

# THE CASE FOR PROSECUTING ARMS TRAFFICKERS IN THE INTERNATIONAL CRIMINAL COURT

*Leigh Rome*<sup>†</sup>

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*Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and not clothed. This world in arms is not*

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<sup>†</sup> Submissions Editor, *Cardozo Law Review*. J.D. Candidate (June 2015), Benjamin N. School of Law; B.A., *magna cum laude*, New York University, Gallatin School of Individualized Study, 2012. I would like to thank my Note advisor, Professor Deborah Pearlstein; Kathi Lynn Austin and Conflict Awareness Project; the Human Rights and Genocide Clinic at the Benjamin N. Cardozo School of Law; the editors of the *Cardozo Law Review*; my family; and Sam. This Note is current as of December 15, 2014.

*spending money alone. It is spending the sweat of its laborers, the genius of its scientists, the hopes of its children. . . . This is not a way of life at all, in any true sense. Under the cloud of threatening war, it is humanity hanging from a cross of iron.*<sup>1</sup>

## INTRODUCTION

Despite an increase in the humanitarian crises directly associated with gun violence,<sup>2</sup> and a corresponding spike in the global arms<sup>3</sup> trade, no comprehensive global set of rules governs arms transfers.<sup>4</sup> Where laws exist, arms brokers<sup>5</sup> exploit loopholes<sup>6</sup> and lax enforcement procedures in order to continue dealing weapons, supplying parties who brazenly violate human rights.<sup>7</sup> Illicit arms brokering, or arms trafficking,<sup>8</sup> takes place when an individual mediates arms transfers that violate the law.<sup>9</sup> Today, violent conflicts are primarily supplied with illegally trafficked weapons.<sup>10</sup> However, despite the pivotal role they play

<sup>1</sup> Dwight D. Eisenhower, President of the United States, The Chance for Peace Address Delivered Before the American Society of Newspaper Editors (Apr. 16, 1953).

<sup>2</sup> See CONTROL ARMS, ARMS WITHOUT BORDERS: WHY A GLOBALISED TRADE NEEDS GLOBAL CONTROLS 2, 4 (2006) [hereinafter ARMS WITHOUT BORDERS] (“On average, up to one thousand people die every day as a direct result of armed violence. Countless more are injured, bereaved, abused and displaced . . .”).

<sup>3</sup> The terms “arms” and “weapons” are used interchangeably in this Note.

<sup>4</sup> UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, OCCASIONAL PAPERS NO. 23, THE IMPACT OF POORLY REGULATED ARMS TRANSFERS ON THE WORK OF THE UNITED NATIONS 2, 31 (2013) [hereinafter UNODA OCCASIONAL PAPERS NO. 23]; *Why We Need a Global Arms Trade Treaty*, OXFAM INT’L, <http://www.oxfam.org/en/campaigns/conflict/controlarms/why-we-need-global-arms-trade-treaty> (last visited Jan 13, 2014). As will be discussed *infra* Part I.B.4, a global Arms Trade Treaty was passed in 2013. Nation states may opt in to the treaty, but are not required to. Furthermore, the treaty has only just entered into force, so no one knows yet what the impact will be. Arms Trade Treaty art. 22, Sept. 25, 2014, 52 I.L.M. 988 [hereinafter Arms Trade Treaty] (entering into force on December 24, 2014). See discussion *infra* note 173.

<sup>5</sup> Arms brokers are intermediaries who create the commercial and logistical arrangements necessary to transfer weapons and munitions. Brian Wood, *The Prevention of Illicit Brokering of Small Arms and Light Weapons: Framing the Issue*, in DEVELOPING A MECHANISM TO PREVENT ILLICIT BROKERING IN SMALL ARMS AND LIGHT WEAPONS: SCOPE AND IMPLICATIONS 1 (2006). They are a “diverse group,” and “[m]ost are multilingual and hold a number of passports.” UNITED NATIONS OFFICE ON DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT 144 (2010).

<sup>6</sup> SMALL ARMS SURVEY, SMALL ARMS TRANSFER CONTROL MEASURES AND THE ARMS TRADE TREATY: A SMALL ARMS SURVEY REVIEW (2007–10), at 5 (2012) (explaining that illicit arms trading relies on the lack of control of legal transfers); Wood, *supra* note 5, at 8.

<sup>7</sup> ARMS WITHOUT BORDERS, *supra* note 2, at 2.

<sup>8</sup> For the purposes of this Note, the terms “arms brokering” and “arms trafficking” are used interchangeably.

<sup>9</sup> Wood, *supra* note 5.

<sup>10</sup> See, e.g., SMALL ARMS SURVEY, SMALL ARMS SURVEY 2013: EVERYDAY DANGERS 93–94 (2013) (linking illegal gun trafficking to mafia violence). Rebel groups in particular receive illegally trafficked weapons. *Id.* at 117–18; PIETER D. WEZEMAN, CONFLICTS AND TRANSFERS OF SMALL ARMS 23–24 (Stockholm Int’l Peace Research Inst. 2003); Claudette Torbey, Note, *The*

in fueling global conflicts,<sup>11</sup> most arms brokers transferring weapons illegally do so with impunity.<sup>12</sup>

Brokers working in conflict zones<sup>13</sup> generally supply small arms and light weapons (SALW).<sup>14</sup> These weapons have played a critical role in escalating old conflicts, and initiating new ones worldwide.<sup>15</sup> While

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*Most Egregious Arms Broker: Prosecuting Arms Embargo Violators in the International Criminal Court*, 25 WIS. INT'L L.J. 335 (2007).

<sup>11</sup> See, e.g., DOUGLAS FARAH & STEPHEN BRAUN, *MERCHANT OF DEATH* 3–4 (2007).

<sup>12</sup> Oxfam, *People in the Crossfire: Arms Traffickers Enjoy Impunity as All UN Arms Embargoes in Last Decade Systematically Violated*, OXFAM AM. (Mar. 16, 2006), <http://www.oxfamamerica.org/press/people-in-the-crossfire-arms-traffickers-enjoy-impunity-as-all-un-arms-embargoes-in-last-decade-systematically-violated>.

<sup>13</sup> Conflict zones, or “complex emergencies,” are defined by the United Nations and Inter-Agency Standing Committee as “humanitarian cris[es] in a country, region, or society where there is a total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing UN country programme.” UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS & INTER-AGENCY STANDING COMM., *CIVIL-MILITARY GUIDELINES & REFERENCE FOR COMPLEX EMERGENCIES* 8 (2008) (internal quotation marks omitted).

<sup>14</sup> Elise Keppler, Comment, *Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act*, 19 BERKELEY J. INT'L L. 381, 383 (2001); see also Boris O. Saavedra, *Transnational Crime and Small Arms Trafficking and Proliferation*, in *TRANSNATIONAL THREATS: SMUGGLING AND TRAFFICKING IN ARMS, DRUGS, AND HUMAN LIFE* 64, 66 (Kimberley L. Thachuk ed., 2007) (“Light weapons have been the only weapon used in approximately 95 percent of the 49 regional conflicts started since 1990.” (footnote omitted)). While there is no universally accepted definition of a “small arm” or a “light weapon,” the United Nations defines these weapons based on portability. See Panel of Governmental Experts on Small Arms, *General and Complete Disarmament: Small Arms*, ¶¶ 23–28, U.N. Doc. A/52/298 (Aug. 27, 1997); WEZEMAN, *supra* note 10, at 8 (“Currently, the most commonly used definition of small arms and light weapons is that first introduced in a 1997 document prepared for the UN by a group of experts.”); see also EDWARD J. LAURANCE, *LIGHT WEAPONS AND INTRASTATE CONFLICT: EARLY WARNING FACTORS AND PREVENTIVE ACTION* 16 (Carnegie Comm’n on Preventing Deadly Conflict 1998) (“Weapons in this class are typically smaller, weigh less, cost less, and are more portable and less visible than major conventional weapons. This enhances the capability of nonstate groups and criminals to acquire and transfer them.”).

<sup>15</sup> As former United Nations Secretary General Kofi Annan notes, “[t]he death toll from small arms dwarfs that of all other weapons systems . . . . In terms of the carnage they cause, small arms, indeed, could well be described as ‘weapons of mass destruction.’” UNITED NATIONS DEPT OF PUB. INFO., DPI/2428G, *SMALL ARMS REVIEW CONFERENCE 2006: BACKGROUNDER 1* (2006), available at <http://www.un.org/events/smallarms2006/pdf/backgroundunder.pdf>; see also DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS 10 (Peter Harris & Ben Reilly eds., 1998) (“Since World War Two, cheap, mass-produced, small-calibre weapons have killed far more people than the heavier, more traditional battlefield weaponry.”). SALW have proliferated in part because of their availability, low price point, and the ease with which they may be operated. RELIGIONS FOR PEACE, *SMALL ARMS AND LIGHT WEAPONS: AFRICA* 6, available at [http://www.un.org/disarmament/education/docs/SALW\\_Africa.pdf](http://www.un.org/disarmament/education/docs/SALW_Africa.pdf). While arms brokers can easily move SALW across the globe without being detected, these weapons have deadly long-term effects. *Id.* at 4. In conflict-prone regions:

Small arms and light weapons can potentiate a spiral of lawlessness. Weak states allow their proliferation, and acquisition of arms allows formerly powerless groups to challenge authority, further weakening it. The abundance of arms in the hands of nonstate actors means that new wars can readily be started. In the case of pre-existing

the devastating effects of the illicit arms trade are well documented,<sup>16</sup> holding arms brokers accountable has proven challenging. The case of Viktor Bout is illustrative.<sup>17</sup> Bout has been referred to as “the McDonald’s of arms,”<sup>18</sup> the “merchant of death,”<sup>19</sup> and the “Lord of War.”<sup>20</sup> Once considered the world’s preeminent arms trafficker,<sup>21</sup> Bout supplied weapons to any buyer who could pay, often arming both sides of the world’s bloodiest conflicts.<sup>22</sup>

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conflicts, the influx of weapons exacerbates the violence, as firearms are intrinsically more deadly than other small weapons.

Joel Wallman, *Weapons of Mass Destruction*, HFG REV., Spring 2005, at 1. This destabilization detrimentally affects regional and international security. *Small Arms and Light Weapons (SALW) and Mine Action (MA)*, N. ATLANTIC TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_52142.htm](http://www.nato.int/cps/en/natolive/topics_52142.htm) (last updated Nov. 11, 2014, 4:07 PM); see also DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS, *supra*. (“[P]roliferation of small arms has exponentially increased the intensity of identity-related conflicts.”).

<sup>16</sup> See *infra* Part I.A.

<sup>17</sup> Viktor Bout is a former Soviet military intelligence operative and interpreter. FARAH & BRAUN, *supra* note 11, at 4. He is known by multiple aliases, fluent in six languages, and capable of flying a variety of airplanes. ANDREW FEINSTEIN, *THE SHADOW WORLD: INSIDE THE GLOBAL ARMS TRADE* 115 (2012). He acquired cargo planes when the Soviet Union dissolved, creating an air transport monopoly over arms shipments. George Packer, *Caught!*, *NEW YORKER* (Aug. 12, 2008), <http://www.newyorker.com/news/george-packer/caught>. Mystery still surrounds the whereabouts of Russian cargo planes. See, e.g., John Dennehy, *Shrouded in Mystery: The Russian Cargo Plane Abandoned in Umm Al Quwain*, *NATIONAL* (Sept. 5, 2014, 11:19 AM), <http://www.thenational.ae/arts-lifestyle/the-review/shrouded-in-mystery-the-russian-cargo-plane-abandoned-in-umm-al-quwain>.

<sup>18</sup> Lisa Misol, *Weapons and War Crimes: The Complicity of Arms Suppliers*, in *HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT* 279, 295 (2004) (internal quotation marks omitted), available at <http://www.hrw.org/legacy/wr2k4/download/wr2k4.pdf>.

<sup>19</sup> FARAH & BRAUN, *supra* note 11, at 177 (quoting Peter Hain, ex-Minister of State for Africa, Foreign and Commonwealth Office, U.K. Parliament) (internal quotation marks omitted).

<sup>20</sup> Kathi Austin, *Finally, Face to Face with Alleged Arms Trafficker Viktor Bout*, *FAREED ZAKARIA GPS* (Oct. 11, 2011, 12:00 PM), <http://globalpublicsquare.blogs.cnn.com/2011/10/11/kathi-austin-viktor-bout-trial-begins>. Viktor Bout was the main inspiration for Nicolas Cage’s character in the 2005 Hollywood film *Lord of War*, which chronicles an arms trafficker. *LORD OF WAR* (Lionsgate 2005); see also *Lord of War*, IFC, <http://www.ifc.com/movies/lord-of-war> (last visited Jan. 2, 2015).

<sup>21</sup> FEINSTEIN, *supra* note 17, at 115; Nicholas Schmidle, *Disarming Viktor Bout: The Rise and Fall of the World’s Most Notorious Weapons Trafficker*, *NEW YORKER*, Mar. 5, 2012, at 54.

<sup>22</sup> Douglas Farah & Stephen Braun, *The Merchant of Death*, *FOREIGN POLICY* (Nov. 1, 2006), [http://www.foreignpolicy.com/articles/2006/10/10/the\\_merchant\\_of\\_death](http://www.foreignpolicy.com/articles/2006/10/10/the_merchant_of_death). Some of Bout’s former clients include the Taliban, the Northern Alliance, Charles Taylor, Muammar Gaddafi, the Revolutionary Armed Forces of Colombia (FARC), Congolese warlords, and the U.S. Army. *Id.* Bout began selling to the U.S. Army after he had already been sanctioned, and was a Pentagon-approved contractor delivering supplies to U.S. troops in Iraq. Schmidle, *supra* note 21, at 57–58. Bout was also a “third-tier contractor for the U.S. Air Mobility Command, flying deliveries for Federal Express under an arrangement with . . . a Dubai-based freight forwarder.” FARAH & BRAUN, *supra* note 11, at 221. One of Bout’s companies was also flying “under reconstruction contracts with the petrochemical giant Fluor, and with Kellogg, Brown, and Root (KBR), the engineering and construction subsidiary of Halliburton . . .” *Id.*; see also Laura Rozen, *Meet Viktor Bout, the Real-Life ‘Lord of War’*, *MOTHER JONES* (Sept. 13, 2007, 2:00 AM), <http://www.motherjones.com/politics/2007/09/meet-viktor-bout-real-life-lord-war>.

In the 1990s, a variety of strategies were adopted to try and dismantle Bout's arms dealing operation,<sup>23</sup> including a U.N. Security Council travel ban,<sup>24</sup> a U.N. arms embargo on the countries where Bout and other brokers worked,<sup>25</sup> U.S. Office of Foreign Assets Control (OFAC) sanctions,<sup>26</sup> and an Interpol red notice issued by Belgium.<sup>27</sup> After two fruitless decades, the United States apprehended Bout in 2008, by facilitating a Drug Enforcement Administration (DEA)<sup>28</sup> sting operation that lured him to Thailand.<sup>29</sup> Even then, it took two years for Bout to be extradited from Thailand to the United States to face pending charges in the Southern District of New York.<sup>30</sup> Bout was ultimately tried on restrictive terrorism charges that were closely tied to the sting operation.<sup>31</sup> As a result, his trial failed to address the vast majority of his illicit arms dealings, and thus failed to hold him accountable for the vast majority of his crimes.<sup>32</sup> Bout was convicted in 2011,<sup>33</sup> but he received

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<sup>23</sup> U.S. Department of State's Intelligence and Research Bureau and the C.I.A. began to reference "Viktor B." FARAH & BRAUN, *supra* note 11. U.S. and British intelligence each separately started investigating Bout as early as 1995. *Id.* at 95.

<sup>24</sup> Press Release, Security Council, Security Council Committee on Liberia Updates Travel Ban List, U.N. Press Release SC/8569 (Jan. 12, 2005).

<sup>25</sup> See *infra* note 85.

<sup>26</sup> OFAC sanctions are issued by the U.S. Treasury Department to enforce trade sanctions and target foreign countries, regimes, terrorists, traffickers, and other individuals who threaten U.S. national security, foreign policy, or the economy. *Office of Foreign Assets Control—Sanctions Programs and Information*, U.S. DEP'T TREASURY, <http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx> (last updated Nov. 12, 2014, 5:46 PM). Bout, associated companies, and associates were added to a Specially Designated Nationals list, which prohibited transactions between Bout and U.S. nationals or U.S. banks and froze Bout's U.S. assets. *Indictment, United States v. Bout*, 860 F. Supp. 2d 303 (S.D.N.Y. 2012) (No. 08 CR 365 (SAS)), 2008 WL 8141434, ¶ 1 [hereinafter *Bout Indictment*].

<sup>27</sup> This required Interpol members to apprehend Bout and turn him over to Belgian authorities. FEINSTEIN, *supra* note 17, at 155; see also Donald G. McNeil Jr., *A Nation Challenged: The Money; Belgium Seeks Arms Dealer with Suspected Qaeda Ties*, N.Y. TIMES, Feb. 27, 2002, at A5.

