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Theresa A. DiPerna

ARTICLE

SMALL ARMS AND LIGHT WEAPONS: COMPLICITY "WITH A VIEW" TOWARD EXTENDED STATE RESPONSIBILITY

Theresa A. DiPerna[*]

* Theresa A. DiPerna, J.D., LL.M., Doctoral Candidate (Law). Note: This Article was submitted to the University of Essex, United Kingdom as the author's LL.M. dissertation (2006-2007). The author wishes to acknowledge and personally thank Professor Francoise Hampson for her tireless dedication, guidance, and supervision throughout the LL.M. academic year without which this publication would not have been possible.

I. INTRODUCTION & THESIS

Small arms and light weapons (SALW) have been the principle tools of war, internal conflict, genocide, and other human rights (HR) violations.[1] In the wrong hands, SALW can be the instruments of terrorism, oppression, and the means to commit violations of both Human Rights Law (HRL) and International Humanitarian Law (IHL).[2] They can intensify national and regional instability, prolong armed conflicts and serve as an obstacle to post-conflict reconstruction.[3] In spite of the nexus between SALW and the threat they may pose to human security, international efforts to establish tighter controls improving the monitoring and regulation of the arms trade and to hold states responsible via the development of international law has been slow, weak, and ineffectual.[4]

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1. Paul Eavis, *SALW in the Horn of Africa and Great Lakes Region: Challenges and the Way Forward,* 9 WATSON INST. 251 (2002), *available at* http://www.watsoninstitute.org/bjwa/archive/9.1/SmallArms/Eavis.pdf; *see also* Amnesty Int'l, *Dead on Time—Arms Transportation, Brokering, and the Threat to Human Rights*, AI Index ACT 30/008/2006, May 10, 2006, *available at* http://web.amnesty.org/library/index/engact300082006; CTR. FOR HUMANITARIAN DIALOGUE, BRIEFING PAPER, INTERNATIONAL LAW AND SMALL ARMS AND LIGHT WEAPONS CONTROL: OBLIGATIONS, CHALLENGES, AND OPPORTUNITIES 3 (2006), *available at* http://www.hdcentre.org/files/International_law_and_small_arms.pdf [hereinafter INTERNATIONAL LAW AND SMALL ARMS AND LIGHT WEAPONS CONTROL]; U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on the Promotion and Prot. of Human Rights, *Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. Doc. E/CN.4/Sub.2/2004/37 (June 21, 2004) (*prepared by* Barbara Frey) [hereinafter *Special Rapporteur on the Prevention of Human Rights Violations Committed with Arms and Light Weapons*].

2. INTERNATIONAL LAW AND SMALL ARMS AND LIGHT WEAPONS CONTROL, *supra* note 1, at 3; Int'l Comm. of the Red Cross (ICRC), *Unregulated Arms Availability, Small Arms & Light Weapons, and the U.N. Process*, May 26, 2006, *available at* http://www.icrc.org/web/Eng/siteeng0.nsf/html/small-arms-paper-250506; Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT'L REV. RED CROSS 467, 467 (2005), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-859-p467/$File/irrc_859_Boivin.pdf.

3. *See* Boivin, *supra* note 2, at 467; *see generally* Jessica Howard, *Invoking State Responsibility for Aiding the Commission of International Crimes—Australia, the United States and the Question of East Timor*, 2 MELB. J. INT'L L. 1 (2001).

4. Amnesty Int'l, *supra* note 1, at 58-60; HUMAN RIGHTS WATCH, U.N: "PROGRAM OF INACTION" ON SMALL ARMS (2001), *available at* http://www.hrw.org/english/docs/2001/07/19/global308.htm; Susan Waltz, *U.S. Policy on Small Arms Transfers: A Human Rights Perspective* 2 (Gerald R. Ford School of Pub. Policy, Working Paper No. 43, 2007), *available at* http://www.du.edu/gsis/hrhw/working/2007/43-waltz-2007_rev.pdf; *see also* Lema K. Yanik, *Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations*, 28 HUM. RTS. Q. 357, 386-88 (2006); Arms Exports Pledge '*Worthless*,' BBC NEWS, May 17, 2004, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/3723085.stm (quoting the United Kingdom's Joint Commons committee on defense exports stating end-user certificates aimed at preventing the misuse of exported SALW lacked "legal or political backbone").

The threat posed to human security by the lack of regulation and the limited means for holding states responsible for SALW transfers is exacerbated by globalization, rapid development of affordable technologies, and an arms market increasingly characterized by a complex web of private actors and transport networks.[5]

Weak international regulation and enforcement mechanisms regarding the export/transfer of SALW is primarily due to a lack of political will, the influence of commercial interests, and perceived geo-strategic concerns.[6] It is no coincidence that the states with the greatest influence to effect real change in the way in which SALW transfers are regulated and the means by which states are held responsible for them are the very same states that raise the loudest objections to and stand as the greatest obstacle toward the development of effective and uniform international standards for the transfer of SALW.[7] It is also not happenstance that these are the very same states that produce and export the greatest percentage of the world's SALW.[8]

Given this apparent conflict of interest, it should come as no surprise that the United States, the world's largest exporter of SALW,[9] is opposed to the proposed Arms Trade Treaty (ATT).[10] The ATT applies existing obligations under international law and applies them to SALW transfer decisions and would prohibit SALW transfers where the authorizing state knows or has reason to know that the weapons will be used to commit genocide, crimes against humanity, serious HR abuses, or serious

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5. Neil Cooper, *What's the Point of Arms Transfer Controls?*, 27 CONTEMP. SEC. POL'Y 118, 118-19 (2006).

6. *Id.* at 123; *see also* Rachel Stohl, *U.S. Small Arms and Global Transfer Principles* 1-4 (Project Ploughshares, Working Paper No. 06-1, 2006), *available at* http://www.smallarmssurvey.org/files/portal/spotlight/country/amer_pdf/americas-US-2006-b.pdf; RACHEL STOHL, CTR. FOR DEFENSE INFORMATION, UNITED NATIONS TO CONSIDER AN ARMS TRADE TREATY—U.S. OPPOSES 2 (2006), *available at* http://www.cdi.org/program/document.cfm?documentid=3724&programID=73&from_page=../friendlyversion/printversion.cfm; U.N. ECOSOC, Sub.-Comm'n on the Promotion and Protection of Human Rights, *Final Report Submitted by Barbara Frey, Special Rapporteur in Accordance with Sub.-Comm'n Resolution 2002/25: Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) [hereinafter *Final Report Submitted by Barbara Frey*]; Waltz, *supra* note 4, at 15; Thom Shanker, *U.S. is Top Arms Seller to Developing World*, N.Y. TIMES, Oct. 1, 2007, at A6, *available at* http://www.nytimes.com/2007/10/01/us/01weapons.html?_r=1&hp&oref=slogin.

7. Cooper, *supra* note 5, at 122.

8. *Id.*; Shanker, *supra* note 6; *see also* Yanik, *supra* note 4, at 361-62.

9. Yanik, *supra* note 4, at 362.

10. Stohl, *supra* note 6, at 5-6.

violations of IHL.[11] The United States responds to such criticisms by pointing out that its SALW policy stands as a global "model" to be emulated and that it has initiated and participated in efforts to enhance arms export standards predicated on its superpower status.[12] However, U.S. opposition to the proposed ATT not only contradicts its "official position" on SALW transfers, but also, it fails to acknowledge its "unofficial," covert SALW transfers which bypass arms export control regimes and undermine national and international SALW transfer policies.[13]

As of October 2007, 153 states voted in favor of the ATT Resolution indicating that a majority of states agree that it is desirable to have common international standards for the import, export, and transfer of SALW.[14] However, international efforts to regulate SALW, absent support from the world's leading SALW producers/exporters, is illustrative of the lack of political will to develop meaningful international controls and to enforce those that have been developed.[15] If the international community hopes to obtain the support and leadership of the United States and the other leading state producers/exporters of SALW, such initiatives will have to: expand on what these states are already doing; serve their respective state interests; link such initiatives to terrorism and states' anti-terrorism objectives; and allow for cost-effective compliance while simultaneously providing adequate economic disincentives for noncompliance.[16]

Any international SALW regulatory regime that fails to include these criteria will simply perpetuate existing tokenistic measures to provide uniform, international standards for regulating SALW transfers.[17] Providing adequate economic disincentives where the exporting/transferring state knows or has reason to know that more likely than not those weapons will be used to commit human rights violations or

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11. Draft Framework Convention on International Arms Transfers art. 4, May 25, 2004, *available at* http://www.iansa.org/documents/2004/ att_0504.pdf.

12. Waltz, *supra* note 4, at 5-11.

13. *Id.* at 3-4.

14. Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty*, U.N. Institute for Disarmament Research, Oct. 2007, at 14, *available at* http://www.unidir.org/pdf/ouvrages/pdf-1-92-9045-008-A-en.pdf.

15. *See In-Depth: Guns Out of Control: The Continuing Threat of Small Arms*, Humanitarian News and Analysis, U.N. Offrice for Coodination of Humanitarian Affairs, June 28, 2008, *available at* http://www.irinnews.org/IndepthMain.aspx?IndepthId=8 &ReportId=58952 ; Andrew McLean, *Small Arms–Big Challenge: Can Southern Africa Show the Way for the 2001 U.N. Conference?*, 9 AFR. SECURITY REV. (2000), *available at* http://www.iss.co.za/Pubs/ ASR/9No2/Mcclean.html; Cooper, *supra* note 5, at 119.

16. *See* Stohl, *supra* note 6, at 7.

17. Cooper, *supra* note 5, at 118-19.

other internationally wrongful acts will require the international community to address limitations within the International Law Commission's (ILC) Articles on State Responsibility for Internationally Wrongful Acts (Articles on State Responsibility) regarding the rules for establishing state complicity and impugning compensation to assisting states.[18]

Re-assessing certain aspects of the Articles will allow the international community to establish clear lines of responsibility for states assisting another state to commit international wrongful acts with SALW in a global arms market that is becoming exponentially more complex. The author will illustrate the need for the abovementioned changes by offering the reader an in-depth analysis of the Commentary to Article 16[19] and how its "intent" requirement unduly limits state responsibility.

It is the author's contention that the most practical and effective way to induce states to implement effective controls of exports/transfers of SALW in advance, is by enhancing economic disincentives vis-à-vis holding states responsible for aiding and assisting international wrongful acts committed with SALW where states know or have reason to know that, more likely than not, those weapons will be used to commit HR violations or other internationally wrongful acts.

Part I will set out the parameters and the thesis of this Article. Part II will provide an overview of relevant International Law regarding the export/transfer of SALW transfers. The overview will include a brief discussion of non-binding measures and binding prohibitions under international treaty and customary law norms within the U.N. Charter, U.N. Security Council Resolutions, IHL, and IHR. The author will devote most of this section to illustrate the lack of clarity regarding certain IHR principles and how they limit the international community's ability to hold states responsible for human rights violations committed with SALW when those states know or have reason to know that more likely than not those weapons will be used to commit human rights violations or other internationally wrongful acts.

Part III provides a critical analysis of the ILC's view of Article 16's[20] criteria for establishing state complicity for exporting/transferring states of SALW. The author argues that the Commentary's "intent" requirement is misguided and should the ILC fail to revisit the issue, the regional human

18. Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (Sept. 28, 2001).

19. Report of the International Law Commission on the Work of Its Fifty Third Session, *supra* note 18, art. 16.

20. *Id.*

rights courts and quasi-judicial bodies should—under these specific circumstances—exercise their discretion and set aside the "intent" requirement since the plain language of the Article comes into direct conflict with the Commentary regarding its meaning and the Articles' intent-neutral paradigm. This section also critically analyses the ILC's position that where the wrongful act would have clearly occurred even in the absence of that state's "aid or assistance," no responsibility to compensate will be impugned to the assisting state. The author contends that this position vitiates the Article's purpose.

Lastly, the author will conclude in Part IV that the most effective way to induce states to implement effective, universal controls over SALW transfers in advance, is to hold them responsible for aiding or assisting in the commission of HR violations or other internationally wrongful acts. It is conceded that the law cannot solve all problems but the international community should maximize the law's capacity to effectively stem the flow of SALW to end-users who are known or are more likely than not to use SALW to commit HR violations or other internationally wrongful acts. It is also conceded that as long as SALW are in high demand, there will always be a black market willing and ready to try and supplant reduced supplies of SALW resulting from extended state responsibility and stricter state export/transfer controls. However, where demand is high and supplies are reduced, the cost of illicit SALW will exponentially increase making it less affordable for violating states and non-state actors to acquire SALW through illicit means.

For the purposes of this Article only, responsibility for wrongful acts committed with SALW is limited to states and the rules governing their exportation/transfer. It does not include limitations imposed by national laws or issues related to the lawfulness of stockpiling or producing such weapons. This Article will address state responsibility for state-to-state transfers and transfers from state-to-non-state actors. It will not discuss issues regarding individual criminal responsibility under international criminal law or deal with situations of occupation. Additionally, the author uses the terms "exporting state" to mean any state that exports or authorizes the export of SALW. "Transferring state" shall mean any state that either exports or knowingly allows its territory (land, sea, or airspace) to be used for the transfer of SALW.

The central issues of this Article are: 1) What are states' international obligations with regards to exporting/transferring SALW to end-users who are outside of their national territory that are not situations of occupation; and 2) what is the scope of those obligations? To answer these issues one must answer these following questions: What HR are jus cogens norms? If a right is not a jus cogens norm, is the right part of customary law? If the

right is a part of customary law, does it give rise to obligations erga omnes? If so, do the state's obligations come within their negative obligation not to facilitate a violation of the right?

If a state's obligations come within their negative obligations, does the state's negative obligation to respect the right compel the exporting/transferring state to take steps in fulfillment of its positive obligations (due diligence) to prevent the transfer of SALW to known HR violators or when they have reason to know that, more likely than not, those weapons will be used to commit HR violations or other internationally wrongful acts or as a necessary element of fulfilling its negative obligation to respect the right? Even if the right is not deemed to give rise to obligations erga omnes (defined as obligations toward the international community as a whole), does the exporting/transferring states' obligations have extraterritorial applicability? If so, what is the scope of those obligations?

If the right does not give rise to obligations erga omnes (and presumably not a jus cogens norm), what type of 'knowledge' must the exporting/transferring state have in order to be complicit in violation of the right in question? Lastly, what specific indicators can be used to determine when actual or constructive knowledge can be imputed to the exporting or transferring state?

