



Best practice in the regulation of arms brokering

A paper by Saferworld addressed to the Group of Governmental Experts on Brokering

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Introduction

The purpose of this paper is to provide an informed contribution to the discussions that are due to take place during the second and third meetings of the Group of Governmental Experts convened to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, pursuant to UN General Assembly Resolution 60/81. Accordingly this paper seeks to outline elements of best practice with regard to the oversight, regulation and control of SALW brokering and related activities. Those elements where there would appear to exist a degree of consensus, such as the minimum requirement for regulation of arms brokering through national licensing systems focussed upon the "core" activities of mediation in arms transfers and buying and selling arms have not been substantively addressed. Instead, this briefing seeks to concentrate upon options for regulating those aspects of arms brokering and related activities around which significant debate continues to exist.

1. Brokering Control Lists

One of the principle concerns of states seeking to prevent and combat the illicit brokering in arms, including SALW, relates to the types of goods that should be covered by states' arms brokering controls. The fact that the GGE emerged as a follow-up to the UN Programme of Action to Prevent Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA) has necessarily limited the scope of the discussions in this regard. The mandate given to the GGE, which was established by UN Resolution 60/81, requires that it "...consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons..."¹

Within this context, then, it is worth examining the exact scope of the proposed discussion. For the purposes of the UN PoA and its follow-up processes, the definition of small arms and light weapons was taken from the 1997 Report of the UN Panel of Experts on Small Arms.² This specified the following:

a) Small arms:

- Revolvers and self-loading pistols
- Rifles and carbines
- Sub-machine-guns
- Assault rifles
- Light machine-guns.

b) Light weapons:

- Heavy machine-guns
- Hand-held under-barrel and mounted grenade launchers
- Portable anti-aircraft guns
- Portable anti-tank guns, recoilless rifles

¹ UN General Assembly Resolution 60/81: The illicit trade in small arms and light weapons in all its aspects.

² UN General Assembly Resolution 52/298: Report of the Panel of Governmental Experts on Small Arms

- Portable launchers of anti-tank missile and rocket systems
 - Portable launchers of anti-aircraft missile systems
 - Mortars of calibres of less than 100 mm.
- c) Ammunition and explosives:
- Cartridges (rounds) for small arms
 - Shells and missiles for light weapons
 - Mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems
 - Anti-personnel and anti-tank hand grenades
 - Landmines
 - Explosives.

The above represents a relatively comprehensive definition of small arms and light weapons, ammunition and explosives. However, even within the confines of the GGE mandate it is possible to envisage the inclusion of other categories of weapons – such as certain types of non-military small arms and internal security equipment – the transfer of which to undesirable end-users could have the effect of fuelling human rights abuses, crime, instability and low-level conflict.

In most cases, however, it is not possible to distinguish the controls levied by states on the brokering of major conventional weapons from those governing the brokering in SALW. Accordingly, whilst the GGE may only be able to consider options with regard to controlling brokering of SALW many of the debates and discussions concerning existing practice will inevitably impinge upon controls that have a wider application.

The GGE should consider the most extensive definition possible of SALW which includes non-military SALW as well as relevant internal security equipment, their parts, components and ammunition. However the GGE should also recognise the fact that in those states that currently regulate arms brokering their controls apply to all types of conventional arms.

2. Criteria for assessing Arms Brokering Licences

Since 2001 a plethora of multilateral initiatives have been concluded with a view to encouraging and strengthening national systems for the regulation of arms – including SALW – brokering. These range from the politically-binding Elements for Effective Legislation on Arms Brokering agreed in 2003 by Wassenaar Arrangement member states, to the legally binding EU Common Position of 2003 on the Control of Arms Brokering, to the development, by the OAS, of Model Regulations for the Control of the International Movement of Firearms, their Parts, Components and Ammunition (Broker Regulations). All of these agreements point to the establishment of brokerage licensing systems whereby individual brokering deals are assessed according to objective criteria. As a result, a number of states have integrated controls on arms brokering that reflect this understanding within their national systems of arms export control.

