

THE MOST EGREGIOUS ARMS BROKER: PROSECUTING ARMS EMBARGO VIOLATORS IN THE INTERNATIONAL CRIMINAL COURT

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The end of the Cold War took with it states' control over weapon distribution, and nowhere has this retreat from governmental oversight been as bloody as in the dealing of small arms. While the reasons for the size and prosperity of illicit arms dealing range from the inadequacy of regulation and security mechanisms in the legal weapons market to the poverty of arms exporting and importing countries, the aggregate effect of an uncontrolled market has been devastating on the developing world. Small arms are quite suitable for the internal conflicts that scrape developing countries dry. Their cheap abundance reaps havoc on the present generation and robs the future, as weapons, light and simple enough for child soldiers to operate, are sold in exchange for countries' natural resources, like timber and diamonds.¹ While small arms alone do not incite conflict or undermine development, they do play a formidable role in intrastate conflict.² The United Nations Panel of Governmental Experts on Small Arms explained that role in its 1997 report to the General Assembly:

Accumulations of small arms and light weapons by themselves do not cause the conflicts in which they are used. The availability of these weapons, however, contributes towards exacerbating conflicts by increasing the lethality and duration of violence, by encouraging a violent rather than a peaceful resolution of differences, and by generating a vicious circle of a greater sense of insecurity, which in turn leads to a greater demand for, and use of, such weapons.³

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¹ United Nations Non-Governmental Liaison Service, *Conference on the Illicit Trade in Small Arms and Light Weapons*, ROUNDUP 80, Aug. 2001, available at <http://www.un-ngls.org/documents/text/roundup/80arms.htm> (last visited Aug. 8, 2007).

² See The Secretary-General, *Report of the Panel of Governmental Experts on Small Arms*, ¶ 17, U.N. Doc. A/52/298 (Aug. 27, 1997), available at <http://disarmament.un.org/cab/salw-tracingexperts.html>.

³ *Id.*

Arms brokers are central to the accessibility of weapons for countries in conflict. There is a lack of consensus on the definition of “arms broker”, but generally, they can be defined as “middlemen who negotiate, arrange for, or otherwise facilitate the transfer of weapons.”⁴ Their specific activities vary but may involve introducing suppliers and buyers, obtaining arms, negotiating contracts, arranging for transportation, financing, and/or necessary paperwork.⁵ Illicit brokering occurs when arms are transferred without government authorization, but since few countries have a system of authorization for brokering activities, brokers normally operate in a grey zone.⁶

The UN Security Council has compensated for states’ regulatory voids or loopholes that create grey markets by issuing arms embargo resolutions against countries or non-state actors deemed to threaten “international peace and security.”⁷ However, while the embargoes are legally binding, the UN largely relies on member states to monitor and implement them,⁸ and national courts have jurisdiction over arms

⁴ Int’l Action Network on Small Arms, Key Issues, Arms Brokers, <http://www.iansa.org/issues/index.htm> (last visited Mar. 19, 2007).

⁵ Loretta Bondi & Elise Keppler, *Casting the Net? The Implications of the U.S. on Arms Brokering*, FUND FOR PEACE 19 (2001), available at <http://www.fundforpeace.org/publications/reports/reports.php> (last visited Aug. 8, 2007).

⁶ See SMALL ARMS SURVEY 2001, PROFILING THE PROBLEM 101, 127 (2001), available at http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2001/2001SASCh3_full_en.pdf (Arms transfers are categorized as occurring in legal, grey or black markets. Legal markets are those arms transfers between governments or a government and a private party. These transactions follow national export laws and international or national embargoes. Grey market transfers occur when government agencies or government-backed private parties covertly sell or deliver arms to illicit recipients in another country. An example of a grey market transfer could be the delivery of arms by a government agent to ethnic militias or warlords operating in another country. Black market transfers involve covert transfers of arms by private entities who obtain the arms illicitly and in violation of national and/or international laws. They are the channels through which insurgents, separatists, warlords and other non-state actors purchase arms.) See also Elise Keppler, *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, 386-87 (2001).

⁷ UN Charter, Article 41, available at www.un.org/aboutun/charter/chapter7.htm (last visited Aug. 8, 2007) (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon members of the United Nations to apply such measures.”). As of March 2006, the Security Council has issued arms embargoes against Ivory Coast, Liberia, Somalia, Ethiopia, Eritrea, Iraq, Libya, and the former Yugoslavia as well as against non-state actor groups in Angola, Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, and Sudan. See Oxfam America, *Briefing Paper: UN Arms Embargoes: An Overview of the Last Ten Years* (Mar. 2006), http://www.oxfamamerica.org/newsandpublications/publications/briefing_papers/un_arms_embargoes (last visited Aug. 8, 2007).

⁸ Oxfam America, *supra* note 7.

embargoes violations only where the embargo has been incorporated into the domestic legal system.⁹ Thus, when domestic law fails to cover brokering activity, even where an individual has violated international law, brokers violate international norms with impunity.

This Article proposes that the International Criminal Court (ICC) may serve as an effective forum to prosecute brokers who arm government and non-state actors that commit war crimes. While movement builds for the adoption of comprehensive regulatory schemes at the domestic and global levels, the international community need not stand idly by waiting for governments to overcome structural straitjacketing and practical difficulties that permit brokers to continue arming human rights violators with impunity. With the ICC now staffed and considering its first cases, it may serve as a proper, if temporary, alternative to domestic legislation and prosecution. An analysis of the complicity and complementary principles codified in the ICC's Rome Statute will show how brokers can be prosecuted in the ICC for aiding and abetting war crimes without challenging sovereignty.

Part I of this Article looks at Liberia as an illustration of how brokers circumvent UN arms embargoes and the general characteristics of arms brokers. Part II discusses initiatives at the international, regional, and domestic levels and examines why these instruments have not led to greater success against illegal arms brokering. Finally, Part III argues that regulatory shortcomings necessitate the participation of the ICC, which is legally equipped to bring violators of war crimes to trial, in prosecuting brokers.

I. ARMS BROKERS FUELING THE FIRES IN LIBERIA AND ITS NEIGHBORS

Africa is recognized as the center of illicit small arms and light weapons (SALW) trade.¹⁰ A majority of SALW originates outside the continent, purchased by governments and non-state actors with natural resources, like diamonds and timber.¹¹ UN arms embargoes that block participation in legitimate arms-selling markets feed the grey and black

⁹ Holger Anders & Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, LES RAPPORTS DU GRIP 17 (2005), available at <http://www.iansa.org/issues/documents/brokering-report-grip0905.pdf>.

¹⁰ United Nations Non-Governmental Liaison Service, *supra* note 1.

¹¹ *Id.*

markets, which serve as the primary sources of arms used by countries in conflict.

