



The Fund for Peace

Arms and Conflict Program

CASTING THE NET?

**The Implications of the U.S. Law on
Arms Brokering**

LORETTA BONDI AND ELISE KEPPLER

With a Preface by Kathi Austin

The Fund for Peace
1701 K Street, NW, 11th Floor
Washington, DC 20006
Phone: (202) 223-7940
Fax: (202) 223-7947
<http://www.fundforpeace.org>

TABLE OF CONTENTS

ACKNOWLEDGMENTS	3
THE FUND FOR PEACE MISSION	3
PREFACE.....	4
LIST OF ABBREVIATIONS.....	7
I. SUMMARY AND RECOMMENDATIONS	8
A Note on Methodology	12
II. THE PROBLEM: BROKERING ARMS TO CONFLICT ZONES	113
The Three Faces of Conflict Privatization: Non-state Belligerents, Private Arms Suppliers, and Civilian Victims	113
Shadows in the Market	17
Problems of Definition	19
Escaping Accountability.....	21
III. CASTING THE NET: THE U.S. BROKERING AMENDMENT TO THE ARMS EXPORT CONTROL ACT	21
An Overview of the Law	21
IV. ADMINISTRATION AND APPLICATION OF THE U.S BROKERING LAW ²	28
Mandates and Operating Procedures	29
Information Sharing.....	300
Novelty of the Law	344
V. Practical Enforcement.....	355
Jurisdiction.....	355
Evidence Gathering	366
Extradition	399
Reasonable Defenses	42
VI. THE RECORD OF OTHER GOVERNMENTS.....	45
VII. INTERNATIONAL EFFORTS	47
VII. CONCLUSION	51

ACKNOWLEDGMENTS

About the authors and researchers: Loretta Bondi is the Advocacy Director of the Arms and Conflict Program of The Fund for Peace. Elise Keppler is a Research Intern with the Arms and Conflict Program.

This report is based on preliminary research by Kathi Austin prior to the launch of the Arms and Conflict Program. It was edited by Kathi Austin, the Director of the Arms and Conflict Program and Paula Stinson. Jonah Crawford, an Arms and Conflict Program's Research Intern, provided additional research.

The Arms and Conflict Program wishes to express its gratitude to the U.S. officials interviewed for this report. They all responded promptly and patiently to our repeated inquiries and have been generous with their time and comments. Other governments' officials have been helpful with input and views.

We are particularly grateful to Professor Carolyn Patti Blum of the University of California, Berkeley, School of Law (Boalt Hall), and a member of the Arms and Conflict Program Advisory Committee who helped us frame some of the legal issues discussed in the report, and to numerous colleagues in the nongovernmental community for their suggestions and advice.

We would like to thank the Center for Human Rights at the University of California, Berkeley, the Compton Foundation, the HKH Foundation, the John D. and Catherine T MacArthur Foundation, Roger Linn, the Open Society Institute, the Amnesty International (USA) Patrick Stewart Human Rights Scholarship, the Tides Foundation, and an anonymous donor for their generous support. The John D. and Catherine T. MacArthur Foundation, the Ploughshares Fund and the Winston Foundation provided seed money for our research even before the Arms and Conflict Program was formally launched. The Center for African Studies at Stanford University hosted Kathi Austin as a visiting scholar during the initial research and preparations for the report. We are profoundly grateful for such support.

THE FUND FOR PEACE MISSION

The Fund for Peace is committed to preventing war and alleviating the conditions that cause war. We believe that the best research and analysis should be the basis for action. We seek practical solutions and innovative strategies, tools and tactics that can be used by practitioners, activists and policy-makers alike. All of our programs reflect this approach. We provide decision-makers with the capacity for both early warning of impending conflicts and the ability to assess the effectiveness of interventions for informed decision-making. Our empirical field investigations are joined with proactive advocacy to prevent the misuse and destabilizing impact of small arms and military assistance in conflict zones. Our "dialogues of diverse disciplines" bring together constituencies that traditionally influence policy from opposing perspectives, showing they can be formidable partners when working together.

PREFACE

Over the past twelve years I have tracked licit and illicit arms flows to conflict zones, particularly in Africa, and in so doing, have spent a significant part of my time in the company of arms traffickers and brokers. My access to this underworld was initially possible because arms networks did not fear the threat of exposure by a seemingly powerless non-governmental investigative researcher.

Observing them first hand and up-close, I have come to understand the ways in which traffickers operate as well as the strategies that they develop to evade law enforcement efforts and hide from public scrutiny. This is most often achieved by obtaining high-level political protection.

The documentary evidence and first hand observations that I have collected at great personal risk and brought to the attention of policy-makers, governments and media have contributed little to reining in the most egregious arms traffickers. Colleagues and non-governmental organizations that produced similar work have been equally disappointed by a lack of response and a failure to react on the part of officialdom. Over time, with the backing of influential human rights and arms control organizations, our research efforts have led to policy changes designed to curb the illicit arms trade. However, this has not been accompanied by the robust enforcement efforts which we have determinedly advocated. As a result, the most notorious traffickers, as well as their less well known colleagues, continued to freely conduct business as usual.

Struggling to find enforcement mechanisms which would apply to brokers' actions, I examined and compared the parallel and, at times, converging networks that linked clandestine arms traffickers with the illicit trade in endangered species. I also studied which legislative instruments had been developed or could be put in place to stop such commerce. I soon discovered that governments were more willing to adopt international and domestic laws to halt the killing of wildlife threatened with extinction by illegal traders than to restrain arms merchants engaged in supplying arms to egregious human rights abusers and regimes intent upon wiping out entire communities.

The sleeping giant called the international policy-making community was forced to wake up and confront the problem of illicit arms brokers following the publication of non-governmental reports on the rearming of the genocidaires in Rwanda and related press accounts of arms trafficking networks to Central Africa and elsewhere on the African continent where the loss of human life had reached almost unfathomable proportions.

In response, the United Nations created international commissions of inquiry to investigate arms flows to Rwanda, and later to Angola and Sierra Leone, as well as their links to smuggling routes for diamonds and other valuable commodities. These investigations coincided with some U.N. member states' efforts to strengthen UN arms embargoes which had been consistently violated by private and government-sponsored arms traffickers.

Our research, the U.N. investigations, and press reports embarrassed countries whose citizens were linked to the illicit arms trade. Consequently, some of these countries started

focusing on the evils of arms trafficking to conflict zones and to the problem of unregulated arms brokers.

These middlemen in fact pose a considerable challenge and problems with oversight for governments both domestically and globally since their sphere of activity extends beyond national boundaries. While it makes the most sense to strictly and transparently control brokers, governments have been disinclined to do so because arms traffickers may serve vital national security functions and can be conveniently utilized in covert operations or for intelligence gathering.

In my own research, I have also found a reliance on arms brokers by humanitarian agencies which utilize their transport facilities, airplanes, financial services and other logistical assets because they are often the only means available in some of the world's worst trouble spots. This incongruous interdependence only exacerbates the conflicts to which humanitarian agencies respond since the brokers use this legitimate cover to arm belligerents who prey on and victimize the civilian population.

In 1996, I remember visiting European cities to brief foreign officials about my latest field mission and found many of them for the first time able to talk informatively about the involvement of their nationals in arms "brokering." However, this label now provided a new excuse for government inaction against illicit activities as many officials complained that they did not have adequate laws to control such conduct.

To their credit, concerned policy-makers in the U.S. grew frustrated of watching arms traffickers slip through loopholes in the law. They quietly worked behind the scenes in the mid-1990s to tighten controls on arms brokers. Their efforts culminated in 1996 with a new law that specifically targeted brokering activities.

With the publication in 1999 of the *Arms Fixers: Controlling Brokers and Shipping Agents*, a report by European nongovernmental organizations, the debate on arms brokering moved from specialized circles to a broader policy community and interested public and was followed by a clamor to bring arms brokers activities into the regulated fold. Unfortunately legislation, law enforcement efforts and criminal prosecutions have lagged behind this public consciousness.

Disappointed with international policy efforts, I and other colleagues continue to highlight and expose problems associated with arms brokering through field investigation and advocacy.

The Arms and Conflict Program of The Fund for Peace stems from this commitment. The John D. and Catherine T. MacArthur Foundation, the Ploughshares Fund, the Winston Foundation and an anonymous donor encouragingly supported my individual efforts to carry out research and advocacy on the arms networks which led the creation of the Arms and Conflict Program in January 2000.

Our Program tracks weapons flows from the assembly line, through their pipelines and to their final destination. The intention is to expose traffickers' networks and highlight how unhampered supplies of weapons engender human rights abuses and exacerbate conflicts around

the globe. The Program's research documents the privatization of the weapons transfer cycle now increasingly in the hands of non-state suppliers and recipients and examines the impact of weapons in local communities. This research is conducted through extensive field missions and sustained on-the-ground observation as well as through a multitude of public and private sources. Policy-oriented advocacy is based upon our pioneering research and analysis.

My heartfelt frustration at witnessing too many arms traffickers provide the tools for the murder of hundreds of thousands of innocent people prompted the idea of taking a very close look at the U.S. law on brokering which is reputed to be the best legislative instrument in the world to control these merchants of death. Our report, "Casting the Net? Implications of The U.S. Law on Arms Brokering," examines this new legislation and explores its merits, limits, and pitfalls.

It is not by coincidence that "Casting the Net?" is also the first report produced by the Arms and Conflict Program. We believe that the U.S. as the world's major arms supplier has the moral imperative and a responsibility to prevent, at a minimum, persons under its jurisdiction from arming human rights abusers and regimes committing atrocities against unarmed civilians.

"Casting the Net?" points out that the U.S. law on brokering is comprehensive and far-reaching, but it will only be as good as its enforcement, which so far is nil. Should other governments adopt the U.S. law on arms brokering as a model, its paltry enforcement record suggests serious scrutiny of both the undeniable value as well as the shortcomings of this statute.

As a first step, the U.S. should put its resources where its will is and be more proactive in investigating and prosecuting potential violations of the arms brokering laws.

The Arms and Conflict Program will remain focused on how the arms networks operate, their impact on violence-prone communities, states and regions, and policy recommendations to stem conventional arms proliferation. We hope that our work will contribute to a more secure and peaceful world.

Kathi Austin
Director
Arms and Conflict Program
January 8, 2001

LIST OF ABBREVIATIONS

AECA	Arms Export Control Act
AES	Automated Export System
CIA	Central Intelligence Agency
CMAA	Customs Mutual Assistance Agreement
DEA	Drug Enforcement Administration
DIA	Defense Intelligence Agency
DRC	Democratic Republic of Congo
DTAS	Defense Trade Application System
DTC	Office of Defense Trade Controls
ECASS	Export Control Automated Support System
FBI	Federal Bureau of Investigation
FfP	The Fund for Peace
FORDTIS	Foreign Disclosure and Technology Information System
INTERPOL	International Criminal Police Organization
ITAR	International Trafficking in Arms Regulations
IWETS	Interpol Weapons and Explosives Tracking System
MLAT	Mutual Legal Assistance Treaty
NATO	North Atlantic Treaty Organization
NGOs	Non Governmental Organizations
NTIS	National Technical Information Service
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
PM	Bureau of Political Military Affairs, State Department
RUF	Revolutionary United Front
TECS	Treasury Enforcement Communication System
U.N.	United Nations
UNITA	National Union for the Total Independence of Angola

I. SUMMARY AND RECOMMENDATIONS

In less than a decade, the peaceful “new world order” heralded at the end of the Cold War in 1991 resembled instead a state of chaos in which intra-state conflicts spilled over national borders, turned entire regions into wastelands, and caused unprecedented numbers of civilian deaths. In nearly all of today’s conflicts, the diffusion of weapons, particularly small arms and light weapons, has played a decisive role in the escalation and intensification of violence and warfare.

The effects of such diffusion are difficult to calculate. One thing is certain, however: the widespread availability of arms has contributed to the privatization of conflict, which has resulted in non-state suppliers and recipients acquiring prominence, wealth, and influence. Tragically, the victims of these wars have also been increasingly non-state actors and the most vulnerable elements of society. These include civilians who are deliberately targeted by ruthless combatants and child soldiers who have become a feature of battlefields from Colombia to Sierra Leone.

Faced with continuous and catastrophic humanitarian crises, governments, international institutions, and nongovernmental organizations (NGOs) have recognized that the flow of arms to conflict zones represents a significant threat to the maintenance of peace and security and to the protection of human rights. This recognition is prompting unprecedented collaboration at the local, national, regional, and international levels to create new mechanisms and/or to enforce existing controls over the movement of arms to conflict zones.

To this end, efforts to develop domestic and regional regulations, as well as international standards on arms brokering, are of singular importance. Broadly defined, a broker is any private individual or company that acts as an intermediary between a supplier and a recipient of weapons to facilitate an arms transaction in return for a fee. Activities involved in arms brokering can be as minimal as making the right introductions or as extensive as negotiating every financial and logistical aspect of a transaction.

Arms middlemen who had carried out covert arms deals on behalf of governments prospered during the Cold War. After the fall of the Berlin Wall in 1989, a number of covert pipelines remained operational and attracted resourceful newcomers to the business. As a result, the role of brokers in illicit arms transfers to conflict zones looms large. Driven by profit and opportunity, these operators have often acted in violation of international arms embargoes or national export controls. Brokers have also displayed a callous indifference to the human rights records of their clients and to the nefarious consequences that beefing up arsenals in areas of violent conflict almost inevitably produce.

Traditionally, brokers have operated in a climate of impunity since, unlike arms manufacturers, dealers, and exporters, they are uniquely unregulated. Scant oversight, combined with governments’ ineptitude or reluctance to bust illegal operators, has allowed arms peddlers to circumvent even the limited controls that already exist through a variety of mechanisms. For

example, brokers have long been able to avoid accountability by establishing their bases in countries with extremely lax export laws, often other than their country of citizenship, residence, or domicile. They are skilled in using fraudulent shipping documents and clandestine transport routes such as off-the-beaten track airstrips, roads, and seaports. They are also masters in greasing their way with corrupt officials.

The adoption in 1996 of a comprehensive brokering statute in the United States, passed as an amendment to the 1976 Arms Export Control Act (AECA), was an important effort to address critical aspects of the arms brokering problem and break the impunity with which illegal traffickers operate. This law requires U.S. brokers living anywhere and foreign nationals residing in the United States to register and obtain licenses for all arms deals they transact. Not only does the law empower U.S. implementing and enforcing agencies to keep tabs on the number of brokers and the type of their operations, it also subjects violators to U.S. jurisdiction wherever an offense has been committed.

The U.S. law on arms brokering provides a useful starting point for the development of similar regulations by other countries. However, the manner in which the law is currently being implemented and enforced raises serious concerns over the ultimate success of its application. The problems that U.S. law enforcement agencies have encountered, and which will continue to occur in the future, are:

- **Understaffing and inadequate operating procedures.** The State Department Office of Defense Trade Controls (DTC), which administers the AECA and is responsible for issuing export licenses, is overwhelmed by the number of applications it receives. Only twenty-eight DTC officers are assigned to processing such applications, which were expected to exceed 45,000 in 2000. The Customs Service, the agency that has primary enforcement responsibility for the AECA, is equally overextended as it carries out tasks that range from interdiction of drug trafficking to preventing the illegal export of high-technology defense articles. Moreover, the standard operating procedures for U.S. Customs' investigations may undermine the Service's ability to keep track of brokering violations. In fact, Customs generally develops cases as a result of a seizure of weapons at a U.S. point of entry. Brokers, however, often operate abroad and their transactions may not include actual possession of weapons, and especially not possession of weapons at a U.S. point of entry. Even though the U.S. Customs Service maintains twenty-five offices abroad, their limited numbers and locations may not enable effective enforcement of the law.
- **Gaps in the exchange of information among U.S. government agencies.** Law enforcement officials claim that existing prohibitions on information sharing between government agencies may undermine the ability of enforcement agencies to investigate violations of the brokering law. Agencies with crucial information on brokering activities—such as the Bureau of Intelligence and Research in the Department of State, the Central Intelligence Agency (CIA), and Defense Intelligence Agency (DIA) in the Department of Defense—may in fact be prevented from passing on information because U.S. Customs officials often possess a lower security clearance, which limits their access to information deemed as very sensitive. In addition, available information pertaining to export controls of sensitive goods is dispersed among a number of different databases,

which are maintained by different government agencies and which have not been integrated into a “common operating environment.” As a result, the flow of data from agency to agency is constrained so that field investigators requiring information about suspicious arms transactions might not have timely access to it.

- **Lack of Transparency.** There are also serious discrepancies as to whether information about registered brokers and licenses issued to them is available to the public. According to a DTC official, such information has never been disclosed because it is considered confidential. This lack of transparency prevents public oversight on whether a particular broker is operating in compliance with the law. Other DTC officials stated that, in practice, such information is released on an ad-hoc basis and that a “Registration List of Munitions Manufacturers and Exporters” is available through the Commerce Department’s National Technical Services. This list, however, was last updated in November 1996, only four months after the brokering amendment was passed, and is limited to “manufacturers and exporters.” Thus, it is unclear whether revised versions of the list would include brokers as a separate category.
- **Enforcement problems related to extraterritorial jurisdiction, or the ability of the U.S. to prosecute U.S. offenders for acts committed overseas.** Although extraterritorial jurisdiction is lawful in the U.S., there is no guarantee that if exerted, other countries would not regard it as an infringement of their national sovereignty. Even in cases where the exercise of U.S. jurisdiction abroad does not pose an obstacle, conducting the overseas investigations necessary to gather evidence would be difficult if cooperation mechanisms with foreign agencies have not been established. Moreover, obtaining extradition for indicted offenders would also present major obstacles. Extradition of U.S. citizens or foreigners who have violated U.S. law occurs primarily when a specific extradition treaty exists between the U.S. and the relevant country. In the absence of such a treaty, extradition might be possible only if states agree to comply with the extradition request. Such practice, however, is rare and largely subject to the discretion of the requested state. To complicate matters further, since the brokering statute is new in the United States, it is unlikely that its violations would be regarded as extraditable offenses under existing treaties, most of which predate 1996, the year the brokering amendment was passed.
- **Possible invocation of ignorance of the law.** Arms brokering offenses fall under the rubric of *specific intent* crimes. In order to be proven guilty of such crimes, an offender must be aware that it is illegal not to register and apply for a license. Indicted brokers may persuasively invoke ignorance of the law to escape prosecution because many operators—particularly those active overseas—might not have received pertinent information about the registration and licensing requirements created by the new law. Since the weapons they broker may never touch the U.S., it is highly unlikely that information regarding U.S. legal requirements would be listed on arms invoices issued abroad by foreign entities. Thus, offenders may be able to mount a successful defense based on an assertion of their lack of knowledge of the law.

