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LECTURE

A WORLD DROWNING IN GUNS

*Harold Hongju Koh**

INTRODUCTION

I come to New York to talk about a familiar subject: gun control. But let me warn you: this may be a different kind of gun control lecture than you have heard before. It will not be about gun control in the streets of Manhattan or Columbine, or the Brady Bill, or gun registration, or even the Second Amendment, at least not until the lecture's end. What I want to talk about is gun control in such cities as Freetown, Sierra Leone; Pristina, Kosovo; Medellin, Colombia;

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001. This article represents a lightly edited and footnoted version of the Robert L. Levine Distinguished Lecture, delivered on April 2, 2002 at the Fordham University School of Law in New York City. It is part of a forthcoming book tentatively entitled "Why Nations Obey: A Theory of Compliance with International Law." This lecture grows out of thoughts inspired by a Social Science Research Council Workshop on Law and International Relations sponsored by the Program on Global Security and Cooperation that I attended in February 2002 in Washington, D.C. I am grateful to John Tirman, Tom Biersteker, Ben Rawlence, and the other participants in that workshop for their illuminating papers and presentations on the relationship between international law and small arms proliferation, and to Akhil Amar and Ian Ayres for helpful comments. I am also grateful to Jessica Sebeok and Steve Vladeck of Yale Law School for splendid research assistance, and to my many friends at Fordham for their gracious hospitality during my visit, especially Dean Bill Treanor, Professor Chantal Thomas, and the leaders of the outstanding Crowley Program in International Human Rights, Professors Martin Flaherty, Tracy Higgins, and Catherine Powell.

I dedicate this lecture to my beloved parents-in-law, Sarah J. Fisher and William E. Fisher, Jr. Bill Fisher graduated with the Fordham Law School Golden Reunion Class of 1952. He earned his L.L.B. at Fordham through long and arduous years of night classes, which he took after commuting daily from Long Island to his job in New York City. While Bill pursued a successful career in international business, he and his remarkable wife Sally together raised three gifted children: Jane, Bill III, and my wife Mary-Christy Fisher, who now works as a lawyer at New Haven Legal Assistance Association. I still remember how proud Bill and Sally were, in May 1986, when along with a group of Fordham Law graduates, Bill was admitted to the Bar of the U.S. Supreme Court on motion of Judge William Hughes Mulligan, the former Dean of Fordham Law School. Fragile health prevented Bill Fisher from attending both his Fiftieth Reunion and this lecture at his alma mater, but there should be no doubt that his moral example and commitment to the rule of law inspired it.

Kabul, Afghanistan; Port-au-Prince, Haiti; Mogadishu, Somalia—all places that consumed my attention during my tenure as Assistant Secretary of State for Democracy, Human Rights and Labor.

My government travels took me to some fifty-five countries in two and a half years. During that time, I learned that in every continent, in every city around this planet, there are guns, more guns than we could ever use. There are more guns than any sane civilization would ever need. At the dawn of the twenty-first century, we live in a world drowning in guns. Why is this so and what should we do about it?

Let me divide my answer into three parts: First, how big is the world's gun problem and how did it come about? Second, what can and should we—as responsible lawyers, scholars, and human rights activists—do about this huge and growing global problem? Third, what kind of global gun control regime could we and should we try to build?

I. THE PROBLEM

Let me start by describing the problem. Today there are an estimated 639 million documented small arms in the world. That is more than half-a-billion small arms: more than one for every twelve men, women, and children on the face of the earth. Significantly, all sources concede that this number undercounts the actual number by tens of millions. It does not include, for example, the millions of undocumented, privately held guns in such major countries as China, India, Pakistan, or France.¹

Let me focus on a category known as “small arms and light weapons,” a term generally understood to encompass weapons that possess three characteristics. First, an ordinary person can carry them. They are transportable by individual human beings, and thus are so-called “man- or woman-portable.” Second, they are capable of delivering lethal force. Third, they are primarily designed for military use, and so exclude such recreational weapons as hunting rifles, collectors' items, personal memorabilia, and the like.

While no universally accepted legal terminology exists, considerable agreement has begun to emerge that the term “small arms” includes, at a minimum, handguns, revolvers, pistols, automatic rifles, carbines, shotguns, and machine guns. “Light weapons,” which are usually heavier, larger, and designed to be hand-carried by teams of people, embrace grenade launchers, light mortars, shoulder-fired missiles,

1. Small Arms Survey 2002: Counting the Human Cost [hereinafter SAS 2002]. Much of the information in this part is drawn from the successive editions of this impressive and sobering survey, a project of the Graduate Institute of International Studies in Geneva. Updated information is available at www.smallarmssurvey.org.

rocket launchers, artillery guns, anti-aircraft weapons, anti-tank guns, and related ammunition.²

What characteristics distinguish this class of small arms and light weapons? Let me enumerate six. First and most obvious, they are *portable*, easily concealed and easily used. Unlike complex weapon systems, these systems require little or no maintenance, logistics, support, or training. Children can and do learn how to operate these weapons with sickening ease. As any parent knows, even a five-year-old child knows how to point a gun and pull the trigger. If you saw Ridley Scott's chilling movie, *Black Hawk Down*, based on Mark Bowden's account of the 1993 battle of Mogadishu, Somalia,³ you also know that throughout the developing world, small arms are regularly carried by teenagers and children. During my travels as Assistant Secretary, I cannot tell you how many times I saw teenaged and preteen children carrying rifles and assault weapons, pointing them at each other, or at strangers like me, with a casualness and playfulness that made my blood run cold.

In many parts of the world, the Lord of the Flies carries small arms. Children use small arms to kill other children. Indeed, for all the worldwide effort that has been expended to reduce the flagrant use of child soldiers in armed conflict,⁴ the availability of small arms contributes as much to the global proliferation of child soldiers as any governmental policy.⁵ There are more than 300,000 child soldiers in the world, and many of them carry small arms.⁶ *Black Hawk Down* graphically depicts how in one day in Mogadishu, eighteen American soldiers were killed. But what you probably did not know was that those soldiers killed nearly 500 and wounded 1,000 more, a great many of them children: an all too typical story in the daily saga of small arms.⁷

2. Light weapons fall just below the seven categories of large weapons reported to the UN Register of Conventional Arms, and are thus an intermediary category between "small arms" and "major weapons." The UN Department for Disarmament Affairs website, including official documents pertaining to the Register, is available at <http://disarmament.un.org/cab/register.html>.

3. See generally Mark Bowden, *Black Hawk Down: A Story of Modern War* (1999).

4. See, e.g., David Weissbrodt et al., *International Human Rights: Law, Policy & Process* 38-83 (3d ed. 2001) (describing efforts to create Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict).

5. See, e.g., Human Rights Watch, *My Gun Was as Tall as Me: Child Soldiers in Burma, 2002*, available at <http://www.hrw.org/reports/2002/burma/> (Oct. 2002).

6. In addition, the NGO Coalition to Stop the Use of Child Soldiers estimates that "hundreds of thousands more" have been recruited into various armed forces. See Coalition to Stop the Use of Child Soldiers, *The Child Soldiers Global Report* (2001), available at <http://www.child-soldiers.org> (last visited Apr. 1 2003).

7. "Reliable witnesses in the U.S. military and in Mogadishu now place the [death] count at nearly 500 dead—scores more than was estimated at the time—among more than a thousand casualties. Many were women and children." Mark Bowden, *A Defining Battle*, *Phila. Inquirer*, Nov. 16, 1997, available at

Second, small arms are not just portable, they are *cheap*: cheap to make and cheap to buy. The most famous example is the AK-47, the famous Kalashnikov assault rifle, of which some 70 to 100 million are believed to exist worldwide.⁸ In southern Africa, AK-47s can be bought for as little as \$15, the same price as a bag of maize.⁹ In some countries, you can buy an AK-47 for \$10, or trade one for a goat or a chicken.¹⁰ You can rent an AK-47 by the hour to rob a store or to carry out an assassination.

In many parts of the world, AK-47s are considered romantic. The AK-47 is the “rifle of choice” for guerrilla movements. It has been the symbol of guerrilla resistance for the African National Congress in South Africa, for the Irish Republican Army, and for the Kosovo Liberation Army. An AK-47 even appears on the Mozambique national flag.¹¹ Most timely, the AK-47 has come to be associated with the Mujahedeen of Afghanistan. Afghanistan currently ranks as the world’s leading center of unaccounted small weapons, with at least 10 million small arms believed to be there,¹² having been recently used by Al-Qaeda and the Taliban against U.S. troops in battles like Operation Anaconda. The Washington Post recently reported that, on the eve of the U.S. attack on Iraq, anywhere from one to seven million Iraqi civilians were armed with AK-47s in anticipation of the coming war.¹³

An AK-47 possesses only nine moving parts, and thus is relatively simple to handle and reproduce.¹⁴ Because the original design was not patented in Russia, copies are now being manufactured in some nineteen countries, including China, the former Yugoslavia, Egypt,

<http://inquirer.philly.com/packages/somalia/nov16/rang16.asp>.

