

SMALL ARMS CONSULTATIVE GROUP PROCESS

**SMALL ARMS AND LIGHT
WEAPONS TRANSFERS:
DEVELOPING UNDERSTANDINGS ON
GUIDELINES FOR NATIONAL CONTROLS
AND TRANSFERS TO NON-STATE ACTORS**



CHAIR'S INTERIM REPORT

BITING THE BULLET

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University of Bradford

The Centre for International Co-operation and Security (CICS) is a centre for academic and applied research with extensive expertise in small arms and related issues. It is based at the Department of Peace Studies at the University of Bradford, which is internationally recognised as a leading research and teaching centre in the areas of peace and conflict studies.

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1. Introduction

The informal Small Arms Consultative Group Process on Developing Understandings on Guidelines for National Controls and Transfers to Non-State Actors was established in January 2003, convened by the Biting the Bullet Project¹. The Consultative Group consists of representatives of some 30 governments from most regions, the UN and regional organisations, and selected civil society experts. It has so far met four times, in London (January 2003), Prague (June 2003), New York (July 2003) and Lake Naivasha, Kenya (September 2003), and has now completed the first phase of its work.

The objectives of this informal Small Arms Consultative Group have been to develop shared understandings of two linked issue areas that are of key importance to the implementation and further development of the UN Programme of Action (PoA) on Small Arms and Light Weapons (SALW):

- Transfers of SALW to non-state actors (NSAs)
- Guidelines for national decisions on whether to authorise transfers of SALW²

Considerable progress has been made in exploring and developing shared understandings on these issues, and in developing a framework for addressing them at a global level.

The aim of the Chair's Interim Report is to provide an overview of the discussions held and the progress made in the first phase of the work of the Consultative Group. It also identifies some of the key findings from the discussions to-date: those issues where clearer understandings have developed and others that require further consideration. This report will then provide the basis for moving discussions forward during the second phase of its work in advance of the 2006 UN PoA Review Conference. This report reflects the views expressed by participants and proposes several suggestions for ways in which a continuation of the process can contribute to the agreement of more effective controls on transfers to NSAs and guidelines for national transfer controls in 2006.³

Part two of the report explains the rationale for discussing the two issues and the relationship between them. Part three describes the key issues emerging from the discussions on controls on transfers to NSAs. It does so by exploring why transfers to NSAs are problematic, examining the range of NSAs, and highlighting the main arguments for and against authorising transfers to NSAs in certain circumstances.

Part four of the report reviews the main issues that arose from the Group's discussions on guidelines for national SALW transfer controls. The report sets out the context to the discussions, in regard to commitments under the UN PoA and current international debates, and identifies the main approaches to developing international consensus in this areas. It then concludes in part five with an outline of the next steps for the Process towards the 2006 Review Conference, as discussed and supported by the participants, particularly at the last meeting in Lake Niavaska, Kenya.



2. The Issues and their Interrelationships

The two issues considered by the Consultative Group were selected because they are both, in their different ways, key issues for the UN PoA that remain controversial. They are also closely linked in practice, not least because the criteria applied by states in deciding whether to authorise export, transit or import of SALW have a critical bearing not only on whether licenses for transfers to NSAs are issued, but also on the risks that legal arms transfers are illicitly diverted to NSAs.

The UN PoA contains important commitments relating to national controls on SALW transfers, including obligations to ensure that authorisations for SALW transfers are consistent with the existing responsibilities of states under international law, taking into account in particular the risk of diversion of these weapons into the illicit trade (PoA, Paragraph 11 of Section 2). But this was the result of a difficult compromise, and the implications of these commitments are debated. In contrast, it proved impossible to achieve consensus on any explicit commitments in the UN PoA restricting transfers to NSAs. Nevertheless, it was an issue of fierce debate and continuing concern.

Further discussion and dialogue was necessary on both of these issues if they were to be effectively addressed as the UN PoA develops. The key challenge during the first phase of the Consultative Group's work has been to disentangle the complex issues and concerns associated with each of these issues, and to develop frameworks and approaches within which there is a better prospect of developing stronger international norms and commitments.

