International Criminal Law: Towards New Solutions in the Fight against Illegal Arms Brokers

Katharine Orlovsky
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By KATHARINE ORLOVSKY*

I. Introduction

The arms broker who delivers arms to known human rights violators in conflict zones despite United Nations embargos is a central figure in civil and international armed conflicts. His cargo is instrumental to the commission of war crimes, crimes against humanity, the conscription of child soldiers, rapes, and the destruction of lives and livelihoods. It has been estimated that, between 1991 and 2002, 4 million people were killed with small arms in internal conflicts.¹ It has also been shown that over 50 percent of the war casualties in the 1990s were civilians.²

While the international community is well aware of the harms caused by illegal arms traffic, arms brokers continue to enjoy broad impunity under existing international and domestic law.³ That

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impunity stems from three factors: from the nature of the international arms trade, which is uniquely difficult to regulate; from the murky legal status of United Nations embargos, which are difficult to enforce; and from inadequate political will to implement measures to regulate, deter and punish arms brokers, as evidenced by inadequate legislation of their activities.

Human rights advocates have called for the prosecution of arms brokers before international criminal tribunals and the International Criminal Court (ICC). In examining this possibility, I hope to show that these calls are justified in substance, but may be incompatible with the current realities of international criminal law and its institutions. Throughout the paper I will note issues which make it unlikely that such prosecutions will occur in the near future, despite the fact that they are theoretically, and legally, possible. In doing so I will highlight an existing tension between the realities of international criminal law and the aspirations of international criminal law. An examination of the realities of international criminal law shows that, in seeking to combat the impunity of arms brokers, a better solution lies in increased domestic and international regulation of their activities. However, international criminal law can play a valuable role by underlining the gravity of the acts committed by arms brokers, and by placing the acts in proper context, alongside the worst crimes that are prosecuted in high profile international courts and tribunals.

I will begin in Part II with a brief discussion of the activities of arms brokers, examining why they are uniquely difficult to both regulate and prosecute. I will illustrate their operations by describing one particular case of illegal arms traffic to Rwanda which has been thoroughly investigated by the United Nations, an example I will return to throughout the paper as a means of giving context to the ideas discussed.

Part III explores the legal theories and the institutions of international criminal law which may be used to directly hold a black market arms broker accountable. The International Criminal Court has the ability to prosecute black market arms brokers for the core crimes listed in the Rome Statute under a theory of aiding and abetting or complicity in the commission of genocide, war crimes, or crimes against humanity. As the ICC has just issued its first indictments and has not yet held trials or issued judgments, I will look
to the jurisprudence of the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) for examples of the types of cases which may be brought.

Part IV illustrates how international criminal law can indirectly hold black market arms brokers accountable through triggering domestic prosecution and through the development of treaty law. I will describe how the ICC is designed to encourage domestic prosecution. I will examine how a combination of treaties, including the Rome Statute of the ICC, and a planned international instrument to regulate arms brokering, may work to put new pressure on states to prosecute arms brokers in domestic jurisdictions.

I will conclude by examining the general political climate in which these developments are taking place, and discuss how political will may have an impact on efforts to stop illegal arms brokering activity.

II. Background on Illegal Arms Brokering

a. What it Means to be a Black Market Arms Broker

Illegal arms dealing is a dangerous and profitable business, the methods of which are not always visible, but the effects of which are horribly evident in conflict zones around the world. A groundbreaking 1996 United Nations investigation into arms smuggling into Rwanda gave this general description of the operations of arms brokers in Africa:

Reliable and highly reliable sources in Belgium, Kenya, Rwanda, South Africa, the United Republic of Tanzania and the United Kingdom painted a coherent picture of huge, loose, overlapping webs of more or less illicit arms deals, arms flights and arms deliveries spanning the continent from South Africa as far as Europe, particularly Eastern Europe. Often the participants are businessmen, sometimes with a military or security background, who may or may not also be engaged in entirely legitimate operations having no connection with the arms trade. Many are motivated more by profit than by political or strategic considerations. The aircraft used range from large cargo carriers to small private planes capable of landing on bush airstrips. Those engaged in such activities make free use of fake end-user certificates, exploit loopholes in the law, evade customs and other airport controls by making clandestine night take-offs and landings, file false flight plans and conceal their movements by using
fabricated zone permits, evading radar tracking and observing radio silence in flight. Amid this extensive traffic, which also deals in contraband drugs, firearms, diamonds and gold, the sale and supply of arms and matériel to the former Rwandan government forces is but one small piece of the mosaic.⁴

In this discussion I will focus on “small arms and light weapons” (here, “arms” or “small arms”). This category includes the same types of weapons legally manufactured and purchased for use by national militaries and police forces, and in some countries, legally owned by civilians. Small arms are “lightweight, easy to conceal, can be immediately used by the purchaser, and can be recycled around the world’s conflicts.”⁵ Almost all small arms on the black market have a legitimate origin, having been manufactured under government control, taken from military stockpiles, or bought from licensed gun dealers.⁶

Most international movement of small arms is indeed, by strict definitions, legal, as every state not under international embargo has the right to purchase arms.⁷ Some national and international instruments do exist to regulate trade in small arms, and these will be discussed in greater detail in Part IV below. It suffices to note at this point that many of these instruments are either not legally binding, or contain loopholes that are easily exploited by experienced arms dealers.

In general, the legal trade in small arms is licensed by the government of the exporting state.⁸ While requirements vary from state to state, at a minimum most states require documentation, commonly in the form of end-user certificates specifying the destination of the arms. These end-user certificates can be, and often are, forged or falsified. Regulatory controls are further undermined by corruption on multiple levels—routing through countries with lax or permissive customs and trade rules, and bribes to manufacturers, dealers, transporters and state officials willing to participate in an illegal or off-the-books transaction.

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⁶ Id.
⁷ Id. at 217.
⁸ Id. at 218.
The illegal arms trade is commonly divided into two categories, termed gray and black markets. Gray market transfers are conducted by or with the complicity of national governments.\(^9\) Heavy government involvement in the illegal arms trade took place during and after the Cold War, when superpowers and allies stockpiled weapons and then disarmed rapidly in the 1990s, flooding the market with cheap arms.\(^10\) The stockpiles of weapons in the former Soviet Union, for example, are a major source for illegal arms dealers, and the former Soviet Union has also produced some of the world’s most notorious traffickers.\(^11\) The gray market in illegal arms trade also includes governments’ covert arming of rebel or insurgent groups, and the recruitment and training of private traffickers to deliver the weapons outside of regular channels.\(^12\) Recent reports have shown that the gray market in illegal arms continues to thrive in the context of increased militarization that is the ongoing “war on terror.”\(^13\)

This paper will focus on black market transfers, which are defined as those which operate beyond governments’ knowledge or control.\(^14\) Black market transfers are conducted by private individuals, criminal organizations, or non-state actors such as rebel groups.\(^15\) However, it is important to note that gray market and black market transfers often overlap. Government dealings in the gray market provide sources for the black market, further blur the distinction between legal and illegal dealing, and may provide employment for arms brokers who trade in the black market as well.\(^16\) This overlap of semi-legitimate and illegal deals becomes especially important for understanding the problems of political will behind the impunity of arms brokers.