<sup>28</sup> The DEA works to enforce U.S. controlled substances laws. *DEA Mission Statement*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/about/mission.shtml> (last visited Jan. 2, 2015).

<sup>29</sup> *Bout*, 860 F. Supp. 2d at 305.

<sup>30</sup> Bout was first indicted in 2008 and later indicted under seal in 2009. See *Bout Indictment*, *supra* note 26; *Sealed Indictment, United States v. Bout*, No. 1:09CR01002, 2009 WL 7114037 (S.D.N.Y. Nov. 3, 2009); see also Seth Mydans, *Russian Arrives in U.S. to Face Arms Charges*, N.Y. TIMES, Nov. 17, 2010, at A6. For more about the complexities of Bout's extradition process, which was fraught with allegations of political pressure, corruption, and undue influence, see FEINSTEIN, *supra* note 17, at 157–65; John R. Crook, *Alleged Major Arms Dealer Extradited to United States by Thailand*, 105 AM. J. INT'L L. 149 (2011); Bruce Zagaris, *Thai Criminal Court Ruling Prepares Bout Extradition*, 26 INT'L ENFORCEMENT L. REP. 483 (2010).

<sup>31</sup> Bout was charged with four counts of terrorism offenses: (1) conspiracy to kill U.S. nationals; (2) conspiracy to kill U.S. officers or employees; (3) conspiracy to acquire and use an anti-aircraft missile; and (4) conspiracy to provide material support or resources to a designated foreign terrorist organization. *Bout Indictment*, *supra* note 26. Bout was prosecuted under 18 U.S.C. § 1114 (2012). *Id.*

<sup>32</sup> See *infra* note 186.

the minimum sentence.<sup>34</sup> Bout's prosecution has thus far failed to deter fellow arms traffickers—his competitors and former associates have seamlessly closed the void left in the weapons market.<sup>35</sup>

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<sup>33</sup> Press Release, DOJ, International Arms Dealer Viktor Bout Convicted in New York of Terrorism Crimes (Nov. 2, 2011), available at <http://www.justice.gov/opa/pr/international-arms-dealer-viktor-bout-convicted-new-york-terrorism-crimes>.

<sup>34</sup> Nicholas Schmidle, *Sentencing Viktor Bout*, NEW YORKER (Apr. 6, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/04/sentencin-viktor-bout.html>. In February 2012, Judge Scheindlin held that Bout could no longer be held in solitary confinement, as it violated his Eighth Amendment rights. *United States v. Bout*, 860 F. Supp. 2d 303 (S.D.N.Y. 2012). Bout appealed his November 2011 conviction, but the Second Circuit affirmed. *United States v. Bout*, 731 F.3d 233 (2d Cir. 2013); see also Jonathan Stempel, *Russian Arms Dealer Viktor Bout's U.S. Conviction Upheld*, REUTERS, Sept. 27, 2013, available at <http://www.reuters.com/article/2013/09/27/us-usa-crime-bout-idUSBRE98Q0PG20130927>. On January 17, 2014, Bout abandoned his plan to appeal his conviction to the U.S. Supreme Court. *Viktor Bout Abandons Plan to Appeal to US Supreme Court-Lawyer*, SPUTNIK (Jan. 17, 2014, 6:32 PM), <http://en.ria.ru/world/20140117/186627350/Viktor-Bout-Abandons-Plan-to-Appeal-to-US-Supreme-Court-Lawyer.html>. In a strategic change, on November 5, 2014, Bout's legal defense team filed an application in Thailand challenging the legality of Bout's 2010 extradition to the U.S. *Viktor Bout's Attorneys Debate Legality of His Extradition to the US*, RAPS (Nov. 5, 2014, 11:33 AM), [http://rapsinews.com/judicial\\_news/20141105/272515474.html](http://rapsinews.com/judicial_news/20141105/272515474.html). Bout also sought a new trial in the United States. Jonathan Stempel, *REFILE-Arms Dealer Bout Seeks New Trial, Hires Ashcroft Law Firm*, REUTERS, Dec. 5, 2014, available at <http://www.reuters.com/article/2014/12/05/usa-crime-bout-idUSL1N0ST1I020141205>.

<sup>35</sup> KATHI LYNN AUSTIN, VIKTOR BOUT'S GUNRUNNING SUCCESSORS: A LETHAL GAME OF CATCH ME IF YOU CAN (2012) [hereinafter GUNRUNNING SUCCESSORS]; see also FEINSTEIN, *supra* note 17, at 505–06 (listing known arms traffickers who remain at large). One known Bout associate, Richard Chichakli, has faced repercussions. Chichakli was arrested on money laundering, wire fraud, and conspiracy charges in January 2013, three years after he was indicted in the same indictment as Bout. See Press Release, DOJ, Manhattan U.S. Attorney Announces Arrest Of Richard Ammar Chichakli on Money Laundering, Wire Fraud, and Conspiracy Charges (Jan. 10, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/January13/ChichakliArrestPR.php>; Press Release, DOJ, U.S. Announces New Indictment Against International Arms Dealer Viktor Bout and American Co-Conspirator for Money Laundering, Wire Fraud, and Conspiracy (Feb. 17, 2010), available at <http://www.justice.gov/dea/divisions/nyc/2010/nyc021710p.html>. Chichakli had also been sanctioned by OFAC, see *supra* note 26, but asserted that “going around OFAC . . . is easier than buying a hamburger at McDonalds,” that “one can teach a Monkey to overcome OFAC . . . in about five minutes,” and that he could “testify . . . firsthand” that one can make a “living solely because your name appears on OFAC list.” Nicholas Schmidle, *Catching Richard Chichakli*, NEW YORKER (Jan. 15, 2013), <http://www.newyorker.com/news/news-desk/catching-richard-chichakli> (internal quotation marks omitted). A federal jury in the Southern District of New York convicted Chichakli of “conspiring with Bout and others to violate the International Emergency Economic Powers Act (‘IEEPA’) by attempting to purchase commercial airplanes from American companies, in violation of U.S. sanctions. Chichakli . . . was also found guilty of money laundering conspiracy, wire fraud conspiracy, and six counts of wire fraud, in connection with the attempted aircraft purchases.” U.S. DEP’T OF JUSTICE, SUMMARY OF MAJOR U.S. EXPORT ENFORCEMENT, ECONOMIC ESPIONAGE, TRADE SECRET AND EMBARGO-RELATED CRIMINAL CASES 5–6 (2014); see also Press Release, DOJ, Manhattan U.S. Attorney Announces Conviction of Richard Chichakli, Co-Conspirator of International Arms Dealer Viktor Bout, on Money Laundering, Wire Fraud, and Conspiracy Charges (Dec. 13, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/December13/RichardChichakliVerdictPR.php?print=1.sanction>. Chichakli was sentenced to five years in prison on December 4, 2014. Press Release, DOJ, Richard Ammar Chichakli, Co-Conspirator Of International Arms Dealer Viktor Bout, Sentenced In Manhattan Federal Court To Five Years In Prison On Money Laundering, Wire Fraud, And Conspiracy Charges (Dec. 4,

Thus, while Bout's prosecution and subsequent incarceration have succeeded in preventing him from personally dealing arms, they have failed to achieve the broader goals of eviscerating illicit arms trafficking and holding arms brokers accountable. This demonstrates that the tactics used to fight illegal arms traffickers are flawed. To truly end arms broker impunity, the "toolkit" must be updated and supplemented.<sup>36</sup> Untapped mechanisms—including the International Criminal Court (ICC)—should be added to the arsenal.

The ICC is a permanent international criminal court established by multilateral treaty.<sup>37</sup> The governing treaty, the Rome Statute,<sup>38</sup> sets forth the crimes and persons within the Court's jurisdiction.<sup>39</sup> An ICC matter begins when a state party or the U.N. Security Council refers a "situation" to the court,<sup>40</sup> or when the prosecutor opens an investigation.<sup>41</sup> The ICC has limited jurisdiction, and the Rome Statute

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2014), available at <http://www.justice.gov/usao/nys/pressreleases/December14/ChichakliRichardAmmarSentencingPR.php>. The fascination with Bout's trafficking career continues. In addition to *Lord of War*, *supra* note 20, a documentary about Bout entitled *The Notorious Mr. Bout*, premiered at Sundance Film Festival in 2014. *The Notorious Mr. Bout*, SUNDANCE INST., [http://filmguide.sundance.org/film/13904/the\\_notorious\\_mr\\_bout](http://filmguide.sundance.org/film/13904/the_notorious_mr_bout) (last visited Jan. 2, 2015); see also Colin Freeman, *Viktor Bout: Husband, Father, Arms Dealer*, SUNDAY TELEGRAPH (London), July 27, 2014, at 8.

<sup>36</sup> See *infra* Parts I.B–C.

<sup>37</sup> Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 383–95 (2000). The ICC became operational on July 1, 2002, after sixty countries ratified the Rome Statute. Press Release, Amnesty Int'l, The International Criminal Court—A Historic Development in the Fight for Justice (Apr. 10, 2002), available at <http://www.amnesty.org/en/library/info/IOR40/008/2002>. Today, the Court has 122 state parties. *The States Parties to the Rome Statute*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Jan. 4, 2015). A state becomes party to the ICC by ratifying, accepting, approving, or acceding to the Rome Statute. Rome Statute of the International Criminal Court art. 126, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>38</sup> Rome Statute, *supra* note 37.

<sup>39</sup> *What Is the Rome Statute?*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx) (last visited Jan. 4, 2015). The Rome Statute also sets forth the principles governing investigation, prosecution, trial, international cooperation and judicial assistance, general principles of criminal law, enforcement, and other administrative aspects. Rome Statute, *supra* note 37, pt. VI. The Court contains four organs: the Presidency, the three divisions (Pre-Trial, Trial, and Appeals), the Office of the Prosecutor, and the Registry. *Id.* art. 34. The Court is served by eighteen judges that are nominated and elected by state parties. *Id.* art. 36. The Rome Statute reflects principles of customary international law. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 25 (1999).

<sup>40</sup> Rome Statute, *supra* note 37, arts. 13–14.

<sup>41</sup> The prosecutor may open an investigation subject to authorization by the ICC's pretrial chamber. Rome Statute, *supra* note 37, art. 15. As of January 2015, there are twenty-one cases in nine situations before the ICC. Four were referred by state parties, two were referred by the U.N. Security Council, and two were opened by the prosecutor. *Situations and Cases*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Jan. 4, 2015).

includes strict admissibility and complementarity rules.<sup>42</sup> To prosecute an arms trafficker in the ICC, the trafficker must be complicit to one of the ICC's "core crimes,"<sup>43</sup> which are limited to genocide,<sup>44</sup> crimes against humanity,<sup>45</sup> war crimes,<sup>46</sup> and the crime of aggression.<sup>47</sup> Given the nature of illicit arms brokering, arms brokers are likely instrumental to these core crimes.<sup>48</sup> While arms brokers are typically intermediaries with indirect responsibility—they supply the weapons used to commit crimes, but do not typically commit the crimes themselves<sup>49</sup>—they can incur the same liability as principle perpetrators under the Rome Statute,<sup>50</sup> provided that a theory of liability links them to a "core crime."<sup>51</sup>

Invoking an international venue such as the ICC as a tool against arms traffickers would complement the current mechanisms used to promote trafficker accountability, and provide additional advantages.<sup>52</sup> First, an ICC indictment could reach traffickers residing in nations without domestic laws regulating arms trafficking.<sup>53</sup> Second, as an international venue with members acting collectively, it is more difficult to corrupt the ICC than it is to corrupt a domestic court,<sup>54</sup> and the ICC is less susceptible to individual state concerns about taking on a powerful arms trafficking organization.<sup>55</sup> Third, as one indicted by the

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<sup>42</sup> See *infra* Part I.D.

<sup>43</sup> Rome Statute, *supra* note 37, art. 5.

<sup>44</sup> Genocide is defined as killing or other acts with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. *Id.* art. 6.

<sup>45</sup> Crimes against humanity are defined as killing or other acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. *Id.* art. 7.

<sup>46</sup> War crimes are defined as grave breaches of the Geneva Conventions, or other serious violations of international armed conflict law and customs. *Id.* art. 8.

<sup>47</sup> The crime of aggression has not yet been defined. *Id.* art. 5(2).

<sup>48</sup> Katharine Orlovsky, Note, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT'L & COMP. L. REV. 343, 357 (2006).

<sup>49</sup> *Id.* at 358.

<sup>50</sup> Rome Statute, *supra* note 37, art. 25 (governing individual criminal responsibility); see also Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 954 (2007) ("[T]he degree of criminal responsibility does not diminish as distance from the actual act increases; in fact it often grows.").

<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> See *infra* Part II.A.

<sup>53</sup> Provided, however, those nations are parties to the ICC. See *infra* Part II.A. Currently, few states can exercise prescriptive jurisdiction over arms traffickers—either no laws authorize them to do so, or persons and property must be within the state. *Id.*; see also Annyssa Bellal, *Arms Transfers and International Human Rights Law*, in WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW 448, 463 (Stuart Casey-Maslen ed., 2014). However, for the few states that do have such laws, the ICC's complementarity provisions would apply. See *infra* Part I.D.

<sup>54</sup> Jennifer M. Smith, Note, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111, 1121 (2009).

<sup>55</sup> Kathi Austin, *Illicit Arms Brokers: Aiding and Abetting Atrocities*, 9 BROWN J. WORLD AFF. 203, 213 (2002).

ICC is vulnerable to arrest in any ICC party state,<sup>56</sup> the ICC can deter arms traffickers in a tangible way that domestic prosecutions cannot.<sup>57</sup> Finally, the ICC could set an important symbolic precedent that the global community will no longer tolerate illicit arms trafficking.

While Bout's conviction is a significant achievement, there are important lessons to be gleaned from the two decades of failed efforts to stop Bout, and from the weaknesses of his prosecution.<sup>58</sup> The existing mechanisms used against illicit arms brokers have flaws, and do not sufficiently hold individual brokers accountable or deter their peers from completing illicit arms deals.<sup>59</sup> Despite Bout's incarceration and financial penalties, his close associates and former competitors continue to deal weapons.<sup>60</sup> The current injustice of arms broker impunity needs to be resolved, in order to stem the flow of arms accessible to those who perpetrate human rights violations, and fuel conflicts worldwide.

This Note proposes that the ICC should be added to the arsenal of tools used against arms traffickers and argues that ICC willingness to indict and prosecute arms traffickers would advance current attempts to hold traffickers accountable and contribute to ending the deadly violence fueled by illegal arms. Part I of this Note addresses illicit arms brokering, discusses current attempts to hold arms brokers accountable, explains why these attempts have not succeeded, and introduces the ICC. Part II proposes the ICC as a forum to address arms trafficking and explores prosecuting arms traffickers in the ICC, advancing two theories of international criminal liability that could be used against arms brokers: aiding and abetting and co-perpetration. Finally, this Note concludes that given the gaps present in existing tools used against arms traffickers, ICC involvement could add to the scope of accountability.

#### I. ILLICIT ARMS BROKERING AND ATTEMPTS TO HOLD ARMS BROKERS ACCOUNTABLE

This Part provides background on the current state of illicit arms trafficking. Section A briefly introduces arms transfers and notes the devastating effects of illicit arms trafficking. Section B analyzes current attempts to hold arms brokers accountable, including arms embargoes, domestic laws, international agreements, and the Arms Trade Treaty,

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<sup>56</sup> The Rome Statute, *supra* note 37, art. 89, requires state parties to the Rome Statute to comply with court requests for the "arrest and surrender" of indictees. *See also id.* arts. 86–87 (requiring state cooperation with the ICC).

<sup>57</sup> Critically, many arms brokers reside in European nations that are parties to the ICC. *See infra* Part II.A.

<sup>58</sup> *See infra* Part I.C.

<sup>59</sup> *See infra* Part II.A.

<sup>60</sup> GUNRUNNING SUCCESSORS, *supra* note 35.

and assesses their effectiveness. Section C further investigates why current attempts made against arms brokers have not been successful. Section D provides additional background about the International Criminal Court in order to set the foundation for this Note's proposal that ICC involvement could supplement other attempts to hold arms traffickers accountable.

### A. *Arms Transfer Markets and Illicit Arms Brokering*

Arms brokers mediate transfers in three arms "markets": legal, black, and gray.<sup>61</sup> In the legal market, parties comply with relevant laws and arms embargoes.<sup>62</sup> One way to determine whether an arms transaction is legal is by looking to see whether the end-user certificate (EUC) is authentic.<sup>63</sup> Black market transfers are between non-state actors<sup>64</sup> and occur outside of laws, in contravention of arms embargoes<sup>65</sup> and without government authorization.<sup>66</sup> A gray market transfer lies between these extremes: a government may sponsor the transfer and the transfer may technically comply with national laws, but violate a regional regulation or embargo.<sup>67</sup> Gray market transfers typically include illicit components,<sup>68</sup> such as forged EUCs.<sup>69</sup> Gray market transfers may also involve governments supplying arms to non-state groups and engaging with arms providers outside of regular channels.<sup>70</sup>

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<sup>61</sup> Keppler, *supra* note 14, at 386; *see also* Austin, *supra* note 55, at 205. According to some scholars, even determining the distinction between legal and illegal arms brokering is a "major conceptual problem." *See, e.g.,* WEZEMAN, *supra* note 10, at 6–7.

