

## CHAPTER 3

### SANCTIONS AND ENFORCEMENT

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#### 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

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>

### 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/oss/sanction.htm](http://www.un.org/News/oss/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.
- <sup>53</sup> Germany, *Zweite Verordnung zur Durchführung des Gesetzes über die Kontrolle von Kriegswaffen*, [BGBl I 1961, 649], 1 June 1961, art. 5.
- <sup>54</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. 19.
- <sup>55</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>56</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. 20.
- <sup>57</sup> *Ibid.*
- <sup>58</sup> Landgericht Mannheim, judgement of 19 September 2003, case number 22 KLs 626 Js 7671/02.
- <sup>59</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>60</sup> Loretta Bondi and Elise Keppler, *Casting the Net? The Implications of the U.S. Law on Arms Brokering*, The Fund for Peace, 2001.
- <sup>61</sup> Information kindly provided by Loretta Bondi, who obtained the data in April–May 2006 from the US Department of State.
- <sup>62</sup> Interview with official of the US Department of State, March 2006.
- <sup>63</sup> Interviews with law enforcement officials of the Netherlands, Germany and the United States, March–June 2006.
- <sup>64</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>65</sup> Security Council, "Security Council Committee on Liberia Updates Assets Freeze List", UN press release SC/8570, 1 December 2005.
- <sup>66</sup> Douglas Farah and Kathi Austin, "Victor Bout and the Pentagon", *The New Republic*, 12 January 2006.
- <sup>67</sup> See <[www.interpol.int/Public/ICPO/FactSheets/GI02.pdf](http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf)>.
- <sup>68</sup> 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)>.