

The United Nations Conference on the Illicit Trade in Small Arms and Light Weapons – An Encroachment on the Second Amendment to the U.S. Constitution?

By Daniel B. Pickard



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The United Nations Conference on the Illicit Trade in Small Arms and Light Weapons – An Encroachment on the Second Amendment to the U.S. Constitution?

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I. Introduction

The United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects was convened with the laudable goal of addressing the unlawful trade in these weapons, which pose serious international humanitarian and security threats. The Conference, which was concluded in July 2001, resulted in a Program of Action calling for several follow-up measures, including a review conference to be conducted no later than 2006, and suggests a step toward the creation of an international treaty for the regulation of trade in small arms. During the course of the negotiations delegates from several nations attempted to expand the scope of the Conference to include restricting the private ownership of weapons, and to prevent the sales of small arms to non-State actors. The United States supported the Program of Action because the negotiators were able to ensure that its terms did not compromise any U.S. domestic rights.

As the follow-up mechanisms of the Program of Action are implemented, there is a danger that some nations will again push for actions that threaten rights of American citizens under the U.S. Constitution. The United States is correct in opposing the illegal trade in dangerous weapons. It would similarly be correct in rejecting arguments of certain members of the international community that seek to regulate all trade in small arms, legal and illegal,

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between any actors. Indeed, as discussed in this paper, current proposals purportedly addressing the illicit trade in small arms actually have a much broader reach and constitute threats to vital Constitutional rights. This potential infringement on the rights of U.S. citizens is not necessary to accomplish the goals of the Conference and the Program of Action, as the United States is a world leader in the implementation and enforcement of export controls on military weapons.

Preventing the illicit traffic in small arms involves complicated issues concerning not just arms control but diplomatic considerations, security, law enforcement, and human rights. The United States should support these efforts but not at the cost of violating the Second Amendment to the Constitution. Indeed, the United States must remain vigilant as to any proposed follow-up to the Conference and Program of Action that threaten rights guaranteed under the U.S. Constitution.

II. United Nations Conference on the Illicit Trade in Small Arms and Light Weapons

A. Developments that Culminated in the Conference

In response to concerns regarding the illicit trade in small arms, former United Nations Secretary General Boutros Boutros Ghali called on all United Nations members to “undertake efforts to control the illicit trade in small arms and light weapons.”² Two panels of government

² See Lincoln P. Bloomfield, Jr., Remarks to the Monthly Non-Governmental Organization Briefing, Washington, D.C. (July 5, 2001) (transcript available at <http://usembassy.state.gov/Tokyo/wwwhse0228.html>).

“Small arms and light weapons range from clubs, knives and machetes to those weapons just below those covered by the United Nations Register of Conventional Arms, for example, mortars below the caliber of 100 mm.” UNITED NATIONS, REPORT OF THE PANEL OF GOVERNMENTAL EXPERTS ON SMALL ARMS A/52/298 11 (1997). The PANEL REPORT characterized the weapons as:

- (a) Small arms: revolvers and self-loading pistols; rifles and carbines; sub-machine-guns; assault rifles; light machine-guns;
- (b) Light weapons: heavy machine-guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns, recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; mortars of calibers of less than 100 mm; and

experts were convened and subsequently issued reports with a series of recommendations on how to address problems regarding the illegal trafficking in these arms.³ In December 1999, the UN General Assembly adopted resolution 54/54, which called for a special session devoted to disarmament and for an international conference to be conducted by 2001.⁴ A preparatory committee was established to examine issues connected with the illegal trafficking in small arms, and which conducted three meetings between February 2000 and March 2001.⁵ Subsequently, in New York in July 2001, the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons (“SA/LW”) was convened.

B. Program of Action

On July 20th, 2001, the Conference adopted a “Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.”⁶ The Program at the outset notes the grave concern of the Members concerning:

the illicit manufacture, transfer and circulation of small arms and light weapons and their excessive accumulation and uncontrolled

(Continued . . .)

(c) Ammunition and explosives: cartridges (rounds) for small arms; shells and missiles for light weapons; mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems; anti-personnel and anti-tank hand grenades; landmines; and explosives.

³ See Bloomfield, *supra* note 2.

⁴ See *id.*

⁵ UNITED NATIONS, PANEL REPORT OF THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS A/CONF.192/15 1 (2001). For the reports of the preparatory committee see UNITED NATIONS, REPORTS OF THE PREPARATORY COMMITTEE FOR THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS A/CONF.192/1 (2001).

