enshrined in the Hague Declaration is still relevant as a standard for the new type of weapon. However, the conference did not manage to adopt the proposed protocol in the second review conference (2001) or third review conference (2006).

Realizing that the Convention needed further promotion for its universality, the third review conference in 2006 reached three concrete agreements, namely to establish a compliance mechanism, in which any party could seek help on issues regarding

⁴⁹⁷ Universal Declaration of Human Rights (1948), art 3 states that "[e]very one has the right to life, liberty and security of person".

⁴⁹⁸ Louis Maresca "Second Review Conference of the Convention on Certain Conventional Weapons" (2002) 845 IRRC 255; the Final Declaration of the Second Review Conference of the CCWC (UN Doc CCW/CONF/II/2)

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid. It refers to a modern bullet that works like dum-dum bullets.

implementation; to create a plan of action to promote the universality of the convention and its protocol; and to set up a sponsorship programme.⁵⁰¹ Understandably, this was an effort to encourage States parties, signatories, and States not party to adhere more to the values of the convention and its protocols. As of 31 July 2012, the Convention has attracted more accessions and currently has 115 States Parties.⁵⁰² The plan of action to promote the universality combined with the sponsorship programme would attract more attention to the convention and convince more States to accede to its protocols. However, the number of parties to the convention and its protocols remains relatively low compared to other arms control treaties, although the convention has been in force more than 25 years ago.⁵⁰³

Article 8(2)(a) on review and amendments of the convention, facilitates new proposals from any State Party to propose “new additional Protocols relating to other categories of conventional weapons not covered by the existing Protocols.”⁵⁰⁴ The article provides the further creation of new additional protocols if the States Parties agree to have them. Two protocols, namely the Protocol on Explosive Remnants of War (2003) and the Protocol on Blinding Laser Weapons (1995) were adopted after the Convention came into force on 2 December 1983. The addition of two protocols makes the convention currently consist of five protocols.

a. Protocol on Non-Detectable Fragments (Protocol I) (1980)

The full text of the Protocol on Non-detectable Fragments is only one article which says that “[i]t is prohibited to use any weapons the primary effect of which is to injure

⁵⁰¹ Zdzislaw Lachowski and Martin Sjogren “Conventional Arms Control” in *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (New York, Oxford University Press, 2007) at 621. The sponsorship programme is to fund delegations from developing countries to attend the meeting and report the implementation or initiative to accede/ratify the convention.

⁵⁰² CCWC (1980), 1342 UNTS 137, as of 6 May 2012.

⁵⁰³ As of 31 July 2011, the United Nations Treaties Series data shows that there are 115 States parties to the Convention; Compare to other arms control conventions such as the 1993 Chemical Weapon Convention (188 States parties), the 1997 Mine Ban Convention (160 States parties), or the 1972 Biological Weapons Convention (165 State parties), the number of States parties to the 1980 CCW is relatively low. Information on status of multilateral conventions available at <http://treaties.un.org/Home.aspx?lang=en>. Last accessed 7 May 2012.

⁵⁰⁴ CCWC (1980), 1342 UNTS 137, art 8.

by fragments which in the human body escape detection by X-rays.”⁵⁰⁵ The reasoning behind the prohibition was that the injury caused by the non-detectable fragments would make it very difficult to treat the resulting wounds that caused unnecessary suffering, with no military utility.⁵⁰⁶

The prohibition of the use of weapons not-detectable by X-ray is contained in numerous military manuals, even before the adoption of the Protocol.⁵⁰⁷ There is no record of the existence and use of this type of weapons although the ability to produce them has long been available.⁵⁰⁸ State practice establishes this prohibition as a norm of customary international law and, hence, facilitates the adoption the Protocol without controversy.⁵⁰⁹ Previously applied for international armed conflict, the review conference in the 2001 extended the application of the Protocol to the non-international armed conflicts.

b. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (1980, amended in 1996)

Because of their indiscriminate nature, mines, particularly anti-personnel mines, have been the target of control. Many rules in the Protocol II, which applies to anti-vehicle mines and anti-personnel mines, are aimed at obviating the indiscriminate effects of mines.⁵¹⁰ Article 8 of the Protocol prohibits the “indiscriminate use of weapons” to which it applies “which may be expected to cause incidental loss of civilian life”.⁵¹¹ However, the Protocol still allows the use of mines as long as they are detectable (article 4), have self-destruction and self-deactivation mechanisms according to

⁵⁰⁵ Protocol on Non-Detectable Fragments to the Convention on Prohibitions or Restriction on the Use of certain Conventional Weapons, 1980, art 1.

⁵⁰⁶ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 277.

⁵⁰⁷ *Ibid.*, at 275.

⁵⁰⁸ *Ibid.*, at 276-277.

⁵⁰⁹ *Ibid.*

⁵¹⁰ Protocol II as amended in 1996, 2048 UNTS 93, art 3(5), art 3(6), art 4, art 6(2), and art 6(3); Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 280.

⁵¹¹ Protocol II as amended in 1996, 2048 UNTS 93; UN Doc CCW/CONF.1/16 (Part I), art 3(8) and 3(8.c).

technical annex (article 5), or have a well-recorded mine location (article 6).⁵¹²The Protocol has no provision to address issues of production limitation, stockpiling destruction, or victim assistance and support.

The limited restrictions on the issue of the use of mines in the Protocol II, particularly in relation to anti-personnel mines which have not yet adopted a total ban on the use, even after it was amended, created “wide spread dismay” among the States parties to the CCWC after the review conference in May 1996.⁵¹³ Although the amended version of the Protocol II agreed in 1996 has answered some concerns of the scope and application much further than in the original Protocol II, many were of the view that the amended Protocol II still fell short of the total prohibition of anti-personnel mines they wanted.⁵¹⁴ There was a view among States parties that the prohibition of anti-personnel mines would never be achieved under the CCWC framework and, therefore, an alternative forum was necessary to address the issue.

For booby-traps, the Protocol II and amended Protocol II prohibit the use if their nature or employment violates the legal protection accorded to a protected persons or object.⁵¹⁵ Nevertheless, booby-traps are still the subject to general rules on conduct of hostilities, particularly the principle of distinction and the principle of proportionality.⁵¹⁶

c. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (1980)

The discussions in the preparatory conference on the convention on certain weapons indicated that a large number of States advocated a total prohibition of the use of

⁵¹² Protocol II as amended in 1996, 2048 UNTS 93; UN Doc CCW/CONF.1/16 (Part I).

⁵¹³ Stuart Maslen *Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point* (Intersentia-Transnational Publishers, 2001) at 77.

⁵¹⁴ Ibid.

⁵¹⁵ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 278.

⁵¹⁶ Ibid, at 279.

incendiary weapons.⁵¹⁷ Several others did not subscribe to a total ban, although they did urge strict restrictions to avoid civilian casualties which were later reflected in the Protocol III.⁵¹⁸

The Protocol provides the definition of incendiary weapon as “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof”.⁵¹⁹ The Protocol underlines the possible indiscriminate effect of incendiary weapons on civilians and civilian objects. Hence, article 2(1) urges the parties in armed conflict to make distinction between civilian population/objects and military objectives, and further prohibits attack on civilians:

It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.⁵²⁰

The next sub-article 2(2) and 2(3) deals with the prohibition to set military objectives within a concentrated area of civilians, which again stresses the principle of distinction between civilians or civilian objectives and military objectives:

It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.⁵²¹

The Protocol continues by stressing:

It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to

⁵¹⁷ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 287.

⁵¹⁸ Ibid.

⁵¹⁹ Protocol III (1980), 1342 UNTS 137, art 1(1).

⁵²⁰ Ibid, art 2 (1).

⁵²¹ Ibid, art 2 (2).

minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁵²²

It is also worth noting that the Protocol repeatedly states the prohibition of the use of incendiary weapons against civilians, but does not rule out the use of such a weapon against military objective. The fact that the Protocol III does not include the prohibition of the use against combatants “does not mean, however, that the use of incendiary weapons against combatants is lawful in all circumstances”.⁵²³ Some argue that incendiary weapons may not be used against combatants in a way that that would cause unnecessary suffering.⁵²⁴

d. Protocol on Blinding Laser Weapons (Protocol IV) (1995)

The Protocol prohibits the use of blinding laser weapons specifically designed to cause permanent blindness to the eye, and the parties to the Protocol undertake to not transfer such weapons.⁵²⁵ There was no record that blinding laser weapons had been employed in armed conflicts before the adoption of the Protocol in 1995 despite a report that some countries had laser weapons programmes.⁵²⁶ The Protocol demonstrates that humanitarian law could pre-empt the non-existent but unwanted development of a blinding laser weapon which is considered inhumane.⁵²⁷ One delegate stated at the adoption of the Protocol that “this is the first time in human history that a kind of inhuman weapon is declared illegal and prohibited before it is actually used”.⁵²⁸

⁵²² Ibid, art 2 (3).

⁵²³ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 290.

⁵²⁴ Ibid.

⁵²⁵ Protocol IV (1995) to the CCWC, 1380 UNTS 370, art 1.

⁵²⁶ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 293; see also, James M Strong “Blinding Laser Weapons and Protocol IV: Obscuring the Humanitarian Vision” (1996-1997) 15 Dick J Int’l L 237 at 245.

⁵²⁷ “Symposium of the Blinding Laser Weapons” (1996) 18 Loy LA Int’l & Comp L J 703.

⁵²⁸ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005) vol I, at 293. The US, although not a party to the Protocol IV, withdrew the anti-personnel lasers it was about to deploy.

The prohibition of the use of laser weapons is ruled out as “the effect of laser beam is not indiscriminate” so that any legal case against them “rel[ies] on superfluous injury or unnecessary suffering”.⁵²⁹ As commentators argue, in the balance between military interests and humanitarian considerations, blindness caused by a laser beam must be described as unnecessary suffering.⁵³⁰

The prohibition of the use of laser weapons adds another total ban of certain weapon to the 1980 CCWC, the other is the Protocol I on Non-Detectable Fragments.⁵³¹ Article 1 of the Protocol affirms:

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.⁵³²

Article 1 prohibits the deployment of blinding laser weapons but does not mention the prohibition of the production of such weapons. The possibility of transfer of laser weapons to non-party States or non-States actors is prevented by the prohibition of transfer in the last sentence of article 1.

The Protocol insists the States Parties take precautions in the use of laser equipment as article 2 states:

In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision.⁵³³

⁵²⁹ Bengt Anderberg and Ove Bring “Battlefield Laser Weapons and International Law” (1988) 57 *Nordic J Int’l L* 457 at 459; but see counter arguments in W Hays Parks “*Travaux Préparatoires* and Legal Analysis of Blinding Laser Protocols” [1997] *Army Law* 33 at 33-34. Parks describes another perspective arguing that “[b]linding is not a new battlefield phenomenon, and blinding by laser was not viewed as worse than other, lawful mechanisms for causing blinding, other injury, or death to combatants”.

⁵³⁰ Bengt Anderberg and Ove Bring “Battlefield Laser Weapons and International Law” (1988) 57 *Nordic J Int’l L* 457 at 467.

⁵³¹ Protocol I (1980) to the CCWC, 1342 UNTS 137.

⁵³² Protocol IV (1995) to the CCWC, 1380 UNTS 370, art 1.

⁵³³ Protocol IV (1995) to the CCWC, 1380 UNTS 370, art 2.

Laser weapons may not kill combatants; however, blinding weapons would have huge psychological impact on troops because there is no treatment and the individual would be permanently blind.⁵³⁴ Furthermore, a maimed soldier would be a heavy burden to the unit as the person would require on average, 40 personnel in the medic chain.⁵³⁵ Blinding as “a method of warfare is a superfluous injury and a cause of unnecessary suffering, both of which are prohibited under existing international law”.⁵³⁶ The prohibition of laser weapons highlights again the principle of international humanitarian law that the means of warfare is not unlimited.⁵³⁷

e. Protocol on Explosive Remnants of War (Protocol V) (2003)

The public acknowledgement of the humanitarian impact of explosive means of war does not stop at anti-personnel mines; the unexploded ordnances as remnants of war similarly have disastrous consequences for civilians. The humanitarian concern for the explosives abandoned after the war ends is expressed in the first paragraph of the Protocol: “*Recognizing* the serious post-conflict humanitarian problems caused by explosive remnants of war”[emphasis in original].⁵³⁸ The discussion under the Protocol V covers the issue of unexploded artillery shells, cluster munitions, hand grenades, bombs and mortar shells.⁵³⁹

Article 1 on general application and scope of application reiterates the concerns and implies the problems faced by civilians after armed conflict ends, as:

⁵³⁴ Marshal John “Blinding Laser Weapons” (1997) 31 British Medical Journal 1392.

⁵³⁵ Ibid.

⁵³⁶ Burrus Carnahan M “Unnecessary Suffering, The red Cross, and Tactical Laser Weapon” (1996) 18(4) Loy LA Int’l & Comp L J 703 at 705; James M Strong “Blinding Laser Weapons and Protocol IV: Obscuring the Humanitarian Vision” (1996-1997) 15 Dick J Int’l L 237 at 264.

⁵³⁷ Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), art 35(1). The wording of “the means of warfare is not unlimited” is reiterated in arms control agreements such as the Mine Ban Convention and the Convention on Cluster Munitions.

⁵³⁸ Protocol V (2003) to the CCWC, 2399 UNTS 100, preamble para 1.

⁵³⁹ ICRC, Introduction to Protocol V to the CCWC

<<http://www.icrc.org/ihl.nsf/INTRO/610?OpenDocument>>. Last accessed 11 July 2011.

High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, to minimise the risks and effects of explosive remnants of war in post-conflict situations.⁵⁴⁰

The Convention's review conference in 2006 and the events afterwards, showed that the entry into force of the Protocol V and the discussion of the cluster munitions issue under this Protocol, did not satisfy some States which sought the prohibition of cluster munitions to address humanitarian concerns.⁵⁴¹ States were of the view that the success of negotiations on the prohibition of cluster munitions under the CCWC framework was doubtful, since some major influential countries, such as the US and Russia, opposed any further restrictions on the weapons causing problems in post-conflict situations.⁵⁴² The inability of the CCWC to produce a comprehensive, legally binding prohibition of cluster munitions drove some countries to take the issue of cluster munitions out of the CCWC and establish another forum with the aim to have a binding instrument to ban cluster munitions.⁵⁴³ Later, cluster munitions were discussed in a separate forum leading to the adoption of the Cluster Munitions Convention.

8. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Convention) (1997)

The Mine Ban Convention was adopted after the traditional forum to discuss the issue was regarded as unsuccessful in banning anti-personnel mines. While the negotiation on the restriction of anti-personnel mines in the 1995/1996 review conference of the CCWC did not progress to the level many expected, the number of victims of the weapons kept increasing. In the time of negotiation, in Bosnia alone, it was estimated

⁵⁴⁰ Protocol V (2003) to the CCWC, 2399 UNTS 100, art 1.

⁵⁴¹ Zdzislaw Lachoswski and Martin Sjogren "Conventional Arms Control" in *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (New York, Oxford University Press, 2007) at 620.

⁵⁴² Ibid.

⁵⁴³ Norway then took an initiative to hold a conference in February 2007 to negotiate a legally binding instrument on cluster munitions.

that three to six million anti-personnel mines were scattered around the country.⁵⁴⁴ Additionally, an estimated 1,600 victims each month (or 19,200 a year) were killed or wounded by anti-personnel mines around the world.⁵⁴⁵ The drop in the number of victims to 3,956 new casualties in 2009, the lowest after the adoption of the Convention, is one of the success indicators.⁵⁴⁶

a. Process

The adoption of the Mine Ban Convention (and later also the Convention on Cluster Munitions) was initiated by several countries with wide support from civil society, which was of the view that the issues of anti-personnel mines and cluster munitions were not adequately addressed in the existing mechanism.⁵⁴⁷ The dissatisfaction with the process to have a binding instrument to ban the use of anti-personnel mines brought the countries together in Ottawa, Canada in 1997 to sign a Convention which banned the use of the anti-personnel mines.⁵⁴⁸

The proponents of a total ban on anti-personnel mines could not accept a treaty which did not ban the weapons totally, even with the consequence that the main producers and users would stay outside the treaty. Hence, although the convention successfully attracted as many as 160 countries,⁵⁴⁹ the major producers such as the US, China, and Russia, are not parties and still stay outside the convention.

In the negotiation of the Mine Ban Convention process, the US at one point indeed joined the process but withdrew at a later stage because its conditions to sign the treaty were not acceptable to others, particularly on the geographical exception for the

⁵⁴⁴ Jim Wurst "Inching Toward a Ban" (1996) 52(2) Bulletin of Atomic Scientists 10 at 10.

⁵⁴⁵ Ibid.

⁵⁴⁶ *Landmine Monitor 2010* (Canada, International Campaign to Ban Landmines, 2010) at 1. The number represents new casualties to landmines and explosive remnants of war (ERW) recorded in 2009.

⁵⁴⁷ Ibid, at 77. More than 40 States, with support from ICBL and ICRC, were disappointed with the fact that the amended Protocol II of the CCW fell short of the total prohibition of anti-personnel mines.

⁵⁴⁸ The signing of the Convention in Ottawa gives the Convention an informal name of Ottawa Convention.

⁵⁴⁹ Mine Ban Convention (1997), 2056 UNTS 211; as of 31 July 2012, see the status of the Convention at the United Nations Treaty Series.

use of anti-personnel mines in South Korea and its proposal for a change of definition.⁵⁵⁰

The process to ban anti-personnel mines, culminating in the signing ceremonies in Ottawa 3-4 December 1997, has two important implications to note. First, there was wide civil society support to stop the use and production of anti-personnel mines to avoid further casualties of the weapons. The ICBL and activist Jody Williams shared the Nobel Peace Prize in 1997 for their efforts to ban anti-personnel mines and it was also recognition of the civil society role. Second, the process of the negotiation was finalized outside the United Nations framework.⁵⁵¹

As in other conventions, the rationales and backgrounds of the Mine Ban Convention can be seen from its preamble. Civilian protection is one of the goals the convention seeks. The first preamble paragraph of the convention affirms the States Parties' commitment to stopping civilian casualties and suffering:

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill and maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons....⁵⁵²

The preamble of the convention continues quoting the humanitarian reason in paragraph 8, “[s]tressing the role of public conscience in furthering the principles of humanity”. The convention then notes that the suffering caused by anti-personnel mines is indiscriminate:

Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited... on the principle that a distinction must be made between civilians and combatants.⁵⁵³

⁵⁵⁰ Stuart Maslen *Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point* (Intersentia-Transnational Publishers, 2001) at 84.

⁵⁵¹ The adoption of the 1997 Mine Ban Convention was marked as the first multilateral treaty negotiated outside the UN mechanism since the formation of the United Nations.

⁵⁵² Convention on the Prohibition of the Use, Stockpiling, production and Transfer of Anti-Personnel Mines and on Their Destruction (1997). The Convention consists of 11 preamble paragraphs and 22 articles.

⁵⁵³ Mine Ban Convention (1997), preamble para 11.

The convention suggests that the use of anti-personnel mines is against the principle of humanity and humanitarian law, as they discriminately maim the victims, hence their use violates the principle of international humanitarian law since distinction between civilians and combatants cannot be made.

Anti-personnel mines are the weapons which kill and maim their victims indiscriminately,⁵⁵⁴ and worse, they still pose a threat to civilians when the armed conflicts end and are a hindrance to reconstruction and economic development. The Mine Ban Convention provides the definition of “anti-personnel mine” as:

A mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.⁵⁵⁵

The 1997 Convention on the Prohibition of the Use, Stockpiling, production and Transfer of Anti-Personnel Mines and on their Destruction (the Mine Ban Convention) is considered one of the success stories of arms control conventions. Its success can be seen from many aspects; the fact that 121 States came to sign the Convention was an unprecedented number; the decreasing trend of total anti-personnel mines stockpiling; and the pace at which the convention came into force. The Convention was opened for signing on 3 December 1997 and quickly came into force on 1 March 1999 after the fortieth State submitted its instrument of ratification.⁵⁵⁶

⁵⁵⁴ Nigel Vinson “The Demise of Anti-Personnel Mine: A Military Perspective” (1998) 143 Royal United Service Institute for Defense Studies Journal 18.

⁵⁵⁵ Mine Ban Convention (1997), 2056 UNTS 211, art 2(1).

⁵⁵⁶ Mine Ban Convention (1997), 2056 UNTS 211.

b. Implications

The Mine Ban Convention is unique, for it is regarded as a hybrid of disarmament and humanitarian law.⁵⁵⁷ The articles of the convention ask the States Parties to undertake obligations such as not to use or produce, and to destroy the anti-personnel mines stockpiles which are disarmament measures. On the other hand, the convention is also based on principles of fundamental humanitarian law.⁵⁵⁸ In addition to these prohibitions, the Mine Ban Convention is also the first convention which regulates the matters of victim assistance, an issue of assisting to reintegrate victims into society.⁵⁵⁹

From the beginning, the negotiations departed from the traditional conservative arms control processes. One of several aspects that make it different from typical arms control processes is the considerations; humanitarian considerations are the main purpose of the treaty, above the more strategic, political and military concerns.⁵⁶⁰ It was unprecedented in a multilateral treaty process after World War II and the creation of the UN. These two characteristics are a new formula for the arms control negotiation with strong support from a few governments dissatisfied with the existing status quo and large support and pressure from civil society.

10. Convention on Cluster Munitions (CCM) (2008)

As with the anti-personnel mines, the major cluster munitions users and producers opposed the total ban the treaty sought, thus it was more convenient to discuss the issue of cluster munitions in the framework the Certain Conventional Weapons

⁵⁵⁷ Stuart Maslen *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* (New York, Oxford University Press, 2004) vol 1 at 63.

⁵⁵⁸ Ibid. Maslen further states that the Convention could be described as a disarmament law treaty with a humanitarian, rather than a military or security purpose.

⁵⁵⁹ Mine Ban Convention (1997), 2056 UNTS 211, art 6 (7e).

⁵⁶⁰ Nigel Vinson "The Demise of Anti Personnel Mine: A Military Perspective" (1998) 143 Royal United Service Institute for Defense Studies Journal 18.

Convention (CCWC) where they had more room to avoid the total ban clause.⁵⁶¹ Unlike the process in the CCWC where all major powers participated, the convention on cluster munitions was negotiated without the presence of some major powers, namely China, Russia, and the US, in the whole process.⁵⁶²

The US refusal to engage in the negotiation of the CCM was mainly because the weapon was considered by the US to be an effective weapon in armed conflict,⁵⁶³ and it does not make sense to ban effective weapons. The US quoted military and procedural concerns for its refusal to participate in the Oslo process and argued that amending the CCWC would be an appropriate means to address the problem of cluster munitions.⁵⁶⁴

The series of armed conflicts involving the massive use of cluster munitions have driven States and civil society alike to find an answer to the threat of the weapons. In the war in Iraq in 2003, for example, the United States and United Kingdom used at least twelve thousand clusters containing two million sub-munitions, leaving thousands of unexploded sub-munitions, threatening civilians.⁵⁶⁵ In a similar scenario, during the one-month war against Hezbollah in 2006, Israel launched about four million sub-munitions into Southern Lebanon.⁵⁶⁶ Many of those remaining unexploded sub-munitions are a danger to civilians and will take years to clean out.

The negotiation process and signing of the Convention on Cluster Munitions replicated the Mine Ban Convention. It started from world-wide concern about the effects of the use of cluster munitions.⁵⁶⁷ In the negotiation of a possible new

⁵⁶¹ Under the CCWC, landmines issue is under the Protocol II (mines, booby trap, and other devices) and cluster munitions issue under the Protocol V (explosive remnants of war). However, neither Protocol provides a total ban on the use of mines and cluster munitions.

⁵⁶² From Oslo Conference on Cluster Munitions, 22-23 February 2007, to Dublin Diplomatic Conference, 19-30 May 2008 China, Russia, and the US were not present.

⁵⁶³ Joseph Anzalone "The Virtue of A Proportional Response: The United States Response against the Convention on Cluster Munitions" (2010) 22 Pace Int'l Rev 183 at 184.

⁵⁶⁴ Ibid.

⁵⁶⁵ Bonnie Docherty "The Time is Now: A Historical Argument for a Cluster Munitions Convention" (2007) 20 Harvard Human Rights Journal 53.

⁵⁶⁶ Ibid.

⁵⁶⁷ Convention on Cluster Munitions (signed 3 December 2008, entered into force 1 August 2010); See Final Document of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions,

instrument on cluster munitions in the CCWC framework, it had proven difficult to balance military and humanitarian considerations as it was considered as being “tilted too much toward military considerations”.⁵⁶⁸

Following the failure of the cluster munitions issue under the CCWC, working with other like-minded States and civil societies, in February 2007, Norway launched an initiative, known as Oslo Process.⁵⁶⁹ The Oslo Process set out to create an international treaty by the end of 2008, which it fulfilled. This becomes the most recent example of the adoption of an arms control convention based on humanity or humanitarian reasons. As with the process of the Mine Ban Convention, it is also a departure from the traditional arms control framework, which is based more on security, moving toward more humanitarian considerations.⁵⁷⁰ The preamble paragraphs of the Convention expressly quote the humanity, human rights, and humanitarian principles as background and rationale.⁵⁷¹

Based on humanitarian concerns, the Convention prohibits the use, transfer, and production of cluster munitions, particularly the indiscriminate effect of the weapons on civilian victims.⁵⁷² The Convention requires States parties to destroy existing stockpiles, and make provision to assist survivors and clearance of contaminated areas.⁵⁷³ The process and the adoption of the CCM closely follow the process and plan of the implementation adopted by the Mine Ban Convention, which included

Dublin 19-30 May 2008 (CCM/78), Part II. Available at

<http://www.clustermunitionsdublin.ie/pdf/CCM78_Rev15July2009.pdf>. Last accessed 8 May 2012.

⁵⁶⁸ United Nations Disarmament Yearbook 2008 (Office for Disarmament Affairs, New York, 2009) vol 33 part II at 110.

⁵⁶⁹ “Ban History of Cluster Munitions” ICBL <www.icbl.org/index.php/icbl/Treaties/CCM/Ban-History>. Last accessed on 13 November 2009.

⁵⁷⁰ Stuart Maslen *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* (New York, Oxford University Press, 2004) vol 1 at 63.

⁵⁷¹ CCM (signed 3 December 2008, entered into force 1 August 2010), MTDSG Chap XXVI (6); Final Document of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Dublin 19-30 May 2008 (CCM/78), Part II.

⁵⁷² Ibid, preamble para 3.

⁵⁷³ Ibid, art 3, 4, and 5.

launching an international campaign to ban cluster munitions and the inclusion of civil societies in the process, preparation, and negotiations of the treaty.⁵⁷⁴

As in other treaties, there are contrasting opinions and arguments. One commentator, for example, argues that the adoption of the CCM which bans the use of the weapons is unrealistic at this time and hence will keep the important big countries outside the convention.⁵⁷⁵ In the view of Frank Tempesta, there are two reasons why the cluster munitions should not be removed from the CCWC; firstly, because the CCWC discussions involve more countries, so are more inclusive, with more participating States including great powers; secondly, the Convention's physical requirements, such as requiring a minimum weight and a maximum number of sub-munitions, will instead force military to use larger unitary bombs with greater explosive power, causing more collateral damage.⁵⁷⁶ However, this opinion does not take into account that for years the CCWC has been at stalemate on the issue of cluster munitions and has not projected any possible prohibition of the use of cluster munitions in its work.⁵⁷⁷

The CCM takes into account the respect for human rights and ensures victims caused by cluster munitions get assistance as reflected in the preamble paragraph 9 which says "to ensure and promote the full realization of all human rights and fundamental freedoms of all persons with disabilities".⁵⁷⁸ Preamble paragraph 17 further states "[s]trengthening the role of public conscience in furthering the principles of humanity".⁵⁷⁹ The States Parties of the convention are also committed to "[b]asing themselves on

⁵⁷⁴ Civil societies participated actively in series of meetings in the process toward the adoption in Dublin 30 May 2008. Those civil societies are recorded as observers in the Final Document of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Dublin 19-30 May 2008 (CCM/78).

⁵⁷⁵ Frank Tempesta "Finding an Effective, Practical Solution to Unexploded Ordnance" *Jane's Defense Weekly* (12 August 2009) at 23.

⁵⁷⁶ Ibid; see also, Daniel Joseph Raccuia "The Convention on Cluster Munitions: An Incomplete Solution to the Cluster Munition Problem" (2011) 44 *Van J Transnat'l L* 465.

⁵⁷⁷ Zdzislaw Lachowski and Martin Sjogren "Conventional Arms Control" in *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (Oxford University Press, 2007) at 620.

⁵⁷⁸ CCM (2008), preamble para 9.

⁵⁷⁹ CCM (signed 3 December 2008, entered into force 1 August 2010), UNTS no I-47713, preamble para 17.

the principles and rules of international humanitarian law”,⁵⁸⁰ as a clear indication of the IHL approach in the convention.

C. Summary

Humanitarian law and human rights law have been invoked in the considerations of arms control in the twentieth and twenty-first centuries as has been observed in the treaties negotiations and discussion of arms controls. IHL have a major development role in setting up international mechanisms towards protecting civilians in time of war. Controls, prohibitions, and restrictions of the use of weapons use humanitarian rationales by identifying whether weapons cause unnecessary suffering or are indiscriminate in nature. Protection of civilians demands that a distinction be made between civilians and combatants, and such distinction cannot be made if indiscriminate weapons are used in armed conflict.

Having examined the conventions, Table III.1 below shows the main rationales in each convention.

Table III.1:
Humanitarian rationale in prohibition/restriction of the use of conventional weapons

	Indiscriminate	Superfluous Injury/ unnecessary suffering
(1868) St Petersburg Treaty	×	✓
(1980) Certain Conventional Weapons Convention (CCWC)	✓	✓
Protocol I to CCWC on Non-Detectable Fragments	×	✓
Protocol II to CCWC on Mines, Booby Traps and other Devices	✓	×

⁵⁸⁰ CCM (signed 3 December 2008, entered into force 1 August 2010), UNTS no I-47713, preamble para 20.

Protocol III to CCWC on Incendiary Weapons	✓	×
Protocol IV to CCWC on Blinding Laser Weapons	×	✓
Protocol V to CCWC on Explosive Remnants of War	✓	×
(1997) Mine Ban Convention	✓	×
(2008) Convention on Cluster Munitions	✓	×

The table above indicates the rationales of multilateral arms control treaties on conventional arms as stated in their preamble paragraphs. Humanitarian reasons are the most frequently cited rationales found in the treaties of arms controls as a principle in adopting an arms control treaty. From those treaties, some lessons could be learnt. As clearly demonstrated by the Mine Ban Convention and the Convention on Cluster Munitions, humanity could be a strong and valid rationale to regulate, restrict or prohibit the use of particular types of weapons. Each of these Conventions demonstrates that:

- a. Human rights values, in terms of preventing indiscriminate impact on human development, have started to become a rationale used in arms control treaties; and
- b. The process of their adoption shows that the process of adoption of an arms control treaty may be held outside the traditional forum of arms control. The diversion of the negotiation outside the traditional forum takes place when the traditional forum fails and a majority of like-minded States decide to set up a new specific forum to accommodate the concerns unresolved by the traditional forum.

As several conventions show, humanitarian law principles, such as prohibition of the use of weapons indiscriminate in nature, and causing excessive injury or unnecessary suffering, have been used as rationales to prohibit the use of weapons. It will then be

a question of whether such rationales could also be applied to limit the proliferation of small arms. Here two things are encountered: first, small arms, basically, are not indiscriminate weapons; second, humanitarian law if it is to apply to small arms, applies in time of war, meanwhile small arms are threat to civilians at all times. This may justify a broader approach than humanitarian law when discussing or negotiating small arms issues, viewing the problem from a human rights perspective.

Chapter IV: State Responsibility and its Association with Small Arms

A. Introduction

States have power to set policy on production, export, import and transfer of small arms through State control. However, once a State claims to respect international law by becoming party to various international treaties,⁵⁸¹ it has a responsibility to ensure that the small arms under its control do not undermine respect for international law. State responsibility with regards to transfer of small arms is viewed by this thesis through the development of international law on State responsibility, namely by inspecting the traditional and temporary interpretations of the concept of State responsibility.

Although the uncontrolled availability of small arms may facilitate conflicts, crimes, and violations against human rights, the weapons themselves are considered, *prima facie*, legitimate instruments of defence, in as much as the right to self defence for a sovereign State is guaranteed by the UN Charter.⁵⁸² Small arms are not considered an illegal type of weapon. In this context, it is logical to analyse States' shared responsibilities to protect individuals and societies from atrocities which are facilitated by the uncontrolled availability of small arms.

The thesis will examine the State responsibility with regard to small arms and link it with the work of the International Law Commission (ILC) on Responsibility of States for Internationally Wrongful Acts,⁵⁸³ and the Responsibility to Protect (RtoP).⁵⁸⁴ The thesis examines these doctrines to find how they may support the hypothesis that it is

⁵⁸¹ Vienna Convention on the Law of Treaty (done 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 2 (g), which states: "Party' means a State which has consented to be bound by the treaty and for which the treaty is in force". The Convention also notes at preamble para 2 that the *pacta sunt servanda* rule is universally recognised.

⁵⁸² Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 51.

⁵⁸³ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001); reprinted in *Yearbook of the International Law Commission 2001* (New York and Geneva, United Nations, 2007) vol 2, part 2.

⁵⁸⁴ ICISS *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001); also, 2005 World Summit Outcome, A/Res/60/1 of 16 September 2005, para 138-140.

the responsibility of a State to protect population as a whole. Small arms, or all types of weapons in general, are transferred with the purpose of enabling the recipients to engage in armed conflict. Despite the threat by small arms to human security (as shown in Chapter II), the current mechanism to hold States responsible through development of international law has been described as “slow, weak, and ineffectual”.⁵⁸⁵ The thesis analyses the Responsibility of States for Internationally Wrongful Acts and the RtoP to discover what link they may have to small arms transfer. In the process, the discussion will identify the elements of IHL and IHRL in the State responsibility in the context of small arms.

B. State Responsibility and Small Arms
1. Traditional State sovereignty

State responsibility in the traditional sense, is State-centred and the understanding of State responsibility lays emphasis on a State’s conduct relative to another State.⁵⁸⁶ While the thesis holds the view that States are the primary actors in international relations and a primary subject of international law,⁵⁸⁷ it acknowledges the fact that the concept of State responsibility is not static but evolves dynamically. The traditional view of State responsibility dictates that international law empowers a sovereign State to exercise exclusively absolute jurisdiction within its territorial borders, and that other States and multilateral actors have the corresponding duty not to interfere in a State’s internal affairs.⁵⁸⁸

The Peace of Westphalia in 1648 was identified as laying the foundations for the principle of State sovereignty and marked the start of traditional international law, based on principles of territoriality and State autonomy.⁵⁸⁹ The Peace of Westphalia changed international relations by recognising practices which had not existed before in many respects, for example, the theory of a single overall power ruling Europe

⁵⁸⁵ Theresa A DiPerna “Small Arms and Light Weapons: Complicity ‘with A View’ Toward Extended State Responsibility” (2008) 20 Fla J Int’l L 25 at 26.

⁵⁸⁶ Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) at 248.

⁵⁸⁷ Guido Acquaviva “Subjects of International Law: A Power-Based Analysis” (2005) 38 Vand J Transnat’l L 345 at 352-355.

⁵⁸⁸ Christopher C Joyner “The Responsibility to Protect” (2007) 47(3) Va J Internat’l L 693.

⁵⁸⁹ Harold Hongju Koh “Why Do Nations Obey International Law?”(1997) 106(8) Yale L J 2607.

through a unified set of rules, broke away to one which recognised a multitude of sovereigns, theoretically equal, who could determine the rules for themselves within the realms of their own territorial sovereignty.⁵⁹⁰

Sovereign States functioned as the main actors, while other players, such as non-governmental organizations, played minor roles.⁵⁹¹ The relations between sovereign States were based on equality among them.⁵⁹² Thus, other States should not interfere as sovereignty is characterized by the power of a State over its territory. The Charter of the United Nations affirms the sovereignty of its members and shall not “intervene in matters which are essentially within the domestic jurisdiction”⁵⁹³ as a key rule in traditional relations between States.⁵⁹⁴ This principle of non-intervention together with other principles of sovereignty and territorial integrity were later enshrined in the United Nations Charter that guides the contemporary international relations among States, as the “Organisation is based on the principle of the sovereign equality of all its Members” and that all members should refrain “from the threat of use of force against the territorial integrity or political independence of any State”.⁵⁹⁵

The State system in the Westphalian model seemed to emerge as the answer to the problem of order and violence in seventeenth century Europe.⁵⁹⁶ However, it might not be very much help in the face of new challenges in twenty-first century world. The Westphalian model has been challenged by many who argue that the world’s interdependence and globalization (economic, ecological, social, and human rights) make absolute sovereignty impractical in current geopolitics and the national

⁵⁹⁰ Wyndham A Bewes “Gathered Notes on the Peace of Westphalia of 1648” in *The Grotius Society, Problems of Peace and War: Papers Read before the Society in the Year 1933* (New York, London, Wildy&Sons and Oceana Publications, 1962) at 68.

⁵⁹¹ Harold Hongju Koh “Why Do Nations Obey International Law?”(1997) 106(8) Yale L J 2607.

⁵⁹² Vladimir R Idelson “The Law of Nations and the Individual” in *The Grotius Society, Transactions for the Year 1944: Problems of Peace and War* (New York, London, Wildy&Sons and Oceana Publications, 1962) vol 30 at 53. Interestingly, in the same presentation, Idelson states that “if law were to prevail at all for mankind, States could not be regarded as absolutely sovereign”.

⁵⁹³ Charter of the United Nations, 1 UNTS XVI, art 2 (7).

⁵⁹⁴ LC Green “Enforcement of International Humanitarian Law and Threats to National Sovereignty” (2003) 8 J Conflict & Sec L 101 at 102.

⁵⁹⁵ Charter of the United Nations, 1 UNTS XVI, art 2(1, 4).

⁵⁹⁶ Ramesh Thakur *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) at 77.

sovereignty actually has been always affected by current international structures.⁵⁹⁷ This is particularly relevant today due to universal recognition of issues such as human rights as accelerated by the end of the Cold War or prohibitions of certain methods of warfare, establishment of international criminal court, the World Trade Organisation, which all show the traditional sovereignty challenged.⁵⁹⁸ Globalization and the common global risks faced by the world are often responded to by the active progressive involvement of non-State actors on many issues which facilitate international control of States and show the limits to national sovereignty.⁵⁹⁹ Discussion about the role of civil societies, particularly on their involvement in campaigns to control the trade in small arms, is discussed in Chapter VII.

The traditional view that relations between States are solely a bilateral issue does not fit with the reality that small arms transfers may, in some situations, destabilize countries and regions.⁶⁰⁰ The trade of small arms has many implications for human security beyond static national boundaries and sovereignty, which imply a need for international control.

2. Human rights in contemporary international relations

There is a tension between a world of sovereign States and a world striving for the universal recognition of a human rights norm that requires a State to treat its citizens with at least a basic level of human dignity.⁶⁰¹ When a State becomes a party to a human rights treaty, it is agreeing to the values of that treaty and to be accountable regardless of what society that State is from. Human rights make no distinction “on the basis of the political, jurisdictional or international status of the country or

⁵⁹⁷ Dieter Fleck “National Sovereignty and International Responsibility: Legal and Policy Aspects” in Michael Bothe, Mary Ellen O’Connell and Natalie Ronzitti (eds) *Redefining Sovereignty: The Use of Force after the Cold War* (Transnational Publishers, 2005) at 53.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Report of the UN Secretary-General on Small Arms (S/2008/258), 17 April 2008, at [4-9].

⁶⁰¹ Stacy Humes-Schulz “Limiting Sovereign Immunity in the Age of Human Rights” (2008) 21 *Harv Hum Rts J* 110; Also, Louis Henkin *The Age of Rights* (New York, Columbia University Press, 1990) at 13.

territory to which a person belongs”.⁶⁰² Some argue that human rights now have become a mainstream part of international law, and “respect for human rights a central subject and responsibility of international relations”.⁶⁰³ Thus, from a human rights perspective, the demands of human rights conventions and law know no borders and dictate how a government must interact with its citizens.⁶⁰⁴

The classical understanding of State responsibility as bilateral in nature is, therefore, strained when applied to contemporary human rights and humanitarian norms.⁶⁰⁵ Contemporary development in politics and international law puts more emphasis on respect for human rights, particularly reflected in the drafting of international agreements.⁶⁰⁶ The Charter of the United Nations emphasises that one of the purposes of the organisation is to achieve international cooperation “in promoting and encouraging respect for human rights”.⁶⁰⁷ States also have pledged themselves to achieve “the promotion of universal respect for and the observance of human rights and fundamental freedom”.⁶⁰⁸ A series of international conventions on human rights adopted by States and the establishment of the Human Rights Council strengthen the challenge to the traditional sovereignty.

The Universal Declaration of Human Rights is a reminder that “disregard and contempt for human rights have resulted in barbarous acts” and that “freedom from fear” is one of the highest aspirations of people.⁶⁰⁹ The same respect for human rights is echoed by the Declaration of the Right of Peoples to Peace, that “life without

⁶⁰² Universal Declaration of Human Rights, UNGA res 217A, adopted 10 December 1948, art 2(2).

⁶⁰³ ICISS *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International development Research Centre, 2001) at [6-1.25].

⁶⁰⁴ Stacy Humes-Schulz “Limiting Sovereign Immunity in the Age of Human Rights” (2008) 21 Harv Hum Rts J 110.

⁶⁰⁵ Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) at 248.

⁶⁰⁶ Louis Henkin *The Age of Rights* (New York, Columbia University Press, 1990) at 25.

⁶⁰⁷ Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 1(3).

⁶⁰⁸ Universal Declaration of Human Rights (adopted 10 December 1948, UNGA res 217A), preamble para 6.

⁶⁰⁹ Universal Declaration of Human Rights (UNGA res 217A of 10 December 1948), preamble para 2; “Freedom from fear” should be enjoyed by human beings is echoed by the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966), 993 UNTS 3, preamble para 3; Also the International Covenant on Civil and Political Rights (adopted 16 December 1966), 999 UNTS 171, preamble para 3.

war serves as the primary international prerequisite for the material well-being...and for the full implementation of the rights and fundamental human freedoms”.⁶¹⁰

Human rights are universal in nature regardless of nationality, race, background, and skin colour. Human rights interests know no national borders, as in international practice now, States have a deep interest in the way other States treat their own citizens.⁶¹¹ Arguably, contemporary norms of human rights and humanitarian law influence the understanding of State responsibility. It is reflected in the definition of State responsibility itself which has shifted from bilateralism to community interests (multilateralism).⁶¹² Furthermore, it is a fallacy to say that there was ever such a system of sovereign States with absolute domestic jurisdiction, as on the contrary, States have always been subject to external normative influences.⁶¹³ This is to say, multilateralism is only natural as there has never been an absolute sovereign State which has an absolute jurisdiction over its people and territory free from outside influences.

In the twenty-first century, sovereignty does not mean authority without limit. The fundamental meaning of sovereignty should be conceived as the pre-eminent requirement for the government of a State to exercise responsibility for, not only control over, its actions.⁶¹⁴ This understanding of sovereignty entails that responsibility must be motivated by the supreme duty of a government to protect its population.⁶¹⁵ The international situation further emphasises the importance of government to protect its population, in particular in the post-World War II era because of the holocaust; and the post-Cold War where there were violent ethnic conflicts and civil wars. Much of this determination to protect civilian population is

⁶¹⁰ Declaration on the Right of People to Peace (UNGA res 39/11, 12 November 1984), preamble para 4.

⁶¹¹ Anthony D’Amato “Trashing Customary International Law” (1987) 18 American J Int’l L 101 at 102-5.

⁶¹² Theodor Meron *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006) at 248.

⁶¹³ Duncan B Hollis “Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty (2002) 25 B C Int’l & Comparative L Rev 235 at 249. The Peace of Westphalia, seen as the landmark of sovereignty, itself included derogations from this principle.

⁶¹⁴ Christopher C Joyner “‘The Responsibility to Protect’: Humanitarian Concern and the Lawfulness of Armed Intervention” (2007) 47(3) Va J Int’l L 693.

⁶¹⁵ *Ibid.*

reflected in the Genocide Convention,⁶¹⁶ the Fourth Geneva Convention,⁶¹⁷ and the Rome Statute of the International Criminal Court,⁶¹⁸ which all show affirmation “that the most serious crimes of concern to the international community as a whole must not go unpunished”.⁶¹⁹

Scholars have been trying to explain a standard of State responsibility and identify the existence of an international standard of justice in traditional law of State responsibility.⁶²⁰ There is a standardized fundamental justice that obliges a State to have a system of law and administration in a standard accepted by civilized nations.⁶²¹ The world has been adopting new standards of protection of human rights since the end of World War II by adopting the Charter of the United Nations which includes an undertaking for promoting respect for human rights as one of its purposes.⁶²² This was followed by the adoption of the 1948 Universal Declaration of Human Rights and other international instruments on human rights.⁶²³

The growing respect for human rights reflects the slow transition of sovereignty from being State-centred to becoming people-centred. The international treaties adopted after the Cold War emphasise people-centeredness by the increasing respect for humanity shown in the prosecution of the perpetrators of gross human rights breaches in international courts, which is made permanent by the 1998 Rome Statute of the International Criminal Court.⁶²⁴ Traditionally, States have been reluctant to internationalize the process of accountability for serious violation of humanitarian

⁶¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide (UNGA res 260 A (III), 9 December 1948).

⁶¹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949).

⁶¹⁸ Rome Statute of the International Criminal Court (adopted 1998), 2187 UNTS 90.

⁶¹⁹ *Ibid*, preamble para 4.

⁶²⁰ Y Matsui “The Transformation of the Law of State Responsibility” in Rene Provost (ed) *State Responsibility in International Law* (Hants, Ashgate, 2002) at 7.

⁶²¹ *Ibid*, at 14.

⁶²² Charter of the United Nations, 26 June 1945, 1 UNTS XVI, art 3, states “promoting and encouraging respect for human rights” is one of the organization purposes.

⁶²³ Universal Declaration of Human Rights (UNGA res 217A, 10 December 1948); other human rights instruments include the International Covenant on Civil and Political Rights (concluded 16 December 1966, entered into force 3 January 1976), 993 UNTS 3; International Covenant on Civil and Political Rights (concluded 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.

⁶²⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90.

law, given that the jurisdiction, such as in the 2008 Rome Statute of the International Criminal Court, has been always been considered one of the core components of what constitutes State sovereignty.⁶²⁵

Linking the human rights element in international relations, State sovereignty as the basis of the small arms transfer has a limit because the arms trade may have far reaching implications beyond a country's border,⁶²⁶ which may undermine the respect for human rights. Hence, dealing with the trade of small arms needs a multilateral approach. In a new paradigm of State responsibility, small arms transfer by a sovereign State should take human rights into consideration.⁶²⁷ The responsibility to protect acknowledges that this responsibility is primarily a State concern.⁶²⁸ Prevention of an armed conflict is, first and foremost, the responsibility of sovereign States and the failure to prevent conflict can have wide international consequences.⁶²⁹ The responsibility of arms-exporting States towards the victims of small arms beyond their borders may have far-reaching international implications,⁶³⁰ in particular when the small arms are used to violate international law.

Civil society and supporters of the restriction of small arms transfer find new momentum with the emerging norm in international law from the State responsibility. The International Committee of the Red Cross (ICRC) in its official statement cites the State responsibility in supporting the elaboration by the United Nations to find common standards of a comprehensive, legally binding Arms Trade Treaty.⁶³¹ The ICRC's support reasons that international standards for responsible conventional

⁶²⁵ Manuela Melandri "The Relationship between State Sovereignty and the Enforcement of International Criminal Law under the Rome Statute (1998): A Complex Interplay" (2009) 9 Int'l Crim L Rev 531.

⁶²⁶ Report of the UN Secretary-General on Small Arms (S/2008/258), 17 April 2008, at [4-9].

⁶²⁷ Although some regional groupings such as the European Union have put human rights as criteria of arms transfer (the EU Code of Conduct 1998), there is no international agreement which has achieved the inclusion of human rights as a criteria in arms transfer.

⁶²⁸ Ramesh Thakur *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) at 251.

⁶²⁹ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001).

⁶³⁰ Alexandra Boivin "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87(859) IRRC 467 at 496.

