

## LAWMAKERS, GUNS, & MONEY: HOW THE PROPOSED ARMS TRADE TREATY CAN TARGET ARMED VIOLENCE BY REDUCING SMALL ARMS & LIGHT WEAPONS TRANSFERS TO NON-STATE GROUPS

### I. INTRODUCTION

Every sixty seconds, a person dies as a consequence of armed violence around the world.<sup>1</sup> Many authors in the field of arms reform have noted that the current proliferation of small arms and light weapons has fostered armed violence.<sup>2</sup> These authors have explained that small arms and light weapons enabled killing across Africa, promoted ethnic cleansing in the Balkans, enhanced the capabilities of terrorists in Afghanistan and Iraq, and allowed drug cartels to flourish in Columbia.<sup>3</sup> Michael Klare, Director of Peace and World Security Studies at Hampshire College, contended that a proliferation of weaponry coupled with social issues has resulted in an increased likelihood of armed conflict and bloodshed.<sup>4</sup> Non-state groups, such as terrorist organizations, are among the actors that have perpetuated armed violence and conflict.<sup>5</sup> Recently, foreign policy makers have begun to principally focus upon addressing violent non-state groups as

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1. *Demand a Bullet-Proof Arms Trade Treaty!*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/appeals-for-action/demand-bullet-proof-arms-trade-treaty> (last visited Feb. 27, 2011). In addition to those killed, “[t]housands more each day are injured, raped, brutally repressed, traumatized or forced to flee their homes. At the end of 2008, 26 million people were internally displaced due to armed conflict. Families are torn apart and millions of men, women and children live in fear.” *Id.*

2. See Hugh Griffiths & Adrian Wilkinson, *Guns, Planes and Ships: Identification and Disruption of Clandestine Arms Transfers*, SE. & E. EUROPE CLEARINGHOUSE FOR THE CONTROL OF SMALL ARMS & LIGHT WEAPONS, Aug. 2007, at i (arguing that “[i]n the opening years of the 21st century, the world is still full of countries, provinces and failed states where small arms, light weapons and their ammunition have had, and continue to have, a disproportionate impact on conflict and armed violence.”).

3. See *id.* (explaining that “[t]hese weapons . . . have fueled internecine killings across the breadth of the African continent” and “have been used to ethnically cleanse communities in Bosnia Herzegovina and the Entity of Kosovo” in addition to “enhanc[ing] the terrorist capabilities of groups in Iraq and Afghanistan” and “arm[ing] drug[] cartels in Colombia.”).

4. Michael Renner, *Small Arms, Big Impact: The Next Challenge of Disarmament*, 137 WORLDWATCH PAPER 1, 14 (1997).

5. See *id.* at 14 (discussing how the dispersal of arms to non-state actors has aided the cycle of violence and driven the demand for weapons upward). Non-state groups “encompass many types of actors: armed rebel groups, ‘freedom fighters’, paramilitaries, or warlords.” Denise Garcia, *Arms Transfers Beyond the State-to-State Realm*, 10 INT’L STUD. PERSP. 151, 151 (2009).

opposed to competing states.<sup>6</sup> While violent non-state groups are not a new phenomenon, globalization coupled with increased access to lethal arms has created a notably complex predicament for foreign policy decision makers.<sup>7</sup> Specifically, the ease of access to small arms and light weapons has made the threat of non-state violence omnipresent.<sup>8</sup> The global community has allowed the legal and illegal inundation of weapons to operate without restriction for a substantial time.<sup>9</sup>

However, in 2006, in an effort to address the threat of widespread armed conflict, the United Nations ("U.N.") began the preliminary stages of drafting an arms trade treaty to address the problems associated with the inadequate regulation of the global arms market.<sup>10</sup> As part of the efforts to draft an arms trade treaty, the U.N. sent a questionnaire to its Member States requesting each state's views on a proposed treaty designed to regulate small arms and light weapons.<sup>11</sup> Subsequently, ninety-four Member States and the European Union submitted their views to the U.N.<sup>12</sup> However, the vast majority of Member States neglected to address the increased availability of weapons to non-state groups.<sup>13</sup> Of the ninety-four Member States that responded, only seven states have taken aim at the issue and proposed a prohibition on the transfer of small arms and light weapons to non-state groups.<sup>14</sup>

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6. David Anderson, *Foreign Policy Decision-Making and Violent Non-State Actors*, 1 (2004) (Unpublished Ph.D. dissertation, University of Maryland) (on file with Mckeldin Library, University of Maryland), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/7/2/6/8/pages72682/p72682-2.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/7/2/6/8/pages72682/p72682-2.php).

7. *Id.*

8. *Id.*

9. See Harold Hongju Koh, *A World Drowning In Guns*, 71 *FORDHAM L. REV.* 2333, 2339 (2003) (discussing the current shortcomings of the legal regime pertaining to arms transfers).

10. See United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 3, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses I*] (noting the various perspectives of the Member States pertaining to a drafting of an Arms trade treaty); see also United Nations Secretary-General, *Towards an Arms trade treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, U.N. Doc. A/62/278 (Part II) (August 17, 2007) [hereinafter *U.N. Responses II*] (providing a detailed list of Member State responses not included in Part I).

11. *U.N. Responses I*, *supra* note 10, at 3.

12. *Id.*

13. See *U.N. Responses I*, *supra* note 10 (articulating that of the ninety-four Member States only seven promulgated any form of a restriction upon the transfers of weapons to non-state groups); *U.N. Responses II*, *supra* note 10 (delineating that of the ninety-four Member States only seven promulgated restrictions on non-state groups receiving arms).

14. See *U.N. Responses I*, *supra* note 10, at 6, 20 (listing the stances of Burundi and Nigeria about prohibiting non-state groups from receiving arms); see also *U.N. Re-*

This Article proceeds in three sections.<sup>15</sup> First, this Article's Background section explores what constitutes small arms and light weapons.<sup>16</sup> The Background will further provide an overview of the current international and national legal regimes that regulate the arms trade.<sup>17</sup> Additionally, the Background examines the mechanisms of the global small arms and light weapons trade, including an overview of the white, grey, and black market.<sup>18</sup> Finally, the Background concludes with a discussion of both the proposed arms trade reform efforts, including the proposals of several states to create prohibitions to non-state groups, and the role of the International Criminal Court ("ICC") in transnational criminal justice.<sup>19</sup>

Second, this Article's Argument posits that an absolute prohibition upon arms transfers to non-state groups will not be included in the proposed arms trade treaty based upon both the economic interests and the geopolitical and foreign policy interests of a majority of states.<sup>20</sup> Additionally, the Argument proposes that the number of non-state groups receiving arms could be reduced if the proposed arms trade treaty included three measures.<sup>21</sup> First, the proposed arms trade treaty should include a measure requiring that all transfer documents contain a minimum amount of information to enable officials to make informed decisions regarding the transfer of small arms and light weapons.<sup>22</sup> Second, drafters should include a measure requiring that all transfer documents contain anti-counterfeit technology to discourage forgery.<sup>23</sup> Third, the treaty should include a measure requiring states to utilize the ICC to prosecute black market arms brokers and to provide an enforcement mechanism against the illicit arms trade.<sup>24</sup> This Article concludes that reforms must be made to the current regime that regulates the arms trade and proposes measures beyond an arms trade treaty that would help alleviate the issues that encourage violence worldwide.<sup>25</sup>

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*sponses II, supra* note 10, at 55, 126, 99, 100, 218 (listing the stances of Cuba, Mali, India, Indonesia, and Turkey pertaining to prohibiting non-state groups from receiving arms).

15. *See infra* notes 26-418 and accompanying text.
16. *See infra* notes 26-55 and accompanying text.
17. *See infra* notes 56-93 and accompanying text.
18. *See infra* notes 94-155 and accompanying text.
19. *See infra* notes 156-229 and accompanying text.
20. *See infra* notes 243-81 and accompanying text.
21. *See infra* notes 287-390 and accompanying text.
22. *See infra* notes 287-305 and accompanying text.
23. *See infra* notes 307-21 and accompanying text.
24. *See infra* notes 323-90 and accompanying text.
25. *See infra* notes 391-413 and accompanying text.

## II. BACKGROUND

### A. DEFINING SMALL ARMS AND LIGHT WEAPONS

In 2003, Harold Hongju Koh, professor of international law at Yale Law School, estimated that the total number of documented small arms and light weapons is around 639 million worldwide.<sup>26</sup> However, Professor Koh noted that this statistic does not include the millions of unaccounted for weapons worldwide.<sup>27</sup> This statistic indicates that about one small arm or light weapon is available for every twelve persons on Earth.<sup>28</sup> Commentators on the subject have noted that the existing world levels of small arms and light weapons have had a considerable negative impact upon the international community.<sup>29</sup> For example, the world levels of small arms and light weapons led former United Nations (“U.N.”) Secretary-General Kofi Annan to assert that small arms and light weapons are truly weapons of mass destruction.<sup>30</sup>

No precise definition of small arms and light weapons exists.<sup>31</sup> However, a majority of the global community defines small arms and light weapons as weapons that are light in weight.<sup>32</sup> As a result of their light weight, small arms and light weapons are easy to transport.<sup>33</sup> Moreover, the light weight allows for a wider range of users than conventional weapons.<sup>34</sup> For example, the Avtomat Kalashnikova 47 (“AK-47”), a weapon classified as a small arm,

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26. See Harold Hongju Koh, *A World Drowning In Guns*, 71 *FORDHAM L. REV.* 2333, 2334 (2003) (discussing the global levels of documented small arms and light weapons worldwide).

27. See *id.*, (discussing the global level of unaccounted for small arms and light weapons).

28. *Id.*

29. See LARRY KAHANER, *AK-47: THE WEAPON THAT CHANGED THE FACE OF WAR 171-72* (2007) (discussing how excessive amounts of small arms and light weapons have destabilized nations, enabled terrorists, and had dramatic economic consequences globally).

30. See Press Release, United Nations Secretary-General, *We the Peoples: the Role of the United Nations in the 21st Century*, U.N. Press Release GA/9704 (Apr. 3, 2000) 52 (discussing how the total number of deaths attributed to small arms annually exceeds the death-toll of both atomic bombs).

31. Koh, *supra* note 26, at 2334.

32. See Aaron Karp, *Small Arms—The New Major Weapons*, in *LETHAL COMMERCE* 17, 23 (Jeffery Boutwell et al. eds., 1995) (discussing the distinctions between major weapons systems and small arms and light weapons). Small arms and light weapons include “pistols, grenades, and bayonets through medium sized machine guns, grenade launchers, and light mortars and hand-held rocket launchers.” *Id.* Major weapons include “surface-to-air missiles, all missiles under 25 KM range, ships under 750 tons, all unarmed helicopters, and transport aircraft. *Id.*

33. Matt Schroeder & Guy Lamb, *Illicit Arms Trade in Africa: a Global Enterprise*, *AFR. ANALYST*, Third Quarter 2006, at 69, 71.

34. See Koh, *supra* note 26, at 2335 (noting that both adults and children throughout the world utilize small arms and light weapons).

weighs only 4.3 kilograms.<sup>35</sup> Consequently, child-soldiers can wield small arms and light weapons.<sup>36</sup> Notably, in Afghanistan, a fourteen year-old using a small arm killed the first United States servicemember during the United States invasion of Afghanistan.<sup>37</sup>

Additionally, small arms and light weapons are utilized extensively because they are deadly, simple to operate, resilient, and cheap.<sup>38</sup> Every year, small arms and light weapons cause countless deaths in conflict areas and approximately 200,000 deaths in non-conflict areas.<sup>39</sup> The AK-47, one of the more pervasive small arms, is capable of not only delivering 600 rounds per minute but also destroying an Apache attack helicopter.<sup>40</sup>

Furthermore, small arms and light weapons are simple machines to operate.<sup>41</sup> Unlike a large weapon system, small arms and light weapons require little or no upkeep, logistics, support, or instruction.<sup>42</sup> For example, the AK-47 is composed of only nine moving parts.<sup>43</sup> As a result, small arms and light weapons are simple enough for even an unskilled soldier to utilize.<sup>44</sup>

Moreover, small arms and light weapons are extremely durable.<sup>45</sup> Professor Koh noted that the minimalistic design of the AK-47 has led to its popularity because it provides enhanced durability.<sup>46</sup> While other assault rifles jam easily, the AK-47 operates as if just serviced, even after being hauled through the mud.<sup>47</sup> To illustrate, United States servicemembers during the Vietnam War reported finding rusted and soiled AK-47s buried in rice patties, which fired flawlessly.<sup>48</sup>

Furthermore, small arms and light weapons are cheap.<sup>49</sup> In some regions of Africa, small arms are sold for as low as \$15, the same price

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35. RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE*, xxviii (2007).

36. Koh, *supra* note 26, at 2335.

37. STOHL, *supra* note 35, at 25.

38. Rachel Stohl, *Reality Check: The Danger of Small Arms Proliferation*, 6 *Geo. J. INT'L AFF.* 71, 73 (2005) [hereinafter *Reality Check*].

39. STOHL, *supra* note 35, at 11.

40. *See id.* at xxviii (providing empirical data about the discharge rate of the AK-47); KAHANER, *supra* note 29, at 2 (describing a fire-fight in which an Apache helicopter was substantially damaged by small arms and light weapons).

41. Koh, *supra* note 26, at 2335.

42. *Id.*

43. *Id.* at 2336.

44. STOHL, *supra* note 35, at 3.

45. Koh, *supra* note 26, at 2337.

46. STOHL, *supra* note 35, at 4.

47. *Id.*

48. KAHANER, *supra* note 29, at 3.

49. Koh, *supra* note 26, at 2336.

as a sack of corn.<sup>50</sup> Accordingly, small arms and light weapons are tradable commodities.<sup>51</sup> As a result, sellers have created bazaars and markets centered on the sale of small arms and light weapons.<sup>52</sup> Take for example, the *Cir-toogte* section of the *Bakaaraha* market in Mogadishu, Somalia.<sup>53</sup> *Cir-toogte* literally translated means *shoot in the sky*.<sup>54</sup> Professor Koh has noted that these markets allow traders to exchange small arms and light weapons for, among other things, food, farm animals, trafficked money, and conflict diamonds.<sup>55</sup>

## B. THE LEGAL REGIMES GOVERNING THE ARMS TRADE

### 1. *International Regimes*

International law is the system within which small arms and light weapons transfers occur; hence, an understanding of what constitutes international law serves as the starting point for an analysis of small arms and light weapons transfers.<sup>56</sup> International law originates from diverse sources, many of which do not directly correlate with national legal systems.<sup>57</sup> Currently, the global community utilizes both arms embargoes and the many sub-systems of the inter-

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50. *Id.*

51. *Id.* at 2337. Specifically, the author notes that small arms and light weapons are tradable because of rampant availability, low weight, and portability. *Id.*

52. See CHRISTOPHER CARR, *KALASHNIKOV CULTURE: SMALL ARMS PROLIFERATION AND IRREGULAR WARFARE* 41-42 (2008) (discussing how the small arms and light weapons trade is divided into two markets, the local and the global/regional).

53. *Id.* at 42.

