DOCUMENTI

IAI

TRANSPARENCY AND CONTROL OF CONVENTIONAL ARMS TRANSFERS: SOME LEGAL PRECEDENTS AND CURRENT INTERNATIONAL LAW

by Natalino Ronzitti

ISTITUTO AFFARI INTERNAZIONALI

IAI 9117

TRANSPARENCY AND CONTROL OF CONVENTIONAL ARMS TRANSFERS: SOME LEGAL PRECEDENTS AND CURRENT INTERNATIONAL LAW.

I

BACKGROUND

1. The supply of arms and armed conflicts: a) conflicts between States

The regulations governing the arms trade during a conflict between States can be found in the Hague Conventions V and XIII (1907) devoted to neutrality in land and maritime war, respectively. These regulations left considerable scope for discretion, and were based on the distinction between State versus private trade. A neutral State may not supply arms to belligerents, without violating the right of neutrality. Neutrals are not, however, obliged to prevent their citizens or companies from selling arms to belligerents. Article 7 of Convention V states that "a neutral Power is not bound to prevent the export or transit, for one or other of the belligerents, of arms, munitions of war, or, in general, of any thing which can be of use to an army or fleet." Clearly, a neutral State may prohibit the supply of weapons by private citizens. But if it does so, it must ban the trade in arms to both belligerents, or it would violate its duty to remain impartial.

The same rules apply to neutrality in sea warfare. Article 6 of Convention XIII provides that: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition or war material of any kind whatever, is forbidden". However, the constraints on private individuals are more strict in respect of maritime warfare than land warfare, because Article 8 provides that "the neutral is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations" for one of the belligerents. The difference between these provisions was explained by the fact that ships could have a decisive effect on the outcome of the war. Furthermore, ships are easily identifiable, so that the ban on exports may be more effectively monitored.

2. b) Non international conflicts

In the case of a civil war being waged within a State, the commonly accepted rule is that third parties may help the lawful government but may not support the insurgents. Third States may therefore supply arms to a government dealing with an insurrection, and they are not obliged to ban the supply of arms by private individuals. This is a customary rule, based on a practice that became established

in the 19th century. However, it is not clear whether there exists an obligation under international law to prevent private individuals from supplying weapons to insurgents. They do not, however, enjoy greater freedom than they would have in the case of a conflict between States. Accordingly, the restrictions (which are minimal) that apply to international warfare also apply to civil wars. Moreover, in States where a licence is required to engage in the arms trade, authorizing the export of arms to insurgents could be tantamount to State involvement in helping insurgents, which is forbidden by international law. According to Article 1(3) of the Havana Convention of 1928 on the duties and rights of States in the event of civil war, States are obliged to prohibit the trade in arms and war materials, save those destined for legitimate governments.

Whenever third States recognize a State of belligerency, civil war is equated with an international war with the result that the right of neutrality applies to relations between third States and the belligerents. The lawful government and the insurgents are placed on the same footing, and the Hague Conventions V and XIII apply. Article 1(3) of the Havana Convention mentioned earlier codified this rule, even though the recognition of belligerency is more an academic matter than a reality. During the Spanish Civil War, twenty-seven States undertook to implement a

policy of non-intervention in 1936 under an agreement which obliged them, *inter alia*, not to supply arms to either side. The non-intervention policy was supposed to be controlled by an *ad hoc* committee composed of the States' parties to the agreement.

3. c) Conflicts for self-determination

Conflicts for self-determination were raised to the rank of international conflicts by the First Additional Protocol to the four Geneva Conventions of 1949. This Protocol governed relations between the two belligerents in matters relating to the status of prisoners of war, means and methods of warfare and the protection of the civilian population, but it did not make any provisions governing relations between third States and belligerents. Raising conflicts for self-determination to the status of international conflicts did not, however, involve the application of the traditional right to neutrality and the consequent duty of impartiality towards the warring parties.

The thinking that is now becoming established is that third States commit an international tort whenever they help any government which is preventing self-determination. As a result, the supply of weapons to be used to help a government endeavouring to stifle the right to self-determination should be deemed unlawful. If this thinking

does become established, a State would have to prevent any trade between private individuals and a government engaged in a conflict for self-determination, particularly in cases in which the supply of weapons is subject to authorization. Opinions differ was to whether third States are entitled to supply weapons to the body representing a people struggling for self-determination. The relevant United Nations resolutions, adopted by consensus, accord the right of a people struggling for self-determination to seek out and receive aid (General Assembly Resolution 2625-XXV on Friendly Relations and 3314-XXIX on the Definition of Aggression). However, there are opinions vary on the type of aid which may be accorded them. Some States consider that it is only lawful to provide humanitarian aid while others deem it lawful to provide logistical aid, including the supply of weapons.

