

LES RAPPORTS DU GRIP



REGULATING ARMS BROKERING

TAKING STOCK AND MOVING FORWARD THE UNITED NATIONS PROCESS

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GROUPE DE RECHERCHE
ET D'INFORMATION
SUR LA PAIX ET LA SÉCURITÉ

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Executive Summary

The problem of lacking or inconsistent regulations on arms brokering is painstakingly clear. Arms brokers have been central in numerous illicit or otherwise undesirable arms transfers, including transfers to regions of conflict, embargoed actors, and serious human rights abusers.

Illicitly transferred arms and ammunition, in particular those falling under the generic category of Small Arms and Light Weapons (SALW), fuel armed conflict and crime, are frequently misused in grave violations of human rights and international humanitarian law, and undermine prospects for the peaceful settlement of conflicts and sustainable development.

In the absence of adequate controls, those responsible for arranging and facilitating these transfers cannot be held accountable for their activities.

States recognised the problem of poorly controlled arms brokering under the 2001 United Nations Programme of Action on SALW (UN PoA). Specifically, they committed under this programme to develop adequate national legislation and common understandings on arms brokering.

After four years of discussions on further steps, the UN General Assembly (GA) is now expected to adopt a resolution at its sixtieth session establishing a Group of Governmental Experts (GGE) on Brokering.

This report reviews progress in the implementation of the commitment to control brokering, and identifies the scope for action by the GGE.

The report demonstrates that a growing number of states, especially in Europe, have established legislation on arms brokering, or are in the process of doing so. In addition, important advances have been made in regional and sub-regional fora.

A comparison of the resulting domestic norms and multilateral standards reveals that there exists a large degree of convergence on key regulatory principles and measures.

In turn, this constitutes a good foundation for building on and further developing global minimal standards on brokering controls.

The report argues that this year's UNGA, scheduled for October/November 2005, provides an important opportunity for strengthening the international commitment to enhancing cooperation in combating illicit SALW brokering.

Further efforts in this regard remain a crucial need. At the global level, standards are underdeveloped, while progress in their adoption and implementation at the regional and sub-regional levels strongly varies. In addition, there remain important loopholes in, and inconsistencies between, the various multilateral and national standards.

This means that SALW brokering activities that contribute to regional instability and violations of human rights and international humanitarian law can carry on with relative ease and impunity.

UN member states are consequently urged to adopt a resolution at the sixtieth GA session to establish a GGE on Brokering with an adequate mandate.

In particular, the GGE should be mandated to consider the feasibility of an international instrument to regulate arms brokering, as well as to identify the elements required for an effective exercise of national brokering controls.

Second, building on the work of the 2001 GGE on the feasibility of regulating brokering and its related activities, the Group's mandate should cover consideration of controls on transportation and financial services related to arms brokering.

To complement the GGE work, UN member states are also urged to further develop complementary standards on SALW control, in conformity with commitments undertaken with the UN PoA.

This should include the development of adequate minimal standards on end-user certificates and the formulation of adequate licensing criteria for national decisions on arms exports and brokering activities.

Résumé

Le problème posé par l'absence ou l'incohérence des réglementations sur le courtage en armes est une douloureuse évidence. Les courtiers en armes ont joué un rôle central dans nombre de transferts illicites ou non souhaitables, y compris vers des régions en conflit, des acteurs sous embargo et d'autres responsables de graves violations des droits de l'homme.

Les armes et les munitions faisant l'objet de ces transferts illicites, en particulier celles qui font partie du groupe générique des armes légères et de petit calibre (ALPC), alimentent les conflits et la criminalité armés, sont fréquemment utilisées pour commettre de graves violations des droits humains et du droit humanitaire international et entravent toute perspective de règlement pacifique des conflits et de développement durable.

En l'absence de contrôles adéquats, il est impossible d'exiger des comptes des personnes qui organisent et facilitent ces transferts.

Les Etats ont reconnu dans le Programme d'action des Nations unies de 2001 sur les ALPC, le problème du faible niveau de contrôle sur le courtage. En particulier, ils se sont engagés, dans le cadre de ce programme, à élaborer des législations nationales adéquates et des perceptions communes du courtage en armes.

Après quatre années de discussions quant aux prochaines étapes, l'AG des Nations unies devrait à présent adopter, lors de sa 60e session, un Groupe d'experts gouvernementaux (GEG) sur le courtage.

Le présent rapport évalue les progrès de la mise en oeuvre des engagements en matière de contrôle du courtage et définit le champ d'action du GEG.

Un nombre croissant d'Etats ont établi des législations sur le courtage en armes ou sont en passe de le faire. De plus, on constate d'importants progrès aux niveaux régional et sous-régional.

Une comparaison de ces normes nationales et internationales révèle un degré élevé de convergence sur les principes et les mesures clés.

Cette convergence, à son tour, constitue une bonne base pour développer d'autres normes mondiales minimales sur le contrôle du courtage.

A l'AG des Nations unies d'octobre/novembre 2005, plaide le rapport, la communauté internationale aura l'opportunité de réitérer son engagement à renforcer la coopération dans la lutte contre le courtage illicite d'ALPC.

Il demeure crucial de fournir davantage d'efforts à cet égard. Au niveau mondial, en effet, les normes sont insuffisamment développées, tandis qu'aux niveaux régional et sous-régional, l'adoption et la mise en oeuvre varient fortement. De plus, il subsiste d'importants trous et incohérences dans les différentes normes nationales et multilatérales.

Il en résulte que les activités de courtage en ALPC, qui contribuent à l'instabilité régionale et aux violations des droits de l'homme et du droit humanitaire international, peuvent se poursuivre avec une aisance et une impunité relatives.

Les Etats membres de l'Onu sont donc instamment priés d'adopter, à la 60e session de l'AG, une résolution établissant un GEG sur le courtage doté d'un mandat adéquat.

En particulier, le GEG devrait étudier la faisabilité d'un instrument international de réglementation du courtage et identifier les éléments nécessaires à l'exercice efficace des contrôles nationaux.

Ensuite, dans le sillage des travaux du GEG de 2001 sur la faisabilité d'une réglementation du courtage et de ses activités connexes, le mandat devrait également couvrir le transport et les services financiers liés au courtage.

De plus, les Etats membres de l'Onu, devraient élaborer d'urgence des normes complémentaires sur le contrôle des ALPC, conformément aux engagements pris sous le Programme d'action des Nations unies.

Il s'agit entre autre de développer des normes minimales adéquates concernant les certificats d'utilisateurs finals et les critères d'octroi de licences d'exportation d'armes et d'activités de courtage.

1. The UN process on brokering

In March 2001, a UN Group of Governmental Experts on small arms presented its report to the Secretary-General on the feasibility of restricting the trade in small arms and light weapons to manufacturers and dealers authorised by states (UNGA, 2001a).

Based on the Group's mandate, the report dealt with the activity of small arms brokering, including transportation and financial transactions. The report noted that, in the past, individuals and/or companies have exploited lacking or inconsistent brokering regulations in order to circumvent Security Council arms embargoes, or to broker otherwise illicit or undesirable arms transfers.

The Group also noted that states should, at a minimum, establish national systems of control for brokering and related activities in order to deal effectively with such illicit or undesirable arms transfers.

In the UN Programme of Action on small arms of July 2001 (UN PoA), UN member states translated the Group's observations into a political commitment to develop 'adequate national legislation or administrative procedures regulating the activities of those who engage in [SALW] brokering' (UN, 2001, sec. II, para 14).

As part of the follow-up mechanism to the UN PoA, states also committed to 'consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons' (UN, 2001, sec. IV, para. 1.d).

In implementation of this commitment, the UNGA mandated the Secretary-General in 2003 to hold broad-based consultations "on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons" (UNGA, 2003, para. 11).

To date, four sessions of the consultations have been held between the New York and Geneva UN

Headquarters.¹ They were attended by *interested governments, regional organizations, NGOs and independent experts.*

Most participants have indicated their favour towards 'consolidating existing common understandings on key aspects of the problem of illicit SALW brokering and, to the extent possible, to forge consensus on outstanding issues' (UNGA, 2004a, p. 6, para. 18). Many have also expressed support for the establishment of common minimum standards of control.

In parallel, many states have expressed their support for the negotiation of an international instrument on SALW brokering within the framework of the UN PoA. This call for an international brokering instrument is shared by the UN Secretary General (UNGA, 2005a, p. 32, para. 120) and many civil society organizations (see *Biting the Bullet*, 2005, p. 319).

During its 59th session, the UN General Assembly requested the Secretary-General to continue the broad-based consultations with a view to establishing a Group of Governmental Experts (GGE) that would consider further steps in enhancing international cooperation in preventing, combating and eradicating illicit brokering in SALW (UNGA, 2004b, para. 5).

Specifically, the Assembly requested that the Group be formed after the 2006 small arms review conference and no later than 2007. Further, the Secretary-General was requested to report on the outcome of the consultations at the 60th session of the General Assembly, scheduled for October/November 2005 (*ibidem*).

It is generally expected that the consultations will have a positive outcome and result in a GA resolution this year requesting the Secretary-General to establish the GGE on Brokering.

A possible alternative is that the resolution requests the Secretary-General to establish a UN Open-Ended Working Group (OEWG) to negotiate an international brokering instrument.

1. For details of the sessions, see <http://disarmament.un.org:8080/cab/salw-brokering.html>

2. Aims and structure of the report

At the international level, the present momentum in discussions on global standards on SALW brokering is one of great potential and opportunity.

The formation of, at a minimum, a UN GGE on brokering seems an ideal opportunity to foster common standards on the control of arms brokering, and to prepare possible future negotiations on a related international instrument.

Specifically, the Group could be mandated to prepare the work of an OEWG by clearly defining the binding nature, scope, and contents of an international brokering instrument that would be negotiated by a future OEWG.

A more far-reaching mandate for the GGE would further include the drafting of an instrument text that would provide the basis for negotiations in a later OEWG.

The formation of the Group and the scope of its mandate, therefore, are a critical aspect of current international efforts to control arms brokering activities.

This report intends to contribute to this international process in two ways.

On the one hand, it provides an overview of and compares existing national, regional, and international standards on the control of arms brokering. The report thereby points to areas of convergence which may constitute solid grounds for common international standards.

These areas of convergence should be consolidated and built upon by the GGE's work. The Group, in other words, should seize the opportunities created by the converging understandings on the nature of the illicit brokering issue and its possible solutions.

On the other hand, the report points to a number of elements which are still controversial, but which are central for the effective control of brokering activities, and the prevention of illicit or otherwise undesirable arms transfers.

On these elements, the GGE should strive to build common understandings and, possibly, accepted minimum standards.

The following section of the report gives an overview of the problem of inadequately controlled brokering and presents several well documented cases of illicit brokering deals.

Section 4 analyses the ways in which brokering controls have been designed and implemented at the national level.

Section 5 reviews global and regional standards on arms brokering controls.

Based on Sections 4 and 5, Section 6 reviews common grounds and remaining weaknesses in national and multilateral standards on arms brokering.

Section 7 investigates the scope for further action, at the international level, to move forward the UN process.

As a visual tool, annexes A and B provide summary tables on existing brokering regulations on national and multilateral levels.

3. What is arms brokering ?

Generally speaking, arms brokers are 'middlemen who organize arms transfers between two or more parties. Essentially, they bring together buyers, sellers, transporters, financiers and insurers to make a deal' (Wood and Peleman, 2000, p. 129).