The processes of discussion at the four meetings of the Consultative Group during 2003 were consistently detailed, constructive and exploratory. This in itself was very positive, in view of the frustration and contention that has characterised many of the international debates on these issues at the UN and other forums. The Consultative Group has successfully developed frameworks that, its members believe, promise to enable more productive discussions on international norms in the future. These will be taken forward by the Consultative Group during 2004 and beyond, as discussed in the final section of the report on Next Steps.



3. Controls on Transfers to Non-State Actors

An urgent problem

Flows of SALW to NSAs such as armed rebel groups, warlords, vigilantes, organised criminals and terrorists contribute substantially to violence, insecurity and human suffering across much of the world. National, regional and international action is urgently needed to prevent and reduce access to SALW, and other arms and explosives, by such groups.

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

The challenges of developing global norms

However, it has so far proved impossible at an international level to agree on what these norms and measures should be. At the UN 2001 Conference, a large majority of states spoke in favour of a proposal to ban SALW transfers to non-state actors, unless they were properly authorised by the government of the recipient country. The USA was prominent in blocking consensus on this proposal, though it did not stand alone in doing so. There were a number of states that argued that supplying SALW to selected NSAs may be justified in certain circumstances, for example in order to support 'freedom fighters' resisting an oppressive government.

International debates on such issues have often generated more heat than light. This is partly because the 'transfers to NSAs' debate relates to a complex variety of issues, actors and circumstances that have become entangled, leading to confusion and misunderstandings. The Consultative Group aimed to disentangle the issues and address each systematically.

Unpacking the issues

During the course of the four meetings, the Group examined several issues relating to the transfer of SALW to NSAs, unpacking the issues of concern relating to transfers to NSAs and the types of circumstances within the recipient state that might be of concern. As part of this process, participants considered it useful to identify the types of NSAs that may acquire SALW. The Group then examined the 'hard cases' – circumstances under which transfers to NSAs may be considered.

The Group examined several issues of high concern relating to SALW transfers to NSAs, including:

- Diversion of arms into illicit trade;
- Undermining states' control and capacity to govern;
- Stimulating and prolonging armed conflict;
- Contributing to crime;
- Contributing to terrorism; and,
- Facilitating human rights abuses or violations of international humanitarian law.

The Group then discussed how different circumstances within recipient states may give rise to different concerns regarding the transfer of SALW to NSAs. The key elements of these contexts include:

- The capacity of the recipient state to regulate and control activities, including arms possession and use, in its territory and across its borders;
- Whether the state is in a region of conflict, suffering internal armed conflict, or at risk of armed conflict;
- Risks of human rights abuses, genocide or other violations of international humanitarian law; and,
- Whether a stable state at peace has high or low levels of criminal gun violence.

In addition, the Group identified the wide range of types of NSA that may acquire SALW in both authorised and unauthorised transfers, including:

- Armed rebel groups, freedom fighters, paramilitaries, or warlords;
- Paramilitaries and other NSAs closely associated with state agencies;
- Civilian militia including communal groups and militias, civil defence forces, "Vigilante" groups;
- Political Parties and associated groups;
- Private Military Companies;
- Private Security Companies and other private companies with their own security staff;
- Arms Traders: domestic legal retail markets; traders and wholesalers; arms brokers/front companies etc;
- Terrorists and terrorist organisations;
- Criminals and criminal groups, including black market arms traders;
- Civil institutions, such as museums; and,
- Civilians: Sports shooters; Hunters; Gun Collectors, personal protection.

By unpacking the types of NSA the Group was able to refine its focus to concentrate on those of greatest concern. Four broad types were identified each of which raises distinct issues in relation to SALW transfers, thus, requiring different policy and regulatory approaches. This list of four is illustrative rather than comprehensive:

- 1) NSAs that are legally recognised within the state concerned and subject to the law, including private citizens, legal companies, and civil institutions;
- 2) NSAs that are criminal, including terrorists;
- 3) NSAs that are aligned with the government or governing political elites in a context of possible or actual armed conflict or repression; and,
- 4) NSAs that are opposed or independent of the government in the context of possible or actual conflict or repression.

