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**REGULATIONS ON PROLIFERATION OF SMALL ARMS AND
LIGHT WEAPONS UNDER THE KENYAN FIREARMS ACT
CAP 114**

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I thank God, the One without whom I would not have come this far.Amen.

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14	The Refugee Act, 2006
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ABBREVIATIONS

ATA – Anti Terrorism Assistance

AU – African Union

CPC – Criminal Procedure Code

CFB – Central Firearms Bureau

GDP – Gross Domestic Products

GSU – General Service Unit

ICRC – International Committee of the Red Cross

IHL – International Humanitarian Law

IEDs – Improved Explosive Devices

KDF – Kenya Defence Forces

KNFP – Kenya National Focal Point

KPR – Kenya Police Reserves.

KES – Kenya Shillings

MDGs – Millenium Development Goals

NGOs – Non Governmental Organisations.

NAP – Nation Action Plan for Arms Control and Management

RECSA – Regional Centre on Small Arms

SALW – Small Arms and Light Weapons.

US – United States.

UN – United Nations

UNDP – United Nations Development Programme

WHO – World Health Organisation

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0 INTRODUCTION

1.1 Background of the Study

Proliferation of Small Arms and Light Weapons (SALW) means circulation of SALW among the civilians, most of who are not licensed to use them. Many of the security threats that we face today as Organisations, States and Regions can be linked to the pervasive problem of illicit SALW. Terrorists, organised criminal gangs, insurgents and even pirates, often find their crimes much easier to commit due to easy access to these weapons¹.

Conventional weapons refer to weapons that are not weapons of mass destruction. They include but are not limited to armored combat vehicles, combat helicopters, combat aircraft, warships, small arms and light weapons, landmines, cluster munitions, ammunition and artillery. They are the principal tools used in all wars up to the present day. However, while they inflict dramatic damage, they often get less attention compared to weapons of mass destruction (Unconventional weapons)².

Light weapons are portable weapons designed for use by several persons serving as a crew and include heavy machine guns, automatic cannons, howitzers, mortars of less than 100 mm calibre, grenade launchers, anti-tank weapons and launchers, recoilless guns, shoulder-fired rockets, anti-aircraft weapons and launchers and air defense weapons. Small arms are described as weapons designed for personal use and shall include light machine guns, sub machine guns, including machine pistols, fully automatic rifles and assault rifles, and semi-automatic rifles³. Small arms also include firearms and ammunition.

SALW are the primary tools of violence in numerous conflicts around the world and are used to kill and injure many hundreds of thousands of people each year, many of whom are thought to be

¹<www.nato.int/cps/en/natolive/topics_52142.htm> accessed 22nd January 2014.

²<[www.ipb.org/web/index.php?mostra=content&menu=Weapons and their impact on communities&submenu=conventional Weapons](http://www.ipb.org/web/index.php?mostra=content&menu=Weapons%20and%20their%20impact%20on%20communities&submenu=conventional%20Weapons)> accessed 22nd January 2014.

³ Nairobi Protocol for the Prevention, Control and Reduction of Small Arms And Light Weapons in the Great Lakes Region and the Horn Of Africa 2004, Art 1.

civilians, they therefore lead to destruction of humanity and human rights abuses. Thus there is need to regulate the circulation of SALW in Kenya. One of the major concerns is that, the number of illegally owned small arms is very high. The illegally held small arms are fuelling violent conflict and being used against law enforcement agencies and undermining security. Due to their illicit nature, it is very difficult to compile figures regarding the number of illegally held small arms.

Widespread availability of SALW in a country can have serious negative consequences for development. The availability and use of SALW can block, undermine, and erode efforts to achieve sustainable development. The loss of life and permanent injuries caused by the use of SALW can also significantly reduce levels of economic productivity. According to the 2005 Human Development Report, insecurity linked to armed conflict remains one of the greatest obstacles to human development. It is both a cause and a consequence of mass poverty.

Similarly, high levels of insecurity may deter economic investment and a high level of military spending can divert state resources away from critical areas such as health and education. “Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. The world in arms is not spending money alone. It is spending the sweat of its laborers, the genius of its scientists, and the hopes of its children. This is not a way of life at all, in any true sense. Under the cloud of threatening war, it is humanity hanging from a cross of iron⁴”.

The primary legislative controls regarding the civilian possession and use of SALW are contained within the Firearms Act, Chapter 114 Laws of Kenya. Kenya currently has a wide range of legislation with relevance to SALW including the Police Act, Explosives Act, Armed Forces Act, Customs and Excise Act, Wildlife Act, Extradition Act, Penal Code, Immigration Act, Administration Police Act, Prisons Act, Forest Act and Refugee Act. The Firearms Act's provisions for punishing illicit arm owners are in tandem with similar specifications in Kenya's Penal Code Cap 63. Article 89(1) of the Penal Code provides that any person who, without

⁴ Speech delivered before the American Society Newspapers Editors, April 16, 1953.

reasonable excuse carries or has in his possession or under his control firearm or other offensive weapon or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years. The Penal Code similarly specifies a prison term not exceeding five years for anyone who consorts with or is found in the company of an illicit arms owner.

Legal instruments that institute law enforcement agencies relevant to disarmament include the Police Act Cap 84 and Administration Police Act Cap 85. The Police Act empowers the Kenya Police with the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged. Similarly, under the Administration Police Act, the Kenya Administration Police are granted powers to preserve public peace, to prevent the commission of offences, and to apprehend all persons for whom valid warrants of arrest have been issued.

The Police Act also provides for the employment of the Kenya Police Reserves (KPR). The KPR are to be employed to assist the Force in the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which the Force is charged. As such, the Police Act and the Administration Police Act have provided legal frameworks with which the forces have acted to disarm communities to ensure rule of law.

The Firearms Act dates back to 1954, although it has since been amended on several occasions⁵. It has been criticised as being inadequate and not in step with current realities and law enforcement requirements. It has also been argued that the Act should be amended to incorporate the National Policy on SALW, current realities prevalent in Kenya, and sub-regional and internationally agreed measures to deal with the SALW problem in a comprehensive and co-

⁵ Office of the President, Provincial Administration and Internal Security, Kenya National Focal Point, *Country Report to the Third Bienna Conference on the Status of Implementation of the UN Program of Action on Illicit Small Arms and Light Weapons And Implementation of International Tracing Instrument*, (2008) p. 12.

ordinated manner⁶. It is these flaws that has led to the introduction of Small Arms and Light Weapons Management and Control Bill 2013. This bill seeks to fill in the gaps in the Firearms Act such as weak controls on international transfer of SALW, weak controls on the manufacturers, dealers and gunsmiths, non-existence controls on firearms brokering and the related import and export provisions of the same and to include legal provisions on emerging international standards and norms such as Arm Marking, Disarmament, Collection and disposal of surplus and surrendered illegal SALW. It also seeks to enhance the penalties of offences with regard to small arms and light weapons⁷.

This study seeks to critically analyse each of these issues and the government response towards them. It will also critically look at the reasons why the government has failed to curb proliferation and meets the international obligations under international law State responsibility. It is the desire and wish of the writer that this research will open the mind of the reader to embrace the necessary reforms needed to enhance security for our dear and beloved country. The Kenya Vision 2030 has its economic, social and political pillars grounded on the presumption of the existence and sustainability of security, peace and tranquility. For Kenya to achieve Vision 2030 security in the country is paramount.

1.2 STATEMENT OF THE PROBLEM

Kenya has struggled with insecurity for a long time, largely as a result of the proliferation of SALW. Both internal and external factors contribute to the firearms related challenges facing the country. Domestically, social, economic, religious and political causes have contributed to the demand for and proliferation of small arms. Long and continued political instability and armed conflicts in the countries neighboring Kenya have also contributed to the small arms challenge

⁶ Kenya National Focal Point on Small Arms & Light Weapons, *Kenya National Action Plan*, (Government of Kenya, Office of the President & Kenya National Focal Point on Small Arms and Light Weapons, Nairobi, 2006), p. 74.

⁷ <<http://northkenya.com/2013/10/small-arms-and-light-weapons-management-and-control-bill-2013/#sthash.VWD7QMG4.dpbs>> accessed 11th November 2013.

facing Kenya, given its long and porous borders. The effects of small arms availability and misuse have long been felt throughout Kenyan society⁸.

Pastoralist communities with relatively little police presence and numerous challenges (such as conflict over grazing and water access for their cattle) are greatly affected. This is especially so for communities in the North Eastern, Upper Eastern, and North Rift areas, which are believed to suffer excessively from high levels of illicit firearms and insecurity⁹. Cattle rustling is a traditional activity among all plains pastoralists for example the Turkana and the Samburus. For centuries, spears, bows and arrows were used in raids, deaths were treated seriously and compensated with cattle, and warriors rarely harmed women, children or the elderly.

However, the last 25 years have seen a transformation of raiding into large-scale armed conflict, resulting in many deaths. There has been sophistication of the arms that the raiders carry. The cross-border area is awash with SALW which are not the cause of these conflicts but which exacerbate inter-ethnic tensions, intensify violence and contribute both to the impoverishment of the regions and to wider destabilization, as arms are dispersed to other peaceful parts of Kenya and Uganda and urban centers like Nairobi. This has posed obvious threats to both the subsistence base and the security of local communities¹⁰.

1.21 HISTORICAL ANALYSIS

A study of the various conflicts that have taken place in Kenya clearly shows that there is a significant change on the trend of civilian arming:

⁸ Manasseh Wepundi & others, *Availability of Small Arms and Perceptions of Security in Kenya: An Assessment* (Small Arms Survey, Geneva, 2012), p. 21.

⁹ Kennedy Agande Mtuku, 'Small Arms and Light Weapons Among Pastoral Groups in the Kenyan – Uganda Border Area' [2006] 106/422 *African Affairs* 47-70.

¹⁰ *Ibid.*, p. 48-49.

- During the 1992 and 1997 Likoni clashes, the gangs involved were only armed in crude weapons but still managed to spread fear and terror in their respective neighborhoods during their existence¹¹.
- The election-related violence of 2007/08 in Kenya placed the problem of small arms higher on the national agenda. A total of 1,133 people died as a consequence of the unrest. More than 3,500 Kenyans suffered injuries and over 100,000 private properties were destroyed. Gunshots accounted for 962 casualties out of whom 405 died¹².

The election-related violence of 2007/08, mass displacements, and widespread insecurity are believed to have fed a new demand for small arms, especially in central Rift Valley Province. Whereas many crude weapons were used to unleash the violence and resultant killings, there are reports of communities seeking to acquire and obtaining more sophisticated firearms. Alongside this growing demand are concerns about the potential proliferation of armed groups and the growth of existing organized gangs. This rearmament drive among communities, widely reported by the media, confirms the need to put in place well-founded arms control measures alongside Peace-building efforts.

- Clashes between the Orma and Pokomo groups in the Tana Delta region of Kenya's Coast Province in August and December 2012 left many people dead. Pokomo are farmers and the Ormas are pastoralists.

Tana River at one time had three major irrigation schemes: Bura, Hola, and Tana Delta, which influenced residents' lifestyles in terms of employment and sources of income. The collapse of these schemes forced the nomadic pastoralists to move during the wet season, while the farmers remained along the river. During the dry season the pastoralists move back to the river in search of water and pasture.

¹¹ Manasseh Wepundi, *An analysis of disarmament experiences in Kenya: cooperating to Disarm*, (Regional Centre on Small Arms (RECSA), Nairobi, 2011) p. 10.

¹² CIPEV Report, 2008 p. 345-346.

The utilization of the waters of the Tana River has been in the middle of a conflict pitting these two communities against each other. The Pokomo claim the land along the river and the Orma claim the waters of the river. This has been the major source and cause of a conflict that is usually predictable. The conflict between these two communities and their different yet uncompromising lifestyles previously resulted in few casualties because the weapons of choice were traditional weapons such as clubs, spears, and bows. However, the increasing introduction of small arms and light weapons has caused the number of casualties to escalate and more property to be destroyed than in the past¹³.

- In July 2012, masked men stormed two churches in Garissa, killing seventeen people including two policemen. On October 24, 2011, a grenade was thrown into Nairobi's Machakos bus terminal killing five people. A second attack on the bus station in March 2012 left six people dead and over 60 people injured¹⁴.
- Baragoi killings were also as a result of proliferation of SALW.

On 10th November 2012, the Anti-Stock Theft Unit (ASTU), General Service Unit (GSU) and Regular Police left Baragoi District Headquarters for a joint operation in Nachola location with an aim to recovering the stolen animals, that is 205 Camels stolen by Samburu Morans from the Turkanas on 30th October 2012 on a retaliatory attack. During the operation, the officers were ambushed by heavily armed Turkana raiders where an exchange of fire ensued and police officers were overpowered. They withdrew, leaving 28 police officers dead, one missing and KPRs killed. The security forces noted the proliferation of illegal (SALW) in the area¹⁵.

- Recently, on 21st September 2013, there was a terrorist attack at Westgate Mall in Nairobi. This was largely attributed to the misuse of illegal firearms to terrorize innocent civilians resulting in deaths, physical injury.

¹³ Taya Weiss, 'Guns in the Borderlands', p. 89.

¹⁴ < www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10325230/Nairobi-assault-kenyan-terrorist-attacks-since-1980.html > accessed 28th January 2014.

¹⁵ Kenya National Assembly: *Report of the Joint Departmental Committee on Administration and National Security; Defence and Foreign Affairs; Justice and Legal Affairs; and the Select Committee on Equal Opportunity investigating the matter of the Adverse security situation and loss of lives of security personnel in Garissa and Eastleigh towns, and Baragoi environs, (November 23- December 18, 2012)* p. 15.

The rise on the number of illicit SALW has to a large extent been attributed to the inadequacy of the regulations provided under the Firearms Act Chapter 114. There is need to address the lacunae in the Act to reduce much cases of insecurity that are being witnessed in the country.

1.3 JUSTIFICATION OF THE STUDY

Proliferation of SALW relates to various aspects such as illicit trade, illicit manufacture, illicit possession, illicit stockpiling, illicit brokering, illicit marking, Record keeping, destruction of seized and confiscated arms, management of state owned stockpiles, cooperation and information sharing at regional and international levels, public awareness and confidence building measures, demobilization, disarmament and reintegration

The global arms trade involves a complex web of actors including producers, commercial agents, dealers, transporters and financiers. This has made buyers and sellers of arms increasingly reliant on middlemen or brokers to act as intermediaries and to facilitate arms deals between the different parties. This is illicit trafficking of SALW. Brokers continue to facilitate illicit arms with very few constraints and controls. Unregulated and irresponsible brokering in (SALW) facilitates their flow of illicit into conflict areas and into the hands of criminals. This has grave consequences for international peace and security as well as for economic and social development¹⁶.

The global trade in Conventional weapons, including SALW is a multi-billion dollar business. International progress towards combating the uncontrolled trade in Conventional arms has been slow. Unlike their nuclear counterparts, Conventional weapons have been relatively unregulated in international forums. Arms transfer decisions are made against the backdrop of other political, economic, and diplomatic policies. In some cases, transfer decisions may be ill-advised even when they are perfectly legal. Such irresponsible exports contribute to the displacement of people, violent crime, human rights abuses, and terrorism, all of which undermine security,

¹⁶ United Nations Regional Centre for Peace and Disarmament in Africa (UNREC)/United Nations Office for Disarmament Affairs (UNODA), 'Regulating Small Arms Brokering in East Africa', (UNREC/UNODA, 2011) p. x.

stability and sustainable development¹⁷. This study shows the need to close dangerous loopholes that have allowed arms to flow to human rights abusers and terrorists, perpetuate conflicts, undermine development, and necessitate foreign military intervention.

Kenya has been vulnerable to illicit trafficking through the same channels used for legal arms shipments, with Mombasa's port being one of the entry points used by smugglers for weapons shipments destined for war torn countries in the Great Lakes Region of Africa. For example, a large weapon of shipment destined for Burundi passed through Kenya's Mombasa port before being impounded by Ugandan authorities in October 1999¹⁸.

A link has also been established between illicit arms trafficking and drug trafficking. Border town centers said to be points of dispersion of small arms to Nairobi include Mandera, Moyale, El Wak, Lokichoggio, and Isiolo, located in the north-eastern and upper eastern regions of Kenya. This explains the rise in cases of insecurity in Nairobi and its environments. In 1997 the Kenya Police closed a market near Isiolo that was known as a 'small arms supermarket', but illegal small arms trade persisted¹⁹. Hence, in general terms, Northern Kenya, confronted by the multiple challenges of underdevelopment, inter-ethnic resource-based conflicts, and proximity to war-prone neighboring countries has had the highest prevalence of small arms.

The Nairobi Protocol which entered into force in 2005 and to which Kenya is a signatory, calls for the regulation of small arms brokering through licensing²⁰. However, Firearms Act of Kenya remains silent on brokering and also does not have specific controls in the import, export legal framework that would address the issue of firearms brokering. In the absence of national legislation, accurate information on brokering and brokers is hard to acquire. There is need to

¹⁷<<http://www.stimson.org/research-pages/managing-the-international-arms-trade/>> accessed 13th January 2014.