<sup>62</sup> Keppler, *supra* note 14, at 386.

<sup>63</sup> Schmidle, *supra* note 21, at 56. An EUC shows that weapons were purchased legally, to be delivered to a legitimate government and not sold to a third party. FARAH & BRAUN, *supra* note 11, at 78; *see infra* note 127.

<sup>64</sup> Orlovsky, *supra* note 48, at 347.

<sup>65</sup> Keppler, *supra* note 14, at 387.

<sup>66</sup> SMALL ARMS SURVEY, *Fuelling the Flames: Brokers and Transport Agents in the Illicit Arms Trade*, in SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM 95, 101 (2001) [hereinafter *Fuelling the Flames*]; *see also* WEZEMAN, *supra* note 10, at 23 ("These [black market] sources (individuals, organizations or companies) have not been given permission to trade in arms by the government that *de jure* controls the area where they are based and/or by the authorities of the territories to which the weapons are delivered."). Because "[t]his type of arms trade is obviously very secretive," reliable information about the arms black market is "hard to obtain" and "no proper assessment can be made of the total scale . . ." *Id.*

<sup>67</sup> Keppler, *supra* note 14, at 387.

<sup>68</sup> These transfers may deliberately target countries with weak export controls, exploit loopholes in existing laws, or provide arms to an unauthorized third party instead of the contracting party. *Id.* at 386. Weapons may then be transferred again, from a legitimate buyer, to a country or group under sanctions. Schmidle, *supra* note 21, at 56; *see* WEZEMAN, *supra* note 10, at 7 ("[M]ost weapons usually end up in what is commonly considered the illegal circuit after having been distributed and transferred within the legal circuit . . .").

<sup>69</sup> Schmidle, *supra* note 21, at 56.

<sup>70</sup> Orlovsky, *supra* note 48, at 347.

Brokers normally operate in this gray zone, as few countries have a formal system of authorizing arms brokering.<sup>71</sup> When arms brokers make weapons available in the gray and black markets, they provide the tools needed to instigate, escalate, and reignite conflicts.<sup>72</sup> In practice, the demarcation between the legal, black, and gray arms markets is not clear.<sup>73</sup>

Because SALW are easy to transfer and hard to trace, brokers can often profit from fueling conflicts without repercussions.<sup>74</sup> Arms broker impunity cannot be reconciled with the severe effects of illicit arms trafficking; according to the United Nations, trafficked weapons kill at least 3,000 people every day.<sup>75</sup> At least a third of a million people are killed from armed violence each year, and more are injured, abused, and displaced.<sup>76</sup> In addition, the illicit arms trade perpetuates fear and instability in conflict zones and leads to extreme insecurity and economic hardship.<sup>77</sup> The illicit arms trade also adversely impacts human and economic developmental goals.<sup>78</sup> Conflicts fueled by illicit arms discourage investment and reverse developmental progress, as schools are closed, infrastructure is destroyed, the market is disrupted, investors are wary to enter the country, and resources are diverted from public works projects.<sup>79</sup> Given these consequences, some attempts have

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<sup>71</sup> *Fuelling the Flames*, *supra* note 66. Brokers have exploited the “regulatory void” to transfer arms to “illicit or undesirable users.” HOLGER ANDERS & SILVIA CATTANEO, REGULATING ARMS BROKERING: TAKING STOCK AND MOVING FORWARD THE UNITED NATIONS PROCESS 9 (2005).

<sup>72</sup> *Illicit Trafficking*, SMALL ARMS SURVEY, <http://www.smallarmssurvey.org/weapons-and-markets/transfers/illicit-trafficking.html> (last visited Jan. 4, 2015). After all, “arms, by definition, are sought for the purposes of killing, injuring, and constraining.” Bellal, *supra* note 53, at 448; *see also* ARMS WITHOUT BORDERS, *supra* note 2, at 1 (“Globalisation has changed the arms trade. Arms companies, operating from an increasing number of locations, now source components from across the world. Their products are often assembled in countries with lax controls on where they end up. Too easily, weapons get into the wrong hands.”).

<sup>73</sup> FEINSTEIN, *supra* note 17, at xxiii.

<sup>74</sup> Keppler, *supra* note 14, at 382; Rachel Stohl, *Viktor Bout, Small Arms, and “War Redefined,”* STIMSON (Nov. 7, 2011), <http://www.stimson.org/spotlight/viktor-bout-small-arms-and-war-redefined>.

<sup>75</sup> UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 5, at 134.

<sup>76</sup> ARMS WITHOUT BORDERS, *supra* note 2, at 1.

<sup>77</sup> *Id.* at 26. Estimates suggest that 526,000 people are killed each year as a result of lethal violence, including 55,000 direct conflict deaths. GENEVA DECLARATION ON ARMED VIOLENCE & DEV., GLOBAL BURDEN OF ARMED VIOLENCE 2011: LETHAL ENCOUNTERS 4, 43 (2011).

<sup>78</sup> UNODA OCCASIONAL PAPERS NO. 23, *supra* note 4, at 1; *see also* Saavedra, *supra* note 14, at 66–67.

<sup>79</sup> UNODA OCCASIONAL PAPERS NO. 23, *supra* note 4, at 15. As noted by Control Arms,

An average of US\$22bn a year is spent on arms by countries in Africa, Asia, the Middle East, and Latin America—a sum that would otherwise enable those same countries to be on track to meet the Millennium Development Goals of achieving universal primary education (estimated at \$10bn a year) as well as targets for reducing infant and maternal mortality (estimated at \$12bn a year).

CONTROL ARMS, SHATTERED LIVES: THE CASE FOR TOUGH INTERNATIONAL ARMS CONTROL 4 (2003). More recent estimates suggest that the arms trade is worth \$60 billion a year. FEINSTEIN,

been made to take arms suppliers to task for their role in fueling conflicts.<sup>80</sup> However, the effectiveness of current measures is disputed.<sup>81</sup>

### B. *Analysis of Current Attempts to Hold Arms Brokers Accountable*

The path to Viktor Bout's conviction highlights the common tactics currently used against arms brokers to end illicit weapons dealing operations. These methods include arms embargoes, domestic laws, international agreements, and advocating for an international Arms Trade Treaty. While some of these methods have found partial success, significant accountability gaps remain. This Section will provide a brief overview of these mechanisms and examine their effectiveness.

#### 1. Arms Embargoes

Arms embargoes are targeted sanctions<sup>82</sup> issued during conflicts and humanitarian crises.<sup>83</sup> An arms embargo restricts the weapons trade as applied to a particular recipient.<sup>84</sup> Embargoes can be imposed by states and by international entities, such as the United Nations and the European Union.<sup>85</sup> An arms embargo is meant to prevent weapons from reaching known human rights violators.<sup>86</sup> The theory is that arms embargoes can contribute to ending conflicts and human rights violations, quell aggression, and name and shame individuals who

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*supra* note 17, at xxii. The trade in small arms is worth about \$4 billion annually. *Id.* See generally KATHERINE NIGHTINGALE, OXFAM BRIEFING PAPER 120, SHOOTING DOWN THE MDGs: HOW IRRESPONSIBLE ARMS TRANSFERS UNDERMINE DEVELOPMENT GOALS (2008).

<sup>80</sup> See *infra* Part I.B.

<sup>81</sup> See *infra* Part I.B–C.

<sup>82</sup> PUTTING TEETH IN THE TIGER: IMPROVING THE EFFECTIVENESS OF ARMS EMBARGOES, at xiii (Michael Brzoska & George A. Lopez eds., 2009) [hereinafter PUTTING TEETH IN THE TIGER].

<sup>83</sup> Orlovsky, *supra* note 48, at 348 (“A typical embargo calls upon all states to prevent the sale or supply of arms and related [material] by their nationals or from their territories or using their flag vessels or aircraft to that state or group.” (footnote omitted)).

<sup>84</sup> This can be a national government or a non-governmental group. ELIZABETH KIRKHAM & CATHERINE FLEW, BRIEFING 17: BITING THE BULLET, STRENGTHENING EMBARGOES AND ENHANCING HUMAN SECURITY 9 (2003).

<sup>85</sup> *Id.* As late as 2003, “UN embargoes [were] the only measures that prohibit[ed] weapons transfers to certain conflict zones and [were] globally accepted by governments, except for those targeted by the embargoes.” WEZEMAN, *supra* note 10, at 21. U.N. arms embargoes passed at the peak of Bout's operation notably included Liberia, the Democratic Republic of the Congo, and Sierra Leone. See S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003); S.C. Res. 1493, U.N. Doc. S/RES/1493 (July 28, 2003); S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 5, 1998). During this same period, arms embargoes were also issued against the Ivory Coast, Sudan, Al Qaeda, Rwanda, and Somalia. See S.C. Res. 1572, U.N. Doc. S/RES/1572 (Nov. 15, 2004); S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1011, U.N. Doc. S/RES/1011 (Aug. 16, 1995); S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

<sup>86</sup> G.A. Res. 55/255, U.N. Doc. A/RES/55/255, at 2 (June 8, 2001).

threaten international security.<sup>87</sup> At the same time, arms embargoes may cause less collateral damage than other types of economic sanctions.<sup>88</sup> The United Nations has blacklisted arms brokers who routinely trade in conflict zones to achieve a similar purpose.<sup>89</sup>

Arms embargoes have had little success at stemming the global trade in weapons;<sup>90</sup> nearly every arms embargo has been “systemically violated.”<sup>91</sup> This may be in part because arms embargoes are susceptible to collective action problems—if one arms supplier violates the embargo, the entire regime loses its effectiveness, so there is a diminished incentive for nations to comply.<sup>92</sup> In addition, weapons-producing states may use arms as a political tool to further their own policy interests, regardless of applicable embargoes.<sup>93</sup> Even when an embargo is passed, funding to identify and sanction embargo violators—or to build the capacity necessary to implement the embargo—may not be available.<sup>94</sup> Similarly, the lag time it takes to create compliance mechanisms after an embargo is enacted, an inability to track embargo implementation, the lucrative incentives to breach embargoes, the slim chances of being caught in breach, and the minimal consequences for those who are caught in breach, all contribute to the ineffectiveness of arms embargoes.<sup>95</sup>

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<sup>87</sup> Matthew Moore, *Arming the Embargoed: A Supply-Side Understanding of Arms Embargo Violations*, 54 J. CONFLICT RESOL. 593, 593–94 (2010).

<sup>88</sup> *Id.* at 595.

<sup>89</sup> For example, after the U.N. Security Council adopted Resolution 1521 on Liberia in December 2003, forty-four individuals and entities associated with transporting weapons into Liberia were blacklisted and placed under a travel ban and a Security Council committee was established to monitor the sanctions. See *The Travel Ban List*, UNITED NATIONS, [http://www.un.org/sc/committees/1521/1521\\_list.htm](http://www.un.org/sc/committees/1521/1521_list.htm) (last updated Dec. 16, 2009). Both Bout and his associate Chichakli remain on the United Nation’s Travel Ban list to this day. See *The Travel Ban List*, UNITED NATIONS, [http://www.un.org/sc/committees/1521/pdf/1521\\_Travel\\_Ban\\_list-E-140403.pdf](http://www.un.org/sc/committees/1521/pdf/1521_Travel_Ban_list-E-140403.pdf) (last updated Apr. 3, 2014).

<sup>90</sup> PUTTING TEETH IN THE TIGER, *supra* note 82, at xiv.

<sup>91</sup> Moore, *supra* note 87, at 594 (citation omitted). Some researchers have concluded that while “UN embargoes may increase the cost and difficulty of arms acquisition,” at the end of the day, “most actors in conflicts experience little difficulty in sourcing arms from the international market-place.” Neil Cooper, *What’s the Point of Arms Transfer Controls?*, 27 CONTEMP. SECURITY POL’Y 118, 119–20 (2006). Viktor Bout was especially skilled at breaking the U.N.’s arms embargoes. See FARAH & BRAUN, *supra* note 11, at 76–77. U.N. investigations in Rwanda, Angola, Sierra Leone, and the Democratic Republic of the Congo have unearthed the extent to which arms intermediaries deliberately violate arms embargoes without repercussions. Austin, *supra* note 55, at 204–05.

<sup>92</sup> Moore, *supra* note 87, at 595 (identifying the “weak link phenomenon”). Given the lucrative “strategic benefits” of arms transfers, suppliers have significant incentives to disregard embargoes, “since each state only has to weigh its share of the security risks when choosing to violate an embargo . . .” *Id.*

<sup>93</sup> *Id.* at 607–08. “States can use arms to garner concessions from other states and arms embargoes make the value of the transfer greater.” *Id.* at 608–09.

<sup>94</sup> Cooper, *supra* note 91, at 120.

<sup>95</sup> Theresa A. DiPerna, *Small Arms and Light Weapons: Complicity “with a View” Toward Extended State Responsibility*, 20 FLA. J. INT’L L. 25, 37–38 (2008).

Enforcing arms embargoes also creates jurisdictional problems.<sup>96</sup> There are no mechanisms in international law specifically aimed at arms embargo enforcement.<sup>97</sup> Enforcement and implementation of U.N. arms embargoes must come from member states.<sup>98</sup> However, for domestic courts to have jurisdiction over cases involving arms embargo violations, the embargo must have been incorporated into domestic law, and states are often unwilling or unable to act to achieve this end.<sup>99</sup> Without police or military forces ordered to enforce an embargo, the embargo is often ineffective.<sup>100</sup>

## 2. Domestic Laws

Some nations have passed domestic laws aimed to control arms brokering, which exist alongside other arms control mechanisms. The United States was the first nation to specifically regulate arms broker activities and arguably maintains the strictest control regime.<sup>101</sup> The Arms Export Control Act (AECA) gives the President the power to control import and export of munitions and services generally,<sup>102</sup> but the 1996 Brokering Amendment to the AECA extends control to all arms transfers involving an individual subject to U.S. jurisdiction.<sup>103</sup> This Amendment recognized that the United States could not control arms deals conducted by U.S. citizens outside the United States, or by foreigners,<sup>104</sup> and thus requires all U.S. nationals, regardless of where they live, and all foreign nationals living in the United States, to have a license to broker weapons.<sup>105</sup>

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<sup>96</sup> See Orlovsky, *supra* note 48, at 349.

<sup>97</sup> FARAH & BRAUN, *supra* note 11, at 77.

<sup>98</sup> Orlovsky, *supra* note 48, at 349.

<sup>99</sup> Torbey, *supra* note 10, at 336–37.

<sup>100</sup> See FARAH & BRAUN, *supra* note 11, at 77. This lack of action has practical consequences: for example, a 2000 U.N. report indicated that Bout was funneling arms to forces in Angola that were under an arms embargo, but there were no consequences for the dealer. COLBY GOODMAN, OXFAM BRIEFING PAPER 156, BEYOND VIKTOR BOUT: WHY THE UNITED STATES NEEDS AN ARMS TRADE TREATY 8 (2011). Another arms broker, Leonid Minin, was arrested in Milan in 2000, but the Italian Supreme Court ruled that he could not be prosecuted for violating the United Nations' arms embargo on Liberia, because Italy lacked jurisdiction. AMNESTY INT'L & TRANSARMS, DEAD ON TIME: ARMS TRANSPORTATION, BROKERING AND THE THREAT TO HUMAN RIGHTS 60, 63 (2006).

<sup>101</sup> Arms Export Control Act, 22 U.S.C. §§ 2751–2799 (2010). The United States has used these more stringent requirements to prosecute at least seventy defendants based on crimes related to illegal arms brokering within the past five years. GOODMAN, *supra* note 100, at 24–26. For further discussion of U.S. arms legislation, see Bellal, *supra* note 53, at 465–67.

<sup>102</sup> 22 U.S.C. §§ 2751–2799.

<sup>103</sup> *Id.* § 2778.

<sup>104</sup> Keppler, *supra* note 14, at 391.

<sup>105</sup> 22 U.S.C. § 2778(b). Licenses are conditioned on human rights, foreign policy, and national security considerations. Keppler, *supra* note 14, at 392.

Other countries were initially reluctant to adopt similar regulations,<sup>106</sup> but this has begun to change.<sup>107</sup> Additionally, activities that commonly accompany illegal arms brokering, such as bribery, are frequently criminalized under domestic law, and can provide a more attenuated domestic cause of action against arms traffickers.<sup>108</sup> Implementing laws that regulate arms brokering will theoretically lead to prosecutions of brokers who violate the laws. However, accountability for arms brokers has not resulted, despite increased domestic legislative efforts.<sup>109</sup>

Arms brokers remain uniquely unregulated.<sup>110</sup> Less than half of the world's nations have provisions controlling the types of arms that most traffickers, including Viktor Bout, tend to transport.<sup>111</sup> Furthermore, states that have acted to regulate arms brokering have taken inconsistent approaches,<sup>112</sup> compromising the effectiveness of domestic laws.<sup>113</sup> Brokers desiring to avoid strict arms trafficking laws can simply move

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<sup>106</sup> Between 1996—when the United States implemented brokering controls—and 1999, only eleven countries passed similar legislation. GOODMAN, *supra* note 100.

