

**IN SEARCH OF INTERNATIONAL TORT LAW: CIVIL LIABILITY OF ARMS MANUFACTURERS
FOR INDIRECT SALES TO EMBARGOED CONFLICT ZONES**

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by
David Simonsz

Prepared under the supervision of
Professor Alejandro Lorite

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ACRONYMS & ABBREVIATIONS

ATCA	Alien Tort Claims Act
AI	Amnesty International
DSEI	Defence Services and Equipment International
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUC	End User Certificate
FAR	Rwandan Armed Forces
H & K	Heckler & Koch
HRW	Human Rights Watch
IANSAs	International Action Network on Small Arms
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
MNC	Multinational Corporation
MP	Member of Parliament
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front
SALW	Small arms and light weapons
UN	United Nations
UNICOI	United Nations International Commission of Inquiry
USA	United State of America
USSR	United Soviet Socialist Republic

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1. INTRODUCTION

1.1 The research question

In the past half-century, the rise of human rights has given to many millions of people the hope of a life free from fear, injustice, and want. Unfortunately for most of those millions, the hope remains only that – a hope. Human rights, for all their vaunted purity and ethical value, are social artefacts, and many a human rights campaigner has been reduced to despair at their ultimate fruitlessness. This dissertation suggests a way to give some extra teeth to the decrepit watchdog that human rights law is in danger of becoming. This is to use human rights not only in the sphere of public law, but also as a guiding light in private law. Domestic private laws, such as the law of tort, can be valuable tools in the quest to finally make human rights more than just a hope.

This dissertation will provide an example of just such an application of private law. It begins with a problem; the problem of innocent civilians caught in the world's most savage conflicts. Conflicts like those in Rwanda, Sierra Leone, and the Sudan are so brutal that they earn the dubious distinction of an arms embargo being placed by the UN Security Council upon the host countries.¹ The problem is that these embargoes are not respected,² and the innocent civilians still find themselves on the wrong side of the barrel of a gun.

These guns have travelled a long road before they end up in illegal conflicts. The vast majority are made by highly respected and totally legitimate companies in the developed world. Many guns then go to legitimate destinations, such as the police and armed forces of different states around the world. There is nothing wrong with selling weapons to states – unless those states are under an embargo. And a small but significant percentage of weapons unfortunately do travel to embargoed nations, via a complex network of legal, semi-legal and completely illegal brokers and traders.³ The weapons may travel to several different countries before they reach their destination, sometimes even travelling as dismantled components in different shipments.⁴ But when they do arrive, they cause death and misery.

A further problem for the innocents in the embargoed nations is that when they turn to human rights law for protection, they find that the instruments of human rights, like treaties, and even the binding resolutions of the UN Security Council provide no remedy. Unless implemented and enforced by governments, such instruments are seldom effective. And even the best-intentioned of governments can be slow in promulgating new

¹ United Nations Security Council Resolutions 918 (1994), 1132 (1997), and 1591 (2005) created arms embargoes on Rwanda, Sierra Leone, and the Sudan respectively.

² Control Arms *UN arms embargoes: an overview of the last ten years* (2006) at 1-2

³ Amnesty International *Arms Without Borders* (2006) at 4

⁴ Amnesty International (n 3 above) at 7

legislation, or leave loopholes through which guilty persons may escape. More often, governments simply ignore or avoid the duties imposed on them by international law and human rights law.

The innocents could turn to international criminal law as a solution, and seek to prosecute the brokers who funnel the weapons past embargoes. After all, international criminal law has an independent court, and can be binding on individuals without requiring the intervention of governments. But this approach has two problems: first, that international criminal law has very high standards of proof. In the murky underworld of the arms trade it is difficult to eradicate all reasonable doubt. Secondly, even if one can prove a case against an arms broker, it is often impossible to find one.

This dissertation proposes that the innocents look elsewhere for their solution. Rather than move against the brokers who transfer weapons, instead move against the manufacturers who produce them in the first place. This solves the one problem, as arms manufacturers are much easier to locate than arms brokers. Secondly, rather than use criminal law, one can use civil law. The difficulties in proving negligence, while not insignificant, are much less than the difficulties in proving criminal intent. And although criminal law is the preferred tool for enforcing human rights in cases of massive violations, many criminal law systems do not recognise the criminal capacity of corporations.

So this dissertation is in search of international tort law: a tool by which parties to a complex, multi-jurisdictional civil wrong can be held liable and forced to pay damages to the victims of the wrong. Unfortunately for this dissertation, there is (as yet) no such thing as international tort law. Until there is an international civil court to match the International Criminal Court, one must make do with the ordinary tort laws that currently govern domestic and transnational tort cases. The question is, are these laws enough? Can weapons manufacturers be held liable for negligence for selling weapons, directly or indirectly, to embargoed conflict zones?

1.2 Significance of the research

This dissertation seeks to demonstrate the practical possibilities of holding arms companies liable under the common law of torts, as a possible instrument in support of the enforcement of public international law and international human rights law. It is not possible for this paper to provide all the elements of a proper legal case that would be admissible in all jurisdictions, but there has been enough research done by NGO's and concerned parties over the years to show that every step of such a case can be made. What no one has yet done is to take the separate pieces of factual and legal research and weld them into a single, viable case. This is the burden that this dissertation takes for itself.

The interesting thing about such a case is that there is nothing special or new about any of its components. The data on the devastating impact of arms sales has existed for years, lost amid similar stories of horror from the world's conflict zones. The applicable tort law is even more mundane, involving the basic principles of fault and causation that every law student learns in their first year. But put all these dull bits and pieces together and the result will be explosive.

For example, a successful tort case against the arms manufacturer BAE Systems in the United Kingdom would be based on their foreknowledge that certain of their customers and brokers regularly use BAE Systems products in the violation of human rights.⁵ The implications of such a case would be both dramatic and minimal: dramatic in that companies would be impelled to refuse to sell to certain 'risky' persons, when those persons have been shown to have significant connections to embargoed conflict zones. This would hopefully restrict the flow of weapons to the more volatile parts of the world, which in turn would reduce the devastating destabilising effect of those weapons on local societies. At the same time, impact is minimal as companies would not necessarily be expected to do background checks on their customers, nor track the path of their weapons from customer to customer over the years. This would be an unsustainable burden to place on companies. Instead, all that they would have to do is respond to the exhaustive research compiled by NGO's like Amnesty International, Human Rights Watch, and IANSA. Their exact level of due diligence would be dictated by the applicable standards of tort, which this research seeks to elucidate. It is not unreasonable to demand that arms manufacturers exercise some discretion in their sales, as demonstrated by the fact that direct sales to certain persons or places are already forbidden under UN (or EU or other) sanctions.

Importantly, the use of the flexible medium of tort law means that the companies would no longer be able to slide through the gaps in statutory law that currently protect them. For example, it is currently possible to claim that, while it is illegal to sell guns to Zimbabwe, it is perfectly legal to sell to a broker in South Korea who will then resell the guns to Zimbabwe.⁶ It is submitted that if in this case one knows the arms will be resold to Zimbabwe, such a legal stance is hypocritical, inconsistent, and ethically abhorrent. It is precisely these gaps in the law that have stirred the global campaign for an 'International Arms Trade Treaty'.⁷ It is precisely these gaps in the law that could be nullified, or at least mitigated, by use of tort law. If one reasonably suspects that one's arms are destined for an embargoed country, it should make no difference by what route the arms travel. Knowledge, combined with the power of the arms company to end the transaction, creates responsibility.

⁵ As did in fact happen with BAE Systems and Indonesia. This will be discussed in Chapter Two.

⁶ M Thomas *As used on the famous Nelson Mandela* (2006) at 224-228

⁷ See generally the Control Arms campaign details available at <http://www.controlarms.org/> (visited on 02-10-2007)

1.3 Literature review

MNC liability has become one of the hottest topics in international law over the past decade, partly spurred by globalisation's more ruthless forays into countries like Burma⁸, Papua New Guinea⁹, and Nigeria.¹⁰ Many theories have been put forward on how to provide some legal accountability to the sprawling juggernauts that modern companies have become. Despite this wealth of literature, there is a specific gap that this dissertation seeks to fill.

The first and most obvious method of holding non-state actors liable under international law is using the criminal law. The benefit here is that the binding nature of international criminal law on individuals is not disputed, and is guaranteed by treaties and international tribunals, as well as domestic courts who apply international criminal law. Writers such as Katharine Orlovsky have discussed applying international criminal law to arms brokers, using crimes of complicity under the Rome Statute as a basis for the charges.¹¹ However, as noted above, the biggest problem is that the high standards for *mens rea* under international criminal law make it unlikely that this approach could be adapted to the case of arms manufacturers. It is for this reason that this dissertation will focus on civil liability.

An obvious place to ground international civil liability is within a treaty of some kind. However, the proposed UN Convention on the Illicit Trade in Small Arms and Light Weapons is still a long way from entering into force. Bobby Scott has analysed the results of the UN Conference on this topic, with largely negative conclusions.¹² Any Convention that did come into existence would certainly be important in regulating the trade, but would probably not bind arms companies directly. This complements the work of Erwin Dahinden on arms control laws.¹³ Key for him is not the number of ratifications of a UN treaty, but instead the effectiveness of each state's arms control regime. Incorporation of treaties into domestic law, followed by their effective enforcement is vital. The problem with most arms control regimes today is that either the governments simply fail to implement appropriate legislation, or that legislation has too many loopholes that are easily exploited to move arms into a legal and moral grey area. This problem leads one back to the goal of this dissertation; to plug the loopholes and lacunas in statute law that allow weapons to be sold to embargoed conflict zones without and restraint.

⁸ *Doe v Unocal* 395 F.3d 932 (2002)

⁹ *Sarei v. Rio Tinto Plc* 221 F. Supp. 2d 1116 (2002)

¹⁰ *Social and Economic Rights Action Centre (SERAC) v Nigeria* ACHPR Comm. 155/96 (2001)

¹¹ K Orlovsky 'International Criminal Law: Towards new solutions in the fight against illegal arms brokers' (2006) 29 *Hastings International and Comparative Law Journal* 343

¹² BL Scott 'The UN Conference on the Illicit Trade of Small Arms and Light Weapons: an exercise in futility' (2003) 31 *Georgia Journal of International and Comparative Law* 681

¹³ E Dahinden 'The Future of Arms Control Law' (2005) 10 *Journal of Conflict and Security Law* 263

Some domestic statutes have nonetheless proved effective. Within the domestic civil law field, there is much literature on the Alien Tort Claims Act (ATCA) in the USA.¹⁴ Nancy Morisseau has written explicitly on the chances of child soldiers were they to sue arms manufacturers under the ATCA.¹⁵ She comes to a conclusion that is favourable to the child soldiers, but the obvious limitation of the ATCA is that while it technically creates universal jurisdiction over all individuals and companies in the world, it is practically enforceable against only those persons who have assets in the USA. This dissertation aims at producing a more global framework for liability. The best way to do this is to avoid the loopholes of statute and treaty law, and instead rely on ‘international tort law’.

Within the general field of ‘international tort law’, several books have been written on the general obligations of non-state actors, including companies.¹⁶ These books cover a large number of subjects, and most importantly address the idea that companies can be held liable in domestic courts for violations of international law. However, they tend to focus not on manufacturer liability, but instead on multinational companies who have subsidiaries engaged in wrongful acts in foreign countries. There is still room for research showing that manufacturers should enjoy a functionally similar form of liability to that of proper multinational companies.

