

ARMS CONTROL AT SEA

Legislating the Illicit Trafficking of Small Arms and Light Weapons in the Caribbean



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ACRONYMS

ASEAN	Association of South-East Asian Nations
ATT	Arms Trade Treaty
CARICOM	Caribbean Community
CTBT	The Comprehensive Nuclear Test Ban Treaty
ECOWAS	Economic Community of West African States
EU	European Union
GA	General Assembly
ICJ	International Court of Justice
MDG	The United Nations Millennium Development Goals
OAS	Organisation of American States
OAU	Organisation of African Unity
OSCE	Organisation for Security and Cooperation in the European Union
PoA	UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects
RDB	Regional Disarmament Branch
SADC	Southern African Development Community
SALW	Small Arms and Light Weapons
SC	Security Council
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UN-LiREC	United Nations Regional Centre for Peace, Disarmament and Development in Latin-America and the Caribbean
UNODA	United Nations Office of Disarmament Affairs
UNODC	United Nations Office for Drugs and Crime
US	United States of America
UNRCPD	United Nations Regional Centre for Peace and Disarmament in Asia and the Pacific
VCLT	Vienna Convention on the Law of Treaties

CHAPTER ONE

1. Introduction

The world is flooded with weapons, and small arms and light weapons are slowly killing whole societies. The overwhelming majority of current conflicts are fought with small arms and light weapons, and the victims are predominantly civilian. More human rights abuses are committed with small arms than any other weapon, and the illegal trafficking and spread of these arms is not a prioritised issue in international law. These conflicts are having a devastating effect on States, their economy and the prospects of development. Gun violence is affecting whole societies; armed violence is causing people to flee their homes and is causing food insecurity. Young males are most commonly the user of small arms and light weapons but women and girls are also gravely affected, either through direct threats and a loss of security or through the loss of a family member to armed violence. Small arms and light weapons have traditionally been considered a regional or national issue, however, with the decline of large scale conflicts between states there has been a rise in intrastate-conflict and gun-violence. “Not only has there been a marked increase in crime and violence levels since the 1970s, but also a change in its form. Since the 1990s, the most visible manifestation of violence is no longer political conflict, but instead crime and delinquency”.¹

Armed violence is unquestionably more prevalent in developing countries and poorer regions of the world. “The geographic and demographic dimensions of non-conflict armed violence are significant. Central and South America is one of the regions most seriously affected by armed violence, experiencing homicide rates of more than 20 per 100,000 per year, compared to the global average of 7.6 per 100,000 population.”² This is particularly evident in the Caribbean, where murder rates are even higher. Geography alone makes the island states of the Caribbean more exposed and vulnerable to criminal activities, mainly due to their expansive sea borders, numerous small islands and the considerable distance between and among them. The Caribbean region is experiencing an increasing occurrence of organised crime, and much of these criminal activities are travelling to the region by way of the sea.

Illicit small arms and light weapons easily penetrate the sea borders of the Caribbean region, and the region is lacking the resources to tackle the illicit import and prevent the arms reaching their shores. Small arms and light weapons are transported across the globe by ships, vessels, and even small pleasure boats, and the sovereignty of the seas makes it very difficult to

¹ Heinemann and Verner (2006) p.3

² The Geneva Declaration Secretariat (2008) p.5

regulate the trafficking of SALW. States with extensive coastal lines are especially vulnerable. The Law of the Sea was created to promote the peaceful use of the shared resources of the oceans, it is a wideranging Convention with a long line of affiliates. Yet it appears to be underutilised by the coastal States of the Caribbean, who need it most. There is not necessarily a lack of legal tools relevant to border control and illicit weapons trafficking, but there appears to be little information and knowledge about how existing legislation can be applied to the maritime borders and how much protection coastal State actually have at sea.

This dissertation consists of an overview where the threat of small arms and light weapons is outlined. It reviews what legal instruments are relevant firstly to arms in general, secondly to small arms in particular, and thirdly to small arms in the Caribbean, and which weaknesses these legal instruments carry. Following this, a legal analysis of the Law of the Sea and its possibilities for fighting the illicit spread of small arms and light weapons. Under the Law of the Sea coastal States are entitled to protect their territorial sea, and the Convention awards coastal States the rights to take precautionary measures to protect their borders from the import of illicit goods. The trafficking of small arms and light weapons is a new threat which was not accounted for when the Convention was drafted, this dissertation seeks to prove that small arms and light weapons poses a threat so substantial that the international community must fight it on every arena.

1.1 Reason for choosing the subject matter

I have long had an interest in international security and arms control, and as part of my master studies I got the opportunity to intern with the Regional Disarmament Branch (RDB), one of the four branches of the United Nations' Office for Disarmament Affairs (UNODA). The UN Office for Disarmament Affairs is the overarching office dealing with disarmament all types of arms, and RDB has been set up to deal with small arms and regional disarmament. To fulfill its main function RDB has established three regional offices to tackle regional disarmament. During my internship I was assigned to The United Nations Regional Office for Peace, Disarmament and Development in Latin America and the Caribbean (UN-LiREC), which has specific responsibility for Central and South America. From its base in Lima, Peru, UN-LiREC offers both expert advice and practical assistance to countries in the region. I mainly worked with disarmament issues in the Caribbean. The UN has put in place several targeted efforts to curb the proliferation of small arms and light weapons, but these efforts does not appear to have reached the Caribbean shores, which continue to take a backseat position in disarmament efforts. Although it is common knowledge that the majority

of illicit arms travel to the region by way of the seas and oceans, few scholars and legal experts have analysed which legal provisions can be applied to discourage illicit trafficking at sea.

The illicit trafficking of small arms and light weapons at sea can be considered as uncharted waters. With this dissertation I wanted to provide a qualitative contribution to an area largely unstudied in international affairs. In this paper I have used my own experiences as a case-study, and it is an overview as well as a profound legal analysis of a concrete provision. Because there are so few studies concerning illicit trafficking at sea I believe that it is important to firstly provide an overview how small arms are threatening firstly the international society, and secondly the coastal States of the Caribbean, as well as an overview of existing legislation and initiatives, before proceeding to a legal analysis of Article 25 of the Law of the Sea. I believe that a legal analysis of this area must be put into context, and thus it seemed necessary to tie together the information that is scattered in various different studies before I could proceed to the legal analysis.

I need to point out that I do not have any prior background in law, I have previously completed a Bachelor degree in International Relations and this has had an influence on my paper. I have attempted to use my background in political science as a strength by putting the Law of the Sea within a framework of practical application. I hope that by bringing together this breadth of information I have produced a valuable contribution to an area few have touched upon. When I decided to apply for a master in Public International Law it was because I wanted to put international security into a legislative context and discover how the operational aspects of international law can be applied in practice to improve international security.

1.2 Research question

Small arms and light weapons are threatening human lives and development, and these weapons are traveling freely on the seas and oceans of the world. The Law of the Sea is perhaps the most important legal instrument to guide peaceful relations between States at sea. Maritime border control has been identified by the Caribbean Community (CARICOM) as a key issue when addressing crime prevention and counter-terrorism measures in the Caribbean. With this as a starting point, this study seeks to answer the following questions;

1. How are small arms and light weapons threatening international security, and the Caribbean region in particular?

2. Which legal frameworks have attempted to address the issue of small arms and light weapons, and how binding are they upon States?
3. Does the illicit trafficking in small arms and light weapons constitute such a threat that coastal States can invoke their right of protection under Article 25 of UNCLOS?
4. Should the illicit trafficking in small arms and light weapons constitute a threat to coastal States, what enforcement measures are available under UNCLOS?

1.3 Structure of the thesis

The thesis will systematically approach the subject. Firstly it will outline the threat posed by small arms and light weapons, followed by an overview of different legal instruments relevant to arms in general at the international level. This will be followed by an overview of the Caribbean and the impact that small arms and light weapons are having on the region, combined with an overview of legal initiatives designed to combat SALW on a regional level. Finally, the thesis will undertake a legal analysis of the UN Convention on the Law of the Sea, and more specifically Article 25 and the rights of protection of coastal States, in relation to the illicit seaborne trafficking of arms. This part will take Art.38 from the Statutes of the International Court of Justice (ICJ) and Articles 31-33 from the Vienna Convention on the Law of Treaties (VCLT) as a starting point for the interpretation of relevant legal provisions. The study seeks to establish what options are available under the Law of the Sea to prevent the illicit trafficking of small arms and light weapons at sea.

1.4 Demarcations of the study

As this is meant to be a compact thesis this study will focus on the legal aspects of illicit trafficking; it will attempt to bring together information about the international arms trade, the Caribbean and small arms legislation initiatives from different regions of the world, but the majority of the thesis will concern itself with an analysis of coastal States rights of protection under UNCLOS. This study will not review other legislation relevant to the issue of small arms and light weapons, it will strictly focus on the Law of the Sea. Furthermore, it will not attempt to illustrate how arms are trafficked to the Caribbean region or look into ports of entry. It is also well-known that the illicit trade in arms is closely connected to the illicit trade in narcotic substances and other drugs, but this relationship will not be reviewed either.

