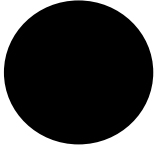


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U.S. Small Arms Policy: Having It Both Ways

Susan Waltz

An essential element of the success of the U.S. program is its export control laws and regulations. These laws are internationally recognized as the most robust and effective in the world....

[At the 2006 UN Review Conference on Small Arms] the United States will make the case that its laws, practices and enforcement procedures are effective models other nations should follow.

—Assistant Secretary of State John Hillen,
Baltimore Sun, July 2006

Does United States policy indeed represent the gold standard for export controls on small arms, as often asserted? Recent events suggest that it is time for a fresh look at this common claim.

Ten years ago the United States and its European partners began to grapple with new realities about the proliferation of small arms. In the early 1990s, the forces that dissolved the Soviet Union also pried locks off the central warehouses where Cold War weapons had been stored, even as the superpowers and their allies averted their gaze from the conflicts that had once engaged them. Fresh supplies of assault rifles and other easily portable weapons began flooding conflict zones, threatening life and livelihood of the world's poorest peoples. In October 2000, UN Secretary General Kofi Annan soberly announced that the annual death toll from small arms regularly exceeded the carnage wrought at Hiroshima

and Nagasaki. No less than the atomic bombs that devastated those cities, he argued, smaller weapons should be recognized as “weapons of mass destruction.” The United States formally undertook to address the growing concern, promising to “promote regional security, peace and reconciliation in regions of conflict and to make the world safer by helping to shut down illicit arms markets that fuel the violence associated with terrorism and international organized crime.” Washington offered strong support for the recommendations of a UN Panel of Experts on Small Arms, and in December 2000 pledged to observe the highest standards of restraint in its own small arms export policies.

Senior government officials frequently hold up U.S. laws, practices, and enforcement procedures as an effective model for other nations to follow. Even analysts and non-governmental organizations (NGOs) who are otherwise critical have lauded U.S. policy. In 2005, the independent Small Arms Survey ranked the U.S. first among 25 countries in its Transparency Barometer, with a score of 16 out of 20 on an index assessing export reporting practices. Similarly, a consortium of NGOs reviewing state efforts to implement the UN's 2001 action plan on small arms gave the United States mostly high marks for its policy and programs. The Congressional Research Service (CRS) in 2006 summed up the consensus: “The export licensing and monitoring laws, regulations and procedures of the United States are widely acknowledged to be the most

transparent, comprehensive, and stringent in the world.”

Understandably, American policy on small arms reflects multiple interests and contains enduring tensions, notably between the desire to promote legitimate exports and the need to prevent illegal and dangerous deals. But statements and actual behavior present puzzling and troubling contradictions. For example, in December 2006, the United States was the only UN member to vote against a resolution, introduced by the United Kingdom, to begin negotiations on a treaty to establish “common international standards for the import, export and transfer of conventional arms.”

It is difficult to reconcile this opposition with testimony by a U.S. representative to the Security Council in 2002 advocating strict export and import controls as “the most effective way to prevent small arms and light weapons from getting into the hands of those who will misuse them,” or with efforts to secure a universal agreement on export criteria for shoulder-fired missiles known as man portable air defense systems (MANPADS).

It is apparent that senior officials hold conflicting views about the breadth of the policy and the range of its application. Prior to last summer’s UN conference on small arms, a U.S. spokesperson told a public audience that “Congress [had] legislated a cradle-to-grave approach to weaponry [mandating that] government agencies follow each piece through its life cycle, from manufacturing and brokerage through export and re-transfer.”

In September 2006, however, a report by the Special Inspector General for Iraq Reconstruction disclosed that the Department of Defense had transferred hundreds of thousands of pistols, assault rifles, and machine guns to Iraqi security forces without recording serial numbers or establishing any other mechanism for accountability. In its reply, the Defense Department protested that it was not responsible for cataloging

weapons destined for a foreign government. The Inspector General in turn rejected these claims, citing Pentagon regulations that require automated registration of all small arms in their inventories, including those released under foreign military sales arrangements.¹

It is dismaying that Defense Department officials did not recognize that their own procedures required them to register these weapons. From a policy perspective, it is yet more troubling that none of the agencies involved related the incident to the larger policy and procedures concerning the responsible transfer of U.S. weapons. Despite these explicit standards and a strong commitment to careful handling, the United States oversaw a two-year program of arms transfers into a volatile, insecure region without even minimum standards of accountability, recklessly contravening the tenets of its own policy and best practice.

Contradictions like these are not simply oversights, common failures of implementation, or even the result of flagging political will. As elaborated below, they extend from confusion about the actual content of U.S. small arms policy, and its representation.

What exactly *is* U.S. policy on small arms transfers? Though policies are always a blend of words and deeds, analysts must begin with the words governments use to describe their own policy intentions. As elaborated below, however, the U.S. has not one, but two, formally established frameworks concerning the international supply of weapons. One of them is expressed in terms of high principles; the other is a shadow policy that rests on political considerations, including expediency. Both approaches are encased in law and one cannot be considered more “official” than the other. The conflicting representations presented below reflect different political values, and different political priorities, but analytically, they must be understood as different aspects of

a single, integrated approach to small arms transfers.

