

Implications of International Law for a Future Arms Trade Treaty

Annyssa Bellal, Stuart Casey-Maslen and Gilles Giacca
Geneva Academy of International Humanitarian Law and Human Rights

Introduction

The aim and layout of the paper

This paper looks at the current state of international law governing the arms¹ trade and its implications for a future Arms Trade Treaty. It covers a wide range of sometimes overlapping bodies of international law, specifically the UN Charter, human rights and humanitarian law, and international criminal law.

As this paper describes, States Parties to relevant treaties are bound by express obligations not to transfer certain weapons while all UN Member States are prohibited from transferring any weapons to certain recipients in accordance with mandatory Security Council arms embargoes. There is also a set of norms found across various instruments that guide decisions by States on situations where the transfer of arms may breach an international obligation. In general, however, it will be seen that the rules of international law regulating the arms trade are fragmented and dispersed, which underpins the need for a comprehensive treaty governing the arms trade.

An overview of the arms trade

For several reasons, there is no straightforward answer to the question, 'How big is the international arms trade?' First, there is no globally agreed definition of 'arms'. ... Second, there is no common agreement on what types of activities constitute the arms trade. ... Third, the lack of openness and transparency by many arms suppliers and recipients regarding the value and volume of their arms exports and imports makes it difficult to collect accurate data. ... This has implications for efforts to establish controls on arms transfers via a future international arms trade treaty ...²

As the above quotation suggests, there is no robust figure for the annual value of the international arms trade. Even one of the world's leading authorities on the arms trade, the Stockholm International Peace Research Institute (SIPRI), has

¹ The terms arms and weapons are used interchangeably in this paper. See below Section 1.3 for a discussion of their definition.

² Paul Holtom and Mark Bromley, 'The International Arms Trade: Difficult to Define, Measure, and Control', *Arms Control Today*, July/August 2010, www.armscontrol.org/act/2010_07-08/holtom-bromley (last visited 7 January 2011).

since 2008 no longer sought even to attempt to put a US dollar value on total global arms exports.³ Prior to 2008, SIPRI estimated that the annual value of the arms trade in 1998 to 2007 inclusive varied between a low of some US\$30 billion in 2000 and a high of more than \$50 billion in 2007.⁴ As has been noted, however, the US Congressional Research Service (CRS)'s annual report to the US Congress put the value of the global arms trade at \$34.5 billion for 2007, i.e. 50 per cent less than the SIPRI figure, demonstrating the difficulty of achieving a reliable figure.⁵

Towards the negotiation of an Arms Trade Treaty

A first preparatory committee for a future Arms Trade Treaty was held in New York on 12–23 July 2010 and a second on 28 February to 5 March 2011, pursuant to United Nations (UN) General Assembly resolution 64/48.⁶ A further preparatory committee meeting is planned for July 2011, leading to a diplomatic conference in mid-2012 to negotiate an Arms Trade Treaty.⁷

In 2006, the General Assembly requested the UN Secretary-General to establish a group of governmental experts to look into '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.'⁸ The report of that group, concluded in 2008, prompted the General Assembly to start discussions focused on a possible arms trade treaty, open to all UN Member States.⁹ At the end of October 2009, after years of discussions and debates, the overwhelming majority of governments – 153 in total – agreed on a timetable to establish a 'strong and robust' Arms Trade Treaty (ATT) with the 'highest common standards' to control international transfers of conventional arms.¹⁰ There is currently no global treaty on the conventional arms trade.

³ In March 2011, however, it reported that total arms sales (i.e. national as well as international sales) within 100 major arms-producing companies increased by US\$14.8 billion from 2008 to reach \$401 billion in 2009, a real increase of 8 per cent. SIPRI, 'Top global arms industry increases arms sales despite ongoing recession, says SIPRI', Stockholm, 21 February 2011.

⁴ SIPRI, 'The financial value of the global arms trade', 5 January 2011, www.sipri.org/research/armaments/transfers/measuring/financial_values (visited 7 January 2011).

⁵ Paul Holtom and Mark Bromley, 'The International Arms Trade: Difficult to Define, Measure, and Control', *op. cit.* The corresponding report by the CRS for 2009, submitted to the US Congress in September 2010, estimated that the international arms trade was worth \$57.5 billion in 2009, a drop of 8.5 per cent from 2008. Almost 40 per cent of the world market in 2009 was accounted for by the US itself. See, e.g., Thom Shanker, 'Bad Economy Drives Down American Arms Sales', *New York Times* (online), 12 September 2010, www.nytimes.com/2010/09/13/world/13weapons.html (visited 7 January 2011).

⁶ See UN doc. A/RES/64/48 (2009).

⁷ 28 February – 4 March 2011; and 11–15 July 2011. A meeting is also scheduled for 2012 on procedural matters prior to the diplomatic conference. All meetings are to be held in New York.

⁸ UN General Assembly Resolution 61/89 of 6 December 2006. UN Secretary-General Ban Ki-moon has described the absence of a normative framework for all States to guide decisions regarding arms transfers as a 'recurring problem'.

⁹ See, e.g., A/RES/63/240 (2008).

¹⁰ Most of the world's biggest arms traders—including the USA, UK, France and Germany—now back the UN process. Nineteen states abstained but are nonetheless engaging in the preparatory process. Zimbabwe was the only State to vote against the GA resolution.

Key Definitions

Arms/weapons

There is no internationally accepted definition of arms or a weapon.¹¹ The US has privately suggested a definition of ‘all arms, munitions, materiel, instruments, mechanisms or devices that have an intended effect of injuring, damaging, destroying or disabling personnel or property.’¹² There are, however, definitions under national law of a weapon. Canada, for example, defines a weapon in its Criminal Code as follows:

‘weapon’ means any thing used, designed to be used or intended for use

(a) in causing death or injury to any person, or

(b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm.¹³

A possible definition of a weapon is as follows:

a device constructed or adapted to kill or physically harm, disorient, incapacitate, and/or affect the behaviour of a person against his/her will and/or destroy military, security force, or dual-use matériel, and which acts through the threat or application of force, or other means, such as the transmission of electricity, the diffusion of chemical substances or biological agents or sound, or the direction of electromagnetic energy. The definition of a weapon includes military equipment designed to deliver weapons, munitions, and ammunition, such as tanks or military aircraft,¹⁴ as well as the use of computers and other devices such as viruses, worms, or Trojan Horses to attack an enemy’s information systems.

¹¹ Within the context of international humanitarian law, a weapon is defined by one British military lawyer as connoting ‘an offensive capability that can be applied to a military object or enemy combatant.’ J. McClelland, ‘The review of weapons in accordance with Article 36 of Additional Protocol I’, *International Review of the Red Cross*, Vol. 85, No 850 (June 2003), p. 404.

¹² Result of a US Department of Defense Working Group cited in ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, Geneva, 2007, p. 8, fn. 17, available at: www.icrc.org/eng/resources/documents/publication/p0902.htm. The US Department of Defense Dictionary of Military Terms does not contain a definition of ‘weapon’ or ‘arms’.

¹³ Section 2, ‘Chapter C-46: An Act respecting the Criminal Law’, laws.justice.gc.ca/PDF/Statute/C/C-46.pdf (accessed 6 January 2011).

¹⁴ This sector of the arms trade is especially important, as one SIPRI researcher notes: ‘Combat aircraft dominate international arms transfers. They accounted for 27 per cent of the volume of transfers of major weapons over the period 2005–2009. This dominant position is even more apparent if all the weapons and components that are transferred for use with combat aircraft—missiles, bombs, sensors and engines—are taken into account. Together, combat aircraft and related weapons and components accounted for around 33 per cent of the volume of transfers.’ Siemon T. Wezeman, ‘International Transfers of Combat Aircraft, 2005–2009’, SIPRI Fact Sheet, November 2010, books.sipri.org/files/FS/SIPRIFS1011.pdf (accessed 7 January 2011). In fact, the percentage would be even higher since with no internationally recognised definition of ‘combat aircraft’, Wezeman defines them, for the purposes of the fact sheet cited, as ‘jet-engined aircraft primarily designed to engage in air-to-air or air-to-ground combat. He notes that this definition does not include the substantial number of smaller jet-engined trainer aircraft that often have a secondary or even primary combat role (such as the Chinese K-8 or the British Hawk), other light armed aircraft (such as the Brazilian EMB-314, the Swiss PC-7 and PC-9 or the US AC-208), anti-submarine warfare aircraft, or armed helicopters.’