The discussion of international criminal law in this paper will focus on individual criminal responsibility of arms brokers. An arms broker has been defined as “any private individual or company that

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10. Id. at 14-15.
14. Marsh, supra note 5, at 221.
15. Id. at 223.
16. Id. at 226.
acts as an intermediary between a supplier and a recipient of weapons to facilitate an arms transaction in return for a fee."17 Arms brokers may never take possession of the arms, but provide "an essential facilitating role" in supplying illegal groups with weapons.18 This means that the broker may play any number of roles in the deal, but for our purposes and for the purposes of prosecution, they must be the person who knowingly provides the means to commit certain crimes.19 The extent of knowledge and participation required for prosecution under international criminal law will be discussed further in Part III below.

b. The Weakness and Uses of United Nations Embargos

Regulation of the arms trade is largely a matter of domestic legislation and licensing, and varies from country to country. International organizations, however, such as the United Nations Security Council, the European Union, and the Organization for Security and Cooperation in Europe, can and do issue embargos intended to prevent arms trade to certain locations or groups for certain periods of time.20 These embargos are generally issued in response to an ongoing state of conflict or humanitarian crisis.21 A typical embargo calls upon all states to prevent the sale or supply of arms and related matériel by their nationals or from their territories or using their flag vessels or aircraft to that state or group.22 The

17. Bondi and Keppler, supra note 9, at 8.
18. Marsh, supra note 5, at 225.
19. Seven main activities have been identified which are performed by arms brokers with the intent of facilitating arms deals. They include: prospecting, offering technical advice, sourcing, mediating negotiations, arranging financing schemes, obtaining necessary documentation, and organizing transport of the ordered weapons. See Holger Anders and Silvia Cattaneo, Groupe de Recherche et d'Information sur la Paix et la Securite (GRIP), Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process 9 (2005), available at <www.iansa.org/issues/documents/brokering-report-grip0905.pdf>.
22. See, e.g., S/RES/918, supra note 21, calling upon all states to "prevent the sale or supply to Rwanda by their nationals or from their territories or using their flag vessels or aircraft of arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts." As of early 2005, United Nations Security Council embargos were in
imposition of an embargo, however, does not itself criminalize arms traffic in United Nations member states, until additional national legislation is passed to enact it into domestic law. This domestic legislation is not always passed, however, or not passed in a timely manner, making embargos difficult to enforce, and in the absence of other means of sanction, making it difficult to discern when arms traffic is illegal.

Embargos are relevant to this discussion for two reasons. The first is that a United Nations Security Council embargo puts arms brokers on notice of a humanitarian or human rights crisis, as it is reasonable to expect that arms brokers will become aware of the embargo in the regular conduct of legal trade. Criminal prosecution of arms brokers for serious violations of international humanitarian law requires proof that the broker knew or should have known that certain crimes had been or were likely to be committed as a result of their actions. Knowledge of an embargo which explicitly warns of a humanitarian crisis may be used as partial evidence of mens rea. The mens rea necessary for prosecution for genocide, war crimes, and crime against humanity will be discussed in detail below in Part III.

The second reason has to do with the relationship between the illegal international arms trade and domestic legislation. Criminal prosecution has traditionally been the province of individual states, and the prosecution of individuals by international bodies has been restricted to ad-hoc institutions which dealt with crimes of a certain magnitude and situations where domestic prosecutions were judged inadequate or impossible. But a major problem with domestic prosecution of arms brokers is inadequate domestic implementation of arms embargos into domestic law, reflecting, among other things, lack of domestic political will to criminalize breaking embargos.

If the ineffectiveness of embargos is largely due to inadequate domestic implementation, the presence of a permanent international criminal court may provide a means of reinforcing state obligations to criminalize embargo breaking. As the ICC investigates conflicts, it will likely uncover arms deals which provided the means for crimes within its jurisdiction. While the principle of non-retroactivity will

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prevent domestic prosecution for crimes if no legislation had implemented the embargo, the overall cumulative effect may be to focus more international attention on the weaknesses of embargos. This in turn may underline the need for international regulation of the arms trade, and the need to have in place domestic legislation to prosecute future violations.

c. Black Market Arms in Rwanda

As international attention is more readily drawn to the direct perpetrators of crimes than to those who supply the means, it is helpful to examine an actual arms deal which resulted in the supply of arms to the Rwandan military while under embargo. This deal illustrates both the type of evidence that might be gathered by international investigators, as well as a common scenario in which an arms broker is a known accomplice to certain crimes but is not prosecuted.

The ICTR is prosecuting Colonel Theoneste Bagasora, a high-ranking officer of the Rwandan government forces.\textsuperscript{23} His indictment states, "during and before the events referred to in this indictment [Bagasora and others] distributed weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and its "accomplices."\textsuperscript{24} Bagasora is charged with individual responsibility for Conspiracy to Commit Genocide, Genocide, Complicity in Genocide, multiple counts of Crimes against Humanity, and multiple counts of Serious Violations of Article Three Common to the Geneva Conventions and Additional Protocol II.\textsuperscript{25} His indictment significantly includes this procurement and distribution of weapons.\textsuperscript{26}

In contrast to Bagasora, South African arms dealer Willem Ehlers has not been indicted by the ICTR, despite having been involved in one of the first exhaustively documented examples of illegal arms traffic into Rwanda. The deal was uncovered by Human Rights Watch, and subsequently investigated by a specially convened United Nations investigation (UNICOI). The investigation found that in June of 1994, while there was a United Nations Security

\begin{footnotesize}
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\item \textsuperscript{23} The Prosecutor v. Theoneste Bagasora, Case No. ICTR 96-7-I, Amended Indictment (Aug, 12, 1999).
\item \textsuperscript{24} Id. at 5.28.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\end{enumerate}
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Council embargo in place on Rwanda, Bagasora met and bought shipments of arms from Ehlers.\textsuperscript{27} The transactions took place in Seychelles, and the government was able to corroborate that Ehlers and Bagasora had purchased two shipments of arms which had been imported, via Zaire, to Rwanda. In its second report, UNICOI found the following:

On the basis of the evidence it has discovered in Zaire and Seychelles, the Commission is satisfied that the Government of Seychelles, acting on the basis of an end-user certificate apparently issued by the Government of Zaire, authorized a sale of weapons in its possession in mid-June 1994. The arms, which included AK-47 rifles, 82-mm and 60-mm mortar shells and 37-mm and 14.5-mm ammunition, were transported from Seychelles to Goma on 17 and 19 June 1994 by an Air Zaire DC-8 cargo aircraft, registration number 9QCLV, in two consignments of about 40 tons each.\textsuperscript{28}

The Government of Zaire did not allow UNICOI to investigate for first-hand evidence of a handover of the shipment from Zaire to Rwandan government forces. However, based on the participation of Bagasora, the fact that Bagasora personally accompanied the arms to Goma, and personal testimony to the Commission, UNICOI concluded that the arms were destined for and delivered to the Rwandan government forces.\textsuperscript{29} They found it "highly probable that a violation of the United Nations embargo took place involving the supply of more than 80 tons of rifles, grenades and ammunition in two


\textsuperscript{28} S/1996/195 \textit{supra} note 27 at 15.

\textsuperscript{29} Id.
consignments flown to Goma airport on 17 and 19 June 1994 and subsequently transferred to the Rwandan government forces then in Gisenyi, Rwanda.  