David Kinley & Junko Tadaki have noted, in their discussion of human rights norms for corporations, that many of the most recent successful international tort cases have ‘hinged upon establishing the direct negligence of the parent company, rather than its responsibility for the torts of its subsidiaries’.¹⁷ The distinction is an interesting one – it suggests that it is irrelevant whether the tort was technically committed by a secondary party, only whether the primary party should be liable for not controlling the secondary party. An analogy here can be made to the case of arms manufacturers and their customers, whether customers are arms brokers or armed group committing the human rights violations themselves.

Kinley and Tadaki refer to a number of negligence cases against British parent companies for the actions of the subsidiaries.¹⁸ These cases were litigated by Richard Meeran, who argued for ‘process liability’.¹⁹ Meeran writes ‘There seems to be no logical reason why, in principle, damage arising from the design and transfer of hazardous technology overseas should be regarded as any less foreseeable than damage from defective products’.²⁰ The

¹⁴ For two opposing viewpoints on the role of ATCA see J Rabkin ‘Universal Justice: The role of Federal Courts in international civil litigation’ (1995) 95 *Columbia Law Review* 2120 and MD Ramsey ‘Multinational Corporate Liability Under the Alien Tort Claims Act: Some structural concerns’ (2001) 24 *Hastings International & Comparative Law Review* 361

¹⁵ N Morisseau ‘Seen but not heard: child soldiers suing arms manufacturers under the Alien Tort Claims Act’ (2004) 89 *Cornell Law Review* at 1263

¹⁶ See most notably A Clapham (ed) *Human Rights Obligations of Non-State Actors* (2006) and P Alston *Non-State Actors and Human Rights* (2005). Also Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999)

¹⁷ D Kinley & J Tadaki ‘From Talk to Walk: The emergence of human rights responsibilities for corporations at international law’ (2004) 44 *Virginia Journal of International Law* 931 at 944

¹⁸ R Meeran ‘Accountability of Transnationals for Human Rights Abuses’ (1998) 148 *New Law Journal* 1686 at 1698

¹⁹ R Meeran ‘“Process Liability” of Multinationals: Overcoming the forum hurdle’ (1995) *Journal of Personal Injury Litigation* 170

²⁰ Meeran (n 19 above) at 170

argument has never been fully settled as the cases to which Meeran referred were eventually settled out of court.²¹ One problem in his approach is that he did require a very close relationship between the parent company and the subsidiary. In practice, this close relationship is difficult to transfer to arms manufacturers and their customers, but the principle remains valid; sufficient proximity between parties can make the controlling party liable no matter the exact legal relationship between them.

Is there support for such a principle in current literature on manufacturer liability? Most literature focuses on the traditional understanding of manufacturer liability – that resulting from production of a flawed product.²² There has been very little research done about a general duty of care owed by manufacturers to the victims of their customers. This is not surprising given the difficulty of establishing such a duty. However, there has been some research done into how a duty of care may exist where the one party can control the actions of a second party.²³ This can be the foundation of a broader duty on the part of manufacturers of specialised goods such as arms.

Another significant body of literature is that on the liability of arms brokers. As the primary link between manufacturers and purchasers, arms brokers present more obvious targets than manufacturers. However, successful prosecutions of arms brokers are few and far between.²⁴ This may suggest that a case against manufacturers is even more unlikely, as they are further up the chain of causation than arms brokers. However, the legal argument based on torts will be different than the criminal law argument used against brokers. Relying on the mechanism of tort law is precisely justified by the problem of the chain of causation. As will be seen below, it all depend on the facts – in principle liability exists.

The above literature review hopefully reveals the gaps into which this dissertation will fit itself. On the one hand, research on international civil liability of companies has focused on parent-subsidiary company relations, and not on manufacturers. On the other hand, current research on manufacturers extends only as far as product liability. As this dearth of research is creating a lacuna in which arms companies are profiting, it is a significant and appropriate area for a dissertation.

1.4 Limitations

The case against arms manufacturers that is the centre of this dissertation is both difficult and lengthy, therefore many matters that would be relevant to a full legal case must be omitted. The first and largest is that this dissertation will deal with substantive law only and not with procedural law. This means that the large mass of

²¹ These cases being *Connelly v. RTZ Corp. Plc.* (No. 2) (1997) All ER 335 and *Lubbe and Others v. Cape Plc.* (No.2) (2000) 4 All ER 268

²² See M Geistfeld 'Manufacturer Moral Hazard and the Tort-Contract Issue in Products Liability' (1995) 15 *International Review of Law and Economics* 241 at 250

²³ S Joseph *Corporations and transnational human rights litigation* (2004) at 67

²⁴ Orlovsky (n 11 above) at 343-345

literature on procedural defences like *forum non conveniens* is not relevant.²⁵ It is unfortunately too broad and complex a matter to fully deal with within this dissertation.

The second is that, as alluded to above, this dissertation shall try to rely on common principles of tort law. This means avoiding legislation, which is inevitably country-specific and therefore limited. This avoidance extends to the Alien Tort Claims Act, which has recently been the centre of some major corporate liability cases in the USA.²⁶ This also has the benefit of avoiding the very special and particular legal doctrines that surround the Act.²⁷ However, to the extent that negligence is relevant to an ATCA claim, a substantive part of this dissertation may still be applicable.²⁸ ATCA is not the only statute that shall be avoided; other examples include the Human Rights Act in the United Kingdom, the general wealth of legislation that flows from the EU, and then soft law instruments like the UN Human Rights Norms for Corporations. It is certainly possible, and indeed it has been argued,²⁹ that such legislation and quasi-legislation can be helpful in providing guiding principles for tort litigation. But such instruments are either non-binding, or they are binding only in a single state. By avoiding such authorities, this dissertation will paradoxically be making its argument stronger in most other states.

Third, this dissertation shall use the United Kingdom as its primary example. The UK is attractive for two reasons. First, its tort law has been widely spread across the world by colonialism, so any case that is successful in the UK may be successful in other common law countries with (relatively) little modification. This increases the relevance of this dissertation. Secondly, the UK is the biggest exporter of arms in the world.³⁰ BAE Systems, the primary supplier of weaponry to the UK government, is the third biggest weapons company in the world, and sells to over a hundred countries across the globe.³¹ The facts therefore support an arms-control case.

But bear in mind that the use of the United Kingdom as primary example is not as important as the focus on common law principles of tort. The purpose of this dissertation is to build a hypothetical case, by dealing with the legal standards of torts as they would be made applicable to indirect sales. Therefore, as a first step towards the development of a true ‘international tort law’ understood as a joint endeavour to curb indirect sales to conflict zones around the world, it makes sense to focus on one legal system, which is moreover the parent system of many others. This does mean that the other major legal family in the world, that of the Civil Law, must be left until another pioneer continues this experimental case using civil law authorities.

²⁵ Consider the arguments in R Meeran (n 19 above)

²⁶ Like *Doe v Unocal* (n 8 above)

²⁷ Morisseau (n 15 above) at 1294

²⁸ As negligence claims in the USA are not substantively different to those in other parts of the common law world, despite the difference in form. This will be explored in Chapter Three.

²⁹ See D Kinley & R Chambers ‘The UN Human Rights Norms for Corporations: The private implications of public international law’ (2006) 6 *Human Rights Law Review* 447 at 489; and R Mullender ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 *Oxford Journal of Legal Studies* 301 at 303-304

³⁰ In terms of number of countries that purchase UK arms, not in terms of value of exports. See the Control Arms Campaign *Fact Sheet* available at <http://www.controlarms.org/> (visited on 3 August 2007)

³¹ Thomas (n 6 above) at 51

Much of the hype around the arms trade has focused on small arms, which are defined by the UN Secretary-General in his 1997 Report of Governmental Experts as including a wide variety of weapons, including revolvers, rifles, carbines, sub-machine guns, and assault rifles. This dissertation does not need nor intend to focus explicitly on small arms, as selling tanks and gunships to embargoed countries is just as illegal and unethical as selling handguns. However, as small arms have been shown to be the greatest cause of casualties worldwide,³² this dissertation will be using much of the research on small arms.

For those pedantic readers of this dissertation who will note that there are no lengthy definitions of arms, arms embargoes, and the like, this is because such details are not strictly necessary to the argument presented here. As stated above, this dissertation emphasises the flexibility of tort law. This makes definitions somewhat redundant, as the issue is not whether sale of handguns per se is illegal. Instead it is whether manufacturers should be cautious in selling potentially dangerous items (a very broad and vague category) to persons who are reasonably likely to abuse them in embargoed conflict zones. Similarly arms embargoes are not important for the precise kind of military technology that is forbidden. What is important is just that the international community deems the conflict in question to be brutal enough that it should not receive weapons for fear of massive human rights violations. This kind of logic for avoiding strict definitions is the reason why they will be few and far between in this dissertation.

This dissertation should also be distinguished from the common arms-control debates and litigation that rage through countries like the USA. As the chapters below will show, there is a world of difference between selling tanks to governments known to be repressive, and making once-off handgun sales to unhappy-looking American teenagers. Attempts to transfer logic or legal principles between these two kinds of debates would be unwise.³³

1.5 Dissertation structure

The argument will proceed as follows. Chapter Two will give the facts of the global arms trade. The important aspects to cover include the size and structure of the arms-trade, the shift between legal and illegal markets, the main actors, the relevance of arms-embargoes, and most importantly whether the facts suggest that arms manufacturers know their weapons are being directed to conflict zones.

Chapter Three is on the law. As the title of this dissertation suggests, there is no (at least, not yet) international tort law to provide an easy framework to evaluate liability. This does not mean that there haven't been successful

³² Amnesty International (n 3 above) at 4

³³ This is not an ironclad rule. For example, this dissertation echoes in part the logic applied in EL Kintner 'Bad Apples and Smoking Barrels: Private actions for public nuisance against the gun industry' (2005) 90 *Iowa Law Review* 1163 with particular reference to the knowledge on the part of manufacturers of their faulty distribution channels.

international tort cases.³⁴ However, they are not technically international tort cases – they simply involve an international element, just as private international law is not strictly speaking international, but deals with international elements in legal disputes. The law that is actually applied is domestic law. Thus, this dissertation argues that the appropriate forum is the country of incorporation of the given company. In this case, UK domestic law will be applied. The applicable law will be analysed to determine what requirements must be met for a successful case. In particular, the UK concept of a ‘duty of care’ will be examined, as well as the basic elements of negligence.

Chapter Four is the conclusion of this dissertation: an application of the facts to the law to decide whether arms manufacturers can be held liable for sales to conflict zones. It will revolve around the two most fundamental questions in this case as they are framed by the application of the common law of torts: Should there be a duty of care? And do the facts prove negligence? If the previous chapters were convincing, these questions should not be hard to answer in the affirmative. It will conclude by summarising what this dissertation has accomplished. Even if every section of this dissertation is a resounding success, it is still only a small part of what must happen if the innocent civilians mentioned at the beginning of this chapter are to receive the justice they deserve.