¹⁸ Edward O. Mogire, *Victims as Security Threats: Refugee Impact on Host state Security in Africa*, p.108 available at <books.google.co.ke/books?id=uhYpoTsIPIC&pg=PA1081pg=illicit+arms+trafficking+through+the+port+of+mombasa&source=bl&ots=EqzRf3H> accessed on 22nd January 2014.

¹⁹ Wepundi M & others, *Op cit.*, p. 23- 24.

²⁰ Nairobi Protocol, *Op cit.*, Art 11.

introduce legal provisions and a national register for brokers and oblige all brokers to register and acquire licenses for brokering activities.

From a human security perspective, civilian possession of small arms and light weapons poses a threat to individuals' human rights. There is a strong correlation between levels of firearm ownership and death rates. Regulation of civilian possession is a major issue in the control of SALW in Kenya. The Firearms Act of Kenya provides a framework for controlling civilian possession of SALW and meeting commitments that the government of Kenya has signed up to in the regional and international agreements. However, the legislation falls short of meeting the provisions of these agreements in a number of other aspects. For example, it does not place a limit on the number of firearms that may be licensed to any one civilian²¹.

To gauge the levels of legal civilian possession of small arms is through the analysis of official records on the licensed civilian possession of small arms. Such records are maintained at the Central Firearms Bureau (CFB). These records should enable law enforcement officers to monitor the legal possession of small arms, and also to distinguish between those small arms that are legally held, and those which are illicit. However, it has been argued that there are inadequacies in the record-keeping for legally held civilian small arms²².

This study is justified on the basis that although there is a legislation, the Firearms Act of Kenya regulating small arms and light weapons availability in the hands of civilians, there is a very high number of illicit small arms and light weapons in the hand of civilians with no professional knowledge about their use and thus increasing insecurity, the problem that this paper seeks to address. Institutions' actions are given legitimacy by the laws and cannot act if there is no direction on how to act. The institutions in Kenya charged with the responsibility of managing and controlling illicit small arms and light weapons have inadequate legal authority and limited institutional and administrative capacity to deal with SALW problem in all its aspects²³.

²¹ Kenya National Focal Point on Small Arms & Light Weapons, *Op cit.*, p. 20-21.

²² *Ibid.*

²³ Office of the President, Ministry of State for Provincial Administration and Internal Security, Republic of Kenya, 'National Policy on Small Arms and Light Weapons', (2009) p. 12-13.

1.4 RESEARCH OBJECTIVE

The objective of this research paper is to discuss the regulations on proliferation of SALW under the Firearms Act Chapter 114 Laws of Kenya and contribute to the ongoing research on insecurity in Kenya.

1.5 RESEARCH QUESTIONS

I intend to address three interrelated research questions, and will attempt to give an answer to each.

- 1) What has the Firearms Act of Kenya provided with regard to civilian possession of firearms and is it in conformity with the commitments that the government of Kenya has signed up to in the regional and international agreements?
- 2) Does the Firearms Act regulate firearms trade especially on firearm brokering and are there any regulations or specific controls in the import, export legal framework that addresses the issue of firearms brokering, and if not is it necessary to regulate brokering of firearms in Kenya?
- 3) Does the Firearm Act of Kenya include provisions on emerging international standards such as disarmament and collection and disposal of surplus and surrendered illegal SALW?
- 4) What are the necessary reforms that need to be done to the existing legal framework, Firearms Act cap 114 on regulation of proliferation of SALW in Kenya.

1.6: HYPOTHESIS

This research proceeds on the presumption that:

- 1) The regulatory measures, with specific reference to the Firearms Act of Kenya, are not effective in regulation of the problem of the increasing number of illegal small arms and light weapons in the hand of untrained civilians.

- 2) The lack of effective means of regulating the proliferation of small arms and light weapons has increased insecurity in the country.
- 3) The institutions in Kenya charged with the responsibility of managing and controlling illicit small arms and light weapons have inadequate legal authority and limited institutional and administrative capacity to deal with SALW problem in all its aspect.

1.7 THEORITICAL FRAMEWORK

This research finds its jurisprudential foundation under the following theories;

1.71 POSITIVE THEORY (LEGAL POSITIVISM)

Legal Positivism claims that laws are actually and specifically enacted or adopted by proper authority, by the government of an organized society. Law is described as part of government's instrument to achieve rational, coherent and defensible rule²⁴. Legal Positivism is divided into classical and analytical positivism. Classical Positivism has a long history and broad influence. It is the earliest modern legal theory in England and is associated with the work of Thomas Hobbes.

According to Hobbes, in the state of nature; there is "a war of every man against every man, a state of constant strife in which the life of man is solitary, poor, nasty, brutish and short"²⁵. Law and Government therefore become necessary to promote order and personal security. According to Thomas Hobbes, laws are therefore rules which the sovereign has commanded, by word; writing or other sufficient sign of the will, to enable citizens distinguish right from wrong. Hobbes opines that man makes the law. This research seeks to address the regulations on the proliferation of SALW under the Firearms Act chapter 114 laws of Kenya an Act of Parliament. The said Act is the main legislation in Kenya dealing with firearms.

1.72 NATURAL LAW THEORY

The ancient Natural law theory is largely associated with St Thomas Aquinas.

²⁴ Peter Macpherson, 'The Political Theory of Possessive Individualism: Hobbes to Locke', (1962) p. 43.

²⁵ *Ibid.*, p. 44.

He categorises law into four: eternal law, natural law, divine law and human law. Human law consists of rules supportable by reason but articulated by human authority for the common good. To Aquinas natural laws are all founded on reason which creates a duty of obedience. Natural law concepts on natural individual rights form the basis for human rights. Proliferation of SALW has led to violations of human rights. This research seeks to look at the inadequacies of the Firearms Act of Kenya and on the reforms that can be done to reduce and prevent the same.

1.73 SOCIAL CONTRACT THEORY

Social contract theory provides that, the citizens sign away their natural rights to a sovereign who thereby acquires unfettered powers. By accepting to be ruled by the government, the populace has ceded their rights to it.

The formulation of a comprehensive law, having strict sanctions for the breach of its provisions by parliament being the sovereign in order to control illicit small arms and light weapons among the Kenyan population, will promote security and peace. State-level failure to provide security is cited as a major cause of demand-based proliferation. When the State loses control over its security functions and fails to maintain the security of its citizens, the subsequent growth of armed violence, banditry and organized crime increases the demand for weapons by citizens seeking to protect themselves and their property²⁶.

1.74 THEORY OF SMALL ARMS DEMAND

Theory of Small arms demand express a situation whereby the people feel that they need small arms for their protection and they therefore purchase SALW. This results in the proliferation of small arms and light weapons. Demand is especially prevalent in the context of pastoral areas, Where 'personal security' is the most frequently cited reason for the possession and use of illegal small arms.

²⁶ Weiss T, *Op cit.*, p. 24.

The stockpiling and purchase of guns even with the intention only to use them in self-defence, can quickly escalate inter-tribal arms races which culminate in the use of the weapons aggressively, for example in cattle raids. In the North Rift area, insecurity as a result of the prevalence of small arms use has fed a gun culture that has undermined entrepreneurial development and investments. This research seeks to point out that one of the major causes of proliferation of SALW is inadequate regulation and proposes that there is need to come up with effective regulation on SALW in Kenya and to meet our international obligations on the same.

1.75 ARMS CONTROL THEORY

Arms control is a term for restrictions upon the development, production, stockpiling, proliferation, and usage of weapons. On a national or community level, arms control can amount to programs to control the access of private citizens to weapons. One of the major efforts to preserve international peace and security in the twenty-first century has been to control or limit the number of weapons and the ways in which weapons can be used.

Arms control analysts of the early 1960s were in agreement that the objectives of arms control were threefold. For Thomas Schelling and Morton Halperin, they were, reducing the likelihood of war, reducing the political and economic costs of preparing for war, and minimizing the scope and violence of war if it occurred. Hedley Bull visualized similar objectives for arms control that is, to contribute to international security and stop the drift to war, to release economic resources otherwise squandered in armaments, and to preclude preparing for war, which is morally wrong²⁷.

Arms control is done through:

- Disarmament

The Kenyan Government has addressed the proliferation of illicit SALW, through several disarmament activities. One of the most recent is the 2010 Operation Dumisha Amani II. This operation was conducted in the context of government estimation that Kenya's pastoralists had

²⁷ Jeffrey A Larsen, 'Arms Control: Cooperative Security in a Changing Environment', (2002) p. 2.

spent KES 1.1 billion (about US\$13,750,000) to arm themselves over the years, based on the number of firearms recovered from them. The voluntary phase began in February, while the forceful phase started two months later in April 2010 and targeted recovering 50,000 arms.²⁸

- Prohibitive Acts

There are various Acts that deal with SALW. The Police Act, Explosives Act, Armed Forces Act, Customs and Excise Act, Wildlife Act, Extradiction Act, Penal Code, Immigration Act, Administration Police Act, Prisons Act, Forest Act and Refugee Act. The Firearms Act is the main legislation. The government has also come up with the National Policy on Small Arms and Light Weapons to supplement the Acts. This study seeks to address the inadequacy of the Firearms Act on SALW and that measures should be put in place to ensure that the Firearms Act is effective in regulating SALW.

- Taxation

The government creates a heavy tax burden on gun owners for every firearm they purchase thus discouraging their purchase. This helps in reducing the number of SALW in circulation.

1.76 THEORY OF SMALL ARMS SUPPLY

Theory of small arms supply addresses how the illicit small arms and light weapons get into the hands of civilians, that is, the illicit trade and illicit trafficking. Only a handful of African countries have the capacity to manufacture arms and ammunition with South Africa topping the list. The small arms component of the South African industry comprises less than ten manufacturers and their output is insignificant in terms of the global small arms trade. Small arms are seized or stolen from government forces, looted from state armouries, purchased from corrupt soldiers and stolen from private owners. Rebels and other armed groups are another

²⁸ Manasseh W, *Op cit.*, p. 27

major source of illicit small arms. According to UN investigators, Somali militias regularly buy arms from and sell arms to each other on the local black market.²⁹

As small arms are lightweight, concealable and durable, the ways in which they can be smuggled are nearly limitless. Long, porous and poorly patrolled land borders facilitate the illicit transfer of small arms on foot or by truck.³⁰ Illicit small arms have also led to the violent intensification of inter-community tensions and conflicts over scarce resources. For instance, low-scale cattle rustling has been a feature of rural life in the border areas of Kenya and Uganda. The nature of the conflict has changed because of the availability of small arms.

During the United Nations conference where the Programme of Action on Illicit Trade in Small Arms and Light Weapons in All Its Aspects was adopted, it was agreed that states were to, put in place, where they did not exist, adequate laws, regulations, and administrative procedures to exercise effective control over the production of SALW within their areas of jurisdiction, and over the export, import, transit, or retransfer of such weapons.

However, it has been observed that, regional and international arms control agreements are limited in that it is the prerogative of the respective governments to implement the provisions of these agreements by amending or establishing relevant legislation and policy. Even if legislation and policy are in place, the necessary resources and systems, such as small arms registers and license vetting procedures, are often dysfunctional or absent. Hence, sub-regional organisations and the international community should support the establishment and effective implementation of national arms control legislation through the provision of resources and technical expertise.

1.77 TRADE IN SMALL ARMS THEORY

Trade in small Arms Theory provides that the global arms trade is a multi-billion dollar business and because it provides a lot of revenue, most governments are reluctant in regulating the same.

²⁹ Matt Schroeder & Guy Lamb, 'The Illicit Arms Trade in Africa: A Global Enterprise', [2006] 1 Africa Analyst 69-78.

³⁰ *Ibid.*, p. 71.

This theory stresses the need to put in place stringent measures and prohibitive Acts and Conventions to regulate the circulation of small arms.

1.8 RESEARCH METHODOLOGY

This research will mainly be descriptive, analytical and prescriptive depending on the available literature from various sources both locally and internationally that relates to proliferation of small arms and light weapons.

The research will rely on primary sources such as:

Statutes such as the Firearms Act Chapter 114 Laws of Kenya. Similarly,

Conventions such as International and regional agreements on Small arms will also be discussed including the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects (UN PoA), United Nations Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, Bamako Declaration on the African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa and the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa

Reports from the various international and regional institutions which have been set up with regard to small arms and light weapons. For example reports from Kenya National Focal Point on Small Arms & Light Weapons, reports from Regional Centre on Small Arms (RECSA), the coordinating body for small arms activities in the Great Lakes Region and the Horn of Africa, reports from United Nations Regional Centre for Peace and Disarmament in Africa, reports from Small Arms Survey and reports from International NGOs such as Saferworld among others.

It will largely draw from secondary sources such as textbooks and articles and various internet sources among others.

It will also rely on various activities of the Government of Kenya mostly with regard to disarmament and other stakeholders such as Kenya Action Network on Small Arms (KANSA), which creates a platform through which its members forge a common front in addressing the problem of SALW in Kenya

1.9 LITERATURE REVIEW

Various books, reports and journal articles have been written about the proliferation of small arms and light weapons.

Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms, edited by Kennedy Agade Mkutu is a book that explains the rise in pastoral violence. His main argument is that pastoralists are under threat from such factors as inadequate policing, pressures on land and water supplies, and increasing insecurity from the proliferation of small arms.

He argues that Cattle rustling now largely influenced by small arms readily available to the pastoralists. The inability to control the influx of small arms continues to create security concerns. The author aptly explains how the proliferation of arms contributes to violence and why previously law-abiding citizens of the Valley resort to arms in settling minor disputes.

The conflicts in neighboring Somalia, Sudan, Ethiopia, and Uganda contribute to the proliferation of weapons in the Rift Valley. The author however, does not specifically address the inadequacies in the current regulation of small arms, the Firearms Act Chapter 114 Laws of Kenya. This study seeks to bring out the inadequacy of the Firearms Act such as lack of brokering provisions who continue to supply illicit SALW in Kenya making them easily available.

Armed Conflict and the law, edited by Machira Apollos is a book that touches on armed conflict and the humanitarian consequences. In Chapter four, the author explains the role of arms and light weapons in escalation of conflicts. However he focuses on West Africa thus does not address the Kenyan perspective, the Firearms Act of Kenya. This research seeks to limit itself to

the Kenyan situation of the inadequacy of the Firearms Act although the researcher seeks to borrow from other jurisdictions with respect to proposing reforms. This is for comparison that Kenya can borrow from what other states have successfully implemented to solve the problem of proliferation of small arms and light weapons as it is a global issue.

Kenya National Focal Point on Small Arms and Light Weapons as an inter-agency body that coordinates all actions on small arms in Kenya, came up with a report *Kenya National Action Plan for Arms Control and Management*, first published in 2006. The report is an assessment of the proliferation of small arms and light weapons and the ways to address the problem. It stipulated that the existing legislation was inadequate and was inconsistent with the provisions of the regional and international agreements, including those relating to import, export and transfer controls, including ensuring that these are consistent with regional small arms agreements, UN instruments and Kenya's support for international transfer controls. However the report did not touch on brokering of small arms in Kenya and on import and export legal framework on the issue of firearm brokering. Brokers have continued to supply illicit small arms and light weapons in Kenya and the Great Lakes Region in general unregulated. In the recent past, cases of insecurity caused by increase in illicit small arms and light weapons in Kenya have increased.

This research seeks to discuss the issue of firearm brokering in Kenya and regulation of brokers as a way to meet the standards of international and regional agreements on small arms and at the same time limit the number of illicit small arms in the hands of civilians. The report also touches on civilian possession of small arms and light weapons. The report provides that the Firearms Act does not limit the number of firearms that may be licensed to one civilian, and it is also inadequate with regard to prohibiting civilian possession of all automatic and semi-automatic rifles and machine guns. This research intends to discuss these inadequacies of the Firearms Act and also discuss the process of being issued with a firearm in Kenya and the penalties of being found with illicit firearms among other things.

Availability of Small Arms and Perceptions of Security in Kenya: An Assessment, edited by Manasseh Wepundi, Eliud Nthiga, Eliud Kabuu, Ryan Murray, and Anna Alvazzi Del Frate and first published in June 2012, is also a report that touches on small arms as a problem in Kenya

and disarmament process done by the Kenyan Government. However, the report is an assessment of the small arms problem in Kenya and insecurity posed by their availability and does not touch on the inadequacy of the Firearms Act of Kenya. This research seeks to discuss the issues brought out in the report but with regard to inadequacy of the Firearms Act. This report does not also touch on firearm brokering. This research paper will touch on regulation of brokers in Kenya.

2.0 LIMITATION OF STUDY

Literature limitation

There are not much textbooks on this area of study and therefore the researcher had to use the internet in order to get more information on the area. Certain websites under the ministry of internal security were inaccessible and thus the much needed information was not accessible.

Time drawback

The time limit given for the completion of this work was not sufficient enough the researcher therefore had no choice but to use any free time to complete this work.

Financial constraints

There was no enough finance to be able to cater for travel expenses in order for the research to gather more information on the research work. However the study was basically library and internet search to limit the travel expenses, library and internet materials proved to be very important and heavily enriched the study.