In 1999 Liberia entered its second civil war in a decade.¹² The rebel group Liberians United for Reconciliation and Democracy (LURD) began fighting to overthrow President Charles Taylor, a military man whose usurpation of the previous regime marked the start of Liberia's first civil war. Since 1992, the country had been under a UN arms embargo, though the lack of effective monitoring¹³ left the resolution with little meaning.¹⁴ Taylor was not only able to replace the thousands of weapons he was forced to relinquish as part of a disarmament program that led to the 1997 presidential elections, but was also able to arm rebel groups in Sierra Leone, Cote d'Ivoire, and Guinea.¹⁵ Most notorious was Taylor's relationship with the Revolutionary United Front (RUF), a rebel group in Sierra Leone that smuggled diamonds out of the country in exchange for weapons that Taylor supplied to them.¹⁶ Given the fallen state of Liberia's economy, Taylor had few resources to sell to pay for the security forces that kept him in power.¹⁷ As a result, he turned for financial support to the RUF's diamond trade, which figured somewhere between \$30 and \$125 million a year in the late 1990s.¹⁸ In return for UN embargoed diamonds, Taylor provided "arms, ammunition, food, and medicines [that were] routinely flown into RUF-controlled areas by helicopters from Liberia."¹⁹

With his hand involved in insurgency movements in the Mano River Union countries (Guinea, Liberia and Sierra Leone), Taylor proved

¹² KEITH KRAUSE & DAVID MUTIMER, *SMALL ARMS SURVEY 2005: WEAPONS AT WAR* 167 (2005) [hereinafter *SMALL ARMS SURVEY 2005*], available at http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2005/2005SAS_intro_en.pdf.

¹³ W. ANDY KNIGHT, *THE UNITED NATIONS AND ARMS EMBARGO VERIFICATION* 54 (1998). No Sanctions Committee was established with the resolution, therefore the responsibility for checking compliance with the embargo was left with the UN member states. *Id.*

¹⁴ See ERIC G. BERMAN, *SMALL ARMS SURVEY, OCCASIONAL PAPER NO. 1: RE-ARMAMENT IN SIERRA LEONE: ONE YEAR AFTER THE LOMÉ PEACE AGREEMENT* 14 (Dec. 2000), available at http://www.smallarmssurvey.org/files/sas/publications/o_papers.html (last visited Aug. 8, 2007); see also S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992).

¹⁵ *From Chaos, Order; Rebuilding Failed States*, *ECONOMIST*, Mar. 5, 2005, at 59.

¹⁶ BERMAN, *supra* note 14, at 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (citing Stephen Pattison, Head, UN Dep't, Foreign & Commonwealth Office, Statement Before the UN Security Council's Exploratory Hearing on Sierra Leone Diamonds (July 31, 2000)); Catherine Mackenzie, First Sec'y, written correspondence, UK Permanent Mission to the UN in New York, Aug. 15, 2000.

to be a threat to the stability of the region of Western Africa.²⁰ The UN had assisted in making significant improvements in Sierra Leone and was concerned that Taylor's activities would undermine its efforts as well as destabilize Guinea.²¹

Attempting to avert a regional crisis situation, in March 2001, the UN Security Council adopted Resolution 1343, which imposed a tighter arms embargo on Liberia.²² Resolution 1343 also established a new committee to ensure observance of the embargo and suggest the possibility of additional sanctions if Liberia continued its support for the RUF and other armed rebel groups in the region.²³ Like the 1992 arms embargo, states were required to provide the Sanctions Committee with information on possible embargo violations.²⁴ Fortunately, given the scarcity of state-supplied information,²⁵ the Security Council also established an independent Panel of Experts to investigate sanctions violations.²⁶ Information generated by their reports not only served not only "name and shame" countries and individuals involved in weapons transfers but also provided the grounds for the Assets Freeze List.²⁷ Many of the individuals and their companies on the list were found by the Panel of Experts to be arms brokers for Liberia and Sierra Leone in violation of UN sanctions.²⁸

²⁰ Expert Panel on Liberia, *Violations of Bans on Arms, Diamond Exports, Official Travel Investigated*; Liberia's Foreign Minister Says Report Does Not Address Government's Compliance, delivered to Security Council, SC/7196 (May 11, 2001), available at <http://www.un.org/News/Press/docs/2001/sc7196.doc.htm>.

²¹ *See id.*

²² S.C. Res. 1343, ¶ 5(a), U.N. Doc. S/RES/1343 (Mar. 7, 2001), available at <http://www.un.org/Docs/sc/committees/Liberia2/Liberia2ResEng.htm>. The resolution also prohibited the import of rough diamonds from Liberia and placed a travel ban on Liberian government officials, its armed forces, and any individuals providing financial or military support to armed rebels. *Id.* ¶¶ 6, 7a.

²³ Chairman of the Security Council Committee, *Report of the Security Council Committee Established Pursuant to Res. 1343 (2001) Concerning Liberia*, ¶ 4, delivered to the President of the Security Council, U.N. Doc. S/2002/83 (Jan. 18, 2002), available at <http://www.un.org/Docs/sc/committees/Liberia2/83e.pdf> [hereinafter *Report of Security Council 2002*].

²⁴ *See* S.C. Res. 1343, *supra* note 22, ¶ 14(b).

²⁵ Soon after the resolution passed, the committee received a letter from the Minister of Foreign Affairs of the Slovak Republic concerning a violation, to which the committee responded that it should be sent to a different UN group. Since then no member state has contacted the committee. *Report of Security Council 2002*, *supra* note 23, ¶¶ 14-15.

²⁶ S.C. Res. 1343, *supra* note 22, ¶¶ 19-19(a).

²⁷ *See* Freeze Assets of Former Liberian President Charles Taylor, S.C. Res. 1532, ¶ 1, U.N. Doc. S/RES/1532 (Mar. 12, 2004), available at <http://www.un.org/News/Press/docs/2005/sc8293.doc.htm>; *see generally* SMALL ARMS SURVEY 2004: RIGHTS AT RISK 266 (2004).

²⁸ *See* S.C. Res. 1343, *supra* note 22, ¶ 19(c).

Two reports from 2002 and 2003 covering a series of six flights between June and September 2002 illustrate the extent to which arms brokers facilitated Taylor's circumvention of the arms embargoes.²⁹ The six flights investigated by the panel originated from Serbia and carried mostly older weapons from Yugoslav army stocks.³⁰ The brokers negotiated a contract for Taylor and prepared the necessary false paperwork, including fabricated end-user certificates that reported the Ministry of Defense of Nigeria as the weapons recipient.³¹ Falsified documents allowed the weapons to be exported from Serbia and provided cover for a mid-flight route change to land in Roberts International Airport in Liberia.³² The arms contract between the Yugoslav army and Liberia was negotiated by Slobodan Tezic through his Belgrade-based Temex Company.³³ Tezic, along with Interjug AS, a Yugoslav freight-forwarding company, prepared a double document trail to legitimize the transfer.³⁴ Temex arranged one set of documents for Yugoslav authorities showing Nigeria's Defense Ministry as the weapons recipient, while Interjug AS prepared cargo manifests for a Lockheed flight crew and operating agent that identified the arms as "mine drilling equipment" for a company in Liberia.³⁵

Though the reports on Temex and Interjug's brokering activities in no way exhaust the sources of weapons³⁶ or the means by which they were illegally brought into Liberia, they are characteristic of arms brokering in Liberia and West Africa.³⁷ Most weapons were imported,³⁸ rather than domestically produced, and were brought in by air in cargo

²⁹ Letter from Chairman of the Security Council Committee to President of the Security Council, Committee Established Pursuant to Resolution 1343 Concerning Liberia, U.N. Doc. S/2002/1115, Table 1 (Oct. 24, 2002) [hereinafter Chairman Letter, Oct. 24, 2002]; Letter from Chairman of the Security Council Committee to President of the Security Council, Committee Established Pursuant to Resolution 1343 Concerning Liberia, U.N. Doc. S/2003/498, ¶¶ 69-70 (Apr. 24, 2003) [hereinafter Chairman Letter, Apr. 24, 2003].

