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SPECIFIC HUMAN RIGHTS ISSUES

Progress report of Barbara Frey, Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons*

Summary

This progress report addresses human rights violations committed with small arms during situations of armed conflict. Small arms are the weapons used to carry out most conflicts. The widespread availability of small arms increases the deadliness of conflicts and the sense of insecurity in communities affected by armed conflict. Among the human rights violations resulting from small arms misuse in wartime are summary executions, indiscriminate killing of civilians, sexual violence, abduction and “disappearance”, torture, and forced recruitment of child soldiers.

There are many adverse consequences to human rights caused by the proliferation of small arms in wartime, especially when arms are used by undisciplined groups, including children. A high proportion of civilian war casualties are caused by small arms. Small arms are used to violate the rights of detainees, including prisoners of war. Small arms are used to block humanitarian relief and prohibit social reconstruction and development. Chronic small arms-related violence contributes to the collapse of economic productivity, the erosion of social services and the disintegration of traditional social and cultural bonds. Small arms are misused to forcibly displace civilian populations. The militarization of refugee and internally displaced persons camps is a well-recognized problem which results in violations against human security, including murders, rapes and criminal violence. Humanitarian workers are at risk as targets of small arms-related violence. International law, including international humanitarian law (IHL) and international human rights law, provides normative limits on the transfer, availability and misuse of small arms by States and armed

individuals and groups. IHL sets limits on the means and methods of warfare and provides safeguards for persons who are not participating or no longer participating in armed conflict. IHL also prohibits the transfer of certain arms either because of the nature of the arms or because of the likely use of the arms by the intended recipients. Article 1 common to the Geneva Conventions of 12 August 1949 requires States parties to “respect and ensure respect” for IHL, including refraining from transferring arms if they have knowledge that the arms will be used to violate IHL. Core obligations under international human rights law, including non-derogable rights such as the right to life, freedom from torture and freedom of thought, conscience and religion, also require States to protect individuals from violations committed with small arms even in wartime.

Laws and mechanisms that could be used to protect individuals from small arms-related human rights violations in wartime include arms embargoes mandated by the Security Council, which could be designed and monitored more effectively. The major barrier to enforcement of arms embargoes is the lack of political will, especially among the major producers and exporters of arms. States can also investigate and prosecute individuals and, in some instances, companies under international criminal law either as perpetrators or accomplices in genocide, war crimes or crimes against humanity.

Small arms misuse has adverse consequences on the human rights of women. Small arms are the tools of rape and other forms of gender-based violence. Men represent the majority of users of small arms as well as the majority of victims of small arms violence. Women assume the burden of caring for men disabled by small arms violence. Male-dominated societies often justify small arms possession through the alleged need to protect vulnerable women, though women actually face greater danger of violence when their families and communities are armed. The exclusion of women from shaping policies relating to small arms allows the social manipulation of the gender-based “gun culture” to continue, with devastating impacts on communities.

The present report provides several recommendations for protecting human rights in wartime against violations committed with small arms, including the need for States to train their security forces about IHL and international human rights law obligations with regard to small arms. The report recommends that the international community improve the design and enforcement of small arms embargoes and enforce criminal sanctions against persons and groups that violate embargoes. The report further recommends that the international community involve women in all phases of policy regarding the availability and use of small arms.

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Introduction

1. In its resolution of 2001/120, the Sub-Commission on the Promotion and Protection of Human Rights decided to entrust Barbara Frey with the task of drafting a working paper on the questions of (a) the trade and carrying of small arms and light weapons; and (b) the use of such weapons in the context of human rights and humanitarian norms to be considered at its fifty-fourth session. In response to this request, Ms. Frey submitted a working paper to the Sub-Commission (E/CN.4/Sub.2/2002/39) considering the diverse legal and practical issues involved in these questions and offering recommendations for further action and research.
2. At its fifty-fourth session, the Sub-Commission examined this working paper and in resolution 2002/25 it endorsed its conclusions and recommendations and recommended that the Commission on Human Rights authorize Ms. Frey's appointment as Special Rapporteur with the task of preparing a comprehensive study on the prevention of human rights violations committed with small arms and light weapons on the basis of the working paper.
3. In decision 2003/112 the Commission on Human Rights approved the nomination of Ms. Frey as Special Rapporteur and requested her to submit a preliminary report to the Sub-Commission at its fifty-fifth session, a progress report at its fifty-sixth session and a final report at its fifty-seventh session.
4. The Special Rapporteur prepared a preliminary report (E/CN.4/Sub.2/2003/29) that was discussed during the fifty-fifth session of the Sub-Commission. The preliminary report set forth a framework for analysing the legal and practical issues involved in the prevention of human rights violations committed with small arms and light weapons. The report defined small arms as those weapons designed for personal use and light weapons as those designed for use by several persons serving as a crew, in accordance with the 1997 report of the Panel of Governmental Experts on Small Arms. The preliminary report described the adverse consequences for human rights caused by the availability of the estimated 640 million small arms as well as 230 million anti-personnel landmines in the world today. It discussed the human rights violations caused by the misuse of small arms by State agents, and the obligation of States to ensure that the use of small arms in police and security activities is carried out in a manner consistent with international human rights law. The report also discussed the due diligence obligations of States to prevent human rights abuses committed by armed individuals and groups. Finally, the preliminary report addressed the legal obligations of States to prevent the transfer of small arms into situations where they will be used to commit serious violations of human rights.
5. The present progress report¹ will first address the detrimental effects on human rights and human security caused by small arms in situations of armed conflict. The report will describe the international humanitarian law framework as well as State obligations under international human rights law for preventing violations committed through the availability, misuse and transfer of small arms in situations of armed conflict. The report specifically considers the need to improve the effectiveness of arms embargoes as a method of preventing violations of human rights and humanitarian law. The report also discusses prosecution of individuals who perpetrate international crimes committed with small arms or who are complicit in such crimes. It concludes by considering some of the gender implications of small arms availability and misuse.
6. The addendum to this report articulates for the consideration of the Sub-Commission a set of draft principles on the prevention of human rights violations committed with small arms.

I. THE HUMANITARIAN CONSEQUENCES OF SMALL ARMS IN SITUATIONS OF ARMED CONFLICT

7. Human rights and human security suffer dramatically during armed conflict, and small arms are the weapons used to carry out those conflicts. In 101 conflicts fought between 1989 and 1996 small arms were the most common weapons, and in some instances the only weapons, used by combatants.² Small arms have been identified as the "real weapons of mass destruction" because the vast majority of conflict-related deaths and injuries since the Second World War have been caused by assault rifles, grenades, mortars and other small arms.³ Small arms, including military-style weapons intended for trained and organized militaries, are often found in the hands of untrained civilians and unaccountable armed groups. Small arms are durable,

easy-to-use and portable and they circulate from conflict to conflict, causing harm and havoc in the war zones where they are available. The widespread availability of small arms increases the lethality and duration of violence as well as increasing the sense of insecurity which in turn leads to a greater demand for weapons (A/52/298, annex, para.14). Cultures of violence, which thrive during armed conflict, serve to normalize and glorify war, weaponry, military force and violence. Cultures of violence favour violent solutions over peaceful ones; they encourage civilians to seek out physical protection, often by acquiring more weapons rather than by engaging in dialogue or confidence-building measures.⁴

Civilian casualties and other violations

8. There are many human rights violations associated with small arms misuse in wartime, including summary executions, indiscriminate killing of civilians, intentional targeting of civilian areas, rape and other kinds of sexual violence at gunpoint, abduction and disappearance, arbitrary detention, torture, forced recruitment of soldiers including children, forced labour, forced displacement, looting, damage to cultural objects and civilian property, among others.⁵

