

# Prohibiting Arms Transfers to Non-State Actors and the Arms Trade Treaty

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## Introduction

It has been widely recognised that uncontrolled arms flows to certain types of non-state actors (NSA) contribute to conflict, armed violence and insecurity around the world. Much of the attention on this issue has focused upon preventing flows of small arms and light weapons (SALW) to armed groups, terrorists and criminals. In general it has also been noted that most NSA ‘lack the skills and training to operate advanced weapons systems’.<sup>1</sup> There are a number of exceptions to this rule since the end of the Cold War as there have been international transfers of major conventional weapons to armed groups operating in Afghanistan, Lebanon, Libya, Sri Lanka and Yemen, as well as private military companies that have acquired helicopters, armoured vehicles and other major conventional weapons.<sup>2</sup> Therefore, while it is understandable that the focus has been on preventing NSA from acquiring SALW such an approach is too narrow for dealing with the issue of preventing NSA from acquiring conventional weapons.<sup>3</sup> Furthermore, recent studies have highlighted that armed groups involved in armed conflict rely heavily on sources located within the states in which they operate for arms, in particular poorly secured government stocks.<sup>4</sup> Nevertheless, black market smuggling, ‘ant trade’, and covert government shipments also continue. Therefore, while attention should be paid to state stockpile security etc. one should not neglect the international dimension of arming armed groups, criminal and terrorists.

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- 1 Policzer, P. and Yankey-Wayne, V., *Armed Groups and the Arms Trade Treaty: Challenges and Opportunities*, Latin American Research Centre, University of Calgary, Armed Groups Project Working Paper 12, Apr. 2009, p. 12.
  - 2 SIPRI Arms Transfers Database, <<http://www.sipri.org/databases/armstransfers/armstransfers>>.
  - 3 Bonomo, J., et al, *Stealing the Sword: Limiting Terrorist Use of Advanced Conventional Weapons* (Santa Monica: RAND Corporation, 2007).
  - 4 Jackson, T., ‘From Under Their Noses: Rebel Groups’ Arms Acquisition and the Importance of Leakages from State Stockpiles’, *International Studies Perspectives*, 11, 2010, pp. 131-47. See also the annual reports of the Small Arms Survey and the reports of the panels and groups of experts appointed to monitor UN sanctions.

In recognition of the concerns that many states have regarding the threat to peace, security and stability posed by armed NSA, several states have proposed or supported the inclusion in the ATT of language calling for prohibition on arms transfers to NSA or for all international arms transfers to be authorized by exporting and importing states. However, discussions on this issue in the PrepComm failed to address a number of challenges raised by the issue of prohibiting arms transfers to NSA, in particular the fact that there is 'no internationally accepted definition of a non-State actor'.<sup>5</sup> While civil society actors and academics have offered lists of entities that could provide the basis for a definition of 'non-state actor', they have not been adopted by all UN member states (see Box 1). Furthermore, the issue of prohibiting transfers to NSA, or for arms transfers only to be conducted by state authorised entities, has not been included in the chair's draft paper.<sup>6</sup> This paper therefore seeks to provide input for consideration of the issue of including a prohibition on arms transfers to NSA in an ATT by:

1. Providing a summary of calls for the inclusion of a prohibition on arms transfers to NSA in the ATT
2. Exploring the failure of efforts to secure a global agreement on a prohibition of unauthorized SALW transfers to NSA
3. Highlighting the main challenges of including a prohibition on transfers to NSA in an ATT - defining NSA and opposition to a blanket prohibition on moral grounds - as well as outlining approaches in existing international instruments that prohibit the transfer of arms to NSA
4. Considering options for tackling the issue of preventing transfers of arms to NSA that are liable to misuse these arms for violations of human rights or limiting international peace, security and stability.

**Box 1. Indicative list of non-state actors<sup>7</sup>**

- Armed rebel groups, 'freedom fighters', paramilitaries, or warlords;
- Paramilitaries and other NSAs closely associated with state agencies;
- Civilian militia including communal groups and militias, civil defence forces, vigilante groups;
- Terrorists and terrorist organisations;
- Criminals and criminal groups, including black market arms traders;
- Political parties and associated political groups;
- Private military companies;

5 Bellal, A., Casey-Maslen, S. And Giacca, G., Implications of International Law for a Future Arms Trade Treaty, UNIDIR Resources, Ideas for Peace and Security, p. 6, <<http://unidir.org/pdf/activites/pdf17-act537.pdf>>.

6 Chairman's draft paper, 14 July 2011, <<http://controlarms.org/wordpress/wp-content/uploads/2011/11/ChairPaper-14July2011.pdf>>.

7 Greene et al, *Developing International Norms to Restrict SALW Transfers to Non-State Actors*, (London: Biting the Bullet, Jan. 2006).

- Private security companies, and other private companies with their own security staff;
- Arms traders: domestic legal retail markets, traders and wholesalers, arms brokers, and front companies;
- Civil institutions, such as museums;
- Civilians: sports shooters, hunters, gun collectors, holders of guns for personal protection.

## States views on the prohibition of arms transfers to non-State actors in the ATT

Given the controversies on the subject of transfers to armed groups, the probability that a discussion on this issue will be ignored during (...) the Arms Trade Treaty deliberations is high: states are likely to avoid a subject that risks stalemating negotiations.<sup>8</sup>

The issue of arms transfers to NSA has been raised by UN member states at each stage of the preparations towards the 2012 UN ATT negotiating conference. First, seven of the 100 responses to the request for states views contained in UN General Assembly resolution 61/89 of December 2006 called for a prohibition on transfers to NSA (see Box 2).<sup>9</sup> Second, ‘issues relating to unlawful transfers to non-state actors (understood as individuals or entities not acting under the lawful authority of any State)’ were raised during the deliberations of the Group of Governmental Experts in 2008.<sup>10</sup> Third, the issue of prohibiting international transfers to NSA was raised during the Preparatory Committee meetings of 2010-2012 by the African Group, CARICOM, ECOWAS, and national and joint statements on behalf of a further 14 states (see box 2).