UNICOI investigated Ehlers further to determine whether he had “aided and abetted the sale or supply of arms to the Rwandan government forces in violation of the embargo.” Ehlers stated that he “had been assured that the arms were destined for Zaire and had been ‘shocked’ to read subsequently that the recipients were in fact the former Rwandan government forces.” He did not deny the transaction with Bagasora, who had been presented to him as a “technical expert.” UNICOI also was able to obtain from the government of Seychelles substantial documentation of this transaction, including itemized receipts signed by Bagasora, and the fake end-user certificate.

Following Bagasora’s indictment, human rights advocates called on the ICTR to prosecute Ehlers for his participation in the Rwandan atrocities, arguing that the indictment of an arms broker in the ICTR would serve the ends of both justice and deterrence. Advocates saw a role for international criminal law, in holding Ehlers accountable, to address not only his crimes but also to serve as a warning to illegal arms brokers. A prosecuted case before the ICTR would put arms brokers on notice, and by providing case law and precedent, would empower the ICC to try arms brokers for their individual responsibility for egregious violations of international law.

Ehlers was never indicted by the ICTR, however, even though such a prosecution is possible under the law developed by the ad-hoc tribunals, and despite the evidence gathered by a United Nations investigatory body. Why has no such case come forward to date? To answer this question, we must examine the mandates and limitations of international criminal tribunals and the ICC. I will next discuss below how international criminal law might deal with an arms broker, and why to this point, it has stopped short of bringing one before a tribunal.

30. Id.
31. Id. at 16.
33. Id.
34. See Austin, supra note 1. See also MISOL, supra note 3.
35. Austin, supra note 1, at 212.
III. Direct Prosecution of Black Market Arms Brokers under International Criminal Law

a. International Criminal Law Generally

International criminal law is "a body of international rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and punish at least some of those crimes." Substantive international criminal law refers to the rules governing which acts are considered international crimes, their elements, defenses, and conditions under which states may or must prosecute these crimes. Procedural international criminal law refers to the rules regulating proceedings in international courts and tribunals. International criminal law encompasses a set of crimes which are broader than those covered by international humanitarian law, the term that applies to the law of armed conflict. International criminal law may prosecute violations of international humanitarian law, as well as crimes that do not take place in the context of an armed conflict, for example, the category of crimes against humanity.

International criminal law has jurisdiction over limited types of crimes. For this paper, I will restrict the discussion to international crimes within the jurisdiction of the ICC, as set out in the Rome Statute: genocide, war crimes, and crimes against humanity. (These crimes will be referred to throughout as the "core crimes"). Briefly, 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. 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. 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

37. Id.
38. Id.
39. The Rome Statute also contains the crime of aggression, which has not been defined in the Statute but generally refers to the idea of crimes against peace, or aggressive war. See CASSESE, supra note 36, at 111-116.
41. Id. art. 7.
Black market arms brokering is a crime which takes place on an international scale, as illustrated in Part II. It is crucial to note, however, that illicit arms trade per se is not an international crime according to either customary international law or international criminal law. Trade violations and smuggling, even in contravention of a United Nations embargo, remain subject to domestic criminal law. When discussing the prosecution of arms brokers before international criminal tribunals or the ICC, the crime in question must be one of the core crimes, to which the arms broker is an accomplice or complicit to by virtue of supply.

It should also be noted however, that in most cases in order to be implicated in one of the core crimes, the arms broker would also commit a violation of domestic law, be it a violation of a trade law, treaty, or embargo. The double violation is significant as it highlights the potential auxiliary role of international criminal institutions as investigatory bodies, to be discussed further in Part IV. In cases where the subject matter of international criminal law is implicated but international courts do not take jurisdiction, domestic prosecution for these other crimes may still achieve a deterrent effect.

b. Background on the International Criminal Court and the United Nations Tribunals

The prosecution of an arms broker before an international court or tribunal would be unprecedented. International criminal law is relatively new. The codification of a body of international humanitarian law, and the creation of international courts that may impose criminal sanctions on individuals who violate international humanitarian law, has its roots in the Geneva Conventions, and in the war crimes tribunals at Nuremberg and Tokyo. The ICTY, convened in 1993, was the first court to enforce the existing body of

42. *Id.* art. 8.  
44. Liability has been extended to suppliers before, notably in the case of Bruno Tesch (also known as the “Zyklon B Case”), in which Tesch was found guilty of knowingly providing poison gas to concentration camps. *U.N. War Crimes Commission, Trial of Bruno Tesch and Two Others, in Law Reports of Trials of War Criminals, Vol.1, 93* (1947).  
international humanitarian law.46 The ICTR, convened in 1994, was created under a substantially similar statute to that of the ICTY in response to the internal conflict in Rwanda.

The ICTY and ICTR were convened by the United Nations Security Council as enforcement measures under Chapter VII of the United Nations Charter, to prosecute serious violations of international humanitarian law.47 They are temporary, ad-hoc tribunals, intended to address crimes arising from specific conflicts, in specific locations, and during specific time periods. By prosecuting the persons responsible, both the ICTY and ICTR are intended to contribute to the process of national reconciliation and to the restoration and maintenance of peace, as well to ensure that such violations would be halted and effectively redressed.

In theory, the prosecution of an arms broker, such as Elhers, would be within the mandate of the ICTR. Why, then, has there been no such prosecution? The main reason may be that the ad-hoc tribunals are temporary, and therefore necessarily limited in scope. The ICTY and ICTR are working towards a “completion strategy” set forth by the Security Council, which calls for the conclusion of investigations by 2004, trials by 2008, and appeals by 2010.48 As part of the completion strategy, both tribunals have adopted strategies that focus on the prosecution of those persons bearing the greatest responsibility for the events, and are working to send other prosecutions to domestic systems.49

Another reason may be the unprecedented nature of the ad-hoc tribunals themselves. The ICTY and ICTR have been subject to scrutiny and criticism for how they have fulfilled their limited mandates, even as they focus on the prosecution of the leaders most obviously connected to the conflicts. Mindful that the success of these institutions will somewhat be determined by the number of successful trials, it would make sense for the prosecutor not to reach beyond the actors who are primarily connected to the conflict to prosecute actors whose connections may seem tenuous or remote. Such prosecutions would have been undoubtedly controversial, and

46. Id.
may even have been seen as political. As such, the prosecution of an arms broker before an ad-hoc tribunal may have been seen as jeopardizing the “regular” purposes and functions of the court as set forth in their statutes.

While the ICTY and ICTR, in their limited remaining time, will not be indicting arms brokers for violations that fall within their jurisdiction, general principles of international criminal law as developed at the ad-hoc tribunals will be applicable at the ICC. Therefore we look to the statutes and decisions of the tribunals to see how the law is developing around individual criminal responsibility for atrocities, bearing in mind significant differences in the structure and functions of the institutions.

c. The International Criminal Court

The ICC is a treaty-based court, established by the Rome Statute of the International Criminal Court (Rome Statute) in 1998. The Rome Statute is influenced by the same principles of international law represented in the ICTY and ICTR statutes, as well as by the statutes and jurisprudence of the tribunals. As a treaty, however, the Rome Statute reflects the necessity of reaching consensus among the states and parties represented at the Rome Conference. As such, it is a document that reflects political concerns, political will, and the lobbying of non-governmental organizations and advocacy groups.

