

REGULATING THE ARMS TRADE – THE POTENTIAL OF INTERNATIONAL CRIMINAL LAW

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ABSTRACT

Existing transnational regulation of the arms trade fails to adequately control the conduct of individual State officials, corporate officers and sole-trading shipping agents and brokers, who supply arms that assist in the commission of international crimes. The limitations of existing regulation are manifold. At the domestic level, arms export regulations vary greatly between different States, they tend not to address “Third State Brokering”, and often lack harsh criminal penalties to deter individuals from acting in this extremely lucrative trade. The Arms Trade Treaty of 2013 (ATT) might have ameliorated some of these problems, but ultimately it grants States a large degree of interpretive space and its implementation remains to be seen. Arms embargoes of the United Nations Security Council (UNSC) have a declaratory power, but have often failed to halt the flow of arms, due in part to a lack of enforcement mechanisms. The principles of State responsibility provide a theoretical basis for liability, but only in relation to State-to-State trades. Meanwhile, international criminal law (ICL) offers a novel basis for regulation of individual conduct in the arms trade based on principles of accomplice liability, whether through universal jurisdiction as a means for national courts to bring prosecutions, or through international criminal tribunals including the International Criminal Court (ICC). The distinctive aspect of ICL, as far as the arms trade is concerned, is its potential to establish criminal responsibility for the arms trade conduct of individuals at an international level, as a form of expressive justice and deterrence.¹

I. INTRODUCTION

The unchecked flow of weapons to perpetrators of mass atrocity was a persistent feature of the twentieth century, and the situation remains much the same today. Individuals who commit international crimes can readily obtain arms and ammunition, in spite of various international and domestic regulatory mechanisms aimed at restricting the trade. The failures

¹ This Brief was prepared while the author was a PhD candidate at King’s College London and a Visiting Researcher at the Asser Institute. As a former Assistant Legal Officer at the ICC, the author states that the views in this Brief are personally held and cannot be attributed to the ICC (fbhamilton@gmail.com).

of existing forms of transnational arms trade regulation have prompted discussion as to whether ICL might contribute to regulating the arms trade.²

ICL is a legal response to individual conduct – it imposes criminal sanctions on the basis of an individual’s direct responsibility under international law.³ The subject of ICL is the individual, whether acting as a State functionary or corporate officer, or in his or her own right. In the arms trade, several sets of actors – States and corporations, as well as individual brokers and shipping agents - engage in buying, selling, brokering, shipping, transshipment, and rental⁴ of arms.⁵ ICL cannot establish the direct liability of every one of those actors involved; it is more likely to address select forms of behaviour, focusing on individuals, in particular the key decision-making individuals who play a role in determining the behaviour of those actors.

The aim of this ICD Brief is to identify the limitations of existing legal regulation of the arms trade, as a starting point for examining the role that ICL might play. This ICD Brief will analyse the limitations of State responsibility, international and regional agreements, arms embargoes, domestic legal regulation, and treaty law in the form of the ATT, in order to identify *lacunae* in the existing regulatory environment of the arms trade, and to inform the discussion about the potential role of the ICC. The Brief is structured around an analysis of existing areas of arms trade regulation in turn, setting out several key limitations of each. The paper then introduces the relevance of ICL as a novel form of regulation, discussing some of its features.

² This ICD Brief reflects the initial stages of the author’s PhD research into the relationship between the arms trade and accomplice liability under ICL. The broader aims of the PhD are to investigate the possibilities and limitations of ICL as a legal response to arms trading, at the centre of which is a doctrinal analysis of the elements of the modes of liability in ICL, in particular evaluating the knowledge requirement of *mens rea* and the sources of law that are being used to develop the modes of liability.

³ See Gerhard Werle and Florian Jessberger, *Principles Of International Criminal Law*, Oxford University Press, 2014, at 31; Robert Cryer, et al. *An Introduction To International Criminal Law And Procedure*, Cambridge University Press, 2014.

⁴ Such non-permanent transfers have become increasingly common, in view of the recent rise in weapon loaning services offered by various private enterprises. It is desirable that rentals be considered in this research, because if the control of arms sales is without corresponding controls on weapon rental, the rental of weapons may become an alternative loophole for circumventing controlled sales of arms. See Daniel M. Salton, “Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking”, *Conneticut Law Review*, 46 (2013): 369.

⁵ “Weapons” is taken as synonymous with “arms” and for the limited purposes of the present discussion the terms extend to ammunition and parts.

In this Brief, the terms ‘international crime’ and ‘ICL’ are used in the sense which relates to the ‘core crimes’ of international law, or international crimes *sensu stricto*,⁶ which correspond to the crimes set out in the ICC’s Rome Statute and its Kampala amendment; namely, genocide, crimes against humanity, war crimes, and the crime of aggression.⁷ ‘International crime’ can be further defined in opposition to ‘transnational crime’.⁸ The Brief considers the regulation of arms trading from a broad perspective, but it is particularly focused on trading where a causal link to the commission of international crimes may exist. The arms trade involves a variety of types of weapon, but in relation to international crimes, the regulation of trade in small arms and light weapons (SALW) is of particular relevance. Despite a historically predominant focus on the risk to peace of non-conventional weapons, a legacy of Cold War concerns, the majority of today’s conflict deaths occur by SALW.⁹

II. DOMESTIC LAW REGULATION

Through their domestic laws, States regulate the arms trading of corporations and natural persons within their jurisdiction by regulating the manufacture, export, import, transportation, insurance, financing, ownership, stockpiling and use of weapons.¹⁰ A brief comparative

⁶ See Gerhard Werle and Florian Jessberger, *Principles Of International Criminal Law*, Oxford University Press, 2014, at 45; Cryer, Robert, et al. *An Introduction To International Criminal Law And Procedure*, Cambridge University Press, 2014; Neil Boister, *Routledge Handbook of Transnational Criminal Law*, Routledge, 2014.

⁷ On the basis of this understanding of international crime, cases involving terrorism charges are not considered to be within the purview of ICL. For instance, the *Victor Bout* case, much-cited in the ICL literature, does not constitute an example of a domestic court’s prosecution of arms trading conduct under ICL in the strict sense, rather, he was charged with offences relating to conspiracy and terrorism. The case is nonetheless illustrative of the difficulties of establishing liability in arms trading cases, including the fact that his prosecution was only made possible by a careful and lengthy undercover CIA operation, which succeeded in obtaining audio evidence of his knowledge of the criminal purpose behind an arms sale. See *United States v Victor Bout*, Trial Judgment, 2 November 2011, District Court for the Southern District of New York; *United States v Victor Bout*, Appeal Judgment, 27 September 2013, United States Court of Appeals for the Second Circuit, United States, 12-1487-cr, pp 3-4; Transcript of meeting, *United States v Viktor Bout*, Government Exhibit 1002-T08 Cr. 365 (SAS), March 6, 2008. The fact that the ICC would not have had jurisdiction over Bout’s crimes, at least as they were legally characterised against him in the US courts, has sometimes been overlooked - see Leigh Rome, “The Case for Prosecuting Arms Traffickers in the International Criminal Court” *Cardozo Law Review* 36 (2015): 1149.

