

SMALL ARMS PROLIFERATION AND THE EUROPEAN UNION'S RESPONSE

INTERNATIONAL ASPECTS

&

THE CASE OF CAMBODIA

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“To the degree that we deny our liberty, succumbing to constraints, we are neither free to be who we are nor are we happy. There is, however, another side to constraints. When they are self-imposed and are based on our responsibility to the larger community of which we are a part, this is not denial of our liberty. This protects and helps ensure our liberty. The difference has to do with conscious choice. When we make conscious choices, we are honoring our response ability. Whereas many constraints outside ourselves are theoretically a reflection of choices we each would make individually (laws and social norms), they tend to lose their inherent power when we defer responsibility for them. Too many people say, “We have to; it’s the law.” Or worse, some ignore the law. In fact, to the extent that we externalize responsibility for making conscious choices, we are again denying our liberty.”

- On Living Liberty, John Denver, Windstar Vision September/October 1993

Preface

In August 2000 I went to Cambodia for a period of two months. At first, the idea was to follow some courses there at the Phnom Penh University. Somehow however that did not happen, instead I ended up working for a local NGO called the Working Group for Weapons Reduction in order to get acquainted with the problems surrounding small arms proliferation, as I had decided to write my final paper on this subject. This Working Group for Weapons Reduction has committed itself to combat the ever increasing accumulation of small arms and light weapons in Cambodia, as such accumulation has a huge detrimental effect on society.

During those two months I got to see a totally different world than the one I was accustomed to. At the time that I was there, the European Union had started an assistance project to help Cambodia battle its Khmer Rouge legacy of small arms and light weapons. This project was named EU-ASAC and was in essence an assistance project aimed at aiding the Cambodian government in its efforts with regard to combating small arms proliferation.

The Working Group for Weapons Reduction was involved in these EU-coordinated activities and contributed to this 'war against arms' by raising awareness amongst the public on small arms issues and training non-violent conflict resolution skills. Furthermore the Working Group was involved in reviewing the new arms legislation drafted by the combined efforts of the European Union and Cambodian experts. Its main task was to collect comments on the draft from the civil population. This was especially realised by organising meetings with various local NGOs and notabilities.

During the two months I worked for the Working Group, my job was mainly to collect and summarize the observations that were made during these meetings. Out of a feeling of sentiment I have incorporate the EU-ASAC project into this paper.

Before turning to the paper, I would like to express my gratitude to three people. First of all I would like to thank my father Henny van der Graaf and Dennis Brennan for providing me with all kinds of papers which are not publicly available. And finally I would like to thank my dear friend Jeroen Holthuijsen in the spur of the moment sacrificed his evening for me by taking the time to read a version which still needed quite some polishing – it cannot have been your best evening thus far.

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General Introduction

The proliferation of small arms and light weapons (herein after small arms) constitutes a worldwide problem with far-reaching international implications. The largest initial contributors to small arms proliferation were the disarmament programmes undertaken by the West after the Cold War. The disarmament only focused on the former parties to the East – West conflict, the Warsaw Pact and the Nato. As a consequence of this disarmament, these countries – and especially the United States and the former USSR – ended up with a great number of surplus weapons, amongst which a large amount of small arms and light weapons. Many of these weapons were sold at very low prices to developing countries; a substantial part was even given away. Lansu speaks of surplus weapons totalling a value of 7 billion dollars being donated to third countries by the USA between 1990 and 1996.¹ Herein lies the root of the proliferation problem of today. A large proportion of the surplus weapons given away directly after the Cold War eventually ended up on the black market and with certain rebel groups. Once on the black market and hardly traceable, these arms started to circulate in the international system, moving from country to country and resurfacing in every new conflict. Due to the long life span of arms, such weapons can keep on circulating in the international system for years – or even decades – on end.

Although small arms are not considered ‘real weapons of mass destruction’, they have a heavy impact on many societies and cause over 1,300 deaths a day worldwide.² This means that nearly one person is killed every minute by small arms. The wide spread of small arms and light weapons therefore has a serious destabilising effect on society, ruining political, economical and social infrastructures. The most direct effect of firearm use is of course the loss of life, there are however also a number of indirect effects resulting from such firearm use which eventually are the main causes for the collapse or decline of the political, economical and social infrastructures. The most obvious are overextended public health care due to the large number of casualties, the value of lost life decreasing a country's earning capacity, increased crime, weakened political authorities and declining foreign investments due to the region's instability.

Apart from the national consequences, instability caused by small arms proliferation tends to have cross-border effects, as small arms are not rarely exported illicitly from these countries to others in the region. The illicit trade within conflict-prone regions is encouraged by the weak administrations such regions generally have (which in turn is a consequence of the national instability). Hence, the problem tends to be ‘exported’.

¹ *Light Weapons the Question of International Regulations and the Role of both Global and Regional Institutions*, Paul Lansu, p. 1.

² *Small Arms Survey 2001: Profiling the Problem*, Graduate Institute of International Studies, Oxford, 2000, p. 1.

Although this scenario is especially true for developing countries, which as a consequence are unable to develop or profit from development aid, some developed countries in the West are also starting to experience problems relating to small arms³. The USA – which is one of the richest and most developed countries – faces increasing medical, social, political and economical costs due to small arms in the hands of street gangs. The negative vicious circle which small arms tend to increase and the potential international effects prompt for action. Since the early 1990s, small arms proliferation has therefore been added to the international agenda. However, it has proven to be a very complex problem to tackle.

In this paper, I want to focus on the different national and international aspects of small arms proliferation and the role the European Union can fulfil in this field. Further I want to draw attention to a project carried out by the EU in Cambodia, by which it assists the Cambodian government in curbing the spread and accumulation of small arms.

Due to the already briefly sketched complexity of small arms proliferation, this paper will only deal with it in a birds-eye view.

In the first part, the main aspects and problems regarding international small arms proliferation will be reviewed. The aspects touched upon will be: weak national arms legislation in developing countries, differing national import- and export policies, licensing agreements, brokering and illicit trafficking. At the end of each paragraph, the interrelationship of these problems will be shown, as well as the European Union's efforts in these fields, if any. Regarding the latter, special attention will be given to the Joint Action on the European Union's Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons and the EU Code of Conduct on Arms Exports, as these attack the problem from totally opposite sides.

In the second part, an EU sponsored project will be reviewed, in which the EU assists Cambodia in combating its small arms related problems. The focus there will be especially on the legal assistance provided by the EU for drafting a new arms law and what was considered relevant for such a law. Further the paper will try to outline how this draft links up with the global and European efforts and achievements.

³ Leaving aside the conflicts in Ireland (IRA) and Spain (ETA), which of course face small arms problems as well.

Part I: Small Arms and Light Weapons in the International Scene

1. Introduction

There are at least an estimated 550 million firearms in the world today, which amounts to one gun for every eleven people of the world population.⁴ As noted above, these arms cause great human suffering and constitute one of the greatest obstacles to sustainable development. Therefore the main goal of European action is to curb small arms proliferation and prevent unlawful use of weapons. However, as the problem is very complex, a comprehensive approach focusing on all aspects of the problem is an absolute necessity in order to ensure that no loopholes remain by which further spread of small arms is possible. The main aspects can be divided in three groups: those concerning the legal sphere and those concerning the illicit sphere.

Legal sphere:

- Weak national arms laws in combination with ineffective and inadequate enforcement.
- Differing national import- and export policies.
- Licensing agreements.

Between the legal and illicit sphere:

- Brokering.

Illicit sphere:

- Illicit trafficking.

2. The Legal Sphere

2.1. Weak national arms legislation

In order to secure a weapons-free society, the very first prerequisite is the existence of a comprehensive and intelligible national arms law. Self-evident and simple as this may seem,

⁴ <Small Arms Survey 2001; Profiling the Problem>, op. cit., p. 88.

this element is often lacking in conflict-prone areas. Many countries, which have just emerged from conflict, have a heavily imbedded culture of violence due to the preceding tumultuous years. During the conflict, the political and socio-economic infrastructures often severely diminished or have even been totally destroyed.⁵ In addition, former legislation has often been repelled by the governing parties because it did not fit their purpose. When such a country finally emerges from the conflict it therefore often faces an inadequate and inconsistent legal system. Arms laws for instance are often lost, out-dated, discriminating or too permitting.