The ICC has a different relationship with sovereign states than the ad-hoc tribunals: it is completely dependent on state cooperation for most of its functions unless the United Nations Security Council provides additional backing. The ICC was designed to be used as a measure of last resort, which has two implications for possible prosecutions of black market arms brokers. First, the ICC’s relationship to domestic legal systems is one of complementarity rather than primacy, limiting the role of the Court according to the actions and capabilities of domestic legal systems. Second, the Court’s reliance on state cooperation may affect the ICC’s ability to investigate and prosecute politically sensitive areas.

The subject matter jurisdiction of the ICC is set out in Article V of the Statute: genocide, crimes against humanity, war crimes, and aggression. With the exception of the crime of aggression, which has yet to be defined, the ICC shares many aspects of subject matter

50. Rome Statute, supra note 40, at art. 5.
jurisdiction with the United Nations tribunals discussed above. As with the ICTY and ICTR, we may anticipate that arms brokers will be found to have been instrumental to the commission of the core crimes listed in the Rome Statute. Whether the ICC can prosecute them depends on the broker's nationality, on which states are party to the Statute, and on when and where the alleged acts took place.

The ICC is not an organ of the United Nations. While its jurisdiction is not geographically restricted, its temporal jurisdiction is limited to crimes after entry into force of the Statute, and after the states involved ratified the statute or acceded jurisdiction to the court.\textsuperscript{51} In order for the ICC to exercise jurisdiction, the crime must either be committed on the territory of a state party to the Statute, or the accused must be a national of a state party.\textsuperscript{52} The Rome Statute also allows non-state parties to accede jurisdiction to the ICC with respect to a specific situation,\textsuperscript{53} and allows the Security Council, under its Chapter VII powers, to refer a criminal case that fits within the subject matter jurisdiction of the ICC.\textsuperscript{54}

The jurisdiction of the ICC is additionally restricted by the principle of complementarity. The Rome Statute, which requires that the ICC notify state parties and other implicated states and allow them to investigate and or prosecute before it may take a case, is designed to encourage prosecutions by domestic legal systems.\textsuperscript{55} The ICC may only proceed if the states involved are unwilling or unable to genuinely prosecute, under the specific criteria set forth in the Statute.\textsuperscript{56} The criteria for unwillingness are set out in Article 17.2, and require scrutiny of the actions or failure to act of that state with respect to the matter before the ICC.\textsuperscript{57} According to the Statute, a

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\item \textsuperscript{51} Id. at art. 11.
\item \textsuperscript{52} Id. at art. 12(2).
\item \textsuperscript{53} Id. at art. 12(3).
\item \textsuperscript{54} Id. at art. 13(b). See, e.g., S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Sudan to the ICC).
\item \textsuperscript{55} Id. at art. 18.
\item \textsuperscript{56} Id. at art. 17.
\item \textsuperscript{57} Article 17(2) of the Rome Statute states:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person
finding of inability requires "total or substantial collapse or unavailability of its national judicial system."^{58}

It remains to be seen how Article 17 will be interpreted by the Court, especially in terms of the criteria for unwillingness, as the provisions of Article 17 do leave room for the ICC to act even if a state is acting on the same matter. In the next section I will go through the provisions of the Rome Statute that may be applied to an arms broker, and the case law of the ICTY and ICTR that is illustrative of the legal issues involved. The following legal theories are explored notwithstanding the jurisdictional barrier complementarity and other policy concerns may present, an issue which will be further explored below in Part IV.


i. Individual criminal responsibility

As middlemen, arms brokers would be charged with a form of indirect responsibility for genocide, war crimes, or crimes against humanity. Under international criminal law, an individual may be held liable for acts committed by others if he knew of the crime (mens rea) and participated to a certain degree in the crime (actus reus).^{59}

The actual perpetrator incurs a principal or direct responsibility, while the participator incurs a derivative or indirect responsibility.^{60} While the perpetrator is often termed the ‘principal’ and the participator the ‘secondary party,’ the principle of individual autonomy, which underlies modern criminal law, means that a secondary party may be no less culpable than the principal.^{61} This is codified in Article 25 of the Rome Statute, which provides for individual responsibility for commission of crimes within the jurisdiction of the ICC.^{62} In this discussion I will focus on Article

^{58} Id. at art. 17(3).
^{60} Id. at 57.
^{61} Id. at 57-58.
^{62} Rome Statute, supra note 40, at art. 25.
25(3)(c) which covers aiding and abetting, and Article 25(3)(d), which covers acting with a common purpose. Both the statutes of the ICTY and ICTR contain similar provisions, whereby an individual may incur individual responsibility for acts where he was not physically present if his contribution to those acts is direct and substantial.\textsuperscript{63}

In seeking to prove responsibility, the mental element is pivotal – without proof of the requisite \textit{mens rea} (knowledge and intent), an arms broker may not be held accountable for the core crimes. Article 30 of Rome Statute addresses this mental element. Article 30 defines intent in relation to conduct as meaning to engage in the conduct, and in relation to a consequence, "that person means to cause that consequence or is aware that it will occur in the ordinary course of events."\textsuperscript{64} Article 30 defines knowledge as an "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."\textsuperscript{65} The jurisprudence of the ICTY and ICTR are instructive as to how \textit{mens rea} may be interpreted.

\textit{ii. Aiding and Abetting}

A charge of aiding or abetting allows an individual to be held criminally liable for his part in criminal acts committed by others. The ICTR defined aiding as "giving assistance to someone" and abetting as "facilitating the commission of a crime by being sympathetic thereto."\textsuperscript{66} The requirements for aiding and abetting have been summarized by the ICTY Trial Chamber:

(i) It must be demonstrated that the aider and abettor carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender.

(ii) The act of assistance need not have actually caused the act of

\textsuperscript{63} ICTY Statute art. 7(1) states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." ICTR Statute Article 6(1) states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime." International Criminal Tribunal for Yugoslavia, Amended Statute of the International Tribunal, art. 7(1) (May 19, 2003), available at <www.un.org/icty/legaldoc-e/index.htm>.

\textsuperscript{64} Rome Statute, \textit{supra} note 40, at art. 30(2).

\textsuperscript{65} Id. at art. 30(3).

\textsuperscript{66} Prosecutor v. Akayesu, Case No. ICTR-96-4-T Trial Chamber Judgment, ¶ 484 (Sept. 2, 1998).
the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender. The act of assistance may be either an act or omission, and it may occur before, during or after the act of the principal offender.

(iii) Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender.

(iv) The mens rea of aiding and abetting requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.

(v) The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's mens rea.