More specifically, brokers perform seven main activities intended to facilitate arms deals, which include:

- prospecting (identifying potential buyers and sellers);
- offering technical advice, for example on weapons systems, modalities for transport and financing, and general features of the deal;
- sourcing, that is, identifying the types and quantities of required weapons, enquiring on prices and payment schemes, etc.;
- mediating negotiations;
- arranging financing schemes for the relevant transaction;
- obtaining necessary documentation, including end-user certificates, import and export authorizations;
- organising transport of the ordered weapons (Small Arms Survey (SAS), 2001, p. 100).

These activities are commonly grouped in two general categories. On the one hand is the 'core brokering activity' of mediation of arms deals, during which brokers may or may not enter in direct ownership or possession of the arms they help to sell, although frequently they will not. On the other hand are the so-called 'associated activities' that include, among others, transportation, financing, insurance and the provision of technical services.

It should be noted that, while frequently made at the policy level, the distinction between core and associated brokering activities may not correspond to actually distinct activities by brokers.

In this sense, adequate brokering controls must be broad in scope to prevent unscrupulous agents from exploiting loopholes created by restrictive definitions of controlled activities.

Given the centrality in the arms trade of the services brokers perform, it is striking that they are typically unregulated within national jurisdictions.

Contrary to other key arms trade actors, such as importers and exporters, brokers operate in a regulatory void that can, and indeed has been exploited to perform arms transfers to illicit or undesirable users - as research by both governmental and non-governmental organizations has consistently shown in the last decade.

These users have included countries under national or international embargoes; armed non-state actors; countries in violation of human rights or humanitarian law standards; as well as recipients in a situation of local or regional instability.

'Third-country' (third-party) brokering

A common argument, often voiced during international discussions, is that brokering controls are unnecessary, because the activities they are designed to control are 'implicitly' covered in arms export regulations.

Brokers, however, frequently engage in what are known as 'third-country' brokering deals. In these deals - sometimes also called 'third-party' brokering - the transferred arms are not exported, imported or transited through the country from which the broker operates. In addition, as already mentioned, the transferred arms do not necessarily enter into the ownership of the broker.

As a consequence, even if states strictly control SALW transfers that pass through their territory or through the ownership of entities and persons under their jurisdiction, brokers will typically not be covered by the related regulations. Indeed, it is this very loophole that unscrupulous brokers regularly exploit.

Moreover, states with no national controls on third-country brokering risk becoming attractive operational bases for agents wishing to circumvent any type of governmental oversight on their brokering activities.

The following paragraphs present some examples of illicit brokering deals. They show that illicit brokering presents challenges that are of a global nature, due to the ability of brokers to exploit any weak link in the arms export control chain. The examples further show that, while different in their details, illicit brokering transactions reveal common characteristics and similar operational techniques.

All of these, in turn, rest on a set of regulatory gaps that must be closed if the issue of illicit and undesirable brokering is to be addressed effectively at both the national and the international levels.

Case-study 1: Arming non-state actors²

On 5 November 2001, a ship registered under the name Otterloo and owned by a Panamanian maritime company, Trafalgar Maritime Inc., arrived in the port of Turbo, in Colombia. Two days later, it offloaded its cargo - 14 containers with 3,117 AK-47s and 5 million rounds of ammunition previously owned by the Nicaraguan armed forces- which was then transferred to the Autodefensas Unidas de Colombia (AUC).

Following an enquiry from the Panamanian Navy to the Nicaraguan Navy concerning the Otterloo, which was suspected of transporting arms to the Revolutionary Armed Forces of Colombia (FARC), a joint investigation involving Panama, Nicaragua, and Colombia uncovered the complex deal behind the arrival of the arms in Turbo.

The deal had originated in an arms swap between the Nicaraguan National Police (NNP) and a private Guatemala-based firm, the Grupo de Representaciones Internacionales (GIR S.A.). The NNP had agreed to provide GIR S.A. with aging surplus police AK-47s, ammunition, and bayonets in exchange for new side arms (465 Jericho pistols and 100 Uzi sub-machine guns). The deal was attractive to the NNP, which needed equipment that was more modern and better suited to police work; it was also approved by relevant Nicaraguan authorities.

GIR S.A. found an interested buyer, Shimon Yelinek, and his associate Marco Shrem, who agreed to buy the 2,500 AK-47s and 2.5 million rounds of ammunition on behalf of the Panamanian National Police (PNP). Yelinek provided GIR S.A. with an alleged PNP purchase order that could be used simultaneously as an end user certificate. In July 2001, Yelinek went to inspect the NNP arms in Nicaragua and declared that their quality did not meet his requirements.

In order not to lose the deal, GIR S.A. set up a side transaction: it persuaded the Nicaraguan Army to swap the NNP's 5,000 old AK-47s for 3,117

new ones that would then be sold to Yelinek; also, the quantity of ammunition was doubled to 5 million rounds. These were the arms that arrived in Turbo some months later.

In the meantime -during July 2001- a Mexican national, Miguel Onatopp Ferriz, established a new shipping company in Panama City; its sole ship, the Otterloo, purchased from Dutch owners, was given a provisional Panamanian licence.

From this point on, the necessary arrangements for the transportation of the arms were made between the Nicaraguan Army (on behalf of the NNP), GIR S.A.'s shipping agent (based in Guatemala), a shipping agent based in Nicaragua (Agencia Vassalli S.A.), and a custom broker hired by the NNP.

The Otterloo sailed from Mexico, announcing that it was transporting nine containers of plastic balls to Panama. It was loaded with 14 containers of arms and ammunition in the Nicaraguan Port of El Rama. The ship's captain signed a bill of lading stating that the ship would sail to Colon, Panama.

But instead of arriving in Panama, the Otterloo arrived and offloaded its cargo in Turbo, Colombia. Once the ship was out to sea, the captain disembarked and disappeared; the Otterloo returned to Panama after further stops in Venezuela and Suriname.

A second deal between Yelinek and GIR S.A. was called off when the joint investigation by Panama, Colombia and Nicaragua was initiated. Yelinek was arrested in Panama in November 2002.

In August 2003, a Panamanian first instance criminal court dismissed the charges against him on the grounds of lack of jurisdiction, given that the arms had been loaded in Nicaragua and delivered in Colombia. The court's decision was appealed by the Panama Fiscalia de Drogas, which took over the investigation.

A critical factor in the transaction was that the Nicaraguan authorities and GIR S.A. neglected to ascertain that the PNP was really behind the arms purchase. No communication passed between any GIR S.A. employee and any Nicaraguan or

² Unless otherwise indicated, this case is based on OAS, 2003.

Panamanian authority, which made Shimon Yelinek's task all the easier.

The latter also had a central role: he provided the fake purchase order, found the arms and made sure they would be serviceable, paid GIR S.A., and organised transportation with the Otterloo.

Other individuals, however, were also central: the owner of the Otterloo, who established the shipping company Trafalgar Maritime Inc. and obtained the necessary authorizations; the captain of the ship, who signed the cargo manifest and bill of lading, both indicating that the Otterloo was headed for Panama; and the owner of GIR S.A., who coordinated the arms exchanges with the Nicaraguan Army and the NNP.

Case-study 2: Violating UN arms embargoes

During the past years, various UN Panels of Experts have been established to investigate violations of UN-mandated arms embargoes. Reports by these Experts Groups have consistently shown the role of various intermediary actors (brokers, shippers and transport agents, among others) in performing these violations.

In August 2004, for example, the UN Security Council re-established the Monitoring Group charged with investigating the implementation of the embargo on Somalia. In its report, the Group found that "despite the newly elected Transitional Federal Government or, perhaps, because of it, arms embargo violations continued to occur at a brisk and alarming rate during the mandate period" (UN Security Council (SC), 2005, p. 8, para. 19).

According to the information gathered during the investigation, "about 67 individuals, companies and entities (the "commercial chain") were witting or unwitting parties to the arms transaction process" (*ibidem*).

Importantly, the Group specified: "A commercial chain generally consists of buyers (recipients) and associates (individuals and organizations), sellers and middlemen, the shipment itself, transport and finally the means and methods of payment" (ivi, p. 8, fn. 1).

The report established that the arms entering Somalia in violation of the embargo were destined to actors on both sides of the political divide. On the

one hand were "opposition elements consisting of warlords, businessmen, fundamentalists and others" who armed and trained themselves to protect their political interests or the profits generated from unregulated commercial activities against the forthcoming Transitional government.

These commercial activities included, among others, the sale of arms, "especially via the Bakaaraha arms market at Irtogete in Mogadishu" (ivi, p. 8f., paras. 20-22). On the other hand was the Transitional Government, which bought arms to enhance its military capability against the opposition; in addition, some of its members were also arming themselves to further their own interests, be they political or commercial (ivi, p. 9, para. 25).

The conclusion of the Group was that "For all sides ... the purchase and acquisition of arms continue to represent the most conspicuous option for the realization of their respective self interests, be they political, religious/political or commercial or a combination of all" (ivi, p. 9, para. 26).

During the six months of the investigation, the Group found evidence of at least 34 individual shipments of arms, which varied in both size and content (ivi, p. 4). They included arms as diverse as anti-aircraft guns, small arms, ammunition and explosives, mines and anti-tank weapons (ivi, p. 10, para. 27-28).³

The shipments were carried out through "organized networks of traders, smugglers and transnational criminal groups" that were used by the arms recipients to clandestinely "facilitate the movements of the arms from their sources outside Somalia into and around the country" (ivi, p. 11, para. 34).

Individuals working in one of these groups operated from Western Europe, the Arabian Peninsula, the Gulf of Aden and the Horn of Africa.

3. Specifically, weapons bought and sold despite the embargo included AK-47 assault rifles, ammunition and magazines, PKM machine guns and ammunition, SG-43 medium machine guns, RPG-7 anti-tank weapons and ammunition, M-79 grenade launchers, Zu-23 anti-aircraft weapons and ammunition, B-10 anti-tank weapons and ammunition, ZP-39 anti-aircraft ammunition, 60 mm/82 mm/120 mm mortar shells, anti-tank mines (e.g., PMP-4), BM-21 multiple rocket launcher ammunition, anti-personnel mines, hand grenades (e.g., RG-4, POMZ-2) and TT-33 Tokarev pistols. In addition, arms flows included large quantities of raw/high explosives, detonators and timers.

Others operated from eastern and south-eastern Asia, southern Africa, the eastern coast of Africa and the Horn of Africa (ivi, p. 11, para. 37).

Both groups were connected to sub-sets of people located in the south-east coast of the Horn of Africa, whose role was mainly to coordinate the delivery of the arms to the final end-user (ivi, p. 11, para. 38).

In order to reduce the likelihood of being discovered and stopped, these individuals used a variety of techniques, including: bribery of government officials; falsification of transport and identity documents; concealment of contraband arms in ships, dhows and land transport vehicles; and businesses controlled or utilised via employees by network members. The two transnational criminal groups also used the existing international maritime shipping lines and port facilities (ivi, p. 11, para. 39).⁴

The information gathered by the Monitoring Group in Somalia strongly echoed other prominent cases of UN embargo violations, similarly reported in UN documents. Examples related to violations of sanctions in Angola, Liberia, Sierra Leone, and Rwanda.

In all cases, complex networks of dealers, brokers, transportation and financing agents were set up, both in the recipient country and between the latter and foreign states.

