

# **Expanding the Net: A Model Convention on Arms Brokering**

A Briefing Paper for  
the United Nations Conference  
on the Illicit Trade  
in Small Arms and Light Weapons  
in All Its Aspects

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# EXPANDING THE NET: A MODEL CONVENTION ON ARMS BROKERING

## The Problem

On June 7, 2001, former Argentine President Carlos Menem was arrested in Buenos Aires and charged with leading a conspiracy involving the sale of 6,575 tons of weapons and explosives to Croatia and Ecuador. The shipments were carried out between 1991 and 1995 when Croatia was under a United Nations (U.N.) arms embargo, and Ecuador was engaged in conflict against Peru.<sup>1</sup>

Successful work by the Argentine courts in linking Menem to illicit arms deals mirrors the outcome of cases involving other “excellent arms traffickers” who had been publicly exposed and met retribution between the end of 2000 and mid-2001. In Peru, President Alberto Fujimori and Vladimiro Montesinos, Fujimori’s espionage czar, were forced to flee the country in late 2000 as a result of a vast scandal that reportedly included an illegal diversion of weapons to Colombian rebels.<sup>2</sup> At different latitudes, the direct hand of another sitting head of state, Liberian President Charles Taylor, in arming the embargoed forces of the Revolutionary United Front in Sierra Leone had prompted the U.N. to slap a new round of sanctions against Taylor in January 2001.<sup>3</sup>

These cases reveal well-honed arms smuggling pipelines and networks operated by globe-trotting brokers, transport agents, dealers and assorted facilitators who are equipped to survive the occasional fall from grace and power of their highly-placed sponsors. While changing political tides, as well as magistrates’ and U.N. actions, might have dented the climate of silence, fear and impunity surrounding the ultimate pay-masters of covert arms deals, the supporting cast of middlemen and peddlers has remained largely unscathed and outside the reach of the law. Such operators retain, therefore, the potential to fuel violent conflict in areas where their business can thrive regardless of the cost in innocent civilian lives.<sup>4</sup>

In the Balkans, for example, the longevity and the adaptability of arms networks that had served forces throughout the region’s conflicts in the 1990s, again came into sharp focus shortly on the heels of Menem’s arrest. On June 9, 2001, a commander of ethnic Albanian guerrillas in Macedonia boasted that the rebels had acquired weaponry capable of directly targeting Skopje, the country’s capital, as well as vital infrastructures and facilities around the

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<sup>1</sup> Anthony Faiola, “Argentina’s Menem Held in Arms Sales,” *The Washington Post*, June 8, 2001. See also “Argentine ministers knew arms sales illegal,” Reuters, July 29, 1998, and Fernando Lobardo, “Menemism Faces Its Final Days,” *La Nación*, April 15, 2001 [FBIS Translated Text].

<sup>2</sup> Kathi Austin, *Arms Trafficking: Closing the Net. A Test Case for Prosecution under the U.S. Law on Arms Brokering* (Washington, D.C.: The Fund for Peace, June 2001), pp. 11-17. Fujimori had been sacked by Parliament in November 2000 because he was found “morally unfit,” to rule the country. Tania Mellado, “Peru Panel Says Fujimori Covered Up Drugs Deals,” Reuters, June 14, 2001.

<sup>3</sup> U.N. Security Council, Resolution 1343 (2001), March 7, 2001.

<sup>4</sup> Loretta Bondi and Elise Keppler, *Casting the Net? Implications of the U.S. Law on Arms Brokering* (Washington, D.C.: The Fund for Peace, 2001), pp. 19-21.

city.<sup>5</sup> The rebel commander stated that his forces had access to all the weapons they needed through traders in neighboring countries. In particular, he claimed that the insurgency's arsenals had been replenished by "mafia" elements in Bulgaria, the former Yugoslavia, and Macedonia itself, and that attempts to cut weapons pipelines had failed to deter both the rebel procurers and their suppliers "who recognize money, nothing else."<sup>6</sup>

To be sure, in the post-Cold War period the widespread availability of arms, particularly small arms and light weapons, has contributed to the privatization of conflict, resulting in non-state suppliers and recipients acquiring new levels of power, wealth, and influence. Tragically, the victims of these wars have also been increasingly non-state actors, and the most vulnerable elements of society.<sup>7</sup> It is estimated that there are more than 500 million small arms and light weapons in circulation around the world—one for about every twelve people. Such arms have been the weapons of choice in the vast majority of last decade's conflicts. Four million people, mostly civilians, perished and countless were injured, maimed or forced to leave their homes during so-called small conflicts fought primarily with small arms.<sup>8</sup>

Mounting evidence of the expanded role of arms dealers, brokers and transportation agents in conflicts spanning from Colombia to Angola, from the Balkans to Afghanistan has steadily accumulated during the 1990s.<sup>9</sup> Elusive by definition and skilled in clandestine practices, arms traffickers had, nonetheless, left detectable tracks in their wake so that their deadly stratagems and activities came to the surface. Despite repeated exposés by the press and seminal reports by nongovernmental organizations, the international community has only recently started to identify the traffickers' role in exacerbating conflict and threatening international security.