At this critical juncture in national and international policy development on brokering regulations, the impediments to effective application of the U.S. law must be addressed. Tackling such impediments now may ensure that future national laws and international standards based on the U.S. model will successfully control brokering activities, and thus help reduce illegal arms trafficking to conflict zones. To this end, The Fund for Peace issues the following recommendations:

To the U.S. Government:

- **Allocate resources and funds** to provide additional staff for the State Department's Office of Defense Trade Controls, the U.S. Customs Service and other pertinent law enforcement agencies. **Train** new personnel on the application of the arms brokering amendment. Increase the number of law enforcement offices overseas, giving priority to the needs of Customs' and other law enforcement agencies responsible for controlling illicit arms trafficking.
- **Upgrade law enforcement agencies' operating procedures** to keep track of U.S. brokers involved in arms transactions abroad, and in transactions which do not involve U.S.-made weapons.
- **Appoint an interagency team** to take the lead in collecting information and coordinating law enforcement agencies' work on arms brokering. U.S. agencies should also appoint and train personnel with the specific task of pro-actively collecting information from all available sources within their agency and providing information and analysis to the coordinating interagency team. Such input should be provided on a regular basis and allow for full interagency disclosure of available information.
- **Integrate individual agencies' databases** into a common operating environment, which would allow each agency to access records, cross-reference information, and update data on arms exports and imports.
- **Pursue investigations of suspected violators of the brokering law.**
- **Collect and be pro-active in making information public** about indictments of offenders of the brokering law.
- **Publish a list of all registered brokers** and their record of compliance with the law.
- **Revise the guidelines** contained in the "International Crime Control Strategy" to include arms brokering activities, and implement them.
- **Start negotiations to expand Mutual Legal Assistance Treaties** with high priority given to countries in Sub-Saharan Africa and countries which have been identified by governments, civil society, and the press as weapons transshipment points of major concern. **Include specific provisions of arms brokering** in such treaties.
- **Educate U.S. prosecutors** and the defense community on the arms brokering law, its application, and implications through systematic and periodic out-reach campaigns. Such campaigns should include announcements and other forms of publicity in specialized publications and websites.
- **Require registered brokers** and other actors in the defense community to provide statements proving familiarity with the requirements and implications of the brokering law.
- **Educate foreign officials and law enforcers** on the requirements of the U.S. brokering law. Develop guidelines to this effect, and work with these officials and law enforcement agents to design standards on brokering registration and licensing.

To the U.S. Congress:

- **Appropriate funds** to implement the above recommendations.
- **Ratify the Inter-American Convention** Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials.

To United Nations (U.N.) member states that have not already done so:

- **Adopt legislation requiring registration** for conducting arms brokering activities from nationals, and individuals who have established residence or domicile, as well as from companies in your country's territory that are acting as brokers. Such brokering activities should include manufacturing, importing, exporting, transferring, and facilitating transfers by mediating, financing or arranging financial transactions, transporting, and freight forwarding between a supplier and a recipient of arms. **Require licenses** for each and every one of the above activities. **Make breaches** of such requirements **punishable by law**.
- **Prosecute violators** of such requirements, as well as violators of U.N., regional, and national arms embargoes. **Prosecute such offenses** including breaches and violations that have been carried out by companies, nationals, or people who have established residence or domicile in your county even when such offenses have been committed overseas. **Include such violations** among extraditable offenses in new extradition treaties.
- **Compile and publish** a list of convicted violators. **Exchange information** with other governments and international law enforcement agencies about potential or suspected illicit brokering activities.
- **Allocate or request funds** to assist in the training of law enforcement staff to carry out investigations on illicit brokering activities.
- **Promote the creation of a U.N. database** on illicit arms transfers.
- **Resume negotiations on the Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition** of the United Nations Convention Against Transnational Organized Crime including specific provisions on the registration and licensing of arms brokers.
- **Start Negotiations** for the adoption of **provisions** on the registration and licensing of arms brokers to be included in the final document of **the U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects**.

A Note on Methodology

This report is based on a series of interviews with U.S. and foreign government officials, academics, legal practitioners, and U.N. and NGO representatives, conducted from October, 1999 to January, 2001. These interviews were conducted in person and by telephone primarily from Washington, D.C. and San Francisco. Research is also drawn from U.S. and foreign legislation and regulations, U.S. case law, testimony and statements offered at U.S. Congressional hearings and U.N. Security Council debates, and reports published by governments, the U.N., NGOs, scholars and the media.

In many cases, the names of the sources cited in this report are withheld. Often, U.S. and foreign government officials agreed to speak to The Fund for Peace only on condition of anonymity.

II. THE PROBLEM: BROKERING ARMS TO CONFLICT ZONES

The Three Faces of Conflict Privatization: Non-state Belligerents, Private Arms Suppliers, and Civilian Victims

The fall of the Berlin Wall in 1989 generated worldwide optimism for international peace and security, but actual events in recent years have crushed these expectations. Instead of increased stability, virulent internal conflicts have emerged at an alarming rate during the past decade, accompanied by unprecedented civilian casualties and gross violations of human rights. The local roots and causes of conflict are numerous and diverse. However, in nearly all of today's conflicts, the diffusion of weapons has played a decisive role in the escalation and the intensification of violence and warfare.

Even though the effects of such diffusion are difficult to calculate, one thing is certain: the widespread availability of arms has contributed to the privatization of conflict, resulting in non-state suppliers and recipients acquiring prominence, wealth, and influence. Tragically, the victims of these wars have also been increasingly non-state actors and the most vulnerable elements of society. These include civilians who are deliberately targeted by ruthless combatants and child soldiers who have become a feature of battlefields.¹ As scholar Michael Klare observed, in violent confrontations from Angola to Sierra Leone and from Colombia to Haiti:

[y]oung men (and some women) equipped solely or primarily with AK47 [assault rifles] and other "light" weapons have produced tens of thousands—and sometimes hundreds of thousands—of fatalities. Most of the casualties in these conflicts are non-combatants. Civilians constituted only five percent of the casualties in World War I, but they constitute about 90 percent of all those killed or wounded in more recent wars.²

Conflicts and the ensuing humanitarian crises are sustained and extended particularly because of uncontrolled flows of large quantities of small arms and light weapons.³ It is

¹ International Committee of the Red Cross, *Arms Availability and the Situation of Civilians in Armed Conflict: A Study by the International Committee of the Red Cross* (Geneva: International Committee of the Red Cross, 1999), p. 1.

² Michael Klare, "The Kalashnikov Age," *The Bulletin of the Atomic Scientists*, January/February 1999.

³ There is no universally accepted definition of small arms and light weapons but a report of the U.N. Secretary-General on 27 August 1997, provides the following definition: "Broadly speaking, small arms are those weapons designed for personal use, and light weapons are those designed for use by several persons serving as a crew. Small arms include revolvers and self-loading pistols, rifles and carbines, submachine guns, assault rifles, and light machine guns. Light weapons are heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns and recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of caliber less than 100mm." The report also examines ammunition and explosives since they form an integral part of the small arms and light weapons used in conflicts. "Ammunition and explosives include cartridges (rounds) for small arms, shells and missiles for light weapons, mobile containers with missiles or shells for single-action anti-aircraft and anti-tank systems, anti-personnel and anti-tank hand grenades, landmines, and explosives." In this report "small arms" will

estimated that there are 500 million of these arms in circulation today, posing one of the gravest threats to human security.⁴ The accumulation of such weapons represents, in part, a deadly legacy of the Superpowers' rivalry during the Cold War. At that time, the opposing blocs pursued their proxy wars by supplying large quantities of military hardware to bolster the combat prowess of a vast array of clients in conflicts spanning from Africa to Asia and South America. These durable weapons kept cascading from conflict to conflict, adding despair to the misery of civilian populations in countries such as Angola that, since independence, have known nothing but a permanent state of strife.⁵

Such hardware, together with excess weapons made available by the downsizing and the modernization of armed forces in major producing countries—particularly in the former Eastern Bloc—continues to fuel conflicts around the world.⁶ According to a study of 101 conflicts fought between 1989 and 1996, small arms and light weapons were the belligerents' weapons of preference and often the only weapons used in those hostilities.⁷ Avid and unrelenting demand is also met with supplies of newly manufactured weapons made more plentiful by the proliferation of small arms manufacturers. A recent study concluded that currently there are 300 producers in more than seventy countries offering small arms at competitive prices. Between 1980 and 1990, eighty-nine new manufacturers entered the market, twelve of them in Africa.⁸

As warlords and rebel leaders gained access to readily available and cheap weapons, they armed their followers, irregular militia, mercenaries, and vigilantes. Their bid to seek power or control over natural resources has produced devastating and drawn out conflicts such as those in Angola, Burundi, the Democratic Republic of Congo (DRC), and Sierra Leone.⁹

The ideological motives of rebel leaders, citizen militia, sectarian gangs, paramilitary forces, and death squads around the world are often murky or simply expedient. A World Bank study described some armed rebellions as a large-scale “predation of productive economic activities,” and calculated that when abundant natural resources are up for grabs in weak states, the feasibility of such predation and the consequent financial viability of rebel organizations become a reliable conflict predictor. While these rebel organizations develop a behavior akin to organized crime, this study chillingly concluded that:

designate “small arms and light weapons.” U.N., Note of the Secretary General, *Small Arms: General and Complete Disarmament*, U.N. Document A/52/298, August 27, 1997, pp. 11-13.

⁴ Michael Renner, “Small Arms, Big Impact,” *World Watch Paper*, October 1997, p. 19.

⁵ Human Rights Watch, *Angola Unravels: The Rise and Fall of the Lusaka Process* (New York: Human Rights Watch, 1999), p. 4.

⁶ In 1996, the Federation of American Scientists reported that, between 1990 and 1995, the U.S. gave away or sold arms at fire-sale prices, the original value of which amounted to \$8.7 billion; Paul Pineo and Lora Lumpe, “Recycled Weapons: American Exports of Surplus Arms, 1990-1995,” *Federation of American Scientists*, 1996, pp. 16-17. For an account of surplus weapons cascading from countries of the former Warsaw Pact, see Human Rights Watch, “Arsenals on the Cheap: NATO Expansion and the Arms Cascade,” *A Human Rights Watch Short Report*, April 1999, Vol. 11, No.5 (D), pp. 2-4.

⁷ P. Wallensteen and M. Sollenberg, “Armed Conflicts, Conflict Termination and Peace Agreements, 1989-1996,” *Journal of Peace and Research*, vol. 34, no. 3.

⁸ Peter Abel, “Manufacturing Trends: Globalising the Source,” *Running Guns: The Global Black Market in Small Arms*, Lora Lumpe ed. (London: Zed Books, 2000), pp. 81-100.

⁹ Human Rights Watch, *World Report 2000* (New York: Human Rights Watch, 2000).

[U]nlike a mafia, the rebel group must expect sometimes to confront substantial government forces, and so will need to protect itself. Rebel groups, therefore need to be much larger than mafias. Typically, rebel organizations have in the range of 500-5,000 fighters, whereas mafias are generally in the range of 20-500. It is because rebel organizations need to be large and to confront government forces in order to function as predators that conflicts can produce cumulative mortality in excess of 1,000 and so qualify empirically as civil wars.¹⁰

As ruthless non-state actors increasingly gained access to weapons, arms supply lines also became more privatized to suit such a demand. Another enduring legacy of the Cold War is the mushrooming of private traffickers who were initially recruited to carry out covert deals on behalf of governments. After the fall of the Berlin Wall, a number of the government-sponsored arms peddlers remained operational and went into business for themselves.¹¹ At the same time, resourceful newcomers joined their ranks. Seizing every opportunity, many of these private traffickers also engage in illicit trade in endangered animal species and products, precious gemstones, minerals, timber, and other valuable commodities.¹² Even though many traffickers are often acting on their own, they continue to provide their services to governments and to official agents who rely on them in times of need.¹³

Not surprisingly, governments have been reluctant to restrain arms traffickers who may serve their own commercial, geopolitical, or national security interests at some point. The advantage of using private agents is that governments can plausibly deny any direct, official role in illegal or questionable transactions.¹⁴ Given such powerful interests at stake, governments have invested neither the energy nor the resources needed to understand the manner in which arms pipelines and international arms traffickers operate in conflict zones. This may also explain

¹⁰ Paul Collier, "Economic Causes of Civil Conflict and Their Implications for Policy," *The World Bank*, June 15, 2000, p. 10.

¹¹ One such trafficker, Fred Keller, who was a part of U.S. covert operations in support of the Angolan rebels of the National Union for the Total Independence of Angola (UNITA), later engaged in private arms trafficking to the perpetrators of the Rwandan genocide. Often when government covert operations end, cargo operatives, planes, and "front company" structures are "handed over lock, stock, and barrel" to former government operatives who convert them into private enterprises. Kathi Austin, "Hearts of Darkness," *The Bulletin of Atomic Scientists*, January/February 1999; and Kathi Austin, "The Illicit Gun Trade, Fanning Flames of Conflict," *The Washington Post*, January 24, 1999.

¹² U.N., Security Council, *Letter Dated 10 March 2000 from the Chairman of the Security Council Committee Established Pursuant to Resolution 864 (1993) Concerning the Situation in Angola Addressed to The President of The Security Council*, U.N. document S/2000/203, March 10, 2000.

¹³ For example, private traffickers who provided arms to the perpetrators of the genocide in Rwanda have also been involved in trafficking weapons to the U.S.-supported Sudanese People's Liberation Army (SPLA), which is fighting the government in Sudan. According to Kathi Austin, "U.S. law enforcement officials were told to look the other way when their investigation of arms networks to the Great Lakes genocidaires overlapped with the activities of 'protected suppliers' to the SPLA." Kathi Austin, "Hearts of Darkness." See also U.N., Security Council, *Letter Dated 10 March 2000*, paras. 23-26, 35, and 40-42.

¹⁴ For example, the Third World Relief Agency brokered weapons to Bosnia in violation of a U.N. arms embargo with funds provided by Saudi Arabia, Iran, Sudan, Turkey, Brunei, Malaysia, and Pakistan and allegedly with tacit support of the U.S. government. John Pomfret, "How Bosnia's Muslims Dodged Arms Embargo; Relief Agency Brokered Aid From Nations Radical Groups," *The Washington Post*, September 26, 1996; and James Coflin, *Small Arms Brokering: Impact, Options for Controls and Regulation*, International Security Research and Outreach Programme, International Security Bureau, Department of Foreign Affairs and International Trade, Ottawa, May 2000, pp. 15-16.

why large numbers of small arms continue to fall into the hands of abusive forces despite international prohibitions such as U.N. mandatory arms embargoes.¹⁵

Such official complicity or negligence flies in the face of the mounting evidence that the role of private arms trafficking to conflict zones and to forces that violate human rights has increased significantly over the past decade. The U.N., parliamentary commissions of inquiry, the press, and non-governmental organizations have consistently documented privately brokered arms shipments and military assistance to government or rebel forces in countries engaged in conflict or otherwise under arms embargoes including: Angola, Burundi, Bosnia, Colombia, Croatia, the Democratic Republic of Congo, Eritrea, Ethiopia, Liberia, Nigeria, Papua New Guinea, the Republic of Congo (Brazzaville), Rwanda, Sierra Leone, Sri Lanka, Sudan, and Yemen.¹⁶

Elusive by definition and skilled in clandestine practices, arms traffickers have, nonetheless, left detectable tracks in their wake so that their deadly stratagems and activities are not beyond scrutiny and investigation. However, the international community has only recently started identifying the traffickers' hands in exacerbating conflict and thus threatening international security. This tardy recognition has not coincided with a meaningful increase in government vigilance and control of their activities. Early attempts at the international level, such as the adoption of a U.N. "Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition," a binding instrument regulating arms trafficking, which contained a provision on arms brokering, have been derailed (see chapter 7).¹⁷ As a result, traffickers continue to ply their lethal commerce almost undisturbed.

¹⁵ The U.N. imposes mandatory embargoes under the powers of Chapter VII of the U.N. Charter to defuse threats to peace, breaches of the peace, and armed aggression. Such embargoes are binding for all U.N. member states that are required to implement and enforce them. Since Iraq's invasion of Kuwait, the U.N. has declared twelve mandatory arms embargoes that have been observed mainly in the breach; see Loretta Bondi, "Arms Embargoes," Paper delivered at the Conference on "Smart Sanctions, the Next Step: Arms Embargoes and Travel Sanctions," Bonn, November 21-23, 1999.

