

Arms Brokering Controls in the Americas and the Caribbean and a Future ATT

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Introduction

This paper provides an overview of how the issue of arms brokering controls has been tackled in the Americas and the Caribbean - both at the regional and national level - and how lessons could be carried forward under a future arms trade treaty (ATT).

States in the Americas and the Caribbean appear to be broadly supportive of the inclusion of brokering controls within an ATT. In their submission of views on a future ATT, 10 of the 17 states in the Americas which submitted reports voiced support for the inclusion of brokering within the scope of an ATT.¹ States in the Americas and the Caribbean have also invested considerable time and effort in developing regional standards with regards to controlling the brokering of small arms and light weapons (SALW).² At the same time, states in the Americas and the Caribbean have a mixed record when it comes to implementing regionally agreed standards on brokering controls via their national legislation. The difficulties states appear to have had in this area may provide important lessons for how an ATT could tackle the issue of arms brokering.

Section 2 of this paper provides an overview of current debates on how the issue of arms brokering should be tackled in an ATT. Section 3 gives a brief summary of the situation regarding conventional arms control and transfer controls in the Americas and the Caribbean, including the OAS 'Model Regulations' on arms brokering. Section 4 compares the provisions of the OAS 'Model Regulations' with other key texts and agreements in the field of arms brokering, including the EU Common Position and the OSCE Principles. Section 5 examines how controls on arms brokering have been implemented at the national level by states in the Americas and the Caribbean. Finally, section 6 draws some potential lessons learned for how the issue of arms brokering could be tackled in an ATT.

1 Sarah Parker, 'Analysis of States' Views on an Arms Trade Treaty', UNIDIR, Oct. 2007. These states were Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Jamaica, Paraguay and Peru.

2 In particular, the OAS 'Model Regulation' includes detailed language which may provide guidelines for how the issue of brokering could be tackled in an ATT. Organisation of American States (OAS), Inter-American Drug Abuse Control Division (CICAD), 'Amendments to the Model Regulation for the Control of the International movement of Firearms, their Parts and Components and Ammunition - Broker Regulations', 13 Nov. 2003.

Current debates on arms brokering and an ATT

There is no universally agreed definition of what constitutes arms brokering. In the field of SALW, the closest thing to an agreed definition is found in the final report of the UN Group of Governmental Experts established to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (UN GGE on SALW brokering). This defined a broker as: ‘a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of small arms and light weapons in return for some form of benefit, whether financial or otherwise’.³

One of the most contentious issues in this area is the question of which activities constitute brokering activities. The report of the UN GGE on SALW brokering defined core brokering activities as including:

- Indicating business opportunities to one or more parties;
- Introductions of relevant parties;
- Assisting parties in proposing, arranging or facilitating agreements or possible contracts;
- Assisting parties in obtaining necessary documentation; or
- Assisting parties in arranging necessary payments.⁴

The report also listed ‘activities closely associated with brokering in small arms and light weapons that do not necessarily in themselves constitute brokering.’ These included ‘acting as dealers or agents in small arms and light weapons, providing for technical assistance, training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other services.’⁵ States differ significantly in terms of how they operationalize these issues at the national level. For example, some states operate with a broad definition of what constitutes ‘core brokering activities’. This can include instances where an individual or company supplies arms which they possess but where the transfer is not covered by the state’s export control legislation because they are being moved from one third country to another third country. Other states focus more narrowly on the act of mediation and exclude activities in which an individual or company owns the arms being transferred.⁶

Reputable governments and arms manufacturers rely on arms brokers to arrange and facilitate sales.⁷ However, unscrupulous arms brokers have been implicated in facilitating

3 UN General Assembly, Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, 30 Aug. 2007, Para. 8.

4 UN General Assembly, Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, 30 Aug. 2007, Para. 8.

5 UN General Assembly, Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, 30 Aug. 2007, Para. 10.

6 Brian Wood, ‘The prevention of illicit brokering of small arms and light weapons: Framing the issue’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations*, UNIDIR, 2006, p. 12.

7 Brian Wood, ‘International initiatives to prevent illicit brokering of arms and related materials’, *Disarmament*

the supply of arms to states subject to UN or regional arms embargoes along with terrorist, insurgent and organized crime groups and other 'undesirable' end-users. In particular, during the late 1990s and early 2000s several reports by NGOs and different UN bodies highlighted the role of arms brokers in arranging transfers to conflict zones in Africa that were subject to UN arms embargoes. These included transfers to Rwanda during the genocide, to Angola during the civil war and to Liberia and Sierra Leone during their own violent conflicts. The individuals concerned had - for the most part - not violated any laws in the state in which they were operating. In most cases the arms did not leave or pass through the state where the broker was operating so the activities were not covered by the states' export or transit controls. This represented a legal loophole which many states have since sought to close by expanding the scope of their transfer controls to include controls on brokering activities. References to states' obligations to maintain controls on the brokering of SALW are found in the UN Programme of Action on SALW and the UN Firearms Protocol, as well as a wide range of regional instruments and best practice guides (see below).

