
Chapter 3

Seminar held on 21st September 2000

Running Guns: The Global Black Market in Small Arms – an Agenda for Action

Speakers: Emanuela-Chiara Gillard and Lora Lumpe

Emanuela-Chiara Gillard and Lora Lumpe offered presentations on the global trade in small arms. Gillard discussed the limitations that international law imposes on small arms transfers, focusing primarily on the activities of states. Lumpe's ensuing presentation concentrated on the illicit arms trade, its methods of operation, and recommendations for action; the discussion was based upon the content of the speaker's recently edited publication, *Running Guns: The Global Black Market in Small Arms*.

Presentation by Emanuela-Chiara Gillard¹

States' Transfers of Small Arms: What's legal? What's illegal?

At first glance, existing limitations imposed on inter-state transfers of small arms appear to represent a blind spot in international law today. Express regulations are few and far between. However, an examination that goes beyond the field of disarmament and sanctions, probing other areas of international law, including international humanitarian and human rights law, reveals a significant number of limitations on states' freedom to transfer or authorize transfers of small arms.

Here, international legal limitations on arms transfers may be broadly categorized as either "express" (or "specific") limitations, or as "implicit" limitations.

Express Limitations of International Law on Arms Transfers

In terms of express limitations, the most basic type is a multilateral or bilateral agreement banning transfers. Although the UN has sponsored multilateral negotiations for the non-proliferation of weapons of mass destruction, little progress has been made in agreeing upon treaties regulating conventional weapons. The three-year Economic Community of West African States (ECOWAS) moratorium, a regional and non-binding agreement concluded in 1998 that prohibits transfers of light weapons, along with international treaty-making on antipersonnel mines, are the only exceptions to this trend.

Express prohibitions of transfers of certain types of weapons can be found in international humanitarian law. Sanctions, imposed by the UN or other international organizations, can prohibit transfers of weapons to specific states.

¹ The presentation was made in Ms. Gillard's personal capacity, and the views expressed are solely her own.

International humanitarian law, the rules which protect those not or no longer taking part in an armed conflict and which restrict permissible means and methods of warfare, includes certain “weapon-specific” prohibitions on the use of certain types of arms. Examples range from the 1869 St. Petersburg Declaration renouncing the use of exploding projectiles, to the 1899 declaration on expanding bullets, the 1980 Convention on the Use of Certain Conventional Weapons, the 1993 Chemical Weapons Convention, and most recently, the 1997 Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines. A number of these conventions not only proscribe the use of the weapons in question, but also their transfer. The express prohibition, not only of arms use but also of transfers, in the more recent conventions could be seen to reflect a development in this area of law and similar prohibitions on transfers should also be read into the other earlier treaties as well.

More general prohibitions of transfers of all weapons to specific state or regional destinations can be established by the imposition of embargoes by the United Nations or regional organizations. These “recipient specific” prohibitions on arms transfers have been increasingly used in recent years by the UN, in the exercise of its responsibility for maintaining international peace and security. The target of an arms embargo is typically a state that is found to be violating international law, but recently, neighboring states and non-state actors, such as the UNITA rebels in Angola and the former *forces armées rwandaises*, have been subject to the UN Security Council’s binding arms sanctions. Practical enforcement of arms embargoes has been problematic, however, and states, individual politicians and private actors have all violated Security Council arms embargoes with impunity.

Implicit International Legal Restrictions on Arms Transfers

In addition to express limitations, international law regulating other areas imposes additional, “implicit” or indirect

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restrictions on states' freedom to transfer arms. Such restrictions, rather than outlawing *any* transfer, tend to depend on the *use* made by the recipient state of the weapons, and are based on the responsibility of the transferring state for aiding or assisting another state in the commission of a wrongful act.²

The cornerstone of the UN Charter, the prohibition on the use or the threat of the use of force enshrined in Article 2(4), imposes certain obligations on states with regard to arms transactions. The destabilizing effects that a potential accumulation of arms may produce, and the additional possibility that such an arms build-up could amount to a threat of use of force in violation of the Charter, impose responsibilities on importing and exporting states to limit the quantity of imports. Moreover, if it is apparent that the receiving state will use the weapons in violation of the prohibition on the use of force, the transfer is illegal even in the absence of a specific embargo.

Customary international law also contains a prohibition on the use of force, and thus similarly imposes limitations on transfers of weapons. Additional limitations are found in other rules of customary international law, such as the principle of non-intervention in the domestic affairs of another state. Thus, an arms transfer by State A into the territory of State B that does not comply with the latter's domestic import rules or is not authorized by State B is not only a breach of State B's domestic legislation, but can also amount to unlawful interference in State B's internal affairs under international law. If arms are supplied to an opposition group, as was done by the United States in the *Nicaragua* ICJ case, accusations of interference are all the more likely. It is well established that the transfer of weapons in such circumstances is prohibited.

The rules prohibiting provision of assistance for the commission of terrorist acts in another state also restrict states'

² See the International Law Commission's Draft Articles on State Responsibility, provisionally adopted in the summer of 2000.

freedom to transfer arms. Such assistance was condemned in a number of UN General Assembly resolutions, and the supply of weapons for such purposes is included in the definition of the international crime of intervention in the affairs of another state, as defined by the ILC's Draft Code of Crimes Against the Peace and Security of Mankind.