The Group examined the policy issues relevant to each of these broad types. For example, transfers of SALW in category 1) are likely to be regulated by both exporting and recipient state according to laws of civilian possession of firearms in the recipient state together with assessments of the risks of diversion, re-export or misuse. Different types of SALW will be regulated differently, probably with strong restrictions on transfers of military-style weapons.

As far as a ban on SALW transfers to NSAs that are criminal, including terrorists (category 2) is concerned, the Group decided that this would pose no major normative problems. All states agree that neither an exporting or importing state should transfer arms to criminals or terrorists, even if they cannot always agree on whether a particular group falls into this category.

However, disputes between the exporting, transit and importing state authorities are most likely to relate to possible transfers to NSAs in categories 3) or 4). These are therefore the primary focus for possible international disagreements.

Before examining the different issues within these two categories, members of the Consultative Group generally agreed that when deciding whether to issue licences authorising the transfer, the importing, exporting and transit states all have a responsibility to take into account several issues, including:

- The risk that the NSA may divert the SALW to other users or to uses other than those authorised, including re-export of the arms;
- The risk that the NSA would misuse SALW, for example through human rights abuses, excessive violence, or crime;
- The risk that the NSA would lose control of the supplied weapons, for example due to poor stockpile management or security, corruption, theft or capture;
- The risk that the NSA becomes a party to armed violence or tension in the future, or that the supply of further SALW intensifies this risk; and,
- The degree of appropriate accountability and control of the NSA.

These issues are important factors when considering the general issue of developing guidelines for national SALW transfer controls (see part four of the report), but also when examining certain circumstances under which transfers to NSAs might be considered possible with or without the authorisation of the recipient states.

The actual risks associated with the issues noted above depend substantially on the specific character, aims and links of the NSA concerned. However they also depend critically on the context of the recipient country, and the capacity of the state to ensure effective control and accountability. The risk that the recipient state will not be able to ensure effective control and accountability is relatively high in: countries that are conflict-prone or suffering from high levels of violent crime; states without well-developed and enforced regulations and controls on SALW; or countries neighbouring conflict zones.

Restricting SALW transfers to NSAs that are not authorised by the recipient State

The most contentious issue at the UN relating to SALW transfers to NSAs concerned possible transfers that have not been authorised by the government of the recipient State. There is agreement that such transfers should not normally be authorised by the exporting or transit states. However, while most states have spoken in favour of a complete ban on such transfers, several have insisted on reserving the right to authorise such transfers in exceptional cases.

Consultative Group members agreed that there are, in principle at least, some 'hard cases' on which there could be legitimate debates about whether SALW transfers to certain NSAs might be justified in specific circumstances even without authorisation by the government of the recipient state. It agreed to consider them, and possible legitimate debates surrounding them, without prejudice to Consultative Group Members' positions on the matter.

Addressing hard cases

In addressing potential hard cases, it is possible to imagine, for example, a situation where popular opposition forces, having unsuccessfully tried all reasonable peaceful approaches, need arms to resist violence and oppression by a brutal dictatorship. It is similarly possible that some states may be sympathetic to authorising SALW transfers to groups they consider to be 'freedom fighters' resisting an illegitimate occupation force.

The Consultative Group examined in detail a number of 'hard cases' that have arguably arisen in practice in recent decades. To be a legitimate 'hard case' a combination of factors need to come together, where in a *particular* context, a case can be made to transfer SALW to a *particular* non-state actor, in pursuit of a *particular* aim – these are considered in turn.

All Consultative Group members agreed that SALW transfers to NSAs should not take place without authorisation by the government of the recipient country in nearly all circumstances. The only *particular contexts* in which legitimate debate could even arise appear to be:

- States experiencing civil war or internal armed conflict;
- States where there is large scale oppression, unjust occupation or genocide; or
- States that willingly harbour transnational organisations, such as terrorists, that pose a threat to international security.