4. Chapter VII of the United Nations Charter.

The United Nations may take appropriate measures in the event of armed conflict. Pursuant to Article 39 of the Charter, in the case of a conflict between States, the United Nations, may decide which State is the aggressor. In this case, any aid to the State defined as the aggressor would be forbidden. The traditional rules of neutrality could no longer apply in such a case. States would also be

obliged to prevent any individuals supplying any weapons to the aggressor. Conversely, any aid to the victim of the aggression would become lawful according to the principle of collective legitimate defence. The United Nations could also influence the situation described above independently of whether or not the aggressor is identified. In the event that a conflict, whether international or domestic, constitutes a threat to international peace and security, the Security Council may recommend or resolve to place an embargo on the supply of weapons. For example, in 1963, the Security Council recommended an embargo on the supply of arms to South Africa, and in Resolution 418 of 1977, it made the embargo mandatory.

5. <u>The absence of any Conventional provisions applicable in peace time: the failure to bring into force the Geneva Convention of 1925 on the arms trade</u>.

For peace time no ad hoc set of regulations exist. The supply of arms is left entirely within the exclusive jurisdiction of States and is generally disciplined by a system of licences and permits. In principle, the Security Council could recommend or resolve on the imposition of sanctions against a State under Article 41 of the United Nations Charter, even though the State may not be involved in an armed conflict. But in this case the State would have

to be considered a threat to peace as a result of its international conduct or its domestic regime, which is a rather remote probability.

Attempts were made at the League of Nations to solve this problem. On June 17, 1925 a Convention on the control of the international trade in arms, munitions and war materials was opened for signature in Geneva. This Convention never came into force because the necessary number of ratifications was never reached. However, it makes an interesting precedent. Its object was to subject the international arms trade to a "general and effective system of control and publicity", and to prohibit the import or export of weapons whose use was forbidden by international law. To do this, the Convention distinguished between five categories of arms and war materials: arms and materials for land, maritime or aerial war, for multiple uses, warships, aircraft, gunpowder and explosives. Arms and materials for land, maritime or aerial war could only be exported if the importer were a State or a State agency. There were very few exceptions to this. Exports had to be documented using a special licence which contained a list of the weapons being exported. The parties were required to give adequate publicity to the exports by publishing quarterly statistics using a special form. They were also obliged to take account of domestic legislation regarding the export and import of weapons. Particular

provisions were laid down regarding the supply of warships. The export of aircraft, gunpowder and explosives was not subject to any particular formality except where they were to be exported to particular zones under a colonial government or being governed under mandate. The Geneva Convention of 1925 governing the trade in weapons of war was supposed to be followed by a convention on the manufacture of weapons, as requested by the importing countries. But since the 1925 Convention did not come into force all attempts at subsequent regulation in this area failed.

6. The system laid down by the Covenant of the League of Nations.

The Covenant of the League of Nations contained a number of provisions directly or indirectly governing the arms trade. Firstly, the Covenant discouraged the manufacture of weapons by private enterprise, and the penultimate paragraph of Article 8 provided that, "The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety". At the same time, on the

assumption that the supply of arms to certain areas might constitute a threat to peace, Article 23(d) provided that the members "will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest". But this provision was not immediately binding because it depended upon the subsequent conclusion of international conventions. Moreover, although the final paragraph of Article 8 was not directly to do with the traffic in weapons, it did require the signatories to exchange information on arms levels and the conditions of the war industries.

7. The United Nations Charter.

The United Nations Charter does not contain any specific *ad hoc* provision. However, Article 11 empowers the General Assembly to deal with matters of disarmament and "the regulation of armaments"; Article 26 vests the Security Council with the responsibility of formulating plans for the "regulation of armaments". Underlying both these provisions, and particularly the second one, is the implicit idea that States must have the minimum amount of weaponry necessary to meet their legitimate self-defence requirements as laid down in Article 51 of the Charter, and at the same time that there is a ceiling above which armaments are no longer

necessary unless they meet the self-defence requirements envisaged in Article 51. In other words, according to the thinking of the Charter, the maintenance of international peace and security postulates that weapons, recognized as being essential for the exercise of the inherent right of self-defence shall nevertheless be kept below the pre-established optimum ceiling. Although the Charter makes no explicit provision governing the arms trade, it has to be viewed in the context of the regulation of weapons and the measures to be undertaken in order to maintain them at an optimum level. Moreover, the relevance of the arms trade for the purposes of maintaining the peace is demonstrated by the fact that the measures recommended or resolved by the Security Council under Article 41 often relate to an embargo on the supply of weapons.