II. OVERVIEW OF INTERNATIONAL LAW REGULATING SALW TRANSFERS

Current and emergent international laws and customary norms regarding the export/transfer of SALW range from express prohibitions to voluntary, non-binding regional codes of conduct. This section will discuss how these current standards have failed to effectively curb the flow of SALW to end-users who commit or are known to commit a range of HR violations and other internationally wrongful acts.[21] Additionally, this section will discuss weaknesses in existing international law regarding the export/transfer of SALW and the limited means for holding states

21. U.N. ECOSOC, Sub.-Comm'n on Human Rights Decision 2001/120, *The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context at Human Rights and Humanitarian Norms*, U.N. Doc. E/CN.4/Sub.2/2002/39 (May 30, 2002) (*prepared by* Barbara Frey); *see also* Amnesty Int'l & Oxfam Int'l, *Shattered Lives: The Case for Tough International Arms Control*, at 24-39, 60-66, AI Index ACT 30/001/2003, 2003, *available at* http://www.controlarms.org/documents/arms_report_full.pdf; Lara Jakes, *U.S. Says Illegal Weapons Exports Growing*, WASHINGTONPOST.COM, Oct. 12, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101100908.html.

responsible for assisting internationally wrongful acts when those weapons are used to commit HR violations.

A. *Non-Binding Measures*

In addition to binding rules, there are a multitude of existing non-binding measures that attempt to regulate the export and transfer of SALW.[22] However, the problem with non-binding measures is self-explanatory—they are non-binding. States may or may not choose to voluntarily follow their guidance and even when they do, the measures contain so many legal gaps and loopholes that states are often able to avoid any real responsibility for exporting or transporting SALW.

Much has been written with regards to the content and weaknesses of binding and non-binding measures for SALW and due to the limited parameters of this Article, the author will not repeat or discuss them in great detail other than to acknowledge their existence and limited value in light of their obvious shortcomings. The author acknowledges that while existing binding and non-binding agreements and codes of conduct limiting or banning the export and transfer of SALW are an important body of norms that propose development and plans of action representing principles that could shape or become customary law, at present, they have not been very effective at stopping or limiting the flow of SALW to end-users that violate HR and commit other internationally wrongful acts.[23]

To date, there is only one agreement that completely bans transfers of SALW creating a non-binding moratorium within ECOWAS.[24] While this and other efforts such as codes of conduct represent a new development in the regulation of exporting and transferring SALW, as they expressly list

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22. *See, e.g.*, STOCKHOLM INT'L PEACE RESEARCH INST., EU CODE OF CONDUCT FOR ARMS EXPORTS (1998), *available at* http://www.sipri.org/contents/expcon/eucode.html; Economic Community of West African States, Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa, 21st Ordinary Session of the Authority of Heads of State and Government, Abuja, Oct. 30-31, 1998 [hereinafter ECOWAS]; U.N. Register of Conventional Arms, G.A. Res. 46/36L, U.N. Doc. A/47/342 (Jan. 1, 1992); Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Additional Document entitled "Elements for Objectives Analysis and Advice Concerning Potentially Destabilizing Accumulations of Conventional Weapons: Explanatory Note," July 12, 1996; Organization for Security and Cooperation in Europe (OSCE), Principles-Organization For Security and Co-operation in Europe, Principles Governing Conventional Arms Transfers (1993).

23. INT'L ACTION NETWORK ON SMALL ARMS (IANSA), CONTROLS ON INTERNATIONAL TRANSFERS OF SMALL ARMS, WORKING GROUP POSITION PAPER ON TRANSFERS (2006) [hereinafter IANSA], *available at* http://www.iansa.org/un/review2006/documents/english/IANSA-position-paper-international-transfers.pdf.

24. ECOWAS, *supra* note 22.

the circumstances under which states must refrain from doing so, they do not impose new substantive limitations to consider in the end-user state as a pre-condition for permitting the export or transfer to take place.[25] The codes typically are a collection of already existing limitations on the export and transfer of SALW.[26] Absent legally-binding standards with adequate economic disincentives, states will continue to export and transfer SALW to end-users who commit HR violations and other internationally wrongful acts so long as it serves their self-interests without any real cost to themselves.

B. *Binding Limitations on SALW Transfers*

1. U.N. Charter & Customary Law: Prohibitions On the Use of Force & Principle of Non-Intervention

A state's inherent right to self-defense against an armed attack is a long-standing principle of customary international law and articulated in Article 51 of the U.N. Charter.[27] Consequently, states claim that they have a corresponding right both to acquire the means of self-defense and to transfer them to other states as an exercise of their right to individual and collective self-defense.[28] Hence, states rationalize that they are motivated to engage in the international trade in SALW premised on geo-strategic, national security interests and the right of states to acquire the means of

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25. IANSA, *supra* note 23.

26. *Id.*

27. U.N. Charter, art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if [an] armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace . . ."); *see also* The Caroline Case (1837) 2 Moore 409 (articulating the customary law standard on necessity and proportionality triggering a state's inherent right of self-defense where the use of force is necessary to avert a threat that is "instant, overwhelming, leaving no choice of means, and no moment of deliberation" and that the amount of force used is no more than necessary to achieve those ends).

28. Michael Crowley & Elizabeth Clegg, *Enhancing Controls on Legal Transfers*, SETON HALL J. DIPL. & INT'L REL. 51, 53 (2001), at 53, *available at* http://diplomacy.shu.edu/journal/new/pdf/VolIINo2/shj3.pdf; DAVID CAPIE, CTR. FOR HUMANITARIAN DIALOGUE, ARMED GROUPS, WEAPONS AVAILABILITY AND MISUSE: AN OVERVIEW OF THE ISSUES AND OPTIONS FOR ACTION 11 (2004) (showing that the United States maintains that the right to transfer weapons to non-state actors should be preserved as an instrument of foreign policy), *available at* http://www.hdcentre.org/publications/armed-groups-weapons-availability-and-misuse-overview-issues-and-options-action.

self-defense.[29] However, the right of states to individual and collective self-defense is not unlimited.[30]

As with all rights, there are also corresponding duties, and the right to export/transfer SALW as a means of self-defense is subject to limitations that flow from the prohibition on the threat or use of force.[31] The principle of non-intervention is based on the right of every sovereign state to conduct its affairs without outside interference as expressed in both Articles 2(4) and Article 2(7) of the U.N. Charter and reiterated in the Declaration on Friendly Relations.[32] The principle of non-intervention

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29. CAPIE, *supra* note 28; *see also* Stohl, *supra* note 6, at 1-2.

30. *See, e.g.*, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 C.T.S. 297; Declaration Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouvear Recueil (Ser. 2) 1002, 187 Consol. T.S. 459; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gasses, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production, and Stockpiling or Bacteriological and Toxin Weapons and on Their Destruction, Apr. 10, 1072, 26 U.S.T.S. 583, 1015 U.N.T.S. 163; Convention on the Prohibition on the Use of Certain Conventional Weapons which may Deemed to be Considered Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, U.N. Doc. A/Conf.95/15; Convention on Certain Chemical Weapons, Oct. 10, 1993 (CCW) (eliminating the possibility of developing, producing, using, stockpiling or transferring chemical weapons and Protocols I-V banning development, production, use and stockpiling of Non-Detectable Fragments; Mines, Booby-Traps, and Other Devices; Incendiary Weapons; Blinding Lasers; and Explosive Remnants of War); Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, G.A. Res. 52/38, U.N. GAOR, 52nd Sess., Supp. No. 49, at 86, U.N. Doc. E/CN.4/1996/177.

31. *See, e.g.*, IADHR, O.A.S. Res. XXX, ch. 1, *adopted by* the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (1992); U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"); *see also* Repertory of Practice of U.N. Organs (1945-1954); Repertory of Practice of U.N. Organs Supps. No. 1-9 (1954-1999), Vol. I-III, Article 51 (emphasizing Repertory of Practice of U.N. Organs supplement No.5 (1970-1978), vol.II, art. 51, paras. 8-19, discussing Article 51 and Article 2(4) of the U.N. Charter, as well as Article 51 in relation to proportionality).

32. U.N. Charter art. 2, para. 4 & 7; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the

includes not only a prohibition on the "threat or use of force against the territorial integrity or political stability of another state," but also, includes a duty for states to refrain from "organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another [s]tate" and to refrain from "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another [s]tate or acquiescing in organized activities within its territory directed towards the commission of such acts . . ."[33]

The International Court of Justice (ICJ) affirmed that the principle of non-intervention was binding on all states as customary international law in Nicarágua.[34] The Court held that while U.S. activities regarding the financing, organizing, training, and the provision of weapons to a Nicaráguan rebel group (contras) did not rise to the level of an armed attack, these activities were held to have been an unlawful intervention in the internal affairs of Nicarágua.[35] The Court added that intervention is unlawful when states use methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.[36] Support in the instant case included the U.S. supplying SALW to the contras.[37]

While there is no international prohibition on providing SALW to support a requesting state's efforts to quell domestic unrest, there are limitations on state intervention in cases where the conflict is a civil war and the intervening state is supplying SALW to both sides of the conflict but would not be a violation of the principle of non-intervention where states are exporting/transferring SALW to non-state groups where the conflict is deemed as a legitimate exercise of their right to self-determination.[38] However, provision of weapons to an opposition group or other non-state actors outside the context of the right to

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present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7.

33. Declaration on Friendly Relations, *supra* note 32.

34. Military and Paramilitary Activities (Nicar. v. United States), 1986 I.C.J. 14, ¶¶ 227-238 (June 27).

35. *Id.*

36. *Id.* ¶¶ 202–209.

37. *Id.* ¶ 195.

38. *See, e.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL, 171-72 (1995); JOHN CURRIE, PUBLIC INTERNATIONAL LAW, 48 (1st ed. 2001); Karl Doehring, *Self-Determination, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 70 (Bruno Simma ed., 1994); *see also* East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30).

self-determination would constitute a violation of the prohibition on intervention in the domestic affairs of states as in the case of the U.S. intervention in Nicarágua.

Thus, if a state exports or transfers SALW, and it either knows, or has reason to know, that more likely than not those weapons will be used to threaten or use force against the territorial sovereignty or political integrity of the receiving state or a third state, then the exporting/transferring state would most likely be in violation of their obligation not to use force in another state or the principle of non-intervention depending on the factual situation of each case.[39] However, as evidenced by the unlawful intervention by the United States in Nicarágua, the ability of the international community to prevent or hold states accountable for such violations is limited to diplomatic protest, international condemnation—rarely in the form of ICJ judgments—and the imposition of U.N. sanctions.

Unfortunately, even these few available mechanisms of accountability are limited since most of the major state producers/exporters of SALW are also the states comprising the permanent membership of the U.N. Security Council who can obstruct or avoid accountability by virtue of their ability to veto such measures.[40] Thus, enforcement tends to be selective and arbitrary based on Security Council Member States' geo-strategic, political, and economic self-interests in spite of their primary responsibility under the U.N. Charter to maintain international peace and security.[41]

2. Express Prohibitions

a. U.N. Embargoes

Other limitations on the transfer of SALW include express prohibitions vis-à-vis embargoes imposed by the Security Council. Operating under Chapter VII of the U.N. Charter, the Security Council may impose and

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39. Nicar. v. United States, 1986 I.C.J. 14, ¶¶ 239-249, 292(3) & 292(4); Declaration on Friendly Relations, *supra* note 32 (binding on all states as customary law); East Timor (Port. v. Austl.), 1995 I.C.J. 90, 357, ¶ 130.

40. *See* Javier Alcalde & Caroline Bouchard, *Human Security and Coherence Within the EU: The Case of 2006 U.N. Small Arms Conference*, 3 HAMBURG REV. SOC. SCI. 150 n.9 (2008), *available at* http://www.hamburg-review.com/fileadmin/pdf/03_01/F_Alcalde_02. pdf; SMALL ARMS SURVEY 2004: RIGHTS AT RISK 7 (Oxford Univ. Press 2004).

41. *See, e.g.*, U.S. Veto of 1979, S.C. Res. 558, U.N. Doc. S/RES/558 (Dec. 13, 1984) (strengthening the 1977 arms embargo against apartheid government in South Africa. The United Kingdom and the United States repeatedly exercised their veto to prevent effective sanctions against South Africa); U.S. Veto of S.C. Res. 487, U.N. Doc. S/Res/487 (June 19, 1981).

enforce binding prohibitions on Member States regarding the transfer of SALW to specific states or regions known as "recipient specific" prohibitions.[42] Article 41 of the Charter imposes a legal obligation on Member States to abide by embargoes enacted by the Security Council and a duty to implement measures to ensure that persons within their jurisdiction comply with the embargoes.[43]

The Security Council has increasingly made use of embargoes on the transfer of SALW in situations deemed as threats or actual breaches to international peace and security.[44] These types of embargoes have been imposed on states found to be violating international law and at times extended to neighboring states in an effort to stop or stem the flow of SALW to the violating state.[45] However, many states escape the imposition of SALW embargoes where either armed conflicts or grave breaches of human rights are taking place due to either neglect or the conflicts of interest of Security Council Member States.[46]

Between 1990 and 2001, there were only eight arms embargoes in place (one of which was voluntary), even though there were fifty-seven major armed conflicts taking place during that same period.[47] Even where such embargoes were imposed, attempts to curtail the flow of SALW to those states ranged from poor to non-existent.[48] While U.N. embargoes may somewhat increase the costs and difficulty of the acquisition of SALW, they can still be relatively easily obtained for the following reasons: accessibility of SALW via the black market due to the increasing sophistication of the illicit arms trade; the lag time between enacting embargoes and lack of means for monitoring compliance; lack of resources or capacity to monitor their implementation; the existence of greater financial incentive to breach, rather than comply with embargoes; the risk

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42. *See* U.N. Charter arts. 39-51; EMANUELA GILLARD, LAUTERPACHT RESEARCH CTR. FOR INT'L LAW, CAMBRIDGE, WHAT IS LEGAL? WHAT IS ILLEGAL? LIMITATIONS ON TRANSFERS OF SMALL ARMS UNDER INTERNATIONAL LAW, *available at* http://www.armstradetreaty.com/att/what.is.legal.what.is.illegal.pdf. *Note: the author is aware that unilateral and multi-lateral embargoes may be imposed (e.g., European Union) but for the sake of brevity this Article will only refer to embargoes imposed by the U.N. Security Council.

43. U.N. Charter art. 41.

44. GILLARD, *supra* note 42, at 2-3.

45. *Id.* at 3.

46. Cooper, *supra* note 5, at 121; Amnesty Int'l, U.N. Arms Embargoes: An Overview of the Last Ten Years: Briefing from the Control Arms Campaign: Amnesty International, Oxfam International and International Action Network on Small Arms (IANSA), AI Index IOR 40/007/2006, Mar. 16, 2006, *available at* http://www.amnestyusa.org/document.php?lang+e&id=ENGIOR40007206.

