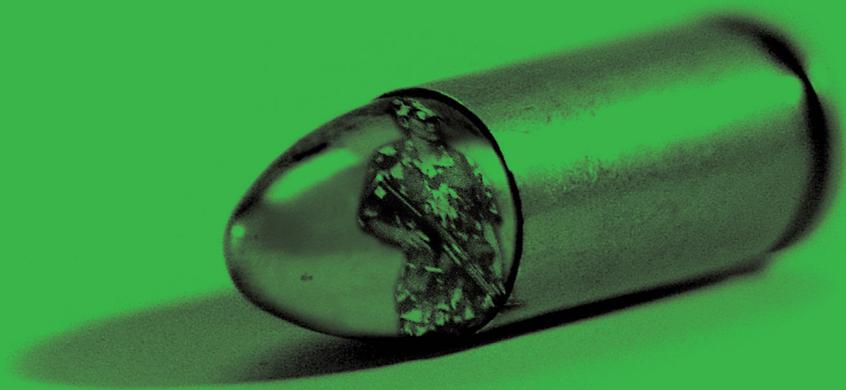


**SMALL ARMS AND LIGHT WEAPONS  
TRANSFER CONTROLS TO PREVENT  
DIVERSION: DEVELOPING AND  
IMPLEMENTING KEY PROGRAMME OF  
ACTION COMMITMENTS**

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BRIEFING

**BITING THE BULLET**

## International Alert.

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International Alert is an independent peacebuilding organisation working in over twenty countries and territories around the world. We work with people affected by violent conflict as well as at government, EU and UN levels to shape both their policy and practice in building sustainable peace. Our regional work is focused mainly on the African Great Lakes, West Africa, the Caucasus, Colombia, Sri Lanka, Nepal and the Philippines. The issues we work on include business, humanitarian aid and development, gender, security and post-conflict reconstruction.



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Saferworld is an independent non-governmental organisation working to identify, develop and publicise more effective approaches to tackling and preventing armed conflict. Saferworld aims to foster greater international restraint over transfers of arms – from light weapons to major conventional weaponry – and dual use goods. At the same time, Saferworld aims to work with governments and non-government groups on the ground in regions of conflict in order to better control flows of, and reduce demand for, arms.



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The Centre for International Co-operation and Security (CICS) is an international centre for applied and policy research and training, combined with academic research excellence. CICS works on international and transnational issues in the fields of conflict, security, development and governance (including arms reduction and control, conflict prevention, post-conflict peace-building; conflict-sensitive development; security sector reform; and DDR programmes). It is based in the Department of Peace Studies at the University of Bradford (UK) – itself an internationally recognised centre of excellence in research and teaching on peace and conflict issues. CICS staff have played a prominent international role in researching on SALW proliferation, trafficking and misuse, and on the development and implementation of national, regional and international agreements and programmes to tackle SALW and related issues.

This briefing was written by Owen Greene and Elizabeth Kirkham. Thanks go to Helen Close for providing research support.

The views expressed herein are those of the authors and do not necessarily represent those of the Biting the Bullet Project.

# SMALL ARMS AND LIGHT WEAPONS TRANSFER CONTROLS TO PREVENT DIVERSION: DEVELOPING AND IMPLEMENTING KEY PROGRAMME OF ACTION COMMITMENTS

Biting the Bullet Policy Report

For the Informal Meeting on Transfer Control Principles for Small Arms  
And Light Weapons  
Geneva, August 2007

Authors: Owen Greene and Elizabeth Kirkham

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## **Executive Summary**

This Biting the Bullet (BtB) report focuses on the issue of preventing and reducing unauthorised diversion of Small Arms and Light Weapons (SALW) transfers. This is widely acknowledged to be a critical issue, and the UN Programme of Action on SALW (PoA) includes strong and unambiguous commitments on this matter. The challenge is to promote and improve implementation of these commitments, which has rich implications.

The report complements discussions on the range of other important issues relating to SALW transfers, such as debates relating to the scope and character of 'existing responsibilities under relevant international law', assistance and resource mobilisation. BtB and its partners have addressed such issues in previous publications.

In practice, virtually all states in the world actively participate in SALW transfers, as importers, exporters, transit or transshipment states, or because arms brokers or shipment agencies operate within their jurisdiction. Most states are actual or potential exporters of SALW, as sources of second-hand or traded arms, ammunition, parts and components even if not as primary manufacturers. Moreover, states regulating import, transit or transshipment of SALW have major responsibilities in their own right. For this reason it is important to focus on ensuring effective controls on all aspects of a SALW transfer.

### **Addressing diversion of SALW transfers to unauthorised recipients**

It is important not to miss opportunities to move forward on clarifying and elaborating international guidelines in less politically contested areas of the PoA on transfer controls including those relating to prevention of diversion of SALW transfers to unauthorised recipients. No state has expressed any normative reservation about this aspect of PoA commitments to control SALW transfers, yet this commitment also has rich and complex implications for any state.

The processes by which SALW transfers are diverted to unauthorised recipients are complex. A properly authorised SALW transfer may be lost or stolen in transit. Occasionally, this takes place despite the best efforts of the exporting, transit and importing state officials. Much more often, the diversion occurs as a result of inadequate or inconsistent national regulations or systems, poor enforcement practices, or due to deliberate, corrupt or neglectful performance by some officials, in one or more of the states responsible for regulating the transfer.

A further dimension of diversion of SALW transfers is when the SALW reach their authorised recipient, but then become accessible by unauthorised other agents or groups. The security and management of SALW holdings by the authorised recipient may be inadequate, enabling loss or theft, or the recipient may transfer some or all of the SALW shipment to parties which had not been authorised by the initial exporting, transit or importing state. This retransfer may take place quickly, or may not occur for several years.

The main priority for states is to prevent SALW diversion before it takes place, by denying transfer authorisation to risky applications. PoA commitments to prevent diversion of SALW transfers imply that all concerned states (including exporting, transit, and importing states) should undertake a proper assessment of risk of diversion before authorising the transfer, including the following risks:

- That the transfer control documentation is forged or not properly authorised
- That the statement relating to end-user or end-use is false or misleading
- That brokers may either facilitate diversion or take inadequate precautions against diversion
- That transshipment agents involved with the transfer could lose control of the shipment or take inadequate precautions against diversion
- That the shipment could be diverted to unauthorised destinations, or destinations that may exercise inadequate controls

- That the regulations and controls of the recipient state relating to SALW holding, ownership, use, sale, or transfer by the end-user are inadequate, or that compliance with and enforcement of such controls is inadequate
- That the authorised recipient may divert the SALW to other users
- That the authorised recipient would lose control of the supplied weapons
- That the recipient comes under pressure to supply arms to groups in areas of armed violence or tension in the future.

The PoA clearly implies that every state concerned should either deny the transfer or take reasonable measures to mitigate the risks of SALW diversion. Possible risk mitigation measures include:

- Ensuring clear end-use and end-user agreements
- Clarifying that the stated end-user identifies real and legitimate need for the SALW concerned (and has satisfactory arrangements in place to ensure responsible disposal of any weapons rendered surplus by the transfer)
- Requiring pre-authorisation of transit routes and transshipment agencies
- Ensuring respectable track record and effective regulation of any brokers and transshipment agents involved
- Monitoring progress of the shipment towards its destination
- Checking delivery to authorised recipient
- Post-delivery checking against subsequent loss or retransfer.

There are many existing standards and good practices and potential international mechanisms and procedures that could usefully be established. This report addresses three of these: end-use controls; transit controls; and controls on retransfer.

### **End-use/end-user certificates (EUCs)**

In recent years numerous examples have come to light of poor and inadequate end-use certification systems and of negligent and corrupt end-use practices that have facilitated the illicit trade in SALW. Overall, there is clear evidence of the following types of cases:

- Cases involving corrupt government agents and/or government complicity
- Cases involving falsification of EUC
- Cases involving failure to ensure authenticity of EUCs.

The acceptance of EUCs at face value by exporting governments is, on its own, insufficient to prevent illicit transfers of SALW. In order to ensure that furnished EUCs are not, in fact, false, governments considering licensing the export of SALW and other weapons need to take steps to verify the authenticity of EUCs that are provided. However even if an EUC is found to be genuine exporting governments need also to be alert to the possibility that the provider of an EUC may be acting as an undeclared agent in acquiring arms and then diverting them to a proscribed end-user. Where governments consider this to be a risk clearly an export licence should not be granted.

The PoA commits states to using “authenticated end-user certificates and effective legal and enforcement measures” (Section II, para 12), and at multilateral and regional level a substantial level of commonality is emerging around EUC requirements amongst those regions and countries that have taken this issue seriously.

The report examines several different aspects of developing good practice with regard to EUCs covering:

- Types of end-use documentation
- Security features
- Authentication procedures
- Delivery verification
- Re-export restrictions

- Follow-up
- Sanctions.