Creating new and adequate national arms legislation is therefore the first step that such countries have to take. However, it is not uncommon that during the preceding conflict the majority of the country's intellectuals have fled or been killed – which especially happened in communist revolutions. Due to the resulting lack of intellectuals and expertise, it is often a very difficult task for the post-conflict government to create a new comprehensive and adequate arms law.⁶ In addition public information on such new legislation is often inadequate so that civil society is not aware of the legislation's content and the (possibly repelling) sanctions for infringements. A final problem is that such new arms legislation is often passed in the form of regulations or decrees rather than as an official law. The reason for this is that regulations and decrees are swifter and easier to design and pass, which is especially relevant for these newly (re) established democracies that are often still very fragile and in need of a sound legal basis for society. However, as regulations have a 'weaker' basis and are easier to withdraw for succeeding governments, such legislation does not provide the necessary stabilising basis.

A concurring problem concerning legislation in conflict-prone areas is its enforcement. This aspect however, can only be tackled by developing a country's political, economic and social structures. Adequate enforcement can only be achieved if the people are convinced of the necessity to turn in its weapons, while being able to rely on the government uniformed forces. Therefore all efforts to assist such countries to develop adequate arms legislation must focus on organising and training the uniformed armed services as well.

Just as decent arms legislation is the first step for conflict-prone countries take, it is also the first aspect the international community has to – and does – focus on, as it is in their own

⁵ Such was the case in Cambodia when Pol Pot came to power. Pol Pot discarded the money system, relocated 80% of the country's population in the countryside in order to establish an agricultural society and killed most intellectuals, politicians and trade-families. When – after only three years – the Pol Pot regime was overthrown, Cambodia had no working economic system any more, hardly any educational system and no political or economic leaders. In the thirty years since the Pol Pot regime, Cambodia has been a very unstable society with many political upheavals, weak institutions and a heavily armed civilian population.

⁶ The arms legislation created by the Cambodian government in 1999 (Sub-decree 38) contained some serious gaps regarding coverage and penalties, and lacked in comprehensiveness. See Part II of this paper.

interest to help developing countries attain the international standards regarding arms proliferation. If the developing countries – which constitute the majority of the countries in the world – do not attain the aforementioned standards, these international standards and agreements will be undermined due to the loopholes created by the lesser regulating capacity of the developing countries. Hence there are a number of development projects in which the international community – amongst others the EU – have offered such conflict-affected countries both financial and technical support in drafting new arms legislation.

From an EU perspective, it is especially the Joint Action on the European Union's Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons, which is relevant.⁷ This Joint Action provides the general basis for the disarmament and development programmes by which the EU provides assistance to developing countries with regard to curbing the spread and accumulation of small arms. The Joint Action will not be dealt with in dept here, as it will be dealt with more thoroughly in the second part, which will focus on an assistance project based on that Joint Action.

However, a few remarks may be made here already. First of all, the overall objective of the Joint Action is to combat and reduce the destabilising accumulation and spread of small arms, to improve and stabilise peace and security and sustainable development, by providing both financial and technical assistance to programmes and projects, which make a direct and identifiable contribution to the curbing of small arms proliferation (article 6 sub 1 Joint Action). Therefore if a country has declared its willingness to engage with the EU through the Joint Action, the EU will not merely provide that country with the financial resources, but it will also provide it with the technical assistance and knowledge necessary. Experts on law and public awareness raising may be made available to assist or work together with the government and local NGO's, and international organisations may be invited to participate or co-ordinate their actions with those of the EU.

In addition to the Joint Action, the Council 'Regulation on combating the excessive and uncontrolled accumulation and spread of small arms and light weapons, within the framework of EU emergency aid, reconstruction and development programmes' has been adopted by the EU.⁸ It reaffirms the objectives of the Joint Action and stresses the need for an 'integrated and comprehensive approach'.

Secondly, it should be kept in mind that the Joint Action is focused on combating small arms proliferation from the demand-side of the problem, whereas the other aspects that will be dealt with below, are all supply-side oriented.

⁷ Joint Action 1999/34/CFSP.

⁸ Council Regulation on Combating the Excessive and Uncontrolled Accumulation and Spread of Small Arms and Light Weapons within the Framework of the EU Emergency Aid, Reconstruction and Development Programmes, adopted on 21 May, Bull. EU 5-1999.

2.2. Differing national legislation

Although adequate national arms legislation is the first step – and thereby the basis for curbing small arms proliferation – it is no more than a first step. As the spread of small arms is a problem with global implications, the solution eventually lies in a global approach. This has been underlined by the negative impact which differing national legislations may have on small arms proliferation.

If a foreign country has a relatively lenient export policy, it may compromise a (stricter) import policy of another country. Especially the unstable conflict-prone countries with their weak administrations (and border controls) may become victim of such lenient foreign export policies.

During the nineties, the international community has grown increasingly aware of this problem, calling for an international and comprehensive approach to the problem. The need for a multilateral policy of arms sales, export, import and transport is now generally accepted. However, as small arms and light weapons fall within the sensitive public security area, progress has been slow.

Within the European Union, the most important accomplishment in this area is the adoption of the EU Code of Conduct for Arms Export on June 8th 1998.⁹ This code is however not a law, but a political agreement aiming at setting high common standards for conventional arms transfers. Moreover it aims at achieving a greater transparency by way of increased information exchange. To this end a number of operative provisions for notification and consultation have been agreed on granting export licences. The key provision obligates EU Member States to deny export licenses if they may have a destabilising effect on conflict-prone countries or regions and to notify each other of such denied export licences, while including the reasoning for such denial. When a Member State wishes to grant an export licence which has previously been denied by another Member State, it has to consult that Member State. If - after consultation - it nonetheless wishes to grant such a licence, it has to provide a detailed explanation to that other state of its reasoning. This system provides quite some political pressure not to issue export licences, which may have the above-mentioned destabilising effects for conflict-prone countries or regions. Moreover, it creates a greater transparency regarding Member States' national export policies.

Although it is a large step in achieving a more international and comprehensive approach as to small arms proliferation, a yet higher level of sophistication has to be attained in this area. First of all the Code – as already mentioned – is no more than a political agreement

⁹ Council document 8675/2/98.

and is therefore not legally binding, although it seems to exert quite some political pressure, especially since it has been decided to make the annual reports public.¹⁰

Another issue concerns the fact that the EU Code of Conduct lacks mechanisms to tackle some of the other aspects of small arms proliferation, such as licensing and brokering.¹¹ The lack of common mechanisms in these areas creates serious gaps in the international import and export system. However, these issues will be dealt with in paragraphs 2.3 and 3.1.

As already stated, the EU Code of Conduct is merely a political agreement. Although, the Code is lived up to quite nicely, it is as of yet impossible to oblige Member States to comply with its provisions. Therefore, if the political will would falter at any time, the Code may become a dead-letter. Although, this is not very likely, it would nevertheless be of great significance if the EU would transpose the provisions of the Code into a regulation. Especially, if such a regulation would be brought under the competence of the European Court of Justice, thereby ensuring enforcement and a uniform interpretation.

2.3. Licensing

The last aspect of small arms proliferation concerning the legal sphere are licensing practices. Although these are not a new phenomenon in the area of arms production, the number of licensing agreements has risen considerably during the last few decades. Amongst others, this can be attributed to the collapse of the communist system in the former Warsaw Pact countries after the Cold War and the subsequent rise of private companies and foreign investment there.

Another reason for the sharp increase of licensing agreements are the increasingly stringent export requirements. Especially since the adoption of the EU Code of Conduct on Arms Exports in 1998, export licences are not granted if they may have a negative impact on the human security or societal stability of the receiving country or region.¹² For such cases, licensing agreements have proven the ideal loophole.

With a licensing agreement the licensor gives the licensee the right to use for instance a production process or a trademark, in exchange for a royalty or other compensation. When licensing to a developing country, the agreement may include actual assistance in setting up a plant as well. Therefore, through licensing agreements, companies may still be able to 'export' their product to a third country.

Apart from bypassing the aim of the export regulations and thereby providing an unstable country with arms, which may deteriorate the national or even the regional situation, the consequences might reach much further. After all, a licensing agreement transfers not the

¹⁰ *Annual report in conformity with operative provision 8 of the European Union code of conduct on arms exports*, Annex to 2206th General Affairs Council Meeting, 11-10-1999, Nr: 11651/99 (Presse 296).

¹¹ <Paul Lansu>, op. cit., p. 1.

¹² See EU Code of Conduct on Arms Exports 1998.

physical arms, but rather the production process. The licensee produces the arms himself and may – depending on the local government’s policy – decide to export the produced arms to other conflict-prone countries. Therefore licensing practices may undermine the international efforts to halt arms proliferation and especially the EU Code of Conduct on Arms Exports, which only covers the physical transfer of arms.