Thus, in these contexts, it would be important to credibly assess whether the government of the state concerned was amenable to peaceful negotiation or pressure that would address the problem acceptably.

In relation to *motivations and aims* of the exporting or transit State, legitimate hard cases can only arise in circumstances where the aims are not shared by the government of the recipient state, but they are shared by at least a wide part of the international community and preferably the UN Security Council. Although in practice selfish national interest has motivated numerous arms transfers to NSAs, this is not sufficient to legitimise such actions.

From the discussions during the Process, the motivations for arms transfers that may even potentially be seen to be legitimate in relation to such 'hard cases' appear to be:

- Protect vulnerable communities or populations from imminent or on-going attack or violent oppression or genocide;
- Combat and prevent international terrorism or crime where it poses a major international threat;
- Promote a relatively desirable peace settlement;
- Prevent or correct a major injustice; and,
- Support international peace-support or humanitarian interventions.

Whether or not SALW transfers to NSAs would be justified even in these cases depends on assessments of whether other available ways of addressing the problem are available and have been explored. Other available approaches would first need to be pursued, including negotiation, international pressure including sanctions, or international intervention by the UN or other multilateral peace-support forces.

Moreover, even if there were wide international agreement on such aims in a specific circumstance, legitimacy would also require a credible assessment that SALW transfers to particular NSAs would be an effective and necessary element of a strategy to achieve these aims, and that the risks of such a transfer were acceptable. In the contexts noted above, there would normally be high risks of misuse, loss, diversion or re-transfer of SALW supplied for such purposes. There would, for example, need to be an identifiable NSA within the state in question that commands wide legitimacy and internal support, with unselfish aims likely to be supported by the great majority of the population, and with a commitment and capacity to control and use the transferred arms effectively and with restraint in line with relevant international norms and conventions.

The above criteria for being considered a 'hard case' in relation to SALW transfers to NSAs without authorisation by the recipient state are highly restrictive. Nevertheless, the Consultative Group believes that, in practice, cases might arise that meet such criteria. Thus, 'hard cases' should be taken seriously when considering possible international norms in this area.

Possible international policy responses to 'hard cases'

In discussing this further, the Consultative Group also examined in detail a range of possible international norms or policy guidelines relating to responses to authentic 'hard cases' as outlined above. It identified two possible broad approaches meriting further exploration: as outlined here in Option A and Option B with the arguments in favour and against identified in each.

Option A: Support a ban on any transfers of SALW

Even recognising the existence of some 'hard cases', there is nevertheless a case for supporting an international norm banning any transfers of SALW to an NSA unless they have been authorised by the government of the recipient state.

There are broadly two major arguments in favour of such an approach:

- In practice, even when the criteria for a 'hard case' are met, the risks associated with transfers of SALW to an NSA in those circumstances are sufficiently high for the transfer never to be justified. The international community should always focus on responding in other ways, including through multilateral humanitarian or peace-support intervention; and,
- 'Hard cases make bad law' – it is better to establish a clear international norm to constrain selfish or unwise transfers to NSAs, even if it may be justified to break the norm, perhaps covertly, exceptionally when hard cases arise.

Arguments against such an approach include:

- It is not clear that the benefits of authorising an arms transfer to an NSA will always be outweighed by the risks or costs, in cases where the criteria for a 'hard case' appear to be met. Thus an international ban, if rigorously respected, could have the effect of tolerating rather than decreasing injustice, oppression and human suffering; and,
- It is a mistake to support an international norm if one believes that it might be legitimate to disobey it in some realistic circumstances. It weakens the international norm, forces even responsible governments into hypocrisy or illegality, and prevents international discussion, regulation and oversight of transfers to NSAs when one or more states believe that a 'hard case' has arisen in which SALW transfers to an NSA is legitimate without authorisation by the government of the recipient state.