47. Cooper, *supra* note 5, at 119.

48. *Id.*

of detection is too low while the consequences of breach are too weak; impunity for illicit traffickers and noncompliant states; and the selective and arbitrary imposition of embargoes in lieu of universal and impartial SALW export/transfer controls.[49]

For example, a 2002 Dutch report on the massacre at Srebrenica showed that during the 1990s, covert SALW supplies to Bosnia-Hersegovina involved the use of the U.S. Air Force and possibly U.S. Special Forces.[50] Unidentified states flew Hercules C-130 cargo planes carrying ammunition, machine guns, Stinger missiles, and other SALW on "black flights" to Tuzla that were clearly blatant violations of an U.N. arms embargo.[51] While it has never been proven which state's pilots flew the planes in question, the success of those flights required the aversion of Airborne Warning and Control System (AWAC) surveillance under U.S. control.[52] This is but one example illustrating the difficulties of enforcing embargoes, monitoring compliance, identifying which states are guilty of noncompliance, and punishing noncompliant states.

b. International Humanitarian Law

As noted previously, states' inherent right of self-defense is not unlimited. There are also limitations on the means and methods of warfare, and restrictions typically are express prohibitions via treaty and customary law that proscribe the use and transfer of SALW.[53] While some of the conventions expressly proscribe prohibitions on the transfer of certain SALW, others are silent on the issue of transfer.[54] However, some argue that silence should not be construed as permissiveness as the most recent conventions expressly prohibit both use and transfer of certain SALW.[55] Arguably, this could be construed as a reflection of emerging norms and that prohibitions on certain SALW could—or some say, should—be read into other earlier treaties.[56] Some scholars also claim that such a conclusion is supported by the difficulty in reconciling a state's freedom to export or transfer certain SALW, whose use is prohibited, with a state's duty to

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49. *See generally* Amnesty Int'l, *supra* note 1; *see also* Cooper, *supra* note 5.

50. NETH. INST. FOR WAR DOCUMENTATION, SREBRENICA: A "SAFE" AREA—RECONSTRUCTION, BACKGROUND, CONSEQUENCES, AND ANALYSES OF THE FALL OF A SAFE AREA, app. II, ch. 4, § 3 (2002), *available at* http://193.173.80.81/srebrenica/.

51. *Id.*

52. *Id.*

53. *See, e.g.*, sources cited, *supra* note 30.

54. GILLARD, *supra* note 42, at 2.

55. *Id.*

56. *Id.*

respect the IHL encompassed in Common Article I of the four Geneva Conventions.[57]

The International Criminal Tribunal for the former Yugoslavia (ICTY) stated that not only does IHL carry with it obligations to respect and ensure the respect of Common Article I, the norms within IHL have an "absolute character" and are of "legal interest" to every member of the international community and as such impose obligations on all members of the international community "as a whole" thereby imposing obligations on all states to respect such obligations.[58] Such language by the ICTY implies that IHL norms carry obligations erga omnes (see below) and thus may possibly fall within a state's negative obligation to respect IHL norms.[59] While it is not entirely clear how states are to implement the obligation to "ensure respect" for IHL, it is clear that when serious violations of the Geneva Conventions or of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) occur, states have a duty to act in order to bring them to an end.[60]

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57. *Id.*; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] (stating that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"); Geneva Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 1, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III}; Geneva Convention Relative to the Protection of Civilian Person in Time of War, art. 1, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, ¶ 1, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Protocol I] (reiterating the obligation to respect and ensure respect applies to international armed conflicts and to non-international armed conflicts to the extent that the latter are covered by Article Three of Geneva Conventions I-IV (Common Article III)). While non-international armed conflicts covered by Protocol II are not explicitly covered by the obligation to respect and to ensure respect, they can nonetheless be considered as indirectly falling within the purview of the provision, insofar as Protocol II is merely an elaboration of Common Article III. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, ¶ 1, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II].

58. Prosecutor v. Zoran Kupreskic, Case No. IT-95-16-T, Trial Chamber Judgment, ¶ 519 (Jan. 14, 2000).

59. Barcelona Traction, Light, and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 33 (Feb. 5) [hereinafter Barcelona Traction].

60. Boivin, *supra* note 2, at 476 n.31 (quoting protocol I "[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or

Therefore, there may be a duty for states to take positive acts in order to fulfill their negative obligation to "ensure respect" for IHL, which could arguably include states taking actions to prevent exporting/transferring SALW to end-users where serious HR violations and grave breaches of IHL are taking place.[61] For instance, such actions could include implementing effective licensing for the manufacture of SALW and of persons involved with the export, import, brokering, insurance, financing and transportation of SALW. It could also mean states have an obligation to require effective end-user certificates before they export/transfer SALW and to effectively investigate, prosecute, and punish persons or entities that do not adhere to or violate laws regulating the abovementioned activities.

Grave breaches of IHL are identified in all four Geneva Conventions and applicable in international armed conflicts: "willful killing, torture or inhuman treatment—including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person . . . [and] extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly."[62]

Other grave breaches as identified in Common Article III to the Geneva Conventions are applicable in non-international armed conflicts: "violence to life and person, in particular murder of all kinds, mutilation, torture . . . cruel and degrading treatment . . . [and] the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[63]

Grave breaches of IHL is a technical term referring to a limited category of war crimes codified by the International Criminal Court (ICC).[64] Additionally, there are international conventions prohibiting the export or transfer of SALW by any other state actors (i.e., state agents) that would

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individually, in co-operation with the United Nations and in conformity with the United Nations Charter"); GILLARD, *supra* note 42.

61. INTERNATIONAL COMMITTEE OF THE RED CROSS, ARMS AVAILABILITY AND THE SITUATION OF CIVILIANS IN ARMED CONFLICTS, 20 (1999) [hereinafter 1999 ICRC Report].

62. Geneva Convention IV, *supra* note 57, art. 147. *See also* Geneva Convention I, *supra* note 57, art. 50; Geneva Convention II, *supra* note 57, art. 51; Geneva Convention III, *supra* note 57, art. 130.

63. Geneva Convention I, *supra* note 57, art. 3; Geneva Convention II, *supra* note 57, art. 3; Geneva Convention III, *supra* note 57, art. 3; Geneva Convention IV, *supra* note 57, art. 3.

64. Rome Statute of the International Criminal Court, art. 8, U.N. Doc. PCNICC/1999/INF/3 (July 17, 1998), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.

rise to complicity in the crime of genocide.[65] The International Criminal Tribunal for Rwanda (ICTR) has elaborated that there are three elements of complicity in genocide: 1) procuring the means of genocide; 2) knowingly aiding and abetting genocide; and 3) instigating genocide.[66] The first and second elements are of particular relevance in regard to the export or transfer of SALW as the ICTR has explicitly linked arms transfers with genocide.[67]

The obligation to "ensure respect" of IHL norms is reiterated and codified in Article 89 of Protocol I and the Rome Statute of the International Criminal Court (Rome Statute) imposing duties to cooperate and take actions which are reflected throughout various U.N. bodies and quasi-judicial bodies.[68] Imposing and enforcing arms embargoes is but one way in which the international community seeks to curtail or stop the flow of SALW into states or territories where HR and IHL violations are taking place during armed conflicts.[69] While the legal basis for such embargoes falls outside the purview of IHL, the appearance of a positive correlation between the imposition of arms embargoes and occurrences of serious HR violations and grave breaches of IHL taking place during armed conflicts, may suggest an emerging authoritative link between the availability of SALW, serious HR violations and grave breaches of IHL—particularly in regard to the availability of SALW and the violation of the rights of children.[70] This historical pattern may be indicative that embargoes on SALW under these circumstances are reflective of states' negative obligation to "ensure respect" for IHL under Common Article I and for Member States of the Rome Statute.[71]

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65. Convention on the Prevention and Punishment of the Crime of Genocide, art. 3(e), Jan. 12, 1951, 78 U.N.T.S. 277.

66. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 533-37 (Sept. 2, 1998); *see also* Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶¶ 393, 395 (May 15, 2003).

67. Akayesu, Case No. ICTR-96-4-T. The court reasoned that "by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would get used for such a purposes." *Id.* ¶ 537.

68. *See* Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67, 78-79 (2000) (Many of the provisions within Protocol I are binding on all states as customary international law).

69. Boivin, *supra* note 2, at 476-77.

70. *Id.* at 478; The Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 57, *delivered to the General Assembly*, U.N. Doc. A/60/335 (Sept. 7, 2005); 1999 ICRC Report, *supra* note 61, at 65.

71. Boivin, *supra* note 2, at 478.

c. Terrorism

It is conceded that there is no universal definition for what constitutes a "terrorist" or "terrorism" per se, nor will this Article attempt to define or create an exhaustive list of what acts can be construed as "terrorist acts." For the purposes of this Article only, the author shall use the terms "terrorists," "terrorism," and "terrorist acts" as defined by the Organization for Economic Co-operation and Development's (OECD) Financial Action Task Force (FATF).[72]

The international community has a long history of attempting to stop the flow of SALW from reaching the hands of those who will use them to commit terrorist acts by imposing on states positive obligations to take actions ranging from criminalizing "the manufacture, obtaining, possession or supplying" of SALW "with a view to the commission in any country whatsoever" of an act of terrorism[73] to obligations requiring states to refrain from "organising, instigating, assisting or participating in . . .

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72. The FATF defines an act of terrorism as follows:

> [(i)] An act which constitutes an offence within the scope of, and as defined in one of the following treaties: Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973), International Convention against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1980), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988), and the International Convention for the Suppression of Terrorist Bombings (1997); and (ii) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act.

FINANCIAL ACTION TASK FORCE, METHODOLOGY FOR ASSESSING COMPLIANCE WITH THE FATF 40 AND THE FATF9 SPECIAL RECOMMENDATIONS 85 (2008), *available at* http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdfen_32250379_32236920_34295666_1_1_1_1,00.html#34295495.

73. *Convention for the Prevention and Punishment of Terrorism*, League of Nations Doc. C.546.M.383.1937.V., art. 2.5 (1937), *reprinted in* 19 LEAGUE OF NATIONS OFFICE J. 23 (1938).

terrorist acts in another state."[74] Similar obligations have come into force prohibiting the export or transfer of SALW where such transfers directly or indirectly aid or assist terrorists.[75] In response to the terrorist attacks on the United States on September 11, 2001, the U.N. Security Council enacted Resolution 1373, which demanded that all states "refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts . . . [and t]ake the necessary steps to prevent the commission of terrorist acts."[76] Depending on the circumstances, support of terrorists may breach a number of Security Council Resolutions and state obligations under treaty and customary law.[77]

States should not knowingly allow their territory to be used in any way that endangers other states—including the threat or use of force against the territorial integrity or political independence of another state.[78] Secondly, the U.N. Declaration of Friendly Relations espouses that as a general principle of international law: "[e]very [s]tate has the duty to refrain from organizing, instigating, assisting or participating in . . . . terrorist acts in another [s]tate or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to . . . involve a threat or use of force."[79]

These prohibitions could be read as attempts to prevent states from knowingly acquiescing in the injurious acts of non-state actors within its territory.[80] As a result, a state that knows or has reason to know of a terrorist act against another state and is able to prevent the attack but fails to do so or fails to warn the threatened state is responsible to the victim state for the attack.[81]

Thus, questions arise as to how to hold a state responsible for tolerating or for passively supporting terrorism when that state allows either its state agents or private actors within its territory or subject to its jurisdiction to transfer SALW to known terrorist groups outside of its national territory. The question becomes more complex when both states have the ability to

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74. *Id.*; *see also* Declaration on Friendly Relations, *supra* note 32.

75. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, ¶ 6, U.N. GAOR, 42nd Sess., 73rd plen. mtg., U.N. Doc. A/RES/42/22 (Nov. 18, 1987). (1988).

76. S.C. Res. 1373, ¶ 2(a)-(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

77. *See, e.g.*, *supra* note 72; U.N. Charter art. 25 (obligating all Member States of the United Nations to comply with Security Council decisions).

78. Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, at 22 (Apr. 9).

79. Declaration on Friendly Relations, *supra* note 32.

80. *See* Davis Brown, *Use of Force Against Terrorism After September 11th, State Responsibility, Self Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 13 (2004).

81. *Corfu Channel*, 1949 I.C.J. 4, at 22-23.

control the state agents or non-state actors but engage in willful blindness because one of those states has decided, as a matter of policy, to put its own economic self-interests and trade relations with a friendly state above its obligations to refrain from passively supporting terrorists and because the terrorist group in question was "not a high priority" to the national security interests of the state involved.[82] Lastly, even if the states in question could not prevent the SALW transfer to terrorist organizations in advance, are the states in question in breach of their international obligations to protect against terrorist acts or to protect against HR violations when they fail to adequately investigate, prosecute or punish those subject to its jurisdiction for exporting or transferring SALW to terrorist organizations?

The Autodefensas Unidas de Colombia (AUC), a Colombian paramilitary group involved in Colombia's civil armed conflict, was designated as a terrorist organization by the U.S. Department of State on September 10, 2001.[83] The AUC is responsible for some of Colombia's worst massacres and notorious for committing serious HR violations against civilians.[84] For example, on January 17, 2001, the AUC entered a small Colombian farming village of Chengue, rounded up all of the male civilians, and smashed their skulls with stones and sledgehammers.[85] The AUC depends primarily upon extortion and drug trafficking to fund its terrorist activities and to purchase SALW.[86]

Chiquita Brands International Inc., a U.S. corporation, is one of the worlds largest and most powerful food marketing and distributing companies in the world.[87] The corporation controls the majority of the

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82. Josh Meyer, *U.S. Bending Rules on Colombia Terror–Several Lawmakers Say Multinationals that Aid Violent Groups in Return for Protection Are Not Being Prosecuted*, L.A. TIMES, July 22, 2007, *available at* http://articles.latimes.com/ 2007/jul/22/nation/na-chiquita22.

83. U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM (2007), *available at* http://www.state.gov/s/ct/rls/crt/ 2006/82738.htm; Matthew Kirdahy, *U.S. Goes Bananas on Chiquita*, FORBES.COM, Mar. 8, 2007, *available at* http://www.forbes.com/markets/2007/03/18/ chiquita-terrorists-faces-markets-equity-cx_mk_0315autofacescan01.html; Amy Goodman, *Chiquita's Slipping Appeal*, ALTERNET, Mar. 21, 2007, *available at* http://www.alternet.org/ story/49588.

84. Goodman, *supra* note 83; Phillip Robertson, *The Octopus in the Cathedral of Salt*, VA. Q. REV., June-Aug. 2007, *available at* http://www.vqronline.org/articles/2007/fall/robertson-octopus-cathedral-salt/.

