

CONVENTIONAL ARMS TRANSFERS IN THE LIGHT OF HUMANITARIAN AND HUMAN RIGHTS LAW

by

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Executive Summary

This paper examines the legality of conventional arms transfers under international law with a special focus on international humanitarian and human rights law. Its first part provides a comprehensive overview over past and present, legal and political attempts to regulate international transfers of conventional arms. This is followed by a detailed analysis of the legal norms pertaining to conventional arms transfers. Underlying this analysis is the assumption that conventional arms transfers are not exclusively regulated by arms control law, but have to be situated at the intersection of arms control law, international humanitarian law, neutrality law, the law on the use of force and human rights law. While transfer prohibitions other than the ones explicitly stated in international conventions are difficult to establish under arms control law, humanitarian law provides a legal basis for transfer prohibitions going beyond explicit treaty provisions in form of common Article 1 to the 1949 Geneva Conventions. In contrast, no transfer prohibitions can be found in human rights law due to the limitation of States' obligations under the relevant human rights treaties to activities taking place under their effective control. Arms supplying and transit States can, however, incur responsibility under international law for the violation of transfer prohibitions and for aiding in the commission of internationally wrongful acts, including serious violations of human rights law committed with the imported arms by the recipient. Against that background, the last part of the paper briefly examines the Draft Framework Convention on International Arms Transfers and evaluates its contribution to the legal regulation of conventional arms transfers.

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Abbreviations

ACL	Arms Control Law
AECA	Arms Export Control Act, 1967
AFDI	Annuaire Français de Droit International
ASIL	The American Society of International Law
ATT	Draft Framework Convention on International Arms Transfers
BASIC	British American Security Information Council
CAT	Conventional Arms Transfers
CCW	Convention on prohibition or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 1980 (as amended 1996)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECmHR	European Commission of Human Rights
ECrHR	European Court of Human Rights
EU	European Union
GA	United Nations General Assembly
GATT	General Agreement on Tariffs and Trade, 1947
GCHV	The Geneva Conventions of August 12, 1949
HRL	Human Rights Law
HV	Convention respecting the rights and duties of neutral Powers and Persons in case of war on land, 1907
HXIII	Convention concerning the rights and duties of neutral Powers in naval war, 1907
IAC	International armed conflict
IANSA	International Action Network on Small Arms
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
IRRC	International Review of the Red Cross
ITAR	International Traffic in Arms Regulations
LoN	League of Nations
NIAC	Non-international armed conflict
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PI	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977
RDMDG	Revue de Droit Militaire et de Droit de la Guerre
RGDIP	Revue Général de Droit International Public
SADC	Southern African Development Community
SALW	Small Arms and Light Weapons
SC	United Nations Security Council
SIPRI	Stockholm International Peace Research Institute
UK	United Kingdom
UN	United Nations
UNC	Charter of the United Nations, 1945
UNDC	United Nations Disarmament Commission
UNIDIR	United Nations Institute for Disarmament Research
US	United States of America
VCLT	Vienna Convention on the Law of Treaties, 1969
WEU	Western European Union

Introduction

“We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...”¹

In pursuit of this laudable goal, the United Nations General Assembly (GA), “striving to put an end completely and forever to the armaments race which places a heavy burden on mankind” has identified “general and complete disarmament under effective international control” as one of its primary objectives.² The international community has subsequently spent considerable time and resources trying to stabilise the arms race, control the proliferation of certain weapons and outlaw the use of others. States have concluded a number of arms control treaties on the testing, development, production, stockpiling, proliferation and use of nuclear, chemical and biological weapons. Interestingly, however, the same activities remain largely unregulated when they concern conventional weapons. It is this latter category of arms that forms the object of this study. Although international humanitarian law (IHL)³ contains general principles and specific rules on the *use* of all weapons in times of armed conflict, only one treaty provision pertains to their *development, acquisition or adoption*.⁴ To date, no global treaty regulates the *transfer* of conventional arms (CAT). At a time when a particular type of conventional arms, namely small arms and light weapons (SALW), are described as “weapons of mass destruction”, because their “death toll dwarfs that of all other weapons systems”,⁵ the lack of a global regime comprehensively regulating CAT constitutes a serious problem.

In contrast to the arms control community’s recent focus on the illegal trafficking of SALW (and weapons of mass destruction) by *non-State actors* (NSA),⁶ this paper is only concerned with *State-to-State transfers* effectuated in accordance with national export legislation.⁷ In essence, the paper evaluates the legality of government authorised CAT in terms of international law, and in particular with regard to States’ obligations under IHL and Human Rights Law (HRL). Arms embargoes decided by the Security Council (SC) under Chapter VII of the *United Nations Charter (UNC)* will be dealt with in a

¹ Preamble, *Charter of the United Nations*, 26 June 1945

² *General and Complete Disarmament*, A/RES/1378(XIV), 20 November 1959

³ The denomination “international humanitarian law” (IHL) is used as a synonym of “laws of war” or “law of armed conflict”. The corpus of “rules of international law applicable in armed conflict” (or *jus in bello*) is broader and includes IHL and the law of neutrality.

⁴ Art. 36, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International armed Conflicts (Protocol I)*, 8 June 1977

⁵ *We the Peoples: The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary-General, A/54/2000, 27 March 2000, §238

⁶ E.g. *Security Council resolution 1540 (2004) [on non-proliferation of nuclear, chemical and biological weapons]*, S/RES/1540(2004), 28 April 2004

⁷ In contrast to many recent publications, this paper is not only concerned with SALW, as a wide variety of arms, including major weapons are being used in current conflicts. I fully subscribe to Wezeman’s argument that the current attempts to regulate SALW trafficking (instruments are being negotiated on the marking, tracing, and brokering of SALW) remain focused

cursory manner only, and so-called measures of “forced disarmament” or transfer prohibitions contained in post-conflict settlements will not be addressed.⁸

The paper is presented in three parts. Part I will provide some basic facts about CAT and includes a brief description of the arguments advanced in favour of their regulation. Special attention is given to the problem of defining conventional arms and their transfer in legal terms. Finally, the last chapter of this part will situate the regulation of CAT in its historical context and tries to give a short description of recently adopted instruments on CAT. In Part II I will assess the legality of CAT in terms of international law. The first section is devoted to the determination of the applicable law and the relationship between different branches of international law governing CAT, namely, arms control law, IHL, HRL and neutrality law. I will then explore secondary rules of international law to determine to what extent States can be held accountable for violations of transfer prohibitions. Building upon this analysis, it will then be evaluated what consequences are for the regulation of CAT by national legal systems. With a view to the future regulation of CAT, Part III will briefly analyse the *Draft Framework Convention on International Arms Transfers (ATT)*, a draft treaty on CAT elaborated by a group of non-governmental organisations (NGO).⁹ I will in particular try to evaluate to what extent the draft treaty reflects existing obligations of States under international law, to what extent it develops international law further, and where potential weaknesses may lie.

on preventing NSA from acquiring weapons, while disregarding the irresponsible, aggressive or oppressive use of arms by State actors. WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, SIPRI, Solna, March 2003, 8- 10

⁸ Examples would be the *Covenant of the League of Nations* (Part I of the *Treaty of Peace between the Allied and Associated Powers and Germany and Protocol*), 28 June 1919 and *Security Council resolution 687 (1991)* [on restoration of the sovereignty, independence and territorial integrity of Kuwait], S/RES/687(1991), 3 April 1991

⁹ See Annexes I and II, *infra*

I Conventional Arms Transfers – An Overview

I.A *The Arms Trade is Out of Control*

“Arms have been traded between states, empires, and peoples throughout human history to achieve a variety of political, military and economic goals. The desire to acquire or export arms is tied closely to the “self-help” nature of the current international system, in which responsibility for security and defense rests with individual states.”¹⁰

I.A.1 Some Facts on Conventional Arms Transfers

The arms trade is not a global phenomenon, but rather one that is concentrated among a few States.¹¹ The top five suppliers of major conventional weapons – the United States (US), Russia, France, Germany and the United Kingdom (UK), accounted for 81 per cent of all transfers in the five-year period from 1999 to 2003.¹² The five largest recipients – China, Greece, India, Turkey and the UK, accounted for 35 per cent of all imports during the same time period.¹³ Globally, there were clear increases in the volumes of major weapons transfers in 2001 and 2003.¹⁴ Unsurprisingly, transfers that had been blocked by the US Congress due to human rights violations in the recipient country have received clearance since September 2001 for reasons related to the fight against terrorism.¹⁵ After several years of decline, therefore, the trend for US exports is now increasing and Russia’s exports continue to grow steadily.¹⁶

Pacifist and human rights NGOs have strongly criticised the export policies of major arms suppliers in recent years¹⁷ and have documented arms transfers that they consider to be morally reprehensible and/or at variance with the suppliers’ (or recipients’) obligations under international law. It will suffice here to give but a few examples.

Surplus Canadian military helicopters were exported via the United States to Columbia, where they are used by the Colombian Armed Forces – forces which have demonstrated a pattern of gross and systematic human rights violations.¹⁸ More helicopters were supplied from Russia and rifles were

¹⁰ KRAUSE, K., MACDONALD M. K., “Regulating Arms Sales Through World War II”, in BURNS, R. D., (ed.), *Encyclopedia of Arms Control and Disarmament*, Vol. II, C. Scribner, New York, 1993, 707

¹¹ KRAUSE, K., “Controlling Arms Trade Since 1945”, in BURNS, R. D., (ed.), *Encyclopedia of Arms Control and Disarmament*, Vol. II, C. Scribner, New York, 1993, 1024

¹² HAGELIN, B., *et al.*, “International arms transfers”, in *SIPRI Yearbook 2004, Armaments, Disarmament and International Security*, SIPRI, Oxford University Press, 2004, 448. N.B. SIPRI’s data on arms transfers refers to *actual deliveries* of major conventional weapons.

¹³ HAGELIN, B., *et al.*, “International arms transfers”, 458

¹⁴ For details, see Appendix 12A, *Ibid.*, 475-480

¹⁵ *Ibid.*, 449; See also HUMAN RIGHTS WATCH, *United States, Dangerous Dealings, Changes to U.S. Military Assistance after September 11*, Report, February 2002

¹⁶ HAGELIN, B., *et al.*, “International arms transfers”, 448

¹⁷ For news on arms exports, visit the following NGO websites: <http://www.controlarms.org>, <http://www.stopwapenhandel.org>, <http://www.caat.org.uk>, <http://www.enaat.org>

¹⁸ “Canadian Helicopters to Colombia”, *Project Ploughshares*, Ploughshares Briefing 01/3, 20 March 2001

produced in Colombia under an Israeli licence.¹⁹ European weapons components, such as UK components for US-made F16-aircraft or German transmission systems for Israeli tanks are being supplied to Israel via the US despite the ongoing Palestinian/Israeli armed conflict and the violations of IHL committed by the Israeli armed forces with these weapons.²⁰ The US delivered tens of thousands of M-16 assault rifles to the Israeli Government.²¹ Russia supplied tanks, attack helicopters and armed personnel carriers to the Sudanese government disregarding the fact that massive human rights abuses have been committed by its armed forces with impunity. The Sudanese government also imported tanks from Belarus.²² Russia exported jet fighters, combat aircraft and large calibre artillery to Ethiopia and Eritrea during the war (1998-2000). It shipped attack helicopters and AK-47 assault rifles to Zimbabwe in spite of persistent allegations of human rights abuses by Zimbabwean government forces and police.²³ From 1998 to 2002, the Nepalese government received helicopters from India, the Ukraine and Australia, and various types of SALW from India, Israel, the US and Belgium.²⁴ From 1998 to 2002, the government of Sierra Leone imported combat helicopters from Ukraine, and received automatic rifles and ammunition from the UK in form of aid. During the same time, Guinea – also involved in the conflict – received mortars from Croatia, rocket launchers from Moldova, towed guns from Romania and combat helicopters from Ukraine.²⁵ Several more pages could be filled with examples of arms transfers that have shocked public opinion.

I.A.2 Reasons for Concern

Although accurate data is difficult to come by due to the lack of transparency in arms transfers (a consequence of their close association with national security and States' desire to protect their arms industries), the unregulated trade in conventional arms has certain serious, negative consequences.

In the framework of arms transfer regulations, decision makers and scholars have long been concerned about the protection of the arms supplier's national security and military power, its advance in military technology, alliance considerations and the risk to upset the delicate regional or international military stability and security by triggering arms races or the outbreak of hostilities. The 1991 Gulf War served as a wake-up call for many arms supplying governments, facing an enemy fully equipped with their own weapons. Recognising that the largest part of illegally traded arms and arms held by NSA have their origin in State-to-State transfers, governments have become more aware of the risk of diversion and the inadvertent supply of arms to States and terrorist or other criminal groups.

¹⁹ Cited in WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, 33

²⁰ "Weapons parts: supplied from Europe, 'made in USA', used in Israel and the Occupied Territories" *Amnesty International*, (undated)

²¹ Cited in WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, 35

²² *Ibid.*, 38

²³ "Russian weapons fuel African conflicts", *Amnesty International*, (undated)

²⁴ Cited in WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, 35

²⁵ *Ibid.*, 36

The fact that excessive spending of scarce resources on imports of conventional arms hampers economic development has long been described in scholarly literature and has been recognised by States.²⁶ It is striking that between 1999 and 2003, the US, UK and France earned more income from arms exports to Africa, Asia, the Middle East and Latin America than they provided in aid.²⁷ The argument often made in the past, according to which the arms industry has positive spill-over effects on other sectors of the economy, can no longer be upheld.²⁸ On the contrary, the trade in conventional weapons is frequently associated with the plundering of natural resources, the diamond trade and other aspects of war economies, which do not contribute to sustainable development.

Concern about the morality or the legality of CAT has been raised since the end of the First World War. Based on the assumption that the availability of arms itself triggers arms races and contributes towards the escalation of conflict into violent conflict, the League of Nations (LoN) undertook several initiatives to limit the arms trade. After the Second World War and particularly during the Decolonisation period, most of the legal literature focused on the question whether and to what extent the export of conventional arms to one side involved in an armed conflict was in violation of the principles of non-intervention or non-interference in internal affairs.²⁹ With respect to wars of national liberation, scholars also analysed how the right to self-determination was affected by CAT. Some legal scholars have tentatively argued that the State importing arms or the exporter itself may be violating certain human rights, in particular economic and social rights and the right to peace.³⁰ The connection between human rights violations and arms transfers has been recognised by the GA, which considers the illicit trafficking in arms a “dangerous phenomenon, because of its destabilizing and destructive

²⁶ As early as 1898, the Russian emperor is said to have observed: “...hundreds of millions are spent in acquiring terrible engines of destruction,...National culture, economic progress and the production of wealth are either paralysed or perverted in their development.” Cited in MYJER, E., “Means and Methods of Warfare and the coincidence of Norms between the Humanitarian Law of Armed Conflict and the Law of Arms Control”, in HEERE, W., (ed.), *International Law and the Hague’s 750th Anniversary*, T.M.C. Asser Press, The Hague, 1999, 371

The *Final Document of the Tenth Special Session of the General Assembly* adopted in June 1978 is the first official UN document to comprehensively address the issue of arms trade. It explicitly recognises that “in a world of finite resources there is a close relationship between expenditure on armament and economic and social development.” It regrets that “this colossal waste of resources is even more serious in that it diverts to military purposes not only material but also technical and human resources which are urgently needed for development in all countries, particularly in the developing countries.” *Final Document of the Tenth Special Session of the General Assembly, A/S-10/2*, 30 June 1978

The “known and potential negative effects” of international arms transfers “on the process of the peaceful social and economic development of all peoples” has also been recognised by the GA *inter alia* in a resolution on *International Arms Transfers*, A/RES/43/75 I, 7 December 1988.

²⁷ “Key facts and figures”, *Control Arms Campaign*, Media Briefing, 9 October 2003

²⁸ The Campaign Against Arms Trade (CAAT) convincingly argues that the extravagant support of arms exports by the UK government using public money to promote and sell military equipment means that other non-military sectors of the economy are deprived of support, even if they are more productive and create more employment. “The Arms Trade – An Introductory Briefing”, *Campaign Against Arms Trade (CAAT)*, (undated); For a discussion of this issue, see FELICE, W., “Militarism and Human Rights”, in *International Affairs*, Vol. 74, No. 1, 1998

²⁹ See for instance VINCINEAU, M., *Exportation d’armes et droit des peuples*, Collection de droit international, Vol. 14, Centre de droit international de l’Institut de Sociologie de l’Université Libre de Bruxelles, Editions de l’Université de Bruxelles, Editions Bruylant, 1984

³⁰ SAJOO, A., “Human Rights Perspectives on the Arms Race”, in *McGill Law Journal*, Vol. 28, No. 3, 1983, 636; See also WEISS, P., BURROUGHES, J., “Weapons of mass destruction and human rights”, in *Disarmament Forum*, No. 3, 2004, 26-28

effects, particularly for the internal situation of affected States and the violation of human rights.”³¹ The idea to evaluate the legality of CAT in terms of HRL has recently gained renewed attention due to the increased interest of human rights organisations in arms control issues. One of the main arguments underlying the current campaigning for the regulation of CAT is that arms contribute to exacerbating conflicts by increasing the lethality and/or the duration of the violence and by encouraging a violent rather than a peaceful solution.³² In this scenario, arms supplying States have at least indirect responsibility for the continuation of these wars. It has also been suggested that the supply of arms keeps corrupt and repressive regimes in place and that exporting States are thus responsible for supplying the means for internal repression.³³ Unfortunately, comprehensive data and scientific analyses on the subject are scarce but several studies have tried to substantiate these assertions and will be dealt with in more detail below.

I.B The Legal Qualification of Conventional Arms Transfers

I.B.1 What are Conventional Arms?

When trying to define conventional arms under international law, it is relatively unproblematic to distinguish them from weapons of mass destruction, i.e. nuclear, chemical and biological (bacteriological and toxin) weapons.³⁴ All other arms are consequently conventional arms. There is no generally accepted definition of the items that qualify as ‘conventional arms’ under international law, however. The classification of weapons differs significantly among national regulations. Certain States distinguish between various categories of arms subject to different regulations.³⁵ The examination of international instruments on CAT shows that the definition of regulated items varies among fields of law and among legal instruments. *Hague Convention V (HV)* speaks of arms and munitions of war,³⁶ *Hague Convention XIII (HXIII)* applies to “war-ships, ammunition, and war material of any kind whatever”,³⁷ the *Convention for the Control of the Trade in Arms and Ammunition (1919 St.Germain Convention)* applies to arms of war,³⁸ and the *Convention for the Supervision of the International Trade in Arms and Ammunition and in*

³¹ *International Arms Transfers*, A/RES/46/36 H, 6 December 1991

³² WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, 24; See also WILLIAMSON, R., (ed.), *The Arms Trade Today*, Arms Transfers and Proliferation: A Commission of the Churches on International Affairs Consultation, January 1993, World Council of Churches, Geneva, 1993

³³ YAKEMTCHOUK, R., “Le Commerce des Armes”, 10-11

³⁴ In September 1947, weapons of mass destruction were defined in a Security Council document as “atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above”. S/C.3/SC.3/7/Rev.1, 8 September 1947

³⁵ Laws and regulations on conventional arms exports and imports in Germany distinguish between five categories of items, all subject to different rules and regulations. See on this point, chapter II.G.2 *infra*.

³⁶ Art. 7 *Convention respecting the rights and duties of neutral Powers and Persons in case of war on land*, 18 October 1907

³⁷ Art. 6 *Convention concerning the rights and duties of neutral Powers in naval war*, 18 October 1907

³⁸ Art. 1 *Convention for the Control of the Trade in Arms and Ammunition*, Saint-Germain-en-Laye, 10 September 1919, League of Nations, Treaty Series, Vol. 7, No.200, 1922

Implements of War (1925 Convention) regulates arms, ammunition and implements of war exclusively designed and intended for land, sea or aerial warfare.³⁹

Instruments can either *list* the items regulated (lists which tend to become outdated quickly), or lay down an abstract *definition*, which is very difficult to achieve. Article 1 of the *1919 St. Germain Convention* follows the list approach. The same method is used by the *European Union (EU) Council Joint Action on SALW*⁴⁰ and the United Nations (UN) Register on Conventional Arms. For the purposes of the UN Register, the following are considered conventional arms: battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships (including submarines), and missiles (including Man-Portable Air-Defence Systems or short: MANPADS) and missile-launchers. SALW (other than MANPADS) and ammunition are not included.⁴¹

The *1925 Convention* divides the weapons it regulates into two categories. The first category contains arms, munitions and war materials exclusively destined to land, sea, or air warfare, whereas category II deals with arms and munitions for civilian or military use. Should it appear that items under category II are used to make war, they have to be treated in accordance with the rules applicable to category I. In this sense, it is the *intended use* of the item that determines whether or not it falls within the definition of conventional arms regulated by the convention. It has been suggested that a distinction should be made between offensive or heavy arms that serve to defend States against external threats, and defensive or light weapons that are used in internal wars and situations of internal unrest.⁴² Accordingly, only objects and materials capable of threatening peace and security on an international scale would be defined as conventional arms under international law. Arms used for policing purposes, such as small calibre firearms, would be excluded from the definition on the basis that these weapons only threaten the internal security of a State but have no bearing on international peace.⁴³ This argument has to be rejected on several grounds. First, it would exclude most SALW, the weapons with

³⁹ Art. 1 *Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*, Geneva, 17 June 1925, in BURNS, R.D., (ed.), *Encyclopedia of Arms Control and Disarmament*, Vol. III, C. Scribner, New York, 1993

⁴⁰ The list annexed to the *Council Joint Action of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP, (2002/589/CFSP)*, Official Journal of the European communities, L 191/1, 19 July 2002 includes the following SALW: machine guns, submachine-guns, fully automatic rifles, semi-automatic rifles if developed and/or introduced as a model for an armed force, moderators. Light weapons include cannons, howitzers and mortars of less than 100 mm calibre, grenade launchers, anti-tank weapons, recoilless guns, anti-tank missiles and launchers, and anti-aircraft missiles/ MANPADS.

⁴¹ *Report on the continuing operation of the United Nations Register of Conventional Arms and its further development*, A/58/274, 28-29

⁴² KAUSCH, H. G., "Internationale Rüstungstransfers", in DELBRÜCK, J., (ed.), *Friedensdokumente aus fünf Jahrhunderten*, Institut für Internationales Recht an der Universität Kiel, N.P. Engel Verlag, Kehl, Strassburg, Arlington, 1984, 1156-1157

⁴³ ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels mit konventionellen Waffen*, Veröffentlichungen des Instituts für Internationales Recht and der Universität Kiel, Band 104, Duncker & Humblot, Berlin, 1988, 158 *et seq.*; Similarly, the draft recommendation of the Western European Union Assembly only concerns "major armaments likely to increase the risk of war in any region of the world". *The International Trade in Armaments*, Assembly of Western European Union, Report and Draft Recommendation submitted on behalf of the Committee on Defence Questions and Armaments, Doc. 500, 4 December 1969, Proceedings, 15th Ordinary Session, Second Part, December 1969

the highest death toll today, from the ambit of international conventional arms regulation; second, the distinction proves impossible in practice because, as the anecdotal evidence given above demonstrates, arms typically designed for national defence are also used in civil wars and for internal repression; and third, we have come to recognise that peace is not divisible and that non-international armed conflicts (NIAC), which constitute the great majority of today's conflicts, and even situations of internal repression, have a bearing on international peace and security.

It is clear, however, that to date, the regulation of CAT in international law has been mostly concerned with "military" arms. Certain scholars argue that equipment should only be covered by international arms transfer regulations "when its primary mission is identified as military".⁴⁴ Other commentators adopt a stricter definition and consider that only military material that can be directly used to destroy or kill in the conduct of hostilities should fall under the definition of war material and hence be regulated.⁴⁵ This distinction is problematic as some arms are used for civilian as well as for policing and for military purposes.⁴⁶ Difficult questions arise with respect to spare parts, upgrades and support equipment. An examination of State practice suggests for instance that the transfer of support equipment and spare parts is not prohibited under the law of neutrality.⁴⁷ The so-called "tools of internal repression" or "tools of torture", which may not have a "primary military mission", also pose problems.⁴⁸ As an illustration, electronic shock devices are not included in the US Munitions list and are hence routinely sold to countries barred from receiving arms under the applicable export legislation.⁴⁹

The current campaign against the arms trade is not only concerned with armed conflicts, but also aims at prohibiting the transfer of items likely to be used for human rights violations in times of

⁴⁴ GOLDBLAT, J., *Arms Control, A Guide to Negotiations and Agreements*, International Peace Research Institute, Oslo, Sage Publications, London, 1994, 182; See also Oeter citing Castrén: "Als 'Kriegsmaterial' in einem weiten Sinne können alle Gegenstände definiert werden, die "ausschliesslich oder zumindest hauptsächlich" militärischen Zwecken dienen." OETER, S., *Neutralität und Waffenhandel*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 103, Springer Verlag, Berlin, 1992, 228

⁴⁵ OETER, S., *Neutralität und Waffenhandel*, 228

⁴⁶ Vincineau notes on the problem of dual-use items: "la distinction entre le caractère civil ou militaire d'une série de produits se révèle hasardeuse. Seule leur utilisation viendra leur conférer leur véritable nature." VINCINEAU, M., *Exportation d'armes et droit des peuples*, 80

⁴⁷ OETER, S., *Neutralität und Waffenhandel*, 229-231; See also chapter II.E.2 *infra*.

⁴⁸ Examples include electro-shock instruments, certain types of handcuffs, leg irons and stun belts. On this problematic, see JOHN, M., "Werkzeuge für Menschenrechtsverletzungen: Kleinwaffen und Repressionstechnologie", in JENNICHEN, A., MARKS, N., SANDEVSKI, T., (eds.), *Rüstungstransfers und Menschenrechte, Geschäfte mit dem Tod*, Politikwissenschaft, Vol. 79, Lit Verlag, Münster, 2002

N.B. It is questionable whether this type of instruments qualifies as conventional weapons under international law. The Panel of Governmental Experts on Small Arms considered however that the category of SALW ranges from clubs, knives and machetes to those weapons just below the ones included in the UN Register of Conventional Arms. (*Report of the Panel of Governmental Experts on Small Arms, A/52/298, 27 August 1997, §24*). "Tools of torture" will be dealt with in this paper, because their transfer poses similar problems in terms of HRL as other weapons transfers, and because these items have been included in some national and international arms export regulations.

⁴⁹ KLARE, M. T., "Arms Sales and Human Rights: America's Merchants of Repression", in FISCHER, G., (Dir.), *Armement – Développement – Droits de l'Homme – Désarmement*, Actes mis à jour du Colloque organisé du 28 au 30 octobre 1982 à l'UNESCO par l'Association Henri Laugier et l'Institut des Sciences Juridiques du Développement, Bruyant, Bruxelles, 1985, 463

peace. Whether it is the military, the police, or a NSA who commits violations with imported arms is no longer relevant. Therefore, the qualification of an item as military or civilian loses much of its significance.⁵⁰ This line of argument would lead to the prohibition of the export of machetes to a country where they reportedly play a prominent role in an ongoing genocide. In practice however, it will prove very difficult to determine what items fall under such a broad transfer prohibition, and tensions with trade law may arise.

In the absence of a universally agreed upon definition of conventional arms under international law, it is left to each instrument to define its scope of application in function of its object and purpose. Although a difficult problem in practice, for the purposes of this paper it suffices to have a general understanding of what is meant by conventional arms.

I.B.2 Defining “Transfer”

This paper deals with *international* arms transfers; transfers that only involve one State are not considered here. For the purposes of the UN Register of Conventional Arms, “international transfers involve, in addition to the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment”.⁵¹ As defined in *Revised Protocol II*⁵² to the *Conventional Weapons Convention (CCW)*,⁵³ transfer “involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines”.⁵⁴ The *Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (Ottawa Convention)* adopts the exact same definition.⁵⁵ The Commentary to the latter convention specifies that “transfer includes both import and export, and whether or not any payment or fee is involved.”⁵⁶ It appears from these definitions that the term “transfer” is commonly understood as being broader than and including “trade” in conventional arms and may also apply to cases of military aid, supply of arms for peace-keeping

⁵⁰ The UK *Export Control Act 2002*, 2002 Chapter 28, 24 July 2002 seems to recognise this. Art. 2§1 of the Schedule annexed to it specifies that “export controls may be imposed in relation to any goods the exportation or use of which is capable of having a relevant consequence” on regional security, human rights, and so on. The US legislator followed the contrary approach. Paragraph 120.3 sets out criteria for the inclusion of items in the Munitions list and explains that “The intended use of the article or service after its export (i.e., for a military or civilian purpose) is not relevant in determining whether the article or service is subject to the controls of this subchapter.” *International Traffic in Arms Regulations (ITAR)*, 22 Code of Federal Regulations, Title 22, Chapter I, Subchapter M

⁵¹ *Report on the continuing operation of the United Nations Register of Conventional Arms and its further development*, A/58/274, 13 August 2003, Explanatory Notes to the Standardised form for reporting international transfers of conventional arms, 49

⁵² *Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices (Prot. II)*, 10 October 1980 (amended on 3 May 1996)

⁵³ *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*, 10 October 1980 (amended 21 December 2001)

⁵⁴ Art.2§15 of *Revised Protocol II* to the CCW

⁵⁵ Art. 2§4 *Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction*, 18 September 1997

forces and transfers in the framework of production joint ventures. Similarly, according to a commentary to the *Chemical Weapons Convention*, the prohibition of transfer of chemical weapons comprises “not only the transfer from a place under the jurisdiction of one State Party to a place under the jurisdiction to [sic!] another State, but also the transfer of the ownership or possession of weapons inside or outside the territory of a State Party to anybody else”.⁵⁷ Based on these definitions, it is clear that the term “transfer” covers transfer of title to *and* control over the arms.⁵⁸ State practice is not uniform,⁵⁹ but it seems that transfer includes the physical movement of conventional arms into or from a State’s territory, even without transfer of title. Consequently, it also covers the *transit* of conventional arms, defined as the action of passing them across national territory.

I.B.3 Which Transfers are Illegal?

As this paper attempts to determine the legality of CAT, the body of law that serves as the standard of evaluation has to be determined first. Art. 1§2 of the *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms* for instance, defines illicit trafficking as: “the import, export, ...or transfer of firearms...from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.”⁶⁰ Similarly, the Southern African Development Community’s (SADC) *Protocol on the Control of Firearms* refers to national authorisation alone, without any reference to international law.⁶¹ In contrast, the *Guidelines for International Arms Transfers* adopted by the UN Disarmament Commission (UNDC) in 1996 define illicit arms trafficking as follows:

“Illicit arms trafficking is understood to cover that international trade in conventional arms, which is contrary to the laws of States and/or international law.”⁶²

Some confusion exists among arms control scholars about the precise meaning of the term “illicit”.⁶³ From a legal point of view, “illicit” has to be understood as a synonym of “illegal”.⁶⁴ Transfers that are in

⁵⁶ MASLEN, S. *Commentaries on Arms Control Treaties, Vol. 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction*, Oxford University Press, Oxford, 2004, 86

⁵⁷ KRUTZSCH, W., TRAPP, R., *A Commentary on the Chemical Weapons Convention*, Martinus Nijhoff Publishers, Dordrecht, 1994, 13

⁵⁸ The interpretation of transfer by the commentary to the *Chemical Weapons Convention* as covering the transfer of title to *or* control over the weapons probably has to be rejected. In cases of occupation for instance, the occupying State assumes control over weapons stockpiles, but there is no transfer of title. This would not constitute a “transfer” in the meaning of the Convention.