In many cases, the factors that ought to be considered in seeking to regulate arms brokering are identical to those that would be considered within the context of licensing direct arms exports. Indeed, the principal rationale behind establishing national systems for controlling both arms exports and arms brokering is to prevent and combat the trade in arms that takes place in violation of national and/or international law (the illicit trade). This premise is reflected to a significant extent in a number of regional and multilateral arms export control agreements and in numerous states' national export control systems.

National controls on arms brokering must therefore ensure that all relevant aspects of national and international law are addressed during the licensing process. The most consistent method of ensuring this is through the application of a comprehensive set of objective criteria. These criteria must reflect the fact that states' right to acquire conventional arms for self-defence and legitimate law enforcement purposes in line with international law and standards is also accompanied by significant responsibilities.

States' core substantive legal obligations in this regard are to:

- Prevent threats to the peace of the international community;
- Ensure respect for the laws of war; and
- Co-operate in the protection and fulfilment of human rights.

The use of conventional arms by States must therefore comply *inter alia* with international standards including those set by the United Nations Charter, the Geneva Conventions of 1949 and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990. At the same time, these responsibilities also extend to the *transfer*, including brokering, of conventional weapons. This means that states should not allow the transfer – i.e. the import, export, transit, transshipment or brokering of weapons if they know that they are likely to be used in violation of international law and standards governing their use.

In order for progress to be made internationally on preventing and combating illicit brokering in arms, a global legally binding agreement on the control of the international arms trade (an Arms Trade Treaty) is required. This agreement must codify the full extent of states existing responsibilities under international law as they relate to all types of transfers of conventional arms. In this regard a set of Global Principles that articulate states responsibilities under international law has been developed by a group of non-governmental agencies³ representing all regions of the world in conjunction with international legal experts. These Global Principles can be summarised as follows:

1. States are responsible for and must authorise all arms transfers that are relevant to their jurisdiction.

2. States must assess all arms transfers, taking into account the following criteria:

- **Express prohibitions** where States must not transfer arms in certain situations;
- Prohibitions on transfers based upon the **likely use of the weapons**, in particular whether the weapons are likely to be used to commit serious violations of international human rights law or international humanitarian law;
- **Other factors and emerging norms** that must be considered when assessing arms transfers.

3. A monitoring and enforcement mechanism must exist, providing for prompt, impartial and transparent investigation of alleged violations of an ATT and appropriate penalties for offenders.

These Global Principles should form the basis of an international ATT and for the regulation of all types of transfers of conventional arms – including the brokering of such. Further, in order to facilitate consistent implementation of these principles, model regulations covering the regulatory and administrative aspects of import, export, transit, transshipment and brokering controls should also be developed.⁴

The criteria whereby arms brokering licences are assessed should be the same as those applied to direct exports of arms. As specified in Section II paragraph 11 of the UN PoA, these criteria must reflect states existing responsibilities under international law. In order to ensure consistent application of arms transfer criteria states should agree an international Arms Trade Treaty that codifies states international legal responsibilities as they relate to the import, export, transit, transshipment and brokering of arms. These are summarised in the Global Principles⁵

³ These organisations form the ATT Steering Committee of NGOs. Committee members include: Africa Peace Forum, Amnesty International, Arias Foundation, Friends Committee on National Legislation, Instituto Sou da Paz, International Action Network on Small Arms, Nonviolence International, Oxfam International, Project Ploughshares, Saferworld, Schweitzer Institute, Caritas Internationalis, Viva Rio, Women's Institute for Alternative Development

⁴ *Inter alia*, these should outline licensing procedures and include provisions to ensure end-use and import certification, delivery verification and end-use monitoring.

