Arms, Traffic in

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Subject(s):
Terrorism — Armed conflict, international — Weapons

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.
A. Introduction

1 Traffic in arms, also referred to as ‘arms trade’ or ‘arms trafficking’, encompasses all stages of transfers of new or surplus conventional weapons and military equipment, including parts, components, and ammunition between States, between non-State entities, or between States and non-State entities. This includes conduct or activities that might be described as forming part of one or more of the following: sale, acquisition, delivery, import, export, transit or trans-shipment of arms, or the brokering of arms deals. Traffic in arms may also involve the supply of weaponry together with other forms of military assistance, such as technical assistance, technology transfer, and training the personnel of the recipient State or non-State entity. Trafficking in non-conventional (nuclear, chemical, and biological) weapons and their means of delivery is also sometimes addressed as an arms trafficking issue. Arms brokering is the arrangement or facilitation of potential arms transfers by intermediaries acting between manufacturers or suppliers of arms on the one hand and buyers and recipients on the other. The term ‘trafficking’ often connotes illicit dealings in arms. The term ‘trade’ is suggestive of licit dealings in arms. This entry deals with the international regulation of both illicit and licit dealings in arms. International efforts to regulate traffic in arms should be distinguished from international regulation concerning → arms control and → disarmament, which are concerned with the limiting, quantitatively and qualitatively, of the build-up of arms by States.

2 Traffic in arms has increasingly become a concern for States, international organizations, and non-governmental organizations. The end of the → Cold War led to an increase in traffic in arms for commercial purposes, less influenced by strategic considerations than in the past. Reductions in the stockpiles of conventional weapons, particularly in Europe, also led to a significant increase in the supply of arms to areas of conflict. The reduction in ‘super-power’ patronage for regimes and armed groups was followed by increased privatization of armed conflict, the emergence of armed groups engaged in illicit commercial activities, and increased numbers of non-international armed conflicts (→ Armed Conflict, Non-International), all of which fuelled an increase in demand for arms. The equipping of → non-State actors with highly lethal weapons to rival police or even military forces has sustained conflicts and transnational criminal activity (→ Transnational Organized Crime) and has threatened the safety and effectiveness of → peacekeeping and humanitarian operations. In response to these developments, global and regional security, humanitarian, and development concerns have prompted international action, in particular regarding the proliferation and dispersion of small arms and light weapons (→ Small Arms, International Restrictions on the Trade in). Humanitarian concerns have also motivated efforts to prohibit and restrict the transfer of anti-personnel → land mines and → cluster munitions. Notwithstanding the profound human suffering that is associated with traffic in arms, international legal regulation remained fragmented: in terms of States that assumed legal obligations; in terms of the weapons that were regulated; and in terms of the types of transfers (State to State, State to non-State actor; non-State actor to State) targeted by the regulation. In recent years this fragmentation has gradually been reduced and the coherence of international legal regulation of traffic in arms has been significantly enhanced by the negotiation of the Arms Trade Treaty (2013), which came into force in 2014.

B. State to State

1. Customary International Law
(a) In the Absence of an Existing Armed Conflict

3 Despite the growing concern about traffic in arms, no rules of customary international law have developed that regulate State acquisition of arms through the arms trade between States. In → Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Merits) ([1986] ICJ Rep 14), the → International Court of Justice (ICJ) concluded that ‘... in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception’ (at para. 269). This generally recognized freedom of States to acquire arms is the basis for excluding State to State arms transfers in some international treaties regulating the arms trade discussed below.

4 There are certain primary rules that may prohibit arms transfers between States. In the case of peremptory norms that give rise to obligations to exercise due diligence to prevent violations—such as to prevent → genocide and → slavery—transfers of arms and the failure to restrict transfers may give rise to State responsibility. The ICJ considered such obligations arising under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) in its judgment in the → Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro) ([2007] ICJ Rep 43 at paras 429–32).

5 The customary international law rules on State responsibility may also operate to effectively prohibit arms transfers between States in two situations, which are dealt with by Arts 16 and 41 of the Articles on State Responsibility of the → International Law Commission (ILC). Art. 16 contemplates the derivative responsibility of a State that transfers arms to another State for the purpose of providing aid or assistance in the commission of an internationally wrongful act by the recipient State. The ILC, in its commentary to Art. 16, observed that

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. (At para. 9.)

