



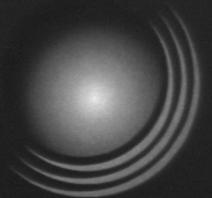
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International Legal Prohibitions on Conventional Arms Transfers

PEGGY MASON

ISROP
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RESEARCH AND
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PROGRAMME

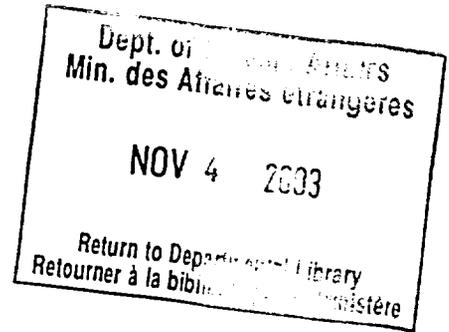


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Peggy Mason



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Preface

The view and positions in this paper are solely those of the author and do not necessarily reflect the views and positions of the Department of Foreign Affairs and International Trade or of the Government of Canada.

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Sommaire

Quelles sont les responsabilités des États en vertu du droit international applicable avec lesquelles leurs autorisations d'exportation doivent se conformer? Ce rapport présente une première liste de cas où les transferts d'armes légères et de petit calibre (ALPC) autorisés par un État peuvent constituer une violation de ses obligations internationales.

Les interdictions de transferts d'armes du droit international : la responsabilité des États

Violation d'interdictions expresses du droit international :

1. Transferts par les États parties à la Convention d'Ottawa sur les mines antipersonnel à quiconque, directement ou indirectement (interdiction expresse par traité de tout transfert de cette arme conventionnelle);
2. Transferts par les États d'ALPC contrairement aux embargos d'armes décidés par le Conseil de sécurité des Nations Unies (interdiction expresse de produits militaires désignés et de destinations ou de destinataires en vertu des résolutions applicables du Conseil de sécurité des Nations Unies);

Violation d'autres obligations du droit international : responsabilité première des États

3. Transferts d'ALPC par des États à des terroristes au sens des conventions antiterroristes auxquelles ils sont parties ou à des groupes ou à des individus désignés comme étant des terroristes figurant sur la liste tenue par le Conseil de sécurité des Nations Unies en vertu de la résolution 1373 (2001) ou au sens de l'interdiction générale faite par le droit international coutumier aux États de soutenir les activités terroristes;
4. Transferts d'ALPC à un État ou à un groupe responsable d'actes de génocide lorsque l'État à l'origine du transfert sait que des actes de génocide sont commis, ou sont voulus, par l'État ou le groupe auquel sont destinées les armes et que l'État à l'origine du transfert a, par le transfert desdites armes, l'intention précise d'aider à l'extermination en tout ou en partie du groupe (national, ethnique, racial, religieux) victime du génocide.
5. Transferts par des États à des mouvements rebelles – à moins qu'on puisse démontrer qu'il s'agit d'une exception, de portée très limitée, ayant pour but d'aider un peuple à disposer de lui-même et à se libérer d'une domination étrangère ou coloniale.

Aide à la perpétration d'un délit international : responsabilité secondaire des États

6. Transferts d'ALPC par un État à un autre État qui participe à une agression illicite, en toute connaissance de cause de l'utilisation visée, dans le but de faciliter l'agression, à la condition cependant que l'acte fautif soit en fait commis.
7. Transferts d'ALPC autorisés par des États qui savent que l'État à qui elles sont destinées les utilise pour porter atteinte aux droits de la personne ou encore commettre des crimes de guerre, des crimes contre l'humanité ou d'autres violations graves du droit international humanitaire.

Les interdictions de transferts d'armes du droit international : la responsabilité criminelle de l'individu

Les États demeurent « les premiers sujets de droit du droit international public », mais la conduite des personnes peut aussi être régie par le droit international. En particulier, le droit pénal international, ou le droit analogue interne, peuvent offrir un mécanisme efficace de règlement du problème des transferts d'armes dans certaines circonstances. La complicité est un motif reconnu de la responsabilité criminelle individuelle en droit international; le Statut de la Cour pénale internationale (Statut de Rome) l'établit expressément. Comme pour la responsabilité des États, la responsabilité de l'individu exige la connaissance des circonstances qui ont entouré la perpétration d'un crime international dans l'État auquel sont destinées les armes et, en règle générale, l'accusé doit également avoir eu l'intention véritable de faciliter la perpétration de certaines activités criminelles par son action. Si ces faits peuvent être établis, les trafiquants

d'armes (y compris les hauts dirigeants d'un gouvernement et les officiers militaires supérieurs ayant eu un rôle à jouer dans la décision d'autoriser le transfert d'armes) pourraient personnellement faire l'objet de sanctions pénales. Contrairement à ce qui se passe dans les autres branches du droit abordées précédemment, il ne serait pas nécessaire d'établir la responsabilité de l'État pour les actes accomplis par la personne en question.

Incidence sur la réglementation et la procédure d'autorisation des exportations nationales

Politiques et procédures efficaces d'autorisation des exportations

Compte tenu de l'importance des interdictions de transfert d'armes conventionnelles du droit international, dont la violation peut engager la responsabilité des États, la responsabilité pénale personnelle ou les deux, les États ont tout intérêt à se montrer prudents et à mettre en place une procédure efficace donnant l'assurance que de tels transferts ne seront pas approuvés. Manifestement, il est difficile d'imaginer comment on peut y arriver sans les mesures suivantes :

- une politique exigeant des organismes ou des personnes en mesure d'accorder les autorisations pertinentes qu'ils agissent conformément à toutes les obligations applicables du droit international;
- des critères d'évaluation des demandes individuelles d'exportation qui ont un rapport spécifique avec ces obligations internationales;
- la participation au processus d'évaluation de personnes ayant l'expertise juridique internationale requise.

