THE CASE FOR PROSECUTING ARMS TRAFFICKERS IN THE INTERNATIONAL CRIMINAL COURT

Leigh Rome†

TABLE OF CONTENTS

INTRODUCTION .............................................................................................................. 1150
I. ILLICIT ARMS BROKERING AND ATTEMPTS TO HOLD ARMS BROKERS ACCOUNTABLE ........................................................................................................ 1157
A. Arms Transfer Markets and Illicit Arms Brokering .............................. 1158
B. Analysis of Current Attempts to Hold Arms Brokers Accountable ..... 1160
   1. Arms Embargoes ............................................................................ 1160
   2. Domestic Laws ............................................................................... 1162
   3. International Agreements ............................................................. 1166
   4. The Arms Trade Treaty ............................................................... 1169
C. Problems with Current Attempts to Hold Arms Brokers Accountable ................................................................................................ 1172
D. About the International Criminal Court ........................................... 1175

II. THE ICC AS A FORUM TO ADDRESS ARMS TRAFFICKING .................................... 1177
A. The ICC Is Well Suited to Address Arms Trafficking ....................... 1177
B. Prosecuting Arms Traffickers in the ICC ......................................... 1180
   1. Aiding and Abetting ................................................................. 1181
   2. Co-Perpetration ......................................................................... 1184
C. Criticism ......................................................................................... 1186

CONCLUSION................................................................................................................... 1188

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

† 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.\(^1\)

**INTRODUCTION**

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

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

\(^2\) 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 . . . .”).

\(^3\) The terms “arms” and “weapons” are used interchangeably in this Note.

\(^4\) 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
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

\(^5\) 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
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).

\(^6\) SMALL ARMS SURVEY, SMALL ARMS TRANSFER CONTROL MEASURES AND THE ARMS TRADE
trading relies on the lack of control of legal transfers); Wood, supra note 5, at 8.

\(^7\) ARMS WITHOUT BORDERS, supra note 2, at 2.

\(^8\) For the purposes of this Note, the terms “arms brokering” and “arms trafficking” are used
interchangeably.

\(^9\) Wood, supra note 5.

\(^10\) 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, most arms brokers transferring weapons illegally do so with impunity.12

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


13 Conflict zones, or “complex emergencies,” are defined by the United Nations and Inter-Agency Standing Committee as “humanitarian crises 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).

14 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.”).

15 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 DEP’T OF PUB. INFO., DPI/2428G, SMALL ARMS REVIEW CONFERENCE 2006: BACKGROUNDER 1 (2006), available at http://www.un.org/events/smallarms2006/pdf/backgrounder.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. 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,\(^{16}\) holding arms brokers accountable has proven challenging. The case of Viktor Bout is illustrative.\(^{17}\) Bout has been referred to as “the McDonald’s of arms,”\(^{18}\) the “merchant of death,”\(^{19}\) and the “Lord of War.”\(^{20}\) Once considered the world’s preeminent arms trafficker,\(^{21}\) Bout supplied weapons to any buyer who could pay, often arming both sides of the world’s bloodiest conflicts.\(^{22}\)
In the 1990s, a variety of strategies were adopted to try and dismantle Bout’s arms dealing operation, including a U.N. Security Council travel ban, a U.N. arms embargo on the countries where Bout and other brokers worked, U.S. Office of Foreign Assets Control (OFAC) sanctions, and an Interpol red notice issued by Belgium. After two fruitless decades, the United States apprehended Bout in 2008, by facilitating a Drug Enforcement Administration (DEA) sting operation that lured him to Thailand. 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. Bout was ultimately tried on restrictive terrorism charges that were closely tied to the sting operation. 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.

23 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.
25 See infra note 85.
26 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].
27 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.
29 Bout, 860 F. Supp. 2d at 305.
30 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).
31 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.
32 See infra note 186.
the minimum sentence. 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.  


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. 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. The governing treaty, the Rome Statute, sets forth the crimes and persons within the Court’s jurisdiction. An ICC matter begins when a state party or the U.N. Security Council refers a “situation” to the court, or when the prosecutor opens an investigation. The ICC has limited jurisdiction, and the Rome Statute

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See infra Parts I.B–C.


Rome Statute, supra note 37.


Rome Statute, supra note 37, arts. 13–14.

