

OVERVIEW OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND ITS PROTOCOLS

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I. THE NEW CONVENTION: A NEW ERA IN INTERNATIONAL COOPERATION

In December 1998, the United Nations General Assembly established¹ an Ad Hoc Committee for the elaboration of the United Nations Convention against Transnational Organized Crime and three additional Protocols addressing: trafficking in persons, especially women and children; illegal trafficking in and transporting of migrants; and illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. In establishing this Committee, the Assembly took a giant step toward closing the gap that existed in international cooperation in an area generally regarded as one of the top priorities of the international community in the 21st century. The Assembly also lay to rest the uncertainty and uneasiness that surrounded the endeavor by manifesting the collective political will of all States to tackle conceptual and political problems and find commonly acceptable solutions. One year later, in December 1999, the General Assembly adopted another resolution², by which it asked the Ad Hoc Committee to intensify its work in order to complete it by the end of 2000. The Assembly thus formalized

the deadline under which the Ad Hoc Committee had been working since its establishment. Apart from the symbolism involved, the deadline reflects the urgency of the needs faced by all States, developed and developing alike, for new tools to prevent and control transnational organized crime. It also reflects the need of sustaining and building on the momentum that made the original decision possible in order to foster consensus while not compromising the quality of the final product.

The process leading up to the establishment of the Ad Hoc Committee may seem long and arduous. However, the reader is urged to keep in mind that only four years passed from the time that the idea of a convention first surfaced until the official commencement of the negotiation process. This compares extremely favourably with other similar initiatives, especially in areas that are as complex as that of criminal justice and the development of international criminal law. Further, the Ad Hoc Committee charged with conducting the negotiations operated from the beginning under a self-imposed short deadline³, which is rather unusual in international negotiations of

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¹ See General Assembly resolution 53/111 of 9 December 1998. In resolution 53/114, also of 9 December 1998, the General Assembly asked the Ad Hoc Committee to devote sufficient time to the elaboration of the Convention and the three additional international legal instruments.

² See General Assembly resolution 54/126 of 17 December 1999.

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this sort, especially in the context of the United Nations. This deadline set a very vigorous pace for the negotiations, which often taxed heavily the capacity of smaller delegations.

The reader should also keep in mind that the Ad Hoc Committee was essentially negotiating in parallel four international legally binding instruments. All this notwithstanding, the Convention was finalized in July, a few months ahead of schedule, and two of the Protocols were completed within the deadline, in spite of the numerous complexities and political concerns they might have entailed.

Finally, the reader should always bear in mind that the United Nations is a global organization founded on the principle of equality. The concerns of all States, big or small, more or less powerful, deserve equal attention and should be taken into account in all of the activities in which the United Nations is engaged. The principal strength of international action, especially that of a normative nature, is its universality. In the case of an instrument intended to address an issue as complex as transnational organized crime, the active participation of both developing and developed countries from all regions is essential. The very nature of transnational organized crime, with the ability of criminal groups to seek the most favourable conditions for their operations, demands no weak links in the chain of joint action.

The spirit guiding the negotiations has been one of constructive engagement and sensitivity to the concerns of everyone

involved in the process. Everyone agrees that the objectives of the negotiations cannot be expediency but consensus, together with conscious and genuine commitment, which are the cornerstones of successful action. Consensus has often been equated with weakness and obscurity, especially when it comes to negotiated texts. It may be true that, at first glance, many documents that have been the results of prolonged negotiations may appear convoluted and inefficient. After all, very often one of the key elements of compromise is ambiguity. Having said this, however, it is also important to bear in mind that equally often the ideal is far removed from the feasible. An international legal instrument that upholds the highest standards of clarity and directness of language, and includes strong and straightforward obligations is desirable and commendable. It also deserves careful study at the academic level and is an essential component of any course in international law. However, if this instrument fails to come into force, or, if it does, is acceded to and implemented by a handful of countries, its practical utility becomes doubtful, to put it mildly, and is destined to languish in library books and soon forgotten.

The Ad Hoc Committee operated with these guiding principles from the time of its establishment. The negotiation process was highly participatory. Over 125 countries participated in the sessions of the Ad Hoc Committee. With the generous help of Austria, Japan, Norway, Poland and the United States, on average 23 of the Least Developed Countries (a group of 48 countries from Africa, Asia and Latin America determined by the General Assembly each year) attended the sessions. Its members agreed early on that the quality of the final product was essential. Other existing Conventions,

³ It should be noted that the General Assembly made this deadline official with resolution 54/126 of 17 December 1999.

such as the 1988 Vienna Drug Convention and the Convention against Terrorist Bombings⁴ would provide inspiration, as they had often dealt with similar issues. However, the Ad Hoc Committee also agreed that every conscious effort would be made to improve upon the texts of these Conventions, to the extent possible, in order to meet the needs of the new Convention and to reflect new trends.

Before proceeding to giving an overview of the text of the Convention, it is important to note a very interesting feature of the negotiation process. It will be recalled that, to a large extent, the driving force behind helping the idea of the convention mature was the enthusiasm of developing countries. Faced with the breakneck pace of the negotiations, several developing countries began complaining that the deadline was having an impact on their ability to study the text fully and prepare their positions. These countries felt that keeping the deadline should not have an adverse impact on the ability of developing countries to express their concerns and negotiate solutions they regarded as acceptable. In addition, as the text was gradually embellished and enriched with new proposals, several developing countries started to entertain fears that developed countries viewed the Convention as an opportunity to impose approaches and solutions on their less powerful counterparts, and this was the reason that the Convention had become highly desirable to them.

Criminal justice is an integral component of a country's soul and, as such, one of the key attributes of sovereignty. In a rapidly developing and

very demanding field as action against transnational crime, particularly organized crime, the tendency to expand jurisdiction at will, in order to respond to specific exigencies, has been noted and feared. Further, developing countries realized that the new Convention would impose a multitude of obligations, which would require the investment of considerable resources. With limited resources and competing priorities, especially at present when most efforts are directed towards addressing problems related to infrastructure and meeting the challenges of globalization, many of these countries foresaw the difficulty of meeting those obligations. This latter dimension of the thinking of those few countries was also a result of two perceptions.

Firstly, all developing countries and countries with economies in transition had gradually become aware, in a more or less painful way, of the ramifications and potential of modern transnational organized crime. However, for several of them the problem had not caused dramatic crises domestically. Consequently, the new obligations were viewed as being out of proportion with their domestic experiences and their political agenda at home.

Secondly, many policy-makers in some developing countries had geared their thinking towards the short-term, mainly as a result of pressing needs. Consequently, the implications of the expansion of transnational organized crime were not included as a parameter in the development of policies for the future. In addition, this short-term thinking could not capture the ramifications of concerted action against transnational organized crime, using the new Convention as the framework and main tool. In other words, the short-term

⁴ Adopted by the General Assembly by resolution 52/164.

