

THE U.N. CONFERENCE ON THE ILLICIT TRADE OF SMALL ARMS AND LIGHT WEAPONS: AN EXERCISE IN FUTILITY

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The state of peace among men living in close proximity is not the natural state (*status naturalis*); instead, the natural state is one of war, which does not just consist in open hostilities, but also in the constant and enduring threat of them.¹

In the summer of 2001, the United Nations held its Conference on the Illicit Trade of Small Arms and Light Weapons in All Its Aspects (hereinafter “Conference”).² With this bold move, the U.N. sought to remove Kant’s looming idea from reality into fiction—to make tranquility among mankind more than a mere possibility. The Conference, which took years to develop, attempted seeks to begin the monumental task of reducing and eliminating, *inter alia*, the illicit possession, manufacture, transfer and circulation of small arms and light weapons.³ However, despite its benevolent intentions, the United Nations created a document that might well produce the very consequences the Conference seeks to prevent: threats to peace and stability,⁴ civilian deaths and injuries,⁵ crime and terrorism,⁶ and even genocide by both state and non-state actors.⁷

While any limitation on arms transfers arguably creates such possibilities, the Conference, through its tool of implementation, the Programme of Action, seems to exacerbate the problems in several ways. First, the Conference alone

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¹ Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), in *PERPETUAL PEACE AND OTHER ESSAYS* 111 (Ted Humphrey trans., 1983).

² See UNITED NATIONS, REPORT OF THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, U.N. Doc. A/CONF.192/15 (2001) [hereinafter FINAL REPORT].

³ See *id.* at 10-12.

⁴ *Id.*

⁵ UNITED NATIONS, GENERAL AND COMPLETE DISARMAMENT, REPORT OF THE GROUP OF GOVERNMENTAL EXPERTS ON SMALL ARMS, U.N. GENERAL ASSEMBLY, FOREWORD BY THE SECRETARY-GENERAL, U.N. Doc. A/54/258 at 2, 8 (1999) [hereinafter 1999 REPORT].

⁶ See FINAL REPORT, *supra* note 2.

⁷ See, e.g., Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237 (1997).

will not produce a legally binding treaty.⁸ Thus, instead of a more solid principle of international law, such as a treaty, the Conference is designed to be an aspirational “political document,” as it would be difficult to achieve a legally binding agreement given the great divergent political interests of states and other actors.⁹ Second, for the purposes of the Conference, there is a significant definitional problem in the term “illicit”. Third, political and economic realities, such as the economic value of the global arms trade, high profitability of illegal arms sales due to increased regulation, and bureaucratic corruption, will probably make successful implementation virtually impossible. Finally, the Conference, in its implementation, eliminates the human right to self-determination and destroys a citizen’s ability to resist violence and oppressive regimes.¹⁰ But for these defects, the Conference could have been a significant advance in the quest for tranquility among men. However, these problematic characteristics arguably render the entire Conference an exercise in futility.

The purpose of this Note is to thoroughly identify and analyze the flaws in the U.N. Conference and its Programme of Action, and to offer suggestions that would better effectuate the goal sought by the Conference. In order to achieve this goal, it is necessary to analyze the history and evolution of the Conference; this will constitute Part I of this Note. Part II will discuss the defects in particular. Part III will suggest the necessary changes that would better express the goals and results the Conference seeks to engender.

⁸ Setting the Record Straight, U.N. Conference on the Illicit Trade of Small Arms and Light Weapons (July 2001), at <http://disarmament.un.org/cab/smallarms/Facts.htm>.

⁹ UNITED NATIONS, GENERAL ASSEMBLY, PREPARATORY COMMITTEE FOR THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, REPORT OF THE GROUP OF GOVERNMENTAL EXPERTS, U.N. Doc. A/Conf.192/PC/33 (2001) [hereinafter 2001 REPORT].

¹⁰ Common sense dictates that if a society is disarmed, their ability to depose an oppressive government or otherwise change their government is diminished. See also Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty*, 1998 B.Y.U. L. REV. 137, 137 (1998).

I. HISTORY AND EVOLUTION OF THE CONFERENCE

The U.N. is no neophyte in the issue of arms control.¹¹ Yet the issues arising from the illicit trade of small arms and light weapons only became a primary focus for the U.N. in the mid-1990s.¹² The U.N. General Assembly pointed to several observations necessitating the international community to specifically target small arms. Although it is readily recognized that small arms and light weapons “do not cause the conflicts in which they are used,” they are held to be “closely related to the increased incidence of internal conflicts and high levels of crime and violence.”¹³ Small arms and light weapons are the weapons of choice for “insurgent forces, criminal gangs and terrorist groups.”¹⁴ Further, these weapons are purported to be widely used for violence that is in violation of domestic laws and international humanitarian law.¹⁵ Many allege these weapons are responsible for millions of civilian casualties.¹⁶ Moreover, there exists a strong concern over the effects these weapons have on children, many of whom are either victims of armed conflicts or are forced to become child soldiers.¹⁷

To address these concerns, in December of 1995 the U.N. issued its mandate to control “illicit” transfers of small arms and light weapons in Resolution 50/70B, which requested the Secretary-General to issue a report on (1) the types of weapons that are used in conflicts in which the U.N. is involved, (2) the “nature and causes of the excessive and destabilizing accumulation and transfer of small arms and light weapons, including their illicit production and trade,” and (3) methods to control and eliminate such accumulations and transfers of small arms and light weapons.¹⁸ Pursuant to this Resolution, the Secretary-General delivered the Report of Governmental

¹¹ See, e.g., Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137. See also TREVOR N. DUPUY, A DOCUMENTARY HISTORY OF ARMS CONTROL AND DISARMAMENT (1973).

¹² The United Nations General Assembly passed Resolution 50/70 B on December 12, 1995, giving the Secretary-General a mandate “to report on the phenomenon of small arms.” See UNITED NATIONS, GENERAL ASSEMBLY, GENERAL AND COMPLETE DISARMAMENT, U.N. Doc. A/52/298 (1997) [hereinafter 1997 REPORT].

¹³ 1999 REPORT, *supra* note 5, ¶ 12.

¹⁴ *Id.* ¶ 13.

¹⁵ See *id.* ¶ 14.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 15.

¹⁸ G.A. Res. 50/70B, U.N. GAOR 90th plen. mtg., U.N. Doc. A/RES/50/70 A-R (1995).

Experts on Small Arms ("1997 Report").¹⁹ This Report, the first of a trilogy written on small arms and light weapons, is of particular importance, for it laid the groundwork for subsequent Governmental Expert Reports, the Conference and the Programme of Action.²⁰

The 1997 Report defined "small arms" to include a wide variety of weapons, including revolvers, rifles and carbines, sub-machine guns and assault rifles.²¹ "Light weapons" comprised of light and heavy machine guns, grenade launchers, anti-tank and aircraft guns and mortars of calibers less than 100mm.²² However, the 1997 Report also stated that other weapons such as hunting rifles and "home-made weapons" were also under consideration.²³

The 1997 Report found several causes of excessive and destabilizing accumulations of small arms and light weapons. According to the Report, accumulations of small arms and light weapons become excessive when a state does not, *inter alia*, restrain productions and transfer of these weapons beyond what is needed for its own defense, when there is no exercise of control over illegal transfers, or when such weapons are used in "armed conflict . . . or other actions contrary to national or international law."²⁴ The causes cited for the accumulations ranged from internal conflicts, foreign dominations, or "violation[s] of the right to self-determination" as expressed in the Charter of the U.N.²⁵ While the 1997 Report found that the acquisition of small arms and light weapons are often the result of legal trade, it noted that the illicit trafficking of such weapons exacerbates many problems that need to be curbed.²⁶ The Report suggests that illicit trafficking "plays a major role in the violence" by "supplying the instruments used to destabilize societies and Governments, encourage crime, and foster terrorism, drug trafficking . . . and the violation of human rights."²⁷ Further, the 1997 Report stated that illicit trafficking also occurs when there is a lack of cooperation between states, when there are no national controls, or, when there are controls, there is no enforcement mechanism in place.²⁸ The 1997 Report then defines what

¹⁹ See 1997 REPORT, *supra* note 12.

²⁰ See *id.* ¶ 1.

²¹ See *id.* ¶ 26.

²² *Id.*

²³ See *id.* ¶ 28.

²⁴ *Id.* ¶ 37.

²⁵ *Id.* ¶ 40.

²⁶ See *id.* ¶ 50.

²⁷ *Id.*

²⁸ See *id.* ¶¶ 59-61.

constitutes "illicit trade." Any international trade in "conventional weapons, which is contrary to the laws of States and/or international law" is deemed illicit.²⁹

The 1997 Report then synthesizes commonalities affecting the regions in which violent conflicts arise. The Group notes that much of the violence is attributed to small and light weapons,³⁰ and, in conclusory fashion, states that "illicit trafficking in arms in some regions has violent and destabilizing effects."³¹ Finally, the 1997 Report concludes with a list of reduction and prevention measures, most of which are aimed at states in order to restrict manufacturing and transfers.³² The Group also recommended further study, noting that the U.N. should convene a "conference on the illicit arms trade in all its aspects, based on the issues identified in the present report."³³

The aforementioned "further study" was accomplished in the second installment of the trilogy of the Group of Governmental Experts Reports ("1999 Report").³⁴ While there is much overlap with the 1997 Report, the primary purpose of the 1999 Report was to determine the progress made in the implementation of the recommendations from the 1997 Report.³⁵ The report found that implementation was not uniform among states, and some recommendations had not been implemented at all.³⁶ The Group then suggested further actions necessary to curb the illicit trade similar to those in its prior report.³⁷ The 1999 Report concluded with a discussion on the objectives and scope of the previously planned Conference on the Illicit Trade in All Its Aspects.³⁸ The Group recommended that the objective of the Conference should be to strengthen legal norms at the regional, national, and global levels, and develop agreed-upon international prevention and reduction methods. Further, the group emphasized the need to mobilize the political will of the international community to control small arms and weapons, and to promote national responsibility for arms transfers.³⁹ The scope of the upcoming

²⁹ See *id.* ¶ 57.