These networks organised the transfer in its entirety, from the identification of the arms sources, to their delivery to the embargoed end-users, exploiting corrupt officials, regulatory deficiencies and lack of state monitoring where they set up business.

Case-study 3: Transferring arms to conflict zones

In addition to being central in the transfer of arms to embargoed destinations, brokering activities have been instrumental in the acquisition of arms by countries in conflict zones.

A case in point is Sri Lanka, a country plagued by close to twenty years of conflict between the Sinhalese-dominated government and the Tamil Tigers movement (LTTE), which sought an independent Tamil state.⁵

According to a Small Arms Survey report, "[t]he illegal procurement system developed by the LTTE over the course of the conflict is perhaps the most innovative and impressive ever witnessed for a non-state organization" (Smith, 2003, p. 10).

With the help of Tamil expatriates, the LTTE was able to source both arms and non-military equipment from a number of Asian countries, including Bangladesh, Hong Kong, India, Myanmar, and Singapore. According to the report

More recently, the international procurement network is run by Tharmalingham Shunmugham, alias Kumaran Pathmanathan, and colloquially known as 'KP'. His main operating bases have been Rangoon, Bangkok and, of late, Johannesburg. Most of his transactions are financed through bank accounts held in Canada, Germany, the Netherlands, Norway, and the United Kingdom (*ibidem*).

In order to guarantee the safe transportation of the illicitly acquired arms, the LTTE developed its own fleet that, at the time of reporting, included at least eleven small freighters registered under flags of convenience (such as Honduras, Liberia and Panama) "owned by LTTE front companies and crewed by VVT Tamils" (*ibidem*).⁶ In procuring the arms, the practice of using fake end-user certificates has been frequently exploited by the group.

Throughout the years, many countries have worked as either important sources or transit points of arms to the LTTE; these included Singapore, Thailand, Cambodia, Myanmar, as well as Cyprus, the Ukraine, and Lebanon, among others (ivi, p. 11).

Arms formerly under the control of Warsaw pact countries became available after the end of the Cold War, thanks to dealers operating from Bulgaria, Kazakhstan, Slovakia, and the Ukraine (*ibidem*).

4. For details of some of the deals uncovered by the Group's investigation, see Annex II of the UN Report.

5. The Sri Lankan government and the LTTE signed a ceasefire agreement in February 2002 (see chronology of the Sri Lankan conflict at <http://www.guardian.co.uk/international/story/0,3604,681879,00.html>); however, the ensuing peace process has stalled a number of times, and has not yet produced a durable solution. See http://news.bbc.co.uk/1/hi/world/south_asia/country_profiles/1168427.stm for a summary.

4. National controls on arms brokering

Central to the fight against illicit SALW brokering is the adoption by states of clear legal frameworks to regulate lawful activities and sanction illicit ones carried out within their national territory and by those under their jurisdiction (e.g. citizens and permanent residents).

Key elements for effective national control systems on arms brokering would include:

- a clear legal definition of the persons, entities and activities subject to national controls;
- a system of registration able to screen those wishing to engage in the trade of military equipment, including brokering activities;
- a system of licensing of brokering transactions, where decisions should be taken according to explicit and comprehensive criteria;
- adequate systems of state monitoring, including, *inter alia*, mandatory record-keeping and reporting on the part of the broker and post-delivery verification mechanisms;
- the establishment of penalties, such as fines or imprisonment, for violations of national brokering regulations.

At the regional and international levels, national arms brokering controls should be complemented with enhanced co-operation between states to facilitate monitoring, enforcement, and prevent undesirable brokering deals.

Around the world, some 40 countries are currently estimated to have enacted brokering-specific regulations within their systems of arms export controls (BtB, 2005, p. 6).

Geographically, these countries are very unevenly distributed, with the majority concentrated in the European region, and the remaining scattered in the Americas, Asia, the Middle East and southern Africa.

This section gives a general overview of the ways in which the control elements mentioned above have been addressed in these national systems, showing that a measure of convergence has developed in some regulatory areas.

This convergence would constitute potentially fertile ground for common international standards, such as those towards which the GGE should work.

In other areas, conversely, strong differences remain, leaving open loopholes and regulatory gaps which can be easily exploited by unscrupulous brokers.

On these areas of disagreement, which are also highlighted in this section, the forthcoming GGE should strive to build, at a minimum, common understandings and, ideally, shared approaches.

4.1 Definitions and scope of controls

Most national systems operating controls on arms brokering define arms brokers as those who arrange and negotiate arms transfers between two foreign states, that is, actors engaging in ‘third-country’ brokering.

In the European region, these countries include Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Liechtenstein, Lithuania, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and the UK. Other countries include Nicaragua, South Africa and the United States (see annex A).

Several states have complemented these controls on ‘third-country’ brokering with controls on mediation and facilitation of arms exports from the national territory. These include, for example, Belgium, Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Malta, Nicaragua, Poland, Slovenia, Slovakia, South Africa, Sweden, Ukraine, and the USA (see annex A).

In this case, controls on arranging contracts for arms exports from national territory are operated in addition to controls on the actual export by the exporter and can therefore be seen as a two-stage licensing system for arms exports.

In contrast, a few states, including France and Italy, operate so far only controls on mediating and other acts aimed at facilitating arms exports from the national territory.

France and Italy, in other words, do not control brokering activities conducted on their territory if the brokered equipment is transferred between two third countries and does not cross their territory (see annex A).

Controls in these states, therefore, leave open a critical loophole. For example, a broker may arrange from French or Italian territory a ‘third-country’ arms transfer to a destination to which

France and Italy would not authorise a direct export. As the arms in this case do not touch the territory from which the broker operates, the broker would not violate current regulations in France and Italy.

While there are differences in the scope of national brokering controls, these generally cover activities such as contract mediation and negotiation services. In addition, controls usually apply irrespective of whether or not the broker acquires or possesses the arms he/she helps to transfer.

Several states also include in their controls mediation-related activities such as marketing, promoting, advertising, and indicating to business partners the possibility for contracts on arms transfers.

Several national definitions further specify that controls are applicable where brokering activities are carried out for non-monetary gains.

This is an important clarification, as commodity traders engaging in illicit arms brokering are reported to also engage in barter trade, for example by exchanging arms for natural resources such as diamonds or tropical timber.

Noteworthy is that some states have also developed the important practice to also control the brokering associated activities of providing transportation and financial services for transfers between two foreign countries.

For example, US legislation stipulates a licensing requirement for brokering activities defined to include “financing, transportation, [or] freight forwarding ... of a defense article or defense service, irrespective of its origin” (USA, ITAR, sec. 129.2.b)

Similarly, Estonia extends its brokering controls to the provision of funds and other practical assistance in relation to transfers of military equipment between two third countries (Estonia, 2003, art. 3.2.1).

Likewise, Bulgaria controls services such as freight forwarding, transportation, consulting, and financing for foreign trade deals on arms transfers between two third countries where any part of the activity is taking place in national territory, including the use of telecommunication facilities or postal services (Bulgaria, 1995, additional provisions, art. 1.a.2).

Further, in Bulgaria, the transportation of weapons by registered agents from and to the territory

of third states, including cases where the weapons do not touch/cross Bulgarian territory, requires a prior authorization (Bulgaria, 1995, art. 13.a).

In Germany, a general trade authorization is required for persons and entities operating aircraft registered in Germany or ships sailing under German flag that transport weapons of war outside the territory of Germany (Germany, 1961, arts. 4.1 and 4.2).

In Liechtenstein, those financing illicit arms transfers may be held to account for their actions by national courts (Liechtenstein, 1999, art. 28.1.h).

4.2 Registration/ Screening of arms brokers

Registers of arms brokers allow national authorities to screen those wishing to engage in controlled activities prior to the granting of licences for individual brokering transactions.

In other words, only those whose trustworthiness and integrity have been assessed by national authorities through a registration system may apply for licenses for individual transactions.

Registrations, which are subject to regular renewal, also allow national authorities to keep track of the persons and entities authorised to engage in the trade of military equipment, as well as to bar from engaging in such trade those who, for example, have in the past violated arms transfer regulations.

States operating a registration scheme that acts as a gateway to engaging in brokering activities include Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Malta, Nicaragua, Poland, Romania, Slovakia, Slovenia, South Africa, Spain, Switzerland, and the USA (see annex A).

Typical elements considered in decisions on registration include whether the applicant is resident or established in the national territory, and whether he/she has been convicted for, or accused of, violating national arms control regulations in recent years.

Should a broker be found to have violated obligations under national regulations or to have provided false information in the registration application, he/she would usually face administrative and/or criminal sanctions.

These may include debarment from the national register, with the consequent ban from engaging in future arms trade activities falling under the jurisdiction of the state that withdrew the registration.

Estonia's State Register on Brokers

The Estonian registration system can be seen as one of the best developed. Individuals and entities falling under Estonian jurisdiction and wishing to engage in brokering activities must obtain a registration not only for acting as brokers but also for the particular categories of military equipment they may wish to broker.

Successful applicants are entered into the electronic State Register of Brokers of Military Goods, which is publicly accessible and provides summary information about the activities the broker has been authorised to engage in (see Estonia, 2004).

Each registered broker is identified by name, and information is provided on categories and countries of destination for which the broker has been registered. In addition, the registration number and date are provided (*ibidem*).

This greatly adds to transparency on the Estonian arms trade. It also allows prospective clients of Estonian brokers to verify that the latter are not considered as potentially undesirable agents by Estonian authorities.

4.3 Licensing of brokering activities conducted within national territory

The core element in national brokering regulations, present in all systems reviewed here, is the requirement for a license to engage in specific brokering transactions.

As mentioned, in the majority of cases, this requirement exists for brokering activities relating to the transfer of military equipment between two foreign countries (see annex A). At a minimum, the requirement applies to brokering activities carried out within the national territory of the controlling state.

A good practice, operated in several states in this context, is to require a license even if only a part of the brokering activity is conducted on the national territory; this includes, for example, the sending or receipt of an e-mail, fax, or telephone call.

National regulations also converge on the principle of prior knowledge of the end-use and end user of the brokered equipment.

This usually entails an obligation, on the part of the broker, to submit at the licensing stage relevant information and documentation on the origin, type, and quantity of the brokered items, as well as on their intended end user and end-use.

Some countries, including the Netherlands and Finland, may require that the broker submits an end-use declaration and relevant assurances by the intended recipient (see Netherlands, 2005, p. 6; and Finland, 1990, art. 4.3).

This may imply that a recipient accepts, where requested, restrictions on end-use or re-exportation that may be imposed not only by the exporting state, but also by the state authorising the brokering of the transferred items.

Of further interest is that many states grant licenses only on a case-by-case basis, that is, in relation to the brokering of each individual arms transfer.

With a view to facilitating defence and industrial co-operation, some countries also provide for open licenses, which allow multiple brokering transactions, usually in relation to specific categories of equipment and/or lists of end users.

Open licenses are generally granted only if the recipient is considered as having high standards for the responsible management of arms and ammunition.

4.4 Licensing of extraterritorial brokering activities

The extension of national jurisdiction beyond a state's territory - that is, on its citizens' and/or residents' activities conducted abroad - is sometimes considered as problematic.

This is because it implies the enforcement of national controls within the jurisdiction of another state.

