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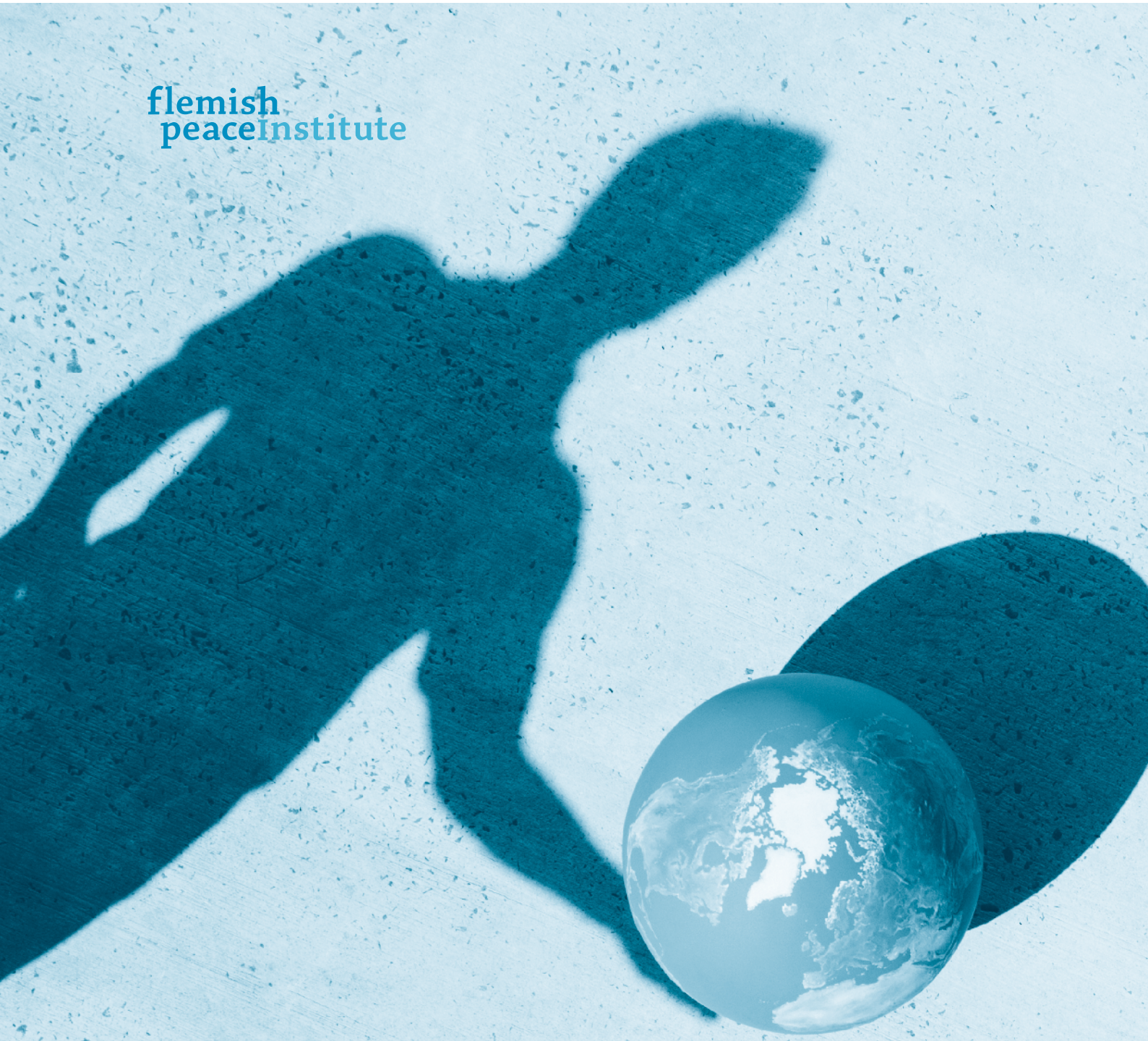

The international framework for control of brokering in military and dual-use items

Report
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Kathleen Van Heuverswyn

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Abstract

- Brokering is a separate category of activity involved in the international trade in military or dual-use items. Brokering is distinct from the import, export and transit of such goods in that 1) the transfer of goods is conducted in countries other than those where the brokers carry out their business activities and 2) the brokers do not themselves possess the goods. They may facilitate contacts between vendors and buyers, negotiate deals, or arrange transactions. Brokers act as intermediaries between producers, buyers, and vendors, without having ownership of the goods.

- Military goods include small arms and light weapons (SALW) as well as other conventional arms. Dual-use items can be applied to both civil and military use. These categories of goods are usually treated separately in national and international regulations.

- Since the 1990s, when the role of brokers was revealed in violations against arms embargoes, the problem of illicit arms brokering – brokering illicit arms deals – has attracted international attention. At the international, regional, and European levels, initiatives were undertaken to combat illicit brokering.

- The United Nations (UN), the *Wassenaar Arrangement* (WA), the Organization for Security and Co-operation in Europe (OSCE), and the European Union (EU) have all adopted either legally or politically binding documents intended to stop illicit brokering, with a special focus on SALW.

- Since the adoption of UN Security Council Resolution 1540 in 2004, increasing attention has been paid to brokering in the trade in sensitive materials that may contribute to the development of nuclear, biological or chemical (NBC) weapons and associated means of delivery.

- At the international level there still appears to be an absence of consensus on:
  - The types of activities and the profile of brokers that need to be subjected to control, but first the international community must agree on definitions of brokers and brokering.
  - The kinds of measure that national legislation needs to impose and the definition of the material scope of application (the types of goods to which the proscriptions are applicable).

- At the international level there is consensus on:
  - The need for national legislation to subject brokers to controls in the country where they conduct their business, which will at the same time create a framework for legal brokering.

  - The need for sanctions to prevent malafide brokers from obtaining impunity for their illicit practices.
  - The granting of authorisation on the basis of *activities*, rather than *persons*, as a control measure.

- EU Regulations impose the most imperative measures. Depending on the type of goods, whether military or dual-use, Common Positions and Regulations impose on the member states the obligation to adapt their policies or implement directly applicable provisions.

- EU Regulations contain clear definitions and a clearly delineated scope of application for the materials (based on lists). They draw a distinction between measures of minimal imposition and options for additional consideration, and require member states to impose appropriate penalties (sanctions).

- Aside from the legally or politically binding documents at the international level, international good practices and recommendations also offer guidelines for the control of brokering practices.

- The reports on good practices and recommendations are a valuable source of information, as they further elucidate aspects of the problem of illicit brokering and, for most of the aspects that need regulation, distinguish between what is minimally required and what may be considered optional.

- All relevant documents underline the significance of legislation and of (criminal) sanctions for cases of non-compliance. However, how successfully this can be implemented in actual practice depends largely on the possibility of being able to identify brokers proactively in order to judge whether their activities conform with the imposed measures.

Introduction

In its Resolution A/RES/63/67 of 2 December 2008, the UN General Assembly calls upon the UN member states to take appropriate measures to prevent and combat illicit brokering in conventional arms and materials, equipment and technology that could promote the proliferation of weapons of mass destruction (WMD). Brokers create and facilitate the preconditions for transactions involving goods. International attention to brokering is directed at activities that are intermediary stages in the trade in arms and other strategically important goods and at persons acting as intermediaries. Control of brokering activities constitutes a cornerstone of export control policy, contributing to securing and ensuring peace and security.

Attention to brokering initially centred on the problem of small arms and light weapons (SALW). A growing awareness of the problem of the proliferation of SALW and the role of brokers in this trade, especially with respect to countries torn by internal conflicts, mobilized concern in the international community. It was thought necessary to conclude agreements to impose criminal sanctions on the actions of malafide brokers. More recently, there is also growing attention to brokering in components for WMD, including for instance chemical and nuclear dual-use items. In this respect, the international community focuses on the so-called *rogue states* and non-state actors that constitute a threat to the existing international order. While the nature of the goods may differ, the general consensus is that a legal framework will enable action against malafide brokers.

Brokering is a cross-border phenomenon that generates attention in different forums. At the international level, this is dealt with in the United Nations (UN) and the Wassenaar Arrangement (WA); at the regional level, in the Organization for Security and Co-operation in Europe (OSCE), and at the supra-national level in the European Union (EU). All these organisations have agreed both legally binding and politically binding declarations. This report reviews them all.

After a description of the problem of illicit brokering, the findings of the study are presented.

Part I describes the legally and politically binding prescriptions at the international, regional,[1] and European levels with respect to the control of brokering in the trade in military and dual-use items. This part concludes with a summary of all the relevant documents and types of provisions, presented in order of the nature of their legal force, that is, their legally or politically binding character.

1 This document was initially prepared in order to analyse the compliance of the Belgian regulations and control system on brokering with international obligations. The inventory and description are therefore restricted to regional documents that are legally or politically binding upon Belgium.

Part II discusses a number of good practices and international research reports with recommendations by experts in the field. Aside from recommendations for a legal framework, other documents highlight the national and international dimension of the problem posed by illicit brokering. The conclusion in Part II lists a number of extra points (in addition to the requirements in Part I) for consideration in the elaboration of a legal framework for an effective control regime.

For a concrete testing of the reference framework that is being worked out within this report, reference is made to the study "*The Belgian control regime for brokering in military and dual-use items*".[2] The latter report analyses and evaluates the Belgian control regime for its effectiveness and compliance with the international and European requirements as outlined in the present study.

2 K. Van Heuverswyn, *The Belgian regime for control of brokering in military and dual-use items*, Flemish Peace Institute, 2010.

Explanatory notes on the problem of illicit brokering

It is useful to start by outlining the problem of illicit brokering. The sections below present an overview of the most significant aspects of this problem, some of which are examined in greater detail in our subsequent discussion of a number of specific documents.

1 Distinction between arms trade and arms brokering

Brokering is a cross-border phenomenon and as such falls within the international (judicial) purview.

There is no internationally accepted definition or description of the brokering in arms or *dual-use items*, but those that have been put forward are similar in that they see brokering as an activity in trade transactions from one third country to another third country.[3] A minority of these partial definitions or descriptions expand the meaning of brokering to include activities in export from the regulating country[4] (the national competent authority that has jurisdiction to regulate the process). Both these views thus start from a national judicial (territorial) standpoint.

However, the noteworthy fact remains that there are no agreed definitions.[5] A number of documents mention *brokering* or *brokering activities* without identifying what trade or types of trade activities fall within that definition. The same holds true for the identification of brokers: there is no consensus on a definition of their profile and activities.[6]

The term broker pertains to individuals who act as intermediaries *between* traders (arms dealers): they offer their services to dealers who are themselves directly involved in arms transactions. The latter category includes producers, importers, exporters, vendors, and

3 'third countries' are foreign countries to the competent (national) authorities, thus countries where they have no jurisdiction; S. CATTANEO, 'National systems of licensing and registration', Chapter 2 in *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons – Scope and Implications*, United Nations Institute for Disarmament Research (UNIDIR), 2007, p. 71 et seq.; A-C MERRELL WETTERWIK, 'Les solutions qui se dessinent pour lutter contre le courtage illicte d'éléments connexes aux armes de destruction massive', web publication on disarmament forum, 2009, p. 21, availabale at http://www.unidir.org/pdf/articles/pdf-art2896.pdf.

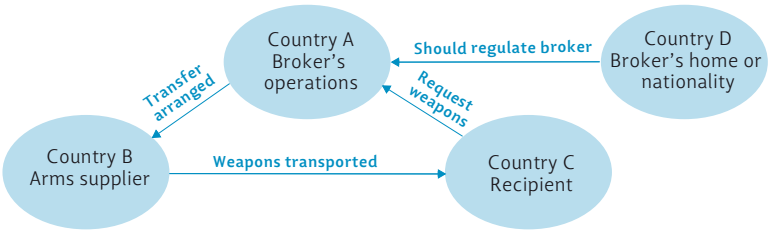
4 OSCE Principles on the control of brokering in SALW of 2004 (see *infra*, 1.3.3) and het Common Position 2003/468/CFSP of the Council of 23 June 2003 on the control of arms brokering (EU, see *infra*, 2.1.3). For an overview of all definitions: see Annex 1.

5 For a full overview of the definitions, see: the table in section 3.1, with the type of definition stated per instrument discussed (Conclusion Part I); also consult in Part I the summary frame with each separately discussed document.

6 S. CATTANEO, *loc. cit.*, p. 68 et seq.

buyers.[7] As a rule, brokers themselves do not possess or own the goods they are handling,[8] although a few documents point out that *brokers* may indeed themselves buy the products.[9]

Such extensions (both territorial and relating to activities) complicate identification of the important distinction between arms trade in general and brokering as a specific activity in the arms trade. A minimal description (i.e. brokering concerns a deal between third countries and the arms are not held in the possession of the broker) presents a clearer and more useful distinction: a person who exports from a regulating country falls under the export legislation, just as the party that itself buys arms is no longer a broker, but rather an arms trader.



Representation of brokering from the International Action Network on Small Arms[10]

The illustration above shows that at least three – or sometimes four or more – countries may be party to brokering activities. Country A is the country where the *broker* exercises his activities, that is, his base. This may or may not be the country of which he is a national or resident (Country D). The transfer of goods takes place outside the territory of Country A: the goods are physically moved from Country B to Country C.

Precise definitions are important also on another level: regulating brokering and compliance with such regulations must involve sanctions for cases of non-compliance. When criminal penalties are a part of any regulation, according to the universal legal principle

7 See, inter alia, the UN Report of a consultative meeting of experts on the feasibility of undertaking a study for restricting the manufacture and trade of small arms to only manufacturers and dealers authorized by States, A/54/160, 6 July 1999, p. 3: "*Brokers arrange arms deals, i.e. materially benefit from facilitating a deal*"; see also: H. ANDERS, 'Controlling arms brokers operating from abroad: Challenges and policy options for EU States', Note d'Analyse du GRIP, 29 June 2009, Brussels, p. 2, available at *http://www.grip.org/and/siteweb/images/NOTES_ANALYSE/2009/NA_2009-08-03_AND_H-ANDERS.pdf* (also as as 'Controlling arms brokers'); B. WOOD, 'The prevention of illicit brokering of small arms and light weapons: framing the issue', in *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons – Scope and Implications*, United Nations Institute for Disarmament Research (UNIDIR), 2007, p. 1 (Referred to as 'The prevention of illicit brokering'); e.a.

8 UN 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, A/62/163, 30 August 2007, p. 3 and p. 9 (further referred to as UN Report A/62/163); S. CATTANEO, *loc. cit.*, p. 69-70 ; B. WOOD, 'The prevention of illicit brokering', *loc. cit.*, p. 12; e.a.

9 OSCE Handbook of Best Practices on Small Arms and Light Weapons, 2003, Chapter IV, p. 8; see also A.-C. MERRELL WETTERWIK, *loc. cit.*, p. 21.

10 See *http://www.iansa.org/un/review2006/Regulating-small-arms-brokering.pdf.*

of criminal procedures[11] the corresponding obligations must be described with sufficient clarity to enforce compliance. The conditions of the regulations need to be 'foreseeable', that is, the persons to whom they apply must understand whether they fall within the purview of such an obligation and which of their activities come under which provisions. This requires clearly stated legal terms, with precisely defined impositions or prohibitions.

In any event, brokering forms a separate category of the arms trade because the *activities differ and* do not fit the import, export, and transit designations.

The primary reason why it is important to regulate brokering activities is to prevent circumvention of the objectives laid down in the regulation on legal arms trade (the combating of illicit arms trafficking).

The difficulty in regulating and controlling such activities lies in their cross-border character – brokers do not conduct their activities within the same jurisdiction as the one where actual transfers of goods take place.[12]

Because brokering nonetheless constitutes a particular subcategory of the arms trade, a number of problems related to it (and that make control, whether or not by means of regulations, necessary) are associated with or identical to those of illicit arms trafficking:

Illicit arms trafficking often starts with a legal transfer but is diverted at some stage to an illegal circuit.[13] This activity often involves the falsification of documentation, corruption, or smuggling and other such illegal acts and actions.[14] This is also true of arms brokering.[15]

11 The legality of the imposition of penalties also issues from article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, Council of Europe) and article 11 of the Universal Declaration of Human Rights (1948, United Nations). In other words, it is a universal legal principle.

12 See inter alia S. CATTANEO, *loc. cit.*, pp. 70-71.

13 See inter alia UN Report on Small Arms prepared with the assistance of the Group of Governmental Experts on Small Arms, A/54/258, 19 August 1999, p. 9 (referred to as UN Report A/54/258); UN 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, A/63/334, 26 August 2008, p. 2 (referred to as UN Report A/63/334); B. WOOD and J. PELEMAN, *op. cit.*, pp. 43 and 47.

14 See inter alia UN Report of the feasibility of restricting the manufacture and trade of small arms to manufacturers and dealers authorized by states, A/54/160 of 6 July 1999, p. 3; UN Report A/54/258, *op. cit.*, p. 9.

15 See inter alia: UN Report in pursuance of GA Resolution 53/77 T entitled "Illicit Traffic in Small Arms", A/54/404, 24 September 1999, p. 5 (Referred to infra as UN Report A/54/404); UN Report on Small Arms, A/55/189, 28 July 2000, p. 9 (referred to as UN Report A/55/189); UN Report A/62/163, *op. cit.*, p. 7; O. GREENE and E. KIRKHAM, *Preventing diversion of small arms and light weapons: issues and priorities for strengthened controls*, Biting the Bullet Policy report, February 2009, a.o., pp. 8 *et seq.*, 12, 44 *et seq.*

Measures such as registrations, authorisations, marking of arms, keeping of registers, etc. all serve as instruments to control and combat the illicit arms trafficking in general, and illegitimate brokering in particular. Through *tracing*, it is in fact possible to determine where along the chain of a transfer an item was diverted from legal to illegal channels.[16]

- Brokering is not per se an illegal activity, just as all arms trade is not illegal.[17] In order to be able to distinguish between legal and illicit or unauthorized arms trade, national arms trade control regimes provide criteria that are included in national legislation. In the assessment of the requests for authorisation, these are tested for their validity against these criteria. Given that brokering also pertains to and involves other types of activity, such criteria must be extended to brokering activities in order to create a frame of reference for legal brokering.[18]

- Illicit arms trafficking and brokering often originate when an opportunity presents itself, not infrequently fuelled by the supply and demand sides of the arms trade. On the demand side are groups or regimes that are unable to acquire arms by legal process and/or regions that have been placed under an embargo.[19] The supply side is characterized by 'arms surpluses' because of overproduction or an overstocking of arms, for instance in post-conflict regions (such as in Eastern Europe after the Cold War) or as a result of badly managed inventories, which increases (the attraction of) opportunities for theft.[20] This applies equally to (illicit) brokering.[21] In order to prevent illicit brokering, brokers must be forced to abide by national legislation and arms embargoes (limiting the risk on the demand side).[22] Arms embargoes are indeed often not directly binding and need to be enforced via national laws. The effective management of arms inventories and arms surpluses (limiting the risk on the supply side) serves both to combat illegal arms transfers in general and illegitimate brokering in particular.

16 G. P. PAOLI, *Comparative Analysis of Post-Manufacture Marking Instruments and Practices for Small Arms and Light Weapons*, UNIDR, 2009, p. 8, *http://www.unidir.ch/pdf/ouvrages/pdf-1-92-9045-009-B-and.pdf*; G. O'CALLAGHAN and S. MEEK, 'The UN firearms protocol: considerations for the UN 2001 conference', Briefing 4, Basic – International Alert – Saferworld, 2000, p. 7,: *http://www.international-alert.org/pdf/btb_brf4.pdf*. See also OSCE Document on Small Arms and Light Weapons, 24 November 2000, p. 3.

17 UN Report A/62/163, *op. cit.*, p. 7; see also: S. TAVERNIER, H. VERVENNE and C. WILLE, 'Wapenhandel en wapenbezit', in G. VERMEULEN (ed.), F. DHONT, *Aspecten van Europees materieel strafrecht*, Antwerp-Apeldoorn, Maklu, 2002, p. 136.

18 According to a UN report, it pertains to the activities of three categories of dealers/traders: (1) retailers and wholesalers, (2) brokers, and (3) transportation agents (and financiers). See UN Report A/54/160, *op. cit.*, p. 3.

19 On brokers responsible for violating arms embargoes, see inter alia: UN Report A/62/163, *op. cit.*, pp. 3 and 5; see also E. CLEGG and M. CROWLEY, *loc. cit.*, p. 4; the website of Amnesty International Nederland: *http://www.amnesty.nl/thema/thema_wapenhandel*: "*Een groot deel van de wapenhandel naar conflictgebieden is in handen van particuliere tussenhandelaars.*"; B. WOOD, 'The prevention of illicit brokering', loc. cit., pp. 1, 2-3 and 4; B. WOOD, 'Strengthening enforcement of UN arms embargoes', Amnesty International, p. 3, (Referred to infra as 'Strengthening enforcement', web publication available at *http://www.iansa.org/un/documents/Strengthening-enforcement-of-UN-arms-embargoes.pdf.*

20 See inter alia: UN Report A/54/258, *op. cit.*, p. 9; UN Report A/54/404, *op. cit.*, p. 5; UN Report A/55/189, *op. cit.*, p. 8; B. WOOD and J. PELEMAN, Chapter 1 in *The arms fixers*, *op. cit.*; O. GREENE and E. KIRKHAM, *op. cit.*, p. 11

21 See inter alia: E. CLEGG and M. CROWLEY, *loc. cit.*, pp. 2 and 8

22 See inter alia: UN Report to the Security Council on "Small Arms", S/2005/69, 17 February 2005, p. 4

– For both illegal arms transfers and unauthorized brokering, it has been determined that there is frequently a link with other illegal activities, such as human trafficking or migrant smuggling, money laundering practices, drug trade, fraudulent financial transactions, and the like.[23] Cooperation with other competent authorities is therefore important for establishing full control of both types of activity.

2 Basic principles for the control of brokering

From the general explanation of the problem, one may draw a number of conclusions that are specific to brokering activities:

– The tighter the regulations governing the legal arms trade, the more difficult, in principle, the practice of illicit brokering: restricting the scope of operations of traders that are (inter)actively being served by brokers will in turn inevitably also restrict the scope of brokering activities.[24] On the other hand, if criteria for (il)legal activities and for the licensing procedures needed to ensure their compliance remain applicable *only* to arms traders, brokers (in the same countries) will be given a free hand. The activities that they employ to facilitate arms transfers by traders (in other countries) therefore need to be subjected to the same control regime.[25]
– In the absence of a cross-border or international control mechanism, a legal framework for combating illicit brokering that at the same time clearly lays out the terms for determining legal brokering can only be worked out at the national level.[26]
– Such a national regime requires a legal framework that, at a minimum, clearly defines brokers and brokering activities, imposes the same criteria on brokering activities that are valid for arms trade, preferably via identical licensing procedures, and provides for sanctions for non-compliance.[27]

23 UN Report A/54/258, *op. cit.*, p. 9; UN Report A/54/404, *op. cit.*, p. 6; UN Report A/55/189, *op. cit.*, p. 9; UN Report of the Third Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, A/CONF.192/BMS/2008/3, 20 August 2008, p. 11; UN Report to the Security Council on Small Arms, S/2006/109, 17 February 2006, pp. 5-6; L. ZAITSEVA, 'Organized Crime, Terrorism and Nuclear Trafficking', in *Strategic Insights*, Volume VI, Issue 5, August 2007, 18 pp.; B. WOOD and J. PELEMAN, Chapter 1 in *The arms fixers*, *op. cit.*; B. WOOD, 'Strengthening enforcement', *loc. cit.*, p. 3; E. CLEGG and M. CROWLEY, *loc. cit.*, p. 6 (over Colombia).

24 E. CLEGG and M. CROWLEY, *loc. cit.*, pp. 2 and 8; P. DANSSAERT and B. JOHNSON-THOMAS, *loc. cit.*, p. 41.

25 OSCE Handbook, Chapter IV *(Brokering)*, *op. cit.*, pp. 5 and 12; UN Report A/62/163, *op. cit.*, p. 13.

26 Combating illicit brokering is the "*primary responsibility*" of states: UN Report A/62/163, *op. cit.*, pp. 3 and 8, OSCE Handbook, Chapter IV *(Brokering)*, *op. cit.*, p.12; O. GREENE and E. KIRKHAM, *op. cit.*, p. 8

27 OSCE Handbook, Chapter IV *(Brokering)*, *op. cit.*, p. 8-19; UN Report A/62/163, *op. cit.*, p. 13 *et seq.*

- In order to exert a preventative, deterrent effect, such sanctions need to carry punitive action for violations. It must (according to the universal[28] legal principles of criminal procedure) be made clear who can or may take action, or what and under which circumstances such action may be taken.
- For universal control of brokering to apply, *all* countries need to implement it; otherwise brokers will simply shift their activities to countries where control is absent[29] and countries that have passed legislation will not be able to implement it. A worldwide system is only as strong as its weakest link. *Ideally*, *there ought to be a universal mechanism*. But in the absence of such a mechanism, all countries should cooperate in order to prevent the development of loopholes;[30] in fact, malafide (brokers) traders are already using such lacunas in the system to their advantage.[31]
- *Ideally*, again, international cooperation ought to entail:[32] agreements concerning the territorial validity of the national measures (to avoid lacunas and dual jurisdictions),[33] uniform and uniformly valid definitions of what constitutes *brokers* and their activities, uniform norms and criteria for when brokering activities are permissible, and uniform lists of the types of arms to which restrictions apply.[34]
- In the same vein, the monitoring of compliance cannot be carried out only at the national level. States must share information,[35] for instance with respect to the final destinations of goods,[36] on internally denied permissions, on the publication of judgments (whether of a criminal nature or not),[37] and the like.

This brief explanation outlines the complexity of the challenge that states face in trying to control brokering in arms.[38]

Part I presents a discussion of the international and regional instruments that impose control measures with respect to brokering in the trade in military and dual-use items.

28 Article 7 of the Convention for the Protection of Human Rights and the Fundamental Freedoms.

29 E. CLEGG and M. CROWLEY, loc. cit., p. 12.

30 O. GREENE and E. KIRKHAM, *op. cit.*, p. 49 *et seq.*; this is also the *ratio legis* or so-called *no undercut* provisions in, e.g., the EU Code of Conduct, currently the Common Position 2008/944 and the EC *Dual-use* Regulations: through joint agreements plus consultation, the Member States are trying to avoid that some countries resort to less stringent stipulations, whereby stricter legislation within certain nations may be circumvented.

31 Rather than trying to circumvent national legislation, brokers move to regions where a legal framework for, and control of, their activities is absent: UN Report 54/160, *op. cit.*, p. 3; UN Report A/54/258, *op. cit.*, p. 9; UN Report A/55/189, *op. cit.*, p. 9; E. CLEGG and M. CROWLEY, *loc. cit.*, p. 2 and p. 8; UN Report A/CONF.192/ BMS/2008/3, *op. cit.*, p. 11; UN Report A/62/163, *op. cit.*, p. 3 and p. 7; see also: S. TAVERNIER, H. VERVENNE and C. WILLE, *loc. cit.*, pp. 136-137; H. ANDERS, 'Controlling arms brokers *loc. cit.* , p. 2; O. GREENE and E. KIRKHAM, *op. cit.*, pp. 8, 11 and 43 *et seq.*

32 OSCE Handbook, Chapter IV *(Brokering)*, *op. cit.*, p. 20; UN Report A/62/163, *op. cit.*, p. 16 *et seq.*

33 OSCE Handbook, Chapter IV *(Brokering)*, *op. cit.*, pp. 10-11.

34 Consideration 7 of the *Dual-use* Regulation 428/2009.

35 UN Report A/62/163, *op. cit.*, pp. 3 and 4.

36 O. GREENE and E. KIRKHAM, *op. cit.*, p. 33 *et seq.*

37 UN Report A/54/404, *op. cit.*, p. 7.

38 Primarily small arms and light weapons, as they command priority attention in international documents; see also section 3.2.

PART I

Binding international and regional commitments to control brokering in military and dual-use items

Part I discusses the international, regional, and European frameworks that bear upon the control of brokering in military and dual-use items.

In order to present a complete and well-ordered review of all the obligations that states have committed themselves to or are required to apply, our discussion categorizes the documents or agreements by organisation.

At the international level, these are the United Nations and the Wassenaar Arrangement; and at the regional level it is the OSCE. We treat the EU separately.

The following elements of each document are discussed:

- the context within which it came into being (if relevant);
- its legal force (whether legally or politically binding);
- the kinds of control measures that are either imposed or recommended;
- the types of individuals, activities, and goods to which the measures are to be applied.

Legal force

In our discussions of each instrument, we note its legal force – the extent to which the state or states are obliged to adapt policy or legislation to the instrument. Traditionally, a distinction is made according to the degree to which an instrument is legally or politically binding. This distinction is much more difficult to make at the international than the national level, where there exists a clear hierarchy between legal norms and where clear enforcement mechanisms have been developed.[39] The law and politics at the international level are often much more closely intertwined than at the national level.[40]

In principle, at the 'supra'-national level the source serves as the distinguishing criterion: whether an instrument or a document falls under international law (a treaty, international customary law, etc.)[41] or is adopted by a political body. Due to the increasing diversification of instruments at the international level over the course of the past few decades, a kind of *soft law* has come into being. *Soft law* refers to a heterogeneous volume of documents and provisions that may or may not have a legal basis but cannot be considered to represent fully adopted legislation or *hard law*.[42] *Soft law* operates in two directions: some authors include conventional law provisions with such ambiguous wording - or provisions

39 B. VERBEEK and R.A. WESSEL, 'Internationaal recht komt van Venus, internationale betrekkingen komen van Mars', in *Vrede and Veiligheid, Tijdschrift voor internationale vraagstukken*, Nijmegen, 2009, no. 2, p. 144.

40 B. VERBEEK and R.A. WESSEL, *loc. cit.*, p. 143 *et seq.*

41 For the sources of the international law see M. BOSSUYT and J. WOUTERS, *Grondlijnen van internationaal recht*, Antwerp, Intersentia, 2005, p. 35 *et seq.*

42 On *soft law* see W. VAN GERVEN, *Hoe blauw is het bloed van de prins?*, Antwerp, Kluwer, 1984, p. 14; J.J. KIRTON and M.J. TREBILCOCK, *Hard Choices, Soft Law – Voluntary Standards in Global Trade, Environment and Social Governance*, University of Toronto, Canada, 2004, p. 13 *et seq.*; ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *Reducing the risk of policy failure. Challenges for regulatory compliance*, Paris, 2000, p. 14 *et seq.*

that are not being applied in practice (for instance, because of an absence of consensus) – as to lose their *hard law* character.[43] On the other hand, *soft law* also includes non-legally binding recommendations, for instance, by technical commissions that enjoy such a degree of moral authority that they cannot be ignored. One example is the scientific recommendations of the *International Commission for Radiological Protection*.[44]

As in the case of *soft law*, *hard law*, or traditional international law instruments such as treaties, while binding, may nonetheless be formulated so vaguely or of such a general a nature that they retain force only as recommendations.

Finally, it may be noted that within each category (legally and politically binding instruments) there are also gradations.

Not all these aspects are discussed in detail; rather, we indicate:

(1) whether an instrument is binding, while also clarifying whether it is either legally or politically binding or is situated somewhere in between as *soft law*;
(2) whether the relevant provisions of each instrument are formulated clearly enough to render them mandatory or whether they are meant rather as recommendations.

43 On the Nuclear Safety Convention see e.g. K. BOUSTANY, 'The Development of Nuclear Law-Making or the Art of Legal "Evasion"', in *Nuclear law Bulletin* n° 61, 1998, p. 39 *et seq.*; with ref. to international labour law: I. DUPLESSIS, 'Soft international labour law: The preferred method of regulation in a decentralized society', in *Governance, International law & Corporate Social Responsibility*, Genève, ILO Research Series 116, 2008, p. 7-36; see with ref. to international environmental law: J. VERSCHUUREN, 'Mensenrechten and milieu', in *Ars Aequi* 1997/9, pp. 577-583, available at http://arno.uvt.nl/show.cgi?fid=4974.

44 See for a discussion: K. VAN HEUVERSWYN, 'ALARA: van wetenschappelijk naar juridisch beginsel', in *Werk & Welzijn* no. 2, Brussels, Prevent, 2001, pp. 9-15.

1

International and regional frameworks

1.1 International: the United Nations

At the international level, the United Nations is most active in regulating the arms trade, including brokering. It acts on the basis of its primary mission to promote peace and security worldwide. Both the General Assembly and the Security Council have already taken initiatives to regulate the arms trade, including brokering. Among the specialized organs of the UN, the *Office for Disarmament Affairs* is specifically involved in control of the arms trade and nuclear and other WMD.[45]

An overview of the various initiatives and instruments employed by the UN demonstrates the focus on the control of brokering in transfers of SALW, with firearms as a specific subcategory, and on combating the proliferation of WMD. In the last instance, the central focus is on control of the (brokering) and trade in goods or items that can be used in the production of WMD. Given that the problem of brokering is linked to the problem of (il)licit arms trade, the general measures bearing on illicit arms trafficking are in each case included in the discussion.

The descriptions are presented in general chronological order since this also shows the evolution of the international community's position on measures to combat illicit arms trafficking and recognition of the share and the importance of brokering.