Art. 41 provides that where a State has committed a serious breach of a peremptory norm, all other States are under an international legal obligation to not render aid or assistance that would allow the recipient State to maintain the situation created by the serious breach. A transfer of arms in those circumstances would result in State responsibility for the transferring State. Although the Articles on State Responsibility purport to contain only secondary rules concerning the consequences of a breach of a primary rule, Arts 16 and 41 straddle the primary/secondary rule distinction insofar as their effect is to impose positive duties on States in the circumstances with which they are concerned.
In Cases of International Armed Conflict

In the case of an international armed conflict, the customary rules concerning whether a State may supply arms to a party to the conflict depend primarily on two things: the identity of the recipient State and the status of the supplying State. In respect of the identity of the recipient State, international law prohibits the giving of assistance, including through the supply of arms, to a State that has committed a serious breach of the prohibition on the use of force. As the unlawful use of force (or on a narrower view, aggression) constitutes a serious violation of a peremptory norm, in accordance with the customary rule contained in Art. 41 Articles on State Responsibility discussed above, international law prohibits the supply of arms that would assist that State. If, on the other hand, a State chooses to participate in an international armed conflict to assist a State that was the victim of an armed attack through collective self-defence, there are no customary international law rules restricting the supply of arms to the victim State.

If a State chooses not to participate in the armed conflict, it would have the status of a neutral State, and any supply of arms would be regulated by the customary rules of neutrality (Neutrality, Concept and General Rules). The rules of neutrality were codified during the early 20th century in the Convention concerning the Rights and Duties of Neutral Powers in Naval War (1 Bevans 723; ‘1907 Hague Convention XIII’) and the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907) 205 CTS 299; ‘1907 Hague Convention V’). Art. 6 1907 Hague Convention XIII forbids the ‘supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever’. This prohibition is absolute and applies irrespective of whether one or both of the parties to the conflict are being armed by other States. This prohibition was not, however, applicable to most private sales of arms (Art. 7 1907 Hague Conventions V and XIII, cf the Alabama Arbitration), but private shipments of arms were subject to seizure as contraband. There has been no comprehensive codification of the law of neutrality since 1907 (cf private restatements of certain aspects of the law of neutrality, in particular the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea) and State practice since the early 20th century has altered or rendered obsolete some of the rules of neutrality in the 1907 Hague Conventions. Relevantly, the customary rule reflected in Art. 7 1907 Hague Conventions V and XIII has been modified to the extent that if the transport or export of arms by private persons or enterprises to a State that is party to an international armed conflict is subject to control by a neutral State, the neutral State has a customary obligation to prevent such a supply of arms by, for example, prohibiting the export. States that support a party to an international armed conflict through the supply of arms but do not themselves participate in the armed conflict (sometimes referred to as declared or undeclared non-belligerency), are in violation of the rules of neutrality, as occurred with a number of States supporting the 2003 invasion of Iraq.

It also appears that customary international humanitarian law prohibits the supply of arms that seeks to encourage its breach. In its decision in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits), the ICJ appeared to accept that a State may violate its obligations under customary international law to respect, and ensure respect for, the rules of customary international humanitarian law if the State, by the transfer of arms, seeks ‘to encourage persons or groups’ engaged in armed conflict ‘to act in violation of’ the rules of customary international law now reflected in Art. 3 common to the four Geneva Conventions of 1949 (at para. 220) applicable in both international and non-international armed conflicts.
(c) In Cases of Non-International Armed Conflict

9 Under the customary principle of non-intervention, States must not supply arms to insurgents in other States. The application of this principle has been contested in cases of → wars of national liberation. It is also at least arguable that the principle is inapplicable to military assistance provided to victims of genocide—see, on a related issue, the Separate Opinion of Judge ad hoc Lauterpacht in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Order) ([13 September 1993] at paras 98–104).

2. Treaties Addressing Traffic in Specific Types of Arms

(a) Global Treaties

10 There are a number of multilateral treaties addressing traffic in particular types of arms that either prohibit transfers absolutely, or that address either the lawful or illicit trade in such arms.