85. Goodman, *supra* note 83.

86. *Id.*

87. Kirdahy, *supra* note 83; Michael Jessen, *Going Bananas*, ALTERNET, Feb. 6, 2001, *available at* http://www.alternet.org/ story/10427/.

world's most important fruit export valued at $1.5 billion annually.[88] Chiquita (formerly United Fruit Company and then United Brands) is notorious for unlawfully intervening in Latin American affairs in order to take over banana-growing lands by paying bribes to paramilitary groups as protection money.[89] An Organization of American States (OAS) report in 2003 found that in November of 2001, Banadex, a Chiquita subsidiary, used one of its ships to smuggle more than 3,000 AK-47 assault rifles and 2.5 million rounds of ammunition to Colombian paramilitaries in the Northern Uraba region.[90] At that time, the AUC was consolidating control of the Uraba region through massacres and assassinations.[91]

The AUC and other paramilitary groups purchased the AK-47s and ammunition from an Israeli arms merchant operating out of Panama who in turn obtained the SALW from the Nicaráguan police.[92] Reportedly, the

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88. Dan Ackman, *Top Of The News: Banana Seller On The Brink*, FORBES.COM, Jan. 17, 2001, *available at* http://www.forbes. com/business/2001/01/17/0117topnews.html.

89. *Id.*; Jeffrey Gold, *Lawsuit: Chiquita Funded Terror Groups*, BOSTON GLOBE, July 19, 2007, *available at* http://www.boston.com/business/articles/2007/07/19/lawsuit_chiquita_funded_terror_groups/.

90. Organization of American States, Jan. 29, 2003, Doc. OEA/Ser.GCP/doc.3687/03; Gold, *supra* note 89; Robertson, *supra* note 84; Carol D. Leonnig, *In Terrorism-Law Case, Chiquita Points to U.S.*, WASH. POST, Aug. 2, 2007, at A01; *Colombians Seek Extradition of U.S. Banana Executive Who Supported Death Squads*, INT'L HERALD TRIB., Mar. 16, 2007 [hereinafter *Colombians Seek Extradition*], *available at* http://www.iht.com/articles/ap/2007/03/16/america/LA-GEN-Colombia-Terrorism-Bananas.php.

91. Gold, *supra* note 89; OEA/Ser.GCP/doc.2687/0329 Jan. 2003; Meyer, *supra* note 82; Gold, *supra* note 89; Robertson, *supra* note 84; Carol D. Leonnig, *In Terrorism–Law Case, Chiquita Points to U.S.*, WASH. POST, Aug. 2, 2007, at A01; *Colombians Seek Extradition of U.S. Banana Executive Who Supported Death Squads*, INT'L HERALD TRIB. (AP), Mar. 16, 2007, *available at* http://www.iht.com/articles/ap/2007/03/16/america/ LA-GEN-Colombia-Terrorism-Bananas.php.

92. Robertson, *supra* note 84. Robertson reported that a former, high-ranking AUC paramilitary commander confirmed that he personally supervised the loading of cocaine onto a Chiquita ship called the Otterloo from a Chiquita dock and the subsequent unloading of fourteen containers of SALW from the same Chiquita ship at Chiquita docks in an apparent drugs-for-weapons deal. This former AUC commander explained Chiquita's involvement in the AUC's drugs-for-weapons exchanges:

> "Look, for every kilo of drugs they put in, they had to pay 500,000 pesos. If you're a drug trafficker, and I'm in control, you'd have to pay me. You have 20 kilos of coca, or you have some other cargo, and I own that region—you understand me? You pay me 500,000 pesos for me to ship those drugs as if they were mine, in the boats. You understand? Chiquita's boats. That's what the Bananero Block had going on here." Lorenzo watched the AUC load drugs onto Chiquita boats; he knew about it because he was there when it happened. "Look, there were drugs, and there were times that they sent drugs for weapons. They sent the kilos of

SALW in question began as a legitimate arms trade between the Nicaraguan National Police and a private Guatemalan arms dealership, Grupo de Representaciones Internationales (GIR S.A.).[93] GIR S.A. offered the police new Israeli manufactured pistols and mini-uzis in return for five thousand surplus AK-47s and 2.5 million rounds of ammunition that was later diverted to the AUC by Shimon Yelinek, an Israeli arms dealer operating in Panama.[94] Shimon Yelinek claimed to be representing the Panamanian National Police.[95] The diversion was made possible in part by Chiquita freighters and docks being utilized as an intricate part of the AUC's cocaine-for-weapons exchanges that allowed the AUC to "act as a contraband-freight consolidator."[96]

Colombian Chief Prosecutor, Mario Iguaran, indicated that the company's top executives knew the AUC was using payoffs and illicit SALW deals to fund operations against Colombian civilians and rivals,[97] therefore, the Colombian government is seeking extradition of the Chiquita top executives to face criminal prosecution in Colombia.[98] Columbia's chief prosecutor's office noted that four people already convicted in the

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> drugs, and from out there, those duros said we are going to send this many kilos of drugs and I need this many rifles."

Robertson, *supra* note 84.

93. Organization of American States, *supra* note 90.
94. *Id.*
95. *Id.*
96. Robertson, *supra* note 84; Organization of American States, *supra* note 90.

> Neither GIR S.A. nor any Nicaraguan official ever questioned the purchase order or attempted to verify that Panama had in fact offered to buy the weapons. Yelinek inspected the police weapons some months after the deal was made, and after Nicaraguan authorities had given permission for the transaction. He declared them to be unserviceable and unsatisfactory. This threatened the transaction. GIR S.A. and the Nicaraguan Army solved the problem by arranging a swap of 5000 surplus police AK47s for 3117 serviceable weapons in the Nicaraguan Army inventory. GIR S.A. delivered the Israeli arms to the police and the Nicaraguan Army took over responsibility for delivering the AK47s. Although the parameters of the transaction changed, no new authority was requested from responsible Nicaraguan agencies.

Organization of American States, *supra* note 90.

97. Meyer, *supra* note 82.
98. *Colombians Seek Extradition*, *supra* note 90.

illicit SALW transfer included Banadex's legal representative.[99] Colombia was seeking additional information from the U.S Department of Justice (DOJ) regarding the SALW transfer.[100] However, the situation is complicated further by the on-going U.S.-Colombian free-trade negotiations.[101]

Thus far, the United States has refused to extradite any Chiquita employees to Colombia, and in exercising its prosecutorial discretion, the DOJ decided not to prosecute Chiquita executives under its national anti-terrorism laws regarding payments the company knowingly made to the AUC and other Colombian terrorist groups.[102] Instead, the DOJ agreed to a plea agreement where Chiquita executives plead guilty to violating anti-terrorism laws and merely fined the company $25 million payable over ten years to the U.S. government.[103] None of the money will go to compensate Colombian victims of HR violations or victims of the groups' terrorist acts.[104]Chiquita generates $4.5 billion a year in annual revenue and sold its Banadex subsidiary in 2004 for $43.5 million.[105]

As far as can be determined, neither the United States, Guatamala, Panama, nor Nicargágua has prosecuted anyone in connection with the illicit SALW weapons transfer to Colombian terrorist organizations.[106] Nor have any of these states been held responsible for failing to effectively investigate, prosecute, or punish those responsible for the unlawful transfer.[107] None of the above-mentioned states have compensated or made

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99. Romero Simon, *Columbia May Extradite Chiquita Officials*, N.Y. TIMES, Mar. 19, 2007, *available at* http://www.nytimes.com/2007/03/19/world/americas/19colombia.ready.html?_r=1&ref=americas&oref=slogin.

100. *Id.*

101. Meyer, *supra* note 82.

102. Carol D. Leonnig, *Ex-Chiquita Execs Won't Face Bribe Charges*, WASH. POST, Sept. 12, 2007, at A04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/11/AR2007091102504.html; Gold, *supra* note 89.

103. Leonnig, *supra* note 102; Simon, *supra* note 99; Kirdahy, *supra* note 83; *Colombians Seek Extradition*, *supra* note 90.

104. *Chiquita Fined 25 Million Dollars for Payment to Paramilitaries*, AGENCY FRANCE PRESSE, Sept. 17, 2007, *available at* http://news.yahoo.com/s/afp/20070917/bs_afp/uscolombiaattacks.

105. *Colombian Seek Extradition*, *supra* note 90; *Chiquita Fined 25 Million Dollars for Payment to Paramilitaries*, AGENCY FRANCE PRESSE, Sept. 17, 2007; *Chiquita Reports Second Quarter 2007 Results*, PRNewswire, Aug. 2, 2007, *available at* http://www.prenewswire.co.uk/cgi/news/release?id=204337.

106. Leonnig, *supra* note 102; Kirdahy, *supra* note 83; *Colomibans Seek Extradition*, *supra* note 90.

107. The plea agreement and the $25 million fine were specific to Chiquita's unlawful payments of bribes to Colombian terrorist organizations and was not an agreement not to prosecute

reparations to any of the victims or the victim state. No information has been found to confirm that any of these states cooperated with the Colombian officials in its own investigation into Banadex's illicit transfer of SALW to Colombian terrorist organizations. The U.N. Security Council Resolution 1373 calls for cooperation between states to suppress terrorist activities.[108] Unlike the Convention for the Prevention and Punishment of Terrorism, the Security Council Resolution does not include the phrase "with a view" and thus does not require a showing of intent to aid or assist terrorists or terrorist acts in order for states to be complicit in the facilitation of terrorist activities.[109]

This case illustrates the difficulties of preventing terrorists from acquiring SALW and enforcing anti-terrorism laws regarding the export/transfer of SALW when states choose to prioritize their own economic self-interests at the expense of HR and anti-terrorism efforts.[110] Arguably the United States, Gutamala, Panama, and Nicargágua are in breach of their international anti-terrorism obligations for failing to ensure that both state and non-state actors subject to their jurisdiction did not aid or assist in the perpetration of terrorist acts and for failing to take measures to prevent such acts from occurring in the territory of a third state.[111] Additionally, Panama and the United States may be in breach of their international obligations by failing to investigate, prosecute, and punish the

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regarding illicit transfers of SALW to Colombian terrorist organizations. U.S. Department of Justice, U.S. Attorney's Office, District of Colombia, *Chiquita Brands International, Inc., Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay a $25 Million Fine*, DOJ Press Release, Mar. 19, 2007, *available at* http://www.bis.doc.gov/news/2007/doj03_19_07.htm.

108. S.C. Res. 1373, *supra* note 76, ¶ 3(c).

109. SC/RES/1373; *see* Eric Schmitt & Thom Shanker, *U.S. Adapts Cold-War Idea to Fight Terrorists*, N.Y. TIMES, Mar. 18, 2008, *available at* http://www.nytimes.com/2008/03/18/washington/18terror.html?pagewanted=3&hp (quoting Rear Adm. William P. Loeffler, deputy director of the Center for Combating Weapons of Mass Destruction at the military's Strategic Command, explaining that President Bush's declaration that the United States would hold "fully accountable" any state that provides nuclear weapons to other states or non-state actors meant that there is no distinction between terrorists who plan or carry out terrorist attacks and those who might supply them with weapons or weapons components. It is a system of "attribution as deterrence").

110. Leonnig, *supra* note 90 (reporting that former U.S. Assistant Attorney General and current Secretary of the Department of Homeland Security, Michael Chertoff turned a blind eye to Chiquita's bribery payments to Colombian terrorist organizations even though Chiquita executives asked for his advise on whether to continue the payments. Chertoff acknowledged the choice was "complicated" because if Chiquita stopped paying the AUC and other terrorist groups, the corporation would have to halt its business operations in Colombia); Meyer, *supra* note 82 (stating that two senior U.S. Department of Justice officials did not think that the AUC or other Colombian terrorist groups were a "high priority" since they had not attacked U.S. interests).

111. S.C. Res. 1373, *supra* note 76, ¶ 3.

Israeli arms dealer and Chiquita employees(respectively) for assisting and supporting terrorist groups by unlawfully providing them with SALW, which were used in the furtherance of terrorist activities. It is not known whether any of these states were aware in advance of the illicit arms deal to determine if they unlawfully intervened in Columbia's civil war.[112] More information is needed to make definitive determinations.

However, the United States failed to adequately punish Chiquita employees due to prioritizing its economic interests over anti-terrorism obligations. Even though Chiquita was fined $25 million for paying bribes to Colombian terrorist groups, the punishment does not duly reflect the seriousness of materially supporting the terrorist acts perpetrated against Colombian civilians. While one cannot expect states to prevent all acts of terrorism, when a state knows or has a reason to know that persons or entities within its territory or subject to its jurisdiction are aiding or assisting terrorist organizations by supplying them with SALW, it has a duty to adequately punish those engaging in such acts.

Lastly, the United States, Nicarágua, Guatamala, and Panama may have breached their HR obligations in the instant case. Although there is a certain lack of clarity regarding the extraterritorial application of states' HR obligations, this incident occurred within the region of the American States. Thus, the United States, Guatamala, and Panama are obligated to respect, protect, and fulfill human rights within the OAS region regardless of the geographical location of the victims.[113]

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112. André Cala, *Bush, Colombia and Narco-Politics*, Consortium News, Mar. 9, 2008, *available at* http://www.consortiumnews.com/2008/030908a.html (explaining that in 1992, former AUC leader Carlos Castaño was a leader of an undercover, paramilitary group called the Persecuted by Pablo Escobar (Pepes) who were trained, equipped, and coordinated jointly by the U.S. Drug Enforcement Administration (DEA), the CIA, the U.S. military, Colombian intelligence services and the Colombian, Cali drug cartel. Castaño, along with other AUC paramilitary leaders, claim that the AUC was similarly, but discretely being aided by the DEA and the CIA).

113. *See* Armando Alejandre Jr. et al. v. Republic of Cuba, Case 11.589, CHR Report No. 86/99, OAS/Ser.L/V/11.104,doc.10 (1999).

> In effect, the Commission believes it pertinent to note that, in certain circumstances, its exercising competent authority over facts which have occurred in an extra-territorial location not only is consonant with but is required by the relevant provisions . . . the American States are obliged to respect the protected rights of any person subject to their jurisdiction. Although this ordinarily refers to persons who are within the territory of a State, in certain circumstances it can refer to behavior having an extraterritorial *locus*, where a person is present on the territory of one State, but is subject to the control of another State, generally through the acts of the agents abroad of the latter State. In principle, the investigation has no reference to the nationality of the alleged victim or his

3. International Human Rights Law

a. Positive-Negative Obligations

States have an international obligation to respect, protect, and fulfill HR according to norms established by treaties and customary law.[114] These obligations can be positive or negative giving rise to both direct and indirect responsibility depending upon whom is actually doing the harm.[115] The distinction between positive and negative obligations typically refers to different obligations with varying scopes of applicability and the means for giving effect to the obligation.[116] The obligation to respect is a negative obligation and requires states to refrain from taking prohibited actions that would interfere directly or indirectly with HR.[117] The obligation to protect is a positive obligation and requires states to take measures that prevent

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> presence in a given geographical zone, but rather to whether in those *specific* circumstances the State observed the rights of a person subject to its authority and control.