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thinking failed to assess the impact of the tendency of organized criminal groups to seek conditions of relative safety when governmental action increases the risk and cost of operations. It should be made very clear that the political commitment and the conviction about the need for the Convention and the desirability of concluding it remained totally undiminished. The negotiations, however, went through a phase of caution on the part of several developing countries and became, as a result, more intricate.

The new Convention can be divided into four main areas: criminalisation, international cooperation, technical cooperation and implementation.

It will be recalled that one of the main reasons for the initial scepticism was whether the concept of transnational organized crime could be defined in an appropriate manner, from both the legal and political perspectives. The negotiators decided to use a two-pronged approach to the issue. First, it was agreed that it would be sounder to define the actors rather than the activities. The rationale behind this approach was that the international community was embarking on negotiating a binding international legal instrument for the future. Organized criminal groups are known to shift from activity to activity, from commodity to commodity and among geographical locations, often on the basis of what in the business world would be called a cost-benefit analysis.

Given this known characteristic, it would be futile to try and capture in a negotiated legal text everything that these groups are known to engage in at present or might decide it makes good business sense to carry out in the future. In this context, the Convention defines an

organized criminal group as being “a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established pursuant to [the] Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”

Second, the new Convention should bring about a certain level of standardization in terms of offences as they are codified in national laws, as a prerequisite of international cooperation. Working on these premises, the Ad Hoc Committee began discussing the concept of serious crime. At the beginning, many countries expressed doubts as to whether the term would be appropriate, arguing that it signifies different things to different systems. It would be useful to bear in mind that this discussion was closely linked to the question of whether the Convention would include a list of offences.

The Ad Hoc Committee asked the Secretariat to carry out an analytical study on serious crime and on if and how the concept was reflected in national laws. The study, which was based on the responses of over 50 States, showed that the concept of serious crime was well understood by all, even if the qualification might not necessarily be used in legislation. The doubts about, or objections to the use of the term gradually subsided. Serious crime is defined as “conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”

The Convention establishes four offences: (a) participation in an organized criminal group; (b) money laundering; (c) corruption; and (d) obstruction of justice.

The provision establishing the offence of participation in an organized criminal group is a carefully crafted one, which balances the concept of conspiracy in the common law system with that of the various versions of participation as such versions have evolved in various continental jurisdictions. The aim was to promote international cooperation under the Convention by ensuring the compatibility of the two concepts, without attempting to fully harmonize them.

The provision on criminalisation of money laundering departs from a previous similar provision in the 1988 Vienna Drugs Convention, but goes beyond by expanding the scope of predicate offences covered.

The provision on the establishment of the offence of corruption was the subject of considerable debate, mainly because it was deemed a limited effort against a much broader phenomenon. The approach finally selected was to include a provision in the Convention, in view of the fact that corruption is one of the methods used, and activities engaged in by organized criminal groups. This was done on the understanding that this Convention could not cover the issue of corruption in a comprehensive manner and a separate convention would be needed for that purpose. In fact, on the recommendation of the Ad Hoc Committee and the Commission, the General Assembly adopted a resolution⁵ on this matter. This resolution sets out the preparatory work, which would need to be carried out in 2001, for the elaboration of the terms of reference of the negotiation of a new separate convention against corruption. Following the completion of this work, a new Ad Hoc

Committee will be established and asked to negotiate the text.

Finally, the provision establishing the offence of obstruction of justice captures the use of force, intimidation or bribery to interfere with witnesses or experts offering testimony, as well as with the performance of the duties of justice or law enforcement officials.

In the area of international cooperation, the Convention includes articles on extradition, mutual legal assistance, transfer of proceedings and law enforcement cooperation.

The provision on extradition adopts the approach of double criminality to this tool of international cooperation. The article provides that most of the particulars of extradition would be essentially left to national legislation or treaties that exist or will be concluded between States. It is for this reason that, with the exception of a safeguard clause on prosecution or punishment on account of sex, race, religion, nationality, ethnic origin or political opinions, the article does not contain grounds for refusal of extradition. There is an implicit recognition of nationality as a traditional ground for refusal of extradition, because this was identified as an area where the new Convention could not attempt to bring about change in national legislation, due to very strict traditions or constitutional impediments. The Convention, however, embodies the principle *aut dedere aut judicare* when extradition is refused on the ground of the nationality of the alleged offender. The article on extradition provides that the offences covered by the Convention would be deemed to be included as extraditable offences in any treaty existing between States Parties, or would be included in future treaties. States Parties can use the

⁵ General Assembly resolution 55/61.

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Convention for extradition purposes even if they make extradition conditional on a treaty. Those which do not make extradition conditional on a treaty will recognize the offences covered by the Convention as extraditable offences between themselves.

Another important feature of the article is that it contains an obligation for States Parties to try and resolve differences by consultation before they refuse an extradition request.

The article on mutual legal assistance is much more extensive, having been called by some a "treaty within a treaty". In its 31 paragraphs, the article details every aspect of mutual assistance, including grounds for refusal. It is important to note that, while the article is largely based on similar provisions in other Conventions, it brings forth the considerable evolution of the concept of mutual legal assistance, as one of the primary tools of international cooperation against transnational crime. In this vein, the article speaks of the use of modern technology, such as electronic mail for the transmission of requests, or video link for the giving of testimony. The Convention also includes language regarding the spontaneous provision of information and assistance, without prior request. In the area of law enforcement cooperation, the Convention includes provisions on exchange of intelligence and other operational information and on the use of modern investigative methods, with the appropriate safeguards.

Prior to proceeding to the area of technical cooperation, it is important to mention that the Convention includes detailed provisions on the development of regulatory regimes to prevent and control money laundering and on confiscation, including provisions on the sharing of

confiscated assets. The Convention also includes provisions for the protection of witnesses, a key component of any successful action against organized crime. The relevant article includes a provision asking States to consider entering into agreements with other States for the relocation of witnesses. Further, and in the same vein, the Convention includes an article on the protection of and assistance to victims and another on measures to enhance cooperation with law enforcement authorities of persons involved in organized criminal groups (those who have been described in recent years using the Italian term *pentiti*).

As mentioned earlier, the involvement and participation of all countries in the joint effort against transnational organized crime lies at the core of the decision to negotiate a new international legal instrument. It also inspired the negotiations throughout the work of the Ad Hoc Committee. The new Convention will create numerous obligations for countries, which range from updating or adopting new legislation to upgrading the capacity of their law enforcement authorities and their criminal justice systems in general. Many of the activities required to meet these obligations are resource intensive and, as a consequence, will create a considerable burden for the limited capacities of developing countries. The spirit of the discussions around this subject has been very interesting. These discussions have been based on the understanding that the implementation of the Convention would be in the interest of all countries. Consequently, such implementation would be the responsibility of all countries, regardless of their level of development. Developing countries would gear their systems and bring their limited resources to bear in discharging this responsibility. However, everyone recognizes that, once this has

been done, there will be many areas where developing countries and countries with economies in transition would require significant assistance until they are able to bring all their capacities up to a common standard.