2.1 CHAPTER BREAKDOWN.

This study is divided into the following:

1) Chapter one

This actually talks about how the writing on this topic came about. It will contain the following; background of the study, statement of the problem, theoretical framework, objectives of the

study, research questions, hypothesis, justification of the study, limitation of the study, literature review and overview of chapters.

2) Chapter two Regulation of civilian possession of SALW

This will look at what the Firearms Act of Kenya has provided with regard to civilian possession of firearms and is it in conformity with the commitments that the government of Kenya has signed up to in the regional and international agreements. This will be a critical discussion of what the Kenyan government is doing and what it has done with regard to the same. It will look at the legislations in place. The Constitutional provisions on the same and policies in place dealing with firearms. It will also touch on what the Judiciary is doing or the Case Laws in place dealing with firearms.

3) Chapter three Regulation of firearm trade in Kenya.

This will look at the firearms trade with a special focus on firearm brokering with regard to the Firearms Act of Kenya and bring out the need to regulate brokers with regard to small arms and light weapons. It will also look at the international laws regulating arms trade and brokering in general and whether Kenya is respecting them (enforcement).

4) Chapter four Emerging international standards

This chapter will basically discuss the emerging international standards not included in the Firearms Act of Kenya such as disarmament and collection and disposal of surplus and surrendered illegal small arms and light weapons and pinpoint what Kenya has been doing with regard to the same. This will answer the why question, and critically discuss the reasons why Kenya has not been effective in regulating the proliferation of SALW.

5) Chapter five Conclusion

This chapter will finally conclude the discussion.

CHAPTER 2 REGULATION OF CIVILIAN POSSESSION OF SALW IN KENYA

2.0 INTRODUCTION

The majority of SALW in circulation in Kenya are in civilian possession and not held by the national armed forces or the police. As of 2011, the Northern region of Kenya was believed to have the most illicit weapons with estimates put over 100,000 units³¹. A joint study carried out in June 2012 by the government of Kenya and the Geneva-based Small Arms revealed that between 530,000 and 680,000 firearms were in the hands of civilians³². This therefore creates a need to regulate civilian gun ownership as an integral part of broader efforts to control access to and use of firearms.

Domestic regulations governing the possession, ownership, carrying, and use of firearms are designed to limit access to these weapons to responsible users, thus reducing the risks of unlawful violence. The underlying principles of this kind of control are to regulate possession and use in an effort to prevent diversion and misuse³³. Diversion is whereby SALW move from their legal owners to illegal purposes through theft or loss.

It has been argued that civilian held firearms are an important contributor to the illicit trade and misuse of weapons through theft, careless storage and deliberate sale. “Limiting and controlling the acquisition and possession of arms on the part of civilians is necessary, not only for combating the culture of violence but especially to prevent the extensive and lucrative illicit commerce in arms that were originally licit”³⁴.

This chapter looks at the regulation of civilian possession of SALW in Kenya. It also looks at the impacts of civilian possession of small arms. It also looks at the circulation of firearms in the

³¹Manasseh Wepudi & others, ‘Lessons from the Frontiers: Civilian Disarmament in Kenya and Uganda’ (Saferworld, May 2011), p.1.

³²Wepundi M & others, *Op cit.*, p. 19 -20.

³³<www.smallarmssurvey.korg/de/regulations-and-controls/control-measures/civilian-possession.html> accessed on 29th January 2014.

³⁴ Speech delivered at the UN Biennial meeting of states on 7th July, 2003 available at <<http://disarmament2.un.org.8080/cab/salw-nationalreports.htm>> and <<http://www.smallarmssurvey.org/publications>> accessed on 29th January 2014.

hands of terrorists and those arming in the pretext of religion and taking the battlefield to the church. It proceeds to look at the international and regional efforts that have been made as well as the laws in Kenya regulating the same. It also critically looks at the efforts of the government in regulating small arms and the challenges it is facing.

2.1 CRIMES LINKED TO CIVILIAN POSSESSION OF SALW IN KENYA

SALW do not in themselves cause violence, but access to them increases the severity of violence, the number of victims and the potential for children to become killers³⁵. Proliferation of illicit small arms has been cited as one of the major causes of conflicts and insecurity in Kenya especially along the Coast and Northern Eastern Provinces³⁶.

Kenya is divided into 47 counties with diverse social-cultural, climatic conditions and political orientations. In terms of crime, prevalence and dynamics, the country appears to assume two broad levels of diversity, rural and urban which define the nature and intensity of crime³⁷. Analysis of crimes from 2011-2013 shows that crimes have increased due to proliferation of illicit arms:

- **SALW related crimes in Nairobi County 2011**

Nairobi has recorded a gradual rise in crime incidents as evidenced by the Kenya Police Report 2011. The report indicated that the rate of crime in Nairobi rose by 40% with the number of female offenders also increasing. Terrorist attacks have also increased since the Operation Linda Nchi military incursion into Somalia by the Kenya Defence forces (KDF). During the security forum for East African Community legislators, Kenya was identified as a major entry point for

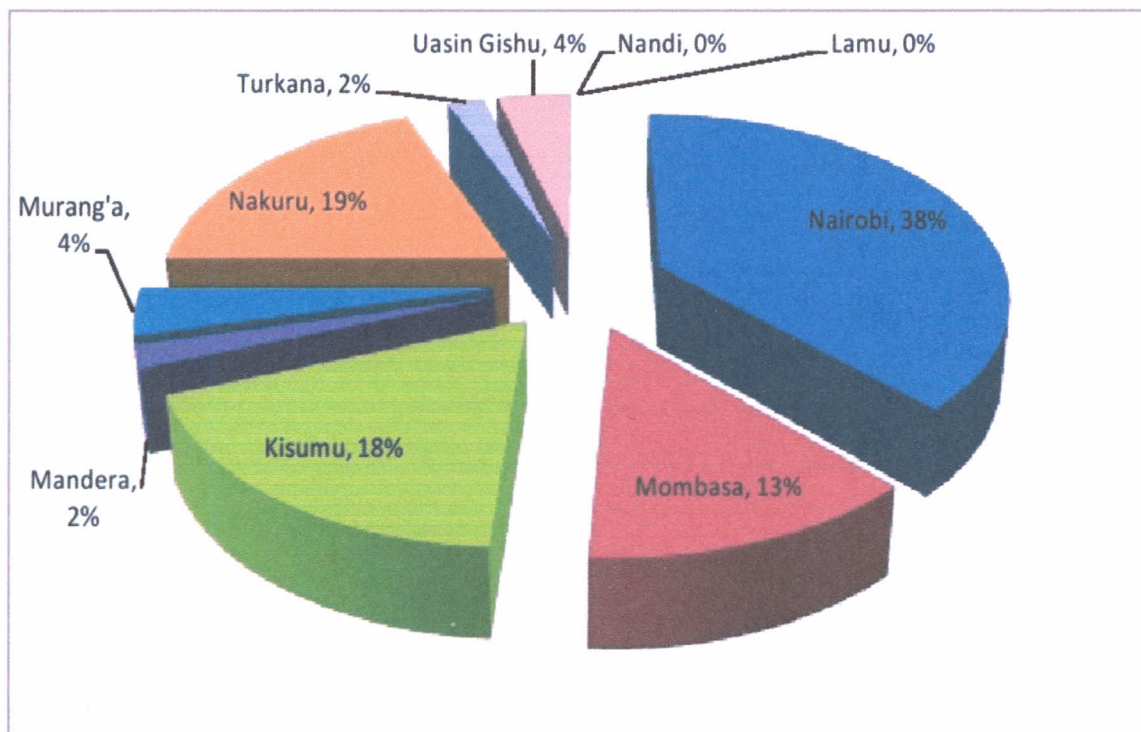
³⁵Wendy Cukier, 'Small Arms and Light Weapons: A public Health Approach' [2002-2003] 9 *Brown J. World Aff.* 261.

³⁶Ministry of State for Provincial Administration and Internal Security, 'A Validated Report of the National Conflict Mapping and Analysis with Recommendations for Actors' (NPI-Africa & NSC Secretariat, September 2012), p. 5.

³⁷Security Research and Information Centre, 'Crime Monitoring Report' (July 2012 - June 2013), p. 4

more than 500,000 illegal arms circulating in the region³⁸. A study carried out recorded theft and robbery as the most common types of crimes in Nairobi. Theft and robbery accounted for 41% and 34.95 respectively³⁹.

- **SALW related crimes in selected Counties from July 2012-June 2013**



- **Analysis**

38% of crimes recorded in newspapers and social media were in Nairobi County as contrasted with only three cases reported in Nandi county during the same time span, or even 5 cases reported in Lamu County which when combined made 0.2% of the total crimes. Nakuru,

³⁸ National Steering Committee on Peace Building & Conflict Management, 'Nairobi Region Annual Crime Observatory Report' (Security Research and Information Centre, 2011/2012), p. 10. See also Daily Nation, on 26th of April 2012, p. 7.

³⁹ National Steering Committee on Peace Building & Conflict Management, *Op cit.*, p. 11

Mombasa and Kisumu recorded 19%, 18% and 13% of the total number of crimes recorded during this period. It was noted that crimes recorded in the city of Nairobi involved the use of sophisticated weapons and more organized criminal gangs⁴⁰.

On the other hand, crimes committed in the rural areas were largely petty in nature although incidents of livestock thefts which were mostly perpetrated using sophisticated arms were reported mostly in pastoralists regions of the country⁴¹. In Madera County inter-clan clashes were reported between the Degodia and the Gareh clans where at least 4 people died and 4,000 displaced. Other areas experiencing tribal clashes include Meru, Kirinyaga, Baringo and West Pokot Counties which had incidents of pastoral and farmer clashes over sharing of resources. A case in point was in Tigania East, Meru County where a man was killed and others injured following a gun fight between farmers and pastoralists over land where herders drove their animals into tomato and onion farms⁴².

Incidents of livestock theft were rampant in Baringo, Meru, Kirinyaga, Marsabit, Turkana, Narok and West Pokot Counties. Cattle rustling in these counties involved the use of firearms and led to loss of lives⁴³.

Access constitutes the universal link, the one against which we can take action, in the chain of events leading to an injury with small arms⁴⁴. Crime prevention approaches identify firearms as the facilitator of crime and violence. Limiting access therefore reduces the occurrence and lethality of certain types of violence⁴⁵. Discussions on small arms affected regions have revealed

⁴⁰Security Research and Information Centre, *Op cit.*, p. 4. See also Security Research and Information Centre, 'National Crime Survey Report' (June 2013), p. 12-13.

⁴¹Security Research and Information Centre, *Op cit.*, p. 4.

⁴² Security Research and Information Centre, *Op cit.*, p. 5. See also Daily Nation, on 7th August 2013.

⁴³Security Research and Information Centre, *Op cit.*, p. 5.

⁴⁴Cukier, *Op cit.*, p. 262. See also Antoine Chapdelaine, 'Firearms Injury Prevention and Gun Control in Canada' [1 November 1996] 9 Can Med Assoc J.155.

⁴⁵ Cukier, *Op cit.*, p. 262. See also R. V Clarke, *Situational Crime Prevention: Successful Case Studies* (1ed, Harrow and Heston, 1992).

that measures aimed at curbing the proliferation of small arms in conflict zones cannot be separated from those aimed at reducing crime⁴⁶.

2.2 IMPACT OF CRIME COMMITTED BY USE OF SALW.

Civilian possession of SALW as well as the resultant crimes has had lots of negative impacts as described below:

1) A Public health approach

The World health organisation (WHO) has indentified violence as pandemic⁴⁷.In other words Firearm injuries have come to be recognized as a global public health problem. It is in this line that the United Nations adopted International Arms Trade Treaty (ATT) in April 2013⁴⁸. The number of small arms in the hands of civilians accounts for more than 80 percent of small arms stocks worldwide and that weapons designed for military purposes rapidly move into civilian markets⁴⁹.

➤ Mortality and Morbidity

Calculating the deaths from small arms in conflict zones is difficult due to lack of data but it has been estimated at 300,000 per year⁵⁰.Civilians account for the large percentage of deaths as estimated by the International Committee of the Red Cross (ICRC) at more than 35

⁴⁶Cukier, *Op cit.* , p. 262.

⁴⁷ WHO resolution.WHA 49.25, 'The Prevention of violence: A priority for public Health' (Geneva: WHO, 1996).

⁴⁸ Maria Valenti & others, ' The Arms Trade Treaty (ATT): A Public Health Imperative, A commentary [2013] *Journal of Public Health Policy* p. 1-12 available at < www.palgrave-journals.com/jphp/> accessed on 6th February 2014.

⁴⁹ Cukier, *Op cit.* , p 263. See also *Small arms Survey 2001: Profiling the Problem* (Oxford, Oxford University Press, 2001).

⁵⁰Cukier, *Op cit.* , p. 263.See also Derek Miller & others, 'Regulation of Civilian Possession of Small Arms and Light Weapons' *Biting The Bullet follow-up project* (Briefing 16) p 7.

percent⁵¹. While precise data is not available, murders, suicides and accidents involving small arms in areas not at war are probably in excess of 200,000.

A survey by WHO of 52 countries documented a total of 104, 492 deaths in high and medium income countries. In 1998, there were almost 100,000 deaths, 98, 052 in the United States, Brazil and Colombia combined. South Africa had more than 11,000 small arms murders in 2000 alone⁵². In addition to those who die, there are other people who are injured and they require specialised treatments in hospitals, some end up having permanent disability problems depriving the society of their hard work, loss of productivity. This clearly shows that there is a correlation between levels of civilian ownership of firearms and death rates.

Between July 2012 and June 2013, a total of 1138 people lost their lives while another 854 were injured in different crime incidents, majority which were robberies, carjacking, cattle rustling, thefts, break in, drug and firearm trafficking and burglary cases in Kenya. There was wide use of firearms in these criminal incidents in most cases involving police shoot outs with criminals. For instance on 3rd September, 2012, police officers shot a total a total of 8 robbers in two robbery incidents and recovered an AK 47 riffle loaded with 47 rounds of ammunition⁵³. About 5% of deaths were occasioned by use of explosives such as grenade and bombs⁵⁴.

- **The Dead and the Injured by Month**

Month	Dead	injured
January 2013	82	39
February 2013	77	29
March 2013	91	36
April 2013	92	110
May 2013	113	67
June 2013	89	125
July 2012	106	104

⁵¹ICRC, 'Arms Availability and the Situation of Civilians in Armed Conflict' (Geneva: ICRC, June 1999)

⁵²WHO, 'Small Arms and Global Health: WHO Contribution to the UN Conference on Illicit Trade in Small Arms and Light Weapons' (Geneva, WHO: 9-20 July 2001)

⁵³ Security Research and Information Centre, *Op cit.*, p. 6. See also Daily Nation, on 4th October, 2012.

⁵⁴ Security Research and Information Centre, *Op cit.*, p. 6.

August 2012	133	77
September 2012	102	63
October 2012	82	57
November 2012	104	78
December 2012	67	69
	1138	854

In criminal cases where firearms were used, it was found out that assault rifles and pistols were the preferred choices. A total of 293 assault rifles, 106 pistols, 18 bombs and 13 explosives were used to commit crimes. According to a police report released in June 2013, a lot of crimes committed involve the use of firearms and ammunition that are in the hands of criminals. The report also revealed that there is an increase in the number of officers being involved in crime with a total of 18 officers being found to have committed various crimes in 2012⁵⁵.

Proliferation of SALW along the porous borders has created a very fertile ground for the increase of crime rate in the country. This is especially among the pastoral communities which are prone to many incidents of rustling and inter-clan clashes⁵⁶.

➤ **Diversion and Disruption of Health Care Resources**

Firearms associated violence has been identified as a major impediment to the provision of basic health care as well as diversion of resources from other health and social services. In most developing countries, scarce resources are absorbed in dealing with such violence⁵⁷. In most wars, health facilities come under attack, in direct violation of International Humanitarian law. Those facilities that remain open during a conflict are often looted or forced to close down, and the remainder are sometimes difficult to reach because of curfews. Restrictions on travel also hamper the distribution of drugs and other medical supplies, causing health systems' referral services and logistic support to break down. Many of the health services of a country are diverted

⁵⁵Security Research and Information Centre, *Op cit.* , p. 8

⁵⁶*Ibid.*

⁵⁷ Miller & others, *Op cit.* , p. 8. See also Jacklyn Cock, ' Fixing Our Sights: A Sociological Perspective on Gun Violence in Contemporary South Africa Society in Transition' (1997) p. 1-4

to the needs of military casualties. Hospitals are forced to neglect the regular care of patients or to shift them to health centers⁵⁸.

