

**WHAT IS LEGAL? WHAT IS ILLEGAL?**  
**Limitations on Transfers of Small Arms under International Law**

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**Introduction**

1. The aim of this paper is to identify the limitations on transfers of small arms imposed by international law today. After some preliminary remarks, the first section of this paper will review express prohibitions on transfers of weapons; the second section will address other binding prohibitions and limitations; and the third will identify other limitations, some based on soft law and some on domestic provisions. The conclusion will try to determine the existence and content of any emerging rule of customary law governing transfers of weapons.
2. By focusing on international law the discussion is narrowed in three important ways. First, it does not address limitations or requirements imposed by national legal systems - ordinarily those of the importing or exporting states.
3. Secondly, this approach focuses on the activities of *states* - the principal subjects of international law. While states remain important players in the arms trade today, the reality is that private individuals play increasingly important roles. Their conduct however, is only marginally regulated by international law.
4. Finally, this paper only considers rules governing *transfers* of weapons. This too, is but one aspect of a wider problem as there are numerous other activities which also must be considered and regulated to avoid the proliferation of weapons: the production of the weapons - including licensed production - the brokering of arms deals, as well as related activities such as the financing of the transactions and the transport of the weapons.
5. What are the limitations on transfers of arms under international law today? At first sight this appears to be blind spot in international law. The situations where there are express limitations are few and far between. However, if one looks beyond the field of disarmament and sanctions, into other areas of law, including international humanitarian and human rights law, it becomes apparent that there exist a number of significant limitations on states' freedom to transfer or authorise transfers of small arms. In fact, it is possible to discern the emergence of a rule of customary law based on non-binding international codes of conduct and their counterparts in national law, requiring exporting states to assess the respect for fundamental principles of international law in recipient states and to refrain from authorising exports in situations where the weapons will be used in violation of these principles. This paper will deal firstly with express limitations and then turn to other more "implicit" restrictions.

**A. Express prohibitions**

6. The most basic form a prohibition can take is a multilateral or bilateral agreement banning transfers. As matters stand today, the UN has sponsored multilateral negotiations for the

non-proliferation of weapons of mass destruction, for example the Nuclear Non-Proliferation Treaty, the Chemical Weapons Treaty and the Biological Weapons Convention, little progress has been made in the field of conventional weapons. With the exception of antipersonnel mines, the only specific agreement prohibiting transfers of light weapons currently in force is the regional and non-binding, three year moratorium concluded by ECOWAS in 1998.

7. Nevertheless, express prohibitions on all transfers of certain types of weapons or on transfers of any types of weapons to specific states can be found in international humanitarian law and in sanctions imposing embargoes on transfers.

#### 1. International Humanitarian Law

8. International humanitarian law (“IHL”) is the body of rules that in times of armed conflict protects persons who are not or no longer taking part in the hostilities. It also restricts the means and methods of warfare that may be employed. In so doing, it imposes a number of limitations - some express and some implicit – on states’ freedom to transfer weapons.
9. The express limitations are “weapon-specific” prohibitions. Numerous conventions prohibiting the use of specific weapons have been concluded, ranging from the 1869 St Petersburg Declaration Renouncing the Use, in Time of War, of Exploding Projectiles, to the 1899 Declaration concerning Expanding Bullets, the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the 1972 Biological Weapons Convention, 1980 Convention on the Use of Certain Conventional Weapons which may be Considered Excessively Injurious, the 1993 Chemical Weapons Convention and, most recently, the 1997 Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines.
10. A number of these conventions not only proscribe the use of the weapons in question but also their transfer. This is the approach adopted by the Biological and Chemical Weapons Conventions, the two most recent protocols to the 1980 Conventional Weapons Convention (Booby traps as amended and Blinding Laser Weapons) and the 1997 Landmines Convention. Silence on the issue of transfers in the other instruments should not, however, be equated with freedom to transfer the weapons. Considering that the more recent conventions expressly prohibit not only the use of weapons but also their transfer, it can be argued that they reflect a development in this area of law and that this prohibition on transfers should be read into the other earlier treaties. This conclusion is supported by the fact that it would be difficult to reconcile a state’s freedom to transfer a weapon whose use is prohibited with the overarching duty on states to respect and ensure respect for IHL enshrined in Article 1 of the Geneva Conventions.