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 (last visited Jan. 4, 2015).
includes strict admissibility and complementarity rules. To prosecute an arms trafficker in the ICC, the trafficker must be complicit to one of the ICC’s “core crimes,” which are limited to genocide, crimes against humanity, war crimes, and the crime of aggression. Given the nature of illicit arms brokering, arms brokers are likely instrumental to these core crimes. 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—they can incur the same liability as principle perpetrators under the Rome Statute, provided that a theory of liability links them to a “core crime.”

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. First, an ICC indictment could reach traffickers residing in nations without domestic laws regulating arms trafficking. 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, and the ICC is less susceptible to individual state concerns about taking on a powerful arms trafficking organization. Third, as one indicted by the

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42 See infra Part I.D.
43 Rome Statute, supra note 37, art. 5.
44 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.
45 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.
46 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.
47 The crime of aggression has not yet been defined. Id. art. 5(2).
49 Id. at 358.
50 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.”).
51 See infra Part II.B.
52 See infra Part II.A.
53 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.
ICC is vulnerable to arrest in any ICC party state, the ICC can deter arms traffickers in a tangible way that domestic prosecutions cannot. 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. 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. Despite Bout’s incarceration and financial penalties, his close associates and former competitors continue to deal weapons. 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,

56 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).
57 Critically, many arms brokers reside in European nations that are parties to the ICC. See infra Part II.A.
58 See infra Part I.C.
59 See infra Part II.A.
60 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.61 In the legal market, parties comply with relevant laws and arms embargoes.62 One way to determine whether an arms transaction is legal is by looking to see whether the end-user certificate (EUC) is authentic.63 Black market transfers are between non-state actors64 and occur outside of laws, in contravention of arms embargoes65 and without government authorization.66 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.67 Gray market transfers typically include illicit components,68 such as forged EUCs.69 Gray market transfers may also involve governments supplying arms to non-state groups and engaging with arms providers outside of regular channels.70

61 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.
62 Keppler, supra note 14, at 386.
63 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.
64 Orlovsky, supra note 48, at 347.
65 Keppler, supra note 14, at 387.
66 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.
67 Schmidle, supra note 21, at 56.
68 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 . . . .”).
69 Schmidle, supra note 21, at 56.
70 Orlovsky, supra note 48, at 347.
Brokers normally operate in this gray zone, as few countries have a formal system of authorizing arms brokering.\textsuperscript{71} When arms brokers make weapons available in the gray and black markets, they provide the tools needed to instigate, escalate, and reignite conflicts.\textsuperscript{72} In practice, the demarcation between the legal, black, and gray arms markets is not clear.\textsuperscript{73}

Because SALW are easy to transfer and hard to trace, brokers can often profit from fueling conflicts without repercussions.\textsuperscript{74} 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.\textsuperscript{75} At least a third of a million people are killed from armed violence each year, and more are injured, abused, and displaced.\textsuperscript{76} In addition, the illicit arms trade perpetuates fear and instability in conflict zones and leads to extreme insecurity and economic hardship.\textsuperscript{77} The illicit arms trade also adversely impacts human and economic developmental goals.\textsuperscript{78} 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.\textsuperscript{79} Given these consequences, some attempts have

\textsuperscript{71} 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).

\textsuperscript{72} Illicit Trafficking, Small Arms Survey, http://www.smallarmsurvey.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.”).

\textsuperscript{73} Feinstein, supra note 17, at xxiii.


\textsuperscript{75} United Nations Office on Drugs & Crime, supra note 5, at 134.

\textsuperscript{76} Arms Without Borders, supra note 2, at 1.

\textsuperscript{77} 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).

\textsuperscript{78} UNODA Occasional Papers No. 23, supra note 4, at 1; see also Saavedra, supra note 14, at 66–67.

\textsuperscript{79} 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. However, the effectiveness of current measures is disputed.

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

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).

80 See infra Part I.B.
81 See infra Part I.B–C.
82 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].
83 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)).
84 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).
threaten international security. At the same time, arms embargoes may cause less collateral damage than other types of economic sanctions. The United Nations has blacklisted arms brokers who routinely trade in conflict zones to achieve a similar purpose.

Arms embargoes have had little success at stemming the global trade in weapons; nearly every arms embargo has been “systemically violated.” 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. In addition, weapons-producing states may use arms as a political tool to further their own policy interests, regardless of applicable embargoes. 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. 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.

