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INTERNATIONAL HUMAN RIGHTS LEXICON

SUSAN MARKS
AND
ANDREW CLAPHAM

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Preface

Like most things, international human rights law can be, and is, studied in many different ways, and with a view to many different questions. One form of enquiry is concerned with the philosophical foundations of human rights law. For example, the question may be examined: do people really have human rights, and if so, what is the scope of these rights, and how is their character as human rights to be explained? Another, quite different sort of enquiry puts that problem aside, and focuses instead on the procedural possibilities that exist for enforcing human rights norms. Here the key issue is often: what action can be taken by people whose human rights have been violated, and how can the avenues of redress available to such people be improved? Yet another style of enquiry delves into particular human rights treaties or normative regimes. A typical investigation might set out by asking: how have the various articles of the International Covenant on Civil and Political Rights been interpreted by the Human Rights Committee and other relevant bodies, and in what ways has that jurisprudence shifted or developed over time?

In this book, while we touch on some of the questions just posed, our main focus is neither philosophical, nor procedural, and nor is it regime-specific. Rather, we survey a range of regimes and debates, with the aim of illustrating something of the diverse articulations of international human rights law with contemporary issues. Thus, instead of proceeding from particular rights, institutions or treaties, we take as our starting point a series of issues (controversies, phenomena, and the groups they most affect)—arranged, as our title announces, alphabetically. In fact, we did not originally plan the alphabetical arrangement. We planned to organise our discussion thematically, around a small number of broadly defined sections. But then we could not decide what should go where. Should ‘sexuality’ go under ‘discrimination’, or does it rather belong

with ‘self-expression’? Is ‘disappearance’ best considered as an issue of ‘the justice system’, or does it have more to do with ‘exceptional regimes’? The alphabet—that wonderful leveller—solved our problem. In the process, it carried us along, if not actually from swords into ploughshares, then at least from ‘arms’ to ‘work’.

Edward Said once wrote that the point of human rights is to put forward interpretations using the same language as that employed by the dominant power ‘to dispute its hierarchy and methods, to elucidate what it has hidden, [and] to pronounce what it has silenced or rendered unpronounceable’. He went on: ‘These intellectual procedures require, above all, an acute sense not of how things are separated but of how they are connected, mixed, involved, embroiled, linked’.¹ As well as enabling us to move through the topics we wanted to address without having to fix their relation to one another, the alphabetical arrangement proved congenial to both dimensions highlighted here by Said. On the one hand, it encourages non-linear reading in a way that—we hope—may foster awareness of new and perhaps unexpected linkages. On the other hand, the lexicon format also supports efforts to promote emancipatory change by inviting consideration of international human rights law in relation to the vocabularies that constitute and intersect it. Central to these vocabularies are concepts like democracy, development, fair trial, globalisation, privacy, terrorism, and torture. What is at stake when we talk in these terms? To quote another insightful scholar, Russell Hanson, ‘[w]hen oppressed people use their oppressors’ keywords uncritically, they literally inhabit a world that is defined for them. But when oppressed people use keywords authentically to define their world for themselves, they have liberated themselves in a quite decisive way’.²

However it is arranged, a book on the subject of international human rights law must today reckon with a large amount of material, and we are immensely grateful for the generous grant for research and writing we were lucky enough to receive from the John D. and Catherine T. MacArthur Foundation. Thanks to this grant, we were able to enlist help in gathering, sifting and working out what to say about all those treaties, declarations, general comments, and judgments, and eventually in preparing our text for publication. Fiorentina Azizi made an especially

¹ E. Said, *Reflections on Exile* (London: Granta Books, 2001), 430.

² R. Hanson, *The Democratic Imagination in America* (Princeton, NJ: Princeton University Press, 1985), 417.

significant contribution. We also have pleasure in acknowledging the assistance of Simon Atrill, Jo Bourke, Théo Boutruche, Drew Gardiner, Hassiba Hadj-Sahraoui, Daniel Joyce, Mecky Kaapanda, Andrew Lang, Claire Mahon, Lisa Oldring and Beatrice Quadranti. H el ene Leggenhager and Monique Nathoo of the Graduate Institute of International Studies handled the accounting and administrative aspects of our grant with exemplary efficiency and good humour. And, in the last stages of the project, we were fortunate that Claire Mahon took on the task of setting up a companion website—www.internationalhumanrightsllexicon.org. We invite readers to visit the site; it contains all the primary texts we mention in this book.