The need to ensure that arms were not supplied or diverted to terrorists, terrorist organisations, organised crime groups and non-state armed groups more specifically also featured in the considerations of a number of national statements. The issue of a prohibition on arms transfers to NSA was discussed in PrepComm sessions on ‘objectives and goals’, ‘criteria and parameters’, and ‘implementation’. Despite these calls, the Chairman’s draft papers do not include a reference to the issue. This omission has been highlighted several times during the PrepComm meetings by Colombia, China and India among others.

<sup>8</sup> Policzer, P. and Yankey-Wayne, V., *Armed Groups and the Arms Trade Treaty: Challenges and Opportunities*, Latin American Research Centre, University of Calgary, Armed Groups Project Working Paper 12, Apr. 2009, p. 2.

<sup>9</sup> Bahamas (on behalf of the Caribbean Community), Brazil, Cuba, Indonesia, Liberia, Mali and Turkey. In addition, Jamaica suggested that “the issue of transfer of arms to non-state actors” should be a principle that should govern an ATT and Mauritius proposed that an ATT should apply to transfers to ‘private end-users or non-State actors’ in order to prevent loopholes. Report of the Secretary-General, *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, UN Doc. A/62/278, 17 Aug. 2007; UN Doc. A/62/278/Add.1, p. 8. See also: Parker, S., *Analysis of States’ Views on an Arms Trade Treaty* (Geneva: UNIDIR, Oct. 2007).

<sup>10</sup> Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/63/334, 26 Aug. 2008, Para. 17.

## **Box 2: Statements in support of a prohibition on arms transfers to NSA in an ATT, 2007-2012**

### *National statements*

Brazil: 'The instrument must contain (...) a clear prohibition of transfers to unauthorized non-State actors'.<sup>11</sup>

China: 'The arms trade should be strictly limited to transactions between sovereign states and transfers of arms to non-State actors should be prohibited, so as to effectively combat and curb illegal trafficking and misuse of weapons'.<sup>12</sup>

Cote d'Ivoire: 'specified that the transfer of arms to non-state actors should be specifically banned by an ATT'.<sup>13</sup>

Cuba: 'Cuba believes that a conventional arms trade treaty will be effective only if it expressly prohibits arms transfers to non-State actors'.<sup>14</sup>

India: 'It is important for my delegation, and indeed for many others, that there be a clear reference prohibiting transfers to non-state actors'.<sup>15</sup>

Indonesia: 'The arms trade treaty should provide provisions to prevent diversion and prohibit transfers that are likely to be used in conflicts by non-State actors or negatively affect the regional security'.<sup>16</sup>

Liberia: 'There must be prohibition of all arms transfers to non-State actors that are not explicitly authorized under international law'.<sup>17</sup>

Mali: 'Member States should prohibit, without exception, all transfers of arms to non-State actors if such transfer is not authorized by the importing Member State'.<sup>18</sup>

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- 11 Brazil, 30 April 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278, 17 Aug. 2007, p. 28.
  - 12 The Chinese delegation, Head of the Chinese delegation, Kang Yong, Deputy Director at the United Nations Arms Trade Treaty to raise transfer standards (unofficial translation), 1 March 2011, <<http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/PrepCom2/Statements-received-20110307/20110301China-C.pdf>>.
  - 13 'Summary report: Plenary Session: Morning – 14 February 2012', Arms Trade Treaty Preparatory Committee 13-17 February 2012, IANSA, <[http://www.iansa.org/system/files/ATTPrepCom\\_Morning%20Plenary\\_140212.pdf](http://www.iansa.org/system/files/ATTPrepCom_Morning%20Plenary_140212.pdf)>.
  - 14 Cuba, 21 May 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278, 17 Aug. 2007, p. 55.
  - 15 'Intervention by Amandeep Singh Gill of India, Third ATT PrepCom, 14 July 2011, New York, <<http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/PrepCom3/2011-July-15/2011-07-15-India-E.pdf>>.
  - 16 Indonesia, 27 April 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278, 17 Aug. 2007, p. 100.
  - 17 Liberia, 21 June 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278, 17 Aug. 2007, p. 121.
  - 18 Mali, 6 July 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278, 17 Aug. 2007, p. 128.

Nigeria: An ATT needs to contain ‘a clear prohibition of transfer to unauthorised non-State actors’.<sup>19</sup>

Turkey: ‘The main focus of the arms trade treaty should be prevention of the acquirement of arms and weapons by non-State actors’.<sup>20</sup>

Zimbabwe: ‘The proposed Treaty should be one that seeks to consolidate States and prevent the transfer of arms into the hands of rebels and some other such groups that seek to destabilize and or unconstitutionally remove legitimate governments’.<sup>21</sup>

*Statements on behalf of regional groups, organisations or ‘like-minded states’*

African Group: ‘A future ATT should contain a clear requirement that all transfers of conventional weapons and SALWs must be expressly authorized by competent government authorities of the importing state, as well as a clear prohibition of transfers to unauthorized non-State actors’.<sup>22</sup>

CARICOM: ‘The proposed treaty should prohibit from participation in the trade in conventional arms non-State actors that may be acquiring them for purposes that are hostile to the interests of peace, security and stability’.<sup>23</sup>

ECOWAS: stated that arms transfers should not be made to non-State actors without the express authority of the State in which they are located.<sup>24</sup>

Argentina, Chile, Colombia, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago and Uruguay: ‘The ATT should make clear that only transaction among states are permitted. Permission of entry of arms to any State must be based on the permit given by the Government of such State’.<sup>25</sup>

Note: where possible written statements have been utilised.

19 Statement by H.E. Ambassador Bukun-Olu Onemola, deputy permanent representative of Nigeria to the United Nations at the Third Session of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty (ATT), New York, Monday 11 July 2011, p. 6, <<http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/PrepCom3/2011-July-11/Afternoon/2011-July-11-Nigeria-E.pdf>>.

20 Turkey, 4 May 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278, 17 Aug. 2007, p. 221.

21 Statement by Group Captain A.V. Murove, to the 3<sup>rd</sup> Preparatory Committee meeting for the Arms Trade Treaty, 10-15 July 2011, New York, <<http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/PrepCom3/2011-July-12/Afternoon/2011-July-12-Zimbabwe-E.pdf>>.

22 ‘Statement of the African Group delivered by Lawrence Olufemi Obisakin, Minister, Permanent Mission of Nigeria to the United Nations, at the First Session of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty’, Monday 12 July 2010, <<http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/2010-07-12/12072010-Nigeria-AfricanGroup-E.PDF>>.