It is important to recognise that, while seeking to develop and promote best practice in end-use control, some states have little experience in such matters and few available resources that can be channelled to these ends. However, if states are serious about preventing and combating the illicit trade in SALW it is clear that certain minimum standards need to be adopted by all states. These should include:

- The systematic employment of EUCs carrying details as specified, for example, by the EU or Wassenaar Arrangement
- The inclusion of commitments to ensure no diversion and no unauthorised re-export clauses in the EUC
- The receipt prior to shipment of approval from the importing and transit states that they authorise the transfer of SALW into/through their territory
- The routine authentication of the details provided on an EUC using open source information
- Where possible, the checking of information provided by the end-user by foreign embassy staff or through direct contact between government departments in the exporting and recipient state
- The requirement that verification of delivery is provided along with confirmation of transit routes
- Reserving the right to carry out on-site inspections should concerns arise post-export
- Clear and proportionate sanctions in the event that breaches of end-user undertakings are discovered.

### **Preventing the unauthorised re-export of SALW**

Section II, para 13 of the PoA makes an important reference to the need to regulate the re-export of SALW. This 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."

This report examines current practices relating to the re-export of SALW with regard to the following:

- States providing re-export notification
- Re-export licensing criteria
- Re-export and end-use controls
- Sanctions.

The extent to which exporting states seek to control the re-export of SALW is an important policy issue for all states. It is key to preventing undesirable and sometimes illicit transfers of SALW. Best practice in preventing the unauthorised re-export of SALW could be considered to be as follows:

*From the perspective of the original exporting state:*

All states should investigate and take full account of the risks of re-export of SALW in the export licensing process. These risks need to be assessed *inter alia* by examining whether the SALW for transfer are commensurate with the legitimate defence and security needs of the importing state as well as appropriate to the needs of the particular end-user. In addition the capacity of the importing state to retain control of the SALW and to prevent their unauthorised diversion or re-export should also be considered.

Checks undertaken to assure the *bona fide* nature of an end-user (see above) need to be part of any effort to guard against re-export. States need to begin by consulting readily available

information and then pursue matters through foreign embassies or direct governmental contact.

SALW transfer contracts, licences and/or EUCs need to include clear provisions relating to controls on re-export, with responses and possible sanctions available to be used in the event of any breaches of these undertakings. The most stringent practice is clearly that there is clear and unequivocal acceptance on the part of the end-user that the SALW are for their sole use and are not to be diverted to another end-user or re-exported without notification or authorisation.

*From the perspective of the re-exporting importing state:*

At a minimum, all states should fulfil their PoA requirement to notify the original exporting state in the event of the retransfer of SALW. However, any additional re-export stipulations (for example a non-re-export clause) that have been agreed within the context of a particular transfer of SALW should be strictly adhered to.

### **Controlling transit of SALW**

Transit controls can represent a weak link in the chain of transfer controls and inadequate controls can be a major contributory factor in the illicit trade in SALW. While in transit, SALW remain susceptible to diversion from the intended, authorised end-user to an illicit entity. Effective transit controls are thus a major part of efforts to prevent and combat the illicit trade in SALW. Despite this, transit controls have yet to become a major subject for international debate and opportunities for the diversion of in-transit shipments of SALW remain.

The PoA carries only limited provisions relating to transit control of SALW. Section II para 2 calls on states to “put in place ... adequate laws, regulations and administrative procedures to exercise effective control over the...transit of [SALW]”, also repeated in paragraph 12, while Section II para 11 requires states “to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit”. 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.

This report explores current practices with regard to controlling transit of SALW from the point of view of:

- The existence of transit controls
- Information required in transit licensing
- Multilateral agreements on SALW transit
- When is a transit licence required
- The capacity to exert effective transit controls
- The security of SALW in transit.

This review of some current practices highlights certain elements that could be considered as emerging best practice including the following:

- The adoption of laws regulations and administrative procedures that allow for the scrutiny and control of all SALW entering national jurisdiction – including territorial waters, air space and sea and air ports
- Securing of the consent (or non-objection) of transit and importing states prior to authorising any export of SALW
- The exchange of information on transit and transshipment licensing with relevant trading partners
- The issuing of transit licences to be dependent upon the provision of all relevant export and import documentation
- Scrutiny of any transit licence applications according to strict criteria such as those agreed by states parties to Nairobi Protocol in the Best Practice Guidelines

- Measures to assure the monitoring and security of all SALW in-transit through national jurisdiction in order to guard against theft or diversion.

## **Conclusions and recommendations**

*Every state has responsibilities seriously and systematically to assess risks of diversion before deciding whether to authorise an SALW transfer. Responsible national officials and units require clear and comprehensive national guidelines and elaborated lists of factors to be taken into account. International understandings should also be developed.*

*Wherever there is a significant risk of diversion to unauthorised users, either before or after the SALW shipment has reached its authorised recipient, the PoA clearly implies that every state concerned should either deny authorisation or take responsible and effective measures to mitigate the risks. In principle, such risk mitigation measures could be established on a case-by-case *ad hoc* basis. In practice, this is not feasible or effective. Guidelines, procedures, mechanisms and capabilities need to be put into place to enable such risk mitigation, including relevant international co-operation mechanisms. If these are not in place, a responsible state should comply with its PoA commitments and deny authorisation for any transfer which poses significant risks of diversion.*

*The next steps for international action to promote implementation of the PoA commitments to prevent and combat diversion of SALW transfers are to clarify the implications of these commitments and prepare for effective consideration at the 2008 Biennial Meeting of States. We hope that this report contributes towards this objective.*

## 1. Introduction

Effective international action to tackle trafficking, proliferation and misuse of Small Arms and Light Weapons requires a comprehensive and multilevel approach to address each aspect of this complex challenge. Measures to enhance controls on SALW transfers are one critical aspect of such action. This is clearly recognised by all states in the UN Programme of Action (PoA) on SALW, which includes a range of important commitments designed to help to prevent, combat and reduce SALW trafficking and proliferation.<sup>1</sup>

Unfortunately, although there has been some progress, implementation of these PoA commitments by states remains inadequate and patchy.<sup>2</sup> There are many reasons for this, but one important contributory factor is that the implications of the several key commitments are not clear or elaborated in the PoA leading to confusion or neglect by responsible government officials. For this reason, since 2001 there have been several international initiatives to elaborate and clarify principles and procedures for PoA commitments on SALW transfer controls. At the 2006 PoA Review Conference most countries made major efforts to achieve agreements on these matters. The Review Conference failed to reach consensus on a final substantial document. Nevertheless, efforts to promote implementation of effective SALW transfer controls, in line with PoA commitments, must remain a priority.

It is therefore important to prepare for constructive and detailed discussion of these matters at the 2008 Biennial Meeting of States (BMS). The Informal Meeting on Transfer Control Principles for SALW (Geneva, 27 – 31 August 2007) is an important opportunity to identify and develop effective approaches towards improved international understandings on SALW transfer controls.

A key challenge at this point is to find ways of ensuring that international discussions on SALW transfer controls remain practical and fresh, and make progress despite some of the frustrating and sterile rhetorical debates and political divisions. It is also important to enable continued progress towards elaboration of PoA agreements on SALW transfers at the same time as states explore the possibilities of establishing a legally binding Arms Trade Treaty covering all types of conventional arms. It would be tragic and unnecessary for progress on clarifying commitments on SALW transfer controls to stall due to confusions about linkage.

*This Biting the Bullet (BtB) report focuses on the issue of preventing and reducing unauthorised diversion of SALW transfers.* This is widely acknowledged to be a critical issue, and the PoA includes strong and unambiguous commitments on this matter. Every state, as far as we know, is unambiguously committed to the principle that states should take full account of the risks of diversion of SALW to unauthorised recipients when considering whether to authorise an SALW transfer. The challenge is to promote and improve implementation of this commitment, which has rich implications.

In focusing on this issue, we intend to complement discussions on the range of other important issues relating to SALW transfers, such as debates relating to the scope and character of “existing responsibilities under relevant international law” (PoA Section II, para 11), assistance and resource mobilisation. BtB and its partners have addressed such issues in previous publications.<sup>3</sup>

The next section briefly outlines recent agreements and initiatives to clarify and elaborate the implications of PoA commitments relating to SALW transfers, and to highlight some key issues. Section 3 then examines key issues and priorities relating to preventing diversion of

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<sup>1</sup> See, *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspects*, 9-20 July 2001, UN Doc A/CONF.192/15.

<sup>2</sup> See *Reviewing action on small arms: assessing the first five years of the UN Programme of Action*, Biting the Bullet, 2006; *International action on small arms: examining the implementing the Programme of Action on small arms*, Biting the Bullet, 2005; *Implementing the Programme of Action 2003: action by states and civil society*, Biting the Bullet, 2003. for a detailed examination of this.