2) Impact on Economic, Social and Political Development

Violence fuelled by firearms also represents a significant threat to reinstatement of democratic governance, which is essential to sustainable development⁵⁹. Inadequate transfer and widespread availability and misuse of weapons bring about delay in life saving humanitarian and development operations in promoting social and economic development⁶⁰. The 2007 post-election violence in Kenya had a negative influence on per capita Gross Domestic Product (GDP). Over the period 2007-2011 per capita GDP was reduced by average of 70 US dollars (USD) per year, which amounts to approximately five percent of the 2007 baseline level. In 2009 per capita GDP in Kenya was estimated to be about six percent lower than its synthetic counterparts⁶¹. Synthetic counterparts are a combination of other African countries that best produces the relevant characteristics of Kenya before the post election violence. For example Tanzania and Uganda.⁶²

2.3 FIREARMS CIRCULATING IN THE HANDS OF TERRORISTS

African Union Convention on Prevention and Combating of Terrorism defines a terrorist act as (a) any act which is in violation of the criminal laws of a state party and which may endanger the life, physical integrity or freedom of, or cause or may cause damage to the public or private property, natural resource, environment or cultural heritage and is calculated or intended to: (i) intimidate, put fear, force, coerce or induce any government, body institution, the general public or any segment thereof, to do or abstain from doing any act, or to adapt or abandon a particular

⁵⁸ <www.un.org/rights/impact.htm> accessed on 6th February 2014.

⁵⁹ Miller & others, *Op cit.*, p. 8. See also Wepudi & others, *Op cit.*, p.28

⁶⁰ Valenti & others, *Op cit.*, p. 3. See also United Nations Office for Disarmament Affairs (2013) available at <<http://www.un.org/disarmament/ATT/>> accessed on 6th February 2014

⁶¹ Laura Guibert & Gabriel Perez-Quiros, ' Measuring The Economic Costs of the 2007/08 Post Election Violence in Kenya' (September 2012) p. 14

⁶² *Ibid.*, p. 6

standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a state and (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing or procurement of any person with the intent to commit any act referred to in paragraph (a) (i) to (iii). The same is provided for under Section 2 of the Prevention of Terrorism Act No 30 of 2012 of Kenya. Terrorists are different from raiders in that their aim is not to steal but to create terror.

There is no universally agreed on definition of terrorism. At best we have most universally accepted definition of terrorism that terrorism is the use of violence to create fear for political religious or ideological reasons. The terror is aimed at non-combatant targets such as civilians or iconic symbols and the objective is to achieve the greatest attainable publicity for a group cause or individual⁶³. Indiscriminate attacks are prohibited under International Humanitarian law (IHL). The principle of distinction is one of the main principles of IHL. The principle commands that parties to an armed conflict always distinguish between combatants and civilians. Only combatants may be attacked. Civilians, the civilian population as a whole or civilian object may never be deliberately attacked⁶⁴.

Walter Laqueur, a prominent terrorism expert argues that there has been a radical transformation in the character of terrorism. Old terrorism is terrorism that strikes only selected targets. New terrorism is terrorism that is indiscriminate and causes as many casualties as possible⁶⁵.

- **The Link Between Terrorism and Proliferation of SALW.**

Paragraph 25 of UN Report on Terrorism provides that International Terrorism and Transnational Organized Crime are often closely related and connected for example through the trafficking of drugs, arms and money laundering. Therefore a comprehensive program to counter

⁶³ <www.sagepub.com-data/51172_ch_1.pdf> accessed on 16th February 2014.

⁶⁴ ICRC, *Humanitarian Debate: Law, policy, action*, (ICRC, 2012) P. 1127.

⁶⁵ *Ibid.*

International Terrorism will be more effective if it is coordinated with the struggle against Transnational Organized Crime⁶⁶.

Terrorism and Transnational Organized Crime thrives in Africa inclusive of Great Lakes Region and one of the major causes is regional conflicts and porous borders. The collapse of Somalia state in 1991 and subsequent lack of central authority and functional institutions occasioned a tremendous security impact in the region like proliferation of SALW⁶⁷. These are the weapons of choice for many terrorists⁶⁸.

- **Kenyan Context: Historical Analysis**

Kenya has faced a number of terrorist attacks;

- Norfolk Hotel Bombing – On 31st December 1990 a bomb went off at Norfolk hotel in Nairobi leaving 14 people dead.
- Bombing of US Embassy in Kenya – On 7th August 1998 the US Embassy in Kenya was bombed. At the same time US Embassy in Tanzania was also bombed. This left 257 people dead and 5,047 injured.
- Bombing of Paradise Hotel – On 28th November 2002 terrorists bombed paradise hotel near Mombasa. 13 Kenyans and 3 Israeli nationals were killed⁶⁹.

Similarly between 2012 and 2013 there have been various grenade attacks for example in Garissa, Nairobi and Mombasa.

- Westgate Shopping Mall Attack – On 21st September 2013 unidentified gunmen attacked Westgate shopping mall in Nairobi killing at least 67 people.

⁶⁶ United Nations and African Union, 'Transnational Crime and Terrorism': *Regional Program of Action for Peace and Security; A Subprogram of Action for Promotion of Interstate Cooperation on Peace and Security* (2006) p. 1.

⁶⁷ *Ibid.*, p. 2.

⁶⁸ <www.armscontrol.org/act/2006_06/smallArmsFeature> accessed on 16th February 2014.

⁶⁹ United Nations and African Union, *Op cit.*, p. 2-3.

The September 2013 attack on Nairobi's Westgate Shopping Centre is attributed to Al-Shabaab, and has placed the Somali extremist group firmly in the global spotlight⁷⁰. From an international perspective, Al-Shabaab (and its affiliated networks, such as Kenya's Al-Hirja) remains a persistent threat, especially to Somalia's immediate neighbour and other troops contributing countries to African Union Peace Support Mission in Somalia (AMISOM)⁷¹. Since at least 2010, Al-Shabaab has operated across Somali's borders staging as many attacks in Kenya alone. The vast majority of these incidents involved grenades, landmines or Improved Explosive Devices (IEDs)⁷².

Kenya being one of the countries of the Great Lakes Region is under an obligation to counter terrorism as is required under the International and Regional instruments it has ratified. These include: UN Convention against Transnational Organized Crime (2003) and its Protocols⁷³, Convention on the Prevention and Combating of Terrorism (1999) and its 2002 Protocol (at the African Union level). Kenya has been on the forefront to combat terrorism activities in the country and has established a National Counter Terrorism Center to coordinate anti-terrorism activities. In 2009, a new Ant-Terrorism unit was formed in Kenya as part of the major reforms in the military to help combat terror threats. It has been behind a number of security operations on the Kenyan- Somali border to prevent infiltration by Al-Qaeda terror group and Al-Shabaab militia from war torn Somalia⁷⁴. This was formed with the help of United States government.

US Antiterrorism Assistance (ATA) programme was established in 1983 to enhance the antiterrorism skills for the partner nations, to strengthen US ties with friendly nations and increase respect for human rights. This ATA support has enhanced the ability of partner states to identify, disrupt and prosecute terrorists. The office of Antiterrorism Assistance training in

⁷⁰ Matt Bryden, 'The Reinvention of Al-Shabaab: A Strategy of Choice or Necessity?' (Centre for Strategic & International Studies, February 2014). P.1.

⁷¹ *Ibid.*, p.2.

⁷² *Ibid.*, p.7-8.

⁷³ United Nations and African Union, *Op cit.*, p.3.

⁷⁴ <http://republicofkenya.org/2009/or/kenya_new_anti_terrorism_unit_formed/> accessed on 16th February 2014.

Kenya has contributed significantly in the nation's ability to confront terrorism at its borders as well as respond to mass casualty events⁷⁵.

- **Arming under the Pretext of Religion**

The comparison between old and new terrorism can also be explained through the evolution of terrorism in four waves. The fourth wave is symbolized by religious justifications for killing, international scope, unparalleled gory and tactics and weapons, and dependence on technologies of modernity. It consists of accessibility to finances and weapons of mass destruction. In the fourth wave, terrorism has reached a global phase and has become *bellum omnium contra omnes* (the war of all against all). It is characterized by religious legitimation for terrorist attacks against civilians in any country that is considered Satan, infidel or apostate that is a religious rebel. For example the intent of Aum Shinrikyo to kill people in Tokyo subways in 1995 through sarin poisoned gas attacks was to punish everyone: infidels and faithful alike. This shows the reality of sacred apocalyptic terrorism⁷⁶.

Proposed by Samuel Huntington, the clash of civilizations provides that cultural and religious differences between civilizations worldwide have become the primary source of terrorism today. The clash of civilization is akin to war of ideas, where ideas and ideologies clash between the West and the Muslim world. Generally religious terrorists compose their own community or population. They view themselves as people only accountable to God. Jihad is an Arabic word meaning "struggle". According to Quran, Muslims have the duty to fight enemies invading non-Muslim territories to spread Islam. The belief is that violent elimination of apostate regimes, the slaughter of the People of the Book (the monotheistic non-Muslims, mostly the Jews and Christians), and the removal of Kafir (those who disbelieve in Allah) are justified in the cause of Jihad. This has driven non state actors such as Al-Qaeda to commit terrorism⁷⁷.

⁷⁵ United States Department of State Bureau of Diplomatic Security, 'ATA Programme Overview' (Office of Antiterrorism Assistance, 2011) p.10.

⁷⁶ < www.sagepub.com-data/51172_ch_1.pdf > accessed on 16th February 2014.

⁷⁷ *Ibid.*

There have also been concerns where the terrorists are taking the battlefield to the church, where churches have become the targets of terrorists. In Kenya for example, there has been rise in insecurity and terrorists attacks especially targeted at innocent Kenyans and Christians in their places of worship⁷⁸.

On November 5, 2011, there was a grenade attack on Garissa's Pentecostal Church that left two people dead and five seriously injured. On April 29, 2012 there was another grenade attack on the House of Miracle Church in Ngara, Nairobi. One worshiper died and 10 seriously injured in that attack. On July 1, 2012, there were twin grenade and small arms attacks on churches in Garissa, one on Our Lady of Consolata Catholic Church and the other on the African Inland Church that killed 17 people and injured 66. The attackers killed two police officers. On September 30, 2012, attackers threw IEDs at St Polycarp ACK Church on Juja Road, Pangani in Nairobi killing one boy. On June 9, 2013, sixteen people were injured when an explosive device hurled at an open-air crusade outside Earthquake Miracle Ministries in Likoni, Mombasa. On March 23, 2014, attackers stormed the "Joy in Jesus Church" in Mombasa killing 4 people and injuring over 21 people.

This has been attributed to increased influx of guns and other dangerous weapons in the country and lack of vigilance in some security personnel causing illegal arms to increase and criminal elements to operate freely in the country. Religious leaders have appealed to the government to address the link between corruption, illegal guns and immigrants⁷⁹.

2.4 INTERNATIONAL TREATIES.

Effective and strong legal instruments set the definition of what is licit and illicit SALW. If comprehensive laws are not in place, the effectiveness of other measures, for example capacity of law enforcement agencies will be undermined. Laws should provide controls to assist the police in maintaining accurate records of registered small arms and contain provisions for the effective marking of small arms, which are both crucial in assisting the police to trace illicit SALW back to the point of origin. The laws should also provide the police with power to

⁷⁸ Joint statement by Christian Leaders of Mainstream Churches of Kenya, 14th April 2014

⁷⁹ *Ibid.*

inspect, search, seize, confiscate and where necessary destroy SALW that are being misused or are in illicit circulation⁸⁰.

Kenya is party to a number of regional and international agreements that sets forth a common understanding on the problem of civilian possession of SALW and how it impacts on the society as well as measures that need to be taken to effectively tackle it from a global to regional dimension⁸¹. Article 2(5) of the Constitution of Kenya 2010 provides that the general rules of international law shall form part of the laws of Kenya. Subsection 6 provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Therefore the obligations created under these international and regional agreements on SALW that Kenya has ratified are binding on Kenya. These include:

- **Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa (Nairobi Declaration).**

This is a politically binding instrument⁸². This means that such an instrument creates a political or rhetoric commitment but is not binding upon signatories.⁸³ It was agreed on 15th March 2000⁸⁴. At the invitation of the Kenyan government, the Ministers for Foreign Affairs of the countries of the Great Lakes Region and Horn of Africa met in Nairobi, Kenya and at the end of the conference signed the Nairobi Declaration⁸⁵.

⁸⁰ Catherine Flew & Angus Urquhart, 'strengthening Small Arms Controls: An audit of small arms legislation in the Great Lakes region and the Horn of Africa, Kenya' (SaferAfrica and Saferworld, February 2004), p. 9.

⁸¹ Office of the President, Ministry of State for Provincial Administration and Internal Security, Republic of Kenya, *Op cit.*, p. 14-15.

⁸² Bureau for Crisis Prevention & Recovery, UNDP, 'How to Guide Small Arms and Light Weapons Legislation' *Advocacy Series* (July 2008) p. 156.

⁸³ *Ibid.*, p. 136.

⁸⁴ Bureau for Crisis Prevention & Recovery, UNDP, *Op cit.*, p. 156.

⁸⁵ Nairobi Secretariat on Small Arms and Light Weapons, *Annual Report on the Progress of the Implementation of the Nairobi Declaration, the Coordinated Agenda for Action and its Implementation Plan to Prevent, Control and*

Section IV provides that the objective of the Declaration is to encourage a concrete and Coordinated Agenda for Action to promote human security by ensuring that the state parties to the Declaration put in place adequate laws, regulations and administrative procedures to effectively control the possession and transfer of SALW.

- **The Coordinated Agenda For Action**

A Coordinated Agenda For Action and Implementation Plan were agreed at the first ministerial review conference of the Nairobi Declaration in August 2002. The Agenda For Action provided for the establishment of an institutional framework, the Nairobi Secretariat now known as Regional Centre on Small Arms (RECSA) and the National Focal Points. At the national level, every signatory to the Nairobi Declaration has formed a national focal point to co-ordinate activities and the implementation of activities and to share information with RECSA and other National Focal Points.⁸⁶

Section IV of Nairobi Declaration and Article 3.1, 3.2, 3.2.1, 3.22 and 3.3 of the Implementation Plan require laws, regulations, standards and prohibitions governing the civilian possession of SALW, including home made weapons⁸⁷.

- **Licensing Requirement for Possession of SALW**

In conformity, Part II of the Firearms Act Cap 114 Laws of Kenya provides that a license is required for the possession of firearms and it is an offence to possess a small arm without a license. Section 4(1) of the Firearms Act provides that no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time. Section 4(2) provides if any person (a) purchases, acquires or has in his possession any firearm or ammunition without holding a certificate or in the case of ammunition in quantities in

Combat the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, p. 3.

⁸⁶ Bureau for Crisis Prevention & Recovery, UNDP, *Op cit.*, p. 158.

⁸⁷ Flew & Urquhart, *op cit.*, p.17. See also Catherine Flew & Angus Urquhart, 'strengthening Small Arms Controls: An audit of small arms legislation in the Great Lakes region and the Horn of Africa, Regional and National Overview' (SaferAfrica and Saferworld, February 2004), p. 57-58.

excess of those so authorised or (b) fails to comply with any condition subject to this Act is guilty of an offence. Section 5(1) of the Act provides that an application for a firearm certificate shall be made to the licensing officer in a prescribed form

The Judiciary arm of the government of Kenya has been in the forefront in prosecuting those who violate these provisions of the Firearms Act. An illustrative case is that of **John Mwangi Kamau Vs Republic**⁸⁸, the appellant and another were jointly charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code cap 63 Laws of Kenya. The appellant was also charged with one count of being in possession of a firearm without a valid license in force issued by the firearm licensing officer contrary to section 4(1) of the Firearm Act, Cap 114 Laws of Kenya and one count of being in possession of live ammunition without a valid license in force issued by the firearm licensing officer contrary to section 4(1) of the *Firearm Act in the Chief Magistrates court at Nyeri*.

The particulars of the first count were that on 27th June 2003 at Gacatha along Karangia/mathakwaini road in Nyeri District within the then Central Province, the appellant and his co-accused jointly with others not before the court while armed with dangerous weapons, namely pistols robbed John Mureithi Theuri of cash Kshs 35,000/=, one mobile phone make motorolla and immediately after the time of such robbery threatened to use actual violence to the said person. The particulars of the second and third counts were that the appellant and his co-accused jointly with others not before the court, on the above mentioned date and place while armed with the above mentioned dangerous weapons robbed Lawrence Nyingi Mureithi and Wilson Mathenge Ndungu of Kshs 200/= and 500/= respectively and immediately before or immediately after the time of robbery threatened to use actual violence on the said persons.

On the count of being in possession of a firearm without a valid license, the particulars were that on 27th June 2003 in Seven Stars Bar in Nyeri town in Nyeri District within the then Central Province, the appellant was found in possession of a colt revolver S/No 146386 without a valid firearm certificate in force issued by the firearm licensing officer and on the same date and in the above mentioned place, the appellant was found in possession of six rounds of .45 mm

⁸⁸ [2011] 320 eKLR 1 (CA).

ammunition without a valid firearm certificate in force issued by the firearm licensing officer. During the trial a firearm examiner provided a report which proved that the revolver was capable of being used as a firearm and confirmed that the 6 rounds of ammunition recovered were .45 inches and was live ammunition capable of being fired.