1.1.1 International attention to control of brokering

Brokering has been a concern of the international community since 1995, when a number of sanctioning commissions that monitor compliance with UN-imposed arms embargoes brought to light the problem of illicit brokering. Especially the initial reports of the *International Commission of Inquiry*, created for the purpose of investigating the implementation of the embargoes on the Rwandan armed forces, emphasized the role of a complex network of actors, among them *brokers*, that supplied the perpetrators of the

45 See the website UNODA: http://www.un.org/disarmament/HomePage/about_us/aboutus.shtml. One can consult on this website all relevant UN documents, including the UN Resolutions and reports with reference to arms trade.

genocide with arms.[46] Similarly, the *UN Panels* and *Groups of Experts* that investigated the violations against the UN Security Council arms embargoes on Angola, Liberia, Sierra Leone, Somalia, and others, arrived at identical conclusions in their reports.[47]

Arms embargoes are one type of the sanctions to which the UN Security Council may resort (on the basis of Chapter VII of the UN Charter) as an instrument to restore or maintain international peace and security.[48] A UN arms embargo is imposed by a resolution of the Security Council: it contains a prohibition to export a certain type or certain types of arms to one or more named regions or to deliver them to a named recipient (a state or public or private organisation or other body).

The Security Council may recommend or impose arms embargoes, and in the latter instance the UN member states must comply with the resolution, that is, they must fully abide by and implement its provisions. They are also obliged to take the necessary steps to enforce its implementation nationally, in other words, to enforce respect for its legal status within their jurisdiction. Hence, UN arms embargoes are not directly mandatory for private actors until appropriate national legislation is enacted to bring them under the jurisdiction of the embargo.[49] For this reason it can be said that the Security Council has little direct impact on compliance with the terms of an embargo. Implementation is strongly dependent on the *goodwill* of the member states.

Furthermore, the UN does not have its own verification system for monitoring the implementation of an embargo that is given legal force in the national legislation of member states. For each UN embargo, a sanctions committee is created for the purpose of monitoring the implementation of and compliance with the sanction, but these committees depend on the information that is provided to them by states. Arms embargoes are therefore regularly breached by both member states and private parties.[50]

In the context of the present study, arms embargoes are especially relevant since they contain criteria that highlight the distinction between legal trade and illicit arms traffick-

46 Source: *http://www.smallarmssurvey.org/files/portal/spotlight/brokering/brok.html*; see also: International Action Network on Small Arms, 'Regulating small arms brokering', IANSA Position Paper 2006, p. 1, to be consulted on: *http://www.iansa.org/un/review2006/Regulating-small-arms-brokering.pdf*, and E. BERMAN, 'The International Commission of Inquiry (Rwanda): Lessons and Observations from the Field', presentation during a seminar of The Geneva Forum, 7 December 1998, p. 6, *http://www.geneva-forum.org/Reports/salw_vol1/19981207.pdf*; see also: UN Report A/62/163, op. cit., p. 7.

47 See *http://www.smallarmssurvey.org/files/portal/spotlight/brokering/brok.html*; see also: E. CLEGG and M. CROWLEY, *loc. cit.*, p. 5; UN Report 54/160, *op. cit.*, p. 3; UN Report A/62/163, *op. cit.*, pp. 3 and 7; D. STRANDOW and P. WALLENSTEEN, *United Nations Arms Embargoes, Their impact on arms flows and target behaviour*, Stockholm International Peace Research Institute (SIPRI), 2007, pp. 21-41.

48 For the text of the UN Charter see *http://www.un.org/and/documents/charter/index*; see also B. WOOD, 'Strengthening enforcement', *loc. cit.*, p. 1.

49 B. WOOD, 'Strengthening enforcement', *loc. cit.*, p. 1; UN Report S/2005/69, *op. cit.*, p. 4.

50 UN Report S/2005/69, *op. cit.*, pp. 4 and 13; UN Report A/62/163, *op. cit.*, pp. 17-18, B. WOOD, 'UN arms embargoes: an overview of the last ten years', summary of *Strengthening compliance with UN arms embargoes*, op. cit., 16 March 2006, 6 pp., available at *http://www.controlarms.org/and/documents%20and%20files/reports/english-reports/un-arms-embargoes-an-overview-of-the-last-ten*; see also footnote 19.

ing (in a general sense and for brokering in particular). When both the nature of the goods and the final destination – end-recipient – are named in an embargo resolution, any delivery of such goods to that destination is *illicit* and may not be carried out. The implementation principle on which embargoes are based requires national legislation, without which no arms trader or broker can be legally apprehended or prosecuted for infringement of a UN arms embargo.

Arms embargoes and brokering

Brokers appear to play a pivotal role in the circumvention of arms embargoes.
Arms embargoes constitute one (of the) criteria that distinguish legal from illicit arms trade and brokering.
Binding arms embargoes impose compliance upon the UN member states; the terms of the embargo must be incorporated in states' national legislation in order to become enforceable on private parties, both arms traders and brokers.

In December 1995, the UN General Assembly asked the Secretary-General to draw up a report on small arms with the assistance of a panel of experts.[51] The report of this *UN Panel of Experts on Small Arms* was presented in 1997.[52] The panel investigated the nature and causes of the destabilizing excessive proliferation of SALW, including illicit manufacture and trafficking.

The subject of brokering is not treated explicitly in the panel's report. Nevertheless, in its findings it emphasizes the link between illicit arms trafficking (in general) and various other criminal practices (para. 41), and explains the specific problem of the uncontrolled trade in SALW caused by the excessive availability of such weapons (e.g. major surpluses, paras 40, 46, and 47) and the fact that it is easy to transport these goods unnoticed (para. 52). Furthermore, the report states that illicit trade is often facilitated by other illegal practices such as the falsification of documentation and smuggling, that financial transactions are concealed because of the bank secrecy act (para. 53), and that illicit trade is made possible by the absence of national legislation (para. 59) and the differences in national legislation - deficiencies that are used to full advantage by illicit arms traffickers (para. 60) - and the absence of international cooperation (paras 60 and 61).

In only one passage is reference made to private arms traders involved in illicit trafficking (para. 54).

In its recommendations, the panel of experts calls for the convening of a conference on the problem (recommendation k) and the commissioning of a study on the feasibility of

51 UN Resolution 50/70 (of the General Assembly) on General and Complete Disarmament, 12 December 1995, A/RES/50/70 of 15 January 1996, 27 pp.

52 UN Report of the Panel of Governmental Experts on Small Arms, in pursuance of GA 51/45 N entitled 'General and complete disarmament: consolidation of peace through practical disarmament measures', UN.Doc. A/52/298, 27 August 1997, 37 p.

limiting the production of and trade in SALW to those producers that have been accredited and authorized by the state, and on the feasibility of creating a databank of accredited producers and traders (recommendation I.ii.)

1.1.2 The Firearms Protocol (2001)

The 1997 report showed that the arms trade is intimately linked to other activities of transnational organised crime such as drug and human trafficking, smuggling of migrants, and money laundering.

On 15 November 2000, the UN adopted the *Convention against Transnational Organized Crime*,[53] and on 31 May 2001, the UN General Assembly adopted Resolution 55/255, approving the Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.[54] The Protocol entered into force on 3 July 2005. Like the Convention to which it is appended, it is binding under international law for the 192 UN member states.

The objectives of the Protocol are to promote, facilitate, and reinforce cooperation among member states with a view to preventing, combating, and eradicating the illicit manufacture of and trafficking in arms, their parts and components and ammunition (art. 2).

The Protocol does not, however, apply to transactions or transfers between the adhering states if it should prejudice their right to take action in the interest of their national security consistent with the UN Charter (art. 4,2).

A series of measures are imposed, such as the following:
- the adoption of legislation and other measures designed to make certain activities subject to sanctions:
  - illicit manufacturing, illicit trafficking and falsified marking (art. 5, 1);
  - attempts to carry out the above and complicity therein (art. 5.2.a);
  - organising, directing, aiding, abetting, facilitating or counselling the commission of an offence (art. 5.2.b);

53 UN Resolution 55/25 (of the General Assembly) of the United Nations Convention against Transnational Organized Crime, 15 November 2000, A/RES/55/25 of 8 January 2001, 5 pp., see the website of the Convention at *http://www.unodc.org/unodc/and/treaties/CTOC/index.html*. The Convention entered into force on 29 September 2003.

54 UN General Assembly Resolution 55/255 on the 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, 31 May 2001, A/RES/55/255 of 8 June 2001, 11 pp.

- the adoption of legal measures to confiscate firearms that have been produced or traded in an illegal manner and to prevent them from falling into the hands of non-authorized parties (art. 6);
- the assurance of preventive measures such as the keeping of registers (art. 7) for a period of 10 years, the requirement to mark firearms (art. 8), the taking of measures to impede the reactivation, and recommissioning of previously deactivated firearms (art. 9);
- the establishment of an effective system of import and export licences or authorisations and measures for international transit (art. 10);
- the exchange of information among member states on authorised producers, dealers, importers, exporters, and possible carriers of firearms, about suspected criminal organisations, systems and methods of concealment and evasion, general routings, etc., employed by organized crime, experience with legislation and in practice, scientific and technical information that is important for establishing enforceable legislation (art. 12, 1 and 2);
- cooperation among member states to search out and detect illicit arms and arms trafficking (art. 12, 3);
- cooperation at the bilateral, regional, and international levels meant to prevent, combat, and eradicate illicit manufacturing and trafficking (art. 13);
- cooperation in the area of training and technical assistance (art. 14).

Article 15 is specifically focused on the problem of brokering. As the final article in a series of requirements, it is the only one that is worded in vague terms: the member states shall consider:

- requiring registration of brokers operating within their territory;
- requiring licensing or authorisation of brokering; or
- requiring disclosure on import and export licences or authorisations, or accompanying documents, of the names and locations of brokers involved in the transaction.

The member states are encouraged to introduce information about brokers into the information exchange relating to arms trade in general (cf. art. 12), and into the national register relating to arms trade in general (cf. art. 7).

Article 15:

"Brokers and brokering

1 With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:
   (a) Requiring registration of brokers operating within their territory;
   (b) Requiring licensing or authorisation of brokering; or
   (c) Requiring disclosure on import and export licences or authorisations, or accompanying documents, of the names and locations of brokers involved in the transaction.
2 State Parties that have established a system of authorisation regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol."

The contrast between the wording of article 15, *shall consider* and *are encouraged*, and all other provisions in articles 5–14 is striking. It is sufficient for member states to *consider* requiring brokers to comply with some form of registration or licensing in order to satisfy the requirement in article 15.1. With respect to the information exchange and *records keeping*, member states are only given encouragement to that effect.

Article 15 does, however, need to be read together with article 5.2.b, which requires member states to *adopt* legislation in which not only the illicit manufacturing of and trafficking in arms but also *"directing, aiding, abetting, facilitating or counselling the commission"* of such actions are made punishable by law. Especially aiding, abetting, facilitating, and counselling are typical broker activities, although there is no explicit reference to brokering as such.

The Protocol does not provide definitions for what ought to be included or understood by the terms broker or brokering activities.

The types of arms to which these obligations apply were defined in article 3:

For the purposes of this Protocol:

(a) "Firearm" shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899;

(b) "Parts and components" shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm;

(c) "Ammunition" shall mean the complete round of its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the respective State Party;

The definitions of illicit manufacture and trafficking appear in article 3. For illicit manufacture, reference is made to the absence of a national licence or authorisation or of a valid identifying marking. Unauthorized trade encompasses the import, export, purchase, sale, delivery, removal, or transfer from one member state to another, when a member state has not granted permission in the manner prescribed by the Protocol or when goods are not properly identified in the way prescribed by the Protocol.

In sum, the Protocol leaves the determination of the evaluation criteria for the (un)authorized character of both manufacture and trade up to the national authorities. The national permissions, authorisations, and licences constitute the sole framework, since the Protocol itself does not introduce any criteria, for instance, conformity with international law in general or with specific legislation such as international humanitarian law.

The Protocol is especially significant as the first international legally binding instrument that contains a provision on brokering. As such, the UN member states (via international convention law) are bound by the Protocol when they have ratified it.

The Protocol is also significant because most of the subsequent documents, those of both the UN and other organisations (the OSCE, the WA, and the EU), make reference to it. The Protocol's added value is that it embodies international recognition (for the first time) of the severity of illicit brokering, constituting an effective means to combat illicit arms trafficking in general.

On the other hand, the Protocol is weakened by its vague wording on the issue of brokering and by the absence of a description of what constitutes brokering and brokering activities. The only concrete obligation is that states must adopt legislation to make the

unauthorized activities typically carried out by brokers punishable under national law. The participating states are free, following their *consideration of the issue*, to refrain from introducing specific regulations, while the states that do so risk allowing malafide brokers to continue their questionable activities.[55]

Summary of the Firearms Protocol

Binding character

The *Firearms Protocol* embodies the first explicit international legal recognition of the brokering problem. The provisions of the Protocol are legally (under conventional law) binding on those nations that have ratified it.

Prescribed measures

Among other measures, the Protocol imposes upon the ratifying states the obligation to make typical brokering activities such as "*directing, aiding, abetting, facilitating or counselling the commission*" of unauthorized trade in firearms punishable by law.
The Protocol imposes concrete obligations on the ratifying nations to *consider* registrations and/or licences and/or the release of information about brokers. Information exchange and the keeping of registers are encouraged.

Evaluation criteria concerning licit versus illicit

No evaluation criteria for brokering appear in the Protocol. Concerning the illicit manufacture of and trafficking in arms, the Protocol prescribes that such criteria be established in national legislation.

Description of brokers and their activities

Neither brokers nor their activities are defined or described.

Scope of application - types of weapons

The types of arms to which these provisions apply are "firearms, parts and components" and "ammunition" and are described in article 3 of the Protocol.

55 In one of the draft versions, for instance, it was proposed to impose a registration on brokers within the country of residence or country of nationality of the broker, coupled to a licence within the country where the broker conducts his activities or in the country of his establishment. On this point, no consensus was reached in the course of the negotiations, and only the need to consider such measures has been retained in the definitive text. See E. CLEGG and M. CROWLEY, *loc. cit.*, p. 19; and an overview of the successive draft versions of the Protocol, preliminary reports et alia: *http://disarmament.un.org/CAB/salw-sggarep.htm.*

1.1.3 The UN Programme of Action on Small Arms and Light Weapons (2001)

In its 1997 report the *UN Panel of Experts on Small Arms* recommended that a conference be held on the trade in SALW.[56] The decision to that effect was taken in 1998 under Resolution 53/77 E.[57]

In the meantime, a report submitted by another panel of experts[58] drew attention to the following problem:

> *"Illicit arms supply networks often involve legal arms purchases or transfers which are subsequently* ***diverted*** *to unauthorized recipients, or leakage from arms storage facilities. Arms brokers play a key role in such networks, along with disreputable transportation and finance companies. Illicit arms trafficking can sometimes be helped* ***by negligent or corrupt governmental officials*** *and by* ***inadequate border and customs controls. Smuggling of illicit arms by criminals, drug traffickers, terrorists, mercenaries or insurgent groups*** *is also an important factor. Efforts to combat illicit arms trafficking are in some cases hampered by* ***inadequate national systems to control stocks*** *and transfers of arms,* ***shortcomings or differences in the legislation and enforcement mechanisms*** *between the States involved, and a* ***lack of information exchange and cooperation*** *at the national, regional and international levels."*

These reports outline the major causes and factors that facilitate illicit arms trafficking, including brokering, and place them in a broader context: non-existence of national legislation or the absence of enforceability; non-alignment of national regimes, whereby malafide brokers are given the opportunity to navigate their way through the lacunas in the system, with or without assistance from corrupt officials and by resorting not infrequently to falsification of documents; the absence of inter-state cooperation and information; the fact that illicit arms trafficking often starts as legal trade and, at some stage, is diverted to proscribed final destinations or end-users; deficient control of regular arms inventories and overstocks; and, finally, the fact that illicit arms trafficking cannot be considered separately from other illegal activities and practices such as drug smuggling and human trafficking, organised crime, etc.

56 UN Report A/52/298, *op. cit.*, recommendation k.

57 UN Resolution (of the General Assembly) on Small Arms, 4 December 1998, A/RES/53/77 E of 12 January 1999, 3 pp.

58 UN Report on Small Arms prepared with the assistance of the Group of Governmental Experts on Small Arms, in pursuance of GA Resolution 52/38 J, A/54/258, 19 August 1999, 25 pp.

All these aspects are dealt with in the *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*,[59] which was adopted at the UN Conference held in New York on 9–20 July 2001:

- attention is paid to the link between illicit arms trade and terrorism, organized crime, and trafficking in drugs and precious minerals (preamble, Consideration 7);
- a reminder of the requirement to remain in compliance with arms embargoes (preamble, Consideration 12) and of the need to take the necessary national implementation measures (paragraph 15);
- the starting premise is the primary responsibility of the member states, while the need for international cooperation and assistance is also emphasized (preamble, Considerations 13 and 14);
- the need for taking steps to prevent weapons from ending up in the hands of unauthorized parties is explicitly mentioned (paragraphs 2 and 11);
- the need to identify groups and individuals involved in illicit manufacturing and trafficking, including financial transactions, is pointed out (paragraph 6);
- in five paragraphs, attention is given to the need for control of regular arms inventories (paragraph 17) and overstocks (paragraph 18), for the elimination of surplus stocks in post-conflict regions (paragraphs 19 and 20), and for control of disarmament (paragraph 21).

These provisions propose a series of measures to cover a wide section of the problem and enable a holistic approach[60] to the illicit trade in SALW in general, and brokering in SALW in particular.

In addition, the Programme of Action contains a host of other, more concrete provisions to prevent and combat illicit arms trafficking. At the national level, these include: the adoption of legal and administrative measures, the institution of penal sanctions, the marking of arms, the keeping of registers, etc. Furthermore, the Programme of Action contains 9 provisions on regional and 10 provisions on global cooperation, information exchange, assistance, etc.

Specifically with respect to brokering, the Programme of Action recommends the following:

- that national bodies created for policy, research, and monitoring of illicit arms trade ought also to focus on brokering and the financing of trade in SALW (paragraph 4);
- that appropriate national measures need to be adopted (legal or administrative) to regulate the activities of brokers: by requiring registration of brokers and/or by issuing licences or authorisations to carry out brokering activities and by instituting sanctions for illicit practices that are carried out within the jurisdiction of the regulating state (paragraph 14);

59 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, A/CONF.192/15, July 2001, 8 pp.

60 See also about the need for a holistic approach: UN Report A/62/163, *op. cit.*, p. 8.

- that, on a global scale, efforts be devoted to reach a common understanding on the problem of brokering (paragraph 39);
- and the need to enhance international cooperation related to SALW brokering (Section IV).

The UN Programme of Action concerning brokering:

At the national level

(...)

4. To establish, or designate as appropriate, national coordination agencies or bodies and institutional infrastructure responsible for policy guidance, research and monitoring of efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects. This should include aspects of the illicit manufacture, control, trafficking, circulation, brokering and trade, as well as tracing, finance, collection and destruction of small arms and light weapons.

14. To develop adequate national legislation of administrative procedures regulating the activities of those who engage in small arms and light weapons brokering. This legislation of procedures should include measures such as registration of brokers, licensing or authorisation of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State's jurisdiction and control.

At the global level

(...)

39. To 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.

A major weakness of the UN Programme of Action is that it does not recommend any obligations that are enforceable under international law, comparable with the provisions of the Protocol. The Programme calls for 'only' political engagement, which, while morally binding, has no binding force for the imposition of sanctions in cases of state non-compliance.

In the view of some authors,[61] this absence of any compelling force is, in effect, the reason why little action has been taken to implement the Programme, especially at the regional and global levels.[62]

Furthermore, the Programme of Action does not contain a definition of arms brokers or a description of their practices.

Follow-up to the UN Programme of Action

In 2006, a second UN conference was organized in order to evaluate the Programme's implementation,[63] but it has not resulted in any new binding or political documents.

The Programme of Action remains in force and in that context an array of new initiatives are being undertaken. Although none of these initiatives has so far resulted in binding agreements, it is useful to present a brief overview of the most important reports, since they throw light on the evolution of the vision of the brokering problem and suggest what we may expect in the future if sufficient consensus is reached on the issue.

On 8 December 2005, the UN General Assembly resolved to form a Group of Governmental Experts with the mandate to present recommendations concerning the reinforcement of international cooperation in the area of combating unauthorized brokering in SALW (Resolution 60/81[64]). The group issued their report on 30 August 2007.[65]

For the first time, a number of important aspects of brokering appear in a UN document, such as:

- a description of brokers and their activities (pp. 8-9);
- the distinction between legal and illicit brokering; the Group adopted the national legislation and the international obligations of a state as a valid criterion (p. 9);
- a number of basic requirements for effective national control of brokering[66] (pp. 18-19);

61 M. BOURNE et. al., *Reviewing action on small arms, assessing the first five years of the UN Programme of Action*, Biting the Bullet, 2006, p. 4, pp. 9-10, p. 265 *et seq.*, available at http://www.international-alert.org/pdf/Reviewing%20Action%20on%20Small%20Arms%202006.pdf.

62 By mid-2007, barely 40 states had adopted legislation - see: UN ReportA/62/163, *op. cit.*, p. 9 (nowhere is it made clear how many countries have proceeded to new legislation or expanded their existing legislation as a result of the Programme of Action), see also: S. CATTANEO and S. PARKER, *Implementing the United Nations Programme of Action on Small Arms and Light Weapons, Analysis of the National Reports submitted by States from 2002 to 2008*, UNIDIR, 2008, p. 130.

63 Consult the website of the 2nd conference at http://www.un.org/events/smallarms2006/.

64 UN Resolution 60/81 (from the General Assembly) on The illicit trade in small arms and light weapons in all its aspects, 8 December 2005, A/RES/60/81 of 11 January 2006, 3 pp.

65 UN 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 August 2007, A/62/163, 26 pp.

66 Report A/62/163, *op. cit.*, p. 3.

– recommendations concerning international cooperation and the sharing of information, international assistance, and *capacity building*, in addition to the promoting of effective reporting methods (pp. 19-20).

Furthermore, the report stresses the importance of ensuring compliance with embargoes (pp. 20-21).

The Group drew inspiration from the existing national legislation and regulations (p. 13 *et seq.*) with respect to definitions, registration and screening of brokers, the keeping of registers by governments, the keeping of registers by brokers themselves about their own activities, licences, licensing criteria, activities related to brokering, jurisdictions (whether extraterritorial or not), sanctions and penalties, and international cooperation (p. 13 *et seq.*).

Becauses these did not appear in a legally or politically binding document, the recommendations are not further discussed here, but they are touched upon in the discussion of good practices in Part II. (see section 1.3).

At the third biennial meeting[67] on the Programme of Action (July 2008), the importance of the recommendations of the *Group of Governmental Experts* was emphasized.[68] At the same time, it was for the first time advocated (in analogy with the report's findings) that regulations on brokering should be made an integral part of states' national export control regimes. Furthermore, for the first time a debate was held on the possibility of starting negotiations towards establishing a binding instrument on brokering.[69]

The UN General Assembly adopted two resolutions in support of the UN Programme of Action: A/RES/62/40 and A/RES/62/47.[70] The member states were encouraged to fully implement the Programme of Action, to adopt legislation, and to exchange information. However, these resolutions do not impose any new obligations.

67 See *http://disarmament.un.org/cab/bms3/1BMS3Pages/1thirdBMS.html.*

68 UN Report A/CONF.192/BMS/2008/3, *op. cit.*, p. 12.

69 UN Report A/CONF.192/BMS/2008/3, *op. cit.*, pp. 11 and 12.

70 UN Resolution 62/40 (of the General Assembly) on Prevention of the illicit transfer and unauthorized access to and use of man-portable air defence systems, 5 December 2007, A/RES/62/40 of 10 January 2008, 2 pp.; UN Resolution 62/47 (of the General Assembly) on The illicit trade in small arms and light weapons in all its aspects, 5 December 2007, A/RES/62/47 of 10 January 2008, 3 pp.

Summary of the UN Programme of Action on SALW

Binding character

The UN Programme of Action on SALW entails political commitments on the part of states, but it does not impose obligations binding under international law. States are asked to implement the provisions, but no sanctions are imposed for cases of non-compliance.

Prescribed measures

The Programme of Action obliges member states to introduce brokering into their policy on arms trade (as well as the financing of arms trade), and to provide an appropriate legal framework or administrative procedures such as the registration of brokers and/or placing their activities under a licence or permit requirement. The illegal activities of brokers must be subject to adequate penalties and sanctions.

Evaluation criteria regarding licit versus illicit brokering

The Programme of Action does not contain any evaluation criteria for brokering.

Definitions

Brokers and their activities are not defined.

Scope of application – types of weapons

The Programme of Action applies to SALW, but there is no definition or reference to a description of SALW.

1.1.4 Resolution 1540 (2004)

On 28 April 2004, the UN Security Council adopted a resolution on the trade in weapons of mass destruction by non-state actors. Resolution 1540[71] imposes on the member states the obligation to do everything in their power to prevent non-state actors from acquiring a capability to manufacture, acquire, transport, or trade nuclear, chemical, or biological (NBC) weapons and their means of delivery (art. 1). In addition, the member states must enact effective legislation to enforce compliance, noting that attempts to circumvent the law or support or finance such activities are punishable.

Aside from legislation prohibiting such activities, member states are required to take the necessary measures to organize national controls – and to impose compliance – to prevent the proliferation of NBC weapons, their means of delivery, and related materials[72] (art. 3).

With a view to creating such controls, the member states are required to take steps:

- to develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport (art. 3(a);
- to develop and maintain appropriate effective physical protection measures (art. 3 (b);
- to develop and maintain appropriate effective border controls and law enforcement measures to detect, deter, prevent and combat illicit trafficking (3(c);
- to establish, develop, review and maintain appropriate effective national export and transshipment controls on such items, including appropriate laws and regulations to control export, transit, transshipment and re-export and controls on providing funds and services related to such export and transshipment such as financing and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal and civil penalties for violations of such export control laws and regulations (3(d).

Other articles primarily call for cooperation and the promotion of compliance with this resolution.

71 UN Resolution of the Security Council 1540 on non-proliferation of weapons of mass destruction, S/RES/1540 (2004) of 28 April 2004, 4 pp.

72 Related materials (cf. footnote 72): materials, equipment and technology that fall under the applicable multilateral conventions and regulations, or have been entered into the national control lists, and that may be used in the design, development, production or use of nuclear, chemical, or biological weapons and their means of delivery.

Provisions of Resolution 1540 with regard to brokering:

Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

(c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

(d) Establish, develop, review and maintain appropriate effective national export and transshipment controls over such items, including appropriate laws and regulations to control export, transit, transshipment and re-export and controls on providing funds and services related to such export and transshipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

The adoption of this resolution needs to be considered in the '*post-9/11*' context and in the light of global concern about terrorism. Much criticism has been levelled against the manner in which it was drafted and on the implications for international law. Such obligations (and especially the obligation to adopt criminal sanctions) should be embodied in a treaty that is negotiated multilaterally and then becomes enforceable at the national level after a state has ratified it.[73]

The scope of the provisions is not at all clear since the resolution does not define brokers and their activities, nor does it clearly define the types of arms that are targeted. In this respect, Wade Boese, Research Manager of the *Arms Control Association*, poses the following questions: "*What items specifically are supposed to be controlled? Should all items on the control lists of the Australia Group, the Nuclear Suppliers Group, the Missile Technology*

73 Among others, because of the fact that the Resolution is based on Chapter VII of the UN Charter and it was opted not to enter into negotiations to reach a convention stage, the fact that the Resolution mandates the imposition of criminal sanctions, plus the references to other conventions to which not all UN Member States have acceded, see in casu G. CASTRYCK, S. DEPAUW and N. DUQUET, *op. cit.*, p. 26; and N. van WILLIGEN, 'Het nucleaire non-proliferatieregime', in *Vrede and Veiligheid*, *Tijdschrift voor internationale vraagstukken*, Nijmegen, 2009, no 2, p. 231; see also the explanation to the Resolution 1540 on the website of the *Nuclear Threat Initiative* with respect to the fact that the legitimacy of the Security Council is called into question as it consists of only 15 members that, without any input by the remaining other Member States, impose obligations on the latter, available at *http://www.nti.org/db/1540/index.html.*

Control Regime, and the Wassenaar Arrangement be subject to all countries' national export controls?"[74]

Nonetheless Resolution 1540 is binding on all the UN member states.[75]

In order to ensure the monitoring of compliance with the resolution, the 1540 Committee was set up with a two-year mandate (art. 4), which has been renewed twice (currently until 2011).[76] The UN member states were called upon to provide the Committee with information about their compliance with the resolution. As of 19 May 2006, a '*legislative database*' has been available on the Committee's website with information about national regimes and other measures related to compliance.[77]

As of May 2009, 148 states had submitted such information.[78] Resolution 1540 has unquestionably been a significant step towards the creation of international norms for export controls, but it has not set a universal standard. In this respect, the wording of the resolution leaves too much room for interpretation, and there is controversy about the legitimacy and competence of the Security Council to impose such prescriptions.

Specific to the issue of brokering, the first implementation report (April 2006) drawn up by the 1540 Committee, made few substantial observations. It noted that 40 states had, with respect to the issue of brokering (trade, negotiations, and assistance), adopted a regulation, some with extraterritorial validity (activities outside their territory or extended to their nationals residing abroad). It was also noted that in the event member states fail to fulfil their obligations, their territories could be used as 'safe havens' by brokers.[79]

The second implementation report (2008) lists 58 states that have adopted legislation on brokering. A number of countries consider brokering as a problematic issue because of its cross-border character and the fact that brokers can conduct their activities uncontrolled since they frequently operate in countries that may not have in place regulatory controls on brokering.

74 See: W. BOESE, '*Implications of UN Security Council Resolution 1540*', *Presentation to the Institute of Nuclear Materials Management Panel Discussion* on 15 March, 2005, available at http://www.armscontrol.org/events/20050315_1540

75 N. van WILLIGEN, *loc. cit.*, p. 231

76 UN Resolution (of the Security Council) 1673 (2006) on non-proliferation of weapons of mass destruction, S/RES/1673 of 27 April 2006, 2 pp. and UN Resolution (of the Security Council) 1810 (2008) on non-proliferation of weapons of mass destruction, S/RES/1810 of 25 April 2008, 4 pp., both available on the website of the 1540 Committee: http://www.un.org/sc/1540/resolutionstatements.shtml; the extension of the mandate of the 1540 Committee refers, according to van Willigen, to the fact that the Resolution, despite its contested judicial character, nevertheless gains and possesses force of authority within the international community, see: N. van WILLIGEN, *loc. cit.*, p. 231.

77 See http://www.un.org/sc/1540/legisdatabase.shtml.

78 The Belgian report was submitted to the Committee on 26 October 2004.

79 UN Report of the Committee established pursuant to Resolution 1540 (2004), S/2006/257, 25 April 2006, pp. 22 and 24.

With respect to the exchange of information, the report states that little is known about the relationship between brokering and WMD proliferation. The Committee recommends organizing workshops on the topic of cross-governmental and interdepartmental processes, and one of the themes that would be of interest in that respect is brokering.[80]

The General Assembly adopted two resolutions in support of Security Council Resolution 1540: A/RES/62/26 (5 December 2007) and A/RES/63/67 (2 December 2008). Resolution 62/26[81] targets transfers in general and calls upon the member states to comply with Resolution 1540 and encourages them to voluntarily provide the Secretary-General with information about their national regulations. Resolution 63/67[82] targets specific brokering activities and calls upon the member states to comply with international regulations and adopt national legislation, while further emphasizing the importance of international cooperation and information exchange. Neither resolution imposes new obligations, yet they are important for two reasons. First, they both pertain to conventional arms and WMD. As such, both types of goods are for the first time treated together at the international level. Furthermore, this joint statement is relevant not only for arms transfers but also for brokering activities.

On 24 September 2009, the UN Security Council adopted Resolution 1887 on Nuclear Security, "*to seek a safer world for all and to create the conditions for a world without nuclear weapons*" (1st paragraph).[83] Resolution 1887 re-establishes and affirms the need for full implementation of Resolution 1540 (p. 3), but it has no provision on brokering, not even a reference to the problem of brokering in goods destined for use in WMD.

Summary of Resolution 1540

Binding character

The resolution is binding on the UN member states, although not all of them are in favour of this imposition. For that reason, compliance will be largely a question of the *good will* of those member states. It lacks a sanctioning mechanism for cases of non-compliance.

80 UN Report of the Committee established pursuant to Resolution 1540 (2004), S/2008/493, 8 July 2008, p. 16, p. 19 and 22.

81 UN Resolution 62/26 (of the General Assembly) on National legislation on transfer of arms, military equipment and dual-use goods and technology, 5 December 2007, A/RES/62/26 of 10 January 2008, 2 pp.

82 UN Resolution (of the General Assembly) 63/67 on Preventing and combating illicit brokering activities, 2 December 2008, A/RES/63/67 of 12 January 2009, 3 pp.

83 UN Resolution (of the Security Council) 1887 (2009) on Maintenance of international peace and security: Nuclear non-proliferation and nuclear disarmament, S/RES/1887 (2009) of 24 September 2009, 6 pp., *http://www.un.org/docs/sc/unsc_resolutions09.htm.*

Prescribed measures
To provide control of WMD non-proliferation, the member states need to organize domestic border and export controls on illicit arms brokering.
The required control measures comprise the entire chain of export transactions, including activities that enable such transactions, such as: financial transactions, *provision of services* and transport. Not only illicit trade but also all attempts to engage in such trade – including participation and complicity, *support services* or the financing of such activities. – need to be prohibited in national law. Providing services and rendering assistance are typical brokering activities. Civil penalties and penal sanctions need to be made enforceable in cases of non-compliance with national law.

Evaluation criteria regarding licit versus illicit
A violation of national legislation that is in conformity with international law makes arms trade, including brokering, illegal.

Description of brokers and their activities
The resolution does not include a definition of brokers or brokering activities.