8. See Small Arms Survey 2001: Profiling the Problem [hereinafter SAS 2001] available at http://www.smallarmssurvey.org/Yearbook2001/Chapter_2.pdf. See generally Michael Klare, *The Kalashnikov Age*, 55 Bull. of Atom. Sci. (Jan./Feb. 1999), available at <http://www.bullatomsci.org/issues/1999/jf99/jf99klare.html> (“[T]he most deadly combat system of the current epoch [is] the adolescent human male equipped with a Kalashnikov—an AK-47 assault rifle.”).

9. SAS 2001, *supra* note 8, available at <http://www.smallarmssurvey.org/Yearbook2001>; see also Richard Norton-Taylor, *When Will UK Bite the Bullet on Gun Traffic?*, Guardian, July 11, 2001, at 15.

10. Bureau of Political Military Affairs, U.S. Dep’t of State, Background Paper, *Can Small Arms and Light Weapons Be Controlled?* (June 2, 2001), available at <http://www.state.gov/t/pm/rls/fs/2001/3768.htm>.

11. See depiction of the Mozambique flag at <http://encarta.msn.com/encnet/refpages/RefMedia.aspx?refid=461533911>.

12. See Watchlist on Children and Armed Conflict, *Issue 1: Afghanistan*, at <http://www.watchlist.org/reports/afghanistan.report.pdf> (Oct. 15, 2001). The Guardian reports: “Afghanistan is the leading centre of unaccounted weapons, with at least 10m in circulation. From 1979 to 1989, the CIA channeled Dollars 2bn in weapons aid to the mojahedin there.” *A World Awash with Guns*, Guardian, July 11, 2001, at 15.

13. See Rajiv Chandrasekaran, *Iraq Arms Civilians as Second Line of Defense Against U.S.*, Wash. Post Foreign Service, February 5, 2003, at A1.

14. *A World Awash with Guns*, *supra* note 12.

and Iraq.¹⁵ Although the “nuclear club” remains thankfully small, a growing number of countries have achieved self-sufficiency in the indigenous production and manufacture of small arms and related ammunition, and many of those countries are even apparently starting to export small arms.¹⁶

Third, small arms and light weapons are shockingly *durable*. Because they have minimal maintenance requirements, small weapons can remain operational for up to twenty years. By contrast, antipersonnel land mines can be used only once. Once triggered, they destroy themselves and become “self-neutralizing.” Yet usable small arms can still be found that date back more than half-a-century to the Second World War.

For that reason alone, small arms users are far less likely to destroy their weapons than they are simply to trade them in for better, more modern weapons. I saw this with my own eyes while visiting a so-called militia “disarmament center” on the border of West and East Timor in late 1999.¹⁷ I was told by the Indonesian military that the Indonesian militias were disarming, and turning in their guns. We went into a small shed, which contained a huge pile of guns of every conceivable variety—crude zip guns, guns with homemade barrels, guns with homemade stocks, you name it. But on closer inspection, I realized that the pile included no modern guns. It dawned on me that what I was standing in was not a disarmament center, but rather a *weapons exchange*. Militiamen were bringing in their homemade zip guns and trading them for AK-47s, earning food coupons and disarmament credit as a premium.

Fourth, small arms are *tradeable*. Guns that are sold legally often wind up in illegal hands. Their fungibility, their portability, their small size, and their widespread availability makes them an alternative black-market global currency for transnational terrorists. Small arms can be bartered for food, livestock, smuggled money, even diamonds. Large shipments can pass undetected across national borders and travel huge distances. In 1997, for example, American agents intercepted an arms shipment of M-2 automatic rifles that had been left in Vietnam by American forces; over a period of twenty years, the agents determined, those rifles had traveled from Ho Chi Minh City to Singapore; to Bremerhaven, Germany; to Long Beach, California; and then to Mexico, where they were finally intercepted.¹⁸

15. *Id.*

16. See Klare, *supra* note 8.

17. See Harold Hongju Koh, Asst. Sec. of State for Democracy, Human Rts. and Labor, On-the-Record Briefing on Recent Trip to Indonesia (Oct. 12, 1999), available at http://www.state.gov/www/policy_remarks/1999/991012_koh_indonesia.html.

18. See Lora Lumpe, *The U.S. Arms Both Sides of Mexico's Drug War*, 61 *Covert Action Q.* 39, 39-46 (Summer 1997), available at <http://www.fas.org/asmp/library/articles/us-mexico.htm>; see also Anne-Marie O'Connor & Jeff Leeds, *U.S. Agents Seize Smuggled Arms*, *L.A. Times*, Mar. 15, 1997, at 19. The intercepted

Fifth, because of these attributes—portability, price, durability, and availability—small arms dramatically fuel and inflame armed conflicts. If the Cold War was the era of nuclear weapons, the post-Cold War years stand as the era of small arms and light weapons.¹⁹ Just as Rwanda was a “low-tech genocide,” committed largely by machete, small arms constitute today’s real weapon of mass destruction. One nongovernmental organization (“NGO”) reports that Africa suffered six million war-related fatalities over the last fifty years, most of these due to small arms and light weapons.²⁰ The U.S. Committee on Refugees reports that we are currently witnessing the largest number of refugees and internally displaced persons since World War II—fourteen million refugees and nineteen million internally displaced—and most of those displaced persons are not fleeing from nuclear weapons but rather men with guns.²¹

The Deputy Secretary-General of the UN, Louise Fréchette, reports that small arms were the only weapons used in forty-six of the forty-nine wars conducted since 1990.²² Three million civilians—almost the equivalent of the population of Ireland—have been killed by small arms since 1990.²³ Not just interstate armed conflicts, but also acts of terrorism, have been conducted with small arms. The people carrying these weapons include the suicide bombers in Haifa and the terrorists of Al-Qaeda. According to recent press accounts, a former Soviet military officer based in the United Arab Emirates runs a weapons trafficking network that supplies the Taliban, Al-Qaeda, Abu Sayyaf in the Philippines, and rebel forces in Africa.²⁴

One recent study has concluded that small arms are implicated in 1,300 deaths a day, a toll that approaches the magnitude of the global AIDS crisis.²⁵ Yet the costs of these weapons runs far deeper than just

shipments contained what were “obviously weapons of war.” *Id.*

19. Patrick Brogan reports that between fifteen and twenty million deaths have occurred in the eighty-five wars since 1945. See Patrick Brogan, *World Conflicts* 644 (1998).

20. The Institute for International Studies (ISS) of South Africa reports that Africa alone has suffered 5,994,000 war-related fatalities in the last fifty years due mostly to small arms and light weapons. See Int’l Info. Programs, *Can Small Arms and Light Weapons Be Controlled?* (June 2, 2001), available at <http://usinfo.state.gov/topical/pol/arms/stories/01060243.htm>.

21. For a comprehensive treatment of the issues and causes affecting displaced persons, see U.S. Committee for Refugees, *World Refugee Survey* (2002), or visit Worldwide Refugee Information, at <http://www.refugees.org/world/worldmain.htm>.

22. Press Release, UN, Deputy Secretary-General Calls for ‘Strongest Possible’ Action Programme from Small Arms Conference (Sept. 7, 2001), available at <http://www.un.org/News/Press/docs/2001/dsgsm137.doc.htm>.

23. Human Rights Watch, Press Release, Major New Campaign Launched Against Small Arms Proliferation (May 11, 1999), available at <http://www.hrw.org/press/1999/may/jansa.htm>.

24. Douglas Farah, *Arrest Aids Pursuit of Weapons Network*, Wash. Post, Feb. 26, 2002, at A1.

25. SAS 2001, *supra* note 8.

the mortality, injury, and psychological trauma of people who are shot. In assessing the social costs imposed by these weapons, one must also take account the public health costs in terms of lost productivity; the crime costs in terms of increases in insurance and the cost of hiring private security firms; the humanitarian costs in terms of displaced persons and injuries to relief personnel; the militarization of refugee camps;²⁶ and the development costs in terms of economic, social, and educational underdevelopment. At a geopolitical level, the costs are felt in terms of threats to regional security, increases in peacekeeping costs, threats to peacekeepers and humanitarian relief workers, and increased security costs to counteract the use of these weapons.²⁷

Sixth, and most striking, until recently, this flood of guns has gone almost entirely *unregulated*. As you know, most arms control efforts since World War II have been devoted to restraining nuclear weapons and weapons of mass destruction, chemical and biological weapons, and those efforts have been salutary. But, until the last decade, there has been no systematic focus on small arms. The task of regulating small arms has been complicated by five main factors. First, a lack of knowledge, which follows from the fact that less than half of the exporting countries publish, or even maintain, data on their small arms exports. Second, the nature of the weapons themselves makes them difficult to track. Third, the large number of producing companies and countries and the black and gray markets for such goods make difficult both supply-side controls and distinguishing licit from illicit trade. Fourth, nearly all such weapons have some legal uses for police work, military purposes, and the like. Fifth and finally, human rights and civil liberties arguments are often made in favor of individuals' rights to possess such weapons under domestic law, as for example, under the Second Amendment of our own Constitution.²⁸

26. As I saw in Kosovo and West Timor, in too many refugee camps there are people with guns. The mere presence of guns turns refugee camps from safe havens into oppressive centers for persecution, as well as for impressing and recruiting child soldiers. See, e.g., Human Rights Watch, *Liberian Refugees in Guinea: Refoulement, Militarization of Camps and Other Protection Concerns* (Nov. 2002), available at www.hrw.org/reports/2002/guinea; see also The Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice*, available at http://www.lchr.org/refugees/reports/ref_rebels_intro.pdf (last visited Apr. 15, 2003).