54. *Id.* The name is fitting because buyers in the *Cir-toogte* literally test their purchases by firing them into the air. *Id.*

55. See Koh *supra* note 26, at 2337 (discussing how illegal small arms and light weapons intersect with other illegal trades); see also Lisa Misol, *Weapons and War Crimes: The Complicity of Arms Suppliers*, HUM. RTS. WATCH WORLD REP. 279, Jan. 25, 2004, at 279, 280 (2004) (discussing how the exchange of diamonds for small arms and light weapons fueled the conflict in Sierra Leone); see generally Dena Montague, *The Business of War and the Prospects of Peace in Sierra Leone*, BROWN J. WORLD AFF., Spring 2002, at 229, 229.

For example, the illegal diamond trade connects the governments of Liberia, Togo, and Burkina Faso to arms brokers in Eastern Europe and Russia and diamond dealers in Belgium and Israel. [Further,] the Revolutionary Armed Forces of Columbia (FARC) is reported to make nearly \$500 million a year in drug trade profits, which includes the value of the weapons they purchase with drugs. . . . This barter was so institutionalized that a *de facto* exchange rate of one kilo of cocaine sulfate per AK-47 was established as the going rate.

STOHL, *supra* note 35, at 15.

56. See Emanuela-Chiara Gillard, *What's Legal? What's Illegal*, in *RUNNING GUNS: THE BLACK MARKET IN SMALL ARMS AND LIGHT WEAPONS* 27, 27-31 (Lora Lumpe ed., 1995) (discussing the sources of the law, which govern the transfer of small arms and light weapons).

57. *Id.* at 27.

national law to produce unequivocal prohibitions on small arms and light weapons transfers.<sup>58</sup>

Organizations like the United Nations (“U.N.”) prohibit small arms and light weapons transfers to particular states or areas by imposing arms embargoes.<sup>59</sup> The U.N. takes such measures to preserve or reinstate international peace and security.<sup>60</sup> The U.N. imposes embargoes after peace-keeping efforts have failed.<sup>61</sup> Once established, embargoes, which apply to all U.N. Member States, prohibit Member States from transferring weapons to the embargoed group.<sup>62</sup> Further, Member States must guarantee that private groups within the state’s jurisdiction do not transfer weapons to the embargoed group.<sup>63</sup> The U.N. has requested that Member States pass national legislation making violation of an arms embargo a criminal offense.<sup>64</sup> However, Emanuela-Chiara Gillard, legal advisor to the International Red Cross, noted that the enforcement of embargoes has been challenging because of the number of states and private individuals that have violated embargoes with few repercussions.<sup>65</sup>

Similar to arms embargoes, the system of customary international law prohibits certain small arms and light weapons transfers.<sup>66</sup> Customary international law imposes one such prohibition by preventing a state from intervening into the domestic affairs of another state.<sup>67</sup> For example, if state *A* transfers weapons into state *B* without complying with state *B*’s import laws, then the transfer will be illegal because the transfer would amount to impermissible interference in state *B*’s internal affairs.<sup>68</sup> Additionally, the international community considers supplying arms to terrorist organizations inter-

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58. *Id.* at 31; *see also id.* at 31-45 (discussing the various systems of international law that prohibit small arms and light weapons transfers). A basic form of prohibition is multilateral and bilateral agreements prohibiting transfer. *Id.* at 31. However, the only agreement in force today is a non-binding moratorium. *Id.*

59. *Id.* at 32. In addition to the U.N. organizations like the European Union have the ability to impose embargoes. *Id.* Further, nations themselves can agree to embargo a state or region. *Id.*

60. United Nations Security Council, *UN Security Council Sanctions Committee: An Overview*, <http://www.un.org/sc/committees/> (last visited Apr. 7, 2011).

61. *Id.* The first U.N. embargo was imposed in 1956 against Southern Rhodesia. Gillard, *supra* note 56, at 33. Subsequently, the Security Council imposed embargoes on the Federal Republic of Yugoslavia, Sierra Leone, Rwanda, Haiti, Liberia, Libya, Somalia, Iraq, and South Africa. *Id.* Further, the Security Council imposed embargoes on groups within a state, such as, the National Union for the Total Independence of Angola, Bosnian Serbs, and all parties in Somalia. *Id.*

62. Gillard, *supra* note 56, at 33.

63. *Id.*

64. S.C. Res. 1196, ¶ 2, U.N. Doc. S/RES/1196 (Sept. 16, 1998).

65. Gillard, *supra* note 56, at 34.

66. *Id.* at 28, 36.

67. *Id.* at 36.

68. *Id.* at 36-37.

nal interference in the affairs of another state because the exporting state undermines the importing state's sovereignty.<sup>69</sup>

In addition, the international community has also created non-binding agreements to regulate the transfer of small arms and light weapons.<sup>70</sup> One example of such a non-binding agreement is the Economic Community of West African States' moratorium on the sale and manufacture of small arms and light weapons.<sup>71</sup> The moratorium bans the import, export, or manufacture of small arms and light weapons in West Africa.<sup>72</sup> The European Union's Code of Conduct on Arms Exports<sup>73</sup> is another example of a non-binding agreement.<sup>74</sup> The European Union promulgated the Code of Conduct in an attempt to harmonize the regulations regarding arms exports amongst European states.<sup>75</sup> However, Emanuela-Chiara Gillard noted that the European Union Code of Conduct is analytically weak because the Code of Conduct amounts to nothing more than a non-binding declaration of intent.<sup>76</sup>

## 2. National Regimes

Individual states are responsible to regulate small arms and light weapons transfers because the international community has not yet promulgated an international binding agreement regulating transfers.<sup>77</sup> Many states have attempted to create effective national export control systems by constructing national regulations to authorize weapons transfers.<sup>78</sup> All major small arms and light weapons exporters have some form of national law governing the export of weaponry, but these laws vary considerably from one state to another.<sup>79</sup>

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69. See *id.* at 37-38 (discussing the genesis and progression of the international community's fight against the supplying of terrorist organizations).

70. *Id.* at 39-40.

71. See *Declaration of a Moratorium on Importation, Exportation, and Manufacture of Light Weapons in West Africa*, ECON. CMTY. OF W. AFRICAN STATES 3 (Oct. 31, 1998), <http://www.poa-iss.org/RegionalOrganizations/ECOWAS/Moratorium%20and%20Code%20of%20Conduct.pdf> (detailing the stance of the Economic Community of West African States pertaining to the ban on small arms and light weapons in the region).

72. *Id.* at 3.

73. 2010 O.J. (C21E).

74. Gillard, *supra* note 56, at 41.

75. *Id.*

76. See *id.* at 43 (discussing the short-comings of the European Union's Code of Conduct on Arms Exports).

77. Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 217-18; see also Michael T. Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in LETHAL COMMERCE 31, 39 (Jeffery Boutwell et al. eds., 1995).

78. GRADUATE INST. OF INT'L & DEV. STUD., SMALL ARMS SURVEY 2009 61 (2009) [hereinafter SMALL ARMS SURVEY 2009].

79. *Id.*

Despite such global variations in national law, states generally require that small arms and light weapons exporters apply to the exporting state for an export license.<sup>80</sup> Normally, states require the exporter to produce an end-user certificate when applying for an export license.<sup>81</sup> Typically, an end-user certificate contains details of the transfer including the names of parties involved, quantity, and value of the transaction.<sup>82</sup> However, many states do not require transfer documents to contain basic information.<sup>83</sup>

Outside of requiring the exporter to produce an end-user certificate and obtain an export license, the national systems of export controls vary widely from state to state.<sup>84</sup> For example, the duration of a single license is not uniform.<sup>85</sup> Additionally, not every state requires international import certificates, which express that the importing state has no objection to the weaponry entering the state.<sup>86</sup> Further, some states require a delivery verification certificate.<sup>87</sup> Importing states produce delivery verification certificates to confirm that the small arms and light weapons transfer has arrived.<sup>88</sup> Finally, some complex transfers require additional documentation, including delivery receipts, transfer manifestoes, flight plans, customs entries, invoices, air waybills, shipper's certificates for dangerous goods, and letters of credit.<sup>89</sup>

Even with such licensing requirements, some states may have licensing exemptions for certain importers, end-users, and end-uses.<sup>90</sup> For instance, Canada requires no export license for transfers from Ca-

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80. *Id.* at 69.

81. *Id.* at 81.

82. *Id.* at 64. While the contents of end-user certificates are normally similar, requirements for what they must contain vary by country. *Id.*

83. See Mark Bromley & Hugh Griffiths, *End-User Certificates: Improving Standards To Prevent Diversion*, STOCKHOLM INT'L PEACE & RES. INST. INSIGHTS ON PEACE & SECURITY, at 7 (Mar. 2010) (discussing the varying amount of information required across the spectrum, including the example that Equatorial Guinea does not require basic information).

84. See SMALL ARMS SURVEY 2009, *supra* note 78, at 70-75 (providing a graph of the various documents that each government requires when authorizing an arms transfer).

85. See *id.* (detailing that the duration of a license depends upon the issuing state). South Africa requires a separate license for every transaction. Marsh, *supra* note 78, at 218. Conversely, the British government grants Open Individual Export Licenses, which allow for unlimited shipments within a two year period per single license. *Id.*

86. *Id.* An international import certificate is presented to an exporting state and is attached to the application for a license. *Id.*

87. See SMALL ARMS SURVEY 2009, *supra* note 78, at 70-72 (noting that some states require delivery verification certificates while others do not).

88. *Id.* at 64. The importer applies for delivery verification certificates. *Id.* The importer is required to produce evidence that delivery has occurred. *Id.* If a delivery verification certificate is required, then the exporter will be expected to present the delivery verification certificate to the exporting state within a set period of time. *Id.*

89. Marsh, *supra* note 77, at 219.

90. SMALL ARMS SURVEY 2009, *supra* note 78, at 78.

nada to the United States.<sup>91</sup> Moreover, Norway does not require an export license if the importer is a member of the North Atlantic Treaty Organization (“NATO”) or the European Union.<sup>92</sup> Additionally, states commonly exempt transfers between government agencies from export controls.<sup>93</sup>

### C. THE MECHANICS OF THE INTERNATIONAL ARMS TRADE

The growth of the international small arms and light weapons trade has not mirrored the development of the conventional arms trade.<sup>94</sup> The lifecycle of a small arm or light weapon begins when the weapon is manufactured in one of almost 100 states.<sup>95</sup> The Graduate Institute of International and Development Studies published the Small Arms Survey, which compiled data indicating that fifteen states dominate the global manufacture of small arms and light weapons by accounting for eighty-three percent of the total exports from 2000 to 2006.<sup>96</sup> Top producers include Austria, Belgium, Brazil, Canada, China, Germany, India, Italy, North Korea, Pakistan, the Russian Federation, Switzerland, Turkey, the United Kingdom, and the United States.<sup>97</sup>

After a small arm or light weapon has been manufactured, the weapon travels through one of three distinct channels until it reaches the final end-user.<sup>98</sup> The three channels that compose the global market are the white market, the grey market, and the black market.<sup>99</sup>

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91. Marsh, *supra* note 77, at 218.

92. SMALL ARMS SURVEY 2009, *supra* note 78, at 78. Romania and Finland also exclude transfers to NATO countries from the licensing system. *Id.*

93. *Id.*

94. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 55 (2007).

95. *See Producers*, SMALL ARMS SURVEY, <http://www.smallarmssurvey.org/weapons-and-markets/producers.html> (last visited Feb. 12, 2011) (articulating that 1,000 companies in 100 countries participate in small arms and light weapons manufacturing).

96. *See* GRADUATE INST. OF INT’L & DEV. STUD., *SMALL ARMS SURVEY 2009* 12 (2009) [hereinafter *SMALL ARMS SURVEY 2009*] (noting the states that have dominated the modern trade in small arms and light weapons).

97. *Industrial Production*, SMALL ARMS SURVEY, <http://www.smallarmssurvey.org/weapons-and-markets/producers/industrial-production.html> (last visited Nov. 3, 2010); *see also* Elizabeth Powers, *Greed, Guns, and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383 (2008).

98. Rachel Stohl, *Reality Check: The Danger of Small Arms Proliferation*, 6 GEO. J. INT’L AFF. 71, 72 (2005) [hereinafter *Reality Check*].

99. *Id.*

### 1. *White Market Transfers*

White market transfers comply with prevailing international and national law.<sup>100</sup> Specifically, white market transfers adhere to United Nations (“U.N.”) arms embargoes, national regulations, and national processes.<sup>101</sup> Normally, the governments or agents of both the exporting and importing states authorize white market transfers.<sup>102</sup> Every year the white market generates approximately \$6 billion in revenue for exporters globally.<sup>103</sup>

Three different types of white market transfers occur.<sup>104</sup> The three distinct types of white market transfers are commercial sales, government-to-government sales, and assistance.<sup>105</sup> Private or state manufacturers carry out commercial sales when they make transfers to non-state or state purchasers for a profit.<sup>106</sup> Government-to-government transfers involve one state transferring or negotiating a transfer to another state.<sup>107</sup> The hallmark of government-to-government transfers is that the importing state utilizes the small arms and light weapons for the legitimate purposes of defense measures, police use, or security initiatives.<sup>108</sup> Finally, assistance transfers occur when small arms and light weapons are transferred without consideration from one state to another to bolster the armed security forces of the recipient state.<sup>109</sup>

### 2. *Grey Market Transfers*

Grey market transfers occur when states or representatives exploit loopholes to evade international and national law.<sup>110</sup> Rachel

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100. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 31 (2007).

101. RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 13 (2007).

102. *See id.* (explaining white market transfers generally involve the governments of both the importing and exporting states).

103. Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, *BROWN J. WORLD AFF.*, Spring 2002, at 217, 217.

104. *SMALL ARMS SURVEY 2009*, *supra* note 98, at 9 (discussing that the eleven actions that compose a white market transfer are commercial sales, government-to-government sales, trials and sampling, assistance, training, peacekeeping operations, repairs, surplus disposal, return of leased weapons, intra-government transfer, and transfers by individuals).

105. *Id.*

106. *Id.* The data available focuses on the commercial export of small arms and light weapons. *Id.*

107. *Id.* Available data focuses on government-to-government transfers, albeit to a lesser extent. *Id.*

108. *See id.* (explaining that white market transfer generally must be utilized for legitimate purposes).

109. *Id.*

110. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 31 (2007); RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 13 (2007).

Stohl, senior analyst at the Center for Defense Information and noted expert on the small arms trade, has noted that the distinction separating a white and grey market transfer is unclear.<sup>111</sup> Grey market transfers often traffic arms utilizing the same networks and processes as white market transfers.<sup>112</sup> Consequently, the inextricable connection between legal and illegal arms complicates initiatives to hinder illicit arms trafficking.<sup>113</sup> Normally, rebel groups and embargoed states are the end-users of grey market transfers.<sup>114</sup>

One form of grey market transfer involves covert aid, which is the delivery by a state of small arms and light weapons to a rebel group.<sup>115</sup> Dr. Mike Bourne, lecturer in International Security Studies at Queen's University of Belfast, noted that grey market transfers accomplish geopolitical objectives, often in violation of a state's own laws.<sup>116</sup> Grey market transfers allow states to intervene in conflict, support a rebel group, create an impasse, increase a conflict, or destabilize another government embroiled in conflict.<sup>117</sup>

The United States' direct and indirect arming of the *Mujahedeen*, in Afghanistan, is an example of grey market commerce.<sup>118</sup> In 1979, the Soviet Union invaded Afghanistan.<sup>119</sup> As a result of the Red Army's invasion, many Afghans leapt into the resistance move-

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111. STOHL, *supra* note 110, at 13; Staff: Rachel Stohl, CENTER FOR DEFENSE INFORMATION, <http://www.cdi.org/aboutcdi/rsbio.html> (last visited Feb. 26, 2010).

