

1. Corruption and the arms trade: sins of commission

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I. Introduction

The arms trade is uniquely and disproportionately infected with corruption. While the trade in weapons constitutes a mere fraction of total world trade, according to one estimate it accounts for a remarkable 40 per cent of corruption.¹ In 2010 a number of long-running investigations relating to bribery in the arms trade were concluded, including cases involving the French arms company DCNS in Taiwan and the British company BAE Systems in the United Kingdom and the United States.² However, the length of time it took to conclude these cases and the often unsatisfactory outcomes and low punitive costs for the companies—not to mention the countless cases that are never investigated—illustrate the difficulties of tackling corruption in the arms trade and the reluctance of authorities to do so.

This chapter attempts to unravel why the arms trade has become synonymous with corruption. It argues that this corruption takes a heavy toll on buyer and seller countries, undermining democratic practice, the rule of law and global security. Section II defines corruption and briefly discusses the features of the arms trade that make it so susceptible to this plague. Section III looks at the case of a highly controversial weapon deal in South Africa that exemplifies many aspects of corruption in the trade. Section IV reveals the impact of this corruption in a broader context using the South African and other examples. Section V concludes with suggestions for multilateral, international and national initiatives that could limit the extent of corruption in the arms trade and considers the rights of those who suffer the consequences of corrupt deals.

¹ This figure was calculated for 2003 by Joe Roeber in work undertaken for Transparency International. Roeber, J., 'Hard-wired for corruption: the arms trade and corruption', *Prospect*, no. 113 (28 Aug. 2005).

² The French state defence company DCNS, together with Thales, was ordered to pay a fine of over \$800 million to the Taiwanese Government after being found guilty of paying bribes to inflate the price of frigates that it supplied on a \$2.8 billion arms deal in 1991. 'Taiwan wins arms suit', *Straits Times*, 5 May 2010. On BAE see USA v. BAE Systems plc, United States District Court for the District of Columbia, Court docket number: 10-CR-035-JDB, Washington, DC, 4 Feb. 2010, <<http://www.justice.gov/criminal/fraud/fcpa/cases/bae-systems.html>>; and Feinstein, A., *The Shadow World: Inside the Global Arms Trade* (Hamish Hamilton/Farrar, Straus & Giroux: London/New York, forthcoming 2011).

II. Understanding corruption in the arms trade

What is corruption?

Corruption is a term with great emotive force that is often used without being precisely defined. Even in key international agreements it is often left vague. For example, the 2003 United Nations Convention against Corruption (UNCAC) fails to define the term because ‘consensus on the definition of corruption had not been reached during the negotiating process’.³ Instead, UNCAC attempts to address ‘specific kinds of corruption’ without providing a prescriptive overarching definitional framework. Nonetheless, UNCAC is legally binding and obliges member states to introduce legal mechanisms to limit corruption. Like UNCAC, the Organisation for Economic Co-operation and Development (OECD) refrains from providing a definition of corruption, despite operating an anti-bribery and corruption programme and monitoring both bribery and corruption. The OECD’s 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions focuses on the specific issue of bribery that is directed at foreign public officials.⁴ However, the convention is not legally binding and instead requests that OECD member countries each enact supporting legislation.

Transparency International (TI) provides a rigorous definition of corruption as ‘the abuse of entrusted power for private gains’.⁵ It further differentiates between corruption ‘according to rule’ and corruption ‘against the rule’. ‘Facilitation payments, where a bribe is paid to receive preferential treatment for something the bribe receiver is required to do by law’, constitute corruption according to rule, whereas corruption against the rule is ‘a bribe paid to obtain services the bribe receiver is prohibited from providing’. This chapter uses TI’s definition but expands it to include the act of corrupting, defined as offering or giving any inducement that may or does result in undue advantage. This highlights both the need for successful conspiracies of corruption to involve two or more willing participants and that all parties, whether purveyors or recipients of such inducements, should thus be considered corrupt.

³ United Nations, ‘United Nations Convention against Corruption’, Press briefing, 31 Oct. 2003, <<http://www.un.org/News/briefings/docs/2003/costatouq.doc.htm>>. The United Nations Convention against Corruption, adopted 31 Oct. 2003, entered into force 14 Dec. 2005, *United Nations Treaty Series*, vol. 2349 (2007).

⁴ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed 17 Dec. 1997, entered into force on 15 Feb. 1999, <http://www.oecd.org/department/0,3355,en_2649_34859_1_1_1_1_1,00.html>. On the OECD Working Group on Bribery in International Business Transactions see <http://www.oecd.org/document/5/0,3746,en_2649_34859_35430021_1_1_1_1,00.html>.

⁵ Transparency International, ‘Frequently asked questions’, [n.d.], <http://www.transparency.org/news_room/faq/corruption_faq>.

Methods and means of corruption in the arms trade

Within the arms trade a wide range of methods and means are used to purchase or acquire undue influence. This chapter focuses on four of the most frequently used: (a) bribery, (b) the failure to declare a conflict of interest, (c) the promise of post-employment and (d) the offer of preferential business access.

Bribery is the first and most widely known method that is common to all types of weapon transaction. In these instances, payments are made or solicited in cash or kind (e.g. diamonds or other movable commodities) to influence a procurement decision. Modern arms dealers most frequently use a network of international banks to facilitate and obscure payments and relationships. In addition, it is extremely rare to find an instance of a supplier paying a bribe or inducement directly to an official or institution. Instead, this is frequently the job of a third party who ‘greases the wheels’ of arms deals. This provides a legal remove between the supplier and the corrupting act. In the case of the al-Yamamah arms deal between the UK and Saudi Arabia—the world’s largest—as well as the example of South Africa below, it was alleged that BAE Systems established a complex web of international banking arrangements and third parties that was designed to provide the greatest secrecy and obscurity for payments made to decision makers.⁶

The second method, common to formal arms deals involving governments, is failure to declare a conflict of interest, whether it be a conflict preceding a potential deal or one actively pursued in anticipation of a deal. In a conflict of interest case, public officials or institutions have a financial stake—be it direct or via a third party, often a relative or confidant—in a particular arms supplier’s success in securing a deal. Public officials may direct contracts to the supplier in anticipation of personal financial reward, sometimes through a financial interest in a company that anticipates a substantial flow of income following the selection of a particular arms supplier.

A third method, occupying more of a legal grey area than those above, is post-employment. Also known as the ‘revolving door’, it occurs when public officials are employed by an arms company shortly or directly after leaving office. In many instances the offer of employment is made while the individual is still a public official adjudicating on decisions to award busi-

⁶ On the al-Yamamah deal see Leigh, D. and Evans, R., ‘The BAE files: the al-Yamamah deal’, *The Guardian*, 7 June 2007. On the South Africa case see section III below; Feinstein (note 2); and Murphy, G., British Serious Fraud Office, Affidavit submitted as Annexure JDP-SW12 in the High Court of South Africa (Transvaal Provincial Division) in the matter of *Ex Parte* the National Director of Public Prosecutions (applicant) re: an application for issue of search warrants in terms of Section 29(5) and 29(6) of the National Prosecuting Authority Act, No. 32 of 1998, as amended (2008).

ness to a future employer.⁷ Certain countries, such as the USA, legally require that public officials observe a 'cooling off' period before entering into private employment with a company connected to previous work as a public servant. However, this period is frequently short, sometimes ignored altogether or can be mitigated by means of, for example, bonus payments made to the official by the employing company.