This slow awakening began largely because of nongovernmental organizations' pressure, and when a U.N. Commission of Inquiry on arms flows to the perpetrators of the Rwandan genocide (known as UNICOI) published its landmark reports between 1996 and 1998.<sup>10</sup> The commission's investigations provided an authoritative understanding and a

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<sup>5</sup> R. Jeffrey Smith, "Insurgents Near Macedonian Capital," *The Washington Post*, June 10, 2001.

<sup>6</sup> Ibid.

<sup>7</sup> Loretta Bondi and Elise Keppler, *Casting the Net*, pp. 13-16.

<sup>8</sup> U.N. Brochure, "Small Arms. United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects," United Nations Department of Public Information, DPI/2183, March 2001, 30M. The definition "small conflict" has been used in reference to internal wars.

<sup>9</sup> Human Rights Watch, "Fueling Afghanistan's War," HRW Press Backgrounder, December 15, 2000, Human Rights Watch, *Stoking the Fires: Military Assistance and Arms Trafficking in Burundi* (New York: Human Rights Watch, 1997), pp. 30-32 (Burundi); Brian Wood and Johan Peleman, *The Arms Fixers: Controlling Brokers and Shipping Agents* (Oslo: BASIC, NISAT and PRIO, 1999), pp. 45, 50, 54, 68-69, 75, and 85-86 (Bosnia, Congo-Brazzaville, Croatia, Papua New Guinea, Sudan, Sri Lanka, Yemen); Jude Webber, "Peru Authorities Bust Colombia Arms-Smuggling Ring," Reuters, August 22, 2000 (Colombia); David Pallister, "Britons Involved in Arms Running," *The Guardian* (London), April 15, 1999 (Democratic Republic of Congo); "Romanian airline boss arrested in arms smuggling case," Agence France Presse, September 1, 1999 (Nigeria); Human Rights Watch, "Arming Rwanda: The Arms Trade and Human Rights Abuses in the Rwandan War," *A Human Rights Watch Short Report*, Vol. 6, No.1 (New York: January 1994); and Human Rights Watch, "Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide," *A Human Rights Watch Short Report*, Vol. 7, No. 4, May 1995.

<sup>10</sup> U.N. Security Council, *Letter Dated 26 January 1996 from the Secretary-General Addressed to the President of the Security Council*, 96-01127 (E) 300196/9601127 Annex; *Letter Dated 13 March 1996 from the Secretary-General*

comprehensive picture of the role of arms traffickers in the dynamics of post-Cold War conflicts. In this context, the supply and spread of small arms and light weapons, rather than the provision of major conventional systems and technologies for the production of weapons of mass destruction, became a focus of subsequent work by the U.N. to deter or stop threats to peace and security, and sanction busting (see below).

Significantly, the commission documented one specific case, an arms transaction linking Théoneste Bagosora, a senior official of the Rwandan government posing as a Zairian official, to Ters Ehlers, a former South African government official and known arms broker, and to the government of the Seychelles. With regard to this particular transaction the commission, helped by the Swiss government, was able to follow the financial trail left by Ehlers, which led to bank accounts in Switzerland, France and Italy.<sup>11</sup>

Triangulation such as that described above involving an embargoed entity, a complaisant government supplier, and a private party (who arranges the deal and provides the logistics to carry it out) was identified as a recurrent feature by U.N. investigations undertaken between 1998 and 2001 to assess the effectiveness of mandatory arms embargoes.