⁶³¹ ICRC position on an Arms Trade Treaty, official statement, 1 October 2009

<www.icrc.org/web/eng/siteeng0.nsf/html/weapons-statement-011009>. Last accessed on 6 October 2009.

arms transfer (including small arms and ammunition) are demanded by the States' responsibilities in international law and international humanitarian law.⁶³²

State responsibility may provide a sound doctrinal grounding for the prohibition in arms transfers and a basis to prevent States from licensing weapons transfers to abusers of human rights and humanitarian law.⁶³³ In situations where there are no prohibitions affecting the transfer of weapons, where the country of destination is not subject to an arms embargo, some argue, 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.⁶³⁴

3. Human rights and sovereignty

Acquiring weapons is the exercise of a State's right to self-defence in order to protect its sovereignty. The State is central to the discussion of international law on sovereignty because public international law, at least, is configured around the State.⁶³⁵ It now becomes essential to discuss the sovereign State's right to acquire weapons when it meets its responsibility as a member of the international community.

Sovereignty is a fundamental principle in international law and modern international relations as enshrined in the UN Charter.⁶³⁶ As sovereignty and the modern system of international law grew, the concept of national and territorial integrity was also formulated.⁶³⁷ The concept of modern sovereignty was then developed in the sixteenth and seventeenth centuries which viewed sovereignty as omnipotent and indivisible.⁶³⁸ Bodin, for example, held the view that "sovereign authority is the

⁶³² ICRC position on an Arms Trade Treaty, official statement, 1 October 2009 <www.icrc.org/web/eng/siteeng0.nsf/html/weapons-statement-011009>. Last accessed on 6 October 2009.

⁶³³ Alexandra Boivin "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87(859) IRRC 467 at 469.

⁶³⁴ Ibid.

⁶³⁵ Gerry Simpson "The Guise of Sovereignty" in Trudy Jacobsen, Charles Samford, and Ramesh Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate, 2008) at 59.

⁶³⁶ Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 2(1) and 2(7).

⁶³⁷ Charles Chatterjee *International Law and Diplomacy* (Routledge, 2007) at 36.

⁶³⁸ Ibid, at 48.

defining characteristic of a State, and that sovereignty is both unconditional and unified”.⁶³⁹ Bodin’s view regarding unified sovereignty was supported by Hobbes.⁶⁴⁰

Sovereignty in a legal sense, as the traditional view suggests, is an absolute control within a State territory, although de facto control by the government is a question of degree.⁶⁴¹ The establishment of the United Nations, the Nuremburg or Tokyo war crimes trials, the adoption of the Universal Declaration of Human Rights, and the holding of political leaders accountable for crimes of State (in Nuremburg and Tokyo Judgments, supplemented by the Genocide Convention),⁶⁴² challenged a central tenet of the Westphalian ethos, which holds that whatever takes place within the territory of a State is a matter of sovereign right and not subject to external view.⁶⁴³ Some further important events mark major acknowledgment of the importance of strengthening the norm of international relations and show that State sovereignty is not absolute.⁶⁴⁴ Even internally, the authority of a State is constrained and regulated by constitutional power-sharing arrangements.⁶⁴⁵ The Universal Declaration of Human Rights as an international human rights protection system, in particular, has in some instance penetrated the wall of rigid State sovereignty.⁶⁴⁶ In this regard, the current international structure of international relations accommodates a forum, such

⁶³⁹ Deborah Baumgold *Contract Theory in Historical Context: Essays on Grotius, Hobbes, and Locke* (Brill, Leiden, 2010) at 55.

⁶⁴⁰ *Ibid.*, at 59.

⁶⁴¹ Joseph S Nye Jr *Understanding International Conflicts: An Introduction to Theory and History* (7th ed, Longman, 2009) at 168.

⁶⁴² Convention on the Prevention and Punishment of the Crime of Genocide (UNGA res 260 A (III), 9 December 1948); the Charter of the International Military Tribunal (Nuremburg Charter, signed in London, 8 August 1945), available at <http://avalon.law.yale.edu/subject_menus/imt.asp>; and the Charter of the International Military Tribunal for the Far East (Tokyo Charter, adopted in Tokyo, 19 January 1946).

⁶⁴³ Richard Falk “International Law: Amid Power, Order and Justice” in Charles Webel and Johan Galtung (eds), *Handbook of Peace and Conflict Studies* (Routledge, 2007) at 333.

⁶⁴⁴ See Neil Walker “Late Sovereignty in the European Union” in Neil Walker (ed) *Sovereignty in Transition* (Hart Publishing, 2003) at 6-7. Walker addressed the incoherence and normative shortcoming of the concept of sovereignty by defining it as “the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering purports to establish and sustain the identity and status of the particular polity qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.”

⁶⁴⁵ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001) at [12-2.7].

⁶⁴⁶ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 198.

as the United Nations Human Rights Council to assess the human rights situations in all the UN member countries.⁶⁴⁷

Initial important support for the concept of sovereignty as responsibility came from then British Prime Minister Tony Blair who argued that sovereignty should be re-conceptualized since the traditional model of sovereignty did not fit into a globalised world.⁶⁴⁸ Blair argued that “[w]e cannot turn our backs on conflicts and the violation of human right rights within other countries”.⁶⁴⁹ The statement reaffirms that interconnectedness among countries creates international responsibilities.⁶⁵⁰

A sovereign State has an international obligation as a responsible member of the international community. The responsibility of a sovereign State when it joins the United Nations implies the readiness to act as a responsible member of the international community:

On the one hand, granting membership of the UN, the international community welcomes the signatory State as a responsible member of the community of nations. On the other hand, the State itself, in signing the Charter, accepts the responsibilities of membership flowing from that signature. There is no transfer or dilution of State sovereignty. But there is a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal function and external duties.⁶⁵¹

The acceptance by the international community of the notion of the responsibility to protect, as shown by the adoption of the principle of responsibility to protect in the 2005 World Summit Outcome Document and the United Nations resolution,⁶⁵² is the acceptance of a newly embraced norm. Together with the ILC’s Articles, the concept

⁶⁴⁷ Human Rights Council has a review process of every State called universal periodic review, mandated by the UNGA res 60/251 of 15 March 2006.

⁶⁴⁸ Alex J Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge, Polity Press, 2009) at 25.

⁶⁴⁹ Ibid; see also Tony Blair *Doctrine of the International Community*, speech by the Prime Minister Tony Blair to the Economic Club Chicago, Hotel Hilton, Chicago, USA, 22 April 1999 <<http://web.archive.org/web/19990902094809/http://www.fco.gov.uk/news/speechtext.asp?2316>>.

⁶⁵⁰ Ibid ; but see David Chandler “Rhetoric without Responsibility: The Attraction of ‘Ethical’ Foreign Policy” (2003) 5 BJPIR 295.

⁶⁵¹ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001) at 13.

⁶⁵² UNGA res 60/L.1 of 15 September 2005 on the 2005 World Summit Outcome.

of RtoP requests States to protect the international community as a whole by addressing both the root causes and direct causes of an armed conflict.⁶⁵³ Sovereignty entails the responsibility to protect the population, including from genocide, war crimes, ethnic cleansing, and crimes against humanity as agreed by the 2005 World Summit.⁶⁵⁴ When the State is unable or unwilling to fulfil this responsibility or is itself the perpetrator, the responsibility to protect shifts to the international community to act in its place.⁶⁵⁵

The rationale for conceiving sovereignty as responsibility is increasingly being justified by the escalating influence that human rights norms exert as they are accepted as genuine components of human security.⁶⁵⁶ The rights of people within a State now go beyond national boundaries, as there is a shared responsibility of the international community to respect basic human rights. The principle of sovereignty as responsibility suggests that the legitimacy of a government rests upon the extent to which it respects the rights and duties of its citizens.⁶⁵⁷ An international small arms agreement negotiated among States could involve core aspects of sovereignty, particularly on something such as monitoring a restriction on arms trade if gross violations of IHR and/or IHL occur, and sanctions for non-compliance, that often make States reluctant to delegate powers to supranational bodies enforcing the implementation of the agreed treaty.⁶⁵⁸

There is a natural link between rights and responsibilities. It is often easy to obtain agreement about people's rights, but the question of who is responsible for protecting or meeting those rights is more problematic.⁶⁵⁹ When there is an agreement of certain

⁶⁵³ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, 2001) at XI. Synopsis of the responsibility to protect includes the elements embracing three basic responsibilities: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild.

⁶⁵⁴ 2005 World Summit Outcome Document, para 139.

⁶⁵⁵ Ramesh Thakur *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) at 251.

⁶⁵⁶ Christopher C Joyner "The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention" (2007) 47(3) *Va J Int'l L* 693.

⁶⁵⁷ Christopher C Joyner "The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention" (2007) 47(3) *Va J Int'l L* 693.

⁶⁵⁸ Michael E Smith *International Security: Politics, Policy, Prospects* (2010) at 137.

⁶⁵⁹ Jim Ife "Human Rights and Peace" in Charles Webel and Johan Galtung (eds) *Handbook of Peace and Conflict Studies* (Routledge, 2007) at 168-9.

rights, there should be a responsibility to ensure that the rights agreed upon are respected. States then need to work together to protect the people's human rights beyond national jurisdiction. It is in this context of multilateralism that the small arms trade is discussed, to prevent such weapons being used to violate human rights.

Sovereignty, in its new norm, entails responsibility including the responsibility of a State to protect its citizens.⁶⁶⁰ State sovereignty which does not allow any intervention in the internal affairs of a State is in conflict with the moral imperative of upholding human rights worldwide, which would require necessary intervention for their protection.

For many, it is rather difficult to understand the commitment of major powers to protect human rights in situations where little or no geo-political or economic interest is involved.⁶⁶¹ Critics argue that the impetus of promotion by the British government and other leading western States of ethical foreign policy may actually lie in the domestic sphere and the search for enhancing political legitimacy.⁶⁶² Regardless of the motive, the norm of the RtoP has been embraced by the world leaders in the World Outcome Document which may have a significant contribution to shaping international relations.

C. ILC's Articles on Responsibility of States for Internationally Wrongful Acts

The International Law Commission (ILC) was formed in 1948 and started its annual session in 1949⁶⁶³ with the objective to promote "the progressive development of international law and its codification".⁶⁶⁴ In its early work, State responsibility was one of the 14 subject topics selected for codification.⁶⁶⁵ The ILC work on State responsibility began in 1956, was focused on State responsibility for injuries to aliens

⁶⁶⁰ Christopher C Joyner "The Responsibility to Protect" (2007) 47(3) Va J Int'l L 693.

⁶⁶¹ David Chandler "Rhetoric without Responsibility: The Attraction of 'Ethical' Foreign Policy" (2003) 5 BJPIR 295 at 310.

⁶⁶² See for example, David Chandler "Rhetoric without Responsibility: The Attraction of 'Ethical' Foreign Policy" (2003) 5 BJPIR 295 at 295.

⁶⁶³ GA Res 174 (II) of 21 November 1947.

⁶⁶⁴ Statute of the International Law Commission, GA Res 174 (II) of 21 November 1947, art 1 (1).

⁶⁶⁵ International Law Commission <<http://www.un.org/law/ilc/index.htm>>, last accessed 13 May 2012.

and their property, which was part of the International law of diplomatic protection.⁶⁶⁶

After slow progress, in 1963 the ILC approved an inter-sessional subcommittee recommendation to redraw the boundaries of the topic so as to focus on general rules of general application concerning State responsibility, this would include, among others, human rights and disarmament.⁶⁶⁷ In 2001, it was decided by the ILC to amend title of the subject of State responsibility into “Responsibility of States for Internationally Wrongful Acts”.⁶⁶⁸ In 2001, after long years of discussion, the ILC eventually adopted the final Draft Articles of Responsibility of States for Internationally Wrongful Acts (hereinafter the Articles).⁶⁶⁹

The Articles as adopted in 2001 reflect the nature of general application of State responsibility and make distinction between the primary and secondary rules. The emphasis of the Articles is on the secondary rules of State responsibility, that is, “the general conditions under international law for the States to be considered responsible for wrongful actions or omissions”.⁶⁷⁰ The Articles do not deal with the function of the primary rules, that is, “the content of the international obligation breach of which gives rise to responsibility”.⁶⁷¹ A commentator, in addition, explains that primary rules are the substantive obligations of States in the numerous subject areas of international law; and secondary rules are those that elaborate what it means for a State to be legally accountable for violations of these duties.⁶⁷²

The Articles determine the principles which govern the responsibility of States for internationally wrongful acts, and define the rules that place obligations on States, the

⁶⁶⁶ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 1.

⁶⁶⁷ *Ibid.*, at 2.

⁶⁶⁸ ILC fifty-third session, A/CN.4/L.602/Rev.1 of 26 July 2001.

⁶⁶⁹ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001); reprinted in *Yearbook of the International Law Commission 2001* (New York and Geneva, United Nations, 2007) vol 2, part 2, at 26.

⁶⁷⁰ *Yearbook of the International Law Commission 2001* (New York and Geneva, United Nations, 2007) vol 2, part 2, at 31.

⁶⁷¹ *Ibid.*

⁶⁷² Steven R Ratner “Corporations and Human Rights: A Theory of Legal Responsibility” (2001) 111 *Yale L J* 443 at 489-491.

violation of which may generate responsibility.⁶⁷³ State responsibility is pre-eminently an area of international law developed by State practice and international judgments, of which numerous examples are referred to in the ILC's commentary on the Articles.⁶⁷⁴

The ILC's work has been welcomed by the international community as it develops further international law in this area. The Articles developed a new fundamental norm and marked a change in paradigm as the work of the ILC on State responsibility is well accepted and widely cited by the ICJ and other tribunals, even when the Articles was provisionally adopted.⁶⁷⁵ The International Court of Justice (ICJ), for example, cites the ILC's works on State responsibility in *Gabcikova-Nagymaros Project*⁶⁷⁶ and the International Tribunal for the Law of the Sea cites it in *The M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v Guinea)*.⁶⁷⁷ This makes it important to analyse whether the State responsibility as drafted by the ILC may cover the State responsibility to regulate the transfer of arms.

The first three articles of the Articles on Responsibility of States for Internationally Wrongful Acts set three basic principles: the responsibility of a State for its internationally wrongful acts, elements of an internationally wrongful act of a State, and characterisation of an act of a State as internationally wrongful.⁶⁷⁸ A State can be held accountable for any internationally wrongful acts under article 1 of the Articles

⁶⁷³ Responsibility of States for Internationally Wrongful Acts 2001, printed in *Yearbook of the International Law Commission 2001* (New York and Geneva, United Nations, 2007) vol 2, part 2, at 26.

⁶⁷⁴ *Yearbook of the International Law Commission 2001* (New York and Geneva, United Nations, 2007) vol 2, part 2, at 26; see also, Anthony Aust *Handbook of International Law* (Cambridge, Cambridge University Press, 2005) at 407.

⁶⁷⁵ See for example: *Gabcikova-Nagymaros Project*, Judgment, [2007] ICJ Report 7 at para 47 and 50-53; *The M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v Guinea)*, International Tribunal for the Law of the Sea, Judgment of 1 July 1999 at para 98; see, James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 59; Stefan Kadelbach "Jus Cogens, Obligation Erga Omnes and Other Rules: The Identification of Fundamental Norms" in Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, 2006) at 23.

⁶⁷⁶ *Gabcikova-Nagymaros Project*, Judgment, (2007) ICJ Report 7 at para 47 and 50-53.

⁶⁷⁷ *The M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v Guinea)*, International Tribunal for the Law of the Sea, Judgment of 1 July 1999 at para 98.

⁶⁷⁸ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001), art 1, 2, and 3.

which hold that “[e]very internationally wrongful act of a State entails the international responsibility of that State”.⁶⁷⁹ The commentary of the Articles explains that whether there has been an internationally wrongful act depends on two things: first, “on the requirement of the obligation which is said to have been breached,” and second, “on the framework conditions for such an act”.⁶⁸⁰ The Articles do not define when exactly a State will be in breach of international law, and that has to be determined by applying the primary rules (the law of treaties, customary international law, and other sources of international law) to the facts of each case.⁶⁸¹

The second principle of elements of an internationally wrongful act of a State is described in article 2:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.⁶⁸²

The third principle states that the “characterization of an act of a State as internationally wrongful is governed by international law”.⁶⁸³ If it is contrary to national law, the Articles explains that such “characterization is not affected by the characterization of the same act as lawful by internal law.”⁶⁸⁴

Taking into account the basic principles in articles 1, 2 and 3, if there has been an internationally wrongful act in transfers of small arms, it should fulfil the wrongfulness required by these principles as well as the requirement of the obligation of international law which has been breached either by an action or omission. The Articles do not “specify the content of the obligations laid down by particular primary

⁶⁷⁹ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001).

⁶⁸⁰ *Yearbook of the International Law Commission 2001* (New York and Geneva, United Nations, 2007) vol 2, part 2, at 32.

⁶⁸¹ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 74.

⁶⁸² Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001), art 2.

⁶⁸³ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001), art 3.

⁶⁸⁴ *Ibid.*

rules” and leave the matter “for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State”.⁶⁸⁵

In relation to the humanitarian problems created by the excessive availability of small arms, one can examine and link the issue of small arms to the Articles. Being general in character, the Articles apply to the whole field of international obligations of States.⁶⁸⁶ A transfer of small arms which leads to a mass killing could raise State responsibility under the Articles as the sending State either by action or omission, could be held responsible for internationally wrongful acts if there is an agreement in law of treaties as premier rules, showing that there “is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation”.⁶⁸⁷ State responsibility for an international obligation may arise from provisions stipulated in a treaty or all other sources of international obligations.⁶⁸⁸ State responsibility may also arise from breaches of obligation to the international community as a whole.⁶⁸⁹

State is not an abstract entity. Transfers of small arms which help the commission of internationally wrongful acts are carried out by State organs and persons. The Articles explain that the “conduct of any State organ shall be considered an act of that State under international law”⁶⁹⁰ and a State organ “includes any person or entity which has that status in accordance with the internal law of the State.”⁶⁹¹ The Articles explain further the status of a person or entity which is not a State organ but is empowered by the State to exercise elements of government authority “shall be considered an act of the State under international law, provided the person or entity is acting in that

⁶⁸⁵ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 75.

⁶⁸⁶ *Ibid.*, at 76.

⁶⁸⁷ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001), art 12.

⁶⁸⁸ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 126.

⁶⁸⁹ *Ibid.*, at 127.

⁶⁹⁰ Responsibility of States for Internationally Wrongful Acts (adopted by the General Assembly A/RES/56/83 of 12 December 2001), art 4 (1).

⁶⁹¹ Responsibility of States for Internationally Wrongful Acts, (adopted by the General Assembly A/RES/56/83 of 12 December 2001), art 4 (2).

capacity in the particular instance.”⁶⁹² This is intended to take into account situations where former State corporations have been privatized but retained regulatory functions.⁶⁹³ Thus, the acts of persons or entities of private companies in transfers within arms trade which are not State organs but nonetheless authorized to exercise governmental authority are considered act of the State. In other words, the transfer of small arms by persons or entities which are not State organs but are empowered by the State, does not excuse the State from being responsible in the case that leads to the commission of internationally wrongful acts.

With transfer of small arms leading to an act of internationally wrongness in mind, article 16 stipulates that a “State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so”.⁶⁹⁴ However, one clause states that, the aiding State is internationally responsible if that State “does so with knowledge of the circumstances of internationally wrongful acts”.⁶⁹⁵ This is something that might be difficult to prove as an aiding State may not know that the second State will use the weapons in the commission of an internationally wrongful act.

In the light of the article 16, it can be said that a State supplying small arms to another State which is known to use the weapons to do an internationally wrongful act, can be held responsible for “relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law”.⁶⁹⁶ Commentary on the Articles explains that States have a responsibility to prevent certain conduct by another State, “[a] State may be required by its international obligations to prevent certain conduct by another State, or at least to prevent the harm that may flow from such conduct”.⁶⁹⁷ Commentary on the Articles

⁶⁹² Ibid, art 5.

⁶⁹³ Yearbook of International Law Commission 2001 (New York and Geneva, United Nations, 2007) vol 2, part 2, at 42 para (1).

⁶⁹⁴ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001), art 16.

⁶⁹⁵ Ibid, art 16 (a).

⁶⁹⁶ Yearbook of International Law Commission 2001 (New York and Geneva, United Nations, 2007) vol 2, part 2, at 56.

⁶⁹⁷ Ibid, at 64.

further shows that State practice supports assigning international responsibility to a State which assists another State in the internationally wrongful act.⁶⁹⁸

Following the previous argument, one may argue that it is an international obligation for a State to prevent a weapons transfer in order to prevent certain conduct by another State in doing an internationally wrongful act, such as serious violation of IHL/IHRL. The Articles demand States maximize the law's capacity in using the ILC principle to hold responsible those who are responsible for assisting the commission of human rights violations and other internationally wrongful acts.⁶⁹⁹ With regard to small arms, using the reasoning of the Articles, there should be a clear standard to prevent the flow of small arms to the end-users who are more likely than not to use the weapons in wrongful acts.⁷⁰⁰ Based on article 16 of the ILC's Articles on State responsibility,⁷⁰¹ a State transferring to a recipient State which later uses the arms to commit internationally wrongful acts may be held accountable for having a supporting role. However, there are limits to the scope of responsibility of article 16; the first, the assisting State must have knowledge of the circumstances that make the conduct of the receiving State unlawful; secondly, the supply of weapons must be given with the view to facilitating the commission of the wrongful act; thirdly, the act must be such that it would have been wrongful had it been executed by the assisting State itself.⁷⁰²

Apart from the work of the ILC on State responsibility, there is also an emerging State responsibility to protect (RtoP). The responsibility to protect when linked to the issue of small arms, may serve as the basis to argue that the responsibility to protect requires States to be responsible in the arms trade.

⁶⁹⁸ Ibid, at 66. For example, in 1984, Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the grounds that the assistance was facilitating the act of aggression by Iraq.

⁶⁹⁹ Theresa A DiPerna "Small Arms and Light Weapons: Complicity 'with A View' toward Extended State Responsibility" (2008) 20 Fla J Int'l L 25 at 30; Also Alexandra Boivin "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87 IRRC 467 at 467-470.

⁷⁰⁰ Ibid.

⁷⁰¹ *Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001* (United Nations, 2008) at 66, para 1.

⁷⁰² Ibid, at 66, para 3; see, Alexandra Boivin "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87(859) IRRC 467 at 471.

D. Responsibility to Protect (RtoP)

The growing norm of respecting universal human rights requires a State to protect the human rights of, not only its own citizens, but all human beings regardless of their citizenship, race, national, or other status.⁷⁰³ The concept of responsibility to protect emerged after genocide in Rwanda (1994) and the act of ethnic cleansing in the Srebrenica, Bosnia (1995) to which the international community failed to respond in time. There were about 800,000 people massacred within only three months in Rwanda in 1994 due to the slow reactions of the international community.⁷⁰⁴

In 2000, the Secretary General of the United Nations, Kofi Annan, in his report to the General Assembly challenged the international community to find a consensus on the basic question of sovereignty.⁷⁰⁵ This is, in part, to address a dilemma on the inability of the international community to address humanitarian crises in the face of State sovereignty. In answering the challenge, the International Commission on Intervention and State Sovereignty (ICISS), was established. The Commission worked for one year to present a report. The term “Responsibility to Protect” was first formally introduced in the 2001 report by the ICISS.⁷⁰⁶ The RtoP has basic principles which state that “State sovereignty implies responsibility” and consists of elements of the State responsibility to prevent, the responsibility to react, and the responsibility to rebuild.⁷⁰⁷

The RtoP provides the last resort for the international community to intervene with two primary considerations; the first is the presence of serious human rights abuses

⁷⁰³ Universal declaration of Human Rights (10 December 1948), UNGA res 217A, art 2; Reprinted in *International Instruments of the United Nations* (New York, United Nations, 1997) at 85.

⁷⁰⁴ Ramesh Thakur *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) at 244.

⁷⁰⁵ ICISS *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at vi. At the UN General Assembly in 1999 and again in 2000 the UN Secretary-General posed a question for international community to answer: “...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”

⁷⁰⁶ International Commission of Intervention and State Sovereignty was formed by Canadian Government in response to then Secretary General Kofi Annan’s challenge to governments to resolve tension between sovereignty and human rights.

⁷⁰⁷ ICISS *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at xi.

among parties in the war; the second is the inability or unwillingness of the national government to stop the atrocities.⁷⁰⁸ The intervention of the international community based on this norm hence may be against the national wish and has further broad implications, namely the change of the traditional definition of an international security threat, which means an issue previously regarded internal now can be considered a threat to international security.⁷⁰⁹ While the controversy around the RtoP focuses mainly on the intervention and sovereignty, the thesis stresses the element of prevention and seeks to show that the prevention in the RtoP supports an argument of the need of a standard in the global trade of small arms. The cases of genocide in Rwanda and ethnic cleansing in Srebrenica mentioned above both took place in an intra-State war context where small arms may have played a role in facilitating the atrocities.

State sovereignty, territorial integrity and the principle of non-intervention are the basis on which the United Nations treats its members.⁷¹⁰ However, it was intra-State conflicts, such as in Rwanda and Yugoslavia which caused great casualties and serious abuse of human rights which may have altered the understanding of the role of individual human beings in State-based sovereignty. This presents a difficult challenge to the United Nations to reconcile its principle of member States' sovereignty with the mandate to maintain international peace and security.⁷¹¹

Chapter VII of the UN Charter allows the Security Council to intervene on an issue if it is considered a threat to international peace and security. The RtoP offers the Security Council the possibility to intervene, under Chapter VII of the UN Charter, on an issue which has traditionally been regarded as domestic and not a threat to international peace and security after the threshold criteria has been fulfilled.⁷¹²

⁷⁰⁸ Michael E Smith *International Security: Politics, Policy, Prospects* (Palgrave Macmillan, 2010) at 113.

⁷⁰⁹ *Ibid.*

⁷¹⁰ Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 2 (1, 4, 7).

⁷¹¹ Ramesh Thakur *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) at 245.

⁷¹² ICISS *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at 29-35.

The most important aspect of the responsibility to protect is prevention, to prevent things before they happen. The ISSS states that its first and most important goal is to save lives and hence the responsibility to prevent is the “single most important dimension of the responsibility to protect”.⁷¹³ Despite this recognition of the importance of the element of prevention, not much attention is paid to the prevention aspect, particularly in terms of a collective international responsibility.⁷¹⁴ Later, with the input of civil society, the ICISS developed a recommendation that more emphasis should be placed on the prevention of conflict/protection of civilian aspects of the report.⁷¹⁵

The RtoP does not provide an explicit link between arms transfer and the State responsibility to protect. Nevertheless, drawing the association of the responsibility to protect with the uncontrolled spread of small arms and putting the element of prevention in the RtoP as priority,⁷¹⁶ States are indirectly requested to control the circulation of the weapons in order to prevent them being used in crimes against humanity or creating any “other man-made crises which put populations at risk.”⁷¹⁷

1. Response to the RtoP

After the introduction of the RtoP by the ICISS in 2001, there was positive acceptance by many States as it was adopted in the 2005 World Summit organized by the United Nations. The world leaders agreed on a document which includes three paragraphs related to the responsibility to protect under the sub-title “responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity”.⁷¹⁸ Paragraph 138 of the World Summit Outcome states that:

⁷¹³ Alex J Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, 2009) at 52.

⁷¹⁴ Hitoshi Nasu “Operationalizing the ‘Responsibility to Protect’ and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict” (2009) 14 J Conflict & Security L 209 at 210.

⁷¹⁵ Alex J Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, 2009) at 72.

⁷¹⁶ ICISS *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at xi.

⁷¹⁷ ICISS *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at xi.

⁷¹⁸ 2005 World Summit Document (A/RES/60/1 of 16 September 2005), para 138-140.

Individual State has responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. And this responsibility entails the prevention of such crimes, including their incitements, through appropriate and necessary means. We accept that responsibility and will act in accordance with it...⁷¹⁹

The following paragraph 139 acknowledges that the international community has responsibility to take collective action “to help to protect populations”⁷²⁰. The world leaders also pledge that:

We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁷²¹

One of the key points in paragraph 138 is that the States explicitly acknowledge the acceptance of responsibility and undertake to act in accordance with it. Following the acknowledgment by the world’s leaders in the World Summit Document, the United Nations Security Council later endorsed the relevant paragraph of the World Summit Document in its resolution 1674 on 24 April 2006. The endorsement of both the United Nations General Assembly and Security Council reflects the broad level of acceptance of the RtoP by governments. The Security Council affirms the 2005 World Summit Outcome in which governments recognized that “development, peace and security and human rights are interlinked and mutually reinforcing.”⁷²² As the thesis will show in the next section, although in many cases the RtoP is referred to by States and by the UN resolutions, some States show resistance to the RtoP.

The world leaders’ acceptance of the RtoP may have great implications in international relations. If the responsibility to protect does emerge full-fledged as an accepted norm of international law, it will generate a revolution in consciousness to protect population in international relations.⁷²³ The essential leitmotif of the responsibility to protect maintains that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes

⁷¹⁹ Ibid, para 138.

⁷²⁰ Ibid, para 139.

⁷²¹ Ibid, para 140.

⁷²² Statement by the President of the Security Council, S/PRST/2008/43 of 19 November 2008.

⁷²³ Christopher C Joyner “The Responsibility to Protect’: Humanitarian Concern and the Lawfulness of Armed Intervention” (2007) 47(3) Va J Int’l L 693.

against humanity.⁷²⁴ Sovereignty should mean that the people are protected from these atrocities and there is a common responsibility to prevent these events from happening. The prevention is applied so as to impose the responsibility to protect long before the carnage begins.⁷²⁵

The level of acceptance of or resistance to the RtoP is reflected in how it is referred to as a concept, norm, or doctrine. The language used to describe the RtoP is “norm” or “emerging norm”, and “doctrine” by those who regard it as having high status in international law, and “concept” or “idea” by those who have reservations or disapprove of it.⁷²⁶ Apparently, the resistance is grounded in fear that the RtoP will be a legal obligation and concern for its breadth.⁷²⁷

The RtoP encompasses legal and normative values and is understood differently as an evolving trend, a political commitment and emerging norm.⁷²⁸ The acceptance of the RtoP as reflected in the 2005 World Summit Outcome is simply because it is a materialisation of a norm which has long existed and is anchored in “well established principles of international law”.⁷²⁹ As a commentator points out, the RtoP has a similar source to the 1899 Hague Convention and its Martens clause of the principle of “laws of humanity, and the requirement of public conscience”, as well as other human rights conventions.⁷³⁰ Similarly, some States have the same opinion that the

⁷²⁴ Ibid.

⁷²⁵ Ibid.

⁷²⁶ Jeremy Sarkin “Why the Responsibility to Protect (R2P) as a Doctrine or (Emerging) Norm to Prevent Genocide and Other Massive Human Rights Violations is on the Decline: The Role of Principles, Pragmatism and the Shifting Patterns of International Relations” (2009) 47 *Politorbis* 51 at 57; see also a debate in the General-Assembly over the UN Secretary-General report on the implementation of the RtoP which shows various terms such as doctrine, concept, norm, idea are used by States in describing the RtoP (official records of the General Assembly, A/63/PV.96-101). The term “concept” is now also used by the proponents of the RtoP; that may reflect a situation where the RtoP is not welcome by all.

⁷²⁷ Jeremy Sarkin “Why the Responsibility to Protect (R2P) as a Doctrine or (Emerging) Norm to Prevent Genocide and Other Massive Human Rights Violations is on the Decline: The Role of Principles, Pragmatism and the Shifting Patterns of International Relations” (2009) 47 *Politorbis* 51 at 57.

⁷²⁸ Hitoshi Nasu “Operationalizing the ‘Responsibility to Protect’ and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict” (2009) 14 *J Conflict & Security L* 209 at 209.

⁷²⁹ Report of the Secretary-General, Implementing the Responsibility to Protect (A/63/677), 12 January 2009, at 5, para 3.

⁷³⁰ Jeremy Sarkin “Why the Responsibility to Protect (R2P) as a Doctrine or (Emerging) Norm to Prevent Genocide and Other Massive Human Rights Violations is on the Decline: The Role of

RtoP is not new and is “firmly based in international law, including international human rights and humanitarian law”.⁷³¹ It is in its implementation into a policy and operational readiness in current international relations that the RtoP faces challenges.⁷³²

In 2009, in seeking clarification on implementation to “give doctrinal, policy, and institutional life” to the RtoP, the UN Secretary-General presented a report to member States for their consideration.⁷³³ The debate on the report is productive and shows support from the majority of States to the report on implementation of the RtoP, although some concerns can still be heard.⁷³⁴

The RtoP inevitably faces challenges of interpretations based on State interests. Some governments show their resistance to the RtoP and worry about its use and consequence to State sovereignty. For example, in the Security Council debate, the Russian Federation cited its action in intervening into Georgia in 2008 as being an act of responsibility to protect, to protect Russian civilians and the intervention itself was a role of a peacekeeper.⁷³⁵

The UN General Assembly later adopted a short resolution on the RtoP consisting of two operational paragraphs, which take note of the report of the Secretary-General and decide “its consideration of the responsibility to protect”.⁷³⁶ Debate on this resolution reflects States’ view towards the RtoP in which some fear that the RtoP may undermine State sovereignty. Although the resolution is not successful to

Principles, Pragmatism and the Shifting Patterns of International Relations” (2009) 47 *Politorbis* 51 at 56; see, the Hague Convention (II) regarding laws and Custom of War on Land (1899).

⁷³¹ Statements of De Klerk (Netherlands), McKay (New Zealand) at the General Assembly debate, July 2009 (A/63/PV.97-98). Others (for example, Switzerland) emphasise that although the RtoP covers numerous existing international law obligations, it remains a political concept and does not in itself constitute a norm.

⁷³² Report of the Secretary General, Implementing the Responsibility to Protect (A/63/677), 12 January 2009, at 1.

⁷³³ Report of the Secretary-General, Implementing the Responsibility to Protect (A/63/677), 12 January 2009, at 4, para 2.

⁷³⁴ Official records of the General Assembly, A/63/PV.96-101. Cuba, Venezuela, Yemen, and Pakistan are known for their negative comments on the RtoP.

⁷³⁵ Statement of Vitaly Churkin of the Russian Federation in the Security Council meeting on the agenda “The Situation in Georgia”, New York, 8 August 2008 (S/PV.5952).

⁷³⁶ A/RES/63/308 of 14 September 2009. The resolution does not use the terms “concept” or “norm” in its language, and simply refers to the “RtoP”.

outlining practical implementation at this stage, it secures a follow up consideration of the RtoP.

2. RtoP and its linkage with small arms

Despite intervention and sovereignty argument dominating the discussion on the RtoP, the 2001 ICISS report covers other new security issues. There is an acknowledgement of the marked security phenomenon of the proliferation of armed conflicts within States since the end of the cold war.⁷³⁷ The report touches the issue of small arms in acknowledging that these internal conflicts are made more complex and lethal,”in particular by the proliferation of cheap, highly destructive weapons”,⁷³⁸ which results in increased vulnerability for civilians as they are often deliberately targeted.⁷³⁹ The ICISS report on the RtoP identifies that these internal conflicts are fuelled by arms transfers originated in the developed world which in turn will have global destabilising effects in forms of refugee flows, terrorism, spread of infectious disease, and organized crime.⁷⁴⁰

The Report of the High-Level Panel on Threats, Challenges and Changes (2004) embraces the RtoP to meet global threats and challenges.⁷⁴¹ The report identifies the threat of intra-State conflict and suggests that the UN give more attention to “developing international regimes and norms to govern some of the sources and accelerators of conflict”, which include arms control and disarmament regimes.⁷⁴² The report makes two recommendations for States in relation to the issue of small arms: to encourage the States to conclude the negotiations on legally binding tracing and marking and report accurately on all elements on the UN register of conventional arms.⁷⁴³

⁷³⁷ ICISS *The Responsibility to Protect* (Ottawa, International Development Research Centre, 2001) at 4, para 1.16.

⁷³⁸ Ibid, at 4, para 1.18.

⁷³⁹ Ibid, at 4, para 1.19.

⁷⁴⁰ Ibid, at 4, para 1.20.

⁷⁴¹ Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Changes *A More Secure World: Our Shared Responsibility* (United Nations, 2004).

⁷⁴² Ibid, at 35, para 89.

⁷⁴³ Ibid, at 36, para 96 and 97; the negotiations in the UN on marking and tracing concluded in 2005 (UNGA decision 60/519, 8 December 2005) but failed to adopt a legally binding instrument.

Security Council resolution 1674 (2006) on the protection of civilians in armed conflict reaffirms the acceptance of the provision of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect.⁷⁴⁴ The acceptance of the responsibility to protect is encouraged by the regrettable fact that “civilians account for the vast majority of casualties in situations of armed conflict”.⁷⁴⁵ Most important is that the resolution is concerned with, and acknowledges, the effects of the use of small arms on civilians affected by armed conflict.⁷⁴⁶ By now, the Security Council resolution 1674 (2006) has provided a link between the civilian protection in armed conflict, the responsibility to protect, and the use of small arms that may affect civilians.

The responsibility to protect should be able to regulate the acquisition and prevention of the diversion of legally acquired weapons to illicit markets.⁷⁴⁷ It further reaffirms understanding that responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, as agreed by the heads of government in 2005, should include the stricter control of small arms trade as such weapons are recognized to facilitate those crimes occurrence.

A State might, by now, think about the State responsibility to protect in engaging in small arms trade to prevent the weapons from being used to commit or facilitate the commission of genocide, war crimes, ethnic cleansing, and crimes against humanity.⁷⁴⁸ The RtoP does not merely focus on humanitarian intervention, the concept is wider and more far-reaching and stresses the element of prevention, as opposed to intervention, as the most important element.⁷⁴⁹ The responsibility to prevent a conflict and protect civilians, then is compatible with the need to regulate

⁷⁴⁴ SC res 1674 (2006), preamble para 4; References to the RtoP are also in SC res 1755 (2007); SC res 1828 (2008).

⁷⁴⁵ SC res 1674 (2006), preamble para 4; SC res 1706 (2006), preamble para 2, the Security Council recalled its earlier reaffirmation of the provisions.

⁷⁴⁶ SC res 1674 (2006), preamble para 5.

⁷⁴⁷ Statement of Briz Gutierrez of Colombia, on the responsibility to protect at the Security Council open debate on the protection of civilians in armed conflict, New York, 28 June 2006.

⁷⁴⁸ The commitment of the world governments in 2005 Summit Outcome Document (A/Res/60/1) cites the four atrocities in this order, genocide, war crimes, ethnic cleansing, and crimes against humanity.

⁷⁴⁹ Alex J Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge, 2009) at 98.

the free flow of small arms as the weapons encourage conflicts and put civilians in danger, either directly or indirectly.⁷⁵⁰

As the United Nations is still searching to implement the RtoP into a practical policy, the point of protecting civilians has become familiar ground for adoption of the Security Council resolution 1970 (2011), which imposed an arms embargo, asset freeze, and use of force against Libya. In the preamble paragraph, it mentions the need to recall “the Libyan authorities’ responsibility to protect its population”.⁷⁵¹ The reference to “the responsibility of the Libyan authorities to protect the Libyan population” was reiterated in the SC resolution 1973 (2011) which authorized the use of force after Libya failed to fulfil the responsibility and comply with the resolution 1970 (2011).⁷⁵² France, co-sponsor of the resolution, argues that the resolution provides “means to protect the civilian populations in Libya” and stresses the importance of swift action for the Council does not have “much time left”.⁷⁵³ The statement of the UK after the voting reiterates the justification of the resolution adopted which is to end violence and to protect civilians.⁷⁵⁴

The link between the issue of small arms and the RtoP started to emerge among scholars. For example, Stephanie LK Koorey mentions RtoP briefly in the discussion of States’ engagement in response to the proliferation of small arms.⁷⁵⁵ She is of the

⁷⁵⁰ The association of the concept of responsibility to protect with small arms is relatively new. There are limited references on the association. International NGOs, such as the ICRC, have been trying to convince States to have a responsible arms trade in its statements on the small arms issue. The ICRC’s position on the Arms Trade Treaty, for example, supports an international standard in conventional transfer based on “States’ responsibilities under international law” www.icrc.org/web/eng/siteeng0.nsf/html/weapons-statement-011009. Last accessed on 18 October 2009. See also the ICRC statement, 9 October 2009 at the United Nations General Assembly, on agenda “General and complete disarmament–Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects” www.icrc.org/web/eng/siteeng0.nsf/html/united-nations-statement-091009. Last accessed on 18 October 2009.

⁷⁵¹ UNSC res 1970 (2011) of 26 February 2011.

⁷⁵² UNSC res 1973 (2011) of 17 March 2011.

⁷⁵³ Statement of France in the Security Council meeting, 17 March 2011 (official records of the Security Council S/PV.6498).

⁷⁵⁴ Statement of the UK in the Security Council meeting, 17 March 2011 (official records of the Security Council S/PV.6498).

⁷⁵⁵ Stephanie LK Koorey “Orphans’ and Icons: Small Arms Control and Armed Groups in Southeast Asia” (PhD Thesis, Australian National University, 2008) at 333.

view that the concept of RtoP within the spectrum of humanitarian response, may be a useful means for dealing with small arms control when States accept the doctrine.⁷⁵⁶

E. Summary

A sovereign State, as the heads of States agreed in 2005 world summit, has responsibility to protect its citizens from, inter alia, genocide, war crimes, ethnic cleansing, and crimes against humanity. Sovereignty where responsibility for the arms transfer is concerned, means transfer of arms must be done in a responsible manner. In this context, the issue of small arms is discussed in view of the fact that the wide availability of small arms may greatly facilitate the above-mentioned atrocities. Therefore, it is expected that a sovereign State is capable of keeping its people safe from the excessive flow of small arms and also of helping other countries in avoiding it. In other words, a sovereign State has the responsibility to protect its people from the impacts of the wide availability of small arms by fulfilling its responsibility to regulate the flow of these weapons.

The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts provide a new progressive contemporary interpretation of State responsibility, as a State may be held responsible for in assisting internationally wrongful acts. The Articles are complemented by the emerging norm of the RtoP in efforts to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity. The RtoP stresses the importance of the prevention element; that the protection starts before the crimes take place. It is to prevent the atrocities before they happen. The RtoP and the ILC's Articles support the effort to regulate the trade of small arms as control on their trade serves as a preventive element in avoiding atrocities.

Sovereignty implies responsibility as States have a responsibility towards the international community and must behave in accordance with acceptable human rights and humanitarian norms. A situation where there are no global restrictions on

⁷⁵⁶ Stephanie LK Koorey "Orphans' and Icons: Small Arms Control and Armed Groups in Southeast Asia" (PhD Thesis, Australian National University, 2008) at 333.

small arms transfers, so that these weapons are widely available, is not in conformity with the principles of State responsibility and respect for human rights.

The norm of the RtoP to restrict small arms trade in order to prevent them from being used in crimes against humanity needs to be widely well accepted by States to make it a strong legal argument. The RtoP association with the small arms issue is found when protection of civilians is in question. As small arms mainly kill civilians, it is the State responsibility to protect all civilians from the danger of small arms proliferation. In practice, the link between the responsibility to protect civilians and small arms has been shown, among other things, in the Security Council resolutions related to the protection of civilians in armed conflict. It is in this understanding of protecting civilians, that the States have a responsibility to strengthen the control of small arms trade.

Chapter V: International Efforts to Restrict the Uncontrolled Circulation of Small Arms

A. Introduction

Transfer of weapons from a political perspective is potentially a foreign policy tool, as was the practice during the Cold War era. The Soviet Union armed its allies and the US did the same, including supporting the mujahidin who fought the Soviet occupation in Afghanistan in the 1980s with several hundred thousand tons of weapons, including small arms.⁷⁵⁷ The availability of arms may change the political security balance in a region and change the political situation within a country. History provides some examples. One of those, the sudden availability of weapons in the Republic of Georgia in 1991, altered the dynamics of political interaction leading to militarization of politics and the use of force to settle disputes.⁷⁵⁸

A flow of arms to a certain region poses a threat to the established balance of power. This was demonstrated in 2006 when Venezuela signed a deal with the Russian Federation to supply the former with 100,000 of the popular Kalashnikov assault rifles.⁷⁵⁹ The move was clearly stated by the Venezuelan President as being in anticipation of the perceived threat of a possible US invasion.⁷⁶⁰ The deal attracted criticism and a strong reaction from the US government which was of the view that the deal would not be good for the region and expressed concerns that the weapons might even leak to leftist guerrillas in the region.⁷⁶¹

⁷⁵⁷ Larry Kahaner *AK-47: The Weapon that Changed the Face of War* (John Wiley&Sons, Inc, New Jersey, 2007) at 66. The US reportedly supplied as many as four hundred thousand AKs to the Mujahedeens in Afghanistan during Soviet invasion in Afghanistan; Milton Bearden “Afghanistan, Graveyard of Empires” (2001) 80 *Foreign Aff* 17 at 20-21.

⁷⁵⁸ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 62.

⁷⁵⁹ “Russia in Arms Talk with Chavez” *BBC News*, Wednesday, 31 May 2006 <<http://news.bbc.co.uk/2/hi/americas/5033768.stm>>. Last accessed 13 October 2010.

⁷⁶⁰ *Ibid.*

⁷⁶¹ “Venezuela’s One-man Arms Race Triggers Alarm in US” *Sydney Morning Herald*, 25 March 2005 <www.smh.com.au/news/World/Venezuelas-oneman-arms-race-triggers-alarm-in-US/2005/03/24/1111525293452.html>. Last accessed 14 October 2010.

There are many State interests implicated in small arms trade, either economic or political-security, which will be affected once there is a treaty to regulate arms trade. Some States rely heavily on their defence industry, and arms trade also has a more strategic military value beyond economic benefits. In a traditional view, arms trade is more a political than an economic issue, although the circumstances after the end of the Cold War may have changed the motive more towards economic considerations. With the world spending over US\$1 trillion a year,⁷⁶² the global arms trade involves significant value estimated to be worth around US\$60 billion per year.⁷⁶³ Annual, authorised, small arms trade alone exceeds US\$6 billion.⁷⁶⁴ Economic interest is, arguably, one of strong reasons behind the reluctance of States to transparently regulate small arms trade. Those who benefit from it do not want any international binding instrument that would cut the economic advantage the (small) arms industry generates.⁷⁶⁵

Major arms producers are also major world powers, which are in a clear conflict of interest in controlling or restricting the arms trade. Weapons are, and have been, inherently a political issue because States garner diplomatic and strategic benefits from State-sponsored weapons sales or transfer.⁷⁶⁶ This rightly implies that the weapons trade is about power, legitimacy, and strategic interests as well as about money and diplomacy, and all of these may weaken the efforts to regulate and diminish the trade.⁷⁶⁷

⁷⁶² UN Secretary-General's statement at the UN Conference on the Arms Trade Treaty, New York, 3 July 2012.

⁷⁶³ BBC "UN Global Arms Treaty Talks Stalled", 3 July 2012 < <http://www.bbc.co.uk/news/world-18684022>>.

⁷⁶⁴ Small Arms Survey "Weapons and Markets" < <http://www.smallarmssurvey.org/weapons-and-markets.html>>. Last accessed 22 July 2012.

⁷⁶⁵ Rachel Stohl "Reality Check: The Danger of Small Arms Proliferation" (2005) 6 *Geo J Int'l Aff* 71 at 74.

⁷⁶⁶ Lora Lumpe "Aiming for Prevention: Approaches to Controlling Availability Existing International Efforts"(Norwegian Initiative on Small Arms Transfer), Conference paper, Plenary Contribution to IPPNW Conference *Aiming for Prevention: International Medical Conference on Small Arms, Gun Violence, and Injury*. Helsinki, Finland, 28-30 September 2001 <<http://www.ippnw.org/ResourceLibrary/Hels/Lumpe.pdf>>. Last accessed on 5 February 2010.

⁷⁶⁷ Ibid.

Trends show that some developing countries now have been able to develop their small arms industry and are exporting their weapons to other developing countries.⁷⁶⁸ This creates more players in the small arms trade which means that more States with investment in the arms industry are at risk from the existence of an international regulation.

Against this backdrop, this chapter analyses the nature of the discussion of small arms in the international system, particularly in the framework of the United Nations, both in the Security Council and the General Assembly. Efforts of the international community to adopt or formulate instruments to regulate small arms are probed and examined to identify how far the world's governments have progressed in this issue and why the instruments adopted have not been working well in restricting the arms trade. The chapter emphasises the United Nations' work to promote transparency in small arms transfer in the absence of an existing international legal instrument regulating the trade of small arms.