The Principled Approach

Before the illicit trade in small arms and light weapons can be dealt with effectively, it is essential that we first carefully regulate the international transfers (legal trade) in SA/LW and ensure that it is properly controlled. To that end, the U.S. Government regulates arms exports under fully transparent procedures and promotes greater openness in the practices of other nations.

—U.S. State Department Fact Sheet,
July 2001

The U.S. policy on small arms transfers as openly articulated by government officials is predicated on America's superpower status and its role as a leading purveyor of weapons. In the 1930s, the federal government asserted its authority to regulate and control all U.S. arms transactions, and in successive decades it has taken that responsibility seriously. Policy documents of record attest to a principled approach, emphasizing restraint, control, and transparency in order to reduce the risks of criminal and political violence. Notwithstanding America's recognition of the right of self defense and its support for the legitimate trade in weapons, the U.S. has declared itself a global leader in "efforts to mitigate the illicit trafficking and destabilizing accumulation of small arms and light weapons."

As officials frequently point out, U.S. weapons transfers are governed by law, notably the Arms Export Control Act (AECA) and the Foreign Assistance Act (FAA). These statutes authorize sales and grants arranged by the federal government and spell out conditions for commercial exports. Provisions in the United States Code and a set of implementing regulations known as the International Traffic in Arms Regulations

(ITAR) subject all transactions to government approval and explicitly prohibit exports to countries under U.S. or UN embargo. They also require that a country's human rights record be considered before an arms transaction is authorized. Undersecretary of State Robert Joseph highlighted features of the regulatory regime in his speech to the 2006 UN review conference on small arms:

The United States has a robust and transparent system of laws and regulations governing national holdings, manufacture and the international movement of small arms and light weapons. All firearms, by law, are marked at the time of manufacture and import. In addition, we have some of the strongest laws of any state concerning third-party transfers of weapons. The United States is also one of only a handful of countries to assert universal jurisdiction on all U.S. weapons or citizens involved in the arms trade, no matter where they are located. A robust end-use monitoring system and a tough legal framework for enforcement support this export control regime.

U.S. statutes establish the legal underpinnings of the regime, and congressional oversight is exercised through the House and Senate appropriations committees, the armed forces committees, the international relations committees, and various subcommittees.

Because the laws are robust, the implementation machinery is necessarily complex. More than a dozen quasi-independent agencies are charged with implementation and enforcement. Although a comprehensive review of the numerous programs lies beyond the scope of this article, a cursory overview is instructive. In the 2006 report prepared for Congress, CRS analyst Richard Grimmett singled out the defining features of U.S.

small arms policy: efforts to curb black market transfers; promoting accountability within the legitimate trade; assisting other countries to improve their own standards; and destroying excess weapons.² These four objectives serve as a useful framework for reviewing the extensive array of programs. At the same time, they offer a perspective on the policy as represented by programs.

Programmatically, the U.S. places greatest emphasis on efforts to curb the supply of unauthorized or black-market small arms destined for conflict zones, terrorists, international criminal organizations, or drug traffickers. This is also the most complex aspect of the policy, with responsibility for implementation shared by the Departments of State, Commerce, Defense, Homeland Security, Justice, and occasionally, the Department of Treasury. Activities range from criminal prosecutions to end-use monitoring and training programs for industry compliance.

Because most illegal traffic in weapons across U.S. borders is in the outbound direction, federal agencies primarily focus on export activities. Agents with the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and the new Immigration Customs Enforcement Agency (ICE), housed in the Department of Homeland Security, regularly intercept and prosecute arms deals involving light weapons. In 2006, for example, ICE agents foiled a plot to export scores of state-of-the-art firearms, machine guns, sniper rifles, and surface-to-air missiles to Tamil Tigers in Sri Lanka.

The ATF's National Tracing Center is occasionally asked to assist international criminal investigations through gun analysis by tracking the movement of U.S.-origin firearms. Over a two-year period in the late 1990s, for example, some 150 cases investigated by the ATF involved international small arms trafficking. The powers of these various law enforcement agencies are supplemented by the Treasury Department's

Office of Foreign Assets Control, which has authority under the Emergency Economic Powers Act to freeze foreign assets under U.S. jurisdiction. It was thus the Treasury Department that in April 2005 slapped sanctions on four individuals and 30 companies linked to the notorious Russian arms trafficker, Victor Bout.

