

# INTERNATIONAL TRANSFER OF SALW: LIMITATIONS AND PROBLEMS

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## ABSTRACT

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

## INTRODUCTION

Disarmament as an issue of International law has developed in the twentieth century, in the Covenant of the League of Nations and the UN Charter.<sup>2</sup> It was acknowledged that for support of peace it is required to lessen the national armaments to a minimum level. The legitimate sources of arms control are basically treaties and customs. Since, the Second

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<sup>2</sup>ZERAYYIHDEGO, THE ARMS TRADE AND INTERNATIONAL LAW, (Oxford and Portland, Oregon) (Vol. 15, 2007).

World War, endless improvements have been accomplished in Arms Control Treaties at various levels. Substantive guidelines of Arms control normally create a custom first and are the most ignored source of law. The state practice and *opinio juris* stay pivotal in setting up such standards and applying the components of custom to arms control issues. Because of the sensitive nature of the regulation of armaments, states are by and large hesitant to go into treatise of this kind.

### SMALL ARMS AND LIGHT WEAPONS

SALW<sup>3</sup> are defined as deadly weapons suitable for personal or for group use, employed or to be employed by states and others, for legal or illegal purposes and are uncovered in *lex specialis* weaponry legal regimes'.<sup>4</sup> The world is flooded with SALW numbering at least 500 million.<sup>5</sup> This has been accepted that half a million people die every year, as victims of SALW, most of which are civilian.<sup>6</sup> Violence and crimes such as homicides, robberies, rapes and kidnapping usually involve small arms.<sup>7</sup> They are the main source of genocide and repression.<sup>8</sup> The main source of proliferation is the 'legal trade' of arms by states although the black market in weapon is the real problem, the 'illicit' and grey market transfers are the major sources of the crises and diversion to underground markets.<sup>9</sup> The interesting aspect here is that they identified the most diffused SALW in the world and called upon the States to sign the *Arms Treaty* in 2006.<sup>10</sup>

### SUBSTANTIVE RESTRICTIONS ON MANUFACTURE OF SALW

There is no international legal norm which restricts the manufacture or prevents the illegal trafficking of SALW globally. However, there are some domestic laws which restrict the manufacture of small arms especially military weapons. The transformation of the ECOWAS Moratorium<sup>11</sup> in 2006 into a Convention codified the existing norm that limit the transfer of

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<sup>3</sup> Small Arms and Light Weapons.

<sup>4</sup> ZERAYYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

<sup>5</sup> ANNAN, 'SMALL ARMS, BIG PROBLEMS', *International Herald Tribune* (2001).

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

<sup>7</sup> William, Robert and Camilla, '*Stray Bullets: The Impact of Small Arms Misuse in Central America*', *Small Arms Survey*, Occasional Paper (2002).

<sup>8</sup> Annan, '*Small Arms, Big Problems*', *International Herald Tribune* (2001).

<sup>9</sup> ZERAYYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

<sup>10</sup> Gun Control Activity Position, The FCIAT and the ICCAT.

<sup>11</sup> ECOWAS Conventions (West African Arms Moratorium on the Manufacture, Importation and Exportation of Small Arms of 1998) Article 3 and 6 ban the transfer of small arms if it violates the principles of international law or violate humanitarian law.

small arms.<sup>12</sup> The *UN High-level Panel on Threats, Challenges and Change of 2004*<sup>13</sup> adopted an approach to limit the production and disperse of small arms globally. All these concerned efforts by the International community have lead to the adoption of GA Resolution<sup>14</sup> which formed an arms trade treaty establishing common standard for the import, export and transfer of convention arms.<sup>15</sup>

It has been noted that transfer of conventional weapons cannot be prevented as long as their manufacture remains unlimited.<sup>16</sup> The excessive availability of these weapons and there accumulation is a persistent threat to international security. It is a *pre-emptory norms* and *erga omnes* obligations on states to maintain peace and security by restricting the flow and use of small arms.