23 Bahamas (on behalf of the Caribbean Community), 19 November 2007, Report of the Secretary-General, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, UN Doc. A/62/278Add.3, 27 November 2007, p. 3.

24 ‘Government statements to the third morning of the PrepCom’, Day 3 of the PrepCom: The Chairman’s Draft Elements of an ATT, 14 July 2010, <<http://armstradetreaty.blogspot.se/2010/07/day-3-of-prepcom.htm>>.

25 Argentina, Chile, Colombia, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago and Uruguay, ‘Joint statement on elements for a Treaty’, 21 July 2010, <<http://www.adh-geneva.ch/RULAC/pdf/Mexico-joint-statement-21072010.pdf>>. St Lucia also supported the joint statement.

There are no written statements to the Secretary-General or from the PrepComm meetings in which states explicitly opposed a prohibition on transfers to NSA in an ATT.<sup>26</sup> However, the US made an intervention during the first day of the first PrepComm in July 2010 in which it stated that arms transfers are a sovereign decision and blanket prohibitions were not appropriate.<sup>27</sup> The issue of opposing a prohibition on arms transfers to NSA is not explicitly included in the published list of key US red lines, although it is stated that the US will ‘oppose provisions inconsistent with existing US law or that would unduly interfere with our ability to import, export or transfer arms in support of our national security and foreign policy interests’.<sup>28</sup> For those who have followed discussions around the issue of including a prohibition on transfers of SALW to NSA in the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA) on prohibiting transfers of SALW to NSA, it should come as no surprise that this issue has not been included in the chairman’s draft text.<sup>29</sup>

## **The failure of efforts to reach a global agreement on a prohibition of SALW transfers to non-State actors**

It is understandable that much of the discussion on the need for a prohibition on transfers of arms to NSA has focused upon SALW. This section will consider two efforts to secure a global prohibition on SALW transfers to NSA: the 1998 ‘Global Convention Prohibiting the International Transfer of Military Small Arms and Light Weapons to Non-State Actors’ (‘Global Convention’) and the 2001 UN programme of action on the illicit trade in small arms and light weapons (PoA). Both cases highlight some of the challenges that have prevented a global agreement on a prohibition on SALW transfers to NSA.

### **Global Convention Prohibiting the International Transfer of Military Small Arms and Light Weapons to Non-State Actors**

At a meeting of 21 governments in Oslo in July 1998, the Canadian government presented a proposal for a ‘Global Convention Prohibiting the International Transfer of Military Small Arms and Light Weapons to Non-State Actors’.<sup>30</sup> The proposal was presented a year after the signing of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction (Ottawa Treaty) and the report of the UN Panel of Experts on Small Arms.

The proposal stressed the need to ensure that transfers of military SALW are better controlled to prevent their delivery or diversion ‘into the wrong hands’, and discussed a range of possible elements for the convention relating to definitions of SALW, international transfer and NSA. It also stressed the need to promote greater transparency of SALW

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26 ‘Statements on an Arms Trade Treaty’, <<http://www.un.org/disarmament/convarms/ATTPrepCom/Statements.html>>.

27 ‘Monday 12 July 2010, Day 1 of the PrepComm’, Arms Trade Treaty legal blog, <<http://armstradetreaty.blogspot.se/2010/07/day-1-of-prepcom.html>>.

28 US Department of State, Elements of an Arms Trade Treaty Fact Sheet, 4 June 2010, <<http://www.state.gov/t/isn/rls/fs/148314.htm>>.

29 See for example: Parker, S., Analysis of States’ Views on an Arms Trade Treaty (Geneva: UNIDIR, Oct. 2007), p. 15.

30 Discussion Paper: A proposed global convention prohibiting the international transfer of military small arms and light weapons to non-state actors, Canadian Mission to the UN in New York, December 1998.

transfers and mechanisms to assist States Parties to solve problems and review the operation of the mechanism.

The proposal noted that ‘non-state actors are varied and difficult to define with certainty’.<sup>31</sup> Therefore, the Canadian government proposed defining what constitutes a ‘state actor’ and then prohibiting transfers to all actors that do not fall within this definition. The proposal considered ‘state actors’ to include government controlled military, police and law enforcement agencies, as well as ‘organisations who are agents or who are authorised to act on behalf of state actors’. The proposal reflected the Canadian government’s policy of not ‘transferring of arms to opposition groups in order to overthrow unpopular regimes’.<sup>32</sup> The reasons offered to support this stance included: concerns that arming NSA in such cases would lead to an escalation in violence and limit the chances of peaceful conflict resolution as well as the legacy of a ‘weaponised’ society. The proposed Convention would therefore make it illegal for states to authorising the covert or overt supply of arms to NSA located in another state that have not been granted authorization to import receive the arms shipment.<sup>33</sup>

A number of states and NGOs opposed the proposal because it would ban arms transfers to NSA in cases where armed opposition against an illegitimate or repressive government was deemed ‘the only option’. Therefore, the proposal was not adopted. Nevertheless, the sentiments of the Canadian proposal were carried forward at the regional level in western Africa by ECOWAS (see below) and in the European Union’s Joint Action of 17 December 1998 adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on the European Union’s contribution to combating the destabilizing accumulation and spread of small arms and light weapons (1999/34/CFSP). Among a range of issues on which the Joint Action committed the EU to build consensus in regional and international forums was a ‘commitment by exporting countries to supply small arms only to governments (either directly or through duly licensed entities authorized to procure weapons on their behalf) in accordance with appropriate international and regional restrictive arms export criteria’.<sup>34</sup> Although the Canadian proposal was not adopted, several states supported the principle of a prohibition on SALW to NSA, or rather a commitment for SALW to only be transferred between governments or entities authorized by governments, and promoted the issue in the build-up to the 2001 UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.<sup>35</sup>

## **UN Programme of Action on SALW**

A proposal for a global prohibition on the transfer of SALW to NSA was one of the most controversial issues addressed at the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (9-20 July 2001), which resulted in the

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31 Ibid.

32 Ibid.

33 Ibid.

34 European Union’s Joint Action of 17 December 1998 adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on the European Union’s contribution to combating the destabilizing accumulation and spread of small arms and light weapons (1999/34/CFSP), Article 3(b).

