

## **The International Tracing Instrument: Challenges and Opportunities**

*PrepCom side event, 2006 Small Arms Review Conference*

### **Introduction**

I would first like to thank the Government of Canada for hosting this important event and for inviting me to speak. As we consider how to take the UN small arms process forward over the coming months, we should not overlook the important challenges we continue to face in relation to the tracing of illicit SALW. In the first part of my presentation, I will review some of the main features of the *International Tracing Instrument*, adopted by the General Assembly last month. In the last part of my presentation, I will highlight some key challenges in implementing the tracing instrument, along with important opportunities for further normative development. A more detailed treatment of these subjects will appear in the 2006 edition of the *Small Arms Survey*, to be published this coming June.

While I was an advisor to the Chairman of the UN tracing negotiations, Ambassador Anton Thalmann of Switzerland, I must stress that the views I express here are my own and should not be attributed to Ambassador Thalmann or the Government of Switzerland.

### **An Analysis of the Instrument**

#### *Character and scope*

As you all know, the *International Tracing Instrument* is not legally binding. Nevertheless, as it was negotiated and approved within the framework of the UN, it is universal in its scope. All UN Member States have committed themselves to meeting the requirements of the tracing instrument.

As many States were of the view that ammunition raised issues that differed from those pertaining to SALW (the weapons themselves), the tracing instrument does not cover ammunition. The Open-Ended Working Group (OEWG) that negotiated the tracing instrument recommended, however, that the issue of ammunition be addressed in a comprehensive manner as part of a separate UN process.

#### *Definition of SALW*

In contrast to the *UN Programme of Action*, which contains no definition, the *International Tracing Instrument* defines SALW using language from both the law enforcement and arms

control communities (*UN Firearms Protocol* and 1997 UN Panel report respectively). The scope of the *International Tracing Instrument* is much broader than the *Firearms Protocol*, which basically limits itself to firearms. The tracing instrument covers all small arms and almost all light weapons mentioned in the 1997 UN Panel report. The only exception is light weapons that are not man-portable, but still “portable” in the sense of the 1997 UN definition—for example, large recoilless rifles which can only be transported by light vehicle.

The language borrowed from the *UN Firearms Protocol* (with important modifications), setting out the technical characteristics of SALW, ensures that the tracing instrument will apply to types of weapons that are not listed in the 1997 Panel report (are perhaps not yet developed), but are nonetheless captured by the technical part of the definition.

### *Marking*

If SALW are to be traced, they need to be marked with basic identifying information. In conjunction with a weapon’s physical characteristics, such markings are used to identify the weapon as well as the governments or companies that can assist in reconstructing its history.

In paragraph 8(a), the *International Tracing Instrument* largely reproduces the *UN Firearms Protocol* standard for marking at the time of manufacture. Though it strongly recommends the marking of weapons at time of import, the tracing instrument does not make this mandatory (para. 8(b)). This is a key weakness of the instrument. The older the weapon, the more likely it is that the record-keeping chain will be broken. An import mark significantly increases the chances of a successful trace.

Paragraph 8(d) addresses the important issue of existing government stocks. The Small Arms Survey and others have identified the leakage of such stocks as a key source of weapons for war zones and the illicit market generally. If such weapons have not been marked, they cannot be traced after they leave the government stockpile. Under paragraph 8(d), all SALW in the possession of government armed and security forces for their own use at the time of adoption of the instrument must be “duly marked”.

Paragraph 9 deals with the confiscation of illicit SALW, usefully developing other commitments in this area by requiring that SALW be securely stored in advance of their destruction, or marking and recording. Building on text contained in the report of the Group of Governmental Experts on Tracing (GGE), the *International Tracing Instrument* also stipulates the characteristics and placement of marks (paras. 7 and 10).

### *Record-keeping*

Record-keeping, after marking, is the second prerequisite for effective tracing. Records contain information about the marked weapon itself, along with elements of its history, beginning with manufacture.

The essential record-keeping standard is found in paragraph 11 of the tracing instrument. In order to ensure timely and reliable tracing, States have agreed to establish and maintain accurate and comprehensive records for all marked SALW within their territory.

The *International Tracing Instrument* also prescribes the length of time records must be kept—at least 30 years for manufacturing records and 20 years for all other records. It thus exceeds the *Firearms Protocol's* 10-year minimum. As a general principle, States have undertaken, “to the extent possible”, to keep records “indefinitely” (para. 12).

### *Cooperation in tracing*

Section V, devoted to “Cooperation in tracing”, forms the operational core of the *International Tracing Instrument*. This is also where it adds greatest value to existing small arms measures, establishing detailed modalities for tracing cooperation that have no parallel elsewhere.<sup>1</sup>

Paragraph 16 reflects the outcome of the debate during the negotiations concerning the role of non-state entities in the tracing instrument, mentioning only States with respect to the initiation of tracing requests.<sup>2</sup> In practice, this means that a State is not *required* to respond to a request it receives from a non-state entity. Yet, nothing in the instrument prevents a country from responding to such requests if it wants to. It can apply the provisions of the instrument or develop other modalities for such situations as it sees fit.