³⁴ Consider *Connelly v. RTZ Corp. Plc.* and *Lubbe and Others v. Cape Plc.* (n 21 above)

2. THE INTERNATIONAL ARMS TRADE

2.1 International sales and manufacturers

In the introduction to his scathingly funny book on the arms trade,³⁵ UK comedian and arms trade activist Mark Thomas lists a few basic facts that everyone should know:

- There are 640 million small arms in the world;
- 8 million new small arms are added each year;
- 1 person is killed every minute with small arms;
- Half a million people a year die from small arms-related violence;
- Three-quarters of those killed are civilians, and most of those are women and children;
- 1135 companies in 98 countries manufacture small arms, ammunition, and components; the number has doubled in the last 40 years
- Around 300 000 children worldwide are turned into soldiers by giving them small arms;
- 60 percent of small arms end up in the hands of criminal gangs, rebel groups, and civilians.³⁶

The scale of the arms trade, both legal and illegal, is immense. The legal trade in small arms alone is estimated to be around four billion US dollars a year,³⁷ with the illegal small arms trade being another one to two billion a year.³⁸ This in turn is estimated by other studies to be only five percent of the total legal arms, putting that figure at around 80 billion US dollars a year.³⁹ The figure for illegal trades is believed to be lower.⁴⁰ The Graduate Institute of International Studies, a Geneva-based academic institute specialising in arms-trade research, argues:

‘The legal and the illicit markets for small arms and light weapons - domestic as well as international - are linked by virtue of the fact that weapons can be diverted from the legal into the illicit realm. Diversion includes government supplies to armed non-state groups, violation of arms embargoes, violation of end-user agreements, ant trade, diversion from government or authorized private stockpiles, and battlefield seizures and war booty. Information on illicit cross-border transfers is generally hard to come by’.⁴¹

Amnesty International note that ‘If the current growth in worldwide military spending continues, by the end of 2006 it will have passed the highest figure reached during the Cold War. After year-on-year increases since 1999, global military spending this year is estimated to reach an unprecedented \$1,058.9bn, which is roughly 15

³⁵ Thomas (n 6 above) at 17

³⁶ All the above facts from Thomas (n 6 above) at 17. Thomas cites ‘Control Arms, BBC, Oxfam, and Global Village websites’ as his sources.

³⁷ Graduate Institute of International Studies ‘Small Arms Survey – Transfers’ available at <http://www.smallarmssurvey.org/files/portal/issueareas/transfers/transfers.html> (visited 11 October 2007)

³⁸ Graduate Institute of International Studies *Small Arms Survey 2001: Profiling the problem* (2001) at 8

³⁹ Morisseau (n 15 above) at 1268

⁴⁰ Graduate Institute of International Studies (n 37 above)

⁴¹ Graduate Institute of International Studies (n 37 above)

times annual international aid expenditure. This is not due to the growth in arms sales alone; military spending covers other costs beside. But in 2005, estimated global spending on arms alone was 34 per cent higher than in 1996'.⁴² Furthermore they say that 'G8 countries, four of whom are also Permanent Members of the UN Security Council, continue to be among the most substantial distributors of the weapons and other military equipment used in conflicts and the violation of human rights worldwide. In 2005, the traditional big five arms-exporting countries – Russia, the USA, France, Germany and the UK – still dominated global sales of major conventional weapons, with an estimated 82 per cent of the market'.⁴³

The above information outlines the context in which the arms trade operates. Weapons are made in the developed world. These weapons are then usually exported to other countries, as the developed world simply lacks a large enough market. For example Israel, despite having relatively high security needs, actually exports two-thirds of its military products.⁴⁴ Harold Hongju Koh, former US Assistant Secretary of State for Democracy, Human Rights, and Labour, notes that 'The startling fact remains that the United States itself manufactures and sells some \$463 million in light weapons annually. It exported those weapons in 1998 to 124 countries, in five of which those weapons were later used to fire on US and UN soldiers'.⁴⁵ This is a truly massive amount of guns – as Koh says, 'more guns than any sane civilisation would ever need'.⁴⁶ Are all these guns produced every year really all going to legally and morally acceptable destinations? The evidence suggests not.

2.2 United Nations arms embargoes

Arms embargoes play an important role in the case constructed by this dissertation. Remember that there is nothing wrong with just selling weapons – even the Control Arms Campaign acknowledges that the arms industry is a legitimate area of business.⁴⁷ The argument of this dissertation is narrower; that sometimes certain countries should not be receiving arms, on the basis that these countries are more likely to abuse arms and violate human rights.

But if one is to accuse a company of negligently selling to a 'risky' country, one must have a reasonably objective standard against which to decide what is 'risky'. Arms embargoes are the cornerstone of this dissertation's standard. They are certainly not the only way to determine risk – Amnesty International and Human Rights Watch would laugh at the idea that countries that are not embargoed are somehow free from weapons-related human rights violations. But embargoes by the UN are a useful starting point for a number of reasons. First, such embargoes are created only in the most extreme and violent of cases. The Stockholm

⁴² Amnesty International (n 3 above) at 6 (footnotes omitted)

⁴³ Amnesty International (n 3 above) at 2

⁴⁴ Amnesty International (n 3 above) at 9

⁴⁵ HH Koh 'A World Drowning in Guns' (2003) 71 *Fordham Law Review* 2333 at 2358

⁴⁶ Koh (n 45 above) at 2333

⁴⁷ See the Control Arms Campaign available at <http://www.controlarms.org/> (visited on 3 August 2007)

International Peace Research Institute catalogued 57 separate major armed conflicts between 1990 and 2001, of which only eight were subject to UN arms embargoes.⁴⁸ These embargoed conflicts included Liberia, Somalia, Rwanda, Iraq, and the former Yugoslavia.⁴⁹ There is also a standing embargo on any sales of any military equipment or technology to Al-Qaeda.⁵⁰ These names will ring bells with anyone familiar with the most savage wars of the past decades. Any conflict embargoed by the UN is likely to be of such brutality or injustice that it becomes uncontroversial to argue that one should not sell weapons to involved parties.

The second reason why UN arms embargoes may be helpful is the size of the UN. Quite simply, the UN includes almost every nation on the planet, and so any norms generated by it will be of greater applicability – by sheer virtue of its size – than those generated by other groups.

Finally, the UN Security Council is exceptional in that its resolutions under Chapter Seven of the UN Charter have binding legal force on UN Member States. There exist many general agreements on the problems of the arms trade; consider for example the EU Code of Conduct on Arms Exports.⁵¹ This document has been signed by all EU members in 1998 and a further 13 non-EU states have chosen to associate themselves with the code.⁵² According to International Alert '[t]he Code includes eight criteria, through which the members pledge not to export weapons that would exacerbate regional tensions or conflict, or be used in internal repression or human rights violations'.⁵³ But the Code is not legally binding, and therefore persons caught violating it cannot be prosecuted.⁵⁴ Such legal loopholes lead to regrettable cases like that of Leonid Minim, the Ukrainian-born Israeli arms-dealer who supplied Charles Taylor of Liberia with weapons. In 2000 Minim was caught in Italy with documents detailing arms documents and, for good measure, half a million dollars in diamonds and quantities of cocaine.⁵⁵ Minim even confessed to the prosecutor of the case that he supplied weapons to Taylor.⁵⁶ But Minim – despite the apparent weight of evidence against him – could not be prosecuted, as Italy had no binding laws on arms brokering. The Code was not enough. Similar problems apply to other agreements, like the Wassenaar Arrangement,⁵⁷ the US-EU Action Plan on Small Arms⁵⁸ and the UN Register of Conventional Arms.⁵⁹ UN

⁴⁸ Control Arms (n 2 above) at 1

⁴⁹ Control Arms (n 2 above) at 2

⁵⁰ United Nations Security Council Resolution 1267 (1999) and successive Resolutions

⁵¹ EU Code of Conduct on Arms Exports (available at

<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1014919016078> (visited 20 October 2007)

⁵² International Alert *Implementing International Small Arms Controls: Some lessons from Eurasia, Latin America and West Africa* (2005)

⁵³ International Alert (n 52 above)

⁵⁴ International Alert (n 52 above)

⁵⁵ Thomas (n 6 above) at 224

⁵⁶ Thomas (n 6 above) at 227

⁵⁷ The Wassenaar Arrangement consists of a group of thirty-three states that are weapons producers and suppliers. Royal Ministry of Foreign Affairs, Oslo, Wassenaar Arrangement, Information Exchange on the Control of Arms Brokerage (2000).

⁵⁸ United States-European Union Statement of Common Principles on Small Arms and Light Weapons (December 1999) available at <http://www.useu.be/summit/arms1299.html> (visited 22 October 2007); United States-European Union Action Plan on Small Arms and Light Weapons (December 1999) available at <http://www.useu.be/summit/arms1299.html> (visited 22 October 2007).

Security Resolutions do not completely solve this problem. They did not help in the prosecution of Minim despite UN embargoes on Sierra Leone and Liberia, although this was largely because of lax implementation by Italy. Nonetheless they do have more power over countries than purely symbolic codes, and they demonstrate that states are in principle willing to support the embargoes with legal sanctions. If the embargoes have not been supported by proper legislation, then it is only appropriate that tort law step in to fill the gap.

It is for these reasons that UN arms embargoes will be a partial basis for this dissertation's argument. However, one should remember that one can still argue that companies of a given nationality should respect any embargoes to which their home country is a party. For example, UK and French companies should probably not export to Zimbabwe, even though it is not under a UN embargo, as it is under an EU embargo.⁶⁰ The argument is not a difficult one to make, because by imposing an embargo all EU countries have acknowledged that Zimbabwe is suffering from human rights violations that will only be aggravated by arms imports.

2.3 The great wealth of evidence on illegal arms brokerage

How exactly do weapons get from legitimate and respectable arms manufacturers to child soldiers in the jungles of Sierra Leone? This is a vital question for this dissertation. Many weapons have an extremely long shelf-life; for example the missile launcher used by Al-Qaeda in November 2002 when they unsuccessfully tried to shoot down a plane in Mombasa in Kenya was a Soviet SA-7.⁶¹ It was made in 1978, which means it was working perfectly almost a quarter of a century later. Handguns like the ubiquitous AK-47 have an even longer shelf-life as they have only nine working parts.⁶² It is therefore possible that the weapons used in embargoed conflicts have such a lengthy, complex, and indirect relationship with manufacturers that it would be ludicrous to hold manufacturers liable for what those weapons do. But it is irrelevant whether 99% of the guns in illegal conflicts are obtained so indirectly – the question then becomes what should be done with the 1% of weapons that are obtained reasonably directly from manufacturers. In either case, arms brokers are usually the important link.

