

# The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators

David B. Kopel,\* Paul Gallant\*\* and Joanne D. Eisen\*\*\*

*Abstract: Advocates of the proposed United Nations Arms Trade Treaty (ATT) promise that it will prevent the flow of arms to human rights violators. This Article first examines the ATT and observes that the ATT, if implemented as promised, would require dozens of additional arms embargoes, including embargoes on much of Africa. The Article then provides case studies of the current supply of arms to the dictatorship in Zimbabwe and to the warlords in the eastern Democratic Republic of the Congo (DRC). The Article argues that the ATT would do nothing to remediate the conditions that have allowed so many arms to be acquired by human rights violators. The ATT would have no more effective force than the embargoes that are already imposed by the U.N. Security Council; therefore U.N. member states, including China, which violate current Security Council embargoes, could just as well violate ATT embargoes. Accordingly, the ATT is a distraction, and human rights activists should instead examine alternative methods of addressing the problem of arms in the hands of human rights violators.*

*At the end of this Article, there is an abstract in Spanish, and a detailed summary of the Article in French.*

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\* Adjunct Professor of Advanced Constitutional Law, Denver University Sturm College of Law. Research Director, Independence Institute, Golden, Colo.; Associate Policy Analyst, Cato Institute, Washington, D.C. We would like to thank Dave Heal (University of Michigan Law School, class of 2010) and Trevor Burrus (Denver University Sturm College of Law, class of 2010) for research assistance. We would also like to thank Ted R. Bromund of the Heritage Foundation for insightful critiques.

\*\* Senior Fellow, Independence Institute, Golden, Colo.

\*\*\* Senior Fellow, Independence Institute, Golden, Colo.

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In this Article, we examine whether the proposed Arms Trade Treaty (ATT), currently being drafted at the United Nations, can be expected to achieve the stated goal of its proponents: to control the flow of small arms and light weapons (SALW) and thereby to prevent humanitarian and human rights abuses.

The Article begins by surveying the record of previous failed international arms embargoes and by describing several daunting challenges to an effective ATT: the large number of unstable nations that produce arms; the current international system of state sovereignty; the well-established practice of dictatorial governments ratifying but then ignoring human rights treaties; and the nature of the black market.

Part II of the Article details the current, unsuccessful efforts to restrict the flow of arms to the dictatorship in Zimbabwe. Part II also considers whether an ATT would improve the possibility for an effective embargo against the Mugabe regime.

Part III conducts a similar case study of the Democratic Republic of the Congo (DRC), which the U.N. Security Council put under an arms

embargo in 2003, with an expanded embargo imposed in 2005. Part III also examines the role of the U.N. itself in illegal arms smuggling into the DRC.

Given the dim prospects that an ATT will make for more effective embargoes against human rights violators, Part IV offers some alternative approaches for reducing arms flows to rights violators and for providing protection to victims.

#### I. THE FAILURES OF ARMS EMBARGOES

The leading international gun prohibition lobby is Control Arms,<sup>1</sup> a subsidiary of Oxfam, Amnesty International, and IANSA (the International Action Network on Small Arms). Control Arms forthrightly acknowledges that “every one of the 13 United Nations arms embargoes imposed in the last decade has been systematically violated. . . .”<sup>2</sup>

Accordingly, Control Arms recommends the establishment of “a more effective framework of controls based on a common set of criteria for international arms transfers fully consistent with international law: an international Arms Trade Treaty.”<sup>3</sup> However, Control Arms does not

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1. See Control Arms Campaign, <http://www.controlarms.org/en> (last visited Oct. 6, 2009).

2. See CONTROL ARMS, UN ARMS EMBARGOES: AN OVERVIEW OF THE LAST TEN YEARS 1 (Mar. 16, 2006), available at [http://www.oxfam.org.uk/what\\_we\\_do/issues/conflict\\_disasters/downloads/bn\\_armsembargoes.pdf](http://www.oxfam.org.uk/what_we_do/issues/conflict_disasters/downloads/bn_armsembargoes.pdf)

[hereinafter “UN ARMS EMBARGOES: AN OVERVIEW”] (“[E]very one of the 13 United Nations arms embargoes imposed in the last decade has been systematically violated. . . .”); see also SARAH PARKER, U.N. INST. FOR DISARMAMENT RESEARCH, IMPLICATIONS OF STATES’ VIEWS ON AN ARMS TRADE TREATY 49, Box 8 (Jan. 2008), available at <http://www.unidir.ch/pdf/ouvrages/pdf-1-92-9045-008-B-en.pdf> (“Evidence suggests that UN arms embargoes have done little to stem the flow of weapons to target countries and that violations have consistently occurred.”); PAUL CORNISH, CHATHAM HOUSE, AN INTERNATIONAL ARMS TRADE TREATY: BUILDING CONSENSUS AND MAKING IT WORK ¶ 24 (June 28, 2007), available at [http://www.chathamhouse.org.uk/files/9387\\_050607armstrade.pdf](http://www.chathamhouse.org.uk/files/9387_050607armstrade.pdf).

(“It is widely perceived that regional and international efforts at conventional arms trade regulation have not worked.”); TOWARDS AN ARMS TRADE TREATY: NEXT STEPS FOR THE UN PROGRAMME OF ACTION 8 (June 2005), available at [http://www.iansa.org/control\\_arms/documents/att-bms-en.pdf](http://www.iansa.org/control_arms/documents/att-bms-en.pdf) [hereinafter “TOWARDS AN ATT”] (“Current controls do not work.”); see also DAMIEN FRUCHART, ET AL., UNITED NATIONS ARMS EMBARGOES: THEIR IMPACT ON ARMS FLOWS AND TARGET BEHAVIOUR, v (2007), available at <http://books.sipri.org/files/misc/UNAE/SIPRI07UNAE.pdf> (The U.N. “embargoes that have been introduced since 1990 have been assessed as having a limited impact on both arms flows to and the behaviour of embargoed targets.”).

3. See UN ARMS EMBARGOES: AN OVERVIEW, *supra* note 2, at 5; see also Kim Sengupta, *Embargoes on global arms trade have been total failure, says UN*, THE INDEPENDENT (UK), Mar. 16, 2006; Abid Aslam, *Watchdogs Target Small Arms, Saying Dealers ‘Defy UN Embargoes,’* ONEWORLD.NET, Mar. 17, 2006, available at <http://us.oneworld.net/node/129385> (last visited Oct. 6, 2009).

explain how an ATT embargo could be more effectively enforced than a U.N. Security Council embargo.

At the direction of the United Nations General Assembly, an Arms Trade Treaty is currently being drafted. The second drafting meeting took place July 13-17, 2009, in New York City.<sup>4</sup> Further meetings are planned through 2011.<sup>5</sup>

Under current international law, the United Nations Security Council can impose a mandatory arms embargo when acting under its powers granted by Chapter VII of the U.N. Charter, which authorizes the Security Council to act against threats to international peace.<sup>6</sup> As with any proposed Security Council action, each of the five permanent members of the Security Council (the United States, United Kingdom, France, Russia, and China) holds veto power.

Although a final version of the ATT is being negotiated, proponents hope that the ATT will allow for the imposition of mandatory embargoes without the consent of the Security Council.<sup>7</sup> Because of the veto power of China and Russia, the Security Council has not been able to impose an arms embargo on Zimbabwe, but an outside mechanism, under the auspices of an ATT, might be able to do so.

At the current stage in negotiations, it is not clear that the advocates of embargoes without Security Council approval will get their wish. Like most other modern global treaties, the ATT would be administered by a permanent bureaucratic organization,<sup>8</sup> which would receive reports

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For an excellent discussion of incorporation of international humanitarian norms into an ATT, see INT'L COMM. OF THE RED CROSS, ARMS TRANSFER DECISIONS: APPLYING INTERNATIONAL HUMANITARIAN LAW CRITERIA, PRACTICAL GUIDE § 3.1 (2007), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA7DQHUZ/\\$file/icrc\\_may2007.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA7DQHUZ/$file/icrc_may2007.pdf?openelement).

4. UK Arms Control & Disarmament, *Towards an International Arms Trade Treaty*, Second Meeting of the Open Ended Working Group (13-17 July 2009), available at <http://ukunarmscontrol.fco.gov.uk/en/the-uk-disarmament/armstradetreaty#> (last visited Oct. 5, 2009).

5. U.N. Office for Disarmament Affairs, *Towards an Arms Trade Treaty*, available at <http://www.un.org/disarmament/convarms/ArmsTradeTreaty/html/ATT.shtml> (last visited Oct. 5, 2009).

6. The Security Council is separately authorized, by Chapter VI, to make non-binding recommendations for dispute resolution.

7. See UN ARMS EMBARGOES: AN OVERVIEW, *supra* note 2, at 3:

Decisions to impose, or more importantly not to impose arms embargoes, are also largely guided by political considerations. Often the commercial, political or other strategic interests of any one member of the UN Security Council means a decision to impose an arms embargo on a particular regime or armed group is not tabled or agreed.

8. ELIZABETH KIRKHAM, SAFERWORLD, MAKING IT WORK: MONITORING AND VERIFYING IMPLEMENTATION OF AN ARMS TRADE TREATY 4.1 (2008), available at [http://kms1.isn.ethz.ch/serviceengine/Files/ISN/56372/ipublicationdocument\\_singledocument/7BDA5BCB-A19A-4080-A163-568EEC771B17/en/makingitwork.pdf](http://kms1.isn.ethz.ch/serviceengine/Files/ISN/56372/ipublicationdocument_singledocument/7BDA5BCB-A19A-4080-A163-568EEC771B17/en/makingitwork.pdf).

about compliance from treaty nations<sup>9</sup> and would act “as a repository for and source of information on breaches of UN arms embargoes. . . .”<sup>10</sup> At present, it is unclear whether the ATT would be administered by an institution within the U.N. structure or by an independent entity. The ATT body could recommend that the Security Council impose a new embargo, or (less likely) the ATT body might have the authority to impose an embargo itself.

*A. How Many Embargoes are Needed?*

For purposes of Section A, let us hypothesize that, one way or another, the ATT body gets all the embargoes that are appropriate. That is, the various delegates of the ATT governing body put aside their own governments’ interests and vote for embargoes whenever appropriate, even against military allies or important trading partners of their own nations. Then the embargo goes into legal effect, either because the ATT body can impose the embargo or because the U.N. Security Council always imposes embargoes that are recommended by the ATT. Presumably the Security Council delegates—especially including all five permanent members of the Security Council—will rise above their national interests and vote in favor of whatever the ATT body claims is required by international law.

One can search the history of the Security Council, and of every global treaty governing body, and one would have great difficulty finding isolated examples of such selfless behavior. If finding isolated examples is like looking for a needle in a haystack, finding in a U.N. treaty body, or in the Security Council, such selflessness as the predominant standard of behavior is like looking for a haystack made of golden needles. It is possible to imagine that such a thing could exist, but no such thing has ever been known to exist in real life.

However, the ATT proponents are promising, in effect, that their new treaty body will be the haystack of golden needles. They are claiming, after all, that one result of an ATT will be a global arms embargo against Israel.<sup>11</sup> Never mind that both of the two most powerful U.N. members would be extremely unlikely to agree: the United States has a long-standing special relationship with Israel and China carries on a thriving arms trade with Israel. The United Kingdom’s relationship

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9. *Id.* at 3.1.

10. *Id.* at iv.

11. International Action Network on Small Arms, *Gaza: An ATT would reduce civilian casualties*, [http://www.iansa.org/regions/nafrica/gaza\\_att09.htm](http://www.iansa.org/regions/nafrica/gaza_att09.htm) (last visited Oct. 5, 2009); CONTROL ARMS, ARMS WITHOUT BORDERS: WHY A GLOBALISED TRADE NEEDS GLOBAL CONTROLS (Oct. 2, 2006), available at <http://www.statewatch.org/news/2006/nov/arms-without-borders.pdf>.

with Israel has also been generally friendly, and the U.K., too, holds a Security Council veto.

Imagining that an ATT would work as it is supposed to also requires the fantastic assumption that China itself would be subjected to an embargo. Arms in the hands of Chinese military are used for the suppression of human rights in China, which is why the U.S. and the European Union (E.U.) have restricted arms sales to China ever since the Tiananmen Square massacre in 1989.<sup>12</sup> Other than domestic repression, the main use of the Chinese military has been to threaten and bully democratic Taiwan—and a violent attempt to conquer Taiwan would be contrary to the U.N.'s founding purpose of safeguarding peace. Thirdly, as will be detailed below, China has made itself into an international weapons supermarket for third-world tyrants and has repeatedly flouted international law and U.N. embargoes in doing so. If, as ATT proponents promise, arms sales to human rights violators will be prevented by the Arms Trade Treaty, then China would have to be near the top of the list for countries to be embargoed. Search the records of every U.N. body in this century and see how many—if any—instances you can find of any such body taking an action that was strongly opposed by China.

Putting the China issue aside, the ATT, if it works as its proponents promise, would lead to dozens of new arms embargoes, including embargoes for almost all African nations; significantly, about half of the embargo targets already have a domestic arms industry.<sup>13</sup> Let us now examine the scope of the necessary embargoes.

Small arms control proponents have accurately pointed out that embargoes often fail because at-risk states have not been prevented from obtaining stockpiles of weapons early on, before the Security Council has imposed an embargo.<sup>14</sup> Thus, the proponents suggest preventing

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12. KRISTIN ARCHICK, RICHARD F. GRIMMETT, SHIRLEY KAN, CONGRESSIONAL RESEARCH SERVICE, EUROPEAN UNION'S ARMS EMBARGO ON CHINA: IMPLICATIONS AND OPTIONS FOR U.S. POLICY 1 (Jan. 26, 2006), *available at* <http://italy.usembassy.gov/pdf/other/RL32870.pdf>.

13. We cross-referenced the list of arms-producing countries published by SMALL ARMS SURVEY 2002, *infra* note 29, at 57, against the list of countries that were embargoed as of 2007, either by the U.N. or the E.U., as listed by Stockholm International Peace Research Institute (SIPRI), *available at* <http://archives.sipri.org/contents/armstrad/embargoes.html> (last visited Oct. 5, 2009). The six embargoed countries that produced arms were North Korea, China, Iran, Myanmar, Sudan, and Zimbabwe. The six embargoed countries that did not produce arms were Cote d'Ivoire, the DRC, Lebanon, Liberia, Somalia, and Uzbekistan.

14. *See* UN ARMS EMBARGOES: AN OVERVIEW, *supra* note 2, at 1 ("Such embargoes are usually late and blunt instruments, and the UN Sanctions Committees, which oversee the embargoes, have to rely largely on Member States to monitor and implement them."); *see also* Dominic Tierney, *Irrelevant or malevolent? UN arms embargoes in civil wars*, 31 REV. OF INT'L STUD. 645, 651 (2005) ("There is not a single case where an arms

weapons transfers “if they . . . are *likely to be used* for serious violations of human rights. . . .”<sup>15</sup> The standard is similar to “preventive detention.” That is, an embargo would not be imposed *after* a nation has used arms to perpetrate abuses; instead, the embargo would be imposed prospectively, once the ATT body decides that imported arms “are likely” to be used to abuse human rights.

ATT advocates recognize that embargoes must be imposed in a non-discriminatory manner. As Paul Cornish wrote:

the economic and social underdevelopment of a country might become grounds on which to discriminate against that country in matters of security and defence imports. It will be essential for the credibility of the ATT to avoid the charge of discrimination, and to avoid the impression that ATT participants are a cartel which has arrogated to itself the authority to direct weaker states in matters of sovereign national policy.<sup>16</sup>

So let us examine how many nations would need to be embargoed, based on neutral, non-discriminatory rules and taking into account the ATT’s preventive principle. A panel of experts designated as the executor of an ATT would need to assess the stability of countries in order to determine which countries would be most likely to:

- (1) use weapons against civilian populations,
- (2) create regional instability, and
- (3) resell the weapons to countries that would be likely to commit either of the aforementioned acts.

How do you identify countries that would be “likely” to commit human rights abuses? J. Joseph Hewitt, Jonathan Wilkenfeld, and Ted Robert Gurr coined the term “conflict syndrome” for “high risk states”—meaning “simultaneously politically unstable, challenged by rebels and terrorists, tempted to resort to mass killings of civilians, and enmeshed in international crises.”<sup>17</sup> As other scholars have observed, “massive human rights violations . . . are typically associated with state

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embargo was introduced sufficiently early to prevent the aggressor faction from actually initiating civil war.”)

15. See TOWARDS AN ATT, *supra* note 2, at 4 (emphasis in original); see also DAVID CORTRIGHT & GEORGE A. LOPEZ, WITH LINDA GERBER, PROJECT PLOUGHSHARES, SANCTIONS *SANS* COMMITMENT: AN ASSESSMENT OF UN ARMS EMBARGOES 8-9 (May 2002), available at <http://www.ploughshares.ca/libraries/WorkingPapers/wp022.pdf> (“An earlier and more effective effort to cut off the supply of arms . . . might have made a difference in preventing or at least reducing the scale of subsequent military hostilities.”).

16. CORNISH, *supra* note 2, at ¶ 27.

17. J. JOSEPH HEWITT, JONATHAN WILKENFELD, & TED ROBERT GURR, PEACE AND CONFLICT 2008, at 4 (2008).

breakdown.”<sup>18</sup> In fact, “[s]eventy-seven percent of all international crises in the post-Cold War era (1990-2005) include one or more actors classified as unstable, fragile, or failed at the time of the crisis. . . .”<sup>19</sup>

Hewitt’s *Peace and Conflict Instability Ledger*<sup>20</sup> provides a sophisticated quantification of factors that predict with a high level of confidence the risk of a country’s instability. The methodology is based on factors that include “the incoherence of the governing regime, high infant mortality rates, lack of integration with the global economy, the militarization of society, and the presence of armed conflict in neighboring states.”<sup>21</sup> The *Instability Ledger* offers a statistical confidence range for each of the 160 countries examined.<sup>22</sup> The table that Hewitt constructed was the most highly developed we could find in the literature.

Hewitt suggested a risk ratio of greater than 7.3 for classifying a country as high risk.<sup>23</sup> Of the 160 countries studied, Hewitt found forty of them to be high risk.<sup>24</sup> A risk ratio between 3.56 and 7.3 indicated a country at moderate risk, and a country below 3.56—such as the U.S.—was at low risk.<sup>25</sup>

We compared arms-producing countries with the countries Hewitt designated as at risk of state failure. According to the 2002 *Small Arms Survey* (SAS), there are ninety-eight arms-producing countries in the

18. See DANIEL C. ESTY, JACK A. GOLDSTONE, TED ROBERT GURR, PAMELA T. SURKO & ALAN N. UNGER, WORKING PAPERS: STATE FAILURE TASK FORCE REPORT 1 (Nov. 30, 1995), available at <http://globalpolicy.gmu.edu/pitf/SFTF Phase I Report.pdf>.

19. See Jonathan Wilkenfeld, *Unstable States and International Crises*, in HEWITT, WILKENFELD & GURR, *supra* note 17, at 67, 68.

20. *Id.* at 5.

21. *Id.*

22. *Id.* at 15-20.

23. *Id.* at 9-10. A risk ratio is defined by the authors as:

[T]he likelihood of future instability in a country . . . . The risk ratio gives the relative risk of instability in a country compared to the average estimated likelihood of instability for 28 member countries of the Organization for Economic Cooperation and Development (OECD). The member states of the OECD were selected as a baseline because the organization’s membership is widely viewed as representing the most politically stable countries in the world . . . . The risk ratio for any country is computed by dividing that country’s estimated probability for future instability by the baseline OECD probability of 0.003. *Id.* (internal footnotes omitted).

24. *Id.* at 15-20.

25. *Id.* at 17, 20 n.8. As with most exercises in quantitative political science, the metrics are not perfectly predictive. Over the long term, about two-thirds of the at-risk states do fail, but this means that one third do not. Moreover, there is a rate of approximately one regime crisis annually among the states that were not identified as at-risk. See ESTY ET AL., *supra* note 18, at ix.

world.<sup>26</sup> As of 2009, there are 195 independent states,<sup>27</sup> so about half of the all nations are arms producers.