³⁰ Chairman Letter, Oct. 24, 2002, *supra* note 29, ¶¶ 65, 67.

³¹ *Id.* ¶ 69.

³² *Id.* ¶ 64.

³³ *Id.* ¶ 68.

³⁴ *Id.* ¶ 80; Chairman Letter, Apr. 24, 2003, *supra* note 29, ¶ 70.

³⁵ Chairman Letter, Oct. 24, 2002, *supra* note 29, ¶¶ 69, 78.

³⁶ Weapons were also transferred from as far away as China. "Brokers based from Hong Kong and mainland China facilitated the transfer of Chinese-made weapons to Liberia's largest logging company, the Oriental Timber Company, which was under Taylor's control." SMALL ARMS SURVEY 2005, *supra* note 12, at 168.

³⁷ See BERMAN, *supra* note 14, at 14.

³⁸ SMALL ARMS SURVEY 2005, *supra* note 12, at 168.

planes rather than by water.³⁹ Cargo planes allowed frequent and quick deliveries and easy route or delivery time changes.⁴⁰

The Temex-Interjug activities also contained elements that are typical of brokering operations in general. There has been a noticed change in arms brokers and their operations since the end of the Cold War, namely that governments assert less control over brokers and arms transfers.⁴¹ Before 1989, traffickers were often contracted by the superpowers to arm their respective sides in proxy wars.⁴² In current times of need, states, and even humanitarian agencies, continue to turn to brokers for their logistical expertise or for transporting capabilities to reach “the world’s worst trouble spots,”⁴³ but most brokers now work as freelance contractors.⁴⁴

The demise of the Soviet Union moreover has allowed brokers to assume control of its “fully operational systems of clandestine transport, replete with money channels, people who understood how to use them, and, most important, established shipping pipelines.”⁴⁵ These pipelines, once used by government agents to carry out covert deals, are still in operation but are now utilized by independent dealers.⁴⁶ In general, offering price has replaced ideology as the determining factor for whether government agents will permit or facilitate an arms transfer. A corrupt government will sell false end-user certificates, a required document for any legal sale.⁴⁷ Moreover, as often reported by the media, in weak Eastern European countries left with unaccounted-for Soviet

³⁹ Chairman Letter, Apr. 24, 2003, *supra* note 29, ¶ 104.

⁴⁰ *Id.*

⁴¹ Arms experts, like Loretta Bondi and Elise Keppler, argue that in some cases, states continue to assert control over brokering and that brokers escape liability for their crimes because high officials “secretly endorse” their activities. Bondi & Keppler, *supra* note 5, at 19. While this may be true, this Article focuses on immunity as a result of regulatory failure.

⁴² Peter Landesman, *Arms and the Man*, N.Y. TIMES MAGAZINE, Aug. 17, 2003, at 28.

⁴³ Bondi & Keppler, *supra* note 5, at 5. State reliance on illicit arms brokers may complicate the process of bringing brokers to justice. For example, until 2004, the United States and the United Kingdom resisted adding Victor Bout, a well-known arms dealer to Charles Taylor among many others, to the Asset Freeze List. Bout had both supplied arms to the Northern Alliance and flown UN peacekeepers to East Timor and Somalia. *List of Individuals and Entities Subject to the Measures Contained in ¶ 1 of S.C. Res. 1532 (2004) Concerning Liberia (Assets Freeze List)* (last updated Apr. 3, 2006), available at http://www.un.org/Docs/sc/committees/Liberia3/1532_afl.htm.

⁴⁴ Landesman, *supra* note 42, at 32.

⁴⁵ *Id.*

⁴⁶ Bondi & Keppler, *supra* note 5, at 15.

⁴⁷ See Chairman Letter, Apr. 24, 2003, *supra* note 29.

arsenals, “bribes are paid to officials and officers to look the other way, or soldiers are paid to play warehouse stock clerks.”⁴⁸

Since small arms proliferation rose to international attention in the mid-1990s, there has been considerable amount of discussion on how states individually and collectively need to reassert control over arms transfers, particularly with regards to brokering.⁴⁹ Arms brokering is an international operation made up of highly mobile participants.⁵⁰ Individuals involved in illicit brokering are often “equipped with little more than a mobile phone, a fax and good connections, and may operate offices in several countries.”⁵¹ Thus, effective control requires monitoring at global, regional, and local levels.⁵² Supranational agreements are necessary to prevent brokers from evading laws by moving into weaker regions or neighboring states.⁵³ International instruments that set minimum requirements for brokering arms transfers would remove dealers from the legally ambiguous zone in which they operate. Regional agreements are necessary to allow countries to collectively tailor their laws in response to common, pressing issues of the region.⁵⁴ Harmonization of laws is especially important where borders are porous.⁵⁵ Finally, domestic participation is vital as both national and international laws are enforced at the local level.⁵⁶

The following section looks at what steps have been taken at all three levels to control brokering activity. Overall, while the initiatives show a political will to address arms brokering, multilateral agreements and national legislation have had little practical impact.

⁴⁸ Landesman, *supra* note 42, at 32.

⁴⁹ BITING THE BULLET PROJECT, IMPLEMENTING THE PROGRAMME OF ACTION 2003: ACTION BY STATES AND CIVIL SOCIETY 156 (2003), available at www.iansa.org/documents/03poareport (last visited Aug. 8, 2007).

⁵⁰ Amnesty Int'l & TransArms, *Dead on Time—Arms Transportation, Brokering and the Threat to Human Rights*, Conclusions and Recommendations (2006), <http://web.amnesty.org/library/index/engact300082006> (last visited Aug. 8, 2007).

⁵¹ HOLGER ANDERS, CONTROLLING ARMS BROKERING: NEXT STEPS FOR EU MEMBER STATES 10 (2004), available at www.iansa.org/issues/documents/controlling%20arms_brokering.pdf.

⁵² See Sarah Meek, *Combating Arms Trafficking: Progress and Prospects*, in *RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS* 183, 183-84 (Lora Lumpe ed., 2000).

⁵³ *Id.* at 184. Porous borders are not only a problem among the weaker states of West Africa where governments do not have the capacity to control borders, but also in the European Union. See *id.* at 197, 197 n.36.

