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**Developing a Mechanism  
to Prevent Illicit Brokering  
in Small Arms and Light Weapons**  
**Scope and Implications**



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UNIDIR/2006/23

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UNIDIR  
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### **United Nations Department for Disarmament Affairs**

The Department for Disarmament Affairs promotes the goal of nuclear disarmament and non-proliferation and the strengthening of the disarmament regimes in respect to other weapons of mass destruction, chemical and biological weapons. It also promotes disarmament efforts in the area of conventional weapons, especially landmines and small arms. The Department was established in January 1998.

### **United Nations Institute for Disarmament Research**

The United Nations Institute for Disarmament Research (UNIDIR)—an inter-governmental organization within the United Nations—conducts research on disarmament and security with the aim of assisting the international community in their disarmament thinking, decisions and efforts. Through its research projects, publications, small meetings and expert networks, UNIDIR promotes creative thinking and dialogue on the disarmament and security challenges of today and of tomorrow.

### **Small Arms Survey**

The Small Arms Survey is an independent research project located at the Graduate Institute of International Studies in Geneva. It serves as the principal source of public information on all aspects of small arms and as a resource centre for governments, policy makers, researchers and activists. The project also monitors national and international (governmental and non-governmental) initiatives and acts as a clearinghouse for the sharing of information and the dissemination of best practices.



## FOREWORD

During the past decade, the problems posed by unregulated arms brokering activities have become an issue of growing concern for governments, international organizations and civil society in the context of international efforts against the illicit trade in small arms and light weapons. An important body of research has brought the role of arms brokers in facilitating arms transfers to unlawful or illegitimate recipients to the fore of the political agenda. Despite their central role in the arms business, the activities of arms brokers are often unregulated. Arms brokers who facilitate unlawful arms transfers are aiding and abetting violators of arms embargoes, armed groups, criminal gangs and terrorists, thus fuelling insecurity and conflict in many regions of the world.

A number of regional organizations such as the African Union, the Andean Community, the Economic Community of West African States, the European Union, the Organization of American States, the Organization for Security and Co-operation in Europe, and the Southern African Development Community, as well as the states parties to the Wassenaar Arrangement and the states of the Great Lakes Region and the Horn of Africa, have developed instruments and standards for the regulation of brokering activities that the respective member states are encouraged or required to adopt. Such instruments could form the basis of a global effort to curb illicit arms brokering. Partly as an effect of these regional agreements, about 40 countries throughout the world have developed specific controls on brokering activities. In the majority of national legislations, however, brokering activities remain unregulated. In addition, loopholes and inconsistencies in existing systems of control continue to be exploited by unscrupulous brokers.

Following the Secretary-General's consultations with all Member States and interested regional and subregional organizations, and recognizing the need for concerted global action, in 2005 the United Nations General Assembly adopted resolution 60/81 establishing a group of governmental experts to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons.

This study, conducted under the auspices of the United Nations Coordinating Action on Small Arms (CASA), examines existing instruments at the national and international levels. It aims to identify common elements and options for regulation, to enhance understanding of the issue and to clarify its most complex aspects.

The project partners are grateful to the Governments of the Netherlands and of Norway for their financial and political support of this study. The partners would also like to express their appreciation for the intellectual contribution of the authors and of the numerous reviewers.

As a contribution to consideration of the issue at the global level, it is our hope that this publication will help to deepen and widen dialogue on the crucial issue of illicit brokering of small arms and light weapons.

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## EXECUTIVE SUMMARY

### INTRODUCTION

1. One of the consequences of the more global, differentiated and diverse arms trade is the increasing reliance of arms buyers and sellers on specialized services from persons or companies that act as intermediaries, or “middlemen”, to arrange arms transactions. Put simply, arms brokers are intermediaries who negotiate commercial and logistical arrangements to meet the requirements of buyers, sellers and other relevant actors, such as officials, financiers and transport agents, in order to facilitate the transfer of weapons and munitions in return for a commission or other material reward, gain or consideration.
2. Evidence suggests that such activities by arms brokers are not covered in most national laws and regulations, so a legal definition of “arms brokering” and “illicit arms brokering” remains an aspiration rather than a reality for the majority of states. As of mid-2006, it is estimated that around 40 out of 192 UN Member States had enacted specific laws or regulations covering brokering within their systems of arms export control, two-thirds of which were located in Europe.
3. This study therefore provides: (i) an understanding of the terms “arms brokering” and in particular “illicit arms brokering” in the emerging international standards, national laws and current literature; (ii) knowledge of the main features of states’ licensing and registration rules and procedures, drawing upon a significant body of national law and regulation pertaining to arms brokering that has been emerging among a minority of states; (iii) a review of sanctions and enforcement procedures on arms brokering, which demonstrates an array of problems and opportunities for law enforcement and monitoring agencies to curb illicit arms brokering; and (iv) an appreciation of the international evolution of the arms brokering issue when it emerged in discourse on UN arms embargoes, and as the main elements of a control agenda in UN, regional and multinational standards established so far.



4. Strictly speaking, brokering is the act of mediation and not the act of purchasing or taking possession of material items in a transaction. However, evidence suggests that often arms brokers also act as arms dealers, merchants or traders in an intermediary role by buying weapons or munitions themselves in order to sell them for a profit. Sometimes they may also act as commercial agents who represent certain buyers and sellers in an ongoing relationship. All of these activities are variously included in definitions of arms brokering agreed by regional and multilateral bodies, and in national laws. In addition, to ensure the delivery of consignments, arms brokers often work in networks with arms suppliers; transport, warehousing and logistics agents; financiers; insurers; and relevant state officials. Thus, the activities of arms brokers may include the finding of the arms to be traded; the facilitation of the commercial transaction; and the arrangement of necessary legal and other documentation; as well as the negotiation of arms sales, purchases, finance and insurance, and the logistical needs to ensure delivery.
5. Governmental authorities regard arms brokering as a necessary supportive activity to facilitate the supply of arms required for legitimate national defence, law enforcement and civilian uses. Such mediation has a part to play in meeting states' security needs as long as the resulting arms exports, imports and transshipments themselves are properly regulated according to the rule of law. However, the absence of effective laws and regulations in most countries to govern arms brokering has created a significant "grey area" in the international arms trade that is open to substantial abuse. A growing number of reports indicate that strict state control of arms brokering, including of small arms, light weapons and related materiel, is an essential component to reducing and removing the risk of such arms transfers contributing to breaches of international law, especially in conflict-prone regions of the world where serious violations of humanitarian and human rights law are widespread and frequent.

## INTERNATIONAL INITIATIVES

6. Successive United Nations reports on the violation of Security Council arms embargoes on different countries show a lack of effective accountability of arms brokering networks. The first reference to

brokering activities in a United Nations context was made in 1996 by the UN International Commission of Inquiry on arms flows to the perpetrators of the Rwandan genocide. Subsequent UN investigations on the violation of arms embargoes on Angola, the Democratic Republic of the Congo, Liberia, Sierra Leone and Somalia confirmed the important need to prevent the illicit brokering of small arms and light weapons.

7. In 2001, a UN Group of Governmental Experts (GGE), established in December 1999 pursuant to General Assembly resolution 54/54 V, examined the issue of brokering in some depth for the first time. It reported on the feasibility of restricting the trade in small arms and light weapons to manufacturers and dealers authorized by states and concluded that Member States need to establish national systems of control for brokering and related activities occurring within their territorial jurisdiction, in order to deal effectively with illicit or undesirable arms transfers. The GGE found that most states did not have control systems for the registration of arms brokers, the licensing of arms brokering activities or for record-keeping and information sharing on arms brokering, and indicated that, in the short term, the regional level might be the most promising for implementing international action. Furthermore, the GGE suggested that states should: (i) develop and implement national regulations and controls; (ii) identify good practices and develop common approaches or agreed minimum standards; and (iii) make resources available nationally and through appropriate programmes for international cooperation and assistance.
8. The United Nations *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, negotiated in 2001 and which entered into force on 3 July 2005 after ratification by 40 Member States, sets out some basic legal obligations of states to control the brokering of firearms and related parts and ammunition in Article 15(1):

With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a

system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:

- (a) Requiring registration of brokers operating within their territory;
- (b) Requiring licensing or authorization of brokering; or
- (c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.

Although the specific provisions on brokering in the UN Firearms Protocol are rather general and permissive, and not specific and mandatory, the Protocol establishes a principle of multiple authorization by the exporting, importing and transiting states involved.

9. In July 2001, a UN conference of states agreed on the *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (PoA). In the PoA, Member States agreed to develop national legislation or administrative practices regulating those who broker the transfer of such weapons, addressing topics including the registration of brokers, licensing or authorization of brokering transactions, and penalties for illicit brokering activities performed within the state's jurisdiction and control. States also agreed to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons.
10. Some regional and multilateral organizations already have established instruments. The Organization of American States' (OAS) Inter-American Drug Abuse Control Commission (CICAD) agreed the Model Regulations to Control Brokers of small arms which has many strong features, but so far it has not been widely adopted by OAS member states. In Africa a commitment to control the brokering of small arms and light weapons has been made by all states of the African Union, Africa's Great Lakes region and the Horn of Africa (the Nairobi Group), the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). Although the three subregional agreements in Africa are legally binding, the majority of states have yet to incorporate these standards into their domestic law. In Europe, standards for the control of brokering of all conventional arms were agreed by the European Union and by the

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Organization for Security and Co-operation in Europe (OSCE). A lesser-known security-related initiative that mentions brokering was agreed by the UN Economic Commission for Europe. In addition, the Wassenaar Arrangement—in which participate the leading conventional arms producing and exporting states—agreed in 2003 a set of common *Elements for Effective Legislation on Arms Brokering*. Although this is merely a politically binding agreement, it does raise the bar for brokering controls in a number of areas and covers the regulation of international transfers of all conventional arms. The Asian and Middle East regions so far lack any agreed standards to control arms brokering, but an explicit reference was made by the Association of Southeast Asian Nations (ASEAN) in May 2002 to preventing arms smuggling as part of transnational crime and in 2004 Asia-Pacific Economic Cooperation (APEC) agreed to ban the use of non-governmental brokers and brokering services for transfers of man-portable air defence systems (MANPADS).

11. In December 2004 and 2005 the General Assembly requested the Secretary-General:

to continue to hold broad-based consultations ... with all Member States and interested regional and sub-regional organizations on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, with a view to establishing, after the 2006 review conference and no later than 2007, and after the conclusion of the work of the Open-ended Working Group [on marking and tracing], a group of governmental experts, appointed by him on the basis of equitable geographical representation, to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons ... .

This Group of Government Experts will be convened in late November 2006.

## DEFINING “ILLICIT ARMS BROKERING”

12. Although there is not yet a universally agreed definition of the term “illicit arms brokering”, it usually refers in general to those acts of mediation to arrange arms transfers: (i) whose intended recipients are

groups, individuals or states that are prohibited by national or international law from possessing or acquiring such arms—for example, embargoed states, armed groups and criminal gangs, including those believed to engage in terrorist attacks; and (ii) where a broker carries out some other activity in contravention of the national law applicable where the broker operates, resides or holds nationality, for example failing to acquire prior authorization from the relevant state to conduct arms brokering within that jurisdiction. In addition, some activities of arms brokers may be criminal under more general laws—such as statutes that outlaw the transfer of arms without state approval, or bribery or money laundering, which are illegal in most if not all states. However, a more precise elaboration of this definition first requires further consideration of what exactly constitutes arms brokering.

13. One more complex but essential part of determining what exactly constitutes illicit brokering—and conversely what exactly constitutes licit brokering—of international arms transactions is whether such activity, even if authorized by a state official, actually conforms to international law. According to the 1996 United Nations Disarmament Commission Guidelines for International Arms Transfers, “... illicit arms trafficking is understood to cover that international trade in conventional arms, which is contrary to the laws of States and/or international law.” Reflecting this commitment in 2001, Member States agreed in the PoA that they should “assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law ...”. States have progressively established and amended their standards or criteria for the authorization of legitimate arms transfers in national laws, regulations and policies so as to reflect evolving international law. These are also applicable to the authorization of arms brokering transactions, but such standards and criteria vary between states. The UN General Assembly has so far determined that “... limitations on arms transfers can be found in international treaties, binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations and the principles and purposes of the Charter.” However, the General Assembly has not yet agreed on a set of explicit standards that provide Member States with clear, consistent and fair

criteria for decisions on the authorization of international transfer of conventional arms and military equipment and services.

## EXISTING NATIONAL SYSTEMS OF LICENSING AND REGISTRATION

14. It is important to start building knowledge of how the limited number of national brokering control systems work, but caution should be exercised when interpreting aggregate data because of the large variations in the quality and effectiveness of such systems. Even in those states that have laws and regulations applicable to arms brokering activities, too often the standards and enforcement procedures are weak. Loopholes are left open by legislators that arms brokering networks can and do exploit. In general, major loopholes occur if national laws and regulations *exclude*: (i) effective registration and record keeping of eligible brokers; (ii) licensing on a case-by-case basis using objective international standards; (iii) brokering the transfer of specific types of arms and military equipment; (iv) extraterritorial and “third-country” brokering activities; (v) the brokering of financial and transport services for arms deals; and (vi) the role of government officials who broker arms deals. Recently agreed multilateral and regional instruments, as well as some national laws, for the control of arms brokering can provide states with effective options to close these loopholes.
15. Licensing systems constitute the backbone of all national regimes for the control of brokering activities. In all the countries where brokering activities are controlled, there is a requirement for brokers to obtain explicit—usually written—government authorization in order to be able to operate. Lacking such an authorization, the related deals are deemed illegal and therefore susceptible to prosecution and punishment by national authorities.
16. Licensing systems for brokering activities are usually integrated in the more general sets of rules governing the transfer of arms and military equipment. This means that relevant provisions are contained in national laws and regulations on the export, import and transit of arms and military equipment and these may reflect international commitments made by states in treaties and other international and regional instruments. The bodies administering export, import and

transit controls also administer brokering controls, and the criteria used for deciding on arms exports are also used to decide on brokering applications. As far as small arms and light weapons are concerned, however, it is currently common for national systems to apply different sets of rules to military-style small arms and light weapons, on the one hand, and so-called “civilian circulation weapons” on the other.

17. In the majority of cases, national legal systems focus on those activities that involve contract mediation, putting in contact buyers and sellers, as well as arranging payment or transportation schemes necessary for the actualization of the planned weapons transfer (as opposed to the actual provision of transportation or financing services). Importantly, these systems consider the actual possession of the weapons by the broker irrelevant. A few countries such as Bulgaria, Estonia and South Africa extend their controls to activities such as the facilitation of arms transportation, freight forwarding and financing.
18. A “classic” arms export/import control system—which centres around the control of weapons that move across national borders—does not cover deals by brokers working in a given country who are able to evade its arms export/import controls by simply organizing the transfer wholly outside the country’s borders. It is not surprising, then, that such “third-country” brokering has been the focus of most international initiatives and multilateral standards on the issue, and that all existing national systems have established a licensing requirement for brokering between third countries, when the brokering occurs on their territory.
19. Given the international nature of arms brokering—which commonly spans many countries—and the security threats posed by uncontrolled arms brokering, at least some degree of extraterritorial control by states becomes essential for a meaningful functioning of national controls on arms transfers. A variety of existing national systems contain an extraterritorial dimension to their controls on brokering activities. In most cases, extraterritoriality is full—that is, all the rules that apply to nationals, registered companies and established residents when they operate within the national territory extend to their activities abroad. This covers rules for licensing and, where present, for registration, with penalties for related violations. A few states have opted for more limited and selective forms of extraterritoriality whereby national

controls covering the activities of nationals and residents conducted abroad apply only in specific cases, notably where brokering in certain types of weapons or to embargoed destinations is prohibited or subject to special measures.

20. The types of weapons, military equipment and parts, and sometimes paramilitary security goods and services, covered by national brokering controls are usually the same items that are subject to a given country's export/import regime—they are on so-called "control lists". It is common for these control lists to be designed to include, or coincide with, lists determined by multilateral organizations. The lists agreed by these multilateral organizations, as reflected in the majority of national military lists, cover military-style small arms and light weapons, but do not cover some types of small arms permitted for civilian circulation and possession. Brokering of the latter is either regulated through other pieces of legislation (usually the national firearms acts, which also establish the conditions for acquisition and carrying of weapons by civilians) or is not regulated at all.
21. Exemptions from the licensing requirement for brokering activities are extremely common. Of the systems analysed in preparing this report, all provide for situations in which a brokering license will not be necessary. At a minimum, such an exemption covers the activities of government agencies, particularly national armed and police forces. In a few cases, however, licensing exemptions apply to broader instances that relate to trade with allies or very close commercial partners. If such exemptions are not regulated by other national laws and regulations, for example anti-corruption laws and mechanisms applicable to public officials, they may result in loopholes that can be exploited by unscrupulous brokering networks.
22. A particularly important element in the decision-making process is represented by the criteria or guidelines that relevant national agencies employ to decide ultimately whether to grant or refuse a brokering license. These criteria may spell out prohibitions—instances in which authorizations will be refused—or specify the elements that must be considered during the decision-making process, but these can be voluntary and vary between states. Licenses for extraterritorial brokering activities are reportedly only granted by those states with such jurisdiction if the activity would also receive a license if



conducted in the home state. Most common prohibitions are connected with the implementation of arms embargoes—typically decreed by the UN Security Council, but also by other multilateral or regional organizations. Other prohibitions may relate to the transfer of weapons to countries in a situation of internal conflict or regional instability. Besides outright prohibitions, decision-making criteria may include factors such as the consideration of the situation in the recipient country, in terms of human rights violations, reliability or economic stability. Brokering licenses will also be refused when there is evidence or suspicion that the recipient country has committed genocide or crimes against humanity, or if there is a risk that the weapons will be diverted to irregular armed groups.

23. In addition to requiring that brokering activities be licensed, some national systems impose a registration requirement on brokers as a precondition to be able to operate. In these systems, brokers must be registered before they can apply for a license to perform a specific transaction. The essential trait of registration as a precondition to operate is that it establishes a second level of screening, additional to the one taking place during the licensing process. Registers are also sources of “institutional memory”, records that lend themselves to potential uses in the enforcement of controls nationally and in the exchange of information internationally. Registration may be cancelled or revoked, particularly in the case of violations to the national trade laws and regulations. In the countries where brokers do not have to register with national authorities before they apply for an individual deal license, the maintenance of records on granted licenses by the state becomes a particularly important element. In a few systems, the record of the information a broker has provided when applying for an individual deal license is treated as a form of de facto automatic registration.
24. According to the governments questioned in preparing this report, the storing of state data on refused licenses is also quite common. Records are also kept for quite long periods of time, which range (in the case of responding governments) from a minimum of ten years to an indefinite period of time. There is also usually a requirement for brokers themselves to keep adequate records of the activities in which they have been authorized to engage as well as to submit reports on their activities to national authorities. Most governments as well report that

records on granted/refused licenses are shared with national agencies other than those responsible for screening them. In the majority of cases, however, this is done on request or “if necessary”. At the international level, it is significant that all except one of the countries questioned in preparing this report indicated they do not share this information with foreign governmental authorities or international institutions.

25. Identifying and collecting clear evidence of illicit activities required for indictments and prosecutions may depend crucially on the quality and comprehensiveness of record-keeping, the resources and professionalism of law enforcement agencies, and on cooperation from persons in the legitimate arms trade and other states. Law enforcement officials confirmed that it is a regular occurrence that investigations have to be dropped because no such evidence can be obtained, even in cases where there exists reasonable suspicion of wrongdoing. Cooperation among states is required for obtaining admissible evidence on, and for the arrest and extradition of, individuals suspected of involvement in illicit arms brokering who are located outside the state in which that person is sought for questioning or prosecution. There is no state that has extradition agreements with all other states.
26. The provision of false documentation, logistical means or financial services often forms part of illicit arms brokering and trafficking, but such activities may be carried out by persons who are not involved in the actual contractual negotiations. So, if “brokering activity” is defined or interpreted in the law only as “contract negotiation”, then such violations may not be prosecuted as illegal brokering activities, as has occurred in some cases.
27. Prosecution of illegal brokering activities under UN Security Council embargoes can be improved if such activities are made a criminal offence in all states and if the prohibited activities cover the direct or indirect supply, sale and transfer—irrespective of the origins of the arms. UN Expert Groups are intended to provide new information to the Security Council and to follow-up past cases. These UN Groups often do not have sufficiently skilled investigators and lack judicial powers making them unable to produce reports adequate for national prosecutions. There are nevertheless some examples where a UN

Group report has stimulated a judicial process or resulted in positive political action. This has depended upon political will, an enabling judicial environment, and the support of media and non-governmental organizations.

28. A closely related issue is that states usually do not define the deliberate trafficking of arms in violation of UN arms embargoes as an offence under *universal jurisdiction*—the right of a state to “investigate or prosecute persons for crimes committed outside the state’s territory which are not linked to that state by the nationality of the suspect or of the victim or by the harm to the state’s own national interests”. Whether national courts may exercise universal jurisdiction, and over which crimes, differs among states.
29. A major problem in relation to the licensing of arms brokering activities and the monitoring and enforcement of such licences is the absence of verification procedures regarding end-use and the submission of official end-use documentation, which should be a normal requirement for arms exporters and importers. Prior to being authorized to engage in contract negotiations, brokers should be asked to provide information on the intended end-use or end-user. However, if there are no cross-checking procedures with export and import licensing authorities, the information on end-use and end-users provided only by the broker will not be verified with the potential recipient of the arms transfer and with the authorities of the importing state. In addition, the use of delivery verification certificates and post-delivery visits to the stockpiles of importers is highly relevant but apparently rarely used for monitoring of licenses for the transportation of arms and for the brokering of arms transport services.
30. There is no single approach among states for penalties for violations of arms brokering controls. Penalties that may be imposed differ according to the particular violation and the legal frameworks under which the violation is tried. A general distinction can be made between administrative penalties imposed for misdemeanours and criminal penalties imposed for more serious violations. Penalties may include the revocation of a brokering license, the imposition of a monetary fine or, where relevant, debarment from engaging in future arms trade activities, and imprisonment. Penalties such as the freezing of assets and travel bans on “designated” individuals and companies for the

violation of UN arms embargoes have also been recommended by UN Sanctions Committees. These act as a deterrent but are often not implemented by Member States.

31. International cooperation to help combat illicit brokering of small arms and light weapons can also be improved. It could include the provision of technical, financial, legal and other support for the review of existing national legislation and capacity-building for licensing and law enforcement agencies. The International Criminal Police Organization (Interpol) has a potential role in the enforcement of brokering controls, as has the World Customs Organization. Both organizations have initiated programmes to counter illicit trafficking in arms. The International Civil Aviation Organization and the International Maritime Organization, as well as non-governmental industry agencies such as the International Air Transport Association, may also be helpful but so far they appear to have no specific programmes on this issue.
32. An important question is whether Member States should develop through the United Nations an international instrument to regulate the activities of arms brokers in order to encourage states to establish consistent and coherent best practice standards and procedures. The UN Secretary-General urged Member States to negotiate a legally binding international instrument to regulate arms brokering in his 2005 *In Larger Freedom* report. It would be feasible for states to consider proposals based upon the existing multilateral and regional instruments and the lessons learned from the national control of arms brokering in order to produce options for an international instrument to prevent the illicit brokering of arms, in particular small arms and light weapons. Even if such an instrument were not legally binding, it could provide a major tool for the international community's efforts to curb and eradicate the illicit trade in small arms and light weapons.



## CHAPTER 1

# THE PREVENTION OF ILLICIT BROKERING OF SMALL ARMS AND LIGHT WEAPONS: FRAMING THE ISSUE

Brian Wood

## INTRODUCTION

The international arms trade is becoming more global, differentiated and diverse. One of the consequences is the increasing reliance of arms buyers and sellers on specialized services from persons or companies that act as intermediaries, or “middlemen”, to arrange arms transactions. Arms brokers are intermediaries who negotiate, in return for a commission or other material reward, gain or consideration, commercial and logistical arrangements to meet the requirements of buyers, sellers and other relevant actors, such as officials, financiers and transport agents, in order to facilitate the transfer of weapons and munitions.

Evidence suggests that such activities by arms brokers are not covered in most national laws and regulations, so a legal definition of “arms brokering” and “illicit arms brokering” remains an aspiration rather than a reality for the majority of states. Nevertheless, in the emerging laws and literature, the term “illicit arms brokering” usually refers to those acts of mediation to arrange arms transfers whose intended recipients are groups, individuals or states that are prohibited by national or international law from possessing or acquiring such arms—for example, embargoed states, armed groups and criminal gangs, including those believed to engage in terrorist attacks. However, whether such brokering activities are illegal in the country where the broker carries out the activity or where the broker resides or holds nationality depends on whether there is a relevant law—sadly, this is often not the case because so few states have laws that specifically address arms brokering. Some activities of arms brokers may nevertheless be criminal under more general laws, such as statutes that outlaw bribery, which is illegal in most, if not all, states.

Governmental authorities have tended to regard legitimate arms brokering as a necessary supportive activity in the increasingly complex international arms trade, and that such mediation has a part to play in meeting states' security needs as long as the resulting arms exports, imports and transshipments are properly regulated according to the rule of law. However, as this study shows, the absence, in most countries, of effective laws and regulations to govern arms brokering has created a significant "grey area" in the international arms trade that encourages the proliferation and misuse of arms, including small arms and light weapons (SALW), especially where recipients are relatively untrained and unaccountable.

**Box 1.1. The case of Akire Nemoto**

On 3 June 2004, Akire Nemoto,<sup>a</sup> reported to have been one of the senior members of a Japanese crime syndicate nicknamed "Overseas Arsenal", was arrested at his residence in Manila during a joint operation by the Philippine and Taiwanese police. Taiwanese police alleged that Nemoto had received US\$ 100,000 from a Taiwanese criminal gang to smuggle pistols and sub-machine guns into Taiwan. Nemoto came to police attention while they were investigating a drug smuggling case.

When he was arrested, Nemoto was reportedly found to be in possession of a KG-99 sub-machine gun, two pistols and ammunition. In addition, the Taiwanese police stated that the arrest had interrupted the shipment of 100 pistols and sub-machine guns to Taiwan, but that 100 pistols had already been sent. The weapons (along with heroin and amphetamines) were smuggled into Taiwan using fishing boats.

Nemoto is a Japanese national, however, he was not covered by the Japanese law on arms brokering because it applies only to residents in Japan, and not to the activities of its citizens located abroad. Nemoto was resident in Manila.

<sup>a</sup> Also referred to as "Akira Nemoto", "Nemoto Akire" and "Nemoto Akira".

Source: This illustrative case was written and researched by Nicolas Marsh using the following sources: Deborah Kuo, "Taiwan, Philippine Police Crack Yakuza Arms Trafficking Ring", *Central News Agency*, 4 June 2004; and Jimmy Chuang, "Japanese Gun-Smuggling Suspect Nabbed in Manila", *Taipei Times*, 5 June 2004.

Successive United Nations (UN) reports on the violation of Security Council arms embargoes on different countries show that a lack of effective accountability of arms brokering and trafficking networks poses a significant

transnational threat to both state security and human security, and at times has undermined the authority of the Security Council.<sup>1</sup> Over the past ten years, studies have shown that strict state control of arms brokering, including of SALW and related materiel, is an essential component to reducing and removing the risk of arms transfers contributing to violations of international law, especially in conflict-prone regions of the world where serious violations of humanitarian and human rights law are widespread and frequent.<sup>2</sup>

Studies and campaigns carried out by non-governmental researchers since the mid-1990s have changed public perceptions and prompted international bodies and governments to act on this growing and dramatic problem.<sup>3</sup> International outrage was expressed particularly about the brokering of arms to and within Africa after the revelations in 1995 that brokers had played a crucial role in arming the perpetrators of the 1994 genocide in Rwanda.<sup>4</sup> Further concern was expressed after reports emerged about the role of brokers in helping to arm the Angolan rebel movement, the National Union for the Total Independence of Angola (UNITA), as well as the Revolutionary United Front (RUF) rebels in Sierra Leone, despite arms embargoes imposed on these rebel groups by the United Nations Security Council.<sup>5</sup>

Although much of the supply and acquisition of arms in these areas of armed conflict was conducted by government agents or licensed entities, it became increasingly apparent in the late 1990s that lack of effective control of international arms brokering was an important additional factor fuelling conflicts in Africa and elsewhere, in particular in the destabilizing accumulation, illegal trafficking, unlawful possession and gross misuse of SALW. It was also recognized that the phenomenon has been closely linked to the illegal exploitation of natural resources, as well as to money laundering, corruption and other malpractices that together undermined socio-economic development and human rights in Africa and elsewhere. The recent focus of international concern about the ongoing arming of warring parties in the Democratic Republic of the Congo (DRC), where it was estimated that, since 1998, a staggering three million or more people have died, directly or indirectly, as a result of the armed conflict, has confirmed this general view.<sup>6</sup>

Despite Security Council resolution 1196 of 16 September 1998, in which the Security Council called upon states to adopt legislation making the



violation of arms embargoes a criminal offence, many states do not strictly monitor or prosecute the violation of UN arms embargoes by their nationals or residents, or follow up vigorously on the Security Council's "designation lists" to freeze the assets and ban the travel of those individuals and companies involved in gross violations.<sup>7</sup>

### **Box 1.2. The case of Leonid Minin**

On 5 August 2000, Leonid Minin, an Israeli national<sup>8</sup> born in Ukraine and already known to the Italian and Belgian police for his trafficking activities, was arrested in a hotel near Milan. In his room, the police found non-declared diamonds,<sup>9</sup> large amounts of money, and about 1,500 documents in various languages (including English, Russian, Dutch and French) on oil, timber and arms transactions, mostly involving Liberia—a country subject to a UN arms embargo since 1992 and a diamond embargo since early 2001.<sup>10</sup> He was briefly detained and then put under house arrest, but on 21 June 2001 was re-arrested and charged with arms trafficking and illegal possession of diamonds (valued at €500,000). The public prosecutor of the Monza (Milan) Court charged Minin with organizing, in association with others, two arms shipments apparently destined for the ministries of defence of Burkina Faso and Côte d'Ivoire, but in fact directed to UN-embargoed Liberia and to the Liberia-backed RUF in Sierra Leone, also subject to a UN arms embargo.<sup>11</sup>

According to the seized documents, the first delivery arranged by Minin in March 1999 was a cargo of 68 tons of military equipment, including 3,000 AKM assault rifles, 1 million rounds of ammunition, 25 RPG-7s and related ordnance, Strela-3 and Metis systems and 80 related missiles. The arms were bought from the Ukrainian arms marketing company Ukrspetsexport through a Gibraltar-based firm, Engineering & Technical Company Ltd (allegedly one of Minin's shell companies), by using an end-user certificate from Burkina Faso signed on 10 February 1999 by Lieutenant-Colonel Gilbert Diendere. The arms were transported from Gostomel, Ukraine, to Ouagadougou, Burkina Faso, on an An-124 operated by a UK company, AirFoyle, which was the sales agent for Ukraine's Antonov Design Bureau. After it arrived in Burkina Faso, the cargo was trans-shipped to Monrovia, Liberia, in various flights made by Minin's own business jet.

Payments for the shipment show the global nature of the arms deal arranged by Minin. Italian prosecution authorities were directed—reportedly by Minin himself—to a Hungarian bank account owned by a company allegedly related to Minin, the British Virgin Island-registered firm Engineering & Technical Company Ltd. To this account, John Enrique Smythe,<sup>12</sup> Commissioner of Liberia's National

**Box 1.2** (continued)

Bureau of Immigration for Naturalization, credited payments for a total US\$ 463,470 on 8 and 10 March 1999. Payments credited to the same account were entered for two other companies—Tholos Anstalt, for US\$ 965,750 on 22 April 1999, and Zimbabwe Defence Industries, for US\$ 1,383,150 and US\$ 2,103,150 on 22 March and on 31 May 1999, respectively. Payments amounting to US\$ 295,815 from the account were made on 1, 16 and 22 June 1999 to a T.J. Dube, who appears to share the same name with Colonel T.J. Dube, head of Zimbabwe Defence Industries. Further payments from the same account were made to various companies, including Ukrspetsexport, AirFoyle, Transbalkan Cargo Service (BV and Ltd), Phoenix FZE, Arsenal Corp. General Technical Co-operation LLC, and NAIRFO Trading SA.

The second arms delivery arranged by Minin was routed via Côte d'Ivoire rather than Burkina Faso. The arms deal consisted of 113 tons of arms brokered through Spetstechnoexport (a subsidiary of Ukrspetsexport), and included 10,500 AK-47 assault rifles, 120 sniper rifles, 100 grenade launchers, night-vision equipment and 8 million rounds of ammunition. A portion of these arms was delivered in July 2000, apparently destined for Côte d'Ivoire using an end-user certificate signed on 26 May 2000 by a senior official of the Ministry of Defence and authorizing a Moscow-based company, Aviatrend Ltd, to carry out the shipment.<sup>13</sup> The arms were transported from Gostomel to Abidjan, Côte d'Ivoire, on 15 July with the same An-124 that ferried the arms to Burkina Faso in 1999, this time chartered by Aviatrend. Once there, they were trans-shipped to Monrovia in several flights performed by a relatively smaller aircraft, an Il-18, using fake Liberian registration.<sup>14</sup> The aircraft was operated by West Africa Air Services, a phantom airline purposely set up by the Liberian government and Sanjivan Ruprah,<sup>15</sup> an arms and diamonds dealer and business partner of arms trafficker Victor Bout who has been named in several UN reports on the violation of Security Council arms embargoes. Aviatrend Ltd was found by Italian prosecutors to be controlled by Gibraltar-registered Aviatrend, owner of a bank account in Cyprus to which Minin sent about US\$1 million for the arms shipment through a complex route involving another account at the New York Chase Manhattan Bank.

On 17 September 2002, the Court of Appeal (*Corte di Cassazione*) in Rome upheld an appeal by the defendant against the continuation of his detention and ordered his release, unless he was charged and remanded for other crimes.<sup>16</sup> The judges ruled that the prosecution lacked jurisdiction on Minin's trafficking activities because the arms transfers in question did not pass through Italian territory. On 18 December 2002 at the trial of Minin in Monza, the judges

**Box 1.2** (continued)

declared him non-prosecutable for the charges relating to international arms trafficking because the court lacked jurisdiction; however, they upheld the charge for his illegal possession of diamonds, for which he was later convicted and fined €40,000.<sup>17</sup> Thus, Minin walked free and left Italy. However, the Monza public prosecutor appealed against the sentence in February 2003 and later submitted evidence to the Corte di Cassazione, including from the authorities in Ukraine, to support the right of jurisdiction to prosecute Minin for his trafficking of arms, even though the arms never entered Italy.<sup>18</sup> Nevertheless, on 9 January 2004, the Corte di Cassazione declared its non-competence to examine the documentation, rejected the appeal, and confirmed the acquittal of Minin. Subsequently, he tried to return to Italy from Israel but was rejected by Italian authorities because of his inclusion in a UN Travel Ban List established in June 2001 and reiterated in March 2004 to enforce the UN embargo on Liberia.<sup>19</sup>

Source: Research on primary documents for this case was carried out originally for Amnesty International by Sergio Finardi, director of TransArms - Research Center for the Logistics of Arms Transfers.

## INTERNATIONAL INITIATIVES

International discussions by states concerning the need to prevent the illicit brokering of arms have been conducted under the auspices of the United Nations as well as within regional and multilateral bodies. In 1996 the UN General Assembly agreed through the Disarmament Commission that “States should maintain strict regulations on the activities of private international arms dealers and cooperate to prevent such dealers from engaging in illicit arms trafficking.”<sup>20</sup> As Chapter 4 outlines, there emerged an understanding between 1996 and 2000, especially through the investigations of violations of UN arms embargoes on Angola, Rwanda, and Sierra Leone, that the international “brokering” (that is, mediation) of arms deals had become a closely related business activity to that of international “dealing” in arms (that is, the buying and selling of arms) and organizing the “delivery” of arms (that is, the transporting of arms).

In May 1999, a UN consultative meeting of non-government experts was held in New York to assist the Secretary-General in ascertaining the feasibility of undertaking a study for restricting the manufacture and trade of small arms to those manufacturers and dealers authorized by states, as

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requested by the General Assembly in resolution 53/77 E of 4 December 1998 entitled "Small arms". The meeting concluded that such a study was "both feasible and desirable, and could help Member States and the international community to promote national and international efforts in addressing the proliferation of small arms and light weapons".<sup>21</sup> The meeting agreed that the study:

should cover the possibility and desirability of licensing and/or regulating the activities of all participants in the production and international transfer of small arms and light weapons and ammunition, including not only manufacturers and dealers but also brokers, transportation agents and financiers. In particular, the different roles and responsibilities of dealers, brokers, transportation agents and financial institutions need to be clarified ...<sup>22</sup>

In 2001, the General Assembly adopted the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (The Firearms Protocol).<sup>23</sup> The Protocol, which entered into force on 3 July 2005 after ratification by 40 Member States, sets out some basic legal obligations of states to control the brokering of firearms and related parts and ammunition in Article 15(1):

With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:

- (a) Requiring registration of brokers operating within their territory;
- (b) Requiring licensing or authorization of brokering; or
- (c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.

Although the specific provisions on brokering in the UN Firearms Protocol are rather general and permissive, and not specific and mandatory, the Protocol establishes a principle of reciprocal authorization of brokering transactions by the exporting, importing and transiting states involved, as well as by the state where the broker operates. If it were further developed through additional standards and implemented effectively, the Protocol

could provide more transparency and accountability in the international transfer of small arms and make it more difficult for brokers of such arms to circumvent export/import/transit regulations.

In addition to this initiative to prevent international organized crime facilitated by firearms, many states wanted the UN to address also the humanitarian impact of the proliferation and misuse of SALW. Through UN General Assembly resolutions, the UN Secretary-General had since 1996 convened a series of expert groups to report on this wider issue.

In March 2001, a UN Group of Governmental Experts (GGE), established in December 1999 pursuant to General Assembly resolution 54/54 V, reported on the feasibility of restricting the manufacture and trade in SALW to those manufacturers and dealers authorized by states.<sup>24</sup> The GGE called on Member States to establish national systems of control for brokering and related activities occurring within their territorial jurisdiction, in order to deal effectively with illicit or undesirable arms transfers. The GGE found that most states did not have control systems for the registration of arms brokers, the licensing of arms brokering activities or for record-keeping and information sharing on arms brokering.

The report noted that:

arms brokering, which is a largely unregulated activity, can also *take place in grey areas between legal and illegal dealings* [emphasis added]. Some brokers deliberately exploit inconsistencies and gaps in national laws and administrative procedures to circumvent controls, and arrange transfers involving States where export control procedures and enforcement are weak.<sup>25</sup>

The GGE concluded that there was a need for all states to “consider ways to avoid gaps and inconsistencies in national approaches that may undermine the effectiveness of controls”.<sup>26</sup> The Group discussed the practicality of the negotiation by states of a legally binding international instrument. However, the GGE agreed that the lack of sufficient national experience with brokering regulation, together with the variety of national approaches to brokering control and the lack of agreed criteria, would complicate the achievement of a legally binding agreement at that time. The GGE indicated that, in the short term, the regional level might be the most promising for implementing international action and that states could:

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- develop and implement national regulations and controls;
  - identify good practices and develop common approaches or agreed minimum standards; and
  - make resources available nationally and through appropriate programmes for international cooperation and assistance.<sup>27</sup>

Since the publication of this GGE report in March 2001, government initiatives have tended to follow these broad recommendations, while the governments of Norway and the Netherlands have taken a leading role in assisting states to consider and develop their approaches to this problem (a process known as the Dutch–Norwegian Initiative on Brokering).

In July 2001, the participating states in the UN Conference agreed on the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA).<sup>28</sup> In the PoA, Member States agreed to develop adequate national legislation or administrative procedures regulating the activities of those who engage in SALW brokering, including the registration of brokers, the licensing or authorization of brokering transactions, as well as the appropriate penalties for all illicit brokering activities performed within the state’s jurisdiction and control.<sup>29</sup> States also agreed to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in SALW.<sup>30</sup> The adoption of the PoA opened a new chapter in the international efforts to combat the illicit trade in SALW.

In December 2003, the UN General Assembly mandated the Secretary-General to hold broad-based consultations “on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons”.<sup>31</sup> Four informal consultations were held in New York and Geneva in 2004, which showed that a limited measure of convergence by states had emerged on essential standards to prevent illicit arms brokering, especially of small arms and light weapons, although there were still some important points of disagreement. In December 2004 the General Assembly requested the Secretary-General:

to continue to hold broad-based consultations ... with all Member States and interested regional and subregional organizations on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, with a view to establishing, after the 2006 review conference and no later than

2007, and after the conclusion of the work of the Open-ended Working Group [on marking and tracing], a group of governmental experts, appointed by him on the basis of equitable geographical representation, to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons ...<sup>32</sup>

Pursuant to that resolution, the United Nations Department for Disarmament Affairs (DDA) organized two additional broad-based consultations, which took place in New York and Geneva in July 2005. In preparation for these consultations, DDA also organized two workshops, between May and June 2005 in New York and Geneva, in collaboration with the Governments of the Netherlands and Norway.

Informal consultations were also held by DDA on the margins of other meetings, such as a regional symposium on the implementation of the PoA by the Arab States (Algiers, 11–13 April 2005), a United Nations workshop on small arms and light weapons (Beijing, 19–21 April 2005), a meeting on the implementation of the PoA organized by the Organization for Security and Co-operation in Europe (OSCE) (Vienna, 25 April 2005), the Organization of American States (OAS) Forum on Confidence- and Security-Building Measures (Washington, 25–26 April 2005), a workshop on transfer control initiatives for the Caribbean Community (CARICOM) (Nassau, 12 May 2005), a United Nations regional workshop on conventional arms (Nairobi, 31 May–2 June 2005), a workshop on transfer control initiatives for the Andean Community (Lima, 19–20 May 2005), and a workshop on transfer controls initiatives for the Southern Common Market (MERCOSUR) region (Porto Alegre, 2 June 2005).

Finally, with resolution 60/81 of 8 December 2005, the General Assembly decided to establish a Group of Governmental Experts, appointed by the Secretary-General on the basis of equitable geographical representation, “commencing after the Review Conference and no later than 2007, to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons in three sessions of one week’s duration each”. The Group will meet in Geneva in late November 2006 and in New York in March and June 2007.

In addition to the efforts undertaken within the framework of the UN, a recent series of regional and multilateral instruments were established that

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could help form the basis of a sustained effort by states to curb illicit arms brokering. However, many of these instruments do not define illicit arms brokering adequately or consistently, and for the main part do not yet cover countries in the Asian, the Pacific and the Middle East regions—all places where arms brokers are active. Also, most of these instruments are not legally binding on states. In June 2004 the General Assembly of the Organization of American States adopted the Inter-American Drug Abuse Control Commission (CICAD) Model Regulations for the Control of Brokers of Firearms, their Parts, Components and Ammunition,<sup>33</sup> which has many strong features, but so far it has not been widely adopted by the member states of the OAS.<sup>34</sup> In Africa a commitment to control the brokering of SALW has been made by all states of the African Union, the states of East Africa, the Great Lakes and the Horn of Africa (the Nairobi Group), the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS).<sup>35</sup> Although the three subregional agreements in Africa are legally binding, the majority of states have yet to incorporate these standards into their national laws.<sup>36</sup> In Europe, standards for the control of arms brokering were agreed by the European Union<sup>37</sup> and by the OSCE.<sup>38</sup> A lesser known security-related initiative that mentions brokering was agreed by the UN Economic Commission for Europe.<sup>39</sup>

In addition, the Wassenaar Arrangement—the group of leading conventional arms producers and exporters—agreed in 2003 a set of common Elements for Effective Legislation on Arms Brokering.<sup>40</sup> Although this is merely a politically binding agreement, it raises the bar for brokering controls in a number of areas and covers the regulation of international transfers of all conventional arms.