U.N. investigators, experts, and monitors dispatched to Angola (2000-2001), Sierra Leone (2000) and the Democratic Republic of the Congo (2001) were unanimous in pointing out the need to restrain the activities of private brokers who, operating on their own, or with official blessing, contribute to seemingly endless cycles of conflict and humanitarian disasters. One U.N. team observed that arms traffickers:

...profit from conflicts, the trade in illicit arms and diamonds, and, not least, on the transport of such illicit merchandise. These structures operate through impressive networks in many countries, often without respect for the law of the land. The people and the companies involved in these kinds of activities are instrumental in facilitating war and armed conflict and should be prevented from continuing their activities.<sup>12</sup>

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*Addressed to the President of the Security Council*, S/1996/95, March 14, 1996; *Letter Dated 1 November 1996 from the Secretary-General Addressed to the President of the Security Council*, S/1997/1010, December 24, 1997. An addendum to UNICOP's third report can be found in: *Letter Dated 22 January 1998 from the Secretary-General Addressed to the President of the Security Council*, S/1998/63, January 26, 1998, and *Letter Dated 18 November 1998 from the Secretary-General Addressed to the President of the Security Council*, S/1998/1096, November 18, 1998.

<sup>11</sup> The commission cited two payments for 80 tons of weapons on June 15 and 17, 1994 of \$180,000 and \$150,000, respectively, which came from Ehlers' bank account number 82113 CHEATA with the Lugano branch of the Union Bancaire Privée. On the same bank account Ehlers was credited with \$592,784 and \$734,099 on June 14 and 16, 1994, respectively. These payments came from the Banque Nationale du Rwanda, Kigali with the source of the funds listed as the Banque Nationale de Paris, SA. Ehlers, in turn, paid the government of the Seychelles \$330,000 and \$40,000 into a bank account held with the Banca Nazionale del Lavoro in Alessandria, Italy for a consignment of goods sold to the government of Zaire in a sale which he brokered. "Addendum to the Third report of the International Commission of Inquiry (Rwanda)," in U.N. Security Council, *Letter dated 22 January 1998*, paras. 21-26

<sup>12</sup> U.N. Security Council, *Letter dated 21 December 2000 from the Chairman of the Security Council Committee established pursuant to resolution 864 (1993) concerning the situation in Angola addressed to the President of the Security Council*, S/2000/1225, December 21, 2000, para. 23.

In a subsequent report, the same U.N. monitors emphasized the urgency of tightening regulations on the activities and operations of arms-brokering companies. They went on to recommend that states consider establishing an international register of the dubious companies involved in sanctions busting.<sup>13</sup>

These groundbreaking U.N. reports did not shy away from naming names and pointing out specific state responsibilities in aiding and abetting, as well as profiting from, arms trafficking and other forms of contraband. Their recommendations and calls for action have remained largely unheeded, however.

### **First Steps, Uncertain Direction**

In April 1998, fifty-six countries endorsed a U.N. Economic and Social Council resolution calling for a legally binding instrument to combat illicit trafficking in firearms to be attached to the U.N. Convention on Transnational Organized Crime. To this end, seven months later Canada submitted a draft text for a “Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.”<sup>14</sup> Negotiations on the Protocol started in Vienna in 1999, and raised high expectations that they would be successfully concluded before the end of 2000.<sup>15</sup> The opposite happened. Disagreements over the scope of the Protocol and the issue of marking weapons ground the process to an abrupt halt in October 2000.<sup>16</sup> While the Convention on Transnational Organized Crime was opened for signatures on December 12, 2000, it took an additional three months to complete negotiations on the Firearms Protocol which was then adopted by the U.N. General Assembly on May 31, 2001.<sup>17</sup>

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<sup>13</sup> U.N. Security Council, *Letter dated 16 April 2001 from the Chairman of the Security Council Committee established pursuant to resolution 864 (1993) concerning the situation in Angola addressed to the President of the Security Council*, S/2001/363, April 18, 2001, paras. 33-34.

<sup>14</sup> U.N. Economic and Social Council, Commission on Crime Prevention and Criminal Justice, *Criminal Justice Reform and Strengthening of Legal Institutions: Measures to Regulate Firearms*, U.N. Document E/CN.15/1998/L.6/Rev.1, April 28, 1998; U.N., Ad Hoc Committee on the Elaboration of a Convention Against Transnational Crime, *Revised Draft 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*, U.N. Document A/AC.254/4/Add.2/Rev.1, February 8, 1999.

<sup>15</sup> U.N. Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, *Proposals and Contributions Received from Governments*, U.N. Document A/AC.254/5/Add.18, February 3, 2000, Art. 18 bis.

<sup>16</sup> With regard to “scope,” negotiators could not agree on whether “state-to-state” arms transfers should be explicitly exempted or whether the Protocol should limit the exemptions to cases related to national security. Some delegations required that prohibitions on transfers be extended to “states to non-states transactions”; others opposed this approach. In regard to marking, some states wanted an exemption from marking state-manufactured guns allegedly fearing that sensitive information on production levels and sources of manufacture could be derived from information encoded in arms serial numbers. Other delegates interpreted this position as an effort to obstruct investigations and prevent disclosure. This latter group of delegates supported the inclusion of a universal requirement to mark all weapons at the time of manufacture, as well as an identification system that would allow each gun to be uniquely identifiable without the assistance of the country of origin. Loretta Bondi and Elise Keppler, *Casting the Net*, pp. 47-48.