⁵⁴ *Id.* at 184.

⁵⁵ *Id.* at 189.

⁵⁶ *Id.* at 183.

II. INTERNATIONAL, REGIONAL, AND DOMESTIC INITIATIVES

A. INTERNATIONAL ARENA

Arms brokering reached international attention after a series of UN Panel Reports monitoring compliance with sanctions “revealed the role of arms brokers as the major violators of arms embargoes in Angola, DRC, Liberia, and Sierra Leone.”⁵⁷ There are two documents that concern arms brokering: the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects (UN PoA) and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol).⁵⁸ As the instruments were written within three months of each other, the “standards and procedures” laid out in the Firearms Protocol were intended to “complement and reinforce” the political obligations listed in PoA.⁵⁹

The Firearms Protocol was adopted by the UN General Assembly (UNGA) on May 31, 2001, but came into effect more than four years later, after Poland became the fortieth country to ratify the resolution.⁶⁰ Although the Firearms Protocol is the only legally binding global instrument on small arms,⁶¹ its impact on the issue of brokering is minimal as it encourages but does not require regulation of arms brokers.⁶² Article 15(1) states that participating countries “*shall consider*

⁵⁷ BITING THE BULLET PROJECT, INTERNATIONAL ACTION ON SMALL ARMS 2005: EXAMINING IMPLEMENTATION OF THE UN PROGRAMME OF ACTION 2005, at 257 (2005) [hereinafter BITING THE BULLET, 2005], available at www.international-alert.org/pdfs/red_book_2005.pdf.

⁵⁸ Anders & Cattaneo, *supra* note 9, at 22.

⁵⁹ U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 9-20, 2001, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, prmb., U.N. Doc A/CONF.192/15 (2001), available at <http://disarmament.un.org/cab/poa.html> (last visited Aug. 8, 2007) [hereinafter PoA].

⁶⁰ U.N. General Assembly, 55th Sess., *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, art. 18, U.N. Doc A/RES/55/255 (June 8, 2001) [hereinafter UN Firearms Protocol] (Under Article 18 the agreement would become legally binding after forty countries had ratified it).

⁶¹ U.N. Second Biennial Meeting of States, July 11-15, 2005, *Global Action to Stop Gun Violence 2* (2005), available at <http://www.iansa.org/un/bms2005/BMS-report-for-web.pdf>.

⁶² U.N. Firearms Protocol, *supra* note 60, art. 15.

establishing a system for regulating the activities of those who engage in brokering.”⁶³ It suggests that the system could include optional measures, such as registering “brokers operating within their territory,” “[r]equiring licensing or authorization of brokering,” or “[r]equiring disclosure on import and export licenses accompanying documents, of the names and locations of brokers involved in the transaction.”⁶⁴ The Firearm Protocol also encourages participating states to include such information in “exchanges of information” and “retain records” on brokers and brokering.⁶⁵

The PoA is an outgrowth of the groundbreaking 2001 UN Small Arms Conference.⁶⁶ Though some states at the conference advocated for establishing standards and “strict regulation” of brokering, the PoA is a non-binding agreement that uses broad language to address brokering and illicit arms trade in general.⁶⁷ With regard to brokering, states agreed “[t]o develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering and control.”⁶⁸ The language was significantly watered-down when compared to previous drafts of the PoA, which had included a commitment to develop an international instrument to control arms brokering.⁶⁹ Despite the weak language, states did recognize the importance of developing “common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons.”⁷⁰

Arguably, the most significant part of the PoA is its final provision, which recommends the convention of states on a biennial basis to review the program’s progress at national, regional and global levels.⁷¹ In accordance with the recommendation, states have convened in 2003 and 2005. Because the purpose of the convention is to evaluate the rate of implementation and not to introduce new measures, the PoA has been less effective in forcing countries to control brokering than in sustaining international discussion on brokering.

⁶³ *Id.* art. 15(1) (emphasis added).

⁶⁴ *Id.* arts. 15(1)(a-c).

⁶⁵ *Id.* art. 15(2).

⁶⁶ PoA, *supra* note 59, sec. I, ¶ 1.

⁶⁷ SMALL ARMS SURVEY 2004, *supra* note 27, at 147.

⁶⁸ PoA, *supra* note 59, sec. II, ¶ 14.

⁶⁹ BITING THE BULLET, 2005, *supra* note 57, at 257.

⁷⁰ PoA, *supra* note 59, sec. II, ¶ 39.

⁷¹ *Id.* sec. IV, ¶ 1(b).

B. REGIONAL INSTRUMENTS

At the regional level, there has been greater harmonization of brokering controls.⁷² This Article looks at the OAS Model Regulations, the EU Common Position, and the African Union's Bamako Agreement—three agreements that specifically address the issue of brokering.⁷³

I. ORGANIZATION OF AMERICAN STATES' MODEL REGULATIONS

In November 2003, the Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States (OAS) amended their Model Regulation for the Control of the International Movement of Firearms, their Parts and Components and Ammunition to include Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition (Model Regulations).⁷⁴ The purpose of the Model Regulations is to promote the harmonization of broker regulations.⁷⁵ Unique to this brokering instrument, the Model Regulations provide a detailed list of recommended measures that serve as a “drafting guide”⁷⁶ for countries to consider adopting or integrating into established regulatory systems.⁷⁷ These measures include: defining brokers and brokering activities;⁷⁸ establishing a National Authority for the registration or licensing of brokers;⁷⁹ a registration system;⁸⁰ a licensing system;⁸¹ a list of prohibited brokering activities;⁸² adopting

⁷² BITING THE BULLET, 2005, *supra* note 57, at 159. For a more in-depth reading, see SMALL ARMS SURVEY 2004, *supra* note 27.

⁷³ Other organizations like the OSCE and the Wassenaar Arrangement have produced political documents on arms brokering regulation. The Wassenaar Arrangement is a group of primarily arms-exporting states. See, e.g., BITING THE BULLET, 2005, *supra* note 57, at 159. This group has not been included in this Article, but its influence has not been overlooked.

⁷⁴ Organization of American States, Inter-American Drug Abuse and Control Commission, *Draft Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition* (2003), available at http://www.oas.org/juridico/english/cicad_brokers.pdf [hereinafter OAS, *Draft Model Regulations*]; Anders & Cattaneo, *supra* note 9, at 24.

⁷⁵ OAS, *Draft Model Regulations*, *supra* note 74, pmb1.

⁷⁶ See Meek, *supra* note 52, at 191.

⁷⁷ OAS, *Draft Model Regulations*, *supra* note 74, pmb1; Meek, *supra* note 52, at 191.

⁷⁸ OAS, *Draft Model Regulations*, *supra* note 74, art. 2; Anders & Cattaneo, *supra* note 9, at 24.

⁷⁹ OAS, *Draft Model Regulations*, *supra* note 74, art. 2.

⁸⁰ *Id.* art. 3.

⁸¹ *Id.* art. 4.