This section will set out a few examples illustrating how weapons flow from arms manufacturers to brokers and ultimately to their purchasers. It is convenient to begin with the case already mentioned; that of Israeli arms broker Leonid Minim. Minim had been caught with a literal bagful of evidence, detailing arms shipments from

⁵⁹ The UN Register of Conventional Arms is an ongoing multilateral effort to track conventional weaponry. Its most recent updates are available at <http://disarmament.un.org/cab/register.html> (visited 13 October 2007)

⁶⁰ EU Common Foreign & Security Policy – Sanctions or restrictive measures in force (5 October 2007) available at http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm (visited 22 October 2007)

⁶¹ Thomas (n 6 above) at 16

⁶² Koh (n 45 above) at 2336-2337

the former USSR to Charles Taylor in Liberia as well as the RUF rebel group in Sierra Leone.⁶³ Both countries were under UN embargoes at the time.⁶⁴ Thomas describes Minim's recent activities:

'A few weeks before his arrest, Minim had completed a deal to ship 113 tonnes of arms and munitions to Taylor, using End User Certificates from the Côte D'Ivoire and Burkina Faso ... Minim used a Gibraltar-based brokering company, Chartered Engineering and Technical Company Ltd, to purchase the weapons from the Ukrainian company Ukrspetsexport. The weapons were flown to Ouagadougou in Burkina Faso, they arrived 13 March 1999 and, according to Major General Felix Mujakperuo, commander of the ECOMOG peacekeeping forces in Sierra Leone, the plane waited by the VIP terminal while the weapons were transferred to another plane to Liberia, from where some of the weapons were diverted to the RUF in Sierra Leone. This particular shipment consisted of 3,000 AKM (Kalashnikov) assault rifles, fifty machine guns, twenty-five rocket-propelled grenade launchers (RPGs), five Strela-3 (also known as SA-7) missiles and 5 Metis anti-tank guided-missile systems, as well as ammunition for these weapons'.⁶⁵

Nancy Morriseau, while arguing for the liability of arms manufacturers under the Alien Tort Claims Act,⁶⁶ mentions the same case. She includes a few other details of interest:

'Burkina Faso, certified as both the end-user and the place of final destination, denies U.N. evidence indicating that the weapons were re-exported to a third country. The U.N. investigation revealed that some weapons were offloaded in Burkina Faso's capital, Ouagadougou, others were trucked to the Western Burkina Faso city of Bobo Dioulasso, and the remaining weapons made their way to Liberia ... Three days after the Ukrainian weapons arrived, [Liberian President Charles] Taylor's private presidential jet flew into Ouagadougou, where weapons were loaded on board and flown back to Liberia. In all, this process was repeated three times, and an additional three flights were made into Bobo Dioulasso to pick up the weapons located there. Every individual involved in this weapons trafficking scheme had to be compensated to ensure their compliance ... While the Burkina Faso weapons shipment strongly illustrates the interplay of legal and illegal arms transfers and the multifarious actors involved, its main significance is in confirming the role of small arms and light weapons in sustaining conflict. An earlier shipment, made in December 1998, precipitated the Burkina Faso one. [Leonid] Minin's BAC-111 flew twice from Niamey Airport in Niger to Liberia, and on the second trip weapons that may have come from the Nigerian armed forces' existing stockpiles were flown to Liberia and offloaded. Just days later, "the RUF rebels started a major offensive that eventually resulted in [a] destructive January 1999 raid on Freetown [in Sierra Leone]".⁶⁷

A second example is from the four-month study conducted by Human Rights Watch on arms shipments to ex-Rwandan government forces between 1994 and 1995.⁶⁸ These forces had only just committed the horrific 1994 Rwandan genocide in which 800 000 people were killed in less than four months.⁶⁹ Nonetheless HRW reported that '[a]fter a year in exile, the perpetrators of the Rwandan genocide have rebuilt their military infrastructure,

⁶³ Thomas (n 6 above) at 225

⁶⁴ Thomas (n 6 above) at 225

⁶⁵ Thomas (n 6 above) at 225-226

⁶⁶ Morriseau (n 15 above) at 1276-1277

⁶⁷ Morriseau (n 15 above) at 1276-1278 footnotes omitted

⁶⁸ Human Rights Watch *Rearming with Impunity: International support for the perpetrators of the Rwandan genocide* (1995)

⁶⁹ Human Rights Watch (n 68 above)

largely in Zaire, and are rearming themselves in preparation for a violent return to Rwanda'.⁷⁰ How did they obtain arms? Via South African arms broker Willem Ehlers and the connivance of several major countries, notably France, Zaire (now the Democratic Republic of Congo), the Seychelles, and apartheid South Africa.⁷¹ A summary of HRW's discoveries on the flow of weapons follows:

'The international arms embargo, imposed by the U.N. Security Council against Rwanda on May 17, 1994, has presented the only nominal obstacle to the ousted Rwandan government's quest for arms. The embargo has not been actively enforced, however, and shipments of arms have reached the ex-FAR in Zaire during the last year, mostly via the airport at Goma in eastern Zaire ... Arms flows to the FAR were not suspended immediately by France after the imposition of the arms embargo on May 17, 1994. Rather, they were diverted to Goma airport in Zaire as an alternative to Rwanda's capital, Kigali, where fighting between the FAR and the rebel RPF as well as an international presence made continued shipments extremely difficult. Some of the first arms shipments to arrive in Goma after May 17 were supplied to the FAR by the French government ... Zairian officials, including military chiefs, have played a key role both in supplying arms and facilitating arms flows to the FAR, before but also after the international community imposed an arms embargo against Rwanda on May 17, 1994. Some officials have openly encouraged arms trafficking by private dealers through Zaire, generally in return for kickbacks ... Cargo companies that are ostensibly private and that are either registered or based in Zaire transport many of the weapons that are being supplied covertly throughout Africa. ... Pilots file false flight plans, often listing fictitious destinations such as Swaziland, Gabon, Libya and Nigeria, under pressure from contractual partners to disguise the true origin or destination of arms cargo; staff at N'Djili airport in Kinshasa are paid a minimum of \$1,000 per flight by the cargo companies to file these false flight plans. Pilots also supply false cargo manifests - the documents describing the content of the cargo ... Some of the planes are known to have been registered in Zaire, Nigeria, Liberia and Lebanon. For example, one shipment in mid-June arrived on an aircraft registered in Liberia, with a Belgian crew from Ostend, which picked up arms in Libya, including artillery, ammunition and rifles from old government stocks ... In one important shipment, two planes of Air Zaire, a Zairian state company, flew weapons, reportedly antitank and fragmentation grenades, as well as high-calibre ammunition, to Goma from the Seychelles on the nights of June 16-17 and 18-19, 1994 ... The shipment was consigned for Somalia, where an international arms embargo was in place at the time. According to the Seychelles minister of defense, James Michel, end-user certificates for the shipment were provided by Zaire. In this instance, end-user certificates served to conceal the ultimate destination of the weapons and provide a means of deniability for those involved in breaking the arms embargo against Rwanda ... Another shipment facilitated by the government of Zaire around the same time involved an American private arms dealer who allegedly was previously involved in covert CIA operations in support of UNITA in Angola, Fred Zeller ... Prior to the international arms embargo, South Africa was one of the main suppliers of arms to Rwanda. After the embargo was imposed, South African government officials who previously had coordinated arms supplies to Rwanda helped to organize at least one shipment of arms to the FAR. Colonel Theoneste Bagasora, a senior official in the Ministry of Defense of the self-declared Rwandan government-in-exile, has stated that he met with South African officials at the end of May and early June 1994 to arrange further shipments of arms to the FAR. According to Bagasora, the officials refused to consider direct South African arms shipments in violation of the embargo, but offered to help arrange shipments by other parties. Bagasora said that, following the meeting, he, a Zairian government representative, and Willem Ehlers who reportedly used to be an aide to the former president of South Africa, P. W. Botha, flew to the Seychelles on June 4, where they negotiated the purchase of arms for the FAR, which were subsequently flown to Goma'.⁷²

⁷⁰ Human Rights Watch (n 68 above)

⁷¹ Human Rights Watch (n 68 above)

⁷² Human Rights Watch (n 68 above) footnotes omitted

This HRW report sparked an official UN International Commission of Inquiry (UNICOI), which followed up on the HRW investigation. Katharine Orlovsky summarised the findings of this Commission as it related to arms broker Willem Ehlers:

‘The investigation found that in June of 1994, while there was a United Nations Security Council embargo in place on Rwanda, Bagasora met and bought shipments of arms from Ehlers. The transactions took place in Seychelles, and the government was able to corroborate that Ehlers and Bagasora had purchased two shipments of arms which had been imported, via Zaire, to Rwanda. In its second report, UNICOI found ... that the Government of Seychelles, acting on the basis of an end-user certificate apparently issued by the Government of Zaire, authorized a sale of weapons in its possession in mid-June 1994. The arms, which included AK-47 rifles, 82-mm and 60-mm mortar shells and 37-mm and 14.5-mm ammunition, were transported from Seychelles to Goma on 17 and 19 June 1994 by an Air Zaire DC-8 cargo aircraft, registration number 9QCLV, in two consignments of about 40 tons each ... UNICOI also was able to obtain from the government of Seychelles substantial documentation of this transaction, including itemized receipts signed by Bagasora, and the fake end-user certificate’.⁷³

The third example was a sting operation set up by Mark Thomas, the United Kingdom arms activist, with assistance from the news company Channel 4, to see how easy it would be for him to break EU arms embargoes on selling weapons to Zimbabwe.⁷⁴ Working from the United Kingdom, Thomas set up a fake arms company he dubbed Clifford Martin Associates.⁷⁵ The chosen cargo was a few hundred MP5 sub-machine guns, officially made by the German gun manufacturers Heckler & Koch. Thomas writes:

‘At the time I was setting up Clifford Martin Associates, the German company [Heckler & Koch] was owned by Royal Ordnance, which in turn was owned by BAE Systems (formerly British Aerospace). Heckler & Koch extended the chain of supply by licensing the manufacture of the guns to Pakistan, Iran and Turkey, among other places ... As a German company, after February 2002 H & K were subject to the EU arms embargo on Zimbabwe. Put simply, they can’t export to Mugabe. But what of the companies who pay H & K to produce MP5s under licence? Could they sell to Zimbabwe? ... Unsurprisingly, the answer is yes’.⁷⁶

Thomas received offers to ship weapons to Zimbabwe from licensed producers of the MP5 in Iran, Turkey and Pakistan. Negotiations with the Pakistani company confirmed that they would be happy to ship the weapons to Zimbabwe – a sale that would send profits through Pakistan to Heckler & Koch in Germany and further to BAE Systems in the United Kingdom, despite EU sanctions.⁷⁷ Thomas then went a step further and asked Swiss arms dealers Brügger and Thomet whether they could help provide MP5’s as well.⁷⁸ The Swiss company sent Thomas the details of their agent, a company called Finnrapel Oy, in Finland. Note that Switzerland is not in the EU, but Finland is. Finnrapel Oy was run by a man named Olli Salo, who was fairly open about how he smuggled guns.⁷⁹

⁷³ Orlovsky (n 11 above) at 350-351

⁷⁴ Thomas (n 6 above) at 59-74

⁷⁵ Thomas (n 6 above) at 59

⁷⁶ Thomas (n 6 above) at 60

⁷⁷ Thomas (n 6 above) at 60-62

⁷⁸ Thomas (n 6 above) at 66

⁷⁹ Thomas (n 6 above) at 67

He told Thomas that he doesn't even need an End User Certificate – all he needs is an import permit.⁸⁰ These permits are obtained from the embargoed country, and are hence very easy to obtain if that embargoed country wants arms. The gun components are actually made in the Heckler & Koch factory in Germany, but they are assembled by hand in Switzerland to avoid needing an export licence.⁸¹ Salo admitted to Thomas that the guns were basically made by Heckler & Koch directly, but that the company employed such indirect methods to avoid admitting they were involved in sales to embargoed companies.⁸² Furthermore, Mr Thomet the Swiss arms dealer admitted to Thomas that they knew Salo was an arms smuggler, and that they regularly used him to send arms to illegal destinations all around the world.⁸³

Salo admitted to Thomas that while the goods were in Finland, the labels on the crates would be switched, thus facilitating the illegal transfer.⁸⁴ Thomas later exposed Salo, who denied everything, saying that all the receipts and emails he'd sent to Thomas were a joke.⁸⁵ However, Salo was never prosecuted.

The above three examples are long and somewhat overburdened with facts, but this is necessary for two important reasons. First, it demonstrates the lengthy and complex nature of arms trades, with each transaction sometimes going through several different countries. Secondly, it shows that despite this length and complexity there is a wealth of information about the arms trade. Names, dates, flight numbers, cargo lists – every fact one could hope to have in order to build a case is available. There are even open admissions by arms manufacturers themselves that they work hand-in-glove with arms smugglers.⁸⁶ So whatever reason is given for the impossibility of suing arms manufacturers, it cannot be a lack of information.