11 Various multilateral treaties applicable to non-conventional (nuclear, chemical, and biological) weapons prohibit absolutely the transfer of weapons or related materials. The Treaty on the Non-Proliferation of Nuclear Weapons (‘Nuclear NPT’) ([1968] 729 UNTS 161) prohibits, for example, the transfer of nuclear weapons and other nuclear explosive devices (see Arts I and II). The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (‘Biological Weapons Convention’) ([1972] 1015 UNTS 163) prohibits the transfer of any of the agents, toxins, weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict (see Arts I and III; → Biological Weapons and Warfare). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (‘Chemical Weapons Convention’) ([1993] 1974 UNTS 45) prohibits the transfer of chemical weapons (see Art. I; → Chemical Weapons and Warfare). These three treaties apply in respect of direct or indirect transfers to any recipient whatsoever, and therefore apply in respect of State to State transfers and State to non-State actor transfers.

12 A number of multilateral treaties concerning particular types of conventional arms also prohibit transfers absolutely. Two of the protocols annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects ([1980] 1342 UNTS 137; ‘CCW Convention’) are examples. The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) obliges States Parties not to transfer any mine the use of which is prohibited by the Protocol (see Art. 8), and the Protocol on Blinding Laser Weapons (Protocol IV) requires States Parties not to transfer laser weapons specifically designed to cause permanent blindness to any State or non-State entity (see Art. 1). Additionally, States Parties to the Convention on the prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction ([1997] 2056 UNTS 211) are obliged never to transfer to anyone, directly or indirectly, anti-personnel mines (see Art. 1). States Parties to the 2008 Convention on Cluster Munitions (2688 UNTS 39) are bound by the same obligation in relation to cluster munitions (Art. 1).

13 The Arms Trade Treaty (2013) regulates the lawful trade in a broad range of conventional weapons: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; small arms and lights weapons; ammunition/munitions for covered arms; and parts and components of such arms (Arts 2–4). Building on existing obligations under customary international law and treaties dealt with in this entry (see Art. 6), the Arms Trade Treaty
creates additional obligations regarding exports (Art. 7), imports (Art. 8), transit and transshipment (Art. 9), brokering (Art. 10), the prevention of the diversion of arms (Art. 11), record keeping (Art. 12), and reporting (Art. 13). These additional obligations include obligations to establish and enforce national control systems to implement the Treaty’s obligations (Arts 5 and 14). Art. 7 requires exporting States to undertake risk assessments as to whether covered arms, ammunition/munitions, parts, or components ‘could be used to’, inter alia, ‘commit or facilitate a serious violation’ of ‘international humanitarian law’ or ‘international human rights law’. Similar risk assessments are to be undertaken in respect of offences under international treaties relating to terrorism and organized crime. If, following such a risk assessment, an exporting State ‘determines that there is an overriding risk’ of such a violation or offence, then the exporting State ‘shall not authorize the export’.

14 In the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime ([2001] 2326 UNTS 208), States Parties are required to criminalize ‘illicit trafficking in firearms, their parts and components and ammunition’ (see Art. 5). Art. 4 of the Protocol expressly provides that the protocol ‘shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations’. The travaux préparatoires of the Protocol nonetheless indicate that it applies to commercial transfers of firearms ‘between entities owned or operated by Governments, such as state-owned arms manufacturers’. States Parties are required to ‘establish and maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition’ (see Art. 10). In order to facilitate tracing, the Protocol imposes obligations on States Parties to require distinct and identifiable markings to be applied to firearms manufactured in, or imported into, their territory (see Art. 8). States Parties that have not already established a system regulating firearm brokers and brokering are also required to ‘consider establishing a system for regulating the activities of those who engage in brokering’ (see Art. 15).

(b) Regional Treaties

15 The Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (1997), which was negotiated under the auspices of the → Organization of American States (OAS), contains provisions similar to those of the 2001 Protocol to the United Nations Convention against Transnational Organized Crime referred to above. The Inter-American Convention also applies to State transfers in cases where firearms are transferred to or across a State Party’s territory without its authorization, but the treaty does not address brokering. Regional and sub-regional initiatives have also been taken by developing States in the African region. Three treaties, imposing significant obligations on Parties regarding traffic in small arms and light weapons, have entered into force. Small arms are generally considered to encompass weapons intended for personal use such as assault rifles and light machine-guns. Light weapons are generally considered to cover those weapons intended to be used by several persons serving as a crew, such as heavy machine guns and mortars of a calibre less than 100mm.