'Conventional' arms/weapons

Despite the lack of a formal definition of 'arms' or a 'weapon', there is widespread agreement that 'conventional' arms are all arms/weapons except those that are nuclear, biological, and chemical in nature.¹⁵ The term 'conventional weapons' is widely used, including in the title of a convention regulating the use and transfer of certain conventional weapons, adopted under the auspices of the UN in 1980.¹⁶

Diversion and end-user certificates

The risk of diversion to unauthorised end users (whether States, non-State actors, or others) is a well known phenomenon of the arms trade. End-user certificates may be a sham or may be simply ignored by the recipient and transferred on to an unauthorised user. For instance, in the case of small arms and light weapons (SALW), according to a publication by the NGO, Saferworld:

The vast majority of illicit or uncontrolled SALW in the world have been diverted from authorised legal transfers or holdings. There are relatively few SALW that have been illicit throughout their existence – from production to illicit end-use(r) – although such arms are a significant problem in some contexts.

In virtually every part of the world, the two most important factors contributing to diversion of SALW to unauthorised or illicit uses or users are:

- diversion of authorised SALW transfers, due to inadequate arms transfer controls; and
- diversion from official or authorised holdings of SALW, due to inadequate management or security of such holdings.¹⁷

Munition/ammunition

There is no international definition of 'munition' or 'ammunition', even though the terms are widely used in international treaties and standards. According to the US Department of Defense, a munition is:

A complete device charged with explosives, propellants, pyrotechnics, initiating composition, or nuclear, biological, or chemical material for use in military operations, including demolitions. Certain suitably modified munitions can be used for training, ceremonial, or nonoperational purposes. Also called ammunition. (Note:

¹⁵ Thus, for example, the US Department of Defense defines a conventional weapon as one 'which is neither nuclear, biological, nor chemical.' See *DOD Dictionary of Military and Associated Terms* (as amended through April 2010), p. 106, www.dtic.mil/doctrine/dod_dictionary/data/c/10851.html (accessed 17 June 2010). The US has since muddied the waters somewhat, given that their domestic legislation now defines a 'weapon of mass destruction' as including the following conventional weapons: a 'bomb', 'grenade', 'rocket having a propellant charge of more than four ounces', 'missile having an explosive or incendiary charge of more than one-quarter ounce', 'mine', or 'device similar to any of the devices described in the preceding clauses'. See 18 U.S.C. 2332a, Section 2, and 18 U.S.C. 921, Section 4.

¹⁶ The formal title of the convention is the 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 as amended on 21 December 2001. It is usually referred to more concisely as the Convention on Certain Conventional Weapons (CCW), but is also sometimes termed the Inhumane Weapons Convention.

¹⁷ Owen Greene and Elizabeth Kirkham, 'Preventing Diversion of Small Arms and Light Weapons: Strengthening Border Management Under the UN Programme of Action', Saferworld, London, June 2010, p. 5.

In common usage, 'munitions' [plural] can be military weapons, ammunition, and equipment.)¹⁸

The issue of whether the terms ammunition and munition are synonyms was discussed within the context of the ATT, notably during the Boston Symposium on the Arms Trade Treaty held in September 2010¹⁹ and then the Second PrepCom in February/March 2011. It was not clear to participants whether ammunition was a sub-set of munition. However, the deletion of the reference in the Chair's Draft Paper of 3 March 2011²⁰ to 'munitions' was deemed by certain States to have removed bombs and mines, among other things, from the scope of the draft.²¹

The draft International Small Arms Control Standards define ammunition (for the purpose of small arms and light weapons control) as:

the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in small arms or light weapons.²²

The definition, which is based on the one contained in Article 3(c) of the UN Firearms Protocol,²³ further notes that the term includes cartridges (rounds) for small arms; shells, grenades and missiles for light weapons; and mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems.²⁴ The ordinary definition of ammunition is 'a supply or quantity of bullets or shells'.²⁵

Trade

In ordinary parlance, trade is the 'action of buying and selling goods and services.'²⁶ It is clear, however, that this definition is too narrow for the purposes of the ATT, as it would too easily allow the obligations set down in the future treaty to be avoided (e.g. through brokering, trans-shipment, gift, leasing, etc.) The UN General Assembly resolution calling for the negotiation of an ATT referred to the need to regulate 'import, export and transfer' in a preambular paragraph, although the operative paragraph calling for negotiations only referred to the decision to elaborate a legally binding instrument on the highest possible common international standards for the *transfer* of conventional arms.²⁷

¹⁸ See *DOD Dictionary of Military and Associated Terms* (as amended through April 2010), *op. cit.*, p. 315,

¹⁹ See, e.g., The Arms Trade Treaty blog report on the session on scope in the Boston Seminar, armstradetreaty.blogspot.com/2010_09_01_archive.html (last visited 14 January 2011).

²⁰ Available at: www.adh-geneve.ch/RULAC/pdf/Chairmans-draft-paper.pdf (last visited 10 March 2011).

²¹ See, e.g., Arms Trade Treaty blog report on discussions on Days Four and Five of the Second PrepCom, at : armstradetreaty.blogspot.com.

²² ISACS 01.20: Glossary of terms, definitions and abbreviated terms, Draft International Small Arms Control Standard, First edition, Draft 2.0, p. 8.

²³ "'Ammunition" shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party.' The UN Firearms Protocol, an instrument annexed to the UN Convention against Transnational Organized Crime, seeks to restrict the illicit manufacturing and trafficking of certain small arms. It entered into force on 3 July 2005.

²⁴ *ibid.*

²⁵ Oxford English Dictionary.

²⁶ *ibid.*

²⁷ See UN General Assembly resolution 64/48, 13th preambular paragraph and Operative Paragraph 4.

Transfer

Transfer is a broad term which ostensibly covers any form of import or export or gift. Its use in certain humanitarian/disarmament treaties,²⁸ though, has given rise to ambiguity and dispute as to whether the definition covers transfer of title to weapons without physical movement or transit of weapons without corresponding transfer of title. Thus, for example, Article 2, paragraph 15, of *1996 Amended Protocol II* on mines provides that:

“Transfer” involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.

The definition of transfer in the Chair’s Draft Paper of 3 March 2011 is ambiguous and unclear. As a consequence at the final session of the Second PrepCom on 5 March 2011 for the future ATT Switzerland proposed the following definition:

International transactions covered by this Treaty include those listed below:

- a. Export (includes re-export and temporary export),
- b. Transit (includes trans-shipment),
- c. Import (includes temporary import),
- d. Transfer of title or control over conventional arms from the jurisdiction of one State to another,
- e. Transfer, by tangible or intangible means, of information which is required for the design, development, production, manufacture, assembly operation, repair, testing, maintenance or modification of conventional arms (Transfer of Technology), and
- f. Activities of negotiating or arranging contracts, selling or trading of conventional arms from a third country (Brokering).

Non-State actors

A number of States have suggested that the ATT should prohibit any transfers to armed non-State actors. There is no internationally accepted definition of a non-State actor. In the 2000 Optional Protocol on the involvement of children in armed conflict, attached to the 1990 Convention on the Rights of the Child, reference is made to ‘Armed groups that are distinct from the armed forces of a State’.²⁹ A UN Security Council resolution from 2004 on the threat to international peace and security, from the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, defined a non-State actor as ‘individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution’. It was made

²⁸ See, e.g., the 1980 Convention on Certain Conventional Weapons (especially 1996 Amended Protocol II), the 1997 Anti-Personnel Mine Ban Convention, and the 2008 Convention on Cluster Munitions.

²⁹ Article 4(1), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by UN General Assembly resolution A/RES/54/263 of 25 May 2000. For a detailed analysis of non-state actors under international law, see A. Clapham, *Human Rights Obligations of Non-state Actors*, OUP, 2006, p. 613; A. Clapham, ‘Non-state Actors’, in V. Chetail, (ed.), *Post-Conflict Peacebuilding: A Lexicon*, OUP, 2009, pp. 200-12.

explicit, however, that this and other definitions set out within Resolution 1540 were ‘for the purpose of this resolution only’.³⁰

THE UN CHARTER

The founding instrument of the United Nations, the *1945 UN Charter*, is a universal instrument, which represents the cornerstone of the international legal order and sets out the fundamental principles of international law related to international peace and security. The UN Charter provides a basic legal framework for arms trade through many of its provisions. In keeping with its overall purposes and principles, the UN and its organs have a legitimate interest in the field of arms transfer, as is recognised by the UN Charter. Thus, Article 11, paragraph 1; Article 26; and Article 47 of the Charter refer specifically to the importance of the regulation of ‘armaments’ for the maintenance of international peace and security.

Furthermore, ‘[g]uided by the purposes and principles enshrined in the Charter’, the UN General Assembly has declared that the unregulated arms trade contributes to international and non-international armed conflict, international crimes, and terrorism, and undermines peace and security.³¹ At the same time, however, the Assembly has acknowledged ‘the right of all States to manufacture, import, export, transfer and retain conventional arms for self-defence and security needs, and in order to participate in peace support operations.’³²

Several UN Charter provisions demand consideration in light of the arms trade, particularly those governing the right to self-determination and equal rights of peoples, human rights, the prohibition on the threat or use of force, the obligation of the UN not to intervene ‘in matters which are essentially within the domestic jurisdiction of any state’, and the *inherent* right of individual and collective self-defence. The interpretation and implementation of these provisions, both individually and in the context of the broader legal framework, serves as a starting point for their application to the arms trade. Some of the provisions may be in apparent conflict with each other and one of the challenges for the negotiators of the future Arms Trade Treaty will be to balance the legitimate interests of States in the arms trade against other interests and values, such as development and the enjoyment of human rights.

