

# Controlling the transfer of arms

## Progress and challenges in the African context

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### Introduction

Efforts to put in place comprehensive mechanisms to control the import, export, transfer and transit of small arms and light weapons (SALW) have largely been located in the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN PoA). Section II of the UN PoA, for instance, identifies measures to be taken by states in this regard at the national, regional and global levels, with much greater emphasis given to action at the national level. It is therefore not surprising that efforts to strengthen action at the national level have focused on elaborating Section II, paragraphs 2, 11 and 12. There has in fact been growing recognition that global agreements will have little chance of producing the desired impact unless action at the national level is strengthened and the capacity for implementation undertaken.

This paper argues that events over the past two years (since January 2006) have reinforced the need to locate efforts at strengthening controls over the transfer of small arms at the national and regional levels. This is for two reasons. First, while policy responses and efforts at the global level to control small arms have seen some success, they merely provide broad guidelines on what may be required and do not always adequately elaborate on what is required from member states, as seen in the two principle global agreements that do exist, namely the 2001 UN Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (UN Firearms Protocol) and the UN PoA. For many states the lack of specificity of what is required is problematical and can lead to different interpretations, resulting in a variety of control measures at the national level. However, bearing in mind the different social and political contexts in which these agreements are

implemented, including the varying priorities of states and regions, this may not be such a stumbling block to achieving effective small arms control.

Second, evidence suggests that small arms transfer control efforts at the national and regional level may be more effective, comprehensive and sustainable. States in regional groupings often share more common understandings of the nature of the small arms problem in a particular geographical area and may therefore be more attuned to what is required to address the issue successfully. Allowing either individual states

or states in a region to agree on more stringent measures also facilitates greater coordination and cooperation. This is already evident in existing regional or sub-regional agreements such as the Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and other Related Materials (ECOWAS Convention)<sup>1</sup> and the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials.

Furthermore, agreements negotiated at a sub-regional or regional level are often more stringent than those agreed to at the global level. For example, the Southern African Development Community's (SADC) 2001 Protocol on the Control of Firearms, Ammunition and other Related Material (SADC Firearms Protocol) and the 2004 Nairobi Protocol for the Prevention and Control and Reduction of Small Arms in the Great Lakes Region and the Horn of Africa (Nairobi Protocol) further enhance the provisions of the UN Firearms Protocol, and in the case of the Nairobi Protocol have very specific and detailed supplementary guidelines, including those on transfer controls (see box on Nairobi Protocol for more detail).

The paper outlines the importance of sub-regional protocols in providing coherent frameworks for African states to control the flow of small arms both into and

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across the region. The paper then examines Mauritius and South Africa, identifying the legislative framework which guides these two Southern African countries in their efforts to control the movement of weapons across their respective borders.

### The UN PoA and transfer controls in context

The UN has been the main international forum through which common understandings and standards on transfer controls have been elaborated and adopted. The most significant of these has been the UN PoA which, although limited in its scope, is the only politically binding global framework which prescribes a range of tools for states to combat and prevent the illicit trade in SALW at all levels, including state-to-state transfers.

By the time the PoA was negotiated in July 2001 there was sufficient international consensus that in order to regulate the trade in SALW effectively, it was vital that 'common standards for licensing transfers of small arms include explicit authorizations by the exporting, importing and transit States of the export, import and transit respectively of small arms and light weapons' (Crowley et al 2002).

However, the international community failed to build on this consensus during the final drafting of the UN PoA, resulting in only broad – and hence limited – reference to what is required from states with regard to transfer controls, even at regional and national levels. This gave rise to several new developments.

One new development was increased and ongoing efforts by some major global role-players, in particular the UK government, to try build a coherent approach to putting the issue of transfer controls more firmly on the international agenda, and in particular through elaborating and strengthening key clauses in the UN PoA. This initiative was known as the Transfer Controls Initiative and was supported by a significant number of states as well as several leading arms control and disarmament non-governmental organisations (NGOs). The UK government also recognised the importance of building support for this initiative among those states most affected by armed violence, as well as among states situated in regions where the possibility of developing stronger regional agreements was more likely.

Another new development was the signing of several regional small arms control agreements which were able to build on the lessons learned through the UN PoA process. In this way they could avoid some of the pitfalls seen in previous agreements, but more

importantly they could put in place control mechanisms that were sensitive and relevant to regional contexts and dynamics – at least at the policy level. Perhaps the best example of this is the Nairobi Protocol, which will be discussed in more detail later.

One of the most significant aspects of the UN PoA is that it provides guidelines for coordinated action at the international, regional, national and local levels, highlighting the role of regional organisations in fostering this cooperation. For example, while the majority of states have appointed a national point of contact on small arms, less than half the states have convened a coordinating body.<sup>2</sup>

Although progress in implementing the UN PoA is uneven across states, the most significant progress has occurred at the regional level. Several regional organisations have in fact moved ahead of the UN PoA guidelines not just with regard to transfer controls but also in terms of strengthening national gun laws and brokering regulations. In addition, states in regions that have established regional agreements have gone the furthest in implementing their UN PoA obligations (Maze & Parker 2006). This is seen, for example, through the activities of regional coordinating bodies such as the Regional Centre for Small Arms (RECSA).

Despite the inability of UN member states to agree to a follow-on programme at the UN Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (26 June–9 July 2006), the UN PoA remains an important framework in which states have resolved to implement

and strengthen agreed norms and measures to prevent, combat and eradicate the illicit trade in SALW at the global, regional and national levels. In particular there is agreement that states will work together on measures to strengthen and enforce controls on arms transfers.

The UN PoA recognises that the effective regulation and control of legal small arms transfers is critical to ensuring that the diversion of weapons from legal transfers into illegal circulation is both prevented and reduced. To this end, the 'UN PoA includes important commitments that aim to ensure that states exercise effective controls over the legal transfer' of small arms as is seen in Section II, paragraph 2 (International Alert, Saferworld and University of Bradford 2006).

Efforts to strengthen paragraph 2 and others paragraphs such as 11 and 12 were rooted in the understanding that unless a set of common global standards on transfer controls could be agreed to, work undertaken

Despite the inability of the UN to agree to a follow-on programme, the UN PoA remains an important framework to eradicate the illicit trade in SALW



at the national and regional levels would have limited impact, thereby underlining the importance of action at these levels. More recently the small arms control community has focused on expanding the notion of transfer controls and on developing a set of international guidelines to include all conventional weapons as well as small arms, leading towards an international treaty governing the arms trade in general.<sup>3</sup> This is commonly referred to as the Arms Trade Treaty (ATT).

Oxfam, Amnesty International and the International Action Network on Small Arms (IANSA) have together launched an international campaign, 'Control Arms', which calls for effective arms controls to make people safer from the threat of armed violence. The Control Arms campaign argues that although the UN PoA and various regional protocols commit states to regulate the movement of weapons into and out of their borders, cooperation and control are limited if there is no common position and means to regulate the flow of weapons. Moreover, Control Arms campaign members believe that without a standard set of global requirements to regulate the arms trade, only limited national mechanisms to monitor and regulate the trade in weapons will be developed. The ATT has therefore expanded the concept of arms transfers to refer to 'the import, export and transfer of all conventional arms' (Control Arms 2007).

IANSA, for example, has made the case for states to agree on a set of global principles on international arms transfers that is consistent with their existing responsibilities under international law.<sup>4</sup> Others have published 'principles' which bring together states' existing obligations and indicate what, in their opinion, are the best general rules for the effective control of international transfers of all conventional arms (including SALW) and ammunition.

### ***Transfer controls before and after the Programme of Action***

The need to regulate the legal transfer of SALW between states gained prominence in the mid 1990s, with the Group of Governmental Experts (GGE) reporting to the UN General Assembly on General and Complete Disarmament for small arms (UNGA A/52/298) in 1997. The GGE's brief had been to examine the nature and extent of illicit small arms activities and to identify ways in which to curtail the illicit trade in weapons. The GGE also identified some of the destabilising effects of the ongoing proliferation of small arms, noting that: 'The excessive and destabilizing accumulation and transfer of small arms and light weapons is closely related to the increased incidence of internal conflicts and high

levels of crime and violence' (UNGA A/52/298: 1997: section II, para 14).

The GGE further recognised the need for improved regulation controls in the transfer of weapons in the light of recent misuse of the state's right to import and export SALW (UNGA A/52/298: 1997: para 45). As a result the GGE recommended, *inter alia*, that all states should ensure that they have in place adequate laws, regulations and administrative procedures to exercise effective control over the legal possession of SALW and over their transfer in order to prevent illicit trafficking (UNGA A/52/298: 1997: para 80c).

In addition, the resolution passed at the UN General Assembly in 2006 recognised that:

'The absence of common international standards on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development' (UNGA A/RES/61/89).

The Control Arms campaign believes that without a set of global requirements to regulate the trade, only limited national mechanisms to monitor the trade in weapons will be developed

Recognition of the necessity for transnational controls on arms transfers was not limited to international fora such as the UN. In 1997 the Inter-American Convention developed a control framework for the export, import and transit licensing of firearms, known as the Model Regulations for the Control of the International Movement of Firearms (Crowley et al 2002). These regulations had a significant impact on the text of the 2001 UN Firearms Protocol – which is the only legally binding and global small arms control agreement, and is another example of the importance of work undertaken at national and regional levels.<sup>5</sup>

The objective of the UN Firearms Protocol is to promote, facilitate and strengthen cooperation among states in preventing, combating and eradicating the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition. By ratifying this protocol, states commit to adopting a series of crime control measures which include elements of transfer controls. States are, for example, required in their domestic legislation to set up a system of government authorisations or licensing to ensure the legitimate manufacturing of and trafficking in firearms.

It is now generally accepted that controlling the *legal* trade in small arms is critical to combating and preventing the *illicit* trade in weapons. Furthermore, it is also 'widely recognised that national legislation

and control regimes have an important place in effective national arms export and import control systems' (International Alert, Saferworld and University of Bradford 2006).

The emerging global consensus on the importance of focusing action at the national level is the result of a number of crucial international meetings and conferences. For example, participants at the 2003 Lancaster House Conference on strengthening export controls recognised the value of 'having national guidelines that governments can use in their case-by-case assessments of applications for the authorisation of SALW exports' (Lancaster House Conference 2003). Most states present confirmed that they have national guidelines as a basis for national decision-making.<sup>6</sup> Given this fact, many participants agreed that there is 'potential for developing a shared understanding of guidelines' for assessing transfer applications at the global level.

There have also been attempts to go beyond a narrow focus on exporting states to include importing and transit states, as well as states that have any jurisdiction over brokering activities which may be associated with a particular transfer. This approach 'recognises the responsibilities, roles and concerns of all parties to a SALW transfer process, and not only those of the exporting state' (International Alert, Saferworld and University of Bradford 2006).

Moreover, this approach emphasises the importance of cooperation and consultation between the states that are directly concerned with authorising a possible SALW transfer, addressing the concern that exporting states are not necessarily in a better position than importing states to assess the possible risks of an arms transfer.

Most participants also recognised that getting agreement on strict guidelines for SALW transfers could ultimately make a significant contribution to addressing the concerns about restricting arms transfers to non-state actors (International Alert, Saferworld and University of Bradford 2006). This is, of course, one of the sticking points: what is the breadth and ambit of arms transfer controls?

Many states believe that non-state actors need legitimate, legal access to arms and countries such as the US, for example, are reluctant to agree to a set of guidelines that would make access difficult or impossible. This remains one of the most contentious and divisive issues for UN member states when it comes to agreeing on globally appropriate and relevant transfer control mechanisms.