More routinely, U.S. agencies promote voluntary compliance. To discourage illicit deals, and to enable exporters to recognize disreputable business partners, agencies within the State and Commerce Departments collaborate to maintain and publicize lists of parties who are debarred or otherwise restricted from trade in defense or dual-use commodities. All license applications are screened against these watch-lists—and, in 2006, that involved a review of some 66,000 applications against lists that included more than 130,000 foreign and domestic individuals and companies. When warning signs are triggered in the process of license review, transactions may be subject to close scrutiny and sanction under a State Department program known as Blue Lantern (operated by the Directorate of Defense Trade Controls, or DDTC).³ In 2001, after a highly critical report from the U.S. General Accounting Office prompted congressional intervention, the Department of Defense launched a similar program for foreign military sales, dubbed Golden Sentry. Although neither program focuses primarily on small arms, the Blue Lantern program is required by statute to include among its priorities weapons that can be easily diverted, and Golden Sentry includes surveillance of shoulder-fired Stinger missile. From 2002–04, Blue Lantern checks resulted in 52 unfavorable “determinations” involving small arms, a full 80 percent of those weapons destined for Latin America.⁴

While it works to stem illicit trade, the U.S. also promotes lawful export. A second set of programs is thus intended to support industry and commercial agents without compromising stringent controls. At times,

this requires a balancing act, and government agencies advertise their commitment to assist legitimate transactions even as they threaten punishment for those who transgress. Both the DDTC (State) and the Bureau of Industry and Security (Commerce) run periodic seminars to present and explain regulations and processes, and they provide online services to facilitate legitimate business transactions. Small arms exports account for less than one percent of the \$20 billion U.S. commercial weapons trade, but U.S. companies nevertheless claim the greatest dollar-value share of the world's small arms market, providing licensed firearms and crew-based weapons to approved customers in 112 countries.

Industry complaints about bureaucracy and red tape are common, but they relate primarily to large and high-value weapons systems and dual-use items. In 2007, eight trade organizations launched a campaign to make the export controls more "efficient, predictable, and transparent," but it is unclear how their proposals, if enacted, would affect the export of small arms and light weapons. U.S. military and diplomatic personnel are statutorily prohibited from encouraging or influencing the purchase of U.S.-made military equipment unless they are specifically instructed to do so by the administration, but as a practical matter, the arms industry, including small arms suppliers, benefits from Pentagon promotion. The Pentagon exhibits U.S.-made weapons at arms shows around the world, and small arms and light weapons are often included in package deals arranged through the Foreign Military Sales program. In addition, the Department of Defense facilitates the acquisition of weapons through various grant programs, including most recently supplies to Iraq and Afghanistan.

A third set of programs relates to stockpile management and efforts to reduce the worldwide supply of excess weapons. This is the most recent programmatic initiative, formally launched with the creation of the

State Department's Office of Weapons Removal and Abatement (WRA) in 2003. In the 1990s, U.S. military forces destroyed thousands of small arms on an ad hoc basis—in Haiti, Panama, Liberia, Kosovo, and Albania. More recently, the focus has shifted to portable missiles. In collaboration with the Pentagon's Defense Threat Reduction Agency (DTRA), over the past several years, WRA has arranged to destroy more than 18,500 MANPADS, many of them old and obsolete by contemporary military standards, but dangerous nevertheless. Until now, the budget for weapons destruction has been very modest, averaging only \$2–8 million since 2001, but the Bush administration has dramatically increased its funding request for 2008. If fully funded, \$44.7 million will be made available for overseas small arms stockpile reduction.

Finally, several programs and initiatives revolve around the objective of encouraging other countries to raise their own arms export standards. This is the area where differences between the Clinton and Bush administrations are most apparent, and this aspect of policy is highly nuanced. In the late 1990s, Washington backed several international initiatives, including the Inter-American Convention Against the Illicit Trafficking in Firearms and the UN Firearms Protocol. The Bush administration has retreated from many of these initiatives, however, and in diplomatic forums it has effectively conveyed its disinterest in advancing normative agreements.

In the meetings that led to the 2006 UN review conference on small arms, official spokespersons regularly emphasized U.S. non-negotiables, and the "redlines" tended to overshadow any positive contribution or initiative backed by the United States. This signaling seems primarily addressed to the domestic gun lobby, however, and comprises only part of the story. Further away from public scrutiny, bureaucrats in various agencies have engaged in transnational conversations of a technical nature

to assist other countries' efforts to meet international standards.

Since 1999, the State Department's Office of Export Control Cooperation and other U.S. agencies have actively participated in the "unrestricted discussion and debate" that takes place at annual international conferences on export controls, and regulations developed by the Commerce Department's Bureau of Industry and Security adhere to Organization of American States standards, even though these have not been formally endorsed by the Senate.

Collectively, the programs in these four distinct areas constitute a comprehensive and admirably robust approach to the control and regulation of U.S. small arms transfers. Moreover, they project a responsible and conscientious approach to handling the supply of lethal weapons. An analysis of performance would no doubt reveal discrepancies between policy and practice among numerous other shortcomings, but there can be little doubt about the government's commitment to a principled policy for the traffic in these weapons. The trouble is that this represents only part of the picture, viewed in the most favorable light.

The Shadow Policy

The DoD Small Arms Serialization Program provides a national registry of DoD weapons. Only DoD weapons are included in this registry. There is currently no provision or mechanism to register foreign owned weapons in this program. Therefore, the recommendation to comply with the DoD Small Arms Serialization Program is unattainable.

—Multi-National Security Transition
Command-Iraq, October 2006

As comprehensive as it appears to be, the small arms transfer policy publicized by State Department websites is incomplete. What is missing? In a nutshell, the policy

outlined above excludes discussion of the lawful but covert, undisclosed, incompletely monitored, or unregistered transfers. Weapons supplied under the terms of what can be called a "shadow policy" account for a fraction of all U.S. weapons transfers, but in the context of the War on Terror they have come to represent a substantial portion of transfers of small arms and light weapons.