From the point of view of international customary law there is a legal vacuum in this regard. In a recent judgement, the International Court of Justice stated that "... in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armament can be limited, and this principle is valid for all States without exception" (Case Concerning Military and Paramilitary Activities In and Against Nicaragua, Nicaragua v. United States of America, Merits, Judgement, I.C.J. Reports 1986,

p.135). Hence the need to fill this legal vacuum by resorting to conventional law, bearing in mind that any restrictions must not be discriminatory. The path to follow is laid down in Par. 85 of the Final Document of the Tenth Special Session on Disarmament which states that "Consultations should be carried out among major arms supplier and recipient countries on the limitation of all types of international supply of conventional weapons, based in particular on the principle of undiminished security of the parties with a view to promoting or enhancing stability at a lower military level, taking into account the need of all States to protect their security as well as the inalienable right to self-determination and independence of peoples under colonial or foreign domination and the obligations of States to respect that right, in accordance with the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".

II

THE OBJECTIVES OF THE UN GENERAL ASSEMBLY RESOLUTION 47/75 I

8. The scope of the resolution

The United Nations General Assembly Resolution 47/75 I adopted on 18.11.1988 contains a number of guidelines which

lay the bases for the future regulation of the supply of conventional weapons, covering both lawful supply and the unlawful traffic in arms. The regulations should not only govern the supply and trade in weapons in peace time, but also those to be sent to regions in which there are conflicts and tensions which might endanger international peace and security. Without ignoring the consequences of the supply of war materials in terms of the economic development of peoples, the measures which States should undertake in particular are as follows:

a) to strengthen national systems of controlling the manufacture and transport of weapons, mainly in order to combat "unlawful and clandestine" traffic, whose increase is a cause of concern;

b) to establish an optimum level of armaments for the purposes of national security and the resultant duty not to acquire more weapons than necessary for self-defence;

c) in general, to introduce greater transparency in the international supply of weapons.

8. Lawful self-defence

Article 51 of the United Nations Charter accords States the right to individual or collective self-defence. As evidenced in practice, States have concluded a great many treaties under which they organize their lawful self-defence

in the event that any one member of the treaty is the object of an armed attack. These are multilateral pacts, such as the NATO Treaty, the Warsaw Treaty or the Rio Treaty, or bilateral agreements for mutual defence. Sometimes the military pacts are not reciprocal in nature but only impose an obligation on one of the parties to aid the State if attacked. Examples of these are the agreements guaranteeing permanent neutrality, such as those drawn up between Italy and Libya on behalf of Malta. All the types of military pacts mentioned above are certainly lawful and in accord with the United Nations Charter. They normally provide not only for the casus foederis, but also the obligation to maintain the Member State's defence capacity. A number of provisions in this connection have been concluded covering the supply of war materials and know-how. They also govern cooperation in the field of research, development and production, and the training of military personnel. What makes the supply of weapons within military alliances so peculiar is the fact that it takes place in an inter-State framework or under the strict control of the States concerned. Arms supplies, like cooperation agreements, are certainly lawful because they are designed to pursue an object protected by the international order. Moreover, it must reflect the fact that there is a mutual balance between legitimate self-defence and the duty of every State to

contribute to the maintenance of international peace and security: although a State is free to organize its legitimate self-defence jointly with other States in peace time, it must also strive for the general interest which is to maintain international peace and security. This principle is expressed in the aforementioned resolution 47/75 I which affirms the need to establish an optimum level of armaments in terms of the State's own security and the resultant duty not to acquire more arms than required for self-defence. The principle of establishing an optimum level of armaments in terms of self-defence requirements is a principle that not only applies to legitimate individual defence but also collective defence. For this reason, the regulation of conventional arms supply must also apply in the framework of military alliances. This is consistent with the efforts being made to reduce tension and reduce armaments at regional level.

10. Supplies in war time

The remarks above show that the the arms trade is regulated in war time, but that no such discipline exists in peace time. The regulations governing war time draw a distinction between State trade and private enterprise trade. The former is banned, while the latter is permitted.

However, this distinction is now being completely superseded by a great many factors, including:

- the fact that the supply of weapons by private individuals is subject to a system of authorization;

- the fact that most of the States that make up the international community do not have private armament manufacturers;

- the existence of State-owned armament manufacturing corporations.