Scope of application
The scope of application embraces NBC weapons, related materials, and their means of delivery; in other words, for the first time, also *dual-use items*[84] fall within the purview of the regulation and control of brokering.

1.1.5 General Arms Trade Treaty

The idea of an all-encompassing arms trade treaty was proposed by Nobel Peace Prize laureate Oscar Arias, supported by a number of other prominent individuals, among them the Dalai Lama, Aung San Suu Kyi, and Desmond Tutu.[85] It was embraced and elaborated by NGOs that are active in the field of human rights and international humanitarian law. In December 2006, the UN General Assembly adopted Resolution 61/89 towards an arms trade treaty: establishing common international standards for the import, export, and transfer of conventional arms.[86]

84 See footnote 72 for the description of the related materials.

85 UN Report A/63/334, *op. cit.*, p. 4.

86 UN Resolution 61/89 (of the General Assembly) '*Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*', 6 December 2006, A/RES/61/89 of 18 December 2006, 2 pp., http://disarmament.un.org/CAB/ATT/Resolution_61_89.pdf ; see also http://www.amnesty.nl/thema/thema_wapenhandel.

The Secretary-General was assigned the task of investigating, in cooperation with a group of governmental experts, the feasibility of such a treaty.

The *Group of Governmental Experts* issued a report in August 2008 which stated that there remains a long road ahead before international consensus can be reached on the content of such a treaty and on what to include and leave out of the agreement.

In Resolution 63/240 of 18 October 2008, it was decided to form an *'open-ended working group'* to further investigate the possibilities of reaching consensus on a binding treaty.

NGOs in particular are very active in contributing to the draft treaty. In their position papers, brokering is no longer touched upon incidentally, as in previous reports, but has become one of the inextricable elements of regulated arms trade, in addition to import, export, transfer, and *transshipment*.[87] Furthermore, they insist that the control of arms should be extended to dual-use items.[88]

The Arms Trade Treaty would encompass all types of conventional arms, arms components, support technology, and expertise.

The draft texts stipulate that all states will refrain from any form of arms transfer in cases where the transaction would violate international law or add to the risk of the weapons being used in serious violations of human rights. Also, in an arms transfer account must be taken of the impact that it might or could have on the economic situation and on criminal activities.

Specific aspects such as brokering (and regulation of the legal trade) will be further developed in complementary treaties (protocols).

87 CONTROL ARMS, NGO *Arms Trade Treaty Steering Committee Position Paper: Global Principles for the Parameters of an Arms Trade Treaty*, March 2009, 2 pp.; CONTROL ARMS, NGO *Arms Trade Treaty Steering Committee Position Paper: Scope – Transfers and Transactions to be covered by an Arms Trade Treaty*, March 2009, p. 2; see the position papers at *http://www.controlarms.org/and/resources-and-reports/ngo-arms-trade-treaty-steering-committee-position/*;ATT Steering Committee of NGOs, *Assessing the feasibility, scope and parameters of an Arms Trade Treaty (ATT): An NGO perspective*, 2007, 16 pp., *http://www.controlarms.org/and/documents%20and%20files/reports/english-reports/ATT-Position-Paper-Final.pdf.*

88 CONTROL ARMS, NGO *Arms Trade Treaty Steering Committee Position Paper: Scope – Types of equipment to be covered by an Arms Trade Treaty*, March 2009, p. 1.

1.2 International: the Wassenaar Arrangement

The *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies* (Wassenaar Arrangement, or WA), has from its inception in 1996 dealt with the control of conventional arms and dual-use items. The WA is the successor to COCOM, the *Coordinating Committee on Multilateral Export Controls*, which in the period 1950–94 was a group of 17 states that engaged in export restrictions on strategic military materials to the communist bloc.[89]

The WA, with 40 state participants as of 2009, is an informal group that aims at enhancing regional and international security by promoting transparency in and responsibilisation of the export of conventional military and dual-use items. The group works as a complement to treaties and other organisations concerned with non-proliferation and multilateral export controls to help reinforce them.[90]

The goods whose export the group has agreed to restrict are listed in Annex 3 and Annex 5 of the basic document. Annex 3 concerns conventional arms, the so-called *Munitions List*, which is subdivided into 22 categories. Annex 5, the *Basic List*, lists the (conventional) dual-use items and subdivides them into *sensitive* and *very sensitive items*. Both lists, together with the so-called *Control Lists*, are updated regularly and can be consulted on the WA website.[91]

Some authorities consider the WA to be a rather toothless organisation because its decisions are purely political commitments, without any binding legal force.[92] Its merit rests primarily in its promotion of transparency and cooperation among the participating states. The forum's discussions and search for consensus sometimes pave the way for other, more effective politically or legally binding decisions in other bodies.[93]

The sections below below are based on decisions of the WA Plenary Meetings.

89 CENTER FOR NONPROLIFERATION STUDIES, 'The Wassenaar Arrangement on export controls for conventional arms and dual-use goods and technologies', in *Inventory of International Nonproliferation Organizations and Regimes*, pp. 1-2.

90 See the formation act, the *Initial Elements*, *Purpose 1.*, http://www.wassenaar.org/guidelines/docs/Initial_Elements.pdf.

91 See the *Control Lists* at http://www.wassenaar.org/controllists/index.html.

92 M. LIPSON, 'The Wassenaar Arrangement: Transparency and Restraint through Trans-Governmental Cooperation?', in D. JOYNER, *Non-proliferation export controls: origins, challenges and proposals for strengthening*, Ashgate Publishing Ltd., 2006, pp. 49 and 54.

93 M. LIPSON, *loc. cit.*, p. 51.

1.2.1 WA Best Practice Guidelines for SALW Export (2002)

In 2002, at its annual Plenary, the WA General Assembly adopted the "*Best Practice Guidelines for Exports of Small Arms and Light Weapons*".[94] The participating states committed themselves to organize strict national controls on the export of SALW and the transfer of technology for SALW design, production, testing, and upgrading.

The export of SALW needs to be assessed in the light of the WA Initial Elements (the WA's founding document) and the WA Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons.

The *Guidelines* sum up a number of criteria that participating states need to take into account in their exports of SALW: 10 criteria relate to the situation prevailing in the recipient country (art. I.1), and 11 criteria point to potentially risky situations that would lead to the preferable denial of export licences (I.2). A number of provisions are dedicated to measures to prevent the uncontrolled flow of illicit arms, as well as deficient management of arms inventories, both of which might lead to theft, corruption, or negligence (II.1 and 2).

The participating states agree to reproduce the principles of the *Guidelines* in their national legislation on the export of conventional arms and to assist one another in developing and establishing effective control mechanisms to that end (II.3a and b).

Specifically with respect to brokering, article II. 3.c provides that the participating states introduce adequate legislation or administrative procedures towards the strict control of brokering activities, including the institution of suitable sanctions.

94 In December 2007, the document was updated with reference to the United Nations' *'International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons'*, http://www.wassenaar.org/publicdocuments/2007/docs/SALW_Guidelines.pdf.

Summary of the WA Best Practice Guidelines for SALW Export

Binding character
The Guidelines contain political commitments.

Prescribed measures
Adequate legislation or administrative procedures for the control of brokering, including appropriate sanctions, are being prescribed.

Evaluation criteria regarding licit versus illicit transfers
The criteria are applicable only to the export of SALW, not to brokering.

Description of brokers and activities
The Guidelines do not define brokers and their activities.

Scope of application – types of weapons
The scope of application covers SALW, without any reference in the document to a definition or description thereof. SALW were only as of December 2003 entered in the *Control Lists* as a separate category.

1.2.2 WA Statement of Understanding on Arms Brokerage (2002)

The same WA Plenary also adopted a *Statement of Understanding on Arms Brokerage*. It emphasizes the need to regulate brokering activities. Aside from continuing efforts to further develop their legislation, to fine-tune the criteria for effective brokering in arms, and to consult about ways and means to enforce compliance with the measures, the participating states decided to *consider* the following steps:

- requiring registration of arms brokers;
- limiting the number of licensed brokers;
- requiring licensing or authorisation of brokering;
- requiring disclosure of import and export licences and authorisations, or of accompanying documents and of the names and locations of brokers involved in transactions.

The measures are similar to those set forth in article 15 of the UN Firearms Protocol, with the exception that the WA does not restrict the registration of brokers to those on the territory of the state with the jurisdiction and that the Protocol does not prescribe a limit on the number of licensed brokers.

Summary of the WA Statement of Understanding on Arms Brokerage

Binding character
The Statement is politically binding but its wording is vague: the participating states need only *consider* the imposition of measures.

Prescribed measures
The prescribed measures pertain to the registration of, and limit on, the number of brokers, licences or authorisations for brokering activities and information exchange about import and export activities wherein brokers are involved.

Evaluation criteria regarding licit versus illicit brockering
No criteria are mentioned in the Statement.

Description of brokers and their activities
The Statement offers no description of brokers or their activities.

Scope of application – types of weapon
The document applies to arms brokering, without defining what types of arms are being targeted. Conventional arms are the subject of one of the *Munitions Lists* (one of the two *Control Lists*).

1.2.3 SALW on the WA Control List (2003)

The December 2003 Vienna Plenary adopted a document expanding on Appendix 3 of the *Initial Elements: "Small Arms and Light Weapons – Man-Portable Weapons made or modified to military specification for use as lethal instruments of war"*. Consequently, the list of goods to which the obligation to exchange mutual information applies was expanded to include these goods. They are described as follows:

8.1 ***Small Arms:*** those weapons intended for use by individual members of armed forces or security forces, including revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns.

8.2 ***Light Weapons:*** those weapons intended for use by individual or several members of armed or security forces serving as a crew and delivering primarily direct fire. They include heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; and mortars of calibre less than 75 mm.

8.3 ***Man-Portable Air-Defence Systems:*** surface-to-air missile systems intended for use by an individual or several members of armed forces serving as a crew.

1.2.4 WA Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS) (2003)

The 2003 Plenary also adopted the document "*Elements for Export Controls of Man-Portable Air Defence Systems* (MANPADS)".[95]

Among the guidelines, one relates to brokering (3.3): the exporting governments commit themselves not to resort to non-state approved brokers or services for the trade in MANPADS, unless appropriate permission is granted (by the government in question). In May 2004, this document was adopted by the OSCE in *Decision n° 3/04, OSCE Principles for Export Controls of MANPADS*.[96]

In 2007, the WA *Elements* document was revised and complemented with stricter provisions on the export of MANPADS. The provisions bearing on brokering were left unchanged.[97]

95 This document is a revised version of the *WA Elements for Export Controls for MANPADS* of December 2000; see http://www.wassenaar.org/publicdocuments/index_PD03.html

96 FSC.DEC/3/04 of 26 May 200

97 The latest version (of 2007) may be consulted on: *http://www.wassenaar.org/publicdocuments/2007/docs/Elements%20for%20Export%20Controls%20of%20Manpads.pdf.*

Summary of the WA Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)

Binding character
The document is politically binding.

Prescribed measures
The prescribed measures include the prohibition of trade in MANPADS through the services of brokers or recourse to services unlicensed by governments, unless they have received proper authorisation.

Evaluation criteria regarding licit versus illicit trade in MANPADS
No criteria are described.

Description of brokers and their activities
The document does not contain a description of the term brokers or their activities.

Scope of application – types of weapon
The measures apply to brokering in MANPADS, which was added at the same meeting to the *Munitions List* (one of the two *Control Lists*).

1.2.5 WA Elements for Effective Legislation on Arms Brokering (2003)

Also at the December 2003 Plenary, the WA states adopted the document "*Elements for Effective Legislation on Arms Brokering*". The general objective is to avoid circumvention of the objectives of the WA and of the UN embargoes by creating an unambiguous legal framework pertaining to legal brokering activities involved in the trade in conventional arms, as well as promoting cooperation and transparency among the participating states (preamble).

The WA states declare their agreement to strictly control arms brokers and to adopt and implement appropriate laws and regulations. Applications for licences or requests for authorisations need to be evaluated against the principles and objectives of the WA, as stated in various official documents: the WA *Initial Elements*, the *Elements for Objective*

Analysis and Advice concerning Potentially Destabilising Accumulations of Conventional Weapons, the *Best Practice Guidelines for Exports of SALW* and the *Elements for Export Controls of MANPADS*.

In order to ensure common WA policy on arms brokering, the participating states will introduce the following measures in their national legislation:

- the requirement for a licence or a written authorisation, issued by the competent authority of the territory where the activities are being conducted, irrespective of the broker's nationality or place of residence;
- A licence may also be applied for, irrespective of the location where the brokering activities are taking place, or the participating states may extend their definition of brokering to include instances where the export is conducted from out of their own territory. Likewise, the participating states may consider limiting the number of brokers;
- In principle, brokering concerns transactions from one third country to another third country, encompassing activities such as negotiating, enabling the conclusion of agreements, the sale, trade, the arranging of the transfers of arms or associated military material;
- The keeping of records about individuals and companies that have been granted a legitimate licence, and, eventually, a register of brokers;
- Adequate penalty provisions and administrative measures, including criminal sanctions, in order to effectively enforce the controls;
- The promotion of mutual cooperation and transparency among the states by exchanging information on arms brokering activities within the framework of the *WA General Information Exchange* system, and by providing assistance to other countries that request it in developing effective national control mechanisms;
- Where there does not yet exist specific provisions on brokering, the participating states will without delay introduce appropriate provisions to control arms brokering activities.

Summary of the WA Elements for Effective Legislation on Arms Brokering

Binding character

The document is politically binding.

Prescribed measures

According to this document, general control of brokering is called for by means of adequate laws and regulations.

A distinction is drawn between minimal and optional requirements.

Minimal measures include: a licence or authorisation to conduct brokering activities on the territory of the state with the jurisdiction, irrespective of the nationality or the place of residence of the broker, the keeping of records about the individuals that have been granted a licence or authorisation; adequate administrative measures and penal sanctions and the reinforcement of mutual cooperation and transparency.

The following are among the optional elements: a licence for brokering activities irrespective of the location where they are being conducted, an extension of brokering to export from the own territory, a limit on the number of brokers, or keeping a register of brokers.

Evaluation criteria regarding licit versus illicit activity
Licences and authorisations must be assessed against the WA principles and objectives, such as those mentioned in the official documents.

Description of brokers and their activities
Brokering encompasses activities such as negotiating, enabling the conclusion of agreements, the sale, trade, or the arranging of arms transfers between third countries.

Scope of application – types of weapon
The provisions apply to arms and associated military equipment, without explicit reference to a definition. Such arms are the subjects of the *Munitions Lists*.

1.3 Regional: the Organization for Security and Co-operation in Europe

The OSCE is the major regional cooperative partnership in the area of security. The organisation encompasses 56 states in Europe, Central Asia, and North America.[98]

It was initially created in 1973 under the name Conference on Security and Co-operation in Europe, CSCE; it was given its current name and organisation status in 1995.

The OSCE is active in three dimensions of security: 1) the political-military, 2) the economic-environmental, and 3) the human. Arms trade is a part of the first dimension.[99] The decisions of the OSCE are politically, not legally, binding since they are not based on treaty law.[100] The participating states take decisions by consensus. Heads of state and government meet periodically at a summit; the Ministers of Foreign Affairs meet annually in a Ministerial Council. The policy of the OSCE is determined in the Permanent Council, which meets weekly in Vienna. This meeting holds continuous consultations about the security situation in the OSCE area. This Council is composed of permanent representatives of all the OSCE states.

The *Forum for Security Co-operation* (FSC) is the OSCE consulting and resolving body concerning security themes.[101] It is composed of representatives of the participating states, which take decisions with reference to military aspects of security, such as arms management and disarmament and, in particular, with reference to measures meant to impart confidence and promote security. The FSC holds weekly meetings in Vienna.

The OSCE documents discussed above are decisions taken by the FSC.

98 See http://www.osce.org/about/19298.html; see also G. VERMEULEN, *Europese and internationale instellingen en organisaties*, Maklu, 2006, p. 171 *et seq.*

99 See http://www.osce.org/activities/18803.html.

100 P.H. KOOIJMANS and A.E. de VOS, *Internationaal publiekrecht in vogelvlucht*, Kluwer, 2003, p. 212 *et seq.*

101 See the website of the organisation: http://www.osce.org/fsc/.

1.3.1 OSCE Document on Small Arms and Light Weapons (2000)

On 24 November 2000, the Plenary of the OSCE FSC adopted the *OSCE Document on Small Arms and Light Weapons*.[102] This document contains a series of political decisions (Section VI, 6.) – standards, principles, and measures with reference to SALW produced or designed for military use. The Document's objective is to strengthen confidence among, and the security of, the participating states (preamble, Consideration 3).

This is the first official document that offers a description of "*small arms and light weapons*". It states that, as of 2000, there does not exist an internationally accepted definition, and without wishing to prejudice such a definition in the future[103] gives the following instrumental description (for the objectives of the document) in a footnote to the Preamble:

> *"**small arms and light weapons** are man-portable weapons made or modified to military specifications for use as lethal instruments of war.*
> ***Small arms** are broadly categorized as those weapons intended for use by individual members or armed security forces. They include revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns.*
> ***Light weapons** are broadly categorized as those weapons intended for use by several members of armed or security forces serving as a crew. They include heavy machine guns; hand-held under-barreled and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; mortars of calibers less than 100 mm."*

The OSCE participating states undertake to combat the illicit trade in SALW in all its aspects by means of national control. This encompasses: control of the production and marking of arms, and the keeping of a register in order to be in a position to track and trace arms at any time; effective export controls, border and customs control mechanisms, and cooperation and information exchange at the national, regional, and international levels (Section I, 3(i)). These measures must not prejudice the requirements of national and joint defence, internal security, and participation in UN and OSCE peacekeeping operations (Section I, 3(ii)).

102 OSCE Document on Small Arms and Light Weapons, 24 November 2000, FSC.DOC/1/00, 19 pp.

103 In December 2003, the *Wassenaar Arrangement* entered SALW in the *Munitions List*, see section 1.2.3.

Each type of measure is described further in separate sections with a number of 'traditional' commitments, such as: licences or authorisations for the production (Section II, 2.A) and the import, export, and transshipment of SALW (Section III,B), unique marking (Section II, 2.B) and information exchange on the subject (Section II, 2.D), the registration of the arms held in the state's possession and that of producers, exporters, and importers (Section II, 2.C). The unique marking of arms is especially important for being able to trace the points at which a legal transfer is being diverted to the illicit market (Section II, Introduction, 1). In order to prevent such an illicit diversion, the OSCE also recommends conducting physical checks at the delivery site (Section III, B, 6.).

The OSCE SALW document lists a series of criteria for the participating states to take into account in their national legislation or in policy documents relating to arms export. These criteria are especially important since they form the basis for distinguishing legal from unauthorized arms exports. With all of this, the OSCE has taken a major step forward and has produced more concrete documents than the UN, which refers in more general terms to the needs of internal and common security. Three categories of criteria exist. They pertain to the situation inside the recipient country, the evaluation of risks for international security, and the assessment of the ability of the recipient country to administer and manage its arms stockpiles.

Specifically with respect to brokering, the OSCE SALW document includes three obligations (which article 15, 1 of the UN Protocol adopted a few months later): registration of brokers, a licence or authorisation to engage in trade activities, and the disclosure of information on brokering.

Section III, D.

1. The regulation of the activities of international brokers in small arms is a critical element in a comprehensive approach to combating illicit trafficking in all its aspects. Participating states will consider the establishment of national systems for regulating the activities of those who engage in such brokering.

(i) Requiring registration of brokers operating within their territory;
(ii) Requiring licensing of authorisation of brokering; or
(iii) Requiring disclosure of import and export licenses or authorisations, of accompanying documents, and of the names and locations of brokers involved in the transaction.

In contrast to the UN Protocol, the OSCE Document on SALW does not require that a register of brokers be kept, but it does require the exchange of information on the control of international brokering (Section III, F.2.)

Section III, F., 2.

The participating States will exchange with each other, by 30 June 2001, available information on relevant national legislation and current practice on export policy, procedures, documentation and on control over international brokering in small arms in order to use such an exchange to spread awareness of "best practice" in these areas. They will also submit updated information when necessary.

A great deal of attention is also paid to the need for appropriate measures concerning the collection of arms, their stockpiling in a safe manner, and their destruction after armed conflicts (Section I, 3(vi)). Section IV is devoted entirely to the *management of stockpiles, reduction of surpluses and destruction.*

Similarly, where the OSCE exceeds the UN documents is in the introduction of 'surplus indicators' (Section IV, A.). These items are meant to serve as inspiration to the OSCE participating states in the assessment of their own (case pertaining) surplus stocks. Also with the provisions concerning post-conflict *rehabilitation* (Section V), attention is paid to *stockpile management and reduction* (Section V, E).

Summary of the OSCE Document on Small Arms and Light Weapons – 2000

Binding character

The Document itself is politically binding. The provisions pertaining to brokering only ask the participating states to consider the measures, which constitutes only a very weak commitment.

Prescribed measures

The OSCE participating states undertake to consider the possibility of introducing into their national legislation provisions concerning the registration of brokers residing on their territories, subjecting brokering to a licence or to an authorisation, or forcing them to disclose information about import and export authorisations, or providing relevant documents on such shipments and about the names and locations of the brokers involved in the transactions. These provisions were in 2001 also incorporated in the UN Firearms Protocol.
Furthermore, the OSCE Document requests exchange of information about international brokering.

Evaluation criteria concerning licit versus illicit trade

The OSCE Document establishes only criteria for the assessment of legal export; in principle, these criteria are not applicable to brokering activities.

Description of brokers and their activities

The OSCE Document does not describe either broker or brokering activities.

Scope of application – types of weapon

In the absence of a universally accepted definition of SALW, the OSCE provides an instrumental definition that applies only to the objectives of this document.

1.3.2 OSCE Handbook of Best Practices on Small Arms and Light Weapons (2002)

On 10 July 2002, the OSCE FSC decided to draft a handbook in order to assist the participating states with their implementation of the OSCE Document of 2000.[104] In 2003, the FSC welcomed the *Handbook of Best Practices on Small Arms and Light Weapons*.[105]

The Handbook consists of 8 chapters, each with a directory with guidelines about a specific aspect:[106]

Chapter 4 contains the Guide with reference to the national control of brokering activities. It was prepared by the German and Norwegian governments.

The purpose of the Handbook is, on the one hand, to provide OSCE participating states with guidelines for their national policy (legislation, control, administrative implementation and enforceability) and, on the other, to promote a higher common standard for national practices (pp. 2-3). With reference to brokering. The Guide contains pure guidelines inspired by existing best practices, complemented – insofar as there exist but a few best practices to draw from, and these are not harmonized – with recommendations about what the control of brokering *ought to encompass* (Guide, p. 3).

It is in the first instance oriented towards the organisation's participating states, in support of their implementation of the 2000 *OSCE Document on SALW*. Because of its expansive character, it is also an inspirational source for the OSCE itself; for example, its rinciples on the control of brokering in SALW of 2004 (see above) are clearly based on the recommendations of the Guide in Chapter 4.

Given that the Guide does not impose any kind of commitment on the participating states, either legally or politically, the discussion of its content appears in its entirety with the Good Practices touched upon in Part II of this report.

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104 FSC Decision 11/02 of 10 July 2002.

105 FSC Decision 5/03 Best Practice Guides on Small Arms and Light Weapons, 19 September 2003.

106 Chapter 1: *National Controls over Manufacture of Small Arms and Light Weapons*
Chapter 2: *Marking, Record-keeping and Traceability of Small Arms and Light Weapons*
Chapter 3: *National Procedures for Stockpile Management and Security*
Chapter 4: *National Control of Brokering Activities*
Chapter 5: *Export Control of Small Arms and Light Weapons*
Chapter 6: *Definition and Indicators of a Surplus of Small Arms and Light Weapons*
Chapter 7: *National Procedures for the Destruction of Small Arms and Light Weapons*
Chapter 8: *Best Practice Guide on Small Arms and Light Weapons in Disarmament, Demobilization & Reintegration (DD&R) Processes*

1.3.3 OSCE Decision 8/04: OSCE Principles on the Control of Brokering in Small Arms and Light Weapons (SALW)

On 24 November 2004, the *Plenary Meeting* of the FSC adopted OSCE *Decision* 8/04, *OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*.[107] In this decision, the participating states undertake a number of political commitments, specifically concerning the brokering in the trade in SALW. The aim of the principles is to control arms brokering in order to prevent the circumvention of sanctions of the UN Security Council and decisions of the OSCE (Section I, 1).

To that end, the participating states will make efforts to bring their existing or future national legislation in conformity with the provisions of this Decision. The wording, however, is very weak: the *participating state will endeavour to ensure* ..., which is hardly a strong commitment (Section I, 2).

OSCE Decision 8/04 follows the recommendations of the OSCE Guide (see the discussion on good practices in Part II, above) with reference to the scope of application: the control of brokering encompasses control of activities conducted on the territory of the competent state (National Authority) (Section II, 1). The participating states will take extra-territorial application into consideration (Section II, 2.). They will also work out a clearly defined legal framework for legal brokering activities (Section II, 3). This is the first time that an international document with binding force requires that such a legislative framework concerning legal activities is worked out.[108]

The OSCE describes brokering activities as follows (Section II, 4):

Activities of persons and entities:

- Negotiating or arranging transactions that may involve the transfer of items referred to in the OSCE Document on Small Arms and Light Weapons, and in particular its preamble, paragraph 3, from any other country to another country;
- Or who buy, sell, or arrange the transfer of such items that are in their ownership from any other country to another country.

107 FSC.DEC/8/04.

108 At the European level, Common Position 2003/468/CFSP had already prescribed the development of a legal framework for legal trade; the CP was adopted on 23 June 2003. See section 2.1.3.

The participating states are at liberty to tighten these definitions (e.g., they apply to export from their own territories and not merely among third countries), or to provide for exemptions for transfers among the participating states (Section II, 4, 2nd para.).

Brokering activities shall be subjected to licensing or written authorisations issued by the competent authority of the participating state where the activities are being conducted. Possibly in addition, licences may be required in the location where the broker is residing or is based. Licences will be issued for specific transactions (Section III, 1).

The participating states shall for at least 10 years keep a register of all granted licences or written authorisations (Section III, 2).

The OSCE participating states may elect to require brokers themselves to obtain written permission and to keep a register of persons involved in brokering. However, such a registration or authorisation may not replace the licences for brokering activities (Section IV, 1).

The licence applications for specific transactions will be assessed on the basis of the same criteria as those used for export. In this connection, the Decision refers to Section III of the *OSCE Document on SALW* (see above, section 1.3.1).

These criteria relate, among others, to the situation within the recipient country:
- the degree to which the country respects human rights and fundamental freedoms;
- the internal and regional situation in and around the recipient country, in the light of existing tensions or armed conflicts;
- the degree to which the recipient country complies with international obligations and commitments, in particular on the non-use of force and in the field of non-proliferation, arms control and disarmament as well as respect for international law governing the conduct of armed conflict;
- the assessment of the nature and cost of the arms to be transferred in relation both to the circumstances prevailing in the recipient country, including its legitimate security and defence needs and to the objective of the least diversion of human and economic resources to armaments;
- the right of the recipient country to engage in individual and joint self-defence (cf. article 51 of the UN Charter);
- the possibility that the traded arms might contribute to providing an appropriate and proportionate response by the recipient country to military threats or security threats it faces;
- the legitimate domestic security needs;
- the ability of the recipient country to participate in peacekeeping operations or other measures in accordance with resolutions of the UN or the OSCE.

A second category of criteria pertains to the risk that the proposed arms delivery might:

- be used for the violation or suppression of human rights and fundamental freedoms;
- threaten the national security of other states;
- be diverted to territories whose external relations are the internationally acknowledged responsibility of another state;
- contravene its international commitments, in particular in relation to sanctions adopted by the UN Security Council, decisions take by the OSCE, agreements on non-proliferation, small arms, or other arms control and disarmament agreements;
- prolong or aggravate an existing armed conflict, taking into account the legitimate requirement for self-defence, or threaten compliance with international law governing the conduct of armed conflict;
- endanger peace, create an excessive and destabilizing accumulation of small arms, or otherwise contribute to regional instability;
- be used for the purpose of suppression;
- be used to support or encourage terrorism;
- facilitate organized crime;
- be used for purposes other than for the legitimate defence and security needs of the recipient country.

A third type of criterion concerns the capacity of the (potential) recipient country in the area of stockpile management and security procedures.

One of the criteria that states *may* further consider in their assessment of applications for written permission is whether there ever has been a report of the applicant's previous involvement in illegal or illicit activities (Section IV, 2).

The participating states shall consider establishing, in keeping with their national legislation, a system of mutual exchange of information about brokering activities (Section V 1). Such exchanges might relate to: legislation, registered brokers and broker registers (cases pertaining), denied registration and licence applications (Section V, 2).

Each participating state shall attempt to provide for adequate penalties, including penal sanctions, in order to ensure that the controls on brokering are effectively complied with (Section VI).

On 7 December 2004, OSCE Decision 8/04 was confirmed by the Ministerial Council at its meeting in Sofia,[109] which lent extra political weight.

109 Decision 7/04 OSCE Principles on the Control of brokering in Small Arms and Light Weapons, of the Ministerial Council of the OSCE of 7 December 2004, MC.DEC/7/04.

Summary of the OSCE Principles on the control of brokering in SALW

Binding character

The Principles document is politically binding but contains two kinds of provision. The OSCE participating states undertake to abide by a number of minimal requirements, while in other provisions they consider additional measures (the Principles as such follow the division made in the OSCE Best Practices Guide in their core and optional prescriptions).

Prescribed measures

The commitments include: taking the necessary measures to control brokering activities within their territories, adopting a clear legal framework for legitimate brokering activities, subjecting internal brokering activities to a licence or a written authorisation, assessing the applications by using the same criteria as are used for export licences, keeping records of all granted licences or authorisations for a period of at least 10 years.

The optional provisions include: a possible stricter definition of the provision of exemptions among the participating countries, the possibility to expand the licence requirement to the brokers themselves, taking account in their assessment of previous broker involvement in illegal or illicit activities, and mutual information exchange among the participating states.

Evaluation criteria concerning licit versus illicit activity

The criteria pertaining to the assessment of licence applications for export (previously described in the OSCE Document on SALW) shall be expanded to include brokering activities. It pertains to criteria bearing on the situation in the recipient country and the adjoining regions with respect to the risk of creating increased insecurity and further relating to management of arms stocks and security procedures in the recipient country.

Description of brokers and their activities

Brokering activities are described as the negotiating or arranging of arms transactions among third countries, or arranging the purchase, sale, or transfer among third countries. Brokers may be both physical persons and legal entities.

Scope of application – types of weapon

The scope of application encompasses the SALW as described in the 2000 OSCE Document on SALW (instrumental definition in the absence of a universally accepted definition).

1.3.4 OSCE information exchange

On 17 October 2007, OSCE *Decision* 11/07[110] asked the OSCE participating states to exchange information on their regulations bearing on the brokering of SALW.

The decision asked for information about the general principles that form the basis of states' regulations: measures to exercise control of brokering activities within their territories, measures to control brokering activities conducted outside their territories by their own nationals or by brokers established within their jurisdictions, the description of the existing legislative framework for legal brokering activities, and national definitions of brokering activities.

With regard to licences and registers, the decision called for a description of the licensing process as well as details about the length of the period during which, and the manner in which, such registrations are kept on file.

With regard to registration and permission, it called for information on whether brokers are required to possess written permission to act as brokers or whether there exists a national registry of arms brokers, and what kind of information is entered in such a register.

With regard to the question of enforceability, questions were asked pertaining to the kinds of penalties, including criminal sanctions, that have been instituted in order to enforce compliance with the control of brokering.

The results of this inquiry and questionnaire were summarized by the OSCE's *Conflict Prevention Centre* in a report published on 30 June 2008. A discussion of these findings appears in Part II (see section 1.1, on good practices).

1.3.5 OSCE embargoes

For the sake of completeness it must be noted that the OSCE can also impose arms embargoes. However, these are not binding on the participating states. So far, the OSCE has resorted only once to an arms embargo: on 28 February 1992 it issued an embargo on all deliveries of weapons and munitions to forces engaged in combat (Azerbaijan and Armenia) in the Nagorno-Karabakh region of Azerbaijan.

110 OSCE Information Exchange with regard to OSCE Principles of the Control of Brokering in Small Arms and Light Weapons.

This embargo is still in force. Within the context of arms brokering, such an embargo is relevant since it brings a criterion for distinguishing legal from illegal or unauthorized brokering activities (see also the discussion on UN embargoes in section 1.1.1).

1.4 Other regional organisations

Other regional organisations whose function is oriented towards the control of the trade in arms or related goods concentrate their efforts exclusively on export controls. This is the case for the *Nuclear Suppliers Group*[111] and the *Zangger Committee*[112] with respect to nuclear arms, and the *Missile Technology Control Regime*[113] with respect to the non-proliferation of unmanned missiles capable of launching WMD.

This also pertains to the *Australia Group*, with 39 participating states, regarding the prevention of the proliferation of chemical and biological arms. Without having worked out concrete guidelines on the subject, the *Australia Group* is essentially the only organisation that recently has also devoted attention to the problem of brokering, as is shown by the *Guidelines for Transfers of Sensitive Chemical or Biological Items*, adopted in January 2009.[114] With respect to brokering, the following was stated in these Guidelines:

> *"4. to fulfil the purposes of these Guidelines, the evaluation of export applications will take into account the following non-exhaustive list of factors: (…) d. the role of distributors, brokers or other intermediaries in the transfer, including where appropriate, their ability to provide an authenticated end user certificate specifying both the importer and the ultimate end user of the item to be transferred, as well as the credibility of assurances that the item will reach the stated end user".*

111 See http://www.nuclearsuppliersgroup.org/.

112 See http://www.zanggercommittee.org/.

113 See http://www.mtcr.info/.

114 Available at http://www.australiagroup.net/and/guidelines.html.

2

The European Union

The European Union is discussed separately since it engages in a specific form of regional cooperation.

