

RUDIMENTARY REGULATION OF THE MARKET FOR CONVENTIONAL ARMS

RAVI PANDEY AND RIBHU GARG¹

ABSTRACT

Gradual development of man, both social as well as personal, enhanced his outlook towards life in terms of better standards of living, led to a phase where, progress could be pursued only with transgression into someone else's domain, eventually leading to conflicts and increments in its magnitude.

In today's world of instant connectivity and communication, Conflicts have transcended to a whole new level, so much so that the discerning international community felt the need to control the very genesis of such conflicts. Enter, Embargoes on Arms of all scales, for our consideration, The Arms Trade Treaty for conventional arms.

This being the first of its kind regulation of a market, hitherto, unbridled, was authored very carefully given various complications, inter alia, reverence for the sovereign right of states to legislate in their domain. Hence, the Treaty had to be softened insomuch that it accommodated all principles of World Law. Notwithstanding the flak it received, The Treaty lays strong foundations for International Peace.

KEYWORDS: Ambition; Mogadishu Conflict; World Wars; Cold War; Viktor Bout; Unregulated Global Arms Trade; Enforcement Issues; Nicaragua v. USA; Façade of Defense Agreements; Chapter VII, U.N. Charter; International Jurisprudence.

INTRODUCTION

At the outset, it is felt pertinent to examine the veracity of –‘Guns don't kill people, People Kill People.’ Avoiding the lengthy morality and intricatelogics behind this statement, a simple thought that can indisputably be perceived is that – If not kill, Guns do help!

Considering as an overture, Somalia, a small country in East Africa, straddled by the Arabian Sea and flanked by the, commercially and strategically significant, Gulf of Aden. Owing to

¹ DR. RAM MANOHAR LOHIYA NATIONAL LAW UNIVERSITY, LUCKNOW.

factors like strategic location and a socialist government, it was abused by developed nations. Contemporaneous to the cold war era, it was supplied by arms and ammunitions in huge quantities by the United States.² Pervasive political instability and lawlessness, made warlords pleasurable to violate every fathomable human right of its inhabitants, and henceforth unofficially rule it.³ The gulf country is ridden with internal civil wars ignited by conflicts between various criminally organized factions, case in point – the Mogadishu Conflict, 1992.⁴ Largely, Somalia fell prey to piracy and terrorism, ultimately being recognized as a ‘Failed-State’ at the International Front.⁵

In the right words of Herbert Spencer, The paramount law of natural evolution and selection is survival of the fittest. The same can be perceived from the apocalyptic events leading to extinction of even the most rugged creatures this planet has ever harbored. Enter Homo sapiens. Throughout human history, man has been an unguarded and unprotected creature, originating in caves, its small stature and vulnerabilities vis-à-vis other natural beings and forces, gave it little chances to survive. Perhaps, humans could well have been extinct like mammoths, dinosaurs etc. however, they have apparently done well so far. Now the question arises why? Were humans’ extremely powerful beings? Were they large in number? Were they resistant to natural forces and its laws? The answer to all these questions is an obvious, but a nasty and a nastily fascinating NO!

Most people associate evolution of mankind with its immense and accurate use of brain, which led to a thorough development of perspective and character that segregated them from other beings and eventually made man top the charts of evolution. But do you think just ordinary development of intelligence would have led to the foundation of modern sciences, culture, societies and ultimately, states? It wasn't just apposite use of brain but a feeling, inherent and interestingly peculiar to man, called ambition.

²OLIVER RAMSBOTHAM& TOM WOODHOUSE, ENCYCLOPEDIA OF INTERNATIONAL PEACEKEEPING OPERATIONS 222 (ABC CLIO)(1999).

³David Blair, *Somalia: Analysis of a Failed State*, THE TELEGRAPH, Nov. 18, 2008, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3479010/Somalia-Analysis-of-a-failed-state.html>.

⁴ Phil Hay, *Talking Somali Piracy in Mogadishu*, THE WORLD BANK (Aug. 9, 2015, 2:00 PM), <http://blogs.worldbank.org/nasikiliza/talking-somali-piracy-in-mogadishu.html>.