Paragraph 22 specifies when States may delay or restrict the content of their response to a tracing request from another State, or refuse to provide the information sought:

- where releasing the information would compromise ongoing criminal investigations or violate legislation providing for the protection of confidential information;
- where the requesting State cannot guarantee the confidentiality of the information; or

---

<sup>1</sup> The *UN Firearms Protocol* contains one general provision on tracing (art. 12.4). The GGE's more extensive “common minimum standards” served as raw material for the tracing instrument (para. 93), but lack its normative force.

<sup>2</sup> See also paragraph 18.

- for reasons of national security consistent with the Charter of the United Nations.

The two exceptions related to confidentiality in paragraph 22 are complemented by paragraph 15, which obliges States receiving tracing information to “respect all restrictions placed on its use” and to “guarantee the confidentiality of such information.” If a State does delay, restrict or refuse to provide tracing information on the grounds identified in paragraph 22, it must inform the requesting State of the reasons for this. “The requesting State may subsequently seek clarification of this explanation.” (para. 23)

Fundamentally, paragraph 22 provides those countries that are intent on evading their commitment to respond to tracing requests with broad cover to do so. Similar escape clauses are found in many international instruments, including the *UN Firearms Protocol*. Yet, paragraph 23 will make it rather more apparent—at least to the requesting State—whether a requested State is applying paragraph 22 of the instrument in good faith or not.

### *Implementation*

The tracing instrument’s implementation section outlines mechanisms and arrangements designed to support the effective operation of the instrument. It lays the foundation for implementation at the national level, including the establishment of the necessary legislative and administrative framework, as well as the designation of one or more national points of contact. It also provides for cooperation with the both the UN and Interpol, including the exchange of crucial information on weapons markings used to indicate the country of manufacture and/or country of import.

### *Follow-up*

The *International Tracing Instrument* also looks to the future, committing States to regular reports and meetings on instrument implementation. States have also agreed to review the future development of the instrument during *UN Programme of Action* review conferences. Among other things, this opens the door to the total or partial transformation of the tracing instrument from political to legal form. It also allows for the further development of instrument content.

## **Implementation Challenges**

The new tracing instrument, now applicable to all UN Member States, represents a modest, but important step forward in the international community’s efforts to tackle the small arms problem. The ultimate success of the UN tracing process depends, however, on whether UN

Member States actually implement the new instrument. Moreover, as I have just indicated, the tracing instrument is not cast in stone. Its follow-up provisions, along with the Open-Ended Working Group's recommendations on peacekeeping and ammunition offer important opportunities for further normative development.

I first turn to the question of instrument implementation.

#### *Legislative review /national capacity-building*

24. In accordance with their constitutional processes, States will put in place, where they do not exist, the laws, regulations and administrative procedures needed to ensure the effective implementation of this instrument.

If States are to fulfil their commitments under the tracing instrument, they will need to review their laws, regulations and administrative procedures to determine whether or not these meet instrument requirements.

As part of this legislative review, States could consider strengthening national capacity for instrument implementation (e.g. inter-ministerial coordination; consultation with industry, NGOs and other stakeholders; training programmes).

Research conducted by the Small Arms Survey and several partners last fall in southern Africa, the Americas and Europe indicates that such efforts are well underway in these regions.

#### *Marking of government armed and security force stocks*

8. For the purpose of identifying and tracing illicit small arms and light weapons, States will:

...

(d) Take all necessary measures to ensure that all small arms and light weapons in the possession of government armed and security forces for their own use at the time of adoption of this instrument are duly marked. Markings on these small arms and light weapons do not necessarily have to meet the requirements of subparagraph 8 (a) above;

I earlier mentioned the important commitment States have made to mark existing stocks of weapons held by government armed and security forces—a key source of weapons for war zones and the illicit market generally. Now that the tracing instrument has been adopted by the General Assembly, unmarked government weapons need to be marked.

### *International cooperation and assistance*

*Stressing also* the urgent necessity for international cooperation and assistance, including financial and technical assistance, as appropriate, to support and facilitate efforts to effectively implement this instrument, (pream. para. 9)

...

27. States in a position to do so will, upon request, seriously consider rendering technical, financial and other assistance, both bilaterally and multilaterally, in building national capacity in the areas of marking, record-keeping and tracing, in order to support the effective implementation of this instrument by States.

28. States in a position to do so are also encouraged to seriously consider international cooperation and assistance to examine technologies that would improve the tracing and detection of illicit small arms and light weapons, as well as measures to facilitate the transfer of such technologies.