With the foundation of the European Communities (EC)[115] in the 1950s, the organisation assumed a supranational character, through the transfer of national competences to its European institutions. As a result, the EC was entitled to intervene in the national legal systems of member states and to adopt regulations imposing rights and duties on EC nationals, without intervention by national legislators. In this regard, the EC distinguished itself from other regional and international organisations, which can only adopt decisions that (legally or politically) are of a binding character vis-à-vis the participating states.

From the time of the Maastricht Treaty (1993), which established the European Union, the European cooperative partnership operated according to a structure based on three pillars.[116] The EC primarily retained a supranational character for economic, social, and environmental matters, which were included in the 1st pillar. In the 2nd and 3rd pillars, respectively, Common Foreign and Security Policy (CFSP)[117] and Police and Judicial co-operation in Criminal Matters (PJCC) decision-making was primarily of an intergovernmental nature. Decisions within the competences of the second and third pillars therefore had to be incorporated in national law in order to be enforceable at the national level.

Under the subsequent Amsterdam Treaty (1999) and Nice Treaty (2003), also the second and, especially, the third pillar were given a more supranational character.[118] The Treaty of Lisbon, which entered into force on 1 December 2009, put an end to the pillar structure, aimed at making the Union's organisation more transparent.[119] All the European instruments that are discussed here date from the period between the Maastricht Treaty and the time prior to the entry into force of the Lisbon Treaty. They thus date from a period when there was still a pillar structure.

The control of the trade in military material and *dual-use* items[120] is situated in the competences of all the pillars, but primarily those in the second and, for certain aspects, the first pillar. EU policy therefore encompassed a mix of supranational decisions and intergovernmental cooperation.

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115 Aside from the European Economic Community, also Euratom (Treaties of Rome) was established in 1957; the year 1952 witnessed the establishment of the European Coal and Steel Community. In 1965, the institutions of the EC and of Euratom were merged in the wake of the Merger Treaty, the ECSC ceased to exist in 2002, 50 years following its formation, as was foreseen in the formation treaty; see: PH KOOIJMANS and A.E. de VOS, *op. cit.*, pp. 222-223 and 256.

116 PH KOOIJMANS and A.E. de VOS, *op. cit.*, p. 229, *et seq.*; R. BARENTS, *Het Verdrag van Lissabon: achtergronden en commentaar*, Kluwer, 2008, p. 133 *et seq.*

117 In 1987, the European Act had already provided for a conventional-law basis for a coordinated foreign policy, the EPS of European Political Cooperation, which was the precursor of the present Common Foreign and Security Policy, see: PH KOOIJMANS and A.E. de VOS, *op. cit.*, p. 227.

118 R. BARENTS, *op. cit.*, p. 134.

119 R. BARENTS, *op. cit.*, p. 148.

120 For general information about the EU policy on non-proliferation, disarmament, and export control of military materials and *dual-use* goods, see *http://www.consilium.europa.eu/showPage.aspx?id=392&lang=and.*

The description that follows is intended to clarify the extent of each instrument's legal force and the obligations that it carries for the EU member states and their national legal systems.

The review is divided along the lines of the scope of the EU regulations, namely, on the basis of the type of goods to which the provisions apply. Chronologically, conventional arms, firearms and light weapons, and dual-use goods (for use in WMD) are discussed.

2.1 The EU policy on conventional arms

2.1.1 EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms (1997)

On 26 June 1997, the Council adopted the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms. The EU member states agreed to act in a coordinated manner among themselves, on the one hand, and, on the other, to assist other countries in preventing and combating illicit trade in conventional arms. The Programme is rather a general statement of intent and does not contain any reference to the problem of brokering. The specific importance of the Programme lies in the commitment to monitor the situation on an annual basis and to evaluate it accordingly.[121] As such, it offered a framework for permanent consultation on the illicit trade in conventional arms.

121 See X, Second Annual Report about the implementation of Common Position 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and to the repeal of the Common Position 1999/34/CFSP and the EU programme of June 1997 towards preventing and combating illicit trade in conventional arms, OJ C 330 of 31 December 2002.

2.1.2 EU Code of Conduct on Arms Exports and Common Position 2008/944 (2008)

European Union Council's Code of Conduct on Arms Exports

On 5 June 1998, the EU Code of Conduct on Arms Exports was adopted.[122] The Code was politically binding on the EU member states and imposed on them 8 common criteria for the assessment of licence applications for the export of military material. The Code also contained 11 implementing provisions that prescribed for the member states how they were expected to implement it. In November 2003, the *Working Group on Conventional Arms*, COARM,[123] published a User's Guide with the aim of assisting the member states in arriving at a uniform interpretation of the Code of Conduct.[124]

One of the implementing provisions concerned the drafting of a Common List of Military Goods,[125] which was adopted on 13 June 2000.[126] It is still valid and is updated at regular intervals.[127] The EU member states may also expand their national lists to include other goods.[128] The EU list with military goods is – as is the Code of Conduct - not legally binding on the member states.[129]

The so-called Dual-use Regulations 1334/2000 and 428/2009 (see section 2.3.3.1) refer to the Code of Conduct (art. 8), by which the Code's scope of application is being expanded to include the evaluation of licence applications for the export of dual-use items to non-EU member states. Given that an EU Regulation does, in effect, have binding force, the application of the Code of Conduct for dual-use items was also made obligatory as of 2000 (e.g., as of the entry into force of Regulation 1334/2000).

122 The EU Code of Conduct has not been officially published; it can be consulted on a variety of websites, e.g.,: *http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf*

123 COARM is a Task Force composed of arms and weapons experts engaged in research since 1991 within the Council, see S. TAVERNIER, H. VERVENNE and C. WILLE, *loc. cit.*, p. 158.

124 See also A. HUDSON, 'Case Study on the EU Code of Conduct on Arms Exports', in C. EGENHOFER (ed.), *Policy Coherence for Development in the EU Council Strategies for the Way Forward*, Brussels, Center for European Policy Studies, 2006, p. 98 *et seq.*

125 Implementing provision 5.

126 The list is inspired by, but not identical to, the *Wassenaar Arrangement Munitions List.*

127 The most recent amendment dates back to 23 February 2009, *OJ* C 65 of 19 March 2009, p. 1.

128 Implementing provision 2.

129 They can, however, be forced to follow the list in cases where an EU instrument that is legally binding on a relevant area of application makes reference to it.

EU Common List of Military Goods

The EU Common List, which determined the scope of application and authority of the Code of Conduct, contains the following 22 categories[130] of conventional arms:

ML1 Smooth-bore weapons with a calibre of less than 20 mm, other arms and automatic weapons with a calibre of 12.7 mm (calibre 0.50 inches) or less, and accessories, and specially designed components therefor
ML2 Smooth-bore weapons with a calibre of 20 mm or more, other weapons or armament with a calibre greater than 12.7 mm (calibre 0.50 inches), projectors and accessories, and specially designed components therefor
ML3 Ammunition and fuse setting devices and specially designed components therefor
ML4 Bombs, torpedoes, rockets, missiles, other explosive devices and charges and related equipment and accessories, and specially designed components therefor
ML5 Fire control, and related alerting and warning equipment, and related systems, test and alignment and countermeasure equipment specially designed for military use, and specially designed components and accessories therefor
ML6 Ground vehicles and components
ML7 Chemical or biological toxic agents, "riot control agents", radioactive materials, related equipment, components and materials
ML8 Energetic materials, and related substances
ML9 Vessels of war (surface or underwater), special naval equipment accessories, components and other surface vessels
ML10 "Aircraft", "lighter-than-air vehicles", unmanned airborne vehicles, aero-engines and "aircraft" equipment, related equipment and components, specially designed or modified for military use
ML11 Electronic equipment not controlled elsewhere on the EU Common Military List, and specially designed components therefor
ML12 High velocity kinetic energy weapon systems and related equipment, and specially designed components therefor
ML 13 Armoured or protective equipment and constructions and components
ML 14 Specialised equipment for military training or for simulating military scenarios, simulators specially designed for training in the use of any firearm or weapon specified by ML1 or ML2, and specially designed components and accessories therefor
ML 15 Imaging or countermeasure equipment, specially designed for military use, and specially designed components and accessories therefor

130 The list corresponds to the wording of the most recently revised version of February 2009; EU Common List of military goods (adopted by the Council on 23 February 2009), goods to which the Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment is applicable, *OJ C* 65 of 19 March 2009, pp. 1–34. This list updates and replaces the EU Common List of Military Goods that was adopted by the Council on 3 March 2008.

ML16 Forgings, castings and other unfinished products the use of which in a specified controlled product is identifiable by material composition, geometry or function, and which are specially designed for any products specified by and included in ML1 to ML4, ML6, ML9, ML10, ML12 or ML19
ML 17 Miscellaneous equipment, materials and "libraries", and specially designed components therefor
ML18 Production equipment and components
ML19 Directed energy weapon systems (DEW), related or countermeasure equipment and test models, and specially designed components therefor
ML20 Cryogenic and "super-conductive " equipment and especially designed components and accessories therefor
ML21 "Software"
ML22 "Technology"

Common Position 2008/944/CFSP of the Council of 8 December 2008 defining common rules governing control of exports of military technology and equipment[131]

The Code of Conduct has in the meantime been replaced by Common Position 2008/944/CFSP. In this Position, the provisions of the Code of Conduct were taken over and in some aspects brought up to date with current conditions and circumstances. The amendments concern both an expansion of the evaluation criteria and a sharpening of the implementing provisions vis-à-vis brokering in military materials[132].

Contrary to the Code of Conduct, Common Position 2008/994 is legally binding on the member states, which now are obliged to adapt their national policy to conform to the provisions of the Common Position (CP).

Common Position, article 15 Consolidated versions EU and EC Treaty[133]:

The Council shall adopt common positions. Common Positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies comform to the common positions.

131 *Official Journal of the European Union*, L 335 of 13 December 2008 (hereafter abbreviated as *OJ L*).

132 See also the discussion of Prof. Quentin of the University of Liege: M. QUENTIN, *The European Union Export Control Regime: Comment on the Legislation: article-by-article*, May 2009, p. 136 *et seq.*, http://iv.vlaanderen.be/nlapps/data/docattachments/Quentin.pdf.

133 Consolidated versions of the Treaty on the European Union and the Treaty establishing the European Community, Title V, Provisions on a Common Foreign and Security Policy, OJ C 321 E of 29 December 2006, p. 16.

Although most observers[134] consider the new Code of Conduct to be a legally binding instrument, given that it has been cast in the mould of a Common Position, there is no consenses about the legal force of a CP.[135] This has to do with the characteristics of a CP (compared to the traditional international legal instruments). Because of the conventional legal base, namely article 15 of the EU Treaty, one may speak of a legally binding instrument. Among the counter-arguments are the fact of the intergovernmental character of the CFSP and the absence of a mechanism that would enforce compliance[136] (no *hard law*). Because of this mixed character, a Common Standpoint is also designated as *soft law*.[137] The binding nature of the concrete provisions of a CP is further clarified by the wording of each separate provision.[138]

Common Position 2008/944/CFSP imposes on the EU member states the screening of applications for export licences for items that are listed on the EU Common List, on a case-by-case basis, against the 8 criteria listed in article 2 (art. 1, 1). Applications for export licences include: those for actual export, brokering, transit, transshipment, the intellectual (intangible) transfer of software and technology (art. 1, 2.). The explicit mention of brokering, transit, transshipment and immaterial transfer[139] signifies a substantial expansion of the scope of application in comparison with the scope of the Code of Conduct. Both the evaluation criteria for (il)licit trade and the implementing provisions have applied since 2008.

The CP offers no definitions for brokering or brokers but rather refers in Consideration 8 to Common Position 2003/468/CFSP of 23 June 2003 (see section 2.1.3).

For the sake of completeness, it should be noted that Common Position 2008/944/CFSP is applicable only to extra-Community brokering issuing from EC territory, not to brokering under the jurisdiction of national laws within the EU or issuing from an EU member

134 BAFA, *Information leaflet on trafficking and brokering*, Federal Office of Economics and Export Control, 29 May 2006, p. 5; EUROPEAN PARLIAMENT, Draft resolution on the EU Code of Conduct on arms transfers – failure of the Council to adopt the Common Position and transform the Code into a legally binding instrument, 13 February 2008, p. 2: "*whereas the adoption of this Common Position will make the Code a legally binding arms export control document for all EU Member States*".
See by analogy about the legally binding force of the Common Position 2003/468/CFSP on brokering: V. MOREAU, 'Pour un réel contrôle des courtiers and armes and Belgique', Brussels, GRIP, 31 August 2009, p. 5, http://www.grip.org/and/siteweb/dev.asp?N=simple&O=720; and B. WOOD, 'The prevention of illicit brokering', *loc. cit.*, p. 26.

135 Among others: Koen Lenaerts (prof. European Law at the KUL and judge at the European Court of Justice) and M. Desomer consider the instruments of the 2nd pillar (CFSP) as politically binding, see: K. LENAERTS and M. DESOMER, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', in *European Law Journal*, Vol. 11, N° 6, November 2005, pp. 747-478; see also A. HUDSON, *loc. cit.*, p. 111.

136 See: K. LENAERTS and M. DESOMER, *loc. cit.*, p. 747.

137 See also: A. van den BRINK, *Regelgeving in Nederland ter implementatie van EU-recht*, Kluwer, 2004, p. 128.

138 Some authors prefer to subject the legal force of an instrument to the wording of the provisions that reflect, per concrete case, the wish of the legislator. As mentioned in the introduction to Part I, account has to be taken of both the choice of the instrument (possibly with the specific name given to it) plus the wording of each and every separate provision.

139 Consistent with this explicit mention, the terminology in the Code of Conduct was refined by the substitution of 'materials' with 'technology or equipment'.

state, in contrast to exports, where this distinction does not exist (see the discussion on CP 2003/468 above).[140]

The criteria in article 2 largely correspond to those in the Code of Conduct of 1998:

Criterion 1 Respect for the international obligations and commitments of member states, in particular the sanctions adopted by the UN Security Council or the European Union, such as arms embargoes, non-proliferation provisions, *et alia*[141]

Criterion 2 Respect for human rights in the country of final destination, in particular when there exists the risk that exported goods and technology will be used for internal repression, and abidance by the international humanitarian law by said country[142]

Criterion 3 Internal situation in the country of final destination as a function of the existence of tensions or armed conflicts

Criterion 4 Preservation of regional peace, security and stability

Criterion 5 National security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Criterion 6 Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law

Criterion 7 Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions

Aside from a more detailed description,[143] the Common Position adds another three aspects that should be taken into account in assessments:

d) the risk that the technology or equipment will be re-exported to undesirable destinations and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;

140 Concerning the export of military goods, Common Position 2008/944 (as the Code of Conduct of 1998) draws no distinction between export among the member states and export from the EC. The CP, in other words, applies to both types of export. The grounds for this can be found in article 296 of (the consolidated version of 2006 of) the EU Treaty that for certain types of arms, munitions, and war materials provided for an exception to the free movement of goods. The list of goods to which article 296 is of application has been set down in Council Decision 255/58 of 15 April 1958.
There has existed confusion on this since 2009, because the Directive 2009/43/EC of 6 May 2009 contains provisions with regulations and procedures for community transfers (export among the EU Member States). The ambiguity here concerns only export and not brokering, firstly, since the Directive does not prescribe measures that concern intra-community brokering and, secondly, since CP 2008/944 makes implicit reference to the definition of EC brokering in CP 2003/468 (Directive 2009/43/EC of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *OJ L* 146 of 10 June 2009).

141 Criterion 1 was expanded with: the commitments within the context of the Zangger Committee, and The Hague Code of Conduct against the Proliferation of Ballistic Missiles.

142 Criterion 2 was substantially expanded by an additional reference to international humanitarian law.

143 The provision in the Code of Conduct is: "Risk of diversions or undesirable re-exports".

e) the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;[144]

f) the risk of "reverse engineering" or unintended technology transfer

Criterion 8 Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.

Like the Code of Conduct, the Common Position contains a number of provisions related to its implementation and reaffirms the freedom of the member states to introduce stricter regulations (art. 3).

Article 4 determines that the member states exchange information about licences that were denied on the grounds of the prescribed criteria, plus the reason for the denial. When a member state wishes to grant a licence for a transaction that at any time within the preceding three years was denied by one or several of the other states, it is incumbent on that member to engage in consultation prior to proceeding to the issuance of the licence. When, ultimately, that member does issue the licence, the member states that had previouslydenied it must be informed accordingly, including information about the rationale and justification for doing so. This is known as the so-called *no-undercut* principle that is designed to avoid compromising member states' policies.

The decision whether or not to allow the transfer of military goods and technology is still a national competence (art. 4, 2). The denials and consultations on the issue remain confidential; the member states may not derive an advantage or benefit from the decision (art. 4, 3).

Article 5 contains stricter prescriptions with respect to the assessment of the end-use. Licences may be granted only on the basis of reliable prior knowledge concerning the end-use. A thoroughly checked end-use certificate or similar appropriate documentation and/or an official authorisation by the country of final destination is required for that purpose. In case of export destined for production in third countries, the member states shall in their assessment take due account of the potential use of the end-product and of the risk that the end-product may be diverted or re-exported to an undesirable end-user.

The evaluation criteria and the consulting procedure with respect to denied licences also apply to the list of goods specified in Annex I to Regulation 1334/2000, "*where there are serious grounds for believing that the end user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country*".

144 This condition was also included in the original Code of Conduct, but has now been reformulated.

In order to render the CP as effective as possible, within the framework of the CFSP the member states are pursuing the goal of further reinforcing their cooperation and promotion of greater convergence of efforts in the area of the export of military technology and equipment (art. 7).

The member states must also draw up confidential reports for the other members about their export and the implementation of the CP (art. 8, 1). Annually, the EU shall present the Council with a report based on the contributions from the member states. This report will be published in the *Official Journal of the European Union* (art. 8, 2.). Each member state will in turn draw up a national report about its export of technology and equipment on the Military List (art. 8, 3.).

The member states shall, within the context of the CFSP, jointly assess the situation of potential or real recipients of military technology and equipment (art. 9).

Where appropriate, the member states shall take into account the impact of the proposed export on their economic, social, commercial, and industrial interests, without, however, this being prejudicial to the application of the 8 criteria (art. 10).

The member states "shall use their best endeavours" to encourage other states to apply the same criteria. They shall exchange experiences on their policy concerning the control of their exports and the application of said criteria with countries receptive to their advice (art. 11).

The member states "shall ensure" that their national legislation enables them to control export of the technology and equipment on the EU Common Military List. The Common List is, indeed, only a reference document that does not directly apply as substitute for national lists (art. 12).

The User's Guide to the Code of Conduct shall remain in effect as guidance and will (as it was prior to 2008*) be reviewed on a regular basis* (art. 13).

Summary of Common Position 2008/944/CFSP

Binding character

The original Code of Conduct on Arms Exports was politically binding. Since 2008, with the adoption of the provisions in the Common Position, they have become legally binding, albeit as *soft law*. The member states are obliged to bring their national policy in line with these provisions.

Measures and evaluation criteria
Export of, and brokering in, conventional arms are subject to a licence. The evaluation shall be conducted on the basis of the same 8 criteria that have been established in the Common Position. When these are not met, the Member State must deny the licence.
In order to prevent *undercutting* amongst member states, they shall consult with one another on matters of their individual policies, and they need to engage in discussions when a Member State contemplates granting a licence for a transaction that, within a period of three years previous, was already denied by at least one other Member State. Authorisations may only be granted on the basis of reliable, prior knowledge about the end use.
By means of, amongst others, annual reports, national reports, and joint assessments, the member states shall pursue the goal of closer cooperation and greater convergence amongst their policies.

Description of brokers and their activities
The CP does not provide its own description. By mentioning Common Position 2003/468/CFSP in Consideration 8, the definitions valid therein implicitly apply.

Scope of application
Export of arms and the immaterial (intellectual) transfer of technology mentioned in the EU Common List of Military Goods (to the most recent version, 2009). The provisions regarding brokering are, in analogy with CP 2003/468, limited to extra-Community brokering between EU third countries (see above).

2.1.3 Common Position 2003/468/CFSP of the Council of 23 June 2003 on the control of arms brokering[145]

In the fourth annual report on the EU Code of Conduct, the member states agreed to further tackle the problem of control of arms brokering.[146] On 23 June 2003, the Council of the EU adopted a CP with respect to the control of arms brokering.

145 *OJ L* 156 of 25 June 2003, 2 pp.

146 COUNCIL OF THE EUROPEAN UNION, Fourth Annual Report with reference to implementing provision 8 of the Code of Conduct of the European Union on arms export, *OJ C* 319 of 19 December 2002, Annex I, pp. 4-5.

The member states are obliged to adapt their national policy to a CP (see section 2.1.2 *et seq.* on the legal scope).

As a rationale for the adoption of these provisions, the introductory considerations refer to a correct implementation of the EU Code of Conduct concerning arms export, commitments within the *Wassenaar Arrangement* concerning brokering, the UN Programme on SALW, and the UN Firearms Protocol. These latter three international commitments contain the commitment to control and regulate brokering.

The objective of Common Position 2003/468, as described in article 1, is to supervise the brokering in arms in order to prevent, on the one hand, the arms embargoes of the UN, or the EU, or the OSCE and, on the other, the EU Code of Conduct (now CP 2008/944) from being circumvented. In order to achieve that goal, the member states need to ensure that their national legislation meet the prescriptions of the CP.[147]

The member states shall, at a minimum, take all necessary measures to control brokering activities that take place within their territory. They are encouraged to consider controlling brokering activities outside their territory carried out by brokers of their nationality who are resident or established in their territory (art. 2, 1).

The member states need to establish a clear legal framework for licit brokering activities (art. 2, 2).

Brokering is described in article 2, 3 as follows:

> *"the activities of persons and entities:*
> – *negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country;*
>
> *or*
>
> – *who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country."*
>
> *This paragraph shall not preclude a Member State from defining brokering activities in its national legislation to include cases where such items are exported from its own territory or from the territory of another Member State.*

From the 2nd section of article 2, 3 – which provides for the possibility, within national legislation, of expanding the scope of application to include cases where such items are being exported from a state's own territory or from the territory of another member state – it appears that the provisions of the CP are not automatically valid for brokering where it concerns the transfer of goods between a member state and a third country, or between

147 A Common Position requires Member States to adapt their policies accordingly; the concrete provisions in a CP may, as in this case, prescribe the adaptation of the national legislation.

two EU member states. In the interpretation of CP 2003/468/CFSP, brokering needs to be understood as EU brokering, limited to activities pertaining to transactions between EU–third countries.

The CP demands *at least* a licence or written authorisation issued by the nationally competent authorities at the location where the brokering activities are taking place. National legislation *can* also require that a licence for brokering be compulsory in the location where the broker is located or based (art. 3, 1).

The assessment of applications is carried out on the basis of Common Position 2008/944[148] (formerly the EU Code of Conduct) on arms exports (art. 3, 1). The member states shall, for a minimum of 10 years, keep records of all persons and entities that have obtained such a licence (art. 3, 2).

Aside from the brokering licence, the CP provides the *possibility to impose on the individuals or entities involved a written authorisation* to conduct brokering activities (art. 4, 1). The member states *may* also introduce a register of brokers. Article 4,1 stresses that such an authorisation or registration cannot in any event replace the licence for for each separate brokering activity (as imposed by article 3).

In their assessment of applications for a licence to conduct brokering activities, *the* member states *could* take into account the possible involvement of the applicant in illicit activities and transactions in the past (art. 4, 2).

Article 5 provides for information exchange about brokering among members reciprocally, and, possibly also, with third countries. Such information exchange pertains, among others, to (art. 5, 2):

- legislation;
- registered brokers (if applicable);
- records of brokers;
- denials of registering applications (if applicable) and licensing applications.

In order to ensure actual compliance with the control of brokering, each member state will establish adequate sanctions, including criminal sanctions (art. 6).

148 As of 2008, transferred into Common Position 2008/944/CFSP.

Summary of Common Position 2003/468 on arms brokering

Binding character

Legally binding, as *soft law*, the member states "shall ensure" that they adapt their national policies conform to the provisions in the Common Position.

Measures

The member states must create a clear legal framework for authorized brokering activities and take the necessary measures to control brokering activities taking place within their territories. To that effect, at least a licence or a written authorisation is required for each separate brokering transaction on their respective territories.
An extension of the licensing requirement is possible for (1) activities conducted in the place where the broker is located or based, (2) the brokers themselves.
The member states shall for a period of 10 years keep records of persons and entities that have obtained a licence. The member states may also introduce a register of brokers.
The member states shall prescribe appropriate penalties, if necessary also criminal sanctions.
The member states shall exchange information among themselves.

Evaluation criteria

The applications shall be assessed on the basis of the criteria of Common Position 2008/944/CFSP. Member states may also take account of the applicant's past involvement in illicit activities.

Description of brokers and their activities

The CP provides no definition of a broker but does describe brokering activities.
The definition needs to be understood as defining EC brokering activities among EC third countries. The CP leaves the inclusion of brokering in national laws, from their own territories or from the territory of another EU member state, to the discretion of the member states.

Scope of application – types of weapon

The EU Common List of Military Goods.

2.2 EU policy on small arms and light weapons

2.2.1 Joint Action 1999/34/CFSP and 2002/589/CFSP SALW

Joint Action 1999/34/CFSP

On 17 December 1998 the Council adopted Joint Action 1999/34/CFSP with a view to a European Union contribution[149] to combating the destabilising accumulation and spread of SALW.[150] It offered a framework for the coordination and enhancement of EU policy on SALW and encompasses a number of principles and preventive and reactive measures to be pursued by the EU member states, in both regional and international contexts.

A a Joint Action, it does not imply immediate legal obligations, but it is politically binding. The EU member states are bound by its provisions when adopting positions in the course of their further action.

Joint Action, article 14 Consolidated versions EU and EC Treaty[151]

1 The Council shall adopt joint actions. They shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

3 Joint Actions shall commit the member states in the positions they adopt and in the conduct of their activity.

149 In the introductory considerations reference is made to resolutions and other initiatives taken by the United Nations in this respect.

150 *OJ L* of 15 January 1999, 5 pp.

151 Consolidated versions of the Treaty on the European Union and the Treaty establishing the European Community, Title V, Provisions on a Common Foreign and Security Policy, *OJ C* 321 E of 29 December 2006, p. 16.

Joint Action 2002/589/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons[152]

In 2002, Joint Action 1999/34/CFSP was replaced by a new document with the same objectives: combating the destabilizing accumulation and proliferation of SALW, contributing to their limitation to legitimate levels, and contributing to the resolution of the problems that are generated by such accumulation (art. 1).

This Joint Action aims at achieving consensus on the principles of Title I and making a contribution on several fronts as determined in Title II.

Neither Title contains a provision on brokering. ly article 3 is relevant within the context of brokering since it commits states to deliver SALW exclusively to governments, either directly, or via appropriately and properly authorized bodies.

The annex is relevant because – in the expectation of an internationally adopted definition of SALW – it sums up a number of categories of weapons that are included in it.[153]

Annex:
"The Joint Action shall apply to the following categories of weapons, while not prejudging any future internationally agreed definition of small arms and light weapons. These categories may be subject to further clarification, and may be reviewed in the light of any such future internationally agreed definition:

a) Small arms and accessories specially designed for military use:
- machine guns (including heavy machine guns),
- submachine-guns, including machine pistols,
- fully automatic rifles,
- semi-automatic rifles, if developed and/or introduced as a model for an armed force,
- moderators (silencers).

b) Man or crew-portable light weapons:
- cannon (including automatic cannon), howitzers and mortars of less than 100 mm calibre,
- grenade launchers,
- anti-tank weapons, recoilless guns (shoulder-fired rockets),
- anti-tank missiles and launchers,
- anti-aircraft missiles / man-portable air defence systems (MANPADS)"

152 *OJ L* 191 of 19 July 2002.

153 *Pro memorie*, in November 2002, the OSCE adopted an instrumental definition of SALW in the OSCE Document on SALW, see section 1.3.1; in December 2003, the WA added this category of goods to the *Munitions List*, see section 1.2.3.

Summary of Joint Action 2002/589/CFSP

Binding character
The Joint Action is politically binding: the EU member states need to take it into account.

Measures
For brokering in SALW, the Joint Action prescribes only deliveries to governments, either directly or via appropriately and properly authorized bodies.

Evaluation criteria
Joint Action 2002/589 does not impose any criteria.

Description of brokers and their activities
No definition or description of brokers and their activities have been entered into the Joint Action.

Scope of application – types of weapon
A description of SALW has been entered in annex, in the expectation of an internationally adopted definition.

2.2.2 EU Strategy to Combat the Illicit Accumulation and Trafficking of Small Arms and Light Weapons (SALW) and Their Ammunition[154]

On 15–16 December 2005, the EU for the first time adopted a Strategy on SALW. An EU Strategy is, in essence, a kind of declaration of common intent on the part of the member states about the policy to be implemented on a certain issue. The document describes both the objectives and the means and resources provided by the EU to that effect and establishes a set deadline for implementation.

154 Council document 5319/06, 15-16 December 2005 of 13 January 2006, 15 pp.

The provisions of a Strategy are politically binding on the member states, but it is especially the subsequent Decisions, intended to facilitate implementation of the Strategy, that *may* contain binding provisions. Even then, the binding character of a Decision (Common Position or Joint Action) is dependent on the manner in which more concrete objectives and measures are described.[155]

Common Strategy, article 13 Consolidated versions EU and EC Treaty [156]

1. The European Council shall define the principles of and general guidelines for the Common Foreign and Security Policy, including for matters with defence implications.
2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common. Common strategies shall set out their objective, duration and the means to be made available by the Union and the Member States.
3. The Council shall take the decisions necessary for defining and implementing the Common Foreign and Security Policy on the basis of the general guidelines defined by the European Council.
   The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions.

The Introduction of the EU SALW Strategy starts with a reference to the UN Programme of Action for SALW and the need for complementarity at the national, regional, and global levels. By means of this Strategy, the EU wishes to make its contribution to that effect. As is the case with the 2003 EU Strategy on Weapons of Mass Destruction (see section 2.3.1), Europe considers the threats in a broader perspective than purely military application and pleads for a global approach using a *mix* of instruments (§4).

The 2005 EU Strategy's description of SALW appears in the annex appended to Joint Action 2002/589/CFSP (§6, see *section* 2.2.1).

In Part I, the EU describes its position vis-à-vis the problem of accumulation of SALW stockpiles. With reference to brokering, it holds the following view (§14):

> "*This reactive strategy is necessary but has to be supplemented by preventive action which will tackle illegal supply and demand as well as controls on exports of conventional weapons. Particular attention should be paid to the enormous accumulations of SALW stockpiled in Eastern and South-East Europe and the ways and means by*

155 A. van den BRINK, *op. cit.*, p. 129.

156 Consolidated versions of the Treaty on the European Union and the Treaty establishing the European Community, Title V, Provisions on a Common Foreign and Security Policy, OJ C 321 E of 29 December 2006, p. 16.

which they are disseminated in Africa (illegal brokering and transport). According to UN reports, since the late 1990's an increasing proportion of the SALW disseminated in Africa have come from weapons stockpiles in Central, Eastern and South-East Europe. The involvement of firms and businessmen of Central and Eastern European origin, or based there, in the brokering and illegal transport of such SALW has grown accordingly."

Part II of the EU Strategy describes the objectives and the means available. The objectives of Joint Action 2002/589/CFSP are reaffirmed (§16-17) and complemented.

Part III includes an Action Plan containing concrete measures to be taken at the international and regional levels, within the framework of commitments and structured consultations and within the EU.

As regards brokering, the Action Plan provides for the following action:
- support in 2006 for the creation of an experts group on brokering in the framework of the UN Programme of Action (p. 10);
- brokering and illicit trafficking in SALW are to be put on the agendas of all structured political EU dialogues with countries that are major exporters of SALW, specifically with countries holding surplus stocks of SALW left over from the Cold War, in particular in Eastern Europe and South-Eastern Europe (p. 12);
- include brokering and illicit trafficking in SALW in the action plans of the EU for Ukraine and Moldova (p. 12);
- brokering and illicit trafficking in general are to be put on the political agenda in consultation with third countries, with international, regional, and subregional organisations (p. 12);
- ensure that Joint Action 2002/589/CFSP is implemented (p. 13);
- promote implementation by the member states of the Common Position on brokerage, and harmonised application of the Code of Conduct on Arms Exports (p. 13);
- promote the development, via Europol, Eurodouanes and Eurojust, of a policy for actively combating illicit networks trafficking in SALW, including brokers and carriers (p. 13).

2.2.3 EC Directives 91/477 and 2008/51

Aside from its contribution to the UN Programme of Action on issues related to SALW, the EU also participates actively in other UN initiatives.

On 12 December 2000 and 21 May 2004, it respectively signed and ratified the UN Firearms Protocol (see section 1.1.2).[157]

As of the entry into force of the Protocol on 3 July 2005, the EU has been occupied with the alignment of the Community Regulation. One of the legislative documents that needed to be adjusted was Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons.[158] is Directive aims at an intra-Community regulation with reference to the acquisition, the available stock, and the transfer of arms among the member states. It is not applicable to arms for military and policing use or to commercial transactions for military objectives (art. 2).[159] The provisions of the Directive constitute a necessary complement to the rules on the free movement of goods within the Community (Considerations 3 and 4; see also Consideration 1 of Directive 2008/51).

Aspects with regard to the internal market belong to the competences of the first pillar. Directives are binding on the member states for their goals and intended results and need to be incorporated in national law. The member states are at liberty to choose the appropriate instruments under national law. Some provisions of the Directives that are concretely formulated may (following expiration of the transposition term) become directly applicable (the so-called direct effect of European Directives).[160]

> ***Directive***, *article 249 Consolidated versions EU and EC Treaty* [161]
>
> A directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods.

Directive 2008/51/EC of 21 May 2008 amending Directive 91/477/EEC ensures the intra-Community transposition of the UN Protocol (Considerations 2 and 3).[162]

157 See section 2.3.1 on WMD with regard to UN Security Council Resolution 1540.

158 *OJ L* 256 of 13 September 1991, p. 51.

159 Neither on collectors nor organisations with a cultural or historical scope and purpose.

160 R. BARENTS and L.J. BRINKHORST, *Grondlijnen van het Europees Recht*, Kluwer Deventer 2006, p. 186 *et seq.*

161 Consolidated versions of the Treaty on the European Union and the Treaty establishing the European Community, Title I, Provisions governing the institutions – Chapter 2 – Provisions common to several institutions, OJ C 321 E of 29 December 2006, p. 153.

162 Directive 2008/51/EC of the European Parliament and the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, *OJ L* 179 of 8 July 2008, pp. 5–11; see section 1.1.2 for a discussion of the UN Protocol.

The needed amendments pertained, among others, to: the mandatory marking of firearms (Consideration 7), the period during which arms registers are to be kept on file (Consideration 8) and the need for penal sanctions (Consideration 10).

Within the context of this study, the following aspects are important: the definition of brokers or intermediaries (Consideration 9), the adaptation of the definitions and the concepts of "illicit manufacturing of" and "trade in" "firearms", "parts thereof", and "ammunition" (Consideration 6).

The Directive introduces the following definitions:

Firearm:

> "any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded for one of the reasons listed in Part III of Annex I.
> Firearms are classified in Part II of Annex I.
> For the purposes of this Directive, an object shall be considered as capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if:
> – it has the appearance of a firearm, and
> – as a result of its construction or the material from which it is made, it can be so converted."

Part:

> "any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm."

Essential component:

> "the breach-closing mechanism, the chamber and the barrel of a firearm which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted."

Ammunition:

> "the complete round or the components thereof, including cartridge cases, primer, propellant powder, bullets or projectiles that are used in a firearm, provided that those components are themselves subject to authorisation in the relevant Member State."

Broker:

> "any natural or legal person other than a dealer, whose trade or business consists wholly or partly in the buying, selling or arranging the transfer of weapons."

Dealer:

> "any natural or legal person whose trade or business consists wholly or partly in the manufacture, trade, exchange, hiring out, repair or conversion of firearms, parts and ammunition. "

Illicit trafficking:

> "the acquisition, sale, delivery, movement or transfer of firearms, their parts or ammunition from or across the territory of one Member State to that of another Member State if any one of the Member States concerned does not authorise it in accordance with the terms of this Directive or if the assembled firearms are not marked in accordance with Article 4(1)."

Article 3 of Directive 2008/51 adds in the original Directive an article 4ter which determines that the member states need to consider the introduction of a regulatory system on the activities of brokers. According to the Directive, such a system could encompass one or more measures, such as the obligatory registration of arms brokers operating on their territories, or compulsory licensing or authorisation for brokering activities.

Summary of Directive 91/477/EEC (as amended by Directive 2008/51)

Binding character

Legally binding; the member states are obliged to incorporate the prescriptions of the Directive in their national regulations.

Measures

For intra-Community 'brokering' in SALW, the Directive, in analogy with the UN Firearms Protocol, prescribes that consideration be given to the registration of 'brokers' that are active on the territory of the member state in question, as well as the introduction of a mandatory licence or authorisation for their activities.

Evaluation criteria

The Directive does not impose criteria.

Description of brokers and their activities

The Directive describes a 'broker' as a person who is not an arms dealer and whose business consists either wholly or partly in buying, selling, or organizing the (intra-Community) transfer of arms.

Scope of application - types of weapon

The Directive defines firearms, part, essential component, ammunition, dealer, broker, illicit manufacture, illicit trafficking etc. and largely adopts the wording of the UN Firearms Protocol.

2.3 EU and weapons of mass destruction

2.3.1 The EU Strategy against Proliferation of Weapons of Mass Destruction (2003)

In June 2003, the EU launched its first Action Plan against the proliferation of WMD, the so-called *Thessaloniki Declaration*;[163] It was adopted on 12 December 2003.[164] Its purpose is "*to prevent, deter, halt and, where possible, eliminate proliferation programmes of concern worldwide*" (introduction, §2.).

The EU Strategy defines proliferation as a global threat that requires a global response and approach and for which cross-border, preferably international, cooperation is required. The EU wants to make its contribution and advocates a full gamut of measures (Chapter III, §29) in order to confront the threats on several fronts: e.g., by the introduction of international commitments, by national and international controls, by sanctions, by political and economic leverage, and by prevention: "*The best solution to the problem of proliferation of WMD is that countries should no longer feel they need them*" (§20).

Aside from a general view of the problem and the manner in which it can be tackled most effectively and efficiently according to the EU, the Strategy includes a list of concrete measures on which the EU wants to focus in particular. It is meant to function as a kind of '*Living Action Plan*', whose application in practice will be very closely monitored (p. 9 *et seq.*).

The Action Plan sets out measures for: the reinforcement of international mechanisms (both commitments and compliance mechanisms, Action Plan A.1), the promotion of the role of the UN Security Council and the strengthening of availability of expertise (A.2),

163 Adopted at the European Council of Thessaloniki on 19 and 20 June 2003. See http://abolition2000europe.org/index.php?op=ViewArticle&articleId=121&blogId=1.

164 COUNCIL OF THE EUROPEAN UNION, Fight against the proliferation of weapons of mass destruction - EU Strategy against proliferation of Weapons of Mass Destruction, Brussels, 10 December 2003, Doc. no. 15708/03, 13 pp., http://register.consilium.europa.eu/pdf/and/03/st15/st15708.en03.pdf.

efforts to support verification mechanisms (A.3), improvement of policy and practices related to export controls (A.4), enhancement of the security of WMD-sensitive materials in order to limit the risks of *diversion* (A.5), reinforcement of the detection, control, and interception of illicit trafficking (A.6). This requires the adoption by the member states of a common policy on sanctions for illicit export, smuggling, and brokering in WMD (p. 12). This is the only passage in the EU WMD Strategy where brokering is mentioned.

Furthermore, the EU Strategy notes a number of concrete measures pertaining to the promotion of a stable regional and international context (B., pp. 12-13).

On 24 June, 2009, the European Commission tabled a proposal for a new Action Plan to ensure chemical, biological, radiological, and nuclear security.[165]

As noted in section 2.2.2 of the present study, it is especially the Decisions aiming at the implementation of an EU Strategy that can impose concrete measures and obligations on the member states to adapt their national legislations or practices. An EU Strategy is important especially at the political level but does not per se necessarily result in immediate juridical implications.

2.3.2 Initiatives following the EU Strategy against Proliferation of Weapons of Mass Destruction

In implementing the WMD Strategy, the EU has embarked on a series of decisions, none of which has created any new legal commitments for the member states:[166] for example, Joint Action 2008/368/CFSP: Joint Action 2008/368/CFSP of the Council of 14 May 2008 in support of the implementation of UN Security Council Resolution 1540 (2004), and in the framework of the implementation of the WMD Strategy.[167]

165 See the website of Commissioner Barriot: 'The Commission proposes a new policy to enhance chemical, biological, radiological and nuclear security in the EU, Brussels, 24 June 2009, Reference no document: IP/09/992, http://ec.europa.eu/commission_barroso/barrot/news/default_and.htm

166 See http://eur-lex.europa.eu/and/index.htm, search item '*massavernietigingswapens*', for an overview on all of the current initiatives on WMD.

167 *OJ L* 127 of 15 May 2008, pp. 78–83. Already in 2006, a Joint Action was adopted in support of Resolution 1540: Joint Action 2006/419/CFSP of the Council in support of the implementation of UN Security Council Resolution 1540 (2004) and within the context of the implementation of the EU Strategy against Proliferation of WMD, *OJ L* 165 of 17 June 2006, p. 30.

As a contribution to the implementation of UN Security Council Resolution 1540, and in conformity with the EU Strategy against Proliferation of WMD, the EU has decided on the basis of this Joint Action to organize a series of thematic workshops (art. 1, 1 and 2).[168]

2.3.3 The EC Dual-use Regulations

Dual-use items are civil products that lend themselves to use in applications for military purposes and, in some instances, may also be used in the manufacture of, or as means of delivery for, WMD.[169]

Since 1994, the EC has issued Community regulations on dual-use technology and equipment, commonly referred to as dual-use items.[170] The main objective of the control of the export of such items is to prevent the proliferation of WMD, thereby also meeting the objectives of Resolution 1540.[171]

2.3.3.1 EC Dual-use Regulation 1334/2000

On 22 June 2000, the first Community Regulation of 1994 was replaced by Regulation 1344/2000, aiming at further harmonisation of export licences for dual-use items within the European Community.[172]

Control of the export of dual-use items falls within the purview of the European Community (1st pillar). A Regulation was therefore chosen because of its direct applicability in the national law of the individual member states, requiring no further transposition (unlike Directives).[173]

168 See also: 'EU support to United Nations Security Council Resolution 1540' in COUNCIL OF THE EUROPEAN UNION, *The European Union Strategy against the Proliferation of Weapons of Mass Destruction*, 2008, pp. 13-16, http://www.consilium.europa.eu/uedocs/cmsUpload/AND%20prolif_int%202008.pdf.

169 See *inter alia* the explanation in COMMISSION OF THE EUROPEAN COMMUNITIES, Communication of the Commission and Proposal for a Council Regulation of 18 December 2006 setting up a Community regime for the control of exports of dual-use items and technology, COM(2006) 829 def., p. 2 (further referred to as COM(2006) 829 def.)

170 EC Regulation No 3381/94, *OJ L* 367 of 31 December 1994, p. 1 *et seq.*, amended in 1995; Resolution 94/942/CFSP, *OJ L* 367 of 31 December 1994, p. 8 *et seq.*, last amended in 2000.

171 COMMISSION OF THE EUROPEAN COMMUNITIES, Proposal for a Council Regulation amending and updating Regulation (EC) No. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, Brussels, 11 September 2008, COM/2008/0541 def., p. 3.

172 EC Regulation No 1334/2000 of the Council of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, *OJ L* 159 of 30 June 2000, p. 1 *et seq.*

173 See: COM(2006) 829 def., *op. cit.*, pp. 10-11.

Regulation, article 249 Consolidated versions EU and EC Treaty[174]

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

2.3.3.2 EC Dual-use Regulation 428/2009

After Regulation 1334/2000 had been amended several times, it was, for reasons of clarity,[175] replaced integrally by Regulation 428/2009 of the Council of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.[176] The Regulation has been in force since 27 August 2009 (art. 27-28).

The recent amendments pertain primarily to the harmonisation of the Regulation with a number of international commitments and obligations,[177] including updating of the list of goods to which the Regulation is applicable[178] and the refinement of the current prescriptions to enhance the effectiveness of the control regime.[179] In the discussion that follows, all new provisions are identified by (N).

The Dual-use Regulation introduces for the EU member states a common (a Community) regulation pertaining to the control of the extra-Community trade transactions in dual-use items. These include: the export, transfer (N), brokering (N), and transit (N) of dual-use items (art. 1).[180]

The creation of a control regime is inspired by concerns about international security; the need for a common regulation follows from the free movement of goods and the Community's goal to assure a uniform and level playing field with identical rules for all the member states.[181] In order to provide such assurance "*harmonised policies are a*

174 Consolidated versions of the Treaty on the European Union and the Treaty establishing the European Community - Title I – Provisions governing the institutions – Chapter 2 – Provisions common to various institutions , OJ C 321 E of 29 December 2006, p. 153.

175 *See also: COM(2006) 829 def., op. cit., p. 8 et seq.*

176 *OJ L* 134 of 29 May 2009.

177 EC Regulation No 428/2009, introductory Considerations 3 and 10.

178 EC Regulation No 428/2009, introductory Consideration 6.

179 COM(2006) 829 def., *op. cit.*, p. 2 *et seq.*

180 The provisions of the Regulation are specific prescriptions that are valid over and above the obligations imposed by the community customs regulations: see introductory Consideration 11.

181 EC Regulation No 428/2009, introductory Consideration 18.

prerequisite"[182]: this includes a common list of dual-use items,[183] converging control conditions, harmonized user conditions for licences, precise definitions, harmonisation of reciprocal information exchange, etc.[184]

An important factor for the member states is that such a regulation makes it possible to avoid other member states' using less stringent controls undercut their policies. This refers to the so-called *no-undercut* principle, which was also an important motivator for the Code of Conduct on Arms Exports (see *section* 2.1.2).

The Regulation does not impose upon member states their own Community control system for the export of dual-use items from the EC, but rather obliges them to demand a national export licence for all goods listed in Annex I (art. 3, 1). It is up to the exporter to judge whether an item falls within the purview of Annex I.

Article 2, 1 of Regulation 428/2009 describes 'dual-use items' as follows:

> *"items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture or nuclear weapons or other nuclear explosive devices"*

The *dual-use items* that fall within the scope of application of this Regulation are entered in the list in Annex I. All these products require the issuance of a national extra-Community export licence (cf. art. 3). The list is based on the lists of the *Wassenaar Arrangement*, the *Missile Technology Control Regime*, the *Nuclear Suppliers Group*, the *Australia Group*, and the *Chemical Weapons Convention*. Any updating of these lists in turn requires that the *dual-use items* list in Annex I (art. 15, 1) is updated.

With the exception of the products listed in Annex II, Part 2, a Community licence shall be issued for all other products on the list in Annex I for extra-Community export to Australia, Canada, Japan, New Zealand, Norway, Switzerland, and the United States. For the products on the list in Annex II, Part 2, a national licence is required.

Export as understood in the sense of the Regulation refers to extra-Community export. 'Export' among member states is known as 'intra-Community transfer' and is required only for the products on the list in Annex IV (art. 22 *et seq.*). The list in Annex IV is a part of the list in Annex I and includes the most 'delicate' goods from the point of view of the risk of WMD proliferation.

182 EC Regulation No 428/2009, introductory Consideration 4.

183 EC Regulation No 428/2009, resp. introductory Considerations 7.

184 EC Regulation No 428/2009, introductory Consideration 18.

Article 4 provides for a so-called *catch-all* clause that makes it possible to demand a licence even for goods that are not on the list in Annex I: when these goods are destined for use in WMD (art. 4, 1.); for military products on national lists, intended for countries under embargo (art. 4, 2.), exported without due regard for the national licensing procedure (art. 4, 3.); or when there exists a risk that they *are or may be intended* for WMD (art. 4, 5, the so-called *suspicion clause*[185]).

Article 5 (N) applies to brokering in *dual-use items* and states the following:

- A licence is required for brokering services with reference to the goods on the list in Annex I if the broker has been informed by the competent authorities where he is resident or where he is based that the goods may be destined for use in WMD (cf. art. 4, 1). If the broker is aware of this himself, it shall be incumbent on him to notify the competent authorities accordingly so as to enable them to decide whether authorisation is required.
- The member states themselves decide whether to extend this regulation to goods that are not on the list in Annex I, in the event that the goods may be destined for WMD (cf. art. 4, 1) or for military end-use or military purposes (cf. art. 4, 2).
- Member states may also decide to impose a licensing obligation when there exists a suspicion that the items may be destined for WMD (cf. the *suspicion clause* of art. 4, 5)

Brokering services and brokers are, according to articles 2, 5. and 6.:

Brokering services:
"the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country; or

- the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

For the purposes of this Regulation, the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion".

Broker:
"any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community into the territory of a third country"

Hence, the intention was not to impose a systematic licensing requirement for brokering. The Commission emphasized in its explanatory notes to the proposal to amend the *Dual-use* Regulation that control of brokering services is extremely difficult since the transacted goods, for which brokers are rendering services to facilitate such transactions, are

185 See also: M. QUENTIN, *op. cit.*, p. 26.

located in countries outside the EU and therefore fall under the legislative powers of those third countries.

Two situations have been retained that will allow controls: when a broker is cognisant of the illicit end-use of the goods for WMD in third countries, and when the member state where the broker is based has informed the latter of such risks. In both these instances, it shall be incumbent on the broker to make a licence application before the commencement of the transaction.[186]

These provisions are valid only for brokering services with reference to third countries from a Community point of view: in other words, to the EC countries and not to third country member states; and when the broker is an EC national or based in EC territory. The Regulation does not prescribe anything about intra-Community brokering.

In contrast to the CP (art. 2, 3, 2nd section) on brokering in military material, the Dual-use Regulation does not explicitly provide for expanding the requirement concerning extra-Community brokering to include intra-Community brokering among EU member states. Dual-use items that are being transacted by an "EC broker" from the territory of another EC nation to an EC third country hence do not fall within the purview of these provisions. This, in fact, from a Community perspective concerns export to which the prescriptions of art. 9 are applicable.[187]

Article 6 regulates transit and provides, as in the case of brokering, for the *possibility* to impose a licensing requirement (not for an *automatic* licensing requirement, as is the case for export). The Regulation does not apply to services or technology transferred by the physical movement of persons from within to outside the EC (art. 7).

Article 8 provides for a second *catch-all* clause that gives the member states the possibility to impose, for reasons of public security or human rights considerations, a prohibition on export, or to impose an authorisation requirement for items that are not included on the list in Annex I.

Article 9 imposes a Community General Export Authorisation for certain exports to the countries on the lists in Annex II. For all other items in Annex I, the authorisations (individual, global, or general) are issued by the competent national authorities. National general export authorisations need to be defined in the national legislation or in practice (art. 9, 4).

Article 10 pertains to the authorisations for brokering services (N, art. 10, 1):
- such authorisations shall be granted by the competent authorities of the member state where the broker is resident or established;

186 COM(2006) 829 def., *op. cit.*, p. 6.

187 See also M. QUENTIN, *op. cit.*, p. 32.

- they shall be granted for a quantity of specific items moving between two or more third countries;
- the location of the items in the originating third country, the end-user and the exact location where the latter resides must be clearly identified;
- the authorisations shall be valid throughout the Community.

Brokers shall provide the competent authorities with all relevant information required for assessing the validity of the request for authorisation (N, art. 10, 2):
- details about the location of the dual-use items in the originating third country;
- a clear description of the items and the quantity involved;
- the identity of third parties involved in the transaction;
- the third country of destination;
- the end-user in that country and its exact location.

Requests for authorisations shall be processed within the term as determined by national law or practice (N, art. 10, 3.).

The member states shall supply the Commission with a list of the authorities empowered to grant authorisations for the provision of brokering services. The Commission shall publish the list in the C series of the *Official Journal of the European Union* (N, art. 10, 4).

In deciding whether to grant authorisation, both for export and for brokering services (N), the member states shall take into account all relevant considerations, including (art. 12):

> "a) the obligations and commitments they have each accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties;
>
> b) their obligations under sanctions imposed by a common position or a joint action adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;
>
> c) considerations of national foreign and security policy, including those covered by Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment;
>
> d) considerations about intended end use and the risk of diversion."

The same evaluation criteria therefore apply to export authorisations and to authorisations for brokering services. The list comprises a number of objective conditions (which may, or may not, have been satisfied, as in a) and a number of subjective criteria. The list is non-limitative.[188]

188 See also M. QUENTIN, *op. cit.*, p. 67.

Article 13, 1, 2 and 4 prescribes that member states may refuse to grant authorisation, both for export and for brokering services (N), and may annul, suspend, modify or revoke such authorisation (N). Refusals shall be re-examined after a period of 3 years, following which the decision will be confirmed or modified. In every case, the other member states and the Commission shall be notified accordingly.

This information exchange is important for the so-called *no-undercut* principle, as described in article 13, 5. It obliges the member states, prior to their granting authorisation, to take due account of previous denials by other member states for an 'essentially identical transaction'. In case there are such denials, there shall first be consultation among the competent authority that is considering the application and the competent authority(ies) of the member state(s) that previously refused to grant authorisation. In the event the authorisation is nonetheless granted, the other member states and the Commission shall be so informed, and all relevant information shall be provided to explain and motivate the decision. This provision applies to export, transit (N), and brokering (N).

The purpose of this provision is to avoid, as far as possible, a situation in which a member state grants authorisation for activities that were previously (recently) denied by any other member state(s). Since a number of criteria imply a subjective evaluation, such a risk is not unrealistic. This provision is intended to prevent countries from using a flexible interpretation that will undermine stricter policies in force in other states.

For that reason, article 19 furthermore provides for cooperation and information exchange among the member states, in collaboration with the Commission, in order that disparities in the application of export controls will not lead to a deflection of trade "*which could create difficulties for one or more member states*" (art. 19, 1). This provision deals only with export, not with brokering services. Also, direct cooperation and information exchange among the competent authorities of the member states for the purpose of improving Community export controls applies only to exports and data pertaining to exporters (art. 19, 2).

The Regulation does, however, state that the provision of guidance with reference to exporters and to brokers is the responsibility of the member states in which those parties are resident or established (N, art. 19, 5).

Authorisations for brokering services must be submitted in writing or electronically (N, just as is the case for individual and global export authorisations, art. 14). Annex III contains model samples of national authorisations. Annex III contains the model sample form for brokering services. The national forms need, at the least, mention all elements – and in the same sequence – as those prescribed by the model sample.

The Regulation likewise provides for a number of control measures. Exporters of (art. 20, 1), and brokers in (N) dual-use items must, in accordance with the national law or practice in force in the respective member states, keep detailed registers or records of their activi-

ties that are subject to authorisation. Brokers must, on request, be able to provide a description of the dual-use items, of the period during which such products were the subject of their services, and of the destinations and the countries where those services were rendered (N, art. 20, 2).

The registers or records must be kept on file for at least 3 years (from the end of the calendar year in which the export or the brokering services took place). These papers need to be submitted, on request, to the competent authority or the member state where the exporter is established or where the broker is resident or established (art. 20, 3, N for brokering).

Finally, the member states must take the necessary measures to guarantee that the competent authorities can establish whether the export control measures are being properly applied (art. 21) and ensure correct compliance by their sanctioning of violations of the Regulation and its implementing provisions. These sanctions need to be effective, proportionate and dissuasive (art. 24).

The original proposal went a lot further on the matter of sanctions than the text that was adopted and specifically provided for the explicit obligation to impose criminal sanctions in certain instances. A specific situation was targeted: in the case of the deliberate export of items destined for WMD or their transfer without authorisation or with falsification of information in order to be granted authorisation that otherwise would be denied.[189] In the event, this provision was not included in the final version of the Regulation.

Summary of the EC Dual-use Regulation 428/2009

Binding character

The Regulation is directly applicable in the EU member states.

Measures and evaluation criteria

Authorisation is required for brokering services if the broker has been informed that the items may be intended for weapons of mass destruction. A *catch-all* provision and a *suspicion clause* allow for possible expansions upon this by the member states.
The Regulation describes the kind of information that must be submitted with the application to the competent authority. The applications shall be assessed in the light of international commitments with respect to non-proliferation; of EU, OSCE, and UN sanctions; of CP 2008/944, and considerations pertaining to end-use and the risk of diversion.
The *no undercut* principle is applicable to brokering.
Brokers themselves need to keep registers or records for a three-year period.
The member states shall provide guidance to the brokers and provide for (penal) sanctions.

189 See: COM(2006) 829 def., *op. cit.*, p. 37.

Description of brokers and their activities
The Regulation gives a definition for the EC broker and EC brokering services, and for brokering among EC third countries.

Scope of application
The Regulation applies to the products listed in Annex I.

2.3.3.3 Export of dual-use items to Iran

Concerning the export of dual-use items to Iran, there is also a special Regulation 423/2007,[190] which imposes an export prohibition on the goods listed in Annex I and a licensing requirement for the goods in Annex II. Regulation 423/2007 was aimed at brokering services already prior to the new dual-use Regulation of 2009, which prohibits brokering for the goods listed in Annex I and II.

Annex I includes all equipment and technology on the lists of the *Nuclear Suppliers Group and the Missile Technology Control Regime* (art. 2, a). Annex II lists other items that may serve in the production of nuclear weapons (art. 3, 2)

The Regulation defines brokering in article 1, f as follows:

"'brokering services' means activities of persons, entities and partnerships acting as intermediaries by buying, selling or arranging the transfer of goods and technology, or negotiating or arranging transactions that involve the transfer of goods or technology"

This Regulation takes precedence over the general dual-use Regulation insofar as it relates to the same goods (introductory Consideration 4).

190 Regulation No 423/2007 of the Council of 19 April 2007 concerning restrictive measures against Iran, *OJ L* 103 of 20 April 2007.

2.4 EU instruments with a mixed scope for application

2.4.1 EU and the Arms Trade Treaty (ATT)

The EU is also actively involved in the preparation of a general arms trade treaty that is meant to become a binding instrument under international law for transfers (including those related to brokering) of all types of conventional arms (see also section 1.1.5).

From the very start, the EU has welcomed the UN initiative to start negotiations and work on a draft treaty. UN Resolution 61/89 was adopted on 6 December 2006; on 11 December 2006, the EU Council "*welcome[d] the formal start of the process towards the elaboration of a legally binding international Arms Trade Treaty*" and confirmed its intention to play an active role in the process.[191]

In its conclusions of 10 December 2007, the Council held that an all-encompassing, legally binding instrument, in conformity with the existing international legal responsibilities of states, and wherein common international standards are being established for the import, export, and transfer of conventional arms, will contribute significantly to combating the undesirable and irresponsible proliferation of conventional arms.

On 19 January 2009, the Council adopted Decision 2009/42/CFSP promoting the process leading to a negotiated Arms Trade Treaty.[192] The purpose of this Decision is to raise awareness among national and regional actors, the member states of the United Nations, civil society, and industry of the current negotiations on a treaty and to encourage debate on the topic. To that end, there are plans to organise a number of regional seminars.

191 The conclusions of the Council with reference to the trade treaty are available at *http://www.eu-un.europa.eu/articles/and/article_6580_and.htm.*

192 *OJ L* 17 of 22 January 2009.

2.4.2 EU embargoes

The EU also imposes arms embargoes. It does so most often to implement a UN Security Council, but the EU can also decide to impose an embargo independently, as it did on Zimbabwe.

As a rule, the Council first adopts a Common Position, followed by a Regulation. Most of the sanctions are directed against states, but sometimes individuals or organisations are targeted, for instance, individuals who are sought as perpetrators of war crimes or terrorist organisations.

2.5 Other EU instruments

For the sake of completeness, two other EU instruments deserve mention: Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment,[193] and Joint Action 2000/0401/CFSP concerning the control of technical assistance related to certain military end uses.[194] Neither contains prescriptions bearing on brokering but they do make reference to lending technical assistance. A number of sources[195] consider technical assistance as an optional activity of brokering that ought to be regulated. e definitions of what constitutes technical assistance in the Regulation and the Joint Action[196] do, however, specify that the term pertains to activities that are complementary to arms trade rather than to brokering. Since brokers act especially as intermediaries, as negotiators, or as facilitators with respect to transactions connected with arms trade, and generally do not personally have or acquire physical possession of the weapons themselves, activities such as repairs, maintenance, training, proffering technical advice, etc. cannot readily be counted as one of the actual *business* activities *of brokers*.

193 Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *OJ L* 200 of 30 July 2005.

194 Joint Action 2000/0401/CFSP of the Council of 22 June 2000 concerning the control of technical assistance related to certain military end uses, *OJ L* 159 of 30 June 2000.

195 OSCE Handbook (Guide on *brokering*), *op. cit.*, pp. 4 and 9; UN Report A/62/163, *op. cit.*, pp. 8-9.

196 Resp. in art. 2, f and art. 1.

Moreover, it appears from Regulation 423/2007, which regulates exports to Iran, that Europe considers technical assistance and brokering as two distinctive activities. In the list of definitions in article 1, both are, in fact, described as separate items.

Since most of the documents do not consider technical services as a brokering activity, neither of these instruments is discussed here.

3

Summary of the international instruments related to brokering in arms and dual-use items

To conclude Part I, we provide a summary overview of all instruments with reference to the control of arms brokering at the international, regional, and European levels.

A list of all the instruments and an overview of all aspects of these instruments are discussed in this chapter.

Finally, a number of general reflections are offered.
Annex I contains an overview of all definitions.

3.1 Overview of all documents

Chronological overview by source	
United Nations	
UN	Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition; Protocol to the Convention against trans¬national organized crime (May 2001)
UN	Programme of action on small arms and light weapons (July 2001)
UN	Security Council resolution 1540 dealing with weapons of mass destruction and non-state actors (April 2004)
Wassenaar Arrangement	
WA	Best practices guidelines for SALW export (December 2002)
WA	Statement of understanding on arms brokerage (December 2002)
WA	Elements for export controls on man-portable air defence systems (December 2003)
WA	Elements for effective legislation on arms brokering (December 2003)
Organisation for Security and Cooperation in Europe	
OSCE	Document on small arms and light weapons (November 2000)
OSCE	Principles on the control of brokering in SALW (November 2004)
European Union	
EU	Joint Action 2002/589/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons (July 2002)
EU	Common Position 2003/468/CFSP on the control of arms brokering (June 2003)
EU	Directive 2008/51/EC amending Directive 91/477/EEC on control of the acquisition and possession of weapons (May 2008)

European Union	
EU	Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (December 2008)
EU	Regulation N° 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (May 2009)

3.2 Overview of the types of provision, by document

Source	Legal force	Measures	Assessment criteria	Definition brokering	Definition brokers	Types of weapon
UN Firearms Protocol	Legally binding	Yes	No	No	No	Firearms (definition)
UN Programme of Action	Politically binding	Yes	No	No	No	SALW[197] (no definition)
UN Resolution 1540	Legally binding	Yes	Yes	No	No	NBC[198] and dual-use for WMD[199] (no definition)
WA Directives SALW export	Politically binding	Yes	No	No	No	SALW (no definition)
WA Statement on brokering	Politically binding	Yes	No	No	No	Conventional arms, Control List
WA Elements MANPADS	Politically binding	Yes	No	No	No	MANPADS[200], Control List
WA Elements brokering	Politically binding	Yes	Yes	Yes	No	Conventional arms, Control List
OSCE Document SALW (2000)	Politically binding	Yes	No	No	No	SALW (instrumental definition)
OSCE Principles on brokering	Politically binding	Yes	Yes	Yes	Yes	SALW (instrumental definition)

197 Small Arms and Light Weapons.

198 Nuclear, Biological, Chemical.

199 Weapons of mass destruction.

200 Man-Portable Air Defence Systems.

Source	Legal force	Measures	Assessment criteria	Definition brokering	Definition brokers	Types of weapon
EU CP 2003 brokering	Soft law	Yes	Yes	Yes	No	Conventional arms – EU list
EU JA 2002 SALW	Politically binding	Yes	No	No	No	SALW (instrumental definition)
EU Directive 91/477 (2008/51)	Legally binding	Yes	No	No	Yes	SALW cf. definitions UN Protocol
EU CP 2008 'Code of Conduct'	Soft law	Yes	Yes	Implicit	No	Conventional arms – EU list
EU Dual-use Regulation 2009	Direct effect	Yes	Yes	Yes	Yes	Dual-use items in Annex I

A critical look at the aspects that have been regulated shows that there is international consensus about the need for measures pertaining to brokering, but it also indicates:

- that measures are often proposed without a clear-cut description of the activities and/or individuals and/or types of arms to which they apply;
- that few instruments advance criteria by which to judge brokering activities;
- that, as for the weapon types, the UN is targeting especially SALW, with Firearms as a specific sub-category[201] and products for the production of WMD (including *dual-use items*), the WA is targeting SALW and other conventional arms, and the OSCE is targeting SALW. The EU works with two clearly distinct lists: one for military goods, of which SALW form a sub-category, and one for *dual-use items* that can be used for the production of WMD.

These observations indicate that at the international level there is no clear consensus on a profile for brokers or brokering activities, or the criteria by which brokering ought to be judged within national legislations, or about the types of goods that fall under the types of controls applicable to them.

201 The UN considers 'portability' as the main difference between firearms and other types of weapon that belong to the category of SALW. Fireams are, according to the UN Interpretative Notes, weapons that "*could be moved or carried by one person without mechanical or other assistance*", see art. 3 of the Interpretative notes for the official records (travaux préparatoires) of the negotiation of the 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, A/55/383/Add.3, 21 March 2001.

PART II

Good practices and international recommendations

Aside from the legally or politically binding documents issued at the international level, international good practices and recommendations devote extra attention to brokering. They present information on good practices in other countries and other types of documents about the control of brokering that do not possess any imperative force. Within the context of the present study, additional information is sought about the legal framework on the control (section 1) and a mechanism to identify and thereby 'catch' brokers (section 2).

1

Good practices and non-imperative recommendations with respect to the control of brokering

Part I discussed a number of 'official' documents, i.e. legally or politically binding documents that were adopted by a legislative or non-legislative body of a European, regional, or international office or organisation. ch documents contain compromise texts that reflect a consensus among the body's members. The greater the number of members, the greater the diversity of the respective interests and the greater the chance of vagueness in the compromise about what kind of consensus is ultimately to be reached.

This explains why, in general, there are fewer prescriptions, why they possess a less imperative and enforceable character, why they are less far-reaching, and why their material scope of application is more limited the more international the character of the document.

