

SMALL ARMS CONSULTATIVE GROUP PROCESS

Small Arms and Light Weapons Transfers: Developing Understandings
on Guidelines for National Controls and Transfers to Non-State Actors

Developing International Guidelines for National Controls on SALW Transfers

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**Convened by
Biting the Bullet Project (International Alert, Saferworld and University of Bradford)**

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Small Arms Consultative Group Process

1. Introduction

This document is a revised version of one of the sections of the SALW Consultative Group Process' 'Food for Thought' Paper¹, published in July 2005, which outlined ideas on approaches to international shared understandings on two linked issue areas that are of key importance to the implementation and further development of the UN Programme of Action (PoA) on Small Arms and Light Weapons (SALW):

- Restrictions of transfers of SALW to non-state actors (NSA)
- Guidelines for national decisions on whether to authorise transfers of SALW

These two issues are also closely linked in practice, not least because the criteria applied by states in deciding whether to authorise SALW transfers have a critical bearing on whether licenses for transfers to NSAs are issued and also on the risks that legal arms transfers are illicitly diverted to NSAs.

Further discussion and dialogue has been necessary on both of these issues to enable them to be effectively addressed at the 2006 UN Conference to review the PoA. The informal Small Arms Consultative Group Process (CGP) was established in January 2003 to facilitate the development of shared understandings and ways forward for the PoA on these two linked issues. It consists of representatives of over 30 governments from most regions,² the UN and several regional organisations, and selected civil society experts. It is convened by the Biting the Bullet Project.³ It has so far met six times during 2003 – 2005.⁴

In 2004, BtB published the results of the first phase of the CGP's work.⁵ In the second phase of its work, since summer 2004, the members of the CGP have made considerable progress in developing shared understandings and possible proposals. These were outlined in some detail in the CGP 'Food for Thought' Paper (July 2005). Although the governments, organisations and experts participating in the CGP did not necessarily fully endorse the approaches and proposals outlined in this Paper, they did all agree to present this paper as a useful contribution to wider international discussion and debate.

As we approach the Preparatory Conference for the 2006 UN Conference to Review Implementation of the PoA, it is increasingly important to focus on specific suggestions to clarify and elaborate PoA commitments, including those relating to controls on SALW transfers.

¹ Small Arms Consultative Group Process, Food for Thought Paper: Small Arms and Light weapons Transfers: developing understandings on Guidelines for National Controls and Transfers to Non-State Actors, published and disseminated on behalf of the CGP participants by Biting the Bullet Project (Bradford University, International Alert, Saferworld), July 2005. Please note that the present paper is a slightly revised version of the paper that was issued preliminarily on 17 November 2005, in which a few typographic errors have been corrected, and including three small formulation changes in the final section to bring wording more precisely into line with customary UN language.

² Governments that are participating in this informal Small Arms Consultative Group Process include: Argentina, Belarus, Botswana, Brazil, Canada, Czech Republic, Colombia, Estonia, Finland, Germany, Ghana, Kenya, Japan, Latvia, Lithuania, Mexico, Nigeria, Norway, Poland, Mozambique, Netherlands, Romania, Russian Federation, Slovakia, Sri Lanka, Switzerland, Tanzania, Uganda, UK, Ukraine, USA. A number of additional states have expressed support for the CGP and an intention to join the process.

³ Biting the Bullet is a joint project of Bradford University, International Alert, and Saferworld to inform and promote the development and implementation of the UN Programme of Action on small arms.

⁴ The CGP meetings have taken place in London, UK (January 2003); Prague, Czech Republic (June 2003); New York, USA (July 2003); Lake Naivasha, Kenya (September 2003); Colombo, Sri Lanka (September 2004); and Rio de Janeiro, Brazil (April 2005).

⁵ Chair's Interim Report, Small Arms Consultative Group Process, Small Arms and Light Weapons Transfers: developing understandings on guidelines for national controls, Biting the Bullet Project, London, May 2004.

This short paper aims to present a revised draft of the CGP ideas relating to the elaboration of international guidelines for national decisions on whether to authorise proposed SALW transfers. The content of the ideas contained in the CGP 'Food for Thought Paper' is essentially unchanged, but we have aimed to simplify and clarify some of the formulations. CGP ideas relating to possible commitments relating to SALW transfers to Non-State Actors will be presented in forthcoming separate papers.