#### 2. Embargoes on transfers of weapons

11. More general prohibitions of transfers of all weapons to specific states or regions can be established by the imposition of embargoes by the United Nations or regional organisations. These are “recipient specific” prohibitions. For sake of brevity, this paper will only refer to embargoes imposed by the UN, but the European Union, for example, has imposed embargoes on transfers of weapons, as have a number of states, unilaterally.
12. Without going into the intricacies of the rules governing the imposition and implementation of sanctions, in the exercise of its responsibility for the maintenance of international peace

and security, the UN Security Council has, in recent years, made increasing use of its power to impose binding sanctions in situations which it determines amount to a threat or to breach of the peace. These sanctions have often included the imposition of embargoes on transfers of arms to the state found to be violating international law. In certain cases the embargoes have extended to neighbouring states and, in recent interesting examples to non-state actors such as the UNITA guerrillas in Angola and the former *forces armées rwandaises*.

13. Security Council decisions to impose arms embargoes are taken under Chapter VII of the UN Charter and thus are binding on all members of the UN. Obligations ensue on two levels: first, states themselves are prohibited from transferring the weapons to the embargoed state, and secondly, they must also take the necessary measures to implement, apply and enforce the embargo internally to make it operative against private actors within their jurisdiction. The precise nature of the responsibility for violations of the embargo by private actors on the national level, that is, whether transferring of weapons in violation of the embargo will be a civil or criminal offence, is left to the discretion of states in their implementing measures. For example, in the United Kingdom all violations of the embargo are considered criminal offences carrying imprisonment sentences, while in Italy embargo violations are considered “administrative” offences, punishable with a fine based upon the value of the prohibited transaction but falling far below this value. In a resolution of 1998, however, the Security Council called upon states to adopt legislation making the violation of arms embargoes a criminal offence.
14. In practice, however, the enforcement of arms embargoes has proven problematic and states and private actors have violated them with impunity. The Security Council has recently begun to develop mechanisms to follow up and oversee their implementation. Examples include the International Commission of Inquiry established to investigate allegations of violations of the embargo against Rwanda and, more recently, the Panel of Experts appointed to investigate alleged violations of the sanctions imposed against UNITA guerrillas in Angola. This Panel’s report, issued earlier this year, surprised many by its specific identification of governments, individual politicians and private persons involved in embargo-busting. Among its recommendations to ensure respect of the embargo the Panel of Experts included the imposition of sanctions against leaders and governments found to have deliberately broken the embargo; embargoes on sales by the violating states to named countries for a period of three years followed by a probation period of a further three years; and the inclusion of compliance with UN sanctions regimes among the criteria considered by NATO and the EU when evaluating new candidates for membership.
15. Furthermore, although useful as a mechanism for limiting the influx of weapons into an area of conflict, embargoes are of limited use in preventing this build-up as they are only imposed once the Security Council determines that there exists a threat or breach of the peace. The embargoes can do nothing to head off situations of violence falling short of this threshold. In addition, lack of political will within the Security Council or other relevant bodies has frequently prevented or delayed the imposition of sanctions.

## **B. Other prohibitions and limitations**

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<sup>i</sup> Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, Enclosure to Annex I to UN Doc., S/20000/203, 10 March 2000, paras 52-56.

16. In addition to these express limitations, the law regulating other areas imposes additional restrictions on states' freedom to make or authorise transfers of weapons. While the limitations referred to so far make *any* transfer illegal, many of these additional limitations are dependent on the *use* made by the recipient state of the weapons. The exporting state's responsibility is based upon its participation in the recipient state's wrongful act under international law.
17. As many of the restrictions on transfers of weapons arise from this responsibility for participation in the wrongful act of another state, it is necessary to go into this question in some detail. If a state commits a violation of international law it bears primary responsibility for it. However, there may be circumstances where a state may have "secondary" responsibility for a violation of law committed by another state. The International Law Commission – the United Nations body established to promote the progressive development of international law and its codification – has addressed this issue in the context of its preparation of the Draft Articles on State Responsibility. Draft article 16, as adopted by the drafting committee in 2000, provides as follows:

**Aid or assistance in the commission of an internationally wrongful act**

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.<sup>ii</sup>

18. Thus, in situations where state A carries out an act, not necessarily illegal in itself, which assists state B to commit a wrongful act, if state A was aware of state B's (intended) wrongful act and this act would have been wrongful if state A had committed it, state A may be responsible for having participated in the wrong committed by state B. The commentary to an earlier version of the draft article, gave a number of examples of this "secondary" or "indirect" responsibility. They included a state granting overflight or landing rights to another state for an unlawful military operation or, more to the point, "a State that knowingly supplies arms to another State for the purpose of assisting the latter to act in a manner inconsistent with its international obligations".<sup>iii</sup> An obvious example would be if the recipient state was perpetrating a genocide. It should be noted that the current version of the draft article does not require the state A to *intend* to assist state B in the commission of the wrongful act. A lower threshold of liability is adopted: it is sufficient that state A is aware of circumstances of state B's conduct.<sup>iv</sup> The effect of this principle is that manner in which the recipient state will use the weapons may affect the lawfulness of the transfer.

