New York

Meeting of the Small Arms Working Group, 13 April 2005

Brokering of Small Arms and Light Weapons.
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Background

Governments around the world have committed themselves to introduce arms brokering legislation where it is needed. The most important commitment is in the 2001 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects:

> To develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering. This legislation or procedures should include measures such as 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.
> *Programme of Action II.14*

Arms brokering concerns the activity of arranging arms transactions. The broker acts as a middle man between the seller and buyer, and in addition to arranging the sale, may also provide other services such as financing or transport. While there has been much international attention concerning brokers' involvement in violations of laws and UN arms embargoes, it is important to note from the outset that there is no serious call to ban brokering as such. This is because, as in many other fields, brokering can be an essential and wholly legitimate part of the defence industry.

The focus of attention by governments and civil society organisations alike has been to bring brokering under legal control. This is necessary because, in many states, laws concerning the export and import of arms only cover the transfer of defence material. The activity of arranging a transfer is outside existing regulations. A recent survey by the *Small Arms Survey 2004* found that some 25 countries had legislation controlling arms brokering. In addition, some other countries have regulations that implicitly cover brokering (such as by having a state monopoly company with the sole right to engage in arms deals).

This oversight is a matter of urgency because numerous UN Security Council reports into arms embargo violations, and investigations into arms trafficking (among them *The Arms Fixers* by PRIO in Oslo), have identified the key role played by unscrupulous brokers in setting up illicit arms supplies. In short, in order to illegally transport arms, documents need to be forged, officials bribed, cooperative aircraft and pilots found, and police and

customs officers avoided. Such operations require complex networks, at the centre of which stands the broker, the arranger of the transaction.

Two important aspects of the brokering issue can be highlighted by the following recent examples. First, in December 2004, the UN Security Council Sanctions Committee investigating violations of the embargo on the Democratic Republic of Congo, detailed the links between locally operating air transport companies and international arms brokers, including a well-known arms broker who has been identified in previous UN Sanctions Committee investigations into embargo violations. The report indicated links between companies and aircraft operating in the DR Congo, and those under investigation by another UN Security Council committee investigating violations of the arms embargo covering Liberia. In doing so, it highlighted a complex web of some seven companies operating in six different countries.

Second, on 4 April this year, a man was convicted by a US court, and sentenced to three years and ten months in jail, for illegal brokering activities. He had been engaged in arranging the sale of 200 Kalashnikov assault rifles to a Colombian group called the Autodefensas Unidas de Colombia (AUC). The importance of his conviction is underlined when one recalls that in 2001 the AUC had been included in the US State Department's list of Foreign Terrorist Organizations.

These two examples make two salient points. First, illegal arms brokering remains a key problem for states seeking to enforce UN arms embargoes and prevent the transfer of weapons to parties of concern. Second, strong legal controls concerning arms brokering can and do work.

Recent developments as regards international instruments.

As mentioned above the UN Programme of Action commits member states to develop adequate national legislation and regulation regarding the brokering of small arms and light weapons. Since 2001, we have witnessed the development of six regional and multilateral agreements concerning brokering (either as specific documents on brokering, or as part of larger documents on small arms). They range between elements of a protocol to a UN Convention, to politically binding statements by regional organisations. They are:

Agreement	**Date**
OSCE Principles on the Control of Brokering in Small Arms and Light Weapons	2004
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	2004
An EU Common Position on the Control of Arms Brokering	2003
The OAS Model Regulations for the Control of Brokers of Firearms, their Parts, Components and Ammunition	2003
The Wassenaar Arrangement Elements for Effective Legislation on Arms Brokering	2003

UN 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	2001

In total these six documents cover 121 governments, including all the world's major exporters of small arms and light weapons.[i] In addition, other agreements, such as the SADC Protocol on the Control of Firearms, Ammunition and other Related Materials, and the Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, call upon their respective governments to control brokering activity (without providing details on how this should be done).

Common elements on the brokering issue.

These agreements represent several consensuses. First, governments agree to reiterate and reinforce their commitment under the Programme of Action to introduce regulations to control arms brokering. Second, they have reached consensus on the key aspects of controlling arms brokering, namely to define the activity of brokering, and to develop principles of regulation that can be incorporated in national legislation. Last, the similarities between the regional approaches provide a strong basis for discussions concerning a global instrument on arms brokering.

Concerning the definition of brokering, with the exception of the UN Protocol (which does not explicitly define brokering), they all stated that brokering involved facilitating or *arranging the transfer of arms*.[1] This act of arrangement could involve transactions concerning two or more countries other than that in which the broker is located at the time the deal is being made. None of the agreements require the broker to take possession of the arms in question.

Furthermore, the Nairobi Protocol and the OAS model regulations state that this arrangement *should be done for a fee, or other such material advantage*. Such an addition to the definition has been made to exclude from the scope of the regulations people from the arms industry, who, as part of their legitimate activities, inform each other of market opportunities.

All the agreements called for the *licensing of specific brokering activities*. Before acting as a broker, a person would have to first obtain a license from the relevant government department. Thus brokering would be licensed in a similar fashion to general arms exports.

In addition, all the agreements, except the Wassenaar Arrangement's Elements, suggested that as an additional measure states could require that all arms brokers should first *register their occupation*. The Wassenaar Arrangement's Elements state that

[1] This definition is also found in the SADC Protocol on the Control of Firearms, Ammunition and other Related Materials.

"Participating States may also seek to limit the number of brokers." This could imply registration, but is not as explicit.

All of the agreements recommended that governments should *exchange information* about their national regulations and the activities of licensed or registered brokers within their jurisdiction.[2] Furthermore, except the Wassenaar Arrangement's Elements, all the agreements recommended that governments establish mechanisms to *keep records on brokering activities*.

All of the agreements recommended that states *introduce appropriate legal sanctions*, including criminal prosecution, to ensure that the above regulatory measures are respected.[3]

To sum up, there is already a developing consensus via the above agreements:

- Brokering concerns arranging the transfer of arms.
- Each brokering activity should be licensed.
- Governments could also require that brokers be registered.
- Information should be exchanged on brokering activities and legislation.
- Legal sanctions should be introduced.

Another important contribution to helping governments fulfil their commitment under the UN Programme of Action to introduce brokering regulations was the Dutch–Norwegian Initiative on Further Steps to Enhance International Co-operation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons. One of its activities was an international conference in Oslo on 23-24 April 2003, at which 27 governmental experts, as well as specialists from International Organisations and academic institutions, met to discuss ways of enhancing control over brokering activities.

The conference discussed methods that governments could use to control the activities of arms brokers. The Chair's report highlighted numerous areas of consensus among the participants, and where there were differences of opinion, it highlighted various options that governments could take.

Some remaining differences.

There are two main areas in which there are differences of opinion.

The first concerns what is known as extra-territorial jurisdiction. This term applies to the ability of governments to prosecute criminal offences (by their citizens) that took place outside their national territory. This type of legislation has been introduced by a number of countries to control activities (occurring outside their territory), such as war crimes,

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[2] The Nairobi Protocol did not mention this in Article 11 on brokering, but information exchange on the various articles of the Protocol is mentioned in Article 14 Mutual Legal Assistance.

[3] Both the Nairobi Protocal and UN Protocol recommended legal sanctions in separate articles (Article 3 and Article 5 respectively).

torture, or sex tourism. This issue is of special importance concerning brokering when one considers that, as mentioned in the introduction, brokering often involves complex international networks. The ability of a broker to evade national legislation by conducting meetings or telephone calls in another country obviously undermines the efficacy of the tightest national regulations.

Some countries, most notably the United States, have addressed this problem by extending the scope of their legislation to all brokering activities by their citizens irrespective of where they are carried out. However, many states encounter difficulties introducing such measures. First, because it is feared that enforcing extra-territoriality could impose an excessive burden on law enforcement agencies. Second, there exist constitutional problems concerning extending jurisdiction in some states.

Governments have addressed this dilemma in a number of ways. First, it can be recognised that extra-territoriality could be a tool to be used if a brokering case comes to light, rather than an obligation for states to permanently monitor the activities of their expatriates. Second, governments have made compromises. Some states, for example, have provisions for extra-territoriality for the violation of UN Arms Embargoes (but not concerning other aspects of brokering legislation). Others have sought to widen the net of their territorial legislation as far as possible. The UK regulations, for example, come into force if any part of the brokering activity (including financial transactions) took place within UK territory.

The second issue where a consensus is yet to develop concerns the scope of brokering activities. Acting as a middle man between the seller, and buyer, of a piece of military equipment is the core brokering activity. However, experience indicates that operations such as arranging transport or financing are also crucial to illicit arms transfers. The main objection to including transport and financing is the fear that this would impose an excessive bureaucratic burden upon both companies and government licensing departments.

This problem could perhaps be resolved by governments that do regulate activities such as transportation and financing providing more information on their procedures and the administrative load. One possible compromise concerning transportation would be to, in practice, only require licensing and registration for parties that were involved in arms as part of their normal business, and exclude the potentially large number that might only very occasionally transport small quantities of military material.

The issue of financing is associated with similar dilemmas. Some governments are concerned that such legislation might impose an excessive regulatory burden. Again, there are ways of limiting the scope of regulations to the most sensitive cases. The Netherlands, for example, includes financing in its brokering legislation, but a license is only required for financing the transfer of items on its list of strategic goods that are being exported outside the EU.

These issues serve to underline the importance of negotiating a legally binding international instrument on brokering, in order to facilitate closer international cooperation which is so vital in dealing with such a complex and transnational issue as brokering.

Conclusion.

To conclude, governments have committed themselves via the Programme of Action to ensure that they have adequate regulations to control brokering activities. The importance of this commitment is underscored by the continuing activity of unscrupulous arms brokers in arranging illicit transfers of small arms and light weapons.

While a relatively small number of states have introduced brokering controls, significantly more are covered by regional and multilateral agreements. Furthermore, there is a developing consensus among these documents on how to create brokering legislation.

The six agreements provide a solid foundation upon which the proposed Group of Governmental Experts on arms brokering can begin its work. Governments need a clear set of guidelines on how best to introduce brokering legislation. The Group will hopefully be able to provide governments with a toolkit to implement the principles outlined in the existing agreements.

While we look forward to the establishment of the Group of Governmental Experts in 2006 or early 2007, we should try to expand the areas of agreement as regards the nature and scope of the brokering issue. Regional efforts are very important in this regard and I welcome the fact that this issue is being dealt with at this symposium. I hope that our discussions here can contribute to improving our understanding and advancing the case for regulating small arms brokering in the Arab states.

I thank you for your attention.

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[i] The states covered by the six regional and multilateral agreements are: Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Cape Verde, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, DR Congo, Ecuador, El Salvador, Eritrea, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Grenada, Guatemala, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Ireland, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mali, Malta, Mauritius, Mexico, Moldova, Monaco, Nauru, Netherlands, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, FYR Macedonia, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Senegal, Serbia and Montenegro, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Suriname, Sweden, Switzerland, Tajikistan, Tanzania, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela.