

# 5: PROGRESS TOWARDS CONTROLLING SALW TRANSFERS

## 5.1 INTRODUCTION

It is now a well-established fact that the illicit trade in SALW is inextricably linked to the government-sanctioned or 'legal' trade, and that effective transfer controls are key to preventing destabilising accumulations and misuse of these weapons. Any effort that seeks to tackle the illicit trade in SALW in a comprehensive manner must therefore also address the 'legal' trade. This premise has been fully acknowledged in the PoA itself, which includes measures to promote the effective regulation of the import, export and transit of SALW alongside those to address guidelines on transfer control, arms brokering, end-use, border controls and the enforcement of UN arms embargoes. Although the nature and type of these commitments vary across the range of issues addressed, the PoA nevertheless recognises implicitly, if not explicitly, that preventing and combating the illicit trade in SALW requires a comprehensive approach to SALW transfers.

The following chapter seeks to examine states' implementation of the various PoA commitments relating to SALW transfer controls. Each sub-section addresses a different aspect of transfer controls and begins by setting out the PoA undertakings that relate to the particular issue in question. These are then contrasted with the principal commitments made in regional and multilateral SALW control fora in order to show where the PoA is out of step with existing standards of good practice, followed by an assessment of the range of types of national practices, which seeks to illustrate the extent to which states are meeting their commitments under the PoA. Potential links between poor levels of national implementation and inadequacies in the PoA are highlighted, leading to conclusions on the need for further progress to be made at the international level. The chapter ends with an examination of measures that could be considered by the Review Conference in order to promote enhanced implementation of international SALW transfer controls.

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## 5.2 QUALITY AND SCOPE OF ASSESSMENT OF TRANSFER APPLICATIONS

### 5.2.1 INTRODUCTION

The quality and scope of national SALW transfer control provisions will have a significant bearing upon efforts to prevent and combat the illicit trade in SALW. As well as being comprehensive in scope, i.e. involving all types of SALW transfer activities including export, import, retransfer, transit/transshipment, brokering and transportation, such controls must be sufficiently detailed and applied with enough consistency and rigour to prevent the exploitation of loopholes by unscrupulous actors and to close opportunities for the illicit trade and misuse of SALW.

### 5.2.2 THE UN POA AND THE QUALITY AND SCOPE OF NATIONAL TRANSFER CONTROL PROVISIONS

The PoA makes a number of references to the need for effective SALW transfer control provisions at the national level. The basic requirements in this regard are set out in Section II, Para 2, which requires that states:

"...put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients."

Particular provisions relating to the export and transit of SALW are also elaborated within Section II, Para 11 (see relevant sub-sections in this chapter) and are restated in Section II, Para 12, along with the

requirement for states to employ “the use of authenticated end-user certificates and effective legal and enforcement measures.”

The issue of retransfer is addressed in Section II, Para 13, which requires states to:

“...make every effort, in accordance with national laws and practices, without prejudice to the right of States to re-export small arms and light weapons that they have previously imported, to notify the original exporting State in accordance with their bilateral agreements before the retransfer of those weapons.”

Finally, the need for adequate controls relating to SALW brokering is addressed in Section II, Para 14 (see section 5.6).

The range of commitments covered by the PoA is thus relatively extensive, covering most aspects of national SALW transfer controls, although it fails to address issues such as licensed production overseas. At the same time, the detail of what is required in each case is often lacking and there is a complete lack of elaboration of any key elements of a SALW import control system and inadequate elaboration of provisions relating to export control. These shortcomings, with regard to brokering, end-use controls, transit controls, and transfer control principles are discussed in distinct sub-sections of this Chapter. Issues relating to the quality and scope of export and import assessment, including in particular the issues of the retransfer of SALW and assessing the risk of diversion are discussed below.

### 5.2.3 OTHER REGIONAL/INTERNATIONAL AGREEMENTS AND THE QUALITY AND SCOPE OF NATIONAL SALW EXPORT AND IMPORT CONTROL PROVISIONS

Issues relating to the quality and scope of export and import control provisions are also addressed (to varying degrees) by other international and multilateral agreements. The provisions of 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)<sup>1</sup> are consistent with those of the PoA insofar as it establishes that states must “maintain an effective system export and import licensing or authorization, as well as of measures on international transit”.<sup>2</sup> However, the UN Firearms Protocol goes much further in that it also requires that, prior to issuing firearms export licences, states must ensure that the importing government has authorised the transfer and that any transit states have also given their authorisation in writing. In addition, the UN Firearms Protocol sets out the type of information that should be included in export and import licences and requires that the transit state be appraised of all relevant details in advance of the transfer taking place.

It should be noted, however, that the differing levels of commitments in the UN Firearms Protocol and the PoA are undoubtedly a function of the differing nature of the two instruments in that the former is a legally binding instrument of law enforcement and the latter a politically binding agreement within the disarmament context. Furthermore, the application of the Firearms Protocol is much more limited in that it is restricted to commercial transactions involving firearms only, whereas the PoA applies to all types of transfers of all categories of SALW including state-to-state transfers or those relating to national security. Interestingly, the commitments within the 2004 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Nairobi Protocol)<sup>3</sup> relating to the scope and extent of SALW transfer provisions mirror those of the UN Firearms Protocol; however the Nairobi Protocol covers the full range of SALW and does not exclude state-to-state transfers.

<sup>1</sup> 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), 8 June 2001 [http://www.unodc.org/pdf/crime/a\\_res\\_55/255e.pdf](http://www.unodc.org/pdf/crime/a_res_55/255e.pdf)

<sup>2</sup> UN Firearms Protocol, Article 10.

<sup>3</sup> The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 21 April 2004 <http://www.smallarmsnet.org/docs/saaf12.pdf>

In the Organisation of American States (OAS) region, the Inter-American Drug Abuse Control Commission (CICAD) Model Regulations<sup>4</sup> aim to establish a harmonised system for monitoring and controlling international movements of firearms, addressing of the questions of export, import and transit licensing, specifying procedures to be followed with regard to the issuing of such licences and the extent of the information required in each case.

The Organisation for Security and Co-operation in Europe (OSCE) has addressed issues relating mainly to the quality and scope of SALW export control rather than imports, but those provisions that exist are quite extensive. The OSCE Best Practice Guidelines<sup>5</sup> relating to Export Control of SALW state that:

“legislation on the control over the export and transit of SALW and associated technology should define, where applicable:

- when a licence is needed
- possible exemptions from the licence requirement
- the circumstances under which the licence may be granted
- the licensing procedure
- the rights and responsibilities of the State authority and the exporter
- the relations between the authorities involved in the licensing procedure
- the product lists
- effective sanctions sufficient to punish and deter violations of export controls

In addition, there is a detailed account of the circumstances under which an export licence may be required and of the information that should be carried on an export licence, as well as a list of the types of supporting documentation that should be considered alongside any such application. The OSCE Guidelines also repeat the provisions of the Firearms Protocol with regard to securing the authorisation of transit states and encouraging notification by exporting and importing states of the dispatch and the arrival of SALW shipments. Finally, the Guidelines suggest that states should ensure that clauses restricting re-export and prohibiting the diversion of exported SALW be included in any end-use undertaking or any contract that is signed by the recipient.

The Wassenaar Arrangement Best Practice Guidelines for Exports of SALW<sup>6</sup> say very little with regard to mechanisms for effective SALW transfer controls, although they do mention the need for states seeking to retransfer SALW to notify the original exporting state in advance.

The EU is alone in examining the issue of transferring SALW production capacity, for example, through licensed production overseas. In 2002 the Fourth Annual Report of the EU Code of Conduct<sup>7</sup> stated that when exporting goods or technology which would be used to manufacture military equipment Member States would take into account the use of the finished product and risks associated with its export or diversion. While this agreement is welcome, it does not address the full range of issues which arise from the transfer of SALW production capacities overseas.

It is clear from the above analysis that the various multilateral SALW control instruments specify widely differing measures with regard to SALW transfer control provisions. The legally binding UN Firearms Protocol and Nairobi Protocol address *inter alia* the export, import and transit of SALW while the CICAD Model Regulations establish detailed standards with regard to licensing provisions in each of these

<sup>4</sup> Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition <http://www.state.gov/documents/organization/61643.pdf>

<sup>5</sup> OSCE Handbook of Best Practices on Small Arms and Light Weapons [http://www.osce.org/fsc/item\\_11\\_13550.html](http://www.osce.org/fsc/item_11_13550.html)

<sup>6</sup> Wassenaar Arrangement Best Practice Guidelines for Exports of SALW, December 2002,

<http://www.wassenaar.org/publicdocuments/Basic%20documents%202006%20-%20January.doc>

<sup>7</sup> [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c\\_319/c\\_31920021219en00010045.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_319/c_31920021219en00010045.pdf)

respects. Although considerably more detailed, the OSCE Guidelines focus solely on provisions for export control, while including reference to controls on retransfer and diversion. Thus, while there is no single instrument that provides a comprehensive approach with regard to SALW transfer control provisions, when the range of multilateral instruments are considered it is possible to draw a picture of emerging best practice in terms of the quality and scope of SALW import and export control provisions.

#### **5.2.4 NATIONAL PRACTICES REGARDING THE QUALITY AND SCOPE OF NATIONAL EXPORT AND IMPORT CONTROL PROVISIONS**

A majority of states (and entities) appear to meet the basic PoA requirements for laws, regulations and administrative procedures relating to the export of SALW, with at least 111 states claiming to possess such provisions. However, this figure is disappointing considering that approximately 80 states appear to have failed to implement even the most basic provisions called for by the PoA. With regard to provisions for the control of SALW import, a greater number – at least 135 states – are known to have laws, regulations or administrative procedures.

It is likely that, as with the commitments in the various multilateral SALW control agreements, national provisions and practices with regard to SALW export and import control will vary significantly in their scope and stringency. Indeed, it is clear that a significantly greater number of states have laws, regulations and/or administrative procedures relating to SALW import than have such provisions for export control. This is undoubtedly due to the fact that whilst some states do not see themselves as exporters per se of SALW, they nevertheless recognise themselves and their citizens as potential importers of these weapons.

Import control systems are different from export control systems in terms of the bodies of law, regulation and departmental authorities and procedures involved. In addition, the application of import regulations involves the consideration of a different range of concerns relating to the regulation of SALW possession and use within national jurisdictions. There is a relative lack of scrutiny given to import licensing procedures compared with the considerable efforts that have been expended by states in the development and promulgation of comprehensive export control systems. Indeed, the complete lack of elaboration of aspects of import control within the PoA reflects how much less interest is generally paid to issues of import than to export. This has been illustrated in the fact that whilst 63 states have reviewed their export control legislation since 2001, only 51 have reviewed their regulations on import control.

The level of sophistication and detail of many states' import and export provisions is such that a systematic comparison is beyond the scope of this report. It is possible, however, to provide some illustration of the different types of approaches that exist, for example:

- In Finland, import and export regulations are the same for civilian and military SALW; in Germany there is a strict differentiation between the two categories, which are covered by different laws and regulations. These different approaches help to show why the debate as to how best to differentiate controls on civilian and military SALW during the 2001 UN Conference process proved inconclusive.
- In Ethiopia, only the Ministry of Defence is permitted to import or export SALW; in Croatia the process of export and import control for commercial and state actors is governed by different regulations whilst government-to-government weapons transfers involve a reduced administrative process. Accordingly, in those countries where commercial enterprises are involved in SALW import and export, it is likely that different regulations and procedures will apply to government and commercial activities. Indeed, in the UK it has long been a source of contention within the NGO community that arms export legislation does not bind the Crown and is therefore not applicable to government-to-government deals.

- In Moldova, the Interdepartmental Control Commission on Export, Import and Transit of Strategic Goods authorises export or transfer of SALW; in Malta, export authorisations are issued by the Director Responsible for Trade, following approval by the Police Department (Weapons Office) and the Ministry of Foreign Affairs; in Italy, the export of certain types of SALW can be authorised by local police commanders. Since differing types of authorities will have differing perspectives on what factors should be considered in any SALW export authorisation, such a wide variation in responsibility for this is likely to lead to significant differences in the quality and scope of assessment of SALW transfers amongst states.
- In the vast majority of states, SALW export authorisations are the responsibility of the national authorities. However in Belgium, competence for authorising SALW export licences was ceded to the regions in 2003. By 2005, the Flemish Region had adopted its own law in terms of export controls but Région Wallonne and Bruxelles-Capitale have not undertaken this task and still refer to federal law. These developments have given rise to serious concerns amongst the Belgian NGO community concerning the consistency with which export controls, including the EU Code of Conduct, are being applied to SALW exports across the three regions.

Since diversion of SALW from the licit into the illegal trade represents one of the primary sources of illicit SALW, assessing the risk of diversion should be at the heart of states' export control systems and of efforts to prevent and combat illicit trafficking in these weapons. As such, the risk of diversion is specifically identified in Section II, Para 11 of the PoA as an important consideration for states when authorising exports of SALW. Surprisingly, however, only around 41 states actually claim to assess the risk of diversion of SALW as part of their export control system. Of these 41 states, moreover, 32 are situated in the wider Europe region, reflecting the attention paid to the issue of diversion in the EU Code of Conduct and the OSCE SALW Document and Best Practice Guidelines. Nevertheless, the fact that only seven states outside Europe give credence to the risks of diversion in their national export control systems is startling, considering that, amongst all export control criteria, the risk of diversion was singled out for attention by the PoA.

Another export-control related issue that is given particular attention in the PoA concerns the retransfer of SALW. Section II, Para 13 requires states to notify the original exporting state before retransferring any imported weapons. Although this does not amount to an obligation on states to notify the retransfer of SALW, it is clear that if the majority of states were to adopt a system of retransfer notification, efforts to trace illicit weapons back to their point of diversion would be greatly assisted. Despite the obvious benefits of adopting a policy of retransfer notification a paltry 28 states claim to include a requirement that they are notified of the retransfer of any SALW that they have exported.

### 5.2.5 ENHANCING STANDARDS OF CONTROL

States' national approaches to export and import control have evolved over many years in response to their particular national circumstances and requirements and it is likely that those countries relying on very old legislation are unlikely to meet all the necessary requirements of a modern, effective export and import control system. Although in recent years there have been efforts towards some level of harmonisation in different regional and multilateral fora, as noted above, the various legally binding protocols, model regulations and best practice guidelines have adopted a range of different approaches to export and import licensing.

The lack of detailed commitments in the PoA regarding the requirements for effective SALW transfer controls has undoubtedly done little to encourage harmonisation or uniformity of national approaches. That said, it is questionable as to whether this can be blamed for the significant number (more than 30%) of states that have yet to establish SALW export control laws, regulations or administrative procedures

and the 25% that have yet to establish the same provisions relating to SALW import control. Moreover, it should be noted that in those situations where the PoA makes fairly explicit statements, such as those relating to the retransfer and diversion of SALW, only a small minority of states have adopted relevant procedures. Accordingly, the inadequacies and divergences in states' approaches to the regulation of SALW export and import control are likely to be significantly contributing to the illicit trade in SALW. Thus there appears to be a considerable need for the elaboration of international standards in this regard, beyond the basic requirement for states to adopt adequate laws, regulations and administrative procedures for the control of SALW. These international standards could consist of a combination of the measures that have so far been adopted at regional level. Best practice guidelines for import, export, transit, licensed production and brokering control could be developed along with associated model regulations for relevant licensing procedures.

## 5.3 TRANSFER CONTROL GUIDELINES

### 5.3.1 INTRODUCTION

The issue of transfer controls is one of most extensively debated subjects within the context of preventing and combating the illicit trade in SALW in general, and the UN PoA in particular. This is because it is widely understood that ensuring restraint and responsibility in SALW transfers is key to preventing destabilising accumulations, diversion and misuse of these weapons. The success of efforts to reduce the negative impact of SALW proliferation depends, to a significant extent, upon the development and implementation of effective transfer controls.

A large number of governments and non-governmental organisations recognises that in order to make effective progress in efforts to tackle the illicit trade in SALW agreement must be reached on a set of guidelines governing international transfers of SALW.