⁵⁹ See Canada’s and Norway’s interpretations of the *Ottawa Convention* cited in MASLEN, S. *Commentaries on Arms Control Treaties...*, 88-90

⁶⁰ Art. 1§2 *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, 14 November 1997

⁶¹ Art. 1 *Protocol on the Control of Firearms, Ammunition and other related materials in the Southern African Development Community (SADC) Region*, 14 August 2001; See also Art. 1 of 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*, 21 April 2004

⁶² §7 *Guidelines for international arms transfers in the context of General Assembly resolution 46/36 H of 6 December 1991*, annexed to the Report of the Disarmament Commission, General Assembly, Official Records, 51st Session, Supplement No. 42, A/51/42, 22 May 1996

⁶³ For a critical discussion of this issue, see WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, 6-8

violation of *national* law, such as exports to a country under a national embargo, or exports of arms without a licence, are undisputedly illegal and no NSA could invoke international law to justify its behaviour before national authorities.⁶⁵ States have greatly divergent views on what constitutes undesirable arms transfers and what should be considered legal or illegal, however,⁶⁶ which creates diverging standards. The question arises whether certain CAT that conform to the relevant national regulations could still be in violation of *international* law and would therefore have to be considered illegal.⁶⁷ Technically, such a situation may arise if a State fails to take all necessary measures in its domestic system to ensure that arms transfers it authorises are in compliance with its obligations under international law.⁶⁸ In my view, legality of international arms transfers has to be established with reference to both international and national law.

All major exporters and indeed most States have formal decision-making procedures for arms transfers in place (a detailed description of which is outside of the framework of this paper). Generally, the most basic controls on CAT are unilateral export and import controls applied by States. Each State has its own way of classifying arms transfers, but the basic idea is that governments approve sales or other transfers through legal instruments, such as export licences on the part of the supplier, end-use certificates on the part of the recipient, or through approval by national parliaments or specific government agencies.⁶⁹ The approval process usually involves high-level representation from the foreign ministry, defence department, intelligence community, arms control agencies and other interested bodies.⁷⁰ The decision on the granting or refusal of an export licence is usually made in accordance with predefined criteria. These licensing criteria differ considerably among States and are

⁶⁴ The Small Arms Survey analyses SALW transfers in terms of a “legality spectrum” distinguishing legal from illicit grey market and illegal black market transfers. Illicit grey market transfers are described as those that “happen when governments or their agents exploit loopholes or circumvent national and/or international laws or policy.” (SMALL ARMS SURVEY, “A Thriving Trade: Global Legal Small Arms Transfers”, in *Small Arms Survey 2001: Profiling the Problem*, Oxford University Press, Oxford, 2001, 141) From a legal point of view, these distinctions are not meaningful. The exploitation of loopholes is a legal although perhaps a morally reprehensible activity, whereas the circumvention of national and/or international law has to be qualified as illegal.

⁶⁵ On this point, see PRIoux, R., “Les lois applicables aux contrats internationaux de vente d’armes”, in *Revue Belge de Droit International*, Vol. 26, No. 1, 1993, 228 *et seq.*

⁶⁶ WEZEMAN, P. D., *Conflicts and Transfers of Small Arms*, 6

⁶⁷ The focus on State-to-State transfers in accordance with national law excludes from the ambit of this study such prominent instruments as the *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, A/CONF.192/15, 20 July 2001, 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*, 31 May 2001, the *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, 14 November 1997, and the *SADC Protocol of 2001*.

⁶⁸ It would be a clear violation of international law, if a State Party to the *Ottawa Convention* fails to enact a prohibition of transfer of anti-personnel mines for instance and then authorises the export of such mines.

⁶⁹ SMALL ARMS SURVEY, “A Thriving Trade: Global Legal Small Arms Transfers”, 142

⁷⁰ KRAUSE, K., “Controlling Arms Trade Since 1945”, 1024

often rather vague.⁷¹ Some governments have chosen to formulate these criteria in legally non-binding government documents that can be changed by executive decision, whereas in other States, they have been included in national export laws and regulations.⁷² These criteria form the basis of government decisions on export licences and are therefore at the centre of this study.

I.C Historical Overview

This chapter provides a general overview of political and legal attempts by States to regulate CAT. With a view to the main topic of this paper, the focus is on multilateral, non-forcible initiatives to control State-to-State transfer of conventional weapons. Most of these initiatives will be dealt with in greater detail in Part II.

I.C.1 Restrictions on Conventional Arms Transfers before World War I

The arms trade and attempts to control it have a long history. During the Roman imperial period, arms production was controlled by the State and the laws of the Roman Empire forbade any provision of arms to barbarians.⁷³ As a consequence of the struggle between Christianity and Islam, Christian rulers attempted to prevent the trade in arms to their enemies. The Third Lateran Council of 1179 and the Fourth Lateran Council of 1215 prohibited the sale of arms, ships or material for weapons (such as iron) to the Saracens.⁷⁴ Such unilateral prohibitions were soon followed by negotiated multilateral restraints, such as the agreement of 1370 between Edward III of England and the Low Countries (Flanders, Bruges, Ypres) prohibiting the supply of arms and military materials to enemies of England.⁷⁵ These agreements were all of a temporary nature and never aimed at comprehensively regulating the trade in arms.⁷⁶

The time after the Industrial Revolution was characterised by *laissez-faire* economic policies. The trade in arms, as well as their production, was traditionally conducted by private actors. Arms were treated no differently from other commodities and were ruled by the principle of free trade and freedom of the sea. The end of the 19th century brought two major exceptions to this rule. The first one was the conclusion of the *General Act of the Brussels Conference* of 1890,⁷⁷ the first multilateral agreement to

⁷¹ General references to “international peace”, “regional security”, and the like are frequent. In contrast, Art. 5 (b) of the Swiss *Verordnung über das Kriegsmaterial*, SR 514.511, 25 February 1998 is very specific in that it mentions the use of child soldiers in the recipient country. On the other hand, the law makes no reference to other violations of IHL.

⁷² KRAUSE, K., “Controlling Arms Trade Since 1945”, 1024

⁷³ KRAUSE, K., MACDONALD M. K., “Regulating Arms Sales Through World War II”, 708

⁷⁴ “We excommunicate and anathematize, moreover, those false and impious Christians who, in opposition to Christ and the Christian people, convey arms to the Saracens and iron and timber for their galleys.” *Canon 71: Crusade to recover the holy Land*, Fourth Lateran Council, 1215, in TANNER, N., (ed.), *Decrees of the Ecumenical Councils*, Sheed and Ward, London, 1990

⁷⁵ KRAUSE, K., MACDONALD M. K., “Regulating Arms Sales Through World War II”, 708

⁷⁶ For more details, see *Ibid.*, 710

⁷⁷ *General Act of the Brussels Conference relating to the African Slave Trade*, 2 July 1890, in PARRY, C., (ed.), *The Consolidated Treaty Series*, Vol.173, Oceana Publications Inc., New York, 1978; The *Brussels Act* was concluded between 13 European States, the United States, Persia, Zanzibar, and the Congo Free State.

regulate the arms trade and to date the only one to enter into force. The agreement established a link between internal wars, the slave trade and the import of arms into Africa. In contrast to previous bilateral restraint agreements, the *1890 Brussels Act* not only regulated the transfer of arms during armed conflict but was meant to apply first and foremost in times of peace. The treaty was not ratified by all possible suppliers, it did not provide for any verification mechanism, and its geographical limitations were very difficult to enforce. On the other hand, it had some restraining impact on the arms trade in colonial territories and laid the basis for post-World War I initiatives to control the trade in arms.

Legal restrictions imposed on the trade in war materials during international armed conflicts constitute the second exception to the principle of free trade. Rules on the rights and obligations of neutrals were laid down in *Hague Conventions V and XIII* of 1907.⁷⁸

In the period between these peace conferences and the end of the First World War, the idea of arms control “rested quietly in the depository of lost causes”.⁷⁹ It appears from this brief overview that early restrictions placed on the trade in arms were mostly motivated by the desire to protect limited military resources and to protect one’s technological lead, the desire not to arm a potential or actual enemy, and the self-interested considerations of colonial powers to preserve a monopoly of military power in their colonies.

I.C.2 The League of Nation’s Attempts to Regulate Conventional Arms Transfers

After the First World War, the widespread public sentiment against the private arms trade and arms manufacture which were believed to be an important cause for the war led to considerable public pressure to regulate the trade in arms. Article 8§5 of the *Covenant of the League of Nations* states that “the manufacture by private enterprise of munitions and implements of war is open to grave objections”⁸⁰ and Article 23§4 entrusts members of the LoN “with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest.”⁸¹ Although this latter Article seems to aim at a general regulation of the trade in arms, its application was in fact limited to colonies and thereby introduced an element of discrimination. The first multilateral achievement of the LoN in accordance with its mandate under Article 23 was the conclusion of the *1919 St.Germain-en-Laye Convention* mentioned earlier, which explicitly built on the *1890 Brussels Act*. The major aim of the Convention was to prohibit the export of arms to those areas of Africa and Asia that were under colonial control or League mandates. The Convention foresaw that arms could only be supplied to signatory governments and set up a system of control and a requirement

⁷⁸ See chapter II.E.2 *infra*.

⁷⁹ DEN DEKKER, G., *The Law of Arms Control, International Supervision and Enforcement*, Developments in International Law, Vol. 41, Martinus Nijhoff Publishers, The Hague, Boston, London, 2001 citing Martin, 10

⁸⁰ Art. 8§5 *Covenant of the League of Nations* (Part I of the *Treaty of Peace between the Allied and Associated Powers and Germany and Protocol*), 28 June 1919

⁸¹ Art. 23§4 *LoN Covenant*

of export licences. It allowed for important exceptions concerning direct supplies to other governments with an export license and finally failed to enter into force for lack of US ratification.

After this failure, another important multilateral attempt at controlling the arms trade was made at the Conference for the Supervision of the International Trade in Arms, Munitions, and Implements of War, held in Geneva in 1925. Although the Conference accepted the principle that every State had a legitimate right to trade in arms to ensure its security, a new idea introduced by the resulting 1925 *Convention* was that the regulation of the arms trade was desirable even beyond colonial areas. Certain States were concerned about the danger the accumulation of vast stocks of surplus arms posed to global peace, the security of nations and individuals independently of their own national interests.⁸² Although the Convention achieved supervision of the international trade through reciprocal publicity and a licensing system, it never entered into force.

Finally, a Conference for the Reduction and Limitation of Armaments was convened in Geneva from 1932 until 1937. There was increasing support for the idea that the control of the manufacture and the sale of arms was at the heart of the limitation and reduction of arms, and States generally agreed that the private manufacture of arms should be subjected to government license and that there should be national responsibility for these activities.⁸³ Political difficulties proved insurmountable, however. By 1935, the Conference ceased to function, and it was finally dissolved in 1937.

Several less consensual attempts at controlling the trade in arms were undertaken during the inter-war period. Already the post-World War I peace treaties all explicitly prohibited the importation of arms munitions and war material as well as their manufacture and exportation.⁸⁴ A series of embargoes were adopted, the most successful of which was probably the embargo imposed on Bolivia and Paraguay with a view to force them to reach a negotiated settlement to the Chaco War (1932-1935).⁸⁵ The embargoes against China in 1919, Japan (Sino-Japanese war 1933-1945) and Italy (Italo-Ethiopian war, 1934-1936)⁸⁶ were less successful. During the Spanish Civil War (1936-1939), invoking the principle of non-intervention, twenty-seven States declared that they would not export arms to Spain.⁸⁷

⁸² KRAUSE, K., MACDONALD M. K., "Regulating Arms Sales Through World War II", 716

⁸³ KAUSCH, H. G., "Internationale Rüstungstransfers", 1162

⁸⁴ Art. 170 of the *Treaty of Peace between the Allied and Associated Powers and Germany and Protocol* stipulates: „L'importation en Allemagne des armes, munitions et matériel de guerre de quelque nature que ce soit sera strictement prohibée. Il en sera de même de la fabrication et de l'exportation des armes, munitions et matériel de guerre de quelque nature que ce soit, à destination des pays étrangers“.

⁸⁵ The embargo was arguably based on Art. 11§1 of the *LoN Covenant*, but whether or not this provision enabled LoN members to such an action was open to debate. See ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 61

⁸⁶ The only embargo adopted on the basis of Art. 16 of the *LoN Covenant*.

⁸⁷ This declaration was widely violated and proved soon illusionary. YAKEMTCHOUK, R., "Le respect de la destination des armes acquises à l'étranger: la clause de finalité d'emploi et de non-réexportation", in *AFDI*, Vol. XXIV, 1978, 125

Influenced by the LoN efforts, most arms-producing States adopted national controls over arms exports,⁸⁸ nationalised their arms industry and instituted government to government sales as a norm.⁸⁹ Even the US yielded to increasing public pressure and disfavoured arms exports to areas of unrest or warfare.⁹⁰ A regional treaty which deserves mention is the *Central American Arms Limitation Treaty* of 1923. In its Article 3, the contracting Parties undertake not to export or permit the export of arms from one Central American country to another.⁹¹

Before the outbreak of World War II therefore, the multilateral efforts to comprehensively regulate the arms trade through a negotiated instrument had failed. The LoN had succeeded however in articulating the long-standing and widely held view that trading in arms was morally problematic.⁹² For political reasons it became apparent that reinforced government control of arms exports was highly desirable. It also appears that at least with regard to arms embargoes, real concern for international and regional peace and the possibility to contribute to war prevention or conflict management were important motivations.

I.C.3 Post – World War II Initiatives to Regulate Conventional Arms Transfers

In contrast to the *LoN Covenant*, the *UNC* does not contain any reference to international arms transfers. In the aftermath of Hiroshima and Nagasaki, the UN's main focus with regard to arms control and disarmament was on nuclear weapons, but a range of multilateral initiatives to control CAT have nevertheless been launched. Most of these initiatives were taken by regional organisations or particular groups of States and/or concern only a certain type of conventional weapon. These "partial" initiatives will be dealt with first. Then, I will look at the few global and comprehensive initiatives that have been launched, both within and outside of the UN.

I.C.3.a Partial Initiatives

One of the first multilateral control efforts in a particular region was the *Tripartite Declaration* adopted by the UK, US and France in 1950 with the aim to co-ordinate their arms supplies to the Middle East.⁹³ In contrast to this supplier-led initiative stands the regime created by the 1974 *Ayacucho Declaration*, a non-binding agreement signed by certain American States and aimed at restricting their arms imports.⁹⁴ Another notable initiative by a regional body is the *1969 resolution* of the Western

⁸⁸ KAUSCH, H. G., "Internationale Rüstungstransfers", 1162

⁸⁹ KRAUSE, K., MACDONALD M. K., "Regulating Arms Sales Through World War II", 721

⁹⁰ *Ibid.*, 722

⁹¹ Art. 3 *Convention on the Limitation of Armaments of Central American States*, 7 February 1923

⁹² KRAUSE, K., MACDONALD M. K., "Regulating Arms Sales Through World War II", 722

⁹³ KRAUSE, K., "Controlling Arms Trade Since 1945", 1026

⁹⁴ Other initiatives have been launched by the Organisation of American States, none of which had a notable impact on CAT in the region. For details, see ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 85-86

European Union (WEU) Assembly, which calls upon suppliers “de ne plus exporter des armements lourds capables d’augmenter les risques de guerre...”.⁹⁵

Throughout the 1970s and in the context of US-Soviet *détente*, the two States engaged in a bilateral process, the Conventional Arms Transfer Talks.⁹⁶ Mainly driven by the Carter administration’s arms transfer restraint policy, the US focused on restraining arms transfers to particular regions, whereas the USSR suggested that limits should be introduced on arms sales to racist regimes, States holding unjustified territorial claims and States rejecting disarmament efforts.⁹⁷ The process broke down by early 1980 without producing tangible results.

After the 1991 Gulf War had revived concerns over international arms transfers, the five permanent members of the SC adopted common guidelines aimed at creating a “serious, responsible and prudent attitude of restraint”.⁹⁸ Subsequently, various international organisations seized the issue of CAT. Some of these initiatives produced legally non-binding codes of conduct aimed at guiding member States’ authorisations of arms transfer by formulating criteria to be taken into account when deciding on export licences. In 1993, the Organization for Security and Co-operation in Europe (OSCE) adopted the *Principles governing Conventional Arms Transfers*⁹⁹ and in 1998 the EU adopted its *Code of Conduct for Arms Exports*,¹⁰⁰ probably the most elaborate instrument on arms transfers. In 1999, the Stability Pact for South Eastern Europe issued a joint declaration on responsible arms transfers, recognising

“the need to distinguish between arms transfers that legitimately contribute to national defense and security, and those that exacerbate instability, tension, violence and loss of human lives in regions of conflict or that may help build arsenals of irresponsible recipients.”¹⁰¹

In 2000, the US and the SADC jointly urged all States to “exercise restraint in the sale and transfer of conventional arms to regions of conflict in Africa...”.¹⁰² The *US-EU Declaration* of the same year contains specific criteria for arms transfers.¹⁰³ Licensing criteria for brokering activities are also

⁹⁵ *The International Trade in Armaments*, Assembly of Western European Union, Report and Draft Recommendation submitted on behalf of the Committee on Defence Questions and Armaments, Doc. 500, 4 December 1969, Proceedings, 15th Ordinary Session, Second Part, December 1969

⁹⁶ Notwithstanding their name, these talks were only concerned with trade. Other forms of transfers were excluded from the negotiations. ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 88

⁹⁷ GOLDBLAT, J., *Arms Control, A Guide to Negotiations and Agreements*, 182-183

⁹⁸ *Guidelines for Conventional Arms Transfers*, Communiqué issued following the meeting of the Five, London, 18 October 1991

⁹⁹ *Principles Governing Conventional Arms Transfers*, adopted at the 49th Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation in Vienna on 25 November 1993, DOC.FSC/3/96

¹⁰⁰ *European Union Code of Conduct for Arms Exports*, Council of the European Union, 8675/2/98 REV 2, 8 June 1998

¹⁰¹ *Joint Declaration on Responsible Arms Transfers*, Special Co-ordinator of the Stability Pact for South Eastern Europe, Sofia conference on export controls, 15 December 1999

¹⁰² *United States – Southern African Development Community Declaration on United Nations Sanctions and Restraint in Sale and Transfers of Conventional Arms to Regions of Conflict in Africa*, annexed to the identical letters dated 5 December 2000 from the Permanent Representative of Namibia and the United States of America to the United Nations addressed to the President of the General Assembly and the President of the Security Council, A/55/696 – S/2000/1200

¹⁰³ *Declaration by the European Union and the United States on the Responsibilities of States and on Transparency regarding Arms Exports*, adopted at the EU-US Summit, Washington, 18 December 2000

contained in the *Draft Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition of the Organization of American States (OAS)*.¹⁰⁴

Mention has to be made also of some recent instruments addressing the transfer of SALW, the most notable of which is probably the 1998 ECOWAS Moratorium¹⁰⁵ (extended in 2001 and again in 2004) prohibiting all imports, exports and manufacture of SALW throughout the West African region. The moratorium is not legally binding, however, and it allows for exemptions to meet “legitimate national security needs”, the precise meaning of which has yet to be defined.¹⁰⁶ The *G-8 Miyazaki Initiatives for Conflict Prevention* also mentions considerations for repression and aggression in respect to SALW exports.¹⁰⁷

Additional restrictions on the transfer of particular weapons are imposed by the Missile Technology Control Regime (MTCR), an informal association of States with the objective to control the proliferation of ballistic missiles and the *2002 Hague Code of Conduct against Ballistic Missile Proliferation (HCOC)*.¹⁰⁸ Similarly, the Wassenaar Arrangement, another informal supplier control regime that grew out of the Coordinating Committee for Multilateral Export Controls (CoCom) in 1996 is primarily motivated by strategic considerations, but has recently adopted documents that mention human rights as a factor to consider when making export decisions.¹⁰⁹ Furthermore, certain treaties outlaw the use and transfer of particular types of conventional weapons.¹¹⁰ These treaties will be dealt with in more detail in chapter II.B.2.

¹⁰⁴ Art. 4§7 and Art. 5 of the *Draft Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition*, 2003

¹⁰⁵ Economic Community of West African States

¹⁰⁶ According to the 2004 edition of the Small Arms Survey, it is unclear what effects the moratorium had on authorised transfers in the region. SMALL ARMS SURVEY, “Back to the Sources: International Small Arms Transfers”, in *Small Arms Survey 2004: Rights at Risk*, Oxford University Press, Oxford, 2004, 112

¹⁰⁷ *United States – Southern African Development Community Declaration ... A/55/161- S/2000/714*, 3

Several important instruments on SALW transfers will not be dealt with here. The *European Union Council Joint Action* of 12 July 2002 and the *Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering*, Official Journal of the European Union, L 156/79, 25 June 2003 do not add substantially to the principles laid down in the *EU Code of Conduct*. The recently adopted *Nairobi Protocol*, 2004 focuses on SALW transfers in violation of national law and merely requires States to establish a licensing system for all imports and exports.

¹⁰⁸ Although missiles clearly fall within the category of conventional arms, they will not be studied here as their main interest resides in their capacity to deliver weapons of mass destruction. Regulatory instruments like the MTCR and the HCOC have to be analysed in this particular context.

¹⁰⁹ Art. 1(e) *Elements for objective analysis and advice concerning potentially destabilising accumulations of conventional weapons*, The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, paper approved by the Plenary, 3 December 1998; Art. 1(i) *Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)*, The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, as adopted by the Plenary, 11-12 December 2002

¹¹⁰ Art. 8 *Revised Protocol II to the CCW*, Art. 1 *Protocol IV to the CCW* and Art. 1(b) *Ottawa Convention*

I.C.3.b Comprehensive Initiatives

Embargoes on CAT imposed by the SC¹¹¹ or the GA,¹¹² although adopted by the most universal organisation to date, only have a limited geographical and temporal scope of application. Truly global and comprehensive approaches are rare. In 1978, the 10th Special Session of the GA (the 1st Special Session on Disarmament) was convened. Its Final Document is the first official UN document to mention CAT as a general problem. It states in § 22:

“There should also be negotiations on the limitation of international transfer of conventional weapons, based in particular on the same principle [the principle of undiminished security of the parties with a view to promoting or enhancing stability at a lower military level, taking into account the need of all States to protect their security.] and taking into account the inalienable right to self-determination and independence of peoples under colonial or foreign domination...”¹¹³

Unfortunately, no concrete action was taken, and the 2nd and 3rd Special Sessions on Disarmament held in 1982 and 1988 respectively did not produce any substantial outcome.¹¹⁴

Based on the idea that more transparency and publicity in arms transfers would reduce tensions, build confidence between States and deter them from spending their scarce resources on excessive armament, Malta introduced a draft resolution to be adopted by the GA in 1965 trying to institute a system of transparency and publicity in arms transfers.¹¹⁵ Finally, in 1991, the United Nations Register of Conventional Arms Transfers was set up. It only *indirectly* affects CAT transfers by decreasing the danger of arms races through increased transparency.¹¹⁶

In 1991, the GA adopted a resolution urging member States to “promote the development of internationally harmonized laws and administrative procedures relating to official arms procurement and arms transfer policies”.¹¹⁷ In this context the UNDC adopted two sets of guidelines containing criteria for international arms transfers in 1996 and 1999 respectively.¹¹⁸

¹¹¹ In *Resolution on the Palestinian question*, S/801, 29 May 1948, the SC merely invited member States not to supply war materials. Later, clearly mandatory embargoes were adopted under Chapter VII of the *UNC*, such as *Security Council resolution 181 (1963) [calling upon all States to cease the sale and shipment of arms to South Africa]*, S/RES/181(1963), 7 August 1963.

¹¹² *Intervention of the Central People's Government of the People's Republic of China in Korea*, A/RES/498 (V), 1 February 1951 and *Additional measures to be employed to meet the aggression in Korea*, A/RES/500 (V), 18 May 1951; There was considerable disagreement on the question whether the GA had the power to impose an arms embargo and some States did not adhere to it.

¹¹³ *Final Document of the Tenth Special Session of the General Assembly*, A/S-10/2, 30 June 1978

¹¹⁴ ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 81. According to Vlasic the Second Session “ended in complete failure”. VLASIC, I., “Raison d’Etat v. Raison de l’Humanité – The United Nations SSOD II and Beyond”, in *McGill Law Journal*, Vol. 28, No. 3, 1983, 507; Currently, the GA is considering the convening of a Fourth Special Session to be held in 2006. Cf. A/C.1/59/1 G at § 9(dd)

¹¹⁵ Similar less ambitious resolutions were introduced in the First Committee by Denmark in 1967, by Norway, Iceland and Malta 1968, and by Japan in 1976.

¹¹⁶ Moreover, the UN Register does not include SALW (except MANPADS) and ammunition. The number of States submitting data on a regular basis is still rather low, and the comparison between different States’ data sets is difficult due to diverging reporting standards. The UN Register and other transparency regimes before it (such as the *1925 Convention*) are criticised as discriminatory by States not producing arms because the production of arms is not subject to the same transparency requirements as arms imports.

¹¹⁷ *International Arms Transfers*, A/RES/46/36 H, 6 December 1991; In more recent resolutions the GA stressed the responsibility of member States „to enact and improve national legislation, regulations and procedures and to exercise

Outside of the UN, only one truly comprehensive and global initiative on CAT has been launched: The *Draft Framework Convention on International Arms Transfers* [the ATT], which will be examined in Part III *infra*.

I.D Conclusion of Part I

Despite all multilateral attempts, and particularly the ardent efforts undertaken by the LoN, the “jurist has still to cope with the discomfiting truth that the *Brussels Act* of 1890 remains the only international agreement regulating arms trade to have entered into force”.¹¹⁹ Needless to say that this colonial treaty finds no practical application today. Although the international community has so far failed to regulate CAT comprehensively, diverse regional and partial initiatives have been launched. Common themes in the codes of conduct mentioned above include criteria on international and regional security and stability, the risk of reverse engineering and the risk of diversion or re-export of arms. Reference is also made to the economic situation in the recipient country and the question whether the recipient is involved in an armed conflict or whether there are tensions in the recipient’s region. Unlike earlier texts, these codes formulate criteria based on recipients’ compliance with international law in general, and arms control regimes, HRL and (to a lesser degree) IHL in particular. Before the end of the Cold War, human rights or internal repression in the recipient country played a very marginal role in the evaluation of export licence applications. Today, these criteria are at least mentioned in the majority of the codes under consideration.¹²⁰ All of the international instruments formulating export criteria are of a political, legally non-binding nature. At first view therefore, the legal regime seems to be rather disparate, leaving it largely to national law to regulate CAT. The recent focus on SALW trafficking undertaken by NSA in violation of national law has contributed little to formulate general criteria for CAT by States.

effective control over the transfer of arms, military equipment and dual-use goods and technology, while ensuring that such legislation, regulations and procedures are consistent with the obligations of States Parties under international treaties.” *National legislation on transfer of arms, military equipment and dual-use goods and technology*, A/RES/57/66, 30 December 2002 and *National legislation on transfer of arms, military equipment and dual-use goods and technology*, A/RES/58/42, 17 December 2003

¹¹⁸ *Guidelines for international arms transfers in the context of General Assembly resolution 46/36 H of 6 December 1991*, annexed to the Report of the Disarmament Commission, A/51/42, 22 May 1996 and *Guidelines on conventional arms control/limitation and disarmament, with particular emphasis on consolidation of peace in the context of General Assembly resolution 51/45 N*, annexed to the Report of the Disarmament Commission, A/54/42, 6 May 1999

¹¹⁹ POLITAKIS, G. P., “Variations on a Myth: Neutrality and the Arms Trade”, in *German Yearbook of International Law*, Vol. 35, 1992, 454

¹²⁰ For a comparative analysis of the different criteria contained in these instruments, see Annex IV *infra*.

II International Legal Norms on Conventional Arms Transfers

“On est ici sur le terrain des principes. Et *ce commerce les soulève tous sans en satisfaire aucun*. Il pose au droit des questions essentielles, pour lesquelles la technique n’amène que des réponses partielles.”¹²¹

II.A Determination of the Applicable Law

At the outset of any legal analysis the applicable law has to be determined. With respect to CAT, the exercise proves to be somewhat tricky. Legal essays on the subject are relatively rare and the question arises, whether there is a corpus of law specifically regulating CAT, or whether relevant rules can be found in different branches of international law dealing with weapons, war, or the transfers of commodities. That national law applies is unquestionable. The applicability of neutrality law seems equally undisputed.

II.A.1 Trade Law...

It is comparably easy to exclude CAT from the ambit of the corpus of law that regulates the export and import of commodities. Reference should be made to Article XXI (b) of the *General Agreement on Tariffs and Trade (GATT)*, according to which nothing in the agreement shall be construed

“to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests,

...

(ii) relating to the traffic in arms, ammunition or implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations

...¹²²

The scope of this “security exception” is uncertain, and thus, as a practical matter, export controls in arms are left up to the discretion of each member of the World Trade Organisation.¹²³ The reference to “emergency in international relations” includes not only situations of armed conflict but applies equally to situations that could pose a threat of future armed conflict and to economic, social or political emergency situations.¹²⁴ War materials have even been classified as “*rentrant dans la catégorie des produits hors-commerce*”. Because they are directly linked to national defence, “il n’a jamais été envisagé que le commerce des armes puisse être libre: il relève de *l’imperium* étatique.”¹²⁵ It appears

¹²¹ MARTINEZ, J.-C., “Le droit international et le commerce des armes”, in SOCIETE FRANCAISE POUR LE DROIT INTERNATIONAL, *Le droit international et les armes*, Colloque de Montpellier du 3 au 5 juin 1982, Editions A. Pedone, Paris, 1983, 113

¹²² Art. XXI (b) *General Agreement on Tariffs and Trade*, 30 October 1947

¹²³ MATSUSHITA, M., SCHOENBAUM, T.J., MAVROIDIS, P.C., *The World Trade Organization, Law Practice and Policy*, Oxford University Press, Oxford, 2004, 222

¹²⁴ MATSUSHITA, *et al.*, *The World Trade Organization...*, 223

¹²⁵ CARREAU, D., JUILLARD, P., *Droit international économique*, Dalloz, Paris, 2003, 251-252. The same principle is embodied in Article 223§1(b) of the *Treaty Establishing the European Community*, 25 March 1957: “any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected

therefore, that CAT are primarily regulated by other branches of law. If one adopts a broad definition of conventional arms under international law, including many dual-use items and “tools of torture”, however, principles and rules of trade law will have to be taken into account.

II.A.2 ...Arms Control Law and Humanitarian Law...

The question whether CAT are regulated by a special branch of international law and how this field may relate to other branches of international law will be examined next. CAT have been the object of numerous essays by scholars in political science and security studies and are usually dealt with under the heading of arms control and disarmament. Do the legal rules on CAT accordingly belong to the field of arms control or disarmament law? – Or do we have to turn to other fields of international law concerned with weapons, such as IHL?

II.A.2.a Arms Control Law as an Autonomous Branch of International Law

Den Dekker asserts that the law of arms control today forms a special branch of international law,

“composed of a number of systems of legal norms that are related because of their common subject matter, viz. the regulation of national armaments with the ultimate objective to achieve general and complete disarmament under strict and effective international control”.¹²⁶

Carter specifies that the modern development of arms control and disarmament law perhaps dates from the early 1960s,¹²⁷ and he defines its overall goal as the reduction or elimination of instabilities in the military field with a view to lessening the probability of the outbreak of war, limiting the destruction caused in time of war, and reducing the economic strains caused by the arms race.¹²⁸ In 1990, the International Law Association (ILA) mandated a Committee on “Arms Control and Disarmament Law” to

“investigate the manner in which the principles and rules of international law may contribute to the control or reduction of armaments and military force and to the reduction of the risk of armed conflict...”¹²⁹

The majority view of the doctrine points to the existence of an autonomous corpus of arms control law (ACL).¹³⁰ Undisputedly, at least part of the motives for the regulation of CAT correspond to the goals of ACL described above, and consequently, the norms of ACL apply to CAT.

with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes”.