Conventional arms disarmament in the United Nations started in 1947 when the Security Council created a commission to deal with the effort to reduce conventional arms.⁷⁶⁹ During the Cold War era, the issue of small arms was not considered a main issue as, in this period, the world's attention focused on the higher profile issue of weapons, particularly weapons of mass destruction. The situation changed in the late 1990s when the world found that it had an excessive supply of small arms piling up from the Cold War. Only then did the world start to focus on the problem of small arms. This was marked by the emergence of multilateral discussions in the United Nations General Assembly under the topic of international arms transfer.⁷⁷⁰ The early resolution focused on small arms entitled "Assistance to States for curbing the illicit

⁷⁶⁸ Michael E Smith *International Security: Politics, Policy, Prospects* (Palgrave Macmillan, 2010) at 129.

⁷⁶⁹ UNSC resolution S/RES/18 (1947).

⁷⁷⁰ In 1991 the issue of small arms did not stand alone and was discussed under the title "International arms transfers" (A/Res/ 46/36 H of 6 December 1991); Sporadic effort, albeit not exclusively on small arms, did take place before 1990s to stop sales of weapons to a certain area, for example, the Tripartite Declaration between the United States, Britain, and France. See, Alexander Gillespie *A History of the Laws of War: The Customs and Laws of War with Regards to Arms Control* (Oxford, Hart Publishing, 2011) vol 3, at 46-47.

traffic in small arms and collecting them”, was adopted in 1994.⁷⁷¹ Subsequently in 1995, the UN General Assembly adopted a proper small arms focused-resolution entitled “Small arms”.⁷⁷² At a later stage, the Security Council was also involved in the discussion of small arms as a proper subject and acknowledged the importance of finding a solution to curb and restrict these weapons.⁷⁷³ Apart from sanctioning an arms embargo, which generally includes small arms, the involvement of Security Council mainly takes the form of the discussion of the Secretary-General’s periodic report, started in 2002, on small arms.⁷⁷⁴

Although limited in terms of effectiveness in restricting the uncontrolled small arms proliferation, the international community of States has adopted a series of instruments which the thesis will examine. Those documents are, among other things, the Firearms Protocol,⁷⁷⁵ the UNPoA,⁷⁷⁶ the International Tracing Instrument (ITI),⁷⁷⁷ and the UN Register.⁷⁷⁸ These documents will be examined to ascertain their purposes and rationales, and how they have been implemented. Analysis of the documents will reveal their strengths and their shortcomings and help to explain why the contemporary instruments adopted do not help much in restricting the proliferation of small arms, although they do provide benefit in setting a norm and serving as a basis for the subsequent control effort. The issue of small arms is also dealt with by the General Assembly, where its deliberation keeps the issue alive, and on the radar of the governments.

⁷⁷¹ UNGA resolution A/RES/ 49/75 G of 15 December 1994.

⁷⁷² UNGA resolution A/RES/50/70 B of 12 December 1995.

⁷⁷³ The involvement of the Security Council, started in 2002, is mainly in the discussion responding to the Secretary-General report on small arms presented to the Council, and the inclusion of small arms in an arms embargo.

⁷⁷⁴ UN Document S/2002/1053 of 20 September 2002.

⁷⁷⁵ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Conventions against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005), 2236 UNTS 208; DOC A/55/383/add.2.

⁷⁷⁶ 2001 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, UN Doc A/CONF.192/15.

⁷⁷⁷ International Instrument to Enable States to Identify and Trace, in Timely and Reliable Manner, Illicit Small Arms and Light Weapons (adopted 8 December 2005), UN Doc A/CONF.192/15.

⁷⁷⁸ UNGA Resolution 46/36 L of 9 December 1991.

With regard to the Security Council involvement in the issue of small arms, the development of the discussion can be followed through two tracks. The first is the arms embargo as a legal mechanism imposed by the Security Council which binds all the UN members; the second is the discussion of the Secretary-General's report on small arms to the Security Council. The report prepared by the Secretary-General provides recommendations on small arms that member States may take up. In addition, the report describes at what stage the progress to combat small arms proliferation is, and shows the development, challenges, and key areas of focus.

B. Small Arms in the Security Council

1. Arms embargo

The Charter of the United Nations states that the purpose of the world body is to maintain peace and security, and to implement that purpose by taking effective “collective measures for the prevention and removal of threats to the peace”.⁷⁷⁹ The Charter gives power to the Security Council and the responsibility to maintain peace, and take necessary measures to control situations which are considered threats to international peace and security.⁷⁸⁰

In performing its primary responsibility, the Security Council may use its powers, which include applying economic sanctions and measures not involving the use of force, governed by Chapter VII (action with respect to threats to the peace, breaches of the peace, and acts of aggression), to deal with threats to international peace and security.⁷⁸¹ In general, sanctions imposed by the Security Council could be an arms or/and economic embargo, where members of the United Nations are prohibited from becoming involved in military, trade and economic activities with the targeted

⁷⁷⁹ Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 1(1).

⁷⁸⁰ Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 24.

⁷⁸¹ Charter of the United Nations (26 June 1945), 1 UNTS XVI, chp VII.

government or entity.⁷⁸² If all other options are considered inadequate, the next option is the use of force.⁷⁸³

The wording used in a resolution represents the legal weight of each resolution. While all Security Council decisions are legally binding, a sanction through a Security Council Resolution is of two types, voluntary and mandatory; the wording specifies the type. The Security Council voluntary resolution uses the wording “calls upon all States,” while the mandatory resolution states “decides that all States shall” in key operative paragraphs.⁷⁸⁴ The use of the phrase “calls upon all States” is more symbolic and political than “decides that all States shall” which implies a legal obligation.⁷⁸⁵ For instance, the Security Council Resolution 1904 (2009) on economic and arms embargo against the Al-qaida, Osama bin Laden, and the Taliban states: “*Decides* that all States take the measures as previously imposed by paragraph 4(b)...with respect to Al-qaida” [emphasis in original].⁷⁸⁶

On the other hand, resolution 1882 (2009) on children and armed conflict uses a different wording: “*Calls upon* those parties listed in the annexes of the Secretary-General’s report on children and armed conflict” [emphasis in original].⁷⁸⁷ Despite different wording in the Security Council resolutions, there is general agreement that the resolutions adopting sanction measures are binding.⁷⁸⁸ Hence, all the Security Council resolutions on arms embargo are considered mandatory.

Economic embargoes are seen as creating unwanted effects of downgrading the lives of ordinary people, hence, arms embargoes are considered “smarter” and preferable to

⁷⁸² Charter of the United Nations, art 41 explains that the “Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions...”

⁷⁸³ Charter of the United Nations (1945), art 42.

⁷⁸⁴ Damien Fruchart and others *United Nations Embargoes: Their Impact on Arms Flows and Target Behaviour* (SIPRI, 2007) at 1.

⁷⁸⁵ *Ibid*, at 2.

⁷⁸⁶ UNSC res 1904 (2009) on 17 December 2009, operative para 3.

⁷⁸⁷ UNSC res 1882 (2009) on 4 August 2009, operative paragraph 5(c).

⁷⁸⁸ Vera Gowlland-Debbas “Sanctions Regimes under Article 41 of the UN Charter” in Vera Gowlland-Debbas (ed) *National Implementation of United Nations Sanctions: A Comparative Study* (Martinus Nijhoff Publishers, 2004) at 19.

economic because they target the elite or armed force, and limit humanitarian impacts.⁷⁸⁹

A decision to impose an arms embargo is taken after the Security Council has been convinced that a situation is a threat, and imposing a sanction is necessary. Chapter VII of the Charter of the United Nations guides the Council in its action with respect to threats to peace, breaches of the peace and acts of aggression. The Security Council, firstly, “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken”.⁷⁹⁰ After deciding that there is a threat to peace, breach of the peace, or act of aggression, the Security Council then calls on the parties to comply with their obligations under the Charter to settle their dispute by peaceful means.⁷⁹¹ Whenever the tension continues, the Security Council under article 41 decides on non-military enforcement measures. The imposition of an arms embargo is one of the non-military enforcement measures.⁷⁹²

The arms embargo’s main purpose is to deny access of parties in conflict to weapons, thereby inducing military stalemates and preventing conflicts from escalating.⁷⁹³ It is in this context arms embargoes have a role in controlling the trade of small arms. A supply restriction incorporated in a Security Council arms embargo can serve as a potentially powerful tool to address the issue of illicit trade of small arms.⁷⁹⁴ Some arms embargoes are implemented with the support of Security Council sanctions

⁷⁸⁹ Damien Fruchart, Paul Holtom, Siemon T Wezeman, Daniel Strandow and Peter Wallensteen *United Nations Embargoes: Their Impact on Arms Flows and Target Behaviour* (SIPRI, 2007) at 5.

⁷⁹⁰ Charter of the United Nations, art 39.

⁷⁹¹ *Ibid*, art 39-40. See also Max Hilare *United Nations Law and the Security Council* (Ashgate Publishing Limited, 2005) at 253.

⁷⁹² Charter of the United Nations (26 June 1945), 1 UNTS XVI, art 41, which states: “The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

⁷⁹³ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (Routledge, 2008) at 140.

⁷⁹⁴ Report of the Secretary-General on Small Arms to the United Nations Security Council, S/2008/258, 17 April 2008 at 11.

committees to oversee their implementation by reaffirming, recalling, or reiterating the demand that States enforce the embargoes.⁷⁹⁵

There is a stark contrast in the use of arms embargoes during and after the Cold War. Until 1990, the United Nations rarely imposed arms embargoes. There were only two arms embargoes imposed by the Security Council in the period 1945 to 1990, on Rhodesia (now Zimbabwe) on 16 December 1966, and South Africa on 4 November 1977.⁷⁹⁶ Acting under Chapter VII of the UN Charter, the sanction on Rhodesia was a combination of economic and arms embargo, in which States were to prevent export and import of Rhodesian product such as asbestos, iron ore, tobacco, sugar, meat products; and any activities that were “calculated to promote the sale or shipment to Southern Rhodesia of arms, ammunition of all types, military aircraft, military vehicle, and equipment”.⁷⁹⁷ The Security Council imposed an arms embargo as the arms acquisition by South Africa was considered “a threat to maintenance of international peace and security” and “*decide[ed]* that all States shall cease forthwith any provision to South Africa of arms and related *materiel* of all types”[emphasis in original].⁷⁹⁸

The end of the Cold War changed the Security Council’s considerations on imposing non-military measures in many situations and arms embargo, as a means to change the behaviour of a targeted country/entity, is now a more preferred form of sanction and its use drastically increased after the end of the Cold War. In comparison to only two arms embargoes in the period 1945-1990, in 2010 alone there were 10 active arms embargoes in place, including a prohibition against transfer of small arms to targeted States and entities.⁷⁹⁹ The increasing number of embargoes is mainly because the five permanent States in the Security Council (P5), now sometimes find it easier to agree on imposing arms embargoes (assuming there are no direct interests to any of the P5) compared to the time of the Cold War when the P5 was involved in fierce

⁷⁹⁵ Report of the Secretary-General on Small Arms to the United Nations Security Council (S/2008/258, 17 April 2008) at [39].

⁷⁹⁶ UNSC res 232 (1966) of 16 December 1966; and UNSC res 418 (1977) of 4 November 1977.

⁷⁹⁷ UNSC res 232 (1966), operative para 2.

⁷⁹⁸ UNSC res 418 (1977).

⁷⁹⁹ UNSC Sanctions Committees <www.un.org/sc/committees/>. Last accessed on 20 April 2010.

ideological competition among themselves and the veto right was likely to be used when any party pushed the agenda on embargoes. As the result of this geo-political change, many of the armed conflicts, which were traditionally considered within domestic jurisdiction, now can be recognized as constituting a threat to international peace and security.⁸⁰⁰

Under article 41, the Security Council has imposed various arms embargoes in various situations which include imposing comprehensive sanctions, among others, on Somalia (1992), the National Patriotic Front of Liberia (NPFL), Libya (1992), Rwanda (1992), the Federal Republic of Yugoslavia (1996), Sierra Leone (1997), Afghanistan (1998), Eritrea and Ethiopia (2000), Iran (2006), and Libya (2011).⁸⁰¹ Most arms embargoes sanctions are to prohibit the sale, transfer or supply of arms, ammunition, military equipment, goods and related services to target States, armed groups, entities, or individuals. An example of such arms embargoes is the Security Council resolution 733 (1992) which:

Decides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purpose of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise;⁸⁰²

Since small arms are the weapons of choice in most conflicts, they constitute the majority of transfers which were impacted upon by the embargoes.⁸⁰³ Therefore, any violation of an embargo is most likely to involve non-compliance on transfer of small arms, as this fact is underlined and acknowledged, among others, by the Security Council Resolution 1519 (2003) of April 2003. Under the circumstances, the resolution 1519 (2003) established a Monitoring Group which “focus[es] on the on-

⁸⁰⁰ Max Hilaire *United Nations Law and the Security Council* (Ashgate Publishing Limited, 2005) at 253.

⁸⁰¹ See the UN Security Council Sanction Committees < <http://www.un.org/sc/committees/>>, last accessed 17 June 2012.

⁸⁰² UNSC res 733 (1992), operative para 5.

⁸⁰³ Damien Fruchart and others *United Nations Embargoes: Their Impact on Arms Flows and Target Behaviour* (SIPRI, 2007) at 6.

going arms embargo violations including transfer of ammunition, single use weapons, and small arms”.⁸⁰⁴

The recent arms embargoes imposed by the Security Council describe the effort to force a change in the target behaviour and prevent transfer of weapons. Imposing an arms embargo with the main purpose of stopping the flow of arms and easing the violence, however, has its limitations. The arms embargo imposed on the former Yugoslavia by Security Council resolution 713(1991), for example, did not work well to stop the flow of arms as the weapons kept coming to the warring parties through the use of covert government supplies or the black market.⁸⁰⁵ Reports suggest the arms embargo was repeatedly violated by some countries, based on ideological, political, and economic reasons, or they assisted others to violate it.⁸⁰⁶

Arms embargoes work best in situations of military parity between conflicting parties, or in situations where neither of the parties has access to external military hardware. However, in the event of one of the parties being weaker than the other, an embargo ensures a one-sided military victory.⁸⁰⁷ Arms embargoes tend to favour the warring factions that have access to government military ordnance and industries, while making it very difficult for those on the other sides to organise and defend themselves.⁸⁰⁸ For example, the arms embargo against the former Yugoslavia by resolution 713 (1991) may have been effective in restricting the flow of arms to Bosnian forces, but many argued it was “fundamentally unjust because it locked in place the pre-war balance of power, unfairly disadvantaged the Bosnian forces, and

⁸⁰⁴ UNSC res 1519 (2003) of 16 December 2003. Those 10 active arms embargoes in 2010 were the resolution 751 (1992) concerning Somalia; resolution 1132 (1997) concerning Sierra Leone; resolution 1267 (1999) concerning Al Qaida and the Taliban and Associated individuals and entities; resolution 1518 (2003) concerning Iraq and Kuwait; Resolution 1521 (2003) concerning Liberia; Resolution 1533 (2004) concerning the Democratic Republic of the Congo; resolution 1572 (2004) concerning Cote d'Ivoire; resolution 1591 (2005) concerning Sudan; resolution 1718 (2006) concerning certain measures relating to the DPRK ; and resolution 1737 (2006) concerning certain measures relating to the Islamic Republic of Iran.

⁸⁰⁵ Mark Bromley *United Nations Arms Embargoes, Their Impact on Arms Flow and Target Behaviour: Case Study: Former Yugoslavia, 1991-96* (SIPRI, 2007)

books.sipri.org/files/misc/UNAE/SIPRI07UNAEYug.pdf. Last accessed on 13 April 2010.

⁸⁰⁶ Ibid, at 15.

⁸⁰⁷ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (London, Routledge, 2008) at 140.

⁸⁰⁸ Ibid.

thereby unnecessarily prolonged the conflict”.⁸⁰⁹ In addition, in a situation where the conflict is dependent on home-grown weaponry, an externally sanctioned arms embargo has little or no relevance to reducing the armed conflict.⁸¹⁰ Then it can be argued the same limited impact of an arms embargo would apply to a country which was already flooded with weapons before the embargo imposed.⁸¹¹

2. Ineffectiveness of arms embargoes

An analysis of arms embargoes by the UN indicates the ineffectiveness of the sanctions imposed as they had little impact on targets with a low rate of compliance, as well as raising the issue of fairness.⁸¹² There are repeated violations of the arms embargoes, in particular the continuing transfer of small arms, as the United Nations Secretary General admitted in his report, investigations of arms embargo violations have exposed international networks involved in the illicit trade and brokering of small arms.⁸¹³ The stark examples of how a long-imposed arms embargo is ineffective can be seen in the case of Somalia. The arms embargo imposed on the country since 1992 does not reduce the availability of small arms there, and in contrast “the quantity and diversity of small arms available in Somalia are greater than at any time since the early 1990s”.⁸¹⁴

There are several points of concern on arms embargo implementation; first, there have been too many weapons available in the market.⁸¹⁵ The sanction in many cases fails because the target country or entity can choose from a wide range of sellers in the international market place and it is virtually impossible to secure universal

⁸⁰⁹ Mark Bromley *United Nations Arms Embargoes, Their Impact on Arms Flow and Target Behaviour: A Case Study: Former Yugoslavia, 1991-96* (SIPRI, 2007) at 15-16.

⁸¹⁰ Amalendu Misra *Politics of Civil Wars: Conflict, Intervention and Resolution* (London, Routledge, 2008) at 140.

⁸¹¹ Report on Monitoring Group on Somalia, UN Doc S/2010/91 of 10 March 2010. The report suggests that the embargo on Somalia does not reduce the arms availability.

⁸¹² Report of the Secretary-General on Small Arms to the United Nations Security Council (S/2008/258) of 17 April 2008 at para 15.

⁸¹³ Ibid.

⁸¹⁴ Ibid.

⁸¹⁵ Around 1,000 companies, in 100 countries, produce 7.5 to 8 million small arms a year as cited by the Report of the Secretary-General on Small arms (DOC S/2008/258, 17 April 2008) at 4, para 10.

participation as well as to police the compliance even of countries that have agreed to participate.⁸¹⁶ The weapons are available in the grey and black markets to supply the demand from warring parties.

Second, arms embargoes are difficult to enforce and monitor, although, theoretically, they are legally binding documents. Furthermore, the implementation of arms embargoes depends on States' implementation and national jurisdiction, which means that national courts have jurisdiction over arms embargo violations only where an embargo has been incorporated into the domestic legal system.⁸¹⁷ When domestic law fails to address brokering activities, arms brokers who play a central role in providing weapons in armed conflicts are left untouched, although they have violated international law.⁸¹⁸

The situation of impunity enjoyed by arms brokers leads to proposal that the ICC may serve as an effective forum to prosecute the arms brokers supplying arms to governments or non-State actors that commit war crimes.⁸¹⁹ The arms brokers' impunity was illustrated by activities of an arms broker, who has never been indicted, who against the arms embargo imported via Seychelles, Zaire, into Rwanda in 1994 tons of arms, included AK-47 rifles, 82-mm and 60-mm mortar shells, and 37-mm and 14.5-mm ammunition.⁸²⁰

Despite the arms embargoes shortfalls, the Security Council still continues imposing arms embargoes as the chosen measure because the imposition of arms embargoes, at the very least, will show a strong message of disapproval to a target State or armed

⁸¹⁶ Ramesh Thakur "Sanctions: A Triumph of Hope Eternal over Experience Unlimited" (2000) 2(3) *Global Dialogue* 129.

⁸¹⁷ Claudette Torbey "The Most Egregious Arms Brokers: Persecuting Arms Embargo Violators in the International Criminal Court" (2007) 25 (2) *Wis Int'l L J* 335 at 336-337.

⁸¹⁸ *Ibid*; Katharine Orlovsky "International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers (2006) 29 *Hastings Int'l & Comp L Rev* 343.

⁸¹⁹ Claudette Torbey "The Most Egregious Arms Brokers: Persecuting Arms Embargo Violators in the International Criminal Court" (2007) 25 (2) *Wis Int'l L J* 335 at 337; Katharine Orlovsky "International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers (2006) 29 *Hastings Int'l & Comp L Rev* 343.

⁸²⁰ Katharine Orlovsky "International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers (2006) 29 *Hastings Int'l & Comp L Rev* 343 at 350-351; see Steve Boggan "Bloody Trade that Fuels Rwanda's War" *The Independent* (UK, 23 November 2006) <<http://www.independent.co.uk/news/world/bloody-trade-that-fuels-rwandas-war-1353751.html>>.

group and an indication of political will to take punitive action by the international community.⁸²¹ The political pressure, nevertheless, would further add to the isolation of the targeted State.

Third, there is virtually no sanction for violations of an arms embargo. The Sanction Committee, established by the Security Council is to monitor and verify an arms embargo is not being violated, has difficulties because there is no fixed mechanism in place to make it work. The non-compliance has not been sanctioned although there is voice that suggests the United Nations should impose secondary sanctions on those non-compliant countries, for example, a SIPRI's report on arms embargoes suggests, the Security Council should target the States and non-State actors implicated in the violations of an arms embargo by at least practicing "naming and shaming".⁸²² In practice, it may mean the non-compliant countries and/or entities are explicitly mentioned in the related report and meetings.

Fourth, arms embargoes have limitations in reducing the existing weapons. Before an arms embargo is adopted, parties in a (potential) armed conflict might have been stockpiling many weapons. Therefore, an arms embargo will not reduce the availability of weapons procured before an arms embargo is imposed. A Security Council arms embargo does not have any mechanism for collecting and destroying the existing weapons, so the parties in conflicts have no difficulties in waging war. An arms embargo, as an international instrument designed to exercise control over arms proliferation, is often proven ineffective because the focus is on how to stop weapons flowing to conflicts and there are no provisions on how to disarm and remove weapons that already exist.⁸²³

⁸²¹ Guy Lamb "Seven Reasons to Impose Arms Embargo on Zimbabwe" *ISS Today* (Pretoria, South Africa, 16 July 2009) <www.issafrica.org/index.php?link_id=19&slink_id=6291&link_type=12&slink_type=12&tmpl_id=3>, Last accessed on 14 January 2010.

⁸²² Damien Fruchart, Paul Holtom and Siemon T Wezeman *United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour* (SIPRI, 2007) at 54.

⁸²³ *Ibid.*, at 134.

Investigating several cases of arms embargoes may help explain why countries do not comply with the Security Council resolutions. Besides the Security Council arms embargo, regional groupings and individual States may have policies to impose their own embargo on certain target States/entities. For example, the European Union and the US imposed an arms embargo on Myanmar.⁸²⁴ Nevertheless, the ineffectiveness of the arms embargo persists.

The failure of an arms embargo to be an effective instrument to stem the flow of arms is also because of the political compromise in the Security Council in deciding what a threat to international security is. Many States and armed conflicts do not attract arms embargoes because of neglect or conflict of interest among members of Security Council.⁸²⁵ This argument is strengthened by the fact that between 1990 and 2001, for example, there were only eight arms embargoes in place, despite there being fifty-seven major armed conflicts in the same period.⁸²⁶ This adds to difficulties in the implementation of arms embargo; non-compliance, monitoring, and the virtual absence of secondary sanctions for non-compliance. The following sections illustrate two examples, Somalia and Yugoslavia that could explain the complexity and the failure in the implementation of arms embargoes.

3. Examples of the failure and violation of arms embargoes

(i) Somalia

Internal armed conflict and widespread violence in Somalia started in 1991 when the regime of Muhammad Siyad Barre fell. Somalia, since then, has been a country without a central government because no effective central government has managed to take control of the country following the fall of Barre's government. The

⁸²⁴ Council Regulation (EC) No 1081/2000 of 22 May 2000 prohibiting the sale, supply and export to Burma /Myanmar of equipment which might be used for internal repression or terrorism, and freezing the funds of certain persons related to important governmental institutions; extended by Common Position 757/2001/CFSP, and Council Decision 2011/239/CFSP; US Congressional Record- Senate, Renewing the Import Restriction in the Burmese Freedom and Democracy Act of 2003 (22 July 2010), S6146.

⁸²⁵ Theresa A DiPerna "Small Arms and Light Weapons: Complicity 'with A View' toward Extended State Responsibility" (2008) 20 *Flo J Int'l L* 25 at 37.

⁸²⁶ *Ibid.*

continuous inter-communal rivalry has brought the country into deep social disintegration with armed fighting and violence. With the absence of any State authority to impose law and order, Somalia has become a base for transnational crime and terrorists; meanwhile its ports and waters have been used for smuggling, illegal fishing, and waste disposal by pirate networks.⁸²⁷ The internationally recognized Transitional Federal Government (TFG) remains dysfunctional, unpopular and only able to control limited territory in Baydhabo, in western Somalia.⁸²⁸

For almost two decades, the situation in Somalia has shown no improvement, but rather, is becoming more complex. In the words of the 2010 report of the Monitoring Group established by the United Nations:

The conflict remains a grim example of “hybrid warfare”: a combination of conventional capabilities, irregular tactics and formations, as well as indiscriminate violence, coercion, and criminal disorder —compounded in the Somalia case by the interference of regional powers. Somalia’s frail Transitional Federal Government has struggled ineffectually to contain a complex insurgency that conflates religious extremism, political and financial opportunism, and clan interests. Beneath a superficial ideological overlay, armed opposition groups have essentially degenerated into clan militias, manifesting the same kind of fluid alliances and fissile tendencies.⁸²⁹

The Security Council imposed a general and complete arms embargo by adoption of resolution 733 (1992) on 23 January 1992, followed by several other resolutions, such as 1356 (2001), 1725 (2006), 1772 (2007), 1864 (2008), and 1916 (2010), which revised and outlined certain exemptions to the embargo on Somalia. The sanctions combine an arms embargo, a travel ban, and an asset freeze.

The arms embargo imposed by resolution 733 (1992) consists of a territorial arms embargo as well as targeting arms transfers to individuals and entities.⁸³⁰ The measure on the territorial arms embargo states that “[a]ll States shall immediately

⁸²⁷ Sara Linberg and Neil J. Melvin “Major Armed Conflicts” in *SIPRI Yearbook 2007* (Oxford University Press, 2007) at 72-78.

⁸²⁸ Ibid.

⁸²⁹ Report on Monitoring Group on Somalia (UN Doc S/2010/91), 10 March 2010, at 6.

⁸³⁰ UNSC Sanctions Committees <www.un.org/sc/committees/751/index.shtml>. Last accessed on 20 April 2010.

implement a general and complete arms embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise.”⁸³¹ Meanwhile, the targeted embargo states that “Member States shall take the necessary measures to prevent the direct or indirect supply of weapons, military equipment...to the individuals or entities designated by the Committee.”⁸³²

Since 1992, when the Security Council imposed a general and complete arms embargo on Somalia, there has been no sign that the weapons have reduced in number. Instead, persistent low intensity armed conflicts demand a continuous supply of arms which are principally ammunition and small arms.⁸³³ The violations have involved a wide range of actors and organization networks as reports suggest that the weapons in Somalia originate from neighbouring countries and once were legal.⁸³⁴ Meanwhile, Yemen, Ethiopia, and Eritrea are the main markets and transfers for arms.⁸³⁵ In addition, Uganda and the United States, that support the TFG, also contribute to the arms violations since the weapons they gave to the TFG later leaked into the black market.⁸³⁶ Fighting sides and war lords in Somalia undoubtedly benefit from the existence of a black market. Supply of arms in a black market may originate from leaked or diverted government arsenal or irresponsible transfers, among other things, demonstrated by the events in the end of the Cold War when millions of weapons from the stockpiles of Albania, Slovakia, Bulgaria, Ukraine were looted or sold.⁸³⁷

The widespread availability of small arms creates a condition where arms become part of a culture and habit. In Somaliland, Somalia, for example, 74 per cent of the households own small arms, mainly assault rifles and pistols.⁸³⁸ For a country trapped

⁸³¹ Ibid.

⁸³² Ibid.

⁸³³ Report on Monitoring Group on Somalia. Security Council document (S/2010/91) of 10 March 2010 at para 154.

⁸³⁴ Ibid.

⁸³⁵ Ibid, at para 158.

⁸³⁶ Ibid.

⁸³⁷ Alexander Gillespie *A History of the Laws of War: The Customs and Laws of War with Regards to Arms Control* (Oxford, Hart Publishing, 2011) vol 3, at 71; Larry Kahaner *AK47: The Weapon That Changed the World* (New York, Wiley, 2007) at 69-70.

⁸³⁸ Report on Monitoring Group on Somalia. Security Council document (S/2010/91) of 10 March 2010 at para 166.

in a long conflict, Somalia has been continuously flooded with small arms. The most common weapons in the country are assault rifles AKM (Russia), AK-Type 56 (China), Heckler and Koch G-3 (Germany), SAR-80 (Singapore), and M-16 (USA), in which AK-Type 56 is the most common because it is relatively cheap (approximately US\$ 350) combined with widely manufactured M43 ammunition.⁸³⁹

The report indicates the non-compliance with the arms embargo by some States, namely Ethiopia, Kenya, Uganda, Sudan, and United Arab Emirates, which play their parts in violating the arms embargo on Somalia.⁸⁴⁰ The reasons for non-compliance vary. Some States are not aware of their obligations under international law, apparently not well-informed on the latest Security Council resolution, while some others act intentionally.⁸⁴¹

(ii) Yugoslavia

The conflict in Yugoslavia started in June 1991 when Croatia and Slovenia declared their independence from the Socialist Federal Republic of Yugoslavia.⁸⁴² Serbs living in Croatia, supported by the Yugoslav People's Army, opposed the declarations and armed conflict broke out.⁸⁴³ The Security Council imposed an arms embargo by adopting resolution 713 (1991) on 25 September 1991 which decided under Chapter VII of the Charter of the United Nations "that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment".⁸⁴⁴ Despite the embargo, the conflict escalated and continued until the peace accord agreed to in 1995.

⁸³⁹ Annex of the Report on Monitoring Group on Somalia. Security Council document (S/2010/91) of 10 March 2010.

⁸⁴⁰ Report on Monitoring Group on Somalia. Security Council document (S/2010/91) of 10 March 2010 at para 298 and 213.

⁸⁴¹ *Ibid.*, at para 198.

⁸⁴² Report of the Copenhagen Round Table on United Nations Sanctions in the Case of the Former Yugoslavia. Security Council Document (S/1996/776) of 24 September 1996.

⁸⁴³ *Ibid.*

⁸⁴⁴ Security Council res 713 (1991) of 25 September 1991, operative paragraph 6.

Besides the violations of the arms embargo, there were several factors contributing to the ineffectiveness of the measure. The arms embargo imposed on Yugoslavia was ineffective because the target was largely self-sufficient in its military production; and moreover, the actors in the armed conflicts had procured sufficient quantities of weapons before the embargo was adopted.⁸⁴⁵ Serbian forces did not suffer much from the embargo as they enjoyed well-stocked armouries and supplies from a domestic arms industry, thus gaining a military advantage over their opposing forces.⁸⁴⁶

History seemed to repeat itself five years later when Kosovo pushed for its own independence from the Serbs, and a conflict between Kosovo and the Federal Republic of Yugoslavia (FRY) broke out in late 1995-1996.⁸⁴⁷ The crisis attracted international attention as the situation worsened. An arms embargo was again imposed, this time on the Federal Republic of Yugoslavia. The Security Council adopted resolution 1160 (1998) on 31 March 1998 which stated that:

All States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related material of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there.⁸⁴⁸

As with the previous 1991 arms embargo, this arms embargo could not be implemented effectively. While under arms embargo, both the FRY and Kosovo Liberation Army (KLA) still managed to gain access to sources of weaponry. Reportedly, the FRY was able to procure weapon technologies and components illegally from Israel; meanwhile the KLA acquired arms supplies originating from Albania, Bosnia and Herzegovina, Switzerland, and the US with help from the Kosovar Albanian diaspora.⁸⁴⁹ Deals between FRY and Israel formed part of a group

⁸⁴⁵ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 134.

⁸⁴⁶ Mark Bromley *United Nations Arms Embargo, Their Impact on Arms Flow and Target Behaviour. Case Study: Federal Republic of Yugoslavia, 1998-2001* (SIPRI, 2007) at 11.

⁸⁴⁷ *Ibid*, at 3.

⁸⁴⁸ UNSC res 1160 (1998) of 31 March 2008.

⁸⁴⁹ Mark Bromley *United Nations Arms Embargo, Their Impact on Arms Flow and Target Behaviour: Case Study: Federal Republic of Yugoslavia, 1998-2001* (SIPRI, 2007) at 8.

of 16 embargo violating transactions, with a combined value of US\$2 million.⁸⁵⁰ The KLA had arms purchased by its supporters in Switzerland and the USA and these were smuggled into Kosovo.⁸⁵¹ Similarly to the Somalia case, there were many non-compliant countries willing to violate the embargo and the availability of arms on the black market contributed to the ineffectiveness of the arms embargo.

The Security Council may continue imposing arms embargoes even after evidence of ineffectiveness in their implementation. The decision to impose an arms embargo is inevitably influenced by political considerations and interests of the Security Council member States. After all, the Security Council is a political body, hence its acts are based on political considerations.⁸⁵² As the arms embargo is based on political considerations and the perceived general interests of international peace, the Council may even impose an arms embargo on a State exercising the right of self-defence.⁸⁵³ Perceived international peace, interests and political considerations may explain the change of understanding of threat, as the Security Council's decision to impose embargoes in a selected internal armed-conflict indicates that the internal armed-conflict may now constitute "a threat to international peace and security".⁸⁵⁴

As the previous section suggests, arms embargoes alone will be unable to restrict the proliferation of small arms or to significantly reduce the total number of weapons. The measure intended to alter the targeted entities or individuals behaviour and in turn to maintain order is often ineffective. The conflict situations in Somalia and Yugoslavia show that arms embargoes have proven ineffective in limiting targeted entities' ability to wage war.⁸⁵⁵

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

⁸⁵² Yoram Dinstein *War, Aggression and Self-Defence* (4th ed, Cambridge University Press, 2005) at 215.

⁸⁵³ Ibid. Yoram quotes C Gray in referring to the armed conflict in Bosnia and Herzegovina.

⁸⁵⁴ Gwyn Prins *The Heart of War: On Power, Conflict and Obligation in the Twenty-First Century* (Routledge, 2002) at 142. See also the UNSC Res 713 (1991) on Yugoslavian civil war.

⁸⁵⁵ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 131.

4. Reports of the Secretary General on small arms

In addition to the arms embargo decisions which assumedly have a direct effect on small arms circulation, another involvement of the Security Council on the issue is when it considers the report on small arms prepared by the Secretary-General. The first reports of the Secretary-General on small arms submitted to the Security Council in 2002⁸⁵⁶, 2003⁸⁵⁷ and 2005⁸⁵⁸ were based on the requests by the President of the Security Council. The Security Council decided to address the issue of small arms on a more regular basis in 2007, requesting the Secretary-General to submit a report containing analysis, observations, and recommendations on the issue of small arms on a biennial basis starting in 2008.⁸⁵⁹ The issue of small arms has since become a regular agenda item for discussion in the Security Council.

(i) 2002 report

The first report of the Secretary-General on small arms was relatively short, with only seven pages, containing 12 recommendations to the Security-Council for consideration. The short report was made to provide the Security Council with “ways and means in which it could contribute to dealing with the question of illicit trade in small arms and light weapons in situations under its Consideration”.⁸⁶⁰ The report listed facts and figures about small arms, including the estimated number of victims killed by the weapons. The Secretary-General report noted, that the arms embargoes’ purposes, inter alia, were to control the proliferation of small arms, but continued by stating that the measures, because of lack of a monitoring mechanism, “did not play a significant role in eradicating the illicit traffic in small arms.”⁸⁶¹

The report identified the repeated violations of the Security Council arms embargoes by taking the example of trafficking of small arms into Sierra Leone and Liberia and

⁸⁵⁶ S/2002/1053 of 20 September 2002.

⁸⁵⁷ S/2003/1217 of 31 December 2003.

⁸⁵⁸ S/2005/69 of 7 February 2005.

⁸⁵⁹ Security Council Presidential Statement (S/PRST/2007/24) of 29 June 2007.

⁸⁶⁰ Report of the Secretary-General on Small Arms (S/2002/1053) of 20 September 2002 at para 2.

⁸⁶¹ Ibid, at para 10.

indicated the problem of proliferation of the weapons was far from solved.⁸⁶² In its recommendations, the report requested States “to enforce all Council resolutions on sanctions, including those imposing arms embargoes...and to bring their own national legislation into compliance with the Council’s measures on sanctions.”⁸⁶³ This point of recommendation implies the difficulties for States in implementing an arms embargo when their domestic legislation does not provide criminalization provisions on arms embargo violations.

Another point of the recommendations in the report requested the Security Council to “consider coercive measures against Member States that deliberately violate arms embargoes declared in respect of specific conflict areas.”⁸⁶⁴ Later, violations of the arms embargo by Liberia on transfer of arms to Sierra Leone, forced the Security Council to adopt resolution 1478 (2003) as a punishment to Liberia for its non-compliance. The resolution 1478 has become one of the first examples of a secondary sanction to non-compliance.

Member States of the Security Council generally welcomed the Report and stressed their support of the recommendations in the open debate on the issue.⁸⁶⁵ Some States, point out the responsibility of ensuring that the Security Council makes progress in consideration of the issue of small arms with clear goals,⁸⁶⁶ the importance of the DDR programme,⁸⁶⁷ the need to urge the Security Council to be more active in examining the issues of small arms,⁸⁶⁸ and the practical solution of a strict export and import control to fight illicit trade.⁸⁶⁹

⁸⁶² Ibid, at [12].

⁸⁶³ Ibid, recommendation 5.

⁸⁶⁴ Ibid, recommendation 11.

⁸⁶⁵ UN Doc S/PV.4623, verbatim record of the 4623rd meeting, 11 October 2002.

⁸⁶⁶ Statement of Colombia, UN Doc S/PV.4623, verbatim record of the 4623rd meeting, 11 October 2002.

⁸⁶⁷ Statement of France, UN Doc S/PV.4623, verbatim record of the 4623rd meeting, 11 October 2002.

⁸⁶⁸ Statement of Mexico, UN Doc S/PV.4623, verbatim record of the 4623rd meeting, 11 October 2002.

⁸⁶⁹ Statement of the United States of America, UN Doc S/PV.4623, verbatim record of the 4623rd meeting, 11 October 2002.

(ii) 2003 report

The second report was submitted to monitor the development of implementation one year after the first report was issued. This report was prepared based on the Security Council President's request to the Secretary-General to report to the Council on the implementation of all recommendations contained in his first report on small arms.⁸⁷⁰

Again, the Secretary-General acknowledged that arms embargoes proved to be very difficult to enforce. On the point that all Member States of the United Nations should enforce the arms embargoes and bring their legislations into compliance with measures on sanctions (recommendation 5 of the 2002 report), the report suggested the Council consider "steps that could assist Member States in their implementation of the mandatory measures".⁸⁷¹ With the possibility of the Council considering coercive measures against States that deliberately violate arms embargoes, the report underlined that "primary responsibility for the implementation of the sanctions regimes, including arms embargoes, rests with the Member States."⁸⁷² This is to say, any possible sanction against those involved in the violations is for the member States to decide.

(iii) 2005 report

The 2005 report was to provide the Security Council with further up-dates on the implementation of the 12 recommendations contained in the first report of the Secretary-General on small arms in 2002.⁸⁷³ With regards to the point that all Member Countries of the United Nations should enforce the arms embargoes and bring their legislation into compliance with measures on sanctions (recommendation 5 of the 2002 report), the report refers to three aspects in the implementation of an arms embargo. Those three aspects are the legal measures to criminalize breaches of

⁸⁷⁰ Secretary-General on Small Arms (S/2003/1217) of 31 December 2003 at para 1.

⁸⁷¹ Report of the Secretary-General on Small Arms (S/2003/1217), 31 December 2003 at para 14.

⁸⁷² Ibid, at para 50.

⁸⁷³ Report of the Secretary-General on Small Arms (S/2005/69) of 7 February 2005 at para 1.

the arms embargo; various safeguards to prevent nationally produced weapons and ammunition from being diverted; and the formulation of a normative framework to guide decisions regarding arms transfers.⁸⁷⁴ The report highlights the decision by the Council requesting all States to submit reports on the implementation of certain resolutions and to put in writing their reasons for not reporting.⁸⁷⁵

With regard to the possibility of the Council considering coercive measures against States that deliberately violate arms embargoes (recommendation 11 of the 2002 report), the report explains that the monitoring groups established by the Council have been working to monitor and assess the implementation of arms embargoes.⁸⁷⁶ Concerning the persistent violations, the Council has decided to request the monitoring group and group of experts to provide a list of those who continue to violate the arms embargoes on Somalia and the Democratic Republic of Congo for possible further measures by the Council.⁸⁷⁷

(iv) 2008 report

In April 2008, as requested by the Security Council President, the Secretary-General submitted his report on small arms under a new regular biennial report on small arms.⁸⁷⁸ The report consisted of 17 pages with 13 new recommendations which was in contrast to the short 12 paragraphs of the 2002 report. In the report, the Secretary-General laid particular emphasis on reducing armed violence; fostering cooperation among national authorities; enhancing synergy among the UN bodies; improving the monitoring of arms embargoes; developing standardization of end-user certificates; drawing attention to destruction of surplus ammunition stockpiles; and building capacity.⁸⁷⁹

⁸⁷⁴ Ibid, at para 14.

⁸⁷⁵ UNSC res 1526 (2004) of 30 January 2004, concerning Al-Qaida and Taliban, demands States submit reports on the implementation of the resolution. The obligation to submit reports is explained in paragraph 16 of the Report of the Secretary-General on Small Arms (S/2005/69), 7 February 2005.

⁸⁷⁶ Report of the Secretary-General on Small Arms (S/2005/69) of 7 February 2005 at para 53.

⁸⁷⁷ Ibid, at para 54-55.

⁸⁷⁸ Security Council Presidential Statement (S/PRST/2007/24) of 29 June 2007. However, there was no Secretary-General report on small arms in the year 2010 if it was to be on biennial basis. The following report was issued in April 2011.

⁸⁷⁹ Report of the Secretary General on Small Arms to Security Council (S/2008/258) of 17 April 2008.

The report underlined key steps that could improve the effort to combat the wide availability of small arms, including the cooperation among national authorities as a vital point in enhancing capacity building. This comes from understanding that the enactment of a national law on small arms will not have much impact if States do not work together. The report also reflected the absence of a standardized end-user certificate to prevent small arms from falling into the wrong hands.

The report notes the connection between small arms and armed conflict. It indicates that a normative framework is needed for guidance; that the “recurring problem concerning the proliferation of small arms... is the absence of a normative framework for all States to guide decisions regarding arms transfer.”⁸⁸⁰ The United Nations recognizes that in many cases the arms embargoes do not stop proliferation of small arms, which is, in part, because of the absence of clear guidelines for the United Nations members in the area of arms transfers.⁸⁸¹ Hence, it implies that the monitoring will not ensure the effectiveness of arms embargoes if a practical guideline on arms transfer is not available for States to refer to.

(v) 2011 report

The 2011 report⁸⁸² brought the Security Council up to date on a number of topics from the previous 2008 report that required its particular attention, such as trade and brokering, marking, stockpile management, and armed violence. The report continued to underline the essential focus on an inclusive approach to small arms in which security, crime, human rights and development intersected.⁸⁸³ With regard to the development of the implementation of the UNPoA, the report acknowledged the

⁸⁸⁰ Report of the Secretary-General on Small Arms to the United Nations Security Council (S/2008/258) of 17 April 2008 at para 16.

⁸⁸¹ Report of the Secretary-General on Small Arms to the United Nations Security Council (S/2008/258) of 17 April 2008.

⁸⁸² The 2011 report dated 5 April 2011 was issued three years after the last 2008 report, which means a year behind schedule. The Security Council, through a statement by its President dated 29 June 2007 (S/PRST/2007/24), requested the Secretary-General to submit a report on a biennial basis beginning in 2008. There is no explanation found in the report regarding the delay of submission of this report.

⁸⁸³ Report of the Secretary-General on Small Arms of 5 April 2011 (S/2011/255) at 1.

progress made in the third and fourth biennial meetings which succeeded in producing action-oriented outcomes. The report made six recommendations with a focus on the tracing of small arms and weapons collection programmes.

The 2011 report did not particularly raise a new topic or new proposal but reported the facts on the development of the effort to control small arms for the attention of the Council. A matter-of-fact report gave the Council a focus to follow up. Meanwhile, the recommendations offered a priority of areas that required the attention of the Security Council in discussing the issue of small arms.

In summing up all reports, it can be said that a regular report from the Secretary-General ensures the issue of small arms exists in the Security Council and keeps the Council paying proper attention to the danger the weapons pose to international peace and security. The discussion of the reports, including the proposed recommendations, gives a clear picture of the urgency of the problem and provides practical policy in combating the small arms problems to be implemented by States based on the recommendations. Regular reports on small arms provide an opportunity for the Secretary-General to report to the Council of the development and updates of previous recommendation implementation.

The Secretary-General's reports identify what the Security Council could do to make arms embargo implementation more effective in restricting small arms flow to armed conflicts. From the first report in 2002, it is noticeable that specific policies suggested to the Security Council on steps that may improve the implementation of arms embargoes with regard to small arms, have helped the Security Council to realize the significance of small arms in arms embargoes. Some recommendations have been followed, such as having a list of those who continue violating the arms embargoes for possible further measures for the non-compliance.

B. Small Arms in the General Assembly

The General Assembly is another principal organ of the United Nations where most discussion and negotiation on small arms takes place. Discussion with regard to the issue of small arms occurs in the context of its functions and powers to “discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations”.⁸⁸⁴ Although General Assembly resolutions have only political and moral weight, they more broadly reflect the views of the international community which need to be respected as these are the opinion of the world’s governments. One of the first resolutions to address the issue of small arms was in 1994 under the title of assistance to member States in curbing the illicit small arms and collecting them, which welcomed the initiative of Mali to curb and collect small arms in the Saharo-Sahelian subregion.⁸⁸⁵ In the following year, the UN General Assembly started to adopt proper small arms resolution entitled “Small arms” (50/70B of 12 December 1995) which implicitly recognized that the issue of small arms was the problem not only of Africa but also of the world. Notably, the resolution 50/70B requested the Secretary-General to prepare a report with assistance from a panel group of governmental experts.⁸⁸⁶ Since then, there have been a number of General Assembly resolutions concerning small arms over the years. Most of them are a repeated commitment or continuation of certain matters agreed in the previous General Assembly.

The General Assembly adopts resolutions to affirm the common agreement among countries on ideas concerning particular issues. The continuous resolutions help establish growing norms on particular subjects. In the case of small arms, the General Assembly has adopted several resolutions that are continuously renewed every year. For instance, the GA resolution 56/24U, 29 November 2001, on Assistance to States for Curbing the Illicit Traffic in Small Arms and Collecting Them, and resolution 56/24V, 24 December 2001, on Illicit Trade in Small Arms and Light Weapons in All

⁸⁸⁴ Charter of the United Nations, art 11(2).

⁸⁸⁵ UNGA res 49/75G of 15 December 1994. Another related resolution 49/75 M of 15 December 1994 on measures to curb the illicit transfer and use of conventional weapons was also adopted but it failed to indicate small arms as particular weapons that need to be urgently addressed.

⁸⁸⁶ UNGA res 50/70B of 12 December 1995.

Its Aspects. These two resolutions, which have been adopted continuously in the following years, reaffirm the concerns about small arms and admit that proliferation and circulation of small arms “impede development, constitute a threat to populations and to national and regional security”.⁸⁸⁷ Although they have no legal weight, unlike the Security Council resolutions, the continuous adoption has shown the agreed commitment on the necessity to regulate the trade in small arms, reflecting a norm.

It is also relevant to observe the voting behaviour of States with regard to the small arms resolutions to see the policy, or the trend of policy in the area. The smooth consensus on wording in the resolution negotiation on a strict regulation may indicate that the majority of States are ready to have more than a merely politically binding resolution of the General Assembly. On the other hand, the long debate or inconclusive discussion may indicate the difficulties in adopting a more binding document. The resolution A/RES/65/64 on 8 December 2010 on Illicit Trade in Small Arms and Light Weapons in All its Aspects shows a voting pattern of the UN member States where the majority of countries are in favour of the general substance of the resolution. However, following the process and closely examining the compromised sentences will show that the text has been already watered down to get most countries support. Thus, even the majority support in a General Assembly resolution does not automatically reflect that the member States would then be ready to have a legally binding instrument. There are many reasons which cause States to act differently when it comes to the choice to have a legal instrument which would be legally binding on them.