¹⁶ Human Rights Watch, *Angola Unravels*, pp. 92-130; and U.N., Security Council, *Letter Dated March 10 2000* (Angola); Human Rights Watch, *Stoking the Fires: Military Assistance and Arms Trafficking in Burundi* (New York: Human Rights Watch, 1997), pp. 30-32 (Burundi); Brian Wood and Johan Peleman, *The Arms Fixers: Controlling Brokers and Shipping Agents* (Oslo: BASIC, NISAT and PRIO, 1999), pp. 45, 50, 54, 68-69, 75, and 85-86 (Bosnia, Congo-Brazzaville, Croatia, Papua New Guinea, Sudan, Sri Lanka, Yemen); Jeffrey Fleishman, "Bulgaria's arms have been featured hardware in bloodshed from Bosnia to Africa," *The Philadelphia Inquirer*, July 4, 2000 (Eritrea, Ethiopia); Jude Webber, "Peru Authorities Bust Colombia Arms-Smuggling Ring," Reuters, August 22, 2000 (Colombia); David Pallister, "Britons Involved in Arms Running," *The Guardian* (London), April 15, 1999 (DRC); "Romanian airline boss arrested in arms smuggling case," Agence France Presse, September 1, 1999 (Nigeria); Human Rights Watch, "Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide," *A Human Rights Watch Short Report*, Vol. 7, No. 4, May 1995, p. 6; and Assemblée Nationale, Mission d'Information Commune, *Enquête*, Tome III, Auditions, Volume 1, pp. 314 and 570 (Rwanda); David Leppard, Chris Hastings, Carey Scott and Brian Johnson-Thomas, "British Firms Arming Sierra Leone Rebels," *The Sunday Times* (London), January 10, 2000; Sir Thomas Legg KCB QC, Sir Robin Ibbes KBE. *Report of the Sierra Leone Arms Investigation Ordered by the House of Commons* (London: The Stationery Office of the House of Commons, July 27, 1998); and Richard Holbrooke, U.S. Permanent Representative to the United Nations, *Statement before Security Council, Exploratory Hearing on Sierra Leone Diamonds*, July 31, 2000 (Sierra Leone).

¹⁷ The draft Firearms Protocol is to be attached to the U.N. Convention on Transnational Organized Crime. U.N., Economic and Social Council, Commission on Crime Prevention and Criminal Justice, *Criminal Justice Reform and*

Shadows in the Market

Arms transfers to conflict zones and to regimes that abuse human rights largely bypass the legitimate market and take place in the so-called “gray” and “black” markets. While arms sales in the legal market are either government-to-government transfers or commercial sales that comply with national export controls and international law, gray and black market deals often escape legal barriers, scrutiny, and accountability.¹⁸ It is precisely in these latter types of markets that traffickers and brokers loom large. They have been able to attain prominence and attract an ever-expanding list of clients by offering lower prices or less red tape for arms deliveries than found in the open market. Arms middlemen freely sell their lethal wares even in violation of international arms embargoes by taking full advantage of weak and patchy laws. According to analysts Brian Wood and Johan Peleman:

Agents who broker and arrange the transport of arms outside their home countries, taking the profits through offshore accounts, can easily locate cheap supplies of arms in states that lack the capacity to control arms exports and surplus stocks properly, or whose governance is so weak there is no manifest political will to exercise proper control.¹⁹

As a result, unprofessional, ill-trained, and rogue warring groups with scarce resources have been able to secure large quantities of weapons through illicit channels.²⁰

The dividing line between the gray and the black market is often murky and easily crossed.²¹ Gray market sales include state-sponsored covert transfers that fall in between the legal and the illicit realms.²² These deals are carried out in violation of regional arms embargoes, or by eluding legal barriers thanks to political protection or through acquiescence, negligence, bribery, and corruption.²³ Diversion of weapons by the intended end-user, or contractual

Strengthening of Legal Institutions: Measures to Regulate Firearms, U.N. Document E/CN.15/1998/L.6/Rev.1, April 28, 1998; and FfP interview with a U.S. State Department official, Washington, D.C., March 29, 2000.

¹⁸ Analysts have pointed out that guns that have entered into illicit circulation frequently originated from legal transactions: see, for example, “Gun Control In the United States: A Comparative Survey of State Firearm Laws,” *A Project of the Open Society Institute’s Center on Crime, Communities and Culture and the Funders’ Collaborative for Gun Violence Prevention*, Open Society Institute, April 2000, p. 2; and Susannah L. Dyer and Geraldine O’ Callaghan, “One Size Fits All? Prospects for a Global Convention On Illicit Trafficking by 2000,” *BASIC Research Report 99.2*, April 1999.

¹⁹ Brian Wood and Johan Peleman, *op. cit.*, p. 1.

²⁰ Peter Herby, International Committee of the Red Cross, “Arms Transfers, Humanitarian Assistance and Humanitarian Law,” *Workshop on Small Arms 18-20 February 1999, Geneva, Report* (Berne: Swiss Federal Department of Foreign Affairs, 1999), pp. 43-44; Michael Klare, “An Overview of the Global Trade in Small Arms and Light Weapons,” *Small Arms Control, Old Weapons, New Issues*, Jayantha Dhanapala, Mitsuro Donowaki, Swadesh Rana, and Lora Lumpe eds., United Nations Institute for Disarmament Research (Aldershot: Ashgate Publishing Ltd., 1999), p. 3.

²¹ Swiss Federal Department of Foreign Affairs, “Swiss Discussion Paper,” *Workshop on Small Arms 22/23 November 1999, Geneva, Chairman’s Report* (Berne: Swiss Federal Department of Foreign Affairs, 1999), p. 21; and Human Rights Watch, *Stoking the Fires*, p. 31.

²² Michael Klare, “The International Trade in Light Weapons: What Have We Learned?” *Light Weapons and Civil Conflict*, Jeffrey Boutwell and Michael Klare eds., (Lanham: Rowan and Littlefield Publishers, Inc., 1999), p. 21.

²³ Reports indicate that recipients of gray market transfers have included parties in Angola, Burundi, Croatia, the Democratic Republic of Congo, Rwanda, and Sierra Leone. U.N., Security Council, *Letter Dated 10 March 2000*, para. 15 (Angola); Human Rights Watch, *Stoking the Fires*, pp. 30-32 (Burundi); James Risen and Doyle McManus, “U.S. Okd Iranian Arms for Bosnia, Officials Say,” *Los Angeles Times*, April 5, 1996. By the same authors, see also “U.S.

recipient, to an unauthorized party is also regarded as a gray transaction.²⁴ In other instances, gray market operations have involved government-engineered deals that were not explicitly prohibited under national or international law, but which were regarded as politically contentious.²⁵

In contrast, black market sales are transactions conducted completely underground by private individuals and companies in blatant violation of domestic export laws or of mandatory U.N. arms embargoes.²⁶ Although gray market transactions may be in part motivated by political considerations, and black market deals entirely by profit, arms transfers made through both of these markets employ some of the same traffickers' networks and brokering skills that can efficiently "move weapons and money."²⁷

Problems of Definition

While no universal definition of brokering yet exists, analysts generally concur that, at a minimum, any private individual or company acting as an intermediary between a supplier and a recipient to facilitate an arms transaction may be considered a broker.²⁸ However, the specific tasks brokers may undertake in facilitating arms deals may vary considerably, and governments' views often differ widely on which activities qualify as brokering.²⁹ For example, brokers may introduce the supplier and recipient, conduct the bidding process, procure the arms, and/or negotiate the logistics of arms deliveries. As one analyst explains, the actual work of brokers remains somewhat ambiguous because it may be as "simple as 'making the right introductions'

Envoy May Have Aided Arms Convoy to Bosnia," *Los Angeles Times*, April 17, 1996, and "House Panel to Probe Iran Arms to Bosnia," April 25, 1996 (Croatia), David Pallister, "Britons Involved," Reuters, April 15, 1999 (DRC); "Romanian airline boss," September 1, 1999, Agence France Presse (Nigeria); Human Rights Watch, *Rearming with Impunity*, p. 6 (Rwanda); and *Report of the Sierra Leone Arms Investigation Ordered by the House of Commons* (Sierra Leone).

²⁴ For example, according to Human Rights Watch, Malaysia diverted rounds of phosphorus shells of South African origin to Sudan, in violation of end-user commitments. A South African official confirmed that the diversion had indeed occurred. Human Rights Watch, "South Africa: A Question of Principle: Arms Trade and Human Rights," *A Human Rights Watch Short Report*, Vol. 12, No. 5(A), October 2000, p. 24.

²⁵ For example, Bulgaria, the Czech Republic, Russia, Slovakia and the Ukraine supplied weapons for the war effort of Ethiopia and Eritrea in 1999 and at the beginning of 2000. Although such deals were reportedly completed before the U.N. imposed a mandatory arms embargo on both belligerents in May 2000, these five countries had defiantly ignored previous non-binding calls by the U.N. and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, a group of thirty-three major arms exporters, to stop arming Ethiopia and Eritrea. In an unprecedented move, U.S. officials publicly reprimanded the five during the Wassenaar group consultations in May 2000. This "name and shame" tactic was met with denials or silence. FfP interview with a U.S. official present during these discussions, Washington, D.C., June 6, 2000.

²⁶ Loretta Bondi, "Arms Embargoes," and David Cortright and George A. Lopez, *The Sanction Decade: Assessing U.N. Strategies in the 1990s* (Boulder: Lynne Rienner Publishers Inc., 2000).

²⁷ Tara Kartha, "Controlling the Black and Gray Markets in Small Arms in South Asia," *Light Weapons and Civil Conflict*, p. 51.

²⁸ U.N., Note by the Secretary-General, *Small Arms: Report of the Group of Experts on the Problem of Ammunition and Explosives*, U.N. Document A/54/155, June 29, 1999, para. 46; and FfP telephone interview with a U.S. Treasury Department official, October 2, 2000.

²⁹ FfP telephone interviews with Peggy Mason, former Canadian Ambassador for Disarmament, September 26, 2000; and with a U.S. Treasury Department official, October 2, 2000.

or as complex as managing all aspects of a transfer including price negotiations, financing, transportation, and official 'paper work'.³⁰

If attaining a generally agreed upon definition of brokers' activities has proven difficult, common denominators recur in brokers' profiles, despite their different nationalities and areas of operation and expertise. Brokers involved in gray and black market sales tend to be businessmen with military or security industry backgrounds. Their driving force is usually profit rather than political interests. Although they often trade in other sanctioned commodities, they may run legitimate parallel businesses which afford them bona fide credentials and official access.³¹ They are particularly skilled in using fraudulent shipping documents and clandestine transport routes such as off-the-beaten track airstrips, roads, and seaports. They are also masters in greasing their way with corrupt officials.³²

Escaping Accountability

Brokers evade scrutiny because their activities in the gray and black markets are either secretly endorsed by people in high places, or because they successfully circumvent weak controls which by and large do not specifically target brokers. Commenting on such lack of regulation, Stephen Byers, the U.K. Trade and Industry Secretary, observed that in his country: "You need a licence to go fishing, to marry, to drive a car, you even need a licence to run a raffle. But you don't need a licence to broker and traffic in arms." Byers pledged that his government will introduce a licensing system for arms brokers, but as of January 2001, this promise has not yet been fulfilled.³³

The U.K. has not been the only culprit in official neglect, however. To date, only a handful of countries in the world have put legislation in place that, with varying degrees of strictness, refers to brokering activities. These countries are: Canada, France, Germany, the Netherlands, Norway, South Africa, Sweden, Switzerland, and the United States (see chapter 6).³⁴

³⁰ James Coflin, *State Authorization and Inter-State Information Sharing Concerning Small Arms Manufacturers, Dealers, and Brokers*, Canada Department of Foreign Affairs and International Affairs, Ottawa, 1999.

³¹ For example, Rakesh Saxena, a Thai businessman, who financed an arms deal to the Kabbah government in Sierra Leone in violation of a U.N. arms embargo, also maintained mining, fishing, and telecommunications interests in Sierra Leone. Abiodun Alao, *Sierra Leone: Tracing the Genesis of Controversy* (London: The Royal Institute of International Affairs, 1998,) p. 7, available on http://www.riia.org/briefing_papers/bp50.html; and James Coflin, *Small Arms Brokering*, p. 6. On the legal activities of Victor Bout, a notorious Tajiki operator, see "Frances Williams, Revealed: ex-Soviet officer turns sanctions buster," *Financial Times* (London), July 10, 2000.

³² Human Rights Watch, *Stoking the Fires*, pp. 69-70 and 79; U.N., *Small Arms: Report of the Group of Experts on the Problem of Ammunition and Explosives*, para. 55. James Coflin identifies four broad categories of brokers: the defense industry professionals, the opportunists, the patriots, and the criminals, but notes that each case may present different challenges and responses to policy makers' efforts to regulate their activities. James Coflin, *Small Arms Brokering*, pp. 13-14.

³³ "Stricter controls on UK arms dealers," BBC News Online, September 28, 2000, available on http://news.bbc.co.uk/1/hi/english/in_depth/uk_politics/2000/conferences/labour/newsid_946000/946403.

³⁴ Brian Wood and Johan Peleman, *op. cit.*, pp. 105-114. James Coflin also mentions that the nongovernmental organization OXFAM reported that controls on brokering had been adopted by Luxembourg. James Coflin, "State Authorization."

The dearth or the inadequacy of specific controls—and their lackluster application where they exist—are reflected by the fact that arms traffickers have seldom been brought to justice. The most egregious example of this impunity is the failure of prosecuting traffickers who have armed genocidal forces in Rwanda and ruthless rebels in Angola despite international arms embargoes. Some of these traffickers have been exposed by governments, independent U.N. bodies, nongovernmental organizations and the press.³⁵

Moreover, brokers have long been able to avoid the limited controls that exist by establishing their bases in countries with extremely lax export laws, primarily other than their country of citizenship, residence, or domicile.³⁶ Some governments have asserted that they bear no responsibility in regulating their nationals or residents who peddle weapons abroad because the onus of enforcing export controls should rest on the countries from where the arms are exported, transshipped, and imported.³⁷

Illegal traffickers have successfully hedged their bets against prosecution should their transactions be exposed and investigated. For example, they have often covered their tracks by inserting distance between arms suppliers and recipients through a chain of associates and through a multitude of launching pads for their operations.³⁸ According to OXFAM:

In some cases the arms will be delivered by a shipping firm based in one country, with its aeroplane registered in a second, which flies out from a third, will pick up arms in a fourth country, re-fuel in a fifth, be scheduled to land in a sixth, but actually will deliver its lethal consignment in a seventh country. To make things even more complex, it would appear that shipping company details change on a fairly frequent basis, suggesting that they are often set up purely to manage the delivery of a particular consignment of arms.³⁹

³⁵ For example, Ters Ehlers, a South African, and Victor Bout are widely known to be arms traffickers to forces under arms embargoes in conflict zones, but have not been held accountable for their actions. The United Nations, and Human Rights Watch, among others, have identified Ters Ehlers as having brokered small arms and light weapons to the Hutu regime in Rwanda in 1994, and Victor Bout as having brokered weapons to both UNITA and to the Sierra Leonean rebels of the Revolutionary United Front (RUF). U.N., International Commission of Inquiry (Rwanda), *Second Report of the International Commission of Inquiry*, U.N. Document S/1996/195, March 13, 1996, para. 29; Human Rights Watch, *Rearming With Impunity*, p. 11; U.N., Security Council, *Letter Dated March 10 2000*, para 26; and Brian Wood and Johan Peleman, *op. cit.*, pp. 32-34, and p. 68. See also Bureau of Intelligence and Research, U.S. Department of State, *Arms Flows to Central Africa/Great Lakes, Fact Sheet*, November 1999," available on http://www.state.gov/www/global/arms/bureau_pm/fs_9911_armsflows.html.

³⁶ For example, Human Rights Watch reported in 1997 that weapons transfers to Burundi were brokered by French and Pakistani nationals operating from Belgium, by a South African national operating from Uganda, Kenya, and Tanzania, and by a French national operating from Belgium; see Human Rights Watch, *Stoking the Fires*, pp. 34 and 44. Similarly, Victor Bout who has been active in Belgium, the United Arab Emirates, and South Africa, among other countries, brokered arms transfers to rebels in Sierra Leone and Angola. U.N., Security Council, *Letter Dated 10 March 2000*, para. 29; and Brian Wood and Johan Peleman, *op. cit.*, pp. 63-65.

³⁷ FfP telephone interview with a U.S. Treasury Department official, October 2, 2000; and Brian Wood and Johan Peleman, "Making the Deal and Moving the Goods: The Role of Brokers and Shippers," *Running Guns*, p. 132.

³⁸ *Ibid.*

³⁹ OXFAM, *Out of Control: The Loopholes in UK Controls on the Arms Trade* (Oxford: Oxfam, 1998), Sec. 2.

As a result, all that often appears to be happening is that weapons are moving from a supplier country to another country that is not under international embargoes or listed as a proscribed destination by national export laws. The fact that these weapons will be later delivered surreptitiously to a forbidden recipient would, in all likelihood, escape detection by most law enforcement and arms export control agencies which seldom monitor transshipments and compliance with end-user agreements; end-user agreements are contractual promises made by the recipient not to re-transfer the weapons without the exporter's consent. Even when evidence of an illegal transfer emerges, law enforcement agencies may be unable to effectively trace documentary proof connecting all parties to the deal, which could form the basis for indictments (see chapter 5).

Together, all these factors have worked against reining in and prosecuting even those traffickers and brokers who have been repeatedly exposed. Consequently, these arms peddlers remain free to conduct business as usual and to prosper in the fertile breeding ground of today's conflicts.

III. CASTING THE NET: THE U.S. BROKERING AMENDMENT TO THE ARMS EXPORT CONTROL ACT

An Overview of the Law

Although no offender has yet to be convicted under the new U.S. brokering amendment to the Arms Export Control Act (AECA), the passage of this amendment on July 21, 1996 represented an innovative approach to control arms brokers.⁴⁰ The text of the amendment as incorporated into the Arms Export Control Act reads as follows:

(I) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service designated by the President... or in the business of brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service...shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

(II) Such brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.

(III) No person may engage in the business of brokering activities described in subclause (I) without a license, issued in accordance with this Act, except that no license shall be required for such activities undertaken by or for an agency of the United States Government—

(aa) for use by an agency of the United States Government; or

⁴⁰ The title of the amendment is: *An Act to amend the Foreign Assistance Act of 1961 and the Arms Export Control Act to make improvements to certain defense and security assistance provisions under those Acts, to authorize the transfer of naval vessels to certain foreign countries, and for other purposes.* Public Law 164, 104th Cong., 2nd Sess. (July 21, 1996), sec. 151; *Arms Export Control Act*, U.S. Code (U.S.C.) vol. 22, sec. 2778(b)(1976).