9. The proliferation of small arms, especially to undisciplined groups, has had devastating effects on civilians in the midst of armed conflict. Civilian deaths outnumber those of combatants in many of today's ethnic and other internal conflicts. Indeed, civilians have become the deliberate targets of small arms-related violence, a practice that is completely at odds with internationally recognized legal protections granted to non-combatants under international human rights and international humanitarian law.⁶ Civilians also are caught in the crossfire, such as when combatants use disproportionate force in violation of international humanitarian law. Such practices have contributed to the high proportion of civilian war casualties, many of which result from small arms. A study in Croatia, for instance, determined that civilian deaths may have accounted for up to 64 per cent of the 4,339 fatalities studied during the war in 1991/92.⁷ Another study reported that at least 34 per cent of patients in International Committee of the Red Cross ("ICRC") field hospitals in Afghanistan, Rwanda, Chechnya, and the border regions of Kenya and Cambodia were civilians wounded by bullets.⁸ Surveys carried out in Sierra Leone showed that almost 60 per cent of all war injuries were gunshot related, that 11 per cent of all victims were under 15, and 43 per cent were women.⁹

Misuse of arms in prisons and detention centres

10. Small arms are used to violate the rights of detainees and prisoners of war. Excessive use of force, including the misuse of small arms by detaining authorities, has resulted in the death and injury of detainees and prisoners of war and small arms have been used to carry out torture and ill-treatment, all in violation of international humanitarian law. ICRC has documented the shooting of detainees with live bullets during periods of unrest or escape attempts.¹⁰ Using firearms against detainees in circumstances where methods not using firearms could have achieved the same result contravenes international humanitarian law as well as the Code of Conduct for Law Enforcement Officials (art. 3), and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (art. 3, 4, 5, 9). Small arms are used as tools of torture: to beat prisoners, to stage mock executions, and to intimidate prisoners into carrying out degrading or humiliating acts.¹¹

Effects on economic and social rights

11. Widespread availability of small arms not only perpetuates conflicts and makes them more deadly, it also blocks humanitarian relief efforts and prohibits social reconstruction and development. The direct effects of small arms violence include deaths, injuries, the cost of treating war casualties, and the opportunity costs of long-term disability and lost production. Indirect devastation is caused by the falling off of private investment and domestic savings and the decision to spend scarce government resources on security measures, rather than economic or social development. Arms-related violence leads to an atmosphere of insecurity characterized by want, including the deprivation of the right to food,¹² education¹³ and health care.¹⁴ Dr. Olive Kobusingye, a Ugandan physician explains the crisis in health care: "It is like we are mopping the floor with the taps on. It takes five minutes to shower bullets, but it takes three hours and immense resources to repair each person."¹⁵ ICRC reports that in many conflict zones, "it is easier to obtain guns and ammunition than food and medicine".¹⁶ Chronic small arms-related violence contributes to the collapse of economic productivity, erosion of social services, the disintegration of traditional social bonds

and communities and the militarization of society because small arms are used to regulate social and economic interaction.¹⁷ Causal role in forced displacement

12. The availability and misuse of small arms plays a causal role in the forced displacement of civilian populations.¹⁸ According to Secretary-General Kofi Annan, “the forced displacement of civilian populations is now often a direct objective, rather than a by-product, of war” (S/1998/883, para. 12). Combatants use arms to intimidate, attack and displace local populations for many different ends, including ethnic cleansing, political violence or to establish economic control over natural resources.¹⁹ There are currently an estimated 13 million refugees and between 20 and 25 million internally displaced persons (IDPs) in the world.²⁰ An estimated 4.3 million people were uprooted in 2002 alone.²¹ Most of those who are forcibly displaced are women and children; they make up an estimated 70-80 per cent of refugees and IDPs.²² Surveys conducted in IDP and refugee camps indicate that in many cases forced displacement was the result of systematic shootings, threats at gunpoint, small arms-related homicides and other violations of human rights associated with the misuse of small arms.²³

Militarization of refugee and IDP camps

13. The militarization of refugee and IDP camps is a serious problem for the international community. Safe havens created to aid victims of war become in some cases places of outright danger for refugees, relief workers and the surrounding community.²⁴ Camps become militarized “when combatants intermingle with civilian refugees, armed elements take control over the camps, or the camps are used for military recruitment activities, rear bases, and/or broader military-style campaigns”.²⁵ Camps are targeted by security forces, local militias, and insurgent or terrorist groups. Some camps have been used as hubs for arms trafficking.²⁶ The militarization of refugee camps causes security problems in host countries, including crime and other threats to State security. At the same time, some host Governments have endangered refugees by placing camps too close to the fighting, using the camps for cross-border insurgency activities and supplying or accommodating armed actors.²⁷

14. In addition to a wide range of security problems, the presence of armed elements among refugee and IDP populations and in the areas surrounding refugee camps exposes them to persecution, crime and destitution. Women and girls are vulnerable to attack in camps. A study commissioned by the Office of the United Nations High Commissioner for Refugees (UNHCR) observed that armed assailants regularly raped women collecting firewood in certain refugee camps.²⁸

Use of arms to target humanitarian and relief workers

15. In and around war zones, humanitarian, relief and development organizations are increasingly at risk as targets of arms-related violence including killings, hostage-taking, sexual assault, armed robbery and arbitrary arrest or detention. The reasons for these violations against relief workers are twofold: the compelling need for organizations and employees to work in dangerous regions and the growing availability and use of small arms in conflict and post-conflict zones.²⁹ For example, armed groups often force humanitarian agencies to turn over goods and materials intended for aid operations.³⁰ Armed combatants prey upon humanitarian workers and hinder the ability of organizations to provide assistance to those in need.³¹ Surveys of relief personnel indicate that they feel personally threatened by small arms and that their humanitarian and development work is adversely affected by the prevalence and misuse of weapons.³² The vast majority of relief workers reported that they had not received any security training and that, when security training is provided, nationals are only half as likely to have received security training as expatriates.³³ Faced with the threat of armed attack, certain humanitarian organizations have chosen to employ military guards and private security companies.³⁴

II. INTERNATIONAL LAW PROTECTIONS REGARDING THE AVAILABILITY, MISUSE AND TRANSFER OF SMALL ARMS IN ARMED CONFLICT

16. International law, including international humanitarian law (IHL) and international human rights law, provides important normative limits on the transfer, availability and misuse of small arms by States and armed individuals and groups. Taken as a whole, the guarantees of human security and human rights articulated in international law are the building blocks of international security that States must recognize

and enforce if the world is to move towards the genuine protection of human rights and towards the peace and development which depend upon human rights. According to Bertrand Ramcharan, Acting United Nations High Commissioner for Human Rights, “A society that is striving in good faith for human rights, that is imbued with the spirit of respect for human rights, that is aspiring for a culture of human rights, is one that can lessen the risks of conflict.”³⁵

International humanitarian law framework

17. IHL sets limits on the means and methods of warfare and provides safeguards for persons who are not participating, or no longer participating, in armed conflict. The principal instruments of IHL include the Geneva Conventions of 1949 and their Additional Protocols of 1977.³⁶ The four Geneva Conventions and Additional Protocol I apply to international armed conflicts - wars between two or more States and wars of national liberation. A more limited set of rules applies to non-international armed conflicts; those rules are contained in common article 3 to the four Geneva Conventions and in Additional Protocol II. The core protections under international human rights law also apply to non-international armed conflict, even in states of emergency, as will be discussed below.

