

# Brokers Without Borders

How illicit arms brokers can slip through gaps in the Pacific and international arms control system



**Dec. 12, 2009: Thai police officers and soldiers remove boxes of weaponry from a foreign-registered cargo plane onto trucks at Don Muang airport in Bangkok, Thailand (AP Photo/File)**

On 11 December 2009 a 35 tonne cache of conventional weapons left North Korea bound for Iran. The following day the arms were intercepted and seized by authorities in Thailand. In an unexpected twist it was soon discovered that the plane chartered to carry out this illegal transfer was leased by a New Zealand registered shell company. To date those who arranged the transfer have not been held accountable.

The case demonstrates that the existing international arms control system is not adequately combating illicit brokering. Illicit arms brokers continue to use global networks of companies and individuals to exploit regulatory gaps between jurisdictions to carry out their transactions with relative impunity.

An effective Arms Trade Treaty, supported by robust national legislation and regional cooperation, will provide solutions to closing these gaps and stopping the irresponsible trade in deadly weapons.

# Executive summary

Since 2006, more than 2,000 people each day have died as a result of armed violence,<sup>1</sup> and thousands more have had their human rights violated and their livelihoods undermined by the irresponsible trade and use of deadly weapons. The current international arms control system is failing to adequately regulate the arms trade and hold arms brokers and dealers accountable for their actions. As a result weapons continue to be transferred into environments where they are undermining development and fuelling human rights abuses.

Oxfam has produced this report to examine publically available information about one specific case of illicit arms brokering. Through an analysis of the case and the enabling factors that allowed this illicit transfer to occur, the report identifies key lessons about how states can work together at the domestic, regional and international level to find solutions for the problem of illicit brokering.

On 11 December 2009 a 35 tonne cache of conventional weapons left the Democratic People's Republic of Korea ('North Korea') bound for Iran, in violation of the UN arms embargo on North Korea. The following day the arms were intercepted in Bangkok by Thai authorities. In an unexpected twist it was soon discovered that the plane chartered to carry out this illegal transfer was leased by a New Zealand registered company, SP Trading. All of a sudden New Zealand, the country ranked as the world's most peaceful nation in 2009,<sup>2</sup> was linked to one of the biggest international arms trafficking cases that year.

Although the attempted transfer was undoubtedly illicit, to date only a single person linked to the case through the New Zealand registered SP Trading, has been charged. However SP Trading was only one of as many as eight companies involved at various levels, with connections to at least ten different countries spanning Asia, the Pacific, the Middle East, Eastern Europe and the Caucasus.

These revelations have also demonstrated that while there is a perception that the Pacific has low exposure to arms trafficking, in reality the region is open to exploitation by illicit dealers. Illicit brokers have been able to manipulate gaps in New Zealand sanctions and company law frameworks to evade accountability. Without further action to prosecute those criminally responsible, or legislative action to sufficiently tighten New Zealand's relevant regulations, the New Zealand system will remain open to further abuse.

Oxfam and a range of other non-governmental organisations (NGOs) making up the Control Arms Campaign, have called for the creation of the first universal, legally binding Arms Trade Treaty (ATT) to address the inadequacies of the current international arms control system. An effective ATT could help tackle the problem of illicit brokering by imposing higher common international standards amongst states to hold companies and individuals in their jurisdictions accountable for their role in international arms transfers. This should include regulating their conduct and holding them liable where breaches of international law have occurred. Practically, a comprehensive ATT could provide the framework to resolve jurisdictional issues allowing illicit brokers to avoid prosecution and encourage greater cooperation between states to stamp out such activities. To close the gaps that allow illicit brokers to operate with few constraints, it is therefore critical that the scope of an ATT include effective controls on brokers and brokering transactions.

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# Acronyms

ATT	Arms Trade Treaty
CITS-UGA	Centre for International Trade and Security, University of Georgia
DPRK	Democratic People's Republic of Korea ('North Korea')
FAS	Federation of American Scientists
FATF	Financial Action Task Force
MANPADs	Man portable air defence systems
MFAT	Ministry of Foreign Affairs and Trade (New Zealand)
NGO	Non-Government Organisation
NIOC	National Iranian Oil Company
IANSA	International Action Network on Small Arms
IPIS	International Peace Information Service
SALW	Small Arms and Light Weapons
SIPRI	Stockholm International Peace Research Institute
TransArms	Trans Arms Research Center for the Logistics of Arms Transfers
UN	United Nations
UNGA	UN General Assembly
UNPoA	UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
UNIDIR	United Nations Institute for Disarmament Research

# 1 Introduction

Oxfam has produced this report in order to highlight the dangerous gaps that exist in the New Zealand, Pacific and global arms control systems that allow unscrupulous arms brokers to profit from the irresponsible arms trade.

Section two explains the methodology used to investigate this case study and limitations of the research. Section three begins by looking at the impact of the international arms trade and why efforts to control it are essential to building human security. Section four examines the North Korea arms trafficking case in detail, elucidating the key players and complex chain of events. This section draws on information gathered about the case by TransArms, the International Peace Information Service (IPIS) and others to form picture of the case to use in our analysis. Section five analyses the effectiveness of domestic, regional and international laws and regulations relevant to the North Korea arms trafficking case. This section draws conclusions about the gaps that remain at all levels with regards to shell company liability for irresponsible and illicit conduct in the arms trade.

Finally, the report concludes with a series of recommendations about how states can strengthen the currently inadequate arms control system to prevent illicit brokering activities in future. At the domestic and regional levels, illicit brokering can be addressed through strengthened national sanctions legislation and company regulation, as well as greater efforts to prosecute those responsible for illicit brokering.

On the international scale, a legally binding Arms Trade Treaty (ATT), set to be negotiated through the United Nations (UN) by 2012, provides a wider opportunity to address these regulatory gaps that allow illicit brokers to operate with impunity. States involved in the ATT negotiations are encouraged to reflect on the lessons learnt from this case in their efforts to ensure that the ATT will provide a global regulatory solution to the problem of illicit brokering.

## 2 Methodology

This report was prepared using a range of data to build as comprehensive an understanding of the North Korean arms shipment as possible with available information. A review of literature and media reports was conducted and gaps in the reporting of the case and analysis of relevant laws and regulations applicable were explored through interviews with a range of experts on the topic.

Semi-structured qualitative interviews were conducted with twenty-three professionals covering a diversity of perspectives and areas of expertise including civil society, international NGOs, arms control experts, legal experts, New Zealand government officials, journalists who reported on the case and a researcher from the United Nations Institute for Disarmament Research. All interviews were recorded and quotes published from the interviews have been verified by respondents.

Substantial first-hand research into the North Korean case was published by the International Peace Information Service (IPIS) and TransArms<sup>3</sup> immediately following the interception, in their report, “From Deceit to Discovery” and subsequent update.<sup>4</sup> Oxfam have utilised this research to inform their understanding of the case study and have not endeavoured to repeat this work through research of their own. The IPIS and TransArms research, as well as correspondence with one of the authors has substantially contributed to the information available on the case and to the information expressed in Section 4 of this report and elsewhere. Information contained in the map on page 11 is derived partly from the research and published work of IPIS and TransArms.

Given the sensitive nature and on-going investigation of the case some potential sources of evidence were not available to the researcher. The Thai Government report to the UN Security Council on the incident is confidential and was not available for this report. A request under the Official Information Act was submitted to New Zealand authorities by a journalist interviewed in this research but was not met.<sup>5</sup>

In some cases, journalists reporting on the case were able to obtain responses from the individuals involved and these have been included in the report. It was not possible to make direct contact with all individuals and companies named in this report.

## 3 Impact of the arms trade

*'The soldier led me to a bush and demanded that I lie down and get undressed, or he would shoot me and my husband...A few seconds later he was on top of me'.  
Survivor of gun violence,  
IANSA<sup>7</sup>*

*'The fear of guns can keep children away from school, farmers from their land, traders from markets, patients from doctors and voters from pooling booths'.  
John Balavu, Department of Foreign Affairs, Papua New Guinea<sup>9</sup>*

Since 2006 around 740,000 people have died, every year, either directly or indirectly as a result of armed violence.<sup>6</sup> This equates to 2,000 deaths a day, nearly 100 an hour, more than one every minute.