In the three years from 2003–05, the U.S. government sent more *unregistered* light weaponry to Iraq than it had provided to the rest of the world through its publicly reported Foreign Military Sales program over the previous five years.⁵ Because these arms are so easily diverted to the black market, they represent some of the most problematic weapons in circulation. They also give rise to the most serious contradictions in U.S. small arms policy.

Analysts and small arms control advocates have wrestled with the knotty question of properly describing and assessing transfers that do not seem to fit within the bounds of the publicly espoused policy. Covert transactions of questionable nature are sometimes called "gray market transfers" and considered illicit at best. Other transactions—such as the non-U.S. weapons procured for Iraq—appear to fall outside common categories of grant or sale. Discussions and analyses that treat such transactions as exceptional or illicit are problematic as they imply that some transfers are not covered by law or policy.

In fact, the surreptitious or irregular provision of weapons is not an exception to U.S. policy; over the past 60 years it has been an integral component of the policy. Excluding such transactions from analysis, or treating them as a category apart, deflects attention from the laws, oversight mechanisms, and programs that constitute a crucial element of small arms transfer policy. To complete the analysis of existing policy, a fifth prong, acknowledging shadow transfers, must be added to the framework outlined in the 2006 CRS report.

As with other aspects of U.S. policy, the shadow policy on small arms is shaped by law, implemented through government programs, and subject to congressional budget approval and oversight. As already noted, the most robust and stringent provisions of law apply to commercial transactions vetted and approved through the State and Commerce departments. Shadow transactions are generally completed under other legal provisions, in particular the Foreign Assistance Act and the 1947 National Security Act. The FAA establishes the legal framework for weapons furnished to other countries on a grant basis. It also provides the president with authority to draw down U.S. defense stocks on an emergency basis—including weapons acquired abroad—for antiterrorism assistance, narcotics control, and other designated purposes.

In theory, all U.S. government transfers, whether accomplished by grant or sale, are subject to statutes that require assurance that the recipient will use the weapons only for their intended purpose, and that subsequent transfer or resale of the weapons is contingent on U.S. approval. In practice, however, weapons supplied via grant programs may be subject to minimal or no scrutiny, particularly if the weapons in question are not U.S.-manufactured. Defense Department procedures, as a case in point, assert continuing U.S. responsibility for the proper use of weapons provided to other countries, but only if they are of U.S.-origin.⁶

To support other countries with narcotics control, the Drug Enforcement Agency is limited to providing nonlethal assistance. The president, however, has more extensive powers. Since 1996 he has been authorized to use military drawdowns for assistance with narcotics control and any other “anti-crime purpose,” to any country, on any terms and conditions he approves, “notwithstanding any other provision of law.” And as noted below, programs authorized via the mechanism of national defense and emer-

gency supplemental authorization bills in the aftermath of September 11 also lend themselves to shadow transfers, in part via provisions that suspend constraints imposed by the FAA.

Prying Open the Door

Covert actions provide an additional, separate legal channel for shadow transfers. The statutory underpinnings for such operations, including weapons transfers, are found in the National Security Act, incorporated into Title 50 of the U.S. Code under the heading of War and National Defense. (The Arms Export Control Act and the Foreign Assistance Act, by contrast, are included in Title 22, Foreign Relations.) Title 50’s provisions make it lawful for the government to engage in activities “to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” By law, such actions are distinguished from traditional law enforcement, intelligence and military activities, and from traditional diplomatic practice.

The 1947 statute has periodically been modified, and a U.S. president authorizing a covert operation today must be mindful of several constraints. Most importantly, actions cannot be taken in violation of the Constitution, U.S. statutes, or express congressional prohibition. Since 1974, the president has been formally required to report all covert operations to Congress; since 1991 he has been required to issue a written “finding” confirming that each such operation is necessary to support identifiable foreign policy objectives and is important to the national security.⁷ The law further stipulates that all intelligence agencies involved in a planned action must be identified, and Congress must be informed before the intended action commences.

Anecdotal evidence suggests that strict legal requirements may have resulted in fewer formally declared covert actions, but

not necessarily fewer transactions in the shadows.⁸ After consulting with State Department lawyers about the finer points of law in his efforts to find means of supplying weapons to the Bosnians, the veteran U.S. diplomat Richard Holbrooke is reported to have summarized the constraints as a progression: "...[S]uggesting to a foreign country that it might consider a covert action appeared perfectly legal; going one step further and encouraging a foreign country appeared legal but potentially risky from a political standpoint. Actually supporting the foreign action through direct participation, the reports said, crosses the line into covert action."⁹ The legal reforms seem principally to have inspired clever interpretations and innovative policy "workarounds."

In any event, the legal constraints appear not to have had great practical or political effect. Not only are numerous workarounds available to a determined president or his aides, but congressional oversight has been ambivalent, at the least. In the first place, congressional authority is limited. Statutes (enacted by Congress) entitle lawmakers to appropriate information but they also assert very clearly that covert actions are not subject to congressional approval. Secondly, Congress has lacked the political will to impose meaningful constraints on the executive. In the face of executive excess, Congress has episodically expressed outrage and threatened to exercise muscle, but for the most part legislators have appeared content to settle for inclusion in the information loop via select committees on intelligence.