For the purpose of this study armaments will be limited to small arms and light weapons that can be carried by one person or a small crew. The UN has classified small arms as revolvers and self-loading pistols; rifles and carbines; sub-machine-guns; assault rifles; and light machine-guns. Light weapons is generally thought of as weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. These weapons includes heavy machine-guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns, recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; and mortars of calibers less than 100mm.³ This study focuses solely on small arms and light weapons, and does not include other weapons such as clubs, knives and machetes.⁴ The terms 'small arms' and 'light weapons' or the abbreviation 'SALW' will be used interchangeably to denote both classes of weapons.

It should also be noted that the reason for choosing this particularly topic of study is also the main challenge of this dissertation; as the Caribbean has received little attention in the international sphere there is also limited material to research. Comparatively few political scientists, researchers and policy-makers have written about the Caribbean, small arms and legal issues. This study will seek to make use of the available and relevant sources as much as possible.

1.5 Methodology and relevant legal sources

By providing an overview of the threat posed by small arms and light weapons, an overview of the legal framework – or the lack of such – regulating SALW, and an overview of the situation in the Caribbean coupled with a legal analysis of Article 25 of UNCLOS and related legal provisions this study attempts to gain a better understanding of how coastal States can protect their maritime borders and attempt to curb the illicit trade in arms.

The guiding thought behind this dissertation is that existing legislation can be reconsidered to have renewed applicability. The *lex lata* of UN Convention on the Law of the Sea is to govern peaceful relations at sea and it has consistently had a very narrow application. However, the illicit trafficking of SALW poses a new threat to the maritime environment and as the only legal

³ UNGA Res. A/52/298, 27 August 1997

⁴ Ibid. There is no universally recognised definition of SALW. The UN Group of Governmental Experts that explored the issue of SALW in 1997 put forth a definition that included clubs, knives and machetes, though most of the subsequent regional and international instruments have narrowed the definitions used to focus exclusively on firearms.

force at sea the UN Convention on the Law of the Sea must attempt to tackle the current maritime challenges within the boundaries of the legal provisions of the Convention.

This study will draw upon different legislation, primary and secondary sources, but primarily material published in English. The primary sources will include the Statutes of the International Court of Justice, the Vienna Convention on the Law of Treaties, and the UN Convention on the Law of the Sea. Additionally, it will consult relevant UN documents and UN resolutions as appropriate.

In general, when one is seeking to establish what legal instruments exist and how they should be analysed it is necessary to start with the Statutes of the International Court of Justice (ICJ Statutes) and the Vienna Convention on the Law of Treaties (VCLT). According to Art.38 of the ICJ Statutes, commonly accepted legal sources include international conventions, international custom, and the general principles of law recognised by civilised nations. Additionally, subject to the provisions of Art.59, judicial decisions and the teachings of the most highly qualified publicists are also accepted as subsidiary means for the determination of rules of law. Conscious of the ICJ Statutes' guidance of appropriate legal sources, and with reference to Article 31-33 of the Vienna Convention on the Law of Treaties, this thesis will attempt to discover if UNCLOS can be utilised by coastal States seeking to decrease criminal activity reaching their shores by sea. This study will provide an overview of the threat posed by small arms and light weapons, as well as an overview of the situation in the Caribbean, followed by an analysis of the right of self-protection and jurisdiction of coastal States under the UN Convention on the Law of the Sea.

Should this study receive a negative outcome, in the case that the Law of the Sea cannot offer much assistance in deterring illicit trafficking at sea, it is thought that this dissertation still provides a very valuable contribution, in terms of information dissemination, to an area in need of more studies and attention. Any preconceived notions concerning the chosen topic may colour the study, however the subject is approached with an open mind.

CHAPTER TWO

2. The International Threat of Small Arms and Light Weapons

For many years, small arms and light weapons were considered an insignificant threat, compared to large-scale conventional or nuclear weapons, but small arms and light weapons are posing one the biggest threat to human life in our time. Gun-violence affects all societies, whether they are at war, post-conflict, or experience crime or political violence. More than 740,000 people die each year as a result of gun-violence, and as much as two thirds of these deaths – or 490,000 to be more specific – occurs outside of war zones.⁵ The majority of violent deaths occur in non-war situations as the result of small or large-scale criminally or politically motivated armed violence. So as violent as wars can be, the reality is that more people die in everyday armed violence around the world. The spread of illicit small arms and light weapons should be considered a threat serious enough to allow States call upon assistance from other States to suppress such activities. The illegal arms trade is breeding a black economy severe enough for the international community to recognise that there is a need for targeted efforts, at land and at sea. However, laws must be used *lex lata* – as they exist, and not *lex ferenda* – as they ought to be. Various different legal frameworks are attempting to regulate the arms proliferation, both on the international level and on the regional level. This part will look more at this towards the end of the chapter.

Many would perhaps argue that the issue of small arms and light weapons is not an issue of international law. One could even say that this is underlined by the fact that current efforts to prevent the illicit trafficking of small arms and light weapons is primarily done on a national or regional basis, each State to its own. The sovereign nature of the international society almost implies that only a threat directed at a State, or hostilities between States, can be a threat to international peace. However, the nature of conflicts has changed. The world has seen an increase in intra-state conflicts and conflicts between non-state actors, and local conflicts and elevated levels of violence within States are threatening the authority of the State itself. Small arms and light weapons are fuelling civil unrest, and a significant part of small arms and light weapons are transported at sea. Due to the sovereign nature of the seas SALW are transported without significant obstacles across the oceans, and coastal States are particularly exposed to the devastating consequences of the illicit trafficking in SALW.

⁵ The Geneva Declaration Secretariat (2008) p.1

2.1 Sovereignty as a Guiding Principle of International Law

Sovereignty is a cornerstone of UNCLOS, and thus it is very difficult to regulate international activities at sea without restricting sovereignty. International law and the international society is first and foremost a system based on state sovereignty. The UN Charter affirms this in Article 2.1 by stating that the Organization [the UN] is based on the principle of the sovereign equality of all its Members. This assumes that each state is responsible for self-preservation; a strong defence and the ability to protect its interests and citizens.⁶ Although globalisation is generating an increased interconnectedness and states are growing more and more dependent upon each other, state sovereignty remains the defining feature of international law. Each state is ultimately seen as individual entities, as was also noted by Max Huber in the Palmas Island case:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.⁷

In line with public international law, UNCLOS is founded upon the principle of sovereignty; the respect for the supreme power of States within their own territory. This principle is equally valid onboard a ship or vessel. Flagships are to be considered as sovereign representatives of the flag State they are sailing under, and States are prevented from stopping and boarding ships on high seas, even if they are believed carry illicit weapons. Sovereignty assumes that there are rigid boundaries between States, but the oceans of the world is the perhaps the best example that these assumed walls between States are paper-thin at best. Actions at sea, from environmental disasters to drug shipping and illicit trafficking easily spills over to land and illustrates how closely connected the world really is.

2.2 The International Trade in Arms

The manufacturing and spread of SALW is not confined to a specific country or region, and its

⁶ Heinemann and Verner (2006) p.4

⁷ Malanczuk (1997) p.110. See also Island of Palmas Case (1925) p.838

effects are not confined to a specific socio-economic or ethnic group. Both the trade and trafficking of SALW is borderless; components may be produced in different countries, assembled in another and used in a third place. Small arms and light weapons are easy to hide and easy to transport, and can be moved across borders almost effortlessly. In fact, many would argue that small arms have become so prevalent precisely because they are cheap, light and easy to handle, transport, and not least, conceal. “Contrary to other current security threats, which tends to be more narrowly confined, weapons trafficking affects almost all countries in the world – to a greater or lesser degree. A useful typology is to think of countries as either the suppliers of weapons, transit countries or demand countries”⁸. No region, no country and no person is immune from the devastating consequences of the illicit trade of small arms and light weapons. It is extremely difficult to know exactly how many small arms and light weapons are in circulation globally. A number of States only share some information regarding their arms transfers, arms stocks and gun violence statistics, some States provide misleading data, while others do not report their small arms transfers at all. The information that is assembled come from the few countries who dares to report, and even this information is incomplete and inconsistent

What is known, is that a significant part of the illicit trafficking in arms occurs at sea, especially between States in the Caribbean, North and South-America. Adjacent to this, around 90% of the worlds trade is carried out by the international shipping industry, the world fleet is registered in over 150 nations, and manned by over one million seafarers of virtually every nationality.⁹ It is reasonable to suspect that shipping is equally important to traffickers and smugglers. It has been asserted that significant amounts of illegitimate goods, such as SALW, are transported across the seas and oceans of the world, and with less regulation and control both on sea and in docks it is easier to transport large quantities of illegal goods. Crimes at sea has the potential to interfere with commerce and trade, they affect the safety and security of maritime navigation, and also poses a potential threat to seafarers and fishers. These are only some of the consequences that directly affect maritime activity. Crimes at sea has ripple effects beyond the oceans as illicit trafficking spills onto the territories of coastal States which receive illegal goods that are transported to their countries, or through their countries, via their shores and ports.