As for all the others—students, colleagues, friends and family members—from whom we have learned, and on whom we have leaned, we must leave our expressions of thanks to them for another place. We would like simply to acknowledge the special support we have received from Margaret Clapham, Colin Marks and Mona Rishmawi. We also want to give particular thanks to John Louth and Gwen Booth of Oxford University Press. Two more gracious, affirming and flexible editors could not be imagined. Finally, we wish to mention the unique debt we owe to Antonio Cassese. We both served as his research assistant many years ago at the European University Institute in Florence, and it was that experience which set us both on the course of work reflected here. We are delighted now to record our deep gratitude to Nino for his encouragement and inspiration at that crucial stage.

SUSAN MARKS
ANDREW CLAPHAM

Arms

It is fast becoming a cliché of progressive social commentary that ‘small arms are the real weapons of mass destruction’.¹ Approximately half a million people die every year from gunshot wounds, many of them in armed conflict but a large proportion too outside the context of any hostilities.² Many more people are seriously injured through the use of firearms, and more still are indirectly affected. Where whole communities are engulfed by gun violence, access may be prevented to schools, land, markets, health clinics, and humanitarian assistance, with disastrous short- and long-term consequences for the inhabitants. Far from being hard to find, these WMDs are in such communities all too visible.

Weapons of mass destruction more traditionally so called have in two cases been outlawed. Under treaties to which most states of the world are parties, bans have been placed on the development, production, stockpiling, transfer and use of biological and chemical weapons.³ As for nuclear weapons, while the age of deterrence is not yet behind us, lawful use is in practice difficult to imagine.⁴ By contrast, and with

¹ See, e.g., Kofi Annan, quoted in Amnesty International & Oxfam International, *Shattered Lives* (Control Arms Campaign, 2003), 8, and R. Peters, ‘Weapons of Mass Destruction’, *International Herald Tribune*, 28 October 2002. By ‘small arms’ are meant weapons designed for personal use, e.g. revolvers and self-loading pistols, rifles, sub-machine guns, assault rifles, and light machine guns.

² See *Small Arms Survey 2004* (Oxford: Oxford University Press, 2004), 174 ff.

³ See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972 and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993. See also the antecedent Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925.

⁴ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, 8 July 1996, para. 95: ‘Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or

notable exceptions,⁵ conventional weapons have legitimate uses. International law regulates those uses in armed conflict, as part of its regime governing the ‘methods and means’ of warfare.⁶ As just recalled, however, this only covers part of that which requires regulation. What of non-military uses of small arms? What too of the responsibilities of arms suppliers?

In the discussion below, we consider initiatives aimed at enhancing international control of non-military uses of small arms and transfers of weapons generally. Our main focus will be on the ways in which these initiatives draw on, and at the same time help to expand the boundaries of, international human rights law. We begin with firearms use by police and other law enforcement officers. We then look at gun ownership by private people. Finally, we take up the important question of international arms transfers. If small arms are today’s weapons of mass destruction, the key questions we will address have to do with the role of international human rights law in that regard. What role has it played in allowing this state of affairs to develop? What role can it now play in supporting efforts to bring about change?

Police violence

In February 2000 demonstrators lined the streets of New York City to protest the acquittal of four officers of the New York Police Department in connection with the fatal shooting of 22-year-old Guinean, Amadou Diallo. Diallo had been stopped as he was walking into his apartment building late one night. Seeing him reach into the inside pocket of his jacket and pull something out, the officers opened fire. In the seconds

which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.’

⁵ See, e.g., Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, and its Protocols. See also Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty).

⁶ On this, see, e.g., F. Kalshoven & E. Zegveld, *Constraints on the Waging of War*, 3rd ed. (Geneva: ICRC, 2001) and UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), chap. 6.

that followed, 41 shots were discharged. Diallo was unarmed, and had no connection to any crime. What he had taken out of his pocket was his wallet, containing papers that would establish his identity.