Comparaison avec les critères d'exportation d'ALPC de l'OSCE

Ces interdictions du droit international relatives aux transferts d'armes sont une norme mondiale minimale. Bien qu'elles soient considérablement limitées comparativement aux critères d'exportation convenus dans le cadre de l'OSCE pour les ALPC, ce sont des obligations juridiques qui, si elles ne sont pas remplies, pourraient donner lieu à des demandes de réparation à l'endroit des États devant la Cour internationale de justice ou à des poursuites pénales internes ou internationales, à l'endroit des personnes. Ces interdictions s'appliquent à tous les transferts d'armes conventionnelles, y compris toutes les catégories d'ALPC, selon la définition qu'en donne l'ONU et selon celle, plus étroite, de l'OSCE. En outre, ces interdictions ne s'appliquent pas uniquement aux transferts effectués dans l'espace de l'OSCE et de ses pays membres.

Prochaines étapes

1. Les États devraient immédiatement procéder à un examen interne des procédures d'autorisation des transferts d'armes afin d'avoir l'assurance qu'elles sont conformes à leurs obligations juridiques internationales respectives.
2. Les États membres devraient envisager la possibilité de présenter une résolution à la Première Commission de la prochaine Assemblée générale des Nations Unies, afin qu'un groupe d'experts gouvernementaux de l'ONU soit mandaté pour étudier les « responsabilités actuelles des États en vertu des règles du droit international applicables » auxquelles doivent être conformes leurs réglementations et procédures d'autorisations des exportations nationales respectives. Il devrait être précisé dans la résolution que le groupe d'experts devra être composé de personnes ayant l'expertise voulue dans les domaines pertinents du droit international, dont en particulier le droit humanitaire international et les droits de la personne, ainsi que dans l'acquisition de matériel de défense et en matière d'autorisation des exportations d'armes. On pourrait même envisager la possibilité d'obtenir une résolution complémentaire de la Sixième Commission, celle qui est chargée des questions juridiques.
3. Ou bien, la résolution pourrait donner au Secrétaire général le mandat de consulter un groupe « d'experts compétents » qui serait chargé d'amorcer l'étude de cette question dans un contexte le

plus « neutre » possible, sans considérations politiques comme ce serait inévitablement le cas lorsqu'un groupe d'experts *gouvernementaux* est en cause.

4. Une troisième solution est déjà mise en œuvre : la constitution de groupes d'experts de pays et de champs d'expérience différents, gouvernementaux et non gouvernementaux, sous l'égide d'une ONG respectée, dans le but d'étudier la question et d'élargir la compréhension de la communauté internationale au sujet des interdictions de transferts d'armes en vertu du droit international.

Summary

What are the existing responsibilities of states under relevant international law with which their export authorizations must be consistent? Below is an initial list of the possible situations in which small arms and light weapons (SALW) transfers authorized by a state would constitute a breach of its international obligations.

International Legal Prohibitions on Weapons Transfers: State Responsibility

Breach of Express Prohibitions under international law:

1. Transfers by states parties to the Ottawa Mines Convention of anti-personnel mines to anyone, directly or indirectly; (express treaty prohibition on all transfers of this proscribed conventional weapon);
2. Transfers by states of SALW contrary to UN Security Council-mandated arms embargoes; (express prohibition on designated military goods and destinations/recipients in relevant UN Security Council resolutions);

Breach of other international law obligations: primary state responsibility

3. Transfers of SALW by states to terrorists within the meaning of anti-terrorist conventions to which they are party and/or to groups or individuals designated as terrorists on the list maintained by the UN Security Council pursuant to resolution 1373 (2001) and/or within the meaning of the general customary international law prohibition on state support for terrorist activities;
4. Transfers of SALW to a state or group engaging in genocidal acts where the transferring state has both knowledge that genocidal acts are being perpetrated – or are intended - by the recipient state or group and where the transferring state also has, through the transfer of the said arms, the specific intention to assist in the destruction in whole or in part of the group (national, ethnic, racial or religious) against which the genocide is directed.
5. Transfers by states to rebel movements - unless the very narrow exception of assistance to a people seeking self-determination against foreign or colonial domination can be demonstrated. (While there is argument that a norm of humanitarian intervention is developing that might allow for indirect support of rebel movements as part of the intervention, as in the case of Kosovo, at this stage such action without express UN authorization would still appear to be unsanctioned in international law.)

Aid or Assistance in the commission of an internationally wrongful act (secondary state responsibility)

6. Transfers of SALW by a state to another state engaged in unlawful aggression, where the transfer was made in full knowledge of its intended use, with a view to facilitating the aggression and provided also that the wrongful act in fact takes place.
7. Transfers of SALW authorized by states with knowledge that the recipient state is using them to perpetrate human rights abuses, war crimes, crimes against humanity or other grave breaches of international humanitarian law.

International Legal Prohibitions on Weapons Transfers: Individual Criminal Responsibility

While states remain “the principle subjects of international law”, nevertheless, the conduct of individuals may be regulated by international law.” In particular, international criminal law, or domestic analogies, may provide an effective mechanism for addressing problematic arms transfers in certain circumstances. Complicity is a recognized ground establishing individual criminal responsibility at international law. It is directly established in the Rome Statute of the International Criminal Court. Like state responsibility, individual responsibility requires knowledge of the circumstances surrounding the commission of an international crime in the recipient state, and generally the accused also requires the

actual intent to further the commission of some type of criminal activity through his actions. In the event that these requirements are established, arms traders (up to and including high government and military officials engaged in the authorization of arms transfers) could be subject to individual criminal sanction. Unlike other legal areas discussed above, this would not require the establishment of state responsibility for the acts of the individual in question.