(bb) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.⁴¹

As noted above, this brokering law entered into force in 1996 as an amendment to the Arms Export Control Act (AECA), a wide-ranging law originally enacted in 1976 that regulates most activities related to the export of weapons.⁴² The AECA is administered by the Office of Defense Trade Controls (DTC) of the Department of State and enforced by the U.S. Customs Service under the International Traffic in Arms Regulations (ITAR) which constitute a set of implementing rules that correspond to specific AECA provisions. The implementing regulations for the brokering statute were published on December 24, 1997. Their key portions are:

§ 129.2 Definitions:

- (a) Broker means any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.
- (b) Brokering activities means acting as a broker as defined in § 129.2(a), and includes the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service, irrespective of its origin. For example, this includes, but is not limited to, activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside of the United States.

§ 129.3 Requirement to Register:

- (a) Any U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States... who engages in the business of brokering activities... with respect to the manufacture, export, import, or transfer of any defense article or defense service subject to the controls of this subchapter... or any "foreign defense article or defense service" (as defined in § 129.2) is required to register with the Office of Defense Trade Controls.

§ 129.6 Requirement for License/Approval:

- (a) No person may engage in the business of brokering activities without the prior written approval (license) of, or prior notification to, the Office of Defense Trade Controls, except as follows:
 - (b) A license will not be required for:
 - (1) Brokering activities undertaken by or for an agency of the United States Government --
 - (i) for use by an agency of the United States Government; or

⁴¹ Ibid.

⁴² Ibid.; and Bureau of Political-Military Affairs, Department of State, "Amendments to the International Traffic in Arms Regulations," *Federal Register* 62, no. 247 (24 December 1997): 67274; *ITAR*, sec. 129.2(b).

(ii) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.⁴³

In general, under the AECA Congress authorizes the President to control the import and export of defense articles and services.⁴⁴ The ITAR requires that all those involved in the export and import of defense articles and services register with the U.S. government and obtain an export license for each transaction in which they participate. Licenses may be prohibited if the export of the article will:

- contribute to an arms race;
- aid in the development of weapons of mass destruction;
- support international terrorism;
- increase the possibility of the outbreak or escalation of conflict and jeopardize world peace and security, as well as U.S. foreign policy goals;
- violate a U.S. or U.N. Security Council arms embargo;
- prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.⁴⁵

There are some brokering activities that are exempted from the licensing requirement of the brokering regulation. The brokering of certain military equipment arranged wholly within and destined exclusively for the North Atlantic Treaty Organization (NATO) and its member states, as well as Australia, Japan, or New Zealand does not require a license.⁴⁶ This exemption, however, does not include fully-automatic firearms and parts for which a license is still required to broker them in and to all countries.⁴⁷ In addition, Congress passed legislation on October 6, 2000 that permits the President to exempt any country from export license requirements if a binding bilateral agreement is executed between the U.S. and a foreign government.⁴⁸ Such an agreement should include a requirement for the foreign party to create or revise its arms export control regimes, and to make them compatible with U.S. laws in the areas of brokering, conditions on exports, and penalties for violations.⁴⁹

⁴³ “Amendments to the International Traffic in Arms Regulations,” 67274.

⁴⁴ 22U.S.C. sec. 2778(a)(1).

⁴⁵ *International Traffic in Arms Regulations (ITAR), Code of Federal Regulations*, Vol. 22, secs. 120-130 (1997). For a list of prohibited countries, see *ITAR*, sec. 126.1; and the *State Department Embargo Reference Chart*, available on <http://www.pmdtc.org/country.htm>. As of November 2000, twenty-six countries are under a United States arms embargo; at least six have experienced civil conflict in the last five years.

⁴⁶ *ITAR*, sec. 129.6(b)(2). For a full list of military equipment that is exempted from the license requirement in the case of brokering activities for these countries, it is necessary to compare the list of munitions covered by the regulations generally under *ITAR*, sec. 121, against those defense articles that are never exempted from the licensing requirement under *ITAR*, sec. 129.7(a)(1)(i).

⁴⁷ *ITAR*, sec. 129.7(a)(1)(i).

⁴⁸ *An Act to amend the Foreign Assistance Act of 1961 and the Arms Export Control Act to make improvements to certain defense and security assistance provisions under those Acts, to authorize the transfer of naval vessels to certain foreign countries, and for other purposes*. Public Law 280, 106th Cong., 2nd Sess. (Oct. 6, 2000), sec. 102; 22 U.S.C., sec. 2778(j).

⁴⁹ *Ibid.*

The AECA applies to all "*persons of the United States* [emphasis added] involved in the export and import of such articles and services" commencing from its enactment in 1976. If convicted of willfully violating the requirement to register and obtain a license, an offender may be penalized in the amount of no more than \$1,000,000 and imprisonment of up to ten years for each transaction.⁵⁰

Until the introduction of the 1996 brokering amendment, the ITAR did not include any specific provision regulating the activities of arms brokers.⁵¹ However, some of the eighty significant cases which were prosecuted under the AECA between 1989 and 1996 involved offenders who, charged with conspiracy, were convicted specifically for the illicit brokering of American-made weapons.⁵² Other brokering transactions not directly connected with the importation and exportation of weapons to or from the U.S. fell outside the AECA. These included instances in which U.S. citizens or foreign nationals operating from the United States or abroad engaged in deals with arms (of non-U.S. origin) not touching U.S. soil, or when U.S. nationals operating overseas brokered non-U.S. weapons on behalf of another or several foreign entities. A U.S. official pointed out that, as a result, a significant, but undetermined volume of transactions eluded the scope of the law.⁵³

As early as 1980, U.S. government officials realized that, in the increasingly globalized arms bazaar, these loopholes needed to be addressed.⁵⁴ However, during the Cold War, the U.S. continued to turn a blind eye to such crucial regulatory shortcomings, which also allowed the U.S. to protect its covert operations. U.S. enforcement officials openly denounced interference by the CIA and other government departments in the conduct of their investigations and complained that law enforcers' hands were often tied. In interviews with *The New York Times* in 1985, for example, Customs officials and state prosecutors said that investigations on arms traffickers and brokers were routinely blocked or buried at the request of other federal agencies

⁵⁰ *ITAR*, sec. 127.3 (1997); the *AECA*, sec. 2778(c) states: "Criminal violations; punishment. Any person who willfully violates any provision of this section or section 39 [22 USC § 2779], or any rule or regulation issued under either section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than \$1,000,000 or imprisoned not more than ten years, or both."

⁵¹ House of Representatives, *To Make Improvements to Certain Defense and Security Assistance Laws and to Authorize the Transfer of Naval Vessels to Certain Foreign Countries*, 104th Cong., 2nd Sess., 1996, H. Rept. 104-519(I), (April 16, 1996), sec. 151.

⁵² This came to the attention of the FfP when we initiated a specific search of public records that led us to an interesting case. In 1987, a New York district court convicted nineteen defendants of conspiracy to violate the AECA when they attempted to negotiate the transfer of weapons between sellers in Israel and buyers in Iran. In *United States v. Evans*, the court held that it was irrelevant that the defendants operated outside the U.S., and ruled that, since the arms were American-made, the indicted foreign nationals were not immune from prosecution even though a foreign country owned the weapons. Consequently, the court ruled that the activities of the defendants constituted conspiracy to export weapons under U.S. law. The opinion issued by the court does not state in detail the exact brokering activities of the defendants, but states clearly that 1) the defendants were neither trying to export weapons from nor import weapons to the United States, and 2) that the defendants were not producers, manufacturers, or owners of the weapons, but rather intermediaries in the deal. *United States v. Evans*, 667 F. Supp. 974 (S.D.N.Y. 1987), p. 977, *affirmed on other grounds*, 844 F.2d (2d Cir. 1988), p. 36.

⁵³ FfP interview with a U.S. State Department official, Washington, D.C., March 28, 2000.

⁵⁴ *Ibid.*

in Washington.⁵⁵ They also pointed out that legal loopholes often let traffickers off the hook. *The New York Times*, however, described the law enforcement agencies' own neglect of "low-end" arms trafficking, which Customs did not regard as a priority. This report went on to state that:

...[T]he Federal law-enforcement agencies that are responsible for stopping arms smuggling say they have other, more important interests. The Customs Service, for example, says it is so busy fighting drug trafficking and illegal exports of high technology that it pays little attention to guns.⁵⁶

In interviews with The Fund for Peace, Customs officials confirmed that the main focus of the Service's special programs such as Operation Exodus, launched in 1981 to stop the illegal export of U.S. articles, and Project Gemini, an initiative aimed at raising public awareness in the defense industry about the dangers of illegal exports, has been on high-end defense equipment and technology, as well as on dual-use goods, which are items designed for both commercial and military use.⁵⁷

It was not until the mid-1990s—in a much-changed geopolitical climate—that the need to address some of the loopholes in the AECA became compelling. "For a while the U.S. had been watching criminals broker weapons, but they were technically outside of the law," an official told The Fund for Peace.⁵⁸ This same official observed that, "brokers were almost thumbing their noses at the U.S. government because they knew they couldn't get punished." According to U.S. officials, mounting frustration prompted action in 1996.⁵⁹ At that time, Congress and DTC officials worked on an amendment to the law that would allow U.S. enforcers to cast their nets wider. A former member of the U.S. Senate staff suggested that the people involved in this initiative deliberately kept a low profile in order not to ring alarm bells throughout the defense community.⁶⁰ Describing the genesis of the amendment, a U.S. official who had been involved in its development recollected:

PM [the State Department Bureau of Political Military Affairs] took the initiative and managed to gather a fair disposition towards it by other sectors of the administration. The State Department then reached out to the House International Relations Committee which took it on and worked with the Senate Foreign Relations Committee. The riding was pretty smooth, and save for the customary give and take, we realized that the amendment would not be torpedoed [by either the President or Congress]. Everybody realized that we needed to close this loophole and allow for more transparency.⁶¹

⁵⁵ Joel Brinkley and Jeff Gerth, "U.S. Aides See Gun Smugglers as a Low Priority," *The New York Times*, September 26, 1985.

⁵⁶ Ibid.

⁵⁷ FfP interviews with U.S. Customs officials, September 6, 2000, and October 24, 2000.

⁵⁸ FfP interview with a U.S. State Department official, Washington, D.C., March 29, 2000.

⁵⁹ FfP telephone interview with a staff member of the Senate Committee on Foreign Relations, March 21, 2000.

⁶⁰ FfP telephone interview with former member of the Senate staff, December 8, 2000.

⁶¹ FfP interview with a U.S. State Department official, Washington D.C., December 13, 2000.

This effort resulted in a statute that specifically targeted the activities of brokers and that, in the hope of its initiators, would allow U.S. officials to “separate the bad, the good, and the gray [transactions] and force those brokers who walk the line between legal and illegal trafficking to choose sides.”⁶²

As noted above, the U.S. brokering amendment explicitly articulates a broad definition of what constitutes arms brokering activities by stating that “any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration” is to be considered a broker.⁶³

Moreover, brokering activities are defined to specifically include: financing, transportation, freight forwarding, or any other action that facilitates the manufacture, export, or import of a defense article or defense service.⁶⁴ In order to pursue these activities, brokers are required to register with the DTC, obtain a prior approval (a license) or give the DTC prior notification for each transaction they undertake.⁶⁵ Applications must be made in writing and list: 1) all parties to the deal, 2) types, quantity, and value of brokered equipment, 3) the end-use of the material, and 4) the end-users or recipients. In addition, brokers are required to provide an annual report on their activities and transactions to the DTC.⁶⁶

Crucially, it is not legally permissible for violators operating abroad to escape U.S. jurisdiction because the brokering law’s implementing regulations explicitly cover “activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside of the United States.”⁶⁷ In other words, the law applies to U.S. persons operating anywhere, who broker American or foreign weapons, and to non-nationals operating on U.S. soil or abroad in cases where their transactions involve American weapons or reside and/or operate in the U.S.—including using U.S. mail or making telephone calls to and from the U.S.⁶⁸ The reach of the U.S. law beyond U.S. national borders is known as *extraterritorial jurisdiction* (see chapter 5).

⁶² FfP interview with a U.S. State Department official, Washington, D.C., March 29, 2000.

⁶³ Ibid.

⁶⁴ Persons who are engaged solely in financing, transporting, freight forwarding activities without also brokering defense articles and services are not subject to this law. For example, if an individual operates as a transport agent for arms but conducts no actual negotiation of the deal in return for a fee, he is not subject to the provision. *ITAR*, sec. 129.3.

⁶⁵ Under the amendment’s implementing regulations, “no person may engage in the business of brokering activities without the prior written approval (license) or, or prior notification to, the Office of Defense Trade Controls.” Licenses are required when the brokering activities include: 1) fully automatic firearms and components and parts; 2) nuclear weapons strategic delivery systems and all components, parts, accessories, and attachments; 3) nuclear weapons design and test equipment; 4) naval nuclear propulsion equipment; 5) Missile Technology Control Regime; 6) classified defense articles, services and technical data; 7) foreign defense articles or defense services. Prior notification is only permissible when U.S. persons who are already registered as exporters are brokering significant military equipment valued at less than \$1,000,000. *ITAR*, secs. 129.6, 129.7, and 129.8 (1997). This law exempts employees of the United States, foreign governments, or international organizations acting in official capacities from the licensing and registration requirements.

⁶⁶ *ITAR*, secs. 129.8 and 129.9.

⁶⁷ “Amendments to the International Traffic in Arms Regulations,” 67274; *ITAR*, sec. 129.2(b).

⁶⁸ *ITAR*, sec. 129.2.

Responsibility for the enforcement of this law falls under the purview of the U.S. Customs Service, which is tasked with investigating potential violations in cooperation with the DTC and the Department of Justice—including the Federal Bureau of Investigations (FBI), and the Drug Enforcement Administration (DEA). These three administration branches may also coordinate enforcement with other U.S. agencies such as the Department of Treasury’s Bureau of Alcohol, Tobacco, and Firearms (particularly for tracing weapons), and the Secret Service (in cases where financial offenses or threats to the President are involved).⁶⁹

Violators of the regulations or the law may be subject to administrative hearings or criminal procedures.⁷⁰ In the case of an administrative hearing, civil penalties of up to \$1,000,000 for each violation of the AECA and administrative debarment may be imposed.⁷¹ Under a criminal prosecution, a court may impose imprisonment of up to ten years and fines in the amount of \$1,000,000 for each violation.⁷² In addition, a conviction in a court of law results in statutory debarment for the offender.⁷³ When administrative or statutory debarment is imposed on an offender, that person is prohibited from directly or indirectly engaging in the export of defense articles. A list of debarred parties is published in the *Federal Register*, an official publication.⁷⁴ According to State Department policy, statutory debarment generally lasts for three years, but may be imposed for any length of time, after which the individual must apply for a reinstatement of licensing privileges.⁷⁵ Like most breaches of the AECA provisions, brokering offenses are considered *specific intent crimes*. In other words, brokering without registration and a license constitutes a violation only when the broker is aware of the existence of the requirement to register and obtain a license. (See Chapter 5).

Despite the considerable innovation in arms trade control that the brokering amendment introduced, gaps in the substance of the law, practical challenges to enforcement, and the manner in which the law is currently being applied in the U.S. undermine its effective implementation.

IV. ADMINISTRATION AND APPLICATION OF THE U.S BROKERING LAW

⁶⁹ FfP telephone conversation with Jonathan Winer, a U.S. attorney with Alston & Bird, LLP, and a former Deputy Assistant Secretary of State for International Narcotics and Criminal Issues, December 7, 2000.

⁷⁰ 22 U.S.C., sec. 2778; *ITAR*, sec. 127.

⁷¹ The basis for administrative debarment is any violation of the AECA or of any *ITAR* regulation, or when a violation is of such a character as to provide a reasonable basis for the DTC to believe that the violator cannot be relied upon to comply with the AECA and the *ITAR*. *ITAR*, sec. 127.7(b)(2).

⁷² The United States Code prescribes that when an offender operating outside of the United States commits a crime, prosecutors must prosecute in the district where the offender is first arrested or brought into the United States. If the offender is not brought into or arrested in any U.S. district when the case is initiated, however, he or she can be prosecuted in the district of the offender’s last known residence. If the residence is unknown, the case can be prosecuted in Washington, D.C. 18 U.S.C., sec. 3238 (1911). In addition, as long as the venue is proper under the requirements of section 3238, it is irrelevant if a prosecution may also be conducted in a different venue.

⁷³ The basis for a statutory debarment, is any conviction for breaching, or any conspiracy to violate the AECA. 22 U.S.C. sec. 2778; *ITAR*, sec. 127.7(c).

⁷⁴ For a list of debarred parties see State Department Office of Defense Trade Controls, *List of Debarred Parties, July 1988 - May 1999*, available on <http://www.pmdtc.org/debar059.htm>.

⁷⁵ *ITAR*, sec. 127.7.

Mandates and Operating Procedures

There are several problems related to the administration of the brokering provision. In this regard, officials admit that very few in their ranks are familiar with how the law functions or understand its full implications.⁷⁶ A discouraged official further remarked that the momentum which tends to build when a new law is passed may have been lost in this case because the implementing regulations to this provision were not promulgated until one and a half years after the law was adopted, an unusually long lag-period.⁷⁷ To make matters worse, no agency has been empowered with a clearly defined interagency coordinating task or is tracking the application of the law.⁷⁸ Officials have concluded that no progress will be made until all government agencies involved in enforcing this law become more aware of its provisions and scope.⁷⁹

Another challenge to the effective administration of the law stems from the bureaucracy itself, which is already overburdened. Both the DTC, as the office responsible for reviewing licensing applications and administering the law, and U.S. Customs, as the service charged with investigating violations, may be unable to adequately perform these duties because their current mandate is too broad and onerous for their available staff.⁸⁰ Such constraints, both at the DTC and Customs, also cast a shadow over the ability of these agencies to keep track of and pursue a whole new category of actors in the arms market.⁸¹

In testimony before Congress in March 2000, John D. Holum, Under Secretary of State for Arms Control and International Security, reported that the DTC was already overwhelmed by its workload even before the agency assumed new responsibilities for licensing commercial satellites in 1999.⁸² The DTC was authorized to hire twenty-three additional employees,

⁷⁶ FfP telephone interviews with a DTC official, October 26, 1999; with a U.S. Customs official, October 28 1999; and with a U.S. Treasury Department official, October 2, 2000.