This section will end with a summary of the key facts from the above examples, but bear in mind that further facts are provided below, proving knowledge on the part of manufacturers of how their weapons are used and abused. The key facts are:

- 1) Arms are commonly produced in developed nations by legitimate companies (with the exception of weapons taken from Cold War stockpiles and similar very old sources);
- 2) Arms are then usually sold to brokers;
- 3) Sometimes arms are sold by manufacturers directly to the embargoed government/armed group;
- 4) Arms manufacturers can often recommend brokers who are capable of evading embargoes;

⁸⁰ Thomas (n 6 above) at 68

⁸¹ Thomas (n 6 above) at 69

⁸² Thomas (n 6 above) at 68

⁸³ Thomas (n 6 above) at 69. Salo said the only exceptions were North Korea, Iran, and Iraq.

⁸⁴ Thomas (n 6 above) at 70

⁸⁵ Thomas (n 6 above) at 72

⁸⁶ For further examples of arms manufacturers suggesting ways to circumvent international and national laws, see Thomas (n 6 above) at 128-131 and 251

- 5) Certain brokers and certain countries are well-known to be especially deeply involved in the illegal arms trade;
- 6) The arms usually travel through a number of different countries;
- 7) Often the final country before the final illegal destination is a country with lax arms-trafficking rules and bad enforcement;
- 8) When the arms reach the final destination, they often lead to immediate upsurges in violence.

All of these points are important to the case built by this dissertation. However, the issue of manufacturer knowledge requires further detail.

2.4 Knowledge on the part of manufacturers

In later chapters this dissertation will cover in detail the amount of knowledge required in law by manufacturer to sustain a charge of negligence against them. For now, it is sufficient to note that the more knowledge manufacturers can be said to have about where their products go, the better for this dissertation's case.

The above three examples are simply a few among many investigations into the arms trade. It is very easy to go to any of a number of NGO websites to get more details on other illegal transfers. For example, a quick visit to the Human Rights Watch website produced the following story:

‘The case is that of Mil-Tec, a British company that delivered weapons to the Rwandan armed forces, including in air deliveries after the genocide was underway. The government that led the Rwandan genocide took power following the April 6, 1994, killing of then President Juvenal Habyarimana. One of the first acts of the new interim government was to make contact with Mil-Tec to place an urgent order for U.S.\$854,000 worth of arms and ammunition. Ultimately, Rwandan records show, Mil-Tec provided a total U.S.\$5.5 million worth of ammunition and grenades in five separate deliveries on April 18, April 25, May 5, May 9, and May 20. The last of these violated a mandatory U.N. arms embargo imposed on May 17, 1994. The genocide was underway during the time of the arms deliveries—and was widely reported—so one could try to establish that arms traffickers supplying the interim Rwandan government knew how the weapons would be used’.⁸⁷

In the first two examples reported in the above section, it was unclear where the weapons were originally manufactured. A reasonable surmise is that they were part of Cold War stockpiles produced by Soviet governments like Ukraine.⁸⁸ However, the examples do demonstrate that the identities of the arms brokers who supply to illegal destinations are well-known. Minim and Ehlers, the primary (but not the only) arms dealers in the above cases, are inevitably in close contact with arms manufacturers over the years. Furthermore these arms

⁸⁷ Human Rights Watch *Weapons and War Crimes: The complicity of suppliers* (2004)

⁸⁸ See supporting facts in Morisseau (n 15 above) at 1276-1277

dealers often attract public attention from the media and activist groups.⁸⁹ It is therefore beyond reasonable doubt that, as in the third case study, manufacturers are quietly aware that their brokers are persons of dubious integrity.

The third case study, and the Mil-Tec story mentioned above, have stronger cases for manufacturer knowledge. Heckler & Koch knew that the components they produced would be sent to Finrappel Oy, and they knew that the reason for the secrecy was because Olli Salo would arrange for the weapons to be transported to illegal destinations – this was all admitted by the company and its agents.⁹⁰ In the Mil-Tec story, the strongest evidence was the public knowledge of the horrors occurring in Rwanda. One of their shipments occurred after a United Nations Security Council embargo was imposed on Rwanda, which in turn was after the media reports of and public outcry over what was happening in Rwanda. To continue to supply weapons to a government internationally accused of genocide seems astonishingly ignorant at best. Similar scenarios occur elsewhere – consider the report by Amnesty International that UK company Endeavour Resources UK Ltd was supplying weapons to the Sudanese government long after the human rights violations there were recognised, and after sanctions were imposed on Sudan by the EU and the UK.⁹¹

Perhaps the most shocking case is that of the New Labour government in the United Kingdom, and their sales of BAE Systems⁹² Hawk fighter jets to the Indonesian government during the 1990s – when Indonesia was involved in human rights violations in East Timor. These sales began when the Conservative party was in power in 1994.⁹³ Then-opposition MP Robin Cook reported the use of Hawk fighters in bombing runs in East Timor, and criticised their sale in Parliament.⁹⁴ Cook said it was a ‘major humanitarian issue’.⁹⁵ A few years later, Cook and the New Labour government were in power, but rather than end the sales of Hawks and other military goods, Cook allowed a 260 million pound sale to Indonesia. Thomas provides a brief bulleted summary of the salient events:

- 1994 – Cook says there is evidence of Hawks being used in East Timor by Indonesia.
- 1997 – Cook allows Hawks to be sold to Indonesia.
- 1997 – New Labour government says no evidence of Hawks being used in East Timor by Indonesia.
- 1999 – Indonesia admit to using Hawks in East Timor.

⁸⁹ For example, arms broker Victor Bout is so famous and has such global influence he was once declared ‘the MacDonalD’s of arms-trafficking’ in Peter Landesman ‘Arms and the man’ *New York Times Magazine* (17 August 2003) available at <http://www.nytimes.com/2003/08/17/magazine/17BOUT.html> (visited 15 August 2007). Bout’s life also formed the basis for the famed Hollywood film ‘Lord of War’. See: www.msnbc.msn.com/id/9442606/site/newsweek/ (visited 15 August 2007) for a 2005 interview discussion with the director of ‘Lord of War’.

⁹⁰ Thomas (n 6 above) at 59-74

⁹¹ Amnesty International *Sudan: Arming the perpetrators of grave abuses in Darfur* (November 2004) at 21

⁹² Then known as British Aerospace

⁹³ Thomas (n 6 above) at 52

⁹⁴ Thomas (n 6 above) at 52

⁹⁵ As quoted in Thomas (n 6 above) at 52

- 2001 – New Labour government says no evidence of Hawks being used in East Timor by Indonesia.⁹⁶

The UK government ignored the evidence of prominent NGO's, their own previous statements, and the admission of the Indonesian government itself that BAE Systems weapons were being abused in East Timor. Thomas, in reporting these deeds, focuses on the bad faith shown by the UK government. However, this sale was not actually between governments – it was from BAE Systems directly to the Indonesian government. The involvement of the government is a result of BAE Systems needing a license to export such goods, which was duly granted by both UK administrations.⁹⁷ Thomas is therefore correct in castigating the UK government for its granting of the license – but equal censure must go to BAE Systems for continuing the sales. BAE Systems was equally aware of the consequence of their sales, and equally negligent in failing to act on that awareness.

One final point must be made. Many people in the arms industry are, presumably, ordinary citizens who may be too busy with their lives, children, finances, and so on to pay much attention to what's happening in distant countries. They may therefore be genuinely and innocently ignorant of the consequences of their sales. This may be true on an individual level, but thanks to the efforts of activists, it is most unlikely at the level of the company or the industry as a whole.

Why is this? All big arms companies are public companies, and therefore have annual shareholder meetings to report to their shareholders. And, in order to get access to company executives, activists often buy a share in that company and then attend the meeting.⁹⁸ In addition, activists often attend (or at least protest outside) arms trade conventions, like the Defense Services and Equipment International convention held biannually in London.⁹⁹ Thomas documents a number of strategies used by activists at such events, ranging from solemn visits from Polisario representatives¹⁰⁰ to the more media-focused efforts like the Penis of Peace.¹⁰¹ The ordinary knowledge of the company of their customers and the countries they sell to is therefore supplemented by an ongoing activist effort to confront the companies with the consequences of these sales. The result of all this is that while individual employees of the arms company may possibly be ignorant of what damage they are causing, it is highly unlikely that the same is true for the company or the industry as a whole. Arms companies know – but they do not care.

⁹⁶ All information contained in bullet points taken from Thomas (n 6 above) at 54

⁹⁷ Thomas (n 6 above) at 52

⁹⁸ See generally Thomas (n 6 above) at 78 – 114

⁹⁹ Thomas (n 6 above) at 136-140

¹⁰⁰ The 2001 General Annual Meeting of BAE Systems was attended by Breica Lehib, a representative of the Western Saharan political organisation Polisario, to ask BAE Systems why they hold sold weapons to Morocco and thus aided their illegal occupation of Western Sahara. Thomas (n 6 above) at 78

¹⁰¹ The Penis of Peace was used at an Australian defence event. Protesters arrived outside the event venue in a large papier-mâché penis. Halfway through the demonstration, the protesters suddenly ran towards the entrance, and used a battering-ram that had been concealed inside the Penis to break down the doors. Once inside, the protestors abandoned the Penis and ran around causing chaos. As they were all naked and covered in olive oil it was difficult for security forces to catch them. Thomas at 136-137

Consider the confessions of former head lobbyist for the US domestic gun industry, Robert Ricker: ‘The firearms industry . . . has long known that the diversion of firearms from legal channels of commerce to the illegal black market in California and elsewhere occurs principally at the distributor/dealer level’ and has ‘encourage[d] a culture of evasion of firearms laws and regulations’.¹⁰² Kintner further noted:

‘Ricker sat in on several gun-industry meetings where the "movement of guns from the industry's lawful distribution channels into the illegal market" was discussed. Ricker acknowledged that the gun industry has long known that greater industry action to prevent illegal transactions is possible and would curb the supply of firearms to the illegal market. However, until faced with a serious threat of civil liability for past conduct, leaders in the industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market and have sought to silence others within the industry who have advocated reform’¹⁰³

The parallel between the US domestic gun industry and the international arms trade is certainly not perfect, but it illustrates again one point: that arms companies can be fully aware that they are engaging in irresponsible behaviour that leads to human rights violations, and yet still do nothing. More, they will try to hide their tracks. That they have largely succeeded when there is so much evidence against them is a pity and a shame.

¹⁰² Kintner (n 33 above) at 1186-1187 footnotes omitted

¹⁰³ Kintner (n 33 above) at 1187 footnotes omitted

3. CONCEPTS AND FRAMEWORK OF INTERNATIONAL CIVIL LIABILITY

3.1 The appropriate forum

The scenario envisaged by this dissertation is of a company in country A, selling weapons to a variable number of intermediaries in a variable number of countries, that eventually results in human rights violations in country B. Country B is not merely another country with human rights problems, but has been judged especially unworthy of receiving arms – a UN arms embargoes have been imposed against it.¹⁰⁴ Nonetheless, the arms sale and transfer continues. The sale and the harmful consequence therefore occur in different countries. Which law should apply? And what is the appropriate forum?

The answer, of course, must be domestic law and domestic courts. At this stage in the development of international law there is no proper international tribunal capable of giving binding decisions on transnational tort cases. While this is to be regretted, it does not mean that domestic courts have been ineffective in filling the gap. For example in the United Kingdom, courts have already decided on a number of cases which involve domestic companies but foreign effects.¹⁰⁵

As noted above, this dissertation will be using the United Kingdom as its primary example. However it will not be delving into the arcane mysteries of jurisdiction, choice of law, and *forum non conveniens*. Such matters would be the next step to take once this dissertation has established the viability of a substantive case against arms manufacturers, but this step demands more time and space than this dissertation can give. Furthermore, the procedures of transnational torts are dealt with more than adequately elsewhere.¹⁰⁶ All that this dissertation seeks to show is that it is reasonably possible for transnational torts to be litigated in common law countries like the UK.