For every death there are dozens more people injured and left physically and mentally scarred by the impact of armed violence. The mere presence of a weapon can facilitate other crimes and human rights abuses such as sexual and gender-based violence. Often these forms of violence can prove fatal long after the guns fall silent. For example in the Democratic Republic of Congo's province of South Kivu, 22 per cent of rape victims have been estimated to be HIV-positive as a result of their attacks.<sup>8</sup>

The devastating impacts of irresponsible arms transfers upon development progress are clear. Inappropriate arms sales can divert government funds from development initiatives (such as health, education, public planning and infrastructure) and increase national debt.<sup>10</sup> Conventional arms that end up in the wrong hands can put serious strain on public health systems, increase the risk of corruption and wasteful expenditure, and fuel armed conflict and other forms of violence that undermine states economies and their ability to meet the Millennium Development Goals.<sup>11</sup> It is not surprising then that at least 22 of the 34 countries least likely to achieve the Millennium Development Goals are in the midst of, or emerging from, conflict.<sup>12</sup>

This trend is evident in many countries in the Pacific region, In their 2009 research into the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects (UNPoA), Kerry Maze and Yvette Issar found 'the level of armed crime in the capital city of Papua New Guinea places it among the most dangerous cities in the world, while small arms and light weapons (SALW) feature prominently in ethnic and tribal conflict in the Highland provinces.'<sup>13</sup> Needless to say, Papua New Guinea is not on track to meet any of the Millennium Development Goals by 2015.<sup>14</sup> As the Pacific experience shows, even the presence of a small number of weapons in communities can have a corrosive impact on informal relationships and effective rule of law.

## Efforts to curb the irresponsible arms trade

Since 2003, Oxfam and a range of other NGOs comprising the Control Arms Coalition, have called for the creation of a global and legally binding Arms Trade Treaty to stop irresponsible arms transfers that fuel human rights abuses, undermine development and lead to violations of international humanitarian law. In 2009 the UN General Assembly committed to negotiate an ATT by 2012, which would create 'a legally binding instrument on the highest possible common international standards for the transfer of conventional arms'.<sup>15</sup>

To be effective, an ATT must reinforce states' existing obligations under international law, expressly prohibit the authorisation of international arms transfers where they may violate these obligations and be comprehensive in scope covering all weapons, all types of transfers and all transactions, including conventional weapons brokering. The Treaty must contain transparency and compliance measures as well as international cooperation and assistance measures to facilitate its full implementation.

### **Box 1: Illicit Arms Brokering**

A broker is a party that acts as an agent for others in the negotiation of a transaction. Arms brokering may be understood as activities such as negotiating, arranging or otherwise facilitating the transfers of weapons that are neither necessarily in the ownership of the broker, nor necessarily originate in the country from which the broker operates.

There is a significant lack of regulation on brokering, meaning that brokering activities have been utilised to transfer weapons to illicit or undesirable users or destinations, including countries under UN embargoes, armed groups and zones of conflict. When facilitating illicit deals, arms brokers rely on a general lack of governmental control and screening over their activities.

Around the world, only a small number of countries have adopted legislation specifically intended to monitor and control the activities of arms brokers. This means that, unlike other arms trade actors - notably, importers and exporters - brokers have so far operated with few constraints.<sup>16</sup>

## 4 The North Korea arms trafficking case

On 11 December 2009 a cache of conventional weapons left the Democratic People's Republic of Korea ('North Korea') bound for a consignee located in Iran,<sup>17</sup> in violation of UN sanctions on both countries. The following day the arms were intercepted at Don Muang International Airport in Bangkok by Thai authorities, in what became one of the biggest arms trafficking cases exposed that year.

The search by Thai authorities yielded a 35 tonne haul of North Korean weaponry, including rocket-propelled grenades, missile and rocket launchers, missile tubes, surface-to-air missile launchers, spare parts and other heavy weapons at an estimated value of \$18 million.<sup>18</sup>

A report to the UN Security Council from the Panel of Experts established pursuant to UN Sanctions against North Korea revealed that the shipment included 240mm rockets, RPG-7s, TBG-7s and Man-Portable-Air-Defence-Systems (MANPADS)<sup>19</sup>. This has led experts to speculate that Somalia, the horn of Africa, Iraq or Russia, all recent sites of illicit MANPADS activity, could have been the intended final destination for the cargo.<sup>20</sup>

### **Box 2: MANPADS**

Man portable air defence systems are a type of surface to air missile. This type of light weapon can be used by individuals on the ground to shoot down aircraft. According to Matt Schroeder, Federation of American Scientists, MANPADS 'have been used in 48 confirmed instances against civilian aircraft, which has resulted in 45 shoot downs'.<sup>21</sup> Successful MANPAD attacks have been known to kill hundreds of people and generate economic losses of over USD\$15 billion in damages.<sup>22</sup> The transfer of these weapons is controlled through both the Wassenaar Arrangement and the UN Programme of Action on Small Arms and Light Weapons. These items, however, are still available on the black market where their purchase can pose a significant threat to civilians. In recent years MANPADS have been used against civilian aircraft in Angola, DRC, Iraq and Somalia.

Investigations by journalists and researchers in the months immediately following the discovery shed light on the numerous companies and countries involved in this illicit transfer. From the information gathered by Oxfam it appears that as many as eight companies were involved at various levels in the brokering of arms from North Korea, with connections to at least ten different countries spanning Asia, the Pacific, the Middle East, Eastern Europe and the Caucasus.

Like many international illicit arms transfers, the North Korea case involved several transactions between companies and actors in multiple countries. The use of numerous and geographically dispersed companies, each set up to complete a separate part of the transaction in separate jurisdictions, makes it easier for arms brokers to disguise their identity

and in many cases escape prosecution. The following section aims to clarify the chain of events and actors involved in this case.

## A chain of deceit

On 24 September 2009 an Ilyushin-76 aircraft, later used to ship the illicit weapons, was registered in the Republic of Georgia ('Georgia') as 4L-AWA.<sup>23</sup> The owner of the aircraft was listed as Overseas Cargo FZE ('Overseas Cargo') and the operator as 'Air West' Limited.<sup>24</sup> Overseas Cargo is based in Sharjah, United Arab Emirates and is allegedly owned by Ms. Svetlana Zykova.<sup>25</sup> Svetlana Zykova's husband, Mr. Alexander Zykov, owns the 'East Wing Freight Company,' based in Shymkent, Kazakhstan.<sup>26</sup> According to the Washington Times, family members of the crew of the 4L-AWA aircraft claim that Mr. Zykov had employed them for approximately a decade, and he had specifically hired them for the Bangkok flight. Mr. Zykov has denied this claim.<sup>27</sup>

This is not the first time that Overseas Cargo has been named in an arms trafficking case. In 2006, a UN Security Council report named Overseas Cargo as the owner of another Ilyushin-76 aircraft (registration UN-76496) that Overseas Cargo subsequently sold to Aerolift (a Ukrainian company).<sup>28</sup> Aerolift then arranged the onward sale/lease of UN-76496 to another company, Eriko Enterprises.<sup>29</sup> Eriko is named in the report for supplying arms to the Islamic Courts Union in Somalia, in violation of UN Security Council Resolution 1676 (2006). The Somalia case is indicative of the common practice of using the same companies, countries, and often the same aircraft themselves in illicit arms deals.