<sup>107</sup> By 2009, fifty-two nations had passed brokering legislation. *Id.* Notable examples include laws passed in South Africa and Sweden that have extraterritorial application and licensing requirements. For further analysis of this legislation, and further international efforts to regulate domestic brokering outside the United States, see Keppler, *supra* note 14, at 405–10.

<sup>108</sup> Wood, *supra* note 5.

<sup>109</sup> *Brokering*, SMALL ARMS SURVEY, <http://www.smallarmssurvey.org/de/regulations-and-controls/control-measures/brokering.html> (last visited Jan. 4, 2015) (“Since the mid-1990s, a series of multilateral initiatives has aimed to create a common understanding of illicit brokering and to develop the means for tackling it. . . . Nevertheless, in contrast to other arms trade actors—notably, importers and exporters—brokers continue to operate with few, if any, constraints in most parts of the world.”); see also WEZEMAN, *supra* note 10, at 21 (“While such arms export restrictions may limit the options for belligerents to buy weapons, they certainly do not make weapons impossible to acquire.”). By way of example, Wezeman identifies where parties involved in intra-state conflicts—both governments and rebel groups—were able to acquire arms between 1998 and 2002. See *id.* at 33–39.

<sup>110</sup> Austin, *supra* note 55, at 204; see also Keppler, *supra* note 14, at 388 (“Few countries have regulations that might be interpreted to apply to brokering. Even fewer countries have explicit laws on brokering. . . .” (footnote omitted)).

<sup>111</sup> Kathi Austin, *Viktor Bout and Arms-Smuggling Airplanes*, FAREED ZAKARIA GPS (Oct. 31, 2011, 12:52 PM), <http://globalpublicsquare.blogs.cnn.com/2011/10/31/viktor-bout-and-arms-smuggling-airplanes> (“To date, far less than half of the world’s governments have arms brokering controls in place for small arms and light weapons like those Bout has trafficked, and even these vary tremendously in scope and penalties.”); see also ‘Merchant of Death’ Viktor Bout Sentenced to 25 Years, BBC (Apr. 5, 2012, 9:45 PM), <http://www.bbc.co.uk/news/world-us-canada-17634050> (noting that during the sting operation, Bout attempted to sell DEA agents 5000 AK-47 assault rifles and 100 portable surface-to-air missiles).

<sup>112</sup> *Executive Summary*, in DEVELOPING A MECHANISM TO PREVENT ILLICIT BROKERING IN SMALL ARMS AND LIGHT WEAPONS: SCOPE AND IMPLICATIONS, *supra* note 5, at xxvi–xxvii.

<sup>113</sup> The U.N. Group of Governmental Experts on small arms has noted that “individuals and/or companies have exploited lacking or inconsistent brokering regulations in order to circumvent Security Council arms embargoes, or to broker otherwise illicit or undesirable arms transfers.” ANDERS & CATTANEO, *supra* note 71, at 7.

operations to a nation with fewer regulations.<sup>114</sup> Brokers are also able to work around domestic laws that are not comprehensive.<sup>115</sup>

In this way, a lack of consistently applicable laws has contributed to arms broker impunity by shifting the arms trafficking problem to states that have not acted, rather than eliminating it. States are also reluctant to promulgate arms control laws that extend past their national borders.<sup>116</sup> This has created jurisdictional problems when enforcing domestic laws and has contributed to broker immunity.<sup>117</sup> Arms brokers tend not to reside in the countries where the weapons they supply originate or the countries for which the weapons are destined.<sup>118</sup> As a result, they remain untouchable by most domestic laws—a brokering regulation based on property existing within the country's territory is not triggered if weapons never pass through the country where the broker operates.<sup>119</sup> Alternatively, if weapons are not exported from the country where the broker conducts his activities, arms export controls may not apply.<sup>120</sup> To complicate matters further, brokers are accustomed to taking an additional precaution: creating shell companies

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<sup>114</sup> Austin, *supra* note 55, at 213. One of Bout's arms brokering opportunities illustrates the consequences of this reality: the EU Council of Ministers imposed an international arms embargo against the Taliban in 1996. FARAH & BRAUN, *supra* note 11, at 124–25. Bout maintained a company office in Belgium, an EU member state. *Id.* However, in 1997, while Bout was selling weapons to the Taliban in Afghanistan, his office in Belgium only technically violated the embargo and no action could be taken against Bout, as Russia was not an EU member state and Bout's planes were based in Sharjah and registered in Swaziland, Liberia, and Equatorial Guinea. *Id.*

<sup>115</sup> For example, recently convicted arms trafficker Monzer al-Kassar was a self-proclaimed “third-party broker” who reportedly structured his deals from his home in Spain, negotiating between a supplier in a second country and a buyer in a third country, shipping the weapons from country two to country three, and wiring his fee to a bank in a fourth country. Patrick Radden Keefe, *The Trafficker*, NEW YORKER, Feb. 8, 2010, at 39. As Kassar remained in Spain the entire time, he technically did not commit any crime under Spanish law. *Id.*

<sup>116</sup> Only the United States, Sweden, and South Africa apply their brokering laws extraterritorially. Keppler, *supra* note 14, at 388.

<sup>117</sup> For example, in 2001, a Panamanian resident was arrested for an allegedly illicit arms deal, but was released since his actions took place abroad and he had not violated any Panamanian law. GOODMAN, *supra* note 100, at 7.

<sup>118</sup> Austin, *supra* note 55, at 204; *see also* Keppler, *supra* note 14, at 388 (“Moreover, brokers evade regulation by basing their operations outside of their countries of citizenship, residence, or domicile, and in places with lax export controls.” (footnote omitted)). This is one of the advantages of ICC involvement. *See infra* Part II.A.

<sup>119</sup> Recently convicted arms broker al-Kassar did not trigger Spain's arms control laws as the weapons he sold never passed through Spain. *See discussion supra* note 115. Oxfam describes a scenario in which arms are delivered by a shipping firm based in one country, by a plane registered in a second country, flies out from a third, picks up the arms in a fourth country, refuels in a fifth, and is scheduled to land in a sixth but delivers to a seventh country. OXFAM GB, OUT OF CONTROL: THE LOOPHOLES IN UK CONTROLS ON THE ARMS TRADE 3 (1998). Monitoring organizations will only see that weapons are moving from a supplier country to a country that is not under embargo. Keppler, *supra* note 14, at 388. For more information on third-party brokering, *see* ANDERS & CATTANEO, *supra* note 71, at 9–10.

<sup>120</sup> HOLGER ANDERS, CONTROLLING ARMS BROKERING: NEXT STEPS FOR EU MEMBER STATES 10–11 (2004) (discussing the case of Leonid Minin).

or front companies with sham leadership to conceal illegal brokering activities.<sup>121</sup> At the end of the day, illicit arms brokers remain safe from the U.S. AECA thanks to their shell companies, multiple identities, lack of known U.S. presence, and a choice not to deal in U.S. weapons.<sup>122</sup>

Given these methods that traffickers use to eschew liability, the failure of cooperation between nations against arms traffickers<sup>123</sup> and reluctance to share information are fatal.<sup>124</sup> Monitoring arms flows depends on political will, severe arms laws, and tracking systems.<sup>125</sup> Other mechanisms aimed at tracking arms, such as EUCs, remain easily forged<sup>126</sup> and, therefore, ineffective.<sup>127</sup> While there have been a few domestic prosecutions of high-profile arms brokers,<sup>128</sup> including Viktor

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<sup>121</sup> See, e.g., Daniel M. Salton, Note, *Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking*, 46 CONN. L. REV. 369, 382 n.55 (2013) (“Furthermore, brokers sometimes attempt to obfuscate tracing . . . transaction[s] through money laundering or shell companies, which can prevent regulatory authorities from keeping full oversight of the transaction[s].” (citation omitted)). See generally Kepler, *supra* note 14, at 387–88.

<sup>122</sup> FARAH & BRAUN, *supra* note 11, at 107. Even Bout’s prosecution took place under terrorism laws, and did not touch Bout’s arms trafficking history. Bout also was able to use shell companies to remain a Pentagon-approved contractor delivering supplies to U.S. troops in Iraq, even after the U.S. tried to terminate his arms operation. See *supra* note 22 for further discussion about Bout’s dealings with U.S. military contractors.

<sup>123</sup> FARAH & BRAUN, *supra* note 11, at 179.

<sup>124</sup> In 2000, there was no evidence that Bout was operating in the United States or trading American-made weapons. *Id.* at 7, 172. Without cooperation from foreign allies willing to act against Bout, the United States could not act unilaterally. *Id.* The United States needed foreign police officers to arrest Bout abroad and could only assist in transporting Bout to the country that issued the arrest warrant, in a practice known as “rendition.” *Id.* Belgium had a similar problem—officials discovered in 1997 that Bout’s planes were leaving Belgium empty, retrieving arms elsewhere, and dropping them in Rwanda, violating a U.N. arms embargo. Belgium could not act because Bout’s planes were registered in Liberia and Belgium did not have jurisdiction over foreign planes when they left the country. *Id.*

<sup>125</sup> *Id.* at 78.

<sup>126</sup> There are no standardized EUC forms; while some governments type EUCs on Ministry of Defense letterhead, others are less formal. FARAH & BRAUN, *supra* note 11, at 78.

<sup>127</sup> See generally UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, OCCASIONAL PAPERS NO. 21, STUDY ON THE DEVELOPMENT OF A FRAMEWORK FOR IMPROVING END-USE AND END-USER CONTROL SYSTEMS 1, 5–8 (2011) [hereinafter UNODA OCCASIONAL PAPERS NO. 21] (discussing what is required for end-user systems to succeed). Bout notoriously forged EUCs. At one point in his career, he began forging Togolese EUCs and giving them to an arms supplier in Bulgaria. FARAH & BRAUN, *supra* note 11, at 79. “No one selling the weapons in Bulgaria was required to explain why a peaceful, small African nation, with a tiny military that had relied for forty years on French weapons, suddenly needed to spend \$14 million for Soviet bloc weapons . . .” *Id.* Of course, Togo was not the final destination for the weapons; they continued on to Angola, which was under an arms embargo at the time. *Id.* “Even when the documents are legitimate, arms manufacturers seldom try to ascertain whether their products end up in the country that issued the certificate.” Keefe, *supra* note 115, at 43. For an example of a false EUC used by Leonid Minin, see *supra* notes 100 and 120; see also FEINSTEIN, *supra* note 17, at 113.

<sup>128</sup> Aside from Viktor Bout’s prosecution, Orlovsky refers to Dutch prosecutions. Orlovsky, *supra* note 48, at 374–75.

Bout, ultimately, nation-states have not shown enough domestic political will to take serious action against illicit arms brokering.<sup>129</sup>

### 3. International Agreements

An illicit arms transfer is not considered an international crime for purposes of individual criminal liability,<sup>130</sup> but international organizations have made agreements to address illicit arms brokering.<sup>131</sup> In 2001, the U.N. General Assembly approved the United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol),<sup>132</sup> and the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA).<sup>133</sup> The Firearms Protocol was the first legally binding instrument on small arms that applied worldwide.<sup>134</sup> It aims to eliminate illicit trafficking and manufacturing by criminalizing these practices, adopting security and control measures, establishing a licensing system for firearms to easily identify legitimate transactions, and promoting international cooperation to trace firearms.<sup>135</sup> The Protocol purports to provide a framework for states to prevent proliferation of illegal firearms.<sup>136</sup> PoA similarly sets out a range of measures for states to take to control illegal SALW transfers, but it is a non-binding mechanism.<sup>137</sup>

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<sup>129</sup> This has been further evidenced by the states' reluctance to criminalize arms embargo violations. *Id.* at 349, 377–78; *see also infra* Part I.C.

<sup>130</sup> Bellal, *supra* note 53, at 458.

<sup>131</sup> For additional discussion on the international organization efforts discussed in this subpart, *see Saavedra, supra* note 14.

<sup>132</sup> G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (June 8, 2001) [hereinafter Firearms Protocol].

<sup>133</sup> United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 9–20, 2001, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, U.N. Doc. A/CONF.192/15 (July 20, 2001) [hereinafter PoA].

<sup>134</sup> *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*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/firearms-protocol/firearmsprotocol.html> (last visited Jan. 4, 2015); *see also* Arias Found. for Peace & Human Progress, *Position Paper: Conventional Arms and the Arms Trade Treaty*, in 3 GLOBAL AGENDA 2013: WATER, ENERGY, AND THE ARAB AWAKENING 27, 28 (Thomas S. Axworthy & Zafar Adeel eds., 2014).

<sup>135</sup> Firearms Protocol, *supra* note 132, arts. 2, 5–11, 13.

<sup>136</sup> *Id.* art. 2.

<sup>137</sup> PoA, *supra* note 133. Recommendations include suggestions on manufacturing, marking, keeping records, tracing, managing stockpiles, identifying surplus, and transferring internationally. *Id.*; *see also* Arias Found. for Peace & Human Progress, *supra* note 134, at 29.

Similar standards for writing domestic laws regulating arms trafficking have been promulgated by other bodies.<sup>138</sup> The most prominent include programs adopted by the European Union, the Organization of American States, the African Union, and the Wassenaar Group. The European Union passed two directives controlling acquisition and possession of weapons<sup>139</sup> and adopted a Common Position on controlling arms brokering.<sup>140</sup> The Organization of American States adopted the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, a treaty requiring states to establish laws governing the import, export, and tracing of arms, and to create enforcement mechanisms.<sup>141</sup> The Organization also adopted Model Regulations on broker controls and created a procedural system for applying the regulations.<sup>142</sup> The Organization of African Unity (now known as the African Union) adopted the Bamako Declaration, recommending measures for states to control arms transfers, including domestic legislation and capacity development for law enforcement agencies.<sup>143</sup> Finally, the Wassenaar Group's<sup>144</sup> Elements for Effective Legislation on Arms Brokering is a political commitment between arms-producing countries to control brokering activities through legislation, recordkeeping, and promotion of cooperation and transparency.<sup>145</sup>

Despite these agreements on arms brokering, brokers do not appear to be deterred. On one hand, this is because the flexibility of some agreements makes them weak; for example, the Wassenaar

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<sup>138</sup> See ARMS WITHOUT BORDERS, *supra* note 2, at 3.

<sup>139</sup> See Council Directive 91/477/EEC, 1991 O.J. (L 256) 51 (classifies firearms and creates qualifications for acquiring and possessing firearms); Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 Amending Council Directive 91/477/EEC on Control of the Acquisition and Possession of Weapons, 2008 O.J. (L 179) 5 (requires registration and marking of firearms before they enter the market).

<sup>140</sup> Council Common Position (EU) No. 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering (L 156) 79.

<sup>141</sup> Organization of American States, Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, 37 I.L.M. 143 (Nov. 14, 1997).

<sup>142</sup> Organization of American States, Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition, OEA/Ser.L./XIV.2.34 (Nov. 13, 2003).

<sup>143</sup> Organization of African Unity, Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (Dec. 1, 2000). For positions adopted by African regional organizations, see ANDERS & CATTANEO, *supra* note 71, at 23–24.

<sup>144</sup> This is a group of forty-one arms-producing or arms-exporting states. *Introduction, WASSENAAR ARRANGEMENT*, <http://www.wassenaar.org/introduction/index.html> (last visited Jan. 4, 2015).

<sup>145</sup> *Elements for Effective Legislation on Arms Brokering (Agreed at the 2003 Plenary)*, available at [http://www.wassenaar.org/guidelines/docs/Elts\\_for\\_effective\\_legislation\\_on\\_arms\\_brokering.pdf](http://www.wassenaar.org/guidelines/docs/Elts_for_effective_legislation_on_arms_brokering.pdf) (last visited Jan. 4, 2015). The Arrangement focuses on transparency. *Id.* The Wassenaar Arrangement demands EUCs. *Id.* For further discussion of the Wassenaar Arrangement, see Bellal, *supra* note 53, at 467–68.

Agreement gives states control over when to supply or refuse to supply arms, making it less effective as an enforcement mechanism.<sup>146</sup> Additionally, while the various conventions promote judicial cooperation, they are dependent on domestic bodies to produce results.<sup>147</sup> Furthermore, most of the agreements are not legally binding by themselves<sup>148</sup> and have not been formally adopted as part of national laws or implemented consistently.<sup>149</sup> This has stymied the development of binding, globally applicable rules on arms brokering.<sup>150</sup> As a result, there is a small likelihood that arms brokers will be held accountable for illegal weapons dealings and brokers do not seem to fear prosecution or retribution.<sup>151</sup>

U.N. Security Council efforts have also been a disappointment, in terms of creating accountability.<sup>152</sup> Although investigations have created detailed reports that document the extent of arms embargo violations, and expose the “arms shadow world,”<sup>153</sup> the reports do not tangibly punish or deter the arms brokers, and arms pipelines remain active.<sup>154</sup> The Security Council’s international travel bans, which give legal standing to any country willing to try and stop someone on the list, but do not compel state action, have also failed to stop broker movement.<sup>155</sup>

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<sup>146</sup> WASSENAAR ARRANGEMENT, *supra* note 144.