⁵ See booklet entitled *Compilation of Global Principles for Arms Transfers*, Arms Trade Treaty Steering Committee, 2006 available from any of the aforementioned organisations or at <http://web.amnesty.org/library/Index/ENGPOL340042006>

outlined by the international ATT Steering Committee of non-governmental organisations. This international system should also include the development of model regulations for controlling all types of international arms transfer including brokering.

3. Extra-territoriality

All national arms brokering controls should have an extra-territorial dimension i.e. the controls should apply to the activities of nationals and/or residents operating abroad. Of those states that currently operate controls on arms brokering a number have included an extra-territorial dimension within their controls. Nationals of Belgium, the Czech Republic, Estonia, Finland, Hungary, Lithuania, the Netherlands, Nicaragua, Norway, Poland, Romania, South Africa, Sweden, the United Kingdom, the United States and the Ukraine are required to apply for a licence in advance in order to undertake some arms brokering activities even if the weapons involved will not enter or cross the national territory. However the precise nature and scope of extra-territorial controls varies from state to state. For example, in the UK extra-territorial controls on arms brokering activities are limited to the facilitating of transactions by UK nationals involving three specific categories of "restricted" goods – torture equipment, anti-personnel mines and long-range missiles – and to transfers which would contravene national, EU, OSCE or UN arms embargoes. Accordingly, providing that UK nationals avoid transactions where the end user is under embargo, or which involve "restricted" goods, and providing that they carry out their brokering activities outside the UK, they remain free from the reach of UK arms brokering legislation. Thus UK nationals could conceivably broker a wide variety of arms to a range of undesirable end-users that are involved in violent conflict, serious human right abuses and violations of international humanitarian law with relative impunity.

The broadest application of extra-territorial controls is found in the US. Under US legislation, the brokering of defence articles or defence services on the part of all US nationals are subject to a licensing requirement even when the activities are carried out abroad and regardless of whether or not the weapons transit US territory. Furthermore, the brokering licence requirement also extends to foreign agents established and working from abroad in circumstances where they broker US-origin weapons or work with US nationals.

It is sometimes argued that if an international instrument could be agreed on the control of international arms brokering then there would be no requirement for states to incorporate an extra-territorial dimension within their national arms brokering controls. However, even with an international instrument in place, it is likely that unscrupulous arms brokering agents would seek to carry out their activities from those states with the weakest national controls or poorest record of enforcement of arms brokering controls. Accordingly, the adoption of extra-territorial controls by as many states as possible will be an essential element of international efforts to prevent the brokerage of arms into regions of conflict and human rights crisis zones.

All states should incorporate a full extra-territorial dimension within their arms brokering controls. This is necessary in order to ensure that unscrupulous agents may not avoid strict controls in one state by relocating and continuing their activities in another state with weaker controls and/or enforcement mechanisms.

4. Registration

A significant number of states that operate controls on the activities of arms brokering agents also have a requirement that such agents register in advance with the national authorities. The maintenance of a register can function as a useful tool in aiding and monitoring compliance with national arms brokering regulations and other laws. It also facilitates targeted dissemination of information on relevant changes to legislation, control lists, arms embargoes etc. to registered brokers thereby helping to reduce the risk of inadvertent breaches of national brokering regulations.

Arms brokers should be required to register with their national authorities before they can apply for individual brokering licences; they should also be required periodically to renew their

registration. This would provide governments with the opportunity to assess, on an ongoing basis, the reputation of a company or the fitness of an individual to be involved in arms brokering activities. By refusing registration to companies and agents with convictions under either civil or criminal penal codes governments can ensure that only individuals and companies of the highest standing are permitted to register and are therefore eligible to apply for arms brokering licences. Registered agents that are subsequently convicted of either civil or criminal offences – including breaches of transfer control legislation – should be struck off the register and prohibited from further engaging in arms brokering activities.

