Nearly 7,000 small arms are burned in Cambodia to mark the beginning of the UN Small Arms Conference (9 July 2001) (© Reuters/Chor Sokunthea).

Moving from Words to Action: SMALL ARMS NORMS

7

INTRODUCTION

The *Programme of Action* agreed at the 2001 UN Small Arms Conference is striking for the lengthy list of commitments states have made. Among other things, the *Programme's* preamble cites the need to strengthen or develop norms and measures at the global, regional, and national levels (UNGA, 2001b, s. I, para. 22(a)). Yet there is a major debate over the nature of this call to action, since the *Programme* is not legally binding. Does this instrument—or any other, for that matter—establish a firm normative framework to guide multilateral small arms activity?

For many, this is the question that underlies the other issues that surround the UN Conference process and international small arms diplomacy generally. Some have characterized the *Programme* as a fundamental step in the creation of global norms, if not a collection of norms in its own right. The UN Secretary-General has called it 'essential in building norms' (UN, 2001). Laurance (2002), going further, has claimed that the *Programme* gives concrete expression to a range of small arms norms. Other observers have offered much bleaker assessments of the document, denying its importance, or even relevance, to future efforts to combat the misuse of small arms (Human Rights Watch, 2001; MacAskill, 2001; Karp, 2002).

This chapter assesses the normative significance of the *Programme of Action* and, more broadly, the existence or emergence of small arms norms at the global and regional levels. Its major conclusions are as follows:

- States are legally bound to refrain from transferring small arms where this would lead to a violation of established international rules.
- The states of the world now address the small arms issue in quite specific terms, which is the first step in norm development.
- At the 2001 Conference, states underlined the responsibility of *all countries* to take action on small arms, with more than half of the participants noting that their commitment to the issue had been translated into concrete action. This level of commitment is sufficiently strong to have worldwide normative significance.
- In southern Africa, the *SADC Firearms Protocol* appears to be spurring the development of subregional norms.

Why study norms? Depending on the perspective one takes, norms guide or prescribe behaviour. Norms, in other words, accompany action—which, most would agree, is what counts in relation to small arms. Only when we know what norms have been created can we assess compliance with them. Knowledge of how the norm-building process is progressing is also crucial for those actors, like civil society and concerned states, that seek to influence the small arms agenda.

The first part of the chapter is devoted to explaining norms from both a legal and a political perspective. What are such norms, how are they created, and how do we know they exist? The second part applies this discussion to the global level, examining small arms norms and norm development worldwide, with a particular focus on the UN Conference *Programme of Action*. The final part of the chapter undertakes the same exercise at the regional level,

scrutinizing the emergence of small arms norms in southern Africa. The approach, especially in those parts devoted to regional norms, is selective, yet the chapter aims to be thorough and precise in those areas it does cover. The theoretical framework developed here will constitute the foundation for further work on small arms norms in subsequent editions of the *Small Arms Survey*.

Norm determination is no easy task. A considerable body of evidence must be marshalled before we can say with confidence that norms guide and prescribe state behaviour in particular areas.

The key test of an international legal norm is whether the parties intend to bind themselves in agreeing to particular conduct.

DEFINING NORMS

Before determining what norms exist in the small arms area, we need a good understanding of what norms are. This exploration of normative theory incorporates both legal and political perspectives, since both are necessary for a complete account of how norms emerge and develop.

Norms in international law

The international legal system has no law-making mechanism equivalent to the legislative branch of government found within states.[1] International legal norms are ascertained, when they are ascertained, after the fact of their formation by international judicial bodies or by national courts called upon to make such a determination. The key test of an international legal norm is whether the parties intend to bind themselves in agreeing to particular conduct. Treaties bind all states which are parties to them. Depending on their wording and the circumstances of their adoption, other instruments may also be binding (Cassese, 2001, p. 161; Dupuy, 2000, para. 244). For a specific commitment to amount to a functioning legal norm, it must be possible to determine when it has been breached and what the legal consequences are in this case (Chinkin, 1989, p. 859). A series of rules prescribe the consequences of violating public international law in some detail.

When it comes to making international law, states have the final word. As described below, other actors, including NGOs, may play important roles in implementing and developing international legal rules—proposing new norms and scrutinizing implementation—but states still make international law, whether expressly in the form of treaties or indirectly, in the case of custom, through their behaviour and implied assent to new unwritten rules. Treaties and custom are thus the two principal sources of international law.[2] They are equally authoritative; neither is superior to the other, though each has distinct advantages and disadvantages in regulating state behaviour. A given issue may be regulated by both treaty and custom. The two can co-exist independently and develop in different ways (ICJ, 1986, paras 172–82).

Treaties

Treaties are the clearest expression of states' consent to be legally bound. They may be bilateral or multilateral, regional or global, and may regulate any aspect of international relations. Examples of treaties which regulate various aspects of small arms include the *UN Firearms Protocol* (UNGA, 2001a) at the global level, and the *Protocol* adopted by the Southern African Development Community at the regional level (SADC, 2001). The nature of treaty obligations can usually be determined quite precisely given that they are (typically) written.

Once a treaty has satisfied the formal requirements for its existence and has entered into force, it imposes binding legal obligations on the states which are party to it.[3] Failure by a party to carry out its obligations amounts to a violation of international law regarding that state's international responsibility. However, in the case of multilateral conventions, a specified minimum number of ratifications is usually required before they have force of law. The small arms area is no exception.

Signing a treaty that requires ratification does have legal implications. While a state which signs a treaty is not thereby required to ratify it, it is obliged 'to refrain from acts which would defeat the object and purpose of a treaty' in the period between signature and entry into force (UNGA, 1969, art. 18). A state does not have to comply in a general or specific sense with the treaty, since this would make ratification unnecessary, but it must not do anything which would prevent it from being carried out at a later date—for example, destroying objects slated for eventual return (Aust, 2000, pp. 93–95). We will consider what this principle means in relation to the *UN Firearms Protocol* (not yet in force) in the 'Global norms' section of the chapter.

Since treaties are still rare in the small arms field, customary international law is potentially a more important source of norms.

Treaty norms are typically more precise than customary ones because of their written form. They may also include binding dispute settlement or enforcement mechanisms. For example, the *UN Firearms Protocol* provides for the settlement of disputes concerning its interpretation or application through recourse to arbitration or the International Court of Justice (ICJ) (UNGA, 2001a, art. 16). This makes treaties an attractive option when attempting to develop the law or regulate a particular issue. Yet it also means that states tend to exercise great care in the negotiation of treaties—defining their obligations narrowly and avoiding issues they have doubts about. A risk therefore exists that the level of commitment reached in a binding legal instrument may be much lower than that in a non-binding one (Gillard, 2002, paras 18–20).

Customary international law

Since treaties are still rare in the small arms field, customary international law is potentially a more important source of norms. The unwritten character of customary norms often makes them less precise than their treaty counterparts. Customary international law also tends to develop slowly. Yet custom remains important in many areas, and is constantly evolving in accordance with the changing needs of international society. Its advantage over treaties and other sources of international law lies precisely in this adaptability.

The *Statute of the International Court of Justice* (art. 38(1)(b)) provides the most authoritative definition of customary international law: 'a general practice accepted as law' (UN, 1945). As confirmed by the ICJ in its case law, a customary norm derives from the two elements of state practice and the conviction that such practice is required or permitted by law (known as *opinio juris*), and is not simply motivated by courtesy or tradition (ICJ, 1986, paras 183–84).[4]

What constitutes the first element, 'a general practice', is context-dependent (Bernhardt, 1992, p. 900; Malanczuk, 1997, p. 42). In some areas of international law, a large amount of consistent practice may be needed (e.g., sovereign immunities), while rather less may suffice elsewhere (e.g., outer space law) to bring a customary rule into being. It is clear, in any case, that the practice need not be uniform in the sense of every state in the world having adopted it (Bernhardt, 1992, p. 900; Cassese, 2001, p. 123; Malanczuk, 1997, pp. 42–43). It should, however, 'reflect wide acceptance among the states particularly involved in the relevant activity'.[5] A universal (global) rule of customary international law must also be representative of the various regions of the world and of states' different levels of development (Dupuy, 2000, para. 318). While major inconsistencies in practice prevent the formation of a customary rule, isolated

and exceptional cases of non-compliance do not normally have this effect (Malanczuk, 1997, pp. 41–42). Individual instances of non-compliance can count as evidence in support of the rule if such conduct is condemned by other states or justified by the state whose behaviour is called into question as a permitted deviation from the rule (ICJ, 1986, para. 186).

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Acting President Weeramantry reads the order of the International Court of Justice in the case opposing the Federal Republic of Yugoslavia and ten NATO countries (2 June 1999).

All state organs and agencies can contribute to the practice of a particular state, but not the private acts of individuals or companies within the state (Bernhardt, 1992, p. 900; Gillard, 2002, para. 30). Not all types of state practice, however, have the same value for the establishment of a customary rule. Most conclusive are clear acts of state organs with responsibility for the relevant subject area, especially when accompanied by evidence of *opinio juris* (Bernhardt, 1992, p. 900; Gillard, 2002, paras 28–35). As well, a current of opinion asserts that practice may consist not only of what states do but also of what they say (Gillard, 2002, para. 29; Malanczuk, 1997, p. 43). In any case, action weighs more heavily than words. Thus, the voting records of states in international forums, such as the UN General Assembly, generally rank low in importance and cannot on their own establish rules of customary international law. Yet they can be used to corroborate other forms of state practice or serve as evidence of *opinio juris*.[6]

Official statements are a prime source of *opinio juris*, especially express affirmations by a state that it is acting pursuant to a legal obligation. If a state with a particular stake in a matter condemns certain conduct as illegal, this will tend to weigh strongly in denying its legality. Conversely, if a group of states claims legal justification for certain conduct and other states do not challenge that claim, this may lead to the formation of a new rule of customary international law, even if the practice departs from existing law (Bernhardt, 1992, p. 900; Malanczuk, 1997, pp. 44–45). International courts also appear increasingly inclined to accept so-called soft-law instruments, especially UN General Assembly resolutions, as sources of *opinio juris*, though not as sources of international law in their own right (ICJ, 1986, para. 188; 1996, para. 70).

Once the elements of practice and *opinio juris* are present, a rule of customary international law is formed. There is no minimum period for the formation of a customary rule, though where the practice has been of relatively short duration the ICJ has insisted that it be 'both extensive and virtually uniform' (ICJ, 1969, para. 74).[7] Again, context is crucial, but there is no 'instant custom'.[8] Unlike a treaty norm, once a customary rule has been established it binds all the states of the world, unless a particular state has consistently and persistently objected to its formation (ICJ, 1951, p. 131).[9] Once formed, many customary norms continue to adapt to changing conditions and to meet new needs in the international environment.

Customary international law may also be regional in scope. The two elements, state practice and *opinio juris*, needed for the creation of global custom also apply at the regional level, though in the majority view there must be clearer recognition and acceptance of such rules before they become law within the region (ICJ, 1950, pp. 276–78; Schindler, 2000, p. 163).

Soft law

The main characteristic of soft law is that it is not 'law' in the sense of producing legally binding rights and obligations. A soft-law instrument does not legally bind the states which adopt it. In case of non-compliance, the consequences which normally flow from the breach of an international legal norm (the rules of state responsibility) do not apply.[10] Soft law can take a variety of forms, including recommendations, resolutions, declarations, final acts, guidelines, principles, codes of conduct, and programmes. The fields of human rights, environmental protection, and international economic relations have seen considerable use of soft-law instruments. Many of the measures adopted in relation to small arms also fall into this category, including the *Programme of Action* adopted at the July 2001 UN Small Arms Conference (UNGA, 2001b).

Soft law is often a stepping stone towards the creation of 'hard law'. It can spur the development of new rules of customary international law and/or lay the foundations for new treaty law—provided such law meets the conditions described above. Thus, the non-binding 1948 *Universal Declaration of Human Rights* (UNGA, 1948) led to the adoption, in 1966, of the legally binding international covenants on civil and political rights (UNGA, 1966b) and on economic, social, and cultural rights (UNGA, 1966a).