The trial court sentenced the appellant to death for the offence of robbery with violence and to three years imprisonment for the offence of being in possession of firearm. The appellant co-accused was acquitted for lack of evidence. Aggrieved with the trial court's decision the appellant filed an appeal in the High Court. The High Court in a judgment dated 2nd December 2011 dismissed the appeal, it is against that decision that this second appeal was based on the ground that the learned trial magistrate and the first appellate court erred in law and fact by failing to resolve inconsistencies apparent in the prosecution's evidence and particulars of charges.

The court in reiterating the fact that a second appeal must be confined to points of law held that, according to section 382 of Criminal Procedure Code (CPC) discrepancies in evidence are not considered material if they do not prejudice to the accused or if they are inconsequential to the conviction or sentence. Therefore according to the report of the firearm expert, it was clear that the firearm recovered from the appellant was Revolver serial No 146386 and that the discrepancies claimed on the description and serial No of the firearm were curable under the aforementioned section of CPC.

With regard to the issue of ammunition recovered it was held that the evidence casted doubt as to which ammunition was found on the appellant, whether it was one which was presented to the firearm expert or ammunition which was produced at the trial court. Therefore the trial court had correctly acquitted the appellant of the said offence.

With regard to identification of the appellant, it was held that the prosecution witness as the single identifying witness was credible as there was no possibility of error. Further it was held that the learned judge did not err in confirming the conviction and sentence of the appellant on the charge of robbery with violence. The appeal was held to have no merit and was thus

dismissed. The death sentence was confirmed and it was held that the sentence of possession of firearm was to be held in abeyance.

➤ **Personal suitability to possess arms - General Conditions**

Section 5(2) of the Firearms Act Cap 114 laws of Kenya, provides that a firearm certificate shall be granted if the licensing officer is satisfied that the applicant has a good reason for purchasing, acquiring or having in his possession the firearm or ammunition in respect of which the application is made and can be permitted to have in his possession that firearm or ammunition without danger to the public safety or peace. Firearm certificate shall not be given to a person of intemperate habits or unsound mind and the licensing officer must be satisfied that the applicant will take all reasonable precautions to keep the firearm secure and in safe custody.

➤ **Age Restriction**

Section 32(1) of the Firearms Act provides that no person under the age of twelve years shall have in his possession any firearm or ammunition to which part II applies, and no person under the age of fourteen years shall have in his possession any firearm ammunition to which part II applies other than a miniature rifle not exceeding 0.22 calibre or a shotgun the bore of which is not larger than 20 gauge and ammunition suitable thereof, except in circumstances where he is entitled to have possession thereof without holding a firearm certificate by virtue of subsection (8), subsection (9) or subsection (10) of Section 7. Section 7 of the Act establishes the exemptions from holding a firearm certificate.

➤ **Duration of License and Renewal of License**

Section 5(4) of the Act provides that a firearm certificate shall, unless revoked or cancelled remain in force for one year from the date when it was granted or last renewed but shall be renewable for a further period of one year by a licensing officer. Section 8(1) provides that a licensing officer may refuse to grant, renew or vary a firearm certificate or to grant a permit, unless and until any firearm to which the firearm certificate or permit will be granted, renewed or varied relate is produced for his inspection and for marking.

➤ **Use of Small Arms**

Regulations and restrictions exist with regard to civilian possession, carriage and use of small arms. Part III Section 33 of the Firearms Act Cap 114, provides that any person who behaves in a disorderly manner while carrying a firearm to which part II applies, shall be guilty of an offence and liable to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand shillings or both.

➤ **Licensing or Lending**

Section 16(1) of the Act provides that no person shall sell or transfer to any other person in Kenya other than a registered firearm dealer any firearm or ammunition unless that other person produces a certificate authorising him to purchase it or as the case may be, to acquire it by means of transfer without holding a certificate.

- **Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa.**

This is a legally binding instrument. This means that ratification of the instrument indicates a legal commitment to implement the instrument's provisions within national legislation. It was signed in April 2004 and entered into force in May 2006. Kenya ratified the protocol on 6th September 2005 and deposited its instruments of ratification with the secretariat on the 11th day of September 2005. Nairobi protocol stems from the Agreement of the Nairobi Declaration elaborating the commitments of the Declaration into a more detailed set of legally binding measures.

Article 3(a) (iii) requires the establishment as a criminal offence the illicit possession and misuse of SALW. Article 3(c) (i) requires the prohibition of unrestricted civilian possession of small arms. In conformity, Section 34(1) of the Firearms Act Cap 114, provides that if any person who makes or attempts to make any use of a firearm or an imitation firearm with the intention to commit any criminal offence he shall be guilty of an offence and liable to imprisonment for a term not less than seven, but not exceeding fifteen years, and where any person commits any

such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that offence.

An illustrative case is **Philip Kennedy Otieno v State**⁸⁹, the appellant was charged jointly with two others with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code (first count) and an alternative charge of, preparation to commit a felony contrary to section 308(1) of the Penal Code. The appellant also faced another charge of, possession of a firearm without a firearm certificate in force contrary to section 4(2)(a) as read with subsection 3(a) of the Firearms Act (second count).

The particulars of the charge were that on 30th May 2010 at Migori Township in Migori District within Nyanza Province, the appellant and his co-accused jointly with others not before the court being armed with dangerous and offensive weapons namely a homemade pistol and knife attempted to rob Mohammed Abdi. The particulars of the alternative charge under which the appellant was charged jointly with his co-accused were that on 30th day of May 2010 at the aforementioned place, the appellant and his co-accused jointly with others not before the court were found with a dangerous weapon namely a homemade pistol in circumstances that indicated that they were so armed with the intent to commit a felony namely robbery with violence.

The particulars of the charge under the second count in which the appellant was charged alone were that on 30th May 2010 at Migori Township in Migori District within Nyanza Province, the appellant was found in possession of firearm namely a homemade pistol (imitation firearm) in contravention of the Firearms Act. The imitation firearm was identified as MF1-1. A firearm expert on examining the same testified that he successfully tested the home made gun and formed the opinion that the gun was capable of firing and that it was a firearm in accordance with the Firearms Act of Kenya.

After the conclusion of the prosecution case, the trial court found insufficient evidence to place the co-accused person on their defences and were acquitted under section 210 of the CPC. However the trial court ruled that there were sufficient evidence to place the appellant on his defence on the second count namely ,being in possession of a firearm without a firearm

⁸⁹ [2011] 125 eKLR 1 (CA).

certificate in force in Kenya, contrary to section 4(2)(a) as read with section 3(a) of the Firearms Act. The trial judge held that the count should have read being in possession of a firearm without a firearm certificate in force contrary to section 4(2) (a) as read with section 3(b) and not 3(a) of the Firearms Act since the firearm found in possession of the appellant according to the report of the firearm examiner was not a prohibited weapon under section 2 of the Act.

Section 4(3) of the Firearms Act provides that any person who is convicted of an offence under section 4(2) shall (a) if the firearm concerned is a prohibited weapon of a type specified in paragraph b of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years. Subsection (b) provides that if the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years.

The appellant in his defence denied among other things, having knowledge of the charges facing him and his co-accused and the fact that he was found in possession of a firearm as alleged by the prosecution witnesses. The trial court found the appellant guilty on count II, convicted him and sentenced him to serve 5 years imprisonment.

It is based on this decision that this appeal is based on the ground that the weight of the alleged offence was not water tight to warrant such a conviction and such a sentence. The court of appeal judge in dismissing the appeal held that under section 4(3) (b) of the Firearms Act the trial court's sentence of 5 years imprisonment imposed on the appellant was the minimum provided under the law and given that the trial court's discretion was restricted in that it could only impose a sentence of between 5 to 10 years imprisonment, the trial court did not exercise the discretion wrongly.

- **Best Practice Guidelines for the Implementation of the Nairobi Declaration and Nairobi Protocol on Small Arms and Light Weapons.**

These were developed during the course of 2005 to elaborate the provisions of the Nairobi Protocol. They are intended to aid states in implementing the Nairobi Protocol and to provide a common set of minimum standards. One of the primary objectives of the Best Practice

Guidelines is to inform the national processes of legislative review, as called for in the Nairobi Declaration and the Nairobi Protocol and in doing so promote regional harmonisation of small arms legislation across the Great Lakes Region and the Horn of Africa, that is, to ensure that all states criminalize the same core set of activities to ensure that common standards are adopted⁹⁰.

The Best Practice Guidelines were developed in two phases during the 2005 and are consequently contained in two documents: The Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons and Guidelines for the Harmonisation of Legislation. Section D, Part 2 of the Guidelines for Regional Harmonisation provides for conditions to be met by applicants for a license to possess small arms by civilians, details of licensing process and restrictions on possession and use⁹¹.

- **Organisation of African Unity Bamako Declaration on an African Common Position on the Illicit Proliferation and Circulation and Trafficking of Small Arms and Light Weapons, 2000 (Bamako Declaration)**

It is a politically binding instrument agreed on 1st December 2000. Parties are all the members of Organisation of African Unity, now known as Africa Union (AU) and thus Kenya being a member is bound by it. The Bamako Declaration was concluded ahead of the UN conference on SALW in July 2001 and sought to present a unified voice on challenges facing Africa and Africa priorities for action on SALW control. It presents a broad statement of the challenges posed by uncontrolled proliferation of SALW in Africa and calls upon member states to coordinate efforts to address the SALW problem and urge the international community to support these efforts. Section 3(iii) recommends establishing as a criminal offence the illegal possession and use of SALW.

⁹⁰ Bureau for Crisis Prevention, UNDP, *Op cit.*, p. 158-159.

⁹¹ *Ibid.*, p. 159-160.

- **UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 2001(UNPOA)**

It is a politically binding instrument agreed in July 2001 and state parties are all members of the United Nations (UN), therefore Kenya being a member of the UN is bound by it. Section II (3) recommends establishing a criminal offence, the illegal possession of SALW⁹².

2.5 CHALLENGES FACING SALW IN KENYA

There are various challenges facing control of circulation of SALW in Kenya. These include:

- **Lack of Comprehensive Legislative framework.**

In a Country Report to the Fourth UN BMS on the Status of Implementation of the UN PoA on Illicit Small Arms and Light Weapons and The Implementation of International Tracing Instrument 2010, the Government acknowledged that, the lack of a comprehensive legislative framework to address demand and supply factors, was a key factor in the proliferation of illicit SALW⁹³. Although the Firearms Act conforms to most of the provisions of the regional and international agreements, fundamental absences include;

- No competency testing or age restriction for license applicants.

Art. 3 (c) (viii) of Nairobi protocol requires provisions for the competency testing of prospective small arm owners. The Firearms Act Cap 114 does not have provisions on the same as required under the protocol, therefore the national legislation does not conform to the Protocol.

- No restriction on the number of small arms that may be licensed to any one civilian.

⁹² *Ibid.*, p. 138-139.

⁹³ Manasseh W, *Op cit.*, p.49.

Art. 3 (c) (ix) of the Nairobi Protocol requires a restriction on the number of small arms that may be owned. **Section 5(3) of the Firearms Act Cap 114** provides that a firearm certificate granted under this section shall be in the prescribed form, and shall specify the conditions (if any) subject to which it is held, the nature and number of firearms to which it relates and as respects ammunition, the quantities authorized to be purchased and to be held at any one time there under. The Firearms Act cap 114 does not conform to the Protocol in that each small arms license specifies the number of weapons to which it relates, but there is no upper limit specified which indicates how large this number may be⁹⁴.

➤ No total prohibition on the civilian possession and use of all light weapons and automatic and semi-automatic rifles and machine guns

Art. 3 (c) (ii) and Art. 5 (b) (iii) of the Nairobi Protocol requires the total prohibition of the civilian possession and use of all light weapons and automatic and semiautomatic rifles and machine guns. The Firearms Act cap 114 does not conform to Protocol in that whilst certain types of automatic, semiautomatic and other weapons are prohibited under Section 2 of the Act, the national legislation does not contain a total prohibition on the civilian possession and use of all light weapons and automatic and semiautomatic rifles and machine guns.

➤ The fines are too weak to deter illegal possession of firearms

Kenya's legal provisions are considered lenient for those found with illegal arms. The Firearm Act's provisions and fines are too weak to deter the illegal possession of firearms. Possession of illegal firearms is bailable since it is treated as a petty case notwithstanding the gravity of crimes that may be committed.⁹⁵

⁹⁴ Government of Kenya, *Kenya National Action Plan for Arms Control and Management*, (Nairobi, Oakland Media, 2006) p. 21.

⁹⁵ *Ibid.*, p.54.

- **Lack of capacity and resources, a challenge to police oversight and accountability.**

This handicap leads to lack of trust in the police to promote security and safety and in turn leads to rural communities arming themselves and mushrooming of private security companies in urban areas⁹⁶. Persistent allegations of widespread corruption on the police officers has further eroded public trust.

➤ Kenya Police Reservists

The Kenya Police Reservists (KPRs) are made up of volunteers operating within their own localities. KPRs are armed by the state to supplement the role of police in providing security where police presence is low⁹⁷. The National Police Service Act of 2011, which was enacted to give effect to the Constitution of Kenya 2010, provides that KPRs may be deployed to assist the Kenya Police Service or the Administration Police Service in their respective mandates.⁹⁸

The constitution of Kenya 2010 has created devolved government and under the National Police Service Act of 2011, policing is under the County Policing Authority made up of the Governor and his representatives and police service heads. However neither the Act nor any other document provides explicit guidelines on the management of KPRs, leaving much to the discretion of the Governors⁹⁹.

KPR is a cost effective body that is well placed to protect livestock across many arid and semi-arid areas. The force is used by the government to bolster police numbers in remote areas and is also used in border management. In rural areas KPR is an integral part of the administrative structure. However, there have been reports of firearm misuse by KPRs and

⁹⁶ Kennedy Mtuku & Gerald Wandera, *Policing the periphery: Opportunities and Challenges for Kenya Police Reservists*, (Small Arms Survey, Switzerland, March 2013) p. 16.

⁹⁷ *Ibid.*, p. 11.

⁹⁸ *Ibid.*, p. 20.

⁹⁹ *Ibid.*, p. 21

renting out of state owned weapons. In January 2012 170 KPRs were disarmed in Moyale after concerns that they had been renting their weapons out to criminals¹⁰⁰.

The local Officer Commanding the Police Station (OCS) is supposed to supervise KPRs, but in practice that is not the case. Ammunition is provided monthly and the OCS is required to file a monthly return, but, in Turkana for example, this is held back due to limited resources available to covering long distances to implement such reporting. Arms Control relies on clear policy governing leadership mode of operation, adequate supervision, including the resources to carry out such supervision, which in the case of the KPR are entirely lacking¹⁰¹.

If people are to disarm they must feel that they live in a secure environment and have faith in the ability of local forces to deliver this security¹⁰².

➤ Private Security Companies

In Kenya regulation of the private security sector is seen as a prerequisite to allowing guards to carry firearms as proposed in the Private Security Regulation Bill 2010, a measure seen as a deterrent to crime, but which could also become a security risk if arms filter to criminals. Those in opposition of the Bill have argued that the Private guards should not be allowed to carry arms as the sector lacks adequate personnel to train guards on firearm handling and arm storage facilities. In addition, their low pay, makes them vulnerable to misuse of firearms or hiring out their guns to criminals for financial gains. Security analysts argue that the move to arm private guards could end up increasing the number of illicit arms because of lack of adequate storage facilities means they would filter to criminals¹⁰³.

¹⁰⁰ *Ibid.*, P. 19-20.

¹⁰¹ *Ibid.*, p. 60.

¹⁰² Paul Eavis, 'SALW in the Horn of Africa and the Great Lakes Region: Challenges and the Ways Forward' [2002-2003] 9 *Brown J. World Aff.* 251.

¹⁰³ <www.businessdailyafrica.com/Corporate-News/-/539550/1009398/-/v7mqjtj/-/index.html> accessed on 1st April 2014

- **Poor cross-border co-operation between police forces and other government officials.**

Raiding has implications for relations with neighbouring states as warriors cross national borders in search of cattle and weapons¹⁰⁴. Recent decades have seen an escalation of conflicts and banditry among pastoralists in the Kenya-Uganda border region fuelled by a growing number of small arms. The Kenya Uganda border is one of East Africa's most severely affected areas in terms of firearm related insecurity¹⁰⁵. The poor mechanism for cross border co-operation between Kenya and Uganda governments mean that they are severely constrained in controlling the movements of armed groups and weapons. Joint action is the only effective response¹⁰⁶.

- **Proximity to war prone neighbouring countries**

Porous borders with unstable neighbouring states have had a negative impact on security in Kenya. Firearm related crimes have been rising in Kenya due to the growing number of illicit arms that come from the war torn Somalia.

Much of East Africa and the Horn of Africa is flooded with guns, predominantly small arms, and a large number of these weapons spill over into Kenya. Since the late 1970s the countries bordering Kenya to the north (Ethiopia, Somalia, Sudan and Uganda) have experienced long periods of unrest and internal armed conflict¹⁰⁷.

¹⁰⁴ Eavis, *Op cit.*, p. 255.

¹⁰⁵ Kennedy Agande Mtuku, *Op cit.*, p. 49.

¹⁰⁶ Eavis p, *Op cit.*, p. 255.