(vi) However, the aider and abettor need not share the mens rea of the principal offender.67

The ICTY has held that that the individual need not intend to assist or facilitate. "Knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the mens rea requirement of this mode of participation." The ICTY has further held that an aider or abettor need not know the precise crime intended or committed. "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."69

Article 25(3)(c) of the Rome Statute addresses aiding and abetting. An individual "shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person, for the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission, including providing the means for its commission." [emphasis added] 68

68. Prosecutor v. Blaskic, Case No. IT-95-14, Appeals Chamber Judgment, ¶ 49 (July 29, 2004).
70. Rome Statute, supra note 40, at art. 25(3)(c).
language seems to provide for liability even if the act falls short of the substantial assistance required by the ICTY for aiding or abetting, and even if the crime was not completed. It has also been noted, however, that the Rome Statute, in requiring aiding and abetting "for the purpose of facilitating" has a higher mens rea standard than that established in the ad-hoc tribunals.\footnote{VAN SLIEDREGT, supra note 59, at 93.}

Establishing mens rea for arms brokers in these cases would require careful accumulation of evidence on the part of prosecutors. It has been argued that arms brokers should be considered professionals, and that this status may be used towards establishing mens rea. A professional arms broker may be subject to the expectation that they make themselves aware of any possibility that their transaction may violate an international embargo.\footnote{Austin, supra note 1, at 212. With regard to the Ehlers, Austin notes: Being an expert professional in arms transactions and having previously come under scrutiny for possible unlawful activities, he had knowledge of legal arms brokering requirements and understood the need to familiarize himself with all the details of the transactions in order not to be involved in a foul deal – especially a violation of an international arms embargo. Both the international arms embargo and the Rwandan genocide were widely reported in the South African and international press. Moreover, it can be illustrated that Ehlers knew his clients – already accused of the gravest of crimes – and their motives, yet assisted them with the purposeful attempt to cover up an illicit operation that was meant to help conclude the genocide.}

This is especially true where an ongoing humanitarian crisis is the subject of intense international media attention. Using the Ehlers example, a court applying international criminal law may find that knowledge of the embargo and the media attention on the Rwandan genocide may provide sufficient evidence to presume that he knew or should have known of the conflict and the crimes being committed.

The prosecutor would likely also want to prove that the broker knew, with specificity or certainty, the identity of the purchaser. Given the numerous roles an arms broker may play, such face-to-face deals, which would clearly provide the best evidence of an arms broker's knowledge of the identity of the purchaser, may be the exception rather than the rule. In the context of large international shipments, however, lack of such evidence may still be overcome. As William Schabas points out, "Most gun merchants will argue that they know little of the end use of the firearms they sell . . . . 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.” 73

As Schabas points out, 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. Such evidence may also be useful for overcoming defenses of ignorance and legitimate use. Once an embargo has been imposed, notice is given of an extraordinary situation in that region. While, under ordinary circumstances, arms may be legitimately sold for military and civilian use, the imposition of an embargo de-legitimizes all further sales of arms. A court may find, once the broker’s knowledge of the embargo and buyer has been established, that the broker also knew or should have known that there were no legal purposes for that particular sale for the express reason that crimes were being committed or were likely to be committed in that region.

The issue of an alleged accomplice’s knowledge of legitimate versus illegitimate uses for goods was raised in war crimes tribunals after the Second World War. There, poison gas manufacturers avoided conviction by successfully claiming ignorance of the end use of their product, while suppliers of the same substance were found guilty of complicity in genocide. 74 These issues have been raised more recently with the December 2005 conviction by a Dutch court of Frans van Anraat, a Dutch businessman, for complicity in war crimes in connection with his sales of chemicals to Saddam Hussein. The court found that van Anraat had known that the materials he sold to Iraq during the rule of Saddam Hussein could be used to make lethal poison gas. 75

The court acquitted van Anraat for complicity in genocide, however, finding that it could not be proved that he knew that the chemicals would be used for genocide. 76 When the underlying crime of the principal is genocide, aiding or abetting is more difficult to prove, due to the specific intent requirement. The jurisprudence of

74. In the “Zyklon B Case” the supplier of the poison gas Zyklon B, used for mass extermination at concentration camps, was convicted, while in the “I.G. Farben Case,” the manufacturers successfully argued that they were unaware of the end use of the product, and that they thought it was being used as a delousing agent. See Schabas, supra note 73, at 443.
76. Id.
the ICTR is unclear as to whether aiding and abetting genocide requires a shared specific intent, or knowledge of the principal’s genocidal intent. If proof of shared intent is required, arms brokers might be excluded, as they are more likely to be motivated by profit than by genocidal intent. Depending on the identity of the buyer and the facts of the case, it may be possible to prove that an arms broker had knowledge of the perpetrator’s genocidal intent. It is worth noting that the ICTR has specifically referred to “complicity by procuring means, such as weapons, instruments, or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose...” However, a prosecutor may still face problems in proving how far the broker’s knowledge may be presumed to reach, and the threshold for proving genocidal intent with respect to the principal remains high.

### iii. Common Purpose and Joint Criminal Enterprise

Another theory of criminal liability which may be applicable to arms brokers is that of common purpose or joint criminal enterprise (JCE), which generally involves a greater degree of individual criminal responsibility than aiding and abetting. JCE has been found to be implicitly included in Article 7(1) of the Statute of the ICTY. Three categories of JCE have been defined. JCE 1 requires a common purpose with the same criminal intent, and includes cases of “co-perpetratorship.” JCE 2 requires action pursuant to a concerted plan, and “is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps.” It seems unlikely that an arms broker would be sufficiently involved with the planning or commission of crimes to fit these modes of liability.


79. Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶ 92 (Feb 28, 2005). For an outline of the distinctions between aiding and abetting and JCE in the law of the ad-hoc tribunals, see Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 229 (July 15, 1999).


81. *Id.* at ¶ 198.

82. Kvocka Appeals Chamber Judgment, *supra* note 79, at ¶ 82.
JCE 3 "concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose." In such cases, "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk." It should be noted at the outset that commentators have read Article 25(3)(d) of the Rome Statute, which provides for liability under a common purpose doctrine, to exclude JCE. After laying out the basic principles of JCE according to the ad-hoc tribunals, I will discuss this argument and its applicability to arms brokers.

The elements of JCE require a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and the participation of the accused in the common design. This requires the establishment of the existence of an arrangement or understanding that a particular crime will be committed, but this arrangement or understanding need not be express, and it may be inferred from all the circumstances. While the contribution need not be substantial, the significance of the contribution will be relevant to demonstrating shared intent. The accused’s participation also need not be "a sine qua non, without which the crimes could or would not have been committed." In addition, an individual may be held responsible for

83. Tadic Appeals Chamber Judgment, supra note 79, at ¶ 204.
84. Id.
85. See E. VAN SLIEDREGT, supra note 59, at 107-109. Article 25 (3)(d) of the ICC Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person, in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.
86. Tadic Appeals Chamber Judgment, supra note 79, at ¶ 227.
88. Kvocka Appeals Chamber Judgment, supra note 79, at ¶ 97.
89. Id. at ¶ 98.
crimes outside the common purpose if it was foreseeable that such a crime might be perpetrated, and the accused willingly took that risk.\textsuperscript{90}

For JCE 3, the \textit{mens rea} requires "the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group."\textsuperscript{91} In this case, "responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk."\textsuperscript{92} A court may find that a broker, taking extraordinary measures to circumvent an embargo, exhibits behavior reckless or indifferent to the risk that he is participating in crimes. Although the preliminary obstacles of proving knowledge and intent remain, combined with the need to establish a common purpose, the acts of a black market arms broker may well fit within JCE 3 as outlined in the jurisprudence of the ad-hoc tribunals.