35 Lumpe, L., ‘Curbing the proliferation of small arms and light weapons’, 5th Conference of the Center for Preventative Action, Council on Foreign Relations, Dec. 1998, <<http://www.prio.no/NISAT/Publications/Curbing-the-Proliferation-of-Small-Arms-and-Light-Weapons2/>>.

adoption of the PoA. The draft text of the PoA, presented in January 2001 at the second PrepComm session for UN Conference, included the provision:

Exporting countries will supply small arms only to governments, either directly or through entities authorized to procure arms on behalf of governments'.<sup>36</sup>

Despite US opposition to this provision, the revised draft text of the PoA presented at the third session of the PrepComm in March 2001 retained the call for SALW to only be supplied to governments and this text was used as the basis for negotiations at the Conference.<sup>37</sup>

On 9 July 2001, in his address to a plenary session of the Conference, John Bolton, the then US Under Secretary for Arms Control and International Security, made it clear that a prohibition on SALW transfers to NSA was a red line for the USA, stating that:

This proposal, we believe, is both conceptually and practically flawed. (...) This proposal would preclude assistance to an oppressed non-state group defending itself from a genocidal government. Distinctions between governments and non-governments are irrelevant in determining responsible and irresponsible end-users of arms.<sup>38</sup>

The issue of a prohibition on the supply of SALW to NSA was one of two issues on which consensus had not been achieved by the end of the conference – the other was the issue of including a reference to civilian possession. A large number of states pushed for the inclusion of such a provision in the PoA, while the US had been the most vocal opponent. In an attempt to retain a reference to NSA in the PoA, Canada sought to include in the preamble 'a state has to bear special responsibility when it sends arms to nonstate actors'.<sup>39</sup> This remained unacceptable to the USA and it was not until the early hours of 21 July 2001 that the African Group agreed to relinquish their call for language on the prohibition of SALW transfers to NSA. Their price for acquiescing on this point was for the President of the conference to include in the final report reference to his 'disappointment over the Conference's inability to agree, due to the concerns of one State (...) the need for preventing sales of (SALW) to non-state groups' and his acknowledgement that the African Group had compromised to save the PoA.<sup>40</sup> The US restated its red line on a prohibition on SALW transfers to NSA during various meetings to discuss the PoA after the 2001 conference.<sup>41</sup>

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36 Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Working Paper by the Chairman of the Preparatory Committee, UN Doc. A/CONF.192/PC/L.4, 11 Dec. 2000, Para. II. 9(f).

37 Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Working Paper by the Chairman of the Preparatory Committee, UN Doc. A/CONF.192/PC/L.4/Rev.1, 12 Feb. 2001, Para. II. 13.

38 John R. Bolton, Under Secretary for Arms Control and International Security, Plenary address to the UN Conference on the Illicit Trade in Small Arms and Light Weapons, New York City, 9 July 2001, <<http://2001-2009.state.gov/t/us/rm/janJuly/4038.htm>>.

39 'Reaching consensus in New York: The 2001 UN Small Arms Conference', Small Arms Survey 2002: Counting the Human Cost (Oxford: Oxford University Press, 2002), p. 220.

40 Statement by the President of the Conference after the adoption of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Annex to the Report of the United Nations, Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July, UN. Doc. A/CONF.192/15.

41 U.S. Views: Ban on Transfers of Small Arms and Light Weapons to Non-State Groups

Between 2003 and the 2006 PoA Review Conference, the Small Arms Consultative Group Process (a group of 30 states and a number of civil society organisations) sought to develop understandings on the issue of prohibiting transfers of SALW to NSA that had not received authorisation from both supplier and recipient governments.<sup>42</sup> Despite awareness of the fact that the US position on the issue remained unchanged, the proposal for a prohibition on SALW to NSA to be included in the text of a revised PoA was raised during the 2006 Review Conference. The USA again strongly resisted efforts to include a reference to NSA in the PoA.<sup>43</sup>

While the USA was the most vocal opponent of a global prohibition on the transfer of SALW to NSA being included in the PoA, it has been argued that the USA was not alone in its opposition. For example, some have claimed that a number of Arab states, as well as Iran, would have probably opposed a prohibition more vocally if the USA had not.<sup>44</sup>

## The main challenges for including a prohibition on transfers to non-State actors in the ATT

Based upon the discussions in the lead-up to the ATT and the discussions on a prohibition on transfers of SALW to NSA, there are two major obstacles for a prohibition on transfers to NSA in the ATT. Both challenges involve overcoming political concerns. The first challenge relates to achieving consensus on a definition of NSA to be used in the treaty. The second challenge relates to overcoming opposition to a blanket ban on transfers to NSA that do not have the express authorisation of both supplier state and state in which the NSA will take delivery of the arms.

### Defining non-state actors

The first challenge for securing agreement on a prohibition on transfers to NSA in an ATT is that there is still 'no internationally accepted definition of a non-State actor'.<sup>45</sup> When the issue of prohibiting transfers to NSA was raised in the PrepComm, states provided a range of different understandings and definitions of NSA. It appeared that some states had a clear idea of categories of NSA that should not receive arms - terrorists, rebel groups and criminals – but did not consider the implications for entities that are NSA but which many states would consider eligible to receive arms if they had received the express authorisation of the state in which they are located – arms companies, private military and security companies, etc. Furthermore, it is unclear how one would deal with entities that have been recognised as independent states by at least one UN member state, but which are not UN member states? How would a potential supplier approach

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C. Edward Peartree, Foreign Affairs Officer, Bureau of Political-Military Affairs Remarks at Follow-up Meeting on the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, Tokyo, Japan, 24 Jan. 2002, <<http://2001-2009.state.gov/t/pm/rls/rm/8766.htm>>.

42 Greene et al, *Developing International Norms to Restrict SALW Transfers to Non-State Actors*, (London: Biting the Bullet, Jan. 2006).

43 'Back to Basics: Transfer controls in global perspective', *Small Arms Survey 2007: Guns and the City* (Cambridge: Cambridge University Press, 2007), p. 123.