18. IHL imposes limits on how small arms are used in conflicts and prohibits the use of certain weapons entirely. A cardinal principle of IHL requires a distinction to be made between combatants and civilians, and further requires that civilian populations and objects be protected from harm.³⁷ Small arms that are intrinsically incapable of distinguishing between combatants and civilians are prohibited under this principle. Certain weapons including anti-personnel landmines, chemical weapons and biological weapons have been expressly prohibited for this reason.³⁸ Under the principle of distinction, IHL also requires that parties to an armed conflict may only target military objectives, prohibits indiscriminate attacks and mandates that precautions be taken to minimize civilian losses.

19. A second cardinal principle of IHL is the prohibition of using weapons of a nature to cause superfluous injury or unnecessary suffering. Similarly, small arms that violate this second principle are prohibited, including but not limited to expanding bullets, booby traps and blinding laser weapons.³⁹

20. States and armed groups are prohibited from misusing small arms to commit serious violations of IHL. Serious violations have been defined in IHL to include “grave breaches” during international conflicts as identified in the four Geneva Conventions including wilful killing, torture or inhuman treatment such as biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer of a protected person, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.⁴⁰ Grave breaches also include violations of Common article 3 of the Geneva Conventions which also apply in non-international armed conflicts. Common article 3 requires humane treatment of non-combatants, including prisoners of war, and specifically prohibits violence to life and person, in particular murder, mutilation, cruel treatment and torture. These violations have also been included in the list of war crimes set forth in the 1998 Rome Statute of the International Criminal Court. The Rome Statute (art. 8) also covers other serious violations of international humanitarian law in both international and non-international conflicts.

Limitations on transfer under IHL and general principles of international law

21. In addition to the above limitations on use, IHL also prohibits the transfer of certain arms either because of the nature of the arms or because of the likely use of the arms by the intended recipients. Several more recent IHL treaties, such as the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction of 1972 (the Biological Weapons Convention), the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1993 (the Chemical Weapons Convention) and the Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997, expressly prohibit not only the use of certain weapons but also their transfer. Legal commentators have suggested that the prohibition on transfers should be read into the earlier treaties as well.⁴¹ It would indeed be illogical to permit States to transfer weapons that they are expressly prohibited from using.

22. Separate from limitations on the transfer of arms based on the blanket prohibition on their possession or use, there are also limitations on the transfer of arms which flow from the use or the likely use of weapons in particular circumstances. States are obligated by general principles of international law to use due diligence to prevent transfers of small arms that will aid in human rights violations in recipient States. States that violate international human rights and international humanitarian law by misusing small arms clearly bear the primary responsibility for their actions. There may be circumstances, however, in which a State may have secondary responsibility for violations committed by another State. The principle is articulated in the International Law Commission's draft articles on responsibility of States for internationally wrongful acts, which were commended to Governments by the General Assembly in its resolution 56/83. Article 16 provides:

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

“(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

“(b) The act would be internationally wrongful if committed by the State.” The effect of this principle is that States transferring arms with knowledge that the arms will assist another State to commit a wrongful act, such as a gross violation of IHL or international human rights law, may be held responsible for the wrongful act committed by the recipient State.⁴² ILC expressly considered the issue of arms transfer in its legal commentary to the draft articles.⁴³ The principle gives rise to binding legal obligations on all States to regulate the transfer of small arms.

23. Under article 1 common to the Geneva Conventions of 1949, States are obligated to “respect and ensure respect” for IHL. Common article 1 requires States not only to ensure respect of IHL within their own jurisdictions, but to take steps to ensure that the rules are respected even by States and non-State actors outside of their immediate jurisdiction.⁴⁴ To comply with this obligation States must not transfer small arms to States or other entities if those arms are likely to be used to commit serious violations of IHL.

24. Under the obligation to “respect and ensure respect” set forth in Common article 1 of the Geneva Conventions of 1949, States should refrain from transferring arms if they know that they are likely to be used to violate IHL. ICRC asserts that, to fulfil the obligation of States under Common article 1, all national laws and policies and regional and global instruments on arms transfers should include a requirement to assess the recipient's likely respect for humanitarian law.⁴⁵ ICRC has proposed criteria for such an assessment including: the IHL ratification record of the recipient, whether the recipient State has trained its armed forces regarding its obligations under IHL, the State's record of investigation and prosecution of IHL violations, the State's control mechanisms regarding internal distribution of arms and ammunition and the existence of a transparent verification process for determining the identity of the actual end user of the small arms.⁴⁶

25. In December 2003, the International Conference of the Red Cross and Red Crescent adopted as part of its Agenda for Humanitarian Action, Final Goal 2.3, which commits the Conference to “reduce the human suffering resulting from the uncontrolled availability and misuse of weapons”. To achieve this goal, the Conference agreed that “States should make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed”.⁴⁷

International human rights obligations during armed conflict

26. In addition to limitations on the use and transfer of small arms under IHL obligations, States are prohibited from using small arms to violate core human rights even during armed conflict. States may suspend certain human rights protections when they have officially proclaimed a state of emergency but they may never suspend specific core or non-derogable rights. The standard for suspending any international human rights is quite demanding: article 4 of the International Covenant on Civil and Political Rights provides that, in order for human rights to be suspended, the announced state of emergency must “threaten the life of the nation”, States may derogate from their human rights obligations only to the extent “strictly required by the exigencies of the situation,” and the actions must be taken in a non-discriminatory manner. States may never suspend the right to life (art. 6), freedom from torture (art. 7), freedom from slavery (art. 8,

paras. 1 and 2), the right to recognition before the law (art. 16), or the freedom of thought, conscience and religion (art. 18), among others. These core human rights overlap substantially with the protections owed to non-combatants under common article 3 of the Geneva Conventions. Non-combatants are therefore entitled to the mutually reinforcing provisions found in IHL and international human rights law which are intended to protect them even in the most extreme situations of armed conflict.

The failure of arms embargoes

27. United Nations Security Council arms embargoes prohibit the transfer of small arms to certain designated recipient groups or States. Mandatory embargoes are imposed under Chapter VII of the Charter and are therefore binding on all Members of the United Nations. Since the end of the cold war the Council has declared at least 14 mandatory arms embargoes in response to external aggression, civil war, persistent breaches of peace accords, humanitarian crises, serious violations of human rights, coups and support of terrorism. Arms embargoes prohibit States from transferring any weapons to the embargoed destination and additionally require that States enact national measures so that private actors do not transfer weapons to the embargoed destination. When embargo violations occur, Member States are obligated to impose penalties on the violators. Unfortunately, embargoes are often imposed too late to prevent or reduce armed conflicts and human rights violations.

28. The international community has failed to enforce arms embargoes effectively and the consequences of such failures have been devastating.⁴⁸ The Security Council has taken some steps to improve methods of supervision. The most notable innovation has been the use of investigative panels to expose sanctions violations and recommend steps to strengthen enforcement.⁴⁹ The investigative panels have offered a critical view of the methods used to circumvent United Nations sanctions. The Fowler report (S/2000/203, annex I), which documented sanctions violations in Angola, for instance, revealed the complicity of certain States as well as the pervasive use of private arms brokers as crucial players in arms trafficking. According to that United Nations investigative report, arms brokers were responsible for purchasing and supplying the bulk of the weapons to the União Nacional Para a Independência Total de Angola (UNITA) as well as providing ammunition, parts and training to rebel forces.⁵⁰ Other important practices that facilitate the violation of arms embargoes are poorly regulated air transportation and the falsification of end user certificates.