2. Elaborating and Clarifying International Guidelines for National Controls on SALW Transfers

2.1 Introduction: The PoA and SALW transfer controls

Effective regulation and control of legal transfers of SALW are essential components of efforts to prevent, reduce and combat illicit SALW trafficking in all its aspects. Many SALW enter illicit circulation or use through diversion from legal transfers. Large quantities of arms fall into the hands of criminals, terrorists, rebel groups and others through leakage from legally held military, police, civilian or other stocks. Moreover, SALW that have been transferred legally can be misused in human rights abuses and repression, or contribute to conflict, violence and insecurity.

The PoA includes important commitments that aim to ensure that states exercise effective controls over legal transfers of SALW. For example, Paragraph 2 of Section II of the PoA commits states to

'put into place, where they do 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 and transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in SALW or their diversion to unauthorised recipients.'

The key commitment relating to guidelines for SALW transfers is contained in Paragraph 11 of Section II of the PoA. States should

'assess applications for export authorisations according to strict national regulations and procedures that cover all SALW and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illicit trade.'

This is an important commitment, with powerful implications for national systems for regulating SALW transfers. But these implications are not elaborated or fully clear.

It is widely recognised that national guidelines have an important place in effective national arms export and import control systems. Such guidelines are needed to enable licensing officials to make reasonably consistent case-by-case assessments of applications for authorisation of SALW transfers, which take appropriate account of all of the factors deemed relevant by the state, including national and international policies and commitments.

The lack of clarity means that the implications of these PoA obligations may not be clear for national officials responsible for carrying them out, and that there is high risk of significant differences in national interpretations for these obligations. These are probably undermining the effectiveness of the PoA, and may lead to damaging misunderstandings and disputes. There would be important benefits to clarifying the implications of these commitments and elaborating shared international understandings of the guidelines and criteria that national officials should take into account when deciding whether to authorise applications to transfer SALW.

2.2 The value of elaborating international norms for importing and transit as well as exporting States

The debates during the preparations for the 2001 UN Conference focussed on the possible international guidelines for national decisions on whether to authorise SALW *exports*. This is reflected in the formulation of the main relevant PoA commitment quoted above.

It may be more productive instead to focus on possible international guidelines to be applied by all states involved in authorising an SALW transfer: importing and transit states as well as exporting states. To these should also be added states with jurisdiction over any brokering activities that might be associated with the possible SALW transfer in question.

This revised approach recognises the responsibilities, roles and concerns of all parties to an SALW transfer process, and not only those of the exporting state. Moreover, it helps to avoid possible concerns that international guidelines might imply, for example, that exporting states are in a better position than importing states to assess the possible risks of the SALW transfer under consideration or the security or other needs that have given rise to the transfer application.

Moreover, this revised approach emphasises the importance of co-operation and consultation between all states directly concerned with authorising a possible SALW transfer. While recognising that the national authorities for the exporting and importing states each have the right independently to decide on whether to authorise a proposed SALW transfer, and that the transfer is illegal unless authorised by both parties, they should be encouraged to consult and exchange information before arriving at decisions. Consultations should as far as possible be based on international or expert reports to which each party has access.

Relevant authorities in transit states should also ensure that they have adequate information before taking authorisation decisions, as should states with authority over any arms brokers that may be involved.

2.3 CGP Ideas for elaborated international guidelines for national decisions on whether to authorise proposed SALW transfers

This section suggests a formulation of possible undertakings by States concerning the elaboration of international guidelines relating to national authorisation of proposed SALW transfers. There is a need to clarify and elaborate existing commitments contained in Paragraph 11 of Section II of the PoA, and this section aims to contribute to this process. Further, for the reasons discussed above, it proposes broadening the scope of such commitments and guidelines beyond exporting States to include importing and transit states, and also States with authority over any arms brokers that may be involved.

Recognising the principles enshrined in the Charter of the United Nations, including (inter alia) the prohibition on the threat or use of force; non-interference in the internal affairs of another state; the peaceful resolution of international disputes; respect for human rights; and the rights of States to self defence and to acquire arms required for legitimate national security needs.