44 Garcia, D., 'Arms transfers beyond the State-to-State realm', *International Studies Perspectives*, 10, 2009, p. 156.

45 Bellal, A., Casey-Maslen, S. And Giacca, G., Implications of International Law for a Future Arms Trade Treaty, UNIDIR Resources, Ideas for Peace and Security, p. 6, <<http://unidir.org/pdf/activites/pdf17-act537.pdf>>.

the issue of supplying arms to the security or law enforcement forces of Abkhazia, Kosovo, Northern Cyprus, Palestine, Sahrawi Arab Democratic Republic, South Ossetia or Taiwan? In other words, there are categories of NSA which the overwhelming majority of states in principle would agree should be prohibited from receiving arms under any circumstances, categories of NSA that most states would be likely to authorize as recipients of arms, and categories of NSA that will divide opinions in the international community.

The Canadian proposal for a Global Convention proposed a 'negative' definition of NSA - anything that is not a government-controlled military, police or law enforcement agency or state-authorized entity. The proposed prohibition on transfers to NSA in the PoA was instead phrased as a call for arms transfers to only be conducted between governments. This latter approach has been utilized in the Wassenaar Arrangement's 'Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)', which states that 'decisions to permit Man-Portable Air Defence Systems (MANPADS) exports will only be made by competent authorities of the exporting government, only to foreign governments or to agents authorized by the government'.<sup>46</sup> As noted above, however, this does not resolve issues relating to entities that are not UN member states but which are recognised as states by some but not all UN member states.

With regards to a 'positive' definition of NSA to be prohibited from receiving arms, there are several approaches to the issue that currently exist:

- NSA that are prohibited from receiving arms, as outlined by UN Security Council resolutions
- African sub-regional legally-binding instruments prohibiting the transfer of SALW to non-state armed groups.

#### *Defining NSA in UN Security Council Resolutions*

One can identify two types of United Nations Security Council resolutions that identify non-state entities to be subject to prohibitions on the supply of arms in two ways. First, UN arms embargoes, imposed by resolutions adopted by the UN Security Council under the authority of Chapter VII, Article 41, of the UN Charter, legally oblige UN member states to prohibit the supply of 'arms, ammunition, military equipment and related services' to the entire territory of particular states or to non-state armed groups and individuals operating in particular territories. Since 1991 the UN Security Council has imposed 11 arms embargoes specifically targeting NSA (see Box 3). However, it is worth noting that in six of these cases, arms embargoes had previously also been imposed on the governmental forces with which these NSA were in conflict – i.e. both state and NSA conflicting parties were targeted by UN arms embargoes (DRC, Iraq, Liberia, Rwanda, Sierra Leone, and Somalia).

In addition to UN arms embargoes targeting armed groups operating in the territory of particular UN member states, there is also an arms embargo on Al-Qaida and Associated Individuals and Entities, which is not limited to the territory of a particular UN member

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<sup>46</sup> Wassenaar Arrangement, Elements for Export Controls of Man-Portable Air Defense Systems (MANPADS), Agreed at the WA Plenary, 1 December 2000. See also: G8 Action Plan: Enhance Transport Security and Control of Man-Portable Air Defense Systems (MANPADS); OSCE, Man-portable Air Defence Systems, OSCE Doc. FSC.DEC/7/03, 23 July 2003; 'APEC Guidelines On Controls And Security Of Man-Portable Air Defense Systems (MANPADS)', APEC Doc. 2004/AMM/035, 17-18 Nov. 2004.

state. The Security Council Committee established to oversee implementation and enforcement of the measures outlined in resolution 1267 and subsequent resolutions relating to sanctions against Al-Qaida is also tasked with maintaining a list of individuals and entities and groups associated with Al-Qaida.<sup>47</sup> The individuals, entities and groups contained on the list have been provided by UN member states and international organisations, with the reasons for their inclusion on the list also provided. While the individuals, entities and groups contained on the list are already subject to prohibitions on arms transfers, does this approach serve as a useful model for a broader list of NSA to be subject to prohibitions under an ATT? It may be possible to achieve agreement on a number of groups that should be subject to prohibitions, but there are likely to be a number of cases where agreement will not be possible.

### **Box 3: UN arms embargoes targeting Non-State Actors, 1991-2011**

Al-Qaida and associated persons: imposed by resolution 1390, on 16 January 2002

NSA in the Democratic Republic of the Congo (DRC): imposed by resolution 1493 on 28 July 2003

NSA in Iraq: imposed by resolution 1546 on 8 June 2004

NSA in Lebanon: imposed by resolution 1701 on 11 August 2006

\* NSA in Liberia: imposed by resolution 1521 on 22 December 2003

\* NSA in Rwanda and neighbouring states active in Rwanda: imposed by resolution 1011 on 16 August 1995. Resolution 1823 lifted the arms embargo on NSA in Rwanda and neighbouring states on 10 July 2008.

\* NSA in Sierra Leone: imposed by resolution 1171 of 5 June 1998. Resolution 1940 lifted the arms embargo on NSA in Sierra Leone on 29 September 2010

NSA in Darfur, Sudan: imposed by resolution 1556 on 30 July 2004. Resolution 1591 expanded the scope of the arms embargo was to cover Sudanese state forces in Darfur on 29 March 2005

\* NSA in Somalia: imposed by resolution 1744 on 21 February 2007.

Taliban (Afghanistan): imposed by resolution 1333 on 19 December 2000. Replaced by resolution 1390.

UNITA (Angola): imposed by resolution 864 on 15 September 1993. Lifted by resolution 1448 on 9 December 2002.

Notes: \* indicates that the government and non-state forces had previously been targeted by a UN arms embargo

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47 The List established and maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) with respect to individuals, groups, undertakings and other entities associated with Al-Qaida, can be found at: <[http://www.un.org/sc/committees/1267/aa\\_sanctions\\_list.shtml](http://www.un.org/sc/committees/1267/aa_sanctions_list.shtml)>.

Second, UN Security Council Resolution 1540, which requires states to put in place ‘appropriate’ and ‘effective’ laws that prohibit any non-state actor from manufacturing, acquiring, possessing, developing, transporting, transferring or using nuclear, chemical or biological weapons and their means of delivery, provided a definition of NSA. Resolution 1540 defined an NSA as an ‘individual or entity not acting under lawful authority of any state conducting activities which come within the scope of this resolution’. Resolution 1540 noted that this definition was only for the purpose of the resolution, but it is worth noting that in essence it is similar to proposals put forward by states in UN discussions at the PoA on a prohibition on SALW transfers to NSA and ATT PrepComm sessions on a prohibition on arms transfers to NSA.