The common purpose doctrine in the Rome Statute largely corresponds to JCE. JCE 1 and most types of JCE 2 will fit within 25(3)(d)(i), which requires shared intent.\textsuperscript{93} JCE 3, however, may "fall outside the ambit of the ICC regime."\textsuperscript{94} Article 25(3)(d)(ii) states that an individual must make an intentional contribution to the commission or attempted commission of a crime \textit{with the knowledge of the intention of the group to commit the crime}.\textsuperscript{95} [emphasis added] This does not allow for liability based on the "foreseeability-risk test" for JCE 3, but imposes a higher standard of \textit{mens rea}.\textsuperscript{96}

Following this analysis of the common purpose provisions of the Rome Statute, and given the specific reference in Article 25(3)(c) to providing means for the commission of crimes, it seems that an arms broker before the ICC would be charged with aiding and abetting, rather than acting with a common purpose. The theoretical possibility of prosecution before the ICC, however, must still contend with factors external to the substantive law of the Rome Statute.

\begin{itemize}
\item \textsuperscript{90} Tadic Appeals Chamber Judgment, \textit{supra} note 79, at ¶ 228.
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textsc{VAN SLIEDREGT}, \textit{supra} note 59, at 108.
\item \textsuperscript{94} \textit{Id.} at 109.
\item \textsuperscript{95} Rome Statute, \textit{supra} note 40, at art. 25(3)(d).
\item \textsuperscript{96} \textsc{VAN SLIEDREGT}, \textit{supra} note 59, at 108.
\end{itemize}
Whether such prosecutions take place may depend on applicable international agreements, internal policies of the ICC, and the relationship of the ICC to domestic courts. While certain of these factors may diminish the likelihood of direct international prosecution of arms brokers, they may yet work indirectly to combat the impunity of arms brokers.

IV. Indirect uses of International Criminal Law: Developing Principles, Applying Pressure, and Domestic Prosecutions

a. International Agreements: Developing Principles, Creating State Obligations

The discussion of direct prosecution of arms brokers under international criminal law centers on rules. Given that the legal, gray, and black markets coexist and overlap, the development of clear standards is necessary to combat the impunity of black market arms brokers. The past ten years has seen a remarkable increase in international efforts to regulate arms brokers. There are two major international instruments, the 2001 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA) and the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (United Nations Firearms Protocol). In addition, there are ongoing efforts to develop an international arms trade treaty, both within the United Nations and in the NGO community.

With respect to arms brokers, the PoA is the more relevant


The PoA is a non-legally binding document which explicitly recognizes that the illicit arms trade "sustains conflicts, exacerbates violence, contributes to the displacement of civilians, undermines respect for international humanitarian law, impedes the provision of humanitarian assistance to victims of armed conflict and fuels crime and terrorism." It calls upon states to put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients.

It expressly calls on states to establish as criminal offences the illegal manufacture, possession, stockpiling and trade of small arms and light weapons within their areas of jurisdiction. Notably, the PoA further calls on states "to take appropriate measures, including all legal or administrative means," against any activity that violates a United Nations Security Council Embargo.

The United Nations convenes periodic reviews of the PoA and the progress made by states in implementing its recommendations. A recent report on states' progress on the PoA noted that "less than 40 states have laws enabling them to control arms brokering activities." Even if this number increases, an international agreement is called for to create harmonization between state laws, which can differ greatly. Differences between state laws create "loop-holes and inconsistencies that dubious arms brokers will be able to continue to exploit."

In the summer of 2006, the United Nations will convene a major review conference of the PoA in New York. The review conference is expected to address the implementation of the PoA by reviewing the progress made and by considering further measures to strengthen

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100. Id. at II.2.
101. Id. at II.3.
102. Id. at II.4.
104. Id.
and promote effective implementation.\textsuperscript{105} It is also expected to address the lack of international action to combat the illegal arms trade.\textsuperscript{106} A United Nations Open Ended Working Group has recently concluded negotiations towards an international instrument to enable states to identify and trace illicit arms recovered in the context of armed conflict and crime.\textsuperscript{107} However, the limited focus on marking and tracing of small arms is evidence of the contentiousness of this particular area of state activity. While it is generally acknowledged by NGOs, and in the substance of the PoA, that broader controls are necessary, the much more limited United Nations Firearms protocol and the recommendations of the working groups reflect the political realities.

The PoA is seen as compromised in substance in order to achieve consensus, and crime prevention is seen as a particular area of weakness.\textsuperscript{108} A legally binding international instrument to regulate arms brokers, however, would create definite obligations on states, particularly in the area of domestic prosecution of arms brokers. In the past, state objections to the negotiation of a legally binding instrument have forced the compromise of establishing a United Nations Group of Experts with a limited mandate.\textsuperscript{109} With the expectation that similar objections may be encountered this time around, groups are pushing for the establishment, after 2006, of another Open Ended Working Group to negotiate a treaty to control small arms brokering activities.\textsuperscript{110}

However, state objections raised at a recent United Nations preparatory conference shows that the arms trade remains an area where certain states are particularly reluctant to enter into a legally


\textsuperscript{106} Id.


\textsuperscript{108} GREENE, supra note 105, at 29.

\textsuperscript{109} Id. at 7.

binding agreement.\textsuperscript{111} Measures which would constrain the legal trade and legal manufacture of weapons, impose domestic restrictions on civilian ownership and use of weapons, or ban transfers to non-state actors, were objected to as falling outside the scope of the PoA.\textsuperscript{112} In addition, for political, strategic, and economic reasons, certain states may choose to obstruct the process indefinitely, basing their objections in broadly stated policy concerns such as sovereignty, national security, and terrorism.

It is true that the issue of a binding international arms trade treaty, like any binding international instrument, implicates issues of sovereignty. An arms trade treaty would clarify domestic obligations regarding regulation of the arms trade, including the criminal prosecution of illegal arms brokering. The negotiation process would raise the domestic profile of issues surrounding the arms trade, forcing states to examine their domestic regimes. An international instrument would be expected to ask states to establish national controls, clarify the goods to be covered, contain model regulations and definitions to ensure consistent national controls, establish arrangements for information exchange and consultation, and establish minimum penalties as well as mechanisms for cooperation in enforcement.\textsuperscript{113}

As advocates for an arms trade treaty point out, however, unregulated arms brokers exact an enormous human cost, and such domestic measures must be seen as a necessary solution.\textsuperscript{114} An


\textsuperscript{112} See Steven Costner, U.S. Dept. of State, United States Opening Statement to the Preparatory Committee Meeting for the First Review Conference of the United Nations Program of Action for Small Arms and Light Weapons (Jan. 11, 2006), available at <www.un.org/events/smallarms2006/pdf/United%20States.pdf >. The objection to a ban on transfers to non-state actors could prove particularly problematic for preventing crimes committed in the context of internal armed conflict, where at least one party is typically a non-state actor.

\textsuperscript{113} Greene, supra note 105, at 7.

international arms trade treaty, signed and ratified by a significant number of states, would transform the relationship between international criminal law and the illegal arms trade by creating multiple points for accountability and therefore deterrents. An illicit arms broker performs any number of potentially illegal acts – from the breaking of an international embargo, to the breaking of the domestic trade law of any number of states, to complicity in the core crimes of international criminal law. The existence of an international treaty would greatly increase the possibility that there would be laws on the books of the states in which the broker operated that could be used to prosecute him domestically for crimes other than genocide, crimes against humanity, or war crimes. Although such domestic prosecutions would likely carry lesser penalties than domestic or international prosecution for the core crimes, they would nonetheless be an improvement over the impunity that arms brokers currently enjoy.