A series of the General Assembly resolutions provide a forum for new ideas and proposals with regard to the effort to control small arms proliferation. As the issue of small arms is the concern of the majority of member States, the General Assembly keeps the issue alive and up-dates the development of the effort to control these weapons.

⁸⁸⁷ UNGA res 56/24U of 29 November 2001, preamble paragraph 1.

With respect to the issue of small arms, probably the most significant role of the General Assembly is that, through its resolutions, it decides to convene meetings, conferences, and groups to discuss, negotiate, or prepare a report on the issue. The General Assembly resolutions decide the UN Register, groups of governmental experts meetings, conferences and other meetings related to small arms. For example, the role of the General Assembly is significant in keeping the UNPoA process. When the UNPoA biennial meetings could not decide to hold a review conference in 2006, the decision to organize the conference was made by a General Assembly resolution.⁸⁸⁸ Similarly, the decision to convene a meeting on an arms trade treaty in 2012 was made by a General Assembly resolution.⁸⁸⁹

1. United Nations Register and the inclusion of small arms

A General Assembly resolution that has important link to small arms is resolution 46/36 L of 6 December 1991 entitled Transparency in Armaments, which encourages States to submit reports on their imports and exports of conventional arms in one calendar year. The resolution requires member States to take action on a regular basis and provide information on their transfer of conventional weapons. The report on the UN Register would help the process of confidence building measures and promote transparency in armament among States, because States would be aware of each other's intentions with regard to armaments. On its development, the UN Register continues to encourage the member States to include the transfer of small arms in their reports⁸⁹⁰ although the effort to include small arms as additional category of the UN Register has, so far, not succeeded.

The report in the UN Register, as decided by the resolution 46/36 L in 1991, is submitted on a voluntary basis. Started in 1992, the number of the States which have submitted their report was promising with China, the UK, France, Russia, and the US

⁸⁸⁸ UNGA res 59/86 of 3 December 2004.

⁸⁸⁹ UNGA res 64/48 of 2 December 2009.

⁸⁹⁰ UNGA res 66/39 of 2 December 2011, operative para 4.

doing so.⁸⁹¹ The submission by the all permanent members of the Security Council (P5), which are also the main arms producers, is nothing but positive in showing a willingness to be transparent in their arms transactions covered by the UN Register. The overall reports have a fluctuating trend reflecting inconsistent reporting from the United Nations Member States. In the first year (1992), there were 95 governments submitting reports, up to 123 in 2003, but the number fell to 79 in 2008, 76 in 2009, 72 in 2010, and 84 in 2011.⁸⁹² The exact reason for the erratic submission is unknown, perhaps partly because the report is on a voluntary basis or because of the technical difficulties in filling the forms. The United Nations secretariat tries to address this issue by organizing several regional workshops aimed at raising awareness about the UN Register among the officials in the regions, including information sessions on filling in the forms.⁸⁹³

i. Purpose of arms register

The preamble paragraphs of the resolution 46/36 L of 9 December 1991 state the purpose of the resolution is “to work towards easing tensions”, more openness and promote transparency in military matters.⁸⁹⁴ The following preamble paragraph underlines the importance of “confidence-building measures, including transparency and exchange of relevant information on armaments”, which is “likely to reduce the occurrence of dangerous misperceptions about the intentions of States and to promote trust among States.”⁸⁹⁵

From the need to have confidence building, the preamble paragraph 7 of the resolution 46/36 L rightly mentions that the illicit trade of arms may cause “destabilizing and destructive effects...particularly for the internal situation of

⁸⁹¹ Reports from States can be accessed at the United Nations Office for Disarmament Affairs <<http://www.un.org/disarmament/convarms/Register/>>.

⁸⁹² United Nations Register on Conventional Arms <http://disarmament.un.org/UN_REGISTER.NSF>. Last accessed 31 July 2012; see temporary list submission for calendar year 2011 in the Report of the Secretary General, A/66/127 of 12 July 2011.

⁸⁹³ United Nations Register of Conventional Arms, Report of Secretary-General (A/65/133), 15 July 2010.

⁸⁹⁴ UNGA res 46/36 L of 9 December 1991, preamble para 2.

⁸⁹⁵ Ibid, preamble para 3; see also Paul Holtom and Mark Bromley *Implementing An Arms Trade Treaty: Lessons on Reporting and Monitoring from Existing Mechanism* (SIPRI, 2011) at 5.

affected States and the violation of human rights.”⁸⁹⁶ The citation of human rights is significant to reaffirm the common understanding that the uncontrolled spread of arms may promote violence and undermine respect for human rights, which may trigger further instability.

The adoption of the resolution on the UN Register started a regular voluntary report submission on transfer of conventional weapons by States and a move to encourage a greater transparency from States in global arms transfers. The resolution seeks transparency of the global conventional weapons trade by calling on all countries to report their conventional arms procurement annually, and requests States to inform of their arms transfers and procurements through national production in accordance with the categories of weapons agreed.⁸⁹⁷

Initially, the resolution 46/36 L above and its annex do not include the report of the imports and exports of small arms because the weapons are not part of the seven categories. The resolution, as stated in paragraphs 8 and 10, however, is open for the expansion of further categories of the conventional weapons reported.⁸⁹⁸ Pursuant to this, in the following years, there have been many discussions on whether to include small arms.

ii. Categories of weapons and efforts to include small arms

As explained in the annex “Register of Conventional Arms” of the resolution 46/36, there are seven (7) categories of conventional weapons which are requested to be reported by the Member States. The seven categories of conventional weapons are Category I: battle tanks; Category II: armoured combat vehicles; Category III: large

⁸⁹⁶ Ibid, preamble para 7.

⁸⁹⁷ UNGA res 46/36 L of 9 December 1991. The operative paragraph 9 reads: “*Calls upon* all Member States to provide annually for the Register data on imports and exports of arms”; and the operative paragraph 10 reads: “*Invites* Member States, pending the expansion of the Register also to provide to the Secretary-General, with their annual report on imports and exports of arms, available background information regarding their military holdings, procurement through national production and relevant policies”.

⁸⁹⁸ UNGA res 46/36 L of 9 December 1991.

calibre artillery systems; Category IV: combat aircraft; Category V: attack helicopters; Category VI: warships; Category VII: missiles and missile launchers.⁸⁹⁹

It was more than ten years later, in 2003, that Member States for the first time were requested to fill a supplemental form for the procurement of small arms as background information, in addition to the other seven categories. The proposal to include small arms as a supplemental report first appeared when the group of governmental experts in its report noted that interested States could provide voluntary information on transfers of small arms with their annual submissions.⁹⁰⁰ Several countries, like the UK, Netherlands, Montenegro, and Sweden, have reported the procurement of small arms since 2003 in the background information. The inclusion of information on small arms transfers was further encouraged by the decision to have “the optional standardized reporting form, as adopted by the 2006 group of governmental experts”.⁹⁰¹ As it is optional, the majority of countries opt to not report it.

The need for transparency in the transfers of small arms was tabled for following meetings. As decided at the 2006 meeting, the group of governmental experts in 2009 discussed the category expansion proposal to include the report on small arms as category VIII in the Arms Register, although in the end, the group failed to achieve consensus.⁹⁰² That means that further efforts to include small arms in the Register have to wait for the next group of governmental experts triennial meeting. If the new category is included, it would greatly help in making the small arms transfer transparent, to foster trust among countries.

iii. Follow up and implementation of the UN Register

Although the UN Register works on a voluntary basis, the majority of the United Nations Member States actually submit their reports. The UN Register has received

⁸⁹⁹ UNGA res 46/36 L of 9 December 1991.

⁹⁰⁰ Paragraph 107 of the report on the continuing operation of the United Nations Register of Conventional Arms and its further development. UN Doc. A/58/274 of 13 August 2003.

⁹⁰¹ UNGA res 61/77 of 6 December 2006.

⁹⁰² Jeff Abramson “UN Conventional Arms Register Falters” (2009) 39(7) Arms Control Today at 27.

reports from 173 countries since its inception through the adoption of resolution 46/36 L of 9 December 1991.⁹⁰³ The number of governments submitting reports with background information is far less. There were reports from 95 governments in 1992 (44 with background information), 94 governments in 1993 (39 with background information), and 117 governments in 2005 (30 with background information).⁹⁰⁴ Following the adoption of standardized reporting forms in 2006, 36 out of 113 countries provided the report on small arms.⁹⁰⁵ The number that provided background information increased to 48 out of 91 countries in 2007, and 53 out of 80 countries in 2008.⁹⁰⁶ The latest data submission for the calendar year 2011 showed, from 84 countries, 48 provided background information on small arms transfer.⁹⁰⁷ The generally increasing positive trend in general background information is constructive because more submissions would eventually create a greater transparency in small arms transfer and procurement.

At this juncture, the UN Register is the only mechanism to promote transparency in the procurement of small arms. The limited data about procurement and the small arms transfer can be retrieved from reports with background information. The inclusion of the supplemental report on the exports and imports of small arms, albeit not an official category in the Arms Register, has revealed some parts of the transfer on the small arms trade in background information submitted by States. Whilst the UN Register has limited implication on small arms trade transparency, it is a step in the right direction of bringing some light into this area. Furthermore, the possibility of small arms being an official category has great potential to help bringing more transparency in the small arms trade.

⁹⁰³ Office for Disarmament Affairs, United Nations, New York

<<http://www.un.org/disarmament/convarms/Register/>>. Last accessed on 31 July 2012.

⁹⁰⁴ United Nations Register on Conventional Arms <http://disarmament.un.org/UN_REGISTER.NSF>. Last accessed on 15 July 2011.

⁹⁰⁵ Ibid.

⁹⁰⁶ “Fact Sheet on the United Nations Register of Conventional Arms” (2008) Office for Disarmament Affairs, United Nations, New York

<www.un.org/disarmament/convarms/Register/HTML/Register_2009GGE.shtml>. Last accessed on 15 July 2011. United Nations Secretary-General Report on the United Nations Register of Conventional Arms, A/65/133 of 15 July 2010, A/65/133/add.1 of 15 September 2010, A/65/133/add.2 of 23 November 2010, A/65/133/add.3 of 17 January 2011, A/65/133/add.4 of 8 February 2011, A/65/133/add.5 of 2 March 2011.

⁹⁰⁷ United Nations Office for Disarmament Affairs

<<http://www.un.org/disarmament/convarms/Register/>>. Last accessed 31 July 2012.

D. International Instruments related to Small Arms

1. United Nations Programme of Action

In July 2001, Member States of the United Nations gathered in New York to convene a meeting on small arms as a response to concerns of the international community on the impact of small arms on human security in general. The end result of the conference is the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UNPoA).⁹⁰⁸ This programme, so far, is one of the most unified and comprehensive international efforts in trying to tackle the problem of small arms. The meeting presented a great chance for the world to be finally able to regulate small arms trade; a chance that was missed as the meeting failed to adopt a legal instrument and ended up instead with only the political document of a programme of action.

The UNPoA focuses on the concerns about the impact of small arms and their widespread availability in conflict and post-conflict situations. The focus on small arms in conflict-related situations is shown by underlining the importance of the DDR program in Part II (20) which states that the programme is to “develop and implement, including in conflict and post-conflict situations, public awareness and confidence-building programmes on the problem and consequences of the illicit trade” in small arms.⁹⁰⁹ The problems around small arms trade are indeed multifaceted and addressing only the illicit part is not adequate. Hence, the term “illicit” trade in the long title of the conference is understood as the easier of many aspects of the small arms trade for States to start focusing on.⁹¹⁰ While it is considered the easiest part, addressing illicit trade would only partly touch the real issue because many illegal arms, in reality, start out as legal arms which then are misused or diverted to unauthorized individuals or parties.⁹¹¹

⁹⁰⁸ UN Doc A/CONF.192/15

⁹⁰⁹ UN Doc A/CONF.192/15.

⁹¹⁰ Lora Lumpe “Aiming for Prevention: Approaches to Controlling Availability Existing International Efforts” (paper presented to IPPNW Conference Aiming for Prevention: International Medical Conference on Small Arms, Gun Violence, and Injury, Helsinki, Finland, 28-30 September 2001) <www.ipnw.org/ResourceLibrary/Hels/Lumpe.pdf>. Last accessed on 5 February 2010.

⁹¹¹ Denise Garcia *Small Arms and Security: New Emerging International Norms* (Routledge, 2006) at 198.

a. Rationales

The UNPoA consists of four parts; Part I (Preamble), Part II (Preventing, combating and eradicating), Part III (Implementation, international cooperation and assistance), and Part IV (Follow-up).⁹¹² Part I (preamble) consists of rationales, background and purposes of the document that will be examined further. Parts II and III consist of detailed measures for States to put in place, adopt, establish, and implement at national, regional, and global level to combat the illicit trade of small arms. Many of the UNPoA follow-up meetings contain reports of individual States on the progress of the measures recommended.

The preamble of the UNPoA describes what problems small arms may cause, such as their relation to humanitarian and socio-economic consequences, and their potential as a threat to security. The preamble also acknowledges that small arms may exacerbate violence and undermine respect for international law:

Gravely concerned about the illicit manufacture, transfer and circulation of small arms...which have a wide range of humanitarian and socio-economic consequences and pose a serious threat to peace, reconciliation, safety, security, stability and sustainable development...⁹¹³

The UNPoA also recognizes that the illicit trade in small arms “sustains conflicts, exacerbates violence, contributes to the displacement of civilians, [and] undermines respect for international humanitarian law”.⁹¹⁴ Paragraph 13 in the preamble reconfirms the notion that it is States’ main responsibility to control and prevent small arms from being diverted into the wrong hands. The participating States to the conference believe “that Governments bear the primary responsibility for preventing, combating and eradicating the illicit trade in small arms...”⁹¹⁵ In the same way, the States recognise that “the international community has a duty to deal with this issue, and [acknowledges] that the challenge posed by the illicit trade in small arms and

⁹¹² UN Doc A/CONF.192/15.

⁹¹³ 2001 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (A/CONF.192/15), preamble para 2.

⁹¹⁴ 2001 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (A/CONF.192/15), preamble para 3.

⁹¹⁵ *Ibid.*, para 13.

light weapons in all its aspects is multifaceted...”.⁹¹⁶ When States recognize that it is their responsibility to prevent illicit trade, this arguably implies that it is also States’ responsibility to ensure that the arms transferred do not subsequently become illicit.

Concern for humanity is shown in the preamble to the UNPoA on small arms, demonstrated by the concerns regarding excessive accumulation and uncontrolled spread of small arms “which have a wide range of humanitarian and socio-economic consequences”.⁹¹⁷ The UNPoA continues stressing the importance of the humanity rationale in paragraph 4, which is “[d]etermined to reduce human suffering caused by the illicit trade in small arms”.⁹¹⁸ The preamble part of the UNPoA provides some humanitarian grounds reinforcing the humanitarian *raison d’être* in regulating the small arms trade and reiterates the argument of scholars and civil society that small arms sustain conflict and undermine respect for international humanitarian law⁹¹⁹ as earlier exemplified in nearly every conflict zone in which the IHL is not observed.

The preamble paragraphs of the UNPoA indicate the recognition of several important points with regards to small arms. The first, human security is recognized as the rationale for regulation of small arms trade beyond war and armed conflict as it relates to a greater socio-economic problem as small arms availability is entwined with stability, security, economic development, culture, and the public health sector.⁹²⁰ The second, there is a recognition “that the Governments bear the primary responsibility” in preventing and combating illicit trade in small arms.⁹²¹ This has serious implications with regard to State responsibility in small arms transfers, as it arguably may also mean that States are responsible for the consequences the weapons have caused.

⁹¹⁶ Ibid, para 15.

⁹¹⁷ 2001 United Nations Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (A/CONF.192/15); A/RES/56/24V on 24 December 2001.

⁹¹⁸ Ibid.

⁹¹⁹ Ibid, para 5.

⁹²⁰ United Nations Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN PoA 2001), A/CONF.192/15, preamble para 2, 5, and 4.

⁹²¹ Ibid, preamble para 13.

b. Measures to control illicit trade of small arms

The UNPoA lists measures suggested to be adopted by countries. Part II: Preventing, combating and eradicating the illicit trade consists of various practical measures, States are requested and recommended to take in order to prevent, eradicate, and combat the illicit trade in small arms at the national level; at the regional level; and at the global level.⁹²² At the national level, States are requested:

To put in place, where they do not exist, adequate laws, regulations and administrative procedure to exercise effective control over the production of small arms... and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorised recipients.⁹²³

States are required to identify groups or individuals engaged in illegal manufacture, trade, transfer and take action under appropriate national law.⁹²⁴ Part II also requests States to adopt and implement the necessary legislative measures to establish as criminal offenses under domestic law, the illegal manufacture, possession, and trade of small arms.⁹²⁵

The UNPoA recognizes opportunistic non-State actors, groups, or individuals that may be involved in particular aspects of illegal small arms trade. Hence, the States are requested to identify and take action under national law against groups and individuals engaged in illegal manufacture, trade, stockpiling, transfer and possession of small arms.⁹²⁶ The measures to control illicit trade of small arms also include the application of appropriate and reliable marking, accurate records, adoption of adequate national legislation on small arms brokering, and the use of authenticated end-user certificates.⁹²⁷

⁹²² UN PoA (2001), A/CONF.192/15.

⁹²³ UN PoA (2001), A/CONF.192/15, part II, para 2.

⁹²⁴ Ibid, part II, para 6.

⁹²⁵ 2001 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. General Assembly document (A/CONF.192/15), part II, para 3.

⁹²⁶ Ibid, part II, para 6.

⁹²⁷ Ibid, part II, para 7, 9, 12, and 14.

In addition to the acknowledgment of State responsibility and duty in controlling illicit trade of small arms in the preamble (Part I), the operative paragraphs (Part II) include a reference to State responsibility to prevent the diversion of the weapons. The programme recommends States to have strict national regulations that “are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into illegal trade”.⁹²⁸ This underlines State responsibility under international law, particularly the element of prevention, so that the weapons are not being used in genocide, war crimes, ethnic cleansing, and other crimes against humanity.⁹²⁹

Further questions may arise from reading the text: What is the existing mechanism of international law to regulate or prevent the diversion of weapons into illegal trade? And, what incentives are there for them to do so? The reality is that, apart from the Security Council arms embargo, there is no legal instrument to control small arms trade.

Realising that the campaign against the illicit trade of small arms cannot be fought by a single State alone, the participating States at the conference indicated the need to cooperate at the regional and global level.⁹³⁰ At the regional level, the UNPoA encourages States:

To encourage negotiations, where appropriate, with the aim of concluding relevant legally binding instruments aimed at preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects, and where they do exist to ratify and fully implement them.⁹³¹

This thesis, in the next chapter, shows how States in regional groupings respond to the issue of small arms.

⁹²⁸ Ibid, part II, para 11.

⁹²⁹ As codified in the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90.

⁹³⁰ A/CONF.192/15, part II and III.

⁹³¹ 2001 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. General Assembly document (A/CONF.192/15), part II, para 25.

Another measure to combat the illicit trade of small arms is to establish moratoriums on transfer and manufacture of small arms as suggested in paragraph 26, Part II of the UNPoA. Those moratoriums on transfer would be likely to reduce the arms transfers and manufacture in the affected region. Finally, the States are encouraged, at the regional level, to support “national disarmament, demobilization and reintegration programmes, particularly in post-conflict situations.”⁹³² This is another wording that shows the focus of the UNPoA on conflict and post-conflict situations where a strong programme of DDR is needed.

At the global level, States undertake to cooperate with the United Nations system to ensure the effective implementation of arms embargoes and to provide, on a voluntary basis, national reports on implementation of the Programme of Action (paragraphs 32 and 33, part II). This becomes the basis for the United Nations Member States’ voluntary submission on the implementation of the UNPoA.

c. Implementation and follow-up

Part III of the UNPoA, entitled “Implementation, international cooperation and assistance”, recognizes the need for close cooperation between States and acknowledges, again, “that primary responsibility for solving the problems associated with the illicit trade in small arms and light weapons in all its aspects falls on all States.”⁹³³ The reiteration of State responsibility, on international cooperation in part III, is relevant to demonstrate that the State responsibility is beyond the border of an individual State. A sovereign State is, in theory, morally obligated towards other States and other human beings.⁹³⁴ This particular part of the UNPoA consists of the encouragement for States, in a position to do so, to render assistance, including

⁹³² Ibid, part II, para 30.

⁹³³ United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. General Assembly document (2001), the UN General Assembly (A/CONF.192/15), part III, paragraph 1.

⁹³⁴ Patrick Capps *Human Dignity and the Foundations of International Law* (Hart Publishing, 2009) at 196.

technical and financial assistance where needed, to support the implementation of the UNPoA.⁹³⁵

In part IV, the States agreed to convene a review conference in five years' time to review progress made in the implementation of the Programme of Action; to convene a meeting of States on a biennial basis to consider national, regional, and global implementation of the Programme of Action; and to undertake a United Nations study "for examining the feasibility of developing an international instrument to enable States to identify and trace in a timely and reliable manner illicit small arms".⁹³⁶ The undertaking of the States to have an instrument to identify and trace small arms has led to the adoption of the International Tracing Instrument by the General Assembly in 2005.⁹³⁷

States have been submitting reports voluntarily on the implementation of the Program of Action as requested by the resolution 56/24 of 12 December 2001. To assist States in submitting reports, the Office for Disarmament Affairs of the United Nations prepares a template and guidelines for the report.⁹³⁸ The UNPoA text does not indicate whether the report is to be submitted on an annual or biennial basis; however, since the follow-up meeting of the UNPoA is held on a biennial basis, it appears that most States opt to submit biennially although some of them indeed do so annually. In 2003, as many as 99 States submitted their implementation reports, increasing to 105 in 2005, and 109 in 2008.⁹³⁹ It is worth noting that the P5 countries are among those who submitted their reports. The reports submitted by States about the implementation reveal the effort that has been made by individual countries to regulate small arms in accordance with the points suggested in the UNPoA. It also

⁹³⁵ United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001), the UN General Assembly document (A/CONF.192/15), part III, para 3.

⁹³⁶ Ibid, part IV, para 1,

⁹³⁷ UNGA Decision 60/519 of 8 December 2005.

⁹³⁸ The form can be found at the UNODA

<<http://www.un.org/disarmament/convarms/Register/Forms/>>. Last accessed 21 June 2012.

⁹³⁹ United Nations Programme of Action Support System: PoA-ISS < <http://www.poa-iss.org/poa/poa.aspx>>. Last accessed on 25 January 2010.

serves as a confidence building measure, in addition to promoting norms through the multilateral mechanism of the United Nations.⁹⁴⁰

As a follow-up, the United Nations held the first review conference (RevConf) of the implementation of the UNPoA in 2006 to review the implementation of the UNPoA in the previous five years. States came to the meeting to report the actions they had taken so far in fulfilling their political undertakings to combat the small arms trade. The 2006 review conference was still filled with contrasting, divided positions, particularly on the issues of civilian possession and prohibition of transfer to non-state actors, with some arguing for the right to bear arms or moral obligation to help people against their oppressive government. Some are of the view that the international regulation of small arms trade may undermine the right to bear weapons. In the opening of the RevConf, even the UN Secretary-General tried to clarify the perception of the UNPoA by including in his statement that the UNPoA is not “intended to deny law-abiding citizens their right to bear arms in accordance with their national traditions” and it is “directed toward illegal weapons and not legal ones.”⁹⁴¹

Despite the reassuring statement from the Secretary-General, the United States delegation responded to that statement by stating that the United States will not agree to any provisions restricting civilian possession, use or legal trade of firearms inconsistent with its laws and practices.⁹⁴²

However, since the change of government in Washington to the Obama administration, the US position has been assertive, accommodating, and engaging in small arms related processes such as in the UNPoA meetings and the preliminary

⁹⁴⁰ Denise Garcia *Small Arms and Security: New Emerging International Norms* (New York, Routledge, 2006) at 43.

⁹⁴¹ United Nations Secretary-General Statement in the opening of the UNPoA RevConf, New York, on 26 June 2006.

⁹⁴² Statement by Robert G. Joseph, Undersecretary of State for Arms Control and International Security, at the United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 27 June 2006

<www.un.org/events/smallarms2006/pdf/arms060627usa-eng.pdf>. Last accessed on 25 January 2010.

negotiations as preparation towards the 2012 conference on an arms trade treaty.⁹⁴³ It helps the UNPoA process to focus on encouraging States to implement the suggested points at national, regional, and global levels.

d. Missed chance to regulate the small arms trade

The failure of the 2001 conference to adopt a legally binding document to regulate the illicit trade on small arms has disappointed many. Two main factors were seen as the reasons. First, the discussion to regulate small arms trade took place within a strict arms control and not a human rights framework.⁹⁴⁴ Hence the debate on the issue went to a more political point of view and did not view the problem from the human security perspective shared by many delegates and civil society. Second, major influential powers, in particular the US, did not provide their leadership in combating the unrestricted circulation of small arms and instead stood in the way. The position of the European Union, and the African countries in the conference was positive towards having a global legal document on small arms but the hope that the conference would lead to negotiating a treaty was not fulfilled.

The conference's result disappointed many. Those who were upset were mostly small arms affected countries and civil society which described the conference as having "represented a dramatic missed opportunity, both for the emerging transnational legal process of global small arms regulation and for the United States as a potential leader of the process".⁹⁴⁵ The disappointment of many countries, in particular the countries in Africa which are worst affected by small arms, is not only of not being able to have a legal document, but also on the policy of the United States on avoiding

⁹⁴³ US support to an ATT reversing the vote in the UNGA from against in 2006 and 2008 to in favour in 2009. See also Remarks on Arms Trade Treaty by Ellen Tauscher, Under Secretary for Arms Control and International Security, US Department of State, 18 February 2010 <<http://www.state.gov/t/us/136849.htm>>. Last accessed on 27 September 2011.

⁹⁴⁴ Harold Hongju Koh "Commentary: World Drowning in Guns" in Thomas J Biesteker and others (eds) *International Law and International Relations: Bridging Theory and Practice* (Routledge, 2007) at 64-65.

⁹⁴⁵ *Ibid.*, at 65.

the discussion on transparency in civilian possession on small arms and prohibiting transfer to non-state actors.⁹⁴⁶

The UN Secretary-General, in his 2008 report on small arms, added his voice to the disappointment and listed the factors that have impeded the progress of the UNPoA implementation. Those factors are, among others, that the UNPoA is not a legally binding instrument; Member States tend to view UNPoA through specific lens, overlooking the nexus between security and development; the UNPoA does not include ammunition; the document lacks measurability and specific numerical targets; and it does not provide concrete procedures for operational information exchange among States' law enforcements authorities.⁹⁴⁷ The Secretary-General's statement thus summed up that the points the States could not agree on at the 2001 Conference were among the main factors impeding the implementation of the programme.

The Program of Action itself, while it is only a political document, provides a forum where dialogue and discussion on aspects of small arms can occur on a regular basis and therefore norms continue being disseminated among States. The UNPoA related meetings, together with UNGA resolutions on small arms are perhaps the most significant factors in keeping the issue alive and opening up further possibility for having more effective regulation to control the small arms trade.

e. Latest developments

The inability of the UNPoA to adopt a more productive outcome was mainly because of the resistance of major powers and once the major powers, particularly the US, adopted a policy of more engagement, the meetings of the UNPoA started showing progress. The last two meetings in 2008 and 2010 on the follow-up of the implementation of the UNPoA showed promising progress. In both meetings, States

⁹⁴⁶ Statement by the President of the Conference on Small Arms, Ambassador Camilo Reyes Rodriguez after the adoption of the UN Programme of Action, New York, 21 July 2001. He stated that "Africa had agreed only with the greatest of reluctance to the deletion of proposed language addressing these vital issues relating to the illicit trade in small arms".

⁹⁴⁷ Report of the Secretary-General on Small Arms. S/2008/258, 17 April 2008.

produced action-oriented outcomes that provided guidance for national, regional and international efforts and cooperation.⁹⁴⁸

The biennial meeting of States in June 2010 produced practical outcomes in which important points of implementation, “The way forward”, are specified.⁹⁴⁹ Those points with specific way forward plans are on the establishment of sub-regional or regional mechanisms, international cooperation and assistance, strengthening of the follow-up mechanism, and the implementation of the ITI.⁹⁵⁰ The outcome of the meeting was later endorsed by the General Assembly as it encouraged all States to implement “the measures in the section of the report entitled ‘The way forward’”.⁹⁵¹ The meeting prepared a well planned second review conference for the implementation of the UNPoA in 2012 and no State apparently tried to block the process, as had been the case in the 2006 review conference. This change can be attributed to a better implementation of the UNPoA.

2. Firearms Protocol (2001)

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (the Firearms Protocol) was signed in 2001.⁹⁵² It was adopted to complement the United Nations Convention against Transnational Organized Crime (2000) and therefore its implementation is viewed as being to combat transnational organized crime.

⁹⁴⁸ Report of Secretary-General on Small Arms, 5 April 2011 (S/2011/255) at 14.

⁹⁴⁹ Report of the Fourth Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 14-18 June 2010 (A/CONF.192/BMS/2010/3).

⁹⁵⁰ Ibid.

⁹⁵¹ UNGA resolution (65/64) on the illicit trade in small arms and light weapons in all its aspects, of 8 December 2010, operative paragraph 4.

⁹⁵² Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005), 2326 UNTS 208.

The UNGA resolution 55/255 of 31 May 2001 on the Protocol provides insights into the way States in the United Nations think about it. Again, the resolution reflects the concerns of States that a regulation on firearms could undermine a State's right to self-defence as it reaffirms "the inherent right to individual or collective self-defence recognized in Article 51 of the Charter of the United Nations, which implies that States also have the right to acquire arms with which to defend themselves".⁹⁵³

The resolution 55/255 also reaffirms another right, namely "the right of self-determination of all peoples, in particular peoples under colonial or other forms of alien domination or foreign occupation, and the importance of the effective realization of that right".⁹⁵⁴ Hence, the preamble paragraphs underline two rights, the right of self-defence and the right of self-determination, that States think very important and up hold those rights against any possibility that may jeopardize them. Citing these rights in the resolution may reflect a situation where States do not want the provisions in the Protocol undermine the rights of self-defence and self-determination.

a. Purpose

The purpose of the Protocol is stated in article 2 as being to "promote, facilitate and strengthen cooperation among States parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition."⁹⁵⁵ The Protocol includes ammunition as a part that needs to be tackled in the combat against illicit firearms. The inclusion of the issue of ammunition is reassuring, since the UNPoA was not able to agree on the ammunition issue when the participating countries negotiated the document.

The protocol is the first international legal instrument to criminalize firearms traffickers and demand States parties establish national legislation in criminalizing

⁹⁵³ UNGA res 55/255 of 31 May 2001, preamble para 4.

⁹⁵⁴ Ibid, preamble para 4.

⁹⁵⁵ Ibid, art 2.

arms traffickers.⁹⁵⁶ With regard to the illegal trade, article 5 requires each State party to “adopt such legislative and other measures as may be necessary to establish as criminal offences”⁹⁵⁷

Some of the conduct that is required to be criminalized by the Protocol includes illicit manufacturing, illicit trafficking, and falsifying or altering the marking.⁹⁵⁸ The Protocol lists steps to be taken by States parties to prevent illicit trade of firearms. These steps are on record-keeping (article 7) and marking (article 8) as well as on ensuring all information on export, import, transit, licences and authorizations, quantity, marking, and identification be well kept. The Protocol demands States parties establish requirements for export, import, transit licensing and authorization systems which require both exporting and importing States have export and import licensing authorization.⁹⁵⁹ As for the arms brokers, the Protocol indicates that “States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering”.⁹⁶⁰

b. Protocol’s focus

The significant importance of the Protocol is that it is the first international legal document which sets required steps for States parties to adopt to control the illicit trade of firearms and to prevent illicit trafficking. The Protocol provides a legal basis for a State to adopt legislation to criminalize aspects of illicit firearms trade but it does not say in what situation transfer between States must not be conducted, for example, as where it would endanger people in the importing State. Neither does the Protocol give any hints to avoid regional instability caused by arms transfer.

⁹⁵⁶ 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 (2001), 2326 UNTS 208, art 5.

⁹⁵⁷ 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 (2001), 2326 UNTS 208, art 5.

⁹⁵⁸ Ibid.

⁹⁵⁹ Ibid, art 10.

⁹⁶⁰ Ibid, art 11.

The Protocol works on the assumption that State-to-State transfer cannot be impeded at all times as article 4 (2) states:

This Protocol shall not apply to State-to-State transactions or to State transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.⁹⁶¹

The Protocol thus focuses on combating organized crime and works based on two important assumptions, transfer of firearms in the Protocol will not apply to government sales; and the protocol is considered as law enforcement and not arms control.⁹⁶² The Protocol has a different focus in combating crime in reference to the issue of firearms, which was specifically adopted to control organized crime. Hence, it puts aside the aspects of humanitarianism and human security or even arms control, thus facilitating the Protocol's easy adoption.⁹⁶³

3. International Tracing Instrument (2005)

On many occasions, the country of origin of a weapon cannot be identified because it has no clear marking system. Having a clear marking on the weapons would enable the tracing of the country of origin, manufacturer, and the end-user of the weapons. The endeavour to have an international instrument on standardized marking resulted in the adoption by the General Assembly of an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (ITI) on 8 December 2005.⁹⁶⁴

⁹⁶¹ 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 (2001), 2326 UNTS 208, art 4(2).

⁹⁶² Wade Boese "UN General Assembly Adopts Illicit Firearms Protocol" (2001) 31(6) Arms Control 29 at 29.

⁹⁶³ S Neil MacFarlane and Yuen Foong Khong *Human Security and the UN: A Critical History* (Indiana University Press, 2006) at 198.

⁹⁶⁴ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (UNGA decision 60/519 of 8 December 2005).

The preamble of the instrument indicates that the need to trace and identify small arms is “required in the context of all forms of crimes and conflict situations”,⁹⁶⁵ as well as stressing that all aspects relating to the small arms issue should be “addressed in a coordinated and comprehensive manner”.⁹⁶⁶ The instrument tries to fill the absence of any standardized international mechanism on the marking of small arms. This is, in part, a response to some concerns that lethal weapons, such as small arms, are difficult to trace because there is no worldwide system to record the information on the sale and transfer of small arms.⁹⁶⁷ Without a worldwide standardized tracing system, a small arms exporting country can easily claim ignorance about any weapons which have ended up in the wrong hands.⁹⁶⁸

Provided weapons are marked in compliance with the ITI, small arms proliferation could be traced to collect the information on the manufacturer, country of origin, and the end-users of the weapons. In this way, the parties involved in diverting the weapons could be held responsible. Observing the provisions in the instrument, the preamble states that the main purposes are to “enable States to identify and trace, in a timely and reliable manner, illicit small arms”; and “to promote and facilitate international cooperation and assistance in marking and tracing”.⁹⁶⁹ The instrument ensures in its provisions not to undermine the right of States to acquire weapons in self-defence, which, understandably accommodates States’ concerns that the regulations on small arms would jeopardize the right to self-defence:

This instrument does not restrict the right of States to acquire, manufacture, transfer and retain small arms and light weapons for their self-defence and security needs...in a manner consistent with the Charter of the United Nations.⁹⁷⁰

⁹⁶⁵ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (UNGA decision 60/519 of 8 December 2005), preamble para 2.

⁹⁶⁶ Ibid, preamble para 8.

⁹⁶⁷ Thalif Deen “Disarmament: A Non-Binding Pact to Control Small Arms Is Finalized” *Global Information Network* (New York, 1 August 2005). A joint report released by IANSA, Oxfam, and Amnesty International entitled “Lethal arms vanishing without trace” concluded that it is more difficult to trace an AK-47 than a genetically modified tomato or a suitcase.

⁹⁶⁸ Ibid.

⁹⁶⁹ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (2005), General Provision, para 1 and 2.

⁹⁷⁰ Ibid, para 3.

As the paragraph above also shows, self-defence is the concern of countries in discussing small arms. The instrument demands States have:

...unique marking providing the name of the manufacturer, the country of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture; and encourage the marking of such additional information as the year of manufacture, weapon type/model and calibre.⁹⁷¹

Many States came to the meeting on marking and tracing negotiation with the hope to have a legal instrument on tracing and marking. The countries affected by the wide spread of small arms in sub-Saharan Africa, Latin America, and the Caribbean, as well as European Union member countries made their positions known, they preferred a legal document.⁹⁷² Staunch opposition from the US, Israel, Egypt, and Japan delivered a major blow to the effort to have a legal instrument on tracing and marking.⁹⁷³ Efforts to regulate the trade aspect of small arms again did not result in a much-needed legally binding instrument.

Discussion of the implementation of the ITI takes place within the framework of the UNPoA process such as in the biennial meeting or review conference of the UNPoA.⁹⁷⁴ In practice, since the adoption of the ITI in 2005, developments related to the instrument have included the report on the ITI implementation by States. Until 31 December 2010, in response to the demand of report submission every two years, as many as 66 countries have submitted reports on the implementation of the instrument.⁹⁷⁵

⁹⁷¹ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (UNGA decision 60/519 of 8 December 2005), point 8 (a).

⁹⁷² Fitzroy Sterling "Illicit Gun Trade Flourishes Despite Government Pledges" *Global Information Network* (New York, 29 June 2006) at 1.

⁹⁷³ *Ibid*, at 1.

⁹⁷⁴ UNGA res 61/66 of 6 December 2006.

⁹⁷⁵ Sarah Parker *Analysis of National Reports: Implementation of the UN Programme of Action on Small Arms and the International Tracing Instrument in 2009-10* (Small Arms Survey, 2011) at 47-48.

E. Summary

Small arms are always part of arms embargoes imposed by the Security Council. The number of arms embargoes increased significantly after the Cold War as the P5 countries have found it relatively easier to agree on imposing an arms embargo when there is no more ideological rivalry among them as there was in the Cold War. The Security Council resolutions to impose an arms embargo are based on Chapter VII of the Charter of the United Nations regarding responsibility to maintain international peace and security, which means that the Security Council has to agree that a particular country or conflict or entity or individual targeted by the arms embargo is a threat to international peace and security. An arms embargo imposed by the Security Council represents unified efforts by the international community to control the circulation of weapons to specific targeted entities/individuals. An armed conflict usually precedes, or serves as a prerequisite to adopting an arms embargo, although it is not always the case. However, after having experienced the imposition of many arms embargoes, the United Nations found that, for various reasons, in many cases such arm embargoes were rather ineffective to stop the flow of small arms.⁹⁷⁶

The Security Council resolutions on arms embargoes bear legal responsibility; however, States would not be able to fully comply with the resolution in the implementation if they did not have national capacity to enforce them. The violations occur, in part, because States do not have the means to fully comply with the resolutions and not because they intend to defy or violate them. Thus States will have difficulty in implementing arms embargoes if there is no international legal arms transfer regime which States must adhere to and incorporate into their national legislation to begin with. Therefore, it is reasonable that an international legal instrument regulating the small arms trade is needed to enforce and complement any Security Council resolution on arms embargoes.

⁹⁷⁶ Report of the Secretary-General on Small Arms (S/2008/258), 17 April 2008, at [5-15].

Arms embargoes have been repeatedly violated for economic, ideological, and political reasons. This is acknowledged by the United Nations in many of the Sanctions Committees reports. In many cases, an arms embargo is ineffective because it is merely symbolic and difficult to enforce. In its relation to small arms, a failure can have several reasons, such as difficulties in monitoring and enforcement, excessive availability of small arms, lack of sanctions for violations, and lack of control over existing weapons.

Apart from arms embargoes, there are other efforts to control small arms under the UN framework, such as the 2001 UNPoA, the 2001 Protocol on Firearms, and the 2005 International Tracing Instrument. These instruments, while not effective enough in controlling small arms proliferation, have been a step forward in establishing global awareness and norms. Another instrument in pursuing transparency in global armament is the UN Register, adopted to encourage countries to submit voluntary reports on seven categories of arms transfer. The UN register, however, does not include small arms, as the negotiation to add small arms as the eighth category has not yet been successful.

As one of the most consolidated efforts by the world to regulate small arms trade, the conference to combat illicit trade of small arms in 2001 was considered as a missed opportunity as it failed to adopt a legal document. The debate in the negotiation of small arms in the UNPoA revolves around “illicit” trade and no one disagrees that the illicit trade should be stopped. The debate can be extended to how to stop legal trade to prevent the weapons that might be used in internationally wrongful acts. The UNPoA, nevertheless, has demonstrated that the rationale of humanity in its preamble can be a reason to regulate weapons as well as explicitly acknowledged the view that it is State responsibility and duty to control the circulation of small arms under relevant international law.

Chapter VI:

Regional Response to Small Arms

A. Introduction

This chapter will describe the responses of regional organizations to the threat of the uncontrolled proliferation of small arms. The thesis examines regional organizations' response to the issue of small arms with their regional policy and how they apply it. For the purpose of examining regional response to the issue of small arms, the thesis has chosen regional organizations in Africa, Asia, Europe, and the Americas. A comparison is made to see how, and to what extent, each regional institution responds to the threat of small arms with considerations of IHL and IHRL.

The world has been working to negotiate an international common standard on arms trade, although so far has not been able to adopt a legally binding treaty. In the absence of a legally binding instrument to regulate the transfer of the weapons at a global level, a regional approach could offer an alternative in providing legal instrument or normative guidelines.⁹⁷⁷ To some extent, arguably, regional and sub-regional instruments or normative frameworks “have been proven useful in preventing the transfer of arms to areas of conflict or repressive Governments”.⁹⁷⁸

As seen in Chapter II, practically no region is free from the impact of the wide availability of small arms, with various degrees of impact from their use. In response to the threats of small arms, some regional and sub-regional organizations have moved far in dealing with small arms, including adopting legally binding instruments, while some others have not been able to do so. Regions with different security challenges, levels of economy and political institutions may have different responses to the same threat of small arms. Each regional organization also has its distinctive institutional characteristics which partly explains the way it behaves and responds to an issue.

⁹⁷⁷ As recommended by the 2001 UN Programme of Action (A/CONF.192/15), part II, para 24-31.

⁹⁷⁸ Report of the Secretary-General on Small Arms to the United Nations Security Council, S/2008/258, 17 April 2008, para 15.

B. Africa

Africa, with around 100 million small arms in circulation,⁹⁷⁹ perhaps is the best example to describe a region facing a challenge to deal with the wide availability of small arms, violence and prolonged armed conflicts.⁹⁸⁰ Prolonged armed conflicts, such as that in Somalia, affect the neighbouring countries as the weapons spread across porous borders. Reports indicate that small arms in Kenya come from Somalia, Sudan, Ethiopia, Tanzania, and Uganda.⁹⁸¹ Taking as indicators the high rate of violence and on-going armed conflict, each country with high violent crime rates engaging in a war or in a post-armed conflict situation may have millions of small arms.⁹⁸²

With regard to the small arms issue, Africa has found that consensus is much more difficult to achieve at the international level than at the regional level as there are always countries to block the negotiation.⁹⁸³ Being the most affected by the proliferation of small arms, the African countries' determination to control small arms is reflected in their regional policies on the issue.

The adoption of four legally binding sub-regional instruments in Africa is an important step toward restricting the uncontrolled proliferation of small arms in the continent. It will take some time to fully measure the success of the implementation of the legally binding instruments adopted. However, the establishment of regional/sub-regional legal instruments has been by itself a success as they allow African governments to create national commissions and give each government the

⁹⁷⁹ Hugh McCullum "Small Arms: The World's Favorite Weapons of Mass Destruction" (2007) 5(1) AfricaFiles.

⁹⁸⁰ As acknowledged by the preamble paragraphs of sub-regional instruments: the 2001 SADC Protocol, the 2006 ECOWAS Convention, and the 2004 Nairobi Protocol.

⁹⁸¹ Manasseh Wepundi and others *Special Report, Availability of Small Arms and Perceptions of Security in Kenya: An Assessment* (Geneva, Small Arms Survey, 2012) at 56, 58, in Kenya, the conservative estimate suggests there may be 530,000 to 680,000 illicit small arms.

⁹⁸² *Small Arms Survey 2009: Shadows of War* (Cambridge, 2009) at 166, as in South Africa alone, it was estimated 5,590,000 guns in circulation are in civilian hands; Denise Garcia *Small Arms in Africa: Legal Indicators* (Ibrahim Index of African Governance, 2008) at 6, suggests in West Africa, it is estimated approximately 8-10 million illegal weapons are in circulation.

⁹⁸³ Denise Garcia *Small Arms in Africa: Legal Indicators* (Ibrahim Index of African Governance, 2008) at 3.

ability to implement and monitor the initiative as set forth by the instruments.⁹⁸⁴ Furthermore, regional legal instruments provide guidelines for States to observe and set up regional norms of small arms transfer.

One indicator of the positive effect of the regional instruments is a closer cooperation among the countries to combat the proliferation of small arms as required by the legal instrument.⁹⁸⁵ To foster cooperation among law enforcement agencies, African countries also established a coordination mechanism among regional police chiefs and established the control of small arms in their programmes.⁹⁸⁶ The countries bound by the same legal instrument tend to work more closely in order to combat illegal proliferation, such as the cooperation between South Africa and Mozambique.⁹⁸⁷ The two countries, which belong to Southern African Development Community (SADC), organized a joint operation to stem movement of illegal firearms across their common borders.⁹⁸⁸

1. Bamako Declaration

The vast destruction by armed conflicts and violence experienced by African countries, in which small arms played a great part, steers African countries to actively push the issue of small arms on the international agenda. The African countries of the Organisation of African Unity (since 2002 replaced by the African Union) think of playing an active part and present a strong united voice and it is for that purpose they adopted a common agenda on small arms which they declared in Bamako in 2000.⁹⁸⁹

⁹⁸⁴ Denise Garcia *Small Arms in Africa: Legal Indicators* (Ibrahim Index of African Governance, 2008) at 7.

⁹⁸⁵ Southern African Development Community Protocol on the Control of Firearms, Ammunition and Other Related Materials (adopted on 14 August 2001, entered into force in 8 November 2004), art 11(2).

⁹⁸⁶ Elli Kytomaki and Valerie Yankey-Wayne *Five Years of Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports* (United Nations Publication, 2006) at 28-29.

⁹⁸⁷ Noel Stott "Small Arms Proliferation in Southern Africa: Reducing the Impact of 'Real Weapons of Mass Destruction'" (2007) 5(3) *AfricaFiles* .

⁹⁸⁸ *Ibid.*

⁹⁸⁹ Bamako Declaration on An African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000). Available at

The Bamako Declaration reflects the priority and determination of African countries to deal with the issue of small arms as they acknowledge that the proliferation of small arms “continues to have devastating consequences for stability and development”.⁹⁹⁰ The Declaration recognizes the link with IHL as the illicit proliferation of small arms “sustains conflict, exacerbates violence...and threatens international humanitarian law”.⁹⁹¹ It then moves further to make reference to human rights as the proliferation of small arms “jeopardises the respect for fundamental human rights and hinders economic development”.⁹⁹² The African countries agree that the issue of small arms should be addressed through, inter alia, “the observance of human rights”⁹⁹³ and “the respect for international humanitarian law”.⁹⁹⁴

Bamako Declaration is not a legally binding instrument but demonstrates the determination of a collective effort by countries in Africa to deal with destruction caused by small arms.⁹⁹⁵ Adopted in 2000 before the UN Conference on small arms, there are many similar elements in the Bamako Declaration also found in the 2001 UNPoA, which may be the result of the African contribution to international effort addressing small arms.⁹⁹⁶

<<http://www.armsnet africa.org/content/bamako-declaration-african-common-position-illicit-proliferation-circulation-and-trafficking>>. Last accessed 2 July 2012.

⁹⁹⁰ Bamako Declaration on An African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000), at V(1). Available at

<<http://www.armsnet africa.org/content/bamako-declaration-african-common-position-illicit-proliferation-circulation-and-trafficking>>. Last accessed 2 July 2012.

⁹⁹¹ Bamako Declaration on An African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000), at V(1.i). Available at

<<http://www.armsnet africa.org/content/bamako-declaration-african-common-position-illicit-proliferation-circulation-and-trafficking>>. Last accessed 2 July 2012.