³⁰ See *id.* ¶ 77.

³¹ *Id.*

³² See *id.* ¶¶ 79-80.

³³ *Id.* ¶ 80.

³⁴ See 1999 REPORT, *supra* note 5.

³⁵ See *id.* ¶ 2.

³⁶ See *id.* ¶¶ 73, 76, 81.

³⁷ See *id.* ¶ 94.

³⁸ See *id.* ¶ 122.

³⁹ See *id.* ¶ 126.

conference would focus on the illicit trade of small arms and light weapons that are manufactured to military specifications; other weapons would also be considered.⁴⁰

The final installment of the trilogy was the 2001 Report of the Group of Governmental Experts ("2001 Report").⁴¹ Again, there was significant overlap and repetition with the preceding reports. However, the 2001 Report evaluated a range of procedures and approaches to eliminate illicit trafficking in small arms and light weapons.⁴² In this regard, the Group stated that approaches that curb illicit manufacturing, stockpiling of surplus weapons, and the illicit trade of small arms and light weapons will cure the ills associated with these weapons.⁴³

The three Reports can be summarized as follows: first, the U.N. has attributed various evils to small arms and light weapons. Second, the U.N.'s approach to dealing with the problem of small arms is to curb the illicit trade of such weapons. Third, the method of curbing the illicit trade is to control the legal trade and manufacture of small arms and light weapons.⁴⁴ Finally, only transfers that are contrary to the laws of nations or international law are "illicit."⁴⁵ With these points in mind, this Note turns to a consideration of the Conference, with particular emphasis on the Programme of Action.

The Conference, held in March of 2001, is the culmination of years of study, as evidenced by the Reports of the Group of Governmental Experts and other memoranda.⁴⁶ This Note shall focus on the Programme of Action in all subsequent discussion, for it is the operational document of the Conference. Before discussing what the Programme of Action actually does, it is necessary to note certain relevant provisions in the Preamble. The Preamble suggests that although the Programme seeks to eradicate the illicit trade in small arms and light weapons, the U.N. nonetheless reaffirms "the inherent right to individual or collective self-defense in accordance with Article 51 of the U.N. Charter."⁴⁷ Similarly, the Programme of Action reaffirms the right to self-determination of all peoples, noting specific situations of foreign domination

⁴⁰ See *id.* at 130.

⁴¹ 2001 REPORT, *supra* note 9.

⁴² *Id.* ¶ 33.

⁴³ *Id.* ¶¶ 33, 47, 52, 59.

⁴⁴ See 1997 REPORT, *supra* note 12, ¶ 50; see also FINAL REPORT, *supra* note 2, at 10, ¶ 2.

⁴⁵ See 1997 REPORT, *supra* note 12, ¶ 57.

⁴⁶ For a more exhaustive view of the documentation leading to the Conference, see <http://disarmament.un.org/cab/smallarms> (last visited May 31, 2003).

⁴⁷ FINAL REPORT, *supra* note 2, at 7, ¶ 9 (2001).

or occupation.⁴⁸ The Preamble then states that the Conference “shall not be construed as authorizing or encouraging any action that would dismember or impair” sovereign and independent states who conduct themselves “in compliance with the principle of equal rights and self-determination of peoples.”⁴⁹ Despite these statements, the Conference does nothing for, or rather destroys, rights to preserve one’s safety from tyrants and despots. This Note will show that the Conference will likely cater to the oppressor, even when the policies set forth work in perfect harmony. This is significant, as the geographical areas at which this Conference is aimed are notorious for oppression, political assassinations, violence against civilians, and genocide.⁵⁰

The Programme of Action sets forth numerous measures to curb the “illicit” trade of small arms and light weapons at the national, regional, and global levels.⁵¹ While the proposed measures at the regional and global levels are important, subsequent discussion will focus on those measures that are operative at the national level for two reasons. First, on its face, the Conference places more emphasis on national measures,⁵² and second, the Conference’s ill effects will be most damaging at national levels.⁵³

At the national level, the Conference generally seeks to “prevent, combat and eradicate the illicit trade in small arms and light weapons.”⁵⁴ To accomplish this objective, participating states vow to undertake numerous

⁴⁸ *Id.* at 8, ¶ 11.

⁴⁹ *Id.*

⁵⁰ For example, the U.N. has made Afghanistan a special case in its crusade against “illicit” transfers. See 1997 REPORT, *supra* note 12, at 31. At the time of this U.N. report, it can hardly be maintained that the authority in Afghanistan was an enlightened protector of the rights of Afghan citizens. It is arguable that the Taliban used these small arms and light weapons as tools of oppression. It also must be noted that the Taliban employed gun control, and ended it only in the face of a U.S. attack. See *Taliban Increase Security, Threaten to Kill US Agents*, Oct. 25, 2001, A.P., available at HindustanTimes.com/nonfram/251001/dLAME20.asp [hereinafter TALIBAN INCREASE SECURITY]; see also Gregory Bluc, *Afghanistan: Geopolitics and a Festering Crisis*, Sept. 26, 2001, available at http://www.uvic.ca/~blueg/11-Sep-2001_panel.htm#Bunton. Ironically, many weapons that would be “wrongful” under the U.N. Conference were probably used by Anti-Taliban tribal groups to help end the regime’s rule.

⁵¹ See FINAL REPORT, *supra* note 2, at 10-14.

⁵² A total of twenty-two paragraphs focuses exclusively on nations, while only eighteen paragraphs are aimed at measures to be adopted at the regional and global levels. See *id.*

⁵³ It is the author’s position that the Conference’s “political” message could be utilized by heads of state to oppress its own people, partly by prohibiting them from possessing a means to defend themselves from governments and other groups, such as rebel forces operating within a state during civil uprisings. Thus, most of the damage would occur at a national level.

⁵⁴ See FINAL REPORT, *supra* note 2, at 10, ¶ 1.

measures in the Programme of Action which can be classified as measures seeking to control the illicit manufacture, trafficking, transfer, trade, possession and stockpiling of small arms and light weapons;⁵⁵ measures seeking to adequately control the legal trade, thereby reducing the illegal trade;⁵⁶ and measures that set up organizational support mechanisms for measures to combat the illicit trade.⁵⁷ This Note will discuss each type of measure in detail before any assessment on their effectiveness or desirability.

Most measures within the Programme of Action are aimed at curbing the illicit trade.⁵⁸ First, the Programme of Action states that participating States agree to put into effect legislation that will "prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients."⁵⁹ Second, the document urges States to establish national criminal offenses that penalize the "illegal manufacture, possession, stockpiling and trade of small arms and light weapons" within that State's jurisdiction.⁶⁰ Third, States are to identify groups and individuals who are involved in the illegal "manufacture, trade, stockpiling, transfer, possession, as well as financing for acquisition, of small arms and light weapons," and to prosecute those individuals under that States' laws.⁶¹ States are also expected to adopt measures to prevent the "manufacture, stockpiling, transfer and possession of any unmarked or inadequately marked weapons."⁶² Finally, States pledge to take action against any arms transfers that violate U.N. arms embargoes.⁶³

The Programme of Action also utilizes controls on the legal trade to combat the illicit market for small arms and light weapons.⁶⁴ First, States are to

⁵⁵ See *id.* at 10-12.

⁵⁶ See *id.*

⁵⁷ See *id.* at 10-12, ¶¶ 4, 5, 10.

⁵⁸ While most measures are aimed specifically at curbing the illegal trade in small arms and light weapons, there are other measures directed at legal transfers or possession. See, e.g., *id.* at 10, ¶ 9.

⁵⁹ *Id.* at 10, ¶ 2.

⁶⁰ *Id.* at 10, ¶ 3.

⁶¹ *Id.* at 10, ¶ 6.

⁶² *Id.* at 10, ¶ 8.

⁶³ See *id.* at 11, ¶ 15.

⁶⁴ Although the U.N. Report on the Conference on its face deals with "illicit" small arms and light weapons, it seems obvious that the Conference seeks to limit all transfers of such weapons. See 1997 REPORT, *supra* note 12, ¶ 78 (recommending measures to "reduce excessive and destabilizing accumulation and transfer of small arms and light weapons."); see also FINAL REPORT, *supra* note 2, at 10-12, ¶¶ 7, 9, 10.

require manufacturers within their jurisdiction to “apply an adequate and reliable marking” on all small arms and light weapons made; such markings are to identify the national origin and manufacturer of each weapon and aid in identifying and tracing the weapon after sale.⁶⁵ Further, States are to keep thorough records on the manufacture, possession, and transfer of each weapon within their jurisdiction, as well as enacting legislation to ensure that such weapons are traced.⁶⁶ Participating states also pledge to enact a strict regime of export controls on small arms and light weapons in an effort to prevent diversion of such weapons into the illegal trade;⁶⁷ this includes the use of “end-user certificates”⁶⁸ to ensure no retransfer of small arms and light weapons takes place without prior authorization of the original supplier State. Moreover, participating States are to develop adequate legislation to regulate arms broker activities, likewise aimed to curb the diversion of “legal” arms into illicit markets.⁶⁹

Other provisions, also aimed at the legal trade and possession of small arms and light weapons, provide for the destruction of surplus weapons lawfully owned by the State (which include government-seized weapons from violators)⁷⁰ and adequate management of government-controlled weapons.⁷¹

The third category of provisions within the Programme of Action can be referred to as organizational or administrative support mechanisms, designed to aid States’ efforts to combat the problems associated with small arms and light weapons.⁷² First, States vow to establish bureaucracies to provide “policy guidance” and monitoring of efforts to eradicate the illicit trade.⁷³ It is assumed that these agencies would likely be responsible for supervising the suggested licensing, record-keeping, marking, monitoring and import/export

⁶⁵ See *id.* at 10-12, ¶ 7.