These committees are charged to exercise Congress's statutory right to be notified when defense items with aggregate value in excess of \$1 million are transferred beyond control of the U.S. government by any intelligence agency in a given fiscal year. It is unclear, though, whether such oversight authority or potentially significant budget authority results in fewer arms transfers.

In some cases it may be that consultations with Congress (or even the specter of consultations with Congress) work to cancel or curtail ill-advised plans. In other cases, members of Congress may actually use their authority and privileged knowledge to increase authorized funding for arms transfers. Such was the case with Congressman Charlie Wilson (D-TX), who used his powers as a member of the House Appropriations Defense Sub-Committee to significantly augment funds for covert small arms transfers to Afghanistan. Less subtly, in 1994 Congress specifically instructed the U.S. government not to enforce an arms embargo on Bosnia. In 1998, it went yet further, authorizing nearly \$100 million in military assistance (including weapons) to bolster a flagging White House initiative to assist Iraqi dissidents in their efforts to remove Saddam Hussein from power in Iraq.

The instruments used to implement the shadow policy have evolved considerably over the past six decades. During the height of the Cold War, the U.S. depended primarily on the Central Intelligence Agency (CIA) to carry out covert actions, including the provision of weapons and money to procure them. After a number of failed operations and congressional inquiries in the 1970s, however, covert operations were made subject to somewhat greater scrutiny and became more cumbersome as a tool of secretive presidential policy. The complexity of the U.S. intelligence community—today comprised of 16 separate agencies—offers the executive some choice in carrying out shadow operations, including secret arms transfers. While the CIA remains the best known intelligence agency, the Pentagon currently has a much more extensive intelligence network and today accounts for the great bulk of national intelligence funding.¹⁰

Over time, presidents and their advisors have been inventive using government agencies as well as outside actors to implement various aspects of the shadow policy. To stay within the bounds of law (and circumvent

Congress), for example, the Reagan administration turned to members of its National Security Council (NSC) to carry out the Iran-Contra project, which involved the surreptitious supply of weapons to both Iran and the Nicaraguan Contras.

Although Congress enacted an amendment explicitly forbidding use of appropriated funds and U.S. intelligence agencies to overthrow the Nicaraguan government, NSC officials secretly sold weapons to Iran and diverted the proceeds to arm the Contras. In the same period, Washington persuaded Saudi Arabia to pay for millions of AK-47 assault rifles and other light weapons to be channeled to the Afghan *mujahideen* through Pakistani intelligence services. During the 1990s, covert supplies to Bosnia-Herzegovina appear to have involved the Air Force in some measure, and possibly Special Forces under control of the Pentagon. According to the Dutch government's 2002 report on the 1995 massacre at Srebrenica, it is not clear which nation's pilots flew the Hercules C-130 cargo planes that ferried ammunition, machine guns, Stingers, and other light weaponry on "black flights to Tuzla" in clear violation of a UN arms embargo, but the success of those flights definitely required collaboration of AWAC surveillance under U.S. control. Ten years later, Bosnia faced the challenge of disposing of its wartime stocks of light weaponry, and recent reports from Amnesty International suggest that some U.S. officers serving under NATO command authorized transfers to Rwanda and Iraq.¹¹

More recently, questions have been raised about U.S. covert activities in Somalia, formally under a UN arms embargo since 1992. Sizable payments by CIA agents to Somali warlords in exchange for information about al Qaeda operatives are thought to have financed illicit weapons that fueled open hostilities in 2006.¹² Stories circulating in 2007 further suggest that the U.S., in collusion with Saudi Arabia, has clandestinely armed Fatah al-Islam in Lebanon.¹³

As intimated, the features of a shadow transfer may vary according to circumstances. Some involve covert operations; some do not. The U.S. military and the CIA air-lifted weapons to various anti-Taliban troops in Afghanistan in the fall of 2001, and reports suggest that President Bush may have authorized a covert action to bypass requirements associated with more public forms of military assistance.¹⁴ Other shadow transfers have been authorized more openly. The 2006 Emergency Supplemental Appropriations Act, for example, includes provisions to supply light weapons for narcotics control in Afghanistan, and several other programs created in conjunction with the War on Terror lend themselves to shadow transfers even if they do not extend from formally declared covert operations.

Among them is a military training program known as "Section 1206," which permits the Pentagon not only to train but also to equip foreign military personnel without going through the State Department's normal screening procedures.¹⁵ A second program, known as Coalition Support Funds, reimburses allies for outlays related to their counterterrorist operations as well as for military support in Iraq and Afghanistan. Pakistan, Poland, Jordan, Afghanistan, Uzbekistan, Georgia, Ukraine, Czech Republic, and Djibouti are among the countries that have benefited from this program. Reimbursements may cover ammunition as well as fuel, security, and airlift, but there is virtually no mechanism to establish accountability for these funds.¹⁶

Other programs—including the Iraq Security Forces Fund, the Afghanistan Security Forces Fund, and general provisions under Section 1205 of the 2006 Emergency Supplemental bill—openly authorize transfer of defense articles to Iraqi and Afghan security forces but appear to bypass the most stringent requirements of formal policy, especially where non-U.S. weapons may be involved.