Of the forty high-risk countries identified by Hewitt, fourteen of them are weapons producers, according to SAS.<sup>28</sup> Of the forty medium-risk countries, twenty-six are arms producing countries.<sup>29</sup> Thus, exactly half of the at-risk countries manufacture their own weapons.

Other human rights groups<sup>30</sup> have constructed lists of countries that are committing human rights abuses and are at risk of political instability

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26. GRADUATE INST. OF INT'L STUDIES, SMALL ARMS SURVEY 2002: COUNTING THE HUMAN COST 9 (2002).

27. See Matt Rosenberg, *The Number of Countries in the World*, Mar. 18, 2008, ABOUT.COM, available at <http://geography.about.com/cs/countries/a/numbercountries.htm> (last visited Oct. 5, 2009) ("A very frequent geographical question is 'How many countries are in the world?' Different numbers pop up when one inquires or reads about the number of countries in the world. Each source you use often yields a different answer. Ultimately, the best answer is that there are 195 countries in the world."). The U.S. Department of State counts 194. See U.S. Dep't of State, *Independent States in the World*, July 29, 2009, available at <http://www.state.gov/s/inr/rls/4250.htm> (last visited Oct. 5, 2009). However, for reasons of *realpolitik*, the State Department pretends that Taiwan is not a *de facto* state, *id.*, despite the fact that it possesses all the standard attributes of statehood, including a defined territory, a government that exercises effective control over that territory, and the demonstrated capacity to enter into relations with other states. If we count realistically, rather than on the basis of State Department fictions, 195 appears to be the correct total.

28. Armenia, Bangladesh, Bolivia, Brazil, Burkina Faso, Cambodia, Ethiopia, Georgia, Guinea-Bissau, India, Iraq, Kenya, Nigeria, and Tanzania.

29. Albania, Algeria, Cameroon, Colombia, Dominican Republic, Ecuador, Guatemala, Guinea, Indonesia, North Korea, Mexico, Moldova, Myanmar, Nepal, Pakistan, Papua New Guinea, Peru, Romania, Russian Federation, South Africa, Sudan, Turkey, Uganda, Ukraine, Venezuela, and Former Republic of Yugoslavia.

30. E.g. Human Rights Watch, About Us, <http://www.hrw.org/en/about> (last visited Oct. 6, 2009) ("By focusing international attention where human rights are violated, we give voice to the oppressed and hold oppressors accountable for their crimes."); Amnesty Int'l, Who We Are, <http://www.amnesty.org/en/who-we-are/> (last visited Oct. 6, 2009) ("Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights for all."); International Crisis Group, About Crisis Group, <http://www.crisisgroup.org/home/index.cfm?id=208&l=1> (last visited Oct. 6, 2009) ("The International Crisis Group is now generally recognised as the world's leading independent, non-partisan, source of analysis and advice to governments, and intergovernmental bodies like the United Nations, European Union and World Bank, on the prevention and resolution of deadly conflict."); Genocide Watch, About Genocide Watch, <http://www.genocidewatch.org/aboutus.html> (last visited Oct. 6, 2009) ("Genocide Watch exists to predict, prevent, stop, and punish genocide and other forms of mass murder."); World Bank, The worldwide governance indicators project: Answering the critics, [http://econ.worldbank.org/external/default/main?pagePK=64165259&piPK=64165421&theSitePK=469372&menuPK=64216926&entityID=000016406\\_20070223093027](http://econ.worldbank.org/external/default/main?pagePK=64165259&piPK=64165421&theSitePK=469372&menuPK=64216926&entityID=000016406_20070223093027) (last visited Oct. 6, 2009) ("The Worldwide Governance Indicators, reporting estimates of six dimensions of governance for over 200 countries between 1996 and 2005, have become widely used among policymakers and academics."); Universal Human Rights Index of United Nations Documents, <http://www.universalhumanrightsindex.org/en/about.html> (last visited Oct. 6, 2009) ("The Universal Human Rights Index (Index) is designed primarily to facilitate access to human rights documents issued by the UN human rights treaty bodies and the special

and civil strife. In 2005, Human Rights Watch (HRW) singled out sixty-eight countries that the organization considered to be human rights abusers.<sup>31</sup> These countries were not always the same countries that Hewitt placed on his high- or medium-risk list for state failure. For example, HRW identified the United States as a human rights abuser,<sup>32</sup> and Hewitt determined that the U.S. was at an extremely low risk for state failure.<sup>33</sup>

We combined the countries listed by HRW as human rights abusers and those listed by Hewitt as at medium- and high-risk for state failure. Thirty-nine countries were on both lists,<sup>34</sup> and 109 countries were on at least one list.<sup>35</sup> When we cross-referenced the 109 problematic

procedures of the Human Rights Council.”); CIRI Human Rights Data Project, <http://ciri.binghamton.edu/> (last visited Oct. 6, 2009):

The Cingranelli-Richards (CIRI) Human Rights Dataset contains standards-based quantitative information on government respect for 15 internationally recognized human rights for 195 countries, annually from 1981-2007. It is designed for use by scholars and students who seek to test theories about the causes and consequences of human rights violations, as well as policy makers and analysts who seek to estimate the human rights effects of a wide variety of institutional changes and public policies including democratization, economic aid, military aid, structural adjustment, and humanitarian intervention.

*See also* Freedom House, About Us, <http://www.freedomhouse.org/template.cfm?page=2> (last visited Oct. 6, 2009):

Freedom House is a clear voice for democracy and freedom around the world. Since its founding in 1941 by prominent Americans concerned with the mounting threats to peace and democracy, Freedom House has been a vigorous proponent of democratic values and a steadfast opponent of dictatorships of the far left and the far right.

*See also* Mo Ibrahim Foundation, *South Africa outpaces North Africa in governance performance*, at 2 (Oct. 5, 2009), available at [http://www.moibrahimfoundation.org/en/media/get/20091004\\_2009-ibrahim-index-of-african-governance-global-news-release.pdf](http://www.moibrahimfoundation.org/en/media/get/20091004_2009-ibrahim-index-of-african-governance-global-news-release.pdf) (last visited Nov. 10, 2009):

The Ibrahim Index of African Governance was created in recognition of the need for a robust, comprehensive and quantifiable tool for citizens and civil society to track government performance in Africa. The development of the Ibrahim Index reflects the Foundation’s long-term commitment to support African ownership of the governance debate, to develop capacity in African institutions, and to improve the quality, reliability, and availability of data about Africa.

31. *See* HUMAN RIGHTS WATCH, *WORLD REPORT 2006: EVENTS OF 2005* (2006). HRW put the European Union on its human rights abuse list, but to avoid confusion, we did not count it, and instead just counted the particular E.U. nations that HRW listed.

32. *See id.* at 502.

33. HEWITT, WILKENFELD, & GURR, *supra* note 17, at 17. They determined that the U.S. had a risk score of 1.0.

34. Afghanistan, Angola, Armenia, Bangladesh, Brazil, Burma, Burundi, Cambodia, Colombia, Côte d’Ivoire, Democratic Republic of Congo, Eritrea, Ethiopia, Georgia, Guatemala, Haiti, India, Indonesia, Iraq, Jordan, Liberia, Mexico, Nepal, Nigeria, North Korea, Pakistan, Papua New Guinea, Peru, Russia, Rwanda, Sierra Leone, South Africa, Sri Lanka, Sudan, Tajikistan, Turkey, Uganda, Ukraine, and Venezuela.

35. Of the sixty-eight countries on HRW’s list of abusers, twenty-nine were not on Hewitt’s list of at-risk for instability. Of those twenty-nine, twenty-one were arms

countries<sup>36</sup> with the SAS list of arms-producing countries, we found that sixty-one of those 109 countries produced weapons.

In 2005, there were twenty-five areas of major conflict around the globe,<sup>37</sup> with more conflicts erupting.<sup>38</sup> Since there are already twenty-five conflicts, worldwide, but only ten extant U.N. embargoes,<sup>39</sup> we would need several more embargoes just to close the gap. We would need still more embargoes to prevent countries that might soon be at war from building up arsenals.

Besides the countries at near-term risk of conflict, there is the separate problem of countries (e.g., Zimbabwe) that have sometimes peaceful relations with their neighbors, but are at high risk of using arms for domestic violations of human rights. This list would include, at the least, the countries that are already identified as human rights abusers and are at high risk of instability. If the ATT panel were cautious enough to also embargo human rights violators that are at medium risk of instability, then we find that much of Africa needs to be embargoed,<sup>40</sup> in contravention to Cornish's admonition that counseled against creating the appearance of discrimination.<sup>41</sup>

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producers, according to the *Small Arms Survey* 2002 listing. These are Argentina, Belarus, Bosnia & Herzegovina, Chile, China, Croatia, Cuba, Egypt, Iran, Israel, Kazakhstan, Kyrgyzstan, Malaysia, Morocco, Saudi Arabia, Syria, Thailand, United Arab Emirates, United States, Vietnam, and Zimbabwe.

36. Those 109 problematic countries were a compilation of Hewitt's at-risk countries and Human Rights Watch's countries that were listed as human rights abusers in 2005, cited in HRW's *2006 World Report*, *supra* note 31.

37. See J. Joseph Hewitt, *Trends in Global Conflict, 1946-2005*, in HEWITT, WILKENFELD, & GURR, *supra* note 17, at 21, 23. Afghanistan, Algeria, Azerbaijan, Burundi, Chad, Colombia, Ethiopia, India (three separate conflicts), Indonesia, Iran, Iraq, Israel, Myanmar (Burma) (two separate conflicts), Nepal, Philippines (two separate conflicts), Russia, Sri Lanka, Sudan, Turkey, Uganda, and the United States.

38. See HEWITT, WILKENFELD, & GURR, *supra* note 17, at 1 ("Has the magnitude of armed conflict declined? The answer is yes when judged by falling numbers of internal wars and their average death-tolls across the last 20 years. But when we tabulate the number of states engaged in armed conflicts, either their own or multilateral wars as in Iraq and Afghanistan, the long-run trend is up."); cf. Hewitt, *supra* note 37, at 21 ("Still, there is indirect evidence suggesting that new conflicts may be erupting at a slower pace.").

39. See Stockholm Int'l Peace Research Inst., International Arms Transfers, <http://www.sipri.org/contents/armstrad/embargoes.html> (last visited Oct. 6, 2009). Target: Taliban, Al-Qaida, Usama bin Laden; Cote d'Ivoire; DRC (rebels); Iran (technology related to nuclear weapon delivery systems); Lebanon (non-government forces); Liberia; North Korea (DPRK); Sierra Leone (rebels); Somalia; and Sudan (Darfur region).

40. See HEWITT, WILKENFELD, & GURR, *supra* note 17, at 15, 17 (list of countries at risk). Those countries are, in Sub-Saharan Africa: Cape Verde, Congo (Brazzaville), Gabon, Gambia, Mauritius, Swaziland, and Zimbabwe. In North Africa, they are Egypt, Libya, Morocco, and Tunisia.

41. See Cornish, *supra* note 2, at ¶ 24.

Thus, if the ATT is implemented as its proponents insist that it must be (proactive embargoes against the possibility of “likely” violations of human rights and embargoes based on neutral criteria), then the ATT must immediately lead to, at the very least, dozens of new arms embargoes.

Significantly, half or more of the new embargo targets already have their own domestic arms industries. Banning arms imports will not be effective if a country can produce arms itself. Hence, the import of raw materials or arms components would also have to be embargoed, vastly expanding the necessary scope of the embargo—and the attendant difficulties of enforcement—all the more so since many arms components or materials have dual uses, and the importing nation could claim that the imports were for civilian use.

Moreover, at least for firearms, stopping local manufacture by a determined government would be essentially impossible. For example, in Ghana, the British colonial regime banned firearms manufacture, in order to make resistance to colonialism more difficult.<sup>42</sup> The post-colonial government did the same, and, several years ago, signed a U.N.-backed regional treaty that bans firearms manufacture throughout ECOWAS (Economic Community of West African States).<sup>43</sup> Yet Ghana has a thriving firearms manufacturing business, and local gunsmiths can even produce working copies of the AK-47 rifle. Using little more than “a pair of bellows to fan the fire, a hammer, and an iron pipe,” an individual Ghanaian gunsmith can produce several guns per day; collectively, they produce about a hundred thousand per year.<sup>44</sup>

Firearms manufacture is not rocket science. It is possible to imagine an international arms control regime that makes it impossible for underdeveloped countries to acquire the technology to produce intercontinental ballistic missiles. It is preposterous to imagine that international embargoes can prevent governments from being able to manufacture firearms. If Ghanaian blacksmiths—evading decades of national prohibition by operating “in forests, farms and many other secluded places”<sup>45</sup>—can produce a hundred thousand guns per year, then any government in the world would be able to develop its own firearms manufacturing capability, if it chose to do so.

Accordingly, the notion that an international arms embargo against a government that violates human rights could deprive that government

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42. Emmanuel Addo Sowatey, *Small arms proliferation and regional security in West Africa: The Ghanaian case*, in 1 NEWS FROM THE NORDIC AFR. INST. 6, 6 (Nordiska Afrikainstitutet 2005), available at [http://www.nai.uu.se/publications/news/documents/news1\\_2005.pdf](http://www.nai.uu.se/publications/news/documents/news1_2005.pdf).

43. *Id.* at 6.

44. *Id.* at 8.

45. *Id.*

of firearms, even if all other nations complied with the embargo, is extremely implausible. To the contrary, embargoes that stimulate domestic production can contribute, in the long run, to international arms proliferation: “[T]he great irony that a country that built up its arms capacity to counter an international embargo, as South Africa did, celebrated its freedom from pariah status by using that capacity to plunge into export sales.”<sup>46</sup>

### B. *State Sovereignty and Treaty Enforcement*

It was apparent early in the ATT process that, while non-governmental organizations (NGOs) were concerned about a reduction in total violence, states were concerned about their sovereignty.<sup>47</sup> As early as 2003, HRW noted:

[G]overnments have generally conceived the problem narrowly as one of national security rather than human security. They largely have focused attention on the action of private arms traffickers, deflecting their own responsibility. A human rights approach to small arms, by contrast, puts people at the center of the analysis and highlights that it is up to governments to take action to respond to the small arms problem.<sup>48</sup>

If U.N. member governments sign a treaty that they believe is potentially damaging to their sovereignty—even though that treaty would be very beneficial to the global population—they may not fulfill their obligations needed to make the treaty succeed.

By January 2008, ninety-eight member states had provided input to the U.N. concerning their views on an ATT.<sup>49</sup> Sarah Parker, a researcher at the Small Arms Survey in Geneva, organized those reports and wrote

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46. R. T. NAYLOR, *WAGES OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY* 130 (2002).

On the International Court of Justice (the U.N.’s “world court,” ICJ), see Hurst Hannum, *Fact-Finding by Nongovernmental Human Rights Organizations*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 294 (Richard Lillich ed. 1992) (arguing that the ICJ is too slow and remote to deal effectively with complicated fact patterns involving violations of human rights).

47. See G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006) (“Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms”). At the time the resolution was passed, the U.N. asked for input from member states concerning their views about an ATT. See Parker, *supra* note 2, at 1.

48. See Human Rights Watch, *Small Arms and Human Rights: The Need for Global Action*, Briefing Paper for the U.N. Biennial Meeting on Small Arms, July 7, 2003, at 12, available at <http://www.hrw.org/backgrounders/arms/small-arms-070703.pdf>; see also AMNESTY INT’L, *A GLOBAL ARMS TRADE TREATY: WHAT STATES WANT I* (Oct. 2007), available at <http://www.amnesty.org/en/library/asset/POL34/004/2007/en/dom-POL340042007en.pdf>.

49. See PARKER, *supra* note 2, at 1.

two papers summarizing and categorizing the information.<sup>50</sup> One recurring concern was the right of the state to possess self-defense arms under an ATT.<sup>51</sup> Unwilling to cede additional sovereignty via an ATT, “[f]ifty-two states made a specific request that the inherent right to self-defence enshrined by Article 51 of the UN Charter be referred to in a treaty.”<sup>52</sup>

States also expressed concern about their right to manufacture arms: “44 states sought to include a reference to the right of states to manufacture, import, export, transfer and possess conventional weapons for self-defence, security or participation in peacekeeping operations.”<sup>53</sup>

Recognition of such a government “right” to manufacture or trade arms would be a human rights catastrophe. Consider, for example, Zimbabwe. China has prevented the imposition of a U.N. embargo on Zimbabwe,<sup>54</sup> but the E.U. has imposed its own embargo.<sup>55</sup> Under an ATT, Zimbabwe would argue that: (1) the Zimbabwe government has an internationally recognized “right” to arms; (2) the ATT enforcement body has refused (thanks to pressure from China) to impose an arms embargo on Zimbabwe; (3) therefore, an arms embargo by the E.U., or anyone else, is a violation of Zimbabwe’s “rights” under international law and is void.

Unsurprisingly, because the push for the ATT is the product of gun prohibition NGOs, the ATT does not even acknowledge the existence of the *personal* right of arms, even though that right is explicitly guaranteed by several national constitutions (United States, Mexico, Haiti, and Guatemala). Nor does the draft ATT acknowledge the rights of personal self-defense, the right to resist tyranny, and the right of security in the home (which implies a right to resist unlawful home invasions), though these rights are guaranteed by dozens of national constitutions.<sup>56</sup> Thus,

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50. See SARAH PARKER, U.N. INST. FOR DISARMAMENT RESEARCH, ANALYSIS OF STATES’ VIEWS ON AN ARMS TRADE TREATY (Oct. 2007), available at <http://www.docstoc.com/docs/2411122/Analysis-of-States-Views-on-an-Arms-Trade-Treaty>; see also PARKER, *supra* note 2.

51. See PARKER, *supra* note 50; see also PARKER, *supra* note 2.

52. See PARKER, *supra* note 50, at § 3.4.1. The U.N. Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51, available at <http://www.un.org/en/documents/charter/chapter7.shtml>.

53. See PARKER, *supra* note 50, at § 3.4.1.

54. PAUL HOLTOM & NOEL KELLY, STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2009, at app. 12A, available at <http://www.sipri.org/yearbook/2009/12/12A>.

55. *Id.*

56. See David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 137-47 (2007):

the ATT's willful blindness towards personal rights, combined with its invention of government rights, would serve to undermine any arms embargo imposed outside the ATT process itself.

While the ATT submissions indicated that states were worried about weapons transfers that aid human rights violators,<sup>57</sup> the states showed strong desire to maintain their sovereignty and their safety from rogue nations.<sup>58</sup> Significantly, "[m]any submissions stated that national implementation must remain the sole responsibility of each member state and that final decisions regarding the authorization of each transaction must lie within the competence of each state party."<sup>59</sup>

But of course such decision-making would make the ATT nearly worthless. If each state is the authority for the legality of its actions under the ATT, then the Mugabe regime in Zimbabwe can simply declare that it has a wonderful record on human rights and that it never uses arms to violate human rights. China can then accept as binding Zimbabwe's self-declaration and continue to supply arms to the Mugabe thugocracy. Quite understandably, the NGO advocates of the ATT want

Right of self-defense: Antigua & Barbuda, the Bahamas, Barbados, Belize, Cyprus, Grenada, Guyana, Honduras, Jamaica, Malta, Nigeria, Peru, Samoa, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Slovakia, and Zimbabwe.

Right to resist tyranny: Andorra, Argentina, Congo, Greece, Guatemala, Honduras, Hungary, Lithuania, Mauritania, Peru, Portugal, Romania, and Slovakia.

Right of security in the home: Afghanistan, Andorra, Angola, Antigua and Barbuda, Armenia, Azerbaijan, Bahamas, Belarus, Belgium, Belize, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, China, Congo, Cuba, Dominican Republic, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, Germany, Grenada, Guatemala, Guyana, Honduras, Hong Kong, Iran, Ireland, Italy, Jamaica, Jordan, Kuwait, Latvia, Lebanon, Liberia, Libya, Luxembourg, Macedonia, Madagascar, Mongolia, Nepal, Nicaragua, Niger, Oman, Panama, Paraguay, Peru, Portugal, Qatar, Romania, Russia, Rwanda, St. Christopher and Nevis, St. Lucia, St. Vincent, Slovakia, Saudi Arabia, South Korea, Spain, Suriname, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uruguay, Venezuela, Vietnam, Zambia, and Zimbabwe.