⁶⁶ See *id.* at 10-11, ¶¶ 9, 10.

⁶⁷ See *id.* at 11, ¶ 11.

⁶⁸ *Id.*

⁶⁹ See FINAL REPORT, *supra* note 2, at 11, ¶ 14.

⁷⁰ See *id.* at 11, ¶ 16.

⁷¹ See *id.* at 12, ¶ 18. This provision is an attempt to address the 1997 Albanian debacle, in which protesters raided military and police depots, where some raids resulted in an 80 percent loss of total weapons holdings. Many of these stolen weapons ended up in conflict areas such as Kosovo. See Rachel Stohl & Col. Dan Smith, *Small Arms in Failed States: A Deadly Combination* (1999), available at <http://www.cdi.org/issues/failedstates/march99.html>.

⁷² These measures implement agencies, points of contact and policy direction between States. See FINAL REPORT, *supra* note 2, at 10, ¶ 4.

⁷³ See *id.*

control measures advocated by the Programme of Action.⁷⁴ States are also to set up "national points of contact," to act as a sort of arms ambassador, for information sharing among countries regarding the implementation of the Programme of Action.⁷⁵ Finally, participating States are to develop disarmament, demobilization and reintegration programs in order to eradicate the illicit trade.⁷⁶

II. FAILINGS OF THE U.N. CONFERENCE

One can concede that the Conference's objective, to secure freedom from wanton violence perpetuated by evil men, is the epitome of civilized thought, and further, that several measures set forth in the Programme of Action seem properly poised to achieve this objective. However, there seem to be several fundamental flaws within the Conference and its vehicle of implementation, the Programme of Action, which render the Conference ineffective, and perhaps could be utilized to exacerbate the violence. This, in turn, makes the document a cumulation of wasted resources, evidence of a misguided approach, and overall, a representation of the international community's failure to adequately address the problems that create threats to innocent civilians.

In particular, the flaws are several; some result from realities for which the international community as a whole cannot be responsible. Yet other flaws may be directly linked to the overly naive and idealistic mentality that is characteristic of many international activists and organizations. The Programme of Action's shortcomings can be summarized as follows: first, it is a non-binding "political" document; there are no teeth, and hence no real enforcement. Although this is a significant criticism, the unenforceability of the Conference is actually a blessing. As history indicates, disarmament can result in serious infractions of human rights.⁷⁷ Second, the Conference is ambiguous, and at times even contradictory in its definitions of "illicit" and "small arms" and "light weapons"; this undermines its authority. Third, the regime of controls and agencies advocated by the Programme of Action are accompanied by prohibitive costs that make the plan simply unfeasible, particularly for countries that are most in need of order. Finally, in certain

⁷⁴ *See id.*

⁷⁵ *See id.* at 10, ¶ 5.

⁷⁶ *See id.* at 12, ¶ 21.

⁷⁷ *See generally* JAY SIMKIN ET AL., *LETHAL LAWS* (1994); *see also* Polsby & Cates, *supra* note 7.

situations, perfect compliance with the Programme of Action would absolutely allow oppressors to commit crimes against humanity, in that the oppressed will be unarmed and unable to defend themselves. Each of these four flaws will be individually examined in the following sections.

A. Prima Facie Unenforceability

The Conference's most obvious defect is its admitted unenforceability. Indeed, it was previously recognized that the possibility of creating a legally binding measure was not likely.⁷⁸ Subsequent U.N. statements attest to this reality, noting that the Conference "will not become international law and will not result in a legally binding treaty."⁷⁹

Three factors account for the Conference's prima facie unenforceability. First, several U.N. member states are responsible for a bulk of the worldwide arms trade, and because the Conference also affects the legal trade, it would no doubt be difficult to get states who anticipate activity in arms trade to agree to restrictions on such a profitable industry.⁸⁰ For example, the five permanent members of the U.N. Security Council—the United States, Russia, China, the United Kingdom and France—are responsible for a large portion of the worldwide arms trade.⁸¹ Since the legal trade in small arms has an estimated worth of 7 to 10 billion U.S. dollars, it is no surprise that states are unwilling to succumb to controls.⁸² Other factors responsible for the Conference's unenforceability are the "lack of sufficient national experience with brokering regulations," and the lack of "agreed criteria" for such controls. These factors have made creating a legally binding document difficult to achieve.⁸³ These factors had the practical effect of regulating the Conference to a utopic

⁷⁸ See 2001 REPORT, *supra* note 9, ¶ 83.

⁷⁹ Setting the Record Straight, *supra* note 8.

⁸⁰ See, e.g., Statement by Ambassador Wang Yingfan of the People's Republic of China to the U.N., July 9, 2001, available at <http://disarmament.un.org/cab/smallarms/statements/ChinaE.html>; Statement by John R. Bolton, United States Under Secretary of State for Arms Control and International Security Affairs (July 9, 2000), available at <http://disarmament.un.org/cab/smallarms/statements/usE.html>. Both China and the United States vehemently defended its country's ability to participate in the legal trade. *Id.*

⁸¹ See Jeffrey Boutwell & Michael T. Klare, *Scourge of Small Arms*, SCIENTIFIC AMERICAN, June 2000, available at <http://www.sciam.com> (June 2000).

⁸² *Id.*

⁸³ See 2001 REPORT, *supra* note 9, ¶ 83.

'talkfest'; many human rights groups have even dubbed the Programme of Action a "Program of Inaction."⁸⁴

Several implications flow from the Conference's unenforceability. First, it appears the international community cannot adequately confront the true causes behind the rash of violence and lawlessness allegedly associated with small arms and light weapons; the conference merely seeks to treat the symptoms with a collection of unenforceable measures. This, in part, is attributable to the troubling fact that many of the leaders of the international community are unwilling to sacrifice fluctuations in their gross domestic product (GDP) to confront forces that result in the gross violations of human rights, domestic, and international law.⁸⁵ Rather, States are willing to make token statements on eradicating "illicit" transfers of small arms and light weapons, even when such "illicit" transfers make up only ten to twenty percent of all arms transfers.⁸⁶ Any efforts to eliminate the evils attributed to small arms and light weapons must attack those ills that cause most conflicts in the first instance.⁸⁷

A second implication flowing from the Conference's unenforceability is that States are willing to demonize small arms and light weapons with mere "political" measures that will not significantly alter the status quo, rather than attack root causes of the problem. Again, it cannot be over-emphasized that many commentators and criminologists agree that small arms do not "cause" the atrocities that civilized societies seek to abate.⁸⁸ Thus, the question must be asked: why do activists and governments insist on eradicating weapons as a means to solve such multifaceted problems as ethnic violence, genocide and crimes against women, children and civilians? It cannot be denied that small

⁸⁴ Human Rights Watch, *U.N.: "Program of Inaction" on Small Arms* (July 19, 2001), available at <http://www.hrw.org/press/2001/07/smallarms0719.htm>.

⁸⁵ The 1997 Report acknowledged that conflicts involving small arms and light weapons arise from "complex political, commercial, socio-economic, ethnic, cultural and ideological factors." See 1997 REPORT, *supra* note 12, ¶ 38.

⁸⁶ See SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM 165 (2001); see also Boutwell & Klare, *supra* note 81.

⁸⁷ See 1997 REPORT, *supra* note 12, ¶ 38. The international community must first deal with the admitted cause ("complex political, commercial, socio-economic, ethnic, cultural and ideological factors") rather than deal with the effects that could result in the deprivation of human rights and hinder the ability of an individual to defend themselves from oppressors.

⁸⁸ See 1997 REPORT, *supra* note 12 ("[A]ccumulations of small arms and light weapons by themselves do not cause the conflicts in which they are used."); see generally Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995).

arms and light weapons do play a part in these problems; however, a Conference that makes "illicit" transfers "super-illegal" will not solve the problems sought to be curbed. This is perhaps due to the utopic liberal ideology that is characteristic of many international activists, representatives, and NGOs dealing with firearm control issues.⁸⁹ For example, most of the NGOs and representatives emphatically support arms control measures, and arms control is most often an argument used by liberal groups in the United States and other countries.⁹⁰ Regardless, it appears the major proponents of the Conference are guided by more liberal philosophies when it comes to controlling weapons-related violence, many of which naively believe that simply issuing a "political statement" will become a first step in solving the scourge of small arms. Yet the problems associated with the atrocities committed with small arms and light weapons are far too complex to be conquered by a Conference that will only combat the "illicit trade" of such weapons.