Internationally a common consensus is forming and “UN practice has highlighted the fact that arms shall not be sent to countries where SALW are used or may be used for gross violations and abuses of human rights.”¹⁰ UN Member States have furthermore agreed to properly

⁸ Lumpe (2002) p.186

⁹ See the websites of the International Chamber of Shipping and the International Maritime Organization

¹⁰ Yihdego (2007) p.141

assess export authorisation of SALW, in accordance with “existing responsibilities of States under relevant international law”.¹¹ This consensus is not legally binding, but a broad agreement and common practice does arguably form a political commitment. In attempting to prevent SALW to travel from the legal market to the black market popular deterrence measures include export control, marking and tracing.

These are commendable efforts, but arguably the main problem does not normally sit with the exporters. As Yihdego points out, legally exported SALW may become illegal by the time they have reached their final destination;

“Many states focus on the importance of export, and as most SALW are flowing from the developed to the developing world, the developed world is better equipped, financially and politically to take measures to ensure safe and sound export of SALW. However, a far more effective mean of preventing the illicit spread of SALW is to impose far stricter import controls and stop illicit arms transfers en route. The danger with a heavy focus on export control is that SALW may be exported legally, but by the time it reaches its final destination it has gone through several ports and is now being imported illegally to struggling and poor communities”.¹²

This illustrates how the legal sale in arms can contribute to the illegal trafficking and spread of SALW. Trafficking at sea is aiding the proliferation of SALW and the lack of regulation of shipping means it is fairly easy for small arms to slip from the legal market to the illicit market.

2.3 The Social Impact of Arms Trafficking

It is unquestionable that SALW are having a terrible impact on societies. Although there is no evidence to indicate that small arms and light weapons are the primary cause behind conflicts they are fueling local and regional conflicts. SALW contribute to civil wars, conflict and even terrorism, and severely impede development, thus causing a vicious cycle. As intra-state violence has increased, so has the use of weapons, and it would be a grave mistake to write off SALW as unimportant when “[a]s much as 60 per cent of all homicides are committed with firearms – ranging from a high of 77 per cent in Central America to a low of 19 per cent in Western Europe”.¹³

Very few societies can claim to be completely disconnected from the arms production and arms trade, and the indiscriminate spread and use of SALW is posing a great threat to human

¹¹ UN PoA A/CONF.192/15 (2001) Art.11

¹² Yihdego (2007) p.251

¹³ The Geneva Declaration Secretariat (2008) p.5

security and personal safety for millions of people. Counting the human cost of the spread of SALW is a painful calculation, in his 2002 Report on Small Arms the Secretary-General wrote;

The spread of illicit small arms and light weapons is a global threat to human security and human rights. At least 500,000 people die every year as a result of the use of small arms and light weapons. Of the estimated 4 million war-related deaths during the 1990s, 90 per cent of those killed were civilians, and 80 per cent of those were women and children, mostly victims of the misuse of small arms and light weapons. In addition, tens of millions more people have lost their livelihoods, homes and families because of the indiscriminate and pervasive use of these weapons.¹⁴

Beyond the despairing death toll lies the huge cost SALW are having on States and societies. An unmapped number of people are injured each year, many suffering permanent disabilities, and many live on with profound mental scars. Armed violence is spreading fear and insecurity, sorrow and devastation, and it is destroying human capital. Although there are still many that would argue that SALW should not be a subject of international law, it should be unquestionable that small arms and light weapons is a global threat. The destruction regional violence is causing is challenging the stability of States and the human toll is stagnating development, both these issues can disrupt the international society. The consequences of the small arms and light weapons, the internal violence and insecurity it is causing, are threatening the sovereignty of States from within.

2.4 Combating Arms Proliferation

Readily available and easy to use small arms and light weapons is used every day, both inside and outside of direct conflicts, and SALW account for as much as 80% of casualties.¹⁵ Gun violence is causing insecurity which leads to a higher demand for weapons, which itself breed a greater insecurity, and a vicious circle spins on. To combat the illicit trade in arms both issues related to gun violence and insecurity must be addressed. The international community has attempted to address the issue in different ways; some legislation is binding, while some is soft law and is as such guiding at best. If there is a need for a renewed use of the Law of the Sea it is important to establish what measures that already exist and what they commit States to. This part takes a closer look at existing international arms regulations and their legal commitment.

As arms appears to migrate from state to state as easily as from region to region it is

¹⁴ UN Report S/2002/1053, 20 September 2002

¹⁵ UN Resolution A/52/298, 27 August 1997

crucial that the measures which are made at the global level are effective and functional.¹⁶ On the international arena some arms-initiatives have gained momentum, however this applies mostly to heavy arms, and even in this area the progress is slow. The Comprehensive Nuclear Test Ban Treaty (CTBT), which bans all nuclear testing, has yet to enter into force, awaiting ratification by nine key nuclear-weapon States which took part in the treaty negotiations. Until it enters into force the CTBT is only soft law. More than a hundred States has agreed on a ban on cluster munitions, and the Convention on Cluster Munitions entered into force in 2010 after the necessary 30 States had ratified it. The Landmine Convention also continues to add members, but ratification has not been universal and most landmine production occurs in States that has not offered any indication they will be ratifying. These initiatives are all binding upon ratification, but they have a very limited scope as few States have chosen to ratify, including those who commonly produce and use landmines, such as the US.

In recognition that arms control and disarmament are essential for the maintenance of international peace and security, the UN General Assembly passed a landmark resolution which established the UN process on an Arms Trade Treaty¹⁷. The treaty will cover all conventional weapons, including small arms and light weapons, and it will be legally binding upon ratification when it is completed. However, as long as it is still a process it is still only soft-law. In 2008, an open-ended working group was established¹⁸ and in 2010 the group submitted its first report¹⁹. In its report the group is displaying a commitment to the principles of sovereignty, and acknowledges the right of all states to manufacture, import, export, transfer and retain weapons for self-defence and security needs. The report furthermore affirms that the UN Arms Trade Treaty will be undertaken in an open and transparent manner, on the basis of consensus²⁰. As Richard Dwomoh points out in his book, *Small Arms and Light Weapons Proliferation and the Maintenance of International Peace and Security*, “there is still no firm commitment at the UNGA to start negotiations of an ATT. The consensus-bound procedures of negotiations at the UN will allow individual states, should they so decide, to bloc further developments towards an ATT within the UN framework”²¹. The success of a potential arms trade treaty is dependent upon global political will, and the obstacles are still great.

¹⁶ Lumpe (2002) p.189

¹⁷ UN Resolution A/Res/61/89, 18 December 2006

¹⁸ UN Resolution A/Res/63/240, 8 January 2009

¹⁹ UN Resolution A/Res/64/48, 12 January 2010

²⁰ Ibid

²¹ Dwomoh (2010) p.24

Conventional weapons are the most common type of armament globally and historically the most commonly used in conflict. To date, there are three specific international instruments that deal with small arms and light weapons; the first is the 'Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime' (the 2001 UN Firearms Protocol). The Firearms Protocol requires states to criminalise offenses such as the illicit manufacturing and trafficking of firearms. It presents a uniform international standard and it is currently the only global legally binding instrument addressing the issue of small arms. Like several other arms initiatives, the Firearms Protocol has a very limited scope as few States have chosen to sign and ratify the Protocol. As such, the Firearms Protocol has a limited effect in practice.

The second international instrument is the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA). The PoA provides the framework for activities to counter the illicit trade in small arms and light weapons. The UN PoA is more of a guide to all States working with deterring small arms and light weapons. It not a legally or politically binding document, however, its findings have the ears of policy makers at the UN and thus its assertions are important. The UN PoA sums up some of the consequences and worries related to the proliferation of SALW, these include; sustaining and exacerbating conflicts; diminishing the security of vulnerable groups such as women, children and internally displacing or refugees; furthering organised crime and terrorism, and halting development and growth on both a national, regional and international level.²²

The third and final international instrument is the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (the International Tracing Instrument). This instrument holds conditions on marking new production and Government stocks, marking at the time of import, and also provides a framework for states to file small arms tracing requests with one another. Again, this is not a legal or political document, but a specific instrument to aid States in their fight against SALW. To date, the UN's efforts to curb small arms proliferation has proven to be the most comprehensive legislation so far, however it is only legally binding upon those who have signed and ratified the different instruments.