International efforts to prevent policing of this sort have a basis in norms concerning the right to life. In the contemporary regime of international human rights protection, the starting point for those norms is article 3 of the Universal Declaration of Human Rights: 'Everyone has the right to life, liberty and security of the person'. Building on this, the International Covenant on Civil and Political Rights places on states parties an obligation to respect and ensure the right to life, adding that '[t]his right shall be protected by law' and that '[n]o one shall be arbitrarily deprived of his life'.⁷ Similar provisions are included in treaties and other international instruments associated with the various regional human rights systems, among them the African Charter of Human and Peoples' Rights,⁸ the American Convention on Human Rights⁹ and the European Convention on Human Rights.¹⁰ The European Convention contains an especially detailed provision, which indicates when a deprivation of life will exceptionally be compatible with the Convention, that is to say when killing will not count as arbitrary. It will not count as arbitrary when it:

results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

We will return to that provision in a moment. For now, let us note two documents in which the concept of arbitrary deprivation of life has been specified in the context of policing. Both texts are considered to set out standards that are implicit in the universal right to life. The first, adopted by the United Nations General Assembly in 1979, is the UN Code of Conduct for Law Enforcement Officials.¹¹ By 'law enforcement officials' are meant here all those who are authorised to carry out police powers; in some countries and situations, that may include not only police officers, but also military authorities, state security forces, or

⁷ Art. 6(1).

⁸ Art. 4.

⁹ Art. 4(1).

¹⁰ Art. 2.

¹¹ Adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

other officials. The Code of Conduct enunciates a series of points relating to the obligation of such officials to maintain and uphold human rights. Where firearms are concerned, the most important of these points is that '[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'.¹² According to a commentary incorporated within the Code of Conduct, this means that '[i]n general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender'.¹³

The second document is a more detailed elaboration of these points. This is the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted in 1990.¹⁴ With regard to firearms, the general principle is said to be that:

[l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.¹⁵

Immediately following this is a stipulation that '[i]n any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life'. Alongside these provisions aimed at law enforcement officials, the Basic Principles also highlight relevant obligations of governments and law enforcement agencies. Selection of law enforcement officials must involve proper screening methods. Training must be provided not only in the use of firearms, but also in non-violent methods. Insofar as violence becomes necessary, police should be equipped with a broad range of types of weapons and ammunition, so as to allow for a differentiated use of force and firearms. Where appropriate, self-defensive equipment and bullet-proof vehicles should also be provided, in order to decrease the need to use weapons of any kind. (This obviously has particular relevance for policing at demonstrations.)¹⁶ Finally, whenever

¹² Art. 3. ¹³ Commentary to art. 3, para. (c).

¹⁴ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) U.N. Doc. A/CONF.144/28/Rev.1 at 112.

¹⁵ Principle 9. ¹⁶ Regarding assemblies, see further Principles 12–14.

death or injury is caused, there must be an effective investigation, with appropriate steps to ensure criminal liability in cases where there is evidence of arbitrary or abusive force.¹⁷

From these two international instruments we can glean, among other things, that the use of firearms can only be justified as a last resort, when, and to the extent, strictly necessary in self-defence or the defence of others against an imminent threat of death or serious injury. In this connection, considerable stress obviously falls on the provision of training, and especially training in the tactical assessment of threats. As one report comments, '[t]oo many police forces around the world are trained *how to fire a gun* but not how to decide *whether it should be fired*, or when'.¹⁸ The responsibilities of governments for preventing firearms abuse by law enforcement officials have also been the subject of some important pronouncements by international human rights courts and supervisory bodies. One case under the European Convention on Human Rights arose out of the fatal shooting by British soldiers of three unarmed people in Gibraltar.¹⁹ The shooting occurred in the context of an operation to avert a bomb attack of which the British Government had received warning. The European Court of Human Rights observed that the obligations entailed by the right to life are not exhausted by the duty of state officials to refrain from arbitrary killing; states parties to the Convention have a positive obligation to protect life, and this calls for the provision of appropriate training, instructions and briefing, along with especially strict operational control where lethal force may be involved. In the circumstances of this case, the European Court determined that the control and organisation of the operation had been flawed in crucial respects. Instructions had been given to the soldiers which had made the use of lethal force 'almost unavoidable'.²⁰ It followed for the Court that a violation of the Convention had occurred. In terms of the Convention provision quoted above, it had not been established that force had been used which was 'no more than absolutely necessary' in defence of persons from unlawful violence.²¹

¹⁷ See also Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council resolution 1989/65 of 24 May 1989.

¹⁸ *Guns and Policing* (Control Arms Campaign, 2004), 2, available at www.controlarms.org.

¹⁹ *McCann and Others v United Kingdom*, Judgment of the European Court of Human Rights, 5 September 1995.

²⁰ *Ibid.*, para. 210.

²¹ See European Convention on Human Rights, art. 2(2).

