

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 Norms to Restrict SALW Transfers to Non-State Actors

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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 on 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 licences 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 to Non-State Actors (NSA).

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.

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 development of international norms to promote effective controls on SALW transfers to Non-State Actors. The content of the ideas contained in the CGP 'Food for Thought Paper' is essentially unchanged, but we have aimed further to simplify and clarify some of the formulations and their potential relevance to the 2006 Conference to review the PoA. CGP ideas relating to elaborating and clarifying PoA commitments relating to national controls on SALW transfers have been presented in a companion paper to this one, issued by BtB in November 2005.⁶

Transfers to NSA: a critical issue for the 2006 UN Review Conference

The issue of developing international norms to restrict SALW transfers to non-state actors is likely to be particularly sensitive and important for the 2006 UN Conference to review the PoA. It is widely acknowledged to be an important issue, meriting appropriate effective international commitments. However, the experience during 2001 of trying to negotiate specific commitments for inclusion in the PoA was frustrating and non-productive.

Attempts in 2001 to negotiate a complete ban on authorising any SALW transfers to NSA without specific approval of the governments of both the recipient and exporting state foundered over the issue of possible exceptional 'hard cases' where some states believe that such transfers might in principle be justified (this issue is examined in depth later in the present paper). Similarly, attempts to define an international norm identifying certain types of SALW that should not be licensed to civilians for non-official purposes failed due to disagreements on which types to so identify. Moreover, the negotiation process on these issue turned out to be particularly acrimonious, leading to charges of bad-faith or hypocrisy.

Nevertheless, the problems arising from inadequate controls on transfers, sales, holding and use of SALW to NSA are so important that it is both inevitable and legitimate that proposals to develop international norms on this issue will be made in the lead-up to and during the 2006 Review Conference. It is important to develop understandings and approaches to this issue that promote the prospects for productive discussion and international agreement, and which avoid the pitfalls and risks of the approaches tried in 2001.

This has been a core objective for the CGP in its work between 2002 – 2005, and the ideas outlined in this paper are offered as a contribution to this task. As will be clear, approaches are identified for addressing aspects of the transfers to NSA issue which essentially involve the clarification and elaboration of existing PoA commitments and their implications. These thus would not involve negotiation on essentially new norms at the 2006 Review Conference, and may be relatively negotiable. The CGP has further developed approaches that focus on improving the framework for developing norms to restrict SALW transfers to armed opposition groups in a way that at least promises more constructive and productive discussion on this issue in 2006 than experienced in 2001.

⁶ The companion paper '*Developing International Guidelines for National Controls on SALW Transfers*' was issued by BtB in November 2006, which outlined the main results of the other key aspect of GCP work.

2. Restrictions on Transfers of SALW to Non-State Actors

2.1 Introduction: the challenges

One important difference between SALW and major conventional weapons is that armed forces of states are only one of the wide variety of types of legitimate holders and users of small arms. In addition to other branches of state security services (including national and local police, border guards, coast guards), many categories of Non-State Actor (NSA) are also legitimate holders of small arms in many countries. Hunters and sports shooters may, in most states, be awarded licences to hold certain categories of small arms. In addition, in many countries firearms licences may be awarded to citizens or private companies for the purposes of self-protection or delivery of private security services.

However, arms flows to NSA also constitute a major part of the problems associated with excessive availability and spread of SALW. They enable or facilitate armed violence and crime. Flows of SALW to NSA such as armed rebel groups, warlords, vigilantes, organised criminals and terrorists contribute substantially to violence, insecurity and human suffering in conflict prone countries or regions of conflict across much of the world. National, regional and international action is urgently needed to prevent and reduce access to SALW, and other arms and explosives, by such groups.

Although NSAs of concern often acquire many of their arms within the countries where they operate, for example through the open market or from leakage or theft from official stocks, they also depend substantially on supplies of arms from abroad. There is therefore a strong case for developing international norms and measures to enhance controls on transfers of SALW to NSAs.

However, it has so far proved very difficult at an international level to agree on what these norms and measures should be. As noted above, during the lead-up to the 2001 UN Conference on the illicit trade in small arms and light weapons in all its aspects, the issue of international restrictions on SALW transfers to NSA was an important and controversial topic. However, no commitments that specifically relate to transfers to NSAs could be agreed and furthermore the debates were often confused, acrimonious and unproductive.