The existence of national arms brokering registers can also assist in exchanges of information amongst states that are co-operating in tackling illicit arms brokering. For example, states that operate registers are in a position to pass on information concerning brokering agents that have been convicted of serious crimes and struck from the register. This can help to prevent de-barred agents from moving from the jurisdiction of a state where they are banned from operating and continuing their activities elsewhere. As such, systems of registration will be most effective in preventing illicit arms brokering where they incorporate a requirement for brokers to regularly renew their registration, where they are open to public scrutiny and where they are combined with a system of individual, case-by-case licensing of arms brokering activities. In addition all registered arms brokers should be required to keep detailed records of their transactions so as to facilitate monitoring and enforcement of controls by national authorities. These detailed records should be used by governments to form the basis of an annual public report including detailed information on all brokering licences granted.

The exact requirements for registration and the implications for arms brokers varies from state to state. In the US, as part of the comprehensive legislation on arms brokering the requirements for and effects of registration are far-reaching. Any person or entity wishing to engage in the brokering of defence articles or services must register with the Department of State and pay a registration fee. The person or entity is required to disclose information regarding their eligibility for engaging in such brokering activities, demonstrating that they are not indicted or convicted under relevant statutes. Information on corporate lineage (where relevant) and the nature of the brokering activities to be undertaken is also required. Registration, which is valid for a maximum of two years, is a prerequisite for any application for a licence to undertake specific brokering activities. The Department of State conducts a detailed review of each registration application, whilst any material changes to the initial registration must be reported to the Department of State. A broker indicted or convicted of violating the Arms Export Control Act becomes ineligible to engage with or benefit from any regulated activity and a debarment is published in the Federal Register.

In Spain, all brokers are required to register prior to engaging in arms brokering activities. This registration requirement covers all those involved in the brokering of items on the EU Military List and applies to all those who are involved in brokering activities from a third country to any other third country irrespective of whether or not the goods enter Spain. The Spanish Government also makes available information on registered brokers and any registration request denials or removals to other EU Member States. Brokers can be removed from the register if they fail to comply with the conditions of the registration or if they provide false information.

Although the UK government does not operate a formal register of arms brokers a *de facto* register (or database) of arms brokering agents is compiled by means of the information that is contained on arms brokering licence applications. The information that is stored by the Department of Trade and Industry and is not made publicly available. Its primary purpose is to allow the authorities to verify the identity of applicants and is particularly useful in relation to those brokering agents that apply for a licence on-line and who may not be based in the UK. Information contained in the database is not used as a means of disqualifying arms brokering agents from applying for licences to broker arms transfers but it can be shared with partner governments (e.g. in the EU) in any exchanges that take place concerning the activities of arms brokering agents.

The effective scrutiny and oversight of the activities of arms brokering agents is greatly assisted by the requirement for their registration with national authorities. In many states doctors, lawyers, child-minders and taxi-drivers are subject to a registration requirement; in view of the potentially devastating impact of unregulated arms brokering it is crucial that individuals and companies that engage in this activity should also be subject to a form of official scrutiny. Moreover, states should ensure that the requirement for registration is accompanied by sanctions, including the risk of debarment, against those convicted of civil or criminal offences. States should also require registered brokers to keep detailed records of their activities so as to facilitate the compilation of public reports on arms brokering activities licensed by national authorities. These measures will further enhance the effectiveness of national brokering controls by facilitating the exchange of information with other states on the activities of known agents.

5. Brokering-related activities

In addition to controlling core arms brokering activities, some governments have also sought to regulate a range of associated activities that play a crucial role in the fulfilment of most arms brokering deals. These activities include providing transportation, logistics, freight forwarding, insurance and financial services that are associated with the sale and delivery of arms. Whilst brokers can, and do, undertake such brokering related activities alongside the core activities of mediating in arms deals and buying and selling arms these activities can also be undertaken by specialist individuals and companies that would not be affected by controls on core arms brokering activities.