27. Robert Muggah & Peter Batchelor, "*Development Held Hostage*": *Assessing the Effects of Small Arms on Human Development*, A Preliminary Study of the Socio-Economic Impacts and Development Linkages of Small Arms Proliferation, Availability and Use (United Nations Development Programme, Apr. 2002), available at http://www.undp.org/erd/smallarms/docs/development_held_hostage.pdf.

28. The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. See generally Natalie J. Goldring, *The NRA Goes Global*, 55 Bull. of Atom. Sci. (Jan./Feb. 1999), available at <http://www.bullatomsci.org/issues/1999/jf99/jf99goldring.html> (discussing the NRA's and other pro-gun organizations' attempts to prevent international controls on illicit

Given this complex mix of problems, it would be easy simply to throw up one's hands and say that this is one of the world's problems we cannot solve. Indeed, I must confess that that was my own reaction when I first encountered this issue as Assistant Secretary of State for Human Rights. But during my time in office, two things changed my mind.

First, when I visited places like Colombia, Kosovo, Sierra Leone, and East Timor, I saw that the very promiscuous presence of guns chokes civil society. Guns kill civil society. The pervasive presence of guns perpetuates a culture of societal violence. People simply do not want to invest money in places where everyone carries guns—for proof, just look at Afghanistan, Colombia, and Somalia. Why should people trust ballots when somebody else will trust the rule of the gun? Or take Afghanistan. At the moment, Hamid Karzai is technically President of that country. But in fact, he functions more like First Selectman of Kabul than as a head of the state. His vice-president was assassinated, and he barely avoided assassination himself.²⁹ British and American army personnel are said to be training the vanguard of a new national army. But meanwhile, in northern Afghanistan, the Northern Alliance has committed looting, murder, and beatings against Pashtun civilians.³⁰ General Rashid Dostum, the Deputy Defense Minister, has been blamed with expelling thousands of Pashtuns from their homes, and is widely believed by UN officials to be receiving money and guns from Iran, which happens to be part of President Bush's "Axis of Evil."³¹ So if guns continue to rule in Afghanistan, as they have done for half a century, what hope can there be there for democracy and civil society?

small arms trade, in part by advancing arguments that such controls would circumscribe domestic Second Amendment rights as well as other fundamental rights and national sovereignty). For a sampling of organizations that equate the right to possess weapons with basic human and civil rights, see, for example, the website of the Second Amendment Sisters, at <http://www.sas-aim.org/stand/un.html>, a women's pro-gun organization founded in reaction to the Million Mom March, with the motto, "Self Defense is a basic human right." For another example, see the website of Seniors United Supporting the Second Amendment, a self-styled "philanthropic human rights organization" of U.S. citizens over the age of 50, dedicated "to preserving the Second Amendment and the rights it enshrines," at <http://www.sussa.org/>.

29. Carlotta Gall, *Threats and Responses: Karzai's Progress*, N.Y. Times, Dec. 25, 2002, at A1.

30. Press Release, Human Rights Watch, *Anti-Pashtun Violence Widespread In Afghanistan*, Human Rights News, Mar. 3, 2002, available at <http://www.hrw.org/press/2002/03/afghanistan0303.htm>.

31. Dexter Filkins, *The Anxiety of Postwar Afghans*, N.Y. Times, Mar. 31, 2002, § 4, at 5; see also Carlotta Gall, *Afghan Leader Swears in 5 Deputies with an Eye to Balance*, N.Y. Times, June 28, 2002, at A6 (explaining Hamid Karzai's attempts to negotiate a political alliance with powerful regional-ethnic warlords and Rashid Dostum's ongoing resistance to a centralized Afghan state). For an in-depth and critical account of competing hegemonic influences in postwar Afghanistan, see Michael Ignatieff, *Nation-Building Lite*, N.Y. Times, July 28, 2002, § 6, at 26.

The second event that deeply affected me was meeting with Oscar Arias Sanchez, the former President of Costa Rica, the winner of the Nobel Peace Prize. During what I expected would be a friendly meeting, he turned to me, provocatively, and asked, "If you are from the U.S. Government and you care about human rights, why don't you stop the flow of guns into Latin America?"³² I felt a combination of concern and skepticism, but an unnerving suspicion that he might be right. I answered, "Well, it is difficult," and gave some of the reasons that I have just given to you. He said to me angrily, "Don't we have enough guns? If the U.S. really cares about human rights, why don't you do something about the guns?"

Since that day, his words have weighed upon me. I had to admit that he was right. If we really care about human rights, we have to do something about the guns. But what, precisely, should we do? How do we develop and establish a global system of effective controls on small arms and light weapons?

II. THE APPROACH

With this background, let me turn away from human rights practice for a moment to a broader question of human rights theory. When I was in the government, what most bothered me was the gap between ideas and influence. As a professor I suspected, and as an official I confirmed, a sad paradox: usually, in the world of policymaking, *those with ideas have no influence and those with influence have no ideas*. Even decisionmakers who seek an innovative solution to a problem often have no time to consult the academic literature, and when they do, they find the literature so abstract or impenetrable that it cannot be applied to the problem at hand. But if that is generally true, how do we bridge the gap in this case and move from ideas to influence?

In my academic work before I entered the government, I tried to explain why nations do and do not obey international law. The key to understanding whether nations will obey international law, I have argued, is *transnational legal process*: the process by which public and private actors—namely, nation-states, corporations, international organizations, nongovernmental organizations—interact in a variety of fora to make, interpret, enforce, and ultimately internalize, rules of international law.³³ The key elements of this approach are

32. Indeed, this is the core objective of the Oscar Arias Foundation. The three primary programs of the Arias Foundation are: The Center for Human Progress, The Center for Organized Participation, and The Center for Peace and Reconciliation (including, inter alia, the First Central American Forum on the Proliferation of Light Weapons).

33. For elaboration of this argument, see Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *Hous. L. Rev.* 623 (1998); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 *Yale L.J.* 2391-92 (1994); Harold Hongju Koh, *How Is International Human Rights Law*

“interaction-interpretation-internalization.” Those seeking to create and embed certain human rights principles into international and domestic law should promote transnational *interactions*, that generate legal *interpretations*, that can in turn be *internalized* into the domestic law of even skeptical nation-states.

Applying this approach to developing a global regulatory solution for small arms and light weapons, we can break down the problem into five stages:

- First, knowledge—understanding the nature of the global problem.
- Second, networks—the creation of NGO and civil society networks to start to build a regime to address the problem.³⁴
- Third, developing norms and recruiting committed individuals who are willing to promote those norms and to speak out against the practice. Such individuals would include credible people from outside the government, such as Oscar Arias himself, whom I call “transnational norm entrepreneurs,” and sympathetic people from within governments, whom I call “governmental norm sponsors.”³⁵
- Fourth, “horizontal process,” a short-hand term for legal process that occurs at an intergovernmental level. This horizontal process can transpire either at a formal intergovernmental level or at informal state-to-state gatherings, anywhere that the governments of say, the United States, the United Kingdom, France, Russia, and China, for example, might all gather to talk about arms control or the development of international law. The goal, as I have specified elsewhere, is creating a law-declaring forum that can operate at a global level to declare an international norm against the illicit sale, transfer, and use of small arms and light weapons, as well as building a broader interpretive community that can construe that norm in a variety of settings.³⁶
- The fifth and final step I call “vertical process,” the process whereby rules negotiated among governments at a horizontal,

Enforced?, 74 Ind. L.J. 1397 (1999); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2358-75 (1991); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997).

34. For probing discussions of how such transnational networks are formed and influence human rights policy, see, for example, Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998); Annelise Riles, *The Network Inside Out* (2000) (discussing the role of Fijian participants as part of the global network that planned and executed the Beijing Women's conference); see also *Transnational Social Movements and Global Politics: Solidarity Beyond the State* (Jackie Smith et al., eds., 1997).

35. Koh, *Bringing International Law Home*, *supra* note 33, at 647-48.

36. *Id.* at 649-51.

intergovernmental level and interpreted through the interaction of transnational actors in these law-declaring fora are brought down vertically into the domestic law of each participating country—"brought home" if you will—and internalized into the domestic statutes, executive practice, and judicial systems of those participating nations.

That, in a nutshell, is how, in my view, international law becomes law that people actually obey: by moving from knowledge, to networks, to norms, to horizontal process, and to vertical process. But if these are the steps toward global regime-building, how far have we actually proceeded up this ladder with regard to the global regulation of small arms and light weapons?

To start with the question of knowledge: why did we know so little about the small arms problem until the last ten years?³⁷ The short answer is that during the Cold War, a huge global arms trade existed, but most of it involved conventional weapons of a very large size.³⁸ Both the United States and the Soviet Union made large-scale conventional arms transfers to "client states." At the same time, a very large small arms trade was also occurring, but like a hill hidden under the floodwaters, it was dwarfed and overshadowed by this huge trade in larger conventional arms. After the Cold War, both the supply and demand side of the large-arms trade diminished: one of the two major arms suppliers, the Soviet Union, effectively went out of business, and its political rationale for providing larger weapons to countries in Central America and Africa disappeared as local wars ended, leaving in their wake huge masses of durable weapons. At the same time, some of the major producers of small arms, like Russia and other countries of the former Soviet Union, continued to manufacture AK-47s at their old levels, creating a dramatic oversupply. So as the floodwaters started to diminish, and conventional arms sales started to drop, suddenly the extent of the ongoing small arms trade became more visible.