Further, it is also sometimes argued that extra-territorial arms brokering controls would be redundant if every state were to control all brokering activities taking place within its territory.

However, even if an international instrument to regulate arms brokering were agreed, there would still remain loopholes that could be easily exploited by unscrupulous brokers.

To illustrate, a broker wishing to avoid restrictive policies and licensing criteria in the home state could simply move his/her activity to a state with weaker standards for licensing or inadequate enforcement practices.

An example would be that of a broker registered in a state which operates an arms embargo on a specific end user which has been established by a regional organization, rather than by the UN Security Council.⁷

In conformity with the sanctions, the state in question would ban brokering activities conducted on its territory and relating to arms transfers to the embargoed end user, and deny the related licences.

To circumvent this restriction, a broker might simply conduct the activity from the territory of another state, which is not part of the regional organization that declared the embargo.

There are also significant differences in the formulation and interpretation of national criteria to assess brokering licence applications. Therefore, by operating from abroad and in absence of extraterritorial controls, a broker could take advantage of weaker standards in foreign countries without violating the regulations of the home state.

Scope of extraterritorial controls

National systems requiring licenses for extraterritorial brokering activities share the basic principle that licenses for activities conducted abroad are granted only if the relevant activity would also be authorised if it were conducted within the national territory.

Further, most states controlling extraterritorial brokering performed by their citizens and/or residents impose a licensing requirement on the arrangement or facilitation of transfers between two foreign countries of any item on national arms control lists.

These states include the Czech Republic, Estonia, Finland, Hungary, Lithuania, the Netherlands, Nicaragua, Norway, Poland, Romania, Sweden, and the USA (see annex A).

In contrast, a few states have adopted extraterritorial brokering controls in relation to certain categories of military equipment only.

For example, the UK requires a license for extraterritorial brokering by UK nationals who are also permanent UK residents (UK 'persons') of

'restricted' goods, that is, long-range missiles and torture equipment, but generally not for other conventional weapons categories (UK, 2003, arts. 3.2 and 3.4).

Similarly, an amendment to the German legislation on brokering is expected to stipulate a license requirement for the extraterritorial brokering of SALW, but not for the brokering of other conventional weapons categories.⁸

Many of the states with extraterritorial controls require a license for brokering activities conducted abroad by their citizens and permanent residents.

In contrast, some states exclude from their extraterritorial controls citizens or nationals who are permanent residents in a foreign country.

For example, a UK national who is not resident in the UK does not have to obtain a license when brokering, from abroad, a transfer of 'restricted' equipment, such as long range missiles (UK, 2003, arts. 3.2 and 3.4).

Of relevance here is also the system in a few states to only require licenses where persons and entities under national jurisdiction intend to broker, when abroad, equipment from a foreign country to an embargoed destination or end user.

A permissible brokering transaction to an embargoed destination may include, for example, the brokering of equipment to an international peace-keeping force stationed in a country under an arms embargo.

To clarify, most states with a licensing requirement for extraterritorial brokering apply this requirement to the brokering of military equipment to any destination, and therefore also to embargoed destinations.

A different scenario is provided by the British legislation in relation to 'third-country' brokering when abroad of non-'restricted' equipment such as

6. Flags of convenience are countries that, due to lack of will or capacity, offer advantageous bases of registration for vessels and aircraft. Flags of convenience typically display very low levels of state monitoring. This implies that they are easier to operate from (companies may register with no ownership or operational link to the flag country), cheaper (taxes are lower), and allow low levels of transparency (see SAS, 2004, p. 146)

7. Unlike UNSC-mandated sanction, the embargo would be mandatory only for the members of the regional organization in question.

8. Information kindly provided by the German Federal Ministry of Economics and Labour, phone and e-mail, June 2005.

SALW. Specifically, a UK ‘person’, that is a UK national who is a UK citizen⁹, does not require a license when brokering from abroad a ‘third-country’ transfer of, for example, SALW to non-embargoed destinations.

However, the UK ‘person’ would require a license when operating from abroad if he/she wishes to broker SALW from a foreign country to a destination under an arms embargo by the UK (UK, 2004, arts. 3.2 and 3.4) (see also section 4.5.1 of this report).

4.5 Criteria for licensing and prohibitions

Licensing of brokering activities can effectively contribute to combating undesirable arms transfers only if there exist clear and adequate criteria for the competent national authorities for assessing license applications for individual brokering transactions.

A general practice in this regard is that brokering licenses are assessed against the same criteria used when deciding on arms exports.

In this sense, brokering licenses are granted only if the licensed transfer would also be authorised as a direct export by the state controlling the brokering activity.

National criteria in the states reviewed here typically stipulate that a brokering license will not be granted if this would violate obligations under international agreements or threatens national foreign policy and security interests.

Usually, the potential impact of the arms transfer in the recipient state is also considered, so that licenses are denied if there is a risk that the brokered military equipment will threaten security and stability in the recipient state or region; will be used in human rights violations or terrorist acts; or will be diverted to undesirable end users (see SAS, 2004, p. 157).

At the same time, it must be noted that there exists a high degree of variation in the licensing criteria stipulated in national laws and regulations, as well as between these and those established within the framework of multilateral organizations.

As mentioned, a consequence is that unscrupulous brokers can circumvent more restrictive criteria in one state by operating from another with less restrictive criteria.

4.5.1 Prohibition of embargo violations

Adequate criteria for the licensing of brokering licenses should clearly specify which activities are prohibited. One element of relevance here is the prohibition of arms embargo violations.

Importantly, despite the widely spread assumption that such a prohibition is automatically applicable in national systems, national courts have jurisdiction over arms embargo violations only if the embargo has been translated into domestic rules.

A useful example in illustration is the 2002 judgement of the Italian Supreme Court in a case against an individual charged with arms trafficking in violation of mandatory UN embargoes on Liberia and Sierra Leone (see *Frontline World*, 2002).

The Court acknowledged the defendant’s role in illicit arms transfers while acting on Italian territory. At the same time, it declared that it could not prosecute the case, because the trafficked arms originated from and were transferred outside Italian territory.

As Italian legislation does not cover the brokering of military equipment between two foreign states, the internationally known trafficker was consequently acquitted (Amnesty International, 2002).

Against this background, the emerging practice to legally prohibit the involvement in arms transfers in violation of arms embargoes is a welcome development.

Significantly, in several cases, this prohibition explicitly extends to brokering activities by persons and entities under national jurisdiction when operating from abroad.

One example referred to above is the UK legislation which prohibits unauthorised supply or delivery of any military equipment to a person or place in embargoed destinations (see section 4.4).

Embargoed destinations are understood to be those under an embargo imposed unilaterally by the UK, or by organizations to which the UK is a party, such as the UN, the EU, or the OSCE.

Specifically, the ban covers both brokers operating from the territory of the UK as well as

9. See UK, 2002, art. 11.

UK persons operating from abroad (UK, 2004, art 3.1 and 3.2).

Further, the wording of this prohibition has been kept broad and covers any act, or part thereof, involving the supply or delivery as well as any act calculated to promote the supply or delivery of military equipment. The ban thereby covers brokering, as well as transportation and financing services (*ibidem*).

The amendment to the German legislation on arms brokering is expected to entail a similar general prohibition. Brokering activities by persons and entities under German jurisdiction anywhere in the world would then be prohibited if this may result in the transfer of any military equipment to any destinations subject to an arms embargo by Germany.¹⁰

4.5.2 Prohibition of activities other than embargo violations

The domestic legal prohibition of brokering activities in violation of arms embargoes should be complemented with prohibitions of activities that would result in transfers entailing a clear risk of contributing to violations of other obligations under international law.

As suggested in the *Model Convention on the Control of Arms Brokering*, useful criteria that should be internationally adopted in this regard would include the prohibition of brokering activities and arms transfers that “will, or seriously threaten to:

- result in acts of genocide or crimes against humanity;
- violate human rights contrary to international law;
- violate international humanitarian law;
- lead to the perpetration of war crimes contrary to international law;
- violate a United Nations Security Council arms embargo;
- support international terrorism;
- result in a breach of a bilateral or multilateral arms control or non-proliferation agreement” (Model Convention, art. 5).

To be comprehensive and effective, these prohibitions should cover all activities and parts thereof, including transportation and financing, carried out by those falling under national jurisdiction.

In addition, they should be applicable to a country’s nationals and residents irrespective of whether they operated within the national territory or abroad.

4.6 Monitoring of arms brokers and brokering activities

4.6.1 Records of brokering licenses

Effective arms brokering controls require mechanisms which allow competent national authorities to monitor the activities of arms brokers and verify their conformity with granted licenses and other relevant obligations under national law.

One control element in this context is the practice, found in most states, to keep centralised records of arms brokering licenses.

The maintenance of databases on brokering licences and the creation of ‘institutional memory’ allow national authorities not only oversight over licensed activities, but also over arms brokers active under national jurisdiction.

A database of granted and denied brokering licences can also provide national authorities with elements required for the screening of previous brokering activities by the license applicant.

This is of particular importance in those states which do not operate a registration requirement for arms brokers.

Noteworthy in this context is the Finnish practice to make the record of licenses publicly accessible (Finnish Ministry of Defence, 2003, p. 3).

In Estonia, the record of brokering licenses is also publicly accessible and has been integrated in the above mentioned Estonian State Register of Brokers in Military Goods (see Estonia, 2004).

Further, many states with such records keep them in electronic format and therefore, in practice, for an indefinite period of time.

4.6.2 Record-keeping and reporting by arms brokers

A corollary to record-keeping practices by national authorities is the obligation for arms brokers to maintain adequate and comprehensive records on their activities.

¹⁰ Information kindly provided by the German Federal Ministry of Economics and Labour, phone and e-mail, June 2005.

These records should, at a minimum, identify quantity, type, and origin of the transferred arms, their destination and end user as well as indicate the transport and financial agents who were involved in the deals.

This measure would follow the widely accepted practice according to which manufacturers and exporters have to maintain adequate records on their production and trade activities.

States that require brokers to keep records of their transactions include Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Poland, Slovakia, Sweden, and the USA (see annex A).

Such records are generally subject to either regular inspections by national authorities, or must be made available to the latter upon request.

Furthermore, failure to maintain adequate records is generally punishable with administrative penalties such as fines (see SAS, 2004, p. 161).

Several states also require arms brokers to submit regular reports to national authorities on their activities.

For example, in Hungary and Estonia, brokers have to provide information on their licensed activities on a monthly and three-monthly basis respectively (see *ivi*, p. 160).

Periods for regular reporting in other states range from three and four months (Sweden and the Czech Republic respectively), to six months (France and Poland), to one year (in Lithuania for brokering of military-type weapons) (*ibidem*).

It should be noted, however, that there sometimes remain important loopholes in record-keeping and reporting requirements.

Specifically, several states have not extended the same record-keeping and reporting mechanisms that apply to manufacturers and exporters to brokers and brokering activities involving transfers of military equipment between two foreign countries.

For example, Austrian exporters and dealers in 'war materials' are required to keep an 'arms book' with information on the exported arms, the date of export, and the buyer, as well as proof of exportation (see Austria, 1998).

Similarly, German exporters and dealers of 'weapons of war' must maintain an 'arms book' in which to note who transported the weapons, who acquired them, and the date of exportation (Germany, 1961b, art. 9).

In both Austria and Germany though, the requirement to keep 'arms books' covers only export activities and excludes those relating to the transfer of military equipment between two foreign countries.