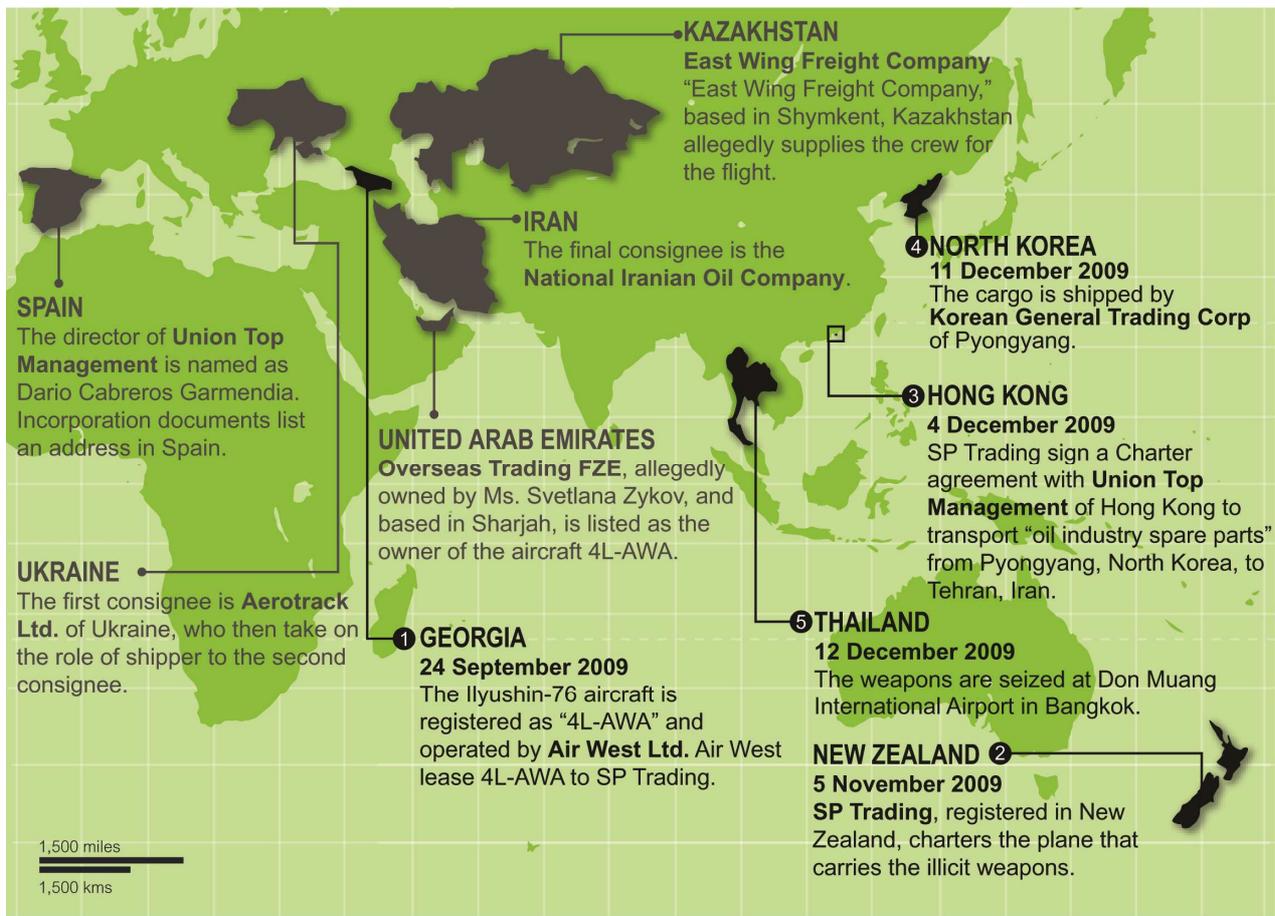
The New Zealand registered company SP Trading leased the 4L-AWA aircraft from Air West on 5 November 2009.<sup>30</sup> SP Trading had been registered with the New Zealand Companies office only three and a half months earlier, on 22 July 2009.<sup>31</sup> The sole shareholder of SP Trading is Vicam (Auckland) Ltd, which from 8 September 2009 until 12 July 2010, was solely owned by GT Group.<sup>32</sup> Initially SP Trading registered Ms. Lu Zhang of Auckland, New Zealand as its director, but on 22 January 2010, Mr. Leo Doro Basil Boe was appointed director with an address in Port Vila, Vanuatu.<sup>33</sup> GT Group, the company that owned Vicam, is based in Vanuatu.

According to the Washington Times, SP Trading is 'managed by a long time Zykov associate Yury Lunyov (who) conceded that a chain of lease agreements links the Zykovs to the plane and crew carrying the North Korean weapons, but he denied they were directly involved in organising the shipment or knew of the contents'.<sup>34</sup> Hugh Griffiths from the Stockholm International Peace Research Institute (SIPRI) has stated that 'the aircraft in question has remained under the control of a Kazakh citizen who has run a series of Kazakhstan registered companies operating in the United Arab Emirates. He has been closely associated with known arms traffickers from Serbia. His aircraft have also routinely carried arms to African conflict zones, as well as servicing humanitarian aid operations and peace support missions in Africa and Iraq'.<sup>35</sup>

TransArms/IPIS experts have, however, noted in previous correspondences with the authors that it was Air West that - as the company that registered the aircraft in Georgia, and as a lessor and operator of the plane for SP Trading, was in control of the Il-76, including control on the crew of the plane that was on leave from the Kazakhstan-registered East Wing. <sup>36</sup>

## Mapping the illicit arms transfer

SP Trading, registered in New Zealand, was only one of as many as eight companies involved at various levels in this case of brokering arms from North Korea. The case stretches across the globe, with connections to at least ten different countries spanning Asia, the Pacific, the Middle East, Eastern Europe and the Caucasus. The following map, based on information collected from research undertaken by TransArms, IPIS and others, illustrates the global nature of this case.



Shell companies and nominee directors are services that allow the true, beneficial owner of a company to remain concealed; a protection mechanism that allows beneficial owners to keep their name out of the public record and avoid accountability. A nominee director's name is used for incorporation documents, meaning that whilst the nominee is legally responsible for the company or entity, the beneficial owner can retain control and anonymity at the same time.

The GT Group website states that the company offers 'offshore company services for privacy, legal tax avoidance, asset protection, financial independence and freedom'.<sup>37</sup> The company offers the establishment of shell companies in a number of jurisdictions in the Pacific, including New Zealand, and the use of nominee directors, 'allowing you to achieve total privacy for yourself or your client'.<sup>38</sup>

In their report *From Deceit to Discovery*, IPIS and TransArms analysed the agreement used by SP Trading to lease the 4L-AWA aircraft from Air West. IPIS reports that the agreement shows SP Trading paid Air West for the hire using a series of intermediary banks.<sup>39</sup>

On 4 December 2009, SP Trading signed a charter agreement with Union Top Management of Hong Kong to transport 'oil industry spare parts' from Pyongyang, North Korea to Tehran, Iran.<sup>40</sup> Union Top Management was incorporated in Hong Kong on 2 November 2009,<sup>41</sup> only a month prior to the charter agreement being signed.

On the charter agreement with SP Trading, Mr. Dario Cabrerros Garmendia is named as the director of Union Top Management. Mr. Garmendia was listed at an address in Spain according to documents in the Hong Kong Companies Registry.<sup>42</sup> Sergio Finardi has researched the North Korea case for TransArms Research Centre and claims that 'further inquiry by our contacts in law enforcement in Spain revealed that the guy [Mr. Garmendia] does not exist as such'.<sup>43</sup> According to documents obtained by TransArms and IPIS, 'Aerotrack Ltd' of Ukraine and the 'Korean General Trading Corp' of Pyongyang, North Korea are the companies responsible for the cargo.<sup>44</sup> The packing list obtained by IPIS and TransArms, identifies the National Iranian Oil Company as the final consignee.<sup>45</sup>

When the Thai authorities found the 35 tons of deadly cargo aboard the flight from North Korea, international media swarmed around the developing case. Within a week journalists had managed to contact the families of the flight crew, who were detained in Thailand. This early questioning by the media uncovered some of the key aspects of the case, which may have been lost if they were left until the later investigations undertaken by states and the United Nations.

## Timeline of Events

- **22 July 2009** – The shell company, SP Trading, is registered in New Zealand.
- **24 September 2009** – The plane (4L-AWA) is registered to 'Overseas Cargo FZE' with 'Air West Ltd' as the operator.
- **2 November 2009** – Another shell company 'Union Top Management' is registered in Hong Kong.
- **5 November 2009** – SP Trading leases the plane (4L-AWA) from the operator (Air West Ltd).
- **4 December 2009** – SP Trading signs a charter agreement with 'Union Top Management' to transport 'oil industry spare parts' from Pyongyang, North Korea to Tehran.
- **7 December 2009** - The plane (4L-AWA) departs Nasosnaya military airport in Azerbaijan (representing a third change to the flight plan since it was initially lodged).<sup>46</sup>
- **11 December 2009** – The plane departs North Korea with arms on board, with Korean General Trading Corporation listed as the shipper on the packing list. The final consignee is listed as the National Iranian Oil Company in Tehran.
- **12 December 2009** - Thai authorities find 35 tons of weapons aboard the plane at Don Muang Airport, Bangkok.
- **15 December 2009** - Agence France Presse breaks the story of the New Zealand link to the arms cache through SP Trading, registered in New Zealand.<sup>47</sup>
- **16-17 December 2009** - New Zealand Minister of Foreign Affairs Murray McCully questioned by media concerning the New Zealand link at a Press Conference in Moscow.
- **17 December 2009** – Time/CNN report on interviews with families of the crew.<sup>48</sup>
- **21 January 2010** – New Zealand Minister of Commerce Simon Power asks officials to examine key aspects of New Zealand's company registration system and provide advice on whether these need to be strengthened.
- **29/30 January 2010** – Thai government report on the incident to the United Nations Sanctions Committee is leaked to the media.<sup>49</sup>
- **2 September 2010** – Lu Zhang, former nominee director of SP Trading, appears in Auckland District court charged with 75 counts of making false statements in company registration forms.
- **9 September 2010** – New Zealand Minister of Commerce Simon Power announces the results of the inquiry into New Zealand's company registration. Several key recommendations are made, which are expected to be introduced in legislation in 2011.