112. See STOHL, *supra* note 110, at 18. (arguing that "[U]sing complicated trafficking routes and exploiting unsynchronized national laws, arms brokers manipulate legal networks for illegal purposes. Governments often use the same networks and routes to transport grey market arms.")

113. *Id.*

114. *Id.* at 13; see also Christian Lowe, *NATO Risks Georgia Rebels' Secession: Russia*, REUTERS (Mar. 11, 2008), <http://www.reuters.com/article/2008/03/11/us-russia-georgia-idUSL1166246120080311> (last visited Apr. 7, 2011) (announcing that Russia had begun trade of small arms with the Georgian rebel group Abkhazia); *China's Arms Sales to Sudan*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080311-cah-arms-sales-fact-sheet.pdf> (last visited Apr. 7 2011) (noting the Chinese government indirectly supplied arms to non-state groups in Sudan); *No Evidence That India Aiding Pak Baloch Rebels*, INDIANEXPRESS.COM (May 27, 2009), <http://www.indianexpress.com/news/no-evidence-that-india-aiding-pak-baloch-rebels/466814/> (last visited Apr. 7, 2011) (explaining the accusations that India was trading small arms and light weapons with non-state groups in Pakistan); *Stevens Inquiry: At a Glance*, BBC NEWS (Apr. 17, 2003), [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/2956337.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/2956337.stm) (last visited Apr. 7, 2011) (noting how the government of the United Kingdom traded arms with loyalist non-state groups in Ireland).

115. BOURNE, *supra* note 110, at 95.

116. *Id.*

117. *Id.*

118. See STOHL, *supra* note 110, at 26-27 (describing the United States efforts to arm the Afghan rebels in their conflict with the Soviet Union); see also BOURNE, *supra* note 110, at 101-07 (discussing the weapons supply lines between the Western Nations and their proxy).

119. STOHL, *supra* note 110, at 26.

ment.<sup>120</sup> The Afghan resistance took the form of a defensive *jihad*, which was under the banner of the *Mujahedeen*.<sup>121</sup> However, the *Mujahedeen* were ill-equipped to combat the Soviets and were dying in great numbers.<sup>122</sup> Consequently, the United States, to repel the Soviets, created a pipeline to supply small arms and light weapons to the *Mujahedeen*.<sup>123</sup>

To arm the *Mujahedeen*, the United States formed a small arms and light weapons pipeline, which utilized other states as conduits for weapons transfers, such as Pakistan.<sup>124</sup> Using the pipeline, the United States Central Intelligence Agency procured hundreds of thousands of AK-47s, which were subsequently passed into Afghanistan.<sup>125</sup> Further, in 1986, the *Mujahedeen* received United States manufactured stinger missiles.<sup>126</sup> By the end of the conflict, the United States' contribution to the *jihad* totaled around \$600 million annually.<sup>127</sup>

After the Soviet withdrawal from Afghanistan, millions of small arms and light weapons remained in Pakistan.<sup>128</sup> While the small arms and light weapons were initially intended for the *Mujahedeen* to combat the Soviet Union, other unintended end-users benefited from the pipeline.<sup>129</sup> For example, officials in Pakistan diverted many small arms and light weapons to Pakistani-criminals.<sup>130</sup> Moreover, the United States government later expressed concern over the diversion of sniper rifles, earmarked for Afghanistan, to Kashmiri insurgents in India.<sup>131</sup> Finally, in the 1990s, Pakistan used left-over small arms and light weapons to arm the Taliban in its military push in Afghanistan.<sup>132</sup>

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120. GILES KEPPEL, *JIHAD: THE TRAIL OF POLITICAL ISLAM* 141 (Anthony F. Roberts trans., 2002).

121. *See id.* at 139 (discussing the make-up of the *Mujahedeen*, including the unifying force that the resistance produced throughout the Middle East and Muslim world).

122. STOHL, *supra* note 110, at 69.

123. BOURNE, *supra* note 110, at 99.

124. STOHL, *supra* note 110, at 26.

125. *Id.*

126. BOURNE, *supra* note 110, at 100-01.

127. KEPPEL, *supra* note 120, at 143.

128. STOHL, *supra* note 110, at 27.

129. *See id.* at 26-27 (discussing the siphoning of weapons from the Pakistan-Afghan pipeline to groups outside the Afghan conflict).

130. *Id.* at 26.

131. *Id.* at 27.

132. *Id.*

### 3. *Black Market Transfers*

Black market transfers are small arms and light weapons exchanges that infringe international or national law.<sup>133</sup> Non-state groups use black market small arms and light weapons for, amongst other things, organized crime, perpetuating conflict, human rights abuses, and genocide.<sup>134</sup> Authors estimate the size of the black market is around ten to twenty percent of the legal market.<sup>135</sup>

Currently, only states and brokers can utilize the legal small arms and light weapons market.<sup>136</sup> Dr. Mike Bourne has noted that direct links between illegal groups and the international small arms and light weapons market are rare.<sup>137</sup> However, arms brokers allow non-state groups to tap into the global small arms and light weapons market.<sup>138</sup> Arms brokers, also known as *merchants of death*, are private individuals and companies that act as intermediaries between a small arms and light weapons supplier and groups seeking weaponry in exchange for a fee.<sup>139</sup> As a result, brokers are the individuals who enable rebel groups, terrorists, death squads, and pirates to gain weapons.<sup>140</sup>

Gun running has its roots in the Cold War, when states did not wish to get directly involved in supplying small arms and light weapons to rebel groups; consequently, states utilized brokers to facilitate transfers.<sup>141</sup> However, brokers had to adjust to a new way of doing business after the conclusion of the Cold War.<sup>142</sup> Soon, brokers began to supply weapons to the highest bidder without making political alliances to the groups receiving arms.<sup>143</sup>

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133. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 31 (2007).

134. Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 223.

135. *Id.* at 220.

136. BOURNE, *supra* note 133, at 115.

137. *Id.* at 115.

138. *Id.* at 114.

139. RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 17 (2007); Kathi Austin, *Illicit Arms Broker: Aiding and Abetting Atrocities*, BROWN J. WORLD AFF., Spring 2002, at 203.

140. Brian Wood & Johan Peleman, *Making the Deal and Moving Goods—The Role of Brokers and Shippers*, in *RUNNING GUNS: THE BLACK MARKET IN SMALL ARMS AND LIGHT WEAPONS* 129, 130 (Lora Lumpe ed., 1995); see generally Matthew Brunwasser, *Gallery of International Arms Dealers: Leonid Efimovich Minin*, FRONTLINE WORLD (May 2002), <http://www.pbs.org/frontlineworld/stories/sierraleone/minin.html> (providing the history of Leonid Minin, an arms broker who has facilitated bloody regimes and warlords throughout the world).

141. See STOHL, *supra* note 139, at 17 (discussing the roots of gun running, specifically the gun runners symbiotic relationship with the Cold War superpowers).

142. *Id.*

143. *Id.*

In arming illegal non-state groups, brokers leave their country of origin and make illegal arms deals in nations with lax legislation to avoid criminal repercussions.<sup>144</sup> Moreover, by exploiting unsynchronized national laws and utilizing complicated trafficking routes, arms brokers subvert legal networks for illegal objectives.<sup>145</sup> Brokers make it a point to not own or keep the illegal small arms and light weapons.<sup>146</sup> Further, black market brokers do not fear prosecution because the few nations with legislation regulating brokering seldom scrutinize their activities.<sup>147</sup> Consequently, brokers are largely free to peddle their lethal goods with freedom and impunity.<sup>148</sup>

When non-state groups seek arms, traders and suppliers of small arms and light weapons circulate shopping lists.<sup>149</sup> Once the traders and suppliers procure the desired small arms and light weapons, brokers arrange the details of the transfer between the arms supplier and the illegal end-user.<sup>150</sup> Subsequently, cargo companies ship the weapons to a transfer point.<sup>151</sup> From the transfer point, transport agents divert the small arms and light weapons to the final destination, the illegal recipient.<sup>152</sup> For example, when Liberia was under a United Nations ("U.N.") arms embargo, brokers diverted two hundred tons of guns and ammunition to Liberia, from Serbia, via Libya.<sup>153</sup> Serbia was the origination point and Libya served as the transfer point from where the arms were smuggled into Liberia.<sup>154</sup> Arm brokers accom-

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144. Austin, *supra* note 139, at 205.

145. STOHL, *supra* note 139, at 18.

146. Austin, *supra* note 139, at 204.

147. *Id.* at 204-05; *See generally* Wendy Cukier, *The Illicit Trade In Small Arms: Addressing The Problem Of Diversion*, PEACEBUILD, 9 (Apr. 2000), <http://www.guncontrol.ca/English/Home/Releases/illicit.pdf>; Controlled Drugs and Substances Act, S.C. 1996, c. 19(5)(3) (Can.).

148. *Id.* at 205.

149. Wood, *supra* note 140, at 130.

150. *See id.* (delineating the role that brokers play in the international arms trade, specifically, a broker's role as facilitator); Austin, *supra* note 141, at 204 (stating that arms brokers are the driving force behind global conflict because they are the people who facilitate conflict); *see also Non-state Actors and the ATT: Challenges and Opportunities*, UNITED NATIONS INST. FOR DISARMAMENT RES., [http://www.unidir.org/bdd/fiche-activite.php?ref\\_activite=487](http://www.unidir.org/bdd/fiche-activite.php?ref_activite=487).

151. Wood, *supra* note 140, at 130.

152. *Id.*; *see also* Prosecutor v. Sesay, Case No. SCSL-2004-15-PT, Indictment (Special Ct. for Sierra Leone August 2, 2006) (detailing the crimes of the Revolutionary United Front, a non-state group that had weapons diverted to them by regional state facilitators).

153. STOHL, *supra* note 139, at 18; *see also* Prosecutor v. Charles Gahnkay Taylor, Case No. SCSL-2003-01-PT, Second Amended Indictment (Special Ct. for Sierra Leone May 29, 2007), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107>.

154. STOHL, *supra* note 139, at 18.

plished the shipment of small arms and light weapons to Liberia by utilizing false Nigerian end-user certificates.<sup>155</sup>

#### D. GLOBAL ATTEMPTS TO REGULATE THE ARMS TRADE

Since World War II, the majority of arms control efforts have strived to prevent the spread of chemical, nuclear, and biological weapons.<sup>156</sup> For example, the Wassenaar Arrangement,<sup>157</sup> the global arrangement proposed to control the spread of weapons, has primarily major weapons within its purview.<sup>158</sup> Moreover, the United Nations ("U.N.") Register of Conventional Arms, the apparatus for sharing information pertaining to weapons, focused primarily on major weapons systems.<sup>159</sup>

However, the global community in the 1990s shifted its focus from major weapons to disarmament on a smaller scale, micro-disarmament.<sup>160</sup> The global community's adoption of the Ottawa Convention to Ban Antipersonnel Landmines<sup>161</sup> in 1997 marked a great accomplishment for the micro-disarmament movement.<sup>162</sup> Micro-disarmament advocated for reducing the number of highly lethal, readily available, and cheap weapons.<sup>163</sup> Moreover, in 1997, the International Campaign to Ban Landmines, a non-governmental organization dedicated to landmine reform, won the Nobel Peace Prize for its efforts.<sup>164</sup>

##### 1. *The 2001 U.N. Conference On The Illicit Trade of Small Arms and Light Weapons in All Its Aspects*

In 2001, New York hosted the United Nations ("U.N.") Conference on the Illicit Trade of Small Arms and Light Weapons in All Its As-

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155. *Id.*

156. Harold Hongju Koh, *A World Drowning In Guns*, 71 *FORDHAM L. REV.* 2333, 2339 (2003).

157. WASSENAAR ARRANGEMENT ON EXPORT CONTROLS FOR CONVENTIONAL ARMS AND DUAL-USE GOODS AND TECHNOLOGY (1996), available at <http://www.wassenaar.org/publicdocuments/2011/docs/WA-DOC%20%2811%29%20001%20-%20Basic%20Documents%20-%20January.pdf>.

158. See RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 39 (2007) (discussing how the Wassenaar Arrangement and the U.N. Registry of Arms, the mechanisms to regulate the arms trade, had largely neglected small arms and light weapons).

159. *Id.*

160. *At Gunpoint: The Small Arms and Light Weapons Trade*, BROWN J. *WORLD AFF.*, Spring 2002, at 159, 159 [hereinafter *At Gunpoint*].

161. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 5, Dec. 3, 1997, 2056 *U.N.T.S.* 211.

162. *At Gunpoint*, *supra* note 160, at 159.

163. *Id.*

164. STOHL, *supra* note 158, at 39.

pects.<sup>165</sup> At the conclusion of the summit, participating states decided to adopt the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, in All Its Aspects<sup>166</sup> ("PoA").<sup>167</sup> The PoA included several measures aimed at many facets of the small arms and light weapons market.<sup>168</sup> Particularly, the measures provided for the registration, marking, and destruction of illicit small arms and light weapons.<sup>169</sup> Many observers deemed the PoA and the conference successful.<sup>170</sup> However, many other observers noted that the conference neither produced a legally binding instrument nor advocated for such a document.<sup>171</sup> Several commentators in the field have claimed that the PoA failed to address some important points despite the fact it established the global community's position.<sup>172</sup>

## 2. *The Arms Trade Treaty*

In the years since the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, in All Its Aspects ("PoA"), many states and non-governmental organizations have noted that the system to prevent the flow of small arms and light weapons has been ineffective.<sup>173</sup> Hence, international entities

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165. Jayantha Dhanapala, *Multilateral Cooperation on Small Arms and Light Weapons: From Crisis to Collective Response*, BROWN J. WORLD AFF., Spring 2002, at 163, 167.

166. Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, in All Its Aspects, U.N. Doc. A/CONF. 192/15 (Jul. 20, 2001).

167. *Id.* The conference was the Bush administration's first foray into the issue of small arms and light weapons. Harold Hongju Koh, *A World Drowning In Guns*, 71 FORDHAM L. REV. 2333, 2347 (2003). The most noteworthy address at the conference was given by United States Undersecretary for Arms Control, John Bolton, who stated that the United States supported the restraints. *Id.* However, Bolton added that the United States would not support constraints on the legal small arms and light weapons trade, promotion of advocacy on an international scale, or measures restricting the small arms and light weapons trade only to states, and the United States would not endorse any document that would impinge on the second amendment of the United States Constitution. *Id.* at 2347-48.

168. Dhanapala, *supra* note 165, at 167.

169. *Id.*

170. *Id.*

171. *Id.* at 167-68.

172. *Id.* at 168.