4.6.3 Delivery verification and post-delivery controls

A further element for the monitoring of brokering activities should be the verification that the brokered equipment has reached the intended recipient.

Where applicable, verification should also extend to what was stated in the end-use certificate.

Such verification would best be carried out by the competent authorities of the recipient state in co-operation with officials of the state that granted the brokering license, where possible.

Post-delivery verification logically descends from the principle of high standards on transfer security and end-use controls, which is applied by a growing number of states to their exports of military equipment.

For example, according to South African legislation on conventional arms exports, recipients of South African military equipment must commit in writing to provide Delivery Verification Certificates as proof of actual importation (South Africa, 2002, art. 7.d).

Bulgarian legislation also stipulates that national authorities "may require from the exporter the inclusion of a contractual provision allowing physical inspection by them or by officials authorized by them of the delivery under the foreign trade deal" (Bulgaria, 1995, art. 17.7).

Regrettably, few of the states operating brokering controls seem to perform delivery verification and post-delivery checks in relation to military equipment that was brokered by persons and entities under their jurisdiction.¹¹

An exception is Belgium, which explicitly provides for delivery verification in relation to military equipment brokered by agents under its jurisdiction.

Specifically, brokering licenses are conditional in Belgium on the payment of a deposit. The deposit is paid back to the broker upon receipt of proof of

11. Research by GRIP, 2003-2005.

the correct delivery to the intended recipient (Belgium, 2003a, art. 15).¹²

4.7 Penalties for violations of brokering regulations

The effective enforcement of arms brokering regulations requires the establishment of adequate penalties for their violations.

Violations may include failure to register or to obtain a license for brokering activities; the submission of false or misleading information in applications for a registration or license; failure to conform to conditions stipulated in granted licenses; and failure to keep adequate records on authorised activities.

National legislations usually distinguish between minor offences, for example due to negligence, and major offences. In most states, criminal sanctions for major offences include fines and/or imprisonment.

Prison terms range from a maximum of four years in Finland and Sweden, to five years in Belgium and Slovenia, to eight years in the Czech Republic and Slovakia (SAS, 2004, p. 160).

In some states operating controls on both 'third-country' brokering and the mediation of exports from national territory, prison terms may also vary according to whether or not the transferred equipment crossed national borders.

For example, those in violation of Lithuanian brokering regulations may face imprisonment of up to three years if the military equipment was transferred between two foreign countries, and up to ten years if the equipment entered, left, or transited through Lithuanian territory (Lithuania, 2005, pp. 9 and 13).

Belgian, Estonian, and Swiss legislations, among others, also provide for the requisition of goods pertaining to an illicit transfer and, in Estonia, the dissolution of commercial entities convicted for illicit arms trade activities (SAS, 2004, p. 160).

In the Czech Republic and the Ukraine, there also exist explicit sanctions on the provision of fraudulent authorizations and documents by governmental officials to facilitate illicit arms transfers (*ibidem*).

Legislation in these countries, therefore, covers not only the activities of brokers, but also of those

who may assist brokers in arranging illicit arms transfers.

4.7.1 Penalties for illicit brokering activities carried out abroad

As argued above, extraterritorial brokering controls and related penalties are crucial elements for preventing brokers to circumvent rules applied in their country of establishment.

For example, a broker may engage abroad in an activity that would be illicit if performed in the territory of the home state.

This broker can, in the absence of extraterritorial controls, return to the home state after the conclusion of the activity without facing the risk of legal prosecution.

In addition, the activity may not be illicit in the state where it was carried out. In this case, the broker would not risk prosecution either in his/her home state, or in the state where he/she carried out the transaction.

At the same time, there are important questions regarding available mechanisms to sanction activities which are illicit under national legislation but which are performed abroad.

One noteworthy approach in this context has been developed by Belgium. Belgian legislation stipulates that national courts have competence over individuals who violated brokering controls even outside the country, provided they have been apprehended on Belgian territory.

This competence exists even if the Belgian authorities have not received a complaint or official notification by the authorities in the country in which the alleged violation took place. It also exists if the activity is not punishable in the country where it was carried out (Belgium, 2003a, art. 15).

Similar provisions exist in South Africa (South Africa, 2002, art. 26.1).

4.7.2 Experiences in prosecutions of alleged illicit brokering activities

So far, there exists little public knowledge on national experiences in prosecuting arms brokers

12. The deposit for an indeterminate license is 10,000 EUR. For licenses for specific operations, the deposit is 1% of the value of the operation with a minimum amount of 1,000 EUR (see Belgium, 2003b, art. 3).

for alleged violations of national brokering regulations.

One possible reason for this is that many of the states which currently operate brokering controls put them in place only very recently.

In addition, it may be that even in states operating brokering controls, some illicit arms brokering activities might simply go undetected.

Indeed, where illicit activities are revealed and investigated, it is often done in response to tip offs by intelligence services and investigative research by journalists and non-governmental organizations.¹³

Another reason may be the scarce knowledge among law enforcement officials about brokering regulations and a lack of coordination between customs officials, police forces and prosecutors (SAS, 2004, p. 163).

This can result in a lack of focus in criminal investigations on violations of brokering regulations so that, where brokers are prosecuted, this is mostly done under legislation other than the one providing for the control of arms brokering.

For example, at present several criminal cases are in preparation or already underway in the Netherlands against persons accused of involvement in illicit arms activities.

There are strong indications that the persons in questions were, next to other illicit arms trade activities, also involved in arranging arms transfers that never touched Dutch territory.

However, prosecutors have chosen not to try the defendants for crimes under the Dutch brokering regulations, but under other legislation which rela-

tes, *inter alia*, to the import and export of strategic goods and the the perpetration of war crimes.¹⁴

Related, investigating the complex nature of illicit brokering deals and obtaining documentary and other evidence may require a long time and great dedication by investigators.

This is particularly the case if evidence required for prosecution has to be collected from abroad. This raises the need for adequate mechanisms of enforcement cooperation at the international level.

In addition, it raises the need for adequate statutes of limitations for illicit brokering activities, that is, the establishment of adequate legal deadlines for filing lawsuits after the alleged activity took place.

For example, in May 2000 Latvian prosecutors brought a criminal case against a former Latvian official. He was accused of participating, in 1992, in an arms brokering deal that resulted in the transfer of military small arms and ammunition from Poland to Somalia, in violation of a UNSC arms embargo.

The criminal case itself was the result of three years of criminal investigations. Eventually, the case was dropped because of the lengthy period of time between the activities in question and their prosecution (*ibidem*).

13. Personal interviews with investigators into illicit arms trafficking, the Netherlands and Switzerland, June and August 2005.

14. Information kindly provided by Frank Slijper, *Campagne tegen Wapenhandel*, Netherlands, June 2005.

5. Global and regional standards on arms brokering controls

In the past few years, the issue of illicit or otherwise undesirable arms brokering has drawn considerable attention at the international level.

In a number of international and regional fora it has spurred intense political discussions, which have resulted in various agreements - either politically or legally binding.

An analysis of these agreements reveals that convergence is developing on some of the regulatory elements needed for an effective control of brokering activities.

As on the national level though, there important areas of disagreement. On these a GGE should strive to build common understandings and approaches.

The following overview also highlights that the present international progress on the issue of arms brokering is geographically limited, and excludes important areas such as Asia, the Middle East, Northern Africa and the Pacific Islands.

In these regions, the acknowledgement of the problems posed by unregulated brokering activities has not yet taken roots, offering another important area of work for the GGE.

5.1 Global agreements

On the global level, two key instruments address the issue of arms brokering control.

These are the UN *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (UN PoA) (UN, 2001) and the *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* (Firearms Protocol) (UNGA, 2001).¹⁵

In the PoA, states agreed “to develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering” (UN, 2001, sec. II, para. 14).

General measures of control to be included in these national legislations or procedures were also listed. They comprise “registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State’s jurisdiction and control” (*ibidem*).

In addition to this commitment at the national level, states agreed “to develop common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons” on the global level (*ivi*, sec. II, para. 39).

The PoA, in other words, recognises that illicit brokering should be addressed by states both nationally, through the regulation of activities carried out in their own territory, and internationally, through a coordinated approach with other countries.

The Firearms Protocol contains similar measures couched in a similar rationale.

According to its provisions, state parties “shall consider establishing a system for regulating the activities of those who engage in brokering” with a view to “preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” (UNGA, 2001b, art. 15.1).

Given that the Protocol is legally binding, it creates an important commitment on the states that have signed it.

At the same time, when it comes to specifying the measures states should adopt at the national level, the Protocol uses typically non-constraining language.

For example, it provides that national systems of brokering controls “could include one or more measures” such as registration, licensing and the disclosure of “the names and locations of brokers involved in the transaction” in import/export licence documentation (*ibidem*).

In addition, states which operate a licensing system are “encouraged to include information on brokers and brokering in their exchanges of information” established in the Protocol itself, as well as

15. The legally-binding UN Firearms Protocol entered into force on 3 July 2005, 90 days after the date of deposit of its fortieth instrument of ratification (UN, 2005).

to retain records on brokers and brokering (ivi, art. 15.2, emphasis added).

5.2 Regional agreements

5.2.1 African Union

In November/December 2000, states members to what is now the African Union (AU) met in Bamako, Mali, to draft a common position in preparation for the 2001 UN Conference on Small Arms.

The document, commonly known as the Bamako Declaration, recommends a number of measures to be taken at the domestic and international levels by AU states.

At the domestic level, these include “tak[ing] appropriate measures to control arms transfers by manufacturers, suppliers, traders, brokers, as well as shipping and transit agents, in a transparent fashion” (Bamako Declaration, sec. A.vii).

At the regional level, AU members are encouraged to codify and harmonise legislation governing the manufacture, trading, brokering, possession and use of small arms and ammunition (ivi, sec. B.ii).

Additional recommendations do not deal with brokering activities *strictu sensu*, but measures that would affect them.

For example, AU states are encouraged to develop national legislation or regulations “to prevent the breaching of international arms embargoes, as decided by the United Nations Security Council” (ivi, sec. A.vi).

They are also encouraged to enhance the capacity of national law enforcement agencies, including those responsible for border controls, as well as to adopt relevant legislation criminalizing the illicit manufacture and trafficking in small arms (ivi, sec. A.ii-iii).

5.2.2 Southern Africa

In the Southern African region, members of the Southern African Development Community agreed, in August 2001, on the legally binding Protocol on the Control of Firearms, Ammunition and Other Related Materials (SADC Protocol).¹⁶

In the Protocol, SADC member states undertook to incorporate a set of elements in their national laws, aimed at preventing, combating and

eradicating “the illicit manufacturing of firearms, ammunition and other related materials, and their excessive and destabilising accumulation, trafficking, possession and use in the Region” (SADC Protocol, art. 3).

These elements include “provisions that regulate firearm brokering in the territories of State Parties” (ivi, art. 5.m).

Brokering is defined as

- a) acting for a commission, advantage or cause, whether pecuniary or otherwise; or
- b) to facilitate the transfer, documentation 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 buyer or recipient thereof (ivi, art. 1.2).

In addition, SADC Members “shall enact the necessary legislation and take other measures to sanction criminally, civilly or administratively under their national law the violation of arms embargoes mandated by the Security Council of the United Nations” (ivi, art. 5.2).