The 'revolving door' between government, the military and weapon manufacturers blurs the line between the state and the defence industry.⁸ In the USA, between 2004 and 2008, 80 per cent of all retiring three- and four-star generals became employees of or consultants to the arms industry.⁹ Worryingly, many of them had been offered employment prior to their retirement, and many retained influential military advisory roles with the US Government after retirement. One of the most egregious cases of the revolving door involved the principal deputy assistant secretary of the US Air Force for acquisition and management, Darleen Druyun. Druyun oversaw negotiations for the leasing of tanker aircraft, a contract worth over \$20 billion that was awarded to Boeing. She divulged confidential information from rival bidders to Boeing and drafted the contract to match the company's aircraft capabilities and budgetary needs.¹⁰ In return, Boeing employed her daughter and son-in-law and made Druyun deputy general manager of the company's missile defence systems unit. After cutting a deal with prosecutors, Druyun served nine months in a minimum-security prison, in addition to receiving relatively mild non-custodial penalties.¹¹

The last common corruption method covered here is preferential business access, which is of particular concern in relation to the countertrade programmes that are associated with many large arms deals. In these controversial programmes, the supplier company agrees to invest in the industry of a purchasing country to 'offset' the economic impact of arms expenditure.¹² Offsets are contentious as the fulfilment of their associated obligations is at best patchy, with many companies building the penalties for

⁷ See e.g. Silverstein, K., *Private Warriors* (Verso: London, 2000); and Silverstein, K., 'How does the defense industry arm itself against budget cuts? With the Pentagon's top brass', *Mother Jones*, Nov./Dec. 1998.

⁸ See e.g. Hartung, W. D., *Prophets of War: Lockheed Martin and the Making of the Military-Industrial Complex* (Nation Books: New York, 2011); and Johnson, C., *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (Metropolitan: New York, 2004).

⁹ Bender, B., 'From the Pentagon to the private sector', *Boston Globe*, 26 Dec. 2010.

¹⁰ Wayne, L., 'Documents show extent of lobbying by Boeing', *New York Times*, 3 Sep. 2003.

¹¹ Cahlink, G., 'Ex-Pentagon procurement executive gets jail time', *Government Executive.com*, 1 Oct. 2004, <<http://www.govexec.com/dailyfed/1004/100104gl.htm>>; Palmer, K., 'Former Air Force acquisition official released from jail', *Government Executive.com*, 3 Oct. 2005, <<http://www.govexec.com/dailyfed/1005/100305k2.htm>>; and Leung, R., 'Cashing in for profit? Who cost taxpayers billions in biggest Pentagon scandal in years?', *60 Minutes*, CBS, 5 Jan. 2005, <<http://www.cbsnews.com/stories/2005/01/04/60II/main664652.shtml>>.

¹² Brauer, J. and Dunne, J. P. (eds), *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets* (Routledge: London, 2004).

non-fulfilment into the purchase price of deals. Offsets often remain shrouded in secrecy as supplier companies and governments refuse oversight in deference to ‘commercial confidentiality’. This secrecy also provides a means of obscuring influence peddling. There is a concern that public officials may be granted cheap or free shares in companies that have been established in furtherance of the offset programme or that they will demand that business investments undertaken by the supplier company directly profit a company in which officials or even a political party have a stake.

Why is the arms trade so susceptible to corruption?

As Joe Roeber has argued, the arms trade is hard-wired for corruption: the very structure of the trade explains the prevalence and nature of the corruption that characterizes it.¹³ Built-in features of the arms trade that facilitate corruption include (a) the secrecy related to national security and commercial confidentiality; (b) the concomitant intimacy of buyers, suppliers and their brokers; (c) the sophistication, fragmentation and in many cases opacity of global production, transportation, and financial networks and instruments; (d) the technical specificity of the product; (e) procurement pressures; and (f) the high financial rewards coupled with a lack of consequences.

The first of these structural features—the trade’s deep and abiding connection to national security and commercial confidentiality concerns—often renders arms deals opaque and highly secretive. With any form of accountability proscribed, those who participate in the deal are protected from scrutiny. Thus, corruption, conflicts of interest, poor decision making and inappropriate national security choices are often concealed. As a consequence, the arms trade is one of the least audited or accountable areas of public or private activity.¹⁴

The centrality of the arms trade to national security begets a second feature: an unusually close relationship between producer companies, agents, middlemen and dealers, and political establishments. In particular, the boundaries between government agencies that are responsible for defence, intelligence and security and the companies involved in the arms trade are blurred. This gives the arms trade a unique position in the political arena both to help shape the agenda of government and to gain ‘inside information’ on government thinking and planned actions. This so-called military-industrial complex creates constant opportunities for rent-

¹³ Roeber (note 1).

¹⁴ Feinstein (note 2).

seeking, opportunism and corruption, all concealed under the rubric of national security.

Tragically, corruption at this level is a self-perpetuating cycle: when a political class becomes engaged in arms trade-related corruption, it applies considerable political pressure to ensure limited investigation and prosecution. Secrecy enables further corruption which, in turn, intensifies the need for greater secrecy. This has the effect of undermining budgetary and procurement processes as well as the rule of law, which is reflected in a singular lack of political will to tackle corruption in many arms-producing and -purchasing countries.

The third feature of the arms trade is its global nature and the associated complicated lines of order, delivery and supply. Often deals are constructed in a complex and opaque manner that involves a number of brokers, shipping agents, purchasers and producers, frequently working in different countries. In some cases, arms deals are concluded between governments that then turn to manufacturers to fulfil them. In other instances, governments enter into contracts directly with commercial suppliers, which do business with each other or third parties, some of which are not even legal entities. These include non-state actors, ranging from armed militias to insurgent groups and informal clusters of 'terrorists'. The sale and supply of (primarily small) arms to such groups is often undertaken by middlemen or agents, also referred to as arms brokers or dealers.¹⁵ Intermediaries of some sort tend to be involved in most arms transactions—large and small, legal and illegal, state and non-state—and are often crucial to the practice of bribery or corruption.

In reality, many arms deals contain elements of all these arrangements stretching across a continuum of legality and ethics from the official, or formal, trade to the black market. While black market deals are illegal in conception and execution, 'grey market' deals are undertaken by governments covertly as they entail both legal and illegal actions to achieve foreign policy ends. The boundaries between the two are vague, hence the use of the term 'shadow world' for arms deals that contain an element of illegality.¹⁶ Many individuals straddle the formal and shadow worlds, selling large military hardware as well as small arms and light weapons (SALW) to both governments and less formal entities. Viktor Bout is alleged to have undertaken transactions and logistical support with not only al-Qaeda and the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) but also the US Government

¹⁵ Dealers are generally defined as middlemen who buy the weapons and then sell them for profit, while brokers do not own the weapons but broker their sale either for cash or commodities, e.g. diamonds, oil or timber. On government reporting on brokering see appendix 6C in this volume.

¹⁶ See Feinstein (note 2).

and the UN.¹⁷ Heinrich Thomet, a Swiss citizen with companies in the Balkans and Cyprus, has operated as a broker for US Department of Defense contracts, but he also appears on a US Government watch list as he is suspected of illicit arms trading in a number of conflicts around the world.¹⁸

The perpetrators of corruption have thus learned to conceal their trails in complex arrangements between states, agents, companies and shell companies, hiding corrupt payments in commissions, consultancies, sub-contracts, offsets and barter deals. While the global nature of the trade lends it extensive cover, anti-corruption legislation and law enforcement tend to be constrained by national borders and domestic law. Prosecutions must traverse the hurdles of jurisdiction and rely on complex multinational investigations that may include ill-resourced, sclerotic or corrupt legal systems.