The distinction between State-run and private trade encourages the arms traffic. This freedom for manoeuvre has been widened with the institution of non-belligerence, because in the event of an armed conflict one of the belligerents may be given logistical support without an international tort being committed. Hence the need to re-examine the Hague Conventions' Regulations. *Inter alia*, these regulations apply in the case of "war" between States. But very rarely in the armed conflicts that have taken place since the Second World War have any of the belligerents declared that they are "at war" with another State, with the result that it is always difficult to decide whether the Hague Conventions V and XIII should apply. Regulations must therefore be adopted which will apply in the event of armed conflict between States even when neither of the parties declare that they are in a state of war. But neither is

there any Convention which governs conflicts for self-determination or civil wars with the sole exception, in the latter case, of the Havana Convention, but this is regional in character. There are considerable difficulties in revising the law of neutrality in relation to the arms trade and drafting regulations to govern conflicts for self-determination and civil wars, which suggests that a gradual approach should be overtaken to solving them.

11. Supplies in peace time

There is a total legal vacuum with regard to the supply of armaments in peace time. The only exceptions relate to atomic weapons (the Non-Proliferation Treaty) and biological weapons (the 1972 Treaty). With regard to chemical weapons, the ban on their supply is one of the main features of the current negotiations. At regional level, there are the additional Protocols III and IV to the Western European Union Treaty. The Agency for controlling weapons is vested with the responsibility of ensuring that the Federal Republic of Germany does not manufacture certain specific weapons and monitoring the quantity of weapons produced by each Member State on the European continent. It is therefore not a fully-fledged form of control over the arms trade.

Article 36 of the First Additional Protocol to the four Geneva Conventions (1977) requires the States parties to

assess whether the use of a new weapon constitutes an infringement of the provisions of the Protocol or any other provision of international law. Article 36 also applies in peace time, and this assessment must be made when the new weapon is under "study, development or adoption". This provision, at least if taken literally, only seems to require the States which acquire weapons to assess whether the new weapons meet the current international parameters, and not the States which supply them. However, this obligation is also taken to apply to the States which supply weapons. Whether or not this interpretation is sound, it should be recalled that, as we shall be seeing shortly, any regulation of arms supplies must take account both of the exporting and the importing States. The virtually total lack of any conventional discipline in this connection has certainly hampered the emergence of any customary law governing the question. Indeed, apart from the case of arms supplies to gangs of terrorists and, more generally, any supplies which are intended to subvert the internal order of another State, no prohibitions in this field exist at all. Neither does international law oblige States to account publicly for their arms supplies. But the lack of any customary discipline is not an obstacle to adopting new instruments in the form of recommendations, statements of principle or even legally binding agreements.

12. Armaments as the subject matter of a future General Assembly Resolution.

One must firstly examine the subject-matter of the regulations. This is a very complex issue that cannot be solved merely referring to the notion of "weapons". This category comprises a wide range of items whose dangerous nature varies widely (from rifles to be used for sports competitions to implements suitable for the purposes of waging war). Then there are the components of a whole weapons system that can be used both for military and for civilian purposes (for example electronic components). War-ships and military aircraft obviously form part of the instruments of violent warfare. But ships (for example container ships) and civilian aircraft (particularly helicopters) may easily be fitted out for military use. The "supply of weapons" does not take place solely in the form of ready-to-use weapons, but also by supplying the technology needed to manufacture them and granting manufacturing licences. Weapons are also supplied together with a technical assistance programme to train the users of the weapons, particularly in the case of highly complex weapon systems.

It is therefore necessary to draw a distinction between: (1) weapons and materials to be used solely for warfare;

(2) weapons and materials that may be used for military and civilian use; (3) technology supply; and (4) technical assistance.

The Convention of 1925 on the control of the international trade in weapons, munitions and implements of war draw a distinction, as we have seen, between five categories of items. However, technology transfers and technical assistance programmes are indicated in bilateral or multilateral mutual defence pacts.

It should be added that many joint manufacturing agreements exist today between the industrialized countries for the joint construction of armaments materials. Cooperation often begins before the production phase and covers the scientific research stage for the design of new weapon systems.