Soft law often constitutes the first step in the formulation of effective responses to global problems—filling the normative vacuum and anticipating the harder, more detailed regulation offered by treaties or international customary law. With the passage of time and the accumulation of state practice, 'soft' norms may develop into customary law and/or be translated into treaty form. The involvement of international organizations, especially the United Nations, in this process is often crucial. Broadly representative bodies such as the UN General Assembly offer forums in which common approaches to problems of general concern can be developed. Since the mid-1990s, the UN General Assembly's First Committee has fulfilled this role in relation to small arms (Abi-Saab, 1993, pp. 65–66; Cassese, 2001, pp. 125, 160–61).

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A girl reads the Universal Declaration of Human Rights at an event marking the 50th anniversary of its adoption in Hong Kong (10 December 1998).

Soft law frequently represents a compromise between those states that would prefer binding law and those that are reluctant to commit to any form of regulation at all (Chinkin, 1989, p. 861). It constitutes, in essence, a minimal response to a widely perceived need for regulation where legal regulation is not feasible. Depending on the subject matter and the international political environment, soft law may never evolve into hard law. Yet even here soft law may have a significant impact on state behaviour. The process of negotiating and implementing soft-law instruments can shape values and align expectations as to what ought to be done in a particular area. Soft-law instruments may also provide for follow-up mechanisms.

Even where these are lacking, concerned governments and civil society groups may spare no effort in holding state compliance to close scrutiny. This is increasingly the case with small arms, with the UN Conference *Programme of Action* providing a particular focus for such activity.

Norms matter because they enable, as well as constrain, behaviour. They make certain kinds of action possible, while excluding others as inappropriate.

Norms in international politics

International politics tends to take a broader, and in many respects less structured, view of the status and role of norms in shaping state behaviour. Although several different approaches exist, this chapter aligns itself with those scholars who focus on the way in which states (and other actors in world politics) construct their social world, including its normative dimensions.[11] In simple terms, norms matter because they enable, as well as constrain, behaviour. They make certain kinds of action possible, while excluding others as inappropriate (Frost, 1998, p. 126). Norms also shape states' interests and preferences, so that the formulation of national interests (and hence policy positions) is influenced by the normative environment (Finnemore, 1996a, p. 158; Kowert and Legro, 1996, p. 462).[12]

What are norms?

Norms are standards that guide the behaviour of actors. They have two basic components, one external, the other internal. The external aspect is a pattern of conduct: 'regularities of behaviour among actors' (Axelrod, 1986, p. 1097). This must be accompanied by a second (internal) element, namely a belief that the behaviour meets the 'collective expectations about proper behaviour' for actors (including states) within a broader community. The behaviour is, in other words, part and parcel of the actor's identity—as a democratic state, for example, or one that respects human rights (Jepperson, Wendt, and Katzenstein, 1996, p. 52; Florini, 1996, p. 364).

The internal element of a norm in international politics bears some resemblance to the requirement of *opinio juris* in customary international law. Yet the meanings of 'obligation' in the two disciplines are quite different. Unlike the law, with its extensive set of rules and procedures, from the political perspective there are no formal consequences in case of non-compliance, though there may be serious consequences nonetheless. States observe political norms, not because they believe they are formally bound to do so, but because they consider it appropriate (Florini, 1996, pp. 364–65), and because non-compliance attracts disapproval or condemnation from other members of the community. Such disapproval may affect the state's reputation and undermine its claim to membership in the relevant community (Hurrell, 2002; Finnemore and Sikkink, 1998).

The fact that an international political norm is not formally codified does not prevent it from influencing actors' behaviour.

By contrast, the external element ('regularities of behaviour') does have much in common with its counterpart in customary international law (the requirement of a 'general practice'). In fact, for some political scientists evidence of 'agreement on norms in the international community is achieved either through parallel or converging national legislation or through international treaties' (Katzenstein, 1993, p. 269). When one passes from legal to social norms, there is no authoritative institution that determines whether a norm exists, yet the fact that a norm is not formally codified—in a treaty, for example—does not prevent it from influencing actors' behaviour.

It seems clear that state behaviour need not be uniform. Not every state in the relevant community need adopt the same conduct before an international political norm can be said to exist. It is difficult, however, to say more than this in the abstract. The number of states required to 'make' a norm will depend on the issue, with the participation of states that have a vested interest in the area especially important. Behaviour that is inconsistent with a norm may,

paradoxically, provide evidence of its existence if accompanied by declarations justifying the conduct in terms of the norm or as a violation excused by some higher principle. Condemnation of non-compliant behaviour can equally serve as evidence of the purported norm if such condemnation is broadly shared (Finnemore, 1996a; Kratochwil and Ruggie, 1986, p. 767).[13]

These are instances where the significance of particular behaviour is revealed through interpretations of it, both by the state whose conduct is at issue and by other countries. Of course, what states say in official statements is indispensable in assessing the motivations which underlie behaviour and establishing the presence of the second component of a norm—the sense that the behaviour is right and appropriate, in fact necessary, in the context of the relevant community. Clearly, language is not always sincere. Words must be checked against action and vice versa. Both the external and internal elements (behaviour, motivations for behaviour) are essential to any determination of the existence or absence of a political or social norm.

Norm emergence and diffusion

Of course, international political norms do not leap out of a social void, fully constituted and broadly accepted. As in the case of international law, such norms are the outcome of a complex process of gestation and development. Finnemore and Sikkink (1998) have provided one of the clearest and most compelling accounts of this process. They divide the 'life cycle' of international political norms into three stages.

In the first stage, 'norm entrepreneurs', who can be state or non-state actors, actively push for the adoption of new standards in particular areas. They call attention to specific issues and reframe them in normative terms, defining something as a 'problem' that needs to be resolved, or pointing to a situation that is 'unjust' or 'inappropriate'. They propose potential solutions and appropriate behaviours, and seek to persuade relevant actors—essentially states, but also other non-governmental actors—to support these initiatives.

Norm entrepreneurs often use organizational platforms, such as the United Nations, to build legitimacy and support for their proposals. This may or may not result in their being embodied in formal instruments, though, as previously noted, such institutionalization is not a prerequisite for the development of political norms.

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Ambassador Jacob Selebi of South Africa (right), President of negotiations for a Mine Ban Convention in Oslo, is congratulated following approval of the Convention by acclamation (17 September 1997).

Norm entrepreneurs played a crucial role in the Ottawa process which led to the ban on anti-personnel landmines (Price, 1998). They have also been instrumental in moving the small arms process forward. Their contributions in this area include public awareness-raising, policy and agenda development, and the provision of information (Small Arms Survey, 2002, pp. 242–43).

The literature on norm entrepreneurs tends to emphasize the role of civil society, especially NGOs. Yet civil society has not been alone in promoting efforts to control small arms. In fact, the small arms problem was first seized upon in the early 1990s by states and inter-governmental organizations, not NGOs. Mali's October 1993 request for UN assistance in controlling small arms, and former UN Secretary-General Boutros-Ghali's inclusion of the issue in his January 1995 *Supplement to an Agenda for Peace* (UN, 1995, paras 60, 63), were two key markers in the emerging discussion.

States that act as norm entrepreneurs perform many of the roles played by civil society in this process. States, moreover, have the final word on norm creation. It is states, as a whole, which determine whether and when initial proposals are translated into actual norms.

The second stage of norm development, 'norm cascading', involves the diffusion and adoption of the proposed norm throughout the relevant community. A 'tipping point' is reached where enough states have adopted the norm that it may be considered as firmly established within the group. The threshold marking the transformation of the proto-norm, or emergent norm, into an accepted norm is exceptionally difficult to pin down. There is no consensus in the literature on how to identify it. Nevertheless, it seems clear that specific quantitative measures are much less useful than a qualitative assessment, which takes account, for example, of the relative importance of the norm for particular members of the group. As with customary international law, norm creation is highly context-dependent.

The political perspective emphasizes process, with the number of norm adherents typically continuing to grow after the point of formation per se.

In contrast to international legal norms, which bind all states, the political perspective emphasizes process, with the number of norm adherents typically continuing to grow after the point of formation *per se* as the norm 'diffuses' throughout the community. Norm diffusion occurs across different states and also within single states, as the norm (e.g. transparency) is 'transmitted' from one generation of political leaders to the next.

Diffusion across states can occur through a variety of mechanisms. States which have adopted the new norm may try to persuade or pressure others to do so (praising and shaming). This will be much easier where the new behaviour has already proved its worth. Adoption of the norm may be seen by the adopting state as a means of enhancing its reputation, affirming its membership within the group, or emulating the behaviour of others (Florini, 1996, p. 375). Although power is not absent from processes of norm diffusion, with strong states sometimes compelling weaker ones to adopt the new norm, behaviour imposed from the 'outside' is often not accompanied by the internal manifestations of norm adherence (Finnemore, 1996b; Nadelmann, 1990).

Civil society also plays a key role in norm diffusion. For example, domestic actors and political networks within the state may embrace a norm and pressure the political leadership to adopt it. Links between local and transnational NGOs are often crucial in this respect. In the process of norm development, there is in fact a dynamic relationship between the domestic and international spheres. Some norms have a domestic origin and diffuse upwards and outwards to international society, whereas others first take shape at the international level.

In the third and final stage of norm development identified by Finnemore and Sikkink, the norm is 'internalized' across the community. In other words, it is accepted and applied automatically. There is no further discussion of whether or not it is appropriate for the community.[14]

GLOBAL NORMS

Although a political perspective on norms takes a broad range of actors into account, in the rest of this chapter we will focus on states as authoritative norm-makers, at least with respect to small arms. It is states that have responsibility for exercising effective control over small arms during their life cycles. From the point of manufacture or import through to commercial distribution and sale, export, first possession, storage, use, and re-transfer, states shape—or at least ought to shape—the environment, in the national territory, within which small arms are held and used. Limiting the discussion to states also makes for easier comparison between the political and legal perspectives.

Initiatives that address the small arms problem have mostly been deployed at the local, national, subregional, and regional levels. National efforts to control small arms are, of course, as old as the nation state itself. Multilateral action that focuses on small arms is, on the other hand, more recent, and can be traced to the emergence of small arms and light weapons as a distinct issue in the early 1990s.[15] As has been described elsewhere (Small Arms Survey, 2001, ch. 7), regions such as the Americas took the lead on small arms, with important efforts following in other parts of the globe. Action at the global level is relatively new, however, with significant developments occurring only in 2001, when agreement was reached on the *UN Firearms Protocol* (UNGA, 2001a) and the UN Small Arms Conference *Programme of Action* (UNGA, 2001b).

Action at the global level is relatively new, with significant developments occurring only in 2001, with agreement on the UN Firearms Protocol and the UN Programme of Action.

The *Firearms Protocol*, negotiated as part of the *United Nations Convention against Transnational Organized Crime* (UNGA, 2000), is the first legally binding instrument concerning small arms at the global level. It nevertheless takes a relatively narrow approach to the problem of illicit firearms manufacture and trafficking. Through provisions for marking and tracing, the licensing of transfers, and the criminalization of specified conduct, the *Firearms Protocol* aims at tightening controls over small arms transfers and enhancing the ability of law enforcement agencies to detect and suppress illicit activity. Though debated right up to the last hour of negotiations, the scope of the *Programme of Action* agreed at the 2001 UN Small Arms Conference is much broader than that of the *Protocol*, and covers many of the issues generally considered essential in addressing the small arms problem.

These two instruments—the *Firearms Protocol* and the UN Conference *Programme of Action*—will ground the following discussion of global norms, though it is the latter, at this stage, which appears to be the more significant, even though it is not legally binding. As in the preceding section, we will take up the question of global small arms norms from a legal perspective before turning to the political approach. Given the current lack of binding law at the global level, the latter will, in fact, prove more informative.

A legal perspective on global norms

The use of small arms and light weapons is extensively regulated at the national level. This law transcends national boundaries where these weapons are used by state officials to deprive their citizens of basic human rights. However, international human rights law, though well established, tends not to address small arms *per se*, focusing instead on specific (proscribed) acts—as opposed to the instruments used to carry these out. For example, small arms, though important, are only one means used to commit extrajudicial executions or torture.