Obviously many of the governments of the above countries do not obey the requirements of their own constitutions—a fact that casts further doubt on their willingness to adhere to international arms control treaties.

57. See PARKER, *supra* note 2, at § 8.3 ("Consideration of the possibility that arms transferred might be used to violate international humanitarian law (IHL) was the second most frequently suggested criterion by states.").

58. See *id.* at § 4 ("Other purposes attributed to an ATT by states included to prevent diversion, to prevent proliferation, to induce transparency, to prevent the destabilizing accumulation of arms, to prevent misuse and to prevent illegal transfers."); AMNESTY INT'L, A GLOBAL ARMS TRADE TREATY, *supra* note 48, at 26:

[M]any states agreed that one of the criterion to be included in assessing transfers is whether there will be a violation of UN Charter principles including the prohibition against the use or threat of force and the prohibition against intervening in the domestic affairs of other states, enshrined in Articles 2(4) and 2(7). These are key provisions in the UN's mandate to maintain international peace and security and form cornerstones of the UN Charter.

59. See AMNESTY INT'L, A GLOBAL ARMS TRADE TREATY, *supra* note 48, at 24 (internal citation omitted).

much stronger limitations on arms transfers than many individual states do.<sup>60</sup>

Amnesty International declares: “States shall not authorise international transfers of arms or ammunition that violate their expressed obligations under international law,”<sup>61</sup> “[s]tates shall not authorise international transfers of arms or ammunition where they will be used or are likely to be used for violations of international law . . .,”<sup>62</sup> and “[s]tates shall take into account other factors, including the likely use of the arms or ammunition, before authorising an arms transfer. . . .”<sup>63</sup> Control Arms points out that already “[t]here is also a universal obligation on States to ensure respect for the rules of international humanitarian law. Without the inclusion of these elementary principles an ATT will simply not be effective.”<sup>64</sup>

But whatever the ATT says that states “shall” do, the ATT will be futile if “shall” means nothing more than “states shall, based solely on their own determination of their obligations. . . .”

As of mid-2009, the draft ATT would require states to submit annual reports about their compliance to an ATT review panel, similar to the panels that exist for other human rights treaties. The ATT panel could, in theory, declare that a state’s report was false or incomplete and could announce that a state was in violation of the ATT. As with other human rights treaties (discussed below), the ATT panel would be able to do nothing more than write some stern words of criticism.

In contrast, the U.N. Security Council has enormous tools at its disposal to enforce its embargoes. The Security Council can authorize or order member states to use force against embargo violators. The ATT panel, on the other hand, could, at most, ask the Security Council to do something. So an ATT embargo would add no coercive force (and

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60. See HILDE WALLACHER & CLARE DA SILVA, INT’L PEACE RESEARCH INST., *PROGRESSING TOWARDS AN ARMS TRADE TREATY* 24 (July 7, 2008) (“The importance of linking the work of an ATT to a human rights framework is evident from the historical record, which reveals connections between the arms trade and gross violations of human rights.”).

61. See AMNESTY INT’L, *COMPILATION OF GLOBAL PRINCIPLES FOR ARMS TRANSFERS* 3 (2006) [hereinafter *COMPILATION OF GLOBAL PRINCIPLES*] available at <http://www.amnesty.org/en/library/asset/POL34/003/2007/en/dom-POL340032007en.pdf>.

62. *Id.* at 4.

63. *Id.* at 5.

64. See ARMS TRADE TREATY STEERING COMMITTEE, *ASSESSING THE FEASIBILITY, SCOPE AND PARAMETERS OF AN ARMS TRADE TREATY (ATT): AN NGO PERSPECTIVE 1* (2007), available at <https://www.controlarms.org/peoples-consultation/documents/ATT%20position%20paper%20designed%20exec%20summary.pdf>; see also WALLACHER & DA SILVA, *supra* note 60, at 24 (For an ATT, “international human rights law is seen as the most important criterion. . . .”)

would indeed usually have less coercive force) than a Security Council embargo.

In terms of enforcement power against sovereign states, the ATT would be a considerable step down from a Security Council embargo. Human rights violators might prefer to operate in an ATT world. When human rights advocates call for an embargo against a government that uses small arms to violate human rights, the government (and its allies) could urge the Security Council to avoid the issue and to let the ATT panel take the lead. The result would be a sham embargo, with no enforcement other than the ATT panel's reports describing violations.

Already the international arms control process has shown the enormous gap between "states shall . . ." and "states actually will. . . ." Consider the issue of transparency.

*Compilation of Global Principles for Arms Transfers*<sup>65</sup> was written by the Arms Trade Treaty Steering Committee, comprised of NGOs.<sup>66</sup> According to Principle 5: "States shall submit comprehensive national annual reports on all their international arms and ammunition transfers to an international registry, which shall publish a compiled, comprehensive, international annual report. Such reports should cover the international transfer of all conventional arms and ammunition including small arms and light weapons."<sup>67</sup>

Yet states are already rejecting transparency.<sup>68</sup> The U.N. currently maintains a Register of Conventional Arms (UNROCA). At present, the UNROCA does not mandate reports on small arms, but states can voluntarily submit small arms information to UNROCA.<sup>69</sup> Although thirty-seven African states have stated that they wish to create SALW transparency in order to control SALW proliferation, only four have reported to UNROCA.<sup>70</sup> The gap between what member state

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65. COMPILATION OF GLOBAL PRINCIPLES, *supra* note 61.

66. *Id.*

67. *Id.* at 6.

68. See EDWARD J. LAURANCE, FOREIGN AFFAIRS & INT'L TRADE CANADA, THE UNITED NATIONS CONVENTIONAL ARMS REGISTER (UNCAR): PRESENT CHALLENGES, NEW DIRECTIONS (2001), available at <http://www.international.gc.ca/arms-armes/isrop-prisi/research-recherche/verification/laurance2001/index.aspx>.

69. The seven UNROCA categories are battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, and missiles and missile launchers. See PAUL HOLTOM, STOCKHOLM INT'L PEACE RESEARCH INST., TRANSPARENCY IN TRANSFERS OF SMALL ARMS AND LIGHT WEAPONS, REPORTS TO THE UNITED NATIONS REGISTER OF CONVENTIONAL ARMS, 2003-2006, at 52-53 (2008), available at <http://books.sipri.org/files/PP/SIPRIPP22.pdf>.

70. See HOLTOM, *supra* note 69, at 49; see also Björn Hagelin, Mark Bromley & Siemon T. Wezeman, *International Arms Transfers*, in SIPRI YEARBOOK 2006, ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY, 449, 471 (2006). In the context of the seven UNROCA categories, Hagelin, Bromley and Wezeman state: "There are signs of political fatigue with regard to UNROCA reporting, visible even among some strong supporters of the principle of transparency in arms transfer." *Id.*

delegations announce at the U.N. and what member state governments actually do is enormous.

*C. Dictatorships and Human Rights Treaty Compliance*

The mantra of ATT advocates is that the ATT would create globally binding arms embargoes, which under international law, all nations (or at least all signatories to the ATT) would be required to obey.

But what the ATT proponents tend to elide is whether the signatory nations *would* obey. Among free nations, such as those of the E.U., compliance with international human rights obligations is generally good. In free nations, there is a tendency for the public and for government officials to value the rule of law—that is, for the government itself to be bound by the law. A free press and a political system somewhat responsive to public demands combine to create pressure for the government to live up to its international humanitarian law obligations. Accordingly, an ATT might be expected to affect the behavior of free nations.

However, as we shall see below in the case studies of Zimbabwe and the DR Congo, the major arms sources for human rights violators tend to be dictatorial governments or smugglers who operate with the covert tolerance of such governments. Would these governments comply with ATT legal obligations?

The record suggests that many of these governments would sign and ratify the ATT without the slightest intent of compliance. In the article *International Human Rights Law and the Politics of Legitimation: Repressive State and Human Rights Treaties*, Emilie M. Hafner-Burton, Kiyoteru Tsutsui, and John W. Meyer performed a quantitative study of human rights treaty ratification by repressive governments.<sup>71</sup> The authors studied seven treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC);

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Among the reasons for refusal to submit information could be reluctance to reveal data regarding a state's military expenditures versus the total budget, or the state's potential military weakness.

71. Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT'L SOC. 115 (2008).

and the Convention on the Protections of the Rights of All Migrant Workers and Members of the Families (MWC).<sup>72</sup>

They found that repressive governments were at least as likely as were free governments to ratify human rights treaties.<sup>73</sup> Particularly likely to sign were repressive regimes that were autonomous; that is, the regimes had such dominance over civil society that they had no worries that ratification of an international treaty might provide a useful talking point for domestic dissidents.<sup>74</sup>

For example, Saudi Arabia, with a thoroughly unfree and misogynist government, has ratified the CEDAW.<sup>75</sup> Apparently the Saudi government did not worry that CEDAW would provide ammunition for Saudi feminists to criticize Saudi government practices, since feminist speech is so utterly suppressed.

In contrast, the government of Malaysia is repressive but not autonomous; accordingly, the government has refrained from ratifying certain human rights treaties for fear that they might provide arguments, which could be deployed by domestic opposition groups.

Notably, China has ratified five of the above seven treaties and has signed the other two.<sup>76</sup> Yet China is in flagrant violation of every one of them, except for CEDAW.<sup>77</sup> China also happens to be massive arms exporter, particularly to human rights violators.<sup>78</sup> ATT proponents have yet to explain why China, assuming it ratified the ATT, would obey the ATT even though China routinely and massively violates other human rights treaties it has ratified.

The authors conclude that repressive regimes, especially autonomous regimes, ratify human rights treaties as an easy means of acquiring some global legitimacy, even though the regimes know that they are unwilling or unable to comply with the treaties.<sup>79</sup>

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72. *Id.* at 118 tab. 1.

73. *Id.* at 123.

74. Hafner-Burton, Tsutsui & Meyer, *supra* note 71, at 124.

75. *Advocates Call for For Senate Ratification Of CEDAW, Commemorate International Women's Day*, MEDICAL NEWS TODAY, Mar. 10, 2009, available at <http://www.medicalnewstoday.com/articles/141624.php> (last visited Oct. 7, 2009).

76. Hafner-Burton, Tsutsui, & Meyer, *supra* note 71, at 119.

77. See, e.g., FREEDOM HOUSE, FREEDOM IN THE WORLD 2009: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES (2009); FREEDOM HOUSE, FREEDOM OF THE PRESS 2009: A GLOBAL SURVEY OF MEDIA INDEPENDENCE (2009); Ashley Esarey, FREEDOM HOUSE, SPEAK NO EVIL: MASS MEDIA CONTROL IN CONTEMPORARY CHINA (Feb. 2006), available at [http://www.freedomhouse.org/uploads/special\\_report/33.pdf](http://www.freedomhouse.org/uploads/special_report/33.pdf).

78. See, e.g., David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1289 (2006); Arkar Moe, *Nobel Laureates Call for Arms Embargo on Burma*, THE IRRAWADDY, May 22, 2009, available at [http://www.irrawaddy.org/article.php?art\\_id=15708](http://www.irrawaddy.org/article.php?art_id=15708).

79. For similar research, see James R. Katalikawe, Henry M. Onoria & Baker G. Wairama, *Crisis and Conflicts in the African Great Lakes Region: The Problem of Noncompliance with Humanitarian Law*, in INTERNATIONAL LAW AND ORGANIZATIONS:

China also has an established record of violating the arms control agreements to which it purports to adhere. In a 2005 report on implementation of the Programme of Action from the U.N.'s 2001 small arms conference, China described its arms export policies as "cautious and responsible."<sup>80</sup> Amnesty International pointed to China's record in supplying arms to the dictatorships of Myanmar, Pakistan, and Sudan as evidence of "a dangerously permissive approach."<sup>81</sup>

And lest one think that China is the only major power that violates its arms control commitments, the sales of military and dual-use equipment to China by firms in Canada, Russia, Europe, and the United States appear to be violations of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which was agreed to by the governments of the nations of the exporting corporations.<sup>82</sup>

#### D. *Black Markets*

Almost by definition,<sup>83</sup> the extent of the black market in small arms and light weapons is unknown. The International Institute of Strategic Studies (IISS) suggests a figure of two to ten billion dollars (U.S.) annually, while the International Committee of the Red Cross (ICRC) places the annual figure at ten to fifteen billion dollars (U.S.).<sup>84</sup> In a paper for the European Institute on Crime Prevention and Control, Peter Lock suggested that more information about arms transfers is needed and that governments need to intensify their efforts at supply-side control because "[b]lack market networks appear to be able to deliver small

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CLOSING THE COMPLIANCE GAP 121 (Edward C. Luck & Michael W. Doyle eds., 2004) (African governments ignore humanitarian international law, including the Geneva Conventions); Jeffery Herbst, *International Laws of War and the African Child: Norms, Compliance, and Sovereignty* in *id.* at 185 (massive and widespread violations of the African Charter on the Rights and Welfare of the Child).

80. AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA SUSTAINING CONFLICT AND HUMAN RIGHTS ABUSES: THE FLOW OF ARMS ACCELERATES 2 (June 11, 2006) [hereinafter "AMNESTY INT'L, CHINA"] (quoting Report of China to the U.N. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, § 7 (June 23, 2005)).

81. AMNESTY INT'L, CHINA, *supra* note 80, at 2.

82. *Id.* at 30.

83. See R.T. Naylor, *The Structure and Operation of the Modern Arms Black Market*, in *LETHAL COMMERCE: THE GLOBAL TRADE IN SMALL ARMS AND LIGHT WEAPONS* 44, 45 (Jeffrey Boutwell, Michael T. Klare & Laura W. Reed eds., 1995) ("Probably the simplest way to understand the essence of a black-market transaction, then, is to recall that 'black' is not a color—it is the absence of light.")

84. See Peter Chalk, *Light Arms Trading in SE Asia*, JANE'S INTELLIGENCE REVIEW, Mar. 1, 2001, reprinted by Rand Corp., available at <http://www.rand.org/commentary/2001/03/01/JIR.html>.

arms, if necessary in large quantity, whenever and where ever effective demand articulates itself.”<sup>85</sup>

But transparency of transfers could be difficult to achieve, and counting on government efforts might be unrealistic. R.T. Naylor, a professor of economics at McGill University in Canada, explains: “Supplying countries hide their sales for political and financial reasons; recipient countries hide their purchases, mainly for political reasons.”<sup>86</sup> So, “[h]istorically, many, perhaps most, black-market deals had at least the tacit agreement (and often the act of collaboration) of the intelligence services of one or several states.”<sup>87</sup> Naylor concluded: “Attacking the actual trafficking seems doomed to failure, given the frequent complicity of governments and the sophistication of the machinery for covertly moving weapons to market and moving the money back.”<sup>88</sup>

ATT advocates promise that stronger controls and harsher sanctions will halt the flow of weapons. But as Moisés Naím, editor-in-chief of *Foreign Policy* magazine, observes: “History and common sense say that, in the long run, market forces tend to prevail over those of governments . . . . Today, conditions for trafficking are the best they have ever been.”<sup>89</sup> As Naím shows, prohibition failure is nothing new; beginning in third century B.C., governments in China and Rome imposed very high taxes on salt.<sup>90</sup> Yet despite harsh penalties, the governments were unable to control the smugglers.<sup>91</sup> Much later, France

85. PETER LOCK, THE EUROPEAN INST. FOR CRIME PREVENTION & CONTROL, PERVASIVE ILLICIT SMALL ARMS AVAILABILITY: A GLOBAL THREAT 15 (1999), available at <http://www.heuni.fi/uploads/cu841.pdf>.

86. See Naylor, *supra* note 83, at 44.

87. See *id.*

88. See *id.* at 55; see also *Public Enquiry on Arms*, VANGUARD (Lagos), Jan. 21, 2008, available at <http://allafrica.com/stories/200801220077.html> (“COURT martial of 15 soldiers, among them three colonels, two lieutenant colonels, one major and nine non-commissioned officers may just reveal a tip of the ease with which arms get into unauthorised through official sources.”); Ernest Mpinganjira, *Illegal arms trade*, THE EAST AFRICAN STANDARD, July 3, 2005 (“A Ugandan national . . . has revealed how gun merchants keep the region’s presidents, business tycoons and senior military officers on their payroll . . . . The complex trafficking web has ensnared a leading Kenyan politician who has run for the Presidency . . . . In its findings, IPIS [International Peace Information Service] indicts the United Nations and the European Union for doing little to stop the arms trade in the region despite knowing the governments, companies and individuals . . . .”); Human Rights Watch, *Liberia: Guinea Flouts Arms Embargo*, Nov. 5, 2003, reprinted in *Global Policy Forum*, available at <http://www.globalpolicy.org/security/issues/liberia/2003/1105flouts.htm> (“Guinea’s Ministry of Defense ordered mortars and other ammunition from Iran and arranged their onward transport to LURD.” According to Lisa Misol, arms researcher with Human Rights Watch, “By supplying munitions to the Liberian rebels, it not only breached an arms embargo, but also became complicit in egregious violations of the laws of war.” *Id.*).

89. MOISÉS NAÍM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 222-23 (2005).

90. *Id.* at 223.

91. *Id.*

even imposed the death penalty and imprisoned thousands of people every year for smuggling, which evaded the salt tax, but the government was unable to suppress the black market for the white substance.<sup>92</sup>

Indeed, world history reveals no successful black market, including one in arms, having been defeated by supply-side controls, and there is no reason to believe that supply-side prohibitions on arms today will be any more successful.<sup>93</sup>

Demand-side reductions may be more successful at producing disarmament. For example, if a government can provide effective security in a region, the citizens may feel less need for their personal defensive arms.<sup>94</sup> Unlike ordinary peaceable citizens, governments and warlords that violate human rights are implausible targets for demand-side reduction. Warlords would not be warlords if they disarmed.<sup>95</sup> Tyrants, like Mugabe, would be overthrown if they gave up their weapons.

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92. MARK KURLANSKY, *SALT: A WORLD HISTORY* 233 (2002) (“By the late eighteenth century, more than 3,000 French men, women, and even children were sentenced to prison or death every year for crimes against the gabelle.”).

93. See R.T. NAYLOR, *WAGES OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY* 11 (2002) (“[N]ever in history has there been a black market defeated from the supply side . . .”); *id.* at 130 (“At all three levels of the supply side—production of new equipment (primary), distribution of old stocks (secondary), and dispersion of arms into the hands of the end-user population (tertiary)—the obstacles to control are formidable.”); see also Naylor, *supra* note 83, at 55 (“Attacking the actual trafficking seems doomed to failure . . .”).

94. See Jurgen Brauer & Robert Muggah, *Completing the Circle: Building a Theory of Small Arms Demand*, 27 *CONTEMP. SEC. POL’Y* 138, 138-39 (2006), available at <http://www.contemporarysecuritypolicy.org/assets/CSP-27-1-Muggah.pdf>:

Much research, writing, and policymaking has been devoted to generating awareness of, and responses to, the supply side of the small arms market, such as export control regimes, weapon registries, and arms and ammunition marking and tracing. It is hoped that by regulating the international and regional supply of small arms, and by preventing or tracking illegal flows that drift into open markets, arms acquisition and hence armed violence can be reduced.

Yet a growing cadre of academics, practitioners, and policymakers question the emphasis on the supply side and seek to examine and understand factors that drive the demand side. For example, both the United Nations Programme of Action (PoA) and the then-Organization of African Unity’s Bamako Declaration refer to a number of areas where demand reduction can be pursued. While proposed interventions are vague and often amount to keeping the status quo, they conclude that the promotion of security, conflict prevention and resolution, crime prevention, and the promotion of health and development can reduce people’s desire to acquire (and ultimately use) small arms. Although a discussion on small arms demand is thus launched, the majority of the policy recommendations emerging from these and other texts continue to advance predominantly supply-side oriented approaches to arms control.

95. Warlords can become interested in giving up their arms if they feel that they are losing the war, and that they will be better off if they conclude a peace agreement sooner rather than later. Some warlords in the DRC appear to have done so, at least partially.

ATT proponents do not explain how they intend to mete out punishments or other sanctions that are sufficiently strong and certain in order to shut down, or even significantly impair, the illicit trade that supplies arms to tyrants, warlords, and other human rights violators.