⁹⁹² Bamako Declaration on An African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000), at V(1.v). Available at

<<http://www.armsnet africa.org/content/bamako-declaration-african-common-position-illicit-proliferation-circulation-and-trafficking>>. Last accessed 2 July 2012.

⁹⁹³ Ibid, at V(2.iii).

⁹⁹⁴ Bamako Declaration on An African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000), at V(2.ix). Available at

<<http://www.armsnet africa.org/content/bamako-declaration-african-common-position-illicit-proliferation-circulation-and-trafficking>>. Last accessed 2 July 2012.

⁹⁹⁵ Claudette Torbey “The Most Egregious Arms Brokers: Persecuting Arms Embargo Violators in the International Criminal Court” (2007) 25 (2) Wis Int’l L J 335 at 348.

⁹⁹⁶ Claudette Torbey “The Most Egregious Arms Brokers: Persecuting Arms Embargo Violators in the International Criminal Court” (2007) 25 (2) Wis Int’l L J 335 at 348.

2. SADC Protocol

Following the African countries' political declaration in Bamako on their common position on small arms, the sub-regional organisation of the Southern Africa Development Community in 2001 finalized the Protocol on the Control of Firearms, Ammunition and other Related Materials.⁹⁹⁷ With the adoption of this Protocol, the 14 SADC countries are legally bound to “enact legislation and take other measures to sanction criminally” the violation of the UNSC arms embargoes⁹⁹⁸ and incorporate into their national laws “the coordination of procedures for the imports, exports, and transits of firearms shipments”.⁹⁹⁹ The SADC Protocol also has specific provisions on marking and record keeping (article 9), public education and awareness programmes (article 13), as well as transparency and information exchange (article 16).

The SADC Protocol was adopted following the international momentum in the efforts to control small arms, particularly within the United Nations framework.¹⁰⁰⁰ In terms of substance, the SADC Protocol is a regional response to a post-conflict situation where countries have to deal with the negative impact of the continuing threat of small arms, which obstruct their development and stability.¹⁰⁰¹

3. Nairobi Protocol

Another sub-regional progress in the combat against the proliferation of small arms is marked by the adoption of the Nairobi Protocol for the Prevention, Control and

⁹⁹⁷ Southern African Development Community (SADC) Protocol on the Control of Firearms, Ammunition and Other Related Materials (adopted 14 August 2001, entered into force 8 November 2004). States parties to the SADC Protocol are Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. It is interesting to note that Zimbabwe, which is not known to have high respect for IHL and IHRL, is also a party to this Protocol.

⁹⁹⁸ SADC Protocol on Control of Firearms, Ammunition and Other Related Materials (2001), art 5 (2).

⁹⁹⁹ Ibid, art 5 (3.c).

¹⁰⁰⁰ See Chapter V.

¹⁰⁰¹ Noel Stott “Small Arms Proliferation in Southern Africa: Reducing the Impact of ‘the Real Weapons of Mass Destruction’” *Africafiles* < <http://www.africafiles.org/article.asp?ID=14228>>. Last accessed 31 July 2012.

Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (2004).¹⁰⁰² In addition, regional centres on small arms were established, for example, the Nairobi Regional Centre on Small Arms, with the purpose to “coordinate the joint effort by National Focal Points in Member States to prevent, combat and eradicate stockpiling and illicit trafficking in small arms”.¹⁰⁰³

The countries in the Great Lakes Region and the Horn of Africa were concerned about the supply of small arms into the region, hence the Nairobi Protocol was adopted with the purpose to, among others, “prevent the excessive and destabilising accumulation of small arms and light weapons in the sub-region.”¹⁰⁰⁴ Like the SADC Protocol, the Nairobi Protocol demands State parties adopt the necessary legislative or other measures to sanction criminally, “under their national law the violation of arms embargoes” mandated by the UNSC or regional organisation.¹⁰⁰⁵ This is a sub-regional contribution to ensure the effectiveness of the implementation of the UNSC arms embargoes.

To support an effective implementation of the Nairobi Protocol, Best Practice Guidelines were issued in 2005.¹⁰⁰⁶ Some criteria are stated as guidelines in arms transfer with the considerations, among other criteria, of IHL and IHRL that “States parties shall not authorise transfers which would violate their direct obligations under international law”¹⁰⁰⁷ including “universally accepted principles of international

¹⁰⁰² Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (signed 21 April 2004, entered into force 5 May 2006). States parties to the Protocol are Burundi, Central Africa Republic, DRC, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Seychelles, Somalia, South Sudan, Sudan, Tanzania, and Uganda.

¹⁰⁰³ Nairobi Regional Centre on Small Arms <www.recsasec.org/about.htm>. Last accessed on 3 March 2010.

¹⁰⁰⁴ Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (signed 21 April 2004, entered into force 5 May 2006), art 2(b).

¹⁰⁰⁵ Ibid, art 3 (b).

¹⁰⁰⁶ Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons (approved by the third Ministerial Review Conference, 20-21 June 2005 in Nairobi). Available at <<http://www.recsasec.org/pdf/Best%20Practice%20Guidelines%20Book.pdf>>, last accessed 4 July 2012.

¹⁰⁰⁷ Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons (approved by the third Ministerial Review Conference, 20-21 June 2005 in Nairobi) at 2.2.3 (a). Available at

humanitarian law”.¹⁰⁰⁸ In addition, States parties shall not authorise transfers which are likely to be used for “the violation and suppression of human and peoples’ rights and freedoms”.¹⁰⁰⁹

4. ECOWAS Convention

In 2006, the African countries in the west part of the continent adopted the Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (ECOWAS Convention).¹⁰¹⁰ The effort of this sub-region to stem the flood of small arms started in 1998 when the head of States of the 15 members of ECOWAS declared the moratorium on the weapons, known as the Bamako Declaration. Eight years later, the ECOWAS successfully transformed it into a legally binding regional convention.¹⁰¹¹

The ECOWAS Convention is important as it is the first convention related to small arms to explicitly put IHL as the basis to ban arms transactions, specifically article 6(2):

A transfer shall not be authorised if its authorisation violates obligations of the requesting States as well as those of Member States, under international law, including: ...(b) universally accepted principles of international humanitarian law.¹⁰¹²

<<http://www.recsasec.org/pdf/Best%20Practice%20Guidelines%20Book.pdf>>, last accessed 4 July 2012.

¹⁰⁰⁸ Ibid, at 2.2.3 (a.vi).

¹⁰⁰⁹ Ibid, at 2.2.3 (b.i).

¹⁰¹⁰ Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other related Material (signed 14 June 2006, entered into force 20 November 2009); States parties to the ECOWAS Convention are Benin, Burkina Faso, Caf e Verde, Cote d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

¹⁰¹¹ ICRC “Efforts at Tackling Arms Proliferation in West Africa Gain Momentum” (press release, 22 May 2009) <www.icrc.org/web/eng/siteeng0.nsf/html/nigeria-weapon-news-220509>. Last access on 26 February 2010.

¹⁰¹² Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other related Material (signed 14 June 2006, entered into force 20 November 2009), art 6(2). See also Zerah Yihdago *The Arms Trade and International Law* (Oxford, Hart Publishing, 2007) at 214.

In arms transfer, the Convention demands the member States consider the possibility of the weapons used against humanitarian law and human rights, so that a transfer shall not be authorised if the arms are destined to be used for “the violation of international humanitarian law or infringement of human and peoples’ rights and freedoms”.¹⁰¹³ The Convention demands the member States not authorise arms transfer if the weapons are used for “the commission of serious violations of IHL, genocide or crimes against humanity”,¹⁰¹⁴ or to “worsen the internal situation in the country of final destination...or prolong armed conflicts”.¹⁰¹⁵

It is worth noting, the ECOWAS Convention was the first legally binding instrument of sub-regional organisation on small arms that departed from the traditional arms control-disarmament approach and invoked the consideration of IHL and IHRL.¹⁰¹⁶ The inclusion of IHL and IHRL as criteria in the ECOWAS Convention was apparently inspired by the similar criteria in the EU Code of Conduct, taking into account that the integrated process of the convention’s drafting was conducted with contributions from various actors including the EU and civil society.¹⁰¹⁷

5. Central African Convention

The latest sub-regional adoption of a legally binding instrument is the Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and

¹⁰¹³ Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other related Materials (signed 14 June 2006, entered into force 20 November 2009), art 6(3.a).

¹⁰¹⁴ Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other related Materials (signed 14 June 2006, entered into force 20 November 2009), art 6(3.b).

¹⁰¹⁵ Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other related Materials (signed 14 June 2006, entered into force 20 November 2009), art 6 (3.c)

¹⁰¹⁶ Denise Garcia *Small Arms in Africa: Legal Indicators* (Ibrahim Index of African Governance, 2008) at 3.

¹⁰¹⁷ Ilhan Berkol “Analysis of the ECOWAS Convention on Small Arms and Light Weapons and Recommendations for the Development of an Action Plan” (2007) Note d’Analyse du GRIP, Brussels < <http://www.grip.org/bdg/pdf/g1071en.pdf>>.

Assembly on 30 April 2010 in Kinshasa, Democratic Republic of Congo.¹⁰¹⁸ The Convention is purposed to “[p]revent, combat and eradicate” the illicit trade, “[s]trengthen the control” of manufacture, trade, and transfer, as well as “[c]ombat armed violence and ease the human suffering” caused by illicit trade and trafficking of small arms.¹⁰¹⁹

IHL and IHRL inclusion in considerations of transfers are explicitly stated in the Convention. The States parties agree that a transfer authorisation shall be denied by the competent national body if small arms “are to be or might be used to commit violations of international human rights law or international humanitarian law”.¹⁰²⁰ A transfer authorisation shall also be denied if the weapons “might violate an international arms embargo”.¹⁰²¹

The African regional common position in Bamako declaration and the three of four sub-regional legally binding instruments have identified directly the important link between IHL and IHRL and the transfer of small arms.¹⁰²² The legal instruments show that they were adopted not based solely on arms control but also beyond this to include considerations of humanitarian and human rights. One important feature of the adoption of the legally binding instruments to control small arms by sub-regional organizations in Africa is that the instruments were adopted in response to the regional problem, not through the power plays and compromise found in a global negotiation.¹⁰²³

¹⁰¹⁸ Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (adopted 30 April 2010, not yet enter into force), UN Doc A/65/57-S/2010/534. Signed by eleven States namely, Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, DRC, Equatorial Guinea, Gabon, and Sao Tome and Principe.

¹⁰¹⁹ Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (adopted 30 April 2010, not yet enter into force), UN Doc A/65/57-S/2010/534, art 1.

¹⁰²⁰ Ibid, art 5 (5.b).

¹⁰²¹ Ibid, art 5 (5.c).

¹⁰²² Nairobi Protocol does not have a reference to IHL and IHRL in its articles but the Best Practice Guidelines of the Protocol have IHL and IHRL as transfer criteria.

¹⁰²³ Noel Stott “Small Arms Proliferation in Southern Africa: Reducing the Impact of ‘the Real Weapons of Mass Destruction’” *Africafiles* < <http://www.africafiles.org/article.asp?ID=14228>>. Last accessed 31 July 2012.

C. Europe

1. EU Code of Conduct on Arms Exports

Countries in Europe and Africa represent a stark contrast in small arms cases, the former¹⁰²⁴ are mostly the manufacturers or exporters and the latter are the importers. It is interesting to see how the European Union (EU) deals with small arms taking into account that significant profit, generated from small arms transfer, is enjoyed by its member countries. It is known that under the EU framework, the European countries are the first to have taken steps to increase the coherence of policy on small arms through, inter alia, common export controls.¹⁰²⁵

As early as 1991, the EU had adopted common criteria which later developed into a code of conduct adopted by the European Union Council in 1998.¹⁰²⁶ The Code of Conduct consists of eight criteria and 12 paragraphs of operative provisions. Recognising the special responsibility of arms exporting States,¹⁰²⁷ the Code of Conduct states several purposes, among others, to:

Set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all EU Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.¹⁰²⁸

The eight criteria of the Code of Conduct specifically state what the EU member countries are allowed to do and what they are not allowed to do in conducting arms exports, which include considerations of the regional stability and the situation in the

¹⁰²⁴ Small Arms Survey ranks top 15 small arms producer countries, namely Austria, Belgium, Brazil, Canada, China, Germany, India, Italy, North Korea, Pakistan, Russian Federation, Switzerland, Turkey, United Kingdom, United States < <http://www.smallarmssurvey.org/de/weapons-and-markets/producers/industrial-production.html?0=>>. Last accessed 4 July 2012.

¹⁰²⁵ Elli Kytomaki and Valerie Yankey-Wayne *Five years of Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports* (United Nations Publication, 2006) at 128.

¹⁰²⁶ European Union Code of Conduct on Arms Exports (1998), the Council of the European Union (8675/2/98 REV2) <<http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>>. Last accessed 5 July 2012.

¹⁰²⁷ Code of Conduct (1998), preamble para 2. the Council of the European Union (8675/2/98 REV2), preamble para 2. Available at <<http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>>. Last accessed 5 July 2012.

¹⁰²⁸ Ibid, preamble para 3.

recipient country. There are criteria that link the transfer of weapons to the respect for IHL, IHRL and internal situation in the buyer country.¹⁰²⁹ The criteria specifically demand member countries consider the “respect of human rights in the country of final destination”¹⁰³⁰ and compliance with international commitments, “including under international humanitarian law”.¹⁰³¹

The Code of Conduct demands the exporting States consider the economic ability of the recipient State to buy weaponry, to avoid a large portion of the recipient State’s budget being allocated to weaponry instead of economic development.¹⁰³² Each of the criteria is broken down into detailed considerations that an arms exporting State has to consider. The criteria are then supported by 12 operative provisions in which practical details in the operation of the Code of Conduct are further elaborated. The operative provisions, for instance, explain how the States will circulate through diplomatic channels, details of licences refused for military equipment in accordance with the Code of Conduct.¹⁰³³

In reality, having a framework and common criteria did not automatically free European countries from transferring weapons incompatible with the criteria. For example, at the time of the Rwanda genocide in the 1990s, reports mention that the Rwandan army acquired considerable quantities of weapons, mainly small arms, from European countries such as France and Bulgaria.¹⁰³⁴ Likewise, a transfer from Bulgaria to Sierra Leone shows that the Code does not regulate the companies and individuals which facilitate arms transfers from Europe.¹⁰³⁵ Another example was the

¹⁰²⁹ EU Code of Conduct (1998), criteria 2, 3, 6 and 8.

¹⁰³⁰ Code of Conduct (1998), preamble para 2. the Council of the European Union (8675/2/98 REV2), criteria 2. Available at <<http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>>. Last accessed 5 July 2012.

¹⁰³¹ Ibid, criterion 6 (b).

¹⁰³² Ibid, criterion 8.

¹⁰³³ EU Code of Conduct (1998), point 3 of the operative provisions.

¹⁰³⁴ Camilla Waszink “The proliferation of Small Arms: A Threat to International Human Rights” (Small Arms Survey, 2001)

<www.smallarmssurvey.org/files/sas/publications/w_papers_pdf/DP/DP_HumanRights.htm>. Last accessed on 8 May 2009.

¹⁰³⁵ Zerah Yihdego *The Arms Trade and International Law* (Hart Publishing, 2007) at 213.

transfer to the Sri Lankan government in 2009, while, at the same time, the EU was condemning its human rights violence.¹⁰³⁶

These examples indicate that there are still loopholes in the practice, lack of enforcement, and the absence of global criteria which certainly helped these things to occur. Furthermore, even though the European Union Code of Conduct on Arms Export provides a guideline in exporting arms, the document is, nevertheless, a political document. As indicated by some critics, the Code of Conduct has some flaws in its practice including the failure to control transit and transshipment of arms, and export to embargoed destinations, breaching the criteria.¹⁰³⁷ Events showed that as recently as 2009, the EU member countries still exported weapons to States that were likely to use the weapons wrongly, such as Tunisia, Egypt, Bahrain and Libya.¹⁰³⁸

Following the Arab Spring in 2011, the question of the origin of the weapons used by the governments in violent response to anti-government protests leads to information about the arms sales from the EU worth billions of euros. Data indicates that, during 1996-2010, the EU member States licensed arms exports to Algeria (1,551 million euros), Bahrain (188 million euros), Egypt (1,098 million euros), Libya (1,056 million euros), Syria (9 million euros), Tunisia (138 million euros), and Yemen (213 million euros).¹⁰³⁹ This further questions the effectiveness of the implementation of the EU policy of the Code of Conduct in arms export.

¹⁰³⁶ Leigh Phillips “While Condemning Sri Lankan Violence, EU Still Sells Arms to Government” (2009) EUObserver.com < <http://euobserver.com/9/28155>>. Last accessed on 3 August 2011.

¹⁰³⁷ *Undermining Global Security: The European Union’s Arms Export* (Amnesty International, 2004) at 5.

¹⁰³⁸ Kaye Stearman “With Our Arms Wide Open” (2011) The European < <http://www.theeuropean-magazine.com/227-steermann/228-eu-arms-exports>>. Last accessed on 3 August 2011. Stearman showed the increase of EU arms export to Middle East had soared from 4.9 billion Euro in 2008 to 6.9 billion Euro in 2009; Mark Bromley “The Review of the EU Common Position on Arms Exports: Prospect for Strengthened Control” (2012) 7 EU Non-Proliferation Consortium 1 at 10.

¹⁰³⁹ Mark Bromley “The Review of the EU Common Position on Arms Exports: Prospect for Strengthened Control” (2012) 7 EU Non-Proliferation Consortium 1 at 10.

2. Mechanism under OSCE

No differently from other parts of the world, Europe has also experienced intra-State armed conflicts such as those in the Balkans. When the conflicts ended, the weapons reportedly went to criminals who were responsible for high levels of criminality in European countries.¹⁰⁴⁰ Meanwhile, countries of the former Warsaw Treaty in South East Europe face another problem as the reduction of their armed forces following the end of the Cold War resulted in a huge surplus of weapons that are at risk of being diverted to the illicit market.¹⁰⁴¹ The Organization for Security and Cooperation in Europe (OSCE) responded to the problem of small arms by assigning the Forum for Security Cooperation (FSC) to deal with aspects of security to develop documents regulating transfer of conventional weapons.¹⁰⁴²

The OSCE adopted the 2000 OSCE Document on Small Arms and Light Weapons¹⁰⁴³ and other documents with the purpose of effectively addressing the small arms problem, fostering transparency and confidence among the participating States, and helping to combat terrorism and organized crime.¹⁰⁴⁴ The Forum of Security Cooperation later issued two important documents as guides for OSCE participating States dealing with small arms and ammunition, namely the OSCE Handbook of Best Practices on Conventional Ammunition released in 2008,¹⁰⁴⁵ and the Handbook of Best Practices on Small Arms and Light Weapons released in 2003.¹⁰⁴⁶

The preamble paragraph of the guidelines states that its objectives are to achieve “(i) greater responsibility in transfers of conventional arms; [and] (ii) the prevention of

¹⁰⁴⁰ Elli Kytomaki and Valerie Yankey-Wayne *Five Years of Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports* (United Nations Publication, 2006) at 127.

¹⁰⁴¹ *Ibid.*, at 128.

¹⁰⁴² OSCE, Forum for Security Cooperation <www.osce.org/fsc/item_11_13550.html>. Last accessed on 5 March 2010.

¹⁰⁴³ OSCE document on small arms (FSC Doc/1/00).

¹⁰⁴⁴ Zdzislaw Lachowski and Svenja Post “Conventional Arms Control” in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford University Press, 2009) at 453.

¹⁰⁴⁵ OSCE Handbook of Best Practices on Conventional Ammunition (2008) <<http://www.osce.org/fsc/33371>>. Last accessed on 5 July 2012.

¹⁰⁴⁶ OSCE Handbook of Best Practices on Small Arms and Light Weapons (2003), decision no 5/03. Available at <<http://www.fas.org/asmp/campaigns/smallarms/OSCEhandbook.pdf>>. Last accessed 5 July 2012.

destabilising accumulations of such arms.”¹⁰⁴⁷ The OSCE Handbook provides guidance on national controls over manufacture of small arms, including guidance on licensing requirements and conditions; marking, record keeping, traceability; national procedures for stockpile management and security; national control of brokering activities, which includes international import certificate (IIC) and end-use documentation; guidance on export control of small arms, including the guidelines on end-user certificates; the definition and indicators of a surplus of small arms; national procedures for the destruction of small arms; and guidance on small arms in the disarmament, demobilization, and reintegration (DDR) process.¹⁰⁴⁸ The document published by the OSCE is comprehensive and covers many aspects of small arms transfer that member countries refer to for their arms transfer management. The implementation of the guide is considered high, although there is still some room for further improvement that may make it even better.¹⁰⁴⁹

In addition to efforts in regional organizations such as OSCE and EU, European countries also participate actively in arms control initiatives in the Wassenaar Arrangement which is more global in scope. The 40 countries participating in the Wassenaar Arrangement are not limited to Europe although they are dominant. Some other participating countries are from Asia, Africa and the Americas¹⁰⁵⁰ In support of the global effort, the latest 2007 amendment contained the reiteration of commitment from the Wassenaar Arrangement participating countries to implement the 2005 International Tracing Instrument.¹⁰⁵¹

The OSCE guidelines of best practice in conducting small arms transfer are complementary to the EU Code of Conduct in arms transfer. The OSCE guidelines’ particular focus on the best practice in small arms transfer is important, as at the time

¹⁰⁴⁷ First paragraph of the Wassenaar Best Practice Guidelines for Export of Small Arms and Light Weapons (SALW). Agreed at the 2002 Plenary and amended at the 2007 Plenary <www.wassenaar.org/publicdocuments/2007/docs/SALW_Guidelines.pdf>. Last accessed on 29 March 2010.

¹⁰⁴⁸ *Handbook of Best Practice on Small arms and Light Weapons* (OSCE, 2003).

¹⁰⁴⁹ Zdzislaw Lachowski and Svenja Post “Conventional Arms Control” in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford University Press, 2009) at 453.

¹⁰⁵⁰ Wassenaar Arrangement www.wassenaar.org/publicdocuments/2007/docs/SALW_Guidelines.pdf. Last accessed on 29 March 2010.

¹⁰⁵¹ *Ibid*, point II.2.

of adoption, Europe had been experiencing a surplus of these weapons. Perhaps one of the most successful elements of the OSCE has been its programme to destroy millions of surplus weapons in Europe which prevents those weapons from being sold cheaply out of the continent. In the period from 2001 to 2007, OSCE participating States destroyed 7,685,424 pieces of small arms.¹⁰⁵²

D. Americas

The Americas have long been familiar with internal armed conflicts and the region has been known to be flooded with small arms for decades. The presence of small arms creates problems in human security and societal development which keep the issue of small arms high on the political agenda at both national and regional levels.¹⁰⁵³ Naturally, the easy access to small arms is identical with violence and crime, as experienced by countries such as Brazil, Colombia, El Salvador, Guatemala, and Jamaica, which have the highest firearm homicide rates in the world.¹⁰⁵⁴

Regional institutions realise that circulation and availability of small arms in Latin America is closely linked with the drug trade and organised crime. The Organization of American States (OAS),¹⁰⁵⁵ therefore, has made an effort to deal with the circulation of small arms and their connection with organized crime by the adoption of the 1997 Inter-American Convention Against the Illicit Manufacturing of and

¹⁰⁵² OSCE, Forum for Security Cooperation, Chairperson's Progress Report to the Sixteenth Meeting of the Ministerial Council: The Continuing Implementation of the OSCE Document on Small Arms and Light Weapons (Helsinki, 2008), MC.GAL/3/08/Rev.2, at 8.

¹⁰⁵³ Elli Kytomaki and Valerie Yankey-Wayne *Five Years of Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports* (Geneva, UNIDIR, 2006) at 61.

¹⁰⁵⁴ Paul Herbert "Latin America's Homicide Rate one of the World Highest" *The Santiago Times* (Chile, Thursday, 19 November 2009)

www.santiagotimes.cl/index.php?option=com_content&view=article&id=17667:latin-americas-homicide-rate-one-of-the-worlds-highest&catid=19:other&Itemid=142. Last accessed 30 May 2010.

¹⁰⁵⁵ AOS member States are 35 independent States of the Americas, namely Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (Commonwealth of), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas (Commonwealth of), Trinidad and Tobago, United States of America, Uruguay, Venezuela (Bolivarian Republic of). The AOS website is available at <http://www.oas.org/en/default.asp>. Last accessed 5 July 2012.

Trafficking in Firearms, Ammunition, Explosives and Other Related Material (CIFTA).¹⁰⁵⁶

The Convention states its purpose as being “to prevent, combat and eradicate the illicit manufacturing of and trafficking of firearms” as well as to “promote and facilitate cooperation and exchange of information” among States Parties with a view to combating illicit manufacturing and trafficking in firearms.¹⁰⁵⁷ The Convention shows the region’s emphasis on the small arms linkage with transnational organized crime or drug trafficking in the provisions to regulate export, import, transit, manufacture, licence, and marking of fire arms. In doing so, the Member States also paid particular attention to the issue of sovereignty reflected in article III, which states that:

1. States Parties shall carry out the obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved to the authorities of that other State Party by its domestic law.¹⁰⁵⁸

This article indicates that the issues of sovereignty and territorial integrity were dominant in the discussion and are the concern of participating States.

That uncontrolled proliferation of small arms may undermine socio-economic development is accordingly acknowledged by the Convention. In combating illegal manufacturing and trafficking of firearms, the Convention indicates the links to the socio-economic development “due to the harmful effects of these activities on the

¹⁰⁵⁶ Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other related Materials (signed 1 January 1997, entered into force 1 July 1998), 2029 UNTS 55.

¹⁰⁵⁷ Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other related Materials (signed 1 January 1997, entered into force 1 July 1998), 2029 UNTS 55, art II.

¹⁰⁵⁸ Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other related Materials (signed 1 January 1997, entered into force 1 July 1998), 2029 UNTS 55, art III.

security...endangering the well-being of peoples, their social and economic development”.¹⁰⁵⁹

The aspects of marking, export, import, and transit licences or authorization are covered in the convention’s provisions.¹⁰⁶⁰ The issue of diversion of once legal firearms and record keeping is also dealt with.¹⁰⁶¹ The Convention is the first regional convention to regulate firearms and visibly become a model for the 2001 Firearms Protocol. In terms of membership, the AOS member States are to include the big small arms producers such as the US and Brazil. The Convention, though, limits itself to combating illicit trafficking and manufacturing of firearms and does not deal with firearms transfer between States. However, the Convention draws criticism in the implementation for its limited ability to combat the threat of small arms because of State non-compliance and ineffective approaches, including the absence of a monitoring mechanism in the Convention.¹⁰⁶²

E. ASEAN

1. ASEAN security challenges

Representing Asia, the Association of Southeast Asian Nations (ASEAN) is chosen because of the high level of small arms circulation in the region.

To some extent, almost all ASEAN countries, including Indonesia, Malaysia, Philippines, and Thailand, once experienced or are still involved in low scale armed conflicts with separatism and rebellions. The excessive presence of small arms leads to the argument that the proliferation of small arms in Southeast Asia has multiple effects, causing high levels of violent crime, fuelling insurgencies, intensifying

¹⁰⁵⁹ Ibid, preamble para 1.

¹⁰⁶⁰ Ibid, art VI and IX.

¹⁰⁶¹ Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (1997), art XI.

¹⁰⁶² “Kierstan Lee Carlson “Fighting Firearms with Fire in the AOS” (2010) 25 AM U Int’l L Rev 614 at 648.

communal conflicts, and impeding development.¹⁰⁶³ Armed conflicts, sectarian conflict, and the activities of organized crime and drug trafficking have been recognized as facilitating the illicit trafficking of small arms in the region.¹⁰⁶⁴

In Philippines, low-intensity armed conflict in Mindanao has been fought since 1971 involving the Moro Islamic Liberation Front (MILF), Moro National Liberation Front (MNLF), and Abu Sayyaf group seeking a State free, and separated from Manila.¹⁰⁶⁵ Thailand also had armed conflict in its southern region as the government had to deal with the re-emergence of the Pattani conflict in 2004 which claimed 2400 lives and the armed conflict which has escalated since.¹⁰⁶⁶ The three provinces in South Thailand, Pattani, Yala, and Narathiwat, are located on the border with Malaysia which suggests the importance of securing the border from transnational arms trafficking.

Reports suggest that, at the end of Indochina War (or Vietnam War, 1959-1975) in Cambodia and Vietnam, large quantities of weapons were left behind and later transported from Indo-China to criminals, guerrillas and separatist groups in other countries in Southeast Asia through the islands and sea routes.¹⁰⁶⁷ In Myanmar, its

¹⁰⁶³ Katherine Kramer *Legal Control on Small Arms and Light Weapons in Southeast Asia* (Small Arms Survey, 2001) at 24. See also reports of violence in individual States of ASEAN, for example the 2011 Human Rights Watch report on extra judicial killings with gunshots in Philippines <<http://www.hrw.org/en/news/2011/07/18/philippines-new-killings-impunity-reigns>>. Last accessed on 21 July 2011.

¹⁰⁶⁴ Elli Kytomaki and Valerie Yankey-Wayne *Five Years of Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports* (United Nations Publication, 2006) at 99.

¹⁰⁶⁵ “The Human Cost of Armed Conflict in the Philippines” (2008) Amnesty International <<http://www.amnesty.org/en/news-and-updates/news/the-human-cost-of-armed-conflict-in-the-philippines-20081029>>. Last accessed on 7 March 2010. This report suggests an estimated 120,000 people have been killed and two million displaced in four decades. The number of small arms in circulation is estimated to be between 2.8 and 5 million, with 8,170 belonging to the MILF, 6,050 to the New People’s Army (NPA), and 300 to Abu Sayyaf; see also Jeffrey Maitem “MILF to AFP: We Have 60,000 Weapons to Fight You” *Philippine Daily Inquirer* (Philippine, 8 October 2010), in which the MILF claimed to have 60,000 weapons which they acquired from their enemies, trade with gun runners within the military, and their own weapons factory <<http://newsinfo.inquirer.net/breakingnews/nation/view/20100810-285998/MILF-to-AFP--We-have-60000-weapons-to-fight-you>>. Last accessed on 28 July 2011.

¹⁰⁶⁶ Neil J Melvin “Conflict In Southern Thailand: Islamism, Violence and the State in the Patani Insurgency” (SIPRI, 2007) <<http://books.sipri.org/files/PP/SIPRIPP20.pdf>>. Last accessed on 17 March 2010.

¹⁰⁶⁷ Elli Kytomaki and Valerie Yankey-Wayne *Five years of Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports*

government has been fighting several armed groups for years where the parties involved use various conventional weapons like MANPADS, landmines and improvised explosive devices (IED) and, of course, small arms.¹⁰⁶⁸

The archipelagic geography of Southeast Asia, with long maritime and continental frontiers, makes the region vulnerable to illicit arms trade and trafficking as it is extremely difficult to monitor. For that reason alone, the ASEAN countries need close cooperation in outlining plans to combat the illicit trafficking of small arms. After all, small arms are regarded as having the most destabilizing effect among conventional weapons.¹⁰⁶⁹ This is well known to the countries in the region and provides motivation to collectively find a way to address the problem.

ASEAN underscores the importance of security and stability as preconditions to having a prosperous ASEAN community with the purpose to “maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region”.¹⁰⁷⁰

Armed conflicts in Southeast Asia may also be either the destination or transit of unauthorized arms trade. As an illustration, the Thailand authority in December 2009

(United Nations Publication, 2006) at 99; Alexander Gillespie *A History of the Laws of War* (Oxford, Hart Publishing, 2011) vol 3, at 47; David Capie “Regional Reintroduction: Missing the Target? The Human Cost of Small Arms Proliferation and Misuse in Southeast Asia” in *Searching for Peace in Asia Pacific* (European Centre for Conflict Prevention, 2005) <<http://www.conflict-prevention.net/page.php?id=45&formid=72&action=show&articleid=674#author>>. Last accessed 11 March 2010; “The M79 Grenade Launcher” *The Nation* (Thailand, 26 March 2010), US-made M-79 grenade launchers, dating back to the war in Vietnam, are available in the black market along the Thai-Cambodian border, smuggled into Thailand and can be bought for TBH 10,000 (or around US\$ 336).

¹⁰⁶⁸ “Armed Conflict Database” International Institute for Strategic Studies (IISS) <http://acd.iiss.org/armedconflict/MainPages/dsp_ConflictSummary.asp?ConflictID=209>. Last accessed on 1 March 2010; David Capie *Small Arms Production and Transfers in Southeast Asia* (Australian National University, 2002) at 63-66. Capie states that the armed groups that fight the Myanmar government, such as the Kerenni Army (KA), Karen National Liberation Army (KNLA) and United Wa State Army (UWSA) acquire their weapons from smuggling across the border from Thailand and Cambodia and across the borders from India and Bangladesh.

¹⁰⁶⁹ Paul Holtom and Siemon T Wezeman “Towards an Arms Trade Treaty” in *SIPRI Yearbook 2007* (Oxford University Press, 2007) at 431.

¹⁰⁷⁰ ASEAN Charter (adopted 20 November 2007, entered into force 15 December 2008), art 1(1). ASEAN comprises 10 States: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

seized a cargo plane with 35 tonnes of weapons originating from Pyongyang which landed in Bangkok for refuelling en route to an unrevealed destination.¹⁰⁷¹

All the conflicts in Southeast Asia are ideal markets for arms traffickers to supply arms, in particular small arms, as they are weapons of choice in intra-state armed conflicts, preferred for their portability and durability. Illegal arms transport combined with drugs are a lucrative business for traffickers. While discussing the transfer of arms and trafficking in ASEAN, it is also worth noting that several of the ASEAN member countries are also small arms producers which mean that some weapons in circulation may be regionally manufactured.

2. ASEAN Response

From a general perspective, since its establishment in 1967 ASEAN has successfully created a relatively stable peaceful region with its own values and organizational mechanism.¹⁰⁷² The ASEAN member countries view the issue of small arms in the context of transnational crime and discussion among them is with the purpose of combating transnational crime within the region.¹⁰⁷³ This means ASEAN does not discuss and address the issue as a distinct subject that needs particular meticulous strategy. A problem arises in this approach, the inclusion of small arms in the agenda

¹⁰⁷¹ “North Korea Arms Plane: No Interference in Arms Smuggling Case: Suthep” *The Nations* (Thailand, 29 January 2010); Simon Tisdall “North Korean Plane Carrying Smuggled Arms Seized in Thailand” *The Guardian* (UK, 13 December 2009) <<http://www.guardian.co.uk/world/2009/dec/13/north-korea-arms-smuggling-plane>>. It is not clear the destination of the cargo with some speculating that it may have been heading to Iran. This is a clear violation of the UN arms embargo, as North Korea has been under United Nations arms embargo and prohibited to import and export weapons since 2006 by the UNSC res 1718 (2008). The Guardian reports that North Korea is estimated to get US\$1billion a year from arms sales.

¹⁰⁷² Erik Martinez Kuhonta “Toward Responsible Sovereignty: The Case for Intervention” In Donald K Emmerson (ed) *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (The Walter H Shorenstein Asia-Pacific Research Center, Stanford, 2008) at 293.

¹⁰⁷³ Katherine Kramer *Legal Control on Small Arms and Light Weapons in Southeast Asia* (Small Arms Survey, 2001) at 2.

of combating transnational crimes can be overshadowed by more pressing issues such as human and drug trafficking.¹⁰⁷⁴

ASEAN, as a regional grouping, discussed the issue of small arms for the first time in the 1997 ASEAN ministerial meeting on transnational crime. It was in this meeting that the ASEAN member countries decided to put the discussion of small arms in the framework of transnational crime, as the weapons were associated closely with terrorism, drug trafficking, money laundering, trafficking of persons, and piracy.¹⁰⁷⁵

The region understands the importance of cooperation in fighting arms smuggling. In the ASEAN Declaration on the Prevention and Control of Transnational Crimes in Manila 1997, ASEAN stresses “the need for sustained cooperation in addressing transnational concerns including the fight against terrorism, trafficking in people, illicit drugs and arms and piracy”.¹⁰⁷⁶ To fight the transnational crime mentioned, ASEAN established cooperation among related offices. For that purpose ASEAN convenes, at least once every two years, an ASEAN Ministerial Meeting on Transnational Crime to coordinate activities of relevant ASEAN bodies, such as the ASEAN Senior Officials on Drug Matters (ASOD) and the ASEAN Chiefs of National Police (ASEANAPOL).¹⁰⁷⁷ In operational terms, the arms smuggling in which small arms are discussed is on the agenda of the ASEANAPOL.

While the meetings’ reports show increasing understanding of the need to work in overcoming arms smuggling, the commitment is still very much on normative language. For example, the recommendation on arms smuggling as the result of the 2004 meeting of the ASEANPOL employed the normative wording “to encourage

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ ASEAN Declaration on the Prevention and Control of Transnational Crimes in Manila, Philippines, 20 December 1997. Document is available at ASEAN Secretariat <www.aseansec.org/documents/DocSeriesOnTC.pdf>. Last accessed on 23 March 2010.

¹⁰⁷⁷ Operative Paragraph 2 of ASEAN Declaration on the Prevention and Control of Transnational Crimes in Manila, Philippines, 20 December 1997. Document is available at ASEAN Secretariat <<http://www.aseansec.org/documents/DocSeriesOnTC.pdf>>> Last accessed on 23 March 2010.

member countries to adopt effective arms control law.”¹⁰⁷⁸ The report of the meeting neither further directs members on what exactly to do in the implementation nor provides further guidelines.

The meeting of the ASEANAPOL in the following year, again, used more normative wording when they agreed “to encourage member countries” to enhance strict control over illegal firearms and explosives and “conduct back tracking investigations to identify the source of manufacture” and to control entry and exit points.¹⁰⁷⁹ However, this statement was not followed by practical measures to implement it. Almost similar language was repeated in the meetings in 2009,¹⁰⁸⁰ and in May 2011, which reviewed the progress of cooperation, including the progress of an electronic database system in combating transnational crimes.¹⁰⁸¹

Examining the joint communiqué of ASEAN meetings on arms smuggling, there is no clear acknowledgment that the State is responsible for preventing free circulation of arms. In the documents, ASEAN does not have any references to the need to respect human rights and acknowledge that excessive availability of small arms may cause, and be used for, suppression or violation of human rights.

A series of ASEAN meetings since 1997 show that ASEAN has been dealing with the issue of small arms under a rigid framework of transnational organized crime and has never discussed it beyond a transnational trafficking context. Actually, small arms could also be discussed under human security or disarmament matters, as other regional organizations have done, where the issue can stand alone. ASEAN, therefore, has not linked the issue of small arms to IHL and IHRL.

¹⁰⁷⁸ Joint Communiqué of the 24th ASEAN Chiefs of Police Conference, Chiang Mai, Thailand, 16-20 August 2004, para 8.5.1. Available at ASEAN Secretariat <<http://www.asean.org/16326.htm>>. Last accessed 6 July 2012.

¹⁰⁷⁹ Joint Communiqué of the 25th ASEAN Chiefs Police Conference, Bali, Indonesia, 16-20 May 2005, para 8 (9.3.1). Available at <<http://www.asean.org/25ASEANAPOL.pdf>>. Last accessed 6 July 2012.

¹⁰⁸⁰ Joint Communiqué of the 29th ASEAN Chiefs Police Conference, Hanoi, Vietnam, 13-15 May 2009. Available at ASEAN Secretariat <<http://www.asean.org/19503.htm>>. Last Accessed 6 July 2012.

¹⁰⁸¹ “ASEAN Police Chiefs Sign Joint Agreement in Lao Conference” (2011) Xinhua News <http://news.xinhuanet.com/english2010/world/2011-06/02/c_13907803.htm>. Last accessed 28 July 2011.

The ASEAN countries have not been able to formulate an agreed regulation to systematically combat the proliferation of small arms in the region in functioning, focused practical action. But even within the transnational crime framework, ASEAN has not shown significant development in operational terms as the organisation does not address other aspects which include addressing the manufacturing, licencing, stockpiling, brokering, end-user certificate mechanism, and tracing and marking.

Against the backdrop described above, some individual countries have organized regional meetings and workshops on small arms as a distinct topic. For example, regional seminar on the implementation of the UNPoA in Bali, Indonesia, February 2003; ASEAN Workshop on Small Arms Control in Cambodia, May 2007; and the recent workshop on the implementation of the UNPoA in Bali, Indonesia, March 2010. Despite these sporadic efforts to discuss the issue of small arms beyond transnational crimes, that it is absent from ASEAN's official agenda suggests that the issue is not yet regarded as a top priority for the region.

Because ASEAN does not have a regional convention on small arms, the ASEAN member countries' commitment to combating uncontrolled proliferation of small arms can be measured by examining their adherence to the 2001 Firearms Protocol,¹⁰⁸² the 2001 UNPoA national report,¹⁰⁸³ and their voting behaviour in the UN resolutions.

Out of 89 countries that have ratified and thus become parties to the Firearms Protocol,¹⁰⁸³ only two ASEAN countries, namely Cambodia (accession on 12 December 2005) and Lao People's Democratic Republic (accession on 26 September 2003), are parties to the Protocol.¹⁰⁸⁴ The other eight ASEAN countries are not parties to the Protocol. With the limited adherence of the ASEAN countries to the

¹⁰⁸² Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005)

¹⁰⁸³ As of 28 July 2011.

¹⁰⁸⁴ Status of ratification of the Firearms Protocol (2001) at the United Nations Treaty Database. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en, last accessed on 25 March 2010.

Firearms Protocol and the absence of a regional convention to control small arms, the only applicable international legal instrument in the region is the arms embargo imposed by the Security Council. This low level of ratification is a paradox since ASEAN puts the issue of small arms under the framework of combating transnational organized crime, but still most of the ASEAN countries do not ratify the Protocol which is intended to deal with the firearms within the said framework. It may reflect how the individual countries of ASEAN do not rank the issue as a priority to be dealt with.

Looking at the reports submitted by individual countries in implementing the UNPoA on small arms from the year 2003 to 2011 shows six countries submitted a report at least once: Cambodia, Indonesia, Malaysia, Philippines, Thailand, and Vietnam.¹⁰⁸⁵ However, four other countries Brunei Darussalam, Laos, Myanmar, and Singapore, have never submitted a report.¹⁰⁸⁶ The non-existence of reports from Singapore is a disappointing sign as the Singapore assault rifle SAR-80 is one of the most common weapons found in Somalia.¹⁰⁸⁷ The Singapore SAR-80, together with AK47s and G3s, was also among the types of weapons confiscated in Kenya between 2010-2011.¹⁰⁸⁸

Another way of examining the ASEAN countries' position towards small arms is by examining their position on the negotiation in the General Assembly on an arms trade treaty. The voting behaviour of the ASEAN countries in all three General Assembly resolutions on the ATT indicates a majority support for the ATT which includes the support from Singapore. In the 2006 resolution, of all 10 ASEAN countries, seven voted yes, and one (Laos) abstained, while two (Myanmar and Vietnam) did not vote (absent).¹⁰⁸⁹ The 2008 resolution showed increased support as Myanmar joined

¹⁰⁸⁵ United Nations Program of Action Implementation Support System: PoA-ISS <<http://www.poa-iss.org/PoA/PoA.aspx>>. Last accessed 27 June 2012.

¹⁰⁸⁶ United Nations Program of Action Implementation Support System: PoA-ISS <<http://www.poa-iss.org/PoA/PoA.aspx>>. Last accessed 27 June 2012.

¹⁰⁸⁷ Report on Monitoring Group on Somalia dated 10 March 2010 (UN Doc S/2010/91) at 74.

¹⁰⁸⁸ Manasseh Wepundi and others *Special Report: Availability of Small Arms and Perception of Security in Kenya: An Assessment* (Geneva, Small Arms Survey, 2012) at 31.

¹⁰⁸⁹ UNGA resolution 61/89.

another seven ASEAN countries, meanwhile Laos and Vietnam were absent.¹⁰⁹⁰ The resolution in 2009 showed a similar tendency to the previous resolution with all ASEAN member countries, except Laos and Vietnam (absent), supporting the resolution.¹⁰⁹¹

Although Vietnam and Laos were absent from voting in the 2008 and 2009 resolutions, it did not necessarily indicate they were in opposition to the ATT. In the past, the two countries have never been active in the negotiation of the ATT either. Their position more likely indicates that the two countries do not regard the issue as their priority. Hence, in general, it can be said ASEAN may be taken as a regional grouping that supports the ATT process, albeit rather weakly.

As a regional organization, ASEAN has not yet done much to control the proliferation of small arms trade in the region, despite rhetoric in the ASEAN meetings. Decisions in ASEAN meetings are based on the agreement of all members on a consensus basis which might be one important reason in explaining the ASEAN way of addressing the issue of small arms. Some scholars argue that there are several factors that make Southeast Asia vulnerable to the proliferation and the misuse of small arms: a high demand for arms, a ready supply of weapons, and institutional weakness of the States in the region.¹⁰⁹² Added to those factors is the long coastline of the countries in Southeast Asia which greatly facilitates the transport of arms trafficking. As a regional organization, ASEAN's response to the small arms problem may have an instrumental effect in shaping regional stability and the scale of intra-state conflicts in some of its member countries. The ASEAN way of group consensus, secret dialogue and informal procedure¹⁰⁹³ may have played important part in preventing ASEAN from placing the issue of small arms transfer onto the regional agenda.

¹⁰⁹⁰ UNGA resolution 63/240.

¹⁰⁹¹ UNGA resolution 64/48.

¹⁰⁹² David Capie "Regional Reintroduction: Missing the Target? The Human Cost of Small Arms Proliferation and Misuse in Southeast Asia" (2005) Searching for Peace in Asia Pacific, European Centre for Conflict Prevention <<http://www.conflict-prevention.net/page.php?id=45&formid=72&action=show&articleid=674#author>>. Last accessed 11 March 2010.

¹⁰⁹³ Ibid.

E. Summary

The most noticeable strong responses to combating the uncontrolled proliferation of small arms, in terms of enacting a regional legal instrument, are shown by Africa. A similar strong response is seen in the Americas, while a relatively less unified regional response is seen in Asia, particularly South East Asia. The EU was the first regional organisation to adopt a code of conduct with criteria and guidelines on arms export, although not in form of legally binding instrument.

Regional responses to the threat of small arms vary as some regional organizations are more advanced and well-equipped in their responses than the others. Compared to other regional/sub-regional organizations, such as the European Union, the ECOWAS, and the OAS, ASEAN is still far behind in controlling the trade of small arms. Importantly, the instruments of the regional organizations in Europe and Africa have linked the issue of small arms to human security and view the issue from a broader perspective than arms control or an issue of trans-national organized crime. The sub-regional legally binding instruments, such as ECOWAS Convention and Central African Convention, have progressively departed from traditional arms control by making explicit links to international humanitarian law and international humanitarian law in the provisions. The OAS and ASEAN, however, still put the issue under the agenda of law enforcement in the context of combating arms smuggling and do not link it with IHL and IHRL.

ASEAN does not have a regional instrument that provides a clear guideline in small arms trade. The minimum response of ASEAN as a regional organization arguably is because it faces more pressing issues; and the difficulties in the organization mechanism to decide when it deals with a dividing issue. The small arms transfer continues illegally from one armed conflict to another in the region with little difficulty, contributing to escalation in crime and destabilization of the region. ASEAN still has not developed a clear, focused strategy on controlling the weapons by adopting a stronger unified policy.

Chapter VII:

Challenges and Opportunities in Adopting an International Legal Instrument to Regulate Small Arms

A. Introduction

Arguably, the post-Cold War world offered a new environment for the international community of States to observe international law, particularly in the growing respect for international humanitarian law (IHL) and international human rights law (IHRL). Current effort to have an international legal instrument on small arms has focused on the inclusion of small arms in the negotiation towards an arms trade treaty (ATT). Hence, the thesis will examine whether the consideration of IHL and IHRL is well reflected in the negotiation of an ATT,¹⁰⁹⁴ that is to balance States' interests in arms in the name of self-defence and sovereignty, and their obligation to respect for IHL and IHRL.

The thesis observes the negotiation process of the existing treaties on conventional arms control to reflect contemporary negotiation processes and proceedings which provide a picture of typical challenges. As the discussion is on conventional weapons, the thesis does not inspect the negotiation process of the conventions of weapons of mass destruction such as the Chemical Weapons Convention,¹⁰⁹⁵ the Biological Weapons Convention,¹⁰⁹⁶ and the Nuclear Non-Proliferation Treaty,¹⁰⁹⁷ although general reference is still useful to make.