However, there are international instruments which specifically seek to regulate the use (and misuse) of small arms by government officials. *A Code of Conduct for Law Enforcement Officials* was adopted by the UN General Assembly in 1979 (UNGA, 1979). Besides emphasizing the duty of law enforcement officials to respect and

protect human rights, it specifies that they 'may use force only when strictly necessary and to the extent required for the performance of their duty' (art. 3). This basic obligation is given more complete expression in the 1990 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (UNECOSOC, 1990). These specify that force and firearms are to be used only as a last resort (Principle 4), and then only with restraint and in proportion to the objective being pursued (Principle 5a). More detailed provisions cover such things as the use of firearms against persons (Principles 9–10), the policing of persons in custody or detention (Principles 15–17), and qualifications, training, and counselling (Principles 18–21). States are also required to 'ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law' (Principle 7).

These instruments, however, are not legally binding. While their status as soft law does not make them irrelevant or ineffective, their normative impact appears uncertain at this stage. More research is needed on this issue, yet the author of a recent 'Working Paper' submitted to the Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights) has noted that the Basic Principles 'have not been well integrated into the domestic laws and practice of States' (UNECOSOC, 2002, para. 42).[16]

The law on arms transfers[17]

Existing international law governing *arms transfers* contains somewhat clearer and harder obligations in relation to small arms at the global level. There are relatively few binding international restrictions on the right of states to transfer arms. Except in relation to weapons of mass destruction, states have so far preferred to sign up to non-binding limitations, often in a regional context,[18] invoking the right of self-defence, both individual and collective, in the face of pressures for stronger regulation.[19]

Arms embargoes imposed by the UN Security Council on particular states or groups, and binding on all UN member states, constitute perhaps the most important set of legal restrictions on arms transfers at the global level. International humanitarian law also prohibits the stockpiling, transfer, and use of certain types of weapons, a few of which fall within the category of small arms and light weapons. For example, under the 1997 Mine Ban Convention, States Parties have banned the use, stockpiling, production, and transfer of anti-personnel mines (*Convention on Anti-personnel Mines*, 1997). In addition, Protocol IV to the Certain Conventional Weapons Convention bans the use and transfer of blinding laser weapons (*Protocol on Blinding Laser Weapons*, 1995).

Even though comprehensive bans apply only exceptionally to particular small arms and light weapons, other international rules will often prohibit arms transfers in certain circumstances. In many of these situations, a transferring state incurs 'secondary, or derivative, responsibility' for violations of international law committed by a recipient state or non-state actor, since the transferring state is aware of the circumstances which give rise to the recipient's illegal conduct (Gillard, 2000, p. 30). International rules which apply indirectly in this way to limit arms transfers, including small arms transfers, include:

- prohibitions on the use of force (e.g., UN Charter Article 2(4));
- prohibitions on interference in the internal affairs of another state;
- prohibitions on the provision of assistance to terrorists;
- international humanitarian law;
- international human rights law; and
- the prohibition of genocide (Gillard, 2000, pp. 35–40).

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The UN Security Council votes unanimously to adopt Resolution 1343, re-imposing an arms embargo on Liberia because of its support for armed rebels in neighbouring Sierra Leone (7 March 2001).

States are thus bound, under existing international law, to refrain from transferring small arms and light weapons in situations that would involve, or lead to, a breach of established international rules such as those listed above. The Commission of Nobel Peace Laureates, assisted by a coalition of several NGOs, has sought to codify these obligations in the form of a *Framework Convention on International Arms Transfers* (Commission of Nobel Peace Laureates/NGO Working Group, 2002). In addition to setting out the law that restricts arms transfers, the *Convention* requires states to integrate these requirements into their national licensing systems (art. 5). The *Framework Convention* remains a proposal. Some of its provisions—for example, the establishment of an international registry of international arms transfers in Article 6—would involve the creation of new law. Yet the *Convention* also serves to underline the considerable body of international law that already regulates international arms transfers.

The UN Firearms Protocol

The *UN Firearms Protocol* was adopted by the UN General Assembly in May 2001 and immediately opened for signature (UNGA, 2001a).[20] By the end of 2002, 52 states had signed the *Protocol*, three of whom had also ratified the instrument.[21] The *Protocol* will enter into force 90 days after the 40th ratification, provided the parent Convention has itself entered into force.[22] Of course, as long as the *Protocol* has not entered into force, it creates no rights or obligations for any state. Nevertheless, as explained earlier, signatory states must 'refrain from acts which would defeat the object and purpose of a treaty' in the period preceding its entry into force for the state (UNGA, 1969, art. 18). In general, it would be difficult for states to thwart irrevocably the performance of *Protocol* obligations. An exception would be Article 7, obliging States Parties to maintain firearms records for at least ten years. The destruction of records less than ten years old by a *Protocol* signatory would almost certainly represent a violation of the above principle.

As noted earlier, treaty and custom can exist side by side, regulating the same subject matter independently and also potentially influencing one another. It is too soon, however, to say how the *Firearms Protocol* might influence the development of customary international law—for example, in the areas of firearms marking or transfer licensing. Were the *Protocol* never to enter into force, this could have a negative influence on parallel customary norms. Yet the *Protocol's* slow pace of ratification to date is not unusual for a multilateral convention.

The UN Programme of Action

The *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, adopted by consensus at the end of the July 2001 UN Small Arms Conference, contains a series of commitments at the national, regional, and global levels (UNGA, 2001b).[23] A soft-law instrument, the *Programme* is not legally binding. Yet, as noted earlier, this does not mean it will be ineffective. The *Programme's* follow-up

mechanisms are modest, but do include biennial meetings and 'a conference no later than 2006 to review progress made in the implementation of the Programme of Action' (UNGA, 2001b, s. IV, para. 1). At the same time, many states, inter-governmental organizations, and NGOs appear determined to ensure and promote *Programme* implementation.

Part of the post-Conference process will also involve efforts to translate the existing, 'politically binding' measures of the Programme into harder legal obligations.

The *Programme* itself provides for this possibility, at least with respect to marking and tracing (UNGA, 2001b, para. 1).[24] Pursuant to this provision, a UN Group of Governmental Experts on Tracing Illicit Small Arms and Light Weapons was established in 2002 for the purpose of examining the feasibility of an international marking and tracing instrument. It will submit its study to the General Assembly in the autumn of 2003 (UNGA, 2001c, para. 10). Civil society has also been active in pushing for the negotiation of international conventions on arms brokering (Fund for Peace, 2001) and international arms transfers (Commission of Nobel Peace Laureates/ NGO Working Group, 2002). Although this remains to be confirmed, the soft-law norms contained in the *Programme* may thus pave the way for legal regulation in selected areas at the global level. The *Programme's* role in spurring new law is also likely—perhaps more likely—to extend to the national and regional levels, as states and regional organizations move to give *Programme* commitments concrete legal form.

Another interesting legal question can be raised in relation to the UN Conference *Programme of Action:* in the areas it covers, does it reflect existing, or perhaps emerging, international custom? With respect to the element of practice, the *Programme* undoubtedly already reflects existing practice for many states, while it prompts others to align their systems with its requirements. As Conference follow-up progresses, a clearer picture of state practice can be expected to emerge. Several initiatives intended to promote the exchange of information on *Programme* implementation are now under way, and will likely facilitate this process. These include, at the global level, the role the UN Department for Disarmament Affairs (UNDDA) is playing in collating and circulating information voluntarily provided by states on their implementation of the *Programme* (UNGA, 2001c, para. 12).[25] At the same time, informal groups comprising representatives of states, NGOs, and international agencies have met to share their experiences in *Programme* implementation.[26]

Nevertheless, as of January 2003, the global picture with respect to state practice remains hazy. Existing information, in terms of geographic scope and level of detail, does not allow us to identify a 'critical mass' of practice in specific areas at the global level.

A political perspective on global norms

The UN Conference process provided a unique opportunity for states from around the world to express their views on small arms issues. These views are important in that they reveal the attitudes or motivations that underlie state behaviour in a given issue area. The First Committee of the UN General Assembly, dealing with disarmament and international security, has been the only other global forum for discussion of the range of issues arising in connection with small arms. Country statements from both of these sources—the UN Conference and the First Committee—will be used in this section in an effort to tease out the attitudes of states towards small arms.

We do not yet have a complete picture of state practice worldwide, preventing, for the moment, any determination of *specific* global norms, whether from an international legal or political perspective. This section nevertheless lays the groundwork for findings on specific norms in future editions of the *Small Arms Survey*.

We first look at how the small arms issue has emerged on the international agenda, examining in some detail how the problem has come to be framed by the international community. We then get down to specifics. What measures have

states proposed for dealing with the problem? If conclusions on norms in these areas elude us at this stage, we will at least seek to determine, in the last part of this section, whether a general norm exists for action on small arms.

For these purposes, we draw upon official statements compiled in the 'UN Small Arms Conference Database' of the Small Arms Survey.[27] In tracking the emergence of the small arms issue, in the next sub-section, we compare statements made during the First Committee general debates from late 1995 to 2001 (50th–56th sessions). Elsewhere, in addition to recent First Committee statements, we also use the statements made during the final negotiating session of the UN Small Arms Conference in July 2001.

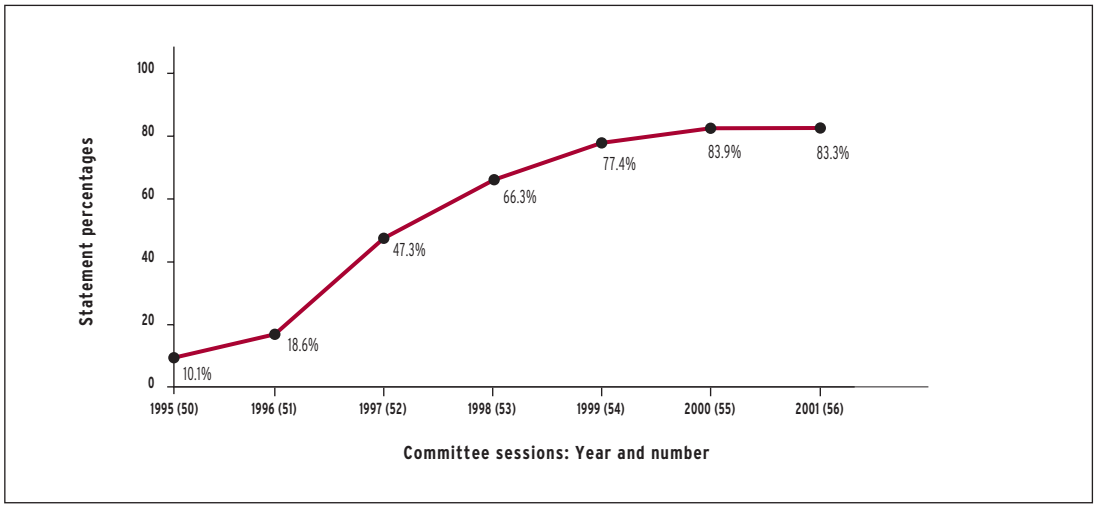
An evolving issue

Small arms have attracted increasing attention. Rarely referred to in the mid-1990s, they are now a constant feature of country statements in UN forums.

Since its emergence onto the world agenda in the early 1990s, the discussion of small arms has advanced in two ways. First, small arms have attracted increasing attention. Rarely referred to in the mid-1990s, small arms are now a constant feature of country statements in UN forums (see Figure 7.1). Second, while the small arms issue was initially discussed in very general terms, several years later, both the problem itself and ways and means of addressing it are tackled in far more specific language.