Although Asia and the Middle East so far lack any agreed regional standards to control arms brokering, an explicit reference was made by the Association of Southeast Asian Nations (ASEAN) in May 2002 to preventing arms smuggling as part of transnational crime.<sup>41</sup> In 2004, Asia-Pacific Economic Cooperation (APEC) agreed to ban the use of non-governmental brokers and brokering services for transfers of man-portable air defence systems (MANPADS).<sup>42</sup>



### DEFINING “ARMS BROKERING ACTIVITIES”

Strictly speaking, brokering is the act of mediation and not the act of purchasing or taking possession of material items in a transaction. However, evidence suggests that arms brokers often act as arms dealers, merchants or traders in an intermediary role by buying weapons or munitions themselves in order to sell them for a profit. Sometimes they may also act as commercial agents who represent certain buyers and sellers in an ongoing relationship. In addition, to ensure the delivery of consignments, arms brokers often work in networks with arms suppliers; transport, warehousing and logistics agents; financiers; insurers and relevant state officials. Thus, the activities of arms brokers may include the finding of the arms to be traded, the facilitation of the commercial transaction, and the arrangement of necessary legal and other documentation, as well as the negotiation of arms sales, purchases, finance and insurance, and the logistical arrangements to ensure delivery.

Whether states can agree precise definitions of what constitutes “arms brokering” and “illicit arms brokering” is important if they are to close loopholes in existing laws and regulations. Emerging bodies of law and international standards regarding the control of arms brokering could help states derive a common understanding and work towards an agreement on these key definitions. The definition of brokering activities in law, and hence who may be a legitimate broker, varies among national laws and in regional instruments, as discussed in Chapter 2. Nevertheless, an underlying positive development is that there appears to be at least some convergence or overlap in the meaning applied by state authorities to definitions of brokering activities in their national laws. This is reflected to some degree in the regional or multilateral standards that exist so far.

The OAS opted for a fairly comprehensive definition of mediation and facilitation in arms brokering which, although limited to small arms, is helpful insofar as brokers often operate in networks with other subcontractors. Experience shows that, in order to prevent illicit trafficking, it is vital to bring the whole network into the frame of the national arms control law. The Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition agreed by the OAS CICAD in November 2003, defines a “broker” or “arms broker” as:

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any natural or legal person who, in return for a fee, commission or other consideration, acts on behalf of others to negotiate or arrange contracts, purchases, sales or other means of transfer of firearms, their parts or components or ammunition.<sup>43</sup>

As such:

“Brokering activities” means acting as a broker and includes manufacturing, exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding, supplying, and delivering firearms, their parts or components or ammunition or any other act performed by a person, that lies outside the scope of his regular business activities and that directly facilitates the brokering activities.<sup>44</sup>

The OSCE agreed the Principles on the Control of Brokering in Small Arms and Light Weapons in November 2004 which define “brokering activities” in a manner similar to that of the European Union,<sup>45</sup> namely as activities of persons and entities:

Negotiating or arranging transactions that involve the transfer of the items referred to in the OSCE Document on Small Arms and Light Weapons, and in particular its preamble, paragraph 3, from any other country to another country;

or

Who buy, sell or arrange the transfer of such items that are in their ownership from any other country to another country.<sup>46</sup>

According to the emerging body of international instruments, arms brokering at its core appears first and foremost to be the mediation and negotiation of transactions between buyers and sellers, plus the arrangement of contracts or essential services to facilitate the deal and the delivery. Existing national controls apply irrespective of whether or not the broker acquires, possesses or delivers the arms in question when acting as an intermediary. In addition, some international definitions of brokering, such as that of the OSCE, include both brokering (negotiating or arranging transactions) and dealing or trading (buying and selling) regardless of whether the person or entity doing this acts as an intermediary. Arguably, this broader definition, found in several international instruments, reflects the reality of the business.

The participating states in the powerful arms manufacturing and exporting group the Wassenaar Arrangement agreed to:

Strictly control the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations. ... For activities of negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment controlled by Wassenaar Participating States from one third country to another third country, a license or written approval should be obtained from the competent authorities of the Participating State where these activities take place whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State.

Similarly, a license may also be required regardless of where the brokering activities take place.

Participating States may also define brokering activities to include cases where the arms and military equipment are exported from their own territory.<sup>47</sup>

Other instruments include a slightly wider range of activities. In 2004, the states of East Africa, the Great Lakes Region and the Horn of Africa, some of whose populations have been seriously affected by proliferation and abuses fuelled by the international brokering and trafficking of SALW, adopted the Nairobi Protocol.<sup>48</sup> Article 11 of the Protocol on standards for national laws covering “Dealers, Brokers and Brokering” agreed that:

State Parties, that have not yet done so, shall establish a national system for regulating dealers and brokers of small arms and light weapons. Such a system of control shall include: regulating all manufacturers, dealers, traders, financiers and transporters of small arms and light weapons through licensing ...<sup>49</sup>

The ECOWAS states also opted for a wider definition of brokering activities as “Work carried out as an intermediary between any manufacturer, supplier or distributor of small arms and light weapons and any buyer or user; this includes the provision of financial support and the transportation of small arms and light weapons”.<sup>50</sup>

The 1996 US law and subsequent regulations on the registration and licensing of arms brokering<sup>51</sup> define an arms broker as “any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee,

commission, or other consideration". This broad definition of brokering activities "includes the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service, irrespective of its origin".<sup>52</sup>

Some national laws also include provisions requiring the regulation of activities closely related to brokering such as financing, transporting, freight forwarding and the consulting of partners about arms transfer deals or deliveries. But they tend not to include specific provisions to control arms marketing, promoting or advertising to commercial audiences the possibilities of making gains from arms transfer deals. The US law, for example, requires that:

banks, firms, or other persons providing financing for defense articles or defense services would be required to register under certain circumstances, such as where the bank or its employees are directly involved in arranging arms deals ... or hold title to defense articles, even when no physical custody of defense articles is involved.<sup>53</sup>

It is generally difficult, although not impossible, to prove that entities and individuals are "directly involved" in arranging arms deals, but arguably it is important that the law requires such persons to seek official authorization from the state where they are domiciled or registered. For example, managers of financial institutions and transport/logistics companies based in the receiving country, because of their familiarity with the local business environment, may be invited to take an active part in providing the expertise and contacts to facilitate an arms deal.

Existing definitions in the literature and UN reports on arms embargoes mention not only financial rewards from brokering, but also possible non-pecuniary benefits that accrue to brokering agents, such as gains from barter trade, or non-material considerations.

In order to help create a clear framework for lawful brokering activities, it is possible to distil from the current literature, legislation and practice and regional instruments, as well from the exchange of views within the UN framework, some essential elements of a general definition of arms brokering (See Box 1.3).

**Box 1.3. A general definition of arms brokering activities**

Leaving aside for a moment the question of what types of arms and types of transfers are covered, it is possible to conclude that in general:

**Arms brokering** is activity carried out for a commission, advantage or cause, whether financial or otherwise, including political or personal consideration, by private individuals or corporate entities *involving one or more of the following*:

- *Acting as an intermediary to negotiate or arrange an arms transaction (deal) between any supplier, or provider of related services, and any buyer or recipient; such as (i) putting buyers and sellers in contact; (ii) finding and offering business opportunities to a buyer and seller; and (iii) providing detailed information or practical assistance to help implement or conclude a transaction;*
- *Arranging contracts and obtaining necessary documents and authorizations on behalf of others to conduct an arms transaction—this may include (i) proposing, designing or facilitating the transfer of contracts between buyer, seller and service providers; (ii) ensuring the exchange of other necessary commercial, import, export, end-use and customs documentation and payment(s) between the parties and the relevant state authorities;*
- *Organizing, negotiating or brokering essential services to complete an arms transaction such as technical consultancy, transportation, freight forwarding, warehousing/storage, logistics, financing or insurance; or*
- *Acting as an agent or representative for buyers, sellers or brokers to negotiate or implement or conclude an arms transaction.*

Arms brokers often engage in *additional closely related activities* such as:

- *Directly trading or dealing in arms as a merchant, thereby buying, selling and acquiring legal ownership and/or physical possession of arms, in order to transfer them to others for a profit or gain; or*
- *Providing essential services to conclude an arms deal and deliver the arms, including logistics, transportation, freight forwarding, warehousing/storage, legal, finance or insurance services.*

Arms brokers may *occasionally engage in*:

- *Marketing, promoting or advertising to commercial audiences the possibilities of making gains from arms transfer deals.*

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## DEFINING “ILLICIT ARMS BROKERING” ACTIVITIES

From the composite definition of what is often meant by the term “arms brokering” found in Box 1.3, one may derive a general definition of what should constitute “illicit arms brokering”. The latter would of course have to be shaped by the parameters of the law and regulations chosen by each state for its jurisdiction. The “illicit” nature of any particular arms brokering activity would depend on whether or not the person or entity was authorized to carry out such activity within that jurisdiction. Authorization would depend on the specific provisions of the law, but it may be useful to here set out the broad options.

There appears to be some consensus reflected in international standards and national law that the following transactions would constitute “illicit arms brokering”:

- Brokering activity relating to the export, import, re-export or transit of conventional arms or related services involving a *particular prohibited foreign country or recipient, or prohibited weapons/arms* (that is to say, brokering transfers to an embargoed or restricted country, or prohibited items—an aspect of “illicit trafficking”).
- Brokering activity relating to the export, import, re-export or transit of conventional arms or related services involving the supply to a *particular recipient without the authority to receive such arms* (brokering transfers to a recipient who does not have a valid end-user certificate<sup>54</sup>—another aspect of “illicit trafficking”).

Beyond that, the question of what sort of brokered transactions should be covered by legal mechanisms such as licensing—therefore determining further types of illegal brokering activity if authorization for such brokering has not been granted—may include one or more of several options:

- Brokering *any transaction* relating to the buying, selling or transfer of conventional arms *in any country* (covering domestic and international transfers). This option appears to be reflected in some existing national laws.
- Brokering *carried out in any country, including any foreign country, for the export, import, re-export or transit* of conventional arms or related services (“full extraterritorial brokering”). This option is

reflected in some national laws and multilateral and regional instruments.

- Brokering transactions for the export, import, re-export or transit of conventional arms or related services *where the physical items are transferred only between foreign countries* (“third-country brokering”). This option is reflected in most existing national laws as well as multilateral and regional instruments.
- Brokering transactions *carried out solely in the home country* for the export, import, re-export or transit of conventional arms or related services anywhere (“domestic brokering”). Again, this option is also reflected in national laws as well as multilateral and regional instruments.

In addition, any law on the control of arms brokering, and hence the prevention of illicit arms brokering, must also define *who* may carry out such activity and *what* items may be transferred. For existing national laws and multilateral/regional instruments on brokering, states have so far opted to include one or more of the following individual or corporate actors: permanent or established residents; registered companies or corporate entities; associations; nationals or citizens; and foreign nationals or citizens (resident and sometimes non-resident in the home state). It appears that government officials and agencies, particularly national armed forces and law enforcement agencies, are usually exempt from such controls.

A major parameter of what would constitute “illicit brokering activity” is determined by what *other intermediate activities* between suppliers/providers and buyers/recipients should be defined as “brokering” in the law—particularly, whether it includes:

- *Directly trading or dealing* in conventional arms and related services, thereby buying, selling and acquiring legal ownership or physical possession of such items, *in order to transfer them to others for a profit or gain*; or
- *Directly providing essential services to conclude such a transaction*, including transportation, freight forwarding, finance or insurance.

Of course, the definition of illicit brokering will also be determined by exactly what types of controlled items fall under the law and regulations on brokering. So far, states have chosen, variously, to include firearms, their parts, components and ammunition (as defined by the OAS); small arms

and light weapons (as defined by the United Nations); conventional arms and munitions (as defined by the Wassenaar Arrangement)—which would subsume the former definitions—with or without the inclusion of associated military and security services.

A complex but essential part of determining exactly what constitutes illicit brokering—and conversely exactly what constitutes licit brokering—of international arms transactions is whether such activity, even if authorized by a state official, actually conforms to international law. According to the 1996 United Nations Guidelines for International Arms Transfers, “illicit arms trafficking is understood to cover that international trade in conventional arms, which is contrary to the laws of States and/or international law”.<sup>55</sup>

Reflecting this commitment in 2001, Member States agreed in the UN PoA that they should “assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law”.<sup>56</sup> What constitutes such international law is to some extent an evolving issue as new treaties and principles are established. States have progressively established and amended their standards or criteria for the authorization of legitimate arms transfers in national laws, regulations and policies so as to reflect such international law and need to apply the same criteria to brokering transactions if they are to prevent the proliferation and irresponsible transfer of arms.

National systems of controlling arms transfers and arms transactions should reflect relevant prohibitions and limitations in international law if a common understanding of and determination to prevent illicit arms brokering is to emerge. Currently, there are significant gaps in and contradictions among national systems. The UN General Assembly has set out some broad parameters for such prohibitions or limitations,<sup>57</sup> summarized in the principle that “limitations on arms transfers can be found in international treaties, binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations and the principles and purposes of the Charter [of the United Nations].”<sup>58</sup>

Respect for UN arms embargoes is an obvious element of such limitations. However, the General Assembly has not yet agreed on a set of explicit standards that provide Member States with clear, consistent and fair criteria



for decisions on the authorization of international transfers of conventional arms and military equipment and services—and hence for the authorization of brokering activities. Such standards should at least reflect the most important elements of existing international obligations of states and provide for the right of legitimate self-defence as well as limit and define the scope of states to authorize the legitimate international transfer of weapons and munitions, including:<sup>59</sup>

- Rules of *state responsibility* prohibiting states from aiding and assisting other states in the commission of an internationally wrongful act, rules which are now codified in the International Law Commission’s Articles on State Responsibility.<sup>60</sup>
- Rules of *international criminal law* prohibiting persons from aiding and abetting in the commission of an international crime. The “aiding and abetting” provision of the International Criminal Court Statute establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by *providing the means* for its commission.<sup>61</sup>
- *Positive obligations of states* to ensure respect for international humanitarian law and to cooperate in the protection and fulfilment of human rights beyond their borders.<sup>62</sup> For example, the imposition of arms embargoes is another way in which the international community seeks to prevent breaches of the peace while also giving effect to its common Article 1 obligation under the Geneva Conventions, Article 1 of the UN Charter and the International Covenants on human rights.<sup>63</sup>

Nevertheless, some recently agreed multilateral and regional instruments on the control of arms brokering do incorporate requirements to meet specific international standards for the authorization by states of such activities, and the standards reflect relevant principles of international law to a greater or lesser extent. These are discussed further below and in subsequent chapters.

## KEY CHALLENGES AND LOOPHOLES IN EXISTING BROKERING CONTROLS

Only a few states have established laws, regulations and administrative procedures to control arms brokering activities. In mid-2006, it is estimated

that around 40 out of 192 UN Member States had enacted specific laws or regulations covering brokering within their systems of arms export control, 25 of which were in Europe—see Chapter 2 for more detail. Therefore, one of the biggest challenges is the massive lack of legislative coverage of brokering activity worldwide. Existing national systems to control arms exports, imports and transit are of course in place in almost all countries, but these are exploited by unscrupulous arms brokers and traffickers who in the modern world economy are able to relocate their operations and reroute their deliveries at short notice. Nevertheless, the momentum to establish laws and regulations on arms brokering appears to be increasing.<sup>64</sup>

Caution should be exercised when interpreting aggregate data on legislation and regulations because of the large variations in the quality and effectiveness of such national control systems on arms brokering. Even in those states that have laws applicable to arms brokering activities, too often the standards and enforcement procedures are weak, as shown in Chapter 3. Loopholes exist that arms brokering networks can and do exploit. In general, major loopholes will be present if national laws and regulations *exclude*:

- effective registration and record-keeping of eligible brokers;
- licensing on a case-by-case basis using objective international standards;
- controls on brokering the transfer of specific types of arms and military equipment;
- controls on extraterritorial and “third-country” brokering activities;
- controls on brokering of financial and transport services for arms deals; or
- controls on the role of government officials who broker arms deals.

Each of these are discussed briefly here.

#### **EFFECTIVE REGISTRATION AND RECORD-KEEPING OF ELIGIBLE BROKERS**

Some states that claim to regulate arms brokering rely exclusively on a general permit or once-only registration allowing arms brokers to pursue their activity at will. Brokering agents deemed to be trustworthy are registered without being objectively screened or required to regularly renew their registration. Moreover, oversight procedures and standards

based on relevant principles of international law are often lacking in the design of registration regimes.

The official registration of those wishing to conduct arms brokering activities is a feature of some national laws and is recommended in international agreements—see Chapter 2. Registration should allow national authorities to screen out persons and companies that cannot be trusted to comply with domestic and foreign arms control laws, for example because of past violations of arms transfer regulations or convictions for other serious criminal offences, and also to keep track of the persons and entities authorized to engage in the trade of military equipment. However, in some international brokering standards, registration is optional.<sup>65</sup> Arguably, control of brokering would be more effective if registration were mandatory and subject to regular renewal and also if the registration system were transparent and used in combination with a case-by-case licensing system for each proposed brokered deal (such an approach is recommended in the OAS Model Regulations on Brokering<sup>66</sup>), and if record-keeping on the part of state officials and brokering agents were mandatory.<sup>67</sup>

Obtaining information on arms brokering and evidence of illicit arms brokering is often difficult because such activities are conducted in secret. Nevertheless, studies over the past decade reveal the main features of arms brokering activity in different countries. However, these studies have tended to focus only or mainly on private firms and individuals. Evidence shows that arms brokering activities have been performed by private firms and individuals specializing in the mediation of arms deals, organizations that represent sectors of the arms industry and promote their military and security products in the global market, and also government agencies tasked with facilitating the procurement of arms and the development of domestic arms production by foreign entities. Yet not all of these types of actors have been officially registered and licensed to broker arms transactions according to common standards based on objective criteria such as having no past involvement in illicit activities.

**Box 1.4. The case of Taos Industries, Speedex and Scout**

Large quantities of SALW from the Bosnia and Herzegovina war-time stockpiles and tens of millions of rounds of ammunition were exported and supposedly shipped to Iraq by a chain of private brokers and transport contractors under the auspices of the US Department of Defense (DoD) between 31 July 2004 and 31 June 2005.<sup>68</sup>

For this US-sponsored arms deal for Iraq, the Bosnian state authorities officially gave permission for the sale following the presentation of end-user certificates from the US Coalition Provisional Authority (CPA) and the interim Iraqi administration. However, the sale, purchase, transportation and storage of the weapons were handled entirely by a complex network of private arms brokers, freight forwarders and air cargo companies operating at times illegally and subject to little or no governmental regulation. Governmental and inter-governmental oversight ended at the cargo aircraft point of departure from the US air base in Tuzla.<sup>69</sup> In Bosnia, US DoD officials and US agency staff assisted the primary US contractor to identify weapons, facilitate their purchase and help enable their movement across Bosnian territory.<sup>70</sup> Officials in Iraq and Bosnia could not verify at the time where the arms ended up or even whether the particular consignments really reached Iraq or were diverted elsewhere.<sup>71</sup>

The arms brokering and freight forwarding network was a pyramidal structure with a primary contractor sitting at the apex astride a collection of largely unregulated, secretive companies operating out of private apartment buildings and gun shops but involved in an arms deal worth tens of millions of dollars. The primary contractor was Taos Industries Inc. based in Madison, Alabama. Taos Industries subcontracted to companies in Bulgaria, Croatia, Switzerland and the United Kingdom which in turn subcontracted to other firms, creating a network of business relationships involving a variety of companies. Other companies within the network operated from offices in Bosnia, Germany, Kyrgyzstan, Russia, Serbia, Ukraine and the United Arab Emirates.

Scout d.o.o. of Croatia was the interface arms brokering company which acted as a conduit between the Federal Bosnia and Herzegovina Ministry of Defence, Taos Industries and related subcontractors.<sup>72</sup> According to a well-informed official, Scout had “a long-standing relationship with the Pentagon” and “good connections with the [Bosnian] Federation Ministry of Defence.”<sup>73</sup> The relative power accorded to Scout was also explained by a Taos executive: “We could not buy the weapons without going through Scout. Scout owned every one of those weapons in that warehouse ... and [the NATO-led Stabilisation Force] ... allowed these guys [Scout] in and out ... we had no choice ... frankly it was a good deal for the US government rather than having them demilled ... they could be used in Iraq where they were needed. It [Scout] was the only party we could go to.”<sup>74</sup>

**Box 1.4** (continued)

Scout's business address in the arms transfer documentation was a fifth-floor flat in an outlying suburb in Zagreb, which was the private residence of the two directors of the company listed in Croatia's business directory.<sup>75</sup> The company listed its business activities as a travel agency, tour operator, a producer of electronic equipment and a representative of foreign companies among others. Last on the list was "arms and ammunition broker".<sup>76</sup> Another subcontractor involved in the brokering and shipping network transferring arms from Bosnia was a Swiss arms brokering company whose business address was a gun shop in the town of Laufen, close to Switzerland's border with Germany.

The first of four flights in August 2004 carrying arms destined for Iraq were conducted by Aerocom, a Moldova-based air cargo company accused in an April 2003 UN report to the UN Security Council of smuggling weapons from Serbia to Liberia in 2002 in contravention of the UN arms embargo on Liberia.<sup>77</sup> The Ukrainian-leased cargo aircraft was flying illegally because Aerocom had lost its Air Operating Certificate on 6 August 2004—the day before it began the series of arms flights from Tuzla.<sup>78</sup> The initial transportation of weaponry was arranged by Taos Industries' European freight forwarding broker, Speedex, which had offices at Sofia Airport in Bulgaria.<sup>79</sup> Senior Taos Industries executives stated that the choice of Aerocom as a cargo airline selected by Speedex was the European freight forwarding broker's decision alone.<sup>80</sup>

Despite the strong US law requiring the US Department of State to register and license the activities of arms brokers, government control systems and Congressional oversight of this arms supply chain was inadequate. The US DoD, which sponsored the transfers,<sup>81</sup> and its principal US contractor, Taos Industries, under US regulations should have instituted effective systems to ensure that their brokers and other contractors and subcontractors did not have a record of illicit arms trafficking and that all contractors had valid operating certificates. But the brokers were foreign firms operating outside the United States that did not require registration with the US Department of State and the transactions were for arms that were not of US origin, thereby further reducing any accountability to the Department of State.

Source: Hugh Griffiths worked on this case as a research consultant for Amnesty International. This case was extracted from Amnesty International and TransArms, *Dead on Time: Arms Transportation, Brokering and the Threat to Human Rights*, 2006, chapter 8.

Questionable or illegal brokering activities are often conducted by individual arms brokers who are able to exploit legal loopholes by operating with a network of shell companies, agents and subcontractors. Such brokering networks are usually fluid, opaque and complex. Individual arms brokers tend to be businessmen with military or security backgrounds and close contacts in the arms supply and security industry. From an arms distribution point of view, they may be a conduit for “strategic” political considerations of selling or buying states and powerful companies, even though from an individual point of view they are motivated primarily by private or corporate economic gain. They take advantage of the global banking, tax avoidance mechanisms and transport industries. Above all, those brokers dealing with dubious customers are skilled at hiding their tracks, often using fake documentation, bribery of officials at all levels, and sometimes linking up with organized criminal networks.

Therefore the design of laws, regulations and procedures for the registration of brokers and the licensing of arms transactions and transfers needs to take such factors fully into account, for example by requiring comprehensive information that can be cross-checked. This would be more likely under a system like that of the ECOWAS Convention, whereby:

1. Member States shall register all citizens and all companies incorporated in their territory that are brokering small arms and light weapons, including financial agents and transportation agents on [such armaments], and shall make such registration a requirement for their licit operation.
2. Member States shall ensure that all registered small arms and light weapons brokering agents obtain an explicit authorization for each individual transaction in which they are involved irrespective of where the arrangements take place.
3. Member States shall require that all small arms and light weapons brokering license applications for authorisation provide full disclosure of relevant import and export licences or authorisations and associated relevant documents, the names and locations of all brokering and shipping agents involved in the transaction and the transit routes and points of the small arms and light weapons shipments.<sup>82</sup>

### ABSENCE OF CASE-BY-CASE LICENSING USING OBJECTIVE INTERNATIONAL STANDARDS

A critical weakness of some laws covering arms brokering is that the criteria for the issuance of licences for brokering agents to conduct transactions are ill defined and may in practice be inconsistent with existing international law and standards. This is compounded by the inadequate integration of licensing methods with the operational guidance for ministers and officials in issuing licences for arms exports and imports. For example, arms export and import license applications appear not to require the submission of information about brokering agents and other subcontractors in the deal.

An additional problem is that not all states with laws and regulations on arms brokering rely on the issuance of “individual licences” on a case-by-case basis for each brokered deal involving the transfer of arms; other states merely grant “open general licences” to arms brokers who are then allowed to mediate or negotiate many transfers, usually for the same country or the same list of specified customers. Such open general licences could easily be abused and should be restricted to exceptional cases, for example where there is a high level of accountability and adequate public transparency by the management of a defence project who need to broker the supply of specified items.

According to the EU Common Position on Brokering adopted in June 2003,<sup>83</sup> EU member states are required to “take all the necessary measures to control brokering activities taking place within their territory.” The lawful engagement of such activities requires “a license or written authorisation ... from the competent authorities of the Member State where these activities take place” and member states must assess applications “for specific brokering transactions against the provisions of the EU Code of Conduct on Arms Exports.” The EU Code of Conduct, agreed in 1998, establishes a set of politically binding criteria, including that a proposed arms export must not be authorized by an EU member state if there is a “clear risk” that the arms in question will be used to facilitate serious human rights violations or violate international arms embargoes (see Chapter 2). In other words, the EU requires that arms brokering be regulated according to common standards that respect existing international law and, although the Code is not itself legally binding, governments in the EU are required to carry out specific checking and reporting procedures and can to some

degree be held to account by their legislatures for compliance with the Code.

Similar standards for the authorization of arms transfers have been agreed by other regional organizations and by multilateral bodies, for example in the OSCE<sup>84</sup> and the Wassenaar Arrangement.<sup>85</sup> However, systems of licensing to uphold international law and standards are not yet established and implemented in all states, even where they have made such commitments, and so international brokering and trafficking networks can easily circumvent such controls.

#### **Box 1.5. The case of Verona Commodities**

Following the signing of the peace accords by the parties to the conflict in the Democratic Republic of the Congo in 2002, which included Rwanda and Uganda, the armed forces of which and their allied armed groups had occupied large parts of eastern DRC, a series of arms flights were made from Tirana, Albania, to Kigali.<sup>86</sup> The flights continued until at least June 2003. These involved up to 400 tonnes of munitions, and were arranged by companies from Albania, Israel, Rwanda, South Africa and the United Kingdom. The deliveries coincided with the reported dissemination of arms from Kigali to rebel groups in the eastern DRC with Rwandan military support, including arms deliveries by air and road; to two Congolese armed opposition groups in the eastern DRC; and also with credible reports alleging arms movements from Kigali to Burundi.<sup>87</sup>

Testimony from participants pointed to the involvement of arms brokers and business intermediaries based in Israel, the Netherlands, and the Turks and Caicos Islands.<sup>88</sup> Albanian Ministry of Defence officials said that a company based in Israel brokered these arms shipments to Rwanda: “Verona Commodities is the agent which we have dealt with. It is an Israeli company with a license from the Israeli government—the Albanian embassy in Tel Aviv has checked it with the Israeli government.”<sup>89</sup> Verona Commodities is a company based in the diamond exchange building in Tel Aviv and is registered in the British Virgin Islands. Another company referred to by customs officers as being part of the deal was Verona Commodities of Burundi Ltd, with a postal address in Kigali. A businessman reportedly working for an Israeli company, Ebony, supervised the off-loading in Kigali of arms from Albania, according to sources. Another reliable source said that a freight-forwarding agent based in Tel Aviv had helped arrange the transport with air charter operators based in the United Kingdom and South Africa.



**Box 1.5** (continued)

According to documents and witness statements obtained by Amnesty International, the first series of six flights of arms from MEICO (the privately owned state-controlled Military Export-Import Company of Albania),<sup>90</sup> took place from Tirana to Kigali in planeloads each carrying over 40 tonnes of arms and ammunition from the end of October into November 2002. These shipments included several million rounds of ammunition, and at least one shipment contained grenades and rocket launchers.

Amnesty International found that three of the companies involved in these five arms deliveries operated from the United Kingdom—African International Airways (Crawley, West Sussex), Intavia Ltd (Crawley and Gatwick) and Platinum Air Cargo (Egham, Surrey).<sup>91</sup> The DC-8 cargo aircraft used for the shipments by African International Airways was registered in Swaziland and maintained in South Africa. The South African majority shareholder of African International Airways said in early 2004 that his company had performed the five flights as “government-to-government” transactions.<sup>92</sup> The UK manager of African International Airways said his company had performed six flights.<sup>93</sup> UK customs authorities questioned these companies in late 2003 after the UK government was alerted to irregularities in the freight shipment procedures.<sup>94</sup>

In addition, during 2003 Verona Commodities brokered another deal with an air charter company based in Rwanda, Silverback Cargo Freighters, which used two DC-8 aircraft to carry out another series of ammunition deliveries from Eastern Europe to Rwanda.<sup>95</sup> The two DC-8s operated by Silverback Cargo Freighters were each sold for a symbolic price of US\$ 10 in a complex deal from the United States and delivered to the company in May 2002.<sup>96</sup> According to Albanian officials, at least four arms flights brokered by Verona Commodities were carried out to Kigali from Tirana from April to at least June 2003.<sup>97</sup> Albanian officials said these flights involved the shipment of large quantities of ammunition. However, Rwandan import certificates did not include the name of Verona Commodities.

Subsequent to recognition of the new Rwandan government, Security Council resolution 1011 of 16 August 1995 terminated restrictions on the supply of arms and related materiel to the Government of Rwanda effective from 1 September 1996.<sup>98</sup> However, two operational paragraphs of this resolution retained aspects of the arms embargo. Arms transfers were prohibited “to Rwanda, or to persons in the States neighbouring Rwanda if such sale or supply is for the purpose of the use of such arms or matériel within Rwanda, other than to the Government of Rwanda ...”<sup>99</sup> and “that no arms or related matériel sold or supplied to the Government of Rwanda may be resold to, transferred to, or made available for use by, any State neighbouring Rwanda, or person not in the service of the Government of Rwanda, either directly or indirectly”.<sup>100</sup> Thus, no arms intended

**Box 1.5** (continued)

for delivery to Rwanda should have been permitted if there was a clear risk that Rwanda would directly or indirectly transfer any of those arms to government forces or non-government groups in eastern DRC or Burundi. The UN Security Council also imposed a mandatory arms embargo on the provinces of North and South Kivu and the Ituri region of the eastern DRC, and on groups not party to the peace agreement in the DRC, on 28 July 2003. The UN Panel of Experts<sup>101</sup> presented evidence to the Security Council in October 2003 of the Rwandan, Ugandan and DRC authorities' involvement in providing military support to armed groups in eastern DRC, including Rwandan military supplies to the RCD–Goma forces, the ANC (*Armée nationale congolaise*), from August 2003 which directly violated the UN arms embargo.<sup>102</sup>

When asked if these large ammunition exports to Rwanda would fuel further grave violations of human rights and international humanitarian law in eastern DRC, given the involvement of Rwanda's armed forces and their support for armed rebels in eastern DRC, Albanian officials said they did not know as they did not have diplomatic representation in that region. Subsequently, the Albanian government agreed with diplomats from the EU to abide by the EU Code of Conduct and to consult with EU allies before authorizing such arms exports in the future.

Source: This case study is derived from work for Amnesty International—see Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005.

In addition, the OAS,<sup>103</sup> ECOWAS<sup>104</sup> and the Nairobi Group<sup>105</sup> have agreed sets of standards on licensing transactions and transfers that reflect the international obligations of states when transferring arms. These standards are intended to have legal force when used to consider the licensing of particular brokering activities. However, so far most member states have not incorporated the respective standards into domestic law and practice. It is impossible to envisage the prevention of illicit arms brokering as long as this is the case. For example, in one of the worst affected regions, standards that reflect relevant principles of international law were agreed by the Nairobi Group in June 2005 in the form of "best practice guidelines" for authorizing international transfers of SALW under the Nairobi Protocol and these are intended also to apply to the consideration of licences for brokering.<sup>106</sup> However, these guidelines have yet to be incorporated into domestic regulations and procedures.

Similarly, the OAS Model Regulations on Brokering require that:

The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to:

- (a) result in acts of genocide or crimes against humanity;
- (b) violate human rights contrary to international law;
- (c) lead to the perpetration of war crimes contrary to international law;
- (d) violate a United Nations Security Council embargo or other multilateral sanctions to which the country adheres, or that it unilaterally applies;
- (e) support terrorist acts;
- (f) result in a diversion of firearms to illegal activities, in particular, those carried out by organized crime; or
- (g) result in a breach of a bilateral or multilateral arms control or non-proliferation agreement.<sup>107</sup>

Such general universal criteria would give more meaning to Section 2, Paragraph 11 of the UN PoA when they are implemented in national law and consistent with relevant principles of international law.<sup>108</sup>

If and when such standards are incorporated into the domestic law of states, officials will need operational or procedural guidelines to ensure that decisions are made as objectively as possible. Procedures could, for example, include a list of prohibited and restricted arms,<sup>109</sup> updated lists of embargoed destinations/recipients<sup>110</sup> and those that pose a high risk of diversion, relevant data on the gross violation of international human rights or humanitarian law with types of arms being considered, and other practical advice to ensure compliance with each criterion when considering licenses.

An example of a prohibition on the brokering of a particular type of weapons system are the APEC Guidelines on Controls and Security of Man-Portable Air Defence Systems (MANPADS), which were submitted by the Russian and US governments during the 16<sup>th</sup> APEC Ministerial Meeting, 17–18 November 2004.<sup>111</sup> It stated that, “Exporting [governments] will not make use of non-governmental brokers or brokering services when transferring MANPADS, unless specifically authorized to on behalf of the [member government].”<sup>112</sup>

Where the conduct of lawful brokering activities within the domestic territory is limited exclusively to state companies, arms markets make it necessary for such states to criminalize those brokering activities of nationals conducted abroad that are in contravention of international law. As in the Verona Commodities case described in Box 1.5 (see p. 27), some officials argue that the monopoly of trade with respect to all arms exports and imports that is granted to a state company will enable those state authorities to prevent illicit arms brokering. However, cases of illicit international arms brokering involving nationals or companies in such states casts doubt on whether such systems are foolproof.<sup>113</sup> The use of front companies by brokers at home or abroad, including in off-shore tax havens and free-trade zones, to mask international arms trafficking activities is all too easy. And the risk of irresponsible or illegitimate arms transfers is greatly increased when each arms export is not subject to rigorous appraisal according to objective standards based upon relevant principles of international law.

#### EXCLUDING TYPES OF ARMS AND MILITARY EQUIPMENT FROM CONTROL

Current discussions in the UN and regional organizations tend to assume that controls on arms brokering should only cover SALW as this class of arms has been identified as the most widely used in today's conflicts. However, most state laws and regulations covering the transfer of SALW also include other arms in the control lists. Governments have usually decided to include all arms on the respective munitions lists rather than just SALW in order to streamline their regulatory and enforcement capacity and in recognition of the fact that many arms brokers tend to arrange deals across a range of military and security equipment.

In all current conflicts, belligerents using SALW also use other arms and military-related equipment, and a number of such items, such as military transport and communications equipment, are necessary for deploying SALW-equipped forces. It is thus a distinct advantage that most existing national laws on brokering cover all conventional arms and other military and dual-use items. In the EU Common Position, the definition of arms is assumed to be the same as that in the EU Code of Conduct—that is, the common list of military equipment controlled by EU member states. The Wassenaar Arrangement agreements to control arms brokering also apply to all international transfers of conventional arms.

**Box 1.6. The case of Endeavour Resources UK Ltd**

In September 2004, a UK newspaper reported that it had obtained documents showing that arms brokers based in Ireland and the United Kingdom had been involved in negotiations for arms deals to supply £2.25 million worth of arms to the Sudan.<sup>114</sup> The UK parliament had introduced a new law that entered into force on 1 May 2004 requiring all arms brokering deals conducted by UK residents on UK territory to be subject to licensed approval and also prohibiting arms brokering by UK nationals and residents to countries subject to a UN, EU or other arms embargo agreed to by the UK government, even when the deal is struck outside UK territory.<sup>115</sup>

In June 2004, an end-use certificate (EUC), apparently signed by the Sudanese government, authorized a UK firm, Endeavour Resources UK Ltd, to negotiate for 5,000 M973 9mm semi-automatic pistols to be supplied by Imbel, a company in Brazil, "for the sole use by the internal drug and law enforcement agencies of the Republic of Sudan."<sup>116</sup> Imbel denied supplying these pistols to the Sudan. According to customs data, the Sudan recorded the importation of US\$ 184,392 worth of "parts, pistols and revolvers" from the United Kingdom. The UK Department of Trade and Industry stated that it had no records of such an export.

The arms brokering activities of Endeavour Resources were not confined to small arms. Another EUC, dated 25 May 2004 and apparently also issued by the Military Industries Corporation of the Sudan, authorized Endeavour Resources UK Ltd to negotiate for the supply to the Sudan of twelve Antonov 26 cargo planes and 50 Antonov 2 "crop spraying" aircraft from the Ukrainian arms export company Ukrspetsexport.<sup>117</sup> The Antonov 2 can carry light cargo or up to 14 passengers, and is reputed for its suitability for parachute drops and landing on very short, rough runways.

Another EUC, apparently authorized by Military Industries Corporation on 23 August 2004, to negotiate for the supply of 50 T-72 main battle tanks and spare engines from Ukrspetsexport, was made out to Sinclair Holdings 7 Ltd, a company registered in the Republic of Ireland.<sup>118</sup> Additional EUCs were issued on 25 May 2004 to Endeavour Resources UK Ltd to negotiate for the supply of 12 BM-21 Grad 122mm multiple rocket launchers, 50 T-72 main battle tanks (and spare engines), 50 BMP-2 fighting vehicles, 50 BTR-80 armoured personnel carriers, 30 M-46 130mm field guns, as well as aircraft and pistols.<sup>119</sup>

The government agency responsible for enforcing UK arms control legislation is understood to have investigated the newspaper report, although no prosecution resulted. Despite an EU agreement to control arms brokering, Ireland did not have any legislation controlling the activities of Irish arms brokers who arrange arms supplies from Ireland or from foreign countries. Therefore, Irish registered companies engaged in such activities were unlikely to be prosecuted.

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Source: This case study is extracted from Amnesty International, *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, 2004, and was researched by the Omega Foundation UK.

### EXTRATERRITORIAL AND “THIRD-COUNTRY” BROKERING

The ease with which the business community can move across countries allows individual arms brokers, and more usually networks of brokers, dealers and service providers, to exploit the paucity and weakness of national laws and enforcement—as illustrated in the cases cited above. The weapons and munitions brokered may never enter the country where the broker operates. In turn, the broker may be based (that is, registered or resident) in one country and operate from another. By using a chain of shell companies and circuitous routes where administrative capacity and law enforcement are weak, unscrupulous arms brokers can arrange the delivery of arms cargoes to irresponsible recipients that have either not been authorized to receive them or have persistently used them unlawfully.

In cases where the intended recipient or end-user of the arms is illegitimate or dubious, brokers and their associates will have an incentive to try and arrange a transfer of arms from one foreign country to another without the physical transfer of arms entering their country of operation. They try in such cases to avoid the transaction falling under the jurisdiction of the state where they base their operations, as illustrated by the case of Leonid Minin described in Box 1.2. This is sometimes called “third-country brokering”, and has been the focus of efforts to control brokering by the OSCE, the EU and Wassenaar Arrangement. This type of brokering is even more difficult to control as the arms do not enter into the possession of the broker.

In addition, when a broker’s activities are prohibited or strictly controlled in their home state, they can themselves travel abroad and carry out their arms brokering activities and operations in another country where the activity is not illegal or is poorly regulated. This is called “extraterritorial brokering.”

In 2003, states participating in the Wassenaar Arrangement agreed to recommend extraterritorial licensing measures to control the brokering of conventional arms, regardless of “whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State” and “regardless of where the brokering activities take place.”<sup>120</sup> The EU Common Position requires EU member states to control third-country

brokering,<sup>121</sup> and leaves it optional for EU member states to control extraterritorial brokering—EU states can merely “consider controlling brokering activities outside their territory carried out by brokers of their nationality resident or established in their territory.” No mention is made in the Common Position of controlling EU citizens who both reside and broker arms deals in foreign countries.

The OAS experts on brokering, on the other hand, opted to recommend, in Article 8 of the Model Regulations on Brokering, that national laws covering brokering activities should apply whether or not such activities are conducted in the controlling state’s territory or in a foreign state. The assumption here is that legislation which lacks such extraterritorial scope can be easily circumvented, and rather than preventing harmful brokering activity will simply move it elsewhere.<sup>122</sup>

Of the existing national laws and regulations on arms brokering, most appear to control “third-country brokering” to some degree, but there are still loopholes in application and enforcement, as illustrated in Chapter 3. In some cases, the home state of the brokering agent will require the agent to obtain a brokering license even if only part of the brokering activity is conducted on the home territory, including, for example, the sending or receipt of an e-mail, fax or telephone call.

#### **Box 1.7. The case of Shimon Yelinek**

Shortly before midnight on 5 November 2001, a ship named the Otterloo (owned by a Panamanian company) docked in the Colombian port of Turbo and delivered 3,000 Kalashnikov rifles and ammunition to a Colombian paramilitary organization. The recipients of the weapons, the United Self-Defence Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC), had previously been placed on the US Department of State’s list of terrorist organizations.

The arms had originally been acquired from the Nicaraguan police by a Guatemalan company, GIR SA, in a complex barter exchange that also involved the Nicaraguan army. GIR SA bought the weapons on the behalf of the Panamanian police who were supposedly being represented by a broker resident in Panama named Shimon Yelinek, who supplied a purchase order and end-user certificate to the Nicaraguan authorities.

**Box 1.7** (continued)

However, after the Otterloo departed Nicaragua loaded with weapons, it went to Colombia without stopping in Panama and the arms were delivered to the AUC. The documents which purported to show that the Panamanian police were the customers turned out to be forgeries.

A subsequent OAS investigation into the affair named Shimon Yelinek as a key player in the diversion of the weapons. The OAS report noted that Yelinek had approached GIR SA claiming to be acting on the behalf of the Panamanian police, paid GIR SA for the arms, supplied the forged documentation, identified the Panamanian company that owned the Otterloo and travelled to Nicaragua in 2000 to inspect the arms prior to purchase.

Soon after the diversion of weapons to the AUC became public in April 2002, Yelinek left Panama. On his return in November 2002 he was arrested at Tocumen airport for his connection to the illegal arms deal.

Yelinek appealed against his incarceration and was initially set free by a lower court. However, the case was appealed by the *Fiscalía de Drogas* (the Public Prosecutor in charge). In March 2004, Panama's Supreme Court decided that the alleged activities had taken place in other countries (and were therefore outside its jurisdiction), and that it had not been shown that Yelinek's activities contravened any international treaties to which Panama was party. The Supreme Court closed the case and freed Yelinek.

This case demonstrates the importance of implementing strict brokering legislation. If Panama had required its residents to seek prior authorization before engaging in brokering activities then at the least they could have monitored Yelinek's actions. Moreover, if he had then gone on to undertake unauthorized brokering activities he could have been prosecuted. Yelinek is an Israeli citizen. However, Israel's brokering laws do not provide powers for it to monitor and regulate the activities of its citizens operating abroad.

Source: This case study was written and researched by Nicolas Marsh. The main sources used were: Juan Manuel Díaz, "Cierran investigaciones por tráfico de armas", *El Panamá América*, 31 March 2004; Permanent Council, *Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia*, OAS document OEA/Ser.G CP/doc. 3687/03, 6 January 2003; Florencio Gálvez, "Corte admite recurso a favor de Yelinek", *Crítica*, 31 March 2004; Oscar Martínez, "Magistrado a favor de anular proceso contra implicados en tráfico de armas", *El Panamá América*, 9 January 2004. See also, "Shadow Report on the OAS Report. Diversion of arms from Nicaragua to Colombia." Prepared by Patricia Orozco Andrade with the collaboration of Roberto Canales Flores, Centro de Estudios Internacionales, Managua, Nicaragua, April 2003. The latter report's findings are in many aspects very different from those of the official OAS report.