<sup>3</sup> See *Small Arms Consultative Group Process: developing international guidelines for national controls on SALW transfers*, BtB, March 2006; *Small Arms Consultative Group Process: developing international norms to restrict SALW transfers to non-state actors*, BtB, November 2005. These and other reports are available on the BtB website [http://www.international-alert.org/our\\_work/themes/biting\\_the\\_bullet.php#briefings](http://www.international-alert.org/our_work/themes/biting_the_bullet.php#briefings).

SALW transfers to unauthorised recipients. Sections 4, 5 and 6 respectively examine in some detail priorities relating to three selected types of measures to reduce risks of diversion: respectively end-use controls; transit controls; and controls on retransfer. The final section highlights some conclusions and recommendations on next steps, including priorities for ensuring productive discussion at the 2008 BMS.

## **2. Developing International Understandings on PoA Commitments to Control SALW Transfers**

### **International commitments and national responsibilities**

In virtually every part of the world, the two most important factors contributing to illicit and uncontrolled flows and holdings of SALW are:

- Inadequate controls on authorised arms transfers
- Losses due to inadequate management or security of official or authorised stocks of arms and ammunition.

Thus action to ensure effective and responsible controls on legal SALW, including controls on SALW transfers, must be a core part of any international or regional action to prevent, reduce or combat the illicit trade in SALW. This is clearly recognised in the PoA, which includes commitments on states to:

- Effectively regulate and control all export, import, transit, and brokering of SALW
- Assess authorisations of transfers against clear and appropriate criteria and principles (including reducing risk of diversion and consistency with existing commitments under relevant international law)
- Exercise effective end-use/end-user controls
- Ensure effective operational systems for controlling SALW transfers (including border controls)
- Support and ensure enforcement of UN and other international arms embargo commitments.

Decisions on whether or not to authorise a possible SALW transfer are a matter for national governments, provided that they are consistent with international obligations such as compliance with UNSC Resolutions and responsibilities under relevant international law. All international initiatives to improve controls on SALW transfers operate within this framework. They focus on:

- Increasing the awareness and capacity of relevant national decision-makers, officials and mechanisms to ensure that national SALW transfer controls operate effectively and consistently with national policies and commitments
- Clarifying and elaborating the implications of national policies and guidelines for assessing whether to authorise an export, import, transit, transshipment or brokering of SALW, including PoA commitments and other international and regional commitments of the state concerned
- Facilitating consultations, co-operation and confidence building between governments and other stakeholders.

Experience shows that all of the above are very important for promoting good quality and consistent national assessments and decisions on SALW.

During the period leading up to the UN 2001 Conference on SALW, several regional organisations established agreed principles, guidelines and procedures on controlling SALW transfers, including the Organisation of American States (OAS), Southern Africa Development Community (SADC), Economic Community of West African States (ECOWAS), East African Community (EAC)/Inter-Governmental Authority on Development (IGAD), EU, Organisation for Security and co-operation in Europe (OSCE), and South Pacific Forum. Several of these

regional agreements have subsequently been supplemented, elaborated or strengthened. The PoA, established in 2001, provided the main global agreement with commitments on SALW transfers and related matters (and states affirmed their strong commitment to the PoA at the 2006 Review Conference and in UNGA Resolutions).

### **Implementing PoA commitments on SALW transfer controls**

Numerous states and regions have made significant progress since 2001 towards implementing their PoA commitments. But unfortunately such progress has been patchy, and some regions and countries have made little discernable progress.<sup>4</sup>

A range of factors appear to explain this troubling situation in relation to controls on SALW transfers. Some fragile or post-conflict states lack capacity to properly implement or enforce appropriate national controls. A much larger category of industrialised and developing states also need to build their capacity to establish and implement SALW transfer controls in line with good practice. Experience demonstrates a strong correlation between the existence and dynamic development of regional or sub-regional agreements and performance at national level. In many countries, the political will to ensure effective and consistent arms transfer controls appears to be inadequate, partial or sporadic.

### **Initiatives to clarify guidelines for implementation of PoA commitments**

One key factor contributing to inadequate performance appears to arise from the formulation of the PoA itself. The implications of several relevant PoA commitments are unclear. In the absence of more elaborated guidance, the national officials and decision-makers responsible for taking decisions on SALW controls often do not take adequate account of PoA commitments. For example, what information and assessments do they need to avoid risks of diversion, or to ensure consistency with existing responsibilities under relevant international law?

To address this problem, significant international initiatives were launched after 2001 to promote, clarify and elaborate the PoA commitments relating to controls on SALW transfers. Most prominent were the Transfer Control Initiative (TCI) and the Informal Consultative Group Process (CGP).

The TCI was sponsored by the UK and an increasing number of other states across the world. It was launched with a major international conference in 2003 at Lancaster House, and was followed up through to 2006 through a series of regional workshops and bilateral consultations, with the objectives of exchanging experience and pursuing the goals outlined above. One of the many outcomes from this initiative was a draft set of suggested international principles or “factors to be taken into account” agreed by a group of governments and other groups at an international workshop in Nairobi in April 2006.<sup>5</sup>

The CGP was a process involving over 34 governments from across the world, together with the UN, regional organisations, and non-governmental experts. It was co-ordinated by the Biting the Bullet (BtB) project. The CGP similarly involved a series of international workshops across the world between 2002 – 2006, with the aim of developing international shared understandings and ideas to two linked and critical issue areas:

- International guidelines for national decisions on whether to authorise SALW transfers
- Restrictions on transfers of SALW to non-state actors.

This CGP process successfully developed some common approaches, and generated a series of widely discussed analyses and possible guidelines.<sup>6</sup>

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Suggested global guidelines for national controls governing transfers of small arms and light weapons*, Nairobi Conference on Transfer Controls, 20-21 April, 2006.

<sup>6</sup> See *Small Arms Consultative Group Process: developing international guidelines for national controls on SALW transfers*, BtB, March 2006; *Small Arms Consultative Group Process: developing international norms to restrict SALW transfers to non-state actors*, BtB, November 2005.

Through these and other initiatives, substantial progress was made between 2001 and 2006 towards developing international understandings to clarify and develop the implications of PoA commitments relating to SALW transfer controls. A large majority of states, but not all, found such processes important and were willing to support a clarification to promote implementation of PoA commitments in these areas. Nevertheless, after the failure of the 2006 Review Conference to consolidate these advances in an agreed document, there is a risk that the advances in recent years will remain unconsolidated and even lost.

### *Ensuring effective legal and procedural controls on SALW*

The UN PoA includes commitments such as “to put into place, where they do not yet 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” (PoA, Section II, para 2).

In practice, the great majority of countries have relevant laws, regulations and administrative procedures in place. But in many cases these are badly out of date, ineffective, inconsistent or incomplete. Those states and regions that have given serious attention to ensuring effective implementation of PoA commitments in this area have found it necessary in recent years to:

- Overhaul and develop their laws and regulations
- Review and strengthen their capacities for assessing applications for SALW transfers; managing the decision-making process; and monitoring and enforcing national decisions
- Improve accountability to promote rigorous and consistent implementation of national policy and regulations
- Support development and dissemination of, and training in, good-practice guidelines at a national and regional level.

In the lead-up to the 2006 Review Conference, there was wide interest among states in developing guidance and mechanisms for international assistance and co-operation on a range of legal, regulatory and administrative arrangements. This included proposals relating to: developing government systems and units for managing SALW transfer controls; developing ‘model law’; enhancing adoption of effective transit and transshipment monitoring and control; authenticated end-user certification; and end-use controls. The new international agreement to enable timely and reliable co-operation to trace illicit SALW is an important step forward in this context, with the priority now being to promote effective implementation. Similarly, the work of the GGE on SALW Brokering will hopefully help to promote development of effective and consistent national laws and regulations to control SALW brokering activities.

In practice, the development of policy guidelines and legal and procedural systems should be seen as closely inter-related processes. It is important to move forward in tandem on both of these dimensions of SALW controls.

## **3. Addressing Diversion of SALW Transfers to Unauthorised Recipients**

### **Preventing diversion: an issue ripe for international progress**

A key obstacle for international clarification of PoA commitments relating to controls on SALW transfers is that some of them had to be particularly carefully formulated in order to manage differing positions and achieve consensus support. It is thus not surprising that progress towards agreeing on ways to clarify and elaborate such commitments is slow and hard.

One such highly negotiated PoA commitment is that states should “assess export applications according to strict national regulations and procedures that cover all SALW and are consistent with the existing responsibilities of States under relevant international law...”(PoA Section II,

para 11). Relevant international law goes well beyond obligations to respect UNSC Resolutions or prevent genocide, to include laws relating to humanitarian law, human rights and other areas.<sup>7</sup>

The problem is that states appear to disagree about: which international laws are relevant; the extent to which some of these laws are binding on them; and the scope of their existing responsibilities under laws they accept, where they relate to SALW transfers. For example, a few states appear to dislike any specific reference to human rights laws and obligations in relation to SALW transfers, but do not want to find themselves in the diplomatically difficult situation of explicitly disowning them. Their solution is to try to avoid or postpone any detailed international discussion of the whole area. Many other states are willing in principle to agree to political guidelines requiring them to take risks of human rights or humanitarian into account when deciding whether to authorise a SALW transfer, but are reluctant to agree to specific interpretations of international law in this respect.