Implications for National Export Authorization Regulations and Procedures

Effective Export Authorization Policy and Procedures

Given the extent of international legal prohibitions on the transfer of conventional arms, the breach of which may give rise to state responsibility or individual criminal responsibility, or both, prudence dictates that states have in place effective procedures to ensure that such transfers will not be approved. Speaking plainly, it is hard to see how this can be done without the following:

- a policy requiring the authorizing agency or individual to act in accordance with all relevant international legal obligations;
- export criteria against which individual applications are assessed that specifically relate to these international obligations; and
- involvement in the assessment process of individuals with the requisite international legal expertise.

Comparison to OSCE SALW Export Criteria

These international legal prohibitions on conventional arms transfers are a minimum global standard. While considerably narrower than the OSCE agreed export criteria for small Arms and light weapons (SALW), they are legally binding and, if breached, could give rise to compensation claims against states in the International Court of Justice or to international or domestic criminal prosecutions against individuals. These prohibitions apply to all conventional arms transfers including all categories of SALW, as set out in the UN Definition, not just the narrower OSCE definition. Furthermore, these prohibitions are not limited in application to transfers within the territory of OSCE countries.

Next Steps

1. States should immediately institute an internal review of arms transfer authorization procedures with a view to ensuring that they are in conformity with their respective international legal obligations.
2. Member States could consider sponsoring a resolution of the First Committee at the next UN General Assembly Session mandating a UN Governmental Expert study of the "existing responsibilities of states under relevant international law" with which their national regulations and procedures for export authorizations must be consistent (as set out in Paragraph 11, Section II of the UN Programme of Action). The resolution should specify that the composition of the Expert Group include expertise in relevant areas of international law – particularly international humanitarian law and human rights law – as well as defence procurement and arms export authorization expertise. Consideration might even be given to securing a complementary resolution from the Sixth Committee, responsible for legal issues.
3. Alternatively, the resolution might mandate the Secretary-General to consult with a group of "qualified experts" to give preliminary consideration to this issue in as "neutral" an environment as possible, without the inevitable intrusion of political considerations when a group of *governmental* experts is involved.
4. A third alternative is already underway – that of convening a geographically and experientially diverse group of experts, governmental and non-governmental alike, under the auspices of a respected NGO, to explore the issue with a view to enlarging the common understanding of the international community in relation to international legal prohibitions on arms transfers.

Introduction

In Paragraph 11 of Section II of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects [SALW], States undertake:

11. To assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade. Likewise, to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit, for the transfer of all small arms and light weapons, with a view to combating the illicit trade in small arms and light weapons. [Emphasis added.]

What are the existing responsibilities of states under relevant international law with which their export authorizations must be consistent? It is the purpose of this paper to seek to identify the main legal prohibitions on arms transfers arising from treaty and customary international law, with the further objective of developing a preliminary list of situations in which transfers of SALW by states could constitute a breach of an international obligation.¹

¹ The resulting list is found in the first part of the Executive Summary with which this paper begins.

International Legal Prohibitions on Conventional² Weapons Transfers: State Responsibility

1. Express Prohibitions under international law

There are express prohibitions on the transfer of specific types of conventional arms arising both from treaty law and from resolutions of the United Nations Security Council, adopted pursuant to Chapter VII of the United Nations Charter.

1.1. *Anti-personnel Mine Ban Treaty (Ottawa Convention)*

Article 1.1.b of the 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction *inter alia* prohibits the transfer to anyone, directly or indirectly, of anti-personnel mines. The Treaty has been ratified by 131 countries and signed by 146.

1.2. *UN Security Council Arms Embargoes*

Under Article 41 of the UN Charter, the Security Council may call upon Member States to apply measures not involving the use of armed force in order to maintain or restore international peace and security. Such measures are commonly referred to as sanctions. As of February 2003, the Security Council had invoked Chapter VII of the United Nations Charter to impose sanctions in fourteen cases: Afghanistan, Angola, Ethiopia and Eritrea, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, South Africa, Southern Rhodesia, Sudan and the former Yugoslavia. Under Article 25 of the United Nations Charter, the decisions of the Security Council are binding in international law and the member nations of the UN are bound to implement them in their domestic legal systems.

An arms embargo is a specific type or sub-category of sanction. Obligations ensue on two levels. First states are prohibited from transferring all or specified types of arms or arms-related material, military advice and training to the embargoed entity, generally a state violating international law, but also non-state actors such as the UNITA guerrillas in Angola or, more recently, Osama Bin Laden. Secondly, states must also take the necessary measures to implement, apply and enforce the embargo internally so as to make it operative with respect to private actors within their jurisdiction. A state may also incur responsibility for an international wrongful act if it assists another State to circumvent sanctions. (See the discussion *infra* of secondary state responsibility.)

2. Other International Law Prohibitions: Primary State Responsibility

In addition to these *express* limitations on weapons transfers, there are a variety of state obligations under international treaty and customary law that have the effect of restricting the *use* of weapons in certain circumstances.

2.1. *International Law and Terrorism*

Numerous multilateral treaties prohibit terrorist acts in specific circumstances (*e.g.* attacks on civilian aviation). Although there is not yet a general treaty in force on the subject, the coming-into-force of recent multilateral conventions addressing terrorist bombings and financing of terrorism signals a growing international acceptance of broad legal prohibitions in this area.³ This regime is complemented by a general customary international law prohibition on state support for terrorist activities.⁴ State practice

² This paper is concerned with international legal prohibitions that apply to small arms and light weapons, a sub-category of conventional armaments. Therefore, excluded from discussion are those prohibitions relating to specific conventional arms that do not include small arms and those relating to non-conventional arms such as weapons of mass destruction or radiological weapons.