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<sup>ii</sup> International Law Commission, Fifty-second session, 1 May–9 June and 10 July–18 August 2000, State Responsibility, Draft articles provisionally adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.600.

<sup>iii</sup> *Yearbook of the International Law Commission* 1978, Vol.II, Part 2, p.103.

<sup>iv</sup> For a detailed discussion of the question of intention or knowledge of wrongfulness, see the report by the Special Rapporteur, International Law Commission, Fifty-first session, 3 May – 23 July 1999, Second Report on State Responsibility, UN Doc. A/CN.4/498/Add.1, paras. 178- 179.

19. For the sake of completeness reference should also be made to the Draft Article 17 which addresses the responsibility of a state for exercising direction and control over the commission of an internationally wrongful act. This article provides as follows:

**Direction and control exercised over commission of an internationally wrongful act**

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.<sup>v</sup>

20. Although addressing a more specific situation than the previous provision, and one where the state bears primary responsibility for the violations, this provision may also give rise to limitations on freedom to transfer weapons in situations where the transferring or recipient state, although not committing violations of the law itself, exercises control over a third state, or arguably a non-state actor, that will commit such violations.

1. The Charter of the United Nations

21. The UN Charter neither expressly prohibits nor permits the use or transfer of any particular weapon. However, its provisions regulating recourse to the use of force are of relevance to arms transfers. The cornerstone of the Charter is the prohibition on the use or the threat of the use of force enshrined in Article 2(4). All other provisions, including those permitting resort to force in certain circumstances, must be read in the light of this prohibition. Thus, although the Charter preserves states' inherent right to self defence - a right often invoked as implying states' right to acquire weapons with which to defend themselves - this right and other states' corresponding right to supply weapons is subject to a number of limitations.
22. Also of relevance are the Charter provisions dealing with disarmament and with arms regulation and the initiatives of the Security Council and General Assembly in this field. Arms regulation is, of course, of crucial importance to the UN's primary role of maintaining international peace and security.<sup>vi</sup> In this context, it should be pointed out that it is well-established that an accumulation of weapons has destabilising effects and can, in certain circumstances, amount to a threat of use of force in violation of the Charter. This finding imposes responsibilities on importing and exporting states to limit the quantity of imports. In the words of the UN Disarmament Commission's 1996 *Guidelines for International Arms Transfers*:

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

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<sup>v</sup> International Law Commission, Fifty-second session, 1 May-9 June and 10 July-18 August 2000, State Responsibility, Draft articles provisionally adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.600.

<sup>vi</sup> See, for example, the Report of the Disarmament Commission, *Guidelines for international arms transfers in the context of General Assembly resolution 46/36 of 6 December 1991*, UN Doc. A/51/42, 22 May 1996, Annex I at para. 6.

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

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23. While the destabilising effects of accumulations of weapons may impose quantitative restrictions on transfers of weapons, if it is apparent that the receiving state will use the weapons in violation of the prohibition of the use of force, the transfer will be prohibited even in the absence of a specific embargo. A state that transfers weapons in such circumstances would obviously be participating in the illegal conduct of the receiving state.

## 2. Customary law prohibitions of the use of force and interference in the domestic affairs of another state

24. Alongside the express prohibition in the UN Charter, a prohibition on the use of force exists in customary international law, imposing the same limitations on transfers of weapons. Additional limitations can be found in other rules of customary law. One such limitation arises from the principle of non-intervention in the domestic affairs of another state. Thus, if state A transfers weapons into the territory of state B without complying with state B's domestic rules for imports of weapons and without the latter's authorisation, not only does the failure to respect the applicable rules make the transfer illegal under national law, but the supply of weapons can amount to unlawful interference in state B's internal affairs. Accusations of interference are all the more likely if the weapons are supplied to opposition forces in the recipient state.

25. In 1965 the General Assembly adopted the Declaration on the Inadmissibility of Intervention<sup>viii</sup> in the Domestic Affairs of States and Protection of their Independence and Sovereignty. In addition to reaffirming the principle of non-intervention proclaimed in the charters of a number of regional organisations, the General Assembly declared that:

1. No State has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other 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 condemned.
2. ... Also, no State shall organize, assist, forment, 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.