These obstacles in clarifying key PoA commitments need to be overcome, and deserve high-level and consistent attention. In the meantime, however, it is important not to miss opportunities to move forward on clarifying and elaborating international guidelines in less politically contested areas of the PoA on transfer controls – particularly those relating to prevention of diversion of SALW transfers to unauthorised recipients. No state has expressed any normative reservation about this aspect of PoA commitments to control SALW transfers. Yet this commitment also has rich and complex implications for any states that take it seriously, which they need to discuss and clarify to guide implementation of national controls by their responsible national officials and authorities.

### **Implications of PoA commitments to prevent and reduce diversion of SALW transfers**

The processes by which SALW transfers are diverted to unauthorised recipients are complex. A properly authorised SALW transfer may be lost or stolen in transit, before it reaches its legitimate recipient. Occasionally, this takes place despite the best efforts of the exporting, transit and importing state officials. Much more often, the diversion occurs as a result of: inadequate or inconsistent national regulations or systems; poor enforcement practices; or due to deliberate, corrupt or neglectful performance by some officials, in one or more of the states responsible for regulating the transfer. Dubious arms brokers earn their money by their ability to circumvent or corrupt the complex of systems and laws of the states concerned.

A further dimension of diversion of SALW transfers is when the SALW reach their authorised recipient, but then become accessible by unauthorised other agents or groups. For example, the security and management of SALW holdings by the authorised recipient may be inadequate, enabling loss or theft. Alternatively, the recipient may transfer some or all of the SALW shipment to parties which had not been authorised by the initial exporting, transit or importing state. This retransfer may take place quickly, or may not occur for several years.

### **The responsibility seriously to assess risks of diversion**

The main priority for states is to prevent SALW diversion before it takes place by denying transfer authorisation to risky applications. At a minimum, PoA commitments to prevent diversion of SALW transfers imply that all concerned states (including exporting, transit, and importing states) should undertake a proper assessment of risk of diversion before authorising the transfer.

This is a challenge for each of the states involved because serious assessments of risks of diversion are often very demanding of resources and time. Each link in the chain needs to be checked and assessed by each national authority involved.

For the exporting state, sometimes even ensuring that the documentation authorising import is authentic and legitimate can be very time-consuming, given the variety of national

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<sup>7</sup> See, for example, *Compilation of global principles for arms transfers*, Arms Trade Treaty Steering Group, 2007, [http://www.controlarms.org/documents/2007/Compilation%20of%20Global%20Principles%20for%20Arms%20Transfers\\_2007.pdf](http://www.controlarms.org/documents/2007/Compilation%20of%20Global%20Principles%20for%20Arms%20Transfers_2007.pdf).

certification systems and authorised signatories. The risks of diversion in transit require detailed assessments and checks on the route and shipping agents. The risks that authorised end-users may retransfer the goods to unauthorised groups require an evaluation of the effectiveness of the regulatory systems of the importing state, and of the interests, needs and capacities of the specific end-user (for example a provincial police force, or a gun-dealer). Similar challenges face the national authorities of the transit and importing state.

These are demanding challenges even for major developed states, with well-developed and resourced national regulations and enforcement systems and with relevant trained embassy staff and resources in most potential partner countries. For smaller or developing countries, there is little prospect of making effective risk assessments for any but a few well-established trading partners without international co-operation.

In all cases, national officials responsible for such risk assessments need clear and elaborated guidelines on what factors need to be taken into account when assessing applications for SALW transfers and how to gather and assess the relevant information.

Some of the guidelines and factors to be taken into account when assessing risks of diversion thus include the following:

- The risk that the transfer control documentation (such as importation certificates) is forged or not properly authorised by the state concerned
- The risk that the statement relating to end-user or end-use is false or misleading
- The risk that brokers involved in the transfer may either facilitate diversion or take inadequate precautions against diversion
- The risk that transshipment agents involved with the transfer could lose control of the shipment or take inadequate precautions against diversion
- The risk that the shipment could be diverted to unauthorised destinations, or destinations that may exercise inadequate controls, once it was outside territorial jurisdiction of the authorising states
- The risk that the regulations and controls of the recipient state relating to SALW holdings, ownership, use, sale, or transfer by the end-user (which may be a state agency or a non-state entity, such as a private security company) are inadequate, or that compliance with and enforcement of such controls is inadequate
- The risk that the authorised recipient may divert the SALW to other users or to uses other than those authorised, including re-export of the arms
- The risk that the authorised recipient would lose control of the supplied weapons, for example due to poor stockpile management or security, corruption, theft or capture
- The risk that the recipient comes under pressure to supply arms to groups in areas of armed violence or tension in the future, or that the supply of further SALW intensifies this risk.

It is important to note that these risks need to be assessed by transit and importing states, as well as exporting states. The end-user in the recipient state may be a non-state entity, such as a private security company or individual, as well as a government agency with legitimate needs for the weapons but inadequate controls.

### **Mitigating risks of diversion**

Wherever there is a significant risk of diversion of the SALW transfer, either before or after it reaches its authorised recipient, the PoA clearly implies that every state concerned should either deny the transfer or take reasonable measures to mitigate the risks. There are a wide range of possible risk mitigation measures, such as:

- Ensuring clear end-use and end-user agreements
- Clarifying that the stated end-user identifies real and legitimate need for the SALW concerned (and has satisfactory arrangements in place to ensure responsible disposal of any weapons rendered surplus by the transfer)
- Requiring pre-authorisation of transit routes and transshipment agencies

- Ensuring respectable track-record and effective regulation of any brokers and transshipment agents involved
- Monitoring progress of the shipment towards its destination
- Checking delivery to authorised recipient
- Post-delivery checking against subsequent loss or retransfer.

A core element of risk mitigation is to develop good and enduring co-operation between the exporting, importing and transit states concerned. For example, legitimate transfers are facilitated if the exporting and transit states are confident in the effectiveness of the importing state's systems for issuing and enforcing importation certificates and regulating and ensuring good controls on SALW holdings within their jurisdiction. Similarly, regular and reliable communications between concerned states relating to each SALW transfer helps to mitigate risks of diversion.

A further key element of risk mitigation is to learn effectively from experience. If unauthorised diversion of previous SALW transfers has taken place involving some of the involved parties, special caution is necessary. States thus have a responsibility to maintain and use systems for monitoring past shipments, and to take proper account of possible diversion. Some states, such as the USA, do this through procedures for post-delivery checking. All states have means to at least informally re-assure themselves of the accuracy of their risk assessments and check out suspicions. The new international instrument to enable timely and reliable tracing of illicit SALW provides an important potential source of information (as well as deterrence) relating to diversion.

In principle, all risk assessments and risk mitigation measures to prevent diversion can be treated on an *ad hoc* case-by-case basis. In practice, this is scarcely adequate. At the least, systems and mechanisms to facilitate and resource case-by-case checks need to be elaborated. This should at least be done on a national level. But it is also important to develop relevant systems and a regional and international level. This facilitates appropriate pooling of resources and experiences, and information sharing between relevant national officials. It also provides a framework for mobilising international resources and assistance.

There are many existing standards and good practices and potential international mechanisms and procedures that could usefully be established. The following sections address three of these: end-use controls; transit controls, and controls on retransfer.

## 4. End-Use/End-User Certificates

### Experience of inadequate end-user controls

In recent years numerous examples have come to light of poor and inadequate end-use certification systems and of negligent and corrupt end-use practices that have facilitated the illicit trade in SALW. A series of reports from UN Groups of Experts established in the early 2000s to examine breaches of arms embargoes imposed upon *inter alia* Angola<sup>8</sup>, Sierra Leone<sup>9</sup> and Somalia<sup>10</sup> were particularly noteworthy in highlighting flaws in existing national end-use practices that have been exploited by corrupt and unscrupulous actors. These have therefore been used as the sources of many of the examples that follow, though the issues they raise are as relevant today as they were when the reports were first published.

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<sup>8</sup> Report of the Panel of Experts on violations of Security Council sanctions against UNITA (Panel of Experts on UNITA) (2000), 10 March 2000, UN Doc S/2000/203

<sup>9</sup> Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 paragraph 19, in relation to Sierra Leone (Panel of Experts on Sierra Leone) (2000), 20 December 2000, UN Doc S/2000/1195 20.

<sup>10</sup> Report of the Panel of Experts on Somalia submitted in accordance with Resolution 1425, (Panel of Experts on Somalia) (2002) 3 July 2002, UN Doc S/2003/223.