⁸ Neil Boister defines TCL as “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects”. Neil Boister, *An introduction to transnational criminal law*. Oxford University Press, 2012. Boister’s definition builds on Jessup’s classic definition of “transnational” law as “all law which regulates actions or events that transcend national frontiers”. See Philip Caryl Jessup, *Transnational law*, Yale University Press, 1956.

⁹ Andrew Feinstein, *The Shadow World: Inside The Global Arms Trade*. Macmillan, 2011.

¹⁰ Following temporary restrictions imposed on arms transfers during World War I, the leading arms manufacturing States began to introduce the first licensing requirements on exports during the 1930s. The United Kingdom introduced legislation in 1931, followed by Belgium, the United States, Sweden, the Netherlands, and then France in 1939. See: Ian Anthony, ed. *Arms Export Regulations*. Oxford University Press, 1991, at 9. The leading manufacturing States have progressively introduced further export controls since that time, and today, domestic law regulation is sufficiently broad that it is possible to talk of “an

analysis of domestic law regulation shows a great deal of variation between different States.¹¹ At the domestic level, States define the boundaries of “arms” and military “*materiel*” in different ways, and there is a great degree of variance in how States regulate “dual-use items” that may be used for military or other purposes. Certain jurisdictions, such as France and Sweden, have traditionally considered *materiel* to have a broad definition, covering items such as cameras and apparatus designed for military purposes, bridge-building equipment, machinery and tools, or even blueprints and technical information or industry knowledge.¹² Certain States consider that arms export regulations apply to dual-use items where the exporter knows that the item will be used for military purposes.¹³ Suffice to say, one of the issues when legislating at a domestic level to regulate arms trading is to account for nationally specific issues concerning which types of items used in a military context are dealt with as “arms” and which are regulated separately on account of their dual-use nature.

One of the limitations of domestic law regulation is, therefore, that it may not regulate certain arms trading activity because of the nature of the dual-use items involved, regardless of the items’ actual end use. By contrast, ICL, with its focus on the criminal conduct and knowledge of individuals, is not limited to addressing particular types of items or weapons, but is instead concerned with the activities for which items are used.

Some States have begun to impose requirements on exporters to verify that the end-user of arms shipments is not involved in perpetrating international crimes. In some cases, end-user requirements have been accompanied by controls on re-exporting and requirements on States to ensure good receipt of the export at its destination, through the use of verified delivery.¹⁴ However, there are serious practical difficulties in ensuring that the true end-user

instrumentalization of arms export control policy in the service of economic and foreign policy goals”. Michael Bothe and Thilo Marauhn, “The Arms Trade: Comparative Aspects of Law.” *Revue Belge de Droit International* 26.1 (1993): 20, at 25. For instance, in the United Kingdom, the relationship between the government and the corporation British Aerospace Engineering has been described as “ever-more symbiotic”. See Sam Perlo-Freeman, “The United Kingdom Arms Industry in a Globalised World”, in Andrew Tan, ed. *The Global Arms Trade: A Handbook*, Routledge, 2014, at 263.

¹¹ See generally, Andrew Tan, ed. *The Global Arms Trade: A Handbook*, Routledge, 2014. Fundamentally, arms export regulation is structured differently in different States, according to whether a State *prima facie* bans or allows international trade. Depending on the legal framework that governs the international trade of entities within a State’s territory, a corporation or individual may or may not have a right to engage in arms exporting. In the United States, there is no constitutional right to engage in international commerce, such that exporting is viewed as a privilege granted by the Government. In Germany, there is a constitutional right of this nature, granting all corporations a subjective right to trade internationally, unless otherwise limited by statute. See Michael Bothe and Thilo Marauhn, “The Arms Trade: Comparative Aspects of Law.” *Revue Belge de Droit International* 26.1 (1993): 20, at 25-26.

¹² Michael Bothe and Thilo Marauhn, “The Arms Trade: Comparative Aspects of Law.” *Revue Belge de Droit International* 26.1 (1993): 20, at 27.

¹³ *Ibid.*, 30.

¹⁴ The function of requirements related to re-exporting is to reduce the possibility of transshipment, where goods appear to be exported to one party, but are, in fact, immediately redirected to another. Such as the

of a shipment of arms is reflected on the documentation used to satisfy end-use requirements.

Arms brokering often features in the transfer of arms to perpetrators of international crimes. Brokers are often able to facilitate trades that would otherwise be in contravention of domestic export controls by conducting their brokering activities from another jurisdiction where controls on exporting are less stringent. Yet, domestic laws on brokering are often extremely limited. While the extent of regulation varies from jurisdiction to jurisdiction, few countries have laws specifically addressed at brokering,¹⁵ equating to perhaps less than half of all States.¹⁶ Brokers play a particularly important role in international crime, because their activities enable trades to perpetrators that might otherwise be prevented from taking place. In effect, brokers enable corporations and individuals to avoid the regulations of the State in which they operate, by using a broker to facilitate the trade. This is particularly problematic because, by its nature, brokering is a business activity that can be easily relocated in order to take advantage of a more permissive regulatory environment in one State than in another. As long as brokers are able to broker deals between a manufacturer in one State and an end-user in another State, then the effectiveness of the original State's export controls is, in many cases, extremely limited, since the broker may be a legitimate end-user in the eyes of the State where the arms originated. Brokers are often shielded from liability by their residence in a third State, from where they coordinate trades between parties in other States, the arms never coming into the territory of the State where the broker resides. As will be discussed below, in some States this can mean that brokers are exempted from the ambit of regulations that do exist.

This problem of 'Third State Brokering' is illustrated by the case of Leonard Minin, a well-known associate of Charles Taylor,¹⁷ who was found to have carried out brokering activities while operating on the territory of Italy. Operating from Italian territory facilitated Minin in arranging arms transfers from the Middle-East to Liberia and Sierra Leone, in breach of UNSC arms embargoes. Under Italian laws, the fact that the weapons were not exported from Italian territory led to Minin's acquittal.¹⁸ In another example, a British arms broker

United States' Import Certificate/Delivery Verification Procedure ("IC/DV" procedure), see Karl Matthias Meessen, *International Law Of Export Control: Jurisdictional Issues*, Aspen Publishers, 1992, at 19.

¹⁵ Elise Keppler, "Comment, Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act", 19 *Berkeley Journal of International Law*, 381 (2001): 387.

¹⁶ Leigh Rome, "The Case for Prosecuting Arms Traffickers in the International Criminal Court" *Cardozo Law Review*. 36 (2015): 1149, at 1163.

¹⁷ Andrew Feinstein, *The Shadow World: Inside The Global Arms Trade*. Macmillan, 2011.

¹⁸ Matthew Schroeder, Dan Smith, and Rachel Stohl, *The Small Arms Trade: A Beginner's Guide*, Oneworld Publications, 2012.

called Gary Hyde had arranged for the transfer of 40,000 AK-47 assault rifles, 30,000 rifles, 10,000 9mm pistols and 32 million rounds of ammunition from China to Nigeria, probably destined for the Nigerian police force. As in Minin's case, the defence for Hyde argued that export license requirements did not apply to him since his activities were related to goods moving outside of the UK, although he coordinated them from within the UK. This lack of clarity in whether the UK's brokering regulations applied in such a situation led to Hyde's trial being suspended, and the Court of Appeal subsequently rejected his jurisdictional argument. Hyde was eventually convicted and sentenced to seven years' imprisonment.¹⁹ Domestic law regulation of arms trading may be limited by a *lacuna* in the law with regard to brokering activities that take place within a State (notwithstanding that they coordinate activities elsewhere), but the Hyde case shows that even where relevant laws exist, they may lack clarity or have been applied by domestic courts in an inconsistent manner and may, therefore, benefit from reform.