It is important to recognise that there is a wide variety of different types of NSAs and also a wide range of types of context and risk. For example, the types of relevant NSA include:

- Armed rebel groups, 'freedom fighters', paramilitaries, or warlords;
- Paramilitaries and other NSAs closely associated with state agencies;
- Civilian militia including communal groups and militias, civil defence forces, vigilante groups;
- Terrorists and terrorist organisations;
- Criminals and criminal groups, including black market arms traders;
- Political parties and associated political groups;
- Private military companies;
- Private security companies, and other private companies with their own security staff;
- Arms traders: domestic legal retail markets, traders and wholesalers, arms brokers, and front companies;
- Civil institutions, such as museums;
- Civilians: sports shooters, hunters, gun collectors, holders of guns for personal protection.

Each of the above categories of NSA present different policy priorities and require distinct regulatory approaches.

2.2 Controlling SALW Transfers to Authorised NSA end-users

Applications to transfer SALW to an NSA end-user generally raise very similar issues in principle to any other possible legal SALW transfer. Thus, there should be no question of authorising SALW transfers to criminals, terrorist groups, and such like. Most applications for authorisation to transfer SALW will relate to only certain categories of NSAs, such as hunters, sports-shooters, gun collectors, citizens for individual self-protection; civil institutions (such as museums); and authorised arms traders or retailers. In many states some private companies may be authorised to hold certain types of small arms to enable them to provide private security services.

The national authorities of the states that are directly concerned should assess applications for a SALW transfer to such NSAs

'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 norm is directly taken from Paragraph 11 of Section II of the PoA. However, it should apply not only to the relevant national authorities of the exporting state, but also to the importing and transit states, as well as states with regulatory authority for any arms brokers that may be involved.

A number of risks that should be taken into account when deciding whether to authorise any SALW transfer apply particularly to transfers to NSAs. These include:

- The risk that the NSA may divert the SALW to other users or to uses other than those authorised, including re-export of the arms;
- The risk that NSA would misuse SALW, for example through human rights abuses, excessive violence, oppression, or crime;
- The risk that the NSA would lose control of the supplied weapons, for example due to poor stockpile management or security, corruption, theft or capture;
- The risk that the NSA becomes a party to armed violence or tension in the future, or that the supply of further SALW intensifies this risk;
- The risk that the regulations and controls of the recipient state relating to SALW holding, ownership, use, sale, or transfer by NSAs are inadequate, or that compliance with and enforcement of such controls is inadequate.

In fact, such guidelines or factors should apply with even greater force because, almost by definition, controls on NSAs will be less direct than for state institutions. Whereas the holding and use of SALW by state agencies (such as police or armed forces) are subject to direct executive control by the government of the recipient state (or should be), controls on behaviour of NSAs are indirect, through regulatory controls and their enforcement.

The relevant national authorities of the exporting, importing and transit states that are directly concerned with the proposed SALW transfer each have a responsibility to take careful account of each of the above risk factors, as well as all other relevant factors, when deciding whether to authorise a transfer. It would be useful for documents agreed at the 2006 Review Conference to highlight the above risk factors and responsibilities, to enhance implementation of existing PoA commitments relating to controls on SALW transfers.

Links with controls on civilian possession of SALW

It is important to note that the above factors, and particularly the last bullet point listed above, directly concern the scope and effectiveness of national regulations and controls of the recipient state over the possession, holding, use and sale of SALW by civilians and other NSAs. Although the content and enforcement of such regulations and controls are the responsibility of the recipient state concerned, their adequacy in relation to the risks listed above is of legitimate concern to all states concerned with the transfer.

This implies that all states should be encouraged systematically to exchange information on their regulations and controls on SALW held by NSAs (including civilians and private security companies), so that all concerned parties

can take a well-informed, and wherever possible co-operative, approach to assessing the adequacy and effectiveness of the controls. To assist such processes, it would be helpful to develop international good-practice guidelines on such regulations and controls, which could be developed through a process launched by the 2006 Review Conference.

It is also important that the national authorities of each of the states directly concerned with authorising the proposed SALW transfer take a realistic approach to assessing the adequacy of existing national controls in the recipient state, and the risks of non-compliance. As is widely recognised, including in the UN PoA and associated international and regional agreements, many states have problems with ensuring adequate controls on small arms held by civilians.