Thus, the Conference's unenforceability displays a general inadequacy in dealing with the problems associated with the illicit small arms and light weapons trade. Further, it accentuates the fundamental flaws with the philosophy and methodology employed to deal with the real and preventable violence at issue. Unenforceability, then, is a double curse: it shows that the international community is unwilling to face the real issues regarding the problem, and it shows that the international community cannot be steadfast even with a possibly flawed plan of attack.

While the Programme of Action is not a legally binding document, however, it may work to establish international norms that will eventually become the basis of binding customary international law.⁹¹ The U.N. has asserted that although the Conference will not produce a legally binding treaty, the Conference shall reach its goals by the "promotion of international norms and cooperation to combat the illicit trafficking in small arms and light

⁸⁹ For example, of all NGOs and activists (approximately forty-one) represented at the Conference, only twelve represented gun ownership groups, and most, if not all, of the gun ownership groups only wanted to divert the Conference's focus from sporting arms. See generally UNITED NATIONS, CIVIL SOCIETY GROUPS HIGHLIGHT IMPACT OF FIREARMS INJURIES, GUN OWNERSHIP RIGHTS IN SMALL ARMS CONFERENCE DEBATE, U.N. Doc. DC/2792 (2001), available at <http://www.un.org/News/Press/docs/2001/DC2792.doc.htm> [hereinafter CIVIL SOCIETY GROUPS].

⁹⁰ See *id.* and accompanying text; see also, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 291 (2000).

⁹¹ See, e.g., LOUIS HENKIN ET AL., INTERNATIONAL LAW 54 (3d ed. 1993).

weapons."⁹² Certain norms of behavior between states can eventually become rules of customary international law.⁹³ This is generally accomplished by satisfying two elements of customary international rules of law: (1) the material element of state practice, and (2) applying to these elements the psychological element of *opinio juris sive necessitatis*.⁹⁴ A rule can become a binding principle of international law when state practice of a rule is constant, uniform, and employed for a sufficient duration,⁹⁵ and when states maintain a conviction that this practice is accepted as law.⁹⁶

Given the elements required to create binding customary international law, it is conceivable that the Conference, or at least the policies espoused, may well become binding. As states are numerous, uniform, and consistent in applying curbs on illicit transfers, and such application is of sufficient length, the material element would be met.⁹⁷

The question of *opinio juris*, however, requires more than the existence of social customs; rather, states must feel obligated to follow a custom because it is compulsory rather than discretionary.⁹⁸ Thus, states must perceive that a principle of law is legally binding before it can be considered customary international law.⁹⁹ This would certainly be accomplished, given the Conference's method of operation: participating states are to pass domestic laws aimed at curbing the illicit trade in small arms and light weapons.¹⁰⁰ Supposing that a sufficient number of participating states enact similar laws regarding illicit transfers of small arms and light weapons, compliance with such a rule will be more obligatory and less discretionary.¹⁰¹ Despite a finding of *opinio juris*, some commentators argue that *opinio juris* is unnecessary, and

⁹² Setting the Record Straight, *supra* note 8.

⁹³ See TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 65 (1998).

⁹⁴ See V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 143-44 (1997).

⁹⁵ "*Opinio juris sive necessitatis*" is defined as the conviction of states that a social habit is, according to international law, obligatory or right. See *id.* at 162-63. It is literally defined as "belief or opinion of law or of necessity." See HILLIER, *supra* note 93, at 80.

⁹⁶ *Id.* at 162.

⁹⁷ See *id.*

⁹⁸ See HILLIER, *supra* note 93, at 66.

⁹⁹ See REBECCA M.M. WALLACE, INTERNATIONAL LAW A STUDENT INTRODUCTION 16 (2d ed. 1992).

¹⁰⁰ See FINAL REPORT, *supra* note 2, at 10-12.

¹⁰¹ See HILLIER, *supra* note 93, at 66. Cf. Right of Passage Case (Port. v. India), 1960 I.C.J. 40 (Apr. 12) (stating "that practice was accepted as law by the parties and has given rise to a right and a correlative obligation").

that all that is necessary to give rise to a rule of customary international law is adequate state practice.¹⁰²

Thus, despite its *prima facie* non-binding status, the policies of the Conference may in the future become binding principles of international law. Because there is a likelihood that the principles will become binding, the Conference's potential effects on oppressive and genocidal regimes must be addressed.¹⁰³

In sum, the Conference is an ineffective tool to eliminate the illicit trade in small arms and light weapons. The ineffectiveness is due to factors such as the high value of global arms transfers, the general prohibition ideology espoused by the international community,¹⁰⁴ and the failure to strongly confront the underlying causes of violence in the modern world. Until these concerns can be adequately confronted, the impediments to achieving the goal of decreased violence and indiscriminate killing will remain.

B. Ambiguity and Contradiction

The Conference's ambiguity and inconsistency work to further discredit the Programme of Action. The ambiguity is twofold: first, the meaning of "illicit" transfers, for the purposes of control, is unclear; second, which weapons are included in the definition, of "small arms and light weapons"? A clear answer to this inquiry is difficult to find. In the 1999 Report, the Panel of Governmental Experts declared that the "primary focus of attention should be on small arms and light weapons that are manufactured to military specifications."¹⁰⁵ However, other official United Nations documents show that other arms, such as sporting rifles and shotguns, are under the purview of the requested controls.¹⁰⁶ Statements and positions of NGOs and activists, who essentially want to rid the world of all small arms and light weapons, support this

¹⁰² See DEGAN, *supra* note 94, at 173 (stating "that where a consistent practice be proved, a certain presumption may arise in favor of the existence of the *opinio juris*, so that the burden of proof lies on the opposing party" to show the usage is a result of courtesy to refute the existence of customary law); see also HILLIER, *supra* note 93, at 51.

¹⁰³ See *infra* Part II.D.

¹⁰⁴ For further discussion on the failures of prohibitory techniques to deal with such multifaceted problems, see Part III.A, *infra*.

¹⁰⁵ 1999 REPORT, *supra* note 5, ¶ 130; see also 1997 REPORT, *supra* note 12, ¶ 24.

¹⁰⁶ See 2001 REPORT, *supra* note 9, at 21 (stating that "small arms" include revolvers, self-loading pistols and rifles").

conclusion.¹⁰⁷ Thus, without explicitly stating so, the Conference seeks to regulate legal and illegal transfers of all small arms and light weapons, not just those that are primarily military weapons.¹⁰⁸ No statements regarding a focus on military-style weapons appear in the Final Report of the United Nations Conference on the Illicit Trade of Small Arms and Light Weapons in All Its Aspects.¹⁰⁹

This particular ambiguity is significant in that it mars the credibility of the Conference in terms of focus and philosophy. It displays the failure of participating states to focus on the primary problem: military-style weapons.¹¹⁰ Further, it again shows the international community's naive view that simply controlling all small arms and light weapons by government force will make the problem go away. Instead of proposing measures narrowly tailored to stop the violence, it instead trumpets sweeping abolitionist measures characteristic of ultra-liberal anti-gun proponents. The Conference thus appears to be not just a stance against violence and oppression, but merely another anti-gun political statement.

While all weapons could be suspect when the international community seeks to deal with tyrants, terrorists, criminals and drug cartels, a majority of the arms used to commit the acts sought to be curbed are within the distinct category of military-style weapons.¹¹¹ However, the Conferences' ambiguous

¹⁰⁷ See CIVIL SOCIETY GROUPS, *supra* note 89. IANSA, a NGO participating in the Conference, seeks to eliminate "the conditions that foster reliance on private arms for self defense" and to create "norms of non-possession." See *IANSA Purpose and Objectives*, available at <http://www.iansa.org/about/M1.htm#1> (2003). Further, the title of one publication located on the United Nations' Small Arms Conference Website best exemplifies the international attitude towards *all* small arms: "[l]et's Go Out Into the World and Gather Up The Small Arms." See Mark Malloch Brown & Jayantha Dhanapala, *Let's Go Out Into The World And Gather Up The Small Arms*, INT'L HERALD TRIB. Jan. 26 2000, available at <http://www.iansa.org/mission/newspub/dhanapala.htm>.

¹⁰⁸ See 1999 REPORT, *supra* note 5, ¶ 130; see also 2001 REPORT, *supra* note 9, at 21.

¹⁰⁹ See FINAL REPORT, *supra* note 2. Initially, the U.N. was to focus on weapons manufactured to military specifications; however, this focus was somehow lost in the transition to the Final Report. See 1997 REPORT, *supra* note 12, ¶ 8.

¹¹⁰ See, e.g., Small Arms Proliferation—The Next Disarmament Challenge, Worldwatch Press Release on Small Arms Proliferation (Oct. 25, 1997), available at <http://www.worldwatch.org/releases/pr971025.html>.