The idea that arms brokering should be included as one of the activities covered by an ATT has been present since the UN process began in 2006. The 2006 UN General Assembly Resolution launching the negotiating process did not mention arms brokering directly, referring instead to controls on the 'import, export and transfer of conventional arms.'⁸ However, in their submissions on the 'feasibility, scope and draft parameters' of an ATT, 63 states voiced support for the inclusion of brokering in the scope of a treaty.⁹ The high number of states that mentioned the issue of arms brokering may have been related to the fact that the UN GGE on SALW brokering was taking place at the same time as states were making their submissions. Several states referenced the UN GGE on SALW brokering in their submissions.¹⁰

Brokering was mentioned in the findings of the 2008 Group of Governmental Experts (GGE) on an ATT. The final report noted that, 'the weapons traded in the illicit market frequently come from unlicensed production and transfers, unlawful re-export and illegal brokering, and unsecure weapons storage and transportation.'¹¹ The report listed 'brokering' as one of the 'types of activities/transactions that might be included in a potential arms trade treaty'.¹² The report also listed 'illicit brokering' as one of the 'thematic aspects' that

Forum, No. 3, 2009, p. 5.

8 UN General Assembly, 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms', 12 Oct. 2006.

9 Sarah Parker, 'Analysis of States' Views on an Arms Trade Treaty', UNIDIR, Oct. 2007.

10 UN General Assembly, Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN document, 30 August 2007. Prior to the start of negotiations on an ATT, there was considerable international support for the negotiation of a legally binding treaty on arms brokering. In 2005, the UN Secretary-General called for the creation of a legally binding international instrument regulating arms brokering, urging states to create a 'legally binding international instrument...to prevent, combat and eradicate illicit brokering' (UN General Assembly, In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General, 21 March 2005, para. 120) For more information, see Valerie Yankey-Wayne, 'Widening our Understanding of the Brokering Issue: Key Developments', in *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Implications*, UNIDIR, 2006.

11 UN General Assembly, 'Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms', 26 Aug. 2008.

12 The full list consisted of 'exports, imports, transfers, re-exports, transit, trans-shipment, licensing,

needed to be addressed.¹³ However, the final report of the 2009 Open-Ended Working Group (OEWG) did not mention brokering.¹⁴ During the discussions of the OEWG, at least 15 states voiced support for the inclusion of brokering within its scope of an ATT.¹⁵ However Egypt and Russia both voiced opposition to its inclusion. Egypt maintained its opposition during the February / March 2011 PrepComm, arguing that any reference to brokering in an ATT should be confined to 'illicit' brokering. During the February / March 2011 PrepComm meeting, Russia confined itself to noting that brokering was not an issue in Russia since only one entity - Rosoboronexport - was permitted to engage in arms sale negotiations.

Both versions of the Chairman's draft papers which were circulated before and during the February / March 2011 ATT PrepComm mentioned 'brokering' as one of the transactions or activities that would be covered by an ATT. The first version provided a lengthy definition of brokering and referred exclusively to SALW, implying that the brokering of other items in the scope of an ATT would not be covered.¹⁶ Several states argued in favour of simplifying the definition of brokering and expanding its coverage to include all of the items covered by the scope of an ATT.¹⁷ The second version of the Chairman's draft paper defined brokering in a more succinct manner and removed the reference to SALW.¹⁸

Even though the majority of states appear to be in favour of including brokering controls within the scope of an ATT, there remain unresolved issues that are yet to be addressed in detail. These include:

- **Coverage** - Will brokering controls apply when an individual or entity is in possession of the items in question? Will brokering controls apply when the transfer is between two states that are party to an ATT? Will brokering controls apply to all items covered by the scope of an ATT or a subset thereof?
- **Criteria** - What criteria should states be required to apply when deciding whether to grant or deny a brokering licence?

transportation, technology transfer and manufacturing and foreign licensed production, as well as countering illegal re-exports, unlicensed production and transfers, illicit arms brokering, and transfers of arms to non-State actors.' UN General Assembly, 'Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms', 26 Aug. 2008.