Following extensive discussion, the Convention includes two articles on technical cooperation, one intended to cover cooperation to develop specific training programmes and the other to deal with technical assistance in the more traditional sense of the term, i.e., involving financing of activities at the bilateral level or through international organizations, such as the United Nations. The latter provision foresees that States Parties will make concrete efforts to enhance their cooperation with developing countries with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime.

States Parties are also asked to enhance financial and material assistance to developing countries in order to support efforts to implement the Convention successfully. For the provision of technical assistance to developing countries and countries with economies in transition, the Convention foresees that States Parties would endeavour to make adequate and regular financial contributions to an account specifically designated for that purpose in a United Nations funding mechanism. The Ad Hoc Committee decided that this account will be operated for the time being within the Crime Prevention and Criminal Justice Fund, a mechanism set up to receive voluntary contributions for the technical cooperation activities of the Centre for International Crime Prevention.

In the resolution by which it adopted the Convention, the General Assembly established this special account under the Crime Prevention and Criminal Justice Fund. It is interesting to note that almost immediately, donor countries began making contributions to that account, demonstrating the seriousness with which they regard the matter of providing assistance to developing countries and countries with economies in transition, even at the pre-ratification stage.

On implementation, the Convention has taken a very interesting course. The Convention will establish a Conference of the Parties, which will have the dual task of improving the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention.

The Conference of the Parties will accomplish these tasks by (a) facilitating the activities of States Parties foreseen under the articles on technical cooperation, including by mobilizing resources; (b) facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combating it; (c) cooperating with relevant international and non-governmental organizations; (d) examining periodically the implementation of the Convention by States Parties; and (e) making recommendations to improve the Convention and its implementation. The relevant article goes on to say that the Conference of the Parties will acquire the necessary knowledge on the measures taken by the States Parties in implementing the Convention and on the difficulties encountered by them in doing so by the States Parties themselves, and

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through such supplemental review mechanisms as it may establish.

The mechanism set up is a clear movement forward from previous practices in the field of implementation of international conventions, at least in the context of the United Nations. The provision establishes a dual form of review. On the one hand, it preserves the more traditional obligation, found in most other Conventions, for States Parties to file regular reports on the progress they have made in implementation. This is supplemented by additional review mechanisms, which the Conference may establish. This is an indirect reference to a system of "peer review", which has been developed in various forms in recent years in the context of regional instruments. Another important feature of the provision is that the Conference of the Parties will not only function as a review body. It will pay equal attention to serving as a forum for developing countries and countries with economies in transition to explain the difficulties they encounter with implementation and seek the assistance necessary to overcome such difficulties. This link between implementation and technical cooperation and assistance reinforces the collective will that guided the negotiations to take into account all concerns and needs and address them jointly in order to achieve the common goals embodied in the new Convention.

Another innovative feature of the new Convention is an article on prevention. The provision is designed not only to introduce formally the concept of prevention, which is relatively new in action against transnational organized crime, but also to include in the Convention some of the results of the latest thinking in this field. The language of the article is permissive, thus

reflecting the novelty of the concept and the fact that it still needs to mature in order to be treated more as an obligation. However, given that States generally interpret even permissive provisions to merit the best possible efforts, the importance of the article is significant. The provision transfers to the global level efforts already discussed or undertaken at the regional level. It is designed to encourage countries to take appropriate legislative, administrative or other measures to shield their legal markets from the infiltration of organized criminal groups. Some of the measures foreseen are the promotion and development of standards and procedures designed to safeguard the integrity of public and private entities, as well as codes of conduct for relevant professions and the prevention of the misuse of legal persons by organized criminal groups.

Perhaps the most interesting feature of the Convention is its scope of application. Its analysis was left last because of the long debate its finalization required, but also because it conditions the entire text of the Convention.

The Convention will apply "to the prevention, investigation and prosecution of (a) the offences established in accordance with [the Convention]; and (b) serious crime as defined [by the Convention], when the offence is transnational in nature and involves an organized criminal group." However, the criminalisation obligations that countries will undertake, regarding the offences they would have to establish in accordance with the Convention, would be "independent". This means that States will legislate to establish as criminal offences the four types of conduct described in the Convention, regardless of whether they are transnational or involve an organized criminal group.

The Convention also defines transnationality. An offence is transnational in nature if it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.

In addition, the provisions on extradition and mutual legal assistance contain specific and very carefully negotiated language to permit application of these articles in order to establish both the transnationality and the involvement of an organized criminal group. Solutions to these matters were based on the demonstrated political will of all countries involved in the process to conclude a Convention that meets all their concerns. Such solutions were also based on the shared desire to reach agreement without diminishing the functionality and quality of the new instrument.

II. THE THREE PROTOCOLS

A. The Protocol Against Trafficking in Persons, Especially Women and Children

1. General Provisions (Articles 1–5)

Article 1 sets out the relationship between the Convention and the Protocol, complementing Article 37 of the Convention. The same text appears in Article 1 of the Protocol against the smuggling of Migrants and has been added as Article 1 of the revised draft Protocol against the Illicit Trafficking in Firearms. The Protocol supplements the Convention, and provisions of the two should be interpreted together.

Provisions of the Convention apply to the Protocol *mutatis mutandis* unless otherwise specified or the Protocol contains provisions which specifically vary or are inconsistent with those of the Convention. All Protocol offences are also regarded as Convention offences, which makes all Convention provisions (e.g., legal assistance, applicable to cases which involve only Protocol offences. The Conference of States Parties, which is established by Article 32 of the Convention, will have similar functions for each protocol by the application of Article 32 to the protocol in question, *mutatis mutandis*.

Articles 2 and 4 set out the basic purpose and scope of the Protocol. The Protocol is intended to “prevent and combat” trafficking in persons and facilitate international co-operation against such trafficking. It applies to the “prevention, investigation and prosecution” of Protocol offences, but only where these are “transnational in nature” and involve an “organized criminal group”, as those terms are defined by the Convention.

The key definition, “trafficking in persons”, appears in Article 3. This term, which is being defined for the first time, is intended to include a range of cases where human beings are exploited by organized crime groups where there is an element of duress involved and a transnational aspect, such as the movement of people across borders or their exploitation within a country by a transnational organized crime group. The definition is broken down into three lists of elements: criminal acts, the means used to commit those acts, and goals (forms of exploitation). At least one element from each of these three groups is required before the definition applies.