The key cases on corporation negligence leading to foreign harms are from mining operations in South Africa. In *Connelly v RTZ Corp Plc*, a former worker at a Namibian uranium mine convinced the House of Lords to let him sue the parent company of the mine in England.¹⁰⁷ The House of Lords gave their main reason as being the denial of justice that would otherwise occur as Namibia had no legal aid mechanisms, and so the plaintiff

¹⁰⁴ Or, as noted above, an embargo by another organisation with some authority over country A, such as the EU.

¹⁰⁵ Primarily *Connelly v. RTZ Corp. Plc.* and *Lubbe and Others v. Cape Plc.* (n 21 above). See also the landmark case of *Kuwait Airways Corp v Iraqi Airways Co* (No.5) [2003] All ER (D) 225, in which Lord Nicholls of Birkenhead commented at 10 that ‘this is a claim in tort for damages in respect of events having no connection with this country’.

¹⁰⁶ See generally C McLachlan ‘International Litigation and the reworking of the Conflict of Laws’ (2004) 120 *Law Quarterly Review* 580; Meeran(n 19 above); R Mortensen ‘Homing Devices in Choice of Tort Law: Australian, British, and Canadian approaches’ (2006) 55 *International & Comparative Law Quarterly* 839; and PT Muchlinski ‘Holding Multinationals to Account: Recent developments in English litigation and the Company Law Review’ (2002) 23 *Company Lawyer* 168

¹⁰⁷ *Connelly v. RTZ Corp. Plc.* (n 21 above)

effectively could not sue and gain a remedy in Namibia.¹⁰⁸ This case was followed by *Lubbe v Cape Plc*, in which claims were made against a British company for its operation of an asbestos mine in South Africa during the apartheid era.¹⁰⁹ The mine provided extremely unsafe working conditions and as a result many of the workers and their families contracted asbestosis.¹¹⁰ As Cape Plc had since stopped operations in South Africa, there was no way for the plaintiffs to seek justice in the local courts. The House of Lords decided to allow the case to continue, after which Cape Plc settled the case for 10.7 million pounds.¹¹¹ Similar facts occurred in *Sithole and Others v Thor Chemicals Holdings Ltd*, although in that case the mine was really a badly-run mercury plant.¹¹² Again, after the court upheld the plaintiffs' right to sue in England, the case was settled by the defendant, in this case for 1.3 million pounds.¹¹³

Importantly, in each of these cases the plaintiff did not argue that the parent company was liable for the acts of its subsidiaries, as is often argued in academia.¹¹⁴ What was argued was that the parent company had itself been negligent, by failing to monitor and control the activities of its subsidiaries.¹¹⁵ Thus the site of the tort was actually in the United Kingdom – the existence and location of subsidiaries is irrelevant. The analogy to this dissertation's case is obvious: here also the site of the negligent act is in the UK, while the harm is felt in foreign jurisdictions.

The repeated settlements mean that the substantive law of the plaintiff's cases is largely untested. However, all that this dissertation needs is confirmation that tort cases on similar lines to that of this dissertation can be litigated in the UK. The above cases and academic commentary provide that confirmation.

3.2 The elements of a tort

At the broadest level of analysis, a tort in the United Kingdom has five elements:

- Conduct – the act or omission by the defendant that anchors his/her liability;
- Causation – the conduct of the defendant must actually lead to the harm suffered;
- Fault – the defendant must have been at fault when he/she acted, including being negligent;
- The duty of care – the defendant must owe some duty of care to the defendant that obligates him/her to avoid faulty conduct;

¹⁰⁸ *Connelly v RTZ Corp Plc* (n 21 above) at 890; see also C McLachlan (n 106 above) at 588

¹⁰⁹ *Lubbe v Cape Plc* (n 21 above)

¹¹⁰ *Lubbe v Cape Plc* (n 21 above) at 1545-1549

¹¹¹ McLachlan (n 106 above) at 589-590

¹¹² *Sithole and Others v Thor Chemicals Holdings Ltd and Another* [1999] WLR 876

¹¹³ R Meeran 'Liability of Multinational Corporations: A critical stage' (1999) available at

<http://www.labournet.net/images/cape/campanal.htm225> (visited 30 August 2007). Richard Meeran was the lead lawyer in *Connelly*, *Cape*, and *Thor*.

¹¹⁴ For example, most of Clapham N 16 above) concentrates on parent-subsidiary liability as a way of holding MNC's accountable.

¹¹⁵ Meeran (n 19 above) at 172-175

- Harm – the plaintiff must actually suffer some harm or loss.¹¹⁶

The above factors encapsulate the general tort as it is known in the UK, the USA, Canada, Australia, South Africa, and other countries,¹¹⁷ albeit sometimes under different names or concepts.¹¹⁸

This dissertation submits that the two key elements above are fault, and the duty of care. In the majority of cases of general torts these are the contested issues.¹¹⁹ In the case envisaged by this dissertation, the other three elements should be easy to prove. The conduct would be the negligent sale of the arms manufacturer to the risky arms broker, government, or other group. Negligent sales are a widely recognised form of conduct that can lead to successful torts.¹²⁰

Secondly, harm is equally simple to prove. Arms sales result in death, injury, destruction of property, and a myriad other human rights violations. There is even an argument that societies suffer generally from excessive arms – that it breeds fear, enables spontaneous violence, and retards human development.¹²¹ In the US, public interest cases against the gun industry have been based on this fact, focussing ‘not on the individual criminal acts committed with guns, but on what is seen as the “infrastructure” for gun crimes: an unlimited supply of guns available to proscribed buyers and persons intent on committing a crime’.¹²²

Causation in law often refers to both factual causation and legal causation, although they are two very different things.¹²³ Factual causation is the everyday kind of causation: A leads to B; B is the result of A. If A does not happen, B will not happen. This is known as the ‘but-for’ test in law; but for the existence of A, B would not exist.¹²⁴ The but-for test is a popular and common-sense way to define the limits of factual causation.¹²⁵

¹¹⁶ Above five points drawn from BA Hepple & MH Matthews *Tort: Cases & Materials* (1991) at 7; see also J Conaghan & W Mansell *The Wrongs of Tort* (1999); JC Van der Walt *Principles of Delict* (2005)

¹¹⁷ Mortensen (n 106 above) at 841-857; J Fulbrook ‘Alcohol and third parties: “Dram shop” liability and beyond’ (2007) 3 *Journal of Personal Injury Law* 220 at 225; A Fagan ‘Rethinking wrongfulness in the law of delict’ (2005) 122 *South African Law Journal* 90 at 90

¹¹⁸ For example, in South Africa the place of the duty of care is filled by the concept of wrongfulness. See Fagan (n 118 above). And US courts look at the same things but in three elements: ‘(a) a duty of care owed by the defendant to the plaintiff; (b) a breach of that duty by a negligent act or omission; and (c) damage proximately caused by that breach’ quoted from T Blyth ‘Bankers’ liability for negligent enablement of impostor fraud and identity theft’ (2004) 19 *Journal of International Banking Law and Regulation* 44 at 45.

¹¹⁹ J Morgan ‘The Rise and Fall of the General Duty of Care’ (2006) 22 *Professional Negligence* 206 at 216. Obviously this differs in special torts like defamation and cases involving pure economic loss. See also J O’Sullivan ‘Suing in Tort where no Contractual Claim will lie: A bird’s eye view’ (2007) 23 *Professional Negligence* 165 at 173-180

¹²⁰ See generally Fulbrook (n 117 above)

¹²¹ Amnesty International (n 3 above) at 26

¹²² Kintner (n 33 above) at 1163

¹²³ J Stapleton ‘Cause in Fact and the Scope of Liability for Consequences’ (2003) 119 *Law Quarterly Review* 388 at 389

¹²⁴ Stapleton (n 123 above) at 388 – 341;

¹²⁵ Although factual causation is not without its own subtleties; for example in matters of multiple or contributing causes. See N Padfield ‘Clean Water and Muddy Causation: Is causation a question of law or fact, or just a way of allocating blame?’ (1995) 17 *Criminal Law Review* 683 at 685-686

Legal causation is more properly a matter of fault,¹²⁶ as it broadly involves the idea that beyond a certain point, consequences lack sufficient proximity to an act for the actor to be held liable for them.¹²⁷ The arms trade provides a good example to illustrate this concept: but for the arms manufacturer, the weapons would not exist to aggravate human rights violations in embargoed countries. This makes the manufacturer the factual cause of all harm ever caused with those weapons. However, after the arms have changed hands a few times, the ability of the manufacturer to control what those weapons do is virtually non-existent. Therefore it is not fair or just that manufacturers be practically considered as the cause of those harms, anymore than the mother of a murderer should be practically considered the cause of her son's murders. Legal causation is therefore about limiting liability, which is a matter of fault. For this reason, matters relating to legal causation will be dealt with below in the section on fault.

The remaining three elements are more difficult in the context of this dissertation's argument, and will therefore be dealt with in greater depth.

3.4 The duty of care

The tort of negligence began in Britain with the famous case of *Donoghue v Stevenson*.¹²⁸ At its core was Lord Atkin's concept of a 'duty of care'.¹²⁹ The duty of care is the mechanism used by English courts to limit the endless liability that would result if people were truly prohibited from ever harming one another.¹³⁰ After all, in the course of life, many actions result in harm. Business, for example, almost always involves taking customers away from other, less efficient businesses. This can often result in the people in those inefficient businesses losing their jobs, with consequential negative effects on their family. Other examples are one boxer deliberately inflicting physical harm on another in the boxing ring, or a woman suffering emotional damage when her boyfriend runs away with her sister. The list is potentially endless. In each of these cases there is harm and fault, but society has decided that these are not matters which require the involvement of legal sanctions. The duty of care exists as a gatekeeper, to indicate which forms of harm are genuinely wrongful and therefore must be prohibited by law.¹³¹

¹²⁶ The appropriate place of legal causation is negligence law is a matter of some debate; see Stapleton (n 123 above) generally. Academics argue that it is either a matter of causation or of fault. The question in each case is the same: when can an individual no longer be held responsible for the consequences of his/her actions? This dissertation will not involve itself in this debate, as it is really a matter of form over substance; see H Beynon 'Causation, Omissions, and Complicity' (1987) 12 *Criminal Law Review* 539 at 540; A Post 'Legal Causation: The neglected sibling' (2007) 1 *Journal of Personal Injury Law* 15 at 15

¹²⁷ D Howarth 'Many Duties of Care – or A Duty of Care? Notes from the Underground' (2006) 26 *Oxford Journal of Legal Studies* 449 at 458

¹²⁸ *Donoghue v Stevenson* (1932) AC 562

¹²⁹ *Donoghue v Stevenson* (n 128 above) at 580

¹³⁰ Morgan (n 119 above) at 222-223

¹³¹ Howarth (n 127 above) at 463

It is important to keep the duty of care distinct from fault. The duty of care is used to decide when there will be no liability for harm caused, no matter how deliberately that harm is done, as in the example of two boxers above. Fault (which will be discussed below) is when the harm caused is considered to be wrongful and deserving of legal sanction, but the person causing the harm is not to blame for that harm because he/she acted neither intentionally nor negligently. An example is a person who runs suddenly into the road and is hit by a car; the harm caused by the accident is abhorred by society, but it is not the driver's fault that the accident occurred, so he/she will not be held liable.