26. The question of interference in the domestic affairs of another state was also addressed by the International Court of Justice in *Case concerning Military and Paramilitary Activities in and against Nicaragua* between Nicaragua and the United States.<sup>ix</sup> The Court found that by training, arming, equipping, financing and supplying the contras forces or otherwise

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<sup>vii</sup> *Id.*, paras. 20 and 21.

<sup>viii</sup> General Assembly resolution 2131 (XX), 21 December 1965. These principles were reiterated in the Declaration on Principles of International Law concerning Friendly Relations among States in Accordance with the Charter of the United Nations adopted by the General Assembly in resolution 2625 (XXV), 1970.

<sup>ix</sup> *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America)*, ICJ Reports 1986, p.14.

encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua the United States had acted in breach of the<sup>x</sup> obligation under customary international law not to intervene in the affairs of another state.

27. It is thus well-established that that transfers of weapons in such circumstances can be characterised as unlawful intervention in the internal affairs of another state and as such a prohibited. On the basis of the principle of responsibility for participation in the wrongful act of another state, this prohibition also extends to seemingly lawful transfers if it is apparent the recipient state will use the weapons for an unlawful interference in the internal affairs of a third state.

### 3. Terrorism

28. A similar approach has been adopted with regard to transfers of weapons for use in acts of terrorism. The numerous initiatives of the international community to prevent terrorism have often addressed and outlawed the provision of weapons for use for acts of terrorism. The first attempt to codify the prohibition on this type of transfer of weapons was the League of Nations' 1937 Convention for the Prevention and Punishment of Terrorism<sup>xi</sup> required parties to criminalise "the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever" of an act of terrorism.<sup>xii</sup> The 1937 convention never entered into force, but the principles it enshrined, prohibiting interference and the criminalisation of transfers of weapons to be used for terrorist acts were to reappear in numerous other international instruments.

29. The General Assembly's 1970 Declaration on Principles of International Law reiterated the duty on states to refrain<sup>xiii</sup> from "organising, instigating, assisting or participating in ... terrorist acts in another state". A similar prohibition against the provision of an direct or indirect assistance to terrorists was repeated in the General Assembly's 1988 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.<sup>xiv</sup> More expressly, the International Law Commission's 1988 Draft Code of Crimes Against the Peace and Security of Mankind classified intervention in the affairs of a state as crime against the peace and defined it as "forming [armed] subversive or terrorist activities by organising, assisting or financing such activities or by supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that state of its sovereign rights".<sup>xv</sup>

30. Thus in this case too, seemingly lawful transfers of weapons would be prohibited if the recipient of the weapons used them to commit acts of terrorism.

### 4. International Humanitarian Law

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<sup>x</sup> *Id.*, para 292(3).

<sup>xi</sup> Convention for the Prevention and Punishment of Terrorism, November 16, 1937, C.546.M.383.1937.V., *série de publications de la Société des Nations, Questions Juridiques*, 1937, V.10.

<sup>xii</sup> *Id.*, Article 2.5.

<sup>xiii</sup> *Id.*

<sup>xiv</sup> General Assembly resolution 42/22 (1988) of 17 March 1988, para. I.6.

<sup>xv</sup> *Report of the International Law Commission*, 1988, paras. 246-255. Similar statements prohibiting states from providing direct or indirect assistance to terrorist activities have been made at a regional level in the Conference on Co-operation and Security in Europe and by the representatives of the G7/G8 nations.

31. In addition to the express prohibitions on the use and transfer of certain weapons discussed above, IHL imposes a number of other important limitations on states' freedom to transfer weapons. One limitation, like the prohibitions enshrined in the treaties, is based on the nature of the weapons and is founded on the two cardinal principles of IHL according to which the legality of every weapon is assessed: the principle of distinction between combatants and non-combatants prohibits the use of weapons<sup>xvi</sup> that are intrinsically incapable of distinguishing between combatants and non-combatants; and the prohibition on the use of weapons "of a nature to cause superfluous injury or unnecessary suffering"<sup>xvii</sup>. The conventions outlawing the use of specific weapons discussed 1 above are just one example of how these principles are put into practice. A number of other types of weapons and ammunition, whose use has not been regulated by a convention may, nevertheless be prohibited on the basis of these customary rules of IHL. With regard to these weapons too, an argument in favour of a prohibition on the transfer of the weapon could be made on the basis of the illegality of its use coupled with states' duty to respect and ensure respect for IHL.
32. Secondly, the manner in which weapons, not by their very nature unlawful, are used may impose limitations on their transfer. Common article 1 to the four 1949 Geneva Conventions, which codify customary rules of IHL, obliges states to "respect and ensure respect" for the rules of IHL. While the primary responsibility for compliance with international law lies with the actual users of the weapons, states have the responsibility to ensure respect for humanitarian law, and the ICRC argues that states – and businesses - engaged in the production and export of small arms<sup>xviii</sup> should bear some responsibility for the use made of the weapons and ammunition they sell. A state which transfers weapons in circumstances where it is likely they will be used to commit serious violations of IHL would clearly be failing its duty to ensure respect for IHL.
33. Serious violations of humanitarian law include the "grave breaches" identified in all four Geneva Conventions, applicable in international armed conflict, which include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer of a protected person and extensive destruction and appropriation of<sup>xix</sup> property not justified by military necessity and carried out unlawfully and wantonly" and those identified in common article 3 to the conventions, applicable in internal conflicts. These violations include: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages of personal dignity, in particular humiliating and degrading treatment, and the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples". The term is also capable of a more expansive interpretation, covering all violations of IHL for which there is individual criminal responsibility. The most recent codification of such