A treaty, to be successful, needs a widespread acceptance by States, which is reflected in the number of countries adhering to it. For an arms control treaty to be adhered to, there should be a fairly high degree of common interest among States in regulating or preventing the weapons the treaty is dealing with.¹⁰⁹⁸ Based on the previous and current efforts to restrict arms, an analysis is made to describe in detail

¹⁰⁹⁴ UNGA res 61/89, 63/240, 64/48; Preparatory Committee Meetings in 2010-2011; and the 2012 United Nations Conference on the Arms Trade Treaty.

¹⁰⁹⁵ Chemical Weapons Convention (1993), 1974 UNTS 45.

¹⁰⁹⁶ Biological Weapons Convention (1972), 1015 UNTS 163.

¹⁰⁹⁷ Treaty on the Non-Proliferation of Nuclear Weapons (1968), 729 UNTS 161.

¹⁰⁹⁸ Michael E Smith *International Security: Politics, Policy, Prospects* (Palgrave Macmillan, 2010) at 135.

the challenges and opportunities of adopting a legal instrument regulating small arms trade, particularly by observing the process toward the diplomatic conference on the ATT in 2012 which failed to adopt a treaty. For the decision-making mechanism, consensus has been a favoured mechanism in shaping many, but not all, multilateral treaties.¹⁰⁹⁹ Consensus is chosen in order to bring all countries on board, although apparently there is an obvious trade-off that there will be difficult compromises to be made to achieve a jointly agreed text.

In all meetings on arms control, the issue of self-defence is always raised. References to self-defence are found in many documents on arms control or small arms such as the 2001 UNPoA,¹¹⁰⁰ the 2001 Firearms Protocol,¹¹⁰¹ the 2005 ITI¹¹⁰² and General Assembly resolutions related to small arms.¹¹⁰³ Early views from States, in response to the Secretary-General's request on an arms trade treaty, also link many references to self-defence.¹¹⁰⁴ Other difficult issues in the ATT negotiation, such as the inclusion of ammunition, transfer to non-State actors, and criteria with IHL and IHRL considerations are observed.

An international treaty will not be much use if only a limited number of countries adopt and adhere to it. Hence, a treaty to be effective and able to match the aspirations of a wide range of countries, should be based on common concern. With regard to the Arms Trade Treaty, the thesis examines States' views on the elements, scope, criteria, and parameters submitted by States¹¹⁰⁵ and the negotiation from the early stages of the process marked by the adoption of the UN General Assembly

¹⁰⁹⁹ For example, the Rules of Procedure of the UN Conference on the Arms Trade Treaty state that the decision making is on the basis of consensus (A/CONF.217/L.1). See also A/RES/64/8 of 2 December 2009, at operational para 5.

¹¹⁰⁰ 2001 UNPoA (A/CONF.192/15).

¹¹⁰¹ 2001 Firearms Protocol, 2326 UNTS 208.

¹¹⁰² International Instrument to Enable States to Identify and Trace, In a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (A/CONF.105/15; adopted by the UNGA Decision 60/519 of 8 December 2005).

¹¹⁰³ For examples A/RES/64/8; A/RES/66/47.

¹¹⁰⁴ Report by the UN Secretary-General: Towards an Arms Trade Treaty (A/62/278 (part I and II) of 17 August 2007).

¹¹⁰⁵ States views are compiled in the Secretary-General Reports. First report was in 2007 (A/62/278) and second report was issued in 2011 (A/66/166).

resolution 61/80 of 6 December 2006 to the collapse of the UN Conference on the Arms Trade Treaty in July 2012.

The issue of self-defence, in the context of small arms, starts from the fact that small arms are the weapons which all countries have in their arsenals. Many States present the argument that the right to self-defence should be respected in negotiating conventional arms control, and small arms are common legitimate weapons to use in exercising such a right.¹¹⁰⁶ All countries seem to be in agreement in this. The issue is how to balance the right to self-defence with the need to have a responsible arms trade: that is, not to authorise transfer which may be used in violation of international humanitarian law (IHL) and human right law (IHRL).¹¹⁰⁷ Some States, the African countries, for instance, took a strong position in support of an international legally binding instrument and became sound proponents and supporters for a strict legal regulation to restrict the proliferation of small arms.¹¹⁰⁸ As many African countries are the most affected by small arms, their view on the issue has considerable weight.

B. Lessons Learned from Previous Treaties

1. Initiative and involvement of civil society in arms control

The treaties on arms control, particularly on conventional arms, show that participating States have to go through a long process before agreeing to negotiate a treaty. In a general sense, a treaty is initiated by a State or a group of States with an understanding that most States have a shared opinion that a convention is needed to address particular concerns on a specific kind of weapon. It is vital that the necessity to adopt a treaty is shared by as many States as possible in order for the convention to

¹¹⁰⁶ Views of States on an ATT are found in the Secretary General Reports A/62/278 (Part I), A/62/278 (Part II), A/62/278/Add.1, A/62/278/Add.2, A/62/278/Add.3, A/62/278/Add.4; Also A/66/166, A/66/166/Add.1, A/66/166/Add.2.

¹¹⁰⁷ The inclusion of the IHL and IHRL in the criteria for arms transfer appears in the UNGA res 61/89, 63/240, 64/48, and the Draft of the Arms Trade Treaty (A/CONF.217/CRP.1).

¹¹⁰⁸ Statement of the African Group, 12 July 2010, before the first Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

be adhered to and that participating States think that their individual interest is better served by having a treaty.¹¹⁰⁹

When countries convene to negotiate provisions and find an agreed document, at this point, support from key States, particularly from the major powers, is needed for a convention to be implementable. It was in this fashion that a diplomatic conference, initiated by Russia, was held in 1868 to adopt the St Petersburg Declaration.¹¹¹⁰

Another example was when the UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCWC) was held in two sessions in Geneva in 1979 and 1980, after a series of the UN General Assembly Resolutions on the issue.¹¹¹¹ The Conference adopted the CCWC confirming the restriction for States to use means of warfare that cause unnecessary suffering, superfluous injuries, and are indiscriminate in nature. The CCWC, the Mine Ban Treaty, as well as the recent Convention on Cluster Munitions, reflect basic humanitarian law concepts on limitation of the methods and weapons used by the belligerents.¹¹¹²

The current general trend shows more involvement of civil society in dialogue and discussion on arms control issues both on WMD and conventional weapons. Using various well organized approaches, they have been trying to make their voices heard by governments. The combination of the NGOs, international organizations, research centres and specialized interest groups have formed a global arms control community

¹¹⁰⁹ Guido Den Dekker *The Law of Arms Control: International Supervision and Enforcement* (Martinus Nijhoff Publishers, 2010) at 22.

¹¹¹⁰ St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (adopted by the International Military Commission, 11 December 1868), (1907) 1 Am J Int'l L Supp 95). The content of the St Petersburg Declaration is explained in the chapter II of the thesis.

¹¹¹¹ Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects (concluded 10 October 1980, entered into force 2 December 1983), 1342 UNTS 137; see, Stuart Maslen *Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point* (Intersentia-Transnational Publishers, 2001) at 29-30.

¹¹¹² See Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol I, at 237-296; David Kaye and Steven A Solomon "The Second Review Conference of the 1980 Convention on Certain Conventional Weapons" (2002) 96 Am J Int'l L 922.

and make sure the issue of arms control is now widely reported and viewed.¹¹¹³ These organizations, through their networks, form pressure groups on how the governments decide and position themselves in the arms control issue.

It appears now that civil society, to some extent, as shown in the Mine Ban Treaty negotiation process, plays an initiating role that was previously only played by States. Civil society plays a role particularly in disseminating information so that the issues reach the wider public. Since 1990s, publication of the results of intensive research on small arms pushed the issue into the international security and arms control agenda¹¹¹⁴ which helps governments to focus on this issue and negotiate an international framework.¹¹¹⁵ The exposure, by the civil society, of the impact of small arms' excessive availability on people's lives further pushed small arms to becoming an agenda item attracting governments' attention.

Something unique to conventional weapons, compared to the weapons of mass destruction, is that all processes to control conventional arms have always been through multilateral process. The 1868 Saint Petersburg Declaration, the 1980 CCWC, the 1997 Mine Ban Convention, and the 2008 Convention on Cluster Munitions are examples of the multilateral route which all existing conventional weapons treaties took. It is assumed, because conventional arms are every body's weapons, they are owned by almost every country. Consequently, the negotiation to regulate conventional arms, internationally or regionally, involves many more States than to negotiate on weapons of mass destruction.

The development of transportation modes and information technology provides greater opportunities for civil society to build global networks and intensify the close observation and involvement in arms control activities. Over the years, civil society has been increasingly more vocal and articulate in conveying opinions on the issue of arms control to influence public opinion which later may influence State policy. Non-

¹¹¹³ Michael E Smith *International Security: Politics, Policy, Prospects* (Palgrave Macmillan, 2010) at 133.

¹¹¹⁴ Damien Rogers *Postinternationalism and Small Arms: Theory, Politics, Security* (Ashgate, 2009) at 90.

¹¹¹⁵ Ibid.

governmental organizations' voices or activities are covered, quoted, and reported by media.¹¹¹⁶ The process of adoption of the 1997 Mine Ban Convention was marked particularly by the significant role that civil society could play in arms control. It was the first conventional arms control where civil society played a crucial role in the process, helped ensure the implementation by States parties and continued the campaign to persuade States to accede to it.¹¹¹⁷

The adoption of the Mine Ban Convention shows significant departure from the traditional arms control/disarmament process where the initiatives come only from States. Instead, impetus came from a loose coalition of concerned States and civil society/non-governmental organizations. Having no progress in the traditional disarmament forum, the Canadian Government initiated the then Ottawa Process in October 1996 with strong support from NGOs worldwide with persuasiveness so solid that “many nations who were initially sceptical of the proposals, including France and Japan, were convinced otherwise.”¹¹¹⁸ The case of anti-personnel mines (APMs) and cluster munitions demonstrates that in the modern era of communication, public opinion matters and cannot simply be ignored.

The campaign to ban the use of APMs involved cross-cultural actors from the NGO activists to high profile world figures. The campaign by the NGOs helped in exposing, to a wider public, the nature of anti-personnel mines as cruel indiscriminate weapons and that put additional pressure on governments to be a party to the treaty. The international movement to ban APMs is well organized with the establishment of an International Campaign to Ban Landmines (ICBL). The ICBL, a coalition of NGOs in the field of human rights and arms control, is perhaps the most noticeable

¹¹¹⁶ See for example, SIPRI's research result as cited in Richard Norton-Taylor “Global Protests Pose Fresh Challenge for International Agency, Says Think Thank” *The Guardian* (London, 4 June 2012) <<http://www.guardian.co.uk/world/2012/jun/04/arab-spring-conflict-international-security?INTCMP=SRCH>>; Analysts from the Small Arms Survey and other organizations are quoted in C J Chivers “Experts Fear Looted Libyan Arms May Find A Way to Terrorists” *The New York Times* (New York, 3 March 2011) <http://www.nytimes.com/2011/03/04/world/africa/04weapons.html?_r=1&pagewanted=all>.

¹¹¹⁷ International Campaign to Ban Landmine (ICBL) actively approaches States, which have not yet ratified the convention, by approaching the governments. Similar approaches are made to States Parties to remind them of their obligations under the convention.

¹¹¹⁸ Nigel Vinson “The Demise of Anti-Personnel Mine: A Military Perspective” (1998) 143 Royal United Service Institute for Defense Studies Journal 18.

NGO in the campaign to ban anti-personnel mines.¹¹¹⁹ Another active NGO in support of the treaty is the Geneva International Centre for Humanitarian Demining (GICHD), an organization funded and supported by more than 12 States and international organizations.¹¹²⁰ The same approach involving a wide public attention was applied to the campaign to ban cluster munitions as an organisation of many NGOs called Cluster Munition Coalition was formed.¹¹²¹

The indiscriminate character of anti-personnel mines and cluster munitions, that is considered inhumane, helps greatly in the universalization of the Mine Ban Convention and the Convention on Cluster Munitions, even without support from the major powers.¹¹²² However, unlike anti-personnel mines and cluster munitions, small arms are an indispensable means for States' defence and security. The different natural characteristics of small arms in comparison with anti-personnel mines and cluster munitions is that the latter two fall into the category of indiscriminate weapons, whereas small arms are not indiscriminate in nature, the concern is the potential use of the weapons in violations of IHL and IHRL. Small arms are designed and "capable of precise direct fire without inherent indiscriminate effects".¹¹²³ Hence, the tactic to rally support from civil society based on the same ethic, might not work so well for small arms. The issue with small arms is not the question of a total ban but regulation, to restrict the weapons from falling into the hands of those who are more likely to use them wrongfully as opposed to not using them at all.

Many NGOs are also active in campaigns to restrict small arms trade. Despite their status as non-governmental organizations, the NGOs and research centres may receive funding from contributing governments in executing their research on small arms. They are, to name a few, the Small Arms Survey, the Stockholm International

¹¹¹⁹ Stuart Maslen *Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point* (Intersentia-Transnational Publishers, 2001) at 18.

¹¹²⁰ GICHD states its mission is "to eliminate anti-personnel mines and to reduce humanitarian impact of other landmines and explosive remnants of war". The profile of the GICHD can be found at <http://www.gichd.org/about-gichd/overview/>. Last accessed on 1 September 2010.

¹¹²¹ Cluster Munition Coalition < <http://www.stopclustermunitions.org/>>.

¹¹²² Stuart Marslen *Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point* (Intersentia-Transnational Publishers, 2001)

¹¹²³ Report of the Panel of Governmental Experts on Small Arms, A/52/298, 27 August 1997, at [32].

Peace Research Institute (SIPRI),¹¹²⁴ the International Action Network on Small Arms (IANSA),¹¹²⁵ and the Norwegian Initiative on Small Arms Transfer (NISAT).¹¹²⁶

The international non-governmental organizations such as ICRC, Amnesty International, and Human Rights Watch also publish research findings on arms controls, in this case on small arms. Research by the NGOs on arms control, as Damien Rogers concludes, “is often conducted with the view to inciting decisive governmental action”.¹¹²⁷ As an illustration, the South Africa based research centre Institute for Security Studies (ISS) published a comprehensive guidebook for African countries to help them in the diplomatic conference to negotiate an arms trade treaty in New York, July 2012.¹¹²⁸ The publications and involvement of civil society in arms control meetings form a new dimension in arms control negotiation, as their presence projects a public opinion that, arguably, has potential to influence the governments’ stance.

The Small Arms Survey is one of the most visible small arms research centres, which annually publishes a Small Arms Survey featuring one specific topic about small arms in each edition. It has published research findings in yearbooks and extensive occasional papers, special reports, book series, and working papers on the subject of small arms. Established in 1999, the Small Arms Survey is supported by, and receives sustained contributions from, governments of Switzerland, Belgium, Canada, Finland, the Netherlands, Norway, Sweden, and the United Kingdom.¹¹²⁹ It is evident that their mission and research are supported by the sponsoring governments. In performing its mission to become a principal public information source on all aspects of small arms, the Small Arms Survey works closely with other institutions, including

¹¹²⁴ Stockholm International Peace Research Institute < <http://www.sipri.org/>>.

¹¹²⁵ International Action Network on Small Arms < <http://iansa.org/>>.

¹¹²⁶ Norwegian Initiative on Small Arms Transfer < <http://www.prio.no/NISAT/>>.

¹¹²⁷ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 77.

¹¹²⁸ Guy Lamb *Negotiating An Arms Trade Treaty: A Toolkit for African States* (Pretoria, Institute for Security Studies, 2012).

¹¹²⁹ Small Arms Survey’s mission statement

<<http://www.smallarmssurvey.org/files/sas/about/partners.html>>. Last accessed on 2 September 2010.

government agencies.¹¹³⁰ The Small Arms Survey has been establishing partnerships with other institutions such as the Amnesty International, the Human Rights Watch, the International Action Network on Small Arms, research centres and universities around the globe, which creates a wide-ranging global network and lays a foundation for worldwide awareness on small arms issues.¹¹³¹

As the result of its extensive research, the Small Arms Survey yearbook has been a main source for academics, international organizations, and also governments. Reports of the Secretary General on small arms, as well as government positions frequently cite the Small Arms Survey research findings.¹¹³² Since the 1990s, published reports of the researchers' findings have been attracting considerable attention towards small arms as an urgent topic.¹¹³³ The increasing amount of literature, made possible by the civil society, helps the policymakers seeking to control arms to better comprehend the topic.¹¹³⁴

The International Action Network on Small Arms (IANSA) is a global network against gun violence with most noticeable physical presence in every open meeting on small arms under the UN framework. It claims a network of 800 civil society organizations working in 120 countries to stop the proliferation and the misuse of small arms.¹¹³⁵ The IANSA tries to achieve its goal to stop gun violence by, among other things, "raising awareness among policymakers, the public and the media about

¹¹³⁰ Ibid; for an example of a joint work between the Small Arms Survey and a government agency, see Manasseh Wepundi *Availability of Small Arms and Perceptions of Security in Kenya: An Assessment* (Geneva, Small Arms Survey, 2012). Assessments and findings of NGO's research on arms control are published and read by a wider public. Study centres with a focus on arms control have been growing in number and many have published their findings for public consumption. Civil society representatives also attend meetings on arms control so as to monitor them and make their opinions known to the governments' delegations.

¹¹³¹ List of partners of the Small Arms Survey is available at <<http://www.smallarmssurvey.org/about-us/partners.html>>. Last accessed 19 July 2012.

¹¹³² Report of the United Nations Secretary-General on Small Arms to Security Council, S/2008/258 of 17 April 2008, made references to the Small Arms Survey, SIPRI and other research findings from NGO publications. States also quoted the Small Arms Survey in the 2007 Secretary-General Report towards an arms trade treaty, A/62/278.

¹¹³³ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 77.

¹¹³⁴ Ibid.

¹¹³⁵ *International Action Network on Small Arms* <<http://iansa.org/about.htm>>. Last accessed on 2 September 2010.

the global threat to human rights and human security caused by small arms”.¹¹³⁶ In the UN meetings on small arms, the presence of the IANSA is obvious as they actively seek to ensure their voice is heard. In session meetings open to NGOs, their representatives make their voices heard, including by setting up stalls outside the meeting venue to display publications, distribute working and position papers, as well as pictures and photographs. They also organize side events and invite government delegates for dialogue and discussion.¹¹³⁷

The role of NGOs in the campaign for restricting arms trade, toward and at the 2012 UN Conference on the Arms Trade treaty, is acknowledged explicitly by governments and the UN Secretary-General. France, for instance, reminded the conference the initiative for an ATT was launched by the Nobel Prize laureate Oscar Arias and civil society, for that, France welcomes the involvement of the NGOs “whose action, reflection, and commitment have played a leading role throughout this process.”¹¹³⁸ In similar tone, the Secretary-General thanked the NGOs for the vigorous support for an ATT, which he said “have helped capture the imagination and energy of millions.”¹¹³⁹

When it comes to the civil society’s participation, the United Nations gives both sides an opportunity to state their position. Both anti-gun control and pro-gun control NGOs are usually in attendance. Anti-gun control associations such as the influential National Rifle Association and the National Muzzle Loading Rifle Association (both are US-based organizations) attend the UN meetings.¹¹⁴⁰ In terms of physical presence, the pro-gun control organizations are more noticeable.

¹¹³⁶ Ibid.

¹¹³⁷ First Session of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010 decided on the modalities on NGOs participation in the General Assembly document A/CONF.217/PC/L.2 of 9 July 2010.

¹¹³⁸ Statement of France (speech by Foreign Minister Laurent Fabius, delivered by Ambassador Jean-Hugues Simon-Michel), dated 2 July 2012 before the UN Conference on the ATT, New York, 2-27 July 2012; see also statement of Costa Rica, 2 July 2012; and statement of the United Kingdom, 3 July 2012. Statements are available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 31 July 2012.

¹¹³⁹ Statement of the UN Secretary-General, 3 July 2012, before the UN Conference on the ATT, New York, 2-27 July 2012. Available at <<http://www.un.org/News/Press/docs/2012/sgsm14394.doc.htm>>.

¹¹⁴⁰ Anti gun control associations such as the Defense Small Arms Advisory Council, the World Forum on the Future of Sport Shooting Activities, and National Rifle Association are recorded giving statements during the PrepCom meetings on the ATT in 2010-2011.

The agenda of the UN small arms process traditionally allocates an open session for various civil societies to take the floor.¹¹⁴¹ As a result, although the time allotted is limited, at the very least, governments are positioned to hear what the civil societies' opinions are on aspects of small arms. These activities would put pressure on them and make the governments' delegates aware that they are being watched by the civil societies. Some reject the idea that the presence of civil societies may play an influencing role in multilateral negotiations, stating that "the visibility does not necessarily equate to significant effects".¹¹⁴² However, the refusal to acknowledge the role civil society plays in the multilateral negotiations on small arms is not in line with the fact that the States' positions and the UN Secretary-General report on small arms frequently quote the research findings published by civil society. It is obvious that States may take into account and even adopt the civil societies' views. As a matter of fact, the effort to establish an arms trade treaty, which includes small arms, was originally the initiative pushed by civil society which was later adopted by governments.¹¹⁴³

Another research centre which actively publishes its research findings on small arms is Stockholm International Peace Research Institute (SIPRI). The SIPRI was an independent research institute established by the Swedish government in 1966 to "provide data, analysis and recommendations, based on open sources, to policymakers, researchers, media and the interested public."¹¹⁴⁴ The most significant contribution of the SIPRI is that it provides a database on arms transfer, although it is not exclusively on small arms. The SIPRI database provides information on conventional arms transfer which gives an indication of the size and value of the total transfer for each supplier and recipient.

¹¹⁴¹ See the "Draft decision on the modalities of attendance of non-governmental organizations at the session of the Preparatory Committee". A/CONF.217/PC/L.2, of 9 July 2010. Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, first session, New York, 12-23 July 2010.

¹¹⁴² Damien Rogers *Postinternational and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 47.

¹¹⁴³ *Small Arms Surveys 2009: Shadows of War* (Cambridge, 2009) at 147. The initiative came from a group of Nobel Peace Laureates and the concept was received by civil society groups which then in 2003 launched a global campaign.

¹¹⁴⁴ Stockholm International Peace Research Institute <<http://www.sipri.org/about>>. Last accessed on 2 September 2010.

The Norwegian Initiative on Small Arms Transfer (NISAT) provides a public database exclusively on small arms transfer. This is, perhaps, the most significant contribution of the NISAT so that a reliable estimation of small arms trade is available. The institution collects data from all sources with a goal to contribute to preventing armed violence.¹¹⁴⁵ The public can search for transfers made by 250 States and territories based on specific classification of small arms, light weapons, ammunition, missiles, parts and accessories.¹¹⁴⁶ The difference between the database provided by the NISAT and other institutes' databases is that the NISAT database specializes in small arms transfer, a significantly useful source for it reveals the transfer values of export and import by each individual State.

The list of the NGOs and civil society does not stop here. There are many other independent research centres dedicating themselves to research and disseminating their findings. They are distributed among different countries; the Institute for Security Studies (ISS) in Pretoria, South Africa,¹¹⁴⁷ and the Bonn International Center for Conversion (BICC).¹¹⁴⁸

It is worth noting that the human rights NGOs, such as Human Rights Watch and Amnesty International, also have an interest in small arms to explain the linkage between arms availability and human rights abuses. Perhaps the most influential international non-governmental organization that also dedicates some research to small arms is the International Committee of the Red Cross (ICRC). This well-known and established organization, with a recognized role in promoting humanitarian law, has a unique status in the UN General Assembly as the only non-government institution granted an observer status at the United Nations.¹¹⁴⁹ This status has

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Norwegian Initiative on Small Arms Transfer <<http://www.prio.no/NISAT/>>. Last accessed on 3 September 2010.

¹¹⁴⁷ Institute for Security Studies <<http://www.iss.co.za/>>.

¹¹⁴⁸ Bonn International Centre for Conversion <<http://www.iss.co.za/>>.

¹¹⁴⁹ General Assembly document A/45/PV.31 of 16 October 1990 on Observer status for the International Committee of the Red Cross, in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949. Observer Status in the United Nations is usually granted to specialized government organizations or regional organizations. It is the first time a non-government institution has been granted such status. The resolution explains that it is because "the

enabled the ICRC to promote its humanitarian views in relevant General Assembly meetings, including the meetings on the future arms trade treaty. The ICRC, in particular, has made known its opinion on the ongoing discussion on an arms trade treaty, and pressed for the inclusion of small arms in the ATT.¹¹⁵⁰ The views from ICRC, as expected, reflect the humanitarian concerns caused by the uncontrolled proliferation of conventional weapons. The ICRC, and other civil society organisations with humanity-based arguments, pushes the linkage of arms trade with IHL and IHRL which must be respected in arms trade.¹¹⁵¹

The partnership of international NGOs with think tanks, universities, and research centres with a global network to campaign for gun control creates a world-wide link. A broad campaign by civil societies has brought the issue of small arms closer to people's attention than it has ever been before. Hence, the view of civil societies on small arms is now more likely to be seriously taken into account by States.

It is now almost a standard practice for meetings in the United Nations that the NGOs are given an opportunity to address the meeting and express their views at an allocated time. The Preparatory Committee meetings on the ATT in 2010-2011 were open to the relevant NGOs and they were allowed to address the meeting during one session specifically allotted for that purpose.¹¹⁵² The same practice of NGO participation applies to the 2012 diplomatic conference on the ATT, which also allows them to provide material to all delegations, outside the conference room.¹¹⁵³

mandate conferred on it by the international community of States through universally ratified international treaties, ICRC acts as a neutral intermediary to provide protection and assistance to the victims of international and non-international armed conflicts.”

¹¹⁵⁰ Statement by the ICRC, 14 July 2010, in the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹¹⁵¹ ICRC *Protecting Civilians and Humanitarian Action through An Effective Arms Trade Treaty* (Geneva, ICRC, 2011); ICRC “Adopting An Effective Arms Trade Treaty: A Humanitarian Imperative” (press release, 1 July 2012).

¹¹⁵² A/CONF.217/PC/L.2, of 9 July 2010, on the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty. The meeting is open to relevant NGOs in consultative status with the Economic and Social Council in accordance with the provisions of Council resolution 1996/31 of 25 July 1996, or other interested NGOs whose work is relevant to the scope of the Conference.

¹¹⁵³ Provisional Rules of Procedures of the Conference on the Arms Trade Treaty (A/CONF.217/L.1).

It was at this allotted time that the coalition NGOs, such as the IANSA and Amnesty International, had the chance to make their views officially heard by States' delegates and recorded in the conference system. In addition, the ICRC, that has standing observer status in the general assembly, enjoys the freedom to address the meeting at any possible time. This opportunity to directly address the meeting is important for civil societies to make their voices heard directly by States' officials mandated to negotiate. In addition, the NGOs may provide the delegations with their publications, working papers, and written statements on particular relevant issues for them to take and read.

The UN mechanism to provide opportunities for civil society to participate, however, is not inclusive in all arms control negotiations. In contrast, such relative openness is non-existent, for example, in the Conference on Disarmament. As another international body negotiating arms control, the Conference on Disarmament follows its own procedure and does not provide a mechanism for the civil society to be directly involved in its meetings.¹¹⁵⁴ The Conference on Disarmament represents the traditional procedure in which only States have the right to speak at the Conference meetings and provides no chance for any NGOs to directly present their views. Likewise, limited presence of civil society is also apparent in the Treaty on the Non-Proliferation of Nuclear Weapons meetings.¹¹⁵⁵ In most cases, States are more relaxed towards NGO's participation in conventional arms control meetings than those regarding weapons of mass destruction.

2. Ensuring implementation

Any future treaty regulating small arms needs an appropriate mechanism to ensure compliance. The existing arms control treaties provide lessons on how a treaty is

¹¹⁵⁴ Rules of Procedure of the Conference on Disarmament (CD/8/Rev.9 of 19 December 2003). Part XII (42) deal with the non-governmental organizations where the Rules state “[a]ll communication from non-governmental organizations to the Conference, to the President or to the Secretariat, shall be retained by the Secretariat and be made available to delegations upon request. A list of all such communications shall be circulated to the conference.” The rules of procedure show civil society cannot be directly involved in the Conference on Disarmament.

¹¹⁵⁵ Treaty on the Non-Proliferation of Nuclear Weapons (1968), 729 UNTS 161.

implemented, including by a support mechanism to ensure compliance by States Parties. A State is willing to comply with the provisions in a treaty mainly because of its concerns both for its reputation and the threat of direct sanctions triggered by non-compliance, hence breaching law.¹¹⁵⁶ Compliance could be ensured by establishing a verification mechanism and/or having periodic inspections by a neutral third party to give a greater chance for a treaty to achieve its goals.¹¹⁵⁷

Taking other arms control treaties as examples, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) verifies the compliance of the States Parties by giving a mandate to the International Atomic Energy Agency (IAEA) to carry out the verification tasks in a safeguard system.¹¹⁵⁸ For this verification purpose, the IAEA may send their inspectors to verify the compliance with the fulfilment of States Parties' obligations under the treaty.¹¹⁵⁹ In practice, a treaty with an implementing body or permanent secretariat would be able to maintain a more regular communication among States Parties than a treaty without it, which would rely on the resources of the secretariat of the United Nations instead. The communication on the issue of the implementation of the Chemical Weapons Convention (CWC), for instance, is served by the technical secretariat of the OPCW. Meanwhile, the communication on the CCWC, which has no implementing body, is served by the United Nations office for disarmament affairs.

The Chemical Weapons Convention verifies the reports of States parties by cross-checking the States Parties' reports of export, to find any suspicious discrepancy, combined with on-site inspection. In the case of the CWC, the Convention

¹¹⁵⁶ Andrew T Guzman "A Compliance-Based Theory of International Law" (2002) 90 Cal L Rev 1825 at 1826; Michael Chertoff "Responsibility to Contain: Protecting Sovereignty under International Law" (2009) 88(1) Foreign Aff 132; see generally the Vienna Convention on the Law of Treaties (done 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331. The consent to be bound by a treaty expressed by signature, exchange of instrument consisting a treaty, ratification, acceptance and other means are elaborated in articles 12 -17.

¹¹⁵⁷ Ibid, at 1829.

¹¹⁵⁸ Treaty on the Non-Proliferation of Nuclear Weapons (1968), 729 UNTS 161, at art III (1). The treaty requires a non-nuclear State Party to accept safeguards and conclude agreement with the International Atomic Energy Agency for the exclusive purpose of verification of the fulfilment of its obligations.

¹¹⁵⁹ International Atomic Energy Agency Safeguards (INFCIRC/26 of 30 March 1961), part v. Available at <<http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc26.pdf>>.

established an implementing body of the CWC, namely the Organization for the Prohibition of Chemical Weapons (OPCW), with the mandate to achieve the objectives and ensure the implementation of the convention by the States parties.¹¹⁶⁰ For those purposes, the OPCW may, as part of its verification activities, deploy their inspectors to conduct on-site inspections at short notice to any national authority of the CWC States Parties.¹¹⁶¹

The NPT and the CWC are the two examples of international arms control treaties which have succeeded in equipping themselves with implementing bodies to ensure the implementation and verify the compliance of the States parties. While an implementing body helps in ensuring the implementation, it appears that not all conventions on arms controls need to have an implementing body. The experience from the recent implementation of particular arms control treaties shows that a treaty can still be effective in the absence of periodic intrusive inspections.

The States parties to conventional arms control treaties, at least at this stage, do not feel it necessary to have an implementing body such as the CWC and the NPT have. The conventions on conventional weapons such as the Mine Ban Convention, the CCWC, and Convention on Cluster Munitions have no specific implementing body to execute the objectives and implementation of the States Parties. Although not an implementing body, the States Parties to the Mine-Ban Convention in 2001 have established an implementation support unit which provides secretarial and administrative support in the meetings.¹¹⁶²

A regional legally binding instrument can be observed as well. The verification mechanism of the Treaty on Conventional Armed Forces in Europe (CFE Treaty)

¹¹⁶⁰ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993), art VIII.

¹¹⁶¹ Ibid, art VIII (5).

¹¹⁶² Final Report of the Third Meeting of States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on their Destruction (APLC/MSP.3/2001/L.7).

may provide hints on an effective verification.¹¹⁶³ The CFE Treaty is accompanied by eight protocols as integral parts of the Treaty which include the Protocol on Notification and Exchange of Information with an Annex on the Format for the Exchange of Information (Protocol 5); and the Protocol on Inspection (Protocol 6). To further ensure compliance by parties, the CFE Treaty establishes a Joint Consultative Group to promote the objectives and implementation.¹¹⁶⁴ As a product of arms control negotiated in the Cold War, the Treaty ensures the implementation by having a detailed arrangement of a verification mechanism, including a detailed site inspection.

Verification mechanism was one of the topics that States considered essential in the early negotiation of the arms trade treaty. States have indicated the indispensable need of verification and compliance processes and the exploration what other enforcement measures to have in a successful treaty.¹¹⁶⁵ It would also be subject to negotiation to ensure the implementation of the provisions of a treaty and whether it needs an implementing body. As in the case of the conventions on anti-personnel mines and cluster munitions, another treaty on conventional weapons may be expected to rely on transparency and an effective reporting mechanism. The challenge of verification for small arms is to find a mechanism of compliance for wrongful use of small arms, namely a model which incorporates the consideration of IHL and IHRL.

All existing conventions on conventional weapons have no implementing body. For example, the CCWC¹¹⁶⁶ and its five protocols are also implemented with no implementing body. The Convention has limited reference to the clarification mechanism and leaves it to each protocol to deal with it. As a consequence, not all

¹¹⁶³ Treaty on Conventional Armed Forces in Europe (signed on 19 November 1990, entered into force on 17 July 1992). For comprehensive information on the CFE Treaty, see Sergey Koulik and Richard Kokoski *Conventional Arms Control: Perspectives on Verification* (Oxford University Press, 1994).

¹¹⁶⁴ Treaty on Conventional Armed Forces in Europe (signed on 19 November 1990, entered into force on 17 July 1992), art XVI.

¹¹⁶⁵ The UK is one of States that underlines the importance of the verification process. Statement by Ambassador John Duncan, the UK Ambassador for Multilateral Arms Control Disarmament, 12 July 2010, before the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹¹⁶⁶ Certain Conventional Weapons Convention (1980), 1342 UNTS 137.

protocols have clear provisions to address the matters relating to compliance, implementation, and clarification. Of all the five protocols, Protocol II provides a reference to implementation and compliance (article 14), likewise Protocol V (article 11), meanwhile the other three Protocols (I, II and IV) have no implementing provisions or clarification on compliance with the implementation.

An arms control treaty anticipates the problem of the issue of non-compliance by providing a compliance mechanism to deal with it. However, not all arms control treaty verification is in the form of an intrusive inspection. The Mine Ban Treaty, for example, deals with the possibility of non-compliance with a non-intrusive procedure. One or more States Parties may wish to clarify “and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of United Nations, a Request for Clarification of that matter to that State Party.”¹¹⁶⁷ The Mine-Ban Convention’s provision, that allows a State to seek a clarification, together with the obligation to submit reports on national implementation measures¹¹⁶⁸ have sufficiently ensured relative smooth implementation of the Convention.

In the Mine Ban Convention negotiation process, a monitoring and verification mechanism initially had been introduced, in the belief that without it the prohibition would be toothless.¹¹⁶⁹ The ICRC suggested a method to set up an independent mechanism to investigate credible reports of the use of anti-personnel mines, the States accepted it at the end of negotiation although they were initially not convinced.¹¹⁷⁰ The mechanism of the facilitation and clarification of compliance in Article 8 of the Mine Ban Convention is a compromise between “the intrusive

¹¹⁶⁷ Article 8 on Facilitation and clarification of the compliance of the 1997 the Mine Ban Convention. The argument that without a verification mechanism, a treaty will be less effective was also raised in the negotiation of the Mine Ban Convention.

¹¹⁶⁸ Mine Ban Convention (1997), art 7, obligates States parties to submit report on, inter alia, the total stockpile, location of mined areas, status of programs for the conversion of anti-personnel mines production facilities and mines destruction.

¹¹⁶⁹ Stuart Maslen *Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point* (Intersentia-Transnational Publishers, 2001) at 81.

¹¹⁷⁰ *Ibid.*

verification measures typical of disarmament treaties and the relatively light model traditionally favoured by international humanitarian law”.¹¹⁷¹

The Convention on Cluster Munitions, similarly to the Mine Ban Convention, does not establish an implementing body to verify the implementation of States Parties. Instead, a State Party is obligated to prepare transparency measures which include reporting on the total number it has, not later than 180 days after entry into force of the convention for that State Party.¹¹⁷² The Convention also facilitates a clarification of compliance mechanism if one or more States Parties wish to resolve questions relating to a matter of compliance by another State Party.¹¹⁷³ Generally, the issues that may arise in the application of the convention will be discussed and decided in regular meetings of States Parties.¹¹⁷⁴

The successful implementation of the Mine Ban Convention without an implementing or intrusive inspection provides a useful lesson for future treaty negotiators with regards to ensuring compliance. The Mine Ban Convention has proved that without an implementing body and on-site verification, a convention could be well implemented by resorting to obligatory reports and the clarification mechanism.¹¹⁷⁵ Transparency is insured by having regular States Parties meetings to observe development of the implementation and address the issues of common concern. However, the Mine Ban Convention allows a fact-finding mission for clarification after the States parties special meeting authorizes such inspection.¹¹⁷⁶ The absence of an implementing body in the Mine Ban Convention, the CCWC, and the CCM suggests that the need to have an implementing body may also depend on the type of weapons banned or regulated.

¹¹⁷¹ Stuart Maslen *Commentaries on Arms Control Treaties, Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Oxford University Press, 2004) at 214.

¹¹⁷² Convention on Cluster Munitions Convention (2008), art 7.

¹¹⁷³ *Ibid*, art 8.

¹¹⁷⁴ Convention on Cluster Munitions (2008), art 11. Both the Convention on Cluster Munitions and the Mine Ban Convention (1997) have annual meetings which give member countries opportunities to discuss all matters of concern in implementation of the Convention.

¹¹⁷⁵ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), art 7 and 8.

¹¹⁷⁶ *Ibid*, art 8.

For small arms, as the existing conventional arms control treaties exemplify, the possible future small arms trade treaty might also adopt the same practical and applicable non-intrusive compliance mechanism. Learning from past experience on compliance mechanisms of the existing conventional arms controls, and also taking into account the portable nature of small arms, the most possible verification mechanism for small arms is by transparency report and not intrusive site inspection. It could take a form of a regular transparency report with information on stockpile, production, and transfer by a State Party during an indicated period of time.¹¹⁷⁷ Moreover, the existing conventional arms treaties suggest that an on-site inspection for small arms might not be very useful to verify the existence of weapons as they are easier to move or conceal than, for example, a chemical plant capable of making chemical weapons or special storage in stockpiling.

A multilateral arms control treaty is adopted to limit, control, ban, or regulate weapons. It deals with the matter of most significance to States and affects their national security, hence it requires ratification for it to enter into force.¹¹⁷⁸ A treaty, to be implemented, needs consent from a State to bind itself with provisions contained in the treaty. For States to voluntarily agree to be bound by a treaty, among other things, it has to accommodate the interests of that State.

C. Small Arms in the Arms Trade Treaty

1. Small arms as part of conventional weapons

The main concern regarding small arms is their excessive availability. This may cause humanitarian problems and a threat to human security, as they can be used to violate human rights and international humanitarian laws. Many other conventional weapons do not arouse that concern to the degree that small arms do. The control of small arms is also much more challenging than other conventional weapons, for

¹¹⁷⁷ Draft of the ATT submitted by the President of the UN Conference on the ATT (dated 26 July 2012), has articles deal with reporting and a secretariat to support the implementation (UN Doc A/CONF.217/CRP.1).

¹¹⁷⁸ Andrew Michie “The Provisional Application of Arms Control Treaties” (2005) 10(3) J Conflict & Security L 345 at 348.

example, anti-personnel mines. This is because firstly, small arms are basic elements of States' defence and security posture and have other uses for law enforcement and recreational purposes; and secondly, they have a strong cultural affinity that may shape the policy to oppose any international instrument that might have domestic repercussions.¹¹⁷⁹

The development and the roadmap provided by the UNGA resolution 64/48 indicates that the most realistic hope to control small arms lies in negotiation to have an ATT. Meanwhile, the inclusion of small arms in an arms trade treaty puts the issue of small arms dependent on decisions on other conventional weapons, many of which have higher profiles: for example, attacking helicopters, fighter jets, missiles, tanks, armoured vehicles, military ships, and unmanned aerial vehicles (UAV).¹¹⁸⁰ The trade of small arms, because of their distinct characteristics - portability and universal use by most countries - is relatively much more difficult to control than other types of weapons.

The inclusion of small arms in an arms trade treaty can be seen through two different possible scenarios. First, it could be an advantage if the negotiation succeeds to establish arms trade standards, as the inclusion will provide a restriction to cover small arms trade. Under an ATT, export or import of small arms would require exporting and importing States to abide by certain rules and criteria in transferring small arms as part of conventional arms. Given the difficulty to regulate small arms as a single topic, and the fact that there is no possibility in a foreseeable future that the world will have a treaty exclusively on small arms trade, the inclusion is the best possible chance the international community has at the present time. Establishing an international treaty that regulates the small arms trade will complement and strengthen other instruments, including the Security Council arms embargoes.

¹¹⁷⁹ S Neil MacFarlane and Yuen Foong Khong *Human Security and the UN: A Critical History* (Indiana University Press, 2006) at 199.

¹¹⁸⁰ Unmanned Aerial Vehicle (UAV), a new type of conventional weapon increasingly used in armed conflict, was suggested to be included in the future ATT. Such proposal was heard during the first PrepCom in July 2010.

Second, it could become a disadvantage if the issue of small arms is to be viewed merely as a part of larger conventional weapons which have different reasons to be restricted or regulated. There are certain characteristics of small arms that need to be taken into consideration. Small arms relate to basic social issues, such as social-economic devastation as the weapons have a great potential to be used in violating IHL and IHRL. The weapons have a discernible profile for what they have caused or could cause, while other conventional weapons have a direct significance to military capability and national security or defence based on their own merit.

The challenges to an ATT apparently already looked difficult as the early discussion of the meetings of the Preparatory Committee for the UN Conference on the ATT throughout 2010 and 2011 demonstrated. The inability of the previous working groups to work on definitive elements of scope, parameters, and criteria may have been utilized by some countries to argue that the States are not ready yet. Russia was one of the countries that explicitly argued in the PrepCom that it was “premature to speak now of a legally binding ATT”.¹¹⁸¹ The PrepCom meetings also showed that States still kept referring to their concerns that an ATT may damage the sovereignty enjoyed by States. In the first Preparatory Committee in 2010, some countries, Pakistan for instance, stated again that an arms trade treaty should not affect a transaction between two sovereign countries and stressed the need for consensus in adopting that treaty.¹¹⁸²

2. UNGA resolutions on ATT and voting behaviour

The long process to have a control on conventional arms culminated in a diplomatic conference in July 2012 as mandated by the General Assembly resolution 64/48 of 2 December 2009. Historically, the initiative can be traced back to 1995 when a group of Nobel Peace Prize Laureates started campaigning for an international legal

¹¹⁸¹ Statement of the Russian Federation delegation, 12 July 2010, before the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹¹⁸² Pakistan Delegation Statement in the First Preparatory Committee Meeting, New York 12-23 July 2010 <<http://www.un.org/disarmament/convarms/ATTPrepCom/Statements-MemberStates.html>>. Last accessed on 6 September 2010.

instrument to prevent irresponsible arms transfer.¹¹⁸³ The initiative was supported by various civil society groups and later taken up by Governments and brought into the UN framework.¹¹⁸⁴ One particular State that pushed for the process was the United Kingdom, which also actively approached governments to raise support for the ATT.¹¹⁸⁵

The campaign took form when the idea was tabled as a draft resolution on the ATT in the United Nations General Assembly in 2006. The resolution 61/89 of 6 December 2006 explicitly mentions “respect for international law, including international human rights law and international humanitarian law,” as considerations in a negotiation towards an arms trade treaty.¹¹⁸⁶ The resolution was adopted with overwhelming support. The voting record on the resolution is a valuable indication as it reveals initial official positions of States, which have now crystallized. It then becomes significant to analyse the votes from major producers and main exporting countries on the resolution. Considering that arms trade involves considerable economic value, political and security interests, their positions on the ATT expectedly reflect those interests.

The resolution 61/89 consists of four operative paragraphs containing two important points: first, considering steps to negotiate for a legally binding treaty; and second, to establish a group of governmental experts (GGE).¹¹⁸⁷ The resolution is to ask the States’ point of view “on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument.”¹¹⁸⁸ Later, the compilation of the views from States showed that most States were of the view it would be feasible to have a treaty and reflected their principle positions on the issues related to arms trade.¹¹⁸⁹ It

¹¹⁸³ Paul Holtom and Siemon T Wezeman “Towards an Arms Trade Treaty?” in *SIPRI Yearbook 2007* (New York, Oxford University Press, 2007) at 431; see also, *Small Arms Survey: Shadows of War* (Cambridge, 2009) at 147.

¹¹⁸⁴ Among the civil society groups who actively campaign for a legally binding instrument are Amnesty International, the International Action Network on Small Arms (IANSA), the Control Arms, and Oxfam; see, *Small Arms Survey: Shadows of War* (New York, Cambridge University Press, 2009) at 147.

¹¹⁸⁵ *Small Arms Survey: Shadows of War* (New York, Cambridge University Press, 2009) at 147.

¹¹⁸⁶ UNGA res 61/89 of 6 December 2006, preamble para 7.

¹¹⁸⁷ UNGA res 61/89 of 6 December 2006.

¹¹⁸⁸ *Ibid*, operative para 1.

¹¹⁸⁹ Secretary-General’s report of the member States’ view of an ATT (2007), A/62/278.

was hope that the work of the GGE would lead the process in a more concrete direction towards an ATT. The GGE started its work and had three meetings between February and August 2008, before submitting a report in the same year.¹¹⁹⁰

The wording of the resolution 61/89 makes it clear the intention to adopt a legal instrument, therefore, closes the door for the inadequate results of a mere political document that is similar in weight to the UNPoA or the ITI.¹¹⁹¹ The resolution recognizes one of the reasons why the world needs a treaty, is that the absence of common international standards on export, import, and transfer of conventional arms “is a contributory factor to conflict...thereby undermining peace, reconciliation, safety, security, stability and sustainable development”.¹¹⁹²

The resolution 61/89 states its purpose is to establish common standards but does not explicitly confirm it will include small arms. The absence of the exact wording to include small arms in it was not satisfying, and States mended this in the resolution 63/240 on ATT in 2008 by explicitly mentioning that they “[d]etermined to prevent the diversion of conventional arms, including small arms and light weapons, from the legal to the illicit market”.¹¹⁹³ The unequivocal wording of the resolution speaks clearly, the arms trade treaty is to include small arms.

The position of States and this dynamic can be traced by looking at the voting patterns of States in the General Assembly. Observing the voting pattern of all the three General Assembly resolutions in 2006, 2008, and 2009 provides information on each States’ position with regard to the ATT. The first two resolutions in 2006 and 2008 show the majority support for a future ATT with 153 and 133, respectively, in favour. It is not surprising to find States that abstained included the main conventional arms producers.¹¹⁹⁴ They, among others, were China, Israel and the

¹¹⁹⁰ Report of the Group of Governmental Experts, A/63/334 of 26 August 2008.

¹¹⁹¹ UNPoA (2001), UN Doc A/CONF.192/15; International Tracing Instrument on Small Arms and Light Weapons (2005), UNGA decision 60/519 of 8 December 2005 .

¹¹⁹² UNGA res 61/89 of 6 December 2006, preamble para 9.

¹¹⁹³ UNGA res 63/240 of 24 December 2008.

¹¹⁹⁴ UNGA official records A/61/PV.67. The countries abstaining are Bahrain, Belarus, China, Egypt, India, Iran, Iraq, Israel, Kuwait, Lao People’s Democratic Republic, Libya, Marshall Islands, Nepal, Oman, Pakistan, Qatar, Russian Federation, Saudi Arabia, Sudan, Syria, United Arab Emirates,

Russian Federation. It is worth noting that States such as India, Pakistan, Saudi Arabia, Egypt, Bahrain, Saudi Arabia, Oman, Qatar, Syria, and United Arab Emirates took the same position, opting to abstain in this matter.¹¹⁹⁵ It is a sensible assumption that the States abstained were actually against the resolution, but left themselves some room for a change in position if the developments of the later progress in negotiation suited their interests.