UN Security Council arms embargoes

The UN Security Council has on numerous occasions prohibited the transfer of arms to specific States or non-State entities by means of embargoes.³³ Thus, for example, in 2004, the Council decided

³⁰ UN Security Council resolution 1540, adopted on 28 April 2004. The text of the resolution is available at: www.un.org/sc/1540/resolutionstatements.shtml (accessed 17 January 2011).

³¹ UN General Assembly Resolution 61/89, 18 December 2006.

³² UN General Assembly Resolution 63/240, 8 January 2009, Fifth preambular paragraph. See also Resolution 61/89, 18 December 2006. The EU Common Position on arms transfers stipulates that States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter. EU Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 8 December 2008, Twelfth preambular paragraph.

³³ An embargo is generally defined as ‘A suspension of commerce, either general or of some particular branch...’ Oxford English Dictionary, www.oed.com/view/Entry/60781?rskey=d6Zo3W&result=1# (accessed

that all States shall, for a period of thirteen months from the date of adoption of this resolution, take the necessary measures to prevent the direct or indirect supply, sale or transfer to Côte d'Ivoire, from their territories or by their nationals, or using their flag vessels or aircraft, of arms or any related materiel, in particular military aircraft and equipment, whether or not originating in their territories, as well as the provision of any assistance, advice or training related to military activities.³⁴

Such embargoes are legally binding on all UN Member States under the UN Charter.³⁵ States have a duty to implement the necessary measures to ensure that private entities within their jurisdiction comply with the embargoes. Violation of the embargo regime by a State or an individual or assisting another State in circumventing it may then amount to a violation of international law incurring for the State the international responsibility for an international wrongful act and for the individual, this might engage individual criminal responsibility (See the section below devoted to international criminal law)

Two categories of embargoes can be distinguished: territorial arms embargoes (pertaining to a specific State, for example Côte d'Ivoire,³⁶ Liberia,³⁷ Somalia,³⁸ and more recently Libya³⁹); and embargoes against certain non-State actors and their members (e.g. UNITA in Angola, as well as non-State actors in the Democratic Republic of Congo,⁴⁰ Liberia,⁴¹

24 January 2011).

³⁴ S/RES/1572, 15 November 2004, Operative Paragraph 7.

³⁵ Article 24 of the UN Charter confers on the Security Council the primary—not exclusive—responsibility for the maintenance of international peace and security. Among available means for discharging this responsibility, under Article 41 of the Charter the Council may call upon Member States to apply measures, commonly referred to as sanctions, not involving the use of armed force. Under Article 25 of the Charter, the decisions of the Security Council are binding upon all Member States. Furthermore, Member States shall not assist States that have been sanctioned by the UN, as set out in Article 2(5). United Nations Charter, signed at San Francisco on 26 June 1945, entry into force 24 October 1945, in accordance with Article 110.

³⁶ S/RES/1572, 15 November 2004 (for a period of 12 months); S/RES/1584, 1 February 2005 (reaffirming the embargo).

³⁷ S/RES/1521, 22 December 2003 (for a period of 12 months); S/RES/1579, 21 December 2004 (renewed for a period of 12 months).

³⁸ S/RES/733, 23 January 1992; most recently reaffirmed in S/RES/1519, 15 December 2003; S/RES/1558, 17 August 2004; and S/RES/1587, 15 March 2005.

³⁹ S/RES/1970, 26 February 2011.

⁴⁰ S/RES/1493, 28 July 2003, targeting 'all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement, in the Democratic Republic of Congo' (for a period of 12 months); S/RES/1552, 27 July 2004 (renewed for a period of 12 months, expiring on 31 July 2005). In its latest resolution, the Security Council decided that the embargo now applies 'to any recipient in the territory.' S/RES/1597, 3 May 2005.

⁴¹ S/RES/1521, 22 December 2003, targeting the LURD (Liberians United for Reconciliation and Democracy) and the Movement for Democracy in Liberia (MODEL), as well as 'all former and current militias and armed groups' (for a period of 12 months); S/RES/1579, 21 December 2004 (renewed for a period of 12 months).

Rwanda,⁴² Sierra Leone,⁴³ and Sudan,⁴⁴ as well as to terrorist groups,⁴⁵ such as *al-Qaida* and associated persons.⁴⁶

Non-intervention

International law prohibits States from interfering directly or indirectly in the internal or external affairs of any other State where such interference threatens that State's sovereignty or political independence.⁴⁷

The prohibition on the threat or use of force against the territorial integrity or political independence of any other State is a fundamental principle of customary international law.⁴⁸ The crucial Article in the UN Charter which covers intervention by States is Article 2(4), which states that:

All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This prohibition is generally understood as the threat or use of 'armed force' in international relations, but it has to be read broadly.⁴⁹ The UN General Assembly's

⁴² S/RES/1011, 16 August 1995, targeting 'non-governmental forces' inside Rwanda and persons in neighbouring States that intend to use arms and related matériel in Rwanda.

⁴³ S/RES/1171, 5 June 1998, targeting 'non-governmental forces in Sierra Leone'.

⁴⁴ S/RES/1556, 30 July 2004, targeting 'all non-governmental entities and individuals, including the Janjaweed, operating in the States of North Darfur, South Darfur and West Darfur'; S/RES/1591, 29 March 2005, extending the measures 'to all parties to the N'djamena Ceasefire Agreement and any other belligerents in the States of North Darfur, South Darfur and West Darfur.'

⁴⁵ The Security Council, in a number of resolutions dealing with international terrorism, imposed obligations on states to take measures including through preventing:

the direct or indirect supply, sale, or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.

UNSC Res 1267 (1999) ((15 October 1999) SCOR 54th Year 148); UNSC Res 1822 (2008) ((30 June 2008) SCOR (1 August 2007–31 July 2008) 170); UNSC Res 1373 (2001) ((28 September 2001) SCOR (1 January 2001–31 July 2002) 291) and subsequent resolutions.

⁴⁶ S/RES/1390, 28 January 2002 (for a period of 12 months); S/RES/1455, 17 January 2003 (decision to improve the implementation of the measures over a further period of 12 months); S/RES/1526, 30 January 2004 (decision to improve the implementation of the measures over a further period of 18 months).

⁴⁷ The principle of sovereign equality of States is enshrined in Article 2(1) UN Charter. Article 2(7) affirms the non-interference by the United Nations in matters which are essentially within the domestic jurisdiction of any State. See also Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty, General Assembly Resolution 2131 (XX) of 21 December 1965 and Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, General Assembly Resolution 42/22 of 18 November 1987, Annex, §6. See also UN General Assembly Resolution A/RES/2625(XXV), 24 October 1970: *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*

⁴⁸ See, e.g., International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Judgment of 27 June 1986, 1984 ICJ Reports, §190.

⁴⁹ See Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary*, Munich, 2nd edn., 2002., pp. 117–119. It is important to note that the UN Charter does not specifically limit the prerogative of States to

Declaration of Principles of International Law concerning Friendly Relations and Cooperation between States provides an authoritative interpretation of that prohibition and the prohibition on other forms of intervention by State as follows:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.⁵⁰

Further, it is important to note that the non-intervention rule under the UN Charter governs actions of each State and group of States, but does not create obligations for non-State actors.⁵¹

Intervention is prohibited when it uses methods of coercion, either in the direct form of military action or in the indirect form of support for non-State actors fighting against the State. Thus, the ICJ, in the *Nicaragua Case*, imputed to the US all the actions of US organs aimed at training, arming, equipping and financing the insurgent military group against Nicaragua was in breach of its obligation under customary international law not to intervene or interfere in the affairs of another State.⁵² The US was held to have incurred responsibility for its own action and conduct, however, the ICJ did not consider as attributable to US some actions by *contras* in breach of international humanitarian law (killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping).⁵³

The ICJ stated that the principle of non-intervention derives from customary international law and while intervention is already allowable at the request of the government of a State, it is not allowed at the request of its opposition group in the present state of international law.⁵⁴ Thus it stated that '[i]t would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made

resort to *armed force* at the domestic level (insurgency, civil war), although any resort to force should be in conformity with the rules of international humanitarian law and international human rights law.

⁵⁰ See also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. The United States of America Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgement, I.C.J. Reports, 1986, paras. 202-214 and 227-238; DRC v. Uganda, Judgement of 19 December 2005, para. 165.