In 2005, at least 21 states had laws providing for some degree of extraterritorial control of arms brokering, and most applied a licensing requirement for arranging an arms transfer for supply and delivery in foreign territories.<sup>123</sup> The laws of the United States and South Africa have a high degree of extraterritorial application that applies to the brokering activities outside the home country by residents, companies as well as nationals wherever they are conducting the brokering activity.

The US law requires US brokers living anywhere and foreign nationals residing in the United States or subject to US jurisdiction to register and obtain licenses for all arms deals they arrange. Those persons conducting brokering activity required to register in the US as a broker include:

Any U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States ... who engages in the business of brokering activities ... with respect to the manufacture, export, import, or transfer of any defense article or defense service subject to the controls of this subchapter ... or any "foreign defense article or defense service".<sup>124</sup>

In describing brokering activities, US brokering regulations specify that such activities include, but are not limited to:

activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside of the United States. But, this does not include activities by U.S. persons that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export or re-transfer in the United States or a foreign person).<sup>125</sup>

As one commentator has observed, "Not only does the law empower US implementing and enforcing agencies to monitor the number of brokers and the type of their operations, it also subjects violators to US jurisdiction wherever an offence has been committed."<sup>126</sup>

In other regional agreements, there are no specific clauses to enable the extraterritorial control of arms brokering by the home state of the broker. For instance, although the preamble to the Nairobi Protocol expresses concern "about the supply of small arms and light weapons into the region and conscious of the need for effective controls of arms transfers by

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suppliers and **brokers outside the region ...** [emphasis added], Article 11 of the Nairobi Protocol requires states parties to:

- establish a national system for regulating dealers and brokers of small arms and light weapons. Such a system of control shall include:
- i. regulating all manufacturers, dealers, traders, financiers and transporters of small arms and light weapons through licensing;
  - ii. registering all brokers **operating within their territory** [emphasis added]... .

Since brokering networks involved in arranging arms supplies to illegitimate end-users will tend to conduct their activities outside jurisdictions with robust control systems, states that choose not to exercise a sufficient degree of extraterritorial control of their nationals and residents—as they do to prevent and curb the illicit trade in people, drugs and other items—will generally fail to control such mobile activity. In this respect, states will often remain entirely dependent on governments with weak arms control laws and enforcement capacity. Governments that are now considering new laws and procedures need to formulate them and plan to deal with these challenges. The critical question is whether states base jurisdiction on the *residency of the brokering entity* regardless of where the brokering activity takes place.

#### **BROKERING OR PROVIDING FINANCIAL, TRANSPORT AND LOGISTICAL SERVICES**

Each year, the global freight transport industry delivers hundreds of thousands of tons of weapons and other military and security equipment, ammunition and spare parts to armed forces, law enforcement agencies, and sometimes to armed groups around the world. Maritime and air transport play a significant role in the supply chain of military equipment, and air transport in particular has been the mode of choice in the supply chain of SALW and ammunition to many conflict zones.<sup>127</sup> Many of the middlemen who routinely facilitate the arms trade—including financial institutions, carriers and providers of logistical services—are not usually required specifically to register or seek specific licenses for their financial, transport or logistical activities, and therefore these may escape official monitoring.

If a person or firm brokers the use of a transport firm, a freight forwarder, warehousing or the funding and insurance for the delivery, this should be covered by the emerging national laws and regulations on arms brokering. However, if a person or firm actually provides such services for the purpose of delivering arms, they appear to be exempt in some jurisdictions from obtaining a license. For example, despite the extensive extraterritorial jurisdiction and other robust provisions on arms brokering, certain exemptions included in the US regulations on brokering exclude the provision of financing, freight forwarding and transporting of “defense articles”.<sup>128</sup> For instance, US law does not require registration by:

*persons exclusively in the business of financing, transporting, or freight forwarding, whose business activities do not also include brokering defense articles or defense services. For example, air carriers and freight forwarders who merely transport or arrange transportation for licensed United States Munitions List items are not required to register, nor are banks or credit companies who merely provide commercially available lines or letters of credit to persons registered in accordance with Part 122 of this subchapter ...*<sup>129</sup>

#### **Box 1.8. Victor Bout’s air trafficking of arms**

Several UN expert panels have reported on illicit arms brokers and traffickers who control air cargo syndicates. One name that frequently shows up is that of Victor Bout. This former air force navigator of the Soviet Union moved to the United Arab Emirates in the early 1990s where he began his own cargo business. Between 1995 and 1997, Bout’s activities were relocated to Ostend airport, Belgium, where he ran two companies,<sup>130</sup> Trans Aviation Network Group<sup>131</sup> and the Liberian registered Air Cess but with an office in Sharjah.<sup>132</sup> Bout and his company Air Cess left Belgium in July 1997. It is not known where he moved this company. An international aviation directory shows that in 1998 Bout (a.k.a. Victor Butt) headed two other companies, Centrafican Airlines and Cessavia; both run from the offices of Transavia Travel Agency<sup>133</sup> in Sharjah.<sup>134</sup> Air Cess suspended its operations in 1998,<sup>135</sup> but later directories list Cessavia operating under the name Air Cess with offices in Sharjah, and run by Victor Bout.<sup>136</sup>

The UN Panel of Experts on Angola reports that between 1996 and 1998 Air Cess made 38 arms flights for the National Union for the Total Independence of Angola (UNITA) in breach of the UN arms embargo.<sup>137</sup> Another company suspected of supplying UNITA with arms was AirPass, a subsidiary of Air Cess.<sup>138</sup> The attention

**Box 1.8** (continued)

of the United Nations was once again drawn to Victor Bout's companies during its investigation of the violations of the UN embargo against Liberia. Planes operated by Centrafrique Airlines made four flights between July and August 2000 for arms deliveries to Liberia.<sup>139</sup> Serious concerns were also raised by the government of Swaziland about an airline company called Santa Cruz Imperial/Flying Dolphin, based in the United Arab Emirates. The company had "used the Liberian registry for its aircraft, apparently unknown to Liberian authorities until 1998. It also used the Swaziland registry until the government of Swaziland de-registered them in 1999." When the government of Swaziland "discovered that some of the aircraft were still operating, the government of Swaziland sent information to the Civil Aviation Authorities in the United Arab Emirates where some of the aircraft were based ... because it believed that the operators may have been involved in arms trafficking."<sup>140</sup> In November 2000 an Il-18, chartered by Centrafrique Airlines from the Moldovan company Vichi, delivered sub-machine guns from Uganda to Liberia. Payments to Vichi were made by the Sharjah-based San Air General Trading.<sup>141</sup> San Air had previously been involved in a shipment of helicopter parts to Liberia in July 2000,<sup>142</sup> followed by another suspicious flight to West Africa in August 2000.<sup>143</sup>

Bout has also been active in the Democratic Republic of the Congo and Rwanda. When in February 2002 an international arrest warrant<sup>144</sup> was issued for Victor Bout by the Brussels investigative judge following the arrest of Sanjivan Ruprah, a press communiqué released by Mr Ruprah's lawyer noted that Paul Kagame, Rwanda's President, and the Rally for Congolese Democracy (RCD) rebels in Congo still had a debt in excess of US\$ 21 million owed to Mr Bout.<sup>145</sup> This was most likely connected to the logistic support that Bout's companies provided to RCD-Goma and the Rwandan army.<sup>146</sup> Officials from the Russian Federation have placed aircraft operated by Bout also in Somalia.<sup>147</sup>

Bout has also been active in other parts of the globe. In the mid-1990s he was supplying Rabani's government in Afghanistan.<sup>148</sup> One of the companies that was linked by the UN to the activities of Bout has flown for the Taliban. It is alleged that a secret meeting took place in October 1996 in a Sharjah hotel between representatives of Air Cess/Flying Dolphin<sup>149</sup> and Taliban representatives. When the meeting ended, the Taliban "had agreed to depend on Air Cess for wheels, tires and other military equipment for Taliban air force planes. Flying Dolphin would provide charter flights when Ariana<sup>150</sup> was unavailable. ... Air Cess ... became a conduit for arms and ammunition obtained for the Taliban from several Eastern European countries."<sup>151</sup> The director of Flying Dolphin has always denied any wrongdoing: "If there's anything happening like this, it's

**Box 1.8** (continued)

without my knowledge.”<sup>152</sup> Flying Dolphin operated weekly flights to Afghanistan between October 2000 and January 2001. These weekly flights were suspended in January 2001 when the UN imposed tougher sanctions on the country.<sup>153</sup>

Source: This case study was researched by Peter Danssaert of the International Peace Information Service, Antwerp.

**EXCLUDING THE ROLE OF GOVERNMENT OFFICIALS  
WHO BROKER ARMS DEALS**

Government officials sometimes act as arms brokers in an official or unofficial capacity, but brokering activity by officials in an official government capacity appears to be exempt from registration in most existing national laws and regional agreements, for example the OAS Model Regulations.<sup>154</sup> US government employees are exempt from provisions of the law on arms brokering if “acting in official capacity” as are “employees of foreign governments or an international organizations acting in official capacity.”<sup>155</sup>

Officials argue that the exclusion of government employees acting in an “official capacity” from registration, licensing and other legal requirements—even if they routinely engage in activities that actively promote sales of arms and security equipment and services—is justified because “the problem” of arms brokering is caused by uncontrolled private individuals and commercial companies. This argument ignores the fact that arms deals brokered by government officials may also sometimes result in the proliferation and misuse of arms unless such brokering is regulated according to strict international standards.

Two different situations involving arms brokering by government officials may pertain: when it is a case of an official acting in a corrupt or unauthorized way, or when an official is acting fully in accord with what his government leaders want, which is to circumvent an arms embargo or to mislead an exporting government.

### Box 1.9. The case of government brokers in the DRC and Namibia

In February 2003 the government in Kinshasa, DRC, attempted to procure 50 T-55 tanks, 20 armoured personnel carriers and approximately 34 million rounds of ammunition from a Czech and a Slovak company.<sup>156</sup> Although this order was not necessarily in violation of the UN embargo on the DRC, it was an extremely large arms order and serious irregularities were noted in the procurement process. In mid-2003, an end-user certificate of the Namibian government was presented to the Czech and Slovak authorities, but agencies of both governments were apprehensive about the final destination of the arms and did not approve its export.<sup>157</sup> This was an instance of a real end-user certificate used in an apparently fraudulent way by procurement officials of the DRC.<sup>158</sup>

The director of Thomas CZ, the Czech arms company, reportedly acknowledged in June 2004 that his company had traded with the DRC and that prior to the 2003 UN arms embargo on the DRC his company had carried out business there.<sup>159</sup> On 28 June 2001 the *Président Administrateur-Délégué* of the Société Minière de Bakwanga (MIBA) in Brussels had received instructions from a senior DRC official to transfer US\$ 588,300 to a bank account of Thomas CZ.<sup>160</sup>

The original order from the DRC had been placed with Thomas CZ, but when the Czech government refused to issue an export licence, the order was placed with Technopol International in Slovakia as an intermediary. Thomas CZ then attempted to obtain an export license to deliver the materiel to Slovakia, while Technopol requested an export licence to Namibia, but both these requests were also refused.

Sources: This case study was extracted from Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005, and was researched by Peter Danssaert of the International Peace Information Service.

To broker an arms deal, government employees may for example use their official position to:

- promise a firm involved in the arms deal that it will be included in government security assistance and arms surplus programmes, or unfairly aid a firm to tender for such a programme;
- facilitate a firm's access to financial aid and credit;
- arrange state support to a company for the purchase of its "offset" production of arms components;
- mobilize a government to support a barter trade deal to benefit a firm; or
- simply accept a bribe.

Some of these activities are crimes, regardless of whether one commits them as a government arms broker or in any other official capacity. It should instead be emphasized that general criminalizing legislation is not sufficient to prevent such practices, and therefore specific legislation is required. Sometimes it is alleged that former procurement agency officials and high-ranking military personnel on the boards of directors and private consultancies of arms manufacturers and private military companies have benefited from previously arranging lucrative contracts for those same firms.

One of the ways that governments, defence industry–governmental associations and firearm dealers associations help each other to promote the sale of arms and associated services is by regularly organizing and participating in international arms fairs and exhibitions. They also stage conferences aimed at promoting particular weapon systems. The rosters of speakers sometimes include military personnel, government officials and experts, any of whom may be a broker. These events are used to identify and promote the demand and sources of supply for customers of particular military and security products and services, and for announcing major arms deals and contracts. The brokering of arms deals is most usually carried out during informal meetings at such events. Therefore, all marketing, sales and official delegates or participants to such events should be properly registered and anyone reported to be involved in brokering transactions should be required to produce authorization for such activity.

“Unofficial” brokering by officials is difficult, but not impossible, to prove. Through careful monitoring and random checks, evidence could be obtained that government employees had received a tangible private fee or other extra benefit from brokering an arms deal. Furthermore, much greater transparency in authorized arms exports would discourage corruption by allowing for easier tracking of weapons and payments.<sup>161</sup>

Laws complementary to arms control laws designed to prevent and prosecute official corruption need to be enacted according to the best international standards and be robustly implemented. Such laws should also take into account the possibility of private gains by officials from arms brokering. There are a number of multilateral instruments against corruption and, although none appear to provide for the control of arms brokering as such,<sup>162</sup> they do set out standards that could prevent “unofficial” arms brokering by officials. For example, Article 9 of the 2003 UN Convention against Corruption requires states parties to, “... in

accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption.”<sup>163</sup>

This UN Convention goes beyond previous instruments of this kind by providing for the criminalization, not only of basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption.

## SUBSEQUENT CHAPTERS OF THIS STUDY

The remainder of this study elaborates the scope and the implications for developing international standards for the control of brokering international arms transfers, particularly transfers of SALW, and why these have become an important agenda item within the United Nations and other international bodies. It is evident that most states have been slow to address the problem of illicit arms brokering but now it is possible to improve and widen existing state practice.

Chapter 2 outlines the main features of states’ licensing and registration rules and procedures and draws upon a significant but relatively small body of national law and regulation pertaining to arms brokering that has been emerging among a minority of states. Although the introduction of new control systems has been limited largely to European countries, there are some notable exceptions, and it is becoming possible to consider some regulatory options from this experience at national level.

Chapter 3 shows, through case studies and a review of sanctions and enforcement procedures, an array of problems and opportunities faced by law enforcement and monitoring agencies in curbing illicit arms brokering. Inconsistencies in information systems, verification procedures and the institutional capacity to enforce and uphold national laws, as well as UN arms embargoes, can be identified and addressed. Enhanced international systems of cooperation and standards are required, for example on



extradition, delivery verification and end-use certification, while criminal and administrative sanctions need to be made consistent.

Chapter 4 traces the precise evolution of the discussions on arms brokering within the United Nations since 1996, when the issue was first addressed within the context of UN arms embargoes. The chapter also explores the emergence of common standards on arms brokering through the existing instruments at the regional level. As well, international initiatives since 1999 to encourage states to establish effective laws, regulations and procedures to prevent illicit arms brokering are reviewed.

It is hoped that, pending the outcome of the forthcoming Group of Government Experts on brokering in late 2007, states should be encouraged to adopt and implement, if they have not yet done so, national laws, regulations and administrative procedures, that are consistent with best practice and the highest international standards, to control the brokering of arms transfers. Moreover, as is demonstrated in this report, the development of a United Nations instrument requiring effective laws, regulations and procedures on the part of states to prevent illicit arms brokering would considerably help such efforts.

## Notes

- <sup>1</sup> See in particular the many UN investigative reports on Angola, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone and Somalia. There are too many reports and UN Security Council decisions to list here so the following list is not exhaustive, but see, on Angola, S/RES/864 (1993), S/RES/1237 (1999), S/RES/1295, S/2000/203, S/2000/1225, S/RES/1336, S/2001/363, S/RES/1348, S/2001/966, S/RES/1374, S/2002/486, S/RES/1404, S/2002/1119, S/RES/1439 and S/2002/1339; on the Democratic Republic of the Congo, see S/RES/997 (1995), S/2002/1146, S/RES/1493 (2003), S/2003/1098, S/RES/1533 (2004), S/2004/551, S/RES/1552 (2004), S/2005/30, S/RES/1596 (2005), S/2005/436, S/RES/1616 (2005), S/RES/1649 (2005) and S/2006/525; on Liberia, see S/RES/985(1995), S/RES/1306 (2000), S/2000/1195, S/RES/1343, S/2001/1015, S/RES/1395, S/2002/470, S/RES/1408 (2002), S/2002/1115, S/RES/1458 (2003), S/2003/498, S/RES/1478 (2003), S/2003/937, S/RES/1521 (2003), and S/RES/1579

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(2004); on Rwanda, see S/RES/918 (1994), S/RES/1005 (1995), S/RES/1011(1995), S/RES/1013 (1995), S/RES/1053(1996), S/RES/1161 (1998) and for investigative reports see footnote 4 below; on Sierra Leone, see S/RES/1132 (1997), S/RES/1171 (1998), S/RES/1306 (2000), and S/2000/1195; and on Somalia, see S/RES/733 (1992), S/RES/751 (1992), S/RES/1356 (2001), S/RES/1407 (2002), S/RES/1425 (2002), S/RES/1474 (2003), S/2003/223, S/RES/1519 (2003), S/2003/1035, S/RES/1558 (2004), S/2004/604, S/RES/1587 (2005), S/2005/153, S/2005/625, S/REV/1630 (2005) and S/2006/229.

- <sup>2</sup> The first major thematic study of international arms brokering was Brian Wood and Johan Peleman, *The Arms Fixers: Controlling the Brokers and Shipping Agents*, Peace Research Institute of Oslo, the Norwegian Initiative on Small Arms Transfers and the British American Security Information Council, 1999.
- <sup>3</sup> The range of literature includes substantive research on arms brokering activities as well as short policy recommendations. See, for example, Brian Wood and Elizabeth Clegg, “Controlling the Gun-runners: Proposals for EU action to Regulate Arms Brokering and Shipping Agents”, British American Security Information Council, The Norwegian Initiative on Small Arms Transfers and Saferworld, briefing paper, 1999; Brian Wood and Johan Peleman, *The Arms Fixers: Controlling the Brokers and Shipping Agents*, Peace Research Institute of Oslo, the Norwegian Initiative on Small Arms Transfers and the British American Security Information Council, 1999; Brian Wood and Johan Peleman, “Making the Deal and Moving the Goods: The Role of Brokers and Shippers”, in Lora Lumpe (ed.), *Running Guns: The Global Market in Small Arms*, Zed Books Ltd, 2000; Elizabeth Clegg and Michael Crowley, *Controlling Arms Brokering and Transport Agents. Time for International Action*, British American Security Information Council, International Alert and Saferworld, Biting the Bullet Briefing 8, 2001; Amnesty International, British American Security Information Council, International Alert, Oxfam and Saferworld, *How Guns Get to War Zones—Techniques of Clandestine Arms Delivery*, 2001; Loretta Bondi, “Expanding the Net: A Model Convention on Arms Brokering”, The Fund for Peace, 2001; Amnesty International, British American Security Information Council, Christian Aid, International Alert, Oxfam and Saferworld, “Loophole in New Law Could Allow British Dealers to Arm Terrorist Groups—Government Breaks Manifesto Commitment”, UK Working Group on Arms, 16 October 2001; The Fund for Peace, *Model Convention on the*

*Registration of Arms Brokers and the Suppression of Unlicensed Arms Brokering*, 2001; William Godnick, "The Organization of American States and the 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects. Tackling the Illicit Trade in Small Arms and Light Weapons", British American Security Information Council, International Alert, Saferworld, Project Ploughshares, Arias Foundation for Peace and Human Progress, 2002; Gail Wannenburg, "Catching the Middlemen Fuelling African Conflicts", in *South African Yearbook of International Affairs 2002/03*, The South African Institute of International Affairs, 2003; Ken Epps, "International Arms Embargoes", Project Ploughshares, 2002; Ian Davis and Roy Isbister (eds), *EU and US Co-operation on Arms Export Controls in a post 9/11 World. Report of a Roundtable Hosted by BASIC and Saferworld*, British American Security Information Council and Saferworld, 2003; Oxfam, "Regulating Weapons Deals: The Case for European Controls on Arms Brokers", *Oxfam Briefing Paper 39*, 2003; Dutch–Norwegian Initiative on Further Steps to Enhance International Co-operation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons, "Chairs' Report" and "Conference Report", 23–24 April 2003; The Fund for Peace, "Statement on the Occasion of the UK Enquiry into Secondary Legislation on the Arms Export Control Bill: the U.S. Law on Arms Brokering", 30 April 2003; Holger Anders, "Controlling Arms Brokering: Next Steps for EU Member States", Groupe de recherche et d'information sur la paix et la sécurité briefing, note d'analyse, 2004; Small Arms Survey, "Fuelling the Flames: Brokers and Transport Agents in the Illicit Arms Trade", in *Small Arms Survey Yearbook 2001: Profiling the Problem*, Graduate Institute of International Studies, 2001 (based largely on the work of Wood and Peleman); Small Arms Survey, "Targeting the Middlemen: Controlling Brokering Activities", in *Small Arms Survey Yearbook 2004: Rights at Risk*, Graduate Institute of International Studies, 2004; Noel Stott, Sarah Meek and Emily Schroeder (eds), *Understanding and Regulating Arms Brokering in Southern Africa*, Institute for Security Studies–Pretoria, workshop report, Johannesburg, 15–17 March 2004; Sibylle Bauer and Mark Bromley, "The European Union Code of Conduct on Arms Exports. Improving the Annual Report", Stockholm International Peace Research Institute, *SIPRI Policy Paper No. 8*, 2004; Roy Isbister and Elizabeth Kirkham, *An Independent Audit of the UK Government*

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*Reports on Strategic Export Controls for 2003 and the First Half of 2004*, Saferworld, 2005.

- <sup>4</sup> See Kathi Austin, *Rwanda/Zaire: Rearming with Impunity*, 1995; Amnesty International, *Rwanda: Arming the Perpetrators of the Genocide*, 1995; and the subsequent reports of the UN International Commission of Inquiry. The UN International Commission of Inquiry was established pursuant to Resolution 1013 (1995) of the United Nations Security Council, to “investigate, *inter alia*, reports relating to the sale or supply of arms and related materiel to former Rwandan government forces in the Great Lakes region in violation of Council Resolution 918, 997 and 1011”. The following reports were published: *Interim Report*, UN document S/1996/67, 29 January 1996; *Second Report*, UN document S/1996/195, 14 March 1996; *Third Report*, UN document S/1997/1010, 24 December 1997; *Addendum to the Third Report*, UN document S/1998/63, 26 January 1998; *Interim Report*, UN document S/1998/777, 19 August 1998; and *Final Report*, UN document S/1998/1096, 18 November 1998.
- <sup>5</sup> These revelations stemmed largely from the reports of UN arms embargo inquiries as well as from a few non-governmental organizations and investigative journalists. The UN investigative reports into the arming of UNITA, under the chair of Ambassador Fowler, were among the first to highlight the role of international arms brokering in the violation of UN arms embargoes. See UN documents S/2000/203, S/2001/363 and S/2002/486.
- <sup>6</sup> See the United Nations periodic investigative reports on the arms embargo on the DRC, as in footnote 1 above, and the UN Sanctions Committee List of individuals and entities subject to the measures imposed by paragraphs 13 and 15 of Security Council resolution 1596 (2005); see also Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005.
- <sup>7</sup> See the ongoing UN group and panel investigative reports on UN embargoes. For background see Brian Wood, “Strengthening Compliance with UN Arms Embargoes—Key Challenges for Monitoring and Verification”, in United Nations Department for Disarmament Affairs, *DDA Occasional Papers No. 10*, 2006; Under Article 41 of the UN Charter, states have a legal obligation to abide by embargoes enacted by the Security Council and a duty to implement measures to ensure that persons within their jurisdiction also comply with the embargoes. Regarding the UN arms embargo “designation lists”, the US Treasury Department has for example implemented

these measures in a number of cases notably linked to the companies and close associates of Victor Bout—see also Box 1.8.

- 8 Minin had Bolivian, Israeli, Greek and Russian passports and two forged German passports. See “List of Individuals Subject to the Measures Imposed by Paragraph 4 of Security Council Resolution 1521 (2003) Concerning Liberia (The Travel Ban List)”, updated 30 November 2005, <[www.un.org/Docs/sc/committees/Liberia3/1521\\_list.htm](http://www.un.org/Docs/sc/committees/Liberia3/1521_list.htm)>.
- 9 Documents seized from Minin showed plans to sell diamonds to Russia and China through a polishing company based in Mauritius. According to Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN document S/2001/1015, 26 October 2001, Minin had diamond weighing equipment in his office in Liberia.
- 10 UN Security Council resolution 788 (November 1992) established an arms embargo on Liberia (implemented from 1995 under Resolution 985). The type of embargo adopted by this resolution was terminated by UN Security Council Resolution 1343 (2001) in March 2001, which imposed a new arms embargo on Liberia. In that resolution the Council decided that, “all States shall take the necessary measures to prevent the direct or indirect import of all rough diamonds from Liberia, whether or not such diamonds originated in Liberia.” See also the “travel ban list” that included Minin, *Security Council Committee Issues List of Persons Affected by Resolution 1343 (2001) on Liberia*, UN press release SC/7068, 4 June 2001. On 5 July 2000 the Security Council had also adopted Resolution 1306 that imposed a ban on the direct or indirect import of rough diamonds from Sierra Leone.
- 11 For references on this UN embargo, see footnote 1 above.
- 12 Named in the UN Panel of Experts on Liberia report for not providing requested information on suspicious flights to Liberia in February 2002, see Security Council, *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1395 (2002), Paragraph 4, in Relation to Liberia*, UN document S/2002/470, 19 April 2002.
- 13 The certificate is part of the documentation attached to the Minin trial in Monza. For a detailed description of this case, see Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN document S/2001/1015, 26 October 2001.
- 14 The Il-18’s real registration at that time was ER-ICJ. It was owned by a Moldovan company, Renan, which was involved in other illegal arms

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transfers, and which leased the aircraft to West Africa Air Services. The latter company was “domiciled” in Liberia, and its office was a PO box address (5620) in Monrovia (1926). LeRoy Urey, Liberia’s Minister for Administration and Public Safety, represented the company in Liberia. See Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN document S/2001/1015, 26 October 2001.

- <sup>15</sup> According to the UN Panel of Experts Report, Ruprah was at that time Liberia’s “Deputy Commissioner of Maritime Affairs” and one of Liberia’s Global Civil Aviation agents appointed by the Ministry of Transport. It was at that time that Liberia’s Civil Aviation register was found to include several phantom planes with multiple fake registrations. Ruprah associated with Victor Bout through the Sharjah-based company San Air. San Air brokered several arms deals and received related payments in its various accounts. Ruprah was arrested in Belgium in February 2002 and released on bail. He fled to Italy but was again arrested in early August 2002 for carrying a forged Belgian passport. Despite the fact that the seized documents showed his involvement in these and other trafficking activities and despite being a fugitive from the bail in Belgium, he was released from jail with the obligation to present himself daily at the police. Soon after he escaped from Italy.
- <sup>16</sup> This account of the court case is based upon Court documents and interviews with legal authorities in Monza, 2002–2004.
- <sup>17</sup> The verdict of 11 June 2003 referred only to a portion of the diamonds seized from Minin. For the other portion of diamonds, the Court declared it did not hold jurisdiction and referred the case to the Belgian authorities in Antwerp.
- <sup>18</sup> For the prosecution of such a crime committed outside Italian territory, the law requires that the crime be also punishable in the country where it was initiated, in this case Ukraine, and also requires the existence of a request by the judicial authorities of that country for the prosecution of the crime. It was argued that the Ukrainian criminal code (before and after 2001, the year in which the old code was reformed) did provide for the prosecution of crimes related to this case, and that the Ukrainian authorities had officially requested international assistance from Italy in August 2003 for prosecuting Minin for arms trafficking.
- <sup>19</sup> See “List of Individuals Subject to the Measures Imposed by Paragraph 4 of Security Council Resolution 1521 (2003) Concerning Liberia (The Travel Ban List)”, updated 30 November 2005, <[www.un.org/Docs/](http://www.un.org/Docs/)

- sc/committees/Liberia3/1521\_list.htm>.
- 20 General Assembly, *Report of the Disarmament Commission*, UN document A/51/42(SUPP), 22 May 1996, para. 39.
- 21 General Assembly, *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*, UN document A/54/160, 6 July 1999, annex, para. 23.
- 22 Ibid., para. 6.
- 23 General Assembly, *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime*, UN document A/RES/55/255, 8 June 2001. This resolution was preceded by the adoption of the *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials* by the Organization of American States in November 1997.
- 24 General Assembly, *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled "Small Arms"*, UN document A/CONF.192/2, 11 May 2001.
- 25 Ibid., para 62.
- 26 Ibid., para.79.
- 27 Ibid, particularly paragraphs 64, 69 and 82.
- 28 *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/CONF.192/15, 9–20 July 2001.
- 29 Ibid., § II(14).
- 30 Ibid., § IV(1)(d).
- 31 General Assembly, *The Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN document A/RES/58/241, 9 January 2004.
- 32 General Assembly, *The Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN document A/RES/59/86, 10 December 2004, operative paragraph 5.
- 33 OAS "Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition", approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004; these Model Regulations on Brokering form a chapter in the "Model Regulations for the Control of the International Movement of Firearms, their Parts

- and Components and Ammunition”, originally adopted by the OAS General Assembly in 1998, CP/CSH-544/03 rev. 2 (1997 and 2003, Amendments), following a CICAD-sponsored “Draft Study on Small Arms Brokering”.
- <sup>34</sup> Only Nicaragua and the United States appear to have laws and regulations explicitly controlling arms brokering.
- <sup>35</sup> African Union, *Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation, and Trafficking of Illicit Small arms and Light Weapons*, 1 December 2000; Southern African Development Community, *Protocol on the control of Firearms, Ammunition and Other Related Material in the Southern African Development Community (SADC) Region*, 14 August 2001; and *The Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa*, 15 March 2000. Subsequently, a more elaborate text of regional standards for national law was developed by the states of East Africa, the Great Lakes and the Horn of Africa in *The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa*, 21 April 2004. This Protocol was elaborated further in a set of Best Practice Guidelines for the control of small arms and light weapons agreed in 2004. The most recent African agreement to control small arms and light weapons, the Economic Community of West African States’ *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials* of 14 June 2006 includes a provision requiring the 15 states parties in West Africa to regulate brokering activities.
- <sup>36</sup> A notable exception is South Africa, which has a fairly comprehensive law and regulations.
- <sup>37</sup> Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, EU document 2003/468/CFSP, 23 June 2003.
- <sup>38</sup> Organization for Security and Co-operation in Europe, *Best Practice Guide on National Control of Brokering Activities*, document FSC.GAL/63/03/Rev. 2, 19 September 2003; and Organization for Security and Co-operation in Europe, *OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*, document FSC.DEC/8/04, 24 November 2004.
- <sup>39</sup> United Nations Economic Commission for Europe, *Proposal for Standard Development in support of Trade Facilitation and Security*,



2003.

- <sup>40</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies firstly agreed in 2002 a *Statement of Understanding on Arms Brokerage*, and this was followed in 2003 by *Elements for Effective Legislation on Arms Brokering*.
- <sup>41</sup> See “ASEAN Plan Of Action To Combat Transnational Crime”, <[www.aseansec.org/16133.htm](http://www.aseansec.org/16133.htm)>.
- <sup>42</sup> Asia–Pacific Economic Cooperation, *APEC Guidelines on Controls And Security of Man-Portable Air Defence Systems (MANPADS)*, document 2004/AMM/035, 18 November 2004.
- <sup>43</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004.
- <sup>44</sup> Ibid.
- <sup>45</sup> In the EU *Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, art. 2(3), “brokering activities” are defined as “... activities of persons and entities: ... negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or ... who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country”.
- <sup>46</sup> Organization for Security and Co-operation in Europe, *OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*, document FSC.DEC/8/04, 24 November 2004, § II(4).
- <sup>47</sup> Wassenaar Arrangement, *Elements for Effective Legislation on Arms Brokering*, 2003, para. 1.
- <sup>48</sup> These states are Burundi, the Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, the Sudan, Uganda and Tanzania.
- <sup>49</sup> For example, Article 11 of the Nairobi Protocol establishes fairly high standards for national laws covering “Dealers, Brokers and Brokering” as follows:
- State Parties, that have not yet done so, shall establish a national system for regulating dealers and brokers of small arms and light weapons. Such a system of control shall include:
- (i) regulating all manufacturers, dealers, traders, financiers and transporters of small arms and light weapons through licensing;

- (ii) registering all brokers operating within their territory;
- (iii) ensuring that all registered brokers seek and obtain authorisation for each individual transaction taking place;
- (iv) ensuring that all brokering transactions provide full disclosure on import and export licenses or authorisation and accompanying documents of the names and locations of all brokers involved in the transaction; and
- (v) licensing, registering and checking regularly and randomly all independent manufacturers, dealers, traders and brokers.

50 Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006.

51 United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.

52 *Ibid.*; according to the law, the term “foreign defense article or defense service” includes “any non-United States defense article or defense service of a nature described on the United States Munitions List regardless of whether such article or service is of United States origin or whether such article or service contains United States origin components.”

53 *Ibid.*

54 See, for example, OSCE, “Standard Elements of End User Certificates and Verification Procedures for SALW Exports”, Decision No. 5/04, 17 November 2004.

55 General Assembly, *Report of the Disarmament Commission*, UN document A/51/42(SUPP), 22 May 1996, annex 1, para. 7. These guidelines were formulated by the United Nations Commission on Disarmament and endorsed by the General Assembly in resolution 51/47 of 10 December 1996.

56 *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/CONF.192/15, 9–20 July 2001, § 2(11).

57 Paragraph 14 of the United Nations *Guidelines on International Arms Transfers* requires that:

in their efforts to control their international arms transfers and to prevent, combat and eradicate illicit arms trafficking, States should bear in mind the principles listed below ... [including]: States should respect the principles and purposes of the Charter of the United Nations, including the right to self-defence; the sovereign equality of all its Members; non-interference in the internal affairs of States; the obligation of Members to refrain in their international relations from

the threat or use of force against the territorial integrity or political independence of any State; the settlement of disputes by peaceful means; and respect for human rights; and continue to reaffirm the right of self determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

- <sup>58</sup> *Ibid.*, para. 8. In addition, to give effect to such international obligations, “States should establish and maintain an effective system of export and import licences for international arms transfers with requirements for full supporting documentation”, *ibid.*, para. 26; and that “in order to help combat illicit arms trafficking, States should make efforts to develop and enhance the application of compatible standards in their legislative and administrative procedures for regulating the export and import of arms,” *ibid.*, para. 36.
- <sup>59</sup> For a scholarly review of current international law on this, see Alexandra Bovin, “Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons”, *International Committee of the Red Cross, International Review of the Red Cross*, volume 87, no. 859, 2005, pp. 467–496.
- <sup>60</sup> Articles 16 and 41(2). The articles were commended by the General Assembly and annexed to resolution 56/83, 12 December 2001.
- <sup>61</sup> *Rome Statute of the International Criminal Court*, UN document A/CONF.183/9, 17 July 1998, art. 25(3)(c).
- <sup>62</sup> For a set of recently agreed principles relating to the control of small arms and guided by international human rights and humanitarian law, see the draft *Principles on the Prevention of Human Rights Violations Committed with Small Arms*, contained in General Assembly, UN document A/HRC/Sub.1/58/L.11/Add.1, 24 August 2006.
- <sup>63</sup> Barbara Frey, *The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms*, Economic and Social Council, UN document E/CN.4/Sub.2/2002/39, 30 May 2002; also Barbara Frey, *Prevention of*

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*Human Rights Violations Committed with Small Arms and Light Weapons*, Economic and Social Council, UN document E/CN.4/Sub.2/2003/29, 25 June 2003.

- <sup>64</sup> To estimate the progress of the establishment of state laws and regulations, one may compare Chapter 2 of this study with a recent overview of national legislation: Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d'information sur la paix et la sécurité, GRIP Report, 2005. In 2004, research by Silvia Cattaneo for the Small Arms Survey found that only 25 states (of which 21 were in Western Europe) had laws on arms brokering, many of these established quite recently. These were Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Italy, Japan, Latvia, Lithuania, Norway, Poland, Romania, Slovakia, Slovenia, South Africa, Sweden, Switzerland, the Netherlands, Ukraine and the United States. See also *Biting the Bullet, International Action on Small Arms 2005: Examining Implementation of the UN Programme of Action*, International Action Network on Small Arms, 2005, p. 6.
- <sup>65</sup> The EU *Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering* makes registration an optional requirement for member states and, moreover, allows EU states to opt for whatever registration system they choose. Article 4 states that:
1. Member States may also require brokers to obtain a written authorisation to act as brokers, as well as establish a register of arms brokers. Registration or authorisation to act as a broker would in any case not replace the requirement to obtain the necessary licence or written authorisation for each transaction.
  2. When assessing any applications for written authorizations to act as brokers, or for registration, Member States could take account, *inter alia*, of any records of past involvement in illicit activities by the applicant.
- <sup>66</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004, art. 3(4): “Registration is effective for two years from the date of approval. Subsequent registration can only be effected by the submission and approval of a new registration form” [emphasis added].

- <sup>67</sup> Only in Belgium is a broker required to pay a deposit to the state authorities, who must then return the deposit once the authorized delivery of arms is verified. Moreover, the records of brokering agents may not be regularly inspected, although in the EU brokers are usually required to submit regular reports every three or four months.
- <sup>68</sup> See Amnesty International and TransArms, *Dead on Time: Arms Transportation, Brokering and the Threat to Human Rights*, 2006, chp. 8. The information therein is based upon contractual data published by the US Department of Defense; interviews with the principal US contractor involved in the supply chain, Taos Industries; and multiple senior European Union Force in Bosnia and Herzegovina (EUFOR) officials; additional information was provided by officials of the OSCE and the Office of the High Representative during 2005 and 2006.
- <sup>69</sup> A North Atlantic Treaty Organisation (NATO) official said that “NATO has no way of monitoring the shipments once they leave Bosnia”, while a EUFOR official claimed that “it is up to the subcontractors to ensure that the weapons reach the intended destination”; *ibid.*
- <sup>70</sup> This information was provided by executives of the principal US contractor, Taos Industries; a NATO officer and a US State Department official; *ibid.*
- <sup>71</sup> Information based on interviews with officials of EUFOR and the Bosnian government, as well as the Multi-National Security Transition Command in Iraq; see *ibid.*, pp. 113–114.
- <sup>72</sup> Arms transfer documentation, and interviews with EUFOR officials and Taos Industries executive. The Federal Bosnia and Herzegovina (BiH) Ministry of Defence was responsible for this contract at the time and these responsibilities have since passed to the unified BiH state-level ministry.
- <sup>73</sup> Meeting with senior official.
- <sup>74</sup> *Ibid.*
- <sup>75</sup> Photographic evidence.
- <sup>76</sup> Croatian business directory.
- <sup>77</sup> *Report of the Panel of Experts Appointed Pursuant to Paragraph 4 of Security Council Resolution 1458 (2003), concerning Liberia*, UN document S/2003/498, 24 April 2003.
- <sup>78</sup> Confirmed by the Moldovan Civil Aviation Authority; Civil aviation companies require Air Operating Certificates (AOCs) in order to fly legally according to the Civil Aviation Authority and the International Civil Aviation Organisation.

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- 79 Telephone conversation and e-mail correspondence with Krassimir Semkov, manager of Speedex; cross-checked with Taos Industries executives.
- 80 Interviews with Taos Industries executives.
- 81 Contractual data from the US Department of Defense, interviews with Taos Industries executives, and the Taos Industries website.
- 82 Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006, art. 20(1–3).
- 83 Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, document 2003/468/CFSP, 23 June 2003.
- 84 Organization for Security and Co-operation in Europe, *OSCE Document on Small Arms and Light Weapons*, document FSC.DOC/1/00, 24 November 2000.
- 85 The Wassenaar Arrangement, *Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)*, 12 December 2002.
- 86 Documents obtained and interviews conducted by Amnesty International, May 2003 to April 2004.
- 87 Further details are contained in Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005.
- 88 Interviews with company officials and customs authorities, 2003; *ibid*.
- 89 Meeting with Albanian officials in Tirana, 2003; *ibid*.
- 90 Meeting with MEICO officials in Tirana, 2003; *ibid*. See also the MEICO website, <[www.mod.gov.al/eng/industria/meico](http://www.mod.gov.al/eng/industria/meico)>; and Bonn International Center for Conversion report with the UNDP on Albania available at <[www.ssr.undp.org.al/download/reports/bicc.pdf](http://www.ssr.undp.org.al/download/reports/bicc.pdf)>. The UNDP BICC report states that “MEICO is charge of the import and export of military equipment for the Albanian government. It can sell export items as functioning products or scrap. Its instructions are to observe UN arms embargoes. The list of relevant ‘forbidden’ destinations is provided by the Ministry of Foreign Affairs. Otherwise it is free to export as it sees fit and is not required to obtain an export license for each international transaction. Instead, it has a general license for arms exports.” According to <[www.cemes.org/current/ethpub/ethnobar/wp1/wp1-d.htm](http://www.cemes.org/current/ethpub/ethnobar/wp1/wp1-d.htm)>, “The state arms company, Meico, was sold off in 1994 to the largest privately owned Albanian company, Vefa Holdings.”
- 91 Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005; this information is based upon Africa International Airways

- freight documents and interviews with company officials, United Kingdom, 2003. African International Airways was established in Swaziland in 1985 and then licensed in South Africa. Intavia Ltd is AIA's General Sales Agent and is based at the same Crawley address of AIA and at Gatwick. Platinum Air Cargo is an air cargo General Sales Agent, with offices in Egham, Surrey, UK; Ostend, Belgium; Schiphol, Netherlands; Houston and Dallas, United States.
- <sup>92</sup> Stefaans Brummer, "SA's war vultures", *Mail & Guardian online*, 16 January 2004.
- <sup>93</sup> Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005, based on an interview with managers of African International Airways in 2005.
- <sup>94</sup> UK Foreign and Commonwealth Office, press statement, 8 August 2003: "The allegations we received concerned a possible breach of the UN sanctions against Rwanda, whereby arms and ammunition exported from Albania were destined for persons outside Rwanda. The FCO judged that if true, this would be a breach of UN Security Council Resolution 1011(1995) paragraphs 9 and 10. We therefore raised this issue with the governments of Albania and Rwanda with the intention of stopping any activity that may breach UN sanctions."
- <sup>95</sup> Silverback Cargo Freighters was founded in 2002 and was reportedly scheduled to serve the cargo needs of a start-up passenger company called Rwandair Express—based in Kigali, partially state-owned and operational from December 2002. "Rwanda's New Airline", *Rwanda: Behind the Headlines*, no. 7, December 2002; telephone interview with Silverback Cargo Freighters, Kigali, May 2005.
- <sup>96</sup> According to the US Federal Aviation Authority (FAA) and industry records, the two DC-8-62 aircraft were de-registered from the US registry in early May 2002, just after the last owner, a San Francisco-based company, had notified the FAA that the planes had been bought by an unspecified Rwandan purchaser. The same records show that the last owner sold the planes on 7 May 2002 to an entity with an address in the financial district of Tortola Island, in the British Virgin Islands.
- <sup>97</sup> Transcript of a meeting between the Secretary-General of the Albanian Ministry of Defence and his officials with a delegation from Amnesty International, Tirana, 11 August 2003.
- <sup>98</sup> Security Council, UN document S/RES/1011 (1995), 16 August 1995.
- <sup>99</sup> *Ibid.*, para. 9:  
*Further decides*, with a view to prohibiting the sale and supply of arms and related *matériel* to non-governmental forces for use in

Rwanda, that all States shall continue to prevent the sale or supply, by their nationals or from their territories or using their flag vessels or aircraft, of arms and related *matériel* of all types, including weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts, to Rwanda, or to persons in the States neighbouring Rwanda if such sale or supply is for the purpose of the use of such arms or *matériel* within Rwanda, other than to the Government of Rwanda as specified in paragraphs 7 and 8 above ... .