### *Defining NSA in African prohibitions on SALW transfers*

Two legally-binding African regional instruments contain explicit prohibitions the transfer of SALW to NSA: the ECOWAS convention on Small Arms and Light Weapons, their Ammunition and other related materials (ECOWAS Convention, 2006; entered into force 2009) and Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair and Assembly (Kinshasa Convention, 2010). Of these two instruments, only the ECOWAS Convention has entered into force. Both instruments call for prohibitions on SALW transfers to NSA and define NSA.

The ECOWAS Convention states that ‘Member States shall ban, without exception, transfers of small arms and light weapons to Non-State Actors that are not explicitly authorised by the importing Member’.<sup>48</sup> The ECOWAS Convention defines NSA as: ‘any actor other than State Actors, mercenaries, armed militias, armed rebel groups and private security companies’.<sup>49</sup> The ECOWAS Convention does not offer a definition of state actors, as proposed in the Canadian Global Convention, but does provide information on authorisations for SALW imports by NSA.

The Kinshasa Convention states that ‘States Parties shall prohibit any transfer of small arms and light weapons, their ammunition and all parts and components that can be used for their manufacture, repair and assembly to, through and from their respective territories to non-State armed groups’.<sup>50</sup> The terminology used in the Kinshasa Convention is therefore narrower than that used in the ECOWAS Convention, as it refers to non-state armed groups (NSAG). Furthermore, the definition of a NSAG also provides greater clarity: ‘a group that could potentially use weapons as part of its use of force in order to achieve political, ideological or economic goals, but which is not part of the formal military establishment of a State, alliance of States or intergovernmental organization and over which the State in which it operates has no control’.<sup>51</sup>

Both the ECOWAS Convention and Kinshasa Convention place an obligation on States Parties not to supply SALW, ammunition and related materials to armed groups that oppose

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48 ECOWAS convention on Small Arms and Light Weapons, their Ammunition and other related materials, (ECOWAS Convention 2006), Article 3(2).2.

49 ECOWAS Convention 2006, Article 1(10).

50 Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair and Assembly, (Kinshasa Convention 2010), Article 4.

51 Kinshasa Convention 2010, Article 2(n).

governments in other signatory states. Given the post-Cold War history of the regions covered by these instruments this is understandable. In particular, various Panels and Groups of Experts tasked with monitoring UN arms embargoes in these regions have highlighted the destabilizing roles played by governments in the regions in supplying or facilitating the supply of SALW and ammunition to rebel groups in neighbouring states.

### **Overcoming opposition to a blanket ban on arms transfers to NSA**

It is clear that there are many cases in which a NSA from the list provided in Box 1 would receive authorization from the relevant authorities in a UN member state to import arms, and a number of cases where the import of arms would never be permitted. The issue of supplying arms to particular entities that are recognized as states by some UN member states will continue to lead to disagreements within the international community. However, the crux of the problem with realizing a global ban on arms transfers to NSA that have not received specific approval from the governments of the recipient and supplier state is that there are 'possible exceptional 'hard cases' where some states believe that such transfers might in principle be justified'.<sup>52</sup> In particular, it has been pointed out that 'frequently overlooked in the arms control milieu is that the state often abuses its monopoly of force against, by definition, defenceless individuals and communities'.<sup>53</sup>

One can understand the reasoning for the ECOWAS and Kinshasa Conventions given the violent armed conflicts involving armed state and NSA in these regions in recent years. However, it is worth remembering that African regional organisations have supported armed resistance by NSA. The Organisation for African Unity (OAU),<sup>54</sup> and in particular its Coordinating Committee for the Liberation of Africa headquartered in Dar es Salaam, Tanzania, assisted with the provision of arms and training for the non-state armed groups Mozambique Liberation Front (Frelimo) guerrillas, African National Congress and SWAPO.<sup>55</sup> The OAU passed resolutions calling for 'political, diplomatic and military aid' as well as support for armed struggle against colonial powers and apartheid regimes.<sup>56</sup> Are these the last morally acceptable circumstances under which it is acceptable to supply arms to NSA engaged in armed conflict with repressive governments?

#### *Supplying arms to NSA: A recent 'hard case' from North Africa?*

The dilemma of whether states should supply arms, ammunition, military materiel and training to NSA engaged facing armed aggression by government forces has been the focus of attention during the Arab Spring, in particular with regards to developments in Libya in 2011 and Syria during 2011-2012. In the case of Libya, paragraph 4 of UN

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52 Greene et al, *Developing International Norms to Restrict SALW Transfers to Non-State Actors*, (London: Biting the Bullet, Jan. 2006), p. 2.

53 Smith, C., 'Weapon transfers to non-state armed groups', *Disarmament Forum*, 1, 2008, p. 51.

54 The OAU was disbanded and replaced by the African Union (AU) on 6 July 2002.

55 Fleshman, M., A 'wind of change' that transformed the continent: Year of independence promoted African freedom struggles', *Africa Renewal*, Aug. 2010, p. 28.

56 E.g. AHG/Res 35 (II) Territories under Portuguese Domination, The Assembly of Heads of State and government meeting in its Second Ordinary Session in Accra, Ghana, from 21 to 25 October 1965; CM/Res.768 (XXXIV) Resolution on South Africa, Council of Ministers, Thirty Fourth Ordinary Session, Addis Ababa, Ethiopia, 6-15 Feb. 1980. Accessed via ISS Africa organisations portal, <<http://www.iss.co.za/organisations.php>>.