⁵¹ According to one view: [t]he principle of non-intervention can not only be violated by a single State but also by a group of States or an international organization. Private persons, institutions or multinational companies cannot violate it through their behaviour.' P. Kunig, 'Intervention, Prohibition of', *Max Planck Encyclopaedia of Public International Law*, 2009, §8, available at www.mpepil.com.

⁵² *Nicaragua v. United States of America*, Judgement of 27 June 1986, *op. cit.*, § 292.

⁵³ A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law* Vol. 18 no. 4, 2007, p. 654

⁵⁴ *Nicaragua v. United States of America*, Judgement of 27 June 1986, *op. cit.*, § 246

by an opposition group in another State.⁵⁵ This being said, nothing precludes the UN Security Council from issuing a resolution that would seek to assist an opposition group within a State. In this sense, it could be argued that the UN Security Council resolution would take priority over the principle of non-intervention by virtue of Article 103 of the UN.⁵⁶ Concurrently, it could be argued that derogations from well-established principles of customary international law should be made explicit in the text of a resolution.

Individual and collective self-defence

The 'inherent' right to self-defence is often claimed as a principle or even the legal basis by which States may lawfully acquire any weapons. Among the exceptions to the prohibition on the threat or use of force, Article 51 of the UN Charter recognises the right to individual or collective self-defence:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if 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...

The exercise of self-defence is thus subject to the State concerned having been the victim of an 'armed attack', which presupposes a violation of Article 2, paragraph 4 of the Charter. Indeed, the ICJ made it clear in several occasions that the existence of an armed attack is a *conditio sine qua non* required for the lawful exercise of the right to individual or collective self-defence.⁵⁷

As noted above, assistance to a non-State armed group may constitute unlawful intervention in the internal affairs of the State or States in which that group is operating and may even be regarded as a threat or use of force.⁵⁸ However, both the ICJ and State practice have held that material support to non-State armed groups in the form of weapons or logistical support is not considered an 'armed attack'.⁵⁹

⁵⁵ *Ibid.*

⁵⁶ Article 103 UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

⁵⁷ *Nicaragua Case, op. cit.*, §237. See also §§195 and 211. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, ICJ Rep. (2003), para. 51; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 June 2004, ICJ Reports 2004, p. 194, §139.

⁵⁸ 'But the Court does not believe that the concept of armed attack includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance *may be regarded as a threat or use of force*, or amount to intervention in the internal or external affairs of other States.' *Nicaragua Case, op. cit.*, §195.

⁵⁹ See also Judge Ruda's separate opinion in the *Nicaragua Case*:

From my point of view it would have been sufficient to say, just as the Court does in its conclusions, that even if there was such assistance and flow of arms, that is not a sufficient excuse for invoking self-defence, because, juridically, the concept of 'armed attack' does not include assistance to rebels.

ibid., §13. In his dissenting opinion, Judge Jennings stated that although the mere provision of arms cannot be said to amount to an armed attack, 'the provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement.' *ibid.*, p. 543.

The right of self-defence can only be exercised in response to an armed attack, including a serious and imminent threat of such an attack, and thus it cannot be exercised against acts that do not reach the threshold of an armed attack. Therefore this inherent right cannot be claimed *in abstracto* to justify the importation of arms. It is therefore our conclusion that the legitimacy of arms acquisition does not fall within the meaning of self-defence under Article 51 of the UN Charter.⁶⁰

Respect for and observance of human rights

The UN Charter establishes 'promotion and respect for human rights' as one of the primary purposes of the United Nations. Article 1, paragraph 3, refers as follows to:

[i]nternational co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion (Art. 1(3) UN Charter).

In analysing Article 1, commentaries on the UN Charter refer to elements of the provision containing human rights as constituting customary international law binding on all.⁶¹

This primary purpose is further buttressed by Article 55(c) of the UN Charter, which requires that the UN promote 'universal respect for, and observance of, human rights and fundamental freedoms for all.' Moreover, UN Member States are bound under Article 56 of the Charter 'to take joint and separate action ... for the achievement of the purposes set forth in Article 55.' Article 55(c) has been interpreted in conjunction with Article 56 to impose legal obligations on member States to 'singly or jointly stand up for respecting human rights.'⁶² The legitimate prerogative of a State to acquire arms in exercise of its sovereignty may therefore be conditional upon the obligation to respect and observe human rights both within a State's territory and externally.

Self-determination

Principles of self-determination and the equal rights of peoples in the UN Charter⁶³ can be said to represent two constituent elements of the same concept. Also embedded in international human rights law⁶⁴ self-determination is considered a fundamental human

⁶⁰ If justification for the acquisition of arms is sought, the relevant provisions can be found in the principles of sovereignty and/or sovereign equality according to Article 2(1) of the UN Charter and General Assembly's Declaration of Principles of International Law concerning Friendly Relations and Cooperation between States adopted by consensus on 24 October 1970. This Declaration is considered as being reflective of customary international law.

⁶¹ Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary*, *op. cit.*, 2002. p. 40.

⁶² E. Riedel, 'Article 55 (c)', in *ibid.*

⁶³ UN Charter, Article 1(2); Article 2(4); and Articles 55 & 56.

⁶⁴ See the *1966 Covenant on Civil and Political Rights*, Article 1(1); and the *1966 Covenant on Economic, Social and Cultural Rights*. By being included in the two covenants self-determination 'was given the characteristic of a fundamental human right or, more accurately, that of a source of essential prerequisites, for the existence of individual human rights, since these rights could not genuinely be exercised without the realization of the – collective-right of self-determination.' D. Thurer and T. Burri, 'Self-determination', *Max Planck Encyclopaedia of Public International Law*, *op. cit.*

right. The legal character of the principle has even been referred to as a ‘the basic principle of international law’ by the Declaration on Friendly Relations.⁶⁵

The issue at point is to determine what legal consequences of self-determination may be attributed to the question of arms transfers. In particular, whether an arms transfer to a non-state actor can be justified under the UN Charter principle on self-determination. However, generally as well as in the specific context of arms transfers, it is difficult to infer specific rights and obligations from the principle of self-determination by virtue of the concept’s complexity and vagueness, owing partially to the lack of both definition of the ‘peoples’ and the content of the principle itself.

Determining ‘who’ constitutes a people is complicated by questions such as ‘how’ such a people is constituted (i.e. its membership), ‘how’ it exercises its rights (the act of self-determination), and how self-determination is implemented. Beyond the question of qualification of the holders of the right to self-determination, it is noteworthy that in the process of decolonisation, the armed support of colonial/liberation movements was not considered lawful by a number of States and in the absence of any consensus on the issue was not recognised in the Friendly Relations Declaration.

Thus, although this Declaration recognises the applicability of the principle of self-determination beyond the traditional context of decolonization it also states that it does not authorise ‘any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people ... without distinction as to race, creed or colour.’⁶⁶

International Human Rights, Humanitarian, and Disarmament Law

Existing regulation of the arms trade by international humanitarian and disarmament law

Traditionally a distinction has been made between international humanitarian law (IHL)⁶⁷—which focused on regulating the use of a weapon in armed conflict—and international disarmament law, which sought primarily to prohibit the production, stockpiling, and transfer of certain weapons, especially those termed ‘of mass

⁶⁵ The basic premise of the self-determination is the right of people of an existing State ‘freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter.’ See Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in Resolution 2625 (XXV), 1970. Self-determination of peoples, even if not explicitly qualified as a rule of *jus cogens*, has been considered as an *erga omnes* rule by the ICJ (*East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*[2004] ICJ Rep 136, 171–72.

⁶⁶ Principle 5, Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations.

⁶⁷ Also called the international law of armed conflict, which forms a central part of *jus in bello*, the rules of international law applicable during armed conflict.

destruction'.⁶⁸ This distinction has been significantly blurred in recent years, with certain States even referring to treaties prohibiting anti-personnel mines and cluster munitions as 'humanitarian disarmament'.⁶⁹

'Respect and ensure respect'

Article 1 common to the four 1949 Geneva Conventions provides that:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.⁷⁰

This provision potentially has significant relevance for the lawful transfer of weapons.⁷¹ In the Nicaragua case before the International Court of Justice, the Court stated in its decision on the merits:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions ...⁷²

This obligation 'to ensure respect' could already be understood as prohibiting the transfer of any weapon that would be likely to facilitate or be used to commit a violation of international humanitarian law in both international and non-international armed conflict. Thus, in July 2010, the International Committee of the Red Cross (ICRC) stated to the first Preparatory Committee meeting for an ATT that:

⁶⁸ See, e.g., International Law Association, 'Berlin Conference (2004), Arms Control and Disarmament Law', www.ila-hq.org/.../88CE46BD-7EEA-452C-AA979D23DCFAE7B1 (visited 20 May 2011); and Sergio Duarte, UN High Representative for Disarmament Affairs, 'Disarmament and the Rule of Law', 2008 American Bar Association Section on International Law, Spring Meeting, UN, New York, 31 March 2008, www.un.org/disarmament/HomePage/HR/docs/2008/2008March31_UN.pdf (accessed 17 January 2011).