²² UN PoA A/CONF.192/15 (2001)

CHAPTER THREE

3. Crime and Development in the Caribbean

International initiatives and attention are crucial in the fight against illicit weapons, solid legislation and good tool are necessary. But even if many states have begun to tackle the issue of SALW and illicit weapons trafficking, one of the regions that is most affected by SALW, Latin America and the Caribbean, is still struggling to control the proliferation. Small arms and light weapons are promoting the drug trade in Latin America and fueling civil violence and yet little is done to stop the spread of small arms and light weapons. “There are two main reasons for this lack of response [to illicit weapons trafficking]: either a government is reluctant to address the issue due to ignorance or a lack of political will to take action; or the government is simply unable to respond and control the movement of goods across its borders”²³. The fight against the illicit spread of small arms and light weapons must take tools that are available to fight gun crime on a regional level, where efforts can be specialised and direct. UNCLOS is the most comprehensive and robust legal tool available for the coastal States of the Caribbean, but one must understand the need for increased control before one can talk about how that control will take place.

Through a careful review of different literature on crime and violence in the Caribbean this chapter attempts to tie together information from many different sources to provide an overview of the problems connected to gun crime in the Caribbean and show that the illicit trafficking of small arms and light weapons is both closely tied to the drug trade, and equally damaging, if not more. It is vital that the Caribbean region begins to address the illicit trafficking at sea in order to attack the problem where it is most prevalent.

3.1 The Caribbean Community

The Caribbean Community is a region consisting of the Caribbean Sea, 13 sovereign States and 17 dependent territories. All are coastal States which are enclosed by the Caribbean Sea, and the surrounding coasts. The region is located southeast of the Gulf of Mexico and North America, east of Central America, and to the north of South America²⁴. “The Gulf of Mexico and the Caribbean Sea [...] are surrounded by continental coast and subdivided by islands. The two regions have

²³ Lumpe (2000) p.187

²⁴ Wikipedia, Last visited on 18.10.2011

generally narrow continental shelves and more extensive zones of continental slope, trenches and abyssal plains. [...] The Gulf is about 1.85 million sq. km.”²⁵ The total population is estimated to be 37,5 million (2000)²⁶ and they are considered to have a multitude of backgrounds and cultures. Although the Caribbean States are vastly different, they share common challenges and problems on the economic and political level. Although the region is consistent of island States they are very much interconnected, and there is a strong emphasis on regionalism among the States.

The Caribbean has often been defined by “an inequality that is high, persistent and that reproduces itself within a context of low socio-economic mobility”.²⁷ The systemic factors that lead to persistent inequality, such as low levels of education, poor quality of political representation, weak political institutions and institutional shortcomings, all contribute to state corruption and exacerbates inequality. According to Alexandra Heineman and Dorte Verner there is a consensus in the literature concerning development in the Caribbean that the explanation for the abnormally high level of violence primarily stems from inequality; “The main risk factor for violent and criminal behaviour next to income inequality are the lack of education, low social capital, unemployment, unruly urbanization and inefficient criminal justice systems.”²⁸ Unemployment, dissatisfaction with income and inequality creates jealousy and anger and can be a contributing factor to the “contact crimes” of the Caribbean.²⁹ The Caribbean region is experiencing widespread systemic problems such as corruption, racism, and access to justice is especially problematic for the poor. There are also high levels of mistrust of the police, which work to the benefit of the criminals and explain the low level of criminal reporting. During the 1990s a link was drawn between development and arms trafficking, and it is important to understand that the fight against the global scourge of armed violence and the prospects for sustainable development are closely linked. A weak infrastructure and a lack of financial growth combined with porous borders makes the region an easy target for organised crime coming from the sea.

3.2 Violence and Gun Crime in the Caribbean

The States of the Caribbean region are a vastly diverse group in terms of their political structure, population size, and level of development, but they share the experience of a colonial past and a

²⁵ Prescott and Schofield (2005) p.347

²⁶ Wikipedia, Last visited on 18.10.2011

²⁷ The European Commission (2010) p.19

²⁸ Heinemann and Verner (2006) p.15

²⁹ Ibid

geography which places them in the path of illicit weapons trafficking and the international drug trade. With its expansive sea border it is left practically open, and illicit trafficking of drugs and weapons travels through the region with little or no hindrance.

Latin American and the Caribbean has been fighting illegal drug trafficking for decades and in the 1990s the region started to see illicit arms trafficking as a part of the drug trade³⁰. The illegal firearms that circulate in the Caribbean come from several different sources. They can come from legal owners in the country itself, they can be bought legally or illegally from a different country, or they can be smuggled into the country. Illegal weapons come from both private owners and the protective services; weapons from the police and the army are commonly targeted for criminal use and go missing at intervals. However, diverted SALW are not the main source of weapons involved in crime. According to the UN Office on Drugs and Crime (UNODC), it is believed that the majority of illegal arms are smuggled into the Caribbean region.³¹

“Smuggled firearms are sourced from South and Central American manufacturers of light arms, among others. [...] Weapons manufactured or otherwise available in South America are smuggled [...] via fishing vessels and private pleasure boats. Some proceed to the United States and Europe, all part of the northward contraband. Weapons from the United States and Canada are transported southward in the shipping of the proceeds from the sale of illegal drugs.”³²

The Caribbean region is very much a transit point for further illicit trafficking. The uncomplicated and unhindered transit of illegal goods through the Caribbean Sea also poses a threat to other States as targets for the export.

In 2002 the Caribbean Community's (CARICOM) Regional Task Force on Crime and Security commissioned a report on the proliferation of small arms and light weapons in the Caribbean;

The resulting report identified three levels of SALW proliferation in the region: countries with established high levels and patterns of armed crime (Jamaica), countries with emerging high levels of armed and organized criminality (Guyana, Trinidad and Tobago), and countries with indications of increased use and availability of small arms (Antigua and Barbuda, Barbados, Dominica, Grenada, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines).³³

³⁰ Boutwell and Klare (1999) p.173

³¹ UNODC and The World Bank, Report No 37820 (2007) p. 130

³² Ibid. Also note that certain established routes have been defined. These are: Jamaica southwards through the Caribbean island chain; Guyana/Trinidad and Tobago northward through the same chain; St. Lucia – St. Vincent and the Grenadines – Martinique triangle, and; St. Maarten – Antigua – St. Vincent and the Grenadines.

³³ CARICOM (2002). See also UNODC and The World Bank, Report No 37820 (2007), p. ix

The report found that the high levels of violence in parts of urban Jamaica had left residents afraid to leave their homes and had decreased interaction with friends and family who live elsewhere. Similar data from the Dominican Republic and Haiti show that people avoid activities and locations that are perceived to expose them to a high risk of criminal victimization. It is reasonable to assume that the situation is the same in other Caribbean States with elevated levels of violence. This same fear is also affecting the tourism industry, which is a considerable source of income for all countries in the Caribbean region. This is having a ripple effect into the economy of Caribbean States, and consequently on the ability to develop and prosper.

According to the report, data for several countries illustrates that the levels of crime and violence were escalating, and so was the use of weapons in criminal acts. Despite the report being commissioned nearly 10 years ago, it is reasonable to believe that more powerful weapons are now being used, taking the more recent high mortality levels into account. Further statistics from 2007 show that the Caribbean region is still one of the most violent regions in the world outside of a conflict zone. The numbers are staggering; according to figures from the UNODC³⁴ and Interpol, the overall Caribbean murder rate - at 30 per 100,000 population annually - are higher than for any other region of the world and have risen in recent years for many of the region's countries. These figures are collected from police statistics, which offer a very imperfect picture of violence, since the majority of these incidents are not reported to police.

Crime is the primary social challenge for the Caribbean, with economic development coming in at close second. The high levels of crime is driving away investment and is slowing down financial growth and development. Regional anti-violence measures, as well as efforts to combat crime and curb the illicit firearms and drugs trafficking are particularly affected by the geographical vulnerabilities of the region. The region is furthermore lacking coherence and strong cooperative bonds. Some arms prevention initiatives have been carried out individually, others on an ad-hoc basis, and there is a need for improved communication, focused initiatives and close cooperation to strengthen the borders and improve border control. The region is especially exposed to crime; as coastal islands the Caribbean States have extensive coastlines and territorial waters to control, and this is highly relative to their ability to fund law enforcement coverage. The cost of crime on the region is high both in economical terms, but even more so in social terms and in human capital.