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Thus, to constitute “trafficking in persons”, there must be:

- **an act of** “recruitment, transportation, transfer, harbouring or receipt of persons”;
- **by means of** “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”;
- **for the purpose of** exploitation, which includes, at a minimum, “...the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The question of whether a victim could consent to trafficking was a major issue in the negotiations. In many trafficking cases, there is initial consent or cooperation between victims and traffickers followed later by more coercive, abusive and exploitive circumstances. Some States, and many NGOs felt that incorporating an element of consent in the definition or offence provisions would make enforcement and prosecution difficult because such early consent would be raised by traffickers as a defence. Other States felt that some element of consent was needed to limit the scope of the offence, distinguish trafficking from legitimate activities and for constitutional reasons. To resolve the issue, paragraph (b) of the definition clarifies that consent becomes irrelevant whenever any of the “means” of trafficking has been used. This compromise addressed the concerns of both positions. To further clarify the relationship between consent, the offence and criminal defences, it was agreed that

the *travaux préparatoires* would draw attention to Article 11(6) of the Convention, which applies to this Protocol *mutatis mutandis*, and which ensures that existing criminal defences in domestic law are preserved.

2. Protection of trafficked persons
(Articles 6–8)

The negotiation of the Protocols against Trafficking in Persons and the Smuggling of Migrants both found it necessary to deal with the fact that the primary subject-matter, while often treated as a commodity by smugglers and traffickers, consists of human beings whose rights must be respected and who must be protected from various forms of harm. The terms “smuggling” and “trafficking”, have acquired different definitions from those traditionally associated with narcotic drugs, for example. The need for an appropriate balance between crime-control measures and measures to support or protect smuggled migrants and victims of trafficking arose in two primary places in each Protocol: the provisions dealing with the return of persons to their countries of origin, and provisions expressly providing for protection, support. These provisions are similar in some respects, but they are not identical. The language of the two instruments also takes account of the fact that there are critical differences between migrants, who have consented to smuggling and for whom repatriation generally poses no significant risks, and victims of trafficking, who have been subjected to various forms of coercion and who face significant risks of re-victimisation or retaliation if they are sent home, particularly if they have assisted law enforcement in prosecuting their traffickers.

Article 6 of the Protocol against Trafficking in Persons contains a series of

general protection and support measures for victims. Paragraphs 1 and 2 require States Parties to take basic measures, subject to constitutional or similar constraints, which include shielding the identities of victims and providing access and input into legal proceedings. While the physical safety of victims cannot absolutely be guaranteed, States Parties are required to endeavour to do so by Article 6(5), as well as by Articles 24(2)(a) (witnesses) and 25(1) (victims) of the Convention. Further measures in Articles 6(3) and 7 of the Protocol are subject to the discretion of States Parties. These include a list of social support benefits such as counselling, housing, education, medical and psychological assistance (Art. 6(3)) and an opportunity for victims to obtain legal status allowing them to remain in the receiving State Party, either temporarily or permanently (Art. 7). The provisions of Convention Articles 24 and 25 may also apply in such cases. Where victims have also been witnesses, for example, the relocation provision of Article 24(2)(a) may apply.

The return of victims of trafficking to their countries of origin is dealt with in Article 8 of the Protocol, which is similar but not identical to the corresponding provision (Art. 18) of the Protocol against the Smuggling of Migrants. A major concern with the return of trafficking victims is that it may leave them vulnerable to being trafficked all over again, or in some cases, vulnerable to retaliation from traffickers for having cooperated with law enforcement or prosecution authorities. Another concern is that in some cases, victims have been sent home while criminal or other legal proceedings in which they have an interest are still ongoing. To respond to these concerns, the text requires all States Parties involved to have due regard for the safety of the victim and for

the status of any ongoing legal proceedings (Art. 8(1), (2)). Returns may be carried out involuntarily, but the text states that the process "...shall preferably be voluntary" (Art. 8(2)). This reflects a compromise between concerns that giving victims any concrete formal legal status or right to remain in destination states might provide further incentives and opportunities for traffickers on one hand, while excessive or rapid returns might unnecessarily expose victims to further hardship and risk on the other. The text does not make any special provision for victims who are also witnesses, but the additional safeguards for witnesses found in Article 24 of the Convention would apply in such cases. More generally, Articles 24 (witnesses) and 25 (victims) of the Convention will generally apply to trafficking victims.

The negotiation of the provisions governing the repatriation or return of smuggled migrants and trafficking victims in both Protocols also faced the need to specify the legal preconditions on which the right of destination States to return individuals and the obligations of countries of origin to facilitate and accept the return, should be based. There was general agreement that States Parties should be required to accept the return of their own nationals and permanent residents, but views differed on whether the status of a smuggled migrant or trafficking victim should be determined at the time of entry into the State seeking to return the person or at the time of the actual return itself. The former option precludes States from revoking status as a national or resident to prevent the return, whereas the latter does not.

Different language was used to address this question in each of the two instruments. In the case of victims of trafficking, countries are obliged to accept

the return of any person who is a national at the time of the return or who had a right of permanent residence at the time he or she entered the destination State (Art. 8(1)). In the case of smuggled migrants, the obligation is only to accept those who are nationals or have a right of permanent residence at the time of the return (Art. 18(1)), although States Parties are also required to consider the return of migrants who had permanent residency rights at the time of entry into the destination State. The *travaux préparatoires* for the Protocol against the Smuggling of Migrants also record the understanding of the Ad Hoc Committee that States Parties "...would not deprive persons of their nationality contrary to international law, thereby rendering them stateless." This acknowledges that nationality can be taken away for cause, but should not be taken away exclusively to prevent repatriation.

Apart from these differences, the obligations placed on States concerning return or repatriation are the same in both instruments. The basic obligation on States Parties is to "facilitate and accept" the return of nationals or specified permanent residents without undue delay and to verify without delay whether illegal migrants in other countries are in fact their nationals or residents (Art. 8(1), (3)). This includes the obligation to issue any necessary travel documents such as passports, entry or transit visas (Art. 8(4)).

3. Prevention, Co-operation and Other Measures (Articles 9–13)

Generally, the law enforcement agencies of countries which ratify the Protocol would be required to co-operate with such things as the identification of offenders and trafficked persons, sharing information about the methods of offenders and the training of

investigators, enforcement and victim-support personnel (Art. 10). Countries would also be required to implement security and border controls to detect and prevent trafficking. These include strengthening their own border controls, imposing requirements on commercial carriers to check passports and visas (Art. 11), setting standards for the technical quality of passports and other travel documents (Art. 12), and co-operation in establishing the validity of their own documents when used abroad (Art. 13). Social methods of prevention, such as research, advertising, and social or economic support are also provided for, both by governments and in collaboration with non-governmental organisations are dealt with both in Article 9, which supports Article 31 of the Convention⁶.

B. The Protocol Against the Smuggling of Migrants by Land, Air and Sea

1. General Provisions (Definitions, Criminalisation, Scope and Purpose, Articles 1–6)

Article 1 sets out the relationship between the Convention and the Protocol, complementing Article 37 of the Convention. The same text appears in Article 1 of the Protocol against Trafficking in Persons and has been added as Article 1 of the revised draft Protocol against the Illicit Trafficking in Firearms. The Protocol supplements the Convention, and provisions of the two should be interpreted together. Provisions of the Convention apply to the Protocol *mutatis mutandis* unless otherwise specified or the Protocol

⁶ See in particular Article 31(5) (public awareness campaigns) and 31(7) (projects aimed at alleviating the circumstances which make certain groups vulnerable to transnational organized crime).

contains provisions which specifically vary or are inconsistent with those of the Convention. All Protocol offences are also regarded as Convention offences, which makes all Convention provisions (e.g., legal assistance, applicable to cases which involve only Protocol offences. The Conference of States Parties, which is established by Article 32 of the Convention, will have similar functions for each protocol by the application of Article 32 to the protocol in question, *mutatis mutandis*.