The challenge in the lead-up to the UN Small Arms Review Conference was whether it was possible, given the progress that had been achieved at the national and regional levels, to agree to a set of international small arms transfer control guidelines primarily through the elaboration and clarification of key commitments already undertaken by states as contained in section II of the UN PoA, in particular paragraph 11.

After much discussion on the nature of small arms transfer controls it is clear that the principle of developing common global standards is now widespread. However, this commitment to global standards is best understood and practiced at the national, regional and sub-regional levels. According to Mariani (2006) there are now well over 100 states that have national legislation in this regard or that 'have signed up to regional or multi-lateral agreements that commit them to apply a system of criteria-based arms transfer controls'.

The experience of strengthening controls at the national level has in a number of instances translated into the adoption of regional measures to regulate the small arms trade, often going further than what is proposed in either the UN PoA or the UN Firearms Protocol. In terms of enhancing and supporting the call for a set of global principles on arms transfers, it makes sense not to lose the experience gained at the national and regional levels over the past ten years but rather to build on the efforts to control the arms trade at these levels.

### **Understanding 'arms transfers'**

Legal arms transfers are 'transfers that occur with the involvement, whether active or passive,<sup>7</sup> of governments or government authorities in accordance with both national and international laws' (Small Arms Survey 2001:142). This means that the trade in weapons relies on a series of transactions to move the weapons from the manufacturer to the distributor, to the seller and eventually to the end user or buyer. In this chain of events there are a number of opportunities for the diversion of weapons into the illegal market.

The problems associated with the transfer of weapons range from the limited use of, and verification of, end-user certificates to a lack of efficient stockpile management. Other opportunities for the illicit trade in weapons have emerged out of deficient universal and coordinated export and import controls.

The locus of control was initially seen to be the responsibility of the arms supplier country, as is evident in some regional agreements such as the 2000 Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small

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Arms and Light Weapons (Bamako Declaration), as well as in a number of UN PoA paragraphs in which transfer controls are often referred to only in relation to the exporting state. Section II, paragraph 12 of the UN PoA, for example, refers only to the export and transit of small arms including the use of end-user certificates, whereas paragraphs 2 and 11 are more inclusive and make reference to import licensing and re-transfer.

It is widely recognised today, however, that both countries importing weapons and transit states share the responsibility to prevent diversion by ensuring that transactions are legitimate. The term 'transfer' therefore includes the import, export, transit and re-transfer and end-user certificate regimes in receiving and supplying countries. This terminology is generally accepted by the international community as including the key components of an effective transfer control regime. However, some would argue that this understanding of the term does not go far enough and that two additional elements need to be added to complete the picture, namely: transfers to non-state actors; and the regulation of brokers and their activities.

But transfer criteria are only one aspect of a state's overall arms transfer control system. An effective transfer control regime should include: systems for the registration and licensing of manufacturers, dealers and brokers; clear procedures for customs and border control officials; and well-defined delivery verification processes. These occur at the national level and should therefore be part and parcel of domestic legislation and procedures, with the possible backing of regional agreements. This is clearly stated in the UN PoA.

### National system of transfer controls

The UN has recognised that 'in some cases the illicit supply of small arms and light weapons has occurred because there is no adequate national system of controls on arms production, exports and imports, and because border customs personnel are poorly trained or corrupt' (UNGA A/52/298 1997: Section D:59).

There is a growing recognition among both states and civil society that developing adequate national legislation and/or strengthening existing legislation – which includes putting in place effective and efficient administrative procedures – are key factors in ensuring effective controls on small arms: that is, controls on the manufacture, transfer, import, export and transit of weapons, as well as brokering activities associated with the trade in small arms.

Placing emphasis on the locus of control at the national level also facilitates a more comprehensive

approach to ensuring enforcement. This can include partnerships between government agencies, industry and relevant civil society organisations (CSOs) as well as bilateral and regional cooperation. Importantly, this approach does not detract from or undermine efforts to build consensus for a global arms trade treaty but rather underscores the fact that work on small arms control has often been most effective and has had the biggest impact at regional and national level. It has also provided the best opportunity to implement both existing approaches (such as those contained in the UN PoA) and some new approaches (such as understanding the factors that fuel demand). Critically, it is at the national level where change matters most and where the primary goal of preventing and reducing the trade in weapons can most likely be realised.

### Efforts at the regional level in Africa

At the international level, the UN PoA provides the framework for the regional implementation of measures to curtail the proliferation of SALW. Initiatives in Africa and particularly in Southern Africa were frequently in advance of some of these initiatives in terms of content, while being perhaps slightly behind in terms of process (Small Arms Survey 2002:128).

Over the past ten years, a range of innovative and far-reaching agreements have been concluded at the regional level across a diverse set of political, social and economic settings that have varied experiences of armed violence. One of the first examples is the European Code of Conduct on arms exports, which is a progressive control mechanism to establish legal guidelines for the trade in weapons. The EU developed a set of

guidelines to govern the trade in weapons in order to establish a common regional monitoring system that was in line with the international rhetoric articulated in the UN PoA (UNDP & WHO 2007).

In Africa, several policy efforts have been made by governments in their fight against the uncontrolled movement of small arms into and across the continent. These include the politically binding Bamako Declaration as well as the more recent (December 2005) African Common Position to the Review Conference on the Progress Made in the Implementation of the UN PoA, as articulated at the Second Continental Conference of African Government Experts on Illicit Trade in SALW. Others include legally binding instruments such as the SADC Firearms Protocol (2001), the Nairobi Protocol (2004) and the ECOWAS Convention (2006). According to Berkol (2007) the latter defines 'transfers' as any movement of arms and not only exports.