The fourth feature of the trade is its technical specificity. The arms trade often deals (albeit never exclusively) in high-tech equipment on which only a handful of experts can confidently pronounce. This means that in many deals a few experts have influence on the final decision. Add to this the small number of politicians and officials involved in these decisions and a situation results in which any potential corrupter needs only sway a few people in order to gain undue influence and secure contracts.

The fifth innately corrupting feature of the arms trade is pressure to procure arms swiftly due to situations of active or imminent conflict. This regularly results in overly hasty procurement decisions with limited oversight. In addition, especially in the cases of civil war or internecine conflict, the rule of law often does not apply and the politics of power dictate that the weapons are purchased by any means necessary. In such a legal black hole, rent-seeking and widespread corruption flourish.

A sixth feature is the massive monetary value of some of these contracts and, given that there are only a small number of high-value deals every year, the highly competitive nature of the business. This contributes to a situation where bribes of significant size can be offered to the small number of individuals who make the key decisions. A final feature is the general lack of consequences for individuals and companies engaged in corruption in the arms trade, which encourages those already in the industry to continue their illicit behaviour and serves to attract new entrants.

While some of the features identified here are found in other types of corruption, the unique aspect of the arms trade is that they are usually all

¹⁷ Farah, D. and Braun, S., *Merchant of Death: Money, Guns, Planes, and the Man Who Makes War Possible* (John Wiley & Sons: Hoboken, NJ, 2007).

¹⁸ See e.g. Amnesty International (AI), *Dead on Time: Arms Transportation, Brokering and the Threat to Human Rights* (AI: London, 9 May 2006); and US House of Representatives, Committee on Oversight And Government Reform, 'The AEY Investigation', Majority Staff Analysis, 24 June 2008, <<http://oversight-archive.waxman.house.gov/documents/20080624102358.pdf>>, p. 9.

present and that the malfeasance is able to occur and remain concealed under the rubric of national security. Not only are investigations or legal proceedings often halted as a threat to national security, if they are started at all, but most information about the transactions never sees the light of day. In most countries, almost regardless of political make-up, there is little political will to actively investigate and prosecute illegal activity in arms deals.¹⁹

III. The South African arms deal: undermining a nascent democracy

South Africa's Strategic Defence Procurement signed in 1999, hereafter referred to as the 'arms deal', was one of the most controversial acts of the country's post-apartheid democratic government, which came to power promising to reduce military spending in favour of socio-economic development.²⁰ Critics have pointed to the arms deal's excessive cost, questionable utility and a host of corruption allegations that led to criminal trials fuelled by a haphazard and suspect procurement process.²¹ For these reasons and more, it exemplifies much about corruption in the arms trade.

The arms deal involved the purchase of sophisticated military hardware for what will eventually amount to approximately 70 billion rand (\$11 billion).²² It included (a) 26 jet fighters—Gripen combat aircraft from BAE and Sweden's Saab, 9 of which were two-seater models, the remainder being single-seat; (b) 24 trainer jet fighters—Hawk trainer aircraft from BAE; (c) 30 light helicopters—A109Ms from Italian supplier Agusta; (d) 4 corvettes—AK200 MEKOs from the German Frigate Consortium (GFC), led by ThyssenKrupp, with a combat suite provided by France's Thomson-CSF/Thales and the local company African Defence Systems; and (e) 3 submarines—class 209 type 1400MODs from the German Submarine Con-

¹⁹ See Feinstein (note 2).

²⁰ On South Africa's military spending see chapter 4, section VIII, in this volume.

²¹ See e.g. Holden, P., *The Arms Deal in Your Pocket* (Jonathan Ball: Cape Town, 2008); Crawford-Browne, T., *Eye on the Money* (Umuzi: Cape Town, 2007); and Feinstein, A., *After the Party: Corruption, the ANC and South Africa's Uncertain Future*, 2nd edn (Verso: London, 2010).

²² This figure, calculated by the authors, is based on the stated rand cost of the deal until 2008, the amount that had been budgeted for the remaining payments until 2011, interest payments (which will continue to be made until 2018) and an estimate of the 'hidden' costs calculated from data in the South African Treasury's Affordability Report and from the South African Auditor-General. According to an announcement in Jan. 2011, by Oct. 2010 the deal had cost 42.362 billion rand, with a further 4.9 billion rand to be spent by mid-2011. However, unlike the figures provided in 2008, the new figure did not include line item costs or a year-by-year breakdown, making it difficult to accurately assess its validity, and so the 2008 calculation remains the most reliable. Sisulu, L., South African Minister of Defence and Military Veterans, 'Question 2768', Written reply to question posed by P. J. Groenewald, South African National Assembly, 25 Jan. 2011, Parliamentary Monitoring Group, South Africa, <<http://www.pmg.org.za/node/22744>>.

sortium headed by Ferrostaal.²³ Each of these purchases undermined the budgeting and procurement processes that South Africa had put in place after the first universal elections in 1994 and led to allegations of corruption and mismanagement.²⁴ Two deals in particular attracted significant adverse attention: the jets (which constituted more than 50 per cent of the total cost of the arms deal) and the corvettes.

Curious selections of Hawks, Gripen and corvettes

The decision to purchase the aircraft can be traced back to 1994 when the South African Air Force (SAAF) started to plan for replacement aircraft following the lifting of the arms embargo against the country. In mid-1996, under criteria decided in 1995 for procuring an aircraft capable of both advanced fighter training and combat missions, both the Gripen and the Hawk failed to make the final shortlist, the first for being 'unaffordable' and the second for its 'high cost' and for not satisfying the 'SAAF operational requirement'.²⁵ In the summer of 1997 the SAAF Command Council announced that the procurement requirements had changed. Under the new system the Gripen made the shortlist, but the Hawk did not. A few months later, in November 1997, the SAAF, on the strict instructions of Defence Minister Joe Modise, switched to a revised version of the old system, which resulted in the selection of the Gripen and the Hawk.²⁶

The decision to return to a revised version of the old system was widely criticized by SAAF officials, who pointed to an increase in cost that did little to improve utility.²⁷ When reviewed under this system, the Gripen was placed last on the shortlist that ranked Germany's Daimler-Benz Aerospace AT2000 combat aircraft first and France's Dassault Mirage 2000 second.²⁸ The Gripen's final success reportedly relied on the fact that Saab was the only bidder to provide information on financing—one of three equally weighted criteria used for assessment.²⁹ It beggars belief that

²³ Engelbrecht, L., 'South Africa's multi-billion arms programme revisited (part one)', Arms Deal Virtual Press Office, 15 Oct. 2001, <http://www.armsdeal-vpo.co.za/articles03/revisited_one.html>; and Holden (note 21), p. 20.

²⁴ See Feinstein (note 21).

²⁵ Myburgh, J., 'BAe and the arms deal', Moneyweb, 14 Aug. 2007, <<http://www.moneyweb.co.za/mw/view/mw/en/page292686?oid=153753&sn=2009%20Detail>>; Myburgh, J., 'BAe and the arms deal (II)', Moneyweb, 15 Aug. 2007, <<http://www.moneyweb.co.za/mw/view/mw/en/page292686?oid=154018&sn=2009%20Detail>>; and *Strategic Defence Packages: Draft Report of the Auditor-General*, [n.d.], chapter 5, used with kind permission of Richard Young; and Holden (note 21), chapter 5.