So in the context of this dissertation's case, if there is no duty of care owed by arms manufacturers to the victims in embargoed conflict zones, then it does not matter if the manufacturers deliberately or negligently break the embargoes and supply the human rights violators in the zones – they cannot be held liable. For this reason the first stage in this dissertation's argument must be proving the existence of a duty of care.

What type of duty of care is sought here? On the face of it, the two parties – the arms manufacturer and the human rights victim – are truly distant in space and time. They will almost certainly never meet, never occupy the same country, and the victim is not even a customer of a customer of the arms manufacturer. But the lack of a genuine relationship between two parties has never been a bar to a duty of care in English law. As Howarth writes:

'The relational view of the duty of care is that the defendant's duty to the claimant must always arise from some relationship, even a 'pre-existing relationship', between the claimant and the defendant. Although popular with the judiciary as a way of limiting liability, and positively loved by law reporters, one of whose favourite catchword descriptions of duty of care cases is 'duty of care to whom?' it makes very little sense. Most defendants have had no relationship at all with their claimants. The driver of a car who carelessly runs down a pedestrian is hardly likely to have met the pedestrian on a previous occasion, and is certainly not allowed to escape liability by saying, 'Never seen him before in my life'. To describe the act of hitting someone as a 'relationship' is simply perverse. The usual explanation is that the parties are 'fellow road users'. But that is a relationship hardly different from 'fellow inhabitant of the country' or even 'fellow human being', a point made by the courts themselves in the context of breach of statutory duty. The 'fellow road-user' theory is also incapable of explaining why I should be liable if I shine a searchlight out of my house into the road, with the result that drivers are dazzled and crash. Am I a 'road-user' in any normal sense? It would be much better to recognize that the duty to take reasonable care arises out of the general law, not out of pre-existing relationships'.¹³²

In addition to Howarth's pithy argument, one must bear in mind that the relationship here is not between the arms manufacturer and anyone who gets killed by their weapons. It is between the arms manufacturer and victims of massive human rights violations so severe that their country is under UN arms embargoes. When the international community takes such an unusual step as imposing embargoes, it is a sign that the citizens in that country are owed a duty; a duty not to have weapons sold to their enemies who will undoubtedly use the

¹³² Howarth (n 127 above) at 463 footnotes omitted

weapons to cause countless innocent deaths, including deaths in violation of international human rights and international humanitarian law. The category of people to whom one owes a duty in this case is relatively very small, the harms prevented are very serious, and the duty is quite easy to fulfil.

This dissertation will make two arguments for why a duty of care should be recognised in this case. The first argument involves demonstrating other accepted duties of care that are substantively similar to the duty of care sought here. This method of analogical reasoning is one of the primary methods of common law development.¹³³ The second argument is based on the fact that tort law is designed to protect society from certain forms of harm that are deemed to be against public policy.¹³⁴ For example, one can sue a drunk driver for crashing into one's car, but one cannot sue one's friend for running away with one's girlfriend. This dissertation argues that human rights law can be used to help inform the kinds of harm that should be prohibited by tort law. If this is the case, then the fact that arms sales to embargoed conflict zones lead to massive human rights violations is sufficient reason to create a duty of care prohibiting such sales.

The first argument is 'development by analogy with established categories' in the words of Lord Justice Brook in *Parkinson v St James and Seacroft University Hospital NHS Trust*.¹³⁵ This method of legal development is central to the common law system. Morgan, in confirming this fact writes: 'If authority for this were needed, the good sense and pragmatism of Lord Wright put analogical reasoning at the heart of the English judicial tradition. He described the judges proceeding: "from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science." Reasoning by analogy at least provides visible landmarks in the otherwise tractless ocean of public policy'.¹³⁶

For example, 'dram shop' laws.¹³⁷ US, Canadian, and Australian laws recognise such laws, and they are in principle applicable to the UK and South Africa on the basis of principles of tort law.¹³⁸ Dram shops laws are the label given to laws prohibiting excessive sales of alcohol to drivers, among others. Fulbrook gives an example:

'[I]n 2005, the Tennessee Supreme Court in *West v East Tennessee Pioneer Oil Co* found liability against a petrol filling station which had neither sold nor supplied the alcohol which caused the drunkenness. Garage hands had assisted an inebriated customer to fill his tank and then watched as he drove straight off the forecourt into oncoming traffic, with no headlights on, into the wrong lane, and striking a vehicle in a head on collision, injuring two occupants ... The reasoning was that, on general tortious principles, the defendant's employees had "affirmatively contributed to a foreseeable and unreasonable risk of harm"'.¹³⁹

¹³³ Hepple & Matthews (n 116 above) at 5.

¹³⁴ Conaghan & Mansell (n 116 above) at 22

¹³⁵ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266

¹³⁶ Morgan (n 119 above) at 216-217 footnotes omitted

¹³⁷ Fulbrook (n 117 above)

¹³⁸ Fulbrook (n 117 above) at 222-223 and 237

¹³⁹ Fulbrook (n 118 above) at 221

These laws, and the many cases in many different countries that go with them,¹⁴⁰ are of interest to this dissertation because of their similarity to the arms trade. Under dram laws, persons are held liable not for doing anything wrong themselves but for enabling other persons to inflict harm on third parties (that the first party may never meet). Alcohol is one ‘enabler’ – weapons are another. In other words, the actors in the dram shop scenario stand in the same legal position to one another as the actors in the illegal arms sale scenario. This is what makes it such a useful analogy, as will be explained further in Chapter Four.

One possible argument against this analogy is that selling alcohol renders the drinker incapable of making proper decisions, thereby relieving him/her of full responsibility. With weapons, the person using the weapons is still in complete control, thus fulfilling the gun industry’s mantra that ‘Guns don’t kill people, people kill people’. The argument is that by retaining control, the user of weapons also becomes the only person responsible for what happens. However, this is semantic in the extreme. It is highly unlikely that courts will penalise a person for selling alcohol to a drunk driver, who later accidentally kills a person, but then lets another person off for selling alcohol to another driver who loudly declares his/her intention to get drunk and then run over innocent people. In either case, the seller will be guilty of contributory negligence.

Furthermore, dram shops laws are just one example of ‘enabling torts’ in modern law. Another example is the liability of banks for negligent banking practices that enable fraudsters to harm third parties.¹⁴¹ Here the fraudster is fully aware of what he/she is doing, yet banks can still be held liable if their methods of testing for fraud are inadequate.¹⁴² This shows the theoretical validity of an enabling tort between parties who have never met, assuming the negligence does lead to a final tort.

The key to these analogies is not the facts, but that the position of the actors is legally similar in each case. The core of the first argument for a duty of care is a successful analogy between these cases; that if a person can be liable for selling alcohol, thereby contributing to harm caused to a person he/she has never encountered, then another person can be equally liable for selling weapons that contribute to harm caused to another unknown party.

The second argument is based on the idea that the existence of duties of care can be influenced by the demands of human rights law. There is strong precedent on this in the United Kingdom in the case of *Osman v United Kingdom*.¹⁴³ Morgan gives a succinct analysis:

¹⁴⁰ See all the cases cited in Fulbrook (n 118 above)

¹⁴¹ See generally Blyth (n 118 above)

¹⁴² Blyth (n 118 above) at 45-46

¹⁴³ *Osman v United Kingdom* (1998) 29 EHRR 245

‘In *Osman v Ferguson*, the [UK] Court of Appeal held, on the authority of *Hill v Chief Constable of West Yorkshire*, that the police owed no duty of care to a boy and his father who had been attacked by a deranged schoolmaster, whom the police had been investigating for “stalking” behaviour. Thus, the claim was struck out as disclosing no cause of action. In *Osman v United Kingdom*, the European Court of Human Rights unanimously held that this entailed a breach of Article 6 of the ECHR, which enshrines the right of access to a court for the determination of a citizen's civil rights and obligations. The European Court held that *Hill*, at least as interpreted by the Court of Appeal, had laid down “an exclusionary rule to protect the police from negligence actions”. Moreover, while in theory the *Hill* rule might yield to competing public policy concerns, in *Osman* there had been proximity between the parties (the potential victims were identified), unlike in the Yorkshire Ripper situation. The fact that *Hill* was applied on these facts, showed that it served to 'confer a blanket immunity' on the police. This was disproportionate. Article 6 required that public policy arguments 'must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police'. In particular, the European Court noted that since the claim was struck out, and never proceeded to trial “there was never any determination on its merits or on the facts on which it was based. The fact that, as the Court observed, the procedure on an application to strike a case out is to assume that the facts stated in the claim are true seemed not to be sufficient”.¹⁴⁴

Here the Court is faced with a question: is there a duty of care? In deciding yes, they implicitly argue that human rights norms, like Article 6 of the ECHR, deserve the protection of tort law. In other words, the fact that the harm caused is a human rights violation, instead of a broken heart (in the counter-example of man losing his girlfriend to his best friend) means that a duty should be recognised as worthy of legal sanction. This is exactly the kind of translation of a human rights norms into tort norms which regularly occurs under ATCA in the USA.¹⁴⁵ There too it is accepted that human rights have a valid – indeed a vital – role to play in deciding when certain conduct should attract civil liability.

The Court furthermore notes that to refuse a duty of care is to confer a blanket immunity on the violators, which is disproportionate. A better approach, they say, is to recognise the duty and move on to a proper analysis of the merits of the case. This is precisely what this dissertation argues. A recognition of the duty of care of arms manufacturers is a recognition of the minimum level of concern owed to the human rights of the innocents living in embargoed countries. It does not mean finding the arms manufacturers liable – but it does mean that human rights are important enough that, on some facts, arms manufacturers may be liable. The question of whether they should, in fact, be liable is a question of fault, and it is the next issue to be analysed by this dissertation.

3.5 Fault and the standard of liability

Most tort claims¹⁴⁶ involve one of two types of fault – intention or negligence. This distinction is recognised in many common law countries.¹⁴⁷ This dissertation will only argue for negligence; that arms manufacturers did not

¹⁴⁴ Morgan (n 119 above) at 220-222 footnotes omitted

¹⁴⁵ Morisseau (n 15 above) at 1295-1301

¹⁴⁶ Barring those involving so-called strict or no-fault liability.

¹⁴⁷ Such as Canada, Australia, South Africa, and the USA. See Kintner (n 33 above); Mortensen (n 106 above)

intend to cause harm to those citizens protected by UN arms embargoes, but instead were unreasonably lax in failing to prevent such harm from occurring. But what is the precise standard of liability contained in negligence? Unfortunately, courts worldwide have grappled with this question without being able to pin down a very clear guide.¹⁴⁸ The most common reference is to the idea of a reasonable person, which has unfortunately this test has been criticised as being ultimately as empty as the idea of negligence itself.¹⁴⁹

The major elements in a reasonableness inquiry seem to be:

- Is there a harm that a reasonable person can foresee?
- Was there a failure to take reasonable steps to avoid such harm?¹⁵⁰

The first inquiry focuses on foreseeability/foreknowledge of the harm that one could cause. If harm cannot be foreseen then one cannot be liable – for example if one gives a friend a supportive slap on the back, which aggravates an unknown heart condition and leads to a fatal heart condition, one will not be liable because the risk of such harm was not reasonably foreseeable. On the other hand, if one helps an obviously-drunk man fill his car with petrol, in the knowledge that he will drive home and probably cause an accident, one will be liable. The reason is that tort law expects persons to behave responsibly when it comes to possible risks to others – but one cannot be responsible about risks of which one is unaware.