- <sup>100</sup> See Security Council, UN document S/RES/1011 (1995), 16 August 1995, para. 10.
- <sup>101</sup> The “UN Panel” referred to here is the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo.
- <sup>102</sup> In accordance with the requirements of Security Council resolution 1457 (2003) of 24 January 2003 and resolution 1499 (2003) of 13 August 2003.
- <sup>103</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004, art. 5.
- <sup>104</sup> Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006, art. 6.
- <sup>105</sup> *Ministerial Declaration on Practical Implementation of Small Arms Action in the Great Lakes Region and the Horn of Africa*, 21 June 2005, annex A.
- <sup>106</sup> Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005.
- <sup>107</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004, art. 5.
- <sup>108</sup> Section 2(11) of the UN Programme of Action on small arms and light weapons requires states “To assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law ...”,



- see *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/CONF.192/15, 9–20 July 2001. Amnesty International and other non-governmental organizations have suggested international standards that would be consistent with relevant international law in Amnesty International, *Compilation of Global Principles for International Arms Transfers*, 2006.
- <sup>109</sup> International instruments that prohibit the use of specific weapons (“weapon-specific” prohibitions) include the 1868 St Petersburg Declaration on explosive projectiles, the 1899 Hague Declaration concerning Expanding Bullets, the 1980 Convention on Certain Conventional Weapons and its Protocols, and most recently, the 1997 Convention on the Prohibition of Anti-Personnel Mines. The more recent conventions expressly prohibit not only the use of weapons but also their transfer.
- <sup>110</sup> For a list of current arms embargoes imposed by the United Nations Security Council, see “Sanctions”, <[www.un.org/News/ocg/sanction.htm](http://www.un.org/News/ocg/sanction.htm)>.
- <sup>111</sup> Asia–Pacific Economic Cooperation, *APEC Guidelines on Controls and Security of Man-Portable Air Defence Systems (MANPADS)*, document 2004/AMM/035, 18 November 2004.
- <sup>112</sup> *Ibid.*
- <sup>113</sup> See, for example, the case of Gus Van Kouwenhoven, prosecuted in the Netherlands for arranging arms transfers in contravention of the UN embargo on Liberia (see Box 3.1 in Chapter 3).
- <sup>114</sup> David Leppard and Robert Winnett, “Briton supplies arms to Sudan”, *The Sunday Times*, 5 September 2004.
- <sup>115</sup> The law was enacted as a result of campaigns by Amnesty International (UK) and other non-governmental organizations.
- <sup>116</sup> End-use certificate from Military Industry Corporation of the Sudan to Imbel of Brazil, dated 23 June 2004.
- <sup>117</sup> End-use certificate from Military Industry Corporation of the Sudan to Ukrspetsexport of Ukraine, dated 25 May 2004.
- <sup>118</sup> End-use certificate from Military Industry Corporation of the Sudan to Ukrspetsexport of Ukraine, dated 23 August 2004.
- <sup>119</sup> End-use certificate from Military Industry Corporation of the Sudan to Ukrspetsexport of Ukraine, dated 25 May 2004.
- <sup>120</sup> Wassenaar Arrangement, *Elements for Effective Legislation on Arms Brokering*, 2003.

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- <sup>121</sup> The EU Common Position on brokering is focused on “the activities of persons and entities ... negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or ... who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.” See Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, 2003/468/CFSP, 23 June 2003, art. 2(3).
- <sup>122</sup> Discussion with OAS official, 2005.
- <sup>123</sup> Such states include the Czech Republic, Estonia, Finland, Hungary, Lithuania, the Netherlands, Nicaragua, Norway, Poland, Romania, Sweden, South Africa and the United States. See Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005.
- <sup>124</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.3(a).
- <sup>125</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.2(b).
- <sup>126</sup> See Ronald Franks, “Registration/Licensing of Arms Brokers, Manufacturers, Exporters and Importers”, Braumiller, Schulz & Co., <[www.globaltradelaw.net](http://www.globaltradelaw.net)>.
- <sup>127</sup> Amnesty International and TransArms, *Dead on Time: Arms Transportation, Brokering and the Threat to Human Rights*, 2006.
- <sup>128</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.3(b).
- <sup>129</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.3(b)(3).
- <sup>130</sup> Another company, TAN Group, was located in Brussels (*Bijlage tot het Belgisch Staatsblad*, 17 December 1994, N° 941217-132).
- <sup>131</sup> *Bijlage tot het Belgisch Staatsblad*, 12 April 1995, N° 950412-268.
- <sup>132</sup> Brian Wood and Johan Peleman, *The Arms Fixers: Controlling the Brokers and Shipping Agents*, Peace Research Institute of Oslo, the Norwegian Initiative on Small Arms Transfers and the British American Security Information Council, 1999, p. 64. Bout was officially residing in Sharjah according to the papers he filed at the Ostend trade registry (*Bijlage van het Belgisch Staatsblad*, 12 April 1995).

- <sup>133</sup> The UN Panel of Experts on Liberia uncovered a document from Transavia Travel Agency signed by Victor Bout in June 2000 (S/2001/1015 §250).
- <sup>134</sup> Ulrich Klee (ed.), *JP Airline-Fleets International 1999/2000*, BUCHair, 1999.
- <sup>135</sup> Ibid.
- <sup>136</sup> Ulrich Klee (ed.), *JP Airline-Fleets International 2001/2002*, BUCHair, 2001; see also letter of the Permanent Representative of the Russian Federation to the United Nations, 11 December 2000.
- <sup>137</sup> Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000.
- <sup>138</sup> Brian Wood and Johan Peleman, *The Arms Fixers: Controlling the Brokers and Shipping Agents*, Peace Research Institute of Oslo, the Norwegian Initiative on Small Arms Transfers and the British American Security Information Council, 1999, p. 67.
- <sup>139</sup> Security Council, *Letter Dated 14 December 2000 from the Chairman and the Members of the Panel of Experts on Sierra Leone Diamonds and Arms, Appointed Pursuant to Security Council Resolution 1306 (2000), Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1132 (1997) Concerning Sierra Leone*, UN document S/2000/1195, 20 December 2000, para. 231–234.
- <sup>140</sup> Ibid., para. 228. See also Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000, para. 136.
- <sup>141</sup> Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Document S/2001/1015, 26 October 2001, para. 185; according to the UN expert panel on Liberia, the person that ran San Air General Trading was also general manager of Centrafrikan Airlines, and both companies shared the same address and telephone number. San Air and Centrafrikan moved to Ajman Free Zone in March 2001 and merged as CET Aviation (ibid., para. 269–271). They therefore conclude that “Centrafrikan Airlines and San Air are clearly two agencies of the same company” (ibid., para. 275).
- <sup>142</sup> Ibid., para. 202–206.
- <sup>143</sup> Ibid., para. 227–240.
- <sup>144</sup> “Aanhoudingsbevel tegen Victor Bout”, *Het Belang van Limburg*, 19 February 2002.
- <sup>145</sup> Press communiqué, Luc De Temmerman, 18 February 2002.

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- <sup>146</sup> See, for instance, Security Council, *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN document S/2002/1146, 16 October 2002, para. 72. See also Amnesty International, *Democratic Republic of Congo: Arming the East*, 2005, p. 48.
- <sup>147</sup> Letter of the Permanent Representative of the Russian Federation to the United Nations, 11 December 2000.
- <sup>148</sup> According to letters sent by Sanjivan Ruprah in 2002 to the US Federal Bureau of Investigation, and in possession of the International Peace Information Service, Antwerp.
- <sup>149</sup> See Judy Pasternak and Stephen Braun, "Emirates looked other way while al Qaeda funds flowed", *LA Times*, 20 January 2002.
- <sup>150</sup> The UN sanctions imposed on Afghanistan in November 1999 closed down the operations of Ariana Airways, Afghanistan's national aviation company.
- <sup>151</sup> Judy Pasternak and Stephen Braun, "Emirates looked other way while al Qaeda funds flowed", *LA Times*, 20 January 2002.
- <sup>152</sup> *Ibid.*
- <sup>153</sup> Nissar Hoath, "New Afghan sanctions halt private air services", *Gulfnews.com*, 21 January 2001.
- <sup>154</sup> *Ibid.*
- <sup>155</sup> United States of America, *International Traffic in Arms Regulations (ITAR)*, rev. 1 April 2006, § 129.3(b)(1–2).
- <sup>156</sup> The end-user certificate lists 50 T-55 main battle tanks, two T-55 command tanks, four VT-55A recovery tanks, 20 BMP-1 vehicles, 20 million 7.62x39 rounds, 10 million 7.62x54 rounds, 2 million 12.7x108 rounds, 1 million 14.5x114 rounds, 1 million 30mm anti-aircraft shells and 6,000 122mm high-explosive rockets for the RM-70 system.
- <sup>157</sup> End-Use Certificate Ref. 408/19, Lt. Gen. D.S. Hawala, Ministry of Defence, Republic of Namibia, Attn. of: Technopol International, Mr. Koecany. International Peace Information Service interviews with Thomas CZ and Technopol, as well as with officials of both governments during 2004 and transcript from the Klenanice programme, Czech Television 1, broadcast on 15 June 2003, reported by Jaroslav Kmet and Dalibor Bartek. The manager of Thomas CZ blamed the television journalists for stopping the order.
- <sup>158</sup> All Party Parliamentary Group on the Great Lakes Region, *Arms Flows in Eastern DR Congo: A Report Pursuant to UN Security Council*

- Resolution 1533 (para 12)*, UK Parliament, 24 December 2004, pp. 29–30.
- <sup>159</sup> Telephone interview with the manager of Thomas CZ, 16 June 2004. He stated that he had sold radios to the DRC but refused to give any further facts. In June 2003, the manager told Czech television that he has been in the DRC and conducted business but also refused to give any details. See transcript from the Klenanice programme, Czech Television 1, broadcast on 15 June 2003, reported by Jaroslav Kmet and Dalibor Bartek.
- <sup>160</sup> *République démocratique du Congo, Ministère à la présidence de la république, A Monsieur le Président Administrateur-Délégué*, 00032/MIN/PRESIREP/2001.
- <sup>161</sup> Joe Roeber, *The Hidden Market: Corruption in the International Arms Trade*, 2004.
- <sup>162</sup> For example, the *Inter-American Convention against Corruption*, adopted by the Organization of American States on 29 March 1996; the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union*, adopted by the Council of the European Union on 26 May 1997; the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by the Organisation for Economic Co-operation and Development on 21 November 1997; the *Criminal Law Convention on Corruption*, adopted by the Committee of Ministers of the Council of Europe on 26 January 1999; the *Civil Law Convention on Corruption*, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999; and the *African Union Convention on Preventing and Combating Corruption*, adopted by the Heads of State and Government of the African Union on 12 July 2003.
- <sup>163</sup> The UN Convention against Corruption was adopted by the General Assembly in resolution 58/4 of 31 October 2003, and came into force on 14 December 2005 with 40 ratifications and 138 signatures; See General Assembly, *United Nations Convention against Corruption*, UN document A/RES/58/4, 21 November 2003, art. 9(1).

## CHAPTER 2

### NATIONAL SYSTEMS OF LICENSING AND REGISTRATION

Silvia Cattaneo

#### INTRODUCTION

Already in its 2001 report, the Group of Governmental Experts tasked with examining the “feasibility of restricting the manufacture and trade of [small arms and light weapons] to the manufacturers and dealers authorized by States” noted that “Many States have not put in place laws, regulations or administrative procedures that regulate arms brokering and related activities.”<sup>1</sup> In the Group’s opinion, this was particularly worrisome, as it meant that “activities that sometimes contribute substantially to illicit trafficking and to excessive and destabilizing accumulations and transfers of small arms and light weapons are not subject to regulation in many countries.”<sup>2</sup> Indeed—the Group continued—despite their centrality in the arms market, brokers often operate in grey areas between the licit and the illicit spheres, where they can exploit existing regulatory gaps or inconsistencies and facilitate the completion of illegal or illegitimate arms transfers.<sup>3</sup>

The Group’s report was one among the many initiatives that, since 2001, have brought the issue of the regulation of brokering activities to the fore, particularly in the context of international debates on the illicit trade of small arms and light weapons (SALW).<sup>4</sup> This increase in attention has led to important changes at both the international and national levels. For example, a variety of regional forums, including among others the European Union (EU), the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE), have adopted standards that the respective member states should or are encouraged to implement in order to control brokers’ activities. At the national level, a few countries have modified their arms exports regimes to include specific controls on previously unregulated brokering activities. The

total number of countries where such controls are in place, however, remains very low. Recent estimates set this number at around 40 countries worldwide, that is, around one-fifth of current UN Member States.<sup>5</sup> This means that, unlike other actors in the arms trade—most notably exporters and importers—brokers enjoy a very high degree of freedom from state monitoring and regulation. In the case of arms delivered to illicit or illegitimate recipients, this has allowed them to operate in a general situation of impunity.

It is important to provide an overview of how brokering controls work in the countries where they have been established, particularly in light of the first meeting of the UN Group of Governmental Experts on illicit brokering in November 2006.<sup>6</sup> The aim of this chapter is to analyse existing national laws and regulations on arms brokering, with a particular focus on the two control elements of licensing and registration.<sup>7</sup> Through an overview of the different ways in which these elements are designed in national jurisdictions, the chapter intends to present a spectrum of regulatory alternatives, thus offering practical input into upcoming international discussions. Based on feedback from governments, the chapter also presents some data on the application of licensing and registration requirements at the national level. However, because only ten of the thirty governments contacted by the author provided such feedback, this information can only be considered indicative.

The chapter is divided into two main sections. The first deals with licensing systems, that is, with those sets of rules that establish what types of activities require government authorization, and the procedures with which such authorizations are granted (or denied). This section is connected to the question of the definition of brokering activities, as it explores what constitutes a (controllable) intermediation activity under different national regimes. The second section deals with registration requirements for brokers. In a few countries, these are established in addition to the licensing of brokering transactions, and constitute a prerequisite for the broker to be able to apply for a specific deal license.

## LICENSING SYSTEMS

Licensing systems constitute the backbone of all national regimes for the control of brokering activities. In all the countries where brokering activities

are controlled, there is a requirement for brokers to obtain explicit—usually written—government authorization in order to be able to operate. Lacking such an authorization, the related deals are deemed illegal and therefore susceptible to prosecution and punishment by national authorities.

Licensing systems for brokering activities are usually integrated in the more general sets of rules governing the transfer of arms and military equipment. This means that relevant provisions are contained in national laws and regulations on the export, import and transit of arms and military equipment. The bodies administering the latter also administer brokering controls, and the criteria used for deciding on arms exports are also used to decide on brokering applications. As far as SALW are concerned, however, it is common for national systems to apply different sets of rules to military-style SALW, on the one hand, and so-called “civilian circulation weapons” on the other.

While generally present across national jurisdictions, licensing systems vary greatly in terms of what is considered a controllable brokering activity. While the principle that brokering must be licensed remains the same, each system deals differently with the specification of who can or must seek government authorization for which types of actions, relating to which types of deals and for which types of goods. For the sake of simplicity and comparability, we can say that licensing systems vary across the following main dimensions:

- the type of activity subject to control, that is, what is legally defined as a controllable “brokering activity” (for example, contract mediation, buying or selling arms on one’s own account or on account of others, the organization of services such as transportation or financing related to arms transfers, or the actual provision of such services);
- the type of deals the brokerage of which requires a license (for example, brokering related to imports/exports, or to the transfer of weapons between two foreign countries);
- the type of actors and the location of their activities to which the controls are applied (for example, national citizens, companies or residents acting abroad);
- the types of goods for whose brokering a license is necessary; and
- the types of exemptions from the licensing requirement.



The elements pertaining to the above dimensions determine who must apply for a brokering license and for what types of deals. Within this general framework, national rules also establish elements relating to the procedure through which licenses are screened and ultimately granted or refused. These specify, among others:

- the types of agents eligible to apply for brokering licenses (for example, natural or legal persons);
- the national agencies responsible for assessing license applications and for granting or refusing the related authorizations;
- the information that must be provided by the prospective broker when applying for a license;
- the types of licenses that can be granted (general versus individual); and
- the criteria used to assess brokering license applications.

All these dimensions, relating to both the general legal framework and to application procedures, are analysed in the following sections.

## GENERAL LEGAL FRAMEWORK

### Types of activities subject to control

As it could be expected, national definitions on the types of brokering activities subject to control—thus, definitions of what brokering *is*—vary greatly, both in content and specificity. Some definitions are broad and perhaps vague, potentially able to capture a wide spectrum of actions, while others are detailed and descriptive.

In the Netherlands, for instance, brokering controls relating to the transfer of strategic goods are based on the *Financial Transactions of Strategic Goods Order* of 1996. The Order does not contain an explicit definition of the terms “broker” or “brokering activity”. However, it does establish a licensing requirement for “acts performed by Dutch residents related to financial transactions for the purpose of trade in military goods, outside the European Union”.<sup>8</sup> Put simply, this means that any Dutch resident financially involved in an operation that leads to the transfer of strategic goods located outside the EU must possess government authorization. In practice, the Order has been interpreted to include operations that fall

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under a general definition of brokering activities, particularly the buying or selling of weapons located outside the European Union.<sup>9</sup>

Similarly, in Hungary, brokering activities have been under government control since 1991, even if an explicit definition of the term was introduced only in 2004. Before such an explicit definition was provided, *Government Decree 48/1991 on the Export, Import and Re-export of Military Equipment and Services* established a licensing requirement for:

The import and export of military products respectively into and from the territory of the Republic of Hungary, the performance there of relevant agency, representation and re-export-related activity, and the performance by Hungarian natural and legal persons and entities lacking legal incorporation of relevant agency, representation and re-export-related activity outside the customs area of the Republic of Hungary.<sup>10</sup>

By way of practice, this provision has been interpreted to cover brokering activities related to arms exports as well as to arms transfers between third countries. With the amendments to the Decree introduced in 2004, brokering activity was explicitly defined as that activity conducted by an eligible firm “in order to achieve the purchase/sale of military equipment or technical assistance between firms from two or more countries”. Importantly, this includes “arranging the transaction, acting as an intermediary between the contracting parties, identifying the possibility of the transaction to either the buyer or the seller, as well as buying or selling on its own account”.<sup>11</sup>

In other national jurisdictions the terms “broker” or “brokering activity” are defined in great detail and specificity. In South Africa, for example, “brokering services” are defined as:

- (a) acting as an agent in negotiating or arranging a contract, purchase, sale or transfer of conventional arms for a commission, advantage or cause, whether financially or otherwise;
- (b) acting as an agent in negotiating or arranging a contract for the provision of services for a commission, advantage or cause, whether financially or otherwise;
- (c) facilitating the transfer of documentation, payment, transportation or freight forwarding, or any combination of the aforementioned, in respect of any transaction relating to buying, selling or transfer of conventional arms; and

- (d) acting as intermediary between any manufacturer or supplier of conventional arms, or provider of services, and any buyer or recipient thereof.<sup>12</sup>

In the majority of cases, national systems focus on those activities that, in international forums, have been designated as “core” brokering.<sup>13</sup> Typically, these involve contract mediation, putting in contact buyers and sellers, as well as arranging payment and/or transportation schemes necessary for the actualization of the planned weapons transfer (as opposed to the actual provision of transportation or financing services). Importantly, these systems consider the actual possession of the weapons by the broker irrelevant. Whether an agent physically possesses the weapons he/she helps to sell or buy, his/her activity will be considered as brokering, and therefore will be legal only if carried out with government authorization.<sup>14</sup> Given the frequency with which brokers mediate transactions in which they do not possess the transferred weapons, this is a particularly important detail.

A few countries extend their controls to activities such as transportation and financing. In Bulgaria, for example, controlled “intermediary activity” includes “activities related to the preparation and/or performance of the foreign trade deal including forwarding services, transport services, consulting services, financing, when the person performing these activities is not the actual exporter, importer or re-exporter and when in some way these activities are related to the territory of the Republic of Bulgaria or with the use of telecommunication facilities for connection and/or postal services of the Republic of Bulgaria ”.<sup>15</sup> In Estonia, “brokering” is understood as “the provision or making available information, practical assistance or funds with a view to arranging or negotiating the arrangement of transactions relating to military goods that involve the transfer of goods from a foreign country to any other foreign country”.<sup>16</sup>

### **Types of brokering transactions subject to controls**

Another element defining the scope of a given national system of control on brokering activities is represented by the types of transactions for which an authorization to act as a broker is necessary. A broker operating in a given country X may facilitate different types of deals. Some may involve weapons that are located in country X itself, and that, therefore, would be exported from it. Others may involve the movement of weapons from outside X to a destination within it, that is, an arms import. But brokering by this agent

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may also relate to the movement of weapons from a location outside X to another location outside X. We are dealing here with an instance of so-called “third-party”, or “third-country”, brokering.

Third-country brokering is an extremely common occurrence in the arms trade. Brokers very often work in one country to facilitate arms deals where the weapons are transferred without physically touching its territory, a type of activity that is made easier by the contemporary characteristics of trade flows and communications systems. From the regulatory point of view, third-country brokering represents a challenge, because a “classic” arms export/import control system—which centres around the control of weapons that move across national borders—does not cover such deals. In practice this means that brokers working in a given country are able to evade its arms export/import controls by simply organizing the transfer wholly outside this country’s borders. As Chapter 1 highlighted, this is one of the ways in which brokers facilitating arms transfers to questionable or outright illegitimate recipients have been able to evade strong national export controls. It is not surprising, then, that third-country brokering has been the focus of most international initiatives and multilateral standards on the issue. Existing national systems also target this particular legal loophole: all of them, indeed, have established a licensing requirement for brokering between third countries, when the brokering occurs on their territory.<sup>17</sup> It is important to note, however, that what constitutes a “third country” may vary across national jurisdictions.

In the simplest form, a “third country” indicates any foreign state. In Norway, for example, the *Regulations of 10 January 1989 Relating to the Implementation of Control of the Export of Strategic Goods, Services and Technology* establish that:

It is not permitted for persons who are domiciled or resident in Norway and Norwegian companies, foundations or associations to engage in trade in, negotiate or by other means assist in the sale of the military products included in [the national military list] *from one foreign country to another* [emphasis added] without the consent of the Ministry of Foreign Affairs.<sup>18</sup>

A similar understanding is present in the United Kingdom, where “third country” is intended as “any country that is not the United Kingdom or the Isle of Man”.<sup>19</sup> Brokering between such countries, which is conducted

wholly or in part in the United Kingdom, requires a license, whether it implies direct trade (acquisition or selling) of the weapons by the broker or the mediation of these operations between other parties.<sup>20</sup>

Within the European Union, a few national systems interpret “third country” as a country outside the EU. This is the understanding that is likely to prevail in the Union, given that it is the one established within the *Council Common Position 2003/468/CFSP* on the control of arms brokering of 2003.<sup>21</sup> The system in Romania, for example, defines brokering activities as those of persons and entities negotiating or arranging transactions that may involve the transfer of items on the Romanian list of military goods from a third country to any other third country, or who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.<sup>22</sup>

An interesting double system is in place in Germany, where brokering must be authorized for different types of deals, depending on the weapons to be traded. German brokering controls have been in place since 1978, when an amendment to the *War Weapons Control Act* of 1961 established a licensing requirement for the acquisition, selling, and the related mediation of weapons located *outside German federal territory* and not destined to import into, or transit through, the country. The Act was applicable only to the brokering of weapons of war, as defined in German law, which included all types of light weapons but excluded some types of military small arms—notably revolvers, self-loading pistols, rifles and carbines. The export, import and transit of such military small arms—and all “other military equipment”—were regulated by the *Foreign Trade and Payments Act* and the *Foreign Trade and Payments Ordinance*, which, however, did not contain any provisions on brokering. Following the adoption of the EU Common Position, an amendment was introduced to establish controls on brokering activities that relate to the transfer of “other military equipment”. In line with the Common Position, brokering is defined as “negotiating or arranging transactions that may involve the transfer of items of the EU Military List from a third country [that is, non-EU] to any other third country”.<sup>23</sup>

Most national systems control brokering related to transfers that touch the national territory (most typically exports), in addition to third-country transfers. This is the case of Sweden, for example, which controls both brokering related to exports from its own territory as well as the brokering

of weapons transfers between two locations abroad.<sup>24</sup> Similarly, applicable legislation in Malta covers the brokerage (with or without actual possession by the broker) of items in the List of Military Equipment “from any country, including Malta, to any other country”.<sup>25</sup> In Bosnia and Herzegovina, as well, brokering (mediation) includes the facilitation by individuals or companies located in the country (whether permanently or temporarily) of “trade in weapons and military equipment, which are located in or out of Bosnia and Herzegovina, for the benefit of the third [foreign] country”.<sup>26</sup>

The distinction between exports/third-country transfers is overcome in systems that employ broad definitions of the scope of brokering controls. The Belgian law, for example, defines as a broker anyone who, whether in return for a fee or not, creates the conditions for the conclusion of a contract relating to the negotiation, exportation or delivery abroad, or possesses, to this end, arms, munitions or military material and related technology *whatever the origin or destination of the goods and independently of the fact that they enter Belgian territory*.<sup>27</sup> A similar wording is contained in the Ukrainian legislation, whose controls on intermediary activity apply “irrespective of the origin of [brokered] goods”.<sup>28</sup>

Among existing systems, an even broader understanding of the scope for brokering controls is used in the United States. Besides applying to nationals and residents, irrespective of where they or the weapons they broker are located, US controls also cover transfers brokered by foreign agents if the traded weapons are of US origin. Indeed, the US definition of brokering includes, among others, “activities by ... foreign persons subject to US jurisdiction involving defense articles or defense services of US or foreign origin which are located inside or outside of the United States”.<sup>29</sup>

### Extraterritorial controls

So far, we have analysed how countries regulate brokering activities conducted on their territory. But what of those activities that are carried out by a given state’s nationals, registered companies or established (permanent) residents abroad? If a broker, national of country A, carries out a deal from country B, do the rules that apply to the broker in A also apply in this case? And, if so, to what extent? For any deal the broker mediates, or only for some types? All these questions pertain to the extraterritorial dimension of national brokering controls, that is, to the extent to which they

apply to nationals, registered companies and residents of a given country operating from outside its borders.

The issue of extraterritoriality has drawn considerable attention in international debates on the issue of brokering activities. This is understandable, for at least two reasons. On the one hand, because extraterritorial provisions imply the application of a state's rules over individuals or companies operating in a foreign jurisdiction, they raise the question of effective enforcement. On the other hand, however, given the international nature of arms brokering—which commonly spans many countries—at least some degree of extraterritoriality becomes essential for a meaningful functioning of national controls. In a situation like the current one, in which brokering controls are in place only in a minority of countries, this issue acquires even more importance. As reported and well-documented cases have shown, brokers registered in a given country, which does not apply relevant controls extraterritorially, can easily evade such controls by conducting business from a foreign location. (See illustrative cases in Chapters 1 and 3.)

A variety of existing national systems have introduced an extraterritorial dimension to their controls on brokering activities. In most cases, extraterritoriality is full, that is, all the rules that apply to nationals, registered companies and established residents when they operate within the national territory extend to their activities abroad. This covers rules for licensing and, where present, for registration, with penalties for related violations. In Finland, for example, “Finnish citizens, Finnish corporations or foreign citizens considered permanent residents of Finland ... are required to have a brokerage licence to engage in the brokerage of defence materiel between third countries outside Finnish territory.”<sup>30</sup> It is important to note that in this case, as in all others in which extraterritoriality applies to third country transfers, the only link between the controlling state and the broker may be the latter's nationality or residency. In other words, if the broker is a Finnish national, corporation or resident, it does not matter whether the broker's activity or the actual transfer of the weapons takes place outside Finnish territory for controls to be applicable.

The United States employs a particularly broad understanding of extraterritoriality in brokering controls. Under US law, brokering licensing requirements apply to activities of all nationals, even when they operate from abroad, for any type of deal (relating to transfers touching US

territory—imports and exports—as well as third-country transfers). The requirement also applies to “non-nationals operating on U.S. soil or abroad in cases where their transactions involve American weapons or reside and/or operate in the U.S.—including using U.S. mail or making telephone calls to and from the US”.<sup>31</sup>

A few states have opted for selective forms of extraterritoriality; in this case, the activities of nationals and residents conducted abroad are covered by national controls only in specific cases. In the United Kingdom, for example, the licensing requirement for brokering activities does not include those conducted wholly outside the United Kingdom (and the Isle of Man), except when the brokering relates to “restricted goods” (for example, long-range missiles and goods used in torture).<sup>32</sup> In addition, any brokering activity that entails the violation of a national or international arms embargo (mandated by the UN Security Council, the EU or the OSCE) can be prosecuted in UK courts, even when conducted overseas.<sup>33</sup>

The amendments to the legislation in Germany, which entered into force in July 2006, have also introduced a previously lacking extraterritorial dimension, which applies to selected cases. According to these new provisions, German residents brokering outside the EU are subject to German prosecution if they carry out deals in contravention of arms embargoes. In addition, the brokering of SALW conducted by German residents outside the EU also requires a license.<sup>34</sup>

### Types of goods

As previously mentioned, national brokering controls are usually included in the broader legal framework regulating arms exports, imports and transits. As a consequence, the items (weapons and military equipment) covered by brokering controls are the same that are subject to a given country’s export/import regime. These items are inserted in lists that are defined at the national level—so-called “control lists”. It is, however, common for these control lists to be designed to include, or coincide with, lists determined by multilateral organizations. Among existing national systems, many refer to the control lists approved by the European Union and the Wassenaar Arrangement.

In Bosnia and Herzegovina, for example, brokering controls cover the items contained in the EU Common Military List.<sup>35</sup> In Bulgaria, they cover the



Wassenaar Arrangement Lists and the EU *List of Dual-Use Items and Technology*.<sup>36</sup> In Hungary, they apply to a consolidated national list that includes equipment and technology contained in the Munitions Lists of the Wassenaar Arrangement, the Common Military List of the EU, and two additional categories: “instruments of coercion and crime surveillance” and “secret-service devices”.<sup>37</sup>

As far as SALW are concerned, the EU Common Military List—generally referred to by EU countries—and the Wassenaar Arrangement Control Lists cover the same categories of items.<sup>38</sup> These include: “Smooth-bore weapons with a calibre of less than 20 mm, other arms and automatic weapons with a calibre of 12.7 mm (calibre 0.50 inches) or less and accessories” and related specially designed components (Munitions List 1);<sup>39</sup> “Smooth-bore weapons with a calibre of 20 mm or more, other weapons or armament with a calibre greater than 12.7 mm (calibre 0.50 inches), projectors and accessories, ... and specially designed components” (Munitions List 2);<sup>40</sup> ammunition relating to the weapons listed in Munitions Lists 1 and 2 (Munitions List 3); and “Bombs, torpedoes, rockets, missiles, other explosive devices and charges and related equipment and accessories, ... specially designed for military use, and specially designed components ...” (Munitions List 4).

The lists agreed by these multilateral organizations, as reflected in the majority of national military lists, cover military-style SALW, but do not cover some types of small arms permitted for civilian circulation and possession. Brokering of the latter is either regulated through other pieces of legislation (usually the national firearms acts, which also establish the conditions for acquisition and carrying of weapons by civilians) or is not regulated at all. An interesting example in this respect is represented by the system in Lithuania. In this country, weapons subject to control by the state are divided into four categories: A, B, C and D.<sup>41</sup> Of these, the first includes military-style SALW—among others—while the remaining three categories relate to civilian-circulation weapons. Controls for the brokering of civilian-circulation weapons were established in 2002, with the *Law on the Control of Arms and Ammunition*. The law provides for a licensing requirement for the brokering of weapons (in the categories B, C and D) that are imported, exported or in transit through Lithuanian territory. Permits are granted only on an individual basis by the Police Department. They are not necessary for individual deals of these weapons involving two third countries; however,

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brokers must submit annual reports to the Police Department on such activities.<sup>42</sup>

In 2004, further controls were established in Lithuania for the regulation of brokering relating to category A weapons, through amendments to the *Law on the Control of Strategic Goods*. These entered into force on 1 August 2004, and control the trade and brokering of weapons listed in the EU Common Military List, some of which are part of category A (military weapons) while others are not. Lithuanian natural and legal persons need both an activity license and an individual deal licence in order to broker weapons that are included in category A. Licenses, which are granted by the Ministry of Economy, are necessary for all transfers directed towards a third country—originating from Lithuania or any country outside Lithuania—and for transfers between EU countries. For the weapons still falling under the provisions of the *Law on the Control of Strategic Goods*, but which are not included in category A weapons, a partially different system applies. Brokers in these weapons only need an individual transaction license—no need for an activity license—which is also granted by the Ministry of Economy. This requirement applies, as above, to all transfers directed to a third country, but not to transfers between two EU countries.<sup>43</sup>

In the Netherlands, as well, two different sets of laws and regulations cover military SALW and civilian-circulation small arms. The above-mentioned *Financial Transactions of Strategic Goods Order* of 1996 controls SALW that fall under the category of strategic goods. The agency mainly responsible for granting licenses under this act is the CDIU (*Centrale Dienst voor In- en Uitvoer*—Central Department for Import and Export Licenses), which is part of the Tax and Customs Department of the Ministry of Finance; while the main enforcement agency is the Fiscal and Economic Investigation Services (FIOD-ECD). The trade, including brokering, of civilian small arms, on the other hand, is controlled through the provisions of the *Arms and Ammunition Act* of 1997; in this case, the main licensing and enforcement agency is the police.

### Licensing exemptions

Exemptions from the licensing requirement for brokering activities are extremely common. All the analysed systems provide for situations in which a brokering license will not be necessary. At a minimum, such an exemption covers the activities of government agencies, particularly national armed

and police forces. In a few instances, however, licensing exemptions apply to broader instances which relate to trade with allies or very close commercial partners.

In the United States, for example, licenses are not necessary for brokering activities that are “arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, any member country of that Organization, Japan, Australia, or New Zealand” except for cases in which particular items are the object of the brokered deal, including fully automatic firearms, their parts and components.<sup>44</sup>

In Switzerland, brokering activities may be conducted on the basis of both a general authorization and individual deal licenses. In two cases, however, only general authorizations are required.<sup>45</sup> Individual licenses are not necessary for the brokering of shipments destined to a specified list of countries.<sup>46</sup> In addition, Swiss manufacturers do not need individual licenses in order to broker war material if they already possess an initial authorization to broker or trade in items similar to those they produce in their own premises. As Swiss officials explained, this provision is intended to cover situations in which the order of a foreign customer exceeds the production capacities of a Swiss manufacturer. The licensing exemption allows such a manufacturer to supply the requested goods directly from their production branches established abroad to the foreign customer, without having to apply for an individual deal license.<sup>47</sup>

#### LICENSING PROCEDURE

Once the general framework for the licensing of brokering activities has been established, a variety of other measures provide for the procedure that must be followed for government authorization to be granted (or refused). These measures specify a variety of elements, such as who can apply for a brokering license, what types of documents must be submitted along with the application, what agencies are charged with issuing authorizations and what criteria these must take into account in their decision-making process. These elements are analysed in the following sections, which deal with the application process, the decision-making process and the types of licences that can be granted.

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### The application process

In general, existing systems for the control of brokering activities do not set specific requirements for eligibility to apply for a license. In a few instances, however, certain conditions must be met for an individual or company to be able to apply for a brokering license. In addition, in some countries—for example, Slovakia—only corporate persons (as opposed to individuals) can apply for brokering licenses.

In the Czech Republic, for example, only “corporate persons with their place of business” in the country in possession of a permit may carry out trade in military equipment. Permits, on the other hand—which are a precondition for applying for brokering licenses—can only be granted under the following conditions:

- a) not more than 49% of the equity capital of the corporate person was invested by foreign persons,
- b) the members of the statutory body of the corporate person and the chief clerks ... ,
  1. have reached 21 years of age,
  2. are citizens of the Czech Republic,
  3. have their permanent residence in the Czech Republic,
  4. are qualified to perform legal acts,
  5. satisfy the conditions laid down by special legislation ... ; meet the prerequisites set out for holding certain positions within the bodies and organizations of the State pursuant to a special legal regulation ... ,
  6. meet the prerequisites for engaging in sensitive activity under a special law ...
- c) the trade in military equipment shall be carried out by a corporate person in his own name and to his own account,
- d) the financial backing of the trade in military equipment by the corporate person is adequate in respect of the expected size of the business.<sup>48</sup>

The system in Poland also establishes requirements on the part of individuals or companies wishing to apply for a brokering license. Before filing an application, natural and legal persons have to implement an “internal system of control” to determine whether:

1. the end user intends to use military goods to violate or repress human rights and fundamental freedoms;

2. the delivery of military goods poses any threat to peace or may otherwise cause destabilisation in the region;
3. the country of final destination supports, facilitates or encourages terrorism or international crime;
4. military goods may be used for any other purpose than to satisfy justified requirements of defence and security in the country of destination.<sup>49</sup>

The internal system of control is also intended to “define tasks of individual authorities in the organization, job descriptions as regards basic tasks related to control and management of trade, framework of co-operation between the natural or legal person and state administration in this area, as well as rules and procedures of employee recruitment, data archiving, internal controls, and completion of orders”.<sup>50</sup>

While the majority of national systems apply to nationals and permanent residents, in a few cases the provisions controlling brokering activities also apply to foreigners and temporary residents. In Switzerland, for example, anyone that wishes to broker from Swiss territory weapons destined to a foreign state, and that does not possess any production premises in Switzerland, needs authorization from the relevant Swiss governmental agency, regardless of the broker’s nationality or country of residence.<sup>51</sup> However, Swiss officials suggested that the practical implementation of such controls on foreign persons may be challenging because they are difficult to monitor.<sup>52</sup> Indeed, in the period between 1998 and 2004, no foreign company or individual operating in Switzerland applied for a brokering license even if, as acknowledged by these officials, such activities “probably took place”.<sup>53</sup> In addition, because the Swiss system does not extend to activities conducted by nationals and residents abroad, it leaves open an easily exploitable loophole.

Similarly, Estonian controls apply to the provision of services, including brokering, “from Estonia to a foreign country or to a foreign recipient of services *regardless of the residence of the service provider who is a natural person or seat of the service provider who is a legal person* [emphasis added] or through the business activity of an Estonian service provider in a foreign country.”<sup>54</sup>

In terms of the license application process, state laws or regulations usually specify the types of documents that must be submitted along with the

application. At a minimum, such documents are intended to prove the nature and establishment of the applying person, as well as to specify the type and quantity of the military and security items or weapons of the intended brokerage deal. A few national systems also require documentation attesting the end-use or end-user of the intended deal, through the submission of an end-use(r) certificate, import certificate or equivalent. For example, agents applying for an individual brokering license in the Czech Republic must submit, in addition to details on the applicant's business and of the weapons to be transferred, "the name of the state from which the military equipment is to be imported or to which it is to be exported, or with which the military equipment abroad is to be handled, even if it is not transported via the Czech Republic".<sup>55</sup> Information must also be submitted concerning the purpose of the transfer, as well as the name and place of the end-user. The application must be supported by the following documents:

- a draft contract or a signed contract with a precise specification of the military equipment and its amount;
- a document on its final use; [and]
- at the Ministry's request [any] other documents enabling a proper assessment of the case ...<sup>56</sup>

In Latvia, the transit of weapons is subject to a license by the Control Committee of Strategic Goods, even when conducted wholly outside Latvian territory (which effectively covers third-country brokering activities).<sup>57</sup> In order to apply for a transit license, individuals or companies must submit, together with the application, a description of the transited goods, a copy of the contract, as well as an import certificate or equivalent document issued by the country of destination or the confirmation of the final use of the relevant goods.<sup>58</sup>

### The decision-making process

Within each country, one state agency is usually the main organ responsible for examining brokering license applications and granting (or refusing) the related authorizations. Existing agencies in this respect are located in a variety of national ministries, typically the ministries of foreign affairs, economy or trade. It is, however, common for these agencies to consult with other government ministries or departments before a decision is taken on a license application. In these cases, in other words, decisions are taken

through inter-agency processes. For example, in Slovakia, brokering permits are issued by the Ministry of Economy following the opinion of the Ministries of Foreign Affairs, Defence and Interior, as well as the National Security Office.<sup>59</sup> In Hungary, the inter-agency process is built in the very constitution of the organ tasked with examining license applications. Brokering licenses are issued by the Hungarian Trade Licensing Office, which consults with the Committee on the Licensing of Foreign Trade in Military Equipment. The Committee's members are designated by the minister heading the Prime Minister's office, and by the Ministries of Interior, Defence, Economy and Transport, Foreign Affairs and Finance.<sup>60</sup>

A particularly important element in the decision-making process is represented by the criteria or guidelines that relevant national agencies employ to ultimately decide whether to grant or refuse a brokering license. These criteria may spell out prohibitions—instances in which authorizations will be refused—or specify the elements that must be considered during the decision-making process. Most common prohibitions are connected with the implementation of arms embargoes—most typically decreed by the UN Security Council, but also by other multilateral or regional organizations. In these cases, the criteria or guidelines establish by law that brokering licenses will be refused if they relate to the transfer of weapons to embargoed destinations. Other prohibitions may relate to the transfer of weapons to countries in a situation of internal conflict or regional instability. Besides outright prohibitions, decision-making criteria may include factors such as the consideration of the situation in the recipient country, in terms of human rights violations, reliability or economic stability. Of course, criteria may also relate to the protection of the foreign policy, economic or other interests of the country deciding on the license application. In South Africa, for example, the Committee responsible for granting brokering licenses must:

- (a) assess each application on a case-by-case basis;
- (b) safeguard the national security interests of the Republic and those of its allies;
- (c) avoid contributing to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms;
- (d) avoid transfers of conventional arms to governments that systematically violate or suppress human rights and fundamental freedoms;
- (e) avoid transfers of conventional arms that are likely to contribute to the escalation of regional military conflicts, endanger peace by

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- introducing destabilising military capabilities into a region or otherwise contribute to regional instability;
- (f) adhere to international law, norms and practices and the international obligations and commitments of the Republic, including United Nations Security Council arms embargoes;
  - (g) take account of calls for reduced military expenditure in the interests of development and human security;
  - (h) avoid contributing to terrorism and crime;
  - (i) consider the conventional arms control system of the recipient country and its record of compliance with end-user certificate undertakings, and avoid the export of conventional arms to a government that has violated an end-user certificate undertaking;
  - (j) take into account the inherent right of individual and collective self-defence of all sovereign countries in terms of the United Nations Charter; and
  - (k) avoid the export of conventional arms that may be used for purposes other than the legitimate defence and security needs of the government of the country of import.<sup>61</sup>

In Nicaragua, prohibited brokering activities relate to exports of conventional firearms to countries:

- with which Nicaragua has an ongoing conflict or dispute;
- which are subject to a UN arms embargo;
- which systematically violate human rights; or
- which support terrorism or crime or provide asylum to drug traffickers.<sup>62</sup>

Brokering licenses will also be refused when there is evidence or suspicion that the recipient country has committed genocide or crimes against humanity; if there is a risk that the weapons will be diverted to irregular armed groups; or if the related arms transfer would violate Nicaragua's bilateral or multilateral agreements on the control non-proliferation of weapons.<sup>63</sup>

European Union countries share a certain degree of uniformity in this respect, as they all refer to the rules set out in the EU Code of Conduct on Arms Exports. Approved in 1998, the Code sets out eight criteria for the assessment of arms exports license applications that relate to the following:



- respect for international commitments taken on by EU members, including international arms embargoes and non-proliferation agreements;
- the human rights situation in the recipient country;
- the internal situation of the recipient country, particularly in relation to the existence of an armed conflict;
- the preservation of peace, security and stability;
- the national security of the EU members, their territories, as well as their allies and friendly states;
- the “behaviour” of the recipient country, particularly as relates to its attitude to terrorism, and respect for international law;
- the risk of unauthorized re-export from the recipient country; and
- the compatibility of the arms exports with the technical and economic capacity of the recipient country.<sup>64</sup>

The Code criteria are sometimes used by states in conjunction with other rules emanating from other multilateral organizations in which they participate. For example, in Bosnia and Herzegovina, licenses are assessed on the basis of the sanctions of the UN Security Council, of the EU Code of Conduct as well as the OSCE Common Export Criteria, in addition to the obligations to the state deriving from other international agreements.<sup>65</sup>

### Types of licenses

Generally speaking, brokering licenses are of two types: individual and open (or general). Individual licenses are granted for one specific transaction, which usually entails one specified destination or end-user and a specific quantity and type of equipment. Open licenses are authorizations for multiple transfers, which may involve multiple destinations or end-users, or multiple classes of goods.