¹²⁶ DEN DEKKER, G., *The Law of Arms Control...*, p.36; Blix agrees: “legal rules on arms control and disarmament,...now constitute a separate body of law...” BLIX, H., “International Law relating to Disarmament and Arms Control with special focus on verification and compliance”, in KALSHOVEN, F., (ed.), *The Centennial of the First International Peace Conference*, Kluwer Law International, The Hague, 2000, 41

¹²⁷ CARTER, K., “New Crimes Against Peace: The Application of International Humanitarian Law Compliance and Enforcement Mechanisms to Arms Control and Disarmament Treaties”, in CANADIAN COUNCIL ON INTERNATIONAL *et al.* (eds.), *Treaty Compliance: Some Concerns and Remedies*, Kluwer Law International, The Hague, 1998, 19

¹²⁸ *Ibid.*, 4

¹²⁹ INTERNATIONAL LAW ASSOCIATION, *Final Report of the Committee on Arms Control and Disarmament Law*, Berlin Conference, 2004, 1

¹³⁰ Concurring: BRING, O., “Regulating Conventional Weapons in the Future – Humanitarian Law or Arms Control?”, in *Journal of Peace Research*, Vol. 24, No. 4, 1987; HÖGEL, D., *Rüstungskontrolle und Völkerrecht, Zur Steuerung*

II.A.2.b The Overlap between Arms Control Law and International Humanitarian Law

That IHL regulates the use of all weapons in times of armed conflict is undisputed. But does it also regulate their transfer? A number of treaties that have a bearing on the transfer of specific conventional arms are commonly associated with the field of IHL and not primarily with ACL. Myjer suggests the following distinction between IHL and ACL:

“For with regard to weapons the (humanitarian) law of armed conflict is primarily about restrictions on the means and methods of warfare to prevent ‘superfluous injury or unnecessary suffering’ in case of war, whereas the law of arms control is about (numerical) restrictions or even a complete ban of certain categories of weapons also in peacetime,…”¹³¹

In his view, the difference lies in IHL’s primarily humanitarian concern, whereas ACL is more interested in improved State security. He admits however that the distinction is not always clear and that these two branches of international law overlap.¹³² IHL and ACL have “traditionally been seen as complementary but unconnected fields...Over the past 10 to 15 years however the divisions between the two fields of law have begun to blur”.¹³³ Rosas notes with reference to the *St. Petersburg Declaration* (1868),¹³⁴ the *Hague Declaration* of 1899¹³⁵ and the Protocols to the CCW that “some treaties which prohibit or restrict the use of weapons in war have disarmament connotations as well”¹³⁶ and Högel acknowledges the existence of a grey area between ACL and IHL where treaties like the CCW or the *ENMOD Convention*¹³⁷ can be found.¹³⁸ In Myjer’s opinion, the *Ottawa Convention* appears to be an arms control

rüstungstechnischen Wandels durch völkerrechtliche Verträge, Tübinger Schriften zum internationalen und europäischen Recht, Vol. 22, Duncker & Humblot, Berlin, 1990; and MYJER, E., “Means and Methods of Warfare...”; Dissenting: BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle im Vertragsvölkerrecht der Gegenwart*, (*Legal Questions of Arms Control in Contemporary International Treaty Law*), Berichte der Deutschen Gesellschaft für Völkerrecht, Vol. 30, C.F. Müller Juristischer Verlag, Heidelberg, 1990, 117

¹³¹ MYJER, E., “Means and Methods of Warfare...”, 373

¹³² *Ibid.*, 373. For Bring, “arms control includes humanitarian regulations on specific weapons, as well as regulations expressing a mix of humanitarian and security concerns”. BRING, O., “Regulating Conventional Weapons in the Future...”, 275

¹³³ CARTER, K., “New Crimes Against Peace...”, 1; On increasing interaction between IHL and ACL, see also ROSAS, A., “The Frontiers of International Humanitarian Law”, in *Journal of Peace Research*, Vol. 24, No. 4, 1987, 232

¹³⁴ *Declaration renouncing the use in time of war, of explosive projectiles under 400 grammes weight*, 29 November – 11 December 1868

¹³⁵ *Declaration concerning expanding bullets*, (Hague Declaration IV,3), 29 July 1899

¹³⁶ ROSAS, A., “The Frontiers of International Humanitarian Law”, 231. He describes the CCW as a “curious blend of disarmament law and humanitarian law.”, 232

According to Den Dekker, the *St. Petersburg Declaration* constitutes an early effort on qualitative arms control or simply part of the long effort to reduce unnecessary brutality and suffering in warfare. DEN DEKKER, G., *The Law of Arms Control...*, footnote 17 at 9; Kalshoven describes the *St. Petersburg Declaration* and the Hague Peace Conferences as “mixed affairs”. KALSHOVEN, F., “Arms, Armaments and International Law”, in *Recueil des Cours*, Collected courses of the Hague Academy of International Law, Vol. 191, 1985, 306; Myjer considers that *Revised Protocol II* (mines) and *Protocol IV* (blinding laser weapons) to the CCW seem to be embedded in both, ACL and IHL. MYJER, E., “Means and Methods of Warfare...”, 376

¹³⁷ *Convention on the prohibition of military or any other hostile use of environmental modification techniques*, 10 December 1976

¹³⁸ HÖGEL, D., *Rüstungskontrolle und Völkerrecht...*, 42: “Im Bereich ihrer schadenslimitierenden Funktion stimmt Rüstungskontrolle weitgehend mit den Anliegen des humanitären Kriegsrechts überein. In dieser ‘Grauzone’ zwischen Rüstungskontrolle und humanitärem Kriegsrecht sind die völkerrechtlichen Normen angesiedelt, die (Erst-) Einsatzverbote und Einsatzbeschränkungen für bestimmte Waffen zum Inhalt haben.” And at 51: “Die kriegsrechtlichen Einsatzverbote und Verwendungsbeschränkungen für bestimmte Waffen können aufgrund der durch sie erzielbaren Präventionswirkungen auf den Rüstungsprozess zu den normativen Instrumenten der Rüstungskontrolle gezählt werden. Sie bilden das Scharnier

(disarmament) treaty in that it regulates not only the use but also the possession and transfer of anti-personnel mines, but its preambular paragraphs profess it to be of an essential humanitarian law character.¹³⁹ Based on these examples, it seems that IHL and ACL both pertain to CAT. Because in certain conventions on conventional arms humanitarian objectives are intertwined with broader concerns about armaments, there is “no reason why humanitarian and disarmament considerations should not be combined”.¹⁴⁰ I agree with Bring that the fruitful relationship between IHL and ACL should be explored more vigorously in the future.¹⁴¹ In his view, the two concepts overlap and one legal approach should not exclude the other.¹⁴² He qualifies this approach as “humanitarian arms control”.¹⁴³ Following Carter, treaties with a hybrid IHL/ ACL parentage and effect, situated at the intersection of the field of ACL and IHL will be referred to as “cross-over conventions”.¹⁴⁴

The foregoing discussion may seem overly theoretical and one may question the necessity of devoting several pages to the determination of the applicable law. In my view, it is important to find out whether CAT are regulated by ACL and/or by IHL because the characteristics of these branches of law determine the kind of legal arguments that can be adopted.

II.A.3 ...and Human Rights Law?

According to Gillard, “human rights law is another important source of limitations on transfers of weapons”.¹⁴⁵ But is HRL at all relevant to the assessment of the legality of CAT? No human rights instrument contains provisions on the transfer of conventional weapons (or any other type of weapons), and despite promising titles, writings by human rights scholars usually fall short of explaining how exactly CAT violate human rights. The common argument establishes a link between CAT and tensions,

zwischen dem völkerrechtlichen Kriegsverhütungs- und dem Kriegsrecht.” For a good illustration of this point of view, see the preamble to the CCW.

¹³⁹ MYJER, E., “Means and Methods of Warfare...”, 375; Compare MATHEWS, R. J., McCORMACK, L. H., “The influence of humanitarian principles in the negotiation of arms control treaties”, in *IRRC*, No. 834, 1999, 7

¹⁴⁰ GREENWOOD, C., “The Law of Weaponry at the Start of the New Millennium”, in SCHMITT, M., GREEN, L., (eds.), *The Law of Armed Conflict: Into the Next Millennium*, International Law Studies, Vol. 71, Naval War College, Newport, 1998, 191

¹⁴¹ BRING, O., “Regulating Conventional Weapons in the Future...”, 275; Dissenting, Rosas: “direct links between humanitarian law and disarmament law should ...not be strengthened further.” ROSAS, A., “The Frontiers of International Humanitarian Law”, 233

¹⁴² BRING, O., “Regulating Conventional Weapons in the Future...”, 285; The ILA Arms Control Committee also underlines the interdependence between different fields of international law. ILA, *Final Report of the Committee on Arms Control and Disarmament Law*, 16;

Interesting in this context is the view expressed by the Chinese delegate during the negotiations of *Revised Protocol II* to the CCW: “Since the Convention and its Protocols fell largely within the framework of war and humanitarian laws, they should, strictly speaking, deal only with the use of weapons, and not with their transfer. However, in the interests of reducing the threat to civilians, his delegation could agree to the inclusion of provisions banning the transfer of mines the use of which was prohibited by the Protocol.” *Summary Record of the 4th Meeting, Final Document*, Review Conference of the State Parties 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, CCW/CONF.I/16(Part II), 342

¹⁴³ BRING, O., “Regulating Conventional Weapons in the Future...”, 282

¹⁴⁴ CARTER, K., “New Crimes Against Peace...”, 19

¹⁴⁵ GILLARD, E., *What is legal? What is illegal?*, A Background Paper on the ATT Convention, Groupe de recherche et d'information sur la paix et la sécurité, Brussels, 10 Septembre 2003, 8

repression or war, and then concludes that human rights are negated by CAT without explaining which obligations were violated and by whom.¹⁴⁶

Interestingly, however, the only comprehensive convention on CAT that ever entered into force linked the prohibition of slave trade, one of the oldest human rights concerns, to the trade in arms.¹⁴⁷ That a connection between HRL and CAT has been established is apparent from the inclusion of human rights criteria in codes of conduct on arms exports, and references to human rights in other inter-governmental texts.¹⁴⁸ The reason for this evolution resides in a changing conception of security. Armament and arms transfers are perceived as a primary tool in a strategy of defence against threat. The emergence and acceptance by policy makers of the concept of human security,¹⁴⁹ has made the person the reference object of security and has led to the evaluation of the legitimacy of arms transfers in terms of individuals' rights and security. Human rights – political and civil, as well as economic and social rights – can be seen as important elements of human security. As such, one can argue that “it is now possible – or more accurately, *acceptable* – to establish the link between the human rights and disarmament through the concept of human security.”¹⁵⁰

Another theoretical link can be seen in the ultimate purpose of both HRL and the regulation of CAT: peace. Alston notes for instance that the “relationship between peace, disarmament and human right is of a dialectical nature. The temptation to seek to compartmentalize consideration of the three issues must be resisted.”¹⁵¹ Before following Alston’s advice I will explore more specialised branches of international law and begin the substantive analysis with ACL.

II.B The Regulation of Conventional Arms Transfers under Arms Control Law

Having established that ACL is indeed an autonomous branch of international law, and after concluding that it is the corpus of law most likely to contain rules on conventional arms, I will first try to find conventional rules restricting or prohibiting CAT, and second, I will look for customary norms on the subject. Finally, general principles of ACL will be examined.

¹⁴⁶ See for example VLASIC, I., “Raison d’Etat v. Raison de...” or SAJOO, A., “Human Rights Perspectives on the Arms Race”, or more recently, STANLEY, R., “Kinderrechte und Waffentransfers”, in JENNICHEN, A., MARKS, N., SANDEVSKI T., (eds.), *Rüstungstransfers und Menschenrechte, Geschäfte mit dem Tod*, Politikwissenschaft, Vol. 79, Lit Verlag, Münster, 2002

¹⁴⁷ Art. 1§7 *1890 Brussels Act*

¹⁴⁸ E.g. *Resolution 928 (1989) on arms sales and human rights*, Parliamentary Assembly of the Council of Europe, 27 September 1989

¹⁴⁹ In the words of the International Commission on Intervention and State Sovereignty (ICISS), “human security means the security of people - their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms.” ICISS, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, 2001, 15

¹⁵⁰ BOYLE K., SIMONSEN, S., “Human security, human rights and disarmament”, in *Disarmament Forum*, No. 3, 2004, 11. (Emphasis in the original.)

¹⁵¹ ALSTON, P., “Peace, Disarmament and Human Rights”, in FISCHER, G., (Dir.), *Armement – Développement – Droits de l’Homme – Désarmement*, Actes mis à jour du Colloque organisé du 28 au 30 octobre 1982 à l’UNESCO par l’Association Henri Laugier et l’Institut des Sciences Juridiques du Développement, Bruyant, Bruxelles, 1985, 329

II.B.1 General Arms Control Treaties on Conventional Arms

According to the concurring opinions of several authorities, ACL is in essence treaty law.¹⁵² As mentioned before, the 1890 *Brussels Act* is the only treaty generally regulating CAT that ever entered into force (although in its territorial scope of application it is quite limited). It merely prohibits the supply of arms to a particular region of the world, without elaborating more general principles. Certain arms control treaties currently in force and which deal with conventional arms in general¹⁵³ may *de facto* have a limiting effect on CAT, but their provisions do not mention transfers explicitly. As noted earlier, the few legally binding instruments on SALW transfers, i.e. the *2001 SADC Protocol* and the *Nairobi Protocol* of 2004 do not contain any substantial provisions on State-to-State transfers either.¹⁵⁴

II.B.2 Cross-Over Conventions on Specific Conventional Arms

II.B.2.a Transfer Prohibitions in Cross-over Conventions

Unlike typical arms control agreements, certain cross-over conventions contain specific transfer provisions. The *Protocol on Blinding Laser Weapons* (1995 *Protocol IV* to the *CCW*) prohibits all transfers to “any State or non-State entity” of “laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision”.¹⁵⁵

In contrast to the original mines-Protocol of 1980, *Revised Protocol II* (1996) to the *CCW* prohibits the transfer of “any mine the use of which is prohibited by this Protocol”.¹⁵⁶ This prohibition applies to:

- mines that are designed or of a nature to cause superfluous injury or unnecessary suffering,¹⁵⁷
- mines specifically designed to detonate the munition in the presence of mine detectors,¹⁵⁸
- self-deactivating mines equipped with an anti-handling device designed to function after the mine itself has ceased to be capable of functioning,¹⁵⁹
- anti-personnel mines which are not detectable,¹⁶⁰
- remotely delivered anti-personnel mines, which are not in compliance with the provisions on self-destruction and self-deactivation set out in the Technical Annex.¹⁶¹

Even States Parties that continue to use remotely delivered anti-personnel mines (APM) that are not in compliance with the self-destruction and self-deactivation mechanisms for up to 9 years after the

¹⁵² DEN DEKKER, G., *The Law of Arms Control...*, 50; BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle...*, 107-108

N.B. Contracts between governments and public or private entities fall outside the scope of ACL.

¹⁵³ E.g. *Treaty on Conventional Armed Forces in Europe (CFE)*, 19 November 1990

¹⁵⁴ *SADC Protocol*, 2001 and *Nairobi Protocol*, 2004

¹⁵⁵ Art. 1 of *Protocol IV* to the *CCW*. (Emphasis added.)

¹⁵⁶ Art. 8§1(a) of *Revised Protocol II* to the *CCW*.

For the purposes of the Protocol, “mine” means “a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle”. Art. 2§1

¹⁵⁷ Art. 3§3

¹⁵⁸ Art. 3§5

¹⁵⁹ Art. 3§6

¹⁶⁰ Art. 4

¹⁶¹ Art. 6§2

Protocol's entry into force – and which were produced prior to the entry into force of the Protocol –¹⁶² are nevertheless bound by this transfer prohibition.¹⁶³

In addition, States are under an obligation to “exercise restraint in the transfer of any mine the use of which is *restricted* by the Protocol.”¹⁶⁴ APM that are not remotely-delivered and other mines, which are remotely delivered, are covered by this provision.¹⁶⁵ Accordingly, States Parties are allowed to transfer remotely-delivered APM with a self-deactivation and self-destruction mechanism, as well as non-remotely-delivered APM to States not Parties to the Protocol, under the condition that the recipient State agrees to apply the Protocol.¹⁶⁶ Any transfer in accordance with Article 8 has to be carried out in compliance with the national law of all States involved, and in accordance “with the relevant provision of the Protocol and the applicable norms of international humanitarian law.”¹⁶⁷ Finally, Article 8§1(b) prohibits transfers of *all* mines to NSA. Interestingly, the protocol does not contain any provision on the transfer of booby-traps and “other devices”, as even Article 8§1(d) only pertains to transfers in accordance with Article 8 itself, which only applies to *mines*!

Hence, *Revised Protocol II* does not prohibit the transfer of all APM completely. The *Ottawa Convention* adopted in 1997 fills this gap. Under its provisions, each State Party undertakes *never under any circumstances* to “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines”.¹⁶⁸

II.B.2.b The Scope of Application of Transfer Prohibitions in Cross-over Conventions

Even though these cross-over conventions only regulate very specific types of conventional arms, they have a broad scope of application. All prohibit transfers to NSA. *Protocol IV* and the *Ottawa Convention* also explicitly prohibit the transfer to *any* State. *Revised Protocol II* is less stringent and it appears that booby-traps and other devices as well as certain mines to which the Protocol applies can be transferred legally.

To date, about 80 States (not even 50 % of all States) are Parties to *Revised Protocol II* and *Protocol IV*, whereas the *Ottawa Convention* is in force for about three quarters of all States. There is therefore some scope for transfers between States Parties to any of these treaties and States not Parties to them. In accordance with a general principle of treaty law, treaties bind only the parties to

¹⁶² Art. 3(c) of the Technical Annex

¹⁶³ Art. 8§2

¹⁶⁴ Art. 8§1(c) (Emphasis added.)

¹⁶⁵ Art. 5 and Art. 6§1 and 6§3

¹⁶⁶ Art. 8§1(c)

¹⁶⁷ Art. 8§1(d) In what these norms of IHL consist will be the object of the next chapter.

¹⁶⁸ Art. 1(b) of the *Ottawa Convention*. In accordance with Art. 3 of the Convention, transfers for the purpose of destruction, for the development of and training in mine detection, mine clearance, or mine destruction techniques naturally remain permitted.

them.¹⁶⁹ With a view to the fundamentally synallagmatic character of ACL, one could argue that the transfer of prohibited weapons would be legal if it occurs between a State Party to the treaty and a State not bound by it. At least with regard to *Protocol IV* and the *Ottawa Convention*, which both prohibit the transfer of the weapons they regulate to *any* State, whether or not it is a High Contracting Party, such an interpretation would defy the object and purpose of the treaties, i.e. to ban APM and blinding laser weapons completely and eliminate them from national arsenals, and would probably run counter to the intention of the drafters.¹⁷⁰ The problem is more complicated in the context of *Revised Protocol II*. Transfers of *mines* whose use is *restricted* under the Protocol to *States not Parties* to it, are regulated by Article 8§1(c) and (d). But what about the applicability of the Protocol to transfers of mines, booby-traps and other devices, whose use is *prohibited*? In an early draft of the Protocol, the prohibition on transfers of *mines* the use of which is prohibited was meant to apply *in all circumstances*.¹⁷¹ Notably, this phrase was deleted in later versions of Article 8§1(a) and it must therefore be assumed that certain prohibited mines, (as well as booby-traps and other devices¹⁷²) can be transferred to States not Parties to the Protocol. An exception arises under Article 3§3 which prohibits the use of *mines, booby-traps or other devices* which are designed or of a nature to cause superfluous injury or unnecessary suffering *in all circumstances*. Because these weapons can never be legally used, following the same argument as for blinding lasers and APM under the *Ottawa Convention*, their transfer, even between High Contracting Parties and States not Parties to the Protocol, is always prohibited.

With regard to the temporal scope of application of these instruments, the *Ottawa Convention* clearly applies in all situations, including peace-time, any armed conflict and situations of internal disturbances and tensions.¹⁷³ *Revised Protocol II* and *Protocol IV* apply to international and non-international armed conflicts but do not apply in situations of internal disturbances and tensions.¹⁷⁴ The question arises therefore, whether prohibited weapons could still be legally transferred if the supplier and/or the recipient are not involved in an armed conflict. The draft text of *Protocol IV* of 6 October 1995 included an Article 1 that should spell out its scope of application.¹⁷⁵ Since no text on the question of scope could be agreed on, Article 1 was finally deleted altogether.¹⁷⁶ Although the absence of

¹⁶⁹ Art. 34 *Vienna Convention on the Law of Treaties*, 22 May 1969

¹⁷⁰ According to Doswald-Beck, the Austrian delegation strongly argued in favour of the inclusion of a ban on transfer of blinding laser weapons, pointing out the particular danger of a State party to the Protocol transferring the weapon to a non-party State, which might use it. Supported by most delegations, the transfer prohibition was finally included. DOSWALD-BECK, L., "New Protocol on Blinding Laser Weapons", in *IRRC*, No. 312, 1996, 289

¹⁷¹ *Chairman's Rolling Text*, Art. 6^{ter}§3, 28 and *Chairman's Rolling Text* annexed to the *Progress Report* of 19 August, Explanatory Note, CCW/CONF.II/16 (Part II), 96

¹⁷² Art. 7§2 prohibiting the use of booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.

¹⁷³ Art. 1§1 of the Convention. See also MASLEN, S. *Commentaries on Arms Control Treaties...*, 71-74

¹⁷⁴ Art. 1§2 of *Revised Protocol II*. The scope of application of *Protocol IV* is determined by Art. 1 and 2 of the CCW as amended on 21 December 2001

¹⁷⁵ *Report of Main Committee III*, CCW/CONF.II/16 (Part II), 123

¹⁷⁶ *Summary Record of the 7th Meeting*, CCW/CONF.II/16 (Part II), 385

consensus raises doubts, the object and purpose of *Protocol IV*, i.e. the complete elimination of blinding laser weapons, suggests that the transfer prohibition must, as a matter of logic, extend to peace time. As for *Revised Protocol II*, there are good arguments why its transfer prohibitions cannot be extended to times of peace.¹⁷⁷ First, while an early draft explicitly envisaged the possibility of applying the Protocol in times of peace,¹⁷⁸ and even though the US delegation consistently adopted this view during negotiations,¹⁷⁹ the idea was soon abandoned and its scope of application restricted to NIACs and IACs.¹⁸⁰ Second, although earlier drafts envisaged the inclusion of an obligation to destroy prohibited weapons in the possession/ownership of High Contracting Parties, such an obligation was not retained in the final version.¹⁸¹ States have differing views on which mines should be completely banned,¹⁸² and because some of them consider their use legal in times of peace, transfer prohibitions cannot extend beyond the scope of application of the Protocol itself.

II.B.3 Customary Norms on Conventional Arms Transfers?

The conventional transfer prohibitions discussed so far concern very particular types of weapons. Are there no rules in ACL that restrict or prohibit transfers that put the objectives of arms control at risk, e.g. a customary rule that prohibits transfers if they threaten international or regional peace, security or stability?

II.B.3.a Treaties on Conventional Arms as a Reflection of Customary Law

Evidence for a customary norm restricting States' freedom to transfer arms may be found in treaties on CAT. The *1919 St. Germain Convention* mainly prohibits arms exports to certain areas and requires States to set up a licensing system. The only licensing criteria it specifies is that no export licences shall be granted to any country which refuses to accept the tutelage under which it has been placed.¹⁸³ The *1925 Convention* also contains a licensing requirement for certain categories of

¹⁷⁷ One may be tempted to argue that the reference to Art. 2 common to the *Geneva Conventions* contained in Art. 1 of the CCW (to which Art. 2 of *Revised Protocol II* refers) extends certain prohibitions to peace times because Art. 2 common GCI-IV provides "In addition to the provisions which shall be implemented in peacetime...". It is questionable whether this was the intention of the drafters. In general, one should keep in mind that behaviour with regard to national armaments not consisting in their use is not covered by *jus in bello*. Consequently, behaviour relating to the development, production, and transfer of certain types of weapons is restricted by treaty-based restraints only and cannot be extended by analogy. DEN DEKKER, G., *The Law of Arms Control...*, 47

¹⁷⁸ See Alternative A of Art.1 in the *Chairman's Rolling Text*, CCW/CONF.I/16(Part II), 21

¹⁷⁹ *Summary Record of the 4th Meeting*, 349; *Summary Records of the (First Part) of the 14th Meeting*, 428 and *Summary Records of the (Second Part) of the 14th Meeting*, 451

¹⁸⁰ A somewhat puzzling interpretative statement is made by Belgium and supported by a number of other States according to which "the provisions of the Protocol must be observed at all times, depending on circumstances". (Emphasis added.) *Summary Record of the (First Part) of the 14th Meeting*, 427

¹⁸¹ Art. 6^{bis}§4 in the *Chairman's Rolling Text*, CCW/CONF.I/16(Part II), 28

¹⁸² Ireland forcefully advocates the total elimination of APM (*Summary Record of the 3rd Meeting*, CCW/CONF.I/16(Part II), 317) whereas the UK only wants to ban non-detectable APM (*Summary Records of the 4th Meeting*, CCW/CONF.I/16(Part II)), 338

¹⁸³ Art. 4 and Art. 10(b) of the *1919 St. Germain Convention*

weapons¹⁸⁴ and specifies that export licences shall only be issued if the arms are required by the recipient for “lawful purposes”.¹⁸⁵ In addition, transit of arms shall be refused to States within the “special zone”, i.e. mainly colonial possessions, if “the attitude or the disturbed condition of the importing State constitutes a threat to peace or public order.”¹⁸⁶ This should not be interpreted as a requirement not to export arms to areas of tension or conflict as Article 33 provides for the suspension of the provisions covering war materials in times of war.¹⁸⁷

It is also very unlikely that customary transfer restrictions may be derived from arms control treaties concerned with military stability, the emplacement of weapons in certain media, from treaties aimed at suppressing the trafficking of arms in violation of national law, or whether transfer prohibitions could be implied in prohibitions on the use of certain weapons. Neither the *CFE treaty*, nor treaties like the 1987 *Intermediate-Range Nuclear Forces Treaty (INF)*¹⁸⁸ or the 1972 *Anti-Ballistic Missile Treaty (ABM)*,¹⁸⁹ addresses the transfer of the missiles they regulate. Furthermore, with a view to the characteristics of ACL, it is highly unlikely that States meant to restrict transfers without explicitly agreeing to do so.

II.B.3.b Non-Binding Codes of Conduct as a Reflection of Customary Law

In contrast to these early conventions, all of the codes of conduct for arms exports under consideration contain licensing criteria relating to arms control objectives:

- international peace, security or stability
- regional peace, security or stability
- the recipient's involvement in or the prolongation or aggravation of a non-international or international armed conflict
- the recipient's commitment to arms control
- the recipient's attitude towards terrorism and organised crime
- the recipient's legitimate defence and security needs
- the risk of diversion or re-export
- the supplier's arms control commitments
- the supplier's national security and international security considerations (alliances)
- the supplier's international interests in general
- confidence building and transparency

Although the instruments containing these criteria are clearly not legally binding for States as conventional obligations, they may still bind them as customary norms of international law.¹⁹⁰ The same criteria can also be found in most of the national export regulations. This could point to the existence of

¹⁸⁴ Art. 4 and Art. 10 of the *1925 Convention*

¹⁸⁵ Art. 14

¹⁸⁶ Art. 18

¹⁸⁷ Art. 33

¹⁸⁸ The *INF Treaty* requires the elimination of ballistic and cruise missiles of a range between 500 and 5,500 kilometres.

¹⁸⁹ The US have withdrawn from the *ABM Treaty* in 2001 and it is therefore no longer in force.

¹⁹⁰ I have no intention to enter into a debate about “soft law” – a subject that remains one of the most controversial and problematic in contemporary international law. Neither will I consider to what extent joint or unilateral State declarations create legal obligations under international law. See on these issues, AHLSTRÖM, C., *The Status of Multilateral Export Control Regimes*, Iustus Förlag, Uppsala, 1999, 50 *et seq.*; For an overview over the instruments under consideration, please refer to Annex IV *infra*.

a customary obligation of States to evaluate transfer decisions in the light of these criteria. It may for instance be a customary obligation of States not to supply arms to a State if this transfer represents a danger for international or regional peace, security or stability; if the transfer contributes to the aggravation or prolongation of a conflict; if there is a risk of diversion; or if the import is not justified by a legitimate defence or security need of the recipient.¹⁹¹ That such a customary obligation exists in ACL is very uncertain, however.¹⁹² In Den Dekker's opinion, "especially in the field of arms control, taking account of the distinction between legally binding and non-legally binding norms is of utmost importance".¹⁹³ He argues that it is extremely doubtful that norms of customary international law even exist in the field of arms control, which includes rules on CAT. Vitzthum and Lysén concur,¹⁹⁴ and Boniface states, in particular with regard to the lack of *opinio juris* on the part of the most relevant States:

"Alors qu'elle joue un rôle non négligeable pour ce qui est de la formation de normes en droit de la guerre, la coutume n'a pas concouru à créer des obligations de maîtrise des armements."¹⁹⁵

While the inclusion of very similar licensing criteria may support the emergence of a customary rule, at present *opinio juris* is probably missing. In the absence of any specific prohibition to transfer conventional arms, States must be presumed to have the right to pursue this activity freely. Does this mean that States can engage in the business of CAT without considerations of any kind? To answer this question general principles of ACL have to be examined.

II.B.4 General Principles of Arms Control Law

II.B.4.a States' Right to Self-Defence

The ILA's Committee on Arms Control Law concludes in its 2004 Report that while the general principles of international law apply in the field of ACL, due to the special nature of the subject, the need to adopt emerging concepts is often felt and that the overall goal should be to achieve "security with

¹⁹¹ These criteria are contained in at least 11 of the 15 instruments analysed.

In contrast, Art. 4 of the 1923 *Central American Arms Limitation Treaty* specifically provided that its transfer prohibition did not apply in cases of civil war or threatened attack by a foreign State.