13 The full list consisted of terrorism, organized crime and other criminal activities; maintaining regional stability; promoting socio-economic development; unlawful transfers to non-State actors, unauthorized re-export, unlicensed production, illicit brokering; right to manufacture and import; end use/end-user assurances; diversion; and compliance with Security Council arms embargoes and other existing international obligations as a necessary condition for transfers..' UN General Assembly, 'Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms', 26 Aug. 2008.

14 UN General Assembly, 'Report of the Open-ended Working Group towards an Arms Trade Treaty: establishing common international standards for the import, export and transfer of conventional arms', 20 July 2009.

15 These states were Argentina, Australia, Bangladesh, Brazil, Colombia, Indonesia, Ireland, New Zealand, Republic of Korea, Romania, Spain, St Vincent's and the Grenadines, Switzerland, the UK and Uruguay.

16 Chairman's Draft Paper, 16 Feb. 2010

17 For example, the UK delegation argued that the definition was 'too focussed on Small Arms and Light weapons and could be rephrased and shortened.' Statement by Ambassador John Duncan, UK Intervention on Scope of an ATT, 28 Feb. 2011.

18 The Paper defined brokering as describing it as '(t)he facilitation by an intermediary who brings together relevant parties and arranges or facilitates a potential transaction of conventional arms in return for some form of benefit, whether financial or otherwise.' Chairman's Draft Paper, 3 Mar. 2011.

- **Extra-territorial controls** - Will brokering controls apply when the broker is operating outside their national territory?
- **Control systems** - Will states be required to introduce systems of brokering licences or will other systems of control be acceptable?
- **Transparency and information sharing** - Will states be expected to share information on their brokering licences under an ATT transparency and reporting instrument?

Differences of opinion on some of these issues were apparent during the February / March 2011 PrepComm, particularly on the questions of whether arranging a transfer between states that are party to an ATT should be covered by a states' brokering controls and whether controls should apply when the broker is also the owner of the arms being transferred. The EU argued that a broker 'should be considered a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of conventional arms, between a state and another state, in return for some form of benefit, whether financial or otherwise.' This definition places a clear emphasis on the act of mediation and appears to exclude cases in which the broker is in possession of the arms being transferred. Meanwhile, Switzerland argued that brokering should be defined as '(a)ctivities of negotiating or arranging contracts, selling or trading of conventional arms from a third country.'¹⁹ The intention appeared to be to capture situations in which a Swiss national is the owner of arms located in a non-state party and sells them to another state or non-state party.

Conventional arms control in the Americas and the Caribbean

States in the Americas and the Caribbean have developed a range of formal and informal Confidence Building Measures (CBMs) in the field of arms control, military spending and non-proliferation. These mechanisms have been created at the continent-wide level, via the Organisation of American States (OAS), and at the regional level, via the Andean Community, UNASUR and other bodies. In many areas, the mechanisms created by states in the Americas and the Caribbean are the most ambitious in the world, committing states to sharing a vast array of security and defence related information. However, states' record on actually implementing these mechanisms - of submitting the information required - has traditionally been weak, with uneven levels of reporting and participation.²⁰

The agreement that is most relevant for improving arms transfer controls is the 1997 Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA Convention). The CIFTA Convention was opened for signature in November 1997 and entered into force in July 1998. The convention requires states parties to establish laws governing the import, export, and tracing of firearms, ammunition, explosives, and other related materials,

19 Preparatory Committee for the United Nations Conference on the Arms Trade Treaty, Statement by Mr. Simon Plüss, Head of the Swiss Delegation, New York, 2 March 2011.

20 For more information, see Mark Bromley and Catalina Perdomo, 'CBMs in Latin America and the effect of arms acquisitions by Venezuela', Real Instituto Elcano, 22 Sep. 2005.

along with enforcement mechanisms.²¹ In particular, the convention facilitates the sharing of information on arms smugglers and their actions, requires the establishment of basic export controls and encourages the provision of legal and technical assistance as required by States Parties. The CIFTA Convention has 30 states parties, more than three-quarters of OAS member states.

The CIFTA Convention makes no direct reference to arms brokering, although Article XIII requires states to exchange information on 'authorized producers, dealers, importers, exporters, and, whenever possible, carriers of firearms, ammunition, explosives, and other related materials.' The terms 'dealers' and 'carriers' go some way towards capturing certain types of activities that are covered by arms brokering.