*'The New Zealand government will do everything that it can internationally to oppose those who wish to embark on the international traffic of arms illegally'.*

New Zealand Minister for Foreign Affairs, 18 December 2009

At the time the New Zealand Minister of Foreign Affairs, the Hon Murray McCully, was in Moscow, where he was questioned on the affair at a press conference. The Minister stated that 'we have been given no reason to believe there are any New Zealanders involved in what is a very unsavoury business and I just want to reassure you that the New Zealand government will do everything that it can internationally to oppose those who wish to embark on the international traffic of arms illegally'.<sup>50</sup>

There are many unanswered questions surrounding the final destination of the cargo. Iran is declared on the packing list as the final destination,<sup>51</sup> yet it still remains unclear if this is where the North Korean arms were due to be unloaded. A 2010 United States Congressional Research Report highlights that 'between 1998 and 2001, North Korea is estimated to have exported some \$1 billion in conventional arms to developing nations'.<sup>52</sup> A more recent estimate by the Institute for Foreign Policy Analysis puts North Korean weapons sales at \$1.5 billion per annum.<sup>53</sup>



**Thai police officers and soldiers surround the cargo plane at Don Muang Airport in Bangkok, Thailand, 12 December, 2009. Photo: AP**

In September 2010, prosecutions commenced in Auckland, New Zealand against Ms. Lu Zhang, the former nominee director of SP Trading. Ms Zhang was charged with 75 offences of making false statements in company registration forms. She pleaded guilty to 20 of the charges pressed against her, while indicating she would contest the other 55 charges on the grounds they had been laid out of time by the Companies Office. The charges however relate to the technical error of Ms. Zhang declaring her office address as her home address, and are not related to criminal liability for the illicit shipment.<sup>54</sup> No further prosecutions of those responsible for the arms transfer have commenced.

# 5 Analysis of arms control arrangements

The actions witnessed in this case are an example of ‘third-country brokering’, where the arms brokers have allegedly tried to ‘avoid the transaction falling under the jurisdiction of the state where they base their operations’.<sup>55</sup>

While there are a range of applicable domestic, regional and international laws that relate to this case study, the individuals, companies and states responsible for this illicit transfer have largely escaped accountability.

This following section will examine each level of jurisdiction to identify what current opportunities exist for holding the relevant parties responsible for this incident and will examine the gaps in the current regime that have enabled those responsible to evade accountability to date. It is proposed that these gaps be addressed by strengthening national legislation and its implementation, in addition to the development and ratification of a legally-binding and effective global Arms Trade Treaty.

## New Zealand domestic law

From the New Zealand perspective there are two areas of domestic law that can be applied to the case: Domestic implementation of UN Security Council Sanctions pertaining to North Korea and Iran and Company Registration Law (New Zealand Companies Act 1993).

The key issue, however, is the extent to which these pieces of legislation effectively and in practice hold entities operating outside New Zealand accountable for their actions.

### Sanctions Regulations

New Zealand implements United Nations resolutions relating to sanctions into domestic legislation through regulations under the United Nations Act of 1946. The relevant New Zealand Regulations in this case are:

- United Nations Sanctions (Democratic Peoples Republic of Korea) Regulations 2006 (SR 2006/382) issued by New Zealand Governor-General, 11 December 2006
- United Nations Sanctions (Iran) Regulations 2007 (SR 2007/74) issued by New Zealand Governor-General, 19 March 2007

#### *UN Sanctions Regulation 2006/382 (DPRK)*

UN Sanctions Regulation 2006/382 prohibits the transfer of specified goods from North Korea into New Zealand and also from North Korea to any destination.<sup>56</sup> This pertains to all arms and includes the sale, transfer, carriage, delivery and any other dealings of these specified goods.<sup>57</sup> Regulation 11 of UN Sanctions Regulation 2006/382 specifies that this is applicable to New Zealand citizens outside New Zealand. There is no

wording in regulation 11 specifically concerning New Zealand registered companies acting outside New Zealand. The Ministry of Foreign Affairs and Trade (MFAT) website recommends 'all persons and entities in New Zealand, and in many cases New Zealand citizens and companies overseas as well, must comply with regulations implementing Security Council sanctions'.<sup>58</sup>

Explicitly extending coverage under regulation 11 to include individuals and New Zealand companies and their off-shore activities would strengthen New Zealand sanctions legislation to deal with the increasingly global nature of business entities. By way of example, the Cluster Munitions Prohibition Act 2009 directly addresses the issue of extraterritoriality and corporations:

*'9 Application of Act in New Zealand and elsewhere*

*(2) This Act also applies to all acts done or omitted outside New Zealand by –  
(d) a body corporate, or a corporation sole, incorporated in New Zealand.'*<sup>59</sup>

Bringing New Zealand sanctions regulations into line with laws such as the Cluster Munitions Prohibition Act could increase their effectiveness. Kelisiana Thynne, Legal Adviser of the International Committee of the Red Cross Regional Delegation in the Pacific has stated, in reference to UN Security Council Sanctions, that 'the government actually has a responsibility to ensure that companies that are registered in their territory are not causing the government itself to breach their international obligations'.<sup>60</sup> Additionally, while noting extradition policies on the whole are strong, the Financial Action Taskforce has stated that 'New Zealand's ability to extradite in cases involving illicit arms trafficking may be restricted by the fact that New Zealand has not criminalised a sufficient range of offences' in this area.<sup>61</sup>

Regulation 12 of UN Sanctions Regulation 2006/382 states that carriage of arms by ship or aircraft from North Korea is prohibited. This applies to any aircraft chartered to a body incorporated in New Zealand.<sup>62</sup> If the aircraft is not registered in New Zealand then the liability rests with the charterer of the aircraft according to regulation 13 of UN Sanctions Regulation 2006/382. Regulation 13 goes as far as covering agents acting on behalf of the charterer.

GT Group have stated that the 'Police have been given information on the identity of the European professional client who set up a New Zealand company (SP Trading) that was caught flying North Korean arms to Iran'.<sup>63</sup> If the beneficial owner of SP Trading was involved in the chartering of the flight that carried the arms from North Korea and had knowledge of the true nature of the cargo, they would be liable under regulation 13 of UN Sanctions Regulation 2006/382.

While making liable the charterer of an aircraft, Regulation 13 allows a defence if the charterer is able to prove they 'did not know and had no reason to suppose' the goods they were carrying were prohibited.<sup>64</sup> This defence for companies who are un-knowingly used by another party to illicitly transfer arms, in violation of the sanctions, also creates a loop-hole that illicit arms brokers are able to exploit to avoid prosecution. Through

*'The government actually has a responsibility to ensure that companies that are registered in their territory are not causing the government itself to breach their international obligations.'*  
Kelisiana Thynne, ICRC

their creation of numerous shell companies for one transaction, they are able to ensure each company does not hold enough information on its own to be liable. This type of case demonstrates why it is so important for domestic legislation to be strong enough to prosecute the entire series of acts that have occurred, not merely those within their jurisdiction.

The International Crisis Group highlights how 'buyers and sellers have an incentive to hide the transactions, especially since all North Korean arms exports are now banned. In the past it was much easier to fabricate shipping documents to avoid detection, but now all North Korean cargo draws scrutiny'.<sup>65</sup> SP Trading should have at least known that both North Korea and Iran were under UN Security Council sanctions, and that therefore any transfer between the two countries should not contain a prohibited item.