<sup>17</sup> U.N. Press Release, Fifty Fifth General Assembly Plenary, 101 Meeting, “General Assembly Adopts Third Additional Protocol--on Firearms—to Convention Against Transnational Organized Crime,” GA/9866, May 31, 2001.

Early drafts of the Protocol included a provision on brokering based on text submitted by the U.S. This provision required arms brokers to register with their country of nationality, residence, and operations. In addition, the draft text required brokers to obtain a license for each transaction they intended to undertake.<sup>18</sup> Such approach was marred by disagreement from the very start, since, according to a U.S. official, the provision did not meet the favor of those governments that were reluctant to take on a burdensome licensing and registration scheme.<sup>19</sup> In the end, the strong wording advocated by the U.S. and other negotiators was diluted into an “encouragement” for states to consider establishing a system to regulate the activities of brokers.<sup>20</sup>

In a parallel move in December 1999, the U.N. General Assembly mandated a group of governmental experts to study the feasibility of restricting the manufacture and trade of small arms to manufacturers and dealers authorized by states.<sup>21</sup> One of the group’s main tasks was to prompt and advance government-to-government discussions on practical possibilities for regulating brokers. The group was expected to release a report that could guide the debate of the U.N. Conference in July 2001 on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, the first global consultation on this topic. The experts’ report, published in March 2001 at the very tail end of the preparatory meetings of the Conference, did paint a useful description of the problem, but fell short of issuing recommendations that could have provided parameters for concrete action.<sup>22</sup>

The follow-up to the experts’ work is uncertain, although the signs on the wall are not encouraging. Strong language calling on participant states to negotiate a legally binding instrument on brokering, which was contained in the January 2001 first draft program of action by the Chairman of the Conference’s preparatory committees, was significantly toned down in the second version of the draft, offered in March 2001.<sup>23</sup> Despite efforts by the

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<sup>18</sup> Loretta Bondi and Elise Keppler, *Casting the Net*, p. 48.

<sup>19</sup> Ibid.

<sup>20</sup> The final text reads: “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. 2. States Parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol.” Article 15, Brokers and Brokering. This document is on file with the Fund for Peace (FFP). For a brief discussion of the outcome of the Protocol’s negotiations, see Betsy Pisik, “Beijing Wins Exemption to U.N. Treaty,” *The Washington Times*, April 4, 2001.

<sup>21</sup> U.N. General Assembly, Resolution A/54/54 V, December 15, 1999.

<sup>22</sup> U.N. General Assembly, Preparatory Committee for the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Third Session, 19-30 March 2001, Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54/V of 15 December 1999, entitled “Small Arms,” A/CONF.192/PC/33.

<sup>23</sup> In the first Working paper by the Chairman of the Preparatory Committee, Draft Programme of Action, under section II “Preventing, Controlling and Curbing the Illicit Trade in Small Arms and Light Weapons,” para. 8, “Measures to prevent diversion from the legal manufacture, acquisition and transfer of small arms and light weapons, including arms brokering-related activities to and impact on illicit trade,” reads: “(d) A legally binding international agreement on brokers will be negotiated.” U.N. General Assembly, Preparatory Committee for the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its

European Union and others, it remains to be seen whether commitments to tangible progress will materialize. To be sure, the majority of state delegations at the Conference (a consensus-driven exercise) did not seem inclined to take on the challenge.<sup>24</sup>

In the run-up to the Conference, divisions over regulating arms brokering were significantly apparent even among the participants of the so-called Oslo Group.<sup>25</sup> Meeting twice in July and December 1999, this informal governmental group had debated the issue at some length.<sup>26</sup> In particular, the group undertook to develop “model legislation and regulations, including comprehensive definitions, in order to achieve more effective national control on brokering in all its aspects as well as related activities. These could constitute international standards against which implementation could be measured.”<sup>27</sup> As of June 2001, a concerted follow-up to this commitment remains in limbo.<sup>28</sup>

### **In Search of International Standards**

The elusiveness of internationally binding standards is matched by, and is partly a result of, the paucity of national legislation on arms brokering. To date, only twelve countries in the world have adopted laws that, with various degrees of strictness, comprehensiveness, and specificity, help define and separate legal activities from gray market and illegal operations.<sup>29</sup>

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Aspects, Second Session, 8-19 January 2001, *Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Working Paper by the Chairman of the Preparatory Committee* A/Conf. 192//PC/L.4, December 11, 2000. The second working paper, under section II, para. 37 contained an exhortation for states: “To develop common understandings of the basic issues and the scope of the problems related to illicit arms brokering with a view to regulate the activities of those engaged in arms brokering.” U.N. General Assembly, Preparatory Committee for the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Third Session, 19-30 March 2001, *Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Working Paper by the Chairman of the Preparatory Committee*, A/Conf. 192//PC/L.4, Rev.1 February 12, 2001.

<sup>24</sup> FfP interviews with delegates to the Conference, New York, March 19-30, 2001.

<sup>25</sup> U.N. General Assembly, *Letter dated 3 February 2000 from the Permanent Representative of Norway to the United Nations addressed to the Secretary-General*, A/54/739, February 7, 2000. Among the measures on arms brokering discussed during the December meeting were “appropriate provisions on brokering in relevant international instruments;” and for “the establishment of national legislation and enforcement systems on small arms brokering where none exist and criminalize[sic] violations.” Ibid.

<sup>26</sup> Twenty-four governments participated in the July meeting. The December meeting was attended by delegations from Australia, Austria, Belgium, Brazil, Canada, Chile, Finland, Germany, Japan, Mali, Mexico, the Netherlands, Norway, South Africa, Sweden, Switzerland, the United Kingdom, and the United States (U.S.). Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> The U.S. proposed discussions on model regulation for arms brokering as an alternative to a binding international instrument. Briefing of the U.S. delegation to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, March 29, 2001. See also Ambassador Donald J. McConnell, Deputy Assistant Secretary of State for Security Operations, Bureau of Political-Military Affairs, U.S. Department of State, “Combating the Spread of Small Arms: the U.S. Approach,” in *U.S. Foreign Policy Journal, an Electronic Journal of the U.S. Department of State*, Vol. 6, No.2, June 2001, available at <http://usinfo.state.gov/journals/itps/0601/ijpe/ijpe0601>.

<sup>29</sup> Loretta Bondi and Elise Keppler, *Casting the Net*, pp. 45-46 and Appendix. This report lists eleven types of national legislation in Canada, France, Germany, the Netherlands, Norway, South Africa, Sweden, Switzerland, the United Kingdom, and the United States. Since its publication in January 2001, the authors received notice that Poland has also adopted controls on brokering. The Polish legislation, based on a comprehensive and innovative approach, has been one of the models The Fund for Peace has carefully studied in conceptualizing

As noted above, states have justified their reluctance to enact such legislation by arguing that regulating a whole new host of players in the arms trade might result in an unbearable administrative burden.

However, it appears that the number of arms brokers is not unmanageable. In the U.S., for example, only 134 brokers had registered with the Office of Defense Trade Controls (ODTC) up to October 1999.<sup>30</sup> Although the number of licenses they applied for is unknown, it would be safe to assume that such licenses constitute only a small portion of the tens of thousands of applications processed by the ODTC every year.<sup>31</sup>

In addition, investigations by the U.N., the press, and by nongovernmental organizations have shown that the traffickers at the center of illegal arms brokering networks catering to areas of conflict and to embargoed forces constitute a steady cast of characters.<sup>32</sup> Indeed, some of the most notorious brokers have become “household names” in U.N. and investigative circles. Analysts have concluded that “there is a reason to believe that the number of brokers is not as great as suggested.”<sup>33</sup>

Despite brokers’ limited numbers, their pursuit of private interest has conspicuously and consistently made a mockery of the international communal will expressed in U.N. Security Council resolutions, and contributed to the plight of countless civilians in areas of violent conflict. Therefore, it should be in the interest of governments to promote legislative action to bring these operators under control. Such action should be undertaken as a matter of urgency, particularly by those governments that have been embarrassed and exposed for providing safe-haven and abode to traffickers.<sup>34</sup>

In deferring the adoption of global and national controls, governments have also argued that, given the international nature of brokering transactions, regional agreements are better suited to respond to the challenges posed by illegal arms trafficking. Such agreements, officials maintain, would be rooted in geographical realities and would provide a uniform regulatory framework, as well as acknowledge states’ different enforcement capabilities. These officials have also pointed out that in the end, regional agreements would be enacted

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and developing its model convention on arms brokering (see below). *Law of November 2000 concerning international trade in goods, technologies and services of strategic significance for state security and maintenance of international peace and security, and amending selected laws*. Article 3(c.)