²⁶ South African Auditor-General, National Prosecuting Authority and the Public Prosecutor, *Joint Investigation Report into the Strategic Defence Procurement Packages* (Government Communication and Information Service: Pretoria, 14 Nov. 2001), para. 4.3.1.4.

²⁷ *Strategic Defence Packages* (note 25), chapter 8.

²⁸ *Strategic Defence Packages* (note 25), chapter 5, para. 5.6.1.6.

²⁹ *Strategic Defence Packages* (note 25), chapter 5, para. 5.6.6.2.

Daimler-Benz and Dassault would fail to submit such a critical element of their proposal, and neither South Africa's Auditor-General nor officials from the Department of Finance could find any record of requests being sent to either company.³⁰

The selection of the Hawk was bedevilled by similar curiosities. In 1998 the Hawk was placed on a shortlist of four potential suppliers. After an initial evaluation, it was ranked third. Italy's Aermacchi MB339FD, which was roughly half the cost of the Hawk, was listed as the best option. When scores were calculated, the MB339FD received an indexed score of 100—the best score possible—while the Hawk received a lowly 44.2.³¹ On 30 April 1998 Modise told the selection committee that it should adopt a 'visionary approach' whereby cost should be excluded from the selection criteria.³² This was a questionable step considering the tightness of the defence budget and that this was the single largest contract procured since the advent of democracy. Soon after, the Secretary of Defence, General Pierre Steyn, resigned in protest stating that 'I was going to have to account for the costs to Parliament, which I couldn't do'.³³

Exclusive of cost, the Hawk could still not beat the MB339FD.³⁴ A massive economic offsets proposal, roughly 10 times larger than any of its competitors, gave the Hawk its competitive advantage. However, when the offset proposals were reviewed by the South African Department of Trade and Industry, it was discovered that they had been 'grossly inflated' by the evaluation committee, from 1.5 billion rand (\$245 million) to 10 billion rand (\$1.6 billion).³⁵ When the two main projects of this proposal were evaluated, major problems were discovered that rendered them unfeasible. Without them, 'BAE had virtually no [offsets] package'.³⁶ General Steyn would later comment that the selection of the Hawk 'had been clear from the start', while the chief of the SAAF remarked that they would only accept the Hawk and Gripen option 'if politically obliged to do so'.³⁷

The process of selecting the GFC'S MEKO corvette was similarly beset by questionable procedures. A limited multi-agency investigation into the arms deal found that the GFC was selected despite a raft of problems with its proposals, including, ironically, a failure to submit all the necessary documentation in support of its bid.³⁸ Senior defence officials, including South African National Defence Force (SANDF) chief of acquisitions

³⁰ *Strategic Defence Packages* (note 25), chapter 5, para. 5.9.7.1.

³¹ *Strategic Defence Packages* (note 25), chapter 5, para. 5.8.3.6.

³² South African Auditor-General et al. (note 26), para. 4.5.1.10.

³³ Sole, S and Groenink, E, 'Pierre Steyn speaks out about the arms deal', *Mail & Guardian*, 2 Feb. 2007.

³⁴ South African Auditor-General et al. (note 26), paras 4.5.3.6 and 4.5.3.7.

³⁵ South African Auditor-General et al. (note 26), paras 4.5.3.6 and 4.5.5.3.

³⁶ South African Auditor-General et al. (note 26), paras 4.5.5.2 and 4.5.5.3.

³⁷ Quoted in Feinstein (note 21), p. 191.

³⁸ South African Auditor-General et al. (note 26), para. 7.3.5.4 (i).

Shamin 'Chippy' Shaik, insisted that this should not exclude the GFC. Draft audit reports later revealed that only a severe manipulation of the process ensured that the GFC bested its closest competition, Spain's Bazan shipyard, which had clearly made the most compelling offer.³⁹

Allegations of corruption

The Gripen, Hawk and corvette deals were surrounded by a multitude of corruption allegations. In the case of the Gripen and Hawk deals this took the dual form of allegations of conflicts of interest and direct bribery payments. The former stemmed in part from the business interests of Defence Minister Modise, who played a central role in ensuring the selection of the BAE–Saab consortium. Soon after the deals were signed it emerged that Modise had acquired shares in a company called Conlog in 1997 through a complex transaction that resulted in him paying nothing for the shares.⁴⁰ Conlog was identified by BAE during the bidding process as a potential recipient of substantial offset contracts.⁴¹ Using insider information, Modise purchased Conlog shares, anticipating that their value would increase in the aftermath of the arms deal as a result of BAE's offset commitments.⁴² This gave Modise considerable inducement to ensure BAE's selection. On retiring from government in early 1999, Modise was appointed chairman of Conlog.⁴³

In addition, and of even greater import, considerable evidence has emerged of substantial payments from BAE and Saab to key arms deal players. In 2008 the British Serious Fraud Office (SFO) submitted an affidavit to the South African courts in support of search warrants against two South African businessmen.⁴⁴ The affidavit outlined an extensive network of front companies and middlemen directing monies to influential individuals. In order to facilitate the payments with maximum secrecy, BAE formed a company called Red Diamond Trading in the British Virgin Islands. Red Diamond, in turn, was controlled by Headquarters Marketing, a unit within BAE (later renamed International Business Support). Payments flowed from Red Diamond to companies controlled by BAE's agents. In total, the SFO was able to track £115 million (\$207 million) in com-

³⁹ *Strategic Defence Packages* (note 25).

⁴⁰ 'MK boss was bought', *Noseweek*, no. 52 (Dec. 2003). See also Kirk, P., 'Three foresightful architects', *Citizen*, 16 Dec. 2003; and Groenink, E. and Sole, S., 'The musketeers who bought the jets', *Mail & Guardian*, 2 Feb. 2007.

⁴¹ South African Government Information Service, 'National Industrial Participation (NIP)—Defence Summary: Project Description', Sep. 1999, <<http://www.info.gov.za/issues/procurement/background/nip.htm>>.

⁴² 'MK boss was bought' (note 40); Kirk (note 40); and Groenink and Sole (note 40).

⁴³ 'Soldiering ahead in business', *Saturday Star*, 6 Nov. 1999; and Kirk, P., 'How Modise wangled SA's fighter jet deal', *Mail & Guardian*, 3 Nov. 2001.

⁴⁴ Murphy (note 6).

mission payments from BAE shell companies to various individuals linked to the arms deal.