In line with their comprehensive approach to the control of arms brokering the US International Traffic in Arms Regulations (ITAR) specifically includes “the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service” in the definition of brokering activities that are subject to prior licensed approval of the Office of Defence Trade Controls.⁶ Other governments have sought to address particular aspects of brokering related activities. For example, the German government imposes a licence requirement on the transportation of arms between third countries on vessels sailing under the German flag or in aircraft registered in Germany.⁷ In the Netherlands, residents are required to seek licensed approval prior to engaging in financial transactions linked to the transfer of controlled goods outside the EU.⁸ In the UK the arrangement of transportation, financial and insurance services in relation to a specific range of “restricted” goods (anti-personnel mines, long-range missiles and torture equipment) is also subject to a licensing requirement. However such controls do not apply to the involvement of UK nationals and residents in relation to transfers of the vast bulk of strategic goods.

One argument that is cited against the development and implementation of comprehensive controls on a range of brokering-related activities is that such controls would place an intolerable administrative burden on states. However it is possible to construct systems of control that, whilst providing much needed regulation and oversight of the transportation, logistical, finance and insurance aspects of arms transfers, would not constitute a significant bureaucratic burden for states. One such system could be based on the issuing of general licences allowing companies to engage in specified activities for a period of two or three years. Restrictions would need to be based on the scope of the licence, including by specifying that only particular forms of support to brokering activities be permitted with regard to transfers of arms to a specified list of destinations and/or end-users. At the same time, companies seeking to benefit from such general authorisations should have to satisfy certain minimum criteria in relation to their ability to ensure their compliance with the restrictions placed on the licence. Companies would be required to keep detailed records of their activities

⁶ United States of America. *International Traffic in Arms Regulations (ITAR)* (undated), sec. 129.2(b).

⁷ Germany, *Kriegswaffenkontrollgesetz*, §4.1 in *Controlling Arms Brokering: Next Steps for EU Member States* Holger Anders, GRIP, January 2004.

⁸ The Netherlands, *Besluit van 24 oktober 1996*, §1, Centrale Dienst voor In- en Uitvoer, 2003, p.13 in 1 in *Controlling Arms Brokering: Next Steps for EU Member States* Holger Anders, GRIP, January 2004.

and these should be subject to regular inspection by administrative authorities. Companies should also be required to show that they had taken all necessary steps to ensure that transfers are legitimate by ensuring that they scrutinise copies of (where relevant) import, export and transit licences and end-user certificates prior to providing services in support of arms transfers. Finally, a concerted effort should also be made in order to ensure that individuals and companies involved in brokering related activities are made aware of their obligations not to engage in the support of arms transfers where they take place in breach of national or international law.

Whilst it would be relatively straightforward to apply such a system of regulation and oversight to companies and individuals based within a states' national jurisdiction, it is also possible to extend these controls to the activities of nationals operating overseas (as is the case with regard to US legislation) and to ships and aircraft operating under the national flag (as is the case with regard to German legislation).

States should include regulation and oversight of individuals and companies engaging in brokering related activities within their arms brokering legislation. At a minimum states should ensure that the transportation, logistics, freight forwarding, insurance and financial services associated with arms transfers are subject to general licensing provisions. These should incorporate record-keeping and transaction verification requirements on the part of companies, as well as regular inspections on the part of national authorities.

6. Co-operation and information sharing amongst states

It is widely recognised that effective information exchange is vital and integral to the effective functioning of multilateral agreements. In the field of conventional arms control there are numerous examples of sub-regional, regional, multilateral and global agreements incorporating provisions for information exchange so as to enhance the overall effectiveness of their operation. For example, at international level the UN PoA encourages states, on a voluntary basis, to provide reports to the Department of Disarmament Affairs on their national implementation of the agreement (Section II, Para 33). In addition, provisions for information exchange exist within the UN CASA (Co-ordinating Action on Small Arms) mechanism. At multilateral level the Wassenaar Arrangement incorporates well-developed information exchange mechanisms, including arms and dual-use transfer and denial notification provisions.