⁵ Ahmad Rashid Jamal, *Identifying Causes of State Failure: The Case of Somalia*, ATLANTIC COMMUNITY, Aug. 13, 2013, <http://www.atlantic-community.org/documents/10180/280d1fa4-ccd0-43fa-af90-834e3b2bb9b3.pdf>.

Man's progress gradually nurtured and finally triggered dangerous hormones of ambition. Now man not only ate other beings, it sold and earned from them too and finally engulfed the entire society into the garb of trade and business. With mankind's eventual affection by trade, the social and economic imbalance caused due to the insatiable human quest of power and profit, led to conflicts.

The acme of humanity's impulse towards international dominance through colonies was visible in World War I. Men killed each other on an unprecedented and unfathomable magnitude. The conflict wasn't culminated efficiently and ensued another global war 20 years later. This time witnessed much more savagery and barbarity, with a whooping death toll of 5,61,25,262⁶.

The second great war culminated with a devastated humanity and a worldwide political catastrophe, adducing great horrors of war and even more afraid of human ability to annihilate the world in a few seconds, courtesy Weapons of Mass Destruction. Later, The Cold War era experienced hints of global breakout, for quite some time. The relations between two major powers, with different politico-economic ideologies, relied on weak ropes while rest of the nugaratory world witnessed from the brinks. Every move of one was countered by the other, which resulted in eventual alignment of other nations and proxy wars, where both US and USSR played their games of trade and support in the form of necessities and arms, with however, undisputed ulterior motives.

The global body formed in the wake of World War II for entrenchment of peace and security through out the globe, the United Nations, has succeeded in preventing a Third World War so far. However, it is debatable that the United Nations has actually succeeded in establishing peace and security throughout.

Now every war in the world was financed by these two giants and led to more human casualties with arms supplied by the humans.⁷ Eventual fall of Soviet empire made global polity, unipolar. As evident, supremacy of The United States became unparalleled. While backstage, growing illegal trade in conventional arms, with an impotent International Law in place, never got regulated. The civil society witnessed horrifying images of multiple civil

⁶HITLER HISTORICAL MUSEUM, <http://hitler.org/ww2-deaths.html> (last visited Jul. 25, 2015).

⁷Joseph A. Hurley, *Review: The Cold War*, 51 REF. AND USER SERVICES QRTLY 200, 200 (Aug. 10, 2015), <http://www.jstor.org/stable/pdf/refuserserq.51.2.200.pdf>.

wars, caused due to poverty, forced anarchy, separatist ideologies and corrupt governments, on a massive scale.

An interesting episode of one Viktor Bout shows how death for one can be living for another. An emigrant from Russia and former Soviet military translator;⁸ he was arrested in Thailand in 2008 before being extradited in 2010, to the United States to stand trial on terrorism charges after having been accused of intending to smuggle arms to the Revolutionary Armed Forces of Colombia (FARC) for use against U.S. forces.⁹ On 2nd November 2011, he was convicted by a jury of a Manhattan federal court on counts of conspiracy to kill U.S. citizens and officials, delivery of anti-aircraft missiles, and providing aid to a terrorist organization.¹⁰ Bout allegedly made significant amounts of money through his multiple air transport companies,¹¹ which shipped cargo mostly to Africa and the Middle East during the 1990s and early 2000s. While working for Charles Taylor in Liberia; for the United Nations in Sudan; and the United States in Iraq,¹² Bout may have facilitated huge arms shipments into various civil wars in Africa with his private air cargo fleets during the 1990s.¹³

To understand how poorly the global arms trade is regulated, consider this: For a \$70 billion industry that produces seven to eight million firearms annually, it loses one million weapons every year to notorious arms traders, like Mr. Viktor Bout, himself, who sold weapons to warlords and terrorists from the 1990s until his capture in 2008. Since then, the international community has sought to build a treaty to control the trade of conventional arms.¹⁴

⁸ James Brooke, *Kremlin to Viktor Bout: Game Not Over*, VOICE OF AMERICA (Jul. 27, 2015, 10:04 AM), <http://blogs.voanews.com/russia-watch/2012/04/25/kremlin-to-viktor-bout-game-not-over.html>.