It is possible to imagine that an ATT could lead to *more* embargoes than does the current system of embargoes imposed by the U.N. Security Council; after all, ATT embargoes, at least as conceived by some of ATT proponents, would not be subject to veto by the permanent members of the Security Council. But it is difficult to see how an ATT embargo could be enforced any more effectively than a Security Council embargo. A Security Council resolution under Chapter VII is, after all, the most powerful form of international law: a mandatory directive, which no U.N. member state has the legal authority to avoid obeying and which is not subject to the member state's own interpretation of its obligations. Further, a Security Council resolution under Chapter VII necessarily has the support (or at least the non-opposition) of the world's two most powerful nations (the United States and China), plus Russia, France, and the United Kingdom, all of which have extensive military operations in foreign countries. If such a mass of power cannot make arms embargoes effective against the black market, there is no reason to imagine that an ATT, which would be backed up by nothing more than a nation's willingness to comply with international law, would be *more* effective.

## II. ZIMBABWE

The government of Zimbabwe is precisely the kind of government that should not be allowed to buy arms. During the most recent election, which, like the one before that and the one before that, was stolen by dictator Robert Mugabe, the government perpetrated extensive and often-lethal violence against political opponents and against people who protested the election fraud.<sup>96</sup>

Arms in the hands of the Zimbabwe National Army, the Zimbabwe Republic Police Force, the Central Intelligence Organisation, and youth militias run by Mugabe's ZANU-PF party have been used to violently suppress political opposition and to ensure the government's control of the food supply.<sup>97</sup>

This is nothing new; in mid-1983, the Army's Fifth Brigade, which had been trained by North Koreans, carried out mass murder, rape,

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96. See Caroline Hawley, *Witnesses describe Zimbabwe violence*, BBC NEWS, June 10, 2008; Guy Lamb, Inst. for Sec. Studies, *Seven Reasons to Impose an Arms Embargo on Zimbabwe*, ISS TODAY, July 16, 2008, available at [http://www.issafrica.org/index.php?link\\_id=5&slink\\_id=6291&link\\_type=12&slink\\_type=12&tmpl\\_id=3](http://www.issafrica.org/index.php?link_id=5&slink_id=6291&link_type=12&slink_type=12&tmpl_id=3) (last visited Oct. 14, 2009).

97. Peter Kagwanja, *Zimbabwe's March 2005 Elections: Dangers and Opportunities*, 14 AFR. SEC. REV. 5, 7-8 (2005).

torture, and kidnapping in Zimbabwe's Midlands and Mataberland.<sup>98</sup> As the United Nations reported, during the late twentieth and early twenty-first century, Zimbabwe took advantage of the wars going on inside the Democratic Republic of the Congo to invade southern regions of the DRC and loot the mineral wealth there.

Thanks to China, there is no U.N. Security Council embargo targeting Zimbabwe. As *The Guardian* notes, "China has in the past used its veto at the UN security council to prevent the Zimbabwe issue from being raised, on the grounds that the country's problems were an internal matter."<sup>99</sup>

Nor is there an African Union embargo. There is an E.U. arms embargo, but it is binding only on E.U. countries.<sup>100</sup>

#### A. *South Africa's Illegal Assistance in Arms Transfers to Zimbabwe*

A large supply of Chinese-made weapons, ordered in January 2008 by the Zimbabwe government, was shipped from China on March 15, 2008, arriving at the port of Durban, South Africa, a month later.<sup>101</sup> Despite an injunction from South Africa's High Court on April 18, 2008, and South African Transport and Allied Workers Union's refusal to unload the ship,<sup>102</sup> South Africa's National Conventional Arms Control Committee approved the transfer of arms through South Africa to

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98. Brian Kagoro, *The Prisoners of Hope: Civil Society and the Opposition in Zimbabwe*, 14 AFR. SEC. REV. 19, 22 (2005).

99. David Beresford, *Chinese Ship Carries Arms Cargo to Mugabe Regime*, THE GUARDIAN (U.K.), Apr. 18, 2008; see also Lamb, *supra* note 96. In July 2008, despite the violence surrounding Zimbabwe's presidential election, both China and Russia vetoed another attempt by the U.N. Security Council to impose an arms embargo. *Id.*

100. See Stockholm Int'l Peace Research Inst., EU arms embargo on Zimbabwe, [http://www.sipri.org/research/armaments/transfers/researchissues/controlling/arms\\_embargoes/eu\\_arms\\_embargoes/zimbabwe/zimbabwe/?searchterm=zimbabwe\\_embargo](http://www.sipri.org/research/armaments/transfers/researchissues/controlling/arms_embargoes/eu_arms_embargoes/zimbabwe/zimbabwe/?searchterm=zimbabwe_embargo) (last visited Nov. 10, 2009).

101. HUMAN RIGHTS FIRST, CHINA'S ARMS SALES TO ZIMBABWE: FACT SHEET, available at <http://www.humanrightsfirst.info/pdf/080428-CAH-china-zimbab-arms-fs.pdf>.

102. See *Phillip v. Nat'l Convention Arms Control Comm.*, no. 4975/08 (High Ct. of S. Afr., Durban & Coast Local Div. Apr. 18, 2008); U.N. Integrated Reg'l Info. Networks, *Ship of Shame Adrift in Controversy*, Apr. 22, 2008:

The ship was denied entrance to Durban by the collective efforts of a news magazine editor, Martin Welz, who warned of the ship's impending arrival, industrial action by members of the South African Transport and Allied Workers Union, who said they would not unload the cargo, and the Southern African Litigation Centre, which obtained a High Court order on 18 April, prohibiting passage of the weapons across South African soil.

See also George Conger, *New Archbishop Calls for Arms Embargo on Zimbabwe*, THE CHURCH OF ENGLAND NEWSPAPER, Apr. 30, 2008, available at <http://geoconger.wordpress.com/2008/04/30/new-archbishop-calls-for-arms-embargo-on-zimbabwe-cen-43008/>.

landlocked Zimbabwe.<sup>103</sup> South African Secretary of Defence January Masilela stated: “If the buyer is the Zimbabwean sovereign government and the seller is the Chinese sovereign government, South Africa has nothing to do with that.”<sup>104</sup>

At the U.N. Security Council in 2008, the South African government joined Libya, Vietnam, Russia, and China in voting against the proposed arms embargo on the Zimbabwe regime.<sup>105</sup> The South African vote was justified on the claim that the U.N. Charter forbids interference in Zimbabwe’s internal affairs.<sup>106</sup> Never mind that the current ruling party in South Africa is the African National Congress (ANC), a violent revolutionary organization, which fought a war against South Africa’s former apartheid government—and which convinced the U.N. Security Council to impose an arms embargo on the South African apartheid government in 1977.<sup>107</sup> The institutionalized racial discrimination of apartheid was a serious violation of human rights—and the mass murders of the Mugabe regime in Zimbabwe are likewise enormous violations of human rights. Greater violations, indeed, if one considers murdering a person to be worse than restricting him because of his skin color.

Yet the present ANC regime in South Africa angles for leadership of Africa (a continent where dictatorships outnumber legitimate governments), and thus for a permanent seat on the Security Council, by pandering to anti-Western rhetoric.<sup>108</sup> So supposedly, the ANC’s war against the Afrikaners (descendants of Dutch settlers who had arrived in Africa before the Pilgrims landed on Plymouth Rock) was an authentic effort of African liberation from non-African power. And, supposedly, any effort to interfere with Robert Mugabe’s mass murder of black Africans is just a form of Western imperialism.

International issues aside, South Africa’s own Arms Control Act should have precluded approval of the transfer through South Africa.<sup>109</sup>

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103. See Beresford, *supra* note 99.

104. *Zimbabwe Arms Ship Quits S Africa*, BBC NEWS, Apr. 19, 2008; see also Beresford, *supra* note 99 (Themba Maseko, South African head of government information, stated, “We are not in a position to act unilaterally and interfere in a trade deal between two countries.”).

105. Benny Avni, *Pretoria’s Cynicism At the U.N.*, N.Y. SUN, Feb. 20, 2007, available at <http://www.nysun.com/article/48919>; Colum Lynch, *South Africa’s U.N. Votes Disappoint Some*, WASH. POST, Apr. 16, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/15/AR2007041500996.html>.

106. *Id.*

107. *Id.*

108. Marian Tupy, *Shame the Beloved Country*, N.Y. SUN, July 18, 2008.

109. Nat’l Conventional Arms Control Act 41 of 2002 § 15, “When considering applications contemplated in section 14 the [arms export permitting] Committee must . . . (d) avoid transfers of conventional arms to governments that systematically violate or suppress human rights and fundamental freedoms . . .”).

As one newspaper pointed out: “The act clearly instructs SA to ‘avoid transfers of conventional arms to governments that systematically violate or suppress human rights . . . .’”<sup>110</sup> So South Africa *already* had a legal obligation, under its domestic law, to block the transfer, and yet it approved the transfer.

South Africa is a democratic nation with a functioning judiciary and a free press. If even democracies will violate their own arms embargoes for reasons of realpolitik, it is unrealistic to think that dictatorships are going to be constrained by international treaty obligations. South Africa’s behavior underscores the fact that *even when there are strong, binding legal obligations*, arms transfer prohibitions can still be ignored. *The Zimbabwean* charged that the government of South Africa “is guilty, at best, of a weak-kneed stance on Zimbabwe, and at worst, actively supporting Mugabe and his thugs’ diabolical behaviour.”<sup>111</sup>

At the United Nations, no national delegation outdoes South Africa’s in self-righteous pronouncements about the need for tough international anti-gun treaties. Never mind that the ATT would have made it illegal for the revolutionary ANC to acquire arms. And never mind that the ANC government refuses even to obey South African gun control laws written by the selfsame ANC government.

#### B. *The Chinese Government’s Arms Supply to Mugabe*

China carries on a thriving arms trade with the Mugabe dictatorship. In 2008, China delivered ammunition to Zimbabwe by having it first shipped to Sudan, then into the Democratic Republic of Congo (in flagrant violation of the U.N. arms embargo for the DRC) and from there to Zimbabwe.<sup>112</sup> Chinese troops have been spotted in Zimbabwe, apparently helping the Mugabe regime protect China’s considerable neo-colonial investments in mining operations.<sup>113</sup> In an article describing the Chinese dictatorship as “The Secret Policeman’s Saviour,” the military intelligence Web site StrategyPage reported:

China is mainly interested in raw materials, which Zimbabwe has lots of (especially gold and platinum). China is selling Zimbabwe communications systems, military trucks and jet fighters, items the country needs to maintain the current dictatorship. Radio jamming

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110. See Editorial, *The Ship of Shame*, THE ZIMBABWEAN, Apr. 22, 2008, available at <http://allafrica.com/stories/200804220305.html>. *The Zimbabwean* is published in the United Kingdom and offers news by exiled Zimbabwean journalists.

111. See *id.*

112. *Gunrunning To Zimbabwe*, STRATEGYPAGE, December 23, 2008, (last visited Oct. 14, 2009).

113. *Asian Mercenaries in Zimbabwe*, STRATEGYPAGE, April 24, 2008, <http://www.strategypage.com/htm/htpara/articles/20080424.aspx?comments=Y> (last visited Oct. 14, 2009).

equipment, to keep out broadcasts criticizing dictator Robert Mugabe, was also provided by China. Apparently, Chinese advisors have been working with Zimbabwean secret police and intelligence organizations.<sup>114</sup>

The only Chinese arms transfer that attracted significant international attention was the “Ship of Shame” in early 2008, which coincided with the violent repression surrounding another stolen election in Zimbabwe. The ship, the *An Yue Jiang*, was loaded with “3.5 million rounds of ammunition for AK-47 assault rifles and pistols, 1500 RPG rockets, and 2,500 mortar shells (60mm and 81mm)”<sup>115</sup> from Poly Technologies, a Chinese arms manufacturer, which is one of the world’s leading suppliers of AK-47 rifles, and which is run by former Chinese military officials.<sup>116</sup>

Because of the upcoming Beijing Olympics, the Chinese government was particularly sensitive to negative international publicity. Accordingly Jiang Yu, the Chinese foreign ministry spokesperson, stated that the China Ocean Shipping Company (the merchant marine for the Chinese military) “decided to recall the ship.”<sup>117</sup> The U.S. Department of State passed on that claim to the U.S. Senate.<sup>118</sup>

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114. *The Secret Policeman’s Savior*, STRATEGYPAGE, April 3, 2006, <http://www.strategypage.com/htm/htpara/articles/20060403.aspx> (last visited Oct. 14, 2009); see also *Chinese Warplanes Over Africa*, STRATEGYPAGE, April 7, 2009, <http://www.strategypage.com/htm/htairfo/20090407.aspx> (last visited Oct. 14, 2009). Russia had also supplied weaponry to the Zimbabwe dictatorship, but stopped doing so after the bills were not paid. *Procurement*, STRATEGYPAGE, June 27, 2001, <http://www.strategypage.com/htm/htproc/articles/20010627.aspx> (last visited Oct. 14, 2009).

115. *Disarming Zimbabwe*, STRATEGYPAGE, April 21, 2008, <http://www.strategypage.com/htm/htproc/articles/20080421.aspx?comments=Y> (last visited Oct. 14, 2009).

116. *Chinese Gunrunners Persist*, STRATEGYPAGE, April 28, 2008, <http://www.strategypage.com/htm/htmurph/articles/20080428.aspx?comments=Y> (last visited Oct. 14, 2009).

117. *China Recalls Weapons Shipment*, ALLAFRICA.COM, available at <http://allafrica.com/stories/printable/200804240286.html> (last visited Oct. 14, 2009).

118. See Brett D. Schaefer, *Zimbabwe: How China kept Mugabe in Power*, THE AFRICAN EXECUTIVE, July 23-28, 2008, available at <http://www.africanexecutive.com/modules/magazine/articles.php?article=3351&magazine=186>:

Nonetheless, on June 5, Deputy Assistant Secretary of State Thomas Christensen told the Senate that “it’s our understanding that that shipment of arms sales—that shipment of arms, which is over \$1 million, we believe, in arms—was sent back to China.” Although Christensen attributed the recall as a response to concerns voiced by the international community, the U.S. government has been unable to verify the Chinese foreign ministry’s statement that the cargo had, in fact, returned to China with the *An Yue Jiang*.

See also Keren Ben-Zeev, *Zimbabwe: Crossing the stretching gulf between a military regime and a civilian state*, HEINRICH BÖLL STIFTUNG, at n.26, available at [http://www.boell.de/downloads/intlpolitics/2008-08-29\\_Keren.pdf](http://www.boell.de/downloads/intlpolitics/2008-08-29_Keren.pdf) (“[A]fter offloading construction materials in Luanda, the *An Yue Jiang* had to return to China without having

However, it appears that the Chinese government lied. StrategyPage had noted that “Poly Technologies has a reputation for getting the goods delivered, no matter what.”<sup>119</sup> Poly Technologies got the job done. After South African dockworkers refused to unload the *An Yue Jiang*, reports surfaced that the ship was headed to Mozambique.<sup>120</sup> Then the ship reappeared in Angola, whose dictatorship is closely allied with Mugabe.<sup>121</sup> Because of intense international pressure, the ship did not initially have authorization to dock in Luanda.<sup>122</sup> An anonymous Angolan government source stated: “The government does not have any intention to allow that vessel into the country. Given the ongoing volatile political situation in Zimbabwe, we believe we need to approach this issue very carefully.”<sup>123</sup>

Unfortunately, the government of Angola made a hasty about-face and permitted the ship to dock, but said that the only offloading would be for construction products.<sup>124</sup> In Luanda, Angola, the ship was observed closely. The International Transport Workers’ Federation reported “there had been no attempt to offload armaments . . . . Trade unionists, including members of the Angolan port workers’ union, maintained a watch on the ship; the police was also present.”<sup>125</sup> Yet not long afterward, Zimbabwe’s Deputy Information Minister Bright Matonga declared that the arms shipment reached its intended target.<sup>126</sup>

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offloaded the arms destined for Zimbabwe.”); Chris Buckley, *Weapons ship may return home with cargo, says China*, BUSINESS DAY, Nov. 13, 2008.

119. *Chinese Gunrunners Persist*, *supra* note 116.

120. *See Zimbabwe Arms Ship Quits S Africa*, *supra* note 104.

121. *See* Tawanda Mashingaidze, Basildon Peta, Hans Pienaar & Louise Flanagan, ‘Angolan troops set to help Mugabe’, CAPE TIMES, Apr. 23, 2008, at 1, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=84&art\\_id=vn20080423054525552C114737](http://www.iol.co.za/index.php?set_id=1&click_id=84&art_id=vn20080423054525552C114737) (“Angolan President Jose Eduardo dos Santos has assured Mugabe that battle-hardened troops who have seen action in the DRC conflict are ready to fly to the aid of Zanu-PF . . . .”). The Zimbabwe and Angola regimes signed a cooperation agreement for military training in 2006 and a defense cooperation agreement in 2002. *Friends With Guns in Zimbabwe*, STRATEGYPAGE, October 15, 2006, <http://www.strategypage.com/qnd/pothot/articles/20061015.aspx> (last visited Oct. 14, 2009).

122. *See Ports reject Zim arms ship*, CAPE ARGUS, Apr. 23, 2008, at 12, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=68&art\\_id=vn20080423121517658C47416](http://www.iol.co.za/index.php?set_id=1&click_id=68&art_id=vn20080423121517658C47416); *see also* *China may recall Zimbabwe weapons*, BBC NEWS, Apr. 22, 2008.

123. *See Ports reject Zim arms ship*, *supra* note 122.

124. *See Angola to allow arms ship to dock*, BBC NEWS, Apr. 25, 2008; *see also Zimbabwe arms ship arrives*, INDEP. ONLINE (South Africa), Apr. 25, 2008, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=68&art\\_id=nw20080425204946651C200742](http://www.iol.co.za/index.php?set_id=1&click_id=68&art_id=nw20080425204946651C200742) (last visited Oct. 14, 2009); *see also* Celia W. Dugger, *Angola Allows Chinese Ship to Dock, but Not Unload Arms for Zimbabwe*, N.Y. TIMES, Apr. 27, 2008; Int’l Transp. Workers’ Fed’n, News Online, *Chinese Arms Vessel Leaves Angola*, May 9, 2008, available at <http://www.itfglobal.org/news-online/index.cfm/newsdetail/1943/region/1/section/0/order/1> (last visited Oct. 14, 2009).

125. *See* Int’l Transp. Workers’ Fed’n, *supra* note 124.

126. *See* Lance Guma, *Minister Claims Controversial Chinese Arms Now in Country*, SW RADIO AFRICA (London), May 6, 2008, available at <http://allafrica.com/stories/>

Happyton Bonyongwe (the director general of Zimbabwe's Central Intelligence Organisation),<sup>127</sup> Zimbabwean Cabinet minister Emmerson Mnangagwa (a long-serving Mugabe official who is currently Minister of Defense), and other high-level military authorities traveled to meet Angolan President Jose Eduardo dos Santos<sup>128</sup>, in order to "organise a way to get the shipment through to Zimbabwe."<sup>129</sup> It was reported that government agents from Malawi also went to Angola for the same purpose, and that President Eduardo dos Santos' personal jet was sighted in Zimbabwe.<sup>130</sup>

The ship apparently turned off its transponder,<sup>131</sup> making it difficult to locate. The six cranes on board the *An Yue Jiang* may have transferred the arms containers of munitions to another unknown vessel, which then delivered the cargo in an unknown manner.<sup>132</sup> There were also reports that the *An Yue Jiang* docked in Dar es Salaam, Tanzania.<sup>133</sup>

The *An Yue Jiang* was reported to have been refueled by the South African Navy's ship, *SAS Drakensberg*.<sup>134</sup> According to *The Namibian* newspaper, after the ship was refueled, it headed to the port of Pointe Noire in Congo-Brazzaville.<sup>135</sup> From there, the arms were flown to Zimbabwe's capital, Harare, "in giant transport aircraft belonging to Avient Aviation, a UK-registered freight charter airline operating out of Zimbabwe."<sup>136</sup>

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printable/200805061078.html ("Deputy Information Minister Bright Matonga on Sunday claimed that the controversial shipment of arms from China, initially blocked by South Africa, Mozambique and Zambia, was now in Zimbabwe.").