At regional and sub regional levels information exchange provisions are specified in relation to the implementation of a wide variety of agreements. For example, the SADC and Nairobi Protocols on Small Arms and Light Weapons incorporate provisions for information exchange with regard to the implementation of the respective agreements and, to this end, regular Ministerial Meetings are held. In the OSCE, the Document on Small Arms has information exchange requirements relating to national marking systems, manufacture control procedures, export policy procedures and documentation, control over brokering and destruction techniques and procedures. The EU Code of Conduct on Arms Exports incorporates a well-established export licence denial notification and consultation mechanism whilst providing for information exchange on end-users of concern. In the Americas, UN-LIREC and the OAS Commission for Inter-American Drug Abuse Control have developed the Small Arms and Light Weapons Administration (SALSA) system to serve as a public and private portal for exchanging information on national legislation and policy actions.

Specifically with regard to the control of arms brokering the EU Common Position on Arms Brokering⁹ requires Member States to establish "a system for exchange of information on brokering activities among themselves as well as with third States" in order to "take particular account of the case where several Member States are involved in the control of the same brokering transaction(s)". In this regard, information exchange on the activities of arms brokering agents is understood to take place within the regular meetings of the EU Council of

⁹ EC Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_156/l_15620030625en00790080.pdf

Ministers Working Group on Arms Exports (COARM). The OAS Model Regulations¹⁰ also incorporate provisions for information exchange in that they recommend that states should disclose the name of the relevant official responsible for carrying out licensing or registration so as to facilitate co-operation and information exchange amongst countries on the control of arms brokers. The Regulations also stipulate that for those countries that adopt a system of registration of arms brokering agents: "National Authorities shall cooperate with one another to exchange information, contained in their respective registry of brokers, including information relative to ineligibility, debarments and denied applicants"¹¹

An effective mechanism for information exchange between states is thus vital to ensuring the effectiveness of national controls on arms brokering agents. However, it is also clear that a formal requirement for registration provides an important basis for states to acquire and store information on the activities of arms brokers and subsequently to be able to exchange relevant information with other states. Not only would such information exchange serve as an aid to the enforcement of controls at national level it would also help to prevent "licence shopping" by arms brokering agents that have been prohibited from operating in one or more states.

The above proposed international system of arms transfer control (an Arms Trade Treaty) regulating the import, export, transit, transshipment and brokering of arms should include provisions for timely information exchange on the implementation of all aspects of arms transfer controls, including arms brokering controls. It should also provide for mutual legal assistance so as to facilitate effective prosecution of illicit arms brokering across international boundaries. Finally, this system should incorporate model regulations that include a requirement that states adopt a national register of arms brokering agents so as to facilitate effective information exchange in this field.

Conclusion

Comprehensive national controls on arms brokering activities, based on best practice, are an essential part of efforts to tackle the proliferation and misuse of all weapons – including SALW. However, in order to be effective, it is essential that the establishment of such controls is rooted in an international system of arms transfer control which encompasses relevant importing, exporting, transit, transshipment and brokering activities and which is based on states responsibilities under international law.

Such an international system should incorporate provisions for information exchange and mutual legal assistance so as to support the effective enforcement of international standards at the national level. At national level, states should ensure that their national controls on arms brokering activities are fully extra-territorial in scope and include a comprehensive registration requirement. States should also extend regulation and oversight into the closely related fields of transportation, logistics, freight forwarding, insurance and financial services as they relate to arms transfers.

Finally, the development of model regulations for the control of arms brokering should be undertaken, including registration, licensing of arms brokering and related activities, and with extra-territorial scope building upon the work undertaken on this matter in the OAS.

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¹⁰ Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition: http://www.cicad.oas.org/Desarrollo_Juridico/ENG/Recursos/322MRFirearmsBrokersEng.pdf

¹¹ Ibid, Article 3, Par 12.