International humanitarian law contributes a number of other limitations on states' freedom to transfer arms. The principle of distinction, and the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, are cardinal principles of this body of law. The illegality of the use of these weapons, combined with states' duty to respect and ensure respect for international humanitarian law, enshrined in Common Article 1 of the Geneva Conventions, could be used as an argument in favor of the illegality of transfers of such arms.

Human rights law is another important source of limitations. Exporting states that supply weapons to states that commit serious violations of human rights can be seen as participating in such states' acts of extra-legal or arbitrary executions or torture.

The 1948 Convention on the Prevention and Punishment of Acts of Genocide prohibits and criminalizes acts of genocide. Article III of the Convention includes conspiracy to commit genocide in the criminal acts covered. A state assisting in the perpetration of an act of genocide, for example by providing the arms with which genocide is carried out, may also be deemed responsible under the Convention. While Article II of the Convention requires such an accomplice to share the intent to destroy part or all of a group, for its acts to amount to complicity in genocide, the supply of weapons, when it is apparent that they will be used to commit an act of genocide, will nevertheless amount to a violation of international law.

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Concluding Remarks

I hope to have presented convincing arguments that international law does lay down a number of important limitations on states' freedom to transfer arms. On the basis of all of these limitations, especially in light of the parallel restrictions applicable in domestic law and in non-binding instruments such as international codes of conduct regulating transfers, it can be argued that we are witnessing the emergence of a rule of customary law governing transfers of small arms. Such a rule would require states to establish licensing requirements for arms transfers, under which requests for exports would be reviewed individually and assessed on the basis of a number of criteria.

The first criterion would prohibit transfers that would put the authorizing state in violation of its own obligations under international law – for example, if an international instrument or an embargo prohibited the transfer.

The second criterion would require scrutiny of whether the recipient state would be likely to use the weapons in a manner contrary to its obligations under international law. In such circumstances, the exporting state should refrain from authorizing the transfer.

Presentation by Lora Lumpe

The Norwegian Initiative on Small Arms Transfers (NISAT)

The Norwegian Initiative on Small Arms Transfers (NISAT) was founded by four non-governmental groups – the Norwegian Red Cross, Norwegian Church Aid, the International Peace Research Institute, Oslo (PRIO), and the Norwegian Institute of International Affairs (NUPI) – who came together in 1997 to coordinate and combine efforts against the lethal spread and misuse of military-style light weapons. The former two groups

possess first-hand experience with the deadly impact of these weapons on civilians abroad, whereas the latter two organizations have played integral research and advocacy roles in support of NISAT's goals.

Among NISAT's concerns are included all sources of small arms trade that contribute to armed conflict, crime and suffering – the legal trade, the borderline trade and the clearly illegal trade.

As part of its efforts to advance the state of knowledge in the first area, NISAT is developing an online database of small arms production, state-authorized transfers and state policies relating to small arms production and export, available at: <http://www.nisat.org>.

On the borderline trade, including the practices of brokers or middlemen who exploit differences between national laws to set up questionable arms deals for profit, NISAT has sponsored the 1999 publication, *The Arms Fixers*, by Brian Wood and Johan Peleman (see Chapter 1 of the current volume). Principal findings of this work include the need to: (1) promote and reinforce states' and insurgents' obligations to abide by and ensure respect for international humanitarian and human rights law; (2) include international humanitarian and human rights law in definitions of what constitutes a "legal" arms transfer; and (3) promote the need for states to enact national laws that limit illicit brokering and shipping activities, and that ensure enforcement of UN and other multilateral embargoes.

NISAT has also undertaken several initiatives aiming to reduce demand for small arms, particularly in Africa.

About the Book, *Running Guns: The Global Black Market in Small Arms*

Over the past five years, small arms have rapidly emerged on the international policymaking agenda. Former UN Secretary-General Boutros-Boutros Ghali coined the term, "micro disarmament," and talked about the humanitarian and societal

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impacts of the spread of small arms and light weapons. At the opening of the 50th UN General Assembly, several governments, including the US president, spoke about the impact of illicit arms trafficking in promoting crime.

Today, nearly every part of the UN system, nearly all regional governmental bodies, and many non-governmental organizations are seized with the subject. For the most part, governmental attention toward the trade in arms has been directed at the illicit arms trade, or that subset of the trade that is completely outside of the control or permission of national governments. This focus on the illicit arms trade is well founded; for, by arming warring parties, criminal gangs and human rights abusers, the illicit trade feeds significantly into humanitarian crises. As a result of international negotiations on the issue, important national and international law has been and will be created to regulate arms transfers.

The focus of my book, *Running Guns* (sponsored by NISAT and PRIO), is on the supply side of the arms trade. While existing stocks of small arms are clearly a large part of the problem – in terms of humanitarian suffering – new supplies are also flowing in. In addition, supply side controls may be easier to implement, in contrast to the difficulties involved in any attempt to alleviate the causes of demand – insecurity, injustice, poverty, hunger, opportunism, warlords, and other factors that fuel the black market in small arms and light weapons.