It would be preferable to draw a distinction between scientific research and the regulation of supplies of weapons. Furthermore, research is not governed by any of the regulations covering weapons whose manufacture is banned (for example the 1972 Treaty on bacteriological weapons does not expressly outlaw scientific research). The agreements for the joint production of war materials under which several Member States take part in building a weapon or a weapon system cannot be technically defined as "arms supply agreements". However, it would be advisable to regulate

these, too, if it is decided that an optimum ceiling should be placed on the weapons that each State or regional alliance should be allowed to possess. In addition to the supply of weapons as such, it is also necessary to discipline the transfer of technologies which is regulated, moreover, in the national legislation of most countries. Technical assistance is complementary to the supply of weapons, and therefore requires regulation.

13. The parties involved in arms supplies

A supply agreement involves two parties: one party which supplies and one party which acquires armaments ~~materials~~. Any convention must take account of both categories of parties. In other words, the obligations must be imposed not only on the countries which supply them but also the countries which acquire them. One reason is that not all the supplier countries are likely to ratify any convention on the trade in war materials, with the result that any potential buyer could apply to a country that has not ratified the convention if it is not obliged to comply with the provisions of the convention itself. However it should be noted that the "supply" problem is not the only issue, even though it is the main one, to be governed by a set of regulations over the arms trade. One must also consider "transit" traffic. Normally speaking, national legislation

also considers this problem and imposes various constraints on foreign weapons which originate abroad and are simply transiting through the territory or territorial waters of a State which is neither the supplier nor the buyer. Any convention on the arms trade would be much more effective if it were to govern not only the supply but also the transit of arms. One only has to think of a land-locked State which is not a signatory to the future convention, but a potential supplier or recipient, surrounded by States parties to the convention. Governing the transit of weapons would raise many sensitive issues regarding coordination with the existing provisions of the Law of the Sea, and in particular, those governing innocent passage in the territorial sea and transit passage through international straits. Obviously, more sensitive issues still would remain to be dealt with if it were deemed to be desirable to govern the traffic of weapons in the high seas, providing the right to visit and stop any ship in violation of the provisions of the future convention. As a model, one could use the regulations which permit belligerents in wartime to stop and visit neutral ships in order to ascertain whether they are carrying cargoes considered to be war contraband.

14. Weapons whose use is banned under international law

There exist certain conventional weapons whose use is banned under international law. Some of these weapons, however, may be used as a means of reprisal in wartime particularly when the enemy fails to comply with the obligation not to use them (reprisals in kind). In other instances the use of these weapons in reprisal is forbidden because there is a specific ban on so doing. For example, Article 6 of the Second Protocol of 1980 on the use of mines, booby traps and other devices provides that certain booby traps are forbidden "in all circumstances". It is necessary to establish the principle according to which a banned weapon may not be supplied even when the use of the weapon is lawful for a "reprisal in kind". This principle has been taken up in a number of disarmament treaties such as the 1972 Treaty banning bacteriological weapons, which expressly forbids the acquisition and supply of such weapons (Articles I and III). Similar obligations are laid down in the text currently being negotiated on the banning of chemical weapons.

The following categories of weapons are expressly forbidden:

- explosive or incendiary projectiles weighing less than 400 grams (the St. Petersburg Declaration of 1868);

- bullets which are crushed or which explode in the human body (the Hague Declaration 1899);

- booby traps whose use is prohibited by the Second Protocol of 1980;

- weapons which use shrapnel that cannot be detected by X-rays (First Protocol of 1980);

- chemical weapons (the Geneva Protocol of 1925);

- bacteriological weapons (the 1972 Treaty).

It should also be recalled that no weapon may be used, even if not expressly banned, when its use would be an infringement of the basic criteria of humanitarian law. This is the case with weapons which provoke unnecessary suffering or harm or indiscriminate effects. Also banned are treacherous weapons, or those likely to provoke ecological disasters. The prohibition on their supply should not only relate to the weapons that are banned under international law currently in force, but also weapons which might be forbidden in future. It would therefore be advisable to adopt a sufficiently flexible clause whenever any ~~treaty~~ on the arms trade is being concluded.

15. Conventional weapons and the security of States

In the Final Document of the Special Session of the General Assembly on Disarmament in 1978 the principle was established according to which there should be a proportion

between the security of States and the reduction of conventional weapons. According to this principle, "... negotiations should be carried out on the balanced reduction of armed forces and of conventional armaments, based on the principle of undiminished security of the parties with a view to promoting or enhancing stability at a lower military level, taking into account the need of all States to protect their security". In this document the hope is expressed that negotiations will take place to limit the supply of conventional weapons based on the same principle: maintaining a high level of security at lower military levels.