#### *BOSNIA AND HERZEGOVINA V. SERBIA AND MONTENEGRO*

Article 16 of Arms trade treaty states that states who aids the transfer of SALW and indulge in any wrongful act with another state would be responsible for its actions. International Court of Justice in this case ruled that Article 16 of Arms Trade Treaty is a customary law and which would be binding. However, this rule would be applicable to only those states that follow same primary rule of international law. This is the loophole of this Article as parties who do not come in its ambit are not bound by it. It has a little or no application to international arms transfer.

#### EXPRESS PROHIBITION UNDER INTERNATIONAL PEACE AND SECURITY NORM

When a member state of UN Charter is been subjected to an armed attack then it is the inherent right of the State to self defense under Article 51 of UN Charter. This obligation to maintain peace and security has now taken the shape of *Jus Cogens*, and would be binding on all the States which cannot derogate from it. Now the question arises whether this obligation

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<sup>12</sup> ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other related material (2006).

<sup>13</sup> A More Secure Order: Our Shared Responsibility, Report of the Secretary General High level Panel on Threat, Challenges and Change, 2004.

<sup>14</sup> General Assembly Resolution No. 61/89 of December 2006.

<sup>15</sup> The Assembly endorsed the First Resolution of the First Committee by vote of 153 in favour, one against and 24 abstentions.

<sup>16</sup> GOLDBAT, A GUIDE TO NEGOTIATIONS AND AGREEMENTS IN ARMS TRADE ( Sage Publications,1994) .

includes SALW Transfer. The UN Charter neither expressly prohibits nor permits the use or transfer of any specific weapon.<sup>17</sup> So, are the states at liberty to import-export SALW?

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

### THE PALESTINE AUTHORITY AND THE SALW TRADE

After the Second World War, when the British rule ended in Palestine territory, a dispute between Israel-Palestine broke out.<sup>18</sup> US condemned Israel for changing the status of Jerusalem which resulted in a war, involving Middle East States.<sup>19</sup> UN Security Council initiated a peace process to cease the war in this region.<sup>20</sup> Statehood and Self Determination of Palestine people was at conflict and therefore, without any armed conflict the International Community wanted to resolve the matter. Hence, Palestine was made entitle to import SALW provided the quantity and quality of SALW does not exceed the purpose it was imported for and should not be in contravention of any norm of arms transfer.

However, in reality the Palestine territory is overflowed with SALW and militant group who are not part of administration.<sup>21</sup> Some Middle Eastern countries are alleged to be shipping enormous weapons to Tanzin groups who alone possess 70,000 guns.<sup>22</sup> Such covert transfers by a State should in this way be rejected from the special case made above.

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<sup>17</sup> GILLARD, *THE GLOBAL BLACK MARKET IN SMALL ARMS*, (Zed Books, 2000).

<sup>18</sup> General Assembly Resolution, 181, 1947.

<sup>19</sup> *Legal Consequence of the Construction of a Wall in the Occupied Palestine Territory Advisory Opinion*, ICJ (2004), paras 117-33.

<sup>20</sup> A 'land for peace formula' was entered between State of Israel and the PLO (Palestine Liberalization Organization) by signing Declaration of Principles on Interim Self-Government Arrangements in 2003.

<sup>21</sup> ZERAYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

<sup>22</sup> *Legal Consequence for States of the Constitutional Presence of South Africa in Namibia, Advisory Opinion*, ICJ Repts 1971, para 117-27.

## OBSERVANCE OF NON INTERVENTION RULE

SALW transfer must comply with the rule of non-intervention and such transaction should be between or on authorization of states only.<sup>23</sup> In *Fisheries case*, the *ICJ* ruled that in respect of usage of custom the evidence must be sought in the behavior of a majority of interested states.<sup>24</sup> In this case, great majority of importing and exporting states of SALW supported the prohibition of weapon supplies to armed group of another state.<sup>25</sup> However, US continued to reject this restriction on the ground that such limitation hamper the need to assist just cause.<sup>26</sup> The *ICJ* in *Nicargua case* made it clear that although states frequently breach the rule of non-intervention, there is no customary rule which supports the emergence of an exception to it.<sup>27</sup> The 1997 UN Panel had shown some support to transfer small arms to armed group of another state. This panel suggested a ban of small arms supply to conflict areas, as one method of preventing, or responding to human catastrophe.<sup>28</sup> Every consignment of arms undertaken in conformity with the rule of non-intervention is not necessarily legal under international law.<sup>29</sup>