<sup>147</sup> Andreas Schloenhardt, *Transnational Organised Crime and the International Criminal Court Developments and Debates*, 24 U. QUEENSLAND L.J. 93, 95 (2005).

<sup>148</sup> PoA is implemented on a voluntary basis; states affirm the “will” to implement, but face no consequences if they do not. *Differences Between the ‘United Nations Programme of Action’ and the ‘United Nations Arms Trade Treaty’*, INT’L ACTION NETWORK ON SMALL ARMS, <http://www.iansa.org/system/files/03%20Differences%20between%20the%20Arms%20Trade%20Treaty%20and%20the%20Programme%20of%20Action.pdf> (last visited Jan. 4, 2015).

<sup>149</sup> See ARMS WITHOUT BORDERS, *supra* note 2, at 3. There is “no convergence concerning the criteria that states should use” for arms transactions. ANDERS & CATTANEO, *supra* note 71, at 28. Furthermore, the standards themselves are incomplete. There are virtually no “controls on ‘brokering-related’ activities such as transportation and financing . . .” *Id.*

<sup>150</sup> “As a result, the UNPoA has generated little or no meaningful humanitarian impact since its establishment in 2001.” DEEPAYAN BASU RAY, OXFAM BRIEFING PAPER, THE DEVIL IS IN THE DETAIL: THE IMPORTANCE OF COMPREHENSIVE AND LEGALLY BINDING CRITERIA FOR ARMS TRANSFERS 3 (2012).

<sup>151</sup> “Skilled at operating in the shadows and exploiting weak national arms transfer controls, arms brokers have funneled arms to almost every country under a UN arms embargo in the last 15 years, often fueling armed conflict and serious human rights violations.” GOODMAN, *supra* note 100, at 1.

<sup>152</sup> FARAH & BRAUN, *supra* note 11, at 80.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 8, 80.

<sup>155</sup> *Id.* at 191–92.

#### 4. The Arms Trade Treaty

The U.N. General Assembly began working towards an international treaty to address arms broker impunity in 2006<sup>156</sup> and the Arms Trade Treaty (ATT)<sup>157</sup> was passed in April 2013.<sup>158</sup> One of the ATT's goals was to prevent and eradicate illicit arms brokering.<sup>159</sup> Advocacy groups believed a treaty would help address the lack of effective legal tools to prosecute arms brokers, and the lack of political will to target arms trafficking generally,<sup>160</sup> whereas current laws enabled arms brokers to use front companies to avoid suspicion.<sup>161</sup>

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<sup>156</sup> The General Assembly passed a resolution called "Towards an Arms Trade Treaty" in 2006, and an expert group was convened to report on the feasibility of an arms treaty. G.A. Res. 61/89, ¶ 2, U.N. Doc. A/RES/61/89 (Dec. 6, 2006). Some scholars have suggested that the impetus for a global Arms Trade Treaty began even earlier, with the Noble Peace Laureates' International Code of Conduct on Arms Transfers in 1997. Arias Found. for Peace & Human Progress, *supra* note 4, at 27. See *id.* for more detailed background on the passage of the Arms Trade Treaty. Additional background on efforts to control the arms trade generally is provided by Marlitt Brandes, "All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty, 5 GOETTINGEN J. INT'L L. 399, 402–06 (2013).

<sup>157</sup> Arms Trade Treaty, *supra* note 4.

<sup>158</sup> *Arms Trade Treaty Passes at UN!*, AMNESTY INT'L (Apr. 2, 2013), <http://www.amnestyusa.org/our-work/latest-victories/arms-trade-treaty-passes>.

<sup>159</sup> Arms Trade Treaty, *supra* note 4, at art. 1; United Nations Conference on the Arms Trade Treaty, July 2–27, 2012, *Report of the Preparatory Committee*, U.N. Doc. A/CONF.217/1, Annex II (Mar. 7, 2012); see also Barry Kellman, *Controlling the Arms Trade: One Important Stride for Humankind*, 37 FORDHAM INT'L L.J. 687, 688–89 (2014) ("The ATT's goal is to contribute to international peace and security by establishing high common international standards for regulating the conventional arms trade and by preventing and eradicating the illicit trade in conventional arms.").

<sup>160</sup> GOODMAN, *supra* note 100, at 1–2; UNODA OCCASIONAL PAPERS NO. 23, *supra* note 4, at 3 ("[C]ommon standards for arms transfers will help States assess the risk that transferred arms would be used . . . to foment regional instability, to commit grave violations of . . . law, or to engage in other forms of politically or criminally motivated armed violence.").

<sup>161</sup> Stohl, *supra* note 74. Front companies were particularly key to Bout's operation. FARAH & BRAUN, *supra* note 11, at 9. One of Bout's planes was

[F]irst registered in Liberia in 1996 in the name of another of his companies, Air Cess. It was later deregistered in Liberia and re-registered in Swaziland until a survey by that country's aviation authorities discovered major irregularities in the paperwork. It was again registered in the Central African Republic operating under the Centrafican Airlines banner. . . . In addition, the plane had dual registration, sometimes flying under the flag of Congo (Brazzaville). And when it was not making deliveries it was parked at Bout's main business hub in Sharjah. When the shipment was about to be delivered it was transferred into the name of Abidjan Freight, a front company owned by [someone else], before embarking on its journey on the multiregistered aircraft.

FEINSTEIN, *supra* note 17, at 118 (footnotes omitted). For a time, Bout maintained official operations in Sharjah, as there was weak government oversight and lax banking standards. FARAH & BRAUN, *supra* note 11, at 51, 53, 56. "Because there were so few regulations in the UAE relating to weapons trafficking and aircraft registration, his flight and ground operations operated with near impunity." *Id.* at 191. The ATT "will establish basic, international standards to guide arms transfers based on States' obligations under existing international law, human rights law, and international human rights law" and "foster greater transparency with respect to the arms trade,

Without comprehensive regulation of brokers and arms transfers, arms can easily be diverted to the black and gray markets.<sup>162</sup> Therefore, the ATT applies to a variety of conventional arms, rather than just SALW,<sup>163</sup> and includes more inclusive controls on exports,<sup>164</sup> imports,<sup>165</sup> arms transfers,<sup>166</sup> brokering,<sup>167</sup> and preventing diversion of arms.<sup>168</sup> The ATT also requires recordkeeping and reporting.<sup>169</sup> These provisions are aimed to comprehensively regulate arms brokering.<sup>170</sup> Unlike previous U.N. mechanisms such as PoA, the ATT is a legally binding treaty, and as such, is part of international law.<sup>171</sup>

Thus far the ATT has had success acquiring state signatories,<sup>172</sup> but it remains to be seen whether the treaty will be effective as it has just

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military expenditure, and arms ownership, resulting in increased trust and security among nation States.” Arias Found. for Peace & Human Progress, *supra* note 4, at 28, 30.

<sup>162</sup> UNODA OCCASIONAL PAPERS NO. 23, *supra* note 4, at 3; *see also* Arias Found. for Peace & Human Progress, *supra* note 4, at 31 (“Better regulation of the legal arms trade is the key to tackling the problem of the illicit arms trade. Problems in the arms trade arise when weapons reach nation States or private businesses that then transport them to sanctioned countries or use them for inhumane acts. . . . The lack of effective legal regulations provides illicit brokers with the opportunity to operate, an opportunity which can be eradicated with the ratification and acceptance of an ATT. An ATT will provide the international standards needed to close the loopholes on which arms brokers rely.” (citation omitted)); Kellman, *supra* note 159, at 720–21 (“As long as weapons are needed for self-defense and maintenance of domestic order, weapons brokers will be essential elements in the supply chain. The problem is that some brokers devote their expertise to illicitly diverting conventional arms, not only as venal conduits but also as stokers of conflict, repression, and crime whose actions have most grave consequences for humanity.”).

<sup>163</sup> Arms Trade Treaty, *supra* note 4, art. 2.

<sup>164</sup> *Id.* art. 7.

<sup>165</sup> *Id.* art. 8.

<sup>166</sup> *Id.* art. 9.

<sup>167</sup> *Id.* art. 10.

<sup>168</sup> *Id.* art. 11.

<sup>169</sup> *Id.* arts. 12–13. This is a key aspect of the ATT: “By holding international reporting standards, arms trade exportation and importation information will be available from all participating nation states, allowing for any mishandling to be noted and sanctioned.” Arias Found. for Peace & Human Progress, *supra* note 4, at 30.

<sup>170</sup> GOODMAN, *supra* note 100, at 5; *see also* Neil MacFarquhar, *U.N. Treaty Is First Aimed at Regulating Global Arms Sales*, N.Y. TIMES, Apr. 3, 2013, at A12 (“The treaty calls for sales to be evaluated on whether the weapons will be used to break humanitarian law, foment genocide or war crimes, abet terrorism or organized crime or slaughter women and children.”).

<sup>171</sup> INT’L ACTION NETWORK ON SMALL ARMS, *supra* note 148.

<sup>172</sup> Sixty-seven states signed the ATT the day it opened for signature. *A Sign of the Times?*, ARMS TRADE TREATY LEGAL BLOG (July 3, 2013), <http://armstradetreaty.blogspot.com/2013/06/a-sign-of-times.html>. As of January 4, 2015, 130 states have signed the treaty and sixty-one states have ratified the treaty. *The Arms Trade Treaty*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/ATT> (last visited Jan. 4, 2015). Some of the world’s top-producing arms countries have signed the treaty, including Britain, France, Germany, Italy, and Spain. Louis Charbonneau, *U.N. Arms Trade Treaty Takes Leap Toward Entry into Force*, REUTERS, Apr. 2, 2014, available at <http://www.reuters.com/article/2014/04/02/us-arms-treaty-un-idUSBREA3126920140402>. While the United States has signed the treaty, it has not ratified it and there has been significant opposition to ratification. *Id.*; *see infra* note 177.

recently entered into force.<sup>173</sup> While the treaty is a positive step,<sup>174</sup> some have suggested that the ATT may not be comprehensive enough,<sup>175</sup> and that some illicit practices escape regulation due to the treaty's loose language.<sup>176</sup> Others are concerned that signatories will not implement and enforce the legislation necessary to give the treaty teeth.<sup>177</sup> Still others suggest that implementation will not happen for years, or worry

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<sup>173</sup> Jerome Taylor & Eric Short, *UN Approves Global Arms Trade Treaty – But How Effective Will It Be?*, INDEPENDENT (Apr. 3, 2013), <http://www.independent.co.uk/news/world/politics/un-approves-global-arms-trade-treaty--but-how-effective-will-it-be-8558664.html>. The treaty text required that the treaty would not enter into force until it was ratified by fifty states. Arms Trade Treaty, *supra* note 4. The treaty just recently entered into force on December 24, 2014, so no one knows yet what the impact will be. Despite the December 24, 2014 entry date, assessing actual implementation will likely be a lengthy process: for example, state parties will have until December 24, 2015 to provide a requisite initial report on national implementation. *Id.* art. 13.

<sup>174</sup> According to Jay Butler:

[T]he recently finalized Arms Trade Treaty may indicate the increasing acknowledgement of states concerning their obligation to avoid complicity in internationally wrongful acts. While the United States, United Kingdom, and France jointly declared their intention in 1950 to export arms only to states that had committed not to initiate any act of aggression, the new Arms Trade Treaty broadens this sort of commitment.

Jay Butler, *Responsibility for Regime Change*, 114 COLUM. L. REV. 503, 547 (2014) (footnotes omitted).

<sup>175</sup> *Hopes Raised for Strong Arms Trade Treaty*, AMNESTY INT'L (July 27, 2012), <http://www.amnesty.org/en/news/hopes-raised-strong-arms-trade-treaty-2012-07-27> (“[F]ocusing solely on ‘military items’ creates a major loophole that governments could exploit to carry on supplying weapons and equipment by simply not classifying it as military.”).

<sup>176</sup> Iain Overton, *The Dangers of an Arms Trader’s Charter? Loopholes and Loose Language in the Arms Trade Treaty Threaten Its Strength*, ACTION ON ARMED VIOLENCE (Mar. 14, 2013), <http://aoav.org.uk/2013/the-dangers-of-an-arms-traders-charter-loopholes-and-loose-language-in-the-arms-trade-treaty-threaten-its-strength>.

<sup>177</sup> See UN: *Atrocities Fuelled by Inaction on Arms Trade Treaty Promises*, AMNESTY INT'L (Apr. 1 2014), <http://www.amnesty.org/en/news/un-atrocities-fuelled-inaction-arms-trade-treaty-promises-2014-04-01>. One scholar alleges,

[T]he ATT is likely to fall short of what is required to curb this network of greed and death. . . . To be most effective, the ATT would need to include strong, enforceable anti-corruption mechanisms; to prevent the export of arms where they may increase conflict, or have a negative effect on human rights and/or socio-economic development; to exercise greater control over the transportation of weapons; to either ban offsets or open them to far more scrutiny; as well as to impose far greater transparency on governments and companies, including the compulsion to reveal publicly how much and for what agents, brokers, dealers and middlemen are paid. And it would need to establish a coordinated international monitoring and enforcement body to police it.

FEINSTEIN, *supra* note 17, at 530. Another insists “the treaty’s success will largely depend on its ratification by major arms suppliers such as the United States, Russia, Germany, France, and China, which account for over seventy percent of the global arms trade.” Brandes, *supra* note 156, at 401–02 (footnote omitted). Regrettably, the United States is already having difficulty with this aspect—on June 24, 2014, the House Appropriations Committee passed the State Foreign Operations bill which prohibits funds to be used for the Arms Trade Treaty before the treaty is fully ratified by the Senate. Department of State, Foreign Operations, and Related Programs Appropriations Act, 2015, H.R. 5013, 113th Cong. § 7061 (2014).

that the treaty will prove meaningless, as it does not contain an enforcement mechanism.<sup>178</sup> While it is too soon to tell what the ATT's ultimate impact will be, it is not currently an active solution to the problem of arms broker impunity.<sup>179</sup>

C. *Problems with Current Attempts to Hold Arms Brokers Accountable*

Despite the variety of tools advocates have used to support arms control efforts, attempts to control brokers have proven insufficient.<sup>180</sup> Brokers are sophisticated and adept at evading regulatory and monitoring mechanisms<sup>181</sup> and broker operations are well organized and adaptable.<sup>182</sup> Furthermore, the lucrative nature of illicit arms trafficking makes the weak deterrent measures even less effective.<sup>183</sup> The circumstances leading to Bout's conviction demonstrate why a new approach to arms broker accountability is necessary. To be clear, Bout, one of the most notorious arms traffickers, is now serving a prison sentence, and it is a triumph for arms control advocates that he was convicted.<sup>184</sup> However, his continued arms trafficking, in the face of a variety of other sanctions, over at least a twenty-year period, demonstrates the continued gravity of the arms trafficking problem, the impotence of current mechanisms used against arms traffickers, and the

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<sup>178</sup> MacFarquhar, *supra* note 170.

<sup>179</sup> Kellman, *supra* note 159, at 731 ("The [ATT] Secretariat should act as a catalyst for making the ATT effective, but whether the Secretariat emerges as a hub of information that can stanch the illicit weapons trade or is merely a distributor of unread reports remains to be seen. . . . The ATT's impact depends, ultimately, on whether its obligations are implemented in harmony with many other policies for reducing conflict."). For a projection of the ATT's effectiveness, see generally Brandes, *supra* note 156.

<sup>180</sup> GOODMAN, *supra* note 100, at 1.

<sup>181</sup> See *id.*; DiPerna, *supra* note 95, at 37.

<sup>182</sup> Bout would reorganize his companies, change their names, and revive old shells, if identified. FARAH & BRAUN, *supra* note 11, at 192; see also Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477, 505 (2014) ("Relaxed state laws in Delaware, for example, have allowed . . . Viktor Bout—the infamous Russian Arms dealer dubbed the 'Merchant of Death'—to form anonymous shell corporations." (footnote omitted)). The U.S. Department of the Treasury identified many of Bout's shell companies in April 2005 and added them to OFAC sanctions lists. See U.S. DEP'T OF THE TREASURY, LIBERIA/CHARLES TAYLOR E.O.: VIKTOR BOUT BUSINESS EMPIRE (2005), available at [http://www.treasury.gov/press-center/press-releases/Documents/0426\\_bout\\_designation\\_chart.pdf](http://www.treasury.gov/press-center/press-releases/Documents/0426_bout_designation_chart.pdf); *Recent OFAC Actions*, U.S. DEP'T TREASURY (Apr. 26, 2005), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20050426.aspx>. Shell companies are also discussed *supra* notes 121 and 162.