173. See David Kopel et al., *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 PENN. ST. L. REV. 891, 893-94 (2010) (discussing the response of non-governmental organizations to the shortcoming of the current regime that regulates the arms trade and their proposals that have led to the proposal of the Arms trade treaty).

have recommended the drafting of a binding arms trade treaty, which they claim would address the shortcomings of the current system.<sup>174</sup>

In December 2006, the United Nations ("U.N.") committed itself to reevaluating its approach to small arms and light weapons control by passing U.N. Resolution 61/89.<sup>175</sup> The resolution noted increasing support for a legally binding instrument to institute universal standards for all small arms and light weapons transfers.<sup>176</sup> Also, the resolution called for the convening of governmental experts from Member States to discuss the feasibility and scope of a legally binding document, such as an arms trade treaty.<sup>177</sup>

The U.N. requested the perspectives of Member States on the viability, extent, and limitations of a possible arms trade treaty.<sup>178</sup> The secretariat requested Member States to reflect upon the features that may contribute to the development and acceptance of an arms trade treaty.<sup>179</sup> Subsequently, ninety-four Member States and the European Union tendered their views to the U.N.<sup>180</sup>

Member State responses were varied.<sup>181</sup> For example, Serbia's response requested the arms trade treaty to address issues related to end-use management.<sup>182</sup> Serbia contended that the creation of standard documents would bolster the necessary level of national accountability.<sup>183</sup> In turn, Serbia proposed that all export and import documents contain a uniform amount of information.<sup>184</sup> Further, Ser-

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174. *See id.* at 893 (explaining the General Assembly's commitment to the continued development of the regulation of the arms trade).

175. *See* G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 6, 2006) (delineating the U.N.'s position that common norms must be established in order to promote stability worldwide).

176. *Id.* at 2.

177. *Id.*

178. United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 3, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses I*].

179. *Id.*

180. *Id.*; *see also* G.A. Res. 63/334, U.N. Doc. A/RES/63/334 (Aug. 26, 2008).

181. *See U.N. Responses I*, *supra* note 178, at 3-23 (providing a detailed list of Member State responses); United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 5-234, U.N. Doc. A/62/278 (Part II) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (listing the responses of the states omitted from part one); *see also Arms Treaty to Reign in Trigger-Happy Regimes on the Way*, BUS. DAILY AFR., Feb. 3, 2011, <http://www.businessdailyafrica.com/Arms+treaty+to+rein+in+trigger+happy+regimes+on+the+way/-/539546/1100412/-/item/0/-/rulwni/-/index.html> (articulating the notion that an arms trade treaty is needed; however, the progress of drafting the treaty has been marked by faction amongst states).

182. *U.N. Responses II*, *supra* note 181, at 188.

183. *Id.*

184. *Id.* The forms included were delivery verification certificates, international import certificates, end-user certificates, and other relevant certificates. *Id.*

bia proposed documents should be printed on particular paper containing a hologram to combat forgery.<sup>185</sup> Along the same lines, Sweden has implemented a system to print all transfer documents on bank note quality paper to combat forgery.<sup>186</sup>

Furthermore, many states also sought to focus upon provisions that promoted transparency in the arms trade treaty.<sup>187</sup> For instance, Trinidad and Tobago recommended that states be required to submit comprehensive national yearly reports on small arms and light weapons transfers.<sup>188</sup> Pursuant to Trinidad and Tobago's recommendation, states would submit national reports to an international clearinghouse, which would issue an all-inclusive international report.<sup>189</sup> Additionally, Ireland proposed a mechanism intended to guarantee transparency in the execution of the treaty by sharing information of both approvals and denials of transfers.<sup>190</sup> Ireland designed this approach to promote mutual consistency in application of the available information creating a realistic monitoring mechanism for the arms trade.<sup>191</sup>

Aside from the creation of standard forms and transparency, many states' responses focused upon the prevalence of non-state groups in small arms and light weapons transfers.<sup>192</sup> For example, France responded that the increasing uncontrolled existence of non-state groups in global conflict was disturbing.<sup>193</sup> Among the multitude of responses expressing concern about the prevalence of non-state groups in conflict, Nigeria, Cuba, Burundi, India, Indonesia, Mali, and Turkey proposed limiting the sale of small arms and light

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185. *Id.*

186. *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010).

187. *See, e.g., U.N. Responses II, supra* note 181, at 217 (noting that Trinidad and Tobago have proposed that the treaty focus upon transparency in arms transfer); *U.N. Responses II, supra* note 181, at 36 (explaining that Burkina Faso's response was focused upon promoting transparency); *U.N. Responses I, supra* note 178, at 15 (delineating that Ireland actually proposed an information sharing mechanism in order to encourage transparency).

188. *U.N. Responses II, supra* note 181, at 217.

189. *Id.*

190. *U.N. Responses I, supra* note 178, at 15.

191. *Id.*

192. *See, e.g., U.N. Responses II, supra* note 181, at 82. (discussing France's alarm as to the increase in non-state groups and small arms and light weapons transfers); *U.N. Responses I, supra* note 178, at 20 (delineating that Nigeria views the presence of non-state groups in arms transfers as a factor that undermines development); *U.N. Responses II, supra* note 181, at 99 (noting that India viewed the presence of non-state groups in armed conflict as a sweeping global problem).

193. *U.N. Responses II, supra* note 181, at 82.

weapons to only states.<sup>194</sup> For instance, Cuba noted that the proposed arms trade treaty would be ineffective unless the treaty explicitly prohibited small arms and light weapons transfers to non-state groups.<sup>195</sup> Further, Turkey responded that the core of the arms trade treaty must prevent non-state groups from acquiring small arms and light weapons.<sup>196</sup> Nigeria also claimed the chief objective of the arms trade treaty must be to guarantee that small arms and light weapons are only transferred for peacekeeping efforts, self-defense, and police use.<sup>197</sup>

#### E. THE INTERNATIONAL CRIMINAL COURT

Colonel Stuart W. Risch, member of the United States Army Judge Advocate General's Corps and author on the subject of international affairs, has noted that the events of the last century produced persecution and slaughter on an enormous scale, unrivaled by any other period in time.<sup>198</sup> After World War I, the global community made considerable efforts to create an enduring international criminal justice entity.<sup>199</sup> Many years later, the global community convened in Rome to discuss the creation of an autonomous and permanent International Criminal Court ("ICC"), able to scrutinize and prosecute shocking global criminals.<sup>200</sup> The meeting produced the Statute of Rome,<sup>201</sup> which laid the foundation for the ICC.<sup>202</sup> Two-thirds of the

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194. *U.N. Responses I*, *supra* note 178, at 20 (discussing Nigeria's plan to block non-state groups from participating in arms transfers); *U.N. Responses II*, *supra* note 181, at 55, (explaining Cuba's proposed ban upon arms transfers to non-state groups); *U.N. Responses II*, *supra* note 181, at 99 (discussing India's proposed ban upon non-state group participation in arms transfers); *U.N. Responses II*, *supra* note 181, at 100 (discussing Indonesia's proposed ban upon arms transfers to non-state groups); *U.N. Responses II*, *supra* note 181, at 128 (noting Mali's proffered prohibition bans non-state group transfers); *U.N. Responses II*, *supra* note 181, at 221 (explaining Turkey's view that non-state groups should be banned from arms transfers).

195. *U.N. Responses II*, *supra* note 181, at 55.

196. *Id.* at 221.

197. *U.N. Responses I*, *supra* note 178, at 20.

198. Colonel Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, 2009 *ARMY LAW* 61, 62 (2009). The century witnessed the Armenian Genocide from 1915-1918. *Id.* World War II provided the Holocaust. *Id.* at 63. The 1960s included war crimes in Vietnam. *Id.* Along the same lines, Cambodia suffered genocide under the *Khmer Rouge*. *Id.* at 63-64. The century came to a close with mass atrocities in Rwanda, Sierra Leone, and the Balkans. *Id.*

199. Sara Anoushirvani, *The Future of the International Criminal Court: The Long Road To Legitimacy Begins With The Trial of Thomas Lubanga Cyilo*, 22 *PAGE INT'L L. REV.* 213 (2010) (discussing the heritage of the International Criminal Court).

200. Risch, *supra* note 198, at 65-66.

201. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf.183/9 (Jul. 1, 2002) [hereinafter *Statute of Rome*].

202. Risch, *supra* note 198, at 66.

drafting states signed the treaty; subsequently, sixty states ratified the treaty.<sup>203</sup> The treaty went into effect on July 1, 2002.<sup>204</sup>

The Statute of Rome delineated the following foundational elements of the ICC: the ICC's jurisdiction, the ICC's principles of criminal culpability, and the complementary nature of the ICC.<sup>205</sup> First, the ICC's jurisdiction covers only the most serious crimes facing the international community.<sup>206</sup> The Statute of Rome delineated the list of crimes to include genocide, crimes against humanity, and war crimes.<sup>207</sup> The Statute of Rome defined genocide as an act perpetrated with the intent to obliterate an ethnic, national, religious, or racial group.<sup>208</sup> Also, the Statute of Rome defined crimes against humanity as an extensive and systematic assault upon a civilian population.<sup>209</sup> Finally, the Statute of Rome defined war crimes as breaches of the protections granted under the Geneva Conventions.<sup>210</sup>

Second, the Statute of Rome articulated the guiding principles of criminal culpability, which addresses more than the perpetrating party.<sup>211</sup> The Statute of Rome affirmed the principles normally recognized under customary international law.<sup>212</sup> Particularly, the Statute of Rome mentioned persons who facilitate crime or aid and abet the

203. *Id.*

204. *Id.* Interestingly, the United States has vehemently opposed the ICC. *Id.* Further, the United States has taken steps to directly undermine the operation of the ICC. *Id.*

205. See *Statute of Rome, supra* note 201, at art. 1 (noting the jurisdictional reach of the ICC and the principle of complementarity); *Statute of Rome, supra* note 201, at art. 25 (outlining the ICC's principles of criminal liability); see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 312-23 (2007) (discussing the principles upon which the ICC is premised).

206. *Statute of Rome, supra* note 201, at art. 5.

207. *Id.*

208. *Id.* at art. 6; see generally THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD (2007).

209. *Id.* at art. 7. Article 7 delineates that the following acts when aimed at a civilian population constitute crimes against humanity:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph 3, or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

*Id.*

210. *Id.* at art. 8.

211. See *id.* at art. 25 (discussing the principles of aiding and abetting of heinous crimes).

212. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 125 (2005).

perpetrator.<sup>213</sup> This includes supplying the means for the commission of the crime.<sup>214</sup>

The ICC, through *ad hoc* tribunal rulings, clarified the liability that exists for assisting the perpetrator of a crime.<sup>215</sup> The ICC declared the assistance does not have to be provided at the time or place the main crime was perpetrated.<sup>216</sup> Further, the ICC opined that the assistance need only facilitate the crime or have a significant effect on the crime.<sup>217</sup> The Statute of Rome does not require assistance to be causally connected to the heinous act.<sup>218</sup> The assisting party will be responsible for all the natural results of the criminal act in question.<sup>219</sup> Assistance ranges from practical assistance to moral support.<sup>220</sup> In some instances, the ICC has articulated that mere presence at the scene of the crime sufficed for aiding and abetting.<sup>221</sup>

Third, the ICC is a subsidiary of national courts because the Statute of Rome applied the concept of complementarity to ICC jurisdiction.<sup>222</sup> The Statute of Rome provided the ICC jurisdiction over grave crimes of global concern.<sup>223</sup> Hence, the global community wields the power to prosecute and punish these acts, regardless of who was involved.<sup>224</sup> However, the Statute of Rome provided that the ICC may only act as a complement to national legal systems.<sup>225</sup>

Nonetheless, the Statute of Rome did express several instances when states would concede jurisdiction to the ICC.<sup>226</sup> For instance, if a state is investigating or prosecuting a case, the ICC cannot remove jurisdiction unless the state is truly unwilling or incapable of carrying out its prosecutorial duties.<sup>227</sup> Moreover, the Statute of Rome provides that the ICC cannot assert jurisdiction if a state has conducted an investigation and has chosen not to prosecute.<sup>228</sup> Nonetheless, the

213. *Statute of Rome*, *supra* note 201, at art. 25.

214. *Id.*

215. WERLE, *supra* note 212, at 126.

216. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 285 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); WERLE, *supra* note 212, at 126.

217. WERLE, *supra* note 212, at 126.

218. *Id.*

219. KRINGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 243 (2001).

220. Prosecutor v. Krnojelac, No. IT-97-25-T, Judgment, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2000); WERLE, *supra* note 212, at 126.

221. WERLE, *supra* note 212, at 126.

222. *Id.* at 69.

223. *Statute of Rome*, *supra* note 201, at art. 1.

224. WERLE, *supra* note 212, at 58.

225. *Statute of Rome*, *supra* note 201, at art. 1.

226. See *id.* at art. 17 (listing the way the jurisdiction of the ICC can override that of the national courts); see also Int'l Crim. Ct. [ICC] R.P. & Evid. 145-47, ICC Doc. ICC-ASP/1/3, R. 145-47 (articulating the procedural guidelines for the ICC) [hereinafter *ICC Rules of Procedure & Evidence*].

227. *Statute of Rome*, *supra* note 201, at art. 17.

228. *Id.*

ICC can assume the case if the state decides not to prosecute because the state is unwilling or unable to prosecute.<sup>229</sup>

### III. ARGUMENT

Armed combatants are killing people around the world at an alarming rate.<sup>230</sup> As a result, small arms and light weapons have irreversibly altered the landscape of contemporary conflict and daily life.<sup>231</sup> Despite the detrimental effect of small arms and light weapons, to date the global community has failed to create an effective international system to regulate the mechanisms of the arms trade.<sup>232</sup> Consequently, small arms and light weapons continue to saturate the world through the white, grey, and black markets.<sup>233</sup> While arms producers conduct white market transfers in accordance with legal norms, many exporters also transfer small arms to non-state groups through grey and black market transfers.<sup>234</sup> With small arms and light weapons, non-state groups, such as *Hamas* and *Hezbollah*, have perpetuated armed violence and conflict.<sup>235</sup>

To reduce the amount of armed violence caused by non-state groups, the global community should prohibit many transfers of small arms and light weapons to non-state groups.<sup>236</sup> While the United Nations' ("U.N.") forthcoming arms trade treaty will be designed to re-

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229. *Id.*

230. *See Demand a Bullet-Proof Arms Trade Treaty!*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/appeals-for-action/demand-bullet-proof-arms-trade-treaty> (last visited Feb. 27, 2011) (noting that armed violence kills one person every minute).

231. RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE 1* (2007).

232. Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 217-18. "The only general observation that can be made is that commercial arms exports are licensed by the government of the exporting state." *Id.*

233. Rachel Stohl, *Reality Check: The Danger of Small Arms Proliferation*, 6 GEO. J. INT'L AFF. 71, 72 (2005) [hereinafter *Reality Check*].

234. STOHL, *supra* note, 231, at 13.

235. *See* Michael Renner, *Small Arms, Big Impact: The Next Challenge of Disarmament*, 137 WORLDWATCH PAPER 1, 14 (1997) (discussing how the dispersal of arms to non-state actors has aided the cycle of violence and driven the demand for weapons upward); STOHL, *supra* note, 231, at 7.

Non-state groups also use AK-47s and other guns in their logos. *The Palestinian Liberation Front*, which operates in Israel, Lebanon and Egypt, has AK-47s in its emblems and the *Salafist Group for Call and Combat*, which operates in Algeria, Chad, Mali, Mauritania and Niger, has a sword and an AK-47 in its symbol. *Hezbollah's* symbol includes a fist clutching an Ak-47, with the AK forming the 'V' of 'Allah.'

