

FOREWORD

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

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

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

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

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

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EXECUTIVE SUMMARY

INTRODUCTION

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

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

INTERNATIONAL INITIATIVES

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

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

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

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

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

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

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

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

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

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

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

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

DEFINING “ILLICIT ARMS BROKERING”

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

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

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

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

EXISTING NATIONAL SYSTEMS OF LICENSING AND REGISTRATION

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

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

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

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

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

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

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

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

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

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

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

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

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