⁸² *Id.* art. 5. The Model Regulations rely on national authorities to refuse licenses to brokering activity that

national legislation that defines and penalizes offenses;⁸³ the liability of legal entities;⁸⁴ defining the scope of jurisdiction;⁸⁵ and requiring brokers to report their activities and the right of national authorities to brokers' records.⁸⁶

Among these measures, there are three points of relevant interest. First, the Model Regulations take a broad definition of "brokering activity."⁸⁷ Brokering activity "includes manufacturing, exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding, supplying, and delivering firearms, their parts or components or ammunition or any other act performed by a person, that lies outside the scope of his regular business activities and that directly facilitates the brokering activities."⁸⁸ By encompassing the broader components of brokering, like transportation, rather than treating them as separate and secondary to negotiating contracts, the definition recognizes how brokering operates in practice.⁸⁹

Second, the Model Regulations encourage an extraterritorial application of the measures.⁹⁰ It states in Article 8 that "[t]he provisions of these Regulations shall apply to all brokers and brokering whether or not: (a) the brokers carry on their brokering activities in _____ (country) or in other countries; or (b) the firearms, parts and components and ammunition enter into the territorial jurisdiction of _____ (country)."⁹¹

Finally, the regulations rely on states for adopting and implementing the measures.⁹² While such a structure respects

will, or seriously threaten to: (a) result in acts of genocide or crimes against humanity; (b) violate human rights contrary to international law; (c) lead to the perpetration of war crimes contrary to international law; (d) violate a United Nations Security Council embargo or other multilateral sanctions to which the country adheres, or that it unilaterally applies; (e) support terrorist acts; (f) result in a diversion of firearms to illegal activities, in particular, those carried out by organized crime, or (g) result in a breach of a bilateral or multilateral arms control or non-proliferation agreement.

Id.

⁸³ *Id.* art. 6.

⁸⁴ *Id.* art. 7.

⁸⁵ *Id.* art. 8.

⁸⁶ *Id.* art. 9.

⁸⁷ Anders & Cattaneo, *supra* note 9, at 24.

⁸⁸ OAS, *Draft Model Regulations*, *supra* note 74, art. 1.

⁸⁹ *See supra* Part I.

⁹⁰ Anders & Cattaneo, *supra* note 9, at 25; OAS, *Draft Model Regulations*, *supra* note 74, art. 8.

⁹¹ OAS, *Draft Model Regulations*, *supra* note 74, art. 8.

⁹² *Id.* pmb1.

sovereignty, it places heavy responsibility and unrealistic expectations on weak, corrupt states.

II. EU COMMON POSITION

The European Union adopted the Common Position in June 2003.⁹³ The Common Position is a legally binding instrument to which member states must align their domestic legislation.⁹⁴ Less detailed than the Model Regulations, the Common Position requires that Member States “take all the necessary measures to control brokering activities taking place within their territory.”⁹⁵ Specifically, member states are to establish a licensing system for brokering activities that occur within their territory⁹⁶ and maintain records for at least ten years on all licensed brokers.⁹⁷ The Common Position also requires members to implement an information system to exchange data on brokering activities⁹⁸ and to enforce the controls on arms brokering with “adequate sanctions, including criminal sanctions.”⁹⁹

In contrast to the OAS’s Model Regulations, the Common Position adopts a narrow definition of brokering activities, defining them as:

[P]ersons and entities negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.¹⁰⁰

Thus, the requirements in the Common Position cover third party brokering but not brokering-related activities.

Also, in contrast to the Model Regulations, the “necessary measures” laid out in the Common Position are limited to territorial

⁹³ Council Common Position on the Control of Arms Brokering No. 468/2003 of June 23, 2003 O.J. (C 156) L156/79 (EC).

⁹⁴ *Id.* art. 1, ¶ 2, 2003 O.J. (L 156) 79.

⁹⁵ *Id.* art. 2, ¶ 1.

⁹⁶ *Id.* art. 3, ¶ 1, 2003 O.J. (L 156) 80.

⁹⁷ *Id.* art. 3, ¶ 2.

⁹⁸ *Id.* art. 5, ¶¶ 1, 2 (The exchange of information on brokering activities among Member States and with third countries is related to the following areas, *inter alia*, legislation, registered brokers, records of brokers, and denials of registering and licensing applications.).

⁹⁹ *Id.* art 6.

¹⁰⁰ *Id.* art 2(3). The definition is not meant to prevent members from including arms exported from their own territory in their legislation on brokering activities. *Id.*

jurisdiction.¹⁰¹ While member states are obliged to control brokering activities in their territory, they are simply “encouraged” to consider regulating extraterritorial activities carried out by nationals residing or established in their territory.¹⁰²

Like the Model Regulations, the Common Position relies on states to control brokering activities through their adoption and enforcement of laws. A survey of brokering laws and frequency of enforcement at the domestic level thus provides a measure of the efficacy of the multilateral agreements.

III. THE AFRICAN UNION’S BAMAKO DECLARATION

The Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Illicit Small Arms and Light Weapons was adopted in 2000, in preparation for a UN small arms conference in July 2001.¹⁰³ Many elements of the Bamako Declaration are found in the UN PoA.¹⁰⁴ Bamako is not legally binding but is seen as an important step in the collective effort to address the destruction caused by small arms.¹⁰⁵ It includes discussion of brokering and recommends “tak[ing] appropriate measures to control arms transfers by manufacturers, suppliers, traders, brokers, as well as shipping and transit agents, in a transparent fashion”¹⁰⁶ as well as encouraging members to adopt and harmonize legislation governing brokering.¹⁰⁷

Serious challenges prevent effective implementation of the recommendations. Internal and regional conflict throughout Africa has flooded the continent with arms, and the accompanying problem of weak and often transitional governments has prevented states from enforcing or harmonizing national legislation.¹⁰⁸

¹⁰¹ *Id.* art. 2(1).

¹⁰² *Id.* (emphasis added).

¹⁰³ Sarah Meek, *Development of International and Regional Small Arms Initiatives* 21 (2004), www.iss.co.za/pubs/CRReports/BrokeringWorkshop04/Development.pdf.

¹⁰⁴ *Id.*

¹⁰⁵ See BITING THE BULLET, 2005, *supra* note 57, at 30 (listing legally binding agreements).

¹⁰⁶ Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation, and Trafficking of Small Arms and Light Weapons, Dec. 1, 2000, sec. 3(A)(vii) [hereinafter Bamako Agreement].

¹⁰⁷ *Id.* sec. 3(B)(ii).

¹⁰⁸ BITING THE BULLET, 2005, *supra* note 57, at 33.