Government data typically refer to weapons of U.S.-origin, but the United States has frequently chosen to supply defense articles not readily identified as American. Stockpiles of Soviet-style weapons captured during the Vietnam War facilitated many clandestine transfers during the Cold War, though, at times, weapons were purchased abroad. Iran-Contra conspirators, for example, went to some lengths to procure Chinese MANPADS for supply to Nicaragua, and many of the AK-47 assault rifles supplied by the U.S. to Afghan *mujahideen* in the 1980s were made in Egypt.¹⁷ The transfer of Soviet-style weapons did not end with the Cold War, however. Since 2003, the U.S. has provided some 185,000 AK-47's to Iraqi forces, along with more than 26,000 Warsaw Pact grenade launchers, machine guns and other rifles.¹⁸

In this analysis, I have treated shadow transfers as a residual category. In some way or another, all shadow transactions fall outside the bounds of the most stringent provisions of the arms export or foreign assistance laws. In some cases these shadow transfers are made public, but they are nevertheless exempted from the most rigorous requirement of law, including continuous, "cradle to grave" oversight. Most shadow transfers additionally share a marked lack of transparency. Details of a particular supply operation may be held tightly, even if the transfer itself complies with American law. Information is not always shared with the public (indeed, emergent information may be denied), and in some cases pertinent details may be withheld from most members of Congress as well. Presidential directives are usually classified documents, and intelligence committees in the Senate and the House are not at liberty to discuss information shared with them *in camera*.

Whether secrecy is motivated by discretion or expediency, its natural effect is to limit accountability. U.S. statutes require proper end-use certification and secure stockpiling as a pre-condition for the

supply of weapons by grant or sale alike, but it is difficult to see how such assurances can be offered when the transfer itself takes place in the shadows. It is unclear, for example, whether weapons recently supplied to Afghanistan under presidential drawdown authority have, as a matter of policy implementation, been processed to provide required assurances about end-use and retransfer.

In 2005, a NATO official interviewed by Amnesty International described massive arms shipments from Bosnia, while the Stabilization Force (SFOR) was under U.S. command. The official told Amnesty that "NATO has no way of monitoring the shipments once they leave Bosnia [and] there is no tracking mechanism to ensure they do not fall into the wrong hands." The shipments in question were apparently destined for Iraq and they may well have included some of the weapons that have since apparently gone missing. Less than a year after the U.S. Inspector General for Iraq pointed out deficient accounting procedures by the Multinational Force-Iraq, the U.S. Government Accounting Office reported that some 190,000 weapons transferred to Iraq could not be tracked.¹⁹ Transfers to Iraq can hardly be considered covert operations, yet they seem not to be covered by the "principled policy" and in the details they are as opaque as other shadow transactions.

Costs and Consequences

A comprehensive view of U.S. small arms policy that incorporates both the principled approach and the shadow policy helps explain contradictions like those presented at the outset of this article. While Washington has embraced and actively promotes high standards of accountability for weapons openly supplied, it is apparently wary of a global agreement to make all transfers equally transparent. Such an agreement would effectively countermand the shadow policy. The historical reliance on back channel arrangements for delivering weapons

under the shadow policy feeds a careless attitude toward some transfers, which sheds light on the stunning lack of accountability for weapons supplied to Iraq as reported by the Inspector General. And it helps explain the Pentagon's reluctance to answer questions in 2004 about its probable use of planes owned by Victor Bout to drop supplies in Afghanistan and Iraq, though just a year later OFAC froze the notorious trafficker's assets and banned any American firm from business transactions with him.

What at first appears to be contradictory policies or performance failures are in fact manifestations of the dual tracks of U.S. small arms policy. Recognizing, and acknowledging, both tracks help explain the contradictions, but it doesn't solve attendant problems. Thousands of AK-47 assault rifles supplied to Afghan *mujabideen* in the 1980s reportedly circulate in arms markets in South Asia, Kashmir, Southeast Asia, and the Middle East. And weapons provided by the United States to Central America in the same period continue to stock today's Latin American black market.

The shadow policy originated during the Cold War, at a time when Washington regularly sought to disguise its involvement in the internal politics of other countries. How well it served American interests in earlier decades is open to debate, but its current costs are apparent. Directly and indirectly, clandestinely supplied weapons can have dire consequences in the world's most politically precarious places. These weapons are easily diverted into the black market, and the shadowy supply networks that profit from such trade erode the governance capacity of already weak states. Indeed, the ready availability of illicit weapons threatens the ability of many states to maintain even titular monopoly on the use of force, a defining feature of the modern state.

The costs of over-supply of small arms and light weapons are generally charged to people who have the misfortune of living in war zones, or to the amorphous account of

"global security." But the shadow policy also exacts cost from the United States. The very existence of a shadow policy undermines the efforts of American arms export officials to promote "best practice" standards that emphasize a broad national commitment to comprehensive, enforceable controls. More pointedly, it undermines the credibility of Washington's publicly espoused policy, raising difficult questions about its own commitment to the principles it promotes.