29. The methods for circumventing arms embargoes are well known and monitoring could be designed in a way that provides greater protection to human rights. The major barrier to arms embargo enforcement is the lack of political will, especially among the major powers which are the largest producers and exporters of arms, to create and enforce an effective international arms monitoring regime.⁵¹ While major powers are quick to point out that they sell arms to legitimate Governments and not embargoed groups, it is well-documented that small arms delivered “legally” to a Government often find their way into the hands of embargoed actors and human rights violators.⁵²

30. Increased transparency and accountability regarding arms embargo enforcement is critical to preventing the human rights violations committed with small arms. If practised broadly, transparency would help provide early warning of potential escalation of violence indicated by an influx of a large number of small arms. Transparency would counter corruption, and the arms trade “is one of the most corrupt and bribery-laden endeavours in the world”.⁵³ In some situations there are structural factors, such as when there is an abundance of small arms already present in a region, that make it difficult to prevent or reduce violence. Despite these problems, concerted enforcement efforts can drive up the costs and risks associated with small arms trafficking and increase the prospects for preventing deadly conflict.⁵⁴ Several non-governmental organizations (NGOs) have recommended that instead of the current system of ad hoc investigative panels, the United Nations should create a special arms embargo unit within the Secretariat, which would collect information on violations, and allow for comparative analysis that could identify patterns of violations.⁵⁵ Arms embargoes are an important tool for preventing human rights violations committed with small arms, especially during armed conflict. The international community has within its grasp the knowledge and means to impose embargoes when justified on human security grounds and to strengthen and enforce them once they are in place. It lacks only the political will to do so.

Individual criminal responsibility for small arms violations

31. Besides holding States accountable for their international obligations not to misuse small arms or to transfer them to groups that do so, individuals and, in some instances, companies could also be held responsible under international criminal law either as perpetrators or accomplices in genocide, war crimes and crimes against humanity. Under the Rome Statute of the International Criminal Court individuals are liable for war crimes if they use prohibited arms and ammunition. The Statute specifically enumerates as war crimes the use of prohibited arms and ammunition including poison weapons or gases (art. 8 (2) (b) (xvii) and (xviii)), exploding bullets (art. 8 (2) (b) (xix)), or weapons of a nature to cause superfluous injury and unnecessary suffering or which are inherently indiscriminate (art. 8 (2) (b) (xx)). Individual perpetrators therefore can be prosecuted in the Court for using prohibited arms or ammunition. They can also be prosecuted for using small arms to commit any other crimes within the Court's jurisdiction, including genocide, crimes against humanity or war crimes.

32. In addition to the international criminal responsibility of perpetrators, persons that knowingly supply arms used to commit atrocities can be prosecuted in national and international tribunals under the general principle of complicity in the commission of a crime. International criminal law provides guidance regarding the application of the principle of complicity. The Nürnberg Tribunal used general principles of criminal law to interpret the Statute of the International Military Tribunal in regard to complicity.⁵⁶ Many were convicted by the Tribunal as accomplices rather than as principals.⁵⁷ The concept that a person may be prosecuted as an accessory to or complicit in the commission of an international crime is also set forth in Control Council Law No. 10 (domestic prosecutions in post-war Germany), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III (e)), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 4 (1)), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. III). 33. International criminal courts have jurisdiction over crimes of complicity. The statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) contain a general complicity provision establishing criminal liability for persons who have "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" that is within the Tribunal's jurisdiction. The Rome Statute, article 25 (3) (c), articulates individual criminal responsibility for persons who, "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".

34. There is case law in international criminal courts that supports the prosecution of arms traffickers who have knowledge that their products will be used to carry out international crimes. The British Military Court convicted the supplier of Zyklon B gas, which was used in the gas chambers at Auschwitz and other concentration camps, for violating "the laws and usages of war".⁵⁸

35. There are three requirements to establish the guilt of an accomplice. First, an international crime, such as genocide, a war crime, or a crime against humanity must have been committed. Second, the accomplice must have contributed in a material way to the crime. Third, the accomplice must have acted with knowledge and intent as to the commission of the underlying crime.⁵⁹ Key cases in the ICTR and the ICTY have interpreted these three elements of complicity: proof of the underlying crime,⁶⁰ physical support of the crime,⁶¹ and knowledge of the consequences of such physical support.⁶² In the Akayesu case, the ICTR Trial Chamber specifically enumerated "procuring means" as an example of complicity by aiding and abetting, and identified within this category "persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes."⁶³ Under the principle set forth in Akayesu, a person who provides small arms to a group knowing that the arms will be used to carry out atrocities could therefore be subject to prosecution as an accomplice to genocide, war crimes or crimes against humanity.⁶⁴ 36. The principle of complicity was used by the Special Court in Sierra Leone, which in March 2003 indicted Charles Taylor, former President of Liberia, for, among other alleged crimes, having provided financing, training, weapons and other support to the rebels in Sierra Leone who engaged in war crimes, crimes against humanity and other serious violations of IHL.⁶⁵

37. It is possible that corporations, as well as individuals, could be tried as accomplices under international criminal law, though the law in this area is still underdeveloped. The Nürnberg Charter included groups or organizations among those who could be prosecuted, but the ICTY and ICTR statutes do not include

organizations as persons within the courts' jurisdiction. Efforts to include criminal liability of "legal persons" within the Rome Statute were unsuccessful. Still, many States do allow for corporate criminal liability and businesses engaging in arms trafficking therefore may face prosecution for complicity in atrocities in their own national courts, especially in cases of universal jurisdiction such as torture, genocide and serious violations of international humanitarian law.⁶⁶

Recent national and international legal developments regarding small arms transfers

38. The Special Rapporteur would like to point out significant developments at the national level, particularly in Belgium and Brazil, to prevent small arms violence through national legislation requiring registration of production, importation and transfer of small arms.⁶⁷ In addition to these national developments, various regional treaties, international political agreements and codes of conduct call for States to assess the impact of their arms transfers to ensure that they do not violate existing international legal obligations, such as international human rights or international humanitarian laws. While several of these initiatives were discussed in the Special Rapporteur's preliminary report (E/CN.4/Sub.2/2003/29, paras. 53-57), with regard to human rights violations, she will briefly elaborate on recent developments, especially as they relate to armed conflict.

39. The Americas have the only legally binding regional treaty on small arms, the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, adopted in 1997, which regulates firearms, ammunition and explosives in the context of law enforcement and crime control. As of March 2004, 22 States out of 34 in the region have ratified it. The Convention requires export, import and transit licences; marking of small arms; and criminalization of illicit production and sales. The Convention itself does not establish export criteria tied to IHL or human rights obligations, but non-binding model regulations on brokering promulgated by the Organization of American States do incorporate such criteria.⁶⁸

40. In 1998, the European Union adopted a politically binding Code of Conduct on Arms Exports which requires member States to conduct an assessment of each request for export of military equipment, including small arms, to ensure that such exports are compatible with specific established criteria. The criteria prohibit EU member States from exporting military equipment if there is a clear risk that the proposed export might be used for internal repression. In addition, States must "exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, the Council of Europe or by the EU" (Criterion Two). With regard to armed conflict, EU States may not export arms which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination (Criterion Three). The EU Code of Conduct includes a mechanism for preventing member States from supplying arms if the request for those arms has already been rejected by another member State. The 10 new member States of the EU are also bound by the Code of Conduct.

41. Belgium's law, mentioned above, is evidence of an effort to make the EU Code legally as well as politically binding in the region. NGOs, however, have reported that despite the Code, EU member States have exported arms, technology and expertise to recipients who have used such items for grave human rights violations or breaches of international humanitarian law.⁶⁹

42. In 1998, the Economic Community of West African States established a regional moratorium banning the importation, exportation and manufacture of light weapons in member States.⁷⁰ While the ban remains in place and is strong in principle, there have been many documented violations which are of particular concern because of widespread armed conflict in the region.⁷¹

43. On a global level, the central agreement on preventing and reducing small arms proliferation is the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects of 2001. The Programme of Action, while comprehensive in scope, was developed largely within an arms control and disarmament framework and thus does not adequately elaborate the human rights and humanitarian consequences of small arms proliferation and misuse. The Programme of Action, a politically binding agreement, does require that national export controls be "consistent with existing responsibilities of States under relevant international law".⁷² One of the objectives

of the ongoing United Nations process on small arms is to identify clearly and precisely the content of these “existing responsibilities”, which must certainly include core human rights and IHL obligations.