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88 Id. at 595.
89 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 (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 (last updated Apr. 3, 2014).
90 PUTTING TEETH IN THE TIGER, supra note 82, at xiv.
91 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.
92 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 the share of the security risks when choosing to violate an embargo . . . .” Id.
93 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.
94 Cooper, supra note 91, at 120.
Enforcing arms embargoes also creates jurisdictional problems. There are no mechanisms in international law specifically aimed at arms embargo enforcement. Enforcement and implementation of U.N. arms embargoes must come from member states. 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. Without police or military forces ordered to enforce an embargo, the embargo is often ineffective.

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. The Arms Export Control Act (AECA) gives the President the power to control import and export of munitions and services generally, but the 1996 Brokering Amendment to the AECA extends control to all arms transfers involving an individual subject to U.S. jurisdiction. This Amendment recognized that the United States could not control arms deals conducted by U.S. citizens outside the United States, or by foreigners, 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.

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96 See Orlovsky, supra note 48, at 349.
97 Farah & Braun, supra note 11, at 77.
98 Orlovsky, supra note 48, at 349.
100 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 § (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).
101 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.
103 Id. § 2778.
104 Keppler, supra note 14, at 391.
Other countries were initially reluctant to adopt similar regulations, but this has begun to change. 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. 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.

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

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

107 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.

108 Wood, supra note 5.

109 Brokering, SMALL ARMS SURVEY, http://www.smallarmssurvey.org/de/regulations-and-rolls/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.

110 Kathi Austin, Viktob 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’ Viktob 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).

111 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.

112 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. Brokers are also able to work around domestic laws that are not comprehensive.

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. This has created jurisdictional problems when enforcing domestic laws and has contributed to broker immunity. Arms brokers tend not to reside in the countries where the weapons they supply originate or the countries for which the weapons are destined. 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. Alternatively, if weapons are not exported from the country where the broker conducts his activities, arms export controls may not apply. To complicate matters further, brokers are accustomed to taking an additional precaution: creating shell companies

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114 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.

115 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.


117 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.

118 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 IIA.

119 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.

or front companies with sham leadership to conceal illegal brokering activities. 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.

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

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121 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 Keppler, supra note 14, at 387–88.

122 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.

123 FARAH & BRAUN, supra note 11, at 179.

124 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.

125 Id. at 78.

126 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.

127 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.

128 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.\(^{129}\)

### 3. International Agreements

An illicit arms transfer is not considered an international crime for purposes of individual criminal liability,\(^{130}\) but international organizations have made agreements to address illicit arms brokering.\(^{131}\) 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),\(^{132}\) 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).\(^{133}\) The Firearms Protocol was the first legally binding instrument on small arms that applied worldwide.\(^{134}\) 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.\(^{135}\) The Protocol purports to provide a framework for states to prevent proliferation of illegal firearms.\(^{136}\) PoA similarly sets out a range of measures for states to take to control illegal SALW transfers, but it is a non-binding mechanism.\(^{137}\)

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\(^{129}\) This has been further evidenced by the states’ reluctance to criminalize arms embargo violations. \textit{Id.} at 349, 377–78; \textit{see also infra} Part I.C.

\(^{130}\) Bellal, \textit{supra} note 53, at 458.

\(^{131}\) For additional discussion on the international organization efforts discussed in this subpart, see Saavedra, \textit{supra} note 14.


\(^{135}\) Firearms Protocol, \textit{supra} note 132, arts. 2, 5–11, 13.

\(^{136}\) \textit{Id.} art. 2.

\(^{137}\) PoA, \textit{supra} note 133. Recommendations include suggestions on manufacturing, marking, keeping records, tracing, managing stockpiles, identifying surplus, and transferring internationally. \textit{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. 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 and adopted a Common Position on controlling arms brokering. 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. The Organization also adopted Model Regulations on broker controls and created a procedural system for applying the regulations. 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. Finally, the Wassenaar Group’s 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.