During the First Committee general debates of October–November 1995 (50th session) that followed the January release of a *Supplement to an Agenda for Peace*, 8 governmental statements out of 79 explicitly mentioned the small arms issue (10.1 per cent). A year later, during the Committee's 51st session, 18 out of 97 did (18.6 per cent). As shown in Figure 7.1, discussion of small arms increased steadily over subsequent years. Forty-three of 91 states mentioned the issue at the 52nd session (1997), 57 of 86 at the 53rd (1998), and 72 of 93 at the 54th (1999). By the 55th session of the First Committee, in 2000, the number of statements referring to small arms during the general debates had risen to 78 out of 93 (83.9 per cent), remaining more or less constant during the 56th session—the first held after the conclusion of the July 2001 UN Conference—at 75 out of 90 (83.3 per cent). This data confirms the popular notion that the small arms issue, in the space of a few years, has secured a prominent place on the international security agenda.

Figure 7.1 **Percentage of governmental statements mentioning small arms during the UNGA First Committee general debates, 1995–2001**



What is especially interesting about the evolution of the global debate among states on small arms is the increasing specificity used in describing both the problem and ways of addressing it. The initial discussion of these issues, in the mid-1990s, was general and rather vague. There was talk of 'the need to establish more effective ways to combat the illicit transfer and acquisition of small conventional weapons' because of the 'potential of such transfers to disrupt national, regional and even international peace and stability' (Hungary, 16 October 1995). Japan pointed out that 'the control of ... small arms ... is a matter of great urgency, inasmuch as they are causing thousands of casualties, including civilian casualties, in various conflicts around the world' (17 October 1995). The general message conveyed by those states (a minority) that were concerned about the issue in the mid-1990s was that the 'illicit spread' of small arms and light weapons constituted a 'destabilizing' factor, which the international community needed to control, 'eradicate', or 'curb'. Five years later, during the 55th session of the First Committee (October–November 2000), and at the final negotiating session of the UN Small Arms Conference (July 2001), the terms of the debate had advanced considerably. On the basis of governmental statements made in the two forums just cited, in the next sub-section we look at how the problem itself was given clearer expression.

Defining the problem

At the 55th session of the First Committee and at the July 2001 UN Conference, the excessive accumulation and widespread availability of small arms were linked to negative impacts in four distinct sectors: human security, stability, crime, and development.

Human security. During the 55th session of the First Committee, 46 governmental statements out of 78 (59 per cent) emphasized the damaging consequences illicit small arms have for the security of individuals. At the Conference, 76 statements out of 134 (56.7 per cent) also presented the problem in these terms. The huge numbers of deaths and injuries caused to civilians—especially, though not exclusively, in conflict situations—were often mentioned. Other negative impacts on human security that were attributed to small arms proliferation included: the violation of human rights and international humanitarian law; child soldiers; forced displacement; and the increased danger faced by humanitarian relief personnel.

> The scourge we face—this real epidemic of violence that is spreading itself throughout the world, fed by the virus of the illicit trade in small arms, causing countless deaths and immeasurable suffering in different regions—is claiming a greater number of victims with every passing year. (Brazil, 9 July 2001)

> When we talk about small arms and light weapons, we are confronted, above all, with a humanitarian problem. Small arms and light weapons are killing thousands of children each year and millions more have witnessed such attacks and are suffering from emotional trauma. Humanitarian and peacekeeping personnel, working to protect children in conflict situations, have come increasingly under fire from small arms and light weapons. (Austria, 9 July 2001)

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A young Somali prepares to test fire an anti-aircraft gun at a Mogadishu gun market, as states meet in New York on the first day of the UN Small Arms Conference.

Stability. In October–November 2000, during the 55th session of the First Committee, 32 statements out of 78 (41 per cent) cited small arms as a threat to stability. During the UN Conference, 73 of 134 did the same (54.5 per cent). While stressing that illicit small arms were not the cause of conflict, many states pointed out that these weapons aggravate, escalate, and/or perpetuate conflict, and also make the post-conflict transition to durable peace more difficult. Small arms were described as: a 'threat to peace and security' at the national, regional, and international levels; a challenge to 'the legitimate authority of states'; and an 'impediment to democracy, good governance, and social stability'.

> The international debate on the illicit trade in small arms and light weapons is taking place amid the many conflicts being waged throughout the world. It is therefore essential to combat the illicit trade in those means used to feed violence and exacerbate these conflicts. Furthermore, by its clandestine nature, this trade provides the weapons that generally increase the war-making capacity of those whose aim is to undermine the stability of many nations and impede the search for peaceful solutions. While small arms and light weapons are not the principal cause of conflicts, their ready availability and illicit trade contribute significantly to expanding conflicts and generating greater violence and instability. (Colombia, 9 July 2001)

> Initially perceived as affecting developing countries, particularly the African ones, their negative impact is increasingly felt worldwide threatening individual and collective security of States, fuelling conflicts and violence, undermining democratic institutions and good governance, destabilizing democratically elected governments and perpetuating poverty and underdevelopment. (Mozambique, 9 July 2001)

Crime. Twenty-four of 78 statements before the 55th session of the First Committee (30.8 per cent), and 73 of 134 during the UN Conference (54.5 per cent), pointed to the link between illicit small arms and crime, whether simple or more organized. Small arms were said to be associated with, and to aggravate, violent crime.

They were also tied to national and international acts of terrorism, drug trafficking, money laundering, and the illegal exploitation of natural resources.

> In the Caribbean, this illicit arms trade is underpinned and fuelled by the illegal drug trade, thus making guns and drugs a double-barrelled force of evil and mayhem in our societies. (Jamaica, 10 July 2001)

> The growing rates of urban violence with a high number of innocent victims is often the consequence of illicit market of arms and of the easy access of anyone to an arm [on] the black market. (Argentina, 12 July 2001)

Development. The adverse impacts of small arms on development were mentioned in 19 of the 78 governmental statements made during the 55th session of the First Committee (24.4 per cent), and in 38 of 134 during the Conference (28.4 per cent). These effects were cited as being both direct and indirect. Small arms were said to 'perpetuate' or 'aggravate' poverty, to 'hinder post-conflict reconstruction', to divert resources away from development, and generally to foster insecure environments in which 'sustainable development' is impaired.

> The result has been such an overhang of small arms and light weapons, particularly in post conflict situations, that many countries are seriously hampered in meeting the challenge of social and economic development. (Ireland, 11 July 2001)

> The uncontrolled spread and easy availability of small arms and light weapons ... prevents and compromises economic, social and political growth and development. (Philippines, 10 July 2001)

Small arms were said to 'perpetuate' or 'aggravate' poverty, to 'hinder post-conflict reconstruction', and to divert resources away from development.

With very few exceptions, all states associated the illicit use of and trade in small arms with one or more of the negative impacts enumerated above. These elements were reflected in the UN Conference *Programme of Action* (UNGA, 2001b, s. I, paras 2–7), with one notable exception. While participating states recognized 'that the illicit trade in small arms and light weapons in all its aspects ... undermines respect for international humanitarian law' (para. 5), due to the firm opposition of some states, no mention was made of human rights violations.[28]

Developing solutions

By the time of the UN Small Arms Conference, the open-ended statements made in the mid-1990s on the need to 'do something' to address the small arms problem had given way to considerably more specific and concrete proposals. As will be discussed in the next sub-section, where we consider the existence of a general small arms norm, these proposals were typically conveyed in language which underlined the moral necessity of taking such action. Nevertheless, when it came down to the details of what needed to be done, a great deal of divergence emerged among states. We list below 16 of the various measures proposed by states at the July 2001 UN Conference, ranked from most to least frequently mentioned. In July 2001, a total of 134 statements were made by, or on behalf of, 171 countries.[29]

International assistance. At the Conference, 98 countries underlined the importance of providing international assistance, whether financial or technical, to the countries that most needed it or that were most affected by the small arms problem. Proposed schemes ranged from setting up specific funds to establishing bilateral and regional programmes.

Marking and tracing. Ninety-five states advocated marking weapons in order to determine the origin of, and transfer routes taken by, small arms, thus preventing their diversion from legal to illicit markets. Specific approaches differed widely, however, with some states emphasizing that regulations for marking were a national responsibility, others favouring 'agreed minimum standards', and a third group advocating the negotiation of legally binding international instruments. The issue of marking was sometimes mentioned in isolation, sometimes in conjunction with the related areas of record-keeping (called for by 30 states) and tracing (27 states).

Disarmament, demobilization, and reintegration (DDR). Eighty-two states highlighted the need to disarm and demobilize ex-combatants and reintegrate them into civilian life. Such measures were noted as fundamental in reconstituting a 'secure environment' and establishing a 'durable peace' in post-conflict settings, including those involving UN peace operations.

Export controls. With a view to tackling the 'supply side' of the issue, 80 states called for the strict national control of small arms transfers. In particular, mandatory import and export licensing were cited as key tools for reducing opportunities for the diversion of weapons to the illicit market.

Brokering. Seventy-nine countries stressed that efforts to tackle the illicit small arms trade could not neglect the role played by brokers, and called for some form of regulation in this area. Some countries spoke of 'standards' while others advocated 'strict regulation' and, in a few cases, 'legally binding instruments'.

Information exchange. Seventy-seven states noted the importance of information exchange in helping states, collectively, to detect illicit arms flows and determine 'best practices'. Information exchange was also mentioned, together with transparency (cited by 38 countries), as a means of building confidence among states.

Export criteria. For 76 states, export controls needed to be underpinned by specific criteria designed to guide and control decisions to transfer weapons to particular destinations. As part of such criteria, states called for the prohibition of transfers to zones of conflict, repressive regimes, states known to violate human rights, and non-state actors.

Involvement of civil society. The need to involve civil society in general, and NGOs in particular, in efforts to tackle the small arms problem was cited by 74 states. Many states referred to the 'invaluable' or 'crucial' role NGOs had played in bringing the small arms issue to the forefront of the international agenda. Most countries saw their participation in the implementation of the *Programme of Action* as essential. The other roles that states envisaged for civil society included awareness raising, education, the promotion of 'cultures of peace', and practical work at the local (community) level.

Stockpile management and security. During the Conference, it was often pointed out that one of the main sources of illicit small arms is loss or theft from government stocks. For this reason, 62 states called for improved national regulation of stockpile management and security.

Regulation of civilian possession. Forty-one countries proposed that national governments formulate and implement regulations governing the possession of weapons, especially by civilians. In the event, this issue proved extremely controversial and was eventually dropped from the final *Programme of Action*.

Weapons collection and destruction. In order to reduce the numbers of weapons in circulation, 32 states called for the inclusion in the *Programme* of provisions on weapons collection and destruction, specifically in post-conflict settings. Forty-one countries also advocated measures for reducing existing weapons stocks in government reserves, preferably by means of destruction.

Criminalization of illicit activity. Twenty-three states proposed that illicit activity relating to the production, transfer, possession, or use of small arms be considered crimes under national legislation and made subject to corresponding penalties.

Co-operation among law enforcement agencies. The importance of co-operation among national law enforcement agencies, especially customs officials, in combating illicit trafficking was cited by 19 states.

National legislative measures. Eighteen states wanted more effective control over legal small arms at the national level. While in four cases the proposal was formulated in general terms, in twelve it related to production, in ten to transfers, and in one to transit and retransfer.

Improving compliance with arms embargoes. The need to respect and enforce UN Security Council arms embargoes was mentioned by 14 states.

Public awareness. Seven states considered it essential to disseminate knowledge about the 'destructive' effects of small arms proliferation and, in general, to foster public support for weapons collection and destruction.

With two exceptions—export criteria and the regulation of civilian possession—these measures and principles found their way into the final *Programme of Action*, though with varying degrees of strength and specificity.

This information helps fill out the picture, already outlined in the *Programme*, of what states believe needs to be done in addressing the small arms problem. First, it offers additional evidence of where national and international priorities lie. Marking and tracing, DDR, export controls, and brokering head the list of specific measures most often mentioned by states during the July 2001 Conference. In some cases—for example marking and tracing—the text of the *Programme* and subsequent follow-up have confirmed the importance of these issues for states. However, the relative lack of attention paid in the *Programme*, and in *Programme* follow-up, to other issues on the list—such as brokering—may point to demands for action which have not yet been satisfied in the context of the UN Conference process.