¹¹¹ See *id.*; see also 1999 REPORT, *supra* note 5, ¶ 130; see also Joost Hiltermann & Loretta Bondi, State Responsibility in the Arms Trade and the Protection of Human Rights, For the Workshop on Small Arms, organized by the Government of Switzerland, Geneva, February 18-20, 1999, available at <http://www.hrw.org/campaigns/mines/1999/geneva-0299.htm> (stating that in many cases of human rights violations, the perpetrators used military surplus weapons shipped

definition, which encompasses virtually any type of weapon, presumably including family heirlooms and sporting firearms, undermines its focus and sacrifices the political capital that is needed to craft a legally binding document that will curb the wrongful violence perpetuated by criminals, despots and terrorists.¹¹²

The second critical ambiguity is the definition of “illicit” transfers that are subject to the proposed measures. At first blush, the meaning seems relatively apparent; the definition of an “illicit transfer” is specifically defined transfers, constituting “international trade in conventional weapons, which is contrary to the laws of States and/or international law.”¹¹³ The ambiguity lies not in its semantics, but rather in its consequences. For example, the Taliban, under the leadership of Mullah Mohammed Omar, vowed to guarantee a peaceful and secure community on the condition that citizens agree to surrender their arms.¹¹⁴ Once the Taliban was firmly in power, the regime committed gross violations of human rights on disarmed constituents, such as the murder of civilians¹¹⁵ and minorities, requiring minorities to wear identification,¹¹⁶ and the oppression of women.¹¹⁷

As the Taliban had prohibited civilian possession of firearms, the supporting of actors that may wish to improve human rights by supplying those oppressed with firearms to oust undemocratic and corrupt governments, would

from other states); *see also* Christopher Carle & Patricia Lewis, *Removing Military Weapons From Civilian Hands*, UNDIR Geneva, August 2000, *available at* <http://www.fas.org/asmp/campaigns/smallarms/disus.htm>.

¹¹² For example, the United States has stated that the use of firearms for hunting and sport shooting are a “legitimate aspect of national life” [in the United States] and that it would not support measures that abrogate these acceptable uses of firearms. As the U.S. is a worldwide leader in the firearms industry, any binding international measures may have to acknowledge these concerns. *See* Statement by John R. Bolton, *supra* note 80; *see also* CIVIL SOCIETY GROUPS, *supra* note 89, at 7.

¹¹³ 1997 REPORT, *supra* note 12, ¶ 57.

¹¹⁴ *See* Indira Lakshmanan, *How Omar Led Taliban to Power, Then Defeat*, BOSTON GLOBE, Dec. 9, 2001, at A1; *see also* TALIBAN INCREASE SECURITY, *supra* note 50.

¹¹⁵ *See* Press Release, Human Rights Watch, Afghanistan: Taliban Massacres Detailed (Feb. 19, 2001), *available at* <http://www.hrw.org/press/2001/02/afghan0219/htm>.

¹¹⁶ *See* Press Release, Human Rights Watch, Afghanistan: Taliban ID Policy Creates Second-Class Citizens (May 24, 2001), *available at* <http://www.hrw.org/press/2001/05/afghan-0524.htm>.

¹¹⁷ *See* Meri Melissi Hartley-Blečić, *The Invisible Women: The Taliban's Oppression of Women in Afghanistan*, 7 ILSA J. INT'L & COMP. L. 533, 534 (2001) (stating that “women are prohibited from obtaining employment outside the home, obtaining a formal education, leaving their homes without a male family member to chaperone them, obtaining medical treatment, and appearing in public without being completely covered by a burqa”).

be contrary to the Conference.¹¹⁸ This presents an irony in that humanitarian groups, who almost universally advocate the end of illicit arms transfers, would also inadvertently support measures that may prolong the oppression (i.e., by preventing groups from obtaining the necessary arms to oust their oppressor).¹¹⁹ Secondly, the flexibility of the term "illicit," if this definition survives the transition from proposed measures to adoption in legally binding instruments, may be so amorphous that it can be used to actually aid oppressive regimes. This position, also advocated by the United States,¹²⁰ has significant merit in light of the frequency of modern-day genocides and oppression.¹²¹

Thus, the Conference's ambiguity in scope and definition pose some substantial problems in any efforts to achieve any appropriate consensus on how to minimize and eliminate the predominant concerns of the international community, including civilian deaths, oppression and genocide. The Programme of Action's definitional problem of what constitutes a "small arm" evidences the international community's inadequacy in focusing on the problem weapons (i.e., military weapons), and further exemplifies the ultra-liberal position that is unlikely to achieve universal support.

C. Implementation Difficulties

The measures advocated by the Conference's Programme of Action will also likely fall prey to difficulties of implementation. The likelihood of

¹¹⁸ A likely counter-argument would be that since the Taliban was not widely recognized as a government, it would not be subject to the definition of "illicit" within the meaning of the conference, as it is not a "State." Such a position would complicate solutions, as the distinction between the doctrines associated with the recognition of "states" (i.e. Afghanistan) rather than "governments" (i.e. the Taliban) is a rather murky and unresolved issue. See Thomas D. Grant, *An Institution Restored?*, 39 VA. J. INT'L L. 191 (1998) (reviewing MARTHA J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STARE PRACTICE, 1815-1995* (1997)); see also M.J. Peterson, *Recognition of Governments Should Not Be Abolished*, 77 AM. J. INT'L L. 31 (1983). Nevertheless, such arguments are without merit, for numerous countries could have provided a similar example for the purposes of this Note (i.e. Nazi Germany, Cambodia, etc.); Afghanistan was chosen because of its currency, to display that such atrocities still occur today.

¹¹⁹ Cf. Virginia Hart Ezell, *U.N. Confab Oks Global Curb on Small Arms*, available at <http://www.nationaldefensemagazine.org/article.cfm?id=618>.

¹²⁰ See Statement by John R. Bolton, *supra* note 80.

¹²¹ See Polsby & Kates, *supra* note 7, at 1238 (quoting Elie Wiesel, who stated that "this century has been the most violent in recorded history. Never have so many people participated in the killing of so many people.").

corruption, fueled by profit-making motives, as well as the limited resources of targeted states and the absence of the rule of law in those states, makes implementation improbable.

First, profit and corruption will likely be obstacles for implementation. Typically, arms transfers occur in one of four ways: stable state to stable state, stable state to unstable state, unstable state to unstable state, and the diversion of transfers of both stable and unstable states to unintended areas.¹²² Although the first path may have consequences towards which the Conference is directed, it is clear that the Conference's focus is directed at the second, third and fourth types of transfers.¹²³

The Programme of Action's measures would certainly be successful, if implemented, at curbing or eliminating stable state to stable state transfers. Stable states typically enjoy the benefits of an established legal system, accountability, and external diplomatic relations, for example, to ensure performance. However, in the latter methods of transfer, these characteristics are often absent. In many countries experiencing intra-state conflicts, arms strategies are "vague or non-existent due to the absence of any recognisable government."¹²⁴ Similarly, a vicious cycle of arms transfers often occurs in African conflicts, where newly formed "governments" willingly transfer arms to rebel forces in neighboring countries already experiencing civil unrest. For example, civil war in Liberia resulted in a victory for warlord Charles Taylor; he successfully toppled the existing government, although fighting subsequently continued.¹²⁵ Once in power, he transferred arms to an ally who was engaged in civil strife in neighboring Sierra Leone.¹²⁶ It would be incredible to maintain that unstable countries such as these will adopt, implement, and maintain the arms controls proposed. Any measure to contain unstable to unstable state arms transfers must focus on the root problems of "inequality, poverty, corruption," and "political lethargy," rather than the effects of such

¹²² For the purposes of this Note, the phrase "stable states" is defined as states operating under a well-established rule of law, affording consistent protection to their citizens and devoid of sovereignty-threatening civil strife.

¹²³ This is supported by a focus on states dealing with insurgency and its after-effects. See, e.g., 1997 REPORT, *supra* note 12, ¶¶ 13-16, 19, 40-52.

¹²⁴ See Lt. Commander A.L. Siew, *Arms Control: The Panacea of Small Arms and Light Weapons Proliferation?* (1997), available at <http://www.cfcsc.ca/irc/nh/nh/9798/0079/html>; see also Stohl & Smith, *supra* note 71.

¹²⁵ See Boutwell & Klare, *supra* note 81.

¹²⁶ See *id.*

problems.¹²⁷ To treat only the effects would be to prolong the underlying problems.

The Conference has sought to deal with this issue by proposing that member states impose measures to prevent unstable to unstable state transfers. At the national level, the Conference seeks to penalize "illegal" transfers among states; narrowly tailored, such measures should eliminate unstable to unstable state transfers, presuming originating states will classify transfers to common diverter states as illicit, and enforce the measures appropriately.¹²⁸ In addition, other measures are aimed at preventing the diversion of small arms into trouble areas; these include a marking system¹²⁹ and end-user certificates,¹³⁰ which attempt to keep track of unaccounted-for arms transfers. Further, the Programme of Action's regional measures are relevant here. At the regional level, the participating states pledge the "strengthening and establishing" of moratoria or similar initiatives aimed at conflict zones or otherwise unstable governments in order to prevent arms diversion.¹³¹

As noted, curbing the illicit arms trade will be futile if success depended on unstable states for enforcement. Thus, any improvement must come from stable states, as most small arms originate in stable states.¹³² However, it will be difficult to depend on these states. First, due to numerous factors,¹³³ the States predominantly responsible for most small arms will most likely be unwilling to cut back on the arms export industry.¹³⁴ A prevalent example is the United States. The U.S. has long been a world leader in arms exports (including conventional weapons),¹³⁵ and is among the world leaders in small

¹²⁷ See Siew, *supra* note 124.

¹²⁸ See FINAL REPORT, *supra* note 2, at pt. II, ¶ 6.

¹²⁹ *Id.* ¶ 7.

¹³⁰ *Id.* ¶ 12.

¹³¹ *Id.* ¶ 26.

¹³² See Boutwell & Klare, *supra* note 81; see also Lucien J. Dhooge, *We Arm the World: The Implications of American Participation in the Global Armaments Trade*, 16 ARIZ. J. INT'L & COMP. L. 577 (1999).

¹³³ Part II.D of this Note specifically addresses the U.S. position on supplying arms to rebels or civilians to aid in fighting a repressive government.