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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138 See ARMS WITHOUT BORDERS, supra note 2, at 3.
141 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).
142 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).
144 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).
Agreement gives states control over when to supply or refuse to supply arms, making it less effective as an enforcement mechanism.\textsuperscript{146} Additionally, while the various conventions promote judicial cooperation, they are dependent on domestic bodies to produce results.\textsuperscript{147} Furthermore, most of the agreements are not legally binding by themselves\textsuperscript{148} and have not been formally adopted as part of national laws or implemented consistently.\textsuperscript{149} This has stymied the development of binding, globally applicable rules on arms brokering.\textsuperscript{150} 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.\textsuperscript{151}

U.N. Security Council efforts have also been a disappointment, in terms of creating accountability.\textsuperscript{152} Although investigations have created detailed reports that document the extent of arms embargo violations, and expose the “arms shadow world,”\textsuperscript{153} the reports do not tangibly punish or deter the arms brokers, and arms pipelines remain active.\textsuperscript{154} 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.\textsuperscript{155}

\begin{footnotesize}
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\item \textsuperscript{146} \textit{Wasenaar Arrangement}, \textit{supra} note 144.
\item \textsuperscript{147} Andreas Schloenhardt, \textit{Transnational Organised Crime and the International Criminal Court Developments and Debates}, 24 U. Queensland L.J. 93, 95 (2005).
\item \textsuperscript{148} PoA is implemented on a voluntary basis; states affirm the “will” to implement, but face no consequences if they do not. \textit{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).
\item \textsuperscript{149} \textit{See Arms Without Borders}, \textit{supra} note 2, at 3. There is "no convergence concerning the criteria that states should use" for arms transactions. \textit{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 . . . . " \textit{Id}.
\item \textsuperscript{150} "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).
\item \textsuperscript{151} "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, \textit{supra} note 100, at 1.
\item \textsuperscript{152} Farah & Braun, \textit{supra} note 11, at 80.
\item \textsuperscript{153} \textit{Id}.
\item \textsuperscript{154} \textit{Id} at 8, 80.
\item \textsuperscript{155} \textit{Id} at 191–92.
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4. The Arms Trade Treaty

The U.N. General Assembly began working towards an international treaty to address arms broker impunity in 2006\footnote{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).} and the Arms Trade Treaty (ATT)\footnote{Arms Trade Treaty, supra note 4.} was passed in April 2013.\footnote{Arms Trade Treaty Passes at UN!, AMNESTY INT’L (Apr. 2, 2013), http://www.amnestyusa.org/our-work/latest-victories/arms-trade-treaty-passes.} One of the ATT’s goals was to prevent and eradicate illicit arms brokering.\footnote{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.”).} 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,\footnote{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.”).} whereas current laws enabled arms brokers to use front companies to avoid suspicion.\footnote{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 Centralafrican 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.\textsuperscript{162} Therefore, the ATT applies to a variety of conventional arms, rather than just SALW,\textsuperscript{163} and includes more inclusive controls on exports,\textsuperscript{164} imports,\textsuperscript{165} arms transfers,\textsuperscript{166} brokering,\textsuperscript{167} and preventing diversion of arms.\textsuperscript{168} The ATT also requires recordkeeping and reporting.\textsuperscript{169} These provisions are aimed to comprehensively regulate arms brokering.\textsuperscript{170} Unlike previous U.N. mechanisms such as PoA, the ATT is a legally binding treaty, and as such, is part of international law.\textsuperscript{171}

Thus far the ATT has had success acquiring state signatories,\textsuperscript{172} but it remains to be seen whether the treaty will be effective as it has just

\textsuperscript{162} 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.”).

\textsuperscript{163} Arms Trade Treaty, supra note 4, art. 2.

\textsuperscript{164} Id. art. 7.

\textsuperscript{165} Id. art. 8.

\textsuperscript{166} Id. art. 9.

\textsuperscript{167} Id. art. 10.

\textsuperscript{168} Id. art. 11.

\textsuperscript{169} 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.

\textsuperscript{170} 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.”).

\textsuperscript{171} INT’L ACTION NETWORK ON SMALL ARMS, supra note 148.

\textsuperscript{172} 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. While the treaty is a positive step, some have suggested that the ATT may not be comprehensive enough, and that some illicit practices escape regulation due to the treaty’s loose language. Others are concerned that signatories will not implement and enforce the legislation necessary to give the treaty teeth. Still others suggest that implementation will not happen for years, or worry

173 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.

174 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.


The 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. 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.