³⁴ UNODC and The World Bank, Report No 37820 (2007) p.1

3.3 Regional initiatives to Combat the Illicit Trafficking of SALW

The Americas is a region which fills the role of both weapons provider and weapons receiver. Weapons are produced and sold in North America and commonly transported to South America. “Both legal and illegal sales can cause problems: for example, weapons purchased legally in the United States reportedly constitute much of the arms inventory of drug traffickers in Latin America”.³⁵ Unlike the drug trade, which usually flows from developing countries to the developed world, small arms and light weapons are transferred in the opposite direction. Many of the coastal States of the Caribbean have initiated specific efforts to reduce arms trafficking. These efforts include “reviewing existing or implementing new legislation to control the ownership and use of firearms by individuals; improving legislation on export controls; prioritising tracing weapons seized from criminals; cracking down on suspect gun dealers; drafting legislation to control arms brokering; and destroying stocks of weapons surplus to national needs.”³⁶

3.3.1 Regional Application of the Inter-American Convention

In 1997 negotiations brought forward the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Material. The Convention entered into force in 1998, and as of 2011 thirty of the thirty-three signatories had also ratified the Convention. Two of the main backers, the United States and Canada have yet to ratify the treaty. The purposes of the agreement are 'to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives and related materials'. The six main provisions are:

1. development of a harmonised system of licensing for the export, import and transit of weapons;
2. a requirement that firearms be marked at the time of manufacture;
3. a requirement that states put in place legislation to make the illicit manufacture and traffic in firearms a criminal offence;
4. an exchange of information on legislation and national practice, known smugglers, smuggling routes and methods used for concealing and detecting firearms, ammunition and explosives;
5. cooperation between law enforcement agencies in the hemisphere; and
6. provision of technical assistance and training for states in the region³⁷

³⁵ Levi and O'Hanlon (2005) p.114

³⁶ Lumpe (2000) p.187. Various UN General Assembly documents provide updates on states' actions in this regard. See, in particular *Report of the Group of Governmental Experts on Small Arms*, UN Doc. A/54/258, 19 August 1999.

³⁷ Lumpe (2000) p.190

The most important feature of the convention is that it is legally binding. The majority of Caribbean States have signed the Convention, with Dominica, Jamaica and St. Vincent & The Grenadines being the exceptions. The Convention is regarded as a success by the OAS and States in the region³⁸, but the Convention is arguably subject to limitations and is struggling with inefficiency. The Convention is based upon the principle of sovereignty and does not in any way attempt to limit the sovereignty of States. The Convention urges States to take the necessary measures within their national legislations to criminalise the trafficking of SALW, and measures between States are based on cooperation. Beyond this, the biggest challenge for the Convention lies in its implementation; most countries in the region are dedicated to the principles of the convention, but their ability – financially and politically – to enact necessary measures to comply with the agreement remains to be seen.³⁹ So even if the Convention is legally binding it is not being rigidly enforced by States in the region due to a lack of resources.

3.3.2 Regional Application of the UN Firearms Protocol

The United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol) deals specifically with the issue of SALW trafficking, but it has not gained widespread use, and it is not legally binding unless it has been signed and ratified. As far as the Caribbean region is concerned only 7 out of 30 Caribbean States have ratified the Firearms Protocol; namely Bahamas, Barbados, Cuba, Grenada, Jamaica, St. Kitts & Nevis and Trinidad & Tobago. The Dominican Republic has signed the Firearms Protocol, but has not yet ratified it. All other Caribbean States have neither signed nor ratified the protocol.

The governments of the Caribbean recognise the seriousness of the escalating levels of armed violence and States in the Caribbean have invested considerable time and effort in developing regional standards to control the trafficking of SALW. Some would even argue that the region has been at the forefront of efforts to establish appropriate arms control and international disarmament instruments aimed at addressing pressing security issues, but little effort has been made to implement and utilise existing international firearms legislation and the region have a mixed report when it comes to implementing agreed standards into their national legislation.

³⁸ Ibid p.192

³⁹ Ibid p.191

CHAPTER FOUR

4. The Law of the Sea and the Right of Protection of Coastal States

Crimes at sea are transnational by their very nature, and include illicit trafficking in small arms and light weapons, drugs, migrants, smuggling, piracy or terrorist acts against shipping or maritime interests.⁴⁰ There is a high activity on the seas and oceans of the world, and although it is indisputable that crimes at sea threaten the interests of coastal States, it also has an impact on collective security on an international level. Although some states are easier targets for illegal import of SALW, no State is immune from smuggling and illicit trafficking. Shipping and the use of the oceans is an integral part of our globalised society, and the UN Convention on the Law of the Sea is the broadest legal guidance for maritime behaviour.

The current legal regime acknowledges that coastal States are susceptible to attacks on its security via its territorial sea. As Mallia describes, the Law of the Sea acknowledges that the territorial sea is an extension of the coastal State's territory, and therefore sovereignty. But the Convention does not adequately cater for the issues which are currently threatening coastal States;

In the 20 years since the adoption of the Convention on the Law of the Sea, crimes at sea have become more prevalent and are increasing. The framers of the Convention never envisaged many of the crimes that exist today, and as a result either included only a general provision or none at all regarding their suppression.⁴¹

The Law of the Sea is not commonly used to legally address the illicit trafficking of SALW, but it was created to contribute to the maintenance of peace, justice and progress for all peoples of the world. But with the constant changes of the international society and the introduction of new threats in the maritime sphere the Law of the Sea must expand its applicability to address the illicit trafficking in SALW.

In this chapter, I will seek to analyse Article 25 of UNCLOS, which safeguards the right of protection of coastal States, to see how this can be applied to the Caribbean region. However, very few legal provisions can be analysed exclusively without reference to other provisions, or as part of a bigger objective. It is impossible to review Art.25 exclusively without reference to the notion of innocent passage or maritime jurisdiction, and as such these issues will also be briefly discussed.

⁴⁰ UN Report A/66/70/Add.1, 11 April 2011, p. 75

⁴¹ Mallia (2010) p.55

4.1 The Interpretation of Treaties

In the past there were no binding rules on interpretation, the criteria for construing treaty law were merely 'rules of logic'.⁴² How we view or interpret a treaty is not insignificant. Most legal texts, if not all, can be interpreted in a multitude of different ways, and different interpretations can give very different outcomes. A legal text can also be unclear, incomplete or contradictory because political differences between the negotiating parties necessitated a compromised formulation, or simply because the ambiguity was overlooked by the drafters.⁴³

4.1.1 Theoretical Approaches to Treaty Interpretation

The main theories applied to treaty interpretation can be found in the subjective, the teleological and the textual school. The subjective method stipulates that the main purpose of treaty interpretation is to identify and spell out the intention of the draftsmen. This has led to some States' attempt to negotiate history (so-called preparatory work or *travaux préparatoires*).⁴⁴ It is thought that the correct meaning of the provisions of the law is enhanced when the original intention of the drafting parties, the historical background and the circumstances under which the treaty was signed, is taken into account. When attempting to view a treaty in this historical light it is very helpful to turn to the concept of *travaux préparatoires*, however one might ask how much intentions matter if they are fabricated? Establishing evidence of the underlying intentions is difficult at best. Furthermore, when the subjective method is applied legal texts becomes subject to cultural interpretation, and conclusions can vary greatly within the same school of thought.

The teleological school aligns itself with the subjective school of thought, but places its emphasis more on the importance of the object and the purpose of a treaty,⁴⁵ and great weight is placed upon the object and purpose pursued by the contracting parties. In other words, the overall aim of the treaty prevails over the intentions held at the time of the conclusion of the treaty. This method gives “pride of place [...] to the principle of 'maximum effectiveness' (*ut res magis valeat quam pereat*), whereby a treaty must be given an interpretation that enables its provisions to be 'effective and useful', that is, to have the appropriate effect.”⁴⁶ This suggests that it is better for legal

⁴² Cassese (2001) p.132

⁴³ Schweigman (2001) p.8

⁴⁴ Cassese (2001) p.133

⁴⁵ Schweigman (2001) p.10

⁴⁶ Cassese (2001) p.134

provisions to be effective rather than to be made void, and that the need for the effective functioning of an organisation is more important than the sovereignty of its members.⁴⁷

The final school of thought, textual or literal meaning, presupposes that the intentions of the drafting parties is adequately expressed in the text of the treaty.⁴⁸ As the name suggests, interpretations and analysis should be done in conformity with the ordinary meaning of the words in the provision. Advocates of the textual school of thought have argued that “when a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurdity, there is no ground for refusing to accept the meaning which the deed naturally presents”.⁴⁹ The achilles heel of this method is that almost every legal text can be interpreted differently, even when the text is to be interpreted in its most literal meaning.

4.1.2 The Vienna Convention on the Law of Treaties

It is vital to international public law that the interpretation of legal texts is done in a consistent manner so as to establish a less ambiguous or contradictory meaning. Thus one convention has become the guiding principle when interpreting legal texts; the Vienna Convention on the Law of Treaties 1969 (VCLT) has to a large degree codified customary law. It has been defined as “a compound of codification and of progressive development of customary international law”.⁵⁰ It is a very important legal instrument, not only because it has crystallised customary law, but because of its broad reach; according to Art. 5 of the VCLT the Convention “applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation.”⁵¹

The Convention tackles treaty interpretation with a balanced approach. Section 3, Articles 31 to 33, of the VCLT deal specifically with the interpretation of treaties. Art.31(1) states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Interpretation according to the 'principle of good faith' is a bona fides rule, which is not a specific rule of interpretation, but a general principle of law. This principle intended to expand the normative scope

⁴⁷ Malanczuk (1997) p.336

⁴⁸ Schweigman (2001) p.11

⁴⁹ Ibid p.12

⁵⁰ Dixon (1996) p.54

⁵¹ VCLT (1969) Art. 5

of treaties, whereby in case of doubt, limitations of sovereignty are to be strictly interpreted.⁵²

Under the Vienna Convention recourse to *travaux préparatoires* may only be regarded as a supplementary means of interpretation. According to Article 32, this supplementary mean should only be used to confirm the meaning resulting from the application of Art.31, or to determine the meaning when the interpretation leaves the meaning ambiguous, obscure or leads to a result which is absurd or unreasonable. Finally, under Art.33, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, and the terms of the treaty are presumed to have the same meaning in each authentic text. The VCLT has applied the literal, systematic and teleological methods of interpretation, and offers a satisfactory blend of the different methods of interpretation.