### 5.3.2 THE UN POA AND TRANSFER CONTROL GUIDELINES

The PoA does not say a great deal about transfer control guidelines, and what it does say applies to only one aspect of SALW transfer: exports. Nevertheless the main provisions set out in Section II, Para 11 are of considerable significance:

“To assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons 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 illegal trade.”

These commitments are, like virtually all substantive aspects of the PoA, the result of a compromise. In the period preceding the 2001 UN Conference, the debate concerning the issue of SALW transfer controls was one of the most extensive. While certain states and regional groupings, including the EU, argued for the inclusion of transfer control criteria to the PoA, no ultimate consensus could be reached on any detailed proposals. Nevertheless, the substance of Section II, Para 11 while underdeveloped does acknowledge the fact that SALW transfer controls must be consistent with states' international legal responsibilities so that any genuine attempt to elaborate upon this commitment should open the way for agreement on meaningful and comprehensive international SALW transfer control guidelines.

The sense that the 2001 Conference was in some ways a missed opportunity has ensured that the debate has continued. Since the PoA was agreed, a number of international initiatives have taken place

with a view to elaborating and promoting agreement on the issue of states' international legal responsibilities regarding SALW transfers. In January 2003, the UK government set in motion the Transfer Controls Initiative process which has sought to explore existing regional practices with regard to SALW transfer control, with a view to identifying commonalities in approach that could be translated at the international level.

The Consultative Group Process (CGP) convened by the Biting the Bullet Project (International Alert, Saferworld and the University of Bradford) has also, over a three and a half year period, sought to develop common understandings around the issue of SALW transfer controls and states' existing responsibilities under international law. Bringing together over 30 governments from different regions as well as international experts from NGOs and UN agencies, the CGP has developed a set of guidelines for international SALW transfers, representing a genuine effort to encapsulate states' existing legal responsibilities. These guidelines have been circulated for consideration by states in advance of the Review Conference.

A third initiative that has had a major influence on the international SALW transfer controls debate since 2001 has been the effort to establish an international Arms Trade Treaty (ATT). Originally inspired by the work of Nobel Peace Laureates and NGOs to establish an International Code of Conduct on Arms Transfers, the ATT has garnered significant international support from governments and NGOs since 2001. While many governments (at least 45) have now declared their support for an ATT, much of this support is declaratory and exactly what these governments would sign up to remains to be established. The international NGO community, however, has a clear view of what any ATT should consist of and has, with the help of a team of international lawyers, put forward a set of 'Global Principles', which clarify states' existing responsibilities under international law. Although the ATT initiative relates to the control of all international arms transfers, and not just SALW, the application of the Global Principles has been discussed extensively in the margins of the two Biennial Meetings of States, at the January 2006 PrepCom and within other relevant international fora. Many NGOs would wish the Global Principles to provide the bedrock for any agreement on SALW transfer controls at the Review Conference.

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### 5.3.3 OTHER INTERNATIONAL AND REGIONAL AGREEMENTS AND TRANSFER CONTROLS

To date, most of the substantive progress that has been made towards the establishment of transfer control guidelines has occurred at the regional/multilateral level. The first major effort in this regard was the EU Code of Conduct on Arms Exports, agreed in June 1998.<sup>8</sup> Although imperfect in terms of its consistency with states' international legal responsibilities, the EU Code nevertheless constitutes a relatively comprehensive agreement and can be seen to have had a major influence on the development of transfer control criteria in the wider European context and elsewhere. Furthermore, the Annual Reporting mechanism of the EU Code has allowed for progressive development of the initiative, particularly with regard to the Code's operative mechanisms. During the EU Code Review of 2004, decisions were taken to strengthen the Code's criteria, particularly those relating to international humanitarian law and also to pursue the development of elaborated guidelines for implementation of these criteria.

The ECOWAS Moratorium on the Import, Export and Manufacture of Light Weapons agreed in November 1998<sup>9</sup> also represents a significant development in SALW transfer controls in that it remains, to date, the only multilateral agreement to completely prohibit the transfer of SALW between states parties. Unfortunately, although groundbreaking in its conception, the Moratorium has not prevented the

<sup>8</sup> EU Council, EU Code of Conduct on Arms Exports, DGE-PESC IV <http://ue.eu.int/uedocs/cmsUpload/08675r2en8.pdf>

<sup>9</sup> ECOWAS Moratorium on the Import, Export and Manufacture of Light Weapons, November 1998 <http://www.fas.org/nuke/control/pcased/text/ecowas.htm>

circulation of SALW within West Africa and as of April 2004 efforts have been underway to replace the Moratorium with a legally binding Convention.

The November 2000 OSCE Document on Small Arms,<sup>10</sup> which was developed in preparation for the 2001 UN Conference, includes a series of common norms, principles and measures aimed at fostering responsible behaviour with regard to the transfer of small arms. While relatively comprehensive in scope, the OSCE Document is not fully consistent with states' international responsibilities, containing only vague commitments relating to international human rights standards and international humanitarian law (IHL).

Since the PoA was agreed, several multilateral and regional agreements on SALW transfer control have emerged. The Wassenaar Arrangement Best Practice Guidelines for Exports of SALW commit participating states, when considering a SALW export, to take into account 10 factors, and to avoid issuing licences if there is a clear risk that the arms in question might lead to 10 situations, including diversion, aggravating armed conflict, endangering peace, repression and suppression of human rights. However, even though these guidelines were agreed after the PoA, they cannot be considered as reflecting states' international legal responsibilities since, as with the OSCE Document, commitments relating *inter alia* to human rights and international humanitarian law are weak and non-binding.

More recently, there has been evidence of a growing desire among some states to address the issue of SALW transfer control guidelines in a way that is consistent with Section II, Para 11 of the PoA. An important initiative in this regard has been the June 2005 Best Practice Guidelines for the implementation of the Nairobi Declaration and the Nairobi Protocol which were agreed pursuant to the April 2004 Nairobi Protocol for the Prevention, Control and Reduction of SALW in the Great Lakes Region and the Horn of Africa.

These Guidelines were endorsed by Ministers in June 2005 and comprise five key chapters, one of which covers the 'Import, Export, Transfer and Transit of SALW'. This chapter includes detailed provisions on both procedural/operative criteria and normative criteria for international arms transfers. These criteria apply to all arms transfers – including export, transit and brokering – and are based firmly on states' existing obligations under international law.

Normative criteria are split into 5 categories:

- (a) States parties shall not authorise transfers which that would violate their direct obligations under international law.
- (b) States parties shall not authorize transfers which are likely to be used for a range of international crimes – e.g. violation of human rights, acts of aggression, terrorism, provoking armed conflicts etc.
- (c) States parties shall take into account a range of other factors before authorizing an arms transfer – such as their potential impact on violent crime, sustainable development etc.
- (d) In order to avoid diversion, states should take into account the recipient's record on compliance with end-use undertakings and diversion, stockpile management, and security procedures etc.
- (e) States parties shall not authorize transfers if the arms have not been marked according to requirements under the Nairobi Protocol.

Finally, a slightly different approach to arms transfer controls has been adopted by Central American states by way of the SICA Code of Conduct on the Transfer of Arms, Ammunition, Explosives and other Related Materials which was presented for signature in December 2004 by the then President of the Security Commission of SICA (Nicaragua). As of January 2006 the Code had been signed by Belize, the

<sup>10</sup> OSCE Document on Small Arms, 24 November 2000, [http://www.osce.org/documents/fsc/2000/11/1873\\_en.pdf](http://www.osce.org/documents/fsc/2000/11/1873_en.pdf)

Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Panama. The SICA Code is far-reaching and has restrictive normative criteria for arms transfers of all types of weapons, as well as a range of operative provisions. It states that arms transfers will not proceed from or toward states which, for example, commit and or condone crimes against humanity, violations of human rights or incur serious breaches of IHL, do not have democracy or freedom of expression, do not report to the UN Arms Register or which are involved in an armed conflict. The SICA Code of Conduct is a politically binding agreement that will become legally binding only when adopted into the national legislation of member states.

In conclusion, since 2001, while there has been an increase in the number of multilateral initiatives dealing with SALW transfer controls guidelines, the impact of the PoA can be seen in terms of a greater emphasis being placed on states' international legal responsibilities, especially in the Nairobi Best Practice Guidelines. However, the PoA has also had an impact regarding the further development of pre-existing SALW control initiatives. Although the outcome of the recent review of the EU Code of Conduct is still awaited, pressure from the EU NGO community appears to have led EU states to revise the inadequate references to IHL in the Code of Conduct in order to bring them into line with states' responsibilities under international law. It is to be hoped that future multilateral agreements, including the forthcoming ECOWAS Convention, will also ensure consistency in this regard.

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#### 5.3.4 NATIONAL PRACTICES REGARDING TRANSFER CONTROL GUIDELINES

Section II, Para 11 of the PoA requires all states to consider export authorisations in accordance with "strict national regulations and procedures" and while this does not explicitly require the inclusion of a set of transfer control guidelines, evidence suggests that the majority of states do apply a set of criteria when assessing SALW export applications. The articulation of national transfer control guidelines is likely to be essential if the PoA commitment concerning consistency with states' responsibilities under international law is to be observed.

For the large number of states that are members of the EU, OSCE, Wassenaar Arrangement, Nairobi Declaration and SICA, national SALW export controls should be centred around the application of the criteria agreed at regional level. However, a significant number of states, such as those situated in South Asia and the Middle East and North Africa region, are not party to any regional or multilateral SALW transfer control agreement, for which the development and application of export control criteria has taken place primarily within the domestic context. Thus, beyond the most basic international standards the scope and nature of national criteria is likely to vary significantly. This can be illustrated by an examination of the transfer control guidelines of a few key arms exporting states.

According to the arms export controls section of the July 2003 National Report of the People's Republic of China on the Implementation of the UN SALW Programme of Action:<sup>11</sup>

"In October 2002, China amended the 1997 Regulations of the People's Republic of China on the Administration of Arms Export in light of the changing situation... to further strengthen the control over the export of conventional arms, including SALW. The Regulations reiterated China's three principles on the export of conventional arms, namely, the export should be conducive to the legitimate self-defence capability of the recipient country; the export should not have negative impact on the peace, security and stability of the region concerned and the world as a whole; and the export should not be used as a tool to interfere with the internal affairs of the recipient country."

<sup>11</sup> National Report of the People's Republic of China on the Implementation of the UN SALW Programme of Action, July 2003, see <http://www.fmprc.gov.cn/eng/wjbj/zjzg/jks/cjjk/2622/t22819.htm>

Clearly these criteria are of a very basic order and do not reflect states' obligations under international law. Among other things, they avoid any reference to international human rights standards and international humanitarian law and thus fall short of the requirements established by the PoA.

On the other hand, South Africa operates a relatively comprehensive set of export control criteria. When considering applications, the National Conventional Arms Control Committee (NCACC) must *inter alia*:

- Avoid contributing to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms
- Avoid transfers of conventional arms to governments that systematically violate or suppress human rights and fundamental freedoms
- Avoid transfers of conventional arms that are likely to contribute to the escalation of regional military conflicts, endanger peace by introducing destabilising military capabilities into a region or otherwise contribute to regional instability
- Adhere to international law, norms and practices and the international obligations and commitments of the Republic, including United Nations Security Council arms embargoes
- Take account of calls for reduced military expenditure in the interests of development and human security
- Avoid contributing to terrorism and crime
- Consider the conventional arms control system of the recipient country and its record of compliance with end-user certificate undertakings and avoid the export of conventional arms to a government that has violated an end-user certificate undertaking
- Avoid the export of conventional arms that may be used for purposes other than the legitimate defence and security needs of the government of the country of import

While these criteria cover a range of issues relevant to SALW transfer control, certain commitments remain underdeveloped and others do not entirely accurately reflect states' international legal obligations. For example, it is not sufficient to undertake only to avoid contributing to the systematic violation or suppression of human rights and fundamental freedoms; consistency with international law would prohibit transfers that abrogate such rights and freedoms. Critically, moreover, the South African criteria fail to explicitly mention the need to observe IHL in the conduct of international arms transfers. However, the NCACC is currently in the process of revising its arms transfer legislation based on lessons learnt during its implementation.

The UK, while adhering to the EU Code of Conduct, also adheres to a set of national export control criteria which, together with the EU Code, are referred to as the 'Consolidated Criteria'.<sup>12</sup> These criteria elaborate on the UK's commitments in the field of international arms control and include further detail in a number of areas including human rights and regional stability. However, since the Consolidated Criteria are, in large part, indistinguishable from the EU Code of Conduct, the same criticisms can be made with regard to the failure of the criteria to reflect states' responsibilities under international law, including inadequate reference to international humanitarian law. Moreover, it is unclear how certain additional elements, such as the provision within the human rights criteria relating to the legitimate use of force by a government within its own boundaries<sup>13</sup> would have the effect of strengthening the commitments contained in the EU Code.

<sup>12</sup> The Consolidated EU and National Arms Export Licensing Criteria, 26 October 2000, HC 199-203W <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1014918697565>

<sup>13</sup> When the UK Consolidated Criteria were published in October 2000, UK NGOs raised concerns *inter alia* with regard to the clause that states "The Government considers that in some cases the use of force by a Government within its own borders, for example to preserve law and order against terrorists or other criminals, is legitimate and does not constitute internal repression, as long as force is used in accordance with the international human rights standards as described above." Specific concerns were raised regarding how the application of this clause would interact with the other aspects of the human rights criteria.

Most national SALW export criteria have been constructed with reference to a combination of international legal obligations and national political and security imperatives. It is likely that, as with the majority of regional SALW transfer control agreements, and as demonstrated through the above examples, many states' national procedures also fall short of the basic requirements of Section II, Para 11 of the PoA.

### 5.3.5 ENHANCING STANDARDS OF CONTROL

As noted above, one major flaw in the PoA commitments relating to SALW transfer control guidelines concerns the fact that Section II, Para 11 of the PoA only refers to export authorisations. Strict interpretation of this paragraph would confine application of any guidelines to that of SALW exports while excluding assessment of brokering, transit or even import licence applications from such consideration. However it is clear that if substantive progress is to be made in preventing and combating the illicit trade in SALW, effective control must be exerted over all aspects of SALW transfers. This necessitates a broad interpretation of Section II, Para 11 of the PoA that recognises the responsibilities, roles and concerns of all parties to SALW transfer processes and not just those of the exporting state. Such an approach would help to avoid concerns that the international guidelines might imply that exporting states are in a better position than importing states to assess the possible risks of SALW transfers under consideration or the security/other needs that have given rise to the transfer application.

An international agreement on guidelines for the control of SALW transfers is clearly long overdue. Since states are wary of taking unilateral action and adopting restrictions that are ignored or undermined by others, the onus has fallen upon regional groupings to set standards for SALW transfer control. However, as a significant number of states are not party to any such regional or multilateral agreement, there is a considerable imperative towards establishing international standards. Indeed, the PoA opens the way for such an agreement and so it should be a major priority for states to elaborate and agree on the nature and extent of states' existing responsibilities under international law as regards SALW transfer control. It is imperative that any such agreement relates to all international SALW transfers - import, export, transit and brokering licence applications.

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## 5.4 TRANSIT CONTROLS

### 5.4.1 INTRODUCTION

Transit controls are often a weak link in the chain of transfer controls and inadequate controls on the transit of SALW are a major contributory factor in the illicit trade in them. While SALW are in transit the risk of shipments being diverted from their authorised recipient to illicit end-users is significant and the absence of effective national controls on transiting SALW further increase opportunities for diversion. Effective transit controls are therefore an essential element of a comprehensive transfer control regime and are a key element of any efforts to prevent the diversion of SALW. Despite its importance, the development of transit controls has yet to become a major subject for international debate. As long as this situation persists opportunities for illicit trafficking in SALW will continue to flourish.