⁹ Victor Bout Extradited to The United States to Stand Trial on Terrorism Charges, 10 Op. Att'y Gen. 1306 (2010), <http://www.justice.gov/opa/pr/viktor-bout-extradited-united-states-stand-trial-terrorism-charges.html>.

¹⁰ Colum Lynch, *Arms Dealer Viktor Bout Convicted*, THE WASHINGTON POST, Nov. 2, 2011, https://www.washingtonpost.com/world/national-security/arms-dealer-viktor-bout-convicted/2011/11/02/gIQAHgIsgM_story.html.

¹¹ Douglas Farah & Stephen Braun, *Merchant of Death: Money, Guns, Planes, and the Man Who Makes War Possible*, THE WASHINGTON TIMES, Jul. 8, 2007, <http://www.washingtontimes.com/news/2007/jul/8/viktor-bout-war-profiteer-who-distributes--arms-b/?page=all.html>.

¹² Mitchell Prothero, *Revealed: Trap That Lured The Merchant of Death*, THE GUARDIAN, Mar. 9, 2008, <http://www.theguardian.com/world/2008/mar/09/armstrade.internationalcrime.html>.

¹³ Duncan Campbell & Ian MacKinnon, *Lord of War' Arms Trafficker Arrested*, THE GUARDIAN, Mar. 7, 2008, <http://www.theguardian.com/world/2008/mar/07/thailand.russia.html>.

¹⁴ Denise Garcia, *Disarming the Lords of War*, FOREIGN AFFAIRS, Dec. 23, 2014, <https://www.foreignaffairs.com/articles/united-states/2014-12-23/disarming-lords-war.html>.

The Arms Trade Treaty is one of the most ambitious projects of United Nations hitherto. It encompasses Global Arms Trade, within the ambit of International Legal Framework. Its governing principle is tacit, viz.

‘To promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources’¹⁵

The treaty contemplates to plug holes in the weapons-export process by requiring nations to monitor all aspects of production—from source to manufacture to export—and pertain to, inter alia, Kalashnikovs; rifles; mortars; grenades; shoulder surface-to-air missiles; tanks and battleships, among a wide spectrum of conventional arms.

The issue that stands is, whether strict restrictions upon conventional arms trade will be detrimental to legal trade of arms; and how will it be enforced upon violating states, given International Law is a soft law?

The enforcement of decisions of the International Court of Justice may involve problems that touch upon some of the most delicate areas of both public international law, and the law of the United Nations, at a time when these two systems of law can hardly be considered as totally separate from each other.¹⁶ The nature of International Law, making it soft and unenforceable, has long questioned its validity, practicability and authenticity which has led to, states not being bound by the decisions of the International Court of Justice, despite having explicit provisions for its enforceability.¹⁷

By conferring upon the Security Council, the authority to ensure compliance of the International Court of Justice's judgment, the United Nations undermines the authority of the court and also strengthens the superiority of the 5 permanent members viz. United States of America, United Kingdom of Great Britain and Northern Ireland, French Fifth Republic, People’s Republic of China and The Russian Federation.

¹⁵The Arms Trade Treaty, Preamble, *opened for signature* Jun. 3, 2013, CONF.217, (*came into force* Dec. 24, 2014).

¹⁶ Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 E.J.I.L. 539, 539 (Jul. 30, 2015), <http://www.ejil.org/pdfs/6/1/1311.pdf>.

¹⁷ U.N. Charter art. 94.

The inherent Veto power of these permanent members virtually renders any resolution or judgments passed against them totally futile, case in point - Military and Paramilitary Activities in and against Nicaragua¹⁸. So, what recourse(s) do affected parties have in case of violation of provisions of Arms Trade Treaty?

In the authors' opinion, the role of media, through electronic as well as print is efficacious in the present reign of instant and massive connectivity, which arguendo, if not able to force out the culprit states, can at least shame them in front of the world.