Not all national systems specify the types of brokering licenses that they allow for, but among those that do, the majority of systems require that brokering licenses be granted on a case-by-case basis, that is, for each individual transaction. In a few systems, such as in Poland and Ukraine, both individual and open licenses can be granted. In one country, only general licenses are issued to brokers: in Slovakia, brokers need a permit (or general authorization) issued by the Ministry of Economy in order to operate, but do not require a specific license for individual transactions. On the other hand, they must keep records of each individual deal (for at least

five years) and report periodically to the same Ministry on their activities.<sup>66</sup> In addition, they must inform the Ministry of Economy for each individual transaction conducted abroad.<sup>67</sup>

A few countries have also established a “multi-stage” licensing system. Brokers in these countries must possess more than one license in order to legally operate; most commonly, these are a general permit, which allows the agent to act as a broker, and an individual license for each specific deal.<sup>68</sup> Such a system is present, for example, in Bulgaria<sup>69</sup> and the Czech Republic.<sup>70</sup> The system in Hungary is three-tiered: in order to operate, Hungarian agents wishing to “act as a representative, agent, broker or intermediary in respect of military equipment or technical assistance, whether within or outside the territory of the Republic of Hungary”<sup>71</sup> need an activity licence, a negotiating licence and a contract licence. Activity licenses can be general (covering any product, country or transaction) or specific (covering a specific product, country or transaction). Obtaining such a license is a necessary precondition for the firm to do any preparatory activity related to the intended deal, and can be granted for a maximum of 24 months (with a possible renewal of 24 additional months). The negotiating license can be granted only if an activity license is present; it authorizes the applicant to prepare a contract within 12 months and can be renewed once for a further 12 months. The performance of a specific deal also requires a contract license, which cannot be granted if either the activity or the negotiating licenses are absent. A contract license is also valid for a 12-month period, renewable for 12 more months. All licenses are granted by the Hungarian Trade Licensing Office and none of the three stages replaces the others.

#### SOME DATA ON IMPLEMENTATION

At the beginning of this research a questionnaire was circulated among countries with brokering controls. Some of the submitted questions related to the practical implementation of licensing rules; they were intended to assess various elements, such as the average workload entailed by the screening of brokering license applications, and the ability of national rules to screen effectively particular types of brokering transactions (for example, extraterritorial activities; transfers of SALW alone as opposed to transfers of conventional military equipment more generally). Unfortunately cooperation from governments was low, as less than one-third of contacted countries provided the requested information. Submitted data, however,

still gives us important indications of national practice as well as of possible enforcement challenges.

In government replies, the average number of license applications processed in one year ranged from zero to 187; the number of licenses granted over the last five years (or the applicable period, for recently established controls) ranged from zero to 274. Importantly, the two highest figures (187 and 274) were both submitted by the United Kingdom, a large weapons producer, where brokering controls were introduced quite recently (2004), and which accompanied the establishment of brokering controls with an extensive information campaign.<sup>72</sup> The UK government also indicated that a high number of prospective brokers were registered for the Open General Trade Control License, the use of which is encouraged by the UK government itself in order to lighten the burden on the screening agencies. The lowest figure reported by responding governments (zero) may be explained by two considerations, which are not necessarily mutually exclusive. On the one hand, countries that reported having screened no application have established brokering controls only recently, in one case starting from July 2006. On the other hand, a government representative suggested that there may be actual confusion on the part of individuals or companies as to when and for what type of activity a brokering license is necessary. In this sense, either the vagueness of the legal definition or the lack of proper communication between governmental authorities and potentially interested agents may have negatively affected the practical implementation of brokering controls.<sup>73</sup>

Governments were also asked whether granted licenses related to two specific types of transactions: brokering conducted by nationals/residents abroad (extraterritorial application of controls) and brokering related to the transfer of SALW only. Of course, where no license has been granted the two questions were not applicable, but answers still offer important indications. Among the five countries that granted brokering licenses in the last five years, three reported that some of these related to the brokering conducted by national agents abroad, indicating the possibility of enforcement across borders, which is often put in doubt in international discussions. In these cases, it would be important to enquire for more detail as to the means that allowed such an extraterritorial screening. On the other hand, most of the respondents reported that no license was granted for the transfer of SALW alone. Again, part of the explanation may rest on the recent establishment of brokering controls but, more generally, this may

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indicate that brokers rarely engage in the mediation of transfers of SALW alone. In the context of current international initiatives on the issue—which all developed in the framework of the fight against the illicit proliferation of small arms—this is a very important indication that the separation between brokering of SALW, as opposed to the brokering of other military equipment, is artificial and does not necessarily reflect actual trade practices. In fact, it was suggested that cases of illicit brokering investigated by subsequent UN Security Council sanctions committees—established to monitor UN embargo implementation—reveal that 90% of illicit brokering is related to the transfer of all kinds of conventional items, and only 10% to the transfer of SALW alone.<sup>74</sup>

## REGISTRATION SYSTEMS

In addition to requiring that brokering activities be licensed, some national systems impose a registration requirement on brokers as a precondition to be able to operate. In these systems, brokers must be registered before they can apply for a license to perform a specific transaction.

The essential trait of registration as a precondition to operate is that it establishes a second level of screening, additional to the one taking place during the licensing process. Registers are also sources of “institutional memory”, records that lend themselves to potential uses in the enforcement of controls nationally and in the exchange of information internationally.

In the systems where a “multi-stage” licensing requirement is in place, brokers’ registration may coincide with the first of these stages, that is, with the granting of a general authorization (or permit) to conduct brokering activity, usually if and when specific deals are licensed. This is the case with Switzerland, for example, where “any person who, on Swiss territory, intends to ... trade in war material, for his own account, or for another’s, or to broker ... for foreign recipients, regardless of the location of the said material” needs an initial authorization before he/she can apply for a specific-deal license.<sup>75</sup> When applying for an initial authorization, brokers wishing to work in Switzerland must submit, among others, a list of the war material object of the required authorization, a declaration of domicile and a copy of their criminal record.<sup>76</sup> Importantly, the initial authorization to broker is revoked if it has not been used for three years.<sup>77</sup>

In other systems with a “multi-stage” licensing process, registration is additional to the other trading licenses that are necessary for the broker to operate. For example, in Bulgaria, only legal or physical persons registered under the Company Law can perform foreign trade activity; after this registration, they still need an activity license and a permit for each transaction.<sup>78</sup> Similarly, in Slovenia, “Trading permits, consents for production and permits for single deals can be obtained only by legal persons registered in the Republic of Slovenia who have a suitable activity entered in the register of companies, or by physical persons who have a suitable activity entered in the register of sole traders.”<sup>79</sup> Once registered, brokers in Slovenia can act on the basis of an initial authorization and a specific deal license for transfers touching Slovenian territory (exports, imports and transits). On the other hand, in addition to being registered, brokers will need only a general authorization if operating in Slovenia and facilitating third-country transfers.<sup>80</sup>

The registration of brokers as a precondition for them to apply for individual deal licenses is a very common practice among existing national systems. It may also be selectively applied; it can be necessary only for the brokering of certain categories of goods, or certain types of transfers. For example, in Lithuania, registration is necessary for the brokering of arms and ammunition that fall into the nationally defined four categories, one of which partially overlaps with the EU Common List of Military Equipment.<sup>81</sup> For the brokering of weapons and equipment that are part of the EU list but not of the national classification, a registration is not necessary, even if individual licenses are still required.<sup>82</sup> Similarly, in the Netherlands, registration is necessary for the brokering of weapons covered by the *Arms and Ammunition Act*, but not for brokers acting under the provisions of the *Financial Transactions of Strategic Goods Order* even if, in this case as well, individual deal licenses will still be necessary.

For the majority of systems that have established a registration requirement, this is applied to all brokering activities. Registration, of course, may be cancelled or revoked, particularly in the case of violations to the national trade laws and regulations. In the United States, for example, debarment is one of the possible penalties that brokers who have violated US trade laws may incur.

In the countries where brokers do not have to register with national authorities before they apply for an individual deal license, the

maintenance of records on granted licenses by the state becomes a particularly important element. In a few systems, the record of the information a broker has provided when applying for an individual deal license is treated as a form of de facto automatic registration. This is the case with Norway and Germany, for example. As stated in the Norwegian report on implementation of the UN Programme of Action, “Norway has no legal registration requirement for brokers. However, when a broker applies for a permission to execute a brokering activity, he will automatically be registered.”<sup>83</sup> In Germany, as well, brokering registration is effected with the first license application.<sup>84</sup> As a source of institutional memory, state records on granted/refused licenses are an important means to exercise monitoring and implementation. In Estonia, the Ministry of Foreign Affairs is mandated to maintain the state register of arms brokers as well as a database of granted export licenses, among others.<sup>85</sup> Similarly, in Bosnia and Herzegovina, the Ministry for Foreign Trade and Economic Relations, tasked with granting brokering licenses, is charged with establishing a database on issued licenses, on which it reports every six months to the Parliamentary Assembly.<sup>86</sup>

Overviewed countries commonly keep records of registered brokers or granted licenses; according to replies to the questionnaire submitted at the beginning of this research, the storing of data on refused licenses is also quite common. Records are also kept for quite long periods of time, which range (in the case of responding governments) from a minimum of ten years to indefinitely. Replies to the questionnaire also give two important indications concerning the sharing of information on granted/refused licenses among national agencies as well as with other countries’ authorities or international organizations. Most responding governments report that records on granted/refused licenses are shared with national agencies other than those responsible for screening them. In the majority of cases, however, this is done on request or “if necessary”. At the international level, it is significant that all except one of the responding countries indicated they do not share this information with foreign governmental authorities or international institutions. The sharing of information is done for the most part on request, if it is made at all possible by existing national rules on privacy. In terms of enforcement, the fact that data on granted and, especially, refused licenses is not shared as a matter of practice with other states or international enforcement agencies may represent a serious pitfall. When faced with a refusal of their license application by a given country, brokers may apply for the same authorization in another state, which—in

the absence of information sharing—would simply not be alerted to the possible illicit nature of the proposed deal. The same, of course, applies to the sharing of information on registered brokers who, if debarred in one state due to violations of arms trade laws, may simply move business elsewhere with minimum risk of being detected.

## CONCLUSION

Since attention has started to emerge on the problem of illicit arms brokers, a central concern of the international community—expressed in non-governmental and inter-governmental reports alike—has related to the general lack of appropriate regulatory frameworks at the national level. One of the key recommendations of the report submitted by the Group of Governmental Experts—which reported in 2001 on the feasibility of restricting the manufacture and trade of SALW to the manufacturers and dealers authorized by states—was indeed that states should, at a minimum, establish national systems of control for brokering and related activities occurring within their territorial jurisdiction, in order to deal effectively with illicit or undesirable arms transfers.

In the last decade much has occurred, at the national level, to respond to this generally expressed concern, and a growing number of countries have modified their national arms export regimes to include specific controls on brokering. At the same time, the total number of countries with such controls in place remains, to date, staggeringly low. It is estimated that around 40 countries worldwide control brokers and their activities, over two-thirds of which are located in the European (Eastern and Western) region.

This chapter presented an overview and analysis of such national regimes, with a particular focus on the two elements of licensing and registration. By examining the different ways in which these are designed at the national level, this chapter tried to present a spectrum of regulatory options, in the hope of providing a valuable resource to the UN Group of Governmental Experts tasked “to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons”.<sup>87</sup>

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The comparison reveals that national brokering controls vary in many respects, two of which may prove central in forthcoming international discussions: the legal definition of “broker” and “brokering activity”, and the degree and nature of extraterritoriality, that is, the application of national controls on activities of nationals and residents abroad.

This chapter also presented some data on national implementation of licensing and registration requirements that, while only indicative, point to some important enforcement challenges. These relate, among others, to:

- the need for legal systems to be very clear as to what is considered a controllable brokering activity and, therefore, needs government authorization;
- the possibility that the distinction between brokering of SALW alone, as opposed to the brokering of conventional military equipment more generally, is difficult to make in practice;
- the related possibility that the present international focus, centred on efforts to combat the illicit proliferation of small arms specifically, may have to be adjusted to the reality of brokering transactions; and
- the importance of national agencies being able to share information internationally on brokering licenses and registered brokers, whether on a bilateral or multilateral basis.

## Notes

- <sup>1</sup> *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled “Small Arms”*, UN document A/CONF.192/2, 11 May 2001, para. 25.
- <sup>2</sup> *Ibid.*
- <sup>3</sup> *Ibid.*, para. 62.
- <sup>4</sup> For details on the international initiatives on the issue as well as on its historical development, see Chapters 1 and 4 of this report.
- <sup>5</sup> Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005; Biting the Bullet Project (International Alert, Saferworld and the University of Bradford), *International Action on Small Arms 2005*:



*Examining Implementation of the UN Programme of Action*, Biting the Bullet (produced for the International Action Network on Small Arms), 2005, p. 6. The formulation of a precise figure presents some challenges. At the national level, the terms “broker” and “brokering activity” are understood in quite different ways. This variation has not only had a negative effect on the formulation of agreed international definitions of either term, but it also makes cross-country comparisons difficult. In many cases this difficulty is compounded by a lack of publicly available legal texts, or by the lack of cooperation by national authorities in providing information.

- 6 With resolution A/RES/60/81 the UN General Assembly established a Group of Governmental Experts tasked “to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons”. The Group will meet in three one-week sessions, starting from November 2006.
- 7 This chapter is based on an analysis of the regulatory systems in place in the following countries: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Liechtenstein, Lithuania, Malta, the Netherlands, Nicaragua, Norway, Poland, Romania, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States. Information for each of these systems was obtained through an analysis and interpretation of relevant legal documents (arms trade laws and regulations), which in a few cases was supplemented with feedback from government authorities. Unofficial translations of legal instruments have been provided throughout this chapter. However, readers should refer to the law in its original language for any clarification or for further information.
- 8 Report submitted in 2005 by the Netherlands to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, p. 6, available at <[http://disarmament.un.org/cab/nationalreports/2005/National%20Report%20\(the%20Netherlands.pdf](http://disarmament.un.org/cab/nationalreports/2005/National%20Report%20(the%20Netherlands.pdf)>.
- 9 In theory, this provision could also be used to control brokers who receive a fee or commission relating to a transfer of strategic goods, even when they do not directly buy or sell such weapons. In practice, such an occurrence has not materialized so far.

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- <sup>10</sup> Hungary, *Government Decree 48/1991 on the Export, Import and Re-export of Military Equipment and Services* [A haditechnikai eszközök és szolgáltatások kiviteléről, behozataláról, illetve reexportjáról szóló], [Government Decree 48/1991 (III.27.)], art. 1(2).
- <sup>11</sup> Hungary, *On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical Assistance*, [Government Decree 16/2004 (II.6.)], art. 1(3).
- <sup>12</sup> South Africa, *National Conventional Arms Control Act*, [No. 41 of 2002], art. 1(i).
- <sup>13</sup> The distinction between “core” and “associated” brokering activities is commonplace in international discussions on the issue, and would aim at capturing the distinction between “mediation”, on the one hand, and the provision of so called “ancillary” services—most typically transportation and financing—on the other. In practice, however, the distinction is not always evident, as the variety of activities conducted by brokers cannot easily be classified according to discreet and clear-cut categories.
- <sup>14</sup> Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005, p. 14.
- <sup>15</sup> Additional provision 1(a)(2) of the *Law on the Control of Foreign Trade Activity in Arms and in Dual-Use Goods and Technologies* (1995, with amendments up to 2002); Bulgaria, *Law on the Control of Foreign Trade Activity in Arms and in Dual-use Goods and Technologies*, [State Gazette 75/2.08.2002r]; see also articles 13(a) and 13(b) regulating the provision of transportation and transit. This text was provided by the Bulgarian Ministry of Foreign Affairs.
- <sup>16</sup> Estonia, *Strategic Goods Act* [Strateegilise Kauba Seadus], [RT I 2004, 2, 7], 17 December 2003, § 3(2)(1).
- <sup>17</sup> A separate question concerns the control of nationals and residents when they work outside the national territory of their country of establishment. This issue is dealt with below, in the section on extraterritorial controls.
- <sup>18</sup> Norway, *Regulations Relating to the Implementation of Control of the Export of Strategic Goods, Services and Technology*, [FOR-1989-01-10-51], 10 January 1989, §1(i). See also Norway, *Act of 18 December 1987 Relating to Control of the Export of Strategic Goods, Services, Technology, etc.*, [LOV-1987-12-18-93], 18 December 1987, § 1: “The King may also lay down a prohibition whereby persons who are

- domiciled or resident in Norway and Norwegian companies, foundations and associations may not without special permission engage in trade in, negotiate, or by other means assist in the sale of weapons or military equipment from one foreign country to another”.
- <sup>19</sup> United Kingdom, *The Trade in Goods (Control) Order 2003*, [Statutory Instrument 2003 no. 2765], art. 2.
- <sup>20</sup> *Ibid.*, art. 4(1–2). The United Kingdom uses different terms for these two cases: it defines “trafficking” as an instance in which a broker trades between two overseas countries on the broker’s own behalf, while “brokering” is intended as an instance in which the broker arranges or mediates contracts between others for trade in military and paramilitary goods between foreign countries. See “Supplementary Guidance Note on Trade (“Trafficking And Brokering”) in Controlled Goods including Trade to Embargoed Destinations”, <[www.dti.gov.uk/files/file8418.pdf](http://www.dti.gov.uk/files/file8418.pdf)>.
- <sup>21</sup> The Common Position is binding on EU members, the majority of which have adopted brokering controls or are in the process of amending relevant export control legislation. See Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, 2003/468/CFSP, 23 June 2003. See also Holger Anders, *Implementing the EU Common Position on the Control of Arms Brokering: Progress after Two Years*, Groupe de recherche et d’information sur la paix et la sécurité briefing, note d’analyse, 2005.
- <sup>22</sup> Romania, *Government Ordinance no. 158/1999 on the control regime of exports, imports and other foreign trade operations with military goods, approved and amended by Law nr. 595/2004 [Lege pentru aprobarea Ordonanței de urgență a Guvernului nr. 158/1999 privind regimul exporturilor și importurilor de produse strategice]*, [Law no. 595/2004], 15 December 2004, art. 5(e).
- <sup>23</sup> Communication with German Ministry of Foreign Affairs, May 2006; see also report submitted in 2005 by Germany to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, available at <<http://disarmament.un.org/cab/nationalreports/2005/Germany.pdf>>.
- <sup>24</sup> Communication with Swedish Ministry of Foreign Affairs, May 2006. See also Sweden, *Military Equipment Act [Lag (1992:1300) om krigsmateriel]*, [SFS 1992:1300], 12 October 1992.
- <sup>25</sup> Malta, *Military Equipment (Export Control) Regulations*, [S.L.365.13], 1 January 2002, art. 2.

- <sup>26</sup> Bosnia and Herzegovina, *Law on the Import and Export of Weapons and Military Equipment* [Zakona o uvozu i izvozu oružja i vojne opreme], [Sl.Glasnik BiH 5/03 and 33/03], 3 July 2003, art. 2(2).
- <sup>27</sup> Belgium, *Law of 25 March 2003, Modifying Law of 5 August 1991 Concerning Import, Export, and Transit of Weapons* [Loi modifiant la loi du 5 août 1991 relative à l'importation, à l'exportation et au transit d'armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente], [2003/09355], 25 March 2003, art. 15.
- <sup>28</sup> Ukraine, *On the State Control over International Transfers of Military and Dual-Use Commodities*, [Law No. 549-IV], 20 February 2003, art. 1.
- <sup>29</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.2(b).
- <sup>30</sup> Finland, *Act on the Export and Transit of Defence Materiel*, [242/1990; amendments up to 900/2002 included], sec. 2a(2).
- <sup>31</sup> Loretta Bondi and Elise Keppler, *Casting the Net? The Implications of the U.S. Law on Arms Brokering*, Washington, DC., The Fund for Peace, January 2001, p. 26. See also Small Arms Survey, *Small Arms Survey 2004: Rights at Risk*, Graduate Institute of International Studies, 2004, p. 158.
- <sup>32</sup> It is also important to note that, when the transfer of restricted goods is involved, not only brokers, but also agents providing accessory services such as transportation, financing, insurance, advertising and promotion—who are normally exempt from licensing for the transfer of non-restricted goods—must be authorized. See UK Department of Trade and Industry, *Supplementary Guidance Note on Trade (“Trafficking And Brokering”) in Controlled Goods Including Trade to Embargoed Destinations*, 2004, <[www.dti.gov.uk/files/file8418.pdf](http://www.dti.gov.uk/files/file8418.pdf)>.
- <sup>33</sup> United Kingdom, *The Trade in Controlled Goods (Embargoed Destinations) Order 2004*, [Statutory Instrument 2004 No. 318], art. 3.
- <sup>34</sup> Communication with the German Ministry of Foreign Affairs, May 2006.
- <sup>35</sup> Bosnia and Herzegovina, *Law on the Import and Export of Weapons and Military Equipment* [Zakona o uvozu i izvozu oružja i vojne opreme], [Sl.Glasnik BiH 5/03 and 33/03], 3 July 2003, art. 3(1).
- <sup>36</sup> E-mail communication with Bulgarian Ministry of Foreign Affairs, January 2004.
- <sup>37</sup> These are contained in Hungary, *On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical*

- Assistance, [Government Decree 16/2004 (II. 6.)], chapters 23 and 24; see also József Gyöngyös, "Conventional Arms Trade Control", <[http://mkeh.gov.hu/haditechnika/nemzeti/haditechnika\\_kulkereskedelem](http://mkeh.gov.hu/haditechnika/nemzeti/haditechnika_kulkereskedelem)>.
- 38 The most recent version of the *Common Military List of the European Union (equipment covered by the European Union Code of Conduct on Arms Exports)* can be found at <[www.eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2006:066:SOM:EN:HTML](http://www.eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2006:066:SOM:EN:HTML)>. The Wassenaar Arrangement Control Lists are available at <[www.wassenaar.org/controllists/WA-LIST%20\(05\)%201%20Corr..pdf](http://www.wassenaar.org/controllists/WA-LIST%20(05)%201%20Corr..pdf)>.
- 39 Included here are, among others, rifles, carbines, revolvers, pistols, machine pistols and machine guns; smooth-bore weapons specially designed for military use and others of the fully automatic, semi-automatic or pump-action type; weapons using caseless ammunition. A few exceptions apply, for example, for old weapons and related reproductions.
- 40 For example, guns, howitzers, cannon, mortars, anti-tank weapons, projectile launchers, military flame throwers, recoilless rifles.
- 41 Lithuania, *Law on the Control of Arms and Ammunition*, [No. IX-705], 15 January 2002, chp. 2.
- 42 Lithuanian reply to authors' questionnaire, 30 May 2006.
- 43 Ibid.
- 44 United States of America, *International Traffic in Arms Regulations (ITAR)*, rev. 1 April 2006, §§ 129.6(b)(2) and 129.7(a)(1)(i).
- 45 Switzerland, *Ordinance on War Materiel [Ordonnance sur le matériel de guerre]*, [RS 514.511], 25 February 1998, art. 6.
- 46 The list is annexed to the ordinance. It currently includes the following countries: Argentina, Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxemburg, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, the United Kingdom and the United States.
- 47 E-mail communication with the Swiss State Secretariat for Economic Affairs, January 2004.
- 48 The Czech Republic, *Act of 15 February 1994 to Regulate Trade in Military Equipment with Foreign Countries*, [No. 38/1994 Coll.], art. 7. The "special legislation" and the "special legal regulation" referred to in sub-paragraph 5 are listed as "Sub-paragraphs a) and b) of the provisions of Art. 2 paragraph 1 of Act no. 451/1991 Coll., stipulating additional prerequisites for the execution of certain functions in State bodies and organizations of the Czech and Slovak Federal Republic,

- the Czech Republic and the Slovak Republic.” The “special law” mentioned in sub-paragraph 6 refers to “Act no. 412/2005 Coll., on the Protection of classified information and on security capacity” (ibid., notes 2 and 2a).
- <sup>49</sup> Poland, *Law of 29 November 2000 on External Trade in Goods, Technologies and Services of Strategic Importance both for State Security and for the Keeping of International Peace and Security* (as amended in July 2004), [Dz. U. No. 119, item 1250], art. 10(1).
- <sup>50</sup> Ibid., art. 11(1).
- <sup>51</sup> Switzerland, *Federal Law on War Materiel [Loi fédérale sur le matériel de guerre]*, [RS 514.51], 13 December 1996, art. 15.
- <sup>52</sup> E-mail communication with the Swiss State Secretariat for Economic Affairs, January 2004.
- <sup>53</sup> Ibid.
- <sup>54</sup> Estonia, *Strategic Goods Act [Strateegilise Kauba Seadus]*, [RT I 2004, 2, 7], 17 December 2003, § 4(2)(4).
- <sup>55</sup> The Czech Republic, *Act of 15 February 1994 to Regulate Trade in Military Equipment with Foreign Countries*, [No. 38/1994 Coll.], art. 15(2)(h).
- <sup>56</sup> Ibid., art.15(3)(a–d).
- <sup>57</sup> Latvian Ministry of Foreign Affairs, *Export, Import and Transit Control of Strategic Goods in the Republic of Latvia*, policy paper, 25 November 2002, <[www.am.gov.lv/en/policy/4672/](http://www.am.gov.lv/en/policy/4672/)>.
- <sup>58</sup> Latvia, *Regulations Regarding Control of Goods of Strategic Significance*, [Cabinet Regulation no. 421], 16 December 1997, art. 26(3).
- <sup>59</sup> Slovak Republic, *On Trading in Military Material and on the Amendment to Act No. 455/1991 Coll. on Licensed Trade as Amended, as Amended*, [Act No. 179/1998 Coll.], art. 5(2).
- <sup>60</sup> Hungary, *Government Decree 48/1991 on the Export, Import and Re-export of Military Equipment and Services [A haditechnikai eszközök és szolgáltatások kiviteléről, behozataláról, illetve reexportjáról szóló]*, [Government Decree 48/1991 (III.27)], art. 4(1–2).
- <sup>61</sup> South Africa, *National Conventional Arms Control Act*, [No. 41 of 2002], art. 15.
- <sup>62</sup> Nicaragua, *Law on the Control and Regulation of Firearms, Munitions, Explosives, and Other Related Materials [Ley especial para el control y regulación de armas de fuego, municiones, explosivos y otros materiales relacionados]*, [Ley No. 510-05], 25 February 2005, art. 114.
- <sup>63</sup> Ibid., art. 119.
- <sup>64</sup> The Code is available at <[www.smallarmsnet.org/docs/saeu03.pdf](http://www.smallarmsnet.org/docs/saeu03.pdf)>.

- <sup>65</sup> Report submitted in 2005 by Bosnia and Herzegovina to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, p. 8, available at <<http://disarmament2.un.org/cab/nationalreports/2005/Bosnia%20and%20Herzegovina.pdf>>.
- <sup>66</sup> *Export Controls of Arms, Military Material and Dual-use Goods and Technologies in Slovakia*, paper presented during the 5<sup>th</sup> International Conference on Export Controls, Budapest, 15–17 September 2003.
- <sup>67</sup> Slovak reply to authors' questionnaire, August 2006.
- <sup>68</sup> In these systems the permit granting the general authorization to act as a broker may coincide with the registration of the agent (see section on registration systems).
- <sup>69</sup> Note that the Bulgarian system uses the term "license" to designate initial authorizations and "permits" for individual (transaction-specific) authorizations. See Bulgaria, *Law on the Control of Foreign Trade Activity in Arms and in Dual-use Goods and Technologies*, [State Gazette 75/2.08.2002r], art. 5(2).
- <sup>70</sup> The Czech Republic, *Act of 15 February 1994 to Regulate Trade in Military Equipment with Foreign Countries*, [No. 38/1994 Coll.], art. 6 and 14.
- <sup>71</sup> Hungary, *On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical Assistance*, [Government Decree 16/2004 (II.6.)], art. 2(2)(c).
- <sup>72</sup> See, for example, the comprehensive information available on the site of the UK Department of Trade and Industry, <[www.dti.gov.uk](http://www.dti.gov.uk)>. Seminars and information sessions were also held to the benefit of arms exporters and prospective brokers.
- <sup>73</sup> Interview with government delegate to the UN Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All Its Aspects, July 2006.
- <sup>74</sup> Intervention by Alex Vines during the meeting "The Scope and Implications of Developing a Mechanism to Prevent Illicit Brokering", New York, 5 July 2006.
- <sup>75</sup> Switzerland, *Federal Law on War Materiel [Loi fédérale sur le matériel de guerre]*, [RS 514.51], 13 December 1996, art. 9 and communication with Swiss federal authorities, January 2004.
- <sup>76</sup> Switzerland, *Ordinance on War Materiel [Ordonnance sur le matériel de guerre]*, [RS 514.511], 25 February 1998, art. 3.
- <sup>77</sup> *Ibid.*, art. 4.

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- <sup>78</sup> Bulgaria, *Law on the Control of Foreign Trade Activity in Arms and in Dual-use Goods and Technologies*, [State Gazette 75/2.08.2002r], art. 5, especially 5(1–2).
- <sup>79</sup> Slovenia, *Decree on Permits and Consents for the Trade in and Production of Military Weapons and Equipment*, [Ur.l. RS, št. 31/2005], 6 February 2003, art. 1.7. “Trade in military weapons and equipment” includes “the sale of military weapons and equipment, including brokerage ..., and import, export and transit of military weapons and equipment” (ibid., art. 1.3). English translation provided by Slovenian official.
- <sup>80</sup> E-mail communication with Slovenian officials, January 2004.
- <sup>81</sup> This being category A.
- <sup>82</sup> Lithuanian response to authors’ questionnaire, 30 May 2006.
- <sup>83</sup> Report submitted in 2005 by Norway to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, available at <<http://disarmament2.un.org/cab/nationalreports/2005/NORWAY.pdf>>.
- <sup>84</sup> German reply to authors’ questionnaire, May 2006.
- <sup>85</sup> Estonia, *Strategic Goods Act [Strateegilise Kauba Seadus]*, [RT I 2004, 2, 7], 17 December 2003, § 10.1–2. Note that in this law “export” includes the provision of services, including brokering (see § 4).
- <sup>86</sup> Bosnia and Herzegovina, *Law on the Import and Export of Weapons and Military Equipment [Zakona o uvozu i izvozu oružja i vojne opreme]*, [Sl.Glasnik BiH 5/03 and 33/03], 3 July 2003, art. 11(1).
- <sup>87</sup> General Assembly, UN document A/RES/60/81, 11 January 2006.





## CHAPTER 3

### SANCTIONS AND ENFORCEMENT

Holger Anders and Alex Vines

#### INTRODUCTION

This chapter focuses on the imposition of legal sanctions on those involved in illicit arms transfers and brokering activities. It also examines existing enforcement mechanisms and the role of international cooperation in the enforcement of brokering controls and their impact on international sanctions. This includes a look at the ways states monitor arms brokers and brokering activities and some of the major problems they face in prosecuting illicit arms brokering. Several case studies illustrate these different approaches and the chapter looks at where there has been progress and where potential areas for progress exist.

#### CONDITIONS FOR PROSECUTION

Legal penalties can only be imposed if legislation makes a particular activity and person liable for trial in a court of justice. National laws and regulations constitute the main source of such legislation and are only applicable if the activity and actor fall within the jurisdiction of the state where the person or entity is prosecuted. A clear legal framework that allows for the distinction between what constitutes “licit” and what constitutes “illicit” brokering is therefore essential for the prosecution in national courts of persons and entities accused of involvement in illegal brokering activities. Research indicates that at present around 40 states have controls on arms brokering.<sup>1</sup>

Many of the states that report having brokering controls in place explicitly define the controlled activities in national laws and regulations. Others states report to subsume under a broader term relevant controls on the

activities of private individuals and commercial enterprises that engage in brokering international arms transfers. An example is the Czech Republic, which until 2004 did not explicitly define arms brokering in its arms control legislation though arguably covered “third-country” brokering in the controls applying to “foreign trade activities”.<sup>2</sup> However, there are no known prosecutions in the Czech Republic under the legislation prior to 2004 of persons or entities accused of involvement in illicit brokering activities. It is not clear therefore whether national courts would have upheld the argument that, for example, the mediation by someone in the territory of the Czech Republic of an international arms transfer between two foreign countries would have constituted an illegal foreign trade act under Czech legislation.

The Czech Republic is also an example of a state that restricts the right to apply for registration and licenses for specific brokering transactions to corporate persons who are citizens and permanent residents of the Czech Republic.<sup>3</sup> A non-corporate person engaging in brokering activities while within Czech territory would therefore automatically be excluded from legal brokering activities and could face legal sanctions. While such a stipulation does not exist in Germany, for example, licensing officials indicated that, in practice, it is only manufacturers established in Germany who are granted licenses for brokering activities. German officials claim that private individuals may be highly mobile and are consequently more difficult to control than established manufacturers.<sup>4</sup> A few states, including the Russian Federation, exclude private individuals and commercial enterprises from transferring arms from or to their home state, with the exception of the sole state-run arms marketing agency; a similar approach exists in China.

Other potential sources of legislation on which to base prosecutions may be offered by international treaty law and international customary law. International treaty law is only binding on those states that have signed and ratified the treaty. International customary law is applicable to all states. An example of such a source in international law is the *Rome Statute of the International Criminal Court* (ICC). The ICC was established in 1998 by 120 states as a treaty-based organization. The *Rome Statute*, which entered into force in 2002, gives the court jurisdiction over “the most serious crimes of concern to the international community as a whole” and to natural persons who would otherwise not be prosecuted in a national court.<sup>5</sup> The *Rome Statute* also gives the ICC jurisdiction over natural persons who

provide the means for the commission of any of these crimes.<sup>6</sup> However, ICC prosecutors have not brought forward any cases against arms traffickers so far. The actual role the ICC may play in prosecutions of illicit arms brokering in the context of a crime under ICC jurisdiction remains unclear.

Worth mentioning in this context are special courts set up under international law in relation to specific countries such as the Special Court for Sierra Leone. Set up in 2002 by the Government of Sierra Leone and the United Nations, the Special Court is mandated to “try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.<sup>7</sup> The court initially examined, in 2003, the possibility of investigating the transportation and delivery of small arms and light weapons (SALW) but subsequently turned its focus away from this area of enquiry. The actual role of special courts may therefore be limited in bringing to justice of persons and entities who brokered illicit arms transfers to, for example, destinations and actors under mandatory UN arms embargoes.

#### CRIMINALIZATION OF ILLICIT BROKERING

States with explicit brokering legislation have often dispersed relevant controls among several laws rather than in one single text. In addition, national legislation and regulations may include exemptions in relation to, for example, the licensing of certain arms brokering activities, the brokering of certain arms, or the brokering of arms to certain destinations. This can introduce considerable variability in the requirements for lawful brokering and, concomitantly, in what constitutes illicit brokering that may be subject to legal penalties under national law. These differences within national law may imply a complex system of control that, unless carefully crafted, may leave loopholes that are exploited by persons and entities involved in undesirable, if not necessarily illicit, brokering activities.

In the Netherlands, operating requirements for legal brokering activities and criminal sanctions of illicit activities differ according to the type of arms brokered, their destination, and the location where the activity is conducted. Brokering of “military” SALW is regulated under the 1996 *Regulation on Financial Transactions related to Strategic Goods*. The brokering of “civilian” small arms is regulated by the 1997 *Arms and Ammunition Act* and, in contrast to the *Regulation on Financial Transactions*,

imposes a licensing requirement for corporations operating outside Dutch territory that have their main establishment in the Netherlands. At the same time, neither law requires a permit for brokering activities by Dutch nationals living and operating abroad. Violations of arms embargoes are punishable under the 1977 *Sanctions Act*.<sup>8</sup> This Act was invoked by public prosecutors in The Hague in the recent trial of an alleged arms trafficker as a basis for the prosecution of a national who resided and operated as an independent businessman in West Africa (see Box 3.1).

### **Box 3.1. Eight years for Dutch arms trafficker**

In March 2005, Dutch police arrested Gus Van Kouwenhoven on charges of complicity in war crimes in Liberia and of trafficking weapons in the period of 2001 to 2003 in violation of the Dutch legislation that implemented the UN arms embargo against Liberia. Van Kouwenhoven, a Dutch national, had come for a short stay in the Netherlands from his home abroad, apparently unaware that there was a warrant for his arrest. He had formed part of the circle of businessmen who gathered around Liberian strongman and former president Charles Taylor in the 1990s and operated lucrative logging concessions in Liberia's forests.

The prosecutor accused Van Kouwenhoven of providing weapons to armed forces under the control of the Oriental Timber Company (OTC), that were used in at least three specific incidents constituting war crimes under the Third and Fourth Geneva Conventions of 1949 as well as common article 3 of the Geneva Conventions. The prosecution further accused Van Kouwenhoven of having been responsible for the repeated use of at least one of OTC's ships for the illicit import of small arms into the port of Buchanan, Liberia. OTC was involved in the operational management of the port. The prosecution called for a prison term of 20 years and a monetary fine of €450,000.

In June 2006 the court acquitted the accused Dutch businessman of complicity in war crimes and rejected the prosecutor's argument that the provision of weapons by Van Kouwenhoven amounted to a criminal offence under the Geneva Conventions. The court found insufficient evidence to demonstrate that the accused had been directly involved in the specific atrocities or had detailed prior knowledge about the atrocities in which the trafficked arms were used. However, the court found the accused man guilty of arms trafficking in violation of Dutch legislation enacted to implement the UN arms embargo on Liberia. Van Kouwenhoven was sentenced to eight years of imprisonment. No monetary fine was imposed on the grounds that the accused was understood to be no longer in the financial position to pay a considerable fine.<sup>9</sup> Van Kouwenhoven has appealed against this conviction.

**Box 3.1** (continued)

It is worth noting that the exclusive legal basis for the prosecution of the accused Dutch businessman for alleged illicit arms trafficking was his nationality. The arms in question did not originate from or pass through the territory of the Netherlands. In addition, the arms transfers in question were not arranged by Van Kouwenhoven while he was within Dutch territory. Indeed, the criminal case could not have been brought forward under the Dutch brokering regulations contained in the 1996 act on involvement in financial transactions in transfers of strategic goods between foreign countries. This is because that act does not extend to the activities of nationals when operating abroad. In contrast, the Dutch legislation enacted to apply the UN arms embargo on Liberia, which formed the basis of the prosecution's case, does apply to nationals when operating from abroad.

**SCOPE OF CONTROLLED ACTIVITIES**

Differences in the scope of controlled brokering activities under national law were treated in Chapter 2. Some examples are worth mentioning here though to illustrate the need for clear laws and regulations that allow for the effective enforcement and prosecutions of persons and entities accused of involvement in illicit brokering activities. For example, controlled activities in Germany include the indication to a business partner the possibility to conclude a contract involving the transfer of arms between two foreign states—for example if a person or entity within German jurisdiction provides information in response to a detailed question that provides a concrete idea about what is sought and in what quantity. A broker would not need a license for responding to the question of whether he/she knows a supplier of ammunition of a particular calibre. However, a license would be required if the question also included the quantity of ammunition desired, thereby providing the initial elements of a concrete arms transfer deal.<sup>10</sup> German courts also have jurisdiction in cases when the broker did not operate for a fee or other compensation. This is because German law only focuses on the activity itself rather than on whether the activity was done for financial compensation or as a free-of-charge service to a client.

In contrast, legislation in the United States specifies that a broker is someone “who acts as an agent for others in negotiating or arranging contracts ... in return for a fee, commission, or other consideration”.<sup>11</sup> US

courts therefore only have jurisdiction over cases in which compensation was agreed to. Legislation on strategic goods in the Netherlands focuses on the “financial involvement” of a resident or company established in the Netherlands in third-party transactions between two countries outside the European Union (EU).<sup>12</sup> A Dutch enforcement official explained that this focus on “financial involvement” was problematic at times because there was no further clarification in national law of the scope of the term. Specifically, it was not clear whether the term enabled the law to cover only those Dutch entities that buy and sell strategic goods, or whether it also covered those who receive a fee or commission for brokering arms deals, or shipping agents who receive money for arranging an arms transfer.<sup>13</sup>

#### OTHER TRANSFER-RELATED ACTIVITIES

The provision of false documentation, logistical means or financial services often forms part of illicit arms trafficking. However, such activities may be carried out by persons who are not involved in the contract negotiations and the activities may fall outside the scope of the negotiations or what may be deemed “brokering activity” as defined in the law. They may therefore not be subject to legal penalties for violations of brokering regulations. For example, a German court ruled in a case in 1991 that the provision of fake end-user certificates (EUCs) in relation to arms transfers between foreign countries was not punishable under German law if the provision of such EUCs did not form part of the contract negotiations.

In October 1991, German law enforcement authorities arrested several individuals in southern Germany after the exchange of a Bolivian EUC for a commission of DM 608,000 (approximately €300,000). The EUC had been provided in the context of a transfer worth US\$ 21 million of military equipment from Czechoslovakia to Croatia which, since early 1991, had been experiencing increasing armed violence between the Croatian government and secessionist Croatian Serbs. The exporters in Czechoslovakia requested the buyer to provide an EUC from a third country that would not raise concerns with export and customs authorities in Czechoslovakia and transit countries. The Croatian buyers contacted business partners in Germany with a request to provide the desired EUC.

The German prosecutors in the case argued that the accused persons had engaged in the unlicensed, and therefore illicit, arrangement of a contract for the transfer of weapons of war between two foreign countries. The court

rejected this argument on the grounds that the prosecution could not provide sufficient evidence that the conclusion of the transfer contract had been made conditional by the sellers on the provision of the fake EUC. The court considered that the provision of the EUC was part of the requirements for the implementation of the already-agreed contract. It was therefore an activity that was unrelated to the controlled activity of contract negotiation. The court consequently did not accept the argumentation that a violation of German controls on the facilitation of contract negotiation had taken place, and acquitted the accused.<sup>14</sup>

In 1993, a German court ruled that the provision of a false EUC for the particular transfer in question was not subject to legal penalties because the transfer had not taken place. No crime had therefore been committed under German law. The accused had been approached in 1990 by a broker who asked whether he could provide an EUC that could be used as a cover for an illegal arms transfer. The arms were to be transported from Bulgaria and transited through Germany for onward delivery to an undisclosed destination. The accused provided the broker with an EUC from the Ministry of Defence of a South American state that identified the armed forces of this state as the sole recipient of the arms. The Ministry of Defence of this state however had at no point been a party to the contract negotiations nor was this ministry of defence the intended recipient. The accused received a commission worth €750,000 for his services.

The court rejected the prosecution's argument because the transfer was to be transited through Germany and therefore fell under German regulations on importation and transit, not under regulations on the transfer of arms between third countries, and no license for brokering arms that transit Germany is required in Germany. The court also rejected that the accused person had violated German law on the importation and transit of arms because the arms had not left Bulgarian territory for Germany due to a disagreement between the contract parties on the payments for the transfer. While the accused person had provided assistance in the aiding of a planned crime, the court ruled that this was not an illicit act under the case-relevant German regulations and consequently acquitted the accused person.<sup>15</sup>

Few states seem to explicitly criminalize the provision of false EUCs in the context of an arms transfer between foreign countries, yet this is important for the prevention of illicit brokering. A reason for this omission is that such



certification is generally not required by a state that considers an application for a brokering license. This may be because the primary responsibility for ensuring the end-use of transferred arms is with the exporting state, not the state that authorizes a brokering license for the transfer.

Some states have explicit controls on the provision of transportation and financial services in relation to arms transfers between foreign countries. In Germany, controls on transportation are only applicable if the transfer takes place on a vessel or aircraft registered in Germany. It is not relevant in these cases whether the operator of the plane or ship is located in Germany or is of German nationality. Other states, including Bulgaria, Estonia and the United States, require their nationals, registered companies and permanent residents to obtain prior authorization in order to transport arms between foreign countries.<sup>16</sup> These states have also imposed a prior authorization requirement for the provision of financial services for transfers between foreign countries. A few states, such as the United Kingdom, do not control transportation and financial services for transfers to non-embargoed destinations but may impose criminal sanctions if these services were provided in the context of transfers to embargoed destinations.