127. See NationMaster.com, Encyclopedia: Happyton Bonyongwe, <http://www.nationmaster.com/encyclopedia/Happyton-Bonyongwe> (last visited Oct. 14, 2009).

128. See Mandy Rossouw, Nic Dawes & Jason Moyo, *Did the weapons go through Angola?*, MAIL & GUARDIAN ONLINE (UK), May 1, 2008, available at <http://www.mg.co.za/article/2008-05-01-did-the-weapons-go-through-angola>; see also *Arms from China's 'ship of shame' reach Mugabe*, SUNDAY HERALD (Scotland), available at <http://www.sundayherald.com/international/shinternational/display.var.2278991.0.0.php>.

129. *Chinese arms delivered in Zimbabwe?* ACTION AFRICA, May 14, 2008.

130. See Guma, *supra* note 126.

131. See *Zim arms ship reaches Angola*, SUNDAY TRIBUNE (South Africa), Apr. 27, 2008, at 15.

132. See *id.*

133. See *id.*

134. See *Arms from China's 'ship of shame' reach Mugabe*, *supra* note 128.

135. See Christof Maletsky, *'Ship of Shame' Cargo Delivered to Country*, THE NAMIBIAN, May 20, 2008.

136. See *id.*

Congo-Brazzaville, also called "Congo," or formally, "Republic of the Congo," is a distinct nation from the much larger Democratic Republic of the Congo. Congo borders the western DRC. The Namibian article, which is written in English, calls the Congo port "Ponta Negra." *Id.* This appears to be a mistake. The meaning is the same as "Pointe Noire" ("black point"), but since French is an official language of Congo, "Pointe Noire" is the proper name. "Ponta Negra" is Portuguese, which is a common second language in much of southwest Africa.

IANSA (a global consortium of gun prohibition organizations) points to the Ship of Shame as showing the need for an ATT:

The case of the Chinese ship carrying arms destined for Zimbabwe is a classic case of why the world needs a tough Arms Trade Treaty . . . . The shipment risked fuelling serious human rights abuses, conflict, poverty and corruption in Zimbabwe . . . . [T]he lack of a global legally-binding agreement on arms transfers meant the international community had no legal framework to stop the shipment.<sup>137</sup>

IANSA writes, “If a tough legally binding Arms Trade Treaty (ATT) based on all relevant international law, including human rights law, had been agreed by all UN Member States then this would have created stronger obligations on the exporter and transiting states . . . .”<sup>138</sup>

We agree. But the mere creation of a “strong” obligation hardly means that governments will comply with that obligation. In order to facilitate Mugabe’s acquisition of weapons, the South African government, run by the African National Congress party, ignored South African law, which had been created by the very same ANC government. The Chinese government has used the DR Congo for transshipment of arms to Zimbabwe, in flagrant violation of the U.N. Security Council embargo on DRC arms—an embargo that was enacted with the consent of that same Chinese government.

There is no reason to believe that the Chinese or South African governments will pay any more attention to new legal obligations than they do to the existing legal obligations that they are already violating.

### C. *Brazilian Arms to Zimbabwe*

China is not Mugabe’s only source for arms. The *Small Arms Survey* reports that Zimbabwe is one of the five major recipients of arms exported from Brazil.<sup>139</sup> Notably, Brazil’s President Lula fought hard for an October 2005 referendum to ban firearms from the law-abiding citizens of Brazil, but he lost 64% to 36%.<sup>140</sup> Lula is one of the loudest voices on the international scene, demanding severe international gun laws, having previously called for an international tax on the legal sale of

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137. Int’l Action Network on Small Arms, *China / Zimbabwe case shows the need for an ATT*, <http://www.iansa.org/regions/safrica/ZimShipmentATT.htm> (last visited Oct. 14, 2009).

138. Int’l Action Network on Small Arms, *China / Zimbabwe case shows the need for an ATT: How a tough ATT would have helped*, [http://www.iansa.org/campaigns\\_events/china\\_zim\\_att08.htm](http://www.iansa.org/campaigns_events/china_zim_att08.htm) (last visited Oct. 14, 2009).

139. GRADUATE INST. OF INT’L STUDIES, *SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS* 69 tbl. 3.1 (2006) [hereinafter *SMALL ARMS SURVEY 2006*] (reporting data for 2003).

140. *Brazilians Reject Gun Sales Ban*, BBC NEWS, Oct. 24, 2005.

firearms.<sup>141</sup> Yet he has refused to use his existing legal powers to block arms exports to one of the most notorious tyrannies on the planet. His actions reinforce the suspicion that for many politicians, gun control is a reflection more of political posturing than of any serious interest in disarming tyrants.

*D. Zimbabwe's Arms Smuggler is Zimbabwe's Arms Control Delegate*

Consider the following speech from a delegate at the U.N.'s 2006 gun control conference:

May you allow me to share with you some of our water tight measures in the control of any movement of small arms and light weapons . . . .

If any individual has to acquire a small arm, be it for self protection or sports, the process is very strict that only a determined individual would ever go through the thorough vetting system . . . . Our control system has proven that no arms can be trafficked into the country without an official permit. [Our country] has banned the sale and possession of self-loading rifles and [sic, to] individuals [sic] and security companies [sic].

Mr President allow me to conclude by saying [our country] has ratified the SADC [South African Development Community] protocol on firearms, ammunitions and other related materials. In line with the SADC protocol an implementation national action plan 2006-2009 is now in-place.<sup>142</sup>

The speech was delivered by Colonel Tshinga J. Dube, the Chief Delegate of Zimbabwe on Arms Control.<sup>143</sup>

Colonel Dube was certainly an expert in the arms trade. The previous decade, acting on behalf of the government-owned Zimbabwe Defence Industries (ZDI), he had defrauded the government of Sri Lanka

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141. *Global tax on guns? Brazil, France propose international levy on arms sales to eliminate world hunger*, WORLDNETDAILY, June 3, 2003, available at [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=32887](http://www.wnd.com/news/article.asp?ARTICLE_ID=32887) (last visited Oct. 21, 2009):

In a speech at the annual meeting of the "Group of Eight," or G8, Brazil's President Luiz Inacio Lula da Silva pushed the arms-sales tax as a scheme whereby the world's wealthiest nations could fund efforts to eliminate world hunger, reports Bloomberg News. . . . Calling the Brazilian leader's proposal "forceful and convincing," Chirac was reluctant to back a levy on weapons manufacturers in France and elsewhere, but suggested a global tax on firearms purchases made by individuals, said the report.

142. Col. Tshinga J. Dube, Chief Delegate of Zimbabwe on Arms Control, Presentation by Zimbabwe to The Conference Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects (June 26-July 7, 2006), available at <http://www.un.org/events/smallarms2006/pdf/arms060628zimeng.pdf>.

143. *Id.*

in a transaction involving 32,400 rounds of mortars that ZDI sold to the Sri Lankan government but never delivered.<sup>144</sup> Dube was also involved in complex international plots in 1999 for the smuggling of arms (in violation of a U.N. embargo) from Ukraine to Liberia, and to the Revolutionary United Front (RUF) in Sierra Leone.<sup>145</sup>

Dube also appears to have participated in a scheme to sell AK-47 rifles to mercenaries who were planning a coup to overthrow the government of Equatorial Guinea; the South African newspaper *Beeld* reported that he was “enraged” when the mercenaries and their plane were seized at Harare Airport.<sup>146</sup>

Colonel Dube also happened to be part of a 2004 meeting between Zimbabwe’s Mugabe and China’s Norinco (an arms manufacturer closely tied to the Chinese army), deepening China’s role as the largest foreign investor in Zimbabwe.<sup>147</sup> In July 2008, Dube was placed on a European list forbidding his travel within the E.U. because he was “complicit in forming or directing repressive state policy.”<sup>148</sup>

It is quite revealing that the Zimbabwe government sent an international arms smuggler as its chief delegate to the U.N. conference on the illicit arms trade.

No one at the U.N. conference was so impolite as to mention that Zimbabwe’s arms control delegate was a notorious international arms smuggler. So even at a U.N. conference arranged for the precise purpose of controlling international arms smuggling, and which was run as a publicity festival for gun prohibition organizations, no one in the room was willing to utter a word about the brazen absurdity of Zimbabwe sending an international arms smuggler to tout Zimbabwe’s purported commitment to arms control.

If the NGOs and their member state allies are so reticent in a forum that they built and ran, it seems hard to believe that they will be any more

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144. *Duped by Zimbabwe*, THE SUNDAY TIMES (Sri Lanka), Sept. 6, 1998, available at <http://www.sundaytimes.lk/980906/spec.html>; Raymond Bonner, *Rebels in Sri Lanka Fight With Aid of Global Market in Light Arms*, N.Y. TIMES, Mar. 7, 1998.

145. Brian Wood, *The Prevention of Illicit Brokering of Small Arms and Light Weapons: Framing The Issue*, in U.N. INST. FOR DISARMAMENT RESEARCH, DEVELOPING A MECHANISM TO PREVENT ILLICIT BROKERING IN SMALL ARMS AND LIGHT WEAPONS—SCOPE AND IMPLICATIONS 1, 4-5 (2007), available at <http://www.unidir.org/pdf/articles/pdf-art2590.pdf>.

146. David Pallister, *Murky tale of a mercenary adventure: Speculation grows as Equatorial Guinea claims plot to kill president was foiled*, THE GUARDIAN, Mar. 13, 2004; Erika Gibson, *Op pad na 'n staatsgreep: SA huursoldate se bestemming was glo land in Wes-Afrika*, BEELD (S. Afr.), Mar. 10, 2004, at 1, available at <http://152.111.1.88/argief/berigte/beeld/2004/03/10/B1/01/02.html>; Mduduzi Mathuthu, *South Africa, Zimbabwe trained 'mercenaries'*, NEW ZIMBABWE, Mar. 9, 2004, available at [http://www.zimbabwesituation.com/mar10\\_2004.html#link2](http://www.zimbabwesituation.com/mar10_2004.html#link2).

147. AMNESTY INT'L, *CHINA*, supra note 80, at 7 (citing *Chinese Delegation Seeks Areas of Co-operation*, AFRICA NEWS SERVICE, Nov. 2, 2004).

148. Commission Regulation 77/2009, 2009 O.J. (L 23) 5, 9 (EC).

courageous in using an ATT forum to do anything serious about Zimbabwe—particularly since, as at any U.N. forum these days, China will exercise a *de facto* veto power, even if it does not have a formal veto.

### III. DEMOCRATIC REPUBLIC OF THE CONGO

Rich in resources, the region now known as the Democratic Republic of the Congo has long been one of the most miserable places on earth. For centuries it was a favorite target of Arab slave traders. Belgium colonized the area in the 1880s, and the colonial rule was among the most brutal and exploitive of any colonial regime run by a western government.<sup>149</sup> Unlike, for example, the French or British Empires, the Belgians did virtually nothing to promote education, build useful infrastructure for the people, or provide the rule of law.

Post-independence has been even worse.<sup>150</sup> Because of the wars in the eastern DRC, more than 1.3 million people have been driven from their homes.<sup>151</sup> It is estimated that between two million and five million people have died as a result of the wars.

#### A. *The 2003 and 2005 Security Council Embargoes*

Using strong language, the U.N. Security Council on July 28, 2003, established an arms embargo on the DRC's northeastern provinces of North Kivu, South Kivu, and the Ituri region of Province Oriental.<sup>152</sup> The embargo also applied to groups anywhere in the DRC that had not joined the new peace agreement.<sup>153</sup>

The Security Council sternly condemned the continuing violations of human rights and humanitarian law, including “violence against women and girls as a tool of warfare.”<sup>154</sup> The Security Council also expressed profound concern about the continuing theft of the DR Congo's natural resources.<sup>155</sup>

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149. See MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT 209 (2001).

150. *Id.*

151. *Out Of Control*, STRATEGYPAGE, June 11, 2009, <http://www.strategypage.com/qnd/congo/articles/20090611.aspx> (last visited Oct. 16, 2009).

152. S.C. Res. 1493, U.N. Doc. S/RES/1493 (July 28, 2003). South Kivu is bordered by Tanzania, Burundi, and Rwanda; North Kivu by Rwanda and Uganda; and the Ituri region by Uganda and Sudan.

153. *Id.* The European Union also placed an arms embargo on the DR Congo on Apr. 7, 1993. See Stockholm Int'l Peace Research Inst., *The European Union Arms embargo on the Democratic Republic of Congo (formerly Zaire)*.

154. S.C. Res. 1493, *supra* note 152, ¶ 9.

155. S.C. Res. 1493, *supra* note 152, ¶ 28.

With the DR Congo's weak central government unable to control the ongoing violence,<sup>156</sup> the Security Council requested that neighboring states join the reconciliation effort to achieve peace.<sup>157</sup>

But it soon became evident that the Security Council's wish list for government control of firearms, peace, and prosperity would not occur. A January 2005 report from the U.N. group of experts on the DR Congo explained that the combination of mineral wealth, immoral business practices, local militia leaders, and deliberate outside interference raised to a level termed as "psychological warfare,"<sup>158</sup> totally overwhelmed any possibility of a peaceful outcome.<sup>159</sup> The report acknowledged that "forcible disarmament" methods (that is, confiscating guns by armed force) were unfeasible at this point.<sup>160</sup>

In 2005, the Security Council reported that government officials from Rwanda and Uganda were providing state-authorized arms shipments into embargoed areas and that South African companies were also supplying weapons.<sup>161</sup> Amnesty International found that firearms were flooding into the DR Congo from many other countries.<sup>162</sup> *Africa Confidential* wrote, "Links to armed groups are so tight that Ituri's rebel leaders travel to Kampala to meet government officials."<sup>163</sup> The black

156. The violence persists. See Lydia Polgreen, *Massacre unfurls in Congo, despite nearby support*, N.Y. TIMES, Dec. 11, 2008 ("The executions in Kiwanja are a study in the unfettered cruelty meted out by the armed groups fighting for power and resources in eastern Congo. But the events are also a textbook example of the continuing failure of the world's largest international peacekeeping force, which has a mandate to protect the Congolese people from brutality.")

157. S.C. Res. 1493, *supra* note 152, ¶ 24.

158. Abdallah Baali, Chairman of U.N. Sec. Council Comm., *Letter dated 25 January 2005 from the Chairman of the Sec. Council Comm. Established pursuant to res. 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Sec. Council*, ¶ 210, U.N. Doc. S/2005/30 (Jan. 25, 2005) [hereinafter Sec. Council Report]:

The front-line States, as well as South Africa, play a critical role in regional stability and in the success of the arms embargo. Throughout its investigations, the Group gathered credible information indicating that Rwanda and Uganda had provided State-authorized arms transfers to the Democratic Republic of the Congo and that their troops had been directly involved in supporting dissident forces. The Group also has information on companies based in South Africa that may have violated the arms embargo . . . .

Throughout its investigations, the Group gathered credible information indicating that Rwanda and Uganda had provided State-authorized arms transfers to the Democratic Republic of the Congo and that their troops had been directly involved in supporting dissident forces.

159. See *id.*

160. *Id.* at ¶ 208. For forcible disarmament in Kenya and Uganda, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 QUINNIPIAC L.REV. 385 (2008).

161. See Sec. Council Report, *supra* note 158.

162. See *Arms still flowing into DR Congo*, BBC NEWS, July 5, 2005.

163. See *Operation Kisanja*, 46 AFR. CONFIDENTIAL 4, 5 (2005).

market, fueled by loot obtained from the DR Congo's natural resources, was totally in control.

Indeed, U.N. investigators found that power brokers within the national government of the DRC itself appear to have supplied arms to the FDLR (*Forces démocratiques de libération du Rwanda*), which is run by former members of the *Interahamwe*—the perpetrators of the Rwandan genocide. They fled to the DRC after being ousted from power and now operate in the DRC.<sup>164</sup> When, in October 2003, a Moldovan cargo plane crash landed in Kamina in the Katanga province of the DRC, the DRC army forcibly prevented U.N. staff from investigating; the plane was allegedly filled with arms intended for groups in South Kivu.<sup>165</sup> Likewise, in 2004 the U.N. was repeatedly obstructed from inspecting air cargos connected to the government-allied MLC (*Mouvement de libération du Congo*) and its military arm, the ALC (*Armée pour la Libération du Congo*).<sup>166</sup>

So on April 18, 2005, the Security Council expanded the embargo to the entire DRC, with certain exceptions. Among the mandatory new requirements of the embargo was that all governments in the region, including the DRC itself and the nations bordering Ituri or the Kivus, maintain a registry of all airplane flights to or from the DRC and that the registry be available to U.N. inspectors.<sup>167</sup>

Air transportation is particularly important to DRC arms smuggling because the DRC does not have a functional national road network. A previous dictator, Mobutu Sese Seko, followed the same policy as had the Russian Czars: to reduce the ability of the peoples of a large and diverse nation to mobilize against the dictatorship, avoid development of efficient means of intra-national travel and communications. Accordingly, the transportation of arms (like the transportation of many other valuable products) to or from the DRC takes place primarily by airplane. The fact that overland smuggling of arms to the DRC is much more difficult than overland smuggling to most other non-island nations would be expected to make enforcement of the arms embargo easier. Amnesty International explained that “[e]xperience from the UN embargoes on Sierra Leone and Liberia shows that without grounding and controlling such [smuggling] aircraft, there can be little done to prevent arms flows.”<sup>168</sup>

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164. AMNESTY INT'L, DEMOCRATIC REPUBLIC OF THE CONGO: ARMING THE EAST 59 (July 2005) [hereinafter *ARMING THE EAST*].

165. *Id.* at 61-62. *Cf.* Sec. Council Report, *supra* note 158, at ¶¶ 160-61 (pattern of human rights abuses by the army).

166. *Id.* at 62.

167. *Id.* at 21.

168. *Id.* at 68.

B. *Embargo Violations by Albania, Burundi, China, the Democratic Republic of the Congo, Rwanda, South Africa, Sudan, Uganda, and Zimbabwe*

Amnesty International notes: “Since 2003, no state has reported to the UN an authorized export of arms to the DRC, yet there is no shortage of arms and ammunition arriving in the DRC.”<sup>169</sup>

China has been a major supplier of arms to various armed groups of human rights violators in Kivu and Ituri, via direct shipments to the DRC, as well as via Uganda, Rwanda, and Burundi.<sup>170</sup> Some of the Chinese arms in the DRC were first supplied to Zimbabwe or Albania, and then forwarded into the DRC.<sup>171</sup> In Uganda, the Luweero Industries arms factory was built with assistance from China and is a subsidiary of the state-owned National Enterprises Corporation.<sup>172</sup> Arms from the factory have been shipped into the eastern DRC.<sup>173</sup>

The *Small Arms Survey* reported that the borders between the DRC and Sudan and Uganda “are porous and allow unchecked small arms proliferation.”<sup>174</sup>

The Ugandan government army (the UPDF, Ugandan People’s Defence Forces) has made incursions into the DRC and worked in Ituri with the FNI (*Front des nationalistes intégrationnistes*) to support a gold smuggling operation, in which gold is smuggled out of the DRC via Uganda, and the FNI uses its share of the revenues to procure arms.<sup>175</sup> The Ugandan army’s actions were a “flagrant violation” of the U.N. embargo, according to MONUC.<sup>176</sup>

With the approval of the South African government, arms have been shipped to Rwanda (in violation of another U.N. arms embargo), and from there have been delivered to RCD-Goma, a militant faction in the DRC, which has been supported and supplied by the Rwandan government.<sup>177</sup> The Rwandan government authorized arms shipments into the DRC for the purpose of supplying RCD-Goma, in flagrant violation of the U.N. embargo.<sup>178</sup>

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169. *Id.* at 38.

170. AMNESTY INT’L, CHINA, *supra* note 80, at 8.

171. ARMING THE EAST, *supra* note 164.

172. *Id.* at 46.

173. *Id.*

174. SMALL ARMS SURVEY 2006, *supra* note 139, at 282 box 11.3.

175. ARMING THE EAST, *supra* note 164, at 63-65.

176. *Id.* MONUC is an acronym is for *Mission de l’Organisation des Nations Unies en République démocratique du Congo* (Mission of the United Nations Organization in the Democratic Republic of the Congo).