Most impressive, in the early 1990s, a massive oversupply emerged. Existing guns were not being destroyed, even while new and more sophisticated guns were being developed. The vicious fighting that took place during the 1990s in Rwanda, in Bosnia, and Kosovo was in many ways supported by these grotesque gun oversupplies.

37. In understanding this question, I am greatly indebted to Edward J. Laurance of Monterey Institute of International Studies for his excellent unpublished paper, *The History of the Global Effort to Regulate Small Arms*, presented at SSRC Small Arms Workshop, Washington, D.C. (Feb. 2002) (on file with the Fordham Law Review).

38. For a definitive treatment of arms control of conventional weapons during the Cold War, see Edward J. Laurance, *The International Arms Trade* (1992).

Only two global regimes exist for dealing with these problems. The first is the UN Register of Conventional Arms,³⁹ which does not record the number of small arms. The second is the so-called Wassenaar Arrangement, a club of 33 exporting states that agrees to consult on voluntary transfers of arms, but which functions opaquely, with no formal clout and little enforcement power.⁴⁰

But in 1993—only ten years ago—academic articles started to appear about the small arms trade, and academic conferences began to spotlight the topic.⁴¹ The academics pushed to get the UN interested, particularly the UN Institute for Disarmament Research.⁴² Research NGOs in several supplying countries also took up this issue—including the Arms Division of Human Rights Watch, the Bonn International Center for Conversion, British American Security Information Council (“BASIC”), International Alert, and the Institute for Security Studies in South Africa. As often happens, once research NGOs get involved, activist NGOs begin to get involved as well. The international gun control lobby soon linked up with the domestic gun control lobbies in leading countries.⁴³

And then, as with the Landmines treaty, transnational norm entrepreneurs entered the picture and started to create action networks. One of the leaders of this movement was my interlocutor, Oscar Arias, who gathered eighteen Nobel Prize Winners to create an International Code of Conduct with regard to arms transfers.⁴⁴ Finally, the transnational activists developed their own network, the

39. The United States was among the original sponsors of the UN resolution establishing the UN Register of Conventional Arms, and annually submits relevant information to the Register, along with more than 90 other countries. A number of countries have proposed complementary regional registers that would explicitly enumerate small arms, for example in Africa, where small arms are the primary weapons of war. See UN Register of Conventional Weapons, available at <http://disarmament.un.org/cab/register.html> (last visited Apr. 9, 2003).

40. See Index of/docs, available at <http://www.wassenaar.org/docs/> (last visited Apr. 15, 2003). To promote more effective controls, the Wassenaar Arrangement is exploring ways to increase transparency in the transfer of conventional arms.

41. The first major academic conference, held at the American Academy of Arts and Sciences in 1994, was reported in *Lethal Commerce: The Global Trade in Small Arms and Light Weapons* 33 (Jeffrey Boutwell et al., eds., 1995).

42. For influential publications by the UNIDR on this topic, see, for example, Swadesh Rana, *Small Arms and Intra-State Conflicts* (1995) and Aaron Karp, *Small Arms Control: The Need for Coordination*, 2 *Disarmament Forum* 5 (2000).

43. In the United States, for example, a leading role in promoting global small arms controls has been played by the Brady Center to Prevent Gun Violence, headed by Sarah Brady and James Brady, former presidential Press Secretary, who was disabled by a handgun in a failed assassination attempt upon President Reagan. See Brady Center, at <http://www.bradycampaign.org/facts/index.asp>.

44. See The Commission of Nobel Peace Laureates' Initiative to Control Arms Transfer, available at <http://www.arias.or.cr/Eindice.htm>. To date, this campaign has been endorsed by eighteen individuals and organizations who have been awarded the Nobel Peace Prize. A coalition of NGOs has also drafted an international convention based on the principles laid out by the Nobel laureates.

International Action Network on Small Arms (“IANSA”), which has become the biggest international network that has existed on any issue since the global landmines campaign. It is a group of over 300 NGOs, which currently include faith-based groups, educational groups, human rights groups, social development groups, public health and medical groups, democracy groups, justice groups, conflict-resolution groups, and anti-gun lobbies.⁴⁵

As I have argued elsewhere, networks can achieve only so much by exerting outside pressure. To be genuinely effective, they need someone sympathetic, *inside* the horizontal intergovernmental process, who can harness their pressure and champion their cause. Into this picture finally entered a governmental norm sponsor, the Secretary-General of the United Nations, who in his 1995 “Call to Action,” encouraged the international community to turn its focus on what he called the weapons “that are actually killing people in the hundreds of thousands.”⁴⁶ In response, UN advisory teams and experts began to convene to develop expertise on the issue and to strategize about potential multilateral solutions. Kofi Annan, the current UN Secretary-General, heightened that commitment in his “We The Peoples” Report issued in conjunction with the September 2000 Millennium summit, when he called for a worldwide effort to prevent war by, *inter alia*, reducing “[the] illicit transfers of weapons, money, or natural resources” that help fuel ethnic and territorial conflicts.⁴⁷

Critically important was the conceptual move that converted small arms from a back-burner arms control issue into a pressing human rights and development issue. Early on, the North and South divided on how to treat this question. The southern countries did not want anyone interfering with their small arms, understandably reasoning that because they could not afford nuclear weapons, rough equity demanded that the arms they could afford should flow relatively unregulated. If the big countries could have nuclear weapons, the small countries reasoned, they ought to be allowed to have their small arms. But once the United Nations and NGOs in these countries started to make the factual case that the prevalence of small arms was a direct cause of the destruction of economic, human rights, and rule of law structures within these countries, key leaders within those countries acquired an incentive to band together with their developed-country counterparts to begin discussing a global regulatory process.

45. For the history and membership of this network, see the IANSA home page at www.iansa.org.

46. *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. Doc. A/50/60-S/1995/1 (Jan. 3, 1995), available at <http://www.un.org/Docs/SG/agsupp.html>.

47. Kofi A. Annan, “*We the Peoples*”: *The Role of the United Nations in the 21st Century*, at 3, available at www.un.org/millennium/sg/report/ (last visited Apr. 9, 2003).

These negotiations began to give rise to the negotiation and conclusion of regional and global measures at the intergovernmental level. In 1997, the United States and twenty-seven other Western Hemisphere nations concluded the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, the first international agreement designed to prevent, combat, and eradicate illicit trafficking in firearms, ammunition, and explosives.⁴⁸ The OAS Convention gave impetus to the United Nations' Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, which was designed to build upon and globalize the standards incorporated in the regional Convention.⁴⁹ In 1998, the fifteen EU nations entered into a political commitment to frame a code of conduct to govern small arms transfers.⁵⁰ Later that year, twenty-one nations met in Oslo, Norway for the first intergovernmental small arms conference. The Oslo Final Document, "Elements of a Common Understanding," called for global support of eleven ongoing international regulatory efforts. Shortly thereafter, about ninety countries plus numerous NGOs met in Brussels for a conference on "Sustainable Disarmament for Sustainable Development," which issued a call to action seeking an integrated approach to disarmament and development.⁵¹ At about the same time, sixteen member states of the Economic Community of West African States ("ECOWAS"), led by Alpha Oumar Konare, then-President of Mali, declared a three-year renewable moratorium on the production, import and export of light weapons in the West African region.⁵² At the December 1999 U.S.-E.U. summit in Washington, the United States and the European Union released a statement of "Common Principles on Small Arms and Light

48. See Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Nov. 1997, Treaty Source (signed by the United States and 28 other OAS member states), available at <http://www.iansa.org/documents/regional/reg5.htm>.

49. See G.A. Res. 55/255, UN GAOR, 55th Sess. (2001), available at http://untreaty.un.org/English/TreatyEvent2002/Texts/English/Firearms_11.pdf

50. See EU Joint Action of 17 Dec. 1998, 1999/34 (1999) (adopted by the Council on the basis of Article J.3 of the Treaty on the European Union's Contribution to combating the destabilizing accumulation and spread of small arms and light weapons), available at <http://www.iansa.org/documents/regional/EUjoint.pdf>.

51. See The Oslo Meeting on Small Arms, An International Agenda on Small Arms and Light Weapons: Elements of a Common Understanding (July 13-14, 1998), available at http://www.iansa.org/documents/regional/2000/jan_00/oslomeeting.htm; see also Sustainable Disarmament for Sustainable Development, The Brussels Call for Action (Oct. 13, 1998), available at <http://www.unesco.org/cpp/uk/declarations/brussels.pdf>.

52. As a follow-up to that meeting, the United Nations African Institute for the Prevention of Crime and the Treatment of Offenders ("UNAFRI") has begun to survey the small arms legislation, regulations, and law enforcement capacities of various African countries.

Weapons,” in which they pledged to observe the “highest standards of restraint” in their small arms export policies, and took further steps to harmonize their export practices and policies.⁵³

These conferences, followed by a series of UN resolutions, created the impetus for the first United Nations Global Conference on Illicit Trade in Small Arms and Light Weapons in all its aspects, which finally took place in July 2001. The Conference marked the Bush Administration’s first engagement with this issue. As in so much recent multilateral activity—the International Criminal Court, the Kyoto Protocol, its policies toward Iraq—the Administration’s participation engendered more enmity than progress. There was some hopeful progress: a consensus UN program of action was finally developed, which enumerated the humanitarian and socio-developmental consequences associated both with illicit weapons trade and weapons accumulation.⁵⁴ Some global norms were articulated to guide the actions not just of states, but also of intergovernmental organizations, NGOs and individual experts in addressing the problems of small arms proliferation, availability and misuse. The participants made halting commitments toward implementing regulatory measures at a national, regional and global level. But the norms discussed were not binding and the norms themselves were underdeveloped. No legally binding measures were adopted, no statements were made regarding transparency or civilian possession of firearms, and the role of nonstate actors both in creating and curing the problem was not clearly elaborated. Most troubling, all discussion still took place within an arms control, rather than a human rights, framework, giving participating states too much freedom to place these issues on the back burner, while citing other more pressing priorities.⁵⁵

The most memorable speech at the UN conference was delivered by U.S. Undersecretary for Arms Control, John Bolton, who declared what became quickly known in the small arms trade as “Bolton’s Do Nots.” After saying that the United States supported the restraint on light weapons, he qualified that support by declaring: “[1] We do not support measures that would constrain legal trade. . . . [2] [we] do not support the promotion of international advocacy. . . . [3] [w]e do not support measures limiting trade in SA/LW [small arms and light weapons] solely to governments. . . . [4] [t]he United States will not

53. See U.S.-EU Statement of Common Principles on Small Arms and Light Weapons, 17 Dec. 1999, available at http://www.iansa.org/documents/regional/dec_99/eu_statement_dec17_99pdf.pdf.

54. See Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (July 9-20, 2001), available at <http://disarmament.un.org/cab/smallarms/>.

55. The strong arms control focus and weak normative framework is evident in, for example, the Programme of Action that state participants in the UN Conference adopted, available on-line at <http://disarmament.un.org/update/jun2001/article2.htm>.

support a mandatory Review Conference,” and—most amazing to a student of American constitutional law—[5] “[t]he United States will not join consensus on a final document that contains measures abrogating the Constitutional right to bear arms.”⁵⁶ This constitutional reference was needlessly provocative. For the conference documents had made amply clear that no treaty proposal would affect legal gun ownership nor were they designed to affect any national gun possession laws.⁵⁷

Senator Dianne Feinstein quickly challenged Undersecretary Bolton’s view, pointing out that the Second Amendment had never been used to overturn any American federal gun law, much less a treaty, and even less a treaty negotiating position. Indeed, she noted, in 1939, a man who had been arrested for taking a sawed-off shotgun across state lines challenged the federal law that prompted his conviction under the Second Amendment, and lost.⁵⁸ Senator

56. John R. Bolton, Statement to the Plenary Session of the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (July 9, 2001), available at http://www.un.int/usa/01_104.htm.

57. In invoking the Second Amendment, Undersecretary Bolton talked proudly of the U.S. cultural tradition of personal gun ownership, which encouraged the then Pakistani Foreign Minister to echo that those in Pakistan also had a “proud cultural legacy” of carrying firearms. Editorial, *Balt. Sun*, July 12, 2001, at 16A.

58. In *United States v. Miller*, 307 U.S. 174, 178 (1939), the U.S. Supreme Court ruled that the “obvious purpose” of the Second Amendment was to “assure the continuation and render possible the effectiveness” of the state militia. Since *Miller*, the Supreme Court upheld against Second Amendment challenge New Jersey’s strict gun control law in 1969 and the federal law banning felons from possessing guns in 1980. In the early 1980s, the Supreme Court declined review of a Second Amendment challenge to an ordinance of the town of Morton Grove, Illinois, which banned handguns (making certain exceptions for law enforcement, the military, and collectors). The Illinois Supreme Court and the Court of Appeals for the Seventh Circuit ruled that not only was the ordinance valid, but there was no individual right to keep and bear arms under the Second Amendment. *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). Courts have now upheld federal laws regulating the private possession of: short-barreled shotguns, *see Miller*, 307 U.S. at 174; machine guns, *see, e.g., United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); and assault weapons, *see San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996). They have also upheld laws prohibiting the possession of firearms: by felons, *see, e.g., United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974); *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); by persons convicted of domestic violence offenses, *see, e.g., Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999); and by persons subject to restraining orders, *see, e.g., United States v. Baker*, 197 F.3d 211 (6th Cir. 1999); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *United States v. Spruill*, 61 F. Supp. 2d 587 (W.D. Tex. 1999). Courts have also upheld extensive federal regulation of firearms dealers. *See United States v. Decker*, 446 F.2d 164 (8th Cir. 1971); *cf. Cody v. United States*, 460 F.2d 34 (8th Cir. 1972) (upholding requirement that gun purchasers accurately answer certain questions prior to purchase). For that reason, even the National Rifle Association has not challenged a U.S. gun law on Second Amendment grounds in several years. For a more complete listing of articles

Feinstein concluded: "If a sawed-off shotgun is not protected by the Second Amendment, why does the Administration seem to feel that the Second Amendment protects the international trafficking of shoulder-launched missiles?"⁵⁹

Even under recent, revisionist readings of the Second Amendment, which give greater weight to the individual's right to bear arms, including those by Professors Laurence Tribe of Harvard and my colleague Akhil Reed Amar of Yale, reasonable regulations on personal ownership would not be struck down under the Second Amendment.⁶⁰ Thus, the United States could easily engage the treaty negotiating process without committing itself to a regime that would affront legitimate Second Amendment concerns. In short, the 2001 UN Conference presents a dramatic missed opportunity, both for the emerging transnational legal process of global small arms regulation and for the United States as a potential leader of that process.⁶¹

III. THINKING ABOUT A SOLUTION

If the last ten years have now produced both knowledge and a network, that leaves open three questions: First, what norms should we now develop? Second, what "horizontal process" should we use to develop and internationalize those norms? Third, how should we envision a complementary "vertical process," whereby the global

discussing the Second Amendment, see David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99, 101 n.9 (1999).

59. Press Release, Senator Dianne Feinstein, Statement on the Bush Administration's Opposition to a UN Accord to Stem the Flow of Guns Feeding International Terrorism and Drug Wars (July 10, 2001), available at <http://www.senate.gov/~feinstein/releases01/sarms2.htm>.

60. See Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. Times, Oct. 28, 1999, at A31 ("The right to bear arms is certainly subject to reasonable regulation in the interest of public safety. Laws that ban certain types of weapons, that require safety devices on others and that otherwise impose strict controls on guns can pass Constitutional scrutiny."); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 Utah L. Rev. 889 (2001); see also Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L.J. 1139 (1996); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994). Predictably, a substantial number of legal scholars and historians dispute the revisionist account. See, e.g., Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 Cornell L. Rev. 879 (1996).

61. For the full report of the UN Conference, see Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, (July 9-20, 2001), available at http://disarmament.un.org/cab/smallarms/files/aconf192_15.pdf.

norms that emerge from the horizontal process can become internalized into domestic legal systems?

A. Norms and Horizontal Process

Here again, the successful global landmines campaign teaches important lessons. The challenge here, as there, is how best to generate a law-declaring forum and to foster an interpretive community capable of announcing and clarifying a clear set of norms.

In the landmines case, the U.S. government initially chose to pursue its multilateral objectives through UN-sponsored efforts conducted via the so-called "Geneva Process." In May 1996, the Review Conference for the United Nations Convention on Conventional Weapons ("Conventional Weapons Conference") developed a revised Protocol II to the 1980 Convention.⁶² The sixty-one-member UN Conference on Disarmament, based in Geneva, began considering limitations on the use of landmines in late 1996. The U.S. government preferred the Geneva Approach to others because as participants in this process, major exporters and users of mines, such as Russia and China, would be bound by the outcome of the Conventional Weapons Conference.⁶³ But the Conventional Weapons Conference, run on a consensus model, broke down when the Mexican government objected to the consideration of the landmine issue in the Geneva forum.⁶⁴ Frustrated with what they perceived to be a lack of progress toward a total ban through the UN-sponsored efforts, NGOs and a number of mid-sized countries switched course and created a new law-declaring forum.⁶⁵ They stepped outside established organizational structures and adopted an alternative framework for generating a convention, which became known as the "Ottawa Process." Thus, when the human rights activists who made up the global landmines coalition realized that they were not going to get a treaty through the conservative UN process, they shifted to another horizontal process, which transpired in a forum of their own design.⁶⁶ As Jody Williams of the International Coalition to Ban Landmines, put it in her Nobel Peace Prize acceptance speech: "[W]e invited them to a meeting and they actually came."⁶⁷ More than seventy nations ultimately attended

62. The Conventional Weapons Conference agreed to ban plastic and other non-detectable mines and to use only self-destructing mines outside marked areas. See *Landmines. Dual Track*, Economist, Jan. 25-31, 1997, at 42.

63. See Frances Williams, *Momentum Grows for UN Landmine Ban Talks*, Fin. Times, Jan. 22, 1997, at 4.

64. See *Mexico Blocks Conclave on World Land-Mine Ban*, Wash. Post, June 13, 1997, at A33.

65. See Jessica Mathews, *The New, Private Order*, Wash. Post, Jan. 21, 1997, at A11 (detailing the growth of the new conference).

66. For discussion of how the Ottawa Process unfolded, see Koh, *Bringing International Law Home*, *supra* note 33, at 658-63.

67. See Jody Williams, Nobel Lecture (Dec. 10, 1997), available at

the October 1996 meeting, sponsored by the Canadian government, and Canadian Foreign Minister Lloyd Axworthy emerged as a leading cooperating governmental norm entrepreneur.⁶⁸ Once the Ottawa Process was fully engaged, it was only a matter of time before the flat-ban Land Mines Convention ultimately emerged.

Only time will tell whether the small arms negotiations will come to fruition in the UN Conference or in an alternative setting. At this point, either the nascent Oslo process or the private-public Brussels process may yet overtake the UN Conference framework. Moreover, the Nobel Peace Laureates' Initiative, headed by Oscar Arias, has drafted a set of principles to govern arms transfers that goes much further than do the statements of the UN Conference.⁶⁹ Still, it seems premature to conclude that the UN Conference route has reached a stalemate or exhausted its effectiveness. What does seem clear, however, is that an interpretive community has begun to form, comprised of both governmental and nongovernmental entities, that has begun actively to debate the contours of the norms at issue. My own view is that it is far less important which venue this ultimately happens in—or to put it another way, which horizontal process, standing or ad hoc, is mobilized—than that the horizontal process unfold within a setting that combines arms control considerations with broader human rights and development concerns.⁷⁰

As important, the norms developed in that horizontal setting should be bright-line norms. One of the major accomplishments of the Land Mines Convention was to focus on a clear, bright-line legal rule that ordinary people could understand, the so-called “flat ban” against the production and use of antipersonnel landmines.⁷¹ But the regulation of small arms presents a far more difficult problem. For we are a long way from persuading governments to accept a flat ban on the trade of *legal* arms. Given that small arms will continue to be lawfully traded, what kind of enforceable norms can be developed in the relevant law-

<http://www.icbl.org/resources/jodynobel.html>.

68. See Dana Priest, *Mine Decision Boosts Clinton-Military Relations*, Wash. Post, Sept. 21, 1997, at A22 (explaining how Axworthy helped Canada take the lead in the campaign to ban land mines).

69. See *supra* note 32.

70. Significantly, much of the most recent activity has transpired not in a human rights framework, but in a global crime control setting. The UN Protocol was drafted in the UN Crime Commission in Vienna as part of the negotiations to conclude the Convention Against Transnational Organized Crime.

71. The full text of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction is available at <http://www.icbl.org/treaty/treatyenglish.html> (last updated Feb. 29, 2000). See Monica Schurtman, *The International Campaign to Ban Landmines and the Ottawa Landmines Treaty: Applications to the Movement to Restrict Small Arms and Light Weapons Transfers* (Feb. 6-7, 2002) (unpublished paper prepared for the SSRC Workshop on Law and International Relations, on file with the Fordham Law Review).

declaring forum? To be viable, a global regime should incorporate at least three elements.

First, a marking and tracing regime must be implemented. The United States is now the major supplier of small arms in the world,⁷² yet the United States and its allies do not trace their newly manufactured weapons in any consistent way. Most governments do, however, mark their weapons and record the marks. Thus, one of the most significant outcomes of the UN Conference was the establishment of a UN Committee to develop a regime that could develop international rules for collating and making available all global marking and tracing information, thus allowing better understanding of how lawfully manufactured weapons are diverted to illicit uses. The UN Resolution establishing the UN Register of Conventional Arms could be modified so that the United States, and the ninety other nations that annually submit relevant information to the Register, could be required to submit information about their small arms production. In addition, a number of countries have proposed complementary regional registers that would explicitly enumerate small arms in areas such as Africa, where small arms remain the primary weapons of war. In due course, a marking and tracing norm could be embedded in a treaty: Article VI of the OAS Convention, for example, calls for marking at the time of manufacture, importation, and confiscation of firearms, grenades and other covered weapons, and Articles XI and XIII further require various forms of record-keeping and information exchange.⁷³

Second, transparency and monitoring of these processes by international NGOs are critical.⁷⁴ The Helsinki Final Act and the creation of an international NGO network to monitor its "human dimension" provisions demonstrated the power of international NGO monitoring as a way of promoting governmental compliance with inconvenient norms.⁷⁵

Here, the most pertinent recent example may be the unexpected rise of the global anticorruption movement. In the early '70s, when the Lockheed scandal broke, the conventional wisdom was that corruption was an international way of life that could never be

72. See, e.g., U.S. "Supplier of Choice" for Weapons Sales, Report of the Arms Trade Resource Center (Aug. 20, 2001), available at <http://www.worldpolicy.org/projects/arms/updates/082001.html>.

73. See General Assembly, Twenty-Fourth Special Session, Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (Nov. 13, 1997), available at <http://www.iansa.org/documents/regional/reg5.htm>.

74. For an overview of NGO concerns and strategizing about small arms monitoring, see *Small Arms and the Humanitarian Community: Developing a Strategy for Action*, Report of the Proceedings of the Nairobi Conference (Nov. 18-20, 2001).

75. See generally William Korey, *The Promises We Keep: Human Rights, the Helsinki Process and American Foreign Policy* (1993).

affected by governments, much less transnational corporations, NGOs or intergovernmental organizations. Yet thirty years later, we see a rapidly expanding global good-governance movement, marked by the enactment of U.S. and other national foreign corrupt practices laws,⁷⁶ an OECD Anti-Bribery Convention,⁷⁷ and perhaps most significant, Transparency International⁷⁸—a transnational network of NGOs—and numerous intergovernmental instruments and declarations dedicated to targeting and eliminating corruption as a way of life.⁷⁹ What made the global anticorruption movement successful, and a model that could be followed here, was that it promoted a “race to the top” on anticorruption by forging a transnational network of private and public entities, including multinational corporations, dedicated both to self-regulation and to the monitoring of rogue actors.

Third and most important, the horizontal process should produce a “transfer ban” that would prevent legal arms from being transferred either to illicit users or to recognized human rights violators.⁸⁰ Although this would not be easy to do, under our own U.S. domestic arms law, there are already restrictions on making transfers or licenses to certain gross violators of human rights who have been so certified by, for example, the Bureau of Political-Military Affairs at the State Department, congressional staffs, and my own former bureau at the State Department, the Bureau of Democracy, Human Rights and Labor.⁸¹ There is an array of well-chronicled methods by which small

76. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

77. The text and related documents of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions are available at <http://www.oecd.org/pdf/M00007000/M00007323.pdf> (Apr. 8, 1998).

78. The Transparency International website can be found at <http://www.transparency.org/>.

79. Examples include: the Lima Declaration, a blueprint for global, multi-sector action against corruption, formulated at the eighth International Anti-Corruption Conference held in Lima, Peru in September 1997; the Durban Commitment (1999), a reaffirmation of the principles expressed in the Lima Declaration and enumeration of specific courses of action in the fight against corruption; and Principles to Combat Corruption in African Countries, a statement produced by African government ministers at a Global Coalition for Africa meeting in 1999. For a list of other African anti-corruption initiatives and declarations, see the website of the 10th International Anti-Corruption Conference, available at <http://www.10iacc.org/download/workshops/cs52a.pdf>.

80. See Barbara Frey, *The Availability and Misuse of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms* (Feb. 6-7, 2002) (unpublished paper prepared for the SSRC Workshop on Law and International Relations, on file with the Fordham Law Review) (arguing for norm requiring states to take effective measures to prevent the transfer of small arms to human rights abusers).

81. For a list of links to specific provisions within U.S. law (and international agreements) that place restrictions on U.S. “security assistance,” including arms transfers, see Federation of American Scientists, Arms Sales Monitoring Project, United States Arms Transfer Eligibility Criteria Index Page, available at <http://fas.org/asmf/campaigns/legislationindex.html> (last visited April 10, 2003). For links to bills and public laws relating to arms transfers and foreign military assistance,

arms are diverted from legal to illegal markets, including falsification of documents, diversion from surplus, illegal resale, purchases by surrogates, and illegal sales by dealers and brokers.⁸² Each of these forms of illegal transfers needs to be separately targeted, and the UN Conference Programme of Action singles out some twenty-five local measures that could be taken to do so. For in the end, the only meaningful mechanism to regulate illicit transfers is stronger *domestic* regulation.⁸³

B. Vertical Process: Internalization

The greatest challenge we face in this process is to create a legal framework that combines a treaty framework built around clear norms with concrete, conforming domestic obligations to be executed by the participating nations. The UN Conference laid out a list of measures to be implemented by nation-states at the national level, ranging from enacting laws regulating small arms production to preventing the use of small arms against children in armed conflict.⁸⁴

Yet as important as specific domestic legal regulatory enactments is the broader strategy for internalization of the emerging global norms. As I have noted above, my broader focus, both as an academic and human rights advocate and policymaker, has been upon developing and promoting strategies of internalizations that help to “bring international law home.”⁸⁵ If a norm against illicit transfers can be

see Federation of American Scientists, Arms Sales Monitoring Project, Bills and Public Laws, available at <http://fas.org/asmp/resources/billlaws.html> (last visited Apr. 10, 2003). And for links to fact sheets, testimony, and reports relating to U.S. arms export policy, see Federation of American Scientists, Arms Sales Monitoring Project, Government Documents, available at http://www.fas.org/asmp/resources/govt_docs.htm (last visited Apr. 10, 2003). The website of the Bureau of Democracy, Human Rights and Labor can be found at <http://www.state.gov/g/drl/>.