C. DOMESTIC REGULATION

An estimated forty countries now have laws regulating brokering.¹⁰⁹ Among those, there remain inconsistencies in their understanding of brokering and scope of review. The lack of consensus has created loopholes in the international system, which compromises their effectiveness.¹¹⁰ Moreover, the global patchwork of regulation allows brokers to operate under “flags of convenience” to evade governmental control.¹¹¹

I. PERSISTENCE OF THE TERRITORIAL PRINCIPLE

Until the later half of the 1990s, most countries left the issue of brokering alone because the nature of the dealing challenged their notions of jurisdiction.¹¹² As one author points out:

[Because the weapons] are not exported from the country in which the broker conducts his or her activities, arms export controls of these countries usually do not apply. . . . A clear example is that of Leonid Minin, an Israeli citizen who partly operated from Italian territory to organize arms transfers in violation of UN embargoes to Liberia and the Revolutionary United Front in Sierra Leone. Arrested in Italy in August 2000 and charged with illegal arms trafficking, the Italian Supreme Court argued that it could not prosecute Minin because the trafficked weapons did not touch Italian soil.¹¹³

The most commonly used and accepted basis for jurisdiction is the territorial principle.¹¹⁴ Under this principle, a state has jurisdiction to make law applicable to all persons and property within its territory.¹¹⁵ Although the presumption that domestic statutes are limited to national boundaries has eroded over the last sixty years, debate continues among countries as to the extraterritorial reach of a state’s jurisdiction.¹¹⁶ Because brokers are often involved in third-country arms deals, the weapons never pass through the country in which the broker operates. Therefore, a brokering regulation based on controlling property within

¹⁰⁹ Anders & Cattaneo, *supra* note 9, at 13.

¹¹⁰ *Id.* at 13.

¹¹¹ *Id.* at 12.

¹¹² *See id.* at 9.

¹¹³ ANDERS, *supra* note 51, at 6.

¹¹⁴ DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 334 (2002).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 334-35.

the country's borders would be inconsequential. A third-country deal does not require brokers to export or import arms, nor transport them through the country's territory.¹¹⁷ Nonetheless, EU member states have resisted imposing extraterritorial controls on brokering as evidenced by the optional, as opposed to required, adoption of such controls in the EU Common Position.¹¹⁸

Most states with brokering regulation require licensing for third-country deals,¹¹⁹ however, within this group a larger, though decreasing, number of states still require the deal to entail some link to the territory. For example, in most Western European countries, interested contract parties must meet or make communications, like emails or faxes, on national territory.¹²⁰ The regulations do not apply to nationals that facilitate arms dealing abroad, and the EU Common Position, as previously mentioned, blandly "encourages" EU members to "consider" extraterritorial control over nationals or brokers residing in their territory.¹²¹ For example, German law regulates air transport if the plane is registered in Germany and would subject the captain to legal penalties if he transported arms to an unauthorized end-user.¹²² However, German law does not cover a situation where a German national or resident is delivering weapons to an unauthorized end-user on a plane registered in a country without controls on brokering-related activities.¹²³

The hesitation to extend jurisdiction beyond territory is rooted in legal traditions, concern over the ability to enforce such controls, and preference for establishing an international agreement on brokering.¹²⁴ For some states the concern arises out of historical events that have contributed to a legal tradition that refrains from controlling nationals' activities committed abroad.¹²⁵ Many members are also skeptical of the enforceability of extraterritorial controls on arms brokering.¹²⁶

¹¹⁷ ANDERS, *supra* note 51, at 10.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 13. These countries include Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Nicaragua, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Ukraine, the United Kingdom, and the United States. *See generally id.*

¹²⁰ *Id.* at 10.

¹²¹ *Id.*

¹²² *Id.* at 9. Ships and aircrafts registered in Germany are regarded as an extension of German territory.

¹²³ *Id.* at 10-11.

¹²⁴ *Id.*

¹²⁵ *Id.* at 10.

¹²⁶ *Id.* at 11.

Specifically, states are concerned about the feasibility of building sufficient documentary evidence to form a legal basis for prosecution.¹²⁷ Moreover, they argue that for national controls to be effective an international instrument must complement them.¹²⁸

In contrast to European jurisdictional tentativeness, the United States offers what may be considered a comprehensive model for brokering regulation in light of its extraterritorial reach: the Brokering Amendment.¹²⁹ The statute, which was passed in 1996 as part of the Arms Export Control Act, asserts jurisdiction over activities by “any U.S. persons, wherever location, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States.”¹³⁰ The law requires U.S. brokers living anywhere in the world and foreign nationals residing in the United States to register and obtain licenses for all arms deals they transact. By expanding the jurisdictional reach of its brokering statute, the United States has closed off loopholes that allowed nationals and residents to evade U.S. law by basing operations in a country with lax controls on brokering.

Despite its jurisdictional reach, the promise of the brokering statute has remained largely unfilled. To date, the United States has prosecuted only one case under the Brokering Amendment, and it was dismissed due to the court’s finding that the defendant did not qualify as a “U.S. person.”¹³¹ And, unfortunately, the U.S. experience is characteristic of brokering regulation enforcement in other countries as well. In general, prosecution of illicit arms brokers has not paralleled an increased awareness of the need to control brokering and adoption of regulations.¹³² One reason may be that most regulations are relatively new and enforcement officers, still unfamiliar with brokering statutes, are more likely to prosecute under more established laws like money laundering and bribery.¹³³ Another reason may be that the complexity of illicit brokering deals requires a great amount of time, dedication, and resources to gather the necessary evidence for successful prosecution.¹³⁴ “Where brokering occurs outside U.S. borders, the U.S. Department of

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Brokering Amendment, Pub. L. No. 104-164 § 151, 110 Stat. 1421 (1996, codified as amended at 22 U.S.C. § 2278 (1996)).

¹³⁰ Registration and Licensing of Brokers, 22 C.F.R. § 129(3)(a) (2000).

¹³¹ *United States v. Yakou*, 428 F.3d 241, 254 (D.C. Cir. 2005).

¹³² *Anders & Cattaneo*, *supra* note 9, at 20-21.

¹³³ *Id.* at 21.

¹³⁴ *Id.*

Customs may have to conduct investigations abroad to gather enough evidence to support the indictment. Although tools for overseas investigation do exist, their scope is limited and they leave much of the investigative process to informal information exchange.¹³⁵ The inadequacy of extradition treaties in addressing illegal arms brokers poses an additional obstacle.¹³⁶ According to Loretta Bondi in her presentation to a UN workshop on illicit arms brokering,

It is unlikely that brokering violations would be regarded as extraditable offenses under existing treaties, most of which predate 1996. . . . In addition, it remains untested whether brokering violations are considered extraditable offenses under treaties that are new or belonging to the so-called “list plus” category. . . . In fact, the “list-plus” approach is hindered by the same pitfalls of the dual criminality condition, which requires that the offense be a crime in the country requesting extradition and in the country where the offender is located.¹³⁷

II. DEFINING BROKERING

While there is no common understanding of what constitutes brokering, most national systems recognize arms brokers as intermediaries who arrange and negotiate arms deals between two foreign states.¹³⁸ Defining the broker as such, however, creates an artificial distinction between “brokering” and “brokering-related” activities.

On the one hand is the “core brokering activity” of mediation of arms deals, during which brokers may or may not enter in direct ownership or possession of the arms they help to sell, although frequently they will not. On the other hand are the so-called “associated activities” that include, among others, transportation, financing, insurance and the provision of technical services.¹³⁹

The harm of restricting the understanding of what constitutes brokering appears where legislation designed to control brokering activities has a limited application to persons engaged in negotiating and

¹³⁵ Keppler, *supra* note 6, at 400.