1. States undertake that any authorisation of transfers of SALW (including parts, components and ammunition) shall be made in strict accordance with their undertakings contained in the PoA, including requirements to:

- a) Assess applications for SALW transfers according to strict national regulations and procedures, and to be consistent with the commitments in paragraph 11 Section II of the PoA and relevant national and international guidelines;

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- b) Ensure explicit authorisation of the SALW transfer by all states directly concerned with the process of the SALW transfer (including the exporting, importing and transit states), in accordance with their relevant and adequate national laws, regulations and administrative procedures to control SALW transfers, and subject to the national controls of relevant transit and/or transshipment states and of states with jurisdiction over relevant arms brokering activities;
 - c) Ensure adequate marking and record-keeping in relation to each of the SALW involved in the proposed transfer, in accordance with relevant international standards, and co-operate to enable timely and reliable identification and tracing of any SALW that are diverted to the illicit trade;

2. Consistent with commitments contained in Paragraph 11 of Section II of the PoA, States shall not authorise exports, imports, transit or brokering activities relating to transfers of SALW (including parts, components and ammunition) where there is a clear risk that the transfer in question might:

- a) Violate or circumvent decisions by the United Nations Security Council including those imposing arms embargoes or restrictions on SALW transfers, or other international, regional or sub-regional sanctions to which the State adheres.
- b) Contravene bilateral or multilateral commitments to which the State is party, including non-proliferation, arms control, disarmament or small arms agreements (such as the 1980 Convention on the Use of Certain Conventional Weapons Which May Be Considered Excessively Injurious and the associated Protocols).
- c) Violate or circumvent their existing responsibilities under relevant international law, including responsibility to avoid actions likely to facilitate or contribute to actions by States and others that are in contradiction to such international law.
- d) Be used for, or to facilitate: gross violations of human rights law, violation or suppression of human and peoples' rights and freedoms, or for the purposes of oppression.
- e) Be used for, or to facilitate, genocide or crimes against humanity or acts that violate universally accepted principles of international humanitarian law.
- f) Be used for, or to facilitate or encourage, terrorist acts.
- g) Be used for, or to threaten, force or acts of aggression against another State or population, or intervention in the internal affairs of other States.
- h) Be diverted to unauthorised uses or users or into the illicit trade, or for any of the purposes listed a) to g) above.

3. In considering whether to authorise exports, imports, transit or brokering activities relating to a proposed transfer of SALW (including their parts, components and ammunition), States should take into account the following factors:

- a) The requirements of the recipient State to enable it to exercise its right to self defence in accordance with Article 51 of the UN Charter, or to enable it otherwise to meet its legitimate national security needs or to contribute to internationally mandated peacekeeping operations.
- b) The record of compliance of all States involved in the process of the transfer with international obligations and commitments, in particular in relation to: compliance with end-use commitments; non-proliferation, arms control and disarmament; prevention and suppression of terrorism; and the record of respect for international human rights law and international law governing the conduct of armed conflict.
- c) The risk that the proposed SALW transfer might adversely affect international, regional or internal peace and security, or contribute to destabilising or uncontrolled accumulations of arms, particularly in countries or regions that are at serious risk of armed conflict or are emerging from conflict.
- d) The risk that the proposed SALW transfer might be used for or would facilitate violent or organised crime or contribute to criminal mis-use of arms and ammunition.
- e) The risk that the SALW concerned in the proposed transfer might be diverted from authorised stocks, for example due to inadequate stockpile management and security, or due to lack of ability or willingness to protect

against transfers, loss, theft or diversion that are unauthorised or inconsistent with commitments relating to end use or end user.

- f) The risk that the proposed SALW transfer may hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the states involved in the process of the SALW transfer.
- g) The risk of diversion or re-export that would contravene or undermine the objectives of PoA and the guidelines listed above.

In addition to the above international obligations and guidelines, each state directly concerned with authorising a proposed transfer may also take into account other relevant national, regional or international commitments or guidelines. Based on the above international obligations and guidelines, and assessing the balance of risks, each state has the right and responsibility to make national decisions. However, the decision-making process should be approached co-operatively and with appropriate consultation.

As far as possible, assessments relating to the above obligations and guidelines should be made on the basis of objective evidence. Where the states directly concerned initially differ in their assessments relating to one or more of the above obligations or guidelines, they should seek to engage in relevant information exchange or consultation, with a view to resolving or addressing the issues or concerns in a co-operative manner.