In June 2002, an OAS General Assembly resolution called for the development of model brokering regulations and the preparation of a study on arms brokering. Increased engagement by states in the Americas and the Caribbean in the field of arms brokering came after a number of cases in which arms brokers were implicated in illicit arms transfers to illegal armed groups. In 2000 Nicaragua authorized the sale of 3000 AK-47 rifles and 2.5 million rounds of ammunition to the Panamanian National Police. However, the end-user certificate had been faked. The weapons were actually shipped, onboard the Otterloo, to Turbo, Colombia, where they were delivered to the United Self-Defence Forces of Colombia (Autodefensas Unidas de Colombia, AUC). A second deal was called off after the launch of a joint investigation by Panamanian, Colombian and Nicaraguan authorities. The deal was organised by an Israeli arms merchant based in Panama and was one of a number of cases that served to highlight the lack of controls over arms brokers in the region.²²

In April 2003, an OAS/CICAD Firearms Experts Group meeting drafted model brokering regulations which were approved in November 2003 and adopted by the OAS General Assembly in June 2004.²³ The OAS 'Model Regulations' were aimed at assisting states with the development of 'harmonized broker controls with respect to the international movements of firearms, their parts and components and ammunition' as well as the creation of 'a system of procedures for applying them.'²⁴ The OAS 'Model Regulations' recommended that these controls should form part of existing 'control mechanisms already established by Member States in other related areas, including export, manufacturing and

21 <<http://www.oas.org/juridico/english/treaties/a-63.html>>. See also, Matthew Schroeder, 'Small Arms, Terrorism and the OAS Firearms Convention', FAS Occasional Paper, March 2004, <http://www.fas.org/asmp/campaigns/smallarms/OAS_Firearms_Convention.htm>.

22 Organization of American States, Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia, 6 Jan. 2003, <http://www.fas.org/asmp/campaigns/smallarms/OAS_Otterloo.htm>; and Holger Anders and Silvia Cattaneo, 'Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process', GRIP, 2005.

23 The United States' National Report on the Implementation of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects, 2010; and Organisation of American States (OAS), Inter-American Drug Abuse Control Division (CICAD), 'Amendments to the Model Regulation for the Control of the International movement of Firearms, their Parts and Components and Ammunition - Broker Regulations', 13 Nov. 2003.

24 Organisation of American States (OAS), Inter-American Drug Abuse Control Division (CICAD), 'Amendments to the Model Regulation for the Control of the International movement of Firearms, their Parts and Components and Ammunition - Broker Regulations', 13 Nov. 2003.

marking of firearms.²⁵ The OAS 'Model Regulations' provides suggested text for states to use when drafting such legislation.

Provisions of the OAS 'Model Regulations'

Definition of brokering activities: The OAS 'Model Regulations' states that a "Broker" or 'Arms Broker' means 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.²⁶

Definition of goods subject to control: The OAS 'Model Regulations' cover firearms, their parts or components or ammunition.

Definition of scope and jurisdiction: The OAS 'Model Regulations' include language covering the control of brokering activities that take place both within and outside the states' national jurisdiction.

Licensing requirements: The OAS 'Model Regulations' include language under which a licence or written authorization would be required for individual brokering transactions. States may also choose to introduce a requirement for a licence or written authorization to be a broker.

Licensing assessment criteria: Under the OAS 'Model Regulations', brokering licences should be assessed according to a set of criteria which take into account the risk that the arms will be used to commit acts of genocide, crimes against humanity, violations of human rights, war crimes or support acts of terrorism, whether they may be diverted to illegal activities, and whether the transfer would contravene UN arms embargoes or other bilateral or multilateral arms control or non-proliferation agreements.

Record-keeping and reporting: Under the OAS 'Model Regulations', brokers should be obliged to submit annual reports on their activities.

Sanctions: Under the OAS 'Model Regulations', states are required to adopt 'appropriate penalties' to punish violations of their brokering controls.

Other global and regional agreements on arms brokering

States in the Americas and the Caribbean are also covered by the provisions on arms brokering within the UN Programme of Action on SALW. Under the Programme of Action on SALW states agreed '(t)o develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering'. This should include 'measures such as registration of brokers, licensing or

25 Organisation of American States (OAS), Inter-American Drug Abuse Control Division (CICAD), 'Amendments to the Model Regulation for the Control of the International movement of Firearms, their Parts and Components and Ammunition - Broker Regulations', 13 Nov. 2003.