⁷⁷ FfP telephone interview with a U.S. Customs official, February 25, 2000; and "Amendments to the International Traffic in Arms Regulations," 67274.

⁷⁸ FfP telephone interviews with a DTC official, October 26, 1999; and with a U.S. Customs official, October 28, 1999 and August 11, 2000; FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000; and FfP telephone interviews with a U.S. Department of Justice official, February 24, 2000; and with a U.S. Treasury Department official, October 2, 2000.

⁷⁹ FfP interview with a U.S. Customs official, Washington D.C., October 24, 2000; and FfP telephone interview with a U.S. Department of Treasury official, October 31, 2000.

⁸⁰ An attorney who works with the DTC noted in a telephone conversation with the FfP on April 11, 2000 that brokering is definitely lost among the many other major export control issues which the DTC oversees; FfP telephone interview with a DTC official, October 26, 1999. See also John C. Payne, Deputy Inspector General for the U.S. Department of State and the United States Information Agency, statement prepared for Senate Committee on Governmental Affairs, *Interagency Inspectors General Report on the Export-Control Process for Dual-Use and Munitions List Commodities: Hearing before the Senate Committee on Governmental Affairs*, 106th Cong., 1st sess., June 23, 1999.

⁸¹ According to a DTC official, as of October 26, 1999, only 134 brokers had registered at that time, and the number of licenses they have applied for is unknown. There are no projected estimates on the number of license and registration applications that will result as the law is more fully implemented; FfP telephone interview with a DTC official, October 26, 1999.

⁸² John D. Holum, Senior Advisor to the President and the Secretary of State for Arms Control, Nonproliferation and Disarmament, statement prepared for the Senate Committee on Governmental Affairs, *Munitions List Export Licensing Issues: Hearing before the Senate Committee on Governmental Affairs*, 106th Cong., 2nd sess., 28 March 2000.

increasing the total full-time staff to sixty-eight and the licensing division staff to twenty-eight, to help handle the some 45,000 license applications expected in 2000, as well as the commercial satellite docket.⁸³ Another crucial responsibility of the DTC is the administration of an export compliance watch-list. This list includes individuals, companies, agencies, and groups whose applications for, or association with, export activities may warrant closer examination. The list encompasses thousands of entries and collates DTC's own data with information from other State Department offices, the U.S. Customs Service, the General Services Administration, the Departments of Commerce, Justice, and Treasury, as well as input from the intelligence community.⁸⁴ Against this background, the modest personnel reinforcements at the DTC could hardly be considered a remedy. As a private attorney who works with the DTC put it, the agency's limited staff, along with the breadth of licensing covered by the DTC, results in brokering being lost among many other major export control priorities.⁸⁵

Similarly, Jim Kolbe, Undersecretary for the U.S. Bureau of Alcohol, Tobacco and Firearms, reported to the U.S. Congress in March 2000 that an interagency review of export licensing procedures by the Departments of Commerce, Defense, Energy, State, Treasury, and the CIA revealed that U.S. Customs was understaffed. The review also pointed out that the Service's personnel were not being sufficiently trained to handle their current task load.⁸⁶ In interviews with The Fund for Peace, a Customs official acknowledged those shortcomings and stated:

In 1999, we had 1,670 seizures of munition list items. Our agents in the field have looked at [brokering investigations] as traditional ITAR violations; that's what they have been familiar with for twenty years. Here [in the U.S.] and overseas we need to educate our people who are already tasked with a universe of all the other things we can throw at them.⁸⁷

In addition to traditional practices, current standard operating procedures for U.S. Customs investigations may hinder the Service's ability to effectively pursue brokering offenses. A U.S. official explained that authority to investigate violations rests with the U.S. Customs Service because most cases against breaches of the AECA are developed as a result of a seizure of weapons by Customs agents at a U.S. point of entry.⁸⁸ Brokers, however, often operate abroad, and their transactions may not involve the actual possession of weapons, particularly not

⁸³ Ibid.

⁸⁴ While at its core the list contains the names of persons debarred from exporting defense articles, and other parties whose activities raise proliferation and law enforcement concerns, it also includes many other parties who are not necessarily engaged in objectionable activities, but which are listed in order to exercise extra scrutiny in evaluating license applications in which their names appear. Companies defaulting on Department of Defense contracts or made ineligible to enter into such contracts are one example of this latter group. FfP telephone interview with a DTC official, October 26, 1999; see also John C. Payne *Interagency Inspectors General Report*. The DTC is also responsible for a global end-use verification program, the so-called "Blue Lantern" program, which monitors both foreign government and private sector compliance with U.S. law and regulations. John D. Holum, *Munitions List Export Licensing Issues*.

⁸⁵ FfP telephone interview with an attorney who works with the DTC, April 11, 2000.

⁸⁶ Jim Kolbe, Under Secretary of the U.S. Bureau of Alcohol, Tobacco and Firearms, statement prepared for a hearing before the House Appropriations Committee Subcommittee on Treasury, Postal Service and General Government Treasury-Postal Appropriations, 106th Cong., 2nd sess., March 9, 2000.

⁸⁷ FfP interview with a U.S. Customs official, Washington D.C., October 24, 2000.

⁸⁸ FfP telephone interview with a U.S. Customs official, October 28, 1999 and August 11, 2000; and FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

possession of weapons at a U.S. point of entry. The U.S. Customs Service maintains only twenty-five offices abroad; both the limited number and location of these offices, as compared to other U.S. agencies monitoring transnational crime, works against effective implementation of the law.⁸⁹ Moreover, as one U.S. official noted, “traditionally, cases are initiated from the U.S. and then agents follow up with our attaché offices overseas. With brokering, where the weapons do not touch U.S. soil, it’s the reverse case. This means that investigations may have to be developed directly from abroad.” The same official pointed out that gathering the evidence on such cases may be extremely difficult without the full collaboration of the interested foreign government’s enforcement agencies and judiciary (see chapter 5). These considerations suggest that unless changes to the prevailing operating procedures and to the enforcement reach of U.S. Customs are swiftly introduced, many offenders under the brokering statute may never be apprehended.⁹⁰

Further, according to a State Department official, the definition of “broker” under the new regulation subjects many more companies and individuals, as well as a host of new players, to the registration and licensing requirements than were anticipated by the DTC and U.S. Customs.⁹¹ The wording of the definition in the brokering regulation is in fact so broad as to include those who have been traditionally considered “consultants” in the defense industry.⁹² This official also claimed that adding such a large number of new actors to the purview of the DTC and U.S. Customs without altering these agencies’ structure and response capacity has contributed to a minimal enforcement of the law thus far.⁹³

Information Sharing

Existing difficulties with information sharing between government agencies may further undermine the ability of enforcement agencies to investigate violations of the brokering law.⁹⁴ According to a U.S. official, the agencies with crucial information on brokering activities—such as the Bureau of Intelligence and Research in the Department of State, the CIA, and the DIA—may in fact be prevented from passing on information to U.S. Customs because U.S. Customs officials often possess a lower security clearance, which limits their access to information deemed as very sensitive.⁹⁵

⁸⁹ U.S. Customs Attaché office locations are: Bangkok, Thailand; Caracas, Venezuela; Interpol-Lyon, France; Montevideo, Uruguay; Paris, France; Singapore; Vienna, Austria; Beijing, China; Hermosillo, Mexico; London, United Kingdom; Moscow, Russia; Pretoria, South Africa; Tijuana, Mexico; Bogotá, Colombia; Frankfurt, Germany; Mexico City, Mexico; Ottawa, Canada; Rome, Italy; Berlin, Germany; Brussels, Belgium; Hong Kong (China, since 1997); Monterey, Mexico; Panama City, Panama; Seoul, Korea; and Tokyo, Japan. U.S. Customs Service, *Attaches Abroad*, available on www.customs.ustras.gov/locations/foreign/attach/index.html. FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

⁹⁰ FfP interview with a U.S. Customs official, Washington D.C., October 24, 2000.

⁹¹ FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

⁹² Traditional consulting activities occur when a foreign consultant is retained by a U.S. defense export firm to advise it on, for example, the needs of the ministry of defense in a foreign country. Under the new brokering provision, such consulting activity clearly “facilitates the exports of the U.S. exporter’s defense articles.” Philip S. Rhoads, *The International Traffic In Arms Regulations: Compliance and Enforcement at the Office of Defense Trade Controls*, U.S. Department of State, 798 PLI/Comm 717 (1999), p. 723; *ITAR*, sec. 129.2.

⁹³ FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

⁹⁴ FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

⁹⁵ U.S. government officials are issued various levels of clearances to access classified information depending on their duties. FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

A U.S. Customs official explained how the process of sharing information is hindered by bureaucratic asymmetry:

For example, if a seizure happens, Customs contacts the DTC to verify whether the dealer was registered and licensed. We also contact informants and intelligence agencies. But [the latter] share information only on a need to know basis.⁹⁶

As a result, intelligence agencies are rarely pro-active in contacting U.S. Customs about suspicious individuals and transactions, U.S. Customs officials complained. Law enforcers from other agencies retort that Customs carries its own share of blame. “Different agencies stand guard on their informants, and each has a built-in bias against being totally honest [and open],” an official concluded.⁹⁷

Moreover, U.S. officials pointed out that the bureaucracy has failed to fully implement its own overall “International Crime Control Strategy,” which states the goal of extending “the first line of defense beyond U.S. borders...by intensifying the activities of law enforcement, diplomatic, and consular personnel abroad.”⁹⁸ In order to achieve this goal, U.S. law enforcement agencies should, at a minimum, be equally represented overseas, a U.S. official explained. According to this official, the opposite is true in too many cases. For example the only two enforcement agencies accredited with the European Union are the FBI and the DEA, which in terms of access to information, foreign experts, and sources, have the power to act as both a filter and a traffic light for other U.S. agencies’ representatives abroad.⁹⁹

Despite the different agencies’ rivalries and disagreements, U.S. officials concur that a lack of interagency cooperation and openness in conducting traditional enforcement operations is even more acute in the case of the relatively new domain of arms brokering. Since brokering is often very difficult to track, this clannish modus operandi, as well as insufficient coordination and interaction among the agencies that have information with the agencies that need it seriously undermines law enforcers’ investigative capacity and ability to pursue offenders.¹⁰⁰

Conversely, there are sources of information on export licenses that cross bureaucratic divides and that are not drawn upon by the DTC and the enforcement agencies in a consistent or efficient manner.¹⁰¹ For instance, the Treasury Enforcement Communications System (TECS) contains a spectrum of data—including the Treasury Department’s own watch-lists of suspected criminals involved in transnational crime—which is available to other government agencies.

However, according to the 1999 *Interagency Inspectors General Report on the Export-Control Process for Dual-Use and Munitions List Commodities*, the DTC often fails to cross-reference each and every party involved in a licensed export transaction with TECS. Hence, undesirable elements may remain undetected. Responding to a congressional request for

⁹⁶ FfP telephone interview with a U.S. Customs official, October 28, 1999.

⁹⁷ FfP interview with a U.S. Treasury official, Washington D.C., December 13, 2000.

⁹⁸ *International Crime Control Strategy* (Washington D.C.: The White House, 1999), pp. 5-6, and 12-13.

⁹⁹ FfP interview with a U.S. official, Washington D.C., December 13, 2000.

¹⁰⁰ FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000; and Vernon Loeb, “Tenet’s Retort on Classified Chile Papers,” *The Washington Post*, August 17, 2000.

¹⁰¹ Senate Committee on Governmental Affairs, *The Interagency Inspectors General Report*.

information regarding the efficacy of the Department of State arms export controls, John Payne, then Deputy Inspector General of the State Department, observed in June 1999 that:

The State Department is one of the agencies that does not run each of the applications that it receives for munitions list items against the TECS system, but it does run the registration information. In order to apply for a license, you have to be registered, and at the time a company or an individual registers for a license that information is run against the TECS system. Now, there would be additional benefits to run the individual applications as well, because they will sometimes have additional information, such as forwarders or other companies or organizations identified on the application that would not have been in the registration information. This is something that State does not object to, sees a need to, but has attributed to a resource problem.... So we are hopeful that as the resource problem is alleviated somewhat, that more of the application information will be run against the TECS system.¹⁰²

To complicate matters further, other agencies in the Composite Export Licensing System—the CIA, and the Departments of Commerce, Defense, and Energy—maintain a number of different databases for export controls of sensitive goods.¹⁰³ However, these databases have not been integrated into a common “operating environment.”¹⁰⁴ Echoing Payne’s conclusions, Lawrence Rogers, then acting Inspector General of the Treasury Department, observed that these agencies were not taking advantage of the available technology to check out the exporters and run their names through the databases “to see what kind of record these exporters have.”¹⁰⁵ As a result, field investigators who may want to obtain information on suspicious arms transactions might not have access to the needed information in a timely fashion.

There are also serious discrepancies as to whether information about registered brokers and licenses issued to them is available to the public. According to a DTC official such information has never been disclosed because it is considered confidential.¹⁰⁶ This lack of

¹⁰² Ibid.

¹⁰³ In addition to the Defense Trade Application System (DTAS) at the DTC, these databases include: the Export Information Database Management System (ECASS) designed to support the Commerce Department’s Bureau of Export Administration which administers the export licensing process and enforcement activities for dual use commodities; the Automated Export System (AES) which is a joint effort of the U.S. Customs Service, the Foreign Trade Division of the Bureau of the Census (Commerce), the Bureau of Export Administration (Commerce), the DTC, other Federal agencies, and the export trade community. The Foreign Disclosure and Technology Information System (FORDTIS) at the Department of Defense is used both for licensing and for financial obligations associated with Foreign Military Sales. The CIA manages the Export Control System. Senate Committee on Governmental Affairs, *The Interagency Inspectors General Report*. See also Colin Clark and Amy Svitak, “Complex Software Demands Stall U.S. Automation Efforts,” *Defense News*, October 2, 2000.

¹⁰⁴ A “common operating environment” refers to an integrated database system. In such an environment each agency would have access, via desktop interface, to specific records maintained at other compliance and enforcement agencies. This would allow for a rapid cross-referencing and updating of important information related to agency activities.

¹⁰⁵ Senate Committee on Governmental Affairs, *The Interagency Inspectors General Report*.

¹⁰⁶ David Trimble, Director of the DTC Compliance Division, referred the FfP to the legal advisors of the State Department working with the Bureau of Political-Military Affairs for a final decision as to whether the information could legally be released. As of January 2001, The FfP was still waiting for a ruling from the State Department. FfP telephone interview with David Trimble, December 15, 2000; and FfP telephone conversations with officials at the Bureau of Political-Military Affairs, December 15, 2000.

transparency prevents public oversight on whether a particular broker is operating in compliance with the law. Other DTC officials, however, indicated to The Fund for Peace that in practice such information is released on an ad-hoc basis, and told us that a “Registration List of Munitions Manufacturers and Exporters” was available through the Commerce Department’s National Technical Services (NTIS).¹⁰⁷ The list we obtained from NTIS was last updated in November 1996, only four months after the brokering law was passed.¹⁰⁸ Moreover, the list makes no mention of the specific ITAR regulations under which applicants are entered, and groups all registrants—manufacturers and exporters—into a single category.¹⁰⁹ It is therefore impossible to determine which kind of export activities registrants are engaged in. It is also unclear whether brokers would be included and identified as such in updated versions of this list.¹¹⁰

Against this background, it is not surprising that there is scant information available on the effect of the brokering law or on its record of success. Officials admit that confusion continues to reign supreme as to whether any indictment has been secured or any prosecutions initiated for illegal brokering activities. Describing a lack of “institutional knowledge,” a U.S. Customs official lamented: “It is very frustrating for all of us that we cannot know more of what is going on.”¹¹¹ Part of the problem, this official maintains, stems from the fact that Customs has experienced a high staff turnover. In addition, the same official pointed out that if investigations have indeed been initiated, as it is widely believed:

[The] people involved do not realize the significance of the event and do not communicate their activities to higher up officials. There is no button on the computer to push to get all this information. There are tons of reports coming to Customs from the field all the time and this stuff is not logged into any kind of database.¹¹²

In a series of interviews with a variety of U.S. officials, The Fund for Peace gathered conflicting views regarding the enforcement record of the law. Some officials stated that there had not been a single prosecution or indictment under the brokering law.¹¹³ Other officials alleged that at least one prosecution had occurred, but were unable to provide any details.¹¹⁴ One of these officials further claimed that at least one investigation had been initiated and, as of

¹⁰⁷ FfP telephone interviews with DTC officials, October 26, 1999 and December 15, 2000.

¹⁰⁸ FfP telephone inquiries with the National Technical Services, October 4, 2000 and December 15, 2000. The “Registration List of Munitions Manufacturers and Exporters (Raw Data File), NTIS order number PB97-500482, was received by the FfP on October 10, 2000.

¹⁰⁹ Brokers register under *ITAR* sec.129.3(a), while manufacturers and exporters register under *ITAR*, sec. 122. In their transmittal letter “any person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services” is required to declare whether the registrant has ever been indicted or convicted. *ITAR*, sec.120.27.

¹¹⁰ FfP telephone inquiry with the NTIS, December 17, 2000.

¹¹¹ FfP telephone interview with a U.S. Customs official, August 11, 2000.

¹¹² *Ibid.*

¹¹³ FfP telephone interviews with a DTC official, October 26, 1999; and with a U.S. Treasury Department official, October 2, 2000.