¹³⁶ *Id.* at 402.

¹³⁷ Loretta Bondi, The U.S. Law on Arms Brokering in 11 Questions and Answers, Presentation to United Nations Workshop (N.Y., May 31, 2005; Geneva, June 3, 2005), at 4, available at <http://disarmament2.un.org/cab/brokering/Loretta%20Bondi.pdf>.

¹³⁸ *See id.*

¹³⁹ Anders & Cattaneo, *supra* note 9, at 9.

arranging arms contracts. As the Liberian case study makes apparent, to focus on those individuals who facilitate contact between the parties allows key players in illicit arms dealing to escape regulation. For example, Interjug AS did not negotiate the arms contract, but it was responsible for preparing the false documents necessary to transport the weapons from Serbia to Liberia.¹⁴⁰ Arranging transportation, though just as responsible for arms transferring as making contacts between the two parties, would escape culpability under the regulations of that narrowly written legislation.

The U.S. Brokering Amendment may offer a model as to how to understand brokering activities.¹⁴¹ First, the statute employs a broad definition of broker. It applies to “any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration”¹⁴² and to anyone engaged in “financing, transportation, freight forwarding, or taking any other action that facilitates the manufacture, export or import of a defense article or defense service.”¹⁴³ Thus, this legislation, in contrast to many other states’ regulation, closes any loophole that results from distinguishing between core and peripheral brokering activities.

Comprehensive definitions and broadening jurisdictional authority, though necessary preliminary steps, are of course incomplete without enforcement. As states negotiate stronger controls over brokering activities, the International Criminal Court could play an important role in pushing states to increase and enforce controls by prosecuting arms brokers whose activities have contributed to the violation of international laws.

¹⁴⁰ Expert Panel on Liberia, *supra* note 20.

¹⁴¹ ANDERS, *supra* note 51, at 6-7.

¹⁴² 22 C.F.R. § 129.2 (2005).

¹⁴³ 22 U.S.C. § 2778(b) (2000).

Under the Brokering Amendment, persons who are engaged solely in financing, transporting, or freight-forwarding activities without also brokering defense articles and services are not subject to the regulation. This exemption has not yet been clarified by the regulations, case law, or the DTC. A plain reading of the text suggests that this provision only exempts actors who are ignorant of any role in facilitating an arms deal, such as banks who may be holding money related to an arms deal, but who have no active involvement in the transaction. It remains to be determined, however, if this exemption might be interpreted to make the brokering regulation significantly narrower, exempting all individuals whose primary role is coordinating, financing, transporting, and freight forwarding for the transaction.

Keppler, *supra* note 6, at 393.

III. POTENTIAL ROLE OF THE INTERNATIONAL CRIMINAL COURT

Given the inadequacy of national legislation and multilateral instruments to control arms dealing, the International Criminal Court (ICC) may prove to be an effective venue for prosecuting illicit arms brokers. The provisions and guiding principles of the ICC provide legal grounds for holding brokers liable; although there are economic and scheduling limitations that would prevent the court's involvement from having a deterrent effect on active and future brokers, it could prove effective in holding well-known brokers accountable for their illicit activity. Moreover, a successful conviction of a high-profile broker may encourage states to more aggressively enforce their brokering laws.

The International Criminal Court became effective on July 1, 2002, upon the sixtieth state's ratification of the Rome Statute of the International Court.¹⁴⁴ As of March 2007, 104 states are members of the ICC.¹⁴⁵ The ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole,"¹⁴⁶ namely the crime of genocide, crimes against humanity, and war crimes.¹⁴⁷ The court is currently trying a case after its first arrest and transfer of a person to the International Criminal Court.¹⁴⁸

The ICC is a "permanent institution"¹⁴⁹ with the power "to exercise its jurisdiction over persons for the most serious crimes of

¹⁴⁴ International Criminal Court, Historical Introduction, www.icc-cpi.int/about/ataglance/history.html (last visited Mar. 17, 2007).

¹⁴⁵ Coalition for the International Criminal Court, Ratification of the Rome Statute, <http://www.iccnw.org/?mod=romeratification> (last visited Mar. 17, 2007).

¹⁴⁶ Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter Rome Statute].

¹⁴⁷ *Id.*; International Criminal Court, Frequently Asked Questions, #4, <http://www.icc-cpi.int/about/ataglance/faq.html> (last visited Mar. 17, 2007) (The ICC also has jurisdiction over the crime of aggression, but it won't exercise its authority until member states adopt a definition of aggression and the elements of the crime.).

¹⁴⁸ International Criminal Court, *First Arrest for the International Criminal Court*, Mar. 17, 2006, http://www.icc-cpi.int/pressrelease_details&id=132.html; Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 (2006), <http://www.icc-cpi.int/cases/RDC/c0106.html> (last visited Mar. 17, 2007) (The Pre-Trial Chamber I of the ICC confirmed the charges of committing war crimes in the Democratic Republic of Congo for enlisting and conscripting children under the age of fifteen into militias and using the child recruits to engage in hostilities.).

¹⁴⁹ Rome Statute, *supra* note 146, art. 1.

international concern.”¹⁵⁰ In Article 1, the court asserts its authority over persons rather than states, revealing early on its lineage to the Nuremberg Trials.¹⁵¹ In response to the defense’s argument that international law applies only to states and not individuals, the Nuremberg International Military Tribunal replied, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁵² The famous passage marked a “paradigm shift”¹⁵³ in international law by extending beyond the state to the individual.¹⁵⁴ The Nuremberg Tribunal also declared individual members of certain organizations, like the Nazi Party, to be subject to international law as well as private industrialists.¹⁵⁵ Gustav Krupp van Bohelm und Halback of the Krupp Company, for example, the main private supplier of armaments and ammunition for Germany during the war, would have stood trial were he not considered mentally and physically unfit.¹⁵⁶

In addition, the Nuremberg judgment introduced “crimes against humanity” as grounds for international prosecution.¹⁵⁷ The crime was “to ensure that the deportation of Germans by Germans to the concentration camps and their subsequent mistreatment and extermination there could be prosecuted.”¹⁵⁸ Prior to its introduction, the manner in which a state treated its citizens was considered to be beyond the reach of international law.¹⁵⁹

The two ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) further developed and clarified international law on crimes against humanity.¹⁶⁰ In particular, the ICTR expanded the application of international criminal law to individuals that were “not necessarily” involved in the war.¹⁶¹ The court found that the

¹⁵⁰ *Id.*

¹⁵¹ Andrew Clapham, *Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 30, 31 (Philippe Sands ed., 2003).

¹⁵² Int’l Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* 223 (1947), *reprinted in* 41 *AM. J. INT’L LAW* 172-333 (1947).

¹⁵³ Clapham, *supra* note 151, at 33.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 34-35.

¹⁵⁶ *Id.* at 37.