Security Council resolution 1973 (2011) authorized UN member states 'to take all necessary measures to protect civilians'.<sup>57</sup> This phrasing invoked the Responsibility to Protect concept, and revealed a division on the issue between the five permanent members of the UN Security Council (P5). France, the UK and USA interpreted these paragraphs as permitting the provision of arms, military materiel and military advisers to the anti-Gaddafi forces as a 'necessary measure to protect civilians'. For China and Russia, the supply of arms, military materiel and military advisers to the anti-Gaddafi forces constituted a violation of resolution 1973 (2011). Further concerns were raised that appeared to suggest that such supplies were in conflict with the UN General Assembly's Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which prohibited states from supporting 'armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state'.<sup>58</sup>

Italy, the UK and USA transferred non-lethal military materiel (namely protective equipment, uniforms etc.) and informed the Sanctions Committee in advance of intentions to supply and after the fact in accordance with UN Security Council Resolution 1973 (2011).<sup>59</sup> France provided information on 'self-defence weapons' airdropped for 'the civilian populations that had been victims of attacks by Libyan armed forces', but requested that the information provided remain confidential.<sup>60</sup> Further, the delivery took place in April 2011, after France had recognised the National Interim Council as Libya's legitimate government. The French ambassador to the UN, Gerard Araud, said that the delivery of 'self-defensive weapons' did not constitute a violation of the arms embargo.<sup>61</sup> Russia, China and India reportedly viewed France's actions as a violation of the embargo and disagreed with the policy of arming the anti-Gaddafi forces.<sup>62</sup>

The 2012 report of the UN Panel of Experts on Libya revealed that according to the Minister of Defence of the National Transitional Council (NTC) in Benghazi in July 2011, Qatar and Sudan had supplied arms and military equipment to the anti-Gadhafi forces in Libya.<sup>63</sup> Qatar categorically denied supplying arms to anti-Gadhafi forces.<sup>64</sup> However, anti-Gadhafi forces used ammunition that Switzerland had supplied to Qatar and Qatari-labelled rifles and ammunition were also reportedly seized en route to the anti-Gaddafi forces.<sup>65</sup> Switzerland and Qatar had bilateral consultations regarding Swiss

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57 Final Report of the Panel of Experts established pursuant to Security Council resolution 1973 (2011) concerning Libya, UN Doc. S/2012/163, 20 Mar. 2012, Para. 79-85.

58 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

59 Final Report of the Panel of Experts established pursuant to Security Council resolution 1973 (2011) concerning Libya, UN Doc. S/2012/163, 20 Mar. 2012, Para. 79-85

60 Final Report of the Panel of Experts established pursuant to Security Council resolution 1973 (2011) concerning Libya, UN Doc. S/2012/163, 20 Mar. 2012, Para. 78.

61 Charbonneau, L., 'Arming rebels doesn't violate UN sanctions: France', Reuters, 29 Jun. 2011, <<http://www.reuters.com/assets/print?aid=USTRE75S7XR20110629>>.

62 Charbonneau, L., 'Arming rebels doesn't violate UN sanctions: France', Reuters, 29 Jun. 2011, <<http://www.reuters.com/assets/print?aid=USTRE75S7XR20110629>>.

63 Final Report of the Panel of Experts established pursuant to Security Council resolution 1973 (2011) concerning Libya, UN Doc. S/2012/163, 20 Mar. 2012, Para. 95 and 105.

64 Final Report of the Panel of Experts established pursuant to Security Council resolution 1973 (2011) concerning Libya, UN Doc. S/2012/163, 20 Mar. 2012, Para. 95 and 101.

65 Gaddafi forces intercept arms from Qatar, Al Jazeera, 5 July 2011, <[english.aljazeera.net/news/](http://english.aljazeera.net/news/)

concerns of unauthorised ammunition re-export from Qatar to the anti-Gaddafi forces. Qatar's ambassador to Switzerland reportedly explained the case as 'a misadventure in the course of the country's support of the NATO engagement in Libya'. Qatar has not expressed a position on the supply of arms to NSA in the ATT. However, along with fellow Gulf Cooperation Council states Saudi Arabia and Kuwait, it has expressed in principle its support for arms to be provided to the Syrian NSA resisting Syrian government forces.<sup>66</sup>

It is notable that according to reliable open source materials the US did not supply arms and ammunition to the anti-Gaddafi forces, although the US Administration notified Congress of plans to offer up to \$25 million worth of material support to groups in Libya, including the NTC.<sup>67</sup> A Congressional Research Service report on the situation in Libya published in the middle of 2011 stressed concerns with the potential negative impacts of the proliferation of SALW and MANPADS and potential concerns about terrorist links to the anti-Gaddafi forces.<sup>68</sup> There was evidence of concerns with 'blowback' potential of arming anti-Gaddafi forces. It is interesting to note that concerns on post-conflict proliferation of arms and misuse by NSA, as well as the limited chances of the anti-Gaddafi forces defeating Gaddafi's forces, were put forward as reasons for restraint in the supply of arms to Libyan NSA. These are the same issues put forward by proponents of a prohibition on transfers of SALW to NSA.<sup>69</sup> However, the decision not to arm anti-Gaddafi opposition does not represent on the US policy position on the issue of prohibitions on arming NSA. For example, the USA supported the French view that deliveries of 'self-defence weapons' to NSA in Libya did not constitute a violation of the arms embargo.<sup>70</sup> Thanks to public pronouncements on the issue of arming NSA in Libya and Syria, it has been shown that in addition to the USA, several Gulf Cooperation Council states are also unlikely to support the inclusion of a prohibition on transfers to NSA in an ATT.

## Addressing calls for a prohibition on transfers to non-state actors in an ATT

While international law can be instructive on the rights and obligations of NSA involved in armed conflict,<sup>71</sup> 'there is at present no general international legal instrument requiring that weapons be transferred only to states and the corollary is that there is no prohibition regarding transferring weapons to non-state groups'.<sup>72</sup> It is unlikely that the ATT will satisfactorily address this issue during the July 2012 negotiating conference for several reasons. First, the chair's draft paper is the most likely roadmap for the negotiating conference and it does not include a provision on either a prohibition on transfers to

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africa/2011/07/2011755223504>.

66 DeYoung, K., 'Saudi, Qatari plans to arms Syrian rebels overtaking cautious approach favored by US', *Washington Post*, 2 Mar. 2012, <[http://www.washingtonpost.com/world/national-security/saudi-qatari-plans-to-arm-syrian-rebels-risk-overtaking-cautious-approach-favored-by-us/2012/03/01/gIQArWQfIR\\_story.html](http://www.washingtonpost.com/world/national-security/saudi-qatari-plans-to-arm-syrian-rebels-risk-overtaking-cautious-approach-favored-by-us/2012/03/01/gIQArWQfIR_story.html)>.