26 Organisation of American States (OAS), Inter-American Drug Abuse Control Division (CICAD), 'Amendments to the Model Regulation for the Control of the International movement of Firearms, their Parts and Components and Ammunition - Broker Regulations', 13 Nov. 2003.

authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State's jurisdiction and control.²⁷ In addition, states in the Americas and the Caribbean which have signed and ratified the UN Firearms Protocol are also obliged to apply its provisions in the field of arms brokering.²⁸ Under the UN Firearms Protocol states which have not yet done so agree to consider 'establishing a system for regulating the activities of those who engage in brokering.' The UN Firearms Protocol does not provide a definition of brokering. However, it states that the system states' put in place could include systems of registering brokers, licences for brokering activities and reporting on brokering activities. To date, 18 states in the Americas and the Caribbean have ratified the UN Firearms Protocol.²⁹

A number of export control regimes and regional groupings developed best practice guides in the field of arms brokering during the early 2000s. These include the EU Common Position on arms brokering (2003), the Wassenaar Arrangement Elements for Effective Legislation on Arms Brokering (2003), the OSCE Principles on the Control of Brokering Small Arms and Light Weapons (2004), and the Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons (2005). The provisions of these different best practice guidelines are compared in Table 1.

There are certain differences between these documents, most notably on scope. For example, the documents produced by the EU and the Wassenaar Arrangement cover the brokering of all military equipment. Meanwhile, the OAS, OSCE and Nairobi Protocol documents only cover the brokering of SALW or Firearms. In addition, while the OAS and Nairobi Protocol documents imply that transfers between any two states should be covered by a states' brokering controls, the EU and Wassenaar Arrangement documents only require controls on transfers between two states that are not covered by the instrument. Transfers to or from a state which is a member of the EU or the Wassenaar Arrangement do not have to be controlled - this is based on the assumption that that states' export or import controls will be sufficient. However, in terms of their definition of brokering transactions and the structure of the control systems they recommend, the documents are very similar. For all instruments, the core definition of brokering activities to be controlled includes negotiating, facilitating or arranging transactions. In addition, they all call for individual licences for individual brokering transactions and the use of agreed criteria for assessing licence applications.

27 UN General Assembly, Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 2001.

28 UN General Assembly, 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, 8 June 2001

29 These states are Argentina, Bahamas, Brazil, Costa Rica, Cuba, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago and Uruguay.

Table 1. Comparison of different best practice guides in the field of arms brokering.

	OAS 'Model Legislation'	EU Common Position	WA Elements	OSCE Principles	Nairobi Guidelines
Activities subject to control					
- Negotiating, facilitating or arranging transactions	X	X	X	X	X
- Buying and selling controlled items abroad		X	X	X	
- Exceptions		X ^a	X ^b	X ^c	
- Exports from states' national territory (optional)		X	X	X	
Definition of goods subject to brokering controls					
- SALW				X	X
- Firearms and their parts, components and ammunition	X				
- Military equipment		X	X		
Definition of scope of jurisdiction					
- Activities within states' national territory	X	X	X	X	X
- Extraterritorial controls	X				
- Extraterritorial controls (optional)		X	X	X	
Licensing procedures					
- Licence for individual brokering transaction	X	X	X	X	X
- Licence to conduct brokering activities	X	X		X	X
- Licence to conduct brokering activities (optional)					
Licensing assessment criteria					
- UN arms embargoes	X	X	X	X	X
- Other	X ^d	X ^e	X ^f	X ^g	X ^h

	OAS 'Model Legislation'	EU Common Position	WA Elements	OSCE Principles	Nairobi Guidelines
Record-keeping and reporting					
- Brokers submit annual reports on their activities (optional)	X				
- Records of licences issued		X	X	X	X
- Register of brokers					X
- Register of brokers (optional)	X	X	X	X	
- Information sharing with other participating states		X	X	X	
Sanctions					
- Sanctions and penalties for violations	X	X	X	X	

^aBrokering controls are only required for transfers from one non-Wassenaar Arrangement state to another non-Wassenaar Arrangement state.

^bBrokering controls are only required for transfers from one non-EU member state to another non-EU member state.

^cStates are 'not precluded' from exempting transfers to and from another OSCE member states from the national controls.

^dLicence applications shall be refused if there is reason to believe that 'the brokering activities will, or seriously threaten to: (a) result in acts of genocide or crimes against humanity; (b) violate human rights contrary to international law; (c) lead to the perpetration of war crimes contrary to international law; (d) violate a United Nations Security Council embargo or other multilateral sanctions to which the country adheres, or that it unilaterally applies; (e) support terrorist acts; (f) result in a diversion of firearms to illegal activities, in particular, those carried out by organized crime; or (g) result in a breach of a bilateral or multilateral arms control or non-proliferation agreement.'

^eLicence applications shall be assessed in accordance with the criteria of the EU Common Position on Arms Exports.

^fLicence applications should be assessed in accordance with the principles and objectives of the Wassenaar Arrangement Initial Elements, the Wassenaar document "Elements for Objective Analysis and Advice concerning Potentially Destabilising Accumulations of Conventional Weapons" and any subsequent amendments thereto and, where applicable, the "Best Practice Guidelines for Exports of Small Arms and Light Weapons" and the "Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)".