¹⁰⁷ Weapons Inflow and the Impact of Regional Conflict available at <www.hrw.org/reports/2002/kenya0502-03.htm> Accessed on 1st April 2014.

Kenya's border is porous and in large arid and thinly populated. Although there are nominal custom checkpoints at the main Kenyan entry points, the rest of the border is rarely patrolled and there are many smugglers' routes¹⁰⁸.

Large refugee population also contributes to the illicit circulation of SALW in the hands of civilians. Many refugees from neighbouring war torn countries carry with them all manner of firearm. It has also been established that most of the refugees are former fighters who cross the border with weapons and sell them for subsistence¹⁰⁹.

2.6 ENFORCED POLICIES

Despite the challenges aforementioned, Kenya has made significant efforts to control supply and circulation of illicit arms in an effort to achieving sustainable peace and security, ingredients for development.

In Kenya, as elsewhere, international attention to the problem of small arms proliferation and misuse has been catalyzed by the global campaign to ban antipersonnel landmines, which culminated in the 1997 Mine Ban Convention/Ottawa Treaty. The government of Kenya signed the Mine Ban Treaty on December 5, 1997, ratified it on January 23, 2001, and the treaty entered into force for Kenya on July 1, 2001¹¹⁰.

The Kenyan government has since 2000 publicly and prominently recognized the need to stem the proliferation of SALW. Drawing on growing international attention to these weapons, particularly in the lead-up to the first-ever U.N. conference on illicit trafficking in such weapons, held in July 2001, Kenya has taken an active role to promote initiatives to stem small arms proliferation at national, sub-regional, and regional levels; to support calls for international action; and to request international assistance for small arms initiatives in poor countries. While

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

not sufficient, these steps do mark real progress in acknowledging the problem and suggest that the government is willing to take steps to curb the problem¹¹¹.

Most notably, Kenya took the initiative to convene in March 2000 a ministerial-level government conference on small arms in the Horn of Africa and the Great Lakes sub-region. The conference resulted in the Nairobi Declaration, in which governments pledged to work together to implement a coordinated regional action plan to stem the proliferation of small arms. In particular, they agreed to improve information-sharing and to harmonize national legislation, giving particular attention to legal controls over the possession and transfer of weapons and the need to improve the institutional capacity of law enforcement bodies. They also called for international support to help them implement agreed measures and designated Kenya to coordinate follow-through¹¹².

After the Nairobi conference, subsequent meetings resulted in the adoption of a regional plan of action and also contributed significantly to the adoption of a common African position on the problem of small arms proliferation, known as the Bamako Declaration, for consideration at the 2001 U.N. conference. Governments vowed to continue to work to limit the spread of these weapons and alleviate their humanitarian consequences.

A National Focal Point (NFP) on SALW was established in Kenya in January 2003. A focal point committee bringing together the Government and Civil Society was launched and a Secretariat established and operationalized with assistance through the then Nairobi Secretariat (now RECSA). The Kenya National Focal Point on Small arms and Light Weapons is charged with the following key functions:

- Co-ordinating national policy and action to address the problem of the proliferation of illicit small arms and light weapons;
- Co-ordinating the development and implementation of the National Action Plan for Arms Control and Management;

¹¹¹ *Ibid.*

¹¹² *Ibid.*

- Co-ordinating with regional and international bodies and other national focal points the implementation of the international and regional declarations and protocols;
- Co-ordinating and interacting with the civil society;
- Co-ordinating research on the problem of illicit small arms and light weapons;
- Monitoring and evaluating the effectiveness of measures to address the problem of proliferation of illicit small arms and light weapons;
- Facilitating the exchange and dissemination of information with regard to the small arms and light weapons problem¹¹³.

The KNFP is guided by the Kenya National Action Plan for Arms Control and Management (NAP), which was approved in June 2004. The Kenya NAP provides an activity framework designed to comprehensively address the SALW problem in Kenya¹¹⁴.

To facilitate comprehensive revision of the legislative, regulatory and administrative regimes, Kenya developed a National Policy on SALW to inform all the proposed changes; taking into account sub-regional arrangement under the Nairobi Protocol and anchored on the Best Practice Guidelines already developed for the Great Lakes Region and Horn of Africa¹¹⁵. The process of developing the policy was steered by the NFP through the Policy Drafting Committee (PDC). The policy document went through a series of consultations with key government officials and the general public. Between January 2005 and March 2006, copies of the Draft National Policy on SALW had been sent out to stakeholders for their input¹¹⁶.

The policy seeks to attain four main objectives: reduce all form of proliferation of SALW and related materials; provide synergy and coordination for the management and control of SALW through legal, institutional and regulatory frameworks; coordinate and promote public awareness raising, education and sensitization on SALW and provides for measures to harmonize

¹¹³ Office of the President, Provincial Administration and Internal Security, Kenya National Focal Point on Small Arms and Light Weapons, *Op cit.*, p. 8-10.

¹¹⁴ James Ndung'u & Manasseh Wepundi, 'Controlling Small Arms and Light Weapons in Kenya and Uganda; Progress So Far' (SaferWorld, May 2011), p. 9.

¹¹⁵ *Ibid.*, p. 11.

¹¹⁶ Office of the President, Ministry of State for Provincial Administration and Internal Security, *Op cit.*, p. 11.

legislation and enhance international cooperation and information exchange on SALW. The policy establishes linkages with relevant national, regional and global instruments¹¹⁷.

The Kenya Government recognizes and acknowledges the existence of illicit arms in the hands of the nomadic pastoral communities and has been working with neighbouring states to reduce arms available to these groups and negative forces fleeing neighbouring states. Over the last five years, a joint disarmament program has been developed with the Ugandan Government to restore peace and order among the nomadic pastoral communities that straddle the common border¹¹⁸.

However, to date, the government has not pursued a comprehensive approach to the widespread circulation and use of small arms. In particular, its emphasis on a legal and law enforcement-oriented strategy, with very limited attention to the factors driving demand for weapons—particularly insecurity deriving from ethnic tensions, the existence of armed community militias, and cross-border attacks, as well as poverty (aggravated by drought) and other socio-economic factors—holds little promise of addressing the problem in the systematic way required.

The government has focused the blame for illegal arms on refugees. In diverting attention from its own responsibility, the government has ignored its role in permitting the transshipment of weapons throughout the region with inadequate controls. It also has failed to make the professionalization of the security forces a priority. Furthermore, by continuing to arm unaccountable police reservists and by neglecting to take action to address the dangerous role played by politicians who stoke communal conflict, the government itself contributes directly to the insecurity that drives small arms proliferation.

¹¹⁷ *Ibid.*, p. 9.

¹¹⁸ Office of the President, Provincial Administration and Internal Security, Kenya National Focal Point on Small Arms and Light Weapons, *Op cit.*, p.15-16.

CHAPTER 3 FIREARMS TRADE IN KENYA

3.0 INTRODUCTION

Of the estimated 640 million SALW in circulation worldwide, 100 million of those are said to be in Africa and majority of those are in the hands of civilians¹¹⁹. The flow of arms is fuelled by persistent instability in the region and recurring outbreak of conflicts within the Horn of Africa, the Great Lakes Region and to neighbouring countries. Firearm trafficking has a clear link to urban violence and gang criminality. It is also closely related to terrorism and armed conflict¹²⁰. UN Firearms Protocol defines illicit trafficking to mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it¹²¹.

Firearms trade is directly linked to activities of rebel movements. Rebel movements across Africa with proliferation of SALW, has created threats to peace, security, stability and development in Africa. The wide availability, accumulation and illicit flow of such weapons has helped in fuelling conflicts, causing series of havoc, undermined various peace agreements, intensified violence that has led to death of many, increasing refugees and Internally Displaced Persons, hindering the development of social stability, democracy and good governance in many African states. There should be a strong synergy among various government institutions within

¹¹⁹ < <http://www.smallamssurvey.org/files/portal/issueareas/inventories/inventories.html> > accessed on 3rd April 2014.

¹²⁰ United Nations Office on Drugs and Crime (UNODC), 'Organized Crime and Trafficking in Eastern Africa': *A discussion Paper at the Regional Ministerial Meeting on Promoting the Rule of Law and Human Security in Eastern Africa*, (Nairobi, November 2009) p.23.

¹²¹ United Nations, 'United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Trans-organized Crime', Article 1(2).

and outside Africa to minimize the activities of rebel movements and the flow of SALW in neighbouring states in Africa¹²².

The ongoing instability in Somalia is a gateway for illicit arms to enter the East African Region. Weak border controls facilitate the flow of weapons from Somalia to the region more generally. Kenya is one of the East African countries that are affected by the influx of firearms from the neighbouring countries which are faced with armed conflict¹²³. A major concern is the diversion of firearms from official sources due to combination of factors including the breakdown of state institutions, looted from government stockpiles, and theft from state run small arms inventories. The majority of firearms in East Africa are diverted from poorly secured stockpiles by corrupt officials or thieves and transactions are frequently facilitated by illicit brokers, who take advantage of weak regulatory system, poor or nonexistent import and export controls and licensing system¹²⁴.

This chapter looks at regulation of Firearms trade in Kenya. It also looks at regulation of firearm brokering in Kenya in comparison with other East African Countries. It proceeds to look at international and regional efforts that have been made on the same, and the government's efforts in meeting its commitments under international and regional legal instruments. It also looks at the challenges facing control of firearm trade in Kenya and the initiatives taken by the Kenyan government that indicate the willingness to deal with the problem.

3.1 INTERNATIONAL TREATIES DEALING WITH FIREARM TRADE

In recent years, the regional instability and humanitarian crisis fueled by illicit trafficking and misuse of conventional arms has become an issue of growing concern for international community. The idea of Arms Trade Treaty with principles based in international law was initiated by Non Governmental organisations (NGOs) in the 1990s and has gained considerable support among United Nations members. This is a strong indication that the global political will

¹²² Dr.Dahida D & Another, 'Arms Light Weapons and Rebel Insurgency across Africa: Impact on Neighboring States' [2013] 3 Public Policy and Administration Research 10.

¹²³ *Ibid.*, p.24. See also Regional Centre on Small Arms (RECSA): Fact Sheet 2008.

¹²⁴ United Nations Office on Drugs and Crime (UNODC), *Op cit.*, p.24.

now exists to address the irresponsible and poorly regulated trade in arms, a trade which fuels conflicts and results in gross human rights abuses and serious violations of International Humanitarian Law. This destabilises countries and regions and undermines sustainable development¹²⁵.

Kenya is party to a number of international and regional instruments regulating international transfer of SALW which provides measures that need to be taken to effectively it from a global to regional dimension. These include:

- **United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN 2001 PoA).**

It is a Politically-binding instrument and therefore it creates a political or rhetoric commitment but is not binding upon signatories. It was agreed in July 2001. All United Nations Member States are parties to it. Therefore Kenya, a member state of the United Nations is a party to it. The Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN Programme of Action) is the central global agreement on preventing and reducing the trafficking and proliferation of SALW¹²⁶.

It sets out a range of comprehensive measures at the national, regional and international level to prevent, combat and eradicate the illicit trade of SALW. It also establishes a framework for states to take action on the following areas; preventing and combating illicit SALW production and trafficking; controls on production, holding and transfer of SALW; weapons collection and destruction; management and security of official and authorized SALW stocks; information exchange and confidence building measures and specific recommendations for the control of SALW in post-conflict settings. It also provides for the establishment of co-ordination bodies and points of contract; international and regional co-operation and information exchange; and the involvement of civil society. The UN Programme of Action calls for states to :

- Develop national legislative controls on; illicit SALW production and trafficking, production, transfers, weapons collection and destruction and stockpile management.

¹²⁵ Amnesty International, 'Global Arms Trade Treaty: What States Want' (October 2007) p.1.

¹²⁶ Bureau for Crisis Prevention & Recovery, UNDP, *Op cit.*, p. 138.

- Develop comprehensive legislation and administrative procedures to facilitate marking, record-keeping and tracing of illicit SALW and cooperate fully in the tracing of SALW
- Act in full compliance with UN Security Council arms embargoes

States also have an obligation to provide information on the implementation of the UN Programme of Action to the UN Department for Disarmament Affairs (DDA)¹²⁷.

UN Programme of Action Section 11 paragraph 16 requires the marking and registration of all confiscated, seized or collected small arms prior to their destruction or disposal.

- **United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (UN Firearms Protocol)**

The United Nations Firearms Protocol was finalised in June 2001 and enacted on 3 July 2005. The protocol supplements the UN Convention against Transnational Organized Crime, and member states commit to criminalise the illicit manufacture and trade of weapons, including Handguns, pistols, submachine guns and light missiles. Article 9 (c) of UN Firearms Protocol provides requires the marking of deactivated firearms with clearly visible mark attesting to its deactivation.

- **International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons**

It is a Politically-binding and was adopted by the UN General Assembly on 12th October 2005. All Member States of the United Nations are parties to it therefore Kenya is a party to it and bound by obligations created therein. The purpose of this Instrument is to enable UN Member States to identify and trace illicit SALW and to promote and facilitate international cooperation on marking and tracing of SALW¹²⁸.

¹²⁷ *Ibid.*, p. 139

¹²⁸ *Ibid.*

The Instrument supports the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Trans-national Organized Crime, by reinforcing and elaborating the requirements to mark and record information on SALW. It sets out detailed provisions relating to control and legislative procedures to enable states to effectively mark and trace illicit SALW. All UN Member States are politically bound to develop joint coordination and cooperation of efforts to mark and trace illicit SALW. The Instrument stipulates that all UN Member States are politically bound to develop and enact national legislation that covers marking, record-keeping and tracing of SALW¹²⁹.

- **Organisation of African Unity Bamako Declaration on an African Common Position on the Illicit Proliferation and Circulation and Trafficking of Small Arms and Light Weapons, 2000 (Bamako Declaration)**

This recommends establishing at the national level the responsible management of licit arms.

- **Nairobi Protocol for the Prevention, control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa.**

Art. 3 (c) (vi) of the Protocol requires provisions ensuring the standardised marking and identification of small arms and light weapons at the time of manufacture, import or export.

➤ **Record Keeping and Marking**

With regard to when this should take place, whether it is during import, export, transit or manufacture, the national legislation (the Firearms Act of Kenya) broadly conforms to the regional and international agreements but falls short in one key area. Part 11 section 8 (1) & (2) of the Firearms Act cap 114 laws of Kenya, states that licenses will not be granted in cases where the small arm is marked. However, the legislation does not explicitly state that small arms must be marked at the time of manufacture, import or export.

¹²⁹ *Ibid.*, p.140.

With regard to where the marking should be, the Firearms Act Cap 114 laws of Kenya, does not conform to the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa. Article 7 of the Protocol requires that the marking should be on the barrel, frame and where applicable, the slide.

Article 7 (a) of the Protocol further requires marking at the time of manufacture with a unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number. Subsection (b) requires marking at the time of import with a simple marking identifying the country and year of import and an individual serial number if it does not have one. Subsection (c) requires the marking of small arms and light weapons in possession of the state with a unique mark. The Firearms Act of Kenya conforms in part to the regional and international agreements. Provisions exist in some areas but a number of gaps are evident. Part 11 section 8 of the Firearms Act cap 114 laws of Kenya provides that, licenses will not be granted with regard to unmarked small arms. However, there is no specification given regarding the time at which the small arms must be marked or the type of information that the marking must contain.

With regard to description of record keeping specifications for example the records that should be kept and for how long, Article 7 of the Nairobi Protocol, requires the maintenance of records of markings for not less than ten years of firearms, ammunition and components that are necessary to trace illicitly manufactured or trafficked arms. Part II Section 13 (1) of the Firearms Act of Kenya provides that for the purposes of this Act, the chief licensing officer shall keep in the prescribed form a register of firearms dealers in which, subject as hereinafter provided, he shall cause to be entered the name of every person who applies to be registered as a firearms dealer and furnishes the prescribed particulars: Provided that –

- i. the licensing officer shall not register an applicant who is prohibited from being registered by order of a court made under section 19; and
- ii. the licensing officer may refuse to register an applicant if he is satisfied that the applicant cannot be permitted to carry on business as a firearms dealer without danger to the public safety or to the peace.

Subsection (3) provides that if the licensing officer, after giving reasonable notice to any person whose name is on the register, is satisfied that that person –

- a) is no longer carrying on business as a firearms dealer; or
- b) cannot be permitted to continue to carry on business as a firearms dealer without danger to the public safety or to the peace, he shall cause the name of that person to be removed from the register.

Subsection (5) provides that if any person, for the purpose of procuring the registration of himself or any other person as a firearms dealer makes any statement which he knows to be false, he shall be guilty of an offence and liable to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand shillings or to both.

The above provisions of the Firearms Act of Kenya clearly shows that, The national legislation conforms in part to the regional and international agreements. Registers are maintained on small arms dealers. However a number of gaps are evident. There are no provisions relating to the centralized registration of all civilian-owned small arms and no requirement for the maintenance of records on small arms markings. Further, there is no specification relating to the length of time for which records must be maintained.

