
Overview of Arms Brokering in Africa

Brian Wood, Amnesty International¹

Introduction

The subject of arms brokering has been thrown into focus over the past few days following the arrest of groups in Equatorial Guinea and in Zimbabwe accused of attempting a coup, mercenarism and attempting to traffic arms. A UK national in particular is accused of trying to broker about US \$180,000 worth of small arms and light weapons from Zimbabwe using an aircraft bought recently in the USA. While the full facts emerge, it is worth remembering that such activities are not uncommon in modern Africa.

International outrage was expressed about the brokering of arms to and within Africa after the revelations in 1995 that such brokers had played a crucial role in arming the perpetrators of the genocide in Rwanda in 1994. Further concern was expressed after revelations emerged about the role of brokers in helping to arm the Angolan rebel movement, UNITA, as well as the RUF rebels in Sierra Leone, despite arms embargoes imposed on these rebel groups by the United Nations Security Council.

Although much of the supply and acquisition of arms in areas of violent conflict has been conducted by government agents or licensed entities, it became increasingly apparent in the late 1990s that unregulated arms brokering was a major factor that has fuelled such conflicts in Africa and elsewhere. There is no doubt that it has contributed to the excessive and destabilizing accumulation and illegal trafficking and possession of small arms and light weapons (SALW). It is also recognised that the phenomenon has been closely linked to the foreign plunder of natural resources, as well as to money laundering, corruption and other malpractices that together undermine socio-economic development and human rights in Africa. The recent focus of international concern on the arming of warring parties in the Democratic Republic of the Congo (DRC), where a staggering three million civilian deaths are estimated to have resulted directly and indirectly from the war since 1998, has confirmed this general view.

The brokering of arms transfers to and within Africa emerged as a distinct commercial and political activity during the Cold War in contrast to the mediation provided by official security services. Some states, through their secret service agencies, used such actors to intervene in foreign countries, or simply tolerated such activities when it was thought this would further their foreign policy goals. Arms sales to dubious customers required competent mediators and

¹ This presentation is based on research conducted by the author and other staff of Amnesty International. Footnotes have been omitted from this version of the paper.

trafficking networks who could offer the supplier states and major arms companies some plausible deniability if found out.

As has been recognised in the Bamako Declaration, Africa cannot afford to allow such unregulated arms brokering. The Member States of SADC have taken the lead in signing, on the 14 August 2001, a Protocol on the Control of Firearms, Ammunition and other Related Materials, which requires each state to enact legislation and other measures to "regulate firearm brokering in the territories of the State Parties".

But the problem cannot be solved in or by Africa alone. The cases illustrated in this presentation indicate that urgent and concerted action is required by governments to strictly control arms brokering, not only in Africa but also worldwide.

What is arms brokering activity?

To regulate arms brokering effectively requires first and foremost an understanding of what this activity entails. As shown in the examples below, control mechanisms must be designed to take account of the often international nature of such activities and also its diffuse and differentiated structure - brokers operate in many countries worldwide usually in networks alongside arms dealers, transport agents, financiers and providers of other military and security services

Thus, the UN Group of Governmental Experts, established in 1999 (pursuant to UN Resolution 54/54 V), encouraged States to consider adopting national laws to control all SALW brokering activities, wherever these take place, by their national citizens, persons that are normally resident on their territory, and companies that are permanently based and managed from premises in their territory.

The activity of brokering arms transfers refers to mediating, organizing, arranging or negotiating between the buyer and seller, or their agents, in order to facilitate a transfer of arms. A broker may acquire the arms in order to achieve the transfer, and if so, will engage in dealing or procurement. But brokering may simply involve introducing the buyer and seller, or their agents. Usually, a broker will receive a fee or commission or other material reward or benefit for this service, perhaps in addition to a profit from the actual sale of the arms.

In the SADC Firearms Protocol, "brokering means (a) acting for a commission, advantage or cause, whether pecuniary or otherwise, and (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 the buyer or recipient thereof." It is a significant omission that the SADC Firearms Protocol does not define "illicit brokering".

The Organization of American States has been considering the adoption of a wider definition of arms brokering activities in the Draft Model Regulation for the Control of the International Movement of Firearms, Parts and Components and Ammunition, proposed by an OAS Group of Experts in November 2003. "Brokering activities' means acting as a broker and 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".

Who are the arms brokers affecting Africa and how many are there?

The answer to this question is very difficult to fathom because the overwhelming majority of states do not register arms brokers or require permits or licences for such brokering. Only 21 states worldwide had by the end of 2003 established specific laws, regulations and administrative practices to control arms brokering. And it appears from the preliminary research that only one state in Africa - South Africa - has passed legislation specifically to regulate arms brokering.