³ See, *e.g.*, *International Convention on the Suppression of Terrorist Bombings*, and the *International Convention on the Suppression of the Financing of Terrorism*.

⁴ See, *e.g.*, 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, discussed *infra*.

and *opinio juris*⁵ since the terrorist attacks of 11 September 2001 strengthen the customary legal status of this prohibition.

The transfer of weapons to terrorists operating in another state would be an internationally wrongful act.⁶ However, effective application of the principle is complicated by the lack of an agreed definition of terrorism at the international level, which reflects at least in part fundamental differences of view among states over the characterization of individuals or groups as terrorists or “freedom fighters” or representatives of the ‘legitimate’ government⁷. The maintenance by the UN Security Council Sanctions Committee on Osama Bin Laden of a list of proscribed terrorist organizations is one practical example of overcoming a hitherto seemingly intractable definitional problem.

2.2. The Genocide Convention

Most states are parties to the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* [Genocide Convention]. Additionally, the prohibition on genocide is part of customary international law, having been recognized as a peremptory norm or principle of *jus cogens*⁸ by the International Court of Justice (ICJ) and other international tribunals. Genocide requires the specific intent (*dolus specialis*) to destroy, in whole or in part, one of four protected groups (national, ethnical, racial or religious). This is a high threshold to meet. Article III of the Convention includes, in addition to the crime of genocide itself, conspiracy to commit genocide, incitement, attempted genocide and complicity in genocide. Although complicity is sufficient to constitute a breach of the Genocide Convention, the specific intent is not established through evidence only of the state’s involvement in the transfer of weapons with knowledge that they are intended for use by the recipient state or group in perpetrating the genocide. It would be necessary to also establish evidence of an *intention* to facilitate the genocide itself. Given the *jus cogens* nature of the prohibition on genocide, if such evidence can be shown (whether directly from statements or orders or inferentially from a systematic pattern of behaviour), then a strong argument can be advanced that a state would itself have committed an internationally wrongful act if it transferred weapons to a state or group committing genocide. Absent the specific intent necessary for genocide, a state transferring weapons to a state that it knows is using them to carry out genocidal acts will likely still be in violation of international humanitarian law (IHL), particularly war crimes or crimes against humanity under the doctrine of secondary state responsibility⁹. (See the discussion *infra* of complicity in violations of IHL.)

2.3. Charter and Customary International Law Prohibitions on the Use of Force¹⁰

Article 2(4) prohibits the threat or use of force in international relations, when directed “against the territorial integrity or political independence of states, or in any other manner inconsistent with the purposes of the United Nations.” Threats are illegal when the force threatened would itself be illegal.¹¹

⁵ There are two elements for international customary law to emerge, namely practice and so called *opinio juris*. *Opinio juris* means that states are acting in a certain manner because it is their legal obligation to do so. One may find proof of international customary law by demonstrating that a certain practice is taking place and that the states who are engaged in that practice are doing so because they feel legally compelled to do so. Not all states have to be engaged in that practice to give a norm the force of customary law. If customary law exists, then it is binding upon states without them having to formally accede to it.

⁶ In addition to characterization as a breach of anti-terrorism law, this would likely also qualify as an impermissible intervention in the domestic affairs of the target state. (See discussion *infra*.)

⁷ The issue of self-determination is discussed at some length, *infra*.

⁸ A principle of *Jus cogens* refers to a norm of international law, binding as such, and recognized by the international community as a whole as having a peremptory character. Those peremptory norms that are clearly accepted and recognized – and therefore from which no derogation is possible – include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. This, in turn, means that a State taking countermeasures in relation to an international wrong perpetrated against it may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide. See, for e.g., *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p.90, at p. 102, para. 29.

⁹ Note that the definition of complicity under the Genocide convention is not limited to the provision of assistance to another state, unlike the customary law doctrine of secondary responsibility, discussed *infra*, which necessarily presupposes the involvement of another state as the primary actor in the wrongdoing.

¹⁰ See also the separate section, *infra*, on assisting a state in the crime of aggression.

¹¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226 [Nuclear Weapons]. For example, threatening to commit an act of aggression would constitute a breach of the Article 2(4) prohibition, even in the absence of an actual attack.

This prohibition is subject to two universally-recognized exceptions: force authorized by the United Nations; or, individual or collective self-defence. The Security Council is granted wide discretionary powers under Chapter VII of the UN Charter to define and take measures to address threats to international peace and security, including the imposition of arms embargoes [as discussed *supra*] and authorizing states to use armed force. Article 51 permits states to defend themselves against armed attacks, without requiring the prior authorization of the Security Council.

The UN Charter prohibition on the use of force applies to arms transfers and other assistance to opposition armed forces. The 1986 decision of the International Court of Justice [ICJ] in *Armed Activities in and Against Nicaragua* held that the transfer of weapons in such circumstances could be considered a use of force in violation of Article 2(4).¹² It should be noted that, as a result of reservations to ICJ jurisdiction by the United States with respect to disputes concerning the UN Charter, the Court was confined to the application of customary international law. However, the Court found the content of the customary legal obligation to be *identical* to that outlined directly in Article 2(4), and its decision must be taken to reflect its view of the conventional as well as customary international legal obligations of states in this regard.¹³

2.4. Customary International Law Principle of Non-Intervention

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. The ICJ in *Nicaragua* noted that expressions of *opinio juris* of States regarding the existence of this principle are numerous and that it had been reflected in many declarations and resolutions adopted by international organizations and conferences in which the United States and Nicaragua have participated. Indeed both the United States and Nicaragua had testified to its acceptance as a customary principle with universal application. As to the content of the principle in customary law, the Court found that the prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.¹⁴

In 1970 the UN General Assembly adopted by consensus the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*,¹⁵ which *inter alia* states that:

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.