Article 2 expresses three purposes: preventing and combatting smuggling, promoting cooperation among States Parties and protecting the rights of smuggled migrants. The scope of application of the instrument (Art. 4) applies both to combatting smuggling and protecting rights, but limits both to offences which are transnational in nature and involve an organized criminal group as defined by the Convention. The Protocol applies only to the prevention, investigation or prosecution of such offences and the protection of the rights of persons who have been the objects of such offences. The phrase “persons who have been the object of such [i.e.: trafficking] offences” in this and other Protocol provisions is intended to clarify that smuggled migrants, while sometimes exploited or endangered by smugglers, are not “victims” of the primary Protocol offence.

The criminalisation provision, Article 6, requires States Parties to criminalise the smuggling of migrants as defined in Article 3, and enabling a person who is not a national or permanent resident of a State to remain there illegally. Producing, procuring, providing, or possessing fraudulent travel or identity documents must also be made an offence, but only where these acts are committed

for the purpose of smuggling migrants. This will generally apply to smugglers without also including the illegal migrants who may only possess the documents for the purpose of use in their own smuggling. A major political and legal concern during negotiations was the general agreement among participants that the Protocol should criminalise the smuggling of migrants without criminalising mere migration or the migrants themselves. This was difficult because illegal migrants have generally committed offences relating to illegal entry or residence in most countries, and would usually be complicit in their own smuggling without language in the Protocol and any implementing legislation to the contrary. The solution, found in Article 5 and Article 6(4) is that the Protocol specifies that the provisions of the Protocol and its implementing legislation should criminalise smuggling but not create any liability for having been smuggled (Art. 5), while providing that offences or other measures adopted or applied by States Parties on their own authority could still apply to mere migrants. As noted, the document offences of Article 6(1)(b) also apply only to those who commit them for the purpose of smuggling others and not for their own migration.⁷

In recognition that smuggling is often dangerous, and to increase protection for migrants, States Parties are also required to make smuggling in circumstances which endanger the migrants’ lives or safety, or which entail inhuman or degrading treatment as aggravating circumstances to the Protocol offences (Art. 6(3)).

⁷ See the note in the *travaux préparatoires* to Art. 6(1)(b) on this point.

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2. Smuggling of Migrants by Sea
(Articles 7–9)

While all of the Protocol applies to all forms of smuggling by land, sea or air, it was felt necessary to make specific provision for smuggling by sea because of the seriousness and volume of the problem, and the body of international maritime law already in existence. Many of the specific provisions of this Part were drawn from or developed based on provisions from three earlier sources dealing with the boarding and searching of vessels and related safeguards: Article 110 of the 1988 U.N. *Convention on the Law of the Sea*, Article 17 of the 1988 U.N. *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, and a more recent (1988) Circular from the International Maritime Organization titled *Interim Measures for Combatting unsafe practices associated with the trafficking or transport of migrants by sea*.

Generally, the provisions of Part II are intended to give states which encounter ships which are believed to be smuggling migrants sufficient powers to take actions to apprehend the migrants and smugglers and to preserve evidence, while respecting the sovereignty of the states (if any) to which the ships are flagged or registered. A major factor for most delegations in striking a balance between sovereignty and effective powers to intervene was the fact that, in many cases, vessels used to smuggle migrants are decrepit or unsound to the point where fast action could be essential to preserving the safety of any migrants on board.

The general rule for taking actions against a ship at sea is that this can only be done with the approval of the State whose flag the ship flies or with whom it is registered. The Protocol requires States

Parties to co-operate “to the fullest extent possible” in accordance with the “international law of the sea”, which term includes both the 1988 U.N. Convention and other instruments (Art. 7). The taking of measures against ships at sea is governed by Article 8, which provides separately for three basic cases:

- States seeking assistance against ships they believe to be their own (Art. 8(1));
- States seeking permission to act against ships believed to be flagged or registered to another State (Art. 8(2)); and
- States taking action against ships believed to be without nationality (Art8(7)).

The remaining provisions of Article 8 deal with the mechanisms whereby the nationality of ships can be established and other relevant information can be transmitted from one interested State Party to another. Under Article 8(1), a state which believes that one of its ships, or a ship which is flying its flag, is being used for smuggling may call upon other States Parties to take action to suppress this, and those States are required to render such assistance as necessary, within available means. Under Article 8(2), a State which believes that a ship registered or flagged to another State is involved in smuggling may check the registry, and ask the registry state for authorisation to board, inspect, and if evidence of smuggling is found, to take other actions. The responding state must answer the requests expeditiously, but may place limits or conditions on what may be done (Art. 8 (4), (5)). Such conditions must be respected, except where there is imminent danger to lives or safety, or where there a bilateral or multilateral agreement between the states involved says otherwise (Art. 8(5)).

Where there is no apparent nationality or registry cannot be determined, the ship may be boarded and inspected as necessary (Art. 8(7)).

The other provision of Part II, Article 9 contains “safeguard clauses” which limit the powers of States Parties to act under Article 8, ensure that fundamental interests such as the safe and humane treatment of persons found on board vessels and the security of vessels and other cargoes are protected, preserve the existing jurisdictions of coastal states and the flag states of vessels, and provide for compensation in cases where the grounds for having taken measures against a vessel later prove unfounded. As a further safeguard, Art. 9(4) also requires that any vessel or aircraft used by a State Party to take actions under Part II must be a warship, military aircraft or other ship or aircraft clearly marked to identify it as being on government service when the action is taken.

3. Prevention, Co-operation and Other Measures (Articles 10–18)

As with the provisions of Articles 27–29 of the Convention, the Protocol provides for the exchange of information which may range from general research or legislative information which would assist others in implementing the Protocol or combatting smuggling in more general terms to much more specific and sensitive information about specific smuggling cases or more general means and methods being used by smugglers (Art. 10). As in the Protocol against Trafficking in Persons, specific legal and administrative measures to combat smuggling which involves commercial carriers are also required, “to the extent possible” (Art. 11). These include penalties where carriers found carrying smuggled migrants are complicit or negligent and requirements that carriers

check basic travel documents before transporting persons across international borders.