67 Blanchard, C.M., *Libya: Unrest and US Policy*, Congressional Research Service RL33142, 6 Jul. 2011, pp. 7-9.

68 Ibid.

69 Greene et al, *Developing International Norms to Restrict SALW Transfers to Non-State Actors*, (London: *Biting the Bullet*, Jan. 2006), p. 6.

70 'Russia says France is violating arms embargo', *Reuters*, 30 June 2011, <[http://www.nytimes.com/2011/07/01/world/europe/01briefs-Russ?\\_r=1](http://www.nytimes.com/2011/07/01/world/europe/01briefs-Russ?_r=1)>.

71 Clapham, A., *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press 2006).

72 Sabel, R., 'Weapons to non-state armed groups—back to Westphalia?', *Disarmament Forum*, 1, 2008', p. 12.

NSA without the express authorisation of authorities in the supplier and recipient state or for all transfers to be conducted between UN member states. Second, time is limited for a consensus to be achieved on a definition of NSA – either positive or negative. Such a definition has eluded other treaty processes and based upon the interventions during the ATT PrepComm sessions of 2010-2012, there are still differences between UN member states on an agreed definition of NSA. Third, a number of states for political reasons will oppose text in an ATT that amounts to a ban on transfers to NSA that goes beyond UN Security Council resolutions. Experience from the PoA process indicates that there will not be agreement by all UN member states on an explicit reference to prohibiting unauthorised transfers to NSA or for transfers to only be conducted between states. Despite these factors, many states are concerned about the negative impacts of uncontrolled transfer of arms to NSA. There are opportunities for UN members to pursue this issue both within and outside the ATT.

### **Risk assessment criteria in an ATT to prevent illicit arms transfers**

A large number of states have stressed that an ATT should be a regulatory instrument and not a prohibition. One of the main goals of the ATT is strengthening the international regulation of international arms transfers and strengthening national controls to prevent the supply of arms to entities that have not been authorised by either a supplier or recipient state, as well as to prevent the potential for the misuse of weapons. The criteria laid out in an ATT can be used to guide the decisions of states on whether to authorise a transfer to an NSA, just as they can also be used to guide decisions on whether to transfer to a state. Some states may use additional criteria or include additional obligations on the recipient government to monitor transfers to NSA, but it is worth noting that proponents of a prohibition on transfers of SALW to NSA provided a risk assessment checklist to limit illicit transfers to NSA that resembles the criteria presented in the chair's draft paper.<sup>73</sup>

### **Using the ATT to promote transparency and confidence-building with regards to transfers to NSA**

Many states maintain lists of particular NSA to which they prohibit the transfer of arms, including NSA that are not designated as subject to prohibitions in UN security council resolutions. States could be encouraged to exchange these lists with other states at meetings of States Parties or via an Implementation Support Unit (ISU). By the same token, they could also be encouraged to share the lists that they maintain of NSA that are registered to produce, receive or deal in conventional arms. The exchange of such information should also assist States Parties in verifying information contained in applications for authorisations and end-user documentation. Where deemed appropriate, such information could also help to facilitate post-shipment controls.

Meetings of states parties also provide a forum in which concerns can be raised surrounding transfers to particular states and NSA, if it is felt that bilateral discussions between States Parties or States Parties and non-States Parties have proven to be unsatisfactory. They also provide the ideal forum for states that have authorised transfers

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73 Greene et al, *Developing International Norms to Restrict SALW Transfers to Non-State Actors*, (London: Biting the Bullet, Jan. 2006), p. 4.

to NSA without authorisation from the relevant authorities in the importing state to explain their conduct.

### **An ATT should be able to accommodate existing or future limitations on arms transfers to NSA**

An ATT should also recognise that groups of states have agreed to prohibitions on transfers of particular conventional arms to certain categories of NSA. For example, a number of states have agreed to permit international transfers of MANPADS to government-authorised entities, while the ECOWAS and Kinshasa Conventions prohibit SALW transfers to unauthorised NSA. These instruments do not need to be explicitly referenced in the text of an ATT. However, states that support these instruments should ensure that an ATT does not undermine these existing instruments and related efforts. One example of how this could be achieved is already present to a degree in the Chair's draft paper:

A State party shall not authorize a transfer of conventional arms from, to, or through territories under its jurisdiction if the transfer violates any of its other relevant international, regional or subregional obligations or commitments regarding the control and regulation of international transfers of conventional arms.<sup>74</sup>

Additionally, groups of states may continue to develop and promote the norm of prohibiting transfers of particular conventional arms to NSA or particular groups of NSA outside the ATT framework. There might be an interest in prohibiting transfers of particular types of weapons or developing particular criteria or obligations for regulating transfers to particular types of NSA that could be regarded as potentially legitimate recipients of arms – e.g. private military or security companies.<sup>75</sup>

### **Beyond the ATT: The importance of stockpile management and security to prevent illicit arms flows to NSA**

As noted in the introduction, research into arms acquisitions by various types of NSA indicates that international transfers are rarely the only, and frequently not the most important, source of arms for NSA involved in armed conflict or armed violence. Armed groups acquire their arms from sources in the territories in which they operate – e.g. via theft from government stockpiles by theft, corrupt government sources or battlefield seizures. Robust stockpile management and security should therefore be priorities for preventing illicit flows of arms to NSA. While supplier states may take such considerations into account before authorising a transfer, or may support efforts to improve stockpile management and security in recipient states via technical, material or financial assistance, these issues are at the heart of the PoA. Indeed, a number of states have already highlighted the issue of stockpile management and security as a priority area for the 2012 PoA Review Conference and this certainly seems the most appropriate forum in which to address this issue.

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74 Chairman's draft paper, 14 July 2011, <<http://controlarms.org/wordpress/wp-content/uploads/2011/11/ChairPaper-14July2011.pdf>>.

75 Bonomo, J., et al, *Stealing the Sword: Limiting Terrorist Use of Advanced Conventional Weapons* (Santa Monica: RAND Corporation, 2007).

# UNIDIR RESOURCES

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The United Nations Institute for Disarmament Research (UNIDIR)—an autonomous institute within the United Nations—conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to the variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and governments. UNIDIR's activities are funded by contributions from governments and donor foundations.