Id. ¶ 23. The author is aware that the Inter-American Declaration is binding by virtue of OAS membership and that it has no express jurisdictional limitations. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989 Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989).

114. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, art. 2(1) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 2(1) Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter ICESCR]; *see also* Universal Declaration of Human Rights, G.A. Res. 217A, art. 28, U.N. GAOR, 3d Sess, 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

115. John Ruggie, Special Representative of the Secretary-General (SRSG), Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rigths Council": Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007), *available at* http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf; Viljam Engström, *Who Is Responsible for Corporate Human Rights Violations?*, ABO AKADEMI U. INST. FOR HUM. RTS., at 11 (2002), *available at* http://www.abo.fi/instut/imr/norfa/ville.pdf; *see also* Human Rights Comm. General Comment 16; *Compiliation of General Recommendations Adopted by Human Rights Treaty Bodies*, art. 17, U.N. Doc. HRI/GEN\1\Rev.1, at 21 (1994).

116. Francoise Hampson, The ECHR and Inter-State Transfers With Risk Of Serious Ill-Treatment—The Attempt To Overturn Chahal, July 2007, at 6 (unpublished, on file with the author).

117. *Id.*

prohibited effects such as third parties interfering with HR[118] or by requiring states to take specific measures of protection.[119] The positive obligation requires states to adopt legislation or take other measures necessary toward the full realization of HR.[120] A state will be in breach of its international obligations if it fails to meet the abovementioned obligations and state responsibility flows from such a breach.[121] For example, the HRC has stated that the positive obligation of ensuring substantive rights within the International Covenant on Civil and Political Rights (ICCPR) (including the right to life) can only be fully realized if individuals are protected from abusive actions by states and states' agents, private persons, or entities.[122] Similarly, regional systems affirm states' positive duties to protect against abuses by non-state actors and require state regulation and adjudication of non-state acts.[123]

A state's negative obligation to respect the right to life within the national territory is a well-settled principle of HRL and is non-derogable even in time of national emergency.[124] While the right is not absolute, states must take steps to maximize protection of the right to life. These steps include the negative obligation of the state to refrain from arbitrary deprivation of the right to life.[125] However, states must also fulfill positive obligations in order to fully meet their human rights obligations.[126]

In terms of states' obligations with regard to SALW, maximizing protection requires (among other things) states to train law enforcement not to engage in arbitrary deprivations of the right to life and take measures to

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118. *See, e.g.*, X & Y v. the Netherlands, 91 Eur. Ct. H.R. (Ser. A), at 23 (1985) (judgment).

119. Osman v. United Kingdom, 29 Eur. Ct. H.R. 245 (1998).

120. *See* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., COMM. ON ECON., SOC., AND CULTURAL RTS., *CESR, General Comments 3: The Nature of States Parties Obligations*, ¶ 2 & 3, U.N. Doc. E/1991/23 (Dec. 14, 1990); Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, (July 29, 1988); Soc. & Econ. Rts. Action Ctr. for Econ. & Soc. Rts. v. Nigeria, Comm. No. 155/96, Case No. ACHPR/COMM/A044/1 (Affr. Comm'n Hum. & People's Rts. Oct. 27, 2001).

121. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY 16 (2002).

122. *Human Rights Comm., General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004).

123. *See generally* Andrew Clapham, Human Rights Obligations of Non-State Actors ch. 9 (2006); Velasquez Rodriguez Case, *supra* note 120, at 173 (establishing the due diligence test); *Osman v. United Kingdom*, EctHR (Oct. 29, 1998), Reports of Judgments and Decisions, 1998-VIII.

124. ICCPR, *supra* note 114, arts. 6 & 4(2); ECHR Charter art. 2; ACHR Charter art. 4; UDHR art. 6; ACHPR art. 4; OHCHR General Comment 6.

125. *Final Report Submitted by Barbara Frey*, *supra* note 6, at 2.

126. *Id.*

minimize violence between private actors by enacting legislation criminalizing violent acts with SALW.[127] However, minimizing violence between non-state actors with SALW includes a states' positive obligation to exercise due diligence exceeding the mere criminalization of violent acts.[128] In other words, to meet their negative obligation to respect HR, states should take positive actions against reasonably foreseeable harm.[129]

The Human Rights Committee has stated that a state is incapable of meeting its HR obligations by merely doing nothing at all.[130] If the international community wishes to have effective rather than illusory realization of HR, then states must come to terms with the fact that HR cannot be fully realized merely through negative obligations alone regarding the export or transfer of SALW. The negative obligations should be supported by positive obligations requiring states do certain things to prevent foreseeable harm.[131]

At present, a state's positive and negative obligations regarding the export and transfer of SALW are determined and limited by the nature of the HR(s) at risk since a state's obligations with respect to those rights are set forth within relevant treaties and customary law.[132] The scope of those obligations is subject to the interpretation of regional and extra-judicial treaty bodies. The question of whether states can be held responsible for exporting/transferring SALW to end-users that are known human rights violators or where it is more likely than not that SALW will be used violate HR may depend upon several factors.

First, exporting/transferring state responsibility may depend on whether the exportation/transfer of SALW under the circumstances is deemed to be a breach of the exporting/transferring state's positive obligations to protect and fulfill or the exporting/transferring state's negative obligation to

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127. *Id.*

128. *Id.*

129. *Id.* at 8; *Jiménez Vaca v. Columbia*, HRC Communication No. 859/1999 ¶ 9.

130. *See, e.g.*, Marckx v. Belgium, 32 Eur. Ct. H.R. (Ser. A) (1979) (holding that while Article 8 of the ECHR is essentially concerned with the state's negative obligation to refrain from arbitrary interference by public authorities, there may be positive obligations inherent in an effective "respect" for family life).

131. *See, e.g.*, Article 6 of the International Covenant on Civil and Political Rights which states: "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." On the scope of Article 6, see Human Rights Committee, General Comment 6: The Right to Life, Apr. 30, 1982, ¶5, U.N. Doc. HRI/GEN/1/Rev.6 of May 12, 2003, at 128 (stating "the right to life has been too often narrowly interpreted . . . The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures . . .").

132. *See, e.g.*, UDHR, art. 28; ICCPR, art. 2(1); ICESCR, art. 2(1).

respect human rights. Secondly, the responsibility of the exporting/transferring state may also depend upon which of the victim's rights were violated or the likelihood of a violation by the end-user (i.e., jus cogens norm such as torture v. other HR). Lastly, the responsibility of the exporting or transferring state may depend on the extraterritorial applicability of the exporting/transferring state's HR obligations.

b. Jurisdiction

Issues regarding the extraterritorial application of HR outside the national territory in general and with regards to SALW transfers in particular are the subjects of much debate. Arguably, one could assert that states are in breach of their HR obligations for failing to exercise due diligence when they export/transfer SALW to states where the exporting/transferring state knows, or has reason to know that more likely than not SALW will be used to commit HR violations.[133] Whether states are obligated to exercise such due diligence in order to fulfill HR obligations extraterritorially is unclear particularly in situations that neither situations of detention or occupation.

The scope of human rights under international treaties is typically limited to those who are either within the state party's territory or subject to its jurisdiction.[134] The scope of a state's due diligence obligation to ensure HR outside the exporting or transferring state's territory depends on the international rule of reasonableness[135] and the degree of control the state has over such exports/transfers of SALW.[136] However, recognizing

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133. *See generally Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, *supra* note 1.

134. ICCPR art. 2 (While Article 2 of the ICCPR refers to all individuals within a state's territory and subject to its jurisdiction, the Human Rights Committee has interpreted these to be independent ground for application of the Covenant); ECHR charter art. 1; *see, e.g.*, Delia Saldias de Lopez v. Uruguay, Commc'n No. 52/1979 (July 29, 1981), U.N. Doc.CCPR/C/OP/1, at 88 (1984); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Req. for Advisory op.) (Order of Dec. 19, 2003).

135. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

136. *See* Ruggie, *supra* note 115; *see generally International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts*, *in* THE INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES (James Crawford ed. 2002) [hereinafter INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY]; Military and Paramilitary Activities (Nicar. v. United States), 1986 I.C.J. 14 (June 27). U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran), Merits, 1980 I.C.J. Rep. 3 (May 24); Prosecutor v. Tadic, 1999 Case No. IT-94-1I, Summary of Appeals Chamber Judgment (July 15, 1999); Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosn.

the extraterritorial application of HR and corresponding due diligence obligations of exporting/transferring states of SALW does not infringe upon the principle of state sovereignty because such obligations focuses on the effects of the actions or inactions of exporting/transferring states rather than the actions of the state of the victim. [137]

Additionally, some of the substantive norms set forth within certain treaties have evolved into customary international law and binding on all states. As such, they should be respected, protected, and ensured both within and outside national territories based upon the principles of the universality of human rights and non-discrimination.[138] Enumerating which rights have evolved into customary law has been the subject of much discussion among academics and it is neither useful nor practical to attempt to provide an exhaustive list here. However, some, if not all, of the rights enumerated in the Universal Declaration of Human Rights (UDHR) such as: the right to life; prohibitions against torture, cruel, inhuman or degrading treatment or punishment; principles of non-discrimination; and the right to be free from arbitrary arrest and detention are arguably part of customary law.[139]

Admittedly, the UDHR was never intended to be a legally binding instrument, but it is fair to say that some, if not most of the rights contained therein, have evolved over time to become general principles or customary international law and as such are binding on all states evidenced not only by opino juris and state practice but also by the large number of states who have signed or ratified the core treaty bodies espousing the rights contained within the UDHR.[140] As customary HRL develops over time, assertions

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& Herz. v. Yugo.), Judgment, 2007 I.C.J. (Feb. 24), *available at* http://www.icj-cij.org/docket/files/91/7/99.pdf.

137. *See* Ruggie, *supra* note 115.

138. *See generally* SIGRUN I. SKOGLY, *The Nature of Customary Law Obligations, in* BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 118 (2006) [hereinafter BEYOND NATIONAL BORDERS].

139. *Id.*; Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty, in* THE INTERNATIONAL BILL OF RIGHTS—THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114-15 (Louis Henkin ed., 1981); Ashlid Samnoy, *The Origins of the Universal Declaration of Human Rights, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, A COMMON STANDARD OF ACHIEVEMENT 10 (Gudmundur Alfredsson & Asbiorn Eide eds., 1999) [hereinafter THE UNIVERSAL DECLARATION].

140. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331; Samnoy, *The Origins of the Universal Declaration of Human Rights, in* THE UNIVERSAL DECLARATION, *supra* note 139. The "inherent right to life" is not only enumerated in the UDHR but also in the following treaty bodies and have garnered a high rate of state participation. UDHR art. 6; ICCPR art. 6; ECHR Charter, art. 2; IACHR Charter, art. 4; ACHPR Charter, art. 4.

that states' HR duties and obligations stop at the water's edge are correspondingly weakened.[141]

While there has recently been some normative convergence regarding states' extraterritorial HR obligations, the enthusiastic approach of the IACtHR remains in sharp contrast to the cautious methodology of the ECtHR.[142] Nevertheless, it would seem incredible that a state has no HR obligations regarding the export/transfer of SALW to those outside their territory when they know or have reason to know that more likely than not those weapons will be used to violate HR of persons outside their national territory or subject to their jurisdiction. To conclude otherwise flies in the face of the principles of the universality of HR and non-discrimination and would lead to the unacceptable conclusion that states have no duties or responsibilities for the effects of their exporting/transferring SALW to known state and non-state human rights violators.

Such a conclusion is even more suspect given that it would allow exporting/transporting states to effectively act, or not act, outside its national territory in a manner inconsistent with its obligations within its national territory—a conclusion the HRC has previously rejected.[143] Lastly, it is worth noting that neither the Inter-American Declaration of Human

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141. Skogly, *The Nature of Customary Law Obligations*, *in* BEYOND NATIONAL BORDERS, *supra* note 138, at 131.

142. *See* John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and U.S. Activities in Iraq*, ASIL INSIGHTS, Oct. 25, 2005, http://www.asil.org/insights/2005/10/ insights051025.html; *see* Alejandre Jr. et al., *supra* note 113. *But see* Bankovic v. Belgium, (Admissibility) App. No.52207/99 Eur. Ct. H.R. (2001) (construing the extraterritorial application of the ECHR narrowly the ECtHR held NATO's bombing of a radio-television station resulting in the death of the civilians outside the attacking states' territories was not sufficient "authority and control" over the victims to bring them within the jurisdiction of the respondent states. However, it could be argued that the ECtHR was only saying that the applicants could not use the ECHR machinery, rather than no human rights violations occurred); Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19), *available at* http://www.icj-cij.org/docket/files/116/10455.pdf.

143. Delia Saldias de Lopez v. Uruguay, Commc'n No. 52/1979 (July 29, 1981), U.N. Doc. CCPR/C/OP/1, at 90 (1984) (holding that Uruguay violated its international obligations under the ICCPR when its security forces abducted and tortured a Uruguayan citizen residing in Argentina. The author is aware that this case meets the jurisdictional requirements set out in Bankovic since it was a situation of detention, however, the Human Rights Committee went further stating nothing within the ICCPR may be interpreted as a right to engage in activities aimed at destroying any rights contained therein reasoning the unconcionability of interpreting state responsibility under Article 2 in such a way as to permit State Parties to engage in violations extraterritorially which they could not engage in within their territory); *see also* ICESCR, *supra* note 114, art. 2 (imposing an obligation on State Parties to take steps "individually and through international assistance and cooperation," toward the progressive realization of the rights contained in the Covenant possibly implying an element of extraterritorial applicability to all State Parties).

Rights (IADHR) nor the African Commission on Human and Peoples Rights (ACHPR) has express jurisdictional limitations[144] raising additional questions regarding those Member States' extraterritorial HR obligations regarding SALW transfers.[145]

c. Due Diligence, Jus Cogens, & Obligations Erga Omnes

States also have an obligation to exercise due diligence so as not to impair the enjoyment of HR as part of their positive obligations to protect and fulfill HR.[146] States' due diligence obligations extend to the prevention of HR violations committed with SALW by both state and non-state actors.[147] The nature and extent of what diligence is due for exporting or transferring states of SALW to prevent those weapons from being used to impair or violate HR would be determined by the "primary rules" within the core treaty bodies which determine fault and injury creating wider responsibility while the Articles on State Responsibility set out more general "secondary rules" of state responsibility and remedies for breaches of the primary rules.[148]

HRL requires states to maximize HR protection particularly with regards to jus cogens human rights obligations and while there is some lack of consensus as to which international norms constitute jus cogens norms,[149] it is generally accepted that acts of aggression—threats or use of

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144. The IADHR is binding vis-à-vis membership in the Organization of American States (OAS); ACHPR Charter, art. 1 (making no reference to jurisdictional limitations).

