

Implications for National Export Authorization Regulations and Procedures

1. Effective Export Authorization Policy and Procedures

Given the extent of international legal prohibitions on the transfer of conventional arms, the breach of which may give rise to state responsibility or individual criminal responsibility, or both, prudence dictates that states have in place effective procedures to ensure that such transfers will not be approved. Speaking plainly, it is hard to see how this can be done without the following:

- a policy requiring the authorizing agency or individual to act in accordance with all relevant international legal obligations;
- export criteria against which individual applications are assessed that specifically relate to these international obligations; and
- involvement in the assessment process of individuals with the requisite international legal expertise.

2. Comparison to OSCE SALW Export Criteria

These international legal prohibitions on conventional arms transfers are a minimum global standard. While considerably narrower than the OSCE agreed export criteria for small Arms and light weapons (SALW), they are legally binding and, if breached, could give rise to compensation claims against states in the International Court of Justice or to international or domestic criminal prosecutions against individuals. These prohibitions apply to all conventional arms transfers including all categories of SALW, as set out in the UN Definition⁴³, not just the narrower OSCE definition. Furthermore, these prohibitions are not limited in application to transfers within the territory of OSCE countries.

3. Next Steps

1. States should immediately institute an internal review of arms transfer authorization procedures with a view to ensuring that they are in conformity with their respective international legal obligations.
2. Member States could consider sponsoring a resolution of the First Committee at the next UN General Assembly Session mandating a UN Governmental Expert study of the “existing responsibilities of states under relevant international law” with which their national regulations and procedures for export authorizations must be consistent (as set out in Paragraph 11, Section II of the UN Programme of Action). The resolution should specify that the composition of the Expert Group include expertise in relevant areas of international law – particularly international humanitarian law and human rights law – as well as defence procurement and arms export authorization expertise. Consideration might even be given to securing a complementary resolution from the Sixth Committee, responsible for legal issues.
3. Alternatively, the resolution might mandate the Secretary-General to consult with a group of “qualified experts” to give preliminary consideration to this issue in as “neutral” an environment as possible, without the inevitable intrusion of political considerations when a group of *governmental* experts is involved.⁴⁴

⁴³ See Annex I, Clarification of Key Terms: “Small Arms and Light Weapons” in A/Conf.92/2 at page 26. However, the broadest definition of small arms and light weapons is likely that found in the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials.

⁴⁴ See for example the Report of a consultative meeting of experts on the feasibility of undertaking a study for restricting the manufacture and trade of small arms to manufacturers and dealers authorized by States, contained in the the Annex to UN document A/54/160 (1999). By its resolution 53/77 E of 4 December 1998, operative paragraph 5, the General Assembly requested the Secretary-General to initiate a study on the feasibility of restricting the manufacture and trade of small arms to manufacturers and dealers authorized by States. Pursuant to that resolution, consultations were held with a group of qualified experts to examine the feasibility of carrying out the study – in effect, a pre-study study. The resulting report outlines key issues for the governmental experts to address and suggests how they might best undertake their work.