Even where domestic law regulation holds the potential to influence the arms trading of individuals, its regulatory power is often limited in practice by a lack of effective enforcement. There is a broad range of State practice in this regard, from States where export controls are backed up by no sanctions or minimal civil penalties,²⁰ to other States where criminal sanctions in the form of lengthy prison sentences are available.²¹ The fact that domestic legal regulation of arms trading often provides for only minor penalties, such as non-criminal fines, limits its coercive effect and precludes the possibility of removing a particular trader from the trade by imprisonment. On the other hand, in jurisdictions where arms trading is addressed by criminal regulation, it may be difficult to establish the higher threshold of criminal intent required for a conviction and the range of ancillary orders that accompany criminal proceedings, such as seizure and forfeiture orders and other forms of injunctive relief, may be difficult to obtain. The choice between criminal or civil regulation of arms trading is particularly relevant in the context of the ATT, where it currently remains to be seen whether State Parties will implement the requirements to establish "national control systems"

¹⁹ This UK case alone challenges Rome's claim that only the United States, Sweden, and South Africa apply their brokering laws extraterritorially - Leigh Rome, "The Case for Prosecuting Arms Traffickers in the International Criminal Court" *Cardozo Law Review*, 36 (2015): 1149, at 1164, citing Elise Keppler, "Comment, Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act", *Berkeley Journal of International Law*, 19 (2001): 381 at 388.

²⁰ Italy is a prominent example where breaching export restrictions is punishable by a maximum of a non-criminal fine, and where a similar lack of enforcement exists in relation to breaches of UNSC arms embargoes, which are considered as an administrative wrong. See Zeray Yihdego, *The Arms Trade And International Law*, Bloomsbury Publishing, 2007, at 111. See also the Leonard Minin case discussed above.

²¹ For instance, Austria, the United States and South Africa impose lengthy prison sentences. See Rachel Stohl and Suzette Grillot, *The International Arms Trade*, Polity, 2009, at 23. Zeray Yihdego, *The Arms Trade And International Law*, Bloomsbury Publishing, 2007, at 111. See also the Hyde case discussed above as a UK example.

for arms trading by introducing criminal or civil regulation. A further important issue of enforcement is the difficulty of verifying end-user certificates, on which brokering regulations often rely.²²

From this brief overview, it is clear that domestic law regulation of arms trading varies greatly across jurisdictions and is often limited by a lack of effective enforcement. Perhaps the most egregious problem is the widespread failure of States to regulate arms brokering in any meaningful way. As long as there exist States that do not regulate arms brokering, or that do not provide for extraterritorial application of their regulations, there will be havens for Third State Brokering. The ability of individual States to progress in setting standards to combat these problems is limited without the cooperation of other States. One of the driving forces of regional and international agreements, as discussed below, has, therefore, been to obtain international consensus on what those standards should be and to require States to impose them.²³

III. INTERNATIONAL AND REGIONAL AGREEMENTS

Several regional agreements, some of a legally binding nature, reflect the commitment of States to reducing the risk that arms transfers will contribute to an international crime. These instruments are often accompanied by guidance for domestic regulation and statements of best practice. The most far-reaching regional agreements have been those coordinated by the EU,²⁴ while other notable initiatives have been developed by the Organization of American States (OAS),²⁵ the Wassenaar Group,²⁶ the African Union,²⁷ the Organization for

²² Douglas Farah and Stephen Braun, *Merchant Of Death: Money, Guns, Planes, And The Man Who Makes War Possible*, John Wiley & Sons, 2007, at 78.

²³ Alexandra Boivin, "Complicity and beyond: International law and the transfer of small arms and light weapons", *International Review of the Red Cross* 87.859 (2005): 467, at 468.

²⁴ At least until the development of the ATT, the EU's initiatives were the most significant form of international cooperation on the arms trade. As discussed in Sibylle Bauer and Mark Bromley, *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, SIPRI Policy Paper No. 8, November 2004, at 4. See the EU Code of Conduct on Arms Exports of 1998; the EU Common Military List; the Joint Action of 17 December 1998 adopted by the Council on the basis of Article J.3 of the Treaty on European Union on the European Union's Contribution To Combating The Destabilising Accumulation and Spread Of Small Arms And Light Weapons, 1999/34/CFS1998; the Common Position on the Control of Arms Brokering of 2003; and the EU Common Position Defining Common Rules Governing Control Of Exports Of Military Technology And Equipment of 2008.

²⁵ OAS, *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, 14 November, 1997. This Convention requires States to establish laws governing the import, export, and tracing of arms, and to create enforcement mechanisms. Other significant non-binding instruments of the OAS include the Model Regulations; the Declaration on SALW of 2000; and the Model Regulations for Brokers, as well as the Inter-American Convention on Transparency in Conventional Weapons.

Security and Co-operation in Europe,²⁸ the North Atlantic Treaty Organization (NATO),²⁹ the Regional Cooperation Council,³⁰ the Southern African Development Community,³¹ Central American initiatives,³² and the Economic Community of West African States.³³ The first regional agreement of note appears to be the Ayacucho Declaration of 1974, a communal commitment of several South American States not to purchase large weapons systems.³⁴

Regional initiatives have, in general, been limited by their lack of legal force, as well as a lack of provision for enforcement mechanisms. The development of regional political commitments to arms trading was an important step in bringing States towards agreement of the ATT, and had a positive impact in developing civil society support for this treaty, but in themselves, the politically-binding regional initiatives outlined above, appear to have had little tangible effect on the most egregious forms of arms trading, including Third State Brokering.

Prior to the ATT's entry into force on December 2014, there existed no multi-lateral treaty, with consensual international membership, aimed at reducing, *inter alia*, international crime

²⁶ Until the early 2000s, the role of the Wassenaar Agreement was largely concerned with facilitating information sharing and transparency between its Member States. It moved beyond this role with the issuance of Best Practices Guidelines for Exports of SALW in 2002 and the Elements for Effective Legislation on Arms Brokering adopted in 2003.

²⁷ The African regional initiatives have been largely non-legally binding or have lacked clear restrictions on trading. In 2000, the predecessor regional organization of the AU adopted the Bamako Declaration. See Organization of African Unity, Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 1 December 2000. In 2005, the AU adopted the Windhoek Common Position. See African Common Position to the Review Conference on Progress Made in the Implementation of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, adopted in Windhoek, Namibia, 14-16 December 2005.

²⁸ See the Principles Governing Conventional Arms Transfers of 1990; the OSCE Document on Small Arms and Light Weapons of 2000; the OSCE Handbook of Best Practices on Small Arms and Light Weapons of 2003; and the Document on Stockpiles of Conventional Weapons of 2003.

²⁹ In addition to a NATO/Euro-Atlantic Partnership Council (EAPC) Working Group established in 1999, the NATO Partnership for Peace Trust Fund Policy was created in 2000 and helps in the destruction of stockpiled anti-personnel landmines and SALW. See Owen Greene, "Examining international responses to illicit arms trafficking", *Crime, Law and Social Change*, 33.1 (2000): 151.