⁶⁹ See, e.g., Foreword by Jonas Gahr Støre, Norwegian Minister of Foreign Affairs, Oslo, June 2010, to Gro Nystuen and Stuart Casey-Maslen (eds.), *The Convention on Cluster Munitions, A Commentary*, Oxford University Press, October 2010, p. vi; 'Nuclear and humanitarian disarmament', Statement of Norway to the First Committee of the UN General Assembly, 6 October 2009, www.norway-un.org/Statements/2009/General-Assembly-Committees/Nuclear-and-humanitarian-disarmament/ (visited 17 January 2011); and also references to 'disarmament as humanitarian action' in John Borrie, *Unacceptable Harm, A History of How the Treaty to Ban Cluster Munitions was Won*, UNIDIR, 2009, pp. 179, 282, 314.

⁷⁰ A similar provision is included in Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter, *1977 Additional Protocol I*).

⁷¹ Although the commentary on the provision published by the ICRC does not make such a claim. See www.icrc.org/ihl.nsf/COM/380-600004?OpenDocument and, with respect to the corresponding provision in *1977 Additional Protocol I*, www.icrc.org/ihl.nsf/COM/470-750004?OpenDocument (both visited 17 January 2011). Although it might not have been its original intent, the duty to ensure respect for the Geneva Conventions is today unanimously understood as referring to violations by other States. M. Sassòli, 'State responsibility for violations of international humanitarian law', *International Review of the Red Cross*, Vol. 84, No. 846 (2002), p. 421.

⁷² Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*) Merits, Judgment of 27 June 1986, §220.

Weapons transfers should be considered in light of States' existing obligation to 'ensure respect' for IHL. This is generally interpreted as conferring a responsibility on third-party States not involved in an armed conflict to refrain from encouraging a party to an armed conflict to violate IHL, avoid action that would assist in such violations, and take appropriate steps to put an end to such violations. States that export arms can be considered particularly influential in 'ensuring respect' for IHL owing to their ability to provide or withhold the means by which violations may be committed.⁷³

As a consequence, the ICRC recommended that an ATT

include a requirement to a) assess the likelihood that serious violations of IHL will be committed with the weapons being transferred, and b) not authorize transfers if there is a clear risk that the arms will be used to commit serious violations of IHL. If an ATT allows measures short of denial where there is a clear risk of serious violations of IHL with the weapons being transferred, then this will undermine an ATT's objective of reducing human suffering.⁷⁴

The Chair's Draft Paper of 3 March 2011, circulated during the Second Preparatory Committee meeting for an ATT, proposed that a weapons transfer shall not be authorised where there is a 'substantial risk' that the weapons 'would be used to commit or facilitate serious violations of international humanitarian law.'⁷⁵ According to the ICRC,⁷⁶ such serious violations would encompass grave breaches of the four *1949 Geneva Conventions* and *1977 Additional Protocol I* as well as 'other serious violations of the law and customs applicable in international and non-international armed conflict' that the 1998 Rome Statute of the International Criminal Court defines as war crimes.⁷⁷

Weapons whose use is outlawed by IHL

It is a general rule of IHL that the right of the parties to an armed conflict to choose methods or means of warfare⁷⁸ is not unlimited.⁷⁹ Indeed, there are certain conventional weapons whose use is outlawed by IHL in all circumstances.

⁷³ 'ICRC statement on IHL criteria in an Arms Trade Treaty', New York, 20 July 2010, www.icrc.org/eng/resources/documents/statement/arms-trade-treaty-standards-statement-200710.htm (visited 17 January 2011).

⁷⁴ *ibid.*

⁷⁵ Section on Criteria, §B2, available at: www.adh-geneve.ch/RULAC/pdf/Chairmans-draft-paper.pdf.

⁷⁶ ICRC, *Arms transfer Decisions, Applying international humanitarian law criteria*, Geneva, June 2007, p. 7.

⁷⁷ Article 8(b), (c), and (e), 1998 Rome Statute of the International Criminal Court.

⁷⁸ Means of warfare are the weapons and weapons systems themselves, whereas methods of warfare are the way in which the weapons are used (e.g. a bomb is a means of warfare, whereas aerial bombardment of a city is a method of warfare). See, e.g., W. H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford, 2009, p. 4.

⁷⁹ The rule is set out in Article 35, paragraph 1 of 1977 Additional Protocol I. It is a general restatement of the international legal reality that certain weapons can never be lawfully used, while other weapons can be used subject to the restrictions imposed by applicable international law.

First and foremost, **the use of weapons which are by their nature indiscriminate is prohibited.**⁸⁰ This rule flows from the prohibition on indiscriminate attacks,⁸¹ which is underpinned by arguably the most fundamental rule of international humanitarian law, the principle of distinction, whereby military operations shall only be directed against military objectives, and never against civilians, the civilian population, or civilian objects.⁸² There is, though, no agreement on which weapons may be outlawed by this rule. One lawyer suggests that an example of such an inherently indiscriminate weapon would be ‘a long-range missile with a guidance system so rudimentary or unreliable that its chances of striking a military objective are almost happenstance.’⁸³

Second, the use of means and methods of warfare which are **of a nature to cause superfluous injury or unnecessary suffering** is prohibited.⁸⁴ According to this rule, ‘it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.’⁸⁵ Unnecessary suffering has in turn been defined as ‘harm greater than that unavoidable to achieve legitimate military objectives.’⁸⁶ The practical criteria to judge the application of this principle, however, remain controversial.⁸⁷ Examples of weapons whose use in armed conflict is widely believed to have been prohibited on the basis of this principle are: exploding bullets; expanding ‘dum-dum’ bullets; blinding laser weapons; and the use of poison.⁸⁸

⁸⁰ See, e.g., International Court of Justice, *Legality of The Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, §78, available at: www.icj-cij.org/docket/files/95/7495.pdf?PHPSESSID=ee0e588e0e6ec50a5097bd98d8d9747d (accessed 14 April 2010); cf. also, Article 8, paragraph 2(b)(xx) of the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998. The International Committee of the Red Cross (ICRC) similarly considers this to be a rule of customary international law. See Rule 71, in J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law – Volume 1: Rules* (Cambridge: Cambridge University Press, 2005).

⁸¹ Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

⁸² See, e.g., Rules 7, 9, 10, 11, and 12, in J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law - Volume 1: Rules, op. cit.*

⁸³ M. N. Schmitt, ‘War, Technology, and International Humanitarian Law’, Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper No. 4 (Summer 2005), p. 10.

⁸⁴ See, e.g. Rule 70, in *ibid.*; Article 8, paragraph 2(b)(xx) of the Rome Statute of the International Criminal Court; cf. also, the third preambular paragraph of the *1980 Convention on Certain Conventional Weapons*, and the eleventh preambular paragraph of the *1997 Anti-Personnel Mine Ban Convention*.

⁸⁵ International Court of Justice, *Legality of The Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *op. cit.*, §78.

⁸⁶ *ibid.*, §238.

⁸⁷ Cp. R. M Coupland, ‘Abhorrent weapons and “superfluous injury or unnecessary suffering”: from field surgery to law’, *British Medical Journal*, No. 315 (29 November 1997), pp. 1450–1452, www.bmj.com/cgi/content/full/315/7120/1450 (accessed 12 May 2010); and Maj. D. M. Verchio, ‘Just Say No! The SirUS Project: Well-Intentioned, But Unnecessary and Superfluous’, *Air Force Law Review*, Vol. 51, No. 183 (2001).

⁸⁸ See, e.g., Rule 17, in J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law - Volume 1: Rules, op. cit.*, p. 241.

In addition, the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may therefore not be used as a weapon.⁸⁹ No conventional weapons have, though, been prohibited on the basis of this principle.⁹⁰

There are also conventional prohibitions on the use of specific weapons in armed conflict, notably blinding laser weapons,⁹¹ as well as expanding bullets⁹² and exploding bullets.⁹³ These prohibitions are believed to have attained the status of customary international law, applicable to all. There is no treaty-based prohibition of the transfer of such weapons.

Conventional weapons whose transfer is prohibited

The transfer of a limited number of weapons is, though, generally prohibited to each State Party to the relevant international treaty. Thus, under *1996 Amended Protocol II* annexed to the *1980 Convention on Certain Conventional Weapons*, the transfer of any landmines (anti-personnel or anti-vehicle) is generally prohibited to any non-State actor, while mines whose use is prohibited under the Protocol—basically only ‘non-detectable’ anti-personnel mines or remotely-delivered anti-personnel mines not equipped with an effective self-destruction or self-neutralization mechanism and a back-up self-deactivation feature—may not be transferred to anyone.⁹⁴

A broader prohibition on anti-personnel mines is applicable to all States Parties to the *1997 Anti-Personnel Mine Ban Convention*.⁹⁵ All transfers of such weapons are prohibited, save for limited numbers,⁹⁶ which be transferred for the development of and training in mine detection, mine clearance, or mine destruction techniques; or any transfer for the sole purpose of destruction. A similar prohibition applies to cluster munitions under the *2008 Convention on Cluster Munitions*.⁹⁷

Concluding remarks

IHL places relatively few restrictions on the transfer of conventional weapons. An obligation not to transfer weapons to anyone that will use them to violate IHL can be

⁸⁹ See, e.g., Rule 45, in *ibid*. According to the ICRC, the rule is applicable in international armed conflicts and arguably also in armed conflicts of a non-international character.