5.2.3 Eastern Africa

In March 2000, representatives of the countries of the Great Lakes Region and the Horn of Africa¹⁷ agreed on the *Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons*.

Signatories of the Declaration decided to

- Encourage a concrete and co-ordinated agenda for action for the sub-region to promote human security and ensure that all States have in place adequate laws, regulations and administrative procedures to exercise effective control over the possession and transfer of small arms and light weapons through measures inter alia to [...] urge source countries to ensure that all manufacturers, traders, brokers, financiers, and transporters of small arms and light weapons are regulated through licensing (Nairobi Declaration, para. iv).

16. The SADC Firearms Protocol entered into force on 8th November 2004, 30 days after the date of deposit of ninth instrument of ratification (see Institute for Security Studies (ISS), 2004).

17. These are Burundi, Democratic Republic of Congo, Djibouti, Ethiopia, Eritrea, Kenya, Rwanda, Sudan, Uganda and United Republic of Tanzania.

The Declaration formed the basis of the *Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa*, which was signed in April 2004 and is a legally-binding instrument.

The Protocol uses for its definition of brokering the same language as that employed in the SADC Protocol. The Nairobi Protocol also includes a definition of ‘broker’ as a person who acts

- a. for a commission, advantage or cause, whether pecuniary or otherwise;
- b. to facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of small arms and light weapons; or
- c. as an intermediary between any manufacturer, or supplier of, or dealer in small arms and light weapons and any buyer or recipient thereof (Nairobi Protocol, art. 1).

Parties to the Protocol have committed to incorporating in their national laws a set of measures (legislative or otherwise) that include “provisions regulating brokering in the individual State Parties” (ivi, art. 3.c.xii).

Details of these provisions are contained in art. 11, according to which “State Parties, that have not yet done so, shall establish a national system for regulating dealers and brokers of small arms and light weapons”.

In particular, these systems shall include, among others:

- The regulation of manufacturers, dealers, traders, financiers and transporters of small arms and light weapons through licensing;
- The registration of brokers operating on the national territory;
- The setting up of a case-by-case system of licensing (i.e. registered brokers should apply for a licence for each individual transaction they facilitate);
- The full disclosure on import and export licenses or authorization and accompanying documents of the names and locations of all brokers involved in the transaction.

Additionally, States Parties are committed to adopting “the necessary legislative or other measures to sanction criminally, civilly or administratively under their national law the violation of arms

embargoes mandated by the Security Council of the United Nations and/or regional organizations” (ivi, art. 3.b).

5.2.4 Americas

In November 2003, the Inter-American Drug Abuse Commission (CICAD) of the Organization of American States (OAS) approved the *Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition* (OAS Model Regulations).

The Regulations are not legally binding. However, they contain a very detailed set of measures that OAS member states are recommended to adopt.

The Model Regulations include nine articles, which cover the following:

- definition of brokers and brokering;
- competent national authorities for the control of brokering activities;
- registration systems;
- licensing of brokering transactions;
- prohibited activities;
- definition of offences and related penalties;
- liability of legal entities;
- scope of controls;
- reports and inspections.

In addition, two annexes contain models for licensing and registration application forms, indicating the information that national authorities are recommended to request from interested legal and natural entities wishing to engage in brokering activities.

‘Brokering’ is defined broadly. It includes “manufacturing, exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding, supplying, and delivering firearms, their parts or components or ammunition or any other act performed by a person, that lies outside the scope of his regular business activities and that directly facilitates the brokering activities” (OAS Model Regulations, art. 1).

“Broker” or “Arms Broker” is defined as “any natural or legal person who, in return for a fee, commission or other consideration, acts on behalf of others to negotiate or arrange contracts, purchases, sales or other means of transfer of firearms, their parts or components or ammunition” (*ibidem*).

The licensing of brokering activities on a case-by-case basis is considered the key element of national brokering controls (ivi, art. 4).

Conversely, registration of brokers is listed as an optional measure. The Model Regulations, however, stress that, at the practical level, a *de facto* registration system can be based on the collection of data submitted by brokers during the licence application process (ivi, art. 3).

Art. 5 spells out prohibitions, that is, cases in which brokering licences should be refused because the related transfer might lead to:

- acts of genocide or crimes against humanity;
- the violation of humans rights contrary to international law;
- the perpetration of war crimes contrary to international law;
- violations of United Nations Security Council embargoes or other multilateral sanctions to which the country adheres, or that it unilaterally applies;
- support of terrorist acts;
- the diversion of firearms to illegal activities, in particular, those carried out by organised crime; or
- a breach of a bilateral or multilateral arms control or non-proliferation agreement.

Other articles of the Model Regulations relate to the criminalization of violations of arms brokering rules and the obligation, on the part of the broker, to submit periodic reports to relevant national authorities (ivi, arts. 6 and 9).

Importantly, the Model Regulations suggest an extraterritorial application of brokering controls to persons, entities and activities falling under national jurisdiction.

Specifically, art. 8 stipulates that the Regulations' provisions shall apply to all brokers and brokering activities whether or not the latter were conducted in the controlling country's territory or in a foreign state, and whether or not the brokered items entered the territorial jurisdiction of the controlling state.

5.2.5 Euro-Atlantic region

In the Euro-Atlantic region, all the main regional organizations/frameworks - namely the European Union, the Organization for Security and Coope-

ration in Europe and the Wassenaar Arrangement - have dealt with the issue of illicit arms brokering.

Among these, only the EU has produced a legally binding agreement, the EU *Common Position on the Control of Arms Brokering*.

While only political in nature, the documents approved within the OSCE and the WA are very similar in substance to the EU Position, thus revealing important areas of agreement across the region over both the nature of the problems posed by illicit brokering and the means to address it.

5.2.5.1 European Union

In the European Union, early agreement on the issue of arms brokering materialised in the adoption of a set of guidelines that "could be a basis for national legislation" (EU Council, 2001, p. 3).

The Guidelines, which only represented a political obligation, were superseded two years later by the legally-binding *EU Common Position on the Control of Arms Brokering*.

With the aim of controlling "arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the European Union Code of Conduct on Arms Exports", the Common Position (CP) requires EU members to adopt or revise their national brokering controls in a way to include a set of key elements (EU, 2003, art. 1.1-2).

The CP defines brokering activities as activities of persons and entities:

- negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country;
- or
- who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country (ivi, art.2.3).

In order to provide a clear legal framework in which such activities take place, EU members are required to establish a licensing regime for activities conducted on their territory.

Licences should be assessed against the criteria of the EU Code of Conduct and records of their details should be kept by relevant authorities for a minimum of 10 years (ivi, art. 3).

Members are also required to establish a system of exchange of information on brokering activities, relating to - *inter alia* - legislation, registered brokers, denials of registering applications and licensing applications (ivi, art. 5).

Finally, they are mandated to establish relevant penalties to ensure the correct enforcement of the controls.

In addition to these mandatory measures, the CP includes other controls as optional. These comprise:

- the application of national controls on residents acting outside the national territory (extraterritorial application of the controls);
- the control of brokering activities related to arms exports, that is, of transfers originating in the national territory, in addition to the control of 'third-party brokering';
- the establishment of an initial authorization requirement, or registration system. This, in any case, would not replace the need for individual transaction licences;
- the possibility to take into account the past record of the applicant when deciding on brokering licences (see ivi, arts. 2; 3; and 4).

5.2.5.2 Organization for Security and cooperation in Europe

The OSCE has also dealt with the brokering issue during the past years. For a start, the need for brokering controls was acknowledged in the 2000 *OSCE Document on Small Arms*.

Section III of the Document, which deals with measures to combat the illicit trafficking in small arms and light weapons, states that "[t]he regulation of the activities of international brokers in small arms is a critical element in a comprehensive approach to combating illicit trafficking in all its aspects" (OSCE Document, sec. III-D, art. 1).

The section continues with an indication of measures that member states might adopt in order to control the activities of arms brokers.

These include the registration of brokers, the licensing of their activities and transactions, and the disclosure, in import and export documents, of the details of involved brokers.

A few years later, the OSCE adopted a *Handbook of Best Practices*, a set of eight best

practice guides on as many aspects of the control of small arms and light weapons.

One of the guides addressed the issue of the control of brokering activities, proposing a set of fundamental and optional measures that member states should adopt in their national systems.

These measures relate to licensing systems and criteria, registration of brokers, enforcement of controls, and international cooperation (see OSCE, 2003).

In 2004, with a decision of the Ministerial Council, the OSCE approved the *OSCE Principles on the control of brokering in small arms and light weapons*.

The Principles, which are politically binding, introduced a series of principles for the control of arms brokering that OSCE Members should introduce at the national level.

The objectives of the decision are

to avoid circumvention of sanctions adopted by the Security Council of the United Nations, decisions taken by the OSCE, ... other agreements on small arms and light weapons, or other arms-control and disarmament agreements, to minimize the risk of diversion of SALW into illegal markets, *inter alia*, into the hands of terrorists and other criminal groups, and to reinforce the export control of SALW (OSCE Principles, sec. 1, art. 1).

Requesting that member states establish "a clear legal framework for lawful brokering Activities" (ivi, sec. II, art. 3), the Principles list a set of regulatory measures that substantially repeat those included in the EU Common Position.

5.2.5.3 Wassenaar Arrangement

Discussions on arms brokering were also held within the Wassenaar Arrangement where they led, in 2002, to a *Statement of Understanding on Arms Brokerage*.

The Statement recognised the "value of regulating the activities of arms brokers" and committed states to consider a number of measures for their control, essentially relating to registration, licensing and disclosure mechanisms (Wassenaar Arrangement, 2002).

A year later this general commitment was reiterated and made more specific in the *Elements for Effective Legislation on Arms Brokering*.

In the Elements, participating states agreed to “strictly control the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations” (Wassenaar Arrangement, 2003).

The purpose of these controls is to “avoid circumvention of the objectives of the Wassenaar Arrangement and UNSC arms embargoes ... and to enhance co-operation and transparency between Participating States” (*ibidem*).

The Elements stipulate that participating states should license brokering activities taking place on their territory and involving arms transfers between third countries (Wassenaar Arrangement, 2003, art.1).

The Elements further stipulate that participating states may also require a license regardless of where the activity is carried out (*ibidem*).

The Elements also suggest that states should establish records of granted licences, “[a]dequate penalty provisions and administrative measures, i.e. involving criminal sanctions” and, possibly, a register of arms brokers, in order to facilitate enforcement of such measures (ivi, arts. 2; and 3).

In order to enhance international cooperation on the issue, the Elements also recommend that states include information on arms brokering within the WA General Information Exchange (ivi, art.4a).

Finally, they recommend assistance to requesting Participating States for the “establishment of effective national mechanisms for controlling arms brokering activities” (ivi, art. 4b).

6. Common ground and remaining weaknesses

As the preceding overviews suggests, during the past years significant convergence has developed in national and multilateral standards of control on arms brokers and their activities.

As the summary tables in annex A and annex B indicate, consensus has emerged in several key areas, notably in relation to the need to establish domestic legal frameworks for the controls of arms brokering.

This convergence constitutes a fruitful basis for their consolidation at the global level by a GGE on Brokering.

Regarding the elements that such frameworks should contain, the here reviewed standards converge on the principle of licensing of brokering activities as the key control measure.

Specifically, this relates to licensing of, at a minimum, the brokering within the national territory of arms transfers between two foreign countries.