¹⁹² An early draft of *Revised Protocol II* included an article prohibiting transfers of landmines, booby-traps and other devices to a country or countries the territory of which is [or could become] the subject of armed conflict whose humanitarian consequences, due to the abuse of the employment of landmines in contravention to the relevant articles of this Protocol, could be considered to be of grave proportions." This provision was soon abandoned, however. Art. 6^{ter} of the *Chairman's Rolling Text* annexed to the *Progress Report* of 19 August, CCW/CONF.II/16(Part II), 95

¹⁹³ DEN DEKKER, G., *The Law of Arms Control...*, 60

¹⁹⁴ BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle...*, 107: "Auch das Gewohnheitsrecht, das ja im wesentlichen nur eine ad-hoc Rechtsentwicklung erlaubt, ist für die Rüstungskontrolle nicht entscheidend."; Lysén notes: "International customary law has only played a secondary role in the formation of this branch of the law." LYSEN, G., "The Adequacy of the Law of Treaties to Arms Control Agreements", in DAHLITZ, J., (ed.), *Avoidance and settlement of arms control disputes: follow-up studies subsequent to the Symposium on the International Law of Arms Control and Disarmament*, Vol. II – Arms Control and Disarmament Law, United Nations, New York/ Geneva, 1994, 123

¹⁹⁵ BONIFACE, P., *Les sources du désarmement*, Economica, Paris, 1989, 216

flexibility in arms control legislation”.¹⁹⁶ The right of States to trade in arms is often deduced from their sovereignty and their inherent right to self-defence: “In the absence of explicit legal prohibitions, States must be presumed to have the right to embark upon weapons programmes...because they are legally entitled to defend themselves.”¹⁹⁷ GA resolutions frequently make reference to the need of States to protect their security and the inherent right to self-defence as embodied in Article 51 *UNC*.¹⁹⁸ Similarly, the *UNDC Guidelines of 1996* recognise that “all States have the inherent right to self-defence, as enshrined in the Charter of the United Nations, and consequently the right to acquire arms for their security, including arms from outside sources.”¹⁹⁹ It can be inferred from the following passage in the International Court of Justice’s (ICJ) judgment in *Military and Paramilitary Activities in and against Nicaragua* that this right of States to transfer arms is not restricted by any quantitative limitations either:²⁰⁰

“...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...”²⁰¹

II.B.4.b Freedom of Commerce and the Obligation to Negotiate about Disarmament

The sovereign right of States to trade in arms can also be inferred from the principle of freedom of commerce, consisting

“in the right – in principle unrestricted – to engage in any commercial activity, whether it be concerned with trading properly so-called...carried on inside the country, or by the exchange of imports and exports, with other countries.”²⁰²

In relation to nuclear weapons, the ICJ has recently reminded States of their duty to negotiate in good faith about disarmament and to conclude respective agreements,²⁰³ a duty frequently reiterated in GA resolutions.²⁰⁴ The exact content of the duty is heavily disputed, and it would probably have to be

¹⁹⁶ ILA, *Final Report of the Committee on Arms Control and Disarmament Law*, 15-16

¹⁹⁷ DEN DEKKER, G., *The Law of Arms Control...*, 44-45; Concurring: ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 163: “Sowohl der Import als auch der Export von Waffen gehören grundsätzlich zum souveränen Recht eines jeden Staates”

¹⁹⁸ Compare §83, A/S-10/2, 30 June 1978; A/RES/43/75 I, 7 December 1988; A/Res/57/66, 30 December 2002; A/Res/58/42, 17 December 2003

¹⁹⁹ §1 *Guidelines for international arms transfers*, A/51/42, 22 May 1996; *Guidelines for Conventional Arms Transfers*, Communiqué issued following the meeting of the Five, London, 18 October 1991; Preamble of the *EU Code of Conduct*; and preambular §§9-10 *Programme of Action*, A/CONF.192/15, 20 July 2001

²⁰⁰ BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle...*, 115: “Die Rüstung – die Nicht-, Auf- oder Abrüstung, der Waffenhandel usw. – gehört zur Staatenfreiheit...Das Recht auf Selbstverteidigung (und eine ggfs. Komplementäre Pflicht zur Abrüstung von ‘overkill’- Kapazitäten) ist nicht quantifizierbar.”

²⁰¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, § 269

²⁰² PCIJ, *The Oscar Chinn Case, Judgment, 12 December 1934, Series A/B, No. 63*, p. 84; The ICJ argued along the same lines in *Case concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America), Judgment (Preliminary Objection), 12 December 1996

²⁰³ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, § 98 *et seq.*

²⁰⁴ §§ 22 and 85 A/S-10/2, 30 June 1978

elaborated into clear rules before producing a direct legal obligation to disarm.²⁰⁵ It is difficult to infer from this principle a specific obligation for the regulation of CAT; consequently I concur with Den Dekker and Vitzthum that

“it cannot be argued that States have to accept limitations on their freedom of behaviour with regard to their national armaments on the basis of these principles”.²⁰⁶

As the Role of the judiciary is extremely limited in the field of ACL, and because the only relevant judicial opinions (namely the ICJ’s advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and its decision in the *Nicaragua* case) corroborate the findings based on treaty law and general principles of ACL, it appears that as far as ACL is concerned, States are free to engage in CAT with the exception of the specific prohibitions discussed.

II.B.5 Findings

The foregoing analysis of ACL shows that there is a serious regulatory deficit in the field of CAT, as there is no comprehensive arms control treaty regulating them. The examination of certain cross-over conventions from the point of view of ACL shows that States Parties to the respective agreements cannot transfer blinding laser weapons and APM at any time, whereas they can transfer certain mines, booby-traps and other devices.

Customary law does not seem to be very developed in the field of ACL, which is probably better described as “law of coexistence” rather than as “law of cooperation”.²⁰⁷ Despite the recent increase in non-binding codes of conduct, a customary rule of international law obliging States to consider certain arms control relevant criteria in their licensing procedures does not exist. In the absence of any general principles of arms control law that would limit States’ freedom to transfer conventional arms, the adage “what is not specifically prohibited, is inferentially permitted” has to be accepted as a general principle of ACL.²⁰⁸ Additional specific prohibitions on CAT may, however, be found in other branches of international law.

II.C International Humanitarian Law and Conventional Arms Transfers

IHL – defined here as the rules relating to the conduct of hostilities and the rules on the protection of persons who do not or no longer participate in hostilities – regulates the transfer of certain weapons explicitly, as the examination of cross-over conventions has demonstrated. Additional cross-over conventions prohibit the use of particular weapons without regulating their transfer. IHL also contains principles applying to the use of all weapons. In how far these rules and principles influence CAT will be examined next.

²⁰⁵ DEN DEKKER, G., *The Law of Arms Control...*, 69

²⁰⁶ *Ibid.*, 69, BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle...*, 115-118

²⁰⁷ BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle...*, 109

²⁰⁸ DEN DEKKER, G., *The Law of Arms Control...*, 69

II.C.1 The Transfer of Weapons whose Use is Prohibited

II.C.1.a Weapons whose Use is Prohibited by a Treaty

Cross-over conventions that include specific transfer prohibitions have already been dealt with under the heading of ACL. This section examines cross-over conventions that outlaw the use of certain conventional weapons without prohibiting their transfer. The first multilateral treaty prohibiting a particular conventional arm was the *St. Petersburg Declaration* of 1868. Having agreed on a limit at which “the necessities of war ought to yield to the requirements of humanity” and based on the precept that “the only legitimate object, which States should endeavour to accomplish during war” would be “exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or rendered their death inevitable”, the contracting Parties renounced “the employment...of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.”²⁰⁹ Inspired by the same sentiment, States participating in the 1899 Hague Peace Conference adopted a Declaration prohibiting the “use of bullets which expand or flatten easily in the human body” – the so-called Dum-Dum bullets.²¹⁰ Another prohibition of a specific weapon is contained in the *Protocol on non-detectable fragments (Protocol I)* to the CCW. According to this protocol, “it is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.”²¹¹ Furthermore, Article 7§2 of *Revised Protocol II* to the CCW prohibits the use of booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.²¹²

The prohibitions expressed in all instruments are commonly believed to be of customary nature and thus bind all States (and NSA). The prohibition on the use of non-detectable fragments is of little practical importance, as these weapons have never been developed.²¹³

II.C.1.b The Obligation to Determine the Legality of a Weapon

None of the aforementioned treaties contains a provision prohibiting the transfer of the weapon they outlaw. Does this mean that their transfer is legal? This would be a worrying prospect as the danger that the weapons prohibited may be resorted to under certain circumstances, for example, in cases of belligerent reprisals, will not disappear as long as the possession and transfer of these weapons remain permitted. In all of the IHL conventions, including the *1949 Geneva Conventions (GC/IV)* and *Additional Protocol I (PI)*, there is only one single provision that expressly mentions arms transfers and thereby establishes a link between IHL and ACL. Article 36 *PI* provides in relevant parts

²⁰⁹ *Declaration renouncing the use in time of war, of explosive projectiles under 400 grammes weight*, 29 November – 11 December 1868

²¹⁰ *Declaration concerning expanding bullets*, 29 July 1899

²¹¹ *Protocol on non-detectable fragments*, 10 October 1980 (*Protocol I* to the CCW)

²¹² Art. 7§2 of *Revised Protocol II*

that “In the ...acquisition of a new weapon...a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited...”²¹⁴ under *PI*, any other IHL or ACL convention or customary law.²¹⁵ The authors of the Commentary to *PI* express the wish that not only States acquiring weapons, but also suppliers examine the legality of the weapons they export.²¹⁶ But even if Article 36 could be extended to suppliers, it has no real bearing on the legality of arms transfers, because it falls short of imposing on States a particular course of action after they have assessed the (il)legality of a weapon.²¹⁷ Only a few States have adopted measures to conduct such reviews²¹⁸ and compliance with this “soft” obligation is at any rate difficult to assess, as is the case with all obligations of conduct.

II.C.1.c Weapons whose Use Violates General Principles of IHL

Contrary to ACL, customary law and general principles play an important role in IHL. A transfer prohibition in customary law would not only apply to weapons whose use is specifically prohibited by a treaty, but would also pertain to arms that must be considered to be contrary to certain “cardinal principles” of IHL. These include the principle according to which the right of States to choose methods or means is not unlimited, the principle of distinction, and the principle of superfluous injury or unnecessary suffering (the SIRUS principle).²¹⁹ In the course of the CAT Talks of the 1970s, the US and the USSR seem to have agreed not to transfer weapons that cause unnecessary suffering, for instance.²²⁰ This is not the place to enter into a debate about whether weapons can be prohibited at all on the basis of general principles alone. A cursory glance at contemporary State practice in respect to the transfer of existing weapons that are most likely to be at variance with these principles suggests that States do not consider themselves bound by a customary transfer prohibition. Small-calibre weapon systems may in their effects be assimilated to Dum-Dum bullets and must by analogy be considered to violate the SIRUS principle. These arms are nevertheless transferred and used widely.²²¹ The same is true for certain cluster munitions, which, because of their very high failure rate, produce effects

²¹³ BRING, O., “Regulating Conventional Weapons in the Future...”, 277

²¹⁴ Art. 36 *PI*

²¹⁵ §1472 ICRC, *Commentaries to Protocols additional to the Geneva Conventions of August 12 1949*

²¹⁶ §1473 *Ibid.*

²¹⁷ DAVID, E., “Les armes nouvelles à la lumière du *jus in bello*”, in *Revue Belge de Droit International*, Vol. 26, No. 1, 1993, 170: “l’art. 36 n’interdit pas de créer, de se procurer ou de détenir des armes nouvelles même si leur emploi viole le droit des conflits armés”; Daoust, *et al.* consider that the examination of weapons to be exported would be in line with States’ obligation under Article 1 common to ensure respect for the *Geneva Conventions* and *PI*, a point I will come back to in chapter II.C.3. DAOUST, I., COUPLAND, R., ISHOEY, R., “New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare”, in *IRRC*, Vol. 84, No. 846, 2002, 352

²¹⁸ DAOUST, I., *et al.*, “New wars, new weapons?...”, 361

²¹⁹ These principles have been restated in ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, §78

²²⁰ ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 88

²²¹ For a detailed examination of the question, see PROKOSCH, E., “The Swiss draft Protocol on Small-Calibre Weapon Systems”, in *IRRC*, No. 307, 1995

comparable to APM and are inherently indiscriminate.²²² That a transfer prohibition of indiscriminate weapons may not exist in customary law is also demonstrated by several GA resolutions adopted before the conclusion of the *Ottawa Convention*. In these resolutions, the GA, expressing its deep concern about APM, declares itself convinced of the utility of an export moratorium on such arms and notes with satisfaction that several States have indeed declared such moratoria. Notably, the GA does not make reference to any legal obligation of its members in any of these resolutions.

Reference should briefly be made to the Martens clause, which, according to the ICJ “has proved to be an effective means of addressing the rapid evolution of military technology”²²³ and “whose continuing existence and applicability is not to be doubted”.²²⁴ According to this clause, as introduced at the 1899 Hague Peace Conference and repeated in similar wording in *Hague Convention IV* of 1907,²²⁵ the 1949 *Geneva Conventions* and 1977 *Additional Protocol I*,

“in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”²²⁶

Myjer sees in the Martens clause the most pertinent standard in the area of overlap between IHL and ACL.²²⁷ It should be kept in mind, however, that no weapon has been outlawed on the basis of the Martens clause alone, and no transfer prohibition can be deduced from it either. Should a customary rule prohibiting the transfer of weapons whose use is forbidden emerge, however, it could build on the dictates of public conscience in combination with the elements of State practice reflected in early treaties on CAT.

II.C.1.d From a Prohibition of Use to a Prohibition of Transfer?

Certain legal commentators consider it a matter of logic that a weapon whose use is prohibited cannot be legally transferred. Martinez argues in this sense:

“Certaines armes, à l'emploi interdit, sont en effet logiquement hors du commerce juridique...Expressément certes, le commerce de ces armes n'est pas interdit. Mais leur utilisation étant prohibée, on peut légitimement penser qu'il en va de même pour leur commerce.”²²⁸

This view is supported by the fact that already the 1919 *St. Germain Convention* envisaged the granting of export licences only “in respect of arms whose use is not prohibited by International Law”.²²⁹ Similar

²²² Compare *European Parliament resolution on Cluster Munitions*, P6_TA(2004)0048, 28 October 2004, § D: “whereas cluster munitions have a high failure rate, often not exploding on impact,..., and many types of cluster munitions and anti-vehicle mines are equipped with sensitive fuses which react to less physical contact than anti-personnel mines,...”. In this resolution, the European Parliament calls for “an immediate moratorium on the use,...transfer or export of cluster munitions,...” (§ K,1) and supports a mandate to negotiate a new protocol to the CCW (§ K,2).

²²³ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, § 78

²²⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, § 87

²²⁵ *Convention respecting the laws and customs of war on land*, 18 October 1907

²²⁶ Art. 1§2 *PI*

²²⁷ MYJER, E., “Means and Methods of Warfare...”, 382

wording can be found in the preamble of the *1925 Convention*, stating that "...the export or import of arms, ammunition or implements, the use of which in war is prohibited by International Law, must not be permitted for such purpose..."²³⁰ In the context of the Arms Limitation Conference, the US proposed in 1934 that the export of arms whose use had been banned by international convention be prohibited.²³¹ An example of national legislation can be found in Article 1§3(6) of the Austrian law on war materials which stipulates that the authorisation to export shall not be given for war material whose development or production or use is illegal under Austrian law.²³²

A majority of scholars considers on the contrary that "the impermissible use of weapons – without the separate undertakings of the participants to refrain from stockpiling or reserving the acquisition or access to the weapons – is simply a 'promise' to disarm..."²³³ Even the commentary to Article 36 dissociates the legality of use from the legality of the possession or transfer of arms, admitting that States could legally possess, and hence transfer, arms the use of which would normally be contrary to IHL, but which may be legal by way of reprisal.²³⁴ In Roeser's opinion, a transfer prohibition cannot be deduced from a prohibition on the use.²³⁵ He bases his conclusion on a passage in the preamble to the CCW, in which the High Contracting Parties express their *wish* that the prohibitions and restrictions of the use of certain conventional weapons "may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons."²³⁶ Second, he opines that prohibitions of use are grounded in IHL and therefore not concerned with disarmament objectives. As explained earlier, this author argues that cross-over conventions are as much concerned with arms control and disarmament, as with upholding elementary considerations of humanity during armed conflicts. Considering that the most recent instruments prohibiting certain conventional weapons, i.e. *Revised Protocol II* and *Protocol IV* to the CCW and the *Ottawa Convention*, all include transfer provisions, and considering the treaty provisions mentioned earlier, one may be inclined to argue that there exists a customary rule prohibiting the transfer of weapons whose use is forbidden. State practice and *opinio juris* prove difficult to establish, however. That States do not consider themselves bound by a

²²⁸ MARTINEZ, J.-C., "Le droit international et le commerce des armes", 116; Frey concurs: "It would indeed be illogical to permit States to transfer weapons that they are expressly prohibited from using." *Progress report*, E/CN.4/Sub.2/2004/37, §21

²²⁹ Art. 1§2 *1919 St. Germain Convention*

²³⁰ Preambular §4 *1925 Convention*

²³¹ KRAUSE, K., MACDONALD M. K., "Regulating Arms Sales Through World War II", 719; ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 71

²³² *Bundesgesetz vom 18. Oktober 1977 über die Ein-, Aus- und Durchfuhr von Kriegsmaterial*, BGBl No. 540/1977, 18 October 1977, Art. 1§3(6): "Die Bewilligung darf für Kriegsmaterial, dessen Entwicklung oder Herstellung oder Einsatz nach österreichischer Rechtsordnung unzulässig ist, nicht erteilt werden."

²³³ ALMOND, H.H., "Arms Control and the Law of War: Control over Weapons and Their Use", in *RDMDG*, Vol. 36, 1997, 19

²³⁴ §1471, ICRC, *Commentaries*

²³⁵ ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 254: "Es ist somit festzuhalten, dass es derzeit ein Handelsverbot für 'verbotene' konventionelle Waffen nicht gibt."

²³⁶ Preambular §9 CCW

transfer prohibition of arms whose use is likely to violate general principles of IHL has already been demonstrated. The same is true for weapons whose use has been outlawed by a treaty.²³⁷

It appears therefore, that a transfer prohibition of arms whose use is prohibited under IHL cannot be based upon the relevant treaties, general principles of IHL, or the Martens clause alone. At this stage, the – perhaps illogical – conclusion has to be drawn that IHL does not contain a norm prohibiting the transfer of weapons whose use it considers illegal.

II.C.2 The Transfer of Weapons whose Use is Restricted

As demonstrated earlier, some IHL conventions *restrict* the way in which particular weapons can be employed. *Hague Convention VIII* of 1907 restricts the laying of automatic submarine contact mines, mainly motivated by the indiscriminate nature of these mines and the protection of the mercantile rights of neutrals.²³⁸ The *1980 Protocol II* to the *CCW* regulates the use of mines, booby-traps and other devices, but its restrictions do not go beyond of what is anyway required by the general rules on the conduct of hostilities.²³⁹ Restrictions imposed by *Revised Protocol II* to the *CCW* on the use of certain mines, booby-traps and other devices have already been dealt with. *Protocol III* to the *CCW* regulates the use of incendiary weapons. It is worth noting that the Protocol does not outlaw incendiary weapons as such. Its only contribution that goes beyond obligations arising under general principles of IHL is the *absolute* prohibition to use air-delivered incendiary weapons against a military objective *located within a concentration of civilians*.²⁴⁰ As the use of automatic submarine contact mines, incendiary weapons, certain mines, booby-traps and other devices is not prohibited in all circumstances, a prohibition of their transfer cannot be implied in the provisions of IHL discussed so far.²⁴¹ The International Committee of the Red Cross (ICRC) suggests that “particular restraint should be exercised in all transfers of weapons and ammunition the use of which is specifically *regulated* under international law.”²⁴² An obligation to exercise restraint is explicitly mentioned in Article 8§1(c) of *Revised Protocol II* to the *CCW*.²⁴³ Needless to say, compliance with this obligation is difficult to determine. Article 8§1(d) of the same protocol obliges each High Contracting Party to ensure that any transfer of mines “takes place in full compliance, by the transferring and the recipient State, with the relevant provisions of this Protocol and *the*

²³⁷ The example of biological weapons demonstrates that the use of a weapon can be outlawed by a treaty (the 1925 *Geneva Protocol*) while its transfer remains permitted (until 1972).

²³⁸ *Convention relative to the laying of automatic submarine contact mines*, 18 October 1907

²³⁹ Art. 3-6 *Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices*, 10 October 1980

²⁴⁰ Art. 2 *Protocol on prohibitions or restrictions on the use of incendiary weapons*, 10 October 1980; *N.B.* This provision does not prohibit the use of all air-delivered incendiary weapons but restricts their use to attacks against military objectives not located within a concentration of civilians.

²⁴¹ ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 251

ICRC, *Arms Availability and the situation of civilians in armed conflict: a study presented by the ICRC*, ICRC, Geneva, 1999, 23. (Emphasis in the original.)

²⁴³ Art. 8§1(c) *Revised Protocol II* to the *CCW*

*applicable norms of international humanitarian law.*²⁴⁴ Does this mean that the transfer of weapons whose use is not *per se* prohibited, but which are likely to be used in a manner inconsistent with the norms of IHL, could still be illegal? This interesting question will be dealt with in the next section.

II.C.3 The Transfers of Weapons whose Use is neither Prohibited nor Restricted

II.C.3.a Arms Availability and Violations of Humanitarian Law

Concern about CAT is also driven by the frequent misuse of weapons which are not *per se* illegal under IHL.²⁴⁵ In a study based on the analysis of armed conflicts in the 1990s, the ICRC has examined whether violations of IHL or civilian injuries are more likely to occur as a function of the availability of weapons.²⁴⁶ The extent to which the findings of the study can be generalised is unclear as the data collected was based on relatively few cases. The results suggest nevertheless that the availability of arms has serious negative effects on the civilian population, either directly or indirectly, by leading to the deterioration of the humanitarian situation. For a legal analysis, however, it is necessary to distinguish injuries to civilians resulting from the intentional targeting of civilians, from the indiscriminate use of a weapon, or from the use of an indiscriminate weapon, all of which constitute clear violations of IHL, on the one hand, and injuries to civilians resulting from lawful attacks (collateral damage) or from the misuse of weapons by civilians for criminal purposes unrelated to the armed conflict (IHL does not apply), which do not constitute violations of IHL, on the other hand. At the very least, the study demonstrates that arms availability facilitates violations of IHL.²⁴⁷ Unfortunately, the study does not give any indications about the influence of arms transfers on IHL violations, as it does not differentiate between arms that are produced locally and arms that flow into the country through trafficking or import.

Assuming that a great portion of weapons used to violate IHL have their origin outside of the country in conflict, respect for IHL in the recipient country has been proposed as a criterion in export licensing regulations.²⁴⁸ Somewhat surprisingly, only 4 of the 15 international instruments include such a criterion²⁴⁹ and only 4 of 12 national instruments consider that respect for IHL in the recipient country

²⁴⁴ Art. 8§1(d) *Revised Protocol II* to the CCW. (Emphasis added.)

²⁴⁵ HUMAN RIGHTS WATCH, *Weapons Transfers and Violations of the Laws of War in Turkey*, Report, November 1995

²⁴⁶ The findings include the following: 59 % of all people injured by weapons were civilians; Intentional firearm injuries affecting civilians is by far the largest category of non-combatant injury; 78% of civilians who sustained combat-related injuries requiring an act of volition (all combat related injuries excluding those caused by mines) were injured by fragmenting munitions. For more details see ICRC, *Arms Availability...*, 10-13

²⁴⁷ See ICRC, *Arms Availability...*, 16; Note, however, that the ICRC study does not allow any conclusions about the relationship between arms *imports* and civilian injuries, as the study did not distinguish between arms that had been locally produced, imported arms, and arms stemming from illegal trafficking.

²⁴⁸ The International Conference of the Red Cross and Red Crescent agreed in its 2003 *Agenda for Humanitarian Action* (Goal 2.3) that “states should make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed.”

²⁴⁹ See Annex IV *infra*.

should be taken into account. Notably, only one of these instruments, the UK *Export Control Act of 2002*, is legally binding.²⁵⁰

II.C.3.b The Obligation to Ensure Respect for Humanitarian Law

It has been proposed that a transfer prohibition of arms that are likely to be used in violation of IHL can be deduced from States' obligation "to ensure respect" under Article 1 common to the 1949 *Geneva Conventions*, which reads as follows:

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."²⁵¹

A thorough analysis of common Article 1 is beyond the scope of this paper²⁵² but it seems necessary to determine the meaning of the undertaking "to ensure respect" before applying the provision to CAT. Without going into detail, it should be mentioned at the outset, that common Article 1 creates a regime of obligations *erga omnes contractantes* with respect to all the rules contained in *GCI-IV* (and, respectively, *PI*). In the ICJ's words

"It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with."²⁵³

Moreover, because a great many rules of IHL embodied in *GCI-IV* constitute "intransgressible principles of international customary law"²⁵⁴ they create obligations *erga omnes*.²⁵⁵ As such, all States are concerned by the undertaking to ensure respect for IHL. The duty to ensure respect applies to IACs and

N.B. Although criterion six of the *EU Code of Conduct* makes reference to the recipient's compliance with IHL, the code does not prohibit the granting of a licence in case of non-compliance, respect for IHL merely has to be taken into account in the decision.

²⁵⁰ Letter D(b) of the *Relevant Consequences Table* annexed to the *Export Control Act 2002*

²⁵¹ Art. 1 *GCI-IV*; see also Art. 1§1 *PI*

²⁵² On this question, see in particular KESSLER, B., *Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1*, Walther-Schücking-Institut für Internationales Recht an der Universität Kiel, Berlin, 2001; See also CONDORELLI, L., BOISSON DE CHAZOURNES, L., "Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances" in SWINARSKI, C., (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, ICRC, The Hague, 1984; KALSHOVEN, F., "The Undertaking to Respect and Ensure Respect in all Circumstances: From tiny Seed to ripening Fruit" in *YIHL*, Vol. 2, 1999; LEVRAT, N., "Les conséquences de l'engagement pris par les Hautes Parties contractantes de "faire respecter" les Conventions humanitaires" in KALSHOVEN, F., SANDOZ, Y., (eds.) *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1986

²⁵³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, § 158

²⁵⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, § 79

²⁵⁵ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, §79: "a great many rules of humanitarian law applicable in armed conflict are so fundamental" that "these fundamental rules are to be observed by all States whether or not they have ratified the Conventions; The ICTY qualifies most norms of IHL as peremptory norms of international law or *jus cogens*. *Prosecutor v. Zoran Kupreskic et al.*, (Case no. IT-95-16-T), Trial Chamber, Judgment, 14 January 2000, § 518-519; Compare KESSLER, B., "The Duty to Ensure Respect under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts" in *German Yearbook of International Law*, Vol. 44, 2001; See also CONDORELLI, L., BOISSON DE CHAZOURNES, L., "Quelques Remarques...", 29; KAMENOV, Tihomir, "The origin of state and entity responsibility for violations of international humanitarian law in armed conflicts" in KALSHOVEN, F., SANDOZ, Y., (eds.) *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1986, 200

NIACs alike.²⁵⁶ The exact meaning of the provision is subject to great controversy, though. Legal scholars do not agree among themselves, not only on the question whether this provision imposes an obligation on States or whether it merely confers a right on them, but more fundamentally, on the question whether this Article has an effect on States not involved in an ongoing armed conflict at all. Relying on subsequent practice as an interpretative tool I argued elsewhere that common Article 1 does indeed impose an obligation on third States, even though that may not have been the initial intention of its drafters.²⁵⁷ Concretely, the obligation to ensure respect for IHL includes a negative obligation not to encourage the commission of acts contrary to it. This conclusion is supported by the ICJ's decision in Nicaragua, where the Court stated that

“there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances’...the US is under an obligation not to encourage persons or groups engaged in the conflict...to act in violation of the provisions of art.3 common...”²⁵⁸

It goes without saying that if there is a negative obligation not to encourage the commission of acts contrary to IHL, participation in such acts is *a fortiori* prohibited.²⁵⁹ As this obligation is one of conduct (and not one of result),²⁶⁰ a third State is responsible under Article 1, not for the initial violation of IHL by the warring party, but for its own conduct of taking all appropriate measures possible in an attempt to end violations²⁶¹ or prevent additional ones. The concrete scope of this positive obligation to take all appropriate measures is determined by the influence a State can exert on the violator²⁶² and the seriousness of the violation committed.²⁶³

It is clear that arms suppliers can exert influence on recipients, in particular if the latter are involved in an ongoing armed conflict. Arguably, once a supplier *knows* that the receiving State commits

²⁵⁶ KESSLER, B., “The Duty to Ensure Respect...”, 509 and 513

²⁵⁷ BREHM, M., *The Role of Third States in Securing Compliance with IHL*, unpublished paper, available with the author. For the contrary view, see KALSHOVEN, F., “The Undertaking to Respect and Ensure Respect...”

²⁵⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27 June 1986, §§ 220 and 255

N.B. As the Court could not attribute the acts of the Contras to the US, they were not found guilty on the basis of a failure to *respect* the Conventions. Consequently, it is plausible to argue that the ICJ declared the US responsible for a violation of Art. 1 because the obligation to *ensure respect* prohibits the incitement to commit violations of the Convention.

²⁵⁹ “Third States are bound by a legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations.” ICRC, *Improving Compliance with International Humanitarian Law, ICRC Expert Seminars*, Report prepared by the ICRC, Geneva, 2003, 4

²⁶⁰ Art. 1 cannot be interpreted as an obligation of result, or in other words a solidary objective responsibility of States for the respect of the Conventions, as this would lead to the unreasonable result that almost all States would constantly be in breach of an international obligation, probably even an obligation *erga omnes*.

²⁶¹ ICRC, *Improving Compliance...*, 5

²⁶² GASSER, H.P., “Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations” in FOX, H., MEYER, M. A., (eds.), *Armed Conflict and the New Law- Effecting Compliance*, The British Institute of International Law, London, 1993, 28; KESSLER, B., *Die Durchsetzung der Genfer Abkommen von 1949...*, 118; LEVRAT, N., “Les conséquences de l’engagement...” , 279

²⁶³ This criterion is mentioned by KESSLER, B., *Die Durchsetzung der Genfer Abkommen von 1949...*, 119; LEVRAT, N., “Les conséquences de l’engagement...” , 279. An indication of what could be considered a serious violation can be found in the *ILC Draft Articles on State Responsibility* that define a serious breach as a “gross or systematic failure to fulfil an

serious violations of IHL with these weapons, ongoing assistance is necessarily given with a view to facilitate further violations,²⁶⁴ which places the supplier in clear violation of its obligation under common Article 1 not to encourage the commission of such violations. I hold that the positive obligation of States to ensure respect for IHL implies the obligation not to supply conventional arms – and especially not arms whose use has been restricted²⁶⁵ – if the supplier *knows* that they are *likely* to be used to commit systematic or gross violations of IHL.²⁶⁶ Admittedly, it may be difficult to determine in practice whether a State knew about the likely misuse of its arms, but this is a question left for courts to answer in specific cases.

Conventional arms are transferred in order to be used, especially if the recipient is already involved in an armed conflict. Consequently, the transfer of arms whose use is explicitly prohibited by an international treaty or of arms whose use *per se* violates cardinal principles of IHL constitutes a violation of States' obligation to ensure respect for IHL.²⁶⁷

Whether actual State practice supports this conclusion is doubtful, though, and in this author's opinion, common Article 1 should be given an interpretation that is sufficiently narrow to avoid the absurd situation of placing a majority of States in continuous violation of it. In accordance with the criteria elaborated above it is clear, however, that influential States should take more effective measures to live up to their obligation "to ensure respect". Arms suppliers are influential States and can fulfil their obligation under common Article 1 by refusing to grant export licences or imposing a total ban on arms exports to a State violating IHL or by terminating military co-operation agreements. Similarly, arms recipients can influence supplier States that violate IHL by refusing to buy arms from them.²⁶⁸

international obligation", Art. 40,2 *Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC at its Fifty-third session (2001)*, A/56/10

²⁶⁴ SASSOLI, M., "State responsibility for violations of international humanitarian law", in *IRRC*, No. 846, 2002, 413

²⁶⁵ The use of restricted arms involves a greater risk to violate principles of IHL relating to the conduct of hostilities. This is precisely why their use has been restricted by a treaty.

