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## **Brokering: Legislation and Enforcement**

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#### **Introduction**

The transfers of small arms and light weapons to the worst conflict affected regions in Africa and human right crisis zones, is normally organized by arms brokering and transport agents. Those countries with weak or no legislation regarding export or import control is normally the target. In most instances, the end users in these target areas are criminals, terrorist or human right abusers. For these end users to obtain these firearms they normally make use of an agent.

#### **Definition**

If an arms broker must be defined in any legislation it must be included that an arms broker can be defined as a middleman who organizes arms transfers between two or more parties, bringing together buyer and seller, financier, insurer and transporter to make an arms deal for financial gain.

#### **International instruments**

In December 2000, the OAU (now AU) adopted the Bamako Declaration, setting out the African states' position in advance of the 2001 UN conference. The document sets out a comprehensive assessment of the problems of the illicit small arms trade. The Declaration makes recommendations for the AU member states to act at national and regional level, whilst also calling upon the international community to adopt more responsible practices to prevent the illicit small arms trade. The issue of arms brokering and transportation is addressed directly and indirectly throughout the document.

The Bamako Declaration recommends that states:

At national level:

- Take appropriate measures to control arms transfers by manufactures, suppliers, traders, brokers, as well as shipping and transit agents, in a transparent fashion.

At regional level:

- Encourage the codification and harmonization of legislation governing the manufacture, tracing, brokering, possession and use of small arms and ammunition.

The AU calls also upon the international community to:

- enact appropriate legislation and regulations to control arms transfers by manufacturers, suppliers, traders, brokers shipping and transit agents.

The provisions of the Bamako Declaration are merely recommendations, and are unlikely to be adopted by states that feel they have no interest in this issue. According to Article 5(m) of the SADC Protocol State Parties should make provision in their national laws to regulate firearms brokering.

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The importance of controlling arms brokering to the OAU and SADC is clear.

### **Control over small arms brokering**

Illicit brokering activities and the trafficking associated with it, had global dimensions and scrupulous brokers exploit loopholes in the global control of arms trafficking. Brokers may have a legitimate role to play in the legal arms trade. However, illicit brokering often plays an important part in the diversion of SALW into the illicit trade and in efforts to circumvent States' arms transfer controls and arms embargoes. SALW can enter the illicit market at many stages in the life cycle of an arm. From a manufacturer, to sale, import and then to the end user. The control over arms brokering activities should be an important part of the legislation of each country to control transfers of arms and other controlled goods. It should criminalize illegal arms trafficking, money laundering, corruption and other undesirable activities associated with unscrupulous arms brokering.

### **Legislation in SADC**

Turning to the situation in Namibia I should make it clear that we do not have as yet a law to control arms brokering. Most of the countries, specific in the SADC Region, had also no legislation in place. It is only South Africa who had made provision in the National Conventional Arms Control Committee Act, 2000 to control arms brokering. Under this Act all persons involved in brokering are required to register in terms of the Act. The committee established under the said Act regulates what transactions such brokers may perform.

Due to the lack of proper legislation in the Region and in Africa as a whole, arms brokers exploit the situations in conflict areas. These are mostly transfers with the most serious consequences for people in the States where those weapons ultimately arrive and are misused.

### **The role of arms brokering agents**

In most third world countries there is a lack of proper legislation to combat money laundering. Inadequate financial regulatory systems have also continued to the creation of a permissive environment within which arms brokering and transport agents operate. The one cannot operate without the other. Arms brokers have shown themselves to be adept at finding loopholes in banking operations, which allow them to launder the proceeds of their illegal arms deals.

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Although the UNPoA urged States to put in place adequate laws, regulations and administrative procedures to ensure effective control over the transfer of SALW, including the use of authenticated end users certificates, and enhance legal enforcement measures there is no specific indication what is adequate laws and regulations. There is a lack of guidelines in all the international instruments for what is required in the legislation.

### **Types of legislation**

Countries who do not have proper legislation in place must ensure that the following important measures be taken up in their national legislation:

- Registration of brokers;
- Licensing; and
- Monitoring

Monitoring must be done through the disclosure of import and export authorizations. These three measures or a combination thereof can contribute to effective regulation of brokering.

### **Options for specific or general legislation**

There are two options for the implementation of brokering legislation.

- Brokering legislation can be integrated in general export control legislation in order to provide a clear legal framework for brokering activities; or
- General legislation could be complemented with provisions, which explicitly cover brokering activities.

### **Import/export controls**

The Namibia Arms and Ammunition Act, 1996 make provision for import and export permits when firearms cross the border. Although these legal requirements are in place, we experienced problems to detect the import of illegal firearms if containers are used, they are very difficult to screen.

This is a problem in the whole of Africa. Equipment is expensive and it is not possible to screen each and every container even if equipment is available. It is also not physically possible to screen all containers. Transfer agents and brokers are aware of these problems countries experience and exploit the situation, together with corrupt officials.

Arms traders supplying illegitimate customers with arms usually exploit the loopholes and weaknesses in arms control systems, especially in third world countries. Countries with weak export and import control measures may be targeted. Vague definitions, poor licensing procedures, corruption and a lack of capacity to enforce customs controls provide arms brokering and transportation agents with an opportunity to move arms along clandestine supply routes.

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## **Jurisdiction**

One of the problems that African countries experience to act against brokers involved in illegal transactions is that such brokers most of the time reside in another country and not even in the country from where the arms originate. Nor do they live in the countries through which the arms pass or for which they are designated. It is even more complex when the broker is not a citizen of a specific country. Brokering controls can be evaded if they only apply to activities taking place within the territorial jurisdiction of the regulating State. Legislation can make provision to act against citizens, even if they are staying outside the country. The problem remains non-citizens not residing in the regulating State.

## **Options to regulate brokering**

There are certain options for states to consider regulating brokering:

- Establish effective national licensing systems to regulate and authorize brokering systems.
- Apply the same national criteria for assessing applications for authorization to a broker in a specific arms deal as they use in assessing applications for licenses to transfer SALW to and from their own country;
- Authorities could consider applications for authorizations of brokering activities on a case-by-case basis. Individual licenses could be issued for each deal.
- To issue open and general licenses for arms brokering activities, special were the risks associated with the arms deal are very low. Specially were effective controls on the import and export of the countries involved exists.

## **Coverage of core and related activities**

It is always a question if legislation controlling brokering should cover only core activities, such as mediating, facilitating, organizing and negotiating contracts for arms suppliers and recipients or should other related and supporting activities such as transport, financing, insurance, promotion, advertising and marketing of arms also be covered.

To cover all the related activities could end up with very complicated and problematic legal distinctions. To avoid this states concentrate most of the time only on the core issues.

## **Covering of brokered products**

Normally the control of brokering of SALW concentrate on the final product. Brokers are often involved in the transfer of components of weapons, as well in facilitating license production abroad. These are elements that should be considered when identifying what activities should be come under national scrutiny.

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## **Exchange of Information**

It is essential that common understandings of the nature of the problem of brokering be developed. There exists a substantial amount of information, both from UN and non-governmental sources, which documents the nature and extent of unregulated arms brokering and transportation.

Inter-governmental exchange of information relating to the brokering and transfer of SALW, including the exchange of confidential information, can contribute in the following ways:

- Ensure effective co-operation amongst law enforcement agencies, police, customs intelligence agencies or regulatory bodies.
- Improving capacity to trace or prevent diversions to unauthorised or destabilising purposes.
- Improving capacity to monitor accumulations and flows of SALW.
- Promote awareness and understanding to control brokering and to promote good practices.
- Stimulating the development and maintenance of appropriate national monitoring, record keeping, and information management systems.

## **Enforcement**

The SARPCCO Memorandum of Understanding makes provision that the countries co-ordinated cross border operations to combat crime. It would therefore not be a problem if the necessary harmonized legislation is in place in the Region to combat illegal transactions by brokers and transporting agents.

## **Conclusion**

Namibia is in the process of amending existing legislation to combat the illegal brokering and transportation of arms. Although we are a stable country and at this stage not a market for brokers, you never know when a situation could be exploited to create another, may be not in Namibia but close by.

The history of Africa during the last 40 years shows that as long as armed conflicts exist there will be a market for SALW. Wherever there are markets there will be brokers and transporters.

For an effective international brokering systems it is vital that common standards for licensing transfers of SALW include explicit authorization by the exporting, importing and transit States. There must be proper information sharing between the countries involved.

Although most of the countries in the SADC Region require a permit to import or export firearms, the control systems differ. To facilitate information exchange and ensure stringent controls in one country is not undermined by lax of control elsewhere, it is important that legislation be harmonized.

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End-user documentation lack in most of the countries in relation to the import, export and transit of firearms. Establishing common standards and practices in certain key areas like brokering, is important to combat the illicit firearm practices in a co-ordinated and concerted manner in the SADC Region specific.