A range of innovative agreements have been concluded at the regional level across a diverse set of political, social and economic settings

The Bamako Declaration set a regional precedent for controlling arms transfers and strongly emphasises the responsibility of arms supplier countries in preventing the diversion of weapons, among others (see Bamako Declaration box).<sup>8</sup> Although only politically binding, the declaration had a significant impact both continentally and internationally: it spurred a number of sub-regional legally binding conventions and influenced aspects of the UN PoA. The Bamako Declaration (2000) recommends that African Union (AU) member states should:

Encourage the codification and harmonization of legislation governing the manufacture, trading, brokering, possession and use of small arms and ammunition. Common standards should include, but not be limited to, marking, record-keeping and control governing imports, exports and the licit trade.

#### **Bamako Declaration**

4. WE STRONGLY APPEAL to the wider international community and, particularly, to arms supplier countries, to:
- i. Accept that trade in small arms should be limited to governments and authorized registered licensed traders;
  - ii. Actively engage, support and fund the efforts of OAU Member States in addressing the problem of the illicit proliferation, circulation and trafficking of small arms and light weapons in the continent;
  - iii. Seriously consider ways to discourage and eliminate the practice of dumping excess weapons in African countries and in violation of arms embargoes;
  - iv. Enact appropriate legislation and regulations to control arms transfers by manufacturers, suppliers, traders, brokers, shipping and transit agents;
  - v. Enact stringent laws, regulations and administrative procedures to ensure the effective control over the transfer of small arms and light weapons, including mechanisms with a view to facilitating the identification of illicit arms transfers; ...

The African Common Position to the Review Conference is an important framework document that complements the Bamako Declaration. The African Common Position:

- Recognises the need for African states to address the fundamental issues and root causes of conflict as important means by which armed violence in general (and in particular the availability, supply and demand for SALW) can be significantly reduced, if not eliminated
- Encourages states to adopt (as soon as possible where they do not exist) the necessary legislative and other measures to establish as a criminal offence under national law, the illicit manufacturing of, trafficking in, and illegal possession and use of SALW, ammunition and other related materials
- Urges states to provide rehabilitation and reintegration assistance to demobilised soldiers, ex-combatants and in particular child soldiers

It was noted further at the Namibia Conference at which the African Common Position was developed that a number of important initiatives introduced since 2001 have enriched the broader debate on illicit SALW, such as those related to the civilian possession of military-style SALW, the transfer of SALW to armed non-state actors, the Transfer Controls Initiative, as well as the ATT, and recognised that these discussions are continuing at their own pace outside the UN PoA review process.<sup>9</sup>

It was also agreed at the Namibia Conference that the AU Commission should convene a technical and legal workshop with the aim of developing a legally binding instrument to prevent, combat and eradicate the illicit trade in SALW.<sup>10</sup>

The Nairobi Protocol was adopted in April 2004 and entered into force on 5 May 2006. It elaborates on the Nairobi Declaration (March 2000), making the region the second in Africa after SADC to adopt a legally binding instrument on small arms. Under the agreement, governments are obliged to address the problem of internal conflict that has served as a magnet for light weapons flowing into central and eastern Africa. The protocol requires states to pass laws outlawing the illicit manufacture, trafficking, possession and misuse of SALW.

The Regional Centre for Small Arms (RECSA) has issued 'Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol' to complement the Protocol and to assist member states to implement its provisions effectively. These were adopted in June 2005. In October 2007 RECSA was invited to participate in the UN General Assembly sessions as an observer. This is a significant development as it enables a sub-regional organisation to engage with the UN PoA process.

The best practice guidelines are significant as they set high common standards and give detailed provisions that go beyond UN PoA commitments, providing a progressive model that other regions can use. In particular, the criteria to be used when authorising small arms transfers are extremely comprehensive and elaborate upon how states' existing responsibilities under international law should inform transfer licensing decisions. These 'are the most comprehensive regional guidelines to date on small arms transfers (and other SALW issues) and most closely reflect states' obligations under international law' (Epps 2007).

Two other events in Africa are worth noting:

- The international workshop on Global Principles for Arms Transfers held in Dar Es Salaam, Tanzania, in February 2005
- The Nairobi Conference on Transfer Controls held in April 2006 in Kenya, which examined suggested

global guidelines for national controls governing SALW transfers

### Nairobi Protocol

#### Article 10

#### Import, Export, Transfer and Transit of Small Arms and Light Weapons

- Each State Party shall establish and maintain an effective system of export and import licensing or authorisation, as well as of measures on international transit, for the transfer of small arms and light weapons.
- Before issuing export licences or authorisations for shipments of small arms and light weapons, each State Party shall verify:
  - i. that the importing States have issued import licences or authorisations; and
  - ii. that without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.
- The export and import licence or authorisation and accompanying documentation together shall contain information that, at a minimum, shall include the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the small arms and light weapons and, whenever there is transit, the countries of transit. The information contained in the import licence must be provided in advance to the transit States.
- The importing State Party shall inform the exporting State Party of the receipt of the dispatched shipment of small arms and light weapons.
- Each State Party shall, within available means, take such measures as may be necessary to ensure that licensing or authorisation procedures are secure and that the authenticity of licensing or authorisation documents can be verified or validated. ...

The Global Principles for Arms Transfers workshop discussed, *inter alia*, a set of five minimum principles that could be considered when reviewing procedures and documentation, permits, and express and conditioned limitations for the export, import and transfer of arms. There was overall consensus at the workshop that, as a minimum, states must ensure that (SaferAfrica 2005):

- All transfers be authorised through a physical permit or licence
- Existing obligations under relevant international law should be respected
- Arms embargoes imposed by the UN Security Council should be respected and enforced
- The issuance of permits or licences should consider the risk that exported arms might be used in the commission of serious violations of human rights or international humanitarian law, including the risk that such arms might be diverted into the wrong hands such as terrorists
- The issuance of permits or licences may affect regional and/or internal security and stability

With respect to the Nairobi conference, participants reaffirmed their commitment to strengthening national controls on SALW transfers in accordance with the UN PoA. In particular they committed to ensuring the effective licensing, end-use control, safe storage, marking and record keeping, and information exchange by the relevant national authorities of all countries involved in any SALW transfer to prevent the diversion of SALW to unauthorised end-users.