<sup>xvi</sup> Article 51(4) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I").

<sup>xvii</sup> Article 35(2) Protocol I. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, p.226, para. 78.

<sup>xviii</sup> ICRC, *Arms Availability and the Situation of Civilians in Armed Conflicts*, 1999 ("the 1999 ICRC Report").

<sup>xix</sup> Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions of 1949.

violations, collectively referred to as “war crimes”<sup>xx</sup> is to be found in the Statute of the International Criminal Court adopted in 1998.

#### 5. Human Rights Law

34. Human rights law is another important source of limitations on transfers of weapons. If a recipient state will use the weapons to commit serious violations of human rights then, exporting states are prohibited from providing the weapons. The most obvious way the weapons could be used by the recipient state in violation of human rights norms would be use by its officials to commit extra-legal or arbitrary executions; to torture or submit individuals to other forms of cruel, inhuman or degrading treatment or punishment; or to detain individuals in violations of human rights standards.
35. The prohibition of transfers could also be applicable where, rather than committing human rights violations itself through its agents, the recipient state is unable to control the private actors who have control of the weapons. Such a situation would be a violation of the state’s duty to protect the right to life. In this instance states should refrain from supplying weapons to states where it is likely they will fall into the hands of individuals over whom the government is incapable of exercising authority and control.
36. It should be noted that certain provisions of human rights treaties can be suspended in times of armed conflict. However, it is well-established that some core non-derogable rights continue to apply. These include the right to life and the prohibition on cruel inhuman and degrading treatment – the right most likely to be breached by abuse of small weapons. Thus, the fact that the recipient state is participating in an armed conflict does not preclude the limitations based on human rights from applying.

#### 6. Genocide

37. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide embodies the *ius cogens* prohibition and criminalisation of acts of genocide. Article III of the Convention includes among the criminal acts covered not only genocide, but also conspiracy to commit genocide and complicity in genocide. Therefore, it is possible for only the perpetrator but also for a state that has assisted in the perpetration of a genocide, for example by providing the weapons with which the genocide was committed, to be responsible under the convention. However, it is unlikely that states supplying weapons have the intent to “destroy in whole or in part a national, ethnical, racial or religious group” required by Article II of the Convention for their actions to amount to complicity in genocide. In situations where this intent is absent, the supply of weapons in circumstances where it is apparent that they will be used to perpetrate a genocide will nevertheless amount to a violation of international law.

#### C. Non-binding limitations

38. So far, this paper has only considered the legally binding limitations on transfers of weapons. However, there exists an important body of norms which, although not binding at present, are proposals for development or non-binding plans of action, and represent principles which could in the future become law. In the context of arms transfers these include non-binding agreements banning transfers of arms and non-binding codes of conduct.

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<sup>xx</sup> Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, Article 8, UN Doc. PCNICC/1999/INF/3.

## 1. Agreements prohibiting transfers

39. To date, the only agreement banning transfers of weapons is the Moratorium concluded on 31 October 1998 by the Member States of the Economic Community of West African States.<sup>xxi</sup> The non-binding moratorium quite simply prohibits the “importation, exportation and manufacture of light weapons in ECOWAS member states” for a renewable period of three years. Accordingly any transfer would be illegal and would give rise to state responsibility of the exporting and importing states.

## 2. Codes of Conduct

40. The idea of employing codes of conduct to regulate arms exports is not new. In 1991 the five permanent members of the Security Council adopted guidelines to this effect.<sup>xxii</sup> These provided that the states in question would avoid transfers likely to prolong or aggravate an existing armed conflict; increase tension or introduce destabilising military capability in a region; contravene embargoes or other internationally agreed restraints; be used otherwise than for legitimate defence and security needs; support international terrorism; be used to interfere in the internal affairs of sovereign states; or seriously undermine the recipient state’s economy. The methods for implementing the guidelines were left to the individual states. Following a breakdown of the discussions in 1992, no further progress was made in the implementation of the guidelines.