... Also no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

Arms transfers to government forces would likely not constitute a violation of sovereignty in most circumstances, given the almost certain prior government request for such assistance, or at least its subsequent acceptance or adoption. There is no international legal prohibition on providing support to a government facing isolated unrest (*e.g.* riots). Some support may be found for legal limitations on intervention in support of governments involved in a full-scale civil war, viewing such conflicts as a legitimate exercise of internal self-determination (with a resulting clear threat to international security in the event of intervention on both sides), though this principle would not apply where outside military assistance was being provided to opposition forces.

¹² (*Nicaragua v. United States of America*), *Merits, Judgement of 27 June 1986*, 1986 I.C.J. Rep. 14 [*Nicaragua*], paras. 227 to 238.

¹³ Paras. 187-201.

¹⁴ Paras 202 – 209.

¹⁵ Resolution 2625 (XXV), adopted by consensus 24 October 1970 [*Friendly Relations Declaration*].

Provision of weapons to an opposition group would likely constitute a violation of the prohibition on intervention in the domestic affairs of states. This principle was recognized by the ICJ in *Nicaragua*.¹⁶ This prohibition may not apply, however, to the provision of arms to legitimate self-determination movements, as discussed below.

2.5. Use of Force by Peoples Exercising the Right of Self-Determination

A right of self-determination of peoples exists at international law, both as a matter of treaty and custom. Although mentioned briefly in the *UN Charter*¹⁷, the right finds concrete expression in Common Article 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Cultural and Social Rights*, which states in part:

1(1). All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This right is reiterated, *inter alia*, in the *Friendly Relations Declaration*, which provides that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right 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.

Such widespread international recognition of the principle of self-determination leads to its characterization as a principle of customary international law, in addition to its status as treaty law.¹⁸

With respect to the establishment of a separate state by a people exercising its right to self-determination, this principle most clearly applies in the context of decolonization and alien occupation, where it has overwhelming legal support. The application of this principle in other contexts poses greater difficulty resulting from limitations expressed in, *inter alia*, the *Friendly Relations Declaration*, which provides that the right of self-determination:

shall not be construed as authorizing or encouraging 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 belonging to the territory without distinction as to race, creed or colour.

Reconciling the competing principles of state sovereignty and self-determination necessarily requires that self-determination generally be accommodated internally, that is within existing state structures and borders, with external self-determination confined only to exceptional circumstances.

Colonization is the most obvious example of a justification for external self-determination. This principle may be extended to cover other peoples under alien domination with little difficulty. A significantly more controversial argument may also be advanced that a people has the right to external self-determination in the event of significant internal repression (in the absence of colonial domination or alien occupation), on the basis that the repressive state is no longer 'conducting itself in compliance with the principle of equal rights and self-determination of peoples'.¹⁹

Where a people is legally entitled to 'external' self-determination, a strong argument can be advanced that it is entitled to use force to secure the exercise of this right. Support for the use of force by

¹⁶ *Nicaragua*, paras. 187-201.

¹⁷ See, e.g., Articles 1 and 55.

¹⁸ See, e.g., Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, Cambridge: Cambridge University Press, 1995 at 171-72; John Currie, *Public International Law*, Toronto: Irwin Law, 2001 at 48; Karl Doehring, "Self-Determination", in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press, 1994 at 70. See also *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. Rep. 90 at 102.

¹⁹ See, e.g., John Currie, *Public International Law*, Toronto: Irwin Law, 2001 at 51-54.

decolonization movements has evolved since the end of the Second World War, specifically as a result of the widespread decolonization movement of the 1960s.²⁰ The legality of the use of force by decolonization movements was not initially accepted by much of the international community, with specific opposition from western (colonial) powers. As a result of this controversy, early UNGA resolutions recognized the validity of anti-colonial movements, but only with reference to the legitimacy (versus legality) of their 'struggle' (which was not intended to equate to an acceptance of a right to use force).²¹ Nonetheless, support for the use of force by decolonization movements has now grown to the point of general, though not universal, international acceptance (at least in part as a result of the relative absence of current colonies). For example, UNGA resolutions have increasingly recognized the legitimacy of using "all available means including *armed struggle*" by self-determination movements acting against colonial domination or alien occupation.²²

2.6. Use of Force Against Self-Determination Movements

A state cannot use force against a people legally exercising its right of self-determination, whether 'internal' or 'external' in nature. The *Friendly Relations Declaration* provides that:

Every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.