Of course, as already noted, the *Programme of Action*, though quite broad in scope, is not comprehensive. Measures left out of the *Programme* include the regulation of civilian possession, the prohibition of transfers to non-state actors, and specific criteria for export licensing, the first two being dropped at the last minute at the insistence of the United States. It is obviously more difficult to prove the existence of global norms in areas not addressed by the *Programme*. It is not clear that states consider such measures right and appropriate—for all states—in accordance with the definition of an international political norm (the internal element). Yet this is not precluded by the mere fact of their omission from the *Programme*.

Opposition by a single state, no matter how powerful, does not disprove the existence of a global political norm, though the real extent of opposition at the UN Conference to the inclusion of the two measures is unknown. Many observers have claimed that other states, equally hostile to these measures, chose to hide their opposition so that the US alone took the resulting political heat. Nevertheless, the extent of the negative reaction to the omission of the two measures is significant. The criticism began with the formal statement made by the President of the Conference following the adoption of the final *Programme of Action:*

> While congratulating all participants for their diligence in reaching this new consensus, I must, as President, also express my disappointment over the Conference's inability to agree, due to the concerns of one State, on language recognizing the need to establish and maintain controls over private ownership of these deadly weapons and the need for preventing sales of such arms to non-State groups. (UNGA, 2001b, Annex)

The criticism continued at the following (56th) session of the First Committee:

> We hope that discussions will continue between member States on those issues that could not be included in the Programme of Action. We are convinced that to the extent that a consensus is reached on the need to approach the questions of the prohibition on the transfer of arms to non-State actors and legislation on restrictions on the possession by civilians of small arms and light weapons, we will succeed in making a significant impact on the illicit trade in these weapons. (Mexico, 8 October 2001)

> The Conference could, however, not agree on the need to establish and maintain controls over private ownership of small arms, and the need for preventing sales of small arms and light weapons to non-state actors. These issues remain of great concern to South Africa and we continue to believe that these issues should be addressed—nationally, regionally and on a global level. (South Africa, 11 October 2001)

Many states made it clear that they considered the banning of transfers to non-state actors and the regulation of civilian possession to be essential tools for combating small arms proliferation and misuse.

With these words, many states[30] made it clear that, despite their exclusion from the final *Programme*, they considered the banning of transfers to non-state actors and the regulation of civilian possession to be essential tools for combating small arms proliferation and misuse. In the case of civilian possession, this was arguably reinforced by the 22 states that declared, during the July Conference, that they had controls in this area. These included countries, like Pakistan and Yemen, where civilians hold large numbers of weapons.

The non-state actors issue was less often addressed in specific terms. While, as indicated above, 76 states wanted criteria for arms transfers, only nine explicitly mentioned the need to ban transfers to non-state actors.[31] Arguably, the general norm that weapons transfers be subject to strict criteria is stronger than the more specific norm that would ban transfers to non-state actors. However, as already mentioned, when we get down to the specifics of what needs to be done, global consensus is frayed at best. And there remains the problem of ascertaining current state practice, worldwide, at this stage in the various issue areas. This precludes any final determination of small arms norms at the global level—with one possible exception.

A general small arms norm?

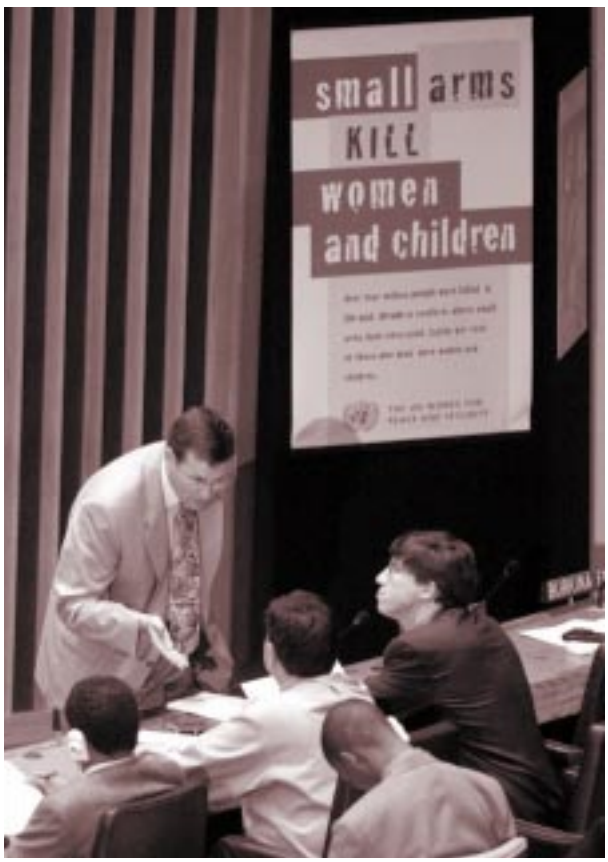
We have seen that between the mid-1990s and the time of the UN Conference in July 2001 the small arms problem (or problems) came to be defined in relatively specific terms. This is undoubtedly the first step in norm development. This increasing precision in the conceptualization of the problem was accompanied by a growing commitment to concrete action. But how strong was, or is, the commitment to tackling the small arms problem? Is this something states merely consider to be desirable. Or do they believe that action on small arms is right and appropriate—indeed required—for all states, in accordance with the internal element of a norm? From an international political perspective, only in the latter case could a norm (the internal element) be said to exist.

Our initial presumption must be that this commitment is relatively strong, given that it has been translated into the UN Small Arms Conference process and, more specifically, the adoption of the *Programme of Action*. Yet we can test our assumption by looking again, in some detail, at what states have said 'between the lines' of the *Programme*.

First, it is important to note that, in calling for action, many countries have used the language of legitimacy, referring to rights and obligations and describing necessary action as a 'responsibility', 'duty', and/or 'obligation' for states. Some countries have also advocated the adoption of international norms on small arms, including legally binding norms.

> Our cause is the protection of life, the edification of the future. Nothing can be more backward than violence and the industry of death that prevents the exercise of citizenship and the enjoyment of the most elementary rights of the individual, the freedom to come and go, the generation of wealth, the maturation of our societies. Nothing can be more just than the preservation of life; nothing can be more modern than peace. (Brazil, 9 July 2001)

> It is our responsibility to act without any delay by reaching a substantial and comprehensive agreement for a global action programme. It is our task to identify a set of international standards and mechanisms in order to consolidate, reinforce and co-ordinate regional and national measures against illicit proliferation and misuse of small arms. (Lithuania, 9 July 2001)



Delegates at the 2001 UN Small Arms Conference.

Of course, words of this kind may be no more than empty shells, designed solely to deflect criticism. For this reason, language emphasizing *practical* commitment to particular standards is important. During the July 2001 Conference, 114 states made reference, sometimes brief, sometimes detailed, to action taken on small arms. In other words, more than half of Conference participants made a point of noting that their commitment to the small arms issue was not merely verbal but had been translated into concrete action. Several of these states were frequently accused, after the Conference, of having diluted the final *Programme of Action*. For example, in its opening statement at the Conference, the United States listed a series of policies—including export controls and the provision of bilateral technical and financial assistance—which, it stressed, demonstrated its seriousness in addressing the small arms problem (United States, 9 July 2001).

From a normative standpoint, it is also important that the commitment to action does not merely emanate from states, taken separately, but is instead shared by the community as a whole. Language emphasizing the responsibility of *all* states with respect to small arms has particular significance for this reason. States not only commit themselves to taking action on small arms, but expect others to do the same.

> [I]t is important that—in parallel with current efforts to tackle the problem from the perspective of the receiving States—action should take place to emphasize the commitment of the Small Arms and Light weapon-exporting States in order to strengthen their national legislations to regulate the process of production and exportation of these weapons as well as the responsibility towards the relevant international decisions on preventing the exportation of such weapons to specific regions or States. (Egypt, 10 July 2001)

A further consideration reinforces the conclusion that states from around the world share the expectation that action is needed on small arms—by all states. Only a handful of countries—the Arab group of states, many Southeast Asian countries, and Cuba—used language which sought to diminish the importance of the issue or the need to address it in concrete terms. Their opposition was nuanced, however. They did not deny that small arms were important, but instead subordinated them to other international security issues, especially weapons of mass destruction.

> The international framework to tackle this question is connected with the priorities of action in the field of disarmament. These priorities have been adopted by the international community and clearly specified in the final document of the 1978 first Special Session of the General Assembly devoted to disarmament, where nuclear disarmament assumed the highest priority followed by other weapons of mass destruction and then the conventional weapons. (Egypt, 10 July 2001)

> In closing, I would like to make the point that as we tackle the issue of the illicit trade in small arms and light weapons, we should not be side-tracked from the priority global issue of nuclear and other weapons of mass destruction and of their delivery systems, which remain the main threat to human survival on this planet. (Malaysia, 11 July 2001)

Even if we allow for these exceptions, it seems clear that the level of commitment to addressing small arms is sufficiently strong, worldwide, to have normative significance—though again we are considering only the second, internal, element of a norm at this stage. We will consider the first element—behaviour—shortly. But first, what would the content of such a global norm be? We have already seen that global consensus quickly breaks down as soon as we begin to consider detailed means of addressing the small arms problem. It seems appropriate, therefore, to base the content of the global norm on the aims of the *Programme of Action*, specifically as reflected in its title. From an international politics perspective, we can thus posit the existence of a global norm that would require states to take 'action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects'

(UNGA, 2001b). As reflected in the *Programme*, such action would have to be comprehensive—addressing the range of negative impacts mentioned in the *Programme*—and situated at the national, regional, and global levels. Such a responsibility would clearly rest upon states, though the involvement of civil society in such efforts would also be important.

It seems clear that the level of commitment to addressing small arms is sufficiently strong, worldwide, to have normative significance.

What of practice? Does current state behaviour confirm the existence of such a norm? The wide range of literature and information now available on small arms measures, including the two previous editions of this yearbook (Small Arms Survey, 2001, ch. 7; 2002, ch. 6), indicates in a general sense that words are being matched by action. There are, of course, gaps in terms of specific issues, such as brokering; yet these do not detract from an overall pattern of increasingly dense regulation of small arms. Some regions, such as the Middle East and South Asia, have also been slow to co-ordinate, at the regional level, on small arms issues; yet this does not mean that national-level controls are absent.

The implications seem clear. From a political perspective, a global norm exists which commits states to take action to prevent, combat, and eradicate the illicit trade in small arms and light weapons in all its aspects.

REGIONAL NORMS

As is well known, there has been much more progress in tackling the small arms problem at the regional level than at the global level. However, in many instances we confront the same lack of information on state practice that precludes definitive conclusions on specific norms at the global level.

In the Americas, the follow-up mechanisms of the 1997 Organization of American States (OAS) Convention against illicit firearms manufacture and trafficking (OAS, 1997) are giving us a clearer picture of state practice in areas covered by the Convention. However, available information remains sketchy. As of May 2002, only 17 of 33 signatory states had responded to an OAS questionnaire on measures taken to implement the Convention.[32] Though a bare majority, this number obviously falls well short of the 'critical mass' of state practice which would have normative significance from both international law and international politics perspectives. Moreover, as of November 2002, individual country submissions—which include details of measures taken—had not been made public by the OAS Secretariat. Replies to the questionnaire were instead being presented in overview form, with all answers combined and analysed in a single document (OAS, 2002a; 2002b).

Information exchange on small arms policy has also featured prominently in the small arms initiatives of the Organization for Security and Cooperation in Europe (OSCE). Pursuant to the *OSCE Document on Small Arms and Light Weapons* (OSCE, 2000), OSCE participating states conducted a first information exchange in 2001. An assessment was commissioned for this exchange, and a workshop held to discuss the results in February 2002. This led to the development of a reporting template for the second information exchange on small arms, conducted in June 2002. The 2002 exchange included information on imports and exports, destruction, surplus small arms, and seizures, as well as stockpile management and security procedures. Although a limited number of OSCE countries have made their submissions public, by and large the information exchanged in 2001 and 2002 has circulated only among participating states.