In reality, it will only be possible to successfully discipline conventional weapons if an optimum security threshold is established, and particularly the minimum level of armaments necessary for security. No regulation of supplies of conventional weapons can be established by laying down limits which will harm the countries which do not manufacture weapons and which depend on external help to guarantee their own security. Neither should one ignore the fact that one of the reasons why the 1925 Convention on the arms trade did not attract a sufficient number of ratifications to become effective was the fact that the non-manufacturing States feared that the conventional limits would end up by placing the manufacturing countries in a

position of intolerable supremacy. It is certainly not easy to establish the optimum level. A first attempt may be made at regional level. The positive developments in Europe in the negotiations for the reduction of conventional weapons are an encouraging sign in this regard. In the regional context, a convention to discipline the supply of conventional weapons could be included among the confidence-building measures. The report of the Secretary General of the United Nations entitled "Comprehensive Study on Confidence-Building Measures" recalls the Ayacucho Declaration (Peru, 1974) to which eight South American States (Argentina, Bolivia, Chile, Ecuador, Colombia, Panama, Peru and Venezuela) "expressed their commitment to put a stop to the acquisition of arms for offensive purposes, in order to dedicate all possible resources to the economic and social development of each country. The implementation of this commitment would represent a genuine confidence- building measure". Furthermore, confidence-building measures in the military field, other than placing restrictions on the supply of conventional weapons, would encourage a clearer perception of individual countries' security requirements and could therefore have a restraining effect on the phenomenon of the international arms trade. In other words, the climate created by these confidence-building measures might induce potential buyers

of weapons to reduce their acquisitions in order to devote the resources saved thereby to their economic development.

16. Conventional weapons and regional conflicts

In the United Nations General Assembly Resolution 43/75 I, stress was placed on the "potential effects" which arms supplies produce on "regions where regional tensions and conflicts endanger national peace and security". The principles governing armed conflicts are not an adequate basis for governing arms supplies. There are various reasons for this. Firstly, because these principles are very permissive and permit the traffic of weapons by private individuals in the event of an international armed conflict. Secondly, because it is not clear when the right to neutrality becomes operative. The fact of the matter is that in order to ensure that they are not denied the right to neutrality, the parties to an armed conflict state that their international relations are governed by peace time law and not by the law of armed conflict.

Limits on supplying arms to areas in which a conflict is actually taking place may be imposed by the United Nations. Under Article 40 of the Charter, the Security Council may recommend the adoption of interim measures. These measures may include the invitation not to supply weapons to areas in which there is a conflict that may endanger international

peace and security. For example, the Security Council Resolution 169 of 1961 recommended that no weapons should be sent into the territory of the Congo. The commitment not to introduce weapons into regions in which a conflict is being waged has sometimes been taken at regional level. For example, the Contadora Group established the obligation for the governments of the region (Central America) to put an end to all forms of illegal arms trafficking, namely the shipping of arms by governments, individuals, regional or extra-regional groups to irregular forces or armed gangs trying to destabilize the governments in the region (the Contadora Act on Peace and Cooperation in Central America, 1985). The notion of "zone of grave international tension" has also been used. For example the EEC Rule 428/89 forbids the export of chemical products which might be used to manufacture chemical weapons to countries "at war" or "situated in zones of grave international tension". Sometimes the ban on supplying weapons is framed in a resolution adopted by the Security Council pursuant to Article 41 of the Charter, and is designed to put an end to the unlawful behaviour of a State. Examples of this are the Resolutions adopted against States that have violated the principle of self-determination. These are Resolutions with which the Security Council recommended or resolved to ban the supply of war material to Rhodesia (277-1970; 326-1973;

328-1973; Portugal (S/5380; S/5844; 218-1965; 290-1970; 312-1972) and South Africa (S/5471; 191-1964; 282-1970; 311-1972; 418-1977).

III

POSSIBLE SYSTEMS OF CONTROL AND PREVENTION

17. National legislation and international rules

In order to propose a set of international rules governing the arms trade it is necessary, first of all, to review the existing regulations. It is appropriate to proceed by collating both domestic and international legislation on this subject. Domestic legislation in various States normally contains rules for adapting the relevant provisions of the Hague Conventions V and XIII of 1907. Sometimes it may be more restrictive, or offer national governments the power to restrict or ban the trade by private individuals. A comparative study would be extremely useful because it would also show whether national legislation is based solely on the Hague Conventions or whether it takes account of subsequent developments. By making a comparative examination of national legislation it will be possible ascertain whether they govern solely the supply of weapons in war time or whether, on the contrary, the supply of weapons in peacetime is also contemplated. A comparison of national legislation will highlight a number of basic principles on which later international regulations