The final consignee of the shipment is listed as the National Iranian Oil Company (NIOC). NIOC has allegedly been involved in other illegal shipments. For example, the Iran-Contra affair 'revealed that NIOC was the consignee of a large cargo of spare parts and fuses for Hawk missiles shipped on August 29, 1986 from Newark (New Jersey)'.<sup>66</sup> IPIS and TransArms have stated that 'Oil drilling equipment' was 'indeed a popular label for arms secretly shipped to Iran from Europe and the United States during the 1980s'.<sup>67</sup> The description of the cargo aboard 4L-AWA was 'oil industry spare parts', which when combined with the cargo's origin and destination points, should have elicited further investigation as part of proper due diligence on the part of SP Trading.

#### *UN Sanctions Regulation SR 2007/74 (Iran)*

The New Zealand legislation pertaining to sanctions on Iran is similar in scope to the regulations concerning North Korea. Regulation 12 of UN Sanctions Regulation SR 2007/74 outlines that a NZ registered aircraft cannot carry arms to Iran, and neither can any aircraft chartered by a company incorporated in NZ, even if the aircraft itself is not registered in NZ.<sup>68</sup> Again, liability can be avoided if the charterer can prove they had no reason to suppose arms were part of the cargo.<sup>69</sup>

The North Korean arms shipment intercepted in Bangkok was in clear violation of UN sanctions on both North Korea and Iran. Although New Zealand has United Nations Sanctions Regulations 2006 (SR 2006/382) and 2007 (SR 2007/74) prohibiting the events that occurred, these do not go far enough to prevent (or deter) this type of incident. According to Anne-Charlotte Merrell Wetterwik of the Centre for International Trade and Security at the University of Georgia (CITS-UGA), the reality is that the unscrupulous arms brokers 'that run this type of trade are not stupid. They will try and test the system and go through the loop-holes and break through the weaker links wherever they can find them and even if it is not sinister by design it may be stupidity by design'.<sup>70</sup>

Of course, legislation alone is not sufficient to prevent illicit activity. It must be demonstrated that New Zealand will use this legislation to prosecute those who disregard the law. Prosecution of violations of New Zealand Sanctions Regulations would substantially increase awareness about the need for due diligence by New Zealand companies when

dealing with imports and exports of goods to countries subject to UN Security Council Sanctions. It would also serve as a strong deterrent against using New Zealand registered companies for illicit arms brokering activities.

## Companies Law

The Companies Act 1993 is the overarching law relating to companies in New Zealand. The Companies Act 1993 is administered by the Ministry of Economic Development (formerly Ministry of Commerce). The Companies office is a branch of the Ministry and has 'compliance, prosecution and enforcement functions under the Companies Act 1993'.<sup>71</sup>

### *Minimal Registration Requirements*

Brokers involved in illicit arms deals often use any number of shell companies to disguise their transactions. These companies are often established in known tax havens where legislation covering extra-territorial acts is minimal. Legislation in countries wanting to encourage international business activity can unintentionally enable shell companies involved in illegal activity. Alex Tan, director (Forensic Services) at PricewaterhouseCoopers believes New Zealand has 'a reputation as a relatively easy place to set up a shell company (and that) a number of overseas people with less-than-honest intentions like to incorporate their company in New Zealand because it has a safe and clean and honest image'.<sup>72</sup>

According to the New Zealand Companies Office website 'incorporating a company online is as simple as reserving your company name, completing the incorporation details and returning your signed consent forms'.<sup>73</sup> According to the Companies Act 1993 the *Essential Requirements* needed to register a company in New Zealand are: a name, one or more shares, one or more shareholders and one or more directors.<sup>74</sup> The online registration system and minimal amount of documentation required creates a relatively easy, virtually instant process for incorporating a company in New Zealand, which can be exploited by those involved in the arms trade. Anne-Charlotte Merrell Wetterwik from CITS-UGA warns 'the technological advances of the whole trade (and) the fact that the broker can sit anywhere and facilitate a deal on the other side of the world, is a concern for everyone'.<sup>75</sup>

### *Nominee Directors*

The ability to appoint nominee directors can obscure the beneficial owner of a company. In 2009 the Financial Action Task Force (FATF) and Asia-Pacific Group on Money Laundering conducted a review of New Zealand's anti-money laundering systems and laws to combat the financing of terrorism. In their review of money laundering in New Zealand the group noted that 'anyone can register a company, so long as it has one director'.<sup>76</sup> Shell companies established for illegal purposes often follow the practice of having a nominee director. This was the case with SP Trading, whose sole shareholder GT Group created the company at the request of an 'international client and appointed a New Zealand based woman, to act as its director'.<sup>77</sup>

In documenting the information required by the Companies Register the FATF has noted that 'although the Register contains useful information about the legal ownership of domestic legal persons, and the legal control of both domestic and overseas legal persons, it contains no information about the beneficial ownership and control of legal persons (i.e. the natural person(s) who ultimately own(s) or control(s) the legal person).'78

This problem occurred with the North Korea shipment as the identity of the arms dealer behind the transfer was obscured through the use of a nominee director. On behalf of GT Group, Mr. Ian Taylor, Director of Marketing, has said 'as a nominee director, as long as you can show that you are not the one in control of the company and you're basically operating under the instruction of the person who has set up the company, then realistically the authorities will see Lu Zhang [previous SP Trading nominee director] is not involved in any way in arms dealing'.<sup>79</sup>

### *Misuse of NZ Companies Registration*

The North Korea case demonstrates how arms brokers are able to use numerous shell companies to disguise their activities. Although shell companies can have legitimate operations, many are set up for illegal purposes. Illicit arms brokers primarily use shell companies to hide their true identity and to avoid prosecution in countries where they are conducting business and where the shell company is registered. Kerry Maze of the United Nations Institute for Disarmament Research (UNIDIR) emphasises that regardless of whether or not an individual state sees itself as having an arms problem, 'illicit brokers based anywhere can use a range of legal loopholes to their advantage. In order to deter illicit brokers, including in regions where little attention to illicit arms trafficking is made, all states have to have preventative policies in place and the means to track and investigate potential illicit brokering activities'.<sup>80</sup> To counter this misuse of shell company functions, countries that have companies registration systems requiring minimal documentation for incorporation should implement stronger controls to deter this criminal use.

A key area for improved regulation is around the use of nominee directors. The FATF has recommended that 'New Zealand should broaden its requirements to ensure that information on the beneficial ownership and control of legal persons is readily available to the competent authorities in a timely manner. Such information would then be available to the law enforcement and regulatory/supervisory agencies upon the proper exercise of their existing powers'<sup>81</sup>. If these rules had been in place in the case of SP Trading, information regarding the company's beneficial owner would have needed to be documented. Ideally this would be in a public arena such as the current companies' registration system website. Competent authorities could use such information to investigate the beneficial owner's possible involvement in signing the charter agreement with Union Top Management, the act which authorised the illicit arms deal. This increased scrutiny would in itself act as a significant deterrent to arms brokers looking for countries where they are able to establish shell companies while themselves remaining free from liability.

*'Illicit brokers based anywhere can use a range of legal loopholes to their advantage. In order to deter illicit brokers, including in regions where little attention to illicit arms trafficking is made, all states have to have preventative policies in place and the means to track and investigate potential illicit brokering activities'.  
- Kerry Maze, UNIDIR*

Following the 2009 FATF report and the domestic and international media coverage of SP Trading's role as a shell company for the North Korean shipment of weapons, New Zealand's Minister of Commerce, the Hon. Simon Power, released a statement on 21 January 2010. He declared that he had instructed officials to look into New Zealand company registration, primarily to determine whether:

- New Zealand-registered companies should be required to have a New Zealand resident director (consistent with requirements in other jurisdictions, including Australia, Canada, and Singapore),
- Directors should be required to provide date-of-birth information to the Registrar of Companies, to help verify their identity,
- The provision of a tax number should be a requirement for all companies upon registration. About 70% of new companies already take advantage of the service offered by the Companies Office to apply for a tax number on incorporation,
- The Registrar should be able to suspend the registration of companies where there are concerns about the bona fides of people involved or the integrity of information supplied in relation to a company.<sup>82</sup>

The Minister of Commerce has emphasised that New Zealand doesn't 'want to become a difficult place to do business, but at the same time we have to align our regulation and registration company requirements with countries like Australia and Canada and director residency is one issue to look very carefully at'.<sup>83</sup>

The outcomes of this inquiry were announced by the Hon. Simon Power on 9 September 2010. Two of the above measures aimed at tightening company registration requirements are included; specifically, New Zealand-registered companies will be required to have either one New Zealand-resident director or a local agent, and the Registrar of Companies will be able to flag companies under investigation for supplying inaccurate information on the bona fides of directors or shareholders. If such an investigation concludes that a company has supplied inaccurate information, the Registrar will be able to remove that company from the register and prohibit its directors from acting as directors for five years. Legislation implementing these changes is expected to be introduced in 2011.<sup>84</sup>

Given that SP Trading did have a New Zealand-resident director, Ms. Lu Zhang, at the time of the lease and transfer, it is unlikely these changes would have stopped SP Trading's involvement in this case. Further, the changes fall short of implementing the FATF recommendation that information about beneficial ownership and control of companies should be readily available to competent authorities. As such, provided that companies such as GT Group continue to offer services establishing resident nominee-directorships in New Zealand, beneficial owners may continue to use New Zealand shell companies to avoid liability for criminal activity.