#### EXTRATERRITORIAL CONTROLS ON ARMS BROKERING

Loopholes and weaknesses in legislation and regulations of the few states that have brokering controls in place, as well as the continuing absence of brokering controls in the vast majority of other states, create an environment that facilitates illicit or otherwise undesirable brokering. In addition, the often highly mobile nature of arms brokers means that activities that may be illicit in one state can be carried out in another in which the broker does not risk legal sanctions for the activity. The extension of controls over persons and entities when operating outside their home state may therefore be a critical element for the effective combat of illicit arms brokering. Regrettably, there often remain considerable misunderstandings in policy debates about what such controls entail and how they are enforced in those states that have extraterritorial brokering controls.

To clarify the meaning of extraterritorial controls, it is helpful to first consider the legal concepts of *territoriality* and *extended territoriality*. The principle of *territoriality* is explicit in brokering controls. The principle implies that a controlled activity taking place anywhere within the national

territory may be subject to legal sanctions if this activity is in violation of national regulations. The principle does not distinguish between national or foreign persons and covers anyone acting within the national territory. In a few states, sanctions may also be imposed if only a part of the activity is taking place within the national territory. For example, within Bulgarian territory, it is an illicit activity to provide or transfer information in phone calls, e-mails or faxes as part of an unauthorized brokering transaction.<sup>17</sup> This approach to territorial jurisdiction is also used in Germany and the United Kingdom.<sup>18</sup>

Germany is also an example of a state applying the principle of *extended territoriality* in its national regulations. Under this principle, sea vessels that fly the national flag and aircraft that are nationally registered are considered as an extension of the national territory. Any national or foreign person or entity wishing to transport controlled military goods in vessels or aircraft that are registered in Germany requires a general authorization for this transport activity.<sup>19</sup> A foreign national who charters and operates a vessel or aircraft that is registered in Germany may therefore violate German regulations if the vessel or aircraft is used to transport arms without the required authorization.

In contrast, the principle of *extraterritorial controls* on arms brokering relates to activities by persons or entities that have a link with a state but operate from a different one. A limited form of extraterritorial controls is the prohibition of brokering activities that result in the transfer of arms and ammunition in violation of arms embargoes by nationals who operate outside the state of their nationality. This form of extraterritorial controls is used in the United Kingdom, for example. A more comprehensive approach to the prohibition of brokering activities conducted abroad that result in arms embargo violations covers, in addition to nationals, entities that are established in the home state as well as permanent citizens and residents of the home state.

In its most comprehensive form, extraterritorial controls apply not only in relation to arms embargo violations, but also to the brokering of transfers to any destination. This latter form is established in the brokering controls of the Czech Republic, Estonia, Finland, Hungary, Lithuania, Nicaragua, Norway, Poland, Romania, Sweden, Ukraine and the United States, among others.<sup>20</sup> Licenses for extraterritorial brokering activities are reportedly only

granted by these states if the activity would also receive a license if conducted in the home state.

Governmental officials who are sceptical about the operability of extraterritorial controls sometimes claim that such controls (that is, the prohibition of certain activities that would also be illegal if conducted in the home state or the additional requirement for a license to engage in a brokering activity when abroad) may be very difficult to enforce, and therefore are against the introduction in national legislation of such extraterritorial controls. However, this argument overlooks the fact that states are frequently obliged under UN and other mandatory arms embargoes to implement certain forms of extraterritorial controls on arms brokering (more on this below). In addition, the argument does not address the fact that without a clear prohibition of, for example, extraterritorial activities by nationals who are involved in illicit arms transfers in violation of UN embargoes, the national cannot be held accountable by the courts of the home state even if there is clear evidence of the individual's involvement in the illicit transfer.

#### STATUTES OF LIMITATIONS

A further condition for the prosecution of illicit brokering activities is that legal proceedings be initiated within a certain period of time after the alleged crime (this period being defined by the statute of limitations). Whether or not there is a time limit for the initiation of legal proceedings, and the maximum period within which proceedings may be initiated, differs within and between states in relation to the specific type of crime. The relevance of such statutes can be illustrated by a case from Latvia involving the prosecution of a former state official for his involvement in the trafficking of arms and ammunition to Somalia in violation of a UN arms embargo. The act in question had occurred in 1992. Investigations into the deal were initiated in 1997, and a criminal case was brought against the accused in 2000. The case was eventually dismissed because the period of time set by the statute of limitations applying to the alleged crime had been exceeded.<sup>21</sup>

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## CONDITIONS FOR PROSECUTIONS UNDER INTERNATIONAL OBLIGATIONS OF STATES

Mandatory arms embargoes are allowed for under Chapter VII of the United Nations Charter. Article 41 of the Charter authorizes the Security Council to call upon UN Member States to take measures not involving the use of armed force to give effect to its decisions and Article 25 obliges UN Member States to “carry out the decisions of the Security Council”. The UN Security Council has imposed numerous embargoes over the last decades, on both states or specific actors or regions within a state. Recent embargoes have covered, for example, Liberia (1992), Libya (1992), Somalia (1992), Angola (1993), Haiti (1993), Rwanda (1994), Sierra Leone (1997), Afghanistan (2000), Eritrea and Ethiopia (2000), the Democratic Republic of the Congo (2003), Côte d’Ivoire (2004) and Sudan (2004).<sup>22</sup>

The language of these embargoes has evolved over time, becoming more specific in recent years. This evolution has resulted in sharper definition of the activities subject to an embargo. However, there is often disagreement within the international community over the monitoring of UN sanctions. Definitions and scope are important because the wording of embargoes will often determine whether or not a particular activity may be interpreted under national law to be subject to legal penalties. Language specifying that states should apply the principles of extended territoriality and nationality could help to delineate prohibited activities more clearly. Even greater clarity could be achieved if the Security Council specified that the prohibited activities comprise the direct or indirect supply, sale and transfer, irrespective of the origins of the arms. This language does not explicitly refer to brokering but may cast a sufficiently wide net in states with relevant legislation to impose legal penalties for brokering that result in transfers in violation of UN embargoes.

Arms embargoes were not effectively monitored until the introduction of ad hoc monitoring groups (Panels, Groups of Experts and Monitoring Mechanisms) in the late 1990s. Such groups provide regular reports to the Security Council Committees tasked to oversee particular sanctions. This important development created a system for feeding independent information on possible breaches directly into the Security Council. Most of the reports provided by expert groups are public and are available on the UN website.<sup>23</sup>

One needs to be aware that many of these groups do not have sufficiently skilled investigators and lack judicial powers making them unable to produce reports adequate for national prosecutions. There are nevertheless some examples where a UN Group report has stimulated a judicial process or resulted in positive political action. This has depended upon willingness to act, an enabling judicial environment, and the support of media, the public and non-governmental organizations, as the following three cases illustrate.

*The Baba Jobe case.* Jobe was Assistant Secretary to the Office of the [Gambian] President and subsequently the Majority leader in the Gambian Parliament. He was named in 2000 by the Sierra Leone Panel of Experts<sup>24</sup> for having brokered weapons for the Revolutionary United Front (RUF) rebels in Sierra Leone and was put on a travel ban list by the Liberian Sanctions Committee as an arms trafficker.<sup>25</sup> Jobe was arrested in late 2003 and convicted in March 2004 for economic crime and jailed for nine years and eight months in Banjul's Mile Two prison.<sup>26</sup>

*The Samih Ossaily and Aziz Nassour case.* This was an important case because a law enforcement agency acted upon information from a UN expert group report and achieved a successful prosecution for the first time. The Federal Police in Belgium read an article in the *Washington Post* in 2001 about Aziz Nassour and Samih Ossaily and decided to investigate. The police used the Sierra Leone and Liberia UN Panel of Experts reports to start their investigation and developed a case on the exchange of conflict diamonds from the RUF for guns and cash.<sup>27</sup> Aziz Nassour left Belgium in June 2001 for Lebanon; Samih Ossaily, on his return from Lebanon, was arrested in Belgium in March 2002. When searching Samih Ossaily's Belgian apartment the Federal Police found an EUC from Côte d'Ivoire dated 8 January 2001. Aziz Nassour admitted that he had sought an official EUC from Côte d'Ivoire but what happened to the weapons after their delivery to Abidjan was not his concern.<sup>28</sup> Records of phone calls to Miami linked an Israeli arms dealer operating out of Panama, Shimon Yelenik. Yelenik was also linked to the diversion of 3,000 Nicaraguan AK-47 assault rifles to Colombian paramilitaries.<sup>29</sup> Nassour admits that he referred the RUF to a "Mr Simon" (Yelenik) as "he was a contact who knew about arms." Nassour emphasized that he was only interested in diamonds: "What they did with the money was not my business."<sup>30</sup>

A Belgian Court in December 2004 convicted eight people for the smuggling of diamonds in violation of UN sanctions and for money laundering. The Police believed arms trafficking had occurred, but the prosecutors could not prove it. So, they sought a 10-year sentence and a US\$ 1.25 million fine for evading customs officials and illegally importing an estimated US\$ 81.7 million worth of diamonds through their company Asa Diam to Antwerp.<sup>31</sup> Aziz Nassour received a sentence of six years of imprisonment (and an additional two years on appeal in 2006) and a US\$ 33,600 fine. Samih Ossaily was given three years (and an additional year on appeal—but was freed after serving 26 months in remand) and a US\$ 13,000 fine. Asa Diam was shut down and the couriers given sentences of between one and two years.

*The Slobodan Tešić case.* In late 2002 and 2003 the Panel of Experts on Liberia verified that six arms shipments were delivered to Liberia between June and August 2002—in violation of UN sanctions—from the Belgrade-based company Temex, run by Slobodan Tešić.<sup>32</sup> The Panel reconstructed the whole supply chain from purchase of the weapons with a false Nigerian EUC via a fictitious company—Aruna Import Company—to delivery of the weapons by Moldovan- and later Equatorial Guinean-registered aircraft using real and false flight plans and manifests. The details of payments—made both directly to Temex and through Waxom, a Liechtenstein accounting and billing affiliate company—were also obtained.<sup>33</sup>

The Panel also obtained hotel registration documents of the brokers in Monrovia, including Mr Tešić's passport number (he denied that he ever visited Liberia), and serial numbers of the weapons delivered. An analysis of weapons surrendered in Liberia's 2004–2005 disarmament process has also been made—all of the weapons which were part of these shipments were easily identifiable.

Although in 2003 the Belgrade Police attempted to investigate this case, no prosecution resulted. It has been reported that Mr Tešić's connections were such that no case on illicit brokering, however strong, could succeed.<sup>34</sup>

These three examples show the different ways in which cases highlighted by UN Panels of Experts are dealt with. In the case of Baba Jobe, his exposure by a UN Panel of Experts led to his arrest. In the case of Aziz Nassour and Samih Ossaily, they were charged with money laundering for dealing with conflict diamonds as the Belgian Federal Police could not prove a weapons

connection beyond intent. These two cases also show that there is a time lag of at least several years between an alleged act and prosecution. Both cases were accompanied by intense media and non-governmental organization (NGO) interest, and this added pressure for sustained action. Since the events of 11 September 2001, there has been increased will on the part of law enforcement agencies to seek prosecution, even if the charges are indirectly related to the violation of UN sanctions. It has also been easier to obtain financial data, including on off-shore companies in tax havens. This in turn appears to have resulted in a decline in brazen sanctions-busting because brokers have become more cautious. A broker who had found UN arms embargoes in the 1990s “inconsequential” admitted that he now avoided soliciting business from sanctioned regimes.<sup>35</sup>

Over the last eight years, several international NGOs have played a role in exposing violations of UN arms sanctions, although the number of these efforts seemed to have peaked due to the high financial costs and legal risks of conducting this type of investigation. Human Rights Watch produced reports on Angola, Rwanda and Sierra Leone that provided leads for UN investigators and contributed to UN sanctions reform. Its 2003 work on the use of mortars in Liberia exposed tensions in the Security Council and highlighted the violation of UN sanctions, including by a neighbouring country (then a Security Council member) that had supplied mortar rounds to the Liberians United for Reconciliation and Democracy (LURD) rebels.<sup>36</sup> Amnesty International has also produced high-impact reports on the Democratic Republic of the Congo, Rwanda and Sudan.<sup>37</sup> A growing NGO trend is to focus on post-conflict justice; advocacy by the UK-based NGO Global Witness helped generate the political will in the Netherlands to seek the prosecution of Dutch businessman Gus Van Kouwenhoven (see Box 3.1).

The Van Kouwenhoven case has provided inspiration for a new effort by the Justice Initiative of the Open Society Initiative (OSI). UN Expert Groups have no judicial authority and are designed to provide new information to the Security Council. As they are not designed to follow-up past cases, this OSI project supports follow-up of cases highlighted by UN Panels of Experts that merit judicial action. Liberia is an initial focus area of this initiative.

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## UN EMBARGOES AND NATIONAL JURISDICTION

States usually do not include the trafficking of arms in violation of UN arms embargoes in their national legislation as an offence that is considered to fall under universal jurisdiction. Universal jurisdiction can be defined as the right of a state to “investigate or prosecute persons for crimes committed outside the state’s territory which are not linked to that state by the nationality of the suspect or of the victim or by the harm to the state’s own national interests.”<sup>38</sup> Whether national courts may exercise universal jurisdiction, and over which crimes, differs among states. Crimes that may be tried in many states under universal jurisdiction include certain war crimes, acts constituting genocide, and crimes against humanity such as torture and trafficking in human beings. Universal jurisdiction has been advocated by campaigners as an important measure “to end impunity by bringing those responsible for crimes under international law to justice”.<sup>39</sup>

The absence of universal jurisdiction over violations of UN arms embargoes may mean that national courts will only hold trials in those cases when the act or suspect are covered by the principles of (extended) territoriality or nationality. This is illustrated by an example in which national courts ruled in 2002 that the case against an arms trafficker involved in UN sanctions-busting in West Africa could not be prosecuted under national law. The reason was that person was not a national of the state in which the prosecutors sought to try him, and that he had not conducted his activities in the territory of that state (see Chapter 1, Box 1.2: The case of Leonid Minin). Arguably, the case could have been prosecuted if universal jurisdiction was practiced in the particular state for violations of UN arms embargoes or, more broadly, acts that aid or abet the commission of certain crimes such as war crimes, the crime of genocide, or crimes against humanity. It seems that few states have such legislation in place for embargo violations but, as we have seen above, prosecution can be sought on other charges.

## EUROPEAN UNION ARMS EMBARGOES

Article 15 of the *Treaty on European Union* authorizes the Council to adopt common positions, including on arms embargoes, and obliges states to “ensure that their national policies conform to the common positions”. Arms embargoes imposed by the EU Council in a common position are therefore binding on the 25 EU member states. In May 2006, EU arms



embargoes were in effect for Burma/Myanmar, China, Côte d'Ivoire, the Democratic Republic of the Congo, Iraq, Liberia, Sierra Leone, Somalia, the Sudan, Uzbekistan and Zimbabwe.<sup>40</sup> In May 2002, the EU also imposed an arms embargo on Al-Qaeda and persons and entities associated with them,<sup>41</sup> thereby linking the EU efforts to combat terrorism with arms export controls. Arms embargoes decided on by the EU Council are not automatically effected in member states, but must be transposed by them into their national legislation.

Where there are UN arms embargoes, those of the EU are formulated in such a way as to include the scope of the UN embargo, although EU embargoes may be formulated in a more comprehensive manner. For example, the 2004 EU arms embargoes on Côte d'Ivoire and Liberia specify that prohibited activities include the supply, sale or transfer of arms from the extended territory of an EU member state or by a national of a member state, irrespective of the origins of the goods. Notably, the embargoes also prohibit the provision of financing or financial assistance related to the provision of arms to the embargoed destination.<sup>42</sup> The 2005 EU arms embargo on the Democratic Republic of the Congo goes further than the embargoes on Côte d'Ivoire and Liberia by explicitly including the *indirect* supply, sale and transfers of arms in the scope of prohibited activities, as well as brokering services related to the provision of arms to the embargoed destination.<sup>43</sup>

#### OTHER INTERNATIONAL OBLIGATIONS

There exist other relevant obligations of states under international law. An example is the responsibility of states under Security Council resolution 1372 (2001) on terrorism to prohibit their nationals and those within their territories from providing financial or other related services for terrorists or terrorist organizations.<sup>44</sup> This resolution, as well as anti-terrorist treaties to which states may be parties, arguably prohibit the transfer of small arms and light weapons to terrorists and terrorist organizations, or at least the financing of such transfers.<sup>45</sup> Also, acts of genocide are prohibited under international customary law, which is binding on all states. Thus, it may be argued that failing to prevent and criminalize the provision of SALW with the intent to facilitate the commission of genocide may constitute a breach of state responsibilities under international law.<sup>46</sup>

Obligations of states in relation to SALW transfers may also be inferred from international humanitarian law and international human rights law. For example, the Geneva Conventions of 1949 prohibit grave breaches of the rules of international armed conflict, including wilful killing and torture or inhuman treatment. Article 3, which is common to all four of the Geneva Conventions, prohibits acts including violence to life and person. Non-derogable principles under international human rights law include the right to life, freedom from torture or inhuman or degrading treatment, and freedom from discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>47</sup> Again, it may be argued that a state may be guilty of aiding or assisting in an internationally wrongful act if it fails to prevent the transfer (or brokering) of SALW in the knowledge that the recipient state will use these weapons to commit grave breaches of international humanitarian law or serious violations of international human rights law.<sup>48</sup>

Regional initiatives can also play an important role. The 1998 moratorium on imports of SALW to the Economic Community of West African States (ECOWAS) was not as effective as had been envisaged. Consequently, at the 30<sup>th</sup> Ordinary Summit of ECOWAS Heads of State and Government on 14 June 2006 in Abuja, Nigeria, agreed upon a binding regional convention. Among the various provisions of the Convention are mechanisms for tightening control over the flow of SALW into the region. This includes the manufacture and individual ownership of such arms. It also includes the establishment of a group of independent experts to assist ECOWAS in monitoring implementation, and the development by ECOWAS, with United Nations Development Programme support, of an operational plan of action for the programme. Time will tell whether this binding initiative will be more successful than its non-binding predecessor.

## EFFECTIVE ENFORCEMENT

Effective enforcement at the stage of licensing a brokering transaction requires that licensing authorities scrutinize the applicant. States that do not register persons or entities wishing to engage in arms brokering activities may face difficulties in scrutinizing a hitherto unknown applicant for an individual brokering license in a timely manner. Effective enforcement also requires scrutiny of the proposed transaction. This may include an assessment of the intended end-use and end-user of the brokered items

under national and other relevant multilateral arms transfer criteria. As for the assessment of export licenses, there may be practical challenges for licensing authorities to collect and analyse available information in order to make a critical assessment of whether a proposed transfer is permissible under the relevant criteria. Limiting the scope of illicit arms transfers should also include the verification by licensing authorities of whether the buyer and seller, who were identified in the information submitted by a broker, are in fact the intended parties to a contract. This could include directly contacting the intended partners to verify their intention to use the broker in their negotiations.

#### END-USE DOCUMENTATION

An important control element in the international arms trade is the requirement that exporters submit official end-use documentation when requesting a license for an arms export from the authorities of the exporting state. Such end-use documentation may take the form of an international import certificate (IIC) or end-user certificate, or private end-use statement. The requirement to submit official end-use documentation at the exporting stage is often found among major arms-exporting states such as those that participate in the Wassenaar Arrangement.<sup>49</sup>

An IIC is issued by the authorities of the importing state declaring that the import of the goods in question is not prohibited under national law. It may also declare that the authorities in the importing country have taken note of a specific planned transfer and do not object to the recipient in their country receiving the arms. The requirement of an exporter to submit an IIC may be complemented with a requirement to submit a private end-user statement. Such a statement has to be issued and signed by the intended recipient or end-user and may contain other restrictions, for example regarding re-exports. Such statements may be permitted for use in applications by commercial entities that wish to import small arms for distribution to domestic civilian markets.<sup>50</sup>

The submission of an EUC may be required of exporters if the intended recipient is a state actor. EUCs may contain conditions that are imposed by the licensing authorities in the exporting state and to which the end-user has committed by signing the EUC. Restrictions may pertain to the end-use and location of use of the imported goods, and whether re-export of the goods is prohibited or must be agreed on by the authorities of the originally

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exporting state. The verification of such end-use documentation may also include efforts to contact the persons or entities that are identified in the documentation to confirm their existence and to authenticate the documentation. The regular mechanism for such verification is via consular verification of the importing state in the state assessing an export license or, conversely, the exporter's country representation in the importing state.<sup>51</sup>

In other words, requesting exporters to submit end-use documentation at the licensing stage and, importantly, verifying this documentation with the issuing authorities in the importing state can greatly assist national authorities in the scrutiny of export applications. However, in relation to licensing arms brokering activities, the requirement to submit official end-use documentation is largely absent. To clarify, prior to being authorized to engage in contract negotiations, brokers may be asked to provide information on the intended end-use or end-user. The request for such information is substantially different from requesting official end-use documents because the information is provided only by the broker, not the authorities of the importing state. Thus, there may exist a significant weakness in national brokering controls if the end-use and end-user information submitted by the broker is not verified with the potential recipient of the arms transfer and the authorities of the importing state.<sup>52</sup>

Moreover, states that define brokering activities exclusively as mediation activities or the transfer of arms from or into the possession of an arms merchant may not address in their controls the activities of persons or entities that provide fake or falsified end-use documentation to the authorities of the arms exporting state. As shown in Chapter 1, it is the provision of fake or falsified end-use documentation that often forms an integral part of the organization of illicit arms transfers.

#### TRANSPORT DOCUMENTATION

Another mechanism that is generally absent in controls on arms brokering is a requirement for applicants wishing to obtain a license for the negotiation of an arms transfer to submit information about the date and route of transport of the brokered goods. A possible reason for this is that a broker requesting a license for contract negotiations may not be in a position to provide licensing authorities with information about the transport of the goods when making a license request. This information may only become available after the conclusion of a contract and therefore after

the conclusion of the licensed brokering activity. The problem is that states exclusively focusing their control systems on the activity of negotiating or arranging transactions—understood as negotiating or arranging contracts between buyers and sellers—may not cover certain actors, such as those in transport and logistics, who might divert such transfers into the illicit sphere.

As indicated, some states do have controls on such logistical activities in addition to controls on contract negotiation. For example, Germany requires the licensing of the transport between foreign countries of military equipment when the transfer is done using aircraft or ships registered in Germany. A license applicant must submit information identifying the name and address of the applicant, the type and quantity or weight of the military equipment, end-use or name and address of the recipient, the means and route of transportation, the origin and final destination, as well as when the transport is to be carried out.<sup>53</sup> It may therefore be a criminal act to engage in unlicensed transportation, to submit false or misleading information, or to act in violation of the granted license. However, no requirement exists in Germany for a transportation license applicant to submit official end-use documentation.

#### **RECORD-KEEPING AND REPORTING**

Another means of promoting effective enforcement of national brokering controls is the imposition of a requirement on brokers to keep adequate records on the activities they have been authorized to engage in, as well as to submit reports on their activities to national authorities. Such record-keeping and reporting mechanisms can facilitate the monitoring and scrutiny by state authorities of the activities of licensed arms brokers. Regulations exist in several states requiring brokers to keep comprehensive records on their licensed activities, and to submit these records either on request or as a condition tied to their registration or a licensed transaction. Records may have to specify information already required at the licensing stage, as well as the state of negotiations or whether a contract was concluded about the transfer of the type and quantity of goods that were indicated at the licensing stage. States with record-keeping or reporting obligations for brokers include Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Poland, Slovakia, Sweden and the United States.<sup>54</sup>

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## DELIVERY AND POST-DELIVERY VERIFICATION

Delivery and post-delivery verification to check that the arms were transferred to the intended and authorized recipient, and that this recipient is complying with any end-use or re-transfer restrictions, can make an important contribution to the control of arms diversion. The use of delivery verification certificates (DVCs) or post-delivery visits to the stockpiles of importers are rarely used instruments in relation to the control of arms brokering. This is because, again, a broker licensed to negotiate or arrange a transfer contract cannot be held responsible for acts that occur after and outside the scope of the licensed activity. In contrast, the use of DVCs is highly relevant for monitoring licenses for the transportation of arms. However, there is little evidence to suggest that states are using such mechanisms in relation to arms transfers between two foreign countries. Where used, these mechanisms are simply employed in relation to exports from national territory.<sup>55</sup>

## PENALTIES FOR VIOLATIONS OF NATIONAL BROKERING CONTROLS

There is no single approach among states for penalties for violations of arms brokering controls. Penalties that may be imposed differ according to the particular violation and the legal framework under which the violation is tried. A general distinction can be made between penalties imposed for misdemeanours and penalties imposed for more serious violations. Penalties may include the revocation of a brokering license, the imposition of a monetary fine or, where relevant, debarment from engaging in future arms trade activities or imprisonment. The maximum length of prison terms for violations of brokering controls ranges from four years in Finland and Sweden to eight years in the Czech Republic and Slovakia.<sup>56</sup> Legislation in Belgium and Switzerland also provides, where possible, for the confiscation of illicitly trafficked goods. In Estonia, courts may also order the dissolution of a commercial entity that is convicted for a violation of national arms controls.<sup>57</sup>

In practice, courts may also make a distinction between illicit brokering that facilitates transfers to (illicit) non-state actors on the one hand, and transfers to official end-users on the other. An example is given by a German court ruling in 2003 in the case of an accused man found to have brokered from German territory, between 1999 and 2002, several arms transfers without the required licenses. Specifically, the accused man had brokered transfers

of military equipment to the Jordanian government from suppliers in Bulgaria, the Russian Federation and Ukraine. He defended his actions by arguing that he had been unaware of the need to obtain a license for each of these deals. The court passed a sentence of two years and 10 months. Worth noting is the reasoning of the court that it was a mitigating circumstance in the case that the brokered transfers concerned “(official) arms deals between governments or state-run entities and legitimate defence firms”.<sup>58</sup>

## ENFORCEMENT AGENCIES

Surveillance and investigative agencies addressing illicit brokering may include the police, customs, and prosecutors’ offices. One example of an investigative agency is the Dutch Fiscal and Economic Investigation Service (FIOD–ECD). The FIOD–ECD falls under the Ministry of Finance and is charged with inspections and investigations of economic offences, fiscal and customs fraud and organized crime. Its mandate covers investigations of illegal transfers of strategic goods, including SALW, and embargo violations. Inspections or investigations may be initiated by, for example, irregularities that are discovered in arms transfer documentation, information obtained from other government agencies, or reports by non-governmental organizations or the media. The FIOD–ECD has the authority to, among other things, enter the premises of a person or entity, as well as to inspect and copy documentation found on these premises. These inspections may lead to criminal investigations if there is a “reasonable suspicion” of an infringement of national controls.<sup>59</sup>

Challenges faced by surveillance and investigative agencies may include limited resources, including a lack of full-time staff with expertise in arms control, and limited exchange of information with other relevant government agencies. Limited resources or arms control experience on the part of customs officials may mean that violations of arms brokering controls are not identified. Limited awareness of brokering controls on the part of prosecutors may result in a reluctance to bring criminal charges against an accused for violations of these controls. This latter difficulty may occur especially in states that have only recently adopted controls on arms brokering. In addition, in cases of a violation of arms brokering controls, the prosecutor may be required to demonstrate a specific intent on the part of the accused to violate a law he/she was aware of. The accused person or

entity may therefore claim ignorance of the law as a mitigating circumstance in his/her defence.

These challenges were identified in a report by a non-governmental research organization in 2001 that investigated why there had been few prosecutions in the United States immediately following the adoption of brokering controls in 1996.<sup>60</sup> However, since the terrorist attacks of 11 September 2001, there have been at least seven indictments or convictions in the United States for violations of arms brokering laws.<sup>61</sup> This increase may partially be the result of a targeted outreach programme by the US Department of State in recent years to raise awareness and promote greater understanding among industry, customs, and other relevant stakeholders about the “new” brokering controls in US arms control legislation.<sup>62</sup> Arguably, there now exists a greater level of information exchange among US enforcement agencies, which can further facilitate investigations into illicit arms transfers and brokering activities.

Challenges to the enforcement of brokering controls may also arise from the fact that illicit brokering, like some other illicit trading activities, is by its nature often hard to identify and investigate. For example, arms brokers’ means of communication can nowadays include landline, internet, satellite and mobile phones, the postal services, faxes and e-mails. The surveillance of a suspect’s communications can therefore pose significant challenges for enforcement agencies. In addition, those engaged in illicit activities may use coded language, false names, falsified or misleading documents and information contained therein, and other means to hide their dealings. Thus, the work of identifying and collecting clear evidence of illicit activities required for indictments and prosecutions may be difficult. Law enforcement officials confirmed that it is a regular occurrence that investigations have to be dropped because no such evidence can be obtained, even in cases where there exists reasonable suspicion of wrongdoing.<sup>63</sup>

In the early 2000s, the FIOD–ECD investigated possible illicit arms trade activities of a small-sized company registered with the Dutch Chamber of Commerce. The company was established at the home address of its owner, a woman of Dutch nationality who was also registered as the manager of the company. Officially, the company worked in asset management. In reality the company was a one-man enterprise run by a Pakistani national, Mr “A”, who resided in the Netherlands and who



worked from the woman's house. The woman was neither aware of the fact that she was registered as the manager of the company, nor of the exact activities of "A". The investigation by the FIOD–ECD into the activities of "A" did not lead to an indictment by the prosecutor's office in this case because of a lack of evidence. It was only through subsequent developments that the extent of his illicit arms brokering activities came to light (see Box 3.2).

**Box 3.2. The case of Pakistani arms broker "A"**

The Dutch Fiscal and Economic Investigation Service launched an investigation into the arms brokering activities of Mr "A", a Pakistani national residing in the Netherlands in the late 1990s. Due to a lack of evidence the case was dropped at the time. Interpol later established that Slovenian customs had temporarily detained a transit shipment of more than 25,000 hand grenades due to incorrect and incomplete transit documentation. The documentation indicated the involvement of a Dutch company linked to "A".

The transit documents indicated that this shipment did not originate in the Netherlands and that it was destined for Pakistan. Checks with the Dutch agency responsible for the licensing of brokering activities showed that this transaction was not and would not have been authorized by them because of the possible use of the grenades in the Kashmir conflict. The Dutch public prosecutor in the case concluded that there was a reasonable suspicion of illicit brokering activities by "A" and launched a criminal investigation.

The FIOD–ECD subsequently conducted a search at the premises where the company was registered and confiscated administrative documents that detailed several international SALW transfers brokered by "A". None of these transfers had been licensed by the Dutch authorities. "A" was convicted by a Dutch court and sentenced to six months imprisonment and a fine of €45,000.<sup>64</sup>

The highly challenging nature of enforcing brokering controls and restrictions posed on certain individuals is also illustrated by the example of Victor Bout, a well-known alleged arms trafficker with direct interests in and close links to companies that have operated an extended network of air cargo companies. Bout has been named in UN and media reports as providing the transportation for illicit arms transfers to a range of embargoed destinations and actors, including armed groups in Angola, Liberia and Sierra Leone. The UN Security Council in November 2005 named Bout among those whose funds, financial assets, and economic resources are to

be frozen by UN Member States to prevent these individuals from interfering in the restoration of peace and stability in Liberia and the subregion.<sup>65</sup> There is also an Interpol arrest warrant for Bout, issued by Belgium in 2002, for laundering the monetary proceeds from illicit arms sales. In July 2004, the US administration issued an executive order prohibiting any person or institution under US jurisdiction to do business with associates of Charles Taylor, including Bout.<sup>66</sup>

Bout seems highly adept in pre-empting punitive measures against the transport companies in which he is involved by changing the registration of his companies and incorporating new ones into his network. This meant that by the time UN sanctions on his companies took effect, many of the embargoed companies were no longer operational.

## INTERPOL

The International Criminal Police Organization (Interpol) may have a potential role in the enforcement of brokering controls. Interpol's mandate is to facilitate cross-border police cooperation among its 184 member states. Each member state is supposed to operate a National Central Bureau staffed by national law enforcement officers. The general secretariat of Interpol is located in Lyon, France. Regional Interpol offices are located in Argentina, Côte d'Ivoire, El Salvador, Kenya, Thailand and Zimbabwe. A liaison office with the UN is located in New York. Interpol also has cooperation agreements with, among others, the UN, the World Customs Organization and the ICC, as well as regional organizations including the Organization of American States, the African Union and the European Union.

Increased cooperation between the United Nations and Interpol is an essential step. In this regard, an important development was the adoption of UN Security Council resolution 1699 (2006) on 8 August 2006, which should assist with the global distribution of names of individuals on targeted sanctions lists for the freezing of assets and for travel bans. The resolution:

Requests the Secretary-General to take the necessary steps to increase cooperation between the United Nations and Interpol in order to provide the Committees with better tools, to fulfil their mandates more effectively, and to give Member States better optional tools to implement those measures adopted by the Security Council and monitored by the

Committees, as well as similar measures that may be adopted by the Security Council in the future, particularly the freezing of assets, travel bans, and arms embargoes ... .

One of the ways that this cooperation will be undertaken is through information sharing. Once it has received a name, Interpol can issue a “Red Notice” and assist in identifying or locating the wanted person. Red Notices contain a description of the wanted person, the offence(s) for which that person is sought, as well as an indication of the jurisdiction that is seeking the person. They are circulated worldwide and request the arrest of the wanted person. In 2005, Interpol issued more than 2,200 Red Notices.<sup>67</sup> They included notices for persons wanted for violations of national arms transfer regulations.

Interpol can also play an important contributing role by facilitating the detention of individuals who are sought for questioning or prosecution by national police forces and judiciaries, and now by UN Sanctions Committees. This requires that Interpol receive a relevant request from one of its member states or an organization with which it has a relevant cooperation agreement with a view to extraditing the individual to the relevant jurisdiction.<sup>68</sup>

#### CUSTOMS AND TRANSPORT ORGANIZATIONS

Another multilateral organization with a potential role in the enforcement of brokering controls is the World Customs Organization (WCO). The WCO has 169 member states, which collectively process 98% of the world’s trade. One aspect of the WCO’s work is to assist its member states in the combat of customs offences. Assistance in this may include the development of strategic plans and enforcement programmes on fighting certain offences, the promotion of cooperation among member states and the provision of technical and training assistance programmes. The WCO also operates the internet-based Customs Enforcement Network for the exchange of information among national customs agencies on, for example, customs offences and seizures of illicitly trafficked goods.

Other international agencies with a potential role in combating the illicit brokering of SALW include the inter-governmental International Civil Aviation Organization and the International Maritime Organization as well as non-governmental industry agencies such as the International Air

Transport Association. It has to be noted though that the mandates of these organization primarily focus on the facilitation of legal trade. Their mandates therefore do not necessarily cover the suppression of illicit arms transfers that are transported by air or sea, or the facilitation of information exchange among members on such trafficking because this may be perceived to be an issue for law enforcement, rather than trade facilitation, organizations. As a result, these organizations do not have specific programmes or structures in place that focus on arms trafficking or that could be drawn upon by national authorities to identify and trace illicit arms transfers.

#### INTERNATIONAL COOPERATION AMONG LAW ENFORCEMENT AGENCIES

Having in place efficient extradition and similar legal procedures can be a major help in the prosecution of illicit arms brokers and traffickers. Indeed, bilateral and international cooperation among enforcement agencies can be key to revealing illicit activities that involve several states, as is the case for arms transfers that are brokered between foreign countries. Instances of actual or expected absence of such cooperation may imply that national agencies investigating a particular person or entity may have to drop the investigation due to a lack of evidence. As seen above with the case of Aziz Nassour, although convicted in Belgium, he remains free in Lebanon because there is no extradition treaty.

Cooperation among states is required for obtaining admissible evidence for the arrest and extradition of individuals suspected of involvement in illicit arms brokering who are located outside the state in which that person is sought for questioning or prosecution.

There are instances when governments or intelligence agencies have shielded brokers they have used for “grey market” or other covert arms transfers that by-pass official licensing and control mechanisms from investigations launched by foreign agencies. Such transfers can be highly problematic and difficult to prove.

#### EXTRADITION

Regarding legal standards in criminal prosecution cases, a typical condition for extradition is that the requirement of dual criminality is met. The principle of dual criminality means that both the state requesting extradition

and the state requested to apprehend and extradite the person agree that the act for which the person is sought is a crime. In addition, the extradition of an individual will usually require that the two states have a mutual extradition agreement that covers the particular crime. There is no state that has extradition agreements with all other states. The United States has extradition agreements with over 100 countries and is probably the state with the highest number of such agreements.<sup>69</sup> In contrast, the United Kingdom has extradition agreements with about 50 states.<sup>70</sup> Colombia has extradition agreements with about 15 states.<sup>71</sup> Clarifying whether an accused person has committed an act that would also be considered a crime in the state that is requested to apprehend the person, and whether the act in question is a crime covered by an extradition treaty between the states in question, may be lengthy processes. Importantly, even if the legal circumstances should allow for extradition, the final decision on whether or not to extradite the person is in most cases a political decision.<sup>72</sup>

The European Arrest Warrant (EAW) was adopted by the EU in 2002 and, following its introduction into national legislation, became operational in many member states. The EAW abolished the requirement of dual criminality for offences in areas such as participation in a criminal organization, terrorism, trafficking in human beings, and illicit arms trafficking. This means that it is no longer relevant whether the states concerned share the definition of the offence on the condition that the offence is punishable by at least three years' imprisonment in the state requesting the extradition. In theory, an EU member state can no longer refuse the extradition of one of its nationals to another EU member state in such cases provided there is sufficient prima facie evidence presented to the extradition court hearing, although in practice there are still many "teething problems" with the process.<sup>73</sup>

#### ASSISTING NATIONAL CONTROLS

A further aspect of possible international cooperation to promote the combat of illicit SALW brokering is the provision of international assistance to states requesting such assistance in the establishment and maintenance of national SALW brokering controls. The providers of such assistance can include states and regional and international organizations in a position to do so. Assistance may cover technical, financial, legal and other support for the examination of existing national legislation with a view to amending this to include brokering controls, for example by drafting relevant

amendments. Assistance may also relate to capacity-building for licensing and law enforcement agencies to monitor arms brokers and dealers and to identify illicit arms transfers and brokers who may be involved in unlawful conduct. The provision of assistance by states and organizations in a position to do so, and upon request, is encouraged, for example, in the UN Programme of Action on SALW.<sup>74</sup>

One example of an organization providing such assistance is the South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC), which was established in 2002. Among other things, SEESAC has provided assistance to states in the region to develop SALW legislation, including on brokering.

There also remains an important role for awareness-raising among government officials, enforcement agencies and industry about the challenges posed by uncontrolled arms brokering and the scope and contents of possible controls to prevent the brokering and dealing of illicit international arms transfers. An example of a multilateral organization that is actively involved in such awareness-raising on arms brokering controls is the Organization for Security and Co-operation in Europe (OSCE). It has provided a forum for setting recommended standards and the training of officials for national commissions on the issue of arms brokering legislation. A recent example is the workshop organized by the OSCE secretariat in Zagreb, Croatia, in March 2006 on "Control over Brokering in SALW in South Eastern Europe and the Caucasus."<sup>75</sup>

Similarly, other organizations such as the Organization of American States and the Regional Centre on Small Arms and Light Weapons (RECSA), which assists states in the Great Lakes Region and Horn of Africa in the implementation of the Nairobi Protocol on SALW, have organized workshops and seminars for government officials and law enforcement agencies to raise awareness about the issue of arms brokering controls. Several governments, including of the Netherlands and of Norway, have also long been active in providing financial support for relevant awareness-raising activities.<sup>76</sup>

## CONCLUSION

Sanctions and enforcement of controls on SALW brokering involve a range of different legal concepts, enforcement mechanisms and implementing agencies, most of them national but with an evolving international framework. States with explicit controls on SALW brokering have adopted different approaches to sanctions and enforcement and the scope of controls may even differ within a state in relation to different types of actors and activities. One approach that has shown some results with improved systems of verification and enforcement is a comprehensive ban on arms trade activities to embargoed destinations. A comprehensive ban is advantageous because such a ban can contain a “catch-all” approach and suspects may be prosecuted for activities other than brokering. There are growing efforts to prosecute and this seems to have acted as a deterrent, with a decline in the brazen sanctions-busting cases that were the hallmark of the late 1990s. This does not mean that such violations have stopped and that there is no further need for concerted action by United Nations Member States to improve methods that help enforce existing arms embargoes, but the increased risk of prosecution has resulted in fewer arms brokers wishing to undertake sanctions-busting activities—those who do are developing more complex supply chains. As previously stated, NGO efforts, by groups such as Amnesty International and Human Rights Watch, to publicly expose and follow up on cases of embargo violations, have put pressure on states to act, and contributed to efforts in the late 1990s to develop a system for the monitoring of arms embargoes.

However, international arms embargoes are typically imposed only when the international humanitarian, human rights and security obligations of states are in serious crisis, and as such are too late to be relied upon as the only or even the principal means to prevent illicit arms brokering. Arms embargoes are usually adopted and implemented as the only or principal means to prevent illicit arms brokering. Too many states have no effective controls on arms brokering, or lack effective means of enforcing such laws and regulations once they are introduced. States deciding to introduce or strengthen controls, sanctions and enforcement measures on brokering and other transfer-related activities to non-embargoed destinations and actors have a choice between whether these controls should be comprehensive in scope or more restricted. A restricted approach that focuses only on contract negotiations and selling or buying arms resulting in transfers between foreign countries carries less administrative burden. But, if such a

restricted approach is adopted, some international brokering of arms transfers that should be deemed illegal may not be subject to legal sanctions because a particular aspect of the activity is not controlled by law, for example the provision of fake end-use documentation or the wrongful use of transportation and financial services.

There is also scope for states to encourage more international cooperation in combating illicit arms brokering through: better implementation of law, regulations and of “best practice” procedures, international standards and guidelines on arms brokering; establishing programmes to create greater awareness so as to harness the support of the public, political leaders and law enforcement officials; and providing more resources and training for law enforcement initiatives. In addition to bilateral cooperation there are international organizations with a possible role in the enforcement of brokering controls. These include, among others, the International Criminal Court, Interpol and the World Customs Organization. UN Security Council resolution 1699 (2006) of 8 August 2006 is an important development because it should enhance cooperation between the United Nations and Interpol. This resolution is designed to assist dissemination to police forces around the world of targeted-sanctions lists of individuals, including illicit arms brokers, for travel bans and the freezing of assets. In the past, these lists often remained the preserve of Ministries of Foreign Affairs and were very unevenly disseminated.

The development of more effective means to enforce international arms embargoes could also help states develop better methods to monitor and enforce national controls on the brokering of arms to potentially problematic non-embargoed destinations and recipients. Two important aspects of this are for states to develop coherent and holistic approaches to legal sanctions, both administrative and criminal, and also to extradition and the exchange of evidence to enable the criminal prosecution of illicit arms brokers and traffickers.

The enforcement of brokering controls and the combating of illicit brokering in SALW is first and foremost the responsibility of states. States themselves choose the controls they adopt and the efforts they make to ensure compliance. Given the nature of modern arms brokering, there is a strong case for controls and enforcement efforts of states to be internationally consistent.