82. See, e.g., Human Rights Watch, No Questions Asked: The Eastern Europe Arms Pipeline to Liberia (2001).

83. See generally Wendy Cukier, *Combating the Illicit Trade in Small Arms and Light Weapons: Strengthening Domestic Regulations* (March 2001), available at http://www.international-alert.org/pdf/pubsec/btb_brf7.pdf.

84. See Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (July 9-20, 2001), available at <http://disarmament.un.org/cab/smallarms/>.

85. See Koh, *Bringing International Law Home*, *supra* note 33. In the book that I am completing, tentatively entitled “Why Nations Obey: A Theory of Compliance with International Law,” I argue that international law norms can be internalized into domestic legal systems through a variety of legal, political and social channels. For four recent examples, see Brief Amici Curiae of Mary Robinson et. al, *Lawrence v. Texas*, 123 S.Ct. 1512 (2003) (No. 02-102) (supporting the overturning of *Bowers v. Hardwick* by urging judicial internalization of an emerging international norm through a specific constitutional channel: the concept of “ordered liberty” in due process law); Harold Hongju Koh, *The 2001 Richard Childress Memorial Lecture: A United States Human Rights Policy for the 21st Century*, 46 St. Louis U. L.J. 293 (2002) (arguing for a U.S. human rights policy of norm-internalization); Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 Case W. Res.

internationalized through the emerging horizontal process described above, by what techniques can we further promote the legal, political and social internalization of that emerging international norm into domestic legal systems?

Here the OAS Convention provides the best model. The Inter-American Convention, *inter alia*, requires each state: to establish a national firearms control system and a register of manufacturers, traders, importers, and exporters of these commodities; to establish a national body to interact with other regional states and a regional organization advisory committee; to standardize national laws and procedures with member states of regional organizations; and to control effectively borders and ports. Other key provisions include requiring an effective licensing or authorization system for the import, export, and in-transit movement of firearms,⁸⁶ an obligation to mark firearms indelibly at the time of manufacture and import to help track the sources of illicit guns, and requiring states to criminalize the illicit manufacturing of and illicit trafficking in firearms.

These national approaches should be supplemented with a private/public network that expressly targets arms brokering and financial transfers. Here too, a useful transnational legal process model has emerged in the area of conflict diamonds. As we have recently learned, one of the major sources of funding for Al-Qaeda is diamonds, which have been a major source of the conflict in Sierra Leone. Recently, a group of companies and governments gathered in the "Kimberley Process," in Kimberley, South Africa, to negotiate the terms of a diamond control regime that would track every diamond export, import, and re-export transaction through monitoring, audited chains of custody, criminal penalties, tamper-proof packaging, and standardized record-keeping. At this writing, the United States, the world's largest importer of diamond jewelry, has not yet accepted the Kimberley Process's proposed documentation and record-keeping requirements. Yet Congress has been considering versions of the Clean Diamonds Act, a diamond import bill supported by the diamond industry and human rights, humanitarian and religious groups, which would prohibit the import of diamonds from countries that have not met Kimberley standards. This is a bill the United States government clearly needs to support.⁸⁷

J. Int'l L. 258 (2003); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085 (2002) (arguing for internalization of international standards regarding the execution of persons with mental retardation).

86. The U.S. Bureau of Alcohol, Tobacco, and Firearms and the United States Customs Service, for example, have engaged in interdiction and investigative efforts along the southwest border of the United States, and U.S. attorneys in that region have increased their efforts to prosecute arms traffickers caught attempting to smuggle firearms into the United States.

87. See Clean Diamond Trade Act, S. 2027, 107th Cong. (2002). See generally

Other potential enforcers of the norms of the small arms regime include corporate actors, who should be enlisted in the internal monitoring of private security companies whom they employ. In Guatemala, for example, the Chamber of Industry reports that private security companies employ more than twice as many security agents as the number of civilian police officers in that country. Police in El Salvador report that approximately twenty-five percent of the weapons confiscated nationwide are taken from private security agents.⁸⁸ In recent years, a number of innovative human rights partnerships have arisen among governments, businesses and civil society, which have sought to internalize human rights obedience into corporate behavior by suggesting minimum corporate standards for human rights performance in the day-to-day conduct of large multinational corporations.⁸⁹ During my time at the State Department, we applied this approach to work with corporations, other governments, and the NGO community to improve human rights performance in the oil, mining and energy sectors. In particular, we at the State Department worked with the government of the United Kingdom, human rights and corporate responsibility groups and large American and British companies to develop Voluntary Principles on Security and Human Rights to govern oil company security arrangements in such key developing countries as Colombia, Indonesia and Nigeria. The objective of these principles was to provide companies with practical guidance on how to prevent human rights violations in dangerous environments. These principles could easily be extended and globalized to include as corporate

Holly Burkhalter, *Blood on the Diamonds*, Wash. Post, Nov. 6, 2001, at A23; Alan Cowell, *40 Nations in Accord on 'Conflict Diamonds'*, N.Y. Times, Nov. 6, 2002, at A6. No major action has been taken on the Congressional act since March 2002. See <http://www.thomas.loc.gov>. In January 2003, Physicians for Human Rights ("PHR") published an update on the Kimberley Process Certification Scheme, available at http://www/phrusa.org/campaigns/sierra_leone/update_010303.html (last visited Mar. 31, 2003). According to Burkhalter, the PHR U.S. Policy Director, the completed agreement is considered by activists to be a "half full glass." In retrospect, she concludes the "US delegation to the talks played a decidedly unhelpful role on the questions that mattered most to the NGOs—independent monitoring and a strong Kimberley Secretariat." *Id.*

88. See William Godnick, *Tackling the Illicit Trade in Small Arms and Light Weapons* (Feb. 6-7, 2002) (unpublished paper prepared for the SSRC Workshop on Law and International Relations, on file with the Fordham Law Review).

89. The two best known of these are the Global Sullivan Principles, see Leon H. Sullivan, *Moving Mountains: The Principles and Purposes of Leon Sullivan* 106-12 (1998), and UN Secretary-General Kofi Annan's Global Compact initiative. With respect to human rights, the Secretary-General's Global Compact asks world business to: "support and respect the protection of international human rights within their sphere of influence"; and "to make sure their own corporations are not complicit in human rights abuses." The Global Compact: The Nine Principles, available at <http://www.unglobalcompact.org>.

security requirements the monitoring of small arms held and used abroad in a corporation's name by private security agents.⁹⁰

Yet another factor contributing to the ease of illicit arms transfers in the western hemisphere has been the presence of financial and tax havens throughout the Caribbean, which facilitate money-laundering that supports arms brokering and large-scale weapons trade. Article XII of the Inter-American Convention⁹¹ borrows from the information disclosure provisions of international tax treaties and usefully stipulates that States Parties should exchange information on "techniques, practices, and legislation to combat money laundering related to illicit manufacturing of and trafficking in firearms."⁹²

More fundamentally, however, to fully effectuate the goals of the small arms regime, the United States must focus on supply-side solutions and destination controls. Supply-side controls mean destroying existing stockpiles of small weapons. Through bilateral and multilateral diplomacy, our government should start a process of promoting exchanges and destruction of existing small weapons caches.⁹³ One promising precedent occurred in September, 2000, when American, Albanian, Norwegian and German diplomats signed a memorandum of understanding on the destruction of over 130,000

90. See Fact Sheet, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Voluntary Principles on Security and Human Rights (released December 20, 2000) [hereinafter *The Voluntary Principles*], available at http://www.state.gov/www/global/human_rights/001220_fsdr principles.html. For a summary of these principles, see Press Briefing, Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor, et al., Voluntary Principles on Security and Human Rights (Dec. 20, 2000), available at http://www.state.gov/www/policy_remarks/2000/001220_koh_hr.html; Sean D. Murphy, Contemporary Practice of the United States Relating to International Law: *Voluntary Human Rights Principles for Extractive and Energy Companies*, 95 Am. J. Int'l L. 626, 636 (2001); Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 Hastings Int'l & Comp. L. Rev. 423 (2001). The Voluntary Principles focus on three areas of mutual concern to the companies and human rights groups. First, they focus on risk assessments—a set of human rights considerations, whether legal, technical or political, that the companies take into account as they structure and revise their security arrangements in light of local conflicts. Second, they focus on interactions between the companies and public security—whether military or police units. Third, the Principles focus on interactions between the companies and private security firms—an area of particular concern to the British oil companies, who had been criticized for human rights abuses committed by private firms to whom they had subcontracted their security work.

91. Article XII, OAS Inter-American Convention, available at http://www.dod.mil/acq/acic/treaties/small/oas/oas_convention.htm (Nov. 13, 1997) [hereinafter OAS Convention].