During the seminar organised by IANSA Flanders last December, recommendations were made regarding the problems concerning licensing agreements and their ‘evasiveness’. According to IANSA, tackling the problem should first and foremost begin at the national level by introducing more stringent written authorisation procedures, regarding the export of production processes.¹³ Herssens argued at the seminar, that licensed production agreements should at least be made subject to the same checks and balances as physical exports. Therefore a licensed production agreement should amongst others be forbidden in cases where the partner country:

- is a conflict-prone country;
- evidently violates the human rights of its citizens in general, or certain minority groups in particular;
- supports either actively or passively terrorist- or drug networks, and - very important;
- if the partner-government neglects the non-re-export clause.

This focus, however, is quite self-evident and generally known. The main problem when implementing this idea is not so much unwillingness on behalf of the states, but rather the intangible and therefore evasive characteristics of licensing agreements. In the past, the transfers of military materials and technology were relatively easy to control as they were either tangible, or made tangible for transport (information had to be put on diskettes or tapes to make it transferable). With the rise of internet and e-mail communications, the transfer of information has become increasingly intangible and ever more difficult to monitor.

Yet, even if the national states manage to establish a thorough export control system regarding licensed production, then the receiving country still has an important role to play in ‘closing’ and maintaining the system.

Imagine that the receiving country – although having a decent record when entering into the agreement – starts to misuse the licensed technology or decides to re-export contrary to the agreement. Of course the contract could state certain sanctions, such as suspension of the contract. However, the technology has already been transferred and the receiving country can use that technology despite the lacking authorisation. Further, it may be very difficult to monitor if the receiving country is living up to its side of the deal, e.g. if it stays within the agreed production limits.

¹³ *Licensed production of arms*, Hilde Herssens, IANSA, Flanders, p. 53.

When tackling the problem by international agreements on licensing, the above-mentioned problems may not be totally solved. However, an international agreement on the conditions for licensing coupled to an information exchange system, would create a stronger system. The number of loopholes due to diverging regulations would decrease, and the greater transparency would make infringements more visible. This combination of less divergences and more transparency should enable the international community to react more adequately in case of serious violations of licensing agreements. A further consequence of an international approach to licensing, would be that the market for illicit license-produced arms would become smaller, as the member state's markets would be less penetrable for such illicitly produced arms.

Even though licensing practices constitute a substantial loophole in the efforts to curb small arms proliferation and its negative effect, the EU has not paid any considerable attention to this issue. As of yet there are no regulations or agreements concerning licensing. It is therefore of great importance that the EU focuses on this area in the near future. There seem to be two alternatives. Firstly the EU could incorporate licensing agreements into its Code of Conduct of 1998. Although this would be a considerable improvement, the problem remains that this Code is not legally binding (see above). Another option would be to devise some other mechanism to deal with these licensing related problems e.g. in a regulation. The advantage would be that such a regulation would be binding on the Member States. However, such a course would probably take considerably more time than merely incorporating the relevant provisions in the Code, as the political will for such a regulation is often lacking. An alternative might be, to incorporate the provisions into the Code of Conduct first and then try to transpose the new Code into a regulation. At least there would then be a basis to work from already, while trying to reach the necessary political agreement for a binding regulation.

3. Between the Legal and the Illicit Sphere

3.1. Brokering

As with all other aspects concerning small arms proliferation, it has proven very difficult to halt brokering. And as with all other aspects, this cannot be attributed to a single cause. The key problem is – once again – the lack of a comprehensive international approach, thus far brokering is only dealt with by national arms control systems, which are naturally territory bound. Especially in the case of brokering, national legislation proves to be very ineffective due to the trans-national scope of brokering activities. Often such national legislation hardly

covers brokering activities, due to which brokering has become a grey area situated between the legal and illicit sphere. Thus rendering it even more difficult to get a general overview on the problem, much less tackle it. Combined with the lack of adequate marking and tracing, and differing types of end-user certificates, import-, export- and transport licenses in the different states, there are many loopholes for the brokers to benefit from.

Before going into depth on the different aspects of brokering, it may prove useful to define what a broker is.

According to the Small Arms Survey 2001¹⁴ a broker is in essence someone who facilitates and organises transactions on a relatively autonomous basis and for some form of compensation or material reward. There are four further identifying characteristics. First of all the broker is relatively invisible during the process of facilitating and organising the deal. Brokers usually will not see the arms in question, and will certainly not have them in possession during any phase of the transaction, therefore rendering it difficult to hold them liable. Secondly parties to an illicit weapons deal will rarely take recourse to contract litigation, brokers therefore often serve as arbitrators to minimise violations of the deal. Thirdly, brokers have an extensive expertise on how to make contact and negotiate on the black market. And finally brokers are superior managers, responsible for setting up and maintaining arms transactions, maintaining complex networks of intermediaries, managing the most reliable transport routes and obtaining the necessary authorisation documents.

The national arms control systems – although quite adequate regarding conventional arms trade – often do not directly address the activities of the brokers, but rather focus on the physical transfer of arms. However, as already explained above, brokers are as a rule only involved in arranging, managing and organising the different aspects of the deal and will not take possession of the weapons covered by the agreement. Therefore, the limited scope of the national legislation – in that it is mainly concerned with the physical transfer – enables brokers to carry out their activities without infringing national laws. There is no or little need for brokers to infringe the law, which is another reason why it is nearly impossible to hold them liable or accountable in any way.¹⁵

Further, the business of providing arms to conflict areas involves a lot of money, not only for the private actors but for states as well. Consequently there are states that assist brokers in exchange for either financial or political gain.¹⁶ They may do so either passively by exerting less adequate controls, or actively by providing legal channels for acquiring arms and authorisations.

Additionally, many countries have poor licensing procedures. Even if arms producing countries have stringent export policies, they might have more lenient licensing procedures.

¹⁴ *Small Arms Survey 2001: Profiling the Problem*, Graduate Institute of International Studies, Oxford, 2001, p. 98-99.

¹⁵ *Ibid.*, p. 124-125.

¹⁶ *Ibid.*

In such cases, the arms may well be licensed to a company in a country that has a less stringent export policy, thereby enabling brokers to export the arms from the latter country. And finally there is the fact that the majority of illicit arms deals start out as legal transactions.¹⁷ The arms mostly ‘disappear’ from the legal sphere during their transportation. This is possible as most arms import-, export- and transit licences only explicitly refer to the point of production or stockpiling and the export border. Transport agents, routes, transportation modalities, etc, are not explicitly mentioned in these licenses. Together with weak border controls and inadequate oversight, it is therefore possible to divert the arms transport to an unauthorised end-user.

From an EU perspective it is again the EU Code of Conduct on Arms Exports of June 8th 1998, which is most relevant with regard to this problem. Although brokers and brokering as such are not specifically addressed by the Code of Conduct, it does provide greater transparency and information sharing amongst the Member States as to export control systems. Due to this increased transparency and the notification system (see above), the national systems’ requirements may grow more alike over time, thereby reducing the number of loopholes from which the brokers can benefit. However, this is no more than a side-effect. If the European Union really wishes to reduce brokering activities, it will have to devise legislation which will allow for greater monitoring of broker activities. After all, a broker as such is not a problem, as long as he does not provide small arms to conflict-prone areas or local war-lords. Therefore, the EU should consider making brokering activities subject to the same requirements as exports (as was also considered with regard to licensing), thereby pulling brokering into the legal sphere.

4. The Illegal Sphere

4.1. Illicit trafficking

Apart from the legal government-authorized arms trade, there is also a quite large illicit international arms market. Efforts to combat this illicit trafficking are obstructed by the lack of regulation and coherence in all the above reviewed areas (differing national export policies, licensing and brokering). Consequently this results in a lack of transparency in the movement of small arms, which results in obscure and impenetrable trading networks, involving: brokers, (corrupt)¹⁸ civil servants, shipping agents, and criminal or rebel organisations and groups. This lack of transparency ultimately obscures the source from

¹⁷ Ibid.

¹⁸ A large number of illicit arms deals start out as legal transactions; <*Small Arms Survey: Profiling the Problem*>, op. cit., p. 123.

which certain arms stem and the different supply routes. In order to effectively tackle illicit trading it is therefore first and foremost necessary to be able to trace small arms and light weapons on the international market.