may be based. The examination of national legislation governing the supply of weapons should not be restricted solely to the legislation proper but should also consider judicial decisions. Sometimes these have been particularly restrictive and have given a more highly developed interpretation of domestic legislation. Another matter to be appraised is the administrative practice followed by the exporting countries which has often given rise to a corpus of rules and the establishment of bodies which are not always shown in the official publications of the exporting State. Furthermore, an examination of national regulations and legislation is necessary in order to delimit the scope of the rules. National legislation governs the export not only of war materials but also materials which might be used for the manufacture of weapons and the export of technologies. It is particularly relevant to establish how components are governed by national legislation, and more specifically the materials which might be used both for peaceful and for military purposes. Another factor to be borne in mind when collecting State legislation are the subjects between whom the weapons are supplied. It is important to establish whether the supply may lawfully occur only between States or whether it is admissible for them to be supplied between private individuals or parties of which at least one is a private individual. It is also

indispensable to examine domestic legislation and the administrative practice of individual States in order to acquire sufficient data to make it possible to attain one of the purposes indicated in the General Assembly Resolution 43/75 I, namely "l'examen des moyens permettant plus de franchise et de transparence en ce qui concerne les transferts mondiaux d'armes". It is essential to ascertain whether, under national legislation in each State, data on the supply of armaments is kept secret or confidential, or whether it is published, and whether the government policy in this regard is also subject to scrutiny by national parliaments. If the data is published nationally it is easier to identify the most appropriate international means of ensuring transparency in relation to the supply of arms.

At international level, the collection of information should obviously not be limited to the Hague Conventions and the Havana Convention. It should also identify the agreements concluded between States governing the supply of weapons and technologies, and not only consider pure supply agreements but also cooperation accords which make provision for the joint manufacture of weapons or weapon systems. Fissile material supply agreements should also be collected even though these are not strictly relevant. Their particular form, at least as far as the agreements concluded under Article III of the Non-Proliferation Treaty or the

"London Guidelines" are concerned, might serve as a model if it were decided that the supply of arms should henceforth be governed by pre-determined models containing both the end-use certificate and the non re-export clause. It would be extremely useful to have a complete list of the joint manufacturing agreements if the future regulations refer not only to the supply of arms but also their manufacture.

18. International instruments

The supply of weapons has to be regulated by appropriate instruments which are compatible with the present state of international society.

It is obvious that the treaty is the main instrument for governing any sector. Moreover, as long ago as under the League of Nations a treaty was concluded (the frequently quoted 1925 Convention) governing this matter. Negotiation of an international treaty covering this subject matter gives rise, however, to considerable difficulties both of a political and technical nature. It is therefore preferable to take a more flexible and step-by-step approach. Firstly it is necessary to appraise the United Nations General Assembly Resolutions. The Assembly adopted Resolution 43/75 I in which, for the very first time, a number of principles relating to the traffic in arms were laid down. Other resolutions could also be adopted in order to better qualify

the existing principles or to elaborate new ones. Since it is likely that the process of regulating the traffic of weapons internationally will take a considerably long time, it is preferable for the discussion to be held among the competent institutions of the United Nations (for example the General Assembly Commission I) perhaps by establishing an *ad hoc* committee on which representatives of both the exporting and importing countries sit. The work could conclude with a draft resolution to be tabled before the General Assembly containing guidelines or a code of conduct which should be adhered to by all concerned. These codes could, for example, contain rules governing the supply of given categories of weapons and also joint manufacturing agreements. Draft conventions could also be adopted to be submitted to the attention of an international conference. These drafts could govern the regulation of sectors which are already disciplined under international law but which are in dire need of revision. This applies particularly to the Hague Conventions V and XIII governing the supply of weapons in the event of armed conflict. A conventional discipline could be adopted to govern the supply of weapons whose use is banned by international law. Another area which is ready for regulation under international agreements is the illegal traffic in weapons and the connections that exist between arms trafficking, drug trafficking and

international terrorism. Cooperation between States should be facilitated by the many conventions that have already been concluded to govern international terrorism and the recent United Nations convention against the unlawful trafficking in drugs. In this connection there are various options which argue in favour of an *ad hoc* convention, the drafting of an additional protocol to existing conventions or the insertion of special clauses to be adopted at the conferences revising the relevant agreements.