In this scenario, increases in national legislation which encouraged prosecution for arms trafficking crimes would still be aided by international criminal law. Here, the ICC may play an auxiliary role, through providing information and exposing transactions, to ensure that some action is taken by the state to enforce their treaty obligations with regard to prosecuting arms trafficking crimes. The importance of encouraging domestic legislation is underlined by the internal policies of the ICC. While the law of the Rome Statute provides for the prosecution of complicit crimes such as supply and funding, the prosecutor of the ICC has forecasted a limited role of mutual support with respect to functional domestic institutions. This policy makes an international arms trade treaty all the more important.

b. Applying Pressure: The ICC and Complementarity

The Office of the Prosecutor (OTP) of the ICC, in a Policy Paper given in September of 2003, stated that, “as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”115 This policy has been followed in the first group

of indictments issued by the ICC in July 2005, and unsealed in October 2005, against the leadership of the Lord’s Resistance Army in Uganda.\textsuperscript{116} Despite stating a narrow scope for its indictments, the OTP has also recognized the centrality of arms brokers and financers to the crimes within its jurisdiction. In the same policy paper, the OTP states that financial links with crimes will be an important area of investigation for the ICC, noting that "[t]he investigation of financial transactions, for example for the purchase of arms used in murder, may well provide evidence proving the commission of atrocities."

However, for criminal actors who fall below the threshold of senior leadership of the state and organization involved, the OTP will call on national authorities to assist with investigations and to provide information regarding financial transactions within their jurisdictions.\textsuperscript{117} Furthermore, the OTP may be able to provide evidence to national authorities which may be used in domestic prosecutions, curbing the source of funding and deterring future crimes.\textsuperscript{118} This is part of a "two-tiered approach" to combat impunity: initiating prosecutions of those who bear the most responsibility for the crimes while encouraging national prosecutions for lower-ranking perpetrators, or working with the international community "to ensure that the offenders are brought to justice by some other means."\textsuperscript{119} In this way the ICC will put pressure on domestic systems to address crimes committed by arms brokers.

The principle of complementarity is also designed to encourage domestic prosecutions. If, for example, the ICC were to open an investigation in Rwanda, and find that Rwanda was unwilling or unable to prosecute, it may take jurisdiction over the state and military actors in the conflict. If, in the course of investigations, the OTP uncovered evidence of arms transfers by Ehlers, a South African national, it may gather information as it pertained to other prosecutions, but would be bound by the terms set out in the Rome Statute to notify state parties which may have jurisdiction over the


\textsuperscript{117} PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR, supra note 115, at 2-3.

\textsuperscript{118} Id.

\textsuperscript{119} Id.
crimes concerned before acting with regard to Ehlers. Should any state inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts "which may constitute crimes referred to in Article 5 [the core crimes] and which relate to the information provided in the notification to States," it may request that the ICC defer investigation. The ICC must then defer, unless it applies for and receives authorization from the pre-trial chamber.

With respect to prosecuting arms brokers, it is important to note that under Article 18, the State's investigation must also be with respect to the core crimes. Should the State be investigating an arms broker for any other criminal acts associated with the transaction and not for a core crime, presumably the ICC would not be barred from investigation for a core crime. This again raises the issue of the relative gravity of the crimes that an arms broker commits. Being prosecuted in a domestic court for an embargo violation will carry lighter penalties and less stigma than being prosecuted for war crimes or crimes against humanity in a domestic or international court. If a major goal of such prosecutions is deterrence, one might argue that it would be equally accomplished by either charge. However, the prosecution of an arms broker for embargo violations, when they have supplied the means for commission of core crimes, could be construed as having a negative effect in that such prosecutions fail to hold them accountable for the full extent of their crimes.

120. Rome Statute, supra note 40, at art. 18. Note that the broad geographic reach of an illegal arms deal would raise interesting questions regarding territoriality for the ICC. It is to be expected that multiple states would be implicated, and factors to be considered may include the nationality of the broker, place of registration of any transport, states that provided documentation or transfer points, and states whose financial institutions are involved in financing a deal.

121. Id.

122. Id. at art. 20. Article 20 of the Rome Statute bars the Court from trying someone who has been tried by another court "for conduct also proscribed under article 6, 7 or 8" with respect to the same conduct." There are exceptions if the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

123. On the significance of sentencing suppliers, see, e.g., comments of Presiding Judge Roel van Rossum in the case of chemical weapons supplier Frans van Anraat:
c. Domestic Prosecution: Bringing International Criminal Law Home

As the establishment and first steps of the ICC are raising the overall profile of international criminal law, greater attention is also being given to the possibilities of prosecuting the core crimes within domestic courts. This attention, many argue, is long overdue. As Timothy McCormack writes, “Despite the rhetoric of a commitment to the principle of trying war crimes, the practice of states confirms glaring inconsistencies between those acts which are tried and those which are not – inconsistencies most readily explicable on the basis of an ‘us’ and ‘them’ mentality.”¹²⁴ In a survey of domestic trials of states’ own nationals for serious violations of international criminal law, McCormack identifies three categories – domestic trials by states in political transition, domestic trials influenced by international criminal tribunals, and domestic trials for serious breaches of military discipline.

It is this second area which may inform the issue of prosecuting arms brokers, in particular, the idea that a threat of international prosecution may act as a catalyst to overcome otherwise weak political will to prosecute. In most of the cases that have been prosecuted to date, however, the trials deal with military actors and are cases where the state has acted to prevent trials at the hands of victors or by other ethnic groups. Such prosecutions have been intermittent and do not yet constitute an established practice of domestic prosecutions for the core crimes, although as awareness of international criminal law grows, such cases may be expected to increase.

McCormack notes that “trials of those fellow nationals who are representative of the predominant ‘us’ will always be more difficult to prosecute.”¹²⁵ He identifies “an aversion to accept the ugliness of what their own troops have done against the enemy they have come

¹²⁵ *Id.* at 141.
I would suggest that there is a similarly ingrained reluctance, albeit a much subtler one, to prosecute businessmen. As William Schabas notes, such accomplices commit white-collar crime "in its most barbaric and cynical guise, stimulated and encouraged by international bankers, investors, transnationals, airlines and traders who are, in the most charitable of scenarios, willfully blind to their participation in human rights violations." 127

Arms brokers are motivated by profit, exploiting strategic advantages, and providing a product for which there is a great market demand. They operate according to the same values that created the vast wealth of western economies. It can almost certainly be said that states would prefer to look elsewhere for their war criminals. The investigation of these individuals by NGOs and international organizations has been invaluable in exposing the willful blindness of states to the crimes of their own nationals. The vulnerability of corporate actors and other non-state and non-military actors is already perceived as a consequence of a permanent international criminal court. 128 This exposure, combined with the pressure of active international criminal courts, may finally begin to erode the impunity of arms brokers.

While impunity for black market arms brokers is the current reality, there are already signs that it does not have to be the future. One case, already mentioned, is the conviction of Frans van Anraat for complicity in war crimes by a Dutch Court. Another case, more relevant to this discussion but in early stages, is that of arms broker Guus van Kouwenhoven. In March of 2005, the Dutch government indicted van Kouwenhoven for war crimes against Liberian citizens, and for violating the United Nations embargo on Liberia. 129 NGO reports had exposed Van Kouwenhoven, a fixture in the inner circle of Charles Taylor and head of a profitable group of natural resource and arms trade operations in Liberia, for his illegal smuggling of arms, timber, and mineral resources. 130 His prosecution by the Dutch

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126. Id. at 142.
127. Schabas, supra note 73, at 451.
128. Id. at 439-59.
government is an excellent example of a reciprocal relationship between domestic and international criminal courts. The Prosecutor of the Special Court for Sierra Leone (SCSL), David Crane, stated that SCSL investigators provided extensive support to Dutch investigators.\footnote{131} Crane further stated that he did not have evidence that van Kouwenhoven was among those bearing ‘greatest responsibility’ for international crimes in Sierra Leone, and so could not, or chose not to, indict him.\footnote{132} This case further illustrates the hierarchy of indictees made by the prosecutors of international criminal courts and the ongoing necessity of domestic prosecution.