Washington could address this problem and resolve the most troubling contradictions in its current policy by pledging to make all weapons it supplies traceable, as its European partners appear willing to do. The avowed policy on conventional arms transfers requires consideration of a recipient country's record on human rights, terrorism, and proliferation, as well as the potential for misuse or diversion, before an arms sale can be approved.

Those same standards should apply to all transfers, whatever the means of delivery. As a matter of overarching principle, the U.S. should not supply weapons to any party for whose use it is unwilling to accept responsibility. This principle is already implicit in statutory provisions that require end-use certification and retransfer agreement for openly supplied weapons. It should be extended to the supply of all weapons lawfully provided by or through the United States, whether or not they are of U.S.-manufacture. To that end, unequivocal language asserting this principle should be inserted into all the relevant statutes, including the 1947 National Security Act, the Foreign Assistance Act, and the Arms Export Control Act.

There is also need to scrutinize existing law, implementing regulations and programs that permit any weapons transactions to escape the most robust standards of accountability and broadest interpretations of U.S. statutes on arms transfers. This includes arms transfers associated with covert actions, but it also relates to growing

reliance on Pentagon-directed programs that downplay or circumvent human rights considerations, and to Defense Authorization legislation that fails to ensure intended end-use and limit re-transfer options. As a starting point, legislators should categorically reject legislation that includes the phrase “notwithstanding any other provision of law,” and instead assert the applicability of all provisions of the AECA and FAA. Where full accountability is not established, the risk of diversion into the black market can be very high, and the probability that weapons will be used to the detriment of human rights and welfare is increased.

Although the small arms issue is regularly overshadowed by the drama of nuclear proliferation and the hard reality of improvised bombs in Iraq, the threats and challenges it poses remain very real. Over the last several decades the number of small arms manufacturers and exporting states has increased dramatically, adding a new layer of complexity to the international arms bazaar. In the meantime, these arms remain the weapons of choice and convenience in low-intensity conflicts that large powers try to control with low-cost solutions. Warlords, insurgents, or government-sponsored militia in Sudan and Somalia have had little difficulty acquiring weapons, despite imposition of a mandatory UN arms embargo. The continued supply of these arms not only fuels conflicts, but also jeopardizes lives of peacekeepers and relief workers.

Continued reliance on shadow transfers belies a commitment to address these challenges. Efforts to refit the Cold War policy as a tool against terror are misguided. What is true for MANPADS is true for other small arms and crew-based weapons: the unmonitored supply of these weapons is dangerous and risky business. The United States should be strengthening its commitment to a policy based on principles and exercising vigilance to ensure it is not undermined. These principles already inform the best practice on small arms transfer standards in

such international organizations as the Wassenaar Arrangement and the OSCE. What remains is for Washington to ensure that all of its transfers will be subject to these same high standards. Until it does so, it is poorly positioned to criticize those who break UN arms embargoes, or who divert weapons to the black market.

Indeed, Washington’s current dual-track policy provides political license to other states inclined to make irresponsible or clandestine transfers. If the United States is not prepared to amend its own policy, it can hardly claim the high ground over those leaders who clandestinely supply lethal weapons in pursuit of their own ideological or mercantile interests. ●

Notes

1. Office of the Special Inspector General for Iraq Reconstruction (SIGIR), “Iraqi Security Forces: Weapons Provided by the U.S. Department of Defense Using the Iraq Relief and Reconstruction Fund,” SIGIR-060033, October 28, 2006. In a protracted exchange, SIGIR consulted with a range of U.S. military personnel, who concurred that the Defense Department had responsibility to enter the weapons in its small arms registry. According to testimony by the Deputy Inspector General for Iraq Reconstruction before Congress in March 2007, the Pentagon has undertaken retroactively to record serial numbers. However, no mention has yet been made of broader requirements mandated by the Arms Export Control Act or the Foreign Assistance Act, upon which U.S. small arms transfer policy is based. A subsequent report released by the U.S. Government Accounting Office in July 2007 (“Stabilizing Iraq: DOD Cannot Ensure that U.S.-Funded Equipment has Reached Iraqi Security Forces”) notes that because funding did not go through traditional security assistance programs, the Defense Department has stated that normal accountability requirements did not apply.

2. Richard F. Grimmett, “International Small Arms and Light Weapons Transfers: U.S. Policy,” (U.S. Library of Congress, Congressional Research Service RS20958), October 2006.

3. For a review of this program's operations during the 1990s, see Fleur A. Burke, *How Little is Enough? U.S. End-Use Monitoring and Oversight of the Weapons Trade* (Washington, DC: Center for Defense Information, 2002), pp. 49–68.

4. Bolivia headed the list, but clients in Switzerland, the United Kingdom, Canada, and Israel were also found suspect. Raw data are available through Federation of American Scientists, "FAS Obtains Data on Arms Export End-use Monitoring," available at <http://www.fas.org/>.