Meanwhile, the UNGA resolution on ATT in 2009 shows 151 supporting to 1 against, with 20 abstentions. The significant change in the voting pattern was that there was a drastic change of position from the United States from *against* to *in favour*, which is a very encouraging sign, given its influence as a major power.

Table VII.1:
Voting pattern of the UNGA resolutions on ATT¹¹⁹⁶

Resolution	In favour	Against	Abstain
61/89 (2006)	153	1 (US)	24
63/240 (2008)	133	1 (US)	19
64/48 (2009)	151	1 (Zimbabwe)	20

Paying closer attention to the drafting process of resolution 61/89 of 6 December 2006, the US even rejected the operative paragraphs 2 and 3 which were to request the Secretary-General to establish a group of governmental experts and provide services and assistance for the group.¹¹⁹⁷ This implies that the US did not want such a group to work and receive support from the UN secretariat in its work. The establishment of a GGE was a move towards finding a common ground among States

Venezuela, Yemen, Zimbabwe. The GA res in 2008 and 2009 show a decline of countries vote “abstain” to 19 in 2008 and 20 in 2009.

¹¹⁹⁵ UNGA official records A/61/PV.67.

¹¹⁹⁶ In 2007, the UNGA did not adopt a resolution on ATT as the member countries were submitting their responses as asked by the UNGA resolution 61/89 of 2006. The table is based on the voting in the three UNGA resolutions on the ATT.

¹¹⁹⁷ Official record of the 67th Plenary Meeting of the UNGA, Wednesday, 6 December 2006 (A/61/PV.67).

on the scope and parameters, and opposition to the formation of the group indicates clear opposition to a treaty. The US stayed with its *against* position in the ATT resolution 6/240 of 24 December 2008.

The voting in the following year, 2009, marked a significant change of the US position on the GA resolution towards an arms trade treaty. While in the previous two resolutions the United States consistently voted *against*, it now voted *in favour* in the 2009 resolution indicating the shift of its policy on arms control following the administration change in Washington. However, one country still voted *against* in the 2009 resolution, and that State was Zimbabwe.

The general position of the States with regards to small arms trade may be explained by finding what their interests are in small arms transfer. Arguably, although there are other factors, the main exporting or importing States will be those most affected by the existence of an arms trade treaty. Hence, it can be assumed, the status of importing or exporting is one of the factors that may influence a State's position. The Small Arms Survey puts the United States on top of the list of small arms exporting countries, followed by Italy, Germany, Brazil, Austria, and Belgium.¹¹⁹⁸ China and Russia are believed to be among the top producers although the transfer data to support this claim is not available.¹¹⁹⁹ Meanwhile, the top importers of small arms include the United States, France, Japan, Canada, South Korea, Germany, and Australia.¹²⁰⁰

In a bigger picture of conventional weapons, all those countries mentioned above make up the SIPRI list of top 20 conventional arms exporters in 2000-2009, namely the USA, Russia, Germany, France, UK, Spain, China, Israel, Netherlands, Italy, Sweden, Switzerland, Belgium, Ukraine, Canada, South Korea, South Africa,

¹¹⁹⁸ *Small Arms Survey 2009* (Cambridge, 2009) at 8.

¹¹⁹⁹ *Ibid.* It is believed that both China and Russia are not very transparent with their transfer data on small arms.

¹²⁰⁰ *Ibid.*

Singapore, Poland, and Uzbekistan.¹²⁰¹ This suggests that, in general, the main exporters and importers of conventional weapons are also the main exporters and importers of small arms.

Meanwhile, the SIPRI database lists the top 20 importers of conventional arms to include China, India, South Korea, Greece, UEA, Turkey, Australia, Egypt, Israel, USA, UK, Singapore, Pakistan, Algeria, Japan, Chile, Malaysia, Poland, Taiwan, and Saudi Arabia.¹²⁰² The ATT puts the interests of both conventional arms exporters and importers on the line. As the absence of international standard in arms transfer benefits them, some States reflect it in their reluctance and rejection of adopting a legal instrument.

Tables VII.1 and VII.2 below on the voting records show the majority of States support an ATT, which also, encouragingly, come from some main exporting and importing countries. However, those who abstain, include main exporters and key players in international relations, such as China and Russia.

Table VII.2:
Exporting countries' voting records

Top 20 Exporting Country ¹²⁰³	Res 61/89 (2006)	Res 63/240 (2008)	Res 64/48 (2009)
1. USA	Against	Against	In favour
2. Russia	Abstain	Abstain	Abstain
3. Germany	In favour	In favour	In favour
4. France	In favour	In favour	In favour
5. UK	In favour	In favour	In favour
6. Netherlands	In favour	In favour	In favour
7. China	Abstain	Abstain	Abstain
8. Italy	In favour	In favour	In favour
9. Sweden	In favour	In favour	In favour
10. Israel	Abstain	Abstain	In favour
11. Ukraine	In favour	In favour	In favour

¹²⁰¹ SIPRI (Stockholm International Peace Research Institute). Data based on SIPRI Trend Indicator Values from 2000 to 2009 <<http://armstrade.sipri.org/armstrade/page/toplist.php>>. Last accessed on 5 July 2010.

¹²⁰² Ibid.

¹²⁰³ Top 20 conventional arms exporting countries from 2000 to 2009, retrieved from SIPRI database <<http://armstrade.sipri.org/armstrade/page/toplist.php>>. Last accessed on 5 July 2010.

12. Spain	In favour	In favour	In favour
13. Switzerland	In favour	In favour	In favour
14. Canada	In favour	In favour	In favour
15. Rep of Korea	In favour	In favour	In favour
16. Belarus	Abstain	Abstain	Abstain
17. Poland	In favour	In favour	In favour
18. Belgium	In favour	In favour	In favour
19. South Africa	In favour	In favour	In favour
20. Uzbekistan	Absent	Absent	Absent

Observing from an importing countries' perspective (Table VII.3), the vote shows those *in favour* overcome those who are *against* or *abstain*. There are, however, some importing countries which consistently vote to *abstain*, China, India, the United Arab Emirates, Egypt, Pakistan, and Saudi Arabia. The US and Israel changed their position in the 2009 resolution to *in favour*. The voting pattern shows that the potential rejection of an arms trade treaty does not only come from some supplier countries but also from some recipient countries. In fact, the recipient countries show a greater potential in resisting an arms trade treaty as some of them consistently voted to *abstain*. The two tables show that only six of the exporting countries voted *against* or *abstain* in resolution 61/89 and this decreased to four in resolution 64/48 compared to eight and six of the importing countries. It may suggest that the importing countries may feel more threatened by an arms trade treaty.

Table VII.3:
Importing countries' voting records

Top 20 Importing Country ¹²⁰⁴	Res 61/89 (2006)	Res 63/240 (2008)	Res 64/48 (2009)
1. China	Abstain	Abstain	Abstain
2. India	Abstain	Abstain	Abstain
3. Rep. of Korea	In favour	In favour	In favour
4. Greece	In favour	In favour	In favour
5. UAE	Abstain	Abstain	Abstain
6. Turkey	In favour	In favour	In favour
7. Australia	In favour	In favour	In favour
8. Egypt	Abstain	Abstain	Abstain
9. Israel	Abstain	Abstain	In favour

¹²⁰⁴ Top 20 conventional arms importing countries from 2000 to 2009, retrieved from SIPRI database <<http://armstrade.sipri.org/armstrade/page/toplist.php>>. Last accessed on 5 July 2010.

10. USA	Against	Against	In favour
11. UK	In favour	In favour	In favour
12. Singapore	In favour	In favour	In favour
13. Pakistan	Abstain	Abstain	Abstain
14. Algeria	In favour	In favour	In favour
15. Japan	In favour	In favour	In favour
16. Chile	In favour	In favour	In favour
17. Malaysia	In favour	In favour	In favour
18. Poland	In favour	In favour	In favour
19. Taiwan ¹²⁰⁵	n/a	n/a	n/a
20. Saudi Arabia	Abstain	Abstain	Abstain

3. Preparing to negotiate an arms trade treaty
a. Elements, objectives and feasibility

The Group of Governmental Experts mandated by the General Assembly resolution 61/89 of 6 December 2006 to find feasibility, scope, and parameters towards an arms trade treaty, submitted the report of its work to the General Assembly in 2008.¹²⁰⁶ However, the report did not decide whether an arms trade treaty was feasible but indicated that “the feasibility of a potential arms trade treaty would be dependent on establishing its collectively agreed objectives, its practical applicability, its resistance to political abuse and its potential for universality.”¹²⁰⁷ It is understood that there is particular reference to the need to resist a treaty becoming a political instrument to avoid scepticism and refusal. International law has long been seen by sceptical observers as being used by powerful nations to impose their will upon smaller and weaker nations, while disregarding the same law when it is against their national interests.¹²⁰⁸

¹²⁰⁵ Taiwan is not a member of the United Nations, hence does not have the right to vote.

¹²⁰⁶ General Assembly Document A/63/334, 26 August 2008 on the Report of the Group of Governmental Experts.

¹²⁰⁷ Report of the Group of Governmental Experts, A/63/334, 26 August 2008, at [14-16].

¹²⁰⁸ Anthony D’Amato “International Law from a Machiavellian Perspective” in W David Clinton (ed) *The Realist Tradition and Contemporary International Relations* (Louisiana State University Press, 2007) at 83.

The feasibility, according to the GGE's report, depends on "the clear definition of the fundamental goals and objectives of a potential arms trade treaty."¹²⁰⁹ The concern of some States that an arms trade treaty would undermine sovereignty is well expressed in the report: for "an arms trade treaty to be considered feasible, it would need to reflect respect for the sovereignty of every State, without interfering in the internal affairs of States or their constitutional provisions, and respect for their territorial integrity."¹²¹⁰ As is clear, from the very beginning the discussion on the feasibility of a potential arms treaty does not evade the consideration of the issue of State sovereignty. The discussion on feasibility revolves around how States find a common ground and balance between individual States' interest in maintaining national security objective and the collective objective of maintaining international security.¹²¹¹

The feasibility was reflected more when the Secretary-General, in 2007, requested the States to give their views on the feasibility, scope, and draft parameters of a potential arms trade treaty; and the majority of around 98 countries responded with the opinion that an arms trade treaty was feasible.¹²¹² The adoption of resolution 64/48 itself, which mandates the 2012 conference, demonstrates overwhelming support of the feasibility of an arms trade treaty from the UN member States.

Before the July 2012 conference, States were invited to submit focused views on elements of an arms trade treaty.¹²¹³ The compilation of States' views on the elements was issued as a background document in May 2012, two months before the diplomatic conference.¹²¹⁴ In the compilation, many States repeated their previous

¹²⁰⁹ Point 17 of the Report of the Group of Governmental Experts. The General Assembly Document A/63/334, 26 August 2008.

¹²¹⁰ Ibid.

¹²¹¹ Guido Den Dekker *The Law of Arms Control: International Supervision and Enforcement* (Martinus Nijhoff Publishers, The Hague, 2001) at 33.

¹²¹² Report of the Secretary-General, A/62/278 of 17 August 2007. There are a few sceptical responses which state that an arms trade treaty will be very difficult to achieve. Venezuela's response is more explicit as it "does not support this initiative" and argues that the priority should be given to nuclear disarmament and elimination of the other categories of weapons of mass destruction. For the record, the United States did not submit a response to the Secretary-General's request.

¹²¹³ Report of the Preparatory Committee for the UN Conference on the Arms Trade Treaty, A/CONF.217/1 of 7 March 2012.

¹²¹⁴ Compilation of Views on the Elements of an Arms Trade Treaty, A/CONF.217/2 of 10 May 2012.

position showing again their support for the criteria of IHL and IHRL and inclusion of small arms in order to have high standards in arms transfer.¹²¹⁵

The third PrepCom meeting Chair's non-paper (2011) contained six points of goals and objectives of the treaty, stating that the treaty will seek to promote the goals and objectives of the United Nations Charter; establish the highest possible common international standards for conventional arms trade; prevent, combat, and eradicate the illicit transfer, production, and brokering; contribute to international and regional peace, security and stability; promote transparency and accountability in arms trade; and be universal in treaty application.¹²¹⁶ The draft of the ATT, issued by the President of the 2012 conference, consisting of five points under article 1, has different wording:

The goals and objectives of the Treaty are:

- a. For States Parties to establish the highest possible common standards for regulating or improving the regulation of the international trade in conventional arms; and
- b. To prevent, combat and eradicate the illicit trade in conventional arms and their diversion to the illicit market or for unauthorised end use;
In order to:
 - c. Contribute to international and regional peace, security and stability;
 - d. Prevent the international trade in conventional arms from contributing to human suffering; and
 - e. Promote cooperation, transparency and responsibility of States Parties in the Trade in conventional arms, thus building confidence among States Parties.¹²¹⁷

There are some changes from the previous Chair's non-paper (2011), but the key points are included in the draft ATT, with slightly different wording.

¹²¹⁵ Ibid.

¹²¹⁶ Chair's non-paper (14 May 2011) in the Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, A/CONF.217/1 of March 2012, at Annex II.

¹²¹⁷ The Draft of the Arms Trade Treaty, 26 July 2012, A/CONF.217/CRP.1, art 1.

b. Scope

The GGE's report in 2008 did not state the scope that a potential arms trade treaty may have but only indicated what conventional arms should be part of it. The report considered "the seven categories of the United Nations Register of Conventional Arms, small arms and light weapons and whether categories, such as ammunition, explosives, components, defence services, technology related to the manufacture of weapons and ammunition should be included".¹²¹⁸ In addition to that, "particular sport and hunting arms should also be taken into account in a potential arms trade treaty".¹²¹⁹ The GGE's report did not describe a clear cut description recommendation, instead, it resorted to a list of categories of weapons that should be included.

With regard to the arms transfer activities, the report suggested that the activities/transactions that might be included as being "exports, imports, transfers, re-exports, transit, trans-shipment, licensing, transportation, technology transfer and manufacturing and foreign licensed production, as well as countering illegal re-exports, unlicensed production and transfers, illicit arms brokering, and transfers of arms to non-State actors".¹²²⁰ The report listed practically all the possible activities of the arms trade and included the controversial issue of transfer to non-State actors.

A series of preparatory meetings prior to the 2012 conference negotiated the elements of the future ATT, mainly on the scope, criteria and parameters. The statements from States in the preparatory meetings implied that the inclusion of all seven categories of weapons in the UN Register plus small arms and ammunition (7+1+1) had the most support. The chair of the third preparatory committee meeting in July 2011 summarised the discussion on the scope to include seven categories of weapons in the UN register and four others, namely small arms, light weapons, ammunition, parts or components, and technology and equipment.¹²²¹

¹²¹⁸ Report of the Group of Governmental Experts, A/63/334, 26 August 2008 at [14-21].

¹²¹⁹ Ibid.

¹²²⁰ Ibid, at [15-22].

¹²²¹ Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, A/CONF.217/1 of March 2012, at Annex II.

The type of weapons to be included also relates to the purpose of the treaty. If the purpose is the promotion of peace and security as well as the promotion of international humanitarian law and human rights law, then all types of conventional arms should be relevant to regulation.¹²²² Stating the obvious, there are no conventional arms posing no danger to peace and security, humanitarian and human rights law so that from this standpoint, all trade in conventional weapons needs to be regulated. However, regulating all types of conventional weapons is certainly very difficult, the most common view, as heard in the preparatory meetings and the UNGA resolutions on the ATT, is to regulate the seven types of weapons in the UN Arms Register together with small arms.

c. Inclusion of human rights in criteria and parameters

Whether the inclusion of small arms in the ATT fits the framework to regulate small arms trade depends on the definition, criteria and standard used in the treaty. If the principles based on human rights and humanitarian laws are to apply, the ATT should be able to control arms transfers to conflict-prone zones or to regimes that are recognized as dictatorial and likely to use the weapons to commit IHL and IHRL violations.¹²²³

In the early negotiation of the ATT, the 2008 GGE report notified that they had discussed the link between international humanitarian law, human rights and arms trade; however, it acknowledged the different opinions, as the Group had:

[D]iscussed, with differing views, the applicability of existing international human rights law and international humanitarian law, while bearing in mind that any potential arms trade treaty should remain objective, non-discriminatory and resistant to political misuse in recognition of the fact

¹²²² Statement by the ICRC, 14 July 2010, before the first Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹²²³ Paul Holtom and Siemon T. Wezeman "Towards an Arms Trade Treaty?" in *SIPRI Yearbook 2007* (Oxford University Press) at 439.

that any potential arms trade treaty would need to respect sovereignty and rights of every State under the Charter of the United Nations.¹²²⁴

As in other arms control meetings, the GGE's report reflects and reiterates the concern of some States that the reference to the humanitarian and human rights consideration would be politically misused. In general, the GGE's report was unable to achieve substantive agreement and did little to pave the way to concrete negotiation on an arms trade treaty.¹²²⁵ The discussion in the GGE describes the political reality and difficult debate around arms control with regard to the issue of sovereignty and rights of a sovereign State. Moreover, the difficulty in achieving agreement on specific decisions on feasibility, scope and parameters within the GGE signals the complexity of the discussion.

Some countries did not easily accept the notion of linking the arms trade with human rights in negotiating an arms control treaty. Putting human rights and humanitarian laws into arms control is a new approach to arms control negotiation which is traditionally negotiated for strategic security.¹²²⁶ Globalization has seen the agenda of international politics as being more multifaceted, and humanitarian and human rights issues have become more important.¹²²⁷ While there is no country free from human rights violations, arguably, there are countries that have worse records than others.

A demand for a balanced, fair, impartial standard of human rights was raised in the ATT negotiation so as to avoid abuse, subjective opinion, and politicization of the treaty. The concern of a possible politicization of treaty making is not unfounded as it has happened previously.¹²²⁸ Politicized interpretation is exemplified in the controversial "humanitarian intervention", especially in a unilateral action, where the intervening country itself has a not so good record of human rights.¹²²⁹ Unilateral,

¹²²⁴ Report of the Group of Governmental Experts, A/63/334, 26 August 2008 [15-24].

¹²²⁵ *Small Arms Survey 2009: Shadows of War* (Cambridge, 2009) at 150-152.

¹²²⁶ See discussion on arms control in Chapter III.

¹²²⁷ Joseph S Nye Jr *Understanding International Conflicts: An Introduction to Theory and History* (7th ed, Longman, 2009) at 10.

¹²²⁸ "Editorial comments" (1985) 79(3) *Am. J. Int'l L.* 641 at 666.

¹²²⁹ Yoram Dinstein *War, Aggression and Self-Defence* (4th ed, Cambridge, Cambridge University Press, 2005) at 71.

subjective opinions on the linkage of human rights and arms trade may be abusive, favouring a few States' interests at the expense of others.

Examining previous documents on small arms, one can see that the linkage to human rights has not been incorporated in the ITI,¹²³⁰ the UNPoA,¹²³¹ or the Firearms Protocol.¹²³² It confirms that human rights argument was a distant concept in the arms control regime. The ITI, adopted by the UN General Assembly in 2005, stresses the importance of the instrument to combat illicit trade but does not link it to human rights or international humanitarian law in its rationales. Similarly, the UNPoA text does not have any direct reference to human rights. The inclusion of human rights references in the UNGA resolutions on the ATT and, as most likely, in the future text of an ATT, is a new approach to directly link the arms control to the protection of human rights. The Mine Ban Convention¹²³³ is known as the case where an arms control treaty observed international humanitarian law practice and rationale. Adding human rights rationale in an arms control treaty is the latest development that has taken place, showing the increasing influence of IHRL.

The limitation of reference to human rights in arms control leads to the opinion that human rights law is not a consideration in the arms control negotiation. Maya Brehm, for example, argues that human rights law does not make a significant contribution to the legal regulation of international arms trade.¹²³⁴ While this was, perhaps, true in the past, it is now changing. More efforts have been made to link human rights to the negotiation of arms trade, primarily to prevent the weapons from being used in human rights violations.

The discussion on an arms trade treaty shows States use human rights and humanitarian rationales as the basis to achieve an arms control treaty. In their statements in small arms related meetings, some States stress the connection between

¹²³⁰ International Tracing Instrument (UNGA Decision 60/519 of 8 December 2005).

¹²³¹ UN Programme of Action on Small Arms (2001) (A/CONF.192/15).

¹²³² Firearms Protocol (2001), 2326 UNTS 208; UN Doc A/55/383/add.2.

¹²³³ Mine Ban Convention (1997), 2056 UNTS 211.

¹²³⁴ Maya Brehm "The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law" (Oxford University Press, 2008) 12(3) J Conflict & Security L 359 at 359.

the arms trade and human rights law and international humanitarian law more than others. Their views are supported widely by civil society. The ICRC, in particular, is quite vocal in pressing their view to be heard by States.¹²³⁵ The ICRC reminds arms-exporting States of the responsibility enshrined in customary international law to ensure respect for, and refrain from encouraging a party to armed conflict to violate, international humanitarian law.¹²³⁶ The civil society links human rights and international humanitarian laws with the availability of, and easy access to, small arms. It is accepted that the excessive availability of small arms exacerbates and intensifies armed conflict, promotes violence, crime and internal repression.¹²³⁷ It strengthens the argument to strictly impose end-user criteria based on human rights and humanitarian law in arms transfer.¹²³⁸

A careful approach should be taken in incorporating IHL and IHRL in arms control agreements as careless pushing of the link of IHL and IHRL could be counter-productive. When a State feels that it is being unfairly treated, there will be a tendency to build its own defence industry at any cost to safeguard its security needs. And worse, it could refuse to engage in an international arms control negotiation. Creating unfair restriction on arms trade would push some States to explore the possibility of having a self-sufficient arms industry at any cost. North Korea and Iran are two examples where the States seek self-sufficiency in their defence industry in extreme ways.¹²³⁹

¹²³⁵ The observer status of the ICRC in the General Assembly gives it more chance for involvement in many more meetings than other non-governmental organizations.

¹²³⁶ Statement by the ICRC, 204 July 2010, before the first Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹²³⁷ Maya Brehm "The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law" (Oxford University Press, 2008) 12 (3) *J Conflict & Security L* 359 at 359.

¹²³⁸ Alexandra Boivin "Complicity and beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87(859) *IRRC* at 468.

¹²³⁹ North Korea is known to have nuclear weapon capability and Iran, allegedly, is pursuing nuclear weapon technology. Iran sits at the 25th of the SIPRI list of conventional arms suppliers in 2011, went up from the 36th place in 2010. <<http://armstrade.sipri.org/armstrade/page/toplist.php>>. Last accessed 30 July 2012. The thesis uses the terms Democratic People's Republic of Korea (DPRK) and North Korea interchangeably throughout the discussion.

In the third PrepCom held in New York, 11-15 July 2011, the Chair issued a draft paper, also called non-paper for its non-official status, to include the elements of a treaty discussed by States during PrepCom meetings which links it to IHL and IHRL. The preamble of the Chair's non-paper mentions the recognition of, among other things, the responsibility of States to control arms trade, and relation of arms transfer to violations of IHL and IHRL:

[T]hat the absence of commonly agreed international standards for the transfer of conventional arms and their diversion to the illicit market are *contributory factors to armed conflict, serious violations of international human rights law and international humanitarian law*...thereby undermining peace, reconciliation, safety, security, stability and sustainable social and economic development [emphasis added].¹²⁴⁰

The progressive nature of the Chair's non-paper demands State Party to make risk assessment with IHL and IHRL in the criteria of arms trade, stating that:

A State Party shall not authorise a transfer of conventional arms if there is a substantial risk that those would:

...

2. Be used to commit or facilitate serious violations of international humanitarian law.
3. Be used to commit or facilitate serious violations of international human rights law.
4. Be used to commit or facilitate serious violations of international criminal law, including genocide, crimes against humanity and war crimes.¹²⁴¹

This Chair's non-paper has fairly accommodated most views from States on the links of arms transfer with IHL and IHRL, which brought hope that this paper would be a basis for discussion to find consensus in the negotiating an arms trade treaty at the UN Conference on the ATT in July 2012.

¹²⁴⁰ Chair's Non-Paper, preamble para 2 (14 July 2011) in the Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, A/CONF.217/1 of 7 March 2012.

¹²⁴¹ Chair's Non-Paper at V (criteria) (14 July 2011) in the Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, A/CONF.217/1 of 7 March 2012

D. Challenges in Establishing a Legally Binding Treaty to Regulate Small Arms

1. Self-defence in the ATT

The right of self-defence started to gain significance in the twentieth century and played a role as legal justification with regard to hostilities occurring in times of peace, when the freedom to resort to war, theoretically, became more restricted.¹²⁴² In what circumstances and to what extent a State may legally exercise self-defence in State practice can be traced to the Caroline incident, in which the United States and Great Britain had diplomatic correspondence in 1841-1842.¹²⁴³ The significant of the *Caroline case* was that both sides agreed the conditions necessary for a valid act of self-defence, which was “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.¹²⁴⁴ The *Caroline case* demonstrated the principles of necessity and proportionality regarding the limitations in practicing self-defence which is now generally accepted as customary international law.¹²⁴⁵

Self-defence has been States’ most cited argument to justify the use of force. For example, German officials defended the Germany invasion of Norway in 1940 as an act of self-defence, an argument which was rejected by the Nuremberg Military Tribunal.¹²⁴⁶ The US and UK justified the military action against Afghanistan in 2001 as being undertaken under article 51 of the UN Charter, which recognises “individual and collective self-defence”.¹²⁴⁷ Although the self-defence justification to invade

¹²⁴² Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, 2002) vol I at 789.

¹²⁴³ Caroline case, Letter from Mr Webster (US) to Mr Fox of 24 April 1841 (excerpt) and Letter from Mr Webster to Lord Ashburton of 6 August 1842 (excerpt) in Shirley V Scott *International Law & Politics: Key Documents* (Boulder, Colorado, Lynne Rienner Publishers, 2006) at 87.

¹²⁴⁴ Caroline case, Letter from Mr Webster (US Secretary of State) to Mr Fox (British Minister in Washington) of 24 April 1841 (excerpt) and Letter from Mr Webster to Lord Ashburton of 6 August 1842 (excerpt) reprinted in Shirley V Scott *International Law & Politics: Key Documents* (Boulder, Colorado, Lynne Rienner Publishers, 2006) at 87-88; Martin A Rogoff and Edward Collins Jr “The Caroline Incident and the Development of International Law” (1990) 16 Brooklyn J Int’l L 493 at 498.

¹²⁴⁵ Martin A Rogoff and Edward Collins Jr “The Caroline Incident and the Development of International Law” (1990) 16 Brooklyn J Int’l L 493 at 526; see Christine Gray *International Law and the Use of Force* (3rd edition, New York, Oxford University Press, 2008) at 148; Ryan T Williams “Dangerous Precedent: America’s Illegal War In Afghanistan” (2011-2012) 33 U Pa J Int’l L 563 at 576;

¹²⁴⁶ Martin A Rogoff and Edward Collins Jr “The Caroline Incident and the Development of International Law” (1990) 16 Brooklyn J Int’l L 493 at 504.

¹²⁴⁷ Letter from Ambassador John Negroponte, Permanent representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001; Letter from Stewart

Afghanistan had many supporters, still there are opposing arguments with regard to necessity and proportionality under humanitarian law, which might challenge the legitimacy of the use of force against Afghanistan.¹²⁴⁸

Following the formation of the United Nations in 1945, the right to self-defence is enshrined in its charter. Cited many times, article 51 of the United Nations Charter is an exception to the prohibition of the use of force and has become the pivot upon which disputes concerning the lawfulness of the use of force usually concentrate.¹²⁴⁹

Article 51 of the Charter states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence in an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹²⁵⁰

Article 51 refers to self-defence as a right, pointing to a situation where a State faces an armed attack and therefore is legally entitled to resort to force.¹²⁵¹ The Charter of the United Nations requires article 51 to be read in connection with article 2, paragraph 4 that “[a]ll Members shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations”.¹²⁵² The International Court of Justice in considerations of the case *Military and Paramilitary Activities In and Against Nicaragua* underlined that this obligation to refrain from the use of force in

Eldon, Charge d’Affaires, UK Mission to the UN in New York, to the President of the Security Council, S/2001/947, 7 October 2001.

¹²⁴⁸ Mary Ellen O’Connel “Lawful Self-Defense to Terrorism” (2002) 63 Pittsburgh L R 889 at 908. O’Connel argues that the military operation in Afghanistan at first met the requirements of lawful self-defence but later it may have gone beyond the bound of proportionality. O’Connel particularly questions the legality of the military operation, and whether it remained necessary and proportional to American’s self-defence after the fall of the Taliban government.

¹²⁴⁹ Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, 2002) vol I at 790.

¹²⁵⁰ Charter of the United Nations, art 51.

¹²⁵¹ Yoram Dinstein *War, Aggression and Self-Defence* (Cambridge University Press, 2005).

¹²⁵² Charter of the United Nations, art 2(4); see generally, Michael Byers *War Law* (London, Atlantic Books, 2005).

article 2, paragraph 4 of the UN Charter is “not only a principle of customary international law but also a fundamental or cardinal principle of such law”.¹²⁵³ This is to stress that the use of force in the act of self-defence is actually the last resort in international relations as the Charter wants the States to renounce forcible self-defence and a unilateral use of force to be excluded as far as possible.¹²⁵⁴

The thesis then inspects the application of self-defence in its relation to international humanitarian law. The ICJ’s arguments, in giving advisory opinion on the legality of the use of nuclear weapons, state that “a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law”.¹²⁵⁵ In its judgment, the ICJ stressed the use of a type of weapon should “be compatible with the requirements of the international law, particularly those of the principles and rules of international humanitarian law”.¹²⁵⁶ Based on the observation that the act of self-defence is limited only by the demands of proportionality and necessity, and that the use of weapon should not ignore principles of humanitarian law,¹²⁵⁷ the thesis concludes that the same principles should apply to the transfer and use of small arms.

Understandably, small arms are an indispensable part of the self-defence force needed to repel an armed attack in exercising rights to self-defence. However, the transfer of small arms for self-defence purposes must also come with the assurance that the weapons will not to be used in contravention of human rights and humanitarian laws. In line with the ICJ argument that the use of weapon should be compatible with international law,¹²⁵⁸ States’ interests in security and self-defence “cannot be

¹²⁵³ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgement (1986) ICJ Reports 14 at 100, para 190.

¹²⁵⁴ Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, 2002) vol I at 790.

¹²⁵⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 at 245, para 42.

¹²⁵⁶ *Ibid*, at 266, para 105.

¹²⁵⁷ *Ibid*; see also, Guido Den Dekker *The Law of Arms Control: International Supervision and Enforcement* (Martinus Nijhoff Publishers, 2001) at 46.

¹²⁵⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 at 266, para 105. However, the Court cannot conclude “whether the threat or use of nuclear weapons

acceptable grounds, if they are in conflict with IHL obligations and other intransgressible norms of international law.”¹²⁵⁹

Article 51, which allows a State to resort to armed self-defence in the face of an armed attack, implicitly acknowledges the Security Council limitation to react promptly to respond to an armed attack. The structure of the Security Council mechanism does not provide an immediate response and therefore allows States to use force as an act of self-defence. Therefore, under current reality, a victim country confronted with an armed attack cannot expect an effective international police to come to its aid and repel the aggressor.¹²⁶⁰ This situation leaves no option for the attacked State other than to defend itself by self-help deploying force, including the use of weapons such as small arms. Article 51 explains that any measures taken by States, shall be immediately reported to the United Nations as “these measures shall not in any way affect the authority and responsibility of the Security Council”.¹²⁶¹ This leads to an argument that the article recognizes a State’s inherent right to exercise self-defence only on an interim basis and requires an immediate report to the Security Council of all actions taken and termination of the action as soon as the Security Council takes measures.¹²⁶²

States’ right to self-defence is frequently cited by many countries in small arms related meetings in the fear that any arms control could hamper weapon acquisition for self-defence.¹²⁶³ Many States attending the United Nations meetings related to

would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.

¹²⁵⁹ Zera Yihdago *The Arms Trade and International Law* (Hart Publishing; Oxford and Portland, Oregon, 2007) at 286.

¹²⁶⁰ Bruno Simma and others (eds) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, 2002) vol I at 211.

¹²⁶¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 at 245, para 44.

¹²⁶² Sikander Ahmad Shah “War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of US Drone Attack in Pakistan” (2010) 9 (1) Wash U Global Stud L Rev 77.

¹²⁶³ UN Secretary-General Report on the Views on Member States’ Views on an ATT (2007), A/62/278 (part I), A/62/278 (part II), A/62/278/Add.1, A/62/278/Add.2, A/62/278/Add.3, A/62/278/Add.4; also *Compilation of Views on the Elements of An Arms Trade Treaty* (2012), A/CONF.217/2, A/CONF.217/2/Add.1.

small arms such as the UNPoA¹²⁶⁴ and International Tracing Instrument,¹²⁶⁵ also voice their position with language revolving around the right to self-defence. The preamble paragraphs of the UNPoA (2001)¹²⁶⁶ for instance, repeatedly stress the inherent right of a sovereign State to self-defence and to acquire weapons in accordance with the United Nations Charter. Three preamble paragraphs 8, 9, and 10, of the UNPoA reaffirm the need to respect the principles of territorial integrity of sovereign States, non-interference in their internal affairs, the right to self-defence, and the right to manufacture small arms for self-defence and security purposes. The references address the deep concerns of some States that the process would jeopardize State sovereignty in manufacturing, importing, and acquiring small arms for the purpose of self-defence.

Many arguments that link small arms with the right to self-defence in the various United Nations meetings are voiced by developing countries. It is the small and medium size countries that are the most concerned with the right to self-defence because they are most likely to be the victims of a possible armed attack and “small arms and light weapons constitute a defence means for the majority of countries in the world”.¹²⁶⁷ Similarly, there are arguments which stress the right of governments to manufacture and possess small arms to “fulfil the requirements of their nation’s defence, protect their sovereignty, and provide security to their territories and people”.¹²⁶⁸ The others further elaborate beyond the necessity to preserve the right to

¹²⁶⁴ UN Program of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspect (2001), UN Doc A/CONF.192/15.

¹²⁶⁵ International Tracing Instrument, UNGA Decision 60/519 of 8 December 2005.

¹²⁶⁶ Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. UN document A/CONF.192/15 of 9-20 July 2009.

¹²⁶⁷ Statement by Manuel Aquera De La Pez, the Head of the Delegation of Cuba, July 3, 2006 at the United Nation Conference to Review Progress Made in the Implementation of the United Nations Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York June 26 - July 7, 2006 www.un.org/events/smallarms2006/pdf/arms060703cuba-eng.pdf. Last Accessed 29 December 2009.

¹²⁶⁸ Statement by Abdulaziz Nasser R Al-shamsi of the United Arab Emirates before the United Nation Conference to Review Progress Made in the Implementation of the United Nations Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York June 26 - July 7, 2006 www.un.org/events/smallarms2006/pdf/arms060703cuba-eng.pdf. Last Accessed 29 December 2009.

self-defence as some States argue that the right to self-defence, responsibility, and obligation to IHL and IHRL must be in balance.¹²⁶⁹

The concern that international treaties might undermine State sovereignty is also actually found in other arms controls/disarmament treaties. The constraints on State sovereignty in the CWC, for example, are said to be stronger constraints than in other typical disarmament treaties.¹²⁷⁰ However, less concern is heard on the prohibition of States to acquire chemical weapons because the world has come to an agreement that the use of such weapons is inhumane because of their indiscriminate nature. In comparison, the world still has not reached full agreement that the wide availability of small arms may have a destructive consequence to human lives and regional security.¹²⁷¹ Often, small arms find their way to those who abuse them because States have not sufficient control on arms transfer and to whom the weapons go.¹²⁷²

2. Consensus-based decisions in the negotiation

The UNGA resolution 64/48 in 2009 led to a greater push in the process towards an arms trade treaty, although there was no illusion that the actual position of several major powers and arms producers remained doubtful. The visible potential problem was identified when resolution 64/48 required the diplomatic conference in 2012 to be held “on the basis of consensus”.¹²⁷³ Clearly, a consensus is difficult to achieve with countries which have diverse opinions on some issues of arms transfer; and the resolution may suggest that State may block the negotiation on the grounds that a consensus has not been achieved.

¹²⁶⁹ Some countries like Canada, Bulgaria, Montenegro, Norway, Republic of Korea and others explicitly state the need to link the right of self-defence with responsibilities and obligation to respect human rights and international humanitarian law. The responses compiled in the Report of the Secretary General, towards an arms trade treaty, A/62/278 (part II) of 17 August 2007.

¹²⁷⁰ Mika Nishimura “Constraints on Sovereignty in the Chemical Weapons Convention from the Perspective of International Law” in Howard M. Hensel (ed) *Sovereignty And the Global Community: The Quest for Order in the International System* (Hants, England: Ashgate Publishing, 2004) at 72.

¹²⁷¹ Damien Rogers *Postinternationalism and Small Arms Control: Theory, Politics, Security* (Ashgate, 2009) at 52.

¹²⁷² Alexandra Boivin “Complicity and beyond: International Law and the Transfer of Small Arms and Light Weapons” (2005) 87(859) IRRC.

¹²⁷³ UNGA resolution 64/48 of 2 December 2009, operative para 5.

Consensus is an established mechanism in the United Nations multilateral agreements, which seeks widespread participation from as many States as possible of diverse sovereign entities.¹²⁷⁴ The choice to have consensus mechanism seems to be on the grounds that consensus-based decision and the ability to modify the treaty would be essential to achieve universality of a treaty.¹²⁷⁵ Consensus is the standard practice to achieve compromise, accommodate various interests, and bring all countries to agreement. However, a consensus is difficult to achieve because each country may calculate its own security, political, and economic interests differently.¹²⁷⁶

Some key text in the Chair's non-paper (2011), such as to "establish the highest possible international standard" in arms transfer with respect for human rights and humanitarian law, could have to resist efforts at watering down and weakening to nominal denominators in order to achieve consensus.¹²⁷⁷ The failure of the conference to restrict small arms in 2001 was, in part, because of the lack of consensus among States and this was identified as one of reasons for the failure of the past small arms process.¹²⁷⁸

Prolonged procedure on the discussion may bring a negotiation to an end and prevent finalization of the discussion. For example, in the discussion of the text suggested by the chair in the review conference on the implementation of the UNPoA in 2006, States piled up amendment upon amendment to the draft under discussion.¹²⁷⁹ This illustrates that active participation of States in a negotiation process does not necessarily reflect the States' support for it. Hence, it is only logical to think that

¹²⁷⁴ Catherine Logan Piper "Reservations to Multilateral Treaties: The Goal of Universality" (1985) 75(1) Iowa L Rev 295 at 301.

¹²⁷⁵ Ibid, at 301.

¹²⁷⁶ Jeffrey D McCausland "Conventional Arms Control" in Jeffrey A Larsen and Gregory J Rattray (Eds) *Arms Control Toward the 21st Century* (Lynne Rienner Publishers, 1996) at 138.

¹²⁷⁷ Chair's non-paper (14 July 2011), Report of the Preparatory Committee for the UN Conference on the Arms Trade Treaty, A/CONF.217/1.

¹²⁷⁸ Paul Holtom and Siemon T Wezeman "Towards an Arms Trade Treaty?" in *SIPRI Yearbook 2007* (Oxford University Press) at 432.

¹²⁷⁹ *Small arms Survey 2009: Shadows of War* (Cambridge University Press, 2009) at 140.

some States may come to a negotiation with the purpose of ruining the process, watering down, or ensuring the negotiation does not succeed.

It takes long debate in the UN consensus mechanism to adopt a treaty. By comparison, the process of adopting a treaty on anti-personnel mines and cluster munitions, which was negotiated outside the CCWC, did not take much time. In the case of the Convention on Cluster Munitions,¹²⁸⁰ the first meeting was held in Oslo in February 2007 and the last meeting in was in Dublin, May 2008 when an agreed text of a treaty was successfully adopted. The process of negotiation took only 18 months. In contrast, in a traditional forum to negotiate arms control, such as the Conference on Disarmament, a successfully negotiated treaty, may take decades to achieve.¹²⁸¹

Consensus for an ATT is difficult to achieve on a series of controversial issues, as reflected in the initial views from States, on scope, criteria and parameters.¹²⁸² Some States fear an ATT may restrict the right to manufacture, export, import, transfer, and retain conventional arms for self-defence and security purposes.¹²⁸³ In contrast, some other States indicate parameters on arms transfers should consider the effect on regional stability, human rights and the international humanitarian laws.¹²⁸⁴ It is always important that a treaty is universally accepted, so as to avoid low ratification from States; however, it must remain effective in the implementation. Too much compromise to reach consensus, arguably, may put the negotiated treaty at risk of losing its primary purpose; that is to effectively control arms trade.

¹²⁸⁰ Convention on Cluster Munitions (2008), MTDSG Chap XXVI (6); CCM/77.

¹²⁸¹ S Neil MacFarlane and Yuen Foong Khong *Human Security and the UN: A Critical History* (Indiana University Press, 2006) at 195.

¹²⁸² Report of the United Nations Secretary-General A/62/278, 17 August 2007.

¹²⁸³ Ibid.

¹²⁸⁴ Report of the Secretary-General, towards an arms trade treaty, A/62/278 (part II) of 17 August 2007

F. Opportunities in Current Multilateral Effort

1. Prospect of having an ATT

As the thesis is being finalising, the diplomatic conference on the Arms Trade Treaty in New York, 2-27 July 2012, has failed to reach agreement to adopt a legally binding treaty controlling trade of conventional arms. For the second time in 11 years, after the failure to adopt a legal instrument on the trade of small arms in 2001, the world has again failed to reach an agreement to have the ATT. However, apparently some countries will continue the search for an ATT and will bring the draft of the ATT to the next General Assembly meeting at the end of the year.¹²⁸⁵ The thesis in this section examines the years of process towards the diplomatic conference which began within the UN framework by the adoption of the UNGA resolution 61/89 of 6 December 2006.

Observing the complexity of issues around small arms, a treaty that includes small arms trade cannot be expected to materialize easily. However, this situation could change if the international community were to come to terms with the idea that the proliferation of small arms has become too destructive and major powers were to show their leadership by taking a supportive role in the process. Past experience has signalled that any negotiation on small arms proves to be very difficult, as evidenced in the meetings of States on the 2001 conference on small arms;¹²⁸⁶ the reluctance of States to add small arms as the eighth category in the UN Register; and the minimum results of the GGE¹²⁸⁷ to agree on feasibility, scope, and parameters of a potential arms trade treaty. On the other hand, in general, the discussion related to small arms in the United Nations mechanism reveals that the majority of States are still eager to find ways to stop the unrestricted proliferation of small arms.

¹²⁸⁵ Conal Urquhart “Arms Trade Treaty Failure Is Disappointing, Says William Hague” *The Guardian* (UK, 28 July 2012) < <http://www.guardian.co.uk/world/2012/jul/28/arms-trade-treaty-william-hague?INTCMP=SRCH>>; Rick Gladstone “UN Misses Its Deadline for Arm Pact” *The New York Times* (United States, 27 July 2012) <http://www.nytimes.com/2012/07/28/world/proponents-of-arms-trade-treaty-urge-final-approval.html?_r=1>.

¹²⁸⁶ 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, A/CONF.192/15.

¹²⁸⁷ Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, A/63/334, 26 August 2008.

The slow development of the UN Register to include small arms provides some insight into the States' views on the transparency issue of conventional weapons. The latest proposed extension of the scope in the UN Register to add a new category to the existing seven categories did not succeed as the discussion on the proposal to include small arms in the latest meeting in 2009 appeared stuck on a debate of the definition of small arms and whether the inclusion was relevant to the UN Register.¹²⁸⁸ This failure, demonstrating the unwillingness of States to openly report their transfers in a more transparent manner, rightly mirrors the complexity in negotiation of conventional arms control.

2. Major Powers' Positions: Observing the Trends

Major powers have significant interests in the trade of conventional weapons, with the total market valued at between US\$40 billion to US\$60 billion a year.¹²⁸⁹ All States with permanent member status in the Security Council, namely China, France, Russia, the UK, and the US, are also main exporters of small arms and conventional arms, and were among the top 10 largest arms exporters in 2011.¹²⁹⁰ Predictably, a future arms trade treaty will have a significant effect on the arms industries of the major powers. Nevertheless, their positions are starkly different from one another with regards to the ATT. The UK is a proponent of an ATT and a main sponsor of the ATT resolutions in the General Assembly, while the US stance is more complicated. Initially it was the main opposition to the first two UNGA resolutions on arms trade

¹²⁸⁸ Report on the Continuing Operation of the United Nations Register of Conventional Arms and Its Further Development, A/64/296 of 14 August 2009.

¹²⁸⁹ Michelle Nichols "United Nations Fails To Agree Landmark Arms-Trade Treaty" *Reuters* (US edition, 27 July 2012) <<http://www.reuters.com/article/2012/07/28/us-arms-treaty-idUSBRE86Q1MW20120728>>; "A Treaty on Conventional Arms" *The New York Times* (US, 8 July 2012) <<http://www.nytimes.com/2012/07/09/opinion/a-treaty-on-conventional-arms.html>>.

¹²⁹⁰ SIPRI (Stockholm International Peace Research Institute). Data based on SIPRI Trend Indicator Values in 2011 <<http://armstrade.sipri.org/armstrade/page/toplist.php>>. Last accessed on 30 July 2012. The top 10 conventional supplier in SIPRI list are USA, Russia, France, China, Germany, UK, Italy, Spain, Sweden, and Netherland.

treaty,¹²⁹¹ then reversed this position to *in favour* in the 2009 resolution,¹²⁹² but later was one of States that blocked the negotiation in July 2012 conference.

The US shift of position in 2009 gave momentum to the process toward the 2012 diplomatic conference. With the US support, the Resolution 64/89 was able to decide a roadmap to hold a diplomatic conference by 2012, adopted without any *against* votes from P5. Negotiating a potential arms trade treaty within the United Nations based on consensus needs support from major powers to be successful. Hence, it would be significant to inspect how States, particularly the major powers, actually responded to an arms trade treaty by examining the views in response to the Secretary-General request on feasibility, scope, and parameters,¹²⁹³ and the voting behaviour on the General Assembly resolutions.

a. China

China, the fourth largest arms supplier,¹²⁹⁴ consistently opted to abstain in all the three General-Assembly resolutions on arms trade treaty.¹²⁹⁵ China has rarely explained its position other than by its vote to *abstain* in the all resolutions on ATT which indicates its cautious response. Taking into account its emerging status as a main conventional arms exporter, it is realistic to expect China would be reluctant to see a legally binding instrument. Nevertheless, China acknowledges that illicit trafficking of arms, in particular small arms, contributes to regional instability and humanitarian crises.¹²⁹⁶ Hence, China, in its official statement, if it was not merely diplomatic lip service, would not stand in the way as it “supports the international community in taking necessary measures to regulate international arms trade”.¹²⁹⁷

¹²⁹¹ UNGA resolution 61/89; and 63/240.

¹²⁹² UNGA resolution 64/48.

¹²⁹³ Secretary-General Report on the Member States’ views on anATT (2007), A/62/278 (part I), A/62/278 (part II); Compilation of Views on the Elements of An Arms Trade Treaty, 10 May 2012, A/CONF.217/2.

¹²⁹⁴ SIPRI (Stockholm International Peace Research Institute). Data based on SIPRI Trend Indicator Values in 2011 <<http://armstrade.sipri.org/armstrade/page/toplist.php>>.

¹²⁹⁵ See UNGA resolutions 61/89, 63/240, 64/48.

¹²⁹⁶ General Assembly Document A/62/678 (Part I) Of 17 August 2007, Towards an Arms Trade Treaty, Report of the Secretary-General.

¹²⁹⁷ General Assembly Document A/62/678 (Part I) of 17 August 2007, Towards an Arms Trade Treaty, Report of the Secretary-General.