Research indicates that a system to ensure such effective tracing of arms on the international market requires three key elements, namely:

1. adequate marking of every individual weapon;
2. accurate record-keeping on production, sales and transfers of weapons, and;
3. effective international co-operative tracing regimes, which allow the relevant authorities to retrace weapons to their original owners.¹⁹

Although – at first sight – such a system seems quite feasible, there are some problems in practice. A first observation which has to be made in this context, is that such a system will only be relevant for the future as weapons already produced and circulating on the international market are not marked and therefore can not be traced. However since efforts are made to collect and destroy these (illicitly) circulating surplus weapons, it can be expected that – if the tracing system is adequately established – at some point in the future the proportion of arms circulating unmarked and therefore untraceable will decrease.

Further, as already implied, the lack of regulation, transparency and coherence with regard to small arms exports, licensing and brokering result in a number of loopholes from which illicit traffickers may benefit, thereby allowing for a larger grey or black market.

As far as the implementation of a marking and tracing system is concerned, there are some practical obstacles. First of all the will of manufacturers to adequately mark arms may not be present as they may be well aware of the fact that some of their customers will not appreciate this. Further, even if marked, criminals and traffickers are often able to remove the marks, as not all of the existing marking techniques are equally adequate. Regarding tracing, the numbers or markings are often poorly recorded and it is time-consuming to access records as recording methods differ and no central international records exists.²⁰ However, if these problems should be overcome, such a tracing system would make a substantial contribution to the international efforts concerning small arms proliferation and would allow a yet more comprehensive approach. Moreover, a comprehensive tracing mechanism would enable brokering to be combated more effectively.

Thus far there is no EU agreement or regulation covering illicit trafficking as such. However, the EU Code of Conduct in its present form may have some relevance here as well as it increases transparency in the area of arms exports, thereby reducing the loopholes

¹⁹ *Biting the Bullet; Briefing 5: Enhancing traceability of small arms and light weapons flows; Developing an international marking and tracing regime*, Owen Greene. , p. 7.

²⁰ *Ibid.*, p. 6.

illicit traffickers can benefit from and reducing the number of arms that can be diverted into the illegal circuit. On the other hand, if illicit traffickers succeed in such diversion regardless of the increased transparency, there is nothing that can be done anymore. Occasionally an illicit transport will be intercepted, but that will have little effect on the problem itself. Therefore a tracing system as described above is still a necessity to enable the EU and its Member States to trace the arms after they have ‘disappeared’ into the illegal circuit, thereby exposing and eradicating the roots of such illicit trading networks.

5. Interrelation between the different aspects of small arms proliferation

From the above, it can be deduced that the aspects are thoroughly interrelated. Inadequate regulation on one aspect, such as export policies, tends to create a loophole with regard to another aspect, e.g. licensing or brokering. The lack of coherency therefore allows for backdoor escapes. The need for a coherent approach is relevant in three ways.

First of all, the policies within each area need to reach a certain level of comprehensiveness. Harmonising the different national small arms policies with regard to exports, imports, licensing and brokering, would be the most obvious and effective solution. However, as long as that is not attainable due to Member States’ sensitivity with regard to small arms-related issues, increased transparency and information exchange can improve the level of comprehensiveness in these areas as well. The first step taken in this regard is the EU Code of Conduct for Arms Exports. Although it has no legal force, it may provide a basis for future legislation.

Secondly, there is the lack of a comprehensive *overall* approach. At present, the lack of regulation and transparency in the one area (for example export policy), increases the possible loopholes in another area (such as licensing or brokering). While reaching a certain level of comprehensiveness and harmonisation within each area is possible by political agreement alone, it remains doubtful that this would also be possible with regard to a comprehensive overall approach. Therefore, ultimately Member States will have to become less sensitive about their small arms policies, lest undermining their own efforts in this field. And finally, with an increasing comprehensive approach, the grey and black markets will decrease in substance. The better controlled the issues in the legal sphere become, the less loopholes will remain for the grey and black market to benefit from.

In order to achieve such increased coherence, the EU will have to devise (further reaching) legislation in all small arms-related areas. If the EU continues to resort to political agreements rather than binding regulations it will remain doubtful whether great improvements can be achieved.

Intermediate Conclusion

Summarising thus far, legislation in the area of small arms and light weapons appears to be quite haphazard. Throughout the entire area of small arms legislation, there are numerous loopholes undermining the battle against small arms proliferation. A more comprehensive approach is an absolute necessary, if the European Union wishes to contribute to the curbing the small arms proliferation.

Although there has been substantial progress in some areas, such as export regulations, much remains to be done. One of the greatest problems constitutes the lack of ‘will’ to devise a true European legal framework regarding the curbing of small arms proliferation. The only ‘real’ achievements thus far seem to be the European Code of Conduct for Arms Export and the Joint Action. However, there is no interrelationship between these two instruments. They both focus on totally different areas of small arms proliferation and leave the vast area in between unregulated.

The EU Code of Conduct for Arms Exports focuses on exports from Europe to elsewhere. Therefore, it is concerned with the ‘supply side’ of small arms proliferation, in that it is developed countries such as in Europe, which provide the conflict-prone regions with arms. The Joint Action focuses on the other side of the problem, the demand side. By assisting conflict-prone regions in, amongst others, devising adequate arms legislation, organising and training uniformed armed services and combating cultures of violence, the demand for small arms is reduced.

Therefore the EU Code of Conduct and the Joint Action are more or less each others counterpart. Both aiming at reducing small arms proliferation, the first from the supply-side, the second from a demand-side orientation.

However, especially the EU Code of Conduct leaves large gaps when considering the supply-side of small arms proliferation as it merely focuses on information exchange and monitoring with regard to the national export policies. One should keep in mind, that this does not mean that the export policies of the Member States are in any way harmonised. It merely provides for a mechanism to overcome some of the most pressing problems arising due to the differing national export policies. And in the end, this mechanism is not even binding on the Member States.

However, the information procedures devised by the EU Code of Conduct may have some impact on illicit trafficking in so far as Member States gain more insight into each other’s policies, consequently enhancing the possibilities of monitoring and thereby decreasing the loopholes and possibilities for counterfeiting authorisations. On the other hand, this should

be regarded merely as a side-effect that does not address the root of the problem. The Code moreover does not relate in any way to the problems surrounding licensing and brokering. Therefore the problems regarding differing national legislations, licensing, brokering and illicit trafficking, will all need additional attention. Especially the last three areas are marked by an almost total lack of European agreement. If these areas are not covered in the near future, they may undermine everything –or the little- achieved thus far. To this end the EU Code of Conduct may prove to be a good starting point.

Then again, there are many roads that lead to Rome. Progress may also be achieved from the other side. By assisting conflict-prone countries with curbing small arms proliferation, the demand-side of the problem may decrease as the demand for small arms in such countries will decrease if the cultures of violence in such countries are successfully combated. With the decrease of the demand-side, licensors, brokers and illicit traffickers may be forced out of the (shrinking) market.

Therefore, the second part of this paper will focus on EU efforts in this area, especially the financial and technical assistance based on the Joint Action to combat the destabilising accumulation of small arms. The case studied, is an assistance programme being carried out at present in Cambodia under the name EU Assistance on curbing Small Arms and Light Weapons in Cambodia (EU-ASAC).

Part II: The Case of Cambodia

1. Introduction

As already mentioned in the Intermediate Conclusion, the second part of this paper will focus on the financial and technical assistance the EU offers on the basis of the Joint Action.

The case studied is the EU-ASAC assistance programme being carried out at present in Cambodia. Such assistance programmes focus on the problems discussed in the paragraph on weak national laws. As already discussed there, there are two main factors concerning the issue of weak national arms legislation. The first factor concerns the lack of adequate and comprehensive laws and regulations, the second factor of this problem is ineffective and inadequate enforcement of any such laws and regulations.

The EU-ASAC programme focuses on both issues, however, the focus of this paper will merely be on the legal side of the assistance programme. Especially on the efforts to draft comprehensive arms legislation, which may serve as a basis for future development.

The order of discussion shall be as follows. First of all the Joint Action and some complementary regulations will be reviewed more in depth. Further the actual legal basis of the EU-Cambodia cooperation and the practical cooperation will be reviewed. Subsequently the newly devised arms law shall be considered; on which principles does the draft law rest and what does it eventually encompass? And finally, the question remains how this new draft fits into the international legal order and which areas will have to be addressed for the future.