¹⁵⁷ *Id.* at 42.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 43.

¹⁶¹ *Id.* at 44.

director of a tea factory abetted in the commission of crimes against humanity and genocide when he “failed to take the necessary and reasonable measures to prevent”¹⁶² his employees from attacking Tutsis.¹⁶³

The elements for criminal responsibility for the crimes listed in the Rome Statute codify the development of international law as it applies to individual culpability in the commission of genocide, crimes against humanity, and war crimes. Under Article 25 of the Rome Statute, the court may find a person criminally responsible for a crime not only where he or she “commits”¹⁶⁴ or “orders”¹⁶⁵ the offense but also where the individual “aids, abets”¹⁶⁶ or “[i]n any other way contributes to [its] commission or attempted commission.”¹⁶⁷ In order for the individual to be found responsible for facilitating a crime, the act must be committed with “intent and knowledge.”¹⁶⁸ This means that the individual must have intended to engage in the activity and was aware that “a circumstance exists or a consequence will occur in the ordinary course of events.”¹⁶⁹ While the ICC has yet to define the boundaries of aiding and abetting or otherwise contributing to a crime’s commission, the statute “cast[s] the net well beyond the principal perpetrators.”¹⁷⁰ Looking at the international crimes committed in Sierra Leone, Bill Schabas, professor and Director of the Irish Centre for Human Rights, predicates that establishing the requisite mental state for the crime of aiding and abetting would not be too demanding.¹⁷¹ He writes:

However, with regard to violations of international humanitarian law, establishing knowledge of the end use should generally be less difficult because of the scale and nature of the assistance. Given the intense publicity about war crimes and other atrocities in Sierra Leone, made known not only in specialized documents such as those issued by the United Nations and international non-governmental organizations but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and

¹⁶² Prosecutor v. Musema, Case No. ICTR-96-13, Judgment and Sentence, ¶ 899 (Jan. 27, 2000).

¹⁶³ *Id.*

¹⁶⁴ Rome Statute, *supra* note 146, art. 25(3)(a).

¹⁶⁵ *Id.* art. 25(3)(b).

¹⁶⁶ *Id.* art. 25(3)(c).

¹⁶⁷ *Id.* art. 25(3)(d).

¹⁶⁸ *Id.* art. 30(1).

¹⁶⁹ *Id.* art. 30(3).

¹⁷⁰ Clapham, *supra* note 151, at 56.

¹⁷¹ *Id.* at 57.

executives, small arms suppliers and so on have knowledge of their contribution to the conflict and to the offences being committed.¹⁷²

The potentially broad exercise of subject-matter jurisdiction is tapered by the court's principle of complementarity.¹⁷³ Article 1 of the Rome Statute states that the court "shall be complementary to national criminal jurisdictions."¹⁷⁴ This means that it will not take a case that a state is investigating or prosecuting in good faith.¹⁷⁵ Philippe Sands from the Center for International Courts and Tribunals at University College of London explains the rationale of the complementary principle:

The policy here being applied is not an accidental one, but rather the product of deliberation and negotiations carried on over many years. The international community is saying that it is primarily for national courts to exercise jurisdiction. There are several rationales for that policy: (1) it recognises that national courts will often be the best placed to deal with international crimes, taking into account the availability of evidence and witnesses, and cost factors; (2) it recognises that the human and financial burden of exercising criminal justice have to be spread around, they cannot be centralised in The Hague; (3) it creates an incentive for states, to encourage them to develop and then apply their national criminal justice systems as a way of avoiding the exercise of jurisdiction by the ICC; and (4) in the expectation that that will happen, it might allow more states to become parties to the ICC Statute, reassured in the knowledge that they have it within their own power to determine whether or not the ICC will exercise jurisdiction.¹⁷⁶

Metaphorically speaking, the ICC plays the role of the legal understudy who will take the stage when justice is inadequately dispensed at the national level. Therefore, even where the individual has committed or facilitated the commission of one of the three crimes, the domestic courts retain primary responsibility for prosecuting the individual.

Deference to national courts is not without its qualifications. Article 17 serves as a check against states that would use the complementary principle to prevent individuals from "being brought to

¹⁷² *Id.*

¹⁷³ Rome Statute, *supra* note 146, art. 1.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* art. 17; Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 21 (2003).

¹⁷⁶ Philippe Sands, *After Pinochet: The Role of National Courts*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 68, 75-76 (Philippe Sands ed., 2003).

justice”¹⁷⁷ in the ICC or are incapable of prosecuting criminals “due to a total or substantial collapse or unavailability of its national judicial system.”¹⁷⁸

In light of the provisions that extend liability to aiders and abettors and the complimentary principle, the ICC appears to be a proper forum for prosecuting illicit arms brokers. First, brokers that arm individuals or groups committing grave human rights violations, as in the case of Liberia, would likely be subject to ICC jurisdiction as aiding and abetting the commission of war crimes, genocide, and/or crimes against humanity. Second, given the media coverage of many armed conflicts and the nature of their operations, brokers facilitating illicit arms transfers would have difficulty disputing the “intent and knowledge” of their involvement in the commission of crimes. Finally, because the arms recipients are weak states in deep political and economic turmoil, they are often incapable or unwilling to investigate and prosecute the facilitators of the crimes.

Practical considerations detract from the desirability of relying on the court to prosecute brokers that engage in serious international crimes. First, the court is limited in the number of cases it can handle. Second, regulation at the local, regional or global level is a preferable means to control brokers, not only because of constraints on judicial resources, but because it is better to prevent crimes than to punish them.¹⁷⁹ Moreover, spotty prosecution of an especially well-known unscrupulous arms dealer may not prove effective in deterring illicit brokering activity.

However, while acknowledging that the court cannot prosecute every dealer, utilizing the Rome Statute even against the most egregious brokers would bring a certain amount of justice. More importantly, a high profile case may serve as a model for domestic jurisdictions and encourage states to adopt and enforce “the necessary measures” that current brokering instruments demand.

¹⁷⁷ Rome Statute, *supra* note 146, art. 17(2).

¹⁷⁸ *Id.* art. 17(3).

¹⁷⁹ CESARE BECCARIA-BONESANA, AN ESSAY ON CRIMES AND PUNISHMENTS 93 (Edward D. Ingraham trans., Academic Reprints 1953) (2d American ed. 1819).

CONCLUSION

Small arms brokers have facilitated atrocities committed around the world by evading embargoes through a sophisticated system of document falsification and transportation established during the Cold War. Since the 1990s, the world has paid increasing attention to the role of arms brokers in fueling intra-state conflict, as was seen in Liberia, and regional destabilization. It is important that the discussion on how to regulate brokering activities is sustained so that states can advance from current national controls and multilateral agreements and coordinate efforts in enforcing regulations. The ICC can encourage this discussion by exercising its legal authority to assert jurisdiction over brokers who violate the provisions of the Rome Statute. In addition to maintaining attention on the issue, the ICC's involvement in bringing egregious arms brokers to justice could serve as a model for how states may prosecute brokers domestically.