Greater presumption of denial

The risks and factors to be taken into account when considering whether to authorise an SALW transfer to an NSA are not counter-balanced by the rights of sovereign states to national security or to holding and transferring arms required for self defence. This implies that there should be a much greater presumption against authorising a SALW transfer to a NSA when any of the risk factors are judged to be substantial.

Strong restrictions on transfers to NSAs of certain types of SALW

Since NSAs lack the rights and responsibilities of sovereign states, and in view of the importance of ensuring and strengthening controls in the areas addressed in the UN PoA, it would be expected that there should be much greater limitations on the types of SALW that can legitimately be held by, and thus transferred to, an NSA. It is now widely recognised that MANPADS should not be transferred to NSAs, not least due to the risks of diversion to terrorist groups. There should similarly be a presumption of denial of military-style weapons to NSAs, except in carefully specified circumstances.

Experience at the 2001 Conference, and also in many international arms control negotiations, indicates that it could be hard to negotiate agreed lists of specific types of SALW that should not be transferred to, or held by, NSAs. Nevertheless, it could prove possible to extend the list of types of SALW that should not be transferred to civilians, Private Security Companies and other NSAs beyond the category of MANPADS: candidates include categories such as heavy machine guns, grenade launchers, and military-style fully automatic weapons. Few if any states presently licence possession by civilians of such types of SALW.

It will inevitably be more problematic to achieve international agreement not to transfer to NSAs other categories of firearms, such as pistols or semi-automatic weapons, since there are wide differences in the stringency of national restrictions on such weapons across the world. The time may not be ripe for specific agreements on such weapon types at the 2006 Review Conference. But it may be useful for processes for international information exchange and consultation on these relatively complex issues to be established within a UN framework, to facilitate improved understanding and possibilities for informal co-ordination and co-operation on this issue amongst states interested in doing so.

2.3 Addressing possible 'hard cases'

It is likely that proposals will be renewed at the 2006 Review Conference for strong international norms that ban or highly restrict SALW transfers to NSA's without explicit authorisation by the governments of both the recipient and exporting states. To enhance the prospects for productive discussion, and avoid damaging and unduly acrimonious rhetoric, it is important to enhance understanding of the issues at stake and of possible approaches toward international agreements. The following discussion outlines some key products from the CGP for this purpose.

There appears to be international consensus that SALW exports to an NSA should, in almost all possible circumstances, be authorised only if it has also been properly authorised by the national authorities of the recipient

state. However, international debates on this issue in 2001 during the preparation of the PoA focussed on the question whether there are ever any exceptional 'hard cases' where it may be legitimate to consider authorising an SALW to an NSA even without authorisation by the government of the recipient state. On this specific issue, there was intense disagreement in 2001.

The great majority of governments have expressed support for a ban on any transfer to an NSA that is not authorised by the recipient country's government. However, it is clear that at least some governments do take the view that certain SALW transfers to NSAs are justified without the approval of the government of the recipient state, since there have been and continue to be numerous cases of covert supplies of SALW to armed opposition groups (particularly in neighbouring countries in regions of conflict).

There is wide international agreement that such covert supplies to armed opposition groups are generally illegitimate, irresponsible, destabilising and harmful to international, state and human security, and should thus be strongly discouraged.

However, it is also reasonable to recognise that there are rare occasions where at least some well-intentioned and responsible governments might doubt that a complete ban is justified on SALW transfers to opposition groups in that specific case. The only *contexts* in which such doubts might conceivably be justified are where the proposed recipient country is:

- experiencing civil war or internal armed conflict;
- experiencing large-scale oppression or genocide.

Even in such contexts, the only legitimate *motivations* for considering such an SALW transfer would be to:

- Protect vulnerable communities or populations from imminent or on-going attack or violent oppression or genocide;
- Promote a relatively desirable peace settlement (e.g. by preventing unjust victory by better-armed forces);
- Support international peace-support or humanitarian interventions (e.g. by providing SALW to specific NSAs working directly under instruction from the international peace-support forces).