2. Legal basis of the EU-Cambodia cooperation

2.1. Joint Action on the European Union's Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons

As I already mentioned earlier, the general basis on which the EU offers disarmament and development assistance to conflict-prone countries and areas, is provided by the Joint Action on the European Union's Contribution to Combating the Destabilising Accumulation

and Spread of Small Arms and Light Weapons, which will now be reviewed in more detail.²¹

In accordance with article 13 of the TEU, the European Council when defining the general guidelines for the common foreign and security policy,²² decided that small arms proliferation “poses a threat to peace and security and reduces the prospects for sustainable development”²³, that it therefore falls within the sphere of the CFSP and consequently may be the subject of joint actions. Subsequently the Council adopted the “Joint Action on the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons” in December 1998.²⁴

The overall objective of the Joint Action is to combat and reduce the destabilising accumulation and spread of small arms, to improve and stabilise peace and security and sustainable development. The Joint Action acknowledges that these aims cannot be attained by separate actions or programmes but that an integrated approach is necessary. Hence the integrated approach has been taken as a basis for the Joint Action, which consequently provides for three kinds of actions:

- The adoption of preventive measures limiting the accumulation of small arms;
- The adoption of reactive measures reducing already existing accumulations of small arms, and
- The adoption of measures providing assistance.

Preventive measures are mainly stated in article 3 of the Joint Action and aim at limiting the accumulation of small arms, thus limiting the supply of small arms. Such accumulation can be reduced by building consensus in the relevant international fora, committing all countries to import and hold small arms only for their legitimate security needs, committing all countries to supply small arms only to governments of other countries, establishing and maintaining national inventories of legally-held weapons and combating “cultures of violence”, to enhance (the feeling of) safety and stability.

Article 4 of the Joint Action names reactive measures such as: assisting the control over and elimination of small arms, enhancing confidence and the feeling of security in society by e.g. demobilisation and rehabilitation of combatants and the removal or safe storage of small arms. Reactive measures therefore aim to reduce the demand for small arms.

²¹ Joint Action 1999/34/CFSP.

²² European Council held on 26-27 June 1992.

²³ Joint Action 1999/34/CFSP, preamble.

²⁴ Joint Action 1999/34/CFSP.

A new approach in this field – which combines a number of different measures – is the 'development for disarmament' approach.²⁵ These programs aim at collecting and destroying the surplus of weapons in society in exchange for development aid. In this approach the destabilising elements (in casu the small arms) are removed from society, while at the same time enhancing the local social and economic infrastructure, which has a stabilising effect and reduces the demand for new arms.

The assistance measures are measures that provide a 'direct and identifiable contribution' to preventive and reactive measures. One can think of raising public awareness towards the “cultures of violence” and the negative spiral they tend to result in.

The Union has committed itself to providing both financial and technical assistance to programmes and projects, which make a direct and identifiable contribution to the principles and measures, referred to above (article 6 sub 1 Joint Action). Therefore if a country has declared its willingness to engage with the EU through the Joint Action, the EU will not merely provide that country with the financial resources, but it will also provide it with the technical assistance and knowledge necessary. Experts on law and public awareness raising may be made available to assist or work together with the government and local NGO's, and international organisations may be invited to participate or co-ordinate their actions with those of the EU.

Besides the fact that a country has to declare its willingness to enter into such a project with the EU, it has to commit itself to comply with the general *ius commune* principles concerning human rights and the rule of law (article 6 sub 2 Joint Action). One can therefore speak of conditional development aid; the country concerned has to ‘prove’ that it is willing to try its utmost to improve its situation.

2.2. Council Regulation on Combating the Excessive and Uncontrolled Accumulation and Spread of Small Arms and Light Weapons within the Framework of the EU Emergency Aid, Reconstruction and Development Programmes

The main importance of the ‘Regulation on combating the excessive and uncontrolled accumulation and spread of small arms and light weapons, within the framework of EU emergency aid, reconstruction and development programmes’ lies in the fact that it stresses the need for an ‘integrated and comprehensive approach’.²⁶ The Regulation acknowledges

²⁵ So called “Gramsh Project”, named after the suburb of Tirana where it was piloted and developed by UNDP.

²⁶ Council Regulation on Combating the Excessive and Uncontrolled Accumulation and Spread of Small Arms and Light Weapons within the Framework of the EU Emergency Aid, Reconstruction and Development Programmes, adopted on 21 May, Bull. EU 5-1999.

that together with the political, economic and social aspects, security is an important – if not the most important – prerequisite for development (article 4 Regulation). Therefore development and security problems are to be addressed together in the future, in order to create a truly ‘integrated and comprehensive’ approach.

2.3. Council Decision implementing Joint Action 1999/34/CFSP with a view to a European Union Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons in Cambodia²⁷

With the adoption of Council Decision 1999/730/CFSP, the Council replied to Cambodia’s request for assistance in combating the accumulation and spread of small arms, thereby implementing Joint Action 1999/34/CFSP.

In the decision the Council stresses once again that the “excessive and uncontrolled accumulation and spread of small arms poses a threat to peace and security and reduces the prospects for sustainable development”, therefore the main objective of the co-operation will be “to contribute to promoting the control, collection and destruction of weapons”²⁸. To this end the EU committed itself to provide both financial and technical assistance in accordance with the Joint Action.

2.4. The Practical EU-Cambodia Cooperation

Quite remarkably, the EU-ASAC project was established in a rather obscure way. No bilateral agreement whatsoever was signed, Cambodia was merely informed of the Council’s intent to provide assistance and its adoption of the Council Decision by way of a “note verbale” delivered by the German Embassy in Phnom Penh.²⁹

After the adoption of the Council Decision, a project manager was appointed to organise the financial and technical activities in Cambodia. These activities were to focus on:

- Assisting the Cambodian government in developing appropriate legislation on the ownership, possession, use, sale and transfer of arms and ammunition;
- Assisting local police and security forces with the development of guidelines for improved record-keeping and security for weapons;

²⁷ Council Decision 1999/730/CFSP.

²⁸ Council Decision 1999/730 CFSP, Article 1.

²⁹ Note no. 242/99, 25 November 1999, German Embassy in Phnom Penh.

- Providing assistance in developing procedures for voluntary surrender of small arms and their subsequent destruction;
- Providing support for civil society programmes to raise public awareness on small arms-related problems³⁰.

To this end a budget was made available totalling 1.268.200 Euro³¹. In order to carry out these objectives, the project manager, with the support of the relevant experts, worked closely together with Cambodian government officials of the Ministries of Interior and National Defense and local NGOs.

For the development of appropriate legislation, an expert was employed by the project manager, to assist in reviewing existing laws and regulations and discussing the priorities. Together they worked in close cooperation with the legal advisor to the deputy prime-minister and with the general of police administration while drafting new arms legislation. The draft was submitted to relevant parties such as the Ministries of Interior and National Defense and local NGOs at intervals. To this end EU-ASAC sponsored a number of round-table discussions at the various stages of the drafting process with a view to gathering relevant comments on the content and form of the draft. At present, the draft has been put to the National Assembly awaiting its adoption. This final draft – its basis and its final content – will be reviewed in the next chapters.

3. The development of appropriate laws and regulations

3.1. The starting point of new small arms legislation

“As with all wars, arriving at a peace in principle –a truce or cease fire- is a critical first step, but only the first. To re-establish conditions of security, to change the climate in society, requires removing or regulating the wide presence of armaments which the conflict brought about.”³² In addition, the institutions need to ensure the necessary control; government, judiciary and the uniformed forces (military and police) are often poorly organised due to the ill-defined legal situation and inadequate law enforcement.

³⁰ *Background Paper to the European Assistance on Curbing Small Arms and Light Weapons in Cambodia*, H. Van Der Graaf, EU-ASAC, Phnom Penh, 2000.

³¹ Council Decision 1999/730/CFSP, Article 3(1) and Council Decision 2001/769/CFSP, Article 1(a).

³² Quoting Dennis Brennan, Legislative Adviser, EU/ASAC during the Workshop on Small Arms in Cambodia, June 14-15, Ministry of Interior, Regulations and Weapons Law, p 1.

Furthermore, although the connection between curbing small arms proliferation and the law is evident, it is equally evident that not just any law will do. It will not suffice to just copy some arms law of any country and implement it in Cambodia. The law must after all compel people to live up to it. Therefore a law ‘tailored’ to the circumstances of Cambodian society is necessary and such law must ultimately be based on the consensus of the people.

This consensus was found in a “weapons-free civil society”, which therefore is taken as the core of the draft Arms Law³³. On the one hand the employment of arms by the uniformed forces is regulated, while on the other hand the civilian population is declared an arms-free sector.

However, even though the draft is based on a widespread national consensus, this is in itself not enough to ensure that the objective will be lived-up to. For the circumstances in a country have to be such, that people *can* live according to such general consensus. The most important prerequisite for a weapons-free civil society is that the citizens must be able to rely on the government for their security. The government must be able to protect the civilian population against both ordinary criminals and corrupt (uniformed) forces.