## Notes

- <sup>1</sup> See Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d'information sur la paix et la sécurité, GRIP Report, 2005.
- <sup>2</sup> See Holger Anders, *Implementing the EU Common Position on the Control of Arms Brokering: Progress after Two Years*, Groupe de recherche et d'information sur la paix et la sécurité briefing, note d'analyse, 2005, annex B.
- <sup>3</sup> Ibid.
- <sup>4</sup> Interview with German licensing official, March 2006.
- <sup>5</sup> See *Rome Statute of the International Criminal Court*, UN document A/CONF.183/9, 17 July 1998, art. 5(1)(a–d).
- <sup>6</sup> Ibid., art. 25(3)(c).
- <sup>7</sup> See “About the Special Court for Sierra Leone”, <[www.sc-sl.org/about.html](http://www.sc-sl.org/about.html)>.
- <sup>8</sup> See Netherlands, *Order of 24 October 1996 on the Regulation of Financial Transactions related to Strategic Goods* [Besluit van 24 oktober 1996, houdende regelen inzake het financieel verkeer strategische goederen], [Staatsblad 1996, 552], 24 October 1996; Netherlands. *Law of 5 July 1997 on Arms and Ammunition* [Wet van 5 juli 1997, houdende regels inzake het vervaardigen, verhandelen, vervoeren, voorhanden hebben, dragen enz. van wapens en munitie], [Staatsblad 1997, 292], 5 July 1996; and for the 1977 Sanctions Act, see Netherlands, *Sanctions Act of 1977* [Wet van 15 februari 1980, tot het treffen van sancties tegen bepaalde staten of gebieden], 15 February 1980.
- <sup>9</sup> See Security Council, *Report of the Panel of Experts appointed Pursuant to UN Security Council Resolution 1306 (2000), paragraph 19, in Relation to Sierra Leone*, UN document S/2000/1195, 20 December 2000; Global Witness, *Logging Off: How the Liberian Timber Industry Fuels Liberia's Humanitarian Disaster and Threatens Sierra Leone*, 2002; Marlise Simons, “Holding arms dealers accountable at home”, *The New York Times*, 3 May 2006; and Daniel Howden, “Charles Taylor's ‘financier’ in the dock”, *The Sunday Independent Online*, 28 May 2006. Additional information kindly provided by the prosecutor's office in Rotterdam (May 2006), as well as by Frank Slijper of *Campagne tegen Wapenhandel* (May and June 2006).

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- <sup>10</sup> Interview with representative of German arms manufacturing company, May 2006.
- <sup>11</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.2(a).
- <sup>12</sup> Netherlands, *Order of 24 October 1996 on the Regulation of Financial Transactions related to Strategic Goods* [Besluit van 24 oktober 1996, houdende regelen inzake het financieel verkeer strategische goederen], [Staatsblad 1996, 552], 24 October 1996.
- <sup>13</sup> Presentation by Dutch Fiscal and Economic Investigation Service at an OSCE workshop entitled “Control over Brokering in SALW in South Eastern Europe and the Caucasus”, Zagreb, Croatia, 29–30 March 2006.
- <sup>14</sup> Oberlandesgerichts Stuttgart, decision of 31 October 1991, case number 3 Ws 274/91.
- <sup>15</sup> Oberlandesgerichts Düsseldorf, decision of 29 January 1993, case number 1 Ws 10/93.
- <sup>16</sup> Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005, annex A.
- <sup>17</sup> *Ibid.*, pp. 14f.
- <sup>18</sup> *Ibid.*, p. 14.
- <sup>19</sup> Germany, *Kriegswaffenkontrollgesetz*, [BGBl I 1961, 444], 20 April 1961, art. 4(1).
- <sup>20</sup> Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005, annex A.
- <sup>21</sup> Small Arms Survey, *Small Arms Survey Yearbook 2004: Rights at Risk*, 2004, p. 163.
- <sup>22</sup> See “Sanctions”, <[www.un.org/News/ossg/sanction.htm](http://www.un.org/News/ossg/sanction.htm)>.
- <sup>23</sup> See “UN Security Council: SG’s Reports 2005”, <[www.un.org/Docs/sc/committees/INTRO.htm](http://www.un.org/Docs/sc/committees/INTRO.htm)>.
- <sup>24</sup> Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Document S/2001/1015, 26 October 2001, para. 287–288.
- <sup>25</sup> This list is available at <[www.un.org/Docs/sc/committees/Liberia3/1521\\_list.htm](http://www.un.org/Docs/sc/committees/Liberia3/1521_list.htm)>.
- <sup>26</sup> Interview with Baba Jobe, Banjul, September 2002; interview with government official, Banjul, 1 June 2006.

- <sup>27</sup> Interview with Agim de Bruycker, who headed the investigation for the Federal Police, 14 July 2006.
- <sup>28</sup> Interview with Aziz Nassour, Beirut, 21 June 2006.
- <sup>29</sup> Shimon Yelenik was arrested in Panama in November 2002 and jailed for several months before being released on bail. Panama eventually dropped the case because of the lack of extraterritorial jurisdiction, but Guatemala, the original source of the weapons, issued in August 2003 an arrest warrant for Yelenik and two other arms dealers; an Interpol arrest warrant was subsequently issued. Eventually Yelenik was arrested in Miami.
- <sup>30</sup> Interview with Aziz Nassour, Beirut, 21 June 2006.
- <sup>31</sup> Interview with Agim de Bruycker, who headed the investigation for the Federal Police, 14 July 2006.
- <sup>32</sup> See *Report of the Panel of Experts Appointed Pursuant to Paragraph 4 of Security Council Resolution 1458 (2003), concerning Liberia*, UN Document S/2003/498, 24 April 2003; and *Report of the Panel of Experts Appointed Pursuant to Paragraph 25 of Security Council Resolution 1458 (2003) concerning Liberia*, UN Document S/2003/937, 28 October 2003.
- <sup>33</sup> Waxom was also linked to a British Virgin Islands company, the Jeff Corporation, which appears to have been connected to UN sanctions-busting of the embargo of Iraq. *Report of the Panel of Experts Appointed Pursuant to Paragraph 4 of Security Council Resolution 1458 (2003), concerning Liberia*, UN Document S/2003/498, 24 April 2003.
- <sup>34</sup> Interview with Belgrade police, 6 January 2004; interview with Panel of Experts on Liberia member Damian Callamard, Monrovia, 12 May 2006.
- <sup>35</sup> Interview with arms broker, Lomé, 23 April 2006.
- <sup>36</sup> See, for example, Human Rights Watch, *Weapons Sanctions, Military Supplies, and Human Suffering: Illegal Arms Flows to Liberia and the June–July 2003 Shelling of Monrovia*, Briefing Paper, 2003.
- <sup>37</sup> See, for example, Amnesty International, “Democratic Republic of Congo: Arming the East”, 2005; Amnesty International, “Rwanda: Arming the Perpetrators of the Genocide”, 1995; and Amnesty International, “Sudan: Arming the Perpetrators of Grave Abuses in Darfur”, 2004.
- <sup>38</sup> Amnesty International, “Universal Jurisdiction: The Duty of States to Enact and Implement Legislation (Introduction)”, 2001, p. 2.
- <sup>39</sup> *Ibid.*, p. 12.

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- <sup>40</sup> See <http://register.consilium.europa.eu/pdf/en/06/st08/st08863.en06.pdf>.
- <sup>41</sup> Council of the European Union, *Common Position of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP*, EU document 2002/402/CFSP.
- <sup>42</sup> Council of the European Union, *Council Common Position 2004/852/CFSP of 13 December 2004 concerning restrictive measures against Côte d'Ivoire*, EU document 2004/852/CFSP, art. 2(1)(a–b); and Council of the European Union, *Council Common Position 2004/137/CFSP of 10 February 2004 concerning restrictive measures against Liberia and repealing Common Position 2001/357/CFSP*, EU document 2004/137/CFSP.
- <sup>43</sup> Council of the European Union, *Council Common Position 2005/440/CFSP of 13 June 2005 concerning restrictive measures against the Democratic Republic of Congo and repealing Common Position 2002/829/CFSP*, EU document 2005/440/CFSP, art. 1(1)(2a–b).
- <sup>44</sup> Security Council, UN document S/RES/1372 (2001), 28 September 2001, art. 1(d).
- <sup>45</sup> See Peggy Mason, “International Legal Prohibitions on Conventional Arms Transfers”, paper prepared for the International Security Research and Outreach Programme, International Security Bureau, Canadian Department of Foreign Affairs and International Trade, 2003, [www.dfait-maeci.gc.ca/arms/isrop/research/mason\\_2003/international\\_law&salw\\_mason.pdf](http://www.dfait-maeci.gc.ca/arms/isrop/research/mason_2003/international_law&salw_mason.pdf).
- <sup>46</sup> Ibid.
- <sup>47</sup> Ibid.
- <sup>48</sup> Ibid.
- <sup>49</sup> See Holger Anders, *Implementation of the UN PoA Standards on Effective SALW Export Controls and the Use of End-user Certification*, unpublished background paper for Biting the Bullet, 2006.
- <sup>50</sup> Ibid.
- <sup>51</sup> Ibid.
- <sup>52</sup> One possible reason for the absence of a requirement for a person or entity applying for a brokering license to submit official end-use documentation with a brokering license application is that requiring such documentation is often understood as the primary responsibility of the state from which the arms are exported, not the state which

- considers granting a license for the brokering of such an export from a foreign state.
- 53 Germany, *Zweite Verordnung zur Durchführung des Gesetzes über die Kontrolle von Kriegswaffen*, [BGBl I 1961, 649], 1 June 1961, art. 5.
- 54 Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d'information sur la paix et la sécurité, GRIP Report, 2005, p. 19.
- 55 See Holger Anders, *Implementation of the UN PoA Standards on Effective SALW Export Controls and the Use of End-user Certification*, unpublished background paper for Biting the Bullet, 2006.
- 56 Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d'information sur la paix et la sécurité, GRIP Report, 2005, p. 20.
- 57 Ibid.
- 58 Landgericht Mannheim, judgement of 19 September 2003, case number 22 KLs 626 Js 7671/02.
- 59 Presentation by Dutch Fiscal and Economic Investigation Service at an OSCE workshop entitled "Control over Brokering in SALW in South Eastern Europe and the Caucasus", Zagreb, Croatia, 29–30 March 2006.
- 60 Loretta Bondi and Elise Keppler, *Casting the Net? The Implications of the U.S. Law on Arms Brokering*, The Fund for Peace, 2001.
- 61 Information kindly provided by Loretta Bondi, who obtained the data in April–May 2006 from the US Department of State.
- 62 Interview with official of the US Department of State, March 2006.
- 63 Interviews with law enforcement officials of the Netherlands, Germany and the United States, March–June 2006.
- 64 Presentation by Dutch Fiscal and Economic Investigation Service at an OSCE workshop entitled "Control over Brokering in SALW in South Eastern Europe and the Caucasus", Zagreb, Croatia, 29–30 March 2006.
- 65 Security Council, "Security Council Committee on Liberia Updates Assets Freeze List", UN press release SC/8570, 1 December 2005.
- 66 Douglas Farah and Kathi Austin, "Victor Bout and the Pentagon", *The New Republic*, 12 January 2006.
- 67 See <[www.interpol.int/Public/ICPO/FactSheets/GI02.pdf](http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf)>.
- 68 See "Notices", <[www.interpol.int/Public/Notices/default.asp](http://www.interpol.int/Public/Notices/default.asp)>.

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- <sup>69</sup> See “Treaties of Extradition”, in United States, US Code, title 18, part II, chp. 209, § 3181.
- <sup>70</sup> See “Foreign & Commonwealth Office Bilateral Extradition Treaties”, <[www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360289117](http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360289117)>.
- <sup>71</sup> See “Extradition Agreements Signed by Colombia”, <[www.oas.org/Juridico/mla/en/col/en\\_col-ext-gen-list.html](http://www.oas.org/Juridico/mla/en/col/en_col-ext-gen-list.html)>.
- <sup>72</sup> See, for example, “Justice and Home Affairs - Freedom, Security and Justice - Extradition”, <[http://ec.europa.eu/justice\\_home/fsj/criminal/extradition/fsj\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm)>.
- <sup>73</sup> Ibid.
- <sup>74</sup> *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/CONF.192/15, New York, 9–20 July 2001, § III(3) and (6).
- <sup>75</sup> See “Forum for Security Co-operation—OSCE workshop in Zagreb to focus on better ways to control sale of small arms and light weapons”, <[www.osce.org/fsc/item\\_1\\_18519.html](http://www.osce.org/fsc/item_1_18519.html)>.
- <sup>76</sup> See, for example, <[www.nisat.org/Brokering/Theme\\_brokering.html](http://www.nisat.org/Brokering/Theme_brokering.html)>.



## CHAPTER 4

### WIDENING OUR UNDERSTANDING OF THE BROKERING ISSUE: KEY DEVELOPMENTS

Valerie Yankey-Wayne

#### INTRODUCTION

Since the 1990s there has been increased concern about combating the illicit trafficking of small arms and light weapons (SALW). As brokering is often key in facilitating SALW transfers, preventing illicit brokering activities is an essential component of the response to illicit trafficking in SALW. While there is not universal agreement on a definition of these activities or the most appropriate response to control them, interest in this issue—on the part of the United Nations, policy makers and civil society groups—remains high.

A number of United Nations discussions within the UN framework, notably by the General Assembly and Security Council, have contributed to the understanding of the scope of brokering activities. In addition, regional and multilateral initiatives, governmental processes and civil society actions have made significant contributions to shaping the definition of, and response to, illicit SALW brokering.<sup>1</sup> This chapter outlines some of the main elements of decisions taken at the international, multilateral and regional levels to curb illicit arms brokering activities. It first traces chronologically some of the significant developments in the understanding of the issue of SALW brokering through relevant contributions by the General Assembly and the Security Council. A short examination of specific responses to brokering developed in response to UN sanctions follows. It then looks at how regional and multilateral agreements are advancing the consideration of SALW brokering activities.



## THE EMERGING CONCERN WITHIN THE UN FRAMEWORK

In October 1993, President Alpha Oumar Konare of Mali sent a letter to the United Nations Secretary-General, requesting that the UN send an advisory mission to the Sahara-Sahel region to consider the control and collection of small arms.<sup>2</sup> Until this time, “general and complete disarmament” covered illicit transfer and use of conventional arms,<sup>3</sup> with no particular emphasis on SALW. However, Mali’s request focused attention on the need to address SALW specifically.

The following year, the General Assembly requested the Secretary-General to report to its fiftieth session on the issue of assistance to states for curbing the illicit traffic in small arms and collecting them.<sup>4</sup> The same resolution also invited Member States to “implement national control measures in order to check the illicit circulation of small arms, in particular by curbing the illegal export of such arms”.<sup>5</sup> Two additional early considerations of SALW trafficking can be found in the work of the 1995 Disarmament Commission under its agenda item 5 on international arms transfers,<sup>6</sup> and that of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1995), which invited Member States to “improve policy development, increase the use of bilateral or multilateral cooperation agreements and, where necessary conduct more extensive research on [inter alia] illicit arms trafficking ...”.<sup>7</sup>

The issue of brokering as an element of the illicit trafficking problem has been woven throughout the work of the UN—through General Assembly initiatives (such as expert groups and agreements dedicated to various aspects of the SALW issue) and through the Security Council processes (expert panels, mechanisms and sanctions committees), particularly on Africa. Some of the key developments in the consideration of the brokering issue within the UN framework are described briefly below.

### INTERNATIONAL COMMISSION OF INQUIRY ON ARMS FLOWS TO THE PERPETRATORS OF THE RWANDAN GENOCIDE (1995–1998)

The subject of illicit brokering activities in SALW was not explicitly considered within the UN framework until the United Nations International Commission of Inquiry on arms flows to the perpetrators of the Rwandan genocide (UNICOI). UNICOI was established on 7 September 1995<sup>8</sup> against the backdrop of allegations related to the Rwandan genocide, and

persistent UN and civil society reports<sup>9</sup> that the UN arms embargo, imposed by the Security Council on 17 May 1994,<sup>10</sup> was not being respected.<sup>11</sup>

UNICOI was mandated:

(a) to collect information and investigate reports relating to the sale or supply of arms and related matériel to former Rwandan government forces in the Great Lakes region in violation of Council resolutions 918 (1994), 997 (1995) and 1011 (1995); (b) to investigate allegations that such forces are receiving military training in order to destabilize Rwanda; (c) to identify parties aiding and abetting the illegal acquisition of arms by former Rwandan government forces, contrary to the Council resolutions referred to above; and (d) to recommend measures to end the illegal flow of arms in the subregion in violation of the Council resolutions referred to above...<sup>12</sup>

UNICOI reported several times between 1996 and early 1998.<sup>13</sup> The Commission of Inquiry was reactivated in April 1998 to collect further information and investigate reports relating to the sale, supply and shipment of arms and related matériel to former Rwandan government forces and militias in the Great Lakes region.<sup>14</sup>

The UNICOI reports marked a watershed in the understanding of what illicit brokering activities entail in practice. The reports illustrated that illicit brokering activities involved complex arrangements and transportation routes for illegal arms, as well as financial transfers and cargo operations.<sup>15</sup> The UNICOI reports also touched upon how dealers misused end-user certificates, exploited legal loopholes, evaded customs and airport controls, and falsified documents such as passports.<sup>16</sup> The reports made reference to allegations of individuals providing training and mercenary services in addition brokering the arms themselves.<sup>17</sup>

The groundbreaking UNICOI reports documented intricate networks of arms suppliers, brokers, private actors and transport companies providing a steady flow of weapons to the region. Some European and Asian countries were reported to have transferred weapons, for example through middlemen and brokers operating from South Africa, Zimbabwe and countries in Europe, and involving financial institutions around the world. For instance, the Commission's first report described in some detail weapons sales to Rwanda in violation of the Security Council arms

embargo.<sup>18</sup> UNICOI also received reliable information on alleged illegal trafficking of arms from South African territory to the Great Lakes region by road via Zimbabwe and Zambia,<sup>19</sup> as well as on allegations regarding payments related to weapons deliveries involving the Seychelles and Zaire.<sup>20</sup>

The details provided by the UNICOI reports on the dynamics of illicit arms trafficking transformed how the subject of arms brokering was understood. The Security Council, concerned about early findings<sup>21</sup> of UNICOI on the sale and supply of arms to former Rwanda government forces in violation of security council embargoes, called upon states whose nationals had been implicated by the report “to investigate the apparent complicity of their officials or private citizens in the purchase of arms from Seychelles in June 1994, and in other suspected violations of relevant Security Council resolutions”.<sup>22</sup>

Concerned about stemming the illicit arms flow to and around Africa, the Security Council in November 1998 encouraged the Secretary-General to “explore means of identifying international arms dealers acting in contravention of national legislation or embargoes established by the United Nations on arms transfers to and in Africa”.<sup>23</sup>

#### **GUIDELINES FOR INTERNATIONAL ARMS TRANSFERS (1996)**

In May 1996, the General Assembly took a decisive step to address the issue of transfers through the United Nations Disarmament Commission’s guidelines for international arms transfers, which cover all conventional weapons. The Disarmament Commission’s report to the General Assembly in May 1996 suggested that “States should maintain strict regulations on the activities of private international arms dealers and cooperate to prevent such dealers from engaging in illicit arms trafficking.”<sup>24</sup> In this context, reference was made to “international arms dealers” involved in illicit arms trafficking contrary to the laws of states or international law. This was the first mention within the context of the United Nations of “regulating” the activities of “private international arms dealers”.

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### THE 1997 PANEL OF GOVERNMENTAL EXPERTS ON SMALL ARMS AND THE 1999 GROUP OF GOVERNMENTAL EXPERTS ON SMALL ARMS

In the late 1990s, the General Assembly called for the establishment of two UN expert groups with a mandate to investigate the types of SALW being used in conflicts, the nature and causes of the excessive and destabilizing accumulation and transfer of SALW, including illicit production and trade, and the ways and means to prevent and reduce the excessive and destabilizing accumulation and transfer of SALW. The reports of both groups<sup>25</sup> identified the key role played by arms dealers, transportation agents and financial institutions in smuggling, concealment, mislabelling and false documentation of arms transfers. They also noted that negligent or corrupt government officials sometimes aided and abetted illicit arms trafficking. The 1997 Panel of Governmental Experts recommended further study of national controls on arms dealers, including the feasibility of a database of licit dealers, to assist in the regulation of brokering activities.<sup>26</sup>

The report of the 1999 Group of Governmental Experts recommended that applications for export authorizations should be assessed according to strict national criteria covering all SALW categories, including surplus or second-hand weapons:

Such legislative, regulatory or administrative measures could include the use of authenticated end-user certificates, enhanced legal and enforcement measures, as appropriate, to control arms-brokering activities, requirements to ensure that no retransfer of small arms and light weapons takes place without prior authorization of the original supplier State, and cooperation in the exchange of information on suspect financial activities. States should ensure that they exercise control over all brokering activities performed in their territory or by dealers registered in their territory, including cases in which the arms do not enter their territory.<sup>27</sup>

Taking note of the recommendations of the 1997 Panel,<sup>28</sup> in January 1999 the General Assembly had requested the Secretary-General “to initiate a study as soon as possible ... on the feasibility of restricting the manufacture and trade of such weapons to the manufacturers and dealers authorized by States”.<sup>29</sup> However this request was limited by the implicit assumption that “authorized” manufacturers and dealers required no international

regulation. The 1999 group encouraged further consideration of the issue of brokering, recommending that:

the study on the feasibility of restricting the manufacture and trade of small arms and light weapons to manufacturers and dealers authorized by States, requested by the General Assembly in paragraph 5 of resolution 53/77 E, should be completed in time for it to be considered at the international conference on the illicit arms trade in all its aspects, to be convened no later than 2001. It welcomes proposals that such a study be extended also to cover brokering activities relating to small arms and light weapons, *including transportation agents and financial transactions* [emphasis added].<sup>30</sup>

Building upon this recommendation and recognizing the importance it placed on the need to address both the transportation and financial aspects of the issue, in December 1999 the General Assembly asked the Secretary-General to appoint a group of governmental experts to study “the feasibility of restricting the manufacture and trade of small arms to manufacturers and dealers authorized by States, which will cover the brokering activities, particularly illicit activities, relating to small arms and light weapons, including transportation agents and financial transactions”.<sup>31</sup> In May 2000, the Secretary-General appointed a panel of governmental experts to carry out a study, on the feasibility of restricting the manufacture and trade of weapons to the manufacturers and dealers authorized by states, covering the brokering activities, particularly illicit activities, relating to SALW, including transportation agents and financial transactions. The Group was tasked:

to carry out a study ... on the feasibility of restricting the manufacture and trade of such weapons to the manufacturers and dealers authorized by States, which will cover the brokering activities, particularly illicit activities, relating to small arms and light weapons, including transportation agents and financial transactions [and to] submit the study as one of the background documents for the Conference to be held in 2001.<sup>32</sup>

### SANCTIONS REGIME IN ANGOLA (2000)

In 1993, the United Nations imposed an arms and petroleum embargo on the *União Nacional Para a Independência Total de Angola* (UNITA), which marked the first time such embargoes were used against a non-state actor.<sup>33</sup>

Despite the embargo, UNITA continued to receive arms and fuel. The United Nations imposed additional sanctions upon UNITA in 1997 and 1998<sup>34</sup> to address the continuing violations. In 1999, the Security Council established an independent Panel of Experts to investigate violations of Security Council sanctions on UNITA.<sup>35</sup> The Panel, under the chairmanship of Robert R. Fowler, was required to inform the Security Council on how the sanctions against UNITA were being violated, who was violating them, and what could be done to make the sanctions more effective. The final report of the Panel of Experts (known as the Fowler Report) was submitted on 10 March 2000.<sup>36</sup>

Following up on this report, the Security Council established the Monitoring Mechanism on Angola Sanctions for a six-month period and mandated it to collect additional relevant information and to investigate relevant leads relating to any violations of the measures contained in the sanctions against UNITA, and investigate any relevant leads contained in the Fowler Report.<sup>37</sup> The final report of the Monitoring Mechanism was submitted on 21 December 2000.<sup>38</sup>

The Fowler Report “named and shamed” governments, companies, and individuals that had directly or indirectly violated UN sanctions on UNITA. This report confirmed that illicit SALW brokering activities are not limited to private actors, but can also involve governments, government agents and companies.

The various reports of the Security Council on Angola, including the Fowler Report and those of the Monitoring Mechanism, have contributed to the brokering debate by illustrating some key factors that facilitate illicit brokering in small arms—and which are briefly mentioned below.

#### **End-use certificates and transit points**

The Monitoring Mechanism discovered that while the export control systems and procedures of the countries they reviewed contained safeguards to prevent the diversion of weapons to embargoed regions or entities, illegal transfers still reached embargoed regions through the use of forged end-user certificates.<sup>39</sup>

The Fowler Report<sup>40</sup> had identified how UNITA used Zaire, Congo-Brazzaville, Burkina Faso, Rwanda and Togo as transit regions and bases for stockpiling weapons, as well as for providing end-user certificates. For

example, until May 1997, UNITA used Zaire as a base for the stockpiling of weapons,<sup>41</sup> and it used end-user certificates from Zaire and Togo as the means by which arms brokers working for UNITA were able to obtain the weapons.<sup>42</sup> The Monitoring Mechanism confirmed this through its investigations, concluding that 18 end-user certificates that surfaced in Bulgaria featuring Togo as the country of origin were forged, as were two end-user certificates that came to light in Romania featuring Togo as the country of origin.<sup>43</sup> According to the Fowler Report, UNITA also used Burkina Faso and Togo as transit points for arms originating from Eastern Europe.<sup>44</sup> For example, flights carrying weapons from Eastern Europe landed in Ouagadougou and Bobo-Dioulasso in Burkina Faso with falsified end-user certificates, and weapons were unlawfully trans-shipped from there to other end-users, including UNITA, in breach of Security Council resolution 864 (1993).<sup>45</sup>

As a consequence, the Monitoring Mechanism stressed the need for arms exporting countries to strengthen their systems pertaining to arms exports, in particular in verifying the authenticity and country of issuance of the relevant documents.<sup>46</sup> They also recommended a:

standard system of support and a sufficient level of security to deter and/or prevent the forgery of end-user certificates. Governments should consider putting in place systems to allow for the speedy exchange of information and verification of the validity of end-user certificates through the designation of a contact authority in the arms exporting and importing side or by any other way deemed appropriate [and] a register of intermediary firms/brokers dealing with import/export of arms should be put in place.<sup>47</sup>

#### **Lack of adequate legislation**

In addition, it came to the attention of the Monitoring Mechanism that the importation procedures in, for example, Togo and Burkina Faso did not appear to be governed by specific legislation,<sup>48</sup> or even managed by a body with clearly delineated responsibilities.<sup>49</sup> To this end, the Monitoring Mechanism recommended that “importation of arms should be subject to adequate legislation and should be managed through a mechanism that can define clearly the responsibilities of all agencies and officials involved. Such system should include provisions designating in person the officials authorized to sign end-user certificates”.<sup>50</sup>

### Transportation

The Fowler Report identified a number of the companies that had transported arms. For example, planes arrived in Zaire from Eastern Europe carrying arms and military equipment for UNITA.<sup>51</sup> Most of these planes arrived at night and the military cargo was off-loaded and then put in bags to try to disguise it as food or clothing.<sup>52</sup> Flight plans were also changed mid-flight. "Typically, flights will leave from [South Africa] declaring Zambia or the DRC as their destination. Once the flights cross into Zambian airspace the planes divert to locations in UNITA controlled territory".<sup>53</sup>

### Payment

The brokers used by UNITA were responsible for negotiating the price and payment of the goods and services,<sup>54</sup> which sometimes included "arranging transport and delivery, any necessary training on the use of the system, maintenance and sometimes even spare parts".<sup>55</sup> According to the Fowler Report, natural resources such as diamonds had a unique role within UNITA's political and military economy.<sup>56</sup> UNITA's ability to exchange rough diamonds for weapons sustained its capacity to procure weapons.<sup>57</sup> "Rough diamond caches rather than cash or bank deposits [constituted] the primary and the preferred means of stockpiling wealth for UNITA".<sup>58</sup> The broker "would sit together with UNITA's own diamond experts to assess and value the diamond packages that UNITA presented for payment".<sup>59</sup>

Shortly after the delivery of the Fowler Report, the Security Council encouraged:

all States to exercise all due diligence, in order to prevent the diversion or trans-shipment of weapons to unauthorized end-users or unauthorized destinations where such diversion or trans-shipment risks resulting in the violation of the measures contained in resolution 864 (1993), including by requiring end-use documentation or equivalent measures before exports from their territories are allowed, and further encourage[d] all States to ensure effective monitoring and regulation in the export of weapons, including by private arms brokers, where they do not already do so ...<sup>60</sup>

### 2001 GROUP OF GOVERNMENTAL EXPERTS

The year 2001 saw the achievement of three important international processes contributing to the understanding of the brokering debate. They



were the report of the Group of Governmental Experts, the Firearms Protocol, and the United Nations Programme of Action on SALW.

In March 2001, the Group of Governmental Experts established by General Assembly resolution 54/54 V reported on the feasibility of restricting the manufacture and trade in SALW to manufacturers and dealers authorized by states.<sup>61</sup>

Building upon on the principles and recommendations contained in the work of the 1997 and 1999 expert groups, this Group considered in detail three key issues identified in the 1999 report (the roles of brokers, transportation agents and financial agents) and considered practical approaches to the more effective regulation of state and private manufacture and trade.

In the absence of internationally accepted definitions, the 2001 Group reached a “common understanding” of the roles of these actors:

Individuals or companies acting as intermediaries between a supplier and a user may be performing one or more of the following roles: dealer, agent acting on behalf of manufacturers, suppliers or recipients, broker, transportation agent, or financial agent. **Dealers** buy and sell quantities of arms and associated items according to the demand of users. **Agents** acting on behalf of manufacturers, suppliers or recipients have a mandate to represent one of them and to conclude a contract in the name of that person. **Brokers** bring together a supplier and a recipient and arrange and facilitate arms deals so as to benefit materially from the deals without necessarily taking ownership of the arms or acting on behalf of one of the two parties. ... **[T]ransportation agents** are agents involved in arrangements for the transportation of the arms and associated goods, and include shipping agents and brokers, freight forwarders and charterers. ... **Financial transactions** include all banking and related activities to arrange for the payment of the purchase of small arms and light weapons, their parts and components, ammunition and explosives, technologies and services. Payments may include credit arrangements, payment in non-financial transactions like resources; they may also be made in the form of barter.<sup>62</sup>

The report of the 2001 Group of Governmental Experts emphasized the need to control brokering activities not just on the national level but also the international level. In addition to requesting adequate licensing and

registration at the national level, the study recommended international cooperation to identify and take adequate measures against related abuses and violations in this area. In this context, the group indicated the need for national registers of offenders to keep track of individuals and companies convicted of violations of the relevant laws and regulations.

The 2001 Group of Governmental Experts sought to demonstrate the degree of feasibility of various approaches in addressing illicit brokering activities at the national and international levels. Their considerations were acknowledged by commitments made in developments later in the year—within the legally binding Firearms Protocol and the politically binding United Nations Programme of Action on small arms and light weapons.

#### THE FIREARMS PROTOCOL

In June 2001, the General Assembly adopted the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (known as the Firearms Protocol). Although the Firearms Protocol does not define brokering activities, it buttressed the suggestions of the 2001 report of the Group of Governmental Experts by providing some useful guidelines for regulating brokering activities at the national level.

According to the Firearms Protocol, a system to regulate the activities of those engaged in brokering could comprise one or more measures, including:

- requiring registration of brokers operating within their territory;
- requiring licensing or authorization of brokering; or
- requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.<sup>63</sup>

#### UN PROGRAMME OF ACTION

In July 2001, the participating states in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects agreed on the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA). Within the

PoA states agreed to develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms brokering. These procedures should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as appropriate penalties for all illicit brokering activities performed within the state's jurisdiction and control.<sup>64</sup> States also committed to criminalizing the illicit trade in SALW, which in effect means incorporating UN arms embargoes into national legislation.<sup>65</sup> As part of the follow-up mechanism to the PoA, states committed to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in SALW.<sup>66</sup>

#### MOMENTUM ON BROKERING SINCE 2001

In December 2003, the General Assembly requested the Secretary-General to hold broad-based consultations "on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons".<sup>67</sup> Between April 2004 and June 2005, six consultations organized by the United Nations Department for Disarmament Affairs (DDA)<sup>68</sup> took place in Geneva and New York.<sup>69</sup> In order to ensure that the views of regional organizations, states and civil society were taken into account, DDA also conducted consultations at the regional level in cooperation with Member States, subregional organizations and civil society.

In his 2005 report *In Larger Freedom*, the UN Secretary-General urged the negotiation of a legally binding international instrument regulating arms brokering. He stated, "[w]e must now begin to make a real difference by ensuring better enforcement of arms embargoes ... and negotiating a legally binding international instrument ... to prevent, combat and eradicate illicit brokering. I urge Member States to agree to expedite negotiations on an instrument on illicit brokering".<sup>70</sup>

The UN General Assembly adopted on 8 December 2005 an international instrument to enable states to identify and trace illicit SALW.<sup>71</sup> Although it made no reference to brokering activities, it stressed "that all aspects relating to illicit small arms and light weapons should be addressed in a coordinated and comprehensive manner".<sup>72</sup>

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According to information voluntarily provided between 2002 and 2006 in the national reports by UN Member States on the implementation of the PoA, 88% of states made reference to the subject of brokering activities in their national reports on implementing the PoA.<sup>73</sup> National reports and statements indicate that a significant number of European countries have brokering laws, although these vary widely in their scope and comprehensiveness. Other states, while recognizing the necessity of regulating brokering activities, have indicated that they have yet to take precautionary measures necessary to regulate arms brokering.<sup>74</sup>

At the 2006 PoA Review Conference, a number of countries expressed their ongoing support for mechanisms to address illicit brokering. For example, the European Union (EU) presidency statement asserted that “Brokering controls remain a high priority for the European Union as illicit brokering is recognized being among the main factors fuelling the illegal trade in SALW world-wide.”<sup>75</sup> The EU also expressed its hope that the Group of Governmental Experts on brokering would take a practical approach to its work and decide on the measures necessary to combat the harm done by unscrupulous arms brokers.

In December 2004 the General Assembly requested the Secretary-General to convene, after the 2006 Review Conference on the PoA and no later than 2007, a group of governmental experts “to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons ...”.<sup>76</sup> This Group of Governmental Experts will commence work in November 2006. The Group’s report will be considered by the sixty-second session of the General Assembly.<sup>77</sup>

## LESSONS LEARNED FROM SANCTIONS AND ARMS EMBARGOES

The Security Council has developed, particularly through various panel and committee reports, valuable knowledge of the practical aspects of SALW brokering activities—and hence, has also developed practical responses. Their investigations of embargo implementation in Angola, Liberia, Rwanda, Sierra Leone and Somalia, among others, have unveiled complex networks of actors responsible for illicit trafficking of arms, and have thus provided further evidence on the dynamics of illicit brokering activities. The

“name and shame” tactic continues to be used to expose ongoing arms trafficking and sanctions violations.

In a report on the situation in Africa in 1998, UN Secretary-General Kofi Annan noted that an arms embargo “can help to diminish the availability of arms with which to pursue a conflict by making the acquisition of weapons more difficult”.<sup>78</sup> Arms embargoes are an important tool available to the Security Council to limit illicit brokering activities. For instance, partly as a result of evidence from the investigations of the Panels of Experts on Sierra Leone and Liberia, the Security Council called on arms-producing and exporting countries to:

enact stringent laws, regulations and administrative procedures in order to ensure, through their implementation, more effective control over the transfer to West Africa of small arms by manufacturers, suppliers, brokers, and shipping and transit agents, including a mechanism that would facilitate the identification of illicit arms transfers, as well as careful scrutiny of end-user certificates.<sup>79</sup>

Recommendations, particularly from reports concerning sanction implementation, have contributed to the understanding of the scope of brokering activities and the development of appropriate responses. These reports found that weak points of some control systems for arms transfers include:

- forged end-user certificates and lack of verification of arms transferred;
- use of third countries to arrange arms shipment;
- aircraft registration and flight plan fraud; and
- the financial assets or economic resources available to arms brokers.

Although the following selection of recommendations proposed by various reports were developed in the context of a specific country situation, they are useful to consider more widely—as appropriate—as they offer options that states might wish to consider at the national and regional levels. The recommendations also provide suggestions on areas for cooperation at the international level (for example, technical cooperation on law enforcement, monitoring mechanisms, investigations, border controls, and so forth).

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## END-USE CERTIFICATES

End-user certificates continue to be a weak point in arms transfers as arms are diverted from the declared end-use. Numerous investigations of violations of Security Council sanctions have identified forged or duplicate end-user certificates as a significant problem. Therefore, in order to prevent the forging and abuse of end-user certificates, and assist arms exports control authorities, the following responses have been suggested, among others:

- Member States that engage in trade of military goods and services could play a more active role in monitoring the implementation of the arms embargo by insisting on end-use certification.<sup>80</sup>
- “Member States could also undertake their own verification checks to trace goods that are reportedly diverted or are at risk of being diverted to the embargoed [regions or entities]”.<sup>81</sup>
- “[A]ll arms transfers by governments should provide for the mandatory authentication and reconciliation of all end-user certificates, as well as the verification of stated undertakings contained in those certificates”.<sup>82</sup>
- In order to make them harder to forge and misuse, a United Nations working group should “develop the modalities for a standardized End-User Certificate that would include the name, address and telephone number of the signing authority for the certificate, and name, address, telephone number and arms trading license of the broker(s) involved”.<sup>83</sup>
- The United Nations should “create a internet-based register of government officials—including examples of their certified signatures—who are authorized to sign end-user certificates”.<sup>84</sup>

## AVIATION

Illicit brokers frequently use aircraft to facilitate their activities. In many cases, authorities were unable to detect illegal over-flights, due to outdated equipment such as inadequate radar systems. Some civil aviation authorities also exercised poor oversight of planes flying on their registry, or there was a problem of registry fraud and abuse, thus enabling arms trafficking networks to conceal their operations through fake registrations and fraudulent documents. A number of recommendations have been

made in view of prohibiting unscrupulous arms brokers from using aircrafts to facilitate their illicit activities. They have also suggested possible options for international cooperation:

- In view of aircraft registration fraud, civil aviation authorities should transmit to Interpol the court documents about airlines involved in illicit activities. They are also encouraged to make court documents publicly available and to coordinate with concerned countries over the use of forged documents by airlines.<sup>85</sup>
- All aircraft, airport authorities and operators of planes operating in conflict regions are “advised to keep all their documentation, log books, operating licences, way bills and cargo manifests for inspection” by the relevant Sanctions Committee.<sup>86</sup>
- “[A]ll operators of aircraft [in conflict zones are] ... required to file their airworthiness and operating licences and their insurance documents with the International Civil Aviation Organization’s headquarters in Montreal, including documentation on inspections carried out during the past ... years. The aircraft of all operators failing to do so should be grounded permanently. Aircraft that do not meet ICAO standards should be grounded permanently”.<sup>87</sup>
- Specialized United Nations monitors should be placed at major airports in conflict regions (and perhaps further afield), “focusing on sensitive areas and coordinating their findings with other airports. This would enable better identification of suspect aircraft. It would also create a deterrent against illicit trafficking, and would generate the information needed to identify planes, owners and operators violating United Nations sanctions and arms embargoes”.<sup>88</sup>
- The International Civil Aviation Organization’s member states are to “computerize their registration lists and centralize them on the ICAO web site so that users could check the situation and status of each aircraft; [and] ICAO’s Safety Oversight programme should place greater emphasis on aircraft registration”.<sup>89</sup>
- All aircraft implicated in the investigations should be grounded. “The grounding order could then be lifted gradually for each individual aircraft, provided all the records (ownership of the plane, operator, operating licence, insurance, airworthiness certificate, certificate of registration and the location of the aircraft)

are inspected by both the Civil Aviation Authority in the country of registration and in the country where the aircraft has its maintenance base”.<sup>90</sup>

- “The Security Council, through ICAO, IATA [International Air Transport Association] and the WCO [World Customs Organization] should create a centralized information bulletin, making the list of grounded aircraft known to all airports in the world”.<sup>91</sup>

### DATABASES AND INFORMATION EXCHANGE

In order to curb the ease by which brokers procure illicit SALW or undertake illicit transfers of such weapons and their components, Security Council documents contain a number of recommendations on information sharing, including:

- Interpol could develop a common standard and the management of a database on significant cases of smuggling and sanctions-busting in conflict regions. “The IWETS (International Weapons and Explosives Tracking System) programme of Interpol could be used for the purpose of tracking the origin of the weaponry”.<sup>92</sup>
- “A project should be developed to profile ... arms brokers with the cooperation of Interpol”.<sup>93</sup>
- Governments should “agree to register, license and monitor the activities of arms brokers” and that “information collected through this exercise be stored in a national database on arms brokers that would be made available, as appropriate, to other Governments, as well as to regional and international organizations seeking to facilitate the curtailment of illicit arms transfers”.<sup>94</sup>
- The establishment of bilateral border control mechanisms to share information and intelligence pertaining to arms embargoes.<sup>95</sup>

### FINANCIAL TRANSACTIONS

Financial transactions are at the centre of illicit trafficking activities. Banks, financial institutions and agents are used by brokers involved in illicit activities.<sup>96</sup> To address this important component of the issue, recommendations have included:



- The establishment of a list of individuals who are deemed to be in clear violation of UN embargoes. “Listed individuals may be subject to freezing of all funds and other financial assets or economic resources of groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly by them or persons acting on their behalf or their direction. States should ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons’ benefit, by their national or by any persons within their territory. Additionally, States may be asked to revoke all business licences and any other certificates or titles that enable those individuals to remain economically active. The United Nations and its agencies may also consider cancelling current agreements with these individuals.”<sup>97</sup>
- Banking procedures could “be developed to facilitate the identification of individuals covered by sanctions, and the freezing of assets.”<sup>98</sup>

#### TRAVEL BAN

Unrestricted travel by representatives or close associates of embargoed groups or entities has been key in facilitating illicit brokering deals and SALW transfers. For example, the Fowler Report notes how UNITA representatives travelled to third countries to make arms deals. “Having examined in detail all aspects of UNITA’s military and strategic procurement, ... the Panel developed a clear appreciation of the very close links between these vital aspects of UNITA’s operations and the ability of UNITA personnel to travel and conduct UNITA business abroad”.<sup>99</sup> The recommendation by the Expert Panel on Somalia offers a response to this problem:

- Targeted travel bans should be introduced for violators of arms embargoes. This may include “a temporary revocation by the issuing State of all passports and other travel documents. This step may be warranted in cases where individuals are found to be in violation of the arms embargo and where financial sanctions are not likely to have the desired effect of stopping future violations.”<sup>100</sup>

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## LAW ENFORCEMENT

As noted in the final report of UNICOI, even where relevant national controls exist, “they are often circumvented by arms dealers who make use of third countries to arrange arms shipments. Governments should be encouraged to tighten the scope and application of the relevant laws in order to close that loophole”.<sup>101</sup>

In summary, the examples listed in this section suggest that authentication of end-user certificates as well as verification of the stated undertaking is key to regulating brokering activity in SALW. There is also the need to tighten control of national civil aviation services to prevent the diversion of weapons by brokers to conflict or embargoed regions. Additionally, information sharing and record-keeping on arms brokering, dealing and transporting among international and national law enforcement agencies are also essential to preventing and tracing activities of unscrupulous actors involving in brokering activities. Lastly, targeted financial and travel sanctions should be imposed on individuals and companies identified to be in clear violation of UN embargoes or involved in illicit brokering activities.

## REGIONAL AND MULTILATERAL INSTRUMENTS ADDRESSING BROKERING ACTIVITIES IN SALW

As the small arms issue attracted attention and gained momentum at the end of the 1990s, brokering started to be addressed through provisions in regional and multilateral declarations, agreements, codes of conduct and best practice guidelines. These initiatives have helped to focus discussion on what constitutes brokering activities. The differing contributions of these regional and multilateral instruments offer “food for thought” concerning what items an eventual international standard on brokering might cover. Additionally, provisions and suggestions by these regional and multilateral processes have stimulated reflection on possible wider responses to be taken within the UN framework.

While individual states are committed to the Firearms Protocol and the PoA, regional and multilateral agreements on SALW that include provisions on brokering do not have uniform geographical coverage—some countries in the regions of Asia, the Middle East, Northern Africa and the Pacific Islands are hardly covered by any regional or multilateral agreement. Since there is

uneven coverage by regional agreements on brokering, perhaps subregional initiatives might better address a given region's unique needs and priorities. Ultimately, however, as a consequence of the multinational dynamics of illicit brokering activities, it will be essential to adopt international minimum standards to address the currently existing loopholes in brokering controls.