¹¹⁴ FfP telephone interview with a U.S. Customs official, October 2, 1999; and FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

November 1999, was still underway.¹¹⁵ According to this official, “There has definitively been a seizure in November [1999], and it looks like it took place in the U.S. It looks like most of the work was done here with little [activity] abroad.”¹¹⁶ This official, however, has been unable to provide more concrete details concerning the operation. Still other officials have suggested that, although there have been no prosecutions for brokering violations, a plea agreement took place between the Department of Justice and an individual indicted for a whole host of other arms export violations. Such violations allegedly included a brokering offense that was added to the indictment during the plea negotiations.¹¹⁷ Months of inquiries by The Fund for Peace to substantiate any or all of these claims led nowhere and to the realization that the most well-informed government experts on the brokering law were the same officials who provided these conflicting reports regarding indictments and prosecutions. Finally, on October 24, 2000, an official categorically stated that, up to that date, not a single prosecution had been initiated.¹¹⁸

Novelty of the Law

In general, officials recognize a lack of comprehensive and coordinated application of the law that they attribute in part to the law’s novelty.¹¹⁹ U.S. officials have also explained the slow progress in securing prosecutions as a result of their need to proceed prudently in such uncharted territory. An official commented:

When a law is new, investigators must be very careful with their first cases so that they can set up cases they can be sure will be [successfully] prosecuted. The problem with the [brokering] law is that it is very difficult to prosecute. The complications of proving and investigating cases make everyone leery of how to proceed. [When on uncertain grounds] we may end up prosecuting for a different violation in order not to set a bad precedent.¹²⁰

Another U.S. official offered a different view: “None of the people working on this issue deal with each other. Brokering may be the latest legislative fad, but without some real commitment behind it, it is not going to go far.”¹²¹

Officials also concede that a number of other factors have and will continue to pose obstacles to effectively indicting, prosecuting, and convicting offenders. These challenges stem from difficulties of practical enforcement, possible invocation of ignorance of the law on the part of violators, and ultimately, a lack of political will to aggressively pursue and enforce the law.

¹¹⁵ FfP interview with a U.S. Customs official, New York, July 20, 2000; and FfP telephone interview with a U.S. Customs official, October 28, 2000.

¹¹⁶ Ibid.

¹¹⁷ FfP telephone interview with a U.S. Customs official, November 2, 1999; and FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

¹¹⁸ FfP interview with a U.S. Customs official, Washington D.C., October 24, 2000.

¹¹⁹ FfP telephone interviews with a U.S. Customs Official, October 28, 1999; and with a U.S. Treasury Department official, October 2, 2000.

¹²⁰ Ibid.

¹²¹ FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

V. PRACTICAL ENFORCEMENT

Even if government agencies were structured to effectively implement the brokering provision, and even if they shared information efficiently, officials recognize that punishing violators living abroad—who likely would comprise a significant percentage of offenders—stands as one of the most difficult challenges.

Jurisdiction

As noted in the previous chapters, the implementing regulations to the brokering law explicitly subject U.S. nationals operating in the U.S. or overseas to its requirements. The regulations also specifically apply to foreigners living in or operating from the U.S., as well as to foreigners who live abroad, but broker U.S.-made weapons, or work in conjunction with U.S. nationals.¹²²

In order to exert extraterritorial jurisdiction over offenders of the U.S. law, two requirements must be met. First, the legislation must manifest a clear Congressional intent that the law be applied extraterritorially. In the case of the brokering amendment, it is reasonable to conclude that such extended jurisdiction was intended by Congress.¹²³

The second requirement is that the law must apply to the offender's conduct under one of the five jurisdictional principles accepted under U.S. and international law. These principles are: territoriality, nationality, protective jurisdiction, effects, and passive personality.

- **Under the principle of territoriality**, any individual regardless of his or her nationality, operating anywhere may be subject to the requirements of U.S. law when a substantial amount of the offense is committed on U.S. territory.¹²⁴
- **Under the principle of nationality**, U.S. nationals are always subject to U.S. law regardless of where they are located.¹²⁵
- **Under the principle of protective jurisdiction**, individuals that conduct activity “against the interests of the state” or against government functions may be subject to U.S. law regardless of nationality.¹²⁶

¹²² It may be useful to re-state that U.S. nationals “where located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States” are subject to the licensing and registration requirements. *ITAR*, sec. 129.2.

¹²³ A Court in *United States v. Evans* held that it was a “reasonable exercise of jurisdiction for Congress to have anticipated that the Arms Export Control Act would be applied to persons and events outside of its borders” because the law is international in scope. The court further found that, “Under both the effects and protective principles, the United States has jurisdiction to legislate in order to protect itself from this type of fraud, irrespective of whether the party making the false representation, or conspiring to do the same, is located within United States borders, and regardless of whether the conspiracy is averted before effects are actually felt in the United States.” *United States v. Evans*, 667 F. Supp. 974 (S.D.N.Y. 1987), p. 981, *affirmed on other grounds*, 844 F.2d (2d. Cir. 1988), p. 36; see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), p. 188.

¹²⁴ *Restatement (Third) of the Foreign Relations Law of the United States*, Comment 402.

¹²⁵ *Blackmer v. United States*, 284 U.S. 421 (1932), p. 436. For a more recent analysis of nationality jurisdiction under U.S. law, see *United States: Review of Implementation of the OECD Convention [on Combating Bribery of Foreign Public Officials in International Business Transactions] and 1997 Recommendation*, available on <http://www.oecd.org/daf/nocorruption/report.htm>.

- **Under the principle of effects**, individuals involved in conduct that has or is intended to have a substantial effect in the United States may also be subject to U.S. law regardless of their nationality.¹²⁷
- **Under the principle of passive personality**, any individual who commits activities against U.S. citizens may be subject to U.S. law.¹²⁸

In sum, all brokers linked to the U.S. by virtue of their nationality, residence, and business operations, or brokering American weapons are subject to the law and can be held accountable for violations under any, or under a combination of the principles stated above.

Some criminal defense attorneys in interviews with The Fund for Peace have questioned the constitutionality of exerting jurisdiction extraterritorially.¹²⁹ However, an examination of the existing body of law refutes such an interpretation. In fact, the U.S. Supreme Court has affirmed that exerting U.S. jurisdiction overseas is entirely constitutional.¹³⁰

Despite the constitutionality of asserting extraterritorial jurisdiction under the AECA, there is no guarantee that if exerted, other countries would accept it. In this regard, analogies drawn from the experience of other laws that require extraterritorial enforcement raise concerns. In response to extraterritorial enforcement of U.S. antitrust laws, for instance, many countries enacted statutes blocking U.S. attempts to gather information and evidence abroad.¹³¹ To date, there is no indication that foreign countries have undertaken similar actions regarding the U.S. brokering law. However, a U.S. official claimed that his foreign counterparts have already shown a degree of resistance to this application of extraterritoriality. “Some smaller countries see it [U.S. extraterritorial enforcement] as bigger countries imposing laws on them. There is also a fear that many countries will be under attack,” this official explained.¹³²

Evidence Gathering

According to a U.S. official, even in countries where the extraterritorial exercise of U.S. jurisdiction would not pose an obstacle, conducting the overseas investigations necessary to gather evidence will be difficult if cooperation mechanisms with foreign agencies have not been put in place.¹³³

Historically, U.S. law enforcers’ overseas investigations to secure indictments were subject entirely to informal cooperation based upon well-honed and often clannish relationships

¹²⁶ *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994), p. 840; M. Cherif Bassouini, *International Extradition, United States Law and Practice* (Dobbs Ferry: Oceana Publishers, 3rd Ed. 1996), pp. 353-355.

¹²⁷ *Strassheim v. Daily*, 221 U.S. 280 (1911), p. 285.

¹²⁸ *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991), *cert. denied*, 508 U.S. 906 (1993), pp. 1205-1206.

¹²⁹ FfP telephone interviews with Karen Snell, Criminal Defense Attorney, Clarence & Snell, August 29, 2000; and with Nancy Pemberton, Pemberton & Associates, August 30, 2000.

¹³⁰ *Strassheim v. Daily*, 221 U.S. 280 (1911), p. 285; *Blackmer v. United States*, 284 U.S. 421 (1932), p. 436. With respect to foreign offenders, the constitutionality of exerting jurisdiction over a particular defendant will be subject to a case-by-case ruling by a judge and thus, may not always be upheld depending on the particular facts.

¹³¹ Joseph P. Griffin, *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505 (1998), p. 505.

¹³² FfP telephone interview with a U.S. Treasury Department official, October 2, 2000.

¹³³ FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

with foreign law enforcement agencies.¹³⁴ Over the last two decades, the growth of transnational crime has prompted an increase in international law enforcement cooperation, and stimulated new thinking on how to tap into different sources for assistance.

For example, enforcement officials have pointed out that the International Criminal Police Agency (Interpol) has the potential to play an important role in investigative cooperation. Interpol maintains several databases, including the Interpol Weapons and Explosives Tracking System (IWETS), which collate information on arms trafficking and weapons seizures and are used by Interpol members for locating fugitives.¹³⁵ Such cooperation is limited though, since Interpol generally does not conduct independent investigations of potential arms export violations or other criminal activities, and relies on national police forces for input.¹³⁶ U.S. officials remarked that Interpol's added value could be in facilitating information flows, provided that the quality of the data it collects from national law enforcement agencies is solid, and that Interpol's communications system is upgraded. In sum, as a U.S. Customs official explained, Interpol is another investigative tool that law enforcers use, but its role in building cases and obtaining evidence is still modest.¹³⁷

On the bilateral level, the U.S. Department of Justice and its foreign counterparts have established agreements to combat crime across borders. These agreements, particularly in the areas of bribery crimes, narcotics trafficking, tax evasion, and securities fraud among others, differ in the depth and breadth of the level of cooperation available, but provide concrete measures and a framework to carry out investigations overseas.¹³⁸

The U.S. Customs Service has also developed a series of Customs Mutual Assistance Agreements (CMAAs) to enhance the exchange of information and documentation with foreign customs and excise agencies. A U.S. Customs official explained that with CMAAs, however, the cooperation offered in the implementation of these agreements varies: "CMMAs are not as powerful as treaties. A lot depends on the relationship that our agents overseas have developed with the law enforcers there. Such cooperation may be crucial in securing indictments."¹³⁹

Once an indictment has been obtained, additional assistance to build a prosecutor's case is available through Mutual Legal Assistance Treaties (MLATs) and letters rogatory. These channels enable states to request help from a foreign country for a variety of crucial tasks

¹³⁴ FfP interviews with a U.S. Customs official, Washington D.C., October 24, 2000, and with a U.S. Treasury official, Washington D.C., December 13, 2000.

¹³⁵ FfP interview with a U.S. Treasury Department official, Washington D.C., December 13, 2000.

¹³⁶ FfP telephone interview with a U.S. Customs official, November 20, 2000.

¹³⁷ Ibid.

¹³⁸ For example, in the area of bribery, a series of agreements, the "Lockheed Agreements," permitted broad mutual assistance—including sharing of information, and utilizing the best efforts to obtain all pertinent information, and to locate witnesses—but the investigative assistance was limited to actions relating to specific investigations of bribes paid to officials by U.S. aircraft manufacturers. Other agreements, such as in the area of narcotics trafficking investigations, permit limited investigative assistance—relating primarily to witnesses and document production—but the evidence may be used in a wider number of legal matters. Michael Abell and Bruno A. Ristau, *International Judicial Assistance(Criminal), Obtaining Evidence Abroad* (Washington, D.C.: International Law Institute 1990, Supp. 1997), Secs. 12(3)(2)-12(3)(11).

¹³⁹ FfP interview with a U.S. Customs official, Washington D.C., October 24, 2000.

including locating persons, delivering court documents, producing and authenticating records, conducting searches, and obtaining witness testimony.¹⁴⁰

MLATs represent a more expeditious and effective way than letters rogatory to secure evidence because of their binding nature and because they specifically delineate the range of services available and of states' obligations in complying with requests.¹⁴¹ The first MLAT came into force in 1990 and represented an innovative response to the challenges posed by transnational crime that, by its nature, transcends national boundaries. The following decade witnessed an escalation of organized criminal activities across borders, as well as an increase in the number of MLATs the U.S. became party to. As of December 2000, the U.S. had thirty-six MLATs in force, John Harris, Director of the Department of Justice Office of International Affairs, Criminal Division, stated.¹⁴² However, none of the existing treaties have been signed between the U.S. and Sub-Saharan African countries.¹⁴³ Although still limited in their number, the scope of these treaties is wide. According to Harris, MLATs generally do not require that the country from which assistance is requested criminalize the activities under investigation by the U.S. Harris pointed out that MLATs are also adaptable to the changing nature of transnational crime and added:

Each MLAT also permits any other form of assistance not prohibited under the law of the requested state... and we have successfully used the MLATs to handle more sophisticated and difficult requests, including some matters not envisioned during the initial negotiations.¹⁴⁴

Consequently, investigations under the U.S. brokering statute could benefit from the menu of options for cooperation included in MLATs, despite the paucity of legislation on brokering outside of the U.S.

In the large majority of countries where a MLAT does not exist, the prosecutor is left with the option of submitting a request for assistance through the more archaic and subjective process of letters rogatory.¹⁴⁵ The major problem with processing such requests is that no standard operating procedure generally exists, and the letters are often funneled through an

¹⁴⁰ Note that all of this assistance is subject to constitutional limitations. Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State, testimony prepared for the Senate Committee on Foreign Relations, *Extradition and Mutual Legal Assistance Treaties: Hearing Before the Senate Foreign Relations Committee*, 105 Cong. 2nd Sess. 15 September 1998.

¹⁴¹ Ethan A. Nadelman, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (University Park: Pennsylvania State University Press, 1993), p. 318.

¹⁴² FfP telephone interview with John Harris, October 25, 2000.

¹⁴³ The U.S. has MLATs with the following countries: Antigua, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Canada, Cayman Islands (extended also to Anguilla, the British Virgin Islands, the Turks and Caicos Islands, and Montserrat), Czech Republic, Dominica, Grenada, Hong Kong Special Administrative Region, Hungary, Israel, Italy, Jamaica, Latvia, Lithuania, Mexico, Morocco, Netherlands, Panama, Philippines, Poland, South Korea, Spain, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Switzerland, Thailand, Trinidad, Turkey, United Kingdom, Uruguay. Information provided by John Harris, Director, Office of International Affairs, Criminal Division to the FfP via fax on December 13, 2000.

¹⁴⁴ John E. Harris, Director, Office of International Affairs, Criminal Division, United States Department of Justice, *Mutual Legal Assistance Treaties: Necessity, Merits, and Problems Arising in the Negotiation Process*, February 10, 2000.

¹⁴⁵ Ethan A. Nadelman, *op. cit.*, p. 319.

untold number of administrative agencies and offices before a response is provided.¹⁴⁶ According to John Harris, a prosecutor may wait many months or years only to find out that the evidence requested through letters rogatory has not materialized. “We have many cases in which evidence...is supplied long after the trial for which it was requested has been completed,” he noted.¹⁴⁷ Thus, letters rogatory represent a time consuming, cumbersome process mostly used when there are no other options available.¹⁴⁸

Since the brokering law is recent and because formal agreements for bilateral law enforcement cooperation are under-developed, law enforcers will continue to depend largely on their foreign colleagues’ informal assistance, interest, and good will to carry out brokering investigations.

Extradition

For the sake of this discussion, let’s assume that a best-case scenario has materialized. U.S. officials have been granted unhampered access to gather evidence overseas, and their efforts have been rewarded with an indictment. However, the case would not be considered satisfactorily concluded until the offender, who might otherwise never set foot again in the United States on his or her own will, is extradited and brought back home to justice. Such a happy ending is not a foregone conclusion.

To begin with, U.S. prosecutors, already overburdened by their workloads, may be unwilling to take up cases involving offenders abroad because these cases may remain on the books for years with fugitives never apprehended or surrendered. As a U.S. Customs official put it, “U.S. prosecutors would ask us first what are the chances of getting this person back [to the U.S.]. Then they would want to know if there is sufficient evidence to prosecute, and lastly, if this case would appeal to a jury.” The reality, this official conceded, is that obtaining an extradition would be difficult.¹⁴⁹

An analysis of extradition law and practice amply supports this assessment. Extradition of U.S. citizens or of foreigners who have violated U.S. law occurs primarily when a specific extradition treaty exists between the U.S. and the interested country. In the absence of such a treaty, extradition might be possible if states agree to comply with an extradition request.¹⁵⁰ Such practices, however, are rare and highly subject to the discretion of the requested country.¹⁵¹ A U.S. official observed, “If there is no extradition treaty [with the country where the offender is located], and the country does not have the same law that they would be willing to prosecute under, we are stuck.”¹⁵²

¹⁴⁶ Ibid.

¹⁴⁷ John E Harris, *Mutual Legal Assistance Treaties*.

¹⁴⁸ U.S. Department of State, *Preparation of Letters Rogatory*, available on http://travel.state.gov/letters_rogatory.html.

¹⁴⁹ FfP interview with a U.S. Customs official, Washington D.C., October 24, 2000.

¹⁵⁰ M. Cherif Bassouini, *op. cit.*, pp. 17, and 217.

¹⁵¹ Ibid., pp. 53, and 217.

¹⁵² FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

Where an extradition treaty exists, as it does between more than 100 countries and the U.S., three conditions must be met in order to make an extradition permissible.¹⁵³ These conditions require that: 1) a *prima facie* case be established against the violator;¹⁵⁴ 2) the offense with which the individual is charged be extraditable; and 3) the offense be a crime in both countries party to the treaty, a provision known as *dual criminality*.¹⁵⁵

In any event, extradition is a cumbersome and lengthy process even for long-established offenses, as the number of outstanding requests—between 300 and 500 at any given day in the U.S.—attests to.¹⁵⁶ Moreover, not all countries may agree to extradite their nationals to another country even where a treaty exists and all of the other requirements for extradition have been met.¹⁵⁷ With respect to the arms brokering law, these impediments are compounded by additional challenges.