Inadequate training, incautious instructions and poor operational control are, then, among the factors that can set the scene for excessive use of firearms by the police. Intensifying these deficiencies is the enduring legacy in some countries of traditions of colonial policing, characterised by only limited safeguards against abuses.²² The failure to conduct an effective investigation after the event has been the subject of complaints under the European Convention and other treaties on a number of occasions, and plainly, that too can facilitate excesses by weakening expectations of accountability.²³ Lack of expected accountability, of course, also facilitates the deployment of police forces as agents of political repression, and we should not forget the whole range of ways in which firearms may be used by police and other state officials to silence opposition through acts and threats of torture, murder, rape, disappearance, and so on. Nor should we forget the violence that may be used against subordinate populations. Indeed, a further factor very frequently mixed up in cases of arbitrary killing by law enforcement officials is racism, particularly in the form of racial profiling.²⁴ Together with the violation of the right to life, this implicates the state in a violation of the duty to ensure human rights to all on a non-discriminatory basis.²⁵ The deadly traces of institutional racism were certainly apparent to those protesting the acquittal of the four officers who killed Amadou Diallo, and a number of initiatives were subsequently introduced in response to the protesters' concerns. At the same time, there was perhaps another consideration shaping that appalling episode—another aspect of the context, on which we have not yet touched, that made this young man vulnerable to the frantic ferocity of the NYPD Street Crime Unit and its semi-automatic pistols. To explore something of this, let us turn now to the issue of private gun ownership.

Gun control

Despite the influential idea that what defines the modern state is a monopoly of the legitimate use of force, the majority of guns are today

²² See *Small Arms Survey 2004* (Oxford: Oxford University Press, 2004), 217.

²³ See, e.g., *Kelly and Others v United Kingdom*, Judgment of the European Court of Human Rights, 4 May 2001.

²⁴ See further Racism*.

²⁵ Recognised in general international human rights law, the duty of non-discrimination is also spelled out in relation to the right to personal security and protection from violence in the Convention on the Elimination of All Forms of Racial Discrimination, art. 5(b).

in private hands. According to recent figures, almost 60 per cent are privately owned.²⁶ The precise relation between firearm accessibility and levels of violence in a society is not fully clear, and is the subject of much debate, especially in the United States. Generally, however, it is plain that firearms facilitate the rapid escalation of disputes and tensions, and increase the likelihood of violent outcomes, whether through intentional shooting or accidents. While mass or serial killings tend to receive the greatest attention, the Geneva-based Small Arms Survey warns against treating firearm violence as simply an affair of lonely psychopaths with unfeasible home armouries. Rather, 'small arms are misused on a daily basis in many communities around the world, making gun violence too banal and too frequent for the international media to cover it'.²⁷ In this regard, the Survey highlights the particular prevalence of armed crime in areas where there has recently been armed conflict. Part of the importance of post-conflict programmes of disarmament, demobilisation and reintegration thus arises from the need to prevent military weapons from being recycled into criminal activity. The Survey also calls attention to another cyclical pattern. In many communities high levels of gun violence have encouraged people to engage private security firms or acquire small arms themselves. Insofar as security arrangements are privatised in this way, small arms are made to proliferate still further, intensifying the potential for misuse, and hence the insecurity that prompted the attempt to gain protection in the first place. At the same time, high levels of private gun ownership in a society may also encourage firearms abuse by police. This is the further consideration to which we referred above, and it serves as a reminder that in this context, fear of firearm violence is both a response to such violence and an ongoing cause of it.

As is well known, a powerful body of opinion in the United States argues that the existence of armed citizen militias is authorised by the Second Amendment to the United States Constitution, which declares that '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'. Others contest this interpretation. Where international law is concerned, gun control is a more recent addition to the rights agenda.

²⁶ Amnesty International & Oxfam International, *Shattered Lives* (Control Arms Campaign, 2003), 20.

²⁷ *Small Arms Survey 2004* (Oxford: Oxford University Press, 2004), 173.

The issues that arise are also framed differently. Instead of revolving around the right of individuals to carry arms, discussions in international human rights law revolve around the duty of states to prevent armed crime, as part of their obligation to protect human rights. That is to say, the focus is less on claims about the legitimacy or otherwise of citizen militias than on assertions of the responsibility of governments for taking steps to protect citizens from violence. Of course, the latter affect the former, inasmuch as gun control is likely to be implied. But the main point is that the former cannot determine the latter; whatever position is taken with respect to the question of individual rights of access to firearms, there remain issues to be considered about the firearm-related entailments of international obligations to protect human rights.