### **Box 3: Shell Companies in the United Kingdom**

New Zealand is not the only country where arms brokers using shell companies (also known as brass plate companies in the UK) registered in their jurisdiction have been implicated in illicit arms deals. The UK Select Committee on Arms Export Controls released a report in March 2010 that details growing concern in the UK regarding the use of brass plate companies to facilitate illicit arms transfers outside UK jurisdiction.<sup>85</sup>

Amnesty International representative Mr. Oliver Sprague gave evidence in December 2009 at a hearing of the UK Select Committee on Arms Export Controls on the issue. In the hearing, Sprague reported on Ukrainian nationals who registered a company in Cornwall, UK and were involved in 'brokering small arms components to Rwanda'.<sup>86</sup> Mr. Sprague told the select committee that 'the UK should not be considered a safe place by gun-runners and the like to trade weapons and their components to places where terrible human rights violations persist. It cannot be right that a company can pay a very small token fee, set up an arms company and broker weapons to human rights crisis zones with apparent impunity from detection and prosecution'.<sup>87</sup>

In its report, the select committee highlighted the lack of enforcement mechanisms to deal with shell companies involved in arms trading into countries where human rights abuses occur under current legislation. The select committee recommended that, 'the Government explore ways in which it would be possible to take enforcement action against brass plate companies, including consulting enforcement agencies in other countries on their approach to this problem'.<sup>88</sup>

## Regional approaches: The Pacific

Unlike most regions around the world, the Pacific is not covered by a specific regional agreement dealing with the transfer of arms. Linked to this, there appears to be a perception in the Pacific that there is low risk of the region being caught up in the illegal arms trade. In their research into the international assistance required for implementation of the UNPoA in five Pacific countries,<sup>89</sup> Kerry Maze and Yvette Issar found that ‘challenges for implementing the PoA in the case study countries can be partly attributed to the general sense that the illicit trade in SALW is not a significant problem there’.<sup>90</sup> However, the case in question clearly demonstrates that even the Pacific region can become embroiled in the illicit arms trade.

*‘Growing efforts to prosecute...acted as a deterrent, with a decline in the brazen sanctions-busting cases that were the hallmark of the late 1990s’.*  
- Alex Vine and Holger Anders

The lack of regional agreements pertaining to the arms trade in the Pacific may make it an attractive region for arms brokers seeking jurisdictions where they are unlikely to face prosecution. In an article for UNIDIR, Small Arms Survey and the UN Department of Disarmament Affairs, Alex Vine and Holger Anders note how ‘growing efforts to prosecute...acted as a deterrent, with a decline in the brazen sanctions-busting cases that were the hallmark of the late 1990s’.<sup>91</sup> In the absence of a legally binding regional or international agreement, the criminal prosecution of illicit arms brokers utilising the tax havens and lax company registration systems in the region would help change the perception of the Pacific as a relatively easy place to base shell companies for illicit arms trading purposes.

Such prosecutions would be further bolstered by financial and other support to Pacific states, to address legislative gaps in the regulation of arms brokering. Kerry Maze and Yvette Issar have highlighted gaps in Pacific regional legislation and the capacity to implement such legislation: ‘Given the current outdated state of most firearms-related legislation, the severe limitations posed by the lack of physical and human resources of the law enforcement and customs services, as well as challenges in the area of information management and record-keeping, coupled with the fact that organized crime is on the rise, the case study countries will not be in a strong position to prevent SALW from proliferating should the demand for SALW arise or traffickers find lucrative and tempting opportunities’.<sup>92</sup>

Although the weapons shipment in this case did not originate in, nor was destined for the Pacific, the region played an important role in enabling this incident to occur. GT Group continues to offer services in other Pacific countries, similar to those that enabled the registration of SP Trading,<sup>93</sup> demonstrating that the risk of similar incidents remains.

An effective Arms Trade Treaty could significantly improve the regulation of arms transfers in the Pacific region. Given the limited budgets and capacity of some smaller states in the region, it will be critical to ensure that an Arms Trade Treaty is accompanied by strong regional cooperation and the provision of assistance to help smaller states implement the Treaty, where required.

# International law and agreements

## United Nations Sanctions

Security Council Resolution 1874 (2009) pertaining to North Korea was adopted on 12 June 2009. This resolution extended the sanctions outlined in the previous Security Council Resolution 1718 (2006) to cover arms and all related material. Iran was listed as the consignee destination for the arms in this case and is also subject to UN Security Council Sanctions; however the sanctions on North Korea are the focus of this section of the report.

The Democratic People's Republic of Korea's Sanctions Committee (the Committee) is responsible for monitoring compliance with the sanctions imposed. The Committee makes annual reports on the status of the sanctions and investigates any breaches that have occurred during the period.

Article 41 of the UN Charter enables the UN Security Council to impose sanctions including arms embargoes on member states, but 'arms embargoes were not effectively monitored until the introduction of ad hoc monitoring groups (Panels, Groups of Experts and Monitoring Mechanisms) in the late 1990s.'<sup>94</sup> These monitoring groups, among other tasks, conduct investigations into sanctions violations and provide reports with evidence to the UN Security Council. In 2009, a Panel of Experts was appointed to assist the Committee with its work programme including conducting investigations into breaches of resolution 1874.<sup>95</sup>

The Panel of Experts established Pursuant to Resolution 1874 (2009) noted in their report in May 2010 to the UN Security Council that the 1718 Committee has been notified of four non-compliance cases involving arms exports, including the shipment of weapons seized at Don Muang airport. Based on the cases notified to the Committee so far, the Panel of Experts believes that North Korea continues to export arms in breach of Resolutions 1718 and 1874.<sup>96</sup>

It is unclear at this stage what effect the strengthened and expanded provisions of resolution 1874 have had on North Korean arms exports and the Panel of Experts will continue to examine this issue.<sup>97</sup> The problem, as with a great deal of international law, is to a large extent the inability of the UN to prosecute in any breaches they investigate. Prosecution is mostly left up to states where the breach occurred. The investigation process of Sanctions Committees serves more to provide evidence that can then be used by countries to prosecute crimes committed within their jurisdiction. States have not widely used the work of monitoring groups to bring about prosecutions involving companies and individuals under their jurisdiction, although in some cases this has proved successful. For example, reports compiled by UN Panels of Experts in Sierra Leone and Liberia were used by Belgian police to successfully prosecute two Lebanese nationals involved in an exchange of conflict diamonds for cash and guns.<sup>98</sup>

The complexity of multi-jurisdictional arms trafficking cases means that, apart from some notable exceptions, states often avoid their responsibility to prosecute, looking to others to take on this costly process, which often involves extradition.

#### **Box 4: Box Leonid Minin**

Leonid Minin was arrested in Italy on 5 August 2000 initially on charges of drug possession. After further investigation including information sharing between Italy, other states and the United Nations, evidence was gathered for further charges. On 20 June 2001, Italian police charged Minin with weapons trafficking, including the delivery of numerous weapons to the Revolutionary United Front in Sierra Leone.<sup>99</sup> On 17 September 2002 the Court of Appeal ordered the release of Mr Minin because 'the prosecution lacked jurisdiction on Minin's trafficking activities because the arms transfers in question did not pass through Italian territory'.<sup>100</sup> This case illustrates the difficulty of prosecuting international arms brokers allegedly involved in illicit deals operating across numerous jurisdictions and through a multitude of shell companies.