The use of false or fraudulent passports and other travel documents is an important element of smuggling, and documents are often taken from migrants upon arrival so that they can be re-used by the smugglers over and over again. To address this part of the problem, Article 12 requires the use of travel documents that cannot easily be used by a person other than the legitimate holder, and of such quality that they cannot easily be falsified, altered or replicated, and Article 13 requires States Parties to verify the legitimacy and validity of any documents purported to have been issued by them. A number of delegations noted that countries which became parties to the Protocol against Trafficking in Persons as well as this Protocol would find it necessary to implement the parallel provisions on travel documents jointly, since it would not be practicable to adopt or apply different rules for smuggling and trafficking cases. As a result, the requirements of Articles 12 and 13 are identical in both instruments.

States Parties are called upon to undertake training activities (Art. 14) and adopt general preventive measures (Art. 15). Training under Article 14 for officials can be domestic or in co-operation with other States Parties where appropriate. It must include not only methods and techniques for investigating and prosecuting offences, but also background intelligence-gathering, crime-prevention, and the need to provide humane treatment and respect for the basic human rights of migrants. Adequate resources are called for, with the assistance of other States where domestic resources or expertise are not enough (Art. 14(3)). Based on the

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assumption that a key element of prevention is the dissemination of information about the true conditions during smuggling and after arrival to discourage potential migrants, Article 15 requires the creation or strengthening of programmes to gather such information, transmit it from one country to another, and ensure that it is made available to the general public and potential migrants. This supports Article 37 of the Convention which calls for information campaigns directed at groups who are particularly vulnerable to the activities of transnational organized crime, which would include regional or ethnic groups likely to be solicited or recruited as potential migrants.

Part II of the Protocol also contains provisions which deal with the protection, assistance and return of migrants. As with the Protocol against Trafficking in Persons, these provisions take account of the fact that migrants, while often treated as a commodity by smugglers, are human beings whose rights must be respected and who must be protected from various forms of harm. Articles 16 (protection and assistance) and 18 (return) provide for the basic assistance of smuggled migrants, taking into account the fact that they are not generally victims of crime and are in far less jeopardy of retaliation from traffickers, but also considering the fact that smuggling is often conducted in circumstances which endanger their lives or safety.

Several provisions of the Protocol are intended to ensure that the basic human rights of migrants are protected from infringement, whether by traffickers, government officials or others. The primary provision is Article 16, which requires appropriate legislative or other measures to “preserve and protect” the

rights of smuggled migrants. Article 14(2)(e) also requires the training of officials in “the humane treatment of migrants and the protection of their rights”, and Article 19 ensures that any rights (e.g., for migrants who are also refugees) under other international humanitarian and human rights law are not affected by the Protocol. Article 16(5) requires conformity with the provision of the Vienna Convention on Consular Relations which requires States Parties to that instrument to inform apprehended migrants of their rights to consular access.⁸

Other provisions address concerns about the fact that migrants are in many cases subjected to dangerous conditions, degrading conditions or physical violence in the course of smuggling. Article 16(2) requires the adoption of appropriate measures to afford migrants protection against violence. Article 6(3) requires States Parties to make the existence of circumstances which endanger lives or safety or entail inhuman or degrading treatment in the course of smuggling an aggravating circumstance to the basic smuggling offence, and Article 16(3) requires appropriate assistance to migrants whose lives or safety are endangered in the course of being smuggled.

The return of smuggled migrants to their countries of origin is dealt with in Article 18 of the Protocol, which is similar but not identical to the corresponding provision (Art. 6) of the Protocol against Trafficking in Persons. Since migrants

⁸ The relevant provision is Article 36 of the Vienna Convention, 596 UNTS 8638–8640. In the discussion of this provision, it was pointed out that as conventional international law, the Convention, and hence the obligation to provide consular access, was binding on all States.

are less likely to be witnesses in transnational organized crime proceedings, the Protocol makes no specific provision for protection or participation in such proceedings, although migrants who are in this position would still be covered by Articles 24 and/or 25 of the Convention, depending on the exact circumstances of their cases. The only protection specifically provided for returned migrants is found in Art. 18(5), which requires all of the States Parties involved in return of a migrant to ensure that it is carried out "...in an orderly manner and with due regard for the safety and dignity..." of the migrant.

The negotiation of the provisions governing the repatriation or return of smuggled migrants and trafficking victims in both Protocols also faced the need to specify the legal preconditions on which the right of destination States to return individuals and the obligations of countries of origin to facilitate and accept the return, should be based. There was general agreement that States Parties should be required to accept the return of their own nationals and permanent residents, but views differed on whether the status of a smuggled migrant or trafficking victim should be determined at the time of entry into the State seeking to return the person or at the time of the actual return itself. The former option precludes States from revoking status as a national or resident to prevent the return, whereas the latter does not.

Different language was used to address this question in each of the two instruments. In the case of victims of trafficking, countries are obliged to accept the return of any person who is a national at the time of the return or who had a right of permanent residence at the time he or she entered the destination State

(Art. 8(1)). In the case of smuggled migrants, the obligation is only to accept those who are nationals or have a right of permanent residence at the time of the return (Art. 18(1)), although States Parties are also required to consider the return of migrants who had permanent residency rights at the time of entry into the destination State. The *travaux préparatoires* for the Protocol against the Smuggling of Migrants also record the understanding of the Ad Hoc Committee that States Parties "...would not deprive persons of their nationality contrary to international law, thereby rendering them stateless." This acknowledges that nationality can be taken away for cause, but should not be taken away exclusively to prevent repatriation.

Apart from these differences, the obligations placed on States concerning return or repatriation are the same in this instrument as in the Protocol against Trafficking in Persons. The basic obligation on States Parties is to "facilitate and accept" the return of nationals or specified residents without undue delay and to verify without delay whether illegal migrants in other countries are in fact their nationals or residents (Art. 18(1), (3)). This includes the obligation to issue any necessary travel documents such as passports, entry or transit visas.

C. Protocol Against the Illicit Manufacturing of or Trafficking in Firearms

1. Status

Many provisions of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms were finalised at the 11th session of the Ad Hoc Committee, but several key issues had not been resolved, and the General Assembly called upon the Ad Hoc

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Committee to conclude the Protocol at an additional session.⁹ The Committee decided to apply a narrow, conventional definition of “firearm”, excluding other forms of destructive device such as rocket-launchers and explosive devices. It also developed language for Article 4(1) and (2) which excludes legitimate State-to-State and national security-related activities from the application of the Protocol while ensuring that the exclusion is not so broad as to opt out virtually any activity. The language developed for Articles 4 and 8 also ensures that all firearms, even those made for government purposes, will be marked at manufacture, allaying concerns about unmarked government firearms later stolen or otherwise diverted into illicit traffic. The language developed for Article 8 ensures the unique marking of each firearm with “alpha-numeric” characters, but allows countries which have previously used “simple geometric” markings as part of their marking systems to maintain this practice. Based on these agreements, the entire Protocol was agreed by the Ad Hoc Committee on consensus. It was then referred to the General Assembly, which adopted it on 31 May 2001.¹⁰ Under Article 17 of the Protocol, it is open for signature at U.N. Headquarters in New York from 2 July 2001 until 12 December 2002.¹¹

2. Relation with the U.N. Convention

Article 1 sets out the relationship between the Convention and the Protocol, complementing Article 37 of the Convention. The same text appears in Article 1 of the Protocols against Trafficking in Persons and the Smuggling of Migrants. The Protocol supplements

the Convention, and provisions of the two should be interpreted together. Provisions of the Convention apply to the Protocol *mutatis mutandis* unless otherwise specified or the Protocol contains provisions which specifically vary or are inconsistent with those of the Convention. All Protocol offences are also regarded as Convention offences, which makes all Convention provisions (e.g., legal assistance, applicable to cases which involve only Protocol offences. The Conference of States Parties, which is established by Article 32 of the Convention, will have similar functions for each protocol by the application of Article 32 to the protocol in question, *mutatis mutandis*.