We mentioned a moment ago that gun control is a relatively recent addition to the agenda of international human rights law. Let us now elaborate on that. In the background is the traditional preoccupation of international law with defining the international responsibility of states with respect to conduct that is attributable to them. Whose conduct does this cover? Quite obviously, it covers public officials, such as police and other law enforcement officers. It also covers private individuals who act on instructions from a government, or self-appointed vigilantes whose conduct the government acknowledges and effectively ‘adopts’ as its own.²⁸ But it does not cover citizens acting in a private capacity. Their activities are clearly not capable of being treated as conduct of the state. With this in mind, the misuse of firearms by private citizens was traditionally viewed in international law as a matter that would presumably engage the responsibility of the individual perpetrator under national criminal law (or international criminal law, if an international crime was involved), but could not engage the responsibility of any state under international human rights law. This is one of the ways in which international human rights law helped to allow small arms to become the real weapons of mass destruction. It failed to hold governments to account for gun control. In effect, it endorsed the daily abuses and all too banal and frequent gun violence recalled above.

²⁸ See International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, arts. 5, 8 and 11, adopted by the ILC at its 53rd session, 2001, UN Doc. A/56/10. See further J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

From the fact that states cannot be held directly responsible for the conduct of citizens acting in a private capacity, however, it does not follow no state responsibility can exist for regulating that conduct. Governments may still be, and in many circumstances today are, held liable by omission if they fail to exercise due diligence in ensuring that human rights are not abused within the private sphere. This 'due diligence' obligation was articulated by the Inter-American Court of Human Rights in 1988, when it declared Honduras responsible under the American Convention of Human Rights for failing to prevent or adequately respond to the disappearance of Manfredo Velásquez Rodríguez. According to the Inter-American Court,

[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.²⁹

With regard specifically to the right to life and the right not to have one's life taken arbitrarily, the Inter-American Court said that '[t]hese rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in [their] violation'.³⁰ Thus, the right to life may form the basis for a positive obligation to prevent arbitrary killing not only by law enforcement officers, as discussed above, but by non-state actors as well. In a more recent case before the European Court of Human Rights, a Kurdish man had been fatally shot by unknown assailants in Turkey.³¹ Though he had reported receiving death threats to the authorities, no action had been taken to protect him. The European Court observed that the obligation undertaken by states parties to the European Convention on Human Rights to secure the right to life includes a duty to take reasonable measures to prevent a real and immediate risk to a person's life. It also includes a duty to undertake an effective investigation after a killing occurs. In neglecting both to provide appropriate protection and to conduct an adequate

²⁹ *Velásquez Rodríguez v Honduras*, Judgment of the Inter-American Court of Human Rights, 29 July 1988, para. 172. ³⁰ *Ibid.*, para. 188.

³¹ *Akkoç v Turkey*, Judgment of the European Court of Human Rights, 10 October 2000.

investigation, the authorities had failed to comply with the obligations of Turkey under the Convention.

There is gathering momentum behind the idea that international human rights law carries implications for the control of firearms in private hands. In 2002 the UN Commission on Human Rights appointed Barbara Frey as Special Rapporteur, with a mandate to study the prevention of human rights violations committed with small arms and light weapons. In a working paper, Frey notes the existence of 'growing pressure to hold States accountable for patterns of abuses, such as the State's failure to establish reasonable regulation regarding the private ownership of small arms that are likely to be used in homicides, suicides and accidents'.³² Pursuing this topic in her preliminary report as Special Rapporteur, she highlights the due diligence standard recognised in the case of Manfredo Velásquez Rodríguez and many subsequent interpretive statements. Applying that standard, Frey writes that 'a State may have an affirmative duty under the human rights instruments to ensure that small arms are not used by armed individuals and groups to commit human rights violations'.³³ The most obvious violations that may be committed in this context are, of course, violations of the right to life. But that is not the only human right at stake here. As a threat to public health, with significant impact on mortality and morbidity rates in some countries, firearms misuse by private citizens compromises the right to health. It may also inhibit the exercise of rights of freedom of expression, assembly, association, political participation, and religion. Where violence becomes pervasive in a community, rights to education, food, work, and access to health care facilities may likewise be affected. Finally, and connectedly, guns may impinge on the right to development. As is emphasised in many recent reports, gun violence has indirect effects at almost every level; it undermines the productivity of economic activity, promotes expenditure on protection rather than production, discourages local and foreign investment, reduces the quality and availability of social services, and erodes the norms of trust and reciprocity that make

³² B. Frey, Working Paper on the question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms, 30 May 2002, UN Doc. E/CN.4/Sub.2/2002/39, para. 46.