41. In November 1993 the Organization on Security and Co-operation in Europe adopted a document entitled “Criteria on Conventional Arms Transfers” which required states, when considering proposed transfers to take into account a number of factors concerning recipient states, including their human rights record; their record of compliance with international commitments; and the nature and cost of the arms in question in relation to the circumstances of the recipient states. The criteria provided that states would avoid transfers likely to, among other things, be used for the suppression of human rights; threaten the national security of other states; or prolong or aggravate existing conflicts or support or encourage terrorism.<sup>xxiii</sup> In 1996 the United Nations Disarmament Commission put forward Guidelines for International Arms Transfers.<sup>xxiv</sup> Although these addressed a number of issues in addition to the regulation of legal transfers, they did not establish specific criteria to be considered by exporting states.

42. The most comprehensive initiative of this kind to date is the Code of Conduct for Arms Exports adopted by the Council of the European Union in June 1998, which covers exports of military equipment and dual-use goods.<sup>xxv</sup> Apart from exports of dual-use equipment, the European Union has left the regulation of arms transfers to the exclusive competence of Member States and the Code of Conduct is the first step towards harmonisation of the Member States’ policies and regulations on transfers. Its aim is to set minimum standards to be applied by all states when considering exports of small weapons.

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<sup>xxi</sup> Economic Community of West African States, *Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa*, 21<sup>st</sup> ordinary session of the Authority of Heads of State and Government, Abuja, 30-31 October 1998.

<sup>xxii</sup> Guidelines for Conventional Arms Transfers agreed by the five permanent members of the Security Council in London, 18 October 1991, 1992 *SIPRI Yearbook* 304.

<sup>xxiii</sup> Decision of the OSCE Forum for Security Cooperation, November 1993, *FSC Journal* No.49, 24 November 1993.

<sup>xxiv</sup> Annex I of the 1996 Report of the Disarmament Commission, GAOR, 51<sup>st</sup> session, supplement No.42, (A/51/42).

<sup>xxv</sup> The European Union Code of Conduct for Arms Exports, 1999 *SIPRI Yearbook* 503.

43. The Code of Conduct requires Member States to consider requests for exports of military equipment on a case-by-case basis, assessing their compatibility with the following eight criteria before granting export authorisations:

1. Respect for the international commitments of EU Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations;
2. The respect for human rights in the country of final destination;
3. The internal situation in the country of final destination, as a function of the tension or the existence of tensions or armed conflicts;
4. The preservation of regional peace, security and stability;
5. The international security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
6. The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and its respect of international law;
7. The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions; and
8. The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

44. Not all criteria are accorded the same importance. If certain criteria are not met, the code requires states to refuse to grant the export licence. These include situations in which the export would violated the exporting state's own international obligations (item 1 above); the existence of a clear risk that the equipment in question might be used for internal repression or that it would be used aggressively against another country to assert by force a territorial claim. With regard to other criteria, states are merely required to either "exercise special caution and vigilance in issuing licences". This approach is adopted, for example, with regard to exports to countries where "serious violations of human rights have been established by the competent bodies of the United Nations, the Council of Europe of the EU", within item 2 above. Finally, with the regard to other criteria, Member States are merely required to "take into account" certain factors.<sup>xxvi</sup>

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<sup>xxvi</sup> Thus, for example, with regard to criterion 6, the code provides that:

- Member States will take into account, inter alia, the record of the buyer country with regard to:
- a. its support or encouragement of terrorism and international organised crime;
  - b. its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international armed conflicts; and
  - c. its commitment to no-proliferation and other areas of arms control and disarmament.