²⁶⁶ *The question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms*, Working Paper submitted by Ms. Barbara Frey, E/CN.4/Sub.2/2002/39, 30 May 2002, §74: "By knowingly providing arms in situations where there are likely to be violations of international humanitarian law, States are acting in breach of their duty to ensure respect for humanitarian law as required by Article 1." (Emphasis added.) Interestingly, Frey chooses a somewhat less definite formulation in her *Progress Report* (§24): "Under the obligation...set forth in Common Article 1..., States should refrain from transferring arms if they know that they are likely to be used to violate IHL." (Emphasis added.)

²⁶⁷ Without providing any reasoning, Gillard comes to the same conclusion: "an argument in favour of a prohibition on the transfer of the weapon could be made on the basis of the illegality of its use coupled with States' duty to respect and ensure respect for IHL." GILLARD, E., *What is legal? What is illegal?...*, 8

²⁶⁸ In a press release of 10 April 2002, Switzerland announced a diplomatic initiative directed at the US, the EU, Russia and the UN with the aim of ensuring greater respect for IHL in the Middle East conflict: "[Switzerland] will further examine whether the operations by the Israeli military in the occupied territories might have an impact on Switzerland's relations with Israel.... The Swiss government will also examine whether certain measures to curtail military co-operation with Israel might be appropriate (in particular with regard to future purchases of military equipment)", *Conflict in the Middle East: Switzerland's Position*, Press release, 10 April 2002

II.C.4 The Scope of Application of Transfer Prohibitions

The analysis of transfer provisions from the point of view of ACL showed that the prohibition of transfer cannot extend beyond the scope of application of the treaty itself if the prohibition on the use does not apply in all circumstances. This finding does not seem to hold with regard to IHL. Certain provisions of IHL deploy their effects in times of peace,²⁶⁹ and common Article 1 expresses an obligation typically addressed to States not involved in an armed conflict. Consequently, the prohibition to transfer arms whose use is *per se* contrary to conventional or customary rules of IHL must also apply to transfers among States not involved in an armed conflict. Hence, it is *at all times* prohibited to transfer arms whose use is prohibited by IHL. One may object to this reasoning that certain conventional arms whose use is illegal under IHL may still be legally employed in situations of internal disturbances and tensions, as IHL does not apply to these situations.²⁷⁰ It is indeed true that the evaluation of the legality of the use of weapons in situations below the level of an armed conflict will have to be pursued in the sphere of HRL.²⁷¹ As long as the possibility of legal use exists, it cannot definitely be concluded that there is an absolute transfer prohibition. I anticipate, however, that the analysis will not be altered by human rights considerations.

With regard to their applicability *ratione personae*, transfer prohibitions based on common Article 1 must be considered to apply to all States, due to the customary – or even *jus cogens* – nature of most norms of IHL, including common Article 1. The great majority of States are parties to *GCI-IV* and are therefore at least under an obligation to ensure respect for the provisions of these conventions, including the obligation not to transfer arms that are likely to be used in violation of *GCI-IV*. Because the obligation to ensure respect also applies to those rules of IHL that constitute intransgressible principles of customary international law, *all States* are under an obligation not to transfer arms whose use violates these principles, independently of whether these principles have been translated into a conventional prohibition. In contrast, the prohibition to transfer arms which are *likely* to be used in violation of IHL does not apply among States not engaged in an ongoing armed conflict, as the weapons are not in and of themselves illegal, nor is it foreseeable that they will be used in violation of IHL.²⁷²

II.C.5 Findings

By considering the transfer of conventional arms not only as an arms control issue, but also as a question regulated by IHL, CAT may be examined in the light of a special mechanism of IHL embodied in common Article 1. In contrast to ACL, which is based on reciprocity, IHL is characterised by non-synallagmatic relations and *erga omnes* obligations, the best illustration of which is precisely

²⁶⁹ Art. 2 common *GCI-IV*: “In addition to the provisions which shall be implemented in peacetime...”

²⁷⁰ An analogy may be drawn from the exclusion of tear gas for riot control from the prohibition of the *Chemical Weapons Convention*.

²⁷¹ KALSHOVEN, F., “Arms, Armaments and International Law”, 297

common Article 1. The combination of prohibitions of use with States' obligation to ensure respect for IHL leads to the conclusion that the transfer of weapons whose use is prohibited either by a treaty, or by general principles of IHL, is forbidden for all States at all times. The inclusion of such a prohibition in the conventions comprehensively addressing CAT, i.e. the *1919 St.Germain Convention* and the *1925 Convention*, the spirit of Article 36 *PI* and the dictates of public conscience all support this conclusion. That all States are furthermore under an obligation not to transfer arms which are *likely* to be used in a manner contrary to IHL applies during an ongoing IAC or NIAC and is but another manifestation of States' obligation to ensure respect for IHL.

II.D Conventional Arms Transfers in the Light of Human Rights Law

There are many human rights violations associated with the misuse of arms, including summary executions, rape and other kinds of sexual violence at gunpoint, abduction, forced displacement, arbitrary detention, torture, and intimidation of prisoners. Arms-related violence also leads to an atmosphere of insecurity characterised by the deprivation of the right to food, education and health care.²⁷³ Human Rights Watch published a report in 1995 that documents the Turkish security forces' violations of IHL and HRL committed with weapons supplied by the US and other NATO countries.²⁷⁴ A recent report by Amnesty International demonstrates how imported weapons have been used by Sudanese government forces to commit grave violations of IHL and HRL in the Darfur region.²⁷⁵

II.D.1 Human Rights Law and the Transfer of Weapons whose Use is Prohibited by Humanitarian Law

II.D.1.a Weapons that are Inherently Indiscriminate or that Violate the SIRUS Principle

As with the analysis of IHL, two aspects of the problem of CAT have to be treated separately. I will first address the issue left unanswered in the preceding chapter, namely, whether the transfer of arms whose use is prohibited under IHL could still be legal in situations not regulated by that body of law. It may seem a little disturbing that weapons which cannot legally be used against another State in an IAC may be employed by a State against its own citizens in situations of violence not amounting to an armed conflict. Though somewhat cynical, the question is justified from a theoretical point of view. The transfer and use of toxic chemicals for the purposes of law enforcement and riot control, for instance, is not prohibited by the *Chemical Weapons Convention*²⁷⁶ and Article 4 of the amended CCW stipulates that nothing in the convention or its protocols "shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all *legitimate* means, to maintain or re-

²⁷² For an overview of the temporal scope of application of transfer prohibitions, see Annex VI *infra*.

²⁷³ *Progress Report*, E/CN.4/Sub.2/2004/37, §11

²⁷⁴ HUMAN RIGHTS WATCH, *Weapons Transfers and Violations of the Laws of War in Turkey*

²⁷⁵ AMNESTY INTERNATIONAL, *Sudan-Arming the perpetrators of grave abuses in Darfur*, November 2004

²⁷⁶ Art. 2§9(d) of the *Chemical Weapons Convention*

establish law and order...”.²⁷⁷ Interestingly, even though the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) broadened the ambit of weapons-related prohibitions to include NIACs, it did not extend “considerations of humanity and common sense” to situations of internal disturbances:

“Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”²⁷⁸

Undoubtedly inspired by the same sentiment of humanity, Article 5§3 of the *Turku/Åbo Declaration of Minimum Humanitarian Standards*, a non-binding statement of fundamental principles applying at all times, provides:

“Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.”²⁷⁹

The *Turku/Åbo Declaration* specifically aims to bridge the gap between IHL and HRL. The inclusion of Article 5§3 already suggests, however, that HRL alone does not provide a sufficient basis for prohibiting the use of these weapons in times of peace.

I argue that because certain weapons are prohibited on the basis of their indiscriminate character and/or because they cause superfluous injury or unnecessary suffering, their use in situations below the threshold of an armed conflict would constitute a violation of the right to life.²⁸⁰ The right to life cannot be derogated from in times of emergency and States are under an obligation to take positive action to protect it. In a law enforcement context, this means that “officials shall respect and protect human dignity and maintain and uphold the human rights of all persons”²⁸¹ and that they may only use force “when strictly necessary and to the extent required for the performance of their duty”.²⁸² *The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* translate this obligation into more concrete rules and require that “whenever the use of force or firearms is unavoidable, law enforcement officials shall ...*minimize* damage and injury, and respect and preserve life...”.²⁸³ Article 11(c) provides that rules and regulations should include a prohibition of those firearms and ammunition “that cause *unwarranted injury* or present an *unwarranted risk*”.²⁸⁴ Consequently, the employment of

²⁷⁷ Art. 4 amended CCW, 2001. (Emphasis added.) Consider also the lack of consensus on the temporal scope of application of *Revised Protocol II* and *IV* to the CCW (see *infra* 28 *et seq.*). Note however, that in accordance with Art. 3§3 of *Revised Protocol II* to the CCW, the use of any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering is prohibited *in all circumstances*, thus including times of peace.

²⁷⁸ ICTY, *Prosecutor v. Dusko Tadic*, (Case No. IT-94-1-AR72), Appeals Chamber, Decision, 2 October 1995, § 119

²⁷⁹ Art. 5§3 *Turku/Åbo Declaration of Minimum Humanitarian Standards*, Expert meeting convened by the Institute for Human Rights, Åbo Akademi University, 2 December 1990

²⁸⁰ Art. 6§1 *International Covenant on Civil and Political Rights*, 16 December 1966: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

²⁸¹ Art. 2 *Code of Conduct for Law Enforcement Officials*, A/34/46 (1979)

²⁸² Art. 3 *Code of Conduct for Law Enforcement Officials*, A/34/46 (1979)

²⁸³ Art. 5(b) *Basic Principles*, A/CONF.144/28/Rev.1, (Emphasis added.)

²⁸⁴ Art. 11 (c) *Basic Principles*, A/CONF.144/28/Rev.1, (Emphasis added.)

small-calibre munitions against rioters in place of other less injurious ammunition runs counter to this principle. In this sense, the use of indiscriminate or unnecessarily injurious weapons goes beyond what is “*absolutely necessary...in action lawfully taken for the purpose of quelling a riot or insurrection*”²⁸⁵ and qualifies as an arbitrary deprivation of life because the government, by choosing a weapon that is inherently indiscriminate or that causes superfluous injury, is in breach of its positive obligation to safeguard life.²⁸⁶ As weapons whose use is contrary to IHL are also illegal under HRL and can hence not be legally employed *at any time*, I see no reason to revise the previous finding, according to which the prohibition to transfer forbidden weapons arising under common Article 1 also extends to peace time.

II.D.1.b “Tools of Torture”

A related issue concerns certain types of security or police equipment, the so-called “tools of torture”, i.e. devices designed to inflict pain on individual victims and which serve no other apparent purpose. Under IHL, the use of these items would probably be contrary to the prohibition of inhumane treatment²⁸⁷ and third States would have to refrain from transferring them in accordance with their obligation to ensure respect for IHL under common Article 1 *GCI-IV*. “Tools of torture” are typically used in situations where IHL does not apply, however, either because the violence does not amount to an armed conflict, or because they are used for acts unrelated to the armed conflict. It flows from the nature of the weapon employed that any resulting injuries may be regarded as being deliberately inflicted on persons in the State’s custody.²⁸⁸ Under HRL, the use of these instruments is therefore likely to be inconsistent with the prohibition of cruel, degrading or inhumane treatment or torture.²⁸⁹ Considering that the prohibition of torture is of customary nature (and even *jus cogens*) and that no State can legally practice it, the transfer of “tools of torture” should be illegal as a matter of logic. Whether an autonomous transfer prohibition can be established under HRL will depend on the outcome of the analysis in the next section of this chapter. I will come back to this issue when examining State responsibility for complicity in wrongful acts of other States.²⁹⁰

²⁸⁵ Art. 2§1 (c) *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950 (Emphasis added.)

²⁸⁶ Hampson writes: “The use of an indiscriminate weapon becomes, for example, unlawful as an arbitrary killing in human rights terms.” HAMPSON, F.J., “Using International Human rights Machinery to enforce the International Law of Armed Conflict”, in *RDMDG*, Vol. 31, 1992, 127; The European Court of Human Rights touched upon a related issue in *Ahmet Özkan* where it considered that independently of whether the houses were deliberately set on fire by security forces or whether they caught fire because of the use of tracer bullets, the fire was a result of the acts of security forces and the government was hence liable for a violation of Article 8 (right to respect for private and family life) of the Convention. See ECtHR, *Ahmet Özkan et al. v. Turkey*, (Application no. 21689/93), Judgment, 6 April 2004, §406 *et seq.*

²⁸⁷ Several articles of the *GCI-IV* prohibit inhumane treatment, most importantly and applicable in all armed conflicts, common Art. 3§1.

²⁸⁸ On this point, see also HAMPSON, F.J., “Using International Human rights Machinery...”, 132-134

²⁸⁹ Art. 7 *ICCPR*: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment....”

²⁹⁰ See chapter II.F.1.b *infra*.

II.D.2 The Transfer of Weapons Likely to be Used in Violation of Human Rights Law

The second aspect concerns the question whether the transfer of weapons that are not in and of themselves illegal, can be prohibited because they are used in a *manner* inconsistent with HRL. I will first briefly explore the scope of application of HRL in times of armed conflict, and then turn to explore the regulation of arms transfers by HRL in times of peace.

II.D.2.a Conventional Arms Transfers and the Interplay between Humanitarian and Human Rights Law

As has long been suspected, and recently been confirmed by the ICJ, HRL applies at all times, and hence, also during armed conflicts.²⁹¹ In Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court considers, however, that even in times of armed conflict, some rights may be exclusively matters of HRL. To answer the question put to it, the ICJ took into consideration both HRL and IHL (as *lex specialis*).²⁹² This paper is mainly concerned with the right to life. In this regard, the ICJ held in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons that “the test of what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”²⁹³ Considering this holding, and following reasoning similar to the one in the previous section, I would generally agree with Hampson that killings or injuries inflicted in breach of the law of armed conflicts are also in breach either of the prohibition of arbitrary killing or of the positive obligation to protect the right to life or of the prohibition on the infliction of cruel or inhuman treatment contained in international human rights treaty texts.²⁹⁴ I do not intend to explore the fascinating relationship between IHL and HRL in detail. If one accepts that IHL is *lex specialis* to HRL in times of armed conflict, it is not unreasonable to argue that *if both apply*, the use of arms in a manner inconsistent with IHL necessarily also constitutes a violation of HRL.²⁹⁵ If States *know* that the arms that they supply are *likely* to be used in violation of IHL, and thus, HRL, they are prohibited from transferring them under common Article 1 GCI-IV.

²⁹¹ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, § 106; See also Human Right Committee, *General Comments No. 29* (CCPR/C/21/Rev.1/Add.11) and *31* (CCPR/C/74/CRP.4/Rev.6)

²⁹² ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, § 106

²⁹³ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, § 25

²⁹⁴ HAMPSON, F.J., “Using International Human rights Machinery...”, 134

²⁹⁵ Note that this excludes situations violating IHL to which HRL does not apply because the violator State does not exercise effective control over its victims. In a recent case, the British High Court found that deaths resulting from military operations in the field did not come within the UK’s jurisdiction, whereas the case of an applicant who died while in custody in a British military base fell within the jurisdiction of the UK in the sense of the *European Convention on Human Rights*. High Court of Justice, Mazin Jumaa Gatteh al Skeini et al. v. The Secretary of State for Defence, (Case No. CO/2242/2004), Judgment, 14 December 2004, §§ 284-288

II.D.2.b Conventional Arms Transfers and Violations of Human Rights Law

It has been noted that “arms are frequently used for direct violations of the rights to life and to physical and mental integrity” and that “they are also the means through which coercion can be brought to bear to perpetrate any number of other abuses.”²⁹⁶ The role played by arms *transfers* – as opposed to arms *availability* – is often unclear, and what rights are being violated is frequently left unexplained.²⁹⁷ The results of a study undertaken by Blanton suggest that “arms imports and the abuse of personal integrity rights are positively related” which leads her to conclude that “developing countries that import greater amounts of arms have higher levels of human rights abuse.”²⁹⁸ In her view, “arms acquisitions appear to contribute to repression by making violent political acts more feasible.”²⁹⁹ With regard to social and economic rights, it is challenging to prove that trading in arms makes a major contribution to poor health and education, because it co-exists in “poor countries” with massive debt, corrupt bureaucracies, and natural disaster.³⁰⁰ All the more interesting is Felice’s analysis of a “rich country”, which demonstrates that increased military spending in the US results in “a diversion of resources away from the collective human rights of education, health care and subsistence.”³⁰¹ Blanton concedes that though there is a negative association between arms imports and human development, the empirical estimates do *not* meet standards of statistical significance.³⁰²

In discussions about arms transfers and human rights, rather vague references are often made to the right to peace and to the preamble of the *UNC*.³⁰³ As the exact content of the right to peace – the most concrete formulation of which may be Article 23§1 of the *African Charter on Human and Peoples’ Rights* and Article 28 of the *Universal Declaration of Human Rights*³⁰⁴ – and its very existence – are in doubt, and because no clear obligations for States can be derived from the principles contained in the *UNC*’s preamble, I will not explore this line of argument further.

²⁹⁶ HILLIER, D., WOOD, B., *Shattered Lives, the case for tough international arms control*, Amnesty International and Oxfam International, London and Oxford, 2003, 27-33

²⁹⁷ See VLASIC, I., “Raison d’Etat v. Raison de...”, 511: “...no accurate yardstick exists for measuring the impact upon human rights of the arms race...”

²⁹⁸ BLANTON, S., “The Role of Arms Transfers in the Quest for Human Security”, in *The Journal of Political and Military Sociology*, Vol. 29, No. 2, 2001, 251

²⁹⁹ BLANTON, S., “Instruments of Security or Tools of Repression? Arms Imports and Human Rights Conditions in Developing Countries”, in *Journal of Peace Research*, Vol. 36, No. 2, 1999, 8

³⁰⁰ SOUTHALL, D., O’HARE, B., “Empty Arms: The Effect of the Arms Trade on Mothers and Children”, in *British Medical Journal*, Vol. 325, 2002, 1457

³⁰¹ FELICE, W., “Militarism and Human Rights”, in *International Affairs*, Vol. 74, No. 1, 1998, 31; *N.B.* Felice does not differentiate between resources used for production for local needs and production for export; Similar arguments are made by SAJOO, A., “Human Rights Perspectives on the Arms Race”, 633 citing the SIPRI Yearbook 1981: “...even if the arms are not ultimately used in war, they ‘kill’ indirectly by diverting scarce economic resources from basic development needs such as nutrition, medical care, housing and education.”; See also HILLIER, D., WOOD, B., *Shattered Lives...*, 36-37

³⁰² BLANTON, S., “The Role of Arms Transfers...”, 251

³⁰³ SAJOO, A., “Human Rights Perspectives on the Arms Race”, 636; See also WEISS, P., BURROUGHS, J., “Weapons of mass destruction and human rights”, 26-28

³⁰⁴ Art. 28 *Universal Declaration of Human Rights*, A/RES/217A(III), 10 December 1948

Awaiting more scientific studies on the relationship between CAT and human rights violations, it will be assumed for the purposes of this paper that the supply of arms contributes to violations of civil and political rights in recipient countries, and in particular to violations of the rights protected by Articles 6 and 7 of the *International Covenant on Civil and Political Rights (ICCPR)*. While it is probable that the excessive diversion of resources to arms imports or exports negatively influences the enjoyment of economic and social rights in recipient and supplier States, these violations are typically difficult to assess and will therefore not be examined here.

II.D.3 Suppliers' Obligations under Human Rights Law

It is uncontroversial that States are responsible for human rights violations committed by their police forces, the military or other State agents. Moreover, they have to “ensure to all individuals within their territory and subject to their jurisdiction” the rights recognised in the relevant human rights treaties,³⁰⁵ and may in certain circumstances be held responsible for acts committed with conventional arms by NSA.³⁰⁶ States' obligation to respect the right to life, for example, thus entails a positive duty to prevent violations by NSA under their control, to investigate, to take protective measures, to punish the perpetrators and to redress the harm caused.³⁰⁷ In the centre of the current debate on CAT and human rights stands the question whether States can be held responsible for supplying arms used to commit human rights violations either by State agents or by NSA in the recipient country. The answer depends first, on the jurisdictional limits of the relevant human rights treaties, and, second, on the extent of supplier States' obligations under these instruments.

II.D.3.a States' Obligation to Ensure Human Rights to Individuals Subject to their Jurisdiction

A State Party to the *ICCPR* undertakes to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” in the Convention.³⁰⁸ With reference to the *ICCPR*'s object and purpose and its drafting history, the ICJ comes to the conclusion in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.”³⁰⁹ The Human Rights Committee states in *General Comment No. 31* that States must respect and ensure the rights in the *ICCPR* “to anyone within the power or effective control” of that

³⁰⁵ for instance Art. 2§1 *ICCPR*

³⁰⁶ See for example Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988

³⁰⁷ See Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6., 29 March 2004, §8, which explicitly mentions that States “have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment”. States' positive duties in respect to the right to life have been affirmed by the ECtHR in a series of decisions, including in *Akkoç v. Turkey*, (Applications nos. 22947/93 and 22948/93), Judgment, 10 October 2000, and in *Kiliç v. Turkey*, (Application no. 22492/93), Judgment, 28 March 2000.

³⁰⁸ Art. 2§1 *ICCPR*. (Emphasis added.)

³⁰⁹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, § 109

State, “even if not situated within the territory of the State Party.”³¹⁰ It follows that States supplying arms could be held responsible for acts committed outside their territory but within their effective control. The *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* stipulates “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention.³¹¹ The European Court of Human Rights (ECtHR) has been called upon to define the notion of jurisdiction in several of its decisions. A thorough analysis of this jurisprudence has been conducted by the British High Court of Justice in a recent judgment.³¹² Only a few landmark cases of the European Court will be cited here.³¹³ In its recent decision in *Bankovic et al. v. Belgium et al.*, the Court noted that the notion of jurisdiction was an “essentially territorial” one,³¹⁴ but there are exceptions to this principle, “the width, nature, rationale and applicability” of which are disputed.³¹⁵ In *Loizidou v. Turkey (Preliminary Objections)* the Court found that

“...the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory.”³¹⁶

The Court elaborated in *Cyprus v. Turkey* that in such a situation, the State’s responsibility is also engaged by acts of a local administration which survives by virtue of its support.³¹⁷ The ECtHR has admitted the extraterritorial application of the *ECHR* not only in cases of control over an *area*, however. In *Öcalan v. Turkey* and *Issa v. Turkey*, the Court accepted that States may be held responsible where their agents exercise control over *persons* abroad.³¹⁸ For the purposes of this paper, these cases are of limited value since arms suppliers usually do not exercise effective control over the area in which violations of HRL are committed with their arms, nor over the victims of such violations. More interesting are the extraterritorial effects produced by an authorisation to supply (or transit) arms on the victims of human rights violations. Reference is sometimes made in this context to extradition and expulsion

³¹⁰ *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6., 29 March 2004, § 10

³¹¹ Art. 1 *ECHR*; Art.1§1 *American Convention on Human Rights*, 22 November 1969; The *African Charter on Human and Peoples’ Rights*, 26 June 1981 does not contain an explicit jurisdictional limitation clause.

³¹² High Court of Justice, *Mazin Jumaa Gatteh al Skeini et al. v. The Secretary of State for Defence*, (Case No. CO/2242/2004), Judgment, 14 December 2004

³¹³ On the genesis of Article 1 of the *ECHR* and an analysis of the ECtHR’s case law on the extraterritorial applicability of the Convention, see LAWSON, R., “Life After *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights”, in COOMANS, F., KAMMINGA, M.T., (eds.) *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, Oxford, 2004

³¹⁴ ECtHR, *Bankovic et al. v. Belgium et al.*, (Application no. 52207/99), Decision on Admissibility, 12 December 2001, § 63

³¹⁵ High Court of Justice, *Mazin Jumaa Gatteh al Skeini et al. v. The Secretary of State for Defence*, (Case No. CO/2242/2004), Judgment, 14 December 2004, § 108

³¹⁶ ECtHR, *Loizidou v. Turkey*, (Application no. 15318/89), Judgment (Preliminary Objections), 23 Mars 1995, §62; See also Inter-American Commission on Human Rights, *Coard et al. v. the United States*, (Case No. 10.951), Report No. 109/99, 29 September 1999

³¹⁷ ECtHR, *Cyprus v. Turkey*, (Application no. 25781/94), Judgment, 10 May 2001, §77: “its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that , in terms of Article 1 of the Convention, Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention...”

³¹⁸ ECtHR, *Issa et al. v. Turkey*, (Application no. 31821/96), Decision on Admission, 30 May 2000; ECtHR, *Öcalan v. Turkey*, (Application no. 46221/99), Decision on Admission, 14 December 2000

cases, but they do not (strictly speaking) concern the problem of jurisdiction, but rather the extent of States' positive obligations to respect the rights of persons present in their territory.³¹⁹ More interesting for the purposes of this paper are *Stocké v. Germany*, and *W.M. v. Denmark*, where the European Commission of Human Rights (ECmHR) considered that to the extent that State agents exercise authority over persons abroad, they bring them within the jurisdiction of that State. The Commission added: "Insofar as the State's acts or omissions affect such persons, the responsibility of the State is engaged."³²⁰ One may be inclined to argue that victims of gun violence in recipient countries are *affected* by supplier States' authorisation of arms exports. However, with a view to more recent case law cited earlier, it would clearly go too far to assume that anybody who is affected by the conduct of a State party to the *ECHR* would come "within the jurisdiction" of that State. Instead, it has been suggested that there needs to be a *direct and immediate link* between the extraterritorial conduct of a State and the alleged violation of an individual's rights.³²¹

In this context, it is worth analysing in some detail the only case about CAT and human rights that has to my knowledge ever been brought before an international judicial organ. In *Tugar v. Italy*,³²² the applicant, an Iraqi mine clearer complained under Article 2 of the *ECHR* (right to life)

"that he suffered a life-threatening injury as a result of:

- a) either the Italian Government knowingly allowing the supply of an "indiscriminate" weapon (anti-personnel mine with no self-detonating or self-neutralising mechanism) or of a weapon which was likely to be used "indiscriminately";
- b) or the Italian Government failing to protect him, by means of an effective arms transfer licensing system..."

The applicant argued that Italy failed to comply with its positive obligation to protect the right to life because the Italian government had sold or allowed to be sold, and in any event had not regulated the sale of APM without a self-detonating or self-neutralising mechanism, to Iraq. The ECmHR declared the application inadmissible on the following grounds: First, the placing of the mines by Iraq was not in itself a matter for which Italy was responsible under the *ECHR*. This is certainly correct, considering that Italy neither exercised control over the Iraqi agents placing the mines, nor over the area of emplacement, nor over the applicant. Second, the Commission considered that the alleged violation only concerns Italy's

³¹⁹ ECtHR, *Bankovic et al. v. Belgium et al.*, (Application no. 52207/99), Decision on Admissibility, 12 December 2001, § 68: "...liability is incurred ... by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad..."

See also O'BOYLE, M., "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic'", in COOMANS, F., KAMMINGA, M.T., (eds.) *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, Oxford, 2004, 126

³²⁰ ECmHR, *Stocké v. Germany*, (Application No. 11755/85), 12 October 1989, §166; ECmHR, *W.M. v. Denmark*, (Application no. 17392/90), Decision on Admissibility, 14 October 1992

³²¹ LAWSON, R., "Life After *Bankovic*...", 103-104

³²² European Commission (First Chamber), *Rasheed Haya Tugar v. Italy*, (Application no. 22869/93), Decision on Admissibility, 18 October 1995

failure to adopt an effective arms transfer licensing system and it observed that the *ECHR* did not guarantee a right to have the transfer of arms regulated.³²³

Third, the Commission noted that the circumstances of the case were entirely different from those of *Soering v. UK*,³²⁴ where an “act of jurisdiction may directly expose a particular individual to a particular and immediate risk.” In the case at hand, the Commission considered that there was “no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible ‘indiscriminate’ use thereof in a third country...”. Therefore, it continued, “the ‘adverse consequences’ of the failure of Italy to regulate arms transfers to Iraq are ‘too remote’ to attract the Italian responsibility.” This section of the decision illustrates the required direct and immediate link between the conduct of the respondent State and the applicant - a link which is probably impossible to establish in the realm of arms exports. Interestingly, the Commission completely ignored the first part of the applicant’s complaint, namely, that Italy knowingly allowed the supply of an “indiscriminate” weapon (as opposed to the indiscriminate use of a weapon). APM without a self-neutralising or self-destruction mechanism must be considered to be inherently indiscriminate weapons, as they are incapable of distinguishing between civilians and combatants stepping on them. Insofar as the use of an inherently indiscriminate weapon is a violation of IHL, Italy should have refrained from supplying them to Iraq pursuant to its obligation to ensure respect of IHL.

The analysis of the jurisdictional limits of human rights conventions leads to the conclusion that arms suppliers (and transit States) cannot be held responsible on this basis.³²⁵ Notwithstanding this conclusion, I will pursue the analysis in order to assess the value of an argument often advanced in this context, invoking States’ obligation to exercise due diligence, an issue related to the extent of States’ obligations.

II.D.3.b Arms Suppliers’ Obligation to Exercise Due Diligence

In spite of the ECmHR’s, the ECtHR’s, the Human Rights Committee’s and the UK High Court’s jurisprudence, commentators assert that

“States and private companies engaged in production and *export* bear a degree of political, moral and, in some cases, *legal responsibility* toward the international community of the use made of their weapons and ammunition.”³²⁶

The Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons, Barbara Frey, writes in her Working Paper on SALW that evolving norms require that

³²³ Whether an obligation to have an effective licensing system in place can be based on other legal obligations of States will be examined in chapter II.G.3.

³²⁴ ECtHR, *Soering v. the United Kingdom*, (Application no. 14038/88), Judgment, 7 July 1989

³²⁵ ECtHR, *Soering v. the United Kingdom*, (Application no. 14038/88), Judgment, 7 July 1989, §86: “Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.”

³²⁶ *Working Paper*, E/CN.4/Sub.2/2002/39, §71 (Emphasis added.)

States take effective measures to prevent the transfer of small arms into situations where they are likely to be used to commit serious human rights abuses.³²⁷ In situations of arms transfers with *knowledge* that arms are *likely* to be used to commit serious violations of HRL or IHL, Frey cites *inter alia* the following examples of violations that may occur: “transfer to a State identified as having a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” and “transfer to a State unable to control post-conflict violence”.³²⁸ In the context of suppliers’ responsibility for arms transfers, reference is frequently made to the concept of due diligence.³²⁹ The due diligence standard has been drawn from traditional State responsibility doctrine governing protection of aliens from *private* violence and it is generally agreed that it involves concepts of duty and failure to exercise due care. What exactly “due diligence” entails and whether it imposes duties that go beyond positive obligations of States to prevent, investigate, punish and compensate is not clear.³³⁰ While Frey acknowledges in her Working Paper that the due diligence standard has been generally accepted as a measure of evaluating a State’s responsibility for violation of human rights by *private actors*,³³¹ in her Progress Report, she argues that “States are obligated by general principles of international law to use due diligence to prevent transfers of small arms that will aid in human rights violations *in recipient States*”³³² without specifying whether it is the recipient State or NSA that commit these violations. Similarly, Gillard holds that

“the prohibition of transfers could also be applicable where...the recipient state is unable to control the private actors who have control of the weapons. ... In this instance states should refrain from supplying weapons to states where it is likely they will fall into the hands of individuals over whom the government is incapable of exercising authority and control.”³³³

This author does not subscribe to this argument for the following reasons. First, even if one adopts a broad understanding of the concept of due diligence, *recipient States* cannot be held responsible for the acts of NSA *over which they do not exercise effective control*. Recipient States that are “unable to control post-conflict violence” or exercise control over “private actors who have control over weapons” cannot be said to violate their duty to prevent, investigate, punish and compensate. Second, even if it is the recipient State itself that commits human rights violations with arms that have been supplied to it, *suppliers’* obligation to exercise due diligence cannot extend to include acts that

³²⁷ Working Paper, E/CN.4/Sub.2/2002/39, §35.