Article 3 (a) (i) of the Nairobi Protocol requires the establishment as a criminal offence the illicit trafficking of SALW. The national legislation, the Firearms Act of Kenya, fully conforms to the regional and international agreements. The national legislation contains offences and penalties relating to the import, export and transit of arms.

With regard to import, export and transit requirements the national legislation broadly conforms to the regional and international agreements but falls short in a few key areas. Licenses are required for the import, export and transit of small arms. However, the legislation does not specify the information that must be included on the licenses. In the Firearms Act of Kenya, no mention is made of the need for end-user certificates and there is no requirement that export applications are assessed in a manner consistent with existing responsibilities under

international law, nor are there any requirements for the auditing and monitoring of licenses¹³⁰. This clearly shows the inadequacy of the Firearms Act of Kenya in regulating proliferation of SALW. This is one of the challenge the government of Kenya is facing in its efforts to control proliferation of SALW in Kenya.

3.2 FIREARM BROKERING IN KENYA AND OTHER EAST AFRICAN COUNTRIES.

Illicit brokering of small arms and light weapons (SALW) facilitates the flow of illicit SALW into conflict areas and into the possession of criminal and terrorist groups. This poses a serious threat to international peace and security, economic and social development and civilian safety. A strong destabilizing factor, uncontrolled SALW brokering activities has steadily contributed to violations of arms embargoes imposed by the Security Council. In 2001, States agreed on the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UNPoA). In this regard, member States made the commitment to develop adequate national legislation and administrative procedures to regulate SALW brokering¹³¹.

Article 1 of the Nairobi protocol for the Prevention, Control and Reduction of Small arms and Light Weapons in the Great Lakes Region and the Horn of Africa defines brokering as, acting:

- a) for a commission, advantage or cause, whether pecuniary or otherwise;
- b) to facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of small arms and light weapons; or
- c) thereby acting as intermediary between any manufacturer, or supplier of, or dealer in small arms and light weapons and any buyer or recipient thereof.

East African member states are signatories to the Nairobi Protocol that calls for the regulation of SALW brokering through registration of brokers and issuance of brokering licenses¹³².

¹³⁰ Flew C & Urquhart A, *Op cit.*, p.32-33.

¹³¹ United Nations Regional Centre for Peace and Disarmament in Africa (UNREC)/United Nations Office for Disarmament Affairs (UNODA), *Op cit.*, p. 5.

¹³² *Ibid.*, P. V.

Since the Nairobi Protocol entered into force in 2005, States Parties have considered reviewing their SALW legislation in light of the provisions of the Nairobi Protocol. While some of these countries (Rwanda and Burundi) have already enacted new legislation that contains provisions on brokering, others are still addressing the issue at the policy level or are envisaging a comprehensive review of their national legislation. Therefore, the state parties have thus far only partly fulfilled their obligations in brokering control set forth by the international and regional instruments. Without the relevant legal provisions that oblige brokers to register, control mechanisms such as the register of brokers can hardly be effective. In addition to the legal framework, specific regulations and administrative procedures need to be formulated to ensure effective functioning of the control mechanisms¹³³.

Illicit arm brokers exploit legal loopholes and often operate within a network of front companies and subcontractors. They falsify documents, use complex transport routes, and associate themselves with organized crime structures and corrupt officials. Their transactions are opaque and can hinder law enforcement structures from tracing their activities¹³⁴. Brokering does not appear in national legislations promulgated before the Nairobi protocol and only Burundi and Rwanda have so far amended their firearm legislations to include brokering regulation. The national legislations of Burundi and Rwanda both require a register of authorized brokers to be kept by the government and a license for brokers to operate. However neither Burundi nor Rwanda has set out detailed Regulations for registering or licensing. In Kenya, Tanzania Uganda and Djibouti, legal provisions for brokering control are yet in place, but preparations are underway in both countries¹³⁵.

Article 3 (c) (xii) of the Nairobi Protocol requires provisions regulating brokering in individual state parties. The Firearms Act of Kenya does not include any provisions for firearms brokering. Nor are there any regulations or specific controls in the imports-exports legal framework that

¹³³ *Ibid.*, p. 9.

¹³⁴ *Ibid.*, p.8.

¹³⁵ *Ibid.*, p. VI.

would address the issue of firearms brokering¹³⁶. Therefore it does not conform to the regional and international agreements. The National Policy on Small Arms and Light Weapons of Kenya addresses firearm brokering and takes into consideration the Nairobi Protocol and Best Practice Guidelines as well as the particularities of the Kenyan context¹³⁷. Research has also revealed that Kenyan firearms dealers (and in some cases clearing agents handling imports and exports) are involved in both dealership and brokering. This double role of dealers is not recognized by the current legislation, which remains silent on brokering¹³⁸.

In the absence of a national brokering legislation accurate information on brokering and brokers is hard to acquire. Current national legislations do not oblige brokers to register, and brokers also wish to remain anonymous¹³⁹. In response to the need of the Nairobi Protocol States Parties to start registering and licensing brokers and brokering transactions, UNREC in 2011 embarked upon the project *Regulating Small Arms Brokering in Eastern Africa*. With the aim of building capacity in the six States Parties to the Protocol, the project helped create an electronic broker register for more effective control on brokers and brokering activities. The project succeeded in installing new registers in Burundi, Kenya, Rwanda, Tanzania and Uganda. However, as long as there is no legal requirement to register, brokers are not obliged to do so. Therefore the obligation to register should be foreseen by the law and specific regulations and administrative procedures should be formulated to ensure effective functioning of the control mechanisms¹⁴⁰.

3.3 ENFORCED POLICIES

Acknowledging the detrimental effects of SALW proliferation, states in the Great Lakes Region and Horn of Africa have adopted a regional approach aimed at curbing the supply and misuse of illicit SALW, in the form of the Nairobi Protocol for the Prevention, Control and Reduction of

¹³⁶ *Ibid.*, p. 10.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, p. 11.

¹³⁹ *Ibid.*, P. VI.

¹⁴⁰ *Ibid.*, p.27-28.

Small Arms and Light Weapons in the Great Lakes Region and Horn of Africa (Nairobi Protocol). Others include the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UNPoA) Nairobi Declaration, Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons¹⁴¹.

The Nairobi Protocol is the most recent and progressive legally binding regional SALW agreement in Africa. The protocol provides for significant levels of cooperation between signatory states in tackling arms control issues¹⁴². Kenya as one of the states in the Great Lakes Region is a party to the above legal instruments and is therefore bound to carry out obligations created under the principle of *pacta sunt servanda*. Ratifying these legal instruments shows willingness to be bound and to contribute towards the greater efforts regionally and nationally to control firearm trade and brokering

The Nairobi Protocol specifies that a system of control shall include:

- regulating all manufacturers, dealers, traders, financiers and transporters of small arms and light weapons through licensing;
- registering all brokers operating within their territory;
- ensuring that all registered brokers seek and obtain authorisation for each individual transaction taking place;
- ensuring that all brokering transactions provide full disclosure on import and export licenses or authorisation and accompanying documents of the names and locations of all brokers involved in the transaction; and
- licensing, registering and checking regularly and randomly all independent manufacturers, dealers, traders and brokers'

¹⁴¹ Dominique Dye, 'Arms Control in a rough neighbourhood: The case of Great Lakes Region and The Horn of Africa', (Institute of Security Studies, February 2009) p. 1.

¹⁴² *Ibid.*, p. 2.

In specifying actions to be undertaken by member states to address SALW proliferation, the Nairobi Protocol aims to close loopholes and ensure that its signatory states uniformly address and cover all aspects related to the illicit proliferation of SALW¹⁴³.

RECSA was established in June 2005 at the Third Ministerial Review Conference of the Nairobi Declaration in Kenya. RECSA coordinates the implementation of the Nairobi Protocol in the signatory states that subscribe to its principles, aims and objectives. These member states are required, both under the declaration and the protocol, to establish a national focal point (NFP) on SALW. NFPs are comprised of representatives from various ministries or departments that deal with internal security issues, and are tasked with facilitating and coordinating implementation of the protocol at the national level. Each country's NFP undertakes to implement the protocol by developing a national action plan (NAP), which is based on the set of 'Best Practice Guidelines'¹⁴⁴.

A NFP on SALW was established in Kenya in January 2003. A focal point committee bringing together the Government and Civil Society was launched and a Secretariat established and operationalized with assistance through the then Nairobi Secretariat (now Regional Centre on Small Arms – RECSA)¹⁴⁵. The Kenya NFP is guided by the Kenya National Action Plan for Arms Control and Management (NAP), which was approved in June 2004. The Kenya NAP provides an activity framework designed to comprehensively address the SALW problem in Kenya¹⁴⁶.

3.4 CHALLENGES FACING ENFORCEMENT IN KENYA

While cooperation at the regional level for countries of Great Lakes region including Kenya has

¹⁴³ *Ibid.*, p. 3.

¹⁴⁴ *Ibid.*

¹⁴⁵ Office of the President, Provincial Administration and Internal Security, Kenya National Focal Point on Small Arms and Light Weapons, *Op cit.*, p. 8-10.

¹⁴⁶ James N & Manasseh W, *Op cit.*, p. 9.

been noteworthy, attempts to implement the provisions of the various legal instruments ratified by these countries at the national level have met with a number of obstacles¹⁴⁷. These obstacles include

- **Lack of Comprehensive Legislative framework**

As aforementioned the Firearms Act Cap 114 Laws of Kenya is inadequate in addressing firearm trade and brokering in Kenya. There are various gaps in the Act with regard to obligations of Kenya under international and regional legal instruments regulating firearm trade and brokering and to which Kenya is a signatory. Even if the National Policy on Small Arms and Light Weapons of Kenya provides for most of these issues not provided for under the Firearms Act, there is need for a legislation which will provide a basis for arrest and conviction if a person is found liable for violating its provisions. A person cannot be taken to court on the basis of a policy.

- **Lack of political commitment (will)**

Most countries of the world are reluctant to actively control and participate in control of firearm trade and brokering because of the revenue they derive from such trade. Although in East Africa there appears to be a high level of rhetorical political commitment to the implementation of the Nairobi Protocol and other legal instruments, the question remains whether this translates into action. While the annual ministerial meetings appear to make the ministers aware of what is happening it seems that this willingness to participate in high regional discussions is not always or consistently translating into support for domestic initiatives on SALW control, such as the review of legislation. National Focal Points (NFPs), the primary agencies through which national action on SALW control are co-ordinated, often lack high-level political support, and with this

¹⁴⁷Dye, *Op cit.*, p. 1.

the financial and institutional support that is necessary to develop and sustain practical SALW control interventions¹⁴⁸.

- **Inadequate financial and technical resources**

For many countries including Kenya severely limited financial and technical resources inhibits progress. While it seems that sufficient financial resources are reaching international and regional structures, it appears that not enough arrive at the national level. Critically, it is at the national level where most of the activities must now take place. Whether through governmental or external channels, funds should be made available to the NFPs for specific tasks that have been identified and properly budgeted for. This means that the NFPs must have the capacity to manage the funds given to them and to properly account for their spending. Individual countries must also realise that they must create budgets for the NFPs and the work they must do. RECSA and other donors cannot provide the funding indefinitely¹⁴⁹.

- **Pastoral Conflicts –**

Raiding has implications for relations with neighbouring states as warriors cross national borders in search of cattle and weapons. Recent decades have seen an escalation of conflicts and banditry among pastoralists in the Kenya-Uganda border region fuelled by a growing number of small arms¹⁵⁰. Pastoralist communities with relatively little police presence and numerous challenges (such as conflict over grazing and water access for their cattle) are greatly affected. This is especially so for communities in the North Eastern, Upper Eastern, and North Rift areas, which are believed to suffer excessively from high levels of illicit firearms and insecurity¹⁵¹.

¹⁴⁸ Saferworld, 'Small Arms and Security in the Great Lakes Region and the Horn of Africa: Harmonising Small Arms Control Legislation', (Saferworld, March 2011) p. 33.

¹⁴⁹ *Ibid.*

¹⁵⁰ Kennedy Agate Mtuku, *Op cit.*, p. 47-70.

¹⁵¹ *Ibid.*, p. 49.

- **Political tensions**

The election-related violence of 2007/08, mass displacements, and widespread insecurity are believed to have fed a new demand for small arms, especially in central Rift Valley Province. Whereas many crude weapons were used to unleash the violence and resultant killings, there are reports of communities seeking to acquire and obtaining more sophisticated firearms. Alongside this growing demand are concerns about the potential proliferation of armed groups and the growth of existing organized gangs. This rearmament drive among communities, widely reported by the media, confirms the need to put in place well-founded arms control measures alongside Peace-building efforts.

- **Porous state borders**

Porous borders with unstable neighbouring states have had a negative impact on security in Kenya. Firearm related crimes have been rising in Kenya due to the growing number of illicit arms that come from the war torn Somalia. Other obstacles include rebel activities and insufficient levels of technical expertise¹⁵². The presence of poorly-paid and poorly-trained security forces further ensures a steady supply of weapons to civilians¹⁵³.

The reinforcement of the legislative and/or regulatory regimes for strengthening border controls at national, regional and multilateral levels is crucial in ensuring that the flow of arms and related material across most of our regional porous borders is countered. States have to enhance practical cooperation among institutions that are responsible for the effective control of borders with a view to combating not only the illicit trade in SALW but also related criminal activities. Investing in security should happen in tandem with other developments as a way of securing any progress attained or being pursued in other sectors of society. With the failure of traditional

¹⁵² Dye, *Op cit.*, p. 1.

¹⁵³ Saferworld, 'Small Arms and Light Weapons: A Training Manual' (Saferworld, February 2012) p. 7.

security concepts to take into account the shifting nature of armed violence and the particular tools of violence, attention is long overdue¹⁵⁴.

CHAPTER 4 INTERNATIONAL STANDARDS ON SALW

4.0 INTRODUCTION

The manifestation of the challenges of averse SALW has been such that they have presented not only a security challenge to the authority of the state (although this was largely limited to Northern Frontier districts), but also have presented a problem of law enforcement. In many parts of Kenya (especially the northern regions) SALW have been widely used to perpetuate conflicts. This has had adverse negative effects on not only the economic wellbeing of the population, but also social, cultural, and political factors in Kenya¹⁵⁵.

The Government of Kenya has the primary responsibility of ensuring security through enforcing law and order. In the discharge of its mandate, the government has tempered coercive with voluntary disarmament approaches in attempts to mop up illicit firearms, especially in northern Kenya. Kenya has implemented well over 50 disarmament operations in the past 100 years¹⁵⁶. Although the Kenya Government has focused most of its disarmament operations in pastoralist areas, arms are increasingly posing significant socio-economic, political and security risks countrywide¹⁵⁷. Coercive measures were, however, fraught with concerns about human rights violations (for example violation of right to privacy), with communities and civil society actors decrying the excessive use of force and torture. Some disarmament efforts, such as the 1984 Operation Wajir, have been described as massacres due to the number of deaths involved¹⁵⁸.

¹⁵⁴ Nyambura Githaiga, 'Regional Dimensions of Conflict in the Great Lakes', (Institute for Security Studies, Nairobi, September 2011) p. 8 – 9.

¹⁵⁵ Wepundi M, *Op cit.*, p. 1.

¹⁵⁶ Wepundi M & others, *Op cit.*, p. 29.

¹⁵⁷ Wepundi M, *Op cit.*, p. 1.

¹⁵⁸ Wepundi M & others, *Op cit.*, p.30. See also Human Rights Watch, (2008: 2009).

The government modified its approach to accommodate human rights concerns and provide alternative livelihoods and options to the targeted communities by designing a disarmament and development programme dubbed Operation Dumisha Amani. This approach integrates development efforts such as rebuilding infrastructure and has an elaborate multi-actor strategy that involves local opinion leaders, civil society, and the media in confidence-building measures for disarmament. The first phase of this initiative began in 2005, and by 2006, 2,298 firearms and 4,418 rounds of ammunition had been recovered. The first phase did not achieve the targeted 50,000 firearms, and so a second phase began in 2010 with a voluntary phase in February of that year. The voluntary phase was also enhanced by a government amnesty offer to all those who willingly turned in their weapons¹⁵⁹. This approach by the government can be described in two contrasting ways. On one hand it can be said that the government is failing, on the other hand it can be argued that the approach is justified on the basis on Human Rights. The government is trying to be prudent not to violate human rights of its citizens. The persisting concerns about the inadequate provision of security and underdevelopment account for communities' unwillingness to surrender all of their firearms¹⁶⁰.

Whereas the government embraced the disarmament and development approach to firearms collection, it implemented two forced disarmament exercises in Mt Elgon district, in Bungoma and Mandera counties. The one implemented in Mt Elgon was codenamed Operation Okoa Maisha (Save Lives), whereas the initiative in Mandera was dubbed Operation Chunga Mpaka (Guard the Border). The two exercises were both associated with claims of human rights violations including allegations of rape, torture, and even killings by the security forces.. For instance, Mt. Elgon's 2008 Operation Okoa Maisha (Operation Save Lives) was faced with numerous claims of torture of civilians by security forces¹⁶¹. In the same year, there was Operation Chunga Mpaka (Guard the Border) in Mandera, in which there were claims of torture

¹⁵⁹ Wepundi M & others, *Oop cit.*, p. 30.