45. The code also contains operative provisions aimed at harmonising its application by Member States and increasing the transparency of the process. States are required to notify each other of export licenses they have refused for failure to meet the criteria. Before any Member State can grant a licence which has been denied by another Member State for an essentially identical transaction in the preceding three years, it is required to consult the state that denied the licence. Although the power to take the final decision remains with individual states, if a licence is granted in these circumstances, the licensing state will have to provide a detailed explanation of its reasoning.
46. The Code of Conduct also imposes an annual reporting obligation on states. Although intended to be confidential, recognising Member States' desire to increase transparency in this area, in 1999 the Council decided to render the report public.<sup>xxvii</sup> In addition to providing information and statistics on Member States' conventional arms exports and implementation of the code, the report also identified the guidelines adopted by the Conventional Arms Exports Working Group to enhance the practical implementation of the code. Among other things, these included the adoption of a common list of military equipment to which the code would apply.
47. The EU Code of Conduct has been the subject of considerable criticism.<sup>xxviii</sup> Its principal weakness is that it is merely a non-binding statement of intent. With regard to its substance, the code has been criticised first, because a number of the criteria, most notably these concerning the human rights situation in the receiving state, are not sufficiently explicit and generally the criteria are ambiguous and leave too much scope for individual interpretation to Member States; secondly, for its failure to include violations of international humanitarian law in the receiving state as a ground for refusing the transfer – under the code such violations are merely something the exporting state should “take into account”; and thirdly because the code relates exclusively to exports of weapons and does not address related issues such as brokerage and licensed production. With regard to its implementation mechanism, the weaknesses lie in the fact that the ultimate decision of whether to grant an export licence remains a discretionary decision to be taken by national authorities which cannot be challenged; and in the lack of transparency of the process: information exchange between states on denied licences remains confidential, the process is not open to parliamentary scrutiny and Member States are not required to report regularly and comprehensively to the public on their implementation of the Code of Conduct.<sup>xxix</sup>
48. Despite these criticisms, the adoption of such a system is nevertheless an important development for the promotion of accountability and transparency in arms transfers. It is important to note that since its adoption in 1998, the geographical scope of application of the Code of Conduct, originally limited to the fifteen members of the European Union, has been considerably extended by its adoption by the states of eastern and central Europe with which the European Union has concluded association agreements, Cyprus, the EFTA countries,

<sup>xxvii</sup> Annual Report in conformity with Operative Provision 8 of the European Union Code of Conduct on Arms Exports, 3 November 1999, (1999/C315/01).

<sup>xxviii</sup> The Code was adopted by the Council as part of the Common Foreign and Security Policy under Title J of the Treaty of European Union and, as such, is only politically and not legally binding. The fact that code was referred to in a Joint Action of the Council under Article J.3 of the treaty did alter its status. (*Joint Action of 1 December 1998, adopted by the Council on the basis of Article J.3 of the Treaty on European Union on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons*, (1999/34/CFSP), O.J., L9/1, 15.1.1999.

<sup>xxix</sup> See, for example, B. Wood and J. Peleman, *The Arms Fixers – Controlling the Brokers and Shipping Agents*, (1999), *PRIO Basic Research Report 99.3*, 127 and B. Adam “Efforts to control the international trade in light weapons”, 1999 *SIPRI Yearbook* 506 at 512.

members of the European Economic Area and Canada. Most recently, in a December 1999 Joint Statement on Small Arms by the US<sup>xxx</sup> and the European Community the US endorsed the principles of the EU Code of Conduct.

49. The idea of establishing codes of conduct for the export of weapons, be they international, regional or national has met with support from a number of sides. In his 1995 report on the work of the Advisory Board on Disarmament Matters, the Secretary General raised the possibility of establishing such a code in supplier states in Africa.<sup>xxxix</sup>
50. Efforts are also being made at the national level in a number of states to enact legislation implementing similar codes of conduct. Obviously, these internal codes are binding. For example, in 1995 South Africa adopted a new policy which imposed conditions on transfers of weapons to a number of identified states experiencing civil strife or human rights abuses, while guidelines for arms transfers adopted in 1996 require South African arms exports to be screened according to human rights<sup>xxxii</sup> and security criteria in the receiving country and be approved by a cabinet-level Minister. Similarly, in June 1997 the United States House of Representatives adopted a code of conduct for arms transfers based on human rights and other criteria. Although the bill has failed at a House/Senate conference committee stage in 1999 a compromise bill was agreed and enacted in 1999. The law requires the US government to initiate multilateral negotiations for the adoption of an international code of conduct which<sup>xxxiii</sup> would prohibit transfers to states that fail to meet a stringent set of human rights criteria. A number of other states, without expressly referring to their national arms export controls laws as codes of conduct in practice apply similar considerations when deciding whether to authorise exports of weapons.
51. Finally, reference must also be made to the International Code of Transfers which is being developed and promoted by a commission of 17 Nobel Peace Prize winners under the direction of former Costa Rican President, Dr Oscar Arias. This draft code is by far the strictest and most comprehensive proposed to date both in terms of criteria to be considered<sup>xxxiv</sup> and in terms of the activities to which the code applies. . The code covers transfers of weapons, transfers of technology and brokerage and includes a requirement that participating states enact the code into national law<sup>xxxv</sup> and introduce measures for its effective implementation and enforcement.
52. It should be noted that although codes of conduct are a new development inasmuch as they expressly list circumstances in which states must refrain from transferring weapons and impose obligations to consider the situation in the recipient state, they are not actually be

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<sup>xxx</sup> US – EU Joint Statement of Common Principles of Small Arms and Light Weapons, 17 December 1999, <http://www.useu.be/summit/arms1299.html>, visited on 6 February 2000.