Even if the above contexts and motivations apply, the only circumstances in which doubts about a ban of SALW transfers could be understandable are where the *potential NSA recipient*:

- commands substantial legitimacy and internal support amongst the population within the state in question;
- has unselfish aims consistent with the legitimate motivations for considering an authorised export (see above);
- has demonstrated commitment and capacity to use the supplied arms effectively and with appropriate restraint;
- is unlikely to misuse arms supplied to it on a substantial scale, for crime or contrary to humanitarian, human rights, and other relevant international law;
- has credible commitment and capacity to control the transferred arms effectively, including relatively safe and secure storage, and low risk of re-export or diversion to non-authorised uses or users.

If all of the above criteria relating to context, motivation and potential NSA recipient apply, then CGP participants recognise that the situation presents a genuine 'hard case'. Although such cases are very rare, it is not unreasonable for some governments to be concerned about such possibilities in debates about proposed international norms to restrict SALW transfers to NSAs.

However, even in such genuine 'hard cases', there are further considerations that should be taken into account, including the following.

Existence of preferable international responses: for such hard cases, it is preferable to respond to the problems of civil war, mass oppression or genocide by other means, including international diplomacy, sanctions, or international intervention by the UN or other multilateral peace-support forces.

Reasonable prospect of success: it will generally be doubtful that the proposed SALW transfer to the appropriate NSA will substantially contribute to the achievement of its legitimate aims.

The need for a comprehensive cost-benefit assessment: a systematic assessment of the short, medium and long-term risks and benefits of the proposed SALW transfer is required. This should include the risks of loss, misuse or future diversion of the supplied arms. Once such risks are taken into account, it is likely that the overall risks and costs will outweigh the proposed benefits of an SALW transfer to a relevant NSA.

Track 1 Majority CGP normative approach

After taking all of the above factors into account, the majority of CGP participants support the establishment of an international norm that prohibits any SALW transfers to an NSA if the government of the recipient states has denied authorisation for the transfer (or would deny authorisation if given the opportunity to do so). They believe that it is preferable to establish a clear international ban on such SALW transfers, not least to constrain spurious justification of selfish or unwise SALW transfers to opposition NSAs. Even in very rare situations where all of the above criteria for a genuine 'hard case' are met, it is unlikely that there will be a reasonable prospect of successfully achieving the legitimate aims through SALW transfer to an NSA, or that a thorough cost-benefit analysis will be positive. Moreover in such cases, other alternatives, including direct intervention by a legitimate multilateral force, will be preferable to SALW transfers.

Track 2 Alternative CGP normative approach

However, a minority of CGP participants support an alternative approach to developing international norms in this area. This alternative approach is to accept the principle that there may be rare but genuine 'hard cases' where SALW transfers to NSAs could legitimately be considered, but to insist on transparency, consultation and adherence to internationally agreed criteria and procedural guidelines.

According to this 'Track 2' minority CGP normative approach, once a state (or group of states) believes it has identified a legitimate 'hard case' and is considering whether to authorise an SALW transfer to an NSA, it should notify the UN Security Council, its allies and partners, and others in the international community of this development, and provide details of its reasoning and justification. It should invite comment and proposed alternative actions.

The state(s) concerned should take detailed account of the ensuing debate and take any opportunities that may arise to address the problem through other means (such as exerting pressure on the state in question or mobilising UN or other support for multilateral monitoring or intervention forces). It should comply with any relevant UN Security Council Resolution that may result.

If, after this process has run its course, the state(s) concerned decide to go ahead with authorising the SALW transfer, they should inform the UN Security Council, and other concerned parties, of their decision, and ensure that they meet the criteria outlined above. They should further commit themselves to accept the responsibilities that arise from authorising such an SALW transfer, which include responsibilities to:

- ensure that all supplied arms are appropriately marked and recorded, with measures in place for tracing co-operation if any of the arms are diverted;
- support the relevant NSA in its efforts to securely manage the arms and prevent misuse or diversion;
- train the NSA in effective use of the arms in relation to the legitimate aims of the transfer;
- continue to pursue the legitimate aims of the transfer through other means, such as multilateral intervention in line with UNSC resolutions;
- support and organise DDR and SALW collection and disposal programmes as soon as the context permits to ensure that the supplied and other surplus arms are not diverted or misused in future.

The states concerned should ensure they meet these responsibilities and also should co-operate with international efforts to monitor the results of the decision and with any subsequent lessons-learned processes.

All CGP participants hope that the above frameworks for considering possible international norms restricting SALW transfers to NSA contribute to constructive wider international debates on these matters during the preparations for the 2006 Review Conference.