### **Other UN Efforts**

#### *Firearms Protocol*

The UN General Assembly adopted the Convention against Transnational Organized Crime on 15 November 2000 and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol) in 2001. The Firearms Protocol is legally-binding on states that ratify the protocol within their domestic legislation. New Zealand has not yet ratified the Firearms Protocol, along with a number of other Pacific governments including Fiji, Tonga and Papua New Guinea. As the 'protocol calls for the regulation of arms brokering and the inclusion of information on brokers and brokering activities in exchanges of information between states'<sup>101</sup> it provides greater potential for information sharing between states. Information sharing would enable states to monitor and flag any activities of irresponsible operators and companies as well as notorious aircraft operating from or within their jurisdiction.

The Firearms Protocol is not legally binding on New Zealand as it has not been ratified. An Arms Amendment Bill, which includes provisions for the ratification of the Firearms Protocol, was introduced to New Zealand Parliament in 2005. The Bill is currently before the Law and Order Select Committee, but a decision is not expected from the Committee until November 2010.<sup>102</sup>

The limitations of the Firearms Protocol are that it only covers firearms, their parts and components and ammunition, and therefore the passages on brokering relate only to the activity related to these weapons. Given the weapons in the North Korea case study were heavy weapons and not firearms, it is unlikely the information sharing provisions in the Firearm Protocol would have made a difference in this case. This is a good example of the limited effectiveness of international arms control

instruments that focus only on a narrow range of weapons. In order to close the loopholes, it is critical that an international treaty of comprehensive scope – dealing with all weapons, all transfers and all types of transaction - is put into effect. The ATT negotiations provide an opportunity for this.

### *Non-Binding Agreements*

The UNPoA was agreed in 2001 and provides a framework for states to adopt various measures to combat the illicit trade in small arms and light weapons.<sup>103</sup> The UNPoA commits signatories to ‘develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering. This legislation or procedures should include measures such as registration of brokers, licensing or authorisation of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the states jurisdiction and control’.<sup>104</sup>

As signatory to the UNPoA, the New Zealand Government has a responsibility to ensure appropriate legislation is in place to penalise and prosecute illicit brokering activities. As already demonstrated, New Zealand legislation currently falls short, particularly in relation to third-country brokering. The non-legally binding nature of the UNPoA means that it is a weak instrument with which to hold governments to account.

The regular reporting mechanism of the UNPoA, whereby states submit national reports on their implementation of the Program, is seen as a valuable way of advancing transparency and accountability. Within the Pacific region however while there are 14 States that are Party to the UNPoA, only six have submitted implementation reports and only four of those six have managed to report in more than one year.<sup>105</sup> New Zealand and Australia are the only two of this group to have regularly reported across multiple years, illustrating the limited level of political will and capacity within the region on the issue of small arms control.

What is also clear is that regular reporting on the implementation of the UNPoA does not necessarily equate to greater transparency and accountability in all cases. For example, in its February 2010 national report, New Zealand did not make any reference to its links to the North Korea case or the issue of third-country brokering. The report stated that ‘There are few arms brokers based in New Zealand and there are no specific controls on brokering’, although there was a commitment to ‘investigating the possibility of creating stand alone export controls legislation (and) such legislation would seek to include express controls on brokering activities’.<sup>106</sup> As the North Korea case demonstrates, such express controls on brokering activities are clearly needed in New Zealand.

On 12 January 2009, the UN General Assembly (UNGA) adopted resolution A/RES/63/67, which ‘calls upon Member States to establish appropriate national laws and/or measures to prevent and combat the illicit brokering of conventional arms... (and) emphasises the importance of international cooperation and assistance, capacity-building and information-sharing in preventing and combating illicit brokering

activities'.<sup>107</sup> Although UNGA resolutions are not legally binding on States, resolution A/RES/63/67 shows an increasing awareness of the need to take an international approach to combating the activities of illicit arms brokers.

The UNPoA and other relevant UNGA resolutions provide useful frameworks for regulating the arms trade but as these are not legally binding on States, they lack any effective avenues for enforcement. A stronger, binding instrument that contains transparency, accountability and enforcement mechanisms is required, and ATT negotiations provide an opportunity for this.

### *Information exchange through the Wassenaar Arrangement*

New Zealand participates in the Wassenaar Arrangement, a non-binding, multi-lateral arrangement of forty states that produce and export arms. In 2007, Wassenaar Arrangement signatory states adopted the Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons through Air Transport. This set of best practices acknowledges that most illicit transfers occur by means of air transport and are often in violation of UN Arms embargoes. Participating states with 'information indicating that an aircraft's cargo includes SALW, and that its flight plan includes a destination subject to a UN arms embargo...should be referred to the relevant national enforcement authorities'.<sup>108</sup> The Wassenaar Arrangement also provides a framework for general information exchange between states on brokering activities, including information on companies and organisations. These information exchange provisions are confidential between states so it is difficult to ascertain from the outside how commonly the mechanism is used by states to prevent illicit and irresponsible arms transfers.

Out of the 10 countries linked to the North Korean case only two – New Zealand and Ukraine – are Wassenaar signatory states. It is difficult to see how information exchanged between these governments could have prevented their involvement in the case. Even if the other countries involved, including Georgia, the UAE and Kazakhstan had been signatories to the Wassenaar Arrangement and participated rigorously in information exchange, it is hard to imagine how the Wassenaar Arrangement information exchange process would have prevented the transfer, given there is no rapid detection mechanism. The ATT could provide a more effective, global mechanism for information exchange that could enhance the ability to detect and prosecute illicit transfers.

## 5 Recommendations

Although the attempted transfer in this case was undoubtedly illicit, to date the perpetrators have managed to escape prosecution at either the domestic or international level. The solution lies not only in criminalising their activities, because to a certain extent the acts are already illegal, but in closing those gaps that currently exist within and between each jurisdiction which enable them to conduct their illicit activities and evade prosecution.

The case demonstrates that in order to better prevent these irresponsible and illicit transfers, it is necessary to work towards an effective, legally-binding and comprehensive international arms control regime that has no loopholes and is effectively enforced. The Arms Trade Treaty negotiations to conclude in 2012 present an important opportunity and should be focused on such an outcome.

### Closing the gaps through an ATT

Discussion about an Arms Trade Treaty to date has primarily focused on measures that states could take to regulate the legal arms trade, in effect criminalising any trade in weapons outside of such a regulatory regime. The Arms Trade Treaty could play an important role in preventing illicit and irresponsible transfers.

Although existing sanctions regulations in New Zealand prohibit the transfer of weapons from North Korea there are still a number of factors that indirectly enable this type of illicit transfer of arms. An Arms Trade Treaty should address these enabling factors and bridge the gaps that currently exist between the various legal frameworks at domestic, regional and international levels.

Kelisiana Thynne from ICRC believes that although 'a lot of the discussions about the Arms Trade Treaty have been about registering the arms themselves, and making sure that you know the trail of the arms little appears to have been done into tracing the companies involved'.<sup>109</sup> The use of numerous shell companies to disguise the identity of the arms broker behind the illicit arms transfer is a particularly important challenge. Because of the global nature of commerce, brokers take advantage of crossing a number of jurisdictions in a bid to escape liability in any one. States need to ensure an ATT acknowledges this challenge, reinforces states responsibilities to hold companies in their jurisdiction accountable and sets out how jurisdiction applies and who is responsible for prosecuting violations of the treaty.

Companies are increasingly involved in activities that previously were the domain of states. As such, an ATT must apply to states, individuals and companies. Positive work is being done in this area by the UN Special Rapporteur on Business and Human Rights, who raised the issue of corporate responsibility under international law and issues in extraterritorial regulation in a series of legal workshops in 2007.<sup>110</sup>

To address the issues raised by the North Korean case Oxfam recommends the Arms Trade Treaty must:

- Be comprehensive in scope – covering all types of conventional weapons, all types of transfers and all types of transactions, including brokering;
- Reinforce states’ responsibilities to hold companies in their jurisdiction accountable, including shell companies;
- Include a mechanism for information sharing between states about weapons, transfers, transactions and aircraft that harmonises the many different information sharing tools that currently exist in the international system;
- Include provisions covering the multi-jurisdictional nature of arms brokering and the procedures for prosecution in such cases
- Require national implementation measures, including legislation, to ensure the Treaty’s full, clear implementation;
- Be supported by an international assistance mechanism to assist smaller states to develop their national legislation and practices in line with the Treaty;
- Include transparency measures, including regular national reporting on national arms transfers;
- Have an effective mechanism to monitor compliance; and
- Ensure accountability – with provisions for adjudication, dispute settlement and sanctions.