³⁰ The South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons was created in 2002 through collaboration between the Stability Pact for South Eastern Europe and the United Nations Development Programme (UNDP).

³¹ The Firearms Protocol entered into force in 2004; see also the Nairobi Declaration of 2004.

³² In particular, the Central American Integration System Code of Conduct, 2005.

³³ Henceforth ECOWAS. The ECOWAS Small Arms Project (ECOSAP) provides technical assistance on the implementation of small arms controls. ECOWAS had developed an arms moratorium, which was instituted in 1998. See Gani Yoroms, "Approaches and challenges in ECOWAS security sector reform and governance in West Africa", *Journal of African Foreign Affairs* 1.2 (2014): 30. See also Edward J. Laurance, "The small arms problem as arms control" in *Controlling Small Arms: Consolidation, Innovation and Relevance in Research and Policy*, Routledge, 2013, at 13.

³⁴ Thomas Ohlson, *Arms Transfer Limitations and Third World Security*, Stockholm International Peace Research Institute, Oxford University Press, 1988, at 180.

by regulating the arms trade.³⁵ Although the ATT is limited in a number of important ways, in particular that “[t]he substantive obligations the treaty imposes are often drafted in an imprecise or ambiguous way”,³⁶ and may be further limited depending on how it is implemented by States, it nonetheless represents a significant development in international legal regulation of the arms trade, especially since it received the consensual support of States.³⁷

Unfortunately, the ATT’s requirements are set in extremely broad language, committing States to “establish and maintain a national control system, including a national control list, in order to implement” the provisions of this Treaty but giving little further indication as to the substantive obligations on States to enact laws at a domestic level.³⁸ The lack of specific standards to guide implementation leaves a large degree of discretion to individual Member States. The lack of specificity means that States might implement either civil or criminal sanctions as a form of “national control system” and that enforcement could take a number of forms, leaving the problem of minimal tangible penalties at the individual level, such as minor civil law fines, as discussed above.

The ATT refers briefly to arms brokering as a form of “transfer” within the scope of the Treaty,³⁹ and requires States to “take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction”.⁴⁰ But, again, there is little guidance on how to implement the requirements.⁴¹ Existing implementation of the ATT at the date of writing is minimal, so it is difficult to predict how this will take place. It remains to be seen whether mismatches in the level of regulation provided in different States by their particular implementation of the ATT may leave in place havens for Third State Brokering as discussed above, but it seems unlikely that the ATT has the power to address such a problem, given its lack of reference to the extraterritorial application of brokering regulations, and, in fact, the specific reference to “brokering taking place under its jurisdiction”.⁴² Furthermore, even if some States interpret the brokering requirements in a more far-reaching manner, it only

³⁵ The ATT applies to all types of conventional arms. ATT, Article 2(1) provides that the scope of the ATT extends to “battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, and missiles and missile launchers, and small arms and light weapons”.

³⁶ Marlitt Brandes, “All’s Well That Ends Well, or Much Ado about Nothing: A Commentary on the Arms Trade Treaty”, *Goettingen Journal of International Law*, 5 (2013): 399, at 428.

³⁷ See Dapo Akande, “What is the Meaning of “Consensus” in International Decision Making?”, *European Journal of International Law talk blog*, Published on 8 April 2013.

³⁸ ATT, Article 5(2).

³⁹ ATT, Article 2(2).

⁴⁰ ATT, Article 10. Measures suggested, but non legally-binding, in this provision of the Treaty “include requiring brokers to register or obtain written authorization before engaging in brokering”.

⁴¹ Nonetheless, it should be recognised that the inclusion of brokering requirements represents a success of the ATT. Earlier drafts of the ATT made no reference to brokering.

⁴² ATT, Article 10.

requires one State to be a brokering haven. Although the international cooperation which led to the ATT is to be welcomed, and represents a degree of political progress on global regulation of arms trading, the ATT's provisions on brokering do not sufficiently address the central issue of the extent of extraterritorial jurisdiction, without which the problem of Third State Brokering remains.

IV. ARMS EMBARGOES

The legal basis for arms embargoes consists in non-permanent agreements between States to sanction a particular target or targets, often temporally or geographically bounded.⁴³ The United Nations is the forum most often used for such agreement, in particular by way of Resolution of the Security Council, and frequently in tandem with an EU embargo.⁴⁴ Chapter VII of the UN Charter allows the Security Council, when it has established the existence of a breach of peace or that peace is threatened, to impose measures to restore or ensure peace.⁴⁵

Arms embargoes may create obligations not only for State Parties, who are often required to ensure that breaches of the terms of the embargo do not take place on their territory, but also for the nationals of those States, who may be prevented from engaging in arms trading with the target, regardless of whether this occurs on the territory of a State party.⁴⁶ This gives arms embargoes the potential to form some basis of liability for Third State Brokering, as described above. However, there is little to suggest that embargoes have been effective in achieving enforcement of the potential to regulate brokering in this way.

⁴³ The types of trading covered by embargos may extend to sale, supply, transfer or export, and the types of arms covered by arms embargos are also variable.

⁴⁴ In a preceding age of international affairs, the League of Nations had agreed to subject any of its Members considered to have committed an act of war against all other Members to, *inter alia*, "severance of all trade or financial relations". Covenant of the League of Nations, Article 16. Upon this basic mechanism for collective security, the UN subsequently built a broader, more centralized system of sanctioning based on Chapter VII of the UN Charter. Alain Pellet and Alina Miron, "Sanctions", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2013; Martin Dawidowicz, "Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council", *British Yearbook of International Law*, 77.1 (2007): 333, at 333.

⁴⁵ UN Charter, Articles 39, 41, 42; see Alain Pellet and Alina Miron, "Sanctions", in *Max Planck Encyclopedia of Public International Law*, 2013, Oxford University Press. These powers have also presaged the development of regional sanctions systems. The EU and OSCE have imposed their own regional multi-lateral arms embargoes. The US has often imposed unilateral arms embargoes, or imposes arms embargoes in cooperation with the EU.

⁴⁶ For instance, see EU Council Decision 2011/273/CFSP, Article 1.

Excepting the possibility of particular examples of effective enforcement, ultimately arms embargoes have failed in practice to prevent the flow of arms to the specified target.⁴⁷ Enforcement is generally of a weak nature, not only because arms embargoes usually come with no specified sanctions to follow breach, but also because no single international body exists that could directly enforce arms embargoes. The effectiveness of domestic courts to enforce arms embargoes following a breach is limited, in particular by the lack of will of individual States when acting alone, and moreover by jurisdictional issues, since arms embargoes are not necessarily incorporated into domestic law. It has even been suggested that arms embargoes often worsen situations by increasing the market value of arms through restrictions on supply, encouraging illicit arms traders by incentivising deals.⁴⁸ Arms embargoes imposed by the UNSC are also politically limited by the veto powers of its permanent members, as seen in the non-embargo of Zimbabwe due to the objections of China and Russia.⁴⁹ Arms embargoes might have a greater coercive effect if they resulted in criminal penalties. Although some have advocated for a system of this type to be initiated, States have been politically reluctant to advance in this respect.⁵⁰

While arms embargoes are an effective means of signalling the disapproval of the international community of the perpetration of international crimes, they have to date been ineffective in preventing arms from flowing to areas where international crimes are being committed. Many of the limitations pointed out above are fundamental to the current arms embargo system, raising the question of whether other areas of law may be more effective at achieving the same ends.