*Id.*

236. *See* United Nations Secretary-General, *Towards an Arms trade treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 20, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses I*] (explaining Nigeria's desire to "prevent accessibility of weapons to non-State actors and other unauthorized end-users.").

duce armed conflict, it will not likely include an absolute prohibition against arms transfers to non-state groups because states have economic interests and geopolitical and foreign policy interests in their ability to transfer arms to non-state groups.<sup>237</sup> Even without an absolute prohibition, the global community could reduce small arms and light weapons transfers to non-state if the treaty that is ultimately accepted realizes three measures.<sup>238</sup> First, the treaty must require transfer documents to include a standard amount of information.<sup>239</sup> Second, the treaty must require transfer documents to include anti-counterfeit technologies.<sup>240</sup> Third, the treaty must advocate for states to utilize the International Criminal Court ("ICC") for purposes of prosecuting illicit arms brokers.<sup>241</sup>

A. A PROPOSED ARMS TRADE TREATY WILL NOT INCLUDE AN ABSOLUTE PROHIBITION UPON TRANSFERS TO NON-STATE GROUPS

The proposed arms trade treaty will not likely contain an absolute prohibition upon small arms and light weapons transfers to non-state groups because of economic policy interests as well as geopolitical interests and foreign policy interest of a majority of states.<sup>242</sup> In December 2006, the United Nations ("U.N.") General Assembly recognized the absence of common international standards controlling the import, export, and transfer of arms.<sup>243</sup> The U.N. noted that currently, small arms and light weapons continuously reach the wrong hands.<sup>244</sup> Shipments of weaponry continue to perpetuate conflict by flooding into regions with abysmal human rights records.<sup>245</sup> Further, the U.N. recognized the lack of a uniform international standard pertaining to the transfer of small arms and light weapons aided crime and terrorism, facilitated conflict, and displaced people; consequently, small arms and light weapons have undermined peace, safety, and sustainable development.<sup>246</sup> U.N. Secretary-General Ban Ki-moon noted the chronic problems associated with lack of a universal stan-

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237. See *infra* notes 243-81 and accompanying text.

238. See *infra* notes 287-390 and accompanying text.

239. See *infra* notes 287-305 and accompanying text.

240. See *infra* notes 307-21 and accompanying text.

241. See *infra* notes 323-90 and accompanying text.

242. See *infra* notes 243-81 and accompanying text.

243. G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 6, 2006).

244. *Towards an Arms Trade Treaty*, UNITED NATIONS OFF. OF DISARMAMENT AFF, <http://www.un.org/disarmament/convarms/ArmsTradeTreaty/html/ATT.shtml> (last visited Nov. 3, 2010) [hereinafter *Towards an Arms Trade Treaty*].

245. *Id.*

246. G.A. Res. 63/334, U.N. Doc. A/RES/63/334, 4 (Aug. 26, 2008).

dard to regulate the small arms trade.<sup>247</sup> Additionally, the Secretary-General articulated that regional examples of arms trade regulation have proven functional in preventing the transfer of weaponry to conflict areas.<sup>248</sup>

To provide international standards on the transfer of small arms and light weapons, the General Assembly requested the meeting of a working group of governmental experts to gather the views of Member States and to explore the viability, scope, and draft framework for the proposed arms trade treaty.<sup>249</sup> The experts' conclusions were separated into four categories: an examination of how the arms trade operated, the feasibility of a treaty, the scope of a treaty, and possible draft parameters.<sup>250</sup> First, the experts explored the current trends of the small arms and light weapons trade.<sup>251</sup> The experts acknowledged that illegal brokers had violated U.N. arms embargoes.<sup>252</sup> Second, the experts discussed the feasibility of an arms trade treaty.<sup>253</sup> The experts warned that a variety of political and economic factors would affect whether such a treaty would be feasible.<sup>254</sup> Third, the experts discussed the scope of a proposed arms trade treaty.<sup>255</sup> The experts considered the treaty should include provisions pertaining to explosives, components for arms, defense services, technology required to manufacture weapons, and ammunition.<sup>256</sup> Fourth, the experts discussed possible draft parameters of the proposed arms trade treaty.<sup>257</sup> In discussing the parameters of the proposed treaty, experts noted that the treaty must address terrorism, organized crime, illicit brokering, and transfers to non-state groups.<sup>258</sup>

### 1. *Economic Interests of Exporting States*

The proposed arms trade treaty would not likely include an absolute prohibition upon small arms and light weapons transfers because powerful and influential states have economic interests in the ability to transfer weaponry to non-state groups.<sup>259</sup> Nigeria, Cuba, Burundi,

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247. *Towards and Arms Trade Treaty*, *supra* note 244.

248. *Id.*

249. G.A. Res. 63/334, at 4, U.N. Doc. A/RES/63/334 (Aug. 26, 2008).

250. *See id.* at 13-16 (exploring the various factors propelling the arms trade forward).

251. *Id.* at 13

252. *Id.*

253. *Id.* at 14.

254. *Id.*

255. *Id.* The experts expounded upon the varying views about the scope of the proposed Arms trade treaty. *Id.*

256. *Id.*

257. *Id.* at 15.

258. *Id.*

259. *See infra* notes 260-73 and accompanying text.

India, Indonesia, Mali, and Turkey have proposed prohibiting small arms and light weapons transfers to non-state groups.<sup>260</sup> India and Turkey noted that the issue of transfers to non-state groups should be central to a proposed arms trade treaty.<sup>261</sup> Taking a more extreme approach, Cuba and Nigeria have proposed absolute restrictions upon the transfer of small arms and light weapons to all non-state groups.<sup>262</sup>

Regardless, the arms trade treaty will not prohibit arms transfers to non-state groups because many powerful states have monetary interests in the ability to sell small arms and light weapons to such groups.<sup>263</sup> For instance, two of the largest exporters of small arms and light weapons are the United States and China.<sup>264</sup> The United States generates billions of dollars annually by selling weaponry, including small arms and light weapons.<sup>265</sup> Additionally, China has reported a 1,815% increase in small arms and light weapons exports between 2000 and 2006.<sup>266</sup> China also leads the world in undocumented transfers, many of which are to Asia and Africa.<sup>267</sup> In addition, the United States and China, along with six of the largest small arms and light weapons producers, have a great deal of political power because they occupy either a permanent or rotating seat upon the

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260. See United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 20 U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses I*] (discussing the restrictions Nigeria proposed upon non-state groups); United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 55, 99, 100, 128, 221 U.N. Doc. A/62/278 (Part II) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (delineating the views of Cuba, India, Indonesia, Mali, and Turkey proposing a restriction upon arms transfer to non-state groups).

261. See *U.N. Responses II*, *supra* note 260, at 99 (discussing India's stance that the lack of a binding instrument has led to easy access to arms for non-state groups); *U.N. Responses II*, *supra* note 260, at 221 (discussing Turkey's view that the Arms trade treaty must be aimed at preventing the non-state groups from gaining small arms and light weapons).

262. See *U.N. Responses II*, *supra* note 260, at 55 (explaining that Cuba does not believe the arms trade treaty will be effective unless it contains an absolute prohibition upon non-state groups); *U.N. Responses II*, *supra* note 260, at 20 (noting that Nigeria desired to restrict arms transfer only to states).

263. See *infra* notes 264-73 and accompanying text.

264. See GRADUATE INST. OF INT'L & DEV. STUD., SMALL ARMS SURVEY 2009 61 (2009) [hereinafter SMALL ARMS SURVEY 2009] (providing an empirical representation of the largest exporters of small arms and light weapons).

265. Elizabeth Powers, *Greed, Guns, and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383 (2008) (noting the United States' mounting assistance to the developing world).

266. See SMALL ARMS SURVEY 2009, *supra* note 264, at 24 (showing that China has seen a marked increase in the amount of military small arms and light weapons they have sold during the 2000-2006 period).

267. *Id.* at 31. "Other countries that appear to have significant levels of undocumented transfers are Israel, Singapore, and Taiwan." *Id.*

United Nations (“U.N.”) Security Council, the group instilled with power to drive U.N. security policy.<sup>268</sup>

In addition to legitimate state-to-state transfers between governments, states also sell small arms and light weapons to non-state groups.<sup>269</sup> For example, Lebanese non-state groups during the 1980s spent approximately \$1 billion annually on small arms and light weapons.<sup>270</sup> During the same period, Bosnian non-state groups were believed to have spent similar amounts on weaponry.<sup>271</sup> Additionally, Columbian drug cartels, paramilitary organizations in Central and South America, and Middle Eastern Kurds are also major non-state purchasers of small arms and light weapons.<sup>272</sup> Thus, politically powerful exporting states would not approve a proposed arms trade treaty that prohibits transfers to non-state groups because the prohibition would result in such states losing billions of dollars in revenue normally generated by non-state group transfers.<sup>273</sup>

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268. See *Industrial Production*, SMALL ARMS SURVEY, <http://www.smallarmssurvey.org/weapons-and-markets/producers/industrial-production.html> (last visited Nov. 3, 2010) (listing the fifteen largest producers or small arms and light weapons, including Austria, Brazil, China, India, the Russian Federation, Turkey, the United Kingdom, and the United States); *Membership of the United Nations Security Council*, UNITED NATIONS SECURITY-COUNCIL, <http://www.un.org/sc/members.asp> (last visited Nov. 5, 2010) (listing the permanent and rotating members of the U.N. Security Council, the group of states that drive the security policy of the U.N.; specifically, Austria, Brazil, China, the Russian Federation, the United Kingdom, and the United States occupy or occupied seats upon the Security Council).

269. *Non-state Actors and the ATT: Challenges and Opportunities*, UNITED NATIONS INST. FOR DISARMAMENT RES., [http://www.unidir.org/bdd/fiche-activite.php?ref\\_activite=487](http://www.unidir.org/bdd/fiche-activite.php?ref_activite=487) (last visited Apr. 15, 2011).

270. Michael T. Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in *LETHAL COMMERCE* 31, 39 (Jeffery Boutwell et al. eds., 1995).

271. *Id.*

272. *Id.*

273. Compare SMALL ARMS SURVEY 2009, *supra* note 264, at 29 (estimating that small arms and light weapons exports of fifty-three nations generated approximately \$ 1.5 billion in revenue, including only reported transfers), Klare, *supra* note 270, at 39 (discussing how non-state groups spend billions of dollars on small arms and light weapons annually), Dena Montague, *The Business of War and the Prospects of Peace in Sierra Leone*, *BROWN J. WORLD AFF.*, Spring 2002, at 229, 229 (noting that Sierra Leone utilizes the majority of its \$70 million annual revenue earned from diamond sales to purchase small arms and light weapons), Powers, *supra* note 264, at 383 (commenting that commercial sales of small arms and light weapons net billions of dollars for arms manufactures), RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* xxviii (2007) (arguing that the United States engaged in the trade of small arms with no-state groups), Christian Lowe, *NATO Risks Georgia Rebels' Secession: Russia*, <http://www.reuters.com/article/2008/03/11/us-russia-georgia-idUSL1166246120080311> (last visited Apr. 7, 2011) (announcing that Russia had begun trade of small arms with the Georgian rebel group Abkhazia), *China's Arms Sales to Sudan*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080311-cah-arms-sales-fact-sheet.pdf> (last visited Apr. 7 2011) (noting the Chinese governments indirect supplying of arms to non-state groups in Sudan), *No Evidence That India Aiding Pak Baloch Rebels*, INDIANEXPRESS.COM, <http://www.indianexpress.com/news/no-evidence-that-in->

## 2. Geopolitical and Foreign Policy Interests of Exporting States

In addition to the monetary interests of exporting states, the proposed arms trade treaty would not likely include a prohibition upon transfers to non-state groups because many states use arms transfers to advance geopolitical and foreign policy objectives.<sup>274</sup> States provide arms to non-state groups to support foreign policy objectives.<sup>275</sup> States believe arms transfers enable them to gain and maintain influence in the developing world.<sup>276</sup> State transfers to non-state groups allow states to intervene in conflict, to support a rebel group, create an impasse, increase a conflict, or destabilize another state.<sup>277</sup> Non-state transfers and proxy wars enable reluctant states to intervene in conflict without placing the intervening state's armed forces in danger.<sup>278</sup>

For instance, former United States Secretary-of-State Colin Powell announced, following the September 11th terrorist attacks, that the United States would be providing small arms and light weapons to anti-Taliban and anti-Saddam Hussein insurgent groups in Afghanistan and Iraq.<sup>279</sup> Similarly, Pakistan has transferred weaponry to Kashmiri rebels, Uganda has aided paramilitaries in Rwanda, and Iran has supplied small arms and light weapons to the Kurdish people of Turkey.<sup>280</sup> Thus, the proposed arms trade treaty would not likely prohibit small arms and light weapons transfers to non-state groups because states would not want to lose the ability to use transfers as

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dia-aiding-pak-baloch-rebels/466814/ (last visited Apr. 7, 2011) (explaining the accusations that India was trading small arms and light weapons with non-state groups in Pakistan), *Stevens Inquiry: At a Glance*, BBC NEWS, [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/2956337.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/2956337.stm) (last visited Apr. 7, 2011) (noting how the government of the United Kingdom traded arms with loyalist non-state groups in Ireland), and *Membership of the United Nations Security Council*, UNITED NATIONS SECURITY-COUNCIL, <http://www.un.org/sc/members.asp> (last visited Nov. 5, 2010) (listing the members of the U.N. Security Council, the group of states that drive the U.N. security policy), with *U.N. Responses II*, *supra* note 260, at 55 (providing Cuba's proposal as an example of an absolute prohibition upon transfers to non-state groups that would eliminate the ability of exporters to make transfer to non-state groups and eliminating the ability to collect billions in revenue).

274. See *infra* notes 277-81 and accompanying text.

275. RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 48 (2007).

276. Michael T. Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in *LETHAL COMMERCE* 31, 31 (Jeffery Boutwell et al. eds., 1995).

277. STOHL, *supra* note 275, at 18.

278. See MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 99 (2007) (discussing that after the Vietnam War the United States was leery of directly getting involved in the Soviet-Afghan War; however, the United States supplied the Afghan resistance with arms in lieu of direct military support).

279. See STOHL, *supra* note 275, at 48 (noting the United States policy of providing proxies in Iraq and Afghanistan with small arms and light weapon to fight Saddam Hussein and the Taliban).

280. Klare, *supra* note 276, at 34.

valuable foreign policy tools, which facilitate the propulsion of geopolitical agendas and foreign policy objectives.<sup>281</sup>

B. WHILE THE PROPOSED ARMS TRADE TREATY WOULD NOT LIKELY ALTOGETHER PROHIBIT TRANSFERS TO NON-STATE GROUPS, THREE MEASURES WOULD REDUCE THE NUMBER OF SMALL ARMS AND LIGHT WEAPONS TRANSFERS TO NON-STATE GROUPS

Including three measures in the proposed arms trade treaty would reduce the amount of transfers to non-state groups.<sup>282</sup> First, a measure should require that all transfer documents contain a baseline amount of information to enable officials to make informed transfer decisions.<sup>283</sup> Second, a measure should command transfer documents to utilize anti-counterfeit technology to discourage forgery.<sup>284</sup> Third, a measure should provide that the global community utilize the International Criminal Court (“ICC”) to punish black market arms brokers.<sup>285</sup>

1. *Requiring All Transfer Documents to Contain a Baseline Amount of Information Would Enable Officials to Make Prudent Transfer Decisions*

The number of non-state groups receiving small arms and light weapons transfers could be reduced if the proposed arms trade treaty included a provision requiring transfer documents contain a uniform base level of information because it would allow officials to make informed transfer decisions.<sup>286</sup> Currently, the global community relies upon national legislation to regulate and license exports of small arms

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281. Compare CHRISTOPHER CARR, *KALASHNIKOV CULTURE: SMALL ARMS PROLIFERATION AND IRREGULAR WARFARE* 23 (2008) (explaining that the United States armed insurgent groups in Central America), LARRY KAHANER, *AK-47: THE WEAPON THAT CHANGED THE FACE OF WAR* 29-30 (2007) (stating that Soviet bloc countries armed Communist rebel groups in Africa and Asia during the Cold War), GILES KEPPEL, *JIHAD: THE TRAIL OF POLITICAL ISLAM* 136-44 (Anthony F. Roberts trans., 2002) (discussing the United States efforts to fend off the Soviet Union in Afghanistan by providing weapons to the *Mujahedeen*, a non-state group), and Klare, *supra* note 276, at 34 (discussing the covert arming of insurgent groups in Serbia, Bosnia, Croatia, Nicaragua, Pakistan, and Turkey in order to fight proxy wars), with United Nations Secretary-General, *Towards an Arms trade treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 5-234, U.N. Doc. A/62/278 (Part II) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (providing, for example, Cuba’s proposal that an absolute prohibition upon transfers to non-state groups should be included in the proposed Arms trade treaty; thus, exporters would lose the ability to transfer arms to non-state groups).