**Box 4.1. Select regional and multilateral initiatives containing provisions on SALW brokering**

- The African Union's Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000)
- The Southern African Development Community's Protocol on the Control of Firearms, Ammunition and other Related Materials in the Southern African Development Community (SADC) Region\* (2001)
- The Wassenaar Arrangement's Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW) (2002)
- The Andean Plan to Prevent, Combat and Eradicate Illicit Trade in Small Arms and Light Weapons in All its Aspects (2003)
- The European Union's Council Common Position on the control of arms brokering (2003)
- The Organization of American States' Model Regulations for the Control of Brokers of Firearms, Their Parts and Components, and Ammunition (2003)
- The Organization for Security and Co-operation in Europe's Handbook of Best Practices on Small Arms and Light Weapons (2003)
- The Wassenaar Arrangement's Elements for Effective Legislation on Arms Brokering (2003)
- The Wassenaar Arrangement's Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS) (2003)
- Asia-Pacific Economic Cooperation's Guidelines on Controls and Security of Man-Portable Air Defence Systems (MANPADS) (2004)
- The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa\* (2004)
- The Organization for Security and Co-operation in Europe's Principles on the Control of Brokering Small Arms and Light Weapons (2004)
- Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons (2005)
- Economic Community of West African States' Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials\* (2006)

\* legally binding

Regional and multilateral agreements concerning brokering have contributed to establishing a framework for discussion at the global level. In addition, they show that consensus among many states is possible on some key elements such as licensing requirements and conditions, registration and record-keeping, criminal liability and information sharing. Even on the complex issues of third-party brokering and extraterritoriality, advances have been made by the participating states of the Wassenaar Arrangement and member states of the Organization of Security and Co-operation in Europe (OSCE). Thus regional agreements and guidelines have contributed to a wider understanding of the subject and have developed consensus on some of the areas concerned. It is therefore useful to consider how these agreements approach various core issues related to SALW brokering activities.

#### SCOPE OF BROKERING ACTIVITIES

There are significant areas of convergence in these regional and multilateral standards of control on arms brokers and their activities. While the regional or multilateral instruments that define brokering describe it as facilitating or arranging transfers of arms, the definitions vary in scope.

Six regional and multilateral instruments provide definitions for arms brokers or brokering activities. They are the Organization of American States (OAS) Model Regulations, the Nairobi Best Practice Guidelines, the Nairobi Protocol, the Southern African Development Community (SADC) Protocol on Firearms, the OSCE Handbook of Best Practices, and the Economic Community of West African States (ECOWAS) Convention. For example, according to Article 1 of the OAS Model Regulations, “‘Broker’ or ‘Arms Broker’ means any natural or legal person who, in return for a fee, commission or other consideration, acts on behalf of others to negotiate or arrange contracts, purchases, sales or other means of transfer of firearms, their parts or components or ammunition.”<sup>102</sup> And according to the Nairobi Best Practice Guidelines:

a Broker is a person who acts: (a) for a commission, advantage or cause, whether pecuniary or otherwise; (b) to facilitate the transfer, documentation and/or payment in respect of any transaction, relating to the buying or selling of small arms and light weapons; or (c) as an intermediary between any manufacturer, or supplier of, or dealer in small arms and light weapons and any buyer or recipient thereof.<sup>103</sup>

With regard to goods covered by brokering activities, the Wassenaar Arrangement's Elements for Effective Legislation on Arms Brokering and the EU Common Position on the Control of Arms Brokering cover the brokering of transfers of military items, while other regional agreements only cover SALW.

The Asia–Pacific Economic Cooperation (APEC) Guidelines on man-portable air defence systems (MANPADS) suggest that exporting states should not make use of non-governmental brokers or brokering services when transferring MANPADS, unless specifically authorized by the importing and exporting states. Similarly, the Wassenaar Arrangement's Elements for Export Controls of MANPADS stipulates that participating states are not to make use of non-governmental brokers or brokering services when transferring MANPADS, unless specifically authorized to on behalf of the government.<sup>104</sup>

Despite their differences, it is worthwhile to note the strong areas of convergence within the relevant international and regional instruments and guidelines. These include recommendations and standards for:

- licensing or authorization of brokering transactions;
- the registration of brokers operating within a state's jurisdiction;
- third-party brokering and extraterritoriality;
- the exchange of information on brokering activities and legislation; and
- the requirement for legal sanctions.

It is therefore useful to consider how these agreements approach various core issues related to SALW brokering activities.

#### **LICENSING OR WRITTEN AUTHORIZATION OF BROKERS OR THEIR ACTIVITIES**

##### **Licensing procedure**

In general, all regional instruments require licensing or written authorization of brokers or their brokering activities within territories of states. The Wassenaar Arrangement's Elements for Effective Legislation on Arms Brokering advances the issue, stating "a licence may also be required regardless of where the brokering activities take place."<sup>105</sup> The OSCE Handbook of Best Practices is even more specific, noting that where State

A has extraterritorial controls on its own nationals, "(a) a license is required from each State, or (b) State A [may waive] the licensing requirement in cases where it considers the controls in State B to be adequate".<sup>106</sup> The Nairobi Best Practice Guidelines and the OSCE Principles stand out as the only regional instruments that request that State Parties should ensure that all registered brokers seek and obtain a license for each transaction.<sup>107</sup> Additionally, the OSCE Principles on the Control of Brokering maintain that registration or authorization to act as a broker would not replace the requirement to obtain the necessary license or written authorization for each transaction.<sup>108</sup>

#### **Brokering controls consistent with international and regional sanctions**

The ECOWAS Convention, the OAS Model Regulations, the EU Common Position, the OSCE Handbook of Best Practices and the Wassenaar Arrangement's Elements for Effective Legislation on Arms Brokering call on states not to authorize transactions that violate their obligations under the United Nations Charter. States are also not to authorize transactions that violate embargoes or decisions adopted by relevant international, multilateral, regional and subregional bodies. The ECOWAS Convention is even more restrictive, stating "[a] transfer shall not be authorised if its authorisation violates .... [u]niversally accepted principles of international humanitarian law" and human rights law."<sup>109</sup>

#### **Brokering controls consistent with overall systems of export controls**

The ECOWAS Convention, the EU Common Position, the OAS Model Regulations, the OSCE Handbook of Best Practices, Nairobi Best Practice Guidelines and the Wassenaar Arrangement's Elements for Effective Legislation on Arms Brokering request countries to ensure that their licensing procedures are consistent with national, regional and international systems of export controls (for instance, as concerns classes of weapons prohibited for export under the country's export control legislation). For example, for cases at the regional level, under the ECOWAS Convention, brokering activities are assessed under the ECOWAS exemption process.<sup>110</sup> In this case, all transfers of weapons in the subregion are prohibited except those for legitimate self-defence and security needs, or for peace support operations. Exemption requests are submitted to the ECOWAS Executive Secretary by member states for approval.<sup>111</sup> Similarly, participating states to the Wassenaar Arrangement are to carefully assess applications for licences or authorizations in accordance with the principles and objectives of the Wassenaar Arrangement's Initial Elements.<sup>112</sup> For the EU countries,

brokering controls are consistent with provisions of the European Union Code of Conduct on Arms Exports.<sup>113</sup> The OSCE Handbook of Best Practices advises that procedures adopted for the “licensing of brokering activities should be no less stringent than those applied to direct exports”,<sup>114</sup> and specifies that the information required of applicants in the licensing procedure should conform to international standards.<sup>115</sup>

### Screening brokers

The OAS Model Regulations, the EU Council Common Position on the control of arms brokering, the Nairobi Best Practice Guidelines, the Nairobi Protocol, the ECOWAS Convention and the OSCE Handbook of Best Practices all provide for screening brokers through licensing procedures. They require detailed information on the broker or brokering transaction, or both, before authorizing a license or certificate. Such information may include criminal liability, the nature of the brokering activity, the country of origin of the goods, a description of the goods and end-use documentation, among other elements. The OSCE Principles and OAS Model Regulations, for example, stress that states should not give authorization to any person who has been convicted of a related serious crime.<sup>116</sup> The ECOWAS Convention, the Nairobi Protocol and the Nairobi Best Practice Guidelines require full disclosure of brokering transactions, including relevant import and export licences or authorizations and associated relevant documents, and the names and locations of all brokers.<sup>117</sup> The Nairobi Best Practice Guidelines advance on the subject by requesting states to license financiers as well.<sup>118</sup> While the Nairobi Best Practice Guidelines focus generally on regulating transporters,<sup>119</sup> the ECOWAS Convention is more specific, including “shipping agents involved in the transaction and the transit routes and points of the small arms and light weapons shipments”.<sup>120</sup>

### Validity of a license

The OAS Model Regulations and the OSCE Handbook of Best Practices are the only regional instruments that make reference to validity of licenses. Since both instruments serve as guides for states, they refrain from imposing set periods. The OAS Model Regulations leave the validity of the license blank, to be determined by member states, while the OSCE Handbook of Best Practices states that the validity of licenses should be limited. “In order to compensate for such limited validity, extension options could be established, which could be exercised by the license holder upon application to the competent authority.”<sup>121</sup>

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## REGISTRATION AND RECORD-KEEPING

Registration and record-keeping are essential in order to keep track of arms brokers and their activities—and also can be used to help trace and identify illicit activities. A number of regional instruments including the Nairobi Best Practice Guidelines, the OAS Model Regulations, the OSCE Handbook of Best Practices, the OSCE Principles, the EU Common Position and the ECOWAS Convention all make reference to registration or record-keeping.

According to the OAS Model Regulations, “the information required on an application for a brokering license can provide the basis for a de facto registry of brokers.”<sup>122</sup> Although the OSCE Handbook of Best Practices asserts that a registration procedure prior to the licensing procedure would appear to be useful, but is not imperative, it insists that “[i]n the interests of proper administration and international exchange of information it is ... highly recommended that records of all licences issued, of licence holders and of the results of government screening for reliability be kept by the competent licensing authority.”<sup>123</sup>

The OAS Model Regulations is the only regional document that specifically indicates that there is no requirement for the registration of brokering activities conducted by state agents, that is “[e]mployees or officials of the Government ... acting in their official capacity; and ... [e]mployees or officials of foreign governments or international organizations acting in their official capacity”.<sup>124</sup>

The OAS Model Regulations request that registration be effective for a maximum of two years from the date of approval. Subsequent registration can only be effected by the submission and approval of a new registration form. However, it is left at the discretion of the state, as some countries may use the same period of registration that exists for exporters of firearms.

Sample broker registration forms contained within the OAS Model Regulations and the Nairobi Best Practice Guidelines require detailed personal and business information for registration of arms brokers.

The ECOWAS Convention, the Nairobi Protocol and the Nairobi Best Practice Guidelines specifically make reference to the registration of financial agents and transportation agents associated with brokering of SALW.<sup>125</sup> The Nairobi Protocol, for example, requires regular and random



checks on all independent SALW manufacturers, dealers, traders and brokers.

Thus far there seems to be consensus on the minimum number of years for keeping records on brokering activities and small arms in general. The EU Common Position on brokering and the OSCE Principles require their members to keep records for a minimum of 10 years on all persons and entities who have obtained a license for brokering activities.<sup>126</sup> States parties to the Nairobi Protocol also agreed to maintain records for 10 years.<sup>127</sup> The SADC Firearms Protocol as well requests states to maintain records and information relating to firearms for not less than 10 years.<sup>128</sup>

### THIRD-PARTY BROKERING AND EXTRATERRITORIALITY

With regard to territorial coverage, the OAS Model Regulations, the OSCE Handbook of Best Practices and the Wassenaar Arrangement's Elements for Effective Legislation on Arms Brokering have covered the issues of brokering in third-party countries and of extraterritoriality. According to the OSCE Handbook of Best Practices, definitions of controlled activities should apply throughout the national territory, regardless of whether they have been conducted by nationals or non-nationals. Additionally, "an extension of brokering controls to apply extraterritorially could be desirable for certain cases, such as activities carried out abroad by nationals and permanent residents, or in the enforcement of international arms embargoes".<sup>129</sup> The EU Common Position on the control of arms brokering advises member states not only to take all the necessary measures to control brokering activities within their territory, but also "to consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory".<sup>130</sup>

The participating states of the Wassenaar Arrangement are encouraged to consider controlling brokering activities outside of their territory carried out by citizens, residents or by brokers who are established in their territory:

For activities of negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment controlled by Wassenaar Participating States from one third country to another third country, a licence or written approval should be obtained from the competent authorities of the Participating State where these activities take

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place whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State.<sup>131</sup>

### INFORMATION SHARING

Most of the regional agreements require national authorities to cooperate with one another to exchange information on respective brokering activities. The OAS Model Regulations, for example, require the OAS member states to share information contained in their respective broker registries, including information on ineligibility, debarments and denied applicants.<sup>132</sup> Similarly, the OSCE Principles recommend that information should be exchanged in the areas of legislation, registered brokers (if applicable), records of brokers, denials of registering applications (if applicable) and licensing applications.<sup>133</sup>

### CRIMINALIZING ILLICIT BROKERING

One important consequence of requiring states to criminalize the illicit trade in SALW—or more specifically the illicit brokering of SALW—is that it requires states to incorporate adherence to UN arms embargoes into their national legislation.

Almost all of the regional agreements encourage national authorities to determine the appropriate sanction in accordance with the gravity of the offence, in order to ensure that controls on arms brokering are effectively enforced. For example, the Nairobi Protocol, the OAS Model Regulations, the EU Common Position, the Andean Plan, the Wassenaar Arrangement, the ECOWAS Convention, the OSCE Handbook of Best Practices and the OSCE Principles on Brokering all make specific reference to criminalizing brokering activities at the national level, while the Nairobi Declaration, the Bamako Declaration and the SADC Firearms Protocol make only general reference to criminalizing illicit trafficking in SALW.

The OSCE Handbook of Best Practices advances on the question of penalties and criminal liability by suggesting that states apply effective and credible enforcement to acts of violations carried out in foreign states by nationals or permanent residents.<sup>134</sup> In the case of extraterritorial application of brokering controls, the activities carried out abroad by nationals and permanent residents should also be made subject to criminal prosecution.<sup>135</sup>

## **OTHER PROCESSES THAT HAVE CONTRIBUTED TO THE DEVELOPMENT OF THE DEBATE**

Initiatives by governments have also positively contributed to the understanding of the brokering issue. Processes directly focused on brokering include the Oslo Meetings and the Dutch–Norwegian Initiative. Others that may be relevant to SALW brokering include the Interlaken Process, the Bonn–Berlin Process and the Stockholm Process.

### **THE OSLO MEETINGS**

In July 1998 the Government of Norway hosted the Oslo Meeting on Small Arms and Light Weapons to examine elements of a common understanding of the problems caused by the uncontrolled proliferation of SALW. A second meeting in December 1999 recognized that brokering activities are one of the essential components of a comprehensive approach to dealing with problems relating to illicit trafficking in small arms.<sup>136</sup> Two suggestions arising from the second Oslo Meeting were that the Security Council could consider the insertion of clauses on brokering activities in legally binding embargo resolutions, and that the issue of brokering should be taken up in multilateral and regional bodies. The 1999 meeting also discussed how to include appropriate provisions on brokering in relevant international legal instruments. The 1999 meeting acknowledged that the proposed provision on brokering in the Draft Protocol on Firearms would make a significant contribution to the global approach to regulating brokering of small arms.<sup>137</sup>

### **THE DUTCH–NORWEGIAN INITIATIVE ON BROKERING OF SMALL ARMS AND LIGHT WEAPONS**

The aim of the Dutch–Norwegian Initiative is to assist states and regions to enact the necessary national laws and to strengthen international cooperation in controlling the brokering of small arms. This initiative, launched in April 2003, recognizes that there are relevant cultural, political and legal traditions that need to be part of the political process of developing a legal framework on arms brokering. Norway and the Netherlands approached regional organizations such as the Association of Southeast Asian Nations (ASEAN), ECOWAS, the OAS, the Pacific Islands Forum and SADC to discuss various relevant aspects of brokering. The

Dutch–Norwegian Initiative acknowledges that regional solutions or regional instruments to control arms brokering could serve as building blocks for an international instrument, since most regions already have basic agreements on cooperation on small arms issues. This initiative therefore seeks to develop the necessary capacities on the political level with regional organizations.

The Governments of the Netherlands and of Norway convened a conference in Oslo in April 2003 entitled “The Dutch–Norwegian Initiative on Further Steps to Enhance International Co-operation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons”. Experts from 27 states, alongside those from the United Nations, regional organizations, research institutes and non-governmental organizations, met to discuss possible approaches towards ensuring effective controls on SALW brokering activities. The meeting also examined possible elements of model regulations on brokering activities. The report of the chairman was presented to the First Biennial Meeting of States to Consider Implementation of the Programme of Action in New York in July 2003.<sup>138</sup>

#### THE INTERLAKEN PROCESS ON TARGETED FINANCIAL SANCTIONS

The Interlaken Process was convened by the Government of Switzerland in March 1998 to examine the feasibility of targeted financial sanctions. A series of workshops and conferences concluded that while targeted financial sanctions are technically feasible, they need adequate legal authority and administrative mechanisms to be effective.<sup>139</sup> The result of the Interlaken Process was a manual<sup>140</sup> that provides specific guidance and recommendations regarding the design and implementation of financial sanctions. It developed technical requirements to improve the application of financial sanctions. For example, effective implementation of financial sanctions at the national level requires that agencies “possess the authority, expertise, and capacity to give effect to Security Council resolutions”.<sup>141</sup> The Interlaken Process manual suggests that financial supervisory and regulatory agencies are likely to be the best source of technical expertise for the administration of sanctions. “States of various sizes often create specialist offices within the central bank or financial ministry but in many cases rely heavily upon expertise of knowledgeable individuals.”<sup>142</sup> The recommendations of the Interlaken Process could serve as a starting point

for discussions on the complex subject of regulating financial activities associated with arms brokering.

#### **THE BONN–BERLIN PROCESS ON ARMS EMBARGOES AND TRAVEL AND AIR-TRAFFIC-RELATED SANCTIONS**

In mid-2001, the Government of Germany sponsored the Bonn–Berlin Process as a contribution to reforming UN arms embargoes and travel-related sanctions. The recommendations from this process related to arms brokering took into consideration recent resolutions establishing arms embargoes, for example against Eritrea, Ethiopia and Sierra Leone.<sup>143</sup> The Bonn–Berlin Process recommended that brokering activities should be included in arms embargoes, and also highlighted the problem of transferring dual-use items. The process proposed a model resolution on arms embargoes to be used by the Security Council, which contains standardized language with respect to the scope of arms embargoes.<sup>144</sup>

#### **THE STOCKHOLM PROCESS ON IMPLEMENTING AND MONITORING TARGETED SANCTIONS**

The Government of Sweden initiated the Stockholm Process in late 2001. Building upon the work of the Interlaken and Bonn–Berlin Processes, it focused on the best ways of implementing and monitoring targeted sanctions. The Stockholm Process emphasized that in order to prevent arms transfers to conflict regions, there is need for a comprehensive approach that considers targeted sanctions as part of a broader coordinated political and diplomatic strategy.

From this initiative, Sweden produced the study *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*,<sup>145</sup> which was presented to the Security Council in early 2003. The guidelines address arms embargoes, financial sanctions, travel bans, aviation bans and targeted trade sanctions. The study indicated that substantial illicit trafficking of arms may occur prior to the imposition of sanctions—which makes it difficult to disrupt established clandestine transfers.<sup>146</sup> Additionally, “trafficking of weapons by air transport has been extremely difficult to identify and detect.”<sup>147</sup> The report suggested that customs services are central in implementation efforts, and may benefit from international cooperation as has been undertaken in efforts to combat the drug trade.<sup>148</sup> The report also

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suggested that states should maintain a “black list” of groups and individuals engaged in illegal trafficking<sup>149</sup> and that states should support the standardization of end-user certificates for arms transfers.<sup>150</sup>

## CONCLUSIONS

This chapter has traced the development of the brokering debate through the UN framework as well as multilateral and regional processes—all of which have made vital contributions to the understanding of brokering activities in SALW. Together, these developments at the international, multilateral, regional and national levels have suggested many potential ways to effectively combat illicit brokering. They include:

**Broadening the scope.** There is a continuing debate on the range of activities included under “brokering activity”. This includes the arrangement of services by intermediaries, as well as by the buyers and sellers, from origin to end-use (including, for example, engaging the services of transport agents, financial agents, and all middlemen or companies involved in negotiating and arranging all aspects of the arms transfer). One of the difficult areas remaining is how to trace and monitor the financial activities associated with brokering. Although the report of the 2001 Group of Governmental Experts suggested that exchange of information on suspect financial activities might be helpful in the control of financing of arms transfers, the issue remains problematic since it is difficult to require licences for individual banking transactions. One option presented by the 2001 Group was to explore how law enforcement agencies could assist in investigating financial transactions related to illicit trafficking.<sup>151</sup>

**Casting the net wider.** Due to the multinational nature of the arms business, the question arises of to what extent legal authority may be extended over brokering activities, for example as regards extraterritorial jurisdiction and third-party transactions. There is also the question of whether controlling brokering activities should cover just SALW or whether it should be extended to cover the brokering of other military items, technology transfers, training services and technical support associated with arms. References to regulating brokering activities in both military and dual-use equipment in sanctions reports<sup>152</sup> provide a basis for considering the option of widening the scope of brokering activities.

**Sanctions and prosecution.** As the complexity of the arms trade has become apparent, the need for flexible yet effective sanctions is becoming clearer. The “name and shame” tactic has been complemented by provisions in regional and multilateral SALW instruments criminalizing the illicit trade in SALW, and in particular illicit brokering. The question is how legal action can be taken at the international level against unscrupulous arms dealers and their activities.

The complicated scope of brokering activities necessitates responses developed through international cooperation. It is within the security interests of all states to adopt common international standards to effectively address the issue of brokering as a contribution to the wider objective of preventing illicit SALW trafficking.

#### Notes

- 1 See Annex for a list of selected documents.
- 2 A UN Advisory Mission visited Mali in 1994, and Burkina Faso, Chad, Côte d’Ivoire, Mauritania, Niger and Senegal the following year.
- 3 See General Assembly resolutions 46/36 H of 6 December 1991, 47/52 G and 47/52 J of December 1992, and 48/75 H and 48/75 J of 16 December 1993.
- 4 General Assembly, *Assistance to States for Curbing the Illicit Traffic in Small Arms and Collecting Them*, A/RES/49/75 G, 15 December 1994, para. 7.
- 5 *Ibid.*, para. 5. The same request was made in A/RES/50/70 H, 15 January 1996.
- 6 The report of the Disarmament Commission was submitted in 1996. The report included guidelines for international arms transfers. See General Assembly, *Report of the Disarmament Commission*, UN document A/51/42, 22 May 1996, para. 39 and annex I.
- 7 *Ninth United Nations Conference on the Prevention of Crime and the Treatment of Offenders*, UN document A/CONF.169/16/Rev.1, 29 April–8 May 1995, § 1(l)(4).
- 8 Security Council, UN document S/RES/1013 (1995), 7 September 1995.
- 9 Non-governmental organizations published several reports that brought international attention to the illicit trafficking of arms, in

particular to those who supplied the perpetrators of the Rwandan genocide. See, for example, Human Rights Watch, "Arming Rwanda: The Arms Trade and Human Rights Abuses in the Rwandan War", 1994; and Kathi Austin, *Rearming With Impunity: International Support for the Perpetrators of the Rwandan Genocide*, Human Rights Watch, 1995.

- <sup>10</sup> Security Council, UN document S/RES/918 (1994), 17 May 1994.
- <sup>11</sup> In 1995, the United Nations Security Council suspended the application of the arms embargo to the Government of Rwanda if items were shipped through specified points of entry, and later terminated the application of these restrictions on sales or supplies to the Government of Rwanda. See Security Council, UN document S/RES/1011 (1995), 16 August 1995, para. 7–9.
- <sup>12</sup> Security Council, UN document S/RES/1013 (1995), 7 September 1995, para. 1.
- <sup>13</sup> See Security Council documents S/1996/67, S/1996/195, S/1997/1010 and S/1998/63.
- <sup>14</sup> Security Council, UN document S/RES/1161 (1998), 9 April 1998; the Commission's mandate was not substantially altered. It produced the following reports: Security Council, *Interim Report of the International Commission of Inquiry (Rwanda)*, UN Document S/1998/777, 19 August 1998; and Security Council, *Final Report of the International Commission of Inquiry (Rwanda)*, UN document S/1998/1096, 18 November 1998.
- <sup>15</sup> For example, see Security Council, *Final Report of the International Commission of Inquiry (Rwanda)*, UN document S/1998/1096, 18 November 1998, para. 27 and 68; and Security Council, *Interim Report of the International Commission of Inquiry (Rwanda)*, UN Document S/1998/777, 19 August 1998, para. 43.
- <sup>16</sup> Security Council, *Final Report of the International Commission of Inquiry (Rwanda)*, UN document S/1998/1096, 18 November 1998, para. 106; Security Council, *Third report of the International Commission of Inquiry (Rwanda)*, UN document S/1997/1010, 24 December 1997, para. 31 and 90.
- <sup>17</sup> *Ibid.*, para. 24 and 27.
- <sup>18</sup> See Security Council, UN document S/1996/195, 14 March 1996, especially para. 21–39 and 41–45.
- <sup>19</sup> Security Council, *Interim Report of the International Commission of Inquiry (Rwanda)*, UN Document S/1998/777, 19 August 1998, para. 31.



- <sup>20</sup> Security Council, *Third Report of the International Commission of Inquiry (Rwanda)*, UN document S/1997/1010, 24 December 1997, para. 62.
- <sup>21</sup> Security Council, *Report of the International Commission of Inquiry (Rwanda)*, UN document S/1996/195, 14 March 1996.
- <sup>22</sup> Security Council, UN document S/RES/1053 (1996), 23 April 1996, para. 9.
- <sup>23</sup> Security Council, UN document S/RES/1209 (1998), 19 November 1998, para. 9.
- <sup>24</sup> General Assembly, *Report of the Disarmament Commission*, UN document A/51/42(SUPP), 22 May 1996, para. 39 (endorsed by General Assembly, UN document A/RES/51/47 B, 8 January 1997). Also in the 1996 Report of the Disarmament Commission, as part of the list (prepared by the Secretariat) of possible items to be included in the agenda of the Disarmament Commission, is the need for a comprehensive study on activities of illegal arms dealers. See *ibid.*, annex III(II).
- <sup>25</sup> General Assembly, UN document A/52/298, 27 August 1997; and General Assembly, UN document A/54/258, 19 August 1999.
- <sup>26</sup> General Assembly, UN document A/52/298, 27 August 1997, para. 80(l). In addition, para. 80(g) recommends that: "The United Nations should urge relevant organizations, such as the International Criminal Police Organization (Interpol) and the World Customs Organization, as well as all States and their relevant national agencies, to closely cooperate in the identification of the groups and individuals engaged in illicit trafficking activities, and the modes of transfer used by them ... ."
- <sup>27</sup> General Assembly, UN document A/54/258, 19 August 1999, para. 113.
- <sup>28</sup> General Assembly, UN document A/52/298, 27 August 1997.
- <sup>29</sup> General Assembly, UN document A/RES/53/77 E, 12 January 1999.
- <sup>30</sup> General Assembly, UN document A/54/258, 19 August 1999, para. 103.
- <sup>31</sup> General Assembly, UN document A/RES/54/54 V, 10 January 2000, para. 14 (a), (b).
- <sup>32</sup> *Ibid.*
- <sup>33</sup> Security Council, UN document S/RES/864 (1993), 15 September 1993. Subsequently, embargoes have been imposed on non-state actors in Afghanistan (S/RES/1333, S/RES/1390 and S/RES/1617), the Democratic Republic of the Congo (S/RES/1493), Liberia (S/RES/788),

- Rwanda (S/RES/918 and S/RES/997), Sierra Leone (S/RES/1132) and Sudan (S/RES/1556). Since it is easier for armed groups, particularly of transnational nature, to elude effective monitoring and sanctions, an embargo imposed on them places a larger responsibility on the broker or exporting state to ensure that arms embargoes are respected.
- <sup>34</sup> Security Council, UN document S/RES/1127 (1997), 28 August 1997; and Security Council, UN document S/RES/1173 (1998), 12 June 1998.
- <sup>35</sup> Security Council, UN document S/RES/1237 (1999), 7 May 1999.
- <sup>36</sup> Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000.
- <sup>37</sup> Security Council, UN document S/RES/1295 (2000), 18 April 2000.
- <sup>38</sup> Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000.
- <sup>39</sup> Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000, para. 53.
- <sup>40</sup> Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000.
- <sup>41</sup> *Ibid.*, para. 18, 20, 34.
- <sup>42</sup> *Ibid.*, para. 20, 35; paragraph 36 also points to allegations of false end-user certificates from Zambia.
- <sup>43</sup> Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000, para. 49(a) and (c), also see para. 39 and 48.
- <sup>44</sup> Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000, para. 21, 41.
- <sup>45</sup> *Ibid.*, para. 21.
- <sup>46</sup> Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000, para. 53 and 226.
- <sup>47</sup> *Ibid.*, para. 228, 229 and 231.
- <sup>48</sup> *Ibid.*, para. 29.
- <sup>49</sup> In general, responsibility for issuing end-user certificates for the importation of arms falls under the auspices of the Minister of Defence.
- <sup>50</sup> Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, UN document S/2000/1225, 21 December 2000, para. 227.

- 51 Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000, para. 18.
- 52 Ibid.
- 53 Ibid., para. 29.
- 54 Ibid., para. 136.
- 55 Ibid., para. 15.
- 56 Ibid., para. 77.
- 57 Ibid.
- 58 Ibid.
- 59 Ibid., para. 16.
- 60 Security Council, UN document S/RES/1295 (2000), 18 April 2000, para. 8.
- 61 *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled "Small Arms"*, UN Document A/CONF.192/PC/33, 12 March 2001.
- 62 *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled "Small Arms"*, UN Document A/CONF.192/2, 11 May 2001, Annex I.
- 63 General Assembly, *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime*, UN document A/RES/55/255, 8 June 2001, art. 15.
- 64 *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, § II (14).
- 65 Ibid., § II(15) and (32).
- 66 Ibid., § IV(1)(d).
- 67 General Assembly, UN document A/RES/58/241, 9 January 2004, para. 11.
- 68 The UN Department for Disarmament Affairs was entrusted with the task of conducting consultations and drafting the Report of the Secretary-General.
- 69 For more information, see <<http://disarmament2.un.org/cab/salw-brokering.html>>.
- 70 General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General*, UN document A/59/2005, 21 March 2005, para. 120.
- 71 General Assembly, UN document A/RES/60/81, 11 January 2006, para. 2.

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- <sup>72</sup> *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, preamble. The text of the Instrument can be found in General Assembly, UN document A/60/88, 27 June 2005.
- <sup>73</sup> Elli Kytömäki and Valerie Yankey-Wayne, *Five Years in Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports*, United Nations Institute for Disarmament Research, 2006, p. xxii.
- <sup>74</sup> Ibid.
- <sup>75</sup> EU Presidency, statement at the UN Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York City, 27 June 2006.
- <sup>76</sup> General Assembly, UN document A/RES/59/86, 10 December 2004, operative paragraph 5.
- <sup>77</sup> General Assembly, UN document A/61/288, 23 August 2006, para. 9.
- <sup>78</sup> *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa. Report of the Secretary-General*, UN Document A/52/871-S/1998/318, 13 April 1998, para. 25.
- <sup>79</sup> Security Council, UN document S/RES/1467 (2003), 18 March 2003, annex (f).
- <sup>80</sup> Security Council, *Letter Dated 21 March 2006 from the Panel of Experts on the Sudan Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1591 (2005) Concerning the Sudan*, UN document S/2006/250, 19 April 2006, recommendation 4, para. 61.
- <sup>81</sup> Ibid.
- <sup>82</sup> Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000, para. 55.
- <sup>83</sup> Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Document S/2001/1015, 26 October 2001, para. 27. Security Council, *Final Report of the International Commission of Inquiry (Rwanda)*, UN document S/1998/1096, 18 November 1998, para. 106.
- <sup>84</sup> Security Council, *Report of the Panel of Experts on Somalia pursuant to Security Council resolutions 1425 (2002)*, UN document S/2003/223, 25 March 2003, para. 187.

- <sup>85</sup> Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Document S/2001/1015, 26 October 2001, para. 9.
- <sup>86</sup> Security Council, *Letter Dated 14 December 2000 from the Chairman and the Members of the Panel of Experts on Sierra Leone Diamonds and Arms, Appointed Pursuant to Security Council Resolution 1306 (2000), Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1132 (1997) Concerning Sierra Leone*, UN document S/2000/1195, 20 December 2000, para. 255.
- <sup>87</sup> *Ibid.*, para. 256.
- <sup>88</sup> *Ibid.*, para. 268.
- <sup>89</sup> Security Council, *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Document S/2001/1015, 26 October 2001, para. 12.
- <sup>90</sup> *Ibid.*, para. 13.
- <sup>91</sup> Security Council, *Letter Dated 14 December 2000 from the Chairman and the Members of the Panel of Experts on Sierra Leone Diamonds and Arms, Appointed Pursuant to Security Council Resolution 1306 (2000), Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1132 (1997) Concerning Sierra Leone*, UN document S/2000/1195, 20 December 2000, para. 257.
- <sup>92</sup> *Ibid.*, para. 260.
- <sup>93</sup> *Ibid.*, para. 261.
- <sup>94</sup> Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000, para. 53.
- <sup>95</sup> Security Council, *Letter Dated 4 January 2005 from the Group of Experts on Democratic Republic of the Congo Addressed to the Chairman of the Security Council Committee Established Pursuant to Resolution 1533 (2004)*, UN document S/2005/30, 25 January 2005. See recommendation regarding Democratic Republic of the Congo and Uganda in paragraph 246.
- <sup>96</sup> However, in an effort to evade financial sanctions, illicit traffickers sometimes use alternative mechanisms for payment, such as rough diamonds. Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000, para. 128.
- <sup>97</sup> Security Council, *Report of the Panel of Experts on Somalia pursuant to Security Council resolutions 1425 (2002)*, UN document S/2003/223, 25 March 2003, para. 188.

- <sup>98</sup> Security Council, *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN document S/2000/203, 10 March 2000, para. 128.
- <sup>99</sup> *Ibid.*, para 131.
- <sup>100</sup> Security Council, *Report of the Panel of Experts on Somalia pursuant to Security Council resolutions 1425 (2002)*, UN document S/2003/223, 25 March 2003, para. 189.
- <sup>101</sup> Security Council, *Final Report of the International Commission of Inquiry (Rwanda)*, UN document S/1998/1096, 18 November 1998, para. 90.
- <sup>102</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004.
- <sup>103</sup> Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005, § 3.2.1.
- <sup>104</sup> Wassenaar Arrangement, *Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)*, 2003, para. 2(3).
- <sup>105</sup> Wassenaar Arrangement, *Elements for Effective Legislation on Arms Brokering*, 2003, para. 1.
- <sup>106</sup> This could be done after consultation among State A and State B. See Organization for Security and Co-operation in Europe, *Handbook of Best Practices on Small Arms and Light Weapons*, 2003, chp. 4, p. 13.
- <sup>107</sup> Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005, § 3.2.4(b).
- <sup>108</sup> Organization for Security and Co-operation in Europe, *OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*, document FSC.DEC/7/04, 7 December 2004, § IV(1).
- <sup>109</sup> Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006, art. 6(2–4). Brokering activities (stipulated in article 20) are also assessed under article 6 of the Convention.
- <sup>110</sup> *Ibid.*, art. 20(5).
- <sup>111</sup> *Ibid.*, art. 5 and 6.
- <sup>112</sup> The Wassenaar Arrangement, *Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)*, 12 December 2002, introductory paragraphs.

- <sup>113</sup> Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, 2003/468/CFSP, 23 June 2003, art. 3.
- <sup>114</sup> Organization for Security and Co-operation in Europe, *Handbook of Best Practices on Small Arms and Light Weapons*, 2003, chp. 4, p. 4.
- <sup>115</sup> *Ibid.*, p. 15.
- <sup>116</sup> Organization for Security and Co-operation in Europe, *OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*, document FSC.DEC/7/04, 7 December 2004, § IV(2); OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004, art. 4(5).
- <sup>117</sup> Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006, art. 20(3); and Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005, § 3.2.4(d).
- <sup>118</sup> Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005; § 3.2.4(c).
- <sup>119</sup> *Ibid.*
- <sup>120</sup> Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006, art. 20(3).
- <sup>121</sup> Organization for Security and Co-operation in Europe, *Handbook of Best Practices on Small Arms and Light Weapons*, 2003, chp. 4, p. 14.
- <sup>122</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004, art. 3.
- <sup>123</sup> Organization for Security and Co-operation in Europe, *Handbook of Best Practices on Small Arms and Light Weapons*, 2003, chp. 4, p. 14.
- <sup>124</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal,

- Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004, para. 6 (a) and (b).
- <sup>125</sup> Economic Community of West African States, *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*, 14 June 2006, art. 20(1); the *Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa*, 21 April 2004, art. 11(1).
- <sup>126</sup> Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, 2003/468/CFSP, 23 June 2003, art. 3.
- <sup>127</sup> The *Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa*, 21 April 2004, art. 7(d).
- <sup>128</sup> Southern African Development Community, *Protocol on the control of Firearms, Ammunition and Other Related Material in the Southern African Development Community (SADC) Region*, 14 August 2001.
- <sup>129</sup> Organization for Security and Co-operation in Europe, *Handbook of Best Practices on Small Arms and Light Weapons*, 2003, chp. 4, p. 5.
- <sup>130</sup> Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, 2003/468/CFSP, 23 June 2003, art. 2(1).
- <sup>131</sup> The Wassenaar Arrangement, *Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)*, 12 December 2002, para. 1.
- <sup>132</sup> OAS “Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition”, approved by the Inter-American Drug Abuse Control Commission (CICAD), held in Montreal, Canada, November 17–20, 2003, CICAD/doc1271/03, and adopted by the OAS General Assembly in June 2004.
- <sup>133</sup> Organization for Security and Co-operation in Europe, *OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*, document FSC.DEC/7/04, 7 December 2004.
- <sup>134</sup> Organization for Security and Co-operation in Europe, *Handbook of Best Practices on Small Arms and Light Weapons*, 2003, chp. 4, p. 4.
- <sup>135</sup> *Ibid.*, p. 19.
- <sup>136</sup> This meeting coincided with the publication of *The Arms Fixers*, which was sponsored by the Norwegian Ministry of Foreign Affairs. Brian Wood and Johan Peleman, *The Arms Fixers: Controlling the Brokers and Shipping Agents*, Peace Research Institute of Oslo, the Norwegian Initiative on Small Arms Transfers and the British American Security Information Council, 1999.



- <sup>137</sup> See International Action Network on Small Arms, *The Second Oslo Meeting on Small Arms and Light Weapons (Oslo II)*, 6–7 December 1999. *Elements of a Common Understanding*, 2000.
- <sup>138</sup> See Norwegian Initiative on Small Arms Transfers, “Conference Report”, *Dutch–Norwegian Initiative on Further Steps to Enhance International Co-operation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons*, Oslo, 23–24 April 2003. Additionally, the Netherlands and Norway—along with Germany—submitted a proposal for an instrument on brokering to the OSCE, which resulted in the OSCE Principles on controlling brokering in 2004.
- <sup>139</sup> Thomas Biersteker, Sue Eckert, Peter Romaniuk et al., *Targeted Financial Sanctions: A Manual for Design and Implementation*, The Thomas J. Watson Jr. Institute for International Studies, Brown University, 2001, p. xi.
- <sup>140</sup> *Ibid.*
- <sup>141</sup> *Ibid.*, p. 90.
- <sup>142</sup> *Ibid.*, p. 92.
- <sup>143</sup> Michael Brzoska (ed.), *Design and Implementation of the Arms Embargoes and Travel and Aviation Related Sanctions: Results of the Bonn–Berlin Process*, Bonn International Center for Conversion, 2001. See also Ken Epps, “International Arms Embargoes”, Project Ploughshares, working paper 02-4, 2002.
- <sup>144</sup> Michael Brzoska (ed.), *Design and Implementation of the Arms Embargoes and Travel and Aviation Related Sanctions: Results of the Bonn–Berlin Process*, Bonn International Center for Conversion, 2001, p. 13.
- <sup>145</sup> Peter Wallensteen, Carina Staibano and Mikael Eriksson (eds), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, Department of Peace and Conflict Research, Uppsala University, 2003.
- <sup>146</sup> *Ibid.*, para. 327.
- <sup>147</sup> *Ibid.*, para. 327.
- <sup>148</sup> *Ibid.*, para. 387.
- <sup>149</sup> *Ibid.*, para. 175.
- <sup>150</sup> *Ibid.*, para. 332.
- <sup>151</sup> *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled “Small Arms”*, UN Document A/CONF.192/2, 11 May 2001, para. 78.

- <sup>152</sup> For example, the Sanctions Committee on Côte d'Ivoire (November 2005) raised questions on considering dual-use equipment such as trucks, Land Cruisers and helicopters. See Security Council, *Report of the Group of Experts Submitted Pursuant to Paragraph 7 of Security Council Resolution 1584 (2005) Concerning Côte d'Ivoire*, UN document S/2005/699, 7 November 2005, para. 87–157.



## ANNEX

### SELECTED RELEVANT DOCUMENTS

#### UNITED NATIONS GENERAL ASSEMBLY DOCUMENTS\*

*The Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/RES/60/81, 11 January 2006.

*The Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/RES/59/86, 10 December 2004.

*The Illicit Trade in Small Arms and Light Weapons in All its Aspects*, UN document A/RES/58/241, 9 January 2004.

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## ACRONYMS

|          |   |
|----------|---|
| ANC      | <i>Armée nationale congolaise</i>   |
| APEC     | Asia–Pacific Economic Cooperation   |
| ASEAN    | Association of Southeast Asian Nations  |
| AUC      | <i>Autodefensas Unidas de Colombia</i> (United Self-Defence Forces of Colombia) |
| CARICOM  | Caribbean Community   |
| CASA     | United Nations Coordinating Action on Small Arms                                |
| CDIU     | Dutch Central Department for Import and Export Licenses                         |
| CICAD    | Inter-American Drug Abuse Control Commission                                    |
| CPA      | US Coalition Provisional Authority  |
| DDA      | United Nations Department for Disarmament Affairs                               |
| DoD      | US Department of Defense  |
| DRC      | The Democratic Republic of the Congo  |
| DVC      | delivery verification certificate   |
| EAW      | European Arrest Warrant   |
| ECOWAS   | Economic Community of West African States                                       |
| EU       | European Union  |
| EUC      | end-user/end-use certificate  |
| FIOD-ECD | Dutch Fiscal and Economic Investigation Services                                |
| GGE      | Group of Governmental Experts   |
| GRIP     | <i>Groupe de recherche et d'information sur la paix et la sécurité</i>          |
| IATA     | International Air Transport Association   |
| ICAO     | International Civil Aviation Organization                                       |
| ICC      | International Criminal Court  |
| IIC      | international import certificate  |
| Interpol | International Criminal Police Organization                                      |
| LURD     | Liberians United for Reconciliation and Democracy                               |
| MANPADS  | man-portable air defence system   |
| MEICO    | Military Export Import Company of Albania                                       |
| MERCOSUR | Southern Common Market  |
| MIBA     | <i>Société Minière de Bakwanga</i>  |
| OAS      | Organization of American States   |
| OSCE     | Organization for Security and Co-operation in Europe                            |
| OSI      | Open Society Initiative   |

|        |   |
|--------|---|
| OTC    | Oriental Timber Company   |
| PoA    | Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects |
| RCD    | Rally for Congolese Democracy   |
| RECSA  | Regional Centre on Small Arms and Light Weapons   |
| RUF    | Revolutionary United Front  |
| SADC   | Southern African Development Community  |
| SALW   | small arms and light weapons  |
| SEESAC | South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons                            |
| UN     | United Nations  |
| UNICOI | United Nations International Commission of Inquiry on arms flows to the perpetrators of the Rwandan genocide              |
| UNIDIR | United Nations Institute for Disarmament Research   |
| UNITA  | <i>União Nacional Para a Independência Total de Angola</i><br>(National Union for the Total Independence of Angola)       |
| WCO    | World Customs Organization  |