

INTERNATIONAL TRANSFER OF SALW: LIMITATIONS AND PROBLEMS

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ABSTRACT

Small arms and Light weapons (SALW) are accessible to wide range of people and are suitable for irregular warfare or criminality because they are easy to conceal and transfer within and outside a country. These arms have been excessively manufactured and distributed during and after the cold war era. The ‘superpowers’, China and their allies delivered a large amount of SALW that ranged from landmines to missiles to combatants in south east, Africa and Latin America, during the cold war. The International Law has not produced any rules which could restrict the level of armaments of a sovereign state. States enjoy the right to retain, import or export SALW for self defense, security needs as well as for its capacity to participate in peacekeeping operations. SALW transfers can also fuel conflict, violent crime and instability; undermine sustainable development and facilitate grave abuses of human rights and serious violations of international humanitarian law and several principles of jus cogens. It is, therefore, a legitimate and urgent concern of the international community that States maintain effective national controls over international transfers of SALW. Almost all States maintain laws, regulations and administrative procedures to control the import, export and transit of arms and other military goods and technologies. However, many of these controls need to be strengthened and updated specifically as they relate to small arms and light weapons, and need to be supplemented with effective controls over transshipment and brokering. The enforcement of transfer controls is often also in need of strengthening. This article aims at analyzing the problem and challenges associated with the transfer of SALW and the repercussions of its illicit transfer, due to the lack of enforceable legal norms.

INTRODUCTION

In the Covenant of the League of Nations and the UN Charter¹, the demobilization or Arms control, as an issue, in international law developed in Twentieth century. To lessen the national armaments to a minimum level, support of peace is required by all the members of the League of Nations. But on the other hand, the UN Charter does not specify demobilization as its core reason and rule. To determine any dispute on the premise of equity and international law and to grow friendly relations among the countries², is one of the main concerns of UN Charter. Treaties and customs are the legitimate source of arms control because the states are both and large hesitant to go into treaties of this kind and also the sensitive nature of the regulation of armaments.

However, endless improvements have been accomplished in Arms Control Treaties at various levels, since the Second World War. Practically, the guidelines of Arms control create a custom first which is the most ignored source of law. In applying the components of custom to arms control issue, the state practice and *opinio juris* play a vital role. The rise of standard guidelines of demobilization is a progressive procedure.

SMALL ARMS AND LIGHT WEAPONS

SALW³ are defined as deadly weapons suitable for personal or for group use, employed or to be employed by states and others, for legal or illegal purposes and are uncovered in *lex specialis* weaponry legal regimes⁴. The world is flooded with at least 500 million SALW⁵. Every year, victims, most of them being civilians, half a million die every year due to use of SALW⁶. Violence and crimes such as homicides, robberies, rapes and kidnapping usually involve small arms. They are the main source of genocide and repression⁷. The 'illicit' and grey market transfers are the major source of the crisis and diversion to the underground market, which is the main problem against the main source of proliferation is the 'legal trade'⁸.

¹ Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

² Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

³ Small Arms and Light Weapons

⁴ Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

⁵ Annam, 'Small Arms, Big Problems' *International Herald Tribune* (2001).

⁶ Report of the Secretary General to the Security Council, 'Small Arms' (2002).

⁷ Annam, 'Small Arms, Big Problems' *International Herald Tribune* (2001).

⁸ Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

SUBSTANTIVE RESTRICTION ON MANUFACTURE OF SALW

Unfortunately, to prevent the illegal trafficking of SALW, there is no international legal norm. However to restrict the manufacture of small arms, especially military weapons, there are domestic laws which restricts the manufacture. The transformation of the ECOWAS Moratorium⁹ in 2006 into a Convention codified the existing norm that limit the transfer of small arms.¹⁰ The *UN High-level Panel on Threats, Challenges and Change of 2004*¹¹ adopted an approach to limit the production and disperse of small arms globally. All these concerned efforts by the International community have lead to the adoption of GA Resolution¹² which formed an arms trade treaty establishing common standard for the import, export and transfer of convention arms.¹³

As long as the manufacture of such weapons remains unlimited, the transfer of conventional weapons cannot be prevented. The biggest threat to international security is the excessive availability and accumulation of those weapons. It is a *pre-emptory norms* and *erga omnes* obligations on states to maintain peace and security by restricting the flow and use of small arms.

EXPRESS PROHIBITION UNDER INTERNATIONAL PEACE AND SECURITY NORM

Under Article 51 of the UN Charter, when a member is subject to an armed attack, then according to the provisions of the charter, such member has an inherent right of state of Self defense. The obligations of maintaining peace and security, which is binding on all the states, has taken the form of *Jus Cogens* and no state can derogate from it. But the main question here is does that obligation

⁹ ECOWAS Conventions (West African Arms Moratorium on the Manufacture, Importation and Exportation of Small Arms of 1998) Article 3 and 6 ban the transfer of small arms if it violates the principles of international law or violate humanitarian law.

¹⁰ ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other related material (2006).

¹¹ A More Secure Order: Our Shared Responsibility, Report of the Secretary General High level Panel on Threat, Challenges and Change, 2004.

¹² General Assembly Resolution No. 61/89 of December 2006.

¹³ The Assembly endorsed the First Resolution of the First Committee by vote of 153 in favour, one against and 24 abstentions.

includes SALW transfer? The UN Charter neither expressly prohibits nor permits the use or transfer of any specific weapon.¹⁴

To support this, In the case of *Nicaragua v USA*, it was ruled by *ICJ* that it is the underlined obligation on the states to restrain them from the act of aggression. Customary rule on international transfer of SALW is that if there is an actual threat from Small then its import and export should be prohibited. Tests have been conducted to see with what motive weapons are been imported, the possibility of diversion or whether the importing state support or encourages terrorism. When there is an apparent risk of the use of SALW against the peace or security of any state then states should refrain from such transfers.

OBSERVANCE OF INTERVENTION RULE

SALW transfer must comply with the rule of non-intervention and such transaction should be between or on authorization of states only.¹⁵ In *Fisheries case*, the *ICJ* ruled that in respect of usage of custom the evidence must be sought in the behavior of a majority of interested states.¹⁶ In this case, great majority of importing and exporting states of SALW supported the prohibition of weapon supplies to armed group of another state.¹⁷ However, US continued to reject this restriction on the ground that such limitation hamper the need to assist just cause.¹⁸ The *ICJ* in *Nicargua case* made it clear that although states frequently breach the rule of non-intervention, there is no customary rule which supports the emergence of an exception to it.¹⁹ The 1997 UN Panel had shown some support to transfer small arms to armed group of another state. This panel suggested a ban of small arms supply to conflict areas, as one method of preventing, or responding

¹⁴ Gillard, *The Global Black Market in Small Arms*, (Zed Books, 2000) .

¹⁵ Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

¹⁶ *Fisheries case*, ICJ Repts 1951.

¹⁷ *Id.*

¹⁸ Security Council Resolution No. 217/1965 and Security Council Resolution No. 221/1966.

¹⁹ Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

to human catastrophe.²⁰ Every consignment of arms undertaken in conformity with the rule of non-intervention is not necessarily legal under international law.²¹

PROHIBITION ON ARMS TRANSFER

International law limits the freedom of state to transfer weapon and also how the states may use small arms, if they are to be used in contravention of International law. The UN Charter neither expressly prohibits nor permit the use or transfer of small arms. But some states provide implicit right to acquire small arm as part of their inherit right to self-defense but which is subject to limitations. International law restrains the exchange of little arms in various ways. One of these is the specific disallowance on the utilization — and subordinately on the exchange — of certain weapons by temperance of standards of worldwide helpful law. Another is the restriction of exchanges to specific States or gatherings as managed by mandatory embargoes forced by the United Nations Security Council. A subtler however no less imperative constraint is dependent upon the end-utilization of the weapons. In circumstances where there are no forbiddances enacting the exchanged weapons, where the nation of goal is not subject to an arms ban, and where consistence with national authorizing necessities is to such an extent that the exchange is in accordance with residential law, worldwide law may regardless disallow a State from exchanging weapons in light of the path in which the weapons will be utilized as a part of the beneficiary State. Under the law of State duty, if the choice to exchange weapons encourages the commission of a globally wrongful act, for example, the execution of an atrocity or the damaging conduct of a police compel, then the exchanging State might be considered in charge of making such infringement conceivable.

UN Security Council has a common practice to impose arms embargoes, both state and non-state members, to a conflict as a response to the existence threat of violent conflict. That's why Under the Article 41 of UN charter, States have a legal obligation to abide by embargoes enacted by the

²⁰ Report of the Secretary General on Threat, Challenges and Change, (2004).

²¹ Zeray Yihdego, *The Arms Trade and International Law*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

UN Security Council and a duty to implement measures to ensure that persons within their jurisdiction also comply with the embargoes ²².

The first of the two obligations of abstention incumbent upon States is one of non-acknowledgment, which incorporates both demonstrations of formal acknowledgment and acts that infer recognition.²² Recognition includes tolerating the authenticity of the situation. Exchanging weapons could hypothetically qualify as a demonstration suggesting recognition to the degree that the products legitimize the force of the abusing State. It is more probable, in any case, that exchanging weapons would rupture the second commitment classified in Article 41(2), to be specific the commitment not to help or help the capable State in keeping up the unlawful circumstance.

CONCLUSION

There is a need to correct the meaning of 'illegal trafficking' in SALW as it incorporates just underground markets. Thusly, just such exchanges which hold fast to the household laws of provider and beneficiary states and with universal standards ought to be legitimized. In spite of there being limitation on assembling of SALW however there exist no universal standard which would anticipate multiplication and illegal trafficking. States should be helped to remember their commitment and good duty of anticipating arms exchange. It is important to address the issue of unlimited arms all-inclusive for solid collaboration from States. This is a call for reinforcing and arranging rules which would force risk on the States in instances of contradiction.

The commitments of arms-trading States toward the casualties of little arms and light weapons past their outskirts are not only good. At the point when genuine violations of international law are undermined or executed, States have a legitimate obligation to act in a legal way with a specific

²² Article 41 confers upon the Security Council the power to call for a “complete or partial interruption of economic relations [...] and the severance of diplomatic relations” in response to a threat to or breach of the peace or an act of aggression. It is within the discretion of each State to decide the type of responsibility (administrative offence v. criminal offence) that attaches to a violation of the embargo by a private actor. In a Resolution on the situation in Africa adopted in 1998, the Security Council encouraged Member States to adopt measures making the violation of mandatory arms embargoes a criminal offence (see S/RES/1196, 16 September 1998, para. 2).

end goal to convey such infringement to an end. One of the ways this should be possible is by guaranteeing that the fare and travel of weapons from their region are firmly controlled by a permitting administration that gives due respect to the level of regard for worldwide law in the nations of destination. Allowing a permit when plainly the weapons will be utilized to submit genuine infringement of human rights or compassionate law can bring about a finding of obligation regarding helping another State in the commission of an international partner wrongful act. This is all the more the situation where the infringement is gross and efficient and are precluded by a commitment emerging under an authoritative standard of universal law, grave breaks of worldwide philanthropic law being the conspicuous case.