Apart from Joe Modise, the recipient who attracted the most attention was Fana Hlongwane, who was personally close to Modise from their days in exile. Modise appointed Hlongwane to the board of the South African state-owned defence company Denel in the mid-1990s and made him his political adviser in 1994. This was a vital position that gave Hlongwane considerable influence with Modise and also allowed him to act as the minister's gatekeeper. The position was salaried and paid for by the Department of Defence, making Hlongwane a government official. According to the SFO's affidavit and other sources, Hlongwane received significant payments from BAE, including a total of £10 million (\$19.5 million) paid in instalments between September 2003 and January 2007 directly from BAE shell companies, with a further £9.15 million (\$16.5 million) to be paid by other BAE shell companies or in the form of bonuses.⁴⁵

The SFO suspected that substantial monies flowed from Hlongwane to important South African politicians and officials linked to the arms deal. In late 2010 it was reported that Hlongwane had granted a sizeable home loan to Siphwe Nyanda, the chief of the SANDF at the time of the deal. Allegedly, Nyanda only paid back a fraction of the loan before it was written off when he was appointed Minister of Communications in 2009, suggestive of a deal to transfer funds to Nyanda with a minimal paper trail.⁴⁶ After leaving the SANDF in 2005, Nyanda became chief executive officer of Hlongwane's group of companies, Ngwane Defence.⁴⁷ Nyanda was SANDF chief during the selection and negotiation process and also, crucially, during a 2004 review of the purchase that resulted in the decision to pursue additional tranches of the BAE–Saab deal. The bonus payment to Hlongwane in 2004 was conditional on South Africa agreeing to the additional tranches.⁴⁸

Similar conflicts of interest and alleged bribes tainted the corvette contracts. Nyanda was also reported to have received a discount on a luxury vehicle from a contractor linked to the corvette deal.⁴⁹ Another politician, Tony Yengeni, former chair of the Parliament's Defence Committee and later the chief whip of the African National Congress (ANC), who tried to stop any investigation into the deal, was later successfully prosecuted for lying to the Parliament about a similar discount he had received.⁵⁰ Perhaps

⁴⁵ Murphy (note 6).

⁴⁶ Brümmer, S. and Sole, S., 'The house the arms deal bought', *Mail & Guardian*, 3 Dec. 2010.

⁴⁷ Brümmer and Sole (note 46).

⁴⁸ See Holden (note 21).

⁴⁹ 'The full list of vehicles supplied by EADS', *Cape Times*, 2 July 2001; and Bezuidenhout, J. and Jurgens, A., 'Chief of SANDF also got Merc', *Sunday Times* (Johannesburg), 24 June 2001.

⁵⁰ In the matter between the State and Tony Sithembiso Yengeni (accused no.1) and Michael Joseph Worfel (accused no. 2), Accused no.1's plea of guilty, Case no. 14/09193/01, Regional Court for

the most infamous example of a conflict of interest involved Chippy Shaik's brother, Schabir Shaik, who was the financial adviser to Jacob Zuma, then South African deputy president, who became the country's president in 2009.

Schabir Shaik had entered into a joint partnership with the French manufacturer Thomson-CSF (later renamed Thales), which was responsible for supplying the combat suite for the corvettes and was thus a joint primary contractor along with the GFC. At one stage, Schabir was threatened with exclusion from the deal as Thomson-CSF worried that he was not favoured by key political players such as South African President Thabo Mbeki.⁵¹ However, Schabir secured his inclusion after both Chippy Shaik and Zuma met with Thomson-CSF representatives at Schabir's instigation.⁵² Chippy allegedly informed Thomson-CSF that he would 'make things difficult' for them if Schabir was not included.⁵³ Schabir Shaik was later found guilty of soliciting a bribe from Thomson-CSF on behalf of Zuma as well as having a generally corrupt relationship with the politician. He received a sentence of 15 years but was released after less than 2 years on unsubstantiated medical grounds. Zuma was also charged in relation to the bribery, but the charges were controversially dropped 10 days before he was elected president.⁵⁴

According to a confidential set of minutes drawn up by executives at ThyssenKrupp, the lead partner of the GFC, Chippy Shaik solicited and received a \$3 million payment if the GFC won the contract.⁵⁵ The payment by ThyssenKrupp was in addition to \$22 million that had allegedly been transferred to a company in Liberia, which was identified by German prosecutors after ThyssenKrupp attempted to declare it as a tax write-off.⁵⁶ The company was ultimately fined for tax transgressions, but the actual corruption was never meaningfully investigated.⁵⁷

the Regional Division of Northern Transvaal, Pretoria, [n.d.], <http://www.armsdeal-vpo.co.za/court_diary/>.

⁵¹ In the matter between the State and Schabir Shaik et al., Judgment, Case no. CC27/04, High Court of South Africa (Durban and Coastal Local Division), 31 Mar. 2005, <http://www.armsdeal-vpo.co.za/court_diary/sshaik_judgmnt-guilty.html>.

⁵² In the matter between the State and Schabir Shaik et al. (note 51).

⁵³ In the matter between the State and Schabir Shaik et al. (note 51).

⁵⁴ Feinstein (note 21), pp. 282–83.

⁵⁵ 'Memorandum from ThyssenKrupp executive confirming bribe to "Chippy" Shaik, head of procurement in the South African National Defence Force', 3 Aug. 1998; Feinstein (note 21), pp. 200, 263; and Feinstein (note 2).

⁵⁶ Brümmer, S. and Sole, S., 'Mbeki, Chippy and the Greek lobbyist', *Mail & Guardian*, 9 Feb. 2007.

⁵⁷ 'Hawks drop SDP probe', DefenceWeb, 15 Oct. 2010, <http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=10060>.

IV. The impact of corruption in the arms trade

The costs of corruption are not just financial: the money lost to corruption is money that cannot be spent on health or education or returned to taxpayers; the weakness of attempts to investigate and prosecute corruption undermines a country's justice and oversight institutions; and the poor procurement decisions that corruption in the arms trade leads to in turn lead to the weakening of a country's ability to defend itself. The full implications of corruption in the arms trade are best illustrated with examples from recent years that affect rich and poor countries, both arms producers and arms purchasers, in all parts of the world.

The South African arms deal—through its social and economic costs and impacts on South Africa's actual security needs, democracy and the rule of law—has had, and continues to have, a debilitating impact on the country. It has also damaged the rule of law in the UK as an exporter state. The exorbitant costs have led to the sacrifice of much needed socio-economic development. Despite the deal being estimated at just under 30 billion rand (\$5 billion) in 1999, the amount is more likely to be in the region of 70 billion rand (\$11 billion) or more by the contracts' conclusion, due to exchange rate fluctuations and the cost of financing.⁵⁸ This figure dwarfs what has been spent on far more pressing priorities.

At the time of the deal, in 1999, President Mbeki claimed that the country could not afford to provide antiretroviral medication to the over 5 million South Africans living with HIV/Aids. Over the next five and a half years, more than 355 000 South Africans died because they were unable to access life-prolonging anti-HIV therapies.⁵⁹ Even after the government began to subsidize HIV-related medication, by 2008 South Africa had spent a paltry 8.7 billion rand (\$1.4 billion) on its HIV/Aids programme, meaning that for every 1 rand spent to combat the disease in South Africa, an equivalent 7.63 rand was spent on the arms deal. In the same period, 41 billion rand (\$6.6 billion) was spent to provide housing to the millions of South Africans left homeless by apartheid-related policies, 30 billion rand (\$4.8 billion) less than spending on the arms deal. South Africa could have built close to 2 million houses with the money spent on the deal.⁶⁰

The arms deal has also squeezed the SANDF budget. In October 2010 it was reported that the cost of running and maintaining both the Gripen and the Hawk aircraft had become prohibitive. The Gripens were, as a result, due to be 'mothballed' in long-term storage, leaving the SAAF with a sev-

⁵⁸ Holden, P. and Van Vuuren, H., *The Devil in the Detail* (Jonathan Ball: Cape Town, forthcoming 2011); and note 22.

⁵⁹ Chigwedere, P. et al., 'Estimating the lost benefits of antiretroviral drug use in South Africa', *Journal of Acquired Immune Deficiency Syndrome*, vol. 49, no. 4 (1 Dec. 2008).