29. States will encourage initiatives, within the framework of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, that mobilize the resources and expertise of, and where appropriate cooperation with, relevant regional and international organizations to promote the implementation of this instrument by States.

International assistance will be important to the effective implementation of the tracing instrument. During the negotiations, some States would not agree to the *mandatory* marking of SALW at the time of import because of concern about potential costs. This is one area where international assistance could prove especially useful.

International assistance will also be needed to help countries fulfill their other marking commitments and to build national capacity for effective record-keeping and tracing.

### *Provision of information to the UN*

31. States will, as soon as possible after the adoption of this instrument, provide the Secretary-General, through the Department for Disarmament Affairs of the Secretariat, with the following information, updating it when necessary:

(a) Name and contact information for the national point(s) of contact;

(b) National marking practices related to markings used to indicate country of manufacture and/or country of import as applicable.

Now that the tracing instrument has taken effect, it is important that States provide the information they have undertaken to give the UN Secretariat, in particular DDA, under paragraph 31 of the instrument.

Complete information on markings used within the State to indicate country of manufacture and country of import is especially crucial as these marks are the starting points for many weapons traces.

## **Opportunities for Normative Development**

Effective implementation of the new tracing instrument will be one important measure of its value-added, but this is not the only consideration. Equally important is the commitment States have made to further develop the instrument, and the recommendations made by the Open-Ended Working Group on peacekeeping and ammunition.

### *The “future development” of the instrument*

38. States will review the implementation and future development of this instrument within the framework of conferences that review the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

The first opportunity to review the “future development” of the *International Tracing Instrument* comes at next summer’s *Programme of Action Review Conference*. While it does not make much sense to be very ambitious in this regard—given the wide range of other issues now on the RevCon agenda—it will be possible, indeed important, to take some initial steps. States could, for example, agree on a simple mechanism for exchanging information on best practices in the areas of marking, record-keeping and tracing. This could involve postings to a UN website on a strictly voluntary basis. The issue of best practice was on the agenda throughout most of the tracing negotiations and could usefully be revived in some form.

### *OEWG recommendation on peacekeeping operations*

The Working Group recommends that the issue of the applicability of provisions of the draft instrument to United Nations peacekeeping operations be considered further within the framework of the United Nations. (OEWG report, para. 28)

As I indicated earlier, UN States do not need to consider whether the tracing instrument applies to UN peacekeeping operations and other non-state entities. It will apply if individual States decide it applies in particular cases. Absent a Security Council decision to this effect, there is no obligation to respond to such requests, but nothing prevents a country from responding to tracing requests initiated by peacekeeping operations or other non-state entities if it wants to.

That said, the Open-Ended Working Group recommendation on peacekeeping gives UN Member States an opportunity to further consider, and perhaps develop, the instrument's conflict tracing functions. These functions are largely implicit in the instrument's existing provisions, including those providing for cooperation with Interpol. Nevertheless, further discussion of this issue within the UN could draw greater attention to this fact and help spur the development of practical tracing mechanisms for specific peacekeeping or sanctions monitoring operations. Enhanced cooperation between the UN and Interpol will be especially important in this regard.

#### *OEWG recommendation on ammunition*

The Working Group recommends that the issue of small arms and light weapons ammunition be addressed in a comprehensive manner as part of a separate process conducted within the framework of the United Nations. (OEWG report, para. 27)

Last, but certainly not least, I turn to the issue of ammunition. So often the neglected stepchild of multilateral small arms negotiations, ammunition also fell through the cracks of the UN tracing negotiations. The OEWG recommendation on ammunition provides an opportunity to redress this. Nevertheless, States should note a potential problem. If ammunition is to be addressed "as part of a separate process", does this mean it will not be included in any future UN negotiations on the brokering and transfer control issues?

In the area of marking and tracing, ammunition raises technical issues that are distinct from those posed by weapons alone. The failure of the Group of Governmental Experts to address these issues in advance of the tracing negotiations made the inclusion of ammunition in those negotiations exceedingly difficult. The "ammunition gap" in the tracing area obviously needs to be addressed, perhaps as part of the separate UN process that the Open-Ended Working Group has called for. Yet, there is no technical reason for separating SALW and their ammunition in the case of international brokering and transfer controls.

#### **Conclusion**

To conclude, the *International Tracing Instrument* is very much a work in progress. On paper, it constitutes a significant advance over existing international measures. Nevertheless, the instrument's real value-added will depend on the degree to which it is effectively implemented, as well as the extent to which it spurs further normative development in tracing and related areas.

I have highlighted some specific challenges and opportunities in this regard. There are others. The agreement reached on the tracing instrument last June—far from marking the end of a process, merely allowed for its continuation.

Thank you