¹⁶⁰ Wepundi M & others, *Op cit.*, p. 30-31

¹⁶¹ Wepundi Manasseh, 'Security' in Wachira Kiragu, Barrack Muluka and Manasseh Wepundi, *Mt Elgon Conflict: A Rapid Assessment of the Underpinning Socioeconomic, Governance and Security Factors*, (Nairobi: UNDP/OCHA, 2009), P. 36 – 49.

of hundreds of people, and one person killed¹⁶². Operation Okota (Operation Collect) of 2006 was accused of indiscriminately harassing communities, “contributing to a perception that the disarmament is a form of community punishment¹⁶³. Despite this, the operations were viewed as successful in dismantling Mt Elgon’s Sabaot Land Defence Force (SLDF) and restoring peace in the two areas¹⁶⁴.

This chapter looks at the emerging international standards not included in the Firearms Act of Kenya such as disarmament and collection and disposal of surplus and surrendered illegal small arms and light weapons and pinpoint what Kenya has been doing with regard to the same. This will answer the why question, and critically discuss the reasons why Kenya has not been effective in regulating the proliferation of SALW.

4.1 COMPLIANCE OF KENYA TO MEET ITS INTERNATIONAL OBLIGATIONS

The Government of Kenya has realized some significant milestones in addressing the continuing threat of illicit small arms. The establishment of the Kenya National Focal Point on Small Arms and Light Weapons (KNFP) has ensured an inclusive multi-disciplinary and multi-stakeholder approach to small arms management. The KNFP is mandated to coordinate all action in addressing small arms issues in Kenya¹⁶⁵.

In its current Strategic Plan 2010/11–2014/15, the KNFP is committed to its vision for the realization of a ‘peaceful, secure and prosperous society free of illicit SALW for sustainable development’. This will be realized through stockpile management, the undertaking of relevant capacity building among law enforcement agencies and other players in small arms, awareness

¹⁶² Human Rights Watch, “*Bring the Gun or you’ll Die*”: Torture, Rape and Other Serious Human Rights Violations by Kenya Security Forces in the Mandera Triangle, (New York: Human Rights Watch, 2009) p. 38 – 44.

¹⁶³ Saferworld, *Developing a strategy to Respond to the Government of Kenya’s Disarmament Programme*, Report of the Round Table Organised by Saferworld and The Great Lakes Parliamentary Forum on Peace, Nairobi 29 June 2006, p. 2.

¹⁶⁴ Wepundi M & others, *Op cit.*, p. 30-31.

¹⁶⁵ *Ibid.*, p. 32.

raising on the dangers of illicit small arms, and institutional capacity strengthening for mitigating small arms challenges¹⁶⁶.

The KNFP's mandate is derived from the 15 March 2000 Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Nairobi Declaration), which called on the Great Lakes and Horn of Africa states to strengthen or establish national mechanisms to deal with the problem of illicit small arms and implement the declaration. The Nairobi Protocol (2004) legally bound states to this requirement under Article 16 on transparency, information exchange, and harmonization. Government and civil society cooperation is equally guaranteed by both the Nairobi Declaration and the Nairobi Protocol (Article 2c)¹⁶⁷.

As a national the KNFP is also guided by other international and continental instruments, specifically the Programme of Action and the Bamako Declaration on the African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2010). Immediately after its formation, the KNFP undertook the national arms mapping in 2003, which informed the development of the National Action Plan to combat illicit arms in the country. The plan's strategy was spelt out in ten themes: institutional framework, policy and legislation, stockpile management, public education and awareness, international and regional cooperation and information exchange, border control and refugees, human development planning, training and capacity building, research, and critical areas of support. These guided and informed KNFP activities for six years. However, some of the provisions were not fully achieved or implemented, curtailed mainly by a lack of resources¹⁶⁸.

Institutionally, the establishment of a functional directorate and the formation of the National Steering Committee on Conflict Management and Peace building (NSC) can be considered key KNFP achievements. It has developed the five-year Strategic Plan 2010/11–2014/15, as well as a

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, p. 33.

¹⁶⁸ *Ibid.*

Monitoring and evaluation strategy. At lower levels, the KNFP established and trained 8 provincial task forces (PTFs) and district task forces (DTFs) in various parts the country. But the success of PTFs and DTFs is constrained by inadequate follow-up, a lack of resources to implement small arms work plans, and the shuffling of administrators. The KNFP has also facilitated the drafting of the National Small Arms Policy¹⁶⁹.

In stockpile management, while disarmament operations such as Okoa Maisha and Dumisha Amani are entirely overseen by independent command chains, the KNFP coordinates efforts to publicly destroy recovered arms. By March 2010 Kenya had destroyed over 25,000 illegal arms and 50,000 rounds of ammunition. The KNFP has acquired five firearms marking machines and by May 2011 had marked over 60,000 firearms. It has also overseen the improvement of data records, and the installation of software for tracking brokerage and trade in arms. Marking government firearms has strengthened identification and traceability, significantly reducing the misuse of these firearms¹⁷⁰.

On the research front, the 2003 National Mapping for Illicit SALW (National Arms Mapping) has been KNFP's major research project, and this informed the development of the Kenya National Action Plan. Internationally and regionally, in addition to participating in international Programme of Action and regional RECSA conferences, the KNFP has played a strategic role in pushing for tough global controls on arms trade by co-sponsoring and lobbying for the adoption of the Arms Trade Treaty, together with other like-minded states¹⁷¹.

4.2 CRITICAL ANALYSIS OF FACTS

Law enforcement efforts to control the proliferation of small arms have also faced challenges. This is mainly in the area of the inadequate physical presence of law enforcement officers, poor

¹⁶⁹ *Ibid.*, p. 33 – 34.

¹⁷⁰ *Ibid.*, p. 34.

¹⁷¹ *Ibid.*

infrastructure, corruption, the scarcity of resources, and difficult terrain in the small arms and conflict hotspot areas. These challenges include:

- **Lack of a comprehensive legislative framework to address disarmament**

The available legal mechanisms, mainly the Firearms Act cap 114 Laws of Kenya do not provide a comprehensive approach to manage and control SALW, and the institutions charged with responsibility of managing and controlling SALW have inadequate legal authority and limited institutional and administrative capacities. The Firearms Act of Kenya does not deal with how disarmament should be approached. The National Policy on SALW seeks to address some of these challenges. National Policy on SALW gives comprehensive guidelines that would support disarmament through strengthening the legal, regulatory and institutional frameworks¹⁷². It also provides for addressing demand factors through linking it with:

- Development programmes –

Through which the Government plans to incorporate combating proliferation of illicit SALW into the national action plans for SALW control at national and local-level socio-economic development agenda; mainstreaming Security Sector Reform in the wider national development policies and programmes; reducing conflict over natural resources and diversification of economic opportunities for those dependant on natural resources; and developing programmes to reduce vulnerabilities associated with cattle rustling

- Strengthening and promoting community security

Through developing and implementing programmes that would enhance police-civilian cooperation in enhancing community and individual security; putting in place strategies to enhance capacity of police and other law enforcement agencies.

- Strengthening community peace agreements

¹⁷²Wepundi M , *Op cit.*, p. 30.

Through improving legislations that would strengthen community peace building initiatives including enforcement of the inter-communal peace agreements.

➤ Amnesties, collection, disarmament, and rehabilitation

Through enhanced coordination of civilian disarmament processes; developing and implementing voluntary amnesty and surrender of illicit SALW including models that would encourage police to work with communities in removing illicit SALW; enhancing storage for impounded SALW to avoid re-entry to communities; developing and enhancing comprehensive public awareness programmes that would increase involvement and support by communities.

➤ Immigration and refugees

Through reviewing the Refugee Act to be in line with the policy and developing and implementing a developmental arms reduction programme in and around refugee communities¹⁷³.

National policy on SALW however, does not focus on the process of disarmament but generally on legal, regulatory and institutional requirements that would enhance management and control proliferation of illicit trafficking and misuse of SALW. Thus, issues such as how to undertake disarmament are not addressed; similarly, it does not categorize how it will address the problem of urban-related and rural-related armament. However in its glossary of terms, the draft policy explains, what constitutes possession and therefore provides grounds for which disarmament can take place. It also defines what SALW, firearms, ammunition and trafficking are, thereby clarifying what type of weapons disarmament exercises would be focusing on. The National policy is however, silent on how a disarmament exercise or process should take place. However in order to effectively control and manage illicit trafficking and misuse of SALW, the process through which disarmament will take place is significant thus warranting a separate policy on disarmament. The National Policy on SALW policy gives provisions for conducting disarmament but does not address itself to how disarmament should take place¹⁷⁴.

¹⁷³ Office of the President, Ministry of State for Provincial Administration and Internal Security, Republic of Kenya, *Op cit.*, p. 27 -29.

¹⁷⁴ Wepundi M ,*Op cit.*, p. 31

- **Resource Constraints**

The KNFP is constrained by limited financial, institutional, and human resources. This is considered a major reason for its inability to fully implement its National Action Plan which was designed to run from 2004 to 2009¹⁷⁵.

- **Inadequate Formal Security**

This has made communities to lose confidence in government security hence the demand for arms. Pastoralist areas are expansive and resources needed to maintain security forces on the ground are inadequate. Yet, even where security officers are present, they are accused of failing to support the community in recovery of livestock (after raids). It has been argued that the **communities have higher confidence in KPRs than Police or GSU**¹⁷⁶.

- **Kenya Police Reservists**

The communities in which they exist consider KPRs to be necessary, but their recruitment and management are seen to be flawed. KPRs are voluntary officers who are attached to the police and are called upon if and when need arises to respond to problematic security situations. Although they play a noble role, some have privatized the small arms given to them by the government and allegedly use them for criminal ends¹⁷⁷.

¹⁷⁵Wepundi M & others, *Op cit.*, p. 34.

¹⁷⁶ Wepundi M ,*Op cit.*, p. 52.

¹⁷⁷Wepundi M & others, *Op cit.*, p. 31.

- **Itinerant Lifestyles and Identity-based Alliances**

Disarmament efforts targeting pastoralist communities are confronted by the challenge of their nomadic existence. Multiple disarmaments in the North Rift have been undermined by the migration of communities to neighbouring countries and/or regions, a fact that has informed the implementation of joint disarmament efforts. Further, nomadic communities share cultural and ethnic traits, making it possible for the Pokot of Kenya to mingle with Ugandan Pokots when avoiding disarmament on the Kenyan side. The same can be observed among Kenya's Turkana and Uganda's Karamojong. This is a major basis for the joint disarmament efforts between Kenya and Uganda¹⁷⁸.

- **Poverty**

Poverty afflicts communities in SALW-infested areas. It also influences demand for arms. Where a significant proportion of the youth are unemployed, and crime and/ or a warrior culture (moranism) promises dividends in terms of profits from SALW trafficking, cattle from raids (in pastoralist areas), and quick money and property (in the case of urban crime), disarmament efforts cannot eradicate small arms¹⁷⁹.

- **Infrastructure**

Pastoralist areas are characterized by poorly developed transport infrastructure. This has provided logistical challenges, given the cost implications of deploying and transporting security personnel on the ground. Further, underdevelopment of the pastoralist areas itself fuels arms proliferation, as marginalized groups resort to guns for self-protection, commercialized cattle rustling and a rewarding arms economy¹⁸⁰.

¹⁷⁸Wepundi M, *Op cit.*, p. 53.

¹⁷⁹ *Ibid.*, p. 55.

¹⁸⁰ *Ibid.*

The persistence of rural and urban demand for illicit arms is symptomatic of inadequate government disarmament measures and/or policies. Over 50 disarmament operations have been implemented in northern Kenya, but they've not erased small arms availability in the country. This necessitates a rethink about government approaches, which should be less coercive and more strategic. Strengthening the capacities of law enforcement agencies, designing arms reduction strategies that include civil society actors and the public, and designing institutional guiding frameworks are some ways the government can approach disarmament¹⁸¹.

CHAPTER 5 CONCLUSION

The Firearms Act of Kenya is inadequate in regulating the proliferation of SALW in Kenya and there is need for urgent attention in this regard. In Kenya, resort to violence is fuelled by political and socio-economic factors. The increase in armed violence in most communities especially the pastoral areas was catalyzed by proliferation of SALW, cattle rustling practices, banditry, competition for pasture and water as well as limited presence of administrative structures. This has had a direct bearing on poverty and under development. Kenyan government has implemented international conventions and agreements, which address issues related to armed violence and development¹⁸².

Kenya recognizes the nexus between Security and Development that have continuously been discussed in various UN and other international forums. This linkage is critical for the attainment of the Millennium Declaration Goals (MDGs) as peace and security issues have a direct impact on the National Development Strategies. Widespread insecurity, high levels of crime, inter-communal conflicts, and SALW proliferation are acknowledged as impacting negatively on Kenya's peace and development¹⁸³.

¹⁸¹Wepundi M , *Op cit.*, p. 2.

¹⁸² *Ibid.*

¹⁸³ Office of the President, Ministry of State for Provincial Administration and Internal Security, Kenya National Focal Points on Small Arms and Light Weapons, 'Kenya's Report on the Interrelation and Initiative on Armed Violence and Development ' (2011) p. 2.

Kenya is privileged and committed to the membership of the Core- Group spearheading the principles and goals of the Geneva Declaration on Armed Violence and Development. Among the key plans and strategies put in place is the Vision 2030. Kenya's Vision 2030 is an economic development plan that aims at producing annual economic growth rates of ten percent. Fundamental to this is the peace and security thematic area which is critical to the attainment of the above. The Vision thus recognizes that safety and security are vital enablers of the country's political, social and economic development providing an enabling environment for individuals, investment and overall improvement in the various sectors. In implementation of the Vision, the First Medium Term Plan (MTP) 2008-2012 has been developed for phase one. This commits the country to adopt policy, legal and institutional framework in security, peace building and conflict management that will be ideal for specific strategies¹⁸⁴.

The government continues to work very closely with the Civil Society and UN agencies under the stewardship of United Nations Development Programme (UNDP) and Civil Society Organizations (CSO's) to address armed violence and development. Among the CSO's working in Kenya on small arms issues are Oxfam, PeaceNet, Saferworld, Kenya Action Network on Small Arms (KANSAs), Africa Peace Forum and Security Research information Centre (SRIC). These have been working together to consolidate national, regional and international action on SALW, notably their support to the Arms Trade Treaty process and engagement with Group of Government Experts¹⁸⁵.

The government of Kenya has prioritized youth empowerment through vocational training and has created opportunities for youth access to education. Local youth polytechnics have been revived across the country to accommodate more youth in enterprise and business skills training. The Free Primary Education (FPE) programme has been intensified to absorb more youth. More recently, the Kazi Kwa Vijana (Employment for Youth) programme was launched with a view to turn the negative energies of the youth into positive and constructive energies¹⁸⁶.

¹⁸⁴ *Ibid.*, p. 2-3.

¹⁸⁵ *Ibid.*, p. 9.

¹⁸⁶ *Ibid.*, p. 7-8.

The Kenyan government in its efforts to address armed conflict and in turn promote development has come up with Alternative Livelihood Projects .This is a comprehensive strategy and effective design of programmes on armed violence reduction in pastoral communities KNFP, Arid Lands Resource Management Project (ALRMP) and UNDP. It seeks to assess and survey the problem of armed violence in the pastoralist communities and contribute to development of a national strategy for armed violence prevention by integrating traditional peace arbitration and conflict resolution justice systems with the project initiatives, secure storage of police weapons and voluntary collection and destruction of illicit weapons in the communities, raise awareness of the dangers of gun use and the negative impacts of armed violence and improvement of access to resources, and identification and implementation of livelihood opportunities and sustainable income generating activities¹⁸⁷.The government however needs to broaden its efforts to deal with the continuing threat of SALW that continues to undermine security and law enforcement in the country.

Highlights from Other Sources

To effectively address armed violence in Kenya, the following have to be taken into consideration:

- Harmonized funding framework for armed violence reduction and development initiatives.
- Strengthening the capacities of various stakeholders.
- Enhanced international support to ensure national reforms efforts are implemented in relation to promote good governance, rule of law and accountability.
- The need for the harmonization of policy and legislation that will promote a co-ordinated approach to armed violence reduction and development.
- Strengthened awareness raising and education on issues of armed violence reduction, peace building, conflict management and small arms reduction.
- Strengthening regional and sub-regional interventions and frameworks on armed violence reduction such as RECSA.

¹⁸⁷ *Ibid.*, p. 7.

- Establishing a Monitoring and Evaluation reporting mechanisms in relation to the implementation of the Geneva Declaration on Armed violence and development¹⁸⁸.

Governments are responsible for guaranteeing the security of their citizens. Therefore it is imperative that States take measures to address the problem. This is a great step towards realization of the MDGS in all its aspects, in Kenya, Africa and the world at large can be realized. Kenya is commitment to promote sustainable security and a culture of peace through implementation of the Geneva declaration on armed Violence and Development¹⁸⁹.

¹⁸⁸ *Ibid.*, p. 10-11.

¹⁸⁹ *Ibid.*

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