³²⁸ Annex to the Working Paper, E/CN.4/Sub.2/2002/39; Elsewhere she formulates the violations somewhat differently as “transfer to States known to violate human right or humanitarian norms on a systematic basis”. FREY, B., “Small Arms and Light Weapons: the Tools Used to Violate Human Rights”, in *Disarmament Forum*, No. 3, 2004, 40

³²⁹ See for instance Hampson’s comments during the 7th meeting (55th session) of the Sub-Commission: “The issue of due diligence and arms transfers to individuals or State organizations needed to be explored in greater depth.” *Summary Record of the 7th Meeting*, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2003/SR.7, 10 August 2003, §32

³³⁰ FARRIOR, S., “State Responsibility for Human Rights Abuses by Non-State Actors”, in *ASIL Proceedings of the 92nd Annual Meeting*, April 1.-4, 1998, 302

³³¹ Working Paper, E/CN.4/Sub.2/2002/39, §48

³³² Progress Report, E/CN.4/Sub.2/2004/37, §22. (Emphasis added.)

have to be attributed to the recipient, and hence, are clearly beyond the supplier's effective control. Third, for a positive obligation to arise, it must be established that the supplier, when authorising an export

“knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers, which judged reasonably, might have been expected to avoid that risk.”³³⁴

To assert that arms suppliers are in violation of their obligations under HRL because they fail to exercise due diligence, in my view, stretches the concept beyond reasonable limits.

II.D.4 A Customary Norm Prohibiting Arms Transfers to Human Rights Violators?

Even after the adoption of the 1966 Covenants, references to human rights – apart from the right to peace and the right to self-determination – have been rare in official documents on arms transfers. Outstanding exceptions are the *1969 Draft Recommendation* submitted to the Assembly of the WEU, which establishes a link between arms suppliers and the commission of murder and genocide in the recipient countries,³³⁵ and a resolution adopted by the Parliamentary Assembly of the Council of Europe in 1989.³³⁶ In operative paragraph 5, the Council expressed its belief that

“de nombreuses exportations d'armes peuvent être utilisées pour la violation des droits de l'homme sur laquelle le pays exportateur n'a d'autre contrôle que le refus d'exporter des armes utilisables pour la répression intérieure...”³³⁷

In recent years, references to HRL in arms transfer instruments have become more frequent. Martinez considers that

“la protection des droits de l'homme est invoquée sinon pour interdire les exportations d'armes, du moins pour les sélectionner....Les armes pouvant servir à la répression intérieure sont souvent interdites d'exportation.”³³⁸

Concern for the internal situation, internal repression or tensions and disturbances in the recipient country is mentioned in 7 of the 15 international instruments I have analysed, and in 4 of the 12 national documents. Only one of these instruments, the UK *Export Control Act of 2002*, is legally binding. Whether HRL is respected, or whether genocide or crimes of humanity are committed in the recipient country is a criterion taken into account in 8 of the 15 international texts, and is included in 6 of the 12 national instruments. This criterion is contained in two legally binding instruments, again the UK *Export Control Act* and the US *Foreign Assistance Act*.

³³³ GILLARD, E., *What is legal? What is illegal?...*, § 35

³³⁴ ECtHR, *Osman v. the United Kingdom*, (Application no. 23452/94), Judgment, 28 October 1998, § 116

³³⁵ *The International Trade in Armaments*, Assembly of Western European Union, Report and Draft Recommendation submitted on behalf of the Committee on Defence Questions and Armaments, Doc. 500, 4 December 1969

³³⁶ *Resolution 928 (1989) on arms sales and human rights*, Parliamentary Assembly of the Council of Europe, 27 September 1989

³³⁷ Operative §5 *Resolution 928 (1989) on arms sales and human rights*; In §10 (c), the Council invited its members to define common criteria for arms sales with special attention to the international obligations in the field of human rights.

³³⁸ MARTINEZ, J.-C., “Le droit international et le commerce des armes”, 134

The fact that only roughly half of the international instruments even include a HRL criterion may come as a surprise, considering that most States are Parties to the *ICCPR* and other human rights treaties, and taking into account that fundamental human rights form part of customary international law (and some of them have even achieved the status of *jus cogens* norms). The relatively rare inclusion of HRL criteria in national laws and regulations is not very encouraging either. Contemporary State practice suggests that States do not currently consider themselves bound by a customary norm requiring them to consider the recipients' human rights record in their licensing procedures.

“Autrement dit, la réserve des droits de l'homme n'est pas loin d'être posée d'autant plus facilement qu'elle n'entraîne pas des sacrifices commerciaux importants.”³³⁹

II.D.5 Findings

On the basis of the foregoing, I conclude that because the employment of weapons whose use would violate IHL principles constitutes a violation of the State's positive obligation to protect the right to life, these weapons can never be used legally. Hence, the transfer prohibition arising under common Article 1 *GCI-IV* must also extend to peace time. The same reasoning cannot be followed with respect to “tools of torture” as they are not covered by the IHL principles on the conduct of hostilities. As HRL alone does not prohibit or restrict States' freedom to supply or transit arms, these items can still be legally transferred. With respect to all other conventional weapons, it appears that even if the supplier knows that the arms are likely to be used to violate civil and political rights in the recipient country, HRL does not prohibit their transfer. The reason for this regulatory gap lies in the structure of HRL, which, in contrast to IHL, primarily aims at protecting individuals from the acts of the State on whose territory or under whose control they are and lacks a mechanism similar to common Article 1 *GCI-IV*. IHL, in contrast, was initially concerned with the protection of combatants and civilians in the hands of a foreign government or affected by the conduct of hostilities generally.

It should be noted right away that these findings do not preclude legal responsibility of supplier States based upon their international obligation not to participate in the wrongful acts of recipient States,³⁴⁰ an issue that will be addressed in chapter II.F *infra*.

II.E Conventional Arms Transfers and the Aggravation of Conflicts

“La guerre, il faut essayer de la prévenir, et certainement il ne faut pas l'attiser par l'envoi d'armes aux belligérants.”³⁴¹

This section aims at completing the discussion of international legal norms on CAT by briefly exploring two other branches of international law that comprise important limitations on CAT, although they do not constitute the primary focus of this paper: Arms embargoes adopted by the SC under

³³⁹ MARTINEZ, J.-C., “Le droit international et le commerce des armes”, 136

³⁴⁰ *Preliminary Report*, E/CN.4/Sub.2/2003/29, §57

³⁴¹ YAKEMTCHOUK, R., “Le transit international des armes de guerre”, in *RGDIP*, Vol. 83, No. 2, 1979, 353

Chapter VII of the *UNC* – a *jus ad bellum* restriction, and limits imposed on neutral States to transfer conventional weapons during war – a *jus in bello* restriction.

II.E.1 The Security Council's Role in Limiting Arms Transfers

Both the GA and the SC have on several occasions adopted resolutions calling for arms embargoes.³⁴² Since 1966, the SC has imposed several clearly mandatory embargoes on States and NSA in application of Article 41 *UNC*, which entitles the SC to

“decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations...”³⁴³

Arms embargoes imposed by the SC are an important factor in the limitation of CAT, because they are relatively comprehensive in their nature.³⁴⁴ In addition, all UN members States – the quasi-totality of States today – are under a legal obligation to implement these embargoes,³⁴⁵ an obligation that overrides other treaty obligations of these States, such as military co-operation agreements.³⁴⁶ It has to be kept in mind, though, that embargoes are not likely to be adopted in the majority of armed conflicts and situations of internal disturbances, because the SC has to determine the existence of a threat to the peace, breach of peace, or act of aggression before taking action under Chapter VII of the Charter.³⁴⁷ Moreover, not all States implement and respect these embargoes to the same degree.³⁴⁸

Regional organisations can also impose arms embargoes. To what extent States are bound to respect these embargoes depends on the respective powers vested in the body adopting them, an issue not dealt with here.

II.E.2 Neutrality Law

“Neutrality presupposes war. War presupposes arms. And arms presuppose humans, sometimes alleged neutrals, disposed to furnish them in abundance.”³⁴⁹

³⁴² For more details on embargoes, see YAKEMTCHOUK, R., “Le Commerce des Armes”, 18-22

³⁴³ Art. 41 *UNC*

³⁴⁴ Earlier SC resolutions that urged States to refrain from supplying the means of internal repression to South Africa did not prevent France and the UK to supply heavy weapons that they considered to be exclusively destined for external defence and which in their view would not be used directly against the local population. YAKEMTCHOUK, R., “Le Commerce des Armes”, 19-20

³⁴⁵ Art. 48 *UNC*

³⁴⁶ Art. 103 *UNC*

³⁴⁷ Art. 39 *UNC*

³⁴⁸ *Report of the Panel of Experts established by the Security Council pursuant to resolution 1237 (1999)*, S/2000/203, 10 March 2000; *Report of the Monitoring Mechanism on Angola Sanctions established by Security Council resolution 1295 (2000)*, S/2000/1225, 21 December 2000; *Report of the Panel of Experts appointed pursuant to Security Council resolution 1306 (2000)*, paragraph 19, in relation to Sierra Leone, S/2000/1195, 20 December 2000; The problem is analysed in CORTRIGHT, D., LOPEZ, G. A., GERBER, L., *Sanctions Sans Commitment: An Assessment of UN Arms Embargoes*, Working Paper No.02-2, , Project Ploughshares, Waterloo, May 2002

³⁴⁹ POLITAKIS, G. P., “Variations on a Myth...”, 435

II.E.2.a Neutrals and Non-Belligerents in a System of Collective Security

This section examines in a cursory manner how neutrality law contributes to the regulation of CAT today.³⁵⁰ Neutrality as a legal concept has been declared dead twice in the course of the 20th century, and yet, it is still alive. The traditional concept of neutrality fits squarely into today's system of collective security created by the *UNC* and is not easily compatible with the IHL notion of armed conflict. This is not the place for an extensive discussion of the role of neutrality in today's legal system, but certain aspects of neutrality law should be clarified at the outset. Most importantly, the status of neutrality is linked to the existence of a *state of war*. At what point in time a state of war exists is unclear, but it seems that there needs to be an IAC, although not all IACs create a state of war. In practice, it is left to every State to determine whether or not a state of war exists.³⁵¹ Once a state of war is recognised, the law of neutrality applies *ipso jure* to all third States.³⁵² Even then, though, it is left to the individual State to declare its neutrality, and hence be bound by the rules of neutrality, or to choose the status of non-belligerent.³⁵³ Whether it is possible to draw a distinction between non-belligerency and neutrality in today's system of collective security is subject to debate.³⁵⁴ Certain scholars assert that the concept of non-belligerency allows States in the present system to support the victim of a violation of Article 2§4 *UNC* without having to enter into war against the aggressor, and at the same time avoid the application of the principle of impartiality imposed on neutral States. The law applicable between belligerents and non-belligerents is a curious mixture of the law of armed conflict (e.g. *GCI-IV* and *PI*) and the law of peace (e.g. trade law). Accordingly, neutrality law does not impose limitations on CAT between these States. Although *GCI-IV* and *PI* contain provisions pertaining to neutral States (respectively, all States not taking part in the IAC), these rules have no real bearing on the question of CAT. Neutral States, on the other hand, have to abide by the principles of neutrality, codified in 1907 *Hague Convention V* on war on land and *Hague Convention XIII* on naval war.

II.E.2.b Rights and Obligations of Neutrals with regard to Conventional Arms Transfers

In their regulation of the trade in arms, the Hague Conventions distinguish between private trade (the only commercial trade existing at the time of their adoption), which the neutral State is not called upon to prevent, on the one hand,³⁵⁵ and, on the other hand, the absolute prohibition of the

³⁵⁰ The concept of "permanent" neutrality will not be dealt with in this paper as its effects on CAT are not significantly different from those produced by "normal" neutrality. For a relatively recent and very comprehensive study on neutrality and the arms trade, see OETER, S., *Neutralität und Waffenhandel*.

³⁵¹ OETER, S., *Neutralität und Waffenhandel*, 141

³⁵² *Ibid.*, 141

³⁵³ *Ibid.*, 143

³⁵⁴ A recent attempt to codify the rules applicable in sea warfare defines neutral as "any State not party to the conflict" and does not distinguish between the concept of neutrality and non-belligerency. Section V, art. 13(d) and Section III, art. 7(b) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994

³⁵⁵ Art. 7 *HV*: "A Neutral Power is not called upon to prevent the export of transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet." (also corresponding art. 7 *HXIII*)

supply, directly or indirectly, by a neutral Power, of war-ships, ammunition, or war material of any kind whatever.³⁵⁶

In addition, restrictions placed on the private trade in arms, have to be impartially applied to all belligerents.³⁵⁷ It should be noted that these treaties have very rarely been applied as conventional norms due to the limited number of ratifications and the *si omnes* clause.³⁵⁸ Their value lies thus in their reflection of customary law. Considering how the structure of the arms trade has changed since 1907, it is difficult to apply their provisions to today's reality, in particular with regard to the private trade in arms. The problem of determining when private trade can be attributed to the State is no longer of relevance, however. Today, all major exporters, and indeed the great majority of States control arms transfers through licensing systems or other procedures. The ultimate decision whether or not a transfer is authorised lies with the government or a specialised governmental agency.³⁵⁹ This decision can be easily attributed to the State as an act of its organs. It follows therefore, that the principle of impartially applied restrictions can only be respected today if neutral States are absolutely prohibited from transferring arms to belligerents.³⁶⁰

With regard to the *transit* of arms through neutral territory, Article 2 *HV* provides that belligerents are forbidden to move "...convoys of either munitions of war or supplies across the territory of a neutral Power".³⁶¹ Consequently, belligerents may only transit war materials through the territory of other belligerents or of non-belligerents that did not declare themselves neutral.

II.E.3 An Obligation not to Prolong or Aggravate Conflicts by Supplying Arms?

Considering that CAT are prohibited under certain circumstances in situations of a threat to the peace, breach of the peace, act of aggression, or when a state of war exists, one may ask whether there is a general prohibition to transfer conventional arms to States engaged in an armed conflict or to regions of tension. Such a prohibition would have a broader field of application than neutrality law or Article 41 *UNC*, and would apply to all third States alike, independently of whether they consider themselves neutral or non-belligerent. Politakis notes that several among the largest arms producing countries have declined to sell arms to areas of tension or countries experiencing internal disturbances.³⁶² Oeter's study of the practice of Switzerland, Sweden and Austria, three States that

³⁵⁶ Art. 6 *HXIII*

³⁵⁷ Art. 9 *HV* and *HXIII*

³⁵⁸ OETER, S., *Neutralität und Waffenhandel*, 219

³⁵⁹ BOTHE, M., MARAUHN, T., "The Arms Trade: Comparative Aspects of Law", in *Revue Belge de Droit International*, Vol. 26, No. 1, 1993, at 29: "There is a virtually uniform state practice of the major arms-producing countries that licence requirements have been applied in order to exercise governmental control on arms exports since the 1930s."

³⁶⁰ See in particular OETER, S., *Neutralität und Waffenhandel*, 216-221; Similar: ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 229-230; POLITAKIS, G. P., "Variations on a Myth...", 505

³⁶¹ Art. 2 *HV*. Special rules for the transit of arms apply in times of peace, for territorial waters, internationalised waterways and the airspace. See on this point YAKEMTCHOUK, R., "Le transit international des armes de guerre"

³⁶² POLITAKIS, G. P., "Variations on a Myth...", 436

consider themselves strictly (or even permanently) neutral, shows that their attitude towards CAT goes beyond what is strictly required by the law of neutrality. All three prohibit the supply of war materials to regions of tension and States engaged in an armed conflict, whether international or not.³⁶³ Our analysis of national export regulations shows that 10 of 12 texts include a criterion on international peace, security or stability; four of them make specific reference to regional peace or security; and five are concerned with the aggravation or prolongation of armed conflicts. The analysis of international non-binding instruments yields the following results: the question whether arms transfers contribute to the prolongation or the aggravation of international or non-international armed conflicts is considered as a criterion for export licences in 11 of 15 instruments. The same proportion of instruments considers regional peace, security or stability as a factor to be taken into account, and 12 of 15 texts are concerned with international peace, security or stability.

In accordance with these findings, certain commentators suggest that there exists a legal obligation prohibiting CAT to regions of conflict (or tension).³⁶⁴ Politakis derives an obligation to refrain from “fanning the flames of war with arms transfers” from the principles expressed in the *Friendly Relations Declaration*, according to which States not Parties to an international dispute “shall refrain from any action which may aggravate the situation...and shall act in accordance with the purposes and principles of the United Nations”.³⁶⁵ He argues that States that ship arms to nations at war aggravate human misery and deepen world disorder, and as such act in disrespect of the principles of the *UNC*.³⁶⁶ Considering that most of the arms exporting States subscribe to the principle that no war material should be consigned to countries participating in an armed conflict, he believes that the formation of a customary rule to this effect has been set in motion long ago.³⁶⁷

One may object to this argumentation that apart from the specific prohibition to transfer arms in violation of an SC arms embargo, the *UNC* does not contain any *operative* provision limiting States’ freedom to transfer arms. Articles 11 and 26 of the *UNC* merely define the GA’s and SC’s responsibilities in the field of arms control and disarmament. No concrete obligations of States in relation to CAT can be inferred from the purposes and principles set out in Article 1 of the Charter either.³⁶⁸ Whether arms transfers can be assimilated to the use or threat of force contrary to Article 2§4 *UNC* and the problems raised by arms transfers in relation to the principles of non-intervention and non-

³⁶³ OETER, S., *Neutralität und Waffenhandel*, 212

³⁶⁴ See for instance YAKEMTCHOUK, R., “Le transit international des armes de guerre”, 383

³⁶⁵ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, A/RES/2625 (XXV), 24 October 1970

³⁶⁶ POLITAKIS, G. P., “Variations on a Myth...”, 504

³⁶⁷ *Ibid.*, 505

³⁶⁸ See also BOTHE, M., VITZTHUM, W., *Rechtsfragen der Rüstungskontrolle...*, 116

interference in the internal affairs have been dealt with elsewhere³⁶⁹ and are outside of the scope of this paper.

Although some States have included a criterion on the aggravation/prolongation of conflicts into their export regulations, and despite numerous references to it in intergovernmental documents, there seems to be considerable reluctance on the part of States to formulate this criterion in a legally binding way. Considering actual State practice, e.g. arms supplies to US forces engaged in (arguably unlawful) IACs in Afghanistan and Iraq, it seems that a customary norm prohibiting arms transfers to conflict regions does not exist.³⁷⁰ The very fact that arms embargoes are imposed in certain situations constituting a threat or a breach of the peace suggests that in the absence of these embargoes, States are free to transfer arms to the battlefield,³⁷¹ within the limits of the law of neutrality – should it apply. This attitude is also illustrated in a statement by the President of the SC, which merely “*encourages* Members to undertake vigorous actions aimed at *restricting* the supply of small arms, light weapons and ammunitions to areas of instability”.³⁷²

II.E.4 Findings

Even in today’s legal system, neutrality has a role to play, at least as long as the SC has not taken a decision under Chapter VII of the *UNC* ordering a particular State to adopt a positive course of action. Both SC arms embargoes and neutrality potentially play an important role in regulating transfers of conventional arms to regions of conflict (and tension). Apart from these specific transfer prohibitions, with their limited scope of application *ratione temporis* and *ratione personae*, the existence of a customary norm prohibiting CAT to regions of conflict (or tension) is doubtful. Considering non-binding export regulations, especially on the international level, and national regulations of certain States, it may at best be argued that such a norm is in *statu nascendi*.³⁷³

It should be noted again that the practical significance of such general transfer prohibitions depends entirely on the definition of conventional weapons they apply to. I will come back to this point in chapter II.G.2.

³⁶⁹ See in particular ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, and MARTINEZ, J.-C., “Le droit international et le commerce des armes”

³⁷⁰ Even Politakis concedes that the very same States that renounce transfers to conflict regions frequently prove unable or unwilling to act in a manner fully compatible with their pledges. POLITAKIS, G. P., “Variations on a Myth...”, 436

³⁷¹ See also MARTINEZ, J.-C., “Le droit international et le commerce des armes”, 160

³⁷² *Statement by the President of the Security Council*, S/PRST/ 2004/1, 19 January 2004 (Emphasis added.)

³⁷³ Compare for instance art. 3§1(2) of the Austrian *Bundesgesetz vom 18. Oktober 1977 über die Ein-, Aus- und Durchfuhr von Kriegsmaterial*, BGBl No. 540/1977, 18 October 1977; Compare art. 4 of the *Loi relative à l’importation, à l’exportation et au transit d’armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente*, 5 August 1991

II.F Responsibility for Violations of Transfer Prohibitions in International Law

“...Noting therefore – since most arms exports are subject to government authorisation – that murder and genocide through intermediaries have acquired a legal foundation...”³⁷⁴

II.F.1 The Responsibility of States for Conventional Arms Transfers in Violation of International Law

This section will explore secondary rules of international law with a special focus on the responsibility of supplier (and transit) States. The analysis is based on the assumption that the International Law Commission’s *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles)* adopted in 2001 reflect customary rules of international law in most regards.³⁷⁵ Without examining the question of self-contained regimes, it can be argued that secondary rules on State responsibility apply to all fields of international law, and that certain branches of international law have their own secondary norms, which are *lex specialis* to the general ones formulated in the *ILC Draft Articles*.³⁷⁶

II.F.1.a Responsibility of States for Internationally Wrongful Acts Committed by their Organs

The cardinal principle of State responsibility is that “every internationally wrongful act of a State entails the international responsibility of that State.”³⁷⁷ For such an act to exist, conduct consisting in an action or omission must, first, be attributed to the State, and second, constitute a breach of an international obligation of that State.³⁷⁸ It is generally recognised that

“the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions...An organ includes any person or entity which has that status in accordance with the internal law of the State.”³⁷⁹

For the purposes of this paper it is irrelevant whether an arms transfer agreement or contract was concluded by an organ of the State or whether it has a purely private character. The ultimate decision whether or not a transfer is authorised lies with the government or a specialised governmental agency.³⁸⁰ By granting an export licence, it is the action of a *de jure* organ of the State that authorises the conduct that eventually results in the breach of an international obligation of that State.³⁸¹

³⁷⁴ *The International Trade in Armaments*, Assembly of Western European Union, Report and Draft Recommendation submitted on behalf of the Committee on Defence Questions and Armaments, Doc. 500, 4 December 1969

³⁷⁵ *Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC at its Fifty-third session (2001)*, A/56/10

³⁷⁶ Art. 55 *ILC Draft Articles*: “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”

³⁷⁷ Art. 1 *ILC Draft Articles*

³⁷⁸ Art. 2 *ILC Draft Articles*

³⁷⁹ Art. 4 *ILC Draft Articles*

³⁸⁰ OETER, S., *Neutralität und Waffenhandel*, 216-221; See also chapter II.E.2 *infra*.

³⁸¹ Of interest is also Article 7 of the *ILC Draft Articles*, especially in relation to corrupt officials. According to this provision, a State is responsible for the “conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority...if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

A breach of an international obligation of a State exists when an act of that State is not in conformity with what is required of it by an obligation by which the State is bound at the time the act occurs.³⁸² In the context of CAT and in accordance with the transfer prohibitions established throughout the preceding chapters, States are responsible under international law for authorising:

- Transfers in violation of a specific transfer prohibition of a treaty in force for that State
- CAT in violation of a State's obligations under neutrality law
- CAT in violation of a SC arms embargo adopted under Article 41 of the *UNC*
- CAT in violation of a mandatory embargo adopted by a regional organisation
- Transfers of arms whose use is prohibited by an IHL treaty or cross-over convention (violation of common Article 1 *GCI-IV*)
- Transfers of arms whose use is prohibited by cardinal principles of IHL (violation of common Article 1 *GCI-IV*)
- CAT authorised with the knowledge that the arms are likely to be used in violation of IHL (respectively certain rights protected by IHL in times of armed conflict) (violation of common Article 1 *GCI-IV*)

The first four obligations are unproblematic and find their origin in the fundamental principle *pacta sunt servanda*.³⁸³ The last three obligations are based on common Article 1 *GCI-IV* and raise an interesting issue. Common Article 1 is treated here as a primary rule of international law to which the secondary rules on State responsibility apply. Supplier States are responsible for their own conduct in violation of their conventional (or customary) obligation to *ensure respect* for IHL. That common Article 1 can also be interpreted as a secondary rule will be illustrated in the next section.

II.F.1.b Responsibility of States for Complicity in Internationally Wrongful Acts Committed by Other States

Arms supplying States cannot be held directly responsible for human rights violations committed by the recipient with their arms in situations that do not amount to armed conflicts or for human rights violations that do not constitute violations of IHL in times of armed conflict, because the conduct of the recipient State cannot be attributed to the supplier State. There may be cases, however, where conduct of a recipient State is nonetheless chargeable to the supplier, even though the wrongfulness of the conduct primarily lies in a breach of the international obligations of the recipient.³⁸⁴

Article 16 of the *ILC Draft Articles* is of particular interest. It reads as follows:

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

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.”³⁸⁵

³⁸² Art. 12 and 13 *ILC Draft Articles*

³⁸³ Examples of States not complying with UN arms embargoes are given in the *Report of the Panel of Experts established by the Security Council pursuant to resolution 1237 (1999)*, S/2000/203, 10 March 2000, in particular §§ 39-46; See also S/2000/1195, § 194 *et seq.* and S/2000/1225, § 24 *et seq.*

³⁸⁴ §5, 152, *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, A/56/10, 2001

³⁸⁵ Art. 16 *ILC Draft Articles*

This provision may be invoked in situations where a transferring State supplies conventional arms to another State with knowledge that those arms are likely to be used in violation of HRL and IHL.³⁸⁶ The ILC expressly mentions the issue of arms transfer in its legal commentary to draft Article 16.³⁸⁷ The scope of responsibility of a supplier State for aiding or assisting is limited in three ways. First, the supplier *has to be aware of the conduct* of the recipient State. In cases where UN agencies, specialised NGOs like Amnesty International or Human Rights Watch, or the supplier's own ministry of foreign affairs have reported widespread or systematic human rights violations, it should be assumed that the supplier knows that the arms transfer is assisting the recipient in the commission of these violations. The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. In other words, the supplier must *intend*, by authorising the arms transfer, to facilitate the occurrence of the wrongful conduct committed by the recipient.³⁸⁸ The third condition limits Article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound.³⁸⁹ Because the great majority of States are Parties to *GCI-IV* and the *ICCPR*, and moreover, most of the rules enshrined in these treaties have acquired customary value and bind all States, this condition is unproblematic.

It is the second requirement that poses problems, because it will in most cases be difficult to assess whether the supplier actually intended to facilitate the commission of violations of IHL or HRL by granting an export licence, or by authorising the transit of arms through its territory. Pure negligence will not be enough to hold a supplier responsible for assistance in a wrongful act of the recipient under Article 16, and the fact that certain States have weak or ineffective licensing systems does not suffice to establish their responsibility.³⁹⁰ Similarly, a supplier cannot be held responsible if it does not foresee that a recipient will re-export its arms in violation of international law.³⁹¹ The same is true for the transfer of arms based on co-production agreements. Only if the supplier can actually influence the transfer

³⁸⁶ *Working Paper*, E/CN.4/Sub.2/2002/39, §73

³⁸⁷ "...a State may incur responsibility if it...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." *ILC Commentary* to art. 16 (9), 158

³⁸⁸ *ILC Commentary* to art. 16 (5), 156

³⁸⁹ *ILC Commentary* to art. 16 (6), 157

³⁹⁰ OETER, S., *Neutralität und Waffenhandel*, 222-223; Hiltermann and Bondi, on the contrary, seem to envisage responsibility for negligence: "These governments [governments authorising supply or transit] are, by their act of commission or omission or by sheer neglect, accessories to the abuses that are being committed." HILTERMANN, J., BONDI, L., *State Responsibility in the Arms Trade and the Protection of Human Rights*, Paper for the Workshop on Small Arms organised by the Government of Switzerland, Geneva, 18-20 February 1999

³⁹¹ Art. 5§2 of the *1925 Convention* stipulates: "Neither the licence nor the export declaration shall entail any responsibility upon the Government of the exporting country as to the destination or ultimate use of any consignment." Yakemtchouk speaks in this context of a "responsabilité politique de l'Etat fournisseur", YAKEMTCHOUK, R., "Le respect de la destination des armes acquises à l'étranger: la clause de finalité d'emploi et de non-réexportation", 144

decision and intentionally agrees to the transfer in question, can it incur responsibility under Article 16.³⁹²

At least with regard to “tools of torture”, however, it must be assumed that the supplier knows of the circumstances of the wrongful act if it transfers items, the only apparent use of which consists in a violation of HRL. The supplier must be considered to transfer these instruments with a view to facilitating the commission of torture, a prohibition that applies to all States. All States that transfer “tools of torture” therefore incur responsibility for aiding in the commission of an internationally wrongful act.

Having addressed the circumstances of attribution, in accordance with Article 16, a supplier State is responsible for its own act of deliberately assisting another State to violate HRL. This includes suppliers’ responsibility for:

- CAT authorised with the knowledge that the arms are likely to be used in violation of HRL
- Transfers of “tools of torture”

The rather high threshold for the attribution of wrongful acts of the recipient to the supplier may be attenuated with regard to the supplier’s responsibility for assisting in the commission of IHL violations. The justification for a lower threshold with regard to IHL can be found in common Article 1 *GCI-IV*. It imposes an obligation that goes beyond the prohibition to participate in internationally wrongful acts as described in the Commentary to the *ILC Draft Articles* in that it does not require that the supplier *intends* to facilitate the violation of IHL. The obligation to ensure respect under common Article 1 constitutes a special rule on complicity in IHL violations. In this sense, common Article 1 is *lex specialis* to the general rules on State responsibility for wrongful acts of other States.³⁹³

In accordance with common Article 1, a supplier State is responsible for its own act of not *ensuring respect* for IHL by the recipient. This responsibility applies to:

- Transfers of arms whose use is prohibited by an IHL treaty or cross-over convention (violation of common Article 1 *GCI-IV*)
- Transfers of arms whose use is prohibited by cardinal principles of IHL (violation of common Article 1 *GCI-IV*)
- CAT authorised with the knowledge that the arms are likely to be used in violation of IHL (violation of common Article 1 *GCI-IV*)

A determination of State responsibility must entail an examination of possible circumstances precluding wrongfulness. This exercise does not raise any issues specific to CAT, but it should be kept in mind that no circumstances precluding wrongfulness can be invoked for violations of IHL, except if specifically provided for by humanitarian law itself.³⁹⁴ Another issue that deserves more attention but will not be dealt with here concerns the legal consequences of wrongful acts and in particular the

³⁹² ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 266

³⁹³ On this line of reasoning, see SASSOLI, M., “State responsibility...”, 413

³⁹⁴ This argument finds its justification in the wording of common art.1 according to which IHL has to be respected “in all circumstances”. Consent as a CPW is excluded on the basis of art. 6/6/6/7 and 7/7/7/ 8 *GCI-IV* as well as art. 51/52/131/148 common to *GCI-IV*

consequences of responsibility entailed by a serious breach of an obligation arising under a peremptory norm of international law.³⁹⁵

II.F.2 Findings

The scope of illegality of CAT under international law is considerably extended by the concept of responsibility of supplier or transit States for complicity in wrongful acts of recipient States, as formulated in Article 16 of the *ILC Draft Articles* and especially as reflected in common Article 1. It is only by having recourse to these mechanisms that suppliers can be held responsible for authorising arms transfers that contribute to the violation of HRL. Even though the threshold of Article 16 requiring knowledge and intent is rather high, it is to be hoped that the possibility to incur responsibility at least encourages supplier States to have an effective export control system in place.³⁹⁶

II.G Consequences for the National Regulation of Conventional Arms Transfers

“Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings...because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. ... The law of nations ... does not require from them such an internal disarrangement in their occupations.” Thomas Jefferson, 1793³⁹⁷

In line with the main focus of this paper on international law, this chapter will mention but a few aspects of national legislation. Furthermore, the analysis focuses on the *supply* of conventional arms. The next section illustrates how the heterogeneity or inefficiency of national export systems impedes the effective implementation of international transfer prohibitions.³⁹⁸

II.G.1 National Arms Transfer Regulations

II.G.1.a Diverging Standards for Arms Exports

The general principle underlying the national export control systems of all major supplier States is the prohibition of exports of controlled items unless a licence is granted. The national licensing procedures of States are extremely heterogeneous, though.³⁹⁹ This heterogeneity stems from States' differing views about their citizens' right to engage in foreign trade in general, and their conception of the

³⁹⁵ Art. 41 *ILC Draft Articles*

³⁹⁶ While it is very popular to establish individual criminal responsibility for violations of international law, international criminal law is not likely to become an important tool for enforcing transfer prohibitions. Individual criminal responsibility under international law is reserved for the most serious crimes which offend fundamental values of the international community and/or cannot be effectively prosecuted by national systems (e.g. trafficking in women or piracy). It should be kept in mind that the majority of abuses committed with conventional arms do not amount to international crimes entailing individual criminal responsibility.