Unlike the legal ambiguity surrounding use of force by or in support of self-determination movements, this principle is not controversial and has achieved general international support.²³

2.7. Arms Transfers in Support of Self-Determination Movements

A strong case can be made that states may provide significant support to decolonization movements in other states, when the exercise of the right of self-determination is being suppressed by the colonizing power. For example, the *Friendly Relations Declaration* provides that, in response to forcible state acts in violation of the above-mentioned 'duty' to refrain from such acts:

In their actions against, and resistance to, such forcible action in pursuit of the exercise of the right of self-determination, such people [i.e. peoples entitled to] are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The *Friendly Relations Declaration* does not, however, directly address or condone arms transfers to, or other armed support of, opposition self-determination movements. This ambiguity was deliberately maintained in order to achieve international consensus in support of this and other UNGA resolutions on this subject.²⁴

The ICJ decision in *Nicaragua* does not expressly preclude the provision of arms to opposition groups in the context of decolonization. In fact, the decision in *Nicaragua* specifically held that "[t]he Court is not here concerned with the process of decolonization; this question is not in issue in the present case."²⁵ This was criticized by Justice Schwebel in a dissenting judgment, on the grounds that it might be viewed as an implicit acceptance by the Court of providing support to armed opposition groups in the decolonization context. Although international law does not generally support intervention in civil disturbances on behalf of opposition forces, a conflict waged against colonial or alien domination cannot necessarily be viewed as a purely internal matter and as such may not fall within this prohibition. Article

²⁰ See, e.g., Malcolm Shaw, *International Law*, 4th ed. (Cambridge University Press, 1997): 795-7; Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2000): 45-50.

²¹ Gray, *ibid.* at 46.

²² See, e.g., resolutions 3070(XXVIII), 3103 (XXVIII), 3328(XXIX), 3481 (XXX), 31/91, 31/92, 32/42, and 32/154. Though this is now often limited to 'all available means.' See, e.g., Shaw and Gray.

²³ See, e.g., Gray.

²⁴ *Ibid.*

²⁵ 206

1(4) of *Additional Protocol I* to the *Geneva Conventions of 12 August 1949* [*Additional Protocol I*] defines 'international armed conflict' to include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the [Friendly Relations Declaration].

As a result, it is reasonable to argue that intervention on behalf of a people exercising its right of self-determination in this context could be considered intervention on behalf of a legitimate government and not in support of an opposition movement, at least where the conflict results from the prior suppression of the exercise of the right of self-determination by the state. However, this position remains controversial. For example, the internationalization of a conflict for the purpose of applying humanitarian law does not necessarily equate with recognition of the existence of two separate states or the applicability of article 2(4) or 51 of the *UN Charter*.²⁶

Outside of the context of *Additional Protocol I* (i.e. conflicts against colonial domination, alien occupation or racist regimes), the possible implicit acceptance by the ICJ in *Nicaragua* regarding support for opposition self-determination movements has even more limited application. Immediately following its statement regarding non-application of the decision to a colonial context, the Court concluded that no general exception to the prohibition on intervention could be justified on the basis of state practice directed "in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified."²⁷ Furthermore, the Court expressly concluded that:

*...while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras.*²⁸

Recent state practice since the *Nicaragua* decision provides little support for intervention in support of armed self-determination movements, in the absence of express or possibly implied authorization from the United Nations Security Council [UNSC]. For example, caution must be exercised with the example established by the 1999 intervention by the North Atlantic Treaty Organization [NATO] in Kosovo. With the exception of Belgium, NATO states involved in this operation did not justify their intervention with reference to a legal right of intervention in support of humanitarian principles. No state argued a legal right to intervene in support of the Kosovo Liberation Army [KLA], the major armed opposition group fighting for independence from the Former Yugoslavia. Instead, preliminary legal justifications forwarded by NATO states have centred around prior UNSC resolutions addressing internal repression in Kosovo.²⁹ While the subsequent UN-authorized international presence in Kosovo is expressly premised on internal self-determination of Kosovar-Albanians, though unequivocally rejecting external self-determination by upholding Yugoslavian territorial integrity, it has also actively sought to disarm the KLA pursuant to its express mandate.³⁰

²⁶ As a result, in spite of significant international support for assisting self-determination movements, Malcolm Shaw (at 797) submits that the provision of armed assistance to peoples engaged in conflict against colonial domination or alien occupation "would appear to be unlawful."

²⁷ 206 ff.

²⁸ 268, emphasis added. However, the legal effect of this statement may be limited by its characterization as *obiter dicta*; the Court followed this statement with the observation that the argument of American intervention in Nicaragua on the basis of Sandinista human rights abuses "cannot in any event be reconciled with [its] legal strategy ... which is based on the right of collective self-defence."

²⁹ See, e.g., *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures*, Verbatim Record, 10 May 1999. This is itself a controversial position, given the lack of express prior authorization of NATO action.

³⁰ UNSC Resolution 1244, UN Doc. S/Res/1244 (10 June 1999), provides for the "demilitarizing the Kosovo Liberation Army [KLA] and other armed Kosovo Albanian groups." However, the resolution only makes specific reference to "offensive actions,"

2.8. Conclusion

An exception to the general prohibition on arms transfers to opposition groups as impermissible acts of force and intervention may exist with respect to support provided to legitimate self-determination movements facing internal state repression. However, as the above analysis demonstrates, the existence of such an exception remains controversial, and strong arguments may also be raised in rebuttal.

3. Aid or Assistance in the commission of an internationally wrongful act (secondary state responsibility)

When the conduct of a state constitutes a breach of an international obligation of that state, the state has committed an international wrong for which it is responsible. Further, another state may be found responsible for *assisting* in the commission of the internationally wrongful act. To determine the circumstances in which a state may be complicit in the internationally wrongful act of another state, it is useful to first consider the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [ILC Draft Articles]³¹. In particular, Article 16 of the ILC Draft Articles establishes state responsibility for 'aiding or assisting' the commission of an internationally wrongful act by another state, where 'knowledge of the circumstances' existed and the act in question would have been wrongful had it been committed directly by the third party state. The *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*³² [ILC Commentaries] clarify the extent of third party state responsibility established by the ILC Draft Articles as follows:

*Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.*³³

With respect to the requirement of knowledge of the circumstances establishing the wrongful act, the ILC Commentaries provide further that:

*The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase 'knowledge of the circumstances of the internationally wrongful act.' A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.*³⁴

The ILC Draft Articles codification of state responsibility for aiding or assisting in the commission of an international wrongful act by another state are not themselves determinative of the issue. The ILC is not a law-making body; its role is to work *towards* the codification and progressive development of the law. The ILC Draft Articles may in future form the basis for negotiating an international treaty on state responsibility; however, they do not yet have any conventional legal status or create any positive obligations for states. The United Nations General Assembly [UNGA] has welcomed the completion of the ILC Draft Articles, annexing them to Resolution 56/83 on 12 December 2001. While this is a significant symbolic step, the UNGA, like the ILC, has no law-making authority. In any event, Resolution 56/83 did

which may lead to some implicit support for use of force by the KLA in its own defence though providing no support for its arming by third states.