Therefore draft Arms Law, has taken these two requirements –(a) regulating the use of arms by the uniformed forces, and (b) ensuring the respect and protection of the unarmed civilian population exercised by those same government forces- as a starting point.

How to go about when drafting a new law for a country on such a sensitive topic as arms regulation? First of all, a common denominator has to be found, as it is vital that the law finds support throughout the whole society. The solution was found in an already existing Cambodian arms regulation: Sub-Decree 38 “On Administering and Inspecting the import, production, selling, distribution and handling of all types of weapons” of April 30th 1999. This regulation –which is the most current expression of government policy (although it is not a law in the legal sense) as to the curbing of arms proliferation- has been used as a basis for both format and substance, thereby ensuring the necessary consensus and consistency.

In addition the scope and nature of the future law will have to be decided. In casu, the drafters chose for a framework law, which should lay the foundation for Khmer arms legislation. A framework law ensures that a comprehensive system of arms legislation can be built, in which future legislation may easily be incorporated. Moreover, a substantive law covering all aspects of arms regulation would not be feasible and would not leave enough room for future developments. Such future developments would then have to be regulated on a totally different basis, thereby endangering the comprehensiveness of the arms legislation. Therefore, the draft “Law on Weapons, Explosives and Ammunition” is a framework law, which leaves a number of issues to be regulated more clearly in sub-decrees or other regulations.

³³ Law on Arms, Explosives and Munitions of 25-07-2000, preamble, p 1.

Turning back to sub-decree 38, why was it considered insufficient and in need of improvement? There are a number of reasons for this. First of all, sub-decree has a very uncertain and unstable basis. It has a basis similar to a Dutch “koninklijk besluit”, meaning that it was issued by the council of ministers and never went through parliament. Therefore any subsequent government could –if it wished to do so- revoke this sub-decree without any legal procedure and without so much as consulting parliament. As the whole arms problem in Cambodia is largely due to the general uncertainty of the population as to personal safety and its lack of faith in the judicial system, a stronger, and more stable law will have to be drafted. Another argument against the use of decrees, is that these are less democratic than law which have been approved of by parliament. Especially regarding a sensitive subject such as small arms legislation, a society should strive for the most democratic basis achievable.

Another issue is that the sub-decree does not distinguish between the different groups in civil society (hunters, bodyguards, shooting club members, diplomats, etc). As a consequence many exceptions may escape the control of the sub-decree (such as arms use for hunting). These possible exceptions have to be identified, regulated and be brought under the control of the government in the new law. If such reasonable exceptions are not accounted for by the law, people may start to deviate from the law and thereby create a feeling of lawlessness.

A further reason why a revision of the arms law is necessary finds its basis in the fact that Cambodia is passing through a period of transgression. The country is still recovering from a thirty-year period of civil wars and political upheaval. Due to its recent turbulent history it is a much more violence-committed society than generally found in the West. It will take a long time before the social and political climate of Cambodia will start to resemble that of the developed countries.

When a country has such a violence-committed society, it will not be able to live up to the standard of the arms laws as known in the developed non-violence committed societies. Therefore –for the time being- the standard of the arms law for Cambodia has to be adjusted to a level more in pace with the society as it now stands. If this is not acknowledged when drafting the law, society may end up with a law, which cannot be enforced because of the large gap as to sophistication between that law and the society it is meant for. Such a law may also undermine the enforcement of other laws and the credibility of the government, thus destabilising society even further. Thus the draft law considers that “unenforceable law is bad law” and that the new law should “reflect present realities, but anticipate a positive evolution in security and police/military efficiency”.³⁴

³⁴ Proposition of Law to the Draft Law on Arms, Explosives and Munitions of 22-07-2000, Dennis Brennan, Phnom Penh, 2000, p. 1.

Summarised, there are a few key principles, which were kept in mind while drafting the new Arms Law. As already explained, the main principle is related to the enforceability of the Arms Law. To establish this one has to recognise the present realities and not impose restrictions or requirements that cannot possibly be enforced or lived up to at present. Therefore room has to be left for future development.

Further the draft intends to give a positive thrust to the efficiency of national security forces and to provide the government with the authority necessary to achieve this, by enlarging its supervisory powers.

Both these principles aim at one main goal: to improve voluntary compliance with the law by both refraining from too strict provisions and enhancing the efficiency of the judicial apparatus.

A last remark which has to be made in relation to the new draft, is that it provides for a framework law. The draft is supposed to be the basis of present and future arms legislation.

3.2. The draft Law on Weapons, Explosives and Ammunition

There are a number of things that are quite striking when reviewing the draft as it lies before Parliament at the moment.

First of all there is not preamble to the draft, as it does not correspond with Khmer law tradition to have a preamble stating the purpose of a law. More important however, may have been the fact that the Khmer felt it was inappropriate to acknowledge in the preamble that the law proceeds from conditions of insecurity.³⁵

Therefore the draft starts quite abruptly by stating its scope in the first two articles. The articles state:

Article 1: "This law aims at determining the management of weapons, explosives and ammunition of any and all types..."

Article 2: "This law governs the equipping, possession, carrying, utilisation, purchase, sale, trading, loan, transfer, hiring, production, fabrication, repair, transit, importation, exportation and stocking of weapons, explosives and ammunition of any and all types"

In short, one can conclude that everything that has to do with arms is covered by the draft. There are however, two remarks to be made in relation to these first articles, namely that the word "management" in the first, and the lack of the word "ownership" in the second are far from self-evident.

³⁵ *Unofficial English Translation of the Comments by the Round Table of 27 March 2001 with regard to the Draft Law on The Management of Weapons, Explosives and Ammunition*, Phnom Penh, 2001, Comment to Article 1.

The word “management” has been chosen deliberately. In a previous version of the draft, the first article stated: “The purpose ... to ensure the protection, safety, tranquillity and peaceful pursuits of the citizens ... through the establishment of a weapons free society. This will provide for removal from the civilian population of ... illegal weapons while strengthening management and accountability for use of such arms, explosive substances, explosives and ammunitions ...”. However, this article has been deleted for the same reasons for which the preamble was repealed. “Management” seemed more neutral and able to cover the whole area of arms legislation.

More striking however, is the lack of the word “ownership” in the second article. This has been done deliberately as well. Extraordinary as this may seem, the reason is that the principle of arms ownership is not envisaged by the law. The Khmer law does not permit any private ownership of any weapon, explosive or ammunition. This means that civilians may only possess arms, but cannot own them, which raises a lot of questions regarding property law as in practice some civilians will have permits to carry weapons. Who will own these weapons?

Article 4 further imposes a strict and absolute prohibition of any kind of possession or use of weapons. Which seems to be contradictory to the principle that the law should be tailored to the present realities. And even though Articles 5 and 6 do provide for some exceptions, the revision of these articles, as compared to earlier draft version, seems to have deleted two of the most important exceptions.³⁶

First of all the exception for self-defence and the protection of property has been repealed. Of course such an exception would not be in line with the principle of a weapons free civil society. However, recalling what has been said earlier about taking into account present realities and the enforceability of the law, it seems that the principle of a weapons free civil society should have made way in favour of present realities and enforceability of the law. After all, in order to establish a weapons free civil society, civilians have to be able to rely on the government uniformed forces for protection of body and property. Such a situation does not exist throughout the whole of Cambodia, as it is a vast country with an underdeveloped infrastructure. Consequently some villages are situated in such remote areas that they are located a few hours from the nearest police post. In addition to lacking telecommunications, it may therefore take up to half a day for any police forces to show up in case of trouble. Taking into account that these villages experience problems with violent gangs more or less regularly, it remains to be seen whether these villages will adhere to the principle of a weapons free civil society.

A second important exception, which has been deleted, concerns the exception allowing for the establishment of private sector arms sale and repair shops. The comment to Article 5

³⁶ See Annex I.

questions how arms are to reach members of target shooting clubs or the higher level officials of the uniformed armed services which are authorized to carry side arms.³⁷

Arms repair shops will not pose a problem, as Article 17 provides for them to be run by the government. Although there is no such provision for arms sale, it would not be illogic for the government to take this task upon itself as well, especially as that would simplify the control on arms authorisations and sales. Further, it might solve the question of ‘private ownership’. The government could then sell arms while retaining the ownership, transferring merely the actual possession of such arms. This would however, remain a very artificial system.

The Articles 10 to 14 place the Ministries of Interior and National Defence in charge of authorising and monitoring arms use, storage and transport.