Option B: Develop international guidelines relating to 'hard cases'

The Consultative Group considered in detail possible policy approaches and options for recognising and addressing possible 'hard cases', where at least some states believe that exceptional circumstances mean that a transfer of SALW to a specific NSA might be justified even in the absence of authorisation by the recipient State.

Arguments in favour of such an approach include:

- The development of international guidelines or procedures relating to 'hard cases' promise to address the legitimate concerns and reservations of some states relating to a complete ban, and may offer opportunities for achieving international consensus on this contentious issue;
- This approach offers countries considering a transfer to an NSA in what it considers to be a 'hard case' the opportunity to avoid covert transfer, with its undesirable implications, and to consult and co-operate with the UNSC and the international community on the issues and risks;
- International procedures and guidelines could reduce the scope for states to justify selfish, destabilising or unwise transfers to NSAs on the declared grounds of legitimate support for 'freedom fighters'; and,
- International procedures and guidelines could potentially increase international transparency, oversight and control over transfers to NSAs where exceptional cases arise, improve the prospects for democratic oversight within the countries concerned, and could clarify the immediate and long-term responsibilities of the exporting and transit states involved.

Arguments against such an approach include:

- The prospects of reaching consensus on useful international guidelines and procedures in this area are remote;
- Exporting or transit states interested in transferring SALW to NSAs will continue to manipulate contested terms like 'terrorist' or 'freedom fighter' in a way that is likely to prevent any guidelines or procedures from operating in practice; and,
- Hypocrisy and selfish covert supply of arms to NSAs by governments will always be with us. It is better to accept at least a rhetorical commitment to an international ban, and move international debates on to focus on strengthening other mechanisms for controls on SALW.

Possible approaches towards the design of international procedures

In exploring option B, the members of the Consultative Group agreed that the possibility of developing international guidelines and procedures to address 'hard cases' is at least sufficiently interesting to merit further discussion.

If this approach were adopted, a number of principles were agreed to be important:

- Transparency and international consultation;
- Justification in terms of wider international interest ('responsibility to protect' vulnerable groups, or to promote just peace settlements and international security);
- Full consideration of alternative means to achieve the desired aims;
- Criteria for the selection, responsibility and accountability of the NSAs concerned, including the use and control of the arms (see also below for those issues that importing, exporting and transit states all have a responsibility to take into account, as they also apply here); and,
- Guidelines on the responsibilities of the suppliers, including restrictions on types and scale of SALW supplied, oversight and efforts to ensure appropriate controls; responsibility to collect, destroy or otherwise control the arms after the conflict.

Procedurally, possible mechanisms should include:

- Notification, information-exchange, and lesson learned mechanisms;
- Consultation, investigation and reporting procedures;
- Decision-making procedures or guidelines, on whether to authorise the transfers and what SALW types and quantities may be involved;
- Marking and accurate record-keeping of arms delivered;
- Monitoring and oversight of the transfer and subsequent use of the arms; and,
- Review of collection and destruction of weapons subsequently.

Considerations on whether an emerging situation meets the criteria of a 'hard case', and whether a transfer to a specific NSA were justified, should as far as possible be discussed at multilateral level, at the UN and elsewhere in other relevant regional or international forums. Procedures should at least be established whereby a government considering such a transfer to an NSA would be obliged to notify and consult with the UN Security Council (UNSC), and take into account international responses before taking a decision.

Guidelines on decision-making on whether to authorise SALW transfers to a specific NSA in an identified 'hard case' remain open to debate. Several Consultative Group members favoured an international guideline that insisted that only the UNSC may take a legitimate decision on such matters. Others argued that in practice this would not resolve the issue in exceptional cases, and that the decision on whether to transfer may also be taken by the exporting state itself or (preferably) by a multilateral or regional organisation such as ECOWAS, EU, OAS, or NATO, provided that this does not contravene an embargo or specific resolution of the UNSC.