Furthermore, tort law imposes liability on risks of which one reasonably should be aware. If one jokingly pushes a friend out into the road, and that friend is then hit by a car, it is not an excuse to say that one didn't know the car was there. Roads are full of cars travelling at high speeds, and a reasonable person should be aware of the risk. In the context of this dissertation, a reasonable person should be aware of the very high risk that if one sells arms to an embargoed country, those arms will be used to perpetuate massive human rights violations.

The second inquiry above is necessary to deal with situations where harms are foreseeable but insubstantial, or equally when harm is foreseeable and substantial but the costs of avoiding such harm is even more substantial.¹⁵¹ An example of the first kind could be in the case of *Bolton v Stone*.¹⁵² In this case the plaintiff was outside a cricket club when he was hit by a cricket ball. The House of Lords held that the risk of such an event happening was so small that the cricket club could not be held liable.¹⁵³ An example of the second kind is the case of *Latimer v AEC Ltd*.¹⁵⁴ In this case an employer's warehouse floor was covered with an oil slick. The employer laid down all the sawdust he could find to eradicate the risk, but later a worker slipped and hurt his ankle. The

¹⁴⁸ Van der Walt (n 106 above) at 46

¹⁴⁹ Van der Walt (n 106 above) at 46-47

¹⁵⁰ Van der Walt (n 106 above) at 47; see also Conaghan & Mansell (n 106 above) at 8

¹⁵¹ Howarth (n 127 above) at 459

¹⁵² *Bolton v Stone* [1951] AC 850

¹⁵³ *Bolton v Stone* [1951] AC 850 at 878

¹⁵⁴ *Latimer v AEC Ltd* [1953] AC 643

Court of Appeal held that the employer had done everything a reasonable person would do – the only other option was to shut down the factory entirely.¹⁵⁵

Finally, one should note that fault can serve as a solution to the problem of ‘floodgates liability’ – the argument that if this dissertation’s case is successful, arms manufacturers will be driven out of business by the many claims that will be made against them. But fault limits liability, as one cannot be liable for what one cannot reasonably foresee. As many of the weapons in embargoed conflict zones have travelled a very convoluted route, the manufacturers can argue that they could not reasonably foresee the harm that selling them would cause. If this argument succeeds, they will escape liability. The question of when harm can be reasonably foreseen will be dealt with in the following chapter, because it is the crux of this entire dissertation.

¹⁵⁵ *Latimer v AEC Ltd* [1953] AC 643 at 643-645

PROVING THE CIVIL LIABILITY OF ARMS MANUFACTURERS

4.1 Should there be a duty of care?

Chapter Three has already established that there are two primary ways in which the common law of tort can develop to recognise new duties of care. The first is by recognising that the harm that the new duty will prohibit is essentially similar to other harms that are already prohibited. Therefore the new duty should be adopted to be consistent with other parts of the common law. The second argument is different in that the harm the new duty prohibits may be a completely new kind of harm – but it is one that the tort law, when informed by human rights, should recognise as appropriate for prohibition.

Now consider the whole scenario in the abstract: A sells B some item which enables B to harm C. This matches what happens in the arms trade, where manufacturers (A) sell arms to armed groups (B) who then use those arms to violate the human rights of innocent civilians in an embargoed conflict zone (C). In some cases, when brokers are involved, the sale between A and B is an indirect one, but this does not alter the fact that A is functionally selling to B.

This abstract scenario of A-B-C also perfectly matches the scenario of dram shop laws. There alcohol-dispensing businesses (A) sell alcohol to a driver (B) who then drives home and crashes into an innocent bystander (C). The only difference is that under current tort law, one is prohibited from selling alcohol to a drunk driver, but one is free to sell weapons to an armed group in an embargoed conflict zone. Assuming that both sales result in genuine legally-recognised harm (a matter that will be proved below) this is highly inconsistent. For this reason it is both possible and proper to impose the relevant duty of care on arms manufacturers.

The second argument in this section is that the harm caused by negligent sales of arms manufacturers is a harm that should be recognised by the common law of tort as worthy of prohibition. Tort law exists to protect a certain form of public policy; some harms deserve legal sanction, but others do not. How can one decide which harms are suitable to be the basis of a tort claim?

One could reply – just look at the severity of the harm caused by the arms trade. This is not a case of a broken heart or a businessman ruined by a competitor. The facts in Chapter Two show that thousands of people are killed every year by small arms, thousands more are injured or driven from their homes, and yet thousands more children are turned into soldiers. But this ignores the fact that not all conflicts and deaths are illegal.¹⁵⁶ A more valid legal argument is based on arms embargoes that are imposed by the United Nations Security Council.

¹⁵⁶ Although use of child soldiers is illegal under international law, so the contribution of the arms trade to the problem of child soldiers is arguably another reason why the trade should be under a duty of care to be careful to whom it sells its weapons.

Those conflicts are illegitimate, and selling weapons to parties in those conflicts would be illegal if states actually implemented legislation to support the UN Security Council resolutions. In other words, states are under an obligation to have domestic laws penalising arms sales to embargoed zones – and tort law can be just another way to help them do this.

UN embargoes are not the only evidence that the harm caused by the arms trade can be undesirable. There is also the influence of human rights. As the European Court of Human Rights stated in the extract from *Osman v United Kingdom* above,¹⁵⁷ human rights can inform any decision on whether a duty of care exists. This is because human rights are themselves a special kind of interest. There are many ways a person can be harmed, but when that person's human rights are harmed, it is a sign that something especially fundamental and important has been violated. This dissertation argues that, as in *Osman*, tort law should recognise the importance of human rights by imposing a duty of care on arms manufacturers.

Finally, the Court in *Osman* also noted that to deny that a duty of care exists is to grant a blanket immunity to arms manufacturers to sell to whomever they chose, even when they are fully aware that their actions will lead to massive human rights violations. Arms manufacturers may escape liability through lack of fault – in fact most of them will. But they should not be regarded as totally separate from the horrors occurring in embargoed countries when it is their weapons that are creating those horrors.

4.2 Is there negligence on the part of arms manufacturers?

Negligence ultimately depends on the facts in each case. All that this dissertation seeks to show is that, in the real world, many arms manufacturers could be held liable. As noted above, there are two key questions:

- Is there a harm that a reasonable person can foresee?
- Was there a failure to take reasonable steps to avoid such harm?

Can harm be reasonably foreseen? In many cases, it definitely can. Using the terminology in the above section, A sells to B either directly or indirectly. Indirect sales go via arms brokers and/or other users of the arms. The two scenarios are slightly different for the purposes of the first inquiry above – that of reasonable foreseeability.

Regarding the first inquiry; if the sale is to B directly, and B is under a UN arms embargo, then there are three reasons why A should reasonably have known that selling arms to B would cause harm to C. First, neither arms sales nor arms embargoes happen overnight. Any country that receives an embargo will do so only after

¹⁵⁷ *Osman v United Kingdom* (n 143 above)

extensive media coverage of whatever brutalities are occurring in that country that makes it deserving of an embargo. For example, there was extensive coverage of the horrors in the Sudan and Rwanda. Arms manufacturers should be reasonably aware of such global controversies.

Second, if the arms manufacturers somehow missed the worldwide debate that would accompany the embargo, they should hear about it given their necessarily close dealings with the given country. To transfer arms requires navigating the bureaucracy and dealing with local government officials. It is beyond reasonable doubt that they can engage in business with these officials, yet remain ignorant of the massive human rights violations that will be occurring in that country.

Finally, even if the companies miss all the signs, there is an ever-present activist network monitoring such matters and bringing them to the attention of the company. BAE Systems cannot claim ignorance of the human rights violations in Indonesia when their own shareholders ask their directors questions about Indonesia at the Annual General Meeting.

The second sales option is that A can sell to a broker, who then sells to B. Here, A has more plausible deniability. Although this dissertation has provided examples of arms manufacturers who have openly acknowledged their links with arms smugglers, not all arms manufacturers are so blasé about their gun-running. Many arms brokers will provide fake End User Certificates to the manufacturers, who will be honestly deceived. However, even in these cases, the identity of risky arms brokers is usually well-known, and this can be a sufficient reason for reasonable concern. Members of the arms trade have all heard, over the course of years in the same business, of brokers like Minim or Ehlers.¹⁵⁸ They know that such dealers, and others that this dissertation has not mentioned, are repeatedly linked to illegal transactions and broken arms embargoes. It is submitted that to sell weapons to such dealers is itself negligent, barring extraordinary reassurances that the arms will not be clandestinely redirected to illegal destinations. The risk that the arms will be abused is simply too great.

For the above reasons, as well as the factual evidence showing that manufacturers do actually know about how their arms get illegally trafficked, it is submitted that harm is reasonably foreseeable. The next step is the second inquiry: are there steps that a reasonable person can take to avoid the foreseen harm? This dissertation submits that the answer is yes; all that is required of the arms manufacturers is that they refuse to sell arms. This is hardly an onerous burden – it is simply a refusal to act. They are not required to police their customers or their customer's customers. They must just act on the knowledge that they can be reasonably expected to have as a result of the ordinary running of their companies.

¹⁵⁸ See n 89 above

The only reason that arms manufacturers could give to avoid such an omission is that it would be bad for business. While business is important, it is not being affected any more than it would be if the home country had implemented legislation to support the UN embargo. This shows that in this case, the loss of business is considered an acceptable sacrifice by the state in question. It proves that human rights can be more important than profits.

4.3 Conclusion

This dissertation began with a problem. The problem was that international human rights law often lacks the domestic implementation needed to turn its promises into reality. The proposed solution to this problem is the use of 'international tort law'; meaning the application of domestic tort principles to multi-jurisdictional civil wrongs cases. To prove that tort law can become an effect support to human rights law, this dissertation created a hypothetical case against arms manufacturers who negligently make indirect sales to embargoed conflict zones. The case was based on common law principles of tort, in order to make the case potentially applicable in the many common law countries around the world. It is left to another to continue the hypothesis by showing that the same case could succeed in civil law countries.

A successful tort case consists of five elements: conduct, causation, the duty of care, fault, and harm. Each of these elements has been proven by this dissertation. The relevant conduct is the sale of arms by arms manufacturers, which has never been in doubt. Causation is proven by the but-for test; but for the weapons being sold by the manufacturers, the armed groups in the embargoed zones would not have been able to carry out massive violations of human rights, such as those seen in Sierra Leone and the Sudan. There are two reasons why a duty of care should exist. First because that would be a consistent development of the common law of tort from analogous cases, and secondly because tort law itself can and has recognised the violation of human rights as being a violation of a duty of care. Fault will change depending on the facts of each case, but the facts gathered within this dissertation prove that arms manufacturers should reasonably foresee that certain of their sales will result in broken UN embargoes. This is because of the widespread global knowledge on when an embargo has been imposed on a conflict. If this is insufficient to inform manufacturers, then they will hear from the government officials who provide them with import permits, or from the activists that attend all major conventions and shareholders' meetings within the arms industry. Finally, the harm caused by the arms trade is the same harm caused by all weapons: death, destruction, and injury. They are the most quintessential of human rights violations, which is confirmed by the fact that the conflicts in these situations have had arms embargoes placed upon them by the UN Security Council.

Arms manufacturers have had it easy for too long. For too long they have been able to produce weapons of destruction and sell them all over the globe, claiming no responsibility when those weapons ruin lives and shatter societies. This dissertation is not arguing that they need special regulation or must obey higher moral standards. It is just arguing that they should obey the same standards as everyone else; the reasonable standards of tort law, and most importantly the universal standards of human rights.

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