

Curbing illicit brokering in WMD-related items: solutions in the making

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Illicit brokering of arms and sensitive dual-use technology has been an elusive loophole in the international non-proliferation system for decades. The globalized marketplace would grind to a halt without the legitimate services a broker provides, but thus far there is no international instrument that separates licit from illicit brokering activities, and conflicts continue to be fuelled by arms and weapons systems provided with the aid of brokers, who can operate fairly freely just by avoiding stricter jurisdictions. State and non-state actors in pursuit of weapons of mass destruction (WMD) capabilities obtain sensitive technologies through the use of elaborate networks of brokers, whose knowledge allows them to circumvent the export control requirements of individual countries through means that are not necessarily illegal.

In recent years, the international community has increasingly focused on the activities of arms brokers. United Nations reports on the embargo-busting activities of brokers in Rwanda and Angola in the 1990s helped the international community move toward the 2001 UN Programme of Action to Prevent, Combat and Eradicate the Illicit trade in Small Arms and Light Weapons in All Its Aspects, which includes requirements for brokering controls.¹ However, these efforts are limited to brokering in small arms and light weapons (SALW), and Member States have been slow to implement even these.

When discussing efforts regarding the control of brokering of so-called dual-use products, the debate gets more complex. A dual-use product is an item that has a civilian use, but could potentially be used for military purposes. Sophisticated ventilation filters used in a pharmaceutical laboratory could just as easily be used in the production of a biological weapon. Protective suits for firefighters battling a chemical fire could just as well be used to protect the individual producing a chemical weapon. Both the filter and the protective suit illustrate how the export control of dual-use items is more complicated, as more scrutiny has to be directed at the end-user than at the item itself. There is a vast legitimate market for dual-use products—the previously mentioned filter enables the production of drugs that save lives—but at the same time there is a need to safeguard products from the potential military use they can have. The existence of the legitimate market makes it easier for proliferators to hide the intended end use of the item, particularly as the military use is often far from obvious. The challenge of determining the military end use and the presence of a fully legitimate market severely impact the fledgling efforts to tackle illicit brokering of dual-use goods. The world needs to address illicit brokering in a comprehensive way, focusing on the activity rather than the commodity.

A handful of countries have enacted controls for brokering activities. Attempts have also been made on a regional and multilateral level to put in place guidelines for brokering. But no equivalent has yet been established at the international level: there are no common standards and guidelines for

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the profession, so illicit activities continue and legitimate brokers are put in the same unfavorable light as illicit brokers.

The situation is, however, changing. On 12 January 2009 the United Nations General Assembly adopted resolution 63/67 to prevent and combat illicit brokering activities: a truly international step was taken. Resolution 63/67 provides a tool to reach further and aim higher: it calls upon Member

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States to “establish appropriate national laws and/or measures to prevent and combat the illicit brokering of conventional arms and of materials, equipment and technology that could contribute to the proliferation of weapons of mass destruction and their means of delivery”.² This is the first time the whole concept of brokering has

been addressed on an international level. Addressing the whole concept, regardless of the commodity, opens up opportunities for taking a comprehensive approach to attacking the grey zones in the global marketplace. It will be easier to identify bad actors by giving the legitimate brokering profession a legitimate framework to manoeuvre within.

The starting point: the brokering business

Brokering can be defined as the activity of facilitating a business transaction between two or more partners without necessarily being in possession of the goods in question. As is the case in any sector of globalized trade, brokers play an essential role in a well-functioning system. Brokers facilitate the movement of items from one place to another, provide on-the-ground knowledge and essential networks of contacts. Through the efforts of brokers, items can reach new markets that otherwise would have problems accessing the goods. The broker or agent usually provides the necessary field expertise to smooth the way for various business transactions. This is true both for licit and illicit trade. It is particularly important when discussing the trade in arms and in strategically sensitive dual-use products.

The potential consequences of illicit brokering in both arms and dual-use products are obvious. Two recent and notorious cases, involving gunrunning operations in Africa and the spread of nuclear weapons technology, illustrate the challenges that illicit brokering poses.