Restricting SALW transfers to NSAs where the import is authorised by the recipient State

As emphasised above, many transfers of SALW to NSA end-users are uncontroversial in principle. Transfers of firearms to be held by private security companies, sports shooters, hunters or civilians for personal protection regularly take place, and are often uncontroversial provided that the transfer and possession is properly authorised by the government of the recipient state.

However, the Consultative Group recognised that internationally important issues and concerns arise even where the government of the recipient state is inclined in principle to authorise the transfer. These issues relate to the suitability of the specific NSAs concerned, and the wider context within which the transfer would take place.

Before deciding whether to issue licenses authorising the transfer, members of the Consultative Group generally agreed that the importing, exporting and transit states all have a responsibility to take into account a number of key issues relating to the supplied weapons, including risks of diversion, misuse, loss of control, use in conflict, or lack of appropriate accountability and control of the NSA itself. These issues are of general concern in all circumstances, as discussed above and in section 4 on page 13.



4. Guidelines for National SALW Transfer Controls

Many SALW enter illicit circulation or use through diversion from legal transfers. Large quantities of arms fall into the hands of criminals, terrorists, rebel groups and others through leakage from legally held military, police, civilian or other stocks. Legally transferred SALW can be misused in human rights abuses and repression. The core aim of transfer controls relating to the application of criteria is to prevent the misuse and uncontrolled proliferation of SALW.

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

Commitments in the UN PoA

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

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

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

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

This is an important commitment. However, it was hard negotiated and represents a compromise.

International Debates

During the preparations of the PoA, and subsequently, there were strong differences of opinion between groups of governments relating to guidelines for national decisions on whether to authorise SALW transfers. Some governments argued in favour of language that would more explicitly commit

states to assess applications for export authorisations against clear national guidelines, and would further specify a number of international guidelines that all states should take into account, similar for example to those included for example in EU and OSCE criteria for arms export controls.

However, a number of other governments were deeply reluctant to make such commitments. They expressed a number of concerns, including objections to guidelines that might imply that exporting states are in a position to assess the security requirements of importing governments. The result was that the PoA specifies only two common guidelines that states should take into account: the risk of diversion and consistency with relevant responsibilities under existing international law.

Building on what was achieved by consensus in the PoA, particularly relating to guidelines relating to risk of diversion and consistency with existing responsibilities under relevant international law, significant progress appears possible on developing international consensus on other factors that states should take into account when deciding whether to authorise transfers of SALW. This is demonstrated not only through the discussions of this Consultative Group, but also through the process launched by the Lancaster House Conference on 14 -15 January 2003 on controlling international transfers of SALW .

At each of its meetings the Consultative Group considered in detail issues relating to factors to be taken into account in national controls on SALW transfers. Its aim was to clarify and address concerns of governments adopting different positions, and to develop possible frameworks within which progress towards international consensus might be achieved. The differences have proved difficult to resolve, yet significant progress was achieved.

Approaches to developing international consensus

The Consultative Group identified some principles and approaches that promise to facilitate international discussions on this issue:

- All governments should be encouraged to exchange and publish information on the national guidelines they use when deciding whether to authorise SALW transfers. Detailed information exchanges during the Consultative Group meetings indicate that in practice many governments, from a variety of regions, use similar or related criteria;
- The focus for developing possible international 'guidelines', or 'factors to be taken into account' should be on factors to be applied by all states involved in authorising SALW transfers: importing and transit states as well as exporting states. From the discussion during the Consultative Group Process, different participants highlighted the importance of transfer controls involving the importing, transit as well as exporting states, eluding to examples to illustrate concerns over, for example, the risk of diversion. However, most of the factors proposed so far are formulated in terms of guidelines for exporting states, which raises concerns amongst governments of states that rely primarily on imports that the proposals may discriminate against them;
- Nevertheless, there was consensus that all states involved in a transfer should assess the risk of diversion and the transfers should be consistent with states' existing responsibilities under

international law. Sources of ideas about possible international guidelines or 'factors to be taken into account' should draw upon a wider range of sources, including those relating to agendas of most concern to developing countries (such as transfers to NSAs).