The European Union (EU) has shown relatively greater transparency in its initiatives on small arms, especially its *Code of Conduct on Arms Exports* (EU, 1998). Since 1999, the annual 'consolidated report', summarizing national implementation of the EU *Code*, has been made public. Even more importantly, EU states are publishing national

export reports, containing more detailed information than that included in the EU summary. The EU trend, in short, appears to be towards greater disclosure of national export practices, though shortfalls remain in the quality and quantity of information provided.[33]

While a lack of information tends to hamper detailed assessments, especially normative assessments, of these developments, small arms practice appears to be converging in many parts of the world, including Europe and perhaps the Americas. One can cite other examples as well, such as the Pacific Islands, where common principles for the regulation of civilian possession are being developed (Alpers and Twyford, 2003). This chapter will, however, concentrate, on southern Africa.

SMALL ARMS NORMS IN SOUTHERN AFRICA[34]

The Southern African Development Community (SADC),[35] based in Gaborone, Botswana, is primarily a political organization that sets the parameters for policy action in the subregion. A number of its mechanisms are now becoming operational, including a major initiative on small arms—the *Protocol on the Control of Firearms, Ammunition and Other Related Materials* (SADC, 2001).

SADC functions at both a political and a technical level. The heads of state and relevant ministers determine the direction of the organization, while a number of technical committees are responsible for implementing SADC policy. Arms control has primarily been seen as a foreign policy objective, although, more recently, small arms have also emerged as a crime prevention issue for SADC countries.

SADC has a Small Arms Committee that meets regularly. All SADC states are now members of the Committee, whose chairmanship rotates annually. Its primary role is to give direction in terms of policy development and implementation, as well as co-ordinating with member states on donor assistance for small arms initiatives conducted through the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO).[36] The Committee also drafted the *SADC Protocol*.

SARPCCO was established in 1995 to co-ordinate work between the police on issues that were undermining security and stability in the subregion. SARPCCO also functions as the subregional INTERPOL bureau. It provides a forum for subregional collaboration on issues that fall entirely or partly beyond the remit of the defence departments of southern African states, such as crime prevention and illicit trafficking. Although independent, SARPCCO works closely with SADC and its subcommittees. Following the creation of the SADC Small Arms Committee, SARPCCO was identified as the implementing agency for SADC on small arms issues. For this purpose, SARPCCO has established a Firearms Desk and appointed an officer whose role is to oversee implementation of the *SADC Protocol* and act as liaison between member states and the SADC Secretariat.

Development of normative behaviour

Perhaps more than other subregions in sub-Saharan Africa, southern Africa has elaborated a framework of legal and political agreements that facilitate the development of additional legal instruments. For example, SADC's constitutive treaty provides for the negotiation of protocols which may be necessary for inter-state co-operation on specific issues.

As the small arms problem rose on the political agenda, the countries of southern Africa developed several complementary approaches. In the first instance, in May 1998, an NGO-sponsored conference adopted a *Southern Africa*

Regional Action Programme on Light Arms and Illicit Arms Trafficking, which was subsequently endorsed by SADC and European Union foreign ministers. The Programme was accompanied by other action at the subregional level involving SADC and SARPCCO, with the two organizations quickly developing a close working relationship on small arms.[37]

The political momentum generated by these processes paved the way for the negotiation of the *SADC Firearms Protocol* (see Box 7.1). At the subregional level it is the legal instrument through which the countries of the subregion will take action on small arms. The *Protocol* was developed at the same time as negotiations on the *UN Firearms Protocol*, as well as the preparatory process for the 2001 UN Small Arms Conference, were underway at the global level.

Box 7.1 The SADC Firearms Protocol

While the *SADC Protocol* uses the term 'firearm' as opposed to 'small arm', it defines the term quite broadly.

'Firearm' means:

a) any portable lethal weapon that expels, or is designed to expel, a shot, bullet, or projectile by the action of burning propellant, excluding antique firearms or their replicas that are not subject to authorisation in the respective States Parties;
b) any device that may be readily converted into a weapon referred to in paragraph a);
c) any small arm as defined in this Article; or
d) any light weapon as defined in this Article. (SADC, 2001, art. 1)

The objectives of the *Protocol* include:

- to prevent, combat, and eradicate the illicit manufacturing of firearms, ammunition, and other related materials, and their excessive and destabilizing accumulation, trafficking, possession, and use in the region;
- to promote and facilitate co-operation and exchange of information and experience; and
- to co-operate closely at the regional and international levels.

For these purposes, states agree to take various measures:

- laws and regulations on the manufacture, transfer, possession, and use of firearms;
- regulation of arms brokers;
- enhancing the operational capacity of police, customs, border guards, the military, the judiciary, and other relevant government agencies to fulfil their roles in implementing the *Protocol;*
- control over state and civilian-owned firearms;
- harmonization of import and export documents and end-use certificates;
- marking and record-keeping;
- disposal of state-owned, confiscated, or unlicensed firearms;
- voluntary surrender of firearms;
- public education and awareness programmes;
- mutual legal assistance;
- law enforcement; and
- transparency and information exchange.

Also developed in advance of the UN Small Arms Conference was the *Bamako Declaration*, adopted by the member states of the Organization of African Unity (OAU, now African Union), in December 2000 (OAU, 2000). The *Bamako Declaration* commits all African countries, including those of northern Africa, to take a common approach towards small arms and provides a framework for the African Union Commission and member states to develop more detailed political or legal mechanisms on the issue.[38] However, in practice, the importance attached to small arms varies significantly across the continent, and countries often look to their subregional institutions to take more immediate and concrete action—as in southern Africa.

The *SADC Protocol* was adopted at the SADC Summit of August 2001[39] and is currently being ratified by individual SADC states. As of November 2002, five countries had ratified the *Protocol:* Botswana, Lesotho, Malawi, Mauritius, and Mozambique. It will enter into force 30 days after two-thirds of the 14 SADC states have ratified it (SADC, 2001, art. 22).

Until the *Protocol* enters into force, its provisions are not legally binding. It is not treaty law. Nor, given that only a minority of SADC states have ratified the instrument, can it be said to reflect customary law across the subregion. All 14 SADC states have, however, signed the *Protocol*, and this has normative significance from an international politics perspective. Specifically, the *Protocol* can be seen to reflect the attitudes of southern African states towards small arms.

The political perspective on norms will therefore guide the analysis in this section. But, before we reach any conclusions about the presence of small arms norms in southern Africa, we need to determine whether such attitudes are also supported by actual behaviour—the other element of a political norm.

In southern Africa, the emergence of normative behaviour in key small arms-related areas appears to take three forms, discussed in turn below. In the *first*, existing laws and procedures are applied, and sometimes modified, to fit developing small arms policy. This is most evident in the approach several southern African countries have adopted towards the regulation of civilian firearms possession. Although there is, as yet, little evidence that countries in the subregion are deliberately harmonizing their laws with those of their neighbours, as countries review their legislation, especially against the requirements of the *SADC Protocol*, it is expected that *de facto* harmonization will occur. *Second*, the evolution of subregional normative behaviour may be based on the practices of a core group of countries. The most striking example of this tendency can be found in the area of weapons destruction. *Third*, new policy may spur new action. This can be seen in the increase in subregional co-operation among law enforcement agencies in southern Africa.

Civilian firearms possession

Although internationally a contentious issue—mainly as a result of the strong position of the United States—regulating the civilian possession of firearms is existing practice for many countries in Africa. Although the degree of regulation varies widely, a survey of four countries in southern Africa found that most had laws on the possession and use of firearms by civilians. Admittedly, some of these laws date from pre-colonial days and may be poorly implemented for various reasons.

Although internationally a contentious issue, regulating the civilian possession of firearms is existing practice for many countries in Africa.

The four countries (Botswana, Lesotho, Namibia, and South Africa) were selected partly because they were willing to provide information within the time frame allotted for the study. The selection is not merely fortuitous, however. These countries have a history of bilateral co-operation on security and policing issues (especially Botswana with Namibia and Lesotho with South Africa).

South Africa's importance in the subregion was another consideration. While, in political terms, the country's influence is more limited than one might expect, given its strong preference to work multilaterally, it is nonetheless real. On the negative side, South Africa's apartheid history, which led to the arming of various non-state groups outside the country, is often blamed for the large quantities of small arms circulating in the subregion. Among SADC countries, South Africa is also viewed as a principal victim of small arms, given the high incidence of gun-related crime and violence within the country. More positively, South Africa is often at the forefront of efforts to develop operational responses to small arms proliferation, especially in the area of law enforcement. However, prior to the recent legislative reforms, South Africa was seen as lagging behind other SADC countries in the regulation of civilian possession (McKenzie, 1999).

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Children play with toy guns in Mannenberg, near Cape Town, South Africa.

South Africa

South Africa has the largest gun-owning population in southern Africa. As of July 1999, there were just over 3.5 million firearms registered to private individuals. Of these, approximately 60 per cent were handguns, 39.1 per cent pistols, and 21.0 per cent revolvers (Chetty, 2000, pp. 32–33). As of September 2002, South Africa still regulated civilian firearms ownership, possession, and use through the 1969 *Arms and Ammunition Act*. The new *Firearms Control Act*, adopted by Parliament in 2000 (South Africa, 2000), is expected to enter fully into force in 2003.

South Africa regulates the ownership, possession, and use of firearms by individuals through a central firearms registration system. There are restrictions placed on who can own or use a gun based on the user, the type of weapon, and the use.

South Africa is often at the forefront of efforts to develop operational responses to small arms proliferation, especially in the area of law enforcement.

The user:

- minimum age restrictions for a firearms licence;
- competency testing (under the new Act);
- vetting for criminal record;
- statement required of need/reason for use.

The weapon:

- ban on fully automatic weapons for civilian use;
- restriction on semi-automatic shotguns/rifles;
- ban on modifications of weapons (e.g. shortened shotgun barrels);
- restrictions on possession and use of handguns (under the new Act).

The use:

- firearms permitted for self-defence and the defence of property;
- private security companies allowed to carry and use firearms;
- restrictions on the discharge of weapons in public places;
- responsibility of gun owners for safe storage and control of firearm.

Lesotho

Lesotho, with a population of just 2.2 million, has a very different scale of gun ownership. Civilian possession of firearms is regulated under the *Internal Security (Arms and Ammunition) Act*, most recently amended in 1999 (Lesotho, 1966; 1999). The minimum age for possessing firearms in Lesotho is 18. As in other countries, civilians must

provide a reason for gun ownership before a licence will be issued. Lesotho bans the possession by civilians of 9mm handguns in the absence of compelling reasons (such as transporting large amounts of cash from a business to a bank). Lesotho also prohibits the licensing of rifles to individuals, leaving shotguns as the most common type of civilian firearm in the country. These are primarily used for hunting and vermin control.

Licenses for civilian-owned firearms are renewed annually. Currently, the police maintain a manual register of firearm ownership, although the intention is to computerize the system when resources are available. This will bring Lesotho in line with the *SADC Firearms Protocol* (SADC, 2001, art. 7) and also streamline the process of tracing weapons within the country and with its neighbours—especially South Africa, which surrounds the mountain kingdom.

Botswana

Botswana borders Namibia, Angola, Zambia, Zimbabwe, and South Africa, countries with a history of violent conflict or political instability. Though Botswana's legislation offers civilians some scope for the possession of firearms, this is severely restricted in practice.

The key legislation is the *Arms and Ammunition Act* and its accompanying *Regulations*, both adopted in 1981 (Botswana, 1981a; 1981b). In principle, the *Act* allows civilians to acquire weapons provided certain criteria are met. These include a minimum age of 18, 'good character', and lack of 'serious criminal conviction' (Botswana, 1981a, art. 24; 1981b, art. 6). In practice, however, civilians are allowed to possess only hunting rifles and shotguns, and only for the purpose of hunting or the protection of livestock or cattle. Four hundred firearm licences are issued to hunters in an annual lottery: 200 for rifles and 200 for shotguns. Botswana currently has some 30,000 firearms licensed for civilian possession in a country of approximately 1.6 million people.[40]

Namibia

Namibia is bordered to the west by the Atlantic Ocean, to the north by Angola, and to the east by Botswana and South Africa. Such porous borders facilitate the movement of illegal goods, including arms. The borders with South Africa and Angola have, in fact, been important transit points for arms trafficking. Large quantities of weapons are the legacy of the Angolan conflict, and its spillover effects have been felt throughout the subregion.