<sup>30</sup> Loretta Bondi and Elise Keppler, *Casting the Net*, p. 29.

<sup>31</sup> In 2000, for example, ODTC was expected to process 45,000 applications. *Ibid.*

<sup>32</sup> For example, Victor Bout is widely known to be an arms trafficker to forces under arms embargoes. He brokered weapons to both Angolan and Sierra Leonean rebels. U.N. Security Council, *Letter Dated March 10 2000*, para. 26; and Brian Wood and Johan Peleman, *Op. cit.*, pp. 32-34.

<sup>33</sup> James Coflin, *Small Arms Brokering: Impact, Options for Controls and Regulation*, International Security Research and Outreach Programme, International Security Bureau, Department of Foreign Affairs and International Trade, Ottawa, May 2000, pp. 15-16.

<sup>34</sup> For example, the role of Cyprus, Ukraine, and the United Arab Emirates, in providing a base for illegal brokers has been repeatedly exposed. U.N. Security Council, *Letter Dated March 10 2000*, and U.N. Security Council, *Letter dated 21 December 2000*, paras. 27-61 in relation to Angola; and *Report of the Panel of Experts appointed pursuant to Security Council resolution 1306 (2000)*, paragraph 19, in relation to Sierra Leone, S/2000/1195, December, paras. 203-217.

through national legislation.<sup>35</sup> In this regard, the draft Firearms Protocol that the Southern African Development Community (SADC) began to negotiate in 1999 with its strong provisions on brokering is a pioneering effort.<sup>36</sup>

Regional solutions are a reasonable first step in the right direction. However, they literally do not cover enough territory for a phenomenon that is global in nature. Regions are just as porous as the nations for which these regional solutions were conceived and wider international cooperation and coordination would enhance both domestic and inter-state efforts. Moreover, a binding international legal framework would not prevent the application of stricter domestic or regional control standards, should states wish to enact them.

### **The Need for an International Convention on Arms Brokering**

The Fund for Peace recognizes the need for legitimate arms transfers. We believe, however, in preventing and stopping weapons flows to areas of conflict and to forces that abuse human rights and international humanitarian law, as well as in circumstances when such flows represent a threat to peace and security. Consequently, one of the foci of our research and advocacy is the role played by illicit arms brokers. On this topic, we have produced a “trilogy” of initiatives comprising two reports and a model international convention.

First, we examined what is regarded as the world’s best legislative model to control brokering activities: the comprehensive brokering statute that the United States passed in 1996 as an amendment to the 1976 Arms Export Control Act (AECA).<sup>37</sup> This important piece of legislation addressed a missing link in arms trade control and created a framework to break the impunity with which illegal traffickers operate. The U.S. statute requires U.S. brokers living anywhere, as well as foreign nationals residing in the United States, to register and obtain licenses for all arms deals they transact. Not only does the law empower U.S. implementing and enforcing agencies to keep tabs on the number of brokers and the type of their operations, it also subjects U.S. citizens and residents to U.S. jurisdiction even when they operate abroad. The reach of the law beyond U.S. national borders is known as

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<sup>35</sup> Discussion during the Workshop on Small Arms and Light Weapons: Legal Aspects of National and International Regulation, organized by the International Law Association, Geneva, May 17-19, 2001.

<sup>36</sup> A draft of the SADC Protocol is on file with the FfP. According to this version, brokering is defined as acting: (i) for a commission, advantage or cause, whether pecuniary or otherwise; (ii) to facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of firearms, ammunition or other related materials; and thereby acting as intermediary between any manufacturer, or supplier of, or dealer in firearms, ammunition, and other related materials and any buyer or recipient thereof. Another regional effort on brokering has been undertaken by the Organization for Security and Cooperation in Europe (OSCE). On November 24, 2000, the 308th Plenary Meeting of the OSCE Forum for Security Cooperation adopted a document which identified the regulation of “activities of international brokers in small arms as a critical element in a comprehensive approach to combating illicit trafficking in all its aspects.” The non-binding document called on states to consider requiring registration and licensing of brokers operating within their territory, disclosing import and export licenses and authorizations, as well as revealing the names and locations of brokers involved in the transaction. OSCE, FSC.JOUR/314, November 24, 2000.