282. See *infra* notes 287-390 and accompanying text.

283. See *infra* notes 287-305 and accompanying text.

284. See *infra* notes 307-21 and accompanying text.

285. See *infra* notes 323-90 and accompanying text.

286. See *infra* notes 287-305 and accompanying text.

and light weapons.<sup>287</sup> During the licensing process each state requires a wide variety of documents.<sup>288</sup> Some states have comprehensive laws regulating the export of small arms and light weapons while other states have practically none.<sup>289</sup> As a consequence, the current condition of global export licensing is disjointed because of the reliance upon varied national legislation.<sup>290</sup> In turn, groups accomplish transfers of questionable legality by accessing small arms and light weapons legally then redirecting the legal weapons through the insufficient national export systems to an illicit non-state group.<sup>291</sup> In doing so, arms brokers make small arms and light weapons available to illicit groups.<sup>292</sup>

One problem associated with the current arms regulation system is that transfer documents do not universally include a minimum amount of information about the parties to the transfer.<sup>293</sup> For instance, an end-user certificate, a document produced by the importing state, normally contains only an insignificant amount of information—a description of the small arms and light weapons, the importing state, and the ultimate end-user.<sup>294</sup> However, many states produce transfer documents containing even less information necessary for exporter officials to make a prudent export decision.<sup>295</sup> For example, Equatorial Guinea's end-user certificates do not contain basic information about the ultimate end-user, such as an address or a contact number.<sup>296</sup> As a consequence of the absent information, export officials sometime negligently authorize transfers to illicit

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287. Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 217-18.

288. See GRADUATE INST. OF INT'L & DEV. STUD., SMALL ARMS SURVEY 2009 70-75 (2009) [hereinafter SMALL ARMS SURVEY 2009] (presenting a graph displaying the variety of documentation requirements needed to carry out a small arms transfer in several different states).

289. RACHEL J. STOHL ET AL., THE SMALL ARMS TRADE: A BEGINNER'S GUIDE 43-44 (2007).

290. Marsh, *supra* note 287, at 217-18.

291. MIKE BOURNE, ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS 112 (2007).

292. See Kathi Austin, *Illicit Arms Broker: Aiding and Abetting Atrocities*, BROWN J. WORLD AFF., Spring 2002, at 203, 207 (noting the role of arms brokers in supplying small arms and light weapons to non-state groups); Jayantha Dhanapala, *Multilateral Cooperation on Small Arms and Light Weapons: From Crisis to Collective Response*, BROWN J. WORLD AFF. Spring 2002 at 163 (discussing how the disjointed nature of the current small arms and light weapons regulatory scheme has failed).

293. Dhanapala, *supra* note 292, at 166.

294. Mark Bromley & Hugh Griffiths, *End-User Certificates: Improving Standards To Prevent Diversion*, STOCKHOLM INT'L PEACE & RES. INST. INSIGHTS ON PEACE & SECURITY, Mar. 2010, at 2 (2010).

295. *Id.* at 7.

296. *Id.*

groups.<sup>297</sup> Non-state groups exploit the discord produced by unsynchronized documents and procedures to procure arms.<sup>298</sup>

The Governments of Sweden and Serbia have proffered that a universal minimum amount of information be mandated for all transfer documents accompanying small arms and light weapons transfers.<sup>299</sup> Sweden implemented a system that required transfer documents contain a minimum amount of information.<sup>300</sup> Similarly, Serbia proposed the creation of documents that contain standard information.<sup>301</sup> Both provisions were aimed at eliminating the confusion surrounding transfer documents currently used in global authorization systems.<sup>302</sup>

The amount of non-state groups receiving small arms and light weapons would be reduced if the proposed arms trade treaty included a measure requiring all transfer documents to contain a minimum level of information because it would alleviate the confusion associated with unsynchronized laws and help export representatives make

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297. STOHL, *supra* note 289, at 13.

298. Compare Bromley, *supra* note 294, at 4 (depicting that prominent best practices manuals for the transfer of arms, promulgated by the European Union, Wassenaar Arrangement, and the Organization for Security and Co-operation in Europe, all require documents to have differing amounts of information), and Bromley, *supra* note 294, at 7 (arguing that despite the standards articulated by best practice manuals, nations continue to produce transfer documents with differing amounts of information), with STOHL, *supra* note 289, at 13 (arguing that government officials not properly inspecting the varying transfer documents is once cause of small arms and light weapons leeching into illicit hands).

299. See United Nations Secretary-General, *Towards an Arms trade treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 188, U.N. Doc. A/62/278 (Part II) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (discussing the proposal by the government of Serbia that would require that all transfer documents include standard amount of information); STOHL, *supra* note 303, at 54 (discussing the proposal by the government of Sweden to create standard forms worldwide); *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010) (discussing the export control regime that Sweden has pursued that includes the requirement that all transfer documents have a standard form).

300. STOHL, *supra* note 289, at 54.

301. *U.N. Responses II*, *supra* note 299, at 188. The documents that Serbia proposed to make uniform were “all kinds of important documents required for the import, export or transfer of conventional arms, such as end-user certificates, international import certificates, delivery verification certificates and other relevant certificates.” *Id.*

302. Compare *U.N. Response II*, *supra* note 299 at 188 (stating that the Serbians wish to implement a program aimed at requiring all transfer documents to contain standard information), and STOHL, *supra* note 289, at 54 (explaining that Sweden has mandated that transfer documents are all standard forms), with BOURNE, *supra* note 291, at 129 (explaining that the diffusion of illicit transfers is in direct correlation to export officials’ “poor capacity to control the flow of goods.”), and Bromley, *supra* note 294, at 7 (arguing that despite the abundance of standards available states continue to produce documents with varying amounts of information; hence, the documents produce confusion and abuse).

sensible transfer decisions.<sup>303</sup> The requirement of a baseline amount of information would bolster the authority of the governmental agency responsible for supervising small arms and light weapons transfers by alleviating the confusion surrounding export licensing.<sup>304</sup> Moreover, a baseline amount of information in all transfer documents would prevent many non-state groups from gaining access to weaponry because it would allow officials to make sensible export decisions and remove the inherent problems associated with the disjointed national legislation.<sup>305</sup>

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303. Compare STOHL, *supra* note 289, at 13 (arguing that non-state groups gain access to weaponry as a result of negligent government agents that “fail to adequately check the documentation associated with the transfers”), Bromley, *supra* note 294, at 7-12 (explaining that the difficulties in arms regulation stem directly from the lack of minimum information; thus, non-state groups can abuse the system and obtain weapons), Dhanapala, *supra* note 292, at 163 (explaining that lack of an international standard for transfer documents fuels the transfer of weapons to illicit groups), and Marsh, *supra* note 287, at 217-18 (articulating that illegal transfers occur as a result of a reliance upon disjointed national export practices), with *U.N. Responses II*, *supra* note 299, at 188 (proposing that all forms that accompany small arms and light weapons transfers contain a minimum amount of information to enable equal administration of export controls), STOHL, *supra* note 289, at 54 (outlining Sweden’s national efforts to create forms that contain a universal amount of information), and *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010) (articulating the steps Sweden has taken to make the information contained in transfer documents universal).

304. Compare *U.N. Responses II*, *supra* note 299, at 188 (explaining Serbia’s system is aimed at making prudent determinations as to exports by amplifying export officials’ accountability), STOHL, *supra* note 289, at 13 (articulating that Sweden has aimed at streamlining the export decision system by advocating for uniform information within transfer documents), and Bromley, *supra* note 294, at 6 (discussing that Sweden has attempted to create an export system that would ease the strain upon export officials), with STOHL, *supra* note 289, at 13 (discussing how officials make negligent decisions that enable non-state groups to gain arms), and Bromley, *supra* note 294, at 7 (explaining documents with varying amounts of information can be manipulated to procure black market arms).

305. Compare STOHL, *supra* note 289, at 43-44 (discussing how non-state groups attain small arms and light weapons by exploiting the confusion associated with the uneven nature of national export licensing systems), Bromley, *supra* note 294, at 7-12 (explaining that the difficulties in arms regulation stem directly from the lack of sufficient information from which to make a decision), Dhanapala, *supra* note 292, at 163 (discussing how the lack of sufficient levels of information on transfer documents enables illicit transfers of small arms and light weapons), and Marsh, *supra* note 303, at 217-18 (explaining that disjointed national export requirements, including the fact that transfer documents do not contain basic information, produce illegal transfers), with *U.N. Responses II*, *supra* note 299, at 188 (proposing that all forms that accompany small arms and light weapons transfers contain universal information), STOHL, *supra* note 305, at 54 (discussing Sweden’s proposal to make transfer documents contain universal information to bolster export official capacity), and *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010) (outlining Sweden’s efforts to diffuse illicit transfer by the use of standard forms).

2. *Requiring All Transfer Documents Contain Anti-Counterfeit Technology Would Eliminate Forgery as a Viable Method for Non-State Groups to Attain Arms*

The proposed arms trade treaty could reduce the number of non-state groups receiving small arms and light weapons by including a measure mandating that transfer documents contain anti-counterfeit technology because it would eliminate non-state groups' ability to utilize forged transfer documents.<sup>306</sup> False documents allow non-state groups to purchase weapons under the appearance of legality.<sup>307</sup> Professor Tom Naylor, professor of economics at McGill University and an authority on small arms and light weapons transfers, has stated that acquiring passable documentation is just as easy as getting a gun-dealer's license in the United States.<sup>308</sup> This is an honor, Naylor contended, denied only to violent criminals.<sup>309</sup> Moreover, Naylor asserted that passable documentation is widely available from numerous sources globally.<sup>310</sup>

As a consequence of the global arms trade, a global illicit trade in transfer documentation has emerged.<sup>311</sup> Non-state groups obtain forged documents from weak points in the global legal market.<sup>312</sup> A passable falsified end-user certificate sells for between \$30,000 and \$100,000.<sup>313</sup> Non-state groups utilize corrupt export officials as a source for falsified documentation.<sup>314</sup> Non-state groups are able to utilize false documents because many states are not stringent in the inspection and verification of documents.<sup>315</sup> A United States Senate subcommittee once noted that some states' procedures surrounding

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306. See *infra* notes 307-21 and accompanying text.

307. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 131 (2007).

308. *Id.* "[O]btaining a passable end-user certificate is about as difficult as getting an American gun-dealer's license, an honor seemingly denied only to convicted serial killers (who can get around that obstacle by applying in the name of their pet dog)." *Id.*

309. *Id.*

310. See *id.* at 131-32 (pointing out that both false and authentic transfer documents are attainable from a myriad of sources would wide). For example, transfers from Eastern Europe to embargoed groups in Angola were accomplished with the use of Togolese end-user certificates. *Id.* Further, transfers to Liberia were accomplished using end-user certificates from the Ivory Coast. *Id.* Finally, Thailand, Pakistan, Nigeria, Bolivia, Panama, and Portugal are the source of many false and authentic end-user certificates used to facilitate the black market trade. *Id.*

311. CHRISTOPHER CARR, *KALASHNIKOV CULTURE: SMALL ARMS PROLIFERATION AND IRREGULAR WARFARE* 35 (2008).

312. BOURNE, *supra* note 307, at 132.

313. CARR, *supra* note 311, at 35.

314. *Id.*

315. *Id.*

the inspection and issuance of transfer documentation was nothing more than a charade.<sup>316</sup>

Along with the proposal that all transfer documents include a baseline amount of information, Sweden has implemented and Serbia has proposed implementing provisions that all transfer documents contain anti-counterfeit technology.<sup>317</sup> Serbia advised that all documentation be printed on holographic paper.<sup>318</sup> Similarly, Sweden recommended and has implemented the printing of documents on banknote quality paper.<sup>319</sup> Both provisions were intended to combat the rampant use of forged documents.<sup>320</sup> The proposed arms trade treaty could reduce the number of non-state groups receiving arms by requiring all transfer documents to include anti-counterfeit technologies because non-state groups would no longer be able to utilize forged transfer documents to gain weaponry.<sup>321</sup>

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316. See *id.* (noting specifically, the subcommittee's assertion that Belgian practices were, "so loosely controlled that they are not worth the paper they are printed on.").

317. United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 188, U.N. Doc. A/62/278 (Part II) (Aug. 17, 2007) [hereinafter *U.N. Responses II*]; see *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010) (discussing Sweden's printing of end-user certificates on bank note quality paper).

318. *U.N. Responses II*, *supra* note 317, at 188.

319. *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010).

320. Compare BOURNE, *supra* note 307, at 131-32 (noting non-state groups rely upon forged transfer documents), and Matt Schroeder & Guy Lamb, *Illicit Arms Trade in Africa: a Global Enterprise*, AFR. ANALYST, Third Quarter 2006, at 69, 72 (detailing how Leonid Minin, a black market arms dealer known to supply illicit groups, was arrested in possession of copious amounts of forged end-user certificates that were used to facilitate illicit arms transfers), with *U.N. Responses II*, *supra* note 307, at 188 (noting the provisions proposed by the Serbian Government advocating for anti-counterfeit technology that would fight forgery), RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 34 (2007) (explaining that Sweden has been a proponent of creating global standards for transfer documents), Mark Bromley & Hugh Griffiths, *End-User Certificates: Improving Standards To Prevent Diversion*, STOCKHOLM INT'L PEACE & RES. INST. INSIGHTS ON PEACE & SECURITY, Mar. 2010, at 7 (2010) (articulating the provisions that have been implemented by the Swedish government pertaining to transfer documents), and *Areas of Responsibility*, SWEDISH AGENCY FOR NON-PROLIFERATION & EXPORT CONTROLS, AUTHORIZATION PROCEDURE, <http://www.isp.se/sa/node.asp?node=538> (last updated Jan. 31, 2010) (noting the measures taken by Sweden to fight counterfeiting, including printing transfer documents on bank note paper).