The examination of the problem of supplying conventional weapons at worldwide level would not be incompatible with the discussion of a similar problem at regional level. For example, the question of supply could be dealt with at regional level in the framework of the CSCE. Current negotiations on the reduction of conventional weapons could also include issues relating to the supply of weapons both in the ambit of the military alliances of the participating countries, and in relations between participating States and third countries. The supply of weapons within military alliances of participating States has an objective linkage with the issue of reducing conventional weapons in the CSCE participating countries. In relations between participating States and third States the problem of weapons supply could be examined primarily from the point of view of the transparency of supplies and then be dealt with more in

depth as a question of limiting the traffic in weapons, perhaps in the context of the confidence-building measures in relation to supplies towards particularly sensitive areas such as the Mediterranean and the Middle East.

19. Monitoring the commitments undertaken

The quality and the effectiveness of the control measures would depend on the type of instruments which States will adopt to govern the arms trade. In principle, these measures could be more intrusive if arms supply is governed by an international treaty; more flexible instruments would nevertheless have to be used if it is decided to adopt guidelines or codes of conduct as the instruments. The optimal solution would probably be a mixed system, because it is likely that the arms trade could be disciplined both by legally binding instruments and by instruments which are not international agreements as such.

It is indispensable, at all events, to focus control on a single agency. The United Nations Secretary General could be vested with specific duties. The Secretariat could be assisted by existing bodies such as UNIDIR. The functions vested in the Secretary General would not prevent the committees set up by the United Nations to monitor the execution of the arm embargo decided or recommended by the Security Council from remaining in existence. Neither is it

incompatible to vest duties in existing organs of the United Nations with the establishment of regional level organisms to carry out control measures on the implementation of the guidelines or code of conduct subscribed by a group of Member States. It is only necessary to identify appropriate forms of coordination.

The Secretary General could also be given the duty of monitoring national legislation. States would be required to notify the United Nations of any national legislation currently in force governing the arms trade. Appropriate adjustments and amendments could be recommended where it was felt that the national legislation did not come up to international standards with regard to transparency. National control measures should also be appraised. In this connection it would be advisable for every State to set up a national arms control authority, where this has not already been done. This authority would liaise with the UN party and ensure that the rules governing arms supplies are properly applied. More effective controls could also be established in relation to weapons whose use is banned.

After a period of application the system proposed above should then be re-examined in order to ascertain whether any individual forms of more effective control could be identified. For example, to ensure greater transparency one might set up an International Register which would list the

data on the arms trade. The register would be built up using the data supplied by States or acquired independently by the United Nations organs (along the lines of what is done in scientific institutions such as SIPRI or IISS which publish an "Arms Trade Register" in the SIPRI Yearbook and a "Major Identified Arms Agreements" list in the Military Balance). This register could be managed by the Secretary General of the United Nations with the aid of other organs of the UN and regional bodies set up to monitor the supply of arms at regional level.

Much more incisive measures should certainly be envisaged to prevent and to suppress the unlawful traffic of arms in connection with terrorism and the drugs trade. In this area an international institution under the aegis of the United Nations should be envisaged, which would collaborate with the national police forces and international institutions such as Interpol. Regional level committees could also be set up and would certainly enhance the efficiency of the system.

20. Lawful supplies and unlawful trafficking

Whatever instrument it is intended to adopt to discipline the supply of weapons, a distinction must be drawn between lawful supplies and unlawful trafficking. The notion of

limiting the supply of weapons only applies to lawful supplies. Unlawful trafficking must be banned altogether.

In principle, lawful supplies should only concern transactions of which the State is the beneficiary. Exceptions could also be provided (for example, on behalf of a national liberation movement, or in the case of resistance against a government responsible for a grave violation of human rights) only if this is expressly authorized by the competent United Nations organs.

All unlawful trafficking should be prohibited. To this end it is advisable to draw up as detailed a list as possible, of prohibited activities. Examples of unlawful trafficking are the following:

- Sending arms in contravention of an embargo decided by the United Nations Security Council;

- Supplying arms whose use is banned by international law (for example, chemical weapons, or weapons banned by the First and Second Protocols of 1980);

- Supplying arms to criminal and terrorist organizations;

- Supplying arms to organizations whose purpose is to subvert the internal order of States.

In these areas, it is necessary to draft an international convention or, as indicated earlier, an additional protocol to existing conventions against terrorism and

drug-trafficking. In these conventions or additional protocols the States should undertake to prevent and severely punish all unlawful trafficking and set up an effective system for extraditing the culprits, where no criminal procedure is instituted in the State in which the culprit is captured.