16 The first of the treaties, the Protocol on Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region (2001), was negotiated by 14 States, members of the → Southern African Development Community (‘SADC’). The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (2004), was the product of negotiations between 11 States. The ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006) was negotiated under the
auspices of the → Economic Community of West African States (ECOWAS). These treaties impose obligations on parties to criminalize illicit trafficking, require the establishment and maintenance of licensing and authorization procedures for transfers (including brokering), and require the establishment and maintenance of tracing mechanisms. The ECOWAS Convention requires collective authorization on the basis of consensus by ECOWAS Member States before certain transfers are permitted under the Convention. A fourth African regional treaty, the Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and All Parts and Components that Can Be Used for their Manufacture, Repair and Assembly (‘Kinshasa Convention’) was negotiated in 2010 but has not yet entered into force. The allocation of sufficient resources will be critical to ensure compliance with the obligations created under these instruments. Inadequate institutional capacity has been a significant factor in past failures to restrict traffic in arms within the region.

(c) Treaties Imposing Obligations on Particular States

17 The Final Protocol between the Powers and China (‘Treaty of Peking’) (1901) subjected China to a prohibition on arms imports. After World War I, restrictions on arms trade and production were imposed on particular States by peace treaties such as, for example, the Treaty of Peace between the Allied and Associated Powers and Germany (→ Versailles Peace Treaty [1919], see Arts 170, 171, 191, and 198).


18 The United Nations Security Council has imposed arms embargoes in respect of various crises. During the Cold War mandatory arms embargoes were imposed by the Security Council only twice: in respect of the regimes in Southern Rhodesia and South Africa. Since the end of the Cold War the Security Council has imposed arms embargoes in respect of regimes and non-State actors in more than 20 States. Violations of such embargoes, in particular by non-State entities, have been of major concern and States have been encouraged to criminalize violations of arms embargoes under their national laws. States are legally obliged to comply with mandatory arms embargoes imposed by the Security Council acting under Chapter VII of the United Nations Charter (see Arts 2 (5) and 25 UN Charter). Individual States and regional organizations, such as the European Union, have also imposed arms embargoes extending beyond relevant Security Council embargoes.

4. Binding Security Council Resolutions as regards Traffic in Specific Weapons

19 In UNSC Res 1540 (2004) ([28 April 2004] SCOR [1 August 2003–31 July 2004] 214) the Security Council decided that ‘all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery’. The Council also decided that States ‘shall take and enforce effective measures to establish domestic controls to prevent the proliferation’ of such weapons and their means of delivery including through ‘appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat ... illicit trafficking ... in such items’. The Security Council established a committee to monitor and report on compliance with the obligations contained in this resolution. The Security Council has subsequently adopted resolutions in relation to specific concerns regarding the proliferation of nuclear weapons, for example, in relation to North Korea
5. ‘Soft Law’ Instruments

20 Various informal arrangements designed to improve export controls to prevent the proliferation of → weapons of mass destruction have been established predominantly by developed States. The Australia Group, for example, was established in 1985 and comprises 40 States that cooperate to improve and coordinate national export controls to prevent the proliferation of chemical and biological weapons. Informal arrangements have also been established in relation to conventional weapons. For example, the Protocol on Explosive Remnants of War to the CCW Convention (Protocol V) includes voluntary best practices in its Technical Annex, which provides that a State planning to transfer explosive ordnance to another State that did not previously possess that type of explosive ordnance, should endeavour to ensure that the receiving State has the capability to store, maintain, and use that explosive ordnance correctly (Technical Annex, 3 (d)).

21 Towards the end of the Cold War major initiatives were taken in relation to trade in conventional arms. In 1991 the United Nations General Assembly requested the Secretary-General to establish and maintain a voluntary Register of Conventional Arms (UNGA Res 46/36 ‘General and Complete Disarmament (Part A – K)’ [6 December 1991] GAOR 46th Session Supp 49 (I) 68–73). The focus of the register has been upon ensuring transparency in transfers of major conventional weapons such as battle tanks, combat aircraft, and → warships, although in recent years States have also been encouraged to include information on transfers of small arms and light weapons. The United Nations Register of Conventional Arms enjoys significant State support. In 1996 the United Nations Disarmament Commission adopted the UNGA ‘Guidelines for International Arms Transfers in the Context of General Assembly Resolution 46/36 H of 6 December 1991’ ([7 May 1996] GAOR 51st Session Supp 42, 10). The Arms Trade Treaty (2013) employs the descriptions used in the register as the basis for national implementation obligations under the treaty (Art. 5 (3)).