44. The First Biennial Meeting of States to Consider the Implementation of the Programme of Action was held at United Nations Headquarters in July 2003. Two very positive outcomes of the meeting were a process for drafting a binding instrument on marking and tracing of small arms and a developing consensus on the need to regulate international arms brokers. Despite this progress, the meeting of States did not acknowledge the links between legal and illegal markets, make progress in defining the existing obligations of States with respect to arms transfer criteria, or recognize the need for domestic regulation of small arms in order to protect human security.

45. The international human rights community has an important role to play in the implementation of the United Nations Programme of Action. There is a need to develop global legal standards to keep small arms out of the hands of human rights violators. The proposed international arms trade treaty⁷³ reaffirms the existing obligations of States under international law and applies those obligations explicitly to the decision to transfer arms. The adoption of such a treaty is needed to clarify State responsibility for arms transfers that result in violations of international human rights and international humanitarian law.

III. GENDER IMPLICATIONS OF THE AVAILABILITY OF SMALL ARMS

46. Among the adverse consequences of small arms on human rights is their use in enforcing discriminatory practices against women and in the commission of other gender-based violations. An analysis of the gender implications of small arms availability, transfer and misuse reveals the different experiences of women and men in the face of the culture of violence facilitated by these weapons. Men represent the majority of users of small arms as well as the majority of victims of small arms violence. Men also represent the majority of decision-makers in the transfer and misuse of small arms. As a result, the strategies developed to address small arms tend to focus exclusively on men; women are seen only as victims who must be protected but who are not allowed to create or implement policies regarding small arms or the violence they support. Such a two-dimensional approach overlooks the role of women in constructing safe communities, and it furthers gender-based stereotypes that equate masculinity with guns. Men as victims of the “gun culture”

47. The majority of small arms-related casualties occur among males between the ages of 15 and 44. Males suffer death at the barrel of a gun far more often than females; for example, during a one-year period in the 1990s, firearm deaths of males in 52 countries outnumbered deaths of females at a ratio of slightly more than 9 to 1, and the majority of these deaths occurred in males aged 15-44.⁷⁴ Males accounted for 77 per cent of all violence-related homicides and over 60 per cent of all suicides globally in the year 2000.⁷⁵ While it is difficult to say with precision how many of these homicides resulted from the use of small arms, the World Health Organization estimated in 2001 that 75 per cent of all male homicides and 30 per cent of all male suicides are carried out with a firearm.⁷⁶ War-related deaths were estimated to be 310,000 persons in the year 2000.⁷⁷ Of these, the greatest mortality rate is found amongst 15- to 44-year-old males.⁷⁸

48. A critical factor in the prevalence of young men as victims of small arms violence is the widespread ideology promoting guns as symbols of masculinity. In some Central European cultures, when a boy is born, people exclaim “We have increased by one gun!” In other armed cultures, the gun is an extension of the male self; Kalashnikovs are as common as baseball caps.⁷⁹ Young men are socialized to believe that guns are the tools by which they can provide, protect and have power in their communities.⁸⁰ Small arms are primarily owned and used by men.⁸¹ If a society has strong social structures, a traditional “gun culture” does not inevitably lead to violence.⁸² In many communities, however, there are no adequate social controls, and the ideology of masculinity and guns is exploited to promote armed violence. In these situations, the consequences of the constructed guns/masculinity ideology may be devastating, as boys and men become both the perpetrators and the victims in the culture of violence that destroys the entire spectrum of rights in their communities.

Women: a powerful voice against small arms violence

49. The human rights of women are severely affected by the availability and misuse of small arms. Proliferation of small arms can increase gender disparities by increasing the physical power of men. The

threat of small arms violence emphasizes gender behaviour in a way that constrains or diminishes women's activities and activism.

50. Small arms are the tools of rape and other forms of sexual violence: women are raped at the point of a gun, and guns are used as an instrument of rape.⁸³ Sexualized violence is promoted by socially constructed ideologies that give men power over women and children. While male-dominated societies often justify small arms possession through the alleged need to protect vulnerable women, women actually face far greater danger when their families and communities are armed.⁸⁴ In post-conflict situations, especially among defeated groups, reasserting "lost" masculinity can take the form of severe repression and violence against women.⁸⁵

51. Because women are sometimes portrayed only as the victims of violence at the barrel of a gun without taking into account the complexity of their experience regarding small arms their opinions regarding small arms proliferation is often undervalued. Women's roles run the entire spectrum, from perpetrators of small arms-related violence to witnesses, to victims, to healers and rebuilders of communities. Women therefore need to participate in all phases of policy-making to prevent small arms violence. The consideration of women's roles as caretakers and community builders is a critical part of the gender analysis. Because men make up the majority of victims of armed violence, women are often the ones left to deal with the consequences of the violence. Whether in peacetime or during armed conflict, the burden of caring for men and holding together families falls disproportionately on women.⁸⁶ It is women who must compensate when their male family members are away in battle, injured or killed. It is women who assume the work of maintaining and restoring communities affected by violence. Still, women are seldom involved in helping to create or implement solutions to violence.⁸⁷

52. Women's exclusion from shaping policies relating to small arms allows manipulations of gender ideology to continue. Male domination of military, law enforcement and security sectors prevents perspectives essential to meaningful arms control and conflict resolution. Women must have a central role in efforts to disarm communities in post-conflict situations and to construct confidence-building measures that decrease the demand for small arms if such efforts are to succeed. Some international programmes have begun to do so. The United Nations Department of Disarmament Affairs, for instance, has developed a Gender Mainstreaming Action Plan to promote gender perspectives in its security work.⁸⁸

IV. CONCLUSIONS AND RECOMMENDATIONS

53. This report focuses on the pervasive role of small arms and light weapons in violations of human rights and IHL in armed conflict. The widespread availability and misuse of small arms causes hundreds of thousands of deaths and injuries in armed conflict and contributes to the collapse of economic and social structures upon which safe communities can be built. Civilians, despite their protected status under international humanitarian law, are caught in the crossfire and specifically targeted by armed groups. The international community has not taken the necessary steps to keep small arms out of the hands of those who use them to violate human rights and IHL. The human rights community, including this Sub-Commission, should call for human security and human rights to be at the centre of international action regarding small arms.

54. It is critical for States to provide training to their armed forces, including military, law enforcement and private security forces under their control, on basic principles of international human rights law and international humanitarian law especially with regard to the use of small arms.

55. To protect the human rights of persons who are threatened by armed conflict, the international community must improve the design and strengthen the enforcement of arms embargoes, and States must enforce criminal sanctions against persons and groups that violate mandatory embargoes. States should adopt binding national laws containing export criteria that prohibit transfers of small arms where such arms are likely to be used to commit serious violations of international human rights or international humanitarian law. The international community should adopt the arms trade treaty, to ensure a common global standard to prevent the transfer of arms likely to be used to commit such violations.

56. States should investigate and prosecute individuals and groups within their jurisdictions that knowingly supply small arms used to commit genocide, war crimes and crimes against humanity, or should refer such individuals for prosecution in an international tribunal.

57. States and the international community should involve women in all phases of policy regarding the availability and use of small arms. Governments, assisted by civil society, should “disarm” the socially constructed notion of guns as masculine by constructing a stable security situation through security sector reform, economic development and strict regulation of illegal gun possession.