321. Compare BOURNE, *supra* note 307, at 132-32 (articulating how non-state groups use falsified or forged documents in order to arm illicit groups), and CARR, *supra* note 311, at 35 (stating that a vibrant forged document market exists that helps perpetuate the transfer of small arms and light weapons to illegal groups), with *U.N. Responses II*, *supra* note 317, at 188 (proposing that all small arms and light weapons transfer documents be printed on a special holographic paper in order to combat the illicit market practice of using forged documents), and Bromley, *supra* note 320, at 6 (discussing Swe-

3. *Utilizing the International Criminal Court to Prosecute Black Market Arms Brokers Would Reduce the Amount of Non-state Groups Receiving Arms Because the Court Would Operate as an Enforcement and Punishment Mechanism*

The proposed arms trade treaty would reduce the number of non-state groups receiving arms transfers if the proposed arms trade treaty advocated that states utilize the International Criminal Court ("ICC") to prosecute black market arms brokers because the ICC provides an enforcement and punishment mechanism that would disincentivize the commission of black market arms brokering.<sup>322</sup> Currently, states rarely prosecute illicit brokering activity.<sup>323</sup> However, the ICC could use the Statute of Rome<sup>324</sup> and its principles of criminal culpability to effectively prosecute illicit brokering.<sup>325</sup> To illustrate, the ICC could utilize the Statute of Rome to prosecute the arms brokers who facilitated former Liberian President Charles Taylor and the Revolutionary United Front's crimes against humanity.<sup>326</sup> Thus, the United Nations ("U.N.") should require, through the proposed arms trade treaty, that states prosecute illicit brokers in the ICC.<sup>327</sup>

The global community could utilize the ICC to provide an enforcement and punishment mechanism for black market arms brokers.<sup>328</sup> The Statute of Rome permits the ICC to prosecute individuals who commit heinous acts.<sup>329</sup> The Statute of Rome provides that an individual who commits an offense within the jurisdiction of the ICC will be individually liable.<sup>330</sup> Furthermore, the Statute of Rome delineates that an individual is also criminally liable if that individual provides the means for a crime, facilitates the crime's commission, or aids, abets, or provides assistance for the commission of the crime.<sup>331</sup> Hence, if an individual assists the perpetrator of a human rights

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den's practice of printing documents associated with small arms and light weapons transfers on banknote quality paper to fight counterfeiting).

322. See *infra* notes 323-90 and accompanying text.

323. Kathi Austin, *Illicit Arms Broker: Aiding and Abetting Atrocities*, BROWN J. WORLD AFF., Spring 2002, at 205.

324. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15—July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf.183/9 (Jul. 1, 2002) [hereinafter *Statute of Rome*].

325. See *infra* notes 329-90 and accompanying text.

326. See *infra* notes 375-81 and accompanying text.

327. See *infra* notes 323-90 and accompanying text.

328. See *infra* notes 329-90 and accompanying text.

329. *Statute of Rome*, *supra* note 324, at art. 1.

330. *Id.* at art. 25(2).

331. *Id.* at art. 25(3)(a)-(c).

abuse, then the assisting party is also criminally liable.<sup>332</sup> The assisting party need only provide practical assistance or moral support to the perpetrating party.<sup>333</sup>

Additionally, the ICC does not require the assisting party to share the intent of the perpetrating party.<sup>334</sup> Mere comprehension of the perpetrator's intent is satisfactory.<sup>335</sup> For example, when a crime is in progress, the assisting party assumes criminal culpability when such party does not hinder the criminal act.<sup>336</sup>

If the accused is found guilty of a criminal act, the Statute of Rome provides the ICC with the authority to punish the guilty party.<sup>337</sup> The Statute of Rome furnishes the ICC with great latitude in sentencing.<sup>338</sup> Pursuant to the Statute of Rome, the ICC has the ability to craft a punishment in each particular case.<sup>339</sup> ICC Rules of Procedure and Evidence,<sup>340</sup> which include a list of permissible punishments, require the ICC to weigh the circumstances surrounding the punishable offense.<sup>341</sup> In doing so, the ICC must weigh the criminal culpability of the accused, the existence of mitigating and aggravating factors, and the act's damage.<sup>342</sup> The sentence must be aimed at both punishing the criminal and deterring others from taking similar actions.<sup>343</sup> Furthermore, the Statute of Rome permits the ICC to impose

332. GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 126 (2005).

333. *Id.*

334. *Id.* at 127.

335. *Id.*

336. KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 243 (2001).

337. *Id.* at 314-23 (describing the sentencing procedures of the ICC); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 312-23 (2007) (discussing the range of penalties that the ICC can implement during the punishment stage, including life in prison and forfeiture of property); *see also* Int'l Crim. Cr. [ICC] R.P. & Evid. 145-47, ICC Doc. ICC-ASP/1/3, R. 145-47 (articulating the sentencing guidelines for the ICC) [hereinafter ICC Rules of Procedure & Evidence].

338. SCHABAS, *supra* note 337, at 312-13.

339. *Id.*

340. Int'l Crim. Cr. [ICC] R.P. & Evid. 145-47, ICC Doc. ICC-ASP/1/3.

341. ICC Rules of Procedure & Evidence, *supra* note 324, at 145.

In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall: (a) bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person; (b) balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime; (c) in addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

*Id.*

342. *Id.*

343. SCHABAS, *supra* note 337, at 314.

a maximum sentence of life imprisonment.<sup>344</sup> Additionally, the ICC may require the guilty party to pay a fine and forfeit property.<sup>345</sup>

The ICC could use the Statute of Rome to punish black market arms brokers.<sup>346</sup> To illustrate, on May 29, 2007, the Special Court for Sierra Leone indicted former Liberian President Charles Taylor (“Taylor”).<sup>347</sup> The indictment accused Taylor of assisting by encouragement the Revolutionary United Front, a rebel group in Sierra Leone.<sup>348</sup> Particularly, Taylor was accused of assisting in heinous crimes against humanity, including terrorizing the civilian population, unlawful killings, sexual violence, physical violence, enabling the use of child soldiers, forced labor, and looting.<sup>349</sup> Taylor provided small arms and light weapons to the Revolutionary United Front in exchange for diamonds and other natural resources.<sup>350</sup> Remarkably, Liberia and the Revolutionary United Front were under U.N. arms embargoes at the time of the exchange.<sup>351</sup>

To procure the weapons for Taylor, Ukrainian arms dealer Leonid Minin first transferred the small arms and light weapons legally from Ukraine to Côte d’Ivoire.<sup>352</sup> Once inside Côte d’Ivoire, a transport company unloaded the arms from the first plane.<sup>353</sup> Subsequently, the transport company loaded the arms onto a second plane, which was flown to Taylor in Liberia.<sup>354</sup> Later, Taylor transferred the arms

344. ICC Rules of Procedure & Evidence, *supra* note 324, at 145; SCHABAS, *supra* note 337, at 312.

345. SCHABAS, *supra* note 337, at 318.

346. Compare KITTICHAISAREE, *supra* note 336, at 243 (explaining that an individual incurs criminal responsibility for the crimes against humanity of another if such individual helps perpetuate the crime), *Statute of Rome*, *supra* note 324, at art. 25(3)(a)-(c) (detailing the ICC’s principles of criminal culpability; specifically, an individual is criminally liable if one provides the means for a crime, facilitates the crime’s commission, or aids, abets, or provides assistance for the commission of the crime), and WERLE, *supra* note 332, at 126 (articulating the principles for criminal liability under the Statute of Rome if one provides the means for a crime’s commission), with *Prosecutor v. Charles Gahnkay Taylor*, Case No. SCSL-2003-01-T, Transcript, 76-77 (Special Court of Sierra Leone Jan. 27, 2010) (delineating the involvement of Leonid Minin in an arms transfer to Taylor; specifically, Minin’s role as the assisting party that provided the means to allow Taylor to fuel the rebels of Sierra Leone).

347. *Prosecutor v. Charles Gahnkay Taylor*, Case No. SCSL-2003-01-PT, Second Amended Indictment (Special Ct. for Sierra Leone May 29, 2007), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0baAMvYM%3d&tabid=107>; RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER’S GUIDE* 32 (2007).

348. *Taylor*, Case No. SCSL-2003-01-PT, at ¶ 9.

349. *Id.* at ¶¶ 5-32 (listing all the indictable offenses Taylor had levied against him).

350. Lisa Misol, *Weapons and War Crimes: The Complicity of Arms Suppliers*, HUM. RTS. WATCH WORLD REP. 279, Jan. 25, 2004, at 279, 280 (2004).

351. *Id.*

352. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 131 (2007); Matt Schroeder & Guy Lamb, *Illicit Arms Trade in Africa: a Global Enterprise*, AFR. ANALYST, Third Quarter 2006, at 69, 72.

353. Schroeder, *supra* note 352, at 72.

354. *Id.*

to the Revolutionary United Front, a rebel group in Sierra Leone.<sup>355</sup> The Revolutionary United Front then used the arms to commit crimes in Sierra Leone.<sup>356</sup>

In a second transfer, Victor Bout, an arms broker, arranged to have arms shipped to Taylor via Burkina Faso, where the Burkina Faso government helped hide the illegal transfer.<sup>357</sup> Victor Bout facilitated the transfer by falsifying the documents necessary to accomplish the illegal acts.<sup>358</sup> Victor Bout is well-known in the global community for his illegal trafficking of small arms and light weapons to groups under U.N. arms embargoes.<sup>359</sup> Victor Bout had armed groups engaged in conflict since the 1990s.<sup>360</sup> Besides Taylor, Victor Bout's clientele has included the Taliban, the Northern Alliance, and virtually all parties that have been involved in conflict in Africa.<sup>361</sup>

Brokers, like Leonid Minin and Victor Bout, play a significant part in illegal small arms and light weapons transfers because individuals prohibited from purchasing small arms and light weapons cannot access the legal weapons market.<sup>362</sup> Consequently, brokers form the link between non-state groups and the legal weapons market.<sup>363</sup> Brokers are middlemen in the small arms and light weapons trade.<sup>364</sup> In filling their role, brokers arrange every detail between the arms supplier and the illegal end-user.<sup>365</sup> Hence, brokers play an essential role in supplying weapons to non-state groups.<sup>366</sup>

Brokers avoid criminal repercussions by manipulating lax national legislation.<sup>367</sup> In manipulating the legal framework, brokers refrain from owning or coming into physical contact with the illegal small arms and light weapons.<sup>368</sup> Further, black market brokers do not fear prosecution because the few nations with legislation regulat-

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355. BOURNE, *supra* note 352, at 131.

356. See Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-15-PT, Indictment (Special Ct. for Sierra Leone August 2, 2006) (describing the crimes committed by the United Revolutionary Front in Sierra Leone, including crimes against humanity, that later led the ICC to prosecute the group).

357. See Misol, *supra* note 350, at 280 (detailing the ways in which Taylor was able to utilize his regional state to facilitate arms transfers in violation of an embargo).

358. *Id.*

359. Austin, *supra* note 332, at 203.

360. *Id.*

361. STOHL, *supra* note 347, at 16-17; Austin *supra* note 332, at 203.

362. BOURNE, *supra* note 352, at 115; Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 225.

363. BOURNE *supra* note 352, at 114.

364. Austin, *supra* note 332, at 204.

365. *Id.*

366. Marsh, *supra* note 362, at 225.

367. Austin, *supra* note 332, at 205.

368. *Id.* at 204.

ing brokering fail to provide a realistic mechanism for punishing illegal brokering activity.<sup>369</sup> For example, under Canadian law, an individual caught illicitly importing small arms faces a mere fine of \$500.<sup>370</sup> In contrast, an individual caught illicitly importing drugs into Canada potentially faces a sentence of life in prison.<sup>371</sup>

Today, Taylor faces prosecution for the crimes of the Revolutionary United Front that he facilitated.<sup>372</sup> However, the brokers who facilitated Taylor are free from criminal prosecution.<sup>373</sup> The brokers have, to this point, escaped criminal liability for their role in facilitating atrocities.<sup>374</sup>

The ICC could use the Statute of Rome's current provisions to punish black market arms brokers.<sup>375</sup> For example, the arms brokers that made transfers to Taylor would be criminally liable under the Statute of Rome.<sup>376</sup> Taylor's crimes involved his procurement of weapons for the Revolutionary United Front.<sup>377</sup> Subsequently, the Revolutionary United Front committed grave crimes against humanity.<sup>378</sup> Consequently, when the brokers provided arms to Taylor while Taylor was subject to an arms embargo, the brokers provided the means for the commission of Taylor's and the Revolutionary United

369. *Id.* at 205.

370. Wendy Cukier, *The Illicit Trade In Small Arms: Addressing The Problem Of Diversion*, PEACEBUILD, 9 (Apr. 2000), <http://www.guncontrol.ca/English/Home/Releases/illicit.pdf>.

371. Controlled Drugs and Substances Act, S.C 1996, c. 19(5)(3) (Can.).

372. Misol, *supra* note 350, at 280

373. *Id.* at 279.

374. *Id.*

375. Compare KITTICHAISAREE, *supra* note 336, at 243 (explaining that an individual incurs criminal responsibility for the crimes against humanity of another if such individual helps perpetuate the crime), *Statute of Rome*, *supra* note 324, at art. 25(3)(a)-(c) (detailing the ICC's principles of criminal culpability; specifically, an individual is criminally liable if one provides the means for a crime, facilitates the crime's commission, or aids, abets, or provides assistance for the commission of the crime), and WERLE, *supra* note 332, at 126 (articulating the principles for criminal liability under the Statute of Rome if one provides the means for a crime's commission), *with* Prosecutor v. Charles Gahnkay Taylor, Case No. SCSL-2003-01-T, Transcript, 76-77 (Special Court of Sierra Leone Jan. 27, 2010) (delineating the involvement of Leonid Minin in an arms transfer to Taylor; specifically, Minin's role as the assisting party that provided the means to allow Taylor to fuel the rebels of Sierra Leone).

376. Compare *Statute of Rome*, *supra* note 324, at art. 25 (3)(c) (noting that one is criminally liable if they provide the means for the commission of the others crime), *with* STOHL, *supra* note 347, at 16-17 (discussing how Victor Bout has illegally armed non-state groups all over the world, including the Taliban and warlords in Africa, providing the means for the commissions of their crimes).

377. Prosecutor v. Charles Gahnkay Taylor, Case No. SCSL-2003-01-PT, Second Amended Indictment (Special Ct. for Sierra Leone May 29, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107>.

378. Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-15-PT, Indictment (Special Ct. for Sierra Leone August 2, 2006).

Front's crimes.<sup>379</sup> The assistance perpetuated and facilitated the continuance of the crime through encouragement.<sup>380</sup> Hence, if the ICC found the brokers guilty of facilitating Taylor and the Revolutionary United Front, the brokers would be subject to severe punishment under the Statute of Rome's criminal culpability provisions.<sup>381</sup>

Accordingly, the proposed arms trade treaty could reduce the number of non-state groups receiving arms if a provision advocated that states utilize the ICC to prosecute black market arms brokers because the ICC would act as an enforcement and punishment mechanism that could disincentivize the illegal arms trade, thus severing the link between non-state groups and weaponry.<sup>382</sup> During the last

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379. Compare STOHL, *supra* note 347, at 32-33 (detailing Taylor's alliance with the Revolutionary United Front to destabilize the government of Sierra Leone, including, Taylor supplying small arms and light weapons to the group in exchange for diamonds and control of Sierra Leone's diamond mines while both groups were under an arms embargo), and Matthew Brunwasser, *Gallery of International Arms Dealers: Leonid Efimovich Minin*, FRONTLINE WORLD (May 2002), <http://www.pbs.org/frontlineworld/stories/sierraleone/minin.html> (providing the evidence discovered in the hotel room of Leonid Minin of an arms transfer to Taylor, specifically, the presence of false end-user certificates and a paper trail leading to Taylor), with *Statute of Rome*, *supra* note 324, at art. 25(3)(a)-(c) (noting that an individual incurs criminal liability for the war crimes of another if the assisting party aids or abets the commission of a crime), and KITTICHAISAREE, *supra* note 336, at 243 (explaining that an assisting party can incur liability by "sending a clear signal of official tolerance" for the crimes by enabling the perpetrating party).