<sup>183</sup> Small Arms Survey reported in 2012 that when including illicit weapons, the trade in small arms costs over \$10 billion annually. Agence France-Presse, *Small Arms Trade Grows to \$8.5 Billion a Year: Survey*, DEFENSE NEWS (Aug. 27, 2012, 4:17 PM), <http://www.defensenews.com/article/20120827/DEFREG02/308270003/Small-Arms-Trade-Grows-8-5-Billion-Year-Survey>. See related discussion *supra* note 79.

<sup>184</sup> See Kathi Lynn Austin, Op-Ed., *Stopping the Trade in Death*, N.Y. TIMES, Dec. 6, 2011, <http://www.nytimes.com/2011/12/07/opinion/stopping-the-trade-in-death.html?ref=viktorbout>.

necessity of exploring other potential solutions to hold arms brokers accountable for their illicit dealings.<sup>185</sup>

First, Bout's trial did not hold him fully accountable, as the prosecution was prohibited from addressing the majority of his arms trafficking crimes.<sup>186</sup> This is not surprising, as under the current arms control regime, addressing an arms trafficker's crimes in their totality is difficult, regardless of the resources expended. Even after the United States spent (at a significant cost) over two decades on an investigation to apprehend Bout, his trial remained tightly circumscribed.<sup>187</sup> This type of prosecution fails to provide closure to victims and disregards the symbolic and expressive power that law can have.

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<sup>185</sup> As Chairman Edward R. Royce of the House of Representatives Foreign Affairs Committee pointed out in a 2013 hearing:

I think there is one item that I have long been concerned about and I guess I will bring it up here. And that was Viktor Bout's ability, frankly, his machinations around the globe to get his hands on the transfer of military equipment. And a lot went into bringing him to the bar of justice. Not only his capture, but getting him extradited here was something we were very involved in.

*Export Control Reform: The Agenda Ahead: Hearing Before the Committee on Foreign Affairs, House of Representatives*, 113th Cong. 29–30 (2013) (statement of Rep. Edward R. Royce, Chairman, H. Comm. on Foreign Affairs). The U.S. Department of the Treasury claimed they “targeted sanctions are exposing and isolating the core elements of the Bout financial empire and illicit arms pipeline” as early as April 2005. Press Release, U.S. Dep't of the Treasury, Treasury Designates Viktor Bout's International Arms Trafficking Network (Apr. 26, 2005), available at <http://www.treasury.gov/press-center/press-releases/Pages/js2406.aspx>. Bout continued to operate in face of these sanctions for another three years, until he was arrested in 2008. *United States v. Bout*, 860 F. Supp. 2d 303, 305 (S.D.N.Y. 2012) (“On March 6, 2008, authorities in Thailand arrested international arms dealer Viktor Bout . . .”). This is in part because “US officials reportedly pondered asking several countries to arrest Viktor Bout but struggled with the fact that some of these countries did not have sufficient laws related to arms trafficking, brokering, and/or transportation.” GOODMAN, *supra* note 100, at 2. “[I]n March 2000, US officials pushed for action to stop Viktor Bout . . . To shut down Bout's operation, however, the US government needed cooperation from foreign allies, which proved difficult . . .” *Id.* at 8 (footnote omitted).

<sup>186</sup> The court was confined to four charges: (1) conspiracy to kill U.S. nationals; (2) conspiracy to kill U.S. officers or employees; (3) conspiracy to acquire and use an anti-aircraft missile; and (4) conspiracy to provide material support or resources to a designated foreign terrorist organization. *Bout Indictment*, *supra* note 26. Judge Scheindlin banned discussion of Libya, Liberia, and Rwanda—three nations where Bout notoriously dealt weapons—in the courtroom. Colin Moynihan, *Judge Considers Pledge for Jurors on Internet Use*, N.Y. TIMES, Sept. 19, 2011, at A23. No evidence of Bout's arms trafficking activities, or his history of arms embargo violations, was allowed. Xiaodon Liang, *Viktor Bout and the Tools Needed to Fight Arms Trafficking*, ARMS CONTROL NOW (Oct. 7, 2011), <http://armscontrolnow.org/2011/10/07/viktor-bout-and-the-tools-needed-to-fight-arms-trafficking>. Ultimately, Bout's trial was “based on . . . one fabricated commercial transaction[, which] grossly understated Bout's true responsibility . . .” James G. Stewart, *A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity*, 16 NEW CRIM. L. REV. 261, 295 (2013).

<sup>187</sup> See, e.g., Schmidle, *supra* note 21, at 63 (“Before the trial began, Scheindlin ruled that references to ‘Lord of War’ would be struck, as well as mentions of Libya and Rwanda, which she termed ‘buzzwords.’”); see also discussion *supra* note 186.

Second, the route to holding Bout accountable involved a country that was willing and able to prosecute him.<sup>188</sup> This is atypical; political realities often prevent prosecutions from occurring.<sup>189</sup> Even where states can exercise jurisdiction over arms traffickers there is a collective action problem—states may oppose unlawful sale of arms to conflict zones but do not want to upset the same arms traffickers they use to obtain their own weapons.<sup>190</sup> There is frequently a relationship between a country's departments of defense and a country's arms producers, as well as a relationship between national intelligence agencies and illicit arms dealers.<sup>191</sup> Prosecutions are also unlikely to occur in cases where states are complicit with illegal arms brokering activities.<sup>192</sup> Many states

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<sup>188</sup> See Kellman, *supra* note 159, at 724.

[P]rosecutions in US courts of conventional arms brokers such as Viktor Bout . . . have depended on increasingly effective principles of legal assistance and cooperation. Despite the success of these prosecutions, experts assert that substantial barriers to the effective investigation and prosecution of criminal diverters of conventional arms remain.

*Id.* at 724 (footnotes omitted); see also FEINSTEIN, *supra* note 17, at 155 (noting that Bout himself was able to evade justice for many years).

<sup>189</sup> In general, "lack of 'political will' has combined with strategic and commercial interests to make most supplier-based export controls little more than acts of tokenism." Cooper, *supra* note 91, at 118. Some researchers have alleged:

The arms industry receives unique treatment from government. Many companies were, and some still are, state-owned. Even those that have been privatized continue to be treated, in many ways, as if they were still in the public fold. . . . Government officials and ministers act as salespeople for private arms contractors as enthusiastically as they do for state-owned entities.

FEINSTEIN, *supra* note 17, at 523. "According to current and former US officials and available information on cases, [one] of the problems the US government continually encounters in enforcing its laws, and in urging governments to stop such brokers, [is] . . . a lack of political will." GOODMAN, *supra* note 100, at 2. "While the US government has been able to bring several well-known arms traffickers to trial in the last few years, such as Viktor Bout and Monzar Al-Kassar, the government has faced some challenges in stopping individuals and companies involved in such crimes abroad." *Id.* at 14. Even in Bout's case, Thailand was resistant to extraditing Bout to the United States and the Thai courts faced immense political pressure from U.S. diplomats. See Crook, *supra* note 30; Zagaris, *supra* note 30; Mydans, *supra* note 30. As a general matter, "[g]overnments can have diverse motives for permitting or denying the supply of weapons to conflict areas," including, but not limited to, "[r]estraining or promoting arms supplies to resolve conflicts" and economic gain. See WEZEMAN, *supra* note 10, at 24–30. Bout's current attempt to declare his 2010 extradition invalid arguably involves putting political pressure on Thailand. *Viktor Bout's Attorneys Debate Legality of His Extradition to the US*, *supra* note 34.

<sup>190</sup> "[A] clampdown on the illicit activities of some traffickers would reduce the bevy of arms peddlers upon which governments have come to rely." Austin, *supra* note 55, at 208–09.

<sup>191</sup> Andrew Feinstein, *Quick Study: The Global Arms Trade: Highly Lethal and Highly Under-Regulated*, *ECONOMIST* (Nov. 2, 2011, 12:14 PM), <http://www.economist.com/blogs/prospero/2011/11/quick-study-global-arms-trade>.

<sup>192</sup> Bout dealt directly with the officials in Liberia, the Democratic Republic of the Congo, Rwanda, Angola, and Sierra Leone. FARAH & BRAUN, *supra* note 11, at 10, 155. Indeed, when Bout agreed to sell FARC weapons during the DEA sting operation in 2008, he acknowledged that they would need an official to sign a false EUC. Schmidle, *supra* note 21, at 61. Officials often help brokers circumvent arms controls and facilitate fake documents. Stohl, *supra* note 74; see also

facilitate black and gray arms trafficking<sup>193</sup> and may sell false EUCs or accept bribes in return for “looking the other way” when a shipment violates an embargo or national laws.<sup>194</sup> States that knowingly export or transfer arms into conflict zones have not accepted responsibility for the abuses that the weapons they furnish make possible and have no incentive to do so.<sup>195</sup>

Ultimately, Bout’s conviction took one important “merchant of death” out of circulation.<sup>196</sup> However, the system remains intact and other arms dealers have already taken his place—neither his prosecution nor his sentence deterred them.<sup>197</sup> It may be unrealistic to attempt to ban SALW entirely,<sup>198</sup> but diversifying the current tools used against arms brokers to attempt and achieve broker accountability is in order.<sup>199</sup> Using the ICC to hold illicit arms brokers accountable is a promising solution that avoids many of the pitfalls of current arms control strategies.

#### D. *About the International Criminal Court*

Before delving into the explanation of why the ICC could have a positive impact on attempts to hold arms traffickers accountable,<sup>200</sup> some background on the court is necessary. The ICC is different from

discussion *supra* note 189. For further discussion of how African states in particular have facilitated illicit arms trafficking, see generally Dawn L. Rothe & Jeffrey Ian Ross, *How States Facilitate Small Arms Trafficking in Africa: A Theoretical and Juristic Interpretation*, 5 AFR. J. CRIMINOLOGY & JUST. STUD. 1 (2011).

<sup>193</sup> Rothe & Ross, *supra* note 192, at 1–2. “For example, in 2000, weapons were transferred from manufacturers in Bulgaria and the Ukraine to Angola in violation of the United Nations Security Council arms embargo against the rebel group UNITA. . . . [M]any other states . . . were complicit in the transfer of these weapons by providing falsified end-user certificates, storage, and transit.” *Id.* at 2 (footnote omitted) (citation omitted).

<sup>194</sup> UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 5 (“Because large-scale arms trafficking is dependent on corruption, most transactions involve a combination of officials and international arms traffickers.”); Torbey, *supra* note 10, at 341–42.

<sup>195</sup> Rothe & Ross, *supra* note 192, at 7.

<sup>196</sup> Stohl, *supra* note 74.

<sup>197</sup> GUNRUNNING SUCCESSORS, *supra* note 35.

<sup>198</sup> SALW have legitimate police, military, and civilian uses. Stohl, *supra* note 74; see also LAURENCE, *supra* note 14, at 16, 18 (“It should also be noted that the lighter and smaller the weapon, the more likely it is that there are provisions for its legitimate use by citizens for personal security, for hunting, and for other culturally acceptable uses. . . . [D]ealing with this issue is also more challenging because light weaponry is found in the inventory of every state’s legitimate armed forces and in some cases of the police as well.”); SMALL ARMS CONSULTATIVE GROUP PROCESS, DEVELOPING INTERNATIONAL NORMS TO RESTRICT SALW TRANSFERS TO NON-STATE ACTORS 3 (2006).

<sup>199</sup> An effective arms control agenda must not only address the political dimension of states that supply weapons and the impact of changes to global defense, but also the increased usage of dual-use technology in defense equipment, and “the pervasiveness of globalized illicit arms networks.” Cooper, *supra* note 91, at 118.

<sup>200</sup> See *infra* Part II.A.

other courts in key ways, as outlined in the Rome Statute.<sup>201</sup> First, the ICC adheres to the principle of complementarity, meaning that the ICC has limited jurisdiction and may only act where national legal systems are unable or unwilling to act.<sup>202</sup> Second, the ICC has circumscribed jurisdiction over subject matter and is only competent to hear the “most serious crimes of concern to the international community as a whole.”<sup>203</sup> The Rome Statute identifies four crimes that meet this requirement: (1) genocide;<sup>204</sup> (2) the crime of aggression;<sup>205</sup> (3) war crimes;<sup>206</sup> and (4) crimes against humanity.<sup>207</sup>

Third, the ICC has circumscribed jurisdiction over persons.<sup>208</sup> In order for an individual who has committed a crime within the ICC’s mandate to become a defendant in the court, one of the following must be true: (1) the state where the crime was committed consents to ICC jurisdiction; (2) the state of nationality of the accused consents to jurisdiction; (3) the U.N. Security Council refers a situation to the ICC;<sup>209</sup> or (4) a state not party to the Rome Statute accepts the court’s

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<sup>201</sup> Rome Statute, *supra* note 37. The Rome Statute is the treaty that governs the ICC. *Id.* art. 1.

<sup>202</sup> *Id.* art. 17. However, state prosecutions only take priority over ICC prosecutions where the conditions of Article 17 are met. *Id.* A case is inadmissible for complementarity purposes where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint . . . [or]
- (d) The case is not of sufficient gravity to justify further action by the Court.

*Id.* The ICC is not supposed to replace the role of state court; it supplements national systems in certain cases. Arsanjani, *supra* note 39, at 24–25. For further complementarity analysis, see William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53 (2008).

<sup>203</sup> Rome Statute, *supra* note 37, art. 5.

<sup>204</sup> *Id.* art. 6. Genocide is defined as killing or other acts with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. *Id.*

<sup>205</sup> *Id.* art. 5(1)(d), 5(2). The crime of aggression is not defined within the Rome Statute and the definition adopted at the ICC’s first review conference in 2010 may not be used as authority for prosecution by the ICC until 2017. ICC, REVIEW CONFERENCE OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/OR/RC-11-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf).

<sup>206</sup> Rome Statute, *supra* note 37, art. 8. War crimes are defined as grave breaches of the Geneva Conventions of 1949 or other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. *Id.*

<sup>207</sup> *Id.* art. 7. Crimes against humanity are defined as killing or other acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. *Id.*

<sup>208</sup> *Id.* arts. 12–19.

<sup>209</sup> In the case of a Security Council referral, the ICC retains jurisdiction even if the accused is a national of a non-state party or if the crime is committed in a non-state party. *Id.*

jurisdiction.<sup>210</sup> Finally, assuming the court has jurisdiction over the potential defendant's crime and the defendant's person, the ICC may only prosecute crimes that were committed on or after the date the Rome Statute came into effect.<sup>211</sup>

## II. THE ICC AS A FORUM TO ADDRESS ARMS TRAFFICKING

This Note proposes the ICC as a mechanism to supplement current attempts to hold arms traffickers accountable. Within Part II, Section A discusses why the ICC is well equipped to address illicit arms trafficking. Section B examines the logistics of prosecuting an arms trafficker in the ICC and advances two theories of international criminal liability that tie arms traffickers to the crimes that the weapons they sell make possible: aiding and abetting and co-perpetration. Section C responds to potential criticisms of ICC involvement. Given the failure of current mechanisms to deter arms traffickers and hold them fully accountable,<sup>212</sup> and the need to control availability of weapons in order to prevent global conflicts, ICC involvement would provide a much-needed update to the current strategies used to control arms.

### A. *The ICC Is Well Suited to Address Arms Trafficking*

While the ICC retains limited jurisdiction over persons and crimes,<sup>213</sup> the venue is well equipped to address international arms trafficking. Using an international venue such as the ICC to stem the illicit global trade in arms has many advantages. First, ICC prosecutions could create more complete accountability for the crimes committed by illicit arms brokers and help compensate for the failings of other mechanisms.<sup>214</sup> ICC involvement would help overcome the issue of state self-interest with which other mechanisms have had difficulties.<sup>215</sup> Current efforts to prevent illicit arms traffickers from operating have largely relied on state implementation for their success,<sup>216</sup> despite the reality that states are not always the main actors in contemporary global

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<sup>210</sup> *Id.* art. 12. The United States was heavily involved in ICC negotiations, but it is not a party to the treaty and it rejects the idea that the ICC may have jurisdiction where the accused national's state does not consent. Arsanjani, *supra* note 39, at 26.

<sup>211</sup> Rome Statute, *supra* note 37, art. 11.

<sup>212</sup> See *supra* Part I.B–C.

<sup>213</sup> See *supra* Part I.D.

<sup>214</sup> Arms traders have successfully eluded efforts to regulate the small arms trade. DAMIEN ROGERS, POSTINTERNATIONALISM AND SMALL ARMS CONTROL: THEORY, POLITICS, SECURITY 35 (2009).

<sup>215</sup> See *supra* Part II.

<sup>216</sup> See *supra* Part II.

affairs.<sup>217</sup> It is, therefore, not entirely surprising that arms brokers acting outside of state auspices are often complicit in gross violations of international law, but attempts to control illicit arms brokering through traditional state-based mechanisms have proved inadequate. ICC prosecutions could remedy many of these shortfalls.