With a view to effective control of brokering, it is useful to discuss a number of good practices. They appear in two types of document: in the description of national systems that in the literature are presented as examples of a conclusive control of brokering; and in recommendations resulting from research reports on the problem of brokering (whether or not themselves based on a prior comparative analysis of national systems).

Each type of document reflects, respectively, what is feasible or workable in practice or what *ideally* ought to be present to tackle the problem of illicit brokering. Because of their non-imperative character, such documents go beyond what 'supra'-national consensus documents prescribe.

In the absence of handbooks, recommendations and discussions of good practices with respect to the control of brokering in conventional arms and dual-use items, the discussion below is limited to documents that pertain to SALW.[202] Given that the problem of brokering in SALW is largely parallel to that of other arms,[203] including WMD (dual-use) and, primarily, the material scope of application differs (that is, the list of goods to which the

202 As mentioned above, international attention is focused primarily on SALW (not on the broader category of conventional arms); for WMD there is on the international level only UN Resolution 1540, where brokering is given only limited attention. Furthermore, the OSCE Handbook (see the discussion above) holds that, internationally, there is no consensus on subjecting brokering in dual-use items (and civil goods) to control (p. 11). EU positions on brokering in conventional arms and dual-use items can be found in preliminary documents on the EU regulations. Only exceptionally is a Position not included in the final, adopted text (such as the criminal sanctions with the Dual-use Regulation, see section 2.3) or where more aspects have been entered than in the official documents. An example of this latter point is the User's Guide, which conains an explanation of the implementation of the EU Code of Conduct, currently CP 2008/944. In it, primarily directives are given to the (officials of the) Member States about the ways in which the Code of Conduct can be complied with at the national level: the further clarifications concern the 'how' aspects with the prescribed implementation provisions, without optional additions of new measures. In particular, much attention is devoted to implementation of the 8 assessment criteria on legal trade (pp. 24-100). See COUNCIL OF THE EUROPEAN UNION, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, Brussels, 29 April 2009, 113 pp., http://register.consilium.europa.eu/pdf/and/09/st09/st09241.en09.pdf.

203 Parallel aspects are, among others, the types of activities conducted by brokers, the need for a legal framework, including penal sanctions, to prevent that brokers will not with impunity carry out illicit practices that have become impossible for exporters since the latter are made subject to regulation and control, the typical cross-border character of brokering that complicates control under national law (which is demarcated by territorial jurisdiction, etc.)

measures are applicable), these recommendations may be seen as a generic frame of reference for the control of brokering.[204]

First, the most important observations presented in the 2008 OSCE report on the exchange of information on brokering are summarized (1.1). This report states what systems and measures are in force and thus offers a kind of state of the art of what currently is deemed politically feasible at the national level (in the OSCE participating countries).

Next are two documents that contain recommendations based on national best practices, with added measures that, in the view of experts, *ideally* ought to be part of a control system on brokering: the OSCE SALW Handbook of 2002 (1.2) and the UN SALW Report of 2007 (1.3).

Finally, there follows an explanation of a model regulation that has been worked out by the *Organisation of American States* (1.4).

All recommendations or guidelines that go beyond prescriptions for imperative instruments are marked in the text with an (X), a reference to the 'extra' character of the measure.

All these documents emphasize the importance of legislation and of (criminal) sanctions in cases of non-compliance. The success of these measures, however, largely depends on the possibility, in practice, to 'catch' brokers proactively, on the ability to judge their activities *a priori* for their compliance with the imposed measures. Also for this aspect, the discussion examines whether there are good practices or recommendations (section 2).

204 Some directives do, in fact, advise against introducing separate systems for specific categories of goods and, recommend to rather work with a uniform control system that, *ideally*, will be valid for all categories (of arms); see the discussion of the OSCE Handbook.

1.1 OSCE Exchange of Information on Brokering Report

The 56 participating states of the OSCE regularly exchange information among themselves.[205] For data on the export, import, and seized and destroyed SALW, this is reported annually. So-called "*One-off Information Exchanges*" refer to questionnaires about existing national regimes and regulations concerning a specific theme.[206] For instance, on 17 October 2007, the OSCE states were requested by Decision 11/07[207] of the Forum for Security Co-operation to exchange information about their then existing regulations on the brokering in SALW.

Forty-six of the 56 OSCE states responded to the questionnaire. The results were summarized by the *Conflict Prevention Centre* in a report published on 23 May 2008[208] which does not contain detailed information or references to individual countries' responses, or present a comparative analysis. Rather, it presents a statistical overview per type of measure. Both the questionnaire and the report follow the structure of the OSCE Principles about Brokering in SALW (FSC *Decision* n° 8/04, see *section* 1.3.3 in Part I).

The following sections deal with the most important and striking observations in the report, in illustration of the current state of the art at the national level with respect to the control of brokering in SALW. Especially notable is the fact that, in 2008, 4 years after publication of the OSCE Principles, there were still major differences between the OSCE states.

General principles

Taking all measures necessary to control brokering activities within one's own territory; working out a clear legal framework for licit brokering activities[209]:

- All 46 responding states are in some way organizing control of brokering activities in SALW ;

205 OSCE CONFLICT PREVENTION CENTRE, *OSCE Report to the Third Biennial Meeting of States, On the Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, Vienna, 25 June 2008, 41 pp. (eferred to as OSCE CPC, *OSCE Report*).

206 For an overview of both types of exchanges, see OSCE CPC, OSCE Report, op. cit., pp. 3-5.

207 FSC Decision N° 11/07 of 17 October 2007, OSCE Information Exchange with regard to OSCE Principles on the Control of Brokering in Small Arms and Light Weapons, 2 pp.

208 OSCE CONFLICT PREVENTION CENTRE, *Updated Summary Report on replies provided by participating States on the one-off information exchange with regard to OSCE Principles on the Control of Brokering in Small Arms and Light Weapons*, Vienna, 23 May 2008, published as Annex 1 of the *OSCE Report to the Third Biennial Meeting of States, op. cit.*, pp. 18-37 (referred to as OSCE CPC, *Updated Summary Report*).

209 OSCE CPC, Updated Summary Report, op. cit., pp. 22-23.

- 34 countries report that brokering is part of a broader legal framework, for instance, regarding export[210];
- Most of the regulations are from the period 1970-80, with recent *updates*.

Extraterritorial control of brokering by brokers of the nationality of, or who are based on, the territory of the regulating state with jurisdiction[211]:
- 13 countries exercise extraterritorial control of their own nationals;
- 8 of these are expanding this control to foreign nationals who reside on their territory.

National definitions[212]:
- Only 26 countries work with a definition of brokers (8), brokering activities (11), or both (7);
- The definitions differ from one another in terms of the activities (often more liberal than the OSCE *Brokering Decision*), the material application scope (often more liberal than SALW), and the territorial scope of application (some EU member states are defining EU brokers).

Licences and registers

The licensing procedure[213]: demand for a written licence or authorisation and an assessment procedure for the applications:
- 20 of the 46 respondent countries issue a brokering licence in keeping with the same procedure and identical criteria as are used for export;
- In 10 countries, compliance with arms embargoes is one of the conditions;
- In 10 countries, considerations for international security are adopted as a condition, via control of the end-use;
- 9 countries demand an end-use certificate as a precondition.

Competent authorities:
- 10 countries report the requirement or the possibility to form a joint committee composed of representatives of several administrations[214] involved in and for the assessment of applications;
- The information required at the time of application differs sharply from country to country.

210 The CPC draws nuances by noting that two states refer to their legislation on export as a legal framework for brokering but neglect to clarify which provisions are specifically related to brokering. Another country specifies that it has no specific legislation pertaining to brokering but that certain aspects are included in other legislation. OSCE CPC, *Updated Summary Report*, *op. cit.*, p. 22.

211 OSCE CPC, *Updated Summary Report*, *op. cit.*, p. 23.

212 OSCE CPC, Updated Summary Report, op. cit., pp. 24-26.

213 OSCE CPC, *Updated Summary Report*, *op. cit.*, p. 27.

214 Examples mentioned are Foreign Affairs, Internal Affairs, Defence and Economy, OSCE CPC, *Updated Summary Report*, *op. cit.*, p. 27.

Type of licence:
- In 15 countries, brokers require a licence for each individual transaction.

Two or *Three-tier approach*[215]:
- Only 2 countries provide for a step-wise procedure: (1) broker's licence, (2) licence for activities (open or specific);
- The possible third step is an *ex post* control.

Keeping registers for all licences for a 10-year period:
- 27 states keep registers;
- 18 states keep records for 10 years, 2 for 15 years, 1 state for 30 years, and 5 states for an indefinite term.

Registration and authorisation

Broker's licence, complementary to the licence for activities (optional):
- 19 states require brokers to present also a written permission.

Registration of brokers (optional):
- 11 states keep registers of brokers;
- 5 states, aside from the general information (name, types of transactions, types of goods, etc.), also keep a "*track record*" about the broker's involvement in illicit practices.

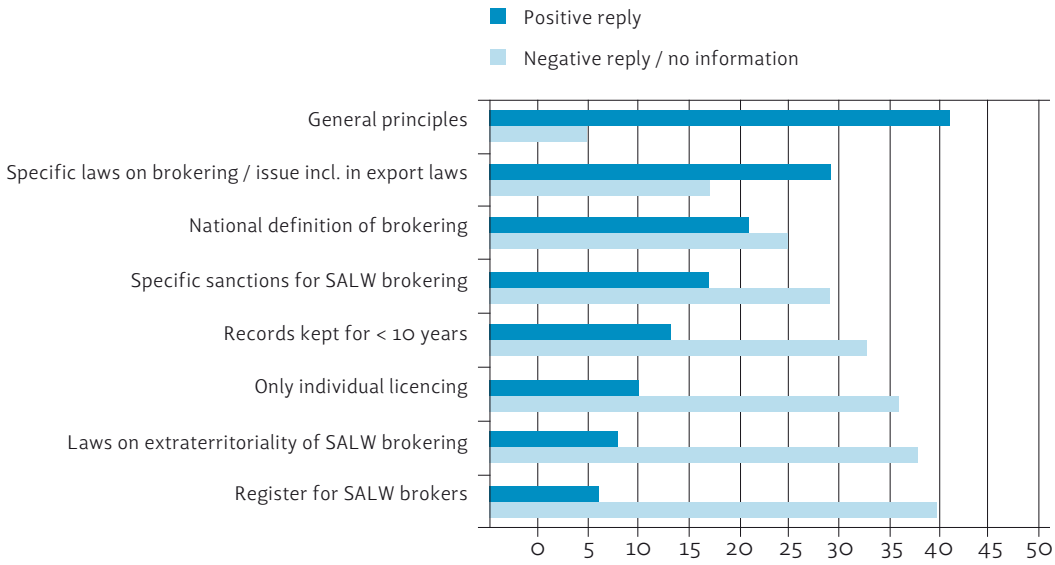
Compliance and enforceability

Providing for adapted penalties, including penal sanctions:
- 22 countries report penal sanctions (20), administrative, or other sanctions specifically with reference to illicit brokering activities
- The minimum and maximum penalties (€170 to €5 million) differ significantly from country to country.

The following bar graph summarises the degree in which the most important measures are present in national regulations.[216] '*Positive reply*' means that a state satisfies the type of measure. The frequency of '*Negative reply*' indicates the number of states that replied that they did not satisfy the condition or the number of states that have failed to provide any information on the point.

215 This refers to a control system that consists of several stages to pass through in chronological succession: (1) registration or permission of brokers, (2) licence or authorisation of brokering activities, (3) possibly the control of the final destination, e.a.

216 OSCE CPC, *Updated Summary Report*, *op. cit.*, p. 34.



The graph shows that most of the states have worked out a legal regulation for the control of brokering, but also that the presence of such legislation or of a legal framework gives little information about the concrete content and scope of the control system. This is also the conclusion arrived at by the OSCE's *Conflict Prevention Centre* (CPC).[217] Especially the absence of a definition of brokering or the lack of sanctions in half the number of the states undermines the applicability and weakens the effectiveness of all the other legal provisions. It further appears that the maintaining of registers of brokers figures as the lowest priority at the national level.

What is not shown in the summary overview, but is emphasized by the CPC in its conclusions (and is at least equally important to the evaluation of the effectiveness of the national regimes), are the major differences among the states themselves. This is valid for all aspects that should be regulated: the definitions of brokers and brokering activities, the licensing conditions and procedures, the registration of conditions and the keeping of registers, the gravity of the sanctions, etc. Especially this observation is important for the OSCE itself, since it points out the need to strengthen regional cooperation. As stated in the introduction in the context of the problem of brokering, no single national control system can on its own combat the practice of illicit brokering as long as there remain somewhere else 'holes in the net' and 'safe havens' for illicit practices.

217 OSCE CPC, *Updated Summary Report*, *op. cit.*, p. 34.

1.2 SCE Handbook of Best Practices on Small Arms and Light Weapons

On 10 July 2002, the OSCE's Forum for Security Co-operation decided to develop a handbook to assist the participating states in their implementation of the 2000 OSCE Document on SALW.[218]

In 2003, the FSC presented the *Handbook of Best Practices on Small Arms and Light Weapons*.[219] It considers the Handbook a source of inspiration for the national policies of the participating states in terms of legislation, control, administrative implementation and enforceability, as well as a possible stimulus to institute stricter common standards (Handbook, pp. 2-3). It encourages wide dissemination of the document to enhance national implementation.

The Handbook does not commit the participating states, either legally or politically. It contains only guidelines that are inspired by existing *best practices*, with the addition – as there are few *best practices* available and these are not harmonized – of recommendations about what the control of trade in SALW *ought to encompass* (Handbook, p. 3). The Handbook first addresses itself to the participating states, to assist in the implementation of the OSCE Document on SALW. Because of its extensive character, it is also a source of inspiration for the OSCE itself; for instance, the OSCE Principles on brokering control in SALW are clearly inspired by the recommendations on brokering (for a discussion about the OSCE Principles, see Part I, 1.3.3).

The Handbook consists of 8 chapters, each containing a Guide with recommendations pertaining to a specific aspect. Chapter 4 is devoted entirely to national control of brokering activities.[220] It was prepared by the German and Norwegian governments. The discussion that follows is limited to Chapter 4.

Coherence and target

The Guide on brokering emphasizes that the question of such control cannot be considered separate from the control of other aspects of SALW, such as their production,

218 FSC Decision 11/02 of 10 July 2002; for a discussion of the OSCE Document, see Part I, 1.3.2.

219 FSC Decision 5/03 *Best Practice Guides on Small Arms and Light Weapons* of 19 September 2003, 145 pp., http://www.osce.org/publications/fsc/2003/12/13550_29_and.pdf.

220 24 pp., published as a separate document at http://www.osce.org/publications/fsc/2003/12/13550_33_and.pdf.

export, etc. Brokering should be controlled in line with such other provisions. Jointly, they need to form two complementary parts of a whole, coherent without overlapping, and mutually reinforcing. For that reason, the Guide recommends restricting the regulation concerning brokering to those specific aspects of it that have not already been regulated elsewhere and integrating such provisions into the regulation on export (X,[221] pp. 2, 4).

The objective of brokering control must be: (1) to identify persons and activities that are situated within a grey zone or within the illicit sphere, (2) to prevent illicit activities and (3) to enable sanctions against offenders (p. 2).

Especially in order to make it possible to impose sanctions, the prescriptions need to be made sufficiently clear, specific, and recognisable. These requirements are pertinent to the types of activity, the kinds of actor to be considered as brokers, the types of conduct that may be considered unauthorized, and the applicable sanctions (p. 2).

Where relevant, the Guide draws a distinction between the *core elements* and optional elements that are not seen as strictly necessary but can contribute to the effectiveness of the chosen regime. The ultimate decision about how detailed a national control system should be is a sovereign one to be taken at the national level (p. 3).

Especially in its description of the scope of application, the Guide refers to the instrumental description employed in the OSCE Document 2000 on SALW (p. 3).[222]

Description of brokering

The Guide recommends that control of brokering be organised on the basis of a system of licences for activities rather than for brokers themselves. Every brokering activity that takes place on the territory of the state involved ought to be subject to a licence, irrespective of the broker's nationality (p. 4).

As many countries have regulated the control of arms exports, the Guide recommends considering only those activities that are pertinent to '*items located in a third country*' *as* '*core brokering activities*' (pp. 4 and 8), such as:

- the acquisition of SALW located in one third country for the purpose of transfer to another third country;
- mediation between sellers and buyers of SALW to facilitate the transfer of these weapons from one third country to another (synonyms for "mediation" are "to arrange", "to negotiate" and "to organize" arms deals);

221 All recommendations or directives that go beyond the prescriptions in the imperative instruments are marked in the text with an (X), referring to the 'extra' character of the measure.

222 See the discussion in Part I, section 1.3.1.

– the indication of an opportunity for such a transaction to the seller or buyer (in particular the introduction of a seller or buyer in return for a fee or other consideration).

Brokers are thus primarily persons who promote the transfer of arms between parties in various third countries by resorting to certain kinds of activity. They function as intermediaries, without engaging in the transaction of the arms deals, although it is becoming more and more accepted that brokering also encompasses cases where they purchase goods in order to resell them (p. 8).

The Guide describes a "broker" as (p. 8): "*the natural person or legal entity that carries out a brokering activity. A broker is anyone who directly performs an activity defined as brokering activity in the exercise of his own commercial or legal relations. The acts of a natural person, especially employees, are to be described to the legal entity*".

The Guide states in a note that, when the brokering *activities* are sufficiently clearly described, an explicit definition of the term *broker* might be dispensable (p. 8).

Following the OSCE definitions, persons who provide indirect support services to brokers, such as financial avenues, insurance coverage, or publicity, are not themselves to be considered brokers (X, p. 8).

Other activities that may be considered as *brokering* activities are the provision of services related to the trade in SALW (pp. 4 and 9):
– transportation, freight forwarding and charters;
– technical services;
– financial services;
– insurance services.

The Guide thus draws a distinction between support services rendered to brokers (not brokering) and to arms traders (eventually to be included under brokering). Although most countries limit their control to *core activities*, the Guide sees added value in a broad description of brokering by an extension of the activities to also optional activities. It offers to the national administrations a better overview of all relevant activities and it avoids an (artificial) breakdown into (too) many categories of activities that, in practice, are sometimes difficult to keep separate. At the same time, the Guide also cautions against overly broad descriptions that are difficult to implement or enforce in practice (p. 9).

What the Guide does not consider as brokering are (pp. 5 and 9):
– the provision of technical services such as manual and intellectual services performed locally that aid in the manufacture or repair of a weapon;
– transfers within one and the same state;
– acquisition of SALW for the purposes of permanent personal use;
– the production/manufacturing of SALW;
– the provision of (not the arranging of): transportation, freight forwarding and charter

services, financial services, technical services, insurance services and publicity: these services can be ranged optionally under *brokering* control but are not considered part of the *core business*.

Material scope of application

The Guide states that the control of SALW is imperative (p. 5). It refers to the description in the OSCE Document 2000 to that effect. Similar controls may be desirable for the other armaments covered by the Wassenaar Arrangement (that is, conventional arms and dual-use items; see Part I, section 1.2). Further extensions of controls to other arms are possible for as long as the control regimes (SALW and other arms) remain compatible (X, p. 11). The Guide states that there is international consensus that dual-use items and goods for civil use should not be the subject of brokering controls (p. 11).[223]

Territorial scope of application

The Guide recommends organising controls on brokering by country for activities that take place within a country's own territory, irrespective of the broker's nationality (pp. 5 and 10). extension of controls to activities outside a country's own territory may be desirable in some cases, for instance, for activities abroad carried out by nationals of the country or persons who maintain permanent residence there or, for instance, for enforcing compliance with international embargoes. However, for some countries this may create a constitutional problem (p. 10). A number of situations may be contemplated (on the condition that they are constitutional): brokering to countries under an arms embargo, transactions that support terrorists or terrorist activities, activities that support a threatening armed conflict or that support conflicts comparable to civil war, and activities that are not subject to licensing within the involved state itself (p. 11).

At the international level, it is important to ensure that all states implement the same territorial scope of application in order to prevent the system from developing loopholes (X, p. 10).

Licensing procedure and criteria for brokering activities (pp. 5, 12)

Licensing criteria similar to those that apply to exports should also apply to brokering, and the licensing procedures should be equally strict. States might also introduce explicit prohibitions in their legislation (possibly via the licensing procedure, X, p. 10).
Screening of applicants should verify their reliability before the issuance of the licence.
A pre-registration procedure could be established but is not imperative.

223 Part I's discussion of UN General Assembly resolutions in follow-up to Security Council Resolution 1540 shows that this position has been out of date since 2008; see section 1.1.4.

Licences ought to be made obligatory for core activities and could eventually be extended to cover optional activities as well (p. 10).

The Guide does not introduce evaluation criteria, since this is the responsibility of individual states. However, reference is made to a number of international texts[224] that can serve as inspiration for states (p. 12).

The Guide further offers a list of situations where there exists a potential risk that goods may be diverted to the illicit circuit (p. 12):
- delivery to private individuals;
- questionable authenticity of the end-use;
- previous violations of commitments regarding end-use;
- the danger of onward shipment to critical neighbouring countries;
- other deliveries by circuitous routes;
- trade in SALW that are unmarked or stem from war booty.

Licences should preferably be granted for each and every *brokering* activity that is subject to licensing (p. 13), and they need to be issued in writing, prior to the commencement of each activity in question (pp. 13-14). In certain circumstances, the licence must be revocable, for instance, when false declarations are made or in the event of changed conditions and circumstances (p. 14).

The validity of licences must be restricted in time, with the possibility of extension (p. 14). Licences need to be granted on a case-by-case basis: for each brokering activity, for each arms transfer, for each recipient (p. 14). Where there exists a small risk that goods may be diverted to the illicit circuit, these rules might possibly be loosened. For instance, additional licences for brokering and export licences, global licences for several activities, for several specific recipients, or for a specific list of goods (this, for instance, would be possible for enterprises that fall under a special regime of administrative control); working with a 'white list' of countries for which licensing conditions may be waived or made more flexible (X, p. 14). The Guide does not recommend general licences (p. 14). When working out a system for licensing, attention should be paid especially to the prevention of 'loopholes' that could be exploited (X, p. 4). Unlicensed brokering activities should, in any event, be sanctioned (p. 14).

Multi-stage approach

The Guide states that applicants must be screened for their reliability (p. 14).
The Guide also recommends that registers be kept of all licences, of the licensed brokers, and of the findings of previous reliability checks (p. 14).

224 The UN Firearms Protocol and the EU Code of Conduct on Arms Exports.

The authorities can use these registers to draw up annual reports, and the data could serve internal cooperation among national authorities, as preliminary materials for parliaments, and for monitoring the enterprises involved (p. 15).

Not all states currently apply such a 'multi-stage' approach, in the sense of (1) prior registration (2) followed by the licensing procedure. Every state is free to act as it deems fit under the circumstances, but the Guide does recommend this process (p. 15).

Other options are obliging brokers to report on their activities within a well-defined period and imposing penalties for non-compliance (p. 15).

Information

The Guide provides a list of all the information that an applicant is required to submit to the competent authority. Again, a distinction is drawn between imperative (core) information - e.g. data relating to the applicant, the goods, the buyer, the nature of the activity, the value of the goods, etc. – and optional information – e.g. about the parties involved in the transport, technical services, etc. (pp. 15-16).

Finally, the Guide advises the refusal of licences in the absence of an authentic document indicating the end-use of the goods (p. 16). This might be an internationally recognized certificate or some other official, written, and original document bearing original signatures or stamps and conforming to the official requirements (p. 16). In this case also, the Guide provides a list of data that such documents ideally ought to contain (p. 17).

Competent (licensing) authority (p. 13)

Since, in practice, brokering activities are conducted in several countries, a problem may arise in terms of a convergence of jurisdictions. The Guide identifies three possible scenarios (X):

- when a distinction can be drawn between a core activity directly related to brokering, such as negotiating or indicating opportunities, and secondary activities, when the state where the core activity is taking place possesses the competent jurisdiction;
- when a core activity is conducted in one state and other activities form the subject of control of brokering in another state, such as transport or technical services, both states may be considered competent, each with respect to the activities conducted on its respective territory. Possibly, the second state may wish to provide a full or partial exemption from its activities;
- when one of the states involved has provided for extraterritorial control of its nationals abroad, while the other state exercises control of the activities, irrespective of the broker's nationality, they may both be competent: in that case, a licence may be required in both countries, or, following joint consultation, one of the countries may

waive its own licensing requirement if it deems the control exercised by the other state to be adequate.

The licensing authority for brokering should, according to the Guide, preferably be the same authority that is responsible for export licences.

Effective enforcement of controls (p. 18)

The effective enforcement of controls on brokering activities requires, according to the Guide, cooperation among several authorities: the licensing authority, ministries called upon to give a political assessment of licence applications, interministerial committees, intelligence services, customs authorities, authorities concerned with the screening of companies and operations of companies engaged in brokering activities, other agencies involved in data administration, judicial prosecution, surveillance authorities and inspectorate services (X).

Cooperation between the authorities and the brokers themselves is also important, especially to inform the dealers of the framework within which they can operate legally. The Guide recommends *outreach* activities in order to enable enterprises to establish reliable internal control systems (X), which also need to apply to activities after the goods are shipped (X), for instance with *Delivery Verification Certificates* or some other customs document.

Judicial prosecution (pp. 5 and 19)

For controls to be effective and credible, sufficiently severe penalties are needed to deal with violations. These penalties (sanctions) ought to apply to illegal acts committed abroad by nationals or permanent residents of the state in casu.

Sanctions may be civil penalties, or of an administrative or a penal nature. Clear, unambiguous legal prescriptions are required (p. 19) for penalizing illegal activities.

In order to have a preventative, deterrent effect, the sanctions need to be sufficiently severe: there should be in place a graduated system of custodial sentences, fines, confiscation of goods, and other measures (p. 19).

Certain serious violations, such as violations of an arms embargo, the proliferation of WMD, support for terrorist activities, and the like, should be considered serious crimes and carry a term of imprisonment (p. 19).

International cooperation (pp. 5, 20)

International cooperation on export controls should, as stated in the Guide, be extended to include brokering (p. 5). The requirement for international information exchange should include information about on legislation, annual reports about granted licences, and notification of denied licences (p. 20).

1.3 UN SALW Report 2007

As discussed in Part I (section 1.1.2), the UN General Assembly decided on 8 December 2005 to form a Group of Governmental Experts with the mandate to offer recommendations for strengthening international cooperation in the area of unauthorized brokering in SALW (Resolution 60/81[225]). The Group presented its Report on 30 August 2007.[226]

The Group managed for the first time to reach consensus at the UN level on a description of illicit brokering in SALW and on a number of elements that could serve as the basis for an effective national system to regulate and control brokering activities (p. 3).

The Foreword emphasizes that combating illicit brokering is, first and foremost, the responsibility of states, yet stresses that actions at the regional and global levels are also required because of the cross-border character of brokering (X).[227]

Their definition describes "a broker in small arms and light weapons" 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."

Within the context of such activities, a broker may (pp. 8-9):
- *identify business* opportunities to one or more parties;
- bring parties in contact with each other;

225 UN General Assembly Resolution 60/81 on The Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 8 December 2005, A/RES/60/81 of 11 January 2006, 3 pp.

226 UN 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, A/62/163, 30 August 2007, 26 pp.

227 See pp. 3, 4, and 8.

- assist parties in proposing, arranging or facilitating agreements or possible contacts;
- assist parties in obtaining the necessary documentation;
- assist parties in arranging payments.

Some activities are not, strictly speaking, a part of brokering but can be performed by brokers, "as part of the process of putting a deal together to gain a benefit": for instance, acting as a dealer or an agent in SALW transactions, offering technical assistance, giving training programmes, organising transportation and shipping services, arranging storage, financing, insurance coverage, maintenance, security, etc. (X).

Brokering activities may take place in the country of which the broker is a national, where the person resides or is registered, but also in other countries. The weapons do not have to enter the territory where the brokering activities are being conducted, and the broker is not necessarily the possessor of the traded arms (p. 9).

Like the OSCE Handbook, 4 years later the UN Report also drawS a distinction between minimal and optional requirements (p. 4).

The criterion that distinguishes licit from illicit brokering is left to states to determine, in keeping with both their national legislation and their international obligations (p. 9). National laws other than on brokering can also be a determining factor for the licit or illicit nature of brokering activities or related activities (X).[228]
The UN Group of Experts – like the OSCE in 2003 –resorted to, and was inspired by, existing national legislation and regulations (p. 13 *et seq.*).

The following aspects are part of what their Report calls "*recurrent elements*" of national legislation:

- ***Definition*** of broker and brokering activities: national legislation describes the one and/or the other (p. 13);
- ***Registration and screening*** potential brokers: some states limit the number of brokers, while others allow only state-controlled organisations; others allow private individuals or entities to submit applications to conduct brokering. Some states impose a general registration requirement as a precondition, in addition to the licensing procedure. Concerning registration or screening, applicants may be asked to submit information that can be checked by the national authorities. This check may also include the screening of previous criminal convictions (pp. 13-14);
- ***Record keeping*** by governments: as a rule, governments, for as long as they deem necessary, will keep records of data about individuals or organisations that have been granted a licence. In most countries, the information in these records is shared with other national administrations, according to nationally prescribed procedures (p. 14);

228 This point is not clarified in the Report, but this paragraph (13) most likely refers to so-called offences under common law, such as bribery, falsification of documents, fraud, and the like, which are often punishable under the Penal Code as independent crimes, irrespective of the context in which they are committed.

- *Record keeping* by brokers: brokers are usually required to keep adequate records of their activities, and in some countries they need to periodically present reports to the competent national offices. The term during which such records are to be kept differs from country to country (p. 14);
- ***Licensing:*** while the name may differ from country to country (licence, authorisation , permit etc.), in practice, the requirements and procedures established in national legislation come down to the same thing. An application may relate to only one or to a series of transactions and the assessment by the competent authorities is conducted on a *case-by-case* basis. In exceptional cases, legislation may provide for an exemption, for instance, for the military or the police (X, p. 14);
- ***Licensing criteria:*** not all countries have established criteria for the evaluation of brokering activities. Where these exist, they are mostly based on a state's national legislation and international commitments with reference to the control of international arms transfers. These are mostly identical to the criteria in effect for export control (p. 15);
- ***Related activities:*** some countries also have in place controls on financial, transportation, or other activities when they are being arranged or facilitated by a broker as part of a transaction from which the broker benefits (p. 15);
- ***Jurisdiction:*** national laws provide for control of individuals and entities as concerns transactions carried out on their own territory. Some states extend the jurisdiction to activities conducted abroad by their own nationals and to activities by persons and organisations based on their territories (p. 15);
- ***Penalties and fines:*** the ways in which non-compliance with national legislation is sanctioned differs from country to country. The sanctions or penalties include: imprisonment, monetary fines, losing the brokering privilege, and , denial of the right to bid on government contracts. Some states publicise information about convictions and debarments. In some states, the sanctions for illicit brokering are identical to those for other illegal trade and commercial activities. A number of countries have adopted specific legislation to enforce arms embargoes (with the aim of establishing specific legal grounds for the prosecution of such violations), and sometimes they mete out more stringent penalties and sanctions (p. 15);
- ***International cooperation:*** since brokering activities by definition involve several countries, cooperation among regulating and controlling agencies is required. National legislation can prescribe the manner in which information may be shared concerning possible prosecution or within the context of the assessment of a licence application as broker or for brokering activities. Information can also be shared on the basis of an agreement that arranges for mutual legal assistance (p. 15).

In its recommendations, the Report adds the following extra points of attention with reference to national control:

- national control of brokering by means of legislation or administrative procedures is seen as the most effective as an aspect of an extended export control regime (X, pp. 16 and 18);

- the recommendations distinguish between minimal provisions, optional elements and "*closely related activities*" (X, p. 18);
- an indispensable complement to national legislation is the capacity to enforce the imposed measures in actual reality (X, p. 16);
- in order to ensure compliance, communication among all agencies involved in the national control is also needed (X, p. 16);
- states are encouraged to take measures to ensure the authenticity of relevant documents and to prevent certificates of end-use or other relevant documents from being misused or forged (pp. 18-19).

In the Report's recommendations, the UN Group further states that national measures *alone* cannot bring the problem of brokering under control (X). It is this emphasis that makes the Report particularly valuable vis-à-vis the OSCE Guide. Because of the cross-border character of the brokering phenomenon, action is required at the regional and global levels (p. 16 *et seq.*). Such action includes:

- ***International cooperation and information exchange:*** bilateral and multilateral information exchange and cooperation can contribute to ensuring the authenticity of relevant such documents as certificates of end-use (pp. 16 and 19); cooperation can also facilitate judicial prosecution and investigation (pp. 17 and 19). States are encouraged to voluntarily share information on, for instance, national control systems (p. 19); regional and international organisations ought to assist national experts in sharing information, among other ways, through training programmes and workshops (p. 18);
- ***International assistance and capacity-building:*** states and supranational organisations that are eligible ought seriously to consider providing assistance when they are requested to do so. Such requests need to be based on a thorough prior analysis of the real needs; the assistance may take the form of joint projects or may result in the establishment of national action plans. In addition, cooperation with Interpol on the use of their data banks should be investigated (pp. 17 and 19);
- ***Promoting effective reporting:*** states are encouraged to voluntarily report on their endeavours, actions, and measures, among others, within the context of the follow-up of the UN Programme of Action. The *UN Office for Disarmament Affairs* could take on a coordinating role. States are also encouraged to periodically review the national reports, for instance, after meetings held in the context of follow-up of the UN Programme of Action (pp. 17 and 20);
- ***Enhancing international cooperation on preventing, combating and eradicating illicit brokering of SALW in violation of UN arms embargoes and sanctions:*** states should take immediate steps to implement and comply with all the UN arms embargoes and UN sanctions, including establishing adapted sanctions in national legislation for illicit brokering (pp. 17-18 and 20).