22 Global soft law instruments addressing small arms and light weapons have been negotiated under the auspices of the United Nations. These soft law instruments have included the ‘Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects’ (UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects [9–20 July 2001] UN Doc A/CONF.192/15, 7) and the UNGA ‘International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons’ ([8 December 2005] General Assembly Decision 60/519, see UN Doc A/60/88, 6). These instruments now also have particular relevance to the scope of the Arms Trade Treaty (2013) (see Art. 5 (3)).

23 Other soft law initiatives are also of significance. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies ‘Final Declaration’, which currently has 41 participating States including most of the major manufacturers of conventional arms, is a voluntary arrangement under which States whose industries are engaged in the export of arms and sensitive dual-use items attempt to coordinate their export approval standards, decisions, and practices. Guidelines have been developed that seek to ensure greater responsibility in transfers of conventional arms, aim to prevent destabilizing accumulations of such arms, and aim to prevent the acquisition of such arms by those engaged in → terrorism. The guidelines include the consideration of whether there exists ‘a clearly identifiable risk’ that ‘weapons might be used to commit or facilitate the violation and suppression of human rights and fundamental freedoms or the laws of armed conflict’ and the risk of the diversion of the arms to illicit trade or other unauthorized recipients (Wassenaar Arrangement—Elements for Objective Analysis and
Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons (2011)). By ensuring transparency in cases where export approval has been refused, the arrangement also seeks to prevent manufacturers in other participating States from taking commercial advantage of refusals by negotiating ‘essentially identical’ transactions to those refused. In 2013, the Member States of the Wassenaar Arrangement expressed their readiness ‘to share their export control experience and expertise with other states, as suggested in the ... [Arms Trade Treaty (2013)]’. Whilst the Wassenaar Arrangement does include major arms exporting States such as the United States, Russia, and major European Union arms exporting States, it is weakened by the non-participation of States such as Brazil, China, and Israel.

24 In addition to such global initiatives, regional measures have been taken to address traffic in arms. European regional initiatives have included efforts within the → Organization for Security and Co-operation in Europe (OSCE) to establish soft law standards to guide members of the OSCE when deciding whether to approve arms transfers. A significant instrument in this regard is the OSCE ‘Document on Small Arms and Light Weapons’ ([20 June 2012] FSC.DOC/1/00/Rev.1). The Council of the European Union adopted the ‘European Union Code of Conduct on Arms Exports’ (1998), which contains criteria similar to those set out in the Wassenaar Arrangement guidelines. Each European Union Member State is to ‘assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct’ although the ‘decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State’. The Code of Conduct is formally referred to in the Council of the European Union ‘Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment’ ([2008] OJ L335/99).

25 Various soft law instruments have been negotiated within the African region. These initiatives include the OAU ‘Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons’ (2000), which was negotiated under the auspices of the Organisation of African Unity—the predecessor to the → African Union (AU). In relation to ECOWAS initiatives, there have been efforts to ensure coordination with participating States in the Wassenaar Arrangement.

C. State to Non-State Entities, Non-State Entities to States, or between Non-State Entities

1. Treaties and Customary International Law

26 Reference has already been made to treaties such as the Nuclear NPT (1968), the Biological Weapons Convention (1972), the Chemical Weapons Convention (1993), the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), the Arms Trade Treaty (2013), the Protocol against the Illicit Manufacture of and Trafficking in Firearms, Their Parts and Components and Ammunition (2001), and the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (with Annex) (1997), and to the obligations they impose on States to prohibit absolutely, or to restrict, transfers of arms. Each of these treaties applies to transfers to non-State entities. Reference has also been made to customary international law prohibitions on transfers of arms arising, for example, in relation to the duty to prevent genocide, that apply to transfers to non-State entities. International criminal law (discussed in section C.3 below) also applies to natural persons involved in arms transfers. States
Parties to relevant treaties are also required to apply national laws and regulations on arms transfers to non-State entities within their jurisdiction.