## TAIWAN AND THE SALW TRADE

Taiwan is a non-state territory but it has its own authority, population and some degree of International Relations.<sup>30</sup> At present it manufactures SALW and their ammunitions,<sup>31</sup> imports military small arms from various countries and has been exporting billions worth Conventional weapons.<sup>32</sup> China continued to object arms transfer to Taiwan as an intrusion of its sovereignty.<sup>33</sup> It emphasized that countries maintaining diplomatic relations with it should refrain from providing arms to Taiwan and should adhere to non-intervention rule.<sup>34</sup> The

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<sup>23</sup>Zerayihdego, *THE ARMS TRADE AND INTERNATIONAL LAW*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

<sup>24</sup> *Fisheries case*, ICJ Repts 1951.

<sup>25</sup> *Id.*

<sup>26</sup> Security Council Resolution No. 217/1965 and Security Council Resolution No. 221/1966.

<sup>27</sup> ZERAYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

<sup>28</sup> Report of the Secretary General on Threat, Challenges and Change, (2004).

<sup>29</sup> ZERAYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (Oxford and Portland, Oregon) (Vol. 15, 2007).

<sup>30</sup> SHAW, *INTERNATIONAL LAW*, 5<sup>TH</sup> ED., AT PG. 298.

<sup>31</sup> SMALL ARMS SURVEY 2002.

<sup>32</sup> ZERAYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (OXFORD AND PORTLAND, OREGON) (VOL. 15, 2007).

<sup>33</sup> *Id.*

<sup>34</sup> SEE, THE WHITE PAPER 2000.

question is, as Taiwan is not a sovereign state so does it has the rights and legal obligations in respect of SALW transfers.

ICJ<sup>35</sup> accepted the principle that a non-state legal entity could exist enjoying some form of sovereignty.<sup>36</sup> Taiwan's arms import is exceptionally justified as it has the right of self defense from domestic or trans- boundary crimes.<sup>37</sup> It would be bound by the norm of *jus cogens* to adhere by the rules of arms transfer.<sup>38</sup> It can't divert the imports to other states or any organizations.<sup>39</sup> The quantity and quality of weapons to be transferred shall be commensurate to the public order.<sup>40</sup> Arms transfer or aid, beyond this would not be justified under the International Law.<sup>41</sup>

## CONCLUSION

There is a need to rectify the definition of 'illicit trafficking' in SALW as it includes only black markets. Therefore, only such transfers which adhere to the domestic laws of supplier and recipient states and with international norms should be justified. Despite there being restriction on manufacturing of SALW but there exist no international norm which would prevent proliferation and illicit trafficking. States need to be reminded of their obligation and moral responsibility of preventing arms trade. It is necessary to address the issue of unrestricted arms globally for strong cooperation from States. This is a call for strengthening and codifying rules which would impose liability on the States in cases of contravention.

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<sup>35</sup> IN *WESTERN SAHARA ADVISORY OPINION*.

<sup>36</sup> BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 6<sup>TH</sup> ED., AT PG. 169.

<sup>37</sup> ZERAYYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (OXFORD AND PORTLAND, OREGON) (VOL. 15, 2007).

<sup>38</sup> CRAWFORD, *'THE CRITERIA FOR STATEHOOD'*, AT 145.

<sup>39</sup> ZERAYYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (OXFORD AND PORTLAND, OREGON) (VOL. 15, 2007).

<sup>40</sup> ZERAYYIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW*, (OXFORD AND PORTLAND, OREGON) (VOL. 15, 2007).

<sup>41</sup> *Id.*