<sup>37</sup> *An Act to amend the Foreign Assistance Act of 1961 and the Arms Export Control Act to make improvements to certain defense and security assistance provisions under those Acts, to authorize the transfer of naval vessels to certain foreign countries, and for other purposes.* Public Law 104, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (July 21, 1996), sec. 151; *Arms Export Control Act*, U.S. Code (U.S.C.) vol. 22, sec. 2778(b)(1976).

extraterritorial jurisdiction. In theory, this makes it possible to prosecute U.S. offenders even when their base of operation is located in countries with weaker controls—a practice that traffickers have consistently employed to escape sanction.<sup>38</sup>

In *Casting the Net? Implications of the U.S. Law on Arms*, published in January 2001, we concluded that, despite its incontrovertible usefulness, the law had never been applied and would continue to pose significant challenges to law enforcers. Chief among them, in terms of the law's international reach, is the enforceability of extraterritorial jurisdiction. If such jurisdiction were exerted, other countries might regard it as an infringement of their national sovereignty. Even in cases where the exercise of U.S. jurisdiction abroad does not pose an obstacle, conducting the overseas investigations necessary to gather evidence could be difficult if cooperation mechanisms with foreign agencies have not been established. Moreover, obtaining extradition for indicted offenders would also present major obstacles. Extradition of U.S. citizens or foreigners who have violated U.S. law occurs primarily when a specific extradition treaty exists between the U.S. and the relevant country. In the absence of such a treaty, extradition might be possible only if states agree to comply with the extradition request. Such practice is rare and largely subject to the discretion of the requested state. To complicate matters further, since the brokering statute is relatively new in the United States, it is unlikely that violations would be regarded as extraditable offenses under existing treaties, most of which predate 1996, the year the brokering amendment was passed.

Realizing that the U.S. law has remained dormant since 1996, The Fund for Peace issued a follow-up report that identified two individuals whose offenses, if prosecuted, could set a legal precedent for the successful application of the law.<sup>39</sup> *Arms Trafficking: Closing the Net, A Test Case for Prosecution under The U.S. Law on Arms Brokering* published in June 2001, challenges U.S. authorities to prosecute a notorious arms trafficker, Sarkis Soghanalian, and his accomplice, Charles Acelor. Based mostly on open source material, Peruvian court records, and interviews with government officials, *Closing the Net* shows how these gunrunners brokered weapons through a complex pipeline. It began with arms that were purchased by Jordan from East Germany, and then resold ostensibly to Peru. These weapons, however, were diverted to the Revolutionary Armed Forces of Colombia (FARC), the largest rebel group in the hemisphere's most enduring internal war. Soghanalian and his partner, a resident and a citizen of the U.S., respectively, violated the registration and licensing requirements of U.S. law. The report calls on the U.S. to prosecute these brokers, or to extend legal assistance to the Peruvian authorities who are seeking the arrest of the two traffickers and information about their connection to the highest echelons of Fujimori's regime.

Throughout our research, U.S. and foreign law enforcers have maintained that, in order to bring international traffickers to justice, all countries should either adopt appropriate laws, or agree to an international binding agreement regulating the activities of brokers. Obviously, the adoption of domestic and international measures would not be mutually exclusive.

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<sup>38</sup> Loretta Bondi and Elise Keppler, *Casting the Net*, pp. 8-45.

<sup>39</sup> Kathi Austin, *Arms Trafficking: Closing the Net*.

We share such inescapable conclusions and decided to take up a challenge that governments seemed reluctant to embrace. We believe that a convention would serve the interest of timely action and provide uniform standards applicable by all countries. To this end, we embarked upon the third leg of our trilogy, enlisting the help of a team of legal experts to assist in drafting a model convention on arms brokering.<sup>40</sup>

A number of existing and agreed upon international treaties and conventions furnished useful legal precedents and parameters. In particular, we were guided by the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials of 1997 ("the Inter-American Convention");<sup>41</sup> the OECD Convention on Combating Bribery of Officials in International Business Transactions of 1997 ("the OECD Convention");<sup>42</sup> a draft of the Southern African Development Community Protocol; and various domestic laws on arms brokering—in particular, the U.S. and the Polish laws—as well as U.N. Security Council resolutions.

In order to make this model convention enforceable, we kept its principles as simple, and yet as comprehensive as possible. First, we focused on a definition of brokering activities encompassing “the importing, exporting, purchasing, selling, transferring, supplying or delivering of arms or arms services, or any action taken to facilitate any of those activities, including transporting, freight forwarding, mediating, insuring or financing.” We introduced a registration and licensing requirement for all these activities and for each transaction.

The matter of jurisdiction is left open for individual states’ discernment according to domestic laws, but we inserted the requirement for states to review whether their current basis of jurisdiction is sufficient to serve the purpose of the model convention. Crucially, we designed a set of standards to curb illicit trafficking based on accepted principles of international law, including human rights and international humanitarian law norms.