V. THE PRINCIPLES OF STATE RESPONSIBILITY

When a State transfers arms to a second State that uses the weapons in breaching an obligation arising from international law, the transferring State may attract liability as an accomplice under the doctrine of State responsibility. From the principles of this doctrine, it is

⁴⁷ See, for instance, Neil Cooper, "What's the Point of Arms Transfer Controls?", *Contemporary Security Policy* 27 (2006): 118, at 119-20. In Syria, the EU Council, in an attempt to improve enforcement, took the additional step of requiring Member States to inspect all vessels and aircraft bound for Syria within their territories and with the consent of the flag state, if they have reasonable grounds to believe that the cargo may include sanctioned items. See Council Decision 2012/420/CFSP 23 July 2012.

⁴⁸ Matthew Moore, "Arming the Embargoed: A Supply-Side Understanding of Arms Embargo Violations", *Journal of Conflict Resolution* 54 (2010): 593, at 594.

⁴⁹ David B. Kopel, Paul Gallant, and Joanne D. Eisen, "The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators", *Penn State Law Review*, 114.3 (2010): 101..

⁵⁰ Katharine Orlovsky, "Note, International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers", *Hastings International and Comparative Law Review*, 29 (2006): 343, at 377.

clear that a transferring State has obligations arising from international law prohibitions on assisting a principal State to violate international law. These obligations limit the extent to which a transferring State may permissibly engage in arms trading.⁵¹ To the extent that the acts of a State are regulated by the potential for accomplice liability, it follows that, to some extent, the arms trading of individual State officials is regulated by the threat of such liability.

The principles of State responsibility were largely unclear or non-existent until 2001, when the International Law Commission (ILC) adopted the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁵² This has been described as a radical leap forward in the morality of international law.⁵³ For present purposes, Articles 16, 41(1), and the first and second phrases of 41(2) of ARSIWA create four relevant sets of obligations on States with regard to arms trading.⁵⁴

Yet the application of such liability remains largely hypothetical at present. Despite the potential of State responsibility to regulate arms trading, a number of fundamental limitations are clear. Most obviously, there is the difficulty of establishing that the arms trading activity in question is attributable to the State. Where a State is itself responsible for transferring arms, for instance, through the provision of military aid, this may be more clear, but whether the transfer of arms carried out by a private company could be the basis of liability for a State that has authorised or facilitated the transfer, is another question, and is beyond the scope of

⁵¹ It has been noted that the accomplice liability of a State under the principle of State responsibility is a “derivative” form of liability, since responsibility is contingent on the liability of a principal State. A State’s liability as a principal occurs if the State’s conduct breaches a primary rule of international law, thereby incurring responsibility to any State injured by the breach. Where the injury is suffered by an individual or a corporation, the State of which they are nationals may bring an international claim on their behalf. When a State does so, it is often referred to as the State “exercising diplomatic protection” of the injured person. See Vaughan Lowe, *International Law*, Oxford University Press, 2007, at 120.

⁵² International Law Commission, 2001, Articles on Responsibility of States for Internationally Wrongful Acts. ARSIWA was considered by the ILC between 1954 and 2001, and represented the first attempt to codify the principles of State responsibility. ARSIWA was widely considered to reflect customary international law at the time. Vaughan Lowe, *International Law*, Oxford University Press, 2007, at 120. See ILC, Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session (ILC Commentary). See also James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002; David Caron, “The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority”, *American Journal of International Law*, 96.4 (2002): 857.

⁵³ Vaughan Lowe, “Responsibility for the Conduct of Other States”, *Japanese Journal of International Law*, 12; See generally, Miles Jackson, *Complicity in International Law*, Oxford University Press, 2015.

⁵⁴ In brief summary: When a receiving State commits an international crime that is not grounded on a peremptory norm of international law, Article 16 provides for the accomplice liability of the supplying State in relation to all “internationally wrongful acts”. Under Article 41(1) there is a possibility that accomplice liability could be grounded on the assertion that a supplier State’s arms trading undermines its cooperation to bring a receiver State’s international crime to an end. Of greater likely relevance is the possibility of grounding accomplice liability on Article 41(2)[i] by showing that the supplier State’s arms trading constitutes “recognition of the legality of” the receiver State’s international crime. The relevance of the previous two provisions would vary depending on the factual circumstances of the case. Perhaps of most obvious relevance is the Article 41(2)[ii] provision creating accomplice liability for “rendering aid or assistance”.

this Brief. Furthermore, as a form of regulation of individual conduct, it must be remembered that the principles discussed above only create obligations on States under international law. An international law obligation on a State indirectly regulates the decision-making arms trading of individuals who work for States, but State liability may be less effective in shaping the individual decision-making of State officials than the coercive effects of a liability regime where those individuals themselves face direct criminal responsibility for their actions.⁵⁵

State responsibility, at least as expressed in ARSIWA, is also fundamentally limited in that the contributing State must be a 'State', and ARSIWA stipulates that "State conduct" does not extend to the acts of private individuals and corporations; it covers only the State's agents, such as the police, military or government.⁵⁶ This means it is doubtful whether under the principles of State responsibility expressed in ARSIWA, a State can be held directly responsible for the arms trading of a private individual or a corporation within its territory.⁵⁷ Likewise, there are difficulties in establishing State responsibility on the basis of complicity, it being necessary to first show a wrongful act. In the context of international crimes, it would be necessary to establish some form of principal liability for involvement in an international

⁵⁵ Although beyond the scope of this ICD Brief, the principle of a State's non-intervention in the internal affairs of another State may also create obligations on States not to engage in untrammelled sales to a non-State group on the territory of another State. Indeed, the ICJ held in the Nicaragua case that the supply of weapons constituted a "clear breach" of this principle. See *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America*, Merits, ICJ Reports 1986, para. 242. However, the customary law status of this prohibition can be challenged, indeed it is certainly true that not all States recognise the non-intervention principle in practice, particularly in light of the continued supply of arms by the United States, France, Britain and other States to various non-State actors, for instance the current arming of opposition groups in the Syrian conflict. The relevance of the principle of non-intervention must also be weighed against the rights of people to self-determination and self-defence, rights which arms trading may serve to protect.

Likewise, although the present analysis focuses on ARSIWA, relevant State obligations may arise from other sources, for instance the provisions of Article 2, paragraph 5, of the Charter of the United Nations, which prohibits States from assisting any other State against which the United Nations is taking preventive or enforcement action. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002.

In addition to the general provisions for State complicity emerging from ARSIWA, there are also arguments about the existence of additional specific customary international law prohibitions on State complicity, which are beyond the scope of the present Brief. For a detailed discussion see Miles Jackson, *Complicity in International Law*, Oxford University Press, 2015.

⁵⁶ Miles Jackson, *Complicity in International Law*, Oxford University Press, 2015.