This is complemented with agreement on the establishment of prohibitions, penalties, and criminalization for violations of national brokering regulations.

Convergence is also strong on the need to prohibit violations of UN arms embargoes and embargoes mandated by other multilateral organizations to which a state may be party.

Regarding other control elements, current standards are more divergent at the national level, and, where stipulated in multilateral instruments, often more cautiously worded.

Notably, this pertains to controls on extraterritorial activities conducted by persons and entities falling under a state's jurisdiction. While several states operate this control element, it is not present in all of the national systems reviewed here.

In parallel, multilateral standards referring to extraterritorial controls usually present them as an

optional measure states are 'only' encouraged to consider or to adopt.

At the same time, this is in itself a significant advance of the last years as even such an encouragement was not included in multilateral brokering standards that were adopted in the early 2000s.

Similarly, registration requirements are not applied in all states with brokering controls and they are often also referred to as optional elements in multilateral instruments.

At the same time, emphasis is put in multilateral standards on the need for national authorities to keep records on brokers and their licensed activities, whether or not a registration scheme is in place.

This shows that states have been alerted to the damages that a lack of institutional memory may entail in terms of monitoring and enforcement.

Several important areas remain undefined in both national and multilateral standards.

One area of concern in this context is the virtual absence of controls on 'brokering-related' activities such as transportation and financing services for arms transfers between two foreign countries.

This is especially regrettable as the urgent need to address these areas of brokering was already identified in the GGE that reported to the UN on brokering in 2001 (see UNGA, 2001a).

In addition, there is no convergence concerning the criteria that states should use when assessing and deciding on the granting or refusal of licenses for brokering transactions.

This lack of common understandings on the responsibilities of states in the arms transfers under international law continue to undermine the effectiveness of national and multilateral arms controls.

Lastly, there remain so far only limited efforts by states to verify correct delivery and end-use of arms they authorised for transfers. This continues to facilitate illicit and otherwise undesirable arms brokering.

7. Future steps: an agenda for a Group of Governmental Experts

The creation of an expert group on regulating SALW brokering, which would follow-up on the work of the Group that reported to the UN in 2001, comes at a favourable moment in the development of global approaches to combating the illicit trade in SALW in all its aspects.

First, UN members recently concluded negotiations on an international instrument to assist states in the timely and reliable tracing of illicit SALW recovered in the context of armed conflict and crime (see UNGA, 2005b).

This will contribute to their ability to identify points of diversion of SALW from the licit to the illicit sphere.

If the record-keeping systems states committed to maintain under the instrument contain adequate information on those involved in transfers — including brokers, transporters, and financial agents— the tracing instrument will also enhance the ability of states to identify brokers and others responsible for SALW diversion.

Second, an increasing number of states already operate SALW brokering controls at the national level.

The above review of their legislation reveals emerging consensus on a key set of elements that are required for the effective exercise of brokering controls.

In addition, in several cases, states have adopted specific control measures that are only encouraged or presented as optional in multilateral agreements on the issue.

These factors indicate that there is a sincere willingness among a growing number of states to move from discussions on brokering controls to more concrete action.

Third, significant advances have been made in many regional and sub-regional fora in the development of common minimal standards on controlling arms brokering.

These generally encompass and build on the commitments made by UN member states under the 2001 UN Programme of Action.

In the EU, as well as eastern and southern Africa, states have agreed to the legally-binding obligation to establish adequate national brokering controls.

Discussions on possible sub-regional standards on brokering controls have also taken place in Western Africa and in the Arab League.

As highlighted above, current regional and sub-regional documents indicate several areas of emerging consensus on key elements of control for SALW brokering.

At the same time, it is still only about one fifth of UN member states which are in conformity with their commitment under the 2001 UN PoA to adequately control arms brokering.

Importantly, there remain loopholes and inconsistencies in and between national regulations and multilateral standards, and existing global standards are rudimentary and fail to specify in greater detail the measures that states should adopt, either individually, or in cooperation with one another.

Finally, there remain several regions and sub-regions in the world where there has been little or no further progress on the control of SALW brokering.

For these reasons, it is crucial that the forthcoming experts group is provided with an adequate and detailed mandate for its work. Key elements the GGE should be mandated to consider in this context include the following.

Feasibility of an international instrument on SALW brokering

There is a clear risk that a GGE on Brokering would merely repeat and duplicate the valuable work that was done by the 2001 GGE.

It is therefore critical that the future GGE is mandated to consider not only further steps in enhancing international cooperation in combating illicit SALW brokering, but also the specific options that are open to UN member states.

Specifically, this mandate should cover consideration of the feasibility of an *International Instrument to Prevent, Combat, and Eradicate Illicit SALW Brokering In All Its Aspects*.

In addition, the GGE should be explicitly mandated to consider the nature, scope and contents of this instrument (see also below) and make

recommendations on these issues to the UN General Assembly.

It may also be desirable that the GGE is mandated to draw up a draft for such an instrument, based on existing good practices on SALW brokering controls.

This draft should form a basis for possible future negotiations by a UN Open-Ended Working Group on Illicit SALW Brokering.

Definitions of brokers, brokering and brokering-related activities

The GGE's mandate should stipulate that the GGE clarify definitions on the actors and activities that should be subject to national controls, as well as identify existing good practices in this regard.

It is essential that the GGE highlights the need for controlling brokering activities within a state's territory in relation to SALW transfers between two foreign countries, and irrespective of whether or not the SALW enter the possession or ownership of the broker.

This should not preclude states wishing to do so to include in their national controls brokering activities related to SALW transfers that touch their national territory (exports, imports and transits).

Further, it would be a serious shortcoming if the GGE now to be created were to have a more restricted approach than that of the 2001 GGE.

Specifically, this means that the forthcoming GGE should be explicitly mandated to include in its scope of consideration adequate controls on 'brokering-related' activities.

It should be stressed that the distinction between 'core brokering' and 'brokering-related activities' is common in the political sphere. However, it does not do justice to the complex web of activities that result in the arranging or facilitation of illicit arms transfers.

In other words, without adequate controls on those providing services other than contract mediation or indicating to business partners the possibility of a contract, many actors responsible for diversions of SALW into the illicit sphere will be able to continue to act with impunity.

Essential minimal standards on licensing, record-keeping, and sanctions

The GGE should clearly define essential minimal standards for effective controls on SALW brokering.

These must include the creation of a clear legal framework for lawful brokering activities and the provision of sanctions, including criminal penalties, on those violating national regulations and laws.

Further essential standards relate to the establishment of a licensing requirement for controlled brokering activities and of centralised records of such licenses.

Consideration should also be given to the principle to grant licenses for SALW transfers, including brokering licenses, only subject to prior confirmation by relevant authorities of the end-use and end user of the transferred weapons.

In addition, the GGE should firmly establish that brokers must be obliged to maintain comprehensive and accurate records on their activities that should be subject to inspection by competent national authorities.

The GGE should also affirm that brokers should further be required to obtain a registration from relevant national authorities as a pre-condition for applying for licenses for individual brokering transactions.

Need for extraterritorial controls

The GGE should clarify the need for extraterritorial controls on SALW brokering, as well as their possible scope.

As previously indicated, comprehensive extraterritorial controls would be based on a license requirement for 'third-country' brokering activities conducted abroad by a country's nationals and permanent residents.

A more limited approach would be to exclude from this licensing requirement nationals who are permanently residing abroad and/or brokering to destinations that are not under an arms embargo (see section 4.4).

Another restricted approach to extraterritorial controls would limit these to sanctions on activities

abroad that violate certain prohibitions relating to, for example, arms embargoes (see section 4.5.1-2 and below).

Need for adequate common standards on licensing criteria and prohibitions

The GGE should address the still outstanding issue of the lack of adequate and clearly spelt out international criteria for national decisions on arms transfers licenses, including brokering licenses.

In the UN Programme of Action, states undertake to assess export authorizations in line with “existing responsibilities (...) under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade” (UN, 2001, sec. II, para. 11). States further undertake to license brokering activities (UN, 2001, sec. II, para. 14).

However, the PoA does not specify what these responsibilities under international law may be, or, indeed, what constitutes relevant international law in this context.

Further, there is no commitment under the PoA to integrate relevant criteria into national legislation on SALW control and to apply these to the assessment of brokering licenses.

The GGE should also address cases that should be subject to clear prohibitions under national legislation.

At a minimum, there should be a clear prohibition of unauthorised brokering activities in relation to arms transfers to destinations or end users under a mandatory UN Security Council arms embargo.

Importantly, the prohibition should be extended to all actors in the arms trade, including transportation and financing agents, and be applicable also if the activity is conducted abroad.

It may be desirable in this context that the GGE also address the question of whether transferring and brokering SALW in violation of a mandatory UN arms embargo should be made subject to universal jurisdiction.

Such universal jurisdiction would entail that every state has the right and obligation to apprehend and hold trial over those accused of certain violations, irrespective of the nationality of the accused and the place where the crime was committed.¹⁸

Further cases that should be subject to clear prohibitions are violations of unilateral arms

embargoes by a state as well as of those imposed in a multilateral forum to which the state may be party.

Other clear prohibitions—identified in the *Model Convention on Brokering*—should be established towards arms transfers that will, or seriously threaten to result in violations of human rights or of international humanitarian law, among others (see section 4.5.2).

Exchanges of information and assistance in combating illicit SALW brokering

The GGE should investigate appropriate ways to strengthen information exchange mechanisms in the context of combating illicit SALW brokering.

One element in this regard could include regular information exchanges on states’ national legislation, regulations and brokering controls, as well as on their experience in implementation.

At the sub-regional and regional levels, and possibly at the global level, information exchange on granted and denied brokering licenses may also be desirable.

Similarly, it may be desirable to consider the international exchange of information on brokers and brokering agents that have been granted/denied a registration or whose registration has been withdrawn because of convictions for involvement in illicit arms transfers.

The GGE should also discuss mechanisms to foster and strengthen cooperation among law enforcement agencies at the national, bilateral and multilateral levels in view of identifying illicit brokering activities and those responsible for them.

This should include consideration of means to support the exchange of information in the context of criminal investigations, as well as of mechanisms for the extradition of those accused of involvement in illicit brokering activities, where needed.

18. In international law, one of the first applications of the principle of universal jurisdiction was the 18th century ban on piracy on the high seas, a territory outside the jurisdiction of all states. Thanks to this principle, any country could prosecute high sea pirates, regardless of whether they had caused injury to the prosecuting state or to one of its nationals. Nowadays, the principle of universal jurisdiction has been extended to prosecute war crimes, genocide, crimes against humanity, torture, and trafficking in human beings, among others (see Pottmeyer, 2003, p.336; and Simon, 2002, pp. 14f.).

Consideration should also be given to mechanisms of technical and financial assistance to states requesting it to draft relevant national legislation and regulations, as well as to train relevant law enforcement agencies, including border and customs agencies.

Need for complementary control standards on SALW transfers

Importantly, the GGE should be mandated to consider complementary measures on controls on SALW brokering that fall outside the immediate scope of currently discussed issues in the UN process on brokering.

One critical element in this regard are measures such as strengthening common approaches to prevent the use of falsified end user certificates and the fraudulent use of authenticated end user certificates. These measures fall within the scope of implementation of the UN PoA on SALW.

Further, the GGE should consider mechanisms to strengthen state efforts in the crucial area of

verification of the correct delivery and end-use of transferred SALW.