<sup>xxxix</sup> Review of the Implementation of the Recommendations and Decisions adopted by the General Assembly at its Tenth Special Session: Advisory Board on Disarmament Affairs: Report of the Secretary General, A/50/391, 30 August 1995, para. 13.

<sup>xxxii</sup> Defence in a Democracy: White Paper on National Defence for the Republic of South Africa, May 1996.

<sup>xxxiii</sup> International Arms Sales Code of Conduct Act 1999.

<sup>xxxiv</sup> The draft code prohibits transfers of weapons which would foreseeably contribute to gross violations of human rights; grave breaches of the laws and customs of war; acts of armed aggressions and forcible deprivation of the right to self-determination, violent suppression of fundamental democratic rights or seriously undermine respect of international arms embargoes, non proliferation treaties and transparency arrangements; the promotion of human development and disarmament; or the prevention of systematic violent crime by non-state actors. *International Code of Conduct on Arms Transfers*, November 1999 draft, article 1. Each of these criteria is described in detail on articles 2 to 9.

<sup>xxxv</sup> *Id.*, articles 11 and 12.

imposing additional limitations in substance on states' freedom to transfer weapon as what they do is bring together the limitations that already exist under international law.

### **Conclusion**

53. This review of the rules and mechanisms regulating transfers of weapons shows that, although there are few express restrictions on states' freedom to transfer weapons, there are a of number situations in which transfers of weapons are prohibited because it is foreseeable that the weapons will be used by the recipient state in violation of international law. Moreover, many states, including, significantly, the principal exporters of weapons, have adopted national codes of conduct requiring them to assess the compliance of the receiving state with fundamental principles of international law before authorising transfers. Additionally, a number of non-binding guidelines, once again, accepted by the principal weapons-exporting states impose similar requirements.
54. Customary international law is a body of rules that is constantly developing and evolving. It is therefore appropriate to ask whether any emerging rule of international law can be discerned from state practice in this field. Apart from the ECOWAS moratorium, there have not been any instances of outright bans of transfers of weapons. Instead, much more widespread are measures limiting the circumstances in which transfers can carried out and requiring states to consider the situation in the receiving state before authorising transfers. Such guidelines exists both at international law and in domestic legal systems. Although the international instruments are not legally binding, often they mirror the binding requirements of export criteria under national law. As discussed in the introduction, national laws are an important source of state practice, and when, as in the present case, there is a coincidence of approach in the national laws of the states most closely associated with a particular activity – in this case weapons-exporting states such as certain members of the European Union, the United States and South Africa - accompanied by instances of state practice on the international level where the same approach has been adopted internationally, it can be argued that a customary rule of international law is in the process of evolving. In the present case, an additional argument in favour of the emergence of a rule of customary law is the fact that in practice the existing national laws and codes of conduct are not laying down new rules. Instead, they are merely gathering together the various implicit rules limiting states' freedom to transfer weapons.
55. Having established that a rule of customary law governing transfers of weapons is in the process of emerging, is it possible to identify the content of this rule? National laws and international share the requirement that exporting states establish licensing requirements for arms exports under which requests for exports are reviewed individually and assessed on the basis of a number of criteria. The first criterion prohibits transfers that would put the authorising state in violation of its own obligations under international law if it authorised the transfers. It includes the question of whether there exist any treaties prohibiting the transfer of the weapons in question or whether there is an embargo in force against the proposed recipient. The subsequent criteria, on the other hand, address the situation in the recipient state and its possible violations of international law for which the exporting state could have secondary responsibility if it were to provide weapons. Precisely what aspects of the recipient state's compliance with international law they cover is still uncertain, in view of the different approaches adopted by the various instruments. However a list of "core" violations can be drawn up, and if it is foreseeable that the weapons will be used by the recipient state

for the commission of those violations of international law the export should not be authorised. A possible list of the core violations would include:

- the violation of the prohibition against the use of force
- intervention in the internal affairs of another state
- the perpetration of serious violations of human rights
- the perpetration of serious violations of international humanitarian law
- the commission of genocide
- the commission of terrorist activities

As at present the Nobel Laureates' draft code is the only instrument whose scope goes beyond transfers of weapons it cannot be argued, desirable as this may be, that states must apply the same criteria when granting licenses to brokers or authorisations for licensed production agreements or transfers of technology.