⁵⁷ This does not preclude, of course, the possibility for the State to be held responsible for failing to prevent the arms trading conduct of private individuals or corporations within its territory. Alexandra Boivin, "Complicity and beyond: International law and the transfer of small arms and light weapons" *International Review of the Red Cross*, (2005): 467, at 474. In addition, there is the possibility that State complicity could be considered to go beyond the ordinary requirement of an agency relationship with a non-State actor. In this scenario, a non-State actor's wrongdoing would be attributed to the State by virtue of an additional complicity relationship - the actor's complicity in the State's actions (which are in turn complicit in the acts of the principal wrongdoer). Jackson has persuasively set out the arguments against this putative lowering of the agency requirement - see Miles Jackson, *Complicity in International Law*, Oxford University Press, 2015, at 176 *et seq.*

crime, such that defences open to the principal perpetrator would also absolve the transferring State of liability for their arms selling activities.⁵⁸

Ultimately, the broader weakness of State responsibility as a response to arms trading in the context of international crimes is its particular inefficacy in tackling the type of arms trading that is most frequently associated with international crime. State-to-State trade may not represent the majority of the relevant trading, but instead, especially where international crime is concerned, a large proportion of trade into conflict zones is carried out by brokers and illegal traffickers, rather than States. Furthermore, although State accomplice liability may discourage States from assisting a particular internationally wrongful act through their arms trading in a particular situation, the principles of State responsibility do not immediately address the details of how States can best determine their arms trading policies in a systematic way. State responsibility may be a useful set of principles for regulating State behaviour, but it does not lead directly to widespread consensus amongst States on concrete progressive steps to regulate individual arms trading at the domestic law level.

VI. ICL AS A NOVEL FORM OF ARMS TRADING REGULATION

It is clear from the foregoing analysis that a diversity of forms of legal mechanisms indirectly regulate the arms trading of the individuals who work at State level and corporations, as well as in their own capacity as brokers or other types of traders. Yet none of these forms of regulation can claim to be truly effective. In particular, the arms trading of arms brokers is not directly regulated by State responsibility as set out in ARSIWA, nor by domestic law in the majority of States, and the international treaty law covering brokers is limited by its lack of specificity, remaining subject to domestic implementation by States. Although beyond the scope of the present Brief, norms of international humanitarian law (IHL) and international human rights law (IHRL) may contribute to standard-setting in other forms of regulation, but do not directly alleviate the general problem of the lack of enforcement. In theory, arms embargoes provide an internationally-coordinated mechanism for regulating the flow of arms into a particular conflict, but in practice their enforcement has been deficient. The analysis of this patchwork of legal mechanisms shows a clear *lacuna* in the regulation of the arms trading of individual brokers, in particular when they carry out Third State Brokering. It is

⁵⁸ For instance, against allegations of UK complicity in the US bombing of Libya in 1986, the UK argued that the US' actions, and thus its provision of air bases to the US, was justified by the law of self-defence. See Christopher Greenwood, "International Law and the United States' Air Operation against Libya", *West Virginia Law Review*, 89 (1986): 933.

suggested that ICL offers some potential to address the deficiencies of other legal mechanisms.

It is first necessary to address the question of whether the legal person of a corporation (as opposed to the liability of individual corporate officers) is a subject of ICL, a topic which has received increasing attention in the academic commentary.⁵⁹ Although, in principle, there is no theoretical barrier to ICL liability for corporate persons, at present there is no international forum where a realistic prospect of such a prosecution exists. The ICC's Rome Statute restricts the personal jurisdiction of the Court to natural persons, excluding legal persons,⁶⁰ as do other major international tribunals.⁶¹ The Special Tribunal for Lebanon (STL) has recently found itself to have jurisdiction over corporate legal persons for crimes of obstruction of justice.⁶² But the validity of this decision has been heavily criticised, and when future international criminal tribunals deal with cases concerning corporate personality, the STL's weight as a source of international law must be seen in light of its legal basis, in an international agreement with the United Nations, not having the same treaty-based weight as the Rome Statute provisions, which go against jurisdiction over legal persons.⁶³ Moreover, the ramifications of the STL's jurisprudence are limited by the tribunal's temporal and factual mandate, offering little opportunity for repeated jurisprudence of this nature.

It has been argued that the Rome Statute should be amended to allow for prosecution of legal persons⁶⁴ and it has been argued that corporate liability for crimes under international law exists, despite being unenforceable in an international tribunal, such that the prohibitions underlying these crimes give rise to obligations that bind corporations.⁶⁵ However, at present, the only realistic application of ICL to a corporation's arms trading activities is in the conduct of individual officers of the corporation.

⁵⁹ See the following two special issues of leading journals *Hastings International and Comparative Law Review* 24 (2000-2001); *Journal of International Criminal Justice*, 3 (2010).

⁶⁰ The Rome Statute provides in Article 25(1) that "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute."

⁶¹ Article 6, ICTY Statute; Article 5, ICTR Statute. Farrell has argued convincingly that the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia also do not have jurisdiction beyond natural persons, see Norman Farrell, "Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals", *Journal of International Criminal Justice*, 8 (2010): 873, at fn 5.

⁶² Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Chamber of the Special Tribunal for Lebanon, 2 October 2010, STL-14-05/PT/AP/AR126.1/F0012-AR126.1/20141002/R000101-R000150/EN/AR/FR/af.

⁶³ Report of the Secretary-General on the establishment of a special tribunal for Lebanon, 15 November 2006, website of the Special Tribunal for Lebanon, accessed on 23 August 2014, 15 November 2006, S/2006/893.

⁶⁴ Wolfgang Kaleck and Miriam Saage-Maaß, "Corporate Accountability for Human Rights Violations Amounting to International Crimes", *Journal of International Criminal Justice*, 8.3 (2010): 699..

⁶⁵ Volker Nerlich, "Core Crimes and Transnational Business Corporations", *Journal of International Criminal Justice* 8 (2010): 895, at 908.

An individual corporate officer, regardless of his or her position within a company, may be held responsible for the arms trading of the corporate organisation. This principle, that the activities of a corporation may be attributed to individual corporate officers, has been clear since the World War II prosecutions based on ICL, when individual industrialists were tried for their roles within companies.⁶⁶ Amongst these trials, the *Zyklon B*⁶⁷ and *IG Farben*⁶⁸ cases relate specifically to arms trading as a basis for accomplice liability, and they reflect ICL's recognition that being part of a corporation does not *prima facie* protect corporate officials themselves from being prosecuted in their individual capacity.

One promising aspect of ICL in this regard is that its use may lead to heightened deterrence effects on corporate officers. It might be considered that the deterrence impact of international criminal prosecutions weighs more heavily on those who act purely for profit, on the grounds that the corporate actor makes more of a free choice to engage in a commercial activity such as arms trading, than do other types of international crime perpetrators. It seems persuasive that often corporate actors will have a range of different commercial opportunities open to them, and may be deterred from following a path which carries the personal risk of criminal prosecution. As Van Der Wilt puts it: "While the average perpetrator of international crimes, whether imbued with ideological fervor or forced by the circumstances to participate in crimes, will perhaps be uninfluenced by the possibility of trial and punishment, the calculating businessman will probably incorporate the prospect of criminal prosecution into his cost-benefit analysis."⁶⁹ A real threat of prosecution for complicity in international crimes would, in that sense, regulate the behaviour of corporate

⁶⁶ The *Krupp* trial indicted an industrialist before the International Military Tribunal of Nuremberg, and many other industrialists were convicted by the subsequent Nuremberg Military Tribunals. Judgment of the International Military Tribunal, 6 FRD 69 (1946), 76. For further information see Doug Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", *Northwestern Journal of International Human Rights*, 6 (2008): 304, at fn 16.