Namibia's legislation on civilian firearms possession is contained in the *Police and Public Order Act* of 1964 and the *Arms and Ammunition Act, 1996* (Namibia, 1964; 1996; 1998). The *Arms and Ammunition Act*, in force since 1 April 1998, allows civilians to possess firearms provided a licence is issued in accordance with defined criteria. While the Act does not limit the period of licence validity, licences can be revoked where their holders are deemed 'unfit' to possess firearms—for example, where they misuse them (Namibia, 1996, ss 5, 10–13). The *Act* stipulates that firearm holders must be at least 18 years old (s. 3) and prohibits civilian possession of automatic weapons and their ammunition (s. 29). Current administrative practice goes further, however, limiting civilian possession to rifles and single shot shotguns.

One of the law's weaknesses is that it does not require competency testing to be undertaken as a condition of licence approval. This stems from a lack of money and personnel.

Regional framework

The issue of civilian firearms possession is given prominent attention in the *SADC Protocol*. It requires that all States Parties incorporate into their national laws:

- prohibition of unrestricted possession of small arms by civilians;
- total prohibition of the possession and use of light weapons by civilians;
- regulation and centralized registration of all civilian-owned firearms;
- provisions that ensure the effective control of firearms, including storage and use, competency testing of prospective owners, and restrictions on owners' rights to relinquish control, use, and possess firearms, ammunition, and other related materials; and
- monitoring and auditing of firearms licences, and the restriction of the number of firearms that may be owned by any person (SADC, 2001, art. 5).

In Article 7 of the *SADC Protocol*, States Parties further:

> undertake to consider a co-ordinated review of national procedures and criteria for issuing and withdrawing of firearm licences and establishing and maintaining national electronic databases of licensed firearms, firearm owners, and commercial firearms traders within their territories.

The need for better record keeping and the lack of competency testing is recognized by the countries surveyed as areas that existing legislation does not cover adequately.

Although their laws predate the negotiation of the *SADC Protocol*, the surveyed countries meet its main requirements in limiting access to military weapons and regulating civilian firearms possession and use generally. The need for better record keeping and the lack of competency testing is recognized by the countries surveyed as areas that existing legislation does not cover adequately.

At the continental level, the *Bamako Declaration* does not directly mention civilian possession; yet it does recommend that states make the illegal possession and use of small arms a criminal offence and, more broadly, develop and implement national programmes for the responsible management of licit arms (OAU, 2000, paras 3.A.iii–iv). Internationally, as noted earlier, the UN Conference *Programme of Action* makes no reference to civilian possession. Nor does the *UN Firearms Protocol*. The *SADC Firearms Protocol* is thus one of the first multilateral instruments to set out standards for civilian possession, ownership, and use of firearms.

Norm on civilian possession

It is quite clear, at least for the four countries surveyed, that there is a norm requiring the possession and use of firearms by civilians to be regulated by the state. Although this regulation may take different forms, the common elements include restrictions relating to the age of the firearms holder, the types of weapons that can be held, and the reasons for possession. Each of the four countries has some form of legislation on civilian firearms possession. This has translated into licensing systems, competency checks, and other measures designed to regulate civilian access to firearms. The normative behaviour of these countries is tied to the *SADC Protocol*, which upon entry into force will set the minimum legal requirements for the regulation of civilian possession.

Additional research is needed to confirm that the observed norm applies not just to the four countries, but to the subregion as a whole. Yet, even if the norm is not now fully subregional, the *SADC Protocol* will very likely provide the impetus for this in the short to medium-term.

Weapons destruction

Weapons destruction has been an active part of government policy in Mozambique and South Africa since the mid-1990s, and has more recently been adopted in Lesotho. Other countries in southern Africa recognize weapons destruction as a priority and are examining the methods and resources which will be needed to integrate it into their small arms control policies. The joint police operations between Mozambique and South Africa (Operation Rachel) have focused on the destruction of arms caches left over from Mozambique's civil war. Otherwise, destruction efforts in South Africa—as well as Lesotho—have focused on confiscated small arms or surplus state-owned weapons.

South Africa

In response to the country's high rates of firearms crime and violence, South Africa has adopted a policy of weapons destruction that covers not only seized and forfeited weapons but also obsolete or surplus weapons held by its security forces. As of October 2002, this policy remained in force, with weapons destroyed on a regular basis.

The South African Police Service (SAPS) has identified firearms as a priority policing area and devotes considerable resources to reducing the availability and use of illicit firearms in the country. Since 1997, the SAPS has conducted a destruction programme for small arms which have been confiscated or identified as redundant or obsolete (see Table 7.1). This includes any firearm not classified as standard for police use.[41]

Table 7.1 Number of firearms destroyed by the SAPS, 1999–August 2002

Year*	Confiscated	State-owned (redundant/obsolete)
1999–2000	9,070	3,341
2001 (July, September, October, and November)	6,656	53,390
2002 (February, July, and August)	9,271	24,203
Total	**24,997**	**80,934**

Note: *The South African financial year runs from February for 12 months.

Source: Correspondence from H. M. Hlela, Divisional Commissioner of the South African Police Service, 29 August 2002

The South African National Defence Force (SANDF) has also undertaken a programme of weapons destruction for obsolete and redundant defence force stocks. This is in keeping with a government decision that all state-owned redundant, obsolete, unserviceable, and confiscated semi-automatic and automatic weapons of a calibre less than 12.7mm would be destroyed (South Africa, SANDF, 2000).

The destruction of SANDF-owned weapons began in June 2000 in an operation code-named 'Mouflon'. A total of 271,867 weapons have been destroyed in the following categories (indicated in Table 7.2).

Table 7.2 Weapons destroyed by the SANDF, July 2000–May 2001

Type	Number destroyed
7.62mm R1 rifle	198,506
7.62mm R1 rifle (paratrooper)	1,326
7.62mm M1 rifle	3,708
7.62mm R1 heavy barrel rifle	2,914
Bren light machine gun	3,637
Vickers machine gun	2,256
R2 rifle	12,237
Uzi sub-machine gun	1,259
12.7 Browning rifle	412
AK-47 rifle	6,000
PPSH submachine gun	1,200
AKM rifle	2,000
Other small calibre weapons (confiscated)	36,412
Total	**271,867**

Source: Sendall and Zondagh (2002)

Lesotho

In November 2001, the governments of Lesotho and South Africa signed an agreement to assist the Kingdom of Lesotho with the destruction of excess small arms. A total of 3,818 surplus and obsolete small arms and light weapons were transported to South Africa and destroyed. This total comprised 3,454 rifles and shotguns, 44 mortars, and 320 revolvers and pistols. Twenty-five spare items (e.g. barrels and triggers) were also destroyed.[42]

While the destruction of these weapons is consistent with the *SADC Protocol*, as of October 2002 it was unclear whether Lesotho would adopt weapons destruction as part of its regular policy.

Mozambique

Mozambique emerged from civil war in 1992. Yet, despite disarmament efforts overseen by a UN peacekeeping force, the country was still left with numerous arms caches. By the mid-1990s, both Mozambique and South Africa, facing rising levels of armed crime, resolved to co-operate in confronting the problem (Chachiua, 1999).

A bilateral co-operation agreement, signed in 1995, paved the way for 'Operation Rachel', a joint undertaking of the Mozambican and South African police. As of August 2002, Operation Rachel had collected and destroyed weapons in all of Mozambique's provinces. Individual operations are collaborative efforts between the two countries, with the Mozambican police responsible for identifying the caches (primarily through the use of informants) and South Africa providing technical and logistical support. The weapons destroyed in Operation Rachel can be identified as 'surplus, redundant or obsolete' under Article 10 of the *SADC Protocol*, specifically in the context of post-conflict disarmament (SADC, 2001).

Regional framework

In Article 10 of the *SADC Protocol*, States Parties agree to adopt and implement programmes for the collection, safe storage, destruction, and responsible disposal of firearms, ammunition, and other related materials 'rendered surplus,

redundant or obsolete' as a result of the implementation of peace agreements or the re-equipment or restructuring of armed forces (SADC, 2001, art. 10). The *Protocol* also requires States Parties 'to adopt co-ordinated national policies for the disposal of confiscated or unlicensed firearms' that come into their possession and 'to develop joint and combined operations' with other States Parties for the location, seizure, and destruction of arms caches left over after conflict (art. 11).

It is worth noting that the practice of countries such as South Africa, which *destroys* all seized firearms, exceeds the requirements of the *Protocol*.

The *Bamako Declaration*, the *UN Programme of Action*, and the *UN Firearms Protocol* all mention the importance of weapons destruction. The *Bamako Declaration*, for example, calls for the development and implementation of national programmes for 'the identification and the destruction by competent national authorities and where necessary, of surplus, obsolete and seized stocks in possession of the State, with, as appropriate, international financial and technical support' (OAU, 2000, para. 3.A.iv).

Norm on weapons destruction

Southern Africa has first-hand experience with the devastating impact of small arms, and countries within the sub-region have initiated programmes to ensure the permanent disposal of weapons through destruction. Among the countries surveyed, Mozambique has focused primarily on the destruction of weapons left over from its civil conflict, while South Africa and Lesotho have adopted broader approaches that are based on assessing national inventories, identifying weapons that are surplus to the needs of the state, and destroying these, along with confiscated weapons. What constitutes a 'surplus' remains a matter of national discretion as the *SADC Protocol* makes no effort to define the term.

Several states in southern Africa, including Botswana, Namibia, and Zambia, are beginning to consider programmes similar to those conducted by South Africa and Lesotho. Resource constraints coupled with a lack of political will in some countries may hinder concrete action on this issue throughout the subregion. It seems likely, however, given the impetus provided by the *SADC Protocol* and the examples of a few states, that more countries in the subregion will integrate weapons destruction into their policies and practices. At this stage, one can characterize weapons destruction as an emerging norm, with a strong chance of taking firmer hold in the subregion.

Southern Africa was fortunate in that an appropriate body, SARPCCO, already existed and was able to incorporate subregional co-operation within its mandate.

Subregional co-operation

The states of southern Africa realized in the mid-1990s that they would need to co-operate in order successfully to combat the proliferation of weapons in the subregion. This recognition stemmed from an understanding of the linkages between the illicit trafficking in small arms and in other illegal commodities, including drugs, vehicles, precious metals, and endangered species. It was also prompted by the realization that smuggling routes for weapons spanned the subregion.

Southern Africa was fortunate in that an appropriate body, SARPCCO, already existed and was able to incorporate such co-operation within its mandate. Further, the change of political regime in South Africa meant that this country was able to engage with its neighbours to combat common problems in a way that was not possible previously.

While SARPCCO has undertaken a number of joint operations with respect to the smuggling of vehicles, drugs, and endangered species, it has not yet devised an operation specifically devoted to firearms. However, several countries in southern Africa already co-operate on this issue at bilateral and multilateral levels. For example, Mozambique has recently had bilateral discussions with two of its neighbours (Malawi and Zimbabwe) concerning the movement of weapons from Mozambican arms caches into these countries for use in crime.[43] In mid-October 2002, Lesotho, South Africa, and Swaziland co-operated in a joint operation aimed at recovering stolen goods and vehicles, and seizing illicit drugs. Again, while not specifically directed at firearms, these operations provide an important framework for co-operation that could eventually be extended to the small arms area.

Regional framework

The *SADC Protocol* places a great deal of emphasis on developing subregional co-operation and co-ordinating relevant activities. In Article 6, States Parties agree to undertake joint training exercises for police, customs, and other relevant officials. Article 14 sets out a framework for mutual legal assistance, with States Parties required to designate a competent authority in this area. Article 15 outlines a series of measures designed to enhance co-operation among law enforcement agencies in promoting the implementation of the *Protocol*, including:

- direct communication systems;
- multi-disciplinary law enforcement units;
- co-operation with international organizations; and
- the establishment of national focal points.