³³ B. Frey, Preliminary Report on the prevention of human rights violations committed with small arms and light weapons, 25 June 2003, UN Doc. E/CN.4/Sub.2/2003/29, para. 43.

co-ordinated social action possible.³⁴ Viewed in this light, control of the private possession and use of guns begins to appear inseparable from the protection and fulfilment of human rights. Can the same be said of control of the supply of those guns?

Arms transfers

The five permanent members of the United Nations Security Council are also the world's five leading exporters of small arms and other conventional weapons. Together, China, France, the Russian Federation, the United Kingdom and the United States account for 88 per cent of all conventional arms exports. The United States alone accounts for 45 per cent.³⁵ In her working paper mentioned above, Barbara Frey observes that efforts to curb firearm violence have spawned a variety of approaches, but that one approach focuses on 'supply-side' issues connected with this market.³⁶ Without minimising the importance of 'demand-side' initiatives to address the social and political context in which arms misuse occurs, the supply-side approach concentrates on preventing transfers of arms to state and non-state actors who will foreseeably use them to commit serious violations of human rights or humanitarian law. By 'transfers' is meant here not just commercial sales, but all kinds of exchanges, including those undertaken within the framework of aid programmes or military alliances. Control of arms transfers is hampered by the immensely complex and highly secretive character of the weapons sector, and by the special status which governments commonly accord arms manufacturing companies, whether state-owned or private. On the other hand, the fact that the weapons sector is closely linked with foreign policy and national security has meant that requirements of government authorisation have been imposed on exports and imports of arms in most countries. This lays

³⁴ See *Small Arms Survey 2003* (Oxford: Oxford University Press, 2003), chap. 4. See also *Guns or Growth?* (Control Arms Campaign, 2004), available at www.controlarms.org.

³⁵ Amnesty International & Oxfam International, *Shattered Lives* (Control Arms Campaign, 2003), 54.

³⁶ B. Frey, Working Paper on the question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms, 30 May 2002, UN Doc. E/CN.4/Sub.2/2002/39, para. 17.

a basis for international initiatives aimed at tightening at least some links in the chain.

To date, however, the primary concern of international initiatives has been the prevention of illicit transfers of arms, that is to say, transfers not authorised by any government. Thus, for example, a Protocol to the Convention against Transnational Organised Crime was adopted in 2001 (the 'Firearms Protocol'), which obliges states parties to take a variety of measures designed to prevent and punish the illicit manufacturing of, and trafficking in, firearms, their parts and components, and ammunition.³⁷ This treaty and other comparable international instruments establish the responsibility of governments to co-operate in checking the unauthorised arms trade.³⁸ But they do little to clarify the responsibilities of governments with respect to the authorisation of arms transfers. As Frey and other analysts stress, that limitation is rendered all the more significant by the ease with which arms acquired in authorised transactions may pass into the illicit arms market. What then of licensing processes? In 1998 the European Union adopted a Code of Conduct on Arms Exports setting out criteria to be taken into account by member states in granting arms export licences. One criterion calls for consideration of respect for human rights in the country of final destination. Specifically, it is declared that member states will:

- (a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression;
- (b) exercise special caution and vigilance in issuing licences... to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.³⁹

'Internal repression' is defined for this purpose to include torture and other ill-treatment, extrajudicial execution, disappearance, arbitrary detention, and other major violations of international human rights law. Along similar lines, the Organization for Security and Cooperation in

³⁷ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001) (not yet in force).

³⁸ See, e.g., Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials. See also Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001), UN Doc. A/CONF.192/15, chap. IV.

³⁹ European Union Code of Conduct on Arms Exports, 5 June 1998, EU Doc. 8675/2/98. REV 2, criterion 2.

Europe adopted a document in 2000, expressing the commitment of member states to avoid issuing export licences where there is a clear risk that small arms may be used to violate human rights.⁴⁰

In 2003 a coalition of non-governmental organisations launched a campaign for an international treaty that would build on these and related instruments. While it is believed that all kinds of conventional weapons should be covered, particular emphasis is laid on small arms, given the mass scale of their exchange and impacts. Central to this proposal is the principle that arms transfers should not be authorised by a government which has, or ought reasonably to have, knowledge that the arms to be transferred are likely to be used, or diverted for use, to commit serious violations of human rights or international humanitarian law. Thus, to cite one example given by the coalition, authorisation may be given for the export of guns to a police force that operates in accordance with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. But authorisation should be denied for the export of guns to a police force which is undisciplined and corrupt, and which uses firearms to commit extra-judicial killings and torture.⁴¹ Or, it could be added, authorisation should be denied for the export of guns to a police force in circumstances where there is a record of persistent diversion for private use to commit violent crime. Plainly, this places on governments an obligation to investigate conditions in countries to which arms transfers are proposed. A rough analogy might be drawn with the investigative obligation entailed by the duty of *non-refoulement* in refugee law.⁴² If a government may not return or expel a person to a state in which his or her life or freedom will be at risk on grounds of race, religion, nationality, membership of a social group or political opinion, nor may it sanction the transfer of arms to a country in which the risk arises of serious violations of human rights or humanitarian law.