The Treaty also derives its validity from the mass support it received during its enactment. Members of the UN General Assembly voted 154 to 3 to approve the treaty (Objectors viz. Iran, North Korean, and Syria); and 130 countries signed it in 2013. By the subsequent year, 60 countries ratified the Treaty and expressed the will to incorporate it into their domestic laws. For the treaty to become effective, only 50 needed to do so.¹⁹

CRITICISMS – FALLACIOUS OR CREDIBLE?

The Arms Trade Treaty has been commonly questioned if it can regulate Defense Cooperation Agreements. The concerned clause enunciates, "This Treaty shall not be cited as grounds for voiding Defense Cooperation Agreements concluded between States Parties to this Treaty."²⁰

However, It may be noted that the language has been toned down to an extent, which exclusively doesn't rule out the possibility of a crooked arms deal, taking place behind the facade of a Defense Co-operation Agreement.²¹ The aforementioned criticism is in the author's humble opinion, frivolous, given the reasoning that by virtue of the said clause, the Treaty only intends to exclude from its purview, legitimate and monitored trade and trade relations between harmonious states.

There is a big divide on this issue, with proponents and opponents justifying each side vehemently. The critics of this provision accuse it to rendering the entire Treaty infructuous. The proponents of the Treaty know that in the realm of International Law, tenets like State

¹⁸Nicar. v. U.S., 1986 I.C.J. 14.

¹⁹Garcia, *supra* note 13.

²⁰*Supra* note 14, art. 26(2).

²¹Barnaby Pace, *Why The Arms Trade Treaty is a Failure*, THE ARMOURER'S FAITH (Jul. 30, 2015, 12:00 PM), <https://armourersfaith.wordpress.com/2013/04/08/why-the-arms-trade-treaty-is-a-failure.html>.

Sovereignty have to uncompromisingly be truckled to.²² The gates to a State's internal matters and to an extent, its trusted communications with allied states, cannot as leisurely, be crashed as to be subjected to such a treaty.

The focal point that stands is that, the result of initiatives and efforts put in by generations together shall not be regarded as totally worthless. This is also

The Arms Trade Treaty is the first legally binding instrument ever negotiated in the United Nations to establish common standards for the international transfer of conventional weapons. The development of common international standards for the trade of conventional arms has long been in the making; with origins in the League of Nations Draft Convention on the Arms Trade, which was never adopted. While, during the Cold War Era, various embargoes and prohibitions on the transfer of chemical, biological and nuclear weapons came in place, no such progress was to be found with respect to conventional arms,²³ which alone contributes to annual deaths, much more than all other Weapons of Mass Destruction, combined.

VIABILITY OF THE TREATY

The Arms Trade Treaty envisages a regulated and monitored trade framework for conventional weapons. This it achieves through certain provisions of the treaty, which, though virtually unenforceable, are bound to protect its humanitarian goals.

The centerpiece of the Arms Trade Treaty is the requirement in Articles 6 and 7 that countries refrain from exporting arms when the weapons will be used to undermine the Treaty's humanitarian goals. These articles are intended to place a strong stigma on arms transfers that contribute to or fuel atrocities, human rights abuses, violations of the laws of armed conflict, terrorism, or transnational organized crime. The Treaty stigmatizes such transfers by prohibiting arms exports in certain circumstances, most notably when the exporter knows that the importer will use the weapons for genocide, crimes against humanity,

²²*Supra* note 11.

²³ Peter Woolcott, *The Arms Trade Treaty*, UNITED NATIONAL AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, 1, 1 (Apr. 2, 2013), http://legal.un.org/avl/pdf/ha/att/att_e.pdf.

and war crimes. Under no circumstance can a State Party transfer arms when it has the knowledge that the weapons will be used for these crimes.²⁴

The only worrying aspect of such a provision is regarding its enforceability. The Security Council of the United Nations is the best-equipped, authoritative and resourceful body, which can enforce provisions of the Treaty against culprit states and in turn non-state actors. The Security Council derives such authority from the United Nations Charter viz. Chapter VII.