¹³⁴ For example, China, Russia, and the United States, all of which rank in the top five of the World Military Expenditures and Arms Experts Report (see *infra* note 135), are unwilling to agree to limits on their respective arms export industries. See 1999 REPORT, *supra* note 5, at 8, 16, 20; see, e.g., Statement by John Bolton, *supra* note 80; Statement by Ambassador Wang Yingfan, *supra* note 80.

¹³⁵ See U.S. DEPT. OF STATE, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 3 (1998), available at http://www.state.gov/www/global/armsbureau_ac/wment98.html.

arms manufacturing.¹³⁶ The United States has maintained its position as a global leader in exports despite its clients' involvement in oppression and conflict. In 1997, for example, the United States supplied arms to countries such as Saudi Arabia and Israel; Israel is continuously involved in armed conflict, and Saudi Arabia is not particularly known for its human rights policies.¹³⁷ Another glaring example concerns Turkey. In 1997, the United States banned light weapons sales to Turkey because of the likelihood that they could be used "to repress a civilian population."¹³⁸ Nevertheless, the State Department approved an export to Turkey of materials for the manufacture of ammunition, carbines and pistols in excess of five million U.S. dollars worth.¹³⁹ From 1995 to 1997, Turkey received a total of 3.1 billion U.S. dollars in U.S. arms exports.¹⁴⁰ With total arms exports in that same period reaching 77.8 billion U.S. dollars, it is hardly surprising that the United States is hesitant to join a consensus on a document that affects a profitable industry.

Second, even presuming that states are willing to help, profit and corruption cannot be eliminated; in fact, prohibitions will actually increase the profit margin and induce even further corruption. Hypothetically, substantial compliance with the Programme of Action's measures would result in a reduction in the illicit arms trade. Elementary economic principles teach us that the obvious consequence will be a consummate increase in price, which will further result in increased profiles.¹⁴¹ High profitability may therefore drive the illicit trade in small arms and light weapons to heights even greater than those before the Conference's measures are in place.¹⁴²

¹³⁶ See *Report on Small Arms Issued by Belfer Center*, HARV. UNIV. GAZETTE, Dec. 16, 1999, available at <http://www.news.harvard.edu/gazette/1999/12.16/belfer.html>.

¹³⁷ See Lora Lumpe, *The Leader of the Pack*, BULLETIN OF THE ATOMIC SCIENTISTS, January/February 1999, vol. 55, no. 1, available at <http://www.thebulletin.org/issues/1999/jflumpe.html>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See U.S. DEPT. OF STATE, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1998, Fact Sheet Released by Bureau of Verification and Compliance, Aug. 21, 2000, available at <http://www.fas.org/man/docs/wmeat98/wmeat98fs.html>.

¹⁴¹ See, e.g., HUBERT HENDERSON, SUPPLY AND DEMAND 15 (1958) (stating that "[w]hen . . . demand exceeds supply, the price tends to rise"); see also DESERPA, MICROECONOMIC THEORY 22 (1998) (stating that "when supply decreases . . . price increases and quantity decreases").

¹⁴² Keep in mind, the Conference seeks to make illicit transfers more difficult to achieve than before. Imposing greater roadblocks in the black market will up the ante in profitability because of the greater risks that accompany participation in that market. See S.K. RAY, ECONOMICS OF THE BLACK MARKET 9, 11, 17 (1981); see also DESERPA, *supra* note 141, at 29 (1998) ("[T]he black market price also reflects cost increases incurred in an effort to evade the law."). Further,

High profitability, characteristic of the small arms/light weapons trade, also fosters corruption. Official corruption is almost universal, and is not necessarily confined to "unstable" states; government corruption is so prevalent that many organizations are calling for a convention to eradicate it.¹⁴³ Already, the small arms trade is wrought with corruption at various levels of government. In Argentina, former President Carlos Menem was indicted for allegedly selling 100 million U.S. dollars worth of explosives and light weapons.¹⁴⁴ Additionally, a scandal recently erupted in South Africa, where African National Congress members were accused of receiving kickbacks and other official wrongdoing in connection with a \$5.5 billion U.S. dollars arms procurement contract.¹⁴⁵

The Conference, in this respect, utterly fails. The Programme of Action, which employs measures to curb an already illegal transaction, will merely exacerbate the corruption aspect of the small arms/light weapons trade. Further reducing the supply of arms will undoubtedly render the trade even more lucrative for traffickers.¹⁴⁶ This is not to suggest that the international community should ignore illicit arms transfers; rather, it should be a clear signal that merely making the traffickers' already nefarious trade more profitable will not suffice. It is certain that the most effective approach to the problem is to decrease the demand for small arms and light weapons, or at least reduce the need to use these weapons. Thus, the international community must confront the root problems that create the need for small arms and light weapons, such as undemocratic institutions, inequality, oppression, and genocide. Dealing with these issues will be difficult, but without these solutions, any successful curbs on the current illicit trade will be an illusory accomplishment—a meaningless trophy to place on the international mantle. Curbing arms production will not decrease demand, and will not destroy the

for a historical example of failures of this method of regulation, see Erik G. Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483 (1997) (discussing the American "War on Drugs").

¹⁴³ See Press Release, United Nations, With Strong Political Will, Governments Could Develop U.N. Convention Against Corruption By 2003, Third Committee Told (Oct. 15, 2001) (on file with author).

¹⁴⁴ See Howard LaFranchi, *Small Wars, Small Arms, Big Graft*, CHRISTIAN SCI. MONITOR, July 10, 2001, at 12.

¹⁴⁵ See *id.*

¹⁴⁶ See RAY, *supra* note 142, at 17 (stating that "with the increase in potential risks on the investment coefficient, the profits will increase or decrease mostly on the extent of risk-taking").

root causes of destabilizing accumulations of small arms and light weapons: inequality and oppression.

D. Small Arms Control, Oppression, and Genocide

The Conference's most obvious failing is that it can be used by oppressors and tyrants to commit genocide and other violations of human rights. The Conference seeks to curb and eliminate all "illicit" transfers of small arms and light weapons, where "illicit" refers to international transfers which are "contrary to the laws of states and/or international law."¹⁴⁷ Member states to the Conference who approve of the Programme of Action are to undertake various measures¹⁴⁸ to "prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects."¹⁴⁹ These measures can then become one of the many implements of oppression in the tyrant's toolbox; the despot can merely declare that his constituents are forbidden under national law to possess "small arms and light weapons," which includes a vast range of firearms, from the common revolver, to AK-47s and anti-aircraft missile systems.¹⁵⁰ Once unarmed, any portion of the populace that is deemed undesirable, including ethnic groups or political opponents, could become easy targets for oppressive regimes.

Although many would characterize such a scenario as a conspiracy theorist's fantasy, oppression, genocide, and political disappearances have become scènes à faire of human civilization. The twentieth century has been particularly violent; some have suggested that it should be referred to as "the age of genocide, since the genocides of this century have killed more than four times as many people as all the wars and revolutions of the same time period combined."¹⁵¹ Governments or other authoritarian regimes have been the predominant perpetrator of genocides and mass murder during the same period.¹⁵² While the exact numbers of deaths may still be at issue, one commentator has stated that "during the first eighty-eight years of this century, almost 170 million men, women, and children have been shot, beaten, tortured,

¹⁴⁷ See 1997 REPORT, *supra* note 12, ¶ 57.

¹⁴⁸ See Part I of this Note, *infra*, for a discussion on the particular measures employed by the Programme of Action; see also FINAL REPORT, *supra* note 2.

¹⁴⁹ See FINAL REPORT, *supra* note 2, at 10.

¹⁵⁰ See 1997 REPORT, *supra* note 12, ¶ 26.

¹⁵¹ ALEX ALVAREZ, GOVERNMENTS, CITIZENS AND GENOCIDE: A COMPARATIVE AND INTERDISCIPLINARY APPROACH 10 (2001).

¹⁵² See *id.* at 57.

knifed, burned, starved, frozen, . . . buried alive, drowned, hung, bombed or killed" by governments.¹⁵³ Combining war casualties, the estimated deaths attributable to governments in this century is approximately 203 million.¹⁵⁴ To put this number in perspective, if these victims "were laid out head to toe, assuming each to be an average of five feet tall, they would reach from Honolulu, Hawaii," across the Pacific and the continental United States to Washington D.C., "*and then back again almost twenty times.*"¹⁵⁵

The relevance of these grim figures to the Conference is obvious. Governments are presumably responsible for ensuring the safety and security of their citizens. Many existing governments thus pass weapons control measures to ensure safety from harm. With the exception of some states, such as the United States and Switzerland, "gun control" is a popular trend, and has received almost unanimous support in international circles.¹⁵⁶ However, gun control laws, including those urged by the Programme of Action, can become fatal or oppressive when administered by tyrannous governments.

A few examples can illustrate the tragic consequences that could result from states' adherence to the policies and measures contained in the Programme of Action. First, consider the small arms/light weapons controls employed by Nazi Germany and the Soviet Union. Prior to the Nazi rise to power, the Weimar Republic instituted a comprehensive gun control law which instituted strict licensing, registration, and marking regulations.¹⁵⁷ Thus, although "law-abiding firearms owners were known to the authorities," the "authority" in Germany was, unfortunately, the Nazi Party. Once the Nazis were firmly in power, on March 18, 1938, Germany passed the Weapons Law, which introduced further controls on civilian ownership of firearms; the Law specifically prohibited Jews from operating businesses involved in the manufacture of firearms and weapons,¹⁵⁸ and explicitly prohibited the issuance of firearms permits "to Gypsies, or to persons who are itinerant like Gypsies."¹⁵⁹ Moreover, issuance of permits to acquire or carry firearms was highly discretionary in that they were only granted to "persons of undoubted reliability, and only if a demonstration of need [was] set forth."¹⁶⁰ Of course,

¹⁵³ R.J. RUMMEL, *DEATH BY GOVERNMENT* 9 (1994).