Participants also recognised the need for enhanced cooperation and assistance in order to strengthen the capacity of states to develop and implement the UN PoA effectively, including SALW transfer controls, and undertook to:

- Ensure that all transfers of SALW are subject to effective national licensing or authorisation procedures in order to prevent their diversion to any party other than the declared end-user
- Make every effort, in accordance with national laws and practices, without prejudice to the right of states to re-export SALW that they have previously imported, to notify the original exporting state, in accordance with their bilateral agreements before the retransfer of those weapons

Kenya submitted these guidelines as a working paper to the UN Review Conference; however, the need to set international standards for the transfer of SALW was not agreed to as some states viewed them as having serious implications for licit transfers between states, while other states felt they went beyond the scope of the UN PoA.

### Case study: Southern Africa

The SADC member states, through the drafting and signing of the SADC Firearms Protocol which entered into force on 8 November 2004, are committed to reducing the proliferation of small arms in the region. The SADC Firearms Protocol commits member states to standards relating to, *inter alia*, the coordination of procedures for the import, export and transit of firearms shipments.

The SADC region has recently begun to address the topic of arms transfer controls and the problems that occur when there are minimal national regulations to control the legal, and to curtail the illicit, transfer of weapons. While most Southern African countries are in the process of redrafting their national legislation to include controls on the flow of weapons into the region, only Mauritius and South Africa have completed this process.

A number of Southern African states have established national focal points (NFPs) to help coordinate different government agencies working on various aspects of small arms. These NFPs are in the process of developing



national action plans. Some have hosted national conferences and participants thereat have included state agencies, parliamentarians, traditional leaders, CSOs such as trade unions and non-governmental associations and locally based international organisations. Besides drawing up an action plan and budget, many NFPs see their role as raising public awareness among civil society as well as informing delegates of the nature of their national, regional and international commitments.

#### SADC Firearms Protocol

The SADC Firearms Protocol requires each member state to:

- Enact national legal measures to ensure proper controls over the manufacturing, possession and use of firearms and ammunition
- Promote legal uniformity and minimum standards as to the manufacture, control, possession, import, export and transfer of firearms and ammunition
- Ensure the standardised marking of firearms at the time of manufacture
- Destroy surplus, redundant or obsolete state-owned firearms and related materials
- Become party to international instruments relating to the prevention, combating and eradication of illicit manufacturing of, excessive and destabilising accumulation of, trafficking in, possession and use of firearms, ammunition and other related materials
- Establish as criminal offences the illicit manufacturing, possession, trafficking and use of firearms, ammunition and other related materials
- Establish national inventories of firearms held by security forces and other state bodies and to enhance their capacity to manage and maintain their secure storage
- Develop and improve transparency in firearms accumulation, flow and policies relating to civilian owned firearms and to establish national firearms databases to facilitate the exchange of information on firearms imports, exports and transfers

As early as 1999, the SADC Council identified the Southern African Regional Police Chiefs Cooperation Organisation (SARPPCO)<sup>11</sup> as the implementation agency for the SADC Policy on Small Arms and Cross Border Crime Prevention (SADC Council Decision, 13–14 August 1999). However it was not until August 2007 at the 12<sup>th</sup> SARPPCO Annual General Meeting in Lusaka, Zambia that the Council of Police Chiefs resolved that the National Focal Point Coordinators' Forum (to be known as the Regional Coordinating Committee [RCC] on Small Arms and Light Weapons) would act as the driving force for implementation, as envisaged by Article 17 of the SADC Protocol.

The SARPPCO Secretariat, in conjunction with the central firearm registries of member countries, are presently developing standard operating procedures to serve as a guideline for implementing regional standards with regard to the SADC Firearms Protocol, in part because of the slow progress being made with respect to the review of national legislation

among its member countries. The draft manual details procedures to be used for the import and export of firearms and ammunition, including import procedures, requirements for an import licence, requirements for a temporary import licence/permit/authorisation, export of firearms and ammunition as well as transit procedures and requirements. Angola, the Democratic Republic of the Congo (DRC) and Madagascar still need to accede to the Protocol.

#### SADC protocol on the control of firearms, ammunition and other related materials in SADC

##### Ratification status as of 30 July 2007

Country	Signature	Ratification
Angola	–	–
Botswana	14.08.01	14.08.01
DRC	14.08.01	–
Lesotho	14.08.01	27.09.02
Madagascar	–	–
Malawi	14.08.01	24.09.02
Mauritius	14.08.01	04.01.02
Mozambique	14.08.01	20.09.02
Namibia	14.08.01	08.10.04
South Africa	14.08.01	27.01.03
Swaziland	14.08.01	01.08.06
Tanzania	14.08.01	24.12.02
Zambia	14.08.01	00.01.03
Zimbabwe	14.08.01	Ratified and deposited but not yet recorded as such by the SADC Secretariat

Source: Southern African Regional Police Chiefs' Cooperation Organisation (SARPPCO), February 2008

#### Mauritius

Mauritius imports weapons and ammunition primarily for use within its state security forces. To date, Mauritius has not experienced significant inflows of firearms for either legal or illegal use; however, there are suggestions that organised crime operations are targeting the island as a springboard for the movement of firearms to other conflict areas in Africa. The Mauritian police believe that transnational organised criminal organisations may in future use the stability on the island to conduct their activities by moving firearms from one conflict area to another without these firearms entering Mauritius.<sup>12</sup>

#### Firearms Act (No. 1 of 2006)

After the Mauritius Police embarked on a process to review the Firearms Act on 18 April 2006, the Cabinet approved a new Firearms Bill (No. 1 of 2006).