^gLicence applications shall be assessed in accordance with the criteria according to the provisions of section III of the OSCE Document on Small Arms and Light Weapons (2000).

^hLicence applications shall be assessed in accordance with the criteria laid down by the Nairobi Guidelines for assessing export licences.

National implementation of arms brokering controls in the Americas and the Caribbean

18 states in the Americas and the Caribbean have provided information on their controls on SALW brokering in their submissions under the UN Programme of Action reporting instrument.³⁰ **Six** states have reported that they have specific national legislation directed at SALW brokering.³¹ However, in several cases the state in question has not provided detailed information on the content of these controls or the definition of ‘arms brokering’ upon which they are based. **Three** states are - or have been - in the process of developing specific national legislation directed at SALW brokering.³² **Two** states operate state monopolies on brokering activities.³³ **Four** states do not have specific national legislation directed at SALW brokering, but appear to control aspects of brokering via other measures.³⁴ **Three** states do not have specific national legislation directed at SALW brokering.³⁵ Finally, **17** states have not provided information to the UN Programme of Action reporting instrument on its SALW brokering controls.³⁶

Argentina is - or has been - in the process of developing specific national legislation directed at SALW brokering. According to its 2009 submission to the UN Programme of Action reporting instrument, Argentina has included provisions regarding the control of arms brokers in draft legislation which is currently under consideration.

Canada does not have specific national legislation directed at SALW brokering, but appears to control aspects of brokering via other measures. According to its 2010 submission under the UN Programme of Action reporting instrument, Canadian businesses dealing with firearms and ammunition ‘must have appropriate firearms business licences and are subject to the full regulatory regime governing firearms businesses.’ Other aspects of illicit arms transfers are captured by provisions in the Criminal Code. In particular, provisions dealing with aiding and abetting the commission of an offence and conspiracy to commit a criminal offence may apply to individuals engaged in illicit arms transfers. Some of these provisions may be applicable even if the offence takes place outside of Canada, provided there is ‘a real and substantial link to Canada.’

Colombia is - or has been - in the process of developing specific national legislation directed at SALW brokering. According to its 2005 submission under the UN Programme of Action reporting instrument, Colombia was in the process of amending its national legislation in order to create controls on arms brokering. However, no further information has been provided since.

30 These states are Argentina, Canada, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, and United States.

31 These states are Dominican Republic, Ecuador, Honduras, Nicaragua, Peru and the United States.

32 These states are Argentina, Colombia and Paraguay.

33 These states are Cuba and Mexico.

34 These states are Canada, Guatemala, Jamaica and Trinidad and Tobago.

35 These states are Guyana, Haiti and Panama.

36 These are Antigua and Barbuda, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Costa Rica, Dominica, El Salvador, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Uruguay and Venezuela.

Cuba operates a state monopoly on brokering activities. According to its 2003 submission under the UN Programme of Action reporting instrument, there are 'no intermediaries in the trade in small arms and light weapons' in Cuba and 'all transactions involving such weapons are controlled by the State through the Ministry of the Interior.'

Dominican Republic has specific national legislation directed at SALW brokering, according to its 2006 submission under the UN Programme of Action reporting instrument. However, Dominican Republic has not provided detailed information on the content of these controls or the definition of 'arms brokering' upon which they are based.

Ecuador has specific national legislation directed at SALW brokering, according to its 2006 submission under the UN Programme of Action reporting instrument. However, Ecuador has not provided detailed information on the content of these controls or the definition of 'arms brokering' upon which they are based.

Guatemala does not have specific national legislation directed at SALW brokering, but appears to control aspects of brokering via other measures. According to its 2005 submission under the UN Programme of Action, brokers in Guatemala are controlled by 'commercial norms'. However, Guatemala has not provided detailed information on the content of these controls or the definition of 'brokers' upon which they are based.

Honduras has specific national legislation directed at SALW brokering, according to its 2004 submission under the UN Programme of Action reporting instrument. In particular, the Act on the Control of Firearms, Ammunition, Explosives and Other Related Materials sets out procedures regulating the activities of those who engage in small arms and light weapons brokering.' This includes 'appropriate offences and penalties for all illicit arms brokering activities.' However, Honduras has not provided detailed information on the content of these controls or the definition of 'arms brokering' upon which they are based.