We noted in the previous section that understandings of state responsibility focused traditionally on public action, to the exclusion of private

⁴⁰ OSCE Document on Small Arms and Light Weapons, adopted by the OSCE Forum for Security Co-operation on 24 November 2000, FSC.DOC/1/00. See also the Wassenaar Arrangement's Best Practice Guidelines for Exports of Small Arms and Light Weapons, adopted 11–12 December 2002.

⁴¹ Amnesty International & Oxfam International, *Shattered Lives* (Control Arms Campaign, 2003), 76.

⁴² See Convention Relating to the Status of Refugees 1951, art. 33.

conduct. So too, understandings of state responsibility have tended to privilege simple forms of responsibility, as against more complex forms, such as complicity, capacitation, or assistance. This is another way in which international human rights law helped to allow small arms to become the real weapons of mass destruction. It failed to hold governments to account for regulating the transfer of arms, and preventing their foreseeable deployment in extra-judicial killings and other abuses. The developments and proposals highlighted in this section reflect an attempt to correct this. A partial and highly selective antecedent may be the practice of the United Nations Security Council with respect to the imposition of arms-related sanctions on states considered to threaten international peace and security. More pertinently, it is frequently recalled in this context that, despite the general emphasis on simple forms of responsibility, a well-accepted principle of international law makes states responsible for knowing assistance. Thus, a state which assists another state to violate international law becomes liable itself where the assistance is provided with knowledge of the anticipated violation.⁴³ Barbara Frey writes that the ‘effect of this principle is to prohibit States from transferring small arms to another State knowing that the other State will use the arms in violation of international law’.⁴⁴ Of course, that only covers state-to-state arms transfers. With regard to transfers more generally, the obligation to regulate transfers may be linked to obligations to co-operate in the protection and fulfilment of human rights, and especially the right to development, as discussed above. In turn, those obligations may also lend support for further supply-side interventions, whether in the mode of ‘turning off the tap’ or ‘draining the pool’.⁴⁵ For instance, commercial intermediaries or ‘brokers’ are recognised to play a pivotal role in the international arms trade, yet brokering activities remain almost entirely unregulated, and indeed unseen. Likewise, efforts to stem the flow of arms

⁴³ See International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 16, adopted by the ILC at its 53rd session, 2001, UN Doc. A/56/10. See further J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 148.

⁴⁴ B. Frey, Working Paper on the question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms, 30 May 2002, UN Doc. E/CN.4/Sub.2/2002/39, para. 73.

⁴⁵ See Amnesty International & Oxfam International, *Shattered Lives* (Control Arms Campaign, 2003), 73.

within countries may depend on post-conflict disarmament programmes, improved stockpiling arrangements, and retrieval of illicit arms. Turning off the tap and draining the pool are not traditional modes of engagement for international human rights law, but, through the issue of arms control, they are starting to emerge as essential ones.

Arms and men

We have begun this book with a theme that similarly forms the departure point of an ancient epic poem: ‘arms and the man’.⁴⁶ With regard to arms, we have recalled the way age-old preoccupations with the rewards and sufferings of battle have come to be accompanied by another, distinctively modern set of concerns about the human and social costs of guns. What, however, of ‘the man’? We have not yet spoken about that aspect. Virgil’s interest, of course, was in one man in particular—the Trojan Aeneas who would one day found Rome. To capture our broader interests in the relation between human rights and arms control, we need to shift into the plural. Arms and *men*? Surely human rights are concerned with humanity as a whole! Surely bullets kill equally, whatever the victim’s sex! Indeed they are, and indeed they do. But from that it does not follow that gender-specific concerns become irrelevant, just as it does not follow that concerns aligned with other social divisions become irrelevant. Quite the contrary, as the succeeding pages will repeatedly illustrate, and as we have already seen in this discussion with regard to racism. To be concerned with the entirety of humanity is necessarily to be concerned with social specificity, and with the way things look when viewed from different points within a social structure.