Such verification should involve the country which authorised the brokering of a given arms transfer, as well as the country which authorised the related export and the destination country.

In addition, the GGE should clearly identify measures to enhance co-operation with relevant actors in the transport and financing sectors.

Controls on transportation and financing agents do not exclusively fall under arms control regulations, a fact that is often overlooked in current debates.

Rather, they also touch on steps that would need to be taken in the fields of international aviation and maritime transport, as well as the banking sector.

Consequently, legislation and actors other than those directly involved in arms export controls should be included in considerations of possible international measures to combat illicit SALW brokering in all its aspects.

Annexes: A - Summary table of national arms brokering regulations

| Country | Licensing 'third-country' brokering | Licensing brokering of exports from national territory | Controls on 'brokering-related' activities for 'third-country' transfers | Licensing / sanctions on extra-territorial brokering | Registration of brokers | Record-keeping /reporting by brokers on 'third-country' transfers |
|--------------------------------------|---|--|---|---|-------------------------|---|
| Austria ¹⁹ | For transfers that involve origins and recipients outside the customs union of the EU | | | | | |
| Belgium ²⁰ | Yes | Yes | | Judicial competence over brokers having violated national brokering controls even if the violation took place abroad | Yes | |
| Bosnia and Herzegovina ²¹ | Yes | Yes | | | Yes | |
| Bulgaria ²² | Yes | Yes | Yes | Judicial competence for violations of UN, EU, OSCE or national embargoes committed anywhere | Yes | Yes |
| Czech Republic ²³ | Yes | | | Yes | Yes | Yes |
| Estonia ²⁴ | Yes | Yes | Yes | Yes | Yes | Yes |
| Finland ²⁵ | Yes | Yes | | Yes | | |
| France ²⁶ | | Yes | | | Yes | Yes |
| Germany ²⁷ | Yes | | General authorization required for transport agents wishing to transfer 'weapons of war' on German registered ships or planes between two third countries | Licensing expected to be established for 'third-country' brokering of SALW. Also expected is establishment of judicial competence for violations of UN, OSCE, EU or national embargoes committed abroad | | |

19. See Austria, 1977, art. 1.4; and Austria, 1995, art. 3.3.

20. See Belgium, 2003a, art. 15.

21. See Bosnia and Herzegovina, 2003.

22. See Bulgaria, 1995, arts. 5.3; 14.1; and additional provisions, 1.a.2.

23. See Czech Republic, 1994, arts.2; 6.1; 7.1; and 14.1.

24. See Estonia, 2003, arts. 3.1-4; 4.2.4; 9; 10.4; 27.3; and 38.

25. See Finland, 1990, arts. 1.1; and 2.a.2.

26. See France, 1992, art. 3; and France, 1995, arts. 1; and 16.1-3.

27. See Germany, 1961a, arts. 4.1; and 4.a. 1-2. Additional information kindly provided by German Federal Ministry of Economics and Labour, telephone, 7 June 2005.

| Country | Licensing 'third-country' brokering | Licensing brokering of exports from national territory | Controls on 'brokering-related' activities for 'third-country' transfers | Licensing / sanctions on extra-territorial brokering | Registration of brokers | Record-keeping /reporting by brokers on 'third-country' transfers |
|-----------------------------|-------------------------------------|--|--|--|--|---|
| Hungary ²⁸ | Yes | Yes | | Yes | Yes | Yes |
| Italy ²⁹ | | Yes | | | Yes | |
| Latvia ³⁰ | Yes | | | | Yes | |
| Liechtenstein ³¹ | Yes | Yes | Criminal sanctions on financing of illicit arms transfers | | General trade authorization required | Yes |
| Lithuania ³² | Yes | Yes | | Yes | For brokers in 'military-type weapons' | Yes |
| Malta ³³ | Yes | Yes | | | Yes | |
| Netherlands ³⁴ | Yes | | | Yes | Necessary for brokers of SALW covered by the Arms and Ammunition Act | |
| Nicaragua ³⁵ | Yes | Yes | | Yes | Yes | |
| Norway ³⁶ | Yes | | | Yes | | |
| Poland ³⁷ | Yes | Yes | | Yes | Yes | Yes |
| Romania ³⁸ | Yes | | | Yes | Yes | |
| Slovakia ³⁹ | Yes | Yes | | | Yes | Yes |
| Slovenia ⁴⁰ | General authorization required | Yes | | | Yes | |
| South Africa ⁴¹ | Yes | Yes | | Courts are competent over violations of brokering regulations even if committed abroad | Yes | |
| Spain ⁴² | Yes | | | | Yes | |
| Sweden ⁴³ | Yes | Yes | | Yes | | Yes |

28. See Hungary, 2004, arts. 1.2-3; 2.2.c; 6.2; and 7.1.

29. See Italy, 1990, art. 3.4.a-b.

30. See Latvia, 2004. Additional information kindly provided by Latvian Ministry of Foreign Affairs, e-mail, 20 May 2005.

31. See Liechtenstein, 1999, arts. 1; 2.1; 4.1; 6.1-2; 9; 15; 23; and 28.1.h.

32. See Lithuania, 2002; Lithuania, 2004; and Lithuania, 2005, p. 13. Additional information kindly provided by Lithuanian Ministry of Foreign Affairs, e-mail, 20 May 2005.

33. See Malta, 2003, arts. 2; and 3.

34. See Netherlands, 1996; Netherlands, 1997; and Netherlands, 2005, p. 6. Additional information kindly provided by Ministry of Economics of the Netherlands, telephone, 14 July 2005.

35. See Nicaragua, 2004.

36. See Norway, 1987.

37. See Poland, 2000, arts. 2; 3.5.a.a-b; 3.8; 6.1-2; and art. 25.1.

38. See Romania, 1999, arts. 1; 3-4; 8-11; 30; and 32-38.

39. See Slovakia, 1998; Slovakia, 2002; and Slovakia, 2005, p. 2. See also Grillot, 2003, p. 31; and Human Rights Watch, 2004.

40. See Slovenia, 2003; Slovenia, 2004; and Slovenia, 2005, p. 9.

41. See South Africa, 2002, arts. 1; 13-15; 22; 24; and 26.

42. See Spain, 2004, art. 2.1.d; 9; and 18.

43. See Sweden, 1992a; and Sweden, 1992b, arts. 2; 4.1-2; 5; 11; and 12.

| Country | Licensing 'third-country' brokering | Licensing brokering of exports from national territory | Controls on 'brokering-related' activities for 'third-country' transfers | Licensing / sanctions on extra-territorial brokering | Registration of brokers | Record-keeping /reporting by brokers on 'third-country' transfers |
|------------------------------|-------------------------------------|---|---|--|-------------------------|---|
| Switzerland ⁴⁴ | Yes | Yes (exemptions apply to those brokering on behalf of manufacturers established in Switzerland) | ring behalf of | (Including for those brokering a manufacturer established in Switzerland) | Yes | |
| Ukraine ⁴⁵ | Yes | Yes | | Yes | Yes | |
| United Kingdom ⁴⁶ | Yes | | Criminal sanctions for any act, including transportation and financing, related to the illicit supply or delivery of military equipment to embargoed destinations | Licensing for brokering in 'restricted' goods i.e. long-range missiles and torture equipment and sanctions on illicit brokering in any equipment to embargoed destinations | | Yes |
| United States ⁴⁷ | Yes | Yes | Yes | Yes | Yes | Yes |

Note: the summary table above refers to controls on SALW and other military equipment falling under national arms control measures. In some states, regulations differ regarding the brokering of 'military-type' SALW and firearms traded on civilian markets. To retain a level of comparability, brokering in firearms on civilian markets has been excluded from this table.

Further, the table aims to be indicative and does not claim to be exhaustive or comprehensive. Rather, it provides information that could be clearly identified in national legislation and regulations. This task was complicated by the absence of easily available information relating to some countries and/or linguistic constraints. It is therefore possible that some states that operate brokering controls are not included in this table.

It should also be noted that all the states reviewed here generally keep centralised records on granted licenses and, where applicable, registration requests, as well as stipulate penalties for violations of national laws and regulations. These important categories for brokering controls have not been included in this table. For further information on brokering controls in many of the states considered above, see Anders, 2005 and Cattaneo, 2004.

44 See Switzerland, 1996, arts. 2; 5.3; 9.1.b; 12; 15; and 22.

45 See Ukraine, 2003, arts. 1-2; 6; 12; 15-18; 22; 24-25; and 27-28.

46 See United Kingdom, 2003, arts. 3.1-2; 3.4; 4.1-3; and 7.1-6; and United Kingdom, 2004, art. 3.1-4; and 6.1-6.

47 See United States of America, International Traffic in Arms Regulations (ITAR), part 129.1-10.

Annexes: B - Summary table of multilateral arms brokering regulations

| Document title | Document Nature | Adoption of brokering legislation | Disclosure requirements* | Licensing brokering activities | Establishment of licensing criteria | Extraterritorial controls |
|---|-----------------|-----------------------------------|--------------------------|--------------------------------|-------------------------------------|---------------------------|
| UN Programme of Action | Political | Yes | | Yes | | |
| UN Firearms Protocol | Legal | | Yes | Yes | | |
| AU Bamako Declaration | Political | Yes | | | | |
| SADC Firearms Protocol | Legal | Yes | | | | |
| Nairobi Declaration | Political | | | Yes | | |
| Nairobi Protocol | Legal | Yes | Yes | Yes | | |
| OAS Model Regulations | Recommendation | Yes | | Yes | Yes | Yes |
| EU Common Position | Legal | Yes | | Yes | Yes | Optional |
| OSCE Document on Small Arms and Light Weapons | Political | Yes | Yes | Yes | | |
| OSCE Best Practices Handbook | Recommendation | Yes | | Yes | Yes | Optional |
| OSCE Principles on the control of brokering in SALW | Political | Yes | | Yes | Yes | Optional |
| WA Statement of Understanding on Arms Brokerage | Political | Yes | Yes | Yes | | |
| WA Elements for Effective Legislation on Arms Brokering | Political | Yes | | Yes | Yes | Optional |

* These refer to the disclosure in import/export licence documentation of the names of brokers involved in the arms transaction

Summary table of multilateral arms brokering regulations – continued

| Document title | Registration (prior authorization) | State records on brokers | Criminalization of embargo violations | Broker's reporting to national authorities | Penalties | Information exchange |
|---|------------------------------------|--------------------------|---------------------------------------|--|-----------|----------------------|
| UN Programme of Action | Yes | | Yes | | Yes | |
| UN Firearms Protocol | Yes | Yes | | | | Yes |
| AU Bamako Declaration | | | Yes | | | |
| SADC Firearms Protocol | | | Yes | | | |
| Nairobi Declaration | | | | | | |
| Nairobi Protocol | Yes | | Yes | | | |
| OAS Model Regulations | Optional | | Yes | Yes | Yes | |
| EU Common Position | Optional | Yes | | | Yes | Yes |
| OSCE Document on Small Arms and Light Weapons | Yes | | Yes | | | |
| OSCE Best Practices Handbook | Optional | Yes | | Optional | Yes | Yes |
| OSCE Principles on the control of brokering in SALW | Optional | Yes | | | Yes | Yes |
| WA Statement of Understanding on Arms Brokerage | Yes | | | | | |
| WA Elements for Effective Legislation on Arms Brokering | Optional | Yes | | | Yes | Yes |

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