Within the context of Mauritian firearms legislation, the transfer of weapons includes 'to let on hire, give, lend, and part with possession' (Mauritius Firearms Act 2006).

A 'dealer in firearms' means any person who manufactures, sells, transfers, repairs, tests or proves firearms or ammunition for the purpose of trade or business. Mauritian law also includes stipulations for monitoring, confiscating and tracking the transfer of individual firearms. In order for a person to transfer or sell firearms they must be registered as a dealer.

The Mauritius Firearms Act of 2006 further articulates regulations on transfers by stating that:

No person shall sell or transfer to any other person, other than a registered dealer in firearms, any firearm or ammunition, unless that other person produces a firearm licence authorising him to purchase or acquire it; No person shall sell or transfer any firearm or ammunition to, or repair, prove, or test any firearm or ammunition for, any other person whom he knows, or has reasonable ground for believing, to be under the influence of intoxicating liquor or a dangerous drug or is of unsound mind; Every person, other than a registered dealer in firearms or gunsmith, who intends to part with the possession of any firearm or ammunition by way of sale, letting on hire, pledge, gift, or loan for use, to any other person, shall, 15 days prior to such parting with possession, give to the Commissioner a notice of such parting with possession, stating his name and address and the name and address of that other person, the type and calibre of the firearm, the maker's name, the identification number or other distinguishing mark and the quantity of ammunition.

The Firearms Act further limits the transfer of weapons to individuals who have committed a crime or who are under the influence of intoxicating substances. In order to control the transfer of weapons Mauritius, like South Africa, has developed a system to register and license the import and export of firearms into and out of the country.

### **South Africa**

Prior to 1994 and under the apartheid regime, most arms import and export control in South Africa was entrusted to the Armaments Development and Production Corporation (Armcor). The controls applicable to sales were detailed in a 'logistics' (log) pamphlet, which set out standard procedures to regulate and control armaments sales between the South African Defence Force and Armcor. Armcor operated as the agent of the military and was obliged

to act 'strictly according to business principles'. Under this control regime Armcor was entitled to sell off surplus stocks.

Annexed to the log pamphlet was a worldwide country categorisation, reflecting whether armaments may or may not be sold to each of the 179 countries. The Defence Foreign Policy Committee (DFPC) was responsible for devising the list, which was subject to Cabinet approval. The DFPC assigned each country to one of three groups:

- Group I – countries with no limitation in respect of marketing and exports
- Group II – countries to which only 'non-sensitive' armaments may be exported
- Group III – countries to which no marketing or exports may occur

It should be noted that 'non-sensitive' armaments (Group II) included automatic and semi-automatic firearms (Commission of Inquiry Into Alleged Arms Transactions Between Armcor and One Eli Wazan and Other Related Matters, 1995).

South Africa today has several new and radically different policies and laws aimed at controlling the flow of weapons into and out of the country. These include:

- A ban on the sale of surplus weapons
- A National Conventional Arms Control Act (No. 41 of 2002) detailing requirements that must be adhered to for the export of firearms, and an associated National Conventional Arms Control Committee (NCACC) providing for political oversight
- The Firearms Control Act (No. 60 of 2000)

### *Destruction of surplus state stock*

At the national level, the South African government has adopted a number of important measures to meet its international and regional obligations. It has, among other steps, developed and implemented a policy position that all *surplus*, redundant, obsolete and confiscated small arms of a calibre below, and including, 12,7 mm be destroyed in order to prevent these from ending up in the illicit small arms trade.<sup>13</sup> The effective collection and disposal of both (confiscated) weapons and surplus stocks is in the broader interests of non-proliferation but is also important for preventing further diffusion through theft and corruption (Davis 2001).

It is with this in mind that in terms of Section II, paragraph 8 of the UN POA, member states undertake:

to regularly review the stocks of small arms and light weapons held by armed forces, police and other bodies authorised and ensure that

such stocks declared by competent national authorities to be surplus to requirements are clearly identified, that programmes for the disposal, *preferably through destruction* [emphasis added], of such stocks are established and implemented and that such stocks are adequately safeguarded until disposal.

According to South African Police Commissioner Jackie Selebi (2002):

It is the South African Government's policy on the non-proliferation and control of small arms and light weapons that the disposal of such stocks be done *by means of destruction* [emphasis added].

### *National Conventional Arms Control Act*

South Africa has also established progressive export and arms brokering controls by means of the National Conventional Arms Control Act of 2002. The Act includes:

- Guidelines and criteria that are to be taken into account when considering marketing, contracting and export permits
- Requirements for the registration of all persons involved in brokering and regulations on the transactions that brokers may perform

The National Conventional Arms Control Act provides for a certain degree of transparency in the export of weapons and establishes a series of criteria (including human rights considerations) by which export licence applications are to be evaluated. Traders in conventional arms must take cognisance of the fact that in terms of section 4(1)(b) of the Act, the following shall be taken into account by the NCACC when deciding on whether or not they may trade in conventional arms with a client in a particular country:

- South Africa's national interest and its international obligations and commitments, particularly as these relate to arms control, non-proliferation, disarmament and the implementation of international humanitarian law;
- National policy decisions not to trade in conventional arms and military equipment and/or material, equipment or technologies that could be used for the development or production of weapons of mass destruction, with
  1. countries involved in the systematic violation or suppression of humanitarian rights and fundamental freedoms;
  2. countries of proliferation concern;
  3. countries, individuals, groups, undertakings and entities mentioned in the United Nations Security Council Chapter 7 resolutions;

4. countries, individuals, groups, undertakings and entities involved in international crime;
5. countries, individuals, groups, undertakings and entities involved in international terrorism;
6. countries involved in armed conflict.

An important aspect of South Africa's policy is its annual release of arms transfers to the public via parliament – something which other African states need to take on board.