4.2 The UN Convention on the Law of the Sea

In more recent times the sea has been divided up into sections or areas, each with a different legal status involving different rights and powers of States. This is in its entirety regulated by the 1982 Convention on the Law of the Sea (UNCLOS). The Convention is an international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which began in 1973 and concluded 1982. The Convention entered into force in 1994, largely replacing various conventions of 1958.⁵³ It defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. To date, 161 States and the European Union have joined UNCLOS⁵⁴ and it has an almost global affiliation. There is some disagreement as to whether the Convention has codified international law, but many would argue that UNCLOS has become custom as illustrated through consistent state practice and *opinio juris*. As Martin Dixon has explained in his Textbook on International Law, the comprehensive nature of the Convention, its development over 9 years, and the wait of 12 years before it entered into force has had a significant impact on customary international law. So even if some States has decided to remain on the outside of the Convention many of the principles have been codified and will be binding on all States. Finally, even if a State is not party to UNCLOS its relations with every other States will be governed by customary international law and their respect for the provisions on UNCLOS.⁵⁵

⁵² Cassese (2001) p.134

⁵³ Ibid p.58

⁵⁴ UN Division for Ocean Affairs and the Law of the Sea (as of 20.10.2011)

⁵⁵ Dixon (2007) p.209

The Law of the Sea is a multilateral treaty, which is commonly referred to in legal terminology as a *traité-loi*, or lawmaking treaty, and have “as a chief characteristic under this classification a set of rules which are applied universally across the full spectrum of State parties.”⁵⁶ Law making treaties, such as Law of the Sea, does not offer any favours to signatories for undertaking obligations. As such, law making treaties are comparable to a degree to legislation under domestic law, binding each member equally to their rules without consideration.⁵⁷ UNCLOS very much aligns itself with this; it imposes few duties upon signatories, it does not limit sovereignty to any great extent, and each coastal State has jurisdiction over their territorial waters and any State has exclusive jurisdiction over its own ships. In many ways UNCLOS attempts to apply the principle of 'maximum effectiveness'. It concerns itself with being first and foremost useful and effective.

The preamble of UNCLOS illustrates that the Convention is founded upon sovereignty and the intentions of the Convention stipulates that a legal order for the seas and oceans will facilitate international communication; will promote the peaceful uses of the seas and oceans; the equitable and efficient utilization of their resources; the conservation of their living resources; and the study, protection and preservation of the marine environment. As far as a law goes, UNCLOS is decidedly uncontroversial. Any prior disagreements or disputes over maritime issues have most often been resolved through international communication, and this has arguably established a broad consensus for legality of the Convention.

4.2.1 UNCLOS in a Broader Perspective: The Concept of Human Security

The primary intention of UNCLOS is to ensure the peaceful usage of the seas, and the Convention encourages States to take responsibility for human security by implementing necessary measures to protect human life and by adopting existing international law as required. UNCLOS has identified the need to uphold the protection of human life in Art.146;

“With respect to the activities in the Area, necessary measures shall be taken to ensure effective protection of human life. To this end the Authority shall adopt appropriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties.”

⁵⁶ Joyner (2011) p.27

⁵⁷ Malanczuk (1997) p.37-38

After a lengthy process the Law of the Sea entered into force in 1994. The same year the United Nations Development Programme (UNDP) drew a link between security and development and manifested the importance of 'human security'. As has been previously described, small arms and light weapons has commonly not been considered as a threat to international peace and security, but it is very much a threat to human security, and this should also be valid under UNCLOS. If we were to analyse Art.146 from a subjective point of view then the concept of 'human security' would bear no value, the Convention was concluded in 1982 and the intentions of the drafters did not include an expanded meaning of the security term. However, if one takes the textual approach, Art.146 should be understood in its ordinary meaning and it clearly states in the Convention that States shall take the necessary measures required to protect human life. This can arguably be interpreted to mean that States must take precautionary measures to limit threats to human life at – or from – sea. Regardless, this new way of viewing security has shifted the focus of international relations and as such the Law of the Sea cannot be immune to such a significant change. The freedom of the high seas is probably the best known of all principles of international law, and certainly one of the oldest. But the Law of the Sea is not an isolated law, it exists alongside rules and practices of general international law. As such, UNCLOS needs to show consideration for adjacent international law and thus needs to contribute to strengthening peace, security, cooperation and friendly relations among all nations⁵⁸ in cooperation with other international law.

For a long time, peace was considered simply as the absence of war, and international security was synonymous with the absence of a military threat. In the post-war decades the notion of peace was altered to include the concept of 'human security', meaning that it was simply not enough to consider a state peaceful if it was not under any direct military threat. 'Peaceful' now also took the internal relations of a state into consideration. The 1994 Human Development Report,⁵⁹ published by the United Nations Development Programme (UNDP), was one of the first publications to connect the concepts of security and development, and thus merged two important areas of the UN's work. The publication has been considered a milestone because of its argument that “freedom from want” and “freedom from fear” is the best approach to tackle global insecurity.

“The introduction of the concept of ‘human security’ marks a change in that security by becoming ‘human’ also encompasses an absence of non-military dangers. This development has its origin in the observation, in particular since the 1990s, with the end of the rivalry between capitalist states and communist states, that the real danger facing

⁵⁸ UNCLOS, Preamble

⁵⁹ UNDP Human Development Report 2004

the world is no longer that of a major war involving two or more national armies, as hitherto, but more localised conflicts which are limited to a single country or region”⁶⁰.

The adjective '*human*' reflects the extension of the concept of security to the individual and underlines the fact that localised conflicts can impact the entire international society. The same meaning can arguably be seen in Art.146 where human security is given specific mention.

Protecting human security is thought to have a vital effect on the internal relations of a State. When a State is experiencing conflict or turmoil the effects will undoubtedly spill over into national production and cause disruptions to the financial situation. It affects the civil society, demotes education, and may lead to internal displacement of people. Other states will be unable to trade with the state in conflict, civil unrest may spread to other states close by, as was clearly seen in the Middle East during the political revolutions of 2011 coined the Arab Spring,⁶¹ and the global financial market may encounter problems. A conflict within a State is potentially equally damaging to international affairs as a conflict between states. Security is no longer solely the absence of armed conflict, and a system of collective security has been complemented by a new dimension of personal safety and security. This extends into the legal sphere, and can especially be applied to the area of small arms and light weapons and the connected issue of illicit trafficking. The first step in deterring the use of SALW begins with restricting the illicit trafficking in SALW as much as possible.

4.2.2 The Right of Protection of Coastal States

The UN Convention on the Law of the Sea values and protects sovereignty, and awards States the highest possible freedom on the high oceans as a shared common good. All States, whether coastal or landlocked, enjoy access to the seas and oceans of the world. This access includes a bundle of distinct freedoms, “such as the freedom of navigation and overflight, the freedom to fish, the freedom to lay submarine cables and pipelines, the freedom to conduct scientific research and the freedom to construct artificial islands.”⁶² This access also includes the right of innocent passage, and allows States the right of free passage through territorial or internal waters if passage is indeed innocent.

However, this does not mean that coastal States are left completely open and exposed

⁶⁰ Ayissi (2005) p. 17

⁶¹ See The Guardian, 15 July 2011

⁶² UNCLOS, Art. 87. See also Dixon (2007) p.231

to the seaborne activities of other States. Following the Convention, all coastal States enjoy a sovereignty which stretches beyond their land territory and internal waters to an adjacent belt of sea, described as territorial sea, which is under the territorial jurisdiction of, and subject to the sovereignty of the coastal State.⁶³ Every State has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles, measured from the baseline. And States are allowed to take action to prevent passage through their own waters if it is not innocent. In their own waters coastal States enjoy sovereignty, jurisdiction and, perhaps most importantly, rights of protection according to Article 25 of UNCLOS;

Art.25 - Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.
3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea of the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

The fact that a State has sovereignty over the territorial sea means that it has the full legislative jurisdiction therein in the same way as on land territory. Arguably, this right of protection of the coastal State is quite unique in international law; States may draw up a list of goods considered to be contraband and deny others access to their territorial waters if any vessel is thought to be in breach of this. Very few legal provisions allow States to take pre-emptive measures

However, the right of innocent passage does impose an important limitation to this sovereignty, and creates a tug of war between the sovereignty of a coastal State and the sovereignty of a flagship.