177. *Id.* at 24. The RCD-Goma’s military branch is the ANC, *Armée nationale congolaise*.

178. *Id.* at 51.

Another militant group responsible for extensive abuses of human rights, the UPC (*Union des patriotes congolais*), obtained arms from South Africa and the Balkans—according to a confidential U.N. report, which was supposed to be seen only by the Security Council, but which was leaked to the public.<sup>179</sup>

The DRC army itself continues to sell weapons to the FDLR (Forces Democratiques de Liberation du Rwanda, founded by the Rwandan genocidaires operating in the DRC), as they work together to exploit gold and tin mines.<sup>180</sup> In November 2009, the *New York Times* obtained a secret United Nations report which confirmed that the Congolese army itself is massively involved in the smuggling of weapons to warlords in the eastern Congo. According to the *Times*' summary of the report, there is “a vast, rebel-driven criminal network in eastern Congo with tentacles touching Spanish charities, Ukrainian arms dealers, corrupt African officials and even secretive North Korean weapons shipments . . . . The report charges that government officials in several African countries are working hand in hand with the rebels to help smuggle out minerals and bring in guns.”<sup>181</sup> What has the U.N. Security Council done about the massive violations of its embargoes? Nothing. As the Institute for Security Studies summarizes, “[T]he Security Council has been loath to take punitive action against those member states that have been consistently implicated in embargo-busting activities in reports by panels of experts.”<sup>182</sup>

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179. *Id.* at 24.

180. See *DR Congo army 'works with rebels,'* BBC NEWS, Sept. 10, 2008.

Human Rights Watch recommended to the government of the DR Congo “Halt immediately the promotion of armed group leaders to senior ranks in the Congolese army. Investigate and bring to justice those promoted to generals and other senior ranks . . . .” Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo 5* (2005), available at [http://www.hrw.org/sites/default/files/reports/drc0505\\_0.pdf](http://www.hrw.org/sites/default/files/reports/drc0505_0.pdf) [hereinafter *Curse of Gold*].

181. Jeffrey Gettleman, *Congo Army Helps Rebels Get Arms, U.N. Finds*, N.Y. TIMES, Nov. 25, 2009.

182. Guy Lamb, *Beyond 'Shadow-Boxing' and 'Lip Service' The Enforcement of Arms Embargoes in Africa*, at “Actions by the UN Security Council” (The Institute for Security Studies, Occasional Paper 135, 2007), available at [http://www.iss.co.za/static/templates/tmpl\\_html.php?node\\_id=2175&slink\\_id=4354&slink\\_type=12&link\\_id=19](http://www.iss.co.za/static/templates/tmpl_html.php?node_id=2175&slink_id=4354&slink_type=12&link_id=19) (“[T]he Security Council has found difficulty in enhancing the capacity of its Secretariat responsible for dealing with sanctions.”); see also DAMIEN FRUCHART ET AL., UNITED NATIONS ARMS EMBARGOES: THEIR IMPACT ON ARMS FLOWS AND TARGET BEHAVIOUR 55 (2007), available at <http://books.sipri.org/files/misc/UNAE/SIPRI07UNAE.pdf> (“Despite a significant body of evidence implicating such actors in UN arms embargo violations, little action has been undertaken at the global level to encourage or coerce actors to comply with their international obligations in these cases.”).

C. *The U.N.'s Participation in Arms Smuggling in Violation of the U.N. Embargo*

BBC reporter Martin Plaut broke the story that “Pakistani UN peacekeeping troops have traded in gold and sold weapons to Congolese militia groups they were meant to disarm. . . .”<sup>183</sup> According to Plaut, a confidential internal U.N. report found evidence of a smuggling network involving Pakistani MONUC peacekeepers.<sup>184</sup>

The U.N. purported to investigate, and Jean-Marie Guéhenno, U.N. Under-Secretary-General for Peacekeeping Operations, announced, “The investigation has found no evidence of gun smuggling. But it has identified an individual who seemed to have facilitated gold smuggling.”<sup>185</sup> Alan Doss, head of MONUC, insisted that the arms smuggling allegations could not be proven.<sup>186</sup> Likewise, the previous head of MONUC, William Lacy Swing,<sup>187</sup> rejected the arms smuggling allegations: “This I can categorically deny.”<sup>188</sup>

Plaut refuted the whitewash:

There are indications that the UN covered up what was taking place for political reasons . . . . UN insiders the BBC has spoken to tell us this aspect [gun smuggling] of the UN report was suppressed for political reasons—it was simply too difficult to accuse Pakistan of re-arming known killers, since Pakistan is the largest troop contributor to the UN, providing 10,000 troops across the world.<sup>189</sup>

We know that ammunition made in Pakistan was confiscated from rebel groups by MONUC.<sup>190</sup> From a question to the spokesperson for the Secretary General of the U.N., we know that there was at least \$2.5 million in gold that was part of the smuggling operation.<sup>191</sup> We also

183. See Martin Plaut, *UN troops 'traded gold for guns'*, BBC NEWS, May 23, 2007.

184. See Martin Plaut, *UN troops 'helped smuggle gold'*, BBC NEWS, Aug. 11, 2007.

185. Martin Plaut, *UN Troops 'armed DR Congo rebels'*, BBC One Panorama, Apr. 28, 2008, available at <http://news.bbc.co.uk/2/hi/programmes/panorama/7331077.stm> (last visited Oct. 16, 2009).

186. See *id.* (Doss' comments are contained in the video clip accompanying the online BBC story.)

187. See *Interview by IRIN News with MONUC chief William Swing* (Aug. 14, 2003), available at <http://www.irinnews.org/Report.aspx?ReportId=45492> (last visited Oct. 16, 2009).

188. Plaut, *UN Troops 'traded gold for guns,' supra* note 183.

189. Plaut, *UN Troops 'armed DR Congo rebels,' supra* note 185.

190. See Alex Vines, *Instruments of the UN Security Council to Address Conflict Resources*, 5 Human Sec. Bulletin 18 (2007), available at <http://www.humansecurity.info/#/vol52-vines/4527474079> (“It is interesting to note that some date-stamps of bullets from ammunition confiscated from rebel groups by MONUC are by the Pakistan Ordnance Factory.”).

191. See U.N. Spokesperson's Noon Briefing, Dep't of Pub. Info. Daily Press Briefing by the Offices of the Spokesperson for the Secretary-General & the Spokesperson for the General Assembly President (May 23, 2007), available at <http://www.un.org/News/>

know that Ugandan Defence Minister Crispus Kiyonga charged that MONUC had re-armed rebels.<sup>192</sup>

Human Rights Watch chided the U.N.'s Jean-Marie Guéhenno, stating:

We are, however, disappointed by the apparent narrowness of the report's conclusions, the lack of transparency in the process, the slow progress of the investigation, and most important, the continuing lack of accountability. You told the British Broadcasting Corporation (BBC) on July 13 that this matter is "now closed." Yet no individual has yet been held accountable despite findings by OIOS, the investigative arm of the United Nations, that illegal behavior by at least one Pakistani officer had occurred.<sup>193</sup>

HRW expressed incredulity that supposedly only one peacekeeper was involved and stated: "It is our view that the assistance provided by Pakistani peacekeepers went well beyond one individual."<sup>194</sup> HRW was concerned that "[t]he slow process in carrying out this investigation and the continued lack of action raises important questions about how the UN investigates itself."<sup>195</sup>

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briefings/docs/2007/db070523.doc.htm (last visited Oct. 16, 2009) (question noting the \$2.5 million figure).

Putting this in perspective, Human Rights Watch noted that between \$240,000 to \$720,000 in gold per month (at the time the report was written) was taken from the Mongbwalu area. *See Curse of Gold, supra* note 180.

192. *See* MONUC, *Uganda accuses UN peacekeepers of arming DR Congo rebels*, Apr. 30, 2008; *see also* Clarification Regarding the MONUC (the United Nations Mission in the Democratic Republic of Congo) Scandal Involving Gold and Arms Trafficking in Mongbwalu, Ituri District, Oriental Province, DRC, *available at* [http://news.bbc.co.uk/1/1/shared/bsp/hi/pdfs/24\\_04\\_08\\_rebel\\_letter.pdf](http://news.bbc.co.uk/1/1/shared/bsp/hi/pdfs/24_04_08_rebel_letter.pdf) (last visited Oct. 16, 2009) ("The MONUC Pakistani Blue Helmets were engaged in the sale of various items (computers, freezers, mobile phones, food stuffs, . . .) for which we were used as intermediaries between them and buyers and, at times, we were buyers ourselves.").

193. Letter from Kenneth Roth, Executive Director, & Steve Crawshaw, UN Advocacy Director, Human Rights Watch, to Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations (July 23, 2007), *available at* [http://www.hrw.org/legacy/english/docs/2007/07/23/congo16448\\_txt.htm](http://www.hrw.org/legacy/english/docs/2007/07/23/congo16448_txt.htm).

194. *See id.*

195. *See id.* HRW also expressed concern, in this same document, about how the U.N. handled other allegations about its peacekeepers' behavior:

We note in this connection that the allegations against the Pakistanis are just one of a series of allegations that have emerged in recent months. These include allegations of gold trading by Indian peacekeepers in North Kivu, the alleged killing of two Congolese detainees and the beating of others by Bangladeshi peacekeepers in Ituri in February 2005, and ongoing allegations of sexual exploitation, among others. As far as we are aware, nobody has been prosecuted in connection with most of these cases.

*See also* Nile Gardiner, *The U.N. Peacekeeping Scandal in the Congo: How Congress Should Respond* (Mar. 1, 2005), in *Heritage Lectures*, Mar. 22, 2005, *available at* [http://www.heritage.org/Research/InternationalOrganizations/upload/76028\\_1.pdf](http://www.heritage.org/Research/InternationalOrganizations/upload/76028_1.pdf).

That the U.N. would be involved in arms smuggling in the DRC should not be shocking. Other U.N. “peacekeepers” and staff in the DRC had a lengthy involvement in sexual abuse of women and children, a problem which was covered up by the U.N. itself, despite then-Secretary General Kofi Annan’s self-serving protestations to the contrary.<sup>196</sup>

According to the gun prohibition NGOs, a government official’s failure to exercise “due diligence” against the transfer of arms to human rights violators means that the official is criminally liable before the International Criminal Court (ICC) for the crimes committed with those arms, under the principles of liability for aiding or abetting.<sup>197</sup>

By this standard, the ICC should open an investigation of the United Nations officials, including Kofi Annan, who appear to have been active participants in efforts to cover up MONUC’s illegal arms sales in the Congo.

Further, according to a recent report from Human Rights Watch, “MONUC’s support of the Congolese armed forces, particularly after receiving credible reports of gross violations of human rights, raises serious concern that MONUC itself is implicated in these grave

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196. See *Annan vows to end sex abuse committed by UN mission staff in DR of Congo*, UN NEWS CENTRE, Nov. 19, 2004, available at <http://www.un.org/apps/news/story.asp?NewsID=12590&Cr=democratic&Cr1=congo>; The Secretary-General, *Report of the Secretary-General on the activities of the Office of Internal Oversight Services, Financing of the United Nations Organization Mission in the Democratic Republic of the Congo*, ¶ 35, U.N. Doc. A/59/661 (Jan. 5, 2005), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A%2F59%2F661&Submit=Search&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A%2F59%2F661&Submit=Search&Lang=E) (“Although MONUC has prepared directives on the prevention of sexual exploitation and abuse, at present, little has been done to implement an effective prevention programme in Bunia.”); *id.* at ¶ 38 (“On several occasions, the commanders of these contingents [in Bunia, DR Congo] either failed to provide the requested information or assistance or actively interfered with the investigation.”).

197. Under international human rights law, States are responsible for their own actions and the actions of their agents. They also have a duty to prevent patterns of abuse committed by private persons, whether or not they are acting under the control of the State. Failure to exercise “due diligence” by omitting to take the necessary steps to protect individuals from organized crime such as kidnapping and killing for ransom can amount to a violation of human rights law. In some cases, the obligation to protect individuals from violations perpetrated by private actors is part and parcel of the State’s obligation not to commit the violation itself. For example, failing to adopt the necessary measures to prevent acts of torture from being carried out on one’s territory may amount to more than a violation of the “due diligence” standard and be treated as a breach of the international norm prohibiting torture. The Rome Statute of the International Criminal Court (ICC), in Article 25 (3)(c), establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by providing the means for its commission. Providing the weapons used to commit or attempt to commit one of the crimes for which the ICC has jurisdiction is sufficient to give rise to responsibility as an accomplice.

COMPILATION OF GLOBAL PRINCIPLES, *supra* note 61, at 21.

abuses.”<sup>198</sup> The report provides extensive evidence that MONUC involvement strengthened Congolese army units which perpetrated mass rapes and mass murders of civilians.<sup>199</sup> Another blatant failure of due diligence by the U.N. helped provide a cornucopia of arms to DRC warlords. Since 1998, the U.N. has been leading an international campaign to disarm the people of Albania.<sup>200</sup> When the collapse of a pyramid scheme led to the collapse of government for a period in 1997, over a million guns were looted from government storehouses.<sup>201</sup> Since then, the U.N. has been working assiduously to collect them, although many Albanian families are reluctant to surrender their only means of protection, especially as the government is manifestly unable to provide protection, particularly in rural areas.<sup>202</sup> However, about two hundred thousand guns have been collected.<sup>203</sup> As it turns out, the Albanian government, after rounding up the guns at the U.N.’s behest, then sold a large number of them to Rwanda, and from there they were shipped to the Rwandan-allied groups in the DRC.

Theoretically, a violation of an ATT embargo could lead to a prosecution in the ICC. In this regard, as in regard to almost everything else, the ATT merely duplicates existing international law, since a violation of a Security Council arms embargo could also lead to an ICC prosecution.

Either way, the ICC has shown that it will be of little use. Human rights organizations were happy when the ICC arrested Thomas Lubanga, the head of the Congolese Patriotic Union (UPC).<sup>204</sup> Lubanga and his group are believed to have perpetrated many rapes and murders in northeast Congo.<sup>205</sup>

Yet to call the ICC prosecution of Lubanga inept would be generous. The first and only chief prosecutor in ICC history is Luis Moreno Ocampo.<sup>206</sup> In a recent issue of *World Affairs*, Julie Flint and Alex de Waal described Ocampo’s handling of the Lubanga prosecution in particular, and the prosecutor’s office in general, as self-serving,

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198. HUMAN RIGHTS WATCH, “YOU WILL BE PUNISHED”: ATTACKS ON CIVILIANS IN EASTERN CONGO 17 (2009), available at [http://www.hrw.org/sites/default/files/reports/drc1209webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/drc1209webwcover_1.pdf).

199. *Id.* at 134-55.

200. David B. Kopel, Paul Gallant & Joanne D. Eisen, *Microdisarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. REV. 969 (2005) [hereinafter *Microdisarmament*].

201. *Timeline: Albania*, BBC NEWS, July 9, 2009 (1997: “Up to a million weapons are looted from army stores as angry mobs take to the streets.”).

202. *Microdisarmament*, *supra* note 200.

203. *Id.*

204. Julie Flint & Alex de Waal, *Case Closed: A Prosecutor without Borders*, WORLD AFFAIRS, Spring 2009, at 23, 30-31.

205. *Id.*

206. *Id.*

publicity-driven, lazy, and lacking in the elementary diligence that would be expected of any prosecutor, let alone the most important international prosecutor in the world.<sup>207</sup> As a result, Lubanga's trial was repeatedly postponed, and the only formal charges against Lubanga are the alleged use of child soldiers, rather than the mass murders and systematic rapes.<sup>208</sup>

*D. After Failing Twice, Do the Same Thing Again*

Control Arms argues that the many breaches of the Security Council embargoes on the DRC prove the need for an ATT.<sup>209</sup> Rt. Brigadier Mujahid Alam, a Pakistani in MONUC, stated at a meeting of Amnesty International held at the United Nations in 2008:

It is the illicit trade and trafficking of arms which is causing all the problems in Congo and causing all the casualties in the civilian population. All of the militias and illegal groups have arms. In the Democratic Republic of Congo we have a UN arms embargo, but it has proved totally ineffective. That is why an Arms Trade Treaty has become so important. An arms embargo by itself won't deliver the goods. An ATT plus embargo would be much more effective.<sup>210</sup>

Like so many ATT advocates, he failed to offer any argument about *why* an international law mandate imposed by an ATT would be more likely to be obeyed than an international law mandate imposed by the Security Council.

Some of the suppliers of arms to the DRC are plainly impervious to international law. For example, the Sudanese dictatorship, which has ratified but flagrantly violated the International Convention on Genocide, is currently the target of arrest warrants from the ICC.<sup>211</sup> Yet the ICC's actions have led the regime to intensify rather than relent from its crimes against the people of Darfur. If the regime will flout the ICC, it is unrealistic to expect that an ATT will convince the regime to stop profiting from the supply of arms into the DRC.

Other regimes, such as those of Rwanda or Uganda or Albania, have not achieved Sudan's pariah status, but it is hard to see why they will shrink from violating two international law obligations, if they are already willing to violate one such obligation.

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207. *Id.*

208. *Id.*

209. See *DR Congo arms embargo 'failing'*, BBC NEWS, Oct. 16, 2006.

210. See Control Arms, *Senior military Officers back an Arms Trade Treaty*, available at <http://www.controlarms.org/en/events/first-comm-2008/senior-military-officers-back-an-arms-trade-treaty> (last visited Oct. 16, 2009).

211. *Warrant Issued for Sudan's Leader*, BBC NEWS, Mar 4, 2009.

Indeed, the theory that two binding obligations will do the trick where one binding obligation has failed is already disproven by the events in the DRC. Rwanda, Uganda, Sudan, Burundi, and the DRC itself (all of which have violated the U.N. embargo on the DRC) are all signatories to the Nairobi Protocol, a U.N.-sponsored gun control treaty for East African nations.<sup>212</sup> Putting aside the Security Council embargoes, the Nairobi Protocol outlaws the DRC arms smuggling in which the aforesaid nations have been engaged.<sup>213</sup>

In practice, the Nairobi Protocol's insistence on severe gun control has proven effective in providing the signatory nations with an additional pretext to disarm their domestic populations, which has the effect of rendering them defenseless against human rights abusers. But the Protocol has been an abject failure in preventing arms smuggling by these same regimes.

Amnesty International's solution is to urge that there be "a joint monitoring mechanism to ensure the effective compliance . . . with the Nairobi Protocol . . ." <sup>214</sup> As if anyone would pay more attention to the reports of the joint monitoring mechanism than is paid the reports from MONUC itself, which detail how the Nairobi signatories are smuggling arms into the DRC.

#### IV. TWO ALTERNATIVE APPROACHES

In this Part, we present two ideas about how to address problems related to the acquisition of arms by human rights violators. We do not claim that these two proposed solutions are the only possibilities; nor do we claim that these ideas, by themselves, would solve the whole problem. We offer them merely as starting points for discussion.

Because ATT embargoes cannot realistically be expected to succeed where previous embargoes have failed, the tremendous amount of time and energy being invested in the ATT is a dangerous distraction. Humanitarian organizations, diplomats, and the rest of the freedom-loving international community should more wisely invest their time in exploring potential alternative solutions.

If you, the reader, decide that our two proffered solutions would be ineffective or harmful, then we urge you to continue to search for better ones. The Arms Trade Treaty is not going to help the victims of human

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212. Other signatories are Ethiopia, Djibouti, Eritrea, Kenya, Tanzania, and Seychelles.

213. See Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, Apr. 21, 2004, at art. 2(a), available at <http://www.smallarmsnet.org/docs/saaf12.pdf>, ("prevent, combat and eradicate the illicit manufacturing of, trafficking in, possession and use of small arms and light weapons in the sub-region.").

214. ARMING THE EAST, *supra* note 164, at 72.

rights abuses, so it is essential to look far and wide for ideas that might really help.

*A. Cut Foreign Aid*

Foreign aid ends up paying for up to 40% of arms purchases by African governments. So found Paul Collier and Anke Hoeffler, in a global study covering 1960-99.<sup>215</sup>

The International Monetary Fund suspended aid to Zimbabwe's government in the early twenty-first century. Although the suspension resulted from the government's failure to achieve budget goals,<sup>216</sup> the suspension undoubtedly reduced the government's resources for arms purchases.