5. The U.S. transferred some 370,000 weapons valued at \$133 million from 2003–05. SIGIR, "Iraqi Security Forces." According to Congressionally-mandated "Section 655 Reports," transfers of small arms and light weapons through the Foreign Military Sales program from FY 1997 to FY 2001 totaled \$119 million, based on the data compiled by Tamar Gabelnick, Maria Haug, and Lora Lumpe, "A Guide to the U.S. Small Arms Market, Industry, and Exports, 1998–2004." Small Arms Survey Occasional Paper 19, 2006, p. 65. It should be noted that the \$119 million figure does not include the value of licensed direct commercial sales. As signaled by Gabelnick et al., licenses are not always followed by sales. Customs data, however, indicate that actual commercial transfers during the calendar years 1998–2002 amounted to about \$96 million annually (\$481.2 million over the five-year period).

6. Department of Defense, "Security Assistance Management Manual," ch. 8, 2003.

7. For a discussion of the origins of these provisions in the post-Vietnam era, see Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven: Yale University Press, 1991), pp. 57–59. According to Independent Counsel Lawrence Walsh, U.S. law establishes two clear principles regarding covert transactions: the president is personally accountable for covert operations, and all covert operations must be reported to Congress (*Iran-Contra: The Final Report* [New York: Random House, 1994], p. 64).

8. William J. Daugherty, "Approval and Review of Covert Action Programs Since Reagan," *International Journal of Intelligence and Counterintelligence*, vol. 17 (2004), pp. 62–80. Also see Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and*

Bin Laden, from the Soviet Invasion to September 11, 2001 (New York: Penguin Books, 2004).

9. As relayed by the Government of Netherlands, in *Srebrenica: A "Safe" Area*, Appendix II: Intelligence and the War in Bosnia 1992–1995; ch. 4, sec. 2, "Arms supplies to the ABiH: the Croatian Pipeline," (2002).

10. Intelligence agencies under the aegis of the Pentagon include the National Security Agency, Army Intelligence, Air Force Intelligence, Marine Corps Intelligence, Navy Intelligence, the Defense Intelligence Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency.

11. Amnesty International, "Democratic Republic of Congo: Arming the East," AFR/62/006/2005 (July 2005), pp. 26–32 and "Dead on Time—Arms Transportation, Brokering and the Threat to Human Rights," ACT 30/008/2006 (May 2006), pp. 104–117.

12. Michael Hirsh and Jeffrey Bartholet, "Fighting in the Shadows: Battles Rage near the Scene of 'Black Hawk Down'—and a Covert American Hand is Tied to the Warlords," *Newsweek*, June 5, 2006. Also see "CIA Failed in Somalia, Officials Say. Money for Warlords Backfired, They Assert." *International Herald Tribune*, June 9, 2006.

13. "Seymour Hersh: U.S. Indirectly Backed Islamist Militants Fighting Lebanese Army," *Democracy Now*, May 24, 2007. Available at <http://www.democracynow.org/>. Reports about U.S. involvement with Fatah al-Islam have not been confirmed, but a U.S. Senate report does indicate that CENTCOM is transferring equipment to Lebanon for a project called "Reducing Hezbollah's Operational Space."

14. Human Rights Watch, "United States: Dangerous Dealings," February 2002, p. 6, citing news reports from the *Wall Street Journal* and the *Washington Post*.

15. See Nathaniel Heller and Tom Sites, "Collateral Damage: U.S. hands out vast sums of money to combat terrorism while ignoring human rights records; lobbying key to funding flows." (Center for Public Integrity, May 22, 2007). Also see U.S. Senate, Committee on Foreign Relations, "Embassies as Command Posts in the Anti-Terror Campaign," December 15, 2006. The Bush administration has requested both extended authority and increased

funding for this program, also known as “Global Train and Equip.” The program’s funding was increased from \$200 million in FY 2006 to \$300 million in FY 2007, and the administration has requested \$500 million for FY 2008. In proposed legislation (“Building Global Partnerships Act of 2007”) it has also requested that authority be granted to the president or secretary of state to waive “any other provision of law” in consideration of a country’s eligibility to receive military assistance through the train and equip program, and to extend the U.S. military’s mandate to include authority to build the capacity of foreign military and security forces. In July 2007, the Senate Armed Services Committee reduced the FY2008 Global Train and Equip funding back down to its FY2007 levels, but whether the “notwithstanding any other provision of law” clause will be allowed to stand remains unclear.

16. Heller and Sites, “Collateral Damage.”

17. Robert Parry, “Iran-Contra and Wen Ho Lee,” Sept 18, 2000. Available at <http://www>.

consortiumnews.com; Jeffrey Boutwell and Michael Klare, “Small Arms and Light Weapons: Controlling the Real Instruments of War,” *Arms Control Today* (August/September 1998); Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* (New York: Penguin Books, 2005).

18. The choice of particular weapons is presumably motivated by various practicalities, including the desire to provide weapons that are familiar or can be acquired cheaply. These weapons were supplied in addition to approximately 140,000 Austrian Glock pistols and 5,400 other non-Warsaw Pact munitions. SIGIR, “Iraqi Security Forces” and GAO “Stabilizing Iraq.”

19. Amnesty International, “Dead on Time.” The SIGIR report covered 19 contracts awarded between November 2003 and April 2005, roughly coincident with U.S. command over stabilization forces in Bosnia.