For example, currently few nations can exercise prescriptive jurisdiction over arms traffickers—either no laws authorize them to do so or the laws are limited to persons and property within the state.<sup>218</sup> ICC involvement alleviates this problem, as the Rome Statute contains the legal framework necessary to prosecute traffickers and is not dependent on domestic implementing laws.<sup>219</sup> However, even assuming that a state can exercise jurisdiction over an arms trafficker, prosecutions frequently do not occur, either because of corruption<sup>220</sup> or fears of taking on a powerful arms trafficker from whom the state may wish to purchase weapons.<sup>221</sup> On the other hand, because the ICC is an international body, it is likely less vulnerable than national courts to threats from outside groups who do not wish to see a defendant convicted.<sup>222</sup> Similarly, using the ICC to prosecute a trafficker removes individual state responsibility and increases the possibility for collective action, making it more politically realistic for states to cooperate, as they are no longer jeopardizing their own weapons supplies.<sup>223</sup> Ultimately, a centralized approach to arms trafficking reduces the current burden on states to act independently.<sup>224</sup>

Second, even where a domestic court has jurisdiction over an arms trafficker, as the United States did over Viktor Bout, the ICC remains advantageous. The threat of an ICC prosecution has greater deterrence

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<sup>217</sup> ROGERS, *supra* note 214, at 32.

<sup>218</sup> This would exempt third-country arms deals, where the weapons never pass through the country where the broker operates. *See supra* note 119; *see also* Bellal, *supra* note 53.

<sup>219</sup> *See supra* Part I.D.

<sup>220</sup> *See supra* Part I.C.

<sup>221</sup> *See supra* note 190 and accompanying text.

<sup>222</sup> Smith, *supra* note 54; *see also* Tom Obokata, *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*, 54 INT'L & COMP. L. Q. 445, 454 (2005) ("National criminal justice systems are more vulnerable to these practices, as it may be easy for traffickers, such as organized criminal groups, to influence them to advance their business of trafficking. However, being an independent international judicial organ with judges who have no personal interests or opportunities for gain, it is arguable that it is difficult for criminals to influence the judges of the ICC."). While there is the potential that U.N. Security Council states could refuse to refer a case to the ICC for political reasons, this would only apply in cases where the potential defendant is from a country that is not an ICC party and does not consent to ICC jurisdiction.

<sup>223</sup> Global cooperation, through intelligence sharing, investigation, arrest, and prosecution, is necessary for international law enforcement authorities to keep pace with arms brokers. Austin, *supra* note 55.

<sup>224</sup> Schloenhardt, *supra* note 147, at 96.

powers than the threat of prosecution in a domestic court.<sup>225</sup> It is problematic that existing mechanisms, including prosecutions, have not deterred arms brokers, because the brokers are business people—a class generally considered to include deterrable, rational actors.<sup>226</sup> ICC measures are more effective deterrents—an ICC indictment and arrest warrant would make the trafficker vulnerable to arrest in any state that is a party to the ICC.<sup>227</sup> As many illicit arms brokers live in European nations that are parties to the ICC, this is a significant threat that would greatly restrict their freedom of movement.<sup>228</sup> After the indictment is issued, the threat remains regardless of whether the trafficker is ultimately prosecuted in the ICC.

Prosecutions of human rights violators generally contribute to preventing future atrocities.<sup>229</sup> However, domestic convictions of illicit

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<sup>225</sup> “By creating a global consensus to assign criminal responsibility and provide appropriate punishment to those most responsible for atrocities of concern to the international community as a whole, the ICC will ultimately lead to their reduction and cessation.” Wasana Punyasena, *Conflict Prevention and the International Criminal Court: Deterrence in a Changing World*, 14 MICH. ST. J. INT’L L. 39, 68 (2006). Punyasena further hypothesizes that “[t]he mere threat of potential jurisdiction by the ICC encourages States Parties to be more vigilant and proactive in prosecuting . . . perpetrators . . .” *Id.* at 69 (footnote omitted). Payam Akhavan adds that, “even these modest and early glimmerings of international criminal justice may be dramatic and transformative.” Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 31 (2001). The ICC may also improve overall deterrence by also indicting nonviolent and subordinate criminals. Eamon Aloyo, *To Indict or Not to Indict? The ICC, Deterrence, and Nonviolent and Subordinate International Criminals* (Apr. 2, 2012) (unpublished manuscript), available at <http://wpsa.research.pdx.edu/meet/2012/aloyo.pdf>.

<sup>226</sup> Deterrence takes place when one party’s threats cause another to refrain from a course of action. Paul K. Huth, *Deterrence and International Conflict: Empirical Findings and Theoretical Debates*, 2 ANN. REV. POL. SCI. 25, 26 (1999). In a study of cocaine smugglers, research found the smugglers could be deterred depending on their perception of the risks. R. Anthony, *A Calibrated Model of the Psychology of Deterrence*, 56 BULL. ON NARCOTICS 49 (2004), available at [https://www.unodc.org/pdf/bulletin/bulletin\\_2004\\_01\\_01\\_1\\_Art2.pdf](https://www.unodc.org/pdf/bulletin/bulletin_2004_01_01_1_Art2.pdf). Anthony found that the fees necessary to induce someone to smuggle drugs rose in proportion to the increased risk, and the fees demanded escalate as the consequences become more severe. *Id.* at 62. However, the smugglers were largely rational actors, taking risks for gains by considering whether the level of risk was acceptable; if the risk was too high, they would not smuggle. *Id.* Similarly, if the costs were high enough for arms traffickers, either the price they would demand from purchasers would be too high for the business to continue or the traffickers would not accept the risk. To deter a trafficker, the threat needs to be severe enough to prevent recurrence of the offense. Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 285 (2002). This Note argues that the ICC is more equipped to provide this threat.

<sup>227</sup> The ICC enforces arrest warrants through cooperation of member states, which are required to cooperate with investigations and prosecutions. Rome Statute, *supra* note 37, arts. 86–87. When the court indicts someone, it may request specific cooperation in writing. *Id.* art. 89(1).

<sup>228</sup> For example, al-Kassar lived in Spain, an ICC party. Keefe, *supra* note 115; *see also supra* note 119. This contributes to the ICC’s ability to deter in a way that other attempts have failed. *See supra* note 226.

<sup>229</sup> Akhavan, *supra* note 225, at 8, 10, 30. (“Precedents of accountability, however selective and limited, contribute to the transformation of a culture of impunity that has hitherto implied the political acceptability of massive human rights abuses. . . . Publicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of

arms brokers have not thwarted arms broker efforts. For the reasons noted above, the ICC offers an opportunity to provide a better deterrence role and change the existing pattern of arms broker impunity. Finally, it makes sense for the ICC to have jurisdiction over a crime with the moral prohibition of arms trafficking. As with the other crimes that the ICC has jurisdiction over,<sup>230</sup> arms trafficking is a deadly and pervasive global problem.<sup>231</sup> The ICC is a forum to hear the most serious crimes<sup>232</sup> and cases that are otherwise not being prosecuted.<sup>233</sup> In the case of illicit arms trafficking, the ICC could supplement the current tools used against illicit arms brokers.

### B. *Prosecuting Arms Traffickers in the ICC*

To issue an indictment for an arms trafficker, the ICC prosecutor must determine that the ICC's personal jurisdiction, admissibility, and complementarity provisions are satisfied and that the crime at issue falls under the ICC's subject matter jurisdiction.<sup>234</sup> The prosecutor then advances a theory of liability that links the accused to the crime. A theory of liability takes into account the role that the actor played in the commission of the crime. Under international criminal law, which informs the Rome Statute,<sup>235</sup> individuals who directly perpetrate a crime<sup>236</sup> and individuals in positions of "command responsibility"<sup>237</sup> incur liability for their actions. However, neither of these theories typically applies to arms traffickers, intermediaries whose sole interaction in conflicts involves supplying weapons.<sup>238</sup>

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moral example to transform behavior," whereas "[i]mpunity is often a recipe for continued violence and instability.").

<sup>230</sup> ROGERS, *supra* note 214, at 15–16 ("[T]he widespread availability and ongoing use of small arms is also perceived as a threat common to most if not all governments, and best managed and mitigated by cooperation among member-states belonging to intergovernmental organizations.").

<sup>231</sup> See *supra* Part II.A.

<sup>232</sup> Punyasena, *supra* note 225, at 39.

<sup>233</sup> Schloenhardt, *supra* note 147, at 96 ("Giving an International Criminal Court jurisdiction over crimes such as . . . arms smuggling . . . will mean greater certainty of arresting, prosecuting, and punishing those who [organize], carry out or otherwise engage in these crimes. The ICC would make international law enforcement more efficient and add another layer of criminal justice; it would provide another forum for prosecution in addition to those established at national levels.").

<sup>234</sup> Rome Statute, *supra* note 37, art. 6. This means that the components of the "core crime" the prosecutor is relying on must also be satisfied. These components have been extensively analyzed elsewhere. See Kelly D. Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 CRIM. L.F. 33 (1999).

<sup>235</sup> Rome Statute, *supra* note 37, art. 21.

<sup>236</sup> *Id.* art. 25(2).

<sup>237</sup> *Id.* art. 28.

<sup>238</sup> Misol, *supra* note 18, at 290.

Although arms brokers have less direct responsibility,<sup>239</sup> the Rome Statute provides that one can be indirectly liable if they possess the requisite mens rea (i.e., that the individual committing the acts knew of the crime) and actus reus (i.e., that the individual participated in committing the crime).<sup>240</sup> If both of those requirements are satisfied, an indirect perpetrator of an ICC “core crime” may be subject to the same liability as the principal perpetrator.<sup>241</sup> Keeping in mind the role that arms brokers frequently play in the commission of the ICC’s core crimes, two theories of liability would allow the ICC to prosecute arms traffickers as aiding and abetting,<sup>242</sup> and co-perpetration.<sup>243</sup>

### 1. Aiding and Abetting

The first theory of liability that applies to many arms traffickers is complicity, or aiding and abetting.<sup>244</sup> Aiding and abetting permits criminal liability for an individual’s part in a crime committed by another.<sup>245</sup> Since the Nuremberg Trials, those who aid and abet crimes have been held responsible under international criminal law.<sup>246</sup> Under the Rome Statute, an individual is criminally responsible for a crime within the ICC’s jurisdiction if that person, for the purposes of facilitating the commission of such a crime, aided, abetted, or otherwise assisted in its commission.<sup>247</sup> One can be criminally liable under the Rome Statute if he or she contributes in “any other way.”<sup>248</sup> This extends

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<sup>239</sup> Orlovsky, *supra* note 48, at 358. As Gerhard Werle points out, “the degree of criminal responsibility does not diminish as distance from the actual act increases; in fact it often grows.” Werle, *supra* note 50.

<sup>240</sup> Rome Statute, *supra* note 37, art. 6. The Rome Statute requires intent “that person means to cause that consequence or is aware that it will occur in the ordinary course of events,” and knowledge as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” *Id.* art. 30.

<sup>241</sup> *Id.* art. 25.

<sup>242</sup> *Id.* art. 25(3)(c); Orlovsky, *supra* note 48, at 358–59.

<sup>243</sup> Rome Statute, *supra* note 37, art. 25(3)(d).

<sup>244</sup> Misol, *supra* note 18, at 290.

<sup>245</sup> Orlovsky, *supra* note 48, at 358–59.

<sup>246</sup> The Nuremberg Charter provided individual responsibility for “accomplices participating in the formulation or execution of a common plan or conspiracy to commit” crimes included under the charter. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal sect. II, art. 6, Aug. 8, 1945, 82 U.N.T.S. 280.

<sup>247</sup> This includes providing the means for its commission. Rome Statute, *supra* note 37, art. 25(3)(c). This includes if one “in any other way contributes” to a crime or attempted crime where a group of people are acting with a common purpose. *Id.* art. 25(3)(d).

<sup>248</sup> *Id.* art. 25.

to corporate actors who supply products necessary to commit crimes against human rights.<sup>249</sup>

Aiding and abetting includes a conduct element—actus reus—and mental state—mens rea.<sup>250</sup> The actus reus for aiding and abetting requires practical assistance, encouragement, or support that substantially affects perpetration of the crime.<sup>251</sup> The mens rea is knowledge that these acts assist in the commission of the offense.<sup>252</sup> Aiding and abetting, therefore, contains an objective condition (providing assistance or support that substantially impacts the crime), and a subjective component (knowledge that actions assist in the commission of the crime).<sup>253</sup>

Ad hoc predecessor tribunals that provide structural precedent and decisions with persuasive authority for the ICC, including the International Criminal Tribunal for Yugoslavia (ICTY)<sup>254</sup> and the International Criminal Tribunal for Rwanda (ICTR),<sup>255</sup> established individual responsibility for persons who aided or abetted international crimes.<sup>256</sup> For the actus reus requirement, the ICTY held that the accused's act or omission could occur before, during, or after the principal offender's act, as long as the accused's act or omission had a substantial effect on the commission of the crime.<sup>257</sup> Mere presence at

<sup>249</sup> Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 304 (2008).

<sup>250</sup> Prosecutor v. Furundzija, Case No. ICTY IT-95-17/1, Judgment, ¶ 249 (Dec. 10, 1998).

<sup>251</sup> *Id.* ¶ 235.

<sup>252</sup> *Id.* ¶¶ 236–39. However, some commentators have contested whether knowledge that actions will facilitate a crime suffices, or whether purpose or intent to commit the crime is necessary under the Rome Statute. Cassel, *supra* note 249, at 309, 310, 314–15. Even so, Cassel acknowledges that

“[P]urpose” in the ICC Statute need not mean the exclusive or even primary purpose. A secondary purpose, including one inferred from knowledge of the likely consequences, should suffice. . . . This seems to be the only reasonable interpretation of “purpose,” if article 25 (3)(c) is interpreted, as it must be, in light of the “object and purpose” of the ICC Statute.

*Id.* at 312–13. Therefore, customary international law, including the ICTY case law requiring mere knowledge for those who aid and abet may suffice. *Id.* at 315.

<sup>253</sup> Bellal, *supra* note 53, at 459–60. While the accused needs to know that what they are doing is leading to the commission of a crime, popular media coverage and public arms embargoes can all be used to prove knowledge. Torbey, *supra* note 10, at 357–58.

<sup>254</sup> The ICTY was an ad-hoc U.N. tribunal that heard cases dealing with Balkan war crimes of the 1990s. *About the ICTY*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited Jan. 5, 2015).

<sup>255</sup> The ICTR was an ad-hoc tribunal established by the U.N. Security Council to resolve violations of humanitarian law from the Rwandan genocide. *The ICTR in Brief*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictcr.org/en/tribunal> (last visited Jan. 5, 2015).

<sup>256</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7.1, U.N. Doc. S/RES/827 (May 25, 1993) (most recently updated by S.C. Res. 1877, U.N. Doc. S/RES1877 (July 7, 2009)); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6.1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>257</sup> Prosecutor v. Krnojelac, Case No. ICTY IT-97-25-T, Judgment, ¶¶ 88–90 (Mar. 15, 2002).

the crime scene without further impact on the principal's actions did not satisfy the actus reus requirement.<sup>258</sup> For the mens rea requirement, the ICTY held that the aider and abettor had to have known that his acts assisted in the commission of the principal perpetrator's crime,<sup>259</sup> although he need not know the exact crime in order to be guilty.<sup>260</sup> The aider and abettor had to be aware of the elements of the principal offender's crime, but did not need to share the mens rea of the principal offender.<sup>261</sup>

Supplying weapons to commit a crime within the Rome Statute's jurisdiction could qualify as aiding and abetting the crime, and lead to individual criminal liability under Article 25.<sup>262</sup> The ICTR observed that liability could attach under a theory of aiding and abetting for weapons suppliers who knew their supplies would be used to commit a crime.<sup>263</sup> Chief of Investigations of the Special Court for Sierra Leone, another ad hoc tribunal predating the ICC, similarly noted that if an arms supplier knows that the weapons they supply will be "misused," the supplier could be prosecuted under the theory of aiding and abetting.<sup>264</sup>

As there are some circumstances in which presence at a crime scene suffices for individual criminal liability,<sup>265</sup> persons who supply weapons ultimately contribute to the crimes those weapons commit; they make execution of the crime possible<sup>266</sup> and could therefore satisfy the Rome Statute's mens rea and actus reus requirements. Proving the objective actus reus component would not be onerous—but for the trafficker's weapons supply, the principal perpetrators would not be able to commit the crime. Proving the subjective mens rea component is more difficult, but not prohibitive. Establishing knowledge that assistance aids in commission of the crime is not the problem—the prosecutor could prove that the broker was aware of country conditions in the destination he or she sold to, that he or she knew the background of his or her clientele, or that he or she knew they intended to commit crimes.<sup>267</sup> Additionally, as arms brokers may be considered

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<sup>258</sup> *Id.*

<sup>259</sup> Prosecutor v. Blaskic, Case No. ICTY IT-95-14, Judgment, ¶ 49 (July 29, 2004); *Krnojelac*, IT-97-25-T, ¶¶ 88–90.