³¹ Adopted by the International Law Commission at its fifty-third session (2001). See the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10).

³² Extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2. Available on-line at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf#pagemode=bookmarks).

³³ ILC Commentaries, p. 155. Emphasis added.

³⁴ *Ibid.* Emphasis added.

not actually *adopt* the ILC Draft Articles as a statement of the UNGA position on the matter of state responsibility. Instead, it simply “[took] note” of the ILC Draft Articles, “commend[ing] them to the attention of Governments *without prejudice to the question of their future adoption or other appropriate action*”.³⁵ Thus, while the principle of secondary state responsibility outlined in Article 16 is compelling, it has not necessarily achieved the status of an international legal obligation. It is not part of conventional (treaty-based) international law. Can we then say whether there is evidence of the acceptance of the broad interpretation of this principle as a matter of customary international law, arising from evidence of state practice and *opinio juris*? The ILC commentaries themselves cite evidence that secondary state responsibility may have achieved this customary status,³⁶ albeit within the substantial limitations imposed by the knowledge requirements established in Article 16 as discussed above.

3.1. Charter and Customary International Law Prohibitions on the Use of Force: Assisting in the Crime of Aggression

Applying the doctrine of complicity or of secondary state responsibility to the case of the transfer of arms by a state to another state engaged in unlawful aggression, the transferring state will be internationally responsible for assisting that aggression where the transfer was made in full knowledge of its intended use, and with a view to facilitating the aggression, provided as well that the wrongful act in fact takes place. Although the circumstances of each case will need to be carefully examined to determine if the requisite knowledge and intention are present, shipments of arms over time, in full knowledge of the use to which they are regularly being put, would appear to constitute clear evidence of a “direct link” between the aid or assistance given and the subsequent wrongful conduct.³⁷

3.2. Restrictions on the use of Conventional Arms arising from International Humanitarian Law (IHL): Assisting Grave Breaches

International humanitarian law (IHL) is the body of rules which, in wartime, protects people who are not, or are no longer, participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law. Serious violations of humanitarian law include the “grave breaches” identified in all four Geneva Conventions, applicable in international armed conflict, which include willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; unlawful deportation or transfer of a protected person and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly³⁸ 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 recognized as indispensable by civilized peoples. The term is also capable of a more expansive interpretation, covering

³⁵ Emphasis added.

³⁶ For example, the ILC Commentaries conclude that “[s]tate practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State.” This conclusion is based upon controversies arising over, *inter alia*, Iranian allegations that the United Kingdom [UK] provided chemical weapons to Iraq in 1984, similar concerns over Sudanese support for Iraqi chemical weapons production in the late 1990s, as well as concern over the use of UK air bases by the United States to launch attacks on Libya in 1986. See, for e.g., ILC Commentaries p. 157.

³⁷ In *Nicaragua vs. the USA* the International Court of Justice quoted the definition of aggression annexed to General Assembly Resolution 3314 (XXIX) “as expressing customary law in this respect”. (See *Nicaragua supra* at paras 187-201). Article 3 enumerates a non-exhaustive list of acts that qualify as acts of aggression including “(f) [t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.” Note also that the ILC Commentaries to Article 16 state that the prohibition on the non-use of force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. (See ILC Commentaries, *supra*, Article 16, paragraph 8, p. 158.)

³⁸ Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions of 1949.

all violations of IHL for which there is individual criminal responsibility. The most recent codification of such violations, collectively referred to as “war crimes”, is to be found in the Statute of the International Criminal Court adopted in 1998.³⁹

If a state transfers weapons to another state⁴⁰ in circumstances where it has knowledge that the receiving state is using these weapons to engaged in serious violations of international humanitarian law, then the transferring state may be responsible for aiding an international wrong. (See also the discussion *infra* on the individual criminal responsibility that may attach to officials involved in assisting war crimes and crimes against humanity).

3.3. Restrictions on the Use of Conventional Arms arising from Human Rights Law: Assisting in the Breach of Human Rights Law

If a state transfers weapons to another state in circumstances where it has knowledge that the receiving state is using them to commit serious violations of international human rights law, then it may be guilty of aiding the internationally wrongful conduct. As the ILC Commentaries note:

*The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the United Nations Security Council or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations. Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.*⁴¹

As was earlier argued in relation to aiding aggression, the transfer of arms over time, and in full knowledge of their actual use in the perpetration of human rights abuses, would provide compelling evidence of the requisite knowledge and intention to support state responsibility for assisting the internationally wrongful conduct.

With the legal content of international human rights law principles open to significant debate, a further threshold question will be ‘what constitutes a serious human rights violation?’ At a minimum, however, the set of core human rights from which no derogation is possible, not even in times of emergency, would clearly qualify. These are listed in Article 4(2) of the *International Covenant on Civil and Political Rights* and include the right to life, freedom from torture or degrading treatment, freedom from slavery, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion. In addition, withdrawal of other rights cannot occur if doing so discriminates solely on the ground of race, colour, sex, language, religion or social origin.