58. As suggested in the discussion among Sub-Commission members at the fifty-fifth session, the author will explore further in her final report the due diligence responsibilities of States to protect the right to life of persons within their jurisdiction through reasonable regulations, including licensing, to prevent possession of arms by persons who are at risk of misusing them, requiring safe storage of small arms, requiring tracking information by manufacturers, investigating and prosecuting those who misuse small arms, and offering periodic amnesties and other appropriate measures to remove unwanted small arms from circulation. In particular, there is a need to explore the boundaries of the right to self-defence as a general principle of criminal law and its specific application to small arms possession and use. The Special Rapporteur would welcome the comments of members of the Sub-Commission and non-governmental organizations on this topic.

Notes

1 The Special Rapporteur would like to recognize the following for their assistance with this progress report: Jonathan Eloff, Rochelle Hammer, Rebecca Verreau, Arati Vasan, and Xiaochuan Zhao.

2 International Committee of the Red Cross Arms Availability and the Situation of Civilians in Armed Conflict, Geneva, 1995, p. 23 (hereinafter, “ICRC, Arms Availability”) (citing P. Walenstein and M. Sollenberg, “Armed Conflicts, Conflict Termination and Peace Agreements, 1989-1996”, *Journal of Peace Research*, vol. 34, No. 3).

3 International Action Network on Small Arms, “Small arms are weapons of mass destruction”, <http://www.iansa.org/media/wmd.htm>; United Nations, “The Impact of Armed Conflict in Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children”, United Nations, 2000, p. 34 (“The Machel Review”); International Committee of the Red Cross, “Arms Availability: questions and answers”, 2000, <http://www.icrc.org/web/eng/siteeng0.nsp> (9 April 2004).

4 Robert Muggah and Eric Berman, *Humanitarianism under Threat: the Humanitarian Impacts of Small Arms and Light Weapons* (Geneva: Small Arms Survey, 2001), p. 2 (hereinafter, “Humanitarianism under Threat”).

5 Human Rights Watch, “Small Arms and Human Rights: The Need for Global Action”, A Briefing Paper for the UN Biennial Meeting of States, 7 July 2003, http://www.hrw.org/backgrounders/arms/small-arms-070703-02.htm#P64_6670; see generally, Control Arms Campaign, <http://www.controlarms.org>.

6 ICRC, Arms Availability, op. cit., pp. 16-17.

7 Ibid., p. 16.

8 Robin Coupland and David Meddings, “Mortality Associated with the Use of Weapons in Armed Conflicts, Wartime Atrocities and Civilian Mass Shootings: Literature Review”, *British Medical Journal*, vol. 319, 1999.

9 Peter Salama, Bruce Laurence, and Monica Nolan, “Health and Human Rights in Contemporary Humanitarian Crises: Is Kosovo More Important than Sierra Leone?” *British Medical Journal*, vol. 319, 1999, pp. 1569-71.E/CN.4/Sub.2/2004/37 page 19

10 ICRC, “Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation”, section 5, February 2003, http://www.humanrightsfirst.org/iraq/ICRC_Report.pdf (The ICRC documented several instances in 2003 in US-run prisons in Iraq in which guards shot at persons deprived of their liberty with live ammunition. The ICRC repeatedly recommended that the Coalition forces use non-lethal methods to deal with demonstrations, riots or escape attempts.)

11 Ibid., section 3.

12 Armed violence resulted in dramatic decreases in food production and agricultural exports in Angola, Mozambique and Sierra Leone. Graduate Institute of International Studies, *Small Arms Survey 2003: Development Denied*, Geneva, 2003, p. 143 (hereinafter, “Development Denied”).

13 Studies have shown decreases in the number of primary, secondary, vocational and night schools in certain areas of Afghanistan, Colombia, Mozambique, Nicaragua, Sierra Leone, Sudan, and Uganda during periods of intense conflict. Ibid., p. 141 (citing Robin Luckham, et al., *Conflict and Poverty in Sub-Saharan Africa: An Assessment of the Issues and Evidence*, Brighton, UK: Institute of Development Studies, 2001, and Frances Stewart and Valpy Fitzgerald, *War and Underdevelopment: the Economic and Social Consequences of Conflict*, Oxford: Oxford University Press, 2001).

14 Health facilities in conflict areas often lack rudimentary medical supplies and personnel, resulting in increased likelihood of infection, disability and death. According to a study in northern Uganda, most gunshot victims did not receive medical treatment within the first seven hours of their injury, and 34 per cent had to wait more than two days. Olive Kobusingye, “The Effects of SALW Proliferation and Abuse in Gulu District, Uganda: A Public Health Approach”, in Bonn International Center for Conversion, Brief 24, 2002, p. 73, <http://www.bicc.de/publications/brief/brief24/content.html> (hereinafter BICC Brief #24).

15 Centre for Humanitarian Dialogue, *Putting People First* (Geneva: Centre for Humanitarian Dialogue, 2003), p. 8.

16 ICRC, “Arms Availability: questions and answers”, op. cit.

17 Department for International Development, *Tackling Poverty by Reducing Armed Violence: Recommendations from a Wilton Park Workshop*, London, April 2003, p. 9.

18 Humanitarianism under Threat, op. cit., p. 3. Refugee and IDP flows from societies where small arms are easily accessible have increased over the past decade. Return is impossible because of persistent threats at the site of origin. Ibid., p. 22.

19 Robert Muggah, “Small Arms and Forced Displacement”, *Forced Migration Online*, at <http://www.forcedmigration.org/guides/fmo002.html> (hereinafter “Small Arms and Forced Displacement”). E/CN.4/Sub.2/2004/37 page 20

20 United Nations High Commissioner for Refugees, <http://www.unhcr.ch> (2004). *World Refugee Survey 2003*, US Committee for Refugees, May 2003. In Colombia, for example, estimates of the IDP population range from 400,000 to 2.2 million. Moreover, a large proportion of Colombian displacement can be attributed to massacres, and 90 per cent of atrocities committed by the military, paramilitary and guerrilla combatants are carried out with small arms. Minister of Defense, <http://www.mindefensa.gov.co/publicaciones/ministerio/espanol/armas-documento.pdf>.

21 2002 is the most recent year for which figures are available. Debbie Hillier and Brian Wood, *Shattered Lives: The Case for Tough International Arms Control*, Amnesty International and Oxfam GB, at 29 (citing *World Refugee Survey 2003*, US Committee for Refugees, May 2003) (hereinafter “Shattered Lives”). In Sudan, more than four million people are displaced, with 85 percent of the residents of southern Sudan having been displaced at least once in the last 15 years. Ibid.

22 Humanitarianism under Threat, op. cit., p. 3.

23 *Small Arms and Forced Displacement*, op. cit.

24 Karen Jacobsen, “A Framework for Exploring the Political and Security Context of Refugee Populated Areas”, *Refugee Survey Quarterly*, vol. 19, No. 1, UNHCR, Geneva, 2000, p. 3.

25 Kathi Austin, *Armed Refugee Camps: A Microcosm of the Link between Arms Availability and Insecurity*, at 1 (6 February 2002) (presentation at a workshop organized by the US Social Science Research Center Council’s Program on Global Security and Cooperation).

26 *Shattered Lives*, op. cit., p. 29; *Humanitarianism under Threat*, op. cit., p. 20 (“In Kenya, significant numbers of weapons that were once used in Sudan, Somalia, and Uganda are being trafficked back into refugee camps and surrounding areas of Turkana (Kakuma) and the northeast (Dadaab’s Ifo, Dagahaley and Hagadera).”)