In considering the gender dimensions of firearms, we can start by noting the prominence of men in firearm-related violence. Men commit the vast majority of firearm-related crimes, and also make up the vast majority of those killed or injured as a result of them. On current global figures, 90 per cent of firearm homicide victims are male.⁴⁷ We can also observe the place which guns may occupy in the everyday life of men—the way rifles may be kept as treasured inheritances, worn like

⁴⁶ Virgil (D. West, trans.), *The Aeneid* (London: Penguin, 1990), 3.

⁴⁷ *Small Arms Survey 2004* (Oxford: Oxford University Press, 2004), 178.

pieces of jewellery, or used in parallel economies as tokens of exchange. At the same time, we can point to the association between men and guns within the imaginative or symbolic domain. While the idea of guns as phallic extensions is now a commonplace, the sexualised imagery of guns has always been more complicated than that. As Henri Myrntinen observes in a study of the bearing of forms of masculinity for approaches to disarmament, guns are also used as female sex objects—the bearer’s ‘bride’—and, more generally, as fetishes of male prowess.⁴⁸ Finally, we can register the way all this is bound up with a particular, militarised version of masculinity, which both relies on guns and is enforced by them. As Myrntinen explains, “[d]oing” masculinity with the help of a weapon is... the visible manifestation of certain, violent and often militarized enactments of masculinity’.⁴⁹ Within those enactments the weapon serves at once as a symbol and as an actual tool for asserting authority and suppressing others—other people, quite obviously, but also other forms of masculinity in which the model of the warrior and armed protector is refused. Myrntinen concludes that post-conflict disarmament, demobilisation and reintegration strategies must be linked to a ‘demobilisation’ of the distinctive notions of masculinity that foster a fear of disarmament as emasculating and of non-violence as effete.⁵⁰

How do such notions develop? Clearly, the formation of masculinities is embedded in historical and cultural processes that vary considerably across the world, as well as within communities. Likewise, the significance of the display and use of weapons is not constant, but must be investigated in specific social contexts. At the same time, as Charlotte Hooper remarks in another study of masculine identities, ‘[m]asculinities are not just domestic cultural variables but are to some extent formed by international politics itself’.⁵¹ Wars make men as much as men make wars,⁵² and the same can be said of colonial government,

⁴⁸ H. Myrntinen, ‘Disarming Masculinities’, *Disarmament Forum* (2003), 37.

⁴⁹ *Ibid.*, 44. ⁵⁰ See *ibid.*

⁵¹ C. Hooper, ‘Masculinist Practices and Gender Politics: The Operational Masculinities in International Relations’ in M. Zalewski and J. Parpart (eds.), *The ‘Man’ Question in International Relations* (Boulder, Colo.: Westview Press, 1998), 28, 39.

⁵² See B. Ehrenreich, ‘Forward’ in K. Theweleit, *Male Fantasies*, vol. 1 (Cambridge: Cambridge University Press, 1987), xvi (‘it is not only men that make wars, it is wars that make men’), quoted in C. Hooper, ‘Masculinist Practices and Gender Politics: The Operational Masculinities in International Relations’ in M. Zalewski and J. Parpart (eds.), *The ‘Man’ Question in International Relations* (Boulder, Colo.: Westview Press, 1998), 28, 39.

international conferences, peace-enforcement operations, and a range of other institutions and practices. The image of ‘western protector-warriors in the streets of Kabul or Pristina, a “robust”, manly but benevolent force, sporting designer shades and displaying their weapons while always ready to assist the poor and helpless women and children they encounter’ is especially familiar today.⁵³ And if masculinities are to some extent formed by international politics, they are also partly shaped by international law, including international human rights law. At the simplest level, permitting access to guns to remain unregulated contributes to the processes that sustain and naturalise militarised traditions of masculine identity—the very militarised traditions that drive down the value of men’s right to life and right to health. Of course, unregulated access to guns profoundly affects women too, both in the way violence may be facilitated and subordinate status coercively reinforced, and in the broader outcomes that may be produced. While men are more likely than women to suffer death or injury in consequence of firearm violence, the indirect social and economic effects we described earlier impact upon women at least equally. This then is a final way in which international human rights law helped to allow small arms to become the real weapons of mass destruction. It helped to make guns seem instinctively manly, obscuring alternative and competing forms of masculine identity—and, with them, alternative and competing forms of human life.

⁵³ H. Myrntinen, ‘Disarming Masculinities’, *Disarmament Forum* (2003), 37, 39.