Articles 9, 15 and 16 devise a registration and information system with regard to the arms, explosives and munitions, thereby increasing the traceability of such arms. The basis of this system is the registration of each and every weapon. In addition any loss of arms has to be registered as well, thereby making such arms less suitable for sale on the black market. Finally no arms, explosives or munitions may be destroyed or deleted from the records without prior authorisation.

Import, export, repair and production of any and all arms, explosives and munitions are placed within the exclusive jurisdiction of the government by Article 17. In addition these all have to be conducted in accordance with the relevant international rules and must be approved of by the National Assembly (with the exception of repairs).

Finally Article 24 of the draft provides for an amnesty period of three months, during which illegally held arms can be turned in to the competent authorities. Registration of legally held arms must be completed within nine months after the law comes into force.

3.3. The draft Law and the International Scene

The question now remains if this new draft – even though merely a framework law – provides a broad enough basis for future development, in particular regarding future international developments and agreements.

³⁷ *Unofficial English Translation of the Comments by the Round Table of 27 March 2001 with regard to the Draft Law on The Management of Weapons, Explosives and Ammunition*, Phnom Penh, 2001, Comment to Article 5.

In the first part, the main aspects or bottlenecks of (inter)national arms legislation have been reviewed. In how far has the draft Law on the Management of Weapons, Explosives and Ammunition taken these aspects into account?

Keeping the same order as in Part I, national arms laws, enforcement, import- and export policies and licensing agreements will be reviewed first, then brokering and illicit trafficking.

The draft Law on the Management of Weapons, Explosives and Ammunition should be able to provide a stable basis to new comprehensive arms legislation. However, the success of the Arms Law will depend on a few additional circumstances. First and foremost, the general level of development needs to be improved, giving priority – as far as possible seen the ‘integrated approach’ – to human security. Important complementary measures in order to achieve this are improved training and control regarding armed government forces and a better-educated and independent judiciary. Without such complementary measures adequate and effective enforcement will be an illusion.

Although not reviewed in this paper, the Council Decision provided for technical assistance in these areas as well.³⁸

Regarding the possible international implications of import- and export policies, the draft only provides a basis in Article 17 by stating that such policies are to be “in line with the concerned international rules”. According to the comment to that article, there may be a potential conflict between Cambodia’s accession to certain international conventions and the testing of ‘weapons, explosives and ammunition’ as mentioned earlier in the article.³⁹ However, the same comment states that this problem is being clarified in an implementing sub-decree. It remains to be seen, if this problem can be resolved.

The third issue of small arms proliferation falling within the legal sphere (see Part I, page 3) concerns licensing agreements, to which the draft does not refer in any way. This may be an omission. However, as arms production, import and export will be within the exclusive jurisdiction of the government (Article 17), any related arms licensing must also fall within the exclusive jurisdiction of the government. It is after all hard to devise a system in which there is no private arms production sector, but nonetheless a private arms licensing sector. Therefore – if the issue ever arises – the government will be able to enforce a strict licensing policy without having to fear any opposition from the non-existing private arms

³⁸ Council Decision of 15 November 1999 Implementing Joint Action 1999/34/CFSP with a view to a European Union Contribution to Combating the Destabilising Accumulation and Spread of Small Arms and Light Weapons in Cambodia, Annex.

³⁹ *Unofficial English Translation of the Comments by the Round Table of 27 March 2001 with regard to the Draft Law on The Management of Weapons, Explosives and Ammunition*, Phnom Penh, 2001, Comment to Article 17.

sector. But as already indicated, this is *if* the issue ever arises, which does not seem very likely regarding the present level of underdevelopment the country is experiencing.

The small arms proliferation as fuelled by illicit trafficking may pose a problem however for a number of reasons. First of all, Cambodia still is in the process of developing adequate, effective and well-trained uniformed armed forces. It may take a while before these government forces reach full 'majority', but even then illicit trafficking can only be halted by a combined international effort. To this end a coordinated effort by the ASEAN will be necessary, as illicit trafficking is a problem of whole regions, rather than of single countries.⁴⁰ However ASEAN has little policy-making power and its members have a shared aversion against interference in their internal affairs thereby rendering progress slow. Nevertheless it has managed to achieve some agreement as to combating trans-national crime, amongst which small arms trafficking. However, the level of agreement reached thus far is merely expressed in political statements and actions undertaken have been reactive rather than proactive.⁴¹ Although, the efforts of ASEAN could be elaborated on in more dept, this cannot be done here, as it would take us too far off course.

Finally the last aspect dealt with in Part I concerns brokering. Brokering may – just as licensing – prove a lot more difficult under Khmer law than under other national laws. After all import, export and transport are within the exclusive jurisdiction of the government. Therefore there will be no room for private arms import, -export or -transport authorisations, which is one of the main services a broker provides. On the other hand, there are of course a lot of illegal arms, explosives and munitions in Cambodia at present, which may be smuggled out of the country by illicit traffickers and sold through brokers all the same.⁴²

⁴⁰ ASEAN: Association of Southeast Asian Nations comprising of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

⁴¹ *Legal Controls on Small Arms and Light Weapons in Southeast Asia*, Katherine Kramer, July 2001, pp. 1-2.

⁴² There are an estimated 500.000 illegally held small arms and light weapons in Cambodia.

Final Conclusion

In this paper, only the major aspects of small arms proliferation have been reviewed. Nonetheless, it may be clear, that the field of small arms proliferation is a highly complex one, due to the large number of sub-fields and the mutual interdependency of curbing small arms proliferation and sustainable development. Therefore a comprehensive approach, taking into account all aspects regarding small arms proliferation, is an absolute necessity. If no comprehensive approach is devised, the inconsistencies between the different aspects may lead to a number of loopholes in the system, encouraging especially licensing practices, brokering activities and illicit trafficking.

By adopting the EU Code of Conduct for Arms Exports of 8 June 1998, the EU addressed merely one single aspect of the supply-side of small arms proliferation. Thereby leaving the other aspects regarding the supply-side of the problem such as licensing, brokering and illicit trafficking unregulated. Although the EU Code of Conduct may have some positive side-effects, mainly regarding illicit trafficking as a result of increased transparency thereby decreasing the number of loopholes available for illicit traffickers, such positive side-effects do not address the root causes.

Furthermore, the aspect that *is* addressed by the EU Code of Conduct – arms exports by EU Member States – is merely dealt with by way of political agreement to exchange information and consult one another on such exports. Therefore, even with regard to arms exports there is no binding regulation compelling Member States to comply with or live up to certain minimum standards.

As for the supply-side of small arms proliferation, the conclusion therefore is that devising a comprehensive system ‘attacking’ all relevant aspects has just started and is still in its ‘infancy’.

As for the demand-side of small arms proliferation, the Joint Action provides a basis on which coherent action *can* be undertaken. Important in this respect, is that the European Union has shown to be aware of the necessity for an ‘integrated and comprehensive’ approach therefore focussing its efforts both to curbing small arms proliferation and sustainable development. The Joint Action consequently provides for a number of actions, including amongst others providing assistance: regarding the development of appropriate arms regulation, the development of guidelines for improved record-keeping, the collection and destruction of surplus arms and by supporting civil society programmes which raise public awareness on small arms-related problems.

Therefore, a decent basis may be provided for assisting less-developed countries in their efforts to combat the spread of small arms. However, as this is the first project of its kind, the future will have to show how effective such assistance ultimately can or will be. On the

other hand, the concept seems promising, the cooperation went smoothly and the provided assistance has been very much welcomed by Cambodia.

Taking account of the situation as reviewed by this paper, the overall conclusion should be that the European Union will have to remain focusing on its domestic efforts, in order to achieve a truly comprehensive European system. If it does not do so, the situation may arise in which the European Union puts a lot of effort in assisting 'on the spot' while fuelling the problem from within its own territory by way of e.g. licensing agreements or brokering activities. However, as it has only been since the last ten to fifteen years that the issue has had any priority on the international agenda, the achievements thus far are not bad. Therefore, despite the 'child diseases' experienced and the present lack of a truly comprehensive system, the future looks quite promising if the current pace can be upheld.

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ANNEX

29/03/01: Note: Draft unofficial English translation.

Law on The Management of Weapons, Explosives and Ammunition

Article 1.

This law aims at determining the management of weapons, explosives and ammunition of any and all types in the Kingdom of Cambodia.

Article 2.

This law governs the equipping, possession, carrying, utilisation, purchase, sale, trading, loan, transfer, hiring, production, fabrication, repair, transit, importation, exportation, and stocking of weapons, explosives and ammunition of any and all types.