### 5.4.2 THE UN POA AND TRANSIT

The PoA's paragraphs pertaining to controls over the transit of SALW do not give clear details of the "measures on international transit"<sup>14</sup> that are to be implemented. Rather, Section II, Para 2 merely calls for states to "put in place...adequate laws, regulations and administrative procedures to exercise

<sup>14</sup> UN PoA Section II, Para 11

effective control over the...transit of [SALW]”. This requirement is essentially repeated, but not elaborated upon in Section II, Para 12. The PoA does not contain any specific clauses or articles clearly defining when a transit shipment should be subject to controls and what minimum standards, should be used for assessing applications, let alone best practice. Overall, the PoA is very weakly worded on the issue of transit controls and certainly does not give the impression that transit licence applications should be considered in a manner akin to those of export licence applications.

Moreover the PoA does not explicitly address the closely linked issue of transshipment: where goods enter a state’s jurisdiction in one carrier and are then transferred to another before being shipped on to their destination. As transshipment involves the passage of goods through the jurisdiction of a state en route between origin and end-user states, provisions applying to the transit and transshipment of SALW should be considered as comparable.<sup>15</sup> For the purposes of this section, transshipment is considered as being included within the term ‘transit’.

#### 5.4.3 OTHER INTERNATIONAL AND REGIONAL AGREEMENTS AND TRANSIT

The UN Firearms Protocol does not refer to the transshipment of SALW but addresses several aspects of the transit of firearms. Apart from requiring that states maintain “measures on international transit” (Article 10), it also requires that, prior to authorising a firearms shipment, states involved in the transfer have secured, in writing, notice from any transit states that they have no objection to the transit taking place. It also specifies that any export and import licenses issued contain information on the countries that any shipment is to transit. These provisions appear to be based on those contained in the Inter-American Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and Other Related Materials<sup>16</sup> which is, in turn, supported by the OAS CICAD Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition.<sup>17</sup> Beyond this, the UN Firearms Protocol and the Inter-American Convention both require that state parties ensure the security of firearms in transit through their territory.

The provisions of the Nairobi Protocol echo those of the UN Firearms Protocol in that they require the prior authorisation of transit shipments on the one hand, and the inclusion of information on transit states within any SALW export and import documentation on the other. The SADC Firearms Protocol,<sup>18</sup> however, falls short of these international standards and merely requires the co-ordination of procedures relating to international transit of firearms, although it does require that state parties are in a position to seize firearms transiting their territory without the appropriate authorisations.

The EU Code of Conduct Users Guide<sup>19</sup> specifies that transit and transshipment licences are included under the definitions of an export license and, consequently, denial notifications should also be issued with regard to transit and transshipment licenses.

The 2003 OSCE Best Practice Guidelines on the Export of SALW refer to the commitments of the PoA and UN Firearms Protocol regarding transit. Importantly, however, they also recommend that the criteria

<sup>15</sup> The OAS-CICAD Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (1997) and the User’s Guide to the EU Code of Conduct on Arms Exports define transit and transshipment as follows: ‘Transit’: “movements in which the goods (military equipment) merely pass through the territory of a member state”; ‘Transshipment’: “transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport”.

<sup>16</sup> Inter-American Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and Other Related Materials, November 1997 <http://www.oas.org/juridico/English/treaties/a-63.html>

<sup>17</sup> The CICAD Model Regulations contain details of the procedures for issuing in-transit shipment authorisations, the information and documentation to be requested before such authorisations can be issued, as well as the information to be contained on the in-transit shipment authorisation.

<sup>18</sup> Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (SADC) Region, 2002 <http://www.smallarmsnet.org/docs/saaf09.pdf>

<sup>19</sup> User’s Guide to the EU Code of Conduct on Arms Exports, December 2005, see <http://ue.eu.int/uedocs/cmsUpload/st05179en06.pdf>

used to judge SALW export authorisations should also be used in assessing transit licences. This provision is also incorporated in the Nairobi Best Practice Guidelines, which specify that a series of objective criteria be applied in the case of export and transit applications.

The commonalities between the various regional and multilateral SALW control instruments and how they address the transit issue exist only at a very basic level and refer to little more than the need for transit controls and for exporting and importing states to secure prior authorisation for any transit of firearms/SALW. The development of best practice guidelines by the OSCE and Nairobi Declaration states has addressed the issue of criteria to assess transit licence applications; however, these provisions have yet to be widely adopted.

One aspect that is not addressed by any of the relevant regional and multilateral SALW control agreements, and which therefore remains a key area of variation, relates to defining those circumstances when a transit licence is deemed necessary. For example, under the auspices of the Spanish Presidency, during the first six months of 2002, EU Member States considered the issue of transit. Despite agreeing on definitions of 'transit' and 'transshipment' and that transit licences should be subject to denial notification procedures under the EU Code of Conduct, Member States could not agree on the precise set of circumstances under which a transit licence should be required. Issues of contention included whether shipments either originating in, or which have already passed through another EU member state should be subject to transit licensing procedures. The failure of even the then-15 EU states to agree on common criteria for establishing when a transit licence is necessary is illustrative of how difficult an issue this is for states and also of the need for much greater international attention to be paid to this aspect of transfer controls.

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#### 5.4.4 NATIONAL PRACTICES REGARDING TRANSIT CONTROLS

Most states lack transit controls that apply to SALW – only around 79 states worldwide claim to have laws, regulations and procedures relating to the transit of SALW. Further, among those that do have some controls, there is a range of interpretations as to when an arms shipment passing through the territory of a state that is neither the exporting or destination state for the shipment requires a transit or transshipment licence. Transit controls, like export controls, are designed, implemented and enforced at the national level, with differing national legal systems explaining the lack of international convergence in both their scope and strength.

In some countries transit controls exist in name only. For example, in Slovakia a transit licence is only required if the shipment will take longer than seven days to pass through the 48,845 sq km of Slovakian territory.<sup>20</sup> In practice, as it should not take any form of transport seven days to cross Slovakian territory, Slovakian controls have virtually no potential to prevent diversion or to exercise responsible control over any arms passing through their jurisdiction.

By contrast, the government of Hungary appears to take a much more restrictive approach to controlling the transit of arms through its jurisdiction. Following a government decree from 2004, the EU's Code of Conduct criteria must also be used when considering all licence applications,<sup>21</sup> and in contrast to Slovakia, this same decree defines transit as: "the shipping process in the course of which military equipment is moved through the territory of the Republic of Hungary in such a way that there is no change in its customs status".<sup>22</sup> Crucially, Hungary also appears to apply transit

<sup>20</sup> Para. 22c of Act No. 179 of the Slovak Republic, "On Trading with Military Equipment", 15 May 1998.

<sup>21</sup> Art.5 of the Government of Hungary's Decree 16/2004 (II.6) "On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical Assistance", 2004.

<sup>22</sup> Art 1(13) of the Government of Hungary's Decree 16/2004 (II.6) "On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical Assistance", 2004.

controls to shipments from NATO allies to EU member states.<sup>23</sup> Finally, Hungarian legislation requires that arms transit shipments must be accompanied by an armed security escort during passage through Hungarian territory.<sup>24</sup> Taken together, the various aspects of Hungary's transit controls could be seen as an example of best practice regarding the development of comprehensive transfer controls.

The Strategic Trade Controls Branch of the Trade and Industry Department of Hong Kong reportedly carries out a risk assessment process, which assesses the possible risk of diversion of all cargoes containing items drawn from its munitions' and dual-use goods' lists. Transshipments of such restricted items are treated as import and export shipments and therefore require such licenses, while transit shipments of goods contained on these lists require transit licenses.

A wide variety of practices would thus appear to exist with regard to the control of transit of SALW. While less than half of all states actually have legislation with regard to transit, those states that do operate such controls appear to do so in accordance to widely differing standards. The lack of clear common international standards or even emerging best practice relating to all aspects of transit controls does little to encourage states to review and enhance their national legislation in this area.

#### 5.4.5 THE IMPACT OF THE POA ON THE POLICIES AND PRACTICES OF STATES

The way in which transit controls are addressed in the PoA certainly does not appear to have increased pressure upon states to proactively strengthen controls in this area. By failing to develop clear and simple elaborations of transit commitments, or even to generate a clear sense of their purpose, the PoA and other agreements have missed opportunities to encourage the strengthening of transit controls and therefore reinforce one of the weak points in the chain of transfer controls. Indeed, during discussions in the EU in 2002 on the harmonisation of transit control (see above), fears were apparently raised that strengthened transit controls would deter shipping companies from passing through European ports, first, because of the increased amount of paperwork that would be required and second, because of the potential for delays created by the need to conduct physical checks or verify more documentation. It was argued that this would damage the transit reputation of the state and its transport sector, leading to reduced revenues.

However, two of the world's largest transit/transshipment hubs, Hong Kong and Singapore, have relatively comprehensive transit controls in place. Current Hong Kong transit controls were brought in during 2000 and therefore pre-date the PoA, whereas Singapore introduced its Strategic Goods (Control) Act in 2002.<sup>25</sup> In both cases, the categories of transit and transshipment are clearly defined, with procedures and considerations that are taken into account when processing licence applications for military equipment, SALW and dual-use goods also outlined in subsidiary legislation. These examples demonstrate that entities with considerable 'in-transit' and transshipment transfer flows are willing to subject these flows to tighter controls, thus undermining the argument that transit controls are an unnecessary impediment to the free flow of goods.

However, the fact that transit shipments are subjected to fairly stringent controls in Hong Kong and Singapore probably owes more to Asian export control seminars on weapons of mass destruction

<sup>23</sup> According to Amnesty International, in *Undermining Global Security. The European Union's Arms Exports*, (London, 2004), p. 21, in 2004 a shipment of military equipment in Turkish trucks was stopped on the Romanian-Hungarian border because it did not have the correct transit documentation.

<sup>24</sup> Taken from a presentation of the Permanent Mission of the Republic of Hungary to the UN to the UN Department for Disarmament, New York, 11 June 2004, (No. 253-1/2004).

<sup>25</sup> The Import and Export Ordinance, Chapter 60 of the Laws of Hong Kong; Strategic Goods (Control) Act of Singapore, 2002 (Act 40 of 2002), date of commencement, 1 January 2003; Strategic Goods (Control) Regulations of Singapore, 2004, date of commencement, 7 January 2004.

(WMD), which have been taking place in the region since 1993, and US initiatives to combat WMD trafficking since 9/11, such as the Container Security Initiative (CSI).<sup>26</sup> Similarly, global initiatives that have had greatest impact with regard to the development of transit controls have been focused on issues other than SALW. The PoA's failure to adequately address transit may have contributed to the neglect of SALW in these initiatives.

#### 5.4.6 ENHANCING STANDARDS OF CONTROL

The fact that the majority of states do not operate transit controls suggests that concerted action is required on the part of these states to develop and implement effective SALW transit regulations. However, it should also be noted that the tightening of transit controls work most effectively when similar moves are undertaken by other transit hubs in the region and bilateral and/or regional agreements on the regular sharing of information on transit applications and denial notifications for transit licence applications are established. The various initiatives undertaken by the EU, the Nairobi Declaration states and other regional groupings in this regard have significantly greater potential to impact on controlling SALW in transit than do unilateral national measures.

In many cases where states have yet to establish effective transit controls, the lack of resources, detection equipment, experienced personnel for carrying out pre-shipment and post-shipment verification procedures, documentation checks and physical cargo checks could be partly responsible for inaction. This points to the need for the development of international assistance programmes involving the provision of resources, technical equipment and expertise in order to bolster national efforts to implement transit controls.

Another requirement of effective transit controls is for comprehensive systems for information sharing amongst all concerned parties. This should not be confined to national inter-agency and international state-to-state exchanges, but relevant non-state parties such as SALW manufacturers and exporting, importing and transportation companies should also be made aware of the risks of diversion and the penalties that will be dispensed if their enterprise is found to be colluding with brokers or other agents of diversion. This will require that up-to-date information on controlled goods and prohibited end-users is available and accessible for enterprises involved in the transit of such goods, which could be usefully established through regional or international databases.

### 5.5 END-USE/END-USER CONTROLS

#### 5.5.1 INTRODUCTION

End-use and end-user controls are now widely recognised as an essential component of any arms export control regime. States operate a range of end-use/end-user controls, including the requirement that the importer provide a statement of the end-use of a particular export (end-use certificate) or a statement establishing the ultimate end-user of the items in question (end-user certificate); in many contexts, however, the terms 'end-use certificate' and 'end-user certificate' are used interchangeably. Beyond this, states may also require provision of an International Import

<sup>26</sup> See, for example, 'Emerging Issue: Transit and Transshipment Controls', in NIS Export Control Observer, No. 4, April 2003, p. 18, [http://cns.mis.edu/pubs/nisexcon/pdfs/ob\\_0304e.pdf](http://cns.mis.edu/pubs/nisexcon/pdfs/ob_0304e.pdf). The Container Security Initiative (CSI) was launched by U.S. Customs in January 2002 in recognition of the fact that the volume of containers passing through the world's ports makes them an attractive resource for those interested in moving shipments of illicit goods undetected around the globe, in particular 'terrorists'. The CSI's stated aims include 1) targeting containers that pose a risk for terrorism; 2) pre-screening such containers at ports of departure – i.e. before they reach U.S. ports; 3) using detection technology at ports of departure; 4) promoting the use tamper-evident containers. By December 2005, 41 ports around the world had agreed to participate in the CSI, which meant that they had U.S. Customs and Border Protection Officials deployed at their ports. For more information see: [http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/csi/](http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/)

Certificate (IIC), which is essentially a statement from the recipient government authorising the import of the goods into its territory. Some states also require the provision of a Delivery Verification Certificate, which certifies that the goods in question have arrived at their ultimate destination. Exporting states may also insist upon a range of other controls, such as a prohibition on the re-export of the goods (see section 5.1 above) without their prior written consent. They may also reserve the right to carry out follow-up inspections to ensure that the goods are being used by the stated recipient in a manner that is consistent with the information on the original export licence application and relevant end-user undertakings.

### 5.5.2 UN POA AND END-USER CONTROLS

The PoA commits states to using “authenticated end-user certificates and effective legal and enforcement measures” (Section II Para 12). However, it contains little further detail on the form of end-user certificates, the information that they should contain and what the procedures should be for their authentication.

### 5.5.3 OTHER INTERNATIONAL AND REGIONAL AGREEMENTS AND END-USER CONTROLS

In addition to the PoA, end-user controls (EUCs) are referred to in a variety of other international and regional/sub-regional SALW agreements. For example, they are explicitly mentioned in the SADC Firearms Protocol of 2001 and the 2004 Nairobi Protocol encompassing states from the Great Lakes Region and Horn of Africa. Both protocols refer to EUCs as part of national SALW export control systems, and promote their harmonisation among state parties.<sup>27</sup> The Nairobi Protocol also stipulates that the granting of export licences should be conditional on the issue of an import authorisation by the recipient state and states that relevant licences should contain information identifying the country of export, transit, and importation, a description of type and quantity of SALW, and their final recipient.<sup>28</sup>

Also of note are the 1997 Inter-American Convention on Firearms and the UN Firearms Protocol of 2001. Although neither of these instruments explicitly refers to the use of EUCs, both nevertheless stipulate that the granting of export licences should be dependent on an authorisation being issued by the recipient state.<sup>29</sup> Further, the UN Firearms Protocol and the Model Regulations associated with the Inter-American Firearms Convention stipulate minimum information requirements in export and import licences that are equivalent to those stipulated in the Nairobi Protocol.<sup>30</sup>

Standards set by the EU and the Wassenaar Arrangement detail the elements that are considered to represent the basic level of information required in EUCs while at the same time elaborating on a set of further optional provisions.

Specifically, EUCs, when requested, must include, as a minimum:

- The exporter's details (at least name, address and business name)
- The end-user's details (at least name, address and business name)
- The country of final destination
- A description of the goods being exported (type, characteristics), or reference to the contract concluded with the authorities of the country of final destination
- The quantity and/or value of the exported goods
- The signature, name and position of the end-user
- The date of the end-user certificate

<sup>27</sup> SADC Firearms Protocol, art. 8.c and .d and the Nairobi Protocol, art. 10.e and 16.g.

<sup>28</sup> Nairobi Protocol, art. 10.b.i. and c.

<sup>29</sup> Inter-American Convention, art. IX.2 and 3 and UN Firearms Protocol, art. 10.2.a.