### *Cases involving corrupt government agents and/or government complicity*

For example the UN Panel of Experts established to investigate breaches of the UN arms embargo in place against non-government groups in Sierra Leone reported in December 2000 on several cases involving the transshipment of weapons including SALW to Liberia, a known state-sponsor of the notorious RUF rebel group that was guilty of a systematic campaign of violence and atrocities in Sierra Leone. In one particular case, an EUC issued by the government of Burkina Faso on 10 February 1999 authorised a Gibraltar-based company to purchase weapons – including surface-to-air missiles and rocket propelled grenades and their launchers – for the sole use of the Ministry of Defence of Burkina Faso which was to be the final destination and end-user of the weapons. The Panel reports, however, that rather than being retained by Burkina Faso they were temporarily offloaded in Ouagadougou before being transhipped to Liberia.<sup>11</sup>

The UN Panel investigation violations of the sanctions against UNITA also reported in 2000 that Zairian and Togolese EUCs were regularly provided by their respective governments and used by UNITA in the acquisition of arms, including SALW.<sup>12</sup> Furthermore, the UN Panel on Somalia discovered that Djibouti had been an important transshipment point for the supply of weapons into Somalia with Djibouti officials apparently willing to provide false EUCs and transport for such ends. In one case uncovered by the Panel an EUC dating from January 2001 and naming the Djibouti police force was offered for sale on the black market. The EUC included anti-aircraft artillery and machine guns despite the fact that these are not standard police weapons.<sup>13</sup> The Panel also found that between 2000 and 2001 high-level Yemeni officials were reportedly willing to offer Yemeni EUCs and to facilitate the sale and delivery of weapons into Somalia.<sup>14</sup>

### *Cases involving falsification of end-user certificate*

The UN Panel investigating violations of the sanctions against UNITA also uncovered the use of false EUCs by UNITA in the acquisition of arms and materiel. In particular EUCs falsely purporting to emanate from Zambia were presented in 1995 and 1996 to the governments of the Ukraine, the Russian Federation and Bulgaria. The Panel went on record to say that they believed at least one shipment of ammunition was transferred from Bulgaria on the basis of false EUCs.<sup>15</sup>

In addition the UN Panel investigating breaches of the embargo against non-government groups in Sierra Leone makes reference to 37 arms flights taking place, all with false EUCs and false flight schedules, carried out by Victor Bout using Liberian-registered planes between July 1997 and October 1998.<sup>16</sup>

### *Cases involving failure to ensure authenticity of end-use certificates*

The UN Panel established to investigate breaches of the arms embargo in force against Somalia<sup>17</sup> also identified examples whereby basic checks on the authenticity of end-use documentation were not carried out and illicit transfers of weapons took place. The Somalia Panel discovered through their investigations that in 1992 weapons were exported from Poland to Croatia (then under a UN arms embargo) on the basis of EUCs from the Ministry of Defence for the People's Democratic Republic of Yemen (PDRY), despite the fact that the PDRY had ceased to exist in May 1990 (when it merged with the Arab Republic of Yemen to become the Republic of Yemen). According to the Panel, the Polish government claimed at the time they did not check the veracity of end-user documents with foreign embassies.<sup>18</sup>

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<sup>11</sup> Panel of Experts on Sierra Leone (2000), paras 203 – 207.

<sup>12</sup> Panel of Experts on UNITA, (2000), paras 20 and 35.

<sup>13</sup> Panel of Experts on Somalia (2002), paras 79 – 85.

<sup>14</sup> *Ibid.*, paras 74 – 77.

<sup>15</sup> Panel of Experts on UNITA (2000), paras 36 – 38.

<sup>16</sup> Panel of Experts on Sierra Leone (2000), para 230.

<sup>17</sup> Panel of Experts on Somalia, (2002)

<sup>18</sup> *Ibid.* paras 41 – 45.

### *National practices in end-use certification*

It is clear, then that the acceptance of EUCs at face value by exporting governments is, on its own, insufficient to prevent illicit transfers of SALW. In order to ensure that furnished EUCs are not, in fact, false, governments considering licensing the export of SALW and other weapons need to take steps to verify the authenticity of EUCs that are provided. However even if an EUC is found to be genuine exporting governments need also to be alert to the possibility that the provider of an EUC may be acting as an undeclared agent in acquiring arms and then diverting them to a proscribed end-user.

Despite the above bad examples it is important to recognise that good practice in end-use certification and monitoring does exist and that all states can learn from the experiences of others in order to improve end-use controls and prevent diversion and illicit trafficking of SALW.

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

Approximately 60 states report to have systems in place that include the use of EUCs or equivalent documentation however more than half of these states (32 of them) are located in one world region - Europe. Of those states that do not implement end-use control systems many claim that they do not export or retransfer SALW and so have no need for export controls that include the use of EUCs. However, as argued above, all states are *potential* exporters of SALW and so should institute systems and procedures to assure and monitor the end-use of exported SALW in order to prevent diversion and misuse.

In the case of those states that do have end-use provisions as part of their SALW export control system, there are important differences in the scope, detail and comprehensiveness of relevant national practices.

#### Types of end-use documentation

EUCs are the most common form of documentation required to certify the final end-user of prospective SALW exports. There are variations in the form and content of EUCs required by exporting states. For example, many governments have a standard format EUC that is applicable to the export of all strategic goods. However, some states (including Sweden) have several different types of EUC depending on what is being exported. The German government's end-use certification requirements also may vary depending on type of goods being exported, country of destination and end-user. In addition the German government allows for both “Private” and “Official” types of EUC. A “Private” EUC contains statements by consignee or end-user referring to the final destination and use of the items; “Official” EUCs are required if the exported items are to be delivered to a governmental end-user. Other states that accept Private EUCs include Argentina, Australia, Brazil, Canada, France, Lithuania, Spain, Switzerland and Turkey Often these relate to exports of ‘civilian’ or non-military small arms and are provided, for example, by commercial companies importing hunting rifles for sale on the domestic market.

Where states do not require an EUC the most common alternative is the International Import Certificate (IIC) – provided by the government of the importing state prior to the transfer. States using this type of import authorisation include 30 that are members of one or more multilateral arms transfer control arrangements as well as Brazil, China, Colombia, Egypt, India, Pakistan, South Africa and Uruguay.

#### *Security features*

A variety of security features are employed by states seeking to prevent falsification and misrepresentation of end-use commitments. For example, governments including that of

South Africa and Germany specify that an official stamp or seal must be provided by the end-user along with an authorised signature and a reference number. The Swedish government goes further requiring the aforementioned details and a declaration to be provided by the end-user all on special bank-note-quality paper.

#### *Authentication procedures*

For many states authentication procedures appear to involve consular verification in the recipient state to check that the information contained in the documents is correct and that the documents were signed by those authorised to do so. 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. For example 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>19</sup>

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>20</sup>

The US system of end-use control also focuses less on paper and more on process in terms of end-use with the primary focus on the information provided in the licence and EUC. Every licence application is carefully scrutinised to assess risk: if a private company is unfamiliar to the US licensing authority, if the end-use documentation is unclear, if the amount of the arms is large or the destination is of concern, for example, the US authorities may initiate its ‘Blue Lantern’ system of end-use checks. This end-use monitoring program allows the US government to check a transaction prior to licensing, or alternatively to do a post-shipment verification to confirm end-user and end-user (see below).<sup>21</sup>

#### *Delivery verification*

Several states report to have export systems under which they can require that the recipient must commit to providing a delivery verification certificate 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. Some states such as Sweden reserve the right to request this in specific cases, for example when transferring particularly sensitive types of equipment, such as Man-Portable Air Defense System (MANPADS). Other states require systematic verification of end-use. For example in South Africa a legal pre-requisite for the issuance of an export licence is that the end-user commits to providing a delivery verification certificate. The Belgian government has relatively stringent requirements in that three months after the export has taken place proof of delivery is required including details of transit routes and travel plans.

#### *Re-export restrictions*

Several states report that they make use of re-export restrictions as part of their end-use controls (see section 5 for a detailed discussion).

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<sup>19</sup> See UN Office of Disarmament Affairs: small arms and light weapons, ‘States that have submitted reports to the Department of Disarmament Affairs in 2005: Canada’, p10, <http://disarmament.un.org/cab/nationalreports/2005/CanadaUN-Report-SALW-2005-Final-eng.pdf>.

<sup>20</sup> Interviews with British arms export officials conducted by Holger Anders, 2004 – 05.

<sup>21</sup> Saferworld correspondence with US licensing officials 2 August 2007.

### Follow-up

Few states reserve the right to follow-up exports of SALW post-delivery. Of those that do the South African government insists that EUCs contain a clause stating that the buyer grants access and permission to South African government representative(s) to visit the facilities to verify the end-use.<sup>22</sup> The 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>23</sup>

### The US Blue Lantern Programme<sup>24</sup>

The most comprehensive system of end-use checks is found in the US Blue Lantern Programme. The Blue Lantern program is managed within the Directorate of Defence Trade Controls (PM/DDTC) by the Office of Defense Trade Controls Compliance's (DTCC) Research and Analysis Division (RAD). According to the US State Department, Blue Lantern end-use monitoring entails pre-licence or post-shipment checks undertaken to verify the legitimacy of a transaction and to provide reasonable assurance that: i) the recipient is complying with the requirements imposed by the United States Government with respect to use, transfers, and security of the defense articles and defense services; and ii) such articles and services are being used for the purposes for which they are provided.