Norm on subregional co-operation

Co-operation among law enforcement agencies is now well-established in southern Africa. While implementation of joint operations directed specifically at small arms has lagged so far, firearms are often recovered in the course of other operations, such as those aimed at vehicle smuggling. The incorporation of co-operation in state practice at a high level, and the existence of the necessary legal framework in the *SADC Protocol*, are important indicators that co-operation on small arms may follow. Moreover, the framework for such co-operation is present, at the operational level, in the form of SARPCCO.

To judge from the expanding scope and depth of co-operation among the countries of southern Africa, it seems evident that a norm of subregional co-operation is well entrenched and should continue to strengthen. While co-operation is still sparse and *ad hoc* in relation to small arms, the broader subregional trend towards greater co-operation, coupled with an increasing recognition of its importance for small arms, suggests considerable potential for the development of a norm for co-operation on small arms.

CONCLUSION

This chapter has involved a careful, though not exhaustive, examination of small arms norms. A conceptual framework was developed and subsequently applied at the global level and in a selected region. In the first part of the chapter, we looked at two sources of international law, treaties and custom, examining their constituent elements and special characteristics. 'Soft law' was also included in this discussion. Although not legally binding, soft law may be a precursor to the hard law of treaties or custom. It also often serves as an alternative means of regulating state behaviour.

International politics has its own conception of norms. Perhaps its most important difference from international law is that there are no formal consequences of non-compliance with international political norms. Yet this does not mean they are not followed, or that non-compliance is not sanctioned.

From both political and legal perspectives, state practice is a key element of a norm. In both perspectives, there are thresholds, difficult to determine, which mark the passage from 'proto' or 'emerging' norm to fully-fledged norm, accepted as such by the relevant community. Yet both perspectives also recognize a broader, long-term process of norm development in which initial aspirations for change take clearer, collective form (as soft law or an emerging international political norm) before being translated into genuine norm.

Where do things stand, normatively-speaking, in the small arms area? In southern Africa, it appears that the *SADC Firearms Protocol*, though not yet in force, is prompting states to align their small arms policies to meet its various requirements. The normative implications of this are not always clear, at this stage, yet a dynamic process of norm development seems to be unfolding in the subregion.

At the global level, the most important body of international law now relevant to small arms applies, indirectly, to the transfers of these weapons—precluding such transfer where this can be expected to result in the violation of existing international rules, for example in the field of human rights. Outside this context, international law applicable to small arms is scarce. As long as the *UN Firearms Protocol* has not entered into force, its significance is limited. Although not legally binding, the UN Conference *Programme of Action* is probably more important at this stage. It may well help spur the development of new law. It may even reflect existing, customary international law in some of the areas it covers, though, again, the lack of information on state practice worldwide prevents us from determining this at the present time.

In examining global norms from an international politics perspective, we sketched out the evolution of state attitudes within the framework of the UN General Assembly First Committee and the UN Conference process. States are not only paying much more attention to the small arms issue, as compared with the mid-1990s when the issue first emerged; they are also increasingly focused in their approach to the problem, describing it with some precision and developing specific remedial measures, as reflected in the *Programme of Action*. Yet global consensus breaks down once we move beyond the often vague consensus language of the *Programme* to look in detail at state attitudes in particular areas. In the areas it covers, the *Programme* must therefore constitute the starting point for any determination of international political norms at the global level, once the gap with respect to state practice starts to be filled.

In fact, the main conclusion of this chapter is that the *Programme* does indeed constitute a watershed in efforts to tackle the small arms problem—specifically in terms of norm development. As a unique expression of global

consensus on small arms issues, the *Programme* will be central to norm determination and norm development at the global level in the coming years, whether from an international law or an international politics perspective. Nevertheless, in both cases, we face a gap with respect to state practice worldwide.

This 'practice gap' has two distinct components. The first is a lack of information. While transparency in relation to small arms has improved markedly since the early 1990s, it remains the exception rather than the rule throughout the world. This lack of transparency prevents us, for the moment, from saying much about norms at the global level and in most regions. The second part of the gap in relation to state practice is not about information, but about how things may, or may not, be changing. For some states in some areas, the *Programme of Action* simply reflects the status quo; these countries are already in compliance. Yet many other states have considerable work to do before the text of the *Programme* becomes reality.

The general commitment to action exists. As this chapter has argued, states worldwide have now accepted a political or social, if not legal, norm requiring them to take action to prevent, combat, and eradicate the illicit trade in small arms and light weapons in all its aspects. The complex nature of the small arms issue—in comparison with anti-personnel landmines, for example—almost invariably dictates an open-ended starting point. Yet the devil—an effective resolution of the small arms problem—lies in the detail. The general norm remains to be translated into specific action at the global, regional, and national levels.

States, in short, confront two related challenges: to follow up their paper commitments, especially in the *Programme*, with concrete action, and to show that they are, in fact, doing so. On the basis of the information now available, it seems clear that these needs are being addressed to some extent in the immediate post-Conference period. Much has been done to give practical expression to the text of the *Programme*, yet the two gaps remain unfilled. It is not yet clear whether states, collectively, will take up the twin challenge of effective action and greater transparency.

7. LIST OF ABBREVIATIONS

DDR	Disarmament, demobilization, and reintegration
EU	European Union
ICJ	International Court of Justice
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization for Security and Co-operation in Europe
SADC	Southern African Development Community
SANDF	South African National Defence Force
SAPS	South African Police Service
SARPCCO	Southern African Regional Police Chiefs Co-operation Organisation
UNDDA	United Nations Department for Disarmament Affairs
UNECOSOC	United Nations Economic and Social Council
UNGA	United Nations General Assembly

7. ENDNOTES

[1] An international organization may have law-making powers where its statutes or constitutive instruments so provide; yet such laws bind only the organization's member states.

[2] Other sources are listed in Article 38 of the *Statute of the International Court of Justice* (UN, 1945).

[3] The 1969 *Vienna Convention on the Law of Treaties* sets out rules governing the conclusion, observance, interpretation, validity, and termination of treaties between states (UNGA, 1969). A second convention, adopted in 1986, covers treaties involving international organizations (UNGA, 1986).

[4] See also the cases cited by Dupuy (2000, para. 319) and Malanczuk (1997, p. 39).

[5] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, vol. 1, 1987, para. 102, p. 25; quoted in Malanczuk (1997, p. 42). See also ICJ (1969, para. 74).

[6] See, for example, ICJ (1986, para. 188) and ICJ (1996, para. 70). See also Chinkin (1989, p. 858) and Dupuy (2000, paras 399–401).

[7] See also Bernhardt (1992, p. 901).

[8] See Malanczuk (1997, pp. 45–46).

[9] Note, however, that in recent years many prominent commentators have questioned (or even rejected) the continuing validity of this traditional rule. See, for example: Bernhardt (1992, p. 904); Cassese (2001, pp. 118–119, 123–24); Malanczuk (1997, p. 48).

[10] This is not to say that soft law has no legal effects of any kind. See: Abi-Saab (1993); Chinkin (1989, pp. 865–66); Dupuy (1988, pp. 388–89).

[11] For example, Frost (1998, p. 126) asserts that the market-based economic systems common today are not the inevitable outcome of independent economic forces, but have instead emerged out of the deeply held values of those that participate in these systems. These include individual liberty, the primacy of contracts, and the importance of private property.

[12] In other words, the chapter follows a broadly constructivist approach to international politics. For a review and critique of the realist, neo-liberal, and constructivist approaches to norms, see Cattaneo (2002).

[13] 'Precisely because state behaviour within regimes is interpreted by other states, the rationales and justifications for behaviour which are proffered, together with pleas for understanding or admissions of guilt, as well as the responsiveness to such reasoning on the part of other states, all are absolutely critical component parts of any explanation involving the efficacy of norms' (Kratochwil and Ruggie, 1986, p. 768). See also: Finnemore and Sikkink (1998); Kratochwil (1989).

[14] See Cattaneo (2002) for a more complete account of the processes described in this section, including relevant literature.

[15] Note, however, that small arms were an occasional focus of international concern well before the 1990s, for example in the context of international terrorism. The *Convention for the Prevention and Punishment of Terrorism*, drafted by the League of Nations in 1937 (though never in force), would have required states to limit the transfer of small arms that might be used in terrorist acts, as well as mark and record sales of these weapons (Luck, 2003, p. 4).

[16] See also UNECOSOC (1996, para. 88). Links to further documentation can be found on the UN Crime and Justice Information Network website:
<http://www.uncjin.org/Standards/Conduct/conduct.html>

[17] Information and analysis in this sub-section is derived from Gillard (2000).

[18] For an overview of these instruments, including codes of conduct on arms exports, see Gillard (2000, pp. 40–45).

[19] See, for example, the UN Conference *Programme of Action* (UNGA, 2001b, s. I, para. 9).

[20] For more on the contents and negotiating history of the Protocol, see Small Arms Survey (2002, pp. 237–41).

[21] The ratifying countries are Bulgaria, Burkina Faso, and Mali. For the latest information on Protocol signatures and ratifications, see <http://www.undcp.org/odccp/crime_cicp_signatures_firearms.html>

[22] The conditions for the entry into force of the main Convention are the same as for the *Firearms Protocol* (40 ratifications plus 90 days). As of 7 February 2003, 147 states had signed the Convention, while 30 had ratified it. For an update, see:
<http://www.undcp.org/odccp/crime_cicp_signatures_convention.html>

[23] For more on the *Programme of Action* and the UN Small Arms Conference, see Small Arms Survey (2002, ch. 5).

[24] The same paragraph of the *Programme* also provides for follow-up on the brokering issue, yet the language used is resolutely non-committal and hardly anticipates an international legal instrument.

[25] For the latest information, see the UNDDA website:
<http://disarmament.un.org/cab/>

[26] An extensive review of action taken by all types of actors to implement the *Programme of Action*, as of August 2002, can be found in Laurance and Stohl (2002).

[27] See the 'Government Documents and Statements' database at <http://www.smallarmssurvey.org/Database.html> Use the country and date (dd.mm.yyyy) information in this section to find the complete country statements.

[28] See Small Arms Survey, 2002, p. 221.

[29] Note that in this sub-section and the next, statements made on behalf of inter-governmental organizations or groups are counted as the total number of states belonging to, or associated with, that group as of July 2001. To avoid double-counting, countries which gave separate statements at the Conference are not included in group totals.

[30] See also the statements made by: Guatemala, 8 October; Brazil, 9 October; Mongolia, 9 October; Chile, 10 October; Costa Rica, 10 October; Nepal, 10 October; Burkina Faso, 11 October; New Zealand, 11 October; Kenya, 15 October; and Cameroon, 17 October.

[31] The issue was mentioned by Afghanistan, Costa Rica, India, Indonesia, Malawi, Panama, Sri Lanka, Sudan, and Togo. When the term 'non-state actors' was not used, similar language, such as 'violent and rebellious groups', 'armed' or 'rebel' or 'belligerent' groups, was employed instead. Indonesia and Sudan stressed that transfers should be allowed only among states or governments.

[32] These states were: Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Mexico, Panama, Peru, Trinidad and Tobago, and Venezuela.

[33] For a detailed discussion of the transparency issue as it relates to small arms exports, see Haug *et al.* (2002).

[34] Information and analysis in this section is derived from Meek (2002).

[35] The 14 member countries of SADC are: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

[36] The 12 member countries of SARPCCO are: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

[37] For details, see Small Arms Survey (2001, pp. 261–62).

[38] For details, see Small Arms Survey (2001, pp. 265–66).

[39] Angola was not an original signatory of the Protocol. However it has subsequently announced its intention to sign and ratify the instrument.

[40] Interview with Superintendent Boikhutso Dube of the Botswana Police Force, 10 October 2002, Pretoria. See also McKenzie (1999).

[41] Correspondence from H. M. Hlela, Divisional Commissioner of the South African Police Service, 29 August 2002.

[42] Source on file with the Institute for Security Studies, Pretoria.

[43] Interview with a representative of the Mozambican Ministry of the Interior, Pretoria, 11 October 2002.

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