⁶⁰ Holden and Van Vuuren (note 58).

erely limited offensive air capacity.⁶¹ Only 11 of the 24 Hawks have ever been operational, and they have only been allocated 2500 flying hours per year due to cost.⁶² The SAAF has confirmed that the lack of flying hours for the Hawk means that pilots lack the flight time needed to graduate to flying the Gripen.⁶³ If a single type of combat aircraft had been bought—the SAAF’s initial plan prior to Modise’s intervention—such waste could have been avoided. It is estimated that corruption added almost a third to the total cost of the deal.⁶⁴ This profligacy has, if anything, undermined South Africa’s security and its ability to play a meaningful peacekeeping role in Africa. The SAAF was forced to acknowledge that because of the Gripen and Hawk purchases they were unable to acquire the transport planes they required.⁶⁵

The controversial dropping of fraud and corruption charges against Jacob Zuma gave the impression of an open season for corruption within the ANC and government. The arms deal was followed by a string of major corruption scandals that paid scant regard to the procurement and financial management regulations that had been subverted by the weapon purchases.⁶⁶ It is a widely held view that the arms deal was the point at which the ANC government lost its moral compass, leading directly to the undermining of the rule of law, mechanisms of accountability and key institutions of South Africa’s fragile post-apartheid democracy, including the Parliament, the prosecutorial authority and two leading anti-corruption bodies, at a cost that is still not fully calculated.⁶⁷

In the UK, the SFO’s decision to effectively drop the investigation into the South African arms deal, along with all other investigations into BAE, in return for a settlement of £30 million (\$54 million) has sullied British democracy and the rule of law.⁶⁸ Clare Short, the former British Secretary of

⁶¹ Hartley, W., ‘Funds pinch may ground SA’s R10bn Gripen fleet’, *Business Day* (Johannesburg), 26 Oct. 2010.

⁶² Jordan, B., ‘Air Force boss slams poor state of affairs’, *The Times* (Johannesburg), 4 Apr. 2010.

⁶³ Jordan (note 62).

⁶⁴ This is based on a rough calculation by the authors. See note 22.

⁶⁵ Ensor, L., ‘SA’s R13,7bn fighter jets turn into an expensive folly’, *Business Day* (Johannesburg), 12 Mar. 2007.

⁶⁶ Feinstein (note 21), chapter 15.

⁶⁷ See e.g. Haffajee, F., ‘This will not go away’, *Mail & Guardian*, 12 Jan. 2007; Holden (note 21); and Feinstein (note 21), chapter 15.

⁶⁸ This figure is comprised of a fine of £500 000 (\$900 000) for ‘irregular accounting practices’ in a Tanzanian deal for an inappropriate and overpriced air radar system that was tainted by allegations of high-level corruption, with £225 000 (\$405 000) going towards prosecution costs and the remaining £29.275 million (\$52.695 million) going to Tanzania in reparations. Evans, R. and Lewis, P., ‘BAE deal with Tanzania: military air traffic control—for country with no airforce’, *The Guardian*, 6 Feb. 2010; ‘Military radar probe: the key suspects . . . and the case against them’, *This Day* (Dar es Salaam), 15 Feb. 2010; Leigh, D. and Evans, R., ‘Tanzania’, *The Guardian*, 7 June 2007; and Sentencing remarks, Case no. S2010565, In the Crown Court at Southwark before Mr Justice Bean, Between R and BAE Systems PLC, 21 Dec. 2010, <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf>>.

State for International Development, placed the blame squarely at the door of former Prime Minister Tony Blair, stating that ‘Tony was absolutely dedicated to all arms sales proposals. Whenever British Aerospace wanted anything, he supported them 100 per cent’.⁶⁹ In fact, when the Blair government halted the investigation into the al-Yamamah deal in late 2006, even some in the British business community were concerned about its ramifications. Hermes, the largest British pension fund, wrote to the prime minister that the decision threatened the UK’s reputation as a leading financial centre and that it would have a high long-term cost for business and markets.⁷⁰

The negative impact of arms trade corruption on development, democracy, the rule of law and global security is apparent in buying and selling countries across the trade. The US military’s award of a \$298 million contract in 2007 to AEY Inc. for the provision of ammunition to the Afghan security forces was such an instance.⁷¹ AEY was run by 21-year-old Efraim Diveroli, and both the company and its young president were on the US State Department Defense Trade Controls watch list, which was never consulted.⁷² Instead, the US Army asked for an independent evaluation of the company from a private individual, Ralph Merrill, who produced a glowing endorsement of AEY and Diveroli. It transpired that Merrill was a financial backer and a vice-president of AEY.⁷³ Not only does the AEY contract illustrate a lack of transparency and rigour in US procurement practices, but it endangered the lives of the Afghan security forces, who were provided with 40-year-old Chinese ammunition that AEY had acquired in Albania. Heinrich Thomet’s Cyprus-based firm charged AEY \$40 per thousand bullets, after the Albanian Government had sold them to Thomet’s company for \$22. The difference was allegedly shared with Albanian officials and the Albanian defence minister.⁷⁴ In March 2008 an unsafe prefabricated factory that was built in the Albanian village of Gerdec by the companies involved and the Albanian military exploded, killing 27 people and injuring hundreds. The cost of the deal and its consequences to Albanian and US taxpayers ran into tens of millions of dollars. The reputations of

⁶⁹ Hosken, A., ‘BAE: the Tanzanian connection’, *Today*, BBC Radio 4, 1 Oct. 2009, <<http://news.bbc.co.uk/1/hi/8284000/8284510.stm>>.

⁷⁰ Burgess, K. and Eaglesham, J., ‘Hermes enters BAE probe fray’, *Financial Times*, 22 Dec. 2006.

⁷¹ Tilghman, A., ‘State put AEY on trafficking watchlist, then signed contracts with arms dealer’, Talking Points Memo (TPM) Muckraker, 26 June 2008, <http://tpmmuckraker.talkingpointsmemo.com/2008/06/state_put_aey_on_watchlist_the.php>.

⁷² Chivers, C. J., ‘Supplier under scrutiny on arms for Afghans’, *New York Times*, 27 Mar. 2008.

⁷³ Tilghman, A., ‘Army awarded AEY contract after “recommendation” from firm’s financial backer’, Talking Points Memo (TPM) Muckraker, 24 June 2008, <http://tpmmuckraker.talkingpointsmemo.com/2008/06/aey_contract_after_recommendation_from_firms_financial_backer.php>.

⁷⁴ Chivers (note 72); Klosi, A., *The Gerdec Disaster: Its Causes, Culprits and Victims* (K&B: Tirana, 2010); and ‘Supermarketi Meico’ [Supermarket Meico], *Mapo* (Tirana), 6 Sep. 2008.

both governments were tarnished, while the Afghan security forces and the residents of Gerdec paid in injuries or with their lives.

In addition to DCNS's involvement in the Taiwanese scandal, the company faces a separate enquiry in France over allegations that it paid kickbacks to a friend of the Malaysian prime minister.⁷⁵ In June 2002 DCNS—then known as DCN—concluded a €1.2 billion (\$1.8 billion) deal to supply Malaysia with two Scorpène submarines and a retired Agosta submarine.⁷⁶ A Malaysian opposition politician reflected widespread concern about the cost and utility of the purchase, stating that ‘while we face financial problems . . . the government is having two white elephants which keep expanding in cost’.⁷⁷ It later emerged that €114 million (\$170 million) had been paid in ‘consulting fees’ to a company whose principle shareholder was the wife of a close associate of the defence minister—now the prime minister.⁷⁸ There has been no investigation into the corruption allegations by Malaysia, although French prosecutors eventually opened one in 2010.⁷⁹ Moreover, a translator for the Malaysian delegation negotiating the deal who threatened to reveal its details was murdered by a special bodyguard unit, underscoring the damage that corrupt arms deals wreak on the rule of law.⁸⁰ The scandal continues to haunt the Malaysian Government.