Having domestic precedents for the prosecution of black market arms brokers will help end impunity, but domestic systems on their own have proven unreliable and uneven in their approach. International law, as detailed in Part III and Part IV, is developing in ways that can greatly help domestic prosecutions be more consistent and effective in the future. International agreements could help to create standardized legal tools for domestic prosecution. Domestic prosecution can be aided by the jurisprudence of international criminal courts and tribunals. The prosecution of van Kouwenhoven shows that international actors can be of direct help in providing evidence to domestic prosecutions, and that the development of international criminal law presents the domestic prosecutor with an increasingly functional set of tools. Whether the political will exists to use those tools will be addressed below.

V. Conclusion

There are a number of individual arms brokers who have become infamous for their ability to exploit legal loopholes and collude with governments in order to ply their wares to militias and in war zones around the world.\footnote{133} These brokers have been named, reported on, and yet continue to operate. At the same time, the United Nations has repeatedly noted that volatile situations tend to combust with new deliveries of arms, which is indeed the whole point behind arms

\begin{footnotes}
\item[132] \textit{Id.}
\end{footnotes}
Returning to the situation in Rwanda, in their final report UNICOI stated that the situation in the Great Lakes region was "rapidly heading towards a catastrophe of incalculable consequences which requires urgent, comprehensive and decisive measures on the part of the international community. The danger of a repetition of tragedy comparable to the Rwandan genocide of 1994, but on a subregional scale, cannot be ruled out." With conflict and instability ongoing in the Democratic Republic of Congo, Uganda, Rwanda, Burundi, and Sudan, the prediction of the Commission seems tragically accurate, and decisive international measures sadly absent.

If ending the impunity of arms brokers comes down to strengthening political will, whose will should be shored up first? The Commission concluded that "most African countries, and in particular the countries in the Great Lakes region, do not have the expertise, training or resources to monitor the illegal flow of arms, and some clearly lack the political will to do so." They noted the lack of treaties or international controls governing the proliferation of small arms, and that the national laws that do exist are often circumvented by arms dealers who make use of third countries to arrange arms shipments. They noted, in a number of reports, the unenforceability of United Nations embargos, and that in this case, as in many others, the lack of domestic legislation implementing the embargo left no effective means to enforce the embargo or prosecute the violators. The Commission itself concluded that an arms embargo did not constitute an "effective, proactive mechanism."

The most effective approach to end the impunity of black market arms brokers is uniform, universal criminalization of their activities. If all states incorporate an embargo into their national law, it will greatly decrease the ability of brokers to circumvent embargos by operating from third countries. The very existence of a permanent international criminal court speaks to some consensus among states that the acts constituting the core crimes are universally proscribed. And the existence of international criminal sanctions for arms brokers' contributions to genocide, war crimes, and crimes against

135. Id. at 18.
136. Id.
humanity would both acknowledge the centrality of their acts to those grave crimes, and lift some of the burden of deterrence from a struggling regulatory regime.

The ICC remains a largely untested institution, and one that will be closely watched. It is highly likely that the OTP will follow its stated policy of focusing on those bearing the greatest responsibility, while at the same time sharing information with and encouraging national prosecutions. In the future, however, the direct prosecution of arms dealers for crimes within the statute of the court does remain a possibility. The ICC has roots in both tried legal theories, as it follows the work of the ad-hoc tribunals, and in policy aims, as the first permanent court to address agreed upon international crimes as not only a means of redress, but also of prevention and deterrence. As M. Cherif Bassiouni writes:

The purpose of a permanent international criminal court is to combine humanitarian values and policy considerations which are essential for justice, redress, and prevention, with the need for restoration and preservation or peace. An international criminal court is the most appropriate international mechanism through which the proscriptive norms against genocide, crimes against humanity, and war crimes can become effective instrumental norms, as opposed to being essentially the embodiment of intrinsic values reflecting international social expectations. The consistent interpretation and successive application of such norms intensifies social expectations and reinforces compliance.\(^{138}\)

As discussed above, one of the main obstacles to the prevention of arms traffic into areas of humanitarian crisis is that states lack the political will, and in many cases also the practical means, to do so. States may choose not to enforce embargos or to prosecute their violators in their jurisdictions because these states rely on the same arms brokers for some of their own military needs.\(^{139}\) Arms brokers operate with relative impunity in part because there is unofficial but very effective tolerance of their activities. Their contributions to atrocities are disregarded as a matter of convenience and policy. Prosecuting arms brokers remains a low priority in domestic criminal

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139. See Marsh, *supra* note 5, at 221. See also Farah and Austin, *supra* note 13.
law. As of now, there is little incentive to use domestic resources to prosecute crimes which have little impact in the arms brokers’ home jurisdiction. This is especially true when such prosecutions would dislodge the barrier between “us” and “them,” effectively making a businessman no better than a concentration camp commander.

It remains to be seen whether the ICC, through direct and indirect means, will successfully overcome what McCormack has called “the inconsistencies and selectivities riddling the approaches of various nations to prosecute international crimes pursuant to their own domestic law.”140 Direct prosecution of arms brokers in the ICC would work as a means of deterrence, through the codification and enforcement of the societal norms against the core crimes.141 Such prosecutions would go further to create an “effective instrumental norm” against the permissive climate in which international arms brokers currently operate.

The precise details of how the ICC will share responsibility with domestic prosecution are yet to be determined, as is the exact form of effective treaty dealing with arms brokers. But the overall shape of accountability for black market arms brokers is clear. It would involve complementary enforcement by both the ICC and domestic prosecution, relying on crimes defined by the Rome Statute, other treaties, and domestic statutes. Underlying the move towards accountability is a greater recognition of the gravity of the crimes that black market arms brokers commit.

The ad-hoc tribunals will close without having prosecuted the arms brokers complicit in the crimes within their jurisdiction. While their failure to prosecute the suppliers may be disappointing, we may also acknowledge that human rights advocacy often calls for ideas whose time has not yet come as a means, in time, of bringing them to pass. This paper is written under the assumption that international criminal law and the ICC are here to stay, will mature and grow in strength, and may in time expand their focus and reach. To this end, it is valuable to group arms brokers, who are often from, or who have strong ties to developed, conflict-free regions, with the genocidaires and war criminals who keep them in business. To do so undermines

140. McCormack, supra note 124, at 107.
141. It is also worth noting that the Rome Statute may be amended seven years after entry into force. See Rome Statute arts. 121 and 123. It is conceivable that the ICC may in time expand its jurisdiction to include other crimes, and that trafficking crimes could one day be explicitly prosecutable by the court.
the deflective quality inherent in dissociating the acts of arms brokers from the subsequent crimes committed with their wares. It undermines the “otherness” of the conflicts where the illegal arms brokers have the greatest and most deadly impact. Close examination of the applications of international criminal law to the acts of black market arms brokers may eventually overcome states’ own complicity in ignoring these crimes, and encourage legislation and enforcement of regulations and criminal laws effective enough to stop them.