Mindful of the potential seriousness of violations ranging up to aiding and abetting acts of genocide, crimes against humanity, and war crimes, the model convention requires states to establish infringements of the agreement’s provisions and prohibitions as offenses under national law. Since money laundering activities figure prominently in connection with illegal arms trafficking, we made certain that the model convention captures the link between the illicit flows of money and arms.

This model convention also seeks to address the need to develop mutual legal cooperation and extradition mechanisms by providing channels for the former and a requirement to include brokering in the list of extraditable offenses for the latter. In particular, the model convention requires states to designate a “national authority” to be tasked with implementing the law and acting as a focal point and a coordinating agent for domestic and international cooperation, as well as a repository of information.

Under the rubric “Invalidity of Transactions,” we sought to create a system of disincentives that would force brokers walking the fine line between the legal and the illegal realms to make choices. For example, faced with the risk of having an aircraft insurance

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<sup>40</sup> The team from both the London and the New York offices of the law firm Clifford Chance was led by Jeremy Carver, coordinated by Richard Winfield, and included Rae Lindsay and James Bourke.

<sup>41</sup> Organization of American States, General Assembly Resolution AG/RES.1 (XXIV-E/97), 24<sup>th</sup> Special Session, 13 November 1997.

<sup>42</sup> Signed in Paris on 17 December 1997 (DAFFE/IME/BR(97)20).

contract canceled or invalidated because of a brokering violation, arms traders and transportation agents might think twice before engaging in illicit operations. Similarly, the credit extended to a dealer to finance or complete a transaction might also be withdrawn. With the innovative element of “unacceptable risk,” the model convention also aims at engaging the banking, arms manufacturing, and the insurance industries in the fight against illegal arms trafficking by giving them the authority to protect their assets against illegitimate transactions.<sup>43</sup>

The model convention also ensures that the interest of transparency is served by requiring states to publish a list of registered brokers, and of operators that have incurred administrative or criminal sanctions.

Finally, in line with the OECD convention on bribery, we offer a simple implementation mechanism whereby states parties establish a working group on arms brokering. The working group helps to implement the convention, distributes relevant information, oversees states’ self-evaluating assessments based on responses to a standardized questionnaire, and monitors compliance.

The Fund for Peace believes that the international debate on, and knowledge of, the threat posed by illicit arms brokering must move to the next phase where concrete action replaces rhetoric. Our model convention is offered in the hope that states will use it as a framework for negotiations leading to an international binding agreement. The necessity and urgency of such an instrument is widely felt by civil society and law enforcers alike. What is needed now is a coalition of willing governments and civil society to take on the challenge.

To this end, The Fund for Peace issues the following recommendations:

**To U.N. member states participating in the United Nations Conference on The Illicit Trade in Small Arms and Light Weapons in All Its Aspects:**

- **Include** in the **final document** of the Conference a commitment to start **early negotiations** on an international **convention** on arms **brokering**. Such convention should include, at a minimum, the elements and requirements outlined in this paper and contained in The Fund for Peace model convention.
- **Convene** a **working group** to study, in conjunction with civil society, a **timetable** and **venue** for negotiations.

**To U.N. member states that have not already done so:**

- **Adopt legislation requiring registration** for conducting arms brokering activities from nationals and individuals who have established residence or domicile, as well as from companies that are acting as brokers in your country’s territory. Such brokering activities should include manufacturing, importing, exporting, transferring, and facilitating transfers by mediating, financing or arranging financial transactions, transporting, and

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<sup>43</sup> Jeremy Carver, “An Arms Brokering Convention,” Presentation at the Workshop on Small Arms and Light Weapons: Legal Aspects of National and International Regulation, organized by the International Law Association, Geneva, May 17-19, 2001.

freight forwarding between a supplier and a recipient of arms. **Require licenses** for each and every one of the above activities. **Make breaches** of such requirements **punishable by law**.

- **Prosecute violators** of such requirements, as well as violators of U.N., regional, and national arms embargoes. **Prosecute such offenses** including breaches and violations that have been carried out by companies, nationals, or people who have established residence or domicile in your county even when such offenses have been committed overseas. **Include such violations** among extraditable offenses in all extradition treaties.
- **Compile and publish** a list of convicted violators. **Exchange information** with other governments and international law enforcement agencies about potential or suspected illicit brokering activities.
- **Allocate or request funds** to assist in the training of law enforcement staff to carry out investigations on illicit brokering activities.
- **Promote the creation of a U.N. database** on illicit arms transfers.
- **Ratify the Firearms Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition** of the United Nations Convention against Transnational Organized Crime.