145. It should also be noted that post Alejandre v. Cuba, the Inter-American Commission recently rejected as inadmissible a petition that conduct of U.S. forces in Iraq violated Inter-American human rights law without articulating its reasons for doing so although it may have been due to the violations having occurred outside of the region of the OAS. John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-international Armed Conflict in an Extraterritorial Context*, New England School of Law Working Paper Series, Paper 2, 2007, at 32 n.90, *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1001&context=nesl/neslfwps; *see* Cerone, *supra* note 142.

146. Velásquez Rodríguez Case, (Ser. C) 1988 Inter-Am. Ct. H.R., No. 4, at 4, 9 (holding that states have a duty to "organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights").

147. Final Report Submitted by Barbara Frey, *supra* note 6, at 2-8.

148. *See generally Articles on State Responsibility*, *in* INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136; Daniel Bodansky et al., *Symposium: the ILC's State Responsibility Articles, Introduction and Overview*, 96 AM. J. INT'L L. 773 (2002).

149. IVAN SHEARER, STARKE'S INTERNATIONAL LAW (11th ed. 1994); Maria Spinedi, *International Crimes of State: The Legislative History* [hereinafter *International Crimes of State*], *in* INTERNATIONAL CRIMES OF STATE 135-37 (Joseph Weiler et al. eds., 1989), Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tenative Analysis of Three*

force and the prohibitions against torture, genocide, crimes against humanity, war crimes, piracy and slavery are jus cogens norms.[150] As such, they are deemed as having a special legal character that by definition gives rise to rights and obligations erga omnes and therefore carries with them legal consequences not only for the violating state but also for third states.[151]

Not only are states prohibited from violating jus cogens norms, they must refrain from doing anything that will facilitate the commission of a violation.[152] However, it is important to note the distinction between international crimes and jus cogens norms with regards to state responsibility for the transfer of SALW. While international crimes require evidence of breach, jus cogens norms only require evidence of a possibility of breach to trigger state obligations to prevent them from occurring.[153] As such, jus cogens norms appear to fall within a state's negative obligations and states may be in violation of those obligations, if they export/transfer SALW to end-users whom they know or have reason to know that more likely than not those weapons will be used to violate jus cogens norms.

While all jus cogens norms are deemed to give rise to states' obligations erga omnes, not all obligations erga omnes necessarily rise to a jus cogens norm.[154] While disagreements exist as to whether there is an exhaustive list of rights giving rise to obligations erga omnes,[155] the ICJ in

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Related Concepts, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 149, at 156-58; *see also* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67 (1996).

150. Vienna Convention on the Law of Treaties, arts. 53 & 64, Jan. 27, 1980, 115 U.N.T.S. 331, 8 I.L.M. 679; Bassiouni, *supra* note 149, at 68.

151. Hampson, *supra* note 116, at 8; Prosecutor v. Furundzija, Case No. IT-95-17/I-T, Trial Chamber Judgment, ¶¶ 139-143 (Dec. 10, 1998); ECtHR judgment in Al Adsani v. the United Kingdom, 35763/97, judgment of Nov. 21, 2001; Prosecutor v. Delalic and others, Case No. IT-69-21-T, Trial Chamber Judgment, ¶¶ 452-454 (Nov. 16, 1998); Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970, at 32; Human Rights Comm., *General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, Fifty-second session, U.N. Committee Against Torture Draft General comment No. 2, Implementation of Article 2 by State Parties, 38th Session*, U.N. Doc. ICPR/21/Rev.1/Add.6, ¶ 1 (May 16, 2007).

152. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16, at 155-60.

153. Howard, *supra* note 3, at 6-11.

154. Hampson, *supra* note 116, at 8; Howard, *supra* note 3, at 7-11; Barcelona Traction, *supra* note 151, at 33-34.

155. *See, e.g.*, LAURI HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 52-55 (1988); Reparations for Injuries

Barcelona Traction held that a distinction exists between state obligations created through bilateral or multi-lateral agreements and obligations of states toward the international community as a whole.[156] The ICJ elaborated that in light of the importance of the rights in question, "all states can be held to have a legal interest in their protection; they are obligations erga omnes" and provided four examples meeting that criteria: acts of aggression; genocide; slavery; and racial discrimination.[157] In an attempt to analyze the development of obligations owed erga omnes, Maurizio Ragazzi developed what has been described as a descriptive and not a prescriptive formula that must be met in order for the obligation to be deemed erga omnes.[158] Borrowing heavily from the ICJ in Barcelona Traction, Ragazzi's list of rights included those enumerated within that case but mentioned the rights to life and human dignity as being "fundamental" to the promotion of HR.[159]

Thus, according to Ragazzi, only those rights espoused within Barcelona Traction can be deemed to have obligations erga omnes with the possible exception of adding the right to self-determination.[160] However, since Ragazzi did not intend to create an exhaustive list of rights giving rise to obligations erga omnes and mentions the right to life and human dignity as being "fundamental" in the promotion of HR, it would seem odd not to include the right to life and the right to be free from cruel, inhuman, and degrading treatment within the list of those rights giving rise to obligations erga omnes although these rights have not yet developed into jus cogens norms.[161] If one accepts Ragazzi's criterion as a reflection of the ICJ's concept of rights giving rise to obligations erga omnes, then states may have negative obligations not to transfer SALW to end-users whom are known or where the exporting or transferring state has reason to know that more likely than not SALW will be used to violate a right giving rise to erga omnes obligations.

Suffered in the Service of the United Nations (Advisory Opinion) (1949) ICJ Rep 1, 181-182. *But see* Barcelona Traction, *supra* note 151 at 33-34.

156. Barcelona Traction, *supra* note 151.

157. *Id.* at 33-34. (emphasis added).

158. MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 134 (1997), *cited in* Howard, *supra* note 3, at 8-9.

159. *Id.* at 132-34.

160. *Id.* at 9.

161. *See* Prosecutor v. Blaskic, Case No. IT-95-14, Trial Chamber, ¶ 182 (Mar. 3, 2000) (defining "violence to life and person" as "a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences").

d. State Obligations & Causation of Harm

Even if one presumes all of states' HR obligations are applicable extraterritorially for the purposes of this Article, the issue of establishing a direct causational link between the exporting/transferring of SALW, and the harm suffered by the victim in the receiving state has historically stood as an obstacle toward holding exporting/transferring states responsible for HR violations that occur outside of the exporting/transferring state's territory even when the exporting or transferring state failed to adequately regulate such transfers.[162] Comparisons have been made between states' obligations regarding the exportation/transfer of SALW with states' obligations of non-refoulement under International Refugee Law (IRL).[163] It has been argued that making such analogies between states' obligations regarding non-refoulement and states' obligations regarding exporting/transferring SALW is flawed due to a distinct difference in the causational link between the state's conduct and the victim's harm.[164]

It is asserted that the causational distinction turns on the notion that the act of returning a person to another state where there is a real risk of either torture or serious ill-treatment is a sine qua non cause of the victim's eventual harm, whereas exporting or transferring SALW either to known human rights violators or to end-users where states have reason to know that more likely than not SALW will be used to commit HR violations lacks the same direct, immediate causational linkages of harm between the victim and the exporting/transferring state of SALW.[165] It has been asserted that the export/transfer of SALW does not meet the "but for . . ." causation test—that is "but for the export/transfer of weapon 'X,' HR violation 'Y' would not have occurred."[166]

For example, in Tugar v. Italy, Rasheed Tugar, an Iraqi national, filed a complaint with the Human Rights Commission (HRCM) alleging Italy

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162. *See, e.g.*, Rasheed Tugar v. Italy, App. No. 22869/93, Eur. Comm'n H.R. (decision of Oct. 18, 1995, unpublished).

163. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA/RES/39/46, Annex art. 4, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A139/51 (Dec. 10, 1984) [hereinafter CAT]; Boivin, *supra* note 2, at 479-81 (citing SUSAN MARKS & ANDREW CLAPHAM, INTERNATIONAL HUMAN RIGHTS, OXFORD UNIVERSITY PRESS 13 (Oxford, 2005)) (stating "If a government may not return or expel a person to a State in which his or her life or freedom will be at risk . . . nor may it sanction the transfer of arms to a country in which the risk arises of serious violations of human rights or humanitarian law").

164. Boivin, *supra* note 2, at 479-80.

165. *Id.*; *Rasheed Tugar*, App. No. 22869/93, Eur. Comm'n H.R.

166. *See* Boivin, *supra* note 2, at 479-80; *Rasheed Tugar*, *infra* note 167.

failed to protect his right to life under the European Convention of Human Rights (ECHR).[167] In 1993, Tugar was employed as a mine-clearer in Iraq when he stepped on a mine resulting in the amputation of his lower-right leg.[168] In 1982, the Iraqi Ministry of Foreign Affairs contracted the procurement of 5.75 million anti-personnel mines with an Italian company, V.M., to be delivered when there was no Italian law regulating the exportation of the SALW in question and the Ministry of Foreign Trade enjoyed a wide margin of discretion in granting export licenses.[169] The applicant argued that Italy "did not regulate the sale of anti-personnel mines not containing any self-detonating or self-neutralising mechanism, thus failing to secure his right to life as guaranteed by Article 2 of the Convention."[170] Additionally, the applicant's counsel argued that analogous to expulsion cases such as *Soering*,[171] the Italian authorities had exposed the applicant to real and foreseeable harm—namely, the risk of "indiscriminate" use of mines by Iraq.[172] The Commission dismissed the application reasoning that:

> the applicant's injury can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible "indiscriminate" use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered.[173]

It is conceded that there is a problem establishing that a state breached its positive obligations to protect or to fulfill human rights by exporting or transferring SALW because in order to do so, the victim must prove that the exporting or transferring state is the direct proximate cause of the victim's harm—meaning there is no other intervening cause which comes between the original negligence of the exporting/transferring state and the

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167. *Rasheed Tugar*, App. No. 22869/93, Eur. Comm'n H.R., *cited in* OLIVIER DE SCHUTTER, THE ACCOUNTABILITY OF MULTINATIONALS FOR HUMAN RIGHTS VIOLATIONS IN EUROPEAN LAW, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER NUMBER 1, 61 n.211 (2004), *available at* http://www.chrgj.org/docs/wp/s04deschutter.pdf.

168. *Id.*

169. *Id.*

170. *Id.*

171. Soering v. U.K., Judgment, 7 July 1989, Series A, Vol. 161.

172. Boivin, *supra* note 2 at 480; DE SCHUTTER, *supra* note 167.

173. Tugar v. Italy, App. No. 22869/93, Eur. Comm'n on H.R. (1995).

injured victim in another state.[174] If this intervening cause (the end-user) is the substantial reason for the injury, then the exporting or transferring state may have reduced responsibility or no responsibility at all.[175] The argument follows that while the exporting or transferring state of SALW may be negligent for failing to regulate the export or transfer of SALW, the end-user state's negligent, tortious or criminal conduct stands as the intervening cause (i.e., direct proximate cause) of the victim's harm. Therefore, it is only the end-user-state who is responsible or liable for failing to fulfill its HR obligations with regards to the injured victim within its territory or subject to its jurisdiction from actual or foreseeable HR violations.

Similarly, in *Tugar v. Italy*, the Commission asked whether the applicant's "injury was the direct consequence" of Italy's failure to regulate the transfer of anti-personnel mines to Iraq and whether there was an "immediate relationship" between Italy's supplying anti-personnel mines to Iraq and Iraq's "indiscriminate" use of those weapons.[176] In other words, was there a direct causational link between Italy's failure to regulate the export of anti-personnel mines and Iraq's subsequent misuse of those weapons and secondly, was there a direct causational link between Italy's failure to regulate the exportation of anti-personnel mines and the victim's harm?

The Commission answered "no" to both questions;[177] however, the issues under discussion here are distinctly broader from those in *Tugar*—namely, whether a state is in violation of either its positive, negative, or both sets of obligations when that state exports/transfers SALW to a known HR violator or when, more likely than not, SALW will be used to commit HR violations or other internationally wrongful acts. Additionally, the Commission in *Tugar* merely sought to establish direct responsibility and did not address issues regarding indirect state responsibility.[178] Lastly, the Commission in *Tugar* merely looked to establish the exporting state's specific positive obligation to regulate the export of SALW with respect to the victim's right to life and did not

174. *See* Law.com Law Dictionary, "proximate cause," http://dictionary.law.com (last visited Apr. 13, 2008); Law.com Law Dictionary, "intervening cause," http://dictionary.law.com (last visited Apr. 13, 2008).

175. *See supra* note 174; *see also Rasheed Tugar*, *supra* note 167.

176. *Rasheed Tugar*, *supra* note 167.

177. *Id.*

178. *Id.*

address states' broader positive and negative obligations in relation to other human rights.[179]

As noted above, jus cogens norms—particularly torture—have a special legal character that carry with them special obligations. However, the author contends that assertions of causational differences between exposing persons to the real risk of foreseeable harm vis-à-vis states exporting/transferring SALW to end-users where SALW are known to be used or more likely than not those weapons will be used to violate human rights —and exposing persons to the real risk of foreseeable harm vis-à-vis expulsion of persons back to states where there is the same actual or foreseeable risk that the person will be subjected to torture—is an alleged difference without any distinction.

Resorting to the Commission's rationale in *Tugar*, it could be argued that states seeking to expel persons who are at the same actual or foreseeable risk that they will be subjected to torture—are not the direct proximate cause of actual or foreseeable harm, but rather, the receiving state, its agents, or non-state actors within the territory of the receiving state is the proximate cause of actual or foreseeable harm (i.e., the intervening cause of the victims harm). Such reasoning is equally flawed in both instances.[180] First, states have both positive and negative obligations with regards to torture and other human rights norms.

For example, states not only have a positive obligation to make acts of torture criminal offences under its domestic law, they are also obligated to criminalize "attempts to commit torture and . . . act[s] . . . which constitute [] complicity or participation in torture."[181] Secondly, states have a negative obligation to "take reasonable measures to prevent foreseeable risks of torture . . . by officials of other states or non-state actors."[182] Thus, exporting or transferring the means—in the instant case, SALW or in the case of refoulement, a person—to a state where there is a real risk of torture, is to facilitate the violation of a jus cogens norm.[183] All that is required is that the exporting or transferring state of SALW knows or has reason to know of the real risk of torture to give rise to state responsibility

179. *Id.*

180. CAT, *supra* note 163, art. 3; Convention Relating to the Status of Refugees, art. 33, Apr. 22, 1954, *available at* http://www.unhchr.ch/html/menus/b/o_c_ref.html; Chahal v U.K., App. No. 22414/93, Eur. Ct. H.R. ¶ 88 & 91 (1989); Soering v U.K., App. No. 14038/88, Eur. Ct. H.R. ¶¶ 88 & 91 (1989).