The government of Rwanda is heavily dependent on foreign aid and probably could not have afforded its massive arms purchases without that aid.<sup>217</sup> Amnesty International recommended that when international aid is donated to the DRC, Rwanda, or Uganda by the United States, Japan, or European nations, the donors "should ensure that such aid does not serve the purpose, directly or indirectly via fungible accounting or resource exchanges, of purchasing or acquiring arms or related military and security items."<sup>218</sup>

In Zimbabwe, the opposition leader Morgan Tsvangirai has finally been allowed to participate, nominally, in a coalition government.<sup>219</sup> But the *Washington Post* argues that the United States should not provide foreign aid to Zimbabwe:

A power-sharing deal aimed at restoring democracy has mostly shored up strongman Robert Mugabe.

... Mr. Mugabe's control over the state remains unbroken. He still commands the army and security forces and has violated or ignored most of the political provisions in the coalition agreement. Opposition leaders still face arrest and prosecution on trumped-up charges, white-owned farms still are being illegally seized and restrictions on the media have not been lifted. The 85-year-old president and his coterie of thugs evidently have no intention of

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215. Paul Collier & Anke Hoeffler, *Unintended Consequences: Does Aid Promote Arms Races?* 69 OXFORD BULL. OF ECON. & STAT. 1 (2007); PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 103 (2007).

216. *Trends and Markers: Some facts about Zimbabwe*, 14 AFR. SEC. REV. 69, 71 (2005).

217. ARMING THE EAST, *supra* note 164, at 34.

218. *Id.* at 73.

219. *Mugabe, Tsvangirai and Mutambara Sign Power Sharing Deal*, NEW ZIMBABWE.COM, Sept. 15, 2008, <http://www.newzimbabwe.com/pages/mbeki164.18763.html> (last visited Oct. 16, 2009).

complying with a plan to hold new elections under a revised constitution two years from now.

Now Mr. Tsvangirai is on a three-week tour of Western capitals—including this week in Washington—to campaign for fresh economic aid that Mr. Mugabe could not dream of obtaining on his own. Mr. Tsvangirai should not get any . . . .

Until Mr. Mugabe yields power, nothing should be done that would serve to prop up the current government—even if it is headed by a more palatable politician.<sup>220</sup>

A government's decision to supply foreign aid is based on a wide variety of factors, and in this Article, we do not attempt to analyze all the issues that militate for or against foreign aid to particular nations.

However, if reducing arms acquisitions by warlords and dictators were considered to be the paramount goal, then terminating “aid” to most of the African regimes mentioned in this Article would be the logical result.

#### *B. Provide the Tools for Self-Defense*

It must be emphasized that the warring factions in the DR Congo do not treat the civilian population as innocent bystanders. The civilians are not “collateral damage.” To the contrary, much of the victimization of the civilian population is carried out deliberately by the various groups. For example, the FDLR (founded by the Rwandan Hutu genocidaires) “live off the locals, looting, raping and killing on a regular basis, extorting food and other goods via the threat of murder. From time to time, the Hutu rebels continue to kill dozens of villagers, to maintain the climate of terror.”<sup>221</sup>

Recalling some militia battles in Ituri, one MONUC officer stated, “We had the impression that the soldiers were not fighting each other, but rather the civilian population.”<sup>222</sup> In May 2004, dissidents from RCD-Goma took over Bukavu city in South Kivu and commenced what became known as *opération TDF* (*téléphones, dollars, filles*; that is, “mobile telephones, dollars, daughters”), demanding TDF as they broke into homes, raped over a hundred females, including seventeen girls, age 13 years or younger (among them a 3 year old), and murdered more than sixty people.<sup>223</sup>

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220. Editorial, *Zimbabwe's 'Transition,'* THE WASH. POST, June 13, 2009, at A14.

221. *Out Of Control*, *supra* note 151.

222. ARMING THE EAST, *supra* note 164, at 12 (quoting Amnesty International report of interview with officer regarding militia battles in Ituri).

223. ARMING THE EAST, *supra* note 164, at 15.

The DRC rebel groups which, as part of an amnesty deal, joined with the DRC military are no better: “[T]he former rebels did not give up their warlord ways, and continued to abuse civilians (rape, murder, looting).”<sup>224</sup> For example, the United Nations reported a 2007 looting “rampage” by the Congolese National Army, the FARDC (*Forces armées de la république démocratique du Congo*).<sup>225</sup> The U.N. has asked that several of the DRC army warlords be arrested for war crimes, but the DRC government has refused.<sup>226</sup>

As StrategyPage observed:

The Army is performing not much differently from the warlord militias they fight, because the army is poorly paid, and led. Often former warlord fighters, the soldiers have not had much training, and are often commanded by officers and sergeants who are also former irregulars. Just renaming poorly trained gunmen as “soldiers” doesn’t make it so. And in the field, the “soldiers” behave as they used to, raping and looting more than fighting the bandits and warlord gunmen.<sup>227</sup>

Similarly, the members of the Lord’s Resistance Army (LRA) “live by looting from local villages.”<sup>228</sup> The town of Faradje lies in the far northeastern Congo, near the borders with Sudan and Uganda. Nearby is Garamba National Park, which has become a hideout for the LRA. The LRA, which has operated in southern Sudan and northern Uganda for two decades, is notably vicious even by the standards of Central Africa. As the *New York Times* put it: “[K]idnapping children and turning them into porters, sex slaves and killing machines seems to be their special form of cruelty.”<sup>229</sup>

The 25,000 villagers of Faradje have been abandoned by the Congolese National Army and by MONUC. In December 2008, the Congolese National Army, in conjunction with the Ugandan army and with the assistance of American advisors, attempted an offensive against

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224. *Out Of Control*, *supra* note 151.

225. *War Enters the Bandit Phase*, STRATEGYPAGE, March 20, 2007, <https://www.strategypage.com/qnd/congo/20070322.aspx> (last visited Oct. 16, 2009).

226. *Out Of Control*, *supra* note 151.

227. *The War on Rebel Militias*, STRATEGYPAGE, March 14, 2006, <http://www.strategypage.com/qnd/congo/articles/20060314.aspx> (last visited Oct. 16, 2009).

228. *Out Of Control*, *supra* note 151.

229. Jeffrey Gettleman, *Armed with Little but Resolve, And Defending a Hollowed Village*, N.Y. TIMES, Feb. 19, 2009, at A11. The LRA has been active in the Nord-Kivu and Orientale provinces of the DRC at least since 2005. In January 2006, the LRA killed eight Guatemalan peacekeeping troops; LRA activities have forced NGOs which were removing land mines in the DRC to suspend activities. SMALL ARMS SURVEY 2006, *supra* note 139, at 276.

the LRA's base in Garamba National Park.<sup>230</sup> The offensive failed, and the LRA went on a rampage against nearby civilians.<sup>231</sup> In Faradje, more than 150 people, including the town's only doctor, were killed, and more than 200 people, mostly young people, were kidnapped.<sup>232</sup> The civilian death toll from recent LRA activity totaled more than one thousand.<sup>233</sup>

So the people of Faradje have formed a self-defense militia. Thousands of men and teenagers participate in the militia, which patrols the area; they are armed with axes, machetes, slingshots, and poor quality shotguns, not ideal for self-defense against the LRA, which has machine guns and mortars,<sup>234</sup> but much better than nothing and much better than relying on futile hopes for protection by the CNA or MONUC.

For some people, arms policy is not a means to an end, but an end itself—that is, the fulfillment of the aesthetic goal of a disarmed global populace. For other people, arms policy is a means to an end—such as humanitarian improvement of the conditions of victimized people. If we treat arms policy as a means rather than an end, then it seems clear that there are some groups which it would be desirable to disarm—for example, the army of Zimbabwe. Likewise, there are groups for which more and better arms would *improve* the humanitarian situation. The militia of Faradje is an example.

As this Article has argued, disarming human rights violators, such as the army of Zimbabwe or the LRA is eminently desirable, but quite difficult in practice; and the ATT will do little, if anything, to prevent rights violators from acquiring even more arms. In contrast, providing defensive arms to victims would be easy. Bringing one plane's worth of quality firearms and ammunition into Faradje could supply plenty of defensive arms to the Faradje militia. Given that the CNA and MONUC are quite evidently *not* going to protect Faradje, the best humanitarian choice would be to help the people of Faradje, and the rest of the DRC, to protect themselves.

An argument against allowing arms possession by civilians is that the civilians themselves will misuse guns. For example, people in some rural parts of North Kivu, in the DRC, speak Rwanda.<sup>235</sup> The ANC (the armed wing of RCD-Goma) has distributed arms to Rwandophone civilians there, claiming that the civilians need arms to protect themselves from attacks by the FDLR (the Rwandans in the DRC who are allied with, or belonged to, the genocidal former regime in Rwanda

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230. Gettleman, *supra* note 230.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. The language is also known as “Kinyarwanda.” It is widely spoken not only in the nation of Rwanda, but also in southern Uganda and in the eastern DRC.

and its “security” force, the *Interahamwe*.) Further, RCD supporters say that they fear a possible campaign by the central government of the DRC, or by the DRC army to exterminate the Rwandaphones in the eastern DRC, or to drive them out of the country.<sup>236</sup>

But some of the arms that the ANC distributed to civilians were not used for legitimate defense. In December 2004 in Nyabiondo, ANC soldiers massacred dozens of Hunde civilians, and there were reports that armed Rwandaphone civilians participated in the attack.<sup>237</sup> More generally, a local police official in North Kivu reported an increase in robberies and ambushes as a result of the supplying of arms to the Rwandaphones.<sup>238</sup>

Another source of civilian arms supply in the northeast DRC has been Ugandan traders using the cover of darkness to bring in small quantities of arms by bicycle or on foot.<sup>239</sup> A study by the Christian pacifist NGO Pax Christi reported, “Most of the users of such weapons were said to be armed criminal gangs, rebel soldiers and increasing numbers of self-defence militia, although some weapons were used just for hunting. The researchers found that such arms were being used for wide scale criminality and human rights abuses.”<sup>240</sup>

The findings highlight a problem of the prohibition of arms (and, for that matter, other items): when there is no legal market, the trade is conducted in a black market, and the black market sellers will sell to anyone, whether the buyer is nefarious or benign. In contrast, when there is a regulated, legal market, the legal vendors have incentives to comply with laws that distinguish legitimate buyers (e.g., persons buying guns for self-defense or hunting) from the illegitimate ones (e.g., persons with a record of perpetrating gang crimes). The regulated system is not perfect, but it is better than the black market one.

If, somehow, the eastern DRC could return to the days when people were armed only with bows and spears and when firearms were rare, the country might be much better off. But the people of North and South Kivu, and Ituri, live in a world in which they are prey for diverse bands of warlord armies, including some related to the nominal government. They are likewise prey to smaller-scale criminals who have taken advantage of the thriving arms smuggling in which the DRC government, and every government bordering the eastern DRC, and the United Nations itself, has been complicit.

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236. ARMING THE EAST, *supra* note 164, at 53.

237. *Id.*

238. *Id.*

239. *Id.* at 67.

240. *Id.* (summarizing the findings of Pax Christi (Netherlands), *Proliferation and Illicit Traffic of Small Arms and Light Weapons in the Northeast of the DRC*, Jan. 2003).

A humanitarian arms policy for the eastern DRC should provide self-defense arms for families and villages, so that they can protect themselves from the depredations of warlords. The distribution of legitimate defensive arms could be organized so that arms are not given to villages or individuals that are known to have perpetrated crimes or human rights abuses.

Undoubtedly, some guns would still end up in the wrong hands, but the good people would at least have the ability to protect themselves. Because all the warlord armies (including those which are part of the national army) subsist by looting and pillaging, if most of the villages had the ability to defend themselves, then the warlords would lose their supply base and might find it much more difficult to attract new recruits or to maintain their existing forces.

As William Blackstone explained, the right to arms is the human right that is most necessary in situations like the eastern DRC:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law . . . and it is indeed a public allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>241</sup>

The regime in Kinshasa cannot control its own army, let alone employ that army so as to defeat all the warlords (including the warlords who are nominally part of the Congolese army) and thereby provide security of the people of the eastern DRC. But one can at least imagine that the Kinshasa government would *like* to do so.

The situation in Zimbabwe is considerably worse. There, the problem is not warlordism, but a centralized tyranny that has deliberately starved much of the population to death and driven the country to ruin. The Mugabe regime's gun confiscation program has been an integral part of the process.<sup>242</sup> The people of Zimbabwe have every right to forcefully resist the Mugabe regime. As Robert Mugabe once stated, "Only a

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241. 1 WILLIAM BLACKSTONE, COMMENTARIES \*143-44.

242. See David B. Kopel, *Dailies ignoring Zimbabwe crisis*, ROCKY MOUNTAIN NEWS/DENVER POST, Sept. 1, 2002, available at <http://www.davekopel.com/Media/RMN/2002/Zimbabwe.htm>; David B. Kopel, Paul Gallant & Joanne Eisen, *Ripe for Genocide*, NAT'L REV. ONLINE, Feb. 13, 2001, <http://www.davekopel.com/NRO/2001/Ripe-for-Genocide.htm> (last visited Oct. 16, 2009); see also *Zimbabwe Loses Food, Find Guns*, STRATEGYPAGE, March 11, 2006, <http://www.strategypage.com/qnd/pothot/articles/20060311.aspx> (last visited Oct. 16, 2009) ("The government arrested 15 people allegedly connected with the arms stockpile found earlier in the week in the town of Mutare. All fifteen are members of the Movement for Democratic Change (MDC).").

government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law . . . .”<sup>243</sup>

Although Western gun prohibition organizations deny that arms are of any use to people resisting tyranny, Mugabe knows better. In 1976, he said, “Our votes must go together with our guns; after all, any vote we shall have, shall have been the product of the gun. The gun, which produces the votes, should remain its security officer, its guarantor. The people’s vote and the people’s guns are always inseparable twins.”<sup>244</sup>

In disarming the people of Zimbabwe, Mugabe set the preconditions for depriving them of the right to vote in free elections.

Humanitarian assistance providing arms for the people of Zimbabwe would not necessarily allow them to overthrow the Mugabe tyranny immediately. At the least, arms would allow the people some means to defend themselves from Mugabe’s secret police and the various government-run gangs of thugs.

The personal right of self-defense is the foundation of international law itself, as the classical founders such as Vitoria, Suarez, Grotius, Pufendorf, and Vattel elucidated.<sup>245</sup>

If one’s primary objective is the protection of human rights, then one must realistically acknowledge that, especially in situations where the international community cannot disarm the perpetrators of human rights abuses, then the victims of the abuses have the human right of self-defense, and the derivative right to arms necessary for legitimate self-defense.

## V. CONCLUSION

Samuel Johnson reportedly described a second marriage as “[t]he triumph of hope over experience.”<sup>246</sup> But at least in a second marriage, one of the spouses is different. The proponents of the arms trade treaty are offering a particularly implausible promise that hope will triumph over experience.

An ATT might (if it evades the need for approval by the U.N. Security Council) create *more* arms embargoes. There is no evidence that these new embargoes will be any more effective than the many failed embargoes of the past.

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243. Brian Kagoro, *The Prisoners of Hope: Civil Society and the Opposition in Zimbabwe*, 14 AFR. SEC. REV. 19, 19 (2005) (quoting Robert Mugabe, Address to the Organisation of African Unity, July 22, 1980).

244. Chris Maroleng, *Zimbabwe’s Zezuru Sum Game*, 14 AFR. SEC. REV. 77, 80 (2005) (quoting Robert Mugabe, radio address from Maputo, 1976).

245. See Kopel, Gallant & Eisen, *supra* note 56.

246. 1 JAMES BOSWELL, LIFE OF SAMUEL JOHNSON, LL.D. 334 (London, Henry Baldwin, 1791).

Transnational moral entrepreneurs<sup>247</sup> keep themselves in business and affirm their moral worth by campaigning for an ATT. But there appears no realistic prospect that their program will help the victims of human rights abuses. In a debate before the House of Lords, the Earl of Sandwich stated the obvious: “[A]rms control is one of those subjects where high-flown phrases of intent disguise the reality of failure and incapacity on the ground.”<sup>248</sup>

Once the ATT fails, the transnational entrepreneurs will likely be back with demands for yet another instrument of international law, which will supposedly succeed at performing the arms supply-control miracle at which all previous international laws have failed. For persons whose primary concern is not an obsession with arms control, but is instead a determination to defend human rights, it is long past time to stop wasting effort on an ATT and to get to work on looking for genuinely effective ways to help the people of Zimbabwe, the Democratic Republic of the Congo, and the world’s many other victims of human rights abuses.

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247. See PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 19 (2006):

Often organized and linked through transnational advocacy networks, they mobilize popular opinion and political support both within their host country and abroad, they stimulate and assist in the creation of like-minded organizations in other countries, and they play a significant role in elevating their objective beyond its identification with the national interest of their government; indeed, their transnational efforts are often directed toward persuading foreign audiences (especially foreign elites) that a particular prohibition regime reflects not merely the peculiar moral code of one society but a more widely shared, even universal, moral sense.

248. See *House of Lords Debates, Arms Trade Treaty*, May 15, 2008, available at <http://www.theyworkforyou.com/lords/?id=2008-05-15a.1152.2> (last visited Oct. 16, 2009) (quoting The Earl of Sandwich, 475 PARL. DEB. H.L. (5th ser.) (2008) 1162).

**El Tratado Global de Armas: El Zimbabwe, la República Democrática del Congo, y el Efecto de los Embargos de Armas sobre los Violadores de los Derechos Humanos**

Por David B. Kopel, Paul Gallant y Joanne D. Eisen  
Traducido por Jeffrey Widmayer

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Resumen: Los defensores del propuesto Tratado Global de Armas de las Naciones Unidas (Arms Trade Treaty, ATT) prometen que el tratado impedirá la venta de armas a los violadores de derechos humanos. Este artículo examinará el ATT y observa que el ATT, si implementado como prometido, exigirá muchos embargos adicionales de armas, incluyendo embargos contra muchos países de África. Después, el artículo examinará estudios de de la actual venta de armas a la dictadura de Zimbabwe y a los líderes militares de la parte oriental de la República Democrática del Congo (RDC). Este artículo propone que el ATT no remediaría las condiciones que han permitido que tantas armas hayan sido adquiridas por los violadores de derechos humanos en Zimbabwe y en la RDC. El ATT no tendría más poder que los embargos que ya han sido impuestos por el Consejo de Seguridad; entonces las naciones, como China, que no respetan los actuales embargos del Consejo de Seguridad, podrían violar los embargos del ATT también. Por consiguiente, los activistas de derechos humanos deben buscar otros métodos de resolver el problema de las armas en las manos de los violadores de derechos humanos.

**Le Traité Mondial sur le Commerce des Armes: Le Zimbabwe,  
La République Démocratique du Congo, et l'effet des embargos sur  
les armes sur les violateurs des droits de l'homme**

David B. Kopel, Paul Gallant, et Joanne D. Eisen  
Traduit par Jeffrey Widmayer

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**Résumé:** Les défenseurs du proposé Traité Mondial sur le Commerce des Armes (TCA) des Nations Unies ont promis que ce traité empêchera le commerce des armes aux violateurs des droits de l'homme. Cet essai examinera d'abord le traité, et observera que le traité, s'il est mis en application comme promis, exigerait des douzaines d'embargos additionnels sur les armes, y compris des embargos sur beaucoup des pays de l'Afrique. Après cela, l'essai considérera des études de cas du fournissement actuel des armes aux dictateurs au Zimbabwe et aux seigneurs de la guerre à la partie est de la République Démocratique du Congo (RDC). L'essai constate que le TCA ne remédiera guère les conditions qui ont permis l'acquisition des armes par les violateurs des droits de l'homme au Zimbabwe et à la RDC. Le TCA n'aura plus de force que les embargos déjà mis en place par le Conseil de Sécurité des Nations Unies ; alors les pays, comme la Chine, qui ne respectent pas les embargos actuels du Conseil de Sécurité ignoreront aussi ceux du TCA. Par conséquent, le TCA ne fait que distraire, et les militants des droits de l'homme devraient examiner des méthodes alternatives d'aborder le problème des armes aux mains des violateurs des droits de l'homme.