Jamaica does not have specific national legislation directed at SALW brokering, but appears to control aspects of brokering via other measures. According to its 2008 submission under the UN Programme of Action reporting instrument, the remit of the Firearms Licensing Authority includes monitoring and approving the importation of arms and monitoring and approving the 'activities of brokers.' The submission also references the activities of law enforcement, customs, police and immigration officials in helping to prevent illicit arms brokering and the introduction of new legislation on the Proceeds of Crime which covers firearms 'importation, sale and distribution.' However, Jamaica has not provided detailed information on the content of these controls or the definition of 'brokers' upon which they are based.

Mexico operates a state monopoly on brokering activities. According to its 2008 submission under the UN Programme of Action reporting instrument, 'the Ministry of Defense has been designated as the only body authorized to trade in weapons in Mexico, through the Department of the Military Industry.'

Nicaragua has specific national legislation directed at SALW brokering. According to its 2006 submission under the UN Programme of Action reporting instrument, under Nicaraguan legislation a broker is defined as a natural or legal persons who, in return for

economic or financial consideration, advantage, commission or other benefit, undertakes the following activities:

- Acting as an agent in the negotiation or arrangement of a contract for the purchase of arms.
- Facilitating or carrying out transfers of documentation, payment, transport or shipping, or any combination of these in relation to the purchase, sale or transfer of any firearm.
- Acting as a broker between any manufacturer or supplier of conventional arms or service provider or any purchaser or recipient of such arms.

Nicaragua's brokering controls include a system of prior authorization and individual licences for particular transactions. Individual licences are valid for 90 days. Licence applications are assessed according to a set of criteria which take into account whether the arms will be delivered to destinations subject to UN arms embargoes, the risk that the arms will be used to commit acts of genocide, crimes against humanity, violations of human rights or acts of terrorism, whether the arms may be diverted to irregular armed groups, and whether the transfer would contravene bilateral or multi-lateral non-proliferation agreements. Brokers are obliged to submit annual reports on their activities. Violations of brokering controls are punishable with sentences of 3-5 years in prison, fines of 12 minimum average salaries, and the confiscation of the arms.

Paraguay is - or has been - in the process of developing specific national legislation directed at SALW brokering. According to its 2006 submission under the UN Programme of Action reporting instrument, Paraguay was considering introducing new regulation in this area in the next modification of its firearms law. However, no further information has been provided since.

Peru has specific national legislation directed at SALW brokering, according to its 2008 submission under the UN Programme of Action reporting instrument. In particular, Law No. 28627 states that 'anyone who illegally engages in the manufacture, importation, export, transfer, sale, brokerage, transport, possession, concealment, usurpation, carrying and unlawfully use weapons, ammunition and explosives war and other related materials, shall be punished by imprisonment of not less than ten nor more than twenty years.' However, Peru has not provided detailed information on the content of these controls or the definition of 'brokerage' upon which they are based.

Trinidad and Tobago does not have specific national legislation directed at SALW brokering, but appears to control aspects of brokering via other measures. According to its 2010 submission under the UN Programme of Action reporting instrument, the Firearms Act and the Firearms Regulations both have sections relating to the 'activities of dealers'. Specifically, 'the legislation provides regulations for the provision of a Firearms Dealer's Licence, lays out the dealer's obligations in terms of registration and transactions and prohibitions which such a licence carries with it.' However, Trinidad and Tobago has not provided detailed information on the content of these controls or the definition of 'dealer' upon which they are based.

United States has specific national legislation directed at SALW brokering. Under the 1996 US law, a broker is defined 'any person who acts as an agent for others in

negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.³⁷ This 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, irrespective of its origin.' However, the provisions do not apply to 'persons exclusively in the business of financing, transporting, or freight forwarding, whose business activities do not also include brokering defense articles or defense services.' US brokering controls cover US citizens located inside or outside of the United States as well as foreign citizens subject to US jurisdiction. They do not apply to US domestic sales or exports, the activities of US government officials, and - except in certain cases - transfers among NATO member states, Australia, Japan, New Zealand, and South Korea.³⁸

US brokering controls include a system of prior authorization and individual licences for particular transactions. Brokers are obliged to submit annual reports on their activities. Violations of brokering controls are punishable with prison sentences, fines or both.³⁹

Conclusions

The experience of states in the Americas and the Caribbean in the field of arms brokering controls holds a number of possible lessons for how this issue could be tackled under an ATT. States in the Americas and the Caribbean have been convinced of the dangers of illicit arms brokering for many years and have developed detailed guidelines regarding how the issue should be tackled at the national level. In particular, the OAS 'Model Regulations' provide detailed guidelines covering the creation of a national systems for licensing and regulating individuals and companies involved in SALW brokering activities. These guidelines are broadly in line with other best practice documents in this area, including the EU Common Position and the OSCE Principles. In addition, states in the Americas and the Caribbean are covered by the brokering provisions of the UN Programme of Action of SALW and - for the 18 states which have signed and ratified the instrument - the UN Firearms Protocol.