For example, since the brokering statute is new in the United States, it is unlikely that its violations would be regarded as extraditable offenses under existing treaties, most of which predate 1996, the year the brokering amendment was passed. In addition, it remains untested whether brokering violations are considered extraditable offenses under treaties that are new or belonging to the so-called “list plus” category. These “list plus” treaties have been developed since 1972 when, in the words of a U.S. official, it became apparent that offenders had found “many new ways to do bad things” which were not captured by traditional extradition treaties.¹⁵⁸ In “list plus” treaties, any offense punishable by more than one year in countries party to the treaty has been added to the menu of extraditable offenses. This innovation, however, does not guarantee that violators of the arms brokering law can be extradited. In fact, the “list-plus” approach is hindered by the same pitfalls of the dual criminality condition, which requires that the offense be a crime in the country requesting extradition and in the country where the offender is located.¹⁵⁹ As discussed in chapter 6, these conditions can hardly be met because only a few countries have adopted brokering statutes that, in any case, do not reflect the extent and the definitions encompassed by the U.S. legislation.

Despite challenges posed by the current status of brokering laws and extradition treaties globally, obstacles against bringing violators to justice through extradition may not be insurmountable. International customary law, for example, indicates that courts should interpret

¹⁵³ Department of State, Office of the Legal Adviser, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force in January 1, 1999* (Washington, D.C.: U.S. Government Printing Office, 1999), Publication 9434, Released April 1999; and FfP telephone interview with a U.S. State Department official, September 22, 2000.

¹⁵⁴ A *prima-facie* case is a lawsuit that alleges facts adequate to prove the underlying conduct supporting the charge against the defendant.

¹⁵⁵ Matthew W. Henning, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead To International Incidents*, 22 B.C. Int'l & Comp. L. Rev. 347 (1999), pp. 349-354.

¹⁵⁶ FfP telephone interview with a U.S. State Department official, September 22, 2000.

¹⁵⁷ M. Cherif Bassouini, *op. cit.*, p. 588.

¹⁵⁸ FfP interview with a U.S. State Department official, Washington D.C., September 22, 2000.

¹⁵⁹ M. Cherif Bassouini, *op. cit.*, p. 396; and Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, (The Hague: Martinus Nijhoff Publishers, 1998) p. 84.

the boundaries of extradition treaties flexibly in order "to accomplish the desired purpose, which is the surrender of fugitives to be tried for extraditable offenses."¹⁶⁰

Responding to a request from the Czech Republic, for example, a New York District Court found in 1998, *In the Matter of the Extradition of Rafael Eduardo Pineda Lara*, that a Dominican arms broker located in the U.S. was extraditable to the Czech Republic for violating Czech arms exports laws.¹⁶¹ Under the terms of the Czech-American extradition treaty signed in 1933, the offense of which he was accused—supplying false information in an application for an arms export license—was not delineated as an extraditable offense.¹⁶² Nevertheless, the New York District Court held that, since the violation included forgery or fraud and these offenses were listed as extraditable, by extension the forgery and fraud employed to violate arms export controls—albeit corollary to the main offense—constituted an extraditable crime.¹⁶³ This ruling suggests that, at least in the U.S., extradition treaties not only are construed liberally, but also can be interpreted broadly enough to allow extradition of violators of brokering laws (and of arms export violations generally).¹⁶⁴

Other countries, which have begun examining the role of arms brokers in illegal weapons flows, may also be compelled to interpret extradition treaties broadly and react favorably to extradition requests.

For this reason, U.S. officials maintain that the best way to ensure extradition of individuals who violate U.S. brokering laws would be for other countries around the world to adopt similar brokering laws. Further, in cases where extradition treaties enumerate specific extraditable offenses, it would be necessary for the treaties to be amended to explicitly add brokering violations to their menu of offenses. Alternatively, both a legal scholar and a U.S. official suggested that brokering violations could become extraditable offenses if governments were to sign an international convention criminalizing such activity.¹⁶⁵

In this regard, a promising development is represented by the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunitions, Explosives, and Other Related Materials, which was adopted on November 13, 1997 and entered into force on July 1, 1998.¹⁶⁶ This Convention does not address the specific role of brokers in arms trafficking, but indirectly covers their activities by explicitly making it illegal for anyone within the borders of the Organization of American States (OAS) to manufacture, import, export, acquire, deliver, move, sell, and transfer weapons, ammunition, explosives, and other related

¹⁶⁰ For example, in *Factor v. Laubheimer*, the Supreme Court, as early as 1933, held that if two interpretations of what constitutes an extraditable offense exist, the more liberal should prevail. *Factor v. Laubheimer*, 290 U.S. 276 (1933), pp. 293-294. See also *Brauche v. Raiche*, 618 F.2d (1st Cir. 1980), p. 843; M. Cherif Bassouini, *op. cit.*, p. 85.

¹⁶¹ *In the Matter of the Extradition of Rafael Eduardo Pineda Lara*, 97 Cr. Misc. 1 (THK) (1998), p. 3.

¹⁶² *Ibid.* Note that the case addressed the reverse of the situation analyzed here, i.e., where the Czech government sought to extradite a Czech citizen from the U.S. because he violated Czech export laws.

¹⁶³ *Ibid.*, p. 41.

¹⁶⁴ *Ibid.*

¹⁶⁵ FfP telephone interviews with Bruce Zagaris, legal scholar, August 29, 2000; and with a U.S. Treasury Department official, October 2, 2000.

¹⁶⁶ *The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunitions, Explosives, and Other Related Materials*, Artcs. II-V, available on <http://www.oas.org/>.

material without a license. In addition, the document prescribes that States Parties establish illicit trafficking in arms as criminal offenses and punish “participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling” in the commission of these offenses. The Convention further prescribes that such offenses be included in current and future extradition treaties between States Parties. In the absence of bilateral extradition treaties, the Convention encourages States Parties to consider “this Convention as the legal basis for extradition.”¹⁶⁷ According to a U.S. official, the absence of specific language on brokering in the Convention warrants differing interpretations. “Such a lack of specificity was largely an oversight,” this official recollected, “because at that time nobody was really focusing on the brokering issue. [States Parties] will interpret the provisions according to their law and practice.” He further stated that to the best of his knowledge, no prosecution has been initiated under the Convention. Consequently, the extradition clause in the text remains untested.¹⁶⁸

The Inter-American Convention engendered great expectations that similar instruments would be adopted on a wider international scale. The U.N. responded in April 1998 by mandating member states to start negotiations on a “Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition,” largely modeled on the Inter-American Convention, to be attached to the U.N. Convention on Organized Transnational Crime (see chapter 7). This time, some governments and civil society organizations pressed for the inclusion of specific language on brokering activities in the Protocol text. The slow progress of the U.N. Firearms Protocol has disappointed expectations that the international community was ready to embrace the legally binding commitments embodied in the Protocol. Negotiations came to an abrupt halt in October 2000—two months before the agreed deadline—over stark disagreement on key provisions (see chapter 7).

U.S. officials admit that the resistance they have encountered in the Protocol process may not diminish in the future. In the absence of international consensus, extradition interpretation and practice will remain relegated almost exclusively to the discretion of individual countries’ judiciaries and political executives.¹⁶⁹

Reasonable Defenses

U.S. officials have identified the fact that brokering offenses fall under the rubric of *specific intent* crimes as another concrete impediment to securing convictions for violations of the brokering regulations.¹⁷⁰ In order to be proven guilty of such crimes, an offender must be aware that it is illegal not to register and apply for a license.¹⁷¹

¹⁶⁷ Ibid.

¹⁶⁸ FfP interview with a U.S. Treasury official, Washington D.C., December 13, 2000. The U.S. has not ratified the Inter-American Convention.

¹⁶⁹ FfP interview with an U.S. State Department official, Washington D.C., March 28, 2000.

¹⁷⁰ FfP telephone interviews with U.S. Customs officials, October, 28, 1999 and November 2, 1999; and FfP interview with a U.S. State Department official, Washington D.C., March 29, 2000.

¹⁷¹ Offenses under all AECA provisions require awareness of the obligation to obtain a license for arms exports in order to protect “innocent or negligent errors” that may occur when individuals have exported items that are “not known generally to be controlled by the government.” See *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978), p.

However, in the absence of an explicit admission of knowledge, U.S. courts have determined a defendant's intent to violate the law upon establishing that a defendant had been specifically informed of the law's requirements,¹⁷² or that a defendant was an expert in arms transactions,¹⁷³ and, lastly, that a written notice had been provided to the defendant as part of an arms invoice.¹⁷⁴ In addition, when the tracks left by a trafficker point to a systematic or purposeful attempt to cover an illicit operation, courts have also held that the violator demonstrated the requisite intent.¹⁷⁵

Against this background, U.S. officials fear that indicted brokers may persuasively invoke ignorance of the law to escape prosecution on two grounds. First, since arms brokering activities were not specifically regulated prior to 1996, many operators might not have received pertinent information on the registration and licensing requirements created by the new law. Second, even though most brokers are undeniably experts in arms transactions, the lack of previous specific regulation of these individuals in the industry suggests that brokers may not be perceived as experts by courts.¹⁷⁶

The DTC has made efforts to address the issue of notice for brokers living in the U.S.¹⁷⁷ In addition to publishing the law in the *Federal Register*, the agency has given workshops and distributed information on brokering to members of the defense community.¹⁷⁸ The Fund for Peace had been unable to learn how the defense industry has reacted to the DTC effort, or whether its members have taken steps to educate their community, including manufacturers, dealers, and service providers, on the brokering amendment and its implications.¹⁷⁹ For

193. In *United States v. Ivonne Adames*, the Court held that in order "to prove a violation of Title 22 U.S.C. §2778 (Arms Export Control Act), the Government must prove that Ivonne Adames [the defendant] acted willfully, i.e. with specific intent to violate the law." *United States of America v. Ivonne Adames*, 683 F. Supp. 255 (S.D. Fla. 1988), p. 256.

¹⁷² In 1985, for example, the Seventh Circuit found in *U.S. v. Malsom* that the defendants were guilty of violating the AECA for exporting weapons to Libya without a license when they had been informed by a friend in the shipping business and an employee at the Commerce Department that a license was required. *U.S. v. Malsom*, 779 F.2d 1228 (7th Cir. 1985), p. 1234.

¹⁷³ *United States v. Wieschenberg*, 604 F.2d 326 (5th Cir. 1979), p. 326.

¹⁷⁴ In *United States v. Swarovski*, the court affirmed the conviction of Mr. Swarovski for attempting to export a military aircraft gunsight camera without a license after he had received an export notice identifying that a license was required for this item. *United States v. Swarovski*, 592 F.2d 131 (2^d Cir. 1979). p. 131.

¹⁷⁵ In *United States v. Murphy*, the First Circuit affirmed a district court's finding that the defendant violated the AECA on the grounds that he did not have a license and had engaged in year-long clandestine efforts, covert acts, and subterfuges to purchase weapons for shipment to Ireland. *United States v. Murphy*, 852 F.2d 1 (1st Cir. 1988), p. 7.

¹⁷⁶ As noted in chapter 3, before the passage of the brokering amendment some brokers had in fact been prosecuted under charges of conspiracy to violate the AECA. *United States v. Evans*, 667 F. Supp. 974 (S.D.N.Y. 1987), p. 977, affirmed on other grounds, 844 F.2d (2^d Cir. 1988), p. 36.

¹⁷⁷ *Federal Register* 62, no. 247 (24 December 1997): 67274; and FfP telephone interview with a U.S. Customs official, November 2, 1999.

¹⁷⁸ FfP telephone interview with a U.S. Customs official, November 2, 1999.

¹⁷⁹ The FfP visited numerous manufacturers' websites, as well as the web sites of arms lobbying groups to assess their community's position on brokering. Visits to websites of the National Rifle Association, <http://www.nrahq.org/>, and the Institute for Legislative Affairs <http://www.nraila.org/>, for example, yielded no result. A search on the website of the Society for International Affairs, a non-profit group that promotes export control awareness among the defense community, was similarly disappointing <http://www.siaed.org/>. Our most recent visits were conducted on December 15, 2000.

example, Mark Barnes, known as a representative of industry, accepted to talk with us and then declined to be interviewed.¹⁸⁰ Ed Soyster, a spokesman for a major defense contractor, Military Professional Resources Incorporated, and a former head of the DIA, expressed a lack of awareness of the specific requirements under the brokering law and its scope.¹⁸¹

U.S. officials are nonetheless hopeful that, as the law becomes more widely known in the defense trade industry, it should be less feasible for brokers living in the U.S. to invoke a lack of knowledge as a successful defense.

However, a claim of lack of knowledge would remain plausible if offered by U.S. brokers who live and work abroad within a defense community that is unlikely to be readily accessible to the U.S. government or which is not specifically targeted for raising an awareness of the law.¹⁸²

An analyst has also suggested that ambiguity in the definition of the role of brokers under the ITAR regulations may play into the hands of violators.¹⁸³ The ITAR defines a “broker” as an “agent for others” who lends services in return for a fee, commission or other consideration.¹⁸⁴ Since the term “agent” is not further elaborated, it is unclear whether the common-law distinction between an agent and an independent contractor applies in this context, or whether a broader coverage encompassing both functions is intended.¹⁸⁵ Consequently, this ambiguity may allow brokers who regard themselves as “independent contractors” to contend that they did not know their activities were subject to regulation.¹⁸⁶ In sum, the lack of specificity in the legal definition of the brokers’ role may also limit the U.S. government’s ability to obtain convictions for violations.

VI. THE RECORD OF OTHER GOVERNMENTS

Other governments have also taken steps to regulate brokers. As explained above, one of the most important features of the U.S. law rests on the fact that this statute subjects U.S. brokers to U.S. *extraterritorial jurisdiction*, or the ability to prosecute individuals and companies for offenses committed overseas. The exercise of such an extended jurisdiction closes a loophole that has often played into the hands of those brokers who, to avoid scrutiny and penalties, had taken up residence in countries with weaker arms control laws.

¹⁸⁰ Mr. Barnes had been instrumental in organizing meetings with a State Department-led interagency group on small arms that took place in December 1999 and April 2000. U.S. officials present at these meetings told us that Mr. Barnes had discussed the issue of arms brokering during these meetings in the name of a sector of the defense industry. In response to our request for an interview, Mr. Barnes at first agreed, but later attached impossible conditions for granting it. The interview never took place. FfP telephone conversation with Mark Barnes, October 30, 2000 and correspondence from Mr. Barnes, October 31, 2000.

¹⁸¹ FfP interview with Ed Soyster, Alexandria, Virginia, March 28, 2000.

¹⁸² FfP telephone interviews with a U.S. Customs official, November 2, 1999 and February 25, 2000.

¹⁸³ Peter D. Trooboff, *A Brief Primer on the International Traffic in Arms Regulations (ITAR)*, 798 PLI/Comm 303 (1999), p. 307.

¹⁸⁴ *ITAR*, sec. 129.2.

¹⁸⁵ Peter D. Trooboff, *op. cit.*, p. 307.

¹⁸⁶ *Ibid.*

In 1998, South Africa also adopted laws that include jurisdiction over brokers beyond national borders. *The Foreign Military Assistance Act* and the Act's implementing regulation discipline the activities of South African nationals, residents, juristic persons, and entities registered and incorporated in South Africa by defining a set of prohibitions and submitting them to registration and licensing requirements. Such activities include those related to the "procurement of equipment" which is a brokering function.¹⁸⁷ Most important, the South African legislation states that any court of law in South Africa may try violators even when their main base of operation is abroad, and stipulates penalties ranging from fines to imprisonment.¹⁸⁸

Arguably, the *Swedish Military Equipment Act* also has extraterritorial reach for brokering activities since it requires anyone who pays taxes in Sweden to obtain permits and comply with the law whether or not the supply or export of military equipment are carried out on Swedish soil or overseas. As in the case of South Africa, the Swedish law subsumes the brokering function under a generic rather than specific category.¹⁸⁹

Canada, France, Germany, the Netherlands, Norway, Switzerland, and the United Kingdom also have existing legislation that imposes varying degrees of regulation on brokers.¹⁹⁰ The Dutch, German, and Norwegian laws require brokers operating on their soil to register and apply for a license when brokering weapons from their country or between two other countries. The French and Swiss laws require brokers operating on their soil to register and apply for a license, but only when the weapons are coming from or moving through their territory. The Canadian law prohibits brokering by anyone located in Canada of any prohibited weapons listed on the Canadian Export Control List (including automatic weapons and other prohibited devices) from Canada, or from any other place to countries not included in an Automatic Firearms Country Control List. Canada, however, does not appear to require registration or licensing to enforce the restriction.¹⁹¹ Notably, none of these countries' laws explicitly subject citizens or residents operating in other countries (or non-nationals residing in other countries, and brokering weapons from their soil) to register and obtain a license for transactions. The United Kingdom and Canada are exceptions in that they have laws that apply to brokers operating outside their territory, but only in the case of mandatory U.N. arms embargoes. Moreover, neither of these two countries' law requires registration or licenses for any brokering transactions. The U.K., as of January 2000, has only pledged to introduce a licensing system for arms brokers.¹⁹²

More recent legislative efforts have been initiated by Bulgaria and Poland. In 1998, the Bulgarian cabinet proposed draft amendments to the Bulgarian export laws that would explicitly

¹⁸⁷ Regulation of the Foreign Military Assistance Regulations, no. R1232, *Government Gazette*, no.19300, October 2, 1999, sec. 1.

¹⁸⁸ *Ibid.*, secs. 8 and 9.

¹⁸⁹ James Coflin, *Small Arms and Brokering*, p. 20.

¹⁹⁰ For a description of these laws, see James Coflin, *Small Arms and Brokering*, pp. 16-22 and Brian Wood and Johan Peleman, *op. cit.*, pp. 105-114.

¹⁹¹ James Coflin, *Small Arms and Brokering*, p. 17.