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. Brokers are sophisticated and adept at evading regulatory and monitoring mechanisms and broker operations are well organized and adaptable. Furthermore, the lucrative nature of illicit arms trafficking makes the weak deterrent measures even less effective. 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. 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

178 MacFarquhar, supra note 170.
179 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.
180 GOODMAN, supra note 100, at 1.
181 See id.; DiPerma, supra note 95, at 37.
182 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 . . . Viktór 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; 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.
183 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.
necessity of exploring other potential solutions to hold arms brokers accountable for their illicit dealings.\textsuperscript{185}

First, Bout’s trial did not hold him fully accountable, as the prosecution was prohibited from addressing the majority of his arms trafficking crimes.\textsuperscript{186} 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.\textsuperscript{187} This type of prosecution fails to provide closure to victims and disregards the symbolic and expressive power that law can have.

\textsuperscript{185} 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.

\textsuperscript{186} 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, \textit{supra} note 26. Judge Scheindlin banned discussion of Libya, Liberia, and Rwanda—three nations where Bout notoriously dealt weapons—in the courtroom. Colin Moynihan, \textit{Judge Considers Pledge for Jurors on Internet Use}, \textit{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, \textit{Viktor Bout and the Tools Needed to Fight Arms Trafficking}, \textit{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, \textit{A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity}, 16 \textit{New Crim. L. Rev.} 261, 295 (2013).

\textsuperscript{187} See, e.g., Schmidle, \textit{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.’”); \textit{see also} discussion \textit{supra} note 186.
Second, the route to holding Bout accountable involved a country that was willing and able to prosecute him. This is atypical; political realities often prevent prosecutions from occurring. 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. 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. Prosecutions are also unlikely to occur in cases where states are complicit with illegal arms brokering activities. Many states

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188 See Kellman, supra note 159, at 724.

189 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.

190 “[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.


192 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 and may sell false EUCs or accept bribes in return for “looking the other way” when a shipment violates an embargo or national laws. 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.

Ultimately, Bout’s conviction took one important “merchant of death” out of circulation. However, the system remains intact and other arms dealers have already taken his place—neither his prosecution nor his sentence deterred them. It may be unrealistic to attempt to ban SALW entirely, but diversifying the current tools used against arms brokers to attempt and achieve broker accountability is in order. 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, some background on the court is necessary. The ICC is different from


193 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).

194 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.

195 Rothe & Ross, supra note 192, at 7.

196 Stohl, supra note 74.

197 GUNRUNNING SUCCESSORS, supra note 35.

198 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).

199 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.

200 See infra Part II.A.
other courts in key ways, as outlined in the Rome Statute. 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. 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.”

The Rome Statute identifies four crimes that meet this requirement: (1) genocide; (2) the crime of aggression; (3) war crimes; and (4) crimes against humanity.

Third, the ICC has circumscribed jurisdiction over persons. 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; or (4) a state not party to the Rome Statute accepts the court’s jurisdiction.

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201 Rome Statute, supra note 37. The Rome Statute is the treaty that governs the ICC. Id. art. 1.

202 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.


203 Rome Statute, supra note 37, art. 5.

204 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.

205 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.

206 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.

207 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.

208 Id. arts. 12–19.

209 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. 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.

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, 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, 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. ICC involvement would help overcome the issue of state self-interest with which other mechanisms have had difficulties. Current efforts to prevent illicit arms traffickers from operating have largely relied on state implementation for their success, despite the reality that states are not always the main actors in contemporary global

210 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.
211 Rome Statute, supra note 37, art. 11.
212 See supra Part I.B–C.
213 See supra Part I.D.
214 Arms traders have successfully eluded efforts to regulate the small arms trade. DAMIEN ROGERS, POSTINTERNATIONALISM AND SMALL ARMS CONTROL: THEORY, POLITICS, SECURITY 35 (2009).
215 See supra Part II.
216 See supra Part II.
affairs.\footnote{Rogers, supra note 214, at 32.} 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.\footnote{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.} 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.\footnote{See supra Part I.D.} However, even assuming that a state can exercise jurisdiction over an arms trafficker, prosecutions frequently do not occur, either because of corruption\footnote{See supra Part I.C.} or fears of taking on a powerful arms trafficker from whom the state may wish to purchase weapons.\footnote{See supra note 190 and accompanying text.} 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.\footnote{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.} 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.\footnote{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.} Ultimately, a centralized approach to arms trafficking reduces the current burden on states to act independently.\footnote{Schloenhardt, supra note 147, at 96.}

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
powers than the threat of prosecution in a domestic court. 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. 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. 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. 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. However, domestic convictions of illicit

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226 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/pdfs/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.

227 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).

228 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.

229 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, arms trafficking is a deadly and pervasive global problem. The ICC is a forum to hear the most serious crimes and cases that are otherwise not being prosecuted. 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. 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, individuals who directly perpetrate a crime and individuals in positions of “command responsibility” incur liability for their actions. However, neither of these theories typically applies to arms traffickers, intermediaries whose sole interaction in conflicts involves supplying weapons.

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

230 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.”).

231 See supra Part II.A.

232 Punyasena, supra note 225, at 39.

233 Schoenhardt, 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.”).

234 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).

235 Rome Statute, supra note 37, art. 21.

236 Id. art. 25(2).

237 Id. art. 28.

238 Misol, supra note 18, at 290.
Although arms brokers have less direct responsibility,\textsuperscript{239} 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).\textsuperscript{240} 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.\textsuperscript{241} 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 are aiding and abetting,\textsuperscript{242} and co-perpetration.\textsuperscript{243}

1. Aiding and Abetting

The first theory of liability that applies to many arms traffickers is complicity, or aiding and abetting.\textsuperscript{244} Aiding and abetting permits criminal liability for an individual’s part in a crime committed by another.\textsuperscript{245} Since the Nuremberg Trials, those who aid and abet crimes have been held responsible under international criminal law.\textsuperscript{246} 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.\textsuperscript{247} One can be criminally liable under the Rome Statute if he or she contributes in “any other way.”\textsuperscript{248} This extends

\textsuperscript{239} Orlovsky, \textit{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, \textit{supra} note 50.

\textsuperscript{240} Rome Statute, \textit{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.” \textit{Id.} art. 30.

\textsuperscript{241} \textit{Id.} art. 25(3)(c); Orlovsky, \textit{supra} note 48, at 358–59.

\textsuperscript{242} \textit{Id.} art. 25(3)(c).\textsuperscript{243} Rome Statute, \textit{supra} note 37, art. 25(3)(d).

\textsuperscript{244} \textit{Id.} art. 25(3)(c); Orlovsky, \textit{supra} note 48, at 358–59.

\textsuperscript{245} \textit{Id.} art. 25(3)(c).

\textsuperscript{246} 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.

\textsuperscript{247} This includes providing the means for its commission. Rome Statute, \textit{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. \textit{Id.} art. 25(3)(d).

\textsuperscript{248} \textit{Id.} art. 25.
to corporate actors who supply products necessary to commit crimes against human rights.249

Aiding and abetting includes a conduct element—actus reus—and mental state—mens rea.250 The actus reus for aiding and abetting requires practical assistance, encouragement, or support that substantially affects perpetration of the crime.251 The mens rea is knowledge that these acts assist in the commission of the offense.252 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).253

Ad hoc predecessor tribunals that provide structural precedent and decisions with persuasive authority for the ICC, including the International Criminal Tribunal for Yugoslavia (ICTY)254 and the International Criminal Tribunal for Rwanda (ICTR),255 established individual responsibility for persons who aided or abetted international crimes.256 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.257 Mere presence at

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251 Id. ¶ 235.
252 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.

253 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.

254 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).


the crime scene without further impact on the principal’s actions did not satisfy the actus reus requirement. 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, although he need not know the exact crime in order to be guilty. 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.

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. 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. 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.

As there are some circumstances in which presence at a crime scene suffices for individual criminal liability, persons who supply weapons ultimately contribute to the crimes those weapons commit; they make execution of the crime possible 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. Additionally, as arms brokers may be considered

258 Id.
259 Prosecutor v. Blaskic, Case No. ICTY IT-95-14, Judgment, ¶ 49 (July 29, 2004); Krnojelac, IT-97-25-T, ¶¶ 88–90.
260 "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).
261 Krnojelac, IT-97-25-T, ¶¶ 88–90.
262 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.
264 Misol, supra note 18, at 296.
265 Furundzija, IT-95-17/1, ¶ 231.
266 Misol, supra note 18, at 294.
267 Id. at 295. This information frequently arises in the context of an arms deal. Bou
professionals, they are expected to know of international arms embargoes. 268 However, some have interpreted the language in Article 25 to require intent that the crime be committed. 269 While there is still debate over the exact standard, even assuming intent is required, it may be proven in the arms trafficking context. 270 Therefore, aiding and abetting remains a viable theory of liability that could be used against arms traffickers in an ICC prosecution. 271

2. Co-Perpetration

A second theory of criminal liability applicable to hold arms brokers individually criminally responsible for their actions in the ICC is co-perpetration. 272 Co-perpetration occurs when individuals working

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.