¹⁵⁴ *See id.* at 13.

¹⁵⁵ *Id.* (emphasis in original).

¹⁵⁶ *See, e.g.,* CIVIL SOCIETY GROUPS, *supra* note 89 and accompanying text.

¹⁵⁷ *See* SIMKIN ET AL., *supra* note 77, at 151.

¹⁵⁸ Waffengesetz, v.18.3.38 (RBGL S.265).

¹⁵⁹ Waffengesetz, v.18.3.38 (RBGL S.267).

¹⁶⁰ *Id.*

Nazi Party members were exempt from these requirements.¹⁶¹ It is not unreasonable to infer, therefore, that Jews were likely excluded from firearms ownership as the strength of the Nazi party grew.¹⁶² In the end, the Nazis exterminated at least six million Jews and 258,000 Gypsies.¹⁶³

Germany's quest for a "final solution" took an interesting turn with Germany's invasion of the Soviet Union. In 1918, Vladimir Lenin passed into law a decree of the Council of People's Commissars, which required that all firearms and ammunition were to be surrendered to the government.¹⁶⁴ As in Germany, members of the Communist Party were exempt.¹⁶⁵ Later, in 1920, Lenin signed a decree imposing severe restrictions on firearms possession.¹⁶⁶ As Lenin's successor, Joseph Stalin, gained power, penalties for unauthorized possession of firearms were increased significantly, and penalties for unauthorized possession of knives were introduced. Article 58 was soon thereafter passed,¹⁶⁷ imposing the death penalty for a wide range of infractions: these included actions considered "counter-revolutionary" (Art. 58(1)); rendering assistance to any opposition to communism (Art. 58(4)); or distributing "propaganda or agitation containing an appeal to overthrow, undermine, or weaken the Soviet authority or to commit individual counter-revolutionary crimes" (Art. 58 (10)).¹⁶⁸ While Article 58 was in effect, the Communist regime was seizing property from farmers and eliminating any political opponents that frustrated Stalin's industrialization plans to finance the Communist experiment.¹⁶⁹

The interesting interaction between the oppressive regimes of the Soviet Union and Nazi Germany occurred during the German invasion of the U.S.S.R. As the Nazis invaded, special units called *einsatzgruppen* were devised for the sole purpose of eliminating undesirable persons (i.e. Jews and Gypsies).¹⁷⁰ Although the *einsatzgruppen* units were small, their Soviet Jewish and Gypsy

¹⁶¹ *Id.*

¹⁶² See SIMKIN ET AL., *supra* note 77, at 153.

¹⁶³ See RUMMEL, *supra* note 153, at 112. Although many historians disagree on the exact Jewish death toll, six million is a mid-range estimate. *Id.*

¹⁶⁴ See SIMKIN ET AL., *supra* note 77, at 98.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* at 101.

¹⁶⁸ *Id.* at 136-43.

¹⁶⁹ See *id.* at 101-04.

¹⁷⁰ See *id.* at 157; see also Allan Ryan, Judgments on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors, 16 B.C. THIRD WORLD L.J. 193, 199 (1996) (Comments of Whitney Robson Harris).

victims (who sometimes outnumbered their captors by ten to one) provided little resistance as the victims were "unarmed, bewildered, and followed orders."¹⁷¹ Given the widespread oppression and strict weapons control statutes existing in the Soviet Union, it is not surprising that these victims were unarmed and unable to defend themselves, not only against home-grown tyrants, but also against foreign invaders.

The Soviet Union and Nazi Germany are only convenient examples, as information relating to their brutal regimes and their genocidal and political murders have been researched thoroughly. Other examples of government-perpetuated mass murder include Turkey under the Ottoman Empire, Communist China, Guatemala, Uganda, Cambodia,¹⁷² Bosnia and Rwanda.¹⁷³ These examples relate only to twentieth century *genocides*; this list does not include regimes that oppress their people in other forms.¹⁷⁴

The policies and measures contained in the Programme of Action would have disallowed any arms transfers to any of the above-mentioned states for groups who are resisting their oppressive governments.¹⁷⁵ While there are many mitigating statements contained in the Programme of Action's preamble regarding "inherent rights to individual or collective self-defense in accordance with Article 51 of the U.N. Charter"¹⁷⁶ and the "reaffirmance of the right of self-determination of all peoples," the protection of these rights is illusory.¹⁷⁷ It is unavoidable that if these measures are enacted as national law, or even established as international norms, international arms transfers to individuals or groups seeking to fight oppression in a state which has outlawed their possession would be contrary to law. Any arguments to the contrary would either be unrealistic, or would expose the Conference's fundamental faults.¹⁷⁸

¹⁷¹ See SIMKIN ET AL., *supra* note 77, at 157.

¹⁷² See *id.* at 77.

¹⁷³ See Helen Fein, *Testing Theories Brutally: Armenia (1915), Bosnia (1992), and Rwanda (1994)*, in *STUDIES IN COMPARATIVE GENOCIDE 157* (Levon Chorbajian & George Shirinian eds., 1999).

¹⁷⁴ Afghanistan is a graphic example. See *supra* notes 114-17 and accompanying text.

¹⁷⁵ The Programme of Action asks participating states to "place adequate laws . . . within their area of jurisdiction . . . in order to prevent . . . [small arms and light weapons] diversion to unauthorized recipients." FINAL REPORT, *supra* note 2, at 10, ¶ 2. To use Nazi Germany as an example, a shipment of arms to German Gypsies by another country would be a "diversion to unauthorized recipients." *Id.*

¹⁷⁶ FINAL REPORT, *supra* note 2, at 7, ¶ 9.

¹⁷⁷ See *id.* at 8, ¶¶ 9, 11.

¹⁷⁸ An argument could be made that states would recognize a state which is oppressive and would, due to conscience, allow arms shipments to opposition fighters in that country. This

Further, to argue that arms embargoes would rectify a state's oppressive practices misses the point; the embargoes would come too late to curb the violence. By the time the oppression has occurred, the tyrannous state will most likely be already armed, its citizens unarmed, and the damage already inflicted. This is a most unsatisfactory approach to curbing violence.

In sum, the prevalence of genocide and politicide as methods of state policy in the twentieth century show that summarily disarming the public could prove costly. Until the international community can employ methods that reduce or eliminate the occurrence of these crimes, a more humane approach would be to at least give victims a fighting chance; access to small arms and light weapons not only give victims a defense, but may also end oppression before widespread warfare ever takes place.¹⁷⁹

III. RECOMMENDATIONS

While the Conference's goals and concerns undoubtedly require the attention of the international community, any successful effort to curb the proliferation of conflicts, violence, oppression and civilian casualties requires more than the simplistic idea of summarily disarming the public. Unfortunately, this is the sole agenda of the U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. It appears that the Conference is aimed at curbing not only "illicit" transfers, but also legal transfers. It is also apparent that "small arms and light weapons" are a deceptively broad category, including practically any implement that could be used to inflict harm on another. Significant effort would be helpful, first, in evaluating the philosophy of disarmament as a realistic method of achieving peace, and secondly, in acknowledging that more permanent and reliable methods are available (although they may well be costly and tedious), to solve the problems which prompted the Conference.

position inevitably shows that the policy of unilateral acquiescence to citizen disarmament is not the solution to ending human rights violations.

¹⁷⁹ Polsby & Kates, *supra* note 7, at 1267-69 (stating that despite attempts to disarm African-Americans in the southern United States, the fact that African-Americans were arming themselves in self-defense forced police intervention, and eventually encouraged "decent citizens in the majority community to come to their aid").

A. Rethinking Weapons Control as an Effective Peace Policy

Total disarmament, that is, the disarming of governments and civilians, is both impractical and dangerous. First, disarming governments would not initially be uniform, partly for fear there would be no reciprocity (the disarmed government would be vulnerable to other governments which had not been disarmed), and partly because in order to achieve enforcement, some entity must actually enforce. This would realistically involve the use of firearms to command compliance. Non-uniform disarmament would also create power vacuums that would likely cause opportunistic conquests. Second, focusing disarmament measures against civilians would be an invitation to corrupt and oppressive governments, as there would be no check on government abuses. Firearms can be regulated to minimize accidental deaths, and persons predisposed to violence can be prevented from possessing firearms by the rule of law; but, oppressive regimes do not dissolve by request or statute. It is unwise to prevent innocent civilians from defending themselves by vilifying firearms as the root of all evil.

Further, any regulatory regime that attempts to reduce the supply of an item without reducing the demand is doomed to fail; one such example involves the United States' efforts to eliminate alcohol and drug consumption.¹⁸⁰ The result of any efforts to eliminate "illicit" trafficking in small arms and light weapons will only make the business more profitable for corrupt brokers and criminal organizations. Reducing the supply of firearms to persons desperate to eliminate tyranny without decreasing the demand is irrational and could pose a threat to human life.¹⁸¹ However, the demand for firearms to protect a person's life, liberty and property from criminals and other oppressors can never be completely eliminated, as power is an ultimate corruptor. Instead, the international community should work to eliminate instances requiring legitimate firearms use, such as curbing the root causes of inequality and oppression. It would be a tragic mistake to deprive citizens of their right to resist oppressive governments until the international community can eliminate such conditions.¹⁸²

¹⁸⁰ See, e.g., Luna, *supra* note 142, at 517-23 (explaining concepts of supply-side and demand-side economies).