The book opens by examining what is meant by the “illegal” arms trade, and proceeds to analyze what is “illegal” under international law. Continuing the emphasis on the supply side, the next part of the book asks the question: Where do the illegally trafficked weapons come from? To better understand this problematic, I offer an investigation of three sources of illegal arms:

1. Covert government operations to supply arms to non-state actors;

2. Weapons production trends, and in particular the role that the export of armament or ammunition factories plays in contributing to a global surplus in small arms – while not illegal, this practice often has the effect of undermining the laws of the state which licensed its arms manufacturer to set up shop; and
3. Loosely regulated domestic gun markets.

In the next section of the book, I explain the operation of the illegal market. Here, two main questions are explored. First, how are illicit arms deals structured, and the guns procured and moved from point A to point B? Second, how are illicit arms deals financed, and the money used to buy guns procured and moved from bank A to bank B?

The last section of the book assesses current efforts to control the deadly illegal arms trade. This section presents an overview and critique of national, regional and global negotiations to limit illegal arms flows, and describes the challenges to international policing efforts relating to small arms control. Following from this chapter, as well as the rest of the book, certain key findings and recommendations can be identified for action.

Recommendations for Controlling the Global Black Market in Arms

The following steps are recommended as essential components of any proposed agenda for combating the illegal arms trade:

1. Broadening the accepted definition of “illegal” arms transfers, to include transfers by governments that violate their obligations to protect human rights laws and international humanitarian laws of war (i.e., arms transfers authorized by governments to abusive governments should be considered
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- “illicit,” in that they violate binding international legal obligations);
2. Development of a standardized and strengthened system of international documentation governing movement of arms, making forgery and theft of such documents more difficult and costly;
 3. Imposition of an international ban on the practice of states’ supplying arms to favored guerrilla groups in order to destabilize or topple governments of which they disapprove (i.e., rejection of the Reagan Doctrine);
 4. Recognition by states that licensed production of assault rifles and other military small arms by domestic industries is undermining international support for arms embargoes, human rights and export controls;
 5. Recognition by states that domestic gun regulation is intrinsically related to international gun trafficking, and that loose gun ownership laws and regulations, such as those in the United States, contribute to the flow of illegal and deadly guns into other countries;
 6. Full implementation by all UN member states of their UN Charter obligation to enact national laws, regulations and policies that will prevent weapons from flowing from or through their territory to states under UN Security Council-mandated arms embargoes (i.e., controlling the brokers and middlemen within the state’s territory who move stocks of surplus arms into conflict zones);
 7. Increased focus and determination among the international governmental and non-governmental communities concerning measures that will minimize the flow of arms to conflict zones, repressive governmental regimes and criminal gangs; and
 8. Enhanced cooperation and assistance to police forces to provide security and protect their populations.

Where Does This Leave Us?

My own personal evaluation of the illicit arms trade leads me to a few realizations, with respect to where we are now, and where our efforts should be directed.

First, the most important thing the international community must achieve next year at the UN 2001 Small Arms Conference is the requirement of all UN members to give full and meaningful effect to their UN Charter obligation to respect UN Security Council-mandated arms embargoes. Whereas my previous assessments would have judged this step too limited, I now hold such a step as crucial to progress against the illicit transfer of arms.

Next, the current obstacles confronting efforts to reform are enormous. Brokers and transporters easily exploit weak regulations and enforcement to change identities, bases of operation and plane registration numbers, thus easily outwitting customs and law enforcement officials. Dealers can procure false or forged documentation without difficulty, providing a veneer of legitimacy to illicit arms transfers. States also bear substantial responsibility for their involvement in conducting, or allowing other states and agents to conduct, gun running and brokering activities, for some perceived short-term political or financial payoff. In sum, the financial, practical and political obstacles to enforcement of anti-trafficking measures result in very few criminal investigations, and even fewer prosecutions of illicit arms traffickers.

Finally, the attainment by states of full implementation of their UN Charter obligations to carry out UN Security Council-mandated arms embargoes would require a great deal. States would need to enact and enforce national laws, both regulating domestic arms production and export, and implementing into national law and regulations the requirement to abide by arms embargoes. Furthermore, strong and thorough control would need to be exerted, over producers, brokers, shippers and any

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other parties involved in arms transfers – any national or corporation who might be helping to undermine a state’s respect for its obligation to abide by an embargo.

In this regard, the recommendations contained in the groundbreaking “Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA” (UN document S/2000/203) should be commended.

Among others, the suggested measures in the Panel’s report include: (1) the development of model laws and regulations to control brokering and shipping agent activities; (2) extra-territorial application of brokering laws; (3) innovation of an international “watch list” of brokers who have been prosecuted in any country for violation of arms export or arms brokering laws; (4) maintenance of an international register, available to the public, of authorized arms brokers; and (5) establishment of a national point of contact within each state to help facilitate proactive cooperation and information-sharing modalities among states’ export control and police/investigative authorities; alternatively, an international clearinghouse might be established, perhaps at Interpol.