27 *Small Arms and Forced Displacement*, op. cit.

- 28 See, Jeff Crisp, “A state of insecurity: the political economy of violence in refugee-populated areas of Kenya”, <http://www.jha.ac/articles/u016.htm> (December, 1999). (According to staff in the camps, assailants often act in groups, carrying firearms and knives and wearing masks to avoid identification. In 2000 there were an estimated 72 reported rape cases in Kenya’s refugee camps compared with 142 in 1998. UNHCR made an effort to reduce the number of rapes by having wood trucked into the camps.)
- 29 Humanitarianism under Threat, *op. cit.*, p. 36.
- 30 ICRC, Arms Availability, *op. cit.*, p. 14. E/CN.4/Sub.2/2004/37 page 21
- 31 In the Line of Fire, *op. cit.*, pp. 19-20; ICRC, Arms Availability, *op. cit.*, p. 15. (According to a survey of ICRC employees, one third of respondents believed that at least half of the populations in need of humanitarian assistance lived in areas not accessible to the ICRC because of armed security threat.)
- 32 In the Line of Fire, *op. cit.*, 4 (participating organizations surveyed in this report included CARE, Oxfam GB, Mediciens du Monde, Concern Worldwide, World Vision, Save the Children, International Rescue Committee, Red-R, GTZ and local partner NGOs, International Federation of the Red Cross and national societies, UNDP, UNICEF, UNHCR, OCHA, WFP and UNSECOORD).
- 33 *Ibid.*
- 34 Humanitarian organizations use armed protection on a regular basis in four conflict-affected countries: northern Iraq, Somalia, Russia (Ingushetia/Chechnya), and northern Kenya. Small Arms and Forced Displacement, *op. cit.*, p. 12. The ICRC and organizations affiliated with the Red Cross and Red Crescent societies do not use armed guards and many other humanitarian organizations do so only as a matter of last resort.
- 35 “Human Rights and Human Security”, in UN Institute on Disarmament Research, Disarmament Forum, vol. 1, 2004.
- 36 The four Geneva Conventions relate to sick and wounded in the field; sick, wounded, and shipwrecked at sea; the treatment of prisoners of war; and the protection of civilians in times of war. The Protocols relate to the protection of victims of international armed conflict and the protection of victims of non-international armed conflict.
- 37 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, para. 78.
- 38 1997 Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines; 1993 Chemical Weapons Convention; 1972 Biological Weapons Convention.
- 39 1899 Declaration concerning Expanding Bullets; Protocols to the 1980 Conventional Weapons Convention.
- 40 Geneva Conventions of 1949, articles 50, 51, 130, 147.
- 41 Emanuela Gillard, “What is Legal? What is Illegal? Limitations on Transfers of Small Arms under International Law” (Lauterpacht Research Centre for International Law, Cambridge) 2000, <http://www.arias.or.cr/fundarias/cpr/armslaw/egillard.html>.
- 42 Gillard, *op. cit.* at 6; see also, The Draft Framework Convention on International Arms Transfers (Arms Trade Treaty), article 3, <http://www.arias.or.cr/fundarias/cpr/armslaw/fccomment.html>. E/CN.4/Sub.2/2004/37 page 22
- 43 “[A] State may incur responsibility if it assists another State to circumvent sanctions - or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations. Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State was aware of and intended to facilitate the commission of the internationally wrongful conduct.” Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, article 19, paragraph 9, pp. 158-59, http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.
- 44 Laurence Boisson de Chazournes and Luigi Condorelli, “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, *International Review of the Red Cross* No. 837, pp. 67-87 (2000).

45 ICRC, Statement by the ICRC at the First Biennial Meeting of States, UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects, 10 July 2003.

46 ICRC, Arms Availability, *op. cit.*, pp. 65-66.

47 [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5Y4DK7/\\$File/conference_ang-final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5Y4DK7/$File/conference_ang-final.pdf).

48 An example of this devastation is the thousands of civilian casualties that were inflicted by Liberian government and rebel forces in Monrovia in June-July 2003 with arms and ammunition supplied in violation of a UN arms embargo. Arms traffickers who supplied the former government of Charles Taylor bypassed legal controls in several countries by using front companies, declaring false destinations and providing forged documents. Human Rights Watch, Weapons Sanctions, Military Supplies, and Human Suffering: Illegal Arms Flows to Liberia and the June-July 2003 Shelling of Monrovia, November 2003, http://www.hrw.org/backgrounder/arms/liberia/liberia_arms.htm#P141_31740 (documenting civilian casualties in Monrovia caused with small arms and ammunition transferred by the Government of Guinea to rebel forces) (hereinafter, *The Shelling of Monrovia*); United Nations, Report of the Panel of Experts pursuant to Security Council resolution 1343, paragraph 19, concerning Liberia (New York 2001).

49 The Fowler Report (S/2000/203), issued in March 2000, documented violations of sanctions against UNITA, the opposition group battling the Angolan government. The report was significant for its willingness to name governments, agencies and individuals which had directly or indirectly violated UN sanctions. A UN expert panel on violations of arms embargoes to Liberia continues to report to the Security Council (S/RES/1521 (2003)). In April 2004, the Secretary-General named an expert panel to monitor the arms embargo in the Democratic Republic of the Congo (S/2004/317). E/CN.4/Sub.2/2004/37 page 23

50 A central figure in the criminal syndicate of arms brokers is Victor Bout. UN investigative panels on Angola, Sierra Leone and the DRC have all identified Bout and his company Air Cess, as principal suppliers of arms to those conflicts. Public exposure has prompted Bout to restructure his company and shift his operations to subcontractors in order to continue his sanctions-busting activities. See, David Cortright and George A. Lopez, *Sanctions and the Search for Security*, Challenges to UN Action, International Peace Academy 2002, pp. 168-69 (hereinafter, "Cortright and Lopez, *Sanctions and the Search for Security*").

51 The permanent members of the Security Council are the five leading conventional arms producers. The production and distribution of small arms in the post-cold war era is quite fragmented and competitive, with at least 1135 companies in 98 countries manufacturing small arms. The US, Russia and China are also the largest producers of small arms, with 21 European countries, Brazil and Israel qualifying as medium producers. Graduate Institute of International Studies, *Small Arms Survey 2002: Counting the Human Cost* (Geneva 2002) p. 20. Russia and China do not provide any detailed information on their small arms exports, which are thought to be extensive. France, the UK and the US provide annual reports of the number and types of weapons exported; the US report provides the most details on the destination, type, quantity and value of small arms exports. M. Haug, M. Langvandslie, L. Lumpe and N. Marsh, "Shining a Light on Small Arms Exports: the Record of State Transparency", Norwegian Initiative on Small Arms Transfers and Small Arms Survey, Occasional Paper #4, 2002, p. 3.

52 See, for example, Cortright and Lopez, *Sanctions and the Search for Security*, *op. cit.*, p. 170 (US arms transferred to Pakistan in the 1980s to counter the Soviet invasion of Afghanistan have been used in various regional conflicts); Human Rights Watch, *Ripe for Reform: Stemming Slovakia's Arms Trade with Human Rights Abusers* (2004) (documenting, among other embargo violations, the illegal re-export to Liberia of 1,000 AK-47 assault rifles in 2000 that Uganda had imported from Slovakia a few weeks earlier).

53 M. Haug, et al., *op. cit.*, p. 2. Transparency International (UK), "Corruption in the Official Arms Trade", Policy Research Paper, April 2002; Joe Roeber, *The Hidden Market: Corruption in the International Arms Trade* (The New Press: September 2001).