⁶³ UNCLOS Art. 2, Note also that according to UNCLOS Art. 3 – Territorial sea can extend up to 12 nautical miles from the coastal State's baseline, and sovereignty extends to the airspace above the territorial sea.

4.2.3 The Right of Innocent Passage

International law has placed some restrictions on the sovereignty of territorial waters of coastal States, and has allowed other States regular use of territorial waters through the notion of innocent passage. Under Art.17 of UNCLOS all States have been awarded the right of innocent passage through territorial seas. This is a provision that underlines the importance of sovereignty in maritime affairs. The threshold to interfere in the affairs of another State, to board a flagship or stop a flagship in their route, is very high. The concept of innocent passage is an important feature of UNCLOS, and it is important to establish if the illicit trafficking of SALW constitutes a breach of innocent passage.

Innocent passage poses no threat to coastal States as long as the vessel claiming this right is indeed only passing through without intentions to breach national or international law relevant to the coastal State. Passage is considered to be innocent as long as it is not prejudicial to the peace, good order or security of the coastal State.⁶⁴ UNCLOS has listed illicit activities considered prejudicial to peace in Art.19, and passage is seen as malfeasant if it, among other activities, engages in the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.⁶⁵ Furthermore, under Art.21 a coastal State may adopt laws and regulations in conformity with the provisions of the Convention relating to innocent passage to further secure maritime safety. These provisions suggests that UNCLOS allows for a wider definition of the term 'security' than what is traditionally applied in international law; UNCLOS includes examples of threats which might be deemed harmful to the security of the sovereignty of the coastal State.

It should be unquestionable that the illicit trafficking of SALW is a breach of innocent passage. The mere presence of small arms and light weapons has placed an enormous strain on the Caribbean region, as described in previous chapters the murder rates and levels of gun crime are exceptionally high and it is affecting everything from the political system to the individual safety of the population. The illicit trafficking of SALW is presenting a severe threat to coastal States, and can be argued to be both 'prejudicial to peace' under Art.19, and in breach of national laws and regulations under Art.21. If a coastal State believes that a vessel is passing through its territorial waters with the intention of offloading illicit goods, either directly or through a smaller transit boat, it has the right to stop the vessel en route.

Although there is a high level of sovereignty in UNCLOS innocent passage should

⁶⁴ UNCLOS, Art.19(1)

⁶⁵ UNCLOS, Art.19(2)(g)

not be perceived as a *carte blanche* to travel freely through both international and territorial waters. If passage is not innocent, but rather in conflict with national or international legislation, the coastal State is empowered under Art.25 to take the necessary steps in its territorial sea to prevent passage. Coastal States have jurisdiction in their own territorial waters, and if illegal activities have been committed onboard a ships passing through their territorial waters they can take action. Illicit weapons trafficking certainly pose such a breach of both national and certainly international law and there should be no doubt that the trafficking of SALW constitutes a threat so severe – to coastal States and the international community as a whole – that it is in conflict with innocent passage and necessitates the need to invoke the right of protection.

4.2.4 Jurisdiction over Territorial Waters

Small arms and light weapons is threatening human security and deterring economic and social development, impacting all parts of the current globalised society. The illicit trafficking of SALW is borderless and as such it presents a universal threat. It is vital that the irrepressible trafficking of SALW must be stopped.

As a general rule all States, whether coastal or landlocked, enjoy full freedom on the high seas as well as the right of innocent passage through territorial or internal waters. The threshold for obstructing this right is very high. Although coastal States enjoy full jurisdiction in their own territorial waters, they are discouraged from exercising criminal jurisdiction on board a foreign ship passing through its territorial sea, with a few exceptions; if the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State, or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.⁶⁶ Art.27 of UNCLOS empowers the coastal State to exercise criminal jurisdiction if a vessel is involved in a crime that extends to the coastal State and is of a kind that would disturb the peace in the country, illicit arms trafficking fulfils these requirements. Art.25 underlines this, and together the two legal provisions allows for precautionary measures inside a coastal States own territorial waters, and thus permits a coastal State to suspend innocent passage under sufficient circumstances, and enforce jurisdiction in line with UNCLOS.

However, the jurisdiction of a coastal State does not extend beyond territorial waters

⁶⁶ UNCLOS, Art.27

and many would perhaps question whether merely preventing non-innocent passage would be an effective tool in the wider scheme of coastal State protection. It is sometimes “not desirable to take enforcement action at the earlier stages so that other offenders may be identified and arrested as well. In this way, on- and off-shore authorities may desist from taking action against a suspicious vessel approaching the land territory of the coastal State in the hope that the contacts on land may be also be revealed”.⁶⁷ This is particularly relevant in the case of illegal importation of SALW, where both the smugglers on board the vessel as well as the traffickers may also be identified. As such a rational coastal state should perhaps be more interested in enforcing its laws against a vessel rather than simply having the capacity to prevent passage of a non-innocent vessel in a wide variety of instances.

Then again, others would argue that the desire to arrest the traffickers of SALW must be measured against the need to protect the population from further import of illicit arms and protect human security. For less resourceful Caribbean coastal States, preventing entrance to its ports may be sufficient to deter illicit trafficking of SALW directly into their territories, even if this means that the problem is shipped to a neighbouring State. But in a region so small and geographically close, shifting the problem to a neighbouring State would not form a solution. The Caribbean region relies to a very large degree on income from tourism, and the gun violence destroying the region is also destroying its reputation and affecting tourism and travel to the islands. Sending vessels which are carrying illicit SALW to a neighbouring State still affects the region as a whole.

Under UNCLOS coastal States are entitled to take both protective and pre-emptive measures; within their territorial waters coastal States may enforce jurisdiction over foreign vessels and under specific circumstances seize cargo if it is considered prejudicial to peace. States may also suspend innocent passage; individual vessels can have this right invoked or a coastal State can apply a full blockade on their sea borders. Although sovereignty is a cornerstone of UNCLOS there is a significant respect for coastal States right of protection.

4.3 UNCLOS as a Part of a Successful Arms Control Regime

The Law of the Sea governs the peaceful relations among States at sea, and ensures the freedom of movement and usage of our maritime resources. The Convention primarily concerns itself with being useful and efficient, and as already mentioned, is very much an uncontroversial convention.

⁶⁷ Mallia (2010) p.3

Few States have challenged the validity of the Convention, and any differences have been resolved through international communication or through the International Tribunal for the Law of the Sea. UNCLOS has achieved a rare consensus in the international society, and this is owed to the high respect for sovereignty embodied in the convention.

This respect for sovereignty combined with a desire for consensus makes UNCLOS unable to impose any responsibilities upon coastal States; States are expected but not obliged to desist from enforcing their laws in respect of crimes committed on passing ships. And here lies the main flaw of UNCLOS; its inability to impose any duties on States. “A successful arms control regime must also have the means to enforce its standards. Indeed, enforcement has always been the Achilles’ heel of arms control.”⁶⁸ If no duties are imposed on States to protect the seas and oceans of the world from illicit and harmful activities then it is unlikely that States which are not directly at threat will divert any resources to tackle such a problem.

As discussed above, there are relevant rights in the Convention that allows coastal States to protect their sea borders. However, on the same note, other international legislation (such as the UN Firearms Protocol among others) also exists and hold similar prescriptions, but both UNCLOS and other legislation are rendered useless if states for some reason is unwilling or unable to uphold the laws. As Patricia Mallia argues;

“States may legally act only within the constraints of international law. However, irrespective of the legal empowerment to act, States also face challenges of a practical nature. A simple example may clarify this point: while each State has an unquestionable legal power to safeguard its port facilities, it is still faced with the difficulty of ensuring the proper and effective monitoring of vessels entering its ports and the efficient, but thorough inspection of its content”.⁶⁹

For resource-poor Caribbean States the sound protection of its ocean line is a down-prioritised area with more immediate challenges taking centre-stage. If a coastal State is unable to monitor and protect its territorial seas all the legal rights in the world would make little difference, and without any specific duties imposed on coastal States the seas and oceans continue to be a haven for illicit activities.

As the international society becomes increasingly more globalised, so do the crimes of illicit maritime trafficking. Likewise, approaches to combat illicit weapons trafficking should appeal to the international society. The inaction of States may be translated into a spiralling increase in maritime insecurity, trafficking and consequently in gun violence.

⁶⁸ Levi and O'Hanlon (2005) p.94

⁶⁹ Mallia (2010) p.2

CHAPTER FIVE

Summary and Conclusion

5.1 Summary

This dissertation has taken a narrow look on the global arms trade and has attempted to illustrate how small arms and light weapons affect the coastal States of the Caribbean, and establish how – and more importantly why – the region should use the Law of the Sea to enforce jurisdiction at sea to protect their maritime borders.