Article 3.

The terms stated in this law shall have the following meanings:

- Weapons: all kinds of produced or fabricated firearms which can be used for killing or injuring human beings or causing damage to property;
- Explosions and ammunition of any and all kinds: produced or fabricated devices or equipment which can be used to harm life or cause damage to property;
- Chemical weapons: all types of produced or fabricated weapons or ammunition which contain chemical or bacterial substances or toxic gases which may damage health, cause harm to life or damage to property;
- Uniformed armed services: the National Police Force and the Royal Cambodian Armed Forces including the Gendarmerie;
- Officials: government employees within the framework of public functions and judicial officials and officials of the high state institutions;
- Civilian population: those who are not covered by the fourth and fifth categories above.

Article 4.

Equipping, possession, carrying, use, purchase, sale, trading, loan, transfer, rental, production, fabrication, repair, transportation, transit, import, export and stocking of weapons, explosives and ammunition of any and all types by the civilian population are prohibited in the Kingdom of Cambodia.

Article 5.

The civilian population may be allowed the following:

- Signal gun and signal ammunition, gun and ammunition used for sport activities;
- Gun with blank cartridges or charges such as: fireworks launcher or gun designed for art performance, which makes a noise when fired but is not harmful;
- Explosive substances to serve civil purposes uses or fireworks;

Conditions and procedures for the implementation of this provision shall be defined by sub-decree upon proposition of the Ministry of Interior.

Article 6.

The Ministry of National Defence and Ministry of Interior shall be permitted to have clubs and fields for target shooting exercises.

Article 7.

Equipping, possession, carrying, utilisation, purchase, sale, trading, loan, transfer, hiring, production, fabrication, repair, transportation, transit, import, export and stocking of weapons, explosives and ammunition of all types by the uniformed armed services and officials shall be covered by the provisions of this law.

Article 8.

No foreigner shall be eligible to possess or to use weapons, explosives and ammunition of any or all types in the Kingdom of Cambodia.

The Royal Government may, upon official request, provide for exceptions for bodyguards of the leader of a foreign state such as President, Head of State and Prime Minister who are paying a visit to the Kingdom of Cambodia.

Chapter 2
Management, Supply and Transportation of Weapons,
Explosives and Ammunition

Article 9.

The registration of weapons, explosives and ammunition of any and all types in the Kingdom of Cambodia is within the competence of the Ministry of National Defence and Ministry of Interior.

Article 10.

The Ministry of National Defence is responsible for supply, control, and management of weapons, explosives and ammunition of any and all types of the Royal Cambodian Armed Forces.

The Ministry of Interior is responsible for supply, control, and management of weapons, explosives and ammunition of any and all types of the National Police Force, officials and the civilian population.

Article 11.

It is within the competence of the Ministry of National Defence to issue authorisation for the use of weapons, explosives and ammunition of any and all types to the Royal Cambodian Armed Forces.

It is also within the competence of the Ministry of Interior to issue authorisation for the use of weapons, explosives and ammunition of any and all types to the National Police Force, officials and the civilian population.

Authorisation for the use of weapons shall specify the types of weapons and conditions to be respected.

Authorisation for the use of weapons of an entity shall define the obligations requiring the weapons be returned to the depot.

Procedures and conditions for the application for an authorisation to use weapons shall be determined by Inter-ministerial declarations of the Ministry of National Defence and Ministry of Interior.

Article 12.

The Ministry of National Defence shall be responsible for the safety and security in the stocking of weapons, explosives and ammunition of any and all types of the Royal Cambodian Armed Forces.

The Ministry of Interior shall be responsible for the safety and security in the stocking of weapons, explosives and ammunition of any and all types of the National Police Force, officials and the civilian population.

All weapons must be registered and all types of weapons must be stored in secure depots. Exceptions to this provision shall be accorded by the Ministry of National Defence and Ministry of Interior through Inter-ministerial declarations.

Article 13.

To ensure public safety and to prevent vital disasters or damage to property, the Minister of Interior or Minister of National Defence may order the temporary evacuation of people from residence upon advice that the depot compounds where weapons, explosives and ammunition of any and all types are being stored may explode.

Procedures for the implementation shall be defined by sub-decree.

Article 14.

Transportation of weapons, explosives and ammunition of any and all types inside the country shall be within the competence of the Ministry of National Defence where the purposes are for national defence or shall be within the competence of the Ministry of Interior where the purposes are for internal security.

Transportation of weapons, explosives and ammunition of any and all types from outside through the Kingdom of Cambodia shall not be carried out unless the is approval from the Royal Government upon proposition of the Ministry of National Defence and Ministry of Interior.

Article 15.

Every loss of weapons, explosives and ammunition shall be reported to the Commune – Sangkat police or gendarmerie post where the loss took place, not later than 24 hours after the loss is discovered. When reporting, there should be one or two witnesses accompanying. In case of no witness available, the competent authority in the area shall examine on the spot and make minutes. In the meantime, a report shall be made available to the superior officer. The report shall be in writing and specify details on weapons, explosives, ammunition and registration number along with the circumstances surrounding the loss.

Article 16.

In no case shall weapons, explosives and ammunition be destroyed or deleted from the list without permission from the Minister of Interior if those weapons, explosives and ammunition are under the jurisdiction of the Ministry of Interior or permission from the Ministry of National Defence if those weapons, explosives and ammunition are under the jurisdiction of the Ministry of National Defence.

Chapter 3 Import, Export, Repair and Production of Weapons, Explosives and Ammunition

Article 17.

Import, export, repair, and production of weapons, explosives and ammunition are within the sole and exclusive jurisdiction of the Royal Government.

The Ministry of National Defence and Ministry of Interior are entitled to have repair shops and to test the quality of weapons, explosives and ammunition of any and all types.

Import, export, and production of weapons, explosives and ammunition of any and all types shall be in line with the concerned international rules.

The Royal Government shall, in writing, report to the National Assembly on import, export and production of weapons, explosives and ammunition of any and all types where the purposes are for the defence domain or public security.

Chapter 4 Penalties

Article 18:

For those who equip, carry, possess, utilise, sell, purchase, loan, transfer, hire, fabricate and repair weapons, explosives and ammunition of any and all types shall be liable to imprisonment from 6 (six) months to 3 (three) years and a fine of 1,00.000 Riel (one million Riel) to 6,000,000 (six million Riel).

Article 19:

Those who trade in, transit, export, import, or stock weapons, explosives and ammunition of any and all types shall be liable to imprisonment from 5 (five) years to 10 (ten) years.

Article 20:

Those who act, without taking any other criminal acts into account, in contravention of article 8 and article 14 of this law shall be subject to a prison term from 5 (five) years to 10 (ten) years.

Article 21:

For those who, without competence under the law, issue authorisation for use of weapons, explosives and ammunition of any and all types in any form or with whatsoever reason shall be liable to imprisonment from 6 (six) months to 3 (three) years and a fine of 3,000,000 Riel (three million Riel) to 6,000,000 Riel (six million Riel).

The designated competent authorities under the law who issue improper authorisation for use of weapons, explosives and ammunition of any and all types, which does not fall under their jurisdiction, shall be liable to imprisonment from 2 (two) years to 5 (five) years and a fine of 4,000,000 Riel (four million Riel) to 10,000,000 Riel (ten million Riel).

Those who make false authorisation for use of weapons, explosives and ammunition of any and all types shall be liable to imprisonment from 5 (five) years to 10 (ten) years.

Those who use a false authorisation for the use of weapons, explosives and ammunition of any and all types shall be subject to serve a prison term from 5 (five) years to 10 (ten) years.

Article 22.

Those who, without taking other criminal acts into account, act in contravention of article 15 and 16 of this law shall be liable to imprisonment from 3 (three) months to 5 (five) years

and a fine of 200,000 Riel (two hundred thousand Riel) to 10,000,000 Riel (ten million Riel).

Chapter 5 Transitional Provisions

Article 23.

If deemed necessary, the Royal Government may establish a National Commission to take initiatives or conduct reform on the management of weapons, explosives and ammunition of any and all types in the Kingdom of Cambodia.

Article 24.

For those who are in illegal possession of weapons, explosives and ammunition of any and all types shall turn them over to the competent authorities at the latest within 3 (three) months following the effective date of this law.

Chapter 6 Final Provision

Article 25:

Any laws and provisions contrary to this law shall be abrogated.

This law was adopted by the National Assembly
on.....during itssession, Second Legislature

Done in Phnom Penh,

President of the National Assembly