181. CAT, *supra* note 163, art. 4.

182. Stephanie Palmer, *A Wrong Turning: Article 3 ECHR and Proportionality*, 65 CAMBRIDGE L.J. 438, 441 (2006), *cited in* Hampson, *supra* note 116.

183. Hampson, *supra* note 116, at 10.

of the transferring or exporting state.[184] Therefore, states have an obligation not to export or transfer SALW where there is a real risk that those weapons will be used as a means for violating the prohibition against torture and, as such, come within the negative obligation of a state not to facilitate the violation.[185]

In other words, the same obligations and standard of care needed for the exporting or transferring state to avoid facilitation or being complicit in torture may be the same with regards to the export or transfer of SALW where there is the same actual or foreseeable risk that persons within the receiving state or subject to its jurisdiction will be at real risk of being subjected to violations of other jus cogens norms. As noted above, jus cogens norms only require evidence of a possibility of breach to trigger state obligations to prevent them from occurring.[186] As such, when there is an actual or foreseeable risk the end-user will use SALW to violate a jus cogens norm, there is no requirement to establish that there is no other intervening cause between the exporting or transferring state's conduct and the victim's harm in order to establish that the exporting or transferring state is the sine qua non cause of the victim's harm.[187] However, distinctions seem to emerge with regards to the negative or positive obligations of an exporting/transferring state of SALW that is relevant to other human rights and it is not entirely clear that there is a correlative relationship between the jus cogens prohibition of torture and the negative obligation to respect HR.[188]

Determining whether states' duties for the export/transfer of SALW, where there is an actual or real risk of HR violations (other than a violation of a jus cogens norm), is a part of the negative obligations of exporting or transferring state (aside from cases of complicity) is an open question.[189] Prohibitions against ill-treatment and other HR violations do not appear to have the same status or due diligence requirements as jus cogens norms although according to Ragazzi, ill-treatment may give rise to obligations erga omnes and thus trigger a state's negative obligations.[190] Additionally, complicity needs to be determined by establishing differing degrees of

184. *Id.*

185. *Id.*; CAT, *supra* note 163, art. 4.

186. Howard, *supra* note 3, at 6-11.

187. Spinedi, *supra* note 149, at 7, 138 (arguing that human rights violations construed as international crimes (i.e., violations of jus cogens norms) are so serious that states are often obliged to prosecute and punish such acts thereby waiving ordinary rules of jurisdiction).

188. *See* Hampson, *supra* note 116, at 11.

189. *Id.*

190. *See id.* at 10.

knowledge in the facilitation of international wrongful acts according to the rules set forth in the Articles on State Responsibility.[191]

III. COMPLICITY "WITH A VIEW" TOWARD EXTENDED STATE RESPONSIBILITY

The Articles on State Responsibility[192] represent a codification and useful starting point of departure for determining indications of established and progressively developing customary "secondary" rules of responsibility and remedies to breaches of "primary" rules set forth within the core treaty bodies.[193] The rules of the Articles on State Responsibility apply both to acts and omissions to treaty obligations and customary norms encompassing the entire spectrum of international law.[194] Importantly, the "primary" rules within the treaty bodies determine fault and injury creating wider state responsibility for state and non-state acts while the Articles on State Responsibility set out more general "secondary" rules of state attribution.[195]

In other words, the "secondary" rules claim to be fault-neutral whereas the "primary" rules do not.[196] The distinction is quite significant in terms of state attribution as the "primary rules" require a showing of intent, whereas the "secondary" rules claiming to be fault-neutral, should not require a showing of specific intent to establish state attribution in the commission of an internationally wrongful act.[197] However, attributing state responsibility in terms of establishing complicity for certain international wrongful acts appear to stand in stark contrast with the Articles on State Responsibility proclaimed overall 'fault neutral' paradigm.[198] Having to show the specific intent of states in order to establish state complicity for international wrongful acts committed with

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191. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, arts. 16 & 41.

192. *Id.*

193. Bodansky et al., *supra* note 148.

194. *Id.* at 780-81.

195. *Id.* at 781; United States Diplomatic & Consular Staff in Tehron (United States v. Iran), 1980 I.C.J. Rep. 3 (May 24); James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 439 (1999).

196. Crawford, *supra* note 195, at 81 ¶ 3 & 84 ¶ 10.

197. *Id.*

198. Hampson, *supra* note 116, at 8-11 (explaining that certain human rights, such as serious ill-treatment, do not have the same status of jus cogens norms and therefore Article 16 may require a showing of intent by assisting states in order to establish their complicity in the commission of an internationally wrongful act).

SALW creates an unnecessarily high threshold for attributing state responsibility when those weapons are then used to commit certain HR violations or other internationally wrongful acts by end-user states.

Efforts to regulate SALW are meant to prevent weapons from being exported/transferred to end-users where it is either known or where it is more likely than not that they will be used to commit HR violations or other internationally wrongful acts. The primary concept at the heart of the issue is that of complicity.[199] The Articles on State Responsibility represent the international community's first attempt to codify this concept.[200] As a result, limitations can be imposed on what would otherwise be deemed lawful export or transfers of SALW.[201]

A. *Article 16*

Article 16 reads as follows:

> A state which aids or assists another [s]tate in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that [s]tate does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that [s]tate.[202]

Reading the plain language of the Article there appears to be four basic elements to establish complicity: 1) state A has committed an internationally wrongful act; 2) state B aided or assisted state A in the commission of that act; 3) state B had "knowledge" of the circumstance of the act of state A; and 4) the internationally wrongful act committed by state A would also have been an internationally wrongful act if committed by state B.

The fundamental rules of statutory construction set out various tests and methods used by courts for determining the meaning of a given law. A court should turn to one cardinal cannon before all others: Courts must presume that the drafters "say [] in a statute what it means and means in a statute what it says. . . ."[203] Thus, "[w]hen the words of a statute are

199. INTERNATIONAL LAW AND SMALL ARMS AND LIGHT WEAPONS CONTROL, *supra* note 1, at 6.

200. *Id.*

201. *Id.*

202. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16.

203. Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992).

unambiguous, then, this first canon is also the last. . . ."[204] With regards to treaty law, "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"[205] The Articles as a codification of customary law are more akin to statutory rather than treaty law; therefore, the meaning of any particular article contained therein should be interpreted accordingly.

The language of Article 16 is fairly straightforward with the exception of a few ambiguous terms needing clarification as to their meaning and scope of applicability. First, what does it mean to "aid" or assist? Secondly, what does "knowledge" mean? Thirdly, what type and how much knowledge must the state have before it can be deemed complicit? Although the Commentary to Article 16 was intended to clarify the meaning and scope of these ambiguities, unfortunately, its analysis does not follow the basic principles of statutory construction and therefore necessitates even further interpretation and clarification by international judicial and quasi-judicial bodies leading to confusing and possibly unintended results. Thus, it is submitted that certain aspects of the Commentary need to be revised by the ILC so that they more accurately reflect established customary law principles, the plain meaning of the Articles' text and general principles of criminal and civil jurisprudence.

1. Aiding or Assisting

The Commentary to Article 16 defines "aiding or assisting" not by saying what it is, but rather what it is not.[206] The reader is instructed that it is necessary to distinguish "aiding and assisting" of an internationally wrongful act from "aiding and assisting" of an individual criminal act emphasizing that one should not confuse state responsibility for "aiding and assisting" with that of being a co-perpetrator or co-participant under criminal law.[207] Whereas "aiding and assisting" in a criminal act implies equal culpability of both the perpetrator of the act as well as the "aider or abettor," the state committing the internationally wrongful act is directly responsible but the state that "aids or assists" is only "indirectly" responsible to the extent that its own conduct "caused or contributed" to

204. *Id.*

205. Sumitomo Shoji Amer., Inc. v. Avagliano, 457 U.S. 176, 180, (1982) (quoting Maximon v. United States, 373 U.S. 49, 54 (1963)).

206. *See id.* and accompanying commentary.

207. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16, ¶ 1.

the wrongful act.[208] However the Commentary adds that where the wrongful act would have clearly occurred even in the absence of that state's "aid or assistance," no responsibility to compensate will be impugned to the assisting state.[209]

2. Scope of Aiding & Assisting: "Knowledge"

The Commentary limits the scope of state responsibility for "aiding and assisting" in three ways: 1) the aiding or assisting state must be "aware" of the circumstances making the conduct of that state internationally wrongful; 2) the aid or assistance must be given "with a view" to facilitating the commission of the act, and must actually do so; and 3) the act must have been wrongful had it been committed by the assisting state.[210]

The standard of proof required to establish "knowledge" of the assisting state is not defined anywhere throughout the Articles.[211] Arguably, constructive or presumed knowledge is an appropriate standard of proof in international law where it can be shown that under certain circumstances, knowledge or awareness could be imputed.[212] Constructive or presumed knowledge is that which can be expected from a state exercising reasonable care whereas objective or actual knowledge depends upon the circumstances in each case.[213] The Commentary explains that the state merely providing material or financial assistance "does not normally assume the risk that its assistance or aid may be used" to violate international law.[214]

However, in today's information age, states can be expected to be knowledgeable of any number of reports of U.N. treaty bodies, special procedures, country reports of other states and a plethora of reputable HR organizations.[215] States can also be expected to have knowledge of the jurisprudence of the U.N. treaty bodies and regional HR courts.[216] Therefore, "knowledge" should be assessed in light of today's widely

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208. *Id.* art. 16 ¶ 1 (emphasis added).

209. *Id.*

210. *Id.* ¶ 3 (emphasis added).

211. INTERNATIONAL LAW AND SMALL ARMS AND LIGHT WEAPONS CONTROL, *supra* note 1, at 6.

212. Boivin, *supra* note 2, at 470-71; INTERNATIONAL LAW AND SMALL ARMS AND LIGHT WEAPONS CONTROL, *supra* note 1, at 6.

213. Boivin, *supra* note 2, at 471.

214. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16 ¶ 4.

215. Hampson, *supra* note 116, at 9.

216. *Id.*

available sources of information regarding states' HR records, public statements and official policies, and their propensity to commit internationally wrongful acts.[217] Given that ignorantia legis neminem excusat is a basic principle in both criminal and civil jurisprudence, where information is widespread that a state is either using or more likely than not to use SALW to commit HR violations or some other internationally wrongful act, it is reasonable to impute presumed or constructive "knowledge" to states that export or transfer SALW.

3. Aiding or Assisting "With A View"

The Commentary to Article 16 states that aiding or assisting requires that the "aid or assistance must be given 'with a view' to facilitating the commission of the wrongful act, and must actually do so."[218] Accordingly, the responsibility and corresponding liability of the assisting state is limited to those cases where the "aid or assistance given is clearly linked to the subsequent wrongful conduct" and the aiding or assisting state "intended" its aid or assistance "to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted state."[219] However, "there is no requirement that the aid or assistance" was essential to the commission of the wrongful act to impugn secondary state responsibility.[220] "It is sufficient if" its aid or assistance "contributed significantly to that act."[221]

The "intent" requirement is particularly problematic with regards to establishing state complicity of exporting or transferring states of SALW to known HR violators when those HR do not fall within the category of jus cogens norms or violations of IHL. A state seeking reparations carries the burden of establishing that the exporting or transferring "state did intend to facilitate a breach of an international obligation by another state."[222] The intent requirement within the Commentary unduly imposes a blanket criminal standard of proof for acts that are often more akin to negligence or intentional torts requiring a much lower standard of proof.[223]

It would also prove to be exceedingly difficult to establish intent given that most decisions regarding the export or transfer of SALW to third states

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217. Boivin, *supra* note 2, at 470-71.

218. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16 cmt. 5 (emphasis added).

219. *Id.* (emphasis added).

220. *Id.*

221. *Id.*

222. Howard, *supra* note 3, at 23.

223. *Id.* (beyond a reasonable doubt versus preponderance of the evidence).

are made by state officials and obtaining evidence of their intent to facilitate the breach of an international obligation of another state is highly unlikely as such intent would unlikely be "official state policy." Even if there were evidence confirming an official policy, the documents would most certainly be unavailable as they are likely to be classified as "state secrets" or matters of "national security" and therefore beyond the reach of judicial scrutiny.

The Articles were intended to be fault neutral and there is nothing in the text of Article 16 requiring a showing of "wrongful intent."[224] The Articles were meant to focus on the objective conduct of states not the subjective intent of states for aiding or assisting in the commission of an internationally wrongful act.[225] In fact, a prior draft version of Article 16 was not interpreted as imposing a requirement to prove the wrongful intent of the assisting state and there is serious doubt even with the Commentary's chief drafter as to whether the intent requirement is obligatory and has hinted that it may be misplaced.[226] Additionally, an ILC report takes note of government suggestions to eliminate the intent requirement from the Commentary entirely.[227]

Nonetheless, the author submits that given the ready availability of today's vast, credible sources of states' HR records, public statements, official policies, and their propensity to commit internationally wrongful acts—such information has become common knowledge.[228] Therefore, when a state chooses to export or transfer SALW to those states, regardless of that common knowledge, it is reasonable to presume the implied intent of the exporting or transferring state is to aid or assist in the facilitation of an internationally wrongful act.[229] It is inconceivable that a state in today's

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224. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16.

225. *Id.* art. 2 cmts. 3, 10.

226. U.N. General Assembly, International Law Commission, Fifty-Third Session, *Fourth Report on State Responsibility*, at 3, U.N. Doc. A/CN.4/517/Add.1 (Apr. 3, 2000) [hereinafter *Fourth Report on State Responsibility*] (*prepared by* James Crawford) (the author is aware that art. 16's predecessor, art. 27, contained the same intent requirement as the current commentary to art. 16 however, it noted many problems in its formulation).

227. Crawford, *supra* note 195, at 439.

228. *See* Boivin, *supra* note 2, at 471-72; Howard, *supra* note 3, at 23.

229. Kate Nahapetian, *Confronting State Complicity in International Law*, 7 UCLA J. INT'L L. & FOREIGN AFF. 99, 127 (2002); *see also* Rosedale, *infra* note 244.