<sup>30</sup> UN Firearms Protocol, art. 10.3 and Model Regulations, chapter II, art. 5.2 and 6.2.

- An end-use and/or non re-export clause
- An indication of the end-use of the goods

Equivalent standards are stipulated in the OSCE Document on SALW of 2001, the OSCE Best Practice Guide on SALW Export Control of 2003, and the Decision on EUCs and Verification Procedures of 2004.<sup>31</sup> They have also been adopted in the Nairobi Best Practice Guidelines on the implementation of the Nairobi Protocol that were adopted in 2005.<sup>32</sup>

Insofar as the PoA states the need for *authenticated* end-use certificates, it is worth noting that several multilateral SALW control instruments affirm the need to ensure that the “authenticity of licensing and authorisation documents can be verified or validated.” This principle is stipulated in, for example, the UN Firearms Protocol,<sup>33</sup> and the SADC<sup>34</sup> and Nairobi protocols.<sup>35</sup> In addition, the OSCE Best Practice Guide and the OSCE Decision on EUCs stipulate that, where the end-user is a non-governmental actor, exporting states have to require a validation of the EUC by the receiving state.<sup>36</sup> Beyond this, the Wassenaar Arrangement’s Best Practices for Effective Enforcement of 2000<sup>37</sup> promote confirmation of the “stated end-user and end-use of items to be exported prior to issuing an export licence” and say that this could range from “documentation to on-site premise checks of the end-user and end-use”.<sup>38</sup>

#### 5.5.4 NATIONAL END-USE(R) PRACTICES

Five years after the adoption of the UN PoA, there are only still 58 states that report to have systems in place that include the use of end-user certificates or equivalent documentation. More than half of these states (31 of them) are located in Europe,<sup>39</sup> 11 states are located in the Americas,<sup>40</sup> seven in Asia,<sup>41</sup> seven in sub-Saharan Africa,<sup>42</sup> two in the Pacific and none in the Middle East and North Africa.<sup>43</sup> Several states report to be in the process of reviewing or amending national controls and to be considering or planning provisions for the use of EUCs, including Côte d’Ivoire, Benin, Lesotho, Kenya, Namibia, Togo, and Uganda. Other states, including Mauritius, the Marshall Islands, Niger, Papua New Guinea, the Philippines, Rwanda, and Senegal claim not to require EUCs as part of their export and transit control systems. Many of these states argue that they do not export or retransfer SALW and so have no need for export controls that include the use of EUCs.

In the case of those states that do have end-use(r) provisions as part of their SALW export control system, there are important differences in the scope, detail and comprehensiveness of relevant national practices. For example, Zimbabwe reports that the EUCs it requires for exports note the details of the end-user, the quantity of transferred SALW, and the transport company.<sup>44</sup> By contrast, Ukraine reports that the exporter must obtain from the importer reliable information on the end-user, intended use and

<sup>31</sup> OSCE Decision no. 5/04 of November 2004 on Standard Elements of End-User Certificates and Verification Procedures for SALW Exports (OSCE Decision).

<sup>32</sup> Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on SALW (Nairobi Guidelines), chapter 2.

<sup>33</sup> UN Firearms Protocol, Article 10.5.

<sup>34</sup> SADC Protocol, Article 8.d.

<sup>35</sup> Nairobi Protocol, Article 10.e.

<sup>36</sup> OSCE Guide, p. 9; and OSCE Decision, para. 1.

<sup>37</sup> Wassenaar Arrangement’s Best Practices for Effective Enforcement, December 2000 [http://www.wassenaar.org/publicdocuments/2000\\_effectiveenforcement.html](http://www.wassenaar.org/publicdocuments/2000_effectiveenforcement.html)

<sup>38</sup> WA Best Practices for Effective Enforcement (WA Enforcement Practices), adopted in December 2000, point 3.

<sup>39</sup> See national reports on PoA implementation by: Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Kazakhstan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovak Republic, Slovenia, Spain, Sweden, Turkey, Ukraine, and the UK, available at <http://disarmament.un.org/cab/salw-nationalreports.html>.

<sup>40</sup> See national reports on PoA implementation by: Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, El Salvador, Nicaragua, Peru, Uruguay and the USA.

<sup>41</sup> See national reports on PoA implementation by: China, India, Indonesia, Pakistan, Republic of Korea and Singapore.

<sup>42</sup> See national reports on PoA implementation by: Botswana, Nigeria, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe.

<sup>43</sup> For Pacific see national reports on PoA implementation by Australia and New Zealand. For MENA see national reports on PoA implementation by Egypt and Israel.

<sup>44</sup> See national report on PoA implementation by Zimbabwe, 2005, p. 8.

place of use of the goods, an undertaking to import the goods only into the country specified and an undertaking that the goods will not be re-exported without the prior consent of the exporter and the Ukrainian authorities.

**Types of end-use documentation:** EUCs are not the only type of documentation accepted by states with regard to the export of SALW. The typical authorisation used as an alternative to EUCs is an International Import Certificate (IIC), which must be submitted to export authorities at the licensing stage and is issued by the recipient state prior to the transfers. States which use such an ‘import’ authorisation include at least 30 states<sup>45</sup> that are member to one or more of the Western arms control forums as well as Brazil, China, Colombia, Egypt, India, Pakistan, South Africa and Uruguay.

‘Private’ EUCs or end-use declarations are also accepted by several states, including Argentina, Australia, Brazil, Canada, France, Germany, Lithuania, Spain, Switzerland and Turkey, particularly with regard to exports of ‘civilian’ or non-military small arms. These private documents are signed by the non-governmental end-user, for example a commercial company that imports hunting rifles for sale on the domestic market. They contain information equivalent to that in official EUCs and may also include end-use and other assurances. This can include a commitment by the company to only sell the imported rifles for civilian end-use on the domestic market of the recipient state. The above-listed states report that they accept private EUCs or end-use declarations only on the condition of the submission of an official IIC to the export authorities.

**Authentication procedures:** States reporting on their authentication procedures<sup>46</sup> have said that authentication usually takes the form of consular verification in the recipient state to check that the information contained in documents is correct and that the documents were signed by those authorised to do so under the law of the recipient state. This may entail the verification by the national embassy of the exporting state with the authorities in the recipient state that the end-user is a reputable entity and that official documents for the particular transfer have in fact been issued by these authorities.

Authentication procedures may also include checks on end-use and end-user information by collecting additional information through open sources such as the internet or press reports, as well as governmental sources. Such procedures exist in, for example, the UK, which puts emphasis in its export control system on risk assessment at the licensing stage to prevent diversions of exported SALW.<sup>47</sup> Canadian policy stipulates that private end-use statements by foreign commercial companies seeking to purchase sporting firearms from Canada will be certified by a member of the locally accredited Canadian mission. Specifically, this member will visit the company “to ensure that it is a reputable business which carries on within the dictates of local laws”.<sup>48</sup>

**Retransfer restrictions:** Several states<sup>49</sup> report that they make use of retransfer restrictions as part of their end-use controls. These are typically imposed in situations whereby ‘military’ SALW are exported to the armed forces of another state. Retransfer restrictions in this case generally require the armed forces to confirm that they will be the sole end-user and that they will not retransfer the items without prior authorisation of the original exporting state. Certain states, including Bulgaria, Italy, the Russian Federation and South Africa report that they may include restrictions in contracts with the recipients.<sup>50</sup>

<sup>45</sup> See national reports on PoA implementation by Argentina, Austria, Australia, Belarus, Canada, Croatia, Denmark, Finland, France, Germany, Ireland, Kazakhstan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Republic of Korea, Romania, Russian Federation, Serbia and Montenegro, Spain, Sweden, Switzerland, Turkey, Ukraine, the UK, and the USA.

<sup>46</sup> These include Argentina, Belarus, Belgium, Bosnia and Herzegovina, Canada, Colombia, Germany, the Russian Federation, South Africa, Sweden, Turkey, and the UK.

<sup>47</sup> Interviews with British arms export officials conducted by Holger Anders, 2004 – 05.

<sup>48</sup> See national report on PoA implementation by Canada for 2005, p. 10.

<sup>49</sup> These include Argentina, Austria, Belarus, Bulgaria, Canada, Bulgaria, Finland, France, Germany, Italy, Kazakhstan, Norway, Republic of Korea, Romania, Russian Federation, South Africa, Spain, Sweden, Switzerland, Turkey, and the UK. See national reports by these states.

<sup>50</sup> See national reports by these states as well as Bulgaria, Law on the Control of Foreign Trade Activity in Arms and in Dual-Use Goods and Technologies (Arms Law), adopted in 2002, Articles 15 and 17 and South Africa, National Conventional Arms Control Act (Arms Law), adopted in 2002, Articles 16 and 17.

**Delivery verification provisions:** Several states report to have export systems under which they can require that the recipient must commit to providing a delivery verification certificate (DVC) as proof that the shipment has reached its authorised destination and end-user. These states include Belgium, Colombia, Finland, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, South Africa, and Spain. In South Africa, it is a legal prerequisite for the issuance of export licences that the recipient commits to providing a DVC.<sup>51</sup>

**Delivery and post-delivery checks:** Few states report to use delivery and post-delivery checks as part of their export control system. Indeed, many states seem to share the approach adopted in, for example, Zimbabwe. Specifically, it is declared policy in Zimbabwe to “not monitor what happens beyond [Zimbabwe’s] borders”. Rather, officials “assume that the SALW reach their destination once they are outside [Zimbabwe’s] borders”.<sup>52</sup> Of those states that do operate systems under which authorities may carry out post-delivery checks, Swedish export authorities may require the inclusion of a clause on EUCs under which the recipient commits to making facilities available to on-site inspections by Swedish authorities to allow for verification of compliance with restrictions that were imposed.<sup>53</sup> Germany, Norway and the UK also report that they may carry out post-delivery checks in cases where, subsequent to export, information becomes available suggesting a possible violation of end-use or retransfer restrictions.

## 5

### 5.5.5 ENHANCING STANDARDS OF CONTROL

PoA commitments relating to assuring the end-use of exported SALW are far from exhaustive and their overall implementation by states remains disappointing. Many states still lack the systems and procedures required to use authenticated EUCs as an element in efforts to prevent and combat diversions of exported SALW. This particularly applies to those states that are not party to any major multilateral SALW control instruments and/or that are not large SALW exporters. This is of concern because diversion of SALW can occur even when exported from states that do not consider themselves as important SALW exporters. Moreover, since diversion of SALW can also occur during transit and after delivery of SALW, the enforcement of effective EUC provisions should be a concern not only to exporting states, but also to transit and recipient states. Nevertheless, even where EUCs are used in export licensing, there are states that require only basic information with regard to the recipient and whose failure to assess or address diversion risks at the licensing stage makes any EUC that is obtained virtually worthless. The failure of states to validate and authenticate the information provided on EUCs is a further cause for concern. In terms of these failures, then, the limited scope of the PoA requirements for end-use control must be strongly criticised.

The need for common international standards relating to the end-use of SALW exports is thus clear. The lack of consistent high standards in states’ practices means that unscrupulous entities can exploit loopholes and shortcomings, thereby fuelling the illicit trade and misuse of SALW. International agreement on best practice in certifying and monitoring end-use of exported SALW must therefore be a priority for all states.

Any such international agreement on SALW end-use must be based on existing best practice in regional and multilateral SALW control fora. At a minimum it should:

- Stipulate that the provision of EUCs, and where necessary IICs and DVCs, should be a precondition for export licences for SALW
- Provide guidance on the minimum amount and types of information to be required in EUCs

<sup>51</sup> South Africa, Arms Law, Article 17.d.

<sup>52</sup> National report on PoA implementation by Zimbabwe for 2005, p. 8.

<sup>53</sup> See national report by Sweden for 2005 and website of Swedish Export Authority, <http://www.isp.se/sa/node.asp?node=466>

- Promote the critical examination of the EUCs, including through comprehensive pre-licensing risk assessment
- Include measures to strengthen capacities for authentication of EUCs and other official documents
- Establish as a norm the exporter's right to conduct follow-up checks on the end-use of the SALW post-export
- Establish that no SALW should be re-exported without the prior written consent of the original exporting state

## 5.6 ARMS BROKERING CONTROLS

### 5.6.1 INTRODUCTION

Arms brokers are central actors in the arms trade in general and SALW in particular, and play a role in facilitating the legal as well as the illicit trade. Reports from UN Panels and other sources have continued to point to the brokers' important role in supplying weapons to regions of conflict and human rights crisis zones. Often taking advantage of loopholes and inconsistencies in national arms transfer control regulations, arms brokers arrange the transfer of arms between third parties and play a key role in providing SALW to end-users who would have difficulty in securing supplies direct from a government-authorised entity.

Despite a growing awareness since the late 1990s of how SALW brokering can fuel the illicit trade, the development of international standards and establishment of national controls have proceeded at a relatively slow pace. Nevertheless, the control of SALW brokering was a major issue for debate at the 2001 UN Conference and this is reflected in the resultant PoA.

### 5.6.2 UN POA AND ARMS BROKERING

The PoA commitments relating to arms brokering appear somewhat contradictory in nature, specifying that states should:

"...develop adequate national legislation or administrative procedures regulating the activities of those who engage in SALW brokering. This legislation or procedures should include measures such as registration of brokers, licensing of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the state's jurisdiction and control." (Section II, Para 14)

"...develop common understandings of the basic issues and the scope of the problems related to illicit brokering in SALW with a view to preventing, combating and eradicating the activities of those engaged in such brokering." (Section II, Para 39)

"...consider further steps to enhance international co-operation in preventing, combating and eradicating illicit brokering in SALW." (Section IV, Para 1d)

These commitments appear to be indicative of the varying levels of understanding among states regarding the nature of the SALW brokering problem and what steps need to be taken to bring it under control. Indeed, the credibility of the commitment to develop national legislation is, to an extent, undermined by the weak commitments made at the global level. This is disappointing, given the efforts of one UN Group of Governmental Experts to examine and report on the SALW brokering issue<sup>64</sup> (see below) and despite the significant attention paid to the phenomenon by numerous UN Panel Reports investigating violations of UN sanctions and arms embargoes.

<sup>64</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled "Small arms", UN Document A/CONF.192/2, 11 May 2001, <http://www.nisat.org/Brokering/UN%20Feasibility%20Study.pdf>

### 5.6.3 OTHER INTERNATIONAL AND REGIONAL AGREEMENTS AND ARMS BROKERING

Apart from the UN PoA, the only other global level international agreement that addresses the issue of SALW brokering is UN Firearms Protocol.<sup>55</sup> While the UN Firearms Protocol is a legally binding instrument, the commitments therein relating to firearms brokering are framed so as to be essentially voluntary. In summary, states are required to “consider” establishing a system for the regulation of firearms brokering, to possibly include registration, licensing of brokering transactions and/or disclosure of brokering detail on import and export licence applications. The fact that this agreement was concluded a matter of weeks before the UN SALW Conference in 2001 undoubtedly had a bearing on the depth of the commitments agreed under the PoA.

Prior to the 2001 Conference, the above-mentioned UN Group of Governmental Experts (GGE) produced a report on the “feasibility of restricting the manufacture and trade of such weapons to the manufacturers and dealers authorized by States”.<sup>56</sup> The GGE report touched on most of the issues connected with the control of brokering activities, including definitions of the activities to be encompassed in the term ‘brokering’, means of regulation, scope of application of controls, questions of extra-territorial jurisdiction, types of licenses to be used and options around the control of related financing and transportation activities. However, the GGE decided to illustrate different regulatory options and the potential advantages and shortcomings associated with each of them rather than recommending specific measures. Accordingly, for the most part - at least at the *global* level - the debate on these different options is still open and, as the commitments in the PoA demonstrate, little convergence has emerged on any of the related specific measures.

Pursuant to the PoA commitment to consider further steps to enhance international co-operation to tackle illicit SALW brokering, a General Assembly Resolution (58/241) was passed, requesting the Secretary General to hold broad-based consultations on the matter. Consultations were held in New York and Geneva in 2004 during which a number of states urged development of an international instrument, while others expressed clear opposition to this. Ultimately a second Resolution (59/86) was passed requesting the Secretary General to continue his consultations and mandating the creation of a UN Group of Experts to consider “further steps in international co-operation” which is to start work after the UN Review Conference and “no later than 2007”.