54 Cortright and Lopez, *Sanctions and the Search for Security*, *op. cit.*, p. 167.

55 Human Rights Watch, *World Report 2001*, 158.

56 "The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime." *United States of America v. Alstötter et al.*, 1948, 6 L.R.T.W.C. 1, p. 62.

57 William A. Schabas, “Enforcing international humanitarian law: Catching the accomplices”, IRRC, vol. 83, No. 842, June 2001.

58 Robert Mulka, a camp commander at Auschwitz, was convicted as an accessory in the mass execution of inmates at the camp because of his involvement in procuring gas, constructing gas E/CN.4/Sub.2/2004/37 page 24 ovens and arranging for transport of inmates to the gas chambers. *United Kingdom v. Tesch et al.*, 1947, 1 L.R.T.W.C. 93-101. The manufacturers of the Zyklon B gas, however, were acquitted after arguing that they thought the gas was being used as a delousing agent. A US war crimes tribunal found that “neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who know of such facts must also have had knowledge of the criminal purposes to which this substance was being put”. *United States of America v. Carl Krauch et al.*, 1948, 8 T.W.C. 1169.

59 See Schabas, *op. cit.*, for an explanation of these elements.

60 See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, para. 530 (explaining the general principle of criminal law).

61 *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Trial Chamber), 10 December 1998, para. 235 (“the *actus reus*” [physical element] of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime).

62 *Prosecutor v. Tadic*, Case No. IT-94-1-T (Opinion and Judgment), 7 May 1997, para. 674 (“there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime”). See also *Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), 3 March 2000, para. 286 (to aid a crime a person must intentionally provide assistance to the perpetrator with knowledge of the perpetrator’s intent to commit a crime, but need not personally support the aim of the perpetrator).

63 *Prosecutor v. Akayesu*, *op. cit.*, para. 536.

64 See Lisa Misol, “Weapons and War Crimes: the Complicity of Arms Suppliers”, in Human Rights Watch, *World Report 2004*, pp. 289-98.

65 *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-I (Indictment), para. 20.

66 See generally Andrew Clapham and Scott Jerbi, “Categories of Complicity in Human Rights Abuses”, http://www.amnesty.it/edu/formazione/mondo_economico/documenti/Corporate_complicity.doc; Schabas, *op. cit.*, pp. 444-45.

67 See, Brazil’s Statute of Disarmament, Law No. 10,826/03, December 2003; Law introducing into Belgian law the EU Code of Conduct on Arms Exports, adopted 26 March 2003, <http://www.grip.org/bdg/g2072.html> (making the EU Code of Conduct binding under Belgian law).

68 Amendments to Model Regulations for the Control of the International Movement of Firearms, their Parts, and Components and Ammunition, proposed by the Group of Experts - Broker Regulations, OEA/Ser. L.IV.2.34 CICAD/doc127/03, 13 November, available at: http://www.cicad.oas.org/en/Assemblies/CICAD34/ENG/Day2/ModelRegArms_Brokers.htm. E/CN.4/Sub.2/2004/37 page 25 At Article 5 (Prohibitions), the Model Regulations provide that: “(1) The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to: (a) result in acts of genocide or crimes against humanity; (b) violate human rights contrary to international law; (c) lead to perpetration of war crimes contrary to international law; (d) violate a United Nations Security Council embargo or other multilateral sanctions to which the country adheres, or that unilaterally applies; (e) support terrorist acts; (f) result in a diversion of firearms to illegal activities, in particular, those carried out by organized crime; or (g) result in a breach of bilateral or multilateral arms control or non-proliferation agreement.”

69 Amnesty International, *Undermining Global Security: the European Union’s arms exports*, AI Index: ACT 30/003/2004, 14 May 2004, <http://web.amnesty.org/library/index/engact300032004>.

70 ECOWAS, *Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa*, twenty-first ordinary session of the Authority of Heads of State and Government, Abuja, 30-31 October 1998, renewed July 2001.

71 See, for example, *The Shelling of Monrovia*, op. cit., regarding arms transfer and misuse in the armed conflict in Liberia.

72 Programme of Action, United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (A/CONF.192/15, chap. IV), July 2001, sect. II, para. 11.

73 <http://www.arias.or.cr/fundarias/cpr/armslaw/fccomment.html>.

74 World Health Organization, *Small Arms and Global Health*, 2001, p. 3, 7 (hereinafter, “WHO, Small Arms and Global Health”) (countries contributed data for a one year period in the mid-1990s, though not necessarily the same year. The total number of firearm deaths of males was 104,493 compared to 11,100 females).

75 World Health Organization, *World Report on Violence and Health*, 2002, p. 10 (hereinafter, “WHO, World Report on Violence and Health”).

76 WHO, *Small Arms and Global Health*, op. cit., p. 6.

77 WHO, *World Report on Violence and Health*, op. cit., p. 2. E/CN.4/Sub.2/2004/37 page 26

78 Christopher J.L. Murray, et al., “Armed conflict as a public health problem”, *British Medical Journal*, 9 February 2002, vol. 324, p. 348.

79 *Shattered Lives*, op. cit., p. 47.

80 Comments recorded in interviews with 12-16 year old boys in South Africa included: “People don’t argue with a gun.” “I feel very weak when I put the gun down.” “When you carry a gun you feel like you are a human being.” Claire Taylor, “Guns, Power and Identity, Gender Perspectives on Small Arms and Light Weapons: Regional and International Concerns” (Bonn International Center for Conversion, Brief 24, 2002), <http://www.bicc.de/publications/brief/brief24/content.html> (hereinafter BICC Brief #24).

81 In the United States, only 9 per cent of women own guns as opposed to 42 per cent of men. *Shattered Lives*, op. cit., p. 47.

82 In Yemen, for instance, widespread availability of arms has not resulted in excessive criminality or unstable social structures. Small Arms Survey, “Living with Weapons: Small Arms in Yemen”, in *Development Denied*, op. cit., at 169-189.

83 Men are also subjected to certain forms of sexualized violence as a way of “feminizing” them and destroying their masculinity. Ojambo Ochieng, BICC Brief #24, op. cit., p. 63.

84 Among high-income countries, where firearms are more available, more women are homicide victims. Women in the United States (which has the highest levels of small arms availability in the world - more than 80 firearms per 100 persons) are at higher risk of homicide victimization than are women in any other high-income country. David Hemenway, Tomoko Shinoda-Tagawa, Matthew Miller, “Firearm Availability and Female Homicide Victimization Rates Among 25 Populous High-Income Countries”, *JAMWA*, vol. 57, 2002; pp. 100-104, http://jamwa.amwa-doc.org/vol57/toc57_2.htm.

85 Sudanese women suffer physical and sexual abuse from male spouses who feel guilt and anger for failing in their duty to protect women. Amani El Jack, “Gender Perspectives on the Management of Small Arms and Light Weapons in the Sudan”, BICC Brief #24, op. cit., pp. 51, 54.

86 Vanessa A. Farr, “A Gendered Analysis of International Agreements on Small Arms and Light Weapons”, BICC Brief #24, op. cit., p. 14.

87 In a study of the Philippines, men collectively decided to arm themselves, purportedly to protect their women and property, disregarding the opinion of women who argued that arms would escalate the violence. *Development Denied*, op. cit., p. 148, citing Ed Quitariano and Eric Libre, “Reaching for the Gun: The Human Cost of Small Arms in Central Mindanao, Philippines”, *Kasarinlan, Philippine Journal of Third World Studies*, vol. 16, No. 2 (2001).

88 DDA, Gender Mainstreaming Action Plan, April 2003, <http://disarmament2.un.org/gender/gmap.pdf>.

* In accordance with General Assembly resolution 53/208 B, paragraph 8, this document is submitted late so as to include the most up-to-date information possible.