⁶ A program of action is not “international law. Rather, it {is} a political statement and a promise that States make to their own people, themselves and to other States.” SETTING THE RECORD STRAIGHT, UN CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, NEW YORK, 9-20 JULY 2001, available at <http://disarmament.un.org/cab/smallarms/facts.htm>.

spread in many regions of the world, which have a wide range of humanitarian and socio-economic consequences and pose a serious threat to peace, reconciliation, safety, security, stability and sustainable development at the individual, local, national, regional, and international levels.⁷

The Conference members resolved to combat the illicit trade in small arms and light weapons by strengthening or developing agreed norms and measures at the global, regional and national levels. The Program of Action indicates that a particular emphasis should be placed on the regions where there is an “excessive and destabilizing accumulation of small arms.”⁸ The Program further states that the political will of the international community should be mobilized to prevent and combat the illegal trade in these weapons and to promote “responsible action by States with a view to preventing the illicit export, import, transit and retransfer of small arms and light weapons.”⁹

The Conference’s action plan contributes to “strengthened export controls, embargo enforcement, arms brokering enforcement, and assistance to affected regions.”¹⁰ The Program of Action is a politically binding but voluntary agenda that was adopted by more than 140 nations.¹¹

The Program of Action encourages countries to:

- Ensure that manufacturers use markings on small arms and light weapons to make it easier to trace illicitly trafficked weapons;
- Establish procedures to monitor legal sales, transfer and stockpiling;
- Establish laws to regulate arms brokers;

⁷ PANEL REPORT, *supra* note 5 at 7. For the Program of Action *see* UN Document A/CONF.192/L.5/Rev.1.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *See* MERLE D. KELLERHALS, U.S. DEPARTMENT OF STATE, UN SMALL ARMS CONFERENCE A SUCCESS, U.S. OFFICIAL SAYS (2001), *available at* <http://usinfo.state.gov/topical/pol/arms/stories/01082001.htm>.

¹¹ *See id.*

- Establish controls over the export and transit of small arms and light weapons;
- Destroy surplus stocks of small arms; and
- Criminalize the illegal manufacture, possession and trade of these weapons.¹²

It was noted that the United States had two “defensive” goals in regard to the Program of Action - preserving the right of private citizens to bear arms and eliminating references to insurgents (or non-state actors) in the final document. Delegates agreed to convene a conference no later than 2006 to review progress made by participating countries in implementing the goals of the Program of Action.

Representatives of other countries and various NGOs voiced dissatisfaction that the United States spoke out in a manner consistent with its responsibilities pursuant to the Second Amendment.¹³ The President of the Conference expressed his “disappointment” that, because of the United States, the conference could not adopt language regarding the need “to establish and maintain controls over private ownership” of these weapons.¹⁴ The Conference President also expressed his displeasure that the Conference was not able to agree on the “need for preventing sales of such arms to non-State groups.”¹⁵

¹² KELLERHALS, *supra* note 10.

¹³ Representatives of the International Action Network on Small Arms (IANSA), an international network of over 300 NGOs from more than 70 countries, made a presentation at the Conference in an effort to impress upon the delegates the importance of stronger gun control measures. The IANSA accused the “American gun lobby and its international allies” of trying to “derail talks ” at the Conference. IANSA Press Release, July 16, 2001, *available at* <http://www.guncontrol.ca/Content/Temp/prss07-16-01.UN.PDF>. NGOs in attendance were collectively allotted three hours to make presentations to the delegates. Time was ultimately divided up among forty NGOs, who each made five minute presentations.

¹⁴ CONFERENCE REPORT, *supra* note 5, at 23.

¹⁵ *Id.*

C. The United States Has Supported the Program of Action

The United States recognized that “[i]n addition to inflicting tremendous human tragedy in terms of innocents killed or forced to become refugees, the conflicts fueled by the illicit small arms/light weapons trade pose a threat to U.S. foreign policy interests.”¹⁶ Therefore, for both humanitarian and foreign policy reasons, the United States supported the objectives of the Conference.¹⁷

In the view of the United States, the cause of this “deplorable situation is the lack of basic export control and enforcement infrastructure in affected regions and the absence of effective mechanisms to control the small arms/light weapons trade internationally.”¹⁸ Accordingly, the United States urged the UN Conference to adopt a Program of Action that contributed to the building of the necessary infrastructure through politically agreed upon measures. Specifically, the United States suggested six elements for an effective program of action: (1) a “robust export control system;” (2) an “effective brokering measure;” (3) an “appropriate set of measures to address surplus weapons and unsecured stockpiles;” (4) improved transparency in arms transactions; (5) adoption of a regional approach as appropriate; and (6) effective enforcement of UN Security Council embargoes.¹⁹

With respect to concerns regarding the Second Amendment to the U.S. Constitution, Assistant Secretary of State Bloomfield stated that the Conference mandate specifically excluded consideration of domestic gun control issues, and emphasized that the United States “opposes

¹⁶ Bloomfield, *supra* note 2.