While these developments do help to keep the issue of SALW brokering internationally ‘live’, the decision to convene a second GGE has nevertheless been criticised by states and non-government groups who believe that the first GGE adequately explored the issue and that the task now is to pursue development of an international instrument to control SALW brokering.

A number of regional agreements/instruments have also been adopted to deal with the issue, which encourage (or mandate) the adoption of brokering controls by national governments. Among these documents, the EU Common Position has certainly had a tangible influence on EU Members. Since the adoption of the Position, which is binding on EU States, at least 10 countries have revised existing legislation or adopted new laws in order to implement its provisions and at least eight more countries are in the process of considering relevant modifications to their current export/import control systems.

In the OAS region, the Model Regulations<sup>57</sup> influenced at least one OAS member’s policy. In 2004, Nicaragua passed a new ‘Special Law’ for the control and regulation of firearms, ammunition, explosives and related materials.

<sup>55</sup> Approved with UN Resolution A/RES/55/255 of 31 May 2001.

<sup>56</sup> UN Document A/CONF.192/2, op. cit. This report was submitted as part of the background documents to the 2001 UN Conference on the Illicit Trade in SALW in All Its Aspects.

<sup>57</sup> The Model Regulations are not legally binding, but contain a set of measures that OAS members are recommended to adopt in their national export control systems.

A comparison of existing regional/global instruments/agreements on brokering reveals that there are important differences. For example while the EU Common Position and the controls set out in the SADC and Nairobi Protocols are legally binding upon member states, the OSCE, OAS and Wassenaar Arrangement provisions remain politically binding only.

Definitions of SALW brokering also vary significantly. Those contained in the latest EU, OSCE and Wassenaar Arrangement documents are very similar and essentially include the ‘core’ activities of negotiation and arrangement, including cases in which the weapons are owned directly by the broker. A much broader definition is contained in the OAS Model Regulations, in which brokering activities are defined as including “manufacturing, exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding, supplying, and delivering firearms, their parts or components or ammunition or any other act performed by a person, that lies outside the scope of his regular business activities and that directly facilitates the brokering activities.”<sup>58</sup>

Despite these and other differences, some degree of convergence nevertheless seems to be emerging from current regional and multilateral agreements, centering on a minimal definition of arms brokering as the mediation between buyers and sellers of SALW and other military goods. There also appears to be an emerging consensus around the need for national licensing systems with options around registration of arms brokers and extra-territorial controls, as reflected in the national-level commitments in the PoA and by national and regional action since 2001. The requirement to establish controls on the financial and transportation aspects of arms brokering, however, seems to be some way off in most regional/multilateral fora.

Despite some evidence of convergence, it is nevertheless important to note that, at present, there are significant areas of the world including Asia, the Middle East and North Africa, where no regional agreement on SALW exists to provide a basis for a common approach to brokering issues. A significant number of countries around the world are therefore bound by no regional/multilateral commitment to control such activities.

#### 5.6.4 NATIONAL PRACTICES REGARDING ARMS BROKERING

As of April 2006, 37 states had established controls on arms brokering with at least 27 having reviewed or introduced new legislation since 2001. Of the 37 states that have controls, at least 25 have a requirement for the registration of arms brokers, 30 have a system of licensing individual transactions and 15 operate some form of extra-territorial controls.

At the national level, existing regulations specific to brokering generally cover activities such as contract mediation and negotiation services (‘core’ brokering activities).<sup>59</sup> Importantly, these controls usually apply to the broker whether he/she actually acquires or possesses the transferred weapons or not. In addition, several national definitions also cover activities that are not carried out for monetary gains, which means that they are able to cover those (quite common) situations in which weapons are brokered in exchange for barter goods.

The US has one of the most comprehensive definitions of brokering activities in place, which includes “the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service, irrespective of its origin”.<sup>60</sup>

Another broad definition is provided in the South African control system. “Brokering services” are defined in Art. 1.i of the National Conventional Arms Control Act (No. 41 of 2002) as including activities such as

<sup>58</sup> CICAD/OAS Model Regulations Article 1.

<sup>59</sup> For more details on this section, see Anders, Holgar and Cattaneo, Silvia, *Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process*, GRIP Report, 2005, especially pp. 13-14.

<sup>60</sup> United States of America, International Traffic in Arms Regulations (ITAR) (undated), sec. 129.2(b).

negotiating or arranging deals, facilitating the transfer of documentation, payment, transportation or freight-forwarding and acting as an intermediary between suppliers and recipients. These activities relate to the provision of conventional arms and related services.

Other states have also, in certain circumstances, extended controls to transportation and/or financing activities connected to SALW transfers between third countries. These include Bulgaria, Estonia, Germany, Liechtenstein, the UK and the US. For example, in the UK, criminal sanctions are established for any act (including transportation and financing) linked to the illicit transfer of military equipment to embargoed destinations<sup>61</sup> whereas Liechtenstein provides for criminal sanctions on the financing of illicit arms transfers.<sup>62</sup>

In terms of the scope of national controls, it is common for countries to subject the brokering of arms transfers between two third countries to a licensing requirement even though the arms transferred do not pass through their jurisdiction.<sup>63</sup> In several states the mandatory licensing requirement, in addition to the brokering of 'third-country deals', also extends to brokering related to arms exports.<sup>64</sup> In a couple of cases (France and Italy) only the brokering relating to arms exports is controlled (in both cases reviews of current export control systems are under consideration, in order to incorporate the measures required by the EU Common Position).

It is important to note that the above-mentioned licensing requirements commonly apply to activities conducted on national territory by nationals and established residents. In a few instances, also activities of foreign agents are controlled (e.g. in Switzerland).

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A number of states' existing national brokering controls have an extra-territorial dimension, although this is applied according to different models. The US has the broadest understanding of extra-territoriality. Under US law, brokering licensing requirements apply to the activities of all nationals, even when they operate from abroad, for any type of deal (relating to transfers touching US territory - imports and exports - as well as third-country transfers). The requirement also applies to foreign agents established and working from abroad if they broker US-origin weapons or work with US nationals.<sup>65</sup> In addition, legislation in force in Belgium, the Czech Republic, Estonia, Finland, Hungary, Lithuania, the Netherlands, Nicaragua, Norway, Poland, Romania, South Africa, Sweden and the Ukraine requires that national agents have a licence when operating from abroad, even if the weapons they broker are transferred without crossing national territory.

A significant number of states that operate controls on the activities of arms brokering agents also have a requirement that agents register in advance with the national authorities (25 in total). Such registers can function as useful tools in monitoring compliance with arms brokering regulations and in exchanges of information amongst states that are co-operating in tackling illicit arms brokering.

Different types of systems for registering arms brokers are in operation. For example the UK government compiles a de facto register (or database) of arms brokering agents by means of the information pertaining to individual arms brokers that is contained on arms brokerage licence applications. The information is stored on a central database within the Department of Trade and Industry and is not made publicly available. Its primary purpose is to allow the authorities to verify the identity of any applicants and it is particularly useful in relation to those brokering agents that apply for a licence on-line and who may not be based in the UK. While the database is not employed as a means of disqualifying arms brokering agents from applying for licences to broker arms transfers, information contained in the UK database can be shared with partner governments (e.g. in the EU) in any exchanges concerning the activities of arms brokering agents.

<sup>61</sup> Trade in Controlled Goods (Embargoed Destinations) Order 2004 (Order No. 318 of 11 March 2004), Article 3.1-4.

<sup>62</sup> Liechtenstein, 'Mediation of War Material' Order of 9 September 1999.

<sup>63</sup> Countries with such a provision relating to so-called 'third-country arms brokering' include Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Liechtenstein, Lithuania, Malta, the Netherlands, Nicaragua, Norway, Poland, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Ukraine, the UK and the United States.

<sup>64</sup> These include Belgium, Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Malta, Nicaragua, Poland, Slovenia, Slovakia, South Africa, Sweden, Ukraine, and the USA.

<sup>65</sup> Small Arms Survey, *Small Arms Survey 2004: Rights at Risk*, Oxford and Geneva, Oxford University Press, 2004, p. 158.

In the US, private persons or entities wishing to engage in the business of brokering activities with respect to the manufacture, export and import of defence articles or defence services must register with the Department of State and pay a registration fee. This registration process involves filling out an application form that requires information on the person's eligibility to engage in the activity (e.g. they are not indicted, convicted etc. under statutes identified in the regulations), information on corporate lineage (if a company) and the nature of the brokering activities. Registration is valid for a maximum of two years and serves as a prerequisite to request authorisations to conduct brokering activities (which is a separate process). The State Department conducts a detailed review of each registration application including a review regarding law enforcement concerns. Material changes to the initial registration must be reported to the Department of State. When the registered broker applies for a brokering authorisation further checks are performed on the elements of specific transactions. US arms export control regulations include civil and criminal provisions. If a broker is indicted or convicted of violating the Arms Export Control Act the broker would become ineligible to engage with or benefit from any regulated activity and a debarment would be published in the Federal Register. The debarment continues until the State Department reinstates the privileges.

### 5.6.5 ENHANCING STANDARDS OF CONTROL

A number of states already operated brokering controls prior to the adoption of the PoA. For those in which controls were adopted after the PoA, the vagueness of the PoA did not prevent states from designing comprehensive systems that went well beyond its requirements as contained in Section II, Para 14. In this regard, regional dynamics and understandings have had a huge influence on states' decisions on the question of brokering controls. At the same time, the fact that the issue was included in the PoA has served to fundamentally legitimise the activities that followed at the regional level.

The lack of specificity in the PoA certainly does not help in the cases of states that are still reluctant to adopt brokering-specific regulations, as in international discussions they continue to deny that they have a brokering 'problem' and even to question the entire nature of the phenomenon. However, hopes of further international progress on SALW brokering would appear to lie with the forthcoming GGE. A number of observers/participants to the process (both governmental and non-governmental) expect this GGE to work similarly to the Group that was formed on marking and tracing and to prepare the ground for a formal negotiation process on an international instrument on brokering. It is paramount, however, that the work of the GGE takes full account of the work of the previous Group of Experts (which reported in 2001) and of emerging best practice in the field of arms brokering controls. Accordingly the GGE should seek to conclude an agreement that includes:

- Definitions of brokering activities and brokers
- Possibilities for control of 'brokering-related' activities, particularly transportation and financing
- Possibilities for extra-territorial controls
- Elements of licensing regimes (e.g. types of activities and goods covered by regulations' scope; procedures for licence application screening, including licensing criteria)
- Systems of registration for brokers
- Systems of criminalisation and penalties
- Mechanisms of law enforcement and monitoring, e.g. requirements for brokers to keep records of their transactions and report to national authorities
- Mechanisms for international co-operation, particularly in implementation of laws and regulations and prosecutions of violations

In view of the emerging consensus around core SALW brokering issues in a number of regional and multilateral fora and the clear preferences expressed in the PoA and UN Firearms Protocol for national systems of licensing and registration, the time would now appear ripe for a crystallisation of international commitments in this area.

<sup>61</sup> <http://www.pmdtc.org/registration/ds2032.pdf>

## 5.7 MEASURES TO ENABLE TRACING OF ILLICIT SALW

### 5.7.1 INTRODUCTION

It is important to develop the ability to trace lines of supply of illicit SALW, in order to identify and close diversion points, and promote accountability for neglectful, irresponsible or criminal activities associated with such diversion. At present, many illicit SALW that are discovered cannot be traced in a reliable and timely manner because of inadequate marking, poor recordkeeping or lack of international co-operation in tracing.

The two main reasons for tracing illicit weapons are:

- To trace a crime weapon as part of a criminal investigation to identify, prosecute or close down the operations of those involved in the misuse or supply of the weapon
- To trace illicit or unauthorised weapons found or seized, to discover and monitor lines of supply, traffickers and diversion points, and thus to prevent or disrupt future illicit supplies to regions of conflict or instability, to rebel groups, terrorists, or organised criminal networks

The first of these reasons relates primarily to police and criminal justice systems, and there are some well-established mechanisms for international co-operation, such as those of Interpol. The second often involves larger arms flows and will often involve diversion or unauthorised end-use of state-to-state transfers as well as private transactions. Investigations are often relatively politicised, and may involve government officials. In this area, mechanisms for international co-operation are much weaker.

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### 5.7.2 THE UN POA AND MEASURES TO ENABLE TRACING OF ILLICIT SALW

The PoA includes strong commitments at the national, regional and international levels on these issues. For example, in Section II of the PoA, states undertake to:

“Ensure that henceforth licensed manufacturers apply an appropriate and reliable marking on each SALW as an integral part of the production process. This marking should be unique and should identify the country of manufacture and also provide information that enables the national authorities of that country to identify the manufacturer and serial number so that the authorities concerned can identify and trace each weapon” (Section II, Para 7)

Section II, paragraph 8 further requires states to adopt and enforce all necessary measures to prevent the manufacture, stockpiling, transfer or possession of any unmarked or inadequately marked SALW; paragraph 9 requires that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of SALW under their jurisdiction so that accurate information can be promptly retrieved and collated by competent national authorities; paragraph 10 requires that states should ensure responsibility for all SALW held and issued by them as well as effective measures for tracing such weapons; and finally paragraph 36 calls on states to strengthen their ability to co-operate in identifying and tracing in a timely and reliable manner illicit SALW.

Section III of the PoA contains specific commitments for states to: “co-operate with each other... in tracing illicit SALW, in particular by strengthening mechanisms based on exchange of relevant information” (Para 11); “consider international co-operation and assistance to examine [and facilitate transfer of] technologies that would improve the tracing and detection of illicit trade in SALW” (Para 10); and “use and support... Interpol’s International Weapons and Explosives Tracking System (IWETS) database” and any other similar databases (Para 9).

Importantly, Section IV of the PoA recommended a follow-up UN study for “examining the feasibility of developing an international instrument to enable states to identify and trace in a timely and reliable manner illicit SALW” (Section IV, Para 1.c). Thus the marking and tracing issue area was singled out at the 2001 Conference for specific follow-up within the UN framework.

### 5.7.3 OTHER INTERNATIONAL AND REGIONAL AGREEMENTS AND MARKING AND TRACING

The UN Firearms Protocol, which entered into force in July 2005, complements the UN PoA, and includes several legally-binding commitments relating to marking, record keeping and tracing of firearms. The Protocol includes strong and specific obligations on marking, including the requirement for unique marking at the point of manufacture of each firearm providing the name of manufacturer, the country or place of manufacture, and the serial number or alternative user-friendly and unique marking system, and also simple additional marks at the point of importation. Similarly, on recordkeeping it commits states to ensure maintenance for at least 10 years of information required to enable tracing of firearms and, where possible, their parts, components and ammunition. On co-operation on tracing, the UN Firearms Protocol has strong overall commitments, including obligation to provide prompt responses to requests for assistance in tracing and co-operation on technical training and assistance. However, it does not specify further the obligations and procedures for co-operation in tracing.

Several regional agreements contain provisions for substantial politically or legally-binding commitments on marking, recordkeeping and tracing of SALW. These include particularly the OSCE Document on SALW, the OAS Inter-American Firearms Convention, the SADC Protocol, the Nairobi Protocol and the Nadi Framework (South Pacific). A number of these regional agreements have further developed, for example through the development of best practice guidelines on marking, recordkeeping and tracing, the elaboration of model regulations, and co-operation in implementation.

### 5.7.4 THE NEW INTERNATIONAL TRACING INSTRUMENT

As a direct follow-up from agreement on the PoA, in December 2001 the UN General Assembly established a Group of Governmental Experts on Tracing Illicit SALW (GGE), chaired by Ambassador Rakesh Sood (India). This GGE met three times during July 2002 – July 2003. It unanimously agreed on a Report that addressed technical and definitional issues and recommended that an international instrument appeared feasible.<sup>67</sup>

The UN General Assembly thus established an ‘Open Ended Working Group on Tracing Illicit Small Arms and Light Weapons’ (OEWG), with a mandate to “negotiate an international instrument to enable states to identify and trace, in a timely and reliable manner, illicit small arms and light weapons.”<sup>68</sup> Under the chairmanship of Ambassador Anton Thalmann (Switzerland) and 14 co-chairs, the OEWG held an organisational meeting in February 2004, and then met three times between June 2004 and June 2005. Negotiations proved difficult, and agreement was only achieved after several difficult compromises, including acceptance that it would be politically binding rather than a legal treaty.