¹⁹² Fran Adams, "Arms brokers to be placed on new register," *The Independent* (London), April 2, 2000.

cover brokering.¹⁹³ For its part, Poland is currently examining the extent to which their existing export laws might be applied to regulate brokers.¹⁹⁴

The following chart, based on a table prepared by James Coflin for the International Security Research and Outreach Programme of the Canadian Department of Foreign Affairs and International Trade, and amended by The Fund for Peace, summarizes the status of existing national legislation on brokering.¹⁹⁵

National Laws on Brokering

Country	Name of Applicable Law	Registration / Licensing	Applies to brokering conducted on soil of country	Applies to brokering conducted on country's soil, but involving transfers that do not touch the soil	Applies to brokers who are citizens and operate abroad	Maximum penalty (prison/ fines)
Canada ¹⁹⁶	<i>Export and Import Permits Act</i>	No/No	Yes	Yes, if U.N. embargo	Yes, if U.N. embargo	10 yrs
	UN Embargo Implementing Sanctions Orders (country specific)					5 yrs
France ¹⁹⁷	<i>Legislative Decree of 18 April 1939, Art. 13</i>	Yes/Yes	Yes	No	No	Not listed in the law.
Germany ¹⁹⁸	<i>War Weapons Control Act of 1961</i>	Yes/Yes	Yes	Yes	No	10 yrs
Netherlands ¹⁹⁹	<i>Economic Offenses Act, Import Export Act, Strategic Export Order, Foreign Financial Transactions Order</i>	Yes/Yes	Yes	Yes	No	6 years 100,000 NLG
Country	Name of Applicable Law	Registration / Licensing	Applies to brokering conducted on soil of country	Applies to brokering conducted on country's soil, but involving transfers that do not touch the soil	Applies to brokers who are citizens and operate abroad	Maximum penalty (prison/ fines)
Norway ²⁰⁰	<i>Act of December 1987</i>	Yes/Yes	Yes	Yes	No	5 yrs

¹⁹³ FfP telephone interview with Peggy Mason, former Canadian Ambassador for Disarmament, September 26, 2000.

¹⁹⁴ FfP interview with a U.S. Customs official, Washington, D.C., October 25, 2000; and Brian Wood and Johan Peleman, *op. cit.*, pp. 109-112.

¹⁹⁵ James Coflin, *Small Arms and Brokering*, p. 22.

¹⁹⁶ FfP telephone interview with Peggy Mason, former Canadian Ambassador for Disarmament, September 26, 2000; and James Coflin, *Small Arms and Brokering*, p. 17.

¹⁹⁷ "French Policy on Export Controls for Conventional Arms and Dual-Use Goods and Technologies," available on http://www.wassenaar.org/docs/fr1_eng.pdf.

¹⁹⁸ James Coflin, *Small Arms and Brokering*, p. 17.

¹⁹⁹ Information provided via fax by a Dutch Customs official, November 21, 2000; see also Stockholm International Peace Research Institute (SIPRI), "Netherlands: National export controls for conventional weapons," available on <http://www.project.sipri.se/expcon/natexpcon/Netherlands/netherlands.htm>.

	<i>relating to control of the export of strategic goods, services and technology</i>					
South Africa ²⁰¹	<i>Foreign Military Assistance Act</i>	Yes/Yes	Yes	Yes	Yes	10 yrs
Sweden ²⁰²	<i>Military Equipment Act</i>	Yes/Yes	Yes	Yes	Yes	2 yrs
Switzerland ²⁰³	<i>Federal Law on War Material</i>	Yes/Yes	Yes	No	No	10 yrs
United Kingdom ²⁰⁴	UN Embargo Implementing Sanctions Orders(country specific)	No/No	Yes	Yes, if U.N. embargo	Yes, if U.N. embargo	7 yrs
United States ²⁰⁵	<i>Arms Export Control Act</i>	Yes/Yes	Yes	Yes	Yes	10 yrs \$1,000,000 (per offense)

VII. INTERNATIONAL EFFORTS

Since 1996, largely due to NGO pressure, governments, as well as international and regional organizations, have slowly started awakening to the threat to international peace and security posed by freewheeling arms traffickers.²⁰⁶

In the recent flurry of activity to curb the movement of small arms into conflict zones and to regimes that abuse human rights, a variety of proposals have emerged. These include:

- creating international transparency mechanisms in government-to-government arms transfers;
- establishing domestic and international regulations to condition legal arms transfers on recipient countries' respect for human rights standards and enforcement of U.N. arms embargoes;
- ensuring security for arms stockpiles;
- implementing post-conflict weapons collection and destruction procedures;
- imposing small arms moratoria on conflict zones; and
- regulating arms brokering activities.²⁰⁷

²⁰⁰ SIPRI, "Norway: Regulation on control of export of strategic goods, strategic goods, services and technology," available on <http://projects.sipri.se/expcon/natexpcon/Norway/noreg89.htm>.

²⁰¹ Regulation of the Foreign Military Assistance Regulations, no. R1232, *Government Gazette*, no.19300, October 2, 1999.

²⁰² Brian Wood and Johan Peleman, *op.cit*, p. 112.

²⁰³ James Coflin, *Small Arms and Brokering*, pp. 19-20.

²⁰⁴ FfP telephone conversation with a U.K. Customs official, November 1, 2000; and *List of Sanctions Regimes and Arms Embargoes Implemented by the UK as at 13 October 2000*, available on <http://files.fco.gov.uk/und/sanctions/list.pdf>.

²⁰⁵ 22 U.S.C. 2778.

²⁰⁶ According to notes of a meeting of the EU-NGO Network in October 1999, until recently only two countries in Europe have had comprehensive brokering regulations. EU-NGO Network, *Notes from the EU-NGO Network on the Arms Trade Meeting*, Helsinki, Finland, October 10, 1999.

²⁰⁷ U.N., Report of the Secretary General, *Small Arms*, U.N. Document A/54/404, September 24, 1999, pp. 42-54.

Since brokers play such a critical role in the movement of arms, initiatives to regulate them are of singular importance.²⁰⁸

In April 1998, fifty-six countries endorsed a U.N. Economic and Social Council resolution calling for a legally binding instrument to combat illicit trafficking in firearms to be attached to the U.N. Convention on Transnational Organized Crime. To this end, seven months later Canada submitted a draft text for a “Firearms Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.”²⁰⁹ Negotiations on the Protocol started in Vienna in 1999, and raised high expectations that they would be successfully concluded before the end of 2000.²¹⁰ The opposite happened when the process came to an abrupt halt in October 2000, as a result of delegates’ irreconcilable disagreements over the scope of the Protocol and the issue of marking weapons.²¹¹ The Convention on Transnational Organized Crime was opened for signatures on December 12, 2000.

The draft text of the Protocol included a provision on brokering which was based on text submitted by the U.S. This provision required arms brokers to register with their country of nationality, country of residence, and country where they conduct operations. In addition, the draft text required brokers to obtain a license for each transaction they intended to undertake.²¹² This approach was marred by disagreement from the very start since, according to a U.S. official, the provision did not meet the favor of those governments that were reluctant to take on a

²⁰⁸ FfP interview with a U.S. State Department official, Washington, D.C., March 28, 2000.

²⁰⁹ U.N., Economic and Social Council, Commission on Crime Prevention and Criminal Justice, *Criminal Justice Reform and Strengthening of Legal Institutions: Measures to Regulate Firearms*, U.N. Document E/CN.15/1998/L.6/Rev.1, April 28, 1998; U.N., Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, *Revised Draft 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*, U.N. Document A/AC.254/4/Add.2/Rev.1, February 8, 1999.

²¹⁰ U.N., Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, *Proposals and Contributions Received from Governments*, U.N. Document A/AC.254/5/Add.18, February 3, 2000, Art. 18 bis.

²¹¹ With regard to “scope,” negotiators could not agree on whether “state-to-state” arms transfers should be explicitly exempted or whether the Protocol should limit the exemptions to cases related to national security. Some delegations required that prohibitions on transfers be extended to “states to non-states transactions,” others opposed this approach. In regard to marking, some states wanted an exemption from marking state-manufactured guns allegedly fearing that sensitive information on production levels and sources of manufacture could be derived from information encoded in arms serial numbers. Other delegates interpreted this position as an effort to obstruct investigations and prevent disclosure. This latter group of delegates supported the inclusion of a universal requirement to mark all weapons at the time of manufacture, as well as an identification system that would allow each gun to be uniquely identifiable without the assistance of the country of origin. FfP telephone interviews with a U.N. official, November 1, 2000, and with a U.S. official, November 2, 2000.

²¹² The provision was drafted from text proposed by the United States with additions submitted by Switzerland and Colombia (marked with brackets) and states: “Registration and licensing of brokers, [traders and forwarders]: [With a view to preventing and combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition,] States Parties that have not done so shall take steps to require persons who act on behalf of others, in return for a fee or other consideration, [for traders, forwarders] in negotiating or arranging transactions involving the international export or import of firearms, their parts and components or ammunition: (a) To register with the country [of nationality and with the country where the negotiations or arrangements referred to above take place;] [where they are resident or established;] and (b) To obtain for [their transactions] [each transaction] a licence or authorization from the country [where the negotiations or arrangements referred to above take place] [where they are resident or established.]” U.N., Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, *Revised Draft Protocol Against the Illicit Manufacturing of and Trafficking in Firearms*.

burdensome licensing and registration scheme.²¹³ In the end, the strong wording advocated by the U.S. and other negotiators was diluted into an “encouragement” for states to establish a system to regulate the activities of brokers.²¹⁴ Some negotiators had also argued that the Protocol should have required state parties to criminalize offenses related to the illicit trafficking in firearms only when such offenses were associated in some way with transnational organized crime, thereby allowing “lone wolf” operators to fall outside of the Protocol’s scope altogether.²¹⁵ The failure of reaching a consensus on the Protocol within the agreed year 2000 deadline, as well as the uncertainties surrounding the timing of the negotiations’ resumption, has dealt a severe blow to international efforts on arms brokering regulation.

Thus, the buck may be passed on to another U.N. forum, the “U.N. Conference in 2001 on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects,” which will be convened on July 9, 2001. Preparatory meetings for the Conference began in February 2000 and have accomplished little as of the close of 2000.²¹⁶ With a rather amorphous mandate and strident disagreement already surfacing among participants on the scope and outcome of this conference—a consensus-driven exercise—progress on the issue of brokering may be further stalled or neutralized altogether.

To avoid such an unsatisfactory outcome, the U.N. has initiated a study on the feasibility of restricting the manufacture and trade of small arms to manufacturers and dealers authorized by states, which will be provided as a background document for the Conference.²¹⁷ The first meetings of this study group, held in May and July 2000, attempted to advance government-to-government discussions on practical possibilities for regulating brokers. In the recollection of one key official, the July meeting succeeded only in bringing the participants’ divergent views on key issues out in the open, thereby mirroring the Firearms Protocol diatribes.²¹⁸ For example, terminology once again worked against consensus as member states bickered about a range of options to define what constitutes brokering activities. Not surprisingly, the debate only inched uphill on other core items such as jurisdiction parameters over traffickers’ transnational operations, and over the wisdom of adopting licensing and registration schemes for brokers which, some argued, might encumber law enforcers.²¹⁹

The July discussions did reflect, however, a growing recognition of the need to deal with a problem that is not going to evaporate from the international community’s agenda. This debate has also helped re-open discussions about the linchpin between legal arms transfers and illicit trafficking in general, as well as the importance of reviewing and expanding existing arms trade

²¹³ FfP telephone interview with a U.S. Treasury Department official, October 2, 2000.

²¹⁴ The October 2000 version of Article 18 bis, “Brokers and Brokering,” in the draft Protocol reads “With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their part components and ammunition, State Parties that have not yet done so [shall consider] [are encouraged to—(longhand in the text)] establish[ing] a system regulating the activities of those who engage in brokering.” This draft article is on file with the FfP.

²¹⁵ FfP interview with a U.S. official, Washington, D.C., November 2, 2000.

²¹⁶ U.N., Report of the Secretary-General, *Small Arms*, U.N. Document A/RES/54/54V, December 15, 1999.

²¹⁷ U.N., *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*, U.N. document A/54/160, July 6, 1999; and U.N., Report of the Secretary-General, *Small Arms*, para.14(a).

²¹⁸ FfP interview with an official present at the U.N. expert meeting, Washington, D.C., October 25, 2000.

²¹⁹ *Ibid.*

practices, norms, and documentary requirements. Governments acknowledged the crucial importance of information sharing on violations, and the inadequacy of national laws to combat the impunity of operators who have taken full advantage of the increasingly globalized arms trade.²²⁰ Ambassador Mason stated that; “ brokering activities can be brought under effective legal regulation through a system that builds on best practices in relation to export/import licensing and creates positive incentives for brokers to comply.” Key elements of this approach, Ambassador Mason continued, would include; “registration of brokers and licensing of individual brokering activities, as well as criteria for registration. For example the broker who wants to register should not have any prior criminal record. There should also be a requirement that applicants for export/import/transit permits deal only with duly registered brokers and disclose on the permit application full details of the proposed transfer.” Ambassador Mason concluded that regulators should exchange information through national coordinating focal points and that a list of registered brokers should be made public, upon consent, where privacy laws so require. .²²¹

At the international level other organizations have stepped into the fray by putting initiatives on the drawing board—and leaving them there. For example, the Wassenaar Arrangement, an international forum of thirty-three states that are weapons producers and suppliers, has slated brokering as an agenda item for discussion in 2001. Norway took the initiative of collecting information about relevant laws among the Arrangement’s participants. According to officials privy to this process, however, participants have shown little enthusiasm and a lack of ideas on how to move forward after Norway completes its survey.²²²

The debate on brokering has also engaged the Organization for Security and Cooperation in Europe (OSCE). On November 24, 2000, the 308th Plenary Meeting of the OSCE Forum for Security Co-operation adopted a document which identified the regulation of “activities of international brokers in small arms as a critical element in a comprehensive approach to combating illicit trafficking in all its aspects.” The document called on states to consider requiring registration and licensing of brokers operating within their territory, disclosing import and export licenses and authorizations, as well as revealing the names and locations of brokers involved in the transaction.²²³

By far the most advanced measures emanating from the debate on brokering are contained in the draft Firearms Protocol that the Southern African Development Community (SADC) began to negotiate in 1999. If approved, as anticipated in March 2001, this Protocol will include

²²⁰ The discussion dwelled on options regarding a requirement for intermediaries in arms transactions to be listed on export license applications, development of export controls in countries which have not put them in place, criminalization of any assistance provided by individuals and companies in illegal arms trafficking, adoption of stricter penalties for stating false or misleading information in export applications, and creation of sophisticated black-lists for companies and individuals involved in or sentenced for their illegal arms trafficking activities. FfP telephone interview with Peggy Mason, former Canadian Ambassador for Disarmament, September 26, 2000; and FfP interview with a U.S. Customs official, Washington, D.C., October 25, 2000.

²²¹ Ibid.

²²² Royal Ministry of Foreign Affairs, Oslo, “Wassenaar Arrangement, Information Exchange on the Control on Arms Brokerage,” [undated] 2000 (on file with the FfP). FfP interviews with officials, Berlin, December 4, 2000, and Washington, D.C., December 12, 2000.

²²³ OSCE, FSC.JOUR/314, November 24, 2000.

binding and comprehensive provisions to regulate brokering activities and a requirement for States Parties to incorporate such provisions in their national law.²²⁴

VII. CONCLUSION

In the last two years, the role played by unregulated arms traffickers in the escalation and duration of conflict has captured the international community's attention. This tardy recognition has yet to produce a framework for regulation, let alone a timetable for action aimed at bringing arms traffickers, brokers, and assorted peddlers into the fold of international law. The recent failure of the U.N. Firearms Protocol negotiations has crushed expectations that, for the first time, internationally binding norms would be put in place to rein in traders who have taken full advantage of privatization and globalization.

Since regional efforts to regulate and discipline activities that cross national borders are still on the drawing board and may require lengthy multilateral negotiations to be completed, the onus of developing appropriate norms and laws rests with national governments.

Only a few governments have taken steps to fill the legislative vacuum that has allowed traffickers and brokers to prosper virtually unchallenged. Among them, the United States has put in place a comprehensive and, literally, far-reaching law, which currently provides the best model for the development of similar national controls.

Laws, however, are only as effective as their implementation and enforcement. Bearing this in mind, the U.S. brokering statute presents a host of challenges, which if not met might squander the efforts of U.S. policy makers and enforcers.

As discussed in this report, U.S. implementing and enforcing agencies have lamented a chronic lack of human resources to breathe life into the brokering statute. Although entirely realistic, this assessment does not explain why the wealthiest country of the world has failed to allocate the necessary resources and manpower to the crucial national security functions embodied in the AECA and its innovations. Clearly, an act of political will is required to correct such shortcomings and to allow the law to realize its full potential.

Political will, however, must be accompanied by a commitment of the whole administrative apparatus to overcome bureaucratic ignorance and "territorial" diffidence, as well as technological barriers, in order to effectively share, process, and analyze information. In this same vein, U.S. law enforcers, the public, and the practitioners should be more systematically educated on the law and its implications. Such an educational outreach should not neglect U.S. prosecutors. The dearth of information on indictments and convictions under the brokering law

²²⁴ Brian Wood and Johan Peleman, *op. cit.*, p. 108. A draft of the SADC Protocol is on file with the FfP. According to this version, brokering is defined as acting: (i) for a commission, advantage or cause, whether pecuniary or otherwise; (ii) to facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of firearms, ammunition or other related materials; and thereby acting as intermediary between any manufacturer, or supplier of, or dealer in firearms, ammunition, and other related materials and any buyer or recipient thereof.

may represent in itself an indictment not only of enforcement pitfalls but also of U.S. courts' reluctance to deal with a new category of offenses.

A simultaneous effort to adjust existing and long-established instruments such as extradition treaties to the new reality of the brokering law must be undertaken.

Finally, all governments should adopt laws regulating the activities of arms brokers and draw from the U.S. experience to produce a better standard. They should also strive to overcome the divisiveness that has dealt a severe blow to the Firearms Protocol and renew confidence that governments and the official international community are prepared to replace rhetorical gestures with concrete and binding actions. These actions are both imperative and urgently needed to address the multitude of problems related to small arms proliferation and those who contribute to it for political and personal gain at the expense of brutalized civilians.