Transparency in the decision-making process is important for a number of reasons. First, in a democracy citizens should be able to hold their elected officials to account for their actions and for the manner in which public funds are used. As arms exports can be one of the more destructive elements of a government's foreign policy, it is crucial that relevant information is made publicly available in order to ensure effective accountability of government to the people. Second, transparency tends to keep governments honest, ensuring that they adhere to national arms export principles and criteria, as well as to international arms control treaties, conventions and relevant UN Security Council resolutions. The absence of transparency often contributes to an environment of impunity among the relevant government officials. Third, transparency has the potential to enhance regional and international peace and security and to build confidence between states, as the sharing of information reduces incidences of suspicion and misperception which could lead to inter-state conflict (Lamb 2007).

### *Firearms Control Act (No. 60 of 2000)*

In addition to the above-mentioned legislative frameworks, South Africa has a comprehensive and effective system of arms control and management aimed at controlling the supply, possession, safe storage, transfer and use of firearms as well as for detecting the criminal or negligent use of weapons (Firearms Control Act, No. 60 of 2000).

The Firearms Control Act (FCA) significantly strengthens existing regulations over the possession and use of firearms in the following ways:

- Criteria for obtaining a licence were expanded to include:
  - a competency certificate which includes training in knowledge of the law and use of a firearm
  - a demonstrated lack of substance dependence
- Increased administrative controls were adopted such as:
  - limits on the number of firearms that any one individual can own
  - regular licence renewals
  - a licence may be revoked if an owner is posing a threat to him/herself or to his/her community

- Greater police powers and stricter penalties such as:
  - stricter penalties for offences committed under this Act, e.g. 25 years for illegal possession of a firearm
  - search and seizure powers without warrants

The Act also deals with the import, export and carriage-in transit of firearms and ammunition. No person may import into or export from South Africa any firearms or ammunition without an import or export permit. According to Chapter 8, section 73(1) and (2) of the FCA, the same applies to the in-transit carriage of any firearms or ammunition. A permit for the import of a firearm or ammunition also constitutes a licence to possess, but the registrar may impose conditions on the use of such weapons and may limit the period of use. An important addition in the FCA which effectively tightened a major loophole in the old Arms and Ammunition Act (1969) is that foreign hunters visiting South Africa may no longer leave their firearm(s), ammunition or any parts or components thereof as a gift – in effect, an illegal weapons transfer.

### Conclusion and recommendations

Africa has been an important role-player in supporting initiatives to strengthen SALW transfer controls and has taken seriously its commitments to implementing the provisions of the UN PoA, within the context of regionally agreed guidelines or legally binding commitments. However, outdated national legislation, obsolete regulatory measures, precarious peace processes, porous borders and the lack of capacity on the part of governments to monitor the legal and illegal movement of firearms effectively, present enormous challenges in addressing small arms control in Africa. In addition, a fundamental concern among many African governments is the lack of resources and capacity to develop the necessary systems and equipment, such as computerised databases, ballistic testing machines and scanning devices.

This points to an important aspect of the UN PoA, which provides for capacity development and resource mobilisation to implement small arms controls as well as to make provision for international cooperation and assistance (see Section III). Although many affected states often lack the capacity to assess their own needs, this is often further undermined by 'donors' lack of knowledge of the different technical and financial needs of individual states and regions to implement the PoA' (quoted in Epps 2007).

Epps suggests that the challenges to the development of arms transfer principles are shared among donor governments and affected states and that these include the 'implementation of agreed instruments and the creation of greater capacity to regulate arms transfers' (Epps 2007).

A recent United Nations Institute for Disarmament Research (UNIDIR) global survey of the international assistance provided for implementing the UN PoA on small arms noted several problems with the estimated \$660 million spent over five years. UNIDIR (2007) points out the following:

- The PoA on the illicit trade in SALW makes it clear that it is the responsibility of states requiring assistance to request the assistance. Authorising, exporting and importing transfers are national prerogatives, and the same must therefore be said for the strengthening of national transfer controls
- The role of the international community is to support and facilitate SALW strategies
- Assistance must build, not replace, a state's own national resources and initiatives
- Assistance should not substitute for a state's own political will

Many, if not all, of these protocols are complex and a process needs to be instituted to prioritise which of the many provisions need to be addressed immediately. Concrete strategies and measurable implementation plans are needed that will see the successful and sustainable execution of these global and regional agreements.

It must, however, be acknowledged that donors face a number of challenges when attempting to assist states. Some of these challenges, which need to be urgently overcome, include:

- Lack of communication and coordination on the ground among different implementing agencies, and donor or recipient states not clearly communicating the assistance being implemented
- Not receiving the documentation and information from recipient states that are needed in order to approve funding
- Funding constraints for donors and practitioners relating to accountability and transparency
- Lack of means to measure the progress and impact of assistance in order to justify present and future expenditures to the public (UNIDIR 2007)

Although efforts are well under way to put in place processes to discuss the feasibility and scope of a global arms trade treaty which includes all weapon types, this must not detract from the fact that existing global instruments such as the UN PoA and the UN Firearms Protocol, although limited, provide sufficient guidelines to enable states to put in place effective small arms transfer control mechanisms at the regional and national levels. Section II, paragraphs 2, 11, and 12 of the UN PoA makes it clear that states have an obligation to put in place adequate laws and administrative procedures to ensure effective control over the manufacture, export, import, transit or re-transfer of SALW. Important policy work on

small arms control has occurred in the global arena, and the focus and attention of both the international community and CSOs needs to be concentrated on implementing these commitments at both national and regional levels.