The final Report of the OEWG included an agreed draft international instrument on tracing illicit SALW as an annex, together with recommendations for follow-on work on two outstanding issues: SALW ammunition; and how the provisions of the new SALW Tracing Instrument should be applied to UN peacekeeping missions.<sup>69</sup> In the autumn of 2005, the UN General Assembly adopted the new

<sup>67</sup> Report of the Group of Governmental Experts on Tracing Illicit Small Arms and Light Weapons, UN General Assembly Document A/58/138

<sup>68</sup> UN GA Resolution 58/241, December 2003.

<sup>69</sup> Report of the Open-Ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, UN General Assembly Document A/60/88, 27 June 2005 access via <http://un.org/ga/59/list60.html>

International Tracing Instrument (with abstentions by a few states to indicate their frustration that the Instrument was not stronger and legally-binding). It therefore came into force at the end of 2005.

The new International Tracing Instrument is politically binding, but all UN member states have committed themselves to meeting its requirements. Its scope is wider than that of the UN Firearms Protocol with one notable exception: the International Tracing Instrument does not cover SALW ammunition, but only the weapons, their parts and components. The great majority of states wanted SALW ammunition to be included in the scope of the instrument, while accepting that this had specific characteristics requiring distinctive treatment; however the USA and some others insisted that it be excluded.

Its obligations relating to marking and recordkeeping are technically similar to those of the UN Firearms Protocol, as outlined above, though it helpfully strengthened minimum standards on recordkeeping by substantially extending the minimum period over which they must be kept. The great contribution of the new International Tracing Instrument is the substantial elaboration of obligations and procedures for reliable and timely co-operation in tracing illicit SALW.<sup>70</sup> On implementation, it encourages technical and financial assistance and co-operation, but disappointingly does not establish specific mechanisms or procedures to promote and facilitate such co-operation in implementation and further development of the instrument.

The reporting and review mechanisms for this new instrument are explicitly integrated with those of the PoA itself. Thus, states will review the implementation and future development of this instrument within the framework of PoA Review Conferences.<sup>71</sup> The biennial reports that states are required to provide on their implementation of the instrument will be considered at PoA BMS meetings<sup>72</sup> while the provisions on mechanisms for technical advice or international co-operation and assistance encourage initiatives within the PoA process to mobilise relevant resources.<sup>73</sup>

Overall, the International Tracing Instrument is undoubtedly an important step forward, although the fact that it is politically rather than legally binding, does not include SALW ammunition within its scope, and the mechanisms for promoting implementation and further development of the instrument are undeveloped represent significant shortcomings. Nevertheless it is important that it is rapidly and fully implemented, and that opportunities are taken to develop it further.

### 5.7.5 NATIONAL PRACTICES

Lack of transparency and available official reports makes it hard to assess national implementation of international standards on marking, recordkeeping and co-operation in tracing. On the basis of available information, some 53 states require that all SALW are marked as an integral part of their manufacture. A similar number of states have measures to tackle unmarked or inadequately marked weapons. In many cases the possession, manufacturing and trade in unmarked or inadequately marked SALW and the removal or alteration of markings from weapons, is a criminal offence. For instance, such provisions are included within the Nairobi Protocol and the Pacific Islands Forum Model Weapons Control Bill. In most cases unmarked or inadequately marked weapons are required to be marked or destroyed. However, there is little information available on how systematically or effectively such standards and procedures are applied.

Only a few states have announced that they have reviewed their marking standards, including – to some degree – Benin, Brazil, China, Monaco, Norway, Slovenia, and Sweden.<sup>74</sup> This lack of action is worrying,

<sup>70</sup> See Annex to the Report of the OEWG, 27 June 2005, op cit.

<sup>71</sup> International Tracing Instrument Para 38

<sup>72</sup> Ibid Para 36 & 37

<sup>73</sup> Ibid Para 27-29

<sup>74</sup> Information on Benin, Monaco, and Sweden from Kytomaki, Elli, and Yankey-Wayne, Valerie, *Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Analysis of the Reports Submitted by States in 2003*, Geneva, UNIDIR, 2003, pp 80 – 81.

particularly in view of the high profile the marking and tracing issues have had in recent years. In some cases, reviews of marking procedures have entailed the adoption of high standards. In Brazil, for instance, the new law established that ammunition produced for the military and the police should have a lot number included in the head-stamp. In a large number of cases, states' marking standards appear to continue to fall below minimum international standards.

According to available information, at least 81 states ensure detailed records on holdings and transfers of SALW. Several other states have been improving their recordkeeping on aspects of SALW that are important to the tracing of illicit arms. Some states have revised their recordkeeping standards or have modernised their recordkeeping system including centralisation, and in some cases computerisation of records. However, national practice in terms of the types of information recorded, and the length of time records are maintained, appear to remain very varied, thereby undermining the traceability of illicit SALW.

Information on national practices in co-operation with tracing requests is limited. According to available information at least 40 states actively co-operate with tracing requests. Some do this on a very large scale. For example, the USA reportedly deals with over 20,000 firearms tracing requests each year. Nearly all of these are probably associated with 'ordinary' criminal investigations. In terms of capacity building, Canada, for example, has been particularly active in developing electronic databases and resources for reliable identification and information exchange on found or seized illicit SALW. It is as yet unclear whether any tracing requests have been made or responded to using the provisions of the new International Tracing Instrument.

Largely in relation to tracing crime weapons, the PoA, UN Firearms Protocol and the International Tracing Instrument all support the role of Interpol in co-operation in tracing and encourages support for Interpol Weapons Electronic Tracing System (IWETS). Some progress has been made in further developing IWETS. For instance the United States and Canada have provided financial support (of US\$125,000 and Can\$300,000 respectively) for enhancing the IWETS system.

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### 5.7.6 ENHANCING TRACING OF ILLICIT SALW

The most important focus for enhancing tracing of illicit SALW is for states to rapidly and fully implement the new International Tracing Instrument, and in particular to start regularly to use the provisions for co-operation in tracing. To enhance awareness, as well as to promote the overall aims of the instrument, states should, as far as possible within confidentiality rules, provide regular reports on relevant activities and their outcomes.

The 2006 Review Conference for the PoA is strategically important for the new International Tracing Instrument. Though it is tempting, it is almost certainly too early in 2006 to try to revisit some of the main debates relating to the scope and key norms of the new instrument, or to attempt to change it into a legally-binding instrument. Government positions have not evolved substantially since the instrument was agreed in 2005 and further progress on such contentious issues is unlikely to be possible at this Review Conference. It is important that the 2006 Review Conference effectively:

- promotes early and full implementation of the SALW Tracing Instrument
- takes decisions that facilitate and support its effective operation and future development
- otherwise properly fulfils its function as the first Review Conference for the SALW Tracing Instrument

The Review Conference is the first international opportunity to report and review the operation of the Tracing Instrument, in order to promote rapid and full implementation through, for example, elaborating

standard forms for requesting and responding to requests for information. It also provides an opportunity to launch key mechanisms and initiatives to facilitate necessary co-ordination, information exchange, international resource centres and international technical advice and assistance. The next such opportunity may not arise until 2011 or later.

It is important that all states demonstrate that they are determined to use the PoA Review Conferences as the distinctive sovereign body for the new instrument, where they can review, revise or develop it as they see fit. Thus it would be useful for states specifically to submit reports on their implementation of the International Tracing Instrument and that specific periods of the Review Conference are officially dedicated to the review of its implementation and consideration of its future development. The outcomes of these discussions ought clearly and specifically to be reflected in the Conference Outcome Document.

One major outcome of the Review Conference should be the launch of a specific global programme to support and enhance implementation of the new International Tracing Instrument. If there is insufficient time to elaborate and define such a programme at the Review Conference itself, a follow-up intersessional meeting or parts of following Biennial Meetings of States should be dedicated to this task.

The Review Conference Outcome Document should also engage with the two key outstanding issues addressed by Report of the OEWG that negotiated the Instrument,<sup>75</sup> namely that of SALW ammunition and the applicability of the provisions of the new tracing instrument to UN peacekeeping operations. On SALW ammunition, the critical international priority is to establish a process within the UN to specifically develop international commitments, norms and programs to address this key issue. The 2006 Review Conference Outcome document should include recommendations on how to take this forward. Similarly, the application of the Instrument to SALW marking, recordkeeping and tracing in post-conflict countries raises particular unresolved issues, and merits specific attention by relevant UN agencies. At the least, a specific mechanism for examining this issue should be recommended by the Conference.

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## 5.8 ENFORCING EMBARGOES

### 5.8.1 INTRODUCTION

Arms embargoes are one of the principal tools of states seeking to prevent, limit and bring an end to armed conflict and human rights abuses. Recourse to embargoes has increasingly been a feature of international relations in the past decade and a half, as states have sought to respond to crises by limiting or halting the flow of arms into particular countries or sub-regions in response to existing or impending conflict.

Although arms embargoes are potentially a very useful tool with which to put pressure on governments and armed groups, there are significant problems with their implementation. Pressure has therefore been building upon the international governmental community to act in order to ensure that the political commitment embodied by the imposition of arms embargoes is matched by the commitment to ensure their rigorous enforcement.

### 5.8.2 THE POA AND UN ARMS EMBARGOES

Ensuring the effectiveness of UN arms embargoes is a specific objective of the PoA. However, the PoA merely reiterates states' existing legal obligations under the Charter of the United Nations<sup>76</sup> and does not require states to commit to anything beyond what has already been agreed.

<sup>75</sup> International Tracing Instrument Para 27 & 28.

<sup>76</sup> Article 41 of the United Nations Charter confers upon the Security Council the power to call for a "complete or partial interruption of economic relations...and the severance of diplomatic relations" in response to a threat to or breach of the peace or an act of aggression.

PoA Section I, Para 12 recalls “the obligations of States to fully comply with arms embargoes decided by the United National Security Council in accordance with the Charter of the United Nations”; Section II, Para 15 requires states “to take appropriate measures, including all legal and administrative means, against any activity that violates a United National Security Council arms embargo in accordance with the Charter of the United Nations”; and Section II, Para 32 requires states “to cooperate with the United Nations system to ensure the effective implementation of arms embargoes decided by the United Nations Security Council in accordance with the Charter of the United Nations”.

However, the PoA has failed to recognise that despite the ever-increasing number of UN embargoes imposed, many states appear either unable and/or unwilling to ensure their full implementation.

Since the PoA was agreed in July 2001 twelve legally binding UN arms embargoes have been brought into operation against government and non-governmental entities.<sup>77</sup> Of the nine UN arms embargoes that remain in force there is considerable evidence to suggest that most, if not all, are being breached to a greater or lesser degree.

### 5.8.3 FAILURES CONTRIBUTING TO ARMS EMBARGO VIOLATIONS

The failure by states to fully comply with UN and other multilateral arms embargoes can be attributed to a range of factors. On occasion, states have been identified as being deliberately complicit in arms embargo violations, acting in what they perceive to be their own national interest.<sup>78</sup> At other times, states have facilitated arms embargo violations either through negligence or because they lack the capacity for implementing measures for effective embargo enforcement.

**Lack of capacity for monitoring shipments of SALW across borders:** A succession of UN Panel of Experts reports<sup>79</sup> has pointed to the inadequacy in air traffic control infrastructure, lack of monitoring of sea ports, and ineffective land border controls as major contributory factors in the violation of UN arms embargoes. Lack of air traffic control capacity is most acute across large parts of sub-Saharan Africa, however the inability of states to prevent arms coming ashore at sea ports and to prevent arms trafficking across long and porous land borders is a feature in most regions. Moreover, there is evidence to suggest that when action is taken in one area to strengthen controls and monitoring, arms traffickers will seek other means of ferrying shipments of arms to embargoed recipients. Accordingly, efforts to prevent arms trafficking across borders must involve strengthening states’ capacities for air space, sea port and land border monitoring and control.

**Failure of states to criminalize arms embargo violations:** In order for states to be able to hold those who violate arms embargoes to account they must have the requisite national legislation in place to criminalise breaches and enable their prosecution under domestic law. Unfortunately, not all states have taken the necessary steps forward in this regard. For example, in Italy the export and transit of arms to countries with an embargo is forbidden.<sup>80</sup> However, in 2002 a loophole in the legal system was exploited by a known arms broker, Leonid Minin, who had partly operated from Italian territory to organise illegal

<sup>77</sup> Legally binding UN arms embargoes have been imposed against the following: Afghanistan (Taliban and Al-Qaida) UNSC 1333 (2000); Angola (UNITA) UNSC 864 (1993), UNSC 1448 (2002); Cote d’Ivoire UNSC 1572 (2004); Darfur Regions of Sudan UNSC 1556 (2004), UNSC 1591 (2005); Democratic Republic of Congo (DRC) UNSC 1493 (2003), UNSC 1552 (2004), UNSC 1616 (2005); FRY Yugoslavia UNSC 713 (1991), UNSC 727 (1992), UNSC 1160 (1998), UNSC 1367 (2001); Iraq UNSC 661 (1990), UNSC 1483 (2003), UNSC 1546 (2004) (non-governmental entities); Liberia UNSC 788 (1992), UNSC 1343 (2001), UNSC 1408 (2001), UNSC 1478 (2002), UNSC 1343 (2003); Libya UNSC 748 (1992), UNSC 1506 (2003); Rwanda (non-governmental entities) UNSC 1011 (1995); UNSC Sierra Leone (non-governmental entities) UNSC 1132 (1997), UNSC 1171 (1998); Somalia UNSC 733 (1992), UNSC 1356 (2001), UNSC 1425 (2002). Of these UNSC 1367 (2001); UNSC 1448 (2002); and UNSC 1506 (2003) have been lifted.

<sup>78</sup> For example, the Panel of Experts (2006) in Darfur judged that the Government of Sudan has violated and continues to violate the provisions of the arms embargo by moving arms into the region. Furthermore, the Government of Eritrea has also been identified as being complicit in providing arms and support to non-governmental groups within the Darfur region: See S/2006/65.

<sup>79</sup> See for example the 2000 Report of the Angola Monitoring Mechanism S/2000/203, the 2006 Panel of Experts Report on the DRC S/2006/53 and the 2005 Report of the Somalia Monitoring Group S/2005/153.

<sup>80</sup> Act No. 185 of 9 July 1990 s. 6(c).

arms transfers in violation of UN arms embargoes to Liberia and the Revolutionary United Front (RUF) in Sierra Leone. The Italian Supreme Court could not prosecute Minin because Italian legislation only addressed the trafficking of weapons to embargoed destinations when the weapons crossed Italian territory.<sup>81</sup> In view of the international attention focused on arms embargo violations in recent years, the failure on the part of states to ensure that their national legislation provides for prosecution of those who violate UN and other arms embargoes can only be regarded as amounting to a critical failure of political will.

**Lack of controls on arms brokering and transportation agents:** The major role of arms brokering and transportation agents in supplying arms to embargoed entities has been highlighted in a number of reports from a succession of UN Panels of Experts investigating violations of UN arms embargoes. States that fail to establish effective controls over such agents run the risk that their territory may be used as a base for the organisation of illicit arms shipments to embargoed destinations and end-users. The fact that arms brokering is often the least visible part of an arms deal, and that the physical trail of the arms delivery does not usually pass through the country where the brokering took place means that many states are continuing to turn a blind eye to the ongoing problem of illicit arms brokering. Unfortunately, only a few countries have adequate laws in this respect, as highlighted in section 5.5 above. In situations where a broker's activities come under investigation, and particularly if their operations become threatened, he/she will tend to move base to another country. This illustrates the need for effective international controls.