The German company Ferrostaal, which was accused of corruption in relation to the South African submarine contract (see section III above), has recently been named in a series of scandals. In March 2010, according to documents in the possession of the German public prosecutor, it was alleged that Ferrostaal had paid just under €83 million (\$124 million) to key Greek politicians to win contracts to supply Greece with submarines.⁸¹ For some commentators the corrupt submarine deals not only damaged

⁷⁵ ‘Defence scandals: Taiwan wins, Malaysia waits’, *Malaysian Mirror*, 6 May 2010

⁷⁶ DCNS, ‘Second Scorpene SSK arrives in Malaysia’, Defence Talk, 13 July 2010, <<http://www.defencetalk.com/second-scorpene-ssk-arrives-in-malaysia-27458/>>; and Kamal, S. M., ‘Government says spent RM6.7bn on Scorpene submarines’, *Malaysian Insider*, 22 June 2010, <<http://www.the-malaysianinsider.com/malaysia/article/government-says-spent-rm6.7b-on-scorpene-submarines/>>.

⁷⁷ Kamal (note 76).

⁷⁸ Manthorpe, J., ‘The prime minister, the private investigator, the murder of a Mongolian model, and 114 million euros’, *Vancouver Sun*, 15 Nov. 2010; Manthorpe, J., ‘Ghost of Mongolian model continues to haunt Malaysian Government’, *Vancouver Sun*, 5 July 2010; and Miller, A., ‘Casualties of warfare’, *Southeast Asia Globe*, 7 July 2010.

⁷⁹ ‘Malaysia’s submarine deal surfaces in France’, *Asia Sentinel*, 16 Apr. 2010, <http://www.asia-sentinel.com/index.php?option=com_content&task=view&id=2406>.

⁸⁰ Manthorpe, ‘The prime minister’ (note 78); Manthorpe, ‘Ghost of Mongolian model’ (note 78); and Miller (note 78).

⁸¹ ‘Submarine cash revealed’, *Kathimerini*, 12 Apr. 2010; Rhoads, C., ‘The submarine deals that helped sink Greece’, *Wall Street Journal*, 10 July 2010; Amies, N., ‘Probe into German–Greek arms deals reveals murky side of defence sales’, *Deutsche Welle*, 12 Aug. 2008, <<http://www.dw-world.de/dw/article/0,,5890375,00.html>>; and Schmitt, J., ‘How German companies bribed their way to Greek deals’, *Der Spiegel*, 11 May 2010.

Greece's reputation among international investors but were also a contributing factor in its debt crisis.⁸²

Similarly scandalous was Ferrostaal's supply of two submarines to the Portuguese Navy at a cost of about \$1 billion, a deal that has also been troubled by allegations of corruption. The most serious of these centred on Jurgen Adolff, Portugal's honorary consul in Munich.⁸³ In January 2003 Ferrostaal reportedly signed a consultancy agreement with Adolff under the terms of which he would receive 0.3 per cent of the total value of the contract. Reportedly, Adolff received a total of €1.6 million (\$2.4 million) from the company for his role.⁸⁴ The fact that he was working for both sides—as a diplomat for the Portuguese Government and as a consultant for Ferrostaal—has attracted considerable criticism. On 26 March 2010 the German Government had informed the Portuguese Embassy that it planned to indict Adolff for influence peddling and corruption, and six days later Adolff was suspended from his position.⁸⁵ Adolff denies any wrongdoing. Other corruption allegations relating to Ferrostaal are still under investigation.⁸⁶ Such activities diminish the standing of German industry, undermine the rule of law in both the producing and purchasing countries and escalate the cost of the equipment sold, thus inhibiting economic growth and development.

V. Conclusions: the way forward

Transparency International's 2010 Global Corruption Barometer found that people's preconception of general corruption have increased since 2008, especially in Western Europe and North America.⁸⁷ This suggests that anti-corruption efforts are struggling to address the problem. These efforts in the arms trade fall short of those in most other sectors.⁸⁸

Protests against the South African arms deal that continued for almost a decade and outrage at the British legal system's soft touch towards BAE Systems and its numerous corruption scandals indicate that, in economically difficult times, patience with arms companies and agents might

⁸² Rhoads (note 81).

⁸³ 'Algarve businessman embroiled in international scandal', *Algarve Resident*, 9 Apr. 2010.

⁸⁴ Schmitt, J., 'Germany's Ferrostaal suspected of organizing bribes for other firms', *Der Spiegel*, 30 Mar. 2010.

⁸⁵ Grácio Pinto, A., 'Cônsul honorário em Munique suspenso por alegada corrupção e suborno' [Honorary consul in Munich suspended for alleged corruption and bribery], *Mundo Português*, 5 Apr. 2010; and 'Munich consul suspended in alleged shady submarine deal', Portugal News Online, 10 Apr. 2010, <<http://www.theportugalnews.com/cgi-bin/google.pl?id=1056-12>>.

⁸⁶ Schmitt (note 84).

⁸⁷ Transparency International, *Global Corruption Barometer 2010 Report* (Transparency International: Berlin, 2010).

⁸⁸ Feinstein (note 2).

be wearing thin.⁸⁹ For those who believe that corruption in the arms trade has not only a devastating impact on poorer countries, but also negative consequences for the nature and quality of democracy in more prosperous states, the challenges are substantial. There can be little argument that an industry that counts its profits in billions and its costs in lives should be both highly regulated and as transparent as possible.

The opaque way in which arms deals are concluded, often among a small clique that shares a narrow self-interest, makes it impossible for the public to judge whether huge amounts of their money are being used in the best possible way. The close relationship between governments and contractors along with the national security ‘imperative’ undermine meaningful judicial oversight. National security concerns, while sometimes legitimate, are often used to hide information of malfeasance that would in no way compromise security. Legislation overseeing the trade is inadequate and in many countries non-existent. All of this makes democracies less transparent, accountable and honest.

Arms companies and individuals who are involved in the trade rarely face justice, even for misdemeanours that are wholly unrelated to their strategic contributions to the state. Political interventions, often justified in the name of national security, ensure that the arms trade operates in its own world, largely immune from the legal and economic vagaries experienced by other companies. Even when a brave prosecutor does attempt to investigate and bring charges against an arms company or dealer, the matter is inevitably settled with little or no public disclosure and seldom any admission of wrongdoing.⁹⁰

The international and multilateral initiatives and the national interventions discussed below offer a range of options that could contribute to increasing both transparency and accountability, as well as reducing corruption, in the arms trade. The rights of the victims of arms trade corruption are also discussed.

International and multilateral initiatives

There is undoubtedly a case for expanding the scope and enforcement of existing multilateral agreements and for the introduction of a strong, rigorously enforced international arms trade treaty (ATT). The European Union’s Common Position on arms exports, which is regarded as among the best multilateral agreements, excludes government-to-government contracts, making it irrelevant that at least five EU member states violated the

⁸⁹ See Feinstein (note 21).

⁹⁰ For cases not investigated or dismissed corruption cases, see Feinstein (note 2).