268 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.

269 Bellal, supra note 53, at 461.

270 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.

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

[If] 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?


273 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.\textsuperscript{274} 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.\textsuperscript{275}

While the ICTY considered co-perpetration as a theory of liability, the doctrine’s main support comes from the ICC itself.\textsuperscript{276} The ICC Pre-Trial Chamber\textsuperscript{277} has concluded that under Article 25(3)(a) of the Rome Statute,\textsuperscript{278} 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.\textsuperscript{279} An indirect perpetrator can be “indispensable” if he controls the agenda, i.e., the plan to commit the crime.\textsuperscript{280} The ICC states that the objective (actus reus) requirements for co-perpetration are the existence of a common plan between participants,\textsuperscript{281} 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.\textsuperscript{282}

A contribution is “essential” if the “common purpose” is unable to be achieved without it.\textsuperscript{283} 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.\textsuperscript{284} The subjective (mens rea) requirement requires that the accused is aware that his or her actions will result in commission of the crime\textsuperscript{285} and that the accused intends the crime to occur, or is aware


\textsuperscript{275} Van Schaack, supra note 272, at 230.

\textsuperscript{276} 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). Weingend, supra note 273, at 476.

\textsuperscript{277} 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, id. arts. 57–58.

\textsuperscript{278} 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).

\textsuperscript{279} Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 326 (Jan 27, 2007).

\textsuperscript{280} Ohlin, supra note 273, at 723.

\textsuperscript{281} Katanga & Chui, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶¶ 522–25.

\textsuperscript{282} 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.

\textsuperscript{283} Werle, supra note 50, at 962.

\textsuperscript{284} Weigend, supra note 273, at 479.

\textsuperscript{285} 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.\textsuperscript{286}

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.\textsuperscript{287} 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,\textsuperscript{288} thus fulfilling the objective requirement that the trafficker could prevent the crime by not performing.\textsuperscript{289} 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.\textsuperscript{290} 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.\textsuperscript{291}

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

\textsuperscript{286} 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.

\textsuperscript{287} 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).

\textsuperscript{288} 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.

\textsuperscript{289} 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.

\textsuperscript{290} A similar issue applied to Lubanga and child soldier conscription. Weigend, supra note 273, at 476.

\textsuperscript{291} Katanga & Chui, Case No. ICC 01/04-01/07, ¶ 533; see also Ohlin, supra note 273, at 723.
international crimes. 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. 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. 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.

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. The ICC is advantageous here, as it has the potential to be a more effective deterrent than existing measures such as domestic prosecutions. Furthermore, “industrialists” have been prosecuted for their corporate involvement in serious crimes both before and after the Nuremberg trials. 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.

293 Schloenhardt, supra note 147, at 121.
294 Orlovsky, supra note 48, at 344.
296 See supra note 226.
297 Id.
Finally, although the ICC may not be perfect, it remains a “vitally necessary alternative to impunity.” As former ICC Chief Prosecutor Luis Moreno-Ocampo has explained, the ICC is only one part of a global system. 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. 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. 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, the potential deterrent effects increase as well.

CONCLUSION

Illegal arms brokering is a serious international problem that has local consequences. The arms traffickers have largely been able to profit off of conflicts with impunity. 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

301 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=RKlXqS6QGl0. 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.
303 Dicker & Keppler, supra note 300, at 195–96.
304 See Moreno-Ocampo Remarks, supra note 302.
305 CONTROL ARMS, supra note 79, at 8; Austin, supra note 55, at 212.
306 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,307 by allowing collective action of the ICC’s 122 state parties, rather than one state acting alone.308 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.309 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.310 Moreover, illegal arms trafficking is a deadly crime that belongs in the ICC,311 a venue created to hear the world’s most serious crimes.312 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.

307 Austin, supra note 55, at 208–09.
308 The States Parties to the Rome Statute, supra note 37.
309 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.
310 See supra note 228.
311 Punyasena, supra note 225, at 39.
312 Dicker & Keppler, supra note 300, at 196.