1.4 OAS Model Regulations on Brokering

As the final example of good practice, this section briefly discusses the model legislation that was worked out by the *Organisation of American States (OAS)* with reference to brokering in the trade in firearms. The model was adopted in November 2003 by the *Inter-American Drug Abuse Control Commission* (CIDAD)[229] and may serve as an inspiration to other countries to develop an effective legal framework for the control of brokering. The discussion is limited to a summary presentation of all aspects of brokering that are subject to regulation. The complete text is presented in Annex 3.

Preamble

Explanations as to the objective and context.

Article 1. Definitions

- Types of weapon
- (Arms) broker
- Brokering activities
- Licence
- Person
- Registration
- Serious crime

Article 2. National Authority

(1) Designation of the National Authority;
(2) Designation of the authorised officials.

229 See the OAS website at *http://www.cicad.oas.org/Desarrollo_Juridico/ENG/Resources/322MRFirearmsBrokersEng.pdf.*

Article 3. Registration

Optional article for states that are introducing a registration system:

(1) obligation for every (arms) broker to be registered in the state where he is conducting his activities or where he resides;
(2) documents that need to be appended to the application;
(3) the registration shall not be complete until the completed registration form containing all the information has been recorded in the registry of brokers; possibly, the National Authority may first verify the authenticity of the submitted documents;
(4) the registration is effective for a defined term (2 years, X);
(5) throughout the period in which the registration is valid, all changes need to be communicated in writing to the National Authority (X);
(6) the following persons are exempt from registration: … (X);
(7) anyone who in the past was registered as producer, importer, or exporter, shall report on additional brokering activities (X);
(8) no one who has been convicted of a related serious crime in any jurisdiction shall be eligible for registration;
(9) the registration fee is …;
(10) every registered broker shall be assigned a broker registration number (X);
(11) the National Authority shall maintain a registry of licensed brokers, possibly available for public inspection;
(12) National Authorities shall cooperate in sharing the information entered in the registers (X).

Article 4 – Licensing

(1) every person who performs or intends to perform brokering activities within the territorial jurisdiction of a competent National Authority (regulating state with jurisdiction) shall submit a licence application prior to each and every activity;
(2) annex II defines the information that must be provided to the competent National Authority with the submission of any licence application. Possibly, the competent National Authority may first verify the authenticity of the documents;
(3) no one who is not registered can acquire a licence for an activity (cf. art. 3, only if required);
(4) the licence shall be valid for a period of … (X);
(5) no licence shall be issued to a person who has been convicted of a related serious crime in any jurisdiction;
(6) no licence shall be issued for the following arms categories: …;
(7) no licence shall be issued for activities in violation of an arms embargo or in infringement upon other multilateral sanctions;
(8) brokering activities undertaken by a government agency do not require prior registration or licensing, but each separate transaction must be reported in advance of execution (X);

(9) in the case of brokering activities under paragraph (7), the same provisions shall apply as mentioned in paragraphs (1) to and including (3);
(10) a licence issued under this Article shall not be transferable (X).

Article 5 – Prohibitions

(1) The National Authority shall prohibit brokering activities and refuse to grant licences if it has 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 arms embargoes;
    (e) support terrorist acts;
    (f) result in a diversion of firearms to illegal activities, in particular those carried out by organized crime;
    (g) result in a breach of a bilateral of multilateral arms control or non-proliferation agreement.

Article 6 – Offences

In accordance with its internal norms, each country will, as necessary, adopt legislation that penalizes the following acts and prescribe the appropriate penalties (X):
(1) conducting brokering activities without registration (art. 3) or failing to provide full and accurate information for the purpose of registration;
(2) engaging in brokering activities without licence (art. 4) or failure to provide full and accurate information for the purpose of securing a licence;
(3) conducting brokering activities in contravention of article 5;
(4) the National Authority shall revoke the registration or licence of any person who commits an offence under these Regulations or any other offence that would render the person ineligible for registration or licensing under Articles 3 or 4.;
(5) in the event of false or incomplete information, the registration or the licence shall be suspended. This will be deemed a violation against common law;
(6) the National Authority shall determine the appropriate sanction in accordance with the gravity of the offence.

Article 7 – Liability of legal entities

(1) The legal entity (X) shall be held liable for an offence committed by a person employed in a managerial function. The liability may encompass administrative, civil or penal sanctions and include monetary fines;

(2) the liability of the legal entity shall be without prejudice to the criminal liability of the person who has committed the offence.

Article 8 – Scope of territorial authority

The provisions of these Regulations shall apply to all brokers and brokering activities whether or not:

(a) the brokers carry on their brokering activities within the territory of … (country);
(b) the arms enter the territory of …

Article 9 – Inspections and reporting

(1) the obligation resting on every registered broker to annually provide the competent National Authority with a report describing the executed activities, the type, the quantity, and the classification of the arms, the value of the transaction, as well as the vendors and buyers involved in the transaction in casu (X);
(2) failure to file a report may result in the suspension of the registration or render ineligible any subsequent application for a new registration. The National Authority may also impose a fine in proportion to the delay in the filing of the report;
(3) a registered broker shall allow the National Authority access to, and inspection of, the records (X);
(4) refusal to grant access to, or inspection of, the records, or to impede in any way such access or inspection by the National Authority shall be deemed an offence.

Annex I: Broker registration form
Annex II: Broker licensing form

2

Good practice for identifying brokers and regulating their activities

The good practices and international non-imperative directives are primarily meant to bring clarity to the context and the problem of brokering. They also touch upon additional elements to benefit a legal framework to make a control system as inclusive as possible.

The UN Report of 2007 is the only document that mentions the need for the capacity to implement, in actual practice, the legally prescribed control system. No other document has thus far drawn attention to that aspect. And yet, a perfectly developed legal control system would be without consequence if it did not succeed in convincing brokers of the necessity to keep registers, to apply for a licence to carry out their activities, etc. And because they may have their residence or base in the regulating competent state, and their activities are rather of the virtual kind and difficult to observe in that same country,[230] it is enormously difficult to trace them.

With respect to proactive action to bring brokers under control, an international literature search for analysis and good practices that might be used for the purpose was unsuccessful.[231] The emphasis in analytic and comparative studies invariably is on (1) the need for a legal framework for the control of brokering, (2) the kinds of aspects to be included in it (such as the description of *brokers* and their activities), and the type of desirable measures to be instituted, (3) the need for sanctions in order to combat the impunity of illicit brokering, and (4) the need for diverse forms of information exchange and cooperation pertaining to these three aspects (legislation, measures, and sanctions).

In terms of practical implementation, however, attention is systematically paid to the problem of *'catching' brokers for the purpose of prosecuting them* (which is exactly the aim of and reason for the legal framework, with clear descriptions and deterrent sanctions), but information about mechanisms to *catch brokers by preventative action with a view to the prior control of their activities* remains absent.

Only in a single recent national report was the problem touched upon and remedial measures proposed to deal with it.

A recent report from the House of Commons emphasizes that the UK is not always able to detect the illicit activities of brokers located on its territory. During a visit to Ukraine, it was revealed that the Ukrainian authorities had granted export licences for light weapons to British *brokers* for destinations that are unauthorized under British legislation.[232] Neither the British Embassy in Kiev, nor the British competent authorities, e.g., the *Export Control*

230 A computer, telephone and/or fax may be all that is needed for conducting their activities; see, for instance: H. ANDERS, 'Controlling arms brokers', *loc. cit.*, p. 2.

231 S. Cattaneo, for instance, mentions in her report that two countries had reported that the legal procedure for brokers has never been implemented. As an explanation it is assumed that this is owing to the fact that legislation has been introduced only very recently or is too unknown to the target group or is unclear. The reason is thus judged on the grounds of assumption only, without any subsequent analysis. See S. CATTANEO, op. cit., p. 86.

232 House of Commons Business and Enterprise, Defence, Foreign Affairs and International Development Committees, Scrutiny of Arms Export Controls (2009): UK Strategic Export Controls Annual Report 2007, Quarterly Reports for 2008, licensing policy and review of export control legislation First Joint Report of Session 2008–09, 19 August 2009, pp. 14-15.

Organisation and the Customs Administration, was aware of this problem. The report formulates two recommendations designed to tighten the control of brokers: on the one hand, registration of brokers, as a condition, prior to the licensing of activities,[233] and, on the other, more efforts on the part of ambassadors and diplomatic personnel to receive information about the activities of British brokers from the local offices responsible for export control.[234]

It appears from a survey of the national administrations in our partner states[235] that, indeed, attention is being given to this in practice and that solutions are being actively sought.

The Netherlands,[236] for instance, which is currently in the process of drafting a new law (the Law on Strategic Services), is trying to provide for extra measures in order to urge brokers to register with the competent administration. As the law was still being drafted at the time of writing, no concrete information was available about the measures that are contemplated.

In Germany, the National Authority BAFA[237] is trying, through a combination of initiatives, to reach as many brokers as possible and to place them under a licensing obligation. For instance, to this effect, consultations are being conducted with industry prior to the adoption of new legislation or changes to existing law. Extensive information, also in English, can be consulted on their website, including specific brochures especially intended for brokers.[238] Third, structural cooperation with customs and inspection departments has been established, meant to secure all relevant information that these services are able to obtain on their own or via cooperation with other agencies (including foreign offices).

Also the French department[239] with competence for the control of brokering in arms for use in war remains alert to the problem of suspected brokers thanks to (informal) cooperation and exchange of information with other agencies and departments. Such offices also include departments competent in the financial and fiscal control areas.

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233 S. Cattaneo mentions the prior registration as an '*institutional memory*'; see S. CATTANEO, *op. cit.*, p. 87

234 House of Commons, *op. cit.*, pp. 3 and 4.

235 For a description of the regulation with respect to brokering in our partner countries, see: G. CASTRYCK, S. DEPAUW and N. DUQUET, *Een vergelijkende studie van het wapenexportbeleid: Vlaanderen en zijn buren*, Brussels, Peace Institute, March 2007, pp. 77-92.

236 From contact with the Task Force Export Control and Strategic Goods of the Dutch Ministry of Economic Affairs; see *http://www.ez.nl/Onderwerpen/International_ondernemen/Exportcontrole strategische_goederen.*

237 Bundesamt für Wirtschaft und Ausfuhrkontrolle.

238 See *http://www.bafa.de/bafa/and/export_control/publications/export_control_information_leaflet_trafficking_brokering.pdf.*

239 The DAS, Délégation aux Affaires Stratégiques, of the Ministry of Defence. On their policy with respect to brokering (*courtage* or *intermédiation*) see *http://www.defense.gouv.fr/das/transferts_sensibles/fabrication_commerce_et_intermediation.*

Because of the limited attention paid to preventative catching of brokers in order to establish prior, proactive control of their activities, it is not possible to propose any further good practices or recommendations based on well-founded, fully justified grounds.

3

Conclusions to be drawn from good practices and international recommendations

The reports on good practices and their recommendations constitute a valuable source of information because they offer some explanations for the problem of brokering and, for most of the aspects that need regulating, distinguish between what is an optional and what is a minimal requirement. Also, they add a number of new points for attention. The most important aspects are listed below.

Finally, we present a synthesis of the initiatives for catching brokers proactively in order to keep remain in compliance with the control measures.

3.1 Extra points of attention

Legal framework:

- The control of brokering ought to be integrated into a broad legal framework, preferably in the framework of export/arms trade, and possibly arms production (OSCE, UN Report). The control of brokering needs to be in line with such other provisions. Together, they need to form complementary, mutually reinforcing parts of a coherent whole (without overlapping). For that reason, the regulation on brokering is best restricted to the specific aspects of it that have not already been dealt with elsewhere.
- *Ideally*, the control of brokering and arms trading should be conducted by the same agencies (OSCE).

Brokers:

- A *broker* is basically a person who does not physically handle the goods and is not in possession of them (OSCE).

Brokering transactions:

- By definition, brokering transactions fall outside the purview of the competent National Authority (OSCE).

Brokering activities:

- Brokering activities in essence include mediation between the producer, buyer, or vendor to arrange a 'deal'. These activities need minimally to fall within the purview of the control system (OSCE, UN report).
- In addition, there are optional or 'related activities' such as support services to brokers (not classified as brokering per se) and other support activities rendered to arms traders, such as financial services, insurance, transportation, publicity, etc. These activities also need to be part of the control mechanisms, albeit not necessarily under the control regime on brokering. They may be considered as a separate (third) category of (support) activities to the arms trade, or they may eventually be subjected to control under other national legislation. Hence, it is necessary for persons or organisations involved in each and every type of such activity to give attention to the following questions:

    - whether the activities are related to the arms trade – this includes import, export, and transit, and possibly also support activities such as technical services rendered in concert with the transactions of the traded goods,
    - whether they fall under the control regime on brokering (no possession of the goods, transactions within third countries).
    - whether they can be controlled on the basis of other regulations, for instance, legislation on financial transactions or on organized crime; financial services, transportation, training, etc. are aspects that are deemed applicable (OSCE, UN report, OAS).

Territorial contact point:

- The territorial contact point (for the competent national authority) is the location where the broker conducts his activities, regardless of whether he is established there, resides there, or is a national subject of the state (OSCE, UN report).
- It needs to be investigated whether agreements with other countries are required in the event there is convergence of jurisdictions when several transactions are taking place in different countries (OSCE).

Control measures:

- Concrete control measures may consist of four types of procedure ('*multi-stage*' approach):
    (1) a licence for each individual brokering transaction is imperative;
    (2) preregistration or (3) a licence may be required from the broker;
    (4) *ex post* controls may be carried out on, among others, the final destination by means of an accredited certificate, or based on the registers kept by the brokers themselves (OSCE).

- A control regime should be established on the basis of a multi-tier system that entails a prohibition on certain activities, licences and possible exemptions (OAS).
- Whoever has been issued a licence as an arms dealer and is also conducting brokering activities must report this as a minimum requirement (OAS).
- The registration and issuance of the licence need to have a defined term of validity (OAS).
- Brokers must be obliged to report any changes that occur during the validity terms of the registration or the licence (OAS).
- Every registered broker shall be issued with a registration number that needs to be stated on all official documents (OAS).
- Licences are issued in person and are non-transferable (OAS).
- It may be possible to work with exemptions for certain destinations, the so-called white lists, or for certain categories of brokers, for instance, public agencies (OSCE, UN report).

Sanctions:

- Effective sanctions demand prescriptions that are sufficiently clear, specific, and recognisable. These requirements are equally valid for the types of activities, the actors who are to be considered as brokers, the types of conduct that may be deemed authorized, and the applicable sanctions (OSCE);
- Sanctions need to target both natural and legal persons (OAS);
- The most effective sanctioning regime is one that provides for a *mix* of sanctions – civil, administrative, and criminal in nature, such as, respectively, the relinquishment of goods, exclusion of participation in public tenders, fines, and imprisonment (OSCE, UN report, OAS);
- It is also preferable to have a multi-tier system of sanctioning by means of:
  (1) penalties for non-compliance with the formal requirements (licence, registers, provision of inaccurate information);
  (2) suspension of the registration/licence when irregularities are being noted;
  (3) additional penalties (sanctions) for violations and offences against common law (falsification of documents, …), such as the revocation of the registration and licence;
  (4) more stringent penalties for embargoes and other illicit activities that constitute a threat to international security; this should correspond to violating the licensing criteria (UN report)

Enforceability:

- A necessary complement to legislation is the capacity to impose compliance with it (UN report).

Cooperation:

- In the assessment of the applications for registration or licensing, it is preferable to involve several agencies, bilaterally or via joint committee. These would, among others, include: the licensing authority, the ministries that make political evaluations, security services, customs departments, agencies that check the reliability of the applicants, other sundry departments that occupy themselves with *'data administration'*, judicial authorities, and inspections (OSCE, OAS).
- Close cooperation is required not only among internal national services but also with other countries. Information exchange is a minimal requirement (UN, UN report): illicit brokering cannot be solved only at the national level.
  - General information exchange may include information on national legislation, annual reports on granted licences, and notifications of denied licences;
  - Through proactive cooperation, information can be exchanged about the (suspected) presence or activities of brokers;
  - Preventative cooperation becomes feasible though the exchange of information about the reliability of brokers;
  - For *ex post* controls, states can cooperate in order to check the authenticity of the end recipients;
  - Judicial cooperation may be needed in order to enable the prosecution of illicit brokers (OSCE).
- It is also important to have cooperation between the authorities and brokers, especially to inform dealers about the framework within which they are allowed to operate legally (OSCE).

Guaranteeing the effectiveness of the control regime:

The difficulty of catching brokers in practice and urging them to follow the prescribed procedures is itself a problem. The fact that the brokers' activities are rather of the "virtual" type in the regulating country with jurisdiction and that the physical transactions take place within the territories of third countries makes it difficult for the competent authorities to track them.

A British report is the only one to have proposed explicit recommendations, including the keeping of registers, to solve this problem. Cattaneo calls such prior registration an *'institutional memory'*.[240] The British report also recommended intensive cooperation with the competent agencies of the countries in which the import, export, and transit actions are conducted.

Other types of measure contemplated, or implemented within the partner countries, are proactive information or *outreach* activities.

240 See S. CATTANEO, *op. cit.*, p. 87.

3.2 Added value of good practices and recommendations

As stated above, the extra points of attention mentioned in the good practices and recommendations form a complement to the binding prescriptions in the 'supra'-national documents discussed in Part I.

Combined, they can serve as a frame of reference for national legislator:

- Compliance with the binding prescriptions ensures *legal compliance*, which demonstrates the will to comply with those measures for which international consensus exists;
- Consideration of non-binding recommendations contributes to well-considered choices from a broad range of minimal and optional measures, based on insight into the problem.

CONCLUSION

This study analysed the international framework for the control of brokering in transactions involving military and dual-use items. Brokering is, indeed, first and foremost a cross-border phenomenon that has come to the attention of various forums such as the United Nations, the Wassenaar Arrangement, the Organization for Security and Co-operation in Europe, and the European Union. The present study thus analyses a wide range of relevant documents to map out the international context that exists for the control of brokering activities.

The introduction sketches the problem of illicit brokering. Brokering in military materials and dual-use items forms a separate category of, and within, the arms trade. Brokering is distinct from arms trade with reference to import, export, and transit in that the transfers of goods are conducted within countries other than those where the brokers carry out their activities. Brokers are mediators acting between a producer, buyer, or vendor, without themselves being in possession or legally entitled to possess the goods. Military items include small arms and light weapons, and other conventional arms and military material. Dual-use items are goods that can be used for both civil and military purposes. Both categories of goods are treated separately in national and international regulations.

Since the 1990s, the international community has turned its attention to the problem of illicit brokering in arms, following a number of reports that exposed the role of brokers in violations of arms embargoes. These reports revealed that, for transfers of goods, brokers select countries that either do not impose export controls or impose controls of a less stringent nature, which enables them to facilitate the trade in goods with unauthorized countries or recipients, either legally or, at least, with impunity. Unauthorized destinations or recipients are those that have been placed under an arms embargo or that constitute a threat to regional or international security or disrespect human rights.

Following such observations, initiatives were taken at the international, regional, and European levels to combat illicit brokering. The UN, the WA, the OSCE, and the EU have, to that effect, adopted legally or politically binding documents.

Part I describes the 'supra'-national obligations with respect to the control of brokering. In terms of content, consensus has not been reached on the types of activities and the profile of brokers that ought to be subjected to control. This is evident from the absence of definitions. The same is true for the types of measure that need to be imposed by national legislation and the delineation of the material scope of application (the types of goods to which the prescriptions apply). At the international level, the major concern is the problem of SALW.

Internationally, there is consensus about the need for national legislation to subject brokers to controls within the territory where they conduct their activities. This has led to the creation of a legal framework for licit brokering. Likewise, there is consensus about the need for sanctions to ensure that malafide brokers do not walk away with impunity. As a control measure, the preference is to license the activities rather than licensing the individuals.

EU Regulation imposes the most imperative measures. Depending on the types of goods, military or dual-use, Common Positions and Regulations impose on the EU member states the obligation to adapt their policies or directly implement the applicable provisions, respectively. The EU Regulation contains clear definitions and a clearly delineated material scope of application (based on lists). It draws a distinction between minimal obligatory measures and additional measures to be considered, and it requires the member states to impose appropriate sanctions.

Part II deals with good practices and international recommendations in the search for new points of attention. It proposes a broad gamut of imperative and optional control measures, and provides explanations with the specific characteristics that are attendant upon the problem of illicit brokering.

The overview shows that, ever since the first international reports brought the problem of unauthorized brokering in SALW to light, we have come a long way. In the first place, we have come to recognize the need not to let brokers escape with impunity from activities that violate arms embargoes or other measures to ensure international security. National legislation, where it existed, imposed obligations on the import, export, and transit of arms, but it did not include the intermediary activities of brokers. The focus of the earliest international initiatives lay primarily on the creation of a frame of reference for national legal frameworks for brokering activities, including sanctions. International attention was focused mainly on SALW, specifically on firearms.

Since that time, the scope of the international initiatives has been extended to other types of arms, while, at the same time, more attention was paid to the need for a holistic approach to combating illicit arms trafficking in all its aspects. Within that context, the control and regulation of brokering form a second-line offensive: preventing persons who are not arms dealers from circumventing import, export, and transit legislation.

Over the years, a broad range of binding documents and recommendations have been adopted at the international and regional levels. Together, they currently offer good insight into the specific characteristics of the problem of illegitimate brokering. National authorities can turn to these documents for help in incorporating measures into their own national legislation. Regional organisations such as the European Union and the Organisation of American States have managed to work out detailed prescriptions. In this process, the European Union goes furthest in the area of dual-use items, based on the supra-national competences that have been assigned to it.

In order to arrive at effective and conclusive control of brokering on a worldwide scale, the international community needs to take a few more steps. It is, in fact, not enough to have international documents recommending the adoption of national legislation. Brokering is, by definition, a cross-border problem, which limits the judicial powers and scope of application of the national authorities. The only way to cope with this limitation is through international cooperation. This cooperation needs to encompass, at the least, exchange of

information about brokers, about granted and denied licences, about criminal convictions, and the like. Ideally, such cooperation should be coordinated and directed by an international agency.

Moreover, simply repressing illicit brokering will not suffice. It is true that, as a result, a legal framework with attendant sanctions will make unauthorized brokering illegal and prevent impunity in the event of illegal activities, but this is too little too late. A better approach to control therefore calls for more decisive preventive action, an approach that will identify brokers and make them aware of the conditions under which they can operate legally. This will also lead to allowing brokering to be considered a legal rather than, by definition, an illicit activity. Also this aspect demands intensive cross-border cooperation, parallel to the national efforts exerted by states.

In both instances, the negotiation of an *Arms Trade Treaty* offers an exceptional opportunity. The ATT takes a holistic approach to the problem of illicit arms trafficking. If the points related to the brokering problem as described in the present report could be addressed in the ATT, this would constitute a significant step towards not only achieving conclusive control of brokering and better guarantees and assurances for the legal arms trade, but towards achieving greater international security and respect for human rights.

Annex 1: Definitions

Overview of all relevant definitions

Brokering	
CP 2003/468/CFSP Brokering	Activities of persons and entities: – negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or – who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.
WA Elements Brokering	Activities of negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment controlled by Wassenaar Arrangement participating states from one third country to another third country
OSCE Principles on Brokering	Activities of persons and entities: – negotiating or arranging transactions that may involve the transfer of items referred to in the OSCE Document on Small Arms and Light Weapons, and in particular its preamble, paragraph 3, from any other country to another country; – or who buy, sell, arrange the transfer of such items that are in their ownership from any other country to another country.
EC Dual-use Regulation 428/2009	Brokering services: – the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country; or – the selling or buying of dual-use items that are located in third countries for their transfer to another third country. For the purposes of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion.
OAS Model Regulations	'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.

Broker	
EC Directive 91/477 (amend. 2008/51)	Broker: Any natural or legal person, other than a dealer, whose trade or business consists wholly or partly in the buying, selling or arranging the transfer of weapons.
EC Dual-use Regulation 428/2009	Broker: Any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community into the territory of a third country.

Broker	
OSCE Handbook SALW	The natural person of legal entity that carries out a brokering activity. A broker is anyone who directly performs a transaction defined as a brokering activity in the exercise of his own commercial or legal relations. The acts of natural persons, especially employees, are to be described to the legal entity
UN Report A/62/163 (2007)	A broker in small arms and light weapons can be described 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
Organisation of American States	'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.

Definitions of lists of goods:

Conventional weapons	
Wassenaar Arrangement	Control list: Munitions List (conventional weapons) and Basic List (dual-use items: for both civil and military use)
EU	EU Common List (22 categories)

Small Arms and Light Weapons	
UN Firearms Protocol	a) "Firearm" shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899; b) "Parts and components" shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm; c) "Ammunition" shall mean the complete round of its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the respective State Party.

WA Control List	8.1 Small Arms: those weapons intended for use by individual members or armed forces or security forces, including revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns. 8.2 Light Weapons: those weapons intended for use by individual or several members of armed or security forces serving as a crew and delivering primarily direct fire. They include heavy machine guns; hand-held under-barrelled and mounted grenade launchers; portable anti-tank guns; recoilless rifles; portable launchers or anti-tank missile and rocket systems; and mortars of calibre less than 75 mm
OSCE Document SALW	(Instrumental definition) Small arms and Light weapons are man-portable weapons made or modified to military specifications for use as lethal instruments of war. Small arms are broadly categorized as those weapons intended for use by individual members or armed security forces. They include revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns. Light weapons are broadly categorized as those weapons intended for use by several members of armed or security forces serving as a crew. They include heavy machine guns; hand-held under-barrelled and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; mortars of calibre less than 100 mm.”
CP 2003/468/CFSP and CP 2008/944/CFSP	Common List, ML 1 and ML 2
JA 2002/589 SALW	a) Small arms and accessories specially designed for military use: – machine-guns (including heavy machine-guns), – sub-machine guns, including machine pistols, – fully automatic rifles, – semi-automatic rifles, if developed and/or introduced as a model for an armed force, – moderators (silencers); b) Man or crew-portable light weapons: – cannon (including automatic cannon), howitzers and mortars of less than 100 mm calibre, – grenade launchers, – anti-tank weapons, recoilless guns (shoulder-fired rockets), – anti-tank missiles and launchers, – anti-aircraft missiles /man-portable air defence systems (MANPADS)
MANPADS – WA Control List	8.3 Man-Portable Air-Defence Systems: surface-to-air missile systems intended for use by an individual or several members of armed forces serving as a crew

Directive 91/477 (amend. 2008/51)	Firearm: Any portable barrelled weapon that expels, is designed to expel, or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded for one of the reasons listed in Part III of Annex I. Firearms are classified in Part II of Annex I. For the purposes of this Directive, an object shall be considered as capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if: – it has the appearance of a firearm, and – as a result of its construction or the material from which it is made, it can be so converted. Part: Any element of replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm. Essential component: The breach-closing mechanism, the chamber and the barrel of a firearm which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted. Ammunition: The complete round or the components thereof, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the relevant Member State.

Dual-use items	
EC Dual-use Regulation 428/2009	Dual-use items: Items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices The items in Annex I.

Annex 2: List of abbreviations and acronyms

Abbreviation/acronym	Full name
CP	Common Position
JA	Joint Action
SALW	Small Arms and Light Weapons
UN	United Nations
WA	The Wassenaar Arrangement
OSCE	Organisation for Security and Cooperation in Europe
Firearms Protocol	UN Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, Protocol to the Convention against transnational organized crime (May 2001)
UN Programme of Action	Programme of Action on Small Arms and Light Weapons (July 2001)
Resolution 1540	Security Council Resolution 1540 dealing with weapons of mass destruction and non-state actors (April 2004)
WA Best Practices Guidelines	WA Best Practices Guidelines for Export on Small Arms and Light Weapons (Dec. 2002)
WA Statement	WA Statement of Understanding on arms brokerage (Dec. 2002)
WA Elements	WA Elements for Effective Legislation on Arms Brokering (Dec. 2003)
OSCE Document	OSCE Document on Small Arms and Light Weapons (November 2000)
OSCE Principles	OSCE Principles on the control of brokering in SALW (Nov. 2004)
JA 2002/589/CFSP	Joint Action 2002/589/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of Small Arms and Light Weapons (July 2002)
CP 2003/468/CFSP	Common Position 2003/468/CFSP concerning control of arms brokering (June 2003)
CP 2008/944/CFSP	Common Position2008/944/CFSP defining common rules governing control of exports of military technology and equipment (Dec. 2008)
EC Regulation 428/2009	Regulation no 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (May 2009)

Annex 3: OAS Model Regulations on brokering

Integral text of the Model Regulations on brokering of the *Organisation of American States*[241].

Preamble

These Model Regulations reflect the Member states' conviction that illicit international trade in firearms, their parts and components and ammunition constitutes a specific risk to the security and the well-being of member states and that measures to promote further cooperation among them, in particular by the promotion of harmonized broker controls with respect to the international movements of firearms, their parts and components and ammunition and a system of procedures for applying them, will assist in preventing their diversion to unlawful ends.

National controls on brokering should complement, and wherever feasible, be integrated in control mechanisms already established by member states in other related areas, including export, manufacturing and marking of firearms, their parts and components and ammunition.

Member States that presently lack legislation or regulatory regimes to control the activities of brokers may seek to adopt the proposed Model Regulations in accordance with the provisions of their legal systems and their fundamental laws.

Article 1.

Definitions

The following definitions shall be applicable throughout the text of these Regulations except when another meaning is expressly indicated:

"Ammunition" means the complete round of its components, including cartridge cases, primers, propellant powder, bullets, of projectiles that are used in any firearm, as defined in Article I of the Inter-American Convention.

"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 and ammunition.

"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 and 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.

"Explosives" means any substance or article that is made, manufactured, or used to produce an explosion, detonation, or propulsive or pyrotechnic effect, except:

241 Source: http://www.cicad.oas.org/Desarrollo_Juridico/ENG/Resources/322MRFirearmsBrokersEng.pdf.

a substances and articles that are not in and of themselves explosive; or
b substances and articles listed in the Annex to the Inter-American Convention;
as defined in Article I of the Inter-American Convention.

"Firearms" means:

a any barrelled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or
b any other weapons or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, launcher, missile, missile system, or mine;

as defined in Article I of the Inter-American Convention.

"Inter-American Convention" means the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials.

"License" or **"licensing"** means the license required for a person to perform brokering activities pursuant to Article 4.

"Parts and components" means, in relation to firearms, those elements that are essential to their operation.

"Person" includes natural and legal persons.

"Registration" means the registration of a natural or legal person as a broker in accordance with Article 3.

"Serious crime" means conduct constituting an offence punishable by a maximum deprivation of liberty or at least four years or a more serious penalty[242].

Article 2.

National Authority

(1) The National Authority for the registration or licensing of brokers shall be the Office of ... situated in the Ministry of ...
(2) The National Authority shall designate the officials authorized to conduct the registration of brokers and/or the licensing of brokering activities in accordance with Articles 3 and 4 respectively.
(3) The National Authority shall make available the name of the officials authorized to carry out licensing or registration to national authorities or other Member States upon request[243].

242 What constitutes a "serious crime" may differ from country to country, and in other countries, may not be defined in national law. In these Regulations, the expression is used in Articles 3 and 4 for the purpose of determining an applicant's eligibility for registration and/or licensing, with the idea of rejecting applicants convicted for a type of crime that would make it undesirable that they engage in arms brokering, for example, an offense that suggests a connection to organized crime. The same definition is used in the United Nations Transnational Organized Crime Convention.

243 he sharing of the identity of officials of the National Authority referred to in paragraph (3) is for purposes of effecting cooperation among countries to facilitate exchanging information about brokers.

Article 3.

Registration[244] – For application by countries which adopt a registration and licensing system[245]

(1) Every person who performs or intends to perform brokering activities within the territorial jurisdiction of ... (country), and where required by the national legislation of the country in which the person is located or carries on business, shall register with the relevant National Authority by providing to that authority information in the form prescribed in Annex I to these Regulations. In the case of legal persons, the form shall be signed by the duly authorized/legal representative or the enterprise.

(2) Every applicant for registration shall submit original or certified copies or information that demonstrates that it is currently authorized to carry on business in the country of ...

(3) Registration shall not be complete until the completed registration form containing all of the information in Annex I has been recorded in the registry of brokers, a broker registration number in accordance with paragraph (10) is assigned, and a copy evidencing approval of the registration by the National Authority is provided to the applicant. Prior to authorizing the registration the National Authority may require verification of the information submitted through original or certified copies of documentation.

(4) Registration is effective for two years from the date of approval. Subsequent registration can only be effected by the submission and approval of a new registration form[246].

(5) Throughout the validity period of the registration, any change in the information provided by an applicant on the registration form shall be communicated in writing to the National Authority by its authorized/legal representative within .... days of the change[247].

(6) The following persons are exempt from registration under this Article: (a) Employees or officials of the Government of the country of ... acting in their official capacity; and (b) Employees or officials of foreign governments or international organizations acting in their official capacity.

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244 Registration is largely viewed as an additional and optional element of brokering controls. At a practical level, the information required on an application for a brokering license can provide the basis for a de facto registration of brokers. A registration regime may be viewed as an optional element of these Model Regulations.

245 Countries that prefer to have only a licensing system need not apply the provisions of Article 3. At a minimum however, a licensing system as set out in Article 4 needs to be imposed. Application of these Model Regulations using only a licensing system should include the maintenance of the information provided on an application for a brokering license as the basis for a de-facto registry of brokers.