⁹⁰ States Parties to the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting, or severe effects as the means of destruction, damage or injury to any other State Party.

⁹¹ Rule 86, in *ibid*. The prohibition of blinding laser weapons is contained in Protocol IV of the *Convention on Certain Conventional Weapons*.

⁹² Rule 77, in *ibid*. This prohibition was first introduced in the *1899 Hague Declaration (IV,3) on Expanding Bullets*.

⁹³ Rule 78, in *ibid*. This prohibition was first introduced in the *1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*.

⁹⁴ Article 8(1) and (2), *1996 Amended Protocol II*.

⁹⁵ Articles 1 and 3 of the Convention.

⁹⁶ ‘the minimum number absolutely necessary’. Article 3(1), *1997 Anti-Personnel Mine Ban Convention*.

⁹⁷ Articles 1 and 3(6) and (7), *2008 Convention on Cluster Munitions*. Neither treaty is believed to be reflective of customary international law. See, e.g., Gro Nystuen and Stuart Casey-Maslen (eds.), *The Convention on Cluster Munitions, A Commentary, op. cit.*, §§0.146–0.152.

adduced from the obligation to ‘ensure respect’ for the four *1949 Geneva Conventions* and *1977 Additional Protocol I*, but the evidence for this assertion is relatively limited. Also of relevance is the obligation under Article 36 of *1977 Additional Protocol I* under which States Parties are obliged to determine, in the ‘study, development, acquisition or adoption of a new weapon, means or method of warfare’, whether the use of any weapon would ‘in some or all circumstances, be prohibited’ by the Protocol or by ‘any other rule of international law applicable’ to such a State.⁹⁸

Existing regulation of the arms trade by international human rights law

International human rights law is the body of international law that seeks to protect the individual against, primarily, the power of the nation State. Especially since the end of the 1939–1945 War and the adoption by the UN General Assembly of the Universal Declaration of Human Rights in 1948, many human rights treaties have been adopted. Some offer generalised protection (e.g., the two 1966 International Covenants—on Civil and Political Rights and on Economic, Social and Cultural Rights), while others deal with protection against certain abuses (e.g., torture, forced disappearances), or address the rights of certain groups (e.g. women, children, migrants, persons with disabilities).

As noted in Section 2 above, under the Charter of the United Nations the UN ‘shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’⁹⁹ Furthermore, all UN Members ‘pledge themselves to take joint and separate action in co-operation with the Organization’ for the achievement of this purpose.¹⁰⁰ Yet, no human rights treaty specifically addresses the trade in weapons nor does international human rights law specifically prohibit the use *per se* of any weapon, whatever its categorisation.¹⁰¹

Furthermore, even though weapons are used across many countries to commit the most serious human rights violations,¹⁰² the transfer of weapons in and of itself does not typically fall within the ambit of a human rights treaty as far as the transferring State is concerned. This is because the obligations upon each State Party are to ensure the enjoyment of rights to all persons under its jurisdiction. This scope of application means the obligations laid down in human rights instruments offer protection primarily to persons present on a State’s own territory as well as, in a widely held (though not consensus) view, where a State exercises effective control extraterritorially.¹⁰³ It would thus not normally extend to holding a foreign government liable for a violation of international human rights law

⁹⁸ Article 36, *1977 Additional Protocol I*. See, e.g., ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, Geneva, 2007, www.icrc.org/eng/resources/documents/publication/p0902.htm (last accessed 17 January 2011).

⁹⁹ Article 55, UN Charter.

¹⁰⁰ Article 56, UN Charter.

¹⁰¹ Indeed, certain weapons whose use as a method of warfare is prohibited in armed conflict by international humanitarian law, such as riot control agents or expanding ‘dumdum’ bullets, are not illegal under human rights law in certain other, albeit limited, situations.

¹⁰² See, e.g., Anup Shah, ‘Arms Trade—a major cause of suffering’, *Global Issues*, 7 November 2010, www.globalissues.org/issue/73/arms-trade-a-major-cause-of-suffering (last visited 21 January 2011).

¹⁰³ See, e.g., Françoise Hampson, ‘The Scope of the Extra-Territorial Applicability of International Human Rights Law’, Chapter 8 in Geoff Gilbert, Françoise Hampson, and Clara Sandoval (eds.), *Essays on Human Rights: In Honour of Professor Sir Nigel Rodley and Professor Kevin Boyle*, Routledge, 25 August 2010.

on the basis that foreign government supplied weapons to the State that committed the violations.

Nonetheless, the level of respect by the recipient State for human rights is potentially relevant to any determination of whether a proposed weapons transfer should proceed—and may result in a determination that a State has committed an internationally wrongful act—on the basis either of national legislation¹⁰⁴ or of the concept of complicity under international law.¹⁰⁵

The argument has been made that States should be obliged to investigate the end-use of the weapons they authorise for international transfer analogous to their obligations to ensure that persons who are removed, expelled, or extradited from their jurisdiction will not face persecution or torture.¹⁰⁶ But, as has been noted, the challenge will be to prove causation.¹⁰⁷

The Chair's Draft Paper of 3 March 2011, circulated during the Second Preparatory Committee meeting for an ATT, proposed that a weapons transfer shall not be authorised where there is a 'substantial risk' that the weapons 'would be used to commit or facilitate serious violations of international human rights law.'¹⁰⁸ Rights especially relevant to such a determination could include the following:

- The right to life (covering, for example, assassinations or other forms of murder, enforced disappearance, as well as genocide),
- The right to freedom from torture and other forms of cruel, inhuman, or degrading treatment, and
- The rights to liberty and security of person and the right to freedom from slavery,
- The right to freedom of thought, conscience, and religion,
- The right to recognition as a person before the law,

as well as the right to protest (which brings together a number of different rights under a single 'umbrella' right such as the rights to freedom of assembly and of expression), and, potentially, rights to health, education, food, and housing.¹⁰⁹ Indeed, for instance, the EU

¹⁰⁴ See, e.g., Section 502B of the US Foreign Assistance Act which stipulates that 'no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.'

¹⁰⁵ See, in this regard, e.g. Alexandra Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons', *International review of the Red Cross*, Vol. 87, No. 859 (September 2005), pp. 467–496.

¹⁰⁶ See Susan Marks & Andrew Clapham, *International Human Rights Lexicon*, Oxford University Press, Oxford, 2005, p. 13.

¹⁰⁷ Alexandre Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons', *International review of the Red Cross*, *op. cit.*, p. 480. Boivin cites 1995 case law from the European Commission on Human Rights in *Tugar v. Italy* whereby it was stated that:

There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered.

¹⁰⁸ Section on Criteria, §B3, available at: www.adh-geneve.ch/RULAC/pdf/Chairmans-draft-paper.pdf.

¹⁰⁹ Several of these rights are reflected in regional treaties and codes of conduct seeking to regulate the arms

Common position on arms trade, which restricts arms exports to countries which breach humanitarian law, seriously violate human rights, also considers the socio-economic situation of the recipient country. It states, in its criterion eight, that:

Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.¹¹⁰

The Genocide Convention

Whether committed in time of peace or in time of war, genocide is a crime under international law¹¹¹ and States are obliged to prevent and punish it, and refrain from complicity in it. It is generally agreed that the provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, the *1948 Genocide Convention*) has become part of customary international law binding on all States and has also been recognised as a peremptory norm of international law.¹¹² In the context of the arms trade, there may be significant legal implications for a State or private individuals that deliver arms to a State or for private individuals involved in the commission of genocide. Two situations relevant to the arms trade may be distinguished: complicity in genocide,¹¹³ and the obligation to prevent genocide.¹¹⁴

Complicity in genocide

The duty to refrain from complicity in genocide is not limited to acts of genocide committed by another State but also to international organisations¹¹⁵ and other non-

trade.

¹¹⁰ Official Journal of the European Union (2008) Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment. The Common Position updates and replaces the European Union Code of Conduct on Arms Exports adopted by the Council on 8 June 1998, Council of the European Union, European Union Code of Conduct on Arms Exports, document 8675/2/98 Rev 2, Brussels, 8 June 1998.

¹¹¹ Article II:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, 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.

¹¹² L. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', *Review of International Studies*, 34, 2008, p. 450.