We recommend all states actively engage in the development of the treaty text and work to ensure these issues are addressed. We further recommend that all states party to the process look at addressing gaps in their companies law that enable illicit arms brokers to register companies in their jurisdiction.

## Closing the gaps in the Pacific

With no regional arms trade agreement applying to international business with shell companies and nominee directorships, the Pacific region is open to exploitation by illicit arms dealers. Even though the arms being sold may not have originated in or be destined for the Pacific, the region can still play an important role in transactions by providing shell companies for illicit brokers to hide behind. An ATT could provide the Pacific with the binding agreement that is needed to close the gaps that currently exist and deter the region's use as a base for shell companies run by illicit arms brokers.

Prosecution of illicit arms brokers utilising the tax havens and lax company registration systems in the region would also help change the perception of the Pacific as a relatively easy place to base shell companies. These efforts could be further bolstered by donors in the region, particularly Australia and New Zealand, providing financial and other support to address legislative and practical gaps in the regulation of arms brokering.

As such, Oxfam recommends that Pacific governments:

- Raise this issue in regional fora including the Pacific Islands Forum Leaders meetings and Regional Security meetings to develop and agree on regional approaches for responding to the risks of illicit brokering
- Address legislative gaps in the regulation of arms brokering and implement stronger controls on company registration and nominee directorships
- Commit to actively prosecute illicit arms brokers and dealers where possible
- Increase the regularity and quality of reporting to the UNPoA as part of a deeper commitment to transparency around the arms trade

Further to this, Oxfam recommends that donors including New Zealand and Australia provide greater financial and practical support to Pacific neighbours in these endeavours.

## Closing the gaps in New Zealand

Controls around company registration in New Zealand need to be tightened to prevent New Zealand businesses from unwittingly or deliberately facilitating illicit arms transfers. A higher level of cross-checked documentation should be required for company registration in New Zealand. Additionally, increasing the legal obligations of the true beneficial owner will contribute to New Zealand's ability to identify and prosecute arms dealers operating behind shell companies. The proposed changes to New Zealand's company registration laws, while going some way towards tightening the legal framework, do not go far enough to achieve the desired outcome of increasing beneficial owner accountability.

In addition to strengthening company registration controls, the investigation and prosecution of the arms broker responsible for this North Korean shipment, for violations of New Zealand Sanctions Regulations, would serve as a strong deterrent to illicit arms brokers considering using New Zealand shell companies for their activities in the future.

Oxfam recommends the New Zealand Government:

- Implement the recommendations of the recent inquiry into New Zealand's company registration requirements and introduce appropriate legislation to enhance transparency and accountability.<sup>111</sup>
- Tighten company registration requirements to ensure that detailed information on the beneficial ownership and control of legal persons is readily available to the competent authorities in a timely manner.
- Amend regulations that implement UN Security Council Sanctions to extend their application to companies registered in New Zealand and the off-shore activities of such companies.
- Develop and implement stand-alone export controls legislation, including express controls on arms brokering activities, including third-country brokering
- Launch a full investigation into the alleged violation of UN Sanctions Regulation 2006/382, especially in relation to the role of SP Trading as charterer of the aircraft. Full investigation in this case will provide a strong deterrent to possible future misuse of New Zealand companies by unscrupulous arms brokers.

## 6 Conclusion

This case demonstrates that there remain dangerous gaps in the New Zealand, Pacific and international arms control systems that can and are being exploited by irresponsible arms brokers, and that no state or region is immune from the risk of fuelling the deadly arms trade.

States have clearly improved their capacity to detect and stop the illicit transfer of weapons, particularly where there are United Nations arms embargoes in place. Indeed, since the 1990s the supply of illicit arms in violation of United Nations Sanctions has seen a decrease, partly as a result of prosecutions of the arms brokers involved.

However, arms brokers continue to avoid detection and prosecution by exploiting lax business regulatory environments and using geographically dispersed shell companies to conduct transactions and transfers. This highlights that gaps still exist in and between the various domestic, regional and international legal frameworks regulating arms brokering activities. An Arms Trade Treaty that explicitly acknowledges and works to address the challenges arising from these enabling factors and loopholes could help bridge these gaps. An ATT therefore must be comprehensive in scope and include effective controls on brokers and brokering transactions. It must also address not only the behaviour and accountability of states, but also reinforce states' responsibilities to hold companies in their jurisdictions to account, and include provisions covering the multi-jurisdictional nature of arms brokering.

With work towards an ATT already begun, there is a great opportunity for change at the international level, but that change also needs to occur at the domestic and regional levels. Countries with weaker legislation need the support of neighbouring countries and regional initiatives to band together and ultimately eradicate the illicit and irresponsible arms trade.

# Notes

- <sup>1</sup> Geneva Declaration Secretariat, *Global Burden of Armed Violence*, September 2008, <<http://www.unhcr.org/refworld/docid/494a455d2.html>>.
- <sup>2</sup> SIPRI, 2009, *Yearbook 2009: Armaments, Disarmament and International Security*, Stockholm International Peace Research Institute, Oxford University Press.
- <sup>3</sup> Trans Arms Center for the Logistics of Arms Transfers incorporated in Colorado and Illinois, US. It has a sister organization incorporated in Milan, Italy: TransArmsEurope (TAE)
- <sup>4</sup> International Peace Information Service and Transarms (2009) From Deceit to Discovery: The strange flight of 4L-AWA, 21 December 2009, <<http://www.ipisresearch.be/arms-trade.php>>; International Peace Information Service and Transarms (2010); From Deceit to Discovery: The strange flight of 4L-AWA – An update, 8 February 2010, <<http://www.ipisresearch.be/arms-trade.php>>, accessed on 6 July 2010.
- <sup>5</sup> Information was not met under the Official Information Act because it was considered advice to the Minister not Policy. Email correspondence with Michael Field 13 June 2010, used with permission.
- <sup>6</sup> Above n 2, *ibid*.
- <sup>7</sup> Manani, C 2006, 'Ambush in Burundi', in 'Survivors: Women Affected by Gun Violence Speak Out', London: IANSA Women's Network, p.1.
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- <sup>56</sup> 11. Procurement of specified goods from DPRK prohibited
- (1) This regulation applies to specified goods that are—
- (a) arms; or
- (b) WMD and ballistic missile-related goods.
- (2) No person in New Zealand, and no New Zealand citizen in any place outside New Zealand, may enter into, or be concerned in, any sale, transfer, carriage, or delivery of, or other dealing with, any goods to which this regulation applies, knowing that they (whether or not they originated in DPRK) are to be supplied or delivered from DPRK.
- New Zealand Government 2009, United Nations Sanctions (Democratic People's Republic of Korea) Regulations 2006 (SR 2006/382), reprint 10 December 2009, Wellington, New Zealand
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- arms includes—
- (a) related materiel of all types (for example, weapons and ammunition); and
- (b) spare parts for any arms, or for any goods specified in paragraph (a); and
- (c) military equipment, as defined in these regulations
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- (1) No ship or aircraft to which subclause (3) applies may be used for—
- (b) the carriage of specified goods that are arms or WMD and ballistic missile-related goods if the carriage is, or forms part of, the carriage of those goods (whether or not they originated in DPRK) to any place from DPRK.
- (3) This subclause applies to the following ships and aircraft:
- (a) any New Zealand ship or New Zealand aircraft (as those terms are defined in regulation 3(1)); and
- (b) any other ship or aircraft that is, for the time being, chartered to—
- (i) any New Zealand citizen; or
- (ii) any body incorporated or constituted under the law of New Zealand.
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- <sup>69</sup> 12 Carriage of nuclear weapon, missile, or enrichment related goods, or arms  
 (1) No ship or aircraft to which subclause (3) applies may be used for—  
 (a) the carriage of any specified nuclear weapon, missile, or enrichment related goods or arms if the carriage is, or forms part of, the carriage of those goods or arms from any place to Iran;  
 (3) This subclause applies to the following ships and aircraft:  
 (b) any other ship or aircraft that is, for the time being, chartered to—  
 (ii) any body incorporated or constituted under the law of New Zealand.
- New Zealand Government (2007) United Nations Sanctions (Iran) Regulations 2007 (SR 2007/74), reprint 18 September 2010, Wellington, New Zealand.
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