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**Falsification of end-user documentation:** The various UN Panel reports have also pointed to the practice, adopted by arms brokers and other actors involved in the illicit arms trade of obtaining or fabricating false end-use certificates and using them to provide cover for arms shipments to embargoed recipients. Indeed, the Panel of Experts report (known as the Fowler Report)<sup>82</sup> investigating the alleged violations of sanctions imposed against the Union of Total Independence for Angola (UNITA) highlighted the role played by forged end-user certificates and arms brokering agents in helping to circumvent UN sanctions. The report found evidence that top level officials from the former Zaire, Burkina Faso and Togo provided end-user certificates and transit or transshipment facilities to brokers working for UNITA in exchange for diamonds, cash or a proportion of the transiting arms. National practices regarding end-user certification vary widely and are wide open to abuse by unscrupulous dealers and brokering and shipping agents (see section 5.5 above).

**Lack of effective monitoring of UN arms embargoes:** UN arms embargoes increasingly contain provisions for the monitoring of implementation, which can be key to ensuring that violations are detected and dealt with. In the Democratic Republic of Congo (DRC), for example, the UN Security Council imposed an arms embargo in July 2003; however, it was not until March 2004 that a Sanctions Committee was established and April 2004<sup>83</sup> when a Group of Experts was finally appointed to monitor the implementation of the embargo and to examine, and take appropriate action on, information concerning alleged violations thereof. The delay in establishing a Sanctions Committee had very serious consequences in that widespread and flagrant violations of the embargo were witnessed during this time.

At the same time, it should be noted that a number of UN sanctions monitoring bodies have been considered ineffective in the past due either to their perceived partiality, longevity, lack of expertise, fragmented approach and/or lack of political will; they can also be remarkably dependent upon the personalities and personnel driving the team.

<sup>81</sup> It is understood that relevant Italian legislation is presently being reviewed with a view to bringing it into line with EU and international standards.

<sup>82</sup> S/2000/203.

<sup>83</sup> The mandate of the Group of Experts was developed in a letter dated 21 April 2004 from the Secretary-General addressed to the President of the Security Council.

Evidence of a successful and innovative approach by a monitoring committee can be seen in the DRC, whereby in November 2005 the sanctions committee published a list of individuals and entities that had violated the arms embargo, and thus were subject to sanctions. Favourable feedback was received about this list, notably from political figures as well as from civil society.<sup>84</sup> It is clear that in order for UN sanctions and embargoes to be effectively implemented, a dedicated monitoring committee must be speedily established with access to all necessary resources and expertise.

#### 5.8.4 THE NEED FOR INTERNATIONAL ACTION TO STRENGTHEN ARMS EMBARGOES

Not all of the above-listed failures or inadequacies could be comprehensively addressed within the scope of the PoA, however a clearer acknowledgement of those factors contributing to the failure of arms embargoes could have been included. Moreover, in practice, even in those areas where the PoA has clear competence, very little has been done to address these issues. Commitments relating to SALW transfer control guidelines, arms brokering controls, transit controls, end-user controls and border controls are scant and under-developed and will have done little, in practice, to bolster implementation of UN arms embargoes.

It is clear that concerted action is required in order to strengthen the implementation of UN arms embargoes. A number of measures should be considered in this regard:

- Raising the cost of non-compliance of sanctions regimes through agreement on the need to criminalise breaches in national laws, and by applying secondary sanctions to those states and parties that do not comply
- The elaboration of key international standards based upon best practice with regard to arms brokering, end-user and transit controls and the development of commitments relating to issues not addressed by the PoA, such as licensed production of SALW overseas
- Greater efforts to enhance the implementation of arms embargoes in the context of initiatives aimed towards controlling illicit trafficking of other materials, e.g. natural resources (such as timber, oil and diamonds)
- Establishment of a dedicated UN Sanctions Unit under the International Secretariat so as to develop monitoring expertise and to place trained observers on the ground
- Establishing a common military list for UN embargoes, so that it is clear which items are covered under each particular embargo

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## 5.9 BORDER CONTROLS

### 5.9.1 INTRODUCTION

Cross-border trafficking of illicit SALW has been identified as a major factor contributing to the proliferation of SALW within regions of conflict and high levels of armed crime. It is a critical part of illicit SALW flows, adding to instability and the contravention of UN arms embargoes. Long, porous borders, the lack of capacity and resources for enforcement of adequate customs and border controls and corrupt practices have been major contributory factors in the illicit trade in SALW. Strengthened border and customs controls and enhanced cross-border co-operation are necessary in order to foster regional stability and to assist national governments in implementing other SALW controls such as legislation on SALW import and export.

<sup>84</sup> S/2006/53, para. 169.

### 5.9.2 THE POA AND BORDER CONTROLS

The PoA's commitments relating to border controls are relatively limited. Section II, Para 27 requires states to:

"...establish, where appropriate, subregional or regional mechanisms, in particular trans-border customs co-operation and networks for information-sharing among law enforcement, border and customs control agencies, with a view to preventing, combating and eradicating the illicit trade in small arms and light weapons across borders."

Beyond this, apart from the further requirement in Section II, Para 7 requiring states to "enhance co-operation, the exchange of experience and training among competent officials, including customs [officials]", the PoA does not create any explicit obligation for the provision of assistance to states for the purposes of development of border controls, or any elaborated framework for their implementation. This failure is brought into sharp focus by the fact that attempts to implement and monitor UN arms embargoes have been consistently undermined in part because of lax border controls, stemming from an acute lack of resources, equipment and trained personnel. For example, in Somalia, the UN Group of Experts reported that customs and border controls were continually circumvented and thus illicit arms were flowing into the country. Forged customs declaration forms, concealed weapons, unofficial crossings of borders and a lack of physical inspections by officials all contributed to the violation of the arms embargo.<sup>85</sup>

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### 5.9.3 OTHER INTERNATIONAL AND REGIONAL AGREEMENTS AND BORDER CONTROLS

Aside from the PoA, other regional and international agreements that have included references to border controls include the Bamako Declaration, the SADC Protocol on the Control of Firearms, the Nairobi Protocol, and the UN Firearms Protocol.

In particular, the SADC<sup>86</sup> and Nairobi<sup>87</sup> Protocols go much further than the PoA in obliging states to create strong border controls. Obligations in these agreements elaborate a range of areas of good practice in this area, including:

- The improvement of operational capacity and training programmes of customs and border guards
- The establishment and improvement of national databases and communication systems
- The acquisition of equipment for monitoring and controlling the movement of firearms across borders
- The establishment of inter-agency working groups to improve policy co-ordination, information sharing and analysis at the national level

However, such comprehensive regional agreements have not been reflected internationally. Apart from these few arrangements, no other multilateral agreement makes such detailed provisions with regard to border controls. Furthermore, the UN Firearms Protocol commitment on border controls is as tentative as the PoA, obliging states to increase the effectiveness of border controls and of police and customs trans-border co-operation only where appropriate.<sup>88</sup>

<sup>85</sup> See, S/2005/153, paras. 76 & 77.

<sup>86</sup> SADC Protocol, Article 6.

<sup>87</sup> Nairobi Protocol, Article 4.

<sup>88</sup> UN Firearms Protocol, Article 11.

#### 5.9.4 PRACTICES WITH REGARD TO BORDER CONTROLS AND CROSS-BORDER CO-OPERATION

There have been numerous examples of cross-border co-operation amongst law enforcement agencies at the regional and sub-regional level. For example, recent border control programmes under the Southeast Europe Co-operative Initiative (SECI)<sup>89</sup> Regional Centre for Combating Transborder Crime have played an important role in tackling SALW proliferation in the sub-region. The SECI Centre functions as a focal point on cross-border crime and illicit trade in SALW. Customs and Police work together in direct co-operation, sharing information and intelligence on illicit SALW seizures. In 2005 a detailed information exchange on SALW seizures was implemented under the name 'Operation Safe Place'.<sup>90</sup> Among the aims of the operation was the identification of individuals and groups engaged in the illegal trade, transfer and possession of illicit SALW as well as the collation of data on the types of goods being trafficked, with the results to be distributed throughout the sub-region.

Other examples of cross-border co-operation include:

- An ECOWAS Department of Defence and Security programme on the restoration of peace and security along the border areas of Guinea and Liberia (2004-2005)
- Bangladesh, India, Myanmar, Sri Lanka, Thailand – Economic Co-operative (BIMST-EC) working regionally on issues of gun running and transnational organised crime, as declared at the BIMST-EC Summit Declaration, July 2004
- EU Commitments, which include an EU Border Assistance Mission to Moldova and Ukraine both in 2005; and a Rapid Reaction Mechanism in Central Asia for a programme of border management and police reform established in 2003
- Border management training provided by the OSCE in 2005 to Georgia and in 2002 to Uzbekistan border guards and customs officers in order to enhance their professional capacities in searching, tracing and seizing illegally trafficked SALW in the region and in examining forged travel and customs documents as well as raising their awareness of internationally accepted rules and regulations in border management
- The Association of South East Asian States (ASEAN) Plan of Action on Transnational Crime, which encourages ASEAN member countries to expand their efforts in combating transnational crimes which include, *inter alia*, arms smuggling. Key objectives include: information exchange; the improvement of the ASEANAPOL regional database; the harmonization of relevant national policies; strengthening legal mechanisms to deal with transnational crime; developing law enforcement and training programmes; and institutional capacity-building

While not all of the above examples directly relate to initiatives aimed towards controlling SALW trafficking, efforts to enhance the capacity of and operational interaction between, *inter alia*, customs, law enforcement agencies and border guards, are important since they should, in many circumstances, enhance capacity to address illicit movements of SALW.

#### 5.9.5 ENHANCING STANDARDS OF CONTROL

Many of the regional initiatives that have sought to address the need for the establishment of effective cross-border controls will not succeed without regional cohesion on the issue and international donor and operational assistance. However, the PoA makes only limited reference to the need for cross-border co-operation and lacks any specific commitment requiring states to ensure that full capacity and resources are made available where needed.

<sup>89</sup> Participating states include Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Hungary, Macedonia, Moldova, Romania, Serbia and Montenegro, Slovenia, Turkey.

<sup>90</sup> By 30 May 2005, seven SECI states had exchanged information under the auspices of 'Operation Safe Place': Albania, Bosnia and Herzegovina, Greece, FYR of Macedonia, Moldova, Romania and Turkey.

The development and maintenance of effective border and customs controls is an extremely resource-intensive process. Monitoring of border checkpoints and sea and airports requires a large number of trained personnel, as well as large quantities of technical equipment. This is therefore an area requiring significant investment on the part of governments and regional and international organisations. However, where an expansion of cross-border co-operation to tackle illicit SALW is combined with other regional and international programmes, e.g. to enhance SALW transfer controls, then there will be a significantly greater likelihood of achieving positive results. A much higher level of international assistance needs to be devoted to the development of customs and border controls, to include elements of training and capacity-building for all enforcement agencies (such as border patrols, customs officials, the police and the military), the provision of technical assistance and information and intelligence sharing under systemised regional database systems.

### Criminal offences/legal penalties

Appropriate legal penalties for a full range of offences relating to illicit trafficking and misuse of SALW are required in all states in order to properly enforce national controls on SALW. Consistency in legal penalties applying to offences across regions and internationally is required to prevent unscrupulous entities from taking advantage of lax penalties that could otherwise exist in some countries.

The UN PoA addresses the issues of criminal offences and legal penalties relating to illicit trafficking in SALW in a rather minimal way. Section II, Para 12 refers to the need for “effective legal and enforcement measures” so as to ensure “effective control over the export and transit of small arms and light weapons”. Section II, Para 14 also mentions the need for “appropriate penalties for all illicit brokering activities”, while Section II, Para 15 requires that states “take appropriate measures, including all legal or administrative means, against any activity that violates a United Nations Security Council arms embargo”. The absence of more detail on international standards for legal penalties means that the effect of these provisions is likely to have been limited.

The UN Firearms Protocol criminalises illicit trafficking of firearms<sup>91</sup> and states that “attempting to commit or participating as an accomplice”<sup>92</sup> and “[o]rganising, directing, aiding, abetting, facilitating or counselling the commission of an offence”<sup>93</sup> in this regard would also constitute an offence. These commitments reflect those contained in the 1997 Inter-American Convention. The SADC and Nairobi Protocols also require the criminalisation of the illicit trafficking of SALW and the violation of UN arms embargoes while the Nairobi Protocol also requires that states “introduce harmonised, heavy, minimum sentences for small arms and light weapons crimes”. This has been elaborated upon within the context of the Nairobi Best Practice Guidelines, which specify that certain crimes relating to SALW are considered transnational in nature (including illicit trafficking and illicit brokering of SALW) and recommend minimum (two – five years) and maximum (15 – 25 years) sentences as appropriate penalties for these offences.

States’ practices with regard to criminal offences are divergent, meaning that the application of legal penalties is also likely to vary. Fewer than two-thirds of states (119 in total) criminalise the illicit trade in SALW. Practices with regard to legal penalties also appear divergent. In Austria, for example, a violation of the statutory regulations concerning the lawful export of war materiel carries a prison sentence of up to two years (unless the offence is punishable by a more severe sentence under other laws). In Belarus the illegal export of items that are subject to export control can carry a sentence of between three and

<sup>91</sup> UN Firearms Protocol Article 5 (1b)

<sup>92</sup> UN Firearms Protocol Article 5 (2a)

<sup>93</sup> UN Firearms Protocol Article 5 (2b)

seven years; whereas in South Africa offences under the Firearms Control Act and the National Conventional Arms Control Act carry penalties of up to 25 years in prison.

Although states are always likely to reserve the right to apply whatever penalties they see fit to particular crimes, it would seem that the issues of criminal offences and legal penalties are two aspects of international SALW control that could significantly benefit from the development of international guidelines for best practice. The Review Conference should clearly acknowledge the need for broad international agreement on the full range of illicit international trafficking activities and should mandate an exchange of information on the application of legal penalties relating to the illicit trafficking of SALW, with a view to establishing agreement on an optimal framework for tackling criminal SALW-related activities.

## 5.10 TRANSFERS TO NON-STATE ACTORS (NSA)

### 5.10.1 INTRODUCTION

The issue of transfers of SALW to non-state actors (NSA) is one of the most notable omissions from the PoA. Attempts in 2001 to address this issue foundered around the fear in some quarters that addressing controls on transfers to NSA would impinge upon the legitimate civilian trade and possession of SALW. However most states do in fact recognise that there are numerous legitimate non-state/civilian recipients of SALW and that the vast majority of transfers to such recipients take place with the authorisation of the relevant exporting and importing authorities. The key debate on SALW transfers to NSA therefore concerns whether it is ever legitimate to carry out a transfer where the authorisation of the NSA's host government has not been given.

While the strict application of stringent transfer control criteria would mean that, in almost all cases, SALW transfers to NSAs without the specific approval of the host government would not take place, there is nevertheless a debate over circumstances when unauthorised transfers could be considered – so called 'hard cases'. At the 2001 UN Conference, some states maintained that, in certain instances, such transfers might be justifiable and so consensus on a ban on unauthorised SALW transfers to NSA could not be achieved, much to the disappointment of a number of states whose peoples had particularly suffered at the hands of rebel groups. Efforts to rule out the transfer of particular types of SALW to NSA also foundered over disagreements as to the exact types of SALW that should be included in such a prohibition.

### 5.10.2 DEVELOPMENTS SINCE 2001

Since the UN PoA was agreed in 2001, the debate on transfers to NSA has continued and moved onto a more constructive footing at the two Biennial Meetings of States in 2003 and 2005 and also at the January 2006 Preparatory Committee. Linked to the UN PoA follow-up process, the principal forum in which substantive discussion has taken place on the issue of transfers to NSA is the Consultative Group Process (CGP) led by the Biting the Bullet Project. Having hosted five meetings over a three year period, bringing together over 30 governments and civil society experts, the CGP has sought to build shared understandings of the range of issues involved in considering SALW transfers to NSA and to explore and develop innovative approaches that would enhance the prospects for international agreement in this area.