Thus, official data on arms brokers barely exists and, even where it is systematically collected, it is not published even in aggregate form. Hence, the most detailed published reports on arms brokering have had to draw from those examples that have come to light through court cases, media and NGO exposures, UN arms embargo investigations and revelations from political scandals. Nevertheless, these put together provide a rich, empirically descriptive picture of international arms brokering.

The data shows that arms brokers tend to be businessmen with military and security backgrounds able to use close contacts in the arms supply and security industry. They are often motivated by economic gain rather than strategic political considerations, and are able to exploit legal loopholes, and to use a network of shell companies, agents and subcontractors. They take advantage of the global banking, tax avoidance and transport industries. Above all, those brokers dealing with dubious customers are skilled at hiding their tracks, often using fake documentation, bribery of officials at all levels, and sometimes linking up with organized criminal networks.

Legal versus illegal brokering

Brokers can have a legitimate role in the legal arms trade, and states tend to agree that 'middle men' have a part to play in meeting states' legitimate security needs if properly regulated. However, the absence of such laws and regulations has created a significant 'grey' area in the international arms trade.

The term 'illicit' arms brokering usually refers to those acts of mediation to facilitate arms shipments where the recipients of these arms are those groups that are prohibited by law from possessing or acquiring weapons — embargoed states, rebels and insurgents, criminal gangs, and terrorists. Such recipients are usually prohibited by law from possessing arms. However, whether such brokering activities are 'illegal' in the country where the broker carries out the activity or where the broker resides or holds nationality is often not the case.

In June 2003, the European Union agreed and adopted a Common Position, which seeks to control arms brokering. Under this Common Position, EU Member States are now required to "take all the necessary measures to control brokering activities taking place within their territory" The lawful engagement of such activities will require "a license or written authorizations... from the competent authorities of the Member State where these activities take place" and Member States will assess applications "for specific brokering transactions against the provisions of the EU Code of Conduct on Arms Exports." However, the Common Position encourages, but does not oblige EU Member States to "consider controlling brokering activities outside their territory carried out by brokers of their nationality resident or established in their territory". Furthermore, even this "consideration" is only partial, as no mention is made of controlling EU citizens who both reside and broker abroad. Legislation which lacks such comprehensive extra-territorial scope can be easily circumvented, and rather than preventing harmful brokering activity will simply move it elsewhere.

In contrast, the US introduced legally binding controls on arms brokering in 1996, enacted as an amendment to the Arms Export Control Act. This incorporates a strong extra-territorial component that: "requires US brokers living anywhere and foreign nationals residing in the United States to register and obtain licenses for all arms deals they transact. Not only does the law empower US implementing and enforcing agencies to monitor the number of brokers and the type of their operations, it also subjects violators to US jurisdiction wherever an offence has been committed." This law appears to have had a certain deterrence value since very few US nationals have been reported to be brokering and transporting arms in Africa outside US government sanctioned operations. Other governments in Europe such as Belgium, Norway, Sweden and Finland (and now Slovakia), have also enacted legislation on brokers that incorporates an extra-territorial element.

The assumption that those who assist the breaking of a UN arms embargo will commit an "illegal act" in all countries, is sadly the opposite of the truth. A recent study found, for example, that amongst the SADC Member States, only South Africa had a law (the National Conventional Arms Control Act enacted in 2002) containing

a provision making it a criminal offence to breach a mandatory UN arms embargo.

Brokers wishing to arm such dubious recipients and destinations try to circumvent national state controls and, judging by the cases unearthed, they often succeed. Frequently, this is achieved by arms brokers in collusion with corrupt state officials and by taking advantage of legal loopholes and weak law enforcement capacities. Organizing such illegal shipments of arms involves a large amount of skill, organization, preparation, and financial resources. Documents need to be forged, officials bribed, legitimate arms companies persuaded to sell their weapons, money laundered, and aircrew recruited. The illegal broker attempts to fulfil these functions.

Controlling "third country" brokering and associated activities

Following the EU Common Position on Brokering, the Wassenaar Arrangement (WA) - the group of leading conventional arms exporters, including many EU states - agreed a set of common Elements for Effective Legislation on Arms Brokering. Although this is again a politically binding agreement it does raise the bar for brokering controls in a number of areas. Under this document WA member states agree to: "Strictly control the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations."

"In order to ensure a common WA policy on arms brokering, each Participating State should include, consistent with its national legislation and practices, the following measures in its national legislation on arms brokering:

"For activities of negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment controlled by Wassenaar Participating States from one third country to another third country, a licence or written approval should be obtained from the competent authorities of the Participating State where these activities take place whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State... Similarly, a licence may also be required regardless of where the brokering activities take place."