The Group identified four main sources for the development of possible international guidelines or 'factors to be taken into account': a) responsibilities under existing international law; b) guidelines relating to the risk of diversion; c) factors relating to SALW flows to NSA; and d) political factors to be taken into account.

A) Responsibilities under existing international law

The precise implications of the existing PoA commitment to ensure consistency with 'the existing responsibilities of states under relevant international law' remain open to debate. They were not elaborated or specified in the PoA. There are various and diverse understandings of the status of existing requirements of international law. The Consultative Group examined in detail the implications of "existing responsibilities" and explored the possibilities for developing common understandings on these.

It was consistently emphasised that all transfers must be authorised by both the importing and exporting states. Beyond that authorisation, a range of international legal limitations on transfers exists. These include:

- Express limitations such as UN arms embargoes; or limitations on particular kinds of weapons;
- Limitations based on the use of weapons: in particular human rights law and international humanitarian law, and;
- Circumstances 'to be taken into account' by states in assessing arms authorisations.

A wide body of international law exists with implications for such limitations and circumstances to be taken into account. The Consultative Group engaged in detailed discussion and exploration of existing responsibilities under international law and the implications of this for developing common understandings of the implications of those laws.

It was noted that there is a risk of undermining the strength of legal obligations by framing them as "factors to be taken into account." The importance of not diluting existing legal commitments was repeatedly emphasised. Nevertheless, existing responsibilities under international law, and politically-binding guidelines can be mutually reinforcing. The existing legal commitments can also provide an important source for formulating shared sets of 'factors to be taken into account'.

B) Guidelines relating to the risk of diversion

The PoA commitment to take into account the risk of diversion is a potential source of more specific factors to be taken into account. There are many mechanisms of diversion, and SALW transfer controls need to take account of all of these.

Factors to be taken into account to reduce risks of diversion include the existence and quality of mechanisms for:

- End-use controls;
- Marking, record-keeping and co-operation in tracing illicit SALW;
- Management and security of stockpiles;
- Transit controls, including pre-notification, monitoring and delivery verification; and,
- Implementation of the PoA and other related international and regional commitments.

In addition, factors such as the credibility of end-use statements and guarantees, and risks of loss of control over arms by recipient are relevant.

C) Factors relating to SALW flows to NSAs

As discussed in section 3 above, controls on flows of arms to NSAs are of high international concern to all countries, including exporting, transit and importing countries. The implication is that states should take into account factors relating to the risks of unauthorised or undesirable flows of arms to NSAs arising from the SALW transfer under consideration.

Factors to be taken into account within this framework include risks of direct or indirect/unauthorised flows of SALW to an NSA that may:

- Divert the SALW to other users or to uses other than those authorised, including re-export of the arms;
- Misuse SALW, for example through human rights abuses, excessive violence, or crime;
- Loose control of the supplied weapons, for example due to poor stockpile management or security, corruption, theft or capture;
- Become a party to armed violence or tension in the future, or that the supply of further SALW intensifies this risk; or
- Act without appropriate accountability to relevant national and international law.

D) Political factors to be taken into account

A range of politically-binding criteria for controlling arms transfers do exist, such as those being elaborated upon by the Lancaster House Process. These were examined by the Consultative Group.

Some of the guidelines articulated as factors to be taken into account in the Lancaster House process relate primarily to the assessments carried out by exporting states when considering applications for export authorisation. However many of them can relatively easily be expressed in terms that are of legitimate concern to *all* of the states involved in authorising a possible SALW transfer.