In the 2012 Conference, China outlined its position that, inter alia, the primary objective of the ATT should be “to prevent and combat illicit arms trade”¹²⁹⁸. The wording focusing on the word *illicit*, is ambiguous as it can be interpreted that any transfer authorised by State is then legitimate. China mentioned nothing of establishing “the highest possible common international standards” for arms trade as the contained in the 2011 Chair’s non-paper.¹²⁹⁹

China stated that an ATT “should address legitimate interest of States and the humanitarian concerns in a balanced manner”.¹³⁰⁰ It appears that the wording is in defence of the concern of potential consequence of arms transfer and substantial risk that those arms would be used to commit violations of IHL.¹³⁰¹ China made no reference to IHL or IHRL in the response to the Secretary-General’s request for States’ views on ATT in 2007. Similarly, China did not make any link between the arms trade and IHL and IHRL in its statements during any of the three PrepComs in 2010-2011.¹³⁰² Based on its statements, it can be said that China’s position may not very supportive of the ATT as it has shown in its voting in three UNGA resolutions, so there was no surprise at the last day of the 2012 conference when it joined several other countries saying it needed more time to consider the issues.¹³⁰³

¹²⁹⁸ Ibid

¹²⁹⁸ Statement by Chinese Delegation at the General Debate of UN Conference of the ATT, 2-27 July 2012. Available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 30 July 2012.

¹²⁹⁹ Chair’s non-paper (14 July 2011) in the Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, A/CONF.217/1, 7 March 2012.

¹³⁰⁰ Statement by Chinese Delegation at the General Debate of UN Conference of the ATT, 2-27 July 2012. Available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 30 July 2012.

¹³⁰¹ Chair’s non-paper (14 July 2011) (at V.B) in the Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, A/CONF.217/1, 7 March 2012.

¹³⁰² Statement by Chinese Delegation at the General Debate of UN Conference of the ATT, 2-27 July 2012. Available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 30 July 2012.

¹³⁰³ “UN Global Arms Treaty Talks End without Agreement” *BBC News* (UK, 28 July 2012) <<http://www.bbc.co.uk/news/world-us-canada-19025542>>.

b. France

France voted *in favour* in all UNGA resolutions on an arms trade treaty despite being ranked as the third largest supplier of conventional arms in 2011.¹³⁰⁴ France showed its support further by stating that the scope for a potential arms trade treaty should include all seven categories in the Arms Register with the addition of small arms, and stressed the importance of effective implementation and the principles of responsibility in arms transfer.¹³⁰⁵

In its statement at the 2012 UN conference, France praised the work of non-governmental organisations in the process for a creation of an ATT. It continued by stressing its position of the importance of IHL and IHRL in the criteria for assessments of arms transfer that:

[T]hey must take into account the compliance with States' international obligations and with international human rights and humanitarian law – criteria to which we attach particular importance – and preserving international peace and security from the risk of diversion of transferred arms.¹³⁰⁶

c. Russia

Russia, like China, abstained in all the three UNGA resolutions¹³⁰⁷ on the arms trade treaty. Similarly, Russia also argued that the efforts of the world should focus more on combating the illegal nature of arms transfer.¹³⁰⁸ Russia further argued that an

¹³⁰⁴ SIPRI (Stockholm International Peace Research Institute). Data based on SIPRI Trend Indicator Values from 2000 to 2009 <<http://armstrade.sipri.org/armstrade/page/toplist.php>>. Last accessed on 5 July 2010.

¹³⁰⁵ Report of the Secretary-General: Towards an Arms Trade Treaty, UN document A/62/678 (Part II) of 17 August 2007; Compilation of Views on the Elements of An Arms Trade Treaty, 10 May 2012, A/CONF.217/2.

¹³⁰⁶ Statement of France at the UN Conference on the ATT, 2 July 2012 <http://www.un.org/disarmament/ATT/statements/docs/20120705/Member%20States/20120705_France_E.pdf>. Last Accessed 30 July 2012.

¹³⁰⁷ UNG resolutions 61/89, 63/240, and 64/48.

¹³⁰⁸ Report of the Secretary-General: Towards an Arms Trade Treaty, A/62/678 (Part II) of 17 August 2007.

arms trade regulation would clash with the right to self-defence; saying “it is still more difficult to agree on global rules for legal transfers of all types of conventional weapons without jeopardizing legal trade and the right of States to self-defence”.¹³⁰⁹ Its statements in the first PrepCom in July 2010 indicated its opposition, arguing that many aspects had not been clarified, including the feasibility, so that Russia “believe[d] it premature to speak now of a legally binding ATT.”¹³¹⁰

Focusing only on “countering arms diversion to illicit circulation”¹³¹¹ as Russia suggested, ignores the fact that even legal transfer may also have a disastrous impact when the arms are used in violations of IHL and/or IHRL. Russia reiterated its position in the 2012 conference, focusing on preventing illegal trade, stating:

We have been outspoken in favour of consolidating the efforts of international community aimed at blocking the channel down which arms “drain away” from legal trade to “black market”...Therefore, we see our main goal in preventing the diversion of arms to illegal traffic.¹³¹²

As in the PrepCom meetings, in 2012 Russia made no reference to either IHL or IHRL as considerations in arms transfer. The Russian point of view and focus clearly explains why it opted to vote *abstain* in all three previous UNGA resolutions on ATT. Russia, undoubtedly, is one of major powers that has the influence to shape the end result of the diplomatic conference to adopt the ATT. However, the Russian inflexibility with its position, together with several other countries, was blamed for the inability of the 2012 diplomatic conference to reach an agreement.¹³¹³

¹³⁰⁹ Ibid.

¹³¹⁰ Statement by the Russian delegation, 12 July 2010, in the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010. Available at www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/2010-07-12/12072010-RussianFederation-E.PDF>. Last accessed on 19 November 2010.

¹³¹¹ Statement by the Russian delegation, 12 July 2010, in the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010. Available at www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/2010-07-12/12072010-RussianFederation-E.PDF>. Last accessed on 30 July 2012.

¹³¹² Statement by the Delegation of the Russian Federation at the 2012 United Nations Conference on the Arms Trade Treaty, New York, 2-27 July 2012. Available at <http://www.un.org/disarmament/ATT/statements/>>. Last accessed 30 July 2012.

¹³¹³ Michelle Nichols “United Nations Fails to Agree Landmark Arms-Trade Treaty” *Reuters* (US edition, 27 July 2012) < <http://www.reuters.com/article/2012/07/28/us-arms-treaty-idUSBRE86Q1MW20120728>>; “UN Global Arms Treaty Talks End without Agreement” *BBC News* (UK, 28 July 2012) < <http://www.bbc.co.uk/news/world-us-canada-19025542>>.

d. United Kingdom

The UK has been taking a leading role in discussing the possibility for the international community to start negotiation on an arms trade treaty. The UK, with support from Argentina, Australia, Costa Rica, Finland, Japan and Kenya, co-sponsored the General Assembly resolution 61/89.¹³¹⁴ The UK also actively approached other countries and presented its ideas with regards to the feasibility, scope, and parameters of an arms trade treaty for other countries to consider.

Among the States, the UK consistently argues that an ATT should uphold the principles of international law, including international human rights law and international humanitarian law.¹³¹⁵ This view is supported and shared by many States as well as civil society and every opportunity is used to press its importance for the future ATT. In the PrepCom meetings 2010-2011, the UK repeated its view of the need for States to uphold the principles of international law, particularly IHL and IHRL in conventional arms trade,¹³¹⁶ the position is parallel to the EU.¹³¹⁷

In the 2012 conference, the UK stated that the negotiation was “being undertaken within the framework of the United Nations...[and] guided by the principles of the UN Charter”.¹³¹⁸ Although the statement reflects the properness of the negotiation within the UN, it may imply that such negotiation can be held outside the UN framework. The UK reiterated its position on the links between arms trade and human

¹³¹⁴ Report of the Secretary-General: Towards an Arms Trade Treaty, UN document A/62/678 (Part II) of 17 August 2007.

¹³¹⁵ Statement by Ambassador John Duncan, UK Ambassador for Multilateral Arms Control Disarmament, 14 July 2010, before the first Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹³¹⁶ Statement by Ambassador John Duncan, 14 July 2010, in the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹³¹⁷ EU statement, 15 July 2010, in the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010

<<http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/2010-07-15/15072010-Belgium-EU-E.PDF>>. Last accessed on 19 November 2010; Council of the European Union 2009 Annual Report from the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament on the Main Aspects and Basic Choices of the CFSP (European Union, 2010) at 10.

¹³¹⁸ Statement of the United Kingdom, delivered by Ambassador Joanne Adamson, to the UN Conference on the Arms Trade Treaty, New York, 3 July 2012. Available at <http://www.un.org/disarmament/ATT/statements/docs/20120705/Member%20States/20120705_UK_E.pdf>. Last accessed 30 July 2012.

rights in that an ATT “will directly help to maintain international peace and security, whilst encouraging respect for human rights and fundamental freedom.”¹³¹⁹

The UK delegate in the 2012 conference, which was known to be a strong supporter of an ATT, was criticised for not joining 74 States appealing the conference to adopt a robust arms trade treaty. The appeal was launched in the fourth week when the conference seemed to be in a deadlock. The UK position of not joining the appeal, perhaps because it tried to get consensus, has been criticised, however, as building consensus cannot be a justification to abandon the principle to have a strong arms trade treaty.¹³²⁰

e. United States and its shift of position

Foreign policy is determined by internal dynamics, as is a State’s foreign policy on arms control. Foreign policy is the extension of internal political development of a nation, which is precisely what happened with the US position on the negotiation towards an arms control treaty following the change of administration from Republican to Democrat in 2008. The Obama administration shifted and provided a more constructive engagement in its policy towards arms control/disarmament, applying more engaging policies on arms control of both the WMD and conventional weapons. The particular change of the US policy on an ATT was explained by the Secretary of State Hilary Clinton that “the US was prepared to begin negotiations on a global treaty regulating trade in conventional weapons, but would only sign the accord if all other States agreed.”¹³²¹

¹³¹⁹ Statement of the United Kingdom, delivered by Ambassador Joanne Adamson, to the UN Conference on the Arms Trade Treaty, New York, 3 July 2012. Available at <http://www.un.org/disarmament/ATT/statements/docs/20120705/Member%20States/20120705_UK_E.pdf>. Last accessed 30 July 2012.

¹³²⁰ Nicholas Watt “David Miliband to Urge UK to ‘Get Off Backside’ over Arms Treaty” *The Guardian* (UK, 25 July 2012) < <http://www.guardian.co.uk/world/2012/jul/25/david-miliband-global-arms-trade-treaty?intcmp=239>>. Last accessed 31 July 2012.

¹³²¹ *Guardian Weekly*, 23 October 2009; see discussion on the position of the United States in Rachel Stohl “Putting the Arms Trade Treaty into Context: Perspectives on the Global Arms Trade, Existing Arms Trade Initiatives, and the Role of the United States” (2009) 103 *Am Soc’y Int’l L Proc* 331.

The new policy is a contrast to the Bush administration which opposed any regulation on conventional arms trade in the UN framework. The Obama administration, reportedly, would use the negotiation on arms trade treaty to press other governments to adopt a “rigorous system of export controls similar to one put in place to regulate US arms exports.”¹³²² While this was welcome news for many, the US hinted that the process to achieve an agreement was not going to be uncomplicated. In the official statement released on 14 October 2009, the US stressed that the importance of a treaty agreed by United Nations should be consensus based to “ensure the widest possible support for the Treaty and to avoid loopholes in the Treaty that can be exploited by those wishing to export arms irresponsibly”.¹³²³

The change of the US policy on the ATT in 2008 had wide implications as it brought more optimism that a treaty would be concluded. The support from the US for an arms trade treaty paves the way to start a realistic process of negotiation in the United Nations. Immediately, the tone of the General Assembly resolution 64/48 of 2 December 2009 changed and was more decisive in setting up a road map for an ATT. The significant decision in the resolution was that the countries decided “to convene a United Nations Conference on the Arms Trade Treaty to meet for four consecutive weeks in 2012 to elaborate on a legally binding instrument on the highest possible common international standards for the transfer of conventional arms”.¹³²⁴ The US position that an arms trade treaty is to be discussed on consensus basis is reflected in the resolution 64/48 wording that “the United Nations [decision] on the Arms Trade Treaty will be undertaken in an open and transparent manner, on the basis of consensus, to achieve a strong and robust treaty”.¹³²⁵

¹³²² Ibid.

¹³²³ Hillary Rodham Clinton, Secretary of State, US Support for the Arms Trade Treaty (14 October 2009) US Department of State <www.state.gov/secretary/rm/2009a/10/130573.htm>. Last accessed 23 July 2010.

¹³²⁴ UNGA res 64/48 of 2 December 2009, operative para 4.

¹³²⁵ Ibid, operative para 5.

F. Failure of the 2012 UN Conference on the ATT

Long anticipated, the UN Conference on the Arms Trade Treaty was held in New York, 2-27 July 2012. One more time, 11 years after the 2001 UN conference on small arms, the world was presented with an opportunity to adopt an international legally binding instrument to regulate small arms trade. One more time, the world had to see another failure. The conference was held against the backdrop of bloodshed in Syria, which further stressed the importance of setting an international standard of the arms trade. However, the 2012 conference ended with no agreement achieved, no consensus, which meant no the ATT.

The draft of the ATT,¹³²⁶ submitted by the President of the Conference on 26 July 2012, apparently has accommodated many concerns, is as flexible as possible, while keeping the focus on having an effective treaty on conventional arms trade. This section probes the draft of the ATT submitted by the President of the Conference in view of how the text deals with, incorporates and reconciles controversial issues and identifies why the conference failed.

1. Key issues and the draft of the ATT
 - a. Criteria of IHL and IHRL

The fear that IHL and IHRL would not appear beyond preamble paragraphs is unproven. The criteria of IHL and IHRL in conventional arms transfer stand in the draft. Article 4, paragraph 2, under the title of national assessment, states:

...

Prior to authorisation and pursuant to its national control system, the State Party shall assess whether the proposed export of conventional arms could:

- a. be used to commit or facilitate a serious violation of international humanitarian law;
- b. be used to commit or facilitate a serious violation of international human rights law;

¹³²⁶ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1.

c. be used to commit or facilitate an act constituting an offense under international conventions and protocols relating to terrorism to which the transferring State is a Party.¹³²⁷

The inclusion of international humanitarian law and international human rights law in a future treaty stays as key criteria in conventional arms transfer, although it has its critics in the negotiation.¹³²⁸ The evolution of the wording and change of criteria can be traced since the GGE report on ATT (2008), the Chair's non-paper (2011), as there are some changes, including the deletion of reference to international criminal law previously found in the Chair's non-paper (2011). The linkage between arms transfer and IHL and IHRL is widely supported and has been championed by some States, during preparatory meetings and at the UN Conference on the ATT in 2012.¹³²⁹

b. Goals and objectives

Several countries since the start of the negotiation prefer a treaty with a focus to prevent illicit trade¹³³⁰ to one on responsible transfer with IHL and IHRL criteria. The draft of the ATT accommodates both:

The goals and objectives of the Treaty are:

- a. For States Parties to establish the highest possible common standards for regulating or improving the regulation of the international trade in conventional arms; and
- b. To prevent, combat and eradicate the illicit trade in conventional arms and their diversion to the illicit market or for unauthorised end use;...¹³³¹

¹³²⁷ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 4.

¹³²⁸ Criteria to include IHL and IHRL, perhaps, are what some other States regarded as “controversial, selective, subjective” or “discriminatory,” see statements of China (undated); Cuba (delivered by Ambassador Rodolfo Benitez, 5 July 2012); Pakistan (delivered by Ambassador Raza Bashir Tarar, 9 July 2012); Venezuela (delivered by Ambassador Jorge Valero, 5 July 2012); Iran (delivered by Ambassador Mohammad Kazaei, 10 July 2012); Egypt (Ambassador Motaz Ahmadein Khalil, 5 July 2012). Statements are available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 31 July 2012.

¹³²⁹ See for example, the statement of Canada, New Zealand, Norway and the East African Community at the UN Conference on the Arms Trade Treaty, New York, 2-27 July 2012. Available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 21 July 2012.

¹³³⁰ For example, statement by the Delegation of the Russian Federation at the 2012 United Nations Conference on the Arms Trade Treaty, New York, 2-27 July 2012. Available at <<http://www.un.org/disarmament/ATT/statements/>>. Last accessed 30 July 2012.

¹³³¹ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 1(1)(2).

The focus on only illicit trade would not stop the practice of current irresponsible transfer which implies that an authorised transfer by a State will be legal, regardless of whether the weapons might be used later in violations of international law. Explicit goals of the treaty may help in understanding the purpose of the treaty but the effective implementation depends on the criteria and the implementation provisions.

c. National assessment

On who decide a transfer of arms, the draft to the Arm Trade Treaty suggests that task falls to national authority. Article 4(1) explains:

In considering whether to authorise an export of conventional arms within the scope of this Treaty, each State party shall assess whether the proposed export would contribute to or undermine peace and security.¹³³²

As to how the assessment is conducted, the draft ATT states 4(3):

In making the assessment, the exporting State Party shall apply the criteria set out in paragraph 2 of this article consistently, and in objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State.¹³³³

Further details of assessment are explained in article 4 (3)(4)(5) and (6), which include, inter alia, consideration of the establishment of risk mitigating measures, and joint action with other States involved in the transfer to avoid the arms from being diverted.¹³³⁴

¹³³² Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 4(1).

¹³³³ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 4(3).

¹³³⁴ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 4(4)(5)(5).

d. Ammunition

Ammunition is a controversial issue in the ATT and the US is known to be strongly against its inclusion in the treaty. Ammunition has been included in the discussion of the GGE in the 2008 report, and in the first PrepCom meeting in July 2010, some States voiced their position in support of the inclusion of ammunition in an ATT.¹³³⁵ The Chair's non paper of July 2011 retained the inclusion of ammunition in the scope of the ATT although resistance to it was heard.

The text of the draft ATT, as submitted by the President on 26 July 2012, does not mention ammunition as being included. It was apparently a compromise that had to be made in order to have the US agreement on the ATT.¹³³⁶ The Draft states that the treaty at minimum apply to battle tanks, armoured combat vehicles, large-calibre artillery system, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.¹³³⁷

e. Private Ownership

Several countries bring the issues of private ownership and seek the confirmation the Treaty respects the right of the private citizen to own small arms for personal and recreation uses.¹³³⁸ The US anti-gun control groups, particularly the National Rifle Association,¹³³⁹ portray an ATT will take away the American individual's right to bear arms. While this is not actually the intention of the ATT which deals with international arms transfer, the draft of the ATT accommodates the concern. The preamble paragraph 13 states:

¹³³⁵ ICRC also pushes the inclusion of the ammunition. ICRC statement, 14 July 2010, before the first Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, New York, 12-23 July 2010.

¹³³⁶ In a President discussion paper, dated 3 July 2012, circulated among the delegates, a reference to "ammunition/military ammunition" was still included in the scope.

¹³³⁷ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 2(1).

¹³³⁸ For example, statement by Canada < <http://www.un.org/disarmament/ATT/statements/>>. Last accessed 31 July 2012.

¹³³⁹ Statement by National Rifle Association (delivered by Wayne Lapierre, undated) before the UN Conference on the ATT, 2-27 July 2012; see National Rifle Association <<http://home.nra.org/#nraorg>>. Last accessed 31 July 2012.

Taking note of the legitimate trade and use of certain conventional arms, inter alia, for recreational, cultural, historical and sporting activities and lawful ownership and use are permitted and protected by law.¹³⁴⁰

f. Transfer to Non-State Actors

The draft of the Arms Trade Treaty does not make any reference to the transfer to non-State actors. It is, perhaps, the best choice, as with the different political interests, States would have found the issue divisive. The previous draft, the 2011 Chair's non-paper, did not mention transfer to non-State actors.

g. Reporting and Implementation

The States parties are required to maintain a national record of the export authorisations or actual export of conventional arms under the scope of the Treaty.¹³⁴¹ Compliance in the trade of conventional arms, as the draft ATT suggests, is ensured through reporting mechanism:

Each State party, shall within the first year after entry into force of this Treaty for that State party, provide an initial report to the secretariat of relevant activities under taken in order to implement this Treaty, including national laws, regulations and administrative measures. States parties shall report on any new activities undertaken in order to implement this Treaty, when appropriate. Reports shall be made available and distributed to States parties by the secretariat.¹³⁴²

Thus, the draft ATT was based on a non-intrusive mechanism in ensuring the implementation of the ATT. It is a most logical mechanism, considering the mobility and portability of conventional arms.

¹³⁴⁰ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, preamble para 13.

¹³⁴¹ Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 10(1).

¹³⁴² Draft of the Arms Trade Treaty, 26 July 2012, UN Doc A/CONF.217/CRP.1, art 10(4).

The draft ATT, in the most part, has been successful in accommodating and reconciling the controversial issues. It is a compromise text. While it is positive to some, it may not be very convincing to others; a reality in a consensus-based negotiation.

2. Tactics of those who do not want a treaty

States come to the negotiation table on arms control to serve or protect their own interests, including their security interests.¹³⁴³ A State active in a negotiation is not necessarily enthusiastic regarding the text.¹³⁴⁴ It may have found that the text is not something it favours or perhaps its proposals on the draft are not well accommodated. A State, a powerful State in particular, may heavily influence the result and hijack the process of negotiation by submitting unacceptable amendments to the draft text. States may also come to a negotiation to block a negotiation using various tactics. In a consensus-based negotiation, States have more room to ruin the process. The delaying tactic has been applied in the 2012 UN Conference on the ATT with interruption, bickering, and time wasting by those who do not want a treaty.¹³⁴⁵ The opening of the conference itself was delayed for more than 24 hours on dispute of the observer status of Palestine; Egypt, known to oppose the treaty, was blamed for creating the impasse, with the US and Israel threatening to walk out from the conference if Palestine attended as a full participant.¹³⁴⁶ The issue was solved with Palestine sitting with the status of an observer.

¹³⁴³ Jeffrey D McCausland “Conventional Arms Control” in Jeffrey A Larsen and Gregory J Rattray (eds) *Arms Control Toward the 21st Century* (Lynne Rienner Publishers, 1996) at 139.

¹³⁴⁴ Anthony Aust *Modern Treaty Law and Practice* (2nd edition, Cambridge University Press, 2007) at 104.

¹³⁴⁵ Nick Hopkins “Draft Arms Treaty Condemned” *The Guardian* (UK, 25 July 2012) <<http://www.guardian.co.uk/world/2012/jul/25/arms-trade-treaty-oxfam?INTCMP=SRCH>>.

¹³⁴⁶ Harvey Morris “Gun, Bullets, Human Rights on Agenda at Arms Treaty Talks” *The New York Times* (United States, 3 July 2012) <<http://rendezvous.blogs.nytimes.com/2012/07/03/guns-bullets-human-rights-on-agenda-at-arms-treaty-talks/>>; Nick Hopkins “Draft Arms Treaty Condemned” *The Guardian* (UK, 25 July 2012) <<http://www.guardian.co.uk/world/2012/jul/25/arms-trade-treaty-oxfam?INTCMP=SRCH>>; Louis Charbonneau “UN Chief Pleads for Arms Pact, Palestinians Demand Seat” *Reuters* (UK edition, 3 July 2012).

The other tactic of filing new proposals to the draft, as actually applied by some countries in previous meetings on small arms,¹³⁴⁷ could not be applied as the President did not issue a draft text treaty until the very last days (the draft was issued on 26 July 2012, a day before the closing date). During weeks of negotiation, he put the discussion under two parallel main committees: first committee dealing with goals and purposes, and the other dealing with scope, implementation and final provisions. Hence, there would be no opportunity to submit new proposals, in a wasting time tactic, to the actual draft.

3. No consensus, no treaty

From their records in the discussion of small arms in the PrepCom meetings and UNGA resolutions,¹³⁴⁸ three of the P5, namely the UK, France, and the US, were supportive of the ATT. Russia and China had not previously taken strong opposition stances to the ATT, although, Russia had made its reluctance more apparent than had China. The US, however, again changed its position during the very last day of the conference, and triggered the inconclusiveness of the conference.¹³⁴⁹

Based on the text in the draft Arms Trade Treaty, the US position was relatively well accommodated. Particularly, the issue of ammunition was omitted and the draft ATT had explicitly included respect for the trade and use of weapons for personal and recreation purposes. From this perspective, and also the positive participation of the US before the last day of the negotiation, it was difficult to see how the US rejection in the end had come from substantive objection to the draft text. It strengthens the view which argues that the US position on the ATT has less to do with the substance

¹³⁴⁷ *Small arms Survey 2009: Shadows of War* (Cambridge University Press, 2009) at 140.

¹³⁴⁸ Particularly the UNGA resolution 64/48 (2009).

¹³⁴⁹ “UN Global Arms Treaty Talks End without Agreement” *BBC News* (UK, 28 July 2012) <<http://www.bbc.co.uk/news/world-us-canada-19025542>>; Rick Gladstone “UN Misses Its Deadline for Arms Pact” *The New York Times* (US, 27 July 2012) <http://www.nytimes.com/2012/07/28/world/proponents-of-arms-trade-treaty-urge-final-approval.html?_r=1>.

and more to do with politics of the ATT in the domestic politics.¹³⁵⁰ The US refusal to adopt the ATT was, apparently, influenced by domestic pressure as 51 senators expressed their opposition to the ATT in a letter to the US State Secretary.¹³⁵¹ Fifty one opposing senators mean that even if the Treaty was adopted, its ratification would not get enough votes in senate. That the US is about to have a general election does not help the situation.

The current weak international mechanism to control (small) arms trade is primarily due to lack of political will, the influence of economic interests, and perceived geo-strategic concerns.¹³⁵² This may change if influential major powers, the US in particular, provide leadership and political will to push an adoption of an ATT. However, the world did not see that leadership in the 2012 UN Conference to the ATT.

G. Small Arms Control: What is Next?

The hope to have a control on the trade small arms has gone, or been delayed, with the failure of the United Nation Conference on the Arms Trade Treaty, New York, 2-27 July 2012. After four weeks of deliberations, President of the Conference Ambassador Moritan issued a draft ATT¹³⁵³ ready to adopt, the United States, however, on the very last day of the negotiation, delivered a final blow to the hopefuls by refusing consensus, stating that it needed more time to consider the issue; then Russia and China also said the same thing.¹³⁵⁴ The diplomatic conference has failed.

¹³⁵⁰ Rachel Stohl "Putting the Arms Trade Treaty into Context: Perspectives on the Global Arms Trade, Existing Arms Trade Initiatives, and the Role of the United States" (2009) 103 *Am Soc'y Int'l L Proc* 331 at 336.

¹³⁵¹ "UN Global Arms Treaty Talks End without Agreement" *BBC News* (UK, 28 July 2012) <<http://www.bbc.co.uk/news/world-us-canada-19025542>>;

¹³⁵² Theresa A DiPerna "Small Arms and Light Weapons: Complicity 'with A View' Toward Extended State Responsibility" (2008) 20 *Fla J Int'l L* 25 at 27.

¹³⁵³ The Draft of the Arms Trade Treaty, 26 July 2012, A/CONF.217/CRP.1; See chapter VII.

¹³⁵⁴ Michelle Nichols "United Nations Fails to Agree Landmark Arms-Trade Treaty" *Reuters* (US edition, 28 July 2012) <<http://www.reuters.com/article/2012/07/28/us-arms-treaty-idUSBRE86Q1MW20120728>>.

This is the second failure as the 2001 conference did not result in a legal instrument. So what now? Some States think it is not over yet. The President of the conference has produced a draft of the ATT incorporating points discussed by States. Now some States are considering the possibility of bringing the draft and adopting it by the mechanism of the General Assembly at the end of the year 2012.¹³⁵⁵ Theoretically, the General Assembly will provide a better chance for States to adopt the treaty, with voting if necessary. Article 18 of the Charter of the United Nations explains the voting procedure:

Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendation with respect to the maintenance of international peace and security....¹³⁵⁶

With the General Assembly seeming to be the next ground for debate, the problem of sidelining US, Russia, or China, all major conventional arms suppliers, looks rather difficult. The US alone controls 40 per cent of global conventional arms transfer.¹³⁵⁷

The proponents of the Arms Trade Treaty, might think of taking the negotiation out of the United Nations framework, as a fall-back position if the General Assembly does not succeed to adopt a treaty. The civil society activists who could not take slow progress and the unwillingness of the major arms producers to have a robust treaty in the conference, evidently taking example from the Mine Ban Treaty which is considered a success even without the major anti-personnel mines producers,¹³⁵⁸ have started talking about an alternative venue to negotiate the ATT.¹³⁵⁹

¹³⁵⁵ Conal Urquhart “Arms Trade Treaty Failure is disappointing, Says William Hague” *The Guardian* (UK, 27 July 2012) <<http://www.guardian.co.uk/world/2012/jul/28/arms-trade-treaty-william-hague>>; Michelle Nichols “United Nations Fails to Agree Landmark Arms Trade Treaty” *Reuters* (US edition, 27 July 2012) <<http://www.reuters.com/article/2012/07/28/us-arms-treaty-idUSBRE86Q1MW20120728>>.

¹³⁵⁶ Charter of the United Nations (1945), art 18.

¹³⁵⁷ Michelle Nichols “United Nations Fails to Agree Landmark Arms-Trade Treaty” *Reuters* (US edition, 28 July 2012) <<http://www.reuters.com/article/2012/07/28/us-arms-treaty-idUSBRE86Q1MW20120728>>.

¹³⁵⁸ See chapter III.

¹³⁵⁹ See for example, the Geneva Academy of International Humanitarian Law and Human Rights “Arms Trade Treaty Legal Blog” <<http://armstradetreaty.blogspot.com/>>. Last Accessed 30 July 2012.

I. Summary

The existing conventional arms treaties, such as the CCWC, the Mine Ban Convention, and the Convention on Cluster Munitions, provide lessons on the process negotiation, mechanism, verification, transparency, and implementation of a treaty. The processes in adopting and implementing the existing conventional treaties offer models to work from for any future conventional arms treaty, some of which have apparently already been incorporated in the elements of the draft ATT. In terms of procedures on arms control, there is also the noticeable role of civil society groups which have gained recognition from States. The presence and involvement of civil society in the arms control process, discussion, and negotiation arguably have an influence, to some extent, on States' views.

As the process towards adoption of the Mine Ban Treaty (1997) and the Convention on Cluster Munitions (2008) shows, the negotiation of arms control may depart from its traditional forum and move to a forum outside the United Nations framework. While the negotiation on the conventional arms trade is still within the United Nations framework, the repeated failure to achieve a legally binding instrument may push the process to outside the United Nations.

The influence of humanitarian and human rights law in arms control is apparent, as is also reflected in current negotiation on an arms trade treaty. During 2010-2011, in preparatory committee meetings toward a diplomatic conference in 2012, some challenges and opportunities had been identified; States were known to have different opinions on a number of issues, things that they had to reconcile in consensus. The 2012 UN Conference to adopt the ATT, however, failed to materialise a treaty, so another rare opportunity to regulate the trade of small arms has gone. In substance, the draft of the Arms Trade Treaty has managed to incorporate the criteria of IHL and IHRL in conventional arms trade. If the text concerning the IHL and IHRL in the draft stands as it is when adopted, it will be the first clear evidence of the influence of IHL and IHRL on contemporary arms control. That might be the decision in another round negotiation in the next UN General Assembly.

One of the concerns of some States is balancing the right of self-defence and the necessity to protect humanity and respect for IHL/IHRL. States may acquire weapons, so as to fulfil their rights to self defence, as long as the weapons acquired do not pose used threats to human rights, stability, peace and security and are not used in violation of IHL/IHRL – criteria in the draft of the ATT. The use of weapons, as ICJ stated in its advisory opinion on the legality of nuclear weapons, should be compatible with the principles and rules of international humanitarian law.

Chapter VIII: Conclusion

- A. Contemporary principles of State responsibility demand that States regulate the small arms trade

In normative arguments, the international law should be able to control and restrict the proliferation of small arms. Arms selling States may be held legally responsible for transferring weapons to States that may use them to commit violations of IHL and IHRL based on normative arguments found in international documents such as ILC's Articles of Responsibility States on Internationally Wrongful Acts and the Responsibility to Protect. While there is no treaty law to force States to do a due diligence process to assess whether the transfer of small arms could be used to commit or facilitate violations of IHL and IHRL, some countries have been practising it. It can be said that a risk assessment prior to authorisation the small arms transfer is grounded in customary international law as some States and regional organisations have been practising the restriction. The European Union has a Code of Conduct on Arms Exports which requires member States to take into account the respect for IHL and IHRL in the country of final destination. Likewise, some regional conventions or Protocols in Africa have provisions to consider the risk in arms transfer by taking into account the respect for IHL and IHRL.

Uncontrolled proliferation of small arms plays a role in worsening wars or armed conflicts, particularly because of their characteristics: portable, affordable, durable, concealable, and lethal. Small arms have been a contributing factor in facilitating crimes, including crimes against humanity as demonstrated in Rwanda and Bosnia, and violations of international humanitarian law and international human rights law.¹³⁶⁰ These weapons, in the wrong hands, can be tools of oppression. Uncontrolled proliferation of small arms has been a threat to human security, destabilised countries and regions, and obstructed economic development.¹³⁶¹

¹³⁶⁰ See Chapter II.

¹³⁶¹ See Chapter II.

Considering the devastating effects of the uncontrolled small arms to human security as they are used in committing or facilitating violations of humanitarian law and human rights law, efforts to control the trade of small arms have to take into account human rights and humanitarian concerns. Controlling of the trade of small arms, arguably, has to focus on protection of civilians from these weapons. The legal argument to find the basis of restriction of arms transfer is contained in the International Law Commission's Articles of Internationally Wrongful Acts,¹³⁶² particularly articles 16-19, which state the responsibility of a State in connection with the act of another State in the commission of internationally wrongful acts. The ILC's Articles serve as secondary rules or the rules of general application concerning States international responsibility.¹³⁶³

The ILC's Articles indicate that a State has a responsibility to avoid and prevent small arms transfer when the sending State has knowledge that the weapons may be used, or are highly likely to be used in internationally wrongful acts: "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..."¹³⁶⁴ According to the Articles, the conduct of an individual or entity which is not an organ of the State, "but which is empowered by the law of the State to exercise elements of the governmental authority shall be considered an act of the State under international law..."¹³⁶⁵ This becomes the main line of reasoning to argue that States should not conduct any transfer of small

¹³⁶² Responsibility of States for Internationally Wrongful Acts (UNGA res A/56/63 of 12 December 2001); *Yearbook of the International Law Commission 2001: General Commentary of the Responsibility of States for Internationally Wrongful Acts* (United Nations, 2007), part II; see deliberation the Articles in James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002); see also discussion on State responsibility in Chapter IV of this thesis.

¹³⁶³ See Chapter IV; James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 2.

¹³⁶⁴ Responsibility of States for Internationally Wrongful Acts (UNGA res 56/83 of 12 December 2001), art 16; James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002) at 2; Theresa A DiPerna "Small Arms and Light Weapons: Complicity with A View Toward Extended State Responsibility" (2008) 20 Fla J Int'l L 25; Alexandra Boivin "Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons" (2005) 87(859) IRRC 467; see also discussion in chapter IV.

¹³⁶⁵ *Ibid*, art 5; see chapter IV.

arms when there is a high possibility that the weapons transferred will be used for internationally wrongful acts.

The significance of the need to have a robust international arms trade treaty, from perspective of the ILC's Articles, is that the treaty will provide a premier rule. A transfer of small arms which leads to violation of IHL/IHRL could raise State responsibility under the Articles as the sending State either by action or omission, could be held responsible for internationally wrongful acts if there is an agreement in law of treaties as premier rules, showing that there "is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation".¹³⁶⁶

A contentious issue which is linked to that of the control of small arms is the right of States to self-defence, enshrined in article 51 of the Charter of the United Nations. However, an arms trade, for the purpose of exercising the right to self-defence, cannot be an acceptable ground if such transfer is in conflict with international humanitarian law and international human rights law. The principles of laws set out by the International Court of Justice in Advisory Opinion on *the Legality of the Threat or Use of Nuclear Weapons*, conclude that a threat or use of nuclear weapons "should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law....".¹³⁶⁷ These fundamental principles of law should also apply to the transfer or use of weapons such as small arms.

The thesis also examined the Responsibility to Protect (RtoP) (2001)¹³⁶⁸ to show the linkage between State responsibility and small arms transfers. Generally, States are in agreement that the responsibility to control arms lies mainly with States. The

¹³⁶⁶ Responsibility of States for Internationally Wrongful Acts (adopted by General Assembly A/RES/56/83 of 12 December 2001), art 12; see Chapter IV.

¹³⁶⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226, para 105 (2) D; see also discussion on humanitarian law in Chapter III and on self-defence in Chapter VII.

¹³⁶⁸ Responsibility of States for Internationally Wrongful Acts (UNGA res 56/83 of 12 December 2001); *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research centre, 2001); see discussion in Chapter IV.

Responsibility to Protect suggests prevention as the core element to prevent atrocities from happening, in line with the purpose of an arms trade treaty to have a control on arms transfer system “of the highest possible [common] standard”¹³⁶⁹ with the view to prevent arms transfer be used in violations of IHL and IHRL.¹³⁷⁰

Prevention is the main focus of the RtoP as one of the core principles, stating: “Prevention is the single most important dimension of the responsibility to protect”.¹³⁷¹ The RtoP can be a basis for the link of State responsibility with focus on human security in the arms trade. The significance of the concept with regards to small arms is that the effort to regulate and control the arms trade is actually a demonstration of a prevention act. Controlling small arms trade means to prevent the weapons from being misused, as putting the RtoP in the context of small arms, it should be seen as part of the State responsibility to prevent small arms being used in violations of IHL and IHRL. Taking the prevention measure first goes together with the effort to have a legally binding instrument to control small arms instead of relying on the reactive response of an arms embargo after the excessive availability of weapons facilitates a mass atrocity. The RtoP does not exclude the use of force, therefore, unsurprisingly, the focus of debate of the RtoP centres on the intervention to protect as pretext of the use force, and not the prevention which the RtoP actually stresses.¹³⁷²

There is a main difference between an arms embargo and the implementation of the RtoP, with the principle of prevention is taken into main consideration. An arms embargo is a measure taken after a conflict has erupted or is about to erupt, imposed on specific targets and time. On the other hand, the prevention, as the State responsibility suggests, is to control weapons flowing to States prone to conflicts. In line with this, based on the prevention principle, the RtoP supports the need to have an international legally binding treaty to prevent small arms from being used to

¹³⁶⁹ UN General Assembly resolution 64/48 of 2 December 2009, operative para 1; the draft of the ATT, UN Doc A/CONF.217/CPR.1 (26 December 2012), art 1; see Chapter VII.

¹³⁷⁰ Draft of the ATT, UN Doc A/CONF.217/CPR.1 of 26 December 2012, art 4(2).

¹³⁷¹ Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington DC, Brookings Institution Press, 2008) at 41; see discussion in Chapter IV.

¹³⁷² *Ibid.*, at 71-104; see Chapter IV.

commit violations of international law, including genocide, war crimes, ethnic cleansing and crimes against humanity.

B. Ineffectiveness of current mechanism to control small arms

Despite the recognized negative impacts of the wide availability of small arms, the world does not have an effective mechanism to control the trade in small arms. The absence of an international regulation on small arms transfer leaves the UN arms embargo as the only global legal instrument on the small arms transfer. However, arms embargo has often proven ineffective in preventing the flow of weapons into armed conflict zones.

An arms embargo is imposed after the Security Council comes to agreement that the targeted State or entity is a threat to international security. The action is thus a reaction in response to a situation that has already occurred or is imminent, rather than a preventive measure. An arms embargo is decided based on political considerations and Security Council member States' interests, so that a non-discriminatory resolution is hard to achieve. Furthermore, an arms embargo, in many cases, has been imposed based on the perceived threat to international security, an action that is considered as being too little and too late.

Security Council resolutions on arms embargoes carry legal responsibility; however, States would not be able to comply with the resolutions if they did not have the national means to enforce them. Violations of arms embargoes occur, in part, because States do not have the capacity to fully comply with the resolutions and not because they intend to defy them. An international legal arms transfer regime such as the ATT, which States can adhere to and incorporate into their national legislation to begin with, may help.

Other existing international mechanisms on small arms are not legally binding instruments and work only on a voluntary basis. The non-legal instruments, the UN

Arms Register, the UNPoA and the International Tracing Instrument, are difficult to enforce, as States are under no obligation to implement them. The 2001 UNPoA, perhaps, is the most comprehensive guideline for States in combating the illicit trade in small arms. It consists of recommended measures for States to implement on aspects of small arms trade such as production, export, import, and transit; and procedure at national, regional, and global levels. As they complement one another, the UNPoA and the International Tracing Instrument adopted by the UN General Assembly in 2005 could be very useful instruments to help in regulating the small arms trade. However, their status of non-legally binding instruments limits their effective implementation. A legally binding ATT would complement and strengthen these instruments, although, the need for caution in this area was obvious as from the start some criteria have been seen, by some States, as discriminatory and subjective criteria which affect the implementation.

The reluctance of States to include small arms as an official category under the UN Register¹³⁷³ reflects the different interests and difficulties when it comes to the issue of transparency of the trade of these weapons. The proposed inclusion of small arms as an official category to the existing seven types of weapon under the UN Register has not materialized. The similar difficulties of the reluctance of States to have an international legal treaty brought failure to the UN conference on the Arms Trade Treaty, July 2012. This was not particularly surprising as the economic and political interests, as well as the strong lobby of anti-gun control, have prevented major States from showing their leadership in the past.

C. IHL and IHRL Influence and the Implications on Future Treaty Negotiation

Recent development in arms control negotiations shows the influence of human rights, which was previously a distant concept in arms control. The series of meetings to negotiate an arms trade treaty on conventional arms, from 2006 to the 2012 UN Conference, demonstrate the growing influence of international humanitarian law and

¹³⁷³ See Chapter V.

human rights law in arms control. The inclusion of international humanitarian law has been apparent since the adoption of the Mine Ban Convention¹³⁷⁴ and the Convention on Cluster Munitions,¹³⁷⁵ the further addition of international human rights is a significant development of arms control.

Clear evidence of IHL and IHRL considerations is demonstrated in the draft ATT submitted by the President of the UN 2012 Conference on the ATT.¹³⁷⁶ IHL and IHRL criteria in the draft ATT is used in assessment of arms transfer to prevent the arms from being used in violations of international law: “States parties shall assess whether the proposed export on conventional arms could: a. be used to commit or facilitate a violation of international humanitarian law; b. be used to commit or facilitate a violation of international human rights law”.¹³⁷⁷ The significance of the inclusion of IHL and IHRL concerns in the negotiation of the ATT can be far reaching in adoption of a treaty, particularly an arms control treaty, because it has created precedence; it is suggesting the future negotiation on arms control needs to take into account humanitarian and human rights concerns.

The influence of IHL and IHRL is also evident in the regional instrument. Regional and subregional organisations in Africa are the most advanced in terms of adopting legal instruments in an effort to control the proliferation of small arms. The existence of four legally binding instruments in Africa serves as a model for other countries and other regional or sub-regional groupings in regulating small arms transfers. The ECOWAS, for example, has moved further in the effort to control small arms by adopting a legally binding convention, which incorporates humanitarian law and human rights law considerations in its provisions.¹³⁷⁸ It is evidence of the growing influence of IHL and IHRL in treaty making, in particular relating to arms control.

¹³⁷⁴ Mine Ban Convention (1997), 2056 UNTS 211; see Chapter III.

¹³⁷⁵ Convention on Cluster Munitions (2008), MTDSG chap XXXVI(6); see Chapter III.

¹³⁷⁶ Draft of the ATT (26 July 2012), UN Doc A/CONF.217/CPRT.1; see Chapter VII.

¹³⁷⁷ *Ibid*, art 4; see Chapter VII

¹³⁷⁸ Economic Community of West African States Convention on Small Arms and Light Weapons, their Ammunition and Other related Materials (2006).

Europe has been the first regional organisation to regulate arms export and set a code of conduct for its member States which has incorporated IHL and IHRL as criteria in the European Union Code of Conduct.¹³⁷⁹ Sub-regional organizations in Africa have been advanced in incorporating IHL and IHRL in legally binding instruments. In contrast, countries in the Americas approached the issue from a security perspective to combat transnational organized crime and drug trafficking by adopting a convention in 1997¹³⁸⁰ which does not deal with IHL or IHRL concerns. Another regional organization examined, ASEAN, is still not able to collectively design a regional policy to respond to the small arms issue. The minimal ASEAN response may come from the fact that it has more pressing issues to deal with or it may have something to do with the organizational mechanism of consensus, which prevents a member State from tabling an issue of importance if there are other member countries not in favour of discussing it.

D. Negotiation Can Depart from Traditional Forum and Role of Civil Society

The presence of civil society and its global campaign in the support of the effort to adopt the Arms Trade Treaty demonstrate the role the NGOs can play in encouraging States to adopt an arms control treaty. The NGOs' active campaign focuses on reminding governments and promoting awareness of the necessity to have a treaty. The success of the involvement of NGOs in adopting the Mine Ban Treaty¹³⁸¹ inspires them to do the same in respect to controlling small arms/conventional arms proliferation. The information communication technology, arguably, facilitates the work of NGOs in establishing effective global networks.

Increasingly involvement of civil society plays a role in disseminating norms through publications and facilitates further research on arms control subjects. The published research findings may find their way to influencing the government policy on the

¹³⁷⁹ European Union Code of Conduct on Arms Export (1998); see Chapter VI.

¹³⁸⁰ Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other related Materials (CIFTA) (1997); see Chapter VI.

¹³⁸¹ Mine Ban Convention (1997), 2055 UNTS 45; see discussion of the Mine Ban treaty in Chapter III and the role of NGOS in adopting a treaty in Chapter VII.

small arms question. In the front line, the ICRC makes a good use of its observer status at the UN meetings to press the view of civil society on small arms. Research centres, such as SIPRI and the Small Arms Survey, publish a comprehensive range of research findings within the arms control subject. The civil society particularly supports the linkage between arms transfer and the IHL and IHRL. The physical presence of civil society groups in the UN meetings is not unrewarding, although it is the States that negotiate and decide on matters. Some arms control initiatives started by civil society, including an arms trade treaty, have been taken over by States.

A significant point, in relation to civil society involvement, is that contemporary arms control negotiation may depart from the traditional forum, namely within the United Nations framework. The negotiation outside the United Nations needs massive civil society support including campaigns to approach governments to join the process. Both the 1997 Mine Ban Convention and the 2008 Convention on Cluster Munitions took a different approach in their adoption, which was outside the United Nations. Both were negotiated and adopted with massive support from NGOs. An arms trade treaty negotiation has the possibility to follow the Mine Ban Convention and the Convention on Cluster Munitions to be brought outside the UN when a State or a group of States, with push and support from NGOs, take the initiative to do so.

However, it needs to be reiterated that sidelining the major powers is something different in the case of small arms/conventional weapons, because all major powers are also major producers of the weapons. The option to push a negotiation even without the engagement of major powers then is apparently problematic. Other than the Mine Ban Convention and the Convention on Cluster Munitions, all multilateral arms control negotiations after World War II were held within the UN framework and subscribed to by all major powers. Those include the NPT, the CCWC, the Chemical Weapons Convention and the Biological Weapons Convention. This makes the Mine-Ban Convention and the Convention on Cluster Munitions unique in their process and challenges the notion that a convention needs support from all major powers to be successful. Both conventions were adopted and attracted substantial State parties.

These facts alone illustrate that, in specific circumstances, a convention can be adopted and implemented with the major powers' absence.

The less inclusive process, without some major powers, as shown by the cluster munitions process, accelerates the negotiation to adopt a treaty. However, there is a risk its adoption may not be widely adhered to by countries. An exclusive process means that some countries' opinions and aspirations are not accommodated. Consequently, those sidelined States will be more likely to stay outside of the convention. In the case of the Convention on Cluster Munitions, the major users and producers such as the US, Russia, and China were sidelined. However, applying the same approach to exclude major players to the Arms Trade Treaty is, perhaps, not a good option because, practically, an international treaty on conventional arms will be difficult to implement effectively without the support of major producers and exporters. Unlike anti-personnel mines, small arms and other conventional weapons in the draft ATT cannot be banned totally, and sidelining countries that are major arms traders from a treaty may only ensure an ineffective instrument.

Despite the 2012 Conference on the Arms Treaty having failed to adopt a treaty, it is not a complete failure: it produced a draft treaty with significant support from most States. The momentum is still there and States are to bring the draft to the UN General Assembly,¹³⁸² and such draft can be a strong basis for further negotiation in the General Assembly. Civil society will play their part in promoting awareness and reminding governments of the importance of the ATT. Flexibility and a strong leadership role by major powers will again play a crucial role in the success of the next negotiation.

¹³⁸² See Chapter VII.

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