Blue Lantern checks involve both pre and post-licensing checks. Before an export licence is granted information provided on EUCs is checked by US government officials, often using open source information such as telephone directories and the internet. US personnel (either from the embassy in a recipient country or personnel from the DDTCC) may also be required to conduct end-use checks overseas to verify the *bona fides* of unfamiliar foreign companies. Post-export, US government officials may also be required to ensure delivery of licensed United States Munitions List (USML) commodities to proper end-users and confirm proper end-use, as well as to determine compliance with DDTCC licensed agreements.

The US government believes that the Blue Lantern programme has strengthened the effectiveness of US export controls and has proven to be a useful instrument in: 1) deterring diversions to unauthorised end-users; 2) aiding the disruption of illicit supply networks used by governments under US or international restrictions and sanctions and international criminal organisations; and 3) helping the Department to make informed licensing decisions and to ensure compliance with US regulations. During 2006 initiated Blue Lantern checks on 613 licence applications checks – less than 1% of applications received during that year. During the same year 489 Blue Lantern cases were concluded with 94 deemed “unfavourable”.

### Sanctions

Breaches of end-use obligations are generally considered a serious matter by exporting governments. In the US if a recipient government is found to have breached end-use obligations the information is generally reported to the US Congress and senior officials of the US government. Depending on the severity of the violation, states can have imposed on them policies of denial or can be formally sanctioned, although this is relatively rare. At very least, such actions would result in very high scrutiny of any licence application in the future and the imposition of licence provisos, ie additional restrictions associated with the export. If a private entity is found to have violated retransfer obligations, they can be debarred (legally barred from any US defence trade) or put under a policy of denial (no exports).<sup>25</sup>

<sup>22</sup> See the South African Department of Trade and Industry for a copy of the EUC and the associated requirements, [http://www.dti.gov.za/nonproliferation/AnnexureANonTransfer\\_EndUseCertificate.pdf](http://www.dti.gov.za/nonproliferation/AnnexureANonTransfer_EndUseCertificate.pdf).

<sup>23</sup> See UN Office of Disarmament Affairs: small arms and light weapons, 'States that have submitted reports to the Department of Disarmament Affairs in 2005: Sweden', <http://disarmament.un.org/cab/nationalreports/2005/Swedish%20National%20report%20PoA%202005.pdf> and the website of the Swedish Inspectorate of Strategic Products, <http://www.isp.se/sa/node.asp?node=466>.

<sup>24</sup> US Department of State: Directorate of Defense Trade Controls, 'End-Use monitoring of defense articles and defense services commercial exports FY 2006', [http://www.pmdtcc.state.gov/docs/End\\_Use\\_FY2006.pdf](http://www.pmdtcc.state.gov/docs/End_Use_FY2006.pdf).

<sup>25</sup> Saferworld correspondence with US licensing officials 2 August 2007.

### *Multilateral agreements on end-use control*

Differing national end-use practices are reflected in a variety of regional and multilateral agreements relating to SALW control. The majority specifically mention the need for EUCs to be part of any SALW transfer authorisation; however the detail and stringency of the recommended measures varies considerably.

At the international level, the UN Firearms Protocol stipulates that the granting of export licences should be dependent on an authorisation being issued by the recipient state (although it does not explicitly refer to the use of EUCs).

In Africa, the ECOWAS Convention requires any arms transfer exemption request to be accompanied by an EUC. The SADC and Nairobi Protocols make limited references to the use of EUCs, calling on states to harmonise transfer documents including EUCs. The Nairobi states have taken steps to fulfil this requirement by agreeing detailed provisions within the Nairobi Best Practice Guidelines.

The most detailed EUC provisions are found in agreements reached by the OSCE, the Nairobi Best Practice Guidelines, the EU, and amongst Wassenaar Arrangement countries. The detailed provisions for end-use certification of the Nairobi Guidelines echo those mandatory provisions outlined by the other three organisations and arrangements above. They include guidance that EUCs should contain:

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

The OSCE Best Practice Guides make a further set of recommendations including anti-fraud and authentication provisions as well as measures to ensure 'Post Shipment Control' such as through delivery verification and on-site inspection. The EU and Wassenaar Arrangement also specify a list of optional provisions relating to *inter alia* details of intermediate consignees, the location of end-use of the SALW to be transferred, and a variety of re-export and delivery verification provisions.

### **Best practice for end-use control**

It is clear that at multilateral and regional level a substantial level of commonality is emerging around EUC requirements among those regions and countries that have taken this issue seriously. However details relating to security provisions, authentication procedures, re-export restrictions and follow-up are either voluntary or left entirely to national discretion.

Among a large group of states there is significant experience in certifying and monitoring the end-use of transferred SALW. National systems have evolved over time with emphasis placed on different aspects depending on governmental priorities, capacities and experience. Anyone seeking to develop a model system for assuring SALW end-use would thus be well advised to consider adopting discrete elements of different national systems.

For example, in the field of end-use certification, many governments can usefully learn from the Swedish system whereby a variety of different types of EUC are used depending on the nature of the transaction. Also of note is the fact that the Swedish government itself produces an EUC on bank-note-quality paper with an individual reference number and this is sent to the end-user for signature and the provision of an official seal. Once the EUC is complete the end-user transmits it to the Swedish embassy in the country where the end-user is located.

The embassy must verify that the request and the signature are legitimate before the transfer is authorised.

In terms of delivery verification, the provision of a delivery verification certificate by the end-user, as required by a number of states, is a useful starting point. The Belgian system whereby three months after the export has taken place proof of delivery is required including details of transit routes and travel plans is one of several substantial examples that could usefully be examined internationally.

In terms of follow-up provisions or post-shipment control the US Blue Lantern system is one of the most rigorous. Reserving the right to conduct follow up on-site inspections to verify end-use is likely to serve as an important deterrent to the unauthorised diversion or re-export of SALW.

### **Minimum standards for end-use control**

It is important to recognise that, whilst seeking to develop and promote best practice in end-use control, some states have little experience in such matters and few available resources that can be channelled to these ends. However, if states are serious about preventing and combating the illicit trade in SALW it is clear that certain minimum standards need to be adopted by all states. These should include:

- The systematic employment of EUCs carrying details as specified in the list outlined above
- The inclusion of commitments to ensure no diversion and no unauthorised re-export clauses in the EUC
- The receipt prior to shipment of approval from the importing and transit states that they authorise the transfer of SALW into/through their territory
- The routine authentication of the details provided on an EUC using open source information
- Where possible, the checking of information provided by the end-user by foreign embassy staff or through direct contact between government departments in the exporting and recipient state
- The requirement that verification of delivery is provided along with confirmation of transit routes
- Reserving the right to carry out on-site-inspections should concerns arise post-export
- Clear and proportionate sanctions in the event that breaches of end-user undertakings are discovered.

## **5. Preventing the Unauthorised Re-export of SALW**

As discussed in section 3, re-exportation of SALW after they have been received by the authorised recipient is an important source of illicit or uncontrolled flows of SALW. In many cases, the unauthorised re-exportation takes place shortly after the shipment has been received. Where this takes place, there must be strong suspicion that the recipient is guilty of deception or non-compliance with the terms under which the original transfer was authorised. In any case, end-use controls will have failed.

Often, however, the re-export may take place years after the shipment was received. The extent to which prior authorisation from governments involved in authorising the original shipment is required for such transfers depends on the terms of the end-use agreements and understandings. In practice, this is often unclear and seen as a 'grey' area. It is very important however that controls on such delayed retransfers are fully and clearly specified. Re-export of second-hand arms and ammunition is one of the primary sources of illicit SALW.

Section II, para 13 of the UN PoA makes an important reference to the need to regulate the re-export of SALW. This 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.” As with many provisions of the PoA this clause was a compromise between those states seeking a complete prohibition on the unauthorised re-export of SALW and those opposing any form of controls on re-export. Nevertheless, the agreed PoA commitment is important and needs to be addressed.

## **Current practices relating to the re-export of SALW**

### *States providing re-export notification*

In terms of the policies and practices of states as importers (potential re-exporters) of SALW, according to data submitted by states in advance of the 2006 UN Review Conference, some 28 governments state that they notify the original exporting state in advance of the retransfer of SALW.<sup>26</sup> Since then, by mid-2007 a further two states – Senegal and Macedonia – have reported that they also take steps to notify the original exporting state in advance of the retransfer of SALW.

States participating in the Wassenaar Arrangement are committed to retransfer controls in as much as specified in the PoA commitment quoted above. Notwithstanding this commitment for many states, including Denmark, Germany and Norway, the policy is to provide re-export notification to the original exporting state *only* if it is a requirement of the relevant end-use undertakings. This approach suggests that it is primarily the responsibility of the states authorising the original transfer to determine the extent to which they need to be informed or to authorise re-export. The export criteria agreed by Nairobi Protocol States as part of the Best Practice Guidelines also require state parties to notify the original exporting state in the event of the retransfer of SALW. However, in all other multilateral agreements where there are restrictions on re-export these are framed in terms of the responsibility of the exporting state.