In chapter 2 we see how small arms and light weapons are increasingly threatening the lives and livelihoods of entire generations, and are killing more people every year than any other weapon. The manufacturing and trade in small arms and light weapons is borderless; the components can be produced in different countries, assembled in another and transported to a third. Even if arms are produced and exported legally, they can become illegal by the time they reach their final destination. SALW are cheap, easy to conceal and transport. It is nearly impossible to establish the volume of SALW that are in circulation, but what we do know is that small arms are causing tremendous destruction and killing almost 500,000 people every year. The majority of gun related deaths happens outside of war zones and strike civilians. This number does not factor in all the people that are hurt and immobilised each year.

The chapter outlines the different international initiatives that are put in place to combat the illicit trafficking of SALW. From the UN three specific initiatives have been designed to combat the illicit trafficking and spread of SALW; the Firearms Protocol, the UN Programme of Action, and the International Tracing Instrument. In addition, the UN is currently working towards a comprehensive Arms Trade Treaty. These legal instruments are meant to form a uniform international standard, and attempts to criminalize the illicit manufacturing and spread of SALW. The drawback with the UN legislation is that these initiatives are only binding upon the countries that have ratified, and few States have chosen to sign or ratify these initiatives.

Chapter 3 takes a closer look at the region most plagued by small arms and light weapons; the Caribbean. The Caribbean region is one of the most violent regions outside of a conflict zone. It consists of 30 territories and approximately 37,5 million people, and gun crime is its first challenge with exceptionally high murder rates and elevated levels of gun crime, gang violence and violence against women. The Caribbean States are vastly different, but they share a common history, and as a close-knit region it also shares many political and economical challenges.

The level of education is low, inequality is high, and political corruption is dominant. A weak infrastructure combined with a lack of resources and extensive, open coastlines makes the States of the region an easy target for organised crime. Illicit drugs and crime trade hands in the region, and the Caribbean is a transit point. It is thought that weapons travel to the region from both North and South America via fishing vessels and private pleasure boats.

The latter part of the chapter reviews legislative initiatives specific to the Americas. Two specific regional frameworks have been utilised to fight the illicit trafficking of SALW, namely the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Material and the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. However, they both have limited application in the region. The Inter-American Convention has a broad reach and most of the Caribbean States have signed and ratified the Convention, but as it does not impose any obligations on the States few have chosen to use resources to fully implement the Inter-American Convention. Opposite to this, few Caribbean States have chosen to sign and ratify the UN Firearms Protocol, and its reach is therefore highly restricted. The low levels of growth and development in the region make it difficult for Caribbean States to find the resources to sufficiently protect the sea borders. In addition, and despite the regions efforts to create common standards to combat the proliferation in SALW, concrete results have been missing.

Chapter 4 reviews the Law of the Sea and more specifically Article 25. The Law of the Sea is the primary guide for peaceful relations at sea, and is meant to govern international relations at sea and allow for a sustainable use of the shared ocean resources. There are many ways to interpret the words of a treaty, and more specifically the provisions of UNCLOS, but in general all treaties should be interpreted in good faith, with due regard for the ordinary meaning and context of the treaty. The Law of the Sea is concerned with being useful and effective, and awards sovereignty a dominant place in its provisions. Flagships have sovereignty over their own vessels on high seas, and are awarded the right of innocent passage through territorial and internal waters, where coastal States have sovereignty. Under UNCLOS coastal States can draw up a list of goods they consider to be illicit and threatening to their internal affairs, and they can deny vessels entry into their waters if they are carrying these goods. UNCLOS allows for a broader definition of the term 'security' as illicit actions at sea can threaten affairs on land.

The illicit trafficking of small arms and light weapons can be considered as prejudicial to peace under UNCLOS, and as a severe breach of national legislation of coastal States. Coastal States are entitled to exercise jurisdiction in their own territorial waters, and they are entitled to stop a ship from passing through their waters if the consequences of the crime extends to

the coastal State. However, this jurisdiction does not extend beyond territorial waters. The least favourable attribute of UNCLOS is its inability to enforce duties upon States. The Law of the Sea awards many rights both to coastal States and flagships, but imposes no obligations on States. If coastal States are unable or unwilling to enforce peaceful use of their territorial water, the right of protection under UNCLOS is rendered useless.

5.2 Conclusion

Small arms and light weapons were for many decades considered a national issue, and not an international threat. The sovereign nature of the international society almost implies that only a threat directed at a State, or hostilities between States, can be a threat to international peace. However, the nature of conflicts has changed. The world has seen an increase in natural disasters, intra-state conflicts and conflicts between non-state actors. A threat may no longer come from large-scale weapons or from a State itself. With the introduction of human security in international affairs the idea of peace took on a broader meaning. Civil unrest and violence within States is a threat to the whole international society, both because a violent State is an unstable contributor on the international scene, and because the unrest may spread to other neighbouring countries. Most importantly, internal violence is threatening the sovereignty of a State from within. Conventional weapons are causing a tremendous destruction. Each year they are killing thousands of civilians, feeding conflicts and enabling crime, and causing a type of insecurity which is breeding a greater need for small arms. This insecurity has a strong presence in the coastal States of the Caribbean, where the levels of gun violence are especially high. It is unquestionable that a significant share of the world's global trade in arms as well as the illicit trafficking in arms takes place at sea. Crimes at sea quickly spill over to coastal States with easily penetrable sea borders, and can in theory travel across the globe without obstacles at sea. They are transnational by nature and pose a threat to international peace and order.

As has been described, the Law of the Sea awards coastal States the right to take necessary steps in its territorial sea to prevent non-innocent passage through their waters, and a vessel carrying small arms and light weapons to the effect of unauthorised entry may be expelled from the territorial sea. A coastal State is permitted to adopt laws and regulations relating to innocent passage in its territorial sea to prevent violations of its domestic legislation. In the case of ships proceeding to internal waters, the coastal State may enforce its jurisdiction. It furthermore has the right to take the necessary steps to prevent any breach of the conditions to which admission of

those ships to internal waters is subject. The Law of the Sea has a high level of respect for the sovereignty of flagships and the free usage of the high seas. *Prima facie*, it would appear that a ship can not be stopped or searched unless a crime has been confirmed, because such coastal state interference would be in violation of the Law of the Sea. Combating crimes at sea is difficult at best, and perhaps even near impossible at present. Considerations must be made both to the freedom of navigation and to the sovereignty of flag States, as well as to the limited resources available to combat and suppress illicit acts in territorial waters.

For any system of law to be able to respond to the needs of society, it has to be able to change and adapt to the changing reality it aims to regulate. The Law of the Sea is no exception to this. Like any other branch of law, international sea law is not static. To the extent that it embodies or attempts to interpret and reflect a legal order for the oceans, it should be able to change and evolve in response to the challenges required by the need to secure and maintain an orderly use of the oceans. Yet, an important point must be made; coastal States are completely unable to uphold the safety of their population and protect its borders from the illicit import of SALW unless they have the legal and practical means to intervene before maritime crime has reached their own shores. The only way to address this situation is to take a preventive approach, encouraging State parties to assert jurisdiction over vessels based on a suspicion of trafficking of illicit goods. In other words, to effectively prevent illicit trafficking of unwanted goods from happening States should be duty bound to take necessary measures to prevent illicit trafficking. Coastal States should exercise not only their right to a judicial jurisdiction, but also a police jurisdiction that will prevent and stop traffickers and smugglers from reaching ports.

Many coastal States, like those of the Caribbean, are unable to effectively and comprehensively protect their territorial waters and extensive sea borders from unwanted and illicit trafficking of small arms and light weapons, as well as other illicit goods. Every aspect of human life on earth tends to become global, and the use of our shared maritime resources only serves to underline this point. Similarly, approaches to combating maritime crime should appeal to a better co-operation at global level. States inaction in this respect may cause the oceans and seas to be seen as a haven for illicit activities, and can be translated into a spiraling increase of crimes aimed specifically at coastal States. All arms control incentives must reflect regional security needs, which predominate today. That means that arms control must also be linked to broader strategy involving the tools of security guarantees and alliance formation. There is much for all nations to revisit and rethink.

As has been mentioned, in the years since the Law of the Sea was created and entered into force, crimes at sea have become more prevalent and are increasing every year. The

authors of the Convention either did not foresee many of the crimes that exist today, or underestimated the effect these crimes have on the international community. As a result adequate legal provisions regarding the suppression of maritime crime were not included. Many international efforts represents a common need to push the areas of control outwards, at least to the borders of territorial sea and utilise the full power of coastal States. While international maritime law does not disallow any such measures, it does not oblige any States to do so either. As long as the Law of the Sea does not impose any duties or obligations on States to specifically prevent and deter the illicit trafficking of small arms and light weapons, as well as other illicit goods, the Convention will not sufficiently protect maritime security.

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