3. Purpose, Scope and Application

The purpose provision (Art. 2) was concluded at the 12th session. It was decided to make the language consistent with that of the other instruments, giving the purpose as: “to promote, facilitate and strengthen cooperation...to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition.”

As noted above, Article 4, dealing with scope of application, was also not concluded until the 12th session. There was general agreement that all types of transfer, transaction and firearm should

⁹ GA/Res/55/25.

¹⁰ GA/Res/55/255. For *travaux préparatoires* notes, see A/55/383/Add.3.

¹¹ Since the adoption of the Protocol by the General Assembly was too late for the Palermo signing conference at which the other instruments were opened for signature, conventional language concerning signature was added to Art. 17 during the final drafting session. The instrument opens for signature somewhat later than those adopted earlier, but it was decided to close all 4 instruments on the same date, 12 December 2002, which is the 2-year anniversary of the opening of the initial 3 instruments.

be *prima facie* included in the Protocol, provided that there is some link to offences which are transnational in nature and involve an organized criminal group in some way as required by Article 3 of the Convention itself. There was also general agreement that the Protocol, which deals with individual criminality and not disarmament or State activities, should not apply to "State-to-State" transactions. The issues not resolved until the final session involved activities which directly involved either only one or no States, but which were nevertheless seen as raising legitimate "national security" concerns on the part of one or more States Parties. This was eventually addressed using language which opts out "national security" transfers, provided that this is consistent with the United Nations Charter (Art. 4(2)). The agreed text of Article 4 also included all illicit "manufacturing" of firearms (Art. 4(1)), while only excluding "transactions" and "transfers" (Art. 4(2)). The effect is to ensure that all firearms must be marked, addressing concerns about the problem of firearms which might otherwise be made without marking for legitimate government or national security purposes and then subsequently diverted, creating a supply of untraceable illicit firearms.

4. Definitions (Article 2) *"Firearm"*

The question of subject-matter is dealt with in the definition provision (Art. 2). It was agreed that the term "firearm" should include any "barrelled weapon which expels a shot, bullet or projectile by the action of an explosive", with the exception of some antique firearms. To address concerns that this applied to very large "firearms", such as artillery-pieces, the word "portable" was added, accompanied by a note in the *travaux préparatoires* to the effect that "portable" itself was intended to mean portable by

one person without mechanical or other assistance. After discussion at several sessions, the Committee ultimately decided not to apply the Protocol to other so-called "destructive devices".

"Illicit manufacturing"

The agreed definition of illicit manufacturing includes three distinct activities: manufacturing without a license, manufacturing from illicit (i.e., trafficked) parts, and manufacturing without marking. Each of these is intended to address a major source of diverted or trafficked firearms. Unlicensed manufacture would include illegal factories and firearms made in a legal factory, but of a type or quantity the producer was not licensed to make. Assembling from trafficked parts would address schemes in which stages of the manufacturing process were split among several jurisdictions to avoid committing offences in any of them. Manufacturing without marking requires that all firearms be marked at manufacture, which ensures that unmarked firearms cannot be diverted before being marked at a later stage. There is some overlap between the definitions of illicit manufacturing and illicit trafficking, since each includes an element (and hence an offence) relating to the manufacture and transfer of firearms without the necessary markings.

"Illicit trafficking"

The agreed definition of "illicit trafficking" is the core of the Protocol. As defined, "Illicit trafficking" would include any transaction or transfer in which a firearm moves from one country to another where the exporting, importing, and transit States, if any, have not licensed or authorized it. This must be read in conjunction with Article 5(1)(a), which requires illicit trafficking to be made a domestic criminal offence, and

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11(2), which precludes the issuance of any export license until the corresponding import and transit license has already been issued. The combined effect is to commit States Parties criminalise the export of any firearms, parts, components or ammunition unless the subsequent import is authorized.

5. Criminalisation Requirements
(Article 5)

The structural approach taken to the criminalisation of illicit trafficking and illicit manufacturing is similar to those of the other instruments: the detailed specification of conduct or activities to be criminalised is set out in the definitional provisions, and then merely criminalised by cross-references back to the definition. States Parties are also required to criminalise attempting to commit, participating as an accomplice in, or organizing or directing others to commit any Protocol offence, although these obligations are subject to limits that make criminalising some of these things impossible in some legal systems (Art. 5(2)).

In substance, States Parties are required to criminalise the two basic activities against which the Protocol is directed, illicit manufacturing and illicit trafficking. They are also required to create one supporting offence, the obliteration, removal or alteration of the serial numbers or other markings on a firearm (Art. 5(1)(c)). It was not necessary to criminalise failing to mark a firearm or transferring an unmarked firearm *per se*, because these activities are included in the definitions and general offences of illicit manufacturing and illicit trafficking. Further offences relating to the financing of illicit trafficking and domestic possession or misuse of trafficked firearms and the breach of arms-embargoes had been proposed, but

were ultimately dropped because they were redundant either with the Convention itself or domestic criminal law or beyond the scope of the Protocol.

6. Confiscation Seizure and Disposal
(Article 6)

The subject of confiscation, forfeiture and disposal is dealt with in Convention Articles 12–14, which deal with both proceeds of crime and instrumentalities of crime, and which apply to the Protocol, *mutatis mutandis*. These would also apply to firearms which have been used in crime as instrumentalities and firearms which have been trafficked as a commodity as proceeds. The Convention definition of “proceeds” (Art. 2(e)) includes “...any property derived from or obtained, directly or indirectly, through the commission of an offence.” This was seen as problematic, because the customary method of disposal for proceeds and instrumentalities is generally to sell them and use the resulting funds for legitimate State purposes or to pay compensation or restitution to victims. Where firearms are concerned, many States felt that the better course was to simply destroy them, thereby ensuring that they could never enter illicit commerce or be used in crime. As a result, Article 6 of the Protocol creates an exception to the general principle established by the Convention, providing that, in the case of firearms parts, components or ammunition, the property should be disposed of either by destruction, or by other disposal only where officially authorised and where the items have been specifically marked and the disposal recorded.