¹⁸¹ Cf. *id.*, *supra* note 142, at 518-23 (analogizing the same problem with the supply and demand of illicit drugs).

¹⁸² The 1997 Report acknowledged that conflicts involving small arms and light weapons arise from "complex political, commercial, socio-economic, ethnic, cultural and ideological factors." See 1997 REPORT, *supra* note 12, ¶ 38.

B. Narrowing the Scope of the Programme of Action

To overcome the deficiencies already addressed in this Note, it is necessary to narrow the Conference's focus on problem areas without simultaneously reducing a citizens' ability to resist oppressive governments or regimes. First, the blanket statement declaring that measures should be implemented to "prevent manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients" should be discarded or at least qualified.¹⁸³ This can be achieved by language that would allow shipments of small arms and light weapons to persons under serious persecution or oppression by state or non-state actors, despite its legality under the oppressing government's laws. Because citizens are already deprived of their inherent rights to collective and individual self-defense provided in Article 51 of the United Nations Charter, and because rights of self-determination are diminished by a national law, disallowing possession of small arms and light weapons would effectively deny these rights under the sanction of international law.¹⁸⁴

Secondly, the Programme of Action should not advocate that states should "establish as criminal offenses under their domestic law the illegal . . . possession . . . of small arms and light weapons within their areas of jurisdiction."¹⁸⁵ To "reaffirm" rights to individual or collective self-defense under Article 51, and to the right of self-determination, and then request that states criminalize the possession of the very items necessary to exercise this right, is absurd. Of course, firearms are not the only method through which one can assert one's rights to self-defense and self-determination.¹⁸⁶ One may resort to civil disobedience, civil resistance, or violent resistance.¹⁸⁷ However, when civil disobedience or civil resistance would be risky or futile, armed resistance may be the only option short of acquiescing to oppression.¹⁸⁸

Finally, there should be more focus on illegal arms brokers to reduce the problems resulting from the use of small arms and light weapons by oppressors and violators of the law. In this respect, the international community must be encouraged to pursue this route of regulation. The Programme of Action

¹⁸³ FINAL REPORT, *supra* note 2, at 10, ¶ 2.

¹⁸⁴ U.N. CHARTER art. 51.

¹⁸⁵ FINAL REPORT, *supra* note 2, at 10, ¶ 3.

¹⁸⁶ See Rachael E. Schwartz, *Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights Under International Law*, 12 B.U. INT'L L.J. 255, 296 (1994).

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

already contains a provision requesting participating states to "develop national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering."¹⁸⁹ This is a step in the right direction. A majority of arms transfers to conflict zones and regimes that abuse human rights are facilitated by arms brokers.¹⁹⁰ Arms brokers are often responsible for diversion of legal arms transfers to oppressive regimes and rebel forces, which then use these arms to commit gross violations of human rights.¹⁹¹

A blanket statement condemning brokering cannot be satisfactory or effective, however. Any limitation on brokering must be tempered with the ideal that citizens have the absolute right of self-protection and self-determination,¹⁹² particularly when such citizens are in danger of oppression. Such citizens should be allowed to possess firearms to protect their life, liberty and property, regardless of where those firearms originated. Thus, the international community should work to adopt measures that seek to pierce the veil of secrecy that shrouds arms brokers, only to ensure that small arms and light weapons do not end up in the hands of oppressors, criminals or terrorists. Yet, until such tyrants and criminals remain at large, it would be absolutely inhumane to permit citizens to face an arbitrary executioner unarmed.

Obviously, measures to curb iniquitous brokers will be difficult to implement. Overseas investigations of broker misconduct and extradition make extraterritorial enforcement of such provisions extremely difficult.¹⁹³ Evidence gathering and exchange between countries pose additional problems.¹⁹⁴ However, given the various worldwide efforts mobilized to combat unchecked brokering activities, hopefully the international community can resolve the issue.¹⁹⁵

¹⁸⁹ FINAL REPORT, *supra* note 2, at 11, ¶ 14.

¹⁹⁰ See Elise Keppler, *Preventing Human Rights Abuses By Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act*, 19 BERKELEY J. INT'L L. 381, 388 (2001).

¹⁹¹ See *id.*

¹⁹² See U.N. CHARTER art. 51; see also FINAL REPORT, *supra* note 2, at 7-8.

¹⁹³ See Keppler, *supra* note 190, at 389.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* at 406.

C. *Reliable Methods of Achieving Peace*

The most realistic and promising method of reducing the amount of casualties resulting from small arms and light weapons use is the promotion of equality, a democratic-style government, and spirited enforcement of penalties punishing all who use firearms to commit criminal offenses against other citizens.¹⁹⁶ The 1997 Report noted that small arms and light weapons are frequently used in conflicts which result from "political, commercial, socio-economic, ethnic, cultural and ideological" causes.¹⁹⁷ It further notes that "such conflicts will not be finally resolved without addressing the root causes."¹⁹⁸ It is time to finally address these root causes, while still enabling victims to adequately defend themselves against criminals and despots.

The most positive step towards addressing these causes is the adoption of democratic institutions. In the period of 1816 to 1991, no wars were fought between democracies, although many were fought against nondemocracies.¹⁹⁹ Of the fifteen most deadly regimes of the twentieth century (in terms of murder by government authority), none were democracies.²⁰⁰ While democracies are not necessarily the perfection of equality and justice, democratic governments appear to be much less lethal to their citizens.

Such an approach would obviously be inefficient and undeniably costly. However, in conjunction with sufficient enforcement of law that penalizes violent offenders, it is perhaps the only method to curb the violence attributed to small arms and light weapons. To do otherwise would mock the millions of victims of genocide, oppression, and indiscriminate violence.

IV. CONCLUSION

The United Nations Conference on the Illicit Trade of Small Arms and Light Weapons in All Its Aspects represents true progress by the international community in addressing the serious concerns of indiscriminate violence, crime and oppression that plague modern society. As the twentieth century has been particularly violent, it is comforting to realize significant thought and deliberation has been devoted to this subject. Yet there are significant flaws

¹⁹⁶ See SIMKIN ET AL., *supra* note 77, at 136-41. Crimes such as murder, assault, rape, robbery, etc are implied.

¹⁹⁷ See 1997 REPORT, *supra* note 12, ¶ 38.

¹⁹⁸ *Id.*

¹⁹⁹ See RUMMEL, *supra* note 153, at 2.

²⁰⁰ *Id.* at 7.

with the product of this deliberation, the Programme of Action. First, the Programme of Action is not a binding principle of international law. It is conceded that the Conference's policies could at some point in the future become the basis of binding customary international law, or alternatively, become the basis of a binding treaty. However, this concession cannot mitigate the fact that years of effort and study have produced a document that does very little to prevent small arms from reaching the hands of oppressors, criminals and the like. Secondly, there is crucial ambiguity within the Programme of Action, specifically in the definition of what constitutes a "small arm" or "light weapon," and what realistically constitutes an "illicit transfer." The terminology provided in the Programme of Action and other developmental documents is unsatisfactory. Regarding the definition of small arms and light weapons, the apparent ambiguity underscores the fact that the international community cannot focus on the core of the problem, that of military-style weapons. Further, this ambiguity may cost necessary political capital in any future attempt to limit arms transfers in binding treaties.

The problem of what constitutes an "illicit" transfer poses a similar dilemma. The Programme of Action gives a brief and succinct definition of the term "illicit"; yet, such a definition cannot remain given the breadth and diversity of problem areas and their underlying characteristics. Some transfers that may, under the Programme of Action, be adjudged as illicit may not be undesirable. Such a dry definition must be enlarged or qualified to confront dissimilar situations.

Third, impediments to implementation will render the Programme of Action brilliant on paper, but useless in practice. While stable states will have little difficulty in enacting and enforcing the suggested provision, the problem areas the Conference seeks to remedy face prohibitive conditions of corruption, high profitability, and the high value of the world-wide arms industry in general.

Finally, and most importantly, the policies and provisions within the Programme of Action, if ever enacted as binding law, would allow the disarmament of citizens, exposing them to the whims of oppressors and tyrants. With the prevalence of genocide and government-sponsored killings, it is inhuman to prevent potential victims from protecting themselves against such arbitrary threats. Disarming the public absolutely prevents citizens from the ability to protect their life, rights, and property, and effectively reduces the rights of self-defense and self-determination to mere verbiage. As the enjoyment of these rights can never be fully guaranteed, the protection of human rights depends on just resistance to oppressors and criminals, and armed resistance may sometimes be the only option. To render a human being

defenseless under the guise of law would be unconscionable in such circumstances.

To achieve the goals espoused by the Conference, several measures are suggested. First, the international community should reconsider blanket disarmament as an effective method of achieving peace and tranquility. In particular, the act of making all arms transfers contrary to the laws of states or international law "illicit" cannot be sufficient. What must be done is not to reduce arms, but reduce the need for using arms. This can be accomplished by advocating democratic-style institutions to properly protect human rights and keep governmental power contained. Further, efforts to investigate and prosecute unscrupulous arms brokers that supply small arms and light weapons to oppressors and terrorists should be placed at the forefront. Until such measures are pursued, mankind's *status naturalis* will remain consonant with Kant's somber description.