⁶⁷ *Trial of Bruno Tesch and two others*, Law Reports of Trials of War Criminals, Vol. I (1949), 92. This case was heard by a British Military Court in Hamburg, where two defendants were convicted on accusations that they committed war crimes contrary to article 46 of the Hague Regulations of 1907, namely that they were complicit in the murder of civilians interned in concentration camps, by supplying poison gas - primarily prussic acid in the form of the pesticide Zyklon B - knowing that it would be used to facilitate those murders. For further analysis see Hans Vest, "Business Leaders and the Modes of Individual Criminal Responsibility under International Law", *Journal of International Criminal Justice*, 8 (2010): 864, at fn 13.

⁶⁸ Office of Military Government for Germany (US), Indictment, Trial 6, IG Farben Case (1947), 1, 2, 85. The case was against officers of IG Farben, a German firm with long-standing ties to the Nazi regime. It was alleged that "during a period of years preceding 8 May 1945", twenty-four senior employees of IG Farben participated in "the planning, preparation, initiation and waging of wars of aggression and invasions of other countries" carried out by the Nazis between March 1938 and December 1941. The indictment describes in great detail the extensive activities of the IG Farben corporation in providing arms to Hitler's regime, in intimate coordination with the Wehrmacht. Although convicted in relation to other charges, the defendants were acquitted on the counts of the indictment relation to their supply of arms.

⁶⁹ Harmen van der Wilt, "Genocide v. War Crimes in the *Van Anraat* Appeal", *Journal of International Criminal Justice*, 6 (2009): 557, at 567.

actors in a way that the other legal mechanisms, particularly the toothless arms embargoes described above, may struggle to achieve.⁷⁰

VII. RELEVANT MODES OF LIABILITY

The Rome Statute's Articles 25 and 28⁷¹ provide the central provisions in modern ICL on individual criminal responsibility.⁷² These provisions are not definitive of liability in ICL but they are considered central in the present analysis because, in addition to their importance as a source of ICL in general, they currently represent the most relevant basis of future prosecutions for individual arms trading before an international tribunal – i.e. at the ICC. The modes of liability that can be most readily envisaged in relation to arms trading are liability as an accomplice under Article 25(3)(c) for 'assistance'⁷³ and under 25(3)(d) for 'any other contribution',⁷⁴ the latter provision perhaps having greater relevance to a putative ICC prosecution of arms trading than is often acknowledged in the existing commentary.⁷⁵ It is also plausible that an individual might attract liability as one of a group of principal perpetrators under the Article 25(3)(a) mode of 'co-perpetration', although this mode includes an objective requirement for a "common plan, design or purpose" that would have to exist

⁷⁰ Indeed there is an unexplored potential role for international tribunals to contribute to and enforce existing forms of regulations, for instance that arms embargoes could be the basis of international criminal prosecutions by characterizing a breach of an arms embargo as an international crime.

⁷¹ Although not considered in the present discussion, the provisions of Article 28 should not be entirely disregarded; the existence of a superior-subordinate relationship within the meaning of Article 28 is not inconceivable in the arms trade context. Indeed, the *Musema* case at the ICTY demonstrates the possibility of liability of a business owner for the acts of his subordinates, the Trial Chamber holding that the "definition of individual criminal responsibility [...] applies not only to the military but also to persons exercising civilian authority as superiors", *Musema*, Trial Chamber, 27 January, 2000, para. 148.

⁷² See for instance Kai Ambos, "Article 25: Individual Criminal Responsibility", in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, 2008, Hart Publishing, at 144.

⁷³ Article 25(3)(c) creates liability for persons who: "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."

⁷⁴ Article 25(3)(d) provides that an individual may be held responsible if he or she "in any other way contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose". Such contribution shall be intentional and shall either "be made with the aim of furthering the criminal activity or criminal purpose of the group"; or alternatively "be made in the knowledge of the intention of the group to commit the crime".

⁷⁵ The provisions of Article 25(3)(d) have been interpreted by the Court as providing a "residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of Article 25(3)(b) or 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made". See *Lubanga*, Confirmation Decision, ICC-01/04-01/06-803-tEN, 29 January 2007. As such, the ICC has recognised that this provision has lower *mens rea* requirements than the other forms of accomplice liability relevant to arms trading conduct. See also Sarah Finnin, "Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court", *International and Comparative Law Quarterly*, 61 (2012): 325.

between the arms trader and other principal perpetrators of the crime,⁷⁶ a requirement which is difficult to conceive of in most situations.⁷⁷ Deeper analysis of the relevant modes of liability is not within the scope of the present Brief, but suffice to say they raise unresolved issues of interpretation and their application in practice has varied between ICC decisions.⁷⁸

In terms of the international crimes that could be considered as a potential basis for arms trader responsibility, there is currently no Rome Statute war crime of ‘arms trading’ nor a crime against humanity of ‘arms trading’. Neither do the other international tribunals have within their jurisdiction such crimes. If we do not currently have an international crime that criminalises arms trading activities by way of principal conduct, then derivative responsibility, for the arms trader’s involvement in the commission of another international crime, is the key. To this end, a large range of international crimes might be considered. Most obviously, it can be envisaged how a material link could be made between the sale of a weapon and its use to perpetrate murder, extermination, genocide, or any other form of serious harm which depends on a gun being fired. But equally of relevance are crimes such as rape, torture and pillaging, to name but three, where the use of a weapon is crucial to the commission of the crime, for instance where the mere presence of a weapon satisfies the element of force in a rape. Clearly, the range of crimes in which the complicity of arms traders might be engaged is vast, and will depend on the specific factual parameters of each case.

VIII. POTENTIAL OF ICL AS A FORM OF REGULATION

The ICC has not yet tried a case based on arms trading and there have been only a small number of ICL prosecutions involving arms trading. In addition to the post-Second World War cases referred to above, the main examples at the domestic level are the recent prosecutions of arms traders in the Dutch courts.⁷⁹ Nonetheless, several features of ICL

⁷⁶ *Lubanga*, Trial Chamber judgment, 14 March 2012, at para. 984.

⁷⁷ This is based on the observation that arms traders’ motivation is primarily economic, but in certain situations individuals can be shown to have acted with the shared intentions of the perpetrators of international crimes, as seen in the World War II cases described above, where major industrialists were alleged to have shared the aims of the Nazi regime, which was deemed a criminal organisation.

⁷⁸ Elies van Sliedregt and Sergey Vasiliev, *Pluralism in International Criminal Law*, 2014, Oxford University Press.