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *See id.*

efforts to further restrict the lawful manufacture, trade and possession of firearms.”²⁰ This proved to be a surprisingly contentious position.

D. Follow-Up to the Conference

As noted, the Conference and the Program of Action mark only the beginning of the current international process - other mechanisms have now been set in motion. Herbert L. Calhoun, the deputy division chief in the Office of Policy, Plans and Analysis at the U.S. State Department’s Bureau of Political-Military Affairs, stated that the Program of Action “has a strong aggressive follow up mechanism. In two years we will sit down and talk about the progress. And in five years we will have a review conference where progress will be assessed.”²¹

Specifically, the Program recommends that a conference be convened no later than 2006 to review progress made in the implementation of the Program of Action as well as biennial meetings to consider national, regional, and global implementation.²² The Program of Action also recommends that the United Nations undertake a study “for examining the feasibility of developing an international instrument to enable States to identify and trace” illicit small arms and light weapons.²³

Consequently, the UN Conference was not an isolated event. Future negotiations regarding treaty proposals concerning the trade in small arms will be conducted, and will directly touch upon rights guaranteed by the U.S. Constitution.

²⁰ *Id.*

²¹ KELLERHALS, *supra* note 10.

²² CONFERENCE REPORT, *supra* note 5, at 16.

²³ *Id.* at 17.

III. The United States Must Ensure that Future Reviews of the Program of Action Do Not Encroach Upon the Second Amendment

Even detractors of the UN Conference on the Illicit Trade in Small Arms and Light Weapons have conceded this its general goals “were praiseworthy on their face: attempting to prevent global *illicit* trade in small arms and light weapons is a noble mission. It is irrefutable that this illicit trade has endangered civilians and peacekeepers alike in various countries and regions, such as Africa.”²⁴ However, efforts connected with the Program of Action marked a thwarted attempt by some nations to overstep the authority of the UN.

It should be noted that the United Nations Charter specifically prohibits the UN from intervening in matters that are within a Member State’s domestic jurisdiction.²⁵ However, this prohibition did not prevent certain representatives from over-reaching. There were attempts by some governments to inappropriately broaden the proper scope of the Conference beyond eradicating the illicit trade in small arms. For example, conference documents defined “small arms” to include “weapons designed for personal use ... {including} revolvers, self-loading pistols, {and} rifles.”²⁶ This overly-broad definition exceeds what the U.S. government correctly believed to be the appropriate focus of the conference, i.e., preventing the illegal trade of “strictly military arms – automatic rifles, machine guns ... that are contributing to the continued violence and suffering in regions of conflict around the world.”²⁷ In the words of one U.S. delegate to the conference, the definition of small arms “fail{ed} to distinguish between a

²⁴ Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 313 (Summer 2002) (citation omitted).

²⁵ U.N. CHARTER art. 2, para. 7.

²⁶ Barr, *supra* note 24, at 314 (citing CONFERENCE REPORT, *supra* note 5).

²⁷ *Id.* (citations omitted).

hunting rifle and a fully automatic high-caliber machine gun used by a repressive regime or a terrorist organization.”²⁸

To their credit, the U.S. delegates prevented efforts to impermissibly broaden the scope of the Conference. The Bush Administration has consistently demonstrated strong support for the Second Amendment.²⁹ John R. Bolton, U.S. Undersecretary of State for Arms Control and International Security Affairs, quoted Attorney General Ashcroft as recognizing that the Second Amendment “protects an individual right to keep and bear arms.”³⁰ The United States’ delegates remained adamant in their opposition to suggestions by Conference participants that ran counter to U.S. sovereignty generally, and the Second Amendment, specifically. Bolton indicated that the United States did not, and would not, support the promotion of international gun control advocacy, measures to prohibit civilian possession of small arms, or attempts to limit trade in SA/LW solely to governments.³¹ He further stated that “laws and procedures governing the