92. OAS Convention, *supra* note 91, Art. XIII (1)(e).

93. The United States has recently contributed experts and funds to destroy small arms, light weapons and ammunition in Liberia, Haiti, and the former Yugoslavia and agreed with ten nations of southeast Europe on a program to destroy illicit arms in their regions. The United States is also apparently working with the Euro-Atlantic Partnership Council ("EAPC") to prevent illicit weapons shipments to the Balkans and central Africa, and to improve security of weapons holdings.

small arms and light weapons in Albania. The Albanians agreed, with the support of the United States, Norway, and Germany, to destroy all weapons collected from the civilian population in the aftermath of the 1997 crisis. In addition, all weapons collected by the Albanian Government in the future, along with surplus military stocks of small arms, are also scheduled for destruction.⁹⁴

These weapons destructions measures, however, must be combined with supply-side control measures within the United States. The startling fact remains that the United States itself manufactures and sells some \$463 million in light weapons annually.⁹⁵ It exported those weapons in 1998 to 124 countries, in five of which those weapons were later used to fire on U.S. and UN soldiers.⁹⁶ Reasonable domestic supply-side solutions would include new export control statutes imposing strict and administrable destination controls.⁹⁷ Domestic regulation must extend to mandatory reporting⁹⁸ and criminal punishment of non-state actors, particularly arms brokers, who are currently regulated only in the most tangential way. We need to apply the drug-trafficking and people-trafficking model to the application of arms brokering.⁹⁹ To address this concern, in 1996, President Clinton

94. See, e.g., Bureau of Political-Military Affairs, U.S. Dep't of State, Small Arms/Light Weapons Destruction in Albania Memorandum (Sept. 7, 2000), available at http://www.state.gov/www/global/arms/bureau_pm/smallarms/000907_albania.html.

95. See Human Rights Watch, *supra* note 5 (indicating that the U.S. sold \$463 million worth of light weapons to 124 countries in 1998).

96. See Norton-Taylor, *supra* note 9.

97. For example, the United States has suspended arms exports to Paraguay since 1996 on the grounds that arms export license applications to that country exceed the normal, reasonable domestic needs of a given importing country. In addition, U.S. law prohibits arms and munitions exported from the United States to be re-transferred by the recipient without prior U.S. approval, and U.S. government audits are conducted if diversions or transshipments are suspected. The United States has also implemented sanctions and embargoes established by the United Nations by prosecuting those who violate embargoes under U.S. law. In addition, the United States has refused to authorize commercial or government-to-government weapons transfers to such conflict areas as the Democratic Republic of the Congo, Ethiopia, Eritrea, and Angola, whose governments are not subject to UN embargoes.

98. In 1996, the President signed legislation amending the Foreign Assistance Act of 1961 to require the annual publication of information about arms authorized for commercial export by the United States that fall below the previously existing reporting thresholds for U.S. large-arms transfers. The report includes detailed, country-by-country information on the numbers of firearms, ammunition, and other "small-ticket" defense items authorized by the United States for export, setting a standard for transparency that could easily be adopted by the 33-nation Wassenaar Arrangement.

99. An International Protocol Against Illicit Firearms Trafficking is currently under negotiation in the UN Crime Commission in Vienna as part of the negotiations to conclude the Convention Against Transnational Organized Crime. For a parallel approach toward the global trafficking in persons scheme, see Testimony Before the House Committee on International Relations, The Global Problem of Trafficking in Persons: Breaking the Vicious Cycle on "Trafficking of Women and Children in the International Sex Trade" (Sept. 14, 1999) (statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor),

signed arms brokering legislation that amended the Arms Export Control Act to give the State Department greater authority to monitor and regulate the activities of arms brokers.¹⁰⁰ Key provisions included the requirements that all brokers must register with the Department of State, must receive State Department authorization for their brokering activities, and must submit annual reports describing such activities. The United States is currently working to promote adoption of similar laws by other nations by incorporating such a provision into the international crime protocol being negotiated in Vienna.

Perhaps the strongest mode of internalization of supply-side controls would be through an enhanced search for technological solutions. One particularly intriguing idea is the idea of promoting production of smart or “perishable ammunition,” e.g., AK-47 bullets that would degrade and become unusable over time. Ironically, by focusing exclusively on controlling the delivery mechanism—the guns themselves—the small arms activists may have overlooked a surer longer-term solution to the international firearms problem.

Finally, American legal scholars are not mere bystanders in this exercise. They can promote norm-internalization through the analysis and development of legal and policy arguments regarding international gun controls. Three areas come to mind. The first is the thorough constitutional research on the Second Amendment that has been invoked by NGOs to reject efforts by John Bolton and others to apply the Second Amendment argument extraterritorially.¹⁰¹ The second has been interdisciplinary research by Ian Ayres and John Donohue rejecting the empirical hypothesis that more guns produce less crime in American society.¹⁰² Some international relations specialists have extrapolated from the “more guns, less crime” hypothesis to suggest that arms control efforts in heavily armed “warlord states” would be similarly counterproductive, claiming that heavily armed societies—e.g., Ingushetia and Somaliland—exhibit a lower level of conflict, because the near-universal possession of guns deters all carriers.¹⁰³ The Ayres-Donohue research effectively counters that conclusion with massive empirical evidence that demonstrates that, if anything, in most of the jurisdictions sampled (at

available at http://www.state.gov/www/policy_remarks/1999/990914_koh_sextrade.html.

100. Law enforcement officials made the first seizure of munitions under the provisions of the new legislation in November 1999.

101. See *supra* notes 57-58.

102. Ian Ayres & John J. Donohue, III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *Stanford L. Rev.* 1193 (2003) (responding to John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (2000)).

103. See, e.g., William Reno, *Arms, Internal War, and the Causes of Peace* (Feb. 6-7, 2002) (unpublished paper prepared for the SSRC Workshop on Law and International Relations, on file with *Fordham Law Review*).

least in the United States) more guns have been associated with more, rather than less, crime. Third, legal scholars can identify new norms that might target some of the most egregious examples of small arms abuse. One possible avenue might be to focus on the criminalization per se, under international criminal law and complementary domestic law, of such acts as bringing small arms into refugee camps. Everyone who holds a small arm in a refugee camp claims to be doing so for “self-defense.” In fact, however, as I have personally witnessed, the mere presence of small arms in such camps functions like fat on fire: transforming refugee camps into child soldier recruitment centers, enabling the persecution of innocents, eliminating the realistic possibility of safe havens, and greatly reducing the prospects for disarmament and demobilization of defeated forces.¹⁰⁴

IV. CONCLUSION

So let me say in closing that we have a problem: a world drowning in guns. What should we do about it? We have knowledge, we have networks, we have an emerging horizontal process to generate norms. We now need to use those emerging norms to create an international framework, and then to internalize those norms into our domestic law, while at the same time pursuing supply-side solutions, and harmonizing our own national approach with those of other countries.

I know that many of you are saying to yourself: “This is a fantasy. It cannot be done.” As I say this, you look at me like I must have looked at Oscar Arias on the day he admonished me: concerned, a bit guilty, but with a hint of belief that a global solution just might be possible.

To fan that belief, we need to think about our government and ourselves. First, what role will our government play? In the future, I think, America’s foreign policy choice will not be isolationism versus internationalism, but what kind of internationalism will the U.S. government pursue? Will it be a power-based internationalism or a norm-based internationalism? As the Bush Administration has recently shown, the world views America as genuinely schizophrenic in its embrace of the global human rights system. In the history of the human rights movement, the United States has been exceptional in many ways, but it has been most exceptional, I believe, in its global *leadership* role in human rights. If anything, it is our job, as human rights activists and academics, to urge our own country to follow more consistently the better angels of its own national nature.¹⁰⁵

104. See, e.g., Kathi Austin, *Armed Refugee Camps as a Microcosm of the Link Between Arms Availability and Insecurity* (Feb. 6-7, 2002) (unpublished paper prepared for the SSRC Workshop on Law and International Relations, on file with the Fordham Law Review); Human Rights Watch, *Liberian Refugees in Guinea: Refoulement, Militarization of Camps and Other Protection Concerns*, (Nov. 2002), available at www.hrw.org/reports/2002/guinea.

105. For elaboration, see generally Harold Hongju Koh, *On American*

And what should we, as U.S. citizens, do? When I left the government several years ago, my major feeling was less of a job well done than of too much work left undone. After a few sleepless nights, I wrote for myself a list of issues on which I needed to do more in the years ahead. One of those issues was the global regulation of small arms.

Some may say this goal is too remote to achieve. But as Oscar Arias asked me: "Don't we have enough guns? If we really care about human rights, shouldn't we do something about the guns?" In a recent interview, Arias said:

The children of the world, what they want, what they need, are health clinics and schools—not guns, not tanks, not armed helicopters, not fighter jets. . . . There is a difference between the typical politician and the typical statesman. A typical politician is that person who tells people what people want to hear. The statesman tells people what people need to know. America has too many politicians and too few statesmen.¹⁰⁶

So let me close then, not with declarations, but with questions. Shouldn't we, as lawyers and citizens committed to human rights, tell our elected officials to be statesmen and not politicians? And why shouldn't we, as lawyers and law students committed to promoting human rights in theory and practice, work together to ensure that our children's children do not grow up in a world drowning in guns?

Exceptionalism, 55 Stanford L. Rev. 1479 (forthcoming May 2003).

106. Kitty Felde, *Oscar Arias: Harsh Words for the U.S. from a Voice for Peace and Prosperity*, L.A. Times, Feb. 20, 2000, at M3 (Interview with Arias).

Notes & Observations