³⁹⁷ Cited in KRAUSE, K., MACDONALD M. K., “Regulating Arms Sales Through World War II”, 711

³⁹⁸ This is not the place for a detailed description of national licensing systems. For a comparative analysis, see OETER, S., *Neutralität und Waffenhandel*, 174 *et seq.*

³⁹⁹ ANTHONY, I., “National Policies and Regional Agreements on Arms Exports”, in *Disarmament Forum, Small Arms Control: The Need for Coordination*, No. 2, 2000, 52

trade in arms in particular,⁴⁰⁰ and naturally results in diverging standards for the granting of export licences. The US and the UK have comparably detailed laws on arms exports that are further concretised in orders or regulations and which specify more or less precisely what criteria are to be taken into account in licensing procedures.⁴⁰¹ The relevant Russian law, in contrast, contains but a few vague references to general principles and leaves it to a government agency to spell out specific criteria.⁴⁰² Despite assertions by the French Ministry of Foreign Affairs that France has imposed on itself one of the most rigorous legislative frameworks for strict arms export controls, this author could not find any criteria used to assess licence applications in France's numerous legal documents on arms exports.⁴⁰³

In general, it seems that in all major supplier countries, the number and precision of criteria that are contained in legally non-binding texts is far greater than the number of criteria laid down in national laws.⁴⁰⁴ In particular, criteria concerned with internal repression and IHL violations are not usually included in legally binding instruments. Annex V *infra* provides an overview over the diverging standards among the five largest suppliers.⁴⁰⁵

⁴⁰⁰ Bothe and Marauhn note that according to the German Constitution freedom of foreign commerce is guaranteed to German citizens (art. 2§1 and art. 12§1 of the 'Grundgesetz') whereas the underlying principle of US export legislation is that foreign commerce is viewed as a privilege granted by the government and not as a subjective right. BOTHE, M., MARAUHN, T., "The Arms Trade: Comparative Aspects of Law", 25-26; On the other hand, Germany officially declares that it pursues a restrictive arms export policy and specifies that the development of additional export-oriented capacities must be avoided. *Politische Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern*, 19 January 2000. That the transfer of war weapons requires a licence is regulated in no lesser a text than the German *Grundgesetz* itself. (*Grundgesetz für die Bundesrepublik Deutschland*, BGBl 1949, 1, 23 May 1949).

One of the principles guiding the Russian control of exports is the "creation of the necessary conditions for the integration of the Russian Federation economy into the world economy"; Art. 4 *Federal Law on Export Control*, passed by the State Duma on 22 June 1999, Approved by the Federation Council on 2 July 1999

Similarly, according to a French policy statement, the level of its "industrie d'armement forte, diversifiée et de haute valeur ajoutée technologique...ne peut être maintenu...que grâce à des regroupements à l'échelle de l'Europe et à une présence sur les marchés à l'exportation", *La France et le contrôle des exportations d'armement*, Ministère des Affaires Etrangères, (undated)

⁴⁰¹ The primary law on arms exports in the UK is the *Export Control Act 2002*, 2002 Chapter 28, 24 July 2002, supplemented by *The Trade of Goods (Control) Order 2003*, Statutory Instrument 2003 No. 2765, 30 October 2003, the *Export of Goods, transfer of Technology and Provision of Technical Assistance (Control) Order 2003*, Statutory Instrument 2003 No. 2764, 30 October 2003, and *The Trade in Controlled Goods (Embargoed Destinations) Order 2004*, Statutory Instrument 2004 No.318, 10 February 2004.

In the US, it is the *Arms Export Control Act (AECA)*, United States Code, Title 22, Chapter 39, 1976 that mainly regulates arms transfers. The *International Traffic in Arms Regulations (ITAR)*, 22 Code of Federal Regulations, Title 22, Chapter I, Subchapter M implement the AECA. Other relevant provisions are contained in the *Foreign Assistance Act (FAS)*, United States Code, Title 22, Chapter 32, 1961.

⁴⁰² Compare art. 21 and art. 22§3 of the Russian *Federal Law on Export Control*, which merely refers to "international commitments", "State interests", and "environmental safety requirements".

⁴⁰³ General concern about the risk of diversion or re-export can be inferred from the text of the *Arrêté du 20 décembre 1999 modifiant l'arrêté du 2 octobre 1992 relatif à la procédure d'importation et d'exportation des matériels de guerre, armes et munitions et des matériels assimilés*. For a recent restatement of France's policy containing a general reference to the criteria of the *EU Code of Conduct*, see *Rapport au parlement sur les exportations d'armement de la France en 2002-2003*, Ministère de la Défense, 28 January 2005

⁴⁰⁴ Concurring: BOTHE, M., MARAUHN, T., "The Arms Trade: Comparative Aspects of Law", 33

⁴⁰⁵ It should be kept in mind, however, that the analysis does not give information about how stringent and precise criteria are formulated. A text may merely *invite* the government to *take into consideration* the human rights situations in the recipient country, or it may on the contrary impose a *mandatory prohibition* to grant a licence under certain circumstances. Stringent,

II.G.1.b Differing Definitions of Conventional Arms

Major differences in the export regulations of the largest suppliers also exist with regard to the classification of items as conventional arms whose transfer is subject to licence requirements. The German arms export control system distinguishes between five categories of items. The narrowly defined 'Kriegswaffen' (war weapons) are subject to the relatively strict 'Kriegswaffenkontrollgesetz' (War Weapons Control Act) and listed in the 'Kriegswaffenliste' (List of War Weapons).⁴⁰⁶ 'Rüstungsgüter' (military equipment) are included in a list annexed to the 'Aussenwirtschaftsverordnung' (Foreign Trade and Payments Ordinance) and subject to the less stringent requirements of the 'Aussenwirtschaftsgesetz' (Foreign Trade and Payment Act). In addition, the government introduced the concept of 'kriegswaffennahe sonstige Rüstungsgüter' (other military equipment related to war weapons) in a policy document of 2000, a category which is not legally defined but supposedly lies somewhere in between 'Kriegswaffen' und 'Rüstungsgüter'. 'Dual-use-Güter' intended for civilian and military purposes are mainly regulated by EU law. The additional terminus 'Wehrmaterial' (defence material) was introduced by a framework agreement concluded by six EU countries and is not found in German export legislation.⁴⁰⁷ As a consequence of these overlapping and vaguely defined categories, Germany was able to export liberal amounts of 'Rüstungsgüter' during the 1991 Gulf War in accordance with the weak requirements of the 'Aussenwirtschaftsgesetz' and without acting contrary to its policy not to export arms to regions of conflict or tension, a principle that applies only to 'kriegswaffennahe sonstige Rüstungsgüter'.⁴⁰⁸ Even though arms export laws of other major suppliers are less complex in their classification of controlled items, they also distinguish between at least two categories of weapons that are subject to different licensing conditions. The procedures are further complicated by lists of recipient countries benefiting from less stringent conditions ("white lists")⁴⁰⁹ and special military co-operation agreements on the one hand, and "black lists" of embargoed destinations on the other hand.

Transfer prohibitions of CAT based on Article 41 of the *UNC* apply to "arms and related materiel of all types"⁴¹⁰ or "paramilitary equipment"⁴¹¹ in general and do not specify which items are to be

precisely formulated criteria included in legally *non-binding* documents may in practice exercise more restraint on the granting of licenses than vague prohibitions contained in national *laws*. Furthermore, the analysis does not allow to draw any conclusions about how consequently States *interpret* and *apply* licensing criteria.

⁴⁰⁶ "The weapon list which is exclusive in character, *inter alia*, does not include means of transport even if intended for purely military purposes, radar systems, means of electronic communication nor the production equipment for such items and relevant know-how." BOTHE, M., MARAUHN, T., "The Arms Trade: Comparative Aspects of Law", 28

⁴⁰⁷ For more details, see MOLTSMANN, B., "Rechtliche Normen für den deutschen Rüstungsexport: Stand-Antinomien-Optionen", in JENNICHEN, A., MARKS, N., SANDEVSKI T., (eds.), *Rüstungstransfers und Menschenrechte, Geschäfte mit dem Tod*, Politikwissenschaft, Vol. 79, Lit Verlag, Münster, 2002; BRZOSKA, M., KÜCHLE, H., *Folgen, Auswirkungen und Gestaltungsmöglichkeiten internationaler Abkommen für eine restriktive deutsche Rüstungspolitik*, Paper no. 19, Bonn International Center for Conversion, Bonn, February 2002

⁴⁰⁸ OETER, S., *Neutralität und Waffenhandel*, 198

⁴⁰⁹ Among members of the same international organisation, such as NATO or OSCE countries, for example.

⁴¹⁰ *Security Council resolution 1333 (2000) [on measures against the Taliban]*, S/RES/1333(2000), 19 December 2000

⁴¹¹ *Security Council resolution 1171 (1998) [on the lifting of the prohibitions on the sale or supply of arms and related matériel to Sierra Leone]*, S/RES/1171(1998), 5 June 1998

included. The same is true for transfer obligations arising under the law of neutrality. The practical significance of these limitations therefore depends entirely on States' classification of certain items as conventional arms. It has been noted before that neutral States impose on themselves restraints broader than those imposed by neutrality law. At the same time, they adopt a very restrictive definition of what war materials are to be banned from export.⁴¹² While they refrain from supplying war materials, munitions, and directly destructive or lethal weapons, they continue to furnish parts, dual-use technology, military cargo planes, helicopters, flat bed trailers specially designed for the transport of tanks, and radar equipment to States involved in an IAC.⁴¹³ This illustrates that comprehensive transfer prohibitions arising under neutrality law and UN embargoes risk being undermined by overly restrictive national definitions of conventional arms.⁴¹⁴

II.G.2 An Obligation to Effectively Regulate Conventional Arms Transfers?

National legislation on CAT is best described as being very diverse. Whereas in some countries existing legislation can be considered comprehensive and effective, in others, legislation is inadequate or even lacking altogether.⁴¹⁵ In view of the risk to be held accountable for HRL or IHL violations committed by the recipient, one would expect supplier States to have effective licensing systems in place. International codes of conduct on arms transfers build on the idea that the criteria they include constitute a regular component of the national licensing procedure. Gillard is of the view that a customary rule of international law is in the process of evolving that requires

“exporting states to assess the respect for fundamental principles of international law in recipient states and to refrain from authorising exports in situations where the weapons will be used in violation of these principles.”⁴¹⁶

A duty to have a strict licensing system in place may also be inferred from certain provisions contained in instruments on SALW trafficking.⁴¹⁷ In the context of the *Programme of Action*, States have undertaken to “assess applications for export authorizations according to strict national regulations and procedures”.⁴¹⁸ According to Frey, it is the principle of secondary responsibility for violations committed by the recipient State that “gives rise to binding legal obligations on all States to regulate the transfer of small arms.”⁴¹⁹ At least in the context of SALW trafficking, it could be argued that there is growing

⁴¹² OETER, S., *Neutralität und Waffenhandel*, 212: “Die Grenzen des anzustrebenden Nichteinmischung werden insoweit sehr weit gezogen, deutlich weiter, als es nach klassischem Neutralitätsrecht erforderlich wäre. Gleiches lässt sich für den Umfang der von den neutralitätspolitischen Exportkontrollen erfassten Warenlisten kaum behaupten.”

⁴¹³ *Ibid.*, 231-235

⁴¹⁴ *Ibid.*, 231, see also YAKEMTCHOUK, R., “Le transit international des armes de guerre”, 362 *et seq.*

⁴¹⁵ *Report of the Group of Experts on the problem of ammunition and explosives*, A/54/155, 29 June 1999, § 62 *et seq.*

⁴¹⁶ GILLARD, E., *What is legal? What is illegal? ...*, 1

⁴¹⁷ See for instance OAS *Model Regulations* of 1997, art. IX of the *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, 14 November 1997, art. 10 of the 2004 *Nairobi Protocol*; art. 3 of the *EU Council Common Position 2003 on arms brokering*.

⁴¹⁸ §11 of Part II *Programme of Action*, A/CONF.192/15

⁴¹⁹ *Progress Report*, E/CN.4/Sub.2/2004/37, §22

consensus about a duty to strengthen national export control systems.⁴²⁰ The same may even be held for arms transfers in general, considering the GA's reiterated calls on States "to ensure that they have in place an adequate body of laws and administrative machinery for regulating and monitoring effectively their transfers of arms".⁴²¹ The risk that States could be tempted to evade international responsibility by keeping their export control systems inefficient has prompted Oeter to argue, *de lege ferenda*, that international obligations of States create a correlative duty to have a minimal system of control in place.⁴²²

Furthermore, the control of CAT makes little sense without ensuring that the arms are not immediately re-exported to another State or diverted.⁴²³ The major suppliers do require end-use certificates for their exports to varying degrees.⁴²⁴ The US undoubtedly imposes the most stringent requirements in this regard.⁴²⁵ In this context, the *Fowler Report* recommends "that there should be increased accountability in the sale of such armaments with the onus of exercising due diligence in determining the actual end-users resting squarely on the supplier."⁴²⁶

In spite of all these arguments, it is clear that no treaty *explicitly* obliges States to have a licensing system in place or to require end-use certificates. Moreover, in *Tugar v. Italy*, the ECmHR clearly rejected the argument that such an obligation may be derived from the *ECHR*:

"The Commission observes in this respect that no right to have the transfer of arms regulated or other such measures taken by a High Contracting Party is as such guaranteed by the Convention".⁴²⁷

Despite indications to the contrary, it seems to that a customary rule requiring States to create control systems of a particular kind or intensity does not exist at present.⁴²⁸ In international law, it is usually left

⁴²⁰ Frey concludes that the non-binding political agreements on the control of SALW transfers "do offer evidence of an emerging international consensus regarding the need for regulation of, at least, illicit arms transfers." *Working Paper*, E/CN.4/Sub.2/2002/39, § 28

⁴²¹ §4 of A/RES/46/36 H, 6 December 1991; see also A/RES/48/75 F, 16 December 1993; A/RES/57/66, 30 December 2002; 30 December 2002; and in particular A/Res/58/42, 17 December 2003; See also §2 of Part II *Programme of Action*, A/CONF.192/15, 20 July 2001

⁴²² OETER, S., *Neutralität und Waffenhandel*, 240; *Report of the Group of Experts on the problem of ammunition and explosives*, A/54/155, 29 June 1999, § 41: "National authorities should be responsible for ensuring that transfers are legal and safe...Whether a transfer is determined to be legitimate or not, the system depends upon laws and regulations and appropriate authorities to enforce them."

⁴²³ The UK government has been criticised for issuing 'incorporation' licences for exports to Israel. These licences allow Israel to incorporate exported UK equipment into its own weapons systems, which are then exported to third countries, such as China – currently under an EU embargo. "New report shows Government still failing to effectively control arms sales", *Saferworld*, Press Release, 11 January 2005

⁴²⁴ End-use certificates can constitute an integral part of an intergovernmental agreement on arms transfers, or States require their companies to include such a requirement in all export agreements.

⁴²⁵ §123.9 *ITAR*; For more information on this subject see YAKEMTCHOUK, R., "Le respect de la destination des armes acquises à l'étranger: la clause de finalité d'emploi et de non-réexportation"

⁴²⁶ Recommendation no.3 *Report of the Panel of Experts established by the Security Council pursuant to resolution 1237 (1999)*, S/2000/203, 10 March 2000, §54

⁴²⁷ *Rasheed Haya Tugar v. Italy*, (Application no. 22869/93), European Commission of Human Rights (First Chamber), Decision on Admissibility, 18 October 1995, 3

⁴²⁸ BOTHE, M., MARAUHN, T., "The Arms Trade: Comparative Aspects of Law", 42: "State practice is too diverse in order to derive a common standard from the confused material even less to be considered as a basis for an emerging rule of

to the State to determine how to implement and ensure respect for its international legal obligations. Undisputedly, however, no State can invoke the lack or inadequacy of its export control system to evade responsibility for violations of its obligations under international law.⁴²⁹

II.G.3 Obstacles to the Judicial Review of Governmental Export Decisions

Governments of several supplier States have been criticised by NGOs for arms exports to countries with a bad human rights record, or where IHL is widely violated⁴³⁰ but the use of judicial mechanisms for the interpretation and implementation of export control legislation has so far been limited to a few cases of alleged violations.⁴³¹ The application of national export laws and regulations by the Belgian, Dutch and British governments has in recent years been challenged before national courts.⁴³² I will analyse this very small body of case law with a view to identifying obstacles to the exercise of judicial review.

All of the cases under consideration have been declared inadmissible on procedural grounds. A Dutch civil law court rejected the case before it because the applicants had not exhausted the remedies available to them under public law.⁴³³ In Belgium, the ‘Conseil d’Etat’ rejected three requests for suspension of the government’s decision to authorise the export of 5’500 machine-guns to Nepal.⁴³⁴ The requests were based on the Belgian law on arms transfers of 5 August 1991, which stipulates that no export licence shall be granted if the recipient country “doit faire face à de graves tensions internes qui

customary international law.” Concurring on this point: OETER, S., *Neutralität und Waffenhandel*, 222, ROESER, T., *Völkerrechtliche Aspekte des internationalen Handels...*, 260

⁴²⁹ PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, Series A/B, No. 44, 24: “...a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”; Art. 32 *ILC Draft Articles*.

⁴³⁰ Despite its detailed new export legislation, the UK granted export licences to Colombia, Indonesia, Israel, Nepal and Saudi Arabia, countries with a questionable human rights record, between January 2003 and June 2004 (“New report shows Government still failing to effectively control arms sales”, *Saferworld*, Press Release, 11 January 2005). The 2003 Export Report by the German government documenting exports to Columbia, Cambodia, Kazakhstan and Pakistan, and especially to the US, a country engaged in several wars, is the object of critique in “Lustiger Rüstungshandel: Gut für die Rüstungswirtschaft – schlecht für die Menschheit”, *Bundesausschuss Friedensratschlag*, Press Release, 1 December 2004

⁴³¹ ANTHONY, I., “National Policies and Regional Agreements on Arms Exports”, 53

⁴³² According to internet-based news media articles, a lawsuit against the US and Israeli governments for arms transfers to Israel and violations of IHL and HRL committed therewith, was filed with the US District Court for the District of Columbia. The author was not able to secure material on the case. “U.S. Lawyers file Palestinian Suit against Sharon/Bush”, *Islam Online & News Agencies*, 18 July 2002

⁴³³ In this first instance civil law case decided by the Dutch ‘Rechtbank’s Gravenhage’, 22 NGOs requested the government to refrain with immediate effect from granting export licences for strategic goods to Israel, to prevent the re-export and transit of military goods to the same destination, and to revoke any existing export licences for strategic goods to Israel. The plaintiffs based their case mainly on the *EU Code of Conduct. Law et. al. v. de Staat der Nederlanden*, (Case no. KG 02/571), Rechtbank ‘s-Gravenhage, Sector civiel recht, Uitspraak, 29 May 2002

⁴³⁴ In the first request, a private person and a civil society organisation asked the ‘Conseil d’Etat’ to suspend the government’s export decision, *De VZW “Nepalese People’s Progressive Forum, Belgium” et al. v. de Belgische Staat*, (Case no. 110.185), Raad van State, Afdeling Administratie, Arrest, 12 September 2002. Another request for suspension was introduced in the name of a Nepali human rights lawyer and activist (*Gopal Siwakoti Chintan et al. v. l’Etat belge*, (Case no. 112.733), Conseil d’Etat, Section d’Administration, Arrêt, 20 November 2002) and a third one by a Belgian parliamentarian (*Brepoels Frieda v. L’Etat belge*, (Case no. 112.734), Conseil d’Etat, Section d’Administration, Arrêt, 20 November 2002).

sont de nature à conduire à un conflit armé” or “est engagé dans une guerre civile”.⁴³⁵ The ‘Conseil d’Etat’ rejected two requests because the applicants failed to prove that the export decision put them *personally* at a “risque de préjudice grave difficilement réparable” in the form of a violation of their physical integrity committed with the exported arms. Another request, introduced by a Belgian parliamentarian who based her competence to seize the Council on her function, was rejected on the ground that appeal for annulment of administrative decisions was only open to parties “justifiant d’une lésion ou d’un intérêt”. The Council considered that the applicant had no specific functional interest in the matter and that the law excluded the possibility of an *actio popularis*. These grounds of refusal mainly concern the applicants’ lack of *locus standi*.⁴³⁶

Probably the most interesting case concerns a claim for judicial review brought against the government of the UK by a person originating from the Indonesian region of Aceh.⁴³⁷ The claim was based on the *Consolidated Criteria for Arms Exports*, which constitute statutory guidance under section 9§8 of the 2002 *Export Control Act* and to which any person exercising licensing powers under this section “shall have regard”.⁴³⁸ The defendants relied on the fact that they had received repeated assurances by the Indonesian government that the military equipment would not be used in Aceh, and they pointed to the absence of any occasion substantiated by appropriate evidence on which such equipment had in fact been used in violation of HRL. The claimant argued in response that this approach lowered the threshold for risk assessment actually required under *the Consolidated Criteria*,⁴³⁹ which did not require that military equipment *had actually been used* for internal repression, but rather that no licences are issued *if there is “a clear risk” that equipment “might be used”* for such purposes. The permission for judicial review was refused on the grounds that evidence did not support the applicants’ contention that the clear risk test had not been applied. As this case illustrates, the lack of transparency in export procedures constitutes an important obstacle to the judicial review of licensing decisions.

⁴³⁵ Art. 4 *Loi relative à l’importation, à l’exportation et au transit d’armes*...5 August 1991

⁴³⁶ The request introduced by the parliamentarian also raised the question whether the government had by its decisions *de facto* formulated new criteria not contained in the 1991 law or created exceptions thereto, which would in the applicant’s view interfere with the law-making prerogatives of the legislative. The Council refused to see in the government’s decisions a modification of the 1991 law and rejected the argument, considering that decisions on export licenses did not fall within the legislator’s functions.

⁴³⁷ *The Queen on the Application of Aguswandi v. The Secretary of State for Trade and Industry and the Secretary of State for Foreign and Commonwealth Affairs*, (Case No. CO/6509/2003), High Court, Queens Bench Division, Judgment on Application for Judicial Review, 29 March 2004. The author was not able to secure official court documents. Unofficial summaries are on file with the author. The central issue was whether the government was complying with its own published and stated policy on the criteria to be applied in determining whether to grant export licences in respect of military equipment destined for Indonesia.

⁴³⁸ Art. 9§5 *Export Control Act 2002*

⁴³⁹ Criterion 2 of the *Consolidated EU and National Arms Export Licensing Criteria* provides that “the Government will: a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression”

Interestingly, the judge noted that he would not have refused permission on the basis that the claimant did not have a sufficient interest in the matter, a ground raised by the defendants. It must be assumed that the claimant was successful in arguing that he had *locus standi*, either because he had “a direct personal interest in the subject”, on the basis that he himself was from Aceh, was prevented from returning, and had still friends and colleagues remaining there and/or because the application represented a “clear and serious issue of public importance”. In contrast to the Belgian case, therefore, applicants’ *locus standi* may not constitute an important obstacle to judicial review in the UK.⁴⁴⁰

It seems that one of the primary reasons for the almost complete lack of case law resides in the fact that precise licensing criteria, if at all formulated, are contained in legally non-binding documents, which are difficult to invoke before judicial organs. Even if criteria are laid down in national laws, however, courts are generally reluctant to challenge government decisions in this area, arguing that such acts of government belong to the realm of national policy and are not subject to judicial review.⁴⁴¹

II.G.4 Findings

“La compétence quasi exclusive laissée aux Etats émiette les sources juridiques de ce commerce, au moins formellement, en autant de réglementations que d’Etats fournisseurs.”⁴⁴²

States are under an obligation to comply with treaty obligations in good faith,⁴⁴³ and to abide by international law in general. How States comply with these obligations is often not regulated by international law. The foregoing overview over national arms export systems illustrates the differences in export legislation and policies among the major supplier States. The almost complete lack of case law and the fact that no case has been admitted for substantive review illustrates how difficult it is to exercise democratic control over the interpretation and application by the government of vaguely formulated licensing regulations. The role of the judiciary and the parliament (with the notable exception

⁴⁴⁰ Another issue raised in *The Queen on the Application of Aguswandi* concerns the legal value of policy documents containing licensing criteria. The defendants asserted that the *EU Code of Conduct* was not a binding legal instrument. In response, the applicant argued with reference to case law that the government had incorporated the *Code of Conduct* in the form of the *Consolidated Criteria* against which it had committed itself to assess applications for licences; that the *Consolidated Criteria* had acquired the status of statutory guidance; and that it was well-established that breach of a public authority’s own stated policy amounts to a breach of public law.

⁴⁴¹ This line of argument constituted the main ground of refusal of an earlier application for judicial review before the British High Court. *R v. President of the Board of Trade, Ex parte TAPOL (The Campaign Against Arms Trade and The World Development Movement)*, (CO/944/97), High Court, Queens Bench Division, Judgment on Application for Judicial Review, 25 March 1997

In 1990, a French court declared itself incompetent to decide the case brought by a human rights organisation against a French company exporting weapons to Iraq, arguing that the sales contract “ne constitue que l’exécution, par l’intermédiaire de cette société, d’un acte de gouvernement, relevant de la politique nationale qui échappe ainsi, sous l’aspect moral qui est en cause, à la compétence de l’autorité judiciaire” (Cour d’appel de Versailles, Décision, 22 March 1990). While the ‘Cour de cassation de France’ reversed this judgment and allowed the judicial review of private sales contracts, it did so by separating the conclusion of the contract from the governmental authorisation and did not pronounce itself on the legality of the latter. (Cour de cassation de France, 30 June 1992). For more information on these cases, see PRIoux, R., “Les lois applicables aux contrats internationaux de vente d’armes”, 218 *et seq.*

⁴⁴² MARTINEZ, J.-C., “Le droit international et le commerce des armes”, 146

⁴⁴³ Art. 26 VCLT

of the US Congress) is very limited in the area of arms exports.⁴⁴⁴ Even though there may not be a legal obligation to have a strict export control system in place, the international community's growing concern for such common values as fundamental human rights and humanitarian law point to an emerging consensus about the desirability to exercise strict control over governmental arms exports.

II.H Conclusion of Part II

“Pour les armements conventionnels, faute de tout texte général, les bases juridiques de leur commerce ne peuvent être qu'empiriques. Les règles sont posées au coup par coup dans des accords de coopération, des accords de principe, ou *Memoranda of understanding*, et surtout dans les contrats même de vente. Le consensualisme, qui domine ici la matière, amène avec sa liberté contractuelle la diversité des règles.”⁴⁴⁵

I concur with this statement by Martinez, in that the few rules of international law that limit States' freedom to transfer conventional arms are quite limited in their scope of application. The overview included in Annex VI illustrates that CAT of weapons whose use is not prohibited in times of peace among States not engaged in an armed conflict are not subject to any limitations. Should violations of HRL be committed with these arms, suppliers can only be held responsible on the basis of Article 16 of the *ILC Draft Articles*.

CAT have traditionally been analysed as an arms control issue, dominated by concerns of reciprocity, national security considerations and strategic stability. Accordingly, ACL is characterised by synallagmatic relations and is mainly treaty law. By moving the issue of CAT from the field of arms control into the realm of IHL and HRL, it becomes possible to apply legal concepts that are foreign to ACL. In my view this approach is justified by the fact that civil society, academia and policy-makers have established a link between CAT and humanitarian issues. Therefore, I consider it admissible to have recourse to customary law and apply concepts of *erga omnes* obligations and analogy-based reasoning to this matter. As the preceding analysis shows, depending on the approach chosen, the scope of application of transfer prohibitions is more or less extensive. For CAT to be legal under international law, they have to conform to all international legal norms pertaining to them. Interestingly, it is therefore IHL that sets the highest standard.

⁴⁴⁴ See also BOTHE, M., MARAUHN, T., “The Arms Trade: Comparative Aspects of Law”, 33-34

⁴⁴⁵ MARTINEZ, J.-C., “Le droit international et le commerce des armes”, 145

III The Time is Ripe for an Arms Trade Treaty

“It is very unlikely that disarmament will ever take place if it must wait for the initiatives of governments and experts. It will only come about as the expression of the political will of people in many parts of the world.”⁴⁴⁶

III.A The Draft Framework Convention on International Arms Transfers (ATT)

Driven by “the political will of people in many parts of the world”, a group of Nobel Peace Laureates led by former Costa Rican President Oscar Arias proposed a comprehensive International Code of Conduct to regulate CAT in 1995. The present version of the *Draft Framework Convention on International Arms Transfers (ATT)* is endorsed by a group of NGOs, including Amnesty International, the Arias Foundation, BASIC, IANSA, Oxfam, Ploughshares and Saferworld. An increasing number of governments, including Costa Rica, Finland, Kenya, Mali, New Zealand, and the UK have expressed their support for an international treaty to control CAT. That such a treaty should be adopted has also been underlined by the Special Rapporteur on the prevention of human rights violations committed with SALW.⁴⁴⁷

Two slightly different versions of the ATT will be examined here, the more recent *Working Draft of 25 May 2004*,⁴⁴⁸ and an older but more comprehensive version dating from 2001.⁴⁴⁹ The ATT is conceived as a framework instrument that contemplates the elaboration of a legally binding regime in a step-by-step manner. The *Draft Framework Convention* itself identifies core substantive prohibitions and establishes mechanisms necessary for their effective implementation. Technical issues and additional commitments would be included in additional protocols to which States Parties to the ATT could accede.⁴⁵⁰ The fundamental principle is expressed in Article 1 according to which the Contracting Parties shall subject all international arms transfers to a licensing system.⁴⁵¹

III.B The ATT's Scope of Application

In the words of the Commentary to the 2004 version, the ATT would

“crystallize, in the context of international arms transfers, commitments already assumed by States *inter alia* under the United Nations Charter, the Geneva Conventions of 1949, other widely supported international conventions, and established principles of customary international law ...”⁴⁵²

⁴⁴⁶ Olaf Palme, cited in ALSTON, P., “Peace, Disarmament and Human Rights”, 327

⁴⁴⁷ *Prevention of human rights violations committed with small arms and light weapons*, Preliminary report submitted by Barbara Frey, Special Rapporteur, E/CN.4/Sub.2/2003/29, 25 June 2003, §58, *Progress report of Barbara Frey, Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons*, E/CN.4/Sub.2/2004/37, 21 June 2004, §55

⁴⁴⁸ *Draft Framework Convention on International Arms Transfers*, Control Arms Campaign, Working Draft of 25 May 2004, see Annex I *infra*.