Individual elements of such reformulated factors to be taken into account attracted varying degrees of support in the Consultative Group. Such elements include:

- The right to self-defence in accordance with Article 51 of the UN Charter of all states involved in the process of the transfer;
- The right of all states involved in the process of the transfer to meet their legitimate national security needs;
- The consent of all states involved in the process of the transfer regarding transfers to territories under its control or jurisdiction;
- The need to avoid destabilising accumulations of arms in the states involved in the process of the transfer;
- The risk that the proposed SALW transfer might support or encourage terrorism and the risk that the proposed SALW transfer might facilitate organised crime in the states involved in the process of the transfer;
- The record of compliance with international obligations and commitments, in particular on the non-use of force and in the field of non-proliferation, or in other areas of arms control and disarmament; and the record of respect for international law governing the conduct of armed conflict of all states involved in the process of the transfer;
- The respect for human rights and the right to self-determination by all parties to the transfer;
- The risk that the proposed transfer will contribute to internal repression or armed insurrection;
- The impact of the proposed transfer on regional peace and security on all states involved in the process of the transfer; and,
- The least diversion of human and economic resources to armaments of all states involved in the process of the transfer.

Combining such guidelines: Developing shared understandings

It is apparent that the lists of concerns developed on the basis of each of the four sources have considerable overlap, even if there is some difference of emphasis.

The Consultative Group thereby believes that future efforts to develop common global understandings on factors to be taken into account are most productively based on the above sources. Such a process should have no implication of possible levelling down of national transfer controls, or limitations on implementation of existing regional and international commitments under international and humanitarian law.



5. Next Steps

The Consultative Group invites all interested states, international and regional organisations, civil society groups, and independent experts to consider the results of the first phase of its work, and to use them to further the debates and contribute to the implementation and further development of the PoA and associated international and regional agreements.

The Consultative Group itself has decided to continue and develop its work during the period of 2004 to 2006. In this second phase, the Group plans to refine proposals and recommendations for possible consideration in preparations for the 2005 Biennial Meeting of States and the 2006 UN Review Conference.

Two further meetings are planned in advance of the Biennial Meeting of States. The first is provisionally planned to take place in September 2004 in South Asia and the second in early 2005 in Latin America. The main purpose of this next phase is to refine the discussions on the two key issues of transfers to NSAs and guidelines for national decisions on transfers, build consensus and strategically involve new participants from key states.

A report outlining progress and findings emerging from the Process will be published prior to the 2005 Biennial Meeting of States to contribute to discussions and debate. Two further meetings will then be held in advance of the Review Conference and a final report, reviewing further progress and proposing key recommendations for the conference will be produced. The exact content of these reports will develop as the discussions in the Group progress, but it is our intention to develop a set of guidelines (with an explanation as to how these have been arrived at) on NSAs and national transfer controls.

The membership of this Process will continue to include existing participants, and to develop and expand its membership and engagement with representatives of states, regional and international organisations and NGOs across the world. The Consultative Group Process will also aim to retain its informal and exploratory character that has enabled the fruitful discussions to take place.

Endnotes

¹ Biting the Bullet is a joint project of International Alert, Saferworld and the University of Bradford to inform and promote the development and implementation of the UN Programme of Action on small arms.

² In relation to paragraph 11 of Section II of the UN Programme of Action To Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects.

³ This Chair Report was drafted by Owen Greene (University of Bradford) with other BtB partners, under the guidance of the Small Arms Consultative Group participants.

Notes



BITING THE BULLET PROJECT

Biting the Bullet is a joint project between Saferworld, International Alert and the University of Bradford. It helped facilitate a wide-ranging and well-informed debate between governments and civil society in the run-up to the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects in July 2001.

Following the agreement of the Programme of Action, Biting the Bullet is now working to promote international understanding of key issues relating to the implementation of the Programme of Action while creating opportunities to discuss the critical issues that proved controversial at the 2001 UN Small Arms Conference. In order to facilitate discussion on these issues, an informal Consultative Group Process involving government officials, international experts and non-governmental organisations was created and has met four times already to discuss the issues of guidelines for national controls on arms transfers and transfers to non-state actors.

In addition Biting the Bullet produced a substantial report on states' implementation of the commitments set out in the Programme of Action. This monitoring report analyses progress at the national, regional and international level. It was researched by partners from all world regions and produced by Biting the Bullet for the International Action Network on Small Arms (IANSA). Another implementation report is being prepared for the 2005 Biennial Meeting

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