### *Re-export licensing criteria*

As discussed in section 3 above, the risk of unauthorised re-export of SALW is a crucial factor that ought to be carefully considered when deciding whether to authorise any SALW transfer. Indeed all signatories to the EU Code of Conduct, for example, are required to consider the risk that arms may be “re-exported under undesirable conditions”.<sup>27</sup> Factors that have a material bearing in this regard include an assessment of: the legitimate defence and domestic security interests of the recipient country; the capability of the recipient country to exert effective export controls; and the risk of the arms being re-exported or diverted to terrorist organisations.<sup>28</sup> The Nairobi export criteria also assert that: “States Parties shall not authorise transfers that are likely to be diverted, within the recipient country or be re-exported, to any other user than the stated final end-user”.<sup>29</sup> Similar provisions are contained in the OSCE Best Practice Guides. The risk of re-export, particularly to terrorists, is also mentioned in the Wassenaar Best Practice Guidelines.<sup>30</sup>

### *Re-export and end-use controls*

Several states report that they make use of re-export restrictions as part of their end-use controls.<sup>31</sup> Indeed, as outlined in the previous section, best practice for SALW end-use control involves the inclusion of re-export restrictions (preferably a non-re-export clause) by SALW

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<sup>26</sup> ‘Table 2’, *Reviewing action on small arms: assessing the first five years of the UN Programme of Action*, Biting the Bullet, 2006;

<sup>27</sup> EU Code of Conduct on Arms Exports: Criterion 7, 5 June 1998, EU Doc 8675/2/98.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Best practice guidelines for the implementation of the Nairobi Declaration and the Nairobi Protocol on small arms and light weapons*, Regional Centre on Small Arms and Light Weapons, (2005).

<sup>30</sup> *Best practice guidelines for exports of small arms and light weapons*, The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, December 2002, [http://www.wassenaar.org/docs/best\\_practice\\_salw.htm](http://www.wassenaar.org/docs/best_practice_salw.htm).

<sup>31</sup> These include Argentina, Austria, Belarus, Belgium, Bulgaria, Canada, Finland, France, Germany, Italy, Kazakhstan, Norway, Republic of Korea, Romania, Russian Federation, South Africa, Spain, Sweden, Switzerland, Turkey, the UK and the US. See national reports on implementation of the PoA by these states.

exporters in relevant end-use documentation. A variety of provisions relating to re-export of SALW – such as allowing for re-export to specific states or based on prior authorisation of the original exporting state – are included in the agreements amongst EU and Wassenaar Arrangement states. However these are optional requirements and states parties are not required to include any form of re-export restrictions in their end-use certification.

Where they are applied, re-export controls are typically imposed in situations whereby 'military' SALW are exported to the armed forces of another state. Re-export restrictions in this case generally require the armed forces to confirm that they will be the sole end-user and that they will not re-export 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>32</sup> One interesting variation on this issue is the approach taken by the German government in which, wherever possible, supply contracts are to stipulate that old arms have to be destroyed when new arms are supplied. This measure is intended to help guard against the irresponsible retransfer of old weapons – one of the principal sources of illicit SALW.

### *Sanctions*

In the event that the unauthorised re-export of SALW is discovered this is generally considered a serious matter by exporting governments. For example the unauthorised retransfer of Swedish-origin SALW could result in the withdrawal of a licence, the reviewing of other export licences that have been granted and the denial of future licences; they may also consult with other EU Member States and, in the case of a serious breach, look into sanctions.<sup>33</sup>

### **Recommendations for best practice in preventing the unauthorised re-export of SALW**

The extent to which exporting states seek to control the re-export of SALW is an important policy issue for all states. It is key to preventing undesirable and sometimes illicit transfers of SALW.

#### *From the perspective of the original exporting state:*

All states should investigate and take full account of the risks of re-export of SALW in the export licensing process. These risks need to be assessed *inter alia* by examining whether the SALW for transfer are commensurate with the legitimate defence and security needs of the importing state as well as appropriate to the needs of the particular end-user. In addition the capacity of the importing state to retain control of the SALW and to prevent their unauthorised diversion or re-export should also be considered.

Checks undertaken to assure the *bona fide* nature of an end-user (see above) need to be part of any effort to guard against re-export. As such the associated capacity and resource implications for exporting states are similar to those encountered by states seeking to authenticate the details provided on EUCs. States thus need to begin by consulting readily available information and then pursue matters through foreign embassies or direct governmental contact as necessary.

SALW transfer contracts, licences and/or EUCs need to include clear provisions relating to controls on retransfer, with responses and possible sanctions available to be used in the event of any breaches of these undertakings. In terms of preventing and combating the illicit trade in SALW, the most stringent practice is that there is clear and unequivocal acceptance on the part of the end-user that the SALW are for their sole use and are not to be diverted to another end-user or re-exported without notification or authorisation.

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<sup>32</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.

<sup>33</sup> Saferworld telephone interview with Swedish licensing officials, August 2007.

Finally, in terms of efforts to prevent inadequately controlled transfers of surplus SALW, the German government's approach, whereby the importing state is required to destroy their old SALW, would appear the most effective way of guarding against the irresponsible re-export of surplus SALW and thus represents an important model which should be emulated by other states.

*From the perspective of the re-exporting importing state:*

At a minimum, all states should fulfil their UN PoA requirement to notify the original exporting state in the event of the retransfer of SALW. However, any additional re-export stipulations (for example a non-retransfer clause) that have been agreed within the context of a particular transfer of SALW should be strictly adhered to.

Clearly, establishing effective controls to prevent diversion of SALW transfers to the illicit market requires international co-operation, and particularly close co-operation between exporting, transit, and importing country governments for each transfer. Where there is high confidence in the stringency of the importing states' controls on SALW exports, the original exporting state can legitimately relax its requirement to authorise re-export. Such confidence develops out of experience, information exchange and consultation. Unfortunately at present there is only a very limited basis for such confidence: most states perform inadequately in taking steps to prevent diversion, and international information exchange and consultation is very limited.

## **6. Controlling Transit of SALW**

Transit controls can represent a weak link in the chain of transfer controls and inadequate controls in this regard can be a major contributory factor in the illicit trade in SALW. While in transit, SALW remain susceptible to diversion from the intended, authorised end-user to an unauthorised or illicit entity. Effective transit controls are thus a major part of efforts to prevent and combat the illicit trade in SALW.

Evidence of weak transit controls can be found in the reports of the various UN Panels of Experts established to investigate violations of the sanctions against UNITA, Sierra Leone and Somalia. For example, the UN Panel of Experts on Somalia reported in October 2003 on the weaknesses that existed in the transit control systems of at airports in a number of states, including Djibouti and Yemen, that were implicated in the routing of weapons into Somalia.<sup>34</sup>

Despite the importance of transit controls this aspect has yet to become a major subject for international debate and opportunities for the diversion of in-transit shipments of SALW remain.

### **Current practices relating SALW transit controls**

The PoA carries some provisions relating to transit control of SALW. Section II, para 2 calls on states to "put in place adequate laws, regulations and administrative procedures to exercise effective control over the...transit of [SALW], repeated in paragraph 12, whilst Section II, para 11 requires states "to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit". The PoA does not elaborate the implications of these commitments, for example clarifying when a transit shipment should be subject to controls and what minimum standards should be used for assessing applications for transit or monitoring shipments while in transit.

#### *Existing of transit controls*

At national level wide variations exist in the level and stringency of SALW transit controls and for many states transit regulations appear to be a work-in-progress. There are often variations

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<sup>34</sup> Report of the Panel of Experts on Somalia (2003), 4 November 2003, UN Doc S/2003/1035, para 115.

in regulations relating to the specific character of the planned transit, which could be exploited by dubious shippers and brokers.

For example, for the Netherlands, an export licence is required if military goods in transit remain in the country for a period of more than 45 days (when transit is by sea) or 20 days (for other modes of transport). If the military goods remain in-country for a shorter period a licence is not required although the export control authorities have the power to impose an *ad hoc* licence requirement. The Dutch government is currently in the process of seeking to eliminate the distinction between so-called 'fast' transit and 'slow' transit so that a licence requirement will apply to all transit shipments regardless how long the goods remain in-country. Transit shipments under the effective export control of EU partners are exempt from Dutch transit licensing requirements.

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>35</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. In Tanzania, prior to the review of SALW legislation which began in 2001, the government of Tanzania had no legal powers to inspect goods transiting its territory. For their part the New Zealand government reported in 2007 that controls on firearms and associated parts "do not apply to the harbours and other territorial waters of New Zealand" and that goods must be landed before they become subject to national export controls. A new Arms Amendment Bill being placed before the New Zealand parliament is, however, seeking to remedy this situation.