³⁹ Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1988, Article 8, UN Doc. PCNICC/1999/INF/3.

⁴⁰ As noted in footnote 9, the doctrine of secondary responsibility cannot be invoked if the state in question is transferring arms to a non-state actor engaged in grave breaches. However, as discussed earlier, such transfers would in all likelihood involve a breach by the transferring state of the prohibition on the use of force and against intervention in the domestic affairs of states.

⁴¹ ILC Commentaries, pp. 158-9.

International Legal Prohibition on Weapons Transfers: Individual Criminal Responsibility

While states remain “the principle subjects of international law”, nevertheless, the conduct of individuals may be regulated by international law.” In particular, international criminal law, or domestic analogies, may provide an effective mechanism for addressing problematic arms transfers in certain circumstances. Complicity is a recognized ground establishing individual criminal responsibility at international law. It is directly established in the Rome Statute of the International Criminal Court.⁴² Like state responsibility, individual responsibility requires knowledge of the circumstances surrounding the commission of an international crime in the recipient state, and generally the accused also requires the actual intent to further the commission of some type of criminal activity through his actions. In the event that these requirements are established, arms traders (up to and including high government and military officials engaged in the authorization of arms transfers) could be subject to individual criminal sanction. Unlike other legal areas discussed above, this would not require the establishment of state responsibility for the acts of the individual in question.

⁴² See, e.g., paragraphs 25(3)(c) and (d). The jurisdiction of the ICC is complementary to the national criminal jurisdiction of states parties and, except where a case is referred by the UN Security Council, is limited to crimes committed on the territory, or by a national, of a state party. However, many states parties to the Rome Treaty have established “universal jurisdiction” to ensure the effective prosecution of the most serious international crimes. Belgium, for example, enacted a law in 1999 that gives its courts the authority to prosecute individuals accused of war crimes and other atrocities regardless of the crimes’ connection to Belgium or the presence of the accused on Belgian soil.

Implications for National Export Authorization Regulations and Procedures

1. Effective Export Authorization Policy and Procedures

Given the extent of international legal prohibitions on the transfer of conventional arms, the breach of which may give rise to state responsibility or individual criminal responsibility, or both, prudence dictates that states have in place effective procedures to ensure that such transfers will not be approved. Speaking plainly, it is hard to see how this can be done without the following:

- a policy requiring the authorizing agency or individual to act in accordance with all relevant international legal obligations;
- export criteria against which individual applications are assessed that specifically relate to these international obligations; and
- involvement in the assessment process of individuals with the requisite international legal expertise.

2. Comparison to OSCE SALW Export Criteria

These international legal prohibitions on conventional arms transfers are a minimum global standard. While considerably narrower than the OSCE agreed export criteria for small Arms and light weapons (SALW), they are legally binding and, if breached, could give rise to compensation claims against states in the International Court of Justice or to international or domestic criminal prosecutions against individuals. These prohibitions apply to all conventional arms transfers including all categories of SALW, as set out in the UN Definition⁴³, not just the narrower OSCE definition. Furthermore, these prohibitions are not limited in application to transfers within the territory of OSCE countries.

3. Next Steps

1. States should immediately institute an internal review of arms transfer authorization procedures with a view to ensuring that they are in conformity with their respective international legal obligations.
2. Member States could consider sponsoring a resolution of the First Committee at the next UN General Assembly Session mandating a UN Governmental Expert study of the “existing responsibilities of states under relevant international law” with which their national regulations and procedures for export authorizations must be consistent (as set out in Paragraph 11, Section II of the UN Programme of Action). The resolution should specify that the composition of the Expert Group include expertise in relevant areas of international law – particularly international humanitarian law and human rights law – as well as defence procurement and arms export authorization expertise. Consideration might even be given to securing a complementary resolution from the Sixth Committee, responsible for legal issues.
3. Alternatively, the resolution might mandate the Secretary-General to consult with a group of “qualified experts” to give preliminary consideration to this issue in as “neutral” an environment as possible, without the inevitable intrusion of political considerations when a group of *governmental* experts is involved.⁴⁴

⁴³ See Annex I, Clarification of Key Terms: “Small Arms and Light Weapons” in A/Conf.92/2 at page 26. However, the broadest definition of small arms and light weapons is likely that found in the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials.

⁴⁴ See for example the Report of a consultative meeting of experts on the feasibility of undertaking a study for restricting the manufacture and trade of small arms to manufacturers and dealers authorized by States, contained in the the Annex to UN document A/54/160 (1999). By its resolution 53/77 E of 4 December 1998, operative paragraph 5, the General Assembly requested the Secretary-General to initiate a study on the feasibility of restricting the manufacture and trade of small arms to manufacturers and dealers authorized by States. Pursuant to that resolution, consultations were held with a group of qualified experts to examine the feasibility of carrying out the study – in effect, a pre-study study. The resulting report outlines key issues for the governmental experts to address and suggests how they might best undertake their work.

4. A third alternative is already underway – that of convening a geographically and experientially diverse group of experts, governmental and non-governmental alike, under the auspices of a respected NGO⁴⁵, to explore the issue with a view to enlarging the common understanding of the international community in relation to international legal prohibitions on arms transfers.

⁴⁵ Under the auspices of the NGO consortium, "Biting the Bullet", a Small Arms Consultative Group Process was instituted in January 2003 entitled: *Small Arms and Light Weapons Transfers: Developing Understandings on Guidelines for National Controls and Transfers to Non-State Actors*.

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