The CGP discussions recognised that the risks of diversion, theft, misuse etc. of SALW transfers to NSA mean that the criteria used to assess such risks must be applied in an especially strict manner, particularly as controls on SALW holdings and use by NSA are bound to be less strict than by state institutions. The CGP also acknowledged the close links between controls on civilian ownership of SALW and that of NSA. In this regard, the lack of reference in the PoA to the need for responsible controls on civilian ownership and use of SALW could be seen as a missed opportunity in terms of establishing international standards on SALW transfers to NSA.

The crux of CGP discussions, however, rested on the most contentious aspect of SALW transfers to NSA: the 'hard cases'. While the great majority of governments have expressed support for a ban on such transfers, it is clear that there are rare occasions where some well-intentioned and responsible governments might doubt that a complete ban is justified. The CGP discussed the circumstances under which such doubts might be justified and, further, what might be considered legitimate motivations for the unauthorised transfer of SALW to NSA, and the characteristics of any NSA that might be considered an eligible recipient of SALW. The conclusion was that the circumstances under which the transfer of SALW to a NSA could be considered in the absence of the express consent of the host government were extremely narrow but that these situations represented genuine 'hard cases'. It was acknowledged that while such 'hard cases' persisted, there would continue to be states that, in the absence of an alternative international response such as the deployment of international peacekeeping forces might wish to take unilateral action.

Having considered all of the aforementioned circumstances, the majority of CGP government participants nevertheless continued to support an outright ban on unauthorised transfers of SALW to NSA. However, in light of the fact that not all states are of this opinion, CGP participants acknowledged the need to consider alternative strategies. One such strategy that was discussed at length within the CGP involved the requirement that any state considering the transfer of SALW to a NSA without the authorisation of the host government should declare its intentions to the UN Security Council and other concerned parties. It should further commit itself to accepting the responsibilities that arise from authorising such a SALW transfer including:

- i) Measures to ensure that all SALW supplied are appropriately marked and recorded
- ii) Assistance to the NSA recipient to ensure that efforts to are made to securely manage the SALW and to prevent misuse and diversion
- iii) Training for the NSA in the responsible use of the SALW
- iv) A commitment to further pursue alternative strategies for resolving the conflict
- v) A commitment to collect and dispose of the transferred SALW as soon as circumstances permit

The CGP considered that the ideas discussed within the forum were worthy of widespread debate, in the hope that a way forward could be agreed upon at the 2006 Review Conference. To this end, a 'Food for Thought' paper was circulated at the 2005 BMS and at the 2006 Preparatory Committee and a side meeting held to enable broad discussion of the ideas therein.

The debate on developing a framework for the control of transfers of SALW to NSA continued at the 2003 and 2005 BMS and the 2006 Preparatory Committee. Although the debate has become more open and has progressed some way since 2001, there nevertheless appears still to be an element of entrenchment in the positions of those states that either supported or opposed a ban on transfers of SALW to NSA that have not been authorised by the government of the recipient. In this regard, some creative thinking and flexibility on the part of all those involved will be required before a way forward can be agreed on this difficult issue.

## 5.11 MAN PORTABLE AIR DEFENCE SYSTEMS (MANPADS)

### 5.11.1 INTRODUCTION

Man Portable Air Defence Systems (MANPADS) are a specific subcategory of SALW. Their use by unauthorised personnel and terrorist organisations is widely perceived as a growing threat to international security. It is estimated that at least 13 non-state groups possess MANPADS, some of which are widely considered to be terrorist organisations. These include the Fuerzas Armadas Revolucionarias de Colombia (FARC), Hezbollah of Lebanon, and the Liberation Tigers of Tamil Eelam (LTTE) of Sri Lanka.<sup>94</sup> Furthermore, in 2003, the US State Department estimated that since the 1970s, over 40 civilian aircraft have been hit by MANPADS, causing approximately 25 crashes and over 600 deaths.<sup>95</sup> These concerns have placed the issue of MANPADS high on the international security agenda.

MANPADS are not singled out for specific attention by the UN PoA, however all relevant commitments relating to SALW transfer controls, including those contained in Section II, Para 11 are applicable, particularly the risk of diversion. The potentially devastating and indiscriminate effects of their misuse means that particular care should be taken by states to scrutinise and assess all aspects of any application for a licence to transfer MANPADS in order to ensure they are not diverted to unauthorised end-users.

### 5.11.2 RECENT INTERNATIONAL DEVELOPMENTS

In recent years, significant progress has been made in regional and international fora on efforts to prevent the proliferation of MANPADS. Since 2003, over 100 states have signed various regional and multilateral agreements to tighten controls. These agreements include:

- The G-8 Action Plan of June 2003, entitled Enhanced Transport Security and Control of MANPADS
- The Wassenaar Arrangement's Elements for Export Controls of MANPADS 2000 (amended in 2003)
- 2003 APEC Summit, Bangkok Declaration on Partnership for the Future (October 2003)
- OSCE, Forum for Security and Co-operation in Europe, Decision No. 3/04: OSCE Principles for Export Controls of MANPADS (May 2004)
- OAS, AG/Res. 2145 (XXV-O/05), Denying MANPADS to Terrorists: Control and Security of MANPADS (June 2005)
- The agreement by the Commonwealth of Independent States to provide notification among the group of states on MANPADS transfers (September 2003)

All of these initiatives have stressed the need for strict national controls over the transfer of MANPADS in order to prevent access to these weapons on the part of terrorist organisations. Moreover, the majority of these agreements specify that exporting states should:

- Take into account, in particular, the risk of diversion of MANPADS to unauthorised end-users
- Not export MANPADS to non-government end-users
- Not use non-governmental brokers in the transfer of MANPADS
- Ensure that the recipient government pledges not to re-export the weapons without the prior consent of the exporting government

<sup>94</sup> Small Arms Survey Presentation on MANPADS to the Geneva Process of Small Arms, by James Bevan, 8 September, 2004.

<sup>95</sup> US Department of State, Bureau of Political-Military Affairs and Bureau of International Security and Non-proliferation, 'The MANPADS Menace: Combating the Threat to Global Aviation from Man-Portable Air Defense Systems', September 20, 2005, at [www.state.gov/t/pm/rls/fs/53558.htm](http://www.state.gov/t/pm/rls/fs/53558.htm), accessed February 6, 2005.

At the global level, several initiatives have been undertaken:

- In 2003 the UNGA decided to include MANPADS in the UN Register of Conventional Arms. Since this new introduction, some 20 states, including many European states but also Israel, Jordan and Malaysia have reported on their imports, exports, holdings or procurement through national production of MANPADS. However, this number represents less than one-fifth of the states that have submitted reports for 2004 (covering the period 2003).<sup>96</sup>
- In December 2004 the UNGA adopted Resolution 59/90, which, *inter alia*, stressed the importance of effective national control on the transfer and brokering of MANPADS and encouraged states to legislate in order to ban transfers of these systems to non-state end-users. This was further elaborated in January 2006 with Resolution 60/77, whereby the UNGA broadened the scope to include training and instruction materials as well as components, and to recognise the efforts made by some states to collect, secure and destroy MANPADS.
- The International Civil Aviation Organization (ICAO) has stepped up its efforts to strengthen civil aviation security worldwide identifying MANPADS as a major threat. In Resolution A35-11, adopted at the ICAO Assembly's 35th session in late 2004, the Assembly urged contracting states "to exercise strict and effective controls on the import, export, transfer or retransfer, as well as storage of MANPADS". The Assembly also urged contracting states that were not members of the Wassenaar Arrangement to nonetheless implement the Wassenaar MANPADS Elements.<sup>97</sup>

Finally, such initiatives are now being profiled within the context of PoA implementation, as shown by the recent inclusion of MANPADS in states' National Reports submitted to the DDA as well as in statements<sup>98</sup> made at the January 2006 PrepCom. In recent Reports, 10<sup>99</sup> states specifically mentioned the need to prevent the illicit transfer and unauthorised access to and use of MANPADS. Furthermore, during the Cluster II thematic debates at the PrepCom, several states expressed the view that the UN SALW process could do more to prevent and combat the illicit transfer of MANPADS and their access by unauthorised end-users, in line with the commitments of UN General Assembly Resolution 59/90 and those of other multilateral fora.

### 5.11.3 ENHANCING STANDARDS OF CONTROL

While much practical action regarding MANPADS has focused on the destruction of surplus stocks of these weapons, the need for effective national controls on transfers has featured high on the international governmental agenda. In this regard, much attention has focused on minimising the risks of diversion but several multilateral agreements have also stressed the need for a ban on transfers of MANPADS to non-state actors and a prohibition on the unauthorised re-export of these weapons. States seem to be willing to go much further in specifying stringent controls on transfers of MANPADS than on other categories of SALW. It is important to recognise, however, that hundreds of thousands more lives are lost each year through the proliferation and misuse of SALW in general than can be attributed specifically to MANPADS. In addition, all of the transfer control issues that have been addressed by MANPADS initiatives are also relevant to other SALW. Efforts to fragment the SALW agenda should therefore be resisted and agreeing comprehensive and effective controls on all categories of SALW should be a major priority for the UN Review Conference.

<sup>96</sup> Small Arms Survey, *Small Arms Survey 2005*, Oxford and Geneva, Oxford University Press, 2005, p. 110.

<sup>97</sup> *Ibid.*, p. 129

<sup>98</sup> Among others, Australia, Russia, the EU and Israel specifically referred to MANPADS within their statements at the January 2006 PrepCom.

<sup>99</sup> Belarus, Germany, Hungary, Israel, Italy, Russia, Thailand, Ukraine, UK, and the US (see DDA National Reports for 2005, 2004 and 2003).

## 5.12 IMPLICATIONS FOR THE 2006 REVIEW CONFERENCE

There is significant scope for the Review Conference to address and improve the way in which the PoA deals with all issues relating to national transfer controls on SALW. It would be extremely beneficial if the Review Conference could explicitly acknowledge the need for transfer controls to be addressed in a holistic sense so as to ensure the development of a set of mutually reinforcing agreements covering all aspects of SALW transfer controls including import controls, export controls, transit controls and brokering controls etc.

Several important debates will be required at the 2006 Review Conference with the aim of issuing strong statements that clarify and develop PoA references to particular issues. In the first instance, these should include calling upon states to speedily conclude and amend national control systems in order to ensure conformity with all relevant provisions in the PoA.

Beyond this, the Review Conference should also seek to establish, where appropriate, co-operative frameworks such as working groups and other dynamic processes in order to facilitate the level of detailed information exchange that is required by the national provisions of the PoA that are related to SALW transfer controls. These provisions will also be an important means of ensuring that the Review Conference encourages and facilitates the development of best practice and clear international standards on SALW transfer controls.

With regard to specific aspects of SALW transfer controls, the Review Conference should endeavour to reach agreement on the scope and extent of national action as follows:

**Quality and scope of assessment of transfer applications:** The Review Conference should call upon all states that have not yet adopted laws, regulations or administrative procedures for the export and import of SALW to do so at the earliest opportunity. Beyond this, the Review Conference could establish a working group of states from different geographical regions in order to elaborate on comprehensive best practice guidelines and model regulations for SALW transfer control to be considered and adopted at the earliest opportunity.

**Transfer control guidelines:** The Review Conference should seek to undertake a detailed elaboration of the commitments set out in Section II, Para 11 of the PoA with a view to agreeing on a set of detailed principles based on states' existing obligations under international law, which could be appended to the PoA. Should an agreement on a full elaboration of Section II Para 11 not be possible within the time constraints of the Review Conference, the meeting should seek to establish a process whereby this is undertaken so as to facilitate agreement on a comprehensive set of international SALW transfer control principles at the earliest opportunity thereafter. Importantly, there should be a clear understanding that while any elaboration of the commitments set out in Section II Para 11 within the PoA review process would necessarily be considered as politically binding, where that elaboration of principles is reflective of states' responsibilities under international law states would necessarily be legally bound to enforce these provisions.

**Transit controls:** Compared with the way that other aspects of SALW transfer controls are addressed in the PoA, the position of transit controls is presented as a poor relation rather than as an important element in efforts to prevent diversion. Accordingly, the Review Conference should agree on the need to establish a basic set of internationally recognised standards for transit and transshipment controls. It should also issue a mandate for a working group to develop a set of international best practice guidelines for transit control to be adopted at the earliest opportunity.

**End-use controls:** The 2006 Review Conference can make an important contribution to promoting the development of strengthened international standards relating to SALW end-use control. The Review Conference should seek to develop an annex to the PoA that establishes clear standards for, inter alia, SALW end-use control based on current international best practice. Should it not prove possible to reach such agreement within the context of the Review Conference itself, the meeting should mandate a working group to develop such a set of standards for adoption at the earliest opportunity.

**Arms brokering:** While the formal mandate of the GGE has yet to be defined it would be useful for the Review Conference to start outlining the contours of such a mandate. This should specify that the GGE work should form the basis of an international control instrument. Secondly, the Review Conference should specify the specific control elements that the Group could consider for inclusion in such an instrument. In order to avoid that the upcoming Group of Experts translates into a mere repetition of the work performed by the previous GGE (which reported to the GA in 2001), its work should focus on generating concrete regulatory options explored in light of existing global and regional agreements, as well as on national practice and experience.

**Tracing of illicit SALW:** The 2006 Review Conference for the PoA is strategically important for the new SALW Tracing Instrument. It is important that the Review Conference seeks to promote early and full implementation of the International Tracing Instrument and that it facilitates and support its effective operation and future development. In particular, the Review Conference should launch a specific global programme to support and enhance implementation of the new International Tracing Instrument. If this is not possible within the confines of the Review Conference a follow-up intersessional meeting, or parts of following Biennial Meetings of States, should be dedicated to this task. The Review Conference Outcome Document should also engage with the two key outstanding issues: SALW ammunition; and the applicability of the provisions of the new tracing instrument to UN peacekeeping operations. On SALW ammunition, the Review Conference should establish a process within the UN to specifically develop international commitments, norms and programs to address this key issue. Similarly, the application of the Instrument to SALW marking, record keeping and tracing in post-conflict countries raises particular unresolved issues and merits specific attention by relevant UN agencies. At the least, a specific mechanism for examining this issue should be recommended by the Conference.

**Arms embargoes:** The Review Conference should articulate a more robust and overt commitment that reflects the paramount importance of upholding UN arms embargoes. This should include an undertaking to develop the UN's institutional infrastructure (for example through the establishment of a dedicated Sanctions Unit) so as to fully support this commitment. Specific undertakings should also be made with regard to capacity-building so as to strengthen states' abilities to control their land and sea borders and airspace thus enabling existing PoA obligations to be upheld. The Review Conference should also encourage the provision of donor and technical assistance programmes targeted towards the enforcement of arms embargoes in regions of conflict.

**Border controls:** The Review Conference should support and encourage the development and maintenance of effective customs and border controls by creating a comprehensive framework for sub-regional, regional and international co-operation and assistance. The Review Conference could mandate the establishment of a fund for the purposes of promoting enhanced cross-border co-operation, particularly along known trafficking routes. Any efforts to promote enhanced cross-border co-operation should, moreover, include the articulation of clearer practical frameworks for co-operation between border-guards/customs, including information sharing and joint operations.

**Transfers to non-state actors (NSA):** The Review Conference should try to reflect the reality of the debate over transfers of SALW to NSA that are not authorised by the government of the recipient i.e. that

most states support a ban on such transfers but that some do not. If possible, the Review Conference should try to provide a way forward to establish a framework for controlling such unauthorised SALW transfers to NSA. If no general agreement can be reached, however, this may be one issue that could benefit from an examination by a Group of Governmental Experts or possibly an informal intersessional process reporting to the next BMS, possibly with recommendations for action on the part of the UNGA.

**MANPADS:** There has been significant attention paid to the issue of controlling MANPADS in the five years since the PoA was agreed and this has led to a raft of regional and multilateral initiatives in this regard. However, in terms of the devastation caused by the illicit proliferation and misuse of MANPADS compared with that of SALW in general, MANPADS should not be considered a pressing priority for states at the Review Conference. Efforts to fragment the SALW agenda by including specific measures on MANPADS at the Review Conference should therefore be resisted. Instead, states should seek to extend to all SALW those aspects of international good practice that have emerged in relation to controls on transfers of MANPADS.