In summary, this paper has argued the following:

- The UN PoA recognises that the effective regulation and control of *legal* small arms transfers is critical to ensuring that the diversion of weapons from legal transfers into *illegal* circulation is both prevented and reduced.
- The term 'transfer' includes the import, export, transit and re-transfer, and end-user certificate regimes in both *receiving* and *supplying* countries. This means that each has roles and responsibilities in combating and preventing the illicit trade in weapons.
- The principle of developing common global principles or criteria on small arms transfer controls is now widespread.
- Transfer criteria are only one aspect of a state's overall arms transfer control system and concentrating only on developing globally agreed criteria might result in other aspects being neglected.
- A commitment to global standards is best understood and practiced at the national, regional and sub-regional levels. For example, agreements negotiated at a sub-regional or regional level are often more stringent than those agreed to at a global level.
- A range of innovative and far-reaching agreements have been concluded in Africa over the past ten years. These include the politically binding Bamako Declaration and the more recent African Common Position to the UN Review Conference, as well as legally binding instruments such as the SADC Firearms Protocol, the Nairobi Protocol and the ECOWAS Convention.
- National legislation and control regimes have an important place in effective arms export and import control systems.
- Emphasising the locus of control at the national level facilitates a more comprehensive approach to ensuring enforcement. This does not detract from or undermine efforts to build consensus for a global arms trade treaty or internationally agreed transfer criteria, but rather underscores the fact that work on small arms control has often been most effective and has had the biggest impact at regional and national levels.
- Without detracting from the importance and utility of new international initiatives, national and regional efforts over the past ten years to control the transfer of arms and the arms trade in general should not be subsumed under a set of global principles.
- Southern African countries are in the process of redrafting legislation to include controls on the flow of weapons into the region. The SADC region

has recently begun to address the topic of arms transfer controls and the problems that occur when there are minimal national regulations to control the legal, and to curtail the illicit, transfer of weapons.

- Mauritius and South Africa have several new and important policies and laws regarding the control of SALW. South Africa has instituted a ban on the sale of surplus weapons and has passed the National Conventional Arms Control Act (No. 41 of 2002) detailing requirements that must be adhered to in order to export firearms. It has established an associated National Conventional Arms Control Committee to provide for political oversight and has passed the Firearms Control Act, which is aimed primarily at regulating the use and ownership of firearms by civilians.
- Important policy work on small arms control has occurred in the global arena, and the focus and attention of both the international community and CSOs needs to be concentrated on implementing these commitments at national and regional levels.
- Common challenges to the development of effective transfer control mechanisms at the national level include the creation of greater capacity to implement already agreed global, regional and sub-regional instruments.
- Section III of the UN PoA provides for capacity development and resource mobilisation to implement small arms controls and to make provision for international cooperation and assistance.

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## Notes

- 1 In 2006, the ECOWAS Moratorium (Declaration of a Moratorium on the Importation, Exportation and Manufacture of Light Weapons in West Africa) was transformed into a convention which was adopted by all member states. The convention is a comprehensive instrument that addresses several essential elements of the UN PoA, such as the manufacture of small arms, their transfer and transparency in the trade.
- 2 See, for example, IANSA, *Reviewing Action on Small Arms, 2006: Assessing the First Five Years of the Programme of Action*. Biting the Bullet. Available at <[www.iansa.org/un/review2006/redbook2006/index.htm](http://www.iansa.org/un/review2006/redbook2006/index.htm)>.
- 3 At the 61st UN General Assembly meeting in 2006, member states adopted resolution A/RES/61/89 – Towards an arms trade treaty: Establishing common international standards for the import, export and

transfer of conventional arms. The resolution called on the secretary-general to 'seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, and to submit a report on the subject to the General Assembly at its sixty-second session'. It also called on the secretary-general to establish a group of governmental experts to address such a treaty and to report on its findings at the 63rd session of the General Assembly. For an analysis of states' views see Parker 2007.

- 4 See for example, the IANSA (2006b) briefing paper, which makes the case that states must use the review conference on the small arms and light weapons Programme of Action to agree to a set of global principles on international arms transfers consistent with states' existing responsibilities under international law.
- 5 This Protocol, negotiated in Vienna from 1998, supplements the UN Convention on Transnational Organised Crime and was adopted by the UN General Assembly on 31 May 2001. It entered into force in June 2005 after having been ratified by more than 40 states. African countries that have so far ratified the Protocol include: Algeria, Benin, Burkina Faso, Cape Verde, Central African Republic, DRC, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, São Tomé, Senegal, South Africa, Uganda, Tanzania and Zambia. (See <[http://www.unodc.org/unodc/crime\\_cicp\\_signatures\\_firearms.html](http://www.unodc.org/unodc/crime_cicp_signatures_firearms.html)>).
- 6 The Lancaster House Conference was hosted by the UK government in January 2003 to consider how to implement the commitments laid out in the UN PoA. The conference was attended by participants and observers from 49 countries, along with representatives from interested international organisations and NGOs.
- 7 'Active' means that arms sales are initiated and officially carried out by governments; 'passive' means that governments license arms sales by private companies.
- 8 It was adopted in Bamako, Mali, December 2000 by the member states of the then Organisation of African Unity (OAU).
- 9 African governmental experts met in Windhoek, Namibia for the Second Continental Conference of African Government Experts on Illicit Trade in SALW from 14-16 December 2005.
- 10 With the reservation of Egypt.
- 11 SARPCCO was established in 1995 to coordinate work between the police forces in Southern Africa on issues that were undermining security and stability in the sub-region.
- 12 Interview with Mauritian police officer, 27 September 2006.
- 13 See also Meek & Stott 2003 and 2004.



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## About this paper

The focus of the international arms control community on the need to put in place comprehensive mechanisms to control the import, export, transfer and transit of small arms and light weapons (SALW) has largely been located in the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN PoA). After much discussion on the nature of small arms transfer controls, the principle of developing common global standards is now widespread. However, this commitment to global standards is best understood and practiced at the national, regional and sub-regional levels. While Africa has taken seriously its commitments to implementing the provisions of the UN PoA, global agreements have little chance of producing the desired impact unless action at the national level is strengthened and the capacity for implementation is enhanced.

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