Despite this activity, available evidence indicates that the number of states which have actually created licensing systems for controlling brokering activities is small. If the figures derived from states' submissions under the UN Programme of Action are accurate then the raise a number of important questions. First, why - despite the provisions of the OAS Model Regulations - are states in the Americas failing to create systems of specific national legislation directed at SALW brokering? And are there ways in which the process could be simplified and made less arduous? For an ATT, this underlines the importance of effective systems of outreach and assistance and the development of workable best practice guides to assist states with implementation.

Another question is whether - under an ATT - states would need to create a fully functioning licensing systems along the lines laid down by the OAS Model Regulations?

37 US State Department, Consolidated ITAR 2010 - ITAR Part 129 - Registration and Licensing of Brokers, <http://www.pmdtc.state.gov/regulations_laws/itar_consolidated.html>.

38 US State Department, Consolidated ITAR 2010 - ITAR Part 129 - Registration and Licensing of Brokers, <http://www.pmdtc.state.gov/regulations_laws/itar_consolidated.html>.

39 US State Department, Consolidated ITAR 2010 - ITAR Part 127 - Violations and Penalties, <http://www.pmdtc.state.gov/regulations_laws/itar_consolidated.html>.

As noted, several states in the Americas and the Caribbean reported in their Programme of Action submissions that while they do not have specific national legislation directed at SALW brokering, they do control aspects of brokering via other means. These include implementing controls on arms dealers, maintaining a state monopoly on arms brokering activities and having a prohibition on brokering certain types of deals - such as transfers to embargoed destinations. Under an ATT, will states be required to create a fully functioning licensing system or will they be allowed to use other means to use other methods to control arms brokering?

Another issue to bear in mind is that all of the regional and international agreements which apply to states in the Americas and the Caribbean are focussed exclusively on controlling the brokering of SALW or Firearms and their related parts, components and ammunition. As it currently stands in the latest version of the Chairman's draft paper, an ATT could require controls on the brokering of all items covered by the scope of an ATT between all states. Even states which have fully developed systems of brokering controls in place - such as the United States - place certain limits on the coverage of their controls. If states with fewer resources at their disposal are to have a realistic chance of implementing future ATT-related controls on arms brokering, it may be necessary to introduce some qualifying language in this regard. This could include allowing states to implement more targeted control systems that focus on particular categories of weapon systems or transfers between particular states.

As with all of the activities which an ATT will seek to control, states will have to determine how prescriptive the treaty text needs to be. What states will have to determine is whether an ATT should:

- Provide detailed prescriptions of the content of national transfer control mechanisms;
- Offer a broad description of key 'essential elements' for controls in each area; or
- List the areas where controls needs to be exerted and leave it for states to articulate specific content at the national and regional level.

Given current time constraints and the differences in national practices in many areas of export controls, there is likely to be pressure to move away from the specific and towards the general - of simply stating that states are required to exert control over arms brokering and leaving it for them to determine the content of these controls. This would reduce the burden attached to implementation and allow states to control brokering in ways that are best suited to the their national context. While this may be attractive, there are also dangers in moving too far from the specific and towards the general. In particular, there has been a great deal of effort devoted to drawing up the essential components of a modern and effective system of brokering controls. Omitting more detailed language describing what arms brokering consists of and how best control it would serve to ignore this hard work while also missing a golden opportunity to advance global standards in this area.

Ultimately, states should not forget the purpose of brokering controls and why the issue rose up the international agenda in the 1990s and 2000s. The intention was to close a legal loophole and ensure that individuals involved in arranging transfers that violate arms

embargoes and fuel conflicts can be held to account. Helping to close this loophole for good by ensuring that as many states as possible have effective controls is possibly one of the biggest contributions that an ATT could make to global peace and security.

One potential solution is to pursue a middle path - of including language that reflects the best practices developed in the OAS Model Regulations and elsewhere while also allowing states to control brokering by other means if they wish to do so. If this is the case, it will be all the more important to establish clear systems of information exchange, public reporting, peer-review, and guidance (perhaps via some kind of User's Guide) to improve and harmonize national practices once an ATT enters into force. This will allow others to see how they are implementing their responsibilities in the field of arms brokering controls while also helping states to share best practices in this area.

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The United Nations Institute for Disarmament Research (UNIDIR)—an autonomous institute within the United Nations—conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to the variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and governments. UNIDIR's activities are funded by contributions from governments and donor foundations.