The Viktor Bout case: the original Lord of War or a legitimate businessman?

Viktor Bout’s story has many chapters, some still being written. It illustrates how easy it can be for an arms broker to avoid penalties and sanctions simply by avoiding certain jurisdictions. The case reveals some of the grey shades in the market where brokers such as Viktor Bout operate.

With the end of the Cold War the world was flooded with excess military and dual-use equipment originating from the former Soviet Union and Warsaw pact countries. As the Soviet Union disintegrated, control functions were not the top priorities of the successor states: effectively monitoring supplies, production and transport routes during this tumultuous period proved impossible, and military supplies were easily obtained by private individuals.³

At the same time, the incentive to obtain these stockpiles had grown. The change in the geopolitical power structure meant that many countries in all parts of the world were left to fend for themselves. Regional and ethnic strife that had been kept under a tight lid during the Cold War now boiled over.⁴ An unprecedented access to supplies met increasing demand, creating a volatile situation. In combination with very limited outside monitoring, regional and domestic tensions rose, from the western Balkans to Liberia.⁵

This situation also gave rise to a new generation of entrepreneurs, adept at taking advantage of opportunities wherever they materialized. One of these men was Viktor Bout. Little is definitively known about Viktor Bout, including his birthplace and even the spelling of his name. Most likely born in what is now Tajikistan, Bout served as a translator in the Soviet Military Intelligence service, the GRU. Upon leaving the GRU, Bout obtained surplus military aircraft in order to set up a fleet of planes ready to provide air freight services to whoever needed it.⁶ Viktor Bout's air freight empire grew from a small operation to an enterprise that at its peak involved more than 50 aircraft—a larger fleet than some countries possess.⁷

The first line of business for Bout was general transport: aid supplies, peacekeeping troops, even flowers. But he was soon making a name for himself in the lucrative business of supplying arms. One of his more notorious clients was the former president of Liberia, Charles Taylor. But Viktor Bout was also referred to as a major arms dealer in other areas—it is claimed he sometimes supplied both sides of a conflict.⁸

On 26 April 2005 the US Treasury Department issued a statement that tried to describe the vast business network of Viktor Bout. Over 30 companies were involved in the network, including Air Cess, Bout's main operational entity, established in Belgium in 1996 but registered in Monrovia, Liberia.⁹ US Presidential Executive Order 13348 placed Viktor Bout and his companies under the same prohibitive measures as other entities connected to Charles Taylor.¹⁰

Viktor Bout's operations themselves had the character of a dual-use item—sometimes using his fleet for civilian purposes, sometimes for military. He supplied arms for diamonds in Sierra Leone.¹¹ In 2000 the United Nations mentioned his name in the context of sanctions violations.¹² In 2003 his fleet was allegedly hired to fly supplies to Iraq for the United States.¹³ The United Nations used his services for transporting aid to Somalia, and to Sri Lanka after the tsunami of 26 December 2004.¹⁴ However, in March 2008 Bout travelled to Thailand allegedly to broker a deal to supply weapons to the Fuerzas Armadas Revolucionarias de Colombia, or FARC, a Colombian guerilla faction.¹⁵ Instead he found himself the target of a sting operation and was arrested. Bout claims to be wrongfully accused.¹⁶ On 11 August 2009 a criminal court in Bangkok, Thailand rejected the US request to have Viktor Bout extradited, stating that the US charges would not be applicable to Thai law. The prosecution has filed an appeal against the decision.¹⁷

The Asher Karni case: trading in sensitive nuclear technology

Asher Karni is an Israeli citizen who lived and operated in South Africa for over twenty years. In January 2004 he was arrested at Denver airport in the United States for facilitating the re-export of US-made spark gaps from South Africa to Pakistan. Spark gaps are sophisticated electronic devices that have a fully legitimate civilian use in medicine, but can also be used to detonate a nuclear weapon.

Karni has a military background, and in the early 2000s he started working for the South African company Eagle Technology, which specializes in providing electronic equipment to both military and civilian customers. At the same time Karni developed private business connections—which allegedly led to his dismissal from Eagle Technology¹⁸—and established his own company, Top-Cape Technology. In mid-2002 the Chief Executive Officer of the Pakistani company Pakland PME Corporation, Humayun Khan, contacted Karni with a request that he purchase export-controlled oscilloscopes from a US company. Oscilloscopes are a type of measuring equipment that can display the time and voltage values of an electrical signal—they can be used to provide data on the safety, reliability, deliverability and yield of a nuclear weapon.¹⁹ Khan reportedly acted as an agent in Pakistan, and had previously procured similar controlled oscilloscopes on an export licence from the United States.²⁰ This time he chose to contact Karni in South Africa, stating that “a careful approach” was needed as the goods

were controlled.²¹ After receiving the orders from Khan, Karni made inquiries at different suppliers. He soon learned that US-origin goods that required a licence to be shipped from the United States to Pakistan could move freely to South Africa.²² To avoid suspicion about the goods' true final destination, Karni chose to involve brokers in the United States to purchase the controlled products from the manufacturers. These brokers would ship the goods via an air freight company to Top-Cape in South Africa, where Karni would later re-export them to Pakistan using another air freight company.²³ The payment was to be transferred from Pakistan to the United States, relayed via South Africa.

In June 2003 Khan contacted Karni again with a request that he arrange the purchase of triggered spark gaps via a US-owned sales agent in France. Khan advised Karni not to disclose the end destination.²⁴ After his initial contact with Polytec, the French sales representative of PerkinElmer, Karni learned that the triggered spark gaps would need an export licence when shipped from France.²⁵ Karni then allegedly contacted another company, Giza Technologies, in Secaucus, New Jersey, United States. On 1 August 2003 Giza Technologies placed an order with PerkinElmer for 200 GP-20B triggered spark gaps, stating that they were shipping the items to a hospital in Johannesburg, South Africa.²⁶ The spark gaps were to be transported to South Africa in three shipments in late 2003.²⁷ On arrival in South Africa Karni sent the goods onward to AJKMC Lithography [sic] Aid Society—a possible front company, given that triggered spark gaps have no use in any type of printing process. South African and US authorities were alerted by an anonymous tip-off and a sting operation was launched with the assistance of PerkinElmer. Authorities on both sides of the Atlantic were able to track the items, which had been rendered useless by PerkinElmer, on their path within the United States, by air to South Africa, from there on to Dubai in the United Arab Emirates, to their arrival in Pakistan. Just as with the purchase of the oscilloscopes, Asher Karni's South African company Top-Cape served as a relay station between the producer and procurer. Having allegedly circumvented the requirement to pursue an export licence, and aided his Pakistani counterpart to hide where the goods were actually going, Karni was arrested and charged. He pled guilty to five felony charges, including conspiring to sell controlled nuclear technology to Pakistan, and was sentenced to three years in federal prison in 2005.²⁸ In addition he has been put under a ten-year export ban until 2015 by the US Department of Commerce, preventing him and any of his associates from participating, indirectly or directly, in any transaction involving any regulated commodity, software or technology exported or to be exported from the United States.²⁹

LESSONS LEARNED

In the court documents related to Karni's trial and the prosecution of his Pakistani contact there are several references to Karni's client asking him to be careful, discreet and not to disclose the true destination of the goods.³⁰ Asher Karni served as a middleman, and an effective one. Suspicions were raised because of the complicated trade routes, the hesitation to pursue orders when the requirement for a licence was raised, and the fact that the goods appeared not to fit the intended use (triggered spark have no use in lithography or printing).³¹ Despite these leads, Karni's unquestionable skills of navigating between different jurisdictions would have kept him in business if South African and US authorities had not been tipped off.³²

The entry point to the illicit market is often where there is a gap in controls.

The cases of Bout and Karni are different in nature but share some important similarities. Both involve multilayered procurement processes, actors operating outside of the exporting country's jurisdiction, and complicated trade routes. Karni, who obviously violated US law, could still avoid being prosecuted by staying clear of US jurisdictional territory. The cases demonstrate that the entry point to the illicit market is often where there is a gap in controls, such as where the same type of product requires a different kind of licence depending on the destination. They also show

that where globalization has created new routes for legal trade, illicit trade has followed. All kinds of commodities use the same routes and are often exchanged for one other: arms are traded for blood diamonds, humans for drugs.³³ Finally, the cases highlight how monitoring illicit trade has grown increasingly difficult due to the complexity of the market and the plethora of actors now associated with brokering, from financing to freight forwarding. There is clearly an urgent need for new regulatory instruments that can be introduced into more jurisdictions, thereby avoiding illicit brokers shopping for less restrictive places for operation.³⁴

Actions taken: leading by example?

The Wassenaar Arrangement—a multilateral export control regime for arms and conventional dual-use products—attempted concrete action on brokering several years ago. In December 2002 the Wassenaar Arrangement adopted a Statement of Understanding on Arms Brokerage,³⁵ where participating states agreed to consider registration, licensing and sharing information regarding brokers. This was followed up a year later with a more detailed guide for licensing arms brokering activities.³⁶ However, instruments adopted under the Wassenaar Arrangement are implemented by the individual participating states and their overall efficiency is hard to determine.

At the regional level, the European Union (EU) has adopted several legal instruments to control arms brokering. In 2003 the EU adopted Common Position 2003/468/CFSP calling for European Union member states to “take all the necessary measures to control brokering activities taking place within their territory”.³⁷ The document also encouraged EU member states to consider controlling brokering activities outside of their territory and called for the establishment of an exchange of information on brokering activities.³⁸ It subjects brokering to the European Code of Conduct on Arms Exports. However, the Common Position and the EU Code of Conduct on Arms Exports address only munitions and arms. Furthermore the documents were initially recommendations and lacked a strong legal requirement for implementation.

On 8 December 2008 the European Union adopted Common Position 2008/944/CFSP³⁹ defining common rules governing the control of exports of military technology and equipment. The new common position brings brokering activities and the Code of Conduct within the same—legally binding—regulatory framework. A licensing requirement is now established for brokering, and brokering activities will have to be judged according to the same eight criteria as are applied by the EU Member States to regular arms exports.⁴⁰ Nonetheless, the implementation of the 2008 Common Position remains the responsibility of individual member states, and it will be interesting to see how this instrument will be used in practice.

These initiatives have served their constituents fairly well, but what has been missing is a call for international action with regard to brokering in general. Even more important, very little has thus far been done with regard to dual-use brokering. The adoption of United Nations Security Council resolution 1540 of 28 April 2004 was a breakthrough for a practical export control mandate on an international scale, and one of the first times the need to control brokering of dual-use goods was mentioned in an international forum.⁴¹ The major non-proliferation treaties and conventions such as the Chemical Weapons Convention and the Treaty on the Non-Proliferation of Nuclear Weapons had not prevented some states from pursuing WMD development programmes, and multilateral export control regimes like the Nuclear Suppliers Group (NSG) had failed to prevent both secondary proliferation and state and non-state actors from obtaining sensitive products and technologies: there was a clear need to find new ways to improve the international non-proliferation network. Resolution 1540’s operational paragraphs mandate UN Member States to put in place export control procedures for WMD-related materials and technologies, including controls on brokering in dual-use items.⁴² In the years since the adoption of the resolution many states have worked on getting their

legislation in shape. Resolution 63/67 will address the need for all countries to put in place regulation for all types of brokering activities. However, controlling dual-use brokering still faces a number of significant challenges.

Remaining challenges and solutions

One of the major challenges is *controllability*. A large number of countries and an overwhelming majority of the arms producers in the world already have controls in place for the production and export of arms.⁴³ In such an environment the broker is most likely operating in a restrictive market. That is not the case with a broker of dual-use goods. The legitimate civilian use of the dual-use product means the item has a place in the commercial market and, most likely, in a less restrictive environment. Regardless of a country's legal traditions with regard to trade and export (some consider export as a privilege, others as a right), the free market argument is an issue that will have to be addressed when dealing with dual-use products.