⁴⁴⁹ *Draft Framework Convention on International Arms Transfers*, The Commission of Nobel Peace Laureates' Initiative to Control Arms, Working document, 05 March 2001, see Annex II *infra*.

⁴⁵⁰ Art. 9 ATT 2004, Art. 8 ATT 2001

⁴⁵¹ Art. 1 ATT 2004 and 2001

⁴⁵² ATT 2004, Notes and Comments, 4

This is a puzzling statement. If it is true that the *ATT* crystallises State's commitments, these commitments cannot be "already assumed by States". According to the ICJ's judgment in the *North Sea Continental Shelf* cases, a treaty provision can be *declaratory* of a pre-existing mandatory rule of customary international law.⁴⁵³ *A contrario*, if a treaty, through its adoption, *crystallises* a customary rule, the norm was not legally binding before the treaty was adopted. The Commentary to the 2001 version is clearer in that it asserts that the *ATT* "codifies rules that currently exist in international law. It does not attempt to impose new limitations or rules."⁴⁵⁴ This section serves to determine whether the adoption of the *ATT* as it stands now would merely restate pre-existing obligations of States or whether it would create new ones and as such contribute to the development of international legal regulation of CAT.

III.B.1 Applicability *ratione temporis* and *ratione personae*

Neither version of the *ATT* contains a provision specifying its scope of application. No preambular clauses have been proposed that could indicate its fields of application *ratione personae* and *ratione temporis*, and possible reasons for its termination or suspension. It may be argued that a treaty regulating arms transfers is regulated by ACL and may be terminated or suspended if hostilities break out.⁴⁵⁵ Lysén notes that

"...certain agreements may, by their very nature, by limiting the number of troops or weapons, become incompatible with the requirements of the conduct of war."⁴⁵⁶

The same authority comes to the conclusion that most arms control agreements cannot be suspended or terminated in the event of an IAC if they establish permanent regimes or because such was the intention of the drafters. In the absence of a specific provision, it is debatable whether the *ATT* establishes a permanent regime or whether, on the contrary, its application is incompatible with the outbreak of hostilities. A related question concerns the termination or suspension of the *ATT* in the event of a breach of the treaty by another party. Assuming that the *ATT* is an arms control treaty, a violation would under certain circumstances entitle other parties to suspend its application by virtue of Article 60§2 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT). I hold that the *ATT* is a typical example of a cross-over convention. With a view to its humanitarian object and purpose and considering that its provisions relate to the protection of the human person, it cannot be suspended or terminated by virtue of Article 60§5 of the VCLT.⁴⁵⁷ In my opinion, it is clearly desirable that the *ATT* applies at all times. Because this is not self-explanatory, I would strongly encourage the drafters to

⁴⁵³ ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, 20 February 1969, §60 *et seq.*

⁴⁵⁴ Footnote (i) of the *ATT 2001*

⁴⁵⁵ The VCLT exhaustively lists grounds of termination and suspension of treaties, yet by virtue of art. 73, the effects of an outbreak of hostilities on treaties are exempted from its scope of application. See in particular LYSÉN, G., *The International Regulation of Armaments: The Law of Disarmament*, Iustus Förlag, Uppsala, 1990, 171-191; See also AUST, A., *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2000, 234 and 243-244

⁴⁵⁶ LYSÉN, G., *The International Regulation of Armaments...*, 191. (Emphasis added.)

make their intention clear and include an Article specifying that the obligations assumed under the *ATT* apply *in all circumstances*.

The *ATT*'s applicability *ratione personae* does not pose any particular problems. It applies to all States Parties. Here too, it seems a good idea to clarify that States Parties are under an obligation to abide by the provisions of the treaty even if they transfer arms to States not Parties to the *ATT*. In imitation of the *Ottawa Convention*, the *ATT* could specify that its transfer prohibitions apply to *direct and indirect transfers to anyone*.

III.B.2 Which Arms are regulated by the ATT?

The *ATT*'s applicability *ratione materiae* is not yet clear. The text circulated at the UN Biennial Meeting of States on the SALW Programme of Action in July 2003 only applies to SALW as defined in the *Report of the Panel of Governmental Experts on Small Arms*.⁴⁵⁸ This definition excludes major conventional weapons, and makes no mention of parts and components. Considering that many violations of IHL and HRL are committed with combat helicopters, it is not useful to limit the scope of the *ATT* to the category of SALW. The 2001 version has a much broader scope of application. By virtue of its Article 9, it applies to SALW, major weapons systems, paramilitary police and security equipment, as well as their parts, components, ammunition, accessories and related equipment.⁴⁵⁹ Such a definition constitutes a significant step forward in the regulation of arms under international law. For the first time in history, the transfer of arms not primarily intended for military use would be regulated by an international legally binding instrument. The inclusion of parts and components is of great importance for an effective regulation of CAT.⁴⁶⁰ Letter (d) of the same paragraph even includes military, police and security training and the provision of expertise. Letter (e) mentions sensitive military and dual-use technologies. This definition of "arms" is very broad, and even though it centres on conventional weapons, it also includes chemical irritants.⁴⁶¹ From a political point of view, it is questionable whether the inclusion of military training and chemical agents is feasible. The inclusion of the latter would have the advantage of regulating the use of chemical agents for the purposes of riot control, which is not prohibited under the *Chemical Weapons Convention*.⁴⁶²

III.B.3 The Arms Trade Treaty's Definition of "Transfer"

Article 7 of the 2004 version defines 'international transfers' as

⁴⁵⁷ Art. 60§5 VCLT

⁴⁵⁸ Art. 7§1 *ATT 2004*. *N.B.* Art.7§1 contains an incorrect reference. The Report of the Panel of Governmental Experts on Small Arms is annexed to the GA document number A/52/298 of 27 August 1997.

⁴⁵⁹ Art. 9§a (a)-(c) *ATT 2001*

⁴⁶⁰ For more information, see "Lock, Stock, and Barrel-How British Arms components Add up to Deadly Weapons", *Control Arms Campaign*, February 2004

⁴⁶¹ Art. 9§1(e) *in fine ATT 2001*

⁴⁶² Art. 2§9(d) *Chemical Weapons Convention*

“transfer, shipment or other movement, of whatever form, of arms from or across the territory of a Contracting Party.”⁴⁶³

The draft of 2001 includes the following definition:

“ ‘International transfers’ shall refer to the movement of arms between two or more jurisdictions pursuant to an agreement regardless of whether for consideration or otherwise.”⁴⁶⁴

Concerning the first definition, it is respectfully submitted that to define “international transfers” as “transfer” is not very useful. Both definitions focus on the physical movement (including shipment) of arms and do not mention the transfer of title, even though transfer of title may be implied in the 2001 definition (movement between jurisdictions). For more clarity, a definition similar to the one given in Article 2§4 of the *Ottawa Convention* could be adopted. In this sense, *international transfer would involve, in addition to the physical movement of arms into or from national territory, the transfer of title to and control over the arms, but does not involve the transfer of territory containing arms stockpiles*. This definition has the advantage of covering also non-physical transfers. In addition, it also embraces import of arms, an issue completely omitted in the ATT’s 2004 definition. Transit is necessarily covered by both transfers “into” or “from” national territory. The significance of the reference made to “an agreement” in the 2001 definition is not clear. If it is meant to exclude transfers in violation of the national law of one of the States involved, this should be regulated in Annex I as a minimum requirement for licence authorisations. The expression “regardless of whether for consideration or otherwise” may be intended to clarify that transfer does not only refer to trade, but also to transfers in form of military aid, or for demonstration purposes and the like.

III.C Substantive Provisions

III.C.1 Absolute Prohibitions

Article 2 absolutely prohibits certain transfers followed by a non-exhaustive list of examples.

The 2004 version reads as follows:

A Contracting Party shall not authorise international transfers of arms which would violate its obligations under international law. These obligations include those arising under or pursuant to:

- (a) the Charter of the United Nations, including decisions of the United Nations Security Council;
- (b) international treaties by which that Contracting Party is bound;
- (c) the prohibition on the use of arms that are incapable of distinguishing between combatants and civilians or are of a nature to cause superfluous injury or unnecessary suffering; and
- (d) customary international law.⁴⁶⁵

The chapeau of this provision seems to be nothing more than a simple restatement of States’ obligation to perform treaties in good faith and abide by international law in general. That States are not allowed to authorise transfers that violate specific transfer prohibitions applying to them is evident. Paragraph (b)

⁴⁶³ Art. 7§2 ATT 2004

⁴⁶⁴ Art. 9§2 ATT 2001

would for example apply to States Parties to the *Ottawa Convention*, whose Article 1§b prohibits transfers of APM. The commentary to Article 2 suggests that this provision goes further and “codifies express limitations on the transfer of arms based on existing express limitations on manufacture, possession, use and transfer of arms”.⁴⁶⁶ Which express limitations on manufacture, possession or use form the basis of transfer prohibitions? While the prohibition of use may under common Article 1 indeed give rise to a transfer prohibition, the same cannot be asserted in general for prohibitions on the production or possession of arms. The commentary to the 2001 version considers that this article only applies to treaties containing express transfer prohibitions.⁴⁶⁷ Furthermore, I fail to see what “obligations under international law”, other than the express obligation to implement SC embargoes, would arise under the *UNC* in connection with paragraph (a). The formulation of the 2001 version, which does not include such a general but vague reference to the *Charter* is preferable.

Paragraph (c) refers to an obligation pursuant to the prohibition on the use of arms which are inherently indiscriminate or which violate the SIRUS principle. The commentary recognises that such an obligation is nowhere stated explicitly but it considers such transfer irreconcilable with the prohibition on the use of these arms.⁴⁶⁸ In the absence of specific treaty provisions on transfer, applying in all circumstances, it is necessary to rely on common Article 1 *GCI-IV* to establish a transfer prohibition of such weapons. As the exact meaning of common Article 1 *GCI-IV* is quite uncertain, it seems advisable to adopt the formulation of the 2001 draft, which explicitly prohibits transfers of arms the use of which is prohibited by IHL.⁴⁶⁹ This prohibition applies also to weapons whose use is not expressly outlawed by a treaty, but it does not solve the problem of divergent opinions on whether a certain arm violates principles of IHL or not.⁴⁷⁰

Paragraph (d) makes reference to a source of international law in general. Its commentary specifies that transfer prohibitions arise under the principle of non-intervention and non-interference in the internal affairs of other States. It may be more useful to explicitly mention transfer prohibitions that are of customary nature, first and foremost those arising under the *law of neutrality*.

III.C.2 Prohibitions based on the Likely Use of the Arms

Article 3 of the 2004 draft prohibits the authorisation of transfers in circumstances in which the State “has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be used” (a) in breach of the *UNC* and corresponding customary obligations,

⁴⁶⁵ Art. 2 *ATT 2004*

⁴⁶⁶ *ATT 2004*, Notes and Comments, 5

⁴⁶⁷ Footnote (vi), *ATT 2001*

⁴⁶⁸ *ATT 2004*, Notes and Comments, 5

⁴⁶⁹ Art. 2§c *ATT 2001*

⁴⁷⁰ According to the Commentary to the 2001 draft a transfer prohibition “should be read into earlier instruments – such as the first three protocols to the CCW” (footnote (vii)). In my view, however, a general transfer prohibition of certain mines (Prot.II) and incendiary weapons (Prot.III) cannot be established because their use is not prohibited in all circumstances.

in particular the prohibition of the threat or use of force; (b) in the commission of serious violations of HRL; (c) in the commission of serious violations of IHL; (d) in the commission of genocide or crimes against humanity; or (e) diverted and used in the commission of any of the foregoing acts. The formulation of the header is slightly different in the 2001 version, in that it prohibits “transfers of arms in circumstances in which there exists a reasonable risk that the arms would be used” for the specified purposes. Both definitions are inspired by Article 16 of the *ILC Draft Articles on State Responsibility*. In contrast to Article 16, States are prohibited from transferring arms not only if they *know* that the arms are used to commit a wrongful act, but also if they *reasonably ought to know*, respectively, if there is a *reasonable risk*. This goes clearly beyond Article 16, which sets a very high threshold for the attribution of accomplice responsibility, even requiring a degree of intent. The *ATT*'s less stringent formulation finds its justification in common Article 1 *GCI-IV* pursuant to which States have to take positive action to prevent violations of IHL.

The prohibition of Article 2(a) would certainly apply to transfers to States engaged in an IAC in violation of Article 2§4 *UNC*, such as, arguably, the invasions of Afghanistan and Iraq. Clearly excluded from this paragraph are transfers to States using force in the exercise of their inherent right of self-defence and to States involved in a NIAC. In practice it may be difficult to determine who is the aggressor, or whether a NIAC has become internationalised. Under the 2001 version, these problems do not arise because it mentions situations constituting a threat to the peace or a breach of the peace and could hence also apply to situations of NIAC or internal disturbances, but will in practice depend on the SC's qualification of the situation.⁴⁷¹

While a prohibition of complicity in the commission of IHL violations (paragraph (c)) can also be based on common Article 1, paragraph (b) constitutes the first explicit primary rule of international law prohibiting transfers of arms likely to be used to commit serious violations of HRL. Its inclusion covers the misuse of arms unrelated to armed conflicts and is of great importance.⁴⁷²

Paragraph (d) applies to the commission of genocide or crimes against humanity. Even though the definitions of these two international crimes are quite undisputed today, the practical importance of this paragraph may be marginal. Whether acts of genocide or crimes against humanity are committed in a country is usually determined *ex post facto* by a judicial organ. In addition, all acts that may be covered by this paragraph necessarily fall under paragraph (b) and/or (c) depending on whether an armed conflict existed at the time of commission.

The last paragraph of this article specifies that if a State knows or reasonably ought to know (if there exists a reasonable risk) that the arms it transfers are likely to be *diverted* and used to commit any

⁴⁷¹ Art.2§a *ATT 2001*

⁴⁷² As standards of evaluation serve the rights enshrined in the relevant treaties, e.g. the *ICCPR*, *ICESCR*, *ECHR*, etc. for HRL and the *GCI-IV* for IHL. Indications as to what constitutes a “serious” violation can be gained from relevant case law.

of the preceding acts, it shall not authorise the transfer. Diversion is not defined in the draft convention but is usually used to refer to the turning aside of arms from their due course, involving theft, unauthorised re-direction or loss of the arms. A Contracting State may also try to evade their obligations under the *ATT* by transferring arms to a State not Party to the *ATT* in the knowledge that the latter will *re-export* the arms to a State where they are likely to be used in violation of international law. In practice it will be difficult to determine whether a supplier ought reasonably to have known that the arms will be diverted or re-exported for prohibited purposes, but it seems nevertheless important to *cover re-export explicitly*. On the other hand, paragraph (e) does not add substantively to the foregoing prohibitions, because no article in the *ATT* requires that it is the recipient State that commits the violation of international law. Independently of who misuses the arms on whose territory, the supplier or transit State has to refrain from authorising the transfer.

III.C.3 Additional Restrictions

Article 4 creates a presumption against the authorisation of transfers, without creating a strict prohibition, in the situations exhaustively listed. The provision requires Contracting States to take into account whether transfers of arms of the kind under consideration are likely to (a) be used for or to facilitate the commission of violent crimes; (b) adversely affect regional security; (c) adversely affect sustainable development; or (d) be diverted and used in a manner contrary to the preceding subparagraphs.⁴⁷³

Although this article does not outright prohibit certain transfers, it may be worth noting that violent crimes and adverse effects on sustainable development may in certain circumstances qualify as serious violations of HRL and hence fall under the absolute prohibition of Article 3§b. The practical enforcement of this article presupposes that it can be verified if the State did in fact take into account the considerations set out, a problem not addressed here.

III.D Conclusion of Part III

It may be concluded that the *ATT* as it stands now merely restates States' pre-existing obligations assumed under the *Ottawa Convention*, *Protocol IV* and *Revised Protocol II* to the *CCW*. A provision on its scope of application should be included to ensure that its transfer prohibitions extend to *all times* and to *all actors*. The *ATT* does not add anything in particular to UN member States' pre-existing obligation not to violate mandatory arms embargoes imposed by the SC. As it stands now, it does not substantially develop the transfer prohibition of arms whose use is contrary to principles of IHL beyond what is required of States under common Article 1 *GCI-IV*, but the prohibition to authorise arms transfers *likely* to be used in the commission of serious violations of *IHL*, implicit in common Article 1,

⁴⁷³ Art. 4 *ATT 2004*; Art. 4(b) of the *ATT 2001* contains also reference to political stability.

would for the first time be explicitly expressed in an international treaty. This would contribute to the determination of the exact meaning of this enigmatic provision.

The *ATT*'s transfer prohibition of arms that are *likely* to be used to commit serious violations of *HRL*, on the other hand, can be said to crystallise an emerging norm of customary international law. As explained before, this prohibition is of utmost importance. The presumption against the authorisation in the circumstances listed in Article 4 of the 2004 draft is also new and does not constitute an existing legal obligation of States. Finally, the definition of arms in the 2001 version would greatly improve States' implementation of their obligations pursuant to the law of neutrality and SC embargoes. In my opinion, therefore, an *ATT* is needed not so much because it gathers together pre-existing rules limiting States' freedom to transfer arms,⁴⁷⁴ but because it creates new, legally binding rules that will hopefully contribute to reduce the violations of *HRL* committed with imported weapons.

Surprisingly, the *ATT* does not even mention neutrality law and it does not include some of the criteria that appear in the great majority of international codes of conduct and national export instruments. That transfers may endanger international or regional peace, security or stability has been reduced to an obligation to "take into account" whether transfers would have "adverse effects on regional security". Transfers that aggravate or prolong ongoing conflicts or exacerbate tensions are not explicitly included.

In conclusion, I agree with Bothe and Marauhn that, in the long run, there is no alternative to developing an international regime not only controlling but also restraining the arms trade.⁴⁷⁵ And while Martinez regretted that "l'élaboration d'une convention internationale sur le commerce des armes, n'est pas vraiment objet de préoccupation",⁴⁷⁶ twenty years later, the time may finally be ripe for precisely such a convention.

⁴⁷⁴ GILLARD, E., *What is legal? What is illegal?...*, §54, 14

⁴⁷⁵ BOTHE, M., MARAUHN, T., "The Arms Trade: Comparative Aspects of Law", 24

⁴⁷⁶ MARTINEZ, J.-C., "Le droit international et le commerce des armes", 143

Conclusion

“The international transfer of conventional arms is a unique part of international trade and relations; in the final analysis it involves tools designed to kill and destroy. It should not be therefore primarily driven by economic or commercial considerations.”⁴⁷⁷

Part I provided a comprehensive overview over past and present attempts to regulate CAT, by legal and political means. The only legally binding text on CAT that ever entered into force dates from 1890. In recent years, several international codes of conduct containing licensing criteria have been adopted in diverse fora, which points to the growing awareness of the problems created by the unregulated and unrestrained CAT. This Part also illustrated the difficulties in defining conventional arms and their transfer under international law, an issue which deserves further consideration.

The second Part examined the legality of CAT under international law with a special focus on IHL and HRL. Based on the assumption that ACL is the branch of international law most likely to contain rules on CAT, I first examined existing treaties containing explicit transfer restrictions. Due to the fundamentally synallagmatic nature of ACL and its emphasis on treaty law, no other transfer prohibitions could be established under ACL. I then turned to evaluate the legality of CAT in the light of IHL and HRL, justifying the application of humanitarian and human rights norms to CAT with reference to the concept of human security.⁴⁷⁸ Given that the trade of arms is not likely to be abandoned, the negative impact of uncontrolled CAT on the respect of human rights supports policies and global agreements that recognise the importance of human security concerns in controlling the transfer of arms within the international community.⁴⁷⁹ While common Article 1 *GCI-IV* constitutes the main legal basis for transfer prohibitions under IHL, no such basis can be found in HRL due to the jurisdictional limitation of States' obligations under human rights instruments. Important limitations on States' freedom to transfer arms arise under the laws of neutrality and Article 41 of the *UNC*, however. On the other hand, State practice was insufficient to affirm the existence of a customary rule of international law prohibiting transfers to regions of conflict or tension and transfers that threaten regional or international stability, peace or security. Taken together, all these primary rules have overlapping fields of application *ratione temporis*, *materiae*, and *personae*. The transfer of most arms (e.g. combat helicopters or machine guns) is completely unregulated by international law in times of peace unless the SC imposes an arms embargo. To a considerable degree, the exercise of restraint in CAT is thus dependent on national legislation and policies. These national regulations tend to diverge significantly among States, and it appears that the

⁴⁷⁷ *Study on ways and means of promoting transparency in international transfers of conventional arms*, Report of the Secretary-General annexed to A/46/301, 9 September 1991, §148

⁴⁷⁸ See also BOYLE K., SIMONSEN, S., “Human security, human rights and disarmament”, 11: “Operationalizing and popularizing the idea of human security can help to clarify and to strengthen a human rights perspective on disarmament.”

⁴⁷⁹ See BLANTON, S., “The Role of Arms Transfers...”, 13 and BLANTON, S., “Instruments of Security or Tools of Repression?...”, 8-9

stricter export criteria are usually included in legally non-binding policy documents rather than in national laws. While an international legal obligation to have a licensing system or other export control mechanisms of a specific kind or intensity in place could not be established, it is clear that under secondary rules of international law, States can incur responsibility for internationally wrongful acts committed by themselves, or as accomplices to acts committed by other States.

Part III examined the *Draft Framework Convention on International Arms Transfers*. Despite important shortcomings, the *ATT* would be an important tool for the regulation of CAT. Its most important contribution to international law and the improvement of human security consists in its prohibition to authorise arms transfers if the supplier knows that the arms are likely to be misused to commit serious violations of HRL.

This author believes that the time is ripe to study armament not only from the perspective of arms control, but also with a view to humanitarian and human rights concerns. The *ATT* translates this approach into practice and allows States to regulate their arms transfers not only in function of limited national security, regional stability and counter-terrorism goals, but also with a view to upholding common core values of the international community, the respect of which eventually guarantees international peace and the security of individuals and peoples.

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Annex on Documents

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Source: Control Arms Campaign, Working Draft of 25 May 2004 (reflecting, with minor modifications, the text circulated at the UN Biennial Program of Action Meeting, New York, July 2003), [http://www.controlarms.org/the_issues/ATT_0504.pdf]

Preamble

[...]

PART I

Article 1 [Authorization of International Arms Transfers]

Contracting Parties shall adopt and apply in accordance with their national laws and procedures a requirement that all international arms transfers be authorised by the issuing of licences.

PART II

Article 2 [Express limitations]

A Contracting Party shall not authorise international transfers of arms which would violate its obligations under international law. These obligations include those arising under or pursuant to:

- a. the Charter of the United Nations, including decisions of the United Nations Security Council;
- b. international treaties by which that Contracting Party is bound;
- c. the prohibition on the use of arms that are incapable of distinguishing between combatants and civilians or are of a nature to cause superfluous injury or unnecessary suffering; and
- d. customary international law.

Article 3 [Limitations based on use]

A Contracting Party shall not authorise international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

- a. used in breach of the United Nations Charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations;
- b. used in the commission of serious violations of human rights;
- c. used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;
- d. used in the commission of genocide or crimes against humanity;
- e. diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this Article.

Article 4 [Other considerations]

In considering whether any international transfer of arms may be authorised in accordance with Article 1 of this Convention, Contracting Parties shall take into account whether transfers of arms of the kind under consideration are likely to:

- a. be used for or to facilitate the commission of violent crimes;
- b. adversely affect regional security;
- c. adversely affect sustainable development; or
- d. be diverted and used in a manner contrary to the preceding sub-paragraphs and in such circumstances there shall be a presumption against authorisation.

PART III

Article 5 [National measures]

Contracting Parties shall establish authorisation and licensing mechanisms under their national law as are necessary to ensure that the requirements of this Convention are effectively applied in accordance with the minimum standards set out in Annex I.

Article 6 [International measures]

1. There shall be established an International Registry of International Arms Transfers.
2. Each Contracting Party shall submit to the International Registry an annual report on international arms transfers from or through its territory or subject to its authorisation in accordance with the requirements of this Convention.
3. The International Registry shall publish an annual report and other periodic reports as appropriate on international arms transfers.

PART IV

Article 7 [Definitions]

For the purpose of this Convention, the following definitions shall apply:

1. "Arms" means small arms and light weapons within the meaning of these terms in the Report of the Panel of Government Experts on Small Arms (A/RES/52/298)* save that the enumerated categories therein are not to be regarded as restrictive of the definition.
2. "International transfers" means the transfer, shipment or other movement, of whatever form, of arms from or across the territory of a Contracting Party.

Article 8 [Relationship to other rules and instruments]

This Convention shall be applied as a minimum standard, without prejudice to any more stringent national, regional or international rules, instruments or requirements.

Article 9 [Protocols]

1. This Convention may be supplemented by one or more protocols.
2. It shall be a requirement that participation in any protocol to this Convention shall only be open to Contracting Parties to this Convention.
3. A Contracting Party to this Convention is not bound by a protocol unless it becomes a Party to the Protocol in accordance with the provisions thereof.

Article 10

Signature, ratification and entry into force
[...]

* Read A/52/298

II. Draft Framework Convention on International Arms Transfers (2001)

Source: Arias Foundation, Working document, Draft 3, of 5 March 2001,
[<http://www.arias.or.cr/fundarias/cpr/armslaw/fccomment.html>]

The Contracting Parties,
[PREAMBLE]...
Have agreed as follows:

PART I

Article 1-Principal obligation

Contracting Parties shall adopt and apply in accordance with their domestic laws and procedures a requirement that all international arms transfers be authorised.

PART II

Article 2-Express limitations

Contracting Parties shall not authorise international transfers of arms which would violate their obligations under international law. These shall include:

- a. obligations arising under decisions of the United Nations Security Council;
- b. obligations arising under international treaties by which the Contracting Parties are bound;
- c. transfers of arms the use of which is prohibited by international humanitarian law because they are incapable of distinguishing between combatants and civilians or are of a nature to cause superfluous injury or unnecessary suffering; and
- d. obligations arising under customary international law.

Article 3- Limitations based on use

Contracting Parties shall not authorise international transfers of arms in circumstances in which there exists a reasonable risk that the arms would:

- a. be used in violation of the prohibitions on: the threat or use of force; threat to the peace; breach of the peace or acts of aggression; unlawful interference in the internal affairs of another State;
- b. be used to commit serious violations of human rights;
- c. be used to commit serious violations of international humanitarian law applicable in international or non-international armed conflict; provision also covers any principles of customary law that may emerge in the future in relation to transfers of arms.
- d. be used to commit acts of genocide or crimes against humanity; xii
- e. be diverted and used to commit any of the acts referred to in the preceding sub-paragraphs.

Article 4-Other considerations

Contracting Parties shall avoid authorising international transfers of arms in circumstances in which there are reasonable grounds for considering that the transfer in question would:

- a. be used for or to facilitate the commission of violent crimes;
- b. adversely affect political stability or regional security;
- c. adversely affect sustainable development; or
- d. be diverted and used in a manner contrary to the preceding sub-paragraphs.

PART III

Article 5-National measures

Contracting Parties shall establish such mechanisms of national law as are necessary to ensure that the requirements of this Convention are effectively applied in accordance with the minimum standards set out in Annex I.

Article 6-International measures

1. Contracting Parties shall establish an international registry of international arms transfers.
2. Contracting Parties shall submit to the international registry an annual report on all aspects relating to arms transfers from or through their jurisdiction.
3. The international registry shall publish an annual report reviewing the annual reports of the Contracting Parties.

PART IV

Article 7-Relation to other obligations

The obligations set out in this Convention shall be applied as a minimum standard, without prejudice to any more stringent national or other requirements.

Article 8-Protocols

1. This Convention may be supplemented by one or more protocols.
Article 5 deals with national measures and refers to an Annex that will include minimum standards of national implementation. These remain to be drafted but will include rules concerning licensing requirements
2. In order to become a Party to a protocol, a State or regional economic integration organisation must also be a Contracting Party to this Convention.
3. A Contracting Party to this Convention is not bound by a protocol unless it becomes a Party to the Protocol in accordance with the provisions thereof.
4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the object and purpose of that protocol.

Article 9-Definitions

For the purpose of this Convention:

a. "Arms" shall refer to:

- a) Weapons designed for personal use or for use by several persons serving as a crew, including but not limited to: revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine-guns (small arms); heavy machine-guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems and mortars of calibres of less than 100 mm, ammunition and explosives, including cartridges (rounds) for small arms, shells and missiles for light weapons, anti-personnel and anti-tank hand grenades, landmines, explosives, and mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems.
- b) Major weapons systems, their parts, components, ammunition and related equipment including but not limited to: artillery, bombs, torpedoes, rockets, missiles, military ground vehicles, vessels of war, aircraft designed for military use, kinetic energy weapons systems, armour or other protective equipment, specialized equipment for military training and direct energy weapons systems.
- c) Paramilitary, police and security equipment, its parts, components, accessories and related equipment including but not limited to: utility vehicles with ballistic protection, imaging or countermeasure equipment and components and accessories specifically designed for military use, acoustic devices and components suitable for riot control purposes, anti-riot and ballistic shields, leg-irons, gang-chains, shackles and electric-shock belts specially designed for

restraining human beings, portable anti-riot devices for administering an incapacitating substance, water-cannon, riot control vehicles which have been electrified in order to repel boarders, portable riot control or self-protection devices that administer an electric shock, including electric-shock batons, electric-shock shields, stun-guns, electric-shock dart guns and tasers.

d) Military, police and security training, including the provision of expertise, knowledge or skill in the use of weapons, munitions, paramilitary equipment, components, and related equipment.

e) Sensitive military and dual-use technologies, including but not limited to: encryption devices, certain machine tools, super-computers, gas-turbine and rocket propulsion technology, avionics, thermal-imaging equipment and chemical irritants.

b. "International transfers" shall refer to the movement of arms between two or more jurisdictions pursuant to an agreement regardless of whether for consideration or otherwise.

Article 10-Signature, ratification and entry into force

1. [Ratification]
2. [Accession]
3. [Entry into force]

Article 11-Dispute settlement

III. Extracts of Cross-over Conventions containing Transfer Prohibitions

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention on Certain Conventional Arms as amended on 3 May 1996)

Article 2 – Definitions

For the purpose of this Protocol:

[...]

15. "Transfer" involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.

Article 8 – Transfers

1. In order to promote the purposes of this Protocol, each High Contracting Party:

(a) undertakes not to transfer any mine the use of which is prohibited by this Protocol;

(b) undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;

(c) undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and

(d) undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.

2. In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the Technical Annex, sub-paragraph I (a) of this Article shall however apply to such mines.

3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph I (a) of this Article.

Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention on Certain Conventional Arms), 13 October 1995

Article 1

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, (“Ottawa Convention”), 18 September 1997

Article 1 – General obligations

1. Each State Party undertakes never under any circumstances:

- a) To use anti-personnel mines;
- b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
- c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

IV. Export Criteria in International Codes of Conduct

V. Export Criteria in National Laws and Policy Documents

VI. Fields of Application of Transfer Prohibitions