7. Record Keeping (Article 7)

Critical to the overall control of trafficking in firearms is the marking of firearms (Art. 8) to ensure that they can be uniquely identified, and the keeping of

records based on the markings in order to make it possible to distinguish between legitimate and illicit activities and to facilitate investigations when a transaction subsequently proves to have been illicit or where firearms are diverted to illicit hands in the course of a legitimate, authorized transaction or transfer. Some delegations had concerns about the need for keeping records with respect to legitimate activities, but it was ultimately agreed that legitimate activities must be scrutinised in order to identify and suppress illicit activities.

Article 7 requires States Parties to either keep records themselves, or to require others (e.g., the actual parties to each import/export transaction) to do so, for a period of ten years, the period being a compromise between the need to limit the administrative burdens on States Parties and the fact that firearms are durable goods which can surface many years after having been transferred. The means whereby States “shall ensure” the keeping of records by others is not addressed by the Protocol, but would in most cases involve a legal requirement that those involved in import/export transactions create and preserve the necessary records. It is open to States Parties to create additional offences to compel the keeping of appropriate records, but the Protocol does not require it. The record-keeping requirement extends to records of transactions in parts, components and/or ammunition only “where appropriate and feasible”. This recognizes the practical difficulties in dealing with smaller parts and components, which may be impossible to mark and are difficult to identify and inspect. Creating and verifying a complete record of parts and components might require the disassembly of each firearm in a shipment to record and inspect each of its parts, for example. In

the case of ammunition, individual marking and record keeping was also seen as impracticable because of the very large numbers of individual cartridges in most shipments. One option for keeping records “where appropriate and feasible” in such cases is for States Parties to require the keeping of records which describe shipments or batches of parts or ammunition, but not individual elements of each.

The actual substance of the records which must be kept consists of whatever information is needed to trace and identify the items involved. This must include the serial number or other markings on the firearm and specified information relating to the source, transit and destination countries in international transfers, but the list is indicative and not exhaustive. Since there is no overall co-ordination of the marking schemes of manufacturers or countries, markings are only unique when other information about a firearm is also known. In most cases, to permit identification and tracing as required, States Parties will therefore find it necessary to keep additional information about a firearm, such as its manufacturer, model, type or calibre.

8. Marking (Article 8)

As noted, the marking requirements were also not finalised until the 12th session of the Ad Hoc Committee. There was general agreement that firearms should be marked in a way which would permit unique identification, but the actual content of markings varies from country to country and manufacturer to manufacturer. Some delegations also sought to exempt firearms made for State agencies, but this was seen as problematic because of the large numbers of State firearms later transferred or diverted to private hands, whether by legitimate or illicit means, which would

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provide a substantial source of untraceable illicit firearms. The identification of the content of “unique” markings was also complicated by the fact that firearm manufacturers employ serial numbers or other markings which are generally only unique when combined with other characteristics of the firearm in question, such as type, calibre and the place, country or factory where it was made. A handgun made in the United States might well have the same serial number as a rifle made in Germany, for example, and ensuring that this could never occur would prove difficult for the countries and companies involved. Ultimately, it was decided to require “unique” marking using the “...name of the manufacturer, the country or place of manufacture, and the serial number” but to allow countries already using a combination of numeric, alpha-numeric and simple geometric symbols to maintain their existing practices.

9. Deactivation of Firearms (Article 9)

In most countries, records tracking firearms are purged whenever the firearms to which they apply are themselves destroyed. Problems have arisen in some cases where firearms are not completely destroyed if the records are purged and the firearms are subsequently restored and used for criminal purposes. Firearms which have been “deactivated” in ways which make them inoperable but leave them intact from a standpoint of outward appearance are popular as display items, and this process is often used to preserve war-trophies which would otherwise be prohibited by domestic laws. To deal with the problem of reactivation, Article 9 of the Protocol contains technical standards which ensure that firearms are not considered to have been destroyed for the purposes of a State Party’s licensing and record-keeping practices unless the

process is essentially irreversible. Paragraph 9(a) also requires essential parts to be disabled and incapable of removal from the deactivated firearm, which precludes any re-circulation of individual parts, or the assembly of new firearms using parts from deactivated ones.

10. Import-Export Requirements (Article 10)

As noted, the offence of “illicit trafficking” consists of international transfer without the legal authorisation of all of the states concerned. To support this, Article 10 contains the requirement that exporting States verify that subsequent transit and import is authorized by the States involved before they license the export itself (Art. 10(2)) Article 10 also provides standard requirements for the documents involved, which provide information about the transaction and identify the firearms involved for purposes of record keeping and any subsequent tracing or other investigative inquiries. After extensive discussion about whether to require the authorization of “transit” States and how to define “transit” for the purposes of imposing such a requirement, a simpler approach was adopted in this Article. The simplified scheme requires that documents identify any transit states and that such States be notified in advance of the transit (Art. 10(3)). If a transit State does not give written notice that it does not object, the exporting State cannot issue an export permit for the transaction (Art. 10(2)(b)). To address concerns about the application of the Protocol to individuals who import or export firearms for temporary use for occupational or recreational purposes, Article 10(6) provides for “simplified procedures” in such cases.

11. Security and Preventive Measures (Article 11)

Some illicitly trafficked firearms are manufactured directly for the illicit market, but most are firearms originally made for lawful purposes and subsequently diverted into criminal hands. To address this, Article 11 calls for security measures to prevent theft or diversion at every stage of the manufacturing, storage, import, export, transit and distribution process.

12. Information and Tracing (Article 12)

As with Articles 27–28 of the Convention, Article 12 of the Protocol covers the exchange of information ranging from very general scientific or forensic information about firearms to specific and potentially sensitive information about organized criminal groups, their means and methods and information about specific legal or illegal transactions. Information about specific individuals or companies involved in the firearms trade can only be provided on a case by case basis (Art. 12(1)). Information about the means and methods of offenders can be requested on a more general basis (Art. 12(2)). Article 12(3) contains the third core obligation of the Protocol, the obligation of States Parties to assist one another as necessary in the tracing of firearms. The term “tracing” itself is defined in paragraph 3(f).

13. Brokers and Brokering (Article 15)

During negotiations, there was extensive discussion about whether the brokering of firearms transactions was a separate activity from trafficking itself, and if so whether it required regulation under separate provisions of the Protocol. A further issue, given the fact that most brokers operate in many jurisdictions, was which of the jurisdictions involved should regulate a broker and what

specific licensing, record-keeping, security and other requirements should be imposed. It was ultimately decided to adopt a flexible provision which leaves these matters to the discretion of each State Party. Where a State Party does impose requirements on brokers, Article 15(1) contains an indicative list of what should be included: basic licensing and registration, and a requirement that brokers identify themselves and state their involvement on import, export and transit documents. Article 15(2) further urges States Parties to keep records with respect to brokering and to exchange such information with other States Parties under Article 12. Article 7, which states that States Parties “shall ensure the maintenance...” of records, does not specify by whom such records would be kept. This means that States Parties could impose a requirement on brokers within their jurisdiction to keep the records of transactions in which they are involved.