<sup>260</sup> "If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." Prosecutor v. Furundzija, Case No. ICTY IT-95-17/1, Judgment, ¶ 246 (Dec. 10, 1998).

<sup>261</sup> *Krnojelac*, IT-97-25-T, ¶¶ 88–90.

<sup>262</sup> Bellal, *supra* note 53, at 460–61. Bellal notes precedent for holding arms sellers criminally responsible for complicity in the commission of an international crime, citing the 2006 conviction of Guus Van Kouwenhoven. *Id.* at 463.

<sup>263</sup> Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 536 (Sept. 2, 1998).

<sup>264</sup> Misol, *supra* note 18, at 296.

<sup>265</sup> *Furundzija*, IT-95-17/1, ¶ 231.

<sup>266</sup> Misol, *supra* note 18, at 294.

<sup>267</sup> *Id.* at 295. This information frequently arises in the context of an arms deal. Bout

professionals, they are expected to know of international arms embargoes.<sup>268</sup> However, some have interpreted the language in Article 25 to require intent that the crime be committed.<sup>269</sup> While there is still debate over the exact standard, even assuming intent is required, it may be proven in the arms trafficking context.<sup>270</sup> Therefore, aiding and abetting remains a viable theory of liability that could be used against arms traffickers in an ICC prosecution.<sup>271</sup>

## 2. Co-Perpetration<sup>272</sup>

A second theory of criminal liability applicable to hold arms brokers individually criminally responsible for their actions in the ICC is co-perpetration.<sup>273</sup> Co-perpetration occurs when individuals working

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specifically asked the DEA informants posing as FARC members what they intended to do with the weapons and was told that they wanted weapons that could attack U.S. helicopters. Crook, *supra* note 30, at 149.

<sup>268</sup> Orlovsky, *supra* note 48, at 361. Furthermore, “the fact that the act in question is facilitating the sale of a large shipment of arms to a country or group under embargo may be useful for proving mens rea.” *Id.* at 362.

<sup>269</sup> Bellal, *supra* note 53, at 461.

<sup>270</sup> For example, while selling arms to DEA informants in Thailand, Viktor Bout told the purchasers that the United States was also “his enemy” and FARC’s fight against the United States was “his fight.” Crook, *supra* note 30, at 149–50.

<sup>271</sup> As Julia Graff points out, the ICC would still have to grapple with complicated questions in order to reach corporate aiders and abettors:

[I]f a corporation purchases diamonds from a rebel group or a state whose military uses the revenue to purchase arms for use against civilians, will the purchase money itself fall within the definition of “means of commission” or “contribution” to the crime? Or would the corporation have to pay more than fair market value for the commodities it purchases from known human rights violators for such payment to constitute a contribution?

Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BRIEF 23, 26 (2004).

<sup>272</sup> For a general analysis of the ICC’s application of the co-perpetration doctrine, see Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-In-Review*, 7 NW. J. INT’L HUM. RTS. 170, 229–34 (2009).

<sup>273</sup> This collective criminal action doctrine creates individual culpability for people acting collectively. Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT’L L. 693, 694 (2011). In the ICC case of Thomas Lubanga Dyilo, the prosecutor did not plead joint criminal enterprise or the common purpose doctrine and charged Lubanga with co-perpetration. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 27, 2007). Since this case has the greatest precedential value to further ICC decisions, this Note will solely focus on co-perpetration. Furthermore, joint criminal enterprise is not enumerated in the Rome Statute although some commentators have argued that the Rome Statute also provides the basis for this theory of liability. See Stefano Manacorda & Chantal Meloni, *Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?*, 9 J. INT’L CRIM JUST. 159, 175–77 (2011); Van Schaack, *supra* note 272, at 230 (includes an analysis of the Prosecutor’s charges in the *Katanga & Chui* case). Regardless, the ICC Pre-Trial Chamber has specifically differentiated co-perpetration from Joint Criminal Enterprise, and criticized Joint Criminal Enterprise’s “subjective approach.” Thomas

in collaboration commit a criminal act.<sup>274</sup> It allows a court to hold people liable who are intimately involved in the commission of a crime, but do not physically perform the crime's objective elements.<sup>275</sup>

While the ICTY considered co-perpetration as a theory of liability, the doctrine's main support comes from the ICC itself.<sup>276</sup> The ICC Pre-Trial Chamber<sup>277</sup> has concluded that under Article 25(3)(a) of the Rome Statute,<sup>278</sup> when multiple people contribute to committing a crime, anyone who contributes is vicariously responsible for the other's contributions and can be considered as a principal to the crime in its entirety.<sup>279</sup> An indirect perpetrator can be "indispensable" if he controls the agenda, i.e., the plan to commit the crime.<sup>280</sup> The ICC states that the objective (*actus reus*) requirements for co-perpetration are the existence of a common plan between participants,<sup>281</sup> and that the defendant was an essential contributor, who exercised joint control as a result of his or her ability to contribute and/or prevent the crime by not performing.<sup>282</sup>

A contribution is "essential" if the "common purpose" is unable to be achieved without it.<sup>283</sup> The accused can only be a co-perpetrator if he or she could frustrate the commission of the crime by not carrying out his or her task.<sup>284</sup> The subjective (*mens rea*) requirement requires that the accused is aware that his or her actions will result in commission of the crime<sup>285</sup> and that the accused intends the crime to occur, or is aware

Weigend, *Intent, Mistake of Law, and Co-Perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 478 (2008).

<sup>274</sup> Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 CHI. J. INT'L L. 159, 167 (2011).

<sup>275</sup> Van Schaack, *supra* note 272, at 230.

<sup>276</sup> Jain, *supra* note 274, at 179. The ICTY first addressed the doctrine in *Prosecutor v. Stakic*, Case No. ICTY IT-97-24-T, Judgment, ¶ 458 (July 31, 2003). However, the ICC thus far has not followed the ICTY's precedent, and the Pre-Trial Chamber has adopted its own interpretation of Article 25(a)(3). Weigend, *supra* note 273, at 476.

<sup>277</sup> This ICC division is informed when the Prosecutor "considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial . . ." Rome Statute, *supra* note 37, art. 56(1)(a). The functions and powers of the pre-trial chamber are enumerated in the Rome Statute. *Id.* arts. 57–58.

<sup>278</sup> The text of Article 25(3)(a) reads "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." *Id.* art. 25(3)(a).

<sup>279</sup> *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 326 (Jan 27, 2007).

<sup>280</sup> Ohlin, *supra* note 273, at 723.

<sup>281</sup> *Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶¶ 522–25.

<sup>282</sup> *Lubanga*, Case No. ICC 01/04-01/06, ¶¶ 343–45; Ohlin, *supra* note 273, at 723; *see also Katanga & Chui*, Case No. ICC-01/04-01/07, ¶¶ 522–25.

<sup>283</sup> Werle, *supra* note 50, at 962.

<sup>284</sup> Weigend, *supra* note 273, at 479.

<sup>285</sup> *Lubanga*, Case No. ICC-01/04-01/06, ¶ 331; Ohlin, *supra* note 273, at 723.

of the risk that the principal will commit the crime, and accepts or consents to this risk.<sup>286</sup>

Arms traffickers are often indispensable to actors who commit the ICC's core crimes and could, therefore, be liable under a theory of co-perpetration.<sup>287</sup> An arms trafficker frequently has joint control over the crime when weapons are indispensable (the arms are an essential contribution) and the trafficker is aware of the crime that will be committed once the weapons are provided,<sup>288</sup> thus fulfilling the objective requirement that the trafficker could prevent the crime by not performing.<sup>289</sup> As there is often no proof that an arms broker personally took part in hostilities, he can only be guilty if he is tied to the principal offenders.<sup>290</sup> Finally, because of the relatively minimal subjective requirements—awareness and consent that the principal will commit the crime—the ICC Prosecutor could likely demonstrate that arms traffickers knowingly selling to those in conflict zones are aware of what their weapons will be used for and the traffickers' decision to sell the weapons anyway is acceptance that the crime will occur.<sup>291</sup>

### C. Criticism

Some scholars may dismiss the thought of involving the ICC as a tool against illegal arms brokers. Critics may argue that “industrialists” such as arms brokers cannot and should not be indicted for facilitating

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<sup>286</sup> *Katanga & Chui*, Case No. ICC 01/04-01/07, ¶ 533; Ohlin, *supra* note 273, at 723. While a third mens rea requirement is arguably that the co-perpetrators formed a common plan to commit the offense, the ICC's Pre-Trial Chamber considers this to be an objective requirement. Weigend, *supra* note 273, at 480; *see also* *Lubanga*, Case No. ICC 01/04-01/06, ¶ 343. Additionally,

[W]here co-perpetrators commit a crime beyond the framework of the common design. . . . liability for joint commission depends on the *mental element* provided for in the definition of the crime. If the crime does not specify mental requirements, the co-perpetrator has to meet the general *mens rea* standard of Article 30 of the ICC Statute.

Werle, *supra* note 50, at 962. Therefore, “unless otherwise provided in the definition of the crime, it suffices that the co-perpetrator is aware of the risk that the crime might be committed in the execution of the common plan, and that he accepted that risk.” *Id.* at 962–63.

<sup>287</sup> Business leaders such as arms traffickers can be liable under a co-perpetration theory. Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility Under International Law*, 8 J. INT'L CRIM. JUST. 851, 868 (2010).

<sup>288</sup> *See* Ohlin, *supra* note 273, at 723. Where genocide, war crimes, and crimes against humanity are involved, this will frequently be the case. *Lubanga*, Case No. ICC 01/04-01/06, ¶¶ 349–60; *Katanga & Chui*, Case No. ICC-01/04-01/07, ¶¶ 527–32.

<sup>289</sup> *Lubanga*, Case No. ICC 01/04-01/06, ¶¶ 343–45; Ohlin, *supra* note 273, at 723; *see also* *Katanga & Chui*, Case No. ICC 01/04-01/07, ¶¶ 522–25.

<sup>290</sup> A similar issue applied to *Lubanga* and child soldier conscription. Weigend, *supra* note 273, at 476.

<sup>291</sup> *Katanga & Chui*, Case No. ICC 01/04-01/07, ¶ 533; *see also* Ohlin, *supra* note 273, at 723.

international crimes.<sup>292</sup> Others may propose that political reluctance towards increasing the scope of the ICC's power and the currently limited body of international criminal law suggest that it is unlikely an arms broker would be prosecuted in the court.<sup>293</sup> A related criticism is that prosecution of arms brokers before the ICC may be justified in substance, but at odds with the current realities of international criminal law.<sup>294</sup> Another criticism is that it may be difficult to show that the guns trafficked by a broker were the ones actually used in the conflicts. Finally, the ICC has been criticized as inefficient in general and ineffective, in part, because not every country is bound by the ICC's jurisdiction.<sup>295</sup>

While acknowledging these criticisms, this Note advocates the ICC as a supplement to existing mechanisms used to hold arms traffickers accountable, not a solution. It is an additional tool that can contribute to the global problem of illegal arms trafficking, not a panacea. Likewise, in addition to the benefits that would stem from the prosecution and conviction of an illicit arms trafficker in an international venue, there are also deterrent benefits from an ICC indictment and arrest warrant being issued, even without a prosecution. At a minimum, ICC acknowledgement of its potential to act against illicit arms brokers could have a deterrent effect by contributing to the broker's cost-benefit analysis of whether he will face repercussions from undertaking a transaction.<sup>296</sup> The ICC is advantageous here, as it has the potential to be a more effective deterrent than existing measures such as domestic prosecutions.<sup>297</sup> Furthermore, "industrialists" have been prosecuted for their corporate involvement in serious crimes both before and after the Nuremberg trials.<sup>298</sup> U.N. investigations have demonstrated that it is very possible to trace weapons to a specific conflict, even where EUCs have been forged; the issue is that this information has not been marshaled to punish traffickers.<sup>299</sup>

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<sup>292</sup> Kyle Rex Jacobson, *Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 167 (2005).

<sup>293</sup> Schloenhardt, *supra* note 147, at 121.

<sup>294</sup> Orlovsky, *supra* note 48, at 344.

<sup>295</sup> See generally Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840 (2002); Jack Goldsmith, Essay, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003); Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1 (2005).

<sup>296</sup> See *supra* note 226.

<sup>297</sup> *Id.*

<sup>298</sup> Jacobson, *supra* note 292, at 169–99.

<sup>299</sup> For an example of the detail that has been determined about arms used in global conflicts, see Report of the Panel of Experts Pursuant to Security Council Resolution 1341 (2001), para. 19, concerning Liberia, Oct. 26, 2001, S/2001/1015.

Finally, although the ICC may not be perfect, it remains a “vitally necessary alternative to impunity.”<sup>300</sup> As former ICC Chief Prosecutor Luis Moreno-Ocampo has explained, the ICC is only one part of a global system.<sup>301</sup> Moreno-Ocampo has also made compelling arguments that the impact of the ICC is in part based on the “shadow concept”—the majority of cases will never be heard by the ICC, but will instead be solved in the “shadow of the law,” whereby ICC rulings will be used by others to resolve disputes and reach agreements without necessitating the court’s involvement.<sup>302</sup> The ICC is a young court and its predecessors, the ICTR and ICTY, both improved their records over time, suggesting that despite the hurdles the ICC may face at present, it too can have an impact.<sup>303</sup> It is certainly equipped to contribute in the fight to end arms trafficker impunity. As the “shadow” of the International Criminal Court expands, maximizing the prevention of global atrocities,<sup>304</sup> the potential deterrent effects increase as well.

#### CONCLUSION

Illegal arms brokering is a serious international problem that has local consequences.<sup>305</sup> The arms traffickers have largely been able to profit off of conflicts with impunity.<sup>306</sup> Even exceptional convictions, such as that of Viktor Bout, have failed to have a deterrent effect. While the international community has acted against traffickers, other tools can be used to prevent weapons from reaching those who perpetrate

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<sup>300</sup> Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH’S WORLD REPORT 2004, at 194, 194 (2004).

<sup>301</sup> Luis Moreno Ocampo, *Former ICC Chief Prosecutor, Defends the ICC Against Criticisms*, INT’L BAR ASS’N (Feb. 15, 2013), available at <https://www.youtube.com/watch?v=RKiXqS6QQl0>. Ocampo continued his defense of the ICC saying, “When you have a law saying you cannot go ahead when there is a red light, you can move when there is a green light, then, if these rules are respected, you move to enforcement. . . . In this case, this convention that we stop when red light and we move with green light, wasn’t existing in international relations. People would commit crimes and nothing would happen to them. . . . this was the first time ‘hey guys, leaders, there are red lights’. . . . the real issue is for the first time we changed the world, we put red lights for leaders who commit massive atrocities.” *Id.*

<sup>302</sup> See Luis Moreno-Ocampo, *Prosecutor of the ICC, Prepared Remarks Before the Council on Foreign Relations* (Feb. 4, 2010) [hereinafter *Moreno-Ocampo Remarks*], available at <http://www.cfr.org/courts-and-tribunals/prepared-remarks-luis-moreno-ocampo-prosecutor-icc/p21375>. Ocampo was analogizing to a 1979 Yale Law Journal article by Robert Mnookin and Lewis Kornhauser that argued that when family courts make divorce rulings, those rulings help other cases to be resolved outside of court. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966–77 (1979).

<sup>303</sup> Dicker & Keppler, *supra* note 300, at 195–96.

<sup>304</sup> See *Moreno-Ocampo Remarks*, *supra* note 302.

<sup>305</sup> CONTROL ARMS, *supra* note 79, at 8; Austin, *supra* note 55, at 212.

<sup>306</sup> See *supra* Part I.B–C.

human rights abuses. An ICC indictment of an arms trafficker, with or without a subsequent prosecution, is one of these remaining tools.

Using the ICC as a venue for prosecuting an arms trafficker would also help address the political complications that come from state reluctance to upset arms traffickers,<sup>307</sup> by allowing collective action of the ICC's 122 state parties, rather than one state acting alone.<sup>308</sup> There are also causes of action against arms traffickers already embedded in the Rome Statute, whereas many states do not have laws that enable prosecution of arms traffickers.<sup>309</sup> The threat of an ICC prosecution may also have greater deterrent powers, given the overlap between states that are ICC parties and nations where arms traffickers generally reside.<sup>310</sup> Moreover, illegal arms trafficking is a deadly crime that belongs in the ICC,<sup>311</sup> a venue created to hear the world's most serious crimes.<sup>312</sup> The ICC has the tools to be an effective forum for prosecuting arms dealers and could create complete culpability, while deterring brokers from selling arms in the future to those who will use them to commit atrocities.

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<sup>307</sup> Austin, *supra* note 55, at 208–09.

<sup>308</sup> *The States Parties to the Rome Statute*, *supra* note 37.

<sup>309</sup> This would exempt third-country arms deals, where the weapons never pass through the country where the broker operates. *See supra* Part I.B.2; *see also* Bellal, *supra* note 53.

<sup>310</sup> *See supra* note 228.

<sup>311</sup> Punyasena, *supra* note 225, at 39.

<sup>312</sup> Dicker & Keppler, *supra* note 300, at 196.