¹¹³ Article III of the Convention includes, in addition to the crime of genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. There is no substantive distinction between the notion of 'complicity in genocide' and the concept of Article 16 of the ILC's Articles on State Responsibility on 'aid and assistance', except that the latter applies only when the wrongful act is committed by a State and not private individuals.

¹¹⁴ Article I states that: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

¹¹⁵ In recent years there has been a growing acceptance that international organisations may be responsible

State actors. Article III(e) refers to both the international responsibility of States and the criminal responsibility of individuals.¹¹⁶ In the landmark 2007 case of *Bosnia and Herzegovina v. Serbia*,¹¹⁷ which interpreted the 1948 Genocide Convention, the ICJ observed that ‘complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide’ and therefore that ‘complicity results from commission’.¹¹⁸ In the situation where an arms transfer aids another State or private individuals to commit genocide, a subjective element is required for State complicity to be established. However, it is not clear whether the assisting State must share the specific intent of the principal perpetrator or whether the mere knowledge of the intent of the perpetrator is required for complicity.¹¹⁹

Obligation to prevent genocide

In the *Bosnia and Herzegovina v. Serbia*¹²⁰ case, the ICJ held that the obligation on each contracting State to prevent genocide is ‘both normative and compelling’.¹²¹ States Parties to the 1948 Genocide Convention must ‘employ all means reasonably available to them, so as to prevent genocide so far as possible.’¹²² A State may violate the obligation to prevent genocide, therefore, if it had ‘manifestly failed to take all measures to prevent

for internationally wrongful acts imputable to them. Under international law, many international organisations, such as the UN enjoy a legal personality that is distinct from that of its member States. In acting as member of an organ of an international organization, a state could be held responsible for the conduct and position it has taken in the organisation. R. Wilde, ‘Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake’, *Journal of International and Comparative Law*, No. 416, 2006, p. 401. See the Advisory Opinion of the ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, 11 April 1949, available at: <http://www.icj-cij.org/docket/files/4/1835.pdf> (last visited Nov. 2008). *Draft Articles on the Responsibility of International Organizations* (as adopted so far by the ILC), UN Doc. A/62/10, 2007, and *Reports on Responsibility of International Organizations*, Giorgio Gaja, Special Rapporteur.

¹¹⁶ Article IV of the Genocide Convention. ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, ICJ Report, §167.

¹¹⁷ The Court had to determine whether or not Serbia was responsible for the genocide perpetrated by the Serbian Army of Bosnia in July 1995. By clear majority, the Court found that, while no direct participation in the commission of genocide by the Serbian government was determined, it was however in breach of Article 1 of the Convention for failing to fulfil its obligation to prevent genocide and for failing to punish the crime by not apprehending and transferring to ICTY all individuals indicted for participating in the commission of the crime of genocide, particularly Radovan Karadzic and Ratko Mladic. ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, ICJ Report. The core arguments about the duty to prevent genocide are explained in Chapter IX of the case.

¹¹⁸ *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, *op. cit.*, §432.

¹¹⁹ Article 16 ILC’s Articles on State Responsibility and its commentary may serve as a guidance. The ICJ in the *Bosnia and Herzegovina v. Serbia and Montenegro* case stated that ‘...although “complicity”, as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the “aid or assistance” furnished by one State for the commission of a wrongful act by another State. In this connection, reference should be made to Article 16 of the ILC’s Articles on State Responsibility, reflecting a customary rule...’ (ICJ Reports 2007, paras. 419–420).

P. Palchetti, ‘State Responsibility for Complicity in Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention- A Commentary*, OUP, pp. 389–390.

¹²⁰ ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, ICJ Report.

¹²¹ *Ibid.* §427.

¹²² *Ibid.*, §430.

genocide which were within its power, and which might have contributed to preventing the genocide.¹²³ This means that irrespective of the actions taken by the UN, States still have the obligation to take all the appropriate measures they deem necessary in order to prevent genocide. The Court held that ‘the obligation of States is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible’.¹²⁴ The responsibility in this respect is thus ‘one of conduct and not one of result’.¹²⁵ The Court articulated a number of parameters to guide this assessment, which include ‘the capacity to influence effectively the action of persons likely to commit, or already committing, genocide’, ‘the geographical distance of the State concerned from the scene of the events’, and ‘the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.’¹²⁶

The Court also adds that ‘a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.’¹²⁷ In other words, the duty to prevent genocide applies as soon as a State knows or reasonably should have known that genocide is occurring.

In the context of arms trade, the analysis described above illustrates possible legal implications according to the rules prohibiting genocide when the provision of arms contributes materially to the commission of the crime of genocide. For instance, the armed conflict in Darfur, which has claimed thousands of lives, has prompted the International Criminal Court to issue an arrest warrant for Sudanese President al-Bashir on charges of genocide, war crimes, and crimes against humanity in Darfur. The States who have provided military assistance or supplied arms to Sudan with the knowledge that genocide may be occurring or may have occurred could entail legal responsibility for violation of the obligation to prevent or complicity in genocide.

International Criminal Law

International criminal law is that body of international law that regulates the establishment of criminal responsibility for individuals accused of having committed international crimes.¹²⁸ Such crimes are defined in the different statutes creating international criminal tribunals¹²⁹ as well as in certain human rights treaties.¹³⁰ Outside the purview of treaty

¹²³ *ibid.*

¹²⁴ *Ibid.* para. 430.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* para. 430.

¹²⁷ *Ibid.* para. 431.

¹²⁸ A more complete definition of international criminal law is given by Cassese: ‘International criminal law (henceforth: ICL) is a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, terrorism) and to make those persons who engage in such conduct criminally liable. They consequently either authorize states, or impose upon them the obligation, to prosecute and punish such criminal conducts. ICL also regulates international proceedings before international courts and tribunals, for prosecuting and trying persons accused of such crimes.’ Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 3.

¹²⁹ See the Statutes establishing the International Criminal Tribunal for ex-Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

¹³⁰ See notably the 1984 Convention against Torture or the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.

law, one can safely assert that under customary international law, such crimes include genocide, crimes against humanity, torture, and war crimes.¹³¹

The illicit trade of weapons is not considered to be an *international* crime, although it is criminalised under the national law of some States as required notably by the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.¹³² In addition, it is within the discretion of States to enact proper legislation (criminal or administrative) to establish the legal responsibility attached to any violations of a UN Security Council embargo.¹³³

However, the international criminal responsibility of *individuals* implicated in the trade of weapons can be engaged if they are deemed to be complicit in the commission of an international crime.¹³⁴ Although case law is still limited, the few relevant precedents are described and analysed below. Thus, international criminal law is potentially of relevance for any individual, including private arms brokers, members of non-State armed groups, or government officials¹³⁵ who engage in the illicit trafficking of arms.¹³⁶ This area needs more attention at both national and international levels whether or not an ATT is ultimately adopted.

‘Aiding and abetting’ international crimes (other than genocide)

Most of the statutes establishing international *ad hoc* or permanent criminal tribunals include provisions on complicity. Article 7, paragraph 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) stipulates that:

¹³¹ At the First Review Conference of the Rome Statute of the ICC in 2009, a definition of aggression was adopted by the States Parties to the Statute. Hence aggression, as defined under the amended Statute, can also be qualified as an international crime... See further: www.adh-geneva.ch/RULAC/other_issues.php?id_issues=8 (last visited 21 January 2011).

¹³² See Article 5 (b) which states that: ‘Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally: (b) Illicit trafficking in firearms, their parts and components and ammunition.’

¹³³ See for example Security Council resolution 1196 which ‘[e]ncourages each Member State, as appropriate, to consider as a means of implementing the obligations referred to in paragraph 1 above the adoption of legislation or other legal measures making the violation of arms embargoes established by the Council a criminal offence’. S/RES/ 1196 (1998), §2.

¹³⁴ The issue of State responsibility for aiding and abetting serious violations of international law is dealt with below (see, *infra*, section 7.)

¹³⁵ Indeed, government officials are not covered by immunity of jurisdiction before international criminal tribunals. See, e.g., Article 27 of the ICC Statute.

¹³⁶ The criminal responsibility of enterprises, such as arms manufacturing companies, which commit or are complicit in the commission of international crimes cannot yet be engaged at the international level. However, the establishment of such a responsibility is possible within domestic systems whether through tort law or criminal law. See notably Article 5 of the Protocol against Illicit Manufacturing of and Trafficking in Firearms, their parts and components and ammunitions which requires State Parties to establish as criminal offence the illicit manufacturing and trafficking of firearms. See also the Report of the International Commission of Jurists, Expert Legal Panel on Corporate Complicity in International Crimes, ‘Corporate Complicity and Legal Accountability, Vol. 2 Criminal Law and International Crimes, 2008, available at www.icj.org (last accessed 24 January 2011); Andrew Clapham, ‘Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups’ *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 899-926; K. Jacobson, ‘Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transaction Facilitate War Crimes and Crimes Against Humanity’, *Air Force Law Review*, Vol. 56, 2005, pp. 167-232.