2. Binding Security Council Resolutions concerning Traffic in Arms to Specified Individuals and Other Non-State Entities

27 In addition to the obligations and oversight under UNSC Res 1540 (2004) referred to above, the Security Council has decided, by a number of resolutions commencing with UNSC Res 1267 (1999) ([15 October 1999] SCOR 54th Year 148) and including, for example, UNSC Res 1822 (2008) ([30 June 2008] SCOR [1 August 2007–31 July 2008] 170), that all States must take measures ‘with respect to Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them’. Such measures include preventing

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

28 UNSC Res 2170 (2014) (15 August 2014) extends these measures to designated individuals affiliated with ‘Islamic State in Iraq and the Levant … and Al Nusrah Front’. The Security Council has, inter alia, established a committee to oversee compliance with the obligations created by these resolutions. This UNSC Res 1267 (1999) committee maintains a list of those that are to be subjected to such measures. Measures to suppress arms trafficking have been imposed in respect of terrorism more generally and have been overseen by the Counter-Terrorism Committee established by the Security Council to implement obligations imposed under UNSC Res 1373 (2001) ([28 September 2001] SCOR [1 January 2001–31 July 2002] 291) and subsequent resolutions.

3. International Criminal Responsibility

29 Individuals can be held responsible under international criminal law in certain situations for the supply of arms that are used in the commission or attempted commission of genocide, war crimes, or crimes against humanity. This form of culpable assistance in the commission of international crimes was recognized as early as the war crimes trials following World War II, where the owner and general manager of a firm that supplied Zyklon B gas used in concentration camps in occupied Poland were found guilty for knowingly and voluntarily providing material assistance to acts of genocide (then charged as a war crime) (see Law Reports of Trials of War Criminals [1947] vol. I, 93 at 102). Modern forms of complicity in international criminal law are captured primarily under aiding and abetting liability (in customary international criminal law and Art. 25 (3) (c) Rome Statute of the International Criminal Court (‘ICC’)) or under the broader residual form of accessorial liability contained in Art. 25 (3) (d) Rome Statute concerning any other contribution to the commission or attempted commission of a crime by a group acting with a common purpose.

30 In respect of aiding and abetting liability, a person will be responsible for procuring or providing arms where such conduct assists, encourages, or lends support to the perpetration of a specific crime and has a substantial effect upon the perpetration of the crime, and the person procuring or providing the arms had knowledge that the arms would assist in the commission of the crime. In Prosecutor v Semanza, a former bourgmestre was found guilty by the International Criminal Tribunal for Rwanda (‘ICTR’) of aiding and abetting war crimes (and for the separate crime of complicity in genocide) for his
distribution of weapons to the Interahamwe, ‘the very instruments that assured the commission of the genocidal massacre’ (see Trial Judgment [15 May 2003] at paras 225, 431-435, 531, 535). There is, however, a recent controversy concerning aiding and abetting liability at customary international law that is worth noting. In 2013, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in Prosecutor v Perišić overturned the conviction of the Chief of Staff of the Yugoslav Army for aiding and abetting the crimes of the Army of the Republika Srpska (‘VRS’) through the provision of weapons, ammunition, and other types of support, because his assistance was not ‘specifically directed towards assisting’ the crimes of the VRS (see Appeals Judgment [28 February 2013] at paras 17, 25–36, 43). This requirement of ‘specific direction’—which, despite being framed as part of the actus reus, operates to turn the mens rea knowledge requirement into intent—was drawn from the language of an earlier ICTY decision (Prosecutor v Tadić [Appeal Judgment] [15 July 1999] at para. 229), which had been repeated in other decisions of the ad hoc international criminal tribunals, but which had not, until Perišić, been the basis for altering the requirements of aiding and abetting liability. This development in Perišić was criticized as introducing a new element not required by customary international criminal law by the Appeals Chamber of the Special Court for Sierra Leone in Prosecutor v Taylor, which upheld a conviction for aiding and abetting the provision of weapons by the Liberian President to the RUF during the Sierra Leonean civil war (see Appeal Judgment [26 September 2013] at paras 471-481).