The Security Council is empowered to determine existence of any threat to peace; breach of peace; or an act of aggression; and impose mandatory sanctions to try to rectify the situation.²⁵ The sanctions may be economic (such as a trade embargo against a country threatening the peace), diplomatic (such as severance of diplomatic relations) or military (the use of armed force to maintain or restore international peace and security).²⁶

Such an action, military in nature, by the Security Council has been taken in the past against the countries like North Korea and Iraq. The sole aim of the coalition forces of the member states was to "use all necessary means to restore international peace and security."

This does not mean that other instruments of diplomacy and sanctions are totally irrelevant or unaccountable. The trade embargoes imposed against Angola, Haiti, Iraq, Liberia, Libya, Rwanda, Somalia and the countries of the former Yugoslavia, have been quite effective.²⁷ These embargoes saved a plethora of lives, otherwise endangered due to vast civil wars and humanitarian crises. Art of diplomacy can be applied to force a prospective threat to conform to provisions of the Treaty, governing international peace and security.

The persistent query exists regarding the role of the member states of the Security Council in the enforcement of the Arms Trade Treaty. The United States of America, formally welcoming the treaty²⁸, with no ratification yet, the world's largest conventional arms exporter can easily protect itself from the wrath of the Security Council, courtesy, permanent membership of the Council and a veto perquisite.

²⁴ Scott Stedjan, *Introductory Note to the Arms Trade Treaty*, 52 I.L.M. 985, 986 (Jul. 26, 2015), <http://www.jstor.org/stable/10.5305/intelegamate.52.4.0985.pdf>.

²⁵ U.N. Charter art. 39-51.

²⁶ Garcia, *supra* note 13.

²⁷ Dominic Tierney, *Irrelevant or Malevolent? UN Arms Embargoes in Civil Wars*, 31 REV. OF INT. STU. 645, 647 (Aug. 6, 2015), <http://www.jstor.org/stable/40072112.pdf>.

²⁸ Avaneesh Pandey, *UN Welcomes Landmark Treaty Regulating Global Arms Trade*, I.B. TIMES, Dec. 24, 2014, <http://www.ibtimes.com/un-welcomes-landmark-treaty-regulating-global-arms-trade-1766610.html>.

The moral aspect of the treaty doesn't undermine the economic interests of the major arms exporters. Notwithstanding the deterrence to involvement of money craving, warmongering state and non-state actors in the dangerous trade of arms, The Treaty seeks to open up a vast market for legal conventional arms.

The peril that persists, owing to immeasurable depths of man's lust for power, is that arms trade cannot, with the given politico-legal systems in place, be impeccably regulated among member states. As discussed above, actions motivated by ambition are hard to surmount with even the worst deterrence, just like providing death penalty cannot completely prevent the crime of homicide, a well-structured Arms Trade Treaty won't guarantee its, as envisaged, purely peaceful application.

Apart from all the criticism it has garnered, since its inception, the Arms Trade Treaty is the right step towards attainment of global peace on the lines of the principles enunciated in United Nation's Charter. It was created with intent to establish global standards of safety in, hitherto, unregulated international arms trade.²⁹

CONCLUSION

The Arms Trade Treaty, in the given scenario of unregulated markets and enforceability issues in international law, is indispensable. Its pragmatic authors conceptualized it to be a step towards efficacious regulation of markets and not a touchstone regulation.

As Jeremy Bentham propounded, the sovereign must prioritize essentials of a happy society with laws in the following order, viz. Security, Equality, Subsistence and Abundance, whereby, provision of security is paramount, followed by fostering equality in the society. However, the sovereign is practically incapable in providing subsistence and abundance and that only the people can do so.³⁰

Hence, there's only so much a treaty can do, in International Jurisprudence.

²⁹John Duncan, *The Arms Trade Treaty: A Supporting Government Perspective*, 103 PROCEEDINGS OF THE ANNUAL MEETING (ASIL) 341, 342 (Jul. 26, 2015), <http://www.jstor.org/stable/10.5305/procanmeetasil.103.1.0341.pdf>.

³⁰EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 85-86 (UNIVERSAL LAW PUBLISHING CO PVT LTD, 5th Indian reprint 2006).