This argument leads to the second general challenge: *identification* of the commodities to be controlled. How will you know if the item you produce and intend to export is controlled or not? It is one thing to control a tank, it is another to control chemicals that could either be used for industrial solvents or in the development of a chemical weapon. You may be aware of safety regulations surrounding this chemical, but the security and proliferation concerns might be more opaque. Larger companies might have the resources to keep track of the whole spectrum of safety and security concerns with regard to their products, but many smaller enterprises may not even know that their product could contribute to a military application. It is likely that some dual-use export control violations can occur purely through lack of awareness. The challenge of identification will have an even stronger impact on the broker, who plays no part in the production of the item and has limited knowledge of the product's capabilities: how will it be possible for this individual to identify a strategically sensitive item, in particular if operating from another country?

Finally, all types of brokering control face the obstacle of *extraterritoriality*. Anyone who has tried to implement export control policies in reality will tell you that once the item has left your jurisdiction it is very difficult to get it back, and even harder to bring people to justice. Some countries have put so-called extraterritoriality clauses in their legislation to facilitate prosecution of export control violations occurring outside of the domestic jurisdiction. But it remains enormously difficult to successfully prosecute a broker in dual-use goods: let us say that a citizen of country X is residing in country Y brokering a deal involving strategically sensitive biochemical technology between countries A and B. How can this individual be brought to justice? Moreover, how can this individual even know that he or she might be violating export control legislation, if the goods in question might at first glance appear purely for civilian use?

One of the more recent attempts to try and tackle these challenges is the recast of the EU regulation for dual-use export control: Council Regulation (EC) 428/2009 was adopted on 5 May 2009 and entered into force at the end of August, setting up a legally binding regime for the control of exports, transfer, brokering and transit of dual-use items.⁴⁴ The regulation has some interesting solutions. To summarize, Article 5(1) specifies that an authorization will be required for the brokering of listed dual-use items if the broker either has "been informed" or "is aware" that the products in question are or may be intended for a WMD purpose. This puts pressure on state authorities and legitimate brokers to exchange information, and opens the way for possible practical implementation. Good communication channels between practitioners in the field and the licensing and enforcement officials will ultimately help to address two of the challenges earlier described: controllability and identification.

What remains to be tackled is the extraterritoriality factor. This can only be solved through a comprehensive international network of controls, where there are no holes between jurisdictions. The important factor to focus on is that illicit brokering *is* controlled, not *how*—regardless of legal tradition and regulatory structure.

THE NEED FOR INFORMATION SHARING

Domestic information sharing between brokers and governmental officials is essential for the effective control of illicit brokering, but so is information sharing on an international, regional and bilateral level. Had South African and US authorities not shared the information they had on the Asher Karni case, Karni would probably still be operating out in the open.

THE NEED FOR KEEPING TRACK

A majority of the bilateral and multilateral initiatives taken so far have included a requirement to register brokers active within the jurisdiction of a state, but can also extend to citizens of that state operating abroad, as well as legal persons registered within the state and operating abroad. This practice has been common in the initiatives regarding conventional and small arms brokering, and could be of use for regulating brokering in general. A universal registration requirement could be a good path to take.

THE NEED TO FIND A BALANCE

Without proper guidance and a sound regulatory framework all brokers are bathed in the same grey light of suspicion. But this is a legitimate profession that global, legitimate trade—regardless of commodity—could not function without. Therefore it is of paramount importance that legitimate brokers operate within well defined rules. What needs to be proliferated therefore is a regulatory framework. General Assembly resolution 63/67 sets the scene by addressing brokering in general without concentrating on the commodity. This is the right way forward but no international instrument, no matter how well crafted, will be effective if it is not implemented. There is a constant ebb and flow of ideas among the non-proliferation community. Whenever the bar of international non-proliferation ideas is raised a little further, it is incumbent on every individual member of the international community to implement these ideas as well as possible, and through that process, to generate new ideas. To solve the problem of illicit brokering we need to translate political mandate to practical, global action.

Notes

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