> The law measures conduct by using a standard of reasonability and prudence. It implies on the part of an actor the intent to achieve the foreseeable consequences of an act. No volitional analysis is undertaken to see if the person actually contemplated those results. Rather, they are imposed by implication of the necessary state of mind.

global information age would not have notice of another state's breach of HR, IHL or of the propensity for another state to commit other internationally wrongful acts. The hierarchical status of the violated rights in question (e.g., torture v. inhuman-degrading treatment) should be irrelevant to the discussion of implied intent.[230]

Lastly, should the ILC fail to revisit the "intent" requirement mandated within Article 16's Commentary, the author proposes that the regional HR courts and HR quasi-judicial bodies should—under these specific circumstances—exercise their discretion to interpret and apply Article 16 by following the fundamental rules of statutory construction and set aside the intent requirement within the Commentary since the plain language of the Article comes into direct conflict with it regarding its meaning.[231] Although it is necessary to determine what "knowledge" means in terms of Article 16, such determinations should be limited to whether a state had actual or constructive knowledge of the violating state's wrongful conduct or the likelihood that such wrongful conduct would occur, not whether the assisting state intended to facilitate the internationally wrongful act of a third state. The necessity to prove the 'intent' of the assisting state should be determined by the treaty bodies and customary law, not the Articles. Although the Commentary can and in most cases should be viewed as obiter dicta, the intent requirement therein is not necessarily obligatory and in this particular case, manifestly ill-conceived and not particularly useful.

It is conceded that this would be highly controversial given the level of deference typically bestowed upon the Commentaries of the treaty bodies. However, setting aside the intent requirement of the Commentary by simply applying the plain meaning of the Article (i.e., merely determining actual or constructive "knowledge") in the instant case is justified since unlike treaties, there is no danger that the application of the words of the Article according to its obvious meaning will lead to a result inconsistent with the intent or expectations of states since states have expressed their desire for its elimination from the Commentary.[232] The Articles merely serving as a reiteration of customary law, not treaty law, implies that states' consent—that "knowledge" does not necessitate a showing of "intent"—can be presumed since states did not insist upon the inclusion of

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Id.

230. *See Report of the Commission to the General Assembly on the Work of Its Thirtieth Session*, [1978] Y.B. of the ILC vol. II, pt. II, 104 (making clear "assistance" is not limited to serious breaches of international law; secondary responsibility applies regardless of the severity of the wrongful act).

231. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16.

232. *Id.*

express language requiring both "knowledge" and "intent" within the Article's text.[233]

Secondly, since the Articles are a reiteration of customary law and thereby more akin to statutory rather than treaty law, they are subject to various means of interpretation and although the Commentary serves a similar function to that of a court's reliance on restatements of the law or legislative history, it is by no means its only source. Thirdly, the drafter of the Article's Commentary is himself in doubt of the intent requirement's obligatory nature and its appropriateness.[234] Lastly, while setting aside the intent requirement will come into direct conflict with the Commentary, where the meaning of the Article is clear on its face, the authoritative statement is the Article's text and not the Article's Commentary or any other extrinsic material.[235] In light of all of the reasons set forth above, the author submits that the authoritative value of the 'intent' requirement within the Commentary is greatly diminished and should therefore be set aside by the ILC and the regional HR judicial and quasi-judicial bodies.

4. Impugning Compensation to the Assisting State

It is also ill-conceived that there is a need to establish that the wrongful act would not have occurred without the aid or assistance provided by the assisting state in order to impugn responsibility to compensate to the assisting state. It completely vitiates the most effective deterrent and purposes of attributing state responsibility for states' aiding/assisting the commission of an internationally wrongful act, namely cessation of the wrongful act, non-repetition and holding assisting states accountable via reparations whenever they do occur. While it is not necessary to establish a state's aid or assistance was essential to the commission of the wrongful act in order to establish a state's secondary responsibility, it should correspondingly not be essential to impugn secondary liability.

Article 16 addresses both primary and secondary responsibility, triggering both primary and secondary liability.[236] Therefore, it should not be necessary to prove the standard 'but for' test. Rather, it should only be necessary to show that the aiding/assisting state contributed in some

233. Crawford, *supra* note 195.

234. *See Fourth Report on State Responsibility*, *supra* note 226.

235. *See* Exxon Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546 (2005).

236. *See* BLACK'S LAW DICTIONARY 933 (8th ed. 2004) (defining primary liability as "liability for which one is directly responsible, as opposed to secondary liability" and defining Secondary Liability as "liability that does not arise unless the primarily liable party fails to honour its obligations").

significant way to the wrongful act in order to trigger secondary liability.[237] It should not have to be proven that the aid or assistance in question was essential before impugning compensation to the assisting state. This is not to suggest that the assisting state should fully compensate for the wrongful act itself, but rather, it should compensate in proportion to and to the extent of the assisting state's acts or omissions contributed to the situation created leading to the victim's harm.

Secondary compensation is essential both in terms of serving as a deterrence and in terms of holding states responsible when they assist other states to violate their international obligations. As discussed throughout, given states competing interests and the tremendous economic benefit states receive from exporting/transferring SALW, there must be some reasonable and effective economic disincentive when states either fail to meet their international obligations or assist others in doing so.

The Articles create new obligations for the breaching state, principally, duties of cessation, non-repetition,[238] and a duty to make full reparation.[239] Article 33(1) characterizes these secondary obligations as being owed to other states or the international community as a whole possibly indicating that a breaching state's obligations of cessation, non-repetition, and reparations are deemed obligations erga omnes.[240] If this is the case, then states have new secondary erga omnes obligations carrying with them legal consequences not only for the violating state but also for third states. Therefore, when states assist end-user states to violate HR rights or other internationally wrongful acts, it is incumbent upon exporting or transferring states to cease exporting or transferring SALW to the violating state, prevent such exports or transfers from reoccurring and to pay reparations as compensation for the victim's harm.

While the Commentary's language implores one to make distinctions between criminal and civil law, it appears to conflate the two and therefore confuses essential elements of both. Criminal law makes no distinction between culpability of the principle offender and that of the aider or abettor.[241] However, some international wrongful acts can and often do, include elements of both criminal and civil law, thus triggering state

237. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art 16, cmt. 1; *but see id.* cmt. 5 (stating that there is "no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act").

238. *Id.* art. 30.

239. *Id.* art. 31.

240. *Id.* art. 33(1).

241. Howard, *supra* note 3, at 11.

responsibilities that impugn their respective obligations and liabilities. In these cases, states[242] that aid or assist in such wrongful acts may be in violation of: obligations erga omnes; jus cogens norms; or their primary obligations within a given treaty none of which may differentiate between the culpability/responsibility of the principle actor from that of the complicit actor.[243] In such cases, there may be no need to prove the fault or intent of the aiding or assisting state or that the wrongful act would have clearly occurred even in the absence of that state's aid/assistance. It is enough to show that the assisting state failed to fulfill its obligations not to facilitate the wrongful act.

Unlike criminal law, where one must prove the intent of the perpetrator of harm, civil law liability does not always require proof of intent. For example the tort of negligence has no intent requirement. What matters is whether some inadvertent act or failure to act created an unreasonable risk to another member of society. The intent of the perpetrator is completely irrelevant. Conversely, intentional torts require proof of the perpetrator's intent but a showing of implied intent could satisfy this requirement. Thus, the Commentary's blanket intent requirement to establish complicity, and its blanket requirement of direct causation to impugn compensation to the assisting state is at best misguided.[244]

The Commentary thus tries to reconcile its reasoning by recognizing that specific substantive rules exist for certain wrongful acts that both prohibit states from committing and aiding or assisting such acts by imposing obligations on states to prevent their occurrence.[245] However, this does not explain or justify imposing a blanket intent requirement to impugn compensation to assisting states and in fact runs counter-intuitive to it. The Commentary adds to the confusion by stating that while these rules do not "rely on any general principle of derived responsibility," the rules neither confirm or deny the existence of a general principle of derived responsibility and that it would be incorrect to deny its existence even if one cannot articulate what the principle is based on or confirm its

242. The author is aware that states cannot commit crimes per se and is simply referring to individuals exercising state authority on behalf of the state—state agents.

243. *See, e.g.*, CAT, *supra* note 163.

244. Herbert L. Rosedale, *Legal Analysis of Intent As a Continuum Emphasizing Social Context of Volition*, 6 CULTIC STUD. J. 25, 25-31 (1989) (stating "The compulsion to reach an all-or-nothing... answer [of intent] ignores the reality of complex or mixed motivation on the part of actors and the importance of social values and context in reaching a legal conclusion, regardless of the volitional capacity or desire of actors").

245. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 16, cmt. 2 (emphasis added).

existence.[246] The Commentary then ducks the issue by stating such rationales are beyond the scope and purpose of Article 16.[247]

B. *Articles 40 & 41*

Article 41 establishes consequences of aiding/assisting a "serious breach" of peremptory norms of general international law as proscribed by Article 40.[248] A breach is serious if it involves a "gross or systematic failure" to fulfill international obligations.[249] Under Article 41, states "have a duty to cooperate in order to bring to an end serious breaches" although the Article "does not prescribe in detail what form this cooperation should take.[250]

Article 41 establishes separate conditions for complicity of jus cogens norms and clarifies the relationship between Article 16 and Article 41:

> This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by Article 16 . . . As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act."[251]

While the Commentary to Article 16 demands a showing of wrongful intent, it appears that aid or assistance with actual or constructive knowledge is presumed intent within jus cogens norms.[252] As discussed throughout this Article, certain norms appear to have been widely accepted as peremptory norms, including the basic rules of IHL.[253] Thus, exporting/transferring weapons to a state where the end-user is violating or more likely than not will violate a jus cogens norm would be a per se breach of Article 41(2). Going beyond Article 16, Article 41 includes conduct "after the fact" that maintains the unlawful situation created by the

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246. *Id.*

247. *Id.*

248. *Id.* art. 41 cmt. 1.

249. *Id.* art. 40; *id.* art. 40 cmts. 1-9.

250. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 41 cmt. 2.

251. *Id.* art. 41 cmt. 11.

252. Hampson, *supra* note 116, at 9.

253. *See also* Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8).

violation, irrespective of whether the breach itself is a continuing one.[254] Thus, it is enough that a state exported/transferred SALW to a territory where jus cogens violations are taking place to establish that the exporting/transferring state contributed to maintaining an unlawful situation under Article 41.

IV. CONCLUSION

As stated previously, the lack of effective international standards and the limited means for holding states responsible for SALW transfers is primarily due to a general lack of political will, the influence of commercial interests and perceived geo-strategic concerns. This is in spite of the nexus between SALW and the threat they pose to human security. This has hindered international efforts to establish tighter controls to improve the monitoring and regulation of the arms trade and to hold states accountable via the development of international law. This Article has shown that existing international law and the means for holding states responsible for aiding or assisting other states to commit HR violations and other internationally wrongful acts via the export or transfer of SALW are predominately weak and ineffectual due in part to selective application and the enforcement of international prohibitions against such transfers.

While existing measures such as binding and non-binding agreements and codes of conduct limiting or banning the export or transfer of SALW are an important body of norms that propose development and plans of action representing principles that could shape or become customary law, at present they have not been very effective at stopping or limiting the flow of SALW to end-users that violate human rights and commit other internationally wrongful acts. U.N. imposed embargoes' attempts to curtail the flow of SALW to those states ranged from poor to non-existent. While U.N. embargoes may somewhat increase the costs and difficulty in the acquisition of SALW, additional economic disincentives are needed to encourage states to comply with, rather than ignore embargoes. The same is true regarding other express prohibitions on the export and transfer of SALW under IHL and international terrorism regimes.

Additionally, the international community must seek clarification to certain aspects of HRL. Particular clarification is needed in terms of assessing a state's obligation to prevent the export/transfer of SALW to known human rights violators and whether such obligations fall within its

254. INTERNATIONAL LAW COMMISSION ON STATE RESPONSIBILITY, *supra* note 136, art. 41 cmt. 12.

positive duties to protect and fulfill or its negative duty to respect HR. Further clarity is also needed regarding jurisdiction and the scope and extraterritorial applicability of HR so that exporting or transferring states can avoid facilitating or being complicit in HRL and IHL violations or other internationally wrongful acts.

Under the limited circumstances where states may be deemed complicit for exporting or transferring SALW to end-users who violate jus cogens norms, the victims of harm must rely on their own states to seek reparations on their behalf for the injuries they suffered. Aside from political impracticalities that may stand in the way of the victim's state seeking reparations from the exporting/transferring state, the heavy burden of proof imposed by the current Articles on State Responsibility unnecessarily adds to a complaining state's burden in seeking reparations from exporting or transferring states when the end-user state has committed violations other than jus cogens norms or "grave breaches" of HR. The author has shown that it is necessary for both the ILC and regional judicial and quasi-judicial human rights bodies to abandon the intent requirement within the Commentary to Article 16 of the Articles on State Responsibility. They should also reconsider the Commentary's requirement to establish that a state's aid or assistance was essential to the commission of the wrongful act in order to impugn compensation to the assisting state.

The lack of clarity within the Articles on State Responsibility and HRL creates a situation that allows states to export or transfer SALW to states that are notorious HR violators, without any real risk of responsibility or economic cost, so long as the receiving state does not use those weapons to commit a "serious" HR violation under Article 41 or "grave breaches" under IHL. The current state of the law is unjust and unworkable, as it requires states to determine which human rights are likely to be violated before exporting/transferring SALW when such distinctions often belies reality.[255] It should make no difference whether a state engages in torture or other HR violations with SALW, the law should prohibit exports/transfers in both instances.

It is conceded that the law cannot solve all problems, but the international community should maximize the law's capacity to effectively stem the flow of SALW to end-users who are known to or more likely than not will use SALW to commit HR violations or other internationally wrongful acts. It is also conceded that as long as SALW are in high

255. Hampson, *supra* note 116, at 8-11 (criticizing attempts to create definitive categories of conduct construed as "torture" and other conduct such as "ill-treatment" as such categories are unworkable).

demand, there will always be a black market waiting in the ready to try and supplant the reduced supplies of SALW resulting from increased state responsibility and stricter state export/transfer controls. However, where demand is high and supplies are reduced, the cost of illicit SALW will exponentially increase making it less affordable for violating states and non-state actors to acquire SALW through illicit means.[256]

It is well known that civil liability has shaped the behavior of private business and major corporations for street-level behavior. Fear of civil litigation influences the manner in which business interacts with the public. It is conceded that the primary motivation for business is profit, whereas states have many and often, conflicting motivations guiding their conduct. However, the risk of financial responsibility via requiring exporting/transferring states to compensate for being directly or indirectly responsible for HRL, IHL, or other international law violations will at least force states to re-assess the benefits they receive from such transfers. Therefore, it is incumbent upon the international community to use all of the legal tools at its disposal to similarly shape and influence states' behaviors regarding not only their decision making processes as to whether they should export/transfer SALW to a given end-user, but also whether they should support effective international standards regarding the export/transfer of SALW.

256. *See, e.g.*, Christopher Dickey, *Iraq's Arms Bazaar*, NEWSWEEK, Aug. 20, 2007, at 32, *available at* http://www.truthout.org/docs_2006/081307A.shtml (reporting that 9mm Glock pistols that once cost $3,500 on the Turkish black market now only cost $500 due to some 20,000 U.S.-bought Glocks intended for Iraq having been smuggled into Turkey resulting in part from relaxed U.S.-Iraqi SALW controls).