380. Compare KITTICHAISAREE, *supra* note 336, at 243-44 (providing examples of how one is liable for aiding and abetting, including providing the means for the crime or by perpetuating the crime), with *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-PT, Indictment (Special Ct. for Sierra Leone August 2, 2006) (describing the crimes committed by the United Revolutionary Front in Sierra Leone, including crimes against humanity, that later led the ICC to prosecute the group), and STOHL, *supra* note 347, at 32-33 (detailing Taylor's facilitation of arms to the Revolutionary United Front to destabilize the government of Sierra Leone in exchange for diamonds and control of Sierra Leone's diamond mines).

381. Compare Matthew Brunwasser, *Gallery of International Arms Dealers: Leonid Efimovich Minin*, FRONTLINE WORLD (May 2002), <http://www.pbs.org/frontlineworld/stories/sierraleone/minin.html> (providing the evidence that Leonid Minin, an international arms broker, illegally supplied arms to Taylor), STOHL, *supra* note 347, at 32-33 (detailing Taylor's alliance with the Revolutionary United Front to destabilize the government of Sierra Leone; including, Taylor supplying small arms and light weapons to the group in exchange for diamonds and control of Sierra Leone's diamond mines while both groups were under an arms embargo), and *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-PT, Indictment (Special Ct. for Sierra Leone August 2, 2006) (describing the crimes committed by the United Revolutionary Front in Sierra Leone that later led to criminal liability in the ICC), with *Statute of Rome*, *supra* note 324, at art. 25(3)(a)-(c) (noting that an individual incurs criminal liability for the war crimes of another if the assisting party aids or abets the commission of a crime), KITTICHAISAREE, *supra* note 336, at 243 (explaining that an assisting party can incur liability by "sending a clear signal of official tolerance" for the crimes by enabling the perpetrating party), and SCHABAS, *supra* note 337, at 314 (outlining the severe sentencing guidelines for parties the ICC finds guilty of assisting others to commit a crime).

382. Compare BOURNE, *supra* note 352, at 114 (noting that brokers serve as a link between non-state groups who cannot legally procure arms and the legal arms trade;

decade, illicit actors have violated every U.N. arms embargo.<sup>383</sup> Black market arms brokers violate these embargoes by illegally providing small arms and light weapons to embargoed non-state groups.<sup>384</sup> Subsequently, the armed groups commit heinous human rights abuses.<sup>385</sup> Arms brokers are the links that connect non-state groups to vast amounts of small arms and light weapons.<sup>386</sup> Arms brokers fulfill this role because the current reliance upon disjointed national legal systems has allowed brokers to execute illegal transfers without substantial legal repercussions.<sup>387</sup> However, the global community could utilize the ICC to provide the missing punishment mechanism by using the principles of criminal culpability articulated in the Statute of Rome.<sup>388</sup> In doing so, the ICC would invoke a fear of prosecution in black market arms brokers, creating a deterrent effect on arms brokers.<sup>389</sup> Thus, the proposed arms trade treaty could reduce the

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hence, brokers provide support for non-state groups), and Austin *supra* note 323, at 204-05 (describing that brokers are emboldened to serve as the link between non-state groups because they do not fear prosecution from national legal systems), with Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-15-PT, Indictment (Special Crt. for Sierra Leone August 2, 2006) (demonstrating that non-state groups commit heinous acts utilizing small arms and light weapons within the purview of the ICC), and *Statute of Rome*, *supra* note 324, at art. 25(3)(a)-(c) (describing the ICC's principles of criminal culpability; specifically, an individual is criminally liable if one provides the means for a crime, facilitates the crime's commission, or aids, abets, or provides assistance for the commission of the crime), WERLE, *supra* note 332, at 126 (stating that one is criminally liable under the Statute if one provides the means for a crime's commission; including, moral or practical support), and SCHABAS, *supra* note 337, at 314 (outlining the severe sentencing guidelines, including life in prison and payment of a fine, for guilty parties in the ICC if one is found to have provided the means for the commission of a heinous act).

383. David Kopel, et al., *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 PENN. ST. L. REV. 891, 893 (2010).

384. Austin, *supra* note 323, at 204.

385. See, e.g., Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-15-PT, Indictment (Special Crt. for Sierra Leone August 2, 2006) (providing an example of the crimes committed by high-ranking Revolutionary United Fronts commanders, including crimes against humanity and war crimes).

386. BOURNE, *supra* note 352, at 114.

387. Austin, *supra* note 323, at 204-05; Misol, *supra* note 365, at 289.

388. Compare *Statute of Rome*, *supra* note 324, at art. 25(3)(c) (explaining that a person is criminally liable under the jurisdiction of the ICC if that person provides assistance to the perpetrator of a crime, specifically the means for the commission of crime), with STOHL, *supra* note 347, at 16-20 (describing arms brokers assisting the bloodiest dictators in Africa along with other human right abusers by providing arms regardless of the human toll and arms embargoes), Michael T. Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in LETHAL COMMERCE 31, 34-35 (Jeffery Boutwell et al. eds., 1995) (arguing "[B]lack market arms traffic has emerged as a major factor in sustaining ethnic and insurgent forces in such areas as the former Yugoslavia, the Horn of Africa, and South and Southeast Asia"), and Schroeder, *supra* note 352, at 72 (describing globetrotting arms brokers providing arms to groups under arms embargoes, which are later used to commit heinous crimes).

389. Compare SCHABAS, *supra* note 337, at 314 (noting that when the ICC crafts a sentence for a convicted individual the court will seek to deter future commissions of the

number of non-state groups receiving arms by using the ICC to punish brokers.<sup>390</sup>

#### IV. CONCLUSION

Each year violence related to small arms and light weapons negatively affects millions of people.<sup>391</sup> Despite the reaching effects of small arms and light weapons, no global treaty exists to curb the use of such weaponry.<sup>392</sup> Non-state groups are amongst the parties that exploit the deficient regulation of the arms industry to perpetuate violence.<sup>393</sup> However, states have failed to address the issues related to non-state groups and their access to weaponry.<sup>394</sup> For instance, the proposed arms trade treaty will not include an absolute prohibition upon small arms and light weapons transfers to non-state groups because states have economic and geopolitical and foreign policy interests in the ability to make transfers to non-state groups.<sup>395</sup> Nonetheless to effectively reduce the amount of small arms and light weapons available to non-state groups, the proposed arms trade treaty must include three measures.<sup>396</sup> First, the proposed arms trade treaty must require that all official documents enabling the transfer of small arms and light weapons contain a baseline amount of informa-

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same crime by demonstrating that illegal conduct will be met with punishment), *with* Austin, *supra* note 323, at 205 (arguing that black market brokers operate with freedom and impunity; as a result, the brokers are empowered to make illicit transfers).

390. Compare BOURNE, *supra* note 352, at 114 (explaining that arms brokers form the link between prohibited non-state groups and the global small arms and light weapons market), STOHL, *supra* note 347, at 20 (explaining that arms brokers continue to make transfers and run their operations because brokers understand that states can do little to stop them), and Austin, *supra* note 323, at 205 (noting arms brokers are empowered to make transfers because they do not fear legal repercussions for providing arms to non-state groups), *with Statute of Rome*, *supra* note 324, at art. 25 (detailing that “[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: . . . [f]or 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”), and SCHABAS, *supra* note 337, at 312 (describing that if the ICC finds an individual guilty of assisting the perpetrator of an international crime, then the ICC may sentence the individual to a maximum sentence of life imprisonment and require the payment of a large fine or forfeiture of property).

391. *Demand a Bullet-Proof Arms Trade Treaty!*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/appeals-for-action/demand-bullet-proof-arms-trade-treaty> (last visited Feb. 27, 2011).

392. *Id.* Notably, the global community has passed treaty pertaining to bananas and dinosaur bones; however, they have failed to pass a treaty to regulate guns and ammunition—the only products created with the sole purpose of killing and injuring. *Id.*

393. Michael Renner, *Small Arms, Big Impact: The Next Challenge of Disarmament*, 137 WORLDWATCH PAPER 1, 14 (1997).

394. *Id.*

395. See *supra* note 243-81 and accompanying text.

396. See *supra* notes 287-390 and accompanying text.

tion so as to enable officials to make informed transfer decisions.<sup>397</sup> Second, the proposed arms trade treaty must require that official documents relating to the export and import of small arms and light weapons utilize anti-counterfeit technology so as to discourage forgery.<sup>398</sup> Third, the global community, through the proposed arms trade treaty, must utilize the International Criminal Court (“ICC”) to punish illicit arms brokers so as to provide the repercussions for their illegal actions currently missing from the international system.<sup>399</sup>

The first measure the proposed arms trade treaty must include is that all official documents enabling the transfer of small arms and light weapons contain a baseline amount of information so as to enable officials to make informed transfer decisions.<sup>400</sup> Currently, export officials cannot make an informed decision about whether a transfer of small arms and light weapons is legitimate because the information contained in each document varies from state to state.<sup>401</sup> As a consequence of such disjointed national law, non-state groups acquire small arms and light weapons by exploiting the confusion surrounding transfer documents.<sup>402</sup> Hence, the proposed arms trade treaty could effectively reduce the amount of negligent transfers to non-state groups if it required the inclusion of a baseline amount of information in every transfer document.<sup>403</sup>

The second measure the proposed arms trade treaty must require is that official documents relating to the export and import of small arms and light weapons utilize anti-counterfeit technology so as to discourage forgery.<sup>404</sup> Currently, states require a plethora of documents to access the world supplies of small arms and light weapons.<sup>405</sup> As a result, non-state groups are forced to produce these documents to tap into the weapons market.<sup>406</sup> Consequently, non-

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397. See *supra* notes 287-305 and accompanying text.

398. See *supra* notes 307-21 and accompanying text.

399. See *supra* notes 323-90 and accompanying text.

400. See *supra* notes 287-305 and accompanying text.

401. See RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* 13 (2007) (arguing that small arms and light weapons reach improper end-users because of “negligent government officials,” which “fail to adequately check the documentation associated with the transfer.”); Mark Bromley & Hugh Griffiths, *End-User Certificates: Improving Standards To Prevent Diversion*, STOCKHOLM INT'L PEACE & RES. INST. INSIGHTS ON PEACE & SECURITY, Mar. 2010, at 7 (2010).

402. See Bromley, *supra* note 396, at 7 (claiming transfer documents with unsynchronized information are ripe for abuse, specifically abuse in the form of diversion into the illegal market around the world).

403. See *supra* notes 302-21 and accompanying text.

404. See *supra* notes 307-21 and accompanying text.

405. GRADUATE INST. OF INT'L & DEV. STUD., *SMALL ARMS SURVEY 2009* 61 (2009) [hereinafter *SMALL ARMS SURVEY 2009*].

406. CHRISTOPHER CARR, *KALASHNIKOV CULTURE: SMALL ARMS PROLIFERATION AND IRREGULAR WARFARE* 35 (2008).

state groups forge transfer documents.<sup>407</sup> False documents provide an appearance of legality to the illegal weaponry.<sup>408</sup> In order to combat falsified transfer documents, Serbia has proposed and Sweden has implemented a measure requiring anti-counterfeit technologies be included in transfer documents.<sup>409</sup> By incorporating similar anti-counterfeit technology requirements for transfer documents in the proposed arms trade treaty, a non-state group's ability to procure weapons with falsified documents would be reduced.<sup>410</sup>

Finally, advocating that states, through the proposed arms trade treaty, utilize the ICC for purposes of prosecuting illicit arms brokers would reduce the amount of non-state groups receiving small arms and light weapons because the ICC would provide an enforcement and punishment mechanism absent from current practices.<sup>411</sup> Currently, arms brokers are essential to the spread of small arms and light weapons.<sup>412</sup> Brokers arrange every detail of arms sales between the supplier and the client.<sup>413</sup> While many legitimate brokers exist, black market arms brokers operate outside the confines of international law.<sup>414</sup> Black market arms brokers supply arms to non-state groups, promote terrorism, advance criminal enterprises, and exacerbate violent conflict.<sup>415</sup> Presently, no effective regime exists to punish black market brokering activity.<sup>416</sup> As a consequence, black market brokers

407. MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 131 (2007).

408. *Id.*

409. See Bromley, *supra* note 396, at 6 (explaining the Sweden's domestic use of anti-counterfeit technology in transfer documents); United Nations Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 188, U.N. Doc. A/62/278 (Part II) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (explaining the measures that have been proposed by Serbia to attack counterfeiting).

410. See *supra* notes 322-37 and accompanying text.

411. See *supra* notes 323-90 and accompanying text.

412. See Kathi Austin, *Illicit Arms Broker: Aiding and Abetting Atrocities*, BROWN J. WORLD AFF., Spring 2002, at 204 (describing the role that arms brokers have played in the arms trade).

413. *Id.* "Historically, arms brokers—the singularly important middlemen in the arms trade—have been uniquely unregulated. Commonly nicknamed 'merchants of death,' they include negotiators, financiers, exporters, importers, and transport agents . . . used to arrange every aspect of an arms deal." *Id.*

414. See *id.* at 204-05 (arguing that many arms brokers have been documented supplying arms to groups prohibited by law from purchasing arms, including groups in East Timor, Rwanda, Kosovo, Afghanistan, Colombia, and Sri Lanka).

415. *Id.*

416. *Id.* at 204.

Since governments and lawful weapons manufacturers often depend on arms brokers to market and facilitate arms sales, there is a legitimate role for middlemen, and their enterprise does not call for a ban. However, more effective regulatory regimes are in order . . . to ensure that brokers engage in authorized sales that conform . . . to international law. Until the appropriate frameworks, transparency measures, and enforcements tools are in place, it will . . . con-

operate with freedom and impunity.<sup>417</sup> However, the global community could utilize the ICC to instill fear into black market brokers and sever the link between non-state groups and the arms market.<sup>418</sup>

While the number of non-state groups receiving arms must be reduced, this author is not proposing that all transfers to non-state groups be prohibited because states may have a legitimate purpose in supplying arms to oppressed non-state groups. Additionally, in enforcing restrictions to non-state groups the ICC should be used as a prosecutorial tool and not a regulatory body. This author is proposing that the ICC be used to prosecute the most egregious arms brokers that facilitate human rights abuses, not as a mechanism to regulate the entire black market. Nonetheless, the amount of non-state groups receiving small arms must be reduced. The proposed arms trade treaty, if utilized properly, represents a great opportunity for the global community to address the pressing issue of armed non-state violence.<sup>419</sup>

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tinue to be difficult to appropriately punish illegal brokers for their crimes and misdeeds.

*Id.* at 205.

417. *Id.*

418. See *supra* notes 323-90 and accompanying text.

419. This Article is dedicated to the women in my life who have always been there for me—Stacie Elaine Biggs & Abigail Elaine Biggs. Also, I would like to thank my friends Michael Knowles, Patrick McCann, & Lee Langdon for going on this long strange trip with me.