Common Position's criteria in the South African arms deal.⁹¹ Similarly, despite the UK being strongly criticized by the OECD's Working Group on Bribery in International Business Transactions for closing its investigation into the al-Yamamah deal with Saudi Arabia, just a few years later British law enforcers were almost as accommodating in settling their investigation into BAE's controversial deals in five other countries, including South Africa.⁹²

Although existing multilateral efforts have shortcomings, a strong ATT could contribute to greater control in the arms trade, but only if its scope is wide enough, its transparency provisions robust and its enforcement mechanisms strong and adequately resourced. It will also need (a) to include strong, enforceable anti-corruption measures; (b) to prevent the export of arms where they may increase conflict, or impact negatively on human rights or socio-economic development; (c) to exercise greater control over the transport of arms; and (d) to impose far greater transparency. Finally, in order to have a practical impact, a coordinated international monitoring and enforcement body should be established.

Furthermore, the use of offsets in arms deals must be addressed, whether as part of an ATT or possibly within the parameters of the World Trade Organization (WTO). The South African experience suggests not only that the original economic investment and job creation promises are largely chimeric, but also that offsets are often a means to obfuscate corrupt payments.⁹³ Because of their controversial nature, the WTO bans the use of offsets as a criterion for contract evaluation in all markets other than the arms trade. The practice must either be far more rigorously circumscribed and open to public scrutiny or abandoned altogether.

Even with improved international and multilateral agreements, enforcement will remain disadvantaged by the reality that while crime—especially as it manifests itself in the arms trade—knows no borders, efforts to police it are constrained by national jurisdiction and less-than-adequate enforcement cooperation. Often, as in the case of South Africa, members of a government from whom cooperation is required have substantial vested interests in frustrating foreign investigations rather than aiding them.⁹⁴

⁹¹ The EU Common Position was introduced in Dec. 2008. It replaced the politically binding EU Code of Conduct on Arms Exports, which was agreed in June 1998. The EU Code of Conduct and the EU Common Position includes a set of operative provisions related to information exchange and consultation that are aimed at harmonizing EU member states' interpretation of the criteria. Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 13 Dec. 2008, pp. 99–103; and Council of the European Union, EU Code of Conduct on Arms Exports, 8675/2/98 Rev. 2, Brussels, 5 June 1998. See also chapter 6, section IV, in this volume.

⁹² 'OECD worried by BAE probe', Reuters, 14 Mar. 2007, <<http://uk.reuters.com/article/2007/03/14/uk-oeed-bae-idUKROB46643020070314>>.

⁹³ Holden and Van Vuuren (note 58).

⁹⁴ See Feinstein (note 21); and Feinstein (note 2).

A new look at the powers of investigators and prosecutors across national boundaries as well as the more rigorous enforcement of governments' obligations to assist international investigations is urgently required. Lessons can certainly be learned from the experience, both good and bad, of international courts prosecuting genocide and other crimes against humanity.

National interventions

National governments could introduce or improve a number of measures that would contribute significantly to combating corruption in the arms trade. As illustrated by the various arms deals discussed above, transparency with respect to the use of agents and middlemen is crucial. Unless companies and governments are forced to disclose—even if to an appropriate, independent body in the purchasing and producing countries, rather than to the general public—how much and for what agents and middlemen are paid, the arms industry will never be cleansed of the corruption that blights it.

Because of the close links between governments and arms companies and dealers, and the role of governments in awarding and winning weapon contracts, the funding of political parties or payments to politicians by arms companies or those linked to them should be made illegal. The unique interface between the arms industry and government, especially the revolving door phenomenon, requires much more powerful and binding legislation and regulation. There should be a lengthy, internationally agreed cooling-off period between employment in the state and the private defence sector, and vice versa.

The penalties that are imposed on arms companies and dealers, on the few occasions when they are punished, are paltry in comparison to the profits made on the deals under investigation. This has effectively given rise to a situation in which companies and wealthy, well-connected individuals, who are far better resourced than investigative and prosecutorial authorities, can easily afford to drag out and counter legal proceedings. BAE and ThyssenKrupp in the South African case are obvious examples.

At least three innovations are worth considering in this regard. The first is the use of a system of graded debarment from public contracts for companies that are found to be involved in corruption, where the period of debarment would be linked to the severity of the offence. The second proposed innovation is the more widespread prosecution of individuals within companies that are involved in corruption. To be effective, this would need to apply to managers with oversight responsibilities as well as to individuals on the ground. Far more agents and middlemen, who often operate on their own without organizational affiliation, should also be targeted. Involvement with a state's intelligence structures, as is often the case with

arms companies and individual dealers, should not be sufficient grounds for immunity from prosecution in relation to corrupt arms deals.

Finally, more rigorous enforcement of auditing and financial regulations—especially in relation to accurate reporting responsibilities, anti-money laundering requirements and tax avoidance measures—would contribute significantly to the fight against arms trade corruption. In a welcome development, in late 2010 the British Accountancy and Actuarial Discipline Board initiated an investigation into the conduct of KPMG as auditors of BAE on its numerous controversial arms deals.⁹⁵ More effective treatment of offshore companies, possibly restricting or even outlawing their use in arms transactions, would make it far more difficult for companies and individual dealers to clandestinely channel bribe payments to unauthorized middlemen or key decision makers.

Victims' rights⁹⁶

It is often not governments or companies that suffer the consequences of arms trade corruption but ordinary citizens who are deprived of socio-economic benefits because of inappropriate or corrupt expenditure on weapons or even, as in the case of the Gerdec community in Albania, innocent bystanders who pay for corruption or the absence of adequate procedures with their lives. Consideration should be given to the rights of these victims and the issue of reparations.

In principle, ensuring that reparations are part of any sanction against companies or wealthy individuals found guilty of paying bribes is a highly laudable approach. It focuses public attention on the fact that bribery is a form of theft, although whether from the state or its citizens is obviously a contentious point in certain circumstances, such as the South African and Albanian cases. It establishes the principle that there is no reason why the developed countries which fine the companies involved should be the sole financial beneficiaries of the sanctions on criminal activity whose victims are often in poorer countries. However, if authorities continue to fine companies only a tiny percentage of the profits made on the corrupt deals, the reparations approach might only further antagonize people in the victim countries.

There are also larger questions of principle with such an approach. To whom should the money go when the foreign government concerned may have been complicit in the corruption and when the officials involved are still in office? On what should the money be spent when the government

⁹⁵ Accountancy & Actuarial Discipline Board, 'AADB investigating auditors' conduct in relation to BAE Systems plc', Press Notice 26, 25 Oct. 2010, <<http://www.frc.org.uk/aadb/press/pub2407.html>>.

⁹⁶ A number of the ideas in this subsection were developed by Sue Hawley of Corruption Watch, <<http://corruptionwatch-uk.org/>>.

has been complicit? Should conditions be applied and how can they be monitored? What is the legal basis for reparations and how can they be structured in such a way as to ensure court approval? What happens where bribes have been paid in multiple countries, and how can reparations be fairly apportioned when this is the case?

Clearly, the issue of victims' rights and reparations requires a proper international and institutional framework in order to work effectively. However, while improved institutional and legal structures and systems at the international and national levels will certainly contribute to reducing corruption in the global arms trade, ultimately it will also depend on politicians wanting to serve the needs of their citizens more than their own power and patronage interests, and arms companies big and small acknowledging that they have a responsibility to society that is as important, if not more so, than their profits.