²⁸ *Id.*

²⁹ Indeed, there has been a growing awareness that the Second Amendment recognizes the private right of individuals to keep and bear arms. *See, e.g.,* United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001) (citing Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEXAS L. REV. 1125 (1996); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L. J. 995 (1995); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 LAW & CONTEMP. PROBS. 151 (1986); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87 (1992); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (1999); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1 (1996); Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L. J. 1236 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

³⁰ John R. Bolton, Remarks at the UN Conference on Illicit Trade in Small Arms and Light Weapons in All its Aspects (Jul. 9, 2001) (transcript available at <http://usembassy.state.gov/tokyo/wwwhse0230.html>).

³¹ *Id.*

possession of small arms by civilians are properly left to individual member states. The United States will not join consensus on a final document that contains measures contrary to our Constitutional right to bear arms.”³²

IV. The United States Already Has Implemented One of the World’s Most Stringent Weapons Controls Regimes Which Satisfy the Goals of the Conference

The attempts by some international activists to influence matters that are properly domestic in nature are particularly unwarranted as the United States has already implemented export controls that more than satisfactorily address the goals of the UN Conference. The United States has established the International Traffic in Arms Regulations (“ITAR”), promulgated by the Secretary of State, in order to control the commercial import and export of U.S. arms.³³ The ITAR established the Office of Defense Trade Controls (“DTC”) within the State Department’s Bureau of Political-Military Affairs, and provides the DTC with the authority to issue and approve licenses and registrations.³⁴ The regulations provide for potentially severe penalties for violations, including fines of \$1,000,000 or imprisonment for a period of ten years, or both.³⁵

The United States has also passed laws to exert control over international commercial weapons transfers that cover any person who is subject to U.S. jurisdiction.³⁶ The Brokering Amendment to the United States arms export control laws “requires that every U.S. national

³² *Id.*

³³ Elise Keppler, *Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act*, 19 BERKELEY J. INT’L L. 381, 389-390 (2001).

³⁴ *Id.* at 390.

³⁵ *Id.* at 391.

³⁶ *Id.* at 389 (“The U.S. Congress passed the Brokering Amendment to the Arms Export Control Act (“AECA”) on July 21, 1996.”) (citation omitted).

(living anywhere in the world) and any foreign national residing in the U.S. obtain a license to broker weapons.”³⁷ Brokering is defined broadly to include “financing, transportation, freight forwarding, or taking any other action that facilitates the manufacture, export, or import of a defense article or defense service.”³⁸ Covered individuals must register with the U.S. government and apply for a license for each brokering transaction.³⁹

Consequently, the United States has already enacted a powerful system for regulating the export, import, and brokering of small arms, including licensing requirements, re-export controls, and rigorous monitoring and investigation of arms transfers. Furthermore, the United States is an international leader in fighting the illicit trade in weapons, offering financial and technical assistance to help other nations develop their own export and import controls, improve border security against smugglers, and secure and destroy stockpiles of weapons in conflict-prone regions.⁴⁰

V. Conclusion

The United States is a world leader in preventing the illegal trade in small arms and light weapons, and appropriately supported the goals of the UN Conference on the Illicit Trade in Small Arms and Light Weapons. However, it is clear that many delegates to the UN Conference intended to expand the scope of the negotiations and would have preferred to restrict the rights of

³⁷ *Id.* at 392 (citing 22 U.S.C. § 2778(b)).

³⁸ *Id.* at 392 (citing 22 U.S.C. § 2778(b)).

³⁹ 22 U.S.C. § 2778(b) (2001).

⁴⁰ James B. Cunningham, Remarks to UN Security Council on Small Arms (Aug. 2, 2001) (transcript available at <http://usembassy.state.gov/posts/jal/wwwhse0263.html>).

private ownership of weapons, and to prevent the sales of such arms to non-State groups. Such efforts, if successful, would have compromised American sovereignty.

When the follow-up conference to the Program of Action is convened sometime before 2006, the United States should remain vigilant in its opposition to any programs or treaties that are incompatible with rights guaranteed under the Second Amendment of the U.S. Constitution. The U.S. should not take any action that threatens rights guaranteed by the Second Amendment in order to meet the worthy goals of the Conference. Indeed, the United States has already implemented significant export controls that, if adopted by other nations, would be a significant step forward in preventing the illicit trade in small arms and light weapons.