Perišić was followed by a subsequent ICTY trial judgment (Prosecutor v Stanišić and Simatović [Trial Judgment] [30 May 2013]) but then departed from in 2014 by the ICTY Appeals Chamber in Prosecutor v Šainović (see Appeals Judgment [23 January 2014]). The issue now appears to be settled after the Appeals Chamber in Stanišić and Simatović, by majority, followed Šainović in finding that aiding and abetting does not require that the assistance be specifically directed to the commission of a crime (Prosecutor v Stanišić and Simatović [Appeals Judgment] [9 December 2015]). This preserves the scope of aiding and abetting liability for those who procure or provide arms to perpetrators of international crimes.

31 In respect of Art. 25 (3) (d) ICC Statute, a person will be responsible if that person makes a significant contribution to the commission or attempted commission of a crime within the ICC’s jurisdiction by a group of persons acting with a common purpose, and the person is at least aware that his or her conduct contributes to the activities of the group. The Pre-Trial Chamber has explicitly considered that ‘arms dealers’ can satisfy all the requirements of Art. 25 (3) (d) (see Prosecutor v Mbarushimana [Decision on the Confirmation of Charges] [16 December 2011] at fn 681). In Prosecutor v Harun and Ali Kushayb, the Pre-Trial Chamber held that there were reasonable grounds to believe that Harun and Ali Kushayb were criminally responsible under Art. 25 (3) (d) for, inter alia, promising to deliver and in fact delivering arms to the Janjaweed for the commission of war crimes and crimes against humanity (see Decision on the Prosecution Application under Article 58 (7) of the Statute [27 April 2007] at paras 85, 88–89, 105–107).

4. National Law Enforcement

32 Many States have established national standards and procedures to assess whether to authorize, and to regulate, international transfers of arms. These standards and procedures often require consideration of whether proposed arms transfers will be consistent with international legal obligations. States Parties to the Arms Trade Treaty (2013) are required to establish national control systems in relation to arms transfers (including ammunition/munitions, parts and components, and brokering) (Art. 5). The New Zealand Government has sponsored the development of a ‘Model Law to assist in identifying and translating [Arms Trade Treaty] commitments into national legislation’. The Arms Trade Treaty provides that ‘[e]ach State Party shall take appropriate measures to enforce national laws
and regulations that implement the provisions of ... [the Arms Trade Treaty]' (Art. 14). The Treaty also requires that '[e]ach State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered ... [by the Treaty] through its territory in accordance with relevant international law' (Art. 9). Coastal State Parties to the Arms Trade Treaty therefore appear to be obliged to regulate foreign flagged vessels transiting, for example, their territorial seas subject, however, to the right of innocent passage. More generally, difficulties arise in the enforcement of national standards required by relevant treaties and other rules of international law against persons who are outside the territory of the State. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (2001), and the regional treaties referred to above generally address these enforcement issues through provisions on → extradition and cooperation, including through international organizations such as INTERPOL (INTERPOL has also entered cooperative agreements with the United Nations). The Arms Trade Treaty includes specific provisions on international cooperation and assistance (Arts 15 and 16).

D. General Assessment and Conclusions

33 International legal regulation of traffic in arms during the 20th century was fragmented. The uncertainty regarding obligations under general international law, the absence of coherence in treaty obligations, and the opposition to movement beyond soft law instruments, for example, in relation to small arms and light weapons, all contributed to the failure to prevent humanitarian catastrophes in conflicts around the world.

34 The 21st century has witnessed significant developments, which have enhanced the potential coherence of international legal regulation of traffic in arms. The UN Security Council in Resolution 2117 (2013) ([26 September 2013] SCOR [1 August 2013–31 July 2014] 275) formally ‘recogniz[ed] ... the significance and central role of ... the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition; the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, as crucial instruments in countering the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons’. In the same resolution, the Security Council also formally ‘acknowledg[ed] the adoption of the Arms Trade Treaty ... and ... the important contribution it can make to international and regional peace, security and stability, reducing human suffering and promoting cooperation’. The Arms Trade Treaty (2013) has the potential to make an important contribution by connecting existing, but previously fragmented, legal regulation in a more coherent manner. Support from the major arms-exporting States remains critical. That the United States and Russia are members of the Wassenaar Arrangement and that the permanent five members of the Security Council voted in favour of Resolution 2117 provides grounds for guarded optimism. Widespread adherence to the Arms Trade Treaty and good faith implementation of its obligations offer the potential for an effective response to arms trafficking, which is a major cause of regional and global insecurity, human rights abuses, and under-development.

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Select Documents

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