#### *Information required in transit licensing*

The level of information that is required by states as a prerequisite for the issuing of a transit licence varies substantially. For example the Danish government reported in 2007 that in order for goods to be granted permission to transit Denmark both export and import licences must be provided. On the other hand the government of Croatia reported that the "entity in the country of destination importing the arms or military equipment is required to present the Ministry of Internal Affairs a valid copy of the import licence issued by the relevant national authority of destination" before a transit licence is issued.

As a major transit and logistics hub the Hong Kong authorities adopt a targeted approach focusing on shipments of concern. The possible risk of diversion of goods in transit is assessed by drawing reference, for example, to the sensitivity of the products and licensing parties concerned, the destination, the shipping route.<sup>36</sup>

Interestingly, Hong Kong has adopted a 'no-undercutting' principle with regard to licensing the transit and transshipment of strategic goods in order to guard against unauthorised diversion for illegitimate uses or proliferation activities. This means that the Hong Kong authorities do not approve a transit or transshipment licence if it is known that the originating country/place would not permit the export of the same goods to the destination in question. In order to ensure that this no-undercutting principle is served, the Hong Kong authorities seek to maintain good co-operation with the licensing and enforcement authorities of its trading partners and currently has bilateral arrangements with sixteen trading partners to exchange denials and licensing information on a regular basis. Trading partners provide Hong Kong with information on denial notifications issued by them and in return pass to them data on transit and transshipment of goods (from the respective partner) to other destinations through Hong Kong. This process helps to ensure and reassure that Hong Kong is not undercutting the export control arrangements of trading partners.

#### *Multilateral agreements on SALW transit*

At multilateral level, different aspects of SALW transit control have been addressed by the major SALW control regimes. For example the UN Firearms Protocol and the Nairobi

<sup>35</sup> Para. 22c of Act No. 179 of the Slovak Republic, "On Trading with Military Equipment", 15 May 1998.

<sup>36</sup> Saferworld correspondence with Hong Kong trade officials, 17 August 2007.

Protocol, echoing the OAS Convention, require states to ensure that any export and import licences issued contain information on the countries that any shipment is to transit. In addition, states involved in the transfer of firearms to secure, in writing, notice from any transit states that they have no objection to the transit taking place. Despite this unequivocal requirement, it is not clear that many states do in fact fulfil this obligation.

Other multilateral agreements place the emphasis on other aspects of transit control. For example, the EU Code of Conduct User's Guide along with both the OSCE Guides and Nairobi Best Practice Guidelines stress that transit licences are subject to the same level and type of scrutiny as are export licences and that the detailed export criteria that have been agreed by each forum provide the basis for assessing any transit licence application.

#### *When is a transit licence required?*

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.

#### *The capacity to exert effective transit controls*

In addition to having the necessary laws, regulations and administrative procedures for the regulation of SALW transit states also need to have the capacity – including experienced personnel and adequate infrastructure – to scrutinise transit shipments and enforce transit controls. The UN Panel on Somalia, reporting in October 2003, noted that inspection procedures at some airports in countries including Djibouti and Yemen were found to be limited or non-existent with too great an emphasis on accepting documentation at face value. The lack of infrastructure was also identified as a major problem. Limited capacity for air traffic control meant that regulating and monitoring air traffic was problematic while the absence of scanning machines made cargo inspection onerous and time-consuming.<sup>37</sup> Even for comparatively wealthy countries finding adequate resources for the control of SALW in-transit may prove problematic particularly in locations where trade volumes are high.

#### *The security of SALW in transit*

Ensuring the monitoring and security of SALW in transit is also an important aspect of preventing the diversion of SALW in transit. A number of states have taken steps in this regard. For example:

- Serbia requires that companies obtain a transit permit that is valid for two weeks and also have an armed escort that is either hired by the company or provided by the Ministry of the Interior. The Mol informs customs and border police that a permit has been granted then the customs officials at the exit point verify it has left the country<sup>38</sup>
- In Romania only Romanian companies are permitted to conduct the transit of controlled goods. Shipments must be accompanied by the Gendarmerie and can only enter the country and the entry point stated on the transit permit<sup>39</sup>

<sup>37</sup> Report of the Panel of Experts on Somalia (2003), para 115.

<sup>38</sup> From *Analysis of national legislation on arms exports and transfers in Western Balkans*, Saferworld/SEESAC, September 2006, p83.

<sup>39</sup> From *Romania's arms transfer control system at EU accession: an analysis*, Saferworld, February 2007, p23. [http://www.saferworld.org.uk/images/pubdocs/Romania\\_Export\\_Controls.pdf](http://www.saferworld.org.uk/images/pubdocs/Romania_Export_Controls.pdf).

- Hungarian legislation requires that arms transit shipments must be accompanied by an armed security escort during passage through Hungarian territory.<sup>40</sup>

### **Recommendations for best practice in transit controls**

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 with widely differing standards. In view of this variety of regulations and practices that exist to control SALW transfers in transit, substantial international export consultations are needed to exchange experiences and identify good practices or model regulations.

Nevertheless, the above review of some current practices highlights certain elements that could be considered as emerging best practice. Accordingly, states should seek to develop and enforce transit controls that include the following:

- The adoption of laws regulations and administrative procedures that allow for the scrutiny and control of all SALW entering national jurisdiction – including territorial waters, air space and sea and air ports
- Securing the consent (or non-objection) of transit and importing states prior to authorising any export of SALW
- The exchange of information on transit and transshipment licensing with relevant trading partners
- The issuing of transit licences to be dependent upon the provision of all relevant export and import documentation
- Scrutiny of any transit licence applications according to strict criteria such as those agreed by states parties to Nairobi Protocol in the Best Practice Guidelines
- Measures to assure the monitoring and security of all SALW in-transit through national jurisdiction in order to guard against theft or diversion.

## **7. Conclusions and Recommendations**

It is important to take action to promote effective implementation of PoA commitments to prevent and combat diversion of SALW transfers to unauthorised recipients. Although this is a key element of PoA commitments, implementation performance so far is patchy and inadequate.

The fact that the principle of preventing diversion is uncontested by any government could mean that relatively rapid progress could be achieved towards clarifying and elaborating PoA commitments in this area, and promoting national, regional and international programmes and measures to enhance implementation.

In the PoA, the stringent commitments to prevent and combat diversion of SALW transfers that states have accepted are rich and complex in their implications. The processes by which SALW transfers are diverted to unauthorised recipients are complex and multi-faceted, and controls need systematically to address each of them. They imply major roles and responsibilities for all relevant states as exporters and importers, and where transit, transshipment, or brokering activities take place within their jurisdiction.

The main priority for all states involved is to take steps to prevent diversion of SALW transfers before they take place.

*This implies that every state has responsibilities to seriously and systematically assess risks of diversion before deciding whether to authorise an SALW transfer. In order to carry out such assessments, responsible national officials and units require clear and comprehensive national guidelines and elaborated lists of factors to be taken into account.*

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<sup>40</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.

International understandings should be developed on what should be included in such guidelines and factors. Section 3 of this report, recommends a number of key elements of such international guidelines.

*Wherever there is a significant risk of diversion to unauthorised users, either before or after the SALW shipment has reached its authorised recipient, the PoA clearly implies that every state concerned should either deny authorisation or take responsible and effective measures to mitigate the risks.* Such risk mitigation measures need to include:

- Ensuring that the end-user's stated needs for the transfer are credible and legitimate
- Confirming that the authorised recipient (and importing state) can ensure safe, secure and enduring control and accountability for the SALW received
- Ensuring rigorous end-use and end-user controls
- Ensuring effective monitoring, security and control during transit and transshipment
- Ensuring effective regulation (and confirmation of integrity) of transshipment and brokering agents involved
- Checking delivery to the authorised end-user, and post-delivery checking for compliance with end-use commitments, or possible loss or retransfer
- Provisions for response measures including sanctions in case problems are identified with the transfer.

In principle, such risk mitigation measures could be established on a case-by-case *ad hoc* basis. In practice, this is not feasible or effective. Guidelines, procedures, mechanisms and capabilities need to be put into place to enable such risk mitigation, including relevant international co-operation mechanisms. If these are not in place, a responsible state should comply with its PoA commitments and deny authorisation for any transfer which poses significant risks of diversion.

To contribute to international co-operation to enable and promote the risk assessment and mitigation measures required to comply with PoA commitments in this area, there is an urgent need for widespread adoption of emerging good practices in relation to three of the important types of measures required to prevent and combat diversion of SALW transfers:

- End-use controls
- Preventing un-authorised re-exports of SALW transfers
- Controls on SALW transfers during transit.

Section 4, 5 and 6 of this report highlight a number of key conclusions and recommendations for national and international action in each of these issue area.

*The next steps for international action to promote implementation of the PoA commitments to prevent and combat diversion of SALW transfers are to clarify the implications of these commitments and prepare for effective consideration at the 2008 Biennial Meeting of States .* We hope that this report contributes towards this objective.

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