⁷⁹ The Netherlands has spearheaded the use of ICL as a novel form of arms trading conduct regulation. In the *Van Anraat* case, a Dutch businessman sold a chemical called TDG to the regime of Saddam Hussein. The TDG was subsequently used to produce mustard gas in order to attack Kurdish villages in northern Iraq as part of the al-Anfal campaign, as well as villages in Iran. Van Anraat was acquitted of aiding and abetting genocide but convicted as an accessory to war crimes based on breaches of prohibitions on the use of chemical weapons. See Harmen van der Wilt, “Genocide v. War Crimes in the *Van Anraat* Appeal”, *Journal of International Criminal Justice*, 6 (2009): 239, at 240. Another Dutch prosecution was brought against the arms trader Guus van Kouwenhoven, who had been involved in supplying arms to Charles Taylor in Liberia.

make it an area of law suited to regulation of individual arms trading. Most clearly, ICL is the basis for the direct criminal responsibility of individuals under international law, so it offers the possibility of holding individuals to account, irrespective of whether their personal decision-making takes place within the structures of a State, corporation or other organisational framework.

The ICC has been suggested as a forum for prosecuting arms trading on previous occasions,⁸⁰ reflecting similar calls for ICC action against other transnational phenomena including drug trafficking⁸¹ and human trafficking.⁸² Yet amongst the potential applications of ICL, arms trading stands out as a realistic and important prospect because of the pivotal role that the arms trade frequently plays in the commission of international crimes. The ICC has the power to prosecute arms trading that takes place in a large part of the world, notwithstanding the Court's lack of universal jurisdiction. One hundred and twenty-three States party to the Rome Statute are subject to the ICC's territorial jurisdiction; all of South America, most of Europe, approximately half of Africa, and parts of Asia.⁸³ Territorial jurisdiction may also come into being temporarily when a State accepts the ICC's jurisdiction, further extending the areas of the world potentially reached by the Court.⁸⁴ In addition, the ICC has jurisdiction where individual arms trading is carried out by a national of any of the aforementioned States, whether it is a State Party or a State temporarily accepting jurisdiction.⁸⁵ The potential reach of the ICC is extended again by the fact that it has jurisdiction when the UNSC refers a situation to the Court, irrespective of the nationality of the accused or the location of the crime.⁸⁶ The territorial jurisdiction of the ICC, therefore, creates a large potential territory in which individual arms trading could be regulated where domestic regulations are deficient.

See Larissa van den Herik, "The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia", *International Criminal Law Review*, 9 (2009): 211.

⁸⁰ See for instance Claudette Torbey, "The Most Egregious Arms Broker: Prosecuting Arms Embargo Violators in the International Criminal Court", *Wisconsin International Law Journal*, 25 (2007): 335; Leigh Rome, "The Case for Prosecuting Arms Traffickers in the International Criminal Court", *Cardozo Law Review*, 36 (2015): 1149.

⁸¹ Molly McConville, "A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court", *American Criminal Law Review*, 37 (2000): 75.

⁸² John Cooper Green, "A Proposal Leading to an International Court to Combat Trafficking in Human Beings", Third Annual Interdisciplinary Conference on Human Trafficking, 2011, Paper 13.

⁸³ Rome Statute, Article 12(2)(a). 123 States have ratified the Rome Statute as of 16 April 2015. This number is likely to increase in the future, with several States having signed but not yet ratified the Rome Statute, or, like El Salvador, having indicated their intention to join.

⁸⁴ Rome Statute, Article 12(3).

⁸⁵ Rome Statute, Article 12(2)(b).

⁸⁶ Rome Statute, Article 13(b).

The geographical reach of the ICC also bolsters the argument that ICL offers an avenue for addressing the problem of Third State Brokering, identified above, for which existing forms of arms trading regulation are limited in their ability to curb. In many instances, the ICC would have jurisdiction over a situation involving Third State Brokering, even where the courts of the State of residence of the broker do not. In this regard, action by the ICC or simply the ICC's existence, hold the potential to induce States to address these problems themselves, through the ICC's "positive complementarity" function, by which State's own investigations and prosecutions at the domestic level are encouraged by the potentiality of an ICC case.⁸⁷

The ICC may be well suited to tackling international crimes collectively at the international level when States struggle to act alone, perhaps because they lack sufficient domestic capacity to enable investigation and prosecution of crimes. The complementary jurisdiction of the ICC offers potential to act in cases where States themselves are unwilling or unable to address arms trading.⁸⁸ Complementarity is of particular relevance where a State's officials are involved in the perpetration of an international crime, leaving the State unwilling to prosecute due to political considerations. Domestic political considerations may be less influential on the ICC's work – its cases can be triggered by a referral from a State Party, by the will of the ICC Prosecutor, or by a referral from the UNSC – and to varying extents, all of the routes to triggering a case mean that the ICC functions with a degree of political independence which may not be available to the prosecutors of the States who have primary jurisdiction over the crimes committed.⁸⁹

A more prosaic advantage of ICL is that there is an existing judicial fora, in the shape of the ICC, which is immediately empowered to act, and which may be currently underused. Some forms of regulation, notably UNSC arms embargoes, have proven to lack necessary enforcement mechanisms, whilst others, such as the ATT, may not lead to improvements in enforcement at the domestic level in the immediate future, since domestic implementation of States' obligations under the ATT may take several years to materialise. Furthermore, the

⁸⁷ Sarah M.H. Nouwen, *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*, 2013, Cambridge University Press.

⁸⁸ Rome Statute, Article 17. See Mohamed M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", *Michigan Journal of International Law*, 23 (2001): 869; Rod Rastan, "Jurisdiction", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, 2015, Oxford University Press; William A. Schabas, *An Introduction To The International Criminal Court*, 2011, Cambridge University Press; Sarah M.H. Nouwen, *Complementarity In The Line Of Fire: The Catalysing Effect Of The International Criminal Court In Uganda And Sudan*, 2013, Cambridge University Press.

⁸⁹ Furthermore the apparatus of the ICC should grant it a degree of independence from domestic political forces. The ICC has an independent Prosecutor who to a certain extent is empowered to trigger cases, providing the blessing of a Pre-Trial Chamber of the Court can be obtained. Rome Statute, Article 15. See William A. Schabas, *An Introduction To The International Criminal Court*, 2011, Cambridge University Press.

ICC is able to consider arms trading occurring any time after 1 July 2002, while other legal mechanisms which are continuing to develop, such as the ATT, are not yet in force.⁹⁰

A final feature of ICL lies in its core principles, which imply that the ICL 'project' is aimed at pursuing all individuals involved in international crimes, regardless of their status as a State official, corporate officer or arms trafficker. Addressing the arms trade would reinforce the declaratory nature of ICL, as an expression of the international community's disapproval of arms trading that facilitates mass atrocity. It would also enhance the credibility of institutions like the ICC, which would be seen as having the power, institutional fearlessness and political independence to tackle a diversity of cases.

ICL certainly holds some potential to contribute to the regulatory environment of individual arms trading, to impact on the individual behaviour of State officials, corporate officers, sole traders and other individuals working in the trade. Moreover, it may do so in ways that current regulation fails to achieve. Careful examination of the limitations of State complicity, domestic regulations, international and regional agreements, the ATT, and arms embargoes, will help to identify impunity gaps where ICL may create liability. Central to this problem will be the analysis of how the relevant modes of liability in ICL apply to individual arms trading.

⁹⁰ The ICC Statute entered into force on 1st July 2002, the date from which the ICC may have jurisdiction over crimes under the Statute. Rome Statute, Article 11.