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

A similar provision can be found in the Statute of the International Criminal Tribunal for Rwanda (ICTR).¹³⁷ Case law of both *ad hoc* tribunals has specified the requisite criteria for the establishment of ‘complicity’ in the commission of an international crime.

In the *Furundjiza* case, the ICTY set out the conditions for a crime of ‘aiding and abetting’ as follows:

the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist in the commission of the offence.¹³⁸

In other words, there are two conditions, objective and subjective attached to the notion of ‘aiding and abetting’. The objective condition is constituted by the fact that the accessory offers to the principal author of the crime *practical assistance, encouragement or moral support*. Such assistance must also have a substantial impact on the perpetration of the crime.¹³⁹ In relation to the arms trade, the ICTR has observed that providing the means for the commission of a crime would include

those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.¹⁴⁰

The subjective element of aiding and abetting resides in the *knowledge* that the actions in question assists in the commission of the crime. That implies *awareness* that the principal author of the crime will be using or has used the assistance for the purpose of engaging in criminal conduct.¹⁴¹

With regard to the International Criminal Court (ICC), Article 25, paragraph 3(c) of the *1998 Rome Statute* also provides that ‘a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court’ if that person:

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

According to scholars the *mere fact of supplying weapons* which have been used to commit one of the international crimes covered by the ICC statute would be sufficient to give rise to the individual responsibility of the accomplice. Indeed, Article 25 seems to define the crime of complicity in a wider manner than the ICTY or ICTR since ‘a direct

¹³⁷ Article 6 of the Statute of ICTR.

¹³⁸ ICTY, *Prosecutor v. Anto Furundjiza*, Case No. IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, §249.

¹³⁹ Cassese, *op. cit.*, p. 215.

¹⁴⁰ ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, §536.

¹⁴¹ *Idem*, p. 217.

and substantial assistance is not necessary and (...) the act of assistance need not to be a condition *sine qua non* of the crime'.¹⁴²

Nevertheless, with regard to the subjective condition of complicity, i.e. the knowledge that the weapons will be used or could be used for the commission of an international crime, the—admittedly scant— jurisprudence of the ICC suggests an even stricter interpretation than the *ad hoc* tribunals. Indeed, the language used in Article 25 – ‘for the purpose’ of facilitating the commission of the crime – has been interpreted as requiring not just knowledge or awareness but also *intent* to commit the crime.¹⁴³ In that sense, to establish the criminal responsibility of an arms broker for the commission of an international crime requires not only proof of the actual transfer of weapon, but also of this person’s will that the crime be committed.¹⁴⁴

The impact of international criminal law on a future ATT

As noted by one author, the end of the Cold War marked a retreat from governmental oversight over the arms trade, leaving the way open for illicit arms trade.¹⁴⁵ Although there is little case law on the issue, practice at national level confirms that trafficking of arms that facilitates the commission of an international crime engages the individual criminal responsibility of the broker. Thus, in 2007, The Hague Court of Appeal convicted Frans Van Anraat for complicity in war crimes for having supplied chemical weapons to Iraq, which were used by Sadaam Hussein to gas the Kurds.¹⁴⁶ In that case, the Court considered that the accused

was very aware of the fact that – in the ordinary course of events – the gas was going to be used ... (and that) the defendant, notwithstanding his statements concerning his relevant knowledge, was aware of the – also then known – unscrupulous character of the then Iraqi regime.¹⁴⁷

¹⁴² See Kai Ambos, ‘Article 25’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos, Baden-Baden, 1999, p. 483; see also Alexandra Boivin, *op. cit.*, pp. 482–483, Andrew Clapham, ‘On complicity’, in Marc Henzelin and Robert Roth (eds.), *Le droit pénal à l’épreuve de l’internationalisation*, Bruylant, Brussels, 2002, p. 254.

¹⁴³ See Robert C. Thompson, Anita Ramasastry and Mark B. Talyor, ‘Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes’, *The George Washington International Law Review*, vol. 40, 2009, p. 860-862.

¹⁴⁴ See in that sense, but with regards to an Alien Tort Statute (ATS) action, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, United States Court of Appeals for the Second Circuit, N° 07 0016-CV, October 2, 2009. The court noted at p. 41 that ‘applying international law, [...] *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone. Even if there is a sufficient international consensus for imposing liability on individuals who purposefully aid and abet a violation of international law, [...]. Only a purpose standard, therefore, has the requisite ‘acceptance among civilized nations’. See also the *Amicus Curiae* for that case submitted by David J. Scheffer in Support of Petitioner and Re-hearing en banc. More specifically on the arms trade, see Katharine Orlovsky, ‘International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms brokers’, *Hastings International and Comparative Law Review*, Vol. 29, pp. 361 *et seq.*

¹⁴⁵ Claudette Torbey, ‘The Most egregious Arms Broker: Prosecuting Arms Embargo Violators in the International Criminal Court’, *Wisconsin International Law Journal*, 2007-2008, p. 335. See also Kathi Austin, *Illicit Arms Brokers: Aiding and Abetting Atrocities*, *Brown Journal of World Affairs*, Vol. IX, No. 1, 2002, pp. 203–216.

¹⁴⁶ Judgment in the case *Public Prosecutor and Frans Van Anraat*, Hague Court of Appeal, Judgment of 25 October 2007, available at *Oxford Reports on International Law* 753 (NL 2007); See also Harmen van der Wilt, ‘Genocide v. War Crimes in the Van Anraat Appeal’, *Journal of International Criminal Justice*, No. 6, pp. 557–567.

¹⁴⁷ *Public Prosecutor and Frans Van Anraat*, Hague Court of Appeal, Judgment of 25 October 2007, *op. cit.*, §16.

In 2006, the District Court of The Hague had also convicted Guus Van Kouwenhoven for complicity in war crime for providing the then-Liberian President, Charles Taylor, with weapons which were used to fight a civil war characterised by massive violations of human rights and humanitarian law.¹⁴⁸ Guus Van Kouwenhoven was subsequently acquitted on appeal for lack of evidence in 2008,¹⁴⁹ but this does not change the fact that individuals can potentially be held criminally responsible for complicity in the commission of an international crime through the selling of arms.

Although this jurisprudence comes from national legal systems, it exemplifies a practice of States that can be of relevance not only for the formation of a customary rule of international law, but which could also be used by an international Court, such as the ICC, for the interpretation of its own provision on complicity.¹⁵⁰

The ICC is seen by some as a promising way to establish the criminal responsibility of arms dealers who are complicit in international crimes, in particular because of the lack of national legislation on the matter, which allows the broker to operate in a grey zone.¹⁵¹ In addition, most existing domestic regulation on the arms trade limits the jurisdiction of the courts to the persons and property present within the territorial boundaries of the state. Since many brokers are involved in third-country arms deals, wherein the weapons never actually pass through the country in which the broker operates, national law is ineffective.¹⁵²

In conclusion, international criminal law is certainly a relevant body of law with regard to the arms trade. The ICC could become a powerful tool to combat illicit arms deals that contribute to the commission of international crimes. In particular, it could target the illegal activities of arms brokers and members of non-State armed groups who operate today mostly with impunity. However, the ICC can only serve as a complement to a more effective legal system at national level. In view of the elaboration of a future ATT, due consideration should be given to an international criminal law clause which would ensure that States Parties adopt meaningful domestic criminal legislation governing the illicit arms trade and which would ensure the establishment of criminal responsibility for those complicit in the commission of international crimes, irrespective of where their activities take place.

¹⁴⁸ Judgment in the case of *Guus Van Kouwenhoven*, District Court of The Hague, Criminal Law Section, Public Prosecutor's Office No. 09/750001-05, 7 June 2006.

¹⁴⁹ See Judgment in the case against Guus Van Kouwenhoven, Hof Den Haag, 10 March 2008, LJN BC7373

¹⁵⁰ For an assessment of the influence of national practice relating to complicity on the ICC, see, e.g., Markus D. Dubber, 'Criminalizing Complicity, A Comparative Analysis', *Journal of International Criminal Justice*, No. 5, 2007, pp. 977–1001.

¹⁵¹ As mentioned by Claudette Torbey: 'Illicit brokering occurs when arms are transferred without government authorization, but since few countries have a system of authorization for brokering activities, brokers normally operate in a grey zone'. She adds in a footnote that: 'Grey market transfers occur when government agencies or government-backed private entities covertly sell or deliver arms to illicit recipients in another country.' Torbey, *op. cit.*, p. 336.

¹⁵² *ibid.*, p. 349.

UNIDIR RESOURCES

About UNIDIR

The United Nations Institute for Disarmament Research (UNIDIR)—an autonomous institute within the United Nations—conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to the variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and governments. UNIDIR's activities are funded by contributions from governments and donor foundations.