**Objectif et organisation**

Cet essai se pose la question de si le proposé TCA pourra réaliser les buts de ses défenseurs: de contrôler la vente de petites armes afin d'empêcher les violations des droits de l'homme. La première partie survolera les échecs des embargos internationaux des armes et décrit les obstacles importants auxquels un TCA efficace devra faire face: les nations instables qui produisent les armes, le système international de la souveraineté, et la tendance des dictateurs de ratifier et après ignorer les traités des droits de l'homme, et le marché noir. La deuxième partie discutera les efforts inutiles à restreindre la vente des armes au régime dictatorial du Zimbabwe et considérera si un TCA pourrait rendre possible un embargo efficace sur le régime de Mugabe. La troisième

partie considérera le cas de la RDC, contre laquelle l'ONU a imposé un embargo en 2003 et a élargi l'embargo en 2005. Le rôle de l'ONU elle-même à la vente des armes à la RDC sera examiné aussi.

La quatrième partie offrira des suggestions alternatives pour la réduction de la vente des armes aux violeurs des droits de l'homme et pour la protection des victimes.

## **I. Les échecs des embargos sur les armes**

Le groupe de pression le plus formidable est "Control Arms," subsidiaire de Oxfam, Amnesty International, et IANSA (The International Action Network on Small Arms). Ce groupe affirme que chacun des treize embargos de l'ONU de cette décennie a été violé. Par conséquent, Control Arms suggère l'établissement du contrôle de la vente des armes qui soit plus en accord avec le droit international: un traité international de la vente des armes. En ce moment, l'ONU se met à écrire un tel document. Malgré cela, sous le droit international actuel, le comité de la sécurité de l'ONU a le pouvoir, sous chapitre 7 de la Charte de l'Établissement de l'ONU, de se mettre en marche face aux menaces à la paix internationale. Les États-Unis, la France, la Grande Bretagne, la Russie, et la Chine ont le droit du veto. Le TCA permettrait l'imposition des embargos sans l'accord du Conseil de Sécurité. Grâce aux vetos de la Chine et de la Russie, le Conseil de Sécurité n'a pas pu imposer un embargo sur le Zimbabwe, mais un mécanisme extérieur pourrait, peut-être, le faire. Au moment, il n'est pas certain si le TCA serait géré par une institution au sein de l'ONU ou par une organisation indépendante.

### *A. Combien d'embargos seront nécessaires?*

Les délégués à l'ONU ont tendance à ratifier des traités et après, à poursuivre des intérêts nationaux au détriment des promesses incluses aux traités. En suivant les désirs des défenseurs du TCA, on serait obligé d'imposer un embargo sur la Chine, vu que ce pays emploie des armes pour la suppression des droits de l'homme et se méfie des embargos de l'ONU. Sous le TCA, on verrait la multiplication des embargos: on serait obligé d'en imposer sur la plupart de l'Afrique. En tout cas, la moitié des pays de l'Afrique produisent, déjà, des armes sur leur terrain. Souvent, les embargos échouent parce que les pays ciblés ramassent des armes avant que l'embargo soit imposé. En plus, il est difficile d'imposer des embargos sans le faire de façon discriminatoire.

Sous le TCA, un groupe d'experts auraient besoin de déterminer la stabilité des nations pour:

1. déterminer quels utiliseront, probablement, les armes contre les civils.
2. déterminer quels pays utiliseront, probablement, les armes pour créer de l'instabilité régionale, et
3. déterminer quels pays revendront les armes aux pays qui s'en serviront pour commettre les délits mentionnés ci-dessus.

D'autres difficultés seront l'identification des pays qui seront classifiés "à haut risque." La moitié des pays à haut risque produisent des armes. Il serait presque impossible d'empêcher la production des armes dans ces pays parce que les matières primaires nécessaires pour la production des armes sont similaires à celles pour d'autres industries.

#### *B. La souveraineté de l'état et l'exécution des traités*

Tandis que les ONG s'intéressent à la réduction de la violence, les nations se concernent de la souveraineté nationale. Quatre-vingts dix-huit pays membres de l'ONU ont exprimé leurs sentiments quant au TCA et ont constaté qu'ils veulent protéger leur droit (de l'état) de la possession des armes pour leur propre défense et craignent que cela ne soit pas respecté sous un TCA. L'article 51 de la charte de l'ONU garantit le droit à se défendre aux pays membres. Les pays membres craignent aussi la perte de leur "droit" de fabriquer des armes. Mais, la reconnaissance d'un tel droit mènerait à une catastrophe des droits humains.

Logiquement, comme le TCA est le produit des ONG qui veulent la réduction des armes, il ne reconnaît pas les droits individuels de se défendre, de combattre l'oppression, et de jouir de la sécurité au foyer. En somme, le TCA est aveugle envers les droits individuels, tandis qu'il crée des droits gouvernementaux.

L'exécution du TCA ne sera pas sans problèmes. Les états membres seraient obligés à rendre des déterminations de leur propre conformité au TCA. Au cas où ils ne se conforment pas aux exigences du traité, les gérants du TCA ne pourraient que critiquer ce manque de la bonne volonté. En contraste, le Conseil de Sécurité de l'ONU a le pouvoir d'exécuter les embargos. Les violateurs des droits de l'homme préféreraient, peut-être, vivre sous un TCA que sous le pouvoir du Conseil de Sécurité. Déjà, l'histoire du contrôle des armes a montré la différence entre ce que les pays membres disent qu'ils feront et ce qu'ils font, en fait.

#### *C. Les dictatures et l'adhésion aux traités des droits de l'homme*

Les défenseurs du TCA constatent qu'un tel traité créera des embargos internationaux, auxquels toutes les nations devront se conformer. Mais est-ce qu'ils s'y conformeraient? Les fournisseurs les plus importants des armes sont des dictatures. L'histoire suggère qu'ils ne s'y conformeraient point. Souvent, les états qui ratifient des traités destinés à la protection des droits de l'homme sans hésiter sont ceux qui sont tellement oppressifs qu'ils ne craignent pas que l'adhésion à un tel traité serve comme base d'opposition. Par exemple, l'Arabie Saoudite a ratifié le CEDAW, sans crainte que les féministes saoudites lèvent leur voix contre des violations des droits de la femme commises par l'état. Les régimes oppressifs ratifient les traités des droits de l'homme pour créer l'impression d'être légitimes au point de vu humanitaire, tandis qu'ils n'ont aucune intention de les suivre.

#### *D. Le marché noir*

Les estimations de la valeur du marché noir des armes varient entre deux et quinze milliards de dollars chaque année (mais, par définition, on manque des chiffres fiables de ce commerce). Il ne serait pas réaliste d'imaginer que, sous un TCA, les pays fourniraient les chiffres concernant les ventes illicites des armes. Il est possible que la manière la plus efficace de diminuer la vente des armes aux pays de haut risque soit de réduire le besoin des armes des habitants de ces pays; s'il y avait plus de sécurité à l'intérieur de ces pays, les habitants n'auraient pas besoin des armes. Cependant, les seigneurs de la guerre ne vont pas augmenter le niveau de sécurité à l'intérieur de leurs pays. Les défenseurs du TCA n'expliquent pas comment, sous un tel traité, les gérants auraient le pouvoir de punir ceux qui ne s'y conforment pas. Comment est-ce qu'un TCA pourrait être exécuté d'une manière plus efficace qu'un embargo du Conseil de Sécurité de l'ONU? Une résolution de ce conseil est la directive la plus puissant du droit international. Si un embargo du Conseil de Sécurité n'a pas la force d'empêcher la vente des armes au marché noir, pourquoi imaginer qu'un TCA la posséderait?

## **II. Le Zimbabwe**

La nation du Zimbabwe est précisément la sorte d'état qui ne devrait pas avoir l'opportunité d'acheter des armes. Pendant l'élection la plus récente, qui, pareil que les élections précédentes, a été volée par le dictateur Robert Mugabe, l'état a opprimé ses détracteurs politiques, ainsi que ceux qui ont protesté la corruption de l'élection. Avec la force des armes, l'armée nationale du Zimbabwe, la police et les milices des jeunes du parti politique de Mugabe ont supprimé l'opposition politique de façon violente et ont donné du contrôle des sources alimentaires au

gouvernement. Cela n'est pas nouveau; en 1983, l'armée du Zimbabwe a commis des meurtres en masse, des viols, de la torture, et des enlèvements dans la partie centrale du pays et à Matabeleland. Le Zimbabwe a aussi, à la fin du vingtième siècle et au début du siècle vingt-et-un, a profité des guerres à la RDC pour envahir le sud du pays et voler des minéraux. Grâce à la Chine, il n'y a pas d'embargo du Conseil de Sécurité sur le Zimbabwe. La Chine s'en sert de son veto pour empêcher des embargos sur le Zimbabwe, disant que les problèmes du Zimbabwe existent à l'intérieur de ce pays et que l'intervention de l'ONU ne serait pas justifiable. L'Union Africaine n'a pas mis d'embargo sur le Zimbabwe. L'Union Européenne a mis un embargo sur ce pays, mais cela n'oblige que les pays de l'Europe à l'obéir.

*A. L'Assistance illégale de l'Afrique du Sud à la vente des armes au Zimbabwe*

En mars, 2008, la Chine a envoyé des armes destinées au Zimbabwe. L'Afrique du Sud a approuvé le transfert de ces armes à travers son pays. Cependant, l'Afrique du Sud avait déjà son traité contre la vente des armes, qu'elle a aussi violé. À la réunion du Conseil de Sécurité en 2008, l'Afrique du Sud, la Libye, le Vietnam, la Russie, et la Chine ont voté contre l'embargo sur le Zimbabwe. L'Afrique du Sud est un pays démocratique, avec une judiciaire efficace et une presse libre. Si une démocratie ne respecte ni ses propres lois, ni les traités de l'ONU, est-ce que l'on peut imaginer que les dictatures y obéiront?

*B. La vente des armes de la Chine à Mugabe*

La Chine vend des armes à Mugabe en échange de la protection des droits précoloniaux de la Chine aux mines du Zimbabwe. En 2008, la Chine a envoyé des armes au Zimbabwe, en passant par le Soudan et la RDC (en flagrant violation de l'embargo de l'ONU). Le seul incident connu qui concerne le transfert des armes de la Chine au Zimbabwe a été celui du navire An Yue Jiang, qui transportait des munitions pour les AK-47, parmi d'autres armes. Voulant éviter de la honte internationale, la Chine a déclaré qu'elle avait rappelé le navire. Cependant, le navire est arrivé au Zimbabwe, après être passé par plusieurs pays de l'Afrique.

C. *Les armes brésiliennes au Zimbabwe*

La Chine n'est pas le seul fournisseur d'armes à Mugabe. Le Zimbabwe est parmi les cinq clients les plus importants des armes du Brésil. Notamment, le président du Brésil, Lula, a proposé un référendum à prohiber les armes au Brésil, mais il a perdu 64% contre 36%. Cependant, il a le pouvoir légal d'arrêter l'exportation des armes à un dictateur méprisé, et il a refusé de le faire. Ses actions renforcent le soupçon que la plupart des hommes politiques parlent du contrôle des armes pour recevoir des bénéfices politiques, et ils manquent du vrai désir de réduire la vente des armes aux dictateurs.

D. *Le contrebandier d'armes du Zimbabwe est aussi le délégué du Zimbabwe à l'ONU.*

Le colonel Tshinga Dube joue les deux rôles. Il est révélateur que le gouvernement du Zimbabwe, qui envoie, comme délégué principal, un contrebandier des armes au congrès de l'ONU au sujet de la vente illicite des armes, soutient tellement le programme du contrôle des petites armes de l'ONU. Il n'y avait personne au congrès qui soit impoli au point d'indiquer que le délégué du Zimbabwe était trafiquant des armes. Si les ONG et leurs alliés n'ont pas levé la voix contre ces actions de la part du Zimbabwe à l'ONU, on ne peut pas croire qu'ils vont être plus courageux sous un TCA à restreindre la vente des armes au Zimbabwe, surtout parce que, comme à l'ONU actuel, la Chine aura le pouvoir de facto du veto, même si elle n'a pas de pouvoir formel du veto.

### III. La République Démocratique du Congo

Riche en ressources naturelles, la région qui est maintenant la RDC est, depuis longtemps, parmi les endroits les plus misérables du monde. Elle a été colonisée par les belges pendant les années 1880. Sous les belges, qui n'ont instauré ni l'éducation, ni l'infrastructure, ni la loi, la région a beaucoup souffert. La période postindépendance a été encore pire. À cause des guerres à l'est du pays, plus que 1,3 millions de personnes ont perdu leurs maisons. On estime qu'entre deux et cinq millions de personnes sont mortes à cause des guerres.

A. *Les embargos du Conseil de Sécurité de 2003 et 2005*

Le 28 juillet, 2003, le Conseil de Sécurité a mis un embargo sur les provinces du nord-est de la RDC: sur le Kivu du Nord, le Kivu du Sud, et la Province Orientale. L'embargo s'appliquait aussi aux groupes à la RDC qui n'avaient pas accepté le nouveau traité de la paix. Le Conseil

de Sécurité a condamné les violations des droits de l'homme commises à la RDC, comme la violence contre les femmes et aussi contre le vol des ressources naturelles de la région. Cet organisme a demandé que les pays voisins aident à restaurer la paix dans la région, mais les experts de l'ONU ont déclaré que la valeur minérale, les pratiques immorales de commerce, et l'influence des pays extérieurs empêchaient une résolution paisible. En 2005, les experts du Conseil de Sécurité ont constaté que les officiels de la Ruanda et de l'Uganda vendaient des armes aux régions de la RDC, qui était sous l'embargo. Le marché noir avait pris le contrôle. Le 18 avril 2005, le Conseil de Sécurité a élargi l'embargo pour inclure la totalité de la RDC.

*B. Les violations d'embargo commises par l'Albanie, le Burundi, la Chine, la RDC, le Ruanda, l'Afrique du Sud, le Soudan, l'Uganda, et le Zimbabwe*

Depuis 2003, aucune nation n'a avoué l'exportation des armes à la RDC; néanmoins, elle n'en manque pas. La Chine a fourni des armes à Kivu, à Ituri, et à d'autres parties de la RDC à travers l'Uganda, le Ruanda, et le Burundi. L'armée du gouvernement de l'Uganda trafique des armes à la RDC, commettant une flagrante violation de l'embargo de l'ONU. Le gouvernement de l'Afrique du Sud permet le transport des armes destinées à la RDC à être envoyées à la Ruanda. L'ONU ne fait rien pour réagir à ces violations de son embargo.

*C. La participation de l'ONU au passage en contrebande en violation de l'embargo de L'ONU*

En 2007, un correspondant du BBC a révélé qu'un pakistanais des forces des Nations Unies pour le maintien de la paix vendait des armes aux groupes militaires congolais: les mêmes groupes que les forces pour le maintien de la paix devaient désarmer. L'ONU a fait semblance d'investiguer l'incident, mais a déclaré qu'elle n'avait rien trouvé. Pourtant, on sait que les munitions fabriquées au Pakistan ont été confisquées des groupes congolais. La lenteur et la manque de responsabilité de l'investigation ont été critiqués par les ONG. Il n'est pas surprenant que les forces de l'ONU aient joué un rôle au trafic des armes. D'autres membres des forces pour le maintien de la paix de l'ONU ont sexuellement maltraité les femmes et les enfants au Congo, un fait que l'ONU a caché. Selon les ONG qui souhaitent réduire la quantité des armes, si un officiel de l'état ne réagit pas au trafic des armes aux violateurs des droits de l'homme, cela veut dire qu'il est criminellement responsable devant la Cour Criminelle Internationale (CCI). Alors, le CCI devrait investiguer les officiels de l'ONU.

#### *D. La Cour Criminelle Internationale*

En théorie, une violation d'un embargo du ATT pourrait être poursuivie à la Cour Criminelle Internationale (CCI). Ainsi, le ATT ne fait que reproduire le droit international existant, vu qu'une violation d'un embargo du Conseil de Sécurité pourrait aussi mener à une poursuite dans cette cour. La CCI n'aidera pas à réduire la vente des armes aux violateurs des droits de l'homme. Les organisations des droits humains étaient contentes quand la CCI a arrêté Thomas Lubanga, chef de l'Union Congolais Patriotique (UCP). Lubanga et son groupe, on croit, ont commis beaucoup de viols et de meurtres au nord-est du Congo. Cependant, la CCI a pris du délai à le poursuivre et les seules inculpations contre lui étaient d'employer les enfants soldats.

#### *E. Après avoir échoué deux fois, faites la même chose de nouveau.*

Control Arms croit que les échecs des embargos du Conseil de Sécurité font la preuve du besoin d'un ATT, mais il n'est pas probable que les nations qui n'obéissent aux embargos déjà existants vont respecter un ATT. Deux obligations avec la force de la loi internationale ne vont pas être efficaces, où une seule obligation a été sans effet. Le Ruanda, l'Uganda, le Soudan, le Burundi et la RDC tous ont signé le Protocole de Nairobi, un traité pour la réduction des armes parrainé par l'ONU. L'insistance de ce protocole a eu l'effet de désarmer les habitants de ces pays, les rendant sans défense contre les violations des droits de l'homme. Cependant, le trafic des armes continue dans ces pays.

### **IV. Deux alternatives**

Dans cette partie de l'article, nous proposons deux idées de comment arrêter l'acquisition des armes par les violateurs des droits de l'homme. On ne constate ni que ce sont les seules possibilités, ni qu'elles, seules, pourront résoudre le problème entier. Nous les proposons seulement comme point de départ. Puisqu'on ne peut pas imaginer qu'un ATT sera une réussite où les embargos antérieurs ont échoué, l'ATT est une perte de temps et de ressources dangereuse. Les organisations humanitaires et les diplomates devraient chercher d'autres moyens de réduire la vente des armes.

#### *A. Réduire l'aide étrangère*

L'aide étrangère finance jusqu'à quarante pour cent des achats des armes des régimes africains. Le FMI a suspendu l'aide au Zimbabwe au début de ce siècle. Cela a diminué les fonds du régime pour acheter des armes. Le gouvernement de Ruanda dépend de l'aide étrangère et n'aurait pas pu acheter des armes sans cet argent.

*B. Fournir des armes pour la défense de soi-même*

Une grande partie de la victimisation des habitants de la RDC est fait exprès. Le pillage, les viols, et le meurtre sont fréquents. Dans une ville, Faradje, les habitants terrorisés ont formé une milice pour se défendre. Ils s'arment des haches, des machettes, et des fusils de mauvaise qualité. Il serait facile de munir la milice de Faradje pour les aider à se défendre contre les violeurs des droits de l'homme. En revanche, il est possible que les armes fournies aux civils ne soient pas utilisées pour se défendre. Si les peuples de l'est de la RDC pouvaient retourner à un moment où on s'armait des arcs et des flèches, la situation serait mieux. Mais ils sont proie aux seigneurs de la guerre, qui ont acquis des armes puissantes, une situation que l'ONU a aidé à réaliser. Puisque les seigneurs de la guerre se nourrissent du pillage, les habitants pourraient couper leurs provisions s'ils pouvaient se défendre. Quand les organisations internationales ne sont pas capables à protéger les habitants d'une région, ils ont le droit de se défendre. Mugabe lui-même a dit que la liberté de voter est liée au droit de pouvoir se défendre. En désarmant les habitants de Zimbabwe, il a assuré qu'ils ne puissent pas s'exprimer librement aux élections.

**V. Conclusion**

Un ATT pourrait créer encore plus d'embargos des armes (s'il fonctionne sans l'accord du Conseil de Sécurité). Il n'y a pas d'évidence que ces nouveaux embargos seraient plus efficaces que ceux d'avant. Les entrepreneurs transnationaux de moralité s'occupent à mener une campagne en faveur d'un ATT pour affirmer leur valeur sociale.

Toutefois, leur programme n'aidera pas aux victimes des violations des droits de l'homme. Pour ceux qui ne se concernent pas avec le contrôle des armes, mais avec la protection des droits de l'homme, c'est le moment de chercher des moyens efficaces à aider les habitants du Zimbabwe, de la RDC, et les autres victimes des violations des droits de l'homme.