246 Countries may wish to provide for a different period, however, two years has been suggested as a maximum. It was pointed out by some countries that the same period of registration that exists for exporters of firearms could also be used for brokers.

247 Generally 30 to 60 days is recommended. As with paragraph 3 above, the communication of a change may be the subject to verification and require approval of the amended registration form by the National Authority.

(7) Every applicant for registration as a broker who is already registered as a manufacturer, an exporter or an importer must also provide notifications of these additional functions to the National Authority.
(8) No person who has been convicted of a related serious crime in any jurisdiction shall be eligible for registration.
(9) The fee for registration as a broker shall be ...
(10) A broker registration number shall be assigned to each registered broker.
(11) Each National Authority shall maintain a registry of brokers. Countries may choose to have the registry of brokers available for public inspection.
(12) 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 applicant[248].

Article 4.

Licensing – For application by all countries.

(1) Every person who performs or intends to perform brokering activities within the territorial jurisdiction of ... (country) shall obtain a license issued by the National Authority prior to each brokering activity that he or she performs.
(2) To obtain a license, the applicant shall provide to the National Authority the information in the form prescribed in Annex II. Before it issues the license, the National Authority may require verification of the information submitted through original or certified copies of the documentation supporting the application.
(3) No person who is registered with the National Authority in accordance with Article 3 shall be entitled to receive a license issued under this section[249].
(4) A license authorizing brokering activities shall be valid for a period of ...
(5) No license shall be issued to a person who has been convicted of a related serious crime in any jurisdiction.
(6) No license shall be issued that would authorize a person to engage in brokering activities with respect to the following classes of firearms, parts and components and ammunition[250].
(7) No license shall be issued that would authorize a person to engage in brokering activities with respect to any country or countries that are the subject of an arms embargo of the United Nations Security Council or other multilateral sanctions to which the country adheres, or that it unilaterally applies.

248 Conceptually, the registry of brokers would consist of a data base in electronic form and could contain other information on individual brokers, such as, for example, the reports referred to in Article 9 of any sanctions applied against persons once registered as brokers.

249 This provision only applies to countries which have adopted a registration and licensing system.

250 This provision would apply to a country that has classes of weapons in relation to which it will not issue a license because it will not authorize their export. Another approach would be to cross-reference the classes of firearms prohibited for export under the country's export control legislation. Regardless of approach, countries need to ensure that this provision is consistent with the prohibitions that the state applies with respect to the export of firearms.

(8) Brokering activities undertaken by or for an agency or the Government of ... (country) may be conducted without registration or a license, however each brokering activity shall be authorized by or require notification to a committee of the Government that includes representation by senior officials of the Ministries of ... or the National Security Committee of that country.

(9) In the case of brokering activities under paragraph (7), the decision to authorize or refuse to authorize brokering activities shall be based upon the same considerations referred to in paragraphs (1) to (3)[251].

(10) A license issued under this Article is not transferable.

Article 5.

Prohibitions

(1) The National Authority shall prohibit activities and refuse to grant licenses if it has 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.

Article 6.

Offences

In accordance with its internal norms, each country will, as required, adopt legislation that penalizes the following acts and prescribe the appropriate penalties.

(1) Any person who performs brokering activities without registering as a broker in accordance with Article 3, or who fails to provide full and accurate information for the purposes of such registration is guilty of an offence.

(2) Any person who participates in brokering activities without a valid license issued by the National Authority in accordance with Article 4, or who fails to provide full and accurate information for the purpose of such a license is guilty of an offence.

(3) Any person who carries on a brokering activity in contravention of the prohibitions enumerated in Article 5 is guilty of an offence.

251 As noted above, the application of paragraph 3 would only affect countries that have adopted a registration and licensing system.

(4) The National Authority shall revoke the registration or license of any person who commits an offence under these Regulations or any other offence that would render the person ineligible for registration or licensing under Articles 3 or 4.
(5) The provision of false information or material omissions in the information reported as determined by the National Authority shall result in the suspension of the broker from eligibility for licensing, and where relevant, from eligibility for registration, for a period of time prescribed by the National Authority. The foregoing shall be considered an offence under the provisions bearing on the submission of false information under the Penal Code.
(6) The National Authority shall determine the appropriate sanction in accordance with the gravity of the offence.

Article 7.

Liability of Legal Entities

(1) Where a person responsible for the management of control of a legal entity located in the territory of the country of ... has, in that capacity, committed an offence under these Regulations, the legal entity shall be held liable for the offence. The liability may be criminal, civil or administrative and may include monetary penalties.
(2) The legal entity shall incur liability without prejudice to the criminal liability of the person referred to in paragraph (1) who has committed the offence[252].

Article 8.

Scope of application

The provisions of these Regulations shall apply to all brokers and brokering activities whether or not:
(a) the brokers carry on their brokering activities in ... (country) or in other countries; or
(b) the firearms, parts and components and ammunition enter into the territorial jurisdiction of ... (country).

Article 9.

Reports and Inspections

(1) Any person required to register under these Regulations shall provide to the National Authority, annually during the period of registration and within thirty days of the anniversary date of its registration, a report in the prescribed form enumerating and describing its brokering activities by quantity, type, classification-description, value in national currency, as well as identification of the vendors and purchasers of firearms, parts and components and ammunition for the activities in which it took part.

252 National norms of certain countries may not contemplate penal sanctions against legal persons, in which case this provision may be enforceable only with respect to civil of administrative penalties.

(2) A failure to file a report within the period specified in paragraph (1) may result in the suspension of the registration or render ineligible any subsequent application for a new registration. The National Authority may also impose a fine for failure to report that increases progressively with the amount of time passing from the time that the report was originally required to be filed.

(3) A broker registered under national legislation shall, in accordance with national law, permit an authorized official of the National Authority to enter and inspect the records of his brokering activities.

(4) Refusal to permit a lawfully designated official of the National Authority to inspect the records of a registered broker or to otherwise interfere with that official in carrying out his official duties shall be considered an offence under the applicable provisions of the penal code.

Annex I

(Article 2)

Broker Registration Form

Date of Application to National Authority ...

A Name

B Address

C Telephone/fax/email

For Individuals:

D Date of Birth

E Citizenship (if dual or multiple, specify)

F National Identity Card N°.

G Photograph – Including a certification that it was taken on a date within three months of the submission of this application

For companies or Other Business Enterprise:

H Name, Title, Address, Telephone, Fax and email of Authorized Representative

I Names, Titles, Dates of birth, Citizenship, National identity card numbers or other identification of persons who own the company and those persons responsible for the day-to-day management and control of the enterprise (if different from H)

J Certificate or Registration of Incorporation n°. including date of incorporation

K Other Registrations

- Producer
- Exporter
- Importer
- Other

L Subsidiary offices (national and foreign):

Name
Address
Telephone/fax/email
Registration n°. (if registered by the National Authority under a separate broker registration)[253]

Annex II

(Article 4)

Broker Licensing Form
Date of Application to National authority ……..

A Name of Broker
B Address, telephone, fax, email
C Date of birth[254]
D Broker registration number[255]
E Identification of goods by classification-description
F Nature of participation in the brokering activity[256]
G Identification of other parties to the Transaction:
– Name of the Party
– Nature of participation (purchaser, vendor, shipper, etc.)
– Nationality
– Country of Residence
– Location of Place of Business
H Identification of Manufacturers of firearms, parts or components, or ammunition
– Name of Manufacturer
– Nationality
– Residence
– Place of Business
I Identification of ownership/source of the firearms, parts or components or ammunition
(Name, address, telephone, fax, email etc.)
J Identification of end-user
(include name, address, telephone, fax, email, etc.)

253 Individual countries may require additional information.

254 This is not necessary for those countries with a broker registration system. For countries without a registry, citizenship, national identity card and photograph should be required as part of the license application.

255 If assigned by the National Authority.

256 Indicate whether participation is in manufacturing, exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding, supplying, and delivering firearms, parts or components or ammunition, or other action or if the participation directly involves the facilitation of these activities.

Bibliography

Literature

ANDERS H., 'Controlling arms brokering, Next steps for EU Member States', GRIP, January 2004, 34 pp., http://www.iansa.org

ANDERS H., 'European Union standards on the control of arms brokering', GRIP/IANSA, presentation at UN Workshops on illicit brokering in SALW, May-June 2005, 8 pp., http://disarmament.un.org

ANDERS H., 'Controlling arms brokers operating from abroad: Challenges and policy options for EU States', Note d'Analyse du GRIP, 29 June 2009, Brussels, 6 pp., http://www.grip.org

ATT STEERING COMMITTEE OF NGOS, 'Assessing the feasibility, scope and parameters of an Arms Trade Treaty (ATT): An NGO perspective', 2007, 16 pp., http://www.controlarms.org

BARENTS R., Het Verdrag van Lissabon: achtergronden en commentaar, Kluwer, 2008, 760 pp.

BARENTS R. and BRINKHORST L.J., *Grondlijnen van het Europees Recht*, Kluwer Deventer 2006, 646 pp.

BERMAN E., 'The International Commission of Inquiry (Rwanda): Lessons and Observations from the Field', presentation at a seminar of The Geneva Forum, 7 December 1998, 12 pp., http://www.geneva-forum.org

BOESE W., 'Implications of UN Security Council Resolution 1540', Presentation to the Institute of Nuclear Materials Management Panel Discussion of 15 March, 2005, http://www.armscontrol.org

BOSSUYT M. and WOUTERS J., *Grondlijnen van internationaal recht*, Antwerp, Intersentia, 2005, p. 35 et seq

BOURNE M. et. al., *Reviewing action on small arms, assessing the first five years of the UN Programme of Action*, Biting the Bullet, 2006, 292 pp., http://www.international-alert.org

BOUSTANY K., 'The Development of Nuclear Law-Making or the Art of Legal "Evasion"', in *Nuclear law Bulletin* n° 61, 1998, 16 pp.

BUSINESS AND ENTERPRISE, DEFENCE, FOREIGN AFFAIRS AND INTERNATIONAL DEVELOPMENT COMMITTEES, Scrutiny of Arms Export Controls (2009): UK Strategic Export Controls Annual Report 2007, Quarterly Reports for 2008, licensing policy and review of export control legislation, First Joint Report of Session 2008–09, House of Commons, 19 August 2009, 173 pp.

CASTRYCK G., DEPAUW S. and DUQUET N., *Het Vlaams wapenexportbeleid: een analyse van de juridische context*, Brussels, Flemish Peace Institute, October 2006, 139 pp., http://www.vlaamsvredesinstituut.eu

CASTRYCK G., DEPAUW S. and DUQUET N., *Een vergelijkende studie van het wapenexportbeleid: Vlaanderen en zijn buren*, Brussels, Flemish Peace Institute, March 2007, pp. 77-92, http://www.vlaamsvredesinstituut.eu

CATTANEO S., 'National systems of licensing and registration', Chapter 2 in *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons – Scope and Implications*, United Nations Institute for Disarmament Research (UNIDIR), 2007, pp. 65-99

CATTANEO S. and PARKER S., *Implementing the United Nations Programme of Action on Small Arms and Light Weapons, Analysis of the National Reports submitted by States from 2002 to 2008*, UNIDIR, 2008, 165 pp.

CENTER FOR NON-PROLIFERATION STUDIES, 'The Wassenaar Arrangement on export controls for conventional arms and dual-use goods and technologies', in *Inventory of International Nonproliferation Organizations and Regimes*, 5 pp.

CLEGG E. and CROWLEY M., 'Controlling Arms Brokering and Transport Agents: Time for International Action', Briefing 8, Basic – International Alert, Saferworld, February 2001, 24 pp., http://www.saferworld.org.uk

COGEN M., *Handboek internationaal recht*, Mechelen, Kluwer Publishers, 2003, 490 pp.

COMMISSION OF THE EUROPEAN COMMUNITIES, *Mededeling van de Commissie over het voorzorgsbeginsel*, COM(2000)1 def., Brussels, 2 February 2000, 30 pp.

CONTROL ARMS, 'NGO Arms Trade Treaty Steering Committee Position Paper: Global Principles for the Parameters of an Arms Trade Treaty', March 2009, 2 pp.

CONTROL ARMS, 'NGO Arms Trade Treaty Steering Committee Position Paper: Scope – Transfers and Transactions to be covered by an Arms Trade Treaty', March 2009, 2 pp.

CONTROL ARMS, 'NGO Arms Trade Treaty Steering Committee Position Paper: Scope – Types of equipment to be covered by an Arms Trade Treaty', March 2009, 2 pp.

Control Arms Position Papers can be consulted on: http://www.controlarms.org

DANSSAERT P. and JOHNSON-THOMAS B., 'Illicit brokering of SALW in Europe: lacunae in Eastern European arms control and verification regimes', in *Disarmament Forum*, Antwerp, International Peace Information Service, 2009, pp. 35-42, http://www.ipisresearch.be/arms-trade.php

DELPÉRÉE F. and DEPRÉ S., *Le système constitutionnel de la Belgique*, Brussels, Larcier, 1998, 342 pp.

DOVER R., 'For Queen and Company: The Role of Intelligence in the UK's Arms Trade', in *Political Studies*, vol. 55, 2007, pp. 683-708

DUJARDIN J. and VANDE LANOTTE J., *Inleiding tot het publiek recht, Deel I Basisbegrippen*, Bruges, Die Keure, 1994, 272 pp.

DUPLESSIS I., 'Soft international labour law: The preferred method of regulation in a decentralized society', in *Governance, International law & Corporate Social Responsibility*, Geneva, ILO Research Series 116, 2008, pp. 7-36

ELLIOTT J., HEESTERBEEK S., LUKENSMEYER C.J., SLOCUM N., *Participatieve methoden, Een gids voor gebruikers*, Dutch edition by the Flemish Institute for Scientific and Technological Aspects Research, January 2006, pp. 113-124

FEDERAL OFFICE OF ECONOMICS AND EXPORT CONTROL (BAFA, Duitsland), *Information leaflet on trafficking and brokering*, 29 May 2006, 11 pp., http://www.bafa.de/bafa/en/export_control/publications/export_control_information_leaflet_trafficking_brokering.pdf

GRADUATE INSTITUTE OF INTERNATIONAL STUDIES GENEVA, 'Chapter 3: Fuelling the Flames: Brokers and Transport Agents', in *Small Arms Survey 2001, Profiling the Problem*, Oxford University Press, 2001, p. 106, http://www.smallarmssurvey.org

GREENE O. and KIRKHAM E., *Preventing diversion of small arms and light weapons: issues and priorities for strengthened controls*, Biting the Bullet Policy report, February 2009, 88 pp.

HUDSON A., 'Case Study on the EU Code of Conduct on Arms Exports', in C. EGENHOFER (ed.), *Policy Coherence for Development in the EU Council Strategies for the Way Forward*, Brussels, Center for European Policy Studies, 2006, 215 pp.

HSU S.S., 'Man Indicted in Plot to Ship Jet Parts to Iran', in *The Washington Post*, 3 September 2009

INTERNATIONAL ACTION NETWORK ON SMALL ARMS, 'Regulating small arms brokering', IANSA Position Paper 2006, 4 pp., http://www.iansa.org/un/review2006/Regulating-small-arms-brokering.pdf

KIRTON J. J. and TREBILCOCK M. J., Hard Choices, Soft Law – Voluntary Standards in Global Trade, Environment and Social Governance, University of Toronto, Canada, 2004, 412 pp.

KOOIJMANS P.H. and DE VOS A.E., *Internationaal publiekrecht in vogelvlucht*, Kluwer, 2003, 391 pp.

LENAERTS K. and DESOMER M., 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', in *European Law Journal*, Vol. 11, N° 6, November 2005, pp. 744-765

LIPSON M., 'The Wassenaar Arrangement: Transparency and Restraint through Trans-Governmental Cooperation?', in D. JOYNER, *Non-proliferation export controls: origins, challenges and proposals for strengthening*, Ashgate Publishing Ltd., 2006, pp. 49-73

MERRELL WETTERWIK A-C, 'Les solutions qui se dessinent pour lutter contre le courtage illicite d'éléments connexes aux armes de destruction massive', web publication on disarmament forum, 2009, 10 pp., http://www.unidir.org/pdf/articles/pdf-art2896.pdf

O'CALLAGHAN G. and MEEK S., 'The UN firearms protocol: considerations for the UN 2001 conference', Briefing 4, Basic – International Alert – Saferworld, 2000, 19 pp., http://www.international-alert.org/pdf/btb_brf4.pdf

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT - OECD, *Reducing the risk of policy failure. Challenges for regulatory compliance*, Paris, 2000, 91 pp., http://cccp.anu.edu.au/Published_OECD_Report2.pdf

ORGANISATIONS FOR SECURITY AND CO-OPERATION IN EUROPE- OSCE, 'Best Practice Guide on National Control of Brokering Activities', Chapter IV in *OSCE Handbook of Best Practices on Small Arms and Light Weapons*, 19 September 2003, 21 pp.

OXFAM, 'Shooting Down the MDGs, How irresponsible arms transfers undermine development goals', Oxfam Briefing Paper 120, October 2008, 29 pp., http://www.oxfam.org/en/policy/shooting-down-mdgs

PAOLI G. P., *Comparative Analysis of Post-Manufacture Marking Instruments and Practices for Small Arms and Light Weapons*, UNIDR, 2009, 64 pp., http://www.unidir.ch/pdf/ouvrages/pdf-1-92-9045-009-B-en.pdf

POPELIER P., *De wet juridisch bekeken*, Tijdschrift voor Wetgeving, Bruges, Die Keure, 2004, 424 pp.

QUENTIN M., *The European Union Export Control Regime: Comment on the Legislation: article-by-article*, May 2009, 170 pp., http://iv.vlaanderen.be/nlapps/data/docattachments/Quentin.pdf

SAFERWORLD, *Weapons under Scrutiny, Implementing arms export controls and combating small arms proliferation in Bulgaria*, Center for the Study of Democracy, 2004, 108 pp., http://www.smallarmssurvey.org/files/portal/issueareas/transfers/transfers_pdf/2004_CSD_Saferworld.pdf

STRANDOW D. and WALLENSTEEN P., *United Nations Arms Embargoes, Their impact on arms flows and target behaviour*, Stockholm International Peace Research Institute (SIPRI), 2007, 76 pp.

TAVERNIER S., VERVENNE H. and WILLE C., 'Wapenhandel en wapenbezit', in G. VERMEULEN (ed.), F. DHONT (collab.), *Aspecten van Europees materieel strafrecht*, Antwerp-Apeldoorn, Maklu, 2002, pp. 135-167

UN Report of the Panel of Governmental Experts on Small Arms, in pursuance of GA 51/45 N entitled "General and complete disarmament: consolidation of peace through practical disarmament measures", UN Doc.A/52/298, 27 August 1997, 37 pp.

UN Report of a consultative meeting of experts on the feasibility of undertaking a study for restricting the manufacture and trade of small arms to manufacturers and dealers authorized by States, A/54/160, 6 July 1999, 5 pp.

UN Report on Small Arms prepared with the assistance of the Group of Governmental Experts on Small Arms, in pursuance of GA Resolution 52/38 J, A/54/258, 19 August 1999, 25 pp.

UN Report in pursuance of GA Resolution 53/77 T entitled "Illicit Traffic in Small Arms", A/54/404, 24 September 1999, 32 pp.

UN Report on Small Arms, A/55/189, 28 July 2000, 25 pp.

UN Report to the Security Council on Small Arms, S/2005/69, 17 February 2005, 18 pp.

UN Report to the Security Council on Small Arms, S/2006/109, 17 February 2006, 18 pp.

UN Report of the Committee established pursuant to Resolution 1540 (2004), S/2006/257, 25 April 2006, 43 pp.

UN 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, A/62/163, 30 August 2007, 26 pp.

UN Report of the Committee established pursuant to Resolution 1540 (2004), S/2008/493, 8 July 2008, 71 pp.

UN Report of the Third Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, A/CONF.192/BMS/2008/3, 20 August 2008, 20 pp.

UN 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, A/63/334, 26 August 2008, 16 pp.

UN Reports on *Small Arms and Light Weapons* http://disarmament.un.org/CAB/salw-sggarep.htm

UYTTENDAELE M., Précis de droit constitutionnel belge: regards sur un système institutionnel paradoxal, Brussels, Bruylant, 2001, 986 pp.

VAN HEUVERSWYN K., Het Belgisch controlestelsel voor tussenhandel in militaire en dual-use goederen, Brussels, Flemish Peace Institute, 2010, 122 pp.

VAN HEUVERSWYN K., *Leven in de risicomaatschappij Deel 1*, Negen basisvereisten voor doeltreffend risicomanagement, Antwerp, Garant, 2009, 396 pp.

VAN HEUVERSWYN K., *Leven in de risicomaatschappij Deel 2*, *Kritische analyse van de Belgische wetgeving: welzijn op het werk*, *civiele veiligheid*, *Sevesorisico's*, Antwerp, Garant, 2009, 503 pp.

VAN HEUVERSWYN K., *Leven in de Risicomaatschappij Deel 3: Aanbevelingen voor doeltreffend risicoreguleringsmanagement*, Antwerp, Garant, 2009, 147 pp.

VAN HEUVERSWYN K., 'ALARA: van wetenschappelijk naar juridisch beginsel', in Werk & Welzijn no 2, Brussels, Prevent, 2001, pp. 9-15

van WILLIGEN N., 'Het nucleaire non-proliferatieregime', in *Vrede en Veiligheid*, *Tijdschrift voor internationale vraagstukken*, Nijmegen, 2009, no 2, pp. 219-234

van den BRINK A., *Regelgeving in Nederland ter implementatie van EU-recht*, Kluwer, 2004, 297 pp.

VERBEEK B. and WESSEL R.A., 'Internationaal recht komt van Venus, internationale betrekkingen komen van Mars', in *Vrede en Veiligheid*, *Tijdschrift voor internationale vraagstukken*, Nijmegen, 2009, no 2, pp. 139-163

VERMEULEN G., Europese en internationale instellingen en organisaties, Maklu, 2006, 222 pp.

VERSCHUUREN J., 'Mensenrechten en milieu', in *Ars Aequi*, 1997/9, pp. 577-583, *http://arno.uvt.nl/show.cgi?fid=4974*

WOOD B., 'Strengthening enforcement of UN arms embargoes', *Amnesty International*, 4 p., *http://www.iansa.org/un/documents/Strengthening-enforcement-of-UN-arms-embargoes.pdf*

WOOD B. and PELEMAN J., *The Arms Fixers*, *Controlling the Brokers and Shipping Agents*, Oslo, International Peace Research Institute, PRIO Studies 3/99, November 1999, 139 p., *http://www.prio.no/NISAT/Publications/The-Arms-Fixers-Controlling-the-Brokers-and-Shipping-Agents/*

WOOD B., 'The prevention of illicit brokering of small arms and light weapons: framing the issue', in *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons – Scope and Implications*, United Nations Institute for Disarmament Research (UNIDIR), 2007, 64 pp.

X, 'EU support to United Nations Security Council Resolution 1540' in COUNCIL OF THE EUROPEAN UNION, *The European Union Strategy against the Proliferation of Weapons of Mass Destruction*, 2008, pp. 13-16, *http://www.consilium.Europe.eu/uedocs/cmsUpload/EN%20prolif_int%202008.pdf*

X, 'Best practice in the regulation of arms brokering', Saferworld paper to the Group of Governmental Experts on Brokering, March 2007, 8 pp., *http://www.saferworld.org.uk/publications*

ZAITSEVA L., 'Organized Crime, Terrorism and Nuclear Trafficking', in *Strategic Insights*, Volume VI, Issue 5, August 2007, 18 pp.

Regulations (in chronological order)
European regulations (and related documents)

COUNCIL OF THE EUROPEAN UNION, Fourth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, *OJ C* 319 of 19 December 2002, Annex I

Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons, *OJ L* 256 of 13 September 1991, pp. 51-58

Joint Action 1999/34/CFSP of 17 December 1998 with a view to a European Union contribution to combating the destabilising accumulation and spread of Small Arms and Light Weapons, *OJ L* of 15 January 1999, pp. 1-5

Council Regulation (EC) No. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, *OJ L* 159 van 30 June 2000, pp. 1-215

Joint Action 2000/0401/CFSP of 22 June 2000 concerning the control of technical assistance related to certain military end uses , *OJ L* 159 of 30 June 2000, pp. 216-217

Joint Action 2002/589/CFSP of 12 July 2002 with a view to a European Union contribution to combating the destabilising accumulation and spread of Small Arms and Light Weapons, *OJ L* 191 of 19 July 2002, pp. 1-4

Second Annual Report on the implementation of the EU Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of Small Arms and Light Weapons, and repealing Joint Action 1999/34/CFSP and the EU programme of June 1997 on illicit trafficking in conventional arms, *OJ C* 330 of 31 December 2002, pp. 1-24

Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, *OJ L* 156 of 25 June 2003, pp. 79-80

COUNCIL OF THE EUROPEAN UNION, Fight against the proliferation of weapons of mass destruction - EU Strategy against proliferation of Weapons of Mass Destruction, Brussels, 10 December 2003, Doc. no 15708/03, 13 pp., *http://register.consilium.Europe.eu/pdf/en/03/st15/st15708.en03.pdf*

COUNCIL OF THE EUROPEAN UNION, User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, Brussels, 29 April 2009, 113 p., *http://register.consilium.Europe.eu/pdf/en/09/st09/st09241.en09.pdf*

Council Regulation (EC) No. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *OJ L* 200 of 30 July 2005, pp. 1-19

COUNCIL OF THE EUROPEAN UNION, EU Strategy to combat the illicit accumulation of and trafficking in Small Arms and Light Weapons (SALW) and their ammunition, Council Document 5319/06. 15-16 December 2005 of 13 January 2006, 15 pp.

Joint Action 2006/419/CFSP of 12 June 2006 in support of the implementation of United Nations Security Council Resolution 1540 (2004) and in the framework of the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction, *OJ L* 165 of 17 June 2006, pp. 30-34

COMMISSION OF THE EUROPEAN COMMUNITIES, Communication of the Commission and Proposal for a Council Regulation of 18 December 2006 setting up a Community regime for the control of exports of dual-use items and technology, COM(2006)829 def., 18 December 2006, 316 pp.

Consolidated versions of the Treaty on the European Union and of the Treaty on the establishment of the European Community, *OJ C* 321 E of 29 December 2006

Council Regulation (EC) N° 423/2007 of 19 April 2007 concerning restrictive measures against Iran, *OJ L* 103 of 20 April 2007, pp. 1-23

COUNCIL OF THE EUROPEAN UNION, The European Union Strategy against the Proliferation of Weapons of Mass Destruction, 2008, 63 p., *http://www.consilium.Europe.eu/uedocs/cmsUpload/EN%20prolif_int%202008.pdf*

EUROPEAN PARLIAMENT, Draft resolution on the EU Code of Conduct on arms transfers – failure of the Council to adopt the Common Position and transform the Code into a legally binding instrument, 13 February 2008, 4 pp.

Joint Action 2008/368/CFSP of 14 May 2008 in support of the implementation of United Nations Security Council Resolution 1540 (2004) and in the framework of the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction, *OJ L* 127 of 15 May 2008, pp. 78–83

Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, *OJ L* 179 of 8 July 2008, pp. 5–11

COMMISSION OF THE EUROPEAN COMMUNITIES, Proposal for a Council Regulation amending and updating Regulation (EC) No. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, Brussels, 11 September 2008, COM/2008/0541 def., 11 pp.

Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment, *OJ L* 335 of 13 December 2008, pp. 99-103

Council Resolution 2009/42/CFSP of 19 January 2009 on support for EU activities in order to promote the process leading towards an Arms Trade Treaty, *OJ L* 17 of 22 January 2009, pp. 39-44

EU Common List of Military Goods adopted by the Council on 23 February 2009, goods to which Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment is applicable, *OJ C* 65 of 19 March 2009, pp. 1–34.

Council Regulation (EC) No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *OJ L* 134 of 29 May 2009, pp. 1-269

Directive 2009/43/EC of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *OJ L* 146 of 10 June 2009, pp. 1-36

EUROPEAN COMMISSION, 'The Commission proposes a new policy to enhance chemical, biological, radiological and nuclear security in the EU, Brussels, 24 June 2009, Document reference no: IP/09/992, *http://ec.Europe.eu/commission_barroso/barrot/news/default_en.htm*

The European regulations can be consulted on:
http://www.eur-lex.Europe.eu

UN Resolutions

UN Resolution 53/77 (of the General Assembly) on Small Arms, 4 December 1998, A/RES/53/77 E of 12 January 1999, 3 pp.

UN Resolution 50/70 (of the General Assembly) on General and Complete Disarmament, 12 December 1995 of 12 December 1995, A/RES/50/70 of 15 January 1996, 27 pp.

UN Resolution 55/25 (of the General Assembly) on the United Nations Convention against Transnational Organized Crime, 15 November 2000, A/RES/55/25 of 8 January 2001, 51pp.

UN Resolution 55/255 (of the General Assembly) on the 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, 31 May 2001, A/RES/55/255 of 8 June 2001, 11 pp.

UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, A/CONF.192/15, July 2001, pp. 13-23

UN Resolution (of the Security Council) 1540 (2004) on non-proliferation of weapons of mass destruction, S/RES/1540 (2004) of 28 April 2004, 4 pp.

UN Resolution 60/81 (of the General Assembly) on The illicit trade in small arms and light weapons in all its aspects, 8 December 2005, A/RES/60/81 of 11 January 2006, 3 pp.

UN Resolution (of the Security Council) 1673 (2006) on non-proliferation of weapons of mass destruction, S/RES/1673 of 27 April 2006, 2 pp.

UN Resolution 61/89 (of the General Assembly) 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms', 6 December 2006, A/RES/61/89 of 18 December 2006, 2 pp.

UN Resolution 62/26 (of the General Assembly) on National legislation on transfer of arms, military equipment and dual-use goods and technology, 5 December 2007, A/RES/62/26 of 10 January 2008, 2 pp.

UN Resolution 62/40 (of the General Assembly) on Prevention of the illicit transfer and unauthorized access to and use of man-portable air defence systems, 5 December 2007, A/RES/62/40 of 10 January 2008, 2 pp.

UN Resolution 62/47 (of the General Assembly) on The illicit trade in small arms and light weapons in all its aspects, 5 December 2007, A/RES/62/47 van 10 January 2008, 3 p.

UN Resolution (of the Security Council) 1810 (2008) on non-proliferation of weapons of mass destruction, S/RES/1810 of 25 April 2008, 4 pp.

UN Resolution (of the General Assembly) 63/67 on Preventing and combating illicit brokering activities, 2 December 2008, A/RES/63/67 van 12 January 2009, 3 p.

UN Resolution (of the Security Council) 1887 (2009) on Maintenance of international peace and security: Nuclear non-proliferation and nuclear disarmament, S/RES/1887 (2009) of 24 September 2009, 6 pp.

All UN Security Council Resolutions can be consulted on: *http://www.un.org/documents/scres.htm*

All UN General Assembly Resolutions can be consulted on: *http://www.un.org/documents/resga.htm*

Decisions of the Organization for Security and Co-operation in Europe - OSCE

OSCE FORUM FOR SECURITY COOPERATION, OSCE Document on Small Arms and Light Weapons, FSC.DOC/1/00, 24 November 2000, 14 pp.

OSCE FORUM FOR SECURITY COOPERATION, DECISION 5/03 BEST PRACTICE GUIDES ON SMALL ARMS AND LIGHT WEAPONS, 19 SEPTEMBER 2003, 1 P.

OSCE FORUM FOR SECURITY COOPERATION, DECISION 3/04 OSCE PRINCIPLES FOR EXPORT CONTROLS OF MAN-PORTABLE DEFENCE SYSTEMS (MANPADS), 26 MAY 2004, 5 PP.

OSCE FORUM FOR SECURITY COOPERATION, DECISION N° 8/04, OSCE Principles on the control of brokering in Small Arms and Light Weapons, of the Forum for Security Cooperation of the OSCE, FSC.DEC/8/04, 24 November 2004, 4 pp.

OSCE MINISTERIAL COUNCIL, Decision N° 7/04 OSCE Principles on the control of brokering in Small Arms and Light Weapons, MC.DEC/7/04, 7 December 2004, 1 p.

OSCE FORUM FOR SECURITY COOPERATION, Decision N° 11/07, An Information Exchange with regard to OSCE Principles on the control of Brokering in Small Arms and Light Weapons, FSC. DEC/11/07, 17 October 2007, 2 pp.

OSCE CONFLICT PREVENTION CENTRE, 'Updated Summary Report on replies provided by participating States on the one-off information exchange with regard to OSCE Principles on the control of brokering in Small Arms and Light Weapons', in *OSCE Report to the Third Biennial Meeting of States, On the Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, Vienna, 25 June 2008, pp. 19-35

All OSCE Documents can be consulted on: *http://www.osce.org*

Documents pertaining to the Wassenaar Arrangement

WASSENAAR ARRANGEMENT, Best Practices Guidelines for Export on Small Arms and Light Weapons, Vienna, 2002, 4 pp.

WASSENAAR ARRANGEMENT, Statement of Understanding on Arms Brokerage, Vienna, 2002, 1 p.

WASSENAAR ARRANGEMENT , Elements for Effective Legislation on Arms Brokering, Vienna, 2003, 2 pp.

WASSENAAR ARRANGEMENT , Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS), Vienna, 2003, 4 pp.

All documents of the Wassenaar Arrangement can be consulted on:
http://www.wassenaar.org

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Flemish Peace Institute
Leuvenseweg 86
1000 Brussels
tel. +32 2 552 45 91

vredesinstituut@vlaamsparlement.be
www.flemishpeaceinstitute.eu