"Records should be kept of individuals and companies which have obtained a licence in accordance with paragraph 1. Participating States may in addition establish a register of brokers."

It could be argued from the existing case material that establishing a control system for regulating "core" arms brokering should also cover arms transportation and the provision of military services. One reason is the extremely close functional integration of these

activities and their higher level of visibility compared to, for example, financing arms deals.

Conclusions and Recommendations

From the few examples and the general analysis given above, it is clear at least that urgent action is required to establish specific laws, regulations and administrative practices not only by states in Africa, but also by other states worldwide. This can happen by following up on what the UN Programme of Action States agreed to do, namely: "develop common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to preventing, combating and eradicating the activities of those engaged in such brokering" (Section II, para 39). The Organization for Security and Cooperation in Europe has since developed a best practice handbook with suggestions for governments to control arms brokers, including the registration and licensing of brokers. The EU has also agreed on a Common Position to control brokering activities that could be stronger but at least is an advance.

There is an emerging shared international understanding that effective arms brokering regulations need to be embedded within a broad system of regulation of transfers of controlled goods (including arms) and laws criminalising trafficking, money laundering, corruption and other undesirable activities associated with unscrupulous arms brokering and transnational organised crime. Two areas requiring close attention are firstly, the prohibition of the use of mercenaries and the strict control of an military and security service providers, and secondly, the strict regulation of arms transporters.

However, it may not be practical to devise one law to cover all these activities. Arms brokers, arms transporters and military service providers could easily be subject to a specific law which includes a normative register in their country of citizenship or residence, and for all proposed arms deals, deliveries or services to be subject to a strict licensing procedure especially if these will be via other countries.

One other critical aspect of arms brokering and trafficking is the common tendency of brokers and agents to use tax haven shell companies to launder the proceeds of the deal, and therefore the OECD efforts to improve transparency and accountability of banks and companies in tax havens need to be strengthened.

Registration system and record maintenance

Without a critical mass of states developing a system of registering legitimate arms brokers, knowledge of who engages in arms brokering will remain partial, or at least the property of intelligence agencies with a global reach. A registration system, including a register of brokers, could strengthen the operation of controls on arms brokering activities by ensuring that systematic information

about active brokers is maintained and regularly updated. Requirements that brokers pre-register before being permitted to apply for brokering licences could have a number of aims and functions within an overall national system for controlling brokering activities.

A broker registration system could be helpful to improve administrative efficiency, exclude dubious persons and companies from legal brokering activities, through imposing eligibility requirements (as already exist in many laws on possession of arms), and improve enforcement, by offering additional possibilities for penalisation of brokers that contravene procedural or good practice requirements, for example through deregistration.

Brokers could be legally required to maintain full documentary records of their activities for as long as possible, and to make them available to national authorities upon request. States could establish and maintain adequate end-use and end-user control systems as a key element of the national controls of arms brokering activities. Licences would not be issued without full and appropriate documentation relating to end-use and end-users, and there would be procedures for authentication of such documentation and for checking the accuracy of the information provided.

A licensing system based on common principles

A licensing system would allow states to put in place a process whereby the appropriate national authorities assess whether to authorise the proposed brokering of an arms deal. Such a process would involve the submission of appropriate information, documentation and guarantees on the side of the broker; a procedure by which relevant government ministries and agencies assess the application; and a set of stringent criteria to guide decisions on a case by case basis.

It is vital to have a level (and safe) playing field between states. Common arms export criteria have been agreed in the OSCE and EU, but not by the AU. The danger is that different regional bodies will choose different criteria to judge brokering licence applications and these will be exploited by unscrupulous brokers and their allies. Thus, the criteria *should be based upon existing principles of international law*, and these should be the same principles to guide decisions on whether to issue an arms export or a brokering licence.

It should be noted that the UN Programme of Action States agreed to "assess applications for export authorisations according to strict national regulations and procedures that cover all small arms and light weapons *and are consistent with the existing responsibilities of States under relevant international law*, taking into account in particular the risk of diversion of these weapons into the illegal trade" (Section 2, paragraph 11).

These principles would also be an essential means to ensure clarity and consistency in the application of national legislation on brokering.

As regards the types of licences, decisions taken on a case-by-case basis, issuing brokering licences for each specific deal, would greatly increase the effectiveness of national brokering controls.

Enforcement requires the existence of laws defining as crimes violations of brokering regulations, and a system of sanctions and penalties. The establishment and maintenance of effective enforcement agencies and mechanisms would increase